THE LAW OF TUG AND TOW AND OFFSHORE CONTRACTS

FOURTH EDITION

SIMON RAINEY

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'WHILST TOWING'

"The third condition is that the tug should be close enough to the ship for the orders to be passed direct; in other words, that the tug should be within hailing distance"

The Apollon [1971] 1 Lloyd's Rep 476 *per* Brandon J at 480

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FOURTH EDITION

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FOREWORD BY
THE RT. HON. LORD CLARKE OF STONE-CUM-EBONY

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To Charlotte

PREFATORY NOTE FROM BIMCO TO THE FOURTH EDITION

Simon Rainey QC's commentary on BIMCO's offshore industry forms has grown considerably since the first edition when the number of forms was fewer. In parallel with BIMCO's efforts to ensure that all major aspects of the ever varied offshore industry are covered by reliable and balanced standard form contracts, drafted with the involvement of the major stakeholders in the relevant sector, this book has kept pace with the new forms and it offers an authoritative and penetrating guide to BIMCO's forms. While the author may not always endorse BIMCO's efforts and while he subjects the drafting to careful scrutiny and analysis, he approaches matters recognising the challenges in drafting a uniform contract, tempering the need to preserve familiarity with the need to reflect changes required by legal and practical developments. This book has become effectively a 'bible' for all those in the industry using these forms, as well as their lawyers, and rightly so. It is a book which is certainly always very closely consulted by our drafting committees during BIMCO's periodic revisions of the forms covered in it.

BIMCO welcomes the publication of this revised edition: the detailed consideration of the forms by BIMCO in its own drafting work and then their subsequent analysis by Simon Rainey Q.C. based on his considerable legal experience and reputation in the sector can only serve, in tandem, to improve the standard and certainty of offshore contracting. That is to the benefit of all.

Grant Hunter.
Denmark, 21 November 2017

BIMCO

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FOREWORD

By the Rt. Hon. Lord Clarke of Stone-cum-Ebony

Back in 1996 when I first wrote this foreword as Admiralty Judge, it was a deceptively slim volume. Deceptive because the book was not only the first to bring together the general law on the subject (not properly analysed in England since Alfred Bucknill K.C.'s *Tug and Tow* (1st edn, 1913; 2nd edn, 1927), although the subject of magisterial treatment in the U.S. with some slight reference to English case law (Parks & Cattell, *The Law of Tug, Tow, and Pilotage* (4th edn) of which I was the proud purchaser of the sole 2 Essex Court copy), but it was also the first to address the special questions which affect towage and offshore operations such as general average, collision and limitation. Perhaps more importantly in the modern world, where standard form contracts in this industry have long prevailed and are, under the auspices of BIMCO, the *lingua franca* of contractual negotiation, Simon Rainey was the first to give a clause-by-clause analysis and commentary of the (then relatively few) standard form contracts in the field: the UK Standard Conditions for port and harbour work and the later BIMCO Towcon, Towhire and Supplytime forms. The book rapidly and deservedly became an authority in its field. Since then over subsequent editions, *Rainey on Tug and Tow and Offshore Contracts* has grown in size to cover the full range of BIMCO standard forms of contract which the offshore industry has adopted in response to the changing needs of and the specialised operations involved in support services for the exploration and drilling industry, in towage and in the marine transportation of heavy and voluminous cargoes.

Now with BIMCO's revision of the leading "Supplytime" form in 2017, the growth of the modern wind farm industry with special vessel needs and the increased use of massive and highly sophisticated ocean-going barges for offshore projects (rather different from the humble maritime "old ladies", plying the River Thames under names either grandiloquent, eccentric or homely, on which I cut my "collision teeth" in former times before Brandon and Sheen JJ.), this fourth edition approaches doorstop width and encompasses not only commentary on the 2017 revision of the BIMCO Supplytime form but also on BIMCO's Windtime and Bargehire forms.

As I discussed in *Farstad Supply AS v Enviroco Ltd (The Far Service)* [2010] UKSC 18 (SC), offshore industry contracts are founded on the *mutual* allocation of risk and the giving of cross- or mutual indemnities (or, as BIMCO refers to them, "knock-for-knock" provisions). This type of provision lies at the heart of the BIMCO forms considered in this book. But I note that the difficult questions of construction of what are mutual exclusion clauses continue. Perhaps it will always be a case of "'T'was ever thus." The same issues as to how restrictively a "mutual" clause should be read where it excludes basic common law liabilities in an ostensibly far-ranging way and whether there should be a "commercial" (or what is now, inaccurately – see *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 – called a "*Rainy Sky*") approach to flesh out or amplify the scope of the exclusion are as critically live now as when I grappled with them as Admiralty Judge in *The Herdentor*, decided as long ago as 19 January 1996 (and disinterred by Simon Rainey as Appendix 22 to this book). The present case law, culminating most recently in the Court of Appeal's review of mutual indemnities and exclusions in *Transocean Drilling v*

Providence Resources (The Arctic III) [2016] EWCA Civ 372 where the Court of Appeal ruled that the *contra proferentem* principle had no role to play in the case of a mutual clause, and in the Court of Appeal's re-evaluation of the *Canada Steamship* principle in relation to the exclusion of liability for negligence in *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373, is admirably tackled in this latest edition.

It is now over 20 years since I wrote the foreword to the first edition of this work and I write this fourth foreword on my transition from Judge of Supreme Court to arbitrator. Questions on the BIMCO standard forms (or on towage or offshore marine operations issues) rarely make it, if at all, to the courts given the high "harbour bar" set by section 69 of the Arbitration Act 1996 and the decrease generally in the litigation of "bumps and scrapes", due in large part to knock-for-knock clauses as exemplified by the BIMCO forms. Judging from this edition with its extensive reference to arbitration claims and arbitration awards under the BIMCO forms since the third edition in 2011, it can be seen that there is still an appreciable body of disputes in arbitration and that I may now, as arbitrator, perhaps be far more likely to encounter the interesting and difficult questions of offshore vessel operation and litigated offshore contract problems than I have been for many years; if so, it is an opportunity which I very much relish. I am therefore even happier than before to be able to say of this new fourth edition, as of those which preceded it, that I can think of no surer guide through the complex issues presented by the problems encountered by the offshore marine industry both in the application of the general law and in the standard form contracts which it uses than Simon Rainey in this new edition of this now long-standing work. It is a testament to the value and authority of the book that it remains today the unrivalled and leading treatment of the law relating to offshore contracts and offshore industry operations.

I wish the author and this fourth edition of *Rainey on Tug and Tow and Offshore Contracts* continued success.

ANTHONY CLARKE
Rye,
East Sussex.
1 September 2017

PREFACE TO THE FOURTH EDITION

The interval between this fourth edition and the third edition of 2011 is, I am glad to say, not as long as that between the third and second editions. But I am even gladder to note that in that interval there has been a much less extensive recasting of the BIMCO standard forms making up a large part of this work than took place in the period 2002–2011. However, the justification for a fourth edition is straightforward.

First, BIMCO, like Argus of the many eyes, unfortunately never sleeps. In 2013, BIMCO published a variant of "Supplytime 2005", the "Windtime" form, specially designed for those fast and light offshore service vessels used for personnel transfer and the provision of other services to the rash of construction projects for inshore and offshore wind farms which modern alternative energy policies have made necessary: a panoptic approach if ever there was one. "Windtime" was seen by many (and with reason) as an interim update of "Supplytime 2005", the most commonly and widely used form in the offshore services and support industry, left behind in drafting terms by the revision of the towage and barge-hiring forms in 2008. Then, in June of this year (2017), the eagerly awaited general revision of "Supplytime" took place; it has followed a different path in some respects from "Windtime" but the general view in its so far short life is that it represents an improvement on the previous 2005 form and on the knock-for-knock provisions in the previous BIMCO forms. Accordingly, this fourth edition consists of a detailed commentary on "Supplytime 2017", the standard form contract which is, perhaps, the lynchpin of most of the contractual arrangements in the offshore vessel industry. I have also included a commentary upon the special provisions of the 2013 "Windtime" form, where these differ from the "Supplytime" template. The drafting of the "Supplytime 2017" form, both in its similarities to the "Windtime form" (with the fuller explanatory notes to the 2013 revision of "Supplytime" wording) and in its divergences in from the approach taken by BIMCO in updating the 2008 "Towhire" model in "Windtime", is frequently instructive.

Secondly, there has been a very live debate in the cases since 2011 as to the correct approach to the construction of standard form contracts in the offshore industry, such as the BIMCO forms, which employ mutual exclusions and cross-indemnities. This has led to the need to re-appraise the operation of all, but particularly the older, BIMCO standard form wordings in the light of a more tolerant and purposive approach to mutual knock-for-knock regimes than has previously existed. The preface to the third edition noted the trend up to 2011 of a potentially restrictive approach (see eg *Seadrill Management Services Ltd v OAO Gazprom (The Ekha)* [2010] 1 Lloyd's Rep 543 (Flaux J) and [2010] EWCA Civ 691). This preface notes the reverse.

The fiercely held battle lines between a "commercial" approach to the construction of contract terms (see *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, so frequently misunderstood and misapplied) and a more literal approach, or at least one which puts the language at the forefront of the interpretative exercise (see *Arnold v Britton* [2015] UKSC 36) have moved backwards and forwards in sterile fashion as much over the terrain of offshore contracts, with their special landscaped features of mutual exclusion and indemnity provisions, as over any other contractual

battleground. We now know (or we have at least now been told) that there was and is no difference and that the battle lines were always imaginary: "On the approach to contractual interpretation, *Rainy Sky* and *Arnold* were saying the same thing" *per* Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 at [14]; cf. however Lord Sumption's elegant extra-judicial dissection of the trench warfare in *A Question of Taste: The Supreme Court and the Interpretation of Contracts* (Harris Lecture, 8 May 2017). But more particularly the whole approach to *mutual* exclusions and cross-indemnities has been under active review in the past few years, against this commercial vs linguistic backdrop.

The correction of approach to the relevance and utility of the so-called "commercial" approach to construction of commercial contracts post *Arnold v Britton* and the current emphasis on the primacy of the language used by the parties as usually the best and surest guide to what they intended to achieve has recently found a loud echo in the rather different field of exemption clauses. The traditional approach that an exclusion or exemption clause is to be construed *contra proferentem* (once one has decided who the *proferens* is) in the event of any ambiguity has ruled the field for many years, although there have been many statements to the effect that it is not to be deployed where the words are themselves sufficiently clear (see eg in relation to the "Towcon" form, Clarke J in *Alexander G. Tsavliris Ltd v OIL Ltd (The Herdentor)*, 19 January 1996 (unreported but noted at (1996) 3 Int ML 75 and set out in Appendix 22 to this book). But the trend since 2011 has increasingly been to give effect to exclusion clauses in commercial contracts without resort to maxims of hostile construction where the wording is subjected to some special linguistic threshold or a more demanding need for clarity.

An early indication of the new approach was given by Lord Neuberger MR in *K/S Victoria Street v House of Fraser* [2011] EWCA Civ 904, although this was perhaps lost sight of. The position was more recently reviewed more clearly and emphatically in the context of the mutual indemnities and exclusions in the important case of *Transocean Drilling v Providence Resources (The Arctic III)* [2016] EWCA Civ 372 where the Court of Appeal ruled that the principle had no role to play in the case of a mutual clause "especially where the parties are of equal bargaining power", and stressed the parallels with *Arnold v Britton*. The Court distinguished the sort of mutual exclusion clause before it from what it described as "a typical exclusion clause, by which a commercially stronger party seeks to exclude or limit liability for its own breaches of contract." The decision raises a number of questions in particular as to equality of bargaining power and the consistency of the Court's approach in the light of a case decided by the Court of Appeal just shortly before (*Nobahar-Cookson v The Hut Group Ltd* [2016] EWCA Civ 128) in which the *contra proferentem* approach had appeared to receive restatement and approval. The Court in *Transocean* was clear that it was not intending to cast any doubt on the allied principle of construction that clear words were required to exclude liability for negligence and the 'Rule' in *Canada Steamship v R*.

However, the recent decision in *Persimmon Homes v Ove Arup* [2017] EWCA Civ 373 appears to continue the trend towards minimising the scope for a *contra proferentem* approach generally, and not just in the context of mutual exclusion or exemption clauses. The Court stressed that it was necessary to distinguish between a simple exclusion of liability and an indemnity clause requiring a party to hold the other harmless from the consequences of that party's negligence and that, at least in the former case, the Court's "impression" was that Canada Steamship guidelines "in so far as they survive" are "now more relevant to indemnity clauses than to exemption clauses" and that in commercial contracts between sophisticated parties, such as a large construction contract (and equally an offshore services contract), it should all turn on the language. As Jackson LJ stated: "Exemption clauses are part of the contractual apparatus for distributing risk. There is no need to approach such clauses with horror or with a mindset determined to cut them down." That is, on one view, a new and more encouraging start to tackling the construction

of a knock-for-knock clause. Certainly, post-*Transocean* and *Ove Arup*, the interpretative terrain seems as if it may have become flatter and quicker and easier to traverse.

Thirdly, the BIMCO forms, particularly the "Towcon 2008/Towhire 2008" forms and "Supplytime 2005" continue to produce all manner of ingenious (and not so ingenious) arguments but also, mixed in with them, some difficult questions of interpretation. This is, perhaps unexpectedly, particularly the case as to the operation and effect of the BIMCO "knock-for-knock" liabilities clause, given the sums at stake and the realisation *ex post contractu* that one has surrendered any claim for loss or damage of one's principal asset. Once again I have been lucky enough to be involved in many of these disputes (and doubly lucky to have enjoyed the generosity of lawyers of many jurisdictions and of offshore operators and their in-house counsel in sending to me their comments and many examples of decisions and arguments over the years from 2011). I wrote the following in 2011, and it remains just as true in 2017: "It appears to be a fact of life that this single provision, providing for a mutual allocation of risk in respect of the parties' respective property and employees, described by BIMCO with justice as lying at the heart of the drafting philosophy behind its offshore industry forms and designed to minimise disputes in favour of insured or self-borne risks, continues to spawn many and varied arguments as to its effect and construction which are of considerable ingenuity." I have therefore expanded the commentary to deal with these many and varied arguments as much as possible throughout the new edition.

Fourthly, having had a number of cases involving BIMCO's "Bargehire 2008" form and the 2013 "Windtime" form, I have now enlarged the commentary chapters to include new commentaries on both forms. While there are good textbooks on demise charters generally, it seemed to me that there was a need for a specific commentary on the special contract of chattel hire that a barge-charter represents. This means (some people may say "at last!") that the book now, finally, comprises a commentary on the *full* suite of *all* of the BIMCO offshore industry forms. It has been a long voyage from the single chapters on "Towcon" and "Supplytime" in the first edition of 1996 to this greatly expanded book, but an enjoyable one, with there being many things in the wider range of BIMCO offshore forms, even in "Windtime" and "Bargehire", *qui valent le détour*. More seriously, one very real benefit of having all of the forms together in one book and their being considered together is that the drafting considerations and problems thrown up by one form frequently illuminate the interpretation of another, as, for example, "Towcon" shows for "Supplytime" (whichever version of the latter is taken) and as "Windtime" and "Bargehire" also show for "Supplytime 2017." I hope that the comparison between forms and between clauses dealing with the same subject matter – albeit differently from form to form – is useful, particularly to those negotiating and drafting contracts who now have a number of standard form "choices."

Fifthly, I have taken the opportunity to revise and update the general chapters on contractual matters, the UK Standard Conditions, collisions, limitation and admiralty jurisdiction in the light of recent case law, particularly from other common law jurisdictions, and other additional materials. I note that the current trend in admiralty jurisdiction matters on that all-important question, given the plethora of strange objects towed or serviced in the offshore industry, of the nature of a "ship" or a "vessel" seems finally to have moved away from the repeated question of "what is a jet-ski?" to the different (but equally A.P. Herbert like) question "is a houseboat a boat?"

It remains only for me to thank those who have played a role in this fourth edition.

There have been many, all of whom I hope I have thanked individually, but I would like, if it is not invidious to do so, to single out the following: Tony Clarke, the Rt. Hon. Lord Clarke of Stone-cum-Ebony who, as with the previous editions of the work, again made time to consider the book in page-proof and to write a kind foreword (following his retirement from the Supreme Court in July and his now practising as arbitrator, the future fifth edition, *Deo volente*, will therefore be likely to include Tony's *ex cathedra* views once again on BIMCO standard form wordings, cf.

The Herdentor); Grant Hunter, the indefatigable and ever-helpful Head of Contracts & Clauses at BIMCO, responsible for the development, revision and promotion of BIMCO's wide range of standard contracts: thanks are due not only for unstinting permission to reproduce the BIMCO forms and the various explanatory notes but also for Grant's willingness to respond to any query (always it seemed within 24 hours), his many insights into the difficult but valuable task which BIMCO performs in balancing on the one hand, perfectionist amendments to a form against, on the other, the settled usage of that form which has brought a measure of contractual discipline and certainty to the industry and, also, for involving me in aspects of the consultative process for the drafting of "Supplytime 2017"; Paul Dean of HFW, one of the leading and busiest practitioners in the field of offshore contracts (seemingly always in the air between London and Houston) and a veritable guru on the topic of the BIMCO forms, particularly "Supplytime", who as before very kindly gave me the benefit of his great experience and practical insights and with whom once again I have had the great good fortune to work on a host of tricky problems on the various BIMCO forms; Chris Kidd of Ince & Co, an equally legendary figure in the world of offshore contracts, member of the drafting sub-committees for both "Supplytime 2017" and "Windtime" and someone who has made a special study of consequential loss and knock-for-knock clauses and who is always happy to discuss and debate however busy he is; Fabien Lerede and Ursula O'Donnell of the Standard Club, one of the leading P. & I. Clubs in the field of offshore risks, with whom I have had many useful discussions, with Fabien's insights as member of the drafting sub-committee for "Windtime" being very helpful; Professor Howard Bennett of the University of Nottingham for his thought-provoking correspondence with me both on limitation in the case of tug and tow and *The Smjeli* [1982] 2 Lloyd's Rep 74 and also on collision liability and the principle of "control" *à la The SS Devonshire v The Barge Leslie* [1912] AC 634: torpid waters these, and not often troubled in practice, but waters which have nevertheless benefitted from a good analytical stir; my good colleagues and friends Professors Bariş Soyer, Andrew Tettenborn and Simon Baughen of the University of Swansea's prestigious Institute of International Shipping and Trade Law who have been instrumental in developing the intensive academic study of offshore contracts (as a very successful colloquium, now published as *Offshore Contracts and Liabilities* (Informa, 2015), ed. Soyer and Tettenborn, and our new collective joint work, *Oil and Gas Contracts* (due for publication in 2018) may perhaps illustrate); Henry Ellis and Gemma Morgan, barristers of Quadrant Chambers, whom I have had the pleasure of leading on a number of difficult "Supplytime" and UK Standard Conditions disputes and who have brought a fresh and challenging eye to the standard forms; the still unknown "E.R." whose extraordinary photograph I have again been allowed by Informa to use as a frontispiece to this fourth edition but whom, despite Informa's best efforts in connection with the third edition, we were unable to trace for permission to use it and, last (but in reality first), my wife Charlotte, without whom nothing. She now, like Davies in Erskine Childers' *The Riddle of the Sands* (1903), and entirely understandably, "objects to towage on principle" and, perhaps still more so, to any mention whatsoever of BIMCO contracts or explanatory notes thereto.

Needless to say, all omissions from and mistakes or infelicities in the text are mine alone. It remains, unfortunately, necessary to say that this work is not intended to provide any individual legal advice to any litigant, client or any other reader of it; although every effort has been made to eliminate errors, no responsibility is therefore accepted to any person who relies on any text, statements or opinions contained within it.

The law is intended to be that as it stood on 31 August 2017.

SIMON RAINEY
Quadrant Chambers
London EC4Y 1AU

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CHAPTER 1

The contract of towage

PART A. PRELIMINARY CONSIDERATIONS

Defining towage

1.1 The towage of one ship by another as a common maritime operation began with the development of the steam paddle tug in the 1820s and 1830s. The first tug upon the River Thames appears to have been the *Lady Dundas* in 1832 (see F C Bowing, *A Hundred Years of Towing: A History*). Not long afterwards in 1839, in perhaps the most celebrated and certainly the most beautiful depiction of towage, Turner painted the *Téméraire* under tow from Sheerness to Beatson's breakers-yard in Rotherhithe on the evening of 6 September 1838. Soon, steam tugs were assisting the sailing ships in the rivers and ports of England. As they grew more powerful, they were engaged to tow sailing ships on longer voyages to hasten the arrival or departure of the ships. So, by the mid-nineteenth century sailing ships would "take steam" to and from the places where the outward pilot was dropped or the inward pilot was taken on board. The definition of towage given by the courts reflected the limited nature of the service that tugs then performed. A towage service was described in *The Princess Alice* (1849) 3 W Rob 138 at p. 139 by Dr Lushington:

> as the employment of one vessel to expedite the voyage of another when nothing more is required than the accelerating [of] her progress.

This definition was adopted and endorsed in successive editions of Bucknill, *Tug and Tow* (1st edn, 1913; 2nd edn, 1927).

1.2 By the time of the second edition of *Bucknill* (above), Dr Lushington's definition of towage had already become too narrow and did not reflect the varied nature of the services which tugs were performing. Today, his definition aptly describes but one aspect of the varied work upon which tugs are commonly engaged. In addition to the towage of ships and other water-borne objects such as oil and gas rigs, tugs frequently render a wide range of services, both in terms of handling and supply, to the offshore industries.

Towage arises *ex contractu*

Towage arises from a contract

1.3 However towage is defined and whatever the particular nature of service being performed by the tug, since towage arises from the engagement or employment of the tug by another vessel to perform a particular service or for a particular purpose, towage arises from a contract concluded between the tug and the tow. As was said by *Bucknill* (above, 2nd edn), p. 1:

> In Admiralty law "towage" expresses the idea of work done under a towage contract as distinguished from towage work done by a salvor.

The contract of towage is merely a species of contract. With the exception of certain special incidents attaching to the formation and content of the mutual relations under that contract, the ordinary principles of the law of contract will apply (for these, see eg *Chitty on Contracts* (32nd edn, 2015)). It is these special incidents which form the subject-matter of this chapter.

The relationship between towage and salvage

1.4 The contractual nature of towage is of particular significance in considering the relationship between towage and salvage as the passage cited from *Bucknill* (above) demonstrates. Since the service as a service, whether of pure towing work or of any allied operation, being performed by a tug can be performed by that tug contractually or as a salvage service, the dividing line between contractual towage and towage rendered as salvage will depend on the presence of a towage contract and on the extent of the contractual services to be rendered under and as defined in that contract. The old cases when speaking of contractual towage describe it as "ordinary towage" (see *The Strathnaver* (1875) 1 App Cas 58 at p. 63) or as "mere towage service" (see *The Reward* (1841) 1 W Rob 174 at p. 177 *per* Dr Lushington) in distinguishing those services which a tug renders under contract from those which it renders as salvor.

1.5 Salvage and the entitlement to remuneration or reward arises irrespective of the existence of a contract between the salvor and the vessel or other property being salved. Although a form of salvage contract is frequently entered into, the most common form being Lloyd's Open Form or "LOF" (which has gone through various revisions, the latest form being LOF 2000, recently revised in minor respects as LOF 2011), salvage does not depend on the conclusion of a contract. Thus, in *The Hestia* [1895] P 193, Bruce J stated at p. 199:

> But salvage claims do not rest upon contract. Where property has been salved from sea perils, and the claimants have effected the salvage, or have contributed to the salvage, the law confers upon them the right to be paid salvage reward out of the proceeds of the property which they have saved or helped to save.
>
> No doubt the parties may by contract determine the amount to be paid but the right to salvage is in no way dependent upon contract, and may exist, and frequently does exist, in the absence of any express contract, or of any circumstances to raise an implied contract.

1.6 Accordingly, where a tug is engaged by a vessel under a towage contract to perform some towage operation, that operation and the work which the tug has to effect to achieve it will not constitute salvage. It is only where the tug has to perform some service outside the contract, and in circumstances of danger to the vessel, that salvage will arise. The touchstone is the scope and nature of the service contemplated by and provided for in the contract. In the celebrated opinion of the Privy Council in *The Minnehaha* (1861) 15 Moo PC 133, *per* Lord Kingsdown at pp. 152–154, it was put in this way:

> But if in the discharge of this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved and may claim as salvor instead of being restricted to be paid for mere towage.

1.7 The settled view is that while the tug is acting as salvor and extra-contractually, the towage contract is "superseded" or "suspended" (see *per* Lord Kingsdown in *The Minnehaha, op. cit*.) or as Sir Samuel Evans P put it in *The Leon Blum* [1915] P 90, after an exhaustive review of the authorities, at pp. 101–102:

> The right conclusion to draw from the authorities, I think, is that where salvage services (which must be voluntary) supervene upon towage services (which are under contract), the two kinds of services cannot co-exist during the same space of time. There must be a moment when the towage service ceases and the salvage service begins and, if the tug remains at her post of duty, there may come a moment when the special and unexpected danger is over, and then the salvage service would end, and the towage service would be resumed. These moments of time may be difficult to fix, but have to be, and are fixed in practice. During the intervening time, the towage contract, insofar as the actual work of towing is concerned, is suspended. I prefer the word "suspended" to some of the other words which have been used, such as "superseded", "vacated", "abandoned", etc.

1.8 As Sir Samuel Evans P states, it is often difficult to discern the point at which a service being rendered by a tug under a towage contract ceases to be regarded as one rendered under

the contract and constitutes salvage. The relationship between contractual towage and salvage is considered in greater detail in Chapter 8 below.

Gratuitous towage

1.9 While not often encountered in practice, especially in the field of commercial towage or the towage of large water-borne objects, instances occasionally arise where the towing vessel agrees to tow another vessel in difficulties without payment. Thus, a friendly tow may be offered and accepted between small boats such as yachts or between sister ships or ships which, although nominally owned by different companies, are in effect sisters. In such a case there is no contract as such. However, the tug is obliged to exercise reasonable care in the performance of the tow and will be liable to the tow in tort if it executes the tow negligently (see *Skelton v London & North Western Rly* (1867) LR 2 CP 631). In that case, a railway company voluntarily followed the practice of shutting a gate by a railway crossing but on one occasion forgot to do so. Willes J, applying the decision in *Coggs v Bernard* (1703) 2 Ld Raym 909, stated at p. 636:

> If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it.

Similarly the tow will owe a duty of care to the tug and will also be obliged to exercise reasonable care in respect of its role in the towage. As it is put by *Bucknill* (above) (2nd edn, p. 1, footnote (b)), where the towage is rendered gratis, "the general duty to take reasonable care governs the mutual relations of each vessel.

1.10 The standard of the reasonable care to be exercised by the "friendly tug" and "friendly tow" will depend on all the circumstances including the type of vessel and nature of the operation proposed; the gratuitous nature of the service will be relevant.

1.11 Thus in the Canadian case of *The West Bay III* (*Maurice Federation v Stewart*) [1969] 1 Lloyd's Rep 158, a "boom-boat" which was used to push floating logs into position suffered an engine failure. A fisheries patrol vessel agreed to give her a tow; she did so gratuitously. During the towage, she increased speed so as to give herself necessary steerage-way but this capsized the boom-boat, causing loss of life. The court (Exchequer Court, British Columbia Admiralty District) held that the patrol vessel owed those duties as were usually owed by the tug. Sheppard J, however, held that there was no negligence. At p. 163 he stated:

> In the case of a gratuitous service, such as that of [the patrol vessel's master] in this instance, there is no liability at law where the fault may be excused as an error in judgement.

See also *Karavias v Callinicos* [1917] WN 323 (gratuitous carriage of persons), *Armand v Carr* [1926] SCR 575, Supreme Court of Canada, and the American cases of *The Mifflin* 1931 AMC 326 and *The Warrior* 1929 AMC 41 which are to the same effect.

The contract of towage is a contract for services

1.12 Under a contract of towage, the tug owners agree to provide services for the tow with tug, which they themselves officer, crew and supply, for an agreed or defined service or to attain an agreed defined result or for an agreed or defined period of time in exchange for periodic or lump sum payments.

1.13 However, in towage contracts and, in particular, in many of the common standard form towage contracts, terms are often used which imply or connote a lease of the tug to the tow or the hire by the tow of the tug. The tug owner is often described as "letting" the tug to the tow; the tow is usually described as "the hirer" of the tug and the contract will commonly refer to the "delivery" to the tow of the tug and of the "redelivery" by the tow of the tug upon the completion of services. Notwithstanding the use of such terms, a towage contract is not a lease nor a contract

for the hire of the tug nor is possession of the tug passed to the tow under the contract. The towage contract is merely a contract for the provision to the tow of services, which services are provided by the tug owners through their tug and tug crew. The position under a towage contract is, therefore, similar to the position under a time charterparty of which Lord Reid said in *The London Explorer* [1971] 1 Lloyd's Rep 523 at p. 526:

> Under such a charter there is no hiring in the true sense. It is not disputed that, throughout, the chartered vessel remains in the possession of the owners, and the master and crew remain the owners' servants. What the charterer gets is a right to have the use of the vessel.

In *The Madeleine* [1967] 2 Lloyd's Rep 224 at p. 238, Roskill J commented as follows in relation to the delivery of a vessel under a time charterparty:

> An owner delivers a ship to a time charterer under this form of charterparty by placing her at the charterers' disposal and by placing the services of her master, officers and crew at the charterers' disposal, so that the charterers may thenceforth give orders (within the terms of the charterparty) as to the employment of the vessel to the master, officers and crew, which orders the owners contract that their servants shall obey.

Is the contract of towage one of bailment (or akin thereto)?

1.14 While under a towage contract the tow does not obtain possession of the tug; on the other hand, the tug may often be put in possession of the tow for the period of the service. So, if the tow is unmanned (eg a dumb barge), or is merely an object which is being conveyed by sea (eg a caisson or a part of a rig), or if the tow is manned by a riding crew put on board by the tug, the tug will have physical possession of the tow. Contrast, however, the position where the tow is fully manned and is simply being towed or propelled or assisted by a tug; in such a case there is no physical possession but only a service being rendered to the tow. In former cases, the contract may appear to be analogous to a contract of bailment or to a contract for the carriage of goods rather than a species of contract for services: as has been said, "it might be said to be natural to regard the tow as in the possession of the tug so as to suggest a bailment of the tow to the tug owner, eg where the tow is an unmanned dead ship or an object such as an oil rig": Palmer, *Bailment* (3rd edn, 2009) at para. 20–037. The principal relevance of the distinction lies in the nature of the obligation upon the tug owner. If he is to be regarded as a bailee, then he is liable for loss of or damage to the tow unless he can exculpate himself; if he is merely a provider of services and obliged to exercise care and skill, if the tow sustains loss or damage, the tow must show a breach of the tug's obligations of care and skill in order to recover (see Palmer, *op. cit*., at, para. 1.047 *et seq*).

1.15 It is submitted that the approach of the Privy Council in *The Julia* (1861) 14 Moo PC 210 and in *The Minnehaha* (1861) 15 Moo PC 133 (considered in detail below) in analysing and classifying towage contracts as contracts where the tug is to be engaged to render services, and to which specific obligations of due care in and about and performance of those services are attached, is inconsistent with the concept of bailment and that of the bailee's strict responsibility for the subject-matter of the bailment in the event of loss subject to very limited exceptions such as Act of God. In *Harris v Anderson* (1863) 14 CB (NS) 499, the Court of Common Pleas rejected an argument that since a tow had grounded during the towage, the tug was to be liable for the same unless it could explain and excuse it. The court held that the claim was bad since it contained no allegation of fault or neglect on the part of the tug. In *The West Cock* [1911] P 23, Sir Samuel Evans P considered the question of the nature of the obligation upon a tug owner to provide a seaworthy tug. He regarded the obligation as an absolute one like that upon a carrier (which is doubtful – see the discussion below), but it is to be noted that he did not seek to support that conclusion by classifying a towage contract as importing the relationship of bailment but kept the two types of contract quite separate (see eg [1911] P 23). The Court of Appeal in

the same case, reported at [1911] P 208, was doubtful as to whether any analogy could be drawn between a towage contract and a contract of affreightment. In *The Kite* [1933] P 154, a claim for damage to goods on board a lighter being towed on the River Thames was approached by the parties as not being a claim in bailment. Langton J approved that concession on the basis that the tug did not have custody of the goods but only control over them (see p. 181).

1.16 However, there is a considerable body of American authority which has specifically rejected the application of rules of bailment to a contract for towage. In *Brown v Clegg* (1870) 3 Mar LC 512 (Supreme Court of Pennsylvania), the owners of barges laden with coal which were damaged during their towage on the River Delaware sought to argue that the owners of the tugs which drew them were liable as bailees and common carriers of the tow. The court considered the previous American authorities and the English cases (referring principally to the decisions of the Privy Council in *The Julia* and *The Minnehaha*) and held that it was clear both in American and English law that tugs are not common carriers of the vessels which they tow. Similarly, in *The Margaret*, 94 US 494 (1876), a tow sued a tug for causing her to ground at the entrance of a harbour during the performance of a towage contract. The court stated (at p. 497):

> The tug was not a common carrier, and the law of that relation has no application here. She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished.

1.17 See also *Stevens v The White City*, 285 US 195 and *Sun Oil Co v Dalzell Co* (1932) 287 US 291. For a more modern consideration of the question see the decision of the US Court of Appeals (5th Circuit) in *Agrico Chemical Co v MV Ben Martin*, 664 F 2d 85 (1981). Generally, see Parks & Cattell, *The Law of Tug, Tow, and Pilotage* (4th edn) at pp. 19–23, where a full list of the American cases is set out and considered.

1.18 Until recently, Canadian law has adopted the same approach as American law as to the rejection of strict liability of the tug for damage to the tow as would follow from a bailee–bailor relationship. In *The Tug Champlain* [1939] 1 DLR 384, the Exchequer Court, at p. 389, held, after a review of the American decisions and the English decisions in *The Minnehaha* and *Spaight v Tedcastle*, that:

> The obligation to carry out a towage contract requires nothing more than that degree of caution and skill which prudent navigators usually employ in such services. The occurrence of an accident raises no presumption against the tug and the burden is on the complaining party to prove a lack of ordinary care.

(See also *Sewell v B.C. Towing and Transport Co* (1884) 9 SCR 527.)

1.19 The court in *The Tug Champlain* considered more fully the approach suggested by the decision of the Court of Common Pleas in *Harris v Anderson* (1863) 14 CB (NS) 499 and made it clear that a claim by the tow against the tug in the event of damage requires the tow to show fault on the part of the tug; the burden of proof is not upon the tug to explain how the damage occurred. However, while the Canadian courts follow the US approach, the particular issue of whether there is a bailment relationship does not appear to have arisen for decision. Where it has, conflicting dicta have been expressed. In *Fraser River Pile & Dredger Ltd v Empire Tug Boats Ltd* (1995) 92 FTR 26 (FCTD), a crane mounted on a barge which was under tow struck a bridge. The tug was found liable on the basis of failure to inspect the tow to ensure it was suitable for towage. Reid J considered the distinctions which flow from a tow which was unmanned and a tow which was manned and questioned whether the degree of physical control amounting to possession conferred on the tug over an unmanned tow did not render the tug a bailee of the tow and liable to it for damage on that basis. Cf. *St. Lawrence Cement Inc v Wakeham & Sons Ltd* (1995) 86 OAC 182, in which the Ontario Court of Appeal, considering the stranding of a barge by her tug, expressed the view, relying on US precedent, that the only basis upon which a tug owner

could be liable for damage to the tow was in negligence and not as bailee. This view is consistent with *The Minnehaha* line of authority in England.

1.20 In Australia, in a case of an unmanned or "dumb" tow, bailment was accepted as the applicable analysis by the Court of Appeal of New South Wales which considered and rejected the contention that the common law of tug and tow and the basis of responsibility applied in cases such as *The Minnehaha* excluded a bailment relationship: see *Commissioner for Main Roads v Stannard Bros Launch Services* (12 September 1990, unreported; noted in Palmer, *op. cit*. at para. 20.038).

1.21 In *Lukoil-Kaliningradmorneft plc v Tata Ltd & Global Marine Inc* [1999] 1 Lloyd's Rep 365, the issue of whether or not towage under a contract of towage (on the BIMCO "Towcon" form, now the "Towcon 2008" form, considered below in Chapter 4) was to be characterised bailment or as akin to bailment arose directly for decision. In that case, Lukoil as tug owner contracted on the "Towcon" form with Global as hirer for the towage of two vessels from Canada to India. The contract identified Tata as the owners of the two vessels to be towed. Lukoil exercised a lien over the vessels on mid-passage at Walvis Bay; the "Towcon" form by its clause 21 (now clause 28 of "Towcon 2008") provides for a possessory lien for sums due under the contract (see Chapter 4 below). Tata contended that it was unaffected by the terms of the contract since Global was the contract party and Global had no authority to contract on its behalf notwithstanding Global's warranty of such authority by the terms of clause 22 of the "Towcon" form (now clause 29 of the 2008 revision). Lukoil, in the alternative to its arguments on authority, contended that it was bailee of the tows, and on bailment and sub-bailment principles (eg *Morris v C.W. Martin & Sons Ltd* [1966] 1 QB 716 and *The Pioneer Container* [1994] 2 AC 324), it was entitled to exercise the clause 21 possessory lien over the tows. (The authority and agency aspects under this clause are considered below in Chapter 4.)

1.22 Toulson J, having at p. 374 referred to pp. 4–6 of the first edition of this work ("where the author comments that no English authority suggests or supports an analysis of a contract of towage as one of or akin to bailment, although the point has never been specifically addressed"), went on to find that Lukoil was bailee of the tow because it "did take delivery and possession of the vessels sufficient to put it in the position of a bailee" (p. 374).

1.23 The basis upon which he did so was the particular nature of the physical relationship between tug and tow during the service. The tows were vessels which were being towed by Lukoil from Canada to India for scrapping; they were unmanned and had no use of rudder or main engine; riding crews from the tugs were put on board or were available to board them in case of need. Effectively they were hulks under tow "in the sole charge of Lukoil" (p. 374).

1.24 Lukoil had accepted that bailment was not a necessary incident of every contract of towage because in a particular case the vessel under tow might remain in the possession of the owner of that vessel throughout. They "confessed and avoided" the American decision in *Stevens v The White City*, 285 US 195, cited by Tata, in which Judge Butler had stated:

> Decisions of this Court show that under a towage contract the tug is not a bailee of the vessel in tow or its cargo . . . The tug does not have exclusive control over the tow but only so far as is necessary to enable the tug and those in charge of her to fulfil the engagement. They do not have control such as belongs to common carriers and other bailees. They have no authority over the master or hands of the towed vessel beyond such as is required to govern the movement of the flotilla. In all other respects and for all other purposes the vessel in tow, its cargo and crew, remain under the authority of its master; and, in emergency the duty is upon him to determine what shall be done for the safety of his vessel and her cargo. In all such cases the right of decision belongs to the master of the tow and not to the master of the tug. A contract merely for towage does not require or contemplate such a delivery as is ordinarily deemed essential to bailment.

1.25 They accepted that in the examples given by Judge Butler, a vessel might remain in the possession of her owner rather than in the possession of the tug, but contested the proposition that

as a matter of law under a contract of towage even where possession of the tow does pass to the tug and its crew a contract of towage cannot be characterised as a bailment. (Cf. the clear parallels with the reasoning of the recent decisions of the Canadian court referred to above; Canadian authority does not appear to have been cited to Toulson J; cf. *Marine Blast Ltd v Targe Towing Ltd (The Von Rocks)* [2004] 1 Lloyd's Rep 721 *per* Mance LJ at 729, para. 28).

1.26 Toulson J accepted Lukoil's argument in these terms (at p. 374):

> I accept Mr. Crookenden's argument on this issue. It seems to me that Lukoil did take delivery and possession of the vessels, sufficient to put it in the position of a bailee. But, on the basis that Tata was not a party to the towage contract, there was no direct bailment by Tata to Lukoil.

He went on to hold that even if there was no bailment as such, a result akin to bailment would arise which would allow the tug owner to rely on the terms of the towage contract against the owner of the tow. See at p. 375, where he stated:

> Lukoil's position was accordingly that of either a sub-bailee or a quasi-bailee (quasi-bailment being similar to sub-bailment except that the intermediary does not take possession himself, but arranges for possession to pass directly from the owner to a third party). The question is whether Lukoil was entitled, as against Tata, to retain possession of the vessels on termination of the towage contract.

1.27 The difficulty with the decision in *Lukoil v Tata* is that, while it imparts the relationship of bailor and bailee into that of tow owner and tug owner by simple reference to the transfer of physical possession of an unmanned tow to the tug, it does not address the consequence of that for the circumstances in which the tug will be liable for damage to the tow. If the relationship is one of bailment then an ordinary strict bailee's liability will be owed by the tug; this has not been the basis of the liability of tug to tow hitherto which, as seen above, has been on the basis of a duty of care with the burden of proof, in the case of damage or loss, on the tow owner to show a relevant want of care by the tug. The bailment argument has surfaced in a number of cases since *Lukoil v Tata* in which it was not necessary for the court to express any view: see *Marine Blast Ltd v Targe Towing Ltd (The Von Rocks)* [2004] 1 Lloyd's Rep 721 *per* Mance LJ at 729, para. 28 and *A Turtle Offshore SA v Superior Trading Inc (The A Turtle*) [2009] 1 Lloyd's Rep 177. In the latter case, which turned on the construction of the "Towcon" knock-for-knock clause, claims in bailment, in the alternative to claims for breach of a "Towcon" contract, were made by the owner of a damaged tow; the parties accepted that the clause would apply equally to both types of claim and therefore the court did not need to consider whether the claims in bailment were, *per se*, well-founded. Both decisions are considered further in Chapter 4 below.

1.28 A possible reconciliation of *Lukoil v Tata* with the line of authority as to the juristic basis of the tug-owners' liability for loss of or damage to the tow (eg *The Julia, The Minnehaha, The West Cock* and *The Kite*) is the following:

i Historically towage was the provision of a service to a vessel of expedition or of the acceleration of her progress.

ii Typically, such service was to manned vessels where no question of dominion and control over the tow sufficient to put the tug in possession of it arose.

iii The *fons et origo* of the duty of the tug to the tow in cases such as *The Minnehaha* and *The Julia* as one of proper care in the provision of the service concerned only manned tows.

iv The principles in those cases appear to have been cross-applied to cases of unmanned tows, such as barges, without any analysis save that towage was characterised as the provision of a service to the tow by the tug indifferently of whether the tow was or was not manned.

v The factual position of a tug *vis-à-vis* an unmanned tow will usually amount to one of possession of the tow, given the degree of control the tug exercises. *A fortiori*, if the tug

has a permanent or occasional riding crew in place: see eg Palmer, *Bailment* (*op. cit*.) para. 1.131 *et seq*. and *n.b*. 1.136.

vi There is no reason in principle why the tug in those circumstances is not a bailee of the tow with the consequences which flow from that characterisation.

vii Even in potential bailment situations where A has possession of a chattel belonging to B, there are settled exceptions to the bailment classification. The leading example is where a servant (employee or agent) is in possession of his master's or principal's chattels where negligence must be established even though the relationship is one of bailment. See eg Palmer (*op. cit*.) at para. 3.083 *et seq*. and Chapter 7(I). Cf. also the categorisation of contracts of hire of operators and machines, *ibid*., Chapter 7(IV)(a).

viii The towage cases are to be treated as such a settled exception at least in so far as the nature of the duty on the tug is concerned and, more particularly, the incidence and content of the burden of proof where the tow is damaged. It is effectively too late to reverse the trend of the cases, at least at first instance level.

ix Other consequences of the possessory relationship established in the law of bailment may apply in the case of unmanned tows, such as that of bailments or quasi-bailments on terms and the effect on sub-bailments to the extent that they are not inconsistent with the settled law on the implied duties of tug and tow. But these remain to be worked out on a case-by-case basis.

1.29 This reconciliation has been described as "somewhat strained" (by *Palmer*, para. 20.038), although at least it seeks to square the conflicting lines of authority as they currently stand and to accommodate the particular case of tug and tow within other exceptions to the relationship of bailment. It is suggested (by *Palmer*), perhaps optimistically in view of the coverage of towage by standard form contracts which usually render the bailment debate unnecessary, that "It would appear to be likely that if the opportunity arises a full-scale attack will be mounted on the decision" in *Lukoil v Tata*. Certainly however, the better view, on the basis of the English case law, as set out above and in previous editions is that the decision in *Lukoil v Tata* is wrong. This view is now endorsed by the leading work on bailment: *Palmer*, at para. 20.038.

1.30 The position as between tug and tow as separate contractual and contracting entities may be contrasted where the tug and vessel towed are owned or operated by the same person. In such a case, the relationship between the tug and the owner of goods being towed on the vessel will not be one of towage but that of a contract of affreightment. This is the position in American law (eg *Agrico Chemical Co, op. cit*.). It is submitted that the position would be the same in English law. There are various contract forms under which a tug owner will offer both tug and barge to transport an object (eg the BIMCO "Projectcon" form, developed from the "Heavycon 2007" and "Heavyliftvoy" forms for the transportation of heavy or voluminous objects). These are effectively charterparties or contracts for the carriage of goods by sea, rather than contracts of towage.

The role of the standard form contract

1.31 Since the mutual relations of tug and tow are founded upon the existence of a contract of towage between them, the definition of their respective rights and obligations will be defined by the terms of the contract which they have agreed.

1.32 Prior to the development of the use of standard form towage contracts and of contracts on tug owners' terms and conditions, the content of the obligations of the parties was worked out by the courts. By 1860, the principles were sufficiently well-established for the Privy Council to summarise them in its opinions in *The Minnehaha* (1861) 15 Moo PC 133 and in *The Julia* (1861) 14 Moo PC 210. As a result, it is clear that in the absence of express stipulation, the law implies certain specific terms in a contract of towage which limit the rights and define the obligations of

tug and tow (see *Bucknill* (above) (2nd edn, 1927), pp. 16–17). The common law principles are considered in detail in Chapter 2.

1.33 Moreover, with the development of towage came the increasing use by tug owners of standard form contracts in an attempt to escape from or to dilute their obligations at common law. By the end of the nineteenth century many forms of contract were in use reflecting the wide range of harbour and port authorities, railway and dock companies and tug operators providing towage services. These forms were united by a common purpose: to exclude and restrict to the greatest extent possible the liability of the tug. The Admiralty Court regarded these attempts to "contract out" of the implied obligations of the towage contract, which had been laid down in the line of cases culminating in the opinions of the Privy Council in *The Minnehaha* and *The Julia* in 1860, with considerable hostility and suspicion. Even in 1913 when Butler Aspinall KC wrote his introduction to the first edition of Bucknill, *Tug and Tow* (p. xv) it could be said that "the law relating to towage depends almost entirely, if not entirely, on judicial decisions." However, where the standard forms or conditions were clearly worded to cover a particular situation, they were given their full effect by the court (see eg the approach of the court in *The President Van Buren* (1924) 19 Ll L Rep 185), even if the court did so in many cases with extreme reluctance (see eg *The Newona* (1920) 4 Ll L Rep 156).

The UK Standard Conditions

1.34 Today, the standard form of contract most in use for port and harbour but also some offshore work in the United Kingdom is the "UK Standard Conditions for Towage and Other Services." This form has been revised frequently and the current form in use is the 1986 Revision. This form is produced by the British Tugowners' Association and is, even today, a good example of a draconian standard form contract heavily favouring the tug owners.

The BIMCO ocean towage and other offshore industry forms

1.35 Other forms are used for ocean towage. While certain tug operators have their own "house" forms, those forms in most common use both in the United Kingdom and internationally have been produced under the auspices of the Baltic and International Maritime Council (BIMCO): these are the "Towhire" and "Towcon" forms which date from 1985 and which have recently been revised as "Towcon 2008" and "Towhire 2008." These forms were designed specifically for the towage industry and as a standard form of contract for towage, either on a lump sum or a daily rate basis. Reflecting the extensive and increasing provision of services by tugs (and other vessels) in connection with the offshore industry and the inaptness of the use of the "Towcon" and "Towhire" for such wider offshore service supply services, these BIMCO forms are supplemented by the "Supplytime 89" form, the predecessor of which first appeared in 1975 and which has now been revised as "Supplytime 2017", superseding the extremely popular "Supplytime 2005" (which is likely to remain a commonly used template for some time to come, given that brokers and the offshore vessel industry are creatures of habit). Further special forms of standard contract have been developed by BIMCO with the needs of the offshore industry in mind. The first was the "Heavycon" form for the transportation of heavy or voluminous objects, now "Heavycon 2007." Subsequently, BIMCO, following an approach by trade interests specialised in the offshore business, formulated a special standard bareboat charter for use in connection with chartering of non self-propelled barges for marine-related construction operations for both offshore and civil work: "Bargehire", now "Bargehire 1994." The success of the BIMCO forms has meant that they tend to be used as templates for other services within the offshore industry for which perhaps they are not precisely designed, as "Towcon" was used until the better suited "Supplytime" was introduced. Specifically in the tug and barge sector, handling particularly the transportation and positioning of objects and materials in large-scale projects in

special combinations of tug and tow, the need to use a combination of BIMCO contracts such as "Towcon", "Heavycon" and "Bargehire" has led to the new form "Projectcon", described by BIMCO as "a specially designed charter party for the tug and barge sector. It is designed to provide a single contractual platform to govern the entire commercial adventure involved in the use of a barge and tug to transport special or projects cargoes." However, a common problem is the use of the general "Supplytime" concept in a host of offshore service contexts, eg such as the provision of a vessel for diving services or as a "platform" for such services, for which it was not principally designed. BIMCO reflected the sudden upsurge in time charters for OSVs and other vessels in the burgeoning industry of offshore wind farm construction with its variant on standard form time charterparty and the "Supplytime" model, "Windtime", to address a sudden industry need for a very narrowly tailored form. However, the need to tailor and supplement the BIMCO forms to reflect the actual service to be rendered is a crucial aspect of good, prudent contract management. The crude adoption of a BIMCO "standard" which is at least broadly analogous to the sphere of activity, albeit which does not cater for the special circumstances of the service, is frequently productive of litigation.

1.36 Similarly, the provision of tug services to salvors to assist them in the achievement of a salvage operation has attracted the formulation of standard contracts to address the particular problems which arise. Here BIMCO has co-operated with the International Salvage Union (ISU) or the ISU itself has devised forms of sub-contract such as "Salvcon" and "Salvhire" and the ISU Award-sharing sub-contract. The "mop-up" services in which tugs and offshore vessels specialise, such as wreck removal, have been covered by BIMCO-ISU forms, the most recent revisions of which are the 2011 forms "Wreckfixed", "Wreckstage" and "Wreckhire."

1.37 It is convenient at this point to comment briefly on the work of BIMCO in this (as in many other maritime) fields. BIMCO has produced standard contracts such as charterparties and bills of lading for more than a century. Some of the industry's most widely used forms such as Gencon 1994 and Shipman 2009 rank among the extensive catalogue of contracts produced by BIMCO. It has led the way in the production of specially designed industry forms, as seen above with special reference to the offshore industry, and in the formulation of stand-alone clauses for use in charterparties, usually responding to special industry needs (see eg the BIMCO ISPS/MTSA Clause and the BIMCO Piracy Clause as well as stevedore damage clauses). Its stated aim is "to raise standards in documentation and to bring about greater harmonisation in trade practice" and to do so by seeking to provide contract forms which provide a balanced solution between the parties, thereby making the forms an attractive and acceptable industrywide basis for contracting. A feature of BIMCO's work, which is particularly important in the present context, is BIMCO's extensive revision work of its forms, carried out in the light of changing developments and the industry's experience of how the forms and particular clauses within them (especially the BIMCO mutual allocation of risk or "knock-for-knock" clauses, present in the majority of BIMCO's forms and enshrining its quest for a balanced contract form). The latest versions of the forms considered in this work, such as "Towcon 2008", "Towhire 2008", "Supplytime 2017", "Bargehire 2008", "Windtime" and the "Wreck" forms of 2011 represent the fruit of industry-wide consultation and consideration. As stated by BIMCO (see Hunter, *Mar Risk Int* 1.9.2008):

> The development of a new standard form or the revision of an existing one is a thorough and detailed process. It can often take two to three years for a specialist sub-committee to gain the approval of Bimco's documentary committee to publish a new document. The sub-committees are made up of industry representatives who freely give their time to these often challenging projects. The common bond is the firm belief that modernising and harmonising shipping documentation is in the best interests of everyone in the industry.

1.38 BIMCO publishes explanatory notes to its forms and helpful comparison and concordance documents, highlighting the changes made by a particular revision and the reasons for them.

Reference is made to these in this work. BIMCO has now introduced "*idea*" (now "IDEA·2"), an internet-based charterparty editing system which provides subscribers with online access to a specially customised copy of Microsoft Word and a large library of over 80 BIMCO standard forms such as charterparties, bills of lading and specialist agreements: only the latest revisions of the forms are available (eg "Towcon 2008" or "Supplytime 2017"), with no similar access to earlier versions of the forms (eg "Towcon" and "Supplytime 2005"). In this way, BIMCO seeks to promote good up-to-date contract praxis and to encourage users to adopt and use only the most current versions of BIMCO forms. However, as practical experience shows, parties continue to contract on older versions of the forms, often in cases where the contract represents "repeat" business and the parties adopt and adapt a previous fixture or series of fixtures. In recognition of this conservatism among many users, BIMCO reformulated its "*idea*" by providing a reference folder of the older forms (although not in usable template form). As it explained in a press release of 13 July 2011:

> The new "archive" folder on idea has been introduced to provide access to some of BIMCO's older forms that are still used in the industry even though more modern editions are available. BIMCO always recommends that you use the very latest edition of any BIMCO form, but if commercial pressure dictates the use of an earlier edition then these older forms are now available in the "archive" folder.

Common European towage forms

1.39 Brief mention should also be made of standard conditions adopted by tug owners in other jurisdictions. Given the volume of towage work in certain places, standard conditions similar to the UK Standard Conditions are commonly found in such places. Good European examples of such other conditions are the Netherlands Tug Owners Conditions 1951 and the Scandinavian Tugowners' Standard Conditions 1959 (1974 Revision). Pursuant to Dutch law, towage within Dutch waters by a Dutch tug owner is subject to the Netherlands Tug Owners Conditions unless expressly excluded. They expressly provide for the application of Dutch law (see Article II). The Scandinavian Conditions are published only in Danish, Norwegian and Swedish. For convenience, the text of these conditions is included in Appendices 20 and 21 respectively, although, since they are rarely encountered in the context of English law contracts, they are not considered in this work.

The place of implied terms in towage and allied contracts

1.40 In large-scale and commercial towage business the mutual relations of tug and tow in present times are habitually defined by standard form contracts. However, a place, and an important one, remains for those implied terms in contracts of towage "laid down" (*per Bucknill* (above, 2nd edn, 1927), p. 17) by the Privy Council in 1860. This is for two reasons. First, the characteristic of many engagements of a tug or tugs to effect a particular service is a rapid exchange of telexes or faxes between the parties via brokers in circumstances of urgency or where neither party is concerned with the minutiae of offer and acceptance; such operating conditions can and often do prove problematic for the effective incorporation (usually at the tug owner's behest) of the standard form set of conditions. Absent such incorporation, the terms implied at common law will apply. Secondly, although much less importantly, in the engagement of tugs, or of a vessel which can tow, on the more *ad hoc* basis which may be encountered in small ship work, albeit by yachts or other vessels of significant value, the engagement is often rudimentary as to the terms which are to govern it, and the parties' rights and obligations will often still be those defined by the decisions of the courts as to the terms to be implied into a contract of towage.

1.41 For these reasons, Chapter 2 considers the implied terms and incidents of a towage contract at common law which will pertain where no standard form of contract or standard terms

and conditions have been used or have effectively been used by the parties. In Chapters 3 and 4, the standard forms which are commonly used in the realms of towage and allied services and which are encountered in English legal practice are considered separately. Chapters 5, 6, 7 and 8 consider the standard forms used for more general offshore purposes, both in the provision of offshore services, including the provision of barges, both basic and specialised, and the transportation of specialised cargoes and execution of marine projects. After a consideration of the special relationship between towage and salvage in Chapter 8, the ISU-inspired standard forms for towage and allied services in a salvage context are treated in Chapter 9 with the specialised forms used by the salvage and offshore industry for wreck removal being considered in Chapter 10.

PART B. THE MAKING OF THE CONTRACT

Authority of master to contract to be towed

On behalf of his owners

1.42 The general position as to the actual and ostensible authority of a ship's master to enter into contracts with third parties on behalf of his owners and so bind his owners has altered considerably with the advent of increased facilities of communication. These mean that in very many cases the master is able to be in constant touch with his owners and that he will be prone to refer to them all but routine navigational and operational decisions. His authority, subject to this limitation, will extend to doing all that is reasonably and ordinarily necessary to effect the usual employment of the vessel (see generally *Scrutton on Charterparties and Bills of Lading* (23rd edn, 2015), Article 43).

1.43 In relation to contracts for towage, the master of a vessel has authority to engage ordinary towage services which, objectively viewed, are reasonably necessary for the due performance of the vessel's voyage or are reasonably necessary for the safe and proper operation of the vessel and for her preservation from loss or damage. For these purposes, the master has authority to enter into a contract for towage provided that the terms of the contract are reasonable terms. As it was put by Sir Baliol Brett MR in *Ocean Steamship Co v Anderson* (1883) 13 QBD 651 at p. 652:

> A captain cannot bind his owners by every towage contract which he may think fit to make it is binding upon them only when the surrounding circumstances are such as to make it reasonable to be made, and also where its terms are reasonable.
>
> (See also *per* Baggallay LJ at p. 663.)

1.44 The nature of the master's ordinary authority to engage towage services is properly analysed as implied actual authority. The ability and right to engage towage services in circumstances of proper and reasonable necessity is an incident both of the master's authority from and his duty to his owners to prosecute the voyage and to employ the vessel safely and properly and in an ordinary and reasonable fashion. The *Ocean Steamship* test is consistent with the summary of the law given by Brandon J in *The Unique Mariner* [1978] 1 Lloyd's Rep 438. He stated at p. 449:

> The principles of law applicable to this issue can, I think, be stated in three propositions as follows. First, the relevant authority of a master, for the purpose of deciding whether his owners are bound, as against a third party, by an act which he has purported to do on their behalf, is his ostensible, rather than his actual, authority. Secondly, the ostensible authority of a master is the same as his implied actual authority, unless the latter has been restricted by express instructions from his owners or their representatives, and the third party concerned is, or should be taken to be, aware of such restriction. Thirdly, the implied actual authority of a master, unless restricted by such instructions lawfully given, extends to doing whatever is incidental to, or necessary for, the successful prosecution of the voyage and the safety and preservation of the ship.

1.45 In that case it was held that the authority of the master extended to making a contract for salvage on the basis of Lloyd's Open Form with its system of determining salvage remuneration by arbitration. Cf. *The City of Calcutta* (1898) 8 Asp MLC 442, in which the Court of Appeal doubted whether a master had authority to bind his owners to a contract involving a Lloyd's salvage arbitration, although it did not decide the point; this expression of doubt must now be considered as ill-founded.

1.46 The requirement to establish both the reasonable necessity for the tug and the reasonableness of the terms of the contract under which the tug is employed is illustrated by two cases. In *The Crusader* [1907] P 15; P 196 (CA), a vessel had run aground and required tug assistance to get her off. The ship's agents were asked by the master to engage a tug and they did so at a rate of £60 *per* day. The master refused to accept such terms and instead engaged the tug on a lump sum basis of £4,000 if the vessel was refloated "no cure–no pay." The court held that the agreement with its term for the payment of £4,000 was unreasonable and exorbitant and, accordingly, was outside the master's authority. The court refused to uphold the contract against his owners. In *The Luna* [1920] P 22, the court considered a contract made on a Humber tug operator's standard form contract. The skipper of the Dutch fishing-vessel the *Luna* engaged the tug *Kingston* to tow his vessel into dock from the mouth of the River Humber and from the dock to the sea for £15. He spoke very little English but orally negotiated the details of the service and the price. He then signed a form knowing it to be a contract but did not or was unable to read it. The form contained the standard terms which included a typical towage contract indemnity provision under which the tow was to indemnify the tug for all damage even if caused by the tug's negligence. The *Kingston* towed the *Luna* into another vessel and was solely to blame. Various arguments were advanced by the owners of the *Luna* to escape from the clause including one that the indemnity clause and standard form were unreasonable and so outside the skipper's authority. This contention was rejected by Hill J. He stated (at p. 27):

> It is said that this clause is unreasonable. It is, and has for many years been, usual for tug owners to protect themselves by such a clause. Nor can I see any ground for saying that it is unreasonable. It is all a question of price . . . The less the liability of the tug owner . . . the lower the price. There is nothing unreasonable in a bargain which puts the work of towage on the tug and the risks of service on the tow.

1.47 The decision in *The Luna* might be criticised on the ground that the incorporation of the standard form at all when signed and agreed to by someone who could not read it is doubtful and might, on this ground, perhaps be decided differently today, at least if it could be shown that the tug owner knew of the skipper's inability to understand the printed conditions (cf. *Geier v Kujawa Weston and Warne Bros* [1970] 1 Lloyd's Rep 364 *per* Brabin J at pp. 368 and 369), although the normal rule is that inability to read the standard terms is no defence by itself to their effective incorporation (see eg *Chitty on Contracts* (32nd edn, 2015), Vol. I, para. 13–016, and see also *Watkins v Rymill* (1883) 10 QBD 178). But, in so far as it establishes that terms in common use in standard forms, albeit onerous, will usually pass *The Ocean Steamship* test of reasonableness for deciding whether or not the entry into a contract on such terms is within the master's authority, it is correctly decided. As *Bucknill* (above) summarised the ratio of the decision, "such a term is usual in forms of contracts of towage, and is reasonable" (2nd edn, p. 8). Compare the situation where onerous terms are agreed which do not form part of an accepted or usual form of contract, where a master's authority is more easily questioned (see eg *The Crusader, op. cit*.).

1.48 Outside the master's ordinary implied actual authority to engage ordinary and usual towage services, there will also be authority to engage exceptional towage services for the ship under the master's agency of necessity. The authority of the master in this context derives from the necessity for the engagement of the tug in circumstances where a reasonable person would regard the engagement as likely to be beneficial to the marine adventure on which the vessel is employed and from the master's inability to communicate with his owners (*The Onward* (1874)

LR 4 A & E 38). In *The Alfred* (1884) 50 LT 511; 5 Asp MLC 214, the master of a ship in distress off Cape Finisterre concluded a towage contract with a vessel which had previously towed his vessel, without payment, for two days before letting go. That vessel agreed to stand by and tow for a further two days if the master agreed to pay not only for the future towage but also for the gratuitously rendered past towage. The court held that if it was reasonable as a matter of necessity to contract for the future towage, it was not unreasonable to agree to pay for the towage already done. *Per* Butt J at p. 512:

> It is clear as a matter of law that the master being the agent *ex necessitate* of his owners was authorised to enter into this agreement . . . The master acted reasonably. It is clear that he thought he was acting reasonably and that there was some chance of saving the valuable property. This he did for the comparatively small sum of £400.

In reality, however, the relevance to the position as between a master and his owners of the agency of necessity cases will today be very rare given the modern immediacy of ship-to-owners communications. The position may be very different in relation to the agency of necessity conferred on a master or ship owners to act on behalf of cargo interests (see below).

On behalf of his vessel's cargo

1.49 Subject to the exception of agency of necessity (see below), the owners of cargo are not bound by any contract of towage or salvage made by the owner or master of the vessel on which the cargo is laden. Neither the owners of the vessel nor the master have authority to bind the cargo carried or the owners of such cargo by any such contract. In *Anderson Tritton & Co v Ocean Steamship Co* (1884) 10 App Cas 107, Lord Blackburn stated at p. 117:

> But neither the owners of the ship nor their master have authority to bind the goods or the owners of the goods by any contract.

Similarly, as it was put by Sir Robert Phillimore in *The Onward* (1874) LR 4 A & E 38 at p. 51:

> According to the law, the master is always the agent for the ship and in special cases of necessity for the cargo also. He is the appointed agent of the former, the involuntary agent of the latter.

1.50 The position has been most recently considered in *Industrie Chimiche Italia v Tsavliris Maritime Co (The Choko Star)* [1990] 1 Lloyd's Rep 516. At first instance, Sheen J had held ([1989] 2 Lloyd's Rep 42 at pp. 46–47) that as the master had implied actual authority to engage salvage assistance on behalf of his owners, he must also have implied actual authority to do the same on behalf of cargo owners, that implication arising out of the contract of carriage. He was reversed by the Court of Appeal. It held, in what has been described as a "purist decision" (see Kennedy & Rose, *Law of Salvage* (9th edn) at para. 10.054) that, in the context of a contract of salvage, the only basis upon which a master might be authorised to contract on behalf of cargo owners was as an agent of necessity. Therefore, however, in the case of a true agency of necessity, ie if:

i it is necessary for the ship to take towage or salvage assistance to save the cargo;
ii it is not possible or practical for the ship to communicate with cargo owners;
iii the master or shipowner acts *bona fide* in the cargo's interests; and
iv it is reasonable for them to enter into the particular contract in question (see the fourfold formulation of the requirements for such agency summarised by Slade LJ in *The Choko Star* [1990] 1 Lloyd's Rep 516 at p. 525),

the cargo may be bound by a contract of towage or salvage entered into by the ship as agent of necessity on its and the ship's behalf. However, the position has now been reversed and the "wise and principled judgment of Sheen J" restored (Kennedy & Rose, *ibid*.) by the International Salvage

Convention of 1989, enacted by the Merchant Shipping Act 1995. This provides by Article 6.2 that, unless a contract provides otherwise expressly or impliedly:

> The master or the owner of the vessel shall have authority to conclude [contracts for salvage operation] on behalf of the owner of the property on board the vessel.

Commonly, while cargo interests are not bound by a contract of towage entered into by their carrying vessel, such interests will be liable to pay to the owners of the vessel their rateable proportion of the towage costs if the engagement of the tug is properly viewed as a general average measure taken by the vessel to preserve cargo and vessel from loss in time of peril. In such an event, the towage expenses will form part of the general average expenses to which cargo interests will be liable to contribute. As to this, see below in Chapter 13.

Authority of a master to take a vessel in tow

The master of a tug

1.51 The master of a tug has implied actual authority to make reasonable contracts with regard to the provision by the tug of future towage services. Such authority creates no special difficulties and its extent will depend on the ordinary law of agency. However, in *The Inchmaree* [1899] P 111, it was held that a tug-master did not have authority to agree retrospectively to deem services to be towage services which services had originally constituted salvage and which had already been completed, although he could do so if the deeming contract was entered into while the service, which had started as a salvage service, was still continuing (see *per* Phillimore J at pp. 116–117).

The master of a vessel not a tug

1.52 As has been seen above, the master of an ordinary trading vessel has implied actual authority to do such things as are involved in and necessary for the usual employment of the vessel. Since the implied actual authority of the master to contract on behalf of his owners is limited to such contracts as relate to the usual employment of the vessel, it is extremely doubtful whether the master of a vessel other than a tug has any authority to contract to tow another vessel. It is difficult to conceive of circumstances where towing would relate to the usual employment of an ordinary vessel and towing is unlikely to be necessary for such a vessel's safety or for the prosecution of her voyage.

1.53 The situation is most likely to arise when a vessel agrees to assist or to tow another vessel in distress. The position is complicated by the fact that a vessel will often by its nature be trading pursuant to some contract of affreightment or charterparty in which third parties are interested as cargo owners or charterers and that undertaking the towage of another vessel may well constitute a deviation putting the vessel outside the contract of carriage and with adverse consequences for her insurance. At common law, the position is that a master of a vessel probably has implied actual authority to deviate and to tow a vessel solely for the purpose of saving life, but that he does not have authority to do so for saving property. Any towage other than for saving life will therefore constitute a deviation. The authority of a master to agree to tow a ship in distress was considered in *The Thetis* (1869) LR 2 A & E 365. In that case, a ship whilst trying to tow another ship collided with her and sank her. In an action by the owners of the sunken vessel against the owners of the towing vessel, the defendants pleaded that they were not liable on the ground that their master had no authority to tow. Sir Robert Phillimore held that the master had an implied authority to tow vessels in distress. He went on to state that he could not assent to the proposition that a deviation for the purpose of rendering salvage services to property would avoid a policy of insurance. However, in *Scaramanga v Stamp* (1880) 5 CPD 295, the Court of Appeal decided

that towage for the purpose of saving property was a deviation which avoided the charterparty and rendered the shipowners liable for damage to the cargo caused by the deviation. In that case, Cockburn CJ pointed out that towage of a disabled vessel was in itself a deviation, "seeing that the effect of taking another vessel in tow is necessarily to retard the progress of the towing vessel and thereby to prolong the risk of the voyage."

1.54 Perhaps because of the uncertainty of the position at common law, the question of the permissibility of deviation for towing vessels has long been the subject of express clauses in charterparties (see Cooke, *Voyage Charters* (4th edn, 2014) at para. 12.16 *et seq*). In *Stuart v British & African Steam Navigation Co* (1875) 32 LT 275, the clause provided "liberty to tow and assist vessels in all situations." It was argued that the phrase was apt only to extend to towage of vessels in distress which the vessel encountered in her voyage. The court dismissed this construction as too narrow, although it implicitly recognised that some (unspecified) limitation was appropriate. Nevertheless, the court held that the phrase was effective to protect a vessel leaving her berth to tow off a stranded vessel three miles away where no life was in danger and which resulted in the towing vessel being wrecked and her cargo lost. In *John Potter & Co v Burrell & Son* [1897] 1 QB 97, the charterparty clause read: "Steamer to have liberty to tow and be towed and assist vessels in all situations and salvage procured to be for the benefit of owners." In the Court of Appeal, Lindley LJ stated (at p. 104):

> Therefore, towing is contemplated. What amount of towing is contemplated is another question. Of course, an unreasonable towage service is not contemplated, and, I take it, no towing service which would defeat the object of the parties to the contract is contemplated. But any towage which is consistent with the attainment of the object is contemplated. All towage involves delay. You cannot tow ships and go at the pace you can if you are not towing. Therefore you must read these clauses [ie, perils of the sea and arrangements for provision of steamers], and, to my mind, it is most important to ascertain exactly what it is the parties are to do.

In that case, the vessel encountered a disabled vessel on her voyage and took her in tow, adding a further three weeks to the voyage to the load port.

Pre-contractual disclosure: *The Kingalock*

1.55 In the nineteenth century the Court of Admiralty asserted a general equitable jurisdiction in respect of contracts of towage and salvage. In *Akerblom v Price Potter Walker & Co* (1881) 7 QBD 129, Sir Baliol Brett MR referred to "the great fundamental rule" (at p. 132) as being:

> Whenever the court is called upon to decide between contending parties, upon claims arising with regard to the infinite number of marine casualties, which are generally so urgent in character that the parties cannot be truly said to be on equal terms as to any agreement they make with regard to them, the court will try to discover what in the widest sense of the terms is under the particular circumstances of the particular case fair and just between the parties . . . If the parties have made an agreement, the court will enforce it, unless it be manifestly unfair and unjust but if it be manifestly unfair and unjust, the Court will disregard it and decree what is fair and just. This is the great fundamental rule.

1.56 One aspect of that equitable jurisdiction was the insistence of the court that the parties to a towage contract were entitled to full pre-contractual disclosure of all facts likely to affect the performance of the towage contract and which were within the special knowledge of either party. In the absence of such disclosure, the contract could be treated as void *ab initio* and a salvage contract would be substituted by the court, the remuneration under which the court would itself assess. The leading case is *The Kingalock* (1854) 1 Spinks A & E 263. In this case, a tug contracted to tow a vessel in very bad weather from the mouth of the River Thames to London for £40. After the towage had commenced the tug discovered that the tow had lost an anchor and had damaged her sails and windlass. The tug declared the contract at an end, but continued to tow

the vessel, and after some difficulty brought her to London. The tug then claimed salvage, and the defendants, the owners of the tow, pleaded the towage contract and contended that they were liable only to pay £40. The court upheld the claim to salvage and set aside the contract. The tug received an award of £160. Dr Lushington in his judgment stated (at p. 266):

> I apprehend that the agreement may be said to be somewhat of a mixed nature at that time (when made) it is hardly to be considered an ordinary towage, not on account of the state and condition of the ship, but on account of the state and condition of the weather, which happened to be exceedingly tempestuous. I think whether the omission to state these facts (that the ship had lost an anchor and some sails) would vitiate this agreement or not will depend upon whether they could, with any reasonable probability, affect the service about to be performed. I am of the opinion that they might have an effect on that service, because I apprehend that coming up the River Thames, particularly during weather so tempestuous as this is represented to have been, the services might have been delayed and rendered much more arduous, much more difficult, in consequence of want of ground tackle, which might be of the last importance to the saving of the vessel, and which might, to a certain extent, have governed the manoeuvres of the steamer. I, therefore, come to the conclusion that as it might affect the performance of the service, the agreement was null and void *ab initio*.

Dr Lushington restated the principle 12 years later in *The Canova* (1866) LR 1 A & E 54. In that case, a tug agreed to tow a vessel into port for a fixed sum. The vessel had not revealed that many of the vessel's crew were ill. The tug performed the contract but claimed salvage on the ground of non-disclosure when the towage contract was made. However, Dr Lushington rejected the claim on the basis that the tow was not in peril when the contract was made. He nevertheless stated as follows:

> If, though unintentionally, there was a concealment of fact so material that it ought to invalidate the agreement, I should not enforce it. We must consider whether the owners of the tug were injured in the performance of their task by the withholding of certain facts, whether, if more time were taken up than should have been, the plaintiffs would be entitled to more than their bargain.

1.57 *The Kingalock* was applied as a case requiring full pre-contractual disclosure in the Canadian case of *Dunsmuir v The Ship Harold* (1894) 3 BCR 128. In that case, when asked by the tug whether any damage on a grounding had occurred, the master, aware that the vessel's hold was 18 inches deep in water, said "I do not know." The Vice-Admiralty Court of British Columbia held that the active concealment by the ship that she was in a leaky and dangerous condition vitiated the contract of towage and entitled the tug to special remuneration (applying *Akerblom*'s case).

1.58 *The Kingalock* was considered more recently in *The Unique Mariner* [1978] 1 Lloyd's Rep 438. A vessel had gone aground. Her owners arranged for a tug to go out to her and notified their master of this. The defendant's salvage tug happened to be in the vicinity and came up to the vessel offering her services. The master wrongly believed her to be the tug arranged for by his owners and accepted it, signing the Lloyd's standard form of salvage agreement (LOF) with the tug-master. When he discovered his mistake he ordered the salvage tug away. The owners sought to have the LOF set aside. One ground on which they did so was that *The Kingalock* established that the contract was a contract *uberrimae fidei* and that the tug should have disclosed all material facts, including, on the facts of that case, that the tug there was there by chance and not pursuant to the owners' own special arrangements. Brandon J stated at pp. 454–455 as follows:

> *The Kingalock* is not an authority which establishes that all contracts relating to salvage services are contracts *uberrimae fidei*, and therefore voidable by either party on the ground of non-disclosure of material facts by the other. It is rather just one example of the exercise by the Admiralty Court of its equitable power to treat as invalid, on the ground of serious unfairness to one side or the other, one particular kind of salvage agreement, namely an agreement by which the amount to be paid for services, in respect of which those rendering them would otherwise have a claim for salvage at large, is fixed at a definite sum in advance.

1.59 It is submitted that Brandon J's limited formulation of the type of contract in which the court will intervene as a type of salvage agreement, being towage in salvage conditions or engaged salvage services, correctly reflects the limited cases in which the equitable jurisdiction of the Admiralty Court over towage contracts has in fact ever been exercised; in all of such cases perilous conditions prevailed at the time of the engagement (see eg *The Kingalock*). His formulation is also in accordance with the statement of the "fundamental rule" in *Akerblom* (above) where Brett MR emphasised the "urgent character" of the circumstances in which the engagement of the tug took place.

1.60 A recent attempt to rely upon Sir Baliol Brett MR's "great fundamental rule" in *Akerblom v Price Potter Walker & Co* (1881) 7 QBD 129 and the equitable jurisdiction of the Admiralty Court was made in a New Zealand case, *Svitzer Salvage BV v Z Energy Ltd* [2013] NZHC 2584 (a case concerned with salvage arising out of the grounding and break-up of the *Rena*, with consequent pollution damage: unfortunately the principles were only debated at the level of whether there was a sufficient case to defend, in answer to a summary judgment application). The court held at para. 196 that

> the underlying policy of the Court is to disregard a manifestly unfair and unjust agreement. Under that policy, the Court will intervene when one of the parties has been practically compelled to accept whatever terms the other party might dictate and the other party has exploited that opportunity to obtain an inequitable advantage. The two requirements are: necessitative circumstances; and an inequitable agreement.

1.61 Following *The Unique Mariner*, it is therefore submitted that the position is as follows:

i In entering into a towage contract, there is no special obligation on tug or tow to make pre-contractual disclosure. The contract of towage is like any other contract and parties are left to the remedy of rescission or damages for misrepresentation as in other contracts. In particular, there is no obligation to disclose material facts.

ii However, in the case, in effect, of engaged salvage services where the tug is engaged under a towage contract to render services to a vessel in peril (such as *The Kingalock* was, with no sails or tackle and in very rough weather, but such as *The Canova* was not, merely with her crew being ill) and for a stipulated reward or fixed sum in circumstances where, but for the contract, the tug could have claimed salvage, the court will intervene in the event of a clearly inequitable result and of unfairness caused by a party's non disclosure at the time the contract was made of matters which had a substantial bearing on the performance of the engaged services under the contract.

iii Otherwise, the position in Admiralty in relation to towage and other contracts is probably no more than an application of ordinary principles of commercial duress (as to which see, eg *Chitty on Contracts* (32nd edn, 2015), at para. 8–015 *et seq*, and, in the marine context, see *Scrutton on Charterparties and Bills of Lading* (23rd edn, 2015), at Article 46), albeit taking account of the special exigencies of a call for urgent towage assistance, stressed in *Akerblom*). As Justice Cooper of the Australian Federal Court, in his address to the Maritime Law Association of Australia and New Zealand Conference in 1996 (cited and applied in *Svitzer Salvage BV v Z Energy Ltd* [2013] NZHC 2584), described the position: admiralty decisions in English, Australian and other Commonwealth jurisdictions are merely "reflecting the . . . approach of the Court to commercial agreements made under the pressure of necessitative circumstances." Compare the approach of the English courts in ordinary duress cases such as *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm), discussed further below.

PART C. OTHER CONTRACTUAL MATTERS

The legislative control of exemption clauses

1.62 In most cases of large-scale commercial towage, the towage contract will have been concluded between commercial entities dealing with each other with a fair measure of equality of bargaining power. However, the towage of small boats not operated commercially or in connection with a business, such as yachts and pleasure craft, is not infrequent and in such cases the tow is likely to have to agree to such towage contract as the tug proposes, together with a range of exemption and exclusion clauses in the tug's favour. The law relating to the legislative control of exemption clauses is complex. Further, it has been subject to recent further legislative amendment by the Consumer Rights Act 2015, which amended the Unfair Contract Terms Act 1977 and repealed The Unfair Terms in Consumer Contracts Regulations 1999 as regards all contracts concluded after 1 October 2015. A consideration of the application of the previous and current legislative controls is beyond the scope of this book: detailed reference can be made to *Chitty on Contracts* (32nd edn, 2015), Chapter 15, section 6, para. 15–062 et seq.

1.63 For present purposes it may be noted only that under section 2(1) of the 1977 Act, which applies to all towage contracts, a contractor cannot exclude or restrict his liability for death or personal injury caused by his negligence or strike them down if they do not satisfy a requirement of "reasonableness" (eg clause purporting to exempt the contractor from liability for breach of contract: section 3). The "reasonableness" of a term is a question of fact in all the circumstances but, in section 11(2), the Act sets out some "guidelines" to which regard is to be had in assessing "reasonableness." These guidelines focus on matters such as the respective bargaining position of the parties and the degree of notice which the other party had of the term in question.

1.64 As an example of the effect of the Act, it may be noted that, following the passing of the Act, the UK Standard Conditions of Towage and Other Services (see Chapter 3 below) in its 1986 Revision abandoned its exclusion clause in respect of death and personal injury resulting from negligence, ie recognising the ineffectiveness of such a clause by virtue of section 2(1) of the Act.

No special rules of construction for towage contracts

1.65 Although the older cases on towage suggest the existence of a canon of strict construction of towage contracts whenever a contract sought to exclude or to limit the terms of the towage contract which are implied at law (see eg *The Newona* (1920) 4 Ll L Rep 156 and Bucknill, *Tug and Tow* (2nd edn, 1927), p. 13), it is submitted that in modern times no special rules of construction apply to towage contracts in respect of exemption or exclusion clauses. The ordinary contract law position accordingly applies (see eg *Chitty on Contracts* (32nd edn, 2015), Vol. I, Chapter 15). For an illuminating modern analysis of the rules of construction applied in the context of standard form contracts generally (of relevance given the UK Standard Conditions, and more particularly the various BIMCO standard forms): see Taylor, "The Interpretation of Standard Form Contracts" [2017] LMCLQ 262.

1.66 Although a full discussion of general contractual principles is outside the scope of this book, it is useful to consider how the present law leaves previous decisions of the court which have sought to restrict common form towage contract exclusion and exemption clauses.

1.67 Since the decision in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, the question of whether or not a particular exemption or exclusion clause is effective to relieve the party in breach from liability is one of construction of the clause in question. This is so even if the breach is of a fundamental obligation in the contract. The concept of a "fundamental breach" of a contract, liability for which, as a matter of law could not be excluded or restricted by contractual provisions, was decisively rejected by the House of Lords in that decision.

1.68 Whilst in *Suisse Atlantique Soc. d'Armement v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, Lord Upjohn spoke (at p. 427) of a strong though rebuttable presumption that exemption clauses were usually not contemplated by the parties as covering breaches of fundamental or critical terms of the contract, it is doubtful whether this presumption or approach has survived *Photo Production*: it certainly received no express support or recognition by the House of Lords in that case. It is submitted that the question remains simply one of construction whatever the clause and whatever the liability and breach to which it is sought to apply that clause (see the valuable and succinct analysis in *Chitty on Contracts* (32nd edn, 2015), Vol. I, para. 15.024).

1.69 However, dicta in *Suisse Atlantique* were recently relied upon in *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177 in which the court (Teare J) held, in relation to the mutual allocation of risk or knock-for-knock clause in the "Towcon form", that although on its construction it was capable of applying to any breach of contract, nevertheless the clause was to be restrictively construed as applying only so long as the tug owners were actually performing their obligations, albeit not to the required standard. This decision is considered in detail in Chapter 4 below (see the commentary to clause 25 of "Towcon 2008").

1.70 It may be noted that there has been a recent revisionism of the approach to the construction of exclusion and indemnity clauses generally and in a number of respects. These trends are discussed in more detail in Chapter 4 in relation to clause 25 of "Towcon 2008" and in Chapter 5 in relation to Clause 14 of "Supplytime 2005" and "Supplytime 2017." For a consideration of the principles of construction in general as applied to mutual indemnity clauses before the recent revisionism and which offers some useful background, see, Rainey, "The Construction of Mutual Indemnities and Knock-for-Knock Clauses", in *Offshore Contracts and Liabilities*, ed Bariş Soyer and Andrew Tettenborn, Informa (2015).

1.71 The first area of revision has appeared in cases where an exemption clause, even where the clause is of mutual operation, is sought to be applied to a deliberate or wilful breach of contract or, while having an effect which falls short of undermining the substratum of the contract so as to render one party's (or both parties') obligations mere declarations of intent, covers and excludes an important area of potential liability, leaving all others in place. The latter class of case has been trammelled in authority previously (see the competing positions in *Tor Line v Alltrans Group* [1984] 1 WLR 48 and *Swiss Bank Corpn v Brink's-Mat Ltd* [1986] 2 Lloyd's Rep 79) and depends upon a correct assessment of whether the clause renders the contract essentially nugatory or binding in honour only: cf. *Mitsubishi Corpn v Eastwind Transport Ltd (The Irbenskiy Proliv)* [2005] 1 Lloyd's Rep 383, *Alexander G. Tsavliris Ltd v OIL Ltd (The Herdentor)*, 19 January 1996, unreported save for a note in (1996) 3 Int ML 75 (but see Appendix 22 and further below) and *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC); see generally *Chitty on Contracts* (32nd edn, 2015), Vol. I at para. 15.007, *passim*). The former class of case represents a relatively new inroad: see in relation to a mutual exclusion of consequential loss, *Internet Broadcasting Corpn Ltd v Mar LLC* [2009] 2 Lloyd's Rep 295 and the correction of that approach in *Astrazeneca UK Ltd v Albemarle International Corpn* [2011] EWHC 1574 (Comm) but with a similar result being reached by different means in *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38.

1.72 The second area of revision is in relation to the role and applicability of the *contra proferentem* rule, that is, the principle of construing an exemption clause narrowly such that where there is ambiguity in it, it will be given the narrowest meaning consistent with preserving common law liability. Recent cases have cast doubt on the utility of the rule at all (*K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904; [2012] Ch 497), or have upheld its application but confined it narrowly to cases of genuine textual ambiguity (*Nobahar-Cookson v The Hut Group Ltd* [2016] EWCA Civ 128).

1.73 More important for common form standard contracts following the BIMCO model is the apparent confirmation, in the context of the debate over construction against *proferens*, that mutual indemnities and cross-exclusions forming part of a knock-for-knock regime are to be approached differently and without any restrictive assumptions (after earlier argument to this effect proved only marginally successful in *Alexander G. Tsavliris Ltd v OIL Ltd (The Herdentor)* in 1996). In the recent decision of *Transocean Drilling UK Ltd v Providence Resources plc (The Arctic III)* [2016] EWCA Civ 372, the Court of Appeal was at pains, in the context of a mutual indemnity regime mutually excluding heads of consequential and direct loss, to stress that it was important to have in mind "the freedom of two commercial parties to determine the terms on which they wish to do business" and that it was to the language chosen by the parties to express their intentions which the Court should have primary regard [14]. The court took a broad view of the purpose behind a mutual exceptions regime as part of a risk allocation scheme. The Court of Appeal was of the view that a clause of this mutual type was not one which one should treat as an exclusion clause, or, at least, not as a typical exclusion clause (see at [14]) and for this reason, and because it was mutual, was not one which could or should properly treat in a *contra proferentem* manner. A similar approach was taken by the Court of Appeal in *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 (discussed in detail in Chapters 3 and 4).

1.74 In the light of the "construction" approach which the court has adopted post-*Photo Production* and which it now adopts, the old decisions on towage contract exclusions (which were almost without exception extremely one-sided) and, in particular, upon the very common form of exemption clause found in older towage contracts, namely the indemnity by tow of tug for all loss and damage even if caused by the tug itself, have to be treated with great caution. While some would probably still be decided in the same way today, others would not:

i In *The West Cock* [1911] P 23, the towage contract contained a clause that the tug owners were "not to be responsible for any damage to the ship they had contracted to tow arising from any perils or accidents of the seas, rivers or navigation, collision or straining or arising from towing gear (including consequence of defect therein or damage thereto)." It was held that the clause did not cover defects in the towing gear existing before the towage began, in as much as the contract evidenced the intention of the parties to refer to defects arising in the course of the towage, but not prior thereto. It is submitted that the language of the exemption clause would today be found to cover a pre-existing defect in the towing gear as well as one arising in the course of the towage and that the case would today be decided differently.

ii In *The Cap Palos* [1925] P 458, an exemption clause provided:

> The acts, neglect or default of the masters, pilots or crew of the steam tugs . . . or any damage or loss that may arise to any vessel or craft being towed, or about to be towed, or having been towed . . . whether such damage arise from or be occasioned by any accident or by any omission, breach of duty, mismanagement, negligence or default of the steam tug owner, or any of his servants or employees.

It was held that the clause was insufficiently clearly worded to exempt the tug owner from negligence on the part of the master during a voyage between Immingham and Hartlepool, which resulted in the tugs losing their hawsers and abandoning the tow in Robin Hood Bay, where she foundered. The clause did not expressly cover an unjustifiable handing over of the obligations of the tug owner to someone else for performance or a failure by the tug owner to tow the vessel in the way in which he had contracted to tow her. It is submitted that the clause, concentrating as it does upon damage to a vessel being or having been towed, would probably be construed in the same way by the court today and as not encompassing, as a matter of construction, an abandonment of the

towage. Given the age of this decision and the different context in which this case was decided (ie of the court's hostility to exclusions in towage contracts: eg *The Newona* (1920) 4 Ll L Rep 156 and Bucknill, *Tug and Tow* (2nd edn, 1927), p. 13), it was perhaps surprising that this decision was heavily relied upon as an aid to construction of the very different BIMCO "Towcon" mutual allocation of risk clause in *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177 and as supporting the cutting back of the field of application of that clause: see the further discussion of *The A Turtle* in Chapter 4 below.

iii In *The Refrigerant* [1925] P 130, the towing hawser broke during the performance of a towage contract, and the tug-master left the ship unjustifiably. The tow was subsequently salved by a trawler, which received £2,000 salvage. The owners of the tow recovered this sum from the owners of the tug as damages for breach of contract and duty. Bateson J held that the tug committed a breach of contract in leaving the tow, and that the very wide clauses of exception, all of which commenced with the words "during the towage service", did not cover such an act. The same construction would probably be adopted by the court today. This would fit well with the approach of the Court of Appeal in *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38 where in relation to a clause excluding all loss of profit the court held that this was too wide a construction and that the words "loss . . . suffered . . . in relation to this agreement" were to be construed as meaning "in relation to the *performance* of this Agreement", and "thus as not extending to losses suffered in consequence of a refusal to perform or to be bound by the Agreement": see *per* Tomlinson LJ at para. 27.

iv In *The Carlton* [1930] P 18, the towage contract contained an indemnity in favour of the tug in respect of "loss or damage of any kind whatsoever or howsoever or wheresoever arising in the course of and in connection with the towage." An accident happened due to the tug owner's servant giving the tow the signal to enter a cutting between two docks when it was unsafe to do so. As the accident, although happening "in the course of towage", was not also "connected with towage", the claim for an indemnity failed. The two parts of the clause were not to be read disjunctively. Given the use of the word "and", it is submitted that this decision is plainly correct.

v In *The Forfarshire* [1908] P 339, the tug undertook to tow and, *inter alia*, to find and provide "all items of transportation" such as to include towing gear. Negligently, the tug used the ship's tackle and, due to a defective rope and a thimble eye which was too small for the towing hook, the line parted and the ship was damaged. The tug invoked the words, "All transporting to be at owners' risk." The court held that such words did not exempt from liability for negligence and only transferred the risk to the owner where the tug was exercising all reasonable care and skill. This decision is well in line with more recent authorities such as *The Raphael* [1982] 2 Lloyd's Rep 42.

vi In *The Riverman* [1928] P 33, a tug towed six different barges under separate contracts. Due to negligence by the tug, the tug collided with another vessel. The tug admitted liability and then claimed from one of the towed barges under two clauses. The first provided that the tug's crew were to be the employees "of the vessel being towed", and the second that any persons interested "in the vessels being so towed" were to indemnify the tug against all claims. The court held that the first clause was inapplicable in a case where there was more than one vessel being towed, but that the second clause applied in the tug's favour. This decision would, it is submitted, be decided in the same way today.

vii In *The Clan Colquhoun* [1936] P 153, a vessel was to be towed by two tugs. The clause provided that the towage, and the exemption regime, was deemed to commence "when the tow rope had been passed to or by the tug." A collision occurred after a rope had

been passed to one tug but before one had been passed to the other tug. Bucknill J held that the clause was to be read as deeming the towage to commence when the rope had been passed to both tugs and that, accordingly, the exemptions did not apply at the time of the collision. This decision seems plainly correct; where two or more tugs are used to provide the pulling power they are for the purposes of such a clause collectively being described as "*the* tug."

viii In *G.W. Rlwy Co v Royal Norwegian Government* [1945] 1 All ER 324, the clause read:

> The hirer shall not bear or be liable for any loss or damage done by or to the tug otherwise than whilst towing, or for loss of life or injury to the crew of the tug.

The hirers sought to argue that they were not liable for loss of life; the court held that they were so liable "whilst towing" and that these words governed the whole clause. This decision seems plainly correct on the language of the clause.

1.75 The approach of the Admiralty Court in cases such as *The West Cock* can be contrasted with its upholding of the exemption or exclusion if, as a matter of construction, the language of the contract was clear and unambiguous. As can be seen from the other cases considered above, such cases are likely to be decided in the same way today. Thus, in *The President Van Buren* (1924) 19 Ll L Rep 185, the court considered a clause which deemed the tug's crew to be the employees of the tow for all purposes (as to which type of clause see below). The court, foreshadowing the approach adopted in *Photo Production*, rejected an argument that the clause was unfair and too wide and upheld its effect in rendering the tow liable for all damage done to tug or tow, even if caused by the acts of the crew of the tug, simply as a pure matter of construction of the clause. In the recent case of *The Borvigilant and Romina G* [2003] 2 Lloyd's Rep 520 (CA), a similar clause in an old version of the UK Standard Towage Conditions was accepted at first instance ([2002] 2 Lloyd's Rep 631, cor. David Steel J) as having the effect stated in *The President Van Buren*.

The effect of the general equitable jurisdiction of the Admiralty Court

1.76 As seen above in the discussion on pre-contractual disclosure, the Admiralty Court has long asserted a general equitable jurisdiction to prevent unfairness in towage contracts. To do what was "fair and just" between the parties was described as "the great fundamental rule" by Sir Baliol Brett MR in *Akerblom v Price Potter Walker and Co* (1881) 7 QBD 129 at p. 132.

1.77 The most recent re-statement of this jurisdiction in England *The Unique Mariner* [1978] 1 Lloyd's Rep 438 makes it clear that this jurisdiction probably exists only in the context of engaged salvage services, that is to say where a tug is engaged under a towage contract to do a fixed price service in circumstances in which it could, absent the contract, have claimed salvage. In New Zealand, in what appears to be the only modern resort to the equitable jurisdiction described in *Akerblom v Price Potter Walker*, the court put the matter more widely and held on a summary judgment application that "the Court will intervene when one of the parties has been practically compelled to accept whatever terms the other party might dictate and the other party has exploited that opportunity to obtain an inequitable advantage. The two requirements are: necessitative circumstances; and an inequitable agreement": *Svitzer Salvage BV v Z Energy Ltd* [2013] NZHC 2584 at para. 196.

1.78 The jurisdiction has impinged upon contracts of towage in respects other than pre-contractual disclosure. These may be briefly mentioned.

i The court will not uphold a contract of towage if either party has extorted the agreement by taking advantage of the danger to which the property of the other party is exposed

(Bucknill, *Tug and Tow* (2nd edn, 1927), p. 11), or where "there is oppression or virtual compulsion arising from inequality in the bargaining position of the two parties concerned" (*per* Brandon J in *The Unique Mariner* [1978] 1 Lloyd's Rep 438 at p. 454). However, whether this aspect of the jurisdiction amounts to more than the application of ordinary contractual principles as to the effect of duress is extremely doubtful. See also *Svitzer Salvage BV v Z Energy Ltd* [2013] NZHC 2584. Compare a typical economic or commercial duress case decided on ordinary duress principles, eg *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm). Tube City chartered a ship owned by Progress, making it clear that the identity of the vessel was important to both it and the receiver of the goods that were to be shipped on it. Progress then concluded a charter for the ship with another party, in breach of its agreement with Tube City. Progress conceded this and said it would find another ship, initially agreeing to compensate Tube City for any damages. Tube City relied on these assurances and did not look for another vessel itself. Progress then changed its stance and made Tube City a "take it or leave it" offer which would have required Tube City to release all claims against the ship-owner.

ii The court will not uphold a contract of towage if the amount agreed upon is utterly inadequate or grossly excessive in comparison to the real value of the services (*The Phantom* (1866) LR 1 A & E 58). In that case, a towage contract for the towage of a fishing smack worth £700 across Lowestoft harbour in a press of other shipping and in bad weather and with her masts and spars weakened contracted for at 8s. 6d. (42½p) was set aside as inequitable. This aspect of the jurisdiction is sparingly exercised and cannot be invoked merely because subsequent events make the bargain a bad one for one or other party. The fairness or unfairness of the bargain is assessed at the time at which the towage contract was made:

> In forming an opinion of the fairness or unfairness of the agreement, I think that the court must regard the position of the parties at the time the agreement was entered into. The agreement cannot become fair or unfair by reason of circumstances which happened afterwards.

In *The Strathgarry* [1895] P 264, a vessel engaged a tug for £500 to tow for half an hour believing that it would in that time be able to restart her engines and avoid salvage; the tug towed for half an hour but the hawser broke, killing some of the vessel's crew and causing damage to her. In the event, the vessel's engines would not restart so she required to be salved by another tug. Bruce J held that the £500 was a fair price for the service given the parties' expectations and their circumstances at the time it was agreed. In *The Unique Mariner* [1978] 1 Lloyd's Rep 438, Brandon J referred (at p. 454) to this aspect of the jurisdiction without criticism in his account of the context in which *The Kingalock* had to be viewed. While there are no modern cases on this aspect of the jurisdiction, in the light of Brandon J's endorsement of the width of the jurisdiction in *The Unique Mariner* (*op. cit*.), where salvage service is performed under a towage contract, the jurisdiction can, potentially, be invoked. However, it is submitted that a very strong case will be required to put the case within the degree of inequity found in *The Phantom* (*op. cit*.). In Brandon J's words in *The Unique Mariner*, the party seeking to avoid the contract would have to show:

> the gross inadequacy or exorbitancy of the sum agreed, which renders an agreement . . . so inequitable to one side or the other that it should not be allowed to stand

(or as Dr Lushington put it in *The Phantom* (*op. cit*.) at p. 61, that the level or amount of the contract price was "utterly futile").

iii The court will not uphold a contract of towage in the event of "the existence of some collusion of one kind or another" (*per* Brandon J in *The Unique Mariner* [1978] 1 Lloyd's Rep 438 at p. 454). While this is vague, it appears to reflect the old cases on fraud or deceit by the tug, ie in bribing or colluding with the tow's master to persuade him to enter into a towage contract on his owner's behalf. See eg *The Crus V* (1862) Lush 583 and *The Generous* (1868) LR 2 A & E 57. Similarly, if there has been active deceit on the part of the tow, as there was in *Dunsmuir v The Ship Harold* (1894) 3 BCR 128 (the facts of which are set out above), the contract will be avoided.

CHAPTER 2

The implied obligations of tug and tow

2.1 The law implies certain terms into the contract of towage which define the rights and obligations of tug and tow. These terms will apply to govern the mutual relations of tug and tow under the contract in the absence of express terms having been agreed which are inconsistent with them or which exclude them: see eg *The Clan Colquhoun* [1936] P 153 *per* Bucknill J at p. 164: "Until this has been accomplished, the ordinary provision of the common law applies to the rights and duties of each party." While the implied terms are of little relevance where the towage contract is concluded on one of the commonly used standard forms, where no form or other express terms have been agreed they will define the bounds of the contract between the parties. (For a useful comparative law overview of the general law of towage in other jurisdictions, which it is beyond the scope of this book to consider, see eg Professor William Tetley: "Tug and tow: a comparative study, common law/civil law, US, UK, Canada and France": 93 *Il Diritto Marittimo* (1991), 893–923; and in his *International Maritime and Admiralty Law* (Carswell, 2003), focusing on the general law of towage in the United States and Canada.)

PART A. THE OBLIGATIONS OF THE TUG

The Supply of Goods and Services Act 1982

2.2 The contract for towage is a contract for services. As such it is a contract to which the Supply of Goods and Services Act 1982, as amended, applies. This Act provides for certain terms to be implied into all contracts for services unless the service is excluded from the Act by Order made by the Secretary of State (see section 12(4)). No exclusion of towage (or salvage) services has been made.

2.3 The relevant sections of the Act are sections 13 and 14. Section 13 provides:

> In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.

Section 14 in its turn provides:

> (1) Where, under a contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time. (2) What is a reasonable time is a question of fact.

These provisions state some fairly basic obligations. Pursuant to section 16(1) of the Act, the duties arising under the Act can be negatived by express agreement (not necessarily by an express exclusion *per se*, but also by a term or terms which are express and which are inconstant with the implication of the statutory term, cf. section 55 of the Sale of Goods Act 1979 by analogy and the case law thereunder: see *Benjamin on Sale of Goods*, 9th edn, para. 11–068) or by a course of dealing or a usage binding between the parties.

2.4 The extent to which the Act adds anything to the implied obligations long settled as being applicable to tug (and tow) is minimal, as will be seen in the next section.

The Minnehaha *and* The Julia

2.5 Prior to the Supply of Goods and Services Act 1982, the terms which the law implied into a towage contract were laid down by the courts. Those terms were given their most comprehensive and authoritative statement in two cases before the Privy Council in 1861.

2.6 In the first case, *The Julia* (1861) Lush 224; 14 Moo PC 210, an action was brought by the owners of the tug against the owners of the tow for damage done to the tug by the negligent management of the tow whilst the tug was making fast to the tow under a towage contract made between the masters of the vessels. Lord Kingsdown, who delivered the judgment of the Board, said:

> The case is said to be of the first impression and to involve the decision of nice questions of law . . . The contract was that the tug should take *The Julia* in tow when required and tow her as far as Gravesend . . . When the contract was made the law would imply an engagement that each vessel would perform its duty in completing it, that proper skill and diligence would be used on board of each, and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of this contract, any inevitable accident happened to the one without any default on the part of the other, no cause of action could arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident.

In *Spaight v Tedcastle* (1881) 6 App Cas 217, Lord Blackburn (at p. 220) described Lord Kingsdown's judgment just cited as one which "clearly and accurately states the law applicable.

2.7 In the second case, *The Minnehaha* (1861) Lush 335; 15 Moo PC 133, the action was for salvage in respect of services rendered by a tug to her tow during the performance of a towage contract. The tow was at anchor and she engaged a passing tug to tow her into the River Mersey and to dock her there for a lump sum. The weather was bad and, shortly after the tug made fast the towing hawser parted, and the tow drifted into danger from which the tug subsequently assisted to salve her. Lord Kingsdown, when delivering judgment, said:

> When a steamboat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so and will do so under all circumstances and at all hazards but she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill and such a crew, tackle and equipment as are reasonably to be expected in a vessel of her class. She may be prevented from fulfilling her contract by a *vis major*, by accidents which were not contemplated and which may render the fulfilment of the contract impossible, and in such case by the general rule of law she is relieved from her obligations. But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of the task, or because the performance of the task is interrupted or cannot be completed in the mode in which it was originally intended, as by the breaking of a ship's hawser.

2.8 The standard of care and skill imposed upon the tug in the discharge of her duties, as stated by Lord Kingsdown in *The Julia*, is one of "proper skill and diligence." In *The Minnehaha*, Lord Kingsdown described the tug's obligation as being one to "use her best endeavours" to achieve the purpose of the contract. At first sight, the obligation of "best endeavours" may appear to connote a significantly higher obligation than one merely to exercise reasonable skill and diligence. However, it is extremely doubtful that when Lord Kingsdown, for the Board, rearticulated in *The Minnehaha* the nature and extent of the duties imposed upon the tug which the Board had considered shortly before in *The Julia*, that it was intended to impose upon the tug a general obligation to exercise best endeavours in and about the towage rather than an obligation to exercise reasonable care and skill. Arguably, *The Minnehaha* and *The Julia* come to the same conclusion and the reference to best endeavours is simply a paraphrase of an obligation to use reasonable

care and skill. Indeed, in Bucknill, *Tug and Tow* (2nd edn, 1927) p. 19, the obligation on the tug as stated in *The Minnehaha* was summarised as merely being one "to show skill and diligence in the performance of the contract"; interestingly, this is a paraphrase of what was said, not in *The Minnehaha*, but in *The Julia*. The same approach was adopted in *The Ratata* [1898] AC 513, where Lord Halsbury LC said that tug owners under towage contracts undertake:

> to exercise reasonable care and skill in the performance of the obligations which they have taken upon themselves for hire and reward in conducting the business of towage to its consummation.

So too in *The Marechal Suchet* [1911] P 1, Sir Samuel Evans P described the obligations of the tug as follows:

> the owners of the tug must be taken to have contracted . . . that reasonable skill, care, energy and diligence should be exercised in the accomplishment of the work.

2.9 In the ordinary contractual context where a "best endeavours" clause is expressly used (as to which see further in Chapter 4 below), the obligation to exercise best endeavours to achieve a specified result has usually been construed as a fairly stringent one to exercise all reasonable efforts to do so and as having been included contractually to provide for an enhanced standard of commitment to performance. Thus in *Terrell v Mabie Todd & Co Ltd* [1952] WN 434, the court considered a licence agreement under which the licensee of a patent in respect of the "Last-drop Ink Bottle" undertook to make best endeavours to sell the bottle in certain defined sales territories. Sellers J stated (at p. 435):

> That he did not think that the contract could be construed more favourably for the defendants than that their obligation was to do what they could reasonably do in the circumstances. The standard of reasonableness was that of a reasonable and prudent board of directors acting properly in the interest of their company and applying their minds to their contractual obligations to exploit the invention.

More recent cases have explored the distinctions between "best endeavours", "reasonable endeavours" and "all reasonable endeavours." For example in *Jet2.Com Ltd v Blackpool Airport Ltd* [2012] EWCA 417, the court had to consider the extent of the obligations on an airport arising from a clause which imposed upon it a dual obligation to "co-operate together and use their best endeavours to promote Jet2.com's low cost services from BA and BAL will use all reasonable endeavours to provide a cost base that will facilitate Jet2.com's low cost pricing." The Court of Appeal held that the obligation to use best endeavours to promote Jet2's business obliged the airport to do all that it reasonably could to enable that business to succeed and grow.

2.10 It is accordingly submitted that in the absence of any different express term, the tug is only under an implied obligation to take all reasonable efforts to achieve the towage and to exercise reasonable care and skill to that end. Such a formulation is in line with the American cases (see eg *US v Leboeuf Bros. Towing Co*, 1978 AMC 2195 (E.D. La.)), which cases are described in Parks & Cattell, *The Law of Tug and Tow*, as applying the same principles as the British cases (4th edn, p. 127).

2.11 However, if the reference to "best endeavours" was intended to signify an enhanced obligation upon the tug, how are the two decisions to be reconciled? The difference in terminology is, it is submitted, to be explained by the fact that the two cases concerned different questions. In *The Julia*, the claim was one by the tow for negligent handling of the tow by the tug while the tug was making fast. The issue turned on the nature of the tug's obligation to carry out the towage operation. In *The Minnehaha*, the claim was one by the tug for salvage over and above the towage fee of 30 guineas. The issue turned on the nature of the obligation of the tug to stay with the tow and, if she had been parted from her, to rejoin the tow in the event of unforeseen difficulties. The two obligations are qualitatively different. In the former case, the Board was right to characterise the obligation as one to exercise proper care and skill in the execution of the ordinary functions

of the tug. In the latter case and given the practical need not to abandon tow or to leave a tow unattended, it was equally justifiable to impose the higher standard of best endeavours upon the tug as to her duty to rejoin and reconnect with the tow and to endeavour to complete the towage. As a *quid pro quo* for the tug, if, in her rejoining or staying with the tow, she exceeds "the scope of her original engagement", she will be entitled to salvage. This higher standard in persevering with the tow may perhaps also be echoed in Lord Kingsdown's words in *The Julia* that there is "an engagement that each vessel would perform its duty in completing it.

The principles summarised

2.12 The effect of the decisions in *The Julia* and *The Minnehaha* as to the obligations owed by the tug to the tow can, it is submitted, be summarised as follows:

i The tug must be manned by a crew and fitted out with such equipment and tackle as are reasonably to be expected in a vessel of her class.

ii The tug must exercise reasonable and proper skill and diligence in the execution, performance and accomplishment of the contractual services (see also *The Marechal Suchet* [1911] P 1).

iii If, which is unlikely, the reference to "best endeavours" in *The Minnehaha* bears any separate content from the obligation to use reasonable care and skill, it signifies that the tug must exercise best endeavours to complete the towage and, in the event of interruption of the tow, to rejoin and reconnect with the tow; if the reference does not bear any separate content, the obligation is one to use reasonable skill, care and diligence to do so.

iv The tug is not relieved from performance of the contract by unforeseen difficulties which interrupt the towage or which mean that it cannot be executed or completed as was originally intended.

v The tug will be entitled to claim salvage if she incurs risks and performs duties not within the scope of her original engagement (see Chapter 7 on towage and salvage).

The impact of the Supply of Goods and Services Act 1982 on these principles

2.13 It will be seen that the Supply of Goods and Services Act 1982 has little practical impact upon the content of the terms implied at law in a towage contract. The nature of the obligation upon the tug to carry out the service with proper skill and diligence as stated in *The Julia*, or with "competent skill" as stated in *The Minnehaha*, is of no different quality to that of the obligation to use reasonable care and skill laid down in section 13 of the Act (see eg *The Marechal Suchet* [1911] P 1, in which the President, Sir Samuel Evans, formulated the duty in a way which is no different from the formulation of the duty by section 13). The obligation to use best endeavours to stay with the tow, if it really connotes best endeavours in an enhanced sense (as to which see above), applies only to the perseverance with the tow in the case of interruptions or difficulties and is higher than that of reasonable care and skill. Whether it adds anything to the general contractual obligation on a party to perform the service contracted for, in the sense of the obligation actually to carry it out rather than the manner in which it is to be carried out, is doubtful. However, pursuant to section 16(3)(a) of the Act, where a stricter duty is imposed upon a supplier by "rule of law", that duty is preserved and is not diluted by the Act. The principles in *The Minnehaha* as followed in the succeeding cases are terms implied by operation of law and amount to a rule of law, and, therefore, the "best endeavours" obligation, to the extent that it has any separate content, is unaffected by the Act.

2.14 Section 14 of the Act and the obligation to perform the service within a reasonable time adds little to the obligation already upon the tug to perform the service "with proper skill and diligence" (*The Julia*). That diligence will necessarily oblige the tug to perform the service with reasonable expedition.

Preparation for the towage

2.15 As part of the obligations upon the tug both to be reasonably crewed, fitted and equipped for the tow and to perform the service with reasonable care and skill, it is implicit that the tug will make all such adequate preparations as are reasonably necessary for the towage. This will usually consist of properly provisioning and equipping the tug. It is not often that the tug will be responsible for the tow although the tug may, as part of its preparations, need to satisfy itself as to the adequacy of the towage connections on the tow and to make necessary modifications and preparations for the reception on board the tow of the towing line(s). The involvement of the tug in preparatory matters on the side of the tow will often be greater in the case of an unmanned tow, where the tug will be directly concerned with the stability and buoyancy of the tow and other matters affecting her tow-worthiness, *a fortiori* if a riding crew is put on board the tow by the tug.

2.16 What is the precise scope of the preparations which the tug is to see to is a question of fact in each case. Examples of the areas of preparation for the towage with which the tug must concern itself appear from the cases:

i The tug must make up the tow in a proper and skilful manner. If more than one vessel is to be towed, the tug must satisfy itself as to the sufficiency of its power to tow the vessels. In *The United Service* (1883) 8 PD 56; (1884) 9 PD 3 (CA), the tug took another vessel in tow after the towage had commenced but was insufficiently powerful to tow both and as a result the original tow stranded. It was held that, but for the exemption clause, the tug would have been in breach of its obligation of fitness for the service.

ii The tug must have the proper tow-lines and equipment on board so it must ensure that the tow-line used is of the proper length for the tow. In *SS Rio Verde (Owners) v SS Abaris (Owners)* (1920) 2 Ll L Rep 411, a scope of hawser of 120 fathoms in a crowded roadstead behind a defence boom with limited sea-room was held to be unseamanlike.

iii The tug must ensure that the navigational requirements of the tow are properly met. This is particularly so where the tow is unmanned where the tug may be responsible for the preparation of the tow's lights. In *The Albion* [1952] 1 Lloyd's Rep 38; [1953] 1 Lloyd's Rep 239 (CA), an uncompleted and unmanned aircraft carrier was under tow by three tugs and sank a collier at night under tow. The tug was held responsible for the aircraft carrier's failure to show the proper lights.

iv The tug must have properly organised the towage and must have a proper and sufficient plan of action to cope with all reasonably foreseeable eventualities: see eg *The Albion* (*op. cit*.) in which the defective planning consisted in the sailing of the tug and tow described above in the conditions shown by the falling barometer and in having failed to broadcast warnings to other shipping (see *per* Somervell LJ, [1953] 2 Lloyd's Rep 82 at p. 87).

v The tug must properly and securely lash the tow and the tug. In the Canadian case of *Patteson, Chandler & Stephen Ltd v The Senator Jackson* [1969] DLR 166, the failure to lash the tow securely to the tug was held to be negligent on the part of the tug, so that when the barge in tow hit a bridge the tug was liable for the damage.

Fitness of the tug for the towage service

The obligation

2.17 Absent any special considerations which may apply where the towage contract is for a named tug (as to which see section 5 below), the tug owner must provide a tug which is:

i properly equipped and manned for the service to be carried out, having regard to the weather and circumstances reasonably to be expected and to the class of tug which she is;

ii reasonably fit and efficient for the service and capable of performing the service, having regard to the same matters.

See *per* Lord Kingsdown in *The Minnehaha* (1861) 15 Moo PC 133 at pp. 152–154.

The nature of the obligation

2.18 As Bucknill (2nd edn, p. 23) stated in 1927, "the precise scope and nature of the warranty by the tug owner as to the efficiency of the tug have not been settled by authority." In particular, the point remains open on the cases whether the tug owner's warranty of fitness and efficiency at common law is an absolute one equivalent to the absolute obligation at common law upon a shipowner to provide a seaworthy ship for the carriage of goods (see eg *Scrutton on Charterparties and Bills of Lading* (23rd edn, 2015), Article 68) or whether the tug owner is required only to exercise reasonable care and skill to ensure that the tug shall be fit and efficient.

2.19 Until 1911, the trend of the cases was to favour an absolute warranty. In *The Undaunted* (1886) 11 PD 46, a tug owner undertook to supply a tug (unnamed), and stipulated that he should be exempted from liability for the negligence of his servants. The tug was inadequately supplied with coal at the commencement of her voyage, and in consequence the voyage was delayed. In an action by the tug owner for the contract price, the owners of the tow counterclaimed for demurrage caused by the tug's insufficient supply of coal. The plaintiffs, as regards the counterclaim, alleged that the shortage of coal was caused by the negligence of their master, for which they were not liable. Butt J held that there was an implied undertaking on the part of the tug owners to supply an efficient tug, that is to say, one properly equipped and properly supplied with coal, and that the exemption did not exclude liability for breach of this undertaking. As Butt J put it at p. 48:

> there being an implied obligation on the tug owners to supply an efficient tug, that is to say, one properly equipped and properly supplied with coal, and as I have found that the tug was deficient in the latter respect, the plaintiffs would be liable, notwithstanding the exception contained on the card. Therefore . . . the plaintiffs had not properly fulfilled their contract.

Although the point was not addressed and did not arise in this decision, Butt J's formulation was regarded as laying down an absolute obligation akin to that of seaworthiness (see eg Carver in his *Carriage of Goods by Sea* (3rd edn), section 112 at p. 140). It may be noted that the case was also interpreted in this sense by Scrutton in his *Law of Charterparties and Bills of Lading* (1st edn, 1886), p. 57, footnote (f).

2.20 It was similarly so regarded by Sir Samuel Evans P, who explicitly described the obligation of efficiency of the tug as being an absolute one in two decisions in 1910. In *The Maréchal Suchet* [1911] P 1, the President described the obligation as follows:

> The owners of the tug must be taken to have contracted that the tug should be efficient, and that her crew, tackle and equipment should be equal to the work to be accomplished in weather and circumstances reasonably to be expected, and that reasonable skill, care, energy and diligence should be exercised in the accomplishment of the work. On the other hand, they did not warrant that the work should be done under all circumstances and at all hazards, and the failure to accomplish it would be excused if it were due to *vis major*, or to accidents not contemplated, and which rendered the doing of the work impossible.

2.21 In *The West Cock* [1911] P 23, the tug, whilst towing the plaintiff's vessel on the River Mersey, lost her towing gear. This was due to the shearing-off of her towing plate caused by defective and fatigued rivets which secured the plate to the tug. It was argued by the tug, first, that they were covered by an exemption clause, but, secondly, that the obligation upon them was only to take reasonable care to ensure that the tug, and therefore the towing plate, was fit for the service. The President upheld the claim on the basis that the exemption clause did not cover the

tug in respect of a state of things existing before the towage began but only in respect of matters occurring during the towage. He further held that, even if the obligation was one to exercise reasonable care and skill as to fitness, the tug owner failed to do so: "this inefficiency could have been ascertained by reasonable care, skill, and attention" (see above, p. 30). Accordingly, the President's discussion as to the standard of the obligation to provide a tug fit for the service was entirely obiter. However, his view was plain:

> In my opinion it is not sufficient for a tug owner in an action like the present one to prove that he is not aware of any unfitness or inefficiency or that it could not be discovered by an ordinary inspection. At the lowest I think his obligation is to prove that the unfitness or inefficiency was not preventable or discoverable by care and skill. But is not the obligation at the outset greater than this? Is it not an obligation which is absolute and which therefore amounts to a warranty? I think it is. It is well-established that the obligation under a charterparty or a bill of lading to provide a vessel which is "seaworthy", in the commercial and legal sense, is an absolute one and amounts to a warranty of a seaworthiness and this obligation has been described as "a representation and an engagement, a contract, by the shipowner that the ship . . . is at the time of its departure reasonably fit for accomplishing the service which the shipowner engages to perform" (*per* Lord Cairns in *Steel v State Line Steamship* Co) and as "a duty on the part of the person who furnishes or supplies the ship . . . unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy and I think also in marine contracts, contracts for sea carriage, that is what is properly called a 'warranty', not merely that they should do their best to make the ship fit, but that the ship should really be fit" (*per* Lord Blackburn).

The justification for this was said to be as follows:

> It is as important that a tug which undertakes to tow a vessel in some cases for long distances and in varying circumstances, with lives and property at risk, should be efficient for the accomplishment of its work, as it is that a cargo laden ship should be seaworthy, and in this sense fit for the purposes of the services undertaken under a charterparty. The foundation of the obligation is the same in either case, namely, the fitness of the tug or the ship for the purpose of the services to be performed.

2.22 The President at pp. 32–33 relied on *The Undaunted* (*op. cit*.) and at p. 33 interpreted *The Minnehaha* (1861) 15 Moo PC 133 as supporting, or at least, as he put it, as being "consistent with", his construction of an absolute warranty. He concluded by stating that, if the matter were one for him to decide then:

> I can see no reason whatever why the same kind of obligation as to efficiency or fitness should not attach to a marine contract of towage as attaches to a marine contract of carriage (p. 34).

2.23 The decision of the President went to appeal in 1911. Although the precise question similarly did not arise for decision on the appeal, the Court of Appeal was specific in distancing itself, with implicit disapproval, from the President's view of the absolute obligation or "warranty." In *The West Cock* on appeal at [1911] P 208, Vaughan Williams LJ considered that *The Minnehaha* tended more in favour of an obligation to exercise reasonable care than in favour of an absolute obligation. Further, he stated that he considered contracts of carriage as "entirely different" and that, although he did not need to go into these matters, "I must not be taken to assent to anything" expressed in the first instance decision except the view at first instance as to the ambit of the exemption clause. Farwell LJ at p. 227 considered it

> quite a different matter to extend the category of common law warranties [ie in the sense of absolute obligations] by adding another one to them, that is to say, by adding to tugs and tug service to ships the liability for goods carried. As at present advised, I express no opinion on that at all,

although he referred to two cases on the hiring of other chattels which pointed in favour of the obligation being merely one to exercise reasonable care and skill. Kennedy LJ, with his unrivalled experience of salvage and towage practice, took a similar approach. He reserved his opin-

ion on the question because it did not arise on the facts (p. 230). However, he commented on the President's alternative formulation of the obligation as being at the very least one of reasonable care, as follows:

> He describes what I may call the qualified obligation as "an implied obligation to provide a tug in a fit and efficient condition so far as skill and care can discover its condition." I accept that statement as correct (p. 232).

2.24 It must be regarded as highly doubtful whether the "absolute obligation" view of the obligation as to the fitness of the tug would today be upheld by the English court, notwithstanding Sir Samuel Evans P's views. The following matters may be noted.

i The contract of towage is only one for services and the cases generally on the hire of a chattel for services do not support and, indeed, are against a special rule where the person providing the service uses an item or object of his own to provide the service. Thus in *Hyman v Nye* (1881) 6 QBD 685, a contract for the provision of the services of a coach, horses and driver was held to imply an obligation to use reasonable care and skill that they be fit for the service. Farwell LJ in *The West Cock* on appeal ([1911] P 208 at p. 227) expressly adopted and paraphrased the test which was applied by the court in that case in terms of tug and tow rather than of coach and horses:

> I think the liability may be very well stated as Lindley J put it in respect to the contract of carriage in *Hyman v Nye*. He says (I alter it so as to apply to a tug owner): "His duty appears to me to be to supply (a tug) as fit for the purpose for which it is hired as care and skill can render it and if whilst (the tug) is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to shew that the breakdown was in the proper sense of the word an accident not preventible by any care or skill." Then a little lower down he says: "As between him and the hirer the risk of defects in (the tug), so far as care and skill can avoid them, ought to be thrown on the owner of (the tug). The hirer trusts him to supply a fit and proper (tug), the lender has it in his power not only to see that it is in a proper state, and to keep it so, and thus protect himself from risk, but also to charge his customers enough to cover his expenses." That, in my opinion, applies as much to a tug as to a carriage. The same principle was adopted in the case of the refrigerator in *Owners of Cargo of Maori King v Hughes*.

The decision in *Owners of Cargo of Maori King v Hughes* [1895] 2 QB 550 is to like effect as to the fitness for service of a refrigeration plant as is the decision in *Pyman SS Co v Hull & Barnsley Rly. Co* [1914] 2 KB 788; [1915] 2 KB 729 as to the services of a floating dry dock. (It may perhaps be noted that Bucknill, *Tug and Tow* (2nd edn, 1927), p. 21, footnote (b) cites *Hyman v Nye* and at p. 23 disapproves of a strict "absolute obligation" approach.)

ii The analogy drawn by the President between a contract for towage and the contracts for the carriage of goods is false. As has been seen above save for a possible argument in relation to the towage of unmanned tows (*sed quaere*), the tug is not in any relation of bailment to the tow whereas the carrier is, hence a strict obligation of seaworthiness. The two cases, contracts for services and contracts for carriage, are, as Vaughan Williams LJ remarked, "entirely different." *The West Cock* at first instance and *The Maréchal Suchet* are unsupported by any other towage case (save for the assumption of an absolute obligation of efficiency made without discussion in the Canadian case of *McKenzie Barge & Derrick Co v Rivtow Marine Ltd* [1968] 2 Lloyd's Rep 505 at p. 508) and are inconsistent with settled authority. Nothing in *The Minnehaha* (1861) 15 Moo PC 133 suggests an absolute obligation; on the contrary, Lord Kingsdown's formulation in that case suggests much more strongly the exercise of reasonable care and skill as

being the tug's obligation; Vaughan Williams LJ's view of what Lord Kingsdown had said, which he expressed in *The West Cock* on appeal at [1911] P 208 at p. 225, is plainly correct. *The Undaunted* (*op. cit*.) relied on by Sir Samuel Evans P does not address the question. Further, in *The Ratata* [1898] AC 513, Lord Halsbury, delivering the judgment of the House of Lords, although not expressly considering the question of the dichotomy of view between an absolute obligation and one only to exercise reasonable care, described the tug's obligation as follows:

> I think it is clear that they undertook to exercise reasonable care and skill in the performance of the obligation which they have taken upon themselves for hire and reward in conducting the business of the towage to its consummation (p. 516).
>
> For the time during which this contract business was being performed, it was the tug of the corporation and its inefficiency was an inefficiency for which the corporation, as contractors for towage with reasonable care and skill, were responsible (p. 517).

This formulation is much more consistent with Lord Kingdown's statement of principle in *The Minnehaha* than that of the "absolute obligation." The President in *The West Cock* had great difficulty in distinguishing *The Ratata* convincingly (see [1911] see above, P 23 at see above, pp. 33–34). Vaughan Williams LJ in *The West Cock* correctly thought that Lord Halsbury's formulation in *The Ratata* went against what the President was stating was the law: see [1911] P 110 at p. 225. His view appears to be correct. Compare, however, to the contrary, the implicit assumption of an absolute obligation in successive editions of *Scrutton on Charterparties and Bills of Lading* citing *The Maréchal Suchet* and *The West Cock* (see eg the latest (22nd, 2015) edition, at p. 116, footnote 52).

iii An absolute obligation of efficiency and fitness of the tug is anomalous in the relationship between tug and tow which, as the cases rejecting the bailment relationship stress, is one in which the only obligation on the tug is to exercise reasonable care and skill in the performance of the contract (see eg *The Tug Champlain* [1939] 1 DLR 384, considered in Chapter 1 above).

2.25 While the issue has not arisen in England since 1911 (hence Bucknill's view in 1927 that "the precise scope and nature of the warranty by the tug owner as to the efficiency of the tug have not been settled by authority": 2nd edn, p. 23), the question arose in Singapore in *Wiltops (Asia) Ltd v Owners of the Tug Sumi Maru 9001 (The Sumi Maru 9001)* [1993] 1 SLR 198 in which there was a debate as to the implication of an obligation of seaworthiness into a contract of towage which focused on some (but only some) of the authorities referred to above, particularly *The Undaunted* and *The West Cock*. The case has been taken by some commentators as possibly suggesting, albeit wrongly, that there is an absolute obligation of seaworthiness based on the view of Sir Samuel Evans P: see Dr Mandaraka-Sheppard in *Modern Maritime Law* at section 6.1.1 (I am grateful to her for highlighting the decision). It is necessary to consider it with some care. The facts of the case were, on any view, extreme. The tug owner was obliged to provide bunkers but due to an increase in bunker prices, refused to pay for them at the increased price. There were negotiations which led to the hirer paying instalments earlier than called for under the contract to fund the tug owner. The towage started and proceeded in fits and starts and the tug owner successfully pressed for further early payments of lump sum hire at various stages of the voyage, the tug having no bunkers to be able to start the next leg of the voyage. The tug deviated to Mauritius (instead of sailing direct to Singapore) because it did not have sufficient bunkers. En route, she encountered bad cyclonic weather and the tug owner demanded further sums. These were not forthcoming and after the main hawser parted, the tug owner abandoned the tow and took up another towage fixture.

2.26 The argument for the tow (by Bernard Rix QC as he then was) was that there was an implied obligation of seaworthiness of the tug and the want of bunkers at each stage of the towage was a breach of that obligation: 209A–B. There appears to have been no focus on whether the nature of the obligation was absolute or was one to exercise due diligence or reasonable care to make seaworthy; it is understandable why that was, given that the bunkering of the tug was a matter which would obviously engage the lesser due diligence obligation in any event. The argument for the tug (by Bernard Eder QC as he then was) was that there was no implied obligation of seaworthiness on the part of the tug, *semble*, in terms that there was no obligation at all in respect of seaworthiness: see how the argument is recorded at 211 at I; reliance seems to have been placed on the cases to suggest that it was an open question as to whether there was any obligation *at all* (*ibid*.). Again, that argument would be understandable in a case where even if the obligation were one of reasonable care, the tug owner would have no answer to it in terms of basic bunkering: hence the tactical decision to seek to strike out *any* obligation whatsoever as to the seaworthiness of the tug. After going through the authorities, the Court of Appeal concluded (at 213) that there was a warranty and preferred the view of Sir Samuel Evans P at first instance in *The West Cock*. In places, there is reference to an "absolute" obligation (eg 212E) but in others merely to there being an obligation to make the tug seaworthy (213G; 213I; 214E) without the standard being expressed. In one sense the finding is unsurprising: as demonstrated above, it has been trite law since *The Minnehaha* that the tug is under *some* obligation as to seaworthiness and fitness for the service and Mr Eder QC's argument to the contrary was bold and doomed to failure. There was no issue before the Singapore Court of Appeal as to whether the standard was absolute or one of due diligence and accordingly, the Court of Appeal did not have to grapple with that (discrete and different) question. Accordingly, it is suggested that while it is possible to read the case as deciding that different question, the arguments before the court make it tolerably clear that that was not the issue before the court and that the decision leaves open the question of *standard* of obligation while it decides the question of the *existence* of an implied obligation.

2.27 It is therefore still submitted, as it was submitted in the previous editions of this work, that the obligation upon the tug owner to provide a tug which is in a fit and efficient state for the service is one to exercise reasonable care and skill and to ensure that particular fitness and efficiency, and that the views, expressed *obiter* at first instance in *The Maréchal Suchet* and *The West Cock*, are wrong in law. See the discussion by Dr Aleka Mandaraka-Sheppard, *Modern Admiralty Law* (2001) p. 772 and now, *Modern Maritime Law and Risk Management* (2008), chapter 14, see above, section 6.1.1. If, contrary to the view expressed above, *The Sumi Maru 9001* decides to the contrary then, while the views of the Singapore Court of Appeal in *The Sumi Maru 9001* command attention and respect, it is nevertheless suggested that the better view remains that of the Court of Appeal in *The West Cock* and that Sir Samuel Evans P's views, *obiter*, are difficult to accept both as a matter of prior authority and principle (as the English Court of Appeal demonstrably found in 1911).

2.28 The position may be contrasted with the position in American law which is that the tug owner is under an absolute duty to provide a tug of sufficient power and equipment: see eg Parks & Cattell, *The Law of Tug and Tow* (4th edn) at p. 129:

> The duty of the tower to provide a tug of sufficient power that has a proper and efficient equipment and tackle is relatively absolute, yet it might be qualified by the underlying premise that this duty is to be interpreted in the light of conditions reasonably to be anticipated.

Contract for a named tug: special considerations

How the considerations arise

2.29 For large-scale operations of ocean towage, the tow may often have in mind the use of the services of a particular tug. Modern tugs for ocean towage work are sophisticated and powerful

instruments and most first-class tug operators have several tugs whose names and identities are well-known in the maritime world for their established prowess in complicated ocean tows and, often, in salvage work and whose details are equally well-known.

2.30 Particular problems may arise where the tow selects a named tug and the contract is for a named tug. In certain circumstances, the implied term as to the fitness and efficiency of the tug may be excluded.

The cases

2.31 In *Robertson v Amazon Tug and Lighterage Co* (1881) 7 QBD 598, the contract was less one for towage by a named tug than for the hire by a person of a tug and its crew which person, in effect, took a demise of it for the duration of the tow. The plaintiff, a master mariner, contracted with the defendants for a lump sum to be paid to him by the defendants, to take a certain specified steam tug of the defendants, towing six sailing barges, from Hull to Brazil, the plaintiff paying the crew and providing provisions for all on board for 70 days. The engines of the steam tug were damaged and out of repair at the time of the contract, but neither the plaintiff nor the defendants were then aware of this. The consequence, however, of the engines being so defective was that the time occupied in the voyage was increased, and the plaintiff's gain in performing his contract was much less than it would otherwise have been. At first instance Lord Coleridge CJ held that the defendants had warranted the reasonable efficiency of the tug. The Court of Appeal reversed this decision (Bramwell LJ dissenting). Brett LJ stated at p. 605:

> When there is a specific thing, there is no implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used. That is the great distinction between a contract to supply a thing which is to be made and which is not specific, and a contract with regard to a specific thing. In the one case you take the thing as it is, in the other the person who undertakes to supply it is bound to supply a thing reasonably fit for the purpose for which it is made.

2.32 However, Cotton LJ held that there was doubt as to the position of a contract for the hire of an ascertained chattel, but described the contract as one by the plaintiff to take the defendants' vessels to a certain place including their named tug. He stated at p. 609:

> The plaintiff here contracts with the defendants for a sum to be paid by them to take a vessel and barge to South America, with liberty to use the vessel as a tug. I say with liberty, for it can hardly be said that it would have been a breach of contract on his part not to use the motive power of the tug, but to tow the Villa Bella and the barges to their destination. If the vessel were not at the time of the contract ascertained and known to both parties, probably the contract would imply such a warranty as relied on by the plaintiff. But a contract made with reference to a known vessel in my opinion stands in a very different position. In such a case, in the absence of actual stipulation, the contractor must, in my opinion, be considered as having agreed to take the risk of the greater or a less efficiency of the chattel for which he contracts. He has to determine what price he will ask for the service or work which he contracts to render or to do. He may examine the chattel and satisfy himself of its condition and efficiency. If he does not and suffers from his neglect to take this precaution, he cannot, in my opinion, make the owner liable. He must, in my opinion, be taken to have fixed the price so as to cover the risk arising from the condition of the instrument which might be examined if he had thought fit so to do.

2.33 Although the contract was in a rather special form, the approach in that case came to be widely applied as a rule in cases of pure contracts of towage. Thus, in *The West Cock* [1911] P 208, Kennedy LJ regarded the rule as applying to towage contracts generally, saying (at p. 231):

> A different set of considerations would have arisen in the present case if the owner of the ship had picked a particular tug and not left it, as he did, to the defendants to supply a tug . . . for the purpose of towing the "Araby."

2.34 In *Point Anne Quarries v The Tug Mary Francis Whalen* (1922) 13 L1 L Rep 40, the Privy Council adopted the rule as a general one, describing the contract as one "for a named tug" falling within *Robertson v Amazon Tug* (at p. 42) and the Board relied upon this rule as one of its grounds for allowing an appeal from a Canadian court which had found for the tow in part because of the tug's incapacity for the towage. In *Fraser & White Ltd v Vernon* [1951] 2 Lloyd's Rep 175, the issue turned on whether the contract was one "for specific tugs" or one "for towage services" (p. 177). McNair J held the contract was for the services of two named tugs, *FW No*. 23 and *Éclair*, and that the claim for breaches of implied warranties as to the tugs failed: as the judge put it, "the short answer to the whole of this claim is that there is no implied warranty or condition or to the fitness of the tugs to do their work" (p. 178).

2.35 But the rule has been distinguished or not applied in other cases. In *The Glenmorven* [1913] P 141, the contract was for the tug *George V* to tow from Vigo to Jarrow. Sir Samuel Evans P held that the principle in *Robertson v Amazon Tug* did not arise because (p. 147):

> I am going to deal with this case upon the basis of the tug itself being chosen by . . . the owners of the ship being towed but not upon the basis that she was so chosen if she went with any defective tackle. It was intended between the parties that the tug should be properly equipped.

This basis of distinction could be applied to almost any case, but it is submitted is probably correct on its facts. The tow did not select the tug but asked the tug owner if he had a tug available. It appears that it was the tug owner who put forward the *George V* and who named it in the contract (see above, p. 142).

2.36 A more serious basis of distinction was that set out in *Reed v Dean* [1949] 1 KB 188 and *Yeoman Credit Ltd v Apps* [1962] 2 QB 508, neither of which were towage cases. In the former case, the contract was one for the hire of a named motor launch which caught fire. Lewis J held there was a warranty of fitness notwithstanding the naming of the launch. He distinguished *Robertson v Amazon Tug* as being not a case of hiring but a case of a contract by a master mariner to take specified vessels to a certain port for reward (p. 192) and relied upon Cotton LJ's restricted formulation as opposed to Brett LJ's more general one (see above). In the subsequent case of *Yeoman Credit v Apps*, the contract was one for the hire purchase of a specified car. Holroyd Pearce LJ held that *Robertson* did not apply. At pp. 514–515 he commented on that case:

> Therefore Bramwell LJ was in favour of there being such a warranty in a contract for the hire of a specific article; Brett LJ was against it and Cotton LJ doubted it without deciding it . . . The decision does not preclude us from holding that there is a warranty in the ordinary hiring of a specific chattel since for the reasons given by Cotton LJ the contract in that case was not a contract of hire at all.

The present position

2.37 It is submitted that the distinguishing of *Robertson* as not being a contract of hire at all, although deriving much support from Cotton LJ's views in *Robertson* itself, is artificial. The contract by which the master agreed to take the vessels to South America was in its form plainly one equivalent to a contract of hire (see also *per* Bramwell LJ in his dissent at p. 603 and *per* Brett LJ at p. 606). Even Cotton LJ described the contract as excluding warranties because it was "a contract made with reference to a known vessel" as might a modern contract which was made by reference to a particular contractor's market renowned tug. However, it is to be recognised that in none of the decisions applying *Robertson* does there appear to have been any argument as to precisely what that case decided (eg in *Fraser & White v Vernon*, distinguished counsel for both parties, Messrs. Mocatta and Eustace Roskill, were content to proceed upon the assumption of the "named" tug rule). It is also to be recognised that as Thomas Scrutton pointed out in the first edition of his *Law of Charterparties and Bills of Lading* (1886), p. 57, footnote (f), the facts in *Robertson* "were very unusual."

2.38 One critical feature may be whether the parties are in fact contracting by reference to a *particular* tug (whether named or not) or by reference to a tug in general (which may be given a name in the contract for ease of identification). This will be a question of fact in each case. In *The M.F. Whalen* and the *Fraser & White* cases, the parties chose to contract by reference to particular tugs. In *The Glenmorven* it appears they did not. In *Reed v Dean*, the contract was one for a launch, which happened to have a name which was used to identify her in the contract. In *Yeoman Credit*, the car was a car but of a particular make and registration number. A further critical feature is whether the contract is one for the hire of the tug itself or is for a contract for the *services* to be performed by the tug.

2.39 It is submitted that the present status of *Robertson v Amazon Tug* is uncertain. To the extent that it decides a point of general principle, it decides that:

i in a contract for the hire of a specific and identified tug where the contract is concluded by reference to that tug, there will be no implied obligation upon the tug owner as to the fitness of that tug (*Robertson v Amazon Tug*);

ii however, in a contract for the hire of an unnamed tug or for the performance of a towage service by a named tug or for the performance of a towage service by a tug which the tug owner shall choose, the implied term as to fitness and efficiency applies.

2.40 To be sure of the position, where a "named tug" is being contracted for it should be made clear by the parties in their contract what the agreed position is as to the fitness of the tug. As has been noted (see Dr Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2008), chapter 14, section 6.2.3), the distinction between a contract for the hire of a specific tug and contracts to perform towage services "may be artificial and cause more confusion than it offers by way of a solution." However, it is clearly present on the cases and, given the well-known nature of certain tugs in the industry in relation to which parties contract by reference to the name and the particular towing instrument, it is a distinction which can have potentially important consequences. It is submitted that sensible contractual risk management merits dealing with it expressly as suggested.

2.41 It should be noted that the American law is to the same effect as *Robertson* (see the decision in *The Dodd*, 1927 AMC 427 (9th Cir.)), and that Parks & Cattell in their commentary on the English cases (see *The Law of Tug and Tow* (4th edn), pp. 17–129) accept *Robertson* as laying down a general rule. Similarly, Scrutton, in the first edition of his work (*op. cit.*), regarded the decision as establishing, albeit on unusual facts, that the naming of the tug "negatived an implied contract of efficiency"; cf. the current editors' position in *Scrutton on Charterparties and Bills of Lading* (23rd edn, 2015), Article 68 at footnote 55, who incline, *semble*, to the approach in *Reed v Dean*, considered above. See also the reference to the "naming" of a tug in the Canadian case of *The Tug Champlain* [1939] 1 DLR 384 at p. 389.

2.42 The rule in *Robertson v Amazon Tug*, of course, leaves unaffected the position where a specific representation is made as to the named tug or where the parties contract on the basis of a common mistake, ie as to the named tug's characteristics (see *The Salvador* (1909) 25 TLR 384; 25 TLR 727 and 26 TLR 149 (lack of power of tug)).

Performance of the towage service

The general position

2.43 The obligation upon the tug in its performance of the towage is to exercise competent skill (see *The Minnehaha* (1861) Lush 335) or proper skill and diligence (see *The Julia* (1861) Lush 224). In other words, the tug must exercise reasonable care of and over the tow and in and about the operations which it performs as part of the towage service.

The question of control

2.44 Of special relevance in considering the question of the tug's obligations in relation to a particular operation in the towage service is the ascertainment of where the responsibility of tug or tow for a particular operation lies. That responsibility depends on the allocation of the control of the particular operation. Which is in control of that operation, the tug or the tow?

2.45 The question of control is particularly relevant in relation to the navigation of the tug and tow. The question is usually answered as between tug and tow by an express provision in the standard form contracts deeming the tug to be in all respects the tow's servant. In the absence of an express provision, the question as to which of the tug or the tow is in control in a particular operation is a question of fact for the court looking at the contract as a whole. However, a default in the performance of the towage by tug or tow can also result in damage to third parties (ie by collision) as well as to the tug and tow. In such a case, the position as to which of tug and tow is in control of the towage operation will be regulated by the court's determination of which is in control, irrespective of what the tug and tow have themselves contractually provided for, either expressly or impliedly, that provision being one incapable of binding anyone other than the parties to the contract (see eg *The Panther and The Ericbank* [1957] 1 Lloyd's Rep 57). For this reason, the question of control usually arises in tort in cases of collision with third parties and the legal principles relating to the doctrine of control are dealt with in this context in Chapter 11.

2.46 For present purposes, however, the law can be stated as follows:

i If the tow is unmanned, generally the tug will be responsible for and will owe contractual obligations, in respect of the navigation of the tow as well as of the tug (see eg *The Adriatic and The Wellington* (1914) 30 TLR 699, in which a dumb barge was held to be under the control of the tug).

ii Where the tow is manned, the question of whether the tug or the tow is in control of a particular towage operation is a question of fact which is to be determined upon the particular facts and circumstances of each case.

2.47 This latter rule was laid down by the House of Lords in the *SS Devonshire v The Barge Leslie* [1912] AC 634. In that case there was a collision between a barge in tow of a tug and a steamship. The tug exercised sole control over the navigation of the tow, and the collision was caused by the joint negligence of the tug and the steamship. It was held in the House of Lords, affirming the Court of Appeal, and the President of the Admiralty Court, that the tow could recover all her damages from the steamship, and that her rights against the steamship were not affected by the negligence of her tug. The case therefore dealt primarily with the right of the tow to recover damages, and not with her liability for damage done by her, but the case decides in general terms that the rights and liabilities of the tow are not affected by the negligence of the tug unless the owners of the tow or their servants have control of the navigation of the tug. In the House of Lords, Lord Ashbourne stated (at p. 648) that there was nothing in the facts of the case to make the tow responsible for the navigation of the tug: "This is not a question of law, but a question of fact to be determined in each case on its own circumstances." Similarly, Lord Atkinson (at p. 656) stated the proposition in these terms:

> It must, therefore, I think, now be taken as conclusively established that the question of the identity of the tow with the tug that tows her is one of fact, not law, to be determined upon the particular facts and circumstances of each case.

This approach is very similar to the approach adopted by the American cases in applying the "dominant mind" doctrine (see eg *Sturgis v Boyer*, 65 US 110 (1861) and *The Margaret*, 94 US 494 (1876)).

2.48 The rule laid down in the *SS Devonshire* dispelled a tendency on the part of the Court of Admiralty under Dr Lushington (see eg *The Duke of Sussex* (1841) 1 W Rob 270 and *The*

Christina (1848) 3 W Rob 29) to ascribe control to the tow as a matter of presumption so as to avoid an apparent divided "command" of the towage. This presumption was doubted by Sir James Hannen P in *The Stormcock* (1885) 5 Asp MLC 470, who stated:

> I myself should have been inclined to think that the decisions of the American courts establish a rule more in conformity with my own ideas of justice; that is, that the particular circumstances should be looked at in each case to see whether the tug or tow or both are liable.

The President returned to the attack in *The Quickstep* (1890) 15 PD 196 where, with Butt J, he adopted the American approach of looking to see which of tug and tow exercised the "dominant mind", exemplified in cases such as *Sturgis v Boyer* (above), as applying in cases where no servant or agent relationship existed. He thereby foreshadowed the decision of the House of Lords in *SS Devonshire*.

2.49 Therefore, in the context of contractual responsibility on the part of tug or tow for some error of navigation during the performance of the towage service, unless there is some express contractual provision regulating the position, the question will be the same as in the context of a claim of a third party for damage sustained by contact with tug or tow. This question is: as a question of fact, which of the tug or the tow was in control of the operation in question as a result of or by which the damage has been occasioned? For a useful more modern example of the factual exercise involved in ascertaining whether the tow is in control of the tug applying the principles in the *SS Devonshire* and in *The Panther and The Ericbank*, see the Canadian decision of *Greig Shipping A/S v The Owners of the Dubai Fortune* (2012) FC 1110 (Federal Court), considered in Chapter 11 below. Lemieux J summarised the principle at para. 49 as follows: "the question of which vessel is in the control is a question of fact to be determined in every case [. . .] the focus of the enquiry is on the relevant negligent act in question, who was entitled to give orders to prevent the negligent act causative of the injury, ie control the act; the way in which the act involving the negligence was done." The court held that a negligent act by a line tug (one amongst others) engaged in berthing a vessel where only a general instruction was given without any oversight of how the tug conducted herself was inimical to any possible control of the tug by the tow.

Examples of identifying which vessel is in control

2.50 Although since *SS Devonshire v The Barge Leslie* [1912] AC 634, the question of control is one of fact to be approached afresh in each case, some tentative guidance on how the question might be answered can be derived from the pre-*Devonshire* cases. However, these must be read with caution and against the background of the presumptions which the courts were prone to make prior to the decision in the *SS Devonshire* case. The approach in the pre-*Devonshire* cases can be summarised as follows:

i In open waters where there is plenty of sea-room for tug and tow to manoeuvre, the tow will normally be in control of the towage if it is giving orders as to the course to be followed and the navigation to be adopted. See eg in *The Isca* (1886) 12 PD 34 *per* Sir James Hannen P at p. 35: "the general direction is to be given by those on board the vessel in tow." This is so even if the tow is not directing every aspect of the towage (see *The Sinquasi* (1880) 5 PD 241). It is interesting to note that the presumption in the old cases that the tow was in control of the towage, at least in the case of ocean towage, may have arisen because of the poorly regarded status of many tug operators. Thus, in *The Niobe* (1888) 13 PD 55, it was stated (*per* Sir James Hannen P at p. 59):

> The authorities clearly establish that the tow has, under the ordinary contract of towage, control over the tug. The tug and tow are engaged in a common undertaking, of which

> the general management and command belongs to the tow, and, in order that she should efficiently execute this command, it is necessary that she should have a good look-out and should not merely allow herself to be drawn, or the tug to go, in a course which will cause damage to another vessel. As Dr Lushington has pointed out, it is essential to the safety of vessels being towed that there should not be a divided command, and convenience has established that the undivided authority shall belong to the tow. The pilot (if there be one) takes his station on board his tow, and the officers of the tow are usually, as in the present case, of a higher class and better able to direct the navigation than those of the tug. The practice which experience has dictated has received the sanction of many legal decisions, and has been recognised in the House of Lords in *Spaight v Tedcastle* (1881) 6 App Cas 217 where Lord Blackburn says that 'it is the duty of the tug to carry out the directions received from the ship'.

Given the very high status of most tug operators today with their extensive experience of complex towages, while the ascertainment of who is in control is a question of fact, if there is any presumption to be made, in many cases it may tend to put the tug in control.

ii Where the tow has given only a general order at the start of the towage and gives no further orders or where no orders as such are given at all, the tug will be in control of the towage. In *The Robert Dixon* (1879) 5 PD 54, Brett LJ stated at p. 58:

> I am very much inclined to think that a tug is bound to obey the orders of the captain, and if the captain had insisted on the tug keeping that course, the tug would have been bound to obey; certainly the captain could not have complained of the tug obeying him. But then, on the plaintiff's own showing, the only evidence was that at the beginning of the towage the tug was directed to tow the ship in a particular course. I assume that to have been the right course but on the way the weather became threatening. Assuming that no further order was given by the captain, it was the duty of the tug to use reasonable care and skill, and unless she was ordered to the contrary, she had the command of the course.

In such a case the tug will have to set the course for the towage (*The Altair* [1897] P 105).

iii In confined waters such as the approaches to a port or in harbour or river towage or in open waters which are congested with other vessels, the control is usually with the tug as the tug is usually the best judge of how to handle the tow and may have local knowledge. See *The Isca (op. cit.) per* Sir James Hannen P (1886) 12 PD at p. 35:

> But it does not follow from this rule that the vessel in tow is to be constantly interfering with the tug, it must depend on the place and on the circumstances as whether there are numerous small vessels about. Those in charge of the tug must exercise their judgement, and not be constantly expecting to receive orders from the vessel in tow, which may be a considerable distance astern of them.

See also *Greig Shipping A/S v The Owners of the Dubai Fortune* (2012) FC 1110 (Federal Court), discussed above and also in Chapter 11 in the context of collision liability.

iv Where the tow, although manned, is disabled in some respect bearing on her navigation, the tug usually has control of the towage (see *The American and The Syria* (1874) LR 6 PC 127).

v Where the tow, although manned, is not herself capable of independent navigation (eg such as a barge or where several craft are towed in a convoy or flotilla), the tug will usually be in control (see *per* Fletcher Moulton LJ in *SS Devonshire* in the Court of Appeal [1912] P 21 at p. 49).

vi Where the tug executes a sudden and unexpected manoeuvre which the tow is powerless to prevent or to shape up to, cases have gone both ways, ie in fixing the tug with control

for the purposes of that manoeuvre even if the tow is otherwise in control (see eg *The Stormcock* (1885) 5 Asp MLC 470) and in fixing the tow with control notwithstanding the sudden act of the tug (see eg *The Sinquasi* (1880) 5 PD 241).

If the tug is in control of the service

2.51 On the assumption that the tug is in control of the navigation of the tug and tow for the purposes of the service, the tug, pursuant to the decisions in *The Minnehaha* and *The Julia*, is bound to exercise all reasonable care and skill and proper seamanship in the navigation of herself and of the tow.

2.52 Thus, for example, among its other implied duties involved in its overriding obligation to exercise reasonable care and skill in and about the towage, the tug is under the following particular obligations.

(i) To exercise all reasonable care and skill in anticipating what the tow might do or how she might manoeuvre during the towage. In *The Cape Colony* (1920) 4 Ll L Rep 116, the tug failed to shift the towing rope from the forward bit to the towing hook sufficiently timeously, held herself too close to the vessel's stern and was collided with when the vessel suddenly used her engine and moved astern. Hill J stated:

> the tug must anticipate and be on the lookout for the engines [ie of the tow] being moved to ahead or astern as required.

Similarly, in *The Shanklin* (1932) 43 Ll L Rep 153, there was a collision of a tug towing a barge with a paddle steamer in Portsmouth harbour. The tug was to blame for failing to anticipate the movement of the steamer as she was leaving the landing stage and for failing to take her way off in time. As Langton J pithily put it at p. 156:

> The moral to be drawn from this case is that if you navigate such unwieldy craft as this tug and barge lashed together you must be unusually on the alert and take no chance. I think Captain Ship took what in ordinary circumstances is an ordinarily fair chance, not perhaps even a sporting chance. He took the chance that the Shanklin would not do what she always does, but she did not do it and he lost on the gamble and I am afraid he must also lose on this case.

(ii) To exercise all reasonable care to keep clear of the tow during the service and, especially, while making fast to avoid contact with the tow. Practically speaking, while tug and tow must each exercise proper care and skill, tugs, being the handier vessels, must take upon themselves the main duty of keeping clear of the tow, eg when making fast (see eg Bucknill, *Tug and Tow* (2nd edn, 1927), p. 28). Thus, in *The Lagarto* (1923) 17 L1 L Rep 264 the tug passed under the bow of the tow while taking her tow rope. The tow increased her speed and swung to starboard. She hit the port quarter of the tug and sank her. The tug failed to establish negligence on the part of the tow. At the end of his judgment Hill J said:

> In fact, tugs that go out to make fast to steamers which are under way, especially those that go to make fast ahead and have to be close under their bows, do engage in that which is a risky operation. A very slight deflection of the head of the tug, a very slight failure to keep the tug in exactly the right position, may expose it to great danger. That is one of the risks tugs have to run and I suppose it is taken into consideration when their remuneration is fixed but every now and again it does not come off. This is the second case of the kind heard this term. But that does not justify tug owners seeking to put the blame on the steamers unless it be established that the ship has been guilty of negligence.

The responsibility of the tug in manoeuvring in close quarters has been specifically considered in three cases.

As has been seen in *The Cape Colony* (1920) 4 Ll L Rep 116, the tug failed to shift the towing rope from the forward bit to the towing hook in good time, and thereby held herself too near the

stern of the tow, the tug being held to blame for the collision that ensued. "A tug which is assisting a steamer to manoeuvre . . . cannot expect that the steamer will keep her engines stationary", said Hill J (at p. 118), and continued: "the tug must anticipate and be on the look out for the engines being moved to ahead or astern as required."

In *The Contest v The Age* (1923) 17 L1 L Rep 172, the tug was putting the ship's hawser on the tow hook. At the end of his judgment, Hill J said:

> however this collision came about it is not suggested, and cannot be suggested, that there was any negligence on the part of the [tow]. Tugs which are making fast to a ship necessarily take upon themselves the main burden of keeping clear and there are many ways in which careless handling of the tugs in the very close quarters in which they have to work, bring them into contact with the ship.

See also *The Clan Colquhoun* [1936] P 153, where the tug was criticised for getting too close to the tow's propellers and for failing to inform itself of the exact position of the propellers.

However, the tow owes a duty too to watch the tug in close-quarter operations. In *The Harmony v The Northborough* (1923) 15 Ll L Rep 119, the tug was going around the tow's stern to take the rope on the starboard side in accordance with instructions received from the ship; while she did so the tow used her main engine, causing propeller wake. It was contended that the tug bore the sole duty to watch out in close quarter manoeuvring. The court rejected this:

> There is no unilateral duty of that kind in the relations of tug and tow. Each of them has to exercise proper care. It is quite true that there are acts which are in themselves acts of peril and a tug which is carrying on business involving risks must incur the proper risks incidental to her occupation; . . . [the tug] being in a position in which her security need not be imperilled . . . is not to be imperilled by unconsidered and hasty action such as was taken by the engines of the [tow].

(iii) To exercise all reasonable care to keep a good look-out and be ready to take decisions as to the navigation of the tug and tow in an emergency without awaiting orders of approval from the tow. In *The Isca* (1886) 12 PD 34, a tug towed a brigantine in the River Usk downstream against the tide at the brigantine's request. The tug mishandled the tow and the tide drew her into collision with a bridge. The tug argued that it was for the tow to give precise orders as to what to do and that she had not done so. As to this Sir James Hannen P stated (at p. 35):

> It is true that the general direction is to be given by those on the vessel in tow and also if a specific order is given by her to the tug, the responsibility must rest with the vessel in tow for the consequences of such order. But it does not follow from this rule that the vessel in tow is to be constantly interfering with the tug; it must depend on the place and on the circumstances and whether there are numerous small vessels about. Those in charge of the tug must exercise their judgement, and must not be constantly expecting to receive orders from the vessel in tow, which may be a considerable distance astern of them.

He was influenced by the narrowness of the river and that the tug was (or should have been) the better judge of how to manoeuvre the convoy in such waters.

Compare *The Niobe* (1888) 13 PD 55 as to the responsibility of the tow to keep a proper look-out for tug and tow (see Part B below).

(iv) To exercise all reasonable care and skill so to direct the tug and tow as to the course to be taken to avoid other vessels encountered during the towage. See eg *The Stormcock* (1885) 5 Asp MLC 470 (tug towing at night with long scope of hawser held tug alone to blame as in such circumstances the tow was under no duty to direct the course of movement of the tug). See also *The Duke of Manchester* (1846) 2 W Rob 470 at p. 477.

(v) To exercise all reasonable care for herself and for the tow to proceed at an appropriate speed in thick or foggy weather. In *The Englishman and The Australia* [1894] P 239, a tug, while towing a vessel, came into collision with, and sank, a third vessel, and was herself damaged. The third vessel and the tug were found to blame for excessive speed in fog. The tow was also found to blame for not controlling the speed of the tug. On these facts it was held by the President (Sir

F. H. Jeune) that, although the tow had not been herself in collision, the owners of the tug and the owners of the tow were liable for half the damages of the third vessel after deducting half the damages of the tug for which the owners of the third vessel were liable. See also *Smith v St. Lawrence Tow Boat Co* (1873) LR 5 PC 308 (both tug and tow held to blame for proceeding in fog).

(vi) To exercise all reasonable care to proceed at a proper speed for the water and sea conditions. While this obligation is usually considered in the context of the tug towing the tow at too fast a speed for the conditions (see eg *The Altair* [1897] P 105), the tug must not tow too slowly either. Thus in *The Ratata* [1898] AC 513, the tug was held liable for proceeding so slowly (due to inefficiency at her boilers) that the last vessel in the line of vessels being towed was stranded due to having insufficient way on.

(vii) To exercise all reasonable care where no course has been stipulated by the tow to plan and follow a reasonable, proper and safe course for tug and tow. In *The Robert Dixon* (1879) 5 PD 54, the tug agreed to tow a ship for a fixed sum. The tug towed her too near to the shore. The hawser parted, and the ship was in danger of being driven ashore. The tug re-established a connection and pulled her clear. The tug's claim for salvage was denied. In the Court of Appeal, James LJ said of the relative duties of tug and tow regarding directions:

> Whether the evidence establishes that the tug acted in violation of any positive directions from the ship during the voyage it is not necessary for us to give an opinion, because if it be true that no directions were given to the tug apart from the general directions at the commencement of the towage, it comes to this, that the master of the tug was acting as it was his duty to do on his own discretion to take the ship on a safe course to the Skerries, allowing for possible contingencies and a change of weather.

(viii) Where necessary, to exercise all reasonable care to take soundings as part of the planning and following of a proper course for tug and tow. In *The Altair* [1897] P 105, the tug agreed to tow a barque to Hull "without interference from the tow." The tug was held to have been negligent in not taking soundings, as she should have done, when nearing the entrance of the Humber. Gorell Barnes J stated at p. 115:

> There seems no doubt that the tug is under the control of the master of the ship but practically the tow cannot be always giving directions as to the course set by the tug, and I am informed by my assessors that the tow usually does leave the course in such towages as the present to the tug, and would not interfere unless there were reasonable grounds for doing so. As a matter of fact, in the present case, the direction of the course was assumed by the tug and it was perhaps not unreasonable that it should be so, because the master of the tug had been to the Humber several times before, whereas the master of the Altair had only once sailed out of that river in the year 1884. . . as no directions were given by the ship to the tug, the latter was responsible for the direction of the course.

(ix) To exercise all reasonable care to avoid shearing on the part of the tow. See *R v The Island Challenger* [1959] Ex CR 413, where the tow was on a long hawser and was allowed to shear into a bridge.

Completion of the towage service

2.53 The overriding obligation upon the tug imposed at common law is to stay with the tow and to persevere in the completion of the towage service. It is as to this obligation which the Board in *The Minnehaha* (1861) Lush 335; 15 Moo PC 133 stated that the tug "will use her best endeavours for that purpose" and that the tug

> does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task, because the performance of the task is interrupted or cannot be completed in the mode in which it was originally intended, as by the weakening of a ship's hawser.

Questions often arise in relation to this obligation, in the context of interruptions to the towage service.

Interruptions in the course of the towage

2.54 Interruptions to a towage service are common: the tow-line parts; the tug is obliged to slip her line in bad weather to avoid colliding with the tow; the tug sustains some mechanical or steering problem; the tug is called away to render some pressing salvage service. In all such cases, the obligation on the tug is the same: to return as soon as possible to the tow, to effect the reconnection of the tow-line and to resume and complete the towage. If this cannot be done, or if the circumstances of the interruption of the towage are such that the service cannot be performed or contemplated, the tug must not leave the tow until she is in a safe place.

2.55 In *The Golden Light, The HM Hayes, The Annapolis* (1861) Lush 365, a tug was forced to let go of her tow because of the risk of collision with a third ship. The tow went on to collide with that ship and then with another. The tug came up behind the tow and succeeded in making fast and in preventing a further collision. The tug claimed salvage. It was held by Dr Lushington that the obligations of the tug under the towage contract did not prevent her from letting go but thereafter she had to resume the tow and to take care of the tow in the situation in which she then found herself.

2.56 In *The Aboukir* (1905) 21 TLR 200, the towage consisted of a tow of a vessel from the anchorage into a dock. The vessel was unable to get into the dock. It was held that the obligation under the contract to assist in the docking of the vessel did not come to an end until the tow was left in a safe place, which on the facts of the case meant returning the tow back to anchorage and leaving her there.

2.57 In *The Refrigerant* [1925] P 130, a tug was held to have breached the contract of towage by abandoning the tow on a towage from Lorient to Liverpool after a hawser parted off the Lizard. The tug went into harbour for a new line and sent out another tug under contract to assist her. Bateson J held that, while the contract was not one to tow without a break and while it was implicit that there might be interruptions, in the event of such an interruption the tug was under a duty to "do all she reasonably can to take care of and protect" the tow and, in particular, to stand by the tow.

2.58 In *Gamecock Steam Towing Co Ltd v Trader Navigation Ltd* (1937) 59 L1 L Rep 170, the contract was to tow a vessel which had sustained damage from Dartmouth to Southampton; the towage, being short, should have taken two days. However, during the towage, the tow began to take water and had to put into port for temporary repairs. The towage as a result took two weeks. The tugs stood by her during the repairs because the towage contract was a lump sum "no cure-no pay" and they wished to earn the remuneration. Goddard J considered that as they chose to do so, the service in standing by fell within the contract. He held that the tugs could have left earlier had they wanted to (p. 174) and that they could claim no extra for standing by in this way:

> I think, the case of *The Refrigerant* . . . is authority for saying that the tug must not leave a vessel having once undertaken the service until she is in a safe place. If they could have got her into a safe place they might have left her. They could have said "It is going to take so long to repair this ship that it will not pay us to go on and as this was not contemplated we threw up the contract."

As to what is a safe place and as to the content of the obligation to stand by during repairs or similar works, Goddard J continued (*ibid*):

> if she had been put in dry dock . . . the tug could have gone away and come back. The law would not require a tug to stand by while a ship was in dry dock.

Circumstances in which the towage can be abandoned

2.59 Notwithstanding the obligation upon the tug to complete the towage and to rejoin the tow in the event of interruption, there is no absolute warranty on the part of the tug that the service

will be performed "under all circumstances and at all hazards" (*The Minnehaha* (1861) Lush 335; 15 Moo PC 133). As was said by the Privy Council in that case, at common law, "The tug is relieved from the performance of her contract by the impossibility of performing it."

2.60 Where, therefore, for some reason the towage service is rendered impossible of performance, the tug is discharged from the contract and may abandon the towage, having left the tow in a safe place (see eg *The Aboukir* (1905) 21 TLR 200). See also *Gamecock Steam Towing Co*, cited above, where Goddard J, *obiter*, suggested that the same position applied where the performance was still possible but where it was radically different from the contemplated. The test was expressed by Dr Lushington in *The White Star* (1866) LR 1 A & E 68 as follows at p. 70:

> The real question is, what are the contracting parties reasonably supposed to have intended by the engagement, and what degree of alteration had they a right to expect, because to suppose that the performance of the service would always be of the same character would be absurd. I apprehend that, when a master of a vessel contracts with the master of a tug, it is upon the supposition that the wind and weather, and the time for performing the service, will be what are ordinary at the time of year, and that the sum contracted for is that which is supposed to be a sufficient remuneration for the ordinary performance of the voyage. It may be a short voyage if all the circumstances are favourable, and it may be a long one if they are unfavourable. I shall submit to you that when an engagement is made – a contract – for a specific time, that contract must be adhered to, and is not to be broken hastily, unless it be shewn that circumstances have occurred which would not have been within the contemplation of the parties, and that such is the state of circumstances, that to insist upon the contract and hold it binding would be contrary to all principles of justice and equity.

2.61 An illustration is given by *The Glenmorven* [1913] P 141. In that case, the plaintiffs contracted for the sum of £400 to tow the defendant's rudderless steamer from Vigo to the Tyne on the basis of a term which provided "no cure, no pay, no claim to be made for salvage." While the towage was proceeding the master and crew of the steamer left her, and the tug, with other assistance, took the steamer first to Falmouth and then on to the Tyne. It was held by the President (Sir Samuel Evans) that the contract was to tow a partially disabled vessel, with her master and crew on board, from Vigo to the Tyne and that that contract came to an end through the fault of those in charge of the steamer, for, though the vessel was not technically a derelict as the tug was in attendance under contract, the master and crew without sufficient justification had abandoned her. From the time of that abandonment the services rendered by the tug were not performed under contract, but were in the nature of salvage for which the award would be £1,400 and, on the basis of a *quantum meruit*, £300 for the previous services. It was held that the contract came to an end when the tow was abandoned, the abandonment not being a temporary one, and when she was left in charge of a tug which was under a legal obligation to go on towing. As the court put it:

> A contract to tow a partially disabled vessel . . . is one thing. A contract to tow a vessel which has been entirely abandoned in the Bay of Biscay is a wholly different contract.

2.62 Where, as is common, the tow cannot be left in a safe place immediately upon the performance of the contract becoming impossible, the tug remains under an obligation to render services to the tow. Even where the tug is in no way to blame for the supervening impossibility, she is, apparently, not free to abandon her tow in danger upon the impossibility manifesting itself, but she is obliged to endeavour to save the tow from danger, albeit that in respect of such services she may be entitled to be paid upon a salvage basis (see eg *The Galatea* (1858) Swa 349).

2.63 Accordingly, the law implies an obligation on a tug under a towage contract to render assistance to her tow in cases of unusual difficulty or danger, and a corresponding obligation on the tow to pay extra remuneration for these services, and to pay such remuneration on a salvage basis if the tug's services save the tow from the danger in question, or contribute to her ultimate safety.

2.64 As it was put by Sir Robert Phillimore in *The I.C. Potter* (1870) LR 3 A & E 292:

> It is not disputed that circumstances may supervene which engraft upon an original towage agreement the character of a salvage service and to this proposition of law I must add another, which has an important bearing on my decision, namely, that when the supervening circumstances, from stress of weather or otherwise, are such as to justify the towing vessel in abandoning her contract, it is still her duty to remain by the towed vessel for the purpose of rendering her assistance, but that for such assistance she is entitled to salvage reward.

2.65 From the perspective of the tow, it appears that where the tug breaks down and leaves the tow so as to effect repairs at least for a substantial period, the tow may be justified in terminating the towage contract as having been abandoned by the tug, thus entitling the tow to engage alternative assistance (see *The Lady Flora Hastings* (1848) 3 W Rob 118). This is consistent with the approach suggested (from the perspective of the tug facing a broken-down tow) by Goddard J in *Gamecock*, considered above.

PART B. THE OBLIGATIONS OF THE TOW

The Julia

2.66 In its decision in *The Julia* (1861) 14 Moo PC 210, the Privy Council considered the obligations on both tug and tow. In general terms, tug and tow owe each other the same obligations, but it is the nature of the towage and the respective roles played in it by tug and tow which will define the extent and content of each other's obligation. Lord Kingsdown stated (at p. 230):

> The contract was that the tug should take the *Julia* in tow when required and tow her as far as Gravesend . . . When the contract was made the law would imply an engagement that each vessel would perform its duty in completing it, that proper skill and diligence would be used on board of each, and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken.

2.67 In that case, the steam-tug *Secret* was engaged by a sailing vessel, *The Julia*, to tow her from Folkestone to Gravesend. *The Julia* ran the tug down due to her carrying too much sail in the prevailing wind conditions and to her following dead astern of the tug rather than keeping her helm to starboard. The tug was held to have been blameless since slipping the hawser would have made no difference. The tow was found liable for failing to observe due care and skill in the towage.

2.68 The American courts have adopted a virtually identical approach to the mutual duties upon the tug and tow: see *The Raleigh*, 44 F 781 (1890) and *The Director*, 1927 AMC 1295 (4th Cir.).

Fitness of the tow for the towage service

2.69 There is an implied term that the tow shall be fit for the towage service as far as the tow owner can put her into that condition by the exercise of reasonable care and diligence. In *Elliott Steam Tug Co v The Chester* (1922) 12 Ll L Rep 331 at p. 333, a tug was engaged to tow an obsolete battle-cruiser, the *Chester*. The tow's bottom was then discovered to be heavily fouled, making towage by one tug too dangerous. A "without prejudice" agreement was entered into for a second tug to be used by the tug owner. The hirer argued that the contract was for the towage of the *Chester* to destination by however many tugs were needed. This was rejected on various grounds. One ground was that (*per* Hill J at p. 333):

> Under a contract for the towage of an obsolete ship, there must be an implied obligation on the part of the tow that she is in a reasonably fit condition to be towed.

2.70 This obligation of "fitness for the towage service" is, it is submitted, equivalent to the obligation of seaworthiness in relation to vessels under contracts of affreightment. The common law concept of seaworthiness may be defined as the fitness of a vessel to withstand the perils which may foreseeably be encountered on the voyage, and where cargo is to be carried, fitness to keep that cargo reasonably safe from those perils (see Cooke, *Voyage Charters* (4th edn, 2014), para. 11.18). The concept is one of the reasonable fitness of the vessel for the job in hand. It is both vessel specific and service or operation specific. The content and extent of what "seaworthiness" entails will therefore be dependent on and be relative to "the nature of the ship, to the particular voyage contracted for and the particular stages of that voyage, being different for summer or for winter voyages, for river and lake or for sea navigation, whilst loading in harbour and when sailing and varies with the particular cargo to be carried" (see *Scrutton on Charterparties and Bills of Lading* (23rd edn, 2015), Article 68) in short: "fit to encounter the perils of the voyage" and fit for the adventure. There is no difficulty with the transposition of the obligation of seaworthiness to the tug, ie that it shall be reasonably fit for the service of towing the particular tow on the particular voyage (see the cases considered above). There is, it is submitted, no difficulty with the use of that concept in relation to the tow. The obligation of the tow to be reasonably fit for the towage in hand means that it shall be fit to be towed by the tug on the voyage intended. Fitness of the tow and seaworthiness are synonymous.

2.71 This view has been doubted: see Dr Aleka Mandaraka-Sheppard, *Modern Admiralty Law* (2001) at p. 782 (the italicised part of the passage cited therefrom below is passage that has been carried forward to her *Modern Maritime Law and Risk Management* (2008) in the corresponding section at section 7.2):

> The statement by Rainy (*sic*) that there is an implied term that the tow must be seaworthy when referring to [*Elliott v Chester*] is misleading [because] *this case did not decide that the tow should be "seaworthy" but "fit to be towed" which is different*.

2.72 It is submitted that there is no difference between the two concepts: it is the same concept which is applied to two different contexts; as the concept is a relative one of "fitness", what that "fitness" entails will vary depending not only on the vessel to which it applies but also the operation for which it is to be fit and the circumstances in which that operation is to be carried out which will bear upon that fitness. Thus a manned first-rate tanker which requires towage assistance to berth will owe a different obligation of "fitness" or "seaworthiness" than will a derelict hulk being towed for scrapping or an immobilised vessel being towed to a port of refuge. The differing content of the obligation of fitness or seaworthiness is inherent in the concept. Dr Mandaraka-Sheppard's view appears to derive from a misconception that "seaworthiness" is either some absolute concept (from which "fitness" is obviously "different", as she suggests) or some concept which is uniquely "cargo" or "affreightment" related (see her characterisation of *The Smjeli*, considered below). Both views of the concept of seaworthiness are, it is respectfully submitted, wrong.

2.73 Thus, in *The Smjeli* [1982] 2 Lloyd's Rep 74, a tug and tow (a dumb barge carrying rig sections) were connected by a towing hawser with an insufficiently large breaking strain. The line parted and the barge was cast ashore, damaging the plaintiffs' coastal defence groynes. The case concerned questions of limitation of liability (see the consideration of this case below in Chapter 11), but Sheen J described the position generally in relation to the condition of the tug and tow (not simply in the context of the cargo-carrying aspect of the barge; cf. Mandaraka-Sheppard (2008) at section 7.2) to be as follows:

> In this case the duty upon the owners of the tug and barge was the common law duty to use reasonable care to send their vessels to sea in a seaworthy condition and at a proper time.

2.74 Compare the American position, which is clear: *Parks & Cattell* (4th edn) state the cases as a whole to be "affirming the duty of a shipowner to furnish a seaworthy tow" (p. 204) and that "many cases have stated the rule in terms such that the owner of the tow impliedly warrants the seaworthiness of his vessel" (ie in a proper condition to be towed).

2.75 In *Canada SS Lines v SS Paisley* [1930] 2 DLR 257 (Can PC), the tow lost its right to limit liability because of its fault, *inter alia*, in allowing the towage to commence without having all proper and sufficient tackle for the service on board the tow and with her anchor left hanging down on the port bow which caused another vessel to be holed during the towage. In *The Bristol City* [1921] P 444, shipbuilders engaged a tug to tow an unfinished vessel from Bristol to Cardiff. She had no hawse pipes or windlass, no chain cable, only one anchor and a short scope of wire rope. The tow-line parted in bad weather and the tow collided with another ship because she was unable to anchor properly. The Court of Appeal held that the tow's want of ground tackle constituted unseaworthiness and was the cause of the collision and held the tow liable. Cf. the view expressed by *Bucknill* (2nd edn, 1927) at p. 25:

> If there is an implied warranty by the tug-owner in a contract of towage that the tug is fit for purpose and is properly equipped with efficient towage appliances, the question may be raised as to a corresponding warranty by the owner of the tow that the tow is fit to be towed and is properly equipped with anchors, windlass, rudder &c. and has an efficient crew on board.

2.76 The fitness of the tow or seaworthiness will therefore depend on all the circumstances, both of the vessel being towed and the "adventure" or nature and scope of the towage. Thus if the towage contract is to tow a stranded vessel off, there will be an implied obligation upon the tow owners that the tow will be in a position where she can be got off by the tug. In *Elliott Steam Tug Co v New Medway Steam Packet Co* (1937) 59 Ll L Rep 35, a tug was hired to tow an 800 ton lighter from a mudbank at the end of a shallow and narrow channel. The court held that the contract was subject to an implied term:

> that the owners of the vessel to be towed would have the vessel in such a position that a tug of the size which they knew would have to be sent to perform the voyage would be able to take the lighter in tow, and that the lighter was in such a position that a tug could pick it up and take it out.

2.77 Compare the decision in *Gamecock Steam Towing Co Ltd v Trader Navigation Co Ltd* (1937) 59 Ll L Rep 170, where the court refused to imply into the contract a term that the vessel should have been lying in midstream in circumstances when she was alongside a berth and lying on mud but could be towed off the mud without difficulty. The court held that the only obligation on the tow was to put herself in a position where she could be taken over by the tug and was lying somewhere whence, at the appropriate state of the tide, she could be floated off and taken in tow.

Proper seamanship during the towage service

The general position

2.78 Irrespective of whether the tug or the tow is in control of the towage, the tow is obliged to take reasonable care in and about the towage. As Buckley LJ put it in *The Devonshire* [1912] P 21 at p. 61:

> The tow may be a steamship or a sailing vessel, and she may, and sometimes does, use her own means of propulsion to assist the tug in their joint venture. The tow can, by her helm, command, within limits, her direction of motion. She does, in fact, owe the maritime duty towards other vessels of using her helm, and under appropriate circumstances, her steam or other means of propulsion or control, so as to avoid collision. She is not, like cargo, a passive spectator of the manoeuvres. She owes a duty to play a part in them, and is to blame if she plays a wrong part. In this I am not speaking of the responsibility of the tow for the conduct of the tug, but of her responsibility for her own conduct.

The question of control

2.79 If, on the factual enquiry made pursuant to the decision in *SS Devonshire v The Barge* Leslie [1912] AC 634, the tow is found to be in control of the towage, the tow's involvement in

and responsibility for navigation during the towage is likely to be increased. But even if the tug is in control of the towage, the tow owes obligations pursuant to the implied terms set out in *The Julia* to use proper skill and diligence and to exercise reasonable care not to increase the risks of the endeavour.

Tow in control

2.80 Where the tow has the control of the navigation, the tow is obliged to take reasonable care as to the course chosen and as to the navigation adopted for the tug and tow. Many of the cases and examples cited above in relation to the tug (see Part A, above) will be equally applicable to the duties imposed upon the tow.

Tug in control

2.81 Even where the tug is in control, the tow must exercise reasonable care to look out both for herself, for the tug and for the accomplishment of the towage by both (see *per* Buckley LJ in *The Devonshire* cited above). Examples of the typical facets of the obligation to take care during and in and about the towage are as follows.

(i) The tow, even if disabled, must anticipate, observe and, in so far as she is able, follow the movements of the tug with all proper seamanlike response. If the tug takes action, the tow should assume that the tug is acting in a seamanlike manner and for a particular purpose and should conduct herself with proper promptitude accordingly. In *The Jane Bacon* (1878) 27 WR 35, a tug took action to avoid a fishing vessel. The crew of the tow delayed in shaping their course to follow the tug because they were unaware of why the tug had altered course as she did. The fishing vessel was struck by the towing hawser. It was held by the Court of Appeal that the tow was negligent.

The corollary of this is that if the tow does shape her course in response to the tug's sudden change of course reasonably relying upon the tug's judgement, she will not be negligent even if the tug's movement was itself negligent: see eg Bucknill, *Tug and Tow* (2nd edn, 1927), p. 51, and see also *Spaight v Tedcastle* (1881) 6 App Cas 217, where the House of Lords held that the tow was justified in assuming that the master of the tug "knew what he was about and would do what was necessary to avoid getting too close to the bank [at the mouth of Dublin harbour] unless the contrary manifestly appeared.

However, if the navigation of the tug is very bad, a failure to anticipate and act upon a particular manoeuvre may not render the tow liable. In *The Comet (Owners) v The W.H. No. 1 (and others)* [1911] AC 30, the owners of a lightship sued the owners of a hopper barge in tow of a tug for damage by collision between the lightship and the barge. The general control of the navigation was in the tug. The tug executed a sudden and unseamanlike manoeuvre as a result of which the barge collided with the lightship. In the Admiralty Court both the master of the tug and a bargee on the barge were held to have been negligent, and tug and tow were accordingly both held liable. The Court of Appeal and the House of Lords held that the bargee had not been negligent, and that the barge owners were therefore not liable. Lord Loreburn, in the course of his judgment, said:

> It is the duty of a tow to do her best under all circumstances to avoid collision, but she cannot be held blameworthy because she did not anticipate a thoroughly bad piece of seamanship on the part of the tug which had her in tow.

(ii) The tow must keep a good look-out and must exercise all ordinary navigation precautions. In *The Minnie Somers v The Francis Batey* (1921) 8 Ll L Rep 247, the Court of Appeal held the tow half to blame for a collision with a wreck-marking vessel. While the tug was to blame for taking the tow in too close a vicinity to the vessel, the tow was held to be blameworthy in not having exercised the necessary navigational precautions; had she parted and slipped the tow-line when she should have, the collision would not have occurred.

(iii) The tow must warn the tug of impending danger and, if it is perceived by the tow to be necessary, must check the tug's speed. A good example of this principle is *The Niobe* (1888) 13 PD 55. In that case, a tug collided with another ship while towing; the collision would have been avoided had there been a good look-out on board the tow and had the tow warned the tug of the impending danger of the other ship closing by "girting" the tug (by shearing to the right under a port helm). The tow was held liable. The action of the tug "might have been prevented by those on board the *Niobe*, if they had done their duty": *per* Sir James Hannen P at p. 60.

(iv) The tow must not allow the tug to proceed at excessive speed in fog or poor visibility (or to proceed at all if such conditions are severe). In *The Englishman and The Australia* [1894] P 239, the tug was found to blame for proceeding too fast in fog and the tow was also found to blame for allowing the tug to proceed at that speed. In *The Challenge and The Duc d'Aumale* [1904] P 41, the tow was held blameworthy for allowing her tug to continue towing ahead in fog after the fog signal of a vessel forward of the beam had been heard by the tow, but not by the tug.

(v) The tow must exercise all reasonable care in the planning and execution of the towage, eg such as the length of the hawser which the tug has out to her. See eg *The Abaris* (1920) 2 Ll L Rep 411, in which it was held that the tow was liable for the use of tow rope of excessive length.

(vi) The tow must exercise reasonable vigilance throughout the towage so as to be able to respond to any sudden events threatening the tug or a third party. Thus, in busy waters or shipping lanes, she should be ready, if necessary, to slip the tow-line so as to avoid damage or collision. See *The Abaris* (*op. cit*.), and see also *The Jane Bacon* (1878) 27 WR 35 where the tow was held to be negligent when proceeding in busy waters in having made the towage connection so fast that it could not be quickly cast off in the event of need.

This need to be alert to slip the lines if necessary is often one of the most important aspects of the tow's duty to exercise reasonable care in and about the towage (see also *The Valsesia* [1927] P 115 and *The Energy* (1870) 23 LT 601).

Other aspects of the tow's obligations: the duty of co-operation

2.82 The particular facet of the general duty upon the tow to exercise reasonable care about the towage will vary from case to case. Other examples of the duties of the tow to her tug (and to others) are as follows:

i The tow must, if it has a crew, and contemplated to be generated as a manned tow, be properly manned. This is an incident of the general requirement that the tow shall be seaworthy (as to which see above): see *The Scotia* (1890) Asp MLC 541.

ii Even if the tow is an unmanned object, such as a dumb barge or other waterborne object, the circumstances may be such as to require her to be manned by a riding crew, eg to tend her lights or to be ready to slip the towing connection. Thus in *The Harlow* [1922] P 175, a tug towing a tow made up of five barges collided with a steamer in the River Thames. The tow was held to have been negligent on the ground that each barge should have had a lighterman on board to control the lines; had they been so manned they would not have collided (see above, p. 177).

iii The tow must have due regard to the tug's navigational lights and signals. In *The Devonian* [1901] P 221, the tow was being held up by a tug while waiting to dock in the River Mersey. The tug was burning misleading lights as a result of which a vessel ran into the tow. The Court of Appeal held the tow in part to blame because, although she was in a position to exercise control over the tug, which was alongside her, and of her lights, she had improperly neglected to do so.

2.83 Put another way, the tug is subject to the ordinary duty of contractual co-operation which applies to a contract of towage as to any other contract. Thus each party has to do what is in its

power and what is reasonably practicable for it to assist the towage. In *The St. Patrick* (1930) 35 Ll L Rep 231, Bateson J held that the existence of a term in the contract that the tug would provide her hawser did not exclude the tow from giving assistance in case of need with her own cables or hawser. As he put it at p. 236:

> It is contemplated when contracts are made for the towage of ships from port to port that each of them will do the reasonable thing to bring the contract to a successful conclusion.

– in other words, an obligation of co-operation akin to the rule in *Mackay v Dick* (1881) 6 App Cas 251: see *Chitty on Contracts* (32nd edn, 2015), Vol. I at paras. 14.014 and 14.015.

CHAPTER 3

Standard form contracts: (I) The UK Standard Conditions for Towage and Other Services

PART A. INTRODUCTION

3.1 The UK Standard Conditions for Towage and Other Services ("the UK Standard Conditions") have a long pedigree dating back, through successive revisions, to 1933. In that year negotiation took place between the Chamber of Shipping and the United Kingdom Tug Owners Association on the subject of the large number of towage conditions in operation in various ports. No agreement was reached, but a set of "national" conditions came into being and was rapidly adopted by UK tug owners. They represent a paradigm standard form contract, being drawn up to protect the interests of the tug owner and relatively draconian in their exclusion and restriction of any possible liability which the tug might be under to the tow. However, while less evident than in the approach of making each party bear its own loss which is found in the "Towcon" and "Towhire" forms, the UK Standard Conditions in their latest revision do seek to achieve some measure of balance between tug and tow (see eg clause 4(c)). To the extent that the concept of construction *contra proferentem* survives as a modern tool of interpretation after *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904; [2012] Ch 497; *Transocean Drilling U.K. Ltd v Providence Resources plc* [2016] EWCA Civ 372 and *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 (as to which see Chapter 1 and Chapter 4), then in the case of the UK Standard Conditions, designed as a one-sided protectionist set of conditions and frequently imposed on a "take it or leave it" basis, the UK Standard Conditions remain apt to be read strictly and narrowly, albeit that their meaning is now largely hallowed in decided cases on previous versions. The UK Standard Conditions are in constant use in contracts for domestic towage operations and, as the heading of the Conditions as being conditions for towage "and other services" makes clear, in contracts for allied or connected services, for example to the offshore industry, which are provided by UK tug owners and operators. As a standard form contract, designedly in favour of tug owners, the UK Standard Conditions have been used not only by UK towage operators but are often also encountered, either unchanged or in some variant form, in other common law jurisdictions and, indeed, in other jurisdictions where tug owners have sought to adopt a standard form exclusionary wording (albeit subject to the local law).

3.2 The current form of the Conditions is the 1986 Revision. The terms of this revision are considered below (a facsimile of the Conditions is at Appendix 1). While the current revision, dating from 1986, is that most usually encountered and is used in many other countries (eg Australia: see *PNSL Berhad v Dalrymple Marine Services Pty Ltd (The Koumala)* [2007] QCA 429, discussed below; and in Canada, where, for example, they are mirrored in many respects by the Eastern Canada Standard Towing Conditions, "ECTOW", published by the Shipping Federation of Canada, used on the East coast and on the Great Lakes), in foreign jurisdictions towage operators may operate on older variants of the form: see eg the National Iranian Oil Corporation in its provision of tugs at Kharg Island, which still uses a "Tug Requisition form" which corresponds to a pre-1986 version of the UK Standard Conditions (see *The Borvigilant and the Romina G* [2003] 2 Lloyd's Rep 520 (CA) referred to below).

PART B. COMMENTARY ON THE CONDITIONS

Clause 1: introductory and definitions

Paragraph (a)

"1. (a) The agreement between the Tugowner and the Hirer is and shall at all times be subject to and include each and all of the conditions herein-after set out."

3.3 The UK Standard Conditions, like any standard form of contract, pre-suppose that a valid contract has been effectively concluded between tug and tow and that the Conditions have been effectively incorporated into that contract. As to the requirements for the conclusion of a contract, reference should be made to the leading contract textbooks (see eg *Chitty on Contracts* (32nd edn, 2015), Vol. I, chapters 2–7). Useful summaries in the marine context are to be found in Coghlin, Baker, *Time Charters* (7th edn, 2014), paras. 1.1–1.42 and Cooke, *Voyage Charters* (4th edn, 2014), paras. 1.3–1.26.

3.4 In practice, the commonest problem is not the question of whether or not a contract has been concluded between tug and tow, but whether the UK Standard Conditions (or such other standard forms as are in question) have been effectively incorporated in the concluded contract which the parties have arrived at. The incorporation of terms or conditions can be achieved in one of three ways:

i *Expressly*. This presents the least difficulty. Thus, the fixture recap between tug and tow, or more usually their brokers, will provide that the Conditions are to apply, eg: "all other terms as *per* UK Standard Conditions" or "Form/Terms: UK Standard Conditions 1986." Towage cases on express incorporation reflect faithfully the general contract cases. In *McKenzie Barge & Derrick Co v Rivtow Marine Ltd* [1968] 2 Lloyd's Rep 505, it was held that terms contained in an invoice delivered after the towage contract had been concluded were ineffective. In *Symonds v Pain* (1861) 30 LJ Ex 256, however, receipts given to the tow containing standard terms were held to be an effective communication because, *inter alia*, of a previous course of dealing.

ii *By a course of dealing between the parties*. This requires more than just a series of previous transactions (see *McCutcheon v David Macbrayne Ltd* [1964] 1 WLR 125). It requires conduct by both parties showing that they intend their dealings to be on terms to be ascertained by reference to a particular document, eg the sending of invoices over a long series of transactions, which invoices incorporate or refer to a standard form and which have never been questioned by the recipient (see eg *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461). An example of incorporation by a course of dealing in the towage context is given by *The Tasmania* (1888) 13 PD 110. The tow engaged the services of the *Tasmania*. The tug owner used to contract with, *inter alia*, the tow owner on terms which excluded liability for damage done by certain named tugs (which did not include the *Tasmania*). The owner of the tow was a director of the tug-owning company and knew well of the terms. The court held that it made no difference that the *Tasmania* was not one of the tugs specifically named in the tug owner's terms. It stated (at p. 114):

> This course of dealing created an agreement with the company that the company should not be liable for damage to his vessels while in tow of the company's tugs and that this would be incorporated into any contract of towage not specifically excluding it, which the plaintiffs their servants or agents might enter into with the company.

The court continued:

> if the plaintiff had not been a director of the tug company and had not had previous dealing with it, it would have been necessary for the tug company, in order to free itself from liability

> for the negligence of its servants in the execution of a contract of towage, to show that the plaintiff had notice of the special terms on which the company did its business. But the plaintiff, both as director and a customer of the company knew those terms. Suppose that instead of the *Tasmania* one of the tugs named in the printed notice had rendered her services, and the plaintiff, being on board his smack, had thrown the rope to the tug which, from darkness or other cause, he did not recognise as one of the company's fleet, he could not in that case have been heard to say, on discovery that the tug he had employed belonged to the company, that he was not bound by the exemption clause because he did not know at the time that it was one of the company's tugs. This course of dealing created an agreement with the company that the company should not be liable for damage to his vessel while in tow of the company's tugs, and this would be incorporated into any contract of towage not specifically excluding it, which the plaintiff, or his servants, might enter into with the company . . . The plaintiff impliedly agreed with the tug company that in the event of employing the *Tasmania* it was to be on the same terms as those on which he had previously employed the company's tugs and, therefore, that the clause exempting the company from liability was in the circumstances of the case [ie collision caused solely by the negligence of the tug master who was at the wheel of the tug at the time] binding on the plaintiff with reference to the *Tasmania* as well as to the tugs specifically named in the printed notice.

iii *By reason of the common understanding in the trade*. In *British Crane Hire v Ipswich Plant Hire* [1975] QB 303, a standard trade form for crane hiring was held to apply, albeit there was no course of dealing, because as Lord Denning MR put it at p. 311:

> both parties knew quite well that conditions were habitually imposed . . . and . . . knew the substance of those conditions . . . the conditions . . . should be regarded as incorporated . . . on the common understanding which is to be derived from the conduct of the parties.

3.5 Thus if barge operators at a place know and expect all contracts of towage entered into by the tug operators at that place to be on the UK Standard Conditions (for example), this may be sufficient to achieve incorporation even if nothing is said about them in making the particular contract. The position might be different for a foreign vessel calling at a UK port for the first time, since the *British Crane Hire* test, as enunciated by Lord Denning MR, is posited on it being so well-known and so commonly the case amongst those contracting that the contracts would be on a certain set of terms that it is a necessary implication (akin to that by reference to the officious bystander test) or, *sed quaere*, equivalent to customary in the trade.

Paragraph (b)(i)–(iii)

"(b) for the purposes of these conditions

(i) 'towing' is any operation in connection with the holding, pushing, pulling, moving, escorting or guiding of or standing by the Hirer's vessel, and the expressions 'to tow', 'being towed' and 'towage' shall be defined likewise.

(ii) 'vessel' shall include any vessel, craft or object of whatsoever nature (whether or not coming within the usual meaning of the word 'vessel') which the Tugowner agrees to tow or to which the Tugowner agrees at the request, express or implied, of the Hirer, to render any service of whatsoever nature other than towing.

(iii) 'tender' shall include any vessel, craft or object of whatsoever nature which is not a tug but which is provided by the Tugowner for the performance of any towage or other service."

3.6 These definitions show the potential width and breadth of the modern towage service and they extend "towage" and the coverage of the UK Standard Conditions to any marine operation being performed by the tug (or tender) to whatever water-borne object is the subject of the service (cf. Dr Lushington's definition of towage given in 1849 in *The Princess Alic*e, 3 W Rob 138 at p. 139). However, while the operations covered by "towing" under clause 1(b)(i) will embrace

the usual towage service such as the towing, holding up and escorting of the tow (whatever it is), they will not extend to cover more general "other services" such as anchor handling, supply and handling work and services ancillary to the offshore industries.

3.7 The importance of whether the service performed by the tug falls within "towing", albeit as widely defined as it is in clause 1(b)(i), or is to be regarded as some "other service", lies in the subsequent provisions in clause 1(b)(iv) and (v) which define the scope of the service to which the UK Standard Conditions, with their exemptions from liability, apply.

Paragraph (b)(iv): "whilst towing"

"(iv) The expression 'whilst towing' shall cover the period commencing when the tug or tender is in a position to receive orders direct from the Hirer's vessel to commence holding, pushing, pulling, moving, escorting, guiding or standing by the vessel or to pick up ropes, wires or lines, or when the towing line has been passed to or by the tug or tender, whichever is the sooner, and ending when the final orders from the Hirer's vessel to cease holding, pushing, pulling, moving, escorting, guiding or standing by the vessel or to cast off ropes, wires or lines has been carried out, or the towing line has been finally slipped, whichever is the later, and the tug or tender is safely clear of the vessel."

"Whilst towing": significance

3.8 The importance of clause 1(b)(iv) is that it defines the period of the towage service during which the UK Standard Conditions and the regime of liability applicable under those conditions applies to the parties and to their operations. Since collisions and mishaps most often occur when the tug is engaged in close-quarter work in effecting the tow or when the line or hawser is being slipped at the conclusion of the service, the precise parameters of "whilst towing" are often of acute importance.

3.9 Clause 1(b)(iv) defines the duration of the towage operation in much wider terms than it is defined at common law. At common law, the towage starts or is deemed to start when the towage connection has been passed to or from the tug (see *The Clan Colquhoun* (1936) 54 Ll L Rep 221). Under clause 1(b)(iv), the start of towage may occur much earlier.

3.10 The period "whilst towing" fixed by clause 1(b)(iv) defines the towage service as continuing between the two fixed points of commencement and termination. Once "towing" commences under the clause, it continues until it ends on the happening of one of the events referred to in the clause irrespective of what the tug is or is not actually doing at any given time. The UK Standard Conditions thereby avoid a potential difficulty for the tug which is encountered with other clauses that define the towage on the basis of a continuing operation being performed by the tug. One such clause was that considered in *The Baltyk* [1947] 2 All ER 560. The clause provided that the contract terms only applied "whilst the towage . . . or assistant services are being performed." The tug was engaged on a tow from Manchester to Eastham Locks. The towage was interrupted for eight hours en route during which the tug was damaged. The tug sued for an indemnity under the conditions. The tow contended that the towage had been stopped at the time of damage. This argument was rejected by Pilcher J:

> In the present case there is no question that the towage had commenced and the conditions had unquestionably commenced to be applicable on the passage to Partington. The condition which constituted the master and crew of the tug the servants of the ship only continued "whilst the towage . . . or assistant services are being performed." Counsel for the defendants argued that these words meant, "while some physical force is being exerted by the tug on the ship, either by strain imposed on a tow rope, or by the tug pushing, without a tow rope." I am satisfied that such an interpretation is too narrow, and that a tug is performing towage, and docking or assistance services when she is fast to the ship, whether at the material time she happens to be exerting any force on the movement of the tow or not. Similarly, it is clear that she may be performing docking or assistance services by pushing with her nose, even though she has no tow rope fast. What precisely is meant by "piloting" services when used in reference to a tug I do not know and counsel were unable to tell me. It is clear, however, that the conditions in the present contract are intended to apply when such a service is being per-

> formed and the word "piloting" seems at least susceptible of an interpretation which would permit of its being carried out without any physical connection or contact between tug and tow. In the present case the [tug] only moved away from [her tow] and went alongside No. 3 tip because if she had remained moored alongside the vessel she would to some extent have obstructed the passage of vessels up and down the canal. I am satisfied that . . . the [tug] was at all material times "under the control" of the *Baltyk* in that she was ready to obey orders received from the ship, she was manoeuvring into a position to establish connection so as to continue the physical operation of towage and assistance which her owners had contracted to perform . . .
>
> . . . When, as in this case, the contractual service of towage and assistance in its physical sense has been interrupted for the ship's purposes, it would be wrong to hold that an accident which occurs to the tug while, in response to orders from the ship, she is manoeuvring in close proximity to the tow for the purpose of making fast, did not occur, to use the words of the contract in this case "whilst the towage or assistance services are being performed." To hold otherwise would, in my view, put an unduly limited construction on the words "towage or other services" even when those words appear in a clause of exception, which . . . has to be construed *contra proferentem*.

3.11 Similarly in *The Ramsden* [1943] P 46, the Barrow-in-Furness towage rules applied to any damage "while the tug is in attendance upon or engaged in any manoeuvre for the purpose of making fast." The tug was in the dock with the tow and from 50 feet away suddenly turned and collided with the tow. Bucknill J held that the tug could have been doing nothing else other than manoeuvring (albeit very unskilfully) to make fast and that, accordingly, the towage rules applied.

3.12 Clause 1(b)(iv) by its different approach to defining the towage avoids the need for the tug to show that the towage services are actually being performed at a time when damage is sustained by the tug or the tow.

3.13 Although the tug and tow may be "towing" within the meaning of clause 1(b)(iv) of the UK Standard Conditions, it should be noted that for the purposes of compliance with the Collision Regulations (see Chapter 10 below) the question of whether or not the tug is towing and the tow is being towed will be a question of fact. If the two vessels are either stopped or are making way through the water independently of each other and if no impulsion or traction is being rendered by the tow-line by the tug to the tow, the tow is not under towage for the purpose of the Regulations (see eg *The Valiant* [1921] P 312). This will be so irrespective of whether, as between the tug and tow as parties, the "towage" is deemed contractually to be continuing.

The commencement of "towing"

3.14 Rather than deeming towage to commence simply at the moment of the passing of the tow-line between tug and tow as is the position in common law, the UK Standard Conditions deem towing to commence at whichever is the sooner of either this moment or "when the tug or tender is in a position to receive orders direct from the Hirer's vessel to commence" the service.

3.15 The term "in a position to receive orders" has received consideration in several cases as tug owners have sought to put themselves within the cover of the UK Standard Conditions as soon as possible and tow owners and hirers of tugs have sought to push back the moment at which the tug will benefit from the Conditions' exemptions.

3.16 In *The Uranienborg* [1936] P 21, a tug was scheduled to take up her tow at 1100 hours. She came up slightly early. At the time of her arrival the tow was still discharging cargo and she was not in a position to be able to effect the towing connection or to give orders to the tug to that end. The tug approached at too fast a speed, came through a line of buoys and, as the result of excessive speed combined with the failure to give orders to reverse her engine in time, she ran into *The Uranienborg* and did very severe damage. The tug sought to avail herself of the UK Standard Conditions on the basis that she was sufficiently close to the tow to be "in a position to receive orders." This was rejected by the Admiralty Court (Sir Boyd Merriman P). The court stated:

> in effect what [counsel for the tug] has argued is this: If it is shown that the tug was there because of a contract of towage and that she is within reasonable hailing distance of the ship at a reasonable time

> in reference to the contract of towage, the words are satisfied. Her physical position is within hail, and that is enough. She is there waiting the moment when somebody gives her the orders which she is prepared to receive. She will receive them direct because she is within hailing distance, and there is no more to be said about it.
>
> I do not think that that is a reasonable interpretation of the words. Of course if that be the only possible meaning of the words, then even if they may appear to lead to an absurd conclusion that cannot be helped, and effect must be given to them. But I do not think that that is what this clause means. Whether one looks at the corresponding point of time at which the towage ends, I think one is driven to the conclusion that something narrower than that is meant. I doubt whether the word "position" is only used in the sense of local situation, I think it involves also the conception of the tug being herself in a condition to receive and act upon the orders. But however that may be, the orders which she is to be in a position to receive are orders to pick up ropes or lines – not orders generally, but those specific orders, and I think that that must have some reference to the intention of those on board the ship to give those orders, and to the readiness of those on board the tug to receive them.

3.17 In other words, for towing to commence the President held that:

i at the very least the tug had to be ready to receive and act upon the orders; and
ii additionally, the moment had to be one at which orders might reasonably be expected to be given by the tow.

3.18 The tug in this case was well within hailing distance, but "in no other sense" was tug or tow, objectively viewed, ready for further orders (see eg at p. 28).

3.19 However, in *The Glenaffric* [1948] 1 All ER 245, the decision in *The Uranienborg* was distinguished. In that case, the tow lying at anchor off Barry Docks was approached by a tug pursuant to a towage agreement. When the tug was within 20–30 feet of the tow, the tug-master was hailed to keep away. He therefore dropped astern until he saw the ship's navigation lights put on, when he again approached the ship and was told that he was not wanted yet and that he was to wait until the ship "got in a bit." He waited until the ship had gone further ahead, and then he approached her again, and was ready to take her in tow, but he received an order to tell the dock master that the ship would not dock on that tide. As he dropped back once more, he touched the ship and was damaged.

3.20 The Court of Appeal held that the tug was "in a position to receive orders", notwithstanding that the tow had declined her services and had stated her unreadiness to receive the tow-line. The court diluted the requirement stipulated in *The Uranienborg* that the tow should have been ready (subjectively?) to give orders for the towage and held that it was enough that the tug reasonably expected to receive orders from the tow. The fact that the tow, subjectively viewed, did not intend to give such orders was immaterial. Scott LJ stated ([1948] 1 All ER at p. 247):

> It is clear from the evidence, as the judge held, that the tug was in that position. The mate was standing by ready to heave the line and so pick up a rope from the ship, and I reject the argument of counsel for the shipowner because, to make it good, he has to read into the clause, after the words "when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines", the further words "and the ship is ready to give orders", which are not there . . .. After the tug has arrived at the ship at a proper time, namely, the normal time in accordance with ordinary practice, to take the ship in tow, she is from then in attendance on the ship and necessarily then begins to incur the risk of damage to herself by contact with the ship . . . I can see no possible ground for implication according to the ordinary rule of construction that nothing can be implied, unless it is necessary to give business efficiency to the bargain that the two parties must have intended when they made the contract.

Somervell LJ stated (at p. 248):

> the tug did reasonably expect orders to be given from the ship, that is to say, orders in relation to towage and in those circumstances it seems to me that the clause applies.

Bucknill LJ disregarded the requirement that the tow should be ready to give orders and stated (at p. 247):

> in Clause 1 the period is covered until the tug is safely clear of the vessel. In this case the tug was never safely clear of the vessel, and, if she was "towing" within the meaning of Clause 1 when she had come alongside and was in a position to comply with orders to proceed to pick up ropes, she was not clear of the vessel at the time the damage was done.

3.21 The decision in *The Glenaffric* emphasised the position of the tug to receive orders and fell back from Sir Boyd Merriman's interpretation of the clause as having regard also to the position of the tow to give such orders. In the Scottish case of *Partafelagid Farmur v Grangemouth & Forth Towing Co Ltd* [1953] 2 Lloyd's Rep 699, a similar emphasis on the position of the tug rather than the tow was adopted by the court. The Court of Session held that:

> the defenders proved their case that the tug was not only in a position to receive orders direct from the ship to take up ropes or lines, but that an order to this effect was in fact given to the tug by the pilot, and that the collision took place "whilst towing" in terms of Condition 1 of the United Kingdom Standard Towage Conditions.

3.22 However, in *The Impetus* [1959] 1 Lloyd's Rep 269, the court (Karminski J) re-emphasised the approach in *The Uranienborg*. In that case, the tug approached the ship at speed in accordance with the usual practice when attending upon her, and when attempting to turn in order to come on a parallel course with the ship the collision occurred by the admitted negligence of the tug. At that moment the tug was ready to receive orders to heave a line on board ship, but was not in the position to throw the heaving line because she was approaching the tow at 90 degrees. Karminski J rejected the argument that because the tug had, by her turning away from the tow, put herself in a position where she could receive but not comply with the tow's order, she was not "towing" within the clause. As the judge put it:

> Clause 1 means what it says and the conditions attach when the tug is in a position to receive orders to pick up ropes or lines. This presupposes that the ship is ready to give such orders, if such orders are required. I cannot, however, accept counsel's submission that a tug can thereafter put herself outside the conditions by getting into a position which may for a short period make it impossible for her to carry out such orders. To import such a condition when the tug is already in attendance on the ship, and, therefore in danger of incurring damage, would . . . be without justification.

3.23 These apparently conflicting decisions were considered by Brandon J in *The Apollon* [1971] 1 Lloyd's Rep 476. In that case, the plaintiff's tug was under a towage contract on the terms of the UK Standard Conditions to assist the defendant's vessel to a berth in Newport docks. The tug was lying adrift with engines running at standby at the quayside. According to the plaintiff's evidence the master was on the bridge and the crew members were at their stations. When the bridge of the vessel was abreast of the stern of the tug the dock pilot aboard the vessel stated that the tug was to take a line aft and act as stern tug. The tug had to manoeuvre round to starboard in order to fall in astern of the vessel and take a rope from her. Whilst carrying out that manoeuvre the tug's port propeller struck a spare dock gate which was moored to the dock wall. The plaintiff claimed an indemnity against the defendant in respect of the damage done and received by the tug. Brandon J distilled the principles to be derived from the three decisions referred to above as follows (at p. 480):

> It seems to me that authorities of this kind are only valuable in so far as it is possible to extract from them some general principle. In so far as they are decisions on the facts of the particular cases, which were all different from the facts of this case, while it is helpful to see how other judges approached the matter, it does not seem that the cases assist very greatly. However, I believe that it is possible to extract from these cases taken together certain general principles which I would state in this way. It seems to me that, for a tug to be in a position to receive orders direct from the hirer's vessel to pick

> up ropes or lines, three conditions must be fulfilled. *The first condition* is that the situation is such that those on board the tug can reasonably expect the ship to give the tug an order to pick up ropes or lines. *The second condition* is that the tug is ready to respond to such orders if given. *The third condition* is that the tug should be close enough to the ship for the orders to be passed direct; in other words, that the tug should be within hailing distance (emphasis supplied).

3.24 He rejected the argument that because the tug, in order to comply with the order received, would have to steam away from the tow and might, as a result, thereby put herself out of the position to receive an order, she fell outside the clause. At p. 480 he stated:

> in most cases, when an order is given to a tug to connect to a ship, it will be necessary for the tug to carry out certain manoeuvres in order to execute the order. Those manoeuvres may involve her in turning round a right angle or 180 degrees or even more, or they may involve her in steaming round the ship's bow or stern. There are infinite manoeuvres one can visualise a tug having to execute in such a situation when such an order is given . . . I cannot see that the fact that a tug has to manoeuvre in some way in order to carry out an order when given shows that she is not in a position to receive that order.

3.25 It is submitted that the statement of the law in *The Apollon* correctly summarises the effect of previous authorities (this passage was recently approved as correct by the Queensland Court of Appeal in *PNSL Berhad v Dalrymple Marine Services Pty Ltd (The Koumala)* [2007] QCA 429; (2008) 737 LMLN 2: see below). While certain commentators (eg Kovats, *The Law of Tugs and Towage* (1980), p. 43) have in the past criticised the requirement that the tug be within "hailing distance" of the tow by reference to the possibilities of VHF and R/T communication, such criticism seems misplaced. The towage service is to commence under clause 1(b)(iv) of the UK Standard Conditions when the tug, in all practical respects, is alongside and at the disposal of the tow. To extend that state of disposal to the position of the tow several miles out on her approach run in to the tow is both unrealistic and fails to give the meaning of the words "to receive orders *direct* from the Hirer's vessel" (emphasis supplied). The epithet "direct" signifies the close proximity and immediacy of preparation between tug and tow which Brandon J described as being within hailing distance. Such, realistically and commercially, is when the towage service in fact begins.

3.26 Commonwealth authorities have similarly placed emphasis on the readiness of the tug to act on orders received as well as upon the physical proximity of tug to tow. In *Australian Steamship Pty Ltd v Koninklijke-Java-China-Paketvaart Lynen NV Amsterdam* [1955] ALR 462, it has been held in Australia that "whilst towing", commencing from when the tug was in a position to receive orders direct from the hirer's vessel to pick up ropes or lines or when the towrope had been passed to or by the tug, whichever was the sooner, meant that:

> the orders that a tug was in a position to receive were orders which could only be carried out when the tug was in a state of readiness, and this means both correctly positioned so far as the vessel was concerned and with everything ready on board the tug itself to pick up the necessary ropes or lines.

3.27 If the tug was not in a position to carry into effect any orders which she might be given, it was irrelevant that the tug was within hailing distance of the hirer's vessel so that she could receive orders. The tug had to be not only within hailing distance but also in a position to carry the tow's orders into effect at that time and in that place.

3.28 A similar approach was taken in *PNSL Berhad v Dalrymple Marine Services Pty Ltd (The Koumala)* [2007] QCA 429; (2008) 737 LMLN 2; noted by Lewins in (2007) 21 A&NZ Mar LJ, by the Supreme Court of Queensland (Court of Appeal). In that case a collision occurred between a tug, *Koumala*, and a vessel which she had been ordered to tow, the *Pernas Arang*. The Queensland towage contract was on the same terms as the UK Standard Conditions in all material respects. The collision was caused as the result of a steering failure on the *Koumala* when it was 150 metres from the *Pernas Arang* and moving at 5 knots towards her, with the failure and the collision found to have been caused by the negligence of the tug's chief engineer. At first instance

it was held that the collision did not occur "whilst towing" within the meaning of clause 4(a). The *Koumala* was not in a position to receive orders direct from the *Pernas Arang* to pick up ropes or lines when the collision occurred, and so the defendants were not liable to the plaintiffs under that clause. The pilot's order to make fast to the starboard shoulder and starboard quarter was not an order of the kind referred to in the definition of the expression "whilst towing" and was only a general order. The Court of Appeal dismissed the appeal, holding that the definition of "whilst towing" plainly envisaged that the defined state of affairs would commence only when the tug and the tow were in close proximity and that the tug had to be in a position to receive orders direct from the tow. The orders described in the definition in the clause were ones which themselves were suggestive of close proximity and the word "direct" conveyed the notion of physical immediacy. On the facts as found, at the time the *Koumala*'s steering failed, she was not in a position to commence, pushing, holding, moving, escorting, or guiding the vessel or to pick up ropes or lines, but was still manoeuvring to put herself in that position. Reliance had been placed by the defendants on *The Impetus* [1959] P 111 (as to which see above) as authority for the proposition that, once in a position to receive orders, the tug did not put itself outside the definition by "getting into a position which may for a short period make it impossible for the tug to carry out the ship's orders." The Court of Appeal rejected that argument and distinguished the facts before it from those in *The Impetus* since the *Koumala* became disabled when it was approaching the *Pernas Arang* for the first time, but was still a substantial distance from her and, moreover, the *Koumala* was never able to put itself in a position to receive an order once the steering failed and did not come within "hailing distance" of the *Pernas Arang* immediately before its steering failure.

3.29 It may be noted that the Court of Appeal approved the analysis of the authorities in the second edition of this work (which, gratifyingly, the court described as a "major text book on this subject": *see per* Williams JA at para. 13).

The involvement of more than one tug

3.30 What if more than one tug or tender is involved in the service? Does the service commence *vis-à-vis* all tugs when the first is in a position to receive orders, or does each tug have to have attained that position before the UK Standard Conditions apply to them? The question is one of construction. If two or three tugs are agreed to be "the tug", clause 1(b)(iv) fits unhappily with treating them all as "the tug" for the purposes of the clause so that if one of them is in the position to receive orders it is sufficient to start the towage service. In *The Clan Colquhoun* [1936] P 153, the terms (in that case the Port of London Authority's Standard Conditions) deemed towage to commence "when the tow rope has been passed to or by the tug." It was contemplated under the towage contract that there would be two tugs. One made fast forward. The other collided making fast astern. It was held that under the Port of London Authority's clauses (which were very similar to the UK Standard Conditions), "the tug" meant "each of the two tugs" so that the second tug's negligence was not covered by the clauses simply because the first tug had achieved the position to receive orders. As Bucknill J put it (at p. 163):

> Clause 1, to which I have referred, says that the towage must be deemed to have commenced when the tow rope has been passed to the tug. But in this case the contract is for towage by two tugs. In such a case does the expression "the tug" mean "each of the two tugs" or does it mean "either of the tow tugs"? The terms, taken as a whole, appear to contemplate the engagement of two tugs. The view that the words "the tug" in cl. 1 mean "each of the two tugs" in this case is borne out by Clause 2. Clause 2 says that during the towage the masters and crews of the tugs shall cease to be under the control of the Port Authority and shall become subject in all things to the orders and control of the master of the ship. But if the towage starts when one of the two tugs makes fast, how can the second tug be under the control of the master of the tow if that tug is at the other end of the dock and is making her way to the ship to be towed?

It is submitted that the position is the same under the UK Standard Conditions.

The cesser of "towing"

3.31 Pursuant to clause 1(b)(iv), the towage service terminates upon the latest of the following two events or occurrences:

i *either* "the final orders from [the tow] to cease holding, pushing, pulling, moving, escorting, guiding or standing by [the tow] or to cast off ropes wires or lines have been carried out";
ii *or* "the towing line has been finally slipped",

subject to the proviso that at the time of such event or occurrence "the tug or tender is safely clear of the vessel."

3.32 The words "the towing line has been finally slipped" were considered by the Australian High Court in *The Walumba* [1964] 2 Lloyd's Rep 387. In that case, a tug, *The Walumba*, was requested by the Australian Shipping Commission to refloat and tow a grounded vessel. The tug made fast and began heaving, but was carried by the tide towards rocks; in manoeuvring to avoid these rocks, the tow-line parted and fouled the tug's propeller. The tug was immobilised and required salvage assistance. The tug sought to recover the cost of this from the hirer under clause 3 of the UK Standard Conditions. The hirer argued that the tug was no longer towing. In allowing the claim, the High Court of Australia held that the words "ending when . . . the tow rope has been finally slipped" did not refer to the accidental parting of the tow-line during the towing and that accordingly the tug's propeller was fouled "whilst towing" and clause 3 of the conditions applied.

Paragraph (b)(v)–(vii)

"(v) Any service of whatsoever nature to be performed by the Tugowner other than towing shall be deemed to cover the period commencing when the tug or tender is placed physically at the disposal of the Hirer at the place designated by the Hirer, or, if such be at a vessel, when the tug or tender is in a position to receive and forthwith carry out orders to come alongside and shall continue until the employment for which the tug or tender has been engaged is ended. If the service is to be ended at or off a vessel the period of service shall end when the tug or tender is safely clear of the vessel or, if it is to be ended elsewhere, then when any persons or property of whatsoever description have been landed or discharged from the tug or tender and/or the service for which the tug or tender has been required is ended.

(vi) The word 'tug' shall include 'tugs', the word 'tender' shall include 'tenders', the word 'vessel' shall include 'vessels', the word 'Tugowner' shall include 'Tugowners', and the word 'Hirer' shall include 'Hirers.'

(vii) The expression 'tugowner' [*sic*] shall include any person or body (other than the Hirer or the owner of the vessel on whose behalf the Hirer contracts as provided in Clause 2 hereof) who is a party to this agreement whether or not he in fact owns any tug or tender, and the expression 'other Tugowner' contained in Clause 5 hereof shall be construed likewise."

3.33 Clause 1(b)(v) defines the commencement and termination of services being performed by the tug which do not constitute "towing" within the meaning of clause 1(b)(i).

3.34 For the commencement of the service, two geographical locations are contemplated with different states of the tug's readiness to perform the service. Thus the service can either start at one of two places:

i At the place designated by the hirer when the tug is placed physically at the disposal of the hirer there. The concept of being "at the physical disposal" of the hirer has been described by past commentators as "a somewhat woolly concept" (Davison & Snelson, *The Law of Towage* (1990)) and as a "nebulous phrase" (Kovats, *The Law of Tug and*

Towage (1980)). It is respectfully submitted that when read with the requirement that the tug shall be at the place designated by the hirer, the concept presents no difficulties and is clear. The tug is at the physical disposal of the hirer for the terms of the service when she is both tendered to the hirer for hirer's orders and is physically ready to comply with those orders. The concept relates both to the physical readiness of the tug to do what the hirer requires of her as well as to her being put at the hirer's disposal in the sense of "awaiting orders." The state of the tug is akin to that of a vessel which tenders notice of readiness under a charterparty on arrival at the loadport or discharge port. The tug similarly arrives at the "designated place" and will put herself at the disposal of the hirer. If the tug is not in fact physically ready to perform the service required of her (eg because a particular hawser or item of tackle necessary for the operation is absent), the service will not be deemed to commence irrespective of the tug's arrival at the designated place. Compare in the ordinary charterparty context *The Tres Flores* [1974] QB 264 (vessel tendered NOR to load but in fact could not do so because infestation made her holds unready to load cargo; held NOR invalid because vessel not ready in all respects for the operation) and *The Virginia M* [1989] 1 Lloyd's Rep 603 (insufficient bunkers for cargo operations). In the United States the courts have adopted the same approach: see eg *Fido v Lloyd Brasiliero*, 283 F 62 (2d. Cir. 1922); see also Cooke, *Voyage Charters* (4th edn, 2014) para. 15.31 *et seq*.).The test of "physical disposal" also signifies that it is the state of the tug which alone determines whether or not the service begins. If the tug arrives at the stated place, is tendered to the hirer and is ready for the service, the service begins, albeit that the hirer is not actually ready to give orders for the service.

ii At the vessel (if that is the designated place), when the tug is "in a position to receive and forthwith carry out orders to come alongside." This concept is very similar to that found in clause 1(b)(iv), which was considered by the court in *The Apollon* [1971] 1 Lloyd's Rep 476, and it is submitted that the same principles will apply. Instead of being in a position to receive orders "direct" from the tow in clause 1(b)(iv), the tug is to be "at the vessel" (ie in her immediate vicinity, and able to come alongside forthwith). The same physical immediacy and proximity between tug and vessel as is required under clause 1(b)(iv) is achieved by different wording.

3.35 Clause 1(b)(v) was briefly considered in *The North Goodwin No. 16* [1980] 1 Lloyd's Rep 71. This is a rare case of *the tow* seeking to argue that the UK Standard Conditions and the contractual towage thereunder had commenced. A tug, the *Northsider*, was engaged to tow a light vessel to Smith's Dock, North Shields. She was held off the River Tyne by another tug awaiting the *Northsider*. Weather conditions were very poor but the *Northsider* left the mouth of the River Tyne and proceeded to the tow where she arrived alongside. The holding tug lost control of the tow which began to drift towards the shore. The *Northsider* took her in tow. She claimed salvage for so doing. The tow argued that the service performed was the contractual towage service which, pursuant to the UK Standard Conditions, had commenced and that the *Northsider* was, accordingly, not a volunteer and could not claim salvage. Sheen J held that the *Northsider* was not a volunteer since the contractual towage or service under clause 1(b)(v) had already commenced and he dismissed the claim for salvage. It is unclear from the report under which limb of clause 1(b)(v) the tow argued the case fell. Given that the *Northsider* was to pick up the light vessel from the other tug, it would appear to be the second limb, although Sheen J at p. 74 stated:

> *Northsider* came out on a towage contract . . . it being conceded that [she] had come out of the protection at the piers pursuant to the terms of her contract,

and based his decision on this; this would appear to put the *Northsider* within the first limb (ie physically at the disposal of the light vessel in the waters off the mouth of the River Tyne).

3.36 For the termination of the service, the clause provides that the service for which the tug was engaged must have ended. However, if the service ends at or off a vessel, there is the added requirement that the tug must be safely clear of her. This covers the tug while manoeuvring away from the vessel and while slipping any connection which she has out to the tow (see also *The Walumba* [1965] 1 Lloyd's Rep 121, considered above). If the service is to be ended at some other place other than the vessel, the service ends when any equipment or persons (eg such as a superintendent or diving team) have been landed or, as the clause rather tritely states, when the service is ended.

3.37 Clause 1(b)(iv) makes "tug" include "tugs" but, on the other hand, does not provide that "tugs" shall mean "tug" where the context so requires it. The question which the court had to consider in *The Clan Colquhoun* [1936] P 153, where two tugs were used and one, but not the other, had passed the tow rope, that event constituting the commencement of towing under the form being considered, is left unresolved by the UK Standard Conditions. Indeed, the Conditions reinforce Bucknill J's conclusion in that case that the "tug" will mean "each tug" if more than one is used when considering the moment at which the line is passed to "the tug": see above as to the position where more than one tug is used.

3.38 For clause 1(b)(vii), see under clause 5 below.

Clause 2: hirer's warranty of authority

"2. If at the time of making this agreement or of performing the towage or of rendering any service other than towing at the request, express or implied, of the Hirer, the Hirer is not the Owner of the vessel referred to herein as 'the Hirer's vessel', the Hirer expressly represents that he is authorised to make and does make this agreement for and on behalf of the owner of the said vessel subject to each and all of these conditions and agrees that both the Hirer and the Owner are bound jointly and severally by these conditions."

3.39 Under this provision, the hirer warrants that he has authority to enter into the contract with the tug on behalf of the owner of the vessel if the hirer is not the owner of the vessel to be towed and purports to agree to bind the owner of the tow to the contract with the tug. This clause is a common one in standard forms but is of very limited efficacy. Certainly, the hirer of the tug by this clause warrants his authority and in the event that the vessel is not made party to the contract, the hirer will be liable to the tug owner for breach of warranty of authority. However, when the hirer of the tug and owner of the tow are separate entities, the owner of the tow will only be liable upon a contract made by the hirer with the tug owner if the hirer had actual or ostensible authority to contract on the tow owner's behalf. The hirer of the tug cannot by himself, in the absence of actual or ostensible authority, bind the owner of the tow (see eg *The Ocean Frost (Armagas v Mundogas)* [1986] AC 717). A very similar provision is found in the BIMCO standard forms of contract "Towcon 2008" and "Towhire 2008" and has been the subject of consideration by the court, in the identical version of the clause contained in the previous version of the "Towcon" form, in *Lukoil Kaliningradmorneft plc v Tata Ltd and Global Marine Inc* [1999] 1 Lloyd's Rep 365 and [1999] 2 Lloyd's Rep 129 (CA), and its doubtful efficacy to confer ostensible authority by means of the "Towcon" clause alone has been emphasised. See below: Chapter 4.

Clause 3: vicarious liability of tow for tug

"3. Whilst towing or whilst at the request, express or implied, of the Hirer, rendering any service other than towing, the master and crew of the tug or tender shall be deemed to be the servants of the Hirer and under the control of the Hirer and/or his servants and/or his agents, and anyone on board the Hirer's vessel who may be employed and/or paid by the Tugowner shall likewise be deemed to be the servant of the Hirer and the Hirer shall accordingly be vicariously liable for any act or omission by any such person so deemed to be the servant of the Hirer."

Generally

3.40 This clause in broad terms seeks to transfer all responsibility for the tug's officers and crew and such others of the tug owner's employees who are engaged in the towage service to the hirer by deeming the tug owner's employees to be the hirer's during the service. Since the tug owner's employees are deemed to be the hirer's servants, it is the hirer and not the tug owner who is to be vicariously liable for their negligent acts and omissions during the service. The effect of the clause is different where the tug places reliance on it as between tug and tow and where the tug seeks to rely upon the deeming provision as against a third party who is claiming in respect of negligence on the part of the tug.

The period during which the clause operates

3.41 Where the tug is "towing" within clause 1(b)(i), the deeming provision operates "whilst towing", as to which see the commentary on clause 1. Where the tug is performing some service other than towing, the provision operates "whilst rendering any service other than towing" at the request, express or implied, of the hirer. This period will be defined by clause 1(b)(v) since it is the "service" which is defined in that clause which the tug will be rendering to the vessel.

Effect as between tug and tow

3.42 The clause is clearly drafted and is entirely effective as between tug and tow to transfer all responsibility for the acts and omission of the tug owner's servants engaged in the towing or service to the tow. This was established in relation to similar wording in *The President Van Buren* (1924) 16 Asp MLC 444. As to the provision by which the tug's crew were deemed to be the tow's employees, Hill J upheld the tug's reliance on the clause:

> The form of the contract aims, in the first place, at making the master and crew of the tug for the time being the servants of the ship which is being towed . . . If the first section, which begins: "The masters and crews of the tugs" and ends "are the servants of the owner or owners" of the vessel towed, is effectual to do that which it sets out to do, it does not much matter what the rest of the conditions provide, because it will be that which the Port of London Authority contemplates and if it effectually makes the masters and crews of the tugs servants of the ships which are being towed – servants for the time being – then it will follow that the owner of the tow cannot claim for damage brought about by people who for the time being are his own servants and he must also be liable for damage caused to the Authority's property by persons who for the time being are his servants, the servants of the owners of the tow . . . [The clause] sets out in terms that for all purposes connected with the towage, the master and crews of tugs are the servants of the owners of the tow.

Accordingly, the effect of the clause as between tug and tow is as follows:

i The clause gives the tug a complete defence to claim by the tow based on damage or liability sustained by the tow as a result of negligence by the tug and by the tug owner's servants. If the contract provides that the master and crew of the tug shall become the servants of the tow during the towage, then the owners of the tow cannot claim against the owners of the tug for damage done by the negligence of the crew of the tug, because by the very terms of the contract the tug's crew are for the time being the servants of the owners of the tow.

ii The clause will give the tug a cause of action against the tow in the event of negligence by the tug which causes the tug owner loss or damage or as a result of which he incurs a liability. It is to be noted that the mere presence in the towage contract of a deeming provision of this nature will be insufficient to confer upon the tug an indemnity from the tow in respect, for example, of tug crew negligence (see *The Devonshire and The St. Winifred* [1913] P 23). To achieve an indemnity, an express provision is required to this effect. While the clause, since it is not worded as such, will not be construed as an indemnity by

tow in favour of tug (see *Det Forenede DS v Barry Rly Co* (1919) 1 L1 L Rep 658 and *Cory & Son v France Fenwick* [1911] 1 KB 135), nevertheless it establishes that, as a matter of contract between tug and tow, the tug men are the tow's employees and servants.

3.43 The use of the word "Hirer" rather than "the vessel being towed" in conjunction with the deeming of the tug's crew to be the servants of the same will not, it is submitted, avoid the problem encountered by the tug owner in *The Riverman* [1928] P 33 (for the facts of this case, see para. 3.60 below) in a case where more than one vessel is being towed under separate contracts. In such a case there will be more than one "Hirer", who is described in the singular in this clause just as the towed vessel was in the clause being considered in that case. The potential inapplicability of the deeming clause in such circumstances should, therefore, always be specifically addressed by the tug owner in circumstances where he is towing a flotilla of water-borne objects under separate contracts by a clause in each contract making it clear that each "Hirer" is jointly and severally deemed to be employer of the crew.

Effect as between tug and tow and third parties

3.44 Clause 3 has no effect as against third parties (eg as against a third party vessel in collision with tug and tow). In such a case, where the third party is injured by or suffers loss and damage as a result of the act of a member of the tug's crew, the question of which of tug and tow is liable for that servant's acts will depend not upon the terms of the contract between tug and tow (being the two possible employers), but will depend upon which of the tug and tow actually had the right to control the servant both as to the task which he was to perform in and about the towage and as to the manner of their performance.

3.45 However, the tug will, if there is an indemnity provision in the contract (as there usually is in tandem with the deeming provision – see eg the UK Standard Conditions, clauses 3 and 4) be able to recover from the tow in respect of its liability to the third party.

3.46 Thus in *The Adriatic and The Wellington* (1914) 30 TLR 699, the owners of a ship claimed damages in respect of a collision by a vessel *Ella* with the *barge Adriatic*, which was in tow of the tug *Wellington*. The court said of the towage contract:

> The owners of the *Ella* with which the barge came into collision did not know anything about this contract or its terms. So far as they were concerned all they knew was that by the negligence of those navigating the tug *Wellington* the collision was caused . . . Whose servants were those who negligently navigated the tug? That was a question of fact . . . It was admitted by the tug master that he was employed and paid by the Alexandra Towing Co Ltd, and that he was subject to dismissal by them, and them alone. It was also undisputed, and indeed indisputable, that the sole control of the navigation of the tug and tow was with the tug. No one in the barge in tow had in fact any control over those in charge of the tug or any control over or any voice in the navigation of the tug, any more than a casual onlooker on the riverside would have. In these circumstances . . . the tug master and his crew were the servants of the tug owners. Whatever might be the legal rights of the tug owners and barge owners *inter se* under the towage contract, the owners of the *Ella*, who suffered injury by the negligence of those in charge of the tug, were strangers to that contract, and had a right to recover against the masters of the servants whose negligence caused the injury.

3.47 Subsequently the tug claimed an indemnity from the tow under the contract. The court held in *The Adriatic* (1915) 85 LJP 12 that the indemnity in favour of the tug covered negligence, and the tug owners were entitled to be indemnified in respect of the damage and costs awarded against them in the collision action and of their own costs in that action.

3.48 The question of which of the tug and tow is in control of the manoeuvre or aspect of navigation complained of by the third party as being negligent is, as has been seen above, a question of fact. To determine this question of fact, the Admiralty Court has applied the "control" test laid

down by the House of Lords in *Mersey Docks & Harbour Board v Coggins & Griffith* [1947] AC 1 in relation to an employee or servant who has two masters. That test can be summarised as follows: when an employee or servant has two masters, which master has control over the employee or servant in the doing of the act which leads to the commission of the tort? As it was put by Lord Porter in that case at p. 17:

> Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject-matter under discussion but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorised to do this he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it.

3.49 Thus in *The Polartank* (1948) 82 Ll L Rep 108, the claim arose out of a collision in the Manchester Ship Canal between a tug, the *Rixton*, acting as stern tug to a vessel, the *Polartank*, proceeding downstream, and a dumb barge, the *Lynn*, being towed upstream. The *Lynn* collided with both the *Polartank* and the *Rixton* due to the fault equally of the tug towing the *Lynn* and of the *Polartank*. A deckhand on the *Rixton* was injured and sued both vessels. The *Polartank* had contracted on a standard Ship Canal tug contract which deemed the crew of the tug towing her to be the servants of the tow during the towage. It was argued that the deckhand was accordingly the servant of the *Polartank*. Willmer J rejected this argument on two grounds. First, "the fact that there was an agreement between the plaintiff's normal employers [the Ship Canal] and the owners of the *Polartank* is, so far as the plaintiff is concerned, *res inter alios acta*." Secondly, he considered the *Mersey Docks & Harbour Board v Coggins* test as formulated by Lord Porter and stated (at p. 125):

> Now let me apply that test to the facts of this case. The evidence in this case is that the orders given by the ship to the tugs (orders it is true, which the tug has to obey) are confined to such orders as to start or stop towing and as to the direction in which to tow. These orders are normally conveyed to the tug from the ship by whistle signal, the practice being, I understand, to use a pea whistle to convey orders to the head tug and the ship's whistle to convey orders to the stern tug. But I wish to make it quite clear, having regard to the evidence which I have heard, that the only orders which the tug expects to receive in practice are general orders of the character that I have mentioned. It is not suggested that anybody in authority on board the ship has any possible right, even if he had the wish, to control the manner in which any individual member of the tug's crew should go about his individual share of the tug's work. It would, for instance, be no business of the master of the ship to instruct a deckhand of the tug as to how he, the deckhand, ought to make a particular rope fast, how to coil or uncoil a particular rope, or anything of that sort. So far as the details of the work of the plaintiff are concerned, it is quite clear on the evidence that he was solely under the control of his own superiors on board the tug, that is to say, the person who alone had authority to control the manner in which the plaintiff did his work was his own general master, the owner of the tug, through his appointed officers. In those circumstances applying as best as I can the test laid down . . . to the facts of this case, I feel that I must come to the conclusion that on no possible view could the plaintiff be regarded as a servant of the owner of the *Polartank*.

3.50 Willmer J adopted the same approach in *The MSC Panther and The Ericbank* [1957] 1 Lloyd's Rep 57. In this case, the *Panther* was towing the *Ericbank* in the Manchester Ship Canal; she was stern tug. The towage contract provided that the crew of the tug were deemed to be the servants of the tow. The *Panther* collided with a third vessel. All three of the vessels involved were, in part, to blame. The third vessel sued the tug and the tow, invoking the deeming provision. Willmer J again referred to *Mersey Docks & Harbour Board v Coggins* and to Lord Porter's test in that case and stated (at p. 67):

> It seems to me that what applies to a crane and its driver should apply equally to a tug and its master or officer in charge. Accordingly applying the principles there stated to the facts of this case, I find myself quite unable to hold that the crew of the *Panther* become in law the servants of the owners of the *Ericbank*, so as to render the latter, and not the former, liable for a faulty manoeuvre within the province of the man in charge of the tug. The position would, I apprehend, be different if the faulty manoeuvre were one within the province of the pilot or officer in charge of the tow, eg if the tug failed to carry out an order or negligently executed without orders a manoeuvre which it was within the province of those in charge of the tow to order. Here, however, the faulty manoeuvre of failing to stop the port propeller in time was a matter which concerned the tug alone and not the tow, and in such circumstances I hold that the liability for the negligence of the mate of the *Panther* rests with his regular employers, the owners of the *Panther*.

3.51 It is therefore submitted that the present approach of the court, following *The Polartank* and *The MSC Panther and The Ericbank*, will be to ignore the agreement between the tug and the tow as to the responsibility of the tow for the tug's servants where a claim is made against either by a third party and will be to apply a factual test, on the *Mersey Docks & Harbour Board v Coggins* model, to ascertain who was in actual control of the servant at the relevant time. This approach may provoke criticism. It may be said that, while the question who in law is to be liable for an employee's acts should depend on the contract between the employer and the employee, nevertheless if a third party, for example the tow, contractually assumes the responsibility for that employee's acts as between himself and the employer, then, though that person be not his employee, that third party and not the employer is vicariously liable for the employee's acts. It is submitted that such criticism fails to recognise that the terms of the contract between tug and tow cannot bind third parties and that vicarious liability does not depend necessarily upon the existence of an employer–employee (or, as it is put in the parlance of the older cases, master and servant) relationship, although it most commonly does so. The liability for an employee's acts usually derives from the existence of a contract between the employer and the employee; it is this which ordinarily gives rise to the liability of the master for the acts of his servant. However, vicarious liability may also exist in the absence of a contract of employment, if the person whose acts are in issue is in a special relationship with another person, this being so usually where the other person controls his acts in such a way that the law regards him as liable for them (see eg Atiyah, *Vicarious Liability* (1967), p. 1, which, despite its age, remains an excellent account of the topic generally). Where a servant serves in effect two masters, as an officer or deckhand on the tug may, employed as he is by the tug owner but being under the direct orders of the tow as to what he is to do and deemed by a clause, such as clause 3 of the UK Standard Conditions, to be the tow's servant, it will be a question of fact whether the general master or the temporary master is in control at any given time and in relation to any given operation (see generally Atiyah (*op. cit*.), chapter 18). The situation is by no means peculiar to the relationship of tug and tow (see the many different examples considered by Atiyah, *op. cit*.). While a contractor to whom the master provides the services of his servants may agree that the servants are to be deemed to be his during the service, a third party is entitled to look to the real position as to the responsibility for the servant's acts and to the real employer in relation to a particular operation (see Atiyah, *op. cit*., at p. 167).

Clause 4: the exemption clause

"4. Whilst towing, or whilst at the request, either expressed or implied, of the Hirer rendering any service of whatsoever nature other than towing:

(a) The Tugowner shall not (except as provided in Clauses 4(c) and (e) hereof) be responsible for or be liable for
  (i) damage of any description done by or to the tug or tender; or done by or to the Hirer's vessel or done by or to any cargo or other thing on board or being loaded on board or intended to be loaded on board the Hirer's vessel or the tug or tender or to or by any other object or property or

(ii) loss of the tug or tender or the Hirer's vessel or of any cargo or other thing on board or being loaded on board or intended to be loaded on board the Hirer's vessel or the tug or tender or any other object or property;
or
(iii) any claim by a person not a party to this agreement for loss or damage of any description whatsoever;
arising from any cause whatsoever, including (without prejudice to the generality of the foregoing) negligence at any time of the Tugowner his servants or agents, unseaworthiness, unfitness or breakdown of the tug or tender, its machinery, boilers, towing gear, equipment, lines, ropes or wires, lack of fuel, stores, speed or otherwise and. . ."

Period of application and scheme of the clause

3.52 The period during which clause 4 is to apply is the same as that under clause 3 deeming the servants of the tug to be those of the tow (see above). The clause is structured in the following way. Paragraph (a) provides for the exemption of the tug from liability and para. (b) confers an indemnity by the hirer or tow in favour of the tug; both of these provisions are subordinate to para. (c), which renders the tug liable in certain circumstances, and para. (e), which imposes liability for death and personal injury. Paragraph (d) deals with delay and consequential loss.

3.53 Given the dependence of the application of the UK Standard Conditions upon the parameters of the "towing" and "other service" laid down respectively in clause 1(b)(iv) and (v), most disputes and reported cases have turned on whether the UK Standard Conditions applied at the time of the loss or damage covered by the exemption clause (see eg *G.W. Rlwy Co v Royal Norwegian Government* [1945] 1 All ER 324), rather than upon the exact parameters and application of the exemption clauses, which have been regarded as tolerably clear.

3.54 What if the tug abandons the tow by slipping her lines and sailing away? It is submitted that the exemption clause would be ineffective in such a case. Pursuant to clause 1(b)(iv), the "towing" would have ended on the slipping once the tug is safely clear similarly, pursuant to clause 1(b)(iv), "the service for which the tug . . . has been required is ended." Old, *pre-Photo Production v Securicor* cases such as those which restricted the tug's exemption from liability to defaults in the *performance* of the towage rather than in the non-performance of it may still, if treated cautiously, be regarded as offering helpful guidance in applying a "construction" approach to clause 4. For example, in *The Cap Palos* [1921] P 458 (CA), the tug, having been engaged to tow a vessel from Immingham to Hartlepool, abandoned her in a bay off her destination after she had temporarily grounded. The tow tried to leave the bay but, in so doing, was wrecked on rocks. The towage contract exempted the tug from all loss, however caused, "to any vessel being towed, or about to be towed or having been towed." The Court of Appeal, reversing the decision of Hill J at first instance, held that the clause was not clear enough to cover "not doing the thing contracted for in the way contracted for" (*per* Atkin LJ). While the decision is very close to a "fundamental breach" type approach, as a question of construction it is arguably still correct (see generally Chapter 1 above; it should be noted that *The Cap Palos* was heavily relied upon as an aid to construction of the very different BIMCO "Towcon" mutual allocation of risk clause in *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177 and as supporting the cutting back of the field of application of that clause: see further the discussion of *The A Turtle* in Chapter 4 below). The approach, for example of the Court of Appeal in *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38; [2013] 2 Lloyd's Rep 270, to the cutting back of widely phrased exclusions, so as to apply only to cases of breach by mis-performance rather than to wholesale non-performance, is well echoed in the approach in *The Cap Palos*. In *Kudos Catering* (considered in greater detail in Chapter 4), the Court of Appeal construed an exclusion clause in a catering services contract which applied a total exclusion of liability in wide terms capable of applying to any breach ("The Contractor hereby acknowledges and agrees that the company shall have no liability whatsoever

in contract . . . for any loss of . . . profits . . . suffered by the Contractor or any third party in relation to this Agreement"). The Court held (at paras. 27 and 29) that:

> [27] [. . .] the expression "in relation to this Agreement" as meaning in this context "in relation to *the performance of* this Agreement", and thus as not extending to losses suffered in consequence of a refusal to perform or to be bound by the Agreement. [. . .]
>
> [29] [. . .] by their language and the context in which they used it they demonstrated that the exclusion related to defective performance of the Agreement, not to a refusal or to a disabling inability to perform it.

Paragraph 4(a)

3.55 This part of the clause operates as a blanket exemption clause in favour of the tug but it must be read subject to para. 4(c) and (e) of the clause. Under the clause, the tug is exempted for all liability in respect of:

i any damage done to or by the tug or the tow or done by or to any cargo on board the tow or to "any other object or property" (dock walls, such as bridges and dock gates, for example);
ii the loss of the tug or the tow or of any cargo or any other object or property;
iii "any claim by a person not a party to this agreement for loss or damage of any description whatsoever." This exclusion is curiously phrased but is sufficient to exclude liability on the part of the tug for liabilities to third parties to which, for example, the tow is exposed by acts or omissions of the tug. As between the tug and the third party, this provision will be ineffective and the tug will be obliged to recover the liability from the tow under the indemnity provisions in para. 4(b).

3.56 The exemption is in respect of the damage, loss or claims described above "arising from any cause whatsoever." This is a wide exemption. However, as a matter of construction in the old towage cases, such exemption was held to be insufficient to exempt liability for the initial unfitness of the tug (see eg *The West Cock* [1911] P 208). Similarly, the courts have, at least until very recently (cf. however the more dismissive approach in *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373) consistently declined to apply wide words of exemption, where the words of the clause can sensibly be construed to exclude liability for acts and omissions otherwise than negligent ones, to exclude liability for negligence (see eg *Canada Steamships Lines v The King* [1952] AC 192; *Smith v South Wales Switchgear* [1978] 1 WLR 165; and *The Raphael* [1982] 2 Lloyd's Rep 42; see also *The Forfarshire* [1908] P 339 ("all transporting at Owners' risk" held to be insufficiently wide to cover tug owner's negligence in equipping the tug with incorrect tackle)). Express reference to negligence is usually the safest course to achieve exemption from liability for negligence. Clause 4(a), apart from its wide general words, expressly excludes liability for:

a negligence of the tug and of the tug owners' servants "at any time" (this, it is submitted, signifies at any time during the towing or service as defined in clause 1(b)(iv) and (v));
b the unseaworthiness or unfitness of the tug in structure, equipment and tackle.

3.57 These exemptions will be effective. The dearth of authority on the UK Standard Conditions save in relation to the period of application of the exemption (see eg *Great Western Railway Co v Royal Norwegian Government* [1945] 1 All ER 324) is eloquent of the effectiveness of the exemption. In particular, it is very doubtful (although still arguable) whether cases such as *The West Cock* (above) are still good law on the exclusion from the coverage of the exemption clause of instances of unseaworthiness or unfitness of the tug which occurred prior to the towage service. In the latter case, it was held that an exemption clause which provided that the tug owners were "not to be responsible for any damage to the ship they have contracted to tow . . . arising

from towing gear (including consequence of defect therein or damage thereto)" did not protect the tug for the poor riveting of the plate to which the towing connection was made on board the tug. Although the Court of Appeal declined to express any view upon that expressed by Sir Samuel Evans P at first instance that the tug owed a duty corresponding to that of the absolute obligations of seaworthiness in a contract of affreightment at common law, it fully endorsed his view that the clause did not cover pre-existing defects. Vaughan Williams LJ stated:

> the more I read this contract, the more I come to the conclusion that it was the intention of both parties to deal only with defects and damage arising in the course of the towage.

Farwell LJ agreed and stated that the contract was:

> clearly limited to the period of towage. The liability was an antecedent liability, and it is impossible to read the word "defect" as extending the protection to a period beyond which governs the whole period. Such a forced rule of construction I think never would be applied, and certainly not in a case like this.

3.58 Nothing in the clause itself in this case is apt to confine loss or damage arising from towing gear to cases where it both arises during the towage and where the defect in the gear also occurs during the towage. It is submitted that applying an ordinary construction approach on *Photo Production v Securicor* principles and having in mind the modern approach to construction of exemption clauses (even one-sided ones such as those in the UK Standard Conditions) post *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904; [2012] Ch 497; *Transocean Drilling U.K. Ltd v Providence Resources Plc* [2016] EWCA Civ 372 and *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373, the clause would now be construed as covering defects in gear whenever they arose.

Paragraph 4(b)

"(b) The Hirer shall (except as provided in Clauses 4(c) and (e)) be responsible for, pay for and indemnify the Tugowner against and in respect of any loss or damage and any claims of whatsoever nature or howsoever arising or caused, whether covered by the provisions of Clause 4(a) hereof or not, suffered by or made against the Tugowner and which shall include, without prejudice to the generality of the foregoing, any loss of or damage to the tug or tender or any property of the Tugowner even if the same arises from or is caused by the negligence of the Tugowner his servants or agents."

3.59 This part of the clause provides for an indemnity in favour of the tug by the tow in respect of any and all loss and damage sustained by and any claims made against and liabilities incurred by the tug. It is also subject to para. 4(c) and (e). The rationale for the express indemnity is to facilitate the tug owners' recovery from the tow in respect of loss, damage and liability without the need to prove breach and, possibly, without the need to satisfy the common law requirements such as causation and foreseeability as to damages claimed for breach of contract.

3.60 As was established in *The Devonshire and The St. Winifred* [1913] P 23, in order to achieve an indemnity by the tow in favour of the tug, a clear and express provision to this effect is required. Clause 4(b) is, for this reason, explicit. Similarly, in *Det Forenede D.S. Co v Barry Rly. Co* (1919) 1 Ll L Rep 658, it was held that an indemnity clause would not support a claim for damage done to the tug owners' property caused by the negligence of the tug's crew. See also the cases generally on the need for a specific reference to negligence in exemption clauses (eg *Canada Steamship Lines v The King* [1952] AC 192) and in relation to indemnity clauses (*Smith v South Wales Switchgear* [1978] 1 WLR 165). Clause 4(b) is, for this reason, also express in its reference to the indemnity covering "any loss of or damage to the tug . . . even if the same arises from or is caused by the negligence of the Tugowner his servants or agents." Accordingly, if, in manoeuvring around the tow during the towage, the tug, by navigational negligence unconnected with the tow, collides with a dock wall damaging tug and wall, the tow will be liable to indemnify the tug in respect of its damage and its liability to the dock operator. Thus, by way of example, in *The Riverman* (1927) 29 L1 L Rep 80, the tug passed at an excessive speed and too close to a ship

at anchor. This caused the tow to collide with the ship and sink her. The tug admitted liability, but brought in as third party the owners of the tow, claiming an indemnity. The towage contract provided that:

> owners or persons interested in the vessel or craft so being towed shall and do undertake, bear, satisfy and indemnify the steam tugowners against all liabilities for the . . . negligence of the tugowners' servants.

The court held that the hirer of the tow was bound by the clause and was liable to indemnify the tug notwithstanding the tug's negligence.

3.61 In *Taylor v Geelong Harbour Trust Commissioners* [1962] 1 Lloyd's Rep 143, the Supreme Court of Victoria had to consider a provision in similar terms:

> 3. The Tugowner shall not, whilst towing, bear or be liable for . . . any personal injury . . . arising from any cause including negligence at any time of the Tugowner's servants or agents . . . and the Hirer shall pay for all . . . personal injury . . . and shall also indemnify the Tugowner against all consequences thereof . . ..

3.62 The facts in that case were that a deckhand on board a launch which had been provided with a tug to assist a vessel in berthing was injured while the tow-line was laid over the launch between tug and tow. The accident was solely due to negligence on the part of the tug in tautening the tow-line. The court held that the clause was effective to oblige the tow to indemnify the tug in respect of its liability to the deckhand that the clause covered the liability of the tug for personal injury sustained by any third party, not just a person on board the tug, provided that the cause of the injury was "in some way connected with the tow." The court applied and followed *Great Western Railway Co v Royal Norwegian Government* [1945] 1 All ER 324.

3.63 The wording of paragraph (b) is prima facie wide enough to encompass a claim by a third party against the tug in respect of death or personal injury (which would arguably also fall within paragraph (a)(iii) as "any claim by a person not party to this agreement for loss or damage of any description whatsoever", and would give rise to an obligation on the tow to indemnify the tug in respect of that third party claim and any liability of the tug incurred to the third party, even where the death or injury were occasioned by the tug's own negligence. The words "in respect of any loss or damage and any claims of whatsoever nature or howsoever arising or caused, whether covered by the provisions of Clause 4(a) hereof or not, suffered by or made against the Tugowner" are wide ones, irrespective of whether such a claim might fall also within para. (a)(iii). While it could be argued that the clause is dealing only with loss or damage to property only, that is not its natural meaning. Whether, if para. (b) is wide enough to achieve such an indemnity, it is ousted by the words "(except as provided in Clauses 4(c) and (e))" where Clause 4(e) deals with the liability of the tug for death and personal injury due to its negligence is dealt with below in considering Clause 4(e).

Paragraph 4(c)

"(c) The provisions of Clauses 4(a) and 4(b) hereof shall not be applicable in respect of any claims which arise in any of the following circumstances:

(i) All claims which the Hirer shall prove to have resulted directly and solely from the personal failure of the Tugowner to exercise reasonable care to make the tug or tender seaworthy for navigation at the commencement of the towing or other service. For the purpose of this Clause the Tugowner's personal responsibility for exercising reasonable care shall be construed as relating only to the person or persons having the ultimate control and chief management of the Tugowner's business and to any servant (excluding the officers and crew of any tug or tender) to whom the Tugowner has specifically delegated the particular duty of exercising reasonable care and shall not include any other servant of the Tugowner or any agent or independent contractor employed by the Tugowner.

(ii) All claims which arise when the tug or tender, although towing or rendering some service other than towing, is not in a position of proximity or risk to or from the Hirer's vessel or any other craft attending the Hirer's vessel and is detached from and safely clear of any ropes, lines, wire cables or moorings associated with the Hirer's vessel. Provided always that, notwithstanding the foregoing, the provisions of Clauses 4(a) and 4(b) shall be fully applicable in respect of all claims which arise at any time when the tug or tender is at the request, whether express or implied, of the Hirer, his servants or his agents, carrying persons or property of whatsoever description (in addition to the Officers and crew and usual equipment of the tug or tender) and which are wholly or partly caused by, or arise out of the presence on board of such persons or property or which arise at anytime [*sic*] when the tug or tender is proceeding to or from the Hirer's vessel in hazardous conditions or circumstances."

3.64 Paragraph 4(c) provides for the exceptions to the tug's exemptions from liability and the tow's obligation to indemnify the tug. It sets out two sets of circumstances in which claims may arise and provides explicitly that para. 4(a) and (b) shall not apply to claims arising in those circumstances. The clause is therefore clearer than that considered in *The Borvigilant and Romina G* [2003] 2 Lloyd's Rep 520, in which the Court of Appeal considered an Iranian "Tug Requisition Form" issued by the National Iranian Oil Corporation for tug operations at Kharg Island based on an earlier incarnation of the UK Standard Conditions. It was argued that the "unseaworthiness" exception applied only in respect of the defence to liability for loss, damage and injury (under what is now para. 4(a)) but not to the indemnity in respect of the same (now para. 4(b)). Always a difficult argument, the Court of Appeal rejected it on the broad basis that the exception must sensibly and naturally apply to both limbs of the protection: "This seems to me to give a sensible meaning to the contract as a whole. Thus, if loss or damage to ship or tug or the personnel of either, is caused simply by the events set out in cl. 2(b), the tugowners are protected unless caused by 'want of reasonable care on the part of the [tugowners] to make the tug seaworthy'.": *per* Sir Anthony Clarke MR at para. 102.

Personal fault of tug owner as to seaworthiness

3.65 The first set of "circumstances" is set out in para. 4(c)(i). This consists of "a personal failure of the Tugowner" to render the tug "seaworthy for navigation" at the beginning of the service. What does "personal" signify? It is submitted that the same principles will be applied as have been applied to similar wording in clause 2 of the "Gencon" form of voyage charterparty and clause 13 of the "Baltime" form of time charterparty (eg liability only for "personal want of due diligence on the part of the Owners or their Manager" to render vessel seaworthy). In *The Brabant* [1965] 2 Lloyd's Rep 546, a case on clause 13 of the "Baltime" form, McNair J held that the fault in discharging the particular obligation in question had to be "personal" to the owners themselves and that the fault was not "personal" to the owners themselves if it was the fault of the owners' employees to whom the owners had delegated the performance of that obligation. That this is so in the context of clause 4(c)(i) is clear as the clause goes on to define what "personal" means for this purpose.

3.66 The UK Standard Conditions are unusual in that they specifically define those within the tug owners' business who are to have the sufficient "personal responsibility" for the exercise of the seaworthiness obligation in other words, the clause itself defines who is to be the alter ego of the tug owner. This avoids or, at least, simplifies the enquiry which would have to be undertaken into the alter ego or governing mind of the tug owner corresponding to that which was undertaken and found in the cases in respect of limitation of liability under section 503 of the Merchant Shipping Act 1894 and the test of "actual fault and privity" (see eg *The Lady Gwendolen* [1965] P 294; *The Marion* [1984] AC 563; and *The Ert Stefanie* [1989] 1 Lloyd's Rep 349; see also the helpful summary given in Cooke, *Voyage Charters* (4th edn, 2014), paras. 11.51–11.65 and in Coghlin, Baker, *Time Charters* (7th edn, 2014) at paras. 37.80–37.66).

3.67 The UK Conditions are also particular in that they stipulate that the hirer must not only be able to point to unseaworthiness due to the personal failure of the tugowner (as defined), but also require that the unseaworthiness is to be the direct and "sole" cause of the claims falling within clause 4(a) and (b). This arguably restricts the operation of the exception to cases where there are no concurrent or co-operating causes of the claim. The position may be contrasted with the Eastern Canada Standard Towing Conditions ("ECTOW") published by the Shipping Federation of Canada. Both the UK Conditions and the ECTOW conditions provide that the exempting and indemnity provisions will not apply where the tug owner fails to exercise due diligence to make the tug seaworthy. There is, however, an important distinction between the UK conditions and the ECTOW conditions in that while the former provide that the onus is on the hirer to prove the loss resulted "directly and *solely*" from the tug owner's failure to exercise due diligence, the ECTOW conditions contain no such express provision. In *Wire Rope Industries v B.C. Marine* [1981] SCR 363, it was held by the Supreme Court of Canada, at p. 395, that once the hirer establishes the loss or damage was due to unseaworthiness of the tug the onus shifts to the tug owner to establish due diligence to make the tug seaworthy even where the unseaworthiness was a cause in combination with other causes.

Tug not in a position of proximity or risk

3.68 The second set of "circumstances" set out in para. 4(c)(ii) is less familiar. However, it seeks to introduce a balance between the responsibilities of tug and tow at the time of the towage service and during the "pure towage" aspect of the service. Accordingly, the exemptions from the tug's liability in clause 4(a) and the indemnity given by the tow to the tug in clause 4(b) will not apply if the following cumulative conditions are satisfied:

i The tug is "towing" within the meaning of clause 1(b)(iv) or performing some other service within the period set out in clause 1(b)(v).
ii Notwithstanding the towing or provision of the other service, the tug is "not in a position of proximity or risk to or from the Hirer's vessel" – less inelegantly, is the tug in a position of proximity to or risk from the tow?
iii Additionally (signified by the conjunctive "and"), the tug must be detached from and safely clear of "any ropes, lines, wire cables or moorings associated with the Hirer's vessel."
iv The tug must not, at the time at which the claim arises, be carrying persons or property for the hirer, which persons or property wholly or partly cause or are the occasion for the claim.
v The tug must not, at the time at which the claim arises, be proceeding to or from the hirer's vessel in hazardous conditions or circumstances.

3.69 The practical facility of clause 4(c)(ii) to the tow is very doubtful. The limiting factors from the tow's point of view are the provisos of not being in proximity or at risk and of being detached and clear of the tow's lines. Taking the various stages of an ordinary towage operation, it can be seen how restricted is the situation described by para. (c)(ii). In the initial stages of most towage or tug services, the tug is operating in close-quarters to the tow in effecting the towage connection. Such close-quarters will put the tug into "proximity" to the tow. Even when the tug is towing and has the appropriate scope of line out to the tow, is she in a relationship of proximity to the tow? The exclusion from the paragraph of being in a position of risk is potentially far wider. The tug will usually be in a situation of risk from the tow in heavy weather, for example when the tow is surging behind the tug or is shearing during the tow. But the tug is also in a position of risk from the tow when the towing connection is being snatched at by the tow with the risk of a sudden and potentially dangerous (for the tug) parting of the tow-line or hawser. "Proximity" of and "risk" to the tug restrict clause 4(c)(ii) substantially. A further restriction is achieved by the

requirement that the tug shall be detached from and clear of all lines "associated with the Hirer's vessel." The term "associated" here is capable of signifying two meanings: first, that the lines are the tow's, and secondly, that the lines are towing lines which the tug has out to the tow or the tow has out to the tug. In the context of an ocean or river towage, the first meaning has no sense but the second has. However, the clause expressly contemplates that the tug may be liable under it when "towing." It is therefore submitted that lines "associated with" the hirer's vessel do not include the towing line but refer only to the auxiliary lines or mooring lines out from the tow when the tug is alongside the tow.

3.70 For these reasons, therefore, the situation envisaged by clause 4(c)(ii) is one where the tug, albeit "towing" within clause 1(b)(iv) or rendering another service within clause 1(b)(v), is clear of the tow with no connections to her other than the tow-line and where the tug is sufficiently distant from the tow so as to be unaffected by her movements and not at risk from the tow. Such situations will often arise in towage and may be situations in which the tug causes damage through negligence to some third party. Clause 4(c)(ii) will exclude such situations from the tug's exemption for liability and, more importantly, from the tow's indemnity of the tug. However, the exception from clause 4(a) and (b), under this heading, is an extremely narrow one. The provisions in the latter part of clause 4(c)(ii) exclude still further its application in various common circumstances (eg where a tug is steaming to or from the tow in very bad weather).

Paragraph 4(d)

"(d) Notwithstanding anything hereinbefore contained, the Tugowner shall under no circumstances whatsoever be responsible for or be liable for any loss or damage caused by or contributed to or arising out of any delay or detention of the Hirer's vessel or of the cargo on board or being loaded on board or intended to be loaded on board the Hirer's vessel or of any other object or property or of any person, or any consequence thereof, whether or not the same shall be caused or arise whilst towing or whilst at the request, either express or implied, of the Hirer rendering any service of whatsoever nature other than towing or at any other time whether before during or after the making of this agreement."

3.71 Paragraph 4(d) is a common type exemption clause dealing with liability for loss or damage arising out of delay or detention of the tow or any consequences of such delay or detention. This is an important provision for the tug. One of the major complaints arising in towage cases is that the towage took too long: if the tow is a newbuilding, those responsible for the tow may have incurred penalties to the yard to which she was being towed for fitting out; if the tow is of a vessel for scrapping, the delay may lead to a fall in the scrap market price per ton (or tonne) of the vessel. Clause 4(d) is a wide exemption clause covering delay or detention howsoever caused and whenever arising.

Paragraph 4(e)

"(e) Notwithstanding anything contained in Clauses 4(a) and (b) hereof the liability of the Tugowner for death or personal injury resulting from negligence is not excluded or restricted thereby."

3.72 This provision represents an amendment to the previous form (1974 Revision) of the UK Standard Conditions to reflect the application of section 2(1) of the Unfair Contract Terms Act 1977 and its prohibition of clauses excluding liability for negligence causing death or personal injury, which prohibition is effective even as regards marine towage contracts (see Chapter 1 above). The provision by clause 4(a)(iii) of the 1974 Revision for the exclusion of liability in such a case is now replaced with an express provision that liability for death or personal injury caused by negligence falls outside the scope of the exemption provisions of clause 4.

3.73 While clause 4(e) reflects the inability, following the Unfair Contract Terms Act 1977, of any party to exclude its personal liability to a claimant in respect of death or personal injury caused by its negligence, the inter-relationship between the indemnity provisions in clauses 4(a)

and 4(b) of the UK Standard Conditions and the acceptance of such liability under clause 4(e) has given rise to argument. It has been argued (in the context of the action arising out of the girting and sinking of the tug *Flying Phantom*, with loss of life, in the River Clyde during her towage of the in-bound vessel *Red Jasmine* in 2007, which settled - but see the MAIB Report and the prosecution and conviction of the Clyde Port Authority for details of the casualty and issues arising) that the indemnity owed by the hirer to the tug-owner under clauses 4(a) and 4(b) would extend to the indemnification of any liability on the part of the tug-owner to its crew for their death or personal injury, arising out of the negligence of the tug-owner or the negligence of other members of the tug's crew for which the tug-owner was vicariously responsible.

3.74 The matter arose in this way and is a good illustration of the circumstances in which the UK Standard Conditions may be sought to be relied upon by the tug against the tow or hirer. A vessel, *Red Jasmine*, engaged a tug, *Flying Phantom*, owned by Svitzer Marine Ltd (Svitzer) as part of a convoy of tugs to assist her up the River Clyde to berth at a quay up-river. The *Flying Phantom* took up position as the bow tug. The passage took place in very heavy fog. The tug grounded on the side of the channel, was then girted by the *Red Jasmine* proceeding on her course and as a result the tug capsized with loss of life. Claims were made against Svitzer by dependants of the crew, alleging negligence on the part of Svitzer in crew training and the working of the emergency release mechanism on the towing wire winch.

3.75 The starting point is that there is no objection in principle (see *The Riverman* (1927) 29 L1 L Rep 80 and *Taylor v Geelong Harbour Trust Commissioners* [1962] 1 Lloyd's Rep 143) or under the Unfair Contract Terms Act 1977 to a party A agreeing with party B that B will be liable to A for any liability for death or personal injury which A incurs, either to its own employees or to third parties, as a result of its own negligence where A performs an operation, such as towage, for B. There is, in such a case, no exclusion of liability for death or personal negligence on the part of A (since A answers in full for such liability), only a passing on of such liability on the part of A from A to B or the creation of a right of recourse, contractually agreed, between A and B in favour of A.

3.76 As considered above, clause 4(b) is likely to extend as a matter of language to give a right to indemnity by the tug against the tow since a claim by dependants against Svitzer would have fallen within the words "in respect of any loss or damage and any claims of whatsoever nature or howsoever arising or caused, whether covered by the provisions of Clause 4(a) hereof or not, suffered by or made against the Tugowner." The issue is therefore as to the effect if the words in Clause 4(e) that the statement that liability of the tug for death or injury due to its negligence applies "Notwithstanding anything contained in Clauses 4(a) and (b).

3.77 These words, are to be read as coupled with the express reference in both clauses 4(a) and 4(b) to clause 4(e) in terms which suggest that clause 4(e) operates as an exception to both clauses: "The Tugowner shall not (*except as* provided in Clauses 4(c) and (e) hereof) be responsible for" in clause 4(a) and "The Hirer shall (*except as* provided in Clauses 4(c) and (e)) be responsible for" in clause 4(b), both emphases added. The wording is at best ambiguous. One reading of the "except as" and "notwithstanding" wording is that it is simply making it clear beyond doubt that the personal liability of the tug for death or injury is not in any way excluded by the UK Standard Conditions, so that where the tug occasions death or injury to crew of the tow, the tug remains liable to the primary claimant. While a person on a third party vessel is unaffected by the terms (as not a party to the contract) and while a member of the tug's crew is similarly unaffected by the UK Standard Conditions which govern only the contract between tug and tow, this reading of clause 4(e) and the allied qualifications in clause 4(a) and (b) leaves unaffected the separate liability of the tow to reimburse the tug for its liability for death or personal injury. This reading is supported by the fact that para. (e) refers to exclusion and restriction of liability of the tug and not to the obligation to indemnify ("is not excluded or restricted thereby"). Another alternative reading is that the repeated exclusion of the tug's liability for death or injury due to its own negligence

is intended to signify that its liability for such matters is removed from the operation of clause 4 altogether. While this reading is perhaps less easy to fit with the wording used in clause 4(e), it gives better effect to the repeated references in clause 4(a), (b) and (e) and particularly to the inclusion of the reference to para. (e) as an exception in the indemnity provision in clause 4(b), to which it would arguably be irrelevant if the intention were to preserve the right to an indemnity from the tow even in such a case.

3.78 It is tentatively suggested that the better view, especially in the light of the extremely one-sided and onerous nature of the UK Standard Conditions and of an indemnity against the consequences of the tug's own negligence in respect of death and injury, is the latter one. This corresponds with the need for the tug-owner to spell out such a right clearly and reflects that the ambiguity in the poorly drafted clause 4(a), (b) and (e) should be read against the tug as *proferens*, even on the latest state of the case law on *contra proferentem* construction (after *Nobahar-Cookson v The Hut Group Ltd* [2016] EWCA Civ 128 and *Transocean Drilling UK Ltd v Providence Resources PLC (The Arctic III)* [2016] EWCA Civ 372). The Court of Appeal's decision in *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 further suggests that a stricter approach should be taken with an indemnity than an exclusion clause. As Jackson LJ stated (at paras. 55 and 56), in words relevant to the argument that the *Red Jasmine* should bear Svitzer's liability for the death of its own crew due to its own negligence:

> 55. Over the last 66 years there has been a long running debate about the effect of that passage and the extent to which it is still good law. In hindsight we can see that it is not satisfactory to deal with exemption clauses and indemnity clauses in one single compendious passage. It is one thing to agree that A is not liable to B for the consequences of A's negligence. It is quite another thing to agree that B must compensate A for the consequences of A's own negligence.
>
> 56. In recent years, and especially since the enactment of UCTA, the courts have softened their approach to both indemnity clauses and exemption clauses: see *Lictor Anstalt v MIR Steel UK* [2012] EWCA Civ 1397; [2013] 2 All ER (Comm) 54 at [31] to [34]. Although the present judgment is not the place for a general review of the law of contract, my impression is that, at any rate in commercial contracts, the Canada Steamships guidelines (in so far as they survive) are now more relevant to indemnity clauses than to exemption clauses.

3.79 However, the position would be different if in the *Flying Phantom* case, to take an example taken from a matter found by the MAIB to be probably not causative of the capsize, if a crew member on the tug rather than Svitzer was negligent (eg by leaving the engine room door open momentarily allowing the tug to founder) and if the other dependants sued Svitzer relying on this negligence and upon Svitzer as being vicariously liable for that negligence. In that case, the only basis of Svitzer's liability would be vicarious liability and under clause 3, the tow would have accepted that it and not the tug-owner is to be treated as the employer of the crew of the tug: see above and *The Adriatic* (1915) 85 LJP 12. In such a case, clause 3 would be likely to "trump" clause 4(e) which must be read with clause 3 and which must be read therefore as restricted to dealing only with the tug's own personal negligence as employer.

Clause 5: substitution of tug

"5. The Tugowner shall at any time be entitled to substitute one or more tugs or tenders for any other tug or tender or tugs or tenders. The Tugowner shall at any time (whether before or after the making of this agreement between him and the Hirer) be entitled to contract with any other Tugowner (hereinafter referred to as 'the other Tugowner') to hire the other Tugowner's tug or tender and in any such event it is hereby agreed that the Tugowner is acting (or is deemed to have acted) as the agent for the Hirer, notwithstanding that the Tugowner may in addition, if authorised whether expressly or impliedly by or on behalf of the other Tugowner, act as agent for the other Tugowner at any time and for any purpose including the making of any agreement with the Hirer. In any event should the Tugowner as agent for the Hirer contract with the other Tugowner for any purpose as aforesaid it is hereby agreed that such contract is and shall at all times be

subject to the provisions of these conditions so that the other Tugowner is bound by the same and may as a principal sue the Hirer thereon and shall have the full benefit of these conditions in every respect expressed or implied herein."

3.80 Clause 5 is a typical modern form of "Himalaya" clause. It addresses the requirements for such a clause which were first sketched out by Lord Reid in *Midland Silicones v Scruttons* [1962] AC 446, where he stated at p. 474, in respect of a possible route for allowing persons not party to the contract to have the benefit of the exemption clauses in the contract, as follows:

> I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.

These requirements were subsequently enclosed by the Privy Council in a series of cases: see eg *The Eurymedon* [1975] AC 154 (*per* Lord Wilberforce at p. 166) and *The New York Star* [1981] 1 WLR 138 (*per* Lord Wilberforce at p. 143).

3.81 The requirements which are to be satisfied if a contract is to apply as to its exemption clauses in favour of a third party (eg the tug-owner to whom the towage operation has been sub-let by the person who contracted with the hirer to provide a tug), and whose tug is physically performing the towage the subject of the contract, are therefore twofold: first, the contract must provide that the third party is to be entitled to the benefit of its terms (either in the terms themselves or in a term which states that the third party is to be deemed included in references to the contracting party); and secondly the contract must provide that that contracting party is contracting for the benefit of those terms not only on his own behalf, but as agent for the owner of any tug to which the contract service may be sub-let by him.

3.82 The earlier variants of the "Himalaya" clause (first considered in the "Himalaya" case, *Adler v Dickson* [1955] 1 QB 158 and in *Midland Silicones v Scruttons* (*op. cit*.)) were fairly basic. For that reason they were ineffective – usually because they did not create an agency relationship in accordance with Lord Reid's second requirement. An example of this defective type of clause in the old version of the UK Standard Conditions was considered in *The Conoco Arrow* [1973] 1 Lloyd's Rep 86.

3.83 In that case, the Admiralty Court struck out a claim against the tow by the tug owner of a tug which had been substituted by the tug owner who was originally party to the contract of towage on the ground that he had no arguable claim that he was party to or entitled to sue upon the contract of towage. In that case, the clause read: "The tug owner may substitute one tug for another and may sublet the work, wholly or in part to other tug owners who shall also have the benefit of and be bound by these conditions." Brandon J held that the substituted tug could not sue upon the contract between the substituting tug owner and the tow:

> The claim as formulated is a crude claim to obtain rights under a contract between two other persons, without, as I say, any allegation of agency or trusteeship.

3.84 The decision is essentially one related to the deficiency of the pleading in that case and is based in part on the failure of the tug owner to advance any case of agency or trusteeship (see Brandon J's tart recording of Mr Rochford's curious disavowal of any such case). However, it illustrates, first, the older type of pre-*Eurymedon* "Himalaya" clause, and secondly, the requirement to advance by reference to the clause an agency and/or a trusteeship argument.

3.85 The present clause 5 has as its commercial purpose the express authorisation by the tow of the tug to enable it to contract with another tug to perform the service and thereby to bind the tow to a contract with the replacement tug but on the same terms (eg the UK Standard Conditions).

3.86 In *The Borvigilant and Romina G* [2003] 2 Lloyd's Rep 520, a case decided before the coming into force of the Contracts (Rights of Third Parties) Act 1999, the Court of Appeal considered an Iranian "Tug Requisition Form" issued by the National Iranian Oil Corporation for tug operations at Kharg Island. The NIOC entered into a contract of towage with Monsoon, owners of the tanker *Romina G*. NIOC engaged a tug, the *Borvigilant*, from a local company, Borkan. The *Borvigilant* negligently collided with the tanker leading to damage and loss of life. The issue was whether Borkan could rely on the NIOC conditions. The form was effectively an old version of the UK Standard Conditions with a "Himalaya" clause very similar to that considered in *The Conoco Arrow* (*op. cit*.) and which read:

> The Company shall have the right to perform their obligations under this contract by using a tug or tugs not owned by themselves but made available to the Company under charter parties or other arrangement. In such circumstances, without prejudice to the Company's rights, the Hirer agrees to the Owners or Charterers of such tug or tugs have the benefits of and being bound by these conditions to the same extent as the Company.

3.87 The Court of Appeal (upholding David Steel J at [2002] 2 Lloyd's Rep 631) concluded that it was not necessary that the tug requisition form should expressly state that NIOC was contracting as agent for Borkan; it was sufficient if the terms of the tug requisition form made that clear. Clause 7 expressly provided that Borkan should have the benefit of and be bound by the conditions of the tug requisition form to the same extent as NIOC; in the absence of any evidence of an intention to create a trust, the parties must have intended that NIOC was making the contract both on its own behalf and on behalf of the owners of any tug used to perform the contract, here Borkan (see paras. 17, 18 and 33). Having held that NIOC had actual authority to contract on behalf of Borkan (on various bases), the Court of Appeal concluded that Monsoon had contracted on the basis that the owners of the tugs which assisted the vessel would have the rights accorded by the terms of the tug requisition form and the very purpose of those terms was to regulate responsibility in the event of a casualty of the kind which took place. In such circumstances it was not unjust to hold Monsoon to those conditions, nor was there anything unfair, unjust or inequitable in holding Monsoon to the terms of the form to which it agreed, whether Borkan gave NIOC authority to make the contract before it was made, or ratified it after it was made and after the casualty; Monsoon was simply bound by the terms of the agreement which it made (see paras. 88 and 90).

3.88 The position under clause 5 will now be regulated by the Contracts (Rights of Third Parties) Act 1999 which applies to all contracts made after 11 May 2000 (section 10(1)) and, while inapplicable to contracts for carriage of goods by sea, will apply to contracts of towage. In outline (for a fuller account: see *Chitty on Contracts* (32nd edn, 2015), Vol. I, para. 15–044 *et seq*.), under the 1999 Act a third party has the right to enforce a contract term where either the contract expressly confers that right on an expressly identified third party or where the contract terms purports to confer a benefit on an expressly identified third party (unless the contract on its true construction shows that the parties did not intend to confer such a benefit): see section 1(1). The requirement of an "expressly identified third party" is defined in the following terms by section 1(3): "The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into." Given the terms of section 1 of the 1999 Act, it seems probable that clause 5 will allow the persons and classes of person identified to enforce and take advantage of the various exceptions and defences of the tug owner under the UK Standard Conditions. The effect of the Unfair Contract Terms Act 1977, and now of the Consumer Rights Act 2015, on the efficacy of reliance on the 1999 Act to visit upon a third party, especially a third party who is a consumer, terms and conditions agreed between the tugowner and tow (eg under the UK Standard Conditions), assuming the same not to have been caught in themselves as unfair or ineffective terms, is considered in *Chitty on Contracts* (32nd edn, 2015), Vol. I, para. 15–044.

Clause 6: reservation of special rights

"6. Nothing contained in these conditions shall limit, prejudice or preclude in any way any legal rights which the Tugowner may have against the Hirer including, but not limited to, any rights which the Tugowner or his servants or agents may have to claim salvage remuneration or special compensation for any extraordinary services rendered to vessels or anything aboard vessels by any tug or tender. Furthermore, nothing contained in these conditions shall limit, prejudice, or preclude in any way any right which the Tugowner may have to limit his liability."

3.89 This clause is, for all practical purposes, superfluous. It seeks to preserve:

i the tug's right to claim salvage in a proper case; and
ii the tug's right (and the tug's crew's right) to limit liability.

Such rights would not be lost save by very clear and explicit language not present nor, *semble*, intended to be present in the UK Standard Conditions.

3.90 In so far as the clause seeks to go further and to reserve the tug's right to claim remuneration over and above what has already been agreed because of some "extraordinary services", it is met by the decisions in *The Julia* (1861) Lush 224; 14 Moo PC 210 and *The Minnehaha* (1861) Lush 335; 15 Moo PC 133. The tug is bound, pursuant to its obligation under the towage contract, to continue with the towage even in the event of unforeseen circumstances or difficulties. It will only be entitled to additional (ie extra-contractual or salvage-based), remuneration if it renders services or encounters risk outside the scope of the original contract. Clause 6 merely preserves rights which the tug already has and which the UK Standard Conditions do not impinge upon.

Clause 7: further exemption clause

"7. The Tugowner will not in any event be responsible or liable for the consequences of war, riots, civil commotions, acts of terrorism or sabotage, strikes, lockouts, disputes, stoppages or labour disturbances (whether he be a party thereto or not) or anything done in contemplation or furtherance thereof or delays of any description, howsoever caused or arising, including by the negligence of the Tugowner or his servants or agents."

3.91 The one-sided nature of the UK Standard Conditions is well illustrated by this form of *force majeure* provision which relieves the tug owner alone from his obligations and is not expressed to extend mutually to tug and tow (cf. the more balanced position achieved by the equivalent "war and other risks" clauses of the "Towcon 2008" and "Towhire 2008" forms).

3.92 The events covered by the clause are commonly found in standard form *force majeure* clauses (although they are much more widely and comprehensively stated in the latest "Towcon 2008" and "Towhire 2008" forms) and are considered in detail in many authorities. The leading treatments of such clauses in the marine context can be found in Cooke, *Voyage Charters* (4th edn, 2014), paras. 26.2–26.27 (dealing particularly with war risks) and Coghlin, Baker, *Time Charters* (7th edn, 2014) at paras. 5.24–5.26 and considering analogous Shelltime charterparty provisions, para. 37.169 *et seq*.; see also the commentary on laytime and demurrage exceptions in similar terms, which is to be found in Schofield, *Laytime and Demurrage* (7th edn, 2016).

3.93 The language and drafting of the clause are not of the clearest. In particular, three matters may be noted.

i The clause purports to exempt the tug from the consequences of the stated events and also of "anything done in contemplation or furtherance thereof." It is unclear whether the "thereof" refers to all of the preceding events or only to "stoppages and labour disturbances." It is submitted that the natural reading of the clause is that this phrase is qualified by all of the listed events but the contrary is arguable and the doubt could give rise to a *contra proferentem* construction.

ii The clause states "(whether he [ie the tug owner] be a party thereto or not)" following the words "stoppages or labour disturbances"; given the punctuation and structure of the clause, it is submitted that on the true construction of the clause, it extends to cover the tug owner whether or not he is party to any strike, lockout, dispute, stoppage or labour disturbance but does not apply if the tug owner is party to any of the other events listed, such as sabotage.

iii The clause extends to "delays of any description." This is not a typical *force majeure* event. It is, however, excluded as a cause of loss and damage even if due to the negligence of the tug. This is a very favourable exemption clause for the tug, since one of the most common complaints on the part of the tow is delay on the part of the tug in performance of the service. The clause is explicit and will, it is submitted, on its construction, exempt the tug from liability for delay – even negligent delay – on the part of the tug.

Clause 8: non-suit clause

"8. The Hirer of the tug or tender engaged subject to these conditions undertakes not to take or cause to be taken any proceedings against any servant or agent of the Tugowner or other Tugowner, whether or not the tug or tender substituted or hired or the contract or any part thereof has been sublet to the owner of the tug or tender, in respect of any negligence or breach of duty or other wrongful act on the part of such servant or agent which, but for this present provision, it would be competent for the Hirer so to do and the owners of such tug or tender shall hold this undertaking for the benefit of their servants and agents."

3.94 To add to the exemptions already in place, clause 8 seeks to prevent the tow from commencing any legal proceedings against the tug or its servants in respect of faults on their part.

Clause 9: jurisdiction clause

"9. (a) The agreement between the Tugowner and the Hirer is and shall be governed by English Law and the Tugowner and the Hirer hereby accept, subject to the proviso contained in subclause (b) hereof, the exclusive jurisdiction of the English Courts (save where the registered office of the Tugowner is situated in Scotland when the agreement is and shall be governed by Scottish Law and the Tugowner and the Hirer hereby shall accept the exclusive jurisdiction of the Scottish Courts).

(b) No suit shall be brought in any jurisdiction other than that provided in sub-clause (a) hereof save that either the Tugowner or the Hirer shall have the option to bring proceedings in rem to obtain the arrest of or other similar remedy against any vessel or property owned by the other party hereto in any jurisdiction where such vessel or property may be found."

3.95 This clause is largely self-explanatory: it provides for English law and jurisdiction (or in appropriate cases, Scottish law and jurisdiction). However, the clause expressly preserves the right of each party to bring *in rem* proceedings in other jurisdictions "to obtain the arrest of or other similar remedy against any vessel or other property owned by" the other party. The object of the clause is clear: that mere security or *saisie conservatoire* type proceedings can be sought in other jurisdictions. Yet it is highly questionable whether the clause, by its reference to proceedings *in rem*, would not also permit an action *in rem* in another jurisdiction on the merits of the dispute between tug and tow.

CHAPTER 4

Standard form contracts: (II) The BIMCO Forms "Towcon 2008" and "Towhire 2008"

PART A. THE "TOWCON 2008" AND "TOWHIRE 2008" FORMS

The genesis of the forms

4.1 In the 1980s, BIMCO (the Baltic and International Maritime Council) were approached by the International Salvage Union (ISU), whose members comprise the majority of the leading international towage and salvage contractors, with a view to collaborating upon the production of a standard form international towage agreement designed to act as a uniform basis for ocean towage contracts. The approach grew out of the dissatisfaction with the use of tugowners' forms in common use for ocean towage which contained widespread exceptions adverse to the tow and the increasing use on an *ad hoc* basis of US forms or "the American Conditions" which adopted a simple risk allocation between tug and tow with each party bearing the risks incidental to their vessel and laying that risk off through insurance: as to the early trend away from exculpatory conditions like the UK Conditions towards a "knock-for-knock" approach of mutual allocation of risk, see Bishop (1995) 70 Tul L Rev 507. As a result of that approach, a sub-committee of the documentary committee of BIMCO, together with representatives of the ISU and of the European Tugowners Association (ETA), debated and produced two standard form contracts for international ocean towage services. The aim of the draftsmen was to produce a more balanced form of contract based on "the American Conditions" which did not, as had been the case with standard forms unilaterally prepared by tug owners or tug owners' associations, heavily favour the tug or impose a draconian regime of exemptions to the disfavour of the tow. The UK Standard Conditions considered in the previous chapter are a paradigm of such unilateral forms. A significant problem with such forms has been well stated by Mr Lannart Hagbert, legal adviser to the ETA:

> legal developments all over the world authorise courts to overrule or adapt agreement terms which, in the court's opinion, lead to an unreasonable result. The risk of unilaterally prepared standard agreements for the benefit of one party is that a court of law might invalidate or modify such conditions.

Accordingly, BIMCO's aim was to develop "a balanced and practical document" which, being developed jointly between BIMCO and tug interests, would lead to "wide international acceptance" of the new form (see BIMCO's explanatory notes to the forms). BIMCO's aim was rapidly achieved and the forms are "recommended" for use by BIMCO, the ISU and the ETA. It is today uncommon in English legal practice to see ocean towage work or other large-scale ocean tug services being performed under any other forms.

The 2008 revision of the forms

4.2 The very widespread use of the forms from their inception in 1985 (and the occasional and inapposite use of both forms as templates for contracts for the rendering of offshore services other than towage) led to the forms being the subject, over the years, of considerable legal scrutiny. In particular, the "knock-for-knock" approach to liabilities for tug and tow adopted by BIMCO in clause 18 of both forms has been the focus of a number of arguments in which parties (or their insurers) have sought to escape from the consequences of a mutual exemption of liability, the

"Towcon" and "Towhire" forms seeking to achieve a balanced position as between tug and tow under which, in broad terms, each party bears the risk and responsibility for injuries and losses and damage affecting or caused by its own employees and equipment. Having been first published by BIMCO in 1985, the forms were felt by BIMCO to be due for review and updating to ensure that they reflected current commercial practice, laws and regulations. During the revision process the opportunity was taken by BIMCO to attempt to resolve various ambiguities which had come up in disputes and to clarify areas of the contracts where necessary. From the outset it was decided by BIMCO to avoid unnecessary rewriting of provisions "in order not to disturb the popularity these documents continue to enjoy." The team behind the revision project was composed of practitioners from the towage industry, including representatives from the International Salvage Union, Svitzer, Fairplay Towage, Marint and LKL Oceantrade. P&I Club advice was provided by Steamship Mutual P&I Club. The commentary below considers the text of the 2008 revisions. For a commentary on the original forms, the reader is directed to the second edition of this work. Just as with the original forms, which were accompanied by BIMCO's explanatory notes, BIMCO has published a set of tables which offer a comparison between the original "Towcon" and "Towhire" forms and the 2008 revisions. These are considered further below. It is inevitable that issues of construction regarding the 2008 revisions of the two forms are likely to involve a consideration of the differences between the original form and the later version, and the reasons, express or to be inferred, for the revised version as an aid to construction. Accordingly, where necessary, the text below considers the position under the previous "Towcon" and under the 2008 revision, where this has been the subject of change.

4.3 Until recently, the "Towcon 2008" and "Towhire 2008" forms represented the most modern form of the BIMCO standard form contract in terms of the drafting of general provisions such as the knock-for-knock regime and the form of "consequential loss" exclusion and served as a point of comparison with the older "Supplytime 2005." The revision of the "Supplytime" form in 2017 to create "Supplytime 2017" (as well as the introduction of "Windtime" in 2013) means that there is now a new body of more up-to-date general provisions against which the older "Towcon 2008" and "Towhire 2008" forms should now be compared. Accordingly, where necessary, the text below contrasts the "Towcon 2008" and "Towhire 2008" provisions with those of "Supplytime 2017" and "Windtime", which are dealt with separately in Chapter 5.

The nature of the two forms

4.4 As before, the "Towcon 2008" and "Towhire 2008" forms are, in effect, the same form in all substantive provisions save as to the basis upon which the tug is to be remunerated by the tow. The distinction between the two forms is clear from their full titles:

i "Towcon 2008": "International Ocean Towage Agreement (Lump Sum)" – ie the services of the tug are to be paid for on the basis of a lump sum payment. This basis of payment is that often found in towage contracts where the tow engages the tug to perform a specific service whose features are, in principle, readily ascertainable by both tug and tow in advance such that the price or cost of the service can be estimated by both parties (ie "a tow from Walvis Bay to Durban"). In such cases, the parties, especially the tow, will usually wish to contract on the basis of a fixed sum for the service so as to achieve certainty and the tug will be more willing to accept the risks which a fixed sum entails given the specific and determinate nature of the service.

ii "Towhire 2008": "International Ocean Towage Agreement (Daily Hire)" – ie the services of the tug are to be paid for on a daily rate of hire basis. This version of the agreement is closely similar in its form and characteristics to a time charterparty of the "time charter trip" type, ie where a vessel is time chartered but in terms of a particular identified voyage or services.

4.5 It should be emphasised that the forms were developed for and are used almost exclusively in the context of ocean towage (ie most commonly large-scale, long duration towage). The forms are inapposite for use in respect of smaller-scale towage operations (ie in port or short coastal services), or in respect of the rendering of other non-towage-related offshore services (for which other specifically designed BIMCO or other forms are now in existence, see eg the "Supplytime" form, revised in 2005 and now again in 2017, which has become in many respects a maid-of-all-work in the offshore industry, and the "Salvhire" form – a joint BIMCO and ISU-inspired form – for salvage-related offshore services: see Chapter 8 below). The unthinking adoption of the two forms as templates for wholly different types of operation is apt to be productive of litigation. So BIMCO states in its explanatory notes to the original forms in a passage equally applicable to the 2008 revisions of them:

> It should be stressed that both Agreements are intended for commercial towage work at sea and have no connection with port towing or salvage.

4.6 In English legal practice, the UK Standard Conditions are still in widespread use for port and harbour towage operations and remain the standard trading conditions of tug-owning or towage companies, including those serving oil terminals.

PART B. THE "TOWCON 2008" FORM

The structure and organisation of the form

4.7 The "Towcon 2008" form is reproduced in facsimile in Appendix 2. The form, following the usual BIMCO drafting approach, is in two parts. Part of the avowed purpose of BIMCO in the 2008 revision was not only to address and remedy perceived deficiencies and grounds for potential dispute arising out of ambiguities in the wording of the original "Towcon" (and "Towhire") but also to re-order the arrangement of the various provisions in Part II in a more logical and structured way.

Part I of "Towcon 2008"

4.8 Part I consists of 41 boxes into which the specific details of the particular agreement concluded between the parties will be entered and by reference to which the standard clauses of the form will come into operation. The matters dealt with by boxes fall into several categories, the most important of which are the following.

Boxes 4 to 12

4.9 These boxes are unchanged and, as before, deal with the tow and provide for a detailed description of it and its characteristics: its name and type (Box 4) and its flag (Box 7); its tonnage and dimensions including towing draught (Boxes 5 and 6); its classification society and P&I insurers (Boxes 9 and 10); details of its "general condition" (Box 11); and any cargo, ballast or property on board (Box 12). The detail and description of the tow will usually be highly important and care should be taken in negotiations, particularly to define any *ad hoc* terms proposed by the tugowner or by the hirer. A recent example of the difficulties that may ensue from leaving terms undefined is *Regulus Ship Services Ltd v Lundin Services BV* [2016] EWHC 2674 (Comm). The case related to the towage of an FPSO from Tunisia to Malaysia, apparently on a variant of "Towcon" (not "Towcon 2008"). The tugowner quoted for the towage on the basis that the tow would be "deadship in light ballast seaworthy condition" and subsequently Box 12, dealing with cargo and ballast was filled out as follows "Particulars of Cargo and/or ballast and/or other property on board the tow Nil Cargo, Gas Free Condition; In Light Ballast Condition." The latter term was not specifically

defined. The towage was alleged by the tugowner to have taken longer than it should, necessitating the burning of more fuel due to the tow not being in light ballast condition in breach of description; the claim succeeded. Phillips J defined the term (by reference to an earlier decision of Andrew Smith J in *Ease Faith Ltd v Leonis Marine Management Ltd* [2006] 1 Lloyd's Rep 673) as follows: "she would carry (as well as any constants and consumables) the minimum ballast that would enable her to proceed safely and in a seaworthy condition on her intended voyage" (para. 66) and that this was an objective test which excluded any views of a surveyor as to what he would recommend (para. 71): "the test cannot have the effect for which Lundin contends, transforming the test from one of the minimum ballast required for physical safety and seaworthiness (producing, at least in theory, a single ascertainable figure) to one based on the wishes of a third party (capable of multiple solutions, depending on the approach of the surveyor engaged)." The arguments in that case as to whether specific figures were or were not agreed in pre-contract discussions etc demonstrate the need to spell out as specifically and clearly as possible in Part I the relevant operating criteria. This is the intention of the BIMCO "Box" system, namely to focus the parties' minds on each aspect of the service in logical stages. (For the discussion in this case of the tugowner's entitlement to delay payments for slow steaming, see the commentary to clause 24 below.)

Boxes 13 to 21

4.10 These boxes provide for the insertion of like details of the tug in Boxes 13–17 and go on to give the important capabilities of the tug: her bollard pull (Box 18) and indicated horse power (Box 19); her bunker consumption with and without tow (Box 20); and details of her winches and towing gear (Box 21).

4.11 This set of boxes, along with Boxes 4–12 above, dealing as they do with the description of the tow and of the tug, when filled out will result in the items of description given becoming terms of the towage contract. They will almost invariably be regarded as intermediate or innominate terms, breach of which gives a right to damages and in certain cases may give rise to a right to terminate. More commonly it is the details of the tug and her towing capabilities that are the most important and that potentially give rise to claims when the towage takes longer than anticipated. Tug owners will often seek to protect themselves by the insertion of words such as "about" when giving a particular detail or, occasionally, "without guarantee." The effect of such terms when coupled with a description is well covered in the law of charterparties (see eg Cooke*, Voyage Charters* (4th edn, 2014), paras. 3.23–3.25 and 3.40). In outline, the position is as follows. Words such as "about" will import a margin of error either side of the stated description; what that margin is and whether the shortfall from the stated figure is within it will be a matter of evidence of what those in the trade would regard as being indicated by the use of the term (see eg *Cargo Ships El Yam v Invotra* [1958] 1 Lloyd's Rep 39). Words such as "without guarantee" will negative the item of description as a contract term but will leave the representor liable, certainly in the event that the statement in question was put forward without an honest belief in its truth (cf. the ETA and charter period cases, eg *The Lipa* [2001] 2 Lloyd's Rep 19) and probably if the item was put forward negligently (see *Japy Frères v Sutherland* (1921) 26 Com Cas 227 and the discussion in *Cooke*, para. 3.40).

Annex A (Vessel Specification)

4.12 It is convenient at this point to refer to Annex A which concludes the printed form and is headed "Vessel Specification"; it is designed to be filled out by the parties, in particular, by the tug owner. Annex A is new and provides for a detailed questionnaire as to the physical characteristics of the tug, her mechanical attributes and her equipment and tackle which greatly supplements (if it is filled out by the parties) the short form details of the tug which are to be supplied in Boxes 13–21. It corresponds to the sorts of detail found in the published information sheet on a tug produced by

tug owners for provision to clients. Notwithstanding its inclusion as an integral part of "Towcon 2008", there is little internal textual reference to Annex A within the form itself, which is somewhat surprising. Thus, the definition of the tug given in clause 1 of Part II is merely the vessel (or vessels) described in Box 13 without reference to Annex A; similarly in the clauses dealing with the tug (clause 19) and her equipment (clause 16) there is no mention of Annex A. The concluding words of Part I alone indicate that the Annex is an integral part of the form ("It is mutually agreed between the party stated in Box 2 (hereinafter called 'the Tugowner') and the party stated in Box 3 (hereinafter called 'the Hirer') that the Tugowner shall, subject to the terms and conditions of this Agreement which consists of PART I including additional clauses, if any agreed and stated in Box 41, PART II and Annex A, use its best endeavours to perform the towage or other service(s) as set out herein"; see further below). The only reference to Annex A in the explanatory notes is in the context of clause 16 (equipment) where BIMCO states: "NOTE: In order to assist the tugowner in providing a standardised specification of the tug to the hirer, a new Annex A has been added to TOWCON. The Annex supplements the details normally to be found in Box 21 (Winches and main towing gear) of Part I." It is suggested that it might be clearer if the definition of "tug" in clause 1 is amended to make express reference to Annex A, in cases where this has been filled out. (Compare clause 3 of "Supplytime 89", "Supplytime 2005" and "Supplytime 2007" which, more logically, contains an express reference to the owners warranting that the vessel shall be "of the description . . . specified in Annex 'A' attached hereto" and also contains a definition of the "Vessel" not only being as described in the relevant box in part I but also "with the particulars stated in ANNEX A": see Chapter 5 below.)

Boxes 22 to 25

4.13 These boxes cover the nature of the service(s), route and the departure and destination points. Given that the form is designed to be used and is most commonly used for towage services, the definition of the service will usually be straightforward (eg "Towage only, always within safe capabilities of tug but always at discretion of tug master in using two or more engines": this is how box 22 was filled out in *Regulus Ship Services Ltd v Lundin Services BV* [2016] EWHC 2674 (Comm). However, given that the service is on lump sum terms (ie a fixed price), if there is any scope for ambiguity about the service (eg it is one of towage with additional services, such as the laying out of ground tackle on arrival or any services on board the tow itself such as the removal of fixed structures used for the tow etc.), then it is advisable to have the service carefully defined. The problem of ill-defined services often arises when tugs are hired in as sub-contractors in a salvage operation (see also the discussion below in Chapter 9 on the "Salvcon 2005" form). Similarly, the provision for the stating of the "contemplated route" in Box 23 usually presents no problems but issues can arise if the route is specified in great detail, either by coordinates or by calling places. While it has been argued that the "route", being only stated as being "contemplated", is not as such a term but only a non-binding indication, this seems difficult to sustain in light of the terms of the deviation provision in clause 24(a) which deals with deviations "from the original route as set out in Box 23" and when such deviations are permissible: see below. The 2008 provision makes new provision for the parties to define the specific contractual incidents attendant upon the towage passing through canals or through "restricted waters" (defined by clause 1 as being waters so defined by the parties in Box 23): Box 23 accordingly caters for such definition and prompts the parties in this regard ("state restricted waters"). It is unusual (for obvious reasons given the nature of ocean towage) to have any average speed of the towage convoy agreed or for a probable duration to be inserted in this section of Part I and no Box as such is provided for this. See for an attempt to argue for an average towage speed based on pre-contractual negotiations (where no point seems to have taken on the entire agreement clause, if there was one based on standard BIMCO terms): *Regulus Ship Services Ltd v Lundin Services BV* [2016] EWHC 2674 (Comm).

Boxes 26 to 30

4.14 These boxes deal with notices and the delay payments. The notices are those to be given pursuant to clause 7(c) of the standard terms in Part II. The notice provision under clause 13 (formerly clause 7) is complex, providing for four notices in all regarding the readiness and the departure of the tow. This complexity was formerly reflected in the fact that the original version of the "Towcon" form was accompanied by specific and separate "Instructions on how to fill in Box 28 in Part I" (see Appendix 2 to the 2nd edition at p. 333). The 2008 revision dispenses with the Instructions in their separate form and instead, and perhaps more logically, now incorporates them directly into the body of the provisions of the "Towcon" terms themselves: see further below in relation to clause 13. However, unfortunately, as seen below, the new Box 29 into which the various dates for the notices are to be inserted consists, by oversight, of numbered rather than lettered sub-paragraphs while clause 13 refers to lettered sub-paragraphs. The context makes it clear which notice and date-spread is meant, but it is unfortunate that, in tidying up and improving this part of the "Towcon", poor proofreading has crept in.

Boxes 33 to 35

4.15 These boxes provide for the amount of the lump sum and when the same is deemed earned and for interest on a late payment.

Box 40

4.16 Box 40 is new and provides for the specific choice by the parties of the agreed dispute resolution procedure and which of the options offered by clause 33 is to be adopted. This corresponds with the wholesale revision of the previous law and jurisdiction clause (the former clause 25) and the adoption in its place of the latest version of BIMCO's standard Dispute Resolution Clause, which forms part of all of the latest forms of BIMCO standard forms of contract. Previously, clause 25 provided for English law and High Court jurisdiction alone and the parties were required to delete the standard form provision and add a bespoke rider clause if they wished to opt out of the prescribed regime. Clause 33 of the 2008 revision provides for a different scheme, with a set of three choices: arbitration in London or New York or elsewhere and Box 40 reflects the need for a specific choice. This brought the "Towcon" form into line with the scheme adopted in the "Supplytime 89" form. The "Supplytime 2017" form adopts the more recent BIMCO Dispute Resolution Clause 2016, but this broadly follows the same scheme and format as Clause 33 of "Towcon 2008." It is important that the parties make an effective choice, as failure to fill out Box 40 may result in problems as to the validity of the arbitration clause: see further the commentary under clause 33 below.

Part II of "Towcon"

4.17 Additionally, the parties are free, as is common, to agree specific *ad hoc* provisions as typed clauses. These are to be indicated in Box 41 of Part I. Apart from any such specially agreed clauses, the order of precedence between the respective provisions of the "Towcon" form is provided for at the conclusion of Part I preceding the signatures of the parties. It is provided, in part, that:

> In the event of a conflict of terms and conditions, the provisions of PART I and any additional clauses, if agreed, shall prevail over those of PART II and Annex A to the extent of such conflict but no further.

4.18 As between typed provisions specially agreed upon and those forming part of a printed form, the usual rule of construction is that printed clauses forming part of a standard form yield before specifically agreed and written or typed clauses since these latter clauses represent the

"immediate language and terms" which the particular parties have adopted while the printed terms are a formulaic expression of general terms applicable to all those using the form (see eg *The Brabant* [1967] 1 QB 588 and *Naviera Amazonica Peruana SA v Cia. International de Seguros* [1988] 1 Lloyd's Rep 116; cf. *Thomas & Co v Portsea SS Co* [1912] AC 1). This common law rule is expressly reflected in the order of precedence in the "Towcon" form. See generally as to "precedence" provisions: *Lewison on Interpretation of Contracts* (6th edn), section 9.13 and *RWE Npower Renewables Ltd v JN Bentley Ltd* [2013] EWHC 978 (TCC) (Akenhead J) and [2014] EWCA Civ 150.

Commentary upon Part II of the form

4.19 Part I of the form, consisting of boxes in which details are to be entered, does not require consideration. However, the concluding words of Part I preceding the space left for signatures contain a general term defining the tug's obligation to the tow. These words state:

> It is mutually agreed between the party stated in Box 2 (hereinafter called "the Tugowner") and the party stated in Box 3 (hereinafter called "the Hirer") that the Tugowner shall, subject to the terms and conditions of this Agreement which consists of PART I including additional clauses, if any agreed and stated in Box 41, PART II and Annex A, use its best endeavours to perform the towage or other service(s) as set out herein.

4.20 This mirrors the wording of the formulation of the duties of the tug given by Lord Kingsdown in *The Minnehaha* (1861) Lush 335, discussed above: "when a steamboat is engaged to tow . . . she does engage that she will use her best endeavours for that purpose." For the reasons set out in Chapter 1 above, it is doubtful whether the use of the term "best endeavours" when used by the court in *The Minnehaha* was intended to connote a higher and more onerous obligation upon the tug than one to exercise reasonable efforts and care in the execution of the towage service.

4.21 However, it is certainly arguable that an express *contractual* provision of "best endeavours" does connote a higher standard of obligation and that, accordingly, the concluding obligation in Part I should be read in the same way as any other such clause and in line with the guidance as to the meaning of such clauses given in the cases in other contexts where they are commonly used, see eg the construction industry (as to which see Bailey, "What are 'best endeavours'?" [2004] Int Const L R 58 and Lewison, *The Interpretation of Contracts* (6th edn) at chapter 16, section 7 for a very comprehensive summary of "best endeavours" and similar clauses; see also the decision of the Singapore Court of Appeal in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] SGCA 16 for a very useful analysis of the case law in various jurisdictions on this topic).

4.22 The cases contain various formulations and paraphrases of the content of a best endeavours obligation but do not differ in their effect which is, effectively that the party must take all such steps and courses of action as are reasonably open to it to attain the stated aim, objective or state of affairs and that it is to be distinguished from lesser obligations such as "reasonable endeavours" (see Lewison, *Interpretation of Contracts* (6th edn), section 16.07, *passim*. Thus:

i In *Sheffield District Railways v Great Central Railway* (1911) 27 TLR 451, a local railway company undertook a contractual obligation to "use their best endeavours to develop through and local traffic." Lawrence J explained the meaning of the obligation which the railway had undertaken as follows:

> We think that best endeavours means what the words say . . .. They do not mean that the limits of reason must be overstepped with regard to the cost of the service; but short of these qualifications they mean that the Great Central Railway company must, broadly speaking, leave no stone unturned to develop traffic on the Sheffield District line.

ii In *Pips (Leisure Productions) Ltd v Walton* [1981] 2 EGLR 172 (cited by Lewison at p. 567), Megarry V-C stated that:

> 'Best endeavours' are something less than efforts which go beyond the bounds of reason, but are considerably more than casual and intermittent activities. There must be the doing of all that reasonable persons could reasonably do in the circumstances.

iii In *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335, Buckley LJ (concurred in by Goff LJ) stated that in relation to an obligation to use best endeavours to obtain planning permission that:

> the covenantors are bound to take all those steps in their power which are capable of producing the desired results, namely the obtaining of planning permission, being steps which a prudent, determined and reasonable owner, acting in his own interest and desiring to achieve that result would take. (343).

Geoffrey Lane LJ stated (at 345):

> These words, as I see it, oblige the purchaser to take all those reasonable steps which a prudent and determined man, acting in his own interests and anxious to obtain planning permission, would have taken.

iv In *Rhodia v Huntsman International* [2007] 2 Lloyd's Rep 325, the Court (Flaux QC as a deputy) discussed the meaning of "reasonable endeavours" and contrasted it with the meaning of "best endeavours." It stated (at para. 33):

> I am not convinced that . . . any of the judges in the cases on which Mr Beazley relied were directing their minds specifically to the issue of whether "best endeavours" and "reasonable endeavours" mean the same thing. As a matter of language . . . one would surely conclude they did not. This is because there may be a number of reasonable courses which could be taken in a given situation to achieve a certain aim. An obligation to use reasonable endeavours to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can. In that context, it may well be that an obligation to take "all reasonable endeavours" equates to using best endeavours and it seems to me that that is what Mustill J said in *Overseas Buyers v Granadex* [1980] 2 Lloyd's Rep 608 at 613. One has a similar sense from a later passage at the end of the judgment of Buckley LJ in *IBM v Rockware Glass* at 343.

v See also *Jet2.com Ltd v Blackpool Airport Ltd* [2011] EWHC 1529 (Comm) in which the court (HH Judge Mackie QC) considered the extent to which a party's commercial interests must be subordinated to the attainment of the stated object where a "best endeavours" obligation has been agreed.

4.23 The court approaches the construction of such clauses on the basis that this is a well-known and understood formulation and that the parties could have chosen a lesser form of obligation and/or could have imported express qualifications allowing each party to look to its own commercial interests and not subordinate those interests to achieving the stated result as, for example, in *CPC Group v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535 (Ch) where the provision adopted was "all reasonable but commercially prudent endeavours to enable the achievement of the various threshold events." Vos J rejected an argument that this was as stringent as a "best endeavours" obligation with which it fell to be contrasted (paras. 250–253). See also.*Jet2.com Ltd v Blackpool Airport Ltd* [2011] EWHC 1529 (Comm) referred to above.

4.24 The "endeavours" which are to be exercised are judged by reference to the actual attributes of the party obliged to take them, here the tug owner:

> A "best endeavours" clause requires the relevant obligor to do its best to achieve a stated objective. The "best" that the obligor can do is ascertained by having regard to the nature, capacity, qualifications and responsibilities of the obligor viewed against the background of the particular contract.

Bailey, *op. cit*., p. 64. The personal nature of an obligation of best endeavours is well-recognised in the cases: see eg *Abballe v Alstom UK Ltd* [2000] EWHC 122 (Tech) (considered further below): the party subject to such an obligation "is obliged to take those steps which a prudent person *in the position of that party* would take in its own interests" to achieve the stipulated result (*per* Judge Lloyd QC at para. 19, emphasis supplied); see also *IBM v Rockware Glass* [1980] FSR 335: an obligation to use best endeavours to obtain planning permission required the party to take all those "steps which a prudent determined and reasonable owner, acting in his own interests and desiring to achieve the result, would take" *per* Geoffrey Lane LJ at 345.

4.25 However, the assessment is an objective one. In *IBM v Rockware Glass* [1980] FSR 335 at 345, the court held that the steps must be those "which a prudent determined and reasonable owner, acting in his own interests and desiring to achieve the result, would take": the test is therefore objective. In *Terrell v Mabie Todd & Co* [1952] 2 Times LR 574, referred to in Chapter 1 above, Sellers J at 576 stated that "The standard of reasonableness is that of a reasonable and prudent board of directors acting properly in the interests of their company and applying their minds to their contractual obligations to exploit the inventions." The court is accordingly applying an objective measure. In *Abballe v Alstom UK Ltd* [2000] EWHC 122 (Tech) at para. 18, the court explained that the "customary meaning" of a best endeavours obligation is that the relevant party:

> is obliged to take those steps which a prudent person in the position of that party would take in its own interests. If there is a dispute about what steps should or should have been taken then if necessary the court or arbitrator will have to decide what a prudent person should do or should have done . . . . A party is not required to abandon or subordinate its own interests to those of the other party . . . In the case of . . . an agreement to use one's best endeavours to perform something the party has to accept that the court or other tribunal may determine what is in its own best interests and to that extent some of the objective criteria would be applied to what will otherwise be regarded as purely selfish or subjective.

See also *Paltara Pty Ltd v Dempster* (1991) 6 WAR 85, cited by Bailey.

Clause 1: the tow

"1. Definitions

'Tugowner' means the party stated in Box 2.
'Hirer' means the party stated in Box 3.
'Tug' means the vessel or vessels as described in Boxes 13 to 16.
'Tow' means one or more vessels or objects of whatsoever nature including anything carried thereon as described in Boxes 4 to 12.
'Voyage' means the voyage described in Boxes 24 and 25.
'Restricted Waters' for the purpose of this Contract means the waterways described in Box 23."

4.26 Clause 1 of the previous edition of "Towcon" contained only a definition of the tow. The 2008 revision replaces this with a set of definitions which are largely otiose, since the Boxes in Part I already sufficiently demonstrate that the tugowner, hirer etc are defined for the purposes of the standard terms in Part II which follow. The explanatory note records that the change is principally stylistic, to bring the "Towcon" form into line with the stable of other BIMCO forms: viz. "To bring greater clarity and readability to the form and to be consistent with other BIMCO documents, the new edition contains a list of six definitions covering terms that are used throughout the agreement."

4.27 The principal substantial change in the new clause 1 is the redefinition of "The tow" in simpler terms. "The tow" is defined in wide terms by reference to two definitions: the first is that it may be "one or more vessels or objects of whatsoever nature including anything carried thereon": this is a simpler definition, jettisoning the previous reference to "craft" which, used in addition to vessel and object was apt to confuse and catering for the fact that "the tow" may consist of a multiple tow or flotilla; the second is that it shall be such vessel or object as is "described in Boxes 4 to 12." The width of the definition, which is apt to cover any water-borne object, extends the applicability of the form to all types of towage and reflects the breadth of modern towage services and of the possible objects which are required to be transported by towage.

4.28 A potential problem arose under the previous version of the "Towcon" form in cases where "the Tow" is, as described in Box 4 of Part I, made up of more than one water-borne object or of a flotilla of towed objects. Thus if a powerful tug contracts to tow several obsolete warships to a breakers' yard or to tow a number of ocean-going barges (eg as commonly arises in the towage of barges laden with breakwater or coastal defence materials from Scandinavia to the UK), "the Tow" as described in Box 4 will consist of a multiple convoy (eg "The hulks of H.M.S. Torrin and H.M.S. Compass Rose" or "Barges C.123 C.56 C.789"). If, on the voyage from the place of departure to the place of destination as defined by Boxes 24 and 25, one part of the convoy founders or is lost by stress of weather, difficulties arose when the remainder of the convoy arrives at destination since "the Tow" as defined in Box 4 had not *per se* arrived. The question was particularly pertinent where the lump sum is earned, as is not uncommon, in different stages of the towage service (eg "25 *per* cent on the departure of the Tow, 25 *per* cent on passing Cape Town, 50 *per* cent on arrival of the Tow in Karachi Roads"). If a part of "the Tow" was lost on passage, "the Tow" as defined in Box 4 had not arrived such as to trigger the entitlement to the reserved portion of the lump sum. As a matter of construction, the lump sum is payable only in the event of the arrival of "the Tow" as described and not for a portion of it. Although clause 23(b) (now 30(b)) provided that, for the purposes of the agreement, the singular shall include the plural and vice versa unless the context otherwise requires, where clause 1 defines the object or objects described in Box 4 as being "the Tow", "the Tow" had been defined for the purposes of the contract as comprising all of the objects referred to in Box 4. In such circumstances, clause 23(b) was of no assistance in resolving this difficulty.

4.29 In previous editions of this work, it was therefore recommended that those providing tugs to perform towage of flotillas or convoys of water-borne objects should be careful to so define "the Tow" in Box 4 as to avoid this complication and, preferably, to append a typed clause clarifying that remuneration is deemed earned upon the happening of a given event or at a given time notwithstanding that any constituent part or parts of "the Tow" were lost or not lost (ie a "lost or not lost" clause). This problem has now been specifically addressed by BIMCO in the 2008 revision of the lump sum provision in just the manner suggested; clause 3(c) now provides that the lump sum is earned in full whether or not all, or part, of the Tow, as defined in Box 4, is lost or not lost.

4.30 The nature of lump sum remuneration is considered in greater detail below.

Clause 2: basis of the contract

"2. Basis of the Agreement

The Tugowner agrees to render the service(s) to the Tow as set out in Box 22."

4.31 This is a further cosmetic change to the previous version of the form arising out of the recasting of clause 1 as a set of definitions extending beyond the definition of the tow. In the old clause 1 which defined "the Tow", it was provided that the tow included any vessel, craft

or object "to which the Tugowner agrees to render the service(s) as set out in Box 22" of Part I. Clause 2 merely sets this out as a separate provision for completeness. It confirms (if confirmation were necessary) that the contract is one for services; as BIMCO states: Clause 2 "establishes the basis of the agreement for the tugowner to provide to the hirers the agreed services set out in Part I of the form."

Clause 3: price and conditions of payment

The lump sum

"3. Price and Conditions of Payment

The Hirer shall pay the Tugowner the sum set in Box 33 (hereinafter called 'the Lump Sum').

The Lump Sum shall be payable as set out in Boxes 33 and 34.

The Lump Sum and all other sums payable to the Tugowner under this Agreement shall be payable without any discount, deduction, set-off, lien, claim or counter-claim, each instalment of the Lump Sum shall be fully and irrevocably earned at the moment it is due as set out in Box 33, Tug and/or Tow or part of Tow lost or not lost, and all other sums shall be fully and irrevocably earned on a daily basis as *per* Box 30.

All payments by the Hirer shall be made in the currency and to the bank account specified in Box 34."

4.32 Paragraphs (a) and (b) provide for the amount of remuneration in the form of a lump sum payment (which is specified in Box 33) and para. (c) for the event(s) upon or time(s) at which the same is to be deemed earned, and para. (d) specifies the currency and bank at which the hirer is to make payment (which details are as specified in Box 34). Apart from re-numbering and the insertion of the words "or part of Tow" in clause 3(c), paras. (a)–(d) of the 2008 clause 3 is virtually identical to that in the former version (old clause 2). In the former version, clause 2 lumped together all payments due under the contract. "To help improve the structure and readability of the contract" (as BIMCO puts it), sums due otherwise than by way of lump sum have now been separated off, with clause 3 being exclusively confined to the contract lump sum remuneration provisions and with payments for bunker adjustment (formerly clause 2(e)) and for delay (formerly clauses 2(f) and (g)) being given their own stand-alone provisions, viz. the new clauses 4 and 6, respectively.

4.33 Mention has already been made of potential difficulties under the previous version of the "Towcon" form where the earning of the lump sum was to take place upon the happening of events concerning or involving "the Tow" as defined as a single unit in Box 4, even if made up of multiple units under towage. These have now been addressed by clause 3(c) with its addition of the words "Tug and/or Tow *or part of Tow* lost or not lost" (emphasis supplied). In this connection, a comparison may be made with the principles applicable in relation to lump sum freight payable under a voyage charterparty for the carriage of cargo. These may be summarised as follows:

i A lump sum freight is, on one view, a sum payable for the rent or hire of a vessel for the particular voyage. In *Merchant Shipping Co v Armitage* (1873) LR 9 QB 99, Lord Coleridge CJ described it thus at p. 107:

> To avoid all risk and all inconvenience between the parties to the contract, the lump sum was taken to represent that at which the one party was willing to hire and the other was willing to lend the ship for the stipulated voyage.

This view cannot be taken too far: if a vessel contracts to carry cargo from A to B for a lump sum and gets the cargo to B but by means other than by the vessel herself (eg in another bottom or by carts), the cargo interests cannot resist a claim for the lump sum on

the basis that the vessel herself was not used and therefore no rent for her is payable (see *Thomas v Harrowing SS Co* [1915] AC 57, where a shipowner who used road carriage rather than the named vessel to get the cargo to destination was held to be entitled to the full lump sum freight).

ii If the lump sum is payable upon the delivery of the cargo and none of the cargo is delivered, the lump sum is not due (see *Merchant Shipping Co v Armitage* (*op. cit*.) *per* Bramwell B at p. 111).

iii However, where the lump sum is payable upon the delivery of the cargo and part of the cargo is lost, if that loss was due to expected perils, the lump sum will be earned in full by the delivery of the remainder of the cargo (see *The Norway (No. 2)* (1865) 3 Moo PC (NS) 245 and *Robinson v Knights* (1873) LR 8 CP 465). *Per* Lord Coleridge CJ in *Merchant Shipping Co v Armitage* (*op. cit*.) at p. 107:

> If it were a matter entirely free from authority there might be some ground for saying that 'entire discharge and right delivery of the cargo' meant the entire discharge and right delivery of the cargo originally put on board. But the fair and reasonable construction of it, regard being had to the contract being for a lump sum, seems to me to be that which the courts have already put upon similar contracts, that the cargo is entirely discharged and rightly delivered, if the whole of it not covered by any of the exceptions in the contract itself is delivered.

It is highly arguable that the same reasoning would apply in the case of a tug earning lump sum freight on arrival of "the Tow" where the tow consists of several water-borne objects. The lump sum is payable to the hire of the tug for that service; if "the Tow" is partly lost by excepted causes but is still delivered, the lump sum similarly remains due.

iv Where freight is payable on delivery or arrival of the cargo, then freight remains due and payable in full if the cargo is delivered in a damaged or deteriorated condition. In such a case, any claim for that damage will have to be made separately and cannot be set off against freight. An exception of somewhat uncertain extent exists where the cargo has been so damaged that, to all intent and purposes, it has lost its commercial identity as the thing it was. If this can be established, then even if it is delivered and taken, delivery of freight is not due. See *Asfar v Blundell* [1896] 1 QB 123 (dates spoiled by immersion in sewage), as explained in *The Caspian Sea* [1980] 1 Lloyd's Rep 91 (cargo of Bachaquero crude contaminated with paraffin and sulphur). In the towage context, the argument surfaces occasionally although the test of "loss of identity" is a difficult one to satisfy: a very badly damaged jack-up rig is still a jack-up rig. However, where eg a large boiler or piece of drilling equipment is so damaged as to be commercially no better than scrap, then the *Asfar v Blundell* analogy may be much more arguable. See the test of Donaldson J in *The Caspian Sea* (above): has the nature of the goods become so altered "as to become for business purposes something else?"

4.34 In the context of a towage contract on lump sum terms, these principles (or principles analogous to them) will only be applicable where the contract is in simple terms, providing for the performance of a towage from A to B with a lump sum payable on arrival at B. More usually, the lump sum will be earned in stages, corresponding to particular stages of the towage or of the route being followed and, if clause 3(c) is unamended, on "lost or not lost" terms such that once a stage has been reached, the freight or lump sum payment for that part is due, whether or not the tow is subsequently delivered and even if subsequent performance of the towage is rendered impossible (see in the freight context *The Karin Vatis* [1988] 2 Lloyd's Rep 330). However, much will depend on how the service in and the earning of the lump sum is defined (see text next following).

The earning of the lump sum and the anti-deduction clause

4.35 As seen above, para. (c) of clause 3 provides as follows:

> (c) The Lump Sum and all other sums payable to the Tugowner under this Agreement shall be payable without any discount, deduction, set-off, lien, claim or counter-claim, each instalment of the Lump Sum shall be fully and irrevocably earned at the moment it is due as set out in Box 33, Tug and/or Tow or part of Tow lost or not lost, and all other sums shall be fully and irrevocably earned on a daily basis as *per* Box 30.

4.36 It accordingly deals with two matters: first, when the lump sum is deemed earned; and, secondly, how that lump sum shall be paid.

4.37 As to the first matter, the clause provides that the sum is "fully and irrevocably earned" at the moment it is said in Box 33 to become due "Tug and/or Tow or part of Tow lost or not lost." These latter words may be inapplicable in certain circumstances, eg if the parties stipulate that the sum is due on arrival and/or hand-over of the tow at destination, there will be no scope for the question of the "lost or not lost" provision. But very frequently the sum or instalments of it are deemed earned at much earlier stages or in successive stages and the clause protects the tug's right to remuneration notwithstanding a subsequent loss of tug or tow or both. The "lost or not lost" provision now specifically addresses the situation in which not the whole of "the Tow" but part of "the Tow" only is lost. BIMCO explains the rationale behind the provision in this way (cf. the suggestion made at p. 94 of the 2nd edition of this work): "New to this edition are the words 'or part of Tow'. These words have been added to cover multiple tows where a partial loss of one or more of the tows occurs but at least one part of the tow remains. To avoid disputes as to whether the entire lump sum is payable in the event of a loss of part of the tow the additional wording makes it clear that in such circumstances the full lump sum is payable."

4.38 As to the second matter, the clause seeks to prevent the hirer from making deductions from the lump sum, eg in respect of claims which the hirer alleges it has arising from non-performance or poor performance of the contract service. Save in the special case of freight (where it has been long-settled that no right of set-off of claims for damages exists to extinguish or diminish claims for freight which claims are to be regarded effectively as "sacrosanct" – see *The Aries* [1977] 1 WLR 185 (HL); *The Dominique* [1989] AC 1056; and *The Khian Captain (No. 2)* [1986] 1 Lloyd's Rep 429; and see generally Cooke, *Voyage Charters* (4th edn, 2014), para. 13.63 *et seq*.), the claim by the hirer which the hirer seeks to deduct from monies due to the tug will fall into one or more of the following categories (for a helpful and succinct modern analysis of the various classes of set-off and their application, see *Fearns (trading as Autopaint International) v Anglo-Dutch Paint & Chemical Co* [2011] 1 WLR 366 *per* George Leggatt QC (sitting as a deputy) at paras. 11–49, applied in *Stemcor UK v Global Steel Holdings Ltd* [2015] EWHC 363 (Comm), and *Geldof Metaalconstructie NV v Simon Carves Ltd* [2011] 1 Lloyd's Rep 517 (CA); see also *Bibby Factors NW Ltd v HFD Ltd* [2015] EWCA Civ 1908; [2016] 1 Lloyd's Rep 517).

a A pure defence to the claim for the price on the basis that the work is worth less than the price being charged. This is called the "defence of abatement" (see *Mondel v Steel* (1841) 8 M & W 858), also called the "right of deduction" (see *The Aries* [1977] 1 WLR 185, *per* Lord Wilberforce discussing *Mondel v Steel* at p. 190C–F).

b A cross-claim which is so closely bound up with the claim for the price and which arises out of the same transaction that it may be set off against it (deriving from the Statutes of Set-off).

c A cross-claim which falls outside para. (b) above but which courts of equity would have regarded as being a ground for preventing the claimant for the price from continuing with his claim until the cross-claim was taken into account. This is usually

referred to as "equitable set-off" (see *The Brede* [1974] QB 233, *per* Lord Denning MR at pp. 248–249) and requires the cross-claim to be "so closely connected with [the plaintiffs] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim": see the recent detailed consideration of this requirement of close connection by the Court of Appeal in *Geldof Metaalconstructie NV v Simon Carves Ltd* [2011] 1 Lloyd's Rep 517, especially *per* Rix LJ at paras. 20–43, *passim*.

d A cross-claim arising out of a different transaction which cannot be set off but which can be raised, in the same proceedings as the claim for the price, as a counterclaim.

4.39 Paragraph (c) of clause 3 is a typical "anti deduction" clause. Such provisions are entirely valid in English law (see *Hong Kong and Shanghai Banking Corpn v Kloeckner & Co* [1990] 2 QB 514; see also *Derham on the Law of Set-Off* (4th edn, 2010)). However, they will be construed strictly since they take away the fundamental rights of any buyer or cross-claimant. Accordingly, to achieve the barring of set-offs and cross-claims, "clear express words" must be used (see *Gilbert Ash Northern Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, *per* Lord Diplock at p. 717). Standard anti set-off clauses usually refer to the price being payable without any set-off or counterclaim being made against it. Such wording may of itself not be sufficient to bar a defence of abatement, although the words "any deduction or diminution in the price" will usually do so.

4.40 Paragraph (c), however, is widely drawn and specifically covers all possible formulations of the tow's claim, thereby effectively barring any deductions whatsoever from the lump sum price and allowing the tug to pursue the hirer by way of interim award (on the same basis as for summary judgment under CPR Part 24) in respect of any non-payment or underpayment. The advantages of such wide wording were demonstrated in *CMA CGM Marseille v Petro Broker International (Formerly known as Petroval Bunker International)* [2011] EWCA Civ 461 where a similarly drawn clause in a bunker supply contract was contract for the supply ("Payment shall be made in full, without set-off, counterclaim, deduction and/or discount, free of bank charges") was held by arbitrators to prevent the freight, once paid, from then being attached or frozen as security for a cross-claim of the owner CMA against the bunker supplier, Petroval, even where Petroval's assets made it questionable that any eventual counterclaim by CMA would be satisfied. The arbitrators, accepting the concern of CMA to attach the freight otherwise due to Petroval as security for its counterclaim, held that any subsequent inability to recover from Petroval was a foreseeable consequence of the "anti-deduction/no set-off" terms which the parties had agreed. They refused to order Petroval to provide security for CMA's counterclaim in an equivalent sum to the amount awarded to Petroval as freight, viewing this as a procedural device to undermine Petroval's substantive rights, namely to be paid without set-off, counterclaim, deduction and/or discount. See also *Axa Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133 at para. 45.

4.41 A clarification has been added to para. (c) by the addition of a specific reference to the delay payments set out in Box 30. In BIMCO's words: "At the end of Sub-clause (c) a reference to Box 30 (Delay Payments) has been added. This has been done to clarify that if the tow is lost between instalments then the rate earned up until the loss of the tow will be pro rata the lump sum instalment and the rate earned after the loss (for repositioning) will be at the delay payment rate."

Clause 4: the bunker price adjustment clause

"4. Bunker Price Adjustment

(a) This Agreement is concluded on the basis of the price *per* metric tonne of bunker oil stated in Box 37.
(b) If the price actually paid by the Tugowner for bunker oil consumed during the Voyage should be higher, the difference shall be paid by the Hirer to the Tugowner.

(c) If the price actually paid by the Tugowner for bunker oil consumed during the Voyage should be lower, the difference shall be paid by the Tugowner to the Hirer.
(d) The log book of the Tug and copies of the bunker supplier's invoices shall be conclusive evidence of the quantity of bunkers consumed and the prices actually paid."

4.42 Clause 4 is designed to protect both parties from market fluctuations in the price of bunkers during the course of the contractual service. The parties contract on the basis of the actual price of the tug's bunkers paid by the tugowner (not by reference to an average price current at the time of contracting as used in the former version; this is set out in Box 37). If the average price of bunkers, as calculated under the clause, is either greater or less than this figure, there is an adjustment under the clause in favour of the tug or the hirer respectively. The clause sets out more concretely and in clearer form how the adjustment is to be arrived at than the old clause 2(e). It provides for greater certainty and avoids potential disputes by stipulating, (a), for the actual price of bunkers paid to be used as the base figure (see the explanatory notes: "This figure will normally be the price of the tug's bunkers at the time of fixing the contract") and, (b), for the tug's log and the bunker receipts to be conclusive evidence, rather than prima facie evidence.

Clause 5: the cancelling date and the hirer's right to cancel

"5. Extension to Cancelling Date

Should the Tug not be ready to commence the towage at the latest at midnight on the date indicated in Box 38, the Hirer shall have the option of cancelling this Agreement and shall be entitled to claim damages for detention if due to the wilful default of the Tugowner.
(a) Should the Tugowner anticipate that the Tug will not be ready, he shall notify the Hirer thereof without delay stating the expected date of the Tug's readiness and ask whether the Hirer will exercise his option to cancel.
(b) Such option to cancel must be exercised within forty-eight (48) hours after the receipt of the Tugowner's notice, otherwise the third day after the date stated in the Tugowner's notice shall be deemed to be the new agreed date to commence the towage in accordance with this Agreement."

4.43 As part of the re-ordering of the arrangement of the clauses in Part II and following the approach in the other more modern BIMCO forms of contract (see the explanatory note to clause 5), certain clauses have been arranged in a form of chronological order. Accordingly, the presentation of the tug to the hirer is now dealt with earlier in the form than previously. In the former version of "Towcon", all rights of cancellation or withdrawal, whether those of the hirer or of the tug owner were dealt with together in clause 16; this clause has now been broken up, with the right of the hirer to cancel, formerly dealt with in clause 16(e), being made the subject of this separate provision.

4.44 Paragraph (a) of the clause provides for a standard voyage charterparty form of cancelling clause. Under this, if the tug is not ready to commence the towage by a set time (midnight) on the agreed cancelling date (which is to be set out in Box 38 of Part I), the hirer may cancel the contract; this is so irrespective of whether there has been any breach of contract by the tug. However, while the clause leaves unaffected the common law rule that if the owner is in breach of some other provision of the charterparty, he remains liable in damages for that breach, it provides that if the unreadiness of the tug is due to the "wilful default" of the tug (eg where the tug has left the tow so as to service a more lucrative contract), the tow may recover "damages for detention" or damages to reflect the delay to the tow in departing under tow. Clause 5(a) stipulates that there is to be an agreed cancelling date. The previous version left it open whether the parties wished to agree to such a date or not which made the operation of the right to cancel highly contentious in circumstances where no such date was in fact agreed (the old clause 16(e) reading "Should the Tug not be ready to commence the towage at the latest at midnight on the date, *if any*, indicated . . .."; emphasis supplied). This has now been remedied (the explanatory notes recording: "Unlike the

previous edition, TOWCON 2008 requires the parties to agree a cancelling date – without which the contract is left open-ended leading to potential dispute should a tug be seriously delayed").

4.45 In the event that the tug knows in advance that it might not be ready, para. (b) provides for a procedure by which the tug can give notice to the tow of this fact and of the tug's new date of readiness and to call upon the hirer to make his position plain in advance. This gives to the hirer an option either to accept the proposed new date or to cancel the contract. The provision is, thus, described, albeit somewhat arcanely, by BIMCO as an "interpellation" provision (*ab "interpellatio"*: to summon or to call upon to answer in a debate) and is designed to be of mutual benefit: "This is a mechanism that benefits both parties by requiring early notification of any possible delays to the tug's arrival at the place of departure beyond the cancellation date. For the tugowner the mechanism avoids having to send the tug on a lengthy passage to the place of departure not knowing if the hirer will cancel the contract on arrival. For the hirer, early notification of a delay to the tug until after the cancellation date may provide sufficient time for a replacement tug to be found or for a new cancellation date to be agreed.

Clause 6: free time and delay payments

"6. Free Time/Delay Payments

(a) The Free Time specified in Boxes 26 and 27 shall be allowed for the connecting and disconnecting of the Tow, transiting canals and Restricted Waters and all other purposes relating thereto. Free Time shall commence when the Tug arrives at the pilot station at the place of departure or the Tug and Tow arrives at the pilot station at the place of destination or anchors or arrives at the usual waiting area off such places or, in the case of canals and Restricted Waters, as from arrival at the pilot station or customary waiting place or anchorage, whichever is the earlier, and until dropping last outbound pilot when leaving for the open sea. Free Time for transiting canals and Restricted Waters shall be as stated in Box 28. Should the Free Time be exceeded, Delay Payments at the rate specified in Box 30 shall be payable until the Tug and Tow sail from the place of departure or the Tug is free to leave the place of destination.
(b) Any Delay Payment due under this Agreement shall be paid to the Tugowner as and when earned on presentation of the invoice."

4.46 Since the towage is on lump sum terms with the lump sum having been calculated in part upon the reasonably anticipated duration of the service, some time for connection and disconnection of the tug is already allowed for within the lump sum price by para. 6(a). This time, called "free time", is stipulated in Boxes 26 and 27 for connection and disconnection respectively. The moment at which the free time commences is provided for by reference to clear and easily identifiable events in an ordinary ocean towage: the arrival of the tug at the pilot station for the place of departure for connection free time and the arrival of the tug and tow at either the pilot station or the usual anchorage or waiting place at the place of destination for disconnection free time.

4.47 In addition, in the 2008 revision, provision is also made for passage through canals and restricted waterways, allowing the parties to provide in Box 28 of Part I for "free time" specifically referable for transit through such waterways, such being a required allowance under the new form: see clause 7 considered below. The commencement points for free time are again clearly detailed: as from arrival at the pilot station or customary waiting place or anchorage, whichever is the earlier, and until dropping last outbound pilot when leaving for the open sea. While the concept of a "Canal" is self-explanatory (and was introduced to cater for slow passage via the great canals such as the Suez, Panama and Kiel), as mentioned above, it is for the parties to define what waters are to be regarded as "Restricted Waters" in Box 23, having regard to the nature of the towage convoy or flotilla and the available sea room. The explanatory notes suggest, by way of example, "It is intended that the parties should agree from the outset what constitutes 'restricted waterways' for the purposes of the contract. Such waterways may include transit through areas such as the Dardanelles and the Bosporus."

4.48 If the free time is exceeded, para. 6(a) provides that delay payments will be due at the rate specified in Box 29. This box envisages the provision of a port rate and a sea rate, presumably, although it is not stated, *per* day and *pro rata*. This should be specified when filling in Box 30. These payments cover the time from expiry of free time to the sailing of the tug and tow (at the place of departure) or until the tug is free to leave (at the place of destination).

4.49 It is submitted that the nature of the delay payment under para. 6(a) is equivalent to that of demurrage payable under an ordinary voyage charterparty. While the subject of demurrage is outside the scope of this work and is dealt with in other texts (notably Schofield, *Laytime and Demurrage* (7th edn, 2016)), a brief outline of its nature and features in the context of "delay payment" is appropriate.

4.50 In an ordinary voyage charterparty there are laytime provisions which usually provide for a period of time within which loading and discharging are to be effected. Although the charterparty will often speak of this period as being time "allowed" to the charterer, the charterer is under an obligation to load or discharge within the permitted laytime. If laytime is exceeded, the charterer is in breach of charterparty. If the charterparty contains a demurrage provision, as it invariably does, the demurrage rate (a sum *per* day and *pro rata*) will constitute liquidated damages for the breach. The position was succinctly summarised by Hobhouse J in *The Forum Craftsman* [1991] 1 Lloyd's Rep 81 at p. 87:

> A liability for demurrage is a liability for liquidated damages for breach of contract. The breach of contract is the failure to discharge (or load) within the permitted laytime. The obligation has two different aspects: the first is the obligation to discharge and the second is to do so within the limited time. There is no breach before that limited time has expired. Once the limited time has been exceeded there is a continuing breach for which the liability in liquidated damages (that is to say demurrage) continues to accrue minute by minute as the failure to complete discharge continues.

4.51 The position under para. 6(a) is, it is submitted, no different. The hirer is given a certain time, viz. that time which is described as "free time", within which the connection or disconnection is to be effected. If this time is exceeded, the hirer is in breach; the hirer's liability in damages is replaced by a liquidated damages provision, being the "delay payment" provided for in Box 30. Significantly, there is no substantial difference in language between common laytime and demurrage provisions under the standard forms of voyage charterparty and para. 6(a) of the "Towcon 2008" form. Where appropriate, reference may be made to the a consolidated attempt at standardisation and harmonisation of laytime and demurrage terms participated in by BIMCO, namely "*The Laytime Definitions for Charterparties 2013*" (representing the latest version and a consolidation of the previous "*Charterparty Laytime Definitions 1980*" and the "*Voylay*" or "*Voyage Charterparty Laytime Interpretation Rules 1993*"). The 2013 Definitions are appended to Cooke, *Voyage Charters* (4th edn, 2014) at appendix 4.2; for the previous versions see the 3rd edn, 2007 at appendices 4.2–4.4). However, unless these rules are expressly incorporated into the contract, they have no express contractual force.

4.52 From the equivalence of "delay payments" to demurrage, certain consequences for the tug owner and hirer follow from the general law of demurrage.

i The liability of the hirer to pay delay payments will be absolute once the free time has been exceeded and will not depend upon the tow being at fault. That this is so is itself clear from the plain wording of para. 6(a): "Should the Free Time be exceeded, Delay Payment(s) at the rate specified in Box 30 shall be payable until . . . ." Thus, whether the connection is not effected within the free time allowed because the hirer has not made the tow ready or because while the tow is ready, the hirer has decided for commercial reasons not to permit connection or because of circumstances beyond her control (eg heavy weather) no connection can be made, the hirer is liable equally to pay the delay

payments as provided for in Box 30. As Viscount Finlay stated in *William Alexander v Aktiebolaget Hansa* [1920] AC 88 at p. 94:

> If the charterer has agreed to load or unload within a fixed period of time . . . he is answerable for the non-performance of that engagement, whatever the nature of the impediments, unless they are covered by exceptions in the charterparty or arise through the fault of the shipowner or those for whom he is responsible.

ii It is not necessary for the tug to show that she has suffered any loss as a result of the free time being exceeded in order to be able to recover the delay payment. That fact of the free time having been exceeded is sufficient (see para. 6(a); see also generally on liquidated damages provisions *Clydebank Engineering Co v Don Jose Ramos y Yzquierdo y Castoneda* [1905] AC 6).

iii The liability to make delay payments will only be excused in two cases: first, if the cause of the free time being or having been exceeded is a cause covered by a relevant exceptions clause; and secondly, if the cause of free time being exceeded is the fault of the shipowner (*per* Viscount Finlay in *Alexander v Hansa* (*ibid*.)).

iv As to the first matter (ie the free time having been exceeded by a cause covered by an applicable exceptions clause – see eg *Union of India v Cia. Naviera Aeolus* [1964] AC 868 at p. 879), in demurrage cases, the courts have adopted a very strict approach to the construction of exceptions clauses as applying so as to exempt a charterer from his liability to pay demurrage, such that, if the exceptions clause does not expressly refer as such to demurrage or is not a specific "demurrage exceptions" clause, very clear and precise wording will be required so as to extend a general exceptions clause to apply to liability for demurrage (see eg *The Johs Stove* [1984] 1 Lloyd's Rep 38 and *The John Michalos* [1987] 2 Lloyd's Rep 188). It is, however, doubtful whether this particularly strict approach is applicable otherwise than in the field of charterparty demurrage where the absolute nature of the demurrage payment has been long-established and is reflected in the imprecise but striking maxim "once on demurrage, always on demurrage." Provided, therefore, that the exception clause in the towage contract is apt to cover the liability to make delay payments and is not ambiguous in accordance with normal principles of construction (see eg *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 3 WLR 163), the hirer will be excused. However, it is advisable to refer specifically to free time and delay payments when drawing up any exceptions clause which is intended to apply to these matters.

v Secondly, the tow will be under no liability under para. 6(a) if the cause of the free time having been exceeded is a breach of the towage contract on the part of the tug or other wrongful conduct of the tug (see Schofield (*op. cit*.)). So, for example, where the tug arrives without her warranted towing gear or with reduced engine power and, as a consequence, free time is exceeded, the hirer will either not be liable for the delay payment or he will be able to cross-claim in respect of any such liability as damages for the tug's breach of contract. (This is so perhaps even if the tug's breach is covered by an exceptions clause which exempts it from liability: see *The Union Amsterdam* [1982] 2 Lloyd's Rep 432 (Parker J).) However, compare the compelling criticism of this case by Schofield (*op. cit*.) and the view that the principle applies more where the exception clause does not relieve the owner from the *liabilities* arising out of the breach itself, but only relieves the owner from the liability in *damages* for that breach.

4.53 Under para. 6(b), any delay payment is to be paid "as and when earned on the presentation of the invoice." This wording is unclear: if the hirer alleges that no delay payment has been earned because the cause of the delay was a breach of contract on the part of the tug, is the payment still

payable upon the presentation of the invoice? It is submitted that the payment is payable upon this event only where there is no *bona fide* dispute as to the payment having been earned.

Clause 7: passage through canals and "Restricted Waters"

"7. Canal and Restricted Waters Transit

(a) If the contemplated route of the Tow, according to Box 23 will involve a transit of a canal or Restricted Waters, the Hirer is granted free time for any such transit, and such free time shall count against the number of hours stipulated in Box 28. If the Tow is delayed beyond the free time stipulated therein, unless the Tugowner is responsible for such delay, the Hirer shall pay for such extra transit time at the Delay Payments rate stipulated in Box 30 and shall, in addition, pay for all other documented extra expenses thereby incurred. Canal or Restricted Waters transit time is defined as from arrival at pilot station or customary waiting place or anchorage, whichever is the earlier, and until dropping last outbound pilot when leaving for the open sea.

(b) Should the transit of a canal or Restricted Waters be made impossible for reasons beyond the Tugowner's control, the Hirer shall pay for all extra time by which the voyage is thereby prolonged at the Delay Payments rate stated in Box 30."

4.54 This is a new provision which includes within the existing "free time" scheme a further allowance for free time when the towage convoy is operating within canals or "Restricted Waters" as defined by the parties. Its terms are self-explanatory and have been included to bring the "Towcon" form into line with the new "Projectcon" form introduced by BIMCO in 2005 as a specially designed charter party for the tug and barge sector which is designed to provide a "single contractual platform" (in BIMCO's words) to govern the entire commercial adventure involved in the use of a barge and tug to transport special or projects cargoes. As the explanatory notes reiterate: "This is a new Clause that is based on the Canal Transit Clause found in the PROJECTCON form (a BIMCO standard contract designed for tug and barge combinations)."

4.55 Paragraph (a) mirrors clause 6 in relation to free time generally, "in respect of free time counting for canal and restricted waterways transit counting being as *per* whatever the parties agree and state in Box 28. If such free time is exceeded due to delay then the extra time incurred is payable by the hirer at the delay payment rate. If the tugowner is responsible for the delay to the tow then the delay payment is not payable for that part of the delay." Paragraph (b) "contemplates the situation where the intended canal or waterway route is closed to the tow through no fault of the tugowner. In such circumstances the tow will have to re-route to reach the destination" and provides that in such a case, the hirer pays for the extra time occasioned by having to re-route at the delay payment rate.

Clause 8: ice clause

"8. Ice Clause for Tug and Tow

(a) The Tug shall not be obliged to force ice, but subject to the Tugowner's prior approval having regard to its size, construction and class, it may follow ice-breakers.

(b) The Tug shall not be required to enter or remain in any ice bound port or area, nor any port or area where lights, lightships, markers or buoys have been, or are about to be withdrawn by reason of ice, nor where on account of ice there is, in the Tugmaster's sole discretion, a risk that, in the ordinary course of events, the Tug will not be able to safely enter the place of departure to connect to the Tow, or depart from the place of departure with the Tow. In addition, if, on account of ice, the Tugmaster in his sole discretion considers it unsafe to proceed to, or to enter, the place of destination for fear of the Tug and/or Tow being frozen in and/or damaged, he shall be at liberty to proceed to the nearest ice free port or safe place and there await the Hirer's instructions.

(c) Any delay, deviation or additional expenses arising out of or in connection with the performance of this Agreement caused by or resulting from ice shall be for the Hirer's account and any delay payments shall be paid at the rate stated in Box 30.

(d) Any additional insurance premiums and/or calls required by the Tug's insurers due to the Tug entering or remaining in any ice bound port or area shall be for the Hirer's account."

4.56 Many voyage charterparties contain an ice clause and the absence of a corresponding provision in the "Towcon" form was a surprising lacuna given the breadth of the waters in which towage operations, especially those serving the offshore exploration and production industry, are routinely conducted. The gap was usually filled by the parties adding an ice rider clause, basing that clause on commercial voyage charter examples or adapting BIMCO's own Ice Clause for use with Voyage Charterparties. "Towcon 2008" addresses the deficiency by a specially tailored version of the BIMCO Ice Clause: "The Ice Clause has been newly introduced into the 2008 edition of TOWCON. It is based on BIMCO's standard Ice Clause for Voyage Charter Parties but has been amended for use with tug operations."

4.57 Paragraph (a) provides that the tug will not in any circumstances be obliged to force ice but may be used to follow ice-breakers in the tugowner's option. While this provision may be amended by the parties (for example if the towage is one using Russian ice-breaker tugs) it gives the Tugowner a complete discretion as to whether and if so in what circumstances the tug is to be used in operations affected by ice. While the explanatory note states: "However, the tug may reasonably be expected to follow ice breakers where other vessels of a similar size, class and construction are doing so, always subject to the tugowner's approval", suggestive of some presumption in the hirers' favour that if the tug is suitable for ice passage behind breakers and other tugs are being so used, that the tugowner can reasonably be expected to do the same. The clause does not however say this and the option is purely the tugowner's, who is free to follow breakers or not. If the tugmaster elects either to force ice or to follow breakers, having the option to refuse to do so, then the consequences of the decision are for the tugowner's responsibility; while damage to the tug will fall within the knock-for-knock mutual indemnity arrangements under the new clause 25 (corresponding to an amended version of the previous well-known "Clause 18" scheme under both the "Towcon" and "Towhire" in their previous forms), any other consequences for the tug or her crew, it is submitted, will also fall to be borne by the tugowner; see by analogy *Limerick v Scott (The Innisboffin)* [1921] 2 KB 613.

4.58 Paragraph (b), from its drafting, appears to have been based in large part upon clause 14(B) of the Baltime 2001 time charterparty ice clause (itself an improved version of the ice clause in the NYPE time charterparty at clause 25): as to which see Coghlin, Baker, *Time Charters* (7th edn, 2014) at paras. 35.1–35.6. In that context, Scrutton LJ, in *Limerick v Stott* [1921] 2 KB 613, said, at p. 620, of a similar predecessor clause, that it:

> enables the captain to refuse to go to an ice-bound port, and to refuse to force ice which he meets on his voyage, without being guilty of any breach of charter, and without prejudicing his owners' right to hire while he is waiting for proper orders, or for a sea free of ice. He is also allowed, but is not obliged, to leave a port which is likely to become ice-bound; that is . . . it cannot be said that the owner loses his right to hire, because the captain elects to stay when he might have escaped.

4.59 The width of the discretion afforded to the tugmaster is clear from the clause and is emphasised in the explanatory notes which state: "The Sub-clause emphasises that the tugmaster may decide in his sole discretion whether or not to proceed to or enter the place of departure or destination if risk of ice exists. Should the tugmaster decide that it is unsafe to proceed to the place of departure or destination then he may proceed to the nearest ice free port or safe place (which may often be much closer to the original destination that the 'nearest ice free port') and await the hirer's instructions."

4.60 Paragraphs (c) and (d) deal with delays, deviation and expenses due to ice which, as is customary under ice clauses, are for the hirer's account, together with any additional insurance premiums if required by the tug's insurers.

Clause 9: additional charges and extra costs

"9. Additional Charges and Extra Costs

(a) The Hirer shall appoint his agents at the place of departure and place of destination and ports of call or refuge and shall provide such agents with adequate funds as required.

(b) The Hirer shall bear and pay as and when they fall due:

(i) All port expenses, pilotage charges, harbour and canal dues and all other expenses of a similar nature, including those incurred under the provisions of Clause 24(b) (Necessary Deviation or Slow Steaming), levied upon or payable in respect of the Tug and the Tow.

(ii) All taxes, (other than those normally payable by the Tugowner in the country where he has his principal place of business and in the country where the Tug is registered) stamp duties or other levies payable in respect of or in connection with this Agreement or the payments of the Lump Sum or other sums payable under this Agreement or the services to be performed under or in pursuance of this Agreement, any Customs or Excise duties and any costs, dues or expenses payable in respect of any necessary permits or licences.

(iii) The cost of the services of any assisting tugs when deemed necessary by the Tugmaster or prescribed by Port or other Authorities.

(iv) All costs and expenses necessary for the preparation of the Tow for towing (including such costs or expenses as those of raising the anchor of the Tow or tending or casting off any moorings of the Tow).

(v) The cost of insurance of the Tow.

(c) All taxes, charges, costs, and expenses payable by the Hirer shall be paid by the Hirer direct to those entitled to them. If, however, any such tax, charge, cost or expense is in fact paid by or on behalf of the Tugowner (notwithstanding that the Tugowner shall under no circumstances be under any obligation to make such payments on behalf of the Hirer) the Hirer shall reimburse the Tugowner on the basis of the actual cost to the Tugowner upon presentation of invoice."

4.61 This clause deals with those charges which are to be for the hirer's account in addition to the lump sum payable to the tug and is virtually unchanged from its previous incarnation as clause 3 of the original "Towcon."

4.62 Paragraph (a) imposes an obligation on the hirer to appoint properly funded agents at the ports or places where the tug and tow will be during the service or where they might call or put into. This is a small but useful provision since a common cause of delays to vessels in charterparty and towage contracts is the temporary inability of local agents to pay locally due expenses which leads to the arrest or *saisie* of the vessel by local claimants and subsequent delays or difficulties in transmitting funds to local agents. This is especially so in less well-organised parts of the world where the tug and tow may be forced to put in for refuge.

4.63 Paragraph (b) deals with the particular heads of expenses and costs which are to be for the account of the hirer. These broadly correspond to the expenses payable by the time charterer under the common forms of "provide and pay for" clauses (see eg clause 2 of the "New York Produce Exchange" form). Of particular importance are the costs of any assisting tugs deemed necessary by the tug-master and all costs and expenses necessary to prepare the tow for the towage which, sensibly, are specifically dealt with. The somewhat anxious surplusage present in the old clause 9(b)(v) where it was restated that cost of insurance of the tow was for the hirer has been removed. It should be noted that in paragraph (b)(i) a specific reference to clause 24(b) has been added, including, by way of "tidying up", those expenses which the tug incurs in attending any vessel in distress or in putting into any port for bunkers, supplies, repairs or other necessaries or to land injured seamen. This adds nothing to the already existing clear statement of the liability of the hirer for such costs (see clause 24(b) itself) but offers another example of BIMCO's belt and braces approach to the drafting ("The purpose of this cross-reference is to clarify that the hirer is obliged to pay for extraordinary costs relating to bunker calls, repair calls, supply calls, or landing of disabled seaman as set out in Clause 24(b)").

4.64 Paragraph (c) makes it clear that it is for the hirer in the first instance to pay the additional costs and not for the tug to pay them and then reclaim them from the hirer, although the tug has a right to be paid any sums which it does expend in this way upon the presentation to the hirer of the tugs' invoice in respect of such costs.

Clause 10: war risk escalation clause

"10. War Risk Escalation Clause

The Lump Sum is based and assessed on all war risk insurance costs applicable to the Tugowner in respect of the contemplated voyage in effect on the date of this Agreement. In the event of any subsequent increase or decrease in the actual costs due to the Tugowner, the Hirer or the Tugowner, as the case may be, shall reimburse to the other the amount of any increase or decrease in such war risk insurance costs."

4.65 Clause 10 implements a similar adjustment procedure for fluctuation in war risk premiums and insurance costs as clause 4 does for fluctuations in bunker prices. The 2008 revision limits the clause, strictly, to war risk premia (explanatory notes: "additional insurance costs related to basic war risks insurance"). Although the clause is headed "War Risk Escalation Clause", just as with the bunker adjustment provision, it covers decreases as well as increases in the costs for the tug of war risk cover (as the explanatory note – somewhat bathetically – states: "It provides a similar function to Clause 4 (Bunker Price Adjustment) by creating a procedure whereby the hirer will be compensated by the tugowner if the actual cost of war risk cover decreases. Similarly, the hirer is obliged to reimburse the tugowner if the actual cost of the cover increases during the voyage"). The 2008 revision omits the words which attached to the recoverability of the increase/decrease under this clause in the original version of the "Towcon" (under which the increase or decrease in war risks had to be "due to the Tugowner fulfilling his obligation under this Agreement") but it is suggested that the sense remains the same (although the previous version was, it is submitted, rather clearer), ie that the increases or decreases in the tug owner's costs must have been ones due to the fact that the tug and tow have to pass or enter a newly arisen war zone, that is, one which has supervened since the conclusion of the contract: see the explanatory note for confirmation that no change was intended ("The intention behind the Clause is that it contemplates a change of circumstances that occur after the contract is concluded. This may be that a new war zone is declared that affects the voyage or an existing conflict is resolved prior to passage").

Clause 11: interest

"11. Interest

If any amounts due under this Agreement are not paid when due, then interest shall accrue and shall be paid in accordance with the provisions of Box 35, on all such amounts until payment is received by the party to whom it is due."

4.66 This provision is a standard one to circumvent the previous absence in English law of a right to recover interest in respect of debts paid late. Previously, it applied only in respect of sums due under the contract to the tug owner; but the 2008 revision applies it mutually to any sums due to either party under the contract (as the explanatory note records: "This Clause has been slightly modified from the version that appears in 'Towcon'. The previous wording was in favour only of the tug owner in terms of interest on amounts not paid when due. The wording has now been amended to make the clause mutual. Under clause 4 (Bunker Price Adjustment) the hirer may also be due sums if the bunker price falls and therefore interest may become payable on such sums by the tug owner. Similarly, payments may be due to either party by the other party under the provisions of clause 10 (War Risk Escalation Clause)." Usually rates of interest are assessed by reference to ordinary commercial rates, with an additional super-added margin. If, as occasionally occurs, the rate of interest fixed is a punitive rate and designed not simply to reflect the cost to the tug owner of being out of his money but also to act as a penalty provision, the interest provision may fall foul of the general rule against penalty provisions as originally set out in *Dunlop Pneumatic Tyre Co v New Garage Co* [1915] AC 79 and as now reconsidered and

restated by the Supreme Court in *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67; [2016] 1 Lloyd's Rep 55. In such a case the interest provision will be unenforceable. The current law is beyond the scope of this book. In summary, the main principles are as follows (see the distillation in *Vivienne Westwood Ltd v Conduit Street Development Ltd* [2017] EWHC 350 (Ch)):

i Whether or not a contractual provision is a penalty is a question of interpretation of the contract, and the real question is whether it is penal or punitive in nature.
ii In English law, a penalty clause can only exist where a secondary obligation is imposed upon a breach of a primary obligation owed by one party to the other. It is to be distinguished from a conditional primary obligation, which depends on events that are not breaches of contract.
iii Whether a clause imposes a secondary liability upon a breach of contract is a question of substance, and not of form.
iv A provision that in substance imposes a secondary liability for breach of a primary obligation is penal if it imposes on the party in default a detriment out of all proportion to any legitimate interest of the innocent party in the performance of the primary obligation, or (using traditional language) which is exorbitant, extravagant or unconscionable in comparison with the value of that legitimate interest.
v The onus lies on the party alleging that a clause is a penalty to show that the secondary liability is exorbitant, extravagant or unconscionable.
vi Since the penalty rule is an interference with freedom of contract, it is not lightly to be concluded that a term in a contract negotiated by properly advised parties of comparable bargaining power is a penalty.

4.67 For a detailed consideration of examples of the application of the "penalty" rule pre-*Makdessi*, see *Macgregor on Damages* (19th edn), Chapter 13 and for a specific pre-*Makdessi* charterparty example of the principle: *Lansat Shipping Co v Glencore Grain BV (The Paragon)* [2009] 2 Lloyd's Rep 688 (late redelivery hire adjustment held to be a penalty). Given that the rate is to be mutually applicable and therefore, presumably, mutually agreed, it is likely that more reasonable "commercial" rates will feature in Box 35 than was sometimes the case under the previous version of the "Towcon" where the rate was the tug owner's rate and commonly fixed at a penal level.

Clause 12: security

"12. Financial Security

The Hirer undertakes to provide, if required by the Tugowner, security to the satisfaction of the Tugowner in the form, and in the sum, at the place and at the time indicated in Box 36 as a guarantee for due performance of the Agreement. Such security shall be returned to the guarantor when the Hirer's financial obligations under this Agreement have been met in full. (*Optional, only applicable if Box 36 filled in*)."

4.68 The "Towcon" form gives an option to include in the towage contract an obligation upon the tow to put up security if this option is to be exercised, the details are to be inserted in Box 36 as to the form and amount of the security and the time at which it is to be put up. The inclusion of this option in the form itself reflects the common situation, especially where the tow consists of a vessel bought by the hirer as scrap and the towage is one to the breaker's yard or where the hirer is a one-ship company or where the company, while the hirer under the towage contract, is not the registered owner of the vessel being towed (See the new explanatory note for confirmation of this: "This option will most likely be exercised by the tugowner in circumstances where the tow may be a vessel destined for recycling or where the tow is not owned by the hirer.") The only

change to the previous version of this provision is the redefinition of the term as providing for "Financial Security", to distinguish it from ISPS-related security matters (see below).

Clause 13: place of departure/readiness for departure

The place of departure

"13. Place of Departure

(a) The Tow shall be tendered to the Tugowner at the Place of Departure stated in Box 24.

(b) The place of connection and departure shall always be safe and accessible for the Tug to enter, to operate in and for the Tug and Tow to leave and shall be a place where such Tug is permitted to commence the towage in accordance with any local or other rules, requirements or regulations and shall always be subject to the approval of the Tugowner which shall not be unreasonably withheld."

4.69 The tow is to be tendered to the tug at the "place of departure" named in Box 24, para. (a). The previously obscure distinction between paras. (a) and (b) of the corresponding provision in the original form (clause 7) between a broad "place of departure" at which the tug is to be tendered and a "precise place of departure" within that place where the tug is to make fast and commence operations has been abandoned in favour of a composite test, focused on the place where the tug makes the towage connection to the tow at a particular place from where, in general terms, the towage begins. As the explanatory notes state: "The distinction between 'place of departure' and 'precise place of departure' has been removed, but the reference to the definition of the place of departure in Part I maintained. To reflect the fact that in some ports the tug cannot connect the tow within the port but has to connect outside the port, eg on a river, it has been decided to use the connection and disconnection places as the triggering points in relation to the duration of towage service. The moment the tug has connected to the tow the departure starts; and similarly, the moment the tug has disconnected from the tow the voyage ends." Often the two will overlap but not necessarily (eg the place of departure of a laid-up vessel might be "Rostock Docks" but the precise place where connection is to be made may be different, eg once in the access channel, on exiting the dock gates to dock No. 2 within those docks). By para. (b), both the place of departure and of connection must meet three criteria:

i It must be safe, both for the tug (ie the particular tug named in the contract – see *Axel Brostrom & Son v Louis Dreyfus & Co* (1932) 38 Com Cas 79) to operate in and for the tug and tow to leave. The concept of safety is well developed in the law relating to charterparties. It is perhaps best summarised by Sellers LJ in *The Eastern City* [1958] 2 Lloyd's Rep 127 at p. 131 (this test, as elaborated by Lord Roskill and Lord Diplock in *The Evia (No. 2)* [1983] 1 AC 736, being re-endorsed by the Supreme Court in *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35: see *per* Lord Clarke of Stone-cum-Ebony at para. 26):

> a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.

For a detailed account of the cases, see Coghlin, Baker, *Time Charters* (7th edn, 2014) at chapter 10 and Cooke, *Voyage Charters* (4th edn, 2014) at paras. 5.30–5.107. Paragraph (b) adds to the requirement of safety a requirement that the place of departure shall be not only safe but also "accessible" for the tug to enter, operate in and leave with the tow. Thus, the place of departure must not only be safe but must have enough sea-room for the tug to do what is reasonably necessary to effect the connection and to manoeuvre with the tow. This states expressly what the common law would probably imply as to

the accessibility of the tow to the tug (see eg *Gamecock Steam Towing Co v Trader Navigation Co Ltd* (1937) 59 L1 L Rep 170).

ii It must be a place where the tug is permitted by any applicable local or other rules and regulations to commence the towage operation. This is an important requirement since many littoral states have enacted detailed rules, usually from the perspective of the avoidance of marine pollution, which in the context of towage, commonly contain powers controlling towage with requirements as to the tow-worthiness of the tow and for the certification of that tow-worthiness by an independent inspection authority. Some countries will require certification by a reputed classification society; others (eg the United Kingdom, South Africa, the United States and Canada) may require their own departmental inspectorates to be satisfied. Given such rules and that towage is frequently the towage either of old vessels for scrapping or of disabled vessels which present greater potential pollution risks, it is essential for the hirer to undertake that the place of departure will be a place where the towage has been officially permitted and cleared.In connection with certification of the tow, see also under clauses 17(a) and 18(c) of the "Towcon 2008" form, which are discussed below.

iii It must be a place which has received the approval of the tug owner. This requirement allows the tug owner to reject a place of departure proposed by the hirer if the tug owner has objectively reasonable grounds for withholding his approval (eg on the grounds of exposure which would make connection problematic to heavy swell or of insufficient sea-room in the pick-up area for the proper manoeuvring of the tug); the clause provides for an express limitation on the owner's right to withhold approval (cf. the limitations which would ordinarily be implied, absent this express statement: see eg *Bluewater Energy Services BV v Mercon Steel Structures BV* [2014] EWHC 2132 (TCC) and *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] 1 Lloyd's Rep 558 *per* Rix LJ at para. 66:

> a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to *Wednesbury* unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria.

4.70 In the time charterparty context, if the port or berth is named in the charterparty, it was until recently arguably unclear whether the express warranty of safety still applied, since, in such a case, the owner is put on notice of the place to or from which the vessel will be traded and, arguably, could form his own view as to its characteristics and as to whether or not he accepts them as being safe for his vessel. It was submitted in the previous editions of this work that the better view was that where a port is named in a charterparty and the charterparty contains an express warranty of safety, it was a matter of construction whether the express warranty applies to the named port or applies only to unnamed ports to which the charterer can direct the vessel within her trading limits (see eg the approach of Mustill J in *The Helen Miller* [1980] 2 Lloyd's Rep 95) and that it was, accordingly, difficult where the parties had attached the adjective "safe" to a named port to which the vessel (or tug) was to be sent by the charterer (or hirer) to treat the safety of the port as deemed accepted by the owner. The position has now been put beyond doubt by the decision of the Court of Appeal in *AIC Ltd v Marine Pilot Ltd (The Archimidis)* [2008] 1 Lloyd's Rep 597

where it was held that the reference to "load one safe port Ventspils" necessarily imported an express warranty by the charterers that Ventspils was a safe port even though it was single and named port. The argument to the contrary essentially rested upon two poorly reasoned London Arbitration awards, 18/86 noted at (1986) 181 LMLN and 11/97 noted at (1997) 463 LMLN. The Court of Appeal gave both of these their long overdue quietus and they were disapproved (see *per* Sir Anthony Clarke MR at paras. 35 and 36). The court approved the following statement by Langley J in a case decided at the same time, *STX Pan Ocean Co Ltd v Ugland Bulk Transport (The Livanita)* [2008] 1 Lloyd's Rep 86 at para. 18: "In my judgment there is no principle of construction which permits a negative answer to the general question raised by this ground. There is no inherent inconsistency between a safe port warranty and a named loading or discharging port."

4.71 In the context of a towage contract on the "Towcon" form, if the place of departure as stated in Box 24 is co-extensive with and the same as the place of connection of the tug and tow and subsequent departure therefrom (eg, as often occurs, if the place of departure is the grounding place of the vessel at a particular and stated position or if the tow is at a specific place, be it lay-up berth or in the roads), it is submitted that the warranty of safety and accessibility remains applicable as a matter of the construction of para. 13(a) and (b). In such cases, the warranty in para. 13(b) is made expressly with reference to the named place of departure referred to in para. 13(a): this was the intended result in any event (see the explanatory note which records that "The place of connection and departure lies within the place of departure and as such, the requirements as to safety and accessibility apply equally to both places").

4.72 However, if, as is contemplated by the clause, the tug owner has the place of departure presented to him for his approval by the hirer and the tug owner approves it, it is highly arguable that he has waived any objection to proceed to the named place of departure. The position is analogous to that considered in the time charterparty cases as to any owner's loss of his right to reject an uncontractual nomination by the charterer of an unsafe port or berth. In *The Kanchenjunga* [1990] 1 Lloyd's Rep 391 (HL), the vessel was ordered by charterers to Kharg Island, a permissible load port; the vessel proceeded thither and tendered notice of readiness. Due to hostilities, the master then took the vessel away and the owners called upon the charterers to re-nominate a safe port. The charterers refused. The House of Lords held that by the owners' act in sailing for Kharg Island and tendering NOR there, they had elected to comply with the charterers' nomination in circumstances when the owners could have refused to do so and that they were bound by the election. Their sole right was damages for breach of contract in the event that, because of charterers' breach of charter in ordering the vessel to an unsafe place, the vessel was damaged or the owners suffered loss. The separate right to damages was unaffected (but cf. *The Chemical Venture* [1993] 1 Lloyd's Rep 508, in which very clear conduct on the part of the owners was held to have estopped them even from asserting that the port of Mina-al-Ahmadi was unsafe so as to be able to set up a claim for damages for breach of contract). So, if the particular precise place of departure chosen by the hirer is submitted to the tug and the tug approves it, the tug cannot subsequently refuse to proceed there nor can the tug's approval be withdrawn. The tug's rights against the hirer to claim damages if the place is unsafe or if the towage is not permitted in breach of para. 13(b) are probably unaffected by the tug's approval. However, it is always highly advisable for the tug owner to make it very clear in the notice of approval of the place of departure that that approval is made without prejudice to the due performance by the hirer of its obligations under para. 13(b).

The readiness of the tow for departure

4.73 Clause 13 continues:

"(c) (i) The Tow shall be ready to sail from the Place of Departure between the dates indicated in Box 29(a), hereinafter called the Initial Departure Period.

(ii) The Hirer shall give the Tugowner such notice as is stipulated in Box 29 in respect of:

(1) Initial Departure Notice (Box 29(b)) which shall be the number of days notice of the number of days period falling within the Initial Departure Period as to when the Tow will be ready to sail from the Place of Departure;
(2) Final Departure Period and Notice (Box 29(c)) which shall be the number of days notice of the number of days period falling within the Initial Departure Period as to when the Tow will be ready to sail from the Place of Departure; and
(3) Final Departure Time and Date Notice (Box 29(d)) which shall be the number of days notice of the time and date of sailing of the Tow which shall fall within the Final Departure Period.

(iii) The Tow shall be offered to the Tugowner, duly certificated in accordance with Box 9, sub-clause (b) above and Clauses 17 (Permits and Certification) and 18(c) (Tow-worthiness of the Tow) and otherwise in accordance with the terms and conditions of this Agreement.

(d) If the Hirer fails to comply strictly with the provisions of sub-clause (c) above the date of departure shall be deemed to be either the last day of the Initial Departure Period or the last day of the Final Departure Period, whichever is earlier, and this date shall be binding for all consequences arising in respect of Delay Payments and any other payments due or charges incurred in the performance of this Agreement."

4.74 Clause 13(c) of "Towcon 2008" substantially rewrites the former clause 7(c) which provided, tersely, that "The Hirer shall give the Tugowner such notice as is stipulated in Box 28 in respect of: Initial Departure Notice (Box 28(b)), Final Departure Period Notice (Box 28(c)) and Final Departure Time and Date Notice (Box 28(d))." The sequence of notices to be given is complex and was regarded by BIMCO as potentially so confusing that it necessitated printed Instructions, set out on the reverse of the printed "Towcon" form as to how to fill out the various boxes. As noted above, the Instructions have now been removed and they have carried into the text of the clause itself, making it much clearer what is to be put in each part of Box 29. BIMCO explain this change as follows: "A notable change that has been made to this Clause is the incorporation of the notice requirements into the main body of the form. This information, describing when the notice must be given and what period must be stated, used to be printed on the reverse of Part I of TOWCON – as a sort of explanatory note. The draftsmen felt that it was more appropriate to build this information into the main terms – especially as with the greater use of BIMCO forms in electronic format the note might go overlooked." Unfortunately, due to some typographical oversight, while clause 13(c) refers to the various dates in Box 29 by reference to lettered sub-paragraphs viz. (a)–(e), the sub-paras. in Box 29 are themselves numbered (i)–(v) and are not lettered. This is unfortunate in a provision of such importance, although the context makes the meaning sufficiently clear.

4.75 In this way, clause 13(c) and (d) make provision for the chronological sequence of notices to be given by the tug relating to the tendering of the tow to the tug. The chronology of notices contemplated by the sub-clauses, read together with Box 29 and using the numbered sub-paragraphs as they actually appear in Box 29, is as follows (see also the examples of date-spreads etc. given in the explanatory notes):

i The tow is to be ready to sail from the departure place within a certain period the limits of which are defined by the dates specified in Box 29(i) (called the "initial departure period", eg 1–30 June 2003).

ii The tow is then required within a period stipulated in Box 29(ii) to give the tug an "initial departure notice" which is an abbreviated or narrowed departure period falling within the "initial departure period." So, it may be agreed that the tow shall, 10 days prior to the commencement of the initial departure period of 1–30 June 2003, give notice of a period of five days within that period during which the tow will be delivered (eg 10–15 June).

iii The tow is then required within a stipulated period to give a "Final Departure Period Notice", being a yet further abbreviated or narrowed departure period falling, this time,

within the "initial departure period." So it may be agreed that the tow shall, three days prior to the commencement of the five-day period of 10–15 June, give notice of a period of 24 hours within the five-day period previously notified (see Box 29(iii)).

iv Finally, the tow must give a notice stating the specified date and time at which the tow is to leave the departure place within the last identified period before this final notice must be given within a stipulated period of days (see Box 29(iv)).

4.76 The importance of the observance of the chronology of notices and the narrowing down of the time at which the tow will be ready for connection lies in clause 13(d), which provides that in the event of non-compliance by the tow with the notice provisions contained in clause 13(c), the departure date is deemed to be the earlier of the last day of the stated "initial departure period" (Box 29(i)) and of the last day of the "final departure period" (Box 29(iii)) for the purposes of "all consequences arising in respect of Delay Payments and any other payments due or charges incurred in the performance of this Agreement.

4.77 Box 29(v) in Part I provides for details to be given of any "alternative address" to which the notices in para. 13(c) are to be given. This is a curious provision, since nowhere else in the printed "Towcon 2008" form is any provision made for the giving of any particular address for service of notices to which the address in Box 29(v) might be an alternative. "Towcon 2008" contains a standard BIMCO Notices Clause (see clause 35) as to the form in which notices are to be given but which does not provide for any specific address to be given. It is plainly sensible for the parties to stipulate for addresses for notices and, given the importance of the clause 13 notices, to restate such address in Box 29(v). This avoids doubts as to the effective receipt of notices.

Certification

4.78 Paragraph 13(c)(iii) provides that the tow owner is to tender the tow to the tug "duly certificated" and in accordance with the terms of the agreement (ie most importantly having those set characteristics stated in Boxes 4–12 in Part I). "Duly certificated" was potentially a very wide requirement and was previously unspecified. However, "Towcon 2008" clarifies specifically that the certificates are to be:

i class certificates (see Box 9); certificates necessary for the towage to commence (see para. 7(b) of the "Towcon" form);

ii certificates necessary for the towage to commence (see clause 13(b) of the "Towcon" form);

iii the certificate of tow-worthiness referred to in clause 18(c) of the "Towcon" form (see below); those certificates specifically referred to in clause 11 of the "Towcon" form (see below); and

iv those certificates specifically referred to in clause 17 of the "Towcon" form, ie any required state or official permits and authorisations etc. (see below).

Clause 14: place of destination

"14. Place of Destination

(a) The Tow shall be accepted and taken over by the Hirer immediately upon arrival at the Place of Destination stated in Box 25.

(b) The place of disconnection shall always be safe and accessible for the Tug and Tow to enter, to operate in, and for the Tug to leave and shall be a place where such Tug is permitted to redeliver the Tow in accordance with any local or other rules, requirements or regulations and shall always be subject to the approval of the Tugowner, which approval shall not be unreasonably withheld."

4.79 This clause provides for the redelivery of the tow to the hirer and the end of the towage service. The place of destination is dealt with in the same terms as the place of departure in clause 13(b) (see the commentary above).

4.80 The tow is to be accepted and taken over "immediately upon arrival" at the place of destination by the hirer. The clause omits the previous reference to the duly authorised representative of the hirer, emphasising for clarity that it is the hirer's sole responsibility to take the tow at the end of the service. This is, from the tug's perspective, an important obligation upon the hirer. Under a lump sum contract the tug will wish to be free as soon as possible. In the event of delays in the tow being taken over beyond the prescribed "free time" for disconnection specified in Box 27 of Part I, para. 2(g) and the scheme of delay payments will become operational.

Clause 15: riding crew

"15. Riding Crew

(a) Riding crew for the Tow, if so requested by the Hirer, shall be provided by the party stated in Box 31. The number of riding crew shall be as stated in Box 31. All costs and expenses for such personnel will be for the account of the Hirer and such personnel shall be at all times under the orders of the Tugmaster. If the riding crew are provided by the Tugowner the Hirer shall pay to the Tugowner the amount *per* man *per* day stated in Box 32. If the riding crew are provided by the Hirer they shall not be deemed to be the servants or agents of the Tugowner. Permission for the Hirer to provide a riding crew on the Tow as well as the composition and suitability of the riding crew shall always be in the discretion of the Tugowner.

(b) It shall be the Hirer's responsibility to provide the riding crew with suitable accommodation, food, fresh water, life saving appliances and all other requirements as necessary to comply with the laws and regulations of the Flag of the Tug and/or Tow and of the States through the territorial waters of which the Tug will pass or enter. It is a requirement that the members of the riding crew shall be able to speak and understand a language which is mutual to the Tug and Tow.

(c) In the event that the Tugowner provides a riding crew for the Tow for its own purposes, all costs and expenses for such personnel shall be for the account of the Tugowner."

4.81 Where the tow is incapable of independent navigation, such as an unmanned barge, or where the tug is concerned to have a crew aboard her for other reasons, such as the monitoring and adjusting of the towing connection or the trim of the tow, a riding crew may be put on board the tow by the tug owner. Similarly, the hirer may wish to place a crew on board the object being towed, such is commonly the case in the towage of expensive drilling installations or water-borne equipment. Clause 15 makes provision for the case where such a crew is used. As BIMCO explains, the Riding Crew provision has been completely rewritten: "The original Riding Crew Clause from TOWCON has been re-written because it was felt to not be sufficiently clearly worded. The purpose of the Clause is to allocate the cost and responsibility for riding crew placed on board the tow – either by the hirer or the tugowner for the hirer's purposes, or by the tugowner for his own purposes."

4.82 The new Riding Crew Clause has been split into three sub-clauses.

4.83 Paragraph (a) deals with a crew put on board the tow for the purposes of and at the request of the hirer. The tug owner is given a discretion (which, by implication, would be one which has to be exercised reasonably and in good faith) as to the suitability and sufficiency of the crew. Box 31 has been provided to allow the parties to stipulate whether such a riding crew is to be provided by the hirer itself, by the tug or by a third party on behalf of the hirer. Box 31 also requires the parties to identify how many members will make up the crew. Clause 15(a) deals with the different payment regimes depending on who physically provides the crew. While such a crew is at hirer's expense and the crew members remain the hirer's employees, the crew is to be under the orders of the tug at all times. This will be highly relevant when assessing the question of who is in control of the tug and tow in the event of a collision with a third party under the factual test of control laid down in the *SS Devonshire v The Barge Leslie* [1912] AC 634 (see the consideration

of this case both in Chapter 2 above and, specifically in relation to collision liability, in Chapter 11 below). For a recent example of the factual issues involved in the identification of where control resides and of the practical application of the *Devonshire* test, see *Greig Shipping A/S v The Owners of the Dubai Fortune* (2012) FC 1110 (Federal Court).

4.84 Paragraph (b) deals with the responsibility for a crew which has put on board the tow for the hirer and whoever provides the riding crew places the responsibility for victualling the riding crew and for satisfying any applicable regulatory or statutory requirements as to the crew upon the hirer. If the riding crew is provided to the tow by the hirer, that crew is required to understand English "or language mutual to the Tug and Tow." This is of considerable importance given the problems caused by the prevalence of different nationalities at different levels of marine service (to take a common example, English or Greek master, Polish officers and Filipino crew). The redrafted clause now addresses such problems satisfactorily by the addition as a permissible alternative to English (as a *lingua franca*) of any other mutual language allowing both tug and tow to communicate *inter se* and clearing up an ambiguity under the previous version ("any mutual language": mutual to whom?) which was pointed out in previous editions of this work (taken up by BIMCO: "The final sentence of Subclause (b) deals with the common working language that the riding crew need to be able to speak and understand for their communications with the tug crew. The previous edition of TOWCON called for the riding to crew to be able to understand English or another mutual language. However, this was felt to be unclear as to whom the 'other language' should be mutual to – such as other members of the riding crew or between the tug and tow. The language issue has been dealt with in TOWCON 2008 by expressly stating that the riding crew must be able to speak and understand a language that is also readily spoken and understood by the crew of the tug").

4.85 Paragraph (c) provides for a riding crew put on board the tow by the tug for its own purposes, commonly checking the connection on board the tow, any stability or trim questions and lights or marks etc: such a crew is to be paid for by the tug owner and to be its responsibility. Such a crew would be regarded in almost every case as the servants of the tug owner, even if sourced by it from a third party, being under the direction and control of those on the tug.

Clause 16: towing gear and use of tow's gear

"16. Towing Gear and Use of Tow's Gear

(a) The Tugowner agrees to provide free of cost to the Hirer the use of all, tow wires, bridles and other towing gear carried on board the Tug for the purpose of the towage or other services to be provided under this Agreement. The Tow shall be connected up in a manner within the discretion of the Tugmaster.

(b) The Tugowner may make reasonable use at his discretion of the Tow's gear, power, anchors, anchor cables, radio, communication and navigational equipment and all other appurtenances free of cost during and for the purposes of the towage or other services to be provided under this Agreement.

(c) The Hirer shall pay for the replacement of any towing gear and accessories should such equipment become lost, damaged or unserviceable during the service(s), other than as a result of the Tugowner's negligence."

4.86 This clause covers the use of the tug's and tow's respective facilities and equipment falling within and included in the lump sum remuneration agreed between the parties.

4.87 Paragraph (a) puts all the lines and towing gear "carried on the tug" at the disposal of the hirer for the contract service. The main items of these will usually have been defined in Box 21 of Part I and possibly also in the new Annex A to the form provided for the "Vessel [viz. Tug] Specification" and will often be readily identifiable from the tug owners' published particulars or brochures which are commonly available in the market for the very large ocean-going tugs. The clause has been amended to delete the reference to "equipment normally carried on the tug" which appeared in the former revision. As BIMCO explains: "The reference to 'normally carried

on board the Tug' has also been changed. It was felt that 'other services to be provided under this Agreement' might require gear and equipment that is not 'normal' to the tug's usual complement. Any special additional gear or equipment required for the contracted towage should be separately negotiated." As noted above, it is in connection with clause 16 that Annex A was introduced and doubtless for this very purpose ("NOTE: In order to assist the tugowner in providing a standardised specification of the tug to the hirer, a new Annex A has been added to TOWCON. The Annex supplements the details normally to be found in Box 21 (Winches and main towing gear) of Part I"). This makes it all the more surprising that no contractual reference is made to the Annex either in the body of clause 16 or elsewhere in the definition of "the tug" in clause 1, thereby providing that the tug owner warrants to the hirer that the tug is equipped as specified in Annex A.

4.88 Notwithstanding the free use of the towing gear, para. (a) makes it clear that the manner in which the towing connection is made up and made fast is within the tug's discretion. This is standard practice.

4.89 Paragraph (b) offers the tug the like use of the tow's facilities. This will often be highly important: for example, VHF for communications between tug and tow and the tow's power for assistance in line and anchor handling, winches, and for the provision of propulsion and steering.

4.90 Paragraph (c) is new to the 2008 revision and brings the "Towcon" into line with other charterparty and service contract regimes under which the charterer or hirer has the use of the service provider's plant or equipment. The hirer is now responsible for making good any loss of or damage to the equipment which it uses. This acts as an exception to the general, knock-for-knock, mutual bearing by each party of any loss of or damage to its property during the service as provided for in clause 25 and a specific reference to clause 16(c) is included within clause 25(b)(i)(1) to make this clear: see below. Clause 16(c) is modelled on clause 9(e) of the "Supplytime 2005" form.

Clause 17: permits and certification

"17. Permits and Certification

(a) The Hirer shall arrange at his own cost and provide to the Tugowner all necessary licenses, authorisations and permits required by the Tug and Tow to undertake and complete the contractual voyage together with all necessary certification for the Tow to enter or leave all or any ports of call or refuge on the contemplated voyage.

(b) Any loss or expense incurred by the Tugowner by reason of the Hirer's failure to comply with this Clause shall be reimbursed by the Hirer to the Tugowner and during any delay caused thereby the Tugowner shall receive additional compensation from the Hirer at the Tug's Delay Payment rate specified in Box 30."

4.91 As foreshadowed in clauses 13(b) and (c)(iii), the issue of the certification of the tow and the obtaining of the requisite official permits and licences for the towage service are important. Paragraph (a) of clause 17 imposes the obligation to obtain all such permits and certificates upon the hirer. The obligation extends to all such certificates and other documents both in the place of the commencement and of the completion of the towage and in all places and ports of call en route, together with any ports of refuge into which tug and tow may put.

4.92 Paragraph (b) specifies expressly that any loss or expense suffered by the tug by the hirer's non-compliance with its para. (a) obligation are to be "reimbursed" by the tow. Although it does not use the usual language of indemnity, it is submitted that this provision operates to give the tug an indemnity against such loss and expense; accordingly, the tug is entitled to recover in full indemnity against the same and is not confined to or obliged to satisfy the requirements of a claim for damages for breach of contract.

4.93 The usual consequence where a tow's certificates are not in order is merely delay for tug and tow while the necessary authorities are mollified or appeased and while the requisite documents and permissions are obtained. This is reflected in para. 17(b), which provides that the tug

shall receive "additional compensation" at the rate of the clause 6(a) delay payments. It is submitted that given the whole of the provisions of clause 17(b), such "additional compensation" is not akin to demurrage or a delay payment proper and clearly does not prevent the tug from seeking and recovering reimbursement of any other or additional losses and expenses incurred during the delay period as a result of the hirer's failure to have proper certification or permits in place.

Clause 18: tow-worthiness of the tow

"18. Tow-worthiness of the Tow

(a) The Hirer shall exercise due diligence to ensure that the Tow shall, at the commencement of the towage, be in all respects fit to be towed from the place of departure to the place of destination.

(b) The Hirer undertakes that the Tow will be suitably trimmed and prepared and ready to be towed at the time when the Tug arrives at the place of departure and fitted and equipped with such shapes, signals, navigational and other lights of a type required for the towage."

Fitness of the tow

4.94 This clause imposes upon the hirer the obligation to exercise due diligence to ensure that the tow is tow-worthy at the commencement of the tow. It mirrors the common law position considered in Chapter 2 above.

4.95 The central obligation upon the hirer is described in para. (a) in the following terms:

> (a) The Hirer shall exercise due diligence to ensure that the Tow shall, at the commencement of the towage, be in all respects fit to be towed from the place of departure to the place of destination.

4.96 The tow-worthiness of the tow is measured by reference to the defined limits of the contractual towage and is assessed only at the commencement of the towage. There is no continuing obligation upon the hirer to ensure that the tow is maintained in a tow-worthy state during the service. Given that the tow may often be unmanned or manned only by a skeleton riding crew, this is a realistic limit upon the obligation and it corresponds to the temporal limit upon the common law warranty of seaworthiness in the field of carriage of goods. The obligation to ensure tow-worthiness is one of due diligence, which is equivalent to the same standard imposed by the Hague and Hague-Visby Rules in relation to seaworthiness (as to which see eg Cooke, *Voyage Charters* (4th edn, 2014) at paras. 85.93–85.108 and *Scrutton on Charterparties and Bills of Lading* (23rd edn, 2015), Articles 68 on seaworthiness and para. 14–046 *et seq*. on due diligence). It is not an absolute warranty or guarantee that the tow will be tow-worthy, only a promise that the hirer will exercise due diligence to attain that result. It should accordingly be noted that:

i Since the standard of care to be exercised is one of due diligence, if there are different reasonable ways of achieving a particular result such as tow-fitness, then provided the hirer has followed one, he has complied with his obligation even if the tow is not thereby made tow-worthy. There are often different schools of thought as to how a tow should be prepared for a towage and towage certifiers may reach different views quite properly. If a reasonable school of thought is adopted and applied completely then that will suffice (see *Union of India v Reederij Amsterdam* [1963] 2 Lloyd's Rep 223 (HL)). Hindsight will not dictate what was reasonable practice at the relevant time. Paraphrasing Cooke, *Voyage Charters* (4th edn, 2014), at para. 85.98, "The duty on the [hirer] to exercise due diligence to make the [tow] [tow-worthy] is not, therefore, a guarantee of success in achieving [tow-worthiness]." See also *The Aditya Vaibhav* [1993] 1 Lloyd's Rep 63.

ii The obligation upon the hirer to exercise due diligence is not a delegable one. The duty is one upon whoever carries out the work of putting the tow into a fit condition for the service and the hirer will be liable for a failure of any such person even if the hirer him-

self is not at fault (eg in the case where the hirer appoints a competent local repairer or welding firm who are to blame for the want of due diligence: see *The Muncaster Castle* [1961] AC 807).

iii While the term "to exercise due diligence" appears to be more stringent than "to exercise reasonable care", there is no difference between the standards which they impose. The obligation to exercise due diligence is, accordingly, co-extensive and co-terminous with such obligations as are imposed by the ordinary duty of care at common law. As it was put more pithily: "Lack of due diligence is negligence" (see *Union of India v NV Reederij Amsterdam* [1963] 2 Lloyd's Rep 223, *per* Lord Reid at p. 235).

iv The obligation of due diligence only applies when the vessel is subject to the property or possession and control of the vessel. As it is put by the editors of Cooke, *Voyage Charters* (4th edn, 2014) at para. 85.103 in relation to contracts of carriage: "The carrier's obligation [to exercise due diligence to make the vessel seaworthy] does not normally operate until the vessel comes within his 'orbit'" ie by acquisition or purchase. This is of particular importance where a tow may often be a vessel bought for scrap or an object which the hirer has purchased elsewhere and is towing back to his place of business. The hirer in such a case is therefore not automatically responsible for a prior want of due diligence by the previous owners. However, as part of his obligation under clause 18 to ensure the tow is fit for towage, he must carry out all reasonable and proper inspections to ensure that that is the case and to remedy or repair anything that he discovers which impinges on the fitness of the tow. Where a defect or poor workmanship has been concealed (eg a patch to a ballast line has been hidden by the previous owners or a shoddy repair crew) and could not have been discovered exercising reasonable care in inspection, the hirer will not be answerable for the unfitness to tow and the want of due diligence which caused it. See *The Muncaster Castle* (*op. cit.*)*, per* Lord Radcliffe at p. 867.

4.97 Paragraph (b), however, deals specifically with three particular matters concerning the tow which might be assumed to have been comprised within the overall obligation to ensure tow-worthiness. These are matters which "the Hirer undertakes" shall have been done by "the time when the tug arrives at the place of departure." The obligation is an unconditional one upon the hirer and, it is submitted, is unqualified by the lesser standard of due diligence provided for in para. (a). Since the three matters are, in principle, ones which should be readily and easily attained on the part of the hirer, this dichotomy of the standard of obligation is perhaps understandable. The three matters which the hirer is to ensure are the following:

i The tow is to "be suitably trimmed" (ie including proper ballasting).

ii The tow is to be "prepared and ready to be towed." While this is potentially a very wide obligation, it follows on from the trimming obligations. It is submitted that the readiness and preparedness relates to matters immediately concerned with the towage (eg panama fairleads cleared and bitts made ready; winches tested; anchor chains and windlass in order).

iii Lastly, the tow is to have all proper lights and navigational shapes and signals. This addresses specifically the problem which arose in *The Albion* [1952] 1 Lloyd's Rep 367.

Certificate of tow-worthiness

"(c) The Hirer shall supply to the Tugowner or the Tugmaster, on the arrival of the Tug at the place of departure a certificate of tow-worthiness for the Tow issued by a recognised firm of Marine Surveyors or Survey Organisation, provided always that the Tugowner shall not be under any obligation to perform the towage until in his discretion he is satisfied that the Tow is in all respects trimmed, prepared, fit and ready for towage but the Tugowner shall not unreasonably withhold his approval."

4.98 While the content of the obligations upon the hirer in relation to the fitness of the tow under paras. (a) and (b) is clear, the tug not unnaturally requires some tangible proof of the tow-worthiness of the tow before the operation commences. This concern is addressed by para. (c), which provides that the tow is, on the tug's arrival at the place of departure, to provide the tug with:

> a certificate of tow-worthiness . . . issued by a recognised firm of Marine Surveyors or Survey Organisation.

4.99 The term "recognised firm" is vague. Even well-known firms may differ greatly in quality and reliability, especially when they have, perforce, to appoint a local firm of surveyors to act as their agents to effect a survey in, for example, a far flung location. Paragraph (c) gives the tug the overriding discretion to refuse to start the towage until the tug owner is himself satisfied of the fitness and readiness of the tow. Paragraph (c) requires the refusal to be made on reasonable grounds. It is when such a refusal is made that difficulties commonly arise and lawyers become involved. Often the problem can be resolved by sending out a reputable surveyor or team of joint surveyors acceptable to both parties to address the technical issues in dispute.

Non-waiver clause

"(d) No inspection of the Tow by the Tugowner shall constitute approval of the Tow's condition or be deemed a waiver of the foregoing undertakings given by the Hirer."

4.100 In this connection, para. (d) expressly provides that no inspection of the tow by the tug shall operate as an approval of the tow or relieve the hirer of its obligation as to tow-worthiness under paras. (a)–(c). This makes obvious sense since the inspection on behalf of the tug owner will usually be necessarily limited in scope and duration.

Clause 19: the tug's seaworthiness

"19. Seaworthiness of the Tug

The Tugowner will exercise due diligence to tender the Tug at the place of departure in a seaworthy condition and in all respects ready to perform the towage, but the Tugowner gives no other warranties, express or implied."

4.101 While clause 13 is a pendant provision to clause 12, it is much briefer and simply provides that the tug owner is to exercise due diligence to provide the tug in a seaworthy condition and in all respects ready to perform the towage. It is submitted this corresponds with the extent of the tug owner's obligation at common law as considered in Chapter 2 above. If those obligations are wider and more absolute (eg in the way in which they were enunciated in *The West Cock* [1911] P 23 at first instance by Sir Samuel Evans P – but see the discussion as to this at Chapter 2, above), then clause 13 reduces the obligation to one of reasonable care.

4.102 The brevity of the provision compared with the greater detail of clause 12 reflects the reality that usually the tug will be provided in full operational condition and as a going concern, fully manned with competent officers and crew, while often the tow is a disabled or unmanned vessel or is a water-borne object of special type which will require special measures to be taken to make her fit for the towage. The seaworthiness of the tug can therefore be dealt with in one succinct term whereas the fitness of the tow for the towage requires to be dealt with more elaborately.

4.103 An important question under the "Towcon" form is the interrelationship of the seaworthiness obligation upon the tugowner and the mutual exceptions clause in clause 25 with it often being contended that clause 19 is some sort of paramount obligation to which clause 25 as a matter of construction cannot derogate. This is considered below in the commentary on clause 25.

Clause 20: substitution of tugs

"20. Substitution of Tugs

The Tugowner shall at all times have the right to substitute any tug or tugs for any other tug or tugs of adequate power (including two or more tugs for one, or one tug for two or more) at any time whether before or after the commencement of the towage or other services and shall be at liberty to employ a tug or tugs belonging to other tugowners for the whole or part of the towage or other service contemplated under this Agreement. Provided however, that the main particulars of the substituted tug or tugs shall be subject to the Hirer's prior approval, but such approval shall not be unreasonably withheld."

4.104 Clause 20 gives the tug owner the right to substitute another tug or combination of tugs for the named tug or tugs at any time before or during the contract service subject to:

i the substituted tug or tugs being of an adequate power;
ii obtaining the hirer's approval (which shall not be unreasonably withheld) of the "main particulars" of the substituted tug or tugs (eg flag; g.r.t.; certificated bollard pull; indicated horsepower; bunker consumption details; and details of winches and main towing gear (ie those details given in Boxes 13–21 of Part I and, where filled out, in Annex A).

4.105 Clause 20 gives the tug owner the right to sub-contract in tugs owned by others. Unlike the cumbersome provisions of clause 5 of the UK Standard Conditions, which deem the tug in such a case to be acting as agent for the tow such that the owner of the substituted tug becomes party to a new contract (on the same terms) with the tow, the "Towcon 2008" contract remains between the original tug owner and the hirer at all times. Any contract relating to the putting in of a substitute tug is a matter between the original tug owner and the owner of the substitute tug. The hirer continues to look to its original contractual counterparty whoever in fact performs the contract service.

Clause 21: salvage

"21. Salvage

(a) Should the Tow break away from the Tug during the course of the towage service, the Tug shall render all reasonable services to re-connect the towline and fulfil this Agreement without making any claim for salvage.

(b) if at any time the Tugowner or the Tugmaster considers it necessary or advisable to engage salvage services from any vessel or person on behalf of the Tug or Tow, or both, the Hirer hereby undertakes and warrants that the Tugowner or his duly authorised servant or agent including the Tugmaster have the full actual authority of the Hirer to accept such services on behalf of the Tow on any reasonable terms. Where circumstances permit, the Tugowner shall consult with the Hirer on the need for salvage services for the Tow."

4.106 In *The Minnehaha* (1861) 15 Moo PC 133, Lord Kingsdown stated at p. 153:

> When a steam boat engages to tow a vessel . . . she does engage that she will use her best endeavours for that purpose . . . she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task, because the performance of the task is interrupted . . . as by the breaking of the ship's hawser.

4.107 In such circumstances at common law, and as seen above, the tug is under an obligation "to do her duty and to use all reasonable care to protect the ship" (see *per* Bateson J in *The Refrigerant* (1925) 22 Ll L Rep 492 at p. 495).

4.108 Paragraph (a) of clause 21 echoes the earlier cases and provides in almost similar vein:

> (a) Should the Tow break away from the Tug during the course of the towage service, the Tug shall render all reasonable services to re-connect the towline and fulfil this Agreement without making any claim for salvage.

4.109 Paragraph (a) was the subject of much debate within the BIMCO documentary sub-committee at the drafting stage of the original version of "Towcon." It is unchanged, save for the use of the more modern term "engage" in place of "seek or accept", in the "Towcon 2008." The form of the clause which emerged reflects the real difficulty in delineating in advance what services that the tug may render in re-establishing the towage connection will be outside or within the scope of the contract. The clause provides that the tug shall perform all reasonable services without claiming salvage, but in so doing does not in reality state any principle which is different from that stated, for example, by Dr Lushington in *The Annapolis* (1861) Lush 355. In that case, it was held that salvage was only due in circumstances:

i "by reason of unforeseen circumstances in the performance of the contract to tow"; and
ii where there have become necessary "new and special services."

See also *per* Hill J in *The Homewood* (1928) 31 L1 L Rep 336 at p. 339 and the considerations which now apply under Article 17 of the Salvage Convention 1989. These matters are considered in detail below in Chapter 8.

4.110 Notwithstanding the problematic nature of the delineation of the scope of towage and the exercise of reasonable efforts within the contract of towage to perform the tow and to surmount operational difficulties so as to minimise claims for salvage for contractual efforts but to leave the tug-owner free to claim salvage for extra-contractual services, the "Towcon" form has since been used frequently by salvors since its inception as a basis for sub-contracting in tugs to assist in a salvage operation. The form is relatively well suited to towage services in any context, except for this clause. This has led to clause 15 being deleted when "Towcon" is used for this purpose and to the development by BIMCO and the ISU of a dedicated "sub-contract form" based on "Towcon": the "Salvcon 2005" form (considered in detail below in Chapter 9).

4.111 Paragraph (b) confers specific actual authority upon the tug owner to enter into salvage contracts with others on behalf of the hirer in circumstances where the tug owner considers the same to be "necessary or advisable." This avoids the need for the tug to establish that it enjoyed an agency of necessity and that it satisfied the four-fold requirements of such an agency (as set out by Slade LJ in *The Choko Star* [1990] 1 Lloyd's Rep 516 at p. 525: see the discussion of this case in Chapter 1 above). A new addition to clause 21(b) is the wording requiring the tug owner to consult with the hirer if circumstances permit. Clause 21(b) now deals with the question of conferring upon the tug by the tow of sufficient express authority to enter into salvage contracts with third parties on behalf of tug and/or tow in appropriate circumstances, with the presumption that the tug will communicate with the hirer before engaging salvage services, save only where time and available means of communication do not permit this. As BIMCO states: "This Clause has been amended to reflect the reality of today that given modern means of communication it is not reasonable to bind the hirer to a salvage contract in which they have had no say."

Clause 22: termination by the hirer

"22. Termination by the Hirer

(a) At any time prior to the departure of the Tow from the place of departure the Hirer may terminate this Agreement upon payment of the termination fee set out in Box 39. If termination takes place whilst the Tug is en route to the place of departure or after the Tug has arrived at or off the place of departure then in addition to the said termination fee the Hirer shall pay any additional amounts due under this Agreement.

(b) In the event that the towage operation is terminated after departure from the place of departure, but before the Tow arrives at the place of destination without fault on the part of the Tugowner, his servants or agents, the Tugowner shall be entitled to be paid, and if already paid to retain all sums payable according to Box 33, accrued Delay Payments and any other amounts due under this Agreement. The above amounts are in addition to any damages the Tugowner may be entitled to claim for breach of this Agreement."

4.112 All rights of cancellation or withdrawal, whether those of the hirer or of the tug owner, were dealt with together in a single provision (clause 16) of the former version of "Towcon." As part of the re-ordering of the arrangement of the clauses in Part II this clause has now been broken up, with the right of the hirer and of the Tugowner to terminate the contract being now the subject of the two separate provisions, clauses 22 and 23 respectively, "for the sake of clarification and to achieve a more logical structure." In both provisions, the terminology of cancellation has been replaced with the more apposite term "Termination", to avoid any confusion with cancellation/cancelling dates (see explanatory notes: "the terminology has been slightly amended. Originally the clause referred to both cancellation and termination, but it has been decided to use the word 'termination' instead of 'cancellation' to be consistent throughout the clause. The word 'termination' in this context also reflects that it is an action that occurs after the commencement of the contract, whereas 'cancellation' occurs prior to the commencement of the contract.").

4.113 Clause 22 provides for the termination of the towage contract and the withdrawal from it by the hirer in two circumstances.

i Under para. (a), "at any time prior to the departure of the Tow from the place of departure" the hirer may cancel the contract upon payment of the prescribed fee in Box 39 of Part I; if the tug has already been mobilised, additional sums may be payable.

ii Additionally, para. (b) provides that in the event of a termination of the towage operation (whether by the hirer or otherwise) after the service has begun in the absence of fault on the part of the tug, the tug is entitled to be paid the lump sum payments provided for in Box 33 together with any other accrued sums without prejudice to any claim in damages which the tug may have arising out of the premature termination if the termination has arisen from some breach of contract on the part of the hirer.

Clause 23: termination by the tug owner

"23. Termination by the Tugowner

(a) The Tugowner may, without prejudice to any other remedies he may have, withdraw from and terminate this Agreement and leave the Tow in a place where the Hirer may take repossession of it and be entitled to payment of the Lump Sum less expenses saved by the Tugowner and all other payments due under this Agreement, upon any one or more of the following grounds:

(i) If there is any delay or delays (other than delay caused by the Tug) at the place of departure exceeding in aggregate fourteen (14) days.
(ii) If there is any delay or delays (other than a delay caused by the Tug) at any port or place of call or refuge exceeding in aggregate fourteen (14) days.
(iii) If the financial security as may be required according to Box 36 is not given within seven (7) running days of the Tugowner's request to provide security.
(iv) If the Hirer has not accepted the Tow within seven (7) running days of arrival at the place of destination.
(v) If any amount payable under this Agreement has not been paid within seven (7) running days of the date such sums are due.

(b) Before exercising his option of withdrawing from this Agreement as aforesaid, the Tugowner shall give the Hirer 48 hours notice of his intention so to withdraw."

4.114 Clause 23 corresponds to the former clause 16(c) and (d). Clause 23(a) confers upon the tug a right of withdrawal from the towage contract and a right to leave the tow in five situations subject only to the tug owner giving 48 hours' notice of withdrawal of his intention to withdraw (see clause 23(b)). The former provision was very much slanted in the tug owner's favour, stipulating that the 48 hours' notice of withdrawal was to be given only where it was "practicable" to do so. This led to considerable uncertainty as to when and in what circumstances a notice of

withdrawal was validly or invalidly given. "Towcon 2008" removes this qualification and makes the 48-hour notice mandatory in all circumstances. It therefore follows that the right of the tug owner only arises after 14 aggregate or seven running days (as applicable) has lapsed plus the 48 hours' notice period: this appears to be confirmed by BIMCO's explanatory notes. The explanatory notes however go on to refer to the 48-hour period as a "grace period given to the hirer to rectify the situation." This does not appear to be a correct reading of clause 23(b). Under clause 23(a), the tug owner acquires an *accrued* right to terminate in any one of the five situations listed. To take an example: if hire is not paid for a period of seven running days, then the right to terminate arises under para. (a) without more. While the tug owner must *then* give the hirer 48 hours' notice that he intends to "exercise his option" (viz. the right which it has now acquired due to the failure to pay hire over that period) to withdraw, if the hirer pays within that period this does not affect the right to terminate. All that the tug owner is required to do is to give the hirer notice of his intention to withdraw the tug, presumably so that the hirer can rapidly make alternative arrangements for the tow. There is no *locus poenitentiae* granted to the hirer akin to an anti-technicality clause in relation to payment of hire. This can be seen when the other grounds are taken: the right to terminate accrues, for example, when there has been an aggregate delay of 14 days. The notice must be given but the right cannot be lost once it is given.

4.115 The five situations are succinctly described in clause 23(a)(i)–(v):

i if there is or are any delay or delays (other than delay caused by the tug) at the place of departure exceeding in aggregate 14 days;
ii if there is or are any delay or delays (other than a delay caused by the tug) at any port or place of call or refuge exceeding in aggregate 14 days;
iii if the security which may be required according to the stipulation in Box 36 has not been given within seven running days of the tug owner's request to provide security;
iv if the hirer has not accepted the tow within seven running days of the arrival of the same at the place of destination;
v if any amount payable under the towage contract has not been paid within seven running days of the date when such sums become due.

In the event of such a withdrawal, the tug owner is entitled to be paid the lump sum and any other additional expenses "less expenses saved" by the tug owner.

4.116 The former clause 16(c) referred to the concept of a "running day" in respect of each of the termination grounds; this also gave rise to ambiguity where it was combined with the concept of an aggregate of running days. This has now been remedied in the current wording of clause 23(a)(i) and (ii): as BIMCO explains, "The word 'running' has been deleted from sub-clauses (a)(i)–(ii) because it was inconsistent with the word 'aggregate'. 'Aggregate days' means the accumulated total of days, while 'running days' means consecutive days. It was decided to take out 'running' because otherwise there could be a significant amount of delays on many occasions, but if they never exceeded the amount of running days stated, the tugowner would never be entitled to withdraw. The number of days has been changed to 14 as seven was considered to be too short a time for the hirer."

4.117 While "running days" as used in the remainder of para. (a) is not specifically defined, it is or should be fairly clear but can sometimes give rise to dispute. While the BIMCO definitions in *The Laytime Definitions for Charterparties 2013* (replacing the previous *1980 Definitions and the Voylay Rules 1993*) are not incorporated, they offer guidance and, arguably, state the obvious (the 2013 Definitions are appended to *Cooke*, at Appendix 4.2). "A day" means "a continuous period of 24 hours which unless the context otherwise requires runs from midnight to midnight" or "a period of 24 consecutive hours running from 0000 hours to 2400 hours" with any part of a day counting *pro rata*. "Running days" means "consecutive days" or "days which follow one immediately after the other." If there is any belief at the time of contracting that reliance on clause 23 is potentially likely, then stipulating a definition of "running days" is sensible.

Clause 24: necessary deviation or slow steaming

"24. Necessary Deviation or Slow Steaming

(a) If the Tug during the course of the towage or other service under this Agreement puts into a port or place or seeks shelter or is detained or deviates from the original route as set out in Box 23, or slow steams because either the Tugowner or Tugmaster reasonably consider

(i) that the Tow is not fit to be towed; or
(ii) the towing connection requires rearrangement; or
(iii) repairs or alterations to or additional equipment for the Tow are required to safeguard the venture and enable the Tow to be towed to destination; or
(iv) it would not be prudent to do otherwise on account of weather conditions actual or forecast, or

because of any other good and valid reason outside the control of the Tugowner or Tugmaster, or because of any delay caused by or at the request of the Hirer, this Agreement shall remain in full force and effect, and the Tugowner shall be entitled to receive from the Hirer additional compensation at the appropriate Delay Payment rate as set out in Box 30 for all time spent in such port or place and for all time spent by the Tug at sea in excess of the time which would have been spent had such slow steaming or deviation not taken place.
(b) The Tug shall at all times be at liberty to go to the assistance of any vessel in distress for the purpose of saving life or property or to call at any port or place for bunkers, repairs, supplies, or any other necessaries or to land disabled seamen, but if towing the Tug shall leave the Tow in a safe place and during such period this Agreement shall remain in full force and effect, including the provisions of Clause 9(b)(i).
(c) Any deviation howsoever or whatsoever by the Tug or by the Tugowner not expressly permitted by the terms and conditions of this Agreement shall not amount to a repudiation of this Agreement and the Agreement shall remain in full force and effect notwithstanding such deviation."

Generally

4.118 Clause 24 of the "Towcon 2008" form deals with deviation. Deviation has been well explored in the law of charterparties and carriage of goods by sea (see eg Cooke, *Voyage Charters* (4th edn, 2014), chapter 12). It consists either of the departure of the vessel, here the tug with the tow under towage by her, from the usual and customary course of the contractual voyage or of the prosecution of the contract voyage by the vessel without exercising all reasonable despatch, for example by slow-steaming or by having idle periods whilst on passage. In the absence of an express liberty to deviate, deviation gives the right to terminate the contract and loss of the protection for the deviating party of any exemption clauses present in the contract.

4.119 Since in towage the possibility of deviation is a very real one, clause 24 has addressed it specifically and has adopted a different regime from that commonly adopted in charterparties, which usually confine themselves to granting a defined and fairly restricted liberty to deviate.

4.120 While clause 24 grants to the tug owner liberties to deviate (or to slow steam), it also provides that an unauthorised deviation shall not bring the contract to an end, that is, it leaves the parties confined to a claim in damages and, more importantly, leaves in place the protection of any relevant exemption clauses for the deviating party. It is important to note that there must actually be a decision to deviate or slow steam on one or more of the grounds referred to. In the case of slow steaming this will be important in restricting a tugowner to claiming delay payments (as opposed to claiming damages for delay due to some separate breach by the tow, eg as to her towable condition) to the case where a considered decision led to the delay by slow steaming (or by deviation) has been taken. In *Regulus Ship Services Ltd v Lundin Services BV* [2016] EWHC 2674 (Comm) the tugowner claimed delay payments for the longer transit time taken irrespective of its separate claim for loss due to delay caused by the tow not being, as warranted, "in light ballast condition" (as to which see the commentary on part I of the "Towcon 2008" form). The court

rejected that claim (para. 99): "The clause plainly requires that the tugowner makes a decision to slow steam because it considers that the tow cannot be towed at the originally contemplated speed. But in this case there is no evidence that Regulus made a decision to steam slowly, or that it did so."

Deviation from the original route

4.121 In the context of a charterparty, the obligation on the owner is to prosecute the voyage between indicated ports "in the usual and customary course" (*Davis v Garrett* (1830) 6 Bing 716, *per* Tindal CJ at p. 725). That may be the direct geographical route, but if the commercial route is ordinarily by some other route, that will define the owner's obligation. The same position will apply under clause 24 in the absence of express provision. Because of the nature of towage, the route will often be the matter of discussion and agreement between the parties prior to the contract. The hirer will wish to achieve the quickest towage but with the least risk of adverse weather or sea conditions threatening the towage connection and the safety of the tow. The tug owner will wish to achieve the quickest towage with the least risk of the tow breaking free and with waters in which the tug can operate most safely. Box 23 of Part I is provided for the route to be specifically defined. If the box is completed then this route will define what is and is not a deviation (see clause 24: "the original route as set out in Box 23"); if it is not, then the parties will have to fall back on ordinary charterparty law principles. Even if the box is completed, those principles will apply in respect of that route, eg such that departures from the route caused by navigational error or involuntarily due to weather or currents or which are ordinary incidents of the voyage would not constitute a deviation (see eg *Cooke*, paras. 12.2 and 12.3).

The liberties to deviate

4.122 Under clause 24 there are two categories of permissible deviation (whether by departure from the usual customary route or by delay in the prosecution of the voyage):

(1) *In the event of matters connected with or arising out of the towage itself which justify deviation*. In such case, not only is the deviation permitted but the tug is entitled to receive "additional compensation" at the delay payment rate provided for by clause 6(a) for the extra time taken as a result of such a deviation. The matters are three in number:

i Where it is reasonably considered that:

a the tow is not fit to be towed, or
b the towing connection requires rearrangement, or
c repairs or alterations to or additional equipment for the tow are required to safeguard the venture and enable the tow to be towed to its destination, or
d it would not be prudent to do otherwise than to alter course or delay on account of weather conditions, either actual or forecast.

The decision as to the existence of any of the matters referred to in (a)–(d) is that of the tug owner or the tug-master. Accordingly, the tug owner's shore office can assess the situation, as can the master of the tug itself. Usually the decision will be a joint one with the tug owner acting on information received from the tug-master but the clause protects the situation where the tug-master has to decide on the spot for himself or where the shore office, knowing something which the master does not, takes an executive decision. Whoever takes the decision, the belief in the existence of the matters (a)–(d) must be a reasonable one based on all the matters of which the relevant person was aware at the time of deviation. The previous version of the form provided for a further ground, based on the inability of the tow to be towed at the original speed contemplated by the

tug owner. The difficulty with this, as BIMCO records, is that it was never a requisite of the "Towcon" that the tug owner had to indicate the towing speed and such indications were rare under any towage contract, given the vagaries of sea, weather and tide and the handling characteristics of the tow. It has accordingly been deleted.

ii Where there is some other good or valid reason outside the control of the tug.
iii Where there has been a delay caused by or at the request of the tow.

(2) A standard charterparty-type liberty to deviate in cases of necessity. That is, a liberty to go to vessels in distress for saving life or to take on bunkers or to put off seamen (see para. (b)). The liberty includes a liberty to deviate to go to vessels for the saving of property. A deviation for this purpose falls outside the common law liberty to deviate which encompasses deviations for the purpose of saving life but excludes those made solely for the purpose of saving property (see eg *Scaramanga v Stamp* (1880) 5 CPD 295 (CA)). This extended liberty will be of importance to tug owners, many of whom will be professional salvors whose tugs are often secondarily employed in engaged commercial services in anticipation of salvage service. In such cases the tug may leave the tow in a safe place. This ordinary type of liberty to deviate will be restrictively construed and will be limited, in so far as it is possible to do so upon the language of the clause, so as not to be inconsistent with the main objects of the contract (see eg *Hadji v Anglo-Arabian SS* (1906) 11 Com (US 219) and *Stag Line v Foscolo Mango* [1932] AC 328). Additional wording emphasising that the hirer account to pay for bunker, repair and supply calls and the landing of disabled seamen under clause 9(b)(i) has been included in the 2008 Revision *ex abundante cautela*.

4.123 In the former version of the clause, a liberty to deviate in respect of compliance with governmental instructions etc was also included (the old clause 17(c)). This has now been subsumed in a wholly new War and Other Risks Clause (clause 27: see below) and accordingly has been deleted in the 2008 revision.

Impermissible deviations

4.124 Under para. (d), even impermissible deviations are to be treated as not having brought the contract to an end. This leaves unaffected any claim which the hirer may have in damages for breach of the towage contract by the tug.

Clause 25: liabilities and mutual indemnities

Generally

4.125 In place of the blanket exemption of the tug from all liability as adopted by the UK Standard Conditions and as widespread in other tug owners' standard forms, the "Towcon" form (and "Towhire") from its inception has sought to achieve a balanced position as between tug and tow which, in broad terms, leaves each party bearing risk and being responsible for injuries and losses and damage affecting or caused by its own employees and equipment. This allocation of risk and responsibility allows each party to protect its own position by appropriate insurance. This was the common position under US or US-inspired contract conditions used in ocean towage and offshore work and was used as the model for the "Towcon" and "Towhire" regime for liabilities. As it was therefore put in the explanatory notes to the original form:

> In accordance with present day practice in the offshore industry, the agreement deals with liabilities as between Tugowner and Hirer on a "knock-for-knock" basis.

4.126 The BIMCO "Clause 18" regime in both contracts rapidly became extremely well-known and has, perhaps, been the most debated aspect of the "Towcon" form as parties (or more usually their insurers), content to enter into the knock-for-knock regime at the outset, when faced with the unpalatable consequences following a major casualty seek to escape bearing the loss of their own property and to impose on the counterparty a liability in damages in respect of it. This, coupled with the choice of English High Court jurisdiction under the former version of the "Towcon" form (the former clause 25, now replaced under clause 33 of "Towcon 2008" with a choice of arbitration alternatives) has produced a small but important body of Commercial Court authority on the operation and effect of the clause 18 scheme of provisions.

4.127 Clause 25 of "Towcon 2008" in large part reproduces clause 18 but the draftsmen have attempted to address some of the ambiguities in the clause, both as highlighted in previous editions of this work based on disputes in which the author was involved and the questions raised in certain of the reported cases. The explanatory notes to the new contract version state:

> This important Clause has always been based upon "knock-for-knock" principles, and it is a cornerstone of both the TOWCON and TOWHIRE agreements. It has been amended to bring greater clarity to its provisions. It has also been renamed "Liability and Indemnity" to be more descriptive of its content. The purpose of the Liability and Indemnity Clause is to strike a balance between the tugowner and the hirer so that each party bears responsibility for the injury or death of its own employees, servants or agents, and, with one exception, for the damage to or loss of its own equipment. This reflects standard practice in the offshore industry where liabilities between the parties are agreed on a so-called "knock-for-knock" basis.

4.128 As will be seen, this statement remains, perhaps, a rather too sweeping summary of the position under clause 25 just as the earlier statement was in respect of the former clause 18.

4.129 The philosophy behind clause 25, as with clause 18 before it, is clear: in the field of marine and offshore projects (as in many areas of infrastructure and construction projects on land) there is frequently a complexity of operations and a multiplicity of contractors and sub-contractors coupled with very high values of property at risk and with difficult and challenging operating conditions: see the useful background given by Greg Gordon: "Risk Allocation In Oil & Gas Contracts", Chapter 13 in Gordon & Paterson (eds), *Oil & Gas Law – Current Problems & Emerging Trends*. As it has been put from the P&I Clubs' perspective (Jennings, *Maritime Risk International* Vol. 19, Issue 3):

> To overcome the obvious dangers and disadvantages, the industry developed standard contracts. These have stood the test of time and they have the great benefit of providing clarity. To reduce the scope for legal action, they incorporate knock-for-knock principles, whereby companies and their contractors are each responsible for their own personnel and property in the event of an accident, regardless of who might be to blame for a particular incident. They can provide rough justice at times but at least everyone knows where they stand and the knock-for-knock regime has proved legally robust.

4.130 The court has approached such risk allocation and mutual indemnification provisions purposively and having in mind the underlying rationale, albeit requiring the parties to express themselves clearly and in accordance with ordinary canons of construction (as to which see below): see eg *E. E. Caledonia Ltd v Orbit Valve Co Europe* [1993] 2 Lloyd's Rep 418 and *Caledonia North Sea Ltd v British Tele communications plc* [2002] 1 Lloyd's Rep 553 *per* Lord Bingham at paragraphs 7–9 and Lord Hoffmann at paragraphs 81–82; see also *Farstad Supply AS v Enviroco Ltd (The Far Service)* [2010] UKSC 18 (Sc); [2010] 2 Lloyd's Rep 387; Rainey, "The Construction of Mutual Indemnities and Knock-for-Knock Clauses", in Bariş Soyer and Andrew Tettenborn (eds), *Offshore Contracts and Liabilities* (2015). A good (and robust example) in the immediate context is the statement of Morison J in *Smit International (Deutschland) GmbH v Josef Mobius Bau-gesellschaft GmbH* [2001] CLC 1545 (at para. 19) in relation to clause 18 of the "Towcon" form (in a case of damage to a third party's property): "The knock for knock agreement is crude but workable allocation of risk and responsibility: even where the tug or tow

is wholly responsible for the accident liability depends entirely upon the happenstance of which of the two collided with the third party." The trend, while receiving the occasional buffet off course, has continued and most recently in *Transocean Drilling UK Ltd v Providence Resources PLC (The Arctic III)* [2016] EWCA Civ 372, the Court of Appeal, in the context of a mutual indemnity regime mutually excluding heads of consequential and direct loss, took a broad view of the purpose behind a mutual exceptions regime as part of a risk allocation scheme. The Court of Appeal expressed the view that a clause of this *mutual* type was not one which one should treat as an exclusion clause, or, at least, not as a typical exclusion clause (see at para. 14).

4.131 However, there remain undertows the other way. As Barbara Jennings, *op. cit*., (from a highly experienced standpoint as a director in respect of offshore risks at the Standard Club) has pointed out there is a trend amongst some parties, particularly the oil companies, to seek to amend the standard form wordings such as those adopted in the BIMCO forms to try to claw back some measure of residual liability on the part of a counterparty for damage done to the affected party:

> Knock-for-knock contracting and insurance arrangements appear to be in retreat in some quarters. BIMCO wordings are also frequently adapted as oil companies seek contractual arrangements that protect their interests and put more responsibility onto the shoulders of the charterers. There is a growing practice of inserting exclusions for gross negligence and wilful misconduct into the liability provisions of offshore contracts . . .. It is easy to understand the drift away from standard wordings and the attraction of a bespoke contract. Oil companies do not need the same degree of insurance cover as their contractors and suppliers and they certainly do not see why they should pay for other companies' mistakes.

4.132 This trend is inevitably productive of litigation and dispute as parties seek to squeeze each other's conduct into the requisite concept, with divergent views as to how that concept falls to be defined in the first place. These concepts are considered below. In addition to this direct attempt at carving out a measure of residual liability, in the offshore vessel sector, both OSVs and other vessels providing services to the industry, the typical "owner/charterer" or "tug/tow" division of responsibility is one which frequently jars with the concept of a mutual laying-off of liabilities to each party's property and liability insurers. It is this which gives rise, in the author's experience, to strained and inventive attempts to construe the knock-for-knock provisions in clause 25 (as with clause 14 of "Supplytime 2005") narrowly, focussing on minor differences or infelicities of language in the formulation of the mutual indemnity. While such attempts are likely to continue, the court's anti-*contra proferentem* approach both generally (*K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904; [2012] Ch 497 and *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373) and *a fortiori* in the context of mutual risk allocation clauses (*Transocean v Providence*, *supra*) represents a bigger obstacle than before to attempts to circumvent a simple, even mechanistic, "knock-for-knock" regime.

"Gross Negligence" and "Wilful Misconduct" exceptions

4.133 In relation to the concept of "gross negligence", English law has usually been dismissive of any distinction between gross and ordinary negligence. The celebrated dictum of Rolfe B in *Wilson v Brett* (1843) 11 M & W 113 ("the same thing, with the addition of a vituperative epithet") has been followed with differing expressions of distaste. Thus, it was applied in similar terms by Willes J in *Grill v General Iron Screw Collier Co* (1866) LR 1 CP 600; and in *Pentecost v London District Auditor* [1951] 2 KB 759, Lord Goddard CJ stated "The use of the expression 'gross negligence' is always misleading. Except in the one case of the law relating to manslaughter the words 'gross negligence' should never be used in connection with any matter to which the common law relates and for this reason: negligence is a breach of duty." Similarly, and more recently, in *Armitage v Nurse* [1998] Ch 241 Millett LJ stated at 254 "But while we regard the difference between fraud on the one hand and mere negligence, however gross, on the other as a difference in kind, we regard the difference between negligence and gross negligence as merely

one of degree. English lawyers have always had a healthy disrespect for the latter distinction." As the position was summarised in *Tradigrain SA v Intertek Testing Services (Canada)* [2007] 1 CLC 154 (CA) by Moore-Bick LJ at para. 23: "The term 'gross negligence' although often found in commercial documents, has never been accepted by English civil law as a concept distinct from simple negligence", although it has content in the law of other jurisdictions.

4.134 However, the concept of "gross negligence" is one which has been given concrete and identifiable content in other jurisdictions, notably in the United States. The US law approach can usefully be appreciated by considering the analysis of Mance J in *The Hellespont Ardent* [1997] 2 Lloyd's Rep 547. In that case, a commercial advisory agreement relating to an investment in oil tankers, and governed by New York law, contained an exception in respect of "damages resulting from acts or omissions . . . which (a) were the result of gross negligence, (b) constituted wilful misconduct, (c) constituted fraud or (d) constituted bad faith." Mance J carried out an exhaustive analysis of expert evidence as to US law (over pp. 580–588) and summarised the position as follows (at 586), expressing the view that as a matter of contractual construction, a not dissimilar English law result would be reached:

> Whether one looks to the authorities decided and the principles identified in the context of New York public policy or to the simple meaning of the words without attributing to them any special meaning under New York law at all, the concepts of "gross negligence" here appears to me to embrace serious negligence amounting to reckless disregard, without any necessary implication of consciousness of the high degree of risk or the likely consequences of the conduct on the part of the person acting or omitting to act. If the matter is viewed according to purely English principles of construction, I would reach the same conclusion. "Gross" negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. But, as a matter of ordinary language and general impression, the concept of gross negligence seems to me capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk. The difference in the way in which the concepts . . . are expressed appears to me entirely consistent with the phrase receiving its ordinary meaning and embracing both situations.

4.135 In relation to the concept of "wilful misconduct", the position of English law has traditionally been different. The term appears to have been a standard term in the terms and conditions of railway companies in the nineteenth century and was construed as equivalent to recklessness: see eg *Lewis v Great Western Railway* (1877) 3 QBD 195 (*per* Bramwell LJ at 206) and *Forder v Great Western Railway* [1905] 2 KB 532 where Lord Alverstone CJ stated at 535:

> Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows or appreciates that it is wrong conduct on his part in the existing circumstances to do, or fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure or omission regardless of consequences. The addition which I would suggest is, or acts with reckless carelessness, not caring what the results of his carelessness may be.

4.136 It was similarly a term of art for the purposes of marine insurance, reflected in section 55(2)(a) of the Marine Insurance Act 1906. In more recent times, the term is one which has been used expressly in a number of international conventions (such as the Warsaw Convention and the CMR and probably influenced by the 1906 Act and the railway conditions: see *per* Longmore J in *National Semiconductors (UK) Ltd v UPS Ltd* [1996] 2 Lloyd's Rep 212 at p. 214) and in the context of these conventions, translated into English law by statute, it has similarly been given ascertainable content and meaning by the English courts, usually heavily influenced by the railway cases. Lord Alverstone's dictum in Forder has been applied in the context of Article 29 of the CMR (see *Jones Ltd v Bencher Ltd* [1986] 1 Lloyd's Rep 54 and *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146). The cases were exhaustively set out and considered in *Thomas Cook Group Ltd v Air Malta* [1997] 2 Lloyd's Rep 399, in the context of Article

25 of the Warsaw Convention, by Cresswell J at 405–408 and the position was summarised by him as follows (at 407–408):

1. The starting point when considering whether in any given circumstances the acts or omissions of a person entrusted with goods of another amounted to wilful misconduct is an enquiry about the conduct ordinarily to be expected in the particular circumstances.
2. The next step is to ask whether the acts or omissions of the defendant were so far outside the range of such conduct as to be properly regarded as "misconduct." (An important circumstance would be a deliberate disregard of express instructions clearly given and understood.)
3. It is next necessary to consider whether the misconduct was wilful.
4. What does not amount to wilful misconduct? Wilful misconduct is far beyond negligence, even gross or culpable negligence.
5. What does amount to wilful misconduct? A person wilfully misconducts himself if he knows and appreciates that it is misconduct on his part in the circumstances to do or to fail or omit to do something and yet (a) intentionally does or fails or omits to do it or (b) persists in the act, failure or omission regardless of the consequences or (c) acts with reckless carelessness, not caring what the results of his carelessness may be. (A person acts with reckless carelessness if, aware of a risk that goods in his care may be lost or damaged, he deliberately goes ahead and takes the risk, when it is unreasonable in all the circumstances for him to do so.)

4.137 The argument that parties in the offshore industry when adopting an exception of gross negligence must be taken to have intended something different from simple negligence in circumstances where the term has content in different jurisdictions, for example the United States, cannot lightly be disregarded in the context of construing a contract *post Chartbrook v Persimmon Homes*: see by analogy the approach taken by the Court of Appeal in *Great Scottish & Western Rlwy Co v British Railways Board* (1993), unreported (CA), transcript 5.4.1993, to a clause which used "gross negligence" in close proximity to "wilful neglect" and in which Neill LJ considered that gross negligence "means very great negligence or a bad case of negligence and may well include an element of recklessness." Accordingly, in the event that a clause is inserted which differentiates between negligence and gross negligence, that clause is likely to be given effect, *a fortiori* if it forms part of a composite clause which refers also to wilful misconduct, bad faith etc. See also *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm).

4.138 Further, in addition to the trend of incorporating "extreme conduct" exceptions, recent decisions have pointed to an alternative approach to the construction, even of ordinarily drafted mutual allocation of risk provisions such as clause 25(b), under which certain types of breach, which have been described as "radical" (ie going to the root of the contract, a throw-back to concepts of "fundamental breach") have been held to fall outside the application of such clauses: see in the context of the predecessor to clause 25(b), clause 18(2) of "Towcon", the decision in *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177, and, in the context of other mutual allocation of risk or "knock-for-knock" provisions, for example a clause mutually excluding the recovery of consequential loss, similar to clause 25(c) of "Towcon 2008" (the former clause 18(3) of "Towcon"), see *Internet Broadcasting Corpn Ltd v Mar LLC* [2009] 2 Lloyd's Rep 295.

The correct approach to construction of clause 25

4.139 Before considering the provisions of the clause, it is necessary to consider how to approach the exercise of construing the clause given the genesis of the "knock-for-knock" regime. Two broad points may be made.

4.140 First, the general approach of clause 25 is to address certain types of loss, damage or liability and to allocate the responsibility for them between the parties. Subclause (a) in broad

terms makes the tug owner responsible for death or injury to his men and others on the tug and the hirer responsible for death or injury to his men and others on the tow. Sub-clause (b) in equally broad terms makes the tug owner responsible for all loss or damage to the tug or done by the tug, while the hirer is responsible for all loss or damage to the tow or done by the tow. Sub-clause (c) relieves both parties equally from any liability for certain heads of loss or damage.

4.141 Clause 25 is therefore a mutual exceptions clause in that it excludes liability mutually in accordance with a scheme of self-insurance. As it was put by Clarke J in *Alexander G. Tsavliris Ltd v OIL Ltd (The Herdentor)*, 19 January 1996, unreported save for a note in (1996) 3 Int ML 75 (but see Appendix 19), in relation to its predecessor clause 18: "Clause 18 contains a code apportioning liabilities between the parties as set out in the clause."

4.142 It is submitted that it is important to bear in mind this mutual nature of the clause and the origins of the "knock-for-knock" approach to liability which the ISU desired and which BIMCO sought to achieve by the "Towcon" form and, in particular, by the clause 18, now 25, regime. As the clause is a mutual exceptions clause, the approach to construction which is to be adopted should therefore be one which seeks to give effect to the commercial purpose of the clause as a broad allocation of risk and responsibility between the respective parties.

4.143 This approach has received important recent confirmation in *Transocean Drilling UK Ltd v Providence Resources PLC (The Arctic III)* [2016] EWCA Civ 372. In that case, the Court of Appeal had to consider a mutual exception clause (clause 20) covering the exclusion of, in broad terms, "consequential loss." The starting point for the court was that the clauses "which were clearly designed to complement each other, contained a detailed and sophisticated scheme for apportioning responsibility for loss and damage of all kinds, backed by insurance. Sometimes called 'knock for knock' provisions, the scheme as a whole provides an important part of the context in which clause 20 is to be construed" (see *per* Moore Bick LJ at para. 9). The Court of Appeal expressly distinguished a mutual clause of this nature from a typical (or what it called a "simple") exclusion clause in this way at para. 14:

> Although it was common ground below that clause 20 is an exclusion clause, it has certain characteristics which differ from a typical exclusion clause, by which a commercially stronger party seeks to exclude or limit liability for its own breaches of contract. In this case the parties are of equal bargaining power and have entered into mutual undertakings to accept the risk of consequential loss flowing from each other's breaches of contract. As I have already pointed out, the clause is to be seen as an integral part of a broader scheme for allocating losses between the parties. It is not, therefore, a simple exclusion clause of a kind which at one time the courts were willing to construe restrictively in order to avoid commercial oppression.

The contrast with the approach at first instance in *Transocean* [2014] EWHC 4260 (Comm) where Popplewell J had taken a strict *contra proferentem* approach is striking. There the judge held at para. 162 as follows:

> 162.The clause falls to be construed contra proferentem against Transocean, notwithstanding that it is a bilateral clause with mutual exclusions and indemnities. Parties in commercial contracts are entitled to apportion risk of loss as they see fit and provisions which limit or exclude liability in such contracts are in general to be construed according to the same principles as other terms: Tradigrain SA *v* Intertek Testing Services (ITS) Canada Ltd [2007] EWCA Civ 154 *per* Moore-Bick LJ at para [46]. Knock for knock provisions in a rig contract (as with clause 18 of the Contract) or in tug and tow contracts (as in Smit) are examples of such an approach. Nevertheless a party relying on an exclusion clause must establish that the words show a clear intention to deprive the other party of a remedy to which he would otherwise be entitled, because one starts with the presumption that neither party intends to abandon any remedies for breach by the other arising by operation of law, and clear words must be used in order to rebut that presumption: Gilbert-Ash *v* Modern Engineering *per* Lord Diplock at p. 717H. That applies to commercial contracts such as a rig contract, and to both parties to the contract even where the exclusion is mutual and is to be found in an indemnity clause: see EE Caledonia Ltd *v* Orbit Valve Co Europe Plc [1994] 1 WLR 1515 at p. 1523B–D.

4.144 However, it is important not to take this approach too far. There is often a distinct tendency on the part of a party seeking to rely upon a mutual indemnity to pray in aid a broad-brush approach to construction to the actual wording used in the relevant provision on the basis of vague statements of high purpose and commercial desirability of risk allocation, as if it were some independent good to which the court should seek to give effect generally when construing a commercial contract in an offshore industry context. Mutual indemnity clauses represent a paradigm type of provision which frequently gives rise to a competition between those who seek to give the wording (even if not clear) a "commercial" (usually broad) construction (praying in aid *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900), and those who argue that, even having in mind the obvious commercial desiderata of a knock-for-knock regime, it is all a question of the actual language used and that this alone defines the result, not some generalised goal. The English courts, while willing to bear in mind the general commercial purpose of such clauses, have nevertheless repeatedly emphasised that, at bottom, the result is one of the true construction, against the background circumstances, of the relevant wording, applying ordinary English law principles of construction, just as with any other contractual provision.

4.145 The case of *E. E. Caledonia Ltd v Orbit Valve Co Europe* [1993] 2 Lloyd's Rep 418 is a good illustration of this limiting principle (and was not doubted in *Transocean v Providence* although its particular context, that of the exclusion of liability for negligence was noted: see para. 22). In that case the court had to consider a mutual risk allocation provision in fairly standard form seeking to allocate to each party the risk of death or injury to its employees and loss of or damage to its property; there was no express reference to the negligence of the party and the issue was whether the guidelines set out by Lord Morton of Henryton in *Canada Steamship v R* [1952] AC 192 fell to be applied, it being argued that they were wholly inapposite to a mutual risk allocation regime. Hobhouse J held that they did in the following important passage at 423–424:

> It is always relevant to have in mind when construing a contract between commercial parties that the primary purposes of the relevant provision may simply be one of the division of risk, often insurable risk. Thus, from a commercial point of view, it is perfectly sensible to construe art. 10(b) as a provision for the division of risk on a broadly "knock for knock" basis. Both (b) and (c) have an obvious inter-relationship with art. 11. There is no objection in principle to such provisions and the Court, particularly a Court accustomed to dealing with commercial contracts, should show no reluctance to give full effect to such a provision. This is an important and forceful argument. But it also has to be borne in mind that commercial contracts are drafted by parties with access to legal advice and in the context of established legal principles as reflected in the decisions of the Courts. Principles of certainty, and indeed justice, require that contracts be construed in accordance with the established principles. The parties are always able by the choice of appropriate language to draft their contract so as to produce a different legal effect. The choice is theirs. In the present case there would have been no problem in drafting the contract so as to produce the result for which the plaintiffs have contended; however the contract was not so drafted and contains only general wording and is seriously lacking in clarity.

4.146 A similar approach was taken more recently in *Seadrill Management Services Ltd v OAO Gazprom (The Ekha)*. In that case, a jack-up rig was provided to Gazprom by Seadrill on the terms of the standard form produced by the International Association of Drilling Contractors ("IADC"), namely the "IADC Offshore Daywork Drilling Contract (Revised February 1997)", headed "International Daywork Drilling Contract – Offshore" ("the IDDCO form"). As part of the IDDCO form, Article IX sets out a series of risk allocation provisions dealing with who bears the risk for certain archetypical offshore problems as set out in paras. 901–909 and, by incorporation, paras. 606, 608 and 1310. There are considerable similarities in broad drafting terms between those provisions and the mutual indemnities in the "Towcon 2008" form. At first instance it was contended that ordinary principles of English construction, for example the principle that "Clear words are necessary before the Court will hold that a contract has taken away rights or remedies which one of the parties to it would have had at common law" (see Lewison, *Interpretation of*

Contracts, 4th edn, section 12.19, and the oft-applied *locus classicus, Gilbert-Ash (Northern) Ltd v Modern Engineering* [1974] AC 689 *per* Lord Diplock), were not to be applied or not with their full rigour in the case of a mutual risk allocation provision.

4.147 The argument was emphatically rejected both at first instance and in the Court of Appeal. At first instance, reported at [2010] 1 Lloyd's Rep 543, Flaux J stated at paras. 174 and 182:

> (174) It is well recognised that offshore contracts of one kind or another (be it drilling contracts or, for example, towage contracts) contain risk allocation provisions which allocate certain risks between the parties irrespective of fault. However the existence of that commercial approach does not assist much in the construction of this particular contract and, in particular, in deciding whether, as Seadrill contends, the risk allocation provisions in this contract are all-encompassing and preclude any claim for damages . . ..
>
> (182) I agree with Mr Rainey that, since this is an English law contract, the starting point is that the court must construe the contract as a whole, without preconceptions, but applying established English law principles of contract construction.

4.148 In the Court of Appeal, [2010] EWCA Civ 691 (see [2010] Lloyd's Rep Plus 25), Moore-Bick LJ (giving the judgment of the court) said as follows (at para. 18):

> I also have some reservations about having regard to what were said to be attitudes generally prevailing in the offshore drilling industry towards risk allocation and the means of providing for it. It is a truism that commercial parties seek certainty, both in the general law and in their contracts, but there are many different ways of achieving it and of failing to do so. The traditional approach has been to identify with precision the scope of the parties' respective obligations, leaving it to the general principles of law to allocate loss. In such cases a breach of contract usually attracts liability for loss caused as a result, but that may be varied by the operation of exclusion and limitation clauses. Risk allocation clauses, by which loss and damage is borne by one or other party and which operate regardless of negligence or other kind of fault, have become common in some areas of activity, in particular, in construction contracts and, it may be, offshore drilling contracts. However, they rarely purport to supplant entirely the basic contractual obligations undertaken by each party and in each case the precise scope of the clause has to be identified in the context of the remainder of the contract. I do not accept, therefore, that one can properly approach a contract of this kind on the assumption that the parties were seeking to allocate the burdens of loss and damage occurring in the course of operations solely by means of risk allocation provisions rather than by defining the scope of their respective obligations. The likelihood is that they were making use of both techniques, but that can be determined only by examining the terms of the contract.

4.149 Applying the general approach to construction of contracts emphasised by the Supreme Court in in *Arnold v Britton* [2015] AC 1619, where the proper place of "commercial" construction was emphasised as being simply part of the iterative process of construction, and that in the ordinary case the key to a question of construction lies in the actual language used, given its usual meaning, it is submitted that, notwithstanding the decision in *Transocean* and the industry discussion after that case, the need for clearly drawn mutual exclusion and indemnity provisions remains clear. Different knock-for-knock provisions will have different effects: some will be drawn widely in both directions, some narrowly and others wide in favour of one rather than the other party where the corresponding indemnity is more restricted (a feature even now of certain BIMCO offshore forms and of the clause under consideration in *Transocean v Providence*, which was not truly mutual). As Lord Neuberger stated in *Arnold* at para. 17 "the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras. 16–26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must

have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision." An attempt to argue that there was a conflict or inconsistency between *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 and *Arnold* received short shrift from the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 where the argument to this effect was summarily dismissed (para. 8). In Lord Hodge's words (for the court): "On the approach to contractual interpretation, *Rainy Sky* and *Arnold* were saying the same thing" (para. 14).

4.150 Secondly, given this background, to what extent is it appropriate to invoke the *contra proferentem* rule of construction when construing clause 25 of "Towcon 2008"? This has been a question posed since the first edition of this work in 1996, following the argument and decision in *The Herdentor*; it is a question to which the answer has varied since 1996 but where the current answer now seems to support the approach (suggested in the first edition) that where a *mutual* exclusion/indemnity provision is concerned, *a fortiori* where there is an industry adopted "balanced" version of such a provision, any form of restrictive interpretation to "read the clause down" or to give it its narrowest meaning, is misplaced. It is to be approached on its own terms, bearing in mind, on the one hand, the sensible purpose of mutual indemnification and risk allocation but, also, looking to the language used in its ordinary sense and meaning, without straining its interpretation in favour of either a wide or a narrow meaning.

4.151 At the onset, it is important to identify the precise basis of this English rule of construction which is applied to exemption clauses. This has been conveniently summarised in *Chitty on Contracts* (32nd edn, 2015), Vol. I, para. 15–012 (formerly by Professor Guest, now by Professor Whittaker) as embracing "two differing but closely related, principles", viz.:

> First, since the party seeking to rely upon an exemption clause bears the burden of proving that the case falls within its provisions, any doubt or ambiguity will be resolved against him and in favour of the other party. Secondly, as in the case of any other written document, in situations of ambiguity the words of the document are to be construed more strongly against the party who made the document and who now seeks to rely on them.

4.152 The position was analysed in detail by the Court of Appeal in *Nobahar-Cookson v The Hut Group Ltd* [2016] EWCA Civ 128. Briggs LJ distinguished between two uses of the term *contra proferentem*: *first*, the rule that an exclusion clause would be read narrowly in the case of ambiguity (para. 18: "the underlying rationale for the principle that, if necessary to resolve ambiguity, exclusion clauses should be narrowly construed has nothing to do with the identification of the *proferens*, either of the document as a whole or of the clause in question. Nor is it a principle derived from an identification of the person seeking to rely upon it. Ambiguity in an exclusion clause may have to be resolved by a narrow construction because an exclusion clause cuts down or detracts from the ambit of some important obligation in a contract, or a remedy conferred by the general law such as (in the present case) an obligation to give effect to a contractual warranty by paying compensation for breach of it. The parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect"); and *secondly*, the classic form which involved resolving ambiguities against the person preparing the document (para. 14: "a rule designed to resolve ambiguities against the party who prepared the document in which the clause appeared, or prepared the particular clause, or against the person for whose benefit the clause operates: see Lewison, (*op. cit*.) at paragraph 7.08(b) at page 391, and the admirable historical introduction which precedes it.").

4.153 The second basis of the rule should have little scope for operation. The "Towcon" form is an industry standard form, adopted for use by the towage industry and drafted to be a balanced document giving effect to the interest of tug and tow on an equal footing. It is in widespread use by tug owners from many nations and is equally widely accepted by tow interests. For example,

"Towcon 2008" is one of the main forms recommended and approved by the leading P&I Clubs for their members to use on the basis for engaging towage services and tugs. Even if one party requests in the contract negotiations that it be used as the basis for the contract, it is highly artificial to regard the "Towcon 2008" form as being "his" document.

4.154 The first basis of the rule has arisen out of unilateral exemption or exclusion clauses drawn up or inserted in the contract in favour of one party only and where that party is the *proferens* of the clause. Not unreasonably, it is for that party to put himself within the terms of the clause. However, where the clause is mirrored by an equivalent exemption or exclusion such that both parties mutually "drop hands" on certain claims, the identity of the *proferens* is difficult to seek. It will depend on the facts of the casualty. If, on a towage service, the tug is damaged and the hirer relies on clause 18(2)(a) as excluding his liability, he is the *proferens*; rendering the Latin, he is the person who advances or puts the clause forward: if the concept looks to the *proferens coram judice* who relies upon it in litigation, rather than the *proferens in contrahendo*, who puts it forward in contract negotiation: see *Youell v Bland Welch* [1992] 2 Lloyd's Rep 127 at 134 *per* Staughton LJ.). Compare where the tow is damaged and the tug owner relies on precisely the same words in clause 18(2)(b) as are present in clause 18(2)(a); he is then the *proferens*. What if, as often occurs, the tug and tow each sustain damage during the service and both parties rely on the same terms in the pendant provisions of clause 18(2)(a) and (b)? The problem is more starkly pointed up by clause 18(3), which excludes certain types of loss, irrespective of which party is claiming. To arrive at what the words in the clause mean by a *contra proferentem* exercise is in such case, it is suggested, both futile and undesirable. The aim is to assess what is the true extent of the mutual exchanges of risk allocation.

4.155 This suggested approach is now borne out in the recent decision of *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904; [2012] Ch 497 where Lord Neuberger MR gave this succinct summary at para. 68:

> Quite apart from raising abstruse issues as to who is the proferens (and, in particular, whether the issue turns on the precise facts of the case or hypothetical analysis), "rules" of interpretation such as contra proferentem are rarely decisive as to the meaning of any provisions of a commercial contract. The words used, commercial sense, and the documentary and factual context, are, and should be, normally enough to determine the meaning of a contractual provision.

The judgment of Moore-Bick LJ in *Transocean Drilling UK Ltd v Providence Resources PLC* [2016] EWCA Civ 372; [2016] 2 Lloyd's LR 51 at paras. 20–21 is to similar effect. The Court of Appeal rejected Popplewell J's approach that the identification of the *proferens* was simply a matter of identifying who was relying on the clause to exclude liability in the given case (see Popplewell J at [2014] EWHC 4260 (Comm) at para. 162):

> In my view the judge was wrong to invoke the contra proferentem principle in this case. It is an approach to construction to which resort may properly be had when the language chosen by the parties is one-sided and genuinely ambiguous, that is, equally capable of bearing two distinct meanings. In such cases the application of the principle may enable the court to choose the meaning that is less favourable to the party who introduced the clause or in whose favour it operates. [. . .] It has no part to play, however, when the meaning of the words is clear, as I think they are in this case; nor does it have a role to play in relation to a clause which favours both parties equally, especially where they are of equal bargaining power. In the case of a mutual clause such as the present clause 20 it is impossible to say who is the proferens and who the proferee.

It should be noted that there is an apparent conflict in the recent authorities. In *Nobahar-Cookson v The Hut Group Ltd* [2016] EWCA Civ 128, the Court of Appeal appeared to state that in terms of the application of *contra proferentem*, it made no difference that the clause was a mutual one. Briggs LJ stated at para. 20 that "In the present case the Buyer challenged by respondent's notice the judge's conclusion that clause 5.1 should not be construed *contra proferentem*

because both sides gave warranties to each other, subject in each case to exclusion clauses. In my judgment that challenge to the judge's analysis is well made. I can see no reason to disapply the principle that resolves ambiguities in a particular exclusion clause by a narrow construction, merely because the same contract contains an exclusion clause limiting the extent of contractual warranties given by the other party. The same principle may be used where necessary to resolve ambiguities (if there are any) in either of them." The oddity is that Briggs LJ agreed with the judgment of Moore-Bick LJ in *Transocean* which took a different approach, as seen above. This conflict was one of the matters relied upon by Providence in seeking permission to appeal to the Supreme Court and it is perhaps a matter of regret that the Supreme Court refused permission.

4.156 But it is suggested that notwithstanding *Nobahar-Cookson*, the current flow of the tide is unquestionably set firmly against a specially strict or exacting construction of mutual exclusions, where these form part of a set of mutual risk allocation provisions. The Court of Appeal in *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 expressly endorsed *K/S Victoria Street* and *Transocean*: see *per* Jackson LJ at para. 52. Jackson LJ went further in emphasising that technical and restrictive interpretation in a contractual field where there was mutual risk allocation (coupled with insurance) had (in his view) little place, even in relation to the exclusion of negligence. At paras. 57–59, he stated:

> 57 In major construction contracts the parties commonly agree how they will allocate the risks between themselves and who will insure against what. Exemption clauses are part of the contractual apparatus for distributing risk. There is no need to approach such clauses with horror or with a mindset determined to cut them down. Contractors and consultants who accept large risks will charge for doing so and will no doubt take out appropriate insurance. Contractors and consultants who accept lesser degrees of risk will presumably reflect that in the fees which they agree.
>
> 58 As previously noted, the exemption clauses in the present case form part of the contractual arrangements concerning professional indemnity insurance. In clause 6 of the 2009 agreement and in clause 4 of the warranties, the parties agreed (a) what risks Arup would accept and insure against and (b) what risks Arup would not accept and would not insure against. Self-evidently, the fees which Arup charged and which the Consortium agreed to pay allowed for the cost of that professional indemnity insurance, even though that cost was not separately identified.
>
> 59 In my view, the canons of construction elucidated in the *Canada Steamships* [sic] line of cases are of very little assistance in the present case.

4.157 The doubtfulness of the application of the *contra proferentem* rule to clauses such as "Towcon" clause 18 is supportable by reference to authority well before *K/S Victoria Street* and *Transocean*. In *Suisse Atlantique Société d'Armement v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, Lord Upjohn commented on mutual exclusion clauses in the following terms at p. 420F:

> Therefore, to succeed in this appeal the owner must displace the demurrage clause. He seeks to do so in reliance on the well-known doctrine that in certain circumstances a party to a contract cannot rely on an exception or limitation clause inserted solely for his benefit. But before examining this doctrine the first question which logically must be asked is, surely, whether this demurrage clause is a clause of exception or limitation. Whatever the ultimate ambit of the doctrine may be found to be it is, in my opinion, confined to clauses which are truly clauses of exemption or limitation, that is to say clauses essentially inserted for the purpose only of protecting one contracting party from the legal consequences of other express terms of the contract or from terms which would otherwise be implied by law or from the terms of the contact regarded as a whole; just as a party may waive a clause which is inserted for solely his own benefit (see *Hawksley v Outram* [1892] 3 Ch 359) so *per* contract there are occasions when a party cannot be permitted to rely on such a clause. But if the clause is inserted for the benefit of both I know of no authority – and none has been cited – which entitles one party unilaterally to disregard its provisions. In my opinion, the demurrage clause with which we are concerned is a clause providing for agreed damages and is different from a clause excluding or limiting liability for damage by breach of contract by one party. An agreed damage clause is for the benefit of both; the party establishing breach by the other need prove no damage in fact; the other must pay that, no less

> but no more. But where liability for damage is limited by a clause then the person seeking to claim damages must prove them at least up to the limit laid down by the clause; the other party, whatever may be the damage in fact, can refuse to pay more if he can rely on the clause. As Greer J said in relation to a demurrage clause in *Aktieselskabet Reidar v Arcos Ltd*: "this clause was put in for my benefit as well as yours; it measures the damages I have to pay . . . "
>
> . . .
>
> Accordingly, in my opinion the demurrage clause is a clause which, the contract being affirmed, remains an agreed damages clause for the benefit of both parties and it is not a clause of exception or limitation inserted for the benefit of one party only to which the doctrine under consideration can properly be applied that is sufficient to dispose of this appeal.

4.158 There is sparse authority in any decided case on the "Towcon" form, but what there is, while mixed, tends to suggest that the court has in the past favoured an ordinary application of the *contra proferentem* approach. This approach will now fall to be re-appraised in the light of the case law since the third edition of this work. In *Smit International (Deutschland) GmbH v Josef Mobius Bau gesellschaft GmbH* [2001] CLC 1545, the court had to consider the interrelationship under "Towcon" of clause 13 and the obligation on the tugowner to provide a seaworthy tug and the exclusions of liability in clause 18 (see further below). No point was taken by the parties as to the approach to construction. Morison J in a short judgment based his decision upon "what I perceive to be the more business-like, or commercial approach" and regarded clause 18 as a "knock-for-knock agreement" which "is a crude but workable allocation of risk and responsibility." He rejected an argument which "would lessen the effectiveness of the knock-for-knock agreement" and what he described as the "blunt and crude regime" of clause 18. The merit of his approach lies in treating clause 18 as a mutual regime with a common purpose, whoever happens in a particular case to be the *proferens* of the regime or the person who is putting it forward in the particular action. His approach is now in line with the current approach in *K/S Victoria Street*, *Transocean v Providence* and *Persimmon v Ove Arup*.

4.159 However, in *The Herdentor* (*op. cit*.), Clarke J had to construe the terms of clause 18(3) of a "Towhire" form (ie identical in terms of clause 18(3) of "Towcon") in the context of the meaning of the term "loss of profit." He addressed the issue as follows:

> The question is, therefore, whether the claim is a claim for loss or profit? There was some discussion at the hearing as to the correct approach to the proper construction of clauses of this kind. [OSA] points out that Clause 18.3 was included for the benefit of both parties, so that neither party can properly be regarded as the proferens as against whom it should be construed. I accept that submission.
>
> On the other hand, the clause is an exemption clause because it excludes liability for loss which would otherwise be recoverable as damages at common law. As such, it is for the party relying upon it to bring the facts clearly within it. In that sense it must be construed against the party who seeks to rely upon it on the facts of the particular case. In the instant case, that is OSA. That does not, however, mean that the clause should be given a strained construction. It should be given its ordinary and natural meaning in its context in the contract and having regard to the purpose and intent of the contact as a whole.

4.160 A similar approach was taken in *Ease Faith v Leonis Marine Management* [2006] 1 Lloyd's Rep 673 in relation to clause 18 of "Towcon." Although it is unclear to what extent there was detailed argument as to the applicability of the principle and whether the passage from *Suisse Atlantique* referred to above was cited to the court, Andrew Smith J (at para. 142, p. 695) stated as follows, following *The Herdentor*:

> In construing the expression "loss of profit" in clause 18(3), it seems to me significant (i) that the expression, being in an exclusion clause, is to be interpreted *contra proferentem*, that is to say, without imposing a strained meaning upon the words, the clause is to be interpreted in the event of ambiguity restrictively against the party seeking to rely upon it on the facts of the particular case; (ii) that clause 18(3) is a clause in a standard form agreement that is directed to excluding liability of both the hirer and the tug owner.

4.161 This echoed the approach taken by Popplewell J at first instance in *Transocean v Providence* [2014] EWHC 4260 (Comm) (para. 162): "That applies to commercial contracts such as a rig contract, and to both parties to the contract even where the exclusion is mutual and is to be found in an indemnity clause"). Compare also the starker approach in a Canadian decision of the Federal Court (trial division) in *Canadian Salt Co v The Ship Irving Cedar* [2000] FCJ No. 1410 (also noted in *Lloyd's Maritime Law Newsletter* No. 557). In that case, O'Keefe J, construing clause 18(2)(a) of a "Towcon" form, held that the clause was an exclusion of liability clause and had to be construed against the person who had made it part of his contract, in that case the defendant tug owners; accordingly, any ambiguity in the clause had to be construed against the tug owners as *proferentes* of the clause.

4.162 In the oil and gas industry, until recently, the position appeared to be the same, namely, that while the court has on occasion considered that construction *contra proferentem* may be inappropriate in the context of a truly mutual knock-for-knock provision which may be invoked by either party, where one party seeks to escape liability for breach of contract, the ordinary approach was still one of construing any ambiguity against that party since he is seeking to escape what the law would otherwise impose: see Gordon, "Risk Allocation In Oil & Gas Contracts", chapter 13 in Gordon & Paterson (eds), *Oil & Gas Law – Current Problems & Emerging Trends*, at para. 13.29, pp. 355–356 and the Scots cases there cited. Those cases and that general approach will now require to be reconsidered in the light of the modern English authorities on mutual exclusion clauses and risk allocation regimes.

4.163 In conclusion, it is submitted that the correct approach to construction of clause 25 is as follows and has changed materially (cf. the summary in the third edition reflecting the dominance of the former *Herdentor* and *Ease Faith* approach):

i The clause is to be construed in the light of its commercial purpose as a mutual exemption and exclusion clause.

ii Although it has not been finally decided one way or the other and there are different decisions at Court of Appeal level, the current trend of recent authority is that the clause should not be construed *contra proferentem*, that is with the intention of resolving ambiguities against the person who invokes the clause and/or who made "Towcon" the basis of the contract but simply looking at the language in its ordinary sense, having regard to its commercial purpose. The position taken in cases such as *The Herdentor* and *Ease Faith* and adopted at first instance in *Transocean* has now been rejected as inapplicable in a mutual exclusion clause (at least between persons of equal bargaining power). It is instructive therefore that the view expressed in the earlier first and second editions of this work now appears to have been adopted or confirmed as in fact correct.

iii Any construction should be tested by looking at it from both the perspective of the tug and the tow in every case as joint *proferentes*.

iv The clause should be construed, where the language permits, so as to give effect to the commercial purpose of the clause and to the "knock-for-knock" intentions of the draftsman and as being a rough and ready allocation of risk and responsibility upon a straightforward and clearly drawn basis.

v Where the clause seeks to exclude or restrict rights which both tug and tow would have against the other at common law, then clear language is required to attain that result. That is not an application of *contra proferentem* but of the ordinary presumption of parties not wishing to give up valuable rights: see the well-known observation of Lord Diplock in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717H.

vi *Semble* even that *Gilbert-Ash* presumption is of lesser weight in a contractual context where it is clear that the parties are intending to give up *some* of their common law

rights (as it will be in a set of mutual exclusions and indemnities): see *Transocean v Providence*, *per* Moore-Bick LJ at para. 21, where he stated that the principle would apply less strongly where: "it is clear that in agreeing to clause 20 in this case the parties did intend to give up some of their rights").

vii But the language of the clause should only be given its ordinary and natural meaning and as a commercial document in accordance with the ordinary approach in *Photo Production v Securicor Transport* [1980] AC 827, it being "wrong to place a strained construction upon words in an exclusion clause which [are] clear and fairly susceptible of one meaning only." (See also Clarke J in *The Herdentor* and Andrew Smith J in *Ease Faith*.)

viii Once construed, a party who wishes to put himself within the scope of the clause so construed bears the burden of proof and, perhaps, he must do so "clearly" (see *per* Clarke J in *The Herdentor*) but on any view he needs only to establish his case on the balance of probabilities.

4.164 The above suggested principles should not be controversial. More controversial is whether the "mutual" nature of the clause and the suggested absence of a *proferens* against whom the clause should be construed is sufficient to exclude other certain well-settled English law principles as to the construction of exemption clauses. The problem arises with sub-clause (a) of clause 25 and the potential applicability of the rule of construction at common law that to exclude liability for negligence, express words must be used, failing which other wording must be present which sufficiently and unequivocally indicates that that was the parties' intention (ie the rule in *Canada Steamship Lines v The King* [1952] AC 192).

Clause 25's use of contractual indemnities

4.165 Clause 25 operates as a system of indemnities (ie contractually conferred and enforceable rights to be indemnified or made whole in certain given eventualities rather than as a system of terms which give rise to the right to damages where a term or terms is or are broken). Various consequences follow this. First, the accruing of the cause of action will depend on the terms of the indemnity (see *The Caroline P* [1984] 2 Lloyd's Rep 440 and the discussion under clause 31 (Time of Suit) below). Secondly, it is suggested that the ordinary rules of causation, remoteness and foreseeability do not necessarily apply to recovery under a pure indemnity, that is a contractual indemnity which is not co-terminous with a breach of contract. In *Total Transport v Arcadia Petroleum (The Eurus)* [1996] 2 Lloyd's Rep 408, Rix J held at p. 432 that where the indemnity is triggered by a breach of contract, the indemnity only covers foreseeable consequences caused by that trigger but accepted that it was a matter of construction, and even in such a case there might be a contrary argument. In the Court of Appeal at [1998] 1 Lloyd's Rep 351, the court held that in the absence of something special about the nature or terms of the contractual indemnity, the same principles of causation and remoteness should apply. The point, however, remains open in the case of the clause 25 indemnities

4.166 In addition, the result that a clause drawn as an *indemnity* may operate equally as an *exclusion* of liability should also be noted. While in the context of clause 25 of "Towcon 2008" (and "Towhire 2008"), the BIMCO clause adopts a "double-barrelled" approach, providing first for an indemnity in mutual terms by para. (a) and then an express exclusion of liability also in indemnity terms in para. (b), simple clauses which provide only for an indemnity are to be construed as an exemption or exclusion of liability as well as a right to seek an indemnity. In *Farstad Supply AS v Enviroco Ltd (The Far Service)* [2010] UKSC 18 (Sc); [2010] 2 Lloyd's Rep 387, the Supreme Court had to construe a provision by which Farstad would "defend, indemnify and hold harmless [Asco], its Affiliates and Customers . . . from and against any and all claims, demands, liabilities, proceedings and causes of action resulting from loss or damage in relation to the Vessel (including total loss) or property of [Farstad] . . . irrespective of the cause of loss or damage,

including where such loss or damage is caused by, or contributed to, by [sic]the negligence of [Asco].'' Farstad chartered its OSV to Asco. Asco in turn contracted with Enviroco to clean her tanks. The operation was done negligently by Enviroco (although Enviroco alleged that Asco was also negligent). Farstad sued Enviroco and Enviroco brought contribution proceedings against Asco, alleging that Asco was equally liable to Farstad and that Asco was liable to make contribution. The Supreme Court held in favour of Asco that the language of the indemnity provisions was such as to exclude as between Asco and Farstad any liability on the part of Asco. As Lord Clarke of Stone-cum-Ebony put the matter at para. 24:

> The question is whether clause 33.5 excludes the charterer's liability to the owner in respect of damage to the vessel caused by the charterer's negligence. In my opinion it plainly does. As appears below, the word "indemnify" is capable of having a wide meaning but, even assuming that by itself it might (depending upon the context) have a narrow meaning, it does not stand alone in the clause. The owner must "defend . . . and hold harmless" the charterer, not only against liabilities and causes of action, but also against "all claims, demands" and "proceedings." The natural meaning of that expression is that, since the owner must hold Asco harmless from a claim by the owner in respect of damage to the vessel caused by Asco's negligence, Asco cannot be liable to the owner in respect of such damage.

See also *per* Lord Mance at para. 57:

> In the case of sub-clause 33.11, Farstad's agreement is to "defend, indemnify and hold harmless Charterer from any consequential or indirect losses that Vessel Owner may suffer as a result of the performance of the Charter." Farstad was the vessel's owner and this sub-clause indicates that the phrase "defend, indemnify and hold harmless" is used in a sense wide enough to embrace agreement to exclude the other contracting party from responsibility. That to my mind is anyway the sense in which it is used in all these clauses. Both the words "hold harmless" and indeed "indemnify" alone can have that sense. On Enviroco's construction, the parties provided that Asco should be indemnified against third party "claims, demands and 'liabilities" it incurred "resulting from loss or damage in relation to the Vessel (including total loss) or property of the Owner [Farstad]", but made no provision at all for claims, demands, etc. by Farstad itself, so leaving Farstad free to make any claims and demands and to establish any liability it wished as against Asco for damage to Farstad's own vessel. That makes no sense as a contractual scheme. Lady Paton thought that, on the basis of Farstad's case, words such as "arising from a claim made by any party other than Farstad" would have to be implied after the word "liabilities" in clause 33.5 "for if they were not implied, 'liabilities' would prima facie include a liability to Farstad arising from negligence on the part of Asco causing loss or damage in relation to the vessel" (para 39). But this is precisely what the parties intended to exclude – with the obvious concomitant that Farstad should insure against all risk of loss to their property, and that of their personnel and others for whom they were responsible (while Asco would insure against all such risks to their own as well as their affiliates' and customers' property: clause 33.6).

For an interesting discussion of this decision, see Courtney, *Indemnities, Exclusions and Contribution* [2011] LMCLQ 340.

Injury to or death of those engaged in the towage: sub-clause (a)

"25. Liability and Indemnity

(a) (i) The Tugowner will indemnify the Hirer in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death of any of the following persons, occurring during the towage or other service hereunder, from arrival of the Tug at the pilot station or customary waiting place or anchorage at the Place of Departure (whichever is the sooner), until disconnection at the Place of Destination, however such geographic and/or time limits shall not apply to sub-clause 25(a)(i)(2) below:
   (1) The Master and members of the crew of the Tug and any other servant or agent of the Tugowner;
   (2) The members of the riding crew provided by the Tugowner or any other person whom the Tugowner provides on board the Tow;
   (3) Any other person on board the Tug who is not a servant or agent of the Hirer or otherwise on board on behalf of or at the request of the Hirer.

(ii) The Hirer will indemnify the Tugowner in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the towage or other service hereunder of any of the following persons:
  (1) The Master and members of the crew of the Tow and any other servant or agents of the Hirer;
  (2) Any other person on board the Tow for whatever purpose except the members of the riding crew or any other persons whom the Tugowner provides on board the Tow pursuant to their obligations under this Agreement."

4.167 Clause 25(a) deals with liabilities and settlements in respect of deaths or injuries to those engaged in the towage service. The former version of the clause applied only to such deaths or injuries if "occurring during the towage or other service" under the contract between the parties.

4.168 The uncertain bounds of this phrase were highlighted in previous editions of this work and contrasted with the better-defined position under the UK Standard Conditions (*supra*) with the phrase "whilst towing", which is used in connection with exemptions, being given a very precise definition. The clause has now been amended, but only in relation to para. (a)(i) in relation to the tug owner's crew, riding crew or third parties unconnected with the hirer on board the tug. In respect of such exposure to liability for death or injury of such persons, the bounds of the service are now defined much more precisely than previously and extending the period to the earliest and latest stages in the operation so as to cover any possible accident to such persons from the earliest possible stage at which the tug is performing a service referable to the hirer and under the contract to the last moment of it doing so. The BIMCO explanatory notes state accordingly:

> Sub-clause (a)(i) has been amended to more clearly specify the period to which it applies. Previously it stated that it covered injury or death "occurring during the towage or other service hereunder." It was felt that this phrase might not necessarily encompass injuries to or death of personnel that occur at the very beginning or the very end of a towage operation.
>
> To resolve this concern new wording has been added to clarify that the intention is that the period of liability begins from the arrival of the tug at the pilot station or customary waiting place and ends when disconnection occurs at the place of destination. In respect of riding crew or other personnel provided by the tugowner and placed on board the tow, the period of responsibility is extended, if appropriate, to whatever point such personnel are placed on board the tow until they finally disembark or, for example, if an accident occurs during a deviation to the voyage.

4.169 In relation to the riding crew referred to under para. (a)(i)(2), these temporal and geographical bounds are displaced and do not apply: see the concluding words of the opening paragraph ("however such geographic and/or time limits shall not apply to sub-clause 25(a)(i)(2)"). No definition is given of the circumstances in which the death of or injury to such persons falls within the clause. The explanatory notes suggest that the result is that the tug owner's responsibility extends "to whatever point such personnel are placed on board the tow until they finally disembark." Given that there is no defined temporal or geographical limit, the class of person is defined by para. (a)(i)(2) itself and will therefore apply (1) to the members of the riding crew, at any stage, and (2) to any other person who the tug owner puts on board the tow, while such latter person is on the tow but not otherwise; this flows from the separate categories of persons covered by para. (a)(i)(2). This seems unnecessarily cumbersome and also to provide for anomalies: if an appointed member of a riding crew provided by the tug, not being a servant or agent of the tug within para. (a)(i)(1), drowns when being taken out by a tender to board the tow then para. (a)(i)(2) would seem to be engaged; contrast an observer not being a member of the riding crew who is sent to the tow by the tug to check the navigational lights who drowns in the same incident: that person has not yet been "provided *on board* the tow" (emphasis supplied). It is curious as to why the wider and precise definition in para. (a)(i) has been removed for this class of person and no other and it may well produce a narrower not a wider result. It is suggested that this qualification should be deleted by amendment of the printed clause.

4.170 In relation to the hirer's personnel, whether the crew of the tow or persons "provide[d] on board the tow", para. (a)(ii) maintains the previous wording and therefore applies only to deaths or injuries to such persons if "occurring during the towage or other service" under the contract between the parties. As noted above, the particular bounds of this phrase are not specifically defined for the purposes of the clause. The explanatory notes are silent as to the thinking behind the distinction between paras. (a)(i) and (a)(ii). It is suggested that under the "Towcon 2008" form the "service" is defined by various provisions in Part I and Part II, albeit not specifically in relation to the operation of clause 25:

i Boxes 22–25 of Part I, read together with clauses 13(a) and 14(a), define the nature of the contract service, the places of departure and destination and the contemplated route.
ii Under clause 6, free time for connection starts on the arrival of the tug at the pilot station of the place of departure and, after the expiry of free time, the tug has to be paid for by delay payments until the tug is free to leave the place of destination.

4.171 It is submitted that, for the purposes of clause 25(a)(ii), the contract service begins upon the arrival of the tug at the pilot station of the place of departure or upon her being tendered to the tow at the place of departure under clause 13(a), and extends until either the tow is taken over by the hirer under clause 14(a) or until the tug is free to leave under clause 6.

4.172 The clause provides that the tug shall indemnify the tow in respect of all deaths of or injury to the tug's crew and tug owners' servants or agents, including the riding crew, and to any third person on board the tug (other than the tow's servants). The tow gives a similar indemnity in respect of its own crew and servants and all persons on board the tow (other than the tug's riding crew or servants).

4.173 The main difficulty with the clause is that while it provides in clear terms for an indemnity to protect the other party in respect of liability for death or injury to the employees of the other party, it does not contain any express reference to liability for death or injury due to the negligence of that other party. To take an example: a member of the tug's crew is killed by a hawser being negligently slipped by one of the hirer's men on board the tow; the crewman's dependants sue the hirer in negligence as being vicariously liable for its servant. The hirer is found liable in negligence by the court. The hirer then seeks an indemnity from the tug owner under clause 25(a)(i) in respect of the damages which it has paid to the dependants. Does the clause give the hirer this right?

4.174 The rule at common law is that a clause which seeks to exempt a person from his negligence must be clearly worded to achieve this result. The same rule applies to indemnity clauses where a party is required to indemnify another against that other party's liability in negligence to third parties (see *Canada Steamship Lines v The King* [1952] AC 192 and *Smith v South Wales Switchgear Co Ltd* [1978] 1 WLR 165 (HL)). While it has been stressed that the *Canada Steamship* principles, albeit enunciated in ostensibly Mosaic form by Lord Morton of Henryton and sometimes treated as such, are merely guidelines not to be adopted slavishly (see for an example of this: *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] 2 Lloyd's Rep 61, *Lictor Anstalt v MIR Steel UK* [2012] EWCA Civ 1397), the three-stage approach derived from his speech still represents the conventional and logical approach. However, its application in the context of mutual clauses and as part of a risk allocation scheme, has recently been doubted by the Court of Appeal in *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373, albeit with a difference of emphasis in relation to indemnity provisions rather than simple exclusions. Jackson LJ put the matter in this way ta paras. 55 and 56, after citing the *locus classicus*, Lord Morton's speech:

> 55. Over the last 66 years there has been a long running debate about the effect of that passage and the extent to which it is still good law. In hindsight we can see that it is not satisfactory to deal with exemption clauses and indemnity clauses in one single compendious passage. It is one thing to agree

> that A is not liable to B for the consequences of A's negligence. It is quite another thing to agree that B must compensate A for the consequences of A's own negligence.
>
> 56. In recent years, and especially since the enactment of UCTA, the courts have softened their approach to both indemnity clauses and exemption clauses: see *Lictor Anstalt v MIR Steel UK [2012] EWCA Civ 1397; [2013] 2 All ER (Comm) 54* at [31] to [34]. Although the present judgment is not the place for a general review of the law of contract, my impression is that, at any rate in commercial contracts, the *Canada Steamships* guidelines (in so far as they survive) are now more relevant to indemnity clauses than to exemption clauses.

It will be noted that Jackson LJ's views were expressed tentatively and that he went on to carry out a classical *Canada Steamship* analysis on the clause in question (at para. 60). It is suggested that it is perhaps too early to announce with any certainty the further relegation of *Canada Steamship* principles and that careful drafting, with express references to negligence, especially in a standard form contract remains a counsel of basic prudence.

4.175 Following the conventional *Canada Steamship* approach *faute de mieux*, where, as is the case with clause 25(a), the contract provision contains no express reference to negligence or to any synonym for it, then the test is "whether the words used are wide enough in their ordinary meaning to cover negligence on the part of the servants of the *proferens*. If a doubt arises at this point, it must be resolved against the *proferens*" (*per* Lord Morton in *Canada Steamship* at p. 208). Applying this test, the words of the indemnity in clause 25(a)(i) are absolute and are arguably wide enough to apply as a matter of language to negligence by the *proferens*' servant.

4.176 Even if that is so and the words are wide enough, a further, second test is then posed (see *per* Lord Morton, *ibid*.): "The Court must then consider whether the head of damage may be based on some ground other than that of negligence." That other ground of liability against which the clause could act as an exemption must not be something fanciful or remote and there are many cases on this test (see *Chitty on Contracts* (32nd edn, 2015), Vol. I, para. 15–013). If there is some other ground, then the clause is presumed to apply to that and not to apply to or include negligence. In the case of clause 25(a)(i), it is strongly arguable that there is another ground of liability for death or personal injury, ie that of breach of contract rather than negligence. In the example given above, the clause would operate sensibly if it applied to death or injury to tug men caused by breach of contract by the hirer (eg as to the tow-worthiness of the tow or the safety of the port, etc.). A recent example of the *Canada Steamship* approach being applied in just this way to an indemnity provision in "knock-for-knock" terms which was construed so as to apply to other heads of liability such as breach of contract, rather than negligence, can be seen in the *Buncefield* litigation: see *Colour Quest Ltd v Total Downstream UK* [2009] 2 Lloyd's Rep 1 at paras. 366–369 (pp. 29–30) in relation to "the clause 9.2 issue": see further as to this case below.

4.177 In these circumstances and notwithstanding the stated intention of the draftsmen to provide a knock-for-knock scheme, it is highly debatable whether clause 25(a)(i) would apply where the liability is due to negligence (cf. clause 25(b), which at least includes an express reference to negligence). It is therefore advisable to insert a suitably drafted rider or amendment to cover negligence to enable the contract to pass the *Canada Steamship* test unambiguously. This remains the position after *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373, although that case might afford a more liberal starting point and might entitle a court or tribunal to hold that in a mutual clause the exclusion of liability for negligence can be taken as necessarily implicit and that express mentions of negligence elsewhere are not as necessarily decisive as they were in *Colour Quest*: see below.

4.178 The same problem arose with other sub-clauses of the previous clause 18 of "Towcon" but these have been addressed in the 2008 revision by the express inclusion of a reference to negligence in clause 25(c): see below.

4.179 This, in a sense, makes the omission of any reference to negligence in para. (a) still more striking and would tend to support an argument based on *Canada Steamship* principles, as

considered above, on the basis that when the draftsman wished to exclude negligence he does so in terms in para. (b) and now in para. (c) but must be taken to have elected not to do so in para. (a). In *Colour Quest Ltd v Total Downstream UK* [2009] 2 Lloyd's Rep 1 the court considered two further mutual indemnity clauses ("the Part III clause 1.2 issue") at para. 370 (p. 30). One clause (1.1) provided for an indemnity by each party in respect of the death or injury of their own employees "whether or not resulting from or contributed to by any negligence or default", whereas the sister provision (1.2) in respect of the indemnity each gave in respect of loss of or damage to their own property contained no equivalent wording. The position was therefore the reverse from that under the "Towcon 2008" form, where para. (b) in relation to loss of or damage to property (and now para. (c) in relation to "consequential losses") refers to negligence, whereas para. (a) in relation to death and injury does not. David Steel J concluded as follows:

> A similar issue arises in regard to part III of the Operating Regulations: does the indemnity in favour of a participant in para 1.2 extend to losses arising from that participant's own negligence? The same points can be made. Indeed in this regard a further point arises. It is very striking that para 1.1 contains express words extending the indemnity to cover negligence of the indemnified participant whilst para 1.2 does not. This disparity must be taken as intentional. In short the presumption emerging from *Canada Steamship* can be taken as all the stronger.

Loss of or damage to or caused by tug and tow: sub-clause (b)

"(b) (i) The following shall be for the sole account of the Tugowner without any recourse to the Hirer, his servants, or agents, whether or not the same is due to any breach of contract, negligence or any other fault on the part of the Hirer, his servants or agents:
(1) Save for the provisions of Clause 16(c), loss or damage of whatsoever nature, howsoever caused to or sustained by the Tug or any property on board the Tug.
(2) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tug or obstruction created by the presence of the Tug.
(3) Loss or damage of whatsoever nature suffered by the Tugowner or by third parties in consequence of the loss or damage referred to in (1) and (2) above.
(4) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Tug or in respect of preventing or abating pollution originating from the Tug.
The Tugowner will indemnify the Hirer in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage. The Tugowner shall not in any circumstances be liable for any loss or damage suffered by the Hirer or caused to or sustained by the Tow in consequence of loss or damage howsoever caused to or sustained by the Tug or any property on board the Tug.
(ii) The following shall be for the sole account of the Hirer without any recourse to the Tugowner, his servants or agents, whether or not the same is due to any breach of contract (including as to the seaworthiness of the Tug), negligence or any other fault on the part of the Tugowner, his servants or agents:
(1) Loss or damage of whatsoever nature, howsoever caused to or sustained by the Tow.
(2) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tow or obstruction created by the presence of the Tow.
(3) Loss or damage of whatsoever nature suffered by the Hirer or by third parties in consequence of the loss or damage referred to in (1) and (2) above.
(4) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Tow or in respect of preventing or abating pollution originating from the Tow.
The Hirer will indemnify the Tugowner in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage but the Hirer shall not in any circumstances be liable for any loss or damage suffered by the Tugowner or caused to or sustained by the Tug in consequence of loss or damage, howsoever caused to or sustained by the Tow."

4.180 Under clause 25(b), the tug and tow each agree to bear certain types of loss, damage and liability in full and without any right of recourse to or upon the other and irrespective of whether

that loss, damage or liability has been caused by the other's breach of contract or negligence. Clause 25(b) essentially represents the former clause 18(2) with a number of changes: (i) the addition of the emphasis "any" to the phrase "breach of contract"; (ii) a specific reference to "(including as to the seaworthiness of the Tug)" in relation to "breach of contract" on the part of the tug owner; and (iii) an exception to the principle that the tug bears the loss of and damage to all of its own property in the case of towing gear of which the hirer has use under clause 16, taking up the express responsibility of the hirer to make good such items provided for under the new clause 16(c).

(1) General scheme of clause 25(b)

4.181 Clause 25(b) operates in two ways: first, it provides for a set of mutual exclusion and exemption clauses in favour of the hirer and the tug owner which provide the hirer and the tug owner with a contractual defence to claims for certain types of loss and damage arising in certain circumstances; secondly, it gives to the hirer and to the tug owner a contractual right of indemnity against the other in respect of liabilities which each may incur in respect of loss or damage falling within their exclusion or exemption clause, thereby providing the hirer and tug owner with a cause of action against the other in respect of such liabilities. See generally in relation to indemnity and exclusion clauses, *Farstad Supply AS v Enviroco Ltd (The Far Service)* [2010] UKSC 18 (Sc); [2010] 2 Lloyd's Rep 387.

(2) Clause 25(b) as an exclusion/exemption clause

4.182 Considering first the exclusion or exemption provision aspect of clause 25(b)(i) and (b)(ii), these apply to certain types of loss. Paragraph (b)(i) deals with the losses which the tug will bear and para. (b)(ii) deals with those to be borne by the tow. Before considering the types of loss, it is important to note the intended scope of the exclusion and exemption.

Scope of exclusion/exemption

4.183 The clause states that the specified loss and damage are to be "for the sole account" of the tug owner or the hirer "without any recourse" to the other. These words show the intention of making the particular party solely responsible for the specified loss and damage with no right to claim against the other party. The important words of the clause are "whether or not the same [ie the specified loss and damage] is due to any breach of contract, negligence or any other fault on the part of [the other party] his servants or agents." Even without the addition of the emphasis "any" in relation to "breach of contract" effected by the 2008 revision, this makes it clear that even if the loss, for example, of the tug is due to breach of contract or negligence on the part of the hirer, the tug owner is to bear that loss in full ("for the sole account of") and has no claim against the hirer ("without any recourse to"). The same applies *mutatis mutandis* in the example of the loss of the tow due to breach of contract, or negligence or any other actionable fault on the part of the tug owner or those on the tug. It should be noted that unlike the UK Standard Conditions which provide for the application of the terms therein whilst the relationship of tug and tow is in place (see above in Chapter 3 in relation to "whilst towing" etc.), clause 25 is in no way premised upon any particular stage in the service or on the vessel being underway. The reference to the "Tow" in the clause, as with any reference to "Tow" in Part II, is merely a reference to the vessel or other object which is receiving the contract services and does not connote that she should actually be under tow: see cause 1 and Boxes 4 *et seq*. Arguments that there needs to be some connection between tug and tow or the tow needs to be receiving some aspect of the towage service will be unlikely to succeed, unless there is a very narrow and specific delineation of the "service" in Box 22 (and even then the argument would seem a very difficult one).

4.184 The result under the clause, it is submitted, is a simple no-fault division of responsibility between tug owner and hirer in respect of the specified loss and damage under which each party foregoes any remedies in contract or tort which he might have against the other in respect of the loss and damage. The simplicity of the former clause 18 regime was reflected by the absence, until relatively recently (2001), of any decided authority on any argument that, notwithstanding clause 18, the party whose vessel was lost or damaged could recover from the other party in respect of that loss and damage where the same was due to his breach of contract or negligence.

4.185 The question of the meaning of "breach of contract" nevertheless was raised in a number of cases under the former versions of "Towcon" and "Towhire", usually where the tow was lost or damaged and in which the hirer alleged that the tug owner was in breach of his obligation as to the seaworthiness of the tug under the former clause 13 of "Towcon" and that clause 18(2)(b) – now clause 25(b)(ii) – did not extend to such a breach so as to exclude the tug owners' liability for that loss or damage, but also very occasionally the converse argument by a tug owner that the hirer could not escape from liability for damage to the tug where it was due to the tow being untowworthy in breach of the hirer's obligations in this regard. However, such cases usually settled before trial (see eg *The Gilbert Rowe* reported on other aspects at [1997] 2 Lloyd's Rep 218) and, for obvious reasons given the danger of precedent, tug owners' insurers scotched arguments against the hirer which logically would lead to the protection of the tug being significantly weakened. Fortunately, one case on the former clause 18 on the "non-applicability to unseaworthiness" argument has been the subject of a decision by the Commercial Court and, despite the changes to "Towcon 2008" still offers important guidance on the correct approach to the present clause 25.

4.186 In *Smit International Deutschland GmbH v Josef Mobius Bau-gesellschaft GmbH* [2001] CLC 1545, Smit hired its tug *Janus* to Mobius on the "Towhire" form to tow Mobius's barges. While it was being towed by *Janus*, a barge collided with a third party dredger. The dredger claimed against Smit who settled the claim. Smit claimed the amount of the settlement from Mobius pursuant to the indemnity provision of clause 18(2)(b). Mobius contended that the tug was unseaworthy in breach of clause 13 of "Towcon" due to the alcoholism and continual drunkenness of the tug-master. On an application by Mobius to set aside judgment in default obtained by Smit, Mobius argued that it had an arguable defence to the claim. The argument, as summarised in the judgment, was as follows:

> Put in simple terms, the Defendants say that where the Tugowner is in breach of clause 13, he cannot rely upon Clause 18(2)(b) because the knock-for-knock agreement in Clause 18 is posited upon the assumption that the Tug was in a seaworthy condition and that the Tow was Tow-worthy (see clause 12). In support of this submission, the Defendants say that an analogy may be drawn with the way the protections given by the Hague/Hague-Visby Rules operate. A carrier whose vessel is unseaworthy cannot, under the Rules, rely upon the excepted perils to avoid liability to cargo interests in respect of damage to cargo.

4.187 Smit contended that the Hague Rules offered no analogy since they were concerned with the cause of how and why cargo came to be damaged, whereas the "knock-for-knock" regime under clause 18 of "Towcon" was "not concerned with causes but is simply concerned to identify whether the collision was between the tug and another vessel or the tow and another vessel." Morison J regarded neither argument as obviously right nor wrong and each party's case on clause 18 having much to commend it. He based his decision on what he perceived "to be the more businesslike, or commercial, approach" and rejected Mobius's defence as unarguable.

4.188 His reasons for doing so were succinctly set out in paras. 19 and 20 of his judgment as follows:

> 19. The knock for knock agreement is crude but workable allocation of risk and responsibility: even where the tug or tow is wholly responsible for the accident liability depends entirely upon the happen-

stance of which of the two collided with the third party. Where damage is caused to an innocent third party during a tow it may often be difficult to ascertain whether the tug or tow or both were at fault. So far as the innocent third party is concerned, provided he receives full satisfaction, the identity of the tortfeasor is unimportant. But if there were disputes between tug and tow, with each blaming the other, absent the agreement there would be a risk that the third party would have to institute proceedings and await judgment before receiving compensation. Thus, an innocent third party himself receives benefit from this type of knock for knock agreement. Further, either the tug or the tow can deal with and settle the third party claim, as the indemnity provision will apply to ensure that as between tug and tow, the risk is borne by the appropriate party under either 18(2)(a) or 18(2)(b). The tug may deal with and settle a third party claim where the tow must bear responsibility and, vice versa. But the settlement must be reasonable.

20. Introducing arguments about seaworthiness into this blunt and crude regime would lessen the effectiveness of the knock for knock agreement. This court is familiar with disputes as to seaworthiness and is aware that they often raise technical issues, sometimes of complexity. I am inclined to the view that the intention behind the standard form contract was not to permit seaworthiness arguments to intrude into the allocation of risk. Clause 18.3 does not suggest otherwise. One can well imagine a case where, due to unseaworthiness, the tug was not ready when it should have been and the tow owners suffer consequential losses which the tug would have to meet. To a limited extent, this conclusion is in accordance with the express wording of sub-clauses 1(a) and 2(b) where the draftsman has apportioned responsibility "whether or not the same is due to breach of contract." This suggests that the apportionment regime was not posited upon the assumption that there was no breach of clause 12 or 13 as the case might be, but rather was regardless of whether those clauses were broken. On the first argument, therefore, both from the structure of the agreement and its wording I am of the view that even if the tug were unseaworthy the tow must bear responsibility for the third party damage and must bear its own losses arising out of damage to the tow [clause 18(2)(b)(i) and (iii)].

4.189 While the judgment of Morison J was perhaps expressed in somewhat more concise and tentative terms than it might otherwise have been (at least for the purposes of scotching once and for all arguments of the type advanced by Mobius), it is submitted that the decision was plainly correct on the then wording of the equivalent of clause 25(b)(ii) of "Towcon 2008." No appeal was pursued in respect of this part of the decision (which also dealt with issues of limitation of liability – see below in Chapter 11).

4.190 The point has now been put beyond doubt, at least in terms of the unseaworthiness of the tug, by the specific addition of the words "whether or not the same is due to any breach of contract (*including as to the seaworthiness of the Tug*), negligence or any other fault on the part of the Tugowner, his servants or agents" (emphasis supplied). The explanatory notes state that this addition was specifically added by BIMCO in light of the decision of Morison J and to confirm the result he reached: "In Sub-clause (b)(ii), which deals with losses to be borne by the hirer, new wording has been added relating to the seaworthiness of the tug. This has been done with regard to *Smit v Mobius* where it was opined that issues of seaworthiness should not interfere with the division of liabilities under Towcon." One has now to hope that, BIMCO having stopped, as it were, one set of earths in relation to the unfitness of the tug in breach of contract, it will not be argued by tug owners that it was not intended to do the same in respect of unfitness of the tow in breach of the obligation of tow-worthiness. Such an argument would be as bad as that rejected in *Smit v Mobius*: "breach of contract" (*a fortiori "any* breach of contract" as emphasised in the 2008 revision) refers and, read naturally, can only refer to a breach of any of the obligations set out in the towage contract by either party. It is unqualified and refers to any and all breaches of contract, now made still clearer by the added emphasis in the 2008 revision.

4.191 The above analysis certainly applies to all breaches by either party which might be characterised as "ordinary" breaches not going to the root of the contract. It was suggested in the earlier editions of this work (see, eg, 2nd edn at pp. 123–124) that clause 18(2) – now clause 25(b) – operated in precisely the same fashion in relation to *any* breach of the towage contract, however grave (or "fundamental" in the old parlance), and without there being any justifiable ground of distinction, as a matter of construction of clause 18, between "types" or "gravities"

of breach (the very argument which was rejected in *Smit v Mobius*, where it was argued that as the seaworthiness of the tug underpinned the contract, clause 18 could not sensibly be read as applying, at least, to such a breach).

4.192 This view and the correct approach to the construction of clause 18(2), and accordingly to its successor clause 25(b), has been put into serious question by the decision in *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177 in which the Court (Teare J) held, as accurately summarised in the headnote, that "Although clause 18 was widely worded and was literally capable of applying to any radical breach, nevertheless in the context of the contract as a whole, and in order to give effect to its main purpose, the clause was to be construed as applying only so long as the tug owners were actually performing their obligations under the TOWCON, albeit not to the required standard."

4.193 In that case, it was argued on behalf of the tow that:

> that the breaches of duty by the tug owner in the present case, commencing the towage when there was an obvious risk that the tug's bunkers would not enable tug and tow to reach Cape Town and continuing the towage when there was an obvious risk that *Ruby Deliverer* might not arrive before *Mighty Deliverer* had run out of fuel, were not of a type for which the parties had agreed to exclude liability. The breaches were inconsistent with the main purpose of TOWCON and would not have been recognised by the parties as representing the performance bargained for. Clear words were required to exclude liability for such breaches and such words were not to be found in clause 18

See para. 101. The opposing argument was summarised by the judge as follows (para. 102):

> On behalf of the tug owners it was submitted that clause 18 is a mutual exemption clause and that its commercial purpose was to allocate the risk of specified types of loss and damage between the parties in a straightforward and clear manner. Risk and responsibility were divided on a no-fault basis. It makes clear who is to insure what. Thus the tug owner must insure the tug and the rig owner must insure the rig. The clause should be construed in a manner which gives effect to that commercial purpose. Reliance was placed on the *Smit International (Deutschland) GmbH v Josef Mobius GmbH* [2001] CLC 1545 *per* Morison J and the discussion in *The Law of Tug and Tow*, 2nd Edition by Rainey, pages 120 to 124.

4.194 The judge accepted the arguments of the tow. Before considering the reasoning of Teare J it is necessary to step back and consider in general terms the principles of construction which apply to "exemption" clauses. As seen above, while knock-for-knock or mutual risk allocation provisions are intended to operate differently from an exemption clause in classic one-sided form, the courts have applied to them the ordinary rules of construction applicable to exemption clauses: see *E. E. Caledonia Ltd v Orbit Valve Co Europe* [1993] 2 Lloyd's Rep 418 and *Seadrill Management Services Ltd v OAO Gazprom (The Ekha)* [2010] EWCA Civ 691 (see [2010] Lloyd's Rep Plus 25). For present purposes, a number of separate principles may be identified, all of which are engaged by the decision in *The A Turtle*.

4.195 The first is that there is no rule of law by which exemption clauses are to be deemed inapplicable in cases of "fundamental breach" or the breach of a "fundamental term." In *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, Lord Diplock stated that, if the expression "fundamental breach" is to be retained, it was to be restricted to the case of a breach of which the consequences are such as to entitle the innocent party to elect to terminate the contract, viz. a repudiatory breach of the contract. Lord Diplock did not employ the phrase "fundamental term", but it is implicit in his comments that there is no category of terms which can be said to be in any sense "fundamental" other than terms classified as conditions of the contract. It follows that there is no presumption that, in inserting an exclusion, exemption or limitation clause into their contract, the parties must be taken to have intended that the clause would be of application to a fundamental breach or the breach of a fundamental term. "The question is in all cases whether the clause, on its true construction, extends to cover the obligation or liability which it is sought to

exclude or restrict": see eg *Chitty on Contracts* (32nd edn, 2015), para. 15–027; see in particular the recent decision in *Astrazeneca UK Ltd v Albemarle International Corpn* [2011] EWHC 1574 (Comm), considered in detail in relation to clause 25(c) below.

4.196 The second, which flows from this, is that there is no rule of law which prevents the parties from excluding or limiting liability for deliberate breaches, ie acts or omissions on the part of one contractual party in conscious and intended breach of contract, what has been referred to as "a deliberate disregard of his bounden obligations": *Sze Hai Tong Bank Co Ltd v Rambler Cycle Co Ltd* [1959] AC 576, 588. The difficulty lies in distinguishing for practical purposes between a breach which occurs due to inadvertence or negligence (the tug arrives late due to want of reasonable care by the crew) and one which occurs deliberately (the tug is late because it is ordered to perform another service first, notwithstanding the contractual requirement) and the irrelevance, in any event, of the distinction where the damages for breach of contract will be the same in either case. Accordingly, while it may therefore be relevant to consider whether an exemption clause was objectively intended by the parties to cover deliberate misconduct or a deliberate non-performance of the contract (see *per* Lord Wilberforce in *Suisse Atlantique Soc. d'Armement v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 435:

> Some deliberate breaches . . . may be, on construction, within an exceptions clause (for example, a deliberate delay for one day in loading.) This is not to say that "deliberateness" may not be a relevant factor: depending on what the party in breach "deliberately" intended to do, it may be possible to say that the parties never contemplated that such a breach would be excused or limited.

There is no presumption and no special rule for deliberate breaches: "to create a special rule for deliberate acts is unnecessary and may lead astray", *per* Lord Wilberforce, *ibid*.

4.197 Thirdly, however, and as a countervailing consideration, an exemption clause may be so widely drawn and general in its scope that if it were applied literally it would defeat the main purpose of the contract which the parties had in mind or, as the court has described it "to deprive one party's stipulations of all contractual force" or "to reduce the contract to a mere declaration of intent": see eg *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 482; *Tor Line AB v Alltrans Group of Canada* [1984] 1 WLR 48; *Mitsubishi Corpn v Eastwind Transport Ltd (The Irbenskiy Proliv)* [2005] 1 Lloyd's Rep 383; *Astrazeneca UK Ltd v Albemarle International Corpn* [2011] EWHC 1574 (Comm) and *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC). But this principle calls for some care in its application since, as the cases are summarised in *Chitty on Contracts* (32nd edn, 2015), at para. 15–010:

> the intent of the clause may be to qualify the main purpose of the contract, so that there is no inconsistency. And if the clause does not entirely exclude the liability of one party, but merely limits or reduces his liability, it does not render his contractual promises illusory. Further, if in the context of the contract as a whole and of the business relationship between the parties the words of the clause are clear and fairly susceptible of one meaning only, then effect must in any event be given to the clause.

4.198 Of particular importance is that, as expressed in *Suisse Atlantique*, the principle is directed at clauses which effectively render the whole contract (at least on one side) devoid of effect (hence the older phrase a *nudum pactum*: a bare and non-binding agreement). There is a tendency to blur this requirement in two ways. The first is to focus upon a particular obligation, perhaps a or the core obligation of the contract, and to pose the question whether this obligation has become a bare expression of contractual intent: see eg *Astrazeneca UK Ltd v Albemarle International Corpn* [2011] EWHC 1574 (Comm) *per* Flaux J at para. 313. This micro-analysis (unless the contract is effectively a single obligation one, eg to sell or to let a chattel) risks subverting the macro-analysis inherent in asking if the contract, as a contract, has by virtue of the exclusion clause become a mere facultative licence on the side of one of the obligors. The correctness of a "single obligation" rather than whole contract approach was left open in *Fujitsu Services Ltd v IBM United Kingdom*

Ltd [2014] EWHC 752 (TCC) by Carr J at para. 61 although *dubitante* as to its correctness. The second is to require the breach of contract (either all breaches or the breach of the core obligation) to be answerable in damages, such that the exclusion of a right to recover damages renders the contract (or the obligation) a *nudum pactum*. The difficulty here is that unless a strict approach is taken (as exemplified by Bingham J in *Swiss Banking Corp* and Clarke J in *The Herdentor*) the court may end up invalidating clauses because of a subjective perception that the "*real*" remedy is being denied to the claimant, even though there may be other substantial ones.

4.199 This was a point made forcibly by Carr J in *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC). Having considered a range of other remedies for breach of the obligation in question in that case (including declaratory relief or possible specific performance), she stated (correctly it is submitted) at para. 61:

> Putting to one side the fact that FSL's approach ignores FSL's rights under clause 6 as identified above, the question is not whether FSL would have adequate remedies but whether or not IBM's construction of clause 20.7 would deprive the contract (or, if one assumes in FSL's favour that a narrower approach is permissible, the workshare arrangements) of all contractual force. It does not.

Carr J went on to analyse the effectiveness of alternative remedies, such as declaratory relief, at para. 62:

> It is also fanciful in my judgment to suggest that declaratory relief against IBM would not amount to an effective remedy. The obtaining of declaratory relief is an important remedy. The suggestion that an organisation such as IBM would simply ignore the ruling of a court as to how the workshare arrangements were to be operated is not realistic. Indeed, FSL by this very claim makes a claim for declaratory relief (for the provision by IBM of documentation and information). As for the granting of specific performance orders or negative injunctions, whatever difficulties and uncertainties there might be in an application for such relief, it cannot be said that such relief could not be sought and would be doomed to failure.

4.200 A case which demonstrates the overlapping considerations between construction of an exemption clause so as to cover even erstwhile fundamental breaches and where liability for breach of what is perceived to be a core obligation is excluded (if damages for breach of it are being excluded) is *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38. The court considered a unilateral exclusion clause in fairly similar terms, providing "18.6 The Contractor hereby acknowledges and agrees that the company shall have no liability whatsoever in contract, tort (including negligence) or otherwise for any loss of goodwill, business, revenue or profits, anticipated savings or wasted expenditure (whether reasonably foreseeable or not) or indirect or consequential loss suffered by the Contractor or any third party in relation to this Agreement . . .." Kudos had agreed with a convention centre to provide catering and hospitality services for a period of five years. Three years into the contract MCC decided to terminate the contract. Kudos asserted that MCC's termination was wrongful and repudiatory and claimed damages for breach of contract including a claim for £1.3 million damages for substantial financial losses in respect of lost profits. MCC sought to rely on the clause which it contended was a widely drawn exclusion clause in its favour. On a trial of a preliminary issue, the court rejected MCC's argument, holding that clause 18.6 did not apply to a repudiatory breach of the contract.

4.201 The Court of Appeal arrived at its decision by a number of routes, some of which were particular to the specific terms in which the clause was drafted. However, the general approach followed was applying the principle that it could not be presumed that the parties would have intended to exclude all liability and that the clause had to be cut back in that light. As Tomlinson LJ put it in the Court of Appeal at paras. 28 and 29:

> In order to construe the provision consistently with business common sense, I would regard the expression "in relation to this Agreement" as meaning in this context "in relation to the performance of this

> Agreement", and thus as not extending to losses suffered in consequence of a refusal to perform or to be bound by the Agreement. [. . .] In my judgment however by their language and the context in which they used it they demonstrated that the exclusion related to defective performance of the Agreement, not to a refusal or to a disabling inability to perform it.

There was however no argument either on the question of whether the correct approach was to look at the obligation or the contract as a whole or whether the exclusion of loss of profits (the typical and most natural head of damages for such breach) was such as to render that obligation nugatory: ie none of the considerations debated in *Fujitsu* appear to have been argued before the Court of Appeal.

4.202 It is also unclear whether *Astrazeneca* and *Internet Broadcasting* were cited. The Court of Appeal rejected the accusation that to adopt the approach which it did was to return to the doctrine of fundamental breach, although Tomlinson LJ at para. 29 took what could fairly be described as not altogether dissimilar approach to that taken in passages in the Deputy Judge's judgment in *Internet Broadcasting*:

> The parties could had they so wished have provided that there should be an exclusion of all liability for financial loss in favour of the Company, but not the Contractor, in the event of a refusal to perform. That would be a bargain which [Counsel] has, I suggest, come close to acknowledging is unlikely, not just for the reason given in the last paragraph but also because of his insistence that whilst the Company accepted no liability for loss of profits, the Contractor could enforce the contract against it and thereby earn those profits. Had the parties intended such an exclusion of all liability for financial loss in the event of refusal or inability of the Company to perform, I would have expected them to spell that out clearly, probably in a free-standing clause rather than in a sub-clause designed in part to qualify an express and limited indemnity, and in one which moreover forms part of a series of sub-clauses dealing with the provision of indemnities and the insurance to support them.

4.203 Against this background, returning to the decision in *The A Turtle*, the stages in the reasoning of Teare J can be summarised as follows:

i He accepted, following *The Herdentor* and *Smit v Mobius*, that "the commercial purpose of clause 18 is to make clear to the parties which one of them is to bear the risk of the loss, damage and liabilities which might arise during the towage and enable each to insure against them" (para. 105).

ii He accepted further that "notwithstanding that the TOWCON places obligations upon the owners of the tug to exercise due diligence to tender the tug in seaworthy condition and ready for the towage and to exercise their best endeavours to perform the towage, that clause 18 exempts the tug owners from liability for breach of those obligations where the loss, damage or liabilities thereby caused are within the loss, damage and liabilities which the rig owner has agreed to accept for his sole account" (para. 106).

iii He considered that nevertheless "contracts are not construed literally but, as it has been put in the past, with regard to the main purpose of the contract or, as it is now frequently put, in the context of the contract as a whole. Thus, however wide the literal meaning of an exemption clause, consideration of the main purpose of the contract or of the context of the contract as a whole may result in the apparently wide words of an exemption clause being construed in a manner which does not defeat that main purpose or which reflects the contractual context" (para. 109).

iv He recorded (*ibid*.) that:

> The words used in clause 18 are of such wide ambit that, construed literally, the owner of the tow must take for his sole account any damage whatsoever suffered by the tow. Thus if the tug owner

chose to disconnect the tow and to abandon it at sea in order to perform a more lucrative towage contract and in consequence thereof the tow was lost, that loss would appear to be for the sole account of the owner of the tow and the tug owner would be exempted from liability for his failure to exercise his best endeavours to perform the towage.

v He then took into account the remarks of Lord Wilberforce in *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 431 and 432 that:

> One may safely say that the parties cannot, in a contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force; to do so would be to reduce the contract to a mere declaration of intent. To this extent it may be correct to say that there is a rule of law against the application of an exceptions clause to a particular type of breach. But short of this it must be a question of contractual intention whether a particular breach is covered or not and the courts are entitled to insist, as they do, that the more radical the breach the clearer must the language be if it is to be covered . . . No formula will solve this type of question and one must look individually at the nature of the contract, the character of the breach and its effect upon future performance and expectation and make a judicial estimation of the final result.

vi He then relied (and relied heavily) upon the decision in *The Cap Palos* [1921] P 458 (commented on above in Chapter 1) in relation to what he described as "the ambit of an exemption clause" in a towage contract and as "helpful" in construing clause 18 of the "Towcon" form (para. 113). In that case, in relation to the particular exemption clause in question, the Court of Appeal had held that it did not cover the deliberate abandonment of the tow.

vii He then held (para. 118), using essentially the same wording as used by the Court of Appeal in *The Cap Palos*, that:

> Had it been intended that the tug owners were not responsible for loss, damage and liabilities (of the categories listed in clause 18) occurring after the tug owner had chosen not to perform the towage contract by, for example, releasing the towage connection in order to perform a more profitable contract, then very clear words would be required because that would be a very radical breach indeed. Whilst the wide words of clause 18 are literally capable of applying to such a radical breach I do not consider that clause 18, if it is to be construed in the context of the TOWCON as a whole and to give effect to the main purpose of the TOWCON, is fairly susceptible of only one meaning, namely, that it applies however radical the breach. The words, when read in the context of the TOWCON as a whole, are also susceptible of applying so long as the tug owners are actually performing their obligations under the TOWCON, albeit not to the required standard.

viii He therefore concluded that "The words, when read in the context of the TOWCON as a whole, are also susceptible of applying so long as the tug owners are actually performing their obligations under the TOWCON, albeit not to the required standard. That ensures that the obligations of the tug owners are more than a mere declaration of intent." (*ibid*.)

ix He buttressed his approach by further resort to *The Cap Palos* in this fashion: "My approach to the construction of clause 18 therefore reflects the approach of Lord Sterndale in *The Cap Palos* notwithstanding that the clause in that case was differently worded and was not a mutual allocation of risk clause" (*ibid*.).

4.204 Before turning to an analysis of the reasoning, it is noteworthy that the result arrived at by Teare J immediately presents as an extremely difficult one in terms of working out any sort of predictable result. The judge posited a test of clause 18 applying "so long as the tug owners are actually performing their obligations under the TOWCON, albeit not to the required standard."

This is a nebulous concept, and appears to have been taken directly from the judgment of Lord Sterndale MR in *The Cap Palos*, which was carefully based on the precise wording of the clause before the Court of Appeal in that case, rather than being some general omnibus statement of principle (see further as to *The Cap Palos* below).

4.205 The test raises more questions than it answers: where a tug is sent to sea in a condition which is unseaworthy and such that there is a breach of clause 19 of "Towcon 2008", is this is a case of the contract not being performed because it is not being performed in the relevant respect or is there performance of other obligations except this one, *ergo* performance viewed overall albeit not to the required standard because one obligation is not being performed at all? How serious does the breach have to be before the tug owner is to be regarded as not actually performing: is there a difference between the provision of a tug which is mechanically liable to constant break-down during the service so as to be incapable of performing it; or of one where the crew is hopelessly incompetent and skippered by a drunken sot (the facts alleged in *Smit v Mobius*) or would both factors amount to not actually performing at all because the tug provided is essentially useless for the purpose for which it was hired in? Or is it enough that at least the tug owner is purporting to perform albeit that the hirer is deprived essentially of the benefit of the bargain? Even on the facts of the case before the judge the alleged facts were close to a case of not performing at all in a real sense rather than simply not having renounced the contract altogether: "failure by the tug owners to exercise due diligence to ensure that the tug had sufficient bunkers at the commencement of the tow occurred whilst the tug owners were performing their obligations under the TOWCON. They did so negligently in circumstances where there was a risk that the tug might not in fact have sufficient bunkers for the towage to Cape Town. But they had not ceased to do anything at all in the performance of their obligations" (see para. 119). The judge was taken by the facts in *The Cap Palos*: the argument before him, based on that case, was "that clause 18 would not protect the tug owners where the rig was lost because the tug owners chose to perform another towage and therefore abandoned the tow at sea in order to perform a more lucrative towage" (para. 108, see also para. 116). But if the tow is lost because the towage connection is deliberately released during the service due to wilful disregard of the tug's duties brought on by drunkenness and rank incompetence, is the result for the purposes of risk allocation any different from a sober decision by the tug owner to sail away and perform another contract? The purpose of clause 18 is to make each party insure its own property whatever the cause of the loss and to avoid enquiry into actionable fault. The decision in *The A Turtle* is therefore apt to lead to a host of arguments that the breach is so serious as to amount, in real terms, to not performing the contract at all in any appreciable sense and to resurrect the sorts of argument that *Smit v Mobius* might be thought to have laid to rest.

4.206 Effectively the result of the judge's reasoning comes to this: where a party renounces or repudiates the contract by his conduct (abandoning the tow is an emotive breach, see the tenor of the Court of Appeal's judgments in *The Cap Palos*, but is no more "radical", to use Teare J's words, than a statement by the tug owner, before the service commences, that the tug will not be provided: each is repudiatory or renunciatory in the same way with the same legal quality and effect and it has never been suggested since *Photo Production* that *that* class of breach requires special express wording to be covered by an exemption clause), then notwithstanding that that is a "breach of contract" falling within clause 18, it is not the sort of breach the parties by their language intended to cover and they must be taken to have intended to cover all breaches save breaches which throw over the contract altogether, ie by not performing the contract at all. This may be compared with the reluctance of the court in *The Herdentor* (*op. cit*.) to accede to a similar argument. In that case, it was argued by Tsavliris that the words "for any reason whatsoever" could not apply as a matter of construction to a withdrawal of a tug's services in deliberate repudiatory breach of contract. Reliance was placed on *Tor Line v Alltrans Group* [1984] 1 WLR

48 to the effect that to so construe clause 18(3) would defeat the main purpose and intent of the contract. Clarke J reached no concluded decision on this argument given his decision that Tsavliris's claim was not caught by clause 18(3)'s exclusion of "loss of profits", as to which see below. However, he referred to what he regarded as the difficulty in the way of such an argument placed by cases such as the decision of Bingham J in Swiss *Bank Corp v Brink's-Mat Ltd* [1986] 2 Lloyd's Rep 79:

> If those conclusions were held to be wrong and it were held that the words of clause 18.3 are clear and susceptible of only one meaning, namely, the exclusion of Tsavliris' claim in this case, the question might arise whether the court should nevertheless decline so to construe the clause or to modify the clause, perhaps by a process of implication, to the extent necessary (as Bingham J put it) to enable effect to be given to the main object and intent of the contract. There are I think difficulties in the way of Tsavliris in advancing an argument along those lines (assuming it to be otherwise permissible to do so) because if, contrary to my conclusions, it were held that the hirer under the Towhire agreement could recover by way of damages for the alleged repudiatory breach the extra cost of hiring any substitute tug, but not the type of loss sustained on the facts of this case, it might not be easy to say that the main object and intent of the contract was frustrated.
>
> However before finally determining this point it would I think be preferable to hear the evidence of those who made the contract as to what, for example, each contemplated and what each contemplated that the other contemplated . . ..

4.207 It is respectfully suggested that the decision in *The A Turtle* is questionable. The reasoning may be challenged at a number of points. First, it gives no effect to the particular wording of clause 18(2) and of sub-clause (2) as a whole. The reference to "The following shall be for the sole account of the [hirer/tug owner] without any recourse to the [tug owner/hirer] whether or not the same is due to breach of contract, negligence or any fault on the part of the [tug owner/hirer]" is difficult to construe as being other than all-encompassing, covering any breach of contract as well as negligence or any other actionable fault. It is difficult as a matter of construction to carve out some types of breach of contract as covered leaving others outside the term "breach of contract." Read naturally, the phrase is clear: it extends to "breaches of contract" without distinction or qualification. The judge recognised that the wording was, read "literally" as he put it, wide enough to cover any and all breaches of contract, including "radical breaches" (by which he appears to have meant repudiatory or renunciatory ones): see para. 116. He appears to have nevertheless been able to discern possible other readings of the term ("I do not consider that clause 18, if it is to be construed in the context of the TOWCON as a whole and to give effect to the main purpose of the TOWCON, is fairly susceptible of only one meaning, namely, that it applies however radical the breach"), where there are none, and to have preferred over the "literal" (but in reality the only natural) reading the "alternative" reading of "applying so long as the tug owners are actually performing their obligations under the TOWCON, albeit not to the required standard." This is effectively the adoption of a pre-*Photo Production* approach to construction. Although the judge reminded himself that a strained construction must not be placed on words which are clear and fairly susceptible of one meaning only (para. 112), he did not in reality give effect to that rule and strained to avoid giving "breach of contract" its ordinary meaning.

4.208 Unlike the Court in the later decision of *Internet Broadcasting Corpn Ltd v Mar LLC (Marhedge)* [2009] 2 Lloyd's Rep 295 (considered below in relation to clause 25(c) of "Towcon 2008"), Teare J did not purport to apply a presumption against an exemption clause applying to deliberate or repudiatory breaches. However, his approach came very close to taking a similar starting point, before approaching the language of the clause. His approach may usefully be compared with that taken by Flaux J in *Astrazeneca UK Ltd v Albemarle International Corpn* [2011] EWHC 1574 (Comm) which rejected the *Internet Broadcasting* decision (see below). In relation to a clause which read "No claims by BUYER of any kind, whether as to the products delivered

or for non-delivery of the products, or otherwise, shall be greater in amount than the purchase price of the product in respect of which such damages are claimed", the judge held (at para. 301):

> Even if the breach by Albemarle of its obligation to deliver DIP had been a deliberate repudiatory breach as AZ contends, the question whether any liability of Albemarle for damages for that breach was limited by clause M would simply be one of construing the clause, albeit strictly, but without any presumption. Since it states: "No claims by [AZ] of any kind, whether as to the products delivered or for non-delivery of the products" it seems to me it is sufficiently clearly worded to cover any breach of the delivery obligations, whether deliberate or otherwise.

4.209 Secondly, the decision is at odds with the approach taken by Bingham J in *Swiss Bank Corpn v Brink's-Mat Ltd* [1986] 2 Lloyd's Rep 79. In that case, Bingham J held at para. 93 that the words "under no liability whatsoever howsoever arising" were susceptible of one meaning only. While subsequent cases such as *Tor Line AB v Alltrans Group of Canada* [1984] 1 WLR 48 demonstrate that the court will be reluctant to construe an exemption clause so as to produce the result that one party is effectively absolved from his express contractual obligations with these becoming no more than a "statement of intent", the guiding principle remains that of giving effect to the words used if they are clear and fairly susceptible of one meaning only. In *Swiss Bank Corpn v Brink's-Mat Ltd* [1986] 2 Lloyd's Rep 79, Bingham J considered a clause which excluded Brink's-Mat in terms that they were to be "under no liability whatsoever however arising" save as set out in a particular clause. He rejected an argument based on the decision in *Tor Line v Alltrans* that the clause had to be modified to give effect to the main object of the contract and so as not to reduce Brink's-Mat's liability under the contract to merely nominal promises. After referring to Lord Diplock's speech in *Photo Production*, Bingham J stated in an important passage at p. 92:

> Lord Diplock concurred in these reasons. He pointed out (at pp. 554 and 851A) that the Court was not entitled to reject the exclusion clause however unreasonable the Court might think it to be, if the words used were clear and fairly susceptible of one meaning only. He also held (at pp. 554 and 851B) that in commercial contracts negotiated between business men capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it was wrong to place a strained construction upon words in an exclusion clause which were clear and fairly susceptible of one meaning only.
>
> My task, therefore, is to construe clause 13(i) and 3(iii) in the context of the contract as a whole and of the business relationship between these parties. In doing so, I regard the words used as clear and fairly susceptible of one meaning only. Brink's-Mat are to be "under no liability whatsoever however arising" save in a case falling within clause 13(i). I do not see how the draftsman could have made his intention plainer. In a contract where the owner of the goods was to insure them and Brink's-Mat were not, I do not find this allocation of risk surprising. Nor does the clause in my judgment remove the substratum of the contract or vitiate the contractual intention of the parties.

4.210 The judge recognised that his approach was prima facie inconsistent with the approach of Bingham J in *Swiss Bank* (at para. 118). He distinguished that case on the basis that the clause in question before Bingham J, while excluding any liability whatsoever and howsoever arising, made an express exception for wilful default. This does not appear to have played a part in Bingham J's reasoning; he merely approached the language on the basis that it should be given its ordinary meaning without straining against such meaning and, in the context of an allocation of risk (to be noted) did not find a wholesale exemption surprising. Teare J appears to have fastened on this point as underlying Bingham J's separate conclusion that the construction at which he arrived did not remove the substratum of the contract or turn into a set of nominal promises.

4.211 Thirdly and related to the latter point, the decision is founded on the arguably incorrect premise that to construe clause 18(2) as applying to all breaches of contract including so-called "radical" ones would be precisely to remove the substratum of the contract or vitiate the contractual intention of the parties and to turn the obligations of the tug owner under "Towcon" contract

into "mere declarations of intent", allowing him to treat his performance as a matter of whim (cf. *Mitsubishi Corpn v Eastwind Transport Ltd (The Irbenskiy Proliv)* [2005] 1 Lloyd's Rep 383 at paras. 28–34 *per* Ian Glick QC cited by the judge). This is a surprising conclusion. Clause 18(2) is, in one sense, of very limited purview: it makes each party bear the risk of loss and damage to its own property, whatever the cause but leaves entirely open the liability for and recovery of any and all *other* losses sustained by reason of the other party's breach of its obligations under the "Towcon", subject only to an exclusion of some specific types of loss and any consequential, rather than direct loss (under clause 18(3), now clause 25(c): see below). Accordingly, in the case of a "radical" breach, the tug owner (as the hirer) will remain liable for all loss occasioned, except for any loss arising from physical loss or damage to the other's property (and in a proper case where damages would not be an adequate remedy would be liable to compulsion by specific performance). The position can be well tested by taking precisely that example of "radical" breach which the judge based himself upon, taken from *The Cap Palos*. The judge was concerned with a case where "the tug owner had chosen not to perform the towage contract by, for example, releasing the towage connection in order to perform a more profitable contract" (para. 116). In such a case, there may be many forms of potentially very substantial loss which are likely (perhaps rather likelier) to flow from the breach rather than the immediate physical loss of the tow: viz. the cost of the hirer bringing in a replacement or replacements; port of refuge expenses, delay costs; the loss caused by having to abandon the contemplated voyage altogether absent replacement tugs if still at the place of departure. Even in the case (possible but less likely) where the tow is abandoned and left to founder, there will be other heads of loss: for example, any direct financial loss arising from the failure of the tow to be delivered. To compare the case with *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC), the hirer continued to enjoy a full suite of remedies (including damages) for breach except that it could not recover for the loss of its tow; all other losses not dealt with by clause 18 remained recoverable, as well as other remedies.

4.212 The stringent approach which requires a clause to be cut back if it denudes the contract of all force or renders one side's obligations merely declarations of intent is only justified (and has only been applied) in cases where truly, there is nothing left if the exception clause is given its apparent linguistic effect: see eg *Chitty on Contracts* (32nd edn, 2015), Vol. I at para. 15–010 (pp. 1136–1137): "if the clause does not entirely exclude the liability of one party but merely limits or reduces his liability, it does not render his contractual promises illusory." Thus, in *Mitsubishi Corpn v Eastwind Transport Ltd (The Irbenskiy Proliv)* [2005] 1 Lloyd's Rep 383, cited by the judge at para. 109, the clause in a contract for the carriage of goods was such, read literally, as wholly to absolve the carrier from any obligation to carry the goods or to deliver them. Ian Glick QC at paras. 28–34 considered that the clause accordingly fell to be cut back to apply only to breaches of "secondary obligations" and not of the sole primary obligation to carry and deliver, for example, such as to permit the carrier deliberately to steal the goods bailed to it. That is not the present case and the judge's reasoning that it was is, it is suggested, unpersuasive. He stated: "It may be argued that such a construction is not required to ensure that the obligations of the tug owners are more than mere declarations of intent because those obligations will be of full effect where loss or damage of a class not within the classes listed in clause 18 is suffered. However, the classes of loss or damage listed in clause 18 are so wide that the construction to which I have referred is realistically required to ensure that the obligations of the tug owners are more than mere declarations of intent." This ignores that there remain substantial potential grounds of liability for failure to deliver the tow, irrespective of clause 18. Contrast the better approach, more consistent with authority, taken by Clarke J in *The Herdentor, obiter*, where the ability to claim other damages for other loss other than the type excluded was seen by him as likely to be fatal to an argument based on this restrictive approach. As seen above, in *The Herdentor* it was argued in relation to clause 18(3) and the words "for any reason whatsoever" that the words could not apply

as a matter of construction to a withdrawal of a tug's services in deliberate repudiatory breach of contract (ie just the sort of "radical" breach envisaged by Teare J) and reliance was placed on *Tor Line v Alltrans Group* [1984] 1 WLR 48 to the effect that to so construe clause 18(3) would defeat the main purpose and intent of the contract. Although Clarke J reached no concluded decision on this argument, he (correctly, it is submitted) regarded the decision of Bingham J in *Swiss Bank Corpn v Brink's-Mat Ltd* [1986] 2 Lloyd's Rep 79 as rendering that argument difficult: "There are I think difficulties . . . because if, contrary to my conclusions, it were held that the hirer under the Towhire agreement could recover by way of damages for the alleged repudiatory breach the extra cost of hiring any substitute tug, but not the type of loss sustained on the facts of this case, it might not be easy to say that the main object and intent of the contract was frustrated." The availability of substantial remedies for breaches of contract (of any kind) other than for the specific types of loss listed in clause 18 was overlooked or given insufficient weight by Teare J and undermines the fundamental premise of his reasoning in para. 116 that it was necessary to construe clause 18(2) restrictively because "That ensures that the obligations of the tug owners are more than a mere declaration of intent." The approach taken by Clarke J in *The Herdentor* echoes that taken by Carr J in *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC). It is respectfully submitted that Teare J confused the issues correctly separated out by Carr J, viz. paraphrasing her at para. 61: "the question is not whether [the tow] would have adequate remedies but whether or not [the tug-owner's] construction of clause [18] would deprive the contract (or, if one assumes in [the tug-owner's] favour that a narrower approach is permissible, the [tug provision] arrangements) of all contractual force." The suggested answer is that clause 18 cannot sensibly be seen as doing so.

4.213 Fourthly, the judge's reliance on the decision in *The Cap Palos* [1925] P 458 is suspect. It is trite that a case on the construction of one exemption clause is not usually of much value in construing a wholly different form of clause, differently worded and conceived for a different purpose. The point applies *a fortiori* where the case relied on is taken from a different era, pre-*Photo Production* and notably from a period where exclusion clauses in any form of towage contract were regarded with extreme disapproval by the court and as being subject to a canon of strict construction whenever a contract sought to exclude or to limit the incidents of the towage contract which are implied at law (see eg *The Newona* (1920) 4 L1 L Rep 156 and Bucknill, *Tug and Tow* (2nd edn, 1927), p. 13, which fall either side of the decision in *The Cap Palos*: see also generally Chapter 1 above).

4.214 Further the decision in that case was very much on the particular clause and the particular facts to which it was sought to be applied. In *The Cap Palos* the exemption clause provided:

> The acts, neglect or default of the masters, pilots or crew of the steam tugs . . . or any damage or loss that may arise to any vessel or craft being towed, or about to be towed, or having been towed . . . whether such damage arise from or be occasioned by any accident or by any omission, breach of duty, mismanagement, negligence or default of the steam tug owner, or any of his servants or employees.

4.215 The critical words of the clause were that the exemption only applied to loss or damage "to any vessel or craft being towed, or about to be towed or having been towed": these read naturally (and certainly if read *contra proferentem*) refer to loss or damage at a time when the tug-owner is preparing to tow, is towing or is disconnecting, ie at any time from the start of the service to the conclusion of it (rather similar in concept to the former variants of "whilst towing" under the later UK Standard Conditions, avoiding difficulties where the protection applied only to while the towage as such was in progress, cf. *The Baltyk* [1947] 2 All ER 560). In this context, it is not surprising that the clause was not held to be one not dealing with the position where the towage was thrown up mid-way during the service. The Court of Appeal held that the clause was insufficiently clearly worded to exempt the tug owner from negligence on the part of the master during (*n.b.*) a contractual towage voyage from Immingham to Hartlepool, which resulted in the tugs losing their hawsers and prematurely abandoning the tow in Robin Hood Bay, where she

foundered. The clause did not expressly cover an unjustifiable handing over of the obligations of the tug owner to someone else for performance nor a failure by the tug owner to tow the vessel in the way in which he had contracted to tow her but only for loss and damage during the period of the towage as defined. The loss and damage did not occur while the vessel was "being towed" or "having been towed" since the towage was to end at Hartlepool and the loss and damage covered was loss and damage at this stage of the towage. In these circumstances, it was perfectly understandable for Lord Sterndale MR to conclude that "I think that the whole clause points to the exceptions being confined to a time when the tug owner is doing something or omitting to do something in the actual performance of the contract" (at p. 468). It has already been submitted above (Chapter 1) that the clause in *The Cap Palos*, concentrating as it did upon damage to a vessel being or having been towed, would probably be construed in the same way by the court today and as not encompassing, as a matter of construction, an abandonment of the towage. It is respectfully suggested that *The Cap Palos* offers no proper guidance whatsoever in the construction of the BIMCO mutual risk allocation clause and that the court's heavy reliance on it in *The A Turtle* (at paragraphs 113 and, in its conclusion, at 116) was misplaced. While Teare J recorded that "the clause in that case was differently worded and was not a mutual allocation of risk clause", he nevertheless adopted the approach of Lord Sterndale MR in that case as if it set out some generally applicable principle of construction (paras. 113 *et seq*. and especially para. 116). It did not do so and the Court of Appeal in *The Cap Palos* did not purport to do otherwise than to construe the particular clause in that case and see if it covered the particular facts of that case.

4.216 It is therefore suggested that it is open in any further case on the old clause 18(2) to contend with some force that *The A Turtle* was not correctly decided. How such an argument would fare may not now matter very much, save for any older cases under the previous version of "Towcon." In the case of the new "Towcon 2008", the successor to clause 18(2), clause 25(b), is differently worded: the new clause provides "whether or not the same is due to *any* breach of contract, negligence or any other fault on the part of" (emphasis supplied). This emphasis on any breach of contract adds further weight to the contention that the clause is not limited to "non-radical" breaches only (however they fall to be defined). The change in wording to clause 25(b) in "Towcon 2008" means in any event that the decision in *The A Turtle* is not binding being in relation to a different wording. Given that decision, it might be considered advisable to add by amendment some further expansion, eg "any breach of contract whatsoever" or "of whatsoever nature" to emphasise the knock-for-knock mutual allocation of risk in favour of both the hirer and the tug owner.

4.217 In the previous editions of this work, various propositions were set out as to the effect of clause 18(2): see eg 2nd edn at pp. 123–124 (repeated in the 3rd edn at pp. 174–175). These were not disapproved as such in *The A Turtle* and it is submitted that notwithstanding that decision they still hold good, at least for clause 25(b) of the 2008 revision of the "Towcon" form with its re-emphasis that each party bears the losses of its own property whether or not due to "*any* breach of contract" by the other. Accordingly, these may be restated as follows.

i Clause 25(b) makes each party responsible for certain types of loss or damage concerning his vessel.

ii It does so "whether or not" that loss or damage is due to the actionable fault of the other party, be it "any breach of contract" or "negligence" or other "fault".

iii "Any breach of contract" refers and can only refer to breach of the towage contract itself by either party. It is unqualified and refers to any and all breaches of contract. Put another way, if effect is given to the ordinary meaning of the words "whether or not the same is due to any breach of contract on the part of the tugowner or hirer, as the case may be", that phrase does not permit of being construed as referring to only some (which?) breaches of contract or as not referring to breaches of contract which are akin to "fundamental breaches" or breaches of obligations which go to the core or to the

essential sub-stratum of the contract. Cf. the approach of Flaux J in *Astrazeneca UK Ltd v Albemarle International Corpn* [2011] EWHC 1574 (Comm), considered below.

iv While cases such as *Tor Line AB v Alltrans Group of Canada* [1984] 1 WLR 48; *Mitsubishi Corpn v Eastwind Transport Ltd (The Irbenskiy Proliv)* [2005] 1 Lloyd's Rep 383 and, now, *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38 demonstrate that the court will be reluctant to construe an exemption clause so as to produce the result that one party is effectively absolved from his express contractual obligations with these becoming no more than a "statement of intent" so that he may or may not perform at his whim, the guiding principle remains that of giving effect to the words used if they are clear and fairly susceptible of one meaning only: *Swiss Bank Corp v Brink's-Mat Ltd* [1986] 2 Lloyd's Rep 79.

v Clause 25(b) does not remove the sub-stratum of the contract nor vitiate the contractual intention of the parties or purport to do so. The parties remain liable in damages at large for breaches of the "Towcon 2008" contract save where the breach produces a particular kind of loss or damage against which the tug owner and hirer can and are expected to insure; cf. the approach of Clarke J in *The Herdentor* in relation to the old clause 18(3), referred to above and, generally, the requirement that the contractual obligation must be rendered devoid of all sensible effective remedy: see *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC) *per* Carr J at paras. 61 and 62. (cited above).

vi "Negligence or any other fault" is explicit and will exclude liability for the loss and damage specified where the same was due to negligence or other actionable tortious wrong on the part of the hirer or tug owner as the case may be. The express reference to "negligence" satisfies the rule in *Canada Steamship Lines v The King* [1952] AC 192.

vii If all liability for negligence is excluded, however gross or extensive, then *a fortiori* it is difficult to see why "any breach of contract" should receive a narrow or impliedly limited construction to exclude major breaches or breaches of self-defined "important" or *soi-disant* "radical" obligations.

4.218 Accordingly, provided the loss or damage or liability is one which falls within the tug owner's responsibility under clause 25(b)(i) or within the hirer's under clause 25(b)(ii), then it is for that party's account and no claim lies against the other in respect of it even if the loss, damage or liability was caused by any breach by that other of any contract term or provision in the "Towcon 2008" contract or by any negligence or other actionable fault by that other.

4.219 It should be noted that the BIMCO "Windtime" form of 2013 (considered in Chapter 5, below) in relation to its version of the knock-for-knock provisions (see clause 16 which was closely modelled on "Supplytime 2005") adopts a very different solution to this problematic area, The form specifically *excludes* from the operation of the mutual exclusions and indemnities the situation of repudiatory or renunciatory breach. Therefore any serious breach of the "Windtime" charter which would enable a party to treat it is having been repudiated (ie by a breach going to the root of the contract, as to which see *Spar Shipping v AS v Grand China Logistics Holding (Group) Co Ltd* [2016] EWCA Civ 982 or by some disabling inability to perform) or renounced (ie by a refusal to perform the contract at all or a refusal to perform it otherwise than in a substantially different manner from that provided for by its terms, as to which see *Spar Shipping*, *op. cit*., also), would allow a full suite of remedies unlimited by the mutual regime in its usual BIMCO form. Thus, clause 16(d), headed "Mutual Exclusion" (ie a mutual exclusion from the effect of the mutual exclusions contained elsewhere in clause 16) provides:

> In the event that either party fails to perform the Charter Party, or unequivocally indicates its intention not to perform it, in a way which thereby permits the other party to treat the Charter Party as at an end other than under the terms of the Charter Party, any such claim that the other party may have shall not be limited or excluded by the terms of this Charter Party.

This is a far-reaching provision and may come as a surprise to those who contract on "Windtime" terms or who use "Windtime" as a template. However, it can be argued that the need to include this in a standard form points up that the intention of BIMCO, objectively gleaned from the different approach taken to "Windtime" in comparison with "Supplytime 2005" (and now "Supplytime 2017) as well as "Towcon 2008" and "Towhire 2008", to exclude, in those offshore contexts, *all* liability. The BIMCO explanatory notes for "Windtime" are not however very illuminating, stating merely that "If a party is in repudiatory breach under WINDTIME any claims by the innocent party will not be excluded or limited under the contract."

Heads of excluded loss and damage

4.220 Having considered the scope of the exclusion and exemption, the types of loss damage and liability borne by each party "knock-for-knock" are much more straightforward. As already seen, para. (b)(i) deals with the losses which the tug will bear and para. (b)(ii) deals with those to be borne by the tow. The provisions are to identical effect and the losses which each agrees to bear can be summarised. Each party agrees to bear in full the following:

a Any loss or damage done to its vessel.

4.221 This covers the most usual type of claim as between tug and tow: that is for physical loss or damage suffered or received by either the tug or the tow. The words "loss or damage . . . caused to or sustained by" are most naturally to be read as referring to physical loss or damage, whether it be the destruction or loss overboard of a part of the vessel or of the whole vessel (ie where it sinks), or damage to the vessel or a part of it. The most common claims under "Towcon" are for such losses or damage occurring either in a collision between tug and tow or in a collision of the tug or the tow with a third party vessel or fixed object (such as a dock wall or floating mooring) or in the contact between the towing gear or connection with either the tug or the tow (eg where the line parts under tension and "whips" the vessel at one or other or both ends of the connection or where the anchor out from the tug fouls the ground tackle out from the tow). Under the clause each party will bear, for example, all the repair costs and incidental expenses involved arising out of the damage sustained however it was caused and even if it was due to the other party's fault.

4.222 It has been argued that the wording "loss or damage" would not be apt to extend to a temporary or remediable situation such as the fouling or soiling of a party's property: in the case in question (under the "Supplytime 2005" form but the issue remains equally relevant to "Towcon 2008"), the contamination of an OSV's saturation diving system by allegedly contaminated diving gas, requiring the extensive cleaning and decontamination of the system was alleged not to amount to loss or damage. (Similar arguments arise in relation to the responsibility for bunkers under the "Supplytime 2005" form where defective bunkers were discovered before use but required extensive bunker tank cleaning.) In all such examples, the term "damage" is likely to be given a wide and sensible meaning: if soup is spilled over a dinner jacket, the jacket is damaged *tel quel* even if it can, subsequently, be successfully dry-cleaned. If a vessel's tanks are left dirty and contaminated such that they cannot be used without cleaning, then most ordinary users of the word "damage" would regard that as "damage to the tanks", even if damage which is temporary and can be remedied. The concept of physical damage is usually satisfied by damage even at a molecular level: see eg *The Orjula* [1995] 2 Lloyd's Rep 396 where Mance J had to consider whether contamination of a vessel by hydrochloric acid which could be cleaned away constituted physical damage. See also *Network Rail Infrastucture Ltd v Simon Handy* [2015] EWHC 1175 (TCC) where Akenhead J put the matter in this way at para. 31: "property can be damaged for the purposes of negligence where the breach of duty results in substances or physical things being deposited on the property in question in a more

than *de minimis* manner such that the property cannot be used or enjoyed as it otherwise would or could be if the substances or physical things had not been so deposited." In *Quorum A/S v Schramm (No 1)* [2002] Lloyd's Rep IR 292, the court considered a claim against underwriters in respect of alleged damage caused to a pastel by Degas, "La Danse Grecque." A fire in a property adjacent to a strong room caused the temperature in the strong room to become hot. While the pastel to all intents and purposes appeared undamaged (although its provenance was affected) expert evidence showed that it had undergone sub-molecular changes. The sub-molecular damage to the pastel caused by the fire was held to be "damage" to the picture for the purposes of the policy. Such damage was clearly direct physical damage resulting from the fire, even though it might not have been visible and its extent could not have been determined without testing which could not be carried out because of its effects on the pastel. The sub-molecular change, judged at the date of the fire, gave rise to the shortening of the life of the pastel and the risk of deterioration (see paras. 90 and 91)

4.223 There is one difference between clause 25(b)(i)(1) and clause 25(b)(ii)(1) which provide for loss and damage to the tug and the tow respectively. In sub-clause (b)(i)(1), the tug-owner bears, in addition to loss and damage done to the tug, loss and damage done to "any property on board the Tug." Sub-clause (b)(ii)(1) does not contain any similar provision regarding the tow. This is because "the Tow" is defined by clause 1 of "Towcon" as the vessel or object "including anything that is carried thereon." There is no definition clause for the tug, therefore "property on board" has to be specifically referred to; further, given that the tug will have towing gear, lines etc. out on board, it is important to have these expressly dealt with under clause 25. The only exception to the tug's bearing loss of its property is in the case of gear and equipment of which the hirer makes use under clause 16: loss of or damage to this is now to be made good by the hirer in all cases under clause 16(c). It will be noted that the concluding words of clause 25(b)(i) make it clear that the tug owner is not to be liable in any circumstances for any loss or damage caused to or sustained by the hirer and the tow "in consequence of any loss or damage . . . caused to or sustained by the tug"; sub-para. (b)(ii) provides the same, *mutatis mutandis*, in respect of the liability of the hirer of loss etc. to the tug owner or tug as a result of loss etc. to the tow. This provision is to make it clear that even if damage to one party's vessel (which that party must bear) causes damage to the other's vessel, then the rule that he whose vessel is to bear the loss however caused and from wherever it comes still applies. It is submitted that the wording is *ex abundante cautela* and adds little to what is already stated in clauses 25(b)(i)(1) and 25(b)(ii)(1). These concluding words have been the subject of a decision in Canada (Federal Court; trial division) in *Canadian Salt Co v The Ship Irving Cedar* [2000] FCT No. 1410; see LMLN 557. In that case, the claimant hirer engaged the defendant tug owner to carry out ice breaking in a channel and around the claimant's basin and wharf and to assist a vessel docking at that wharf. The defendant's tug was navigated negligently and caused damage to the claimant's dock and dock equipment, for which the claimant sued *in rem*. The defendant relied on clause 18(2)(a) of "Towcon" (now clause 25(b)(i)) and contended that it was not liable for damage to the dock since this was "loss or damage suffered by the hirer [ie the claimant, as owner of the dock] in consequence of loss or damage . . . sustained by the tug" which had hit the dock. The claimant argued that the wording did not apply because its damages were not caused as a result of the tug being damaged, which damage to the tug itself caused damage to the claimant's dock. It gave as an example of where the wording would be applicable the case of a tug sinking and thereby causing damage to the tow (or vice versa). As already seen, O'Keefe J construed the clause *contra proferentem* and found for the claimant's construction.

b Any loss or damage done to third parties or to their property in two circumstances: "by reason of contact with" its vessel or by reason of "obstruction created by the presence of" its vessel

4.224 This covers the next most common claim situation between tug and tow, namely where the tug or the tow comes into contact with some third party vessel or other property such as a dock or harbour installation and occasions loss or damage to it. Under clause 25, all tug contact is for the tug owner and all tow contact is for the hirer to bear. Clause 25 also deals with loss or damage to third parties due to obstruction caused by tug or tow. This is not uncommon. A tug may have to take an awkward position in her towing station to manoeuvre the tow often at the start or finish of the tow. The tow itself may be unwieldy and be in the wrong place at the wrong time. The towing connection may part in congested waters or a port area leading to the tug or the tow blocking a channel or navigable waterway. In all such cases the party whose vessel is obstructing will bear all liability to third parties for resultant loss whether or not the other party was actually responsible for causing his vessel to be an obstruction. Other examples which have come up in disputes concern more remote damage. For example, during a towage operation a tug disconnects and leaves the tow at anchor; the tow drags her anchor and the anchor causes damage to some submarine installation (a pipeline or cables). In such a case, the tow would, it is suggested, bear the responsibility for the damage under this part of the clause (and any consequential losses claimed by the relevant third party under the next part of the clause, considered below). The damage to the submarine property was physically occasioned by the action of the tow upon it. The anchor is part of the "Tow" for the purposes of the term "Tow." It is difficult to regard damage done by an anchor out from the tow as not being due to "contact with the Tow" or that "contact with the Tow" is to treated as restricted to the tow as a vessel or craft or the towed object *per se*, not extending to parts of the vessel or object such as her anchors or other tackle out from her, which are directly attached to and more importantly are directly controlled from and by the tow as part of her mooring, navigation and operation. The same concept is employed in clause 25(b)(i) in relation to "contact with the Tug" and it is suggested that a broad and sensible construction would be given to the terms "Tug" and "Tow" and as what comprises the respective vessels in question, defined by clause 1.

c Any loss or damage suffered by that party or by third parties which is consequential upon the loss or damage set out in (a) and (b) above.

4.225 This provision, present in sub-clause (b)(i)(3) and (b)(ii)(3) for tug and tow respectively, deals with loss and damage consequential upon the loss and damage dealt with in the earlier parts of sub-clause (b)(i) and (b)(ii). Thus, if the damage to the vessel under (a) above or the damage done to a third party under (b) above causes consequential losses to be incurred, the party whose vessel has sustained the damage or has done it to the third party will bear all claims for such losses also. To give an example: a towing connection parts and the tow, a cargo vessel, drifts against a dock wall and sustains shell plating damage necessitating repair; the tug, suddenly freed, surges forward and collides with a barge, sinking it but sustaining no damage. The tow will bear the damage done to her and the costs of repair etc. as well as any consequential losses (eg the cost of chartering in a replacement bottom to carry a cargo which the vessel was due to lift and loss of profit). The tug will bear any liability to the barge owner and any consequential losses claimed by that owner (eg the costs of salving and re-conditioning the barge and for loss of use).The interrelationship between sub-clauses (b)(i)(3) and (b)(ii)(3) and sub-clause 25(c) should be carefully noted; under sub-clause (b), *all* loss and damage consequential on damage sustained by a party's vessel or caused to a third party by a party's vessel are for that party's account including losses of profit etc. and loss of use. Under sub-clause (c), the tug owner and hirer, in so far as they have a claim against each other which is unaffected by clause 25(b), agree mutually to

exclude any liability on the part of the other for certain types of consequential loss. Accordingly, in terms of bearing the risk of liability for consequential losses, each party bears the risk of liability of consequential losses incidental to its own vessel whether suffered by themselves or by a third party, but does not bear the risk of consequential losses suffered by the other party. The exact scope of the exclusion of consequential losses under clause 25(c) is considered below.

4.226 It should be noted that the loss or damage must be "consequential upon the loss or damage set out in (a) and (b)." Accordingly, other liabilities which may be incurred by the tug or tow owner in respect of his property which are not, properly analysed, "consequential" on loss of or damage to the property will fall outside the ambit of paras. (b)(i)(3) and (b)(ii)(3). To take a simple example: if due to unseaworthiness of the tug, the tow were to be cut adrift in the open sea but sustained no damage but required to be salved by the hirer, it would be difficult to fit that cost incurred by the hirer within the heads of the knock-for-knock regime under these paragraphs. There has been no loss or damage of or to the tow in any terms: she is safely adrift but requires to be salved to prevent her becoming lost or damaged. In such a case, the hirer's claim to recover its liability in salvage from the tug owner could not easily be met by that owner invoking para. (b)(ii)(3) and contending that that was for the hirer's account. Where the tow sustains damage as a result of which the salvage becomes necessary, the question becomes more complex and depends upon the scope of "consequential." If the tow is subsequently washed up ashore (as the tow was in *The A Turtle*), sustaining some bottom damage and needs to be salved from her immobilised position, is the need for and incurring of liability in respect of salvage one which is consequent upon the damage to the tow, or simply due to the breach of contract and because the tow has been allowed to ground and to become immobilised? While the mutual indemnity falls to be construed widely and not in a *contra proferentem* way (*Transocean v Providence*) it must also be construed in accordance with its terms in a normal way (*Seadrill v Gazprom*).

d All liability in respect of *wreck removal* and allied measures and in respect of pollution prevention relating to its vessel.

4.227 Thus if the tow founders in a navigable waterway due to the fault of the tug and requires to be buoyed as a wreck, then removed and, in the interim, to undergo an underwater operation to remove her bunkers to prevent pollution, the tow will bear the cost of the same. Similarly, if a tug is run down by the tow due to the fault of the tow and requires the same to be done to her, the tug will bear the cost of the same.

4.228 The principal issue which arises in relation to this aspect of the indemnity, which has arisen in number of different factual contexts, is how far the indemnity extends and what operations concerning the tug and the tow are covered by paras. (b)(i) and (b)(ii) which are in identical mutual terms. The clause is plainly capable of extending to various salvage or salvage type operations which the owner of the tug or of the tow has to engage in respect of its own property, even though due to the fault or breach of contract of the other party: as noted above, pumping out bunkers or avoiding a marine pollution incident using professional salvors ("liability . . . in respect of the expense of . . . preventing or abating pollution originating from the [Tug/Tow]"). Does it however extend further and to any salvage operation, irrespective of the absence of damage to the tug or tow (which might trigger the application of paras. (b)(i)(3) and (b)(ii)(3): see above) on the basis that this can be described as a "liability . . . in respect of the moving . . . . the [Tug/Tow]"? There are two views (and given that various matters are current no view is expressed upon them). The first is that "moving" must be read in its context: the paragraph

deals with "wreck removal" and with the "lighting" and "buoying" of the tug or tow. It can be argued that these words constitute a genus and the most natural reading of "moving" is that its meaning is limited by that genus. In other words, "the expense of moving . . . the Tow" has a meaning that is limited to moving a wreck as part of some lesser operation then that of full wreck removal. The contrary argument, which relies upon what is said to be a surprising lacuna, is that "moving" means any operation of moving the tug or the tow, reflecting that the risk allocation is property based, and that the word "or" separates liability "in respect of wreck removal" from liability "in respect of the expense of moving or lighting or buoying the Tow." This disjunctive contradicts an argument that the words "in respect of the expense of moving or lighting or buoying the Tow" are to be construed restrictively by reference to wreck removal in the first sub-clause. Further, the tow may require to be buoyed or lit for any reason during the service (not just that of wreck) and the same may be true of moving the vessel.

(3) Clause 25(b) as an indemnity provision.

4.229 As stated above, in addition to describing the losses which each party is to bear in terms of an exclusion or exemption clause, sub-paras. (i) and (ii) of clause 25(b) go on to provide each party with a contractual right of indemnity against the other. In general terms the nature of an indemnity obligation is that B undertakes to discharge the whole of the loss or damage sustained or the liability incurred by A. The obligation is discharged in one of two ways depending on the precise construction of the indemnity: either the indemnifier undertakes to keep the indemnified party from loss, by avoiding or preventing that loss or that the indemnifier will compensate the indemnified party for the loss which it suffers: see Courtney, *Contractual Indemnities* (2016), pp. 17–18 and generally on the law of contractual indemnities. Whichever method is adopted, the indemnity is only discharged by the complete indemnification of A. In other words, B undertakes to make A whole by meeting the whole of the loss or bearing the whole of the liability in question. He does so either after the loss has been sustained or the liability incurred and discharged by the indemnified party (if the indemnity is a simple compensation type: the wording of clause 25) or can be called upon to do so in advance to prevent the loss or liability from being incurred (if the indemnity of the preventative type, ie of the "hold harmless" type: this is not how clause 25 is worded).

4.230 In summary the effect of para. (b) as an indemnity provision under "Towcon 2008" is as follows.

i The hirer has a right of indemnity against the tug owner in respect of any liability which the hirer is found by a tribunal to be under to a third party and in respect of any claim by a third party which the hirer reasonably compromises provided that the liability or the claim arises out of loss or damage to the tug covered by para. (i).

ii The tug owner has an identical right of indemnity against the hirer in respect of liability to a third party or a third party's claim which it has compromised provided that the liability or claim arises out of loss or damage to the tow covered by para. (ii).

4.231 The common situations in which the indemnity is relied upon are, for example, where the tug is held liable to port authority under local law for the sinking of the tow in the authority's waters and loss suffered by the authority. Under clause 25(b)(ii)(2) or (3) that is loss which the tow must bear; the tug can recover the amount of that liability from the hirer under the indemnity provision. Similarly, the tug is held liable to the owner of the tow for the loss of the tow where the hirer is not the owner and the warranty of authority by the hirer in clause 29 of "Towcon 2008" (see below) is for some reason ineffective. In reverse, the hirer or the tow may incur liability to a

third party for damage done to that party by the tug as part of the towage service; the hirer or tow can invoke the indemnity under clause 25(b)(i).

4.232 Some particular points may be noted about the indemnity provisions of clause 25(b).

4.233 The first is that, while the indemnity is effectively the counterpart or pendant of the "knock-for-knock" distribution of self-borne loss and damage, unlike the "for sole account" provisions which precede it, the indemnity is not expressed to be operative where the liability incurred to the third party by, say, the tug owner arising out of loss of the tow has in fact been incurred due to the negligence of the tug owner. If it were the tow itself which was claiming for the loss, that claim would be met by reliance on clause 25(b)(ii)(1) irrespective of the tug owner's negligence because of the words "for the sole account of the Hirer . . . whether or not the same is due to . . . negligence . . . on the part of the Tugowner." However, no express reference is made in the indemnity to recovery where the person invoking it is seeking to recover for liability due to his own negligence. The rule in *Canada Steamship Lines v The King* [1952] AC 192 applies equally to indemnity clauses and the approach of the court is that a contract will not readily be presumed to allow a party to recover an indemnity against a loss caused by his own negligence (see *Smith v South Wales Switchgear Co* [1978] 1 WLR 165 (HL)). As already seen in the absence of express reference, the court will look to see if the liability the subject of the clause can more readily (but without fancifulness) be regarded as arising on a basis other than negligence (eg for breach of contract); if it can be so regarded then the indemnity will be confined to that other basis. The court will have regard to the whole of the wording of the indemnity and the intention of the parties as reflected in the whole of the contract (see *Caledonia Ltd v Orbit Valve Co* [1994] 1 WLR 1515)). It is strongly arguable that the indemnity in clause 25(b) takes its colour and its scope from the whole of paras. (b)(i) and (b)(ii) and should be regarded as governed by the words "whether or not due to" already considered above. It is part and parcel of the "knock-for-knock" regime contained, if not in clause 25 as a whole, then in clause 25(b). This is even more likely to be the case following the decision in *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373, with its suggested further dilution of the role of *Canada Steamship* principles in commercial contracts involving mutual provisions. However, while it is suggested that that is the correct result, it is not free from argument and a typed rider to the indemnity using the same words as appear in the earlier part of the clause would be prudent.

4.234 The second is that a claim for indemnity under clause 25 is not subject to the contractual claim notification and time bar provisions contained in clause 31 of "Towcon 2008"; that clause is expressed to apply to any claim "[s]ave for the indemnity provisions under clause 25 of this Agreement." Accordingly, the claim will be subject to the ordinary statutory limitation periods at common law under the Limitation Act 1980. As clause 25 itself makes clear, the cause of action will arise only on the liability being "adjudged" by some tribunal seised of the third party's claim or upon the claim being "reasonably compromised": this mirrors the position at common law (see *The Caroline P* [1984] 2 Lloyd's Rep 440, eg *per* Neill J at p. 466).

4.235 The third relates to the requirement of "reasonably compromised." A leading authority on what it is necessary to establish to prove that a settlement was reasonable, considering the well-known case of *Biggin v Permanite* [1951] 2 KB 314, is *The Krapan J* [1999] 1 Lloyd's Rep 688. Colman J held that what the court had to consider was whether the breach of contract had caused the loss incurred in satisfying the settlement. Accordingly, unless (i) the claim was of a sufficient strength reasonably to justify a settlement, and (ii) the amount paid in settlement was reasonable having regard to the strength of the claim, it could not be shown that the loss had been caused by the relevant eventuality or breach of contract.

4.236 Lastly, the indemnity provision is clearly worded to apply to liabilities to or compromises entered into with "third parties." In the ordinary course, this term presents no difficulties: the position between parties to the contract is regulated by the exclusion provision of clause 25(b) and therefore a contract party cannot be a "third party" for the purposes of the indemnity; "third party"

means a party or person not within the contractual relationship and *dehors* the contract. This leaves a lacuna which may not be unimportant. Take this example: the contract is made between the tug owner and the hirer; the hirer, as is not uncommon, is not the owner of the tow but contracts on behalf of such owner as well as itself in circumstances such that as a matter of English law, the tow owner is bound by the contract as a party and the warranty of authority provision in clause 29 of "Towcon" is effective. The tow is lost. The tow's insurers claim against the tug by way of subrogation in a foreign jurisdiction which does not recognise the effectiveness of clause 29 or of the hirer's acting on behalf of the tow owner. The insurers proceed to judgment against the tug owner or force it to settlement. In such a case, where the foreign jurisdiction is a contracting state to eg the Brussels or Lugano Conventions, the judgment must be given effect to by the English courts under the Civil Jurisdiction and Judgments Act 1982, as amended. The tug owner cannot therefore relitigate the claim against the tow owner in England and has no recourse against the tow owner notwithstanding clause 25. Can he recover the sum paid out to the tow owner from the hirer? The hirer's answer to a claim for an indemnity is that it is effective only against liability to "third parties", not against liability to parties who were parties but who have successfully but wrongly denied in another jurisdiction that they are parties. It is submitted that in such a case it is arguable that "third parties" should be construed purposively to extend to parties who have wrongfully renounced their status as "party" to escape the provisions of clause 25, alternatively that the tug is entitled to recover the sum from the hirer pursuant to the "for sole account" provision in the earlier part of clause 25(b)(ii). The arguments above surfaced in *Targe Towing Ltd v Marine Blast Ltd (The Von Rocks)* [2004] 1 Lloyd's Rep 721, but the hirer failed to establish that the tow owner had ever been a party to the towage contract or that the hirer had had authority to contract on behalf of the tow owner; accordingly even on the hirer's case, the tow owner unquestionably remained a "third party" for the purposes of the clause and it was not necessary to go further (see further in relation to this decision under clause 29, "Warranty of Authority", below).

Other (financial) losses: sub-clause (c)

"(c) Save for the provisions of Clauses 17 (Permits & Certification); 18 (Tow-worthiness of the Tow); 19 (Seaworthiness of the Tug); 22 (Termination by the Hirer) and 23 (Termination by the Tugowner), neither the Tugowner nor the Hirer shall be liable to the other party for

(i) any loss of profit, loss of use or loss of production whatsoever and whether arising directly or indirectly from the performance or non performance of this Agreement, and whether or not the same is due to negligence or any other fault on the part of either party, their servants or agents, or

(ii) any consequential loss or damage for any reason whatsoever, whether or not the same is due to any breach of contract, negligence or any other fault on the part of either party, their servants or agents."

4.237 Clause 25(c) represents a significantly revised version of the former clause 18(3). Apart from the cosmetic change to the opening words which give the title of the clauses for breach of which clause 25(c) is not to apply (see further below) although the clauses themselves remain unchanged from the previous version, the 2008 clause effects two important changes to the previous "Towcon" regime.

The changes reflected in clause 25(c): (1) redefinition of heads of loss

4.238 The first is to the manner and definition of the types or heads of loss, liability for which it seeks to exclude. It is necessary in order to set the changes to the old "Towcon" and the present text of "Towcon 2008" in context to consider the case law on this genus of contractual exclusion in general and the application by the courts of that case law to the previous clause 18(3) of the old "Towcon" (and "Towhire").

4.239 It is common in standard form contracts to find a clause which seeks to exclude liability for "indirect or consequential losses." Contracts in which this phrase *simpliciter* or something

akin to it has been used have been considered in a number of cases. See eg *Millar's Machinery Co v David Way & Son* (1935) 40 Com Cas 204 ("consequential damages"); *Saint Line Ltd v Richardsons Westgarth & Co* [1940] 2 KB 99 ("indirect or consequential damages"); *Croudace Construction Ltd v Cawoods Products Ltd* [1978] 2 Lloyd's Rep 55 ("any consequential loss or damage"); *British Sugar plc v NEI Power Projects Ltd* (1997) 87 BLR 42 and *Hotel Services Ltd v Hilton International Hotels (UK) Ltd* [2005] BLR 235 ("consequential loss"); the term "special damage" has been treated as synonymous in this context with indirect or consequential loss or damage: see *Proton Energy Group SA v Orlen Letuva* [2013] EWHC 2872 (Comm) *per* HH Judge Mackie QC at para. 71.The approach of the court to such clauses has been to confine their operation so as to exclude recovery of loss and damage which would only be recoverable under the second limb of *Hadley v Baxendale* (1854) 9 Ex. 341, the *locus classicus* on the law of damages. What this means is that a clause in such a form will not exclude recovery of loss "directly and naturally resulting, in the ordinary course of events, from . . . the breach of contract" (first limb of *Hadley v Baxendale*) but excludes recovery of loss "which would ordinarily follow from a breach of contract under . . . special circumstances", viz. under "the special circumstances under which a contract was actually made" with such circumstances having been "communicated by the plaintiffs to the defendants and thus known to both parties" (second limb of *Hadley v Baxendale*). In broad and simple terms, recovery of loss which any party to an ordinary contract of the type (eg "a towage contract") would be expected to have contemplated as likely to result from a breach would be unaffected by the clause, but recovery of loss which would not be expected to have been so contemplated would be excluded by the clause, even if the parties knew of special circumstances relating to the contract which would have made such loss within their contemplation. See eg Atkinson LJ in *Saint Line v Richardson* (*op. cit*.) at p. 104:

> What the clause does is to protect the respondents from claims for special damages which would be recoverable only on proof of special circumstances and for damages contributed to by some supervening cause.

Or, as Waller LJ put it in *British Sugar v NEI*, a case of a contract for the supply of electrical equipment (*op. cit*.), at p. 51B:

> On a proper reading of that clause an obligation was being placed on the defendants to pay such damages as flowed naturally and directly from any supply by the defendants of faulty goods and materials with the limitation being imposed in relation to some other type of loss which did not flow so directly for example, damage which might flow from special circumstances and come within the second limb in *Hadley v Baxendale*.

4.240 The utility of such a clause will often be limited given the problems which commonly exist in the recovery of damages falling within the second limb of *Hadley v Baxendale* in any event. See eg *per* Parker J in *Croudace v Cawoods* (*op. cit*.) at p. 59 and also *per* Rix J in *BHP v British Steel* [1999] 2 Lloyd's Rep 583 at p. 600, considered in more detail below. As Rix J put it:

> in some and perhaps many cases the distinction [eg between the two limbs of *Hadley v Baxendale*] adopted to construe the exclusion would be likely to exclude nothing.

In other words, nothing which would not in an ordinary case not already be excluded by the operation of the rule in *Hadley v Baxendale*.

4.241 It has to be said that the *Croudace v Cawoods* line of authority has not proved popular in recent years, with the court on a number of occasions doubting whether the cases would be decided the same way today if the question were tackled as *res integra*: see the recent comments of the Court of Appeal in *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372 *per* Moore-Bick LJ at para. 15 and Leggatt J in *Scottish Power UK Plc v BP Exploration Operating Co Ltd* [2015] EWHC 2658 (Comm). The view has been expressed that the English

court's construction has robbed the phrase of its natural meaning which businessmen should be taken more realistically to have had in mind: see eg *Macgregor on Damages* (19th edn, 2014) at paras. 3–013–3–016. Other common law jurisdictions such as Australia have effectively ditched the English law approach. As an example, see *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49, a decision of the Supreme Court of South Australia, where the court held that unless qualified by its context, "consequential loss" would normally extend to all damages suffered as a consequence of a breach of contract. However, as the cases are decided mostly at Court of Appeal level, the matter currently rests pending any review by the Supreme Court. Given that the terms and phrases have now acquired considerable commercial certainty in their usage (however unpalatable in theory) and that avoiding their effect is a matter of very straightforward drafting (as the newer BIMCO and the LOGIC offshore forms demonstrate), it is suggested that a wholesale reversal of the settled position would be unattractive.

4.242 Clause 18(3) of the original "Towcon" form was of a different kind from the clauses considered in the cases above because it specifically enumerated particular heads or types of loss ("loss of profit, loss of use, loss of production") for which it mutually excluded the liability of each party but then lumps in with those enumerated heads of loss the phrase "or any other indirect or consequential damage." The inclusion of these latter words, especially the word "other", posed considerable problems in the construction of the clause. Was the clause to be read such that the enumerated losses govern the clause and the phrase "indirect or consequential damage" were to be given a different meaning from that in the cases just cited? Or was the clause to be read as deeming the enumerated losses, whether or not direct, to be "consequential losses" and as all to be excluded? Or was the clause to be read as dealing with only "indirect or consequential" losses and as applying to the enumerated losses only when they are indirect or consequential *à la Saint Line, Croudace* and *British Sugar* but not when they are direct?

4.243 The latter result had little to commend it because it meant that, notwithstanding the specific reference to particular types of loss, those references are redundant and the clause was to be read as if it referred only to "indirect or consequential loss." This is difficult to support when clause 18(3) was presumably drafted with the intention of dealing specifically with particular types of loss in a way different from the standard form clause in common use.

4.244 However, in the first decided case on the meaning of clause 18(3) of "Towcon", the court held that this was the correct construction of the clause. In *Alexander G. Tsavliris Ltd v OIL Ltd (The Herdentor)*, unreported, 19 January 1996 (noted at (1996) 3 Int ML 75 and now set out in Appendix 19), the Admiralty Court considered certain preliminary issues on clause 18(3) under the old RSC Order 14A. The facts were as follows.

4.245 The plaintiff was the salvor, Alexander G. Tsavliris Ltd ("Tsavliris"). It chartered in a tug, the *Herdentor*, from the defendant tug owners, OIL Ltd trading as OSA Marine ("OIL"). The tug was chartered in so as to assist and enable Tsavliris to perform a salvage operation on Lloyd's Open form in respect of a VLCC in difficulties off the South African coast. The fixture was at a daily rate of hire and the contract was concluded on the "Towhire" form. Shortly after the contract was concluded, Tsavliris entered into a sub-contract with the South African salvors and tug operators, Pentow. The sub-contract was on the International Salvage Union sub-contract under which the salvor agrees that the salvage remuneration eventually payable to him will be shared between himself and the sub-contractor, the precise share to be determined by an arbitrator. There was a dispute as to what precisely was agreed between Tsavliris and OIL as to the duration and nature of the services: Tsavliris contended that it had been agreed that the tug was engaged on an open-ended basis for as long as the salvage might take, while OIL contended that it had been made clear that the tug was being provided for a limited duration towage in the light of another towage operation for which the tug was already engaged. Acting on their view of the contract, OIL withdrew the *Herdentor* after completing the particular towage leg of the service which had

been discussed. Tsavliris sued OIL for wrongful withdrawal. It claimed damages on the following basis: first, Tsavliris contended that the base award which was given to it as contractor in the LOF arbitration was less than it would have been had the tug stayed until the salvage service was completed; and secondly, it contended that the share which it had received out of that award under the ISU sub-contract was less than it would have been. In other words, Tsavliris' overall return on the salvage was said to be less.

4.246 While the allegation of wrongful withdrawal was vigorously contested by OIL, OIL raised a preliminary point of law as to whether the recovery of loss of the kind claimed by Tsavliris was barred by the terms of clause 18(3) of the "Towhire" form as being properly characterised as "loss of profit, loss of use, loss of production or any other indirect or consequential damage." OIL's primary case was that the loss to Tsavliris of its expected return was "loss of profit" within the meaning of the clause and therefore it had an unanswerable defence to the claim even if the claim were otherwise a good one.

4.247 Clarke J found against OIL on the basis that Tsavliris's claim was not one for "loss of profit" and therefore fell outside clause 18(3) (as to this, see below). He went on, however, to consider, obiter, Tsavliris's case that even if its claim was one for loss of profit, it was not excluded by clause 18(3) because it was a direct loss of profit whereas clause 18(3) excludes only claims for indirect loss of profit, loss of use or loss of production. It was common ground that the loss of profit by Tsavliris was direct in the sense of directly resulting and within the first limb of *Hadley v Baxendale*.

4.248 Clarke J was referred by Tsavliris to *Croudace* but did not find it of assistance, recognising that the language of clause 18(3) was different: "it is a decision on a different clause in a different contract." Referring only to the language of clause 18(3), he held that the words "loss of profit, loss of use and loss of production" were governed and defined by the closing words of the clause ("or any other indirect or consequential damage") and that, in particular, the words "or any other" were to be read as having the effect that clause 18(3), in referring to types of loss such as loss of profit etc., was referring to only such types of loss that were indirect but was not excluding recovery of such types of loss that were direct. He held that this was not the "ordinary and natural meaning" of the expression:

> [Tsavliris] relies upon the immediate context in which the words appear. Thus, the clause provides that neither party shall be liable to the other for "loss or profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever." [Tsavliris] submits that the natural meaning of that expression is that only indirect losses in each category are excluded. I accept that submission. It does seem to me that if those words are construed by themselves, the expression "any *other* indirect or consequential damage" (my emphasis) gives content to the meaning of "loss of profit, loss of use" and "loss of production" and strongly suggests that only indirect losses of profit, use and production are to be excluded together with any other indirect or consequential damage which may occur.

The key factor for Clarke J was the use of the word "other":

> As I have already said, the natural meaning of "other" is that it relates back to the words immediately preceding it and that it makes clear that it is only "indirect losses of profit, use and production" which are to be excluded.

4.249 In the first edition of this book, that result was respectfully suggested to be unsound for three reasons, as follows. First, it reduced clause 18(3) which is an integral part of the BIMCO knock-for-knock regime to a provision of very minor effect: as seen above, the *Croudace* line of cases holds that a "no consequential loss claims" provision leaves unaffected direct loss claims and excludes only indirect loss claims or claims for loss falling within the second but not the first limb of *Hadley v Baxendale*. As submitted above, it is questionable of what practical utility such a clause has; it is even more questionable that the draftsmen of the BIMCO forms had in mind this type of distinction when drafting a clause which overall leaves each party bearing its

own losses, direct or indirect (see eg clause 18(1) and (2)). Secondly, the construction was not a natural and ordinary reading of the clause. It reads in to the types of loss enumerated the word "indirect"; this jars with the losses listed. What for example is an indirect loss of use as distinct from a direct loss of use? Thirdly, even if "any other" was to be read so as to treat the types of loss listed as types of indirect and consequential damage, it is submitted that what clause 18(3) was seeking to achieve was to deem certain types of loss, however occurring, as losses which for the purposes of the clause are to be treated as "indirect losses" (ie financial losses), in distinction to the more direct physical or physically connected losses dealt with in clause 18(1) and (2) of the form.

4.250 Following that decision, there were a number of decisions on clauses in different non-towage contracts which were much closer to the wording of clause 18(3) and in which the court arrived at a different result.

4.251 In *Deepak Fertilisers & Petrochemical Corpn v ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep 387, the exclusion was of "loss [of] anticipated profits . . . or for indirect or consequential damages" and arose in a contract for the supply of design technology for a new chemical plant. Rix J held that all claims except the cost of rebuilding the plant (which was destroyed by an explosion) were excluded. The Court of Appeal allowed claims for fixed costs and overheads wasted during the rebuilding period as "direct" losses and therefore recoverable, but held that lost profits were excluded by the clause. Stuart-Smith LJ at p. 403 stated:

> The direct and natural result of the destruction of the plant was that Deepak was left without a methanol plant, the reconstruction of which would cost money and take time, losing for Deepak any methanol production in the meantime. Wasted overheads incurred during the reconstruction of the plant, as well as profits lost during that period, are no more remote as losses than the cost of reconstruction. Lost profits cannot be recovered because they are excluded in terms, not because they are too remote. We consider that this Court is bound by the decision in Croudace where a similar loss was not excluded by a similar exclusion and considered to be direct loss.

4.252 The approach to "lost profits" was that they were excluded *per se* as a head or type of loss without any consideration of whether they were "direct" or ''indirect." The court distinguished between this specifically enumerated type of loss and the catch-all "indirect or consequential damages." Loss of profits was excluded; other losses not specifically referred to were excluded if not "direct" within the meaning of the settled cases on the short-form clause (eg *Croudace*).

4.253 The contract wording in *Deepak* did not contain the words "or any other" in connecting the enumerated loss and the phrase "indirect or consequential damage." This was relied on as an important distinguishing feature in *BHP Petroleum Ltd v British Steel plc and Dalmine SpA* [1999] 2 Lloyd's Rep 583, which concerned a contract for the supply of a steel pipeline for offshore use in the Liverpool Bay field. The contract by clause 14.5 provided:

> Neither the Supplier nor the Purchaser shall bear any liability to the other . . . for loss of production, loss of profits, loss of business or any other indirect losses or consequential damages arising during and/or as a result of the performance or non performance of this Contract . . ..

4.254 The clause was accordingly in virtually identical terms to clause 18(3) of "Towcon." The meaning of clause 14.5 was tried as a preliminary issue before Rix J:

> I turn to the issue caused by the presence of the word "other" in the phrase "or any other indirect losses or consequential damages." This word causes a conundrum. There is authority that the phrase "loss of profits" is *prima facie* an example of direct loss (*Deepak*). "Loss of production" and "loss of business" are merely variations on that theme. There is also the authority discussed above that the words "indirect or consequential" do not refer to what might be called "knock-on" effects, but are concerned with losses which would only be contemplated with the input of knowledge of special circumstances outside the ordinary course of things. However, the specific wording that the parties have agreed appears to require that either direct losses have to be treated as though they were indirect, or that the phrase

> "indirect or consequential" has to be given a special meaning different from that which authority has given to it, or else that the solution which is favoured by Mr Sumption has to be adopted, that only indirect and consequential losses of profits, production or business are excluded.
>
> In my judgment the best solution is to construe the clause as though it read "for loss of production, loss of profits, loss of business or indirect losses or consequential damages of any other kind" and accept that the parties may have been in error to permit the inference that the former phrases are examples of indirect or consequential loss. At least in that way, each of the phrases is given its authoritative meaning, which is what the parties must be supposed to have given their closest attention to. If, however, only production, profit, or business which is within the second limb of *Hadley v Baxendale* is intended to be referred to, then everything in the clause other than "indirect losses or consequential damages" becomes redundant and the previous phrases become dangerously misleading and potentially valueless.

4.255 While the case went to appeal ([2000] 2 Lloyd's Rep 277), the parties did not apparently question this part of his decision, it being agreed that the trial judge should decide whether the particular heads of loss fell within the enumerated losses or within the term "consequential loss" (see eg at p. 291). Accordingly, the decision of Rix J on the relationship between these losses and that term was not considered on appeal.

4.256 On the state of the authorities, there was accordingly a conflict between the construction given to clause 18(3) in *The Herdentor* and the result reached in *BHP v British Steel*. While *Deepak v ICI* did not resolve the conflict, it supported the approach of Rix J in *BHP* and it was submitted in the second edition of this work that the reasoning of Rix J was to be preferred to that of Clarke J in *The Herdentor* in the context of clause 18(3) at least. However, the point had to be recognised as a highly arguable one since, while the "commercial" view tends in favour of the Rix J approach, it could be said forcefully that the Clarke J approach is a more faithful approach to canons of modern construction and follows the contractual language used more closely than that of the Rix J approach, who was forced to justify his approach by holding "that the parties may have been in error to permit the inference that the former phrases are examples of indirect or consequential loss": see [1999] 2 Lloyd's Rep 583 at 600, col. 1.

4.257 The conflict on the authorities fell to be addressed squarely in respect of clause 18(3) of the "Towcon" form in *Ease Faith Ltd v Leonis Marine Management Ltd* [2006] 1 Lloyd's Rep 673. Andrew Smith J declined to follow the Rix J approach and inclined to the Clarke J approach on the wording of clause 18(3) of the "Towcon" form. While his decision was *obiter*, the judge stated at para. 147 that "I respectfully agree [with Clarke J] that the inclusion of the word 'other' must be recognised when interpreting clause 18(3) and its impact is to confine the clause to excluding liability to indirect loss of profit." He did not accept the criticisms as to the arguably uncommercial result and, in particular, found the Rix J approach difficult: "For my part, I do not find it easy to attribute to the parties the error that Rix J supposes and, in effect, to deprive the word 'other' of any real force. It is true that loss of profits is capable of being a direct loss, but it need not be. For my part I do not find it remarkable that parties seeking to exclude all indirect loss but being particularly concerned about indirect loss of profit should agree upon provision that makes specific reference to loss of profits." (para. 149). Accordingly, the specific heads of loss enumerated in the clause were only excluded where they were indirect but not where they were direct.

4.258 A similar result was reached in a non-towage case (*Ferryways NV v Associated British Ports* [2008] 1 Lloyd's Rep 639 at 649–650) in which, on a differently worded provision but with similarities to clause 18(3), the Rix J approach was once again not followed. Teare J., while stressing that each clause turned on its own terms, made it clear that the usual meaning would be presumed to prevail: this was given the very common usage of these terms and the need to produce a clear result if one was not simply to limit the exclusion of liability to the narrow *Croudace v Cawoods* class of loss. He stated at paras. 83 and 84:

> 83. Where a party seeks to protect himself from liability for losses otherwise recoverable by law for breach of contract he must do so by clear and unambiguous language. Clause 9 (c) provides that

liability for such losses as are "of an indirect or consequential nature" is excluded. In the light of the well-recognised meaning which has been accorded to such words in a variety of exemption clauses by the courts from 1934 to 1999 it would require very clear words indeed to indicate that the parties' intentions when using such words was to exclude losses which fall outside that well-recognised meaning. This is particularly so when "indirect" is used as well as "consequential." The use of "indirect" draws an implicit distinction with direct losses. The meaning which has been given to direct losses in the cases which I have mentioned is "loss which flows naturally from the breach without other intervening cause and independently of special circumstances" (*per* Atkinson J in *Saint Line* at p. 103). By contrast, indirect or consequential losses are losses which are not the direct and natural result of the breach (*per* Atkinson J. in *Saint Line* at p. 104).

84. The important question therefore is whether the words in clause 9 "including without the limitation the following" indicate clearly that the parties were giving their own definition of indirect or consequential losses so as to include the specified losses even if they are the direct and natural result of the breach in question. In my judgment those words do not provide the sort of clear indication which is necessary for the Defendant's argument. The parties are merely identifying the type of losses (without limitation) which can fall within the exemption clause so long as the losses meet the prior requirement that they "of an indirect or consequential nature." Had the parties intended that liability for losses which were the direct and natural result of the breach could be excluded they would have hardly have described such losses as "indirect or consequential."

4.259 That approach was recently endorsed by Cooke J in *Star Polaris LLC and HHIC-PHIL Inc* [2016] EWHC 2941 (Comm). The case concerned a shipbuilding contract. As is common in such contracts, the builder gave a 12-month warranty and guarantee (Article IX). The builder undertook to be responsible during that period for any defects, due to matters for which it was contractually responsible, such as bad design or workmanship, and to carry out all necessary repairs. As is similarly common, Article IX stated that the builder was to be under no other responsibility or liability whatsoever in connection with the vessel or under the contract once the vessel had been delivered to the buyer other than under Article IX. Any implied conditions, for example, under statute (such as the Sale of Goods Act 1979) were similarly excluded. Article IX was therefore understandably described by the arbitrators and by the judge as "a complete code for the determination of liability" as between builder and buyer. It was in this special context that Article IX went on to exclude "liability or responsibility . . . arising for or in connection with any consequential or special losses, damages or expenses unless otherwise stated herein." The structure of Article IX was viewed by the Court (at para. 36) as one of repair obligations expressly undertaken by the builder, coupled with the exclusion of everything else in terms of liability and responsibility. The clause differentiated between the cost of repair or replacement, on the one hand, and the broader financial consequences occasioned by the need for a repair or replacement on the other. The court agreed with the arbitrators (a very experienced panel: Michael Collins QC, Richard Siberry QC and Sir David Steel) that "in such circumstances, the word 'consequential' had to mean that which follows as a result or consequence of physical damage, namely additional financial loss other than the cost of repair or replacement." In other words, the clause extended to all loss and damage which was a consequence of the defect covered under the guarantee and the word "consequential" was used by the parties in this agreement in its cause-and-effect sense, as meaning "following as a result or consequence of." However, the judge recognised and sought to emphasise that he was not intending to cast doubt on the well-settled meaning of that term (referring to the usual line of cases including *Ferryways* with approval at para. 18), he held that the specific context in which the wording was used, namely as part of a "complete code" of builder's responsibility, was crucial to a proper understanding of the term and of "fundamental importance in considering the ambit of Article IX" (para. 10).

4.260 Against this background, BIMCO radically amended the old clause 18(3). Instead of the portmanteau wording linking the specific heads of loss to general phraseology in terms of indirect and consequential loss, clause 25(c) breaks the losses to be excluded into two sub-paragraphs.

The first, (c)(i), deals with the specific heads of loss "any loss of profit, loss of use or loss of production whatsoever and whether arising directly or indirectly" from performance or non-performance. The intention of the clause is to exclude liability for the specified heads of loss, whether the loss is direct or indirect. Unfortunately, the way in which it has been drafted confuses the loss being direct or indirect in terms of its foreseeability (as Waller LJ put it in *British Sugar v NEI*) with how the loss has been caused in causation terms and from what it has resulted: thus, the loss is excluded whether "arising directly or indirectly from performance or non-performance" (etc.). The two are not the same concept of direct and indirect in the way these types of clause and this type of wording have been construed by the courts. However, it is submitted that the new clause 25(c)(i) is probably sufficient to achieve the desired result since (i) the clause does purport to exclude the head of loss entirely without any qualification in terms of indirect or direct; (ii) the following part of the clause shows the intention to deal separately with indirect and consequential loss; (iii) there is no linkage between the two parts of the clause which, read naturally, are to be treated as dealing differently with specific heads of loss however arising on the one hand and a generic category of indirect loss on the other. It is unfortunate that the explanatory notes do not really assist in giving the purpose of the clause (although it can clearly be inferred from the difficulties encountered with clause 18(3) of the old "Towcon" as considered above), these stating somewhat elliptically "Sub-clause (c) deals with liability for other types of financial loss. This provision has been substantially re-written from the old 18.3 that appears in TOWCON. The purpose of Sub-clause (c) is to exclude both parties from liability for consequential loss or damage whether direct or indirect"; the latter sentence, with respect, appears to be a contradiction in terms.

4.261 Accordingly, when a particular loss is claimed, the loss will fall to be assessed for the purposes of clause 25(c) in the following manner:

i Is it within the specifically enumerated heads of "loss of profit, loss of use and loss of production", giving these terms their ordinary and natural meaning? If it is, it is excluded under clause 25(c)(i).

ii If it is not, is it still a loss which is an "indirect or consequential" loss within the second part of clause 25(c) on *Croudace* principles? See the residual exercise performed by Rix J in *BHP v British Steel* at [1999] 2 Lloyd's Rep 601, col. 2 (endorsed by the Court of Appeal at [2000] 2 Lloyd's Rep 277). If it is, it is excluded under clause 25(c)(ii).

iii If it is not, then it will be recoverable subject to any remaining requirements of the general law of damages.

The changes reflected in clause 25(c): (2) specific reference to excluded causes (and negligence)

4.262 The second substantial change to the old clause 18(3) in the new clause 25(c) of "Towcon 2008" is that specific reference is included to the causes of excluded loss, including, importantly, to such loss being excluded even where it was caused by negligence on the part of a party.

4.263 This removes a potential argument based on *Canada Steamship Lines v The King* [1951] AC 192 (see above) in relation to the old clause 18(3): in its original form, the clause purported to exclude each party from all liability for the losses stated in the clause "for any reason whatsoever", there being no specific reference to the situation where the losses stated were due to negligence. In those circumstances, the issue arose as to the effect of the clause in a claim in negligence which is not otherwise put or is to be deemed as one for breach of contract and the rule in *Canada Steamship*. It was submitted in previous editions that the clause would probably be regarded as effective against negligence but that it might be advisable to add or insert suitable wording referring to negligence to put the matter beyond doubt (see eg the provision in *BHP v*

British Steel (*op. cit*.), which concluded with the words "regardless of the cause thereof but not limited to the negligence of the party seeking to rely on this provision"). While such an argument was always unpromising given the very clear terms of the old version of the clause, this did not stop such arguments being run. (It may be noted that this argument, in relation to similar wording on clause 12(c) of the "Supplytime 89" form, was dismissed by the court on an application for permission to appeal in *SEA Servizi Ecologici v Muliciero Servicios Maritimos* [2007] EWHC 2639 (Comm): see under Chapter 5 below.) The 2008 version prevents any such argument from now being advanced with a clear reference to negligence in both paras. (c)(i) and (c)(ii).

Heads of excluded loss and damage

4.264 The specifically enumerated heads of "loss of profit, loss of use and loss of production" will be given their ordinary and natural meaning and in most cases it will usually be clear whether a loss claimed for falls within the clause or not. The intention of the clause is effectively to deal with those heads of financial and economic loss which commonly arise, such as when the tow or the tug is damaged during the towage and cannot be used for commercial work, thereby occasioning loss of profit and loss of use to the owning party.

4.265 More difficult are the cases where the "Towcon" form is used otherwise than for simple towage or where the loss suffered by a party is of a special kind or is incurred in special circumstances. In *The Herdentor*, the "Towcon" was used, as is common with some salvors, as a salvage sub-contract on a non-award sharing basis (see generally Chapter 9 below). Tsavliris's claim was for a lesser base award in the LOF arbitration and for a lesser share under the ISU award-sharing sub-contract which it had with Pentow. Was this shortfall in money "a loss of profit"? Clarke J held that it was not:

> [OIL] submits that the claim is for loss of profit on the ground that on Tsavliris' case they have made less profit as a result of the breach than they would otherwise have done. [Tsavliris] submits, on the other hand, that is an artificial approach. [They] submit that the true position is that Tsavliris have received less money as payment for their services than they would have done. It has therefore in effect cost them more. It is as if they have suffered a diminution in the price which they were to receive of the salvage services.
>
> As stated above, there are two elements of the claim. The first is that on Tsavliris' case the overall award was less than it would otherwise have been and the second, and crucial element, is that the share of that award received by Tsavliris under the ISU sub-contract is less than it would otherwise have been. [Tsavliris] points out, whether that involves less profit than would otherwise have been made depends upon whether the services were in fact profitable. It may be that they were, but it seems to me that it is somewhat artificial to treat Tsavliris' claim as a claim for loss of profit.
>
> I accept [Tsavliris'] submission that it is more akin to a claim in respect of a diminution in the price. Tsavliris have received less for the services rendered by them than they would have done. I do not think that that reduction is properly to be categorised as a loss of profit of the kind contemplated by clause 18.3.

4.266 In previous editions the correctness of this part of the decision in *The Herdentor* was questioned on the basis that the judge gave no definition of what "loss of profit" as used in the clause meant and that, while the term "loss of profit" may have different connotations in different contracts, it was arguable that, at the very least in the context of the "Towhire" form, it was designed to cover a loss of money by tug or tow on an operation which is in excess of the tug or tow's costs of earning that money. On the facts of the case before the court, if Tsavliris had incurred out-of-pocket expenses of x and received an award or share of award of y which was greater than x, Tsavliris's profit on the deal would have been y-x. That part of the earnings would have been pure profit and on an ordinary construction of loss of profit would have been caught by the exclusion in clause 18(3). It is submitted that while the judge was correct in refusing to equate loss of revenue *simpliciter* with loss of profit, he should not have held the exact converse, namely

that a loss of remuneration was not in any sense a claim for a loss of profit. The correct interpretation of clause 18(3) in the context of a claim for loss of earnings was submitted to be that it excludes that part of the claim which represents a claim for the profit element in those earnings.

4.267 The point came up for decision in *Ease Faith v Leonis Marine Management* [2006] 1 Lloyd's Rep 673. Once again a very narrow reading of "loss of profits" was reached by the court, in part relying on *The Herdentor*. In that case, a claim was made for a reduced profit on the sale of a vessel sold for scrapping (see para. 140). The vessel was to arrive before a certain date stipulated in the towage contract but was delivered late due to breaches of the towage contract. The buyer was only prepared to take the vessel at a reduced price which meant a reduced profit for the seller (the hirer). The defendants contended that this was caught by clause 18(3) as a "loss of profit." Andrew Smith J held that it was not. Applying the *contra proferentem* rule in para. 142 (as to which see above), he held that the phrase took its meaning *eiusdem generis* from the other phrases in the clause such as "loss of production" and accordingly:

> 143. I interpret the term "loss of profit" as referring to loss of profits generated by future use of the tug or the tow by the towowner or the hirer as the case might be. It seems to be that these losses are similar in kind to loss of use or loss of production and are naturally connoted by the phrase "loss of profit" when read in its context.
>
> 144. I recognise, of course, that the losses incurred by Ease Faith were such as to reduce the profits of the company generally and more specifically the profits of the particular venture in which the company was engaged . . .. However, there are few, if any, losses suffered by a commercial concern that could not be described as amounting to or producing a reduction in the profits, or loss of profit, in this very general sense, for the concern as a whole and for a particular venture or part of the business. The term "loss of profit" in clause 18(3) was, in my judgment, intended to have a more restricted meaning, and is directed to protecting the tug owner from a claim for loss of productive use of the tow and the hirer from a claim of loss of productive use of the tug.145. I am encouraged in this view by the decision of Clarke J in *Tsavliris v OSA Marine Ltd*, 19 January 1996 [viz *The Herdentor*]. The facts of this case are not exactly similar, but it does seem to me that here too the loss, in the words of Clarke J, "is more akin to a diminution of price than a loss of profit."

4.268 Accordingly, the current trend of authority is to limit the meaning of the various heads of loss in clause 25(c)(i) and loss of profit, in particular, appears to be limited to loss of future trading profits using the tug or tow. The decisions may be questioned and the issue is not closed but, as the trend seems clear, users of the "Towcon 2008" form (and of "Towhire 2008") should therefore consider amending clause 25(c) as necessary to be sure to exclude mutually those types of loss which they consider should fall within its terms, by specific reference if possible rather than trusting to clause 25(c).

The circumstances in which clause 25(c) applies

4.269 Lastly on clause 25(c), it should be noted that the exclusion (whatever its effect) does not apply to the losses referred to in clause 25(c) when they arise from breach of the following specified provisions:

i Clause 17: the obligation upon the tow and hirer to arrange for necessary permits and certification.
ii Clause 18: the obligation upon the hirer to ensure the tow-worthiness of the tow.
iii Clause 19: the obligation upon the tug owner to ensure the seaworthiness of the tug.
iv Clauses 22 and 23: the regime of rights and responsibilities in the event of the termination of the contract and the consequent withdrawal of either tug or tow.

4.270 The express, alternatively, implicit statement in clause 25(c) is therefore that, save for certain types of breach in relation to what might be described as fundamental obligations on tug and tow, there will be no liability for the losses of the types of classes identified in clause

25(c), whatever the breach is and howsoever the breach comes about. As with the applicability of clause 25(b) to "radical" breaches, such as deliberate failures to perform the agreement at all or repudiatory breaches, where the recent decision in *The A Turtle* and in has cast doubt as to the types of breach to which the knock-for-knock provision applies, so too with mutual exemptions of consequential loss the court has recently restricted the application of such clauses.

4.271 In *Internet Broadcasting Corpn Ltd v Mar LLC (Marhedge)* [2009] 2 Lloyd's Rep 295 a contract for the provision by the claimant of an internet platform contained the following, fairly common-form, provision which in broad terms corresponds to the present clause 25(c) of "Towcon 2008":

> [N]either party will be liable to the other for any damage to software, damage to or loss of data, loss of profit, anticipated profit, revenues, anticipated savings, goodwill or business opportunity, or for any indirect or consequential loss or damage.

4.272 The claimant's client repudiated the contract. The court held that this was the deliberate decision of the alter ego of the defendant company such that it represented conduct akin to "personal wrongdoing" of the company and a deliberate repudiation of the contract. The court (Gabriel Moss QC sitting as a deputy) held that the consequential loss clause would not apply to a repudiatory breach since very strong wording would be needed to achieve that effect. He held that the relevant clause contained no strong language at all nor any clear statement that deliberate wrongdoing was intended to be covered, let alone deliberate, personal and repudiatory wrongdoing and that, in his view, accordingly the clause could not be held on any established approach to construction to cover such wrongdoing and that the literal meaning would defeat the main object of the contract (see paras. 37, 38 and 39).

4.273 Reference is made to the summary given above (in the commentary on *The A Turtle* decision) of the relevant principles of construction in relation to exemption clauses: that there is no presumption that exemption clauses do not apply to breaches of conditions or repudiatory breaches; that there is similarly no presumption against them applying to deliberate breaches but that the court will construe such clauses limitatively where the literal meaning is to deprive one party's stipulations of all contractual force or to reduce the contract to a mere declaration of intent. Once again these were all engaged in the *Internet Broadcasting* case.

4.274 The Deputy Judge's reasoning adopted two different approaches. The first was that express or very clear wording would be needed to cover the sort of breach in question. Thus, at paras. 32 and 33, he stated:

> Accordingly, if the parties intend an exemption clause to cover a deliberate repudiatory act by one party or either party personally, one would expect to see "clear" language in the sense of "strong" language, for example, "including deliberate repudiatory acts by [the parties to the contract] themselves." Words which literally cover the situation, but also a whole range of lesser situations, will not in my judgment be sufficient. [. . .] There is a presumption, which appears to be a strong presumption, against the exemption clause being construed so as to cover deliberate, repudiatory breach . . .. The words needed to cover a deliberate, repudiatory breach need to be very "clear" in the sense of using "strong" language such as "under no circumstances."

4.275 This appears, with respect, to be wholly out of line with the construction approach advocated in *Photo Production* and seen in action in *Swiss Bank Corpn v Brink's-Mat Ltd* [1986] 2 Lloyd's Rep 79. Although the Deputy Judge stated that he was bound by the cases which rejected the "fundamental breach" theory (see para. 15: "I am bound by the decisions of the House of Lords in the *Suisse Atlantique* case (*Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1966] 1 Lloyd's Rep 529; [1967] 1 AC 361) and *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 Lloyd's Rep 545; [1980] 1 AC 827 to reject the notion that there is any such rule of law and treat the issue as one of construction only"), he appears to have adopted just such an approach, going so far as to require particular breaches or

types of breach to have be referred to specifically in terms to be covered and inferring from the absence of such specific reference that the parties could not have intended the wider result:

> One can further test the intention of the parties by supposing the clause had said "neither party will be liable to the other for any indirect or consequential loss or damage even if caused deliberately by the personal act of the controlling mind of that party in a way which deliberately repudiates the contract between them." I cannot imagine for a moment that any reasonable businessman on either side would have signed up to such a clause in this case (para. 40).

4.276 This aspect of the decision of the Deputy received considerable criticism in *Astrazeneca UK Ltd v Albemarle International Corpn* [2011] EWHC 1574 (Comm) and the view expressed above has been confirmed. In Astrazeneca, a contract for the sale of a pharmaceutical ingredient contained a clause (clause M) which sought to limit the amount of claims for non-delivery to the price payable for the goods in the following terms:

> (M) No claims by BUYER of any kind, whether as to the products delivered or for non-delivery of the products, or otherwise, shall be greater in amount than the purchase price of the product in respect of which such damages are claimed.

4.277 It was argued for the buyer that clause M did not cover deliberate repudiatory breaches of contract in reliance on the decision in *Internet Broadcasting (Marhedge)* as set out in paras. 32 and 33 of the Deputy Judge's judgment (extracts from which are cited above). This was trenchantly rejected by Flaux J who stated at para. 289:

> With the greatest respect to the learned Deputy Judge, in my judgment, this conclusion is wrong on the modern authorities and effectively seeks to revive the doctrine of fundamental breach (which the House of Lords in both *Suisse Atlantique Societe d'Armement Maritime v NV Rotterdamschke Kolen Centrale* [1967] 1 AC 361 and *Photoshop Production v Securicor* [1980] 1 AC 827 concluded was no longer good law), albeit under the guise of "deliberate repudiatory breach."

4.278 Flaux J considered that "What the learned Deputy Judge appears to have done is to quote selectively from the speeches in those cases, whereas full consideration of the relevant speeches demonstrates that the cases do not support the proposition which he set out in paragraph 33 of the judgment" (para. 290). He then carried out a careful analysis of the *Internet* judgment in the light of the full passages in the speeches (over paras. 290–297) and concluded as follows (at para. 301):

> Thus, in my judgment, the judgment in *Marhedge* is heterodox and regressive and does not properly represent the current state of English law. If necessary, I would decline to follow it. Even if the breach by Albemarle of its obligation to deliver DIP had been a deliberate repudiatory breach as AZ contends, the question whether any liability of Albemarle for damages for that breach was limited by clause M would simply be one of construing the clause, albeit strictly, but without any presumption. Since it states: "No claims by [AZ] of any kind, whether as to the products delivered or for non-delivery of the products" it seems to me it is sufficiently clearly worded to cover any breach of the delivery obligations, whether deliberate or otherwise.

4.279 It is respectfully suggested that the analysis of Flaux J was impeccable and rightly dismissive of an attempt by the back door to resurrect the shades of the long dead concept of fundamental (or, for that matter radical or deliberate) breach.

4.280 The second approach taken by the Deputy Judge in *Internet Broadcasting* is more defensible and was an application of the principle, invoked in *The A Turtle*, that giving the words in the particular clause in question their literal meaning would "defeat the main object of the contract": see para. 29 where the judge cited *Suisse Atlantique* case [1967] 1 AC 361 *per* Lord Reid at p. 398G. It may be noted that this approach was also adopted and plied in *Astrazeneca UK Ltd v Albemarle International Corpn* [2011] EWHC 1574 (Comm) by Flaux J when construing a different part of clause M: see at paras. 313 and 312. (A detailed consideration of the case law

in this area as it might relate to the "Towcon 2008" and other BIMCO forms is set out earlier in this chapter.)

4.281 The Deputy Judge concluded that given that the type of loss which would flow from the (or any?) breach was necessarily consequential loss, to give the clause its literal effect would be tantamount to removing any and all liability on the part of the contract-breaker, and therefore the clause fell to be cut back:

> 38. It also seems to me that the literal meaning here would defeat the main object of the contract. The main object can be described as a joint venture in internet broadcasting for mutual profit for an agreed period. A literal reading of the exemption clause would enable either party deliberately and personally to repudiate at any time during the agreed period without any consequences as to lost profit, even though loss of profit is likely to be the only very serious consequence for either party of repudiation. Mr Boswood's argument that the claimant's set up costs are recoverable as damages does not adequately meet this point.
>
> 39. The claimant's set up costs were likely to be modest compared to the potential profit over the agreed term of the agreement if the venture were successful. Having to pay set up costs is therefore unlikely to be a serious deterrent to a deliberate and personal repudiatory breach by the defendant in this case. Moreover, looked at from the claimant's point of view, the defendant was likely to have little or no set up costs at all and very light ongoing obligations, so that repudiation by the claimant would be free of any meaningful cost to the claimant in terms of having to pay damages for direct loss: the only realistic claim of the defendant for substantial damages would be for loss of profits. The defendant's construction of the exemption clause would in effect deprive the contract of any real meaning from the claimant's point of view.

4.282 That aspect of the decision may well have been justifiable on the particular facts before the Deputy Judge. In the context of clause 25(c), it is submitted that the approach would not be applicable. As seen above, clause 25(c) expressly excludes from the operation of the mutual exemption of consequential and special losses such as loss of profit the cases of, perhaps, the most common and most substantial forms of breach by either party: unseaworthiness of the tug or the tow etc. Accordingly in such a case, the clause does not apply at all. It cannot be said that the exclusion of certain specified heads of loss and consequential loss in all other cases would "defeat the object of the towage contract" or would undermine the substratum of that contract or render it a *nudum pactum*. The victim of a breach, including of a repudiatory breach, is entitled to recover any other losses (and given the narrower definition by the courts of "loss of profits" in *The Herdentor* and *Ease Faith* that will include many claims for reduced anticipated economic or financial returns) and all direct losses within the first limb of *Hadley v Baxendale*; cf. *Chitty on Contracts* (32nd edn, 2015), Vol. I at para. 15–007: "if the clause does not entirely exclude the liability of one party but merely limits or reduces his liability, it does not render his contractual promises illusory." See also *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC) referred to above and Carr J's test: "the question is not whether FSL would have adequate remedies but whether or not IBM's construction of clause 20.7 would deprive the contract (or, if one assumes in FSL's favour that a narrower approach is permissible, the workshare arrangements) of all contractual force. It does not." Clause 25(c) cannot be read as depriving the "Towcon 2008" form of all force or of rendering the tug's (or the tow's, depending on who is relying upon the clause) obligations nugatory. It simply excludes a class of loss. Cf. possibly the position under the newer version of the exclusion in "Supplytime 2017", discussed in Chapter 5 below.

4.283 The same analysis would apply to the Court of Appeal's more recent decision in *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38, considered in detail above. As there set out, the court considered a (unilateral) clause which excluded any "liability whatsoever in contract, tort (including negligence) or otherwise for any loss of goodwill, business, revenue or profits, anticipated savings or wasted expenditure (whether reasonably foreseeable or not) or indirect or consequential loss suffered by the Contractor" MCC

having terminated the contract, Kudos claimed that MCC's termination was repudiatory and claimed damages for breach of contract made up of lost profits. The Court of Appeal held that MCC could not rely upon clause 18.6. Although there were a number of matters relied on by the Court of Appeal, an important basis of the decision was that it could not be presumed that the parties would have intended to exclude all liability and that ostensibly by excluding loss of profit completely by clause 18.6 that would be the result. In Tomlinson LJ's words at para. 28: "I repudiate that suggestion. Rather it is, I hope, a legitimate exercise in construing a contract consistently with business common sense and not in a manner which defeats its commercial object. It is an attempt to give effect to the presumption that parties do not lightly abandon a remedy for breach of contract afforded them by the general law." This does, on one view however, resemble the (criticised) approach of the Deputy Judge in *Internet Broadcasting* (see above).

4.284 An aspect of the *Internet Broadcasting (Marhedge)* decision which is important in the context of a knock-for-knock allocation of risk is the judge's analysis of such provisions and how they fell to be construed. The thrust of the BIMCO provision is that certain types of loss or damage are to be insured by each party, whatever the cause or circumstances of the loss or damage. Thus, under clause 25(b), the hirer bears the loss of or damage to the tow and his property on it while the tug owner does the same in respect of the tug and its gear (unless used by the hirer); under clause 25(c) each side agrees to bear its own losses of profit, production and use and their "special" (limb 2 of *Hadley v Baxendale*) losses. In insurance terms, it is open to the hirer or tug owner to lay off the risk by insuring its property, including the tow or the tug, on all risk terms and for each party to take out business interruption cover or loss of profits insurance as appropriate for the types of loss which might flow from the contract not being performed at all or from being mis-performed. As assured, given the terms on which each have contracted with the knowledge of their respective insurers, there will have been a waiver of the right of recourse by way of subrogation, which will fall to be paid for in the premium. Against this background, the comments of the judge in *Internet v Mar* by which he supported his restrictive construction of the mutual clause are, with respect, surprising. He stated as follows:

> 30. Many of the cases on the subject of exemption clauses point out that the normal function of exemption clauses is to allocate risk between the parties, normally insurable risk, so that the parties as commercial men know on whom is the obligation to insure. Thus Lord Wilberforce in *Photo Production* at [1980] 1 AC 827 page 843 states that after the passing of the Unfair Contract Terms Act 1977, "in commercial matters generally, when the parties are not of unequal bargaining power, and *when risks are normally borne by insurance*, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions." [Emphasis added.] The same point about allocation of insurable risk is made by Lord Diplock in the *Photo Production* case at page 851, quoted above.
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> 31. Although insurance is generally available for non-deliberate acts and for vicarious liability, I suspect that it is non-existent or very rare in the case of deliberate wrongful conduct by one contractual party repudiating the contract entirely. It cannot therefore sensibly be the function of an exemption clause, in normal circumstances, to allocate insurable risk with regard to a deliberate repudiatory act by a party himself, as opposed to a servant or agent for that party. The fact that an event is of a type not normally capable of being covered by insurance must in my judgment be a relevant factor and in my view emphasises the difference in approach between cases of deliberate repudiatory conduct by a party themselves as opposed to vicarious liability for the conduct of others.

4.285 This analysis overlooks that the subject-matter of the insurance is the property, not the type of act which leads to the loss of or damage to it and that the knock-for-knock regime is posited on each party insuring certain heads of loss irrespective of cause, ie all risks which will include loss of or damage due to a counterparty failing to perform the contract as much as a natural disaster, negligence or act of God. In the ordinary sense, cover should be available for the sorts of losses that may be suffered and which are referred to in the clause, viz. property damage

or destruction on all risks terms, business interruption cover, DSU or delay in start-up cover (where, for example, equipment is being transported on a tow to a construction site) etc. In any event, whilst it is not common and only written in limited circumstances, breach of contract can itself be the insured subject matter under a policy of insurance: ie contract frustration insurance (one party insuring itself against the other's breach, whether deliberate or otherwise).

4.286 For these reasons, it is submitted that the decision in *Internet Broadcasting Corpn Ltd v Mar LLC* in so far as it was based on the first approach that deliberate or repudiatory breaches of contract will be presumed not to fall within an exemption clause is wrong and deviant from the now settled law that whether or not the clause applies to *any* breach is a matter solely of construction. In so far as it was based on the second approach, while more defensible perhaps on the facts of the case (and now supported by *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38), the reasoning needs to be approached with some care in the context of the operation of clause 25(c) of "Towcon 2008", not least because the "available insurance" underpinning for it adopted by the Deputy Judge is unsound and may well have led the court to apply an unjustified approach to a fairly common provision in the offshore and construction industry.

4.287 Although they were distinguished in *Internet v Mar* (on the basis that they did not concern *repudiatory* breaches: para. 50), the decision in that case may usefully be contrasted with a more robust approach taken by Briggs J in *euNetworks Fiber UK Ltd v Abovenet Communications UK Ltd* [2007] EWHC 3099 (Ch) and in *Mitsubishi Corpn v Eastwind Transport Ltd (The Irbenskiy Proliv)* [2005] 1 Lloyd's Rep 383 *per* Ian Glick QC as a deputy.

4.288 It may also be contrasted, as noted above, with the decision of Clarke J in *Alexander G. Tsavliris Ltd v OIL Ltd (The Herdentor)*, 19 January 1996, unreported (see Appendix 19; noted in (1996) 3 Int ML 75) which adopted an approach more consistent with authority (albeit, on the facts before him, obiter):

> There are I think difficulties . . . because if, contrary to my conclusions, it were held that the hirer under the Towhire agreement could recover by way of damages for the alleged repudiatory breach the extra cost of hiring any substitute tug, but not the type of loss sustained on the facts of this case, it might not be easy to say that the main object and intent of the contract was frustrated.

The overall operation of clause 25(a)–(c)

4.289 Clause 25 does not purport to exclude all liability by a tug or tow for breach of contract or negligence; it is only where such breach or negligence results in a particular type of loss or damage, where that loss or damage concerns the damaged party's own vessel or men, that that party bears the loss. However, save for the general exclusion (with exceptions) of specific types of loss under clause 25(c), liability for breach of contract otherwise remains at large. If, in breach of contract, the tow is unfit for the towage and this results in extra costs for the tug in terms of bunkers, equipment, crew costs and time, such costs will be recoverable as damages for breach of contract. Similarly, if the tug's gear is deficient, requiring special works on board the tow to enable a connection to be made, and such deficiency constitutes a breach of contract, the cost of such work will be recoverable in damages. This is an important feature of clause 25 and one which means that it does not seek to undermine the sub-stratum of the towage contract or to render the contract a mere declaration of intent or a *nudum pactum*, still less does it have this effect. As noted above, it is suggested that the decision on *The A Turtle* [2009] 1 Lloyd's Rep 177 is highly questionable in cutting back the application of clause 25 on the basis that the clause effectively does so given the breadth of the types of loss dealt with by the clause, notwithstanding that these are typical heads of loss subjected to risk allocation in the offshore and other industries.

4.290 However, both this decision, that in *Internet Broadcasting Corpn Ltd v Mar LLC* [2009] 2 Lloyd's Rep 295 (notwithstanding the welcome correction of the latter in *Astrazeneca UK Ltd*

v Albemarle International Corpn [2011] EWHC 1574 (Comm) by Flaux J) and most recently in *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38 demonstrate that previous assumptions as to the all- encompassing scope of the BIMCO knock-for-knock risk allocation and consequential loss provisions both in "Towcon"/"Towhire" and "Supplytime" forms as well as other BIMCO forms will need to be revisited. If the parties genuinely wish to provide for a provision which applies as an "omnibus" provision in relation to all breaches of contract whatsoever, then consideration should be given to seeking to bolster and fortify the standard clauses such as clause 25 with suitably "strong" wording. In this connection it should again be noted that BIMCO has adopted a wholly different approach in relation to the later and post "Towcon 2008" form "Windtime", clause 16 of which excludes the operation if the mutual exclusions and indemnities altogether in the case of a repudiatory to renunciatory breach.

Statutory limitations: sub-clause (d)

"(d) Notwithstanding any provisions of this Agreement to the contrary, the Tugowner shall have the benefit of all limitations of, and exemptions from, liability accorded to the Owners or Chartered Owners of Vessels by any applicable statute or rule of law for the time being in force and the same benefits are to apply regardless of the form of signatures given to this Agreement."

4.291 Two issues arise in relation to sub-clause (d).

4.292 The first is whether there is any significance in the reference to "the Tugowner" having the benefit of limitation of liability with no corresponding reference in the clause to the tow owner and charterer's right to limit (where such a right to limit would exist post-*CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)* [2004] 1 Lloyd's Rep 460, *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35.

4.293 The tug owner is akin to a carrier, although he is not one in law (see Chapter 1 above). Clause 25(d) accordingly preserves for the tug owner all statutory rights of limitation, for example limitation of liability, as if the tug owner were a shipowner. In English law, the most important applicable statute will be the Merchant Shipping Act 1979 (as to which see Chapter 11 below). In *Smit v Mobius* [2001] CLC 1545, considered below in the context of limitation of liability and above in the context of clause 25(b), the hirer of the tug invoked the right to limit under the Limitation Convention 1976, relying on the inclusion of "charterers" within the definition of a "shipowner" entitled to limit under the Convention. The tug owner contended that clause 25(d) impliedly excluded any such right to limit, if it otherwise existed (as to which see Chapter 11 below). It was argued that the fact that clause 25(d) expressly and exclusively preserves the tug owner's right to limit and does not preserve that of the right of the charterer qua "shipowner", clause 25(d) thereby excluded the charterers' right to benefit from limitation of liability on the principle of construction *expressio unius exclusio alterius*. Morison J rejected that argument, holding that for such a wide-ranging exemption of a right which would otherwise exist at common law (and internationally), very clear words of exclusion would be required. This is, it is submitted, correct: see eg the similar approach of the court in *Gilbert-Ash (Northern) Ltd v Modern Engineering* [1974] AC 689, as applied in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] 2 Lloyd's Rep 61; *Liberty Mutual Insurance v HSBC Bank plc* [2002] EWCA Civ 691; *Stocznia Gdynia SA v Gearbulk Holding Ltd* [2009] 1 Lloyd's Rep 461 at 468 and, most recently, *Seadrill Management Services Ltd v OAO Gazprom (The Ekha)* [2010] EWCA Civ 691. Further, the mutual nature of clause 25 would militate against such a construction and in favour of an equal regime. It is likely that it was an oversight (understandable pre- and post-*The Aegean Sea* – see Chapter 12 below) by the BIMCO drafting team. It is perhaps regrettable that the opportunity was not taken to correct the drafting of sub-clause (d) in the light of *Smit v Mobius* in the 2008 revision at the time when this was done in relation to clause 25(b).

4.294 The second issue which arises is whether there is any inconsistency between the granting of an indemnity by the tug (or tow) under the earlier portions of clause 25 and the preservation of the right to limit.

4.295 The question has arisen whether if B undertakes to indemnify A, can B limit its liability to indemnify A as part of its general right to limit under the 1976 Convention? In other words does the language of indemnity itself exclude the right to limit, such that unless there is an express preservation of the right to limit, where B undertakes to indemnify he thereby contracts out of his right to limit? The question is academic in respect of the tug owner given the express reservation of the right to limit notwithstanding the indemnity, but could arise given the absence of reference to the charterer. It is also not uncommon for parties to "borrow" the knock-for-knock regime in "Towcon 2008" or some other BIMCO model but without copying all of the sub-paragraphs and thereby omitting the express preservation of the right to limit. The position in relation to contracting out of the right to limit was considered by the Privy Council in *Bahamas Oil Refining Company International Ltd v The Owners of the Cape Bari Tankschiffahrts GmbH & Co KG (The Cape Bari)* [2016] UKPC 20. That decision is discussed in detail in Chapter 12 below.

4.296 However, even without an express preservation (or reservation) of the right to limit, it is suggested that the mere agreement to indemnify in respect of loss which would be subject to the right to limit would not of itself oust the right to limit thereby leaving the promisor liable to indemnify in full, and to meet all liability irrespective of the limitation figure. First, given the fundamental nature of the right to limit and its availability as a matter of law, the English court is likely to require the intention of the parties to this effect to be demonstrated by clear words. While this may fall short of actually requiring parties to use an express exclusion of the right to limit in order to have that effect, given that the right is a basic and fundamental legal right, then the wording must have that clear effect. If it is capable of being construed subject to that right then it will be so construed. In other words, a *contra proferentem* type approach will be taken. This was also the approach taken by the respondents in the *Bahamas Oil Refining* case and the Privy Council was in favour of that approach Further, where parties to a maritime contract enter into a contract where limitation is or may be expected to be applicable, then the mere fact that they may grant indemnities to each other is not inconsistent with the right to limit. The parties grant indemnities against the background of a legally applicable Conventional framework of the right to limit, even in respect of liabilities and claims which are made. "Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise", in the words of Article 2(2) of the 1976 Limitation Convention. The travaux show that the intention was to provide that limitation would not be excluded simply because of the fact that the claim was founded on a contractual indemnity.

Clause 26: Himalaya clause

"26. Himalaya Clause

All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Agreement or by any applicable statute rule or regulation for the benefit of the Tugowner or Hirer shall also apply to and be for the benefit of:

(a) demise charterers, sub-contractors, operators, Master, officers and crew of the Tug or Tow and,
(b) all bodies corporate, parent of, subsidiary to, affiliated with or under the same management as either the Tugowner or Hirer, as well as all directors, officers, servants and agents of the same and
(c) all parties performing services within the scope of this Agreement for or on behalf of the Tug or Tugowner or Hirer as servants, agents and sub-contractors of such parties.

The Tugowner or Hirer shall be deemed to be acting as agent or trustee of and for the benefit of all such persons, entities and vessels set forth above but only for the limited purpose of contracting for the extension of such benefits to such persons, bodies and vessels."

4.297 The clause is a standard one and is unchanged from the previous version in clause 19, save that it has been broken down into sub-paragraphs and the language modernised "for the sake of clarity and ease of reading." It provides, first, that that all exemptions and defences contained in the "Towcon" contract are to apply to the benefit of certain identified persons or classes of person and, secondly, deems the tug owner and the hirer to be agents of and trustees for all persons who may be engaged by them to perform services for them within the scope of the towage agreement, so that the exemptions and protections of the towage agreement apply equally to those persons as if they were themselves parties to the towage agreement. Such clauses are commonly found in a wide range of standard form contracts.

4.298 The Contracts (Rights of Third Parties) Act 1999 has effected a significant reform of the privity of contract doctrine which confined the enforceability of and taking of rights under contracts to those who were party or privy to the contract in question. With that doctrine, the Himalaya clauses have grappled and various drafting techniques have been adopted to take advantage of agency and trusteeship exceptions to the doctrine (see below). The 1999 Act applies to all contracts made after 11 May 2000 (see section 10(2)) and will apply to towage and offshore contracts, since none of the relevant exceptions in section 6 will apply (the exception for contracts for the carriage of goods by sea is limited to contracts under bills of lading or analogous transport documents such as sea waybills and delivery orders: section 6(6)).

4.299 The scope and operation of the Act lies outside the scope of this work: as to this, see generally *Chitty on Contracts* (32nd edn, 2015), Vol. I, paras. 15–044 *et seq*. In outline, however, under the 1999 Act a third party has the right to enforce a contract term where either the contract expressly confers that right on an expressly identified third party or where the contract terms purport to confer a benefit on an expressly identified third party (unless the contract on its true construction shows that the parties did not intend to confer such a benefit): see section 1(1). The requirement of an "expressly identified third party" is defined in the following terms by section 1(3): "The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into." Given the terms of section 1 of the 1999 Act, it seems clear that clause 26 will allow the persons and classes of person, certainly falling within paras. (a) and (b) where the class is narrow and precise, and probably within para. (c) as well (see *Chitty on Contracts* (32nd edn, 2015), para. 15–046), to enforce and take advantage of the various exceptions and defences, including the exclusion of consequential loss in clause 25(c).

4.300 As to their efficacy and operation of Himalaya clauses at common law, see generally *Chitty on Contracts* (32nd edn, 2015), para. 15–050 *et seq*. and *The Eurymedon (New Zealand Shipping v Satterthwaite*) [1975] AC 154 and *Midland Silicones v Scruttons* [1962] AC 446. These cases lay down four requirements for the clause to be effective at the instance of a person seeking to rely upon the exception etc. in a contract to which he is not a named contracting party:

i Does the contract make it clear that the third party is intended to be protected by the limit of liability provision?
ii Does the contract make it clear that the contract party in addition to contracting on its own behalf is also contracting as agent for the third party?
iii Does the contract party have authority to contract for the third party?
iv Was there consideration for the particular promise on the part of the third party?

4.301 To the extent that it may still be relevant in certain common law jurisdictions who have adopted the same tests but do not have a statute corresponding to the 1999 Act, requirements (i) and (ii) are clearly satisfied by clause 26; requirement (iv) is usually satisfied by the third party performing some act (but cf. *The Rigoletto* [2000] 2 Lloyd's Rep 532). Requirement (iii) will depend on the facts in each case but any defect can usually be cured by simple ratification, to the extent

that ratification is properly available under ordinary principles of agency law. Following the decision of the Privy Council in *The Makhutai* [1996] AC 650, there was already considerable support for a move to a general relaxation of rules relating to third parties claiming the benefits of contracts made in part for their benefit (see eg *Barnett* [1998] IJOSL 178). A good example of this, in the towage context, is given by *The Borvigilant and the Romina G* [2003] 2 Lloyd's Rep 520 (CA), a case on the Himalaya clause in UK Standard Conditions (considered above in Chapter 3). In that case, Sir Anthony Clarke MR noted, relying on the speech of Lord Goff in *The Makhutai*, that the case law was averse to "a search for fine distinctions which would diminish the general applicability, in the light of established commercial practice, of the principle" (at para. 30, see also para. 31).

Clause 27: "war" and other risks and difficulties

4.302 "War and other risks" can either prevent the contract from being fulfilled at all or they can delay its performance or render performance more onerous and costly. The 2008 revision replaces a fairly basic "war" and allied difficulties clause with a much more detailed and elaborate provision described by BIMCO as "A new, comprehensive clause for war and other risks based on Voywar 2004 and the original clause of Towcon/Towhire (War and Other Difficulties)." It is submitted that the new clause is not an improvement on the previous form's "war" clause and, in some respects, is obscure, probably due to the attempt to marry the basic form of the standard charterparty war clauses designed for voyage and time charterparties to the old clause 20 of "Towcon." Interestingly, although the explanatory notes describe the clause as a combination of the Voywar clause and the old clause 20, there are very many points of common drafting between the new clause 27 and the Conwartime 1993 clause, as found in clause 18 of the Baltime 2001 time charterparty (as to which see generally Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 37.169 et seq. Given its length and detail, it is convenient to analyse the various components of the new clause 27 in turn.

Paragraph (a): the "defined terms"

"27. War and Other Risks

(a) For the purpose of this Clause, the words:

(i) 'War Risks' shall include any actual, threatened or reported war; act of war; civil war; hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy; acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever); by any person, body, terrorist or political group, or the Government of any State whatsoever, which, in the reasonable judgement of the Master and/or the Tugowners, may be dangerous or are likely to be or to become dangerous to the Tug, her Tow, crew or other persons on board the Tug or Tow.

(ii) 'Other Risks' shall include any actual, threatened or reported arrest or restraint of princes, rulers or people; insurrections; riots or civil commotions; disturbances; acts of God; epidemics; quarantine; labour troubles; labour obstructions; strikes; lock-outs; embargoes; seizure of the Tow under legal process or for any other cause outside the control of the Tugowner as a result of which it would be impossible or unsafe or commercially impracticable for the Tug or Tow or both to enter or attempt to enter or leave or attempt to leave the place of departure or any port or place of call or refuge or to reach or attempt to reach or enter the port or place of destination of the Tow and there deliver the Tow and leave again, all of which safely and without unreasonable delay, the Tug may leave the Tow or any part thereof at the place of departure or any other port or place where the Hirer may take repossession and this shall be deemed a due fulfilment by the Tugowner of this Agreement and any outstanding sums and all extra costs of delivery at such place and any storage costs incurred by the Tugowner shall thereupon become due and payable by the Hirer."

4.303 BIMCO has described the function of paragraph (a) as follows: "Sub-clause 27(a)(i) and (ii) defines the 'war risks' and 'other risks' for the purpose of the clause." However, paragraph (a)(ii)

goes further and confers rights upon the Tugowner in respect of other risks (as defined) which do not appear to be conferred in the same way for "war risks" (as defined).

4.304 Paragraph (a)(i) sets out a fairly common-form enumeration of the incidents of war and of other types of *force majeure* event as is found in standard form contracts. All of these have been the subject of considerable authority, especially in the context of charterparty and demurrage exceptions. The list, closely mirroring part A(ii) of the Conwartime clause and part A(ii) of the Voywar 2004 clause, reads:

> war; act of war; civil war; hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy; acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever).

4.305 For the cases on these general terms and the precise content of each, reference may be made to Cooke, *Voyage Charters* (4th edn, 2014), paras. 26.2–26.26, in particular as to war-like and similar events, and para. 44.1 *et seq*. on the Voywar 2004 clause; and to Coghlin, Baker, *Time Charters* (7th edn, 2014)), paras. 37.169–7.175 in relation to the Shelltime 4 charterparty war risk provisions.

4.306 An important aspect of the definition is that the event in question, whether actual, threatened or reported, is one which "in the reasonable judgement of the Master and/or the Tugowners, may be dangerous or are likely to be or to become dangerous to the Tug, her Tow, crew or other persons on board the Tug or Tow." The margin of appreciation afforded to the tug, (ie her master or her owners), while wide, is therefore expressly limited by an objective criterion of reasonableness, thereby requiring the tug to justify any invocation of a war risk by reference to objectively demonstrable facts and matters justifying the assessment of the situation as being one being potentially dangerous to the tug, tow or crew. In *The Product Star (No. 2)* [1993] 1 Lloyd's Rep 397 Leggatt LJ (delivering the judgment of the Court of Appeal) posed the test in this way:

> Where A and B contract with another to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably. That entails a proper consideration of the matter after making any necessary enquiries.

4.307 Paragraph (a)(ii) sets out a separate list of events and occurrences, corresponding more to typical *force majeure* events:

> arrest or restraint of princes, rulers or people; insurrections; riots or civil commotions; disturbances; acts of God; epidemics; quarantine; labour troubles; labour obstructions; strikes; lock-outs; embargoes; seizure of the Tow under legal process or for any other cause outside the control of the Tugowner.

4.308 As to these see generally the compendious treatment of such events in the context of laytime and demurrage in Schofield, *Laytime and Demurrage* (7th edn, 2016), para. (b) goes on to add to these familiar concepts the overall qualification that they should be matters "as a result of which it would be impossible or unsafe or commercially impracticable for the Tug or Tow or both to enter or attempt to enter or leave or attempt to leave the place of departure or any port or place of call or refuge or to reach or attempt to reach or enter the port or place of destination of the Tow and there deliver the Tow and leave again, all of which safely and without unreasonable delay." Unlike the war risk situation, there is no express margin of appreciation allowed to the tug and the events appear to be ones which must in fact render it impossible for the tug to perform the service; unsafe for it to do so (presumably being unsafety which could not be reasonably avoided) or "commercially impracticable", applying an objective test to the question. In addition, the service must be able to be done safely (a tautology given the earlier wording) and without unreasonable delay, bringing in a further objective enquiry.

4.309 Sub-paragraph (a)(ii) then abruptly changes tenor and, instead of defining a state of affairs to which the subsequent provisions are going to apply, confers a right on the tug owner in the case of the "other risks", but not the war risks, to leave the tow at an appropriate place and deem the contract fulfilled: "the Tug may leave the Tow or any part thereof at the place of departure or any other port or place where the Hirer may take repossession and this shall be deemed a due fulfilment by the Tugowner of this Agreement and any outstanding sums and all extra costs of delivery at such place and any storage costs incurred by the Tugowner shall thereupon become due and payable by the Hirer." If an event falling within this part of the clause (other risks) interferes such as to render it "impossible or unsafe or commercially impracticable" for either the tug or the tow "safely and without unreasonable delay" to leave the place of departure (or any port of call or of refuge) or to reach the place of destination such as to be able to deliver the tow and release the tug there, the towage contract can be abandoned with the tug leaving the tow at any place. It is provided that the contract is to be regarded as fulfilled upon and by this event such that the tug owner is thereby entitled to payment of all sums due under the contract.

4.310 This is a curious result and is likely to be, simply, bad or careless drafting. The old clause 20 combined both war risks and other "difficulties" in a composite list to which the same wording, just considered, was then attached, thereby applying to both. It would seem unlikely that the draftsmen of "Towcon 2008" intended the ability to leave the tow to apply in one but not the other case. However, the formatting of the new para. (a) subsumes the right to leave the tow only within sub-para. (ii), when presumably what was intended was that (a) it should be an omnibus wording applying to both sets of defined circumstances and (b) that the paragraph was not merely a set of definitions but, as with the old clause 20(a), an important substantive provision dealing with the right to abandon the towage at the place of departure or other place when the warlike or other event is such as to prevent, in advance, the contract from being fulfilled at all. It is submitted that this is how the provision falls to be read but is perhaps unfortunate that it does so somewhat less clearly than the former clause 20(a).

Paragraph (b): war and other risks affecting the passage

"(b) The Tug, unless prior written consent of the Tugowners has first been obtained, shall not be required to continue to or through, any port, place, area or zone (whether of land or sea), or any waterway or canal, where it appears that the Tug, her Tow, the crew or other persons on board the Tug or Tow, in the reasonable judgement of the Master and/or the Tugowners, may be, or are likely to be, exposed to War or Other Risks. Should the Tug be within any such place as aforesaid, which only becomes subject to War or Other Risks, or is likely to be or to become subject to War or Other Risks, after her entry into it, she shall be at liberty to leave such place or area."

4.311 Paragraph (b) provides that without the express consent from the tug owner, the vessel may not be ordered by the hirer to an area where, in the reasonable judgement of the tug master or tug owner, it may be exposed to war or other risks as defined in para. (a) of the clause. Should the tug already be in such an area which subsequently becomes or is likely to become exposed to such risks, then the tug has the liberty to leave it. The approach taken by the Court of Appeal in *The Product Star (No. 2)*, cited above will apply equally in the context of an assessment formed for the purposes of a decision on the part of the tug to refuse to comply with orders or to leave an affected area. See also *Republic of Spain v North of England SS Co* (1938) 61 L1 L Rep 44 *per* Lewis J at 57–58: the "discretion must not be exercised in an arbitrary and unreasonable manner and in this case there was really no exercise of discretion at all as the matter was not considered or no full or sufficient enquiry was made." Being a reasonable assessment, it is one which must also be formed within a reasonable time period: see *Kawasaki Kisen Kaisha v Belships* (1939) 63 L1 L Rep 175 and *The Northern Pioneer* [2003] 1 Lloyd's Rep 212.

4.312 To give a practical example of a situation which would probably not permit a refusal on the part of the tug to proceed: a tug is towing a hull from the eastern Mediterranean to India for

breaking; the tow is a dead ship and is unmanned save for occasional visits from the tug's crew to check the connection. The convoy's course lies through the Gulf of Aden and off Somalia. The tugmaster and crew refuse to sail through the Suez Canal after a number of incidents of piracy upon merchant vessels in rapid succession. Proper research shows that there have been virtually no attacks on towage convoys and that relatively valueless inanimate objects have not been the subject of any successful demand for ransom. It also demonstrates that the very powerful fire-fighting capabilities of ocean-going tugs (such as the tug in question) have permitted tugs to keep pirates well at bay in a way that ordinary ship's hoses do not and that no tug has yet been successfully boarded. In such a case, the refusal to sail would be unreasonable: in Leggatt LJ's words in *The Product Star* "a proper consideration of the matter after making any necessary enquiries" would not suggest that there was a sufficient risk, objectively viewed. In the example just given, the Tugowner overruled its master and withdrew the refusal to sail, the tug sailed (safely) and extra costs in terms of bonuses paid to the crew fell to be met by the hirer. As the editors of Cooke*, Voyage Charters* (4th edn, 2014) observe: "the impersonal formulation [of the wording in the war clause] is probably intended to reflect that there must be a high degree of objectivity about the appearance [of the risk], so that a mere attack of 'cold feet' will not suffice": (para. 26.30, citing *The Fontevivo* [1975] 1 Lloyd's Rep 339)). Plainly at an early stage where the facts are uncertain or the likelihoods are difficult to judge, it would be more difficult to fault a master's appraisal of the situation as presenting a risk of exposure to "War or Other Risks": thus shortly after the statement by Colonel Gaddafi in consequence of allied airstrikes that "marine . . . targets, whether military or civilian, will be exposed to real danger in the Mediterranean, since the area of the Mediterranean and North Africa has become a battleground because of this blatant military aggression" the appreciation of risk might be reasonably different than that which fell to be formed several months later when no such attacks on merchant vessels (or towage convoys) passing between Malta and Libya have taken place.

Paragraphs (c)–(d): additional insurance for the tug and wages for crews

"(c) (i) The Tugowners may effect war risks insurance in respect of the Hull and Machinery of the Tug and their other interests (including, but not limited to, loss of earnings and detention, the crew and their Protection and Indemnity Risks), and the premiums and/ or calls therefor shall be for their account.

(ii) If the Underwriters of such insurance should require payment of additional premiums and/or calls because, pursuant to the Hirer's orders, the Tug is within, or is due to enter and remain within, or pass through any area or areas which are specified by such Underwriters as being subject to additional premiums because of War Risks, then the actual additional premiums and/or calls paid shall be reimbursed by the Hirers to the Tugowners at the same time as the next payment of the Lump Sum is due, or upon delivery of the tow, whichever occurs first.

(d) If the Tugowners become liable under the terms of employment to pay to the crew of the Tug, or any riding crew of the Tow, any War Risk related bonus or additional wages in respect of sailing into a War Risk area, then the actual War Risk related bonus or additional wages paid shall be reimbursed to the Tugowners by the Hirers at the same time as the next payment of hire is due, or upon delivery of the Tow, whichever occurs first."

4.313 The common consequence of the operation of war or other *force majeure* type circumstances is not the wholesale prevention of the service but it being possible, under different circumstances and at an increased cost. For a tug owner, as with any vessel owner, there will be particular costs in terms of additional hull and P&I premiums for war risks and increased wage costs with special "war" or equivalent bonuses or special payments payable to the crew (and in the case of a towage, possibly also the riding crew). Under "Towcon 2008" specific provision is made as to the responsibility of the hirer for all such additional costs, whereas the original "Towcon" was silent in this respect.

Paragraph (e): the liberty to deviate

"(e) The Tug shall have liberty:–

(i) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery, or in any other way whatsoever, which are given by the Government of the Nation under whose flag the Tug sails, or other Government to whose laws the Tugowners are subject, or any other Government, body or group whatsoever acting with the power to compel compliance with their orders or directions;

(ii) to comply with the order, directions or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance;

(iii) to comply with the terms of any resolution of the Security Council of the United Nations, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Tugowners are subject, and to obey the orders and directions of those who are charged with their enforcement;

(iv) to call at any other port to change the crew or any part thereof or other persons on board the Tug or Tow when there is reason to believe that they may be subject to internment, imprisonment or other sanctions."

4.314 Clause 27(e) takes up the former deviation provision covering deviation in accordance with governmental orders previously dealt with by the old clause 17(c) of the former version.

Paragraph (f): blocking and trapping

"(f) If the performance of this Agreement or the voyage to the place of departure would in the ordinary course of events require the Tug and/or Tow to pass through or near to an area where after this Agreement is made there is or there appears to be danger of such area being blocked or passage through being restricted or made hazardous by War or Other Risks then:

(i) The Tug shall not be required to pass through any blockade, whether such blockade be imposed on all vessels, or is imposed selectively in any way whatsoever against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever, or to proceed to an area where she shall be subject, or is likely to be subject to search and/or confiscation.

(ii) If the Tug has not entered such area en route to the place of departure, or having entered has become trapped therein, the Hirer shall pay a Delay Payment at the rate specified in Box 30 for every day of the resulting delay. Provided that if the delays under this Clause amount to more than 14 days in aggregate either party hereto shall be entitled to terminate this Agreement by giving notice in which event, save for liabilities already accrued, neither party shall be under any further liability to the other but the Tugowner shall not be bound to repay to the Hirer any payments already made and all amounts due shall remain payable.

(iii) If the Tug and Tow whilst en route to the place of destination have not entered such area during the course of the towage or other service the Hirer shall pay Delay Payment at the rate indicated in Box 30 for every day by which the towage is prolonged by reason of waiting for such area to become clear and/or safe and/or by reason of proceeding by a longer route to avoid or pass such area in safety.

(iv) If the Tug and Tow whilst en route to the place of destination have become trapped in such area during the course of the towage or other service, the Hirer shall pay a Delay Payment at the rate specified in Box 30 for every day of the resulting delay."

4.315 The mutability of human fortune may mean that circumstances may arise after the contract has been concluded which result in the fact that the route to be taken by the towage convoy "in the ordinary course of events" may "pass through or near to an area" of real or reasonably apparent danger to the tug and/or tow or in which they may be exposed to blockade or trapping due to war-like and similar events. It is to this eventuality that para. (f) applies. The events covered by para. (f) extend to both the war-like and other risks as defined in para. (a)(i) and (a)(ii); cf. the old clause 20(b) of the previous version.

4.316 The explanatory notes are particularly non-committal in relation to the intended scope and effect of this paragraph, stating starkly, if not tritely, that: "Subclause (f) deals with the rights and obligations of the parties in blocking and trapping situations", without explaining what it was

intended such situations would cover. In the ordinary English law and practice of marine insurance, "blocking and trapping" are particular concepts: blocking referring to a blockade (being the use of force or obstacle to cut off access to and egress from a particular place irrespective of the ramifications of definitions of "blockade" in international law: see *The Helen* (1865) 1 A & E 1 at 4 *per* Dr Lushington; and *The Marilu* [1956] 2 Lloyd's Rep 97 *per* Sellers J at 107; cf. *Republic of Spain v North of England SS* (1938) 61 Ll L Rep 44; see generally, Cooke, *Voyage Charters* (4th edn, 2014) at para. 26.3 *et seq*.).

4.317 Paragraph (f) in its introductory section suggests that the term "blocked" is used in a non-technical sense and as referring to any obstacle or impediment to the progress of the tug and her tow due to any restriction or hazard arising from the operation of the war or other risks as defined in sub-para. (a), viz.: "being blocked or passage through being restricted or made hazardous by the War or Other Risks." Unfortunately, the sub-paragraphs under para. (f) then speak of "blockade" in the formal sense, *stricti iuris*, as employed in *Republic of Spain v North of England SS* (1938) 61 Ll L Rep 44, eg by the words "any blockade, whether such blockade be imposed on all vessels, or is imposed selectively in any way whatsoever against vessels of certain flags or ownership [etc.]." It is arguable that the subsequent use of the term "blockade" is a reference back to the wide use of "blocking" in the opening words of para. (f); this would make better commercial sense. But the drafting is not of the best and the clause would benefit from a fresh start, founded on a precise sense of what it was meant to achieve by the clause, rather than a cutting and pasting of different provisions from different sources in a rather "*faute de mieux*" manner.

4.318 Whatever the correct reading of "blockade", once the events within para. (f) are in play, then the clause deals separately with the various stages in the towage operation at which the supervening danger or hazard may arise:

i If the tug is delayed or trapped on her way to pick up the tow, the tow shall pay a delay payment at the rate stated in Box 30 of Part I. Delay in excess of 14 days gives to both parties a right to terminate the contract: para. (f)(ii).

ii If tug and tow are delayed en route to destination either by waiting for the danger or hazard to subside or by taking a longer route to avoid the same, then delay payments are payable by the tow for the extra period. No right of termination is provided for in such a case: para. (f)(iii).

iii If tug and tow are trapped whilst en route to destination, then delay payments are again payable. Both parties have the right to terminate the contract in the event that the period of delay due to trapping exceeds 14 days: para. (f)(iv).

Paragraphs (g) and (h): consequential provisions

"(g) If in accordance with their rights under the foregoing provisions of this Clause, the Tugowners refuse to proceed from the place of departure or to the place of destination, or any one or more of them, they shall immediately notify the Hirers requesting them to nominate a place for redelivery of the Tow. Failing such nomination by the Hirers within 48 hours of the receipt of such notice and request, the Tugowners may redeliver the Tow at any place where the Hirer can take repossession of the Tow.
(h) If in compliance with any of the provisions of this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Agreement."

4.319 These provisions are largely self-explanatory: under sub-para. (g) if the tug owner should exercise its rights under clause 27 and refuse to proceed from the place of departure or to the place of destination it has immediately to notify this to the hirer and ask it to nominate a place for redelivery of the tow. The hirer's failure to nominate such a place within 48 hours from the notice allows the tug owner to redeliver the tow at any place where it is possible for the hirer to take possession of the tow; under sub-para. (h), compliance with or invocation of clause 27 in any instance is to be regarded as due contractual performance rather than as a deviation from the terms of the contract.

Clause 28: lien

"28. Lien

Without prejudice to any other rights which he may have, whether *in rem* or *in personam*, the Tugowner, by himself or his servants or agents or otherwise shall be entitled to exercise a possessory lien upon the Tow in respect of any sum howsoever or whatsoever due to the Tugowner under this Agreement and shall for the purpose of exercising such possessory lien be entitled to take and/or keep possession of the Tow; provided always that the Hirer shall pay to the Tugowner by himself or his servants or agents or otherwise all reasonable costs and expenses and all costs of recovering same, including legal fees, howsoever or whatsoever incurred by or on behalf of the Tugowner by himself or his servants or agents or otherwise in exercising or attempting or preparing to exercise such lien and the Tugowner by himself or his servants or agents or otherwise shall be entitled to receive from the Hirer the Tug's Delay Payment at the rate specified in Box 30 for any reasonable delay to the Tug resulting therefrom."

4.320 This clause gives the tug a possessory lien over the tow in respect of all sums due to the tug under the towage contract (see *Lukoil Kaliningradmorneft plc v Tata Ltd and Global Marine Inc*. [1999] 2 Lloyd's Rep 129). This case also discussed the situations in which the tug owner can exercise the lien over the owner of the tow where that owner is not party to the contract of towage as "hirer." See the discussion of this case under clause 29 below and in the context of towage as bailment in Chapter 1 above. In addition to having the right to retain possession of the tow, the tug has the right to re-take possession. The clause has been amended in two respects in the 2008 revision. First, references have been included to "by himself or his servants or agents or otherwise" so as widen the definition of the persons who are to be paid or who incur the sums the subject of the lien provisions; BIMCO explains: "The clause has been amended to take into account the fact that it is sometimes not the tugowner and hirers themselves that make and receive payment for the various costs and expenses incurred in connection with the exercise of the lien." Secondly, a specific reference to legal costs has been included as part of the recoverable costs of the lien because "in line with other recent lien clauses an addition has been made to make sure that the costs and expenses covers the same in both Europe and USA. In USA legal fees are not included in the definition of costs, thereby this addition to the clause.

In the event of the tug's exercise of a lien, clause 28 provides further that:

i the tow must bear all expenses of exercising the lien; and
ii the tow must pay delay payments at the Box 30 rate for any delay occasioned to the tug by or as a result of exercising the lien.

Clause 29: warranty of authority

"29. Warranty of Authority

If at the time of making this Agreement or providing any service under this Agreement other than towing at the request, express or implied, of the Hirer, the Hirer is not the owner of the Tow referred to in Box 4, the Hirer expressly represents that he is authorised to make and does make this Agreement for and on behalf of the owner of the said Tow and agrees that both the Hirer and the owner of the Tow are bound jointly and severally by the provisions of this Agreement."

4.321 This clause is similar in its purported effect to clause 2 of the UK Standard Conditions (see Chapter 3 above) and has been amended in the 2008 revision by the deletion of wording referring to the owner of the tow being bound by "these conditions" and their replacement with the words "the provisions of this Agreement." This addresses an argument that the owner of the tow was bound only by exceptions ("conditions") but not by positive obligations which, surprisingly found favour in *Targe Towing Ltd v Marine Blast Ltd (The Von Rocks)* [2004] 1 Lloyd's Rep 721 at first instance (HH Judge Hallgarten QC), but which was firmly rejected in the Court of Appeal: see paras. 29–30 *per* Mance LJ. The new version makes it clear (if there was ever

any doubt about it) that where the hirer acts on behalf of the owner of the tow in contracting, the owner of the tow is in the same position in all respects regarding the contract as the hirer *qua* party.

4.322 As with clause 2 of the UK Standard Conditions, the clause can give rise to unfounded expectations on the part of the tug owner that the clause by itself and without more operates to bind the owner of the tow to the contract where the hirer named in the contract is not the owner of the tow, expectations which may well be fanned by the bald (and unfortunately – in English law – wholly inaccurate) statement in the explanatory notes that "Under this clause the hirer named in Part I of the forms promises that it has actual authority to bind the owner of the tow to Towcon in cases where the parties are not the same entity. Both the hirer and the owner of the tow will be bound jointly and severally to the agreement." It is therefore important to consider what the purpose and stated effect of the clause is. It is a promise by the hirer that, if he is not the owner of the tow, then prior to contracting with the tug owner he has obtained the express authority of the owner of the tow to enter into the contact on his behalf too and that he is making the contract on his own behalf and as authorised agent for the owner of the tow. If he does not have that authority and is not agent for the tow, then the promise is broken and the hirer is liable in damages for breach of his warranty of authority. The tug owner's sole remedy is against the hirer for breach by the hirer of the hirer's warranty that he had such authority.

4.323 However, it is often the case that the tug owner wishes to argue that the clause has the effect of binding the owner of the tow to the contract (for an unusual case involving the converse, where the hirer sought to argue against the tug owner that the owner of the tow was bound; see *Targe Towing Ltd v Marine Blast Ltd (The Von Rocks)* [2004] 1 Lloyd's Rep 721, considered below). But as a matter of ordinary contract and agency law, in this typical case a representation by a person (here the hirer) that he is authorised by another (here the owner of the tow) by itself confers no authority on that person nor binds the purported putative principal (the owner of the tow) (see *Armagas Ltd v Mundogas SA* [1986] 1 AC 717 (HL)). Therefore, unless the tug owner is able to establish:

a actual authority conferred on the hirer by the owner of the tow, or
b ostensible authority with which the hirer has been clothed by the owner of the tow,

the only party to the contract will be the hirer, irrespective of the terms of clause 29. To establish (b) requires evidence of some representation by statement or conduct by the owner of the tow by which the hirer was held out to the tug owner as the tow's agent. Clause 29 is simply a representation by the hirer himself, not by the owner of the tow, and is insufficient (see *Armagas*).

4.324 In *Lukoil Kaliningradmorneft plc v Tata Ltd and Global Marine Inc*. [1999] 1 Lloyd's Rep 367, Toulson J had to consider a contract on the "Towcon" form for the towage in tandem of two vessels from Canada to India. The contract was made between Lukoil as tug owner and Global as hirer. Tata was named as the owner of the two vessels. The first instalment of the lump sum price was paid but the others were not. Lukoil purported to exercise the "Towcon" clause 21 possessory lien over the tows when they were off Walvis Bay, Namibia. It was argued by Lukoil that Global had actual authority to contract for Tata, alternatively ostensible authority. Toulson J held that there was actual authority but, alternatively, there was also ostensible authority. He relied upon Tata's conduct as follows at p. 373, col. 2:

> Mr. Bukhonin [for Lukoil] believed that Global was acting on Tata's behalf. He knew that Tata owned the vessels which it had bought . . . Global was not a towage company. If Global was arranging for the towage of the vessels with Tata's permission it was natural to suppose that Global was doing so on Tata's behalf. Tata did not impose any restriction on Global letting those with whom it dealt know that Tata was the owner of the vessels and, by allowing Global to arrange for their towage by a stowage [sic] company it created or allowed a situation in which it was natural for the towage company to suppose that Global was acting on Tata's behalf.

4.325 This robust approach to a "holding out" sufficient to create ostensible authority transgressed the requirement for an unequivocal representation by the owner of the tow (Tata) as putative principal to be made to Lukoil that Global had authority to contract with Lukoil on Tata's behalf. In the Court of Appeal at [1999] 2 Lloyd's Rep 129, it was argued in support of Toulson J's approach that where an owner of a tow allowed a party to contract for towage on a well-known form such as Towcon which contained a clause such as clause 29, this was a sufficient representation by the owner of the tow. The Court of Appeal rejected that argument and Toulson J's finding of ostensible authority at p. 138 (although it dismissed Tata's appeal on the grounds that there was actual authority):

> [it was] submitted that Tata had made a representation by conduct by allowing Global to make arrangements for the towage of their vessels in circumstances where the contract envisaged was one in which the owner became party to the contract of towage. I can see no basis upon which it can be said that any such representation was made. The unchallenged evidence was that Tata knew nothing about the Towcon form.

Sed quaere if Tata had known of that form and of its clause 29 that it was to be used by Global and that it represented that it knew that Global would contract with Lukoil on those terms.

4.326 *Lukoil v Tata* is an important decision in another respect, considered by Toulson J but which did not arise in the Court of Appeal. It was Lukoil's case that, even if Global was not clothed with actual or ostensible authority, Lukoil was still entitled to exercise the "Towcon" clause 21 possessory lien (now clause 28 of "Towcon 2008") against Tata as owner of the tow because:

a there was therefore contract of towage between Tata and Global and another one between Global and Lukoil;
b the contract of towage between Tata and Global was a contract of bailment and that between Global and Lukoil a contract of sub-bailment; and
c Tata's rights against Lukoil as its sub-bailee were subject to the terms of the sub-bailment, Tata being properly regarded as having consented to those terms (see the well-known cases of *Tappenden v Artus* [1964] 2 QB 185; *Morris v C.W. Martin & Sons* [1966] 1 QB 716; and *The Pioneer Container* [1994] 2 AC 324).

4.327 Toulson J accepted that there was a bailment of the tandem tow to Global and a sub-or quasi-bailment of that to Lukoil or something very akin to it (this part of the decision is considered above in Chapter 1). He held that as it was standard practice (on the evidence before him at least) for international towage agreements to contain lien clauses in favour of the tug owner and, as Tata agreed to Global entering into a towage contract, Tata was to be taken as having agreed to Global agreeing to such a usual lien or as having held Global out as having ostensible authority so to agree (see [1999] 1 Lloyd's Rep 367 at p. 375). While this aspect was not considered by the Court of Appeal, it seems unlikely to be correct on the particular facts given Tata's complete ignorance of "Towcon" terms; compare, however, the position if Tata had been aware. While this approach, if correct, will not bind the owner of the tow necessarily to all terms of the contract, it offers a further useful avenue of legal argument for exploration by a tug owner who seeks relief against the owner of the tow rather than a (penniless) hirer.

4.328 The effect of the "Towcon" warranty of authority provision, and possible ways around it, were issues debated before the Court of Appeal in *Targe Towing Ltd v Marine Blast Ltd (The Von Rocks)* [2004] 1 Lloyd's Rep 721. In that case the hirer, Marine Blast, contracted on "Towcon" terms with Targe for the towage of a dredger *Von Rocks*, owned by Noas. The tow was lost and Noas sued Targe in Sweden where the Swedish court rejected Targe's argument, relying on the hirers' warranty of authority clause, that Noas was party to the contract and bound by the knock-for-knock provision to bear the loss of the tow itself; it held that Noas was not a party and could

recover in delict against Targe. Targe then sued Marine Blast for an indemnity under the knock-for-knock provision on the basis that "Loss or damage of whatsoever nature suffered by the hirer or by third parties in consequence of the loss or damage" to the tow was for the hirer's account and that Targe's liability to Noas was a liability to a third party arising out of the loss of the tow. Marine Blast contended that Noas was a party and therefore Targe had no right to an indemnity. The Court of Appeal held that the burden of proof lay upon the party contending that an apparent third party was party to the "Towcon": "the Judge was in my view right to treat Marine Blast as carrying the onus of proving that Noas was party to the towage contract. The fact that Targe is seeking an indemnity on the ground that Noas is a third party does not alter this. On the face of it Noas is a third party, and it is for Marine Blast to establish some authority or ratification": *per* Mance LJ at para. 20.

4.329 Reliance was placed in that case on the decision in *Lukoil v Tata* by the hirer who contended (tentatively, given that it had not been argued by it below) that Noas was to be regarded as bailing the dredger to Marine Blast for the purposes of the tow and Marine Blast then sub-bailed it to Targe under the towage contract; alternatively that even if one were to discard the suggested bailment for towage purposes by Noas to Marine Blast, it might be possible to treat the circumstances as involving a direct, non-contractual, bailment, by Noas to Targe, in which case also the towage contract terms might perhaps limit Targe's responsibility as direct bailees: see *per* Lord Goff in *The Pioneer Container* at pp. 339H–340A and *per* Lord Hobhouse in *The Starsin* [2003] UKHL 12; [2004] 1 Lloyd's Rep 571, at para. 136. The Court of Appeal did not decide the point, as it was not before it, but did not dismiss the possibility of a bailment or sub-bailment on terms analogy although the Court of Appeal did not consider that it would assist Marine Blast in seeking to show that it acted as agent for with authority from Noas; see *per* Mance LJ at para. 28:

> Be that as it may, it is sufficient for the present to concentrate on the distinction between consent to a sub-bailment (or to a simple non-contractual bailment) on terms and consent to the making of a contract by which the original bailor is bound. The two are conceptually different. Consent to a sub-bailment (or to a non-contractual bailment) is by definition different from consent to the creation of a direct contractual relationship between the bailor and sub-bailee. Furthermore, for a bailor to be bound by terms in a sub-bailment (or in a contract to which he is not party), the bailor must have consented to such terms. That does not mean that he must know of them in detail, but they must be of a nature such that he impliedly consents to them. Even if they appear in a contract of sub-bailment, they may be so unusual or so unreasonable that they could not reasonably be understood to fall within the consent granted: *The Pioneer Container*, page 346D *per* Lord Goff. There is no authority suggesting that consent to a sub-bailment can confer authority to act as agent if the sub-bailee so stipulates, and nothing to make this remotely usual. Indeed, the rationale of the doctrine of bailment on terms is that the bailor may be bound by conditions regulating liability in a sub-bailment, without becoming party to any contract with the sub-bailee.

Clauses 30 and 31: general provisions and time bar

"30. General

If any one or more of the terms, conditions or provisions in this Agreement or any part thereof shall be held to be invalid, void or of no effect for any reason whatsoever, the same shall not affect the validity of the remaining terms, conditions or provisions which shall remain and subsist in full force and effect.

For the purpose of this Agreement unless the context otherwise requires the singular shall include the plural and vice versa."

"31. Time for Suit

Save for the indemnity provisions under Clause 25 (Liability and Indemnity) of this Agreement, any claim which may arise out of or in connection with this Agreement or of any towage or other service to be performed hereunder shall be notified within 6 months of delivery of the Tow or of the termination of the

towage or other service for any reason whatever, and any suit shall be brought within one year of the time when the cause of action first arose. If either of these conditions is not complied with the claim and all rights whatsoever and howsoever shall be absolutely barred and extinguished.

Any extension of time granted by the Tugowner to the Hirer or any indulgence shown relating to the time limits set out in this Agreement shall not be a waiver of the Tugowner's right under this Agreement to act upon the Hirer's failure to comply with the time limits."

4.330 Clause 30 contains the routine "interpretation" and "invalidity" boilerplate provisions found in almost all standard form contracts.

4.331 Clause 31 is a time-bar provision which lays down a time period for the bringing of all claims, other than claims for indemnity under clause 25. It applies to any claim "arising out of or in connection" with the agreement on the towage services; these words are very wide and are apt to include claims even as to the existence or nonexistence of the contract (see the similar wording of arbitration clauses considered in *Mustill and Boyd on Commercial Arbitration* (2nd edn, 2001), pp. 117–121; although the black-letter approach to construction of such phrases in the context of the width of an agreement to submit disputes has been comprehensively repudiated by the House of Lords in *Fiona Trust v Privalov* [2007] 2 Lloyd's Rep 267, the fact remains that the wording here adopted is of the very widest on any view). Any claim falling within clause 24 must satisfy a double set of hurdles:

i the claimant must be notified to the other party within six months of the delivery of the tow or the date of termination of the service; and
ii suit must then be brought in respect of the claim within one year of the cause of action having arisen.

4.332 These two time periods therefore do not necessarily start from the same date and most commonly will not do so. To take an example: under a towage contract, the towage service takes six months from commencement of the service to delivery of the tow; the tow has a claim for faulty towing gear which, it alleges, has caused loss and expense at the end of the third month of the service. Notice must be given within six months of delivery but suit must be brought within three months thereafter (ie within 12 months of the cause of action having arisen at the end of the third month of the service). Great care must be taken to have both limbs of the clause 31 requirements in mind as soon as a potential claim situation arises.

4.333 The exception by clause 31 made in respect of "the indemnity provisions under clause 25 of this Agreement" reflects the difficulties which are inherent in the date when the cause of action arises for a claim by way of indemnity, *a fortiori* where the indemnity claimed is in respect of a liability to a third party, where the timing of the third party's claim to recover that liability is outside the control of the party to the "Towcon." The ordinary position in relation to a claim by way of indemnity is that the cause of action arises only when the loss or expense in respect of which an indemnity is to be claimed has been incurred. Where that loss consists of a liability to a third party, the loss will not be incurred until it has been ascertained by a judgment on the liability or by a settlement or compromise of the liability (*The Caroline P* [1984] 2 Lloyd's Rep 440). Under clause 25, the indemnity is an express one in respect of "any liability adjudged or claims reasonably compromised" (see eg clause 25(a)(i) and (ii)). This reflects the common law rule. Clause 31 therefore sensibly disposes of both the notice and the suit requirements for a claim for indemnity under clause 25.

Clause 32: compliance with the ISPS and the United States MTSA legislation

"32. BIMCO ISPS/MTSA Clause 2005

(a) (i) The Tugowner shall comply with the requirements of the International Code for the Security of Ships and of Port Facilities and the relevant amendments to Chapter XI of SOLAS (ISPS Code) relating to the Tug and "the Company" (as defined by the ISPS Code). If trading to or from the

United States or passing through United States waters, the Tugowner shall also comply with the requirements of the US Maritime Transportation Security Act 2002 (MTSA) relating to the Vessel and the "Owner" (as defined by the MTSA).

(ii) Upon request the Tugowner shall provide the Hirer with a copy of the relevant International Ship Security Certificate (or the Interim International Ship Security Certificate) and the full style contact details of the Company Security Officer (CSO).

(iii) Loss, damages, expense or delay (excluding consequential loss, damages, expense or delay) caused by failure on the part of the Tugowner or "the Company"/"Owner" to comply with the requirements of the ISPS Code/MTSA or this Clause shall be for the Tugowner's account, except as otherwise provided in this Agreement.

(b) (i) The Hirer shall provide the Tugowner and the Tugmaster with their full style contact details and, upon request, any other information the Tugowner requires to comply with the ISPS Code/MTSA.

(ii) Loss, damages or expense (excluding consequential loss, damages or expense) caused by failure on the part of the Hirer to comply with this Clause shall be for the Hirer's account, except as otherwise provided in this Agreement, and any delay caused by such failure shall be paid at the delay payment rate stated in Box 30.

(c) Provided that the delay is not caused by the Tugowner's failure to comply with their obligations under the ISPS Code/MTSA, the following shall apply:

(i) Notwithstanding anything to the contrary provided in this Agreement, the Vessel shall be entitled to tender Notice of Readiness even if not cleared due to applicable security regulations or measures imposed by a port facility or any relevant authority under the ISPS Code/MTSA.

(ii) Any delay resulting from measures imposed by a port facility or by any relevant authority under the ISPS Code/MTSA shall be paid at the delay payment rate stated in Box 30, unless such measures result solely from the negligence of the Tugowner, Tugmaster or crew or the previous trading of the Tug, the nationality of the crew or the identity of the Tugowner's managers.

(d) Notwithstanding anything to the contrary provided in this Agreement, any costs or expenses whatsoever solely arising out of or related to security regulations or measures required by the port facility or any relevant authority in accordance with the ISPS Code/MTSA including, but not limited to, security guards, launch services, vessel escorts, security fees or taxes and inspections shall be for the Hirer's account, unless such costs or expenses result solely from the negligence of the Tugowner, Tugmaster or crew or the previous trading of the Tug, the nationality of the crew or the identity of the Tugowner's managers. All measures required by the Tugowner to comply with the Ship Security Plan shall be for the Tugowner's account.

(e) If either party makes any payment which is for the other party's account according to this Clause, the other party shall indemnify the paying party."

4.334 The maritime world has changed considerably since the original version of the "Towcon" form was drawn (and it continues to do). International terrorism and the potential use of vessels engaged in international sea carriage or other maritime operations, and cargoes, as a delivery platform for engines of destruction or as a means of trafficking the *matériel* for terrorist activity has led to an increasingly stringent regard to ship and port safety.

4.335 The International Ship and Port Facility Security Code (ISPS Code) is a comprehensive set of measures to enhance the security of ships and port facilities, developed in response to the perceived threats to ships and port facilities in the wake of the 9/11 attacks in the United States. The ISPS Code is implemented through chapter XI-2 Special measures to enhance maritime security in the International Convention for the Safety of Life at Sea (SOLAS), 1974. The Code has two parts, one mandatory and one recommendatory. In essence, the Code takes the approach that ensuring the security of ships and port facilities is a risk management activity and that, to determine what security measures are appropriate, an assessment of the risks must be made in each particular case. The IMO has described the purpose of the Code as being "to provide a standardised, consistent framework for evaluating risk, enabling Governments to offset changes in threat with changes in vulnerability for ships and port facilities through determination of appropriate security levels and corresponding security measures." The US MTSA Act is an

additional layer of security measures to the ISPS Code and is developed specifically to protect US ports and waterways from terrorist attacks. Both impose a series of complex obligations, failure to comply with which is the subject of sanctions which can result in detention of the vessel or crew members, fines, and significant delay and financial loss.

4.336 BIMCO responded to the need to arrive at a clear and balanced allocation of the parties' (ie the vessel's owners' and charterers') respective obligations, responsibilities and liabilities under both the Code and the MTSA by drafting a stand-alone clause for use in all forms of charterparty. Clause 32 of "Towcon 2008" represents a version of the BIMCO's standard and widely used 2005 time charterparty ISPS/MTSA Clause (adopted as such in "Supplytime 2017"), which provides for compliance with the ISPS Code and the US MTSA Act, albeit modified for towage contracts. The clause is largely self-explanatory.

4.337 Paragraph (a)(i) provides for the tugowner's responsibility to comply with the requirements of the ISPS Code and, if operating within US waters, with the MTSA Act. To this end, para. (a)(ii) entitles the hirer to obtain from the tug owner evidence of compliance with the Code in the form of the requisite ISSC (viz. the International Ship Security Certificate or the Interim International Ship Security Certificate as applicable).

4.338 Given that it is the tug owner's responsibility to comply with the ISPS Code and the MTSA, para. (a)(iii) provides that except as otherwise provided in the contract, any losses, apart from consequential losses, caused by the tug owner's failure to comply with the Code or the Act will be for the tug owner's account. The wording in relation to excluded losses is much simpler than in clause 25(c). Based on the cases cited above in relation to the general approach of the court to such clauses decided up to and including Court of Appeal level (and notwithstanding the current movement against the classic *Croudace v Cawoods* interpretation), the exclusion for "consequential loss, damages, expense or delay" will "protect the [tug owner] from claims [by the hirer] for special damages which would be recoverable only on proof of special circumstances and for damages contributed to by some supervening cause" (paraphrasing Atkinson J in *Saint Line Ltd v Richardsons Westgarth & Co* [1940] 2 KB 99 at 104). "On a proper reading of that clause an obligation [is] being placed on the [tug owner] to pay such damages as flowed naturally and directly from any [failure to comply with the ISPS Code or the MTSA] with the limitation being imposed in relation to some other type of loss which did not flow so directly for example, damage which might flow from special circumstances and come within the second limb in *Hadley v Baxendale*" (paraphrasing Waller LJ in *British Sugar plc v NEI Power Projects Ltd* (1997) 87 BLR 42 at 51B). See generally the discussion above in relation to clause 25(c).

4.339 Certain of the requirements imposed by the Code and the Act on the tug owner are requirements which the tug owner can only meet with the cooperation of the hirer, for example, providing the hirer's full style contact information. The hirer is accordingly made responsible for this information and is made liable to the tug owner for any failure in this regard. As with para. (a)(iii), "consequential losses" (etc.) are excluded.

4.340 Delay is a typical problem in cases involving ISPS and MTSA compliance. Paragraph (c) therefore seeks to allocate the risks of delay due to compliance with the Code or Act in BIMCO's words "in a fair and balanced way which reflects current commercial practice."

4.341 Given that the incurring of expenses and costs in relation to ISPS and MTSA compliance usually results from the hirer's engagement of the tug and the nature of the service, they are akin to the consequences of a vessel's "employment" in charterparty terms.

4.342 Paragraph (d) unsurprisingly provides that all costs and expenses arising from compliance with the Code or Act are to be for the hirer's account unless they result from the negligence of the tug owners, tug master or crew or from tug or tug owner related matters, viz. the previous trading history of the tug, the nationality of the crew or the identity of managers employed by the

tug owner. BIMCO gives as an example of costs and expenses for hirer's account "the tugowner's expenses for compulsory security guards at the gangway in US ports.

4.343 Lastly, para. (e) contains a provision which provides that any payments made by one party which are, under clause 32, to be borne by the other party are recoverable from that party who is liable to make full indemnity for any sums so borne.

Clauses 33–35: dispute resolution; security for claims and contractual notices

Clause 33: (1): the dispute resolution provisions in paragraphs (a)–(c) and (e)

"(a) *This Agreement shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Agreement shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause. The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced. The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

(b) *This Agreement shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Agreement shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgment may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.

(c) *This Agreement shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Agreement shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(d) If Box 40 is not appropriately filled in, sub-clause (a) of this Clause shall apply. Sub-clause

(e) shall apply in all cases.

*Note: Sub-clauses (a), (b) and (c) are alternatives; indicate alternative agreed in Box 40."

4.344 The original version of "Towcon" (and "Towhire" also) provided by its clause 25 for English law to apply and for all disputes to be submitted to the jurisdiction of the English High Court. This explains the number of English Commercial and Admiralty Court decisions on terms within the old "Towcon", almost exclusively wrestling with arguments on the meaning and effect of the knock-for-knock mutual indemnity regime under the then clause 18. In the second edition, it was therefore stated, with some justice: "This can be amended as necessary to provide for a reference to some other jurisdiction or for the submission of disputes to arbitration. The proper law theoretically can also be changed, but given that the form has been drawn up by BIMCO upon the

premise of English law as the governing law (as is apparent from many of the provisions and features of the "Towcon" form), it is submitted that this is undesirable." Notwithstanding the change to the dispute resolution procedure under "Towcon 2008", this remains the case and much of the re-consideration of clause 18 of the old "Towcon" and "Towhire", to the author's knowledge, was focused on recasting the mutual indemnity so as to make it less easy to challenge under English law, for example by arguments based on the *Canada Steamship* line of authority as to the words necessary to achieve an exemption from negligence. The drafting of the original form – much of which remains in "Towcon 2008" – was infused by English law principles and caution should be exercised when adopting a different governing law. For example, different principles apply to such matters in the United States with certain circuits taking a much dimmer and more restrictive view of such provisions than others (see in the context of the very similar offshore industry mutual indemnities under "IDDCO", the IADC Offshore Daywork Drilling Contract (Revised February 1997): Pugh, *The IADC Drilling Offshore Drilling Contract*, (Rocky Mountain Mineral Law Foundation 1998, Mineral Law Series, Paper 8) at 8–61–8–63).

4.345 While the older "Towcon" and "Towhire" forms opted for English law and High Court jurisdiction, the later "Supplytime 89" form gave the parties a choice between English law and arbitration, US law and US arbitration or a bespoke choice. The "Towcon 2008" revision adopts the same approach albeit by reference to what was then the latest version of BIMCO's standard dispute resolution clause which provides for a mandatory mediation procedure (see below). The thinking behind the original version of the clause can be found in BIMCO Bulletin No. 1/2002 and Special Circular No. 1, 16 January 2002. The current version of the BIMCO Standard Dispute Resolution Clause is the 2016 revision (which is materially similar to clause 33 save that the US/New York option has been amended in various respect, principally to delete the mediation provision). Arbitration is to be before either the LMAA in England or the SMA in the United States (unless some other bespoke option is chosen) and the small claims procedures applicable to each body are automatically to be applied to claims of the requisite small value. Unlike the latest form of this BIMCO standard clause (as seen in the new 2010 "Wreck" forms, eg clause 21 of "Wreckhire 2010" considered below in Chapter 9) there is no provision for the more recent LMAA Intermediate Claims Procedure (introduced in 2009 to supplement the existing small claims procedure) and reference is only made to the LMAA Small Claims Procedure. Consideration might be given to a suitable amendment to clause 33 so as to allow the full flexibility of the current LMAA procedures to be available to the parties.

4.346 A difficulty with optional alternatives is that it is not uncommon for the parties to forget to make their election for one or other. Under certain forms of clause this poses a problem since if no alternative is chosen it is submitted that the arbitration clause becomes unenforceable (see *Lovelock (E.J.R.) Ltd v Exportles* [1968] 1 Lloyd's Rep 163 (CA)) and the parties are thrown back, in the event of a dispute, upon the necessity of establishing the jurisdiction of a particular country's courts. The BIMCO provision in the "Towcon 2008", like that in the "Supplytime 89" form, *pace* the second edition of this work at p. 185), avoids this difficulty by expressly providing for English law and LMAA arbitration to be the "default position" absent a choice. Given the importance of an effective choice, it is recommended that, unless one is going for a wholly different option under (c), one or other of the alternatives in (a) and (b) is adopted, cleanly and without attempts to amend or vary the terms of the alternatives in (a) and (b).

Clause 33: (2): the new mediation provisions in paragraph (d)

"(d) Notwithstanding (a), (b) or (c) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Agreement. In the case of a dispute in respect of which arbitration has been commenced under (a), (b) or (c) above, the following shall apply: –

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within 14 calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further 14 calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(v) Either party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.

(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are disclosable under the law and procedure governing the arbitration.

(Note: The parties should be aware that the mediation process may not necessarily interrupt time limits.)"

4.347 In common with its dispute resolution procedure under its other modern forms of contract, BIMCO has provided for a mandatory set of mediation provisions to encourage alternative dispute resolution. The explanatory notes record: "The mediation provision is designed to function in conjunction with the chosen arbitration option, whether that is English law, London arbitration; US law, New York arbitration; or law and arbitration as agreed. Mediation is a technique that is recognised as offering savings in costs and time over traditional methods of dispute resolution for certain types of disputes. BIMCO's mediation provision is only triggered once arbitration proceedings have commenced and then runs in parallel with those proceedings, if the parties so choose. This has been done to ensure that one party cannot invoke mediation as a delaying tactic. It also provides for the parties to be able to mediate on all or just some of the issues being arbitrated." The provisions under para. (e) accordingly give either party the right to call on the other to go to mediation. While the other party is free to decline to mediate, the English law position adopted in court proceedings under the CPR is adopted so that the tribunal, like the court, may after the dispute has been concluded sanction an uncooperative party in costs. The onus is on the tribunal to keep the arbitration proceeding notwithstanding that mediation is under way.

Clause 34: security for claims

"34. Security for Claims

Either party shall have the option to bring proceedings in rem, but only to obtain security or other similar remedy for claims arising under this Agreement against any vessel or property owned by the other party in any state or jurisdiction where such vessel or property may be found."

4.348 This is an amended version of the second part of the original clause 25 (Law and Jurisdiction) contained in the former "Towcon" and is self-explanatory. Many arbitration rules contain a similar provision. In the latest explanatory notes, it is said as follows: "The purpose of this Clause is to allow the tugowner or hirer to arrest the other party's vessel in order to obtain security for claims in whatever country the tug or tow may be located at the time of arrest. The ship will then be arrested according to the laws of that country; however, the substantive claim should be adjudged in accordance with the laws and jurisdiction of the country chosen by the parties to the contract."

Clause 35: notices

"35. BIMCO Notices Clause

All notices given by either party or their agents to the other party or their agents in accordance with the provisions of this Agreement shall be in writing.

For the purposes of this Agreement, 'in writing' shall mean any method of legible communication. A notice may be given by any effective means including, but not limited to, cable, telex, fax, e-mail, registered or recorded mail, or by personal service."

4.349 This is a tidying-up provision and replaces the various isolated references to notices scattered throughout the original "Towcon" form. As noted above, surprisingly perhaps no address has to be given for service as is common in many commercial and maritime contracts where a specific "notifications" provision is included. This would have been something easy to adopt for "Towcon 2008" by the inclusion of an appropriate set of boxes in Part I and a cross-reference in Part II at this point. The possibility therefore remains that notices can be given to any address where the other party operates: indeed, this seems to be envisaged by the explanatory notes ("In line with other recent BIMCO forms, the standard Notices Clause has been included in the revised TOWCON in order to avoid having to repeat in other clauses that notices have to be in writing and also what actually constitutes 'in writing'. The clause provides that all notices given by either party must be in writing in a readable and understandable way capable of being a record. It should be noted that e-mail is listed as one of the acceptable methods and if one of parties publishes its e-mail address as part of its contact details then the other party may if it so wishes use that medium for notices."). This is apt to lead to crossed wires and problems where receipt is disputed. Many commercial entities add a rider clause to suitable effect. The advice given in the explanatory notes is therefore particularly pertinent: "However, given the importance and gravity of some of the notices that may be sent under the contract the parties may choose to rely on methods which provide a confirmation of delivery to the recipient to avoid disputes at a later stage." Certain companies decline to accept formal notices or notifications by e-mail and this may be stated in their e-mail "footer." If such a company contracts on the terms of clause 35, then it will be taken to have contracted to accept e-mail as a valid means of notification, irrespective of what subsequently may be stated in its e-mail wording. Accordingly, if e-mail is not to be used, it will be necessary to amend clause 35.

PART C. THE "TOWHIRE 2008" FORM

The structure and organisation of the form

4.350 The "Towhire 2008" form is reproduced in facsimile in Appendix 3. It follows precisely the same form as the "Towcon 2008" form save for differences consequent upon the basis of payment under the "Towhire 2008" form, being daily hire rather than a lump sum payable under "Towcon 2008." Accordingly, all of the new features of the "Towcon 2008" in terms of the new standard provisions (definitions; re-arrangement of clauses in chronological order; re-casting of the mutual indemnities, ice clause; riding crew; war clause; ISPS and MTSA provisions etc.) have been carried through into the new "Towhire 2008" which is, as before a sister contract in all respects.

4.351 The few differences which exist between the two forms are to be found in the following clauses:

i Clause 3: price and payment clause.
ii Clause 4: bunkers
iii Clause 11: place of departure.
iv Clause 15: permits and certification.

v Clauses 20 and 21: cancellation and withdrawal.
vi Clause 22: deviation and slow-steaming.
vii Clause 25: war and *force majeure* clause.
viii Clause 26: lien clause.

4.352 Some of these differences are very minor and are merely differences in terminology arising from the absence of the scheme of delay payments in the "Towhire 2008" form and from the payment of hire for the services of the tug during the service. A scheme of delay payments in a daily hire agreement is unnecessary (cf. the absence of demurrage provisions in a time charterparty).

Commentary on the different provisions in the "Towhire 2008" form

Clause 3: price and payment clause

"3. Price and Conditions of Payment

(a) The Hirer shall pay the Tugowner the amount of hire set out in Box 33 *per* day or pro rata for part of a day (hereinafter called the "Tug's Daily Rate of Hire') from the time stated in Box 36 until the time stated in Box 37.
(b) (i) The Tug's Daily Rate of Hire shall be payable in advance as set out in Box 33; all hire due hereunder shall be fully and irrevocably earned and non-returnable on a daily basis.
(ii) In the event of the Tug being lost, hire shall cease as of the date of the loss. If the date of the loss cannot be ascertained, then, in addition to any other sums which may be due, half the rate of hire shall be paid, calculated from the date the Tug was last reported until the calculated arrival of the Tug at her destination provided such period does not exceed 14 days.
(iii) In the event of part of the Tow being lost, hire shall continue until the Tug arrives at its destination. In the event of the Tow being lost, hire shall continue until the Tug arrives at its destination or such nearer place, at the Tugowner's discretion, provided such period does not exceed 14 days.
(c) Within 14 days of the termination of the services hereunder by the Tugowner, the Tugowner will if necessary adjust in conformance with the terms of this Agreement hire paid in advance. Any hire paid by the Hirer but not earned under this Agreement and which is refundable thereunder shall be refunded to the Hirer within 14 days of receipt of the Tugowner's adjustment of hire.
*(d) If agreed, the Hirer shall pay the sum set out in Box 31 by way of a mobilisation charge. This sum shall be paid on or before the commencement of the Tug's voyage to the place of departure, and shall be non-returnable, Tug and/or Tow lost or not lost.
*(e) If agreed, the Hirer shall pay the sum set out in Box 32 by way of a demobilisation charge. This amount shall be paid Tow lost or not lost, on or before the termination by the Tugowner of his services under this Agreement.
(f) The Hire and any other sums payable to the Tugowner under this Agreement (or any part thereof) shall be paid without any discount, deduction, set-off, lien, claim or counterclaim.
(g) All payments by the Hirer shall be made in the currency and to the bank account specified in Box 34.
* Sub-clauses (d) and (e) are optional and shall only apply if agreed and stated in Boxes 31 and 32."

Hire

4.353 Clause 3 of "Towhire 2008" essentially restates the old clause 2 with some textual re-ordering and slight amendments. The provisions in relation to the cost of bunkers etc. have been removed and now form part of the new separate "Bunkers" provision: clause 4. The scheme of remuneration for the services of the tug under paras. (a)–(c) of clause 3 is straightforward:

i Hire is payable as a daily rate *per* day or *pro rata* at the rate stipulated in Box 33 between the times set out in Boxes 36 and 37 (para. (a)).

ii The hire is payable in advance as the parties shall agree in Box 37 and is deemed earned on a daily basis ("irrevocably and non-returnable"). The obscure or meaningless reference to "or equivalent compensation" in the original version of para. (b)(i) has now been removed.

iii In the event of the loss of the tug, unsurprisingly, hire ceases to be payable. A formula is given for the calculation of when the hire ceased to be payable in the event that the tug is lost but the date of the loss is unknown.

iv In the event of the loss of the tow, hire continues to be payable, up to a maximum of 14 days, until the tug arrives at destination or some other place elected by the tug owner. As with the "Towcon 2008", the possibility of loss of part of the tow has now been addressed in para. (b)(iii) with hire continuing to be payable for the tug in the event of the whole or part of the tow being lost and until the tug arrives at its destination ("Sub-clause (b)(iii) has been amended to take into account multiple tows where a partial loss of one or more of the tows occurs but at least one part of the tow remains. To avoid disputes as to whether hire is payable in the event of a loss of part of the tow the additional wording makes it clear that in such circumstances hire is payable until the tug arrives at its destination.").

v Within 14 days of the conclusion of the contract services, there is an adjustment between hire earned and hire paid in advance with any overpayment being refunded to the hirer. Payment is to be made within 14 days of the hirer receiving the tugowner's adjustment statement: a helpful clarification added to "Towhire 2008."

vi All sums payable are to be made to a specified account and in a specified currency: see the new para. (g) another helpful clarification bringing into the body of the "Towhire" a matter which was dealt with by a rider clause in most cases.

Mobilisation/demobilisation payment

4.354 The clause contains in paras. (d) and (e) optional clauses as to mobilisation and demobilisation payments.

Anti-deduction clause

4.355 The common law rule as to hire (cf. freight) is that the charterer can make an equitable set-off of claims against the owner (see *The Nanfri* [1978] 2 Lloyd's Rep 132 (CA)). Clause 3(f) excludes this rule in sweeping terms and insulates a claim for hire from any set-off or deduction as if it were a "sacrosanct" claim for freight (see the commentary above as to the similar clause, ie clause 3(c), in the "Towcon 2008" form).

Absence of delay payments and free time

4.356 Since the basis of remuneration of the tug is a daily hire rate from the time of the arrival of the tug until the tug is free again and is not a fixed lump sum, the necessity for a restricted timetable for the connection and disconnection operations and for a system of daily delay payments for excess time is unnecessary. The "Towhire 2008" form accordingly contains no provisions corresponding to clause 6(a) and (b) in the "Towcon 2008" form.

Clause 4: bunkers and allied matters

"4. *Bunkers

(a) Daily Rate of Hire including Bunkers – Bunker Price Adjustment

(i) In the event that the Daily Rate of Hire includes the cost of bunkers then this Agreement is concluded on the basis of the price *per* metric tonne of bunker oil stated in Box 41.

(ii) If the price actually paid by the Tugowner for bunker oil consumed during the Voyage should be higher, the difference shall be paid by the Hirer to the Tugowners.
(iii) If the price actually paid by the Tugowner for bunker oil consumed during the Voyage should be lower, the difference shall be paid by the Tugowner to the Hirer.
(iv) The log book of the Tug and copies of the bunker supplier's invoices shall be conclusive evidence of the quantity of bunkers consumed and the prices actually paid.

(b) *Daily Rate of Hire excluding Bunkers

(i) In the event that the Daily Rate of Hire excludes the cost of bunkers then the Hirer shall pay to the Tugowner the cost of the bunkers and lubricants consumed by the Tug in fulfilling the terms of this Agreement.
(ii) The Tug shall be delivered with sufficient bunkers and lubricants on board for the tow to the first bunkering port (if any) or destination and be re-delivered with not less than sufficient bunkers to reach the nearest bunkering port en route to the Tug's next port of call.
(iii) The Hirer upon delivery and the Tugowner upon re-delivery shall pay for the bunkers and lubricants on board at the current contract price at the time at the port of delivery and re-delivery or at the nearest bunkering port.

(c) Bunker Quality

(i) If the Hirer supplies fuel it shall be of the specifications and grades stated in Box 41. The fuels shall be of a stable and homogeneous nature and unless otherwise agreed in writing, shall comply with ISO standard 82171996 or any subsequent amendments thereof as well as with the relevant provisions of MARPOL.
(ii) The Chief Engineer shall co-operate with the Hirer's bunkering agents and fuel suppliers and comply with their requirements during bunkering, including but not limited to checking, verifying and acknowledging sampling, reading or soundings, meters etc. before, during and/or after delivery of fuels. During delivery four representative samples of all fuels shall be taken at a point as close as possible to the Tug's bunker manifold. The samples shall be labelled and sealed and signed by suppliers, Chief Engineer and the Hirer or their agents. Two samples shall be retained by the suppliers and one each by the Tug and the Hirer. If any claim should arise in respect of the quality or specification or grades of the fuels supplied, the samples of the fuels retained as aforesaid shall be analysed at an independent laboratory by a qualified analyst.

**sub-clauses (a) and (b) are options. State agreed option in Box 41. If no option stated then sub-clause (b) shall apply*."

4.357 Clause 4(a) and (b) correspond to the former clause 2(d) and offer as before the option to include or exclude the cost of bunkers from the rate of hire payable for the tug. The daily rate of hire therefore may or may not include the cost of the tug's bunkers. If it does, para. (a), mirroring the bunker price adjustment procedure under "Towcon 2008" provides for an adjustment mechanism in respect of hire to reflect the difference between the actual cost of bunkers to the tug owner and the figure inserted by the parties in Box 41 of Part I as the current rate for bunkers. As with the "Towcon 2008" form, the procedure is now simplified, removing average cost and replacing it with actual cost during the service with the log book and bunker receipts as conclusive evidence, thereby greatly simplifying the adjustment exercise. If the cost of bunkers is not comprised within the hire rate, then under para. (b) these are to be paid for by the hirer at cost in the usual way, with the ordinary adjustment at the end of the service for any of the hirer's fuel still on board as with time charterers' bunkers on redelivery.

4.358 A feature of the changed world since the original "Towhire" was drafted are the significant problems which have arisen with bunker quality from certain origins. The problems and their consequences are outside the scope of this work but they are now addressed by a widely used BIMCO clause, the BIMCO Bunker Quality Clause which is a common feature of other BIMCO standard form time charter parties. This particular wording was taken from "Supplytime 2005", which has been often used as an alternative agreement to "Towhire" in the offshore industry for services to be supplied and charged for on a daily hire basis. (It should however be

noted that in "Supplytime 2017" a different approach is taken and this provision has been deleted, with the result that the owner bears the risk of the bunkers contracted for by the charterer and stemmed by the vessel being off-specification or deficient in quality: see Chapter 5 below.) It may be thought desirable to modify "Towhire 2008" to reflect this re-allocation of risk: as BIMCO's explanatory notes to "Supplytime 2017" state: "Even if it is the charterers that provide the fuel under a time charter party, it is the owners who control taking it on board and are involved in the sampling process etc. If the owners accept a wrong or unsuitable type of fuel, it would be unfair if the charterers should take that risk.." The essence of the "Towhire 2008" provision (as with the old and now superseded "Supplytime 2005" equivalent provision) is that the hirer is expressly responsible for bunker quality and undertakes that bunkers will be of a minimum specification. Procedures are set out for sampling and resolution of disputes by reference to the sealed samples taken; these are of a fairly common nature. However, no provision is made for the time period for which samples are to be retained. This may be of significance where a dispute arises some time after the supply of fuel in question. Consideration should be given to stipulating how long samples should be retained, taking into account the particular circumstances of the usage of the fuel, when any problems are likely to declare themselves etc. By way of example, BIMCO's Standard Bunker Contract in the context of a sale and purchase of bunkers to a vessel by a bunker supplier provides for the retention of samples (by the seller) for 60 days minimum after physical delivery of the fuel or, if notice is given by the buyer, as long as the buyer may reasonably require.

Clause 11: place of departure

"11. Place of Departure

(a) The Tow shall be tendered to the Tugowner at the Place of Departure stated in Box 23.

(b) The place of connection and departure shall always be safe and accessible for the Tug to enter, to operate in and for the Tug and Tow to leave and shall be a place where such Tug is permitted to commence the towage in accordance with any local or other rules, requirements or regulations and shall always be subject to the approval of the Tugowner which shall not be unreasonably withheld."

4.359 This clause is in very much simpler form than in the "Towcon 2008" form since, given the running of daily hire, there is no need for the provision as to the notices to be given by the tow to the tug as to her readiness.

Other clauses

4.360 As has been seen above, under the "Towcon 2008" form any delays due to failure on the part of the tow to put in place the necessary certification for the towage (clause 15) results in the obligation to pay delay payments. Similarly, for example, clauses 6; 22 and 23 reflect the fact that, under the "Towcon 2008" form, particular provision is made in respect of the recovery of accrued delay payments together with portions of the lump sum earned and in respect of additional time to be paid for by the tow in the form of delay payments (see generally under Part B above). The difference between the "Towcon 2008" and "Towhire 2008" forms in this respect accounts for small drafting differences in respect of these clauses as they appear in the "Towhire 2008" form (clauses 15, 20 and 21).

CHAPTER 5

Standard form contracts: (III) The BIMCO "Supplytime 2017" Form (together with its predecessor "Supplytime 2005" and the "Windtime" variant)

PART A. THE GENESIS OF THE "SUPPLYTIME" FORM

5.1 The large expansion of offshore activities connected with oil exploration and production in the early 1970s led to an increased demand for supply vessels and other offshore service vessels. Initially, contracts for the provision of the services of such vessels tended to be concluded on the basis of the in-house form of the larger tug owners or on the basis of an adaptation of one of the standard time charterparty forms. But with the increase in this specialised trade, the need was felt for a uniform contract to form the basis of individual contracts. BIMCO was approached by trade interests and the "Supplytime" form was produced in 1975.

5.2 Since that time the offshore industry has become still more sophisticated and the range of services being provided by vessels has become still wider. Major operators of such vessels and the members of the International Support Vessel Owners' Association suggested a revision of the form. A Joint Working Group set up by the Documentary Council of BIMCO set to work on a revision of the form with the following objectives:

- To prepare a document which strikes a fair balance between owners and charterers;
- To prepare a document which would be as "timeless" as possible and, therefore, to be written "up-market" thereby, hopefully, avoiding the need for rider clauses;
- To ensure that the document be as internationally applicable as possible;
- To try to clarify the document by use of apt words and trade terminology so as to, hopefully, obviate or reduce the possibility of disputes on interpretation of clauses;
- During the preparatory drafting work to invite trade interests to comment on this project with a view to obtaining the broadest possible support from users in the trade.

5.3 The result was the "Supplytime 89" form. The major change to the old form was the adoption of a regime of liability between owner and hirer on the same "knock-for-knock" basis as that adopted by BIMCO under the "Towcon" and "Towhire" forms (cf. clause 15 of the former "Supplytime" form, which represented a more traditional charterparty exceptions clause in favour of the owners). The "Supplytime 89" form proved to be a remarkably popular and durable standard form contract. The needs of the offshore industry in terms of the provision of a host of potential services by vessels of all kinds for periods of varying durations to a wide range of offshore installations has meant that a general template time charterparty, suited to and adapted to the needs of the offshore industry, with a mutual allocation of risk rather than strict charterer/owner division of responsibility, such as "Supplytime" has filled a gap and, for the most part, has filled it successfully. The form has become very much a "maid-of-all-work" in the offshore industry and this has led, as with the BIMCO towage forms before it, to it being used on occasion for situations for which it was not designed to cater. As BIMCO in its explanatory notes to the new "Supplytime 2017" form records: "The very first edition of SUPPLYTIME appeared in 1975. It was developed to meet the demand for specialist support vessels to serve a rapidly growing offshore oil and gas exploration and production industry. Since then, SUPPLYTIME has become the benchmark for offshore support vessel agreements – and the industry's contract of choice. It

has also been widely adopted by other sectors looking for a contract offering a comprehensive knock-for-knock framework."

5.4 As part of its standard revision and updating of forms, BIMCO undertook a detailed review of "Supplytime 89" and issued a new edition of the contract in 2005. This is the "Supplytime 2005" form, which is the form until very recently currently in use and which has proved equally popular in the industry, having almost largely supplanted use of the previous 1989 version (although one encounters contracts still modelled on the older form). The 2005 form in large part corresponded to the "89" form, although there were important changes to various aspects of the form, principally bringing it into line with changes in BIMCO standard time charterparty clauses since 1989. (Reference may be made to the second edition of this work for provisions of the "Supplytime 89" form which have not survived the revision process as indicated in greater detail below, for example, the "Mutual Recourse of Waiver" contained in Annex "C" to "Supplytime 89.")

5.5 The continuing process of revision by BIMCO of its forms has brought "Supplytime" round for reappraisal and reconsideration once again. An extensive process of consultation and redrafting started in 2015, with, as usual, representatives from across the industry (Maersk Supply Service, Dong Energy, Subsea 7, Fearnley Offshore Supply, the Standard P&I Club, and Ince & Co, chaired by Ian Perrott) all participating in the revision of "Supplytime 2005." The new form, "Supplytime 2017", was adopted by BIMCO on 6 June 2017. The principal goals set by the drafting committee were summarised by them in the explanatory notes which accompany "Supplytime 2017" as follows:

> The revision of SUPPLYTIME 2005 is part of a periodic cycle of updates by BIMCO to ensure that its standard contracts remain relevant and appealing. Although the offshore sector is currently experiencing a severe downturn, BIMCO contracts are designed to be "market neutral" in the expectation that market conditions will vary over the lifespan of a standard form.
>
> At the very heart of SUPPLYTIME lies the knock-for-knock liability regime – a principle commonly found in many offshore support vessel charters. Over time, we have seen an erosion of the pure knock-for-knock mechanism with the introduction of various exceptions. The revision of SUPPLYTIME 2005 has focused on treating both parties equally by removing almost all the exceptions to create a better balance of liabilities and indemnities and a more effective knock-for-knock regime.
>
> We have reviewed SUPPLYTIME in the light of past legal judgments and attempted to clarify some of the more overly complex or ambiguous language which may have given rise to misinterpretation.

5.6 Given the traditionalism in the offshore industry (as generally in the charterparty and broking sectors), it is likely that "Supplytime 2005" will continue in use for a considerable period, notwithstanding the introduction of "Supplytime 2017." Indeed, the changes made to the mutual indemnification and knock-for-knock regime (as described above, stripping out various exceptions to its operation and application) may make "Supplytime 2017" less appealing to parties who had come to terms with a knock-for-knock regime with numerous exceptions, leaving at least some measure of residual liability.

5.7 In light of the fact that there will be two versions of "Supplytime", the 2005 and the 2017 revisions, in common use for an appreciable period, the approach adopted in this chapter has been to deal with "Supplytime 2017" as the new template form but, where necessary, to compare and contrast the 2005 and 2017 forms, identifying the major changes and retaining commentary on the 2005 form as appropriate, updated to take account of legal changes impacting the 2005 form. Given the antiquity now of "Supplytime 89" (despite it being occasionally used: see eg *Greatship (India) Ltd v Oceanografia SA de CV (The Greatship Dhriti)* [2012] EWHC 3468 (Comm): a fixture in 2008 using the 1989 form, three years after the 2005 form was introduced), for a full commentary on the changes effected by "Supplytime 2005" to "Supplytime 89", reference should be made to the third edition of this work; a detailed commentary on "Supplytime 89" is to be found in the second edition.

5.8 The chronology of the "Supplytime 2017" form should be noted. It follows the drafting in 2013 by BIMCO (in a different drafting committee) of "Windtime", BIMCO's specialised charterparty form for offshore wind farm personnel transfer and support vessel services. That form was

in large part developed from "Supplytime 2005" (as the "Windtime" explanatory notes reflect) and was intended (subject to its specific context) to update and improve the core "Supplytime" model, taking account of the later changes to the BIMCO model in "Towcon 2008." Various provisions in "Windtime" are therefore taken from "Towcon 2008." However, a different approach has been taken to a number of aspects of "Supplytime 2017" (particularly in relation to clause 14 and knock-for-knock). This creates the situation where "Windtime" in 2013 is modelled on "Supplytime 2005" with updates and changes but "Supplytime 2017" does not follow the core model used in "Windtime" in important respects. It might have been expected that there would be consistency between the latest version of "Supplytime" and "Windtime" but the two forms have the hallmarks of having been drafted independently of the other. This produces some strange results, considered below. A commentary on the different aspects of the BIMCO "Windtime" form is at Part D of this chapter.

PART B. THE "SUPPLYTIME 2017" FORM

A species of time charterparty

5.9 As its long title denotes, the BIMCO "Supplytime 2017" form is a "Time Charterparty for Offshore Support Vessels" (the change in wording from "Offshore Service Vessels" used in the 2005 form reflects a change in industry terminology over time). The regime provided for by the form is one which closely resembles that under the well-established forms of time charterparty such as the "New York Produce Exchange" ("NYPE") form and the "Baltime" form as well as under other BIMCO standard form time charters, such as "Boxtime" and "Gentime." It provides for a form of time charterparty for the chartering in of tugs and offshore service and supply vessels of literally every description under which the tug or other vessel can be placed at the disposal of the charterer for a particular service or range of services for a particular period.

5.10 As such, much of the law and commentary which has developed in relation to time charterparties *simpliciter* will apply equally to the "Supplytime 2017" form, as it did with the previous "Supplytime 89" and "Supplytime 2005" forms. Space does not permit a consideration of the law relating to time charterparties in general. This chapter is accordingly confined to a commentary on those provisions or aspects of provisions in the "Supplytime 2017" form which specifically concern questions as between offshore charterer and offshore vessel owner or provider rather than generally as between owner and time charterer. As to such general questions, see *passim* Coghlin, Baker, *Time Charters* (7th edn, 2014). For convenience, and as part of the commentary upon the "Supplytime 2017" form, reference is made to the relevant passages in *Time Charters* (and where appropriate to those in Cooke, *Voyage Charters* (4th edn, 2014)) which touch upon the matters dealt with by those provisions of the BIMCO form which correspond to general time charterparty provisions.

5.11 A facsimile of the "Supplytime 2017" form is set out in Appendix 4 to this book, (and one of "Supplytime 2005" at Appendix 5).

The structure and organisation of the "Supplytime 2017" form

5.12 As with the "Towcon" and "Towhire" forms, the "Supplytime 2017" form is divided into two main parts.

5.13 Part I consists of 34 boxes into which the parties will enter the specifically agreed features of the employment contemplated. There has been little material change between the format adopted in "Supplytime 2005" and the new Part I of "Supplytime 2017." Of the most important of these are:

i Box 7: port or place of delivery.
ii Box 8: port or place of re-delivery.

iii Box 9: period of hire (together with Box 10 (optional provision for extensions) and Box 11 (automatic provision for extension to complete voyage)).
iv Box 12: the lump sum mobilisation charge.
v Box 16: the tug's or offshore supply or service vessel's trading limits described as the "area of operation.
vi Box 17: the description and definition of and restrictions upon the service(s) to be rendered by the tug or vessel.
vii Box 18: a box (first introduced as part of "Supplytime 2005"), providing for specific treatment of the previously disputed question as to whether the offshore vessel could be used for particular specialist operations, eg as a diving platform or for ROV operations.
viii Boxes 20–28: dealing with hire payments and other charges.

5.14 The principal change to the "Supplytime 2005" version is that the old Box 31, providing for choice of general average provisions, has been deleted from "Supplytime 2017" as part of the general deletion in the 2017 revision of various standard 'pure' time charter provisions (namely General Average, New Jason and the Both-to-Blame collision clauses). As the explanatory notes state: "These clauses have been deleted in the 2017 edition of SUPPLYTIME. They are not relevant in an offshore support vessel context as they deal with cargo-related matters and cargo is not intended to be carried for third parties under SUPPLYTIME. Furthermore, they would be contrary to the knock-for-knock liability regime." (See further below.)

5.15 Part II consists of the standard form BIMCO provisions, 42 in number by comparison with the "Supplytime 2005" which had 38: this is due to the addition to the form of a number of standard BIMCO provisions as well as a new lay-up provision. As has been indicated above, these are broadly similar in their purport to those present in the standard forms of charterparty, albeit coupled with special provisions reflecting the relationship of tug and tow between the offshore service vessel and her charterer or employer (eg clause 14 with a "knock-for-knock" regime of liability between owner and charterer similar to that adopted in the "Towhire" and "Towcon" forms).

5.16 Unlike the "Supplytime 89" form, and following the changes made to "Supplytime 2005" there are only two Annexes to the "Supplytime 2017" charterparty, as follows:

i Annex "A", which consists of a "Vessel Specification." This is in the form of a questionnaire as to the details and features of the vessel being chartered. This, when completed, will give a very full and complete statement of the attributes of the vessel being chartered, covering her machinery, b.h.p., towing and anchor-handling equipment and firefighting equipment. The specific statement of these attributes greatly reduces the scope of the implied term as to the efficiency in general terms of the tug for the service. This is largely replaced by a detailed statement of the tug's mechanical capacity and of her tackle and gear, leaving it to the tow to judge whether these warranted attributes are sufficient for and commensurate with the services being requested of her. The Annex corresponds to the detailed "vessel description" clause almost invariably found in time charterparties. The importance of the Annex and of the accuracy of the details which are inserted in it lies in the fact that the owners warrant under clause 3(a) of the form that the vessel will be of the description set out in the Annex on delivery: see below. As the explanatory notes to the 2005 revision recognised (see eg in relation to clause 5 of "Supplytime 2005" deleting specific sub-paragraph references to Annex "A" which appeared in the "Supplytime 89" form), many parties using "Supplytime" will simply draw up their own vessel description and use this as Annex "A", ignoring or departing from the questionnaire in the standard BIMCO format. This is likely to continue, although the benefit of Annex A is that it has been drafted to cover all essential aspects of the OSV being chartered and forms a

very convenient and logical, structured checklist which should commend itself to brokers and chartering departments. Annex A to "Supplytime 2017" substantially expands upon and updates the version adopted for the 2005 form, catering for detailed description, for example, of the vessel's propulsion, dynamic positioning, deck capacity and equipment and certificates, and now covers two pages. There have also been changes to reflect ISM Code practice; as the explanatory notes state: "the term 'operator' in SUPPLYTIME 2005 has been replaced with 'Company (as defined by the ISM Code)' to clarify that it is the party legally responsible for the operation of the ship (and thereby the duties and responsibilities imposed by the ISM Code) that should be stated here."

ii Annex "B", which sets out details of the insurance policies to be procured by the tug owner during the service under clause 17 of Part II. The insurances cover the standard risks: hull, P&I, and third party and employers' liability insurance. Given that the services for which the vessel is being engaged are offshore ones, it should be noted that normal P&I cover will not extend to certain offshore operations due to the "special operations exclusion" (most P&I Club rules are in fairly common form) and that it will be necessary for the vessel to take out "special operations cover." Annex "B" provides on one reading for only standard P&I cover with liability for collision and damage to fixed and floating objects (see paragraph (3) of the Annex). It will be necessary to consider amending the Annex to require the owner to take out the special operations cover in an appropriate case as an additional part of its P&I cover. An oddity in the 2005 version of Annex B (which made provision for "Comprehensive General Automobile Liability Insurance") has finally been removed, keeping the insurances required focussed on those relevant in the offshore support vessel context, but otherwise Annex B remains in its "Supplytime 2005" form.

5.17 A feature of the revision of "Supplytime 89" in the drafting of "Supplytime 2005" was that the option to the parties to enter into a "Mutual Waiver of Recourse" offered by "Supplytime 89" in Annex "C" to that form (and in its clause 12(f) of its Part II) was deleted. The former Annex "C" provided, together with clause 12(f) of Part II and Box 28 of Part I, for a special regime between the parties to the contract for liability for damage to property and injury and loss of life. The regime was an optional one and had to be agreed specifically and indicated as having been opted for in Box 28 of "Supplytime 89." The "Mutual Waiver of Recourse" was always a curious feature of the "Supplytime 89" form and the rationale for it was unclear, given the knock-for-knock provisions elsewhere in clause 12 (which became clause 14 of "Supplytime 2005"). The drafting also suffered from various defects which rendered its practical utility questionable: see pp. 176–177 of the second edition of this work. BIMCO's reasoning for the deletion of Annex "C" was stated in the explanatory notes to "Supplytime 2005" as follows:

> The previous clause 12(f) and Annex C regarding Mutual Waiver of Recourse was deleted as it was no longer needed. The reason for this is that the Mutual Waiver of Recourse provision was originally added when there was uncertainty whether the courts would accept the knock-for-knock principle, however, over time it has been seen that the principle is widely accepted by courts.

5.18 The position remains the same under "Supplytime 2017." As noted in the third edition, it is to be hoped that the optimism expressed by BIMCO in this respect has not now become, perhaps, over sanguine given the potential inroads into the efficacy and scope of knock-for-knock by recent decisions such as *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177 in the context of clause 18(2) of "Towcon" (now clause 25(b) of "Towcon 2008"), and *Internet Broadcasting Corpn Ltd v Mar LLC* [2009] 2 Lloyd's Rep 295, in the context of other mutual allocation of risk or "knock-for-knock" provisions, for example a clause mutually excluding the recovery of consequential loss, similar to clause 14(c) of "Supplytime 2005" (the former clause 12(c) of "Supplytime 89"). It is fair to say however, that the poor

drafting of the "Mutual Waiver of Recourse" as set out in Annex "C" to the "Supplytime 89" form would not of itself necessarily prevent a similar approach, being insufficiently explicit to cover "radical" breaches of the type considered in those decisions (see the discussion of them in Chapter 4 above and below in relation to clause 14).

5.19 As with the other BIMCO forms, the "Supplytime 2017" form provides for its order of precedence between its various parts in effectively identical form to that adopted in "Supplytime 2005." This is set out at the conclusion of Part I and preceding the space left for the signatures of the parties, and is as follows:

> It is mutually agreed that this Charter Party shall be performed subject to the conditions contained in the Charter Party consisting of PART I, including additional clauses, if any agreed and stated in Box 34, and PART II as well as ANNEX A and ANNEX B. In the event of a conflict of conditions, the provisions of PART I shall prevail over those of PART II and ANNEX A and ANNEX B to the extent of such conflict but no further.

5.20 Similarly, specific *ad hoc* provisions can be agreed in addition to and in variation of the "Supplytime 2017" form standard provisions. Such provisions will usually prevail over the standard provisions in the event of conflict on ordinary common law principles (see Chapter 4 above). However, the approach in English law to precedence provisions is to fall back upon them only as a last resort and when it is not possible to read the provisions together in a sensible way: *Lewison on Interpretation of Contracts* (6th edn, 2015), section 9.13 and *RWE Npower Renewables Ltd v JN Bentley Ltd* [2013] EWHC 978 (TCC) (Akenhead J) and [2014] EWCA Civ 150.

PART C. COMMENTARY ON THE "SUPPLYTIME 2017" FORM (AND ITS PREDECESSOR "SUPPLYTIME 2005")

Preamble: contractual definitions

"Definitions

'Affiliates' means a company, partnership, or other legal entity which controls, is controlled by, or is under common control with, a party. For the purposes of this definition, the term 'control' means the direct or indirect ownership of fifty *per* cent (50%) or more of the issued share capital or any kind of voting rights in a company, partnership, or legal entity, and 'controls', 'controlled' and 'under common control' shall be construed accordingly.
'Banking Days' means days on which banks are open in the places stated in Box 2 and Box 3.
'Charterers' means the party stated in Box 3.
'Charterers' Group' means any of the following:

(i) Charterers and Charterers' clients (of any tier); and
(ii) co-venturers of any of the foregoing; and
(iii) Affiliates of any of the foregoing; and
(iv) contractors and sub-contractors (of any tier); and
(v) Employees of any of the foregoing;

but always related to the work or project on which the Vessel is employed.

'Crew' means the Master, officers, ratings and any other personnel on board the Vessel and in each case provided by the Owners.
'Employees' means employees, directors, officers, servants, agents or invitees.
'Offshore Units' means any vessel, offshore installation, structure and/or mobile offshore unit used in offshore operations.
'Owners' means the party stated in Box 2.
'Owners' Group' means:

(i) Owners; and
(ii) Owners' Affiliates; and

(iii) contractors and sub-contractors (of any tier); and
(iv) Employees of any of the foregoing

but always related to the work or project on which the Vessel is employed.

'Parties' means the Owners and the Charterers.
'Vessel' means the vessel named in Box 4 and with particulars stated in ANNEX A."

5.21 The definitions section in "Supplytime 2017" has been significantly expanded from the short list in the 2005 version of the form. The main changes are the moving of the definitions of "Owners' Group" and "Charterers' Group" from Clause 14, the knock-for-knock provision (where they had been placed in "Supplytime 2005"), to the general definitions section and the expansion of the classes of persons or parties who are comprised within each "Group." The moving of the definitions is a sensible tidying up of the form: for, while the "Group" concept is of particular relevance to the operation of the mutual exclusions and cross-indemnities in Clause 14, the concept crops up in other provisions in Part II also.

5.22 The concept of "Groups" sweeps up conveniently and compendiously the various parties who may be comprised within those on "owners' side" and on "charterers' side" and who, in the offshore industry particularly, can extend to various contractors and sub-contractors and beyond. It is of particular relevance in the context of Clause 14 and the knock-for-knock regime since the owners and the charterers bear responsibility for loss of or damage to all property (and for death or injury to all personnel) of those in their respective Group. The "Supplytime 2005" revision of the 1989 version was meant to dispose of arguments in the knock-for-knock context which could and did arise under "Supplytime 89" as to whether, for example, where damage is done to the property of a party for whom the charterer is performing works and in connection with which works it has hired in the vessel, that "property" is within the scope of the knock-for-knock regime under the former clause 12(b): for example, a charterer is providing subsea trenching services to an oil major under a project contract and hires in a vessel to assist in lowering equipment to the seabed; the vessel drops an object which contacts the pipeline and a claim is made by the major against the charterer and thence against the vessel owner. The difficulty with attempts to squeeze such a claim in within the old 1989 clause 12 lay in the fact that the oil major client could not easily be described as charterers' "contractors or sub-contractors", this phrase – although not specifically defined in the "Supplytime 89" form – being self-evidently designed and more apt to describe the agents and contractors of the charterer in the execution of the offshore work, not the client for whom the work was ultimately being carried out by the charterer. The "Supplytime 2005" clause 14 by its definitions section sought to tackle this directly, by including within the "Charterers' Group" all co-venturers and "customers" or clients for whom the charterer is performing works, provided that they are referable to the specific project for which the vessel has been hired in. However as pointed out in the third edition (paras. 5.79 and 5.80), the 2005 definitions continued to leave room for argument in relation to sub-sub-contractors on owners' or charterers' "side" involved in the project but not easily described as customers, contractors etc.

5.23 The drafters of "Supplytime 2017" have now sought to spread the net of the Group concept still further to deal with, as it is put in the explanatory notes "all parties operating in the field [. . .] which may suffer loss or damage when working at the site are covered by the knock for knock regime. Parties both up as well as down the charterers' contractual chain are included." The scope of each party's Group has been expanded still further but also simplified and (it is suggested) improved in "Supplytime 2017!.

i Both Groups extend to include those with whom the owners and the charterers are in contractual relations.

ii The Owners' Group includes the owners' contractors and sub-contractors while, rather wider, the charterers' includes the same but also extends to "clients" of the charterers (replacing the "Supplytime 2005" reference to "customers") and "co-venturers" of either the charterers or their clients. This additional scope for the Charterers' Group reflects the common fact in the modern industry that the charterer is likely to be hiring the vessel in as part of some wider operation in which it is engaged with or for others and may not be the owner of the offshore unit to which the vessel is providing her services but a contractor for the owner or consortium of owners, and as part of a complex multi-party project.

iii The scope of the contractors or sub-contractors has sought to be defined in terms which extend to any sub-contractor or sub-sub-contractor at any level in the contractual chain emanating from either the owner or the charterer by the addition of the words "(of any tier)" (the same wording is used in relation to the charterer's "clients"). This is new to "Supplytime 2017" and the explanatory notes state (in relation to the use of this phrase for charterers, but *mutatis mutandis* equally for owners): "In this edition, the term has been expanded to include the defined term [(. . .) with the term] 'clients, contractors and sub-contractors of any tier'. Thus, all parties operating in the field and which may suffer loss or damage when working at the site are covered by the knock for knock regime. Parties both up as well as down the charterers' contractual chain are included and owners avoid liability towards the charterers' contractual counterparties several tiers removed from them. This assists in clarifying which indemnities the charterers have to give and ensures a robust and clear-cut knock-for-knock liability regime." The new form therefore seeks to address the concern voiced in the third edition: "An obvious consequence of the new definition is that the sort of argument deployed in relation to the former narrower definition linked to contractors and sub-contractors in 'Supplytime 89' may be deployed where the property damaged is arguably at one step further removed from the 'customer' or 'co-venturer'." The new "of any tier" wording arguably includes the whole of the "family tree" of contracting parties below the owner or the charterer.

iv As a further addition to "Supplytime 2017", the concept of Group now extends to any affiliates of any of the other persons or parties identified in the definition. The definition adopted is a fairly typical one focussing on control by one company of another either in terms of share capital or effective control through voting rights.

v In "Supplytime 2005", the scope of the Charterers' Group was limited to those "having a contractual relationship with the Charterers, always with respect to the job or project on which the Vessel is employed." That wording was unsatisfactory since it left open questions as to what sort of contractual relationship was intended and suggested direct contractual relations (which might exclude sub- or sub-sub-contractors): see at least one arbitration claim on this basis, ultimately not pursued. Furthermore, there was no corresponding limitation on those in the Owners' Group. "Supplytime 2017" improves the position by simply applying a test of connection to the work on which the vessel is employed, without any need for contractual relations and applies it equally to both Groups.

vi As before, the concept of the Group and those within it extends to "Employees" of the identified parties or persons. The definition of "Employees" remains the same as that given in the previous versions of "Supplytime." However, its importance is increased given the concept of the "Owners' Group" and the "Charterers' Group" especially for the purposes of the operation of the mutual allocation of risk provisions As the explanatory notes to "Supplytime 2005" stated when first introducing the Group concept: "It should be noted that the term 'Employees' includes employees, directors, officers, servants, agents or invitees. This should be kept in mind in the context of the Owners' Group and Charterers' Group in Clause 14(a). In Clause 14(a) 'Employees' are included in the list of entities for which each group is responsible under the knock-for-knock liability provisions."

5.24 As before with the "Supplytime 2005" Group concept, the danger even with the much wider expanded wording in "Supplytime 2017" remains that contracting parties will use the "Supplytime 2017" form on a "one size fits all" basis: it is accordingly still recommended that where particular parties are involved in a project to which the vessel is rendering her services for the charterer, consideration should be given to specific amendments to the definitions either to include certain named parties within the charterer's "Group" or a more precise definition of the levels of contracting party with whom the charterer is directly or more indirectly engaged.

5.25 The other definitions give one of Banking Days (as explained in the notes: "defined as days on which banks are open in the parties' place of business. Parties can link the currency of the hire with the place of that currency by amending this definition. For example, if the charter hire is to be paid in US dollars, reference can be added to days on which banks are open in New York"). A new term, "Crew", is introduced effectively as shorthand for and encompassing the previous term in "Supplytime 2005" of "Master, Offices and Crew." It is also, where the charterers are concerned "is included to assist in distinguishing the enumerated people from personnel placed on board by the charterers."

5.26 Of particular importance in the other definitions given is the following:

> "Offshore Units" means any vessel, offshore installation, structure and/or mobile offshore unit used in offshore operations.

5.27 This is a simpler version of the 2005 definition which sought to identify typical "offshore" operations for which an OSV might be chartered (" 'Offshore unit' shall mean any vessel, offshore installation, structure and/or mobile unit used in offshore exploration, construction, pipelaying or repair, exploitation or production."). As the 2017 explanatory notes reflect, this gives rise to potential argument (and at least one dispute as to whether a specialised, very bespoke, offshore unit was in fact one which could be said to be "used in" exploration, construction, etc.). The notes therefore state: "This definition has been made more generic. Instead of naming all operations that an offshore unit may be involved in, which carries with it the risk of excluding others, reference is made to 'offshore operations'."

5.28 The importance of the definition is not confined to the operation of clause 14 and the mutual exclusions and indemnities. Thus, in connection with the charterers' obligations as to the safety of the places of operation of the vessel under clause 6(a) of Part II of the form, the charterers are to exercise due diligence in employing the vessel at a safe "offshore unit" as well as in a safe port or place. Clause 35 of "Supplytime 89" formerly contained a definition of the "Offshore Site" in these terms: "the area within three nautical miles of an 'offshore unit' from or to which the Owners are requested to take their Vessel by the Charterers." The only reference to that term was in the context of liability for pollution in a salvage operation in rendering salvage assistance to the charterers' property under the Salvage Clause (clause 18(c)(iii) of "Supplytime 2005" and "Supplytime 2017"). Although the explanatory notes are silent, the definition was presumably dropped since it was sufficient to refer to the offshore site in that provision; however (as seen below) the term is now undefined and left general.

Clause 1: period

"1. Charter Period

(a) The Owners let and the Charterers hire the Vessel for the period as stated in Box 9 from the time the Vessel is delivered to the Charterers.

(b) Subject to Subclause 12(b) (Hire and Payments – Extension of Hire), the Charterers have the option to extend the Charter Period in direct continuation for the period stated in Box 10(i), but such an option must be declared in accordance with Box 10(ii).

(c) The Charter Period shall automatically be extended for the time required to complete the voyage or the drilling, testing, completing and/or abandoning of the single borehole including any side-track thereof ('Well') (whichever is stated in Box 11(i)) in progress, such time shall not exceed the period stated in Box 11(ii). The Charterers shall not instruct the Vessel to commence a voyage or Well unless they reasonably expect it to be completed within the Charter Period including the time required for transit to the port or place of redelivery and demobilisation."

5.29 With one addition in para. (c), clause 1 of "Supplytime 2017" is substantially unaltered from the "Supplytime 2005" form, with only minor drafting and editing changes. Under para. (a) of this clause, the basic elements of the parties' agreement are provided for.

i *The description of the parties to the contract*. In accordance with the charterparty cases, the general principle is that it is a question of the construction of the contract as a whole as to who is party to the contract (see eg *The Swan* [1968] 1 Lloyd's Rep 5 and *Brandt v Morris* [1917] 2 KB 784). The problem most commonly arises where an agent signs for his principal and the real principal seeks to intervene in the contract or the other contracting party seeks to render the agent liable as principal. The description of a named party as "owner" coupled with the signature of the charterparty by that person in an unqualified manner (ie in the "(Owners)" signature box) may bind the person signing even if only an agent and may prevent the real principal from suing (see *Humble v Hunter* (1848) 12 QB 310). The description of a person as "Charterer" and his signature under that title is less definitive and has been held not to prevent the true principal from suing or being sued (see *Drughorn v Rederieaktiebolaget Transatlantic* [1919] AC 203; cf. if the word "charterer" is qualified when signing by the word "as" – see *Rederieaktiebolaget Argonaut v Hani* [1918] 2 KB 247). See generally for the case law on this subject, relating particularly to the form and capacity in which charterparties are signed by owners and charterers: Cooke, *Voyage Charters* (4th edn, 2014) at paras. 2.1–2.20. The definitions at the start of Part II seek to tie the contracting party to the person named as "Owners" and "Charterers" in Boxes 2 and 3 of Part I respectively.

ii *The identity and name of the vessel chartered* (as stated in Box 4). Albeit that the contract is usually for a named tug or vessel, given the specific provisions of the charter (eg as to the provisions to be made by the owners, stipulated for in clause 7, and as to the detailed specification of the vessel set out in Annex "A"), the "named tug" line of authority in cases such as *Robertson v Amazon Tug and Lighterage Co* (1881) 7 QBD 598 (see Chapter 1 above) will not apply.

iii The period of the charter service (as defined in Box 9).

5.30 Paragraphs (b) and (c) provide for extensions of the period of charter service which has been stipulated in Box 9 (as to time charterparty extension, see generally Coghlin, Baker, *Time Charters* (7th edn, 2014), chapter 23). Under para. (b), the charterers may be given a facultative option to extend the charter for such period as the parties agree in Box 10(i), provided that any such advance notice period for the declaration of the extension as they agree (and as is set out in Box 10(ii)) is observed. An important restriction on the charterer's right to extend the charter period granted by para. 1(b), where this has been agreed upon by the parties in Box 10, is imposed under "Supplytime 2017" (and before it under "Supplytime 2005"): under its clause 12(b), the option to extend is effectively rendered conditional upon the charterer and the owner being able to agree upon the hire which is to be paid in respect of the extension. Absent any agreement on that hire, then clause 12(b) provides "Should the parties fail to reach an agreement, then the Charterers shall not have the option to extend the Charter Period": see further below in relation to clause 12 (Hire); cf. the position under the former "Supplytime 89" where no such restriction existed, prior to the 2005 revision.

5.31 Paragraph (c) deals with the case where the offshore service vessel is chartered for a voyage or for a well service and provides for the automatic extension of the charter to complete the voyage

or well service defined in Box 11(i) up to the maximum period of time allowed for in Box 11(ii). The previous definition of "well" given in the definitions section in "Supplytime 2005" has sensibly been moved to the only place where it appeared, ie in para. (c) and gives a wide definition of well operations which the vessel might be engaged upon or in relation to ("the drilling, testing, completing and/or abandoning of the single borehole including any side-track thereof"). Sensible advice is given in the explanatory notes as to the need to be clear when agreeing in the context of Box 11(i) what is to trigger the extension. Box 11(i) simply states "Voyage or well (state which):." It is helpful, rather than just state "voyage" or "well", to state precisely what is envisaged. As the notes state: "There is an automatic extension if necessary to complete a voyage or a well. If parties want to expand the scope of the automatic extension, clear words should be used to define what such other tasks should comprise of (eg 'Project')", although from personal experience, broad definitions such as that suggested in the notes can be problematic and productive of argument; therefore, if commercially achievable, it is preferable to be as specific as possible (from both parties' points of view) in filling out Box 11(i).

5.32 Paragraph (c) of "Supplytime 2017" contains an additional sentence prohibiting the charterers from instructing the vessel to commence a last voyage or last well service unless they "reasonably expect" it to be completed within the charter period, including all redelivery and demobilisation steps within that period. The explanatory notes state: "For clarification, the final sentence of subclause 1(c) reflects the English common law position that the charterers should not give voyage orders to the ship, or in respect of a well, which they cannot reasonably expect to be completed within the charter period, including the time required for transit to the place of redelivery and the demobilisation of any Charterers equipment." This is a curious statement as English law is to the opposite, absent express provision in the time charterparty to the contrary. The correct position was explained by Bingham LJ in *Hyundai Merchant Marine v Gesuri Chartering* (*The Peonia*) [1991] 1 Lloyd's Rep 100 at p. 107 as follows (subsequently treated as correct by the House of Lords in *The Gregos* [1995] 1 Lloyd's Rep 1):

> It would seem to me . . . that every time charter must have a final terminal date, that is a date by which (in the absence of an exonerating cause) the charterer is contractually obliged to redeliver the vessel. Where the law implies a margin or tolerance beyond an expiry date stipulated in the charter-party, the final terminal date comes at the end of such implied extension. When the parties have agreed in the charter-party on the margin or tolerance to be allowed, the final terminal date comes at the end of such agreed period. But the nature of a time charter is that the charter is for a finite period of time and when the final terminal date arrives the charterer is contractually bound (in the absence of an exonerating cause) to redeliver the vessel to the owner.

The view taken in the "Supplytime 2017" notes represents the old pre-*Peonia* view (see Coghlin, Baker, *Time Charters* (7th edn, 2014) at para. 4.48). However, the charterers are not liable for failing to redeliver the ship on time if that failure is caused by fault on the part of the owners, whether or not that fault is strictly a breach of charter: see Bingham LJ's comment at p. 108. See generally Coghlin, Baker, *Time Charters* (7th edn, 2014) at paras. 4.46–4.50.

Clause 2: delivery and redelivery

"2. Delivery and Redelivery

(a) *Delivery* –

(i) The Vessel shall be delivered to the Charterers between the dates stated in Box 5 and Box 6 at the port or place specified in Box 7.

(ii) Subject to Subclause 2(b) (Delivery and Redelivery – Mobilisation), the Vessel shall be delivered to the Charterers free of all cargoes and with her cargo tanks clean to applicable industry standards. The port or place of delivery shall be such that the Vessel will always lie safely afloat.

(b) *Mobilisation* – The Charterers shall pay the lump sum mobilisation fee, without discount, as stated in Box 12 upon the delivery of the Vessel.

(c) *Cancelling* – If the Vessel is not delivered by the cancelling date and time stated in Box 6, the Charterers shall be entitled to cancel this Charter Party. However, if the Owners know or ought reasonably to know that they will be unable to deliver the Vessel by the cancelling date, they shall give notice in writing to the Charterers thereof as soon as reasonably practicable stating in such notice the date and time by which they will be able to deliver the Vessel. The Charterers may within twenty-four (24) hours of receipt of such notice give notice in writing to the Owners cancelling this Charter Party. If the Charterers do not give such notice, then the later date specified in the Owners' notice shall be substituted for the cancelling date for all the purposes of this Charter Party. In the event the Charterers cancel the Charter Party, it shall terminate on terms that neither party shall be liable to the other for any losses incurred by reason of the non-delivery of the Vessel or the cancellation of the Charter Party.

(d) *Redelivery* – The Vessel shall be redelivered on the expiration or earlier termination of this Charter Party free of cargo and with cargo tanks clean to applicable industry standards at the port or place as stated in Box 8(i) or such other port or place as may be mutually agreed. The Charterers shall give not less than the number of days' notice in writing of their intention to redeliver the Vessel, as stated in Box 8(ii).

(e) *Demobilisation* – Except in the event of termination due to the Owners' repudiatory breach, the Charterers shall pay the lump sum demobilisation fee without discount in the amount as stated in Box 15 which amount shall be paid on the expiration or on earlier termination of this Charter Party.

(f) *Cargo and services* – Should the Owners agree to the Vessel loading and transporting cargo and/or property and/or undertaking any other service for the Charterers en route to the port of delivery or from the port of redelivery, then all terms and conditions of this Charter Party shall apply to such loading and transporting and/or other service exactly as if performed during the Charter Period excepting only that any lump sum fee agreed in respect thereof shall be payable and earned on loading or commencement of the service as the case may be, the Vessel and/or cargo and/or property lost or not lost."

With certain limited exceptions, clause 2 of "Supplytime 2017" largely mirrors its predecessor provision in "Supplytime 2005."

5.33 Paragraphs (a) and (d) deal with delivery and redelivery respectively. These are very similar to standard time charterparty delivery and redelivery provisions (see Coghlin, Baker, *Time Charters* (7th edn, 2014) at paras. 7.1 and 15.1 *et seq*., respectively).

5.34 A problem which occasionally arises is as to the standard of cleanliness with which the vessel is to be delivered and redelivered after the service. A variant of the standard dry cargo time charter wording (such as "ready to receive cargo with clean swept holds" from the NYPE form) was formerly adopted in the concept of free of cargo and with "clean tanks" in "Supplytime 2005." However, as the explanatory notes to the 2005 form pointed out, cleanliness of tanks is a relative concept. While the cleanliness on delivery would probably import an implicit standard of being, at least, sufficiently clean for the needs of the service for which the vessel is hired, the standard on redelivery is more ambiguous if it is not, again implicitly, to be tied to redelivery in the same condition as when delivered to the charterer. The "Supplytime 2017" form seeks to address this issue more specifically than the 2005 form. First, it restricts the undertaking as to cleanliness of tanks solely to cargo tanks: the previous reference in the 2005 form to "tanks" led to arguments as to whether this also included fuel or bunker tanks. Secondly, it purports to define the standard of cleanliness by reference to being "clean to applicable industry standards." The explanatory notes expand upon the intention of these changes to the 2017 form as follows:

> Under subclause 2(a)(ii), the ship at delivery should be free of cargo and the ship's cargo tanks should be clean to applicable industry standards, and the ship should be able to lie safely afloat at the port or place of delivery. It should be noted that reference is made only to the cargo tanks, and not the fuel tanks. The standard of cleanliness will vary depending on the contents of the tanks and there may be different standards around the world. The words "applicable industry standards" is intended to provide a certain standard without depriving the parties of their required flexibility. In the offshore industry, it is common to have liquid mud and brine cargo tanks cleaned to "brine standard." However, there are other standards as well and the wording has therefore been kept more general.

5.35 While the clarification as to which tanks are covered by the undertaking is to be welcomed, the attempt to define in generic or general terms the requisite standard of cleanliness seems to leave matters where they were under the 2005 form. As noted above, absent express terms, then an implied term as to the minimums standard of cleanliness would be very likely to be imported: the example given in the explanatory notes of brine tanks illustrates this. If the charterer complained that the brine tanks were left dirty and the owner contested this, the dispute would be resolved by reference to a reasonable standard in the industry for cleanliness for brine tanks. In this light the reference to "applicable industry standards" while a useful start (and perhaps the best that can be done given the different types of tank) leaves matters almost as open as before. To take an example from a recent arbitration: the alleged contamination of a saturation diving system raised the issue as to how clean the system had to be on delivery and whose standards were applicable and what these in fact required.

5.36 It follows that under "Supplytime 2017", just as under "Supplytime 2005", if particular specific criteria are to be required then these should be stipulated for clearly to avoid disputes over what is and is not an acceptable standard or "applicable industry standard." The words of the BIMCO explanatory notes to "Supplytime 2005" remain equally apposite for "Supplytime 2017":

> Clause 2(a) provides that the Vessel is to be delivered and redelivered free of cargo and with clean tanks at the agreed port or place. A Vessel chartered in using the Supplytime form can be used for many different purposes and it is therefore not possible to quantify in the printed text the standard of cleanliness of the tanks required in every case. Users of the form should therefore be aware that the minimum standard of cleanliness might need to be stated in addition to the pre-printed wording of this clause or in Annex A. In that respect it should also be noted that Clause 2(d) Redelivery might need to be corrected to the same effect.

5.37 This may be done either by a specific standard or the use of the standard of an independent or party surveyor's "satisfaction" (cf. clause 18 of the Asbatankvoy form, discussed in Cooke, *Voyage Charters* (4th edn, 2014) at para. 68.1 *et seq*.).

5.38 Paragraph (c) contains a cancelling clause: as to this standard feature of a time charter, see Coghlin, Baker, *Time Charters* (7th edn, 2014), at para. 24.1 *et seq*. As it is there put (at para. 24.2): "A cancelling clause gives some protection to both owners and charterers in the event that the ship is delayed. The charterers can terminate the charter and find an alternative ship, but the owners do not incur the liability which they would have incurred by promising delivery at a specific time: see the comments of Bridge, L.J., in *The Democritos* [1976] 2 Lloyd's Rep 149, at page 154." A feature of the "Supplytime 89" form was that it purported to link the right to cancel to the inability of the owners to deliver the vessel "despite the exercise of due diligence" on their part. The usual position in relation to a cancelling clause is simply that it gives the charterer a right to cancel if the vessel does not arrive by the stated date: "The shipowner does not contract to get there by a certain date, but says: 'If I do not get there you may cancel'": see *per* AL Smith J in *Smith v Dart* (1884) 14 QBD 105 at 110. Absent any express provision in the charterparty, there is only an implied obligation to exercise due diligence to tender the ship for delivery by the cancelling date: (Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 24.3 citing *The Democritos* [1976] 2 Lloyd's Rep 149) although it is open to the parties to create an absolute obligation. This appears to have been the intention of BIMCO, when drafting "Supplytime 2005", in deleting the reference to due diligence, previously found in clause 2(c) of the "Supplytime 89" form. See the explanatory notes to the 2005 form:

> The obligation to deliver the Vessel under a time charter is a strict obligation and the reference to due diligence in the SUPPLYTIME 89 version of this Clause was misleading. The reference to "due diligence" was therefore not in context and has subsequently been removed from Clause 2(c). It should be noted that the removal of the phrase does not in anyway change the substance of the Clause as the

> Charterers always had the option to cancel the charter whether or not the Owners had "done their best" to reach the place of delivery on time.

5.39 The textual position remains unchanged under "Supplytime 2017." It would arguably continue to follow that the obligation to deliver as expressed in clause 2(a), "the Vessel shall be delivered . . . between the date[s] stated", is an express obligation that the vessel will be delivered by the cancelling date so as to impose an absolute obligation upon the owners to get the vessel there by that date, breach of which sounds in damages: see *Wilford on Time Charters* (5th edn, 2003), para. 24.18).

5.40 Clause 2(c) contains a similar provision to that in "Towcon 2008" catering for the event where the owner knows in advance that the vessel may not be delivered on time. Paragraph (c) provides for a procedure by which the owner can give notice to the charterer of this fact and of the vessel's new date of delivery and to call upon the charterer to make his position plain in advance. This gives the charterer an option either to accept the proposed new date or to cancel. The explanatory notes to the 2017 form explain this as follows:

> If the ship is running late, the owners must notify the charterers of the date and time by which they will be able to deliver it. The purpose behind this clause is that a ship at risk of arriving after the cancelling date and time should not have to proceed on a long voyage towards the delivery place, not knowing whether or not the charterers will accept the ship once it has arrived. Without this provision, the charterers would be able to wait until the ship tenders its notice of delivery before they decide whether or not to cancel. Under the clause, the charterers will have to declare their option within 24 hours from the owners' notice. If the charterers choose not to cancel, the new cancelling date and time will be the new readiness date and time that the owners stated in their notice.

5.41 A special and not uncommon feature of the employment of a large tug or offshore service vessel is that, at the time at which the charterparty is concluded, she may be laid up or be on standby with a skeleton crew and equipment. The "Supplytime 2017" form reflects this with provision for a lump sum mobilisation charge in para. (b); if agreed upon, this is payable in all circumstances and, in particular, irrespective of any changes in the place of delivery which may have to be agreed for operational reasons. This is so notwithstanding that the words previously found in the "Supplytime 89" version of this provision (viz. "shall not be affected by any change in the port or place of mobilisation") have been omitted from the 2005 and the 2017 versions. The omission appears to reflect the practice of striking out these words by parties (as the explanatory notes in 2005 stated: "The change of port or place of mobilisation previously referred to in the last sentence of clause 2(b)(i) was often deleted by users and consequently the reference has been removed from the revised version altogether") but it is doubtful whether the mobilisation charge is conditional upon delivery of the vessel at a particular place rather than simply upon delivery into the charterer's service, wherever and whenever that in fact occurs. While the earlier version of the form also included the words "in consideration of the Owners giving delivery" and those words have also been deleted (viewed, apparently, by BIMCO in 2005 as surplusage), the mobilisation payment under the terms of clause 2 is earned precisely for that reason. This is further emphasised by the charge being a lump sum mobilisation charge earned without discount on delivery of the vessel. A corresponding demobilisation charge is provided for by para. (e); this is to be payable upon the completion of the service. Clause 2 reflects the similar BIMCO approach adopted in the "Towhire 2008" form as to mobilisation and demobilisation. However, a significant change has been made in "Supplytime 2017" in relation to the payment of a demobilisation fee: in the 2017 form, by contrast with clause 2(e) of "Supplytime 2005", specific exception is made for the case where the charterparty has been cancelled due to the owner's repudiation of the charter. In that event, the charterer is discharged from any obligation to pay a demobilisation fee. The explanatory notes state: "In such cases, it would be unfair to require the charterers to pay the demobilisation fee."

5.42 Paragraph (f) has been made the subject of its own specific provision, having previously in "Supplytime 2005" been part of the mobilisation provisions in para. (b). As the explanatory notes state:

> This provision was part of subclause 2(b)(Mobilisation) in SUPPLYTIME 2005, but has been moved to a separate subclause in the revised edition as it had nothing to do with mobilisation. The clause provides that if the ship carries cargo or perform some other service for the charterers on its way to the delivery port or from the redelivery port, then the charter party will apply to such services as well. However, payment for such additional services should be made as a lump sum in advance, whether ship or cargo lost or not.

Clause 3: condition of vessel

"3. Condition of Vessel

(a) At the date of delivery the Vessel shall be of the description and class as specified in ANNEX A, attached hereto, and in a thoroughly efficient state of hull and machinery.

(b) The Owners shall exercise due diligence to maintain the Vessel in such class and in every way fit for the service stated in Clause 6 (Employment and Area of Operation) throughout the period of this Charter Party."

5.43 Clause 3 of "Supplytime 2017" is effectively identical to its predecessor in "Supplytime 2005", which substantially rewrote the previous "Supplytime 89" version of the clause. The 2017 like the 2005 version imposes two separate obligations upon the owner of the vessel being chartered in relation to her condition. The 2017 explanatory notes accurately describe the position in this way:

> The owners have an absolute obligation to deliver the ship in a seaworthy condition and as described and classed as *per* Annex A. Thereafter, during the currency of the charter, there is a due diligence obligation on the part of the owners to maintain the ship in a seaworthy condition and in class. Apart from that, there is no continuing obligation to maintain the ship as *per* Annex A. Rather, Annex A represents an account of the state of the ship at the time of delivery. If it was otherwise, Annex A would have to be amended every time the ship is modified, which would be impractical in the offshore sector where ships are frequently modified.

5.44 By contrast, the 1989 version, confusingly, imposed two parallel obligations which applied once the vessel had been delivered in her stipulated condition and as to the maintenance of that condition. The former clause 3(a) imposed a strict and absolute obligation to maintain the vessel in the delivery condition ("and undertake so to maintain the Vessel during the period of service") while clause 3(b) imposed an obligation of due diligence to maintain the vessel in a generally seaworthy condition. Issues could therefore arise as to a defect or deficiency in the vessel which arose during the service despite all proper due diligence being exercised but which could nevertheless be described as a breach of the absolute obligation. As was pointed out in the second edition of this work (p. 162), this meant that in very many cases of the underperformance of the chartered offshore service vessel, the charterer had a claim under para. (a) of clause 3 and did not need to establish a failure to exercise due diligence. For example, if the drill water discharge rate was inferior to that which has been stipulated in section 3(d) of Annex "A" to the charterparty, making the vessel unfit for the service, the charterer had a claim under para. (a) in addition to a possible claim under para. (b). In an arbitration award in 1998 a tribunal (of shipping QCs) rejected an argument by owners that clause 3(a) and (b) were to be read as mutually exclusive and held that breach of description could, potentially, amount to a breach of either or both provisions. Similarly, in a later award (London Arbitration 1/02, LMLN 585) an issue arose as to whether deficiencies in a dive system (described in Annex A) fell under para. (a) so as to make the owner strictly responsible or only under para. (b) requiring the charterer to show want of due

diligence. It was held that if the defect consisted of the absence of some item listed in Annex A that would engage para. (a) but if there were a defective condition of vessel or equipment that would not engage para. (a) unless it could be said that the vessel no longer complied with Annex A in some respect. The tribunal recognised that "theoretically" at least there could be a breach of para. (a) notwithstanding full compliance with the obligation of due diligence under para. (b).

5.45 This regime put the "Supplytime 89" form somewhat at odds with the regime adopted under many other standard form time charterparties where there was a strict obligation to deliver the vessel as described and seaworthy at the commencement of the service and thereafter an obligation of due diligence to keep it that way (cf. clauses 1 and 3 of the Shelltime 4 form: see Coghlin, Baker, *Time Charters* (7th edn, 2014) at paras. 37.4 and 37.5 and 37.18). The 2005 revision brought the "Supplytime 2005" form into line and adopts a two-stage approach, making clause 3(a) and (b) cover delivery condition and maintenance of delivery condition as two separate and exclusive obligations. "Supplytime 2017" continues the same approach. However typed amendments, similar to the 1989 wording, are sometimes encountered with the 2005 form and this may continue.

Description, class and seaworthiness as at delivery

5.46 Under para. (a), the owner undertakes that, at the date of the vessel's delivery, the vessel will be both (i) of the description and class set out in Annex "A" to the charterparty and, also, (ii) that it will be in "a thoroughly efficient state of hull and machinery", viz. that it will be in all respects seaworthy (the wording is virtually identical to that in line 5 of the NYPE form: see Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 3.40). This is an absolute obligation in respect of both aspects and is not qualified by a requirement to exercise due diligence only; accordingly, due diligence will not suffice and the vessel must as at the date of delivery under the charter fully comply with Annex "A" and be seaworthy. Since the undertaking relates to the fixed characteristics and capabilities of the vessel upon which the charterer is often relying and which can readily be ascertained by the owner and to the basic fitness of the vessel, the absolute nature of the owner's warranty is sensible and mirrors the position under most other forms of time charterparty.

5.47 As to the vessel's described condition and attributes as set out in Annex "A", the owner will usually protect himself, as far as he is able, by qualifying the specific statements of the vessel's characteristics and attributes by a suitable term of dilution such as "about" or "approximately." Such terms are common in descriptions of vessels under time charterparties, especially in relation to speed and consumption, and have been the subject of numerous decisions: as to these, see Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 3.34 *et seq*.; see also Cooke, *Voyage Charters* (4th edn, 2014), paras. 3.23–3.25. A statement as to the vessel's class will usually be classed as a condition, any breach of which will entitle the charterers to treat the contract as discharged: see Coghlin, Baker, *Time Charters* (7th edn, 2014), paras. 3.46–3.47. As to the seaworthiness of the vessel, an oft-cited statement encapsulating the essence of the requirement is that of Scrutton LJ in *FC Bradley & Sons v Federal Steam Navigation Co* (1926) 24 Ll L Rep 446: "The ship must have that degree of fitness which an ordinary careful owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. Would a prudent owner have required that it should be made good before sending his ship to sea, had he known of it?" An obligation of seaworthiness is an intermediate term and whether a breach of it would entitle the charterer to terminate the contract will be a question of fact and degree: *The Hongkong Fir* [1961] 2 Lloyd's Rep 478.

Seaworthiness and class during the service

5.48 In addition to the obligation set out above, under para. (b) there is imposed upon the owner an obligation, in common terms, to exercise due diligence so as to ensure that the vessel

is seaworthy and in all respects fit for the services for which the vessel has been hired, that is, "in every way fit for the service stated in Clause 6." While the revised version of clause 3(b) omits the previous standard form wording found in other time charters ("tight, staunch strong in good order and condition . . . in every way fit to operate effectively . . . for the services"), which have been held in the time charter context to amount to a full warranty of the physical seaworthiness of the vessel (see eg *The Madeleine* [1967] 2 Lloyd's Rep 224) and to the requirement that the vessel shall be efficient as a going concern, that is, with a competent crew and with proper documents, such as charts, on board her (see eg *The Derby* [1985] 2 Lloyd's Rep 325), it is submitted that the "slimmed-down" version in "Supplytime 2005" achieves the same effect: the vessel must be fit for the contractual service so far as due diligence can make her. See generally Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 11.5 *et seq*. An oddity of the 2017, as of the 2005, version of the "Supplytime" form is that the duty to exercise due diligence to maintain the vessel extends only to her classification status and her seaworthiness; while the vessel was required to comply with the description in Annex "A" as at delivery under clause 3(a), under clause 3(b) there is no express obligation that the owners will exercise due diligence to maintain that condition during the service. This may lead to difficulties where an item of equipment which the vessel was warranted to have as at delivery but which does not affect the fitness of the vessel for the service as such (the two are not necessarily overlapping as the 1998 award referred to above pointed out) becomes inoperative after delivery and during the service. The comparable provision in clause 3(i) of the Shelltime 4 form provides, *per contra*, "Throughout the charter service Owners shall, whenever the passage of time, wear and tear or any event . . . requires steps to be taken to maintain or restore the conditions stipulated in Clause . . . 1, exercise due diligence so to maintain or restore the vessel": consideration should be given to a similar amendment of the present clause 3(b) of "Supplytime 2005." The justification for this 2005 choice, as set out in the 2017 explanatory notes ("Rather, Annex A represents an account of the state of the ship at the time of delivery. If it was otherwise, Annex A would have to be amended every time the ship is modified, which would be impractical in the offshore sector where ships are frequently modified"), seems with respect to set a premium on the fact that aspects of the vessel's configuration or equipment may be changed in operation (for example, the fitting of an A-frame aft to assist in loading operations or if the OSV is also fitted for diving operations as a DSV, some change to her saturation diving system) over the fact that most if not all of the vessel's critical attributes and characteristics are defined in Annex A. In almost all cases, there can be little prejudice or difficulty in requiring the owner to maintain the vessel in as delivered condition including in all respects as set in Annex A (with a suitable rider if substantial changes to the vessel in service are contemplated).

5.49 The undertaking on the owner in relation to the seaworthiness on delivery is in terms of the vessel's "hull and machinery." In one arbitration under the "Supplytime 2005" form concerning an OSV specially fitted out as a dive support vessel, it was ambitiously argued by the owner that the saturation diving system fitted on board the vessel (and described in Annex A) was not comprised within the term "machinery" and that no warranty was given save as to items properly so described as "machinery", being machinery necessary for the operation of the vessel, *qua* vessel and not other equipment; all that Annex A required was that the system be on board and operational. That argument was not the subject of decision and the short dismissive answer to it can be anticipated, but it demonstrates that the use of old terms such as "machinery" where what is meant is all aspects of the vessel's plant, machinery and equipment could usefully be revised in a modern form, such as "Supplytime 2017." The problem is reflected in the 2017 explanatory notes to the new off hire provision in clause 13. There the drafters state that they have added the term "equipment" to "machinery" in the term "breakdown of machinery" in order to widen the scope of the off hire provision. The notes state: "In the 2017 revision, reference to breakdown of equipment has been added. This is intended to cover, for example, DP (Dynamic Positioning) and

gear." This is an unsatisfactory drafting method, since it promotes fine verbal distinctions where none are presumably intended. It would be easier to use the term "vessel" and to define it as including all machinery, plant, equipment or other apparatus forming part of her and not installed by the charterer and separately maintained by it (such as a special diving system).

Clause 4: structural alterations to the vessel and extra equipment

"4. Structural Alterations and Additional Equipment

The Charterers shall have the option, at their expense, of making structural alterations to the Vessel or installing additional equipment, both requiring the written consent of the Owners, which shall not be unreasonably withheld. Unless otherwise agreed, the Vessel is to be redelivered reinstated and all additional equipment removed, at the Charterers' expense, to her condition on delivery, fair wear and tear excepted. The Vessel is to remain on hire during any period of these alterations or reinstatement. The Charterers shall at all times be responsible for repair and maintenance of any such alteration or additional equipment. However, the Owners may, upon giving notice, undertake any such repair and maintenance at the Charterers' expense, when necessary for the safe and efficient performance of the Vessel. The equipment installed by the Charterers shall not become the property of the Owners."

5.50 An important aspect of offshore operations is that the vessel is hired in by the charterer in support of another offshore vessel or unit and to provide a base or platform for services to that other vessel or unit. Such services frequently require the vessel to be modified (sometimes extensively) or to be fitted out with specialised plant. The charterer may need to fit the vessel with some dedicated structure such as a platform, or with some special equipment, for the performance of the service to be carried out by the vessel. Under clause 4, the charterer may do so with the owner's consent (not to be unreasonably withheld) but he must remove the same at the end of the charterparty and is responsible for the maintenance of it during the charter. Such structure or equipment will fall outside the owners' warranty as to the condition of the vessel as set out in clause 3. The explanatory notes (dating back to "Supplytime 89") reflect that often the owner may not have the specialist knowledge to maintain and repair specialised equipment put on board its vessel (eg a special diving system or seismic data collection apparatus). While the owner has the right (and it is suggested the obligation) to step in to maintain and repair when there is a matter affecting the seaworthiness of the vessel or its safe and efficient operation, otherwise it will be a matter for the charterer. The clause does not however deal with the mechanics of possible dual maintenance responsibilities. It will therefore be sensible in a case where this may be problematic because of the quantity or nature of the additional equipment or its effect on the vessel's operation, for there to be an express requirement on the owner to notify the charterer in advance of any work to be carried out by it and, possibly, a system of notification to the owner of planned charterer's repair and maintenance teams visits to the vessel. It should be noted that different results are produced in terms of off hire under clause 13 where there is a breakdown in owner's equipment and charterer's equipment installed under this clause: see the commentary under clause 13 below.

5.51 Issues not uncommonly arise as to the granting of consent by an owner to the proposed change or alteration. The standard adopted by clause 4 is one of "consent" which "[cannot] unreasonably be withheld." This standard has been explained in a number of cases, see eg *Porton Capital Technology Funds v 3M Holdings Ltd* [2011] EWHC 2895 (Comm) and *Barclays Bank plc v UniCredit Bank AG* [2014] EWCA Civ 302 (different wording: "consent to be determined . . . in a commercially reasonable manner"). The concept is used at various places in "Supplytime 2017" (eg clauses 5(b); 18(b); 20(b); 21 and 33(b)) and will have the same meaning in each clause, although the relevant circumstances bearing on reasonableness will vary by context and the particular case. In basic terms (see eg *per* Hamblen J in *Porton Capital* at paras. 219–222) the party requesting consent bears the burden of demonstrating that the other party's refusal to

give consent was unreasonable. The party requested to give consent is not obliged to have regard solely or even principally to the other party's interests when making its decision and can base its decision on reasonable commercial grounds, as the matter affects it and its interests. There is no single objectively correct or justifiable decision, reflecting that what is reasonable in each case will depend on the facts. However, it is likely that if the party requesting consent would suffer disproportionate detriment as a result of a refusal, the refusal may nonetheless be deemed unreasonable. Such clauses can raise difficult issues of classification (as discussed in *Barclays v UniCredit*) as to whether they confer a discretion and if so an unfettered one, but the matter is ultimately one of construction (see *per* Longmore LJ, ibid., at para.14). The wording adopted by BIMCO is the classic landlord and tenant wording (see eg *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] 1 Ch 513, in which there was a covenant against eg assignment without the consent of the landlord "such consent not to be unreasonably withheld", and *British Gas Trading Ltd v Eastern Electricity* [1996] EWCA Civ 1239). It will therefore be squarely covered by the guidance given in *Porton Capital v 3M*.

5.52 Subject to one addition, clause 4 of "Supplytime 2017" is materially identical to its predecessor in "Supplytime 2005"; this was an amended version of the previous clause 23 of "Supplytime 89." The only significant amendment made to the 1989 form (and carried through in the same terms in the 2017 form) is that while the responsibility for the maintenance and repair of the equipment or added structure is the charterer's, the owners are given an express right to take steps in this regard where it is necessary for them to do so for the safety and proper operation of the vessel *qua* vessel. As the explanatory notes to the 2005 form stated, the change was made for practical reasons:

> Often, the Owners does not [*sic*] have the specialist knowledge required to maintain such equipment belonging to Charterers and the wording of this clause has therefore been changed to reflect the practice whereby the Owners might undertake repairs to Charterers' equipment if necessary for the safety and efficient performance of the Vessel, but otherwise the responsibility for repairs and maintenance rests with the Charterers. To avoid the possible duplication of work caused by the Charterers sending teams onboard to do work already undertaken by the Owners, the provision has been amended to contain a formal requirement for the Owners to notify the Charterers (i) that repairs/maintenance is needed [*sic*] and (ii) that the Owners will undertake the work. The responsibility for such alteration and reinstatement rests with the Owners. (*sc*. the Charterers: see the earlier words of Clause 4)

5.53 The "Supplytime 2017" version makes one important change in relation to redelivery of the vessel. The obligation on the charterer to remove its structural changes or additional equipment is frequently a source of argument, where the owner requires the vessel to be put back into what clause 4 of "Supplytime 2005" described as "to her original condition" without exception. While the term "original condition" was usually construed as meaning the condition in which the vessel was originally as at the commencement of the charterparty, some owners have sought to contend (albeit with differing degrees of conviction) that the vessel needed to be put back into a better condition than on delivery, arguing that the reinstatement required restoration, which in many cases could only be done by making the vessel "as new." But in addition, even restoration to an "as on delivery condition" imposes difficulties in a long-term charterparty. The "Supplytime 2017" form dispenses with these areas of uncertainty by simply requiring the vessel "to be redelivered reinstated and all additional equipment removed, at the Charterers' expense, to her condition on delivery, fair wear and tear excepted." The 2017 explanatory notes state, recognising the unforeseen difficulties which the term "original condition" in "Supplytime 2005" sometimes led to:

> Regarding the ship's condition on redelivery, the 2017 edition of SUPPLYTIME no longer requires that the ship should be reinstated to its "original condition", but only to the "condition on delivery" with an exception for fair wear and tear. This is to avoid the need for it to be returned to its original condition as a new ship but rather, to a condition commensurate with its condition on its delivery to the Charterer and, allowing for the normal wear and tear over the period of the charter.

5.54 As before under "Supplytime 2005", under "Supplytime 2017" "The equipment installed by the Charterers shall not become the property of the Owners." This may seem an unnecessary statement, but depending on the degree to which equipment has been installed within the vessel's equipment, there have been attempts in different contexts (usually in an insolvency context) to argue that the charterer's equipment by reason of the degree of attachment and connection to the vessel has lost its identity and property in it has been lost by accession to the greater chattel, the vessel, and therefore to the owners: *accessorium principale sequitur* or *accessio cedit principali*: (ownership of) the accessory item follows or yields to that of the principal item. For an interesting example of a dispute of this nature in the offshore context, concerning modules installed within large steel platforms or "pancakes" for off-loading to an offshore drilling platform, see *International Finance Corpn v DSNL Offshore Ltd* [2005] EWHC 1844 (Comm) where it was argued that, despite retention of title by the seller in the modules, these were lost by accession to the pancakes (unfortunately, although the accession point was fully argued, the Judge (Colman J) touched on only one aspect of it, given that the case was being heard on an urgent basis in vacation and he dealt principally with issue of title and the application in English law of the vendor's equitable lien to sales of chattels). But see also for a more prosaic example (lorry engines): *Hendy Lennox (Industrial Engines) Ltd v Graham Puttick Ltd* [1984] 1 WLR 485 and *McKeown v Cavalier Yachts P/L* (1988) 13 NSWLR 303 (yacht building materials). A short account of the modern law of the effects of accession and loss of title by merger of one chattel in another is given in Rainey, "Whose Goods are They Anyway?" [2016] ICR 324. In the unlikely event that a piece of machinery were so bound up with the vessel that it arguably gave rise to accession, express provision such as that in clause 4 will probably suffice to exclude loss of title: see *Clough Mill Ltd. v Martin* [1985] 1 WLR 111.

Clause 5: survey

Supplytime 2005

"5. Survey

The Owners and the Charterers shall jointly appoint an independent surveyor for the purpose of determining and agreeing in writing the condition of the Vessel, any anchor handling and towing equipment specified in ANNEX 'A', and the quality and quantity of fuel, lubricants and water at the time of delivery and redelivery hereunder. The Owners and the Charterers shall jointly share the time and expense of such surveys."

5.55 Under clause 5 of Supplytime 2005, modest provision was made for an on hire and off hire survey. The parties are to appoint a joint surveyor who is to determine for their agreement the condition of the vessel and, as is common in time charterparties, to determine the quantities of bunkers and oils on board. Such surveys correspond to the usual "on hire" and "off hire" surveys. A different approach is taken in "Supplytime 2017."

Supplytime 2017

"5. Surveys, Audits and Inspections

(a) *Surveys* – Upon delivery and redelivery of the Vessel, the Parties shall jointly appoint an independent surveyor for the purposes of determining and recording in writing:

(i) the type and quantity of fuel;
(ii) the quantity of potable water remaining onboard; and
(iii) the cleanliness and condition of the cargo tanks, as at the time of the Vessel's delivery and redelivery respectively.

The Parties shall jointly share the time and expenses of such surveys.

(b) *Audits and inspections* – Prior to delivery the Owners shall provide the Charterers with such information and documentation as the Charterers may reasonably require to conduct a vessel audit, survey or inspection, upon reasonable notice.

(i) Provided that audits, assessments, surveys or inspections can be accomplished without hindrance to the working or operation of or delay to the Vessel, and subject to prior consent, which shall not be unreasonably withheld, the Owners shall provide full access to the Vessel prior to delivery for the Charterers or their appointed auditor to carry out vessel audits, assessments, surveys and inspections.

(ii) The Charterers shall have the right at any time during the Charter Period, subject to reasonable prior notice, to conduct, or have conducted, any audits, assessments, surveys or inspections of the Vessel.

(iii) The cost for all such audits, assessments, surveys and inspections shall be for the Charterers' account.

(iv) The Owners and the Crew shall assist the Charterers with the audits, assessments, surveys and inspections.

(v) The results, conclusions and any recommendations arising from such audits, assessments, surveys and inspections shall be presented to the Owners for review and reasonable time to comment prior to inclusion on OVID, CMID or similar systems."

5.56 Under "Supplytime 2017" a much more extensive regime in relation to surveys, vessel audits and inspections has been created; this is stated by BIMCO to be necessary "to reflect current practice." As discussed further below, the modern industry operates increasingly on the basis of inspection and audit databases operated by leading industry bodies connected with the oil and gas industry (OCIMF) and with the operation of offshore vessels (IMCA), akin to the "oil major" approval database SIRE based on ship inspection reports and evaluations of tankers.

5.57 Paragraph (a) of the new clause 5 is a redrafted version of the "Supplytime 2005" clause 5, breaking down into separate sub-paragraphs the matters to be the subject of the on- and off hire joint surveys. Curiously, in so doing, while provision is made for standard bunker quantity surveys and for cargo tank cleanliness (corresponding with the new definition of "tanks" in clause 2(a)(ii) of "Supplytime 2017") as well as quantities of drinking water, there is no requirement that the joint survey satisfy itself as to the condition of the vessel generally (cf. "Supplytime 2005": "the condition of the Vessel, any anchor handling and towing equipment specified in ANNEX 'A'"). No explanation is given for this change in the explanatory notes. While para. (b) of the new "Supplytime 2017" form provides for a wider possible programme of audit and inspection by the *charterer*, the benefit of a joint survey on general condition aspects is removed. Given the increased use by charterers of their own independent inspectors or auditors, with information being submitted to the various databases which govern the more sophisticated offshore service vessels in this sector of the industry, the need for a joint survey is reduced and in certain contexts has become effectively redundant. However, given the widespread use of "Supplytime" in a range of different OSV contexts where far more basic standards of operation may be applicable and where database certification may not be applicable, consideration should be given to whether a standard and joint on- and off hire survey is still appropriate.

5.58 Paragraph (b) of clause 5 in the "Supplytime 2017" form reflects the newer practice of the charterer (or its inspector or auditor) carrying out a vessel audit or inspection, usually following an industry database template, before the delivery of the vessel into the charterparty service, with the owner's assistance and with full reasonable access being granted. The position of the owner in terms of the disruption to the vessel's operation (since she is likely to be performing her current service or undertaking demobilisation under her previous fixture) is protected by the reservation that the audit etc. must be able to be "accomplished without hindrance to the working or operation of or delay to the Vessel" and "subject to prior consent, which shall not be unreasonably withheld": as to which see *Porton Capital Technology Funds v 3M Holdings Ltd* [2011] EWHC 2895 (Comm) and the discussion under clause 4 above. The owner is then permitted the opportunity to review and comment upon the results before the data is included on the applicable offshore vessel database. This is highly important as the recording of the findings will effectively go on the vessel's "record sheet" for future fixture negotiations. An additional feature of clause

5 of "Supplytime 2017" is that it permits the charterer to carry out audits and inspections in the same way as prior to delivery.

5.59 The explanatory notes set out the thinking behind the new clause in terms of trying to avoid the problem of a charterer who does not inspect the vessel until after the vessel has been delivered into the charterparty service:

> In practice, it is sometimes a problem that charterers do not survey, inspect or audit the ship before delivery and then argue that the ship should not go on hire until sometime afterwards, when the survey, audit or inspection has been completed, approved and the charterers have accepted the ship. Ideally, the charterers should do this before delivery so that the ship is ready to go on hire at the time of delivery. This provision aims to facilitate this by giving the charterers the right to survey, audit or inspect the ship prior to delivery.

It is doubtful whether the new clause achieves much beyond emphasising the charterer's right to conduct an inspection or audit before delivery and setting out the terms applicable if the charterer wishes to do so. If the charterer is to be required to conduct any inspection which it wishes to carry out and to do so before delivery, then this should be stated in clear terms. Similarly, it may be inconvenient for the owner on a short-term fixture to be exposed to additional or deferred inspection(s) during the service. Consideration should be given in this type of situation to deleting this additional right.

5.60 Clause 5(b) makes reference to the two foremost current databases for OSVs: OVID and CMID

i "OVID" or the Offshore Vessel Inspection Database has been developed by OCIMF to provide a database of offshore inspections broadly following the format of SIRE for oil tankers. The purpose as described on the OCIMF website is as follows:

> The aim of OVID is to provide a robust web based inspection tool and database of inspection reports; this will be underpinned with professional, trained and accredited inspectors. In the long term it is an aspiration that OVID will form a database that is central to the selection and assurance of offshore vessels enhancing the safety of operations in the industry. By utilising a database where inspection reports are available to OVID participating members experience has demonstrated that inspection numbers will drop over time. Assurance checks as a part of the chartering process may be speeded up as the assurance personnel have access instantly to credible information on the vessel and its safety performance. OCIMF members have cooperated to develop a common inspection document and format that will eliminate the need for inspectors to conduct inspections using a core document and client specific supplements; this should simplify the inspection process for both inspectors and ships staff and also provide assurance personnel in the oil companies with increased confidence in the inspection report content. The provision of a document detailing vessel/ unit principal dimensions and equipment will give vessel operators the ability to 'show case' its capabilities and provide a tool to project teams to pre-screen vessels that are capable of undertaking the required activities. Having this document controlled by the vessel/unit operator allows for rapid amendment to reflect upgrading activities, and hence allowing project teams to quickly evaluate the vessels new capabilities.

ii "CMID" or the Common Marine Inspection Document is a standardised format for vessel inspection reports based on a common inspection process and has been developed by the International Marine Contractors Association (IMCA), the international trade association representing offshore, marine and underwater engineering companies. Its purpose is described an inspection/audit process which is undertaken not to assess a vessel's suitability for an industrial operation, "rather its aim is to enable an assessment of the vessel's operating safety status, by examining all aspects of the safety management system in place on board. This will include any observations with regard to the vessel's

internal structural integrity; the safety of its personnel; and its compliance with environmental protection requirements." As the CMID sections demonstrate, it represents a highly detailed audit and inspection covering every aspect of vessel capability and condition, with special sections for different types of vessel or vessel functionality such as DP or dynamic positioning vessels or AH/AHT anchor handling vessels. The broad outline of the general matters covered (leaving aside special characteristics) can be seen from the current form's contents page:

1 Vessel Particulars.
2 Previous Inspections.
3 Certification.
4 Index of Certificates.
5 Safety Management System.
6 Health, Safety and Environment (HSE).
7 Security.
8 Crew Management.
9 Crew Qualifications.
10 Life-saving Appliances (LSA).
11 Firefighting Appliances.
12 Pollution Prevention.
13 General Appearance.
14 Bridge, Navigation and Communications Equipment.
15 Machinery Space.
16 Mooring, Towing and Lifting Equipment.
17 Construction and Stability.

Clause 6: employment and area of operation

Scope of vessel's employment

"6. Employment and Area of Operation

(a) *Employment* – The Vessel shall be employed in offshore activities which are lawful in accordance with the law of the place of the Vessel's flag and/or registration and of the place of operation. Such activities shall be restricted to the service(s) as stated in Box 17, and to voyages between any good and safe port or place and any place or Offshore Units where the Vessel can safely lie always afloat within the area of operation as stated in Box 16 (Area of Operation), which shall always be within International Navigation Limits. The Charterers do not warrant the safety of any such port or place or Offshore Units but shall exercise due diligence in issuing their orders to the Vessel and having regard to her capabilities and the nature of her employment.

(b) ROV operations and diving platform – Unless otherwise stated in Box 18(i), the Charterers shall not have the right to use the Vessel for ROV operations. Unless otherwise stated in Box 18(ii), the Vessel shall not be employed as a diving platform."

5.61 Clause 6 of "Supplytime 2017" corresponds almost exactly to the previous clause 5 of "Supplytime 2005." Paragraph (a) of clause 6 provides that the "vessel shall be employed in offshore activities." While these "activities" are not defined as such, it does not appear that these words in fact add or qualify very much to the effect of clause 6 since the activities, whatever they are, are expressly defined in terms of the services agreed upon by the parties in Box 17: those expressly stated services will be the "offshore activities" on which the vessel is to be employed. The services are subject to various requirements, set out in clause 6, which are cumulative.

i The services must be lawful under the law of the vessel's flag and of the place of the performance of the services. This is a clear requirement: if the activities are lawful, then they must be performed. It is not open to the master or owner to refuse on the basis that their legality is uncertain, although in the case of reasonable doubt it might be open to the owner to call upon the charterer to justify the lawfulness of what it is being asked to do.

ii As already noted, the services are confined to those set out in the definition of the services which is given in Box 17. Given the wide range of services and the possible temptation for a charterer of an offshore vessel under charter to use her for other services than were discussed, Box 17 requires the parties to agree that "employment of the Vessel restricted to" those services which are to be named or described in that box. These services may be specific (eg "transportation of drilling bits to Rig X") or general (eg "attendance upon drilling platform to provide supply and assistance services"). The more general the definition, the more potential ground for dispute there may be as to whether a particular service is or is not comprised within the bounds of the defined service. So, for example, if a vessel is engaged "to assist in the towage/escort of the 'Brent Spar' oil installation to her sinking position", does this service include the vessel being detailed off to shadow and douse with fire hoses a Greenpeace protestors' supply craft which is following and harassing the convoy? There are arguments on both sides; to avoid such problems and potential disputes, the fullest definition of the service is often the most prudent course.

iii The services must engage the vessel only between safe places where she can lie always afloat: as to the obligation upon a charterer to employ the chartered vessel between safe places, see Coghlin, Baker, *Time Charters* (7th edn, 2014), paras. 10.1–10.49 and *Voyage Charters* (4th edn, 2014), para. 5.31 *et seq*.

iv The charterers do not give an absolute warranty of safety, as is found, for example, in the "NYPE" form or the "Baltime" form. Under the "Supplytime 2005" form, the charterers only undertake to exercise due diligence to ensure the vessel is used at and between safe places as if she were their own property: compare the similar approach adopted in clause 4(c) of the "Shelltime 4" form of tanker time charterparty and the commentary on this provision in Coghlin, Baker, *Time Charters* (7th edn, 2014), at paras. 37.41–37.45. In practice, it is often very difficult to establish a breach of such an undertaking, eg where the unsafety of a place lies in something unexpected which could not have been learned of by the charterers (or the owners) in advance: see generally eg *The Saga Cob* [1992] 2 Lloyd's Rep 545 (CA) and *The Chemical Venture* [1993] 1 Lloyd's Rep 508.

v It is therefore important that in filling out Part I in Boxes 7 (delivery port or place); Box 8 (redelivery port or place) and Box 16 (area of operation) no express statement to the effect that the port or place named is "safe" is included. This is both unnecessary and unwise. If a named port is described as "safe" by the charterer, then an absolute warranty of safety may be given, rather than the restricted one of due diligence. In one arbitration concerning a time trip voyage on "Supplytime 2005" terms the Boxes had been filled out with express statements of "safe." It was argued that the case was akin to that considered (obiter) by Colman J in *The Greek Fighter* [2006] 1 Lloyd's Rep where a fixture recap for a time charter on the Shelltime 4 form referred to named ports as "safe." No award was produced but it is suggested that the clear terms of clause 6(a) would arguably not be displaced and that the Boxes terms would be read as shorthand for the "safety" warranted in clause 6. But the issue is best avoided by simply leaving clause 6 to do its job and to leave out additional wording of this sort, wherever it might normally arise.

vi The services must engage the vessel only within the geographical area stipulated in Box 16 as being the contractual "Area of Operation" which is itself to be within the International Navigation Limits (as the Institute Warranty Limits are now known). Consistent with other recently published BIMCO documents the reference to "International Warranty Limits" (IWL) has been changed to "International Navigation Limits" (INL). INL came in to force 1 November 2003 and is an amended version of IWL. More information about INL can be found on the BIMCO website: see the 2005 explanatory notes). As to "trading limits" clauses in charterparties, see generally Coghlin, Baker, *Time Charters* (7th edn, 2014), paras. 5.1–5.23. Provision is made for the not infrequent case of the charterer asking for permission to breach international navigation limits or the trading limits defined in Box 16. In such a case the owner may accede to the request on terms to be agreed, including adjustment of hire. However, there is no obligation upon the owner to agree under the wording of clause 6; if it is desired to have an enforceable right in this respect then consideration should be given to the common-form wording "without the owner's prior consent, which consent shall not unreasonably be withheld.

vii The use of the vessel as a platform for diving operations or for the operation of remotely operated undersea vehicles or other forms craft or machines (or ROVs) is common. These operations present special risks and dangers both to the vessel and her hull and to those engaged in them, Accordingly, specific consent is required from the owners before such operations may be undertaken. A previous version of the clause (in "Supplytime 89") dealt only with the use of the vessel as a diving platform; given the special nature of diving operations and the particular hazards involved in diving work, the ordinary type of offshore service vessel is less well-suited to diving work than a dedicated diving support vessel. The BIMCO form reflected this. The technical advances made in the use of remotely controlled undersea equipment since 1989 made a corresponding provision in respect of ROVs equally necessary and in this respect the 2017 form mirrors the 2005 form. The drafters of "Supplytime 2017" note, pertinently, that "The parties can agree in Box 18 that the ship may be used for ROV operations or as a diving platform. However, users should be aware that such operations may require a lot of additional clauses to provide for this. Nevertheless, it was felt to be useful to retain the options in the box so that it was clear at first glance if the parties had agreed to such services." It is a common problem that "Supplytime" is used for services involving an ROV or for a vessel used as a dive support vessel without adequate consideration being given to how the rider clauses covering such operations are to "fit" with the standard BIMCO clauses in Part II, particularly with regard to vessel condition, master and crew and employment/operation.

Certificates

"(c) *Permission and licences* – Relevant permission and licences from responsible authorities for the Vessel to enter, work in and leave the Area of Operation shall be obtained by the Charterers and the Owners shall make reasonable efforts to assist the Charterers in securing such permission and licences. Where necessary the Charterers shall assist the Owners in obtaining work permits and visas for the Crew to work in the Area of Operation."

5.62 The obtaining of all necessary certification and permission for the services is, as under the "Towcon" and "Towhire" forms, the charterer's responsibility. However, an obligation is also imposed on the owners to give to the charterers their assistance in respect of such matters, if the same be necessary. The "Supplytime 2017" version of this provision has been amended from the 2005 version which placed a heavy burden on the owner to assist the charterer to obtain

the permits it needed: the 2005 wording was "the Owners shall assist, if necessary, in every way possible to secure such permission and licences." This was a highly unusual provision in any licence or certificate context and particularly so in the offshore context where services may have to be rendered (and permits obtained for such services) in hostile, unsophisticated or thoroughly corrupt places. The 2017 solution is a sensible and much more balanced one: the responsibility for permits etc. is on the charterer but the corresponding duty on the owner is one of reasonable efforts only. As the explanatory notes state: "This is a change from SUPPLYTIME 2005 in order to avoid a potential situation where the owners would be obliged to send their managing director half-way around the world to assist in solving a problem with obtaining a permit. What is reasonable may depend, amongst other things, on the duration of the employment in question. For example, what is reasonable by way of assistance in obtaining a permit for a location where the ship is intended to stay for six months, might not be reasonable in relation to a single cargo run." Where the owner may be responsible for getting the work permits for his crew (which may be a personal duty under local law), the charterer is to assist in the same way: "A final sentence has been added that charterers, where necessary, should assist owners in obtaining work permits and visas for the crew. In a few jurisdictions, the ship's crew can only obtain work permits and visas by an invitation and/or sponsorship from the charterers or their clients."

The vessel's space

"(d) *The Vessel's space* – All the Vessel's tanks, decks, and usual places of loading and accommodation throughout the Charter Period shall be at the Charterers' disposal reserving proper and sufficient space for the Vessel's Crew, tackle, apparel, furniture, provisions and stores. The Charterers shall be entitled to carry, so far as space and certification is available and for their purposes in connection with their operations:

(i) Persons other than Crew, other than fare paying, and for such purposes to make use of the Vessel's available accommodation (as *per* ANNEX A). The Owners shall provide suitable provisions and requisites for such persons for which the Charterers shall pay at the rate as stated in Box 27 *per* meal and at the rate as stated in Box 28 *per* day for the provision of bedding and services for persons using available accommodation.
(ii) Lawful cargo whether carried on or under deck.
(iii) Explosives, dangerous goods, and toxic and/or noxious substances whether in bulk or packaged, provided proper notification has been given and such cargo is marked and packed in accordance with the national regulations of the Vessel and/or the International Maritime Dangerous Goods Code and/or other applicable regulations."

5.63 As to the first part of para. (d), compare the typical "whole reach and burthen" clauses in time charterparties such as clause 7 of the "NYPE" form or clause 10 of the "Shelltime 4" form (as to these, see Coghlin, Baker, *Time Charters* (7th edn, 2014), paras.17.4 and 37.65 respectively) or clause 8 of the "Baltime" form. The "Supplytime 2017" form has updated the wording to refer more intelligibly to "All the Vessel's tanks, decks, and usual places of loading and accommodation" but otherwise (save as below) there has been no change to the provisions, save in relation to dangerous cargoes.

5.64 Paragraph (d) also confers upon the charterer the right to use the vessel's space for the carriage of personnel, cargo, and explosive and noxious substances (subject in the case of the latter to proper notification and procedures being carried out and to the granting of an express indemnity in respect of the consequences of the carriage of any dangerous or hazardous cargo). This reflects the common use of such vessels to ferry men and supplies (including dangerous chemicals and explosive charges) to and from the platform or drilling areas being serviced. Clause 6(d)(iii) of "Supplytime 2017" replaces the former clause 6(d)(iii) and (iv) of "Supplytime 2005" with a simpler and more intelligible regime, as well as removing various express indemnities imposed on the charterer for the carriage of such cargoes.

The former 2005 contractual regime

5.65 The starting point is the wording in "Supplytime 89"; this referred to the carriage of explosives and dangerous cargo on the one hand and on the other the carriage of "hazardous and noxious substances" which was obviously a disjunctive rather than a conjunctive use of "and." *Ex*, perhaps somewhat excessive, *cautela*, this was been reflected in the replacement of "and" with "or" in "Supplytime 2005", this being done, in BIMCO's words "to emphasise that material may be hazardous without being noxious." The "Supplytime 2005" wording otherwise preserved the distinction and was worded:

> (iii) Explosives and dangerous cargo, whether in bulk or packaged, provided proper notification has been given and such cargo is marked and packed in accordance with the national regulations of the Vessel and/or the International Maritime Dangerous Goods Code and/or other pertinent regulations. Failing such proper notification, marking or packing the Charterers shall indemnify the Owners in respect of any loss, damage or liability whatsoever and howsoever arising therefrom. The Charterers accept responsibility for any additional expenses (including reinstatement expenses) incurred by the Owners in relation to the carriage of explosives and dangerous cargo.
>
> (iv) Hazardous or noxious substances, subject to Clause 14(f), proper notification and any pertinent regulations

5.66 The distinction between "explosives and dangerous" cargoes and "hazardous or noxious substances" which existed in "Supplytime 2005" and dates from the earliest form of "Supplytime" was always a curious one. Dangerous goods within the IMDG Code are hazardous goods and may very often be noxious. To make sense of the different provisions in "Supplytime 2005", it is presumably the case that goods falling within (iv) are not also within (iii) and that (iv) is a sweep-up category for goods which pose safety issues but which nevertheless fall outside the IMDG code and therefore outside its notification and labelling provisions. Given the comprehensive scope of the IMDG Code which includes a class for goods which present dangers in carriage which are not otherwise specified (see para. 5.1.11 of the IMDG Code in relation to "NOS" goods) it is difficult to see what (iv) covers. It is not possible to read (iv) as dealing with cargoes which pose dangers because of their size, configuration or weight and are in this sense hazardous as some have argued, since the wording of (iv) refers to "hazardous or noxious *substances*" (emphasis supplied) and is not therefore apt to deal with, for example, a cargo of razor wire being carried for fitting around an installation's legs to prevent unauthorised access.

5.67 This creates a further difficulty when clause 14(f) of "Supplytime 2005" (now deleted in "Supplytime 2017") is considered. It is common for the charterer to be obliged to give an indemnity to the owner for the consequences of the carriage of dangerous goods where, at least, the characteristics of the goods have not been declared to the owner: see eg *Brass v Maitland* (1856) 6 E & B 470. As the cross-reference in (iv) makes clear, the indemnity provided for by clause 14(f), as to which see below, applies only in respect of "hazardous or noxious substances" but does not apply in relation to any other explosive or dangerous goods, these being a different and discrete class of goods for the purposes of "Supplytime" as is demonstrated in clause 6(c)(iii) and (iv). Whether this was the intention and what the scope of the indemnity are questions which receive no answer in any of the versions of explanatory note provided by BIMCO for "Supplytime 89" and "Supplytime 2005."

Supplytime 2017

5.68 The drafters of "Supplytime 2017" have simplified matters by deleting any separate provision for hazardous or noxious substances and including within one provision dealing with explosives and dangerous goods, "toxic and/or noxious substances." Further the express indemnity has been deleted (mirroring the similar deletion in the context of the knock-for-knock provisions in clause 14 of the charterer's indemnity under clause 14(f) for hazardous and noxious substances).

The explanatory notes state: "The indemnity contained in SUPPLYTIME 2005 has been removed to make the contract more balanced and to strengthen the knock-for-knock regime." It should however be noted that the ordinary implied term at common law (for losses other than those expressly covered by the mutual provisions in clause 14) under *Brass v Maitland* (1856) 6 E & B 470 (considered in *Effort Shipping v Linden Management, The Giannis NK* [1998] 1 Lloyd's Rep 337 (HL)) will continue to apply; for a discussion of this in the context of the carriage of cargo, see Cooke, *Voyage Charters* (4th edn, 2014) at paras. 6.49–6.57.

Lay-up clause ("Supplytime 2005", cf. clause 33 of "Supplytime 2017")

"(d) *Laying-up of Vessel*. – The Charterers shall have the option of laying up the Vessel at an agreed safe port or place for all or any portion of the Charter Period in which case the Hire hereunder shall continue to be paid but, if the period of such lay-up exceeds 30 consecutive days there shall be credited against such Hire the amount which the Owners shall reasonably have saved by way of reduction in expenses and overheads as a result of the lay-up of the Vessel."

5.69 The "Supplytime 2005" form contained at the end of clause 6 a very limited lay-up provision as worded above. This reflected the fact the charterer may, due to changes in his operational requirements offshore, have no employment for the vessel at all times during the service period. Clause 6(d) of "Supplytime 2005" allowed him to lay up the vessel during the period of the charterparty, paying full hire for the vessel; after 30 days' lay-up, although hire is payable in full, the saving of expenses to the owners of the vessel is credited against the hire. Given the changing economic climate and the retrenchment in the offshore sectors since 2005, the questions raised by lay-up during the service became more complex. BIMCO has ought to address the issue of lay-up in the "Supplytime 2017" form with a much fuller separate provision, the new clause 33, considered below. As the 2017 explanatory notes state: "A new and comprehensive lay-up provision has been drafted for SUPPLYTIME 2017. In the previous editions, this was very brief and did little more than to give the charterers the option of laying up the ship. The procedure to lay up a ship requires a lot of decisions to be made and the new clause aims to clearly set out in chronological order those decisions."

Clause 7: master and crew

"7. Master and Crew

(a) The Crew shall carry out their duties promptly and the Vessel shall render all reasonable services within her capabilities by day and by night and at such times and on such schedules as the Charterers may reasonably require without any obligation on the Charterers to pay to the Owners or the Crew any excess or overtime payments. The Charterers shall furnish the Master with all instructions and sailing directions and the Vessel and Crew shall keep full and correct records accessible to the Charterers or their agents.

(b) (i) No bills of lading shall be issued for shipments under this Charter Party.
(ii) The Master shall sign cargo documents as directed by the Charterers in the form of receipts that are non-negotiable documents and which are clearly marked as such.
(iii) The Charterers shall indemnify the Owners against all liabilities that may arise from the signing of such cargo documents in accordance with the directions of the Charterers to the extent that the terms of such cargo documents impose more onerous liabilities than those assumed by the Owners under the terms of this Charter Party.

(c) The Crew, if required by the Charterers, will connect and disconnect electric cables and cargo hoses when placed on board the Vessel in port as well as alongside the Offshore Units; will operate the machinery on board the Vessel for loading and unloading cargoes; and will hook and unhook pre-slung cargo on board the Vessel when loading or discharging alongside Offshore Units. If any of this work is not permitted by the port regulations or the seamen and/or labour unions, the Charterers shall make, at their own expense, whatever other arrangements may be necessary.

(d) If the Charterers have reason to be dissatisfied with the conduct of any member of the Crew, the Owners on receiving particulars of the complaint shall promptly investigate the matter and if the complaint proves to be well founded, the Owners shall as soon as reasonably possible make appropriate changes in the appointment."

Ordinary features

5.70 This clause corresponds to the usual time charterparty "employment" clause and with the exception of minor textual changes is unchanged from the former clause 6 of "Supplytime 2005." While it represents a fairly common form of time charter "employment" provision, clause 7 has certain special features to reflect the nature of offshore service. As to the ordinary time charter clauses, see eg clause 8 of the "NYPE" form (commented upon in Coghlin, Baker, *Time Charters* (7th edn, 2014), paras. 19.1–19.31). Thus:

i Under para. (a), the master of the vessel is under the charterers' orders. The charterers have the right to the full use of the vessel "within her capabilities", those capabilities being her operating characteristics and capacity given the description of her given in Annex "A" since no others are defined either in para. (a)(i) or elsewhere. Since the use is to be the "reasonable use", this will import an objective standard linked to the use in particular given circumstances of a vessel with those capabilities for a particular service or operation which would not be regarded as unreasonable in the relevant offshore industry.

ii Under para. (b)(ii), the master is to sign cargo documents and the charterers are to indemnify the owners against all consequences of the same. The "cargo documents" referred to expressly exclude bills of lading: see para. (b)(i). This reflects the reality that, in practice, while the vessel may be carrying spares and equipment to and from the rig or well-head, such items will either be the charterers' or will be items which the charterer has himself contracted with the rig-operator to provide and carry. The offshore service vessel will not be acting as the carrier of such goods and the vessel's operators will not enter into any separate contractual relationship with those who may be interested in the goods. This was a feature of the "Supplytime 2005" revision of the form, making this even more explicit, with an express prohibition on the use or issuance of bills of lading under the charterparty and with the right of the charterers being one only to have the master sign non-negotiable receipts marked in terms as such for any items received by the vessel for transportation and it remains the case under the 2017 form. As the explanatory notes to the 2005 revision confirmed: "In the offshore industry it is common practice that cargo belonging to the Charterers is carried, but it is rarely the case that third party cargoes are carried. Consequently Clause 7 expressly states that no Bills of Lading can be issued under the Charter Party . . .. Clause (a)(ii) has been split in to three Clauses and reworded to more clearly reflect the intention of the clause without changing the meaning." The 2017 explanatory notes further state:

> It is not intended that cargo belonging to third parties should be carried on board the ship in exchange for freight payments. Therefore, no bills of lading should be issued for any charterers' cargo carried under SUPPLYTIME and the Master should only sign cargo documents which function as a receipt and are non-negotiable. The charterers are required to indemnify the owners against any liabilities that could arise as a consequence of the Master signing such cargo documents, but only to the extent that the liabilities are greater than those assumed under the SUPPLYTIME charter party.

iii Under para. (c), the crew of the vessel is put at the disposal of the charterer for certain specific works and operations. This list of operations clarifies, in particular, that it is the crew who are to carry out all cargo operations on board the vessel. The "Supplytime 2017" form has made changes to the operations covered to remedy certain deficiencies in the "Supplytime 2005" wording: "This subclause sets out the various tasks which the ship's crew will undertake. If they are prevented by

port regulations or unions from performing the listed tasks then the charterers must make other arrangements at their own expense. In SUPPLYTIME 2017, the reference to the hoses which should be connected/disconnected has been made more generic in order not to exclude certain hoses. Furthermore, cargo has to be pre-slung for the crew to handle it."

iv Under para. (d), the customary right of the time charterer to complain in the event of dissatisfaction with the vessel's personnel is provided for.

Paragraph (d): compliance with orders

5.71 Paragraph (e) of clause 7 is of considerable importance to the tug owner or offshore vessel operator. As the explanatory notes to the 2017 form sate: "The operational control of the ship remains with the owners throughout the charter party." It reads as follows (and is materially identical to the "Supplytime 2005" version):

"(e) The entire operation, navigation, and management of the Vessel shall be in the exclusive control and command of the Owners and the Crew. The Vessel will be operated and the services hereunder will be rendered as requested by the Charterers, subject always to the exclusive right of the Owners or the Master to determine whether operation of the Vessel may be safely undertaken. In the performance of the Charter Party, the Owners are deemed to be an independent contractor, the Charterers being concerned only with the results of the services performed."

5.72 Given the nature of the operations which the owner's vessel will be called upon by the charterers to perform, it will frequently be the case that the vessel is required to perform hazardous operations, such as a close-quarter manoeuvring around an oil platform in poor weather, as part of its employment. Such services will be far removed from those comprised within ordinary time charterparty service. Under the ordinary forms of time charterparty, the right of the vessel to question the orders given to her by charterers is of very uncertain extent. In *Portsmouth SS Co v Liverpool & Glasgow Salvage Association* (1929) 34 Ll L Rep 459, Roche J held that it was not for the master to question unduly his orders "within the limits of obviously grave danger." However, in *Midwest Shipping v Henry* [1971] 1 Lloyd's Rep 375, where a vessel was ordered to tell the authorities at Chalna that she was bound for Singapore (whereas in fact she was bound for Europe), the court held that the master was entitled to query a subsequent order given to the vessel to return to Chalna which would have involved the authorities in learning of the deception. Donaldson J stated in a passage which has, perhaps, been more often cited than applied:

> It seems to me that against that background it must be the duty of the master to act reasonably upon receipt of orders. Some orders are of their nature such that they would, if the master were to act reasonably, require immediate compliance. Others would require a great deal of thought and consideration before a reasonable master would comply with them.

5.73 This broad statement of principle came under scrutiny in *The Houda* [1993] 1 Lloyd's Rep 333. In this case, the owners were held to be in breach of the charterparty in "delaying compliance" with an order by the charterers to discharge cargo at Mina-al-Ahmadi without the production of bills of lading. At first instance, Phillips J considered the distinction between non-compliance and delayed compliance at pp. 343–344 as follows:

> I have found the distinction between delay in complying with an order and a refusal to comply with that order elusive if not illusory.
>
> An unequivocal renunciatory refusal to comply with an order is, of course, easy to recognize, but there is no question of such a refusal in this case. Short of that it seems to me that a failure to comply with an order that persists beyond the period for which it is reasonable to delay becomes tantamount to a refusal to obey the order. Thus one cannot sensibly divorce the question of whether there has been a refusal to obey an order from the question of whether there has been unreasonable delay in obeying the order. What, I believe, is really in issue between the owners and the charterers is the right to pause before obeying an order and whether [the] owners' conduct in this case could possibly fall within that right.

He considered the cases including *Midwest Shipping*, and as to these said the following (p. 345):

> In each of these cases the orders given which the master delayed in executing were orders which threatened to expose ship and cargo to potential peril. In such a situation one can readily understand why the courts held that there was no breach of contract if a master paused for a reasonable period to consider the implications of the order. The paramount duty of a master is to exercise reasonable care for the safety of ship and cargo – a duty that will arise out of the contract of carriage and exist independently of the contract. That paramount duty may make it necessary for him to delay before complying with an order from the charterers. The statement of Mr Justice Donaldson that it must be the duty of the master to act reasonably upon receipt of orders must, in my judgment, be read in that context.

He summarised the position as to the extent to which the law recognised a qualification on the duty of the owners to comply with lawful orders as follows (p. 345):

> As a matter of business efficacy – and on the authorities – I can see justification for the right of [the] owners and their master to delay in obeying an order when this is reasonably necessary in the interest of the safety of ship, cargo and crew. I can see scope, as a matter of business efficacy, for the requirement of some term – express or implied – as to the manner in which [the] charterers' orders are to be conveyed to [the] owners. But I do not consider that any principle of law or business efficacy requires that [the] owners be entitled to delay in obeying a lawful order so long as is reasonably necessary to satisfy themselves that the order is authorised, or lawful under the charterparty, or that in discharging the cargo pursuant to that order they are not infringing the rights of the owners of that cargo. It is for the charterparty to provide what orders the charterers can lawfully give and for the charterers to ensure that their orders are lawful. If they give a lawful order, but the owners have doubts about its legality, it seems to me that the owners' delay in complying with that order must be at their own peril.

5.74 In the Court of Appeal, [1994] 2 Lloyd's Rep 541, that decision was reversed with the Court of Appeal endorsing the view that while a charterer's orders ordinarily required immediate compliance, the circumstances in which an order was received or the nature of it might make it unreasonable for the master to comply without further consideration or scrutiny. The court stated that the question to be considered in each case was how a person of reasonable prudence would act in the circumstances. This effectively restated the approach of Donaldson J in *Midwest Shipping v Henry* [1971] 1 Lloyd's Rep 375.

5.75 Paragraph (e) of clause 7 addresses this important question expressly and by placing the overriding decision-making power in respect of how the vessel is to be operated during the service, notwithstanding the charterer's orders, in the owners, renders this type of assessment unnecessary. While the vessel is at all times to be under the charterer's orders, her navigation and command are to remain under the exclusive control of the vessel's owners who are to "have the exclusive right . . . to determine whether operation of the vessel may be safely undertaken." This gives the operator of the tug or other vessel the right to override an order given to his vessel by the charterer in the event that he, *bona fide*, considers the same to be too unsafe or to involve the vessel or her crew in too hazardous an operation. While the discretion is unfettered on the language of the clause, it is likely that there would be an implied restriction to the effect that the operator or owner would have to act in good faith but there would be no scope for the importation of a standard of "reasonableness", unless possibly of the very high "irrationality" standard adopted in the context of judicial review. Further, given that the clause gives the direct control of navigation and management and all operational matters to the owner, there is no room for the sorts of difficult distinction between "navigation" and "employment" which arise under other forms of time charterparty, for example in relation to the routing of the vessel as was considered by the House of Lords in *The Hill Harmony* [2001] 1 Lloyd's Rep 147 in relation to clause 8 of the NYPE form ("The Captain . . . shall be under the orders and directions of the Charterers as regards employment and agency . . .").

Clauses 8 and 9: "provide and pay for" clauses

5.76 These clauses set out, in the usual time charterparty form, the particular items and services which the charterer and the owner are to provide and pay for and to the vessel for the charterparty service. Clause 8 deals with the owners' responsibilities in this regard and clause 8 with the charterers' responsibilities. The items and services referred to in clauses 8 and 9 reflect the typical charterparty division between "ship-side" and "shore-side" in the special context of the special features of the offshore industry.

5.77 On such clauses generally, see Coghlin, Baker, *Time Charters* (7th edn, 2014) on clauses 1 and 2 of the "NYPE" form at paras. 11.1–11.4 (owners) and 12.1–12.25 (charterers). They are usually construed as absolute obligations on the party who agrees to pay and as to provide the service or facility referred to in the clause, even if the same are dependent on third parties who he cannot control (see *Anastassia v Ugleexport* (1934) 49 Ll L Rep 1). If there is doubt as to the ability to provide due to third party problems, consideration should be given to an exemption clause or a wider *force majeure* provision.

Owners

"8. Owners to Provide

(a) The Owners shall provide and pay for:

(i) all provisions, wages and all other expenses of the Crew;
(ii) all maintenance and repair of the Vessel's hull, machinery and equipment; and
(iii) except as otherwise provided in this Charter Party:

(1) all insurance on the Vessel;
(2) all dues and charges directly related to the Vessel's flag and/or registration;
(3) all deck, cabin and engine room stores, lubricants, ropes and wires required for ordinary ship's purposes and for mooring alongside in harbour; and
(4) all fumigation expenses and sanitation certificates.

The Owners' obligations under this Clause extend to cover all liabilities for consular charges appertaining to the Crew, customs or import duties arising at any time during the performance of this Charter Party in relation to the personal effects of the Crew, and in relation to the stores, provisions and other matters as aforesaid which the Owners are to provide and/or pay for. The Owners shall refund to the Charterers any sums they or their agents may have paid or been compelled to pay in respect of such liability.

(b) On delivery the Vessel shall be equipped at the Owners' expense with any towing and anchor handling equipment specified in ANNEX A."

5.78 The terms of clause 8 are self-explanatory. The only material 2017 change to the version in the "Supplytime 2005" form is the deletion of the words "as specified in ANNEX 'A'" from the phrase "all maintenance and repair of the Vessel's hull, machinery and equipment as specified in ANNEX 'A'." The rationale for this change in the 2017 explanatory notes is "to avoid arguments that if there was a part of the ship's hull, machinery and equipment which for some reason (perhaps by accident) was not been included in Annex A, then the owners would not be obliged to maintain or repair it." Furthermore, lubricants have been added as something that the owners should provide and pay for as this reflects more general current practice, see subclause 8(a)(iii)(3)."

Charterers

"9. Charterers to Provide

(a) While the Vessel is on hire the Charterers shall provide and pay for all fuel and water, dispersants and firefighting foam, and transport thereof, port charges, pilotage and boatmen and canal steersmen (whether compulsory or not), launch hire (unless incurred in connection with the Owners' business), light dues, tug

assistance, canal, dock, harbour, tonnage and other dues and charges, agencies and commissions incurred on the Charterers' business, costs for security or other watchmen, costs for quarantine (if occasioned by the nature of the cargo carried or the ports visited whilst employed under this Charter Party but not otherwise).

(b) The Charterers shall provide and pay for the loading, back-loading and discharging of cargoes when not done by the Crew, the cleaning of cargo tanks, the discharging and disposal of waste products deriving from their operations, all necessary pad eyes, shackles, wires, chains, bottle-screws, load-binders and other similar items required for securing any special, exceptional, unusual or heavy lift deck cargoes, except as provided by the Owners, all ropes, slings, wires, stops, cargo hoses, spreaders and special runners actually used for loading, back-loading and discharging cargoes. Any and all cargo loading, securing, back-loading and discharging equipment shall always have been properly tested and certified as applicable regulations require.

(c) Upon entering into this Charter Party or in any event no later than the time of delivery of the Vessel the Charterers shall provide the Owners with copies of any operational plans or documents which are necessary for the safe and efficient operation of the Vessel. All documents received by the Owners shall be returned to the Charterers on redelivery.

(d) The Charterers shall pay for customs duties, all permits, import duties (including costs involved in establishing temporary or permanent importation bonds), and clearance expenses, for the Vessel and/or equipment, required for or arising out of this Charter Party.

(e) The Charterers shall pay for any replacement of any anchor handling/towing/lifting wires and accessories which have been placed on board by the Owners or the Charterers, should such equipment be lost or damaged, other than as a result of the Owners' negligence.

(f) The Charterers shall pay for any fines, taxes or imposts levied and provide any financial security required in the event that contraband and/or unmanifested drugs and/or cargoes are found to have been shipped as part of the cargo. The Vessel shall remain on hire during any time lost as a result thereof. However, if the Crew are involved in smuggling, any financial security required and any fines, taxes or imposts shall be provided and paid for by the Owners and the Vessel shall be off hire during any time lost as a result thereof."

5.79 The "Supplytime 2005" form contained a number of amendments to clause 8 of "Supplytime 89" and the "Charterers to Provide" regime. As a drafting change in 2005, the responsibility of the charterers to make good any equipment of the owners' (or their own) towing gear and tackle used and damaged or lost during the service which was previously included as an exception to the "Owners to Provide" clause was moved to form an expanded clause 9(e). In addition, two new provisions were included in response to problems which arose in practice under the previous version of the form. The "Supplytime 2017" form makes no substantial changes to the previous version, save to re-allocate to owners the costs of lubricants (see under clause 8(a)(iii)(3) above), and to update the wording to reflect matters of common current concern in para. (b), with a much longer list of matters for the charterer's account related for example to cargo operations and special cargoes and environmental concerns (*per* the notes: "For example, wording to the effect that the charterers should arrange and pay for disposal of waste deriving from their operations has been included.") The following paragraphs are of particular note in the offshore/OSV context.

i Paragraph (c) requires the charterers to provide the owners in advance with operational documentation which impacts upon the safe operation of the vessel. This deals specifically with a not infrequent problem where the vessel was not made aware, by being given suitable plans or charts, of the specific undersea features of an offshore unit or installation in respect of which it was to operate in close proximity. In the event of damage to these (or to the vessel) issues arose as to causation, where an exception to the knock-for-knock regime was potentially engaged. Paragraph (c) is designed to impose the responsibility for the prior provision of all proper operational information upon the charterer.

ii Paragraph (e) imposes the liability on the charterer for the all wires, cables and "accessories" (undefined, but read *eiusdem generis*, presumably items accessory to the specific items referred to namely "anchor handling/towing/lifting wires" such as shackles, runners

and sheaves). These can represent an important cost item in a heavy service (and at least one arbitration claim has concerned only such items with the issue being whether the cause of damage to them was owner's negligence in handling them or just operational failure). Such items have typically been excluded from the knock-for-knock regime; and sensibly so, on the basis that these are fungibles laid out by the owner for the charterer's service which should be paid for by the charterer. Even in the stripped-down version of clause 14 in the 2017 form, these remain an exception to the tug/tow property demarcation. The explanatory notes to the 2017 revision reflect the importance of these items: "The replacement of anchor handling, towing and lifting wires, together with accessories, are for the charterers' account, unless the damage or loss has been caused by the negligence of the owners. Subclause 9(e) is carved out from the knock for knock liability regime contained in subclause 14(a) so that the charterers are liable to replace damaged wires even if they belong to the owners. The reason for this is that these wires can be regarded as consumables, albeit very expensive consumables, the wear and tear of which should not be encompassed by the knock-for-knock liability regime. Needless to say, it is open to the parties to negotiate a different balance."

iii Paragraph (f) deals with the increase in the smuggling, particularly of drugs and alcohol, on board vessels and the increasingly stringent penalties and sanctions to which the vessel and crew may be subjected by local authorities where such contraband is found on board (irrespective of the personal involvement of those on board the vessel in its receipt and concealment aboard). While it is not possible to lay down a code allocating responsibilities in all cases, given the various possible permutations of smuggling para. (f) renders the charterers liable for such matters when they involve the cargo or other items being carried by the vessel for the charterers, thereby addressing one, at least, of the most problematic areas and one of the commonest locations of such contraband; the paragraph shifts the burden of proof that the vessel and her crew were involved to the charterers who otherwise bear all financial consequences, as defined. There is no corresponding provision as to the responsibility of the owners for contraband found within the vessel or her equipment as such, which is equally a common location for the secretion of contraband. Charterers may wish to consider an amendment to para. (e) to render the allocation of responsibility for smuggling closer to a knock-for-knock basis with a provision analogous to para. (e) dealing with shipboard "contraband and/or unmanifested drugs and/or cargoes." The "Supplytime 2017" form has deleted the reference in the phrase "contraband and/or unmanifested drugs and/or cargoes are found to have been shipped as part of the cargo and/or in containers onboard" to "containers", recognising that it adds little (if the containers represent the charterer's cargo) or was apt to impose liability on the charterer where the container was merely a receptacle in which both owner's and charterer's items were put on board the vessel. The consequences of a customs "incident" of this nature usually involve arrest or detention: for this reason the "Supplytime 2017" form now includes specific provision for the charterer's responsibility for putting up security and for the vessel remaining on hire during all time lost.

Clause 10: fuel (including bunkers)

5.80 The provisions relating to bunkers and other fuel carried by the vessel have been substantially redrafted in "Supplytime2017." The 2017 notes explain: "In the 2017 revision, this clause has undergone a complete overhaul as the previous clause did not properly reflect current practice. The clause has been renamed 'Fuel' as the offshore sector does not generally differentiate between fuel carried as cargo and fuel for the ship's propulsion (bunkers) as there is frequently

a common system for both." Those chartering offshore supply vessels should therefore note particularly that the 2017 form is substantially different in terms of the payment and accounting mechanism for fuel on delivery and on redelivery and, importantly, that the express provision in "Supplytime 2005" making the charterer liable to the owner for all consequences of defective or unsuitable fuel has been removed. This was a potentially important qualification to the knock-for-knock principle and as part of the streamlining of the 2017 version of clause 14 has now been deleted. It is therefore necessary to consider each of the 2005 and 2017 versions separately.

Clause 10 of "Supplytime 2005"

"10. Bunkers

(a) Quantity at Delivery/Redelivery – The Vessel shall be delivered with at least the quantity of fuel as stated in Box 19(i) and the Vessel shall be redelivered with about the same quantity as on delivery, provided always that the quantity of fuels at redelivery is at least sufficient to allow the Vessel to safely reach the nearest port at which fuels of the required type or better are available.

(b) Purchase Price – The Charterers shall purchase the fuels on board at delivery at the price prevailing at the time and port of delivery unless otherwise stated in Box 19(ii) and the Owners shall purchase the fuels on board at redelivery at the price prevailing at the time and port of redelivery unless otherwise stated in Box 19(iii). The Charterers shall purchase the lubricants on board at delivery at the list price and the Owners shall purchase the lubricants on board at redelivery at the list price.

(c) Bunkering – The Charterers shall supply fuel of the specifications and grades stated in Box 19(iv). The fuels shall be of a stable and homogeneous nature and unless otherwise agreed in writing, shall comply with ISO standard 8217:1996 or any subsequent amendments thereof as well as with the relevant provisions of MARPOL. The Chief Engineer shall co-operate with the Charterers' bunkering agents and fuel suppliers and comply with their requirements during bunkering, including but not limited to checking, verifying and acknowledging sampling, reading or soundings, meters etc. before, during and/or after delivery of fuels. During delivery four representative samples of all fuels shall be taken at a point as close as possible to the Vessel's bunker manifold. The samples shall be labelled and sealed and signed by suppliers, Chief Engineer and the Charterers or their agents. Two samples shall be retained by the suppliers and one each by the Vessel and the Charterers. If any claim should arise in respect of the quality or specification or grades of the fuels supplied, the samples of the fuels retained as aforesaid shall be analysed by a qualified and independent laboratory.

(d) Liability – The Charterers shall be liable for any loss or damage to the Owners caused by the supply of unsuitable fuels or fuels which do not comply with the specifications and grades set out in Box 19(iv) and the Owners shall not be held liable for any reduction in the Vessel's speed performance and/or increased bunker consumption nor for any time lost and any other consequences arising as a result of such supply."

5.81 This clause was new to the "Supplytime 2005" form and reflected the spate of difficulties caused in the maritime industry by off-specification or poor quality bunkers, especially for OSVs operating in difficult environments where bunker suppliers were of varying reputation and reliability. Paragraphs (a) and (b) of the "Supplytime 2005" version are materially identical to clause 3 of the "NYPE" form: as to which see generally Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 8.72 *et seq*. Unlike the previous version of the clause in "Supplytime 89", the 2005 form made specific provision for the minimum delivery and redelivery quantities of bunkers which avoids potential disputes as to the sufficiency of bunkers to reach the next bunkering stage, which sometimes ensued. Similarly, there is no room for dispute over the prices to be paid for bunkers which are either to be paid for at prices agreed in advance and stipulated in Box 19 or at the price at the delivery or redelivery place. As will be seen below, the "Supplytime 2017" approach is different.

5.82 Paragraphs (c) and (d) address the question of the specification and quality of bunkers to be provided by the charterer and the consequences in terms of liability where the bunkers provided are off-specification. BIMCO explained the purpose behind para. (c) in this way in the

2005 explanatory notes: "In view of the problems often associated with bunkering, SUPPLYTIME 2005 provides more extensive guidelines for the bunkering operation. In clause 10(c) a specific reference is made to ISO standard 8217:1996 and the relevant provisions of MARPOL. Furthermore, the clause sets out the sampling procedure and procedures in respect of the storage of the collected samples." It is to be noted that para. (c) provides not only for a detailed benchmark specification by reference to the grades defined by the parties in Box 19 but also by reference to the current ISO standard and, further, to more abstract concepts such as "stable" and "homogenous" as additional requirements. As with the similar provision in relation to bunker quality and samples contained in clause 4(c)(ii) of "Towhire 2008" discussed above in Chapter 4, no provision is made for how long the samples taken are to be retained. As noted in Chapter 4, BIMCO's Standard Bunker Contract in the context of a sale and purchase of bunkers to a vessel by a bunker supplier provides for the retention of samples (by the seller) for 60 days minimum after physical delivery of the fuel or, if notice is given by the buyer, as long as the buyer may reasonably require. It is to be noted that the provisions of para. (c) deal with the sampling of the fuel of which the vessel takes delivery, essentially for retention in the event of subsequent issues. There is no express duty on the vessel to sample and test the fuel before taking delivery of the fuel or before using it (contrary to an argument in a London arbitration which contended that it was necessarily implicit that the owner should sample and test before accepting the fuel) and nor would this be workable in practice (cf. if the samples being taken during delivery and being collected by the vessel showed the fuel to be visibly of very poor quality which should have been detected by the vessel's crew, where a possible argument of intervening negligence might arise). However, interestingly, in the 2017 explanatory notes the thinking of the drafters behind dropping the charterer's strict responsibility in para. (d) of "Supplytime 2005", discussed below, was indeed that "Even if it is the charterers that provide the fuel under a time charter party, it is the owners who control taking it on board and are involved in the sampling process etc. If the owners accept a wrong or unsuitable type of fuel, it would be unfair if the charterers should take that risk." However that may be, as a matter of legal analysis unless the owner was either (a) under a contractual duty to sample and test before using/accepting fuel supplied by the charterer (not the case); (b) negligent in not sampling or testing before use as a matter of ordinary good shipboard practice (from experience, a difficult contention before arbitrators) or (c) negligent in not responding to a visibly aberrant stem, even if not otherwise under a duty of care under (b), then under "Supplytime 2005" the charterer carries the full responsibility for defective bunkers and their consequences. Note, however, that under the "Supplytime 2017" form the vessel's chief engineer or equivalent has the right to stop bunkering "if such person reasonably believes" that the bunkers are not of the stipulated quality; this perhaps shifts the balance towards a duty, at least, to watch what the sampling is showing in the sample bottles as they come aboard.

5.83 Paragraph (d) of the 2005 form renders the charterer liable for any loss or damage sustained but the terms in which it does so should be carefully noted as they appear to broaden the scope of the charterer's liability. This operates as an express exception to the 2005 form knock-for-knock regime in clause 14 of "Supplytime 2005" (see line 628 in clause 14(b)(i)) and represents a substantial inroad into the allocation to the owner of all risks of loss and damage to the vessel etc. If a stem of poor quality bunkers caused an engine shut-down when the vessel was manoeuvring and the vessel sustains damage in a resulting collision or allision, this would arguably be "loss or damage to the owners caused by the supply of unsuitable fuels [etc.]."

5.84 Under this paragraph, the charterer is "liable for any loss or damage to the Owners caused by the supply of unsuitable fuels or fuels which do not comply with the specifications and grades set out in Box 19 (iv)." This is unfortunately worded: while it is sensible that the charterer is made responsible for off-specification bunkers and therefore the reference to Box 19 is comprehensible, the reference to "unsuitable fuel" is vague. Is it intended to refer back to the express

requirements set out in para. (c) and to deal with the consequences of providing bunkers which are not stable, homogenous or in accordance with the ISO/MARPOL standard? Or is it intended, by the absence of any reference back to para. (c) (cf. the reference back to Box 19) and the use of the term "unsuitable" which is not used elsewhere in the clause, to make the charterer liable for *any* fuel problem where the fuel supplied does not in fact prove suitable for the vessel's engines, even though "on-spec" in accordance with Box 19 and para. (c)? The intention of BIMCO appears to have been the latter since the 2005 explanatory notes provide:

> Clause 10(d) Liability places full liability on the Charterers for any loss or damage suffered by the Owners caused by the supply of unsuitable fuel. If the Charterers provide bunkers in accordance with the specifications, but nevertheless cause damage to the engines, eg, due to additives by the bunker supplier, then liability will still rest with the Charterers. Furthermore, the Owners will not be held liable for any reduction in performance or any other consequences arising as a result thereof. Nevertheless, the Owners must prove that unsuitable fuel was the proximate cause of loss or damage.

5.85 Whether such a construction would be adopted is an interesting question but charterers should be alive to the point since para. (d) in theory imposes a liability on them for any problems encountered with the bunkers due to the bunkers themselves rather than some defect in the vessel's engines (and arguments about "suitability" of fuel for the vessel "as is" are usually difficult ones both technically and legally: see eg Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 12.7 *et seq*., where the view is expressed that the bunkers to be supplied must be "of reasonable general quality and suitable for the type of engines fitted to the particular ship. They will not be obliged to meet any unusual requirements of the engines, beyond those to be expected of their type, unless they have been drawn to their attention by the owners in advance" and London Arbitration 1/88; LMLN 16.1.1988).

5.86 This provision, as already noted, was an unusual one in the time charter context, not mirrored in other standard form time charterparties and has now been entirely removed from "Supplytime 2017." The knock-for-knock provisions in clause 14 of the 2017 form apply irrespective of any breach by the charterer in relation to the obligations as to quality of bunkers (although any other remedies for losses not covered by clause 14 remain unaffected). The 2017 explanatory notes set out the thinking behind this deletion as follows: "What was subclause 10(d) (Liability) of SUPPLYTIME 2005 has been deleted as it was an exception to the knock for knock regime by allocating responsibility for loss or damage caused by the supply of unsuitable fuels on the charterers. Even if it is the charterers that provide the fuel under a time charter party, it is the owners who control taking it on board and are involved in the sampling process etc. If the owners accept a wrong or unsuitable type of fuel, it would be unfair if the charterers should take that risk."

Clause 10 of "Supplytime 2017"

"10. Bunkers

(a) *Upon delivery* – The Vessel shall be delivered with no less fuel on board than the quantity stated in Box 19(i).

(b) *Upon redelivery* – The Vessel shall be redelivered with no less fuel on board than the quantity required by the Vessel to reach, at economical speed, the nearest port where fuel of the specification and grade as stated in Box 19(iv) is available.

(c) *Payment for fuel* – The payment, crediting and accounting of fuel remaining on board the Vessel at the time of delivery and redelivery of the Vessel shall be either in accordance with Subclause 10(c)(i) or 10(c)(ii) below, as indicated in Box 19(ii). If Box 19(ii) is left blank, Subclause 10(c)(i) shall apply.

(i) The Charterers shall purchase and pay the Owners for all the fuel on board at the time of delivery at the substantiated price paid by the Owners at the last loading of fuel and the Owners shall purchase and credit the Charterers for all the fuel on board at the time of redelivery at the substantiated price

paid by the Charterers at the last loading of fuel. The quantities of fuel shall be those recorded on the Vessel's delivery and redelivery surveys (see Clause 5 (Surveys, Audits and Inspections); or

(ii) The Charterers shall pay the Owners, or the Owners shall credit the Charterers, for the difference in the quantity of fuel on board between the delivery and redelivery of the Vessel by reference to the delivery and redelivery surveys (see Clause 5 (Surveys, Audits and Inspections). In the event that the price paid by the Charterers for the quantity of fuel consumed, or credited by the Owners for fuel loaded, is a pre-agreed price, this shall be the price stated in Box 19(iii). Where the price of fuel is not pre-agreed, Box 19(iii) shall be left blank and the price shall be the substantiated price paid for the Vessel's last loading of fuel.

(d) *Loading of fuel* – The Charterers shall supply fuel of the specifications and grades as stated in Box 19(iv). The fuels shall be of a stable and homogenous nature and unless otherwise agreed in writing, shall comply with the latest edition of ISO Standard 8217 as well as with the relevant provisions of MARPOL. The Chief Engineer shall co-operate with the Charterers' bunkering agents and fuel suppliers and comply with their requirements relating to the fuel, including but not limited to, checking, verifying and acknowledging sampling, reading or sounding and metering, before, during and after the loading of fuel. During delivery representative samples of all fuels shall be taken at a point as close as possible to the Vessel's fuel manifold. Each of the samples shall be divided into a minimum of four (4) sub-samples, labelled and sealed and signed by the suppliers, Chief Engineer and the Charterers or their agents. One sub-sample shall be retained on board for MARPOL purposes and the remaining samples distributed between the Owners, the Charterers and the suppliers. If any claim should arise in respect of the quality or specification or grades of the fuel supplied, the samples of the fuel retained as aforesaid shall be analysed by a qualified and independent laboratory, jointly appointed by the Parties, whose analysis as regards the characteristics of the fuel shall be binding on the Parties concerning the characteristics tested for. If one or more of the fuel samples are found not to be in compliance with the specification as agreed in the paragraph above, the Charterers shall meet the cost of this analysis, otherwise the same shall be for the Owners' account.

(e) *Compliance* – The Vessel's Chief Engineer, or nominee, may at any time before or during the loading of any fuel, stop the loading if such person reasonably believes that it does not comply with Subclause 10(d) until such time as the Charterers or the fuel supplier have reasonably demonstrated their compliance with Subclause 10(d). The Vessel shall remain on hire during any stoppage of loading under this Clause.

(f) The Owners shall not be held liable for any reduction in the Vessel's speed, performance and/or increased fuel consumption nor for any time lost arising as a result of any fuel not complying with Subclause 10(d) and the Vessel shall remain on hire.''

5.87 The new "Supplytime 2017" version of clause 10 preserves the basic scheme of delivery and redelivery bunkers in paras. (a) and (b). Paragraph (c) introduces a new payment regime. This was because it was felt by the drafters that this had become out of step with the way the OSV industry dealt with bunkers administratively: "The payment regime in SUPPLYTIME 2005 whereby the charterers purchase the fuels on board at delivery at the price prevailing at the delivery port, and the owners buy back the fuels on board at redelivery, at the price prevailing at the delivery port was considered by the revision team not to reflect current practice due to the increased use of Purchase Orders. It may be difficult to say what the prevailing price is since there may be several different prices in one and the same port." Paragraph (c) provides for two options. Paragraph (c)(i) provides for a default mechanism which applies unless opted out of in Box 19(ii): under this the charterers buy the fuel that is on board at delivery at the same price as the owners paid for it at the last bunkering with the converse applicable at redelivery where owners buy the fuel from the charterers. This largely corresponds with the previous position under clause 10(b) of "Supplytime 2005" and represents the typical time charter procedure. Paragraph (c)(ii) is new and offers parties the option that the fuel is not bought or sold between the parties during the contract but they are to settle the balance at redelivery on the simple basis that if the charterers redeliver the ship with less fuel than it had on delivery, then they pay the owners for the difference whereas if the ship is redelivered with more fuel than at delivery, the owners credit the charterers for the difference. Quantities are dealt with by the delivery and redelivery on- and

off hire surveys (see clause 5(a)(i) of "Supplytime 2017") and fuel prices can either be agreed and stated in Box 19(iii) or fixed on the basis of the price paid at the last bunkering of the ship.

5.88 Paragraph (d) of clause 10 of "Supplytime 2017"corresponds to the quality obligation as to bunkers supplied by the charterer contained in clause 10(b) of "Supplytime 2005", now without the indemnity by the charterer for off-specification or unsuitable fuel. It may be noted that the language as to sampling is unchanged from 2005 and that there is, again, no duty on the owner to assess or test the samples in advance of bunkering and using the fuel. This reflects the realistic position that the owner as in any time charter relies on the charterer to arrange the bunkers and only very unusually pre-tests the offered bunkers before use (cf. however the thinking in the 2017 notes as to why the charterer's indemnity should be removed: "If the owners accept a wrong or unsuitable type of fuel, it would be unfair if the charterers should take that risk"; see above and below). A useful addition has been included in the 2017 form as to who bears the costs of laboratory analysis of the samples, if matters should come to that; as the explanatory notes state: "Quality claims should be resolved by having the samples analysed by a qualified and independent laboratory which has been jointly selected by the owners and charterers. The cost of this analysis should be borne by the charterers in case the samples are shown to be off-spec. However, if all samples are in compliance, then the owners pay for the analysis."

5.89 Paragraph (f) of "Supplytime 2017" carries forward that part of the text of the now deleted para. (d) of the 2005 form: if the fuel is not in compliance with the requirements of para. (d) then the vessel remains on hire and the owner will not be liable for any speed, performance or fuel consumption claims.

5.90 Paragraph (e) of "Supplytime 2017" is new and gives an express right to stop bunkering if the chief engineer reasonably believes that the fuel is off-specification. This is explained as follows in the 2017 notes: "owners now have the possibility, through the chief engineer of the ship, to stop the bunkering process if he or she reasonably believes that the fuel does not comply with subclause 10(d). When deciding whether or not to suspend loading of the fuel, the chief engineer must be acting in good faith." While welcome, in that it strengthens the hands of the owner where being presented with suspect bunkers which the owner wishes to reject before use, it also confirms, implicitly, a duty on the chief engineer to whom samples are being handed during the loading process, usually in clear sample bottles, to assess as far as he can (and that may not be very far) what the fuel looks like. In a London arbitration under the 2005 form (as noted above) it was argued that the owner had a duty to assess the fuel before use. That is not borne out by the language of the 2005 or 2017 forms or, it is suggested, by common chief engineer bunkering practice; but a right to "step in" presupposes that the chief engineer is at least looking at the bottles and not just idly or mechanically putting them on a shelf in the engine room for reference in case of future dispute.

Clause 11: compliance with the ISPS and the United States MTSA legislation

"11. BIMCO ISPS/MTSA Clause for Time Charter Parties

(a) (i) The Owners shall comply with the requirements of the International Code for the Security of Ships and of Port Facilities and the relevant amendments to Chapter XI of SOLAS (ISPS Code) relating to the Vessel and "the Company" (as defined by the ISPS Code). If trading to or from the United States or passing through United States waters, the Owners shall also comply with the requirements of the US Maritime Transportation Security Act 2002 (MTSA) relating to the Vessel and the "Owner" (as defined by the MTSA).

(ii) Upon request the Owners shall provide a copy of the relevant International Ship Security Certificate (or the Interim International Ship Security Certificate) to the Charterers. The Owners shall provide the Charterers with the full style contact details of the Company Security Officer (CSO).

(iii) Except as otherwise provided in this Charter Party, loss, damages, expense or delay (excluding consequential loss, damages, expense or delay) caused by failure on the part of the Owners or "the Company"/"Owner" to comply with the requirements of the ISPS Code/MTSA or this Clause shall be for the Owners' account.

(b) (i) The Charterers shall provide the Owners and the Master with their full style contact details and, upon request, any other information the Owners require to comply with the ISPS Code/MTSA. Furthermore, the Charterers shall ensure that all sub-charter parties they enter into during the period of this Charter Party contain the following provision: "The Charterers shall provide the Owners with their full style contact details and, where sub-letting is permitted under the terms of the charter party, shall ensure that the contact details of all sub-charterers are likewise provided to the Owners."

(ii) Except as otherwise provided in this Charter Party, loss, damages, expense or delay (excluding consequential loss, damages, expense or delay) caused by failure on the part of the Charterers to comply with this Clause shall be for the Charterers' account.

(c) Notwithstanding anything else contained in this Charter Party all delay, costs or expenses whatsoever arising out of or related to security regulations or measures required by the port facility or any relevant authority in accordance with the ISPS Code/MTSA including, but not limited to, security guards, launch services, tug escorts, port security fees or taxes and inspections, shall be for the Charterers' account, unless such costs or expenses result solely from the Owners' negligence. All measures required by the Owners to comply with the Ship Security Plan shall be for the Owners' account.

(d) If either party makes any payment which is for the other party's account according to this Clause, the other party shall indemnify the paying party."

5.91 The explanatory notes to "Supplytime 2017" state: "The BIMCO ISPS/MTSA Clause for Time Charter Parties 2005 contains all requirements in relation to Owners and Charterers in respect of the ISPS Code (the International Code for the Security of Ships and Port Facilities and amendments to Chapter XI of SOLAS)." As noted in Chapter 4 in relation to the comparable BIMCO ISPS/MTSA clause used in the "Towcon" and "Towhire" 2008 revisions, the changes in the safety and security of the maritime world due to international terrorism have led the resultant introduction of the International Ship and Port Facility Security Code (ISPS Code) to ensure the security of ships and port facilities and of the US MTSA Act as an additional layer of security measures, specifically to protect US ports and waterways from terrorist attacks. Both impose obligations, failure to comply with which is the subject of sanctions which can result in detention of the vessel or crew members, fines, and significant delay and financial loss. BIMCO has led the way in developing general clauses to allocate the responsibility and risk for such matters as between charterers and owners. When revising the "Supplytime" form in 2005, BIMCO inserted its standard BIMCO ISPS/MTSA clause for use in time charterparties and clause 11 represents the revised BIMCO clause of 15 June 2005. The position remains the same in clause 11 of "Supplytime 2017."

5.92 The clause is broadly similar to the "Towcon 2008" version and follows the same scheme of allocation of responsibility and risk:

i Under para. (a), the owner is responsible for the vessel's compliance with the applicable requirements of the ISPS Code and, if trading to the US, with the provisions of the MTSA Act and is to provide the charterer with the appropriate documentary proof in the form of the vessel's safety certification required under the Code and the Act if applicable. The owner bears the consequences of non-compliance with the Code and the Act, save for consequential losses (see below).

ii Under para. (b) the charterer is responsible for providing the owner with all necessary contact details and, importantly, with any information which the owner requires for the purposes of its compliance with the Code or the Act. The charterer is responsible for all losses, except consequential losses, which may arise from failure to provide

this information. Recognising the reality that the vessel may be sub-chartered, para. (b) requires the charterer to include an appropriate provision in any sub-charters to ensure that the same right to details and information prevails down any chartering chain.

iii Paragraph (c) provides for a general indemnity by the charterer of the owner in respect of all delay, costs and expenses sustained by the vessel or the owner as a result of ISPS and MTSA compliance. Given that the incurring of expenses and costs in relation to ISPS and MTSA compliance will usually result from the charterer's hiring of the vessel and the nature of the service, they are akin to the consequences of a vessel's "employment" in charterparty terms. Paragraph (c) allocates these to the charterer specifically rather than leave room for disputes as to whether they are matters which fall within any implied indemnity for the consequences of the owner following the charterer's orders and thereby avoids difficulties as in *The Island Archon* [1994] 2 Lloyd's Rep 227 (CA).

5.93 As already noted, paras. (a) and (b) make each party responsible for all losses sustained by the other for its non-compliance with its obligations in respect of ISPS and MTSA as set out in clause 11 "excluding consequential loss, damages, expense or delay." No specific heads of loss such as loss of profits or loss of use are identified and the clause is therefore much simpler in its wording than the general and mutual exclusion of consequential losses including these types of specifically enumerated losses which is contained in the clause 14(c) as part of the knock-for-knock provision. The effect of this simpler wording will be that the relevant party will be under an obligation to pay such damages as flow naturally and directly from any failure to comply with its obligations but will not be liable in damages in respect of some other type of loss which did not flow so directly, for example damage which might flow from special circumstances and come within the second limb in *Hadley v Baxendale* (paraphrasing Waller LJ in *British Sugar plc v NEI Power Projects Ltd* (1997) 87 BLR 42 at 51B).

Clause 12: hire and payments

"12. Hire and Payments

(a) *Hire* – The Charterers shall pay hire due for the Vessel at the rate stated in Box 20(i) *per* day or pro rata for part thereof from the time that the Vessel is delivered to the Charterers until the expiration or earlier termination of this Charter Party.

(b) *Extension hire* – If the option to extend the Charter Period under Subclause 1(b) (Charter Period) is exercised, the hire for such extension shall, unless stated in Box 21, be agreed between the Parties. Should the Parties fail to reach an agreement, then the Charterers shall not have the option to extend the Charter Period.

(c) *Adjustment of hire* – The hire shall be adjusted to reflect documented changes, after the date of entering into the Charter Party, in the Owners' costs arising from changes in laws and regulations, or the implementation thereof, within the Area of Operation stated in Box 16 governing the Vessel, its Owners and/or its Crew or this Charter Party or in the application thereof.

(d) *Invoicing* – All invoices shall be issued in the contract currency stated in Box 20(i). In respect of reimbursable expenses incurred in currencies other than the contract currency, the rate of exchange into the contract currency shall be stated in Box 20(ii). Invoices covering hire and any other payments due shall be issued monthly as stated in Box 22(i) and at the expiration or earlier termination of this Charter Party. If Subclause 10(c)(i) (Fuel – Payment for Fuel) applies, fuel on board at delivery shall be invoiced at the time of delivery.

(e) *Payments* – Payments of hire, fuel invoices and disbursements for the Charterers' account shall be received within the number of days stated in Box 24 from the date of receipt of the invoice. Payment shall be received in the currency stated in Box 20(i) in full without discount or set-off to the account stated in Box 23. However, any advances for disbursements made on behalf of and approved by the Owners may be

deducted from hire due. If payment is not received by the Owners within five (5) Banking Days following the due date the Owners are entitled to charge interest at the rate stated in Box 25 on the amount outstanding from and including the due date until payment is received.

If the Charterers reasonably believe an incorrect invoice has been issued, they shall notify the Owners promptly, but in no event no later than the due date, specifying the reason for disputing the invoice. The Charterers shall pay the undisputed portion of the invoice but shall be entitled to withhold payment of the disputed amount. The Owners shall be entitled to charge interest at the rate stated in Box 25 on such disputed amounts where resolved in favour of the Owners. The balance payment (together with any applicable interest) shall be received by the Owners within five (5) Banking Days after the dispute is resolved. Should the Charterers' claim be valid, a corrected invoice shall be issued by the Owners.

(f) *Suspension and termination* – (i) Where there is a failure to make punctual payment of hire or other sums due and payable by the Charterers to Owners, the Owners shall promptly notify the Charterers in writing of such failure and require payment within five (5) days.

(ii) At any time while hire or other sums due and payable by the Charterers to Owners remain outstanding the Owners shall be entitled to suspend the performance of any or all of their obligations under this Charter Party until such time as all the hire due to the Owners under the Charter Party has been received by the Owners. Throughout any period of suspended performance under this Clause, the Vessel shall remain on hire. The Owners' right to suspend performance under this Clause shall be without prejudice to any other rights they may have under this Charter Party.

(iii) If after five (5) days of the written notification referred to in Subclause 12(f)(i) the sums referred to have still not been received, the Owners may at any time while such sums remain outstanding terminate the Charter Party. The right to terminate shall be exercised promptly and in writing and is not dependent upon the Owners first exercising the right to suspend performance of their obligations under the Charter Party pursuant to Subclause 12(f)(ii) above. The receipt by the Owners of all sums due from the Charterers after the five (5) day period referred to above has expired but prior to the notice of termination shall be deemed a waiver of the Owners' right to terminate the Charter Party. The Owners' right to terminate under this Clause shall be without prejudice to any other rights they may have under this Charter Party.

(iv) Where the Owners choose not to exercise any of the rights afforded to them by this Clause in respect of any particular late payment of hire, or a series of late payments of hire, or other sums due and payable by the Charterers to Owners under the Charter Party, this shall not be construed as a waiver of their right either to suspend performance under Subclause 12(f)(ii) or to terminate the Charter Party under Subclause 12(f)(iii) in respect of any subsequent late payment under this Charter Party.

(v) The Charterers shall indemnify the Owners in respect of any liabilities incurred by the Owners under cargo documents issued pursuant to Subclause 7(b) (Master and Crew) as a consequence of the Owners' proper suspension of any or all of their obligations under this Charter Party or termination of this Charter Party.

(g) *Audit* – The Charterers shall have the right to appoint an independent qualified accountant to audit the Owners' books directly related to work performed under this Charter Party at any time after the conclusion of the Charter Party, up to the expiry of the period stated in Box 26, to determine the validity of the Owners' charges hereunder. The Owners undertake to make their records available for such purposes at their principal place of business during normal working hours. Any discrepancies discovered in payments made shall be promptly resolved by invoice or credit as appropriate."

5.94 Clause 12 provides for the common mechanism of daily hire payments; as to these, see eg Coghlin, Baker, *Time Charters* (7th edn, 2014), paras. 16.1–16.47. The following five features of the "Supplytime 2017" form's approach to hire and payment of hire (continuing, with minor textual changes only, the approach of the 2005 form) may be particularly noted.

5.95 First, provision is made by para. (c) for the adjustment of the rate of hire after the charter has been concluded so as "to reflect documented changes . . . in the Owners' costs arising from changes in the Charterers' requirements" or due to changes in applicable regulations. (The 2005 form added an unnecessary measure of complexity by positing the earlier of two dates "after the date of entering into the Charter Party or the date of commencement of employment, whichever

is earlier": this has been simplified, logically, in the 2017 form to focus solely on the date of the parties' agreement.) This adjustment provision addresses a potential source of dispute. Often the contract service will be made more onerous by reason of operational changes at the well-head or oil platform; similarly, governmental regulations, particularly in relation to safety at work or environmental protection, may be introduced or may become more restrictive. This paragraph allows a proper adjustment in the rate of hire to be made to reflect this. This change in the owners' costs must be "documented." To hold the balance between owner and charterer, para. (g) allows the charterers to carry out an independent audit of the owners' books to verify the financial background to the changes in costs contended for by the owners.

5.96 Issues have arisen under the predecessor to para. (g) under the "Supplytime 89" form (clause 12(f) of which was in identical terms) as to whether the charterers have the right to audit the owners' books more than once, for example, where an audit is carried out under para. (g) but, subsequently, the charterers wish to conduct a further (usually more detailed) audit (perhaps, using a different auditor due to dissatisfaction with the auditor previously engaged). The wording of para. (g) arguably contemplates one single audit by the charterers as a final reckoning after the charter has come to an end; hence the words "to appoint an . . . accountant to audit . . . at any time after the conclusion of the Charter Party." That was the position under the 2005 form and the wording is unchanged in the 2017 form; the 2017 explanatory notes appear to envisage one audit only: "In order to verify the validity of the owners' charges, the charterers may appoint an independent and qualified accountant to audit the owners' accounts relating to the charter party." If the audit is carried out defectively, then that would be a matter between the charterer and the accountant. In a sense, the point is an artificial one: if the owner has nothing to hide, then it has no interest in obstructing a further audit; it may however legitimately insist on all costs which it incurs due to having to arrange and facilitate a second audit being borne by the charterer since the clause contemplates only one "free" audit (as it were). If, however, the charges made upon the charterer under para. (c) are incorrect and do not reflect true costs, then if the matter goes to arbitration (which if the owner refuses to open its books again, it may very well), then the charterers will be entitled to obtain disclosure of the owner's books and records in any event.

5.97 Secondly, payments due to the owners under the charter are not made subject to an "anti-deduction" clause as they are in the "Towcon" and "Towhire" forms. While para. (e) provides that payments are to be made "in full without discount", it is submitted that this wording is ineffective to prevent the charterers from exercising their right of equitable set-off against sums of hire falling due in respect of a claim for damages in respect of a period during which the owners have in breach of charter deprived the charterers of the use of the vessel in whole or in part as they can under an ordinary time charterparty (see Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 16.48 *et seq*.; see also *The Nanfri* [1978] 2 Lloyd's Rep 132 (CA) and *The Aditya Vaibhav* [1991] 1 Lloyd's Rep 573). As was stated by the House of Lords in *Gilbert Ash Northern Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, to achieve an effective exclusion of the ordinary rights of set-off "clear express words" must be used. The words "in full without discount" are, it is submitted, insufficiently clear to bar a right of set-off: see the approach of the Court in *The Teno* [1977] 2 Lloyd's Rep 289 at 293, and *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 1 WLR 501 ("deduction"). Compare the words of clause 3(c) of the "Towcon 2008" form and clause 3(f) of the "Towhire 2008" form ("[payable] without any discount, deduction, set-off, lien, claim or [counter-claim]"). This was the firm view of an arbitral tribunal in 2017 (including one leading shipping QC) which held that the term "without discount" did not have the "requisite level of clarity" to achieve an exclusion of the right of set-off and was to be contrasted with other well-known phrases which addressed the matter specifically. This seems to be plainly correct given the current case law.

5.98 Indeed, para. (e) itself expressly provides for the charterer to have the right to withhold payment of any invoice which is disputed in whole or in part, provided that payment is reasonably disputed and that the charterers can give a reasoned explanation for disputing payment. This reflects the approach of the courts to deductions made under lines 99 and 100 of the "NYPE" form (see *The Nanfri* (*op. cit*.) and *The Kostas Melas* [1981] 1 Lloyd's Rep 18 and Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 16.56). The charterer is probably (although the position is not certain: see *Time Charters op. cit*., para. 16.53) entitled to rely upon a reasonable assessment in good faith of the amount of the deduction: *The Qatar Star* [2011] 1 Lloyd's Rep 350. However, it is important not to conflate the need to "dispute" an invoice with the separate right to assert a right of set-off. In the 2017 award referred to above, the tribunal held that clause 12 was concerned with elements of invoices which are disputed such that detailed issues can be identified and resolved promptly, but that the assertion of the right to an equitable set-off is a "different matter" and that a charterer can exercise any valid right of set-off at any time after the claim which gives rise to it has arisen.

5.99 Thirdly, as referred to above, the right of equitable set-off is subject to the usual constraints as to its availability and exercise as under any time charterparty. In *The Aditya Vaibhav* [1991] 1 Lloyd's Rep 573, the owner was in breach of its obligation as to tank cleaning (under a tanker charter on Shelltime 3 terms) and the vessel was delayed for 14 days and in addition the charterer suffered extra loss and expense. The owner did not seek hire for the 14 days but subsequently when the vessel was back in operation and on-hire, the charterer sought to deduct and set-off its loss and expense from later hire instalments falling due. It was held that no right of set-off existed. Saville J stated at 576: "a claim for hire in respect of such periods cannot be impeached by saying that owners are in any sense asking to be paid for a service which they have not provided. In other words, the cross-claim has no connection with the period when the vessel is at the service of the charterers other than it arises out of the same transaction. This, however, only satisfies the first and not the second requirement for equitable set-off." That was treated as establishing a well-settled general rule equally applicable in the context of clause 12 of the "Supplytime 2005" form by the tribunal in the 2017 award referred to above. See also Coghlin, Baker, *Time Charters* (7th edn, 2014), at para. 16.53.

5.100 Fourthly, in the event of default of payment or while payment remains due, the owners have the express right under para. (f) in broad terms:

i to suspend performance of their obligations under the charterparty with the charterers being liable to indemnify them for all consequences of so doing; and
ii to withdraw the vessel after failure to pay within five days of the owners giving notice to the charterers.

5.101 Paragraph (f) of "Supplytime 2005" replaced part of the former clause 10(e) of "Supplytime 89" with a series of much clearer and fuller provisions (described by BIMCO in 2005 as "very important new provisions in relation to the Owners' right to withdraw the Vessel from the service of the Charterers in the event they do not pay hire on time") dealing with the owners' rights and the charterer's responsibilities in the event of the non-payment of hire by the charterer. The express right of withdrawal is common in time charterparties (see Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 16.57 *et seq*.); as BIMCO stated (again in 2005, explaining the changes to the 1989 form): "The right of withdrawal when the Charterers are in default of payment of hire is a traditional safeguard for the Owners in the time chartering context."

5.102 Paragraph (f) of "Supplytime 2017" is materially unchanged from the 2005 version, although the clause has been restructured and changes made to remove the "cargo carriage" general provisions relating to bills of lading, as elsewhere in the 2017 revision. Paragraph (f)(i) provides for the mandatory giving of notice in writing by the owner where hire has not been paid.

5.103 Just as with the previous clause 10(e) of the "Supplytime 89" form, para. (f)(ii) of the 2017 form (now made a separate sub-paragraph; cf, "Supplytime 2005") fills the lacuna which is present in most time charter forms: this is that the right to withdraw under the ordinary forms of time charterparty gives an owner only the right to *withdraw* the vessel from the charter completely but does not give him the right to *suspend* services or to withdraw the vessel temporarily. In *The Mihalios Xilas* [1978] 2 Lloyd's Rep 186, it was held that such a right of suspension would have to be conferred expressly by the charterparty on the owner in clear terms. Paragraph (f)(ii) does precisely this. This gives the owner a valuable method of putting pressure upon a hirer to make payment of outstanding sums due, not only in relation to hire but also "other sums due and payable by the Charterers to Owners." The paragraph confirms that while the services are suspended the vessel remains on hire and with all terms and conditions of the charterparty continuing with all other rights of the owner against the charterer unaffected. Paragraph (f)(i) makes it clear that the owners have the right to suspend performance altogether or to do so selectively ("any or all of their obligations under this Charter Party"), for example in response to the provision of a particular request or in the rendering of a particular service: this gives the owners complete flexibility as to their response to a non-payment situation.

5.104 The former version of this provision in "Supplytime 89" was considered by the court in *Greatship (India) Ltd v Oceanografia SA de CV (The Greatship Dhriti)* [2012] EWHC 3468 (Comm). Clause 10(e) was a composite clause which contained both the right to withdraw on five days' notice and also to suspend performance It provided "While payment remains due Owners shall be entitled to suspend the performance of any and all of their obligations hereunder." It was argued by the owner that the clause did not contain any express or implied requirement for notice to be given before the owner was entitled to exercise its right to suspend the provision of services of clause 10(e); in other words that there was no requirement to give some form of antecedent or advance notice. The charterer's submission, on the other hand, was that it was an express or implied requirement of clause 10(e) that the owner would give five banking days' notice of intention before exercising their right to withdraw the vessel from the charterparty whether permanently or temporarily. Arbitrators (including the author) held that the right to suspend was not a separate stand-alone provision and could not be read divorced from the context in which it appeared in clause 10(e) of which it formed a part: the structure and organisation of the clause was important to an understanding of the intended purpose and effect of clause 10(e). The court disagreed holding that the words governing the right to suspend were simply "while payment remains due" and referred to any time after which payment has fallen due and remains unpaid under the payment terms: accordingly, on any default in payment, the service could be suspended immediately and without any notice to the charterer. The position, while not unambiguous under "Supplytime 89" (and supported by a more commercial approach to the consequences of an immediate suspension without notice as well as by an earlier LMAA award, not cited in the *Greatship* case), is however now made clear in the differentiation of the right to suspend in para. (f)(ii) from the right to withdraw in para. (f)(iii): this makes it clear that the five days governs solely the right to withdraw the vessel. The 2017 notes therefore state (correctly): "There is no requirement on owners to give notice to the charterers before exercising their right to suspend performance."

5.105 Paragraph (f)(iii) of "Supplytime 2017" contains a grace period provision (added first bv "Supplytime 2005") which corresponds to the common forms of "anti-technicality" provisions found in many time charterparties (eg clause 11(b) of the NYPE 1993 form; see Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 16.90 *et seq*.). Its purpose was described by BIMCO in 2005 as follows (although the note is confusing since para. (f)(ii) provides for a fixed five-day period and no "box" is provided in Part I for the grace days to be selected):

> A "Grace Period" provision has been added in Clause 12(f)(i) and (ii). This provision is designed to avoid the abuse of the Owners' right to immediately withdraw the vessel in situations where there have

> been delays of remittance of hire payments through the banking system at no fault of the Charterers. In some charter forms, the length of the period of grace has been arbitrarily determined, whereas other forms leave it open to the parties to agree on the length of the period of grace normally stipulated as "banking days" and usually combined with notification to the Charterers. This latter choice has been adopted in Clause 12(f)(ii) and it is strongly recommended to study carefully the provisions of the Clause and to fill in the number of days of grace etc., as agreed, in the correct manner.

5.106 "Supplytime 2017" makes one change to the right to withdraw which should be noted. As stated in the explanatory notes: "the owners the right to terminate the charter party if the charterers have still not paid after five days of the notice that was sent under subclause 12(f)(i). It should be noted however, that if the charterers pay *after* the five days' grace period has lapsed, but *before* the owners have sent the written termination notice, the owners lose the right to terminate. This is a change from SUPPLYTIME 2005."

5.107 Paragraphs (f)(iiv) and (f)(v) complete the new provision with, respectively, a non-waiver provision, protecting the owner's future right to withdraw or suspend under the clause and making it clear that a previous failure to exercise its rights under para. (f) is irrelevant to any subsequent non-payment and subsequent accrual of fresh rights under the paragraph and an indemnity as to consequences for the owners under any cargo documents issued under the charter arising from the exercise of suspension or withdrawal rights. The 2017 version of clause 12(f) now deletes all reference to bills of lading.

5.108 The "Supplytime 2005" provision, (f)(iv), referred to liabilities under bills of lading. This was curious since under clause 6(a)(ii) of the "Supplytime 2005" revision of the form there is an express prohibition on the use or issuance of bills of lading under the charterparty and with the right of the charterers being one only to have the master sign non-negotiable receipts marked in terms as such for any items received by the vessel for transportation. Accordingly, there would be no bills of lading under "Supplytime" (unless altered or amended *ad hoc*) and there is no need for provision to be made for them in para. (f)(iv). The third edition noted that the rewriting of para. (f) in the 2005 form was apparently done by adapting a standard time charterparty clause without much thought being given to the other provisions with which it is to work. The 2005 explanatory notes to (f)(iv) are similarly curious since they contradict the explanatory notes provided for clause 6(a)(ii) (as cited above and which make it clear that "In the offshore industry it is common practice that cargo belonging to the Charterers is carried, but it is rarely the case that third party cargoes are carried. Consequently clause 7 expressly states that no Bills of Lading can be issued under the Charter Party"). These state, inexplicably in the context of "Supplytime" where bills of lading contracts will not arise, as follows:

> If the hire happens to be still outstanding on the expiry of the grace period, or any time thereafter, the Owners are entitled without prejudice to withdraw and/or withhold the performance of any and all of their obligations under the charter. Where the hire has not been received, for instance, just when the Vessel is about to load for a new voyage with a charterer who is about to go bankrupt, the Owners run the risk of being saddled with the performance of the new voyage without hire being paid and without cover for expenses falling upon the Charterers. It is too late to withdraw the Vessel if cargo has been loaded and bills of lading have been signed obliging the Owners to perform the voyage according to the bill of lading contract. Such risk is guarded against by the provisions of Clause 12(f)(iv). As long as the hire remains unpaid after expiration of the grace period, the Owners have the right to suspend any or all of their obligations under the charter – including the performance of the Vessel. Although this provision may be of some comfort to Owners facing time Charterers who are unable or unwilling to pay, a warning should be given that suspending services of the Vessel may be in conflict with the Owners' obligations to the bill of lading holder. Consequently, the Owners should never invoke this right before consulting their P&I Club.

5.109 This was wholly inapposite in the context of "Supplytime 2005." It would appear that the notes, like (f)(iv) itself, were unthinkingly "cut and pasted" from a BIMCO standard cargo

time charterparty form such as Boxtime or Gentime. The position has now been rectified in the 2017 form (although the 2017 explanatory notes are silent as to the change, apart from general observations elsewhere as to the unlikelihood of bills of lading under a time charter for an OSV on "Supplytime" terms: see the note to clause 7(b)).

5.110 Fifthly, in relation to the extension of the charterparty period under clause 1(b) where such an option is inserted within the charter with no extension rate agreed in advance (as is common in longer-term fixtures against the background of ordinary market movements, *a fortiori* where the market is experiencing volatility), para. (b) of "Supplytime 2017", reproducing with textual changes the 2005 provision, clears up a source of difficulty. The 1989 version merely provided that, if the option to extend the period was exercised then hire was to be paid in respect of it as shall "be mutually agreed" between the parties. The difficulty arose where the parties could not agree. There being no enforceable obligation to agree a particular rate (save possibly not to refuse to negotiate at all) and the charterer contending that it was entitled to the extension, the assessment of the rate in such cases has to be left to arbitrators on the basis that it was to be a "reasonable rate" (itself a position not free from argument). Paragraph (b) of the 2005 form and now the 2017 form cuts through this by providing that if the parties cannot freely agree on the rate, then the option to extend is inoperative.

Clause 13: off hire (formerly "suspension of hire")

5.111 Clause 13, formerly headed "Suspension of Hire" in "Supplytime 2005" and now more accurately headed "Off Hire" in the "Supplytime 2017" version ("to better reflect its content") is an off hire clause, of a type invariably found in time charterparties. As to this type of clause in general in the time charterparty context, see Coghlin, Baker, *Time Charters* (7th edn, 2014), chapter 25. The essence of such a clause is that the vessel is put off hire when the charterer is deprived of her availability, in terms of the services being required of her, where the reason for that is not a charterer's matter, ie is not to be treated as falling within the time charterer's responsibility. Changes have been made in "Supplytime 2017" to how maintenance during the contractual service are to be dealt with. Otherwise clause 13 of "Supplytime 2017", albeit amended in certain respects, is broadly similar to the "Supplytime 2005" provision. It is therefore convenient to consider the general provisions and the new 2017 maintenance provisions separately.

General

"13. Off-hire

(a) *Off hire and exceptions* – If as a result of any deficiency of Crew or of the Owners' stores, strike of Crew, breakdown of machinery and/or equipment (excluding any equipment installed on the Vessel by the Charterers pursuant to Clause 4 (Structural Alterations and Additional Equipment), damage to hull or other accidents to the Vessel, the Vessel is prevented from working, no hire shall be payable in respect of any time lost and any hire paid in advance shall be adjusted accordingly provided always however that hire shall not cease in the event of the Vessel being prevented from working as aforesaid as a result of:

(i) the carriage of cargo as noted in Subclause 6(d)(iii) (Employment and Area of Operation – The Vessel's Space);
(ii) quarantine or risk of quarantine unless caused by the Crew having communication with the shore or other vessel at any infected area not in connection with the employment of the Vessel, without the consent or the instructions of the Charterers;
(iii) deviation from the Vessel's Charter Party duties or exposure to abnormal risks at the request of the Charterers;
(iv) detention in consequence of being driven into port or to anchorage through stress of weather or trading to shallow harbours or to river or ports with bars or suffering an accident to its cargo, when the expenses resulting from such detention shall be for the Charterers' account howsoever incurred;

(v) detention or damage by ice;
(vi) any act or omission of the Charterers' Group; or
(vii) any *force majeure* event as stated in Clause 35 (*Force majeure*).

(b) *Liability for Vessel not working* – The Owners' liability for any loss, damage or delay sustained by the Charterers as a result of the Vessel being prevented from working by any cause whatsoever, including negligence on the part of a member of the Owners' Group, shall be limited to suspension of hire, except as provided in Subclause 11(a)(iii) (BIMCO ISPS/MTSA Clause for Time Charter Parties), whether or not the Vessel is off hire."

5.112 The features of the "Supplytime 2017" (and 2015) form's version of this off hire clause are as follows. (Paragraphs (a) and (b) of "Supplytime 2017" are substantially the same as those of "Supplytime 2005", save as identified below.)

5.113 First, the clause puts the vessel off hire in a somewhat narrower but more clearly defined set of circumstances than eg clause 15 of the "NYPE" form. Thus:

> any deficiency of Crew or of the Owners' stores, strike of Crew, breakdown of machinery and/or equipment (excluding any equipment installed on the Vessel by the Charterers pursuant to Clause 4 (Structural Alterations and Additional Equipment), damage to hull or other accidents to the Vessel.

5.114 While the class of event is prima facie narrower since some common time charter "off hire" events are not expressly included in the list (fire, stranding, collision etc.), the wording of the clause is wide in scope: thus, damage to hull or other accidents to the vessel would be apt to include damage howsoever caused and any form of accident to the vessel, whether by fire or collision. The clause has presumably sought to avoid older concepts used in off hire clauses such as "average accidents to ship or cargo" and to employ simpler, clearer language for use in a form designed for international use.

5.115 The clause is widened in the 2017 version to include breakdown of "equipment" as well of machinery (the explanatory notes stating, curiously, as if a vessel's DP system was something different from her "machinery": "In the 2017 revision, reference to breakdown of equipment has been added. This is intended to cover, for example, DP (Dynamic Positioning) and gear"). As noted above in relation to clause 3(a) dealing with the condition of the vessel on delivery ("in a thoroughly efficient state of hull and machinery"), it is highly questionable whether any distinctions should be drawn between the vessel and any other part of her fixed or owner installed plant, machine or equipment. The whole general purpose of an off hire clause is that explained as long ago as 1977 by Kerr J in *The Mareva A.S.* [1977] 1 Lloyd's Rep 368 (at p. 381, emphasis added):

> [T]he object is clear. The owners provide the ship and the crew to work her. So long as these are fully efficient and able to render to the charterers the service then required, hire is payable continuously. But *if the ship is for any reason not in full working order* to render the service then required from her, and the charterers suffer loss of time in consequence, then hire is not payable for the time so lost.

The object of off hire is to discharge the charterer from having to pay for the vessel provided by the owner where, as provided, it as a vessel does not "work": this applies irrespective of whether the complaint goes to the vessel's hull, her machinery (in former times perhaps her engine and propelling systems but now, it is submitted, any part of her non-structural systems) or any other form of equipment making up the owner's vessel, *a fortiori* where the vessel is an OSV, DSV or AHTS and comprises a sophisticated amalgam of systems and plant. Further, the 2017 version in dealing with "equipment", excludes "equipment (excluding any equipment installed on the Vessel by the Charterers pursuant to Clause 4 (Structural Alterations and Additional Equipment)": this is presumably to reflect the fact that under clause 4 "The Charterers shall at all times be responsible for repair and maintenance of any such alteration or additional equipment" and

supports a simple "owner's vessel and all that comes with her as provided by owner" and "charterer's own specially installed equipment" dichotomy.

5.116 Even this dichotomy, at least as it is phrased in "Supplytime 2017", may produce some odd results. The charterer has a right to install equipment on the vessel, which becomes part of the vessel for the purposes of the service under clause 4. Once installed, it becomes part of the vessel (even if title in it does not pass to the owner). The owner may have the same obligation in relation to maintenance during the service in relation to charterer's equipment installed on the vessel as in relation to its own: clause 8(a)(ii), unless specifically agreed, requires the owner to maintain the vessel and even under clause 4, the owner may be required to undertake maintenance of the charterer's equipment for ordinary seaworthiness and safe operation reasons. If there is a breakdown in a vessel's winch preventing the working of the vessel there is an off hire event; if there is a breakdown in a fixed crane or "A frame" fitted by the charterer but, even so, albeit maintained by the owner, there is no off hire event. If the charterer's equipment operates in conjunction with owner's equipment, the position may be more complicated still. While one can see the sense in carving out "charterer's equipment" which is *not* maintained by the owner and is separately operated and maintained by the charterer (eg a standard clause 4 position covering plant or equipment such as the charterer's saturation diving system on a dive support vessel), separating out parts of the operational vessel in the absolute fashion adopted seems cumbersome. There is no explanation in the 2017 notes and it may be that this lesser result was what was in fact intended. It would therefore have been simpler for the drafters to have included a simple exception to the operation of off hire to remove any instance of charterer's fault in relation to their equipment within the specified exceptions in sub-paras. (i) *et seq*.: see below. It will accordingly be sensible to amend clause 13(a) to make the position clear, especially in a longer-term time charter with substantial alterations to the vessel made by the charterer which the owner and its crew are alone to maintain and keep operational, eg lifting machinery, strengthened deck plating etc.

5.117 No amendment has been made to the wording "deficiency of men." On long-settled authority this provides solely for insufficiency of crew and neither for the refusal of crew to work (see *Royal Greek Government v Minister of Transport* (1948) 82 Ll L Rep 196 and Coghlin, Baker, *Time Charters* (7th edn, 2014), paras. 25.24–25.26) or for the negligent performance by crew of their duties (see *The Saldanha* [2011] 1 Lloyd's Rep 187 in relation to the commonly found addition "or default of men", which addresses the *Royal Greek Government* issue). However, the BIMCO clause refers to "strike of crew" and accordingly certain types of stoppage or interruption of crew services, at least, will be covered (as to "strike" and "strike of crew" provisions, see Coghlin, Baker, *Time Charters* (7th edn, 2014), paras. 27.49–27.54).

5.118 It is perhaps therefore doubtful whether the 2017 version of clause 13(a) is much of an improvement upon the 2005 wording which read simply: "any deficiency of Crew or of the Owners' stores, strike of Master, Officers and Crew, breakdown of machinery, damage to hull or other accidents to the Vessel."

5.119 Sub-paragra[h (iv) has been the subject of some discussion. The exception to off hire is phrased in terms of "detention in consequence of being driven into port or to anchorage through stress of weather or trading to shallow harbours or to river or ports with bars or suffering an accident to its cargo." It will be seen that this exception (as with others in the clause) relates to the risks inherent in the charterer's operation and trading of the vessel. The point has been raised as to why the grounding of the vessel should be treated differently where the vessel grounds on the bank of the river or channel and where she is detained due to shallow water or a bar in the port or place where she has been directed (ie usually, detained, waiting for a sufficiently high tide to allow her to cross the bar once laden). The answer is straightforward and is given by the language, the context and the nature of an off hire exception: grounding the vessel on the bank or channel side (or indeed upon a bar) is a navigational matter for the owner's account; the holding

up of the vessel due to want of under keel clearance in the place to which the charterer has directed the vessel is, self-evidently, for charterer's account. The sub-paragraph is dealing with detention by types of use of the vessel, not causes of bottom damage.

5.120 These specified events (as to which see Coghlin, Baker, *Time Charters* (7th edn, 2014)) only put the vessel off hire if she is "prevented from working." The clause is accordingly one under which the charterer must show that time was lost as a consequence of the specified event. If, therefore, the vessel while engaged in loading supplies has a main engine breakdown but loading (ie the working which the vessel is actually engaged upon) is unaffected, the vessel is not off hire (see *Hogarth v Miller* [1891] AC 48). The charterer need not show any breach on the part of the owner in relation to any of the events to trigger the suspension of hire. It is sufficient that the working of the vessel is prevented by one or more of the named events.

5.121 The clause is a "net loss of time clause" as is indicated by the words "no Hire shall be payable in respect of any time lost." This means that what is to be allowed to the charterer is the net overall time lost as a result of the specified event or circumstance (see generally as to such clauses Coghlin, Baker, *Time Charters* (7th edn, 2014), paras. 25.7–25.10 and see the 2017 explanatory notes: "Hire will only cease for the time that is lost – this is what is generally called a 'net loss of time clause'"). It has been suggested that where, for example, the vessel has two systems or a redundancy of systems, one in operation and one in stand-by, that the position under clause 13 is unclear. This seems incorrect on basic "net loss of time" principles: if for example a vessel has two dynamic positioning systems and one is put out of operation, the position is straightforward if the working of the vessel can continue unaffected, albeit using the second system: there is no loss of time and the working of the vessel is not in any sense "prevented."

5.122 Secondly, the vessel is not off hire if her working is prevented by various events within the charterers' control or for which the charterer is made responsible. These events are listed in clause 13(a) as follows: the carriage of cargo defined in clause 6(d)(iii), viz. "Explosives, dangerous goods, and toxic and/or noxious substances whether in bulk or packaged, provided proper notification has been given and such cargo is marked and packed in accordance with the national regulations of the Vessel and/or the International Maritime Dangerous Goods Code and/or other applicable regulations"; quarantine (unless not due to the employment of the vessel); deviation; detention due to being driven into port by heavy weather; ice; and acts or omissions of the charterers. Lastly, in the "Supplytime 2017" form, *force majeure* events (as dealt with by clause 35 of the form) are now also included. The purpose of this was to ensure that the vessel is not off hire during a *force majeure* event: "To clarify that hire continues to be payable during a *force majeure* event, reference to this has been added in the latest revision. Clause 35 (*Force majeure*) only deals with loss, damage and delay, but not hire. However, if a *force majeure* event lasts for more than 14 days the charter party may be terminated in accordance with Clause 34 (Early Termination)."

5.123 Thirdly, under para. (b), the owners' liability and the charterers' remedy for loss or damage sustained by the charterers arising out of an off hire event referred to in para. (a) is purportedly limited to suspension of hire. As the 2005 BIMCO explanatory notes stated: "In Sub-clause 13 [sc. 13(b)] it is stated that Owners' liability is limited to suspension of hire, that means that no claim for loss of profit or other claims can be brought to Owners in case of a deficiency." The 2017 notes are to the same effect: "If the ship is prevented from working, no matter for what reason, even due to negligence on the part of someone within the Owners' Group, the charterers' sole remedy for losses is limited to putting the ship off hire. However, there is one exception to this, and that is where the owners have failed to comply with the ISPS Code/MTSA or Clause 11 (BIMCO ISPS/MTSA Clause for Time Charter Parties 2005). Direct losses from such a failure will be for owners' account."

5.124 The ordinary position under a time charter is that if the charterers can prove that the off hire event occurred as a result of the owners' breach of charterparty (even though, as seen above, the charterer need not establish this merely so as to put the vessel off hire) and that he has

suffered loss over and above wasted hire, the charterer can recover damages irrespective of the off hire clause (see *The Democritos* [1975] 1 Lloyd's Rep 386). It is perhaps doubtful whether the words "by any cause whatsoever" are wide enough to exclude the charterers' rights in respect of breach of contract; they are unlikely to be apt by themselves to exclude the owners' liability for negligence (see *The Raphael* [1982] 2 Lloyd's Rep 42). However, it should be noted that an arbitration award in 1998 (unreported) a tribunal of shipping QCs held that the words "by any cause whatsoever" in the then clause 11(b) of "Supplytime 89" had the effect of excluding liability in damages (beyond the suspension of hire) for breaches of contract, even if such breaches were caused by or involved negligence on the basis that the perceived purpose of the clause was to exclude liability of the owners in damages in circumstances where the vessel is prevented from working by an off hire event even if that off hire event is caused by owners' breach and that any other reading rendered para. (b) otiose.

5.125 The effect of the wording "The Owners' liability for any loss, damage or delay sustained by the Charterers as a result of the Vessel being prevented from working *by any cause whatsoever* shall be limited to suspension of hire" (emphasis added) was considered by an arbitration tribunal in its "Supplytime 89" context (wording essentially identical) in London Arbitration 1/02, LMLN 585. It was argued by the charterer that the exclusion of remedies was limited to the failure to provide the vessel in breach of charter and was not such as to apply to other breaches of the charter, eg of the obligation as to maintenance and condition in clause 3. The tribunal held:

> The charterers' argument was incorrect in that the charterparty did not impose on the owners any absolute obligation to provide the services of the vessel, and the mere occurrence of an off hire event would not necessarily place the owners in breach. The purpose of clause 11(b) was to exclude owners' liability for damages in circumstances where the vessel was prevented from working, even if that was caused by owners" breach of charterparty.
>
> In particular, the context for clause 11(b) was that, while the working of a vessel might be prevented by breaches of charterparty not involving negligence, one of the most common causes was breakdown, and if there were any liability on owners for the breakdown that would probably be because the breakdown was the result of a failure to exercise due diligence under clause 3(b). In that context, the words "any loss, damage or delay" and "by any cause whatsoever" were sufficiently wide to show an intention to cover breaches caused by negligence. In a charterparty of this sort it would be surprising if the parties had not intended to exclude liability for breach of clause 3(b).
>
> The precise scope of clause 11(b) was to be understood by reading clauses 11(a) and (b) together: the way the words 'prevented from working" occurred in both indicated that the scope of clause 11(b) was confined to the off hire events identified in clause 11(a). Clause 11(b) excluded liability for damages for breach of the charterparty where the damages resulted from the working of the vessel being prevented by an off hire event even if that off hire event was, or was caused by, a breach of the charterparty (including if it was caused by the breaches of clause 3(a) and/or (b) alleged by the charterers in the present case).

Further, the tribunal held that clause 11(b) and the words "any cause whatsoever" would also limit the charterer's remedies in relation to negligent misrepresentation, provided that the defect complained of as to which the representation went, was an off hire event (this seems, with respect, to be rather more questionable, but the report in the LMLN is very terse on this point).

5.126 The same wording in "Supplytime 2005" was further considered by an arbitration panel in 2017 (including a leading shipping QC) in the following circumstances. A vessel was alleged to be unseaworthy requiring repair and reconditioning and the charterer claimed for such costs, as well as putting the vessel off hire during the period of repair. The owner contended that clause 11(b) limited its liability to the suspension of hire. The tribunal disagreed, holding that the clause had to be viewed against the general principle that a clause excluding a generally available legal remedy must be clearly stated. Paragraph (b) of clause 11 was held to be dealing with a different question, namely applying (only) in respect of damages suffered by the charterer "as a result of the Vessel being prevented from working by any cause whatsoever", which indicated the loss

of use of the vessel. Where a loss was suffered not as a result of the vessel being prevented from working but as a result of the charterer incurring expense in order to place the vessel into a contractual condition, that was a fundamentally different situation and the words "from any cause whatsoever" had to be read in context. The loss had to be one as a result of the vessel not working.

Maintenance and dry-docking

"(c) (i) *Maintenance* – Notwithstanding Subclauses 13(a) and 13(c)(ii), the Owners shall be entitled to twenty-four (24) hours on hire *per* month or pro rata, which shall be cumulative, from the commencement of the charter period for the purposes of maintenance, survey, repair and dry-docking (Maintenance Days). During any such Maintenance Days, the Charterers' obligations under Subclause 9(a) (Charterers to Provide) shall be suspended.

Using, or not using Maintenance Days shall be the Owners decision alone and they shall give the Charterers reasonable notice of their intention to use such days and how many. Hire shall not be payable for accumulated Maintenance Days not used by the Owners. However, hire for any Maintenance Days which, at the Charterers' request, have not been used shall be payable on redelivery or earlier termination of the Charter Party.

(ii) *Dry-docking* – The Charterers shall permit the Vessel to dry-dock at regular intervals in accordance with its classification society requirements. Unless on-hire by reason of accumulated Maintenance Days, the Vessel shall be off hire from the time the Charterers place it at the Owners' disposal. The Vessel shall go back on hire from the time it is placed at the Charterers' disposal at the place where it was originally released.

Whenever a dry-docking is required, the Charterers shall beforehand remove any cargo, and clean any cargo tanks as necessary to effect such dry-docking, after which the Vessel shall be placed at the Owners' disposal. The Vessel shall be returned to the Charterers when it has completed dry-docking and returned to the port or place where it was placed at the Owners' disposal. The Owners choice of dry-dock location shall always be reasonable as to time and cost, both to themselves and to the Charterers.

At the commencement of the charter period, the Owners shall provide the Charterers with the Vessel's class dry-docking schedule for the charter period, including any options to extend."

5.127 Finally, para. (c) of clause 13 deals specifically and in some detail with drydocking and maintenance. This is usually an off hire event *per se* (as in clause 15 of the "NYPE" form). This ordinary approach typically adopted in ordinary time charterparties may be unrealistic and undesirable given the type of engagement which will be concluded under the "Supplytime 2005" form; the offshore vessel will often require regular maintenance and drydocking during the period of the service which will frequently be long term. The clause therefore provides for "windows" for a proper maintenance and drydocking schedule, which drydocking schedule is to be notified to the charterers at the commencement of the charter service.

5.128 The "Supplytime 2017" provision has been substantially rewritten and helpfully now separates out routine in service maintenance and the concept of "maintenance days" from the rather different nature of regular, or special, dry-docking of the vessel which is likely to take the vessel out of service for a more extended period. The drafters explain: "This subclause has been rewritten during the 2017 revision of SUPPLYTIME to make it more balanced and clear. Furthermore, it has been restructured so that subclause 13(c)(i) deals with Maintenance Days and subclause 13(c)(ii) deals with drydocking."

5.129 Paragraph (c)(i) provides for an allowed time for maintenance purposes (now defined as "the purposes of maintenance, survey, repair and dry-docking (Maintenance Days)" of 24 hours on hire *per* month or *pro rata*, which allowed time is cumulative and can, therefore, be aggregated by the owner as necessary. The effect of the vessel being on hire of course denotes that the charterer is responsible for providing fuel to the vessel in the normal way; cf. the unsuccessful

argument to the contrary in a US arbitration (*"Blue Giant"*: SMA, 2016 WL3054902). The 2017 explanatory notes set out the industry background to "maintenance days":

> These so-called "*Maintenance Days"* will start to accumulate from the commencement of the charter period. This is an accepted practice in the offshore industry where ships generally operate with a greater amount of equipment and machinery when compared to other types of ships, and as such require more maintenance and more frequently. It is important for owners to be able to do this maintenance without always being placed off hire when doing so.

The explanatory notes to the "Supplytime 2005" form gave a useful example of how the aggregation may work in practice as much under the 2005 as under the 2017 forms:

> The Charterers must grant the Owners a maximum of 24 hours on hire cumulative, *per* month and pro rata. In other words if the 24 hours are not spent in a particular month they will automatically be transferred to the next. That means that after two months Owners will have 48 hours, after two and a half month Owners will have 60 hours and so on. The time it takes for the Vessel to sail from the area of operation to the drydock will count as time on hire and not against the accumulated time. As a comfort to the Charterers it is stated that the Vessel will be drydocked at regular intervals and that the Owners must furnish the Charterers with a drydocking schedule at the commencement of the charter period.

5.130 Under the 2005 form, the owner could "bank" its maintenance days with the charterer responsible for making payment at the end of the charterparty for all days not used: "In the event of less time being taken by the Owners for repairs and drydocking or, alternatively, the Charterers not making the Vessel available for all or part of this time, the Charterers shall, upon expiration or earlier termination of the Charter Party, pay the equivalent of the daily rate of Hire then prevailing in addition to Hire otherwise due under this Charter Party in respect of all such time not so taken or made available." The "Supplytime 2017" version adopts a different solution, equivalent effectively to a "use it or lose it" regime for owner's maintenance days: "However, days not used may no longer be 'cashed in' on redelivery of the vessel except in certain circumstances." As further explained in the 2017 notes:

> The starting point is that it is the owners' decision when to use their Maintenance Days or not. In SUPPLYTIME 2017, a new concept has been introduced in that if owners decide *not* to use some or all of their Maintenance Days, they will not be able to claim the value of them at the end of the charter period, as was the case under SUPPLYTIME 2005. However, there is one exception to this, and that is where the charterers have specifically asked the owners not to use them. In such cases, hire will be payable for such unused Maintenance Days on redelivery or at the earlier termination of the charter party. During the Maintenance Days, the charterers' obligations under subclause 9(a) (Charterers to Provide) will be suspended.
>
> This is a more balanced solution which may encourage owners to use their Maintenance Days within the charter period.

5.131 It has been suggested that an owner could still get the benefit of unused maintenance days by letting these accumulate and then, towards the end of the charter period, notifying the charterer of the intention to use these *en bloc* (even though not having that intention) and thereby to engineer a refusal of the charterer to the maintenance of the vessel during that period and thence to achieve payment for such days. The issue so raised is not understood. The owner has its express right to maintenance days and to accumulate them and use them during the service. If it gives notice of its intention to use them, it gives notice of its intention to use its contractual right: it is a matter for the charterer whether it agrees to interrupt its (usually remunerative) services to allow the repairs to be carried out or to pay at the end for depriving the owner of its right. Further the "scenario" is an unrealistic one; few owners (it is suggested) give a notice to carry out maintenance, using accrued maintenance days, in bad faith where maintenance is not in fact required.

5.132 Paragraph (c)(ii) is a modified version of the 2005 provision. The charterer is to allow the owner to dry-dock vessel to dry-dock from time to time as required by its classification

society (this now being specified in the 2017 version). Unless dry-docking is being done using accumulated maintenance days, the vessel is off hire during dry-docking. The 2017 revision, now specifies precisely where and when the vessel goes off hire respectively comes back on hire again, namely from the time the charterer places it at the owner's disposal until the time it is placed at the charterer's disposal at the place where it was originally released: this follows the modern time charter forms, eg. clause 22(b) of "Shelltime 4"; cf. the more general wording used in older standard form time charters such as clause 21 of the "NYPE" form ("payment of hire to be suspended until she is again in a proper state for the service"); see generally Coghlin, Baker, *Time Charters* (7th edn, 2014), at para. 33.1 *et seq*. (NYPE) and para. 37.114 *et seq*. (Shelltime).

5.133 Under the 2005 form, the owner had an unfettered right as to where to dry-dock its vessel. The only requirement was that it would notify the charterer of its plans after conclusion of the charter but before the charter period began ("Upon commencement of the charter period, the Owners agree to furnish the Charterers with the Owners' proposed drydocking schedule and the Charterers agree to make every reasonable effort to assist the Owners in adhering to such predetermined drydocking schedule for the Vessel."). This requirement is retained in "Supplytime 2017" ("At the commencement of the charter period, the Owners shall provide the Charterers with the Vessel's class dry-docking schedule for the charter period, including any options to extend") but in addition the 2017 form now states that the owner's choice of dry-dock location should always be reasonable in terms of both time and cost "both to themselves and the charterers." This at least (in theory) allows the charterer to object that a particular dry-docking plan is unreasonable or that the owner has only taken into account what is reasonable from its perspective. Such arguments may be difficult given the competing interests and what defines reasonableness. The 2017 notes give this example: "Under SUPPLYTIME 2005, the charterers may have to bring the ship anywhere the owners decide to have it dry-docked and time and fuel in this connection will be for the charterers' account. For example, the ship could be required to leave a work site in Abidjan to dry dock in Rotterdam, and then return to Abidjan." But if the repair facilities available at the time in Abidjan are not comparable or the standard of Ivoirian shipyards is objectively not as good as that in a Rotterdam yard in a relevant respect, the owner can reasonably say (from both parties' perspectives) that while the job may take longer and cost more because of the displacement of the vessel to north Europe, the vessel will be repaired/maintained to a better or acceptable standard (which it is the owner's responsibility under clause 8 to procure).

Clause 14: liabilities

The main changes to the knock-for-knock regime under "Supplytime 2017"

5.134 Just as with the corresponding provisions in "Towcon 2008" and "Towhire 2008", clause 14 of the "Supplytime 2017" enshrines the mutual allocation of risk regime which is central to the BIMCO forms as part of its "knock-for-knock" philosophy. There are a number of categories of loss which are for the account of the owner or the charterer and where the bearing of that loss is effected by the usual double-barrelled approach found in many mutual allocation of risk clauses (and as adopted by BIMCO) of an exemption of any liability for that loss and a right to an indemnity against the other if, notwithstanding the exemption, the party protected should be held liable to another for that loss. The use of the indemnity and exclusion approach buttresses what would probably be the simple effect of the use if indemnities, which carry with them a corresponding exclusion: see *Farstad Supply AS v Enviroco Ltd (The Far Service)* [2010] UKSC 18 (Sc); [2010] 2 Lloyd's Rep 387; Rainey, "The Construction of Mutual Indemnities and Knock-for-Knock Clauses", in Bariş Soyer and Andrew Tettenborn (eds), *Offshore Contracts and Liabilities* (2015). The 2005 revision of "Supplytime 89" proved to be rather more limited than the later revision of the "Towcon" and "Towhire" forms in 2008 which, as noted above, saw, in

particular, the major amendment of the mutual exclusion of liability for consequential damages/ loss of profit et al. contained in the old clause 18(3) of those forms to grapple with the case law on direct losses and indirect losses and whether the enumerated heads of loss were to be treated as excluded *in toto* (what has been described in Chapter 4 as the Rix J approach) or only if they were indirect or consequential, ie if they fell within limb 2 of *Hadley v Baxendale*, (what was described in Chapter 4 as the Clarke J or *Herdentor* approach). This was, apparently, deliberate on the part of BIMCO:

> This Clause is recognised as being at the very core of SUPPLYTIME and amendments have only been made where it was considered essential to improve the clarity of the provisions or to reflect changes in commercial practice.

5.135 Following the changes made subsequently to the equally central "Towcon" and "Towhire" knock-for-knock provisions in 2008 and the work done, in the light of the "Towhire 2008" form in the drafting of the "Windtime" form, published in 2013 and modelled as an industry-specific update "version" of "Supplytime 2005", major changes to "Supplytime 2017" as the first full-scale revision of "Supplytime 2005", as such, were expected. Those expectations have been met and clause 14 of "Supplytime 2017" is a fundamentally changed version of the 2005 version of "Supplytime" and a step forward from both the "Tow- 2008" and "Windtime" 2013 forms.

5.136 The main changes in "Supplytime 2017" to the previous 2005 version of clause 14 (considered in more detail below) are as follows.

i The definitions of "Owners' Group" and "Charterers' Group" have been removed from the opening section of clause 14 where they were in "Supplytime 2005" and now form part of the general definitions section at the start of Part II. That definitions section has been discussed above. As there considered, the definition of the "Group" concept under the "Supplytime 2017" form is much wider than it was under "Supplytime 2005" extending to affiliates (defined by reference to control) and to contractors and sub-contractors "of any tier" as well as, on the charterer's side, charterer's "clients of any tier." The aim has been to make it clear that everyone on charterer's side (as well as owner's) in relation to the project in hand is encompassed within the mutual exception and indemnity in respect of the defined liabilities. The 2017 explanatory notes state: "Thus, all parties operating in the field and which may suffer loss or damage when working at the site are covered by the knock for knock regime. Parties both up as well as down the charterers' contractual chain are included and owners avoid liability towards the charterers' contractual counterparties several tiers removed from them. This assists in clarifying which indemnities the charterers have to give and ensures a robust and clear-cut knock-for-knock liability regime."

ii The knock-for-knock regime under "Supplytime 2005" was expressed, in both the case of the owner and the charterer, to be subject to an extensive number of exceptions, creating what might have been described as a "Swiss cheese" effect. The list of exceptions for both the owners and the charterers had become longer than in "Supplytime 89", perhaps corresponding to the increase in provisions dealing with ISPS/MTSA; bunkers etc. However, it is fair to note that the charterers were potentially liable for a greater number of breaches outside the knock-for- knock regime than were owners. "Supplytime 2017" radically dispenses with almost all of the exceptions, save in very narrow respects. The aim has been to create "A knock-for-knock regime where the loss lies where it falls at its purest." As the 2107 explanatory notes state (cited above but worth repeating):

> At the very heart of SUPPLYTIME lies the knock-for-knock liability regime – a principle commonly found in many offshore support vessel charters. Over time, we have seen an erosion of the pure knock-for-knock mechanism with the introduction of various exceptions.

> The revision of SUPPLYTIME 2005 has focused on treating both parties equally by removing almost all the exceptions to create a better balance of liabilities and indemnities and a more effective knock-for-knock regime.
>
> We have reviewed SUPPLYTIME in the light of past legal judgments and attempted to clarify some of the more overly complex or ambiguous language which may have given rise to misinterpretation.

iii Clause 14 appears to have attempted to address the problem of the potential inapplicability of the knock-for-knock regime in cases of different types of breach which might be described as "radical" (for example repudiatory or renunciatory breaches) and the issues thrown up by *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177.

iv It was suggested in the 3rd edition of this work that clause 14(c) of "Supplytime 2005" dealing with consequential loss and damage would benefit from reconsideration in the light of (a) the continuing trend in case law, to clauses worded in an "consequential loss *including* . . ." style, of treating the enumerated losses as simply examples of the "limb 2" *Hadley v Baxendale* loss signified by the phrase "consequential" loss (following *Croudace v Cawoods*: see generally Chapter 4 above) and (b) the attempt to address that trend in the later "Towcon 2008" and "Towhire 2008" equivalent mutual exclusions. The drafters of "Supplytime 2017" have now discarded all previous versions of the BIMCO "consequential loss" type provision and have produced in clause 14(b) of "Supplytime 2017" an effective exclusion of the enumerated losses (such as losses of profit) which applies irrespective of which limb of *Hadley v Baxendale* applies as well as retaining a "consequential loss" provision. It is a real improvement in the effect of the mutual exclusion and should now be used in place of other, older, BIMCO formulations.

v Clause 14(b) of "Supplytime 2017" has also, and as part of the redrawing afresh of the "consequential loss" clause, greatly expanded the content of the exclusion of specific losses formerly dealt with in the 2005 "Consequential Damages" provision to provide for a much wider group of mutually excluded losses concerned with economic and contractual loss of the type common in an offshore project. The less sophisticated wording dated back to "Supplytime 89" and the original "Towhire" forms of "loss of use, loss of profits, shut-in or loss of production and cost of insurance" has been significantly developed.

vi Lastly and as part of the removal of the exceptions to the knock-for-knock regime, "Supplytime 2017" has removed the special provision relating to "hazardous and noxious substances" which imposed an indemnity obligation on the charterer for loss and damage caused by the carriage of such substances. The deletion mirrors the liberty under clause 6(d)(iii) to the charterer to carry "Explosives, dangerous goods, and toxic and/or noxious substances whether in bulk or packaged, provided proper notification has been given and such cargo is marked and packed in accordance with the national regulations of the Vessel and/or the International Maritime Dangerous Goods Code."

The "Group" coverage of "knock-for-knock

5.137 As noted above, clause 14 in "Supplytime 2017" no longer starts with the definitions of the "Groups", whether the owner's or the charterer's, which are referred to in the knock-for-knock provisions which follow. The definitions of the "Groups" are wider in the 2017 version of the form and accordingly the reach of the provisions is wider. The comparison between the 2017 and the 2005 forms is set out in the commentary on the definitions set out above. But some examples can be given to illustrate the point taken from two arbitrations under the 2005 form (which did not unfortunately proceed to awards).

5.138 In one, concerning a wind farm project, a charterer had sub-contracted its work in part to A; A in its turn sub-sub-contracted a further aspect of the work to B. B attended upon the worksite

in two launches, one owned by B and another by C from which B had hired the launch. Both launches were struck by the OSV proceeding astern without proper look-out and both received damage. Claims were made by B up the chain for its damaged launch and its liability to C. The owner's response to a claim by the charterer was that neither B nor C were within "and their contractors, sub-contractors." While such an argument may not have succeeded in any event, the new 2017 definition "contractors and sub-contractors (of any tier)" disposes of it more clearly. In the other, concerning pipe-laying, property belonging to A was damaged. A was a party to the project who was not in any direct contractual relationship with the charterer albeit within such a relationship with someone who was. A was therefore loosely within the group of those for whom the work being performed by the OSV was being done. The owner contended, perhaps with more force, that A was not within the "Supplytime 2005" definition of Group "their contractors, sub-contractors, co-venturers and customers (having a contractual relationship with the Charterers, always with respect to the job or project on which the Vessel is employed)" since it was intended to limit the definition to a contractual, and hence a *direct*, contractual relationship. The "Supplytime 2017" definition extends the reach of the mutual indemnity to such a person as either "Charterers and Charterers' clients (of any tier)" or "contractors and sub-contractors (of any tier)" with the only requirement being "but always related to the work or project on which the Vessel is employed" and with no need for an enquiry into the precise nature of the contractual nexus between charterer and client or contractor. Similarly, the introduction of the "affiliate" addresses gaps in a complex project where related companies are involved.

5.139 While it is unfortunately likely that such attempts to escape from the scope of clause 14 will continue under "Supplytime 2017", they should meet with even shorter shrift. The explanatory notes are likely to be correct in hoping that "The removal of most of the exceptions, is balanced by the expansion of the definitions of the Charterers' Group and Owners' Group. These definitions now encompass all the parties which may suffer a loss and which the owners and charterers will be liable to indemnify each other in respect of." One way in which the parties can help themselves is *not* to delete parts of the standard definitions within the "Group" and to consider carefully the impact of additions on the definitions: cf. an arbitration in the United States where the deletion of the term "customer" from the older 2005 definition of "Group" was argued to amount to an implicit acceptance that the project leader was not within the "Group" ("Blue Giant"; SMA; 2016 WL3054902: argument dismissed on other grounds).

"Knock-for-knock"

"14. Liabilities and Indemnities

(a) Knock for knock

(i) *Owners* – Notwithstanding anything else contained in this Charter Party excepting Subclauses 9(e) (Charterers to Provide), 14(c) (Liabilities and Indemnities – Limitations), and 18(c) (Saving of Life and Salvage), the Charterers shall not be responsible for loss of or damage to any property of any member of the Owners' Group, including the Vessel, or for personal injury or death of any member of the Owners' Group, arising out of or in any way connected with the performance or non-performance of this Charter Party whatsoever and in any circumstances, even if such loss, damage or personal injury or death is caused wholly or partially by the act, neglect, breach of duty (whether statutory or otherwise) or default of the Charterers' Group, and even if such loss, damage or personal injury or death is caused wholly or partially by the unseaworthiness of any vessel; and the Owners shall indemnify, protect, defend and hold harmless the Charterers' Group from any and against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of or in connection with such loss, damage, personal injury or death.

(ii) *Charterers* – Notwithstanding anything else contained in this Charter Party excepting Clauses 9(e) (Charterers to provide) and 16 (Wreck Removal), the Owners shall not be responsible for loss of, damage to, or any liability arising out of anything towed by the Vessel, any cargo laden upon or carried by the Vessel or her tow, any property of any member of the Charterers' Group, whether owned or chartered, including their Offshore

Units, or for personal injury or death of any member of the Charterers' Group or of anyone on board anything towed by the Vessel, arising out of or in any way connected with the performance or non-performance of this Charter Party whatsoever and in any circumstances, even if such loss, damage, liability or personal injury or death is caused wholly or partially by the act, neglect, breach of duty (whether statutory or otherwise) or default of the Owners' Group, and even if such loss, damage, liability or personal injury or death is caused wholly or partially by the unseaworthiness of any vessel; and the Charterers shall indemnify, protect, defend and hold harmless the Owners' Group from any and against all claims, costs, expenses, actions, proceedings, suits, demands, and liabilities whatsoever arising out of or in connection with such loss, damage, liability, personal injury or death."

A more limited form of "knock-for-knock"

5.140 As previously in "Supplytime 89" and "Supplytime 2005", para. (a)(i) of clause 14 of "Supplytime 2017" exempts the charterer in wide terms from liability for loss or damage suffered by the owner. Paragraph (a)(ii) does the same on the part of the owner in respect of loss or damage suffered by the charterer.

5.141 It should be noted that although BIMCO in their "Explanatory Notes" to the former "Supplytime 89" form equated the "knock-for-knock" concept used in this form with that used in the "Towcon" and "Towhire" forms, there are and remain significant differences (which may account for the fact that the comparison ceased to be drawn in the explanatory notes accompanying "Supplytime 2005" which merely stated: "Clause 14(a) and (b) [sc. 14(b)(i) and (ii)] sets out the Owners' and the Charterers' liability in a knock-for-knock liability regime). This means that each party pays the claims of its own group following an accident. The principle applies irrespective of blame and seeks to save time and expense in connection with casualties." Similarly, no reference is made to the "Towcon" or "Towhire" models. This is because, unlike the other BIMCO forms, "Supplytime 2017" (like "Supplytime 2005" and "Supplytime 89" before it), consists of exemption clauses in standard form in favour of each party of differing scope rather than clauses under which the parties each agree to bear certain types of loss in precisely the same way. The scope of the exemption for each party is narrower under this approach than in the analogous provisions in "Towcon 2008" and "Towhire 2008" and the precise mirroring of what the tug and the tow each bear under, for example, clause 25(b)(i) and (b)(ii) of "Towcon 2008" is absent from the "Supplytime" regime, although there are broad similarities in that each party bears the risk for its property and personnel. This is a reflection that "Supplytime" is merely a species of time charterparty, where the owners are providing their vessel to perform services under the direction of the charterers and is different in kind from a towage or offshore contract under which one vessel is rendering a towage or similar service to another vessel or floating object, each of which is distinct and separate throughout the service. As the 2017 explanatory notes add "It is not an exact mirror image of subclause 14(a)(i) for the simple reason that the services that the owners and the charterers perform are not identical."

5.142 The most important features of the differences in protection offered to each party under clause 14(a)(i) and (ii) and differences with the regime under the BIMCO "towage" forms are as follows:

i The exemption of the charterers from responsibility and the "hold harmless" or indemnity against suit provision under para. (a) is only in respect of loss of or damage to the property of the owners, including their contractors and sub-contractors (being the more narrowly defined "Owners' Group"), and in respect of death or injury to the Owners' Group's employees or servants. Importantly, there is no exemption of the charterer and right of indemnity granted to the charterer in respect of liabilities which the owners may incur to third parties by reason of the charterers' breach of contract or negligence or arising out of the vessel or other property of the Owners' Group. Cf. clause 19 of the

"Supplytime 2017" form which, like the corresponding provision of "Supplytime 2005" and "Supplytime 89", includes within the "lien clause" a right on the owners' part to an indemnity from the charterers not only in respect of "any lien of whatsoever nature arising upon the Vessel during the Charter Period while it is under the control of the Charterers" but also "against any claims against the Owners arising out of the operation of the Vessel by the Charterers or out of any neglect of the Charterers in relation to the Vessel or the operation thereof" (see further below).

ii The owners' exemption from responsibility and the "hold harmless" provision in para. (a)(ii) is wider. It extends to loss of or damage to any of the Charterers' Group's property whether under tow or not, including cargo carried and any offshore unit, and to death or personal injury of the charterers' personnel and, thus far, mirrors the exemption given to the charterers under para. (a)(i). However, the clause goes on to exempt the owners from "any liability arising out of" the charterers' property or anything towed or carried by the vessel, whether or not that liability was caused by breach of contract or negligence on the part of the owners. This will cover eg liability for wreck removal of the tow and for collision between the tow and a third party vessel or for damage done to undersea installations by the vessel negligently dropping an item of charterers' property from the vessel or some other cargo being carried for the charterer.

iii The knock-for-knock is expressed in both the case of the owner and the charterer to be subject to a number of limited exceptions. The "Supplytime 2005" list of exceptions, as already noted, was long (for the charterer "Notwithstanding anything else contained in this Charter Party excepting Clauses 6(c)(iii), 9(b), 9(e), 9(f), 10(d), 11, 12(f)(iv), 14 (d), 15 (b), 18(c), 26 and 27" and for the owner "excepting Clause 11, 15(a), 16 and 26"). The approach of "Supplytime 2017" has been to reduce these to a minimum. In both the case of the owner and the charterer under paras. (a)(i) and (a)(ii) the principle that each party bears the loss of its own property is not applicable to "replacement of any anchor handling/towing/lifting wires and accessories which have been placed on board by the Owners or the Charterers, should such equipment be lost or damaged" which are always for the charterer's account, save where the owner has been negligent, under clause 9(e). The charterer under para. (a)(i) accepts the owner's right to limit (probably unnecessary given the clear terms of clause 14(c) in any event) and continues to indemnify the owner in respect of matters connected with the saving of life at sea or other maritime salvage dealt with under clause 18(c). Under para. (a)(ii), the owner continues to bear its responsibility under clause 16 for the wreck removal of the vessel chartered from it by the charterer.

5.143 As discussed above, the original "Supplytime 89" form also provided for an optional Annex "C" as a "Mutual Waiver of Recourse." The aim of the Annex was to underscore and confirm that the parties intended that there should be no right of recourse against each other in the case of certain types of loss or damage, which each party agreed to bear irrespective of cause and the fault of the other. The explanatory notes to the 1989 form evidenced that the aim and stated objective of such an agreement was "to avoid *entirely* disputes as to their liabilities" (emphasis supplied) between the parties and their sub-contractors "for damage or injuries to their respective property or employees." This was dropped from "Supplytime 2005" on the basis that "it was no longer needed. The reason for this is that the Mutual Waiver of Recourse provision was originally added when there was uncertainty whether the courts would accept the knock-for-knock principle, however, over time it has been seen that the principle is widely accepted by courts." The "Supplytime 2017" form follows that approach (and Annex C is now no longer referred to at all in the notes accompanying the 2017 form). The possible inroads into that assumption in the recent cases of *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177 on the predecessor to clause 25(b) of "Towcon 2008", and *Internet Broadcasting Corpn Ltd*

v Mar LLC [2009] 2 Lloyd's Rep 295, in the context of a clause mutually excluding the recovery of consequential loss, similar to clause 14(c) of "Supplytime 2005" and clause 14(b) of "Supplytime 2017" may invite reconsideration of some form of express mutual waiver of all recourse in every case and whatever the breach absolutely, as was designed to be achieved by Annex "C." A detailed consideration of the efficacy of Annex "C" is given in the 2nd edition of this work, at pp. 176–177 to which reference may be made. One difficulty with the Annex was that notwithstanding that it purported to be an optional additional agreement in relation to liability and indemnity, it nevertheless was expressed to be subject in all respects to the "knock-for-knock" clause contained in Part II (the old clause 12 of "Supplytime 89"). This was made clear by the introductory and italicised words of para. (f) of Annex "C": "regardless of whether this option is exercised the other provisions of Clause 12 shall apply and shall be paramount." Accordingly, whether it had any additional effect was highly doubtful in any event. If parties desire to strengthen their mutual waiver of recourse, they should look to crafting a clear and explicit set of provisions, rather than defaulting to the former Annex "C" which suffered from various drafting deficiencies, apart from that here mentioned.

Scope of exemption/indemnity

5.144 Clause 14 of the "Supplytime 2017" form has been amended in its description of the circumstances in respect of which both the exemption and indemnity in favour of the owner and the charterer operate. It is necessary to consider the 2005 wording to appreciate the stated explanation behind the changes made in "Supplytime 2017."

5.145 ***The "Supplytime 2005" wording***. The 2005 form in both clause 14(b)(i) and 14(b)(ii) applied the indemnity and the exclusion "even if such loss, damage, injury or death is caused wholly or partially by the act, neglect, or default of [that party], and even if such loss, damage, injury or death is caused wholly or partially by unseaworthiness of any vessel." The clause was therefore effective to cover unseaworthiness and addresses specifically the type of argument deployed unsuccessfully in the "Towcon" context in *Smit International Deutschland GmbH v Josef Mobius Baugesellschaft GmbH* [2001] CLC 1545, considered in Chapter 4 above. Similarly, it is suggested that the 2005 wording was plainly sufficient to exclude either party's liability for negligence and satisfies the requirements of the line of authority starting with *Canada Steamship Lines v The King* [1952] AC 192. As an example of the types of argument which are sometimes advanced in an attempt to escape what might be thought to be the clear purport and effect of clause 14(b)(i) and (ii), in one case where a charterer claimed for damage done to an item of its property, it was argued by the charterer that the predecessor of clause 14(b)(ii), viz. clause 12(b) of "Supplytime 89" did not apply because the damage resulted from the owner's "gross negligence" and negligence as such was not excepted. This was rejected by the tribunal (of two QCs) in an award in 2007 in which it was stated that while the word "negligence" was not used *per se*, the words "neglect or default" were sufficiently synonymous with it. The tribunal relied upon the decision of Clarke J in *Monarch Airlines v London Luton Airport Ltd* [1998] 1 Lloyd's Rep 403 in which he held, relying upon a previous decision as to the meaning of the words in the Railway and Canal Traffic Act 1854 (*Shaw v G.W. Rlwy* [1894] 1 QB 373) that the phrase "any act, omission, neglect or default" in an airport's standard conditions were apt to exclude negligent acts or omissions and liability for such negligence.

5.146 The "Supplytime 2005" wording did not in this phrase refer as such to breach of contract, cf. the wording used in clause 25(b) of the "Towcon 2008" form which reads "whether or not the same is due to any breach of contract, negligence or any other fault." In the light of the decision in *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177, it may be questioned how far the exemption and indemnity offered under clause 14(b) of "Supplytime 2005" extends. That case, which is considered in detail in Chapter 4 above, dwelt on the

fact that the words "breach of contract" in the "Towcon" wording, while theoretically apt to apply to any breach of contract could not be read as applying to "radical breaches" but only to (undefined) non-radical ones (see *per* Teare J at para. 118). He further held that the wording fell to be restricted as follows: "The words, when read in the context of the TOWCON as a whole, are also susceptible of applying so long as the tug owners are actually performing their obligations under the TOWCON, albeit not to the required standard" and that they did not apply where the party was not performing the contract at all. It is plainly arguable that the words "by the act, neglect, or default of [that party], and even if such loss, damage, injury or death is caused wholly or partially by unseaworthiness of any vessel", while apt to include acts, neglect or default which amount to breaches of contract, fall short of any clearly demonstrated intention to apply in the case of any breach of contract, even a major or fundamental one. When the other wording of the 2005 version of clause 14(b) in both sub-paras. (i) and (ii) which defines the exemption and indemnity as being in respect of "loss of or damage to the property . . . or for personal injury or death . . . arising out of or in any way connected with the *performance* of this Charter Party" (emphasis supplied) is taken into account, it is much easier to adopt the approach taken in *The A Turtle* to clause 14 of "Supplytime 2005"; the "Supplytime" wording refers specifically to the loss or damage etc. occurring in relation to the charterparty being performed rather than not performed which is, arguably, very close to the concept employed by Teare J of "actually performing their obligations under the [contract], albeit not to the required standard.

5.147 Curiously, different wording was used in clause 14(c) of "Supplytime 2005", dealing with consequential damage, where the exception applies in respect of "any consequential damages whatsoever arising out of or in connection with the performance *or non-performance* of this Charter Party" (emphasis supplied). Objectively speaking, it seems unlikely that the drafters of the clause (which carries forward the wording from "Supplytime 89") intended such nice distinctions; far more likely is it that they intended to make each party solely responsible for its own equipment, property and employees as under the BIMCO towage forms (see the explanatory notes to the 1989 form). However, the differences in terminology are unfortunate and offer room for debate and dispute.

5.148 ***The "Supplytime 2017" wording***. This lacuna, with no apparent reference to breach of contract in the 2005 form, was sought to be addressed by the drafters of the 2017 revision by bolstering the existing wording in both clause 14(a)(i) and 14(a)(ii) with certain additions. These are shown in italics: "arising out of or in any way connected with the performance *or non-performance* of this Charter Party *whatsoever and in any circumstances*, even if such loss, damage or personal injury or death is caused wholly or partially by the act, neglect, *breach of duty (whether statutory or otherwise)* or default of the [Charterers' OR Owners'] Group, and even if such loss, damage or personal injury or death is caused wholly or partially by the unseaworthiness of any vessel." The explanatory notes state: "Furthermore, the knock for knock regime has been reinforced by expanding the description of the included causes of loss. [. . .] The italicised text shows the added wording. The background to these additions is found in court cases since SUPPLYTIME 2005 such as the *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177."

5.149 No further guidance is given in the drafters' explanatory notes, and it is not stated whether the drafters had had in mind (and rejected) the different approach taken by the drafters of "Windtime." In that form, in what is essentially a modified version of the "Towcon/Towhire 2008" knock-for-knock provision, the clause contains an express disclaimer of any application of the mutual exceptions and indemnities in the case of a repudiatory or renunciatory breach. Clause 16(d) is headed "Mutual Exclusion" (ie a mutual exclusion from the mutual exclusion) and provides:

> In the event that either party fails to perform the Charter Party, or unequivocally indicates its intention not to perform it, in a way which thereby permits the other party to treat the Charter Party as at an end

> other than under the terms of the Charter party, any such claim that the other party may have shall not be limited or excluded by the terms of this Charter Party.

It can be argued that "Supplytime 2017" by the use of the terms emphasised ("arising out of or in any way connected with the performance *or non-performance* of this Charter Party *whatsoever and in any circumstances*" (italics added)) has instead sought to make this intention objectively clear and that where it wishes to exclude its operation in the case of repudiation or renunciation it does so (cf. clause 2(e) in relation to cancellation and the return of the demobilisation fee where the clause states "Except in the event of termination due to the Owners' repudiatory breach" and the drafters have specifically sought to carve this out.)

5.150 Do therefore the drafting changes introduced in clause 14 of "Supplytime 2017" apply the knock-for-knock regime to any and all breaches, including such breaches? As noted above, the decision in *The A Turtle* [2009] 1 Lloyd's Rep 177 is highly questionable, at least in its cutting back the application of knock-for-knock clauses on the basis that the clause leaves the contract a bare statement of intent given the breadth of the types of loss dealt with by the clause, notwithstanding that these are typical heads of loss subjected to risk allocation in the offshore and other industries.

5.151 However, both this decision and that in *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38 (discussed in detail in Chapter 4) confirm that previous assumptions as to the all-encompassing scope of the BIMCO knock-for-knock risk allocation and consequential loss provisions both in "Towcon"/"Towhire" and "Supplytime" forms as well as other BIMCO forms will need to be revisited. The "reading down" of clauses which purport to apply to all breaches as dealing only with non-repudiatory and non-renunciatory breaches in the cases following *The A Turtle* is difficult to escape. In *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38 Tomlinson LJ stated as follows in relation to a clause which dealt with all loss of profit "in relation to this agreement" at para. 29: "In my judgment however by their language and the context in which they used it they demonstrated that the exclusion related to defective performance of the Agreement, not to a refusal or to a disabling inability to perform it." It is certainly possible to read the new wording in the "Supplytime 2017" form as confined to "non-performance" in the sense of mis-performance. It is interesting to note that in *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372 there was some debate in the course of argument about whether the clause (n.b. one virtually identical to "Supplytime 2017" clause 14(b)) enabled Transocean to repudiate the contract with impunity for purely commercial reasons before the rig had even been delivered into service. While the Court of Appeal was at pains to deprecate a *contra proferentem* or restrictive construction of a mutual knock-for-knock provision, Moore-Bick LJ at para. 33 expressed the view, obiter, that "if necessary I would hold that Clause 20 does not contemplate a deliberate repudiation of that kind (see, for example, . . . *The A Turtle* . . .) and there may be other breaches on the part of one or other party to which similar considerations would apply."

5.152 It is suggested that both looking at the language used in the 2017 revision and the current case law, the change in wording in "Supplytime 2017" is not sufficiently explicit to make it clear that a repudiatory or renunciatory breach is covered. Notwithstanding the attempts of the drafters of "Supplytime 2017", the advice must remain: if the parties genuinely wish to provide for a provision which applies as an "omnibus" provision in relation to all breaches of contract whatsoever, then consideration must be given to using suitably explicit wording as riders to the standard clause phraseology. Consideration should be given to amending the clause to refer specifically to use suitably specific and trenchant language. Whether it is necessary to go as far as was suggested in *Internet Broadcasting Corpn Ltd v Mar LLC* [2009] 2 Lloyd's Rep 295 should be doubtful (cf. para. 32 where the judge said "one would expect to see 'clear' language in the sense of 'strong' language, for example, 'including deliberate repudiatory acts by [the parties to the contract] themselves'") following the disapproval of this approach in the recent decision in

Astrazeneca UK Ltd v Albemarle International Corpn [2011] EWHC 1574 (Comm), considered in detail in Chapter 4 above. But given the reluctance of the court to give effect to phrases which refer to breach of contract or non-performance in general wide terms, this may in hindsight not be bad *practical* advice even if, as a matter of strict legal analysis post-*Photo Production v Securicor, it should* not be necessary, eg for the reasons given by Flaux J in *Astrazenaca*.

5.153 "***Neglect***": The "Supplytime 2017" wording retains the core phrase "caused wholly or partially by the act, neglect or default." It may be noted that in the "Windtime" form, the phrase was expanded by the reference to gross negligence, the "Windtime explanatory notes stating: "The reference to 'neglect' (ie negligence) found at lines 637 & 660 of SUPPLYTIME 2005 has been amended in WINDTIME to 'gross neglect' to clarify that the knock for knock indemnity expressly includes 'gross neglect', ie gross negligence. The position under English law is that the difference between 'negligence' and 'gross negligence' is one of degree, not kind." It is suggested that the term "neglect" on its own will cover all forms of negligence and that this "Windtime" addition is unnecessary; this is *a fortiori* the case where there is now additional reference to "breach of duty" in the 2017 wording.

Heads of excluded loss and damage

5.154 Having considered the scope of the exclusion and exemption, the types of loss damage and liability borne by each party "knock-for-knock" are much more straightforward. There is little change to the wording of "Supplytime 2005", clauses (a)(i) and (a)(ii) of "Supplytime 2017" following the previous wording, albeit with textual changes consequent upon the definitions in the new 2017 form. Reference should also be made to the commentary on the "Towcon 2008" wording eg as to the nature of physical "damage" (see Chapter 4). As already seen, para. (a)(i) deals with the losses which the owner will bear and para. (a)(ii) deals with those to be borne by the charterer. Paragraph (b)(i) deals simply with the "property of" the Owners' Group. This, read ordinarily, would connote items, usually chattels but necessarily so, which are owned by the owner (or by anyone within its group). Arguments sometime surface as to whether the property has to be owned outright by the owner and as to the nature of the rights which the owner has over or in the property in question which is loss or damaged. It is suggested that the correct approach is to bear in mind that the purpose of the clause and of knock-for-knock is that the owner (as the charterer) is expected to rely on its insurance of the damaged item and not to claim against the charterer; accordingly items of equipment or chattels which the owner owns, or leases or has a licence to use and which are his to dispose of operationally may arguably be regarded as falling within the owner's "property" since the owner has a sufficient proprietary interest in them and an insurable interest also. It is unfortunate that in the revision of the clause in the "Supplytime 2005" form, where similar provision is made for the charterer's bearing of loss in para. (b)(ii), the wording has been amended to read as follows (relevant amendment to the previous "89" wording shown in italics): "the property of any member of the Charterers' Group, *whether owned or chartered*." This would tend to suggest that "property" means "owned" unless it is expanded to mean "owned or chartered" and would support a narrow meaning of "property" in para. (b)(i). The 2005 explanatory notes are silent as to the rationale for this change and the "Supplytime 2017" form is unchanged in this respect.

5.155 Paragraph (a)(ii), in setting out for what the charterer must carry the risk, deals with a wider class of item than para. (b)(i). The expansion of property to cover any property "owned or chartered" has already been noted. Additionally, the "Supplytime 2005" version of the clause extends to "anything towed by the Vessel, any cargo laden upon or carried by the Vessel or her tow, the property of the [charterer], whether owned or chartered, including their Offshore Units." This listing of items gave rise to a number of disputes under the "Supplytime 89" form. The argument which has been advanced by the charterer was that the term "the property of the charterer" (as it appeared in "Supplytime 89") was not a separate category of property at all but

was merely descriptive of the first two categories of property, with the result that the exclusion of responsibility in favour of the owners for loss of or damage to property is limited to anything towed by the vessel and any cargo laden on or carried by the vessel or her tow which belonged to the charterer or the charterer's offshore units. This argument was ingenious but misconceived simply because of the difficulty of making it work with the phrase immediately following, viz. "including their offshore units" and the fact that it was mirroring the same phrase ("property of owners") in the preceding paragraph. The charterer's property provision therefore did not (in its "Supplytime 2005" form) qualify the exemptions that preceded it; rather, it constituted a separate and independent category of exemption and indemnity in accordance with its ordinary meaning. The argument has not fared well. It was dismissed by the Supreme Court of Western Australia in *Stirling Marine Services Pty Ltd v Austral Piling & Construction Pty Ltd* [1999] WASCA 6, Ipp J stating, *inter alia*, at para. 18: "the natural meaning of the words of the charterers' property provision is not to qualify that which preceded it. For a qualifying effect to be obtained, it is necessary to import words at the beginning of the provision such as 'being' or 'that is'" and at para. 25 "As regards the use of the definite article in the phrase 'the property of the charterers . . . including their offshore units', the word 'the' is entirely appropriate if one assumes that the exemption and indemnity apply to 'anything' towed by the vessel, 'any' cargo upon the vessel and, thirdly, 'the' property of the charterers, that is, 'the' property that is neither towed nor cargo." The matter also went to arbitration in London and the argument was firmly rejected there too as being contrary to the language of the old clause 12(b) and its obvious purpose in an award (of two QCs) given in 2007. The argument was further relegated by reason of the reference to "owned or chartered" in the "Supplytime 2005" version of the clause in para. (b)(ii).

5.156 It has now received (it is hoped) its final *quietus* as the "Supplytime 2017" version at last removes the potentially ambiguous definite article and replaces it with "any", the phrase now reading "the Owners shall not be responsible for loss of, damage to, or any liability arising out of anything towed by the Vessel, any cargo laden upon or carried by the Vessel or her tow, *any* property of any member of the Charterers' Group, whether owned or chartered, including their Offshore Units" (emphasis added).

5.157 The potentially wide-reaching effect of the definition of Charterers' Group as including co-venturers and clients of the charterer can be seen when the responsibility for "Offshore Units" in para. (a)(ii) is considered. Under the 1989 version of the form, the offshore unit had to be that of the charterer or its contractors or sub- contractors. This left a large area of potential liability on the part of the owner for damage done by the vessel to an installation owned by a client of the charterer. This was included within the scope of what the charter must bear by the 2005 form; under "Supplytime 2017" with its greatly expanded concept of the "Charterers' Group" covering contractors and clients "of any tier" and "affiliates" of the same, the coverage is now much more extensive and is likely to cover all but the property and units of third parties unconnected with the project or the work in question and having no relationship of any sort with the charterer.

"Excluded losses" ("Supplytime 2017) or "Consequential damages" (Supplytime 2005)

5.158 As discussed in detail above in Chapter 4 in the context of the equivalent provision in "Towcon 2008", the effect of a clause which seeks to exclude "consequential loss" (or some such synonym of it including the words "indirect" or "special" loss) is often bedevilled by poor drafting. The difficulty arises from the failure to appreciate, first, that that term has acquired a special meaning of losses not ordinarily foreseeable but which are recoverable where knowledge of the special circumstances giving rise to them was possessed at the time of contracting or "limb 2" *Hadley v Baxendale* loss and, secondly, that linking up specific heads of loss which it is sought

to exclude such as "loss of profits" in the same phrase or clause may well result in that specific head being treated simply as if it were an example of that limb 2 loss and not otherwise excluded.

5.159 The problem is illustrated by the relevant provision in "Supplytime 2005", clause 14(c) headed (not encouragingly) "Consequential Damages." The solution to the problem is however demonstrated by the new clause 14(b) of "Supplytime 2017" which is headed "Excluded Losses"; the former attempts to tinker with the BIMCO standard wording have been abandoned and a fresh start, seemingly modelled on the LOGIC Conditions, has instead been adopted. It is convenient to take the 2005 and then the 2017 clauses in turn. For those who seek to use the 2005 form henceforth, a simple and obvious change is to replace the text of clause 14(c) with that of clause 14(b) of "Supplytime 2017" even if no other change is made.

The "Supplytime 2005" version

"(c) Consequential Damages. – Neither party shall be liable to the other for any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Charter Party, and each party shall protect, defend and indemnify the other from and against all such claims from any member of its Group as defined in Clause 14(a).

'Consequential damage' shall include but not be limited to loss of use, loss of profits, shut-in or loss of production and cost of insurance, whether or not foreseeable at the date of this Charter Party."

5.160 Clause 14(c) of "Supplytime 2005" is the equivalent of clauses 25(c) and 24(c) respectively in the "Towcon 2008" and "Towhire 2008" forms. It included two further items in the list of specific forms of "consequential damage" for which liability is sought to be excluded. These additional items are, first, "shut-in", plainly of importance in the context of services being provided for the drilling industry where an accident may lead to suspension of drilling or well-head pumping; and secondly, "cost of insurance", which is for the owners' account under clause 17 of the form and which may prove to be a significant cost item. It is an amended version of the previous clause 12(c) of the "89" form.

The 2005 scope of the losses excluded

5.161 Clause 14(c), like clause 12(c) of "Supplytime 89" before it, prima facie, sought to do two things: to exclude liability for certain enumerated heads of loss and to exclude liability for consequential damages. As has been seen above in Chapter 4 in relation to the corresponding provision in the "Towhire" and now the "Towhire 2008" form, the effect of a "consequential damage" clause depends upon the phrases used and the way in which listed heads of loss are related to the phrase "consequential damage." The effect of clause 14(c) can best be appreciated by considering what the position was under the previous version of the clause in clause 12(c) of the "Supplytime 89" form and then assessing what effect if any the amendments to the form in the 2005 revision have had on that position.

5.162 The case law on consequential damages clauses has been considered in detail in Chapter 4. For present purposes it is sufficient to note that there are three variants of such provisions: the first excludes consequential or indirect damages without more and without a list of specific heads of loss, the second excludes specified heads of loss without any linkage with the concept of consequential damage and then excludes, separately, consequential damage in addition; the third excludes consequential damage and specified heads of loss but in a manner which links them to the concept of consequential damage: this is most commonly done by a phrase such as "consequential damages including loss A, loss B etc." Clause 12(c) of "Supplytime 89" was in this form. The first and second forms of the clause pose little problem; the first is usually defined by cases such as *Croudace Construction Ltd v Cawoods Products Ltd* [1978] 2 Lloyd's Rep 55 ("any consequential loss or damage") and the second effectively consists of discrete provisions

for specific heads of loss which are excluded whether consequential or direct coupled with a separate *Croudace* clause: see *Deepak Fertilisers & Petrochemical Corpn v ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep 387. The third form of the clause is that which has given rise to conflicting views as to the correct interpretation of the clause.

5.163 One line of authority adopted the view that the heads of loss having been enumerated must be taken to have been excluded, direct or indirect, and the phrase "consequential damage" fell to be cut back: see the approach of Rix J in *BHP Petroleum Ltd v British Steel plc and Dalmine SpA* [1999] 2 Lloyd's Rep 583. That approach was difficult to reconcile with the language of "consequential damage including loss A" or "loss A and any other consequential damage", although the commercial purpose of the clause was perhaps rather better served. The predominant line of authority was that the specified head of loss was only excluded in so far as it was consequential loss of that sort and not direct loss of that sort: see the cases on the equivalent provision in the former "Towcon", clause 18(3): eg *Alexander G. Tsavliris Ltd v OIL Ltd (The Herdentor)*, unreported, 19 January 1996 (noted at (1996) 3 Int ML 75 and see Appendix 22) and *Ease Faith Ltd v Leonis Marine Management Ltd* [2006] 1 Lloyd's Rep 67 which followed it (these cases are discussed in detail in Chapter 4). This approach has been adopted in other cases and the clearest recent exposition of it was in *Ferryways NV v Associated British Ports* [2008] 1 Lloyd's Rep 639 at 649–650. A clause in a stevedoring agreement read "loss, damage, costs or expenses of any nature whatsoever incurred or suffered by the Customer which is of an indirect or consequential nature including without limitation the following (i) loss or deferment of profit; [there then followed five other heads of loss such as loss of business etc]." Teare J dealt with the construction of the clause before him in this way:

> 82. Although it can be seen from the above cases that the words "indirect or consequential" appear to have acquired a well-recognised meaning, the scope of the excepted losses in clause 9 must depend upon the true construction of that clause. Unless this clause has been the subject of decision (which it has not) previous decisions cannot bind this Court in construing the meaning of the particular words or phrases in clause 9.
>
> 83. Where a party seeks to protect himself from liability for losses otherwise recoverable by law for breach of contract he must do so by clear and unambiguous language. Clause 9(c) provides that liability for such losses as are "of an indirect or consequential nature" is excluded. In the light of the well-recognised meaning which has been accorded to such words in a variety of exemption clauses by the courts from 1934 to 1999 it would require very clear words indeed to indicate that the parties' intentions when using such words was to exclude losses which fall outside that well-recognised meaning. This is particularly so when "indirect" is used as well as "consequential." The use of "indirect" draws an implicit distinction with direct losses. The meaning which has been given to direct losses in the cases which I have mentioned is "loss which flows naturally from the breach without other intervening cause and independently of special circumstances" (*per* Atkinson J in *Saint Line* at p. 103). By contrast, indirect or consequential losses are losses which are not the direct and natural result of the breach (*per* Atkinson J in *Saint Line* at p. 104).
>
> 84. The important question therefore is whether the words in clause 9 "including without the limitation the following" indicate clearly that the parties were giving their own definition of indirect or consequential losses so as to include the specified losses even if they are the direct and natural result of the breach in question. In my judgment those words do not provide the sort of clear indication which is necessary for the Defendant's argument. The parties are merely identifying the type of losses (without limitation) which can fall within the exemption clause so long as the losses meet the prior requirement that they are "of an indirect or consequential nature." Had the parties intended that liability for losses which were the direct and natural result of the breach could be excluded they would have hardly have described such losses as "indirect or consequential."

5.164 It is submitted that clause 12(c) of "Supplytime 89", which provided for an exclusion of "any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Charter Party, including, but not limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance", is virtually indistinguishable and would

fall to be construed in precisely the same manner. Accordingly, the specified heads of loss listed under clause 12(c) would only be excluded if they were indirect or consequential (ie recoverable if falling within limb 2 of *Hadley v Baxendale*: see Chapter 4 above) but not if they were direct losses (ie losses ordinarily and naturally resulting and foreseeable as such: limb 1).

5.165 "Supplytime 2005" amended the old clause 12(c) in two respects. The first is to word the exclusion and indemnity in terms of the phrase "consequential damage" and then to give a definition of that phrase. The definition is that " 'Consequential damage' shall include but not be limited to loss of use, loss of profits, shut-in or loss of production and cost of insurance, whether or not foreseeable at the date of this Charter Party." It is unclear what the purpose of this amendment was. The explanatory notes do not assist, baldly stating:

> Clause 14(c) concerns performance claims under the charter party and a mutual obligation for each party to defend the other if a claim for which the other party is liable is claimed from the non-liable party. The obligation is extended both to claims under knock-for-knock and performance claims under the Charter Party. The wording of the previous Clause 12(c) was slightly vague and it is felt that the new wording expresses the intentions more clearly.

5.166 However, the intention behind the clause in its previous and current form is not (just as it was not in 1989) stated, notwithstanding the debate over the width and purpose of the corresponding provision in "Towcon" which was current at the time of the 2005 revision of the "Supplytime" form, given the decision in *The Herdentor*. If the intention was to exclude the specific heads of loss whether direct or indirect, that intention was not achieved by the previous wording of clause 12(c) and if the intention behind the 2005 version was to leave the effect of the clause unchanged but just more clearly worded then the 2005 amendment was not designed to alter or extend the scope of the exclusion. However, the wording of the definition is in terms of "whether the loss was foreseeable or not" which would suggest an attempt to grapple with the question of direct and indirect loss and the foreseeability tests in *Hadley v Baxendale* and to provide that the specific losses were excluded in all cases.

5.167 It is very arguable whether, if that was the intention, that effect was achieved. First, the clause maintains and re-emphasises that it excludes only "consequential damage": that is a term which has a settled meaning in the cases: see the summary by Teare J in *Ferryways* at para. 81:

> 81. The words "consequential" or "indirect or consequential" when used in an exemption clause have been construed in a number of different contexts. In Deepak the clause in question stated that the supplier of certain technology and know-how for the construction of a methanol plant was not liable for "indirect or consequential damage." The Court of Appeal appear to have held that such phrase only excluded losses which were other than the direct and natural result of the breach; see [1999] 1 Lloyd's Rep 387 at p. 403. The Court of Appeal considered itself bound by the decision of the Court of Appeal in an earlier case, *Croudace v Cawoods* [1978] 2 Lloyd's Rep 55, which concerned the liability of a supplier of masonry blocks required for the construction of a school and where the phrase "consequential loss or damage" was held not to cover any loss which directly and naturally results in the ordinary course of events from the breach. In *Croudace* the Court of Appeal had considered that the *ratio decidendi* of an earlier case in the Court of Appeal, *Millars Machinery v David Way* (1934) 40 Com Cas 204 (which concerned the liability of the manufacturer of gravel washing plant for consequential loss), was binding on it. Mention should also be made of *Saint Line v Richardsons* [1940] 2 KB 99, a decision of Atkinson J concerning the ambit of a clause which protected an engine builder from "indirect or consequential damages." Atkinson J held that the decision in *Millar's Machinery* provided guidance and that the words "indirect or consequential" do not exclude liability for damages which are the direct and natural result of the breaches complained of.

5.168 Secondly, while each clause must turn on its own wording (as stressed by Teare J in *Ferryways* at para. 82) and while a definition is given by clause 14(c), the definition is in reality little different from the usual phraseology of "consequential damage including loss A." Thirdly, the addition of the words "whether foreseeable or not" raises more questions than it answers. If

the loss was not foreseeable at all, ie because it was not loss foreseeable as ordinarily or naturally resulting from the breach (*Hadley v Baxendale* limb 1) or because it was not loss foreseeable as likely to occur given knowledge of special circumstances (limb 2), then it would not be recoverable at all and there would be no need to exclude it. If the loss was foreseeable then it is arguable that this does not indicate sufficiently clearly that the heads of loss are to be excluded where the loss is direct (limb 1 foreseeability) or indirect and consequential (limb 2 foreseeability). As Teare J pointed out in *Ferryways*, and as the other cases following *The Herdentor* and *Ease Faith* approach demonstrate, "Where a party seeks to protect himself from liability for losses otherwise recoverable by law for breach of contract he must do so by clear and unambiguous language" (para. 83). It is very doubtful whether the amendments made, even if they were intended to do so (which itself is unclear), have had the effect of excluding both consequential damage and, separately, the specific heads of loss, whether direct or consequential.

5.169 In a recent arbitration, the effect of clause 14(c) was debated in the context of a claim for loss of use. Unfortunately, the tribunal (including a leading shipping QC) did not have to reach a concluded view but nevertheless helpfully expressed a strong preliminary view after argument in written submissions. The owner argued that if one posed the question whether the language of clause 14(c) was sufficiently clear and unambiguous to exclude consequential loss of the kinds listed (eg loss of use) but also for direct loss of that kind, the answer was negative where (a) the losses were bound up with the concept of "consequential" and (b) the words "whether or not foreseeable" did not address this question in any relevant way. The tribunal agreed and stated that its strong considered view was that only limb 2 "consequential" loss of use would be excluded. The clause was "simply not sufficiently clear in its effect." This essentially applies a *Ferryways* approach.

5.170 The difficulty with the previous BIMCO form of drafting lay in an apparent unwillingness to ditch the portmanteau or "wrapped-up" form of wording employed in the "third form" of clause and simply to adopt a clear and unambiguous provision in the "second form" as described above. This reluctance has influenced even the revision of the corresponding provision in clause 25(c) of "Towcon 2008" (and the drafting of the equivalent provision in "Windtime"), although at least there the direct/indirect issue has been addressed specifically (see Chapter 4 above). It is accordingly recommended that clause 14(c) be amended by a bespoke "second form" clause. This can now simply be modelled on clause 14(b) of "Supplytime 2017" (below). But various other versions of such forms may be found in the contract drafting textbooks. A simple example which can be used as a starting point in drafting is the clause used in the contract which was considered by the Court of Appeal in *Deepak Fertilisers & Petrochemical Corpn v ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep 387. In that case, the exclusion was in the following terms:

> and in no event shall DAVY by reason of its performance or obligation under this CONTRACT be liable . . . for loss [of] anticipated profits, catalyst, raw-material and products or for indirect or consequential damages.

5.171 The clause therefore sought (a) to exclude certain heads or types of loss absolutely, without linking them to the concept of consequential or indirect loss and without making them examples of such a loss; and (b) to exclude additionally that concept of loss. The important breaking of the link between consequential loss and specific heads of loss which were to be excluded, whether direct or indirect or consequential or not was made. Rix J held that all claims except the cost of rebuilding the plant (which was destroyed by an explosion) were excluded. The Court of Appeal allowed claims for fixed costs and overheads wasted during the rebuilding period as "direct" losses and therefore recoverable, but held that lost profits were excluded by the clause. Stuart-Smith LJ at p. 403 stated: "The direct and natural result of the destruction of the plant was that Deepak was left without a methanol plant, the reconstruction of which would cost money and take time, losing for Deepak any methanol production in the meantime. Wasted overheads incurred during the reconstruction of the plant, as well as profits lost during that period, are no

more remote as losses than the cost of reconstruction. *Lost profits cannot be recovered because they are excluded in terms*, not because they are too remote" (emphasis supplied). The approach to "lost profits" was therefore that they were excluded *per se* as a head or type of loss without any consideration of whether they were "direct" or "indirect." The drafting of the clause enabled the court to distinguish between this specific type of loss and the catch-all "indirect or consequential damages." Loss of profits was excluded; other losses not specifically referred to were excluded if not "direct" within the meaning of the settled cases on clauses dealing, simply, with consequential loss (eg *Croudace*).

The operation of the 2005 clause

5.172 The second respect in which clause 14(c) of "Supplytime 2005" was amended from the previous "Supplytime 89" version is the separation out of the exclusion of liability for such losses on the one hand and the obligation to indemnify on the other. This was unclear in the old clause 12(c) and gave rise to at least one argument that the indemnity was meaningless and inoperative. See London Arbitration 1/02, LMLN 585 where it was argued that the clause achieved both an exclusion of the liability for such damage at the same time as imposing liability to indemnify in respect of it which predicated the existence of the liability for the damage notwithstanding the exclusion; the tribunal held that the indemnity applied to claims against a party by a third party for consequential damage which made sense of the language but was unlikely to have been what BIMCO intended and could lead to very wide liabilities. The position has now been addressed and the indemnity in the "Supplytime 2005" form operates simply to protect a party against claims in respect of the covered losses being made against by any other member of the other party's group and with no wider effect.

5.173 Although there is no express reference to liability for negligence in the "Supplytime 2005" version, it is suggested that, while the matter is not free from contrary argument, the current state of authority (especially after the comments of the Court of Appeal in *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 (see *per* Jackson LJ at paras. 55 and 56) suggests that the words "whatsoever arising out of or in connection with the performance or non-performance of this Charter Party" are wide enough to extend to any breach of contract or negligence. An award in 1998 (three shipping QCs) concluded in relation to a similar absence of express reference to negligence under the "Supplytime 89" form wording that "the fact that the exception was a mutual exception and that it was not a complete exclusion of liability but only purported to exclude consequential loss, in our view justified a less strict approach to construction than that exemplified by *Canada Steamship v The King*." A similar result was reached in later arbitration on the 1989 form: see London Arbitration 1/02, LMLN 585 where the tribunal held that the language of clause 12 (as it then was) as a whole compelled a less strict approach to *Canada Steamship*. Further, the argument, in relation to similar wording on clause 12(c) of the "Supplytime 89" form, was dismissed by the Court on an application for permission to appeal in *SEA Servizi Ecologici v Muliciero Servicios Maritimos* [2007] EWHC 2639 (Comm). Andrew Smith J stated, after referring to the *Canada Steamship* principle, at para. 17:

> However, as Hoffmann LJ said in the *HIH Casualty & General Insurance* Case, this reasoning only makes sense if there is a distinct liability for negligent and non-negligent breaches which the parties could reasonably be supposed to have decided to distinguish. I do not consider that his distinction can have been intended in the case of this contract, where the clause, on its face, is directed to any and every breach of contract arising out of or in connection with performance or non-performance of the contract.

5.174 Lastly in relation to the operation of clause 14(c) of "Supplytime 2005", consideration should be given to the applicability of clause 14(c) to "radical" or fundamental breaches in the light of the decision in *Internet Broadcasting Corpn Ltd v Mar LLC* [2009] 2 Lloyd's Rep 295:

see for a discussion and critique of this decision, the commentary in relation to clause 25(c) of "Towcon 2008" in Chapter 4 above.

The "Supplytime 2017" version

"**(b) Excluded losses**. – Notwithstanding anything else contained in this Charter Party neither party shall be liable to the other for:

(i) any loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those provided by contractors or sub-contractors of any tier or by third parties), loss of profits or anticipated profits; loss of product; loss of business; business interruption; loss of or deferral of drilling rights; loss, restriction or forfeiture of licences, concession or field interest; loss of revenue, shut in, loss of production, deferral of production, increased cost of working; cost of insurance; or any other similar losses whether direct or indirect; and

(ii) any consequential or indirect loss whatsoever;

arising out of or in connection with the performance or non-performance of this Charter Party even if such loss is caused wholly or partially by the act, neglect, breach of duty (whether statutory or otherwise) or default of the indemnified party, and even if such loss is caused wholly or partially by the unseaworthiness of any vessel, and the Owners shall indemnify, protect, defend and hold harmless the Charterers' Group from such losses suffered by the Owners' Group and the Charterers shall indemnify, protect, defend and hold harmless the Owners' Group from such losses suffered by the Charterers' Group."

5.175 Clause 14(c) of "Supplytime 2005" is now the most modern equivalent of clauses 25(c) and 24(c) respectively in the "Towcon 2008" and "Towhire 2008" forms and of clause 16 in the "Windtime" form. It is strange that the 2013 production of the completely new "Windtime" form should have employed the criticised "Towcon 2008" wording, rather than started from scratch as the "Supplytime 2017" form has done. The 2017 version is closely modelled (as a textual comparison shows) on the standard "LOGIC" form wording found in, *inter alios*, the LOGIC "Marine Construction" and the LOGIC "Services for Offshore" standard forms. These standard contracts for the UK offshore oil and gas industry (formerly known as CRINE contracts) have been developed by a drafting committee (more recently, the Oil & Gas UK Legal Issues Forum – LOGIC Standard Contracts Workgroup) and are issued by LOGIC for use within the industry between companies and their contractors. The bringing into line of the BIMCO wording with that used in the (UK) offshore industry and one of the most common offshore industry forms is to be welcomed, meaning that exclusions should work in the same way.

The 2017 scope of the losses excluded

5.176 Clause 14(b), like clause 14(c) of "Supplytime 2015" before it, prima facie is aimed at excluding liability for certain enumerated heads of loss and excluding liability for consequential damages, as that term is classically defined. By splitting up the specifically defined losses and by referring to such losses as "direct or indirect" sub-para. (i) will be effective to exclude the defined losses in full, subject to their content and other drafting matters. In addition, it will exclude "consequential loss" *stricto sensu*.

5.177 Following the LOGIC model, clause 14(b) of "Supplytime 2017" now includes a much larger list of specifically excluded losses, ranging far beyond the rather limited "loss of use, loss of profits, shut-in or loss of production and cost of insurance" of the 2005 form. These are self-explanatory. The explanatory notes record: "Marine spread costs (cost of use of property, equipment, materials and services including without limitation, those provided by contractors or sub-contractors of any tier or by third parties) have been made part of the exclusion clause. Similarly, so has the loss of financial benefit, sometimes referred to as deferral of production, been excluded from liability." While clumsily expressed, the term "any loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those

provided by contractors or sub-contractors of any tier or by third parties)" has been held to extend to and to include wasted costs or what are referred to in the industry as "spread costs" under the term "the cost of use." In *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372 the Court of Appeal in relation to similar wording rejected the argument (accepted by the judge at first instance, Popplewell J [2014] EWHC 4260 (Comm)) that the term had to be read restrictively and *eiusdem generis* and that as the clause was dealing with a range of species of prospective losses, "cost of use" or "loss of use" were not apt to refer to wasted costs. Although it is difficult to identify precisely the exercise of construction conducted by the Court of Appeal in relation to the specific words in the clause, the term "cost of use", while a strange bedfellow for the other types of enumerated losses, was held to be apt to cover what Providence was claiming, described by Moore Bick LJ at para. 10 as being:

> described in [Providence's] evidence as "costs of third party suppliers which have been incurred and paid by Providence, but which would not have been incurred but for Transocean's failures", but however they are described it is clear that the claim is to recover the cost of goods and services supplied by third parties which was wasted, either in the sense that Providence had no use for them while drilling was suspended or in the sense that they did not contribute to the process of completing the well.

The 2017 operation of the clause

5.178 As with clause 14(c) of "Supplytime 2005", clause 14(b) of "Supplytime 2017" provides both for the exclusion of liability for such losses on the one hand and the obligation to indemnify on the other. The clause is expressed to operate where the loss etc is one "arising out of or in connection with the performance or non-performance of this Charter Party even if such loss is caused wholly or partially by the act, neglect, breach of duty (whether statutory or otherwise) or default of the indemnified party, and even if such loss is caused wholly or partially by the unseaworthiness of any vessel." It is again unlikely that this will cover such loss where the breach in question is a repudiatory or renunciatory one. It may be noted that strangely the additional wording inserted in the 2017 revision into paras. (a)(i) and (ii) ("whatsoever and in any circumstances") after "non-performance" has been omitted from para. 4(b), presumably by drafting oversight.

Other matters: limitation of liability and "Himalaya" clause

"(c) Limitations – Nothing contained in this Charter Party shall be construed or held to deprive the Owners or the Charterers, as against any person or party, including as against each other, of any right to claim limitation of liability provided by any applicable law, statute or convention, save that nothing in this Charter Party shall create any right to limit liability. Where the Owners or the Charterers may seek an indemnity under the provisions of this Charter Party or against each other in respect of a claim brought by a third party, the Owners or the Charterers shall seek to limit their liability against such third party.

(d) Himalaya clause – All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Charter Party or by any applicable statute, rule or regulation for the benefit of the Charterers shall also apply to and be for the benefit of the Charterers' Group and their respective underwriters.

All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Charter Party or by any applicable statute, rule or regulation for the benefit of the Owners shall also apply to and be for the benefit of the Owners' Group and their respective underwriters; the Vessel and its registered owners; and the Crew.

The Owners or the Charterers shall be deemed to be acting as agent or trustee of and for the benefit of all such persons and parties set forth above, but only for the Ltd purpose of contracting for the extension of such benefits to such persons and parties."

5.179 Paragraphs (c) and (d) of the "Supplytime 2017" form deal respectively with the preservation of any applicable statutory and other limitations and with the provision of a "Himalaya" clause (as to the effect and operation of these, see Chapter 4 above in relation to the corresponding

provisions in the "Towcon" form). They are unchanged from "Supplytime 2005." The right of either party to limit of liability is preserved, although very unlikely to have been excluded simply by virtue of the parties agreeing to "indemnify" against a particular, either before or *a fortiori* after the decision of the Privy Council in *Bahamas Oil Refining Company International Ltd v The Owners of the Cape Bari Tankschiffahrts GmbH & Co KG (The Cape Bari)* [2016] UKPC 20. That decision is discussed in detail in Chapter 12 below. Following the expansion of the "Charterers' Group" in the definitions section, the Himalaya clause has been similarly expanded to extend the benefit of contractual exemptions to members of this Group. As the 2017 explanatory notes state: "The aim of the Himalaya provision is to extend the benefits under the charter party to the Charterers' Group and their underwriters, and to the Owners' Group and their underwriters, ship, its registered owners and the crew. The purpose of the agency provision in the final paragraph is to provide the mechanism whereby the protective clauses in the charter party will be applicable to the third parties listed in the previous paragraphs."

Hazardous and noxious substances ("Supplytime 2005")

"(f) *Hazardous or Noxious Substances*. – Notwithstanding any other provision of this Charter Party to the contrary, the Charterers shall always be responsible for any losses, damages or liabilities suffered by the Owners' Group, by the Charterers, or by third parties, with respect to the Vessel or other property, personal injury or death, pollution or otherwise, which losses, damages or liabilities are caused, directly or indirectly, as a result of the Vessel's carriage of any hazardous or noxious substances in whatever form as ordered by the Charterers, and the Charterers shall defend, indemnify the Owners and hold the Owners harmless for any expense, loss or liability whatsoever or howsoever arising with respect to the carriage of hazardous or noxious substances."

5.180 Paragraph 14(f) of "Supplytime 2005" provided for an overriding liability on the part of charterers and for an indemnity to be given by them to owners in respect of any losses, damages or liabilities incurred by owners or any third parties in respect of loss, damage, death, injury, pollution or otherwise arising directly or indirectly from the carriage on the vessel of "hazardous or noxious substances" at the charterers' request. The carriage of such substances was envisaged by clause 6(c)(iv) of the 2005 form (the "Supplytime 2017" form now deals simply with "Explosives, dangerous goods, and toxic and/or noxious substances whether in bulk or packaged, provided proper notification has been given and such cargo is marked and packed in accordance with the national regulations of the Vessel and/or the International Maritime Dangerous Goods Code and/or other applicable regulations": clause 6(d)(iii)). Clause 14(f) made it clear that such carriage is to be solely for the risk and the responsibility of the charterers. As noted in the commentary to clause 6 above, the category covered by para. (f) is used by clause 6(c)(iv) in distinction from dangerous and explosive goods dealt with in clause 6(c)(iii); accordingly, clause 14(f) does not provide an indemnity in respect of loss, damage and liability suffered by the owner arising out of the carriage of these goods but only in respect of the special category of "hazardous or noxious substances" which falls outside "explosives and dangerous goods." While in its former 1989 and 2005 use, the category of goods covered was potentially obscure, it is likely now that this category comprises (at least) the types of substances dealt with by International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010 (2010 HNS Convention): see Article I.5 of the Convention. Given that a principal category of "HNS" under the Convention is "oils, carried in bulk, as defined in regulation 1 of Annex I to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended" which is covered by the pollution provisions of "Supplytime 2005" and "Supplytime 2017", it remains questionable what purpose this special indemnity served; hence its deletion from "Supplytime 2017."

Consideration should be given to amending clause 14(f) if dangerous or explosive goods are going to form an important feature of the service and if the owner wishes, notwithstanding proper notification under IMDG etc, to provide for an indemnity against the consequences of carrying such goods.

5.181 Although it is not identified as one of the clauses to which the knock-for-knock regime does not apply in clause 14(b)(ii), given that it appears within the body of clause 14 itself and is prefaced with words showing that it is intended to override all other provisions of the charter-party, it is submitted that the charterers' responsibility for loss, damage and liability due to such substances and materials will fall wholly outside clause 14(a)–(c). The clause is unamended from the previous "Supplytime 89" version, save that the disjunctive "and" is replaced with an "or" (as with clause 6).

5.182 When used, this clause will apply in respect of pollution due to the carriage on the vessel of hazardous or noxious substances and operates as an exception in this regard to the general pollution clause, clause 15 (as to which see below).

5.183 This provision has been wholly deleted from "Supplytime 2017." The reasoning of the drafters was that this achieved a "purer" form of absolute knock-for-knock, so that the owner insures his vessel against loss or damage whatever the cause without carve-outs for particular operations or particularly risky aspects of operations: "[this] has been deleted in line with the objective to achieve a more clear-cut knock for knock liability allocation. This is but one risk among several others which does not justify special treatment." There has been considerable debate about the justice of this deletion. But the thrust of it appears to be misplaced. First, it only ever applied to *substances* (a limited subject-matter) and general explosives or other dangerous solids etc. were never within its scope (addressing the concerns of those involved in North Sea or other work where unexploded munitions of war may need to be handled or carried for disposal). Secondly, if a matter of genuine operational concern, the clause could always be re-inserted by amendment with a suitable reflection in para. (a).

Clause 15: pollution

"15. Pollution

(a) Except as otherwise provided for in Subclause 18(c)(iii) (Saving of Life and Salvage), the Owners shall be liable for, and agree to indemnify, defend and hold harmless the Charterers against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of actual or threatened pollution damage due to discharge, spills or leaks from the Vessel, except as may emanate from cargo thereon or therein and the cost of clean up or control thereof even if such claims, costs expenses, actions proceedings, suits, demands and liabilities are caused wholly or partially by the act, neglect, breach of duty (whether statutory or otherwise) or default of the Charterers' Group.

(b) The Charterers shall be liable for and agree to indemnify, defend and hold harmless the Owners from all claims, costs, expenses, actions, proceedings, suits, demands, liabilities, loss or damage whatsoever arising out of or resulting from any other actual or threatened pollution damage, even if such claims, costs, expenses, actions, proceedings, suits, demands, liabilities, loss or damage are caused wholly or partially by the act, neglect, breach of duty (whether statutory or otherwise) or default of the Owners' Group, and even if such loss, damage or liability is caused wholly or partially by the unseaworthiness of the Vessel.

(c) The Charterers shall, upon giving notice to the Owners or the Master, have the right (but shall not be obliged) to place on board the Vessel and/or have in attendance at the site of any pollution or threatened incident one or more Charterers' representative to observe the measures being taken by Owners and/or national or local authorities or their respective servants, agents or contractors to prevent or minimise pollution damage and to provide advice, equipment or manpower or undertake such other measures, at Charterers' risk and expense, as are permitted under applicable law and as Charterers believe are reasonably necessary to prevent or minimise such pollution damage or to remove the threat of pollution damage."

5.184 Given the typical nature of the offshore services rendered under this form to drilling installations and offshore platforms, liability for pollution damage is a matter which, necessarily, the "Supplytime" form specifically addresses. As the explanatory notes to the "Supplytime 2005" form stated: "Although this provision was written originally with tanker oil spills in mind, it is still relevant to the offshore supply vessel trade where major oil companies remain highly sensitive to the potential consequences of even the most minor pollution incident." The main change effected by "Supplytime 2017" is to remove the exception created in "Supplytime 2005" to knock-for-knock where loss or damage to property or person resulted from pollution. The 2005 version of clause 14, as part of its list of exceptions, included clause 15. That is no longer the case. The result is as the 2017 drafters explain: "In SUPPLYTIME 2005, subclauses 15(a) and 15(b) were excluded from the knock for knock liability regime. These exceptions have now been removed in line with the objective for SUPPLYTIME 2017 to strengthen the knock for knock liability regime. Thus, the parties will therefore be liable towards each other in respect of property damage or death and personal injury caused by pollution as *per* subclauses 15(a) and (b)." Otherwise, there have been only minor changes to clause 15 in "Supplytime 2017."

5.185 Clause 15 apportions liability for pollution between the owners and the charterers on a straightforward basis which involves a simple factual enquiry into the source of the pollution and which reflects, in very rough terms, the concept that the risk of pollution should chiefly be upon the charterer at whose request and for whose purposes the tug or vessel comes into close proximity with rigs, platforms and drilling installations. As the explanatory notes to the 2017 revision correctly state: "This clause provides a clear-cut solution in respect of the parties' liabilities for pollution."

i Under para. (a), if the pollution is due to the act or omission of the owners or their personnel, which act or omission causes or allows a discharge or leak from the vessel (but not otherwise), then the owner is liable unless either the discharge or leak emanates from cargo on or in the vessel. Given the deletion from clause 14 of "Supplytime 2017" of the special exception to knock-for-knock for liabilities and loses of whatever kind resulting from the carriage on the vessel of hazardous or noxious substances at the charterer's request (see the former clause 14(f) of "Supplytime 2005" which applied "notwithstanding any provision of this Charter Party to the contrary"), the further exception to the owner's liability for pollution resulting from such hazardous and noxious substances has been removed. The term "due to discharge, spills or leaks from the Vessel" is self-explanatory: the pollution must be pollution caused by some escape from the vessel or any part of her to the outside environment. However, ingenious attempts have been made in the past under "Supplytime 2005" to argue that clause 15(a) would also be apt to apply to leaks of oil from an item of vessel's equipment (eg a compressor) into charterer's items or property on board (such as stored diving gas) and thereby affording an exception to knock-for-knock under the 2005 clause 14. Contextually and linguistically it is very difficult to see how such an argument could work. It is not naturally what the phrase "actual or threatened pollution damage due to discharge, spills or leaks from the Vessel, except as may emanate from cargo thereon or therein" signifies. Given the removal of the exception for pollution damage from the 2017 knock-for-knock regime, this argument now ceases to be relevant in any event under "Supplytime 2017" since damage to property or person caused by pollution (however interpreted) is dealt with under the clause 14 allocation of risk.

ii In all other cases of pollution, even where the cause of the pollution is the breach of contract or the negligence of the owners or of those on board the vessel, the charterers are liable for the same and are to indemnify the owners in respect of the same (see para. (b)). Thus the charterer will be liable for any pollution from its cargo, from its property

on board or otherwise and from any part of the offshore or undersea installation on which the vessel is working, even where that pollution results from negligent operation by the vessel. While far-reaching, this is a fairly common allocation of risk and as the 2017 notes state: "[i]n line with the knock for knock principle."

5.186 Clause 15 of "Supplytime 2005" introduced in para. (c) a new provision which permitted the charterer (a) to put a representative on board the vessel to observe (and presumably advise upon) any anti-pollution measures being adopted and (b), which step will presumably follow the results of the observations made, to provide equipment and carry out services to minimise pollution damage. The position and the text is unaltered in "Supplytime 2017." The purpose of this additional provision is fairly clear. In very many pollution incidents in an offshore context, the charterer, either given who it or given its relationship with the client whose offshore unit is being serviced, is often much better placed to take necessary anti-pollution measures than is the owner of the offshore vessel, with greater access to the relevant equipment (booms, sprays, dispersant; clear-up teams) and possibly greater technical expertise. Where the charterer is responsible for the pollution under the "Supplytime" (or otherwise under its head contractual arrangements) the imperatives for it to get involved and to take control of the anti-pollution operation will be powerful. In the event that the pollution incident is one for which the vessel is responsible under para. (a), then the costs of the intervention under para. (c) will fall to be paid by the owner as "costs, expenses" under para. (a); otherwise the costs will be borne by the charterer. BIMCO explained the purpose of para. (c) in the 2005 explanatory notes as follows:

> With regard to Clause 15(c) dealing with the Charterers attendance following a pollution incident (or threat of an incident), the clause has been based on the pollution clause found in BPTIME 3. However, that clause was too focussed on oil tanker pollution catastrophes, so a number of logical amendments were made in order to suit the specific needs of the offshore sector. The second paragraph was for example amended to focus on the right conferred on the Charterers to place representatives at the scene of an actual or potential pollution incident.

Clause 16: wreck removal

"16. Wreck Removal

If the Vessel becomes a wreck and has to be removed by order of any lawful authority having jurisdiction over the area where the Vessel is placed or as a result of compulsory law, the Owners shall be liable for any and all expenses in connection with the lighting, marking, raising, removal, destruction of the Vessel."

5.187 This provision corresponds to the old clause 29 of "Supplytime 89" and, as under the BIMCO towage forms, allocates the responsibility for all matters concerning the wreck of the vessel to the owner. Clause 16 of "Supplytime 2017" reproduces the previous 2005 version, save for some minor textual changes and the removal of the words "and is an obstruction to navigation" from the 2005 version's opening phrase "If the vessel becomes a wreck and is an obstruction to navigation and has to be removed by order of any lawful authority." This is a welcome amendment and removes the argument (which cropped up from time to time where a local charterer was fixed with wreck removal expenses and sought to recover these from the owner) that wreck removal under the clause depended not merely on an order from the relevant authority but also upon some separate objective assessment, *pace* the authority's views, of whether the vessel in fact posed an obstruction. The test now is much simpler. As the 2017 explanatory notes state: "The responsibility for wreck removal and associated measures should the ship become a wreck rests with the owners. In the latest edition of SUPPLYTIME, the requirement that the wreck is an obstruction to navigation has been deleted as superfluous. It is sufficient that an order of removal

had been made by a lawful authority with jurisdiction over the area. It is not required that the ship pose an obstruction to navigation as well."

Clause 17: insurance

"17. Insurance

(a) (i) The Owners shall obtain and maintain in effect for the duration of this Charter Party, with reputable insurers, the insurances set forth in ANNEX B. Policy limits shall not be less than those indicated. Reasonable deductibles are acceptable and shall be for the account of the Owners.

(ii) The Charterers shall upon request be named as co-insured. The Owners shall upon request cause insurers to waive subrogation rights against the Charterers' Group. Co-insurance and/or waivers of subrogation shall be given only insofar as these relate to liabilities which are properly the responsibility of the Owners under the terms of this Charter Party.

(b) The Owners shall upon request furnish the Charterers with copies of certificates of insurance which provide sufficient information to verify that the Owners have complied with the insurance requirements of this Charter Party.

(c) If the Charterers takes out insurance that covers risks for which they indemnify Owners, the Charterers shall ensure that their underwriters waive subrogation rights against the Owners Group, but only insofar as these relate to liabilities which are properly the responsibility of the Charterers under the terms of this Charter Party."

5.188 Paragraphs (a) and (b) of clause 17 of "Supplytime 2017" are materially unchanged from the previous clause 17(a) and (b) of "Supplytime 2005" (which itself reproduced the former clause 14 of "Supplytime 89"). As the BIMCO 2017 explanatory notes point out, the possession on the owner's part of adequate insurance is an important aspect of knock-for-knock protection; if the owner is not or not adequately insured then claims (most typically by injured crew or dependants of deceased crew) may be directed, notwithstanding clause 14, at parties who do have such insurance such as the charterer or the charterer's client and thereby lead to a chain of indemnity claims. For this reason, "Adequate insurance is an essential aspect for the proper functioning of the knock for knock regime." The scheme of clause 17 is that the owner must procure and maintain in effect the insurances agreed by the parties and stated in Annex B. The owner's choice of insurer is restricted in that it must insure with "reputable" insurers. While this term is rather nebulous, it at least offers some basis on which the charterer may assess the insurance put in place. The 2017 notes go somewhat further in what was intended by this term: "The owners are required to insure the ship with 'reputable insurers' which is intended to provide a benchmark guide indicating that the chosen insurers should be financially sound and have a good market reputation." If a charterer has specific criteria in mind, it should specify them. However, the current wording has a long pedigree. In Annex "B" to the form, the owners are therefore required to give full details of their insurance in respect of the vessel including hull, P&I and third party liabilities: as to this see above in relation to Annex B; as noted above, it may be necessary for the charterer to require the owner to take out special operations cover, given the nature of the offshore services to be provided, in addition to ordinary P&I cover with liability for collision and damage to fixed and floating objects since oilfield specialist operations are typically excluded from normal P&I cover under the special operations exclusion. Under clause 17, the owners are required to maintain all specified insurances in place and to this end charterers have a right to the production and inspection of the relevant certificates.

5.189 In the event of breach of this clause, the charterer will have a right to damages for breach of contract. Under the "Supplytime 2005" form, para. (c) provided for an express right to the charterer to take out insurance itself, charging the costs of doing so to the owner: "the Charterers may, without prejudice to any other rights or remedies under this Charter Party, purchase similar

coverage and deduct the cost thereof from any payment due to the Owners under this Charter Party." This has been removed from the "Supplytime 2017" version without explanation in the explanatory notes. The ability to deduct insurance costs directly from sums due to the owner is a useful self-help remedy and the purpose of removing it is unclear. The new 2017 version of para. (c) deals with a completely different matter, namely insurance which the charterer takes out (not necessarily as substitute insurance for that which should have been procured by the owner) and which covers risks which the charterer is to bear and indemnify against under clause 14. In that event, any such insurance is to be on terms that the insurers waive subrogation rights against the owner. The apparent aim of the 2017 drafters was to achieve balance between owner and charterer: "In order to make the charter party more balanced, a new subclause has been added to the 2017 edition of SUPPLYTIME. The charterers should ensure that their insurers waive any rights of subrogation they may have against the Owners' Group. The knock for knock allocation of liabilities is built on the idea that each party takes the risk of damage to its own property. If the charterers' insurers do not waive their rights of subrogation they could claim against the owners for the insurance proceeds paid out to the charterers. The owners could then claim against the charterers again under the indemnity provisions and the parties would keep going around in circles. Hence, this new provision that the charterers' insurers should also waive rights of subrogation against the Owners' Group." The "balance" sought to be effected is not in fact symmetrical. Under clause 17(a)(ii) the charterer has the *option* to be named as co-insured on the owner's policy and to request that rights of subrogation be waived, whereas under the new clause 17(c), there is no right in the owner to be named as co-insured (which may reflect that charterer's policy may be a project related one) but the charterer is under an absolute obligation to have its insurers waive rights of subrogation. A suitable rider clause would be necessary to achieve a true balance.

5.190 Subject to this, the charterer has an option to be named as co-insured on the owner's policy with an express waiver of owner's insurer's rights of subrogation and the owner has at least the right to have the charterer's underwriters waive rights of subrogation, in the event that the charterer insures. The clauses therefore address expressly the issue of waiver of rights of subrogation which co-insurance by itself may not necessarily achieve and have the result that the insured losses are covered by a joint "insurance fund", with liabilities *inter se* replaced with claims under the appropriate insurance for an insured loss. The issue has arisen in the context of the BIMCO "Barecon 2001" bareboat charter standard form in *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35. Lord Toulson (with whom Lords Mance and Hodge agreed) put the question in a case of co-insurance as follows at para. 139:

> The critical question is whether the contractual scheme between the owners and the demise charterer precluded any claim by the former against the latter for the insured loss of the vessel. This is a matter of construction. It has become a common practice in various industries for the parties to provide for specified loss or damage to be covered by insurance for their mutual benefit, whether caused by one party's fault or not, thus avoiding potential litigation between them. The question in each case is whether the parties are to be taken to have intended to create an insurance fund which would be the sole avenue for making good the relevant loss or damage, or whether the existence of the fund co-exists with an independent right of action for breach of a term of the contract which has caused that loss. Like all questions of construction, it depends on the provisions of the particular contract: see, for example, *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] 1 WLR 1419.

5.191 The waiver of subrogation required under the clause is only in respect of liabilities which are either properly the owner's responsibility or the charterer's responsibility under clause 14. As the drafters in 2017 have explained (in relation to para. (c) of "Supplytime 2017"): "The waiver only applies to liabilities that are properly the charterers' responsibility. For example, if anyone within the charterers' group dies and the family members claim against the owners, leading the owners' P&I Club to pay out, then the owners' P&I Club would have a subrogated claim against the charterers."

Clause 18: saving of life and salvage

5.192 Just as for those owners providing towage services, salvage will be an important aspect of commercial operations for those who provide the services of offshore vessels. Very commonly, large ocean-going salvage tugs are employed in the provision of offshore services and to the greatest extent possible the owners of such vessels will want to keep open the possibility of providing salvage services while under time charter commitments, both so as to maintain their established reputations for commitment to salvage and their "status" as professional salvors and because of the obvious economic considerations. The clause, which is unchanged from the previous clause 18 of "Supplytime 2005" (itself replicating clause 5 of "Supplytime 89"), deals with three matters.

Liberty to deviate

"(a) The Vessel shall be permitted to deviate for the purpose of saving life at sea without prior approval of or notice to the Charterers and without loss of hire provided however that notice of such deviation is given as soon as possible."

5.193 Paragraph (a) contains the standard liberty to deviate for the purpose of saving life (but not property) at sea, which reflects the common law position (*Scaramanga v Stamp* (1880) 5 CPD 295). The vessel remains on hire under the contract only if the vessel gives notice of the deviation as soon as possible. As the notes to the 2017 form state: "The ship has the right (and obligation) to deviate in order to save life at sea. No advance notice to the charterers is required, but the owners should inform them of the deviation as soon as possible."

Liberty to perform salvage

"(b) Subject to the Charterers' consent, which shall not be unreasonably withheld, the Vessel shall be at liberty to undertake attempts at salvage, it being understood that the Vessel shall be off hire from the time it leaves port or commences to deviate and it shall remain off hire until it is again in every way ready to resume the Charterers' service at a position which is not less favourable to the Charterers than the position at the time of leaving port or deviating for the salvage services. All salvage monies earned by the Vessel shall be divided equally between the Parties, after deducting the Crew's share, legal expenses, value of fuel consumed, hire of the Vessel lost by the Owners during the salvage, repairs to damage sustained, if any, and any other extraordinary loss or expense sustained as a result of the salvage. The Charterers shall be bound by all measures taken by the Owners in order to secure payment of salvage and to fix its amount."

5.194 Of more importance is para. (b), which gives the vessel a liberty to depart from the service to perform or attempt a salvage service (of property not life) with the consent of the charterer, which consent is not to be unreasonably withheld. Such a service is defined in para. (b) simply as "salvage", and thus is apt to include the salvage of goods and property as well as of life salvage. If this liberty is exercised by the owners:

i the vessel is off hire during her time away from the charter service; and
ii if the salvage is successful and the vessel becomes entitled to salvage remuneration, that salvage remuneration is to be shared equally between the owners and the charterers after various deductions have been made to cover any costs or expenses incurred by owners in earning the salvage.

5.195 The common law approach to such clauses where the items of cost and expense which were to be deductible from the shared remuneration were not specified (see eg clause 19 of the "NYPE" form, which refers only to "after deducting Owner's and Charterers' expenses") was to look at the "net pecuniary result of the salvage operations" arrived at by deducting "what each has

contributed towards securing the benefit" (see *Booker v SS Pocklington* [1899] 2 QB 690). Other forms of time charter (see eg clause 19 of the "Baltime" form) for the avoidance of doubt particularised certain of the more controversial or doubtful heads of loss and expense as being deductible items. Clause 18(b) of the "Supplytime 2005" form adopts the same approach as clause 19 of the "Baltime" form in specifying the deductions which owners can make. These will include the hire of the vessel which has been lost by the owners during the salvage due to the off hire provision in para. (b) and the cost of any repairs to damage sustained by their vessel as a result of the salvage.

Salvage rendered to the charterer's property

"(c) The Owners shall waive their right to claim any award for salvage performed on property owned by or contracted to the Charterers' Group, always provided such property was the object of the operation the Vessel was chartered for, and the Vessel shall remain on hire when rendering salvage services to such property. This waiver is without prejudice to any right the Crew may have under any title. If the Owners render assistance to such property in distress on the basis of 'no claim for salvage', then, notwithstanding any other provisions contained in this Charter Party and even in the event of neglect or default of the Owners or Crew:

(i) The Charterers shall be responsible for and shall indemnify the Owners against payments made, under any legal rights, to the Crew in relation to such assistance.
(ii) The Charterers shall be responsible for and shall reimburse the Owners for any loss or damage sustained by the Vessel or her equipment by reason of giving such assistance and shall also pay the Owners' additional expenses thereby incurred.
(iii) The Charterers shall be responsible for any actual or potential spill, seepage and/or emission of any pollutant howsoever caused occurring within the offshore site and any pollution resulting therefrom wheresoever it may occur and including but not limited to the cost of such measures as are reasonably necessary to prevent or mitigate pollution damage, and the Charterers shall indemnify the Owners against any liability, cost or expense arising by reason of such actual or potential spill, seepage and/or emission.
(iv) The Vessel shall not be off hire as a consequence of giving such assistance, or effecting repairs under Subclause 18(c)(ii), and time taken for such repairs shall not count against time granted under Subclause 13(c) (Off hire – Maintenance and Drydocking).
(v) The Charterers shall indemnify the Owners against any liability, cost and/or expense whatsoever in respect of any loss of life, injury, damage or other loss to person or property howsoever arising from such assistance off hire."

5.196 If the vessel renders salvage to property of the charterer which "was the object of the operation" under the charterparty, the vessel under para. (c) waives its claim to salvage and performs the salvage upon a contractual basis. This basis is as follows:

i The vessel remains on hire.
ii The charterers are to be responsible for:

a any payments which the owners have to make to their master and crew in connection with the service (the 2017 explanatory notes reflect some tension in discussing the allocation of responsibility under this wording: "This subclause is sometime considered contentious by charterers, but it is nevertheless needed because of the legal requirement to make payments to the crew in a salvage situation and it would not be balanced if owners were liable for this expense");
b any damage sustained by the vessel;
c any spillages and emissions of pollutants "howsoever caused . . . within the offshore site" and any pollution resulting from the same wherever occurring; the "offshore site" was formerly defined in clause 35 of "Supplytime 89" as "the area within three nautical miles of an 'offshore unit' from or to which the Owners are requested to take their Vessel by the Charterers", viz. a the preliminary definitions clause in Part II as

being a zone of three miles around the charterers' "offshore unit" to which the vessel is rendering services: although no explanation is given for the drafting change in the BIMCO notes, no definition at all is now given of "offshore site" in "Supplytime 2017" (the position was the same under the 2005 form) and so this concept is entirely general and will extend to the physical and geographical reality of the site, without any three mile "zone" or curtilage; and

d any loss or damage to property or injury or death to personnel.

iii The vessel will not be off hire "as a consequence of giving such assistance" and during the effecting of any repairs to damage to the vessel resulting from such salvage. Such repairs are not to count in connection with the vessel's drydocking and maintenance time provided for by clause 11(c). The 2017 explanatory notes state the commercial trade-off envisaged as follows: "since no salvage award will be due to the owners the ship will remain on hire during the operation."

5.197 The matters set out in (i)–(iii) above remain unaffected by any neglect or default by the owners or their personnel.

Clause 19: lien

"19. Lien

The Owners shall have a lien upon all cargoes, fuel and equipment owned by the Charterers for all claims against the Charterers under this Charter Party and the Charterers shall have a lien on the Vessel for all monies paid in advance and not earned. The Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the Owners in the Vessel.

Should the Vessel be arrested by reason of claims or liens arising out of its operation hereunder, unless brought about by the act or neglect of the Owners, the Charterers shall at their own expense take all reasonable steps to secure that within a reasonable time the Vessel is released and at their own expense put up security to release the Vessel. Except as provided in Clause 14 (Liabilities and Indemnities) and unless brought about by the act or neglect of the Owners, the Charterers shall indemnify and hold the Owners harmless against any lien of whatsoever nature arising upon the Vessel during the Charter Period while it is under the control of the Charterers, and against any claims against the Owners arising out of the operation of the Vessel by the Charterers or out of any neglect of the Charterers in relation to the Vessel or the operation thereof."

5.198 This clause (which is unchanged from the "Supplytime 2005" version) has a number of different aspects.

i First, it gives the owner a lien for monies due from the charterer. In this respect it is wider than the "Towcon 2008" and "Towhire 2008" lien clauses and reflects the fact that the vessel may have on board cargoes belonging to the charterer or being shipped by him to others. The "Supplytime 2005" version amended the previous lien clause by adding within the scope of the owner's lien any equipment which the charterer may have which may be in the owner's possession, eg on board the vessel for the service; this is a useful addition from the owners' perspective. For such clauses generally and the manner in which the lien may be exercised, see Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 30.19 *et seq*.

ii Secondly, it prohibits the charterer from permitting any lien or charge to be incurred by the vessel, for example by purchasing supplies which are not paid for and which lead to a claim against or seizure of the vessel by a creditor of the charterer (cf. lines 112–113 of clause 18 of the NYPE form; see Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 30.85).

iii Thirdly, the lien clause contains a provision which, at first blush, contains an important right of indemnity in favour of the owner which appears to impose significant additional liabilities to those accepted by the charterer under the knock-for-knock regime laid down in clause 14. The charterer is liable to indemnify the owner "against any claims against the Owners arising out of the operation of the Vessel by the Charterers or out of any neglect of the Charterers in relation to the Vessel or the operation thereof." However, this provision is open to a rather more restricted reading. Under clause 7(d) of "Supplytime 2005" (as to which see above) and with which clause 19 must be read:

> The entire operation, navigation, and management of the Vessel shall be in the exclusive control and command of the Owners, their Master, Officers and Crew. The Vessel will be operated and the services hereunder will be rendered as requested by the Charterers, subject always to the exclusive right of the Owners or the Master of the Vessel to determine whether operation of the Vessel may be safely undertaken. In the performance of the Charter Party, the Owners are deemed to be an independent contractor, the Charterers being concerned only with the results of the services performed.

Accordingly, the operation of the vessel as such is carried out solely by the owner, as independent contractor for the charterer. It is only therefore in the unusual case where in some respect the charterer has itself in fact operated the vessel, for example by its men taking it upon themselves to operate a crane or derrick on the vessel to lower some piece of sub-sea equipment, and where a claim arises out of *that* operation that the matter will fall within the phrase "arising out of the operation of the Vessel by the Charterers." Similarly, the phrase "out of any neglect of the Charterers in relation to the Vessel or the operation thereof" is limited to those situations where a claim arises out of the negligence of the charterer *vis-à-vis* the vessel or its operation (for example: its men, while using a shore crane, drop an object which causes the vessel's deck to give way, injuring a customs inspection party on board). Accordingly, the scope of application of this part of clause 19 is likely to be limited in practice and, as clause 19 recognises expressly, the basic allocation of risk under clause 14 is unaffected by anything contained within clause 19: "Except as provided in Clause 14."

iv Fourthly, it provides that any arrest of the vessel due to any claims or liens "arising out of the operation of the vessel" are, at least in the first instance, to be dealt with and bail or security put up by the charterer unless the arrest arises out of the owner's fault.

v Fourthly, the clause imposes an obligation on the charterer to keep the vessel free from or to release the vessel from arrest where such arrest is in respect of any lien or encumbrance which might give rise to a third party having priority over the interest in the vessel: cf. *The Vestland* [1980] 2 Lloyd's Rep 171 and Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 30.85. As to the meaning of the term "or their agents" in the term "incurred by them or their agents", see *The Global Santosh* both at Court of Appeal level *per* Gross LJ at [2014] 2 Lloyd's Rep 103, para. 37, and in the Supreme Court at [2016] UKSC 20. The concept of "agent" in the time charter context (and generally) is best described by asking whether the person sought to be treated as "agent" is carrying out a function in the place of charterer or, in acting, is availing itself of a facility contractually derived either directly or indirectly from the charterer.

Clause 20: sublet and assignment

"20. Sublet and Assignment

(a) *Charterers* – The Charterers shall have the option of subletting, assigning or loaning the Vessel to any person or company not competing with the Owners, subject to the Owners' prior approval which shall not be unreasonably withheld or delayed, upon giving notice in writing to the Owners, but the original

Charterers shall always remain responsible to the Owners for due performance of the Charter Party. The person or company taking such subletting, assigning or loan and their contractors and sub-contractors shall be deemed included in the Charterers' Group for all the purposes of this Charter Party. The Owners make it a condition of such consent that additional hire shall be paid as agreed between the Charterers and the Owners in Box 29, having regard to the nature and period of any intended service of the Vessel.

(b) *Owners* – The Owners may not assign or transfer any part of this Charter Party without the written approval of the Charterers, which approval shall not be unreasonably withheld or delayed. Approval by the Charterers of such subletting or assignment shall not relieve the Owners of their responsibility for due performance of the part of the services which is sublet or assigned."

5.199 This clause reproduces, with one textual change, clause 20 of "Supplytime 2005." This in turn amended the previous "Supplytime 89" version of the clause by deleting a provision which permitted a different rate of hire to be charged and which envisaged the possibility of a different "sublet-service-within-the-original-service" (see the old clause 17(b) in Appendix 4 to the second edition of this work); this was deleted, according to the explanatory notes, because, "the previous [para. (b)] has been deleted as the use of the Vessel under a sublet should be consistent with main contracts provisions ie, within the scope of work [sc. the original contractual scope of work in Box 17]." The clause gives the charterers the right to sub-charter the vessel subject to the owners' consent. The owners have a similar right to assign or transfer the charter. Each side is obliged not to refuse to give their consent on unreasonable grounds and each is responsible not only for unreasonably withholding consent, but also for delaying, ie presumably not acting with reasonable promptitude (a difficult matter to prove), in the giving of consent, this being an addition to the 2017 form; the purpose of this change is stated as follows: "Wording has been added to Sub-clauses (a) and (b) to prevent delays in decision making by the relevant party in respect of the approval for subletting, assigning or loaning of the ship."

Clause 21: substitute vessel

"21. Substitute Vessel

The Owners shall be entitled at any time, whether before delivery or at any other time during the Charter Period, to provide a substitute vessel of at least equivalent capability, subject to the Charterers' prior approval which shall not be unreasonably withheld or delayed."

5.200 Compare clause 20 of the "Towcon" form (see Chapter 4 above). This clause, which was unchanged from "Supplytime 89" in the 2005 version, has had the words "of at least equivalent capability" added. While it was probably necessarily implicit in the concept of a "substitute" that the replacement vessel had to be able to perform in a comparable manner ("substitution" being the act of putting in a proxy to perform what one has oneself undertaken to perform), this is a useful clarification. In one claim under the "Supplytime 89" form (which did not progress beyond claim submissions) a very different tug was said to be a "substitute" because it was a tug and could perform the service albeit very slowly (having a markedly inferior bollard pull and different propulsion which meant an inability to keep station as well in what were effectively "Arctic Convoy" weather conditions). The explanatory notes therefore state:

> The owners can at any time substitute the ship provided they receive prior approval from the charterers. In contrast to the equivalent clause in SUPPLYTIME 2005, the wording "of at least equivalent capability" has been inserted with a view to demonstrate more precisely the required particulars and characteristics of the substituted ship and at the same time clarify that it need not be identical to the original ship. Wording has also been added to prevent the charterers from unduly withholding or delaying such approval as owners may have to act quickly to secure a suitable ship in the market.

Clause 22: war risks

5.201 The "Supplytime 2017" form replaces the former "War" clause in the "Supplytime 2005" form with the current BIMCO War Risks Clause for Time Charterparties, known as "Conwartime 2013." This is a war (and similar perils) clause in fairly common form and in its broad outlines follows the similar BIMCO provision in the "Towcon 2008" and "Towhire 2008" forms, commented on above in Chapter 4, to which reference may be made. Clause 22 is reproduced in the full text of the charter in Appendix 4 below. It defines what are meant by "war risks" in para. (a). It prevents the vessel from being employed in war or similar danger zones without the owners' consent (para. (b)) or from being used for the carriage of contraband cargo or to pass through blockades (para. (c)). If such consent is granted, the owners are entitled to charge the additional insurance premiums to the charterers and any crew bonuses or additional payments (paras. (d) and (e)). A wide liberty to deviate in accordance with supervening orders or requirements is provided for (paras. (f) and (h)). Under para. (g) the owner has the right to refuse to proceed and to request an alternative safe port to be nominated by the charter, failing which it may discharge cargo as it sees fit. For a still useful account of the operation of the Conwartime war clause (as incorporated into the Baltime form), despite later editions: see *Wilford on Time Charters* (5th edn, 2003), para. 37.105 *et seq*.

Clause 23: cancellation in light of war

"23. War Cancellation Clause

Either party may cancel this Charter Party on the outbreak of war (whether there be a declaration of war or not) between any two or more of the countries stated in Box 30."

5.202 The "Supplytime 2017" form replaces the previous rather more elaborate provision contained in clause 24 of "Supplytime 2005" (which itself was a simpler version of an even more elaborate clause 19(e) of "Supplytime 89") with this standard form cancellation clause in the event of war between countries specifically named for the purposes of the charter in Box 30. The former default position (anchored historically presumably upon the early membership of the UN Security Council) of any war "between any two or more of the following countries: the United States of America; Russia; the United Kingdom; France; and the People's Republic of China" in the 2005 version has been sensibly deleted. An offshore service in the Bay of Bengal or Cameroon may be wholly unaffected in terms of its physical execution by a wider global conflict, however psychologically unsettling that conflict may be.

Clauses 24 and 25: ports and places affected by ice conditions and disease

5.203 The "Supplytime 2005" form replaced the previous clause 20 of "Supplytime 89" which dealt with places affected by fever and epidemic and ice-bound places together in one composite provision ("Excluded Ports", essentially the same provision as clause 14 of the Baltime form) with two new individual provisions: clause 24 which deals with ice and which transposes the BIMCO General Ice Clause for Time Charter Parties to the "Supplytime" form in place of the old clause 20(a)(b) and 20(b); and clause 25 which is a separate fever/epidemic provision replacing clause 20(a)(a). Under the "Supplytime 2017" form, the same BIMCO Ice Clause has been used as clause 24 and the newer BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties replaces the "Epidemic/Fever" provision in Clause 25.

Ice

"24. BIMCO Ice Clause for Time Charter Parties

(a) The Vessel shall not be obliged to force ice but, subject to the Owners' prior approval having due regard to its size, construction and class, may follow ice-breakers.

(b) The Vessel shall not be required to enter or remain in any icebound port or area, nor any port or area where lights, lightships, markers or buoys have been or are about to be withdrawn by reason of ice, nor where on account of ice there is, in the Master's sole discretion, a risk that, in the ordinary course of events, the Vessel will not be able safely to enter and remain at the port or area or to depart after completion of loading or discharging. If, on account of ice, the Master in the Master's sole discretion considers it unsafe to proceed to, enter or remain at the place of loading or discharging for fear of the Vessel being frozen in and/or damaged, the Master shall be at liberty to sail to the nearest ice-free and safe place and there await the Charterers' instructions.

(c) Any delay or deviation caused by or resulting from ice shall be for the Charterers' account and the Vessel shall remain on-hire.

(d) Any additional premiums and/or calls required by the Vessel's underwriters due to the Vessel entering or remaining in any icebound port or area, shall be for the Charterers' account."

5.204 This provision is (subject to minor textual changes) unchanged from "Supplytime 2005." The BIMCO Ice Clause is broadly similar to the BIMCO clause adapted for "Towcon 2008" and reference may be made to Chapter 4 above. Like the "Towcon" version of the clause, para. (a) provides that the vessel will not be obliged to force ice but may be used to follow ice-breakers in the owner's option. Although the explanatory notes of 2005 and 2017 are silent, the 2005 notes refer to the BIMCO Bulletin No. 6/2004, p. 42. This, in a passage similar to that in the explanatory notes to the "Towcon" ice clause states: "the vessel may reasonably be expected to follow ice breakers where other vessels of a similar size, class and construction are doing so." This wording has been reproduced in the 2017 explanatory notes to para. (a). As has been noted in the commentary in Chapter 4, the suggestion is that there is some presumption or onus on the owner to act reasonably where other vessels are following breakers. However, in its literal terms, this provision apparently gives the owner a complete discretion as to whether and if so in what circumstances the vessel is to be used in operations affected by ice. It is however certainly arguable that the inclusion of the words "having due regard to its size, construction and class" imports a requirement that the owner has to have proper regard in considering whether or not to follow breakers to the objective characteristics of the vessel as such. The concept of "*due* regard" (emphasis supplied) is apt to connote a proper and reasoned consideration not just a purely subjective decision; cf. by analogy the discretion given in the war clause context as to which see *The Product Star (No. 2)* [1993] 1 Lloyd's Rep 397 where Leggatt LJ (delivering the judgment of the Court of Appeal) posed the test in this way:

> Where A and B contract with another to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably. That entails a proper consideration of the matter after making any necessary enquiries."

5.205 Paragraph (b), from its drafting, appears to have been based in large part upon clause 14(B) of the Baltime 2001 time charterparty ice clause (itself an improved version of the ice clause in the NYPE time charterparty at clause 25): as to which see Coghlin, Baker, *Time Charters* (7th edn, 2014), at para. 35.1 *et seq*., and *Limerick v Stott* [1921] 2 KB 613. Again, while the discretion is unfettered, it will be likely to be subject to constraints similar to those enunciated by Leggatt LJ in *The Product Star (No. 2)*.

5.206 If ice operation is expected or if the vessel is being chartered for use in an ice area, it may be advisable to circumscribe the discretion under (a) and (b) by requiring that the approval shall

not be unreasonably withheld, in order to import a measure of objectivity rather than the higher threshold of judicial review standard "unreasonableness" inherent in Leggatt LJ's formulation. Plainly, different considerations will apply (and specific clauses in place of clause 24 would seem necessary) where a specially ice-strengthened vessel is being hired for the offshore service which is to take place in ice-affected waters.

Epidemic and fever/contagious diseases

5.207 The "Supplytime 2005" form contained a short provision as follows:

"25. Epidemic/Fever

The Vessel shall not be ordered to nor bound to enter without the Owners' written permission any place where fever or epidemics are prevalent or to which the Master, Officers and Crew by law are not bound to follow the Vessel.

Notwithstanding the terms of Clause 13, Hire shall be paid for all time lost including any lost owing to loss of or sickness to the Master, Officers, Crew or passengers or to the action of the Crew in refusing to proceed to such place or to be exposed to such risks."

5.208 This clause in this form calls for little comment and was very similar to the former clause 20(a)(a) of "Supplytime 89." The explanatory notes to "Supplytime 2005" stated: "The Epidemic/Fever Clause comes in to play in areas where fever or epidemics such as Ebola is prevalent. Under such circumstances the Vessel is under no obligation to enter the area." Similar considerations are likely to apply to the refusal by owners to proceed to such a place in terms of having, impliedly, to reach their decision *bona fide* and without irrationality, as apply elsewhere in relation to ice and war. The only criteria are that the place must be one where there is (ie where there prevails) fever or an epidemic of some sort (sensibly no attempt is made to define this by reference to any particular benchmark as conditions may differ from port to port) or is a place where, by reason of such matters, the crew under their articles or contracts cannot be made by the owners to enter the place in question.

5.209 The "Supplytime 2017" incorporates a more modern BIMCO standard clause. This, as explained by the notes to the 2017 form, "has been developed for use in response to any virulent disease and has therefore been drafted in general terms without reference to specific conditions. The provisions are intended for application only in the most severe cases. A high threshold has therefore been inserted so that the triggering mechanism will take effect only in instances of extreme illness and cannot be misused for commercial purposes in relation to more commonly encountered or widespread viruses. Given the potential for ambiguity, the term 'epidemics' has been avoided."

"25. BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties

(a) For the purposes of this Clause, the words:

'Disease' means a highly infectious or contagious disease that is seriously harmful to humans.
'Affected Area' means any port or place where there is a risk of exposure to the Vessel, crew or other persons on board to the Disease and/or to a risk of quarantine or other restrictions being imposed in connection with the Disease.

(b) The Vessel shall not be obliged to proceed to or continue to or remain at any place which, in the reasonable judgement of the Master/Owners, is an Affected Area.

(c) If the Owners decide in accordance with Subclause 25(b) that the Vessel shall not proceed or continue to an Affected Area they shall immediately notify the Charterers.

(d) If the Vessel is at any place which the Master in the Master's reasonable judgement considers to have become an Affected Area, the Vessel may leave immediately, with or without cargo on board, after notifying the Charterers.

(e) In the event of Subclause 25(c) or 25(d) the Charterers shall be obliged, notwithstanding any other terms of this Charter Party, to issue alternative voyage orders. If the Charterers do not issue such alternative

voyage orders within forty-eight (48) hours of receipt of the Owners' notification, the Owners may discharge any cargo already on board at any port or place. The Vessel shall remain on hire throughout and the Charterers shall be responsible for all additional costs, expenses and liabilities incurred in connection with such orders/delivery of cargo.

(f) In any event, the Owners shall not be obliged to load cargo or to sign, and the Charterers shall not allow or authorise the issue on the Owners' behalf of, bills of lading, waybills or other documents evidencing contracts of carriage for any Affected Area.

(g) The Charterers shall indemnify the Owners for any costs, expenses or liabilities incurred by the Owners, including claims from holders of bills of lading, as a consequence of the Vessel waiting for and/or complying with the alternative voyage orders.

(h) If, notwithstanding Subclauses 25(b)–(f), the Vessel does proceed to or continue to or remain at an Affected Area:

(i) The Owners shall notify the Charterers of their decision but the Owners shall not be deemed to have waived any of their rights under this Charter Party.
(ii) The Owners shall endeavour to take such reasonable measures in relation to the Disease as may from time to time be recommended by the World Health Organisation.
(iii) Any additional costs, expenses or liabilities whatsoever arising out of the Vessel visiting or having visited an Affected Area, including but not limited to screening, cleaning, fumigating and/or quarantining the Vessel and its crew, shall be for the Charterers' account and the Vessel shall remain on hire throughout.

(i) The Vessel shall have liberty to comply with all orders, directions, recommendations or advice of competent authorities and/or the Flag State of the Vessel in respect of arrival, routes, ports of call, destinations, discharge of cargo, delivery or in any other respect whatsoever relating to issues arising as a result of the Vessel being or having been ordered to an Affected Area.

(j) If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation, nor shall it be or give rise to an off hire event, but shall be considered as due fulfilment of this Charter Party. In the event of a conflict between the provisions of this Clause and any implied or express provision of this Charter Party, this Clause shall prevail to the extent of such conflict, but no further.

(k) The Charterers shall indemnify the Owners if after the currency of this Charter Party any delays, costs, expenses or liabilities whatsoever are incurred as a result of the Vessel having visited an Affected Area during the currency of this Charter Party.

(l) The Charterers shall ensure that this Clause shall be incorporated into all sub-charters and bills of lading, waybills or other documents evidencing contracts of carriage issued pursuant to this Charter Party."

5.210 While considerably more extensive, the provisions are self-explanatory. The position is effectively left to the reasonable judgement of the master of the vessel which may be based on all available information as to whether the port or place where the vessel is being directed by the charterer is a place where there is a risk of exposure to the vessel, crew or other persons on board to a life-threatening disease or to a risk of quarantine or other restrictions being imposed in connection with such a disease. As the explanatory notes to the 2017 form state:

> The content and structure is modelled on the BIMCO War and Piracy Clauses where, within limitations, Owners may refuse to trade to an area of danger. If, nevertheless, that option is waived and the ship proceeds, Charterers will be responsible for resulting liabilities and any additional costs of preventative measures taken by Owners to protect the ship and crew. It is important to note that whether an area presents the degree of danger justifying a refusal to proceed is a subjective decision to be taken by Owners in the light of available evidence and information.

Clauses 26 and 27 of "Supplytime 2005" (removed from "Supplytime 2017"): General Average; New Jason; Both-to-Blame omnibus time charter provisions

5.211 Clauses 26 and 27 of the "Supplytime 2005" form mirrored any standard time charterparty with provisions dealing with general average, a "New Jason" clause and the standard "both-to-blame" collision clause. These have been removed from "Supplytime 2017." They represented

perhaps some cutting-and-pasting from an ordinary dry cargo or tanker time charterparty standard form. As the 2017 explanatory notes state: "These clauses have been deleted in the 2017 edition of SUPPLYTIME. They are not relevant in an offshore support vessel context as they deal with cargo-related matters and cargo is not intended to be carried for third parties under SUPPLYTIME. Furthermore, they would be contrary to the knock-for-knock liability regime. Nevertheless, ships trading to the U.S. may want to consider reinstating the Both to Blame Collision Clause." Similarly, if the vessel is to be performing a cargo-carrying service, given her particular location, then the insertion of these typical cargo charter clause should be considered. The following brief comments apply if "Supplytime 2005" is used.

5.212 *Clause 26: "General Average and New Jason Clause"* See Cooke, *Voyage Charters* (4th edn, 2014), chapters 39 and 73. It should be noted that the clause refers to adjustment of general average being in accordance with the York-Antwerp Rules of 1994 only (which contains revisions in aspects which touch directly on the interest of tug and tow and towage situations: see Chapter 13 below) and deletes the reference to any amendments to the Rules which made make successive Rules apply. This is to exclude the application of the later 2010 York-Antwerp Rules which have not received support from many shipowners and ship-owning organisations and which are disapproved by BIMCO itself. As the explanatory notes in 2005 stated and as remains the case today:

> General Average shall be adjusted in London and in accordance with York-Antwerp Rules 1994, unless otherwise agreed. Furthermore, although a new set of York-Antwerp rules have come in to force in 2004, it was the decision of BIMCO's Documentary Committee that all new and revised charter parties should maintain the reference to adjustment in accordance with York- Antwerp Rules 1994, please refer to Special Circular No. 2, 24 February, 2005.

The subject is dealt with in detail in Chapter 13 below.

5.213 *Clause 27: "Both-to-Blame Collision Clause"* See Cooke, *Voyage Charters* (4th edn, 2014), chapter 75, *passim*.

Clauses 26–32 and 35–42 of "Supplytime 2017": other general or omnibus provisions and standard BIMCO time charter provisions

5.214 With the exception of clause 33 of "Supplytime 2017" which provides for a greatly expanded version of the lay-up provisions in clause 6 of "Supplytime 2005 (as to which see above) and clause 34 of "Supplytime 2017" (being an amended version of clause 31 of "Supplytime 2005") which sets out an "Early termination" provision, both of which merit separate consideration and are dealt with further below, following this section, the concluding provisions of "Supplytime 2017", although somewhat expanded and updated from "Supplytime 2005", are largely typical time charterparty provisions or standard form BIMCO provisions contained, for example, in "Towhire 2008." These have now been updated to include the latest versions of standard and stand-alone time charter clauses promoted by BIMCO and new BIMCO clauses dealing, for example, with sanctions, which have been drafted since 2005. These are general time charter provisions and their effect is explained both in the BIMCO circulars published when the clause in question was published, and in summary form in the explanatory notes to "Supplytime 2017" (or, where older, in the notes to the 2005 form). These appear in the full text of the "Supplytime 2017"in Appendix 4 below, with the previous versions in "Supplytime 2005" in Appendix 5. Needless to say, it is good practice, even for those wedded to "Supplytime 2005" as the preferred contractual template (for example in relation to its version of clause 14 and the knock-for-knock regime) to consider incorporating the latest versions of the BIMCO standard clauses which have been drafted with the purpose of addressing topical issues which have developed or developed differently since 2005.

5.215 *Clause 26: "Health and Safety"* Clause 26 represents a slightly amended version of the former clause 28 of "Supplytime 2005." This reflects the need for the owner to comply with environmental requirements as well as pure health and safety matters which are contained in any applicable regulations. The owner is also required to comply with "such Charterers' instructions as may be appended hereto", presumably also relating to such matters (although this is not specified, this is suggested by the 2017 explanatory notes; "Furthermore, the Owners must comply with any agreed and additional HSE requirements of the Charterers. A qualification has been added that such compliance with the Charterers requirements should not conflict with the ship's flag state obligations"). However, the overriding benchmark in such a case remains the vessel's flag state requirements which prevail in the event of conflict.

5.216 *Clause 27: "Drugs and Alcohol Policy"* This was a new provision in "Supplytime 2005" (then clause 29) and remains materially unchanged in "Supplytime 2017." The 2017 explanatory notes summarise the practical effect of the clause: "The owners must have a drug and alcohol policy in place which at least meets the standards referred to in the OCIMF (Oil Companies International Marine Forum) Guidelines for the Control of Drugs and Alcohol on Board Ship 1995. More information can be found at www.ocimf.com. The ban on drugs extends to prescription drugs if used or abused for purposes other than those for which they were medically prescribed." This clause reflects the perennial problems which have been occasioned by intoxication as a factor in marine casualties. The BIMCO explanatory notes to the 2005 form set out sufficiently the background to and effect of this new clause: "This Clause has been based on the Drug and Alcohol Clause found in BPTIME 3 and given the importance of the provision it has been removed from under the heading of Health and Safety Clause and made a clause in its own right."

5.217 *Clause 28: BIMCO Anti-Corruption Clause for Time Charter Parties:* The 2017 explanatory notes give the context for this standard BIMCO provision: "This standard BIMCO clause provides users with a regime for responding to unlawful demands for gifts in cash or kind, such as cigarettes or alcohol. The clause sets out a series of steps with the contracting parties working together to resist such demands but if this fails, owners' right to hire is protected. Termination, by either party, is the ultimate sanction but a high threshold has been set so that it cannot be easily used as an exit from an inconvenient charter." In essence, the parties are to comply with "all applicable anti-corruption legislation." Given that under a typical "Supplytime" charter, the parties will be involved in worldwide trading, the BIMCO clause is not predicated upon the application of any specific legal system, and is directed at compliance with any and all relevant laws or regulations to which the parties are subject under their own national legislation or legislation in the country or jurisdiction where they are operating. The clause contains a procedure by which an improper "demand" can be notified by the vessel or the owner to the charterer.

5.218 *Clause 29: "MLC 2006":* As the 2017 explanatory notes state, "The ILO Maritime Labour Convention 2006 (MLC 2006) entered into force on 20 August 2013 with the aim to provide comprehensive rights and protection at work for seafarers. The MLC 2006 defines 'seafarer' as 'any person who is employed or engaged or works in any capacity on board'. This definition may create liabilities on the part of the ship owners for any persons working on the ship, including crew employed by the charterers who have not traditionally been regarded as seafarers, for example, concessionaires and entertainers. In the event of doubt whether a particular category of persons on board a ship is considered to be seafarers, the MLC 2006 provides for the question to be decided on a national basis by each flag state, which may give rise to inconsistencies. It is important to note that it is the owners who are ultimately responsible for compliance with the MLC 2006, even in respect of 'seafarers' employed by the charterers. This clause is designed to allocate responsibility between the owners and charterers for personnel on board the ship not directly employed by the owners." The emphasis of the clause is on each party providing the other with adequate proof of compliance with the MLC prior to the service or the boarding of the vessel with charterer's personnel.

5.219 *Clause 30: BIMCO Sanctions Clause for Time Charter Parties*. Sanctions are a feature of the modern world which largely post-date the 2005 form. BIMCO has been at the forefront of efforts to devise a standard clause which allocates responsibilities for (and consequences of) the application of sanctions. In the present context, the purpose of the time charter clause has been stated as follows:

> The purpose of the sanctions clause is to provide owners with a means to assess and act on any voyage order issued by a time charterer which might expose the ship to the risk of sanctions. The test is one of "reasonable judgement" by the owners in determining whether the risk of the imposition of sanctions is tangible. As sanctions are often brought into force within a short period of time, the clause covers the application of sanctions after the ship has begun an employment under the charter. Whether the sanctions existed at the time the order of employment was issued or whether they were subsequently applied, the owners will have the right not to comply with such orders or to refuse to proceed.
>
> The owners must advise the charterers promptly of their refusal to proceed with the voyage and the charterers must provide alternative voyage orders with 48 hours of being notified by the owners. Failure by the charterers to issue alternative voyage orders will result in the owners having the right to discharge any cargo on board at a safe port at charterers' cost. In all circumstances, the ship will remain on hire and the charterers will be obliged to indemnify the owners against any claims brought by the cargo owners or holders of bills of lading or sub-charterers as a consequence of the change of orders or the owners' discharge of the cargo.

5.220 *Clause 31: BIMCO Designated Entities Clause for Time Charter Parties* BIMCO's standard Designated Entities Clause applies in respect of persons or entities (including designated ships), regardless of where they operate from, whose activities are restricted or prohibited and are identified under UN Resolutions, EU laws and regulations or by the United States. It has been drafted as a pendant to the BIMCO Sanctions Clause for Time Charter Parties (applied as part of "Supplytime 2017" in clause 30) which applies to sanctions imposed against a state. The standard clause requires the owner and charterer respectively to warrant that it is not a designated entity. Each party warrants that that continues to be the position throughout the currency of the charterparty.

5.221 *Clause 32: "Taxes"* This is materially unchanged from the former clause 30 of "Supplytime 2005", which represented a new and clearer version of the former 1989 version (omitting qualifying language in "Supplytime 89" which was unnecessary and made the incidence of liability unduly complex). Taxes are to be borne by each party: the division of responsibility is based simply on the owner accepting responsibility for specifically identified taxes (to be identified in Box 31) with the charterer responsible for all other taxes. While the qualification present in the old 1989 clause has been deleted in relation to the charterer's taxes ("arising out of the operation or use of the vessel during the charter period"), plainly the taxes levied must be referable to the service and the charterer's use of the vessel for them. The "Supplytime 2017" version has deleted the reference to a "change in the Area of Operations" (ie that defined in Box 17 of "Supplytime 2005", now Box 16 in the 2017 form). This addresses complications related to the variation of the charterparty to amend the area of operation, which would potentially have wider ramifications than purely in relation to applicable taxes and which will (or should) be dealt with as part of the variation. Clause 32 of "Supplytime 2–17" therefore provides, more simply. That "Hire should be adjusted if there is a change in the owners' tax burden by reason of change in the local regulations or their interpretation after the date of the charter party or the commencement of employment, whichever is earlier" (see the 2017 explanatory notes).

5.222 However, if "Supplytime 2005" is used, then if the "area of operation" of the vessel as originally fixed by the parties in Box 17 is changed, resulting in a documented increase in owners' tax liability, there shall be an adjustment of hire accordingly. Compare the similar approach found in clause 11(c) of the "Supplytime 2005" form to adjustment of hire.

5.223 *Clause 35: "Force Majeure"* Save for the deletion of "epidemic" as a *force majeure* event, reflecting this being covered in detail by clause 25, the BIMCO Infectious or Contagious

Diseases Clause for Time Charter Parties, this is the same version of the previous "Supplytime 2005 *force majeure*" provision (then in clause 32) and includes some important *force majeure* events, in particular the recurrence of piracy and sabotage and terrorism as a prevalent marine risk. As BIMCO explains in its 2017 explanatory notes:

> This clause is modelled on the ICC (International Chamber of Commerce) model *Force majeure* Clause 2003 which BIMCO has used to create a "standard" *force majeure* provision for its contracts. The clause excuses the performance without liability of the party invoking *force majeure* if it can show that the alleged *force majeure* event falls within any of the listed event in the clause; that its performance is prevented by that event; and that it has taken reasonable steps to avoid or minimise the consequences of the event.

5.224 The ICC Clause still represents a *force majeure* clause of fairly classical form. As to the construction of such clauses generally and the principles which the English court will apply in relation to them, see *Lebeaupin v Crispin* [1920] 2 KB 714 (still a useful leading case) and *Chitty on Contracts* (32nd edn, 2015), Vol. I, para. 15–152 *et seq*. and Treitel, *Frustration and Force Majeure* (3rd edn, 2014), *passim*.

5.225 The right to terminate upon the occurrence of a *force majeure* event under clause 34(b)(v) should be noted. This is discussed below.

5.226 *Clause 36: "Confidentiality"* This is a special provision particular to the "Supplytime" form. The 2005 revision made a number of changes to the former version (clause 30 of "Supplytime 89"). The "Supplytime 2017" revision of the form contains a further expanded version of the clause:

> **33. Confidentiality**
>
> All information or data provided or obtained in connection with the performance of this Charter Party is and shall remain confidential and not be disclosed without the prior written consent of the other party, provided however that each party may disclose confidential information to its Affiliates, sub-contractors, and its/their respective auditors and Employees to the extent required for the performance of this Charter Party or for legal or compliance purposes. The Parties shall use their best efforts to ensure that such information shall not be disclosed to any third party by any of their Affiliates, sub-contractors, Employees and agents. This Clause shall not apply to any information or data that has already been published or is in the public domain. All information and data provided by a party is and shall remain the property of that party.

5.227 In its original 1989 form, the clause dealt only with the situation where, because of the vessel's involvement in particular services for the charterers, the owners become aware of confidential information pertaining to the charterers' operations, eg the location of test bore holes for a potential new oil or gas deposits, or the content of seismic data gathering. An enforceable obligation of confidentiality was imposed upon the owners which permitted the hirer in a suitable case to restrain by injunctive relief any possible breach of confidence by the owners relating to the hirer's operations. The 2005 clause was more general and imposed a mutual obligation of confidence on both parties with a fairly stringent obligation of "best efforts" (akin to "best endeavours"; considered above in Chapter 4 above) to preserve the confidence. (The explanatory note to the 2005 clause was puzzling since it suggested that there were different obligations on both parties under the old clause – "The previous Confidentiality Clause in Supplytime 89 was felt to be unbalanced as the Owners only had a due diligence obligation not to disclose information whereas the Charterers had a strict obligation not to disclose information to third parties" – when there was only one obligation upon the owner in respect of the charterer's data etc. only). The 2017 version retains the 2005 model, but makes provision for necessary "internal" disclosure of information within each party's "Group." Given the wide reach of the "Group" as now defined in "Supplytime 2017" in the definitions section (see above), a sensible but limited liberty to disclose within the Group "to the extent required for the performance of this Charter Party or for legal or compliance purposes" is now included.

5.228 It should be noted that a more elaborate and inclusive confidentiality clause has been included in the "Windtime" form at clause 33, with a wider and more specific range of "exceptions" to disclosure of confidential information as follows. It is not clear why this more explicit provision was not employed in the drafting of "Supplytime 2017." The explanatory notes are silent (merely stating "The clause provides certain exceptions where the confidentiality undertaking does not apply, for example regarding information that has already been published in the public domain or which is required for legal purposes").

> This Clause shall not apply to any information or data:
> (a) that has already been published or is in the public domain; or
> (b) which a party may be entitled or is bound to disclose under compulsion of law; or
> (c) is requested by any regulatory authority; or
> (d) as may be disclosed to any parent company or company in the same group of which a party forms part; or
> (e) as may be necessary to disclose for the proper administration or implementation of this Charter Party; or
> (f) as may be disclosed to a party's professional advisers for the proper performance of their professional services; or
> (g) as may be required in the event of actual or pending court or arbitration proceedings which may arise out of or in connection with this Charter Party; or
> (h) as may be required to be disclosed pursuant to a supply contract, which directly or indirectly references this Charter Party and any rates referenced herein.

5.229 *Clause 37: "BIMCO Dispute Resolution Clause 2016"* This corresponds to the similar clause in "Towcon 2008" as to which see the commentary above in relation to this provision (clause 33); as there mentioned, consideration might be given to an amendment to clause 34 so as make available the full flexibility of the current LMAA procedures in relation to intermediate sized claims as well as small claims.

5.230 *Clause 38: "Notices"* This was a new provision to "Supplytime 2005." The 2005 version provided by clause 35 for all notices to be given in writing and defining the various "effective means" means by which that may be done, including e-mail. Clause 38 of "Supplytime 2017" dispenses with any specific definition of the mode of notice-giving, referring simply to it being "effectively given." While the aim of this was stated to be "The words 'effectively given' should encompass different methods of giving notices and in that sense, be 'future proof'", it is perhaps unfortunate. While objectively the test of a notice being effectively given is capable of ready application, the importance of a commercial notice provision is to achieve certainty, with the knowledge that if a message is sent by a defined method to a defined address it will be deemed given and deemed received, with no argument subsequently. It is suggested that a definition of means of notice still plays a sensible drafting role. Further, unlike the corresponding provision in "Towcon 2008" and "Supplytime 2005", "Supplytime 2017" now stipulates an address for service bringing the form into line with most commercial and maritime contracts where a specific "notifications" provision is included. Clause 38 of "Supplytime 2017" now provides for the address to be that in the Boxes identifying owner and charterer respectively; all the more reason then to stipulate modes of communication. Under "Supplytime 2005", there is no stipulated or designated "general" address which has to be given in a Box in Part I (cf. Box 22 in relation to addressing of invoices only). While this is now dealt with in the 2017 form, parties using the 2005 form may wish to add a suitable rider clause to deal with this. The position can be compared, unfavourably it is suggested, with that under "Bargehire 2008" where the position is much clearer:

> (a) All notices given by either party or their agents to the other party or their agents in accordance with the provisions of this Charter Party shall be in writing.
> (b) For the purposes of this Charter Party, "in writing" shall mean any method of legible communication. A notice may be given by any effective means including, but not limited to, cable, telex, fax, e-mail, registered or recorded mail, or by personal service.

As the explanatory notes to that form stress (sensibly) "The Clause provides that all notices given by either party must be in writing in a readable and understandable way capable of being a record. It should be noted that e-mail is listed as one of the acceptable methods and if one of parties publishes its e-mail address as part of its contact details then the other party may if it so wishes use that medium for notices. However, given the importance and gravity of some of the notices that may be sent under the contract the parties may choose to rely on methods which provide a confirmation of delivery to the recipient to avoid disputes at a later stage."

5.231 *Clause 39: "Headings"* The headings used throughout Part II are not to be used as an aid to construction (cf. clause 36 of "Supplytime 2005").

5.232 *Clause 40:* This is a standard "boilerplate" severability clause; the wording, new to the 2005 form (clause 37), was taken from the BIMCO "Repaircon" form at clause 11(b).

Clause 41: "Entire Agreement" clause.

> This Charter Party, including all Annexes referenced herein and attached hereto, is the entire agreement of the Parties, which supersedes all previous written or oral understandings and which may not be modified except by a written amendment signed by both Parties.

5.233 Save for minor textual changes, this mirrors clause 38 of "Supplytime 2005." This form of clause, while frequently regarded as "boilerplate", may serve an important purpose in shutting out attempts to bring in pre-contractual promises or assurances. There is no "one size fits all" approach to entire agreement clauses based on some supposed "general purpose" behind such clauses and it is in every case a question of the construction of the precise terms of the clause in question which decides its effect: see *per* Moore Bick LJ in *Ravennavi SpA v New Century Shipbuilding* [2007] 2 Lloyd's Rep 24 at 30. There is an extensive literature and body of case law on entire agreement clauses which is beyond the scope of this work and dealt with in the general contract text books (for a helpful summary: Lewison, *The Interpretation of Contracts* (6th edn, 2015), section 3.16).

5.234 However, in general terms, the common purpose of such clauses is as described in the leading case of *Inntrepreneur Pub v East Crown* [2000] 2 Lloyd's Rep 611 by Lightman J: "to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of the negotiations some (chance) remark or statement . . . such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere and that accordingly any promises or assurances made in the course of the negotiation . . . shall have no contractual force" (para. 7). While it may be intended to expunge any pre-contractual representations or informal or formal agreements from any legal or contractual force, entire agreement clauses are usually ineffective to protect against liability for misrepresentations made by one party which induced the other party to contract. A recent and clear exposition of this was by the Court of Appeal in *Axa Sun Life Services plc v Campbell Martin Ltd* [2011] EWCA Civ 133 where a clause which purported to provide that the contract "shall supersede any prior promises, agreements, representations, undertakings or implications, whether made orally or in writing between you and us relating to the subject matter of this agreement" was held not to apply to representations but not to misrepresentations, since the clause did "not in terms state either that no representations have been made, or that no reliance has been placed on any representations, or that liability for (mis)representations was excluded: each of which is a traditional way in which potential liability for misrepresentations has been sought to be avoided" (*per* Rix LJ at para. 54). In London Arbitration 1/02, LMLN 585, an arbitration tribunal applied a similar construction to the nearly identical "Supplytime 89" clause 32, holding that clause 32 had no effect in relation to any claim for pre-contractual misrepresentation.

5.235 An entire agreement clause, whatever its form, cannot exclude matters which would be objectively known to the reasonable addressee and which would form part of the admissible factual matrix: see *John v Price Waterhouse* [2002] EWCA Civ 899 where Robert Walker LJ stated (at para. 197) that: "a conventional entire agreement clause cannot in my view affect the question

of whether some matter of fact (whether or not in some documentary form) is admissible as an aid to the process of construing a contractual document"; see also *Proforce Recruit Ltd v The Rugby Group plc* [2006] EWCA Civ 69; *Matchbet v Openbet* [2013] EWHC 3067 (Ch); *Barclays Bank Plc v Unicredit Bank AG* [2014] 2 Lloyd's Rep 59 (CA) applying *Axa Sun Life Services plc v Campbell Martin*.

5.236 Similarly, as an implied term is, if found, an integral part of the agreement which is said to be "entire", an entire agreement clause in the form of clause 38 will not exclude any terms which fall properly to be implied within the "Supplytime" contract between the parties. In *Exxonmobile Sales & Supply v Texaco* [2004] 1 All ER (Comm) 435, an entire agreement clause in a contract for the sale of a parcel 15,000 MT of oil stated that: "This instrument contains the entire agreement of the parties . . . and there is no other promise, representation, warranty, usage or course of dealing affecting it." Nigel Teare QC (as he then was) stated obiter at 441: "It seems to me arguable that where it is necessary to imply a term in order to make the express terms work, such an implied term may not be excluded by the entire agreement clause because it could be said that such a term is to be found in the document or documents forming part of the contract." This approach has more recently been confirmed by the Court of Appeal in *Axa Sun Life Services Ltd v Campbell Martin Ltd* [2011] EWCA Civ 133 where Burnton LJ stated at para. 41 (see also *per* Rix LJ in similar terms at para. 97):

> It is apparent, however, that the Defendants allege that they are to be implied in order to give business efficacy to the Agreements. In other words, the implied terms are said to be intrinsic to the Agreements, and true implications. In my judgment, such terms, if otherwise to be implied, are not excluded by clause 24. As intrinsic provisions of the Agreement, they are within the expression "This Agreement and the Schedules and documents referred to herein" in the first sentence, and they are not "prior" to the Agreement, and therefore are unaffected by the second sentence. The Agreement might have included, but does not include, an express specific exclusion of such implied terms.

See for a contrary (but not very reasoned) analysis the view expressed in *National Trust v Birden* [2009] EWHC 2023 (Ch) by HH Judge Toulmin QC (at para. 149).

5.237 *Clause 42*: "Singular/Plural": a new piece of boilerplate has been added to the "Supplytime 2017" form; the notes state: "In most BIMCO contracts the parties are labelled in plural, for example in SUPPLYTIME they are labelled as 'Owners' and 'Charterers' which are merely labels that point to the identity of each of the parties to the contract. However, to provide for situations where singular and plural terms need to apply in a particular context, provision has been made that the singular includes the plural and vice versa as the context admits or requires."

Clauses 33 and 34 of "Supplytime 2017": lay-up and early termination

5.238 Circumstances (typically market or project related) may mean that the services of the vessel are no longer required by the charterer, whether temporarily or otherwise, and the charterer needs to "mothball" the vessel until times change. Additionally, circumstances may render continued performance either at least temporarily impossible or alternatively a wholly different proposition from how matters presented themselves when the contract was made. Clauses 33 and 34 of "Supplytime 2014" deal with these situations with, respectively, a lay-up and early termination clause. Both clauses have been substantially amended and "improved" compared with their previous "Supplytime 2005" incarnations, still redolent of the Ur-1989 form.

Clause 33: lay-up

5.239 The "Supplytime 2017" form contains a much expanded version of a provision to deal with the laying-up of the vessel during the charter service. The "Supplytime 2005" form

contained at the end of clause 6 only a very limited lay-up provision. The changing economic climate and the retrenchment in the offshore sectors has led to increased use of lay-up during the charter and the questions raised by lay-up have become more complex. BIMCO has sought to address the issue of lay-up in the "Supplytime 2017" form with a much fuller and discrete lay-up provisions. The 2017 explanatory notes therefore set out that: "A new and comprehensive lay-up provision has been drafted for SUPPLYTIME 2017. In the previous editions, this was very brief and did little more than to give the charterers the option of laying up the ship. The procedure to lay up a ship requires a lot of decisions to be made and the new clause aims to clearly set out in chronological order those decisions."

5.240 As the explanatory notes state, the clause sets out a schedule of steps to be followed where lay-up is sought. The starting point is however that the charterer has the option of laying up the ship at any time during the charter period in accordance with the process as set out in the clause.

i The charterer must notify the owner in writing of its intention to lay the vessel up; that notice will contain the necessary details: viz. when the lay-up should start; for how long it will last and the nomination of a safe port or place for the lay-up.

ii The owner is then to provide the charterer with information specified in para. (b) which includes, for example, the nature and extent of the lay-up; the estimated costs; and (most importantly) the amount of reduced hire during the lay-up period. The explanatory notes have left the type of lay-up neutral and to be worked out between the parties. As the notes explain: "In the clause, reference to cold, warm or hot lay-up has purposely been avoided as there are a variety of permutations for lay-up, hence the requirement on the Owners to provide information on the nature of the intended lay-up."

iii With this information to hand, the charterer is then to reach a final decision on whether, with the information provided by the owner, it wishes to proceed with laying-up the vessel.

iv Under para. (e) notice is to be given by the charterer in the event of the re-activation of the vessel and the vessel's reversion to the agreed charterparty hire rate.

5.241 Clause 33 makes provision for the position if the charterparty expires while the vessel is on lay up (para. (f), stipulating a number of special payments) and how other provisions are to operate during lay-up. Paragraph (g) deals with the suspension during the period of lay-up: "the Owners' obligations under this Charter Party that cannot be complied with as a direct result of the Vessel being laid-up." While this sets a useful starting point, it will be sensible for the owner when setting out the terms on which it is prepared to lay up the vessel to make clear precisely what obligations are to be suspended during lay-up and what equipment etc. is to be mothballed. This avoids difficulties on re-activation when the charterer, perhaps now anxious to take advantage of an upturn in the market and wanting the vessel to be "ready to go", complains that the shutting down or mothballing of a system was not an "Owners' obligations under this Charter Party that cannot be complied with as a direct result of the Vessel being laid-up."

5.242 Paragraph (h) deals with the concept of "maintenance days" and the earning and accrual of these. These are suspended but without prejudice to such days which have already accrued. The explanatory notes state:

> Regarding the Maintenance Days under subclause 13(c), they will not continue to accrue during lay-up, see subclause 33(h). Maintenance Days are given to allow the owners to stop the ship for maintenance, repairs and surveys, but without loss of hire, and without interruption by the charterers. All these conditions are automatically met whilst a ship is in lay-up and the owners continue to be paid hire throughout. Therefore, the effect of granting Maintenance Days whilst a ship was in layup would be that the owner got paid twice. A ship in layup (warm or cold) is not going to sail anywhere within short notice and hence the owners can use the layup crew, or put people on board, at any time

and without needing the charterers' permission nor having any concern that the ship will sail, and all the time being paid charter hire. It would therefore be rather unfair if the charterer were obliged to pay for Maintenance Days during this period.

This seems a rather charterer-centric viewpoint. If the vessel is on charter and that service includes the right of the charterer to lay up the vessel on hire but at a reduced rate and where maintenance of the vessel may still be necessary, it is as arguable that the charterer must accept the regime of maintenance of the vessel as much in active service as in lay-up service (perhaps where lay-up may entail different maintenance needs). Consideration should be given by the owner to the deletion of para. (h).

Clause 34: early termination (formerly clause 31 of "Supplytime 2005")

The differences between the "Supplytime 2017" and "Supplytime 2005" forms

5.243 Clause 31 of "Supplytime 2005" was a revised version of the former clause 26 and broadly corresponded to the "Supplytime 89" version. Various timing questions as to when the right arose (or when an event triggered the right occurred) have been re-worded in a clearer and, for the most part, easier to follow way. However, certain problems identified with the "89" version of the clause were not addressed in the 2005 revision and, in certain respects, some provisions were made much less clear as a result of the 2005 revision. The "Supplytime 2017" revision aimed to address these issues and to make the clause easier to operate. While certain new grounds for early termination have been introduced (off hire; failure to insure), others have been removed ("breakdown") or redrafted (repudiatory breach).

5.244 In broad outline, the "Early Termination" provision in the 2005 form had only two parts: first, in para. (a) it allowed for the parties to agree upon an option granted to the charterer to terminate the charterparty for "convenience" and at will upon notice and the payment of a sum in compensation, fixed and stated in Boxes 13 and 14; secondly in para. (b) it provided for an automatic right of termination granted to both parties "for cause", subject to notice provisions, in the case of a number of specified events described as "Termination Events", viz. the requisition, confiscation, loss or long-term (what is meant by "long-term" is to be specified by the parties in Box 33) off hire status of the vessel, the bankruptcy or repudiatory breach of any party or force majeure conditions exceeding 15 days.

5.245 The new "Early Termination" provision in "Supplytime 2017" adopts a more sophisticated approach. *First* it retains in para. (a) a liberty to the parties to agree upon an option granted to the charterer to terminate the charterparty for "convenience", fixed and stated in Boxes 13 and 14: this has been reworded but represents essentially the same 2005 result. *Secondly* in para. (b) it continues to provide for an automatic right of termination granted to both parties "for cause", subject to notice provisions (which have been simplified), in the case of a number of specified events described as "Termination Events." However these "Events", have been cut back to only the requisition or confiscation of the vessel; the bankruptcy of either party; the loss of the vessel; *force majeure* and failure by the owner to procure the stipulated insurances. *Thirdly* separate provisions, discrete from and unaffected by the notice regime for "Termination Events", are included dealing with repudiatory breach and accumulated off hire.

5.246 As discussed below in Part D, the BIMCO "Windtime" form adopts a form of early termination provision which is very close to that used in "Supplytime 2017." The drafting history is not clear from the explanatory notes either of the "Supplytime 2017" form or of the "Windtime" form as to whether the revision of the "Supplytime 2005" form version now adopted in "Supplytime 2017" was carried out by the drafters of "Windtime" and was then revised in minor respects by the sub-committee drafting "Supplytime 2017." The explanatory notes for the "Windtime" form are however more detailed and extensive in relation to the "early termination" provision

than those accompanying "Supplytime 2017", suggesting that this was the case. Reference may therefore usefully also be made to the "Windtime" explanatory notes when considering the new "Supplytime 2017" clause 34.

5.247 The commentary below deals first with the common regime under both the 2017 and predecessor 2005 forms as to termination for the charterer's convenience and then deals with the position under the 2017 form. The more complicated and difficult operation of the "termination for cause" provisions in "Supplytime 2005" is then addressed as a concluding section.

Charterer's right of termination under the 2017 (and 2005) form

"34. Early Termination

(a) *At Charterers' convenience*

The Charterers may terminate this Charter Party at any time by giving the Owners written notice of termination as stated in Box 14, upon expiry of which, this Charter Party will terminate. Upon such termination, Charterers shall pay the compensation for early termination stated in Box 13(ii) and the demobilisation fee stated in Box 15, as well as hire or other payments due under the Charter Party up to the time of termination. If Box 13(i) is left blank, this Clause 34(a) shall *not* apply."

5.248 Clause 34(a) allows the parties to agree that the charterers may terminate the charterparty on notice and upon the payment of a sum, called "compensation for early termination", which is fixed and stated in Box 13 and the ordinary, fixed, demobilisation charge. This is a slightly amended version of the previous clause 31(a) of the "Supplytime 2005" form. It makes express what was already implicit, namely that if the relevant box has not been filled out (Box 13(i)), then clause 34(a) is inapplicable.

Termination by either party "for cause" under the "Supplytime 2017" form

"(b) *For cause*

If any of the events listed in subclauses (i)-(vi) ("Termination Event") occur, either party in respect of the events listed in subclauses (i), (ii), (iv) and (v), and the non-defaulting party in respect of the events listed in subclauses (iii) and (vi), may give written notice of its intention to terminate this Charter Party unless the Termination Event is remedied within fourteen (14) days of receipt of the notice by the other party. If the Termination Event has not been so remedied then the notifying party may terminate this Charter Party with immediate effect upon giving written notice of termination latest within three (3) days of expiry of the 14 days' notice.

(i) Requisition

If the government of the state of registry and/or the flag of the Vessel, or any agency thereof, requisitions for hire or title or otherwise takes possession of the Vessel during the Charter Period.

(ii) Confiscation

If any government, individual or group, whether or not purporting to act as a government or on behalf of any government, confiscates, requisitions, expropriates, seizes or otherwise takes possession of the Vessel during the Charter Period (other than by way of arrest for the purpose of obtaining security).

(iii) Bankruptcy

If either party has a petition presented for its winding up or administration or any other action is taken with a view to its winding up (otherwise than for the purpose of solvent reconstruction or amalgamation), or becomes bankrupt or commits an act of bankruptcy, or makes any arrangement or composition for the benefit of creditors, or has a receiver or manager or administrative receiver or administrator or liquidator appointed in respect of any of its assets, or suspends payments, or anything analogous to any of the foregoing under the law of any

jurisdiction happens to it, or ceases or threatens to cease to carry on business, without prejudice to the accrued rights of that party.

(iv) Loss of Vessel

If the Vessel is lost or becomes a constructive total loss, or is missing. In the case of termination, Hire shall cease from the date the Vessel was lost or, in the event of a constructive total loss, from the date of the event giving rise to such loss. If the date of loss cannot be ascertained or the Vessel is missing, payment of Hire shall cease from the date the Vessel was last reported.

(v) Force Majeure

If a *force majeure* condition as defined in Clause 35 (*Force majeure*) prevents or hinders the performance of the Charter.

(vi) Insurance

If the Owners have not procured the insurance policies in accordance with Clause 17 (Insurance) on delivery or any such insurance policies lapse during the Charter Period.

Termination as a result of any of the above mentioned causes shall not relieve the Charterers of any obligation for Hire and any other payments due up to the date of termination."

5.249 The provision of a right to either party to terminate "for cause" raises the preliminary question whether clause 34(b) is to be construed as an exclusive statement of the circumstances in which the parties may terminate, thereby excluding any rights which exist at common law. Given that para. (b) the "Supplytime 2017" version in setting out a "termination for cause" provision does not seek to legislate for all breaches of contract or even for repudiatory breaches (which, unlike in "Supplytime 2005", are now dealt with separately and not as part of the "for cause" mechanism) it seems clear that paragraph (b) merely sets out additional rights of termination and lays down a procedure for termination or qualifies the circumstances in which certain events may qualify as a termination event.

5.250 The highly unclear duties as to notification of a termination event contained in para. (b) of the 2005 form (and discussed below) have been swept away in the "Supplytime 2017" revision. The provision now sets out a simple two-stage process: *first*, the giving of a notice on the occurrence of the "Event" by the party invoking clause 34 calling on the other party to remedy the position within 14 days and giving notice in that notice of its intention to terminate, absent remedy; *secondly*, a notice of termination within a defined period (three days) of the expiry of the 14-day notice. In relation to the first notice, while the content is not specifically defined, it is clear that the notice must be in writing and notify the recipient of the intention to terminate ("notice of its intention to terminate this Charter Party unless"). It is equally clear that in calling upon the recipient to remedy the event which has occurred, the notice must contain at least reasonable detail of the event to enable the recipient to understand what is being alleged and so that it can identify what it is that it is being called upon to remedy ("unless the Termination Event is remedied"). The notice must also specify the 14-day period running from the date of receipt ("within fourteen (14) days of receipt of the notice by the other party"). In relation to the second notice a simple notice of termination noting the failure to remedy is all that the clause requires.

5.251 The "Termination Events" are now restricted to the following: (a) the requisition of vessel by government of state of registry or flag; (b) the confiscation of vessel other than by way of arrest for security purposes; (c) the bankruptcy or similar insolvency of either party; (d) the loss of vessel; (e) the occurrence of a *force majeure* event falling within clause 35; and (f) the non-procurement or subsequent lapse of the owner's insurance for the vessel as stipulated in Annex B.

5.252 The events are self-explanatory but some changes to the "Supplytime 2005" model and differences with the more recent "Windtime" version should be noted.

i In relation to the "loss of the vessel", both the "Supplytime 2005" and "Windtime" versions incorporated wording dealing with the provision of a substitute vessel by the owner ("unless the Owners promptly state their intention to provide, and do in fact provide, within 14 days of the Vessel being lost or missing, at the port or place from which the Vessel last sailed (or some other mutually acceptable port or place) a substitute vessel pursuant to Clause 23 (Substitute Vessel)"). The "Supplytime 2017" notes do not do so and do not explain the change. However, given that this is a matter which the owner can put forward in terms of remedy, once a notice is given of intention to terminate, if it is able to do so, it was perhaps always an unnecessary statement.

ii In relation to *force majeure*, the former 2005 provision and the equivalent in the "Windtime" form both provide for a time period beyond which the *force majeure* event must operate taking account of when a *force majeure* notice was served ("prevents or hinders the performance of the Charter Party for a period exceeding fifteen (15) consecutive days from the time at which the impediment begins to prevent or hinder performance if notice is given without delay or, if notice is not given without delay, from the time at which notice thereof reaches the other party"). This gives a sensible ground of termination, excluding from the operation of the early termination provisions, temporary or fleeting *force majeure* events. The new "Supplytime 2017" wording is simply in terms of occurrence ("If a *force majeure* condition as defined in Clause 35 (*Force majeure*) prevents or hinders the performance of the Charter") which seems curious and difficult to reconcile with temporary prevention or hindrance for which a party is excused under clause 35. Accordingly, on the happening of a *force majeure* event, there appears to be an immediate right to terminate or at least to call upon the other party to remedy the situation. This was however the express intention of the drafters, stating in their notes to clause 35: "The clause, combined with subclause 34(b)(v), can give rise to a right of early termination by either party if the *force majeure* event continues for a period exceeding 14 consecutive days from the date of the event or notification to the other party."

iii The concept of "breakdown" present in "Supplytime 2005" (and discussed in relation to that form below) has been removed. The reasoning for this is explained in the notes to the "Windtime" form as follows:

> Breakdown has been removed altogether from the Clause. Firstly, it was felt that the concept of a vessel breakdown under Sub-clause (b) potentially giving rise to an entitlement by the owners to terminate the charter party was not as intended by the original draftsmen of SUPPLYTIME. Secondly, it was felt to be unclear as to how the provision for "reasonable steps . . . to remedy the non-performance" of the vessel and the alternative opportunity to provide a substitute vessel were intended to operate in practice. To resolve this matter, the draftsmen of WINDTIME have developed a new Sub-clause (d) (Off hire).

Termination for repudiatory breach and accumulated off hire under "Supplytime 2017"

"(c) *Repudiatory Breach*

If either party is in repudiatory breach of its obligations under this Charter party, the other party shall have the right to terminate this Charter Party with immediate effect by giving notice in accordance with Clause 38 (Notices) without prejudice to any other rights which the terminating party may have under this Charter Party.

(d) *Off hire* – In the event the Vessel is off hire under this Charter Party due to events stated in Subclause 13(a) (Off hire – Off hire and exceptions) for:

(i) a single consecutive period which exceeds that stated in Box 32(i) including any extensions which have been declared; or

(ii) combined periods which exceed that stated in Box 32(ii) in aggregate including any extensions which have been declared,

and the Owners have not provided a substitute vessel pursuant to Clause 21 (Substitute Vessel), this Charter Party may be terminated by the Charterers by giving notice in accordance with Clause 38 (Notices) without prejudice to any other rights which either party may have under this Charter Party."

5.253 Clause 34 of "Supplytime 2017" removes repudiatory breach from the "termination for cause" regime where it unhappily resided (as described below in relation to the old clause 31(b) of "Supplytime 2005") into its own free-standing provision and, also, deals with vessel breakdowns (or more widely the vessel's inability to provide the service) in an accumulated or aggregate off hire provision.

5.254 Paragraph (c) simply provides that if a party is in repudiatory breach the other may give notice of that effect under the notice provision in clause 38 but without prejudice to that party's other rights at law. The provision is therefore effectively otiose, stating what in any event is the position at common law (and emphasising indeed that this remains the position). The drafters of "Windtime" explained their reasoning as follows, but in truth, para. (c) is unnecessary and could simply have been omitted, with general reservation for any other rights of termination not dealt with in clause 34(b) (if itself necessary, *sed quaere*): "Repudiatory breach is dealt with in a new Sub-clause (c) (Default) which reflects the common law position that in the event of a repudiatory breach the 'innocent' party may terminate immediately by giving notice – that party does not have to give a 3 day grace period as *per* SUPPLYTIME to permit the party in breach to 'rectify'."

5.255 Paragraph (d) confers a right to terminate in the event that the vessel's off hire periods exceed time periods agreed between the parties in Box 32 (and on the assumption that the owner does not offer a substitute vessel). The reasoning is again better explained in the notes to the "Windtime" form, *mutatis mutandis*, than in those accompanying "Supplytime 2017":

> This new Sub-clause replaces the "Breakdown" provision found in Clause 31(b)(v) of SUPPLYTIME. Rather than attempting to deal with liability for breakdowns of equipment or the vessel that prevent the owners from providing the required services, the provision instead focuses on maximum periods of off hire. In the new provision, which is not subject to the 3 days' notice/3 days' grace requirements under Sub-clause (b), if there is an off hire event as *per* Sub-clause 15 (a) that lasts longer than the agreed periods in Box 36, depending on whether single consecutive periods or combined periods are to apply, and the owners have not provided a substitute vessel, then the charterers are entitled to terminate the contract. If the parties have not agreed and stated the breakdown period in Part I the default period will be 20 *per* cent of the total charter period in the case of a single consecutive period, and 25 *per* cent in the case of combined periods. Notice to such effect should be given in accordance with the notice clause, Clause 35.

Cf the "Supplytime 2017" explanatory notes:

> This new subclause replaces the "Breakdown" provision found in Clause 31(b)(v) of SUPPLYTIME 2005. Rather than attempting to deal with liability for breakdowns of equipment or the ship that prevent the owners from providing the required services, the provision instead focuses on maximum periods of off hire.

In the new provision, which is not subject to the 14 days' grace period under subclause 34(b), if there is an off hire event as *per* subclause 13(a) that lasts longer than the agreed periods in Box 32, depending on whether single consecutive periods or combined periods are to apply, and the owners have not provided a substitute ship, then the charterers are entitled to terminate the contract. Notice to such effect should be given in accordance with the notice clause, clause 38. It should be noted that when an off hire event arises that may be covered by the owner's use of any accumulated maintenance days, the owner may use such accumulated days, which are on-hire

days, and they will not therefore contribute towards the calculation of off hire days that lead to any right of termination by the charterers

Termination by either party for cause under clause 31(b) of "Supplytime 2005"

5.256 Unlike clause 34 of "Supplytime 2017", clause 31(b) of "Supplytime 2005" grouped together *all* of the events (with some additions) under one composite termination for cause provision. Clause 31(b) included within it, as one of the events giving rise to a right to terminate repudiatory breach (see sub-paragraph (vi)), which would tend to suggest that the clause was designed to codify the parties' rights to terminate. Despite this, the better view is that the clause does not purport to be exclusive of common law rights in any way or to operate as a codification of a *numerus clausus* of termination events. The basic presumption is that clear and explicit words are necessary to contract out of the rights which parties would otherwise enjoy at common law: *Gilbert Ash Northern Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, *per* Lord Diplock at p. 717. Even in relation to the enumerated events, the list in the clause is prefaced with the words "without prejudice to any other rights which either party may have." Accordingly, it is submitted that the clause cannot properly be read as an all-exclusive code and that both parties enjoy any other rights to terminate the charterparty which exist at common law, absent the clause. The "Supplytime 2005" clause merely sets out additional rights of termination and lays down a procedure for termination or qualifies the circumstances in which certain events may qualify as a termination event (eg number of days during which it must prevail for *force majeure* and the circumstances in which a frustrating event such as the loss of the vessel will give rise to termination etc.). Clause 31(b)(vii) in relation to repudiatory breach (now excised from the early termination notice regime in "Supplytime 2017") as a termination "event" raises special questions in this regard which are considered below. The intention behind the predecessor provision in the "Supplytime 89" form (or before) is not revealed in the explanatory notes to that form or to those accompanying "Supplytime 2005" but if it was to create a code as may be arguable, then this has not been achieved as a matter of construction.

The "Supplytime 2005" procedure for termination for cause

5.257 The first part of para. (b) which sets out the procedure for "termination for cause" unfortunately remained unaltered from the former clause 26(b) of the "Supplytime 89" form, notwithstanding compelling criticisms made of it before the 2005 Revision (see Gay, *Problems and Pitfalls of the Supplytime 89 Charterparty* (2004), privately published). It therefore remains, as it was, a poorly drafted provision and an easy 'target' for the commentator: hence the wholesale revision of the "early termination" clause in the context of both "Supplytime 2005" and "Windtime."

5.258 An initial curiosity is the use, in the passive voice, of the transitive verb "to inform." This suggests, at least prima facie, that there needs to be a process by which one party is informed by the other party, or by another, of the occurrence or existence of one of the events or states of affairs listed in paras. (i)–(vii). It is suggested that the verbal phrase "becomes informed of" is to be read as meaning no more than "becomes aware of" (and the corresponding phrase "after such information is received" is naturally to be read as "after it has become aware of it"). Read in this manner, the first sentence means, and means merely, "If either party becomes [aware] of the occurrence of any event described in this Clause that party shall so notify the other party after [it has become aware of it]" and in any event within three days of becoming aware of it.

5.259 A further particular feature of the clause is that, even read as it is suggested it should be, once a party becomes aware of the existence of any of the events listed, that party is thereupon obliged to notify the other of it and must do so in all cases. The clause therefore does not appear to give a party any discretion in the matter; the wording is mandatory: "that party *shall*

so notify the other party" (see line 1181 of "Supplytime 2005"). The clause therefore contemplates a number of stages of which the first is the giving of notice when a party becomes aware that an event occurs. This creates the odd position that if the parties are both aware of an event having occurred, each is obliged to notify the other of it. Given the clear wording of the clause there would appear to be no room for the argument (based on the decision of Mustill J in *The Mozart* [1985] 1 Lloyd's Rep 239 at 245–246) that there is no breach of the notice provision in circumstances where the party to be notified was well aware of the fact which was to be notified from other (or its own) sources since to require the notice to be given in such circumstances was an exercise in futility (ie *lex non cogit ad inutilia*); cf. the doubts expressed on the *Mozart* approach in various cases, eg *The Happy Day* [2002] 2 Lloyd's Rep 487 and *Glencore Grain Ltd v Goldbeam Shipping Inc (The Mass Glory)* [2002] 2 Lloyd's Rep 244 at 254 and now the carefully reasoned rejection of that approach in *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 425 (Comm). In that case, Leggatt J stated at para. 49: "Whether a contractual obligation has arisen in any given case in principle depends on what the particular contract says, interpreted in accordance with the ordinary rules of contract interpretation. There is, in my opinion, no principle of law or even interpretive presumption which enables a contractual precondition to the accrual of a right or obligation to be disapplied just because complying with it is considered by the court to serve no useful purpose."

5.260 Accordingly, the clause predicates a first step under the early termination procedure which requires the parties to give notice to one another once they have become aware of one of the events having occurred. The purpose behind this express contractual obligation to disclose appears to be that a party who has relevant information as to the existence of a state of events entitling it (or the other party) to terminate is obliged to communicate it to the other party in order that the other party knows the facts and has the opportunity to exercise the right to terminate, if it so wishes.

5.261 The imposition of an obligation to notify of an occurrence raises the question of the consequences of a breach of that obligation. To take a hypothetical example: if the vessel is expropriated by a public authority on a Monday and the owner of the vessel is aware of it in circumstances where the charterer is not (yet) aware but fails to give notice of it to the charterer, then the charterer has lost the right to terminate (if it would have done so had it been notified of that occurrence). If the occurrence ends with the release of the vessel on the Wednesday of the following week without the charterer becoming aware of the occurrence for itself until it is over, then, even allowing for the running of the first period of three days allowed to the owner to notify the charterer and the second period of three days for the occurrence to continue, the charterer has lost the right to terminate. Similarly, if the occurrence does not end and the charterer becomes aware of it for itself two weeks later, while it may then invoke the termination procedure (after, oddly, having itself to give notice of the occurrence to the owner within three days of becoming aware of it) it has nevertheless been deprived of the opportunity to terminate the charterparty earlier. If a payment fell due which could have been avoided by the earlier termination, then that would be a potential head of loss. The situation as to the recovery of damages for loss of the right to terminate due to a breach of the obligation to notify would be complicated by issues as to whether and to what extent the charterer would have to establish that it would in fact have terminated either at all or at a particular time and whether the applicable principles would be those of loss of a chance (as in the cases involving professional negligence and missed opportunities) which are beyond the scope of this work.

5.262 The clause is silent as to the form and content of any notice which is required to be given under line 1181. Plainly if a party who becomes aware of an occurrence does not wish to terminate the charterparty but is simply punctiliously observing his obligation to notify, then it is enough that he gives the information. For the avoidance of doubt (and to avoid any argument

later) it would be prudent in every case to state that the notice is given under clause 31(b). If a party who becomes aware of the occurrence does wish to terminate, then, as a matter of language, it is open to it to do so without any need to state that that is its intention until the termination itself. However, in the context of the identically worded "Supplytime 89" provision, at least one arbitration award has interpreted the requirement to notify in such a case as including an implied additional requirement that the notifying party must give a clear statement that the notification is being given by it preparatory to or in contemplation of the exercise by it of the right to terminate if the occurrence has not ceased within the three days allowed (see Gay, "Problems and Pitfalls of the Supplytime 89 Charterparty" (2004), privately published). This is explicable on at least two bases. First, the purpose of a party notifying the other of a serious state of affairs which is such as to entitle it to terminate coupled with the provision that the occurrence must last for three days before the right to terminate can arise must arguably necessarily connote that the three-day period is allowed to the other party to seek to rectify the situation and to bring the occurrence to an end if it can. Secondly, in the case where a party notifies the other of an occurrence but does not intend to terminate, the recipient of that notice must itself give notice back in return (as noted above; see the words "If either party becomes informed of the occurrence of any event described in this clause that party shall so notify the other party after such information is received"). The only purpose of that is to notify the other that the recipient is intending to terminate and therefore the notice of the occurrence must, in that case, carry with it a statement of the intention to terminate to make sense of it.

5.263 Given that in a number of arbitration awards (referred to by Gay, *op. cit*.), it has been held that the giving of the notice in the correct manner and observing the correct time periods is a condition precedent to the right to terminate under clause 31(b), an understandable conclusion given its language, it is highly unfortunate that the clause is poorly drafted. There are two courses open to contracting parties in these circumstances. The first is that, if the charterparty is on the unamended terms of clause 31(b), then the safest course for the party who becomes aware of an occurrence which gives it the right to terminate and who intends to avail itself of that right if the occurrence continues is to give a notification which clearly and explicitly sets out that the notification is being given for the purposes of clause 31(b), that it requires that the occurrence be rectified (if applicable) within the three-day period and that if the situation is unchanged after the three-day period that it intends to terminate (or at the very least that it reserves its right to terminate the charterparty under clause 31(b)) by a further notice in due course. The second and perhaps the more preferable course is simply to replace clause 31(b) with a more clearly drafted provision based on "Supplytime 2017" or "Windtime."

5.264 Once the notification has been given, if the occurrence continues beyond the stipulated three-day period, then the party who wishes to terminate is then entitled to do so. No time period for doing so is stipulated by clause 31(b), which represents an unfortunate lacuna and a further matter which might usefully be corrected by an amendment. In the absence of an express time period, any termination must be exercised within a reasonable time period. Given that the periods which are expressly dealt with by the clause are all very short (two periods of three days), it is highly arguable that a similarly short period would ordinarily apply to any exercise of the right to terminate. It is therefore prudent for the terminating party to terminate very promptly after the three-day period expires.

The events which give rise to the right to terminate under clause 31(b) of "Supplytime 2005"

5.265 The events listed under clause 31(b)(i)–(iii) are largely self-explanatory and were with one exception unaltered from "Supplytime 89." The 2005 revision made it clear that, in relation to requisition and confiscation dealt with by sub-paras. (i) and (ii), arrests of the vessel for the

purposes of obtaining security are not within the provisions, thereby closing off an unmeritorious argument which was sometimes advanced. Clauses 31(b)(iv)–(vi) in relation to the events referred to therein have been amended. The "repudiatory breach" event (sub-para. (vi)) remained unamended and, as before, raises some special issues.

5.266 "*Loss of Vessel*." Under clause 31(b)(iv) the loss of the vessel, whether as a total or a constructive total loss, or the vessel being missing, gives a right to terminate. While the moment at which there is a constructive total loss of the vessel may be less easy to determine than when the vessel is destroyed or sinks for the purposes of the notification procedure, the concept is clear. The obligation on the owners to notify will be of importance here since when the owners are claiming *vis-à-vis* their hull underwriters that the vessel has become a CTL, they should at the same time be informing the charterers of the same fact. The amended version of sub-para. (iv) gives a much more concrete expression to the right of the owner to keep the charterparty afoot by putting in a substitute vessel under clause 21. The "89" version left it open to when the owners were to provide the substitute, if they were going to do so. This occasionally led to issues where an owner spun out affairs leaving the charterer uncertain as to whether it could or could not terminate. The 2005 revision lays down a specific timetable which requires the owner to make his intention clear and to act on it, all within 14 days.

5.267 "*Breakdown*." Under clause 31(b)(v), the right to terminate arises if there is a "breakdown of the Owners' equipment or vessel" which "result[s] in the Owners being unable to perform their obligations" under the charterparty for a period which exceeds that which has been specifically agreed between the parties and stated in Box 33. This curiously gives the owner the right to terminate the charterparty in the event of a breakdown in what it is meant to be providing to the charterer. In other charterparty contexts (or hire contracts) the right to terminate is one usually given only to the charterer (or hirer). Consideration should be given to restricting the right to one exercisable only by the charterer. Certainly, the clause makes little sense in the context of an owner's right to terminate when the new wording added to the "event" in the 2005 Revision is considered (requiring the owner to remedy the defect or provide a substitute vessel).

5.268 The concept of a "breakdown" is tolerably clear and is likely to be construed in a manner similar to that adopted in the analogous concept of off hire clauses such as clause 15 of the NYPE form: see Coghlin, Baker, *Time Charters* (7th edn, 2014), paras. 25.29 and 25.30. The words "must be construed in a popular and reasonable sense" (*per* Lord Ardwell in *Giertsen v Turnbull* 1908 SC 1101 at 1110) and the relevant focus is on factual existence of a breakdown (the vessel or the piece of equipment ceasing to function properly) rather than on the cause of that breakdown, be it internal (such as a bearing failing) or external (such as shore crane striking a towing winch) and which may or may not predate the breakdown incident: see *The Afrapearl* [2004] 2 Lloyd's Rep 305 *per* Clarke LJ at 313 and *Giertsen v Turnbull* (progressive deterioration results in a "breakdown" when the deterioration becomes such as to make it reasonably necessary to interrupt the service to make a repair).

5.269 The breakdown must be one which results in the owners being unable "to perform their obligations hereunder." This prevents a breakdown in an otherwise important piece of equipment which is not required for the particular service or services for which the vessel is hired as described in Box 17 ("Employment of Vessel restricted to [. . . .]") from giving rise to a right to terminate. If the hirer hires an offshore vessel solely to carry supplies and personnel between a shore depot and a rig, then if the vessel's towing winch becomes inoperative this has no effect on the ability to perform their obligations hereunder. While the contractual definition of the vessel contains those particulars and while the owner may still be obliged to maintain and repair, as the breakdown does not prevent the charterer from getting the full benefit of the services for which it hired the vessel, there is no right to terminate; *aliter* if the offshore vessel was to be used to tow and position accommodation barges. More difficult is the extent to which the breakdown must

affect the performance of the owners' obligations to provide the vessel and to render the prescribed services with and by her. It is unclear whether the qualification refers to a total inability to perform the charterparty *tout court* or whether it is directed at an inability to perform the particular service then required of the owner, akin to the concept adopted in off hire clauses which speak of events which "prevent the full working of the ship": see eg *The Berge Sund* [1993] 2 Lloyd's Rep 453 and *The Aquacharm* [1982] 1 Lloyd's Rep 7. In the example just given, if the breakdown of the towing winch occurs but, at the time it does so, the vessel is engaged in running the moorings of the barge, laying out her ground tackle and securing her to mooring points, with no towage service required and she is fully able to do the work as envisaged without the winch, then it is likely that the drastic remedy of termination would be held not to be engaged and an analogy drawn with the off hire cases (as Gay suggests, *op. cit*.). Similarly, as with the off hire cases, where there is a breakdown which causes a partial prevention of the working of the vessel (ie the towing winch breaks down and can only run at reduced load, thereby meaning that towage of the barge can only be affected in very clement conditions necessitating interruptions and delays), this is likely to give rise to a right to terminate: cf. *Tynedale Shipping v Anglo-Soviet* (1936) 41 Com Cas 206 and see *Wilford on Time Charters* (5th edn, 2003), at para. 25.18.

5.270 The breakdown must result in prevention from performance of obligations which must exceed the period agreed and stated in Box 33 and, the wording continues not very felicitously, "[the owners] have not initiated reasonable steps within 48 hours to remedy the non-performance or provided a substitute vessel pursuant to Clause 21 [sic]." These words are new and are badly drafted (as the clumsy language foreshadows). The explanatory notes are silent as to the reasons which lay behind the amendment. There are at least two difficulties which exist in the "Supplytime 2005" version.

5.271 The first and most significant is that it is not stated from *when* the 48 hours within which the owner is to initiate reasonable remedial steps or to provide the substitute vessel are to run. One possibility is that it is from the time of the breakdown itself. This appears to be the reading adopted by BIMCO. The explanatory notes state: "refers to a failure on the part of the Owners to perform their obligations under the Charter Party. The Owners must initiate steps to rectify the failure to perform within 48 hours or provide a substitute Vessel in accordance with clause 21, failing which the Charterers are entitled to terminate the agreement." While this is not explicit, this appears to link the 48-hour period to the obligation of the owner to maintain the vessel under clause 3(b). On this reading, in the event of a breakdown the right to terminate arises in two cases. The first is where the owner initiates the reasonable steps or provides a substitute vessel within 48 hours but the breakdown lasts longer than the Box 33 period; in this case the charterer (or the owner: the oddity referred to above) may terminate on the expiry of the period in Box 33.

5.272 The second is where the owner takes no steps to remedy (or no "reasonable" steps: a source of potential dispute considered below) or to provide a substitute within the 48 hours; in that case, the charterer (or the owner!) has a right to terminate as soon as the 48 hours expires, notwithstanding that the breakdown is one which has not yet lasted beyond the Box 33 period. This reading is a very curious one if it is what BIMCO intended. It does not fit with the period which must be exceeded and would give a right to terminate within a right to terminate. It also posits a ludicrous situation where the charterer can terminate within 48 hours of a breakdown in certain cases and seems to require the owner to act immediately or, more fanciful still, to provide a substitute vessel within 48 hours. The other possible and, it is suggested better, reading, more consistent with the language, is that it is a period of 48 hours which runs immediately following the expiry of the Box 33 stated period. The effect is that notwithstanding the period has expired, the owner has a further grace period of 48 hours to sort matters out. This at least avoids the conflict between the Box 33 period and the 48-hour period. But this is potentially productive of uncertainty as to when the right to terminate arises and raises the second difficulty.

5.273 In the case of the substitution of the vessel the owner has 48 hours to provide one in accordance with clause 21: this would require the owner actually to have physically provided the substitute and therefore also to have obtained the charterer's consent (not to be unreasonably withheld) within the 48-hour period: clause 31(b)(v) focuses on the provision of the substitute vessel which is at least a concrete act capable of ready identification. The other option to the owner is "to initiate reasonable steps within 48 hours to remedy the non-performance." This is a recipe for dispute since it only requires to take *steps* to remedy, which does not mean that the defect or failure is required to be remedied *per se* within the 48-hour period. Further, it is only steps which are reasonable, which connotes steps which are reasonable for it in all the circum-stances and, falling short of "best endeavours", allows it to take any course of action which is a reasonable one. This leads to the very unsatisfactory situation that an owner who has done nothing for the period stated in Box 33 can, at the end of the period, bestir itself and call in a suitable repair company. If the repairer is unable immediately to attend or the works are long-drawn out, the charterer may not terminate and the situation is left open-ended.

5.274 If the "breakdown" event is for some reason to be retained in any form whatsoever (rather than simply deleting it altogether and moving over to an off hire solution as adopted in "Supplytime 2017" and "Windtime"), the safest and most sensible course is simply to delete the new words added by BIMCO in the 2005 revision. Perhaps the easiest course is to revert to and adopt the simplicity and clarity of the "Supplytime 89" equivalent provision, clause 26(b)(v) which reads:

> If, at any time during the term of this Charter Party, a breakdown of the Owners' equipment or Vessel results in the Owners being unable to perform their obligations hereunder for a period exceeding that stated in Box 32 [now 33], unless the Owners provide a substitute vessel pursuant to Clause 18 [now 21].

5.275 "*Force Majeure*." This wording links the *force majeure* event to one which "hinders or prevents the performance of the charterparty." It would have been preferable simply to link the "event" to one falling within the new *force majeure* provision set out in clause 32. The sub-paragraph was recast in the 2005 revision to provide for, what must have been intended as, a clearer starting point for the *force majeure* event. It is, unfortunately, not well worded. It is provided that the 15-day period runs "from the time at which the impediment causes the failure to perform if notice is given without delay or, if notice is not given without delay, from the time at which notice thereof reaches the other party": the purpose appears to be that where party A notifies party B on a Monday of a *force majeure* event which occurred on the Saturday (that being, presumably, "prompt"), then the right to terminate accrues 15 days from the Saturday, not the Monday but where A notifies B a week later on the Monday following and the notice due to an e-mail problem is not received until the following Friday, then the 15 days runs from the Friday (even if B knew himself earlier and notified A). Again, a simpler course is simply to link the starting time to the operation of the *force majeure* event.

5.276 "*Repudiatory Breach*." Clause 31(b) includes within the "events" for which the charterparty may be terminated "If either party is in repudiatory breach of its obligations hereunder." When coupled with the notification provisions, this seems to require a party once it is aware that it is in repudiatory breach to have to notify the other of it (see eg Gay (2004), referring to a majority award – with a QC dissenting – which accepted that "a party has to confess its own repudiatory breaches of charterparty"). In reality, this is unlikely to arise. If a party alleges that the other is in repudiatory breach, it is commonly the case that this is hotly contested in which case the other party, not believing itself to be in such breach, is not "informed" or aware of it and cannot and need not notify it. If a party is in repudiatory breach and knows it, the other party will know it too and the failure to notify by the first party is either otiose or without separate legal consequence. In any event, as the notification under clause 31(b) need not be in any particular form,

the repudiatory conduct will by itself by a "notification" of the repudiatory breach. Similarly, and *a fortiori*, in the case of a renunciation, where a party by his stance or statements evinces an intention not to be bound, he thereby notifies the other party at one and the same time of the renunciation (and the repudiatory breach which it constitutes).

5.277 More significant is whether the victim of the repudiatory breach is obliged to go through the procedure set out in clause 31(b)(vi) or whether it can rely upon its common law right to accept the repudiatory breach (and terminate) immediately. If sub-paragraph (vi) is mandatory, then clause 31(b) obliges the victim of the breach to give the contract-breaker a three-day period, as a sort of *locus poenitentiae*, in which he may alter his stance by remedying the repudiatory breach (if he can) or withdrawing the renunciatory stance (if he can). It has apparently been held by a tribunal that this is indeed the effect of the clause, with the purpose being to give the parties a "cooling-off period" (rather in the same way as an anti-technicality provision in the context of the non-payment of hire) in which the errant party can mend (quickly) his ways (cited by Gay (2004)).

5.278 There are arguments both ways. It may be said that there is little point in the parties having agreed to bring a repudiatory breach within the clause 31(b) procedure, if, irrespective of sub-paragraph (vii), each party still enjoys its common law right to terminate upon breach and without having to wait: sub-paragraph (vii) becomes effectively meaningless. However, if viewed as giving the party, faced with a breach, an optional mechanism to exercising its common law right to terminate, it may be said to have some utility; on this view, while that party can terminate at will, it has a choice between doing so and, instead, employing the clause 31(b) mechanism to see if the other party intends to throw up the contract being a mechanism under which it can explore (if it wishes to do so), whether the party in breach will back down or remedy the situation. That may be said to be an additional procedure of some utility in certain cases. On the other hand, treating the clause 31(b) mechanism as the only way in which a repudiatory breach can be relied on as a ground for termination is inconsistent with the language of the reservation of common law rights expressly set out in the opening words of the clause ("without prejudice to any other rights which either party may have"). Further, while the mechanism may be workable in certain cases, in others it may produce an unacceptable result: for example, if the breach is one which is incapable of remedy (ie where the vessel has been employed elsewhere under a more lucrative contract and cannot and will not be made available to the charterer within three days on any view) or where the breach is clearly renunciatory and the charterer is unwilling to accept half-hearted protestations that the owner intends to comply but is experiencing difficulties, why should the party be prevented from terminating?

5.279 It is submitted that the better reading of clause 31(b) is that it offers an additional mechanism for termination in the event of a repudiatory breach of a "softly softly" variety which does not displace the ordinary common law right to terminate upon breach if so desired. While of rather Delphic assistance, given the absence of reasons and of identification of the specific judge, it may be noted that permission to appeal was given in respect of the tribunal's decision referred to above although the appeal was never proceeded with (see Gay (2004)) which suggests that the "complete code" construction is arguably at least open to serious doubt.

PART D. THE "WINDTIME" FORM: A "SUPPLYTIME" VARIANT

A time charterparty for a special offshore service

5.280 The quest for alternative and renewable energy sources has led to the large-scale development of offshore wind farms. Since the first off Denmark in 1991, these have grown in number and sophistication with the world's largest offshore wind farm, the London Array, located in UK waters. Even larger projects for the United Kingdom are under development or in the

planning stage. Around the world, China has developed its first offshore wind farms at Jiangsu and Donghai Bridge, and in the United States the go ahead has been given for the development of wind farm sites off Rhode Island and Massachusetts. As the BIMCO explanatory notes to the "Windtime" form state, "In this rapidly developing sector, installation and support functions are entirely reliant on the use of specialised vessels ranging from jack-ups to small, high-speed passenger craft. Up until now, offshore wind farm developers have contracted the services of these vessels using standard forms of contract written for the oil and gas sector which are not ideal for the purpose and often require heavy amendment to adapt them."

5.281 As set out in the notes to the "Windtime" form, in 2010 representatives of the wind farm sector operating small personnel transfer or crew transfer vessels (CTVs) and support vessels approached BIMCO with a request for assistance in developing a standard contract specific to their needs. BIMCO discovered that there was considerable interest in this documentary project not only from the owners of these vessels, but also from the charterers who are reliant on these small craft during installation work and for ongoing support. As usual the industry adopted and adapted the nearest modern standard form contract, "Supplytime 2005." But as the BIMCO explanatory notes state "While this sector has become familiar with BIMCO's widely used SUPPLYTIME agreement, it contains a number of provisions that are simply not relevant to wind farms while lacking specific clauses needed by the trade. This has resulted in an increased amount of work in preparing contracts and often widely varying sets of terms and conditions offered by charterers."

5.282 A distinguished drafting sub-committee chaired by Mark Meade of Turbine Transfers Ltd and including Fabien Lerede of the Standard P&I Club and Chris Kidd and Mark de la Haye of Ince & Co and with representatives of major wind farm sector parties set to work. The result is BIMCO's "Windtime" form, published in 2013.

5.283 It is important to note that this form is based on the "Supplytime 2005" form, even though at the same time that the drafting of "Windtime" was being undertaken, work was being started on the updating and redrafting of "Supplytime 2005" to produce "Supplytime 2017." The "Windtime" form then, in terms of the evolutionary progression of BIMCO offshore forms involving knock-for-knock and mutual indemnities, is based on "Supplytime 2005" but has drawn on more modern elements from "Towhire 2008", but it does not represent the latest iteration of the BIMCO concept in knock-for-knock and mutual indemnities which is set out in "Supplytime 2017." The separate drafting processes for the two forms has left a number of significant differences between the "Windtime" and "Supplytime 2017" approach.

5.284 For a fuller account of the background to and purposes of the "Windtime" form, see Overby, "Key Aspects of the New Windtime Form", in B. Soyer and A. Tettenborn (eds), *Offshore Contracts & Liabilities* (2015).

The special aspects of the "Windtime" form

5.285 The long title of the form describes its special sector nature: "Standard Offshore Wind Farm Personnel Transfer and Support Vessel Charter Party." As with the "Towcon" and "Towhire" and "Supplytime 2017" forms, "Windtime" is divided into two main parts. The intended scope of contractual coverage intended by the drafters was designed to be limited to covering vessels used in the transfer of personnel and equipment to and from offshore wind farm installations.

5.286 The form is self-evidently very closely modelled on "Supplytime 2005." As the explanatory notes state: "The Charter Party is modelled on SUPPLYTIME 2005 to which the wind farm sector is already familiar, but applies common amendments and additional clauses to create a trade specific contract." The principal differences are therefore of two kinds: *first*, there are modifications to the "Supplytime 2005" model to reflect the fact the service contemplated is that

of smaller craft than traditional OSVs (although these may be used for the services) providing shorter transit services shuttling workers and supplies out to the wind farm construction sites; *secondly*, changes to the "Supplytime 2005" model simply as a matter of updating standard provisions in the form, such as the knock-for-knock and mutual indemnity provisions, which are capable of applying equally in the "Wind Farm Personnel Transfer and Support Vessel" sector as in the "Offshore Support Vessel" (2017) or "Offshore Services Vessel" (2005) sector.

5.287 This section therefore concentrates only upon the materially different provisions in the "Windtime" form. Generally, reference can be made to the commentaries on the "Supplytime" form, both 2017 and 2005, to which most provisions in the "Windtime" form either identically or substantially conform. Various absences will be noted where the complexity or nature of the subject-matter of the "Supplytime" provision is simply inapplicable in most CTV and wind farm support vessel contexts (eg "lay-up").

Definitions

5.288 The "Windtime" form uses the "Supplytime 2005" definitions of "Owners'" and "Charterers' Group" and therefore does not extend as far as the wider concepts of "Group" in "Supplytime 2017." In relation to the charterer's "Group", the older and more restrictive wording in relation to "customers (having a contractual relationship with the Charterers, always with respect to the job or project on which the Vessel is employed)" is therefore retained. Consideration should be given to deleting these definitions and replacing them with the 2017 wording which makes knock-for-knock more effective. Similarly, the rather more specific definition of an "Offshore Unit", abandoned in "Supplytime 2017", has been kept and modified in the wind farm context, but given the specific sector in which this form is employed, that is unlikely to be unduly restrictive: "'Offshore Unit' shall mean any installation, structure, mobile unit and/or vessel used in offshore wind farm construction, cable-laying, repair, maintenance, power generation or distribution."

5.289 The *ad hoc* definitions used by the parties in Part I to define the nature of the services are amended to remove any reference to "offshore" as the operations are not usually of this nature. See in relation to clause 7(a) and the employment of the vessel, where the drafters state: "The term 'offshore activities' used in SUPPLYTIME has been deleted since wind farm sites may be, strictly speaking, located 'offshore', 'inshore' or 'near-shore'."

Clause 4: condition of the vessel

5.290 This corresponds to the "Supplytime 2005" (and 2017) position and the charterparty provides for an "Annex A", detailing the vessel. Given that certain CTVs or similar vessels are small and may not be classed, clause 4 requires them to be certified by the appropriate authority: "in the event the Vessel is not Classed, the Vessel shall be approved by the relevant regulatory authority."

Clause 6: vessel audit and survey

"6. Vessel Audit and Survey

(a) Prior to delivery the Owners shall provide the Charterers with such information and documentation as the Charterers may reasonably require to conduct a health, safety, quality and environmental (HSQE) vessel audit, upon reasonable notice.

Provided that it can be accomplished at ports of call, without hindrance to the working or operation of or delay to the Vessel, and subject to prior consent, which shall not be unreasonably withheld, the Owners

shall provide full access to the Vessel prior to delivery for the Charterers or their appointed auditor to carry out a HSQE vessel audit and any reasonable actions required to be carried out by the Owners shall be implemented within a reasonable time. The Owners and the crew shall assist the Charterers with the audit. The parties shall bear their own expenses for such surveys.

(b) The Owners and the Charterers shall jointly conduct an in-water survey (or if stated in Box 17 appoint an independent surveyor to conduct such survey) for the purpose of determining and agreeing in writing, the condition of the Vessel, any equipment specified in ANNEX "A", and the quality and quantity of fuel, lubricants and water at the time of delivery and redelivery hereunder. The Owners and the Charterers shall jointly share the time and expense of such surveys."

5.291 The special nature of the services being performed by CTVs and support vessels in this sector, particularly in the context of the carriage of personnel, means that there are additional survey and audit requirements: these are addressed by para. (a). The notes state: "In order to reflect industry practice, WINDTIME incorporates a health, safety, quality and environmental (HSQE) vessel audit clause in conjunction with the traditional vessel survey clause." Paragraph (b) addresses the "afloat" or "in water" surveys which these craft more typically undergo, in place of a full on-hire survey.

Clause 8: master and crew (special features)

"8. Master and Crew

(a) Working Hours

(i) Working Day – The Master shall carry out his duties promptly and the Vessel shall render all reasonable services within her capabilities during the Working Day at such times and on such schedules as the Charterers may reasonably require without any obligations of the Charterers to pay to the Owners or the Master, officers or crew of the Vessel any excess or overtime payments.

(ii) Excess Working Hours – Should the Charterers require the Vessel to work in excess of the agreed Working Day in any one day they shall, as soon as practicable, notify the Owners, provided that such excess shall not result in the crew working hours exceeding those permitted by applicable laws and regulations. If the Charterers' use of the Vessel exceeds the Working day they shall pay the Owners for each extra hour at the Excess hourly rate stated in Box 22. Crew working hours for a Working Day shall include time taken to refuel and ready the Vessel at the beginning of the Working Day as well as shutting the Vessel down and ensuring that it is safe to be left unattended at the end of the Working Day.

(iii) Change in Working Hours – Should the Charterers require the Vessel to increase the Working Day to a twenty-four (24) hour working day, they shall give the Owners the number of days' notice stated in Box 25.

[. . . .]

(e) Offshore Accommodation and Meals

If the Owners and the Charterers agree that the Vessel shall remain offshore overnight during some or all of the Charter Period then, notwithstanding Clause 10 (Owners to Provide), accommodation and meals for the Master, officers and crew shall be provided and paid for by the party named in Box 16 or, if left blank, by the Charterers."

5.292 Clause 8 corresponds to the usual terms of "Supplytime 2005" (and 2017) in relation to cargo documents and the absence of bills of lading; the services of the crew and the "employment" clause under which the charterer gives orders and directions but the master has the sole right to determine whether the operation of the vessel can be safely undertaken. In addition, and to reflect the special nature of the vessels and services, a system of "Working Hours" (to be specified in Part I) has been introduced. The explanatory notes give the background to the need for this supplementary and different regime: "One of the characteristics of the operation of personnel

and equipment transfer vessels is that at present they do not commonly work 24 hours a day on a continuous basis. The practice of the trade is to agree shift periods and rates of charter hire for specifically agreed periods. The term 'Working Day' that appears in this Sub-clause is therefore included in the definitions section where further reference is made to Box 24 where the parties should state the actual times and number of hours *per* day that should constitute a Working Day for the purpose of their agreement."

5.293 Accordingly, the vessel will effectively clock on and clock off and the vessel and master will be at the charterer's service only during the agreed working day of the contract. Further, if the charterer wishes to use the vessel outside the agreed working day in any one day, a notification procedure is provided for. It should be borne in mind, as reflected in clause 8, that there may be statutorily limited working hours: consequently, the owner's ability to agree to additional working hours is restricted by the crew working hours which must not exceed those permitted by any applicable laws and regulations. Paragraph (e) deals with accommodation and meals. The notes explain the background to the need for this level of detail in the "Windtime" form: "A common issue of dispute in the wind farm sector relates to the payment of accommodation and meals for the Master, officers and crew should the vessel should remain offshore overnight at an accommodation facility. This Sub-clause has been included together with Box 16 to help resolve this issue. The parties should state who is to provide and pay for offshore accommodation and meals, failing which the responsibility will rest with the charterers.'

Clause 9: conduct

"9. Conduct

(a) If the Master has reason to be dissatisfied with the conduct of any persons placed on board the vessel by the Charterers, the Master shall have the right to refuse to carry any such persons. On receiving particulars of the complaint the Charterers shall promptly investigate the matter and if the complaint proves to be well founded, the Charterers shall as soon as reasonably possible take appropriate disciplinary action against such persons or, in the case of sub-contractors, require their employers to take such action.

(b) If the Charterers have reason to be dissatisfied with the conduct of the Master or any Officer or member of the crew, the Owners on receiving particulars of the complaint shall promptly investigate the matter and if the complaint proves to be well founded, the Owners shall as soon as reasonably possible make appropriate changes in the appointment."

5.294 It is customary in all usual time charter provision to confer upon the charterer the right to complain about the conduct of the master and crew and to require the owner to investigate the same and take any necessary remedial action. The "Windtime" form makes converse provision given problems that can (and do) crop up with members of the charterer's own personnel or others whom the charterer is transferring to and from the wind farm or other side. Given the small size of certain vessels, there may additionally be safety concerns: "Since inappropriate behaviour on board could very easily compromise the safety of the vessel and those on board, the Master is given the right to refuse to carry charterers' personnel if their conduct is unacceptable." Paragraph (a) therefore deals with the issue of the "problem passenger", making the charterer responsible for any necessary disciplinary action.

Clause 12: bunkers

5.295 Clause 12 is a much simplified version of the "Supplytime 2005" provision. While it obliges the charterer to provide fuel for the vessel and specified the quality requirements, the machinery for on-delivery and on-redelivery bunkers has been dispensed with as simply

unnecessary (cf. the similar approach taken in relation to barges in "Bargehire 2008"). The practice of the CTV and support vessel industry is described as the reason for this:

> One of the distinctive features of WINDTIME is that charterers do not take over and pay for the bunkers as they would under a conventional time charter party. This reflects the practice of the trade and the fact that transfer vessels normally carry only a small quantity of fuel. Instead, the charterers will pay at the end of the charter period for the bunkers actually consumed. As a result there is no need in WINDTIME for a provision dealing with the minimum quantity of bunkers required on delivery and redelivery.

Clause 16: knock-for-knock and mutual indemnities

5.296 As the drafters explain in the explanatory notes, the knock-for-knock regime adopted in "Windtime" is broadly similar to that in "Supplytime 2005": "WINDTIME incorporates the knock for knock liability regime that provides the cornerstone of many BIMCO standard offshore contracts and which has proved so effective in the offshore oil and gas sector since its introduction in the mid-70s. [. . .] The liabilities and indemnities clause in WINDTIME is closely modelled on the equivalent clause in SUPPLYTIME but with the aim to further improve the wording and tailor it to better suit the wind farm industry."

5.297 The main features of the "Windtime" knock-for-knock regime are as follows:

i First, the scheme of extensive exceptions to knock-for-knock as set out in clause 14 of "Supplytime 2005" has been retained. The "purer" or cleaner version which was adopted in the later version of "Supplytime 2017" was not introduced at this stage (presumably because it had not yet been decided upon by the separate sub-committee charged with the "Supplytime" revision).

ii Secondly, a minor change was made to both para. (a)(i) and (a)(ii) to include within the core phrase "caused wholly or partially by the act, neglect or default" a reference to gross negligence, the "Windtime" explanatory notes stating: "The reference to 'neglect' (ie negligence) found at lines 637 & 660 of SUPPLYTIME 2005 has been amended in WINDTIME to 'gross neglect' to clarify that the knock for knock indemnity expressly includes 'gross neglect', ie gross negligence. The position under English law is that the difference between 'negligence' and 'gross negligence' is one of degree, not kind." It is suggested that the term "neglect" on its own would cover all forms of negligence and that this "Windtime" addition is unnecessary; it has not been taken up in the later revision of "Supplytime 2017."

iii The "consequential loss" provision has not followed the heavily criticised "Supplytime 2005" version but instead the drafters opted for a provision based on the "Towcon 2008" version, discussed in detail above in Chapter 4. Clause 16(b) of "Windtime" therefore excludes separately (albeit, confusingly, still under the heading "Consequential Damages") loss arising "indirectly from the performance or non-performance of this Charter Party, and whether or not the same is due to negligence or any other fault on the part of either party, their servants or agents" and in addition, by way of a separate sub-paragraph "any consequential loss or damage for any reason whatsoever, whether or not the same is due to any breach of contract, negligence or any other fault on the part of either party, their servants or agents." The explanatory notes therefore are probably correct in stating:

> When assessing a claim for loss, if the loss is of "profit", "use" or "production", whether such loss is direct or indirect arising out of the performance or non-performance of the contract and regardless of fault, the claim is excluded under Sub-clause (i). If the claim for loss does not fall under Sub-clause (i) but it is an indirect or consequential loss, then it will be excluded under Sub-clause (ii). If the party defending the claim for loss is unable to establish that the claim falls under the exclusions in Sub-clauses (i) and (ii) then damages for the loss will be recoverable by the claimant in principle.

iv Unusually "Windtime" in its clause 16(c) provides for an express limitation of liability in respect of loss due to certain breaches. The rationale for this was by way of *quid pro quo* for the exceptions to the knock-for-knock provisions ("It should be noted that although the number of events that give rise to liabilities under WINDTIME is greater than those under SUPPLYTIME, this has been counterbalanced by the introduction of a cap on certain contractual liabilities"); the "Supplytime 2017" solution has been a different one, simply deleting virtually all importunate exceptions. Care needs to be taken in agreeing the relevant limitation amount specifically, otherwise liability is capped at 20% of the total sum of hire payable:

> Limitations
> Except as provided in the following Clauses:
>
> *Clause 10 (Owners to Provide);*
> *Clause 11 (Charterers to Provide);*
> *Clause 12(c) (Bunkers – Liability);*
> *Clause 14 (Hire and Payments);*
> *Clause 16(a) (Liabilities and Indemnities – Knock for Knock);*
> *Clause 16(f) (Liabilities and Indemnities – Toxic or Noxious Substances);*
> *Clause 17 (Pollution);*
> *Clause 18 (Wreck Removal);*
> *Clause 20(c) (Saving of Life and Salvage); and*
> *Clause 21 (Liens and Claims);*
>
> the liability of either party shall in no event whatsoever exceed the amount stated in Box 31 (or, if left blank, twenty *per* cent (20%) of the total sum of hire due pursuant to the Charter Period stated in Box 9) for any loss, damage, delay or expense of whatsoever nature, and howsoever arising out of the Charter Party.

Lastly, as noted above, clause 16(d) specifically addresses the problem of to which breaches of contract the knock-for-knock regime applies and the issue of whether this applies to repudiatory or renunciatory breaches by simply clarifying that it is of no application in this event. The impact of this on the application of the regime to lesser but *soi-disant* "radical" breaches (to use the term employed by Teare J in *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177) has been considered in Chapter 4 and above. The "Windtime" provision reads:

> (d) Mutual exclusion
> In the event that either party fails to perform the Charter Party, or unequivocally indicates its intention not to perform it, in a way which thereby permits the other party to treat the Charter Party as at an end other than under the terms of the Charter Party, any such claim that the other party may have shall not be limited or excluded by the terms of this Charter Party.

Clause 31: early termination

5.298 The "Windtime" form adopts a form of early termination provision which is very close to that used in "Supplytime 2017"; as to this see above. The difficult and much criticised equivalent in "Supplytime 2005" was not used. The drafting history is not clear from the explanatory notes either of the "Supplytime 2017" form or of the "Windtime" form as to whether the revision of the "Supplytime 2005" form version was first tackled by the drafters of "Windtime" and then revised in minor respects when drafting "Supplytime 2017." However, textual indications in the "Windtime" notes suggest that it was this sub-committee which carried out the first major revision and redrafting of clause 31 of "Supplytime 2005."

CHAPTER 6

Standard form contracts: (IV) The BIMCO "Bargehire 2008" Form

PART A. THE GENESIS OF THE "BARGEHIRE" FORM

6.1 The publication by BIMCO of the standard form contracts "Towcon" and "Towhire" for ocean towage in 1985 was followed by consideration of a possible similar standard form contract for a common form of tow, being the larger forms of ocean-going and offshore barge. The large expansion of offshore activities connected with offshore construction projects and oil exploration and production had led to the increased use of specialised barges and the hiring in of these from barge owners by offshore operators effectively on bareboat or demise terms. BIMCO had a model in terms of a bareboat or demise charterparty in its form "Barecon 89", introduced in 1989, but the simple use of this form was inappropriate since, as the explanatory notes to the "Bargehire 2008" form state, "barges are often chartered with owner's insurance made available to the charterers. In this mode the contract is more akin to a time charter. However, it differs from that form of contract in that the owners exercise no control over the barge during the contract period and will rarely even know the location of the barge." The result was the drafting of a dedicated barge demise charter being BIMCO's "Bargehire 94." The aim was:

> to provide a balanced and practical agreement to serve the needs of those involved in the chartering of unmanned non self-propelled barges used for both offshore and civil work. The charterers of large and smaller barges are usually oil companies, construction contractors and fabrication yards who use the barges for transportation and storage of heavy and voluminous cargoes, such as modules for offshore platforms, in long and short term contracts.

6.2 The form proved very popular. "Bargehire 94" came up for revision in 2007. It therefore was revised at the same time as the "Towcon" and "Towhire" forms relating to the engagement of towage services. The revision sub-committee was made up of representatives from leading barge owners, charterers and brokers and a representative of the Standard P&I Club (one of the major P&I Clubs in this niche sector). The drafters of the revised "Bargehire 2008" explained their purpose in the explanatory notes as being a limited one, leaving the original form unchanged as much as possible. Given the different natures of the two types of contract, one for towage services and the other for a hire of a barge, it is not surprising that the revision of the "Bargehire" form followed a different approach:

> BARGEHIRE 94 has served this particular sector of the industry well over the past 15 years. In 2007 it was decided that to ensure that BARGEHIRE kept pace with commercial practice, the form should undergo a modest revision. The key objective of the revision process was to address the insurance provisions of BARGEHIRE which were felt to not be as clearly worded as they could be. In the new edition, Hull and Machinery insurance and P&I insurance have been split into two separate clauses. Because of the way BARGEHIRE is used commercially and in particular where the charterers are permitted to rely on the owners" P&I insurances, it is essential that the insurance provisions clearly spell out the insurance implications to the parties. The new edition of BARGEHIRE more clearly isolates the various insurance options and their associated liabilities. With the new structure charterers should not be in any doubt as to the extent of their cover and their liabilities when named on the owners" P&I cover as joint entrants. [. . .]
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> The revision process has also provided the opportunity to update some of the standard BIMCO clauses, such as the Law and Arbitration Clause, to the latest editions. Some new features have been introduced, such as provisions relating to the health and safety of ballast engineers placed on board the barge

PART B. THE “BARGEHIRE 2008” FORM

A species of demise charterparty

6.3 In general terms, under “Bargehire 2008” the owner of the barge delivers her, being typically (but not always) unmanned and not self-propelled to the charterer who takes possession of the barge for a defined period and who operates the barge for its own account. The transfer of possession of and sole control over the barge from the barge-owner to the charterer (recognised and endorsed by clause 13 of the form: see below) is the classic indicium of a demise or bareboat charterparty. The position was described in *Baumwoll Manufactur Von Scheibler v Gilchrest & Co* [1892] 1 QB 253 at 259 *per* Lord Esher MR; approved in *Baumvoll v Furness* [1893] AC 8 at 14, as being the following: while the question whether a charterparty is one of demise will turn always on the correct interpretation of the charter in question, a critical test is whether under the charterparty terms the owner of the vessel has “parted with the whole possession and control of the ship, and . . . has given to the charterer a power and right independent of him, and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship.”

6.4 A detailed description of the general nature of a demise charterparty is beyond the scope of this book. For a detailed account of the BIMCO “Barecon 2001” form demise charter, see Mark Davis, *Bareboat Charters* (2nd edn, 2005) (“*Davis*”). A good overall summary is contained in *Scrutton on Charterparties and Bills of Lading* (23rd edn, 2015), at paras. 1–009–1–016 and for an excellent recent analysis see *Carver on Charterparties* (2017), chapter 6 by Stephen Hofmeyr QC (“*Carver*”). The terms “demise and “bareboat” are largely interchangeable: as it is put in *Scrutton*, at para. 1–009, footnote 17 “A charter by demise of a ship without master or crew is sometimes called a “bareboat” or “net” charter”; cf *Carver* at paras. 6–002 and 6–003).

6.5 The following features may be noted in considering the “Bargehire 2008” form.

i A demise charter involves a bailment of the vessel with possession of the vessel passing to the charterer, cf. the position of the tow under a contract of towage (considered above in Chapter 1) which is a contract for services to be rendered by the tug to the tow. The charterer becomes, for most practical purposes, the acting owner of the vessel demised and is sometimes referred to as if the owner (see eg *Sandeman v Scurr* (1866) LR 2 QB 86 at 96; *Baumwoll Manufactur Von Carl Scheibler v Furness* [1893] AC 8 at 17). The term “owner pro hac vice” is often found in the older cases and textbooks: the demise charterer stands in the position of the owner (cf. *Carver*, para. 6–024: “the temporary owner because of the extent of the posession and control” of the vessel).

ii A demise charter is a contract for the hire of a chattel, and as such is subject to the general law relating to contracts of hire.

iii The hire of a chattel by one party to another is a contract for the supply of a service governed by the Supply of Goods and Services Act 1982, as amended: this Act provides for certain terms to be implied into all contracts for services unless the service is excluded from the Act by Order made by the Secretary of State (see section 12(4)). No exclusion of towage, salvage or other services applicable to barge hiring services has been made.

iv Under a demise charterparty, any crew placed on board the barge by the charterer or the charterer’s servants and the owner is not, in general, liable for their negligence; the position in relation to riding crew placed on board the barge (and specialised operatives such as ballast engineers) is dealt with by express provisions of the “Bargehire 2008” form: see eg clause 14.

v While the charterer is in the physical possession of the barge it will be liable for all negligence in respect of its use and condition, save only where the barge causes harm as a result of some aspect of her condition for which the owner is and remains respon-

sible notwithstanding the charterers' use of the vessel and its obligation to maintain her. To take an example: the barge is supplied with various blanked off tanks which the charterer need not use, inspect or maintain during the charter service as contracted for; the cover on one tank has been negligently fitted by the owner and becomes detached during the service injuring persons on board. In such a case, subject to the provisions of "Bargehire 2008", the owner would remain liable for the condition of the barge in tort.

The application of the Supply of Goods and Services Act 1982 (as amended)

6.6 Under a contract of towage, the application of the Supply of Goods and Services Act 1982 and of the implied obligations thereunder is likely to add little for the reasons given in Chapter 2: the common law has developed a series of implied obligations of tug and tow which cover aspects of the condition of each and the standards of the services to be provided by tug to tow and vice versa. In the context of the contract for the hire of a chattel which "Bargehire 2008" represents, the 1982 Act has more scope, given that the hire of a barge is the simple hire of a chattel (in the words of section 6: "a contract under which one person bails or agrees to bail goods to another by way of hire, other"). Leaving aside the changes made by the Consumer Rights Act 2015 to the 1982 Act in respect of those consumer contracts to which the 2015 Act applies (see Schedule 1 to the 2015 Act), the position in relation to non-consumer contracts as to a contract of hire of a chattel is as follows under Part I, sections 6–10A of the Supply of Goods and Services Act 1982

6.7 First, under section 7 of the 1982 Act the owner undertakes that it has or will have the right (a) to transfer possession of the barge to the charterer at the time of the delivery of the chattel into the contractual service and the possession of the hirer ("there is an implied condition on the part of the bailor that in the case of a bailment he has a right to transfer possession of the goods by way of hire for the period of the bailment and in the case of an agreement to bail he will have such a right at the time of the bailment": section 7(1)) and (b), and of considerable importance to a charterer, that the hirer will enjoy quiet possession of the chattel during the period of the hiring ("an implied warranty that the bailee will enjoy quiet possession of the goods for the period of the bailment except so far as the possession may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance disclosed or known to the bailee before the contract is made": section 7(2)). The implied condition under section 7(1) corresponds with that under section 12(1) of the Sale of Goods Act 1979 as to title and, in the same way as under the Sale of Goods Act, there is only a "warranty" as to quiet possession under section 7(2). For an example of a breach of a corresponding obligation, see *The Stena Nautica (No. 2)* [1982] 2 Lloyd's Rep 336. Taken together, these obligations protect the hirer's right to have full and free use of the chattel hired without interference from competing claimants. Under clause 24(b) of "Bargehire 2008", the owner is in any event to indemnify the charterer "against any lien or claim of whatsoever nature arising upon the Barge during the Charter Party arising out of the operation of the Barge by Owners or former charterers prior to the delivery of the Barge": see below.

6.8 Secondly, under section 8(2) the chattel hired must correspond with any stated description (cf. section 13 of the Sale of Goods Act 1979 and see generally *Benjamin on Sale of Goods* (9th edn), at chapter 11, section 1). The concept of "description" is sometimes an elusive one. An illustration of a contractual statement is some matter which identifies the barge and is a substantial ingredient of the identity of the same, for example, her name where this is a particular market attribute which defines the nature and identity of the barge or some description of particular characteristics. However mere statements as to the capabilities and general attributes of the barge (such as deadweight or carrying capacity) will not usually amount to elements of her "description" as such; cf. *Howard Marine & Dredging Co Ltd v Ogden & Sons (Excavations) Ltd* [1978] 1 Lloyd's Rep 334 and *Harrison v Knowles and Foster* [1918] 1 KB 608 in which statements as

to the deadweight capacity of two ships were held to be mere representations. Bailhache J at first instance in *Harrison* (at [1917] 2 KB 606 at 610) put the matter in this way: “where the subject matter of a contract of sale is a specific existing chattel a statement as to some quality possessed by or attaching to such chattel is a warranty, and not a condition, unless the absence of such quality or the possession of it to a smaller extent makes the thing sold different in kind from the thing as described in the contract.” Under clause 3(b) of “Bargehire 2008”, the owner expressly undertakes the obligation that the barge will meet the description set out in Part I of the form, which is likely to cover effectively the same ground as the implied condition under section 8(2).

6.9 Thirdly, under section 9(2) and (4), the chattel hired, if one “[bailed] in the course of a business” must meet the requirements of “satisfactory quality” and “fitness for purpose”, respectively: “goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the consideration for the bailment (if relevant) and all the other relevant circumstances” (see the expansion of the term in section 9(2A)) and “reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied.” The extent and scope of these obligations under the 1982 Act are effectively equivalent to those under section 14 of the Sale of Goods Act 1979 and are considered in this context in detail *Benjamin on Sale of Goods* (9th edn) at chapter 11, section 2. The importance of the usual transfer of responsibility back to the hirer (as to the buyer) in respect of matters “where the bailee examines the goods before the contract is made, which that examination ought to reveal” is *a fortiori* the case where the barge is the subject of an on-hire survey under “Bargehire 2008.” In the case of “Bargehire 2008”, there is only a modest undertaking by the barge owner in clause 3(b) as to the condition of the barge on delivery (“the Barge shall be of the description set out in PART I hereof. The Barge shall be delivered with cargo spaces free of any obstructions with all previous seafastenings removed and shall be properly documented as regards trading certificates, classification and equipment”). It is unlikely that this will displace the application of the statutory implied terms as to condition: see below.

6.10 Pursuant to section 16(1) of the Act, the duties arising under the Act can be negatived by express agreement (not necessarily by an express exclusion *per se*, but also by a term or terms which are express and which are inconsistent with the implication of the statutory term, cf. section 55 of the Sale of Goods Act 1979 by analogy and the case law thereunder: see *Benjamin on Sale of Goods* (9th edn), para. 11–068) or by a course of dealing or a usage binding between the parties. The presence of an express term giving limited undertakings will not amount to the negativing of the statutory implied conditions where the express undertakings can be read as merely additional to the statutory implied terms or partial statements of the position, rather than ousting, or making wholly alternative provision for the subject matter of, the statutory terms. Where the implied conditions as to title and quiet possession are concerned, while these may be excluded under the 1982 Act (cf the position under the sale of Goods Act 1979 where they cannot be excluded), this is subject to a statutory requirement of reasonableness: section 7(4) of the 1982 Act, as amended; as to this see *Chitty on Contracts* (32nd edn, 2015), vol. I, para. 15–094.

The structure and organisation of the “Bargehire 2008” form

6.11 As with the other BIMCO offshore contracts, “Bargehire 2008” is divided into two parts. It is described as a “Standard Barge Charter Party.” A facsimile of the form is at Appendix 7.

6.12 *Part I* of the form consists of 35 Boxes into which the parties are to enter the specific agreed details of the hiring of the barge and in relation to which the general provisions in Part II are to operate. These Boxes are self-explanatory and in many aspects, eg terms as to the period, trading limits, charter hire etc, largely reflect the scheme of any time charterparty and the similar Boxes in “Towhire 2008” and “Supplytime 2017.” Given that the barge is being let to the

charterer to deal with as it pleases, there are no definitions of the “service” since this is wholly within the charterer’s discretion. As the barge is solely at its disposal during the term of the charter; the only relevant limitation is that of trading limits (see Box 23). Of potential importance, in the context of the Supply of Goods and Services Act 1982 is Box 5 (“Name of Barge”) which may be an element of the relevant contractual description, and Box 6 (“Type of Barge”), which may define the capabilities of the barge, eg semi-submersible or roll-on/roll-off., which may in turn bear on the concepts of satisfactory quality and fitness for purpose under the 1982 Act. There is no provision for any detailed description of the barge, cf. the “Annex A” descriptions under the “Towcon” and “Towhire 2008” forms and under the other BIMCO forms, such as “Supplytime 2017.” Where the barge is of special characteristics, it is common to see a rider schedule, cross-referred to in Box 6.

6.13 An important feature of the revision of “Bargehire 2008” was a clearer statement of the insurance position in relation to the barge, both in respect of hull and machinery and also P&I risks, as explained in the accompanying notes. Boxes 28 and 29 are therefore new to the 2008 form, requiring the parties to define H&M and P&I insurance and allocation of responsibility for the same: see also clauses 16 and 17 of Part II.

6.14 *Part II* consists of the standard form BIMCO provisions. As usual, provision is made for additional provisions, supplementary to Part II, which may be agreed between the parties (and which are to be identified in Part I) and for the precedence of the Part II terms (treating the standard BIMCO clauses equally with those specifically agreed as rider clauses): “PREAMBLE – It is mutually agreed that this Contract shall be performed subject to the conditions contained in this Charter Party which shall include PART I, including additional clauses, if any agreed and stated in Box 35, and PART II. In the event of a conflict of conditions, the provisions of PART I shall prevail over those of PART II to the extent of such conflict but no further.” It is fair to say that, compared with other BIMCO forms, the obligations dealt with in Part II are fairly minimalist and very much basic core obligations on the parties. For this reason, it is not uncommon to find “Bargehire 2008” contracts, especially where the barge is a specialised one, either substantially amended or considerably supplemented by rider clauses.

PART C. COMMENTARY ON THE FORM

Clause 1: definitions

6.15 A very simple set of definitions is given in Clause 1. The description of parties as “owners” and “charterers” is dealt with in Chapter 4. Given the relatively simple nature of a contract for the hire of a chattel, even in the offshore context, the three elements: owner, hirer and chattel hired are alone defined, and that by reference to Part I:

“1. Definitions

In this Charter Party, the following terms shall have the meanings hereby assigned to them:

‘The Owners’ shall mean the party stated in Box 3.

‘The Charterers’ shall mean the party stated in Box 4.

‘The Barge’ shall mean the Barge named in Box 5 and with particulars as specified in Boxes 6 to 12.”

Clause 2: period of charter party

“2. Period of Charter Party

(a) In consideration of the hire detailed in Box 24, the Owners let and the Charterers hire the Barge for the period stated in Box 13.

(b) The Charterers shall give a minimum of ten (10) days’ notice (unless otherwise stated in Box 13) of their intention to use any optional period(s) as stated in Box 13.”

6.16 This provision is self-explanatory and defines the period of hire. This clause describes the owners’ consideration for the charterers’ payment of hire, namely to let the barge to the charterers for the agreed period of time as stated in Part I. The 1994 version of the form contained a right for the charterer to extend the period, in its option and without any need for specific agreement to this effect, for up to the lesser of one-third of the agreed period or 45 days. This has now been deleted and the position confined to the practice in the barge market to agree an optional extended period in advance (see the explanatory notes). The charterer is required now to give ten days’ notice (unless otherwise agreed) of its intention to invoke the right to an optional period. Box 13 provides for the period and it is open to the parties to agree one or more optional extensions in Box 13, to which clause 2 will then apply. The ten-day period “is often felt to be too short and the parties now have the opportunity to make the notice period more closely reflect the charter period” in Box 13.

Clause 3: delivery

“3. Delivery

(a) The Barge shall be delivered and accepted by the Charterers at the port or place stated in Box 14.

(b) The Owners undertake that, at delivery, the Barge shall be of the description set out in PART I hereof. The Barge shall be delivered with cargo spaces free of any obstructions with all previous seafastenings removed and shall be properly documented as regards trading certificates, classification and equipment.

(c) Delivery by the Owners of the Barge and acceptance of the Barge by the Charterers shall constitute a full performance by the Owners of all the Owners’ obligations under this Clause 3, and thereafter the Charterers shall not be entitled to make or assert any claim against the Owners on account of any conditions, representations or warranties expressed or implied with respect to the Barge.”

6.17 Clause 3 provides for the delivery of the barge by the owner to the charterer. Paragraph (a) merely provides for the place of delivery. There is no statement as to the safety of the port of delivery either for the barge herself or for the taking of delivery of the barge by the charterer, eg by a suitable tug. Compare clause 2 of the “Barecon 2001” form which requires the charterer to have indicated a safe berth in which to take delivery. Given that under “Bargehire 2008”, the parties simply name a port or place, the position is probably that the parties are bound to deliver and to take delivery at that place and that neither party undertakes that the place will be safe either at all or at the time fixed for delivery: see by analogy Cooke, *Voyage Charters* (4th edn, 2014), at para. 5.35 and *The Houston City* [1954] 2 Lloyd’s Rep 148 *per* Dixon CJ at 153. If the charterer is the party defining the place of delivery, the owner may wish to make it responsible for the safety of the place of delivery. Conversely if the owner is delivering the barge at the end of a previous works project, the charterer may wish to consider protection for its being able to take over the barge in safe conditions, at least in terms corresponding to those in “Towcon 2008” where clause 13(b) imposes an obligation (on the charterer, but the obligation could equally be imposed on the owner) that the place at which the charterer takes up the tug shall be accessible to the tug and safe to enter, use and leave for the purposes of establishing the towing connection. Contrast clause 22(a) of the form which in relation to redelivery imposes an obligation on the charterer as to the safe and accessible position of the barge, ie for the owner to take her back. No corresponding obligation applies to the taking of delivery of her by the charterer at the beginning of the service. Consideration should be given, in the interests of balance, to amending para. (a), using the wording from clause 22(a), *mutatis mutandis*.

6.18 Paragraph (b) is a critical provision since it is the sole statement in "Bargehire 2008" of any express obligation on the barge owner as to the condition of the barge. The express obligations on the owner under "Bargehire 2008" are extremely limited. They may be compared with those under BIMCO's "Barecon 2011" where by clause 2(a) the owner undertakes an obligation of due diligence to make the demise chartered vessel "seaworthy and in every respect ready in hull, machinery and equipment for service under this Charter."

6.19 First, the owner warrants only that "the Barge shall be of the description set out in PART I." As noted above, that description may be minimal and confined to a bare statement of the name of the barge in Box 5 and a statement of her type in Box 6. The obligation therefore may be little more than to provide the barge which the owner has, "as is": if Box 5 states "Barge H.123" and Box states "ocean going barge", then the content of the obligation in terms of actual physical condition and fitness, as well as seaworthiness and, in the towage context, tow-worthiness (as to which see Chapter 2 above) is so limited as to be virtually valueless. Secondly, the owner undertakes that the barge will be delivered "clean" in the sense of clear of any previous cargo and with all special lashing and fastening points fixed or welded on to the barge for her last service but not forming part of her as built structure having been removed. Thirdly, the owner warrants that the barge has all her necessary certification, including class certification. The requirements here are dealt with in terms of the barge being "properly documented": while that is not very well defined, it presumably connotes that the barge has what would be reasonably expected in the barge market, or at least that barge market of which the barge forms a part. There is no express requirement as to the barge's classification status (eg free of recommendation or conditions of class).

6.20 Given the absence of any terms in "Bargehire 2008" expressly excluding or otherwise negativing the implied terms of the Supply of Goods and Services Act 1982 as to compliance with description but more importantly as to satisfactory quality and fitness for purpose (and as considered above), it is suggested that these terms will be implied into and form additional terms of a hire contract on the "Bargehire 2008" form. The result will be that the barge must meet the standard which a reasonable person would regard as satisfactory, taking account of the description of the barge, the amount being paid as consideration for the hire of the barge and all other relevant circumstances. In addition, where the charterer has made known to the owner expressly or by implication the purpose for which the barge is required (for example during the course of the pre-contractual negotiations) then there will be an implied condition that the barge will be fit for that purpose even if that is not the common purpose for which the barge is hired out and will have to be fit for the common purpose in any event.

6.21 Paragraph (c) seeks to put the responsibility for the ascertainment of the condition of the barge upon the charterer by stating that delivery by the owner of the barge and the acceptance and taking delivery of the barge by the charterer "shall constitute a full performance by the Owners of all the Owners' obligations under this Clause 3, and thereafter the Charterers shall not be entitled to make or assert any claim against the Owners on account of any conditions, representations or warranties expressed or implied with respect to the Barge." It may be noted that this wording is essentially the same as that contained in clause 2(c) of BIMCO "Barecon 2001."

6.22 It is highly arguable whether this provision would have the effect of excluding or negativing the incorporation of the implied terms under the Supply of Goods and Services Act 1982 or of protecting the owner from breach of those terms, eg where the barge is not of satisfactory quality or is unfit for purpose. First, para. (c) treats delivery and acceptance merely as demonstrating performance of the specific obligations in clause 3: "a full performance by the Owners of all the Owners' obligations under this Clause 3" and is silent as to any other obligations, for example those implied at law under the 1982 Act, which are not "obligations under this clause 3" but are to found *aliunde*. Secondly, the wording that delivery and acceptance shall disentitle the charterer from making "any claim against the Owners on account of any conditions, representations

or warranties expressed or implied with respect to the Barge", while apt to exclude the implied conditions under the 1982 Act (observing the need to refer specifically to "conditions", not just "warranties": see in the Sale of Goods Act 1979 context, *KG Bominflot. mbH & Co v Petroplus Marketing AG (The Mercini Lady)* [2010] EWCA Civ 1145), is arguably tied (especially if read *contra proferentem* given the ambiguity of the wording) to the obligation in "this clause 3" and, only then, to the express or implied terms allied to that particular obligation as set out in para. (b). The explanatory notes appear to regard the whole matter as one tied to the obligations set out in para. (b): "The clause goes on to describe the barge and its condition at delivery and that the delivery to and acceptance by the charterers should be considered full performance by the owners under this clause."

6.23 The contrary is plainly arguable and the corresponding wording in "Barecon 2001" is regarded as being effective to exclude the terms of the 1982 Act by *Davis* (see para. 4.17). However, the tendency of the court to regard the need to negative Sale of Goods Act 1979 terms to require clear and unambiguous wording makes the position less clear, it is suggested, than is there set out. *Howard Marine & Dredging Co Ltd v Ogden & Sons (Excavations) Ltd* [1978] 1 Lloyd's Rep 334 is an example, in a different context (and perhaps it might be said from a different age in terms of the approach to exclusions of liability) of the restrictive approach to such provisions. There the clause provided that the hirer's acceptance of the barge was to be "conclusive evidence that they have examined the vessel and found her to be in all respects seaworthy" but the court held that the deeming provision could only be treated as effective in relation to such attributes of the vessel as would have been apparent upon a reasonable examination.

Clause 4: mobilisation and demobilisation

"4. Mobilisation and/or Demobilisation

Any mobilisation and/or demobilisation fee, if applicable, shall be paid as set out in Box 16."

6.24 This is self-explanatory. The parties will use Box 16 in Part I to fill out their agreed mobilisation/demobilisation fee and how, where, when, and in what currency, it should be paid.

Clause 5: substitution

"5. Substitution

The Owners shall have the right to substitute the Barge, at any time up to fifteen (15) days prior to the delivery date, with an equivalent Barge suitable for the purpose of this Charter Party, subject to the Charterers' approval which shall not be unreasonably withheld. Such substitution shall have no effect on the hire rates, terms and conditions of this Charter Party, save that any documented additional costs for preparing the substitute Barge for the service shall be for the Owners' account. The Charterers shall notify the Owners of the approximate additional cost, if any, within five (5) working days after the Owners advise the Charterers of their intention to substitute the Barge."

6.25 This provision reflects commercial reality where the barge named is not available due to damage or its previous fixture has overrun. The position of the charterer is fully protected as the financial impact of the change is solely upon the owner, the terms and conditions of the charter are unaffected and the barge must be equivalent to that contracted for and, importantly, "suitable for the purpose of this Charter Party." Accordingly, it will not be sufficient that the barge is in general terms "equivalent" in terms of carrying capacity, deadweight and size: it must also be suitable for the intended service. This requires the charterer to have made known any particular or specific features of the service for which the barge contracted for was, specially, suited, eg despite her size, drawing less water under keel than other barges of like size or some special

configuration of deck fittings. Compare clause 20 of the “Towcon” form (see Chapter 4 above). While it is implicit in the concept of a “substitute” that the replacement vessel has to be able to perform in a comparable manner (“substitution” being the act of putting in a proxy to perform what one has oneself undertaken to perform), clause 5 of “Bargehire 2008” makes the position clear, indeed even more explicit than under “Towcon 2008.” The explanatory notes correctly state therefore that “The substituting barge should be of equivalent size and quality and the substitution should not result in any delay and additional costs for the charterers.”

Clause 6: time for delivery

“6. Time for Delivery

(a) The Barge shall be delivered to the Charterers within the period agreed in Box 17.

(b) The delivery period in sub-clause (a) shall be narrowed down by the Charterers in accordance with the delivery period notification schedule as stated in Box 18.

(c) The declared delivery period shall always be within the previous declared delivery period and the number of days’ notice shall always be counted from the first day in the declared delivery period.”

6.26 This provision is self-explanatory but the use of a “period” for delivery reflects the practice in the barge industry. The explanatory notes state:

> To reflect the fact that in the barge industry the contracts are often entered into some time in advance of the actual execution of the agreement, before the actual dates are known to the parties, the parties only have to state in Part I the delivery window within which the barge has to be delivered to the charterers.
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> Sub-clause (b) refers to Box 18 of Part I which contains a mechanism for narrowing down the initially wide delivery period so that the owners may use its barge efficiently.

Clause 7: cancelling

“7. Cancelling

(a) Should the Barge not be delivered according to Box 18 the Owners shall pay as compensation to the Charterers a daily rate as stated in Box 19 for each day or part thereof counting from 0000 hours on the delivery date until the date delivery actually takes place or an amount as stated in Box 20, whichever is the lesser.

For the purpose of assessing compensation in accordance with this Clause 7(a) the delivery date shall, in the event the Owners have given notice in accordance with Clause 7(d) below and the Charterers have not exercised their option of cancelling, be deemed to be the revised delivery date stated in the Owners’ notice.

(b) Should the Barge not be delivered at the latest seven (7) days after the delivery date the Charterers shall have the option of cancelling this Charter Party and the Owners shall pay to the Charterers the amount stated in Box 20.

(c) Unless the late delivery is caused by the Owners’ negligence or wilful default, the compensation stated in Boxes 19 and 20, respectively, shall be the Charterers’ sole financial remedy for damages arising out of the late delivery.

(d) If it appears that the Barge will be delayed beyond seven (7) days after the delivery date, the Owners shall, as soon as they are in a position to state with reasonable certainty the day on which the Barge should be ready, give notice thereof to the Charterers asking whether they will exercise their option of cancelling and the option must then be declared within forty-eight (48) hours of the receipt by the Charterers of such notice. If the Charterers do not then exercise their option of cancelling, the revised delivery date stated in the Owners’ notice shall be regarded as the new delivery date for the purpose of this Clause.

(e) Notwithstanding any other provision in this Charter Party the Charterers shall have the right to cancel this Charter Party prior to delivery on payment of hire for the firm period as set out in Box 13.”

6.27 Clause 7 contains a cancelling clause in very common form to that in a time charter, as to which see Coghlin, Baker, *Time Charters* (7th edn, 2014), at paras. 24.1 *et seq*. and in the demise charter context, *Davis* at para. 6.1 *et seq*. There are however a number of differences with the typical cancelling clause employed by BIMCO in, for example, "Supplytime 2017" and which go further than a simple right of cancellation, by recognising but limiting the charterer's right to claim damages in the event of late delivery, irrespective of cancellation.

6.28 First, the clause provides for "a daily rate" as "compensation" for late delivery beyond the date stated in Box 18 of Part I. Normally this will be set as a commercial daily rate with some uplift. Provided that the daily rate bears some sensible relation to the loss suffered by the charterer, there will be no room for arguments that the daily rate is a penalty (as to which see now the Supreme Court decision in *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67; [2016] 1 Lloyd's Rep 55, and the helpful distillation in *Vivienne Westwood Ltd v Conduit Street Development Ltd* [2017] EWHC 350 (Ch): a brief summary of the principles is given in Chapter 4 above in relation to the Interest provisions in "Towcon 2008").

6.29 Secondly, the clause provides that this "compensation" is to represent the charterer's sole remedy for late delivery unless the owner is late in delivering the vessel due to "negligence or wilful default." This allows the charterer to claim additional losses due to late delivery where the cause of the delay has been simple, not gross, negligence or deliberate default by the owner. The use of the term "wilful default" makes it debatable whether the term "negligence" was in fact meant (and should therefore be construed) to denote "gross negligence" in the sense considered in *The Hellespont Ardent* [1997] 2 Lloyd's Rep 547 at 586. This is so given that it is with "gross negligence" that the terms "wilful default" or "wilful misconduct" are commonly found (eg *Great Scottish & Western Rlwy Co v British Railways Board* (1993), unreported (CA), transcript 5.4.1993). As to these terms, see the discussion in Chapter 4 above.

6.30 The explanatory notes seem to be confused on this topic. They state: "Sub-clause (c) provides the charterers with the right to cancel the charter party if the owners negligently or wilfully deliver the barge late. The words 'gross' has been deleted from 'gross negligence' as this is not an English legal term and it is inconsistent with recent BIMCO forms." The term "gross negligence", while not used in BIMCO forms, is however commonly employed in the offshore industry, usually as an exception to an exception, often to a knock-for-knock regime: (see Jennings, *Maritime Risk International*, vol. 19, issue 3 for a discussion of the practice). Further, the better view is that the term does have a settled and ascertainable meaning. While it is certainly true that older cases have deprecated the use of the word "gross" in conjunction with "negligence", for example in *Wilson v Brett* (1843) 11 M & W 113 ("the same thing, with the addition of a vituperative epithet"); *Grill v General Iron Screw Collier Co* (1866) LR 1 CP 600 and *Pentecost v London District Auditor* [1951] 2 KB 759, discussed in Chapter 4), modern construction of this term has arrived at a sensible commercial meaning. This meaning denotes an aggravated form of negligence where the risk was recklessly run, eg Mance J's distillation (after a careful consideration of the English and US authorities) of "conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk": *The Hellespont Ardent*, *supra* at p. 586. This is especially the case where the term is used in close proximity to or allied with wilful misconduct or a similar phrase: *Great Scottish & Western Rlwy Co v British Railways Board* (1993), unreported (CA), transcript 5.4.1993; *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm). In such a case to construe "gross negligence" as simple negligence is a strained exercise. Whether the simple juxtaposition of "negligence" with "wilful default" in clause 7 of "Bargehire 2008" will have the same result on an application of a similar *eiusdem generis* approach is more debatable. It is therefore recommended to add the word "gross" by amendment to clause 7.

Clause 8: trading limits

“8. Trading Limits

(a) The Barge shall be employed within its technical capabilities for work in inland, coastal and offshore waters without limit as to trading areas, but always in lawful trades for the carriage of suitable lawful merchandise within the trading limits indicated in Box 23.The Charterers undertake not to employ the Barge or suffer the Barge to be employed otherwise than in conformity with the terms of the instruments of insurance (including any warranties expressed or implied therein) without first obtaining, either by themselves or through the Owners, the consent to such employment by the Barge’s insurers and complying with such requirements as to extra premium or otherwise as the insurers may prescribe. The Charterers shall keep the Owners advised of the intended employment of the Barge.

(b) Without the prior written consent of the Owners, the Barge shall not enter any ice-bound ports, places or waters or any ports where lights or lightships have been or are about to be withdrawn by reason of ice or where there is a risk that in the ordinary course of events the Barge will not be able on account of ice to safely enter the port, use the port, or leave after having completed loading or discharging.”

6.31 While the charterer has the full and free use of the barge without restriction under the demise which the “Bargehire 2008” effects and can accordingly treat the barge as if its own for all practical and operational purposes, an important limitation is the geographical definition of the permitted trading area of the chartered barge. These are dealt with in clause 8 together, however, with other restrictions. For this reason the heading, “Trading Limits”, is misleading as the subject matter of the clause ranges wider. The same heading in “Barecon 89” was changed for this reason to “Trading Restrictions” in “Barecon 2001.” Accordingly, parties should bear in mind that clause 6 covers matter other than simply the geographical limits defined in Part I. Paragraph (a) therefore contains four restrictions on the charterer’s use of the vessel.

6.32 The first is the operation of the vessel within agreed trading limits, to be defined by the parties in Box 23 of Part I. As to “trading limits” clauses in charterparties, see generally Coghlin, Baker, *Time Charters* (7th edn, 2014), paras. 5.1–5.23. The clause is a shorter version of the equivalent clause 6 in “Barecon 2001.” Unlike clause 6 of “Supplytime 2017” and most common forms of voyage and time charterparty, there is no undertaking by the charterer that the barge will only be used at or between safe ports and places as part of the trading limits (cf. the former version of “Bargehire 94”). However, this is dealt with separately (and only partially) by clause 13(f): “It is expressly understood that the Barge shall be moored in ports or places to lie safely, always afloat at any state of tide.” The explanatory notes state that this modification to the 1994 form was because this related to “operational matters not trading limits” (even though clause 8 deals with a variety of trading restrictions beyond limits). With the exception of the places where the barge is to be moored, the charterer trades the barge as if it were its own and under insurance arranged by one or other party and all repairs during the charter service are arranged by it, with an obligation to redeliver the barge in a like condition at the conclusion of the charter. Risks of unsafety and consequent damage are therefore wholly upon the charterer save as provided for in clause 13(f). The only protection for the barge owner is the safe mooring warranty and the definition of a defined geographical area which permits a risk assessment by the owner, particularly in respect of political, war and similar risks: see an example from a “Bargehire 2008” charter considered by the author: “East Coast South America between Panama Canal and Falkland Islands, intention Brazilian offshore waters; Venezuela or Venezuelan waters always excluded.” The importance of clearly expressed trading limits is shown by the opening words of clause 6(a) which otherwise permit the barge to be used “for work in inland, coastal and offshore waters without limit as to trading areas.”

6.33 The second restriction is that the barge can only be used “within its technical capabilities.” This is a potentially important restriction and is linked to the definition of the “Type of Barge” in Box 6 in Part I. Disputes, usually about the redelivery condition of the barge, often arise as to the

allegedly improper use of the barge to perform services for which she is not fitted or designed. If this is an area of potential concern then the owner should stipulate in perhaps greater detail than is usual the technical capabilities of the barge by a rider clause or as many barge owners do by simply appending a specification sheet to the contract, referred to in Box 6.

6.34 Thirdly and linked with this restriction is the requirement to engage in lawful trades only and to carry “suitable lawful merchandise.” This corresponds with the typical time charter clause: see eg clause 6 of “Supplytime 2017.” The word “suitable” is not usually found in other clauses and appears to be derived from “Barecon 89.” It is not clear what it adds. If the barge is only to be used within her capabilities then she is only to carry cargoes which she is technically capable of carrying and if she is to carry only lawful cargo, it does not mean anything to say that the cargo is suitable and lawful or suitably lawful. Given that there are virtually no restrictions on what the barge can carry (see clause 9 below), this could usefully be deleted.

6.35 The fourth requirement with which the charterer must comply is as to the satisfaction at all times of any restrictions or requirements applicable to the barge or her trading under the relevant insurance policies (quaintly referred to as “the instruments of insurance”). It is for this reason that the charterer is required to keep the owner “advised of the intended employment of the barge.” It may be sensible in a long-term charterparty to include a rider clause which imposes a regular notification and update requirement so that the owner is kept fully abreast of the barge’s use, present and future. Notification in very general terms (“general offshore carriage of drilling machinery to and from West Africa”) may not give the owner much information.

6.36 Paragraph (b) deals with ice risks. The language of the paragraph broadly corresponds with para. (b) of the BIMCO Ice Clause for Time Charter Parties, suitably amended to reflect that the barge is unmanned and at the charterer’s disposal. Accordingly, the need for the master’s consent or approval is replaced with the need for the charterer to obtain the prior consent of the owner in writing.

Clause 9: excluded cargoes

“9. Excluded Cargoes

Notwithstanding any provisions to the contrary in this Charter Party it is agreed that nuclear fuels or radioactive materials or waste shall not be loaded or carried under this Charter Party. Stone or similar cargo shall not be carried unless the Owners’ prior written consent is obtained.”

6.37 Although clause 8 deals with certain cargo aspects, clause 9 deals with two specific matters (which might have been simply included in one compendious “trading restrictions” provision like clause 6 of “Barecon 2001” which includes all of the matters dealt with separately by clauses 8 and 9 of “Bargehire 2008”). The first is the exclusion of the carriage of radioactive material or waste, of importance in the offshore industry (cf. the example of lightly radioactive ex-drilling parts which rendered a container subject to special measures and extensive decontamination requirements: *P&O Nedlloyd BV v Arab Metals Co (The UB Tiger)* [2006] EWCA Civ 1717). The second is “stone or similar cargo.” The carriage and, perhaps more pertinently, the loading and stowing of rough stone and rock potentially causes significant damage to the strongest tank top, risking puncturing of the double-bottom and ballast tanks and, in heavy weather, posing further risks of damage and catastrophic cargo shift. The carriage of such materials is a frequent aspect of barge service, eg for the construction of breakwaters and sea defences and therefore the risks need to be assessed (and paid for). As the explanatory notes therefore state: “the carriage of stone or similar cargo requires the owners’ consent due to the additional wear and tear or the excessive risk of damage such cargoes involve.”

Clauses 10 and 11: surveys and inventories

“10. Surveys

(a) The Owners and the Charterers shall appoint a mutually acceptable qualified marine surveyor to determine and provide written reports on the condition of the Barge (including internal inspection of the tank compartments to establish the condition of the bottom of the Barge) together with its equipment, machinery and spares at the times of delivery and redelivery hereunder. It is agreed between the parties hereto that the survey reports shall be taken as conclusive evidence of the condition of the Barge and its equipment on delivery and redelivery.

In the event of damage to the Barge during the Charter Party period, the appointed marine surveyor shall in his off-hire survey report assess the cost for repairing such damage and the time required for such repairs and these figures shall be binding on both parties, except for damage recoverable under the Barge’s insurance.

(b) The cost for the on-hire survey and off-hire survey shall be shared equally between the Owners and the Charterers. Loss of time, if any, in connection with the on-hire survey, shall be borne by the Owners. The off- hire survey shall be conducted in the Charterers’ time. In each case the cost of any docking and undocking, if required, in this connection shall be for the Charterers’ account.”

“11. Inventories and Consumable Oil and Stores

A complete inventory of the Barge’s entire equipment, outfit, appliances and of all consumable stores on board the Barge shall be made by the marine surveyor on delivery and again on redelivery. On redelivery the Charterers shall pay for all bunkers, lubricating oil, water, paints, oils, ropes and other consumable stores used during the charter period and charged at cost.”

6.38 Possibly the most important feature of a demise charter for a barge, as with any contract of hire, is the obligation on the charterer or hirer to return the barge or hired chattel in the same order and condition in which it was in on delivery. That imposes a need to verify as accurately as possible what the condition of the barge is, and the precise status and number of her plant and equipment and accessories or tackle on delivery to the charterer, as well as on redelivery to the owner. The commonest disputes in this sector (as under demise charters generally) in the author’s experience concern allegations by the owner on redelivery that the barge has been poorly maintained by the charterer and is being delivered in a worse condition and, frequently, counter-allegations by the charterer that the condition of the barge was equally defective on delivery and that, by its repairs during the service, the barge is in better condition and that the charterer is entitled to receive some credit for the betterment. Clauses 10 and 11 are therefore at the heart of the demise charter relationship, providing for the ascertainment as accurately as possible of the barge’s condition by an on-hire and off-hire survey, together with the taking of a full inventory of all items of the barge’s equipment, stores and other appurtenances.

6.39 Clause 10 provides for a jointly appointed marine surveyor acting for both parties who is chosen by them both (or, as in one case, in case of dispute and an inability to agree, by the arbitral tribunal). His task is defined as not just that of inspecting but of determining the condition of the barge and her accessories and this connotes a “full” on-hire and off-hire survey, conducted in considerable detail. Given the fact that barges operating in shallow waters as part of an offshore project or otherwise in inland or coastal waters may encounter bottom damage which is often wholly unremarked during the service as the barge is unmanned, at least unless there is water ingress, special reference (“including internal inspection to the tank compartments to establish the condition of the bottom of the Barge”) is made to the need for the surveyor to inspect the barge internally, in all her spaces and tanks to ascertain the presence of indentations, buckling or other setting-up damage from the inside. The costs of the surveyor are jointly borne and loss of time is allocated on the basis of the on-hire survey being for the owner’s account and the off-hire survey being for charterer’s. The surveyor is also to determine as part of the off-hire survey the

costs and time needed to repair any damage sustained by the barge which has not already been repaired by the charterer under clause 13.

6.40 To avoid dispute, clause 10 provides that the findings of the independent joint surveyor are to be “conclusive evidence” of the delivery and redelivery condition determined by the surveyor and the surveyor’s assessment of the cost and time for repairs to damage are to be “binding on both parties.” While not precisely expressed as a “final and binding” determination, as such provisions are commonly found, the intention and language are, it is suggested, clear that this is to be the result. This provides a commercial solution which avoids dispute and leaves matters entirely to the surveyor’s determination.

6.41 While the case law and commentary on “final and binding” determinations is extensive and outside the scope of this book, in general terms the position can be summarised as follows (for a modern detailed account, see Freedman, Farrell, *Kendall on Expert Determination* (5th edn, 2014)). A certificate given or expert determination made under a contract will usually be final as between the parties, unless the certifier or expert has materially departed from his instructions. Where the expert departs from his instructions in a material respect, the parties have not agreed to be bound; and, accordingly, where the certifier has materially departed from his instructions, the certificate (and hence in the clause 190 11 context, the survey determination) will not bind the parties. Any departure from the contractual instruction is material unless it can be truly characterised as trivial or *de minimis* in the sense of it being obvious that it could make no possible difference to either party. See generally, *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2002] 1 Lloyd’s Rep 295 CA, recently considered and approved in *Begum v Hossain* [2015] EWCA Civ 717.

6.42 Unfortunately, presumably by drafting oversight, no corresponding “final and binding” provision is included in clause 11 in relation to the determination by the surveyor of the inventory of equipment and stores. It is strongly arguable that clause 11 is merely amplifying the definition of the task of the surveyor in his determination of the condition of the barge, at least in respect of “the Barge’s entire equipment, outfit, appliances” which form part of the barge or for the purposes of an inspection might be regarded as doing so. It is less clear that mere consumables such as bunkers, oils, paint and ropes etc. do so. It would be prudent to specify this by an amendment to clause 11 and the matter might equally be tidied up in any forthcoming revision of “Bargehire.”

6.43 Clause 11 is different from the typical time charterparty in terms of redelivery and what happens to bunkers and stores on board. Unlike a conventional vessel where very large and valuable quantities of bunkers may be on board, on an unmanned and non-self-propelled barge, “bunkers” will usually be of minor importance and will consist of fuels used to power generators and auxiliary equipment such as winches or cranes (if fitted). The former version of “Bargehire 94” provided in typical time charter terms for the charterer to pay for and take over supplies of this nature on delivery and the owner to do so on redelivery (thereby mirroring the position under the BIMCO “Barecon” form, now clause 9 of “Barecon 2001” at lines 158–159). This has been replaced in “Bargehire 2008” with a simplified provision that the charterer pays for what he has used. As the explanatory notes set out: “The clause has been amended to reflect the fact that in the barge trade, the charterers do not generally take over stores, etc from the owners and return at them redelivery as would happen under a conventional time charter party. The amounts used on barges are small; therefore it is easier for the charterers to just pay for what they have used and for them to be charged on a cost basis.” Cf. the similar approach taken by the drafters of the “Windtime” form.

Clause 12: inspection

“12. Inspection

(a) The Owners shall have the right at any time to inspect or survey the Barge or instruct a duly authorised surveyor to carry out such survey on their behalf to ascertain the condition of the Barge and satisfy themselves that the Barge is being properly repaired and maintained.

(b) The costs of the inspection or survey shall be borne by the Owners and the inspection shall not hamper the Charterers’ operations. All time in respect of inspection, survey or repairs shall count as time on-hire and shall form part of the Charter Party period. The Owners have the right to require the Barge to be surveyed and/or dry-docked for inspection at normal classification intervals on the dates stated in Box 11. The costs of such dry-docking shall be for the account of and in the time of the party responsible for maintaining class according to Clause 16.

(c) All incidents occurring to the Barge shall immediately be reported in writing to the Owners and the Charterers shall, whenever required by the Owners, furnish them with full information in writing regarding any casualties or other accidents or damage to the Barge.”

6.44 The fact that the barge is solely under the control of the charterer makes it important for the owner to be able to verify how the barge is being treated during the service. Akin to a landlord’s right to enter and inspect, the barge owner has a right to inspect at its own cost and without interfering with the charterer’s use of the barge. The provision confers “the right to inspect” in unlimited terms and while the right might arguably be read as subject to a requirement of reasonableness given that the inspection is at owner’s cost and is not to hamper the charterer’s operation, such a limitation is not a necessary implication and the right is effectively unlimited. In one case, which did not proceed to a hearing, it was suggested that this was a “once and for all” single right, capable of being exercised only once. That is obviously unsustainable on the language of the clause. Cf. the position under clause 8(a) of “Barecon 2001” where the words “and the inspection shall not hamper the Charterers’ operations” are not present and the suggestion by *Davis* (at para. 9.2) that this would benefit from amendment to balance the position more between the owner’s and the charterer’s interests.

6.45 Given that the barge is under the charterer’s control and that with the exception of information as to its intended employment, the owner may have very little day-to-day information of the barge and its position, clause 10 expressly requires the charterer to give the owner immediate information of any damage or casualty affecting the barge. The words are very general and cover any accident, casualty or “damage”; subject to a *de minimis* exception which would take into account what is regarded as minor fair wear and tear damage in the trade, any other appreciable damage even in routine operation (dropping of heavy cargo with indentation of bottom plates in the tank top of the hold) must be notified to the owner. Some charterers cover this with a regular report at intervals, but this would not satisfy the requirement of “immediate” notice. The notification of damage, accidents or casualties needs also to be considered in the context of keeping the insurers notified of any claim situation under the policies effected either by the charterer or the owner under clauses 16 and 17.

Clause 13: maintenance and operation

“13. Maintenance and Operation

(a) The Barge shall during the Charter Party period be in the full custody and at the absolute disposal for all purposes of the Charterers and under their complete control in every respect. The Charterers warrant that the tug(s) used shall be of a suitable size and capability for the proposed towing services. The Charterers shall maintain the Barge, her machinery, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice.

The Charterers shall take immediate steps to have necessary repairs done within a reasonable time failing which the Owners shall have the right of withdrawing the Barge from the service of the Charterers without noting any protest and without prejudice to any claim the Owners may otherwise have against the Charterers under the Charter Party.

Unless otherwise agreed, in the event of any improvement, structural changes or expensive new equipment becoming necessary for the continued operation of the Barge by reason of new Class requirements or by compulsory legislation costing more than five *per* cent. (5%) of the Barge’s marine insurance value as

stated in Box 30, then the extent, if any, to which the rate of hire shall be varied and the ratio in which the cost of compliance shall be shared between the parties concerned in order to achieve a reasonable distribution thereof as between the Owners and the Charterers having regard, inter alia, to the length of the period remaining under the Charter Party shall, in the absence of agreement, be referred to arbitration according to Clause 33.

(b) The Charterers shall at their own expense and by their own procurement navigate, operate, supply, fuel and repair the Barge whenever required during the Charter Party period and they shall pay all charges and expenses of every kind and nature whatsoever incidental to their use and operation of the Barge under this Charter Party, including all taxes except those taxes payable on the Owners' income in the country of registration of the Barge and/or the Owners' registered office.

(c) During the currency of this Charter Party, the Barge shall retain her present name as indicated in Box 5 and shall remain under and fly the flag as indicated in Box 5, provided however that the Charterers shall have the liberty to paint the Barge in their own colours, install and display their insignia and fly their own house flag. Painting and re-painting, instalment and re-instalment shall be for the Charterers' account and time used thereby shall count as time on hire.

(d) The Charterers shall make no structural changes to the Barge or changes in the machinery, appurtenances or spare parts thereof without in each instance securing the Owners' prior written approval thereof. If the Owners so approve, the Charterers shall, at their expense and in their time, restore the Barge to its former condition before the termination of the Charter Party, if the Owners so require.

(e) The Charterers shall have the use of all outfit, equipment and appliances on board the Barge at the time of delivery, provided the same or their substantial equivalent shall be returned to the Owners on redelivery in the same good order and condition as when received, ordinary wear and tear excepted. The Charterers shall from time to time during the Charter Party period replace such items of equipment as shall be damaged beyond ordinary wear and tear. The Charterers shall procure that all repairs to or replacement of any damaged, worn or lost parts or equipment be effected in such manner (as regards workmanship, specification and quality of materials) as not to diminish the value of the Barge. The Charterers have the right to fit additional equipment at their expense and risk but the Charterers shall remove such equipment at the end of the period at their cost and prior to the redelivery of the Barge, unless otherwise mutually agreed in advance and in writing. The Barge's ballast tanks shall be used for ballast water only.

(f) It is expressly understood that the Barge shall be moored in ports or places to lie safely, always afloat at any time of tide.

(g) Towage of the Barge in tandem or as a double tow, that is by the same tug(s) but together with any other floating object, is not permitted unless the Owners' prior written consent is obtained."

Generally

6.46 As stated by *Davis* (para. 11.1): "Since by its very nature the bareboat chartering of a vessel entails the owners giving up to the charterers the full possession and control of the ship, it is usually an integral feature of the arrangement that the responsibility for maintenance and operation and all costs and expenses relating thereto shall be borne by the charterers." The 2008 explanatory notes therefore stress that all responsibility for maintenance and the operation of the barge during the service is with the charterer (even if, for some reason, the drafters do not like the word "possession"): "Akin to a bareboat charter the barge will be in full custody and absolute disposal of the charterers throughout the charter period. It follows that the responsibility for maintenance and operation of the barge rests with the charterers. Breach of this obligation will entitle the owners to withdraw the barge. To reflect the intention of the drafters to make the contract less bareboat-like the word 'possession' has been replaced with 'custody'."

6.47 This comment is odd: the intention and effect of the form in 2008, as before in 1994, was to provide a standard form demise or bareboat charterparty for barges. As the same explanatory notes begin: "BIMCO's well-used standard barge bareboat charter party was first formulated and published in 1994. [. . .] BARGEHIRE 94 has served this particular sector of the industry well over the past 15 years. In 2007 it was decided that to ensure that BARGEHIRE kept pace with commercial practice, the form should undergo a modest revision. [. . .] the form is based on

BIMCO’s successful bareboat charter party, BARECON 89, [. . .].” In these circumstances, there should be no reluctance in describing the position accurately in terms of the owner giving up possession of the barge to the charterer, since that is the true effect of the terms of “Bargehire 2008” irrespective of the use of the term “custody.” The barge is hired to the charterer by its owner and the owner gives possession of it to the hirer, as under any bailment by hire.

6.48 Paragraphs (a) and (b) therefore emphasise the traditional characteristics of a demise by stating that the vessel is at the absolute disposal of the charterer and under its “complete” control, ie its sole control, and that all operation of the barge during the charter period is for the charterer’s account. The charterer is to bear all costs and taxes save for those levied on the owner as registered owner as the owner’s own income tax. However, if the barge has to undergo substantial works due to new class requirements or flag state or other compulsory legislation, the BIMCO form provides for an opportunity for the renegotiation of the hire rate (where the costs of the works is over 5% of the barge’s insured value).

Maintenance and repair

6.49 The charterer is obliged in various different respects to maintain and repair the barge to a defined standard.

i Under para. (a) the charterer is obliged to repair the barge and all that comes with it “in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice.” This is, with one difference, equivalent to the obligation upon the owner under a time charterparty and will require the hirer to do whatever is necessary to keep the barge in a good and seaworthy condition: for this and what it entails, see above in relation to clause 3(b) of the “Supplytime 2017” form. The difference is that unlike the obligation under clause 3 of that form (and under forms such as the NYPE) the obligation on the hirer is an absolute one and is not expressed in terms of the exercise of due diligence; for a consideration of an absolute maintenance obligation, see *Adamastos Shipping v Anglo-Saxon Petroleum (The Saxon Star)* [1957] 1 Lloyd’s Rep 271 (CA) *per* Parker LJ at p. 280 and Coghlin, Baker, *Time Charters* (7th edn, 2014), at para. 11–10 *et seq*. Instead of simple reliance upon an obligation to maintain and redeliver in like good order and condition (although one is contained in clause 22(a)), “Bargehire 2008” imposes an absolute obligation on the charterer to maintain the as delivered condition at all times throughout the charter service; this avoids the charterer letting the barge fall into poor condition and seeking at the end of the charter period to reverse time and to put the barge back into condition. Coupled with the owner’s right of inspection under clause 12 and the notification duty on the charterer under that clause, this offers a practical and effective regime for ensuring that the barge is redelivered in good, equivalent condition. Nevertheless, as a long-stop obligation, as seen below, clause 22(a) in relation to redelivery provides that “The Barge shall be redelivered to the Owners in the same or as good a structure, state, condition and class as that in which she was delivered.”

ii Under para. (a) the charterer is under the obligation to arrange repairs to “the Barge, her machinery, appurtenances and spare parts” immediately, such repairs to be carried out within a reasonable time (and to pay for them under para. (b)). The distinction between these aspects of the barge and the barge’s “outfit, equipment and appliances”, dealt with separately in para. (e) should be noted: see below. Given the absence of any listing or specification of the features of the barge, as compared with the description of the tug or OSV in Annex A to “Towcon 2008” or “Supplytime 2017”, distinguishing “machinery” from “equipment” and “appurtenances” from “outfit” is not always a straightforward task. Paragraph (a) requires the charterer to respond immediately to a situation of

damage by having any survey necessary carried out and to put in place repairs within a reasonable time, which although not defined will depend upon the nature of the damage, the need for repair, the safety of the barge continuing with operations and the availability of suitable repair facilities etc. (see eg *Davis*, at para. 11.3 in relation to the similar "Barecon 2001" provision). The importance of prompt repair is underlined by the owner's right to "withdraw the Barge from the service of the Charterers"; while not expanded upon, the right of withdrawal is likely to be construed as a right to terminate the charterparty and withdraw the vessel rather than merely a right to withdraw the services of the vessel temporarily, cf. the position under a time charter where the same expression is used, discussed in Coghlin, Baker, *Time Charters* (7th edn, 2014), at para. 16.74 and see *The Agios Giorgis* [1976] 2 Lloyd's Rep 192 at p. 202, albeit in the time charter context.

iii The repair obligation is also referred to in para. (e) in terms of the barge's "outfit, equipment and appliances." The charterer has the full use of the barge and all her equipment, outfit and stores but is obliged to return the same in equivalent quantity and type and "in the same good order and condition as when received, ordinary wear and tear excepted." The charterer is to replace items which are damaged beyond fair wear and tear (eg fungibles such as ropes and wires or parts used in machinery or items of equipment) during the service and is required to repair or replace "worn or lost parts or equipment" to a standard which is in all respects not such as to diminish the value of the barge. This disjunction between the repair standard of "the Barge, her machinery, appurtenances and spare parts" and variously in para. (e) the barge's "outfit, equipment and appliances" or "parts or equipment" is unsatisfactory and can give rise to disputes, with different standards potentially involved. Consideration might usefully be given to a single repair obligation with specific reference to items which become worn out during the service, and a separate replacement/reinstatement obligation.

6.50 Note that a separate provision, clause 18, deals with the responsibility for carrying out repairs to damage which are insured repairs: this places the responsibility upon the charterer for effecting insured repairs and settling the insurance claim.

Changes to the barge

6.51 The charterer is entitled to fit additional equipment to the barge without the owner's consent under para. (e), provide that the fitting of the same is not a structural alteration or change. Such a change is dealt with under para. (c) both in terms (curiously) of "structural changes to the Barge" and also, separately, "changes [not referred to as structural or of similar quality *mutatis mutandis*] in the machinery, appurtenances or spare parts thereof" where the owner's prior consent is required. This too offers room for dispute; however, the rule of thumb seems in practice to be (from at least one arbitration award) that any changes at all to what is already there requires consent, but adding or installing a new item to or on the barge, provided it does not lead to such a change, does not.

Restrictions on the charterer's use of the barge

6.52 Moved from clause 8 (Trading Limits) in the 2008 revision of "Bargehire", there are three particular restrictions on the use of the barge, despite the width of the charterer's control under paras. (a) and (c).

6.53 First, and most importantly, the barge "shall be moored in ports or places to lie safely, always afloat at any state of tide." As to the safe port and place warranty generally see under the corresponding provisions in "Towcon 2008" and "Supplytime 2017" considered in Chapters 4 and 5, and Coghlin, Baker, *Time Charters* (7th edn, 2014), paras. 10.1–10.49 and Cooke, *Voyage*

Charters (4th edn, 2014), para. 5.31 *et seq*. The warranty applies irrespective of whether the barge is a submersible or semi-submersible barge (albeit contemplated by the form: see eg clause 14) and the barge cannot take the ground under any circumstances, absent amendment of the clause. The warranty is an absolute one as is found, for example, in the “NYPE” form or the “Baltime” form, not that of due diligence as found in “Supplytime 2017” and “Shelltime 4.” Further the warranty is stated to apply only in respect of “mooring” and is not more widely expressed in terms of all ports and places where the barge may be used, for example waters in which she may be manoeuvred for cargo operations without mooring or which she may transit en route to and from a mooring position. This seems an unduly narrow safe port and place undertaking, if one is to be given at all. The charterers do not give an absolute warranty of safety, as is found, for example, in the “NYPE” form or the “Baltime” form. Under the “Supplytime 2005” form, the charterers only undertake to exercise due diligence to ensure the vessel is used at and between safe places as if she were their own property: compare the similar approach adopted in clause 4(c) of the “Shelltime 4” form of tanker time charterparty and the commentary on this provision in Coghlin, Baker, *Time Charters* (7th edn, 2014), at paras. 37.41–37.45.

6.54 Secondly the barge cannot be towed in tandem or as a double tow, ie together with any other floating object without the owner’s consent. This reduces a common area of risk and of hull damage. Lastly, the ballast tanks of the barge can only be used for ballast water: this deals with the situation where a charterer seeks to store fuel or other consumable liquids in a ballast tank, which may lead to cleaning costs, contamination of ballast water and possible tank damage.

Clause 14: ballast engineer

“14. Ballast Engineer

(a) The Barge may be ballasted, and if submersible, submerged and surfaced by the Charterers subject to the Charterers always using a competent ballast engineer for such operations.

(b) In case the Charterers request in writing and the Owners agree to provide a competent ballast engineer, a notice for same of seventy-two (72) hours plus allowance for travelling time to be given by the Charterers for every occasion the Owners’ ballast engineer is required. The Charterers agree to pay to the Owners an amount *per* day as stated in Box 21 *per* ballast engineer for up to ten (10) hours’ work *per* day including but not limited to travelling time and/or time for standby associated therewith. For any hour in excess of ten (10) hours *per* day the Charterers shall pay an amount *per* hour as stated in Box 22 for each ballast engineer. In addition the Charterers shall pay all travel expenses, accommodation expenses and meals for each ballast engineer, all according to the Owners’ invoice, and reimburse the Owners for any advance payments they have made in this respect.

(c) The ballast engineer shall at all times follow the orders and directions of the Charterers. The Charterers shall indemnify and hold the Owners harmless from and against all costs, claims, damages, expenses, losses, liabilities and penalties arising out of or in connection with the ballast operations. All liabilities in respect of death and personal injury relating to the ballast engineer shall be the responsibility of the party providing the ballast engineer.

(d) The Charterers shall provide the ballast engineer with safe access to the Barge. Throughout the time that the ballast engineer is on board the Barge the Charterers shall ensure that they, their client, or their subcontractors shall have a representative in attendance who will keep in contact with the ballast engineer.”

6.55 Clause 14 was a new provision to “Bargehire 2008.” Its effect is self-explanatory and provides for the charterer to have the right to ballast the barge for its various operations (including submerging it partially or fully if so designed, eg for float-on/float-off loading and discharging operations) provided it uses a “competent” ballast engineer (the previous 1994 expression was “fully qualified” but as the 2008 notes state: “As ballast engineers do not normally have qualifications in the conventional sense the words ‘fully qualified’ have been replaced with ‘competent’.”) Although clause 14 does not expressly reflect the position, it seems that the charterer may simply

put on board its own ballast engineer to carry out the necessary operations under para. (a); see also the wording of the mutual indemnity provision in para. (c): “All liabilities in respect of death and personal injury relating to the ballast engineer shall be the responsibility of the party providing the ballast engineer.” Paragraph (b), (c) – largely – and (d) deal with the situation where the charterer requests (as is common) that the owner provide its own ballast engineer for the charterer to use on the barge.

Clause 15: hire

“15. Hire

(a) The Charterers shall pay to the Owners for the hire of the Barge at the rate *per* calendar day stated in Box 24 commencing from the date of its delivery to the Charterers. Hire to continue until the date when the Barge is redelivered by the Charterers to the Owners.

(b) Payment of hire shall be made in cash without discount every month in advance on the first day of each month, in the currency and in the manner indicated in Box 26 and at the place stated in Box 27.

(c) Payment of hire for the first and last month’s hire if less than a full month shall be calculated proportionally according to the number of days in the particular calendar month and advance payment shall be effected accordingly.

(d) Should the Barge be lost or missing, hire shall cease from the date and time when she was lost or last heard of. Any hire paid in advance shall be adjusted accordingly.

(e) Time shall be of the essence in relation to payment of hire hereunder. In default of punctual and regular payment as herein specified, the Owners may require the Charterers to make payment of the amount due within ninety-six (96) running hours of receipt of notification from the Owners, failing which the Owners shall have the right to withdraw the Barge without prejudice to any other claim the Owners may have against the Charterers under this Charter Party. Further, so long as the hire remains unpaid, the Owners shall be entitled to suspend the performance of any and all of their obligations hereunder and shall have no responsibility whatsoever for any consequences thereof in respect of which the Charterers hereby indemnify the Owners.

Hire shall continue to accrue and extra expenses resulting from such suspension shall be for the Charterers’ account.

(f) Any delay in payment of hire shall entitle the Owners to interest at the rate *per* annum as agreed in Box 25.”

6.56 With one important exception, clause 15 largely corresponds with the standard form of most common time charterparty hire provisions, providing for the right of withdrawal of the vessel and termination of the charterparty in the event of non-payment upon the giving of notice by the owner to the charterer (under para. (e)) as well as a right to suspend the provision of the services “so long as the hire remains unpaid.” This effectively mirrors the similar wording in clause 12(f) of the “Supplytime 2017” form (“At any time while hire or other sums due and payable by the Charterers to Owners remain outstanding the Owners shall be entitled to suspend”) and for this reason, no notice of the suspension of the performance of obligations need be given by the owner to the charterer and the obligation can simply be suspended: see *Greatship (India) Ltd v Oceanografia SA de CV (The Greatship Dhriti)* [2012] EWHC 3468 (Comm). The utility of this provision in a time charterparty context is self-evident: the owner is providing the services of the vessel and crew. It is less so in the context of a demise charter where the owner would have to seek to retake possession of the barge from the charterer while she is in service and where the owner’s obligations to be performed merely consist of allowing the charterer to enjoy possession of the barge. To this extent, “Bargehire 2008” resembles more a time charter than a typical demise charter, such provisions not being present in “Barecon 2001” (although there is an express right to terminate the charter for non-payment under that form as part of the termination provsions).

6.57 The exception to the common form of time-charter provision is that clause 15(e) provides that “Time shall be of the essence in relation to payment of hire hereunder.”

6.58 This may be compared with the more extensive wording in clause 11(a) of the standard demise charter "Barecon 2001" form, which provides that "the Charterers shall pay hire due to the Owners punctually in accordance with the terms of thus Charter in respect of which time shall be of the essence." The effect of this is almost certainly to make the prompt and punctual payment of hire a condition of the charterparty, thereby enabling the owner in the event of any non-payment and when terminating for such non-payment not only to exercise its contractual right to terminate but also to terminate for breach of condition and therefore also to claim damages for the loss of the benefit of the charterparty. The owner is therefore absolved of the need to show that the non-payment of hire was either so serious as to amount to a repudiatory breach or that the charterer was in renunciation of the charterparty. Cf. the discussion in *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2016] EWCA Civ 982. In that case the significance of the obligation being described as one as to which time is of the essence was described by Sir Terence Etherton MR at para. 104 as follows:

> It is to be noted that in our jurisprudence the reference to time being "of the essence" is used in two very different senses. On the one hand, it is used to describe a contractual time condition any breach of which is a repudiatory breach entitling the other party to bring the contract to an end. On the other hand, in the context of a provision for service of a notice making time of the essence, typically in a conveyancing contract, subject always to the express terms of the contract it means fixing the time beyond which equity will not intervene to prevent the innocent party being entitled to treat the contract as at an end if the innocent party would otherwise be entitled at law so to do: *Urban 1 (Blonk) Street v Ayres* at [44], esp (6) and (7); *Dalkia Utilities Services plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep 599 at [131].

Clauses 16 and 17: insurance of the barge and in respect of other risks

6.59 Clauses 16 and 17 are lengthy and for that reason are not set out in full here: see Appendix 7 for the full text. Despite their length they are fundamentally straightforward provisions. Their effect has been accurately described in the explanatory notes.

> The two clauses that dealt with insurance and responsibilities in BARGEHIRE 94 – Clause 16 (Owners' Insurance, Responsibilities and Classification) and Clause 17 (Charterers' Insurance, Responsibilities and Classification) – have been replaced with two new clauses.
>
> The Sub-committee has divided the insurance options into two new clauses. The first, Clause 16 has been renamed Hull, Machinery and War Risks Insurance, Responsibilities and Classification. As the name suggests the Clause allocates responsibility for H&M and War Risks insurance. The Clause provides the option for either the owners or the charterers to provide such insurances.
>
> The parties should clearly indicate their choice as to who is to provide H&M and War Risks cover by filling in Box 28. If Box 28 is left blank or is filled in with the wrong information, then, to avoid uncertainty, the owners" marine and war risks cover will apply.
>
> Whichever option is agreed the other party will be named as co-assured on the policy of the insuring party.
>
> Responsibility for maintaining the barge in class rests with whichever party is responsible for H&M insurance.

6.60 The clauses address expressly the issue of co-insurance and waiver of rights of subrogation which co-insurance by itself may not necessarily achieve. The issue has arisen in the context of the BIMCO "Barecon 2001" bareboat charter standard form in *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35. See the discussion of this case in Chapter 5. The provisions are clear in their terms and the explanatory notes are correct, it is suggested, when they state: "the revised insurance and liability provisions now clearly and appropriately embrace the 'bareboat' concept that underlies the agreement. The new wording of Clauses 16 and 17 should avoid any charterers entering into BARGEHIRE agreements without a full understanding of what is required of them in respect of providing insurance for the barge."

6.61 Clause 16 refers to the ordinary questions of hull and machinery insurance. However, the practical difficulties of a charterer taking out P&I insurance for the barge in many cases has led the drafters to tackling this in clause 17. Again, the explanatory notes set out the problem and the solution adopted to it in "Bargehire 2008", where the 1994 form was silent, and are worth citing in full.

> Clause 17 addresses the most difficult aspect of BARGEHIRE – the ability of charterers to obtain appropriate P&I cover for a barge. Due to the nature of the trade, barges are often contracted on short notice and for relatively short durations. This makes it difficult for charterers to obtain P&I cover and has led to the development of the practice of "bareboat" chartering barges with insurance as part of the package.
>
> Option 17(a)(i) (Owners' P&I cover) provides for the owners to insure the barge against P&I risks and to name the charterers as joint entrants on the owners P&I cover. Under this option the charterers will operate the unit and be liable for the risks, but the owners" record will bear the exposure. The risks for which the charterers are liable include traditional owners' risks such as dock damage and wreck removal. This option is most likely to be used where the charterers are unable to obtain their own P&I cover. For the avoidance of doubt by the charterers as to what insurance cover is provided and what risks the charterers are liable for the revised Clause spells out the charterers' liabilities and insurance requirements. The owners are also required to provide the charterers with evidence of insurance cover.
>
> Option 17(a)(ii) (Charterers' P&I cover) represents what most owners are likely to want to use. Here the operational risk lies with the charterers under their own P&I cover. However, as most barge charters are for short durations the owners will most likely choose to maintain their own P&I cover for the barge "in the background" regardless of the cover taken out by the charterers.
>
> Again, as in 17(a)(i) (Owners' P&I cover) this clause spells out what the charterers are liable for and what they must insure. The charterers must also obtain insurance on terms acceptable to the owners and must provide evidence of such cover being placed.

Clause 18: insured repairs

"18. Repairs

(a) The Charterers shall, subject to the approval of the Owners or the Owners' insurers, effect all insured repairs and the Charterers shall undertake settlement of all expenses in connection with such repairs as well as all insured charges, expenses and liabilities. If Sub-clause 16(a)(i) applies the Charterers shall be secured reimbursement through the Owners' insurers for such expenditure upon presentation of accounts.

(b) The Charterers also to remain responsible for and to remedy damage and settle costs and expenses incurred thereby in respect of all other damage not covered by the insurances and/or not exceeding any possible franchise(s) or deductibles as stated in Box 31. All such franchise(s) or deductibles, which are applicable for each and every incident, are for the Charterers' account.

(c) All time used for repairs under the provisions of this Clause, including any deviation, shall count as time on hire and shall form part of the Charter Party period.

(d) Notwithstanding Sub-clause 16(d) the Charterers shall remain responsible for Class survey costs in respect of such damages or repairs."

6.62 This provision supplements clause 16 and 17 and deals principally with insured repairs; it should be read in the light of the general obligation on the charterer in respect of all maintenance and repair under clause 13. It is the charterer's responsibility to effect all insured repairs and under the clause 16(a)(i) option, where the owners take out insurance on the barge, the charterers are to be reimbursed by the owners' insurers for their expenses (para. (a)). Under para. (b) the charterers are also responsible for repairs not covered by insurance. This will apply, for example, where there are deductibles applicable under the terms of the insurance. The barge remains on hire during repairs and any deviation necessary to effect the repairs (para. (c)). The costs for class surveys in respect of damages and repairs as mentioned in the clause are for the charterer's account; this again reflects the transfer of control and operation of the barge to the charterer under clause 13.

Clause 19: ballast water management

“19. Ballast Water Management

(a) All ballast water operations shall be conducted in accordance with the International Convention for the Control and Management for Ships’ Ballast Water and Sediments or other similar legislation as applicable.

The Charterers shall maintain a ballast water management plan approved by the marine warranty surveyor and ensure that all ballast water operations are conducted in accordance with the plan including obtaining approvals and/or licences as required.

(b) At the Charterers’ request the Owners shall provide ballast engineers to conduct the ballast water exchange in accordance with the Charterers’ ballast water management plan. The Charterers shall arrange for the transfer of the ballast engineers to and from the Barge.

(c) All costs arising from compliance with legislation including, but not limited to, the development of the ballast water management plan, permits, licences, engineering studies, provision of ballast engineers and delays to the Barge, shall be for the account of the Charterers.

(d) Should ballast water have to be treated or discharged into another vessel or ashore, the costs and time for such activities will be for the account and responsibility of the Charterers.

(e) The Charterers shall indemnify and hold harmless the Owners with regard to all liabilities, damages, and/or additional time and costs arising from or as a result of ballast water operations in accordance with this Clause.”

6.63 The increased focus on contaminated ballast water as a source of marine pollution and the fact that large ocean-going barges have considerable ballast capacity and may be continually ballasting and deballasting in different waters as part of carriage operations means that it is important that the responsibility for ballast water management is clarified and the charterer’s control over the barge and its operation reflected in provisions which protect the owner from liabilities arising from ballast water issues during the demise to the charterer. As the 2008 notes state: “Ballast water management is an issue which is becoming increasingly important in many jurisdictions. As barges are quite different from other manned ships it has been decided to create a clause especially for the barge industry to deal with this issue, rather than to use a standard clause.”

6.64 The regime adopted by clause 19 is to require the charterer to undertake a contractual obligation to the owner for proper ballast water management in accordance with the relevant international Convention (viz. the International Convention for the Control and Management for Ships’ Ballast Water and Sediments) or other legislation regulating ballast water handling and, additionally, to have and to observe a ballast water management plan. (It should be noted that this will probably note form part of the owner’s periodic inspection under clause 12, which is limited to condition and repair standards. It may be advisable to insert an audit right if the charter is a long one.) In addition, all costs and liabilities of ballast water operations, defined widely and comprehensively in paras. (c), (d) and (e) are for the charterer’s account. As the notes state: “All liabilities and responsibilities for such operations solely rest with the charterers.”

Clause 20: *force majeure*

6.65 This is a variant of common form standard form (and other BIMCO standard form) *force majeure* provisions. See eg in relation to clause 35 of “Supplytime 2017” in Chapter 5 above. Although not stated expressly in the explanatory notes (“A new *force majeure* clause used in other recently published BIMCO documents has replaced the former Clause 18”), this clause is also modelled on the ICC (International Chamber of Commerce) model *Force majeure* Clause 2003 which BIMCO has used to create a “standard” *force majeure* provision for its contracts.

Clause 21: consequential loss

“21. Consequential Loss

Except as elsewhere provided in this Charter Party, neither the Owners nor the Charterers shall be responsible for any consequential loss, howsoever caused, including but not limited to damage or decline in the market value of the Barge or goods during delays, loss of profit or loss of business opportunities in respect of any claim that the one may have against the other.”

6.66 This is an old and, it is suggested, badly drafted example of the type of clause which excludes consequential damage (as defined in *Croudace Construction Ltd v Cawoods Products Ltd* [1978] 2 Lloyd’s Rep 55: “any consequential loss or damage”) and specified heads of loss but in a manner which links them to the concept of consequential damage: this is most commonly done by a phrase such as “consequential damages including loss A, loss B etc.” It should be replaced with a newer version of a consequential loss clause modelled on the “Supplytime 2017” version which separates out as distinct and non-overlapping loses the concept of “consequential” loss and the specific heads of loss described.

6.67 The predominant line of authority is clearly to the effect that the specified head of loss (eg loss of profit) is only excluded in so far as it was consequential loss of that sort and not direct loss of that sort: see the cases considered in Chapter 4 and Chapter 5, eg *Alexander G. Tsavliris Ltd v OIL Ltd (The Herdentor)*, unreported, 19 January 1996 (noted at (1996) 3 Int ML 75 and see Appendix 22); *Ease Faith Ltd v Leonis Marine Management Ltd* [2006] 1 Lloyd’s Rep 67 and the clearest recent exposition in *Ferryways NV v Associated British Ports* [2008] 1 Lloyd’s Rep 639 at 649–650. The approach is a little more problematic in relation to clause 21 of “Bargehire 2008” where the clause refers to types of loss which, it can be argued, do not naturally lend themselves to sensible description as “examples of limb 2 loss” eg “decline in the market value of the Barge or goods during delays.” The approach of the court in *Ease Faith Ltd v Leonis Marine Management Ltd* [2006] 1 Lloyd’s Rep 673 was to reject Rix J’s approach (discussed in detail in Chapter 4) in *BHP Petroleum Ltd v British Steel plc and Dalmine SpA* [1999] 2 Lloyd’s Rep 583 that the concepts specifically referred to led to the conclusion that no distinction was being drawn between direct/limb 1 and indirect or consequential/limb 2 losses. Andrew Smith J held that “For my part I do not find it remarkable that parties seeking to exclude all indirect loss but being particularly concerned about indirect loss of profit should agree upon provision that makes specific reference to loss of profits” (para. 149). With losses such as changes in market value, that approach is more difficult. In a climate where the *Ferryways* and *Croudace* approach is under attack (see the recent comments of the Court of Appeal in *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372 *per* Moore-Bick LJ at para. 15 and Leggatt J in *Scottish Power UK Plc v BP Exploration Operating Co Ltd* [2015] EWHC 2658 (Comm)) it is possible that clause 21 of “Bargehire 2008” is given a “Rix J approach” meaning that sensible drafters will not wish to gamble on that chance and will address the position as suggested above.

Clauses 22 and 23: redelivery and early redelivery

“22. Redelivery

(a) Upon the expiration of this Charter Party, the Charterers shall redeliver the Barge safely moored at the port or place stated in Box 15. Such port/place of redelivery to be always safe and accessible for the tug and the Barge, and where they can lie always safe and afloat at all tides. The Barge shall be redelivered to the Owners in the same or as good a structure, state, condition and class as that in which she was delivered, ordinary wear and tear excepted, with cargo spaces free of any obstructions with all previous seafastenings removed and shall be properly documented as regards trading certificates, classification and equipment.

(b) If the Charterers, for any reason whatsoever, fail to redeliver the Barge on expiry of the Charter Party period, or any amendment to same which has to be agreed in advance and in writing, the Owners shall be entitled to the agreed rate or to the market rate for that period, whichever is the higher, increased by the amount stated in Box 20. Unless the late redelivery is caused by the Charterers’ negligence or wilful default, this compensation shall be the Owners’ sole financial remedy for damages arising out of late redelivery.”

“23. Early Redelivery

Upon giving fifteen (15) days’ prior notice to the Owners, the Charterers shall, notwithstanding any other provision of this Charter Party, be entitled to effect early redelivery of the Barge and to terminate this Charter Party at any time during the period of the Charter Party as agreed according to Clause 2, provided however, that if exercising this option, the Charterers shall pay hire for the remainder of the period of the Charter Party as agreed according to Clause 2.”

6.68 Redelivery raises a number of issues. First, late redelivery is dealt with by special compensation provisions: if the charterer redelivers the barge late the owner will be entitled to whichever is the higher of the agreed rate stated in Part I or the market rate for the overrun period, plus an agreed lump sum, also stated in Part I. It is important to avoid any penal provision in the lump sum. The owner is limited to this compensation as its sole remedy absent “the Charterers’ negligence or wilful default”: as to the doubtful meaning of this expression, see above in relation to clause 7 of “Bargehire 2008”, the cancelling clause applicable to delivery, where this wording is also found.

6.69 Secondly, unlike the delivery provisions of clause 7, where there is no statement as to the safety of the port of delivery either for the barge herself or for the taking of delivery of the barge by the charterer, eg by a suitable tug (cf. clause 2 of the “Barecon 2001” form which requires the charterer to have indicated a safe berth in which to take delivery), and where as there will be a named port or place the charterer takes the risk of safety, under clause 22, the charterer warrants the safety of the place of redelivery and its accessibility for the owner’s tug. This re-emphasises that the charterer may wish to consider protection for its being able to take over the barge in safe conditions on *delivery* in identical terms (compare clause 2(a)(ii) of “Supplytime 2017.”

6.70 Thirdly, clause 22(a) imposes a further obligation on the charterer as to the condition of the barge in addition to the continuing obligations of maintenance and operation under clause 13. The barge is to be redelivered, irrespective of the charterer’s compliance with clause 13 “in the same or as good a structure, state, condition and class as that in which she was delivered, ordinary wear and tear excepted, with cargo spaces free of any obstructions with all previous seafastenings removed and shall be properly documented as regards trading certificates, classification and equipment.” While in very many cases, adequate contractual maintenance may (or should) result in the barge being redelivered in a better condition than as delivered, it is worth bearing in mind that clause 13 and clause 22 are aimed at different things. Under clause 22, the owner gets what he hired back in at least the same condition it was in when he hired it to the charterer, allowing for fair wear and tear. Under clause 13 the charterer accepts an obligation to maintain and repair the barge: if the barge is delivered by the owner in (just) good operational condition but with aspects of hull and outfit on their last legs although still serviceable, the charterer cannot redeliver the vessel in the same condition unless it can argue that good maintenance under clause 13 over the term of the charter permitted the items in question being “nursed” rather than simply changed out or reconditioned or fully overhauled and repaired. In an arbitration concerning the demise charter on “Barecon 2001” terms of a semi-submersible drilling rig, a tribunal (including a leading commercial QC), an argument by the charterer that the condition in which the rig was delivered with a decrepit but fully operational system of, for example, ballast valves meant that the owner could not complain if the rig was delivered back in the same condition, was held to be inconsistent with the separate and independent repairing obligation on the charterer which might result in the rig being redelivered (or having to be redelivered) in a better condition.

6.71 Fourthly, reflecting the fact that barge services may end earlier than anticipated, clause 23 provides for the charterer to redeliver early paying hire for the unexpired portion of the charter term.

Clause 24: non-lien and indemnity

"24. Non-Lien and Indemnity

The Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the Owners in the Barge.
(a) The Charterers shall indemnify and hold the Owners harmless against any lien of whatsoever nature arising upon the Barge during the Charter Party period while she is under the control of the Charterers and on any claims against the Owners arising out of or in relation to the operation of the Barge by the Charterers. Should the Barge be arrested by reason of claims or liens arising out of her operation hereunder by the Charterers, the Charterers shall at their own expense take all reasonable steps to secure that within a reasonable time the Barge is released and at their own expense put up bail to secure release of the Barge.

(b) The Owners shall indemnify and hold the Charterers harmless against any lien or claim of whatsoever nature arising upon the Barge during the Charter Party arising out of the operation of the Barge by Owners or former charterers prior to the delivery of the Barge to Charterers pursuant to this Charter party. Should the Barge be arrested by reason of claims or liens arising out of her operation by Owners or former charterers prior to the delivery hereunder, the Owners shall at their own expense take all reasonable steps to secure the release of the Barge and at their own expense put up bail to secure the release of the Barge. All time that is lost as a result of such an arrest shall be for Owners' account."

6.72 While the punctuation and structure of clause 24 is unsatisfactory, it deals with two matters.

6.73 First, the charterer is not to allow any lien or encumbrance to be incurred in respect of the barge; while logically part of para. (a), this is treated separately. It represents the standard time charter undertaking by a charterer: cf. clause 19 of "Supplytime 2017" and the commentary in Chapter 5. It therefore includes the arrest of the barge and the clause imposes an obligation on the charterer to keep the vessel free from or to release the vessel from arrest where such arrest is in respect of any lien or encumbrance which might give rise to a third party having priority over the interest in the vessel, cf. *The Vestland* [1980] 2 Lloyd's Rep 171 and Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 30.85. As to the meaning of the term "or their agents" in the term "incurred by them or their agents", see *The Global Santosh* both at Court of Appeal level *per* Gross LJ at [2014] 2 Lloyd's Rep 103, para. 37, and in the Supreme Court at [2016] UKSC 20. As part of the charterer's responsibility by para. (a) the charterer undertakes not only to indemnify the owner against claims which may be made against it, or its interest in the barge either during the service or, *semble*, after redelivery provided that they constitute arrests "arising out of or in relation to the operation of the Barge by the Charterers" but also to take steps to free the barge from such arrest.

6.74 Secondly, a corresponding obligation is imposed on the owner in relation to any liens or claims and arrests which are those "arising upon the Barge [sic] during the Charter Party arising out of the operation of the Barge by Owners or former charterers prior to the delivery of the Barge to Charterers." This fortifies the implied obligation under section 7 of the Supply of Goods and Services Act 1982 by which the owner undertakes that it has or will have the right (a) to transfer possession of the barge to the charterer at the time of the delivery of the chattel into the contractual service and the possession of the hirer and (b) and of considerable importance to a charterer, that the hirer will enjoy quiet possession of the chattel during the period of the hiring. It gives the charterer a very useful express right (perhaps amenable to specific performance and certainly to interim relief) to make the owner "take all reasonable steps to secure the release of the Barge and at their own expense put up bail to secure the release of the Barge."

Clauses 26–34: standard boilerplate and other general provisions

6.75 The remaining provisions of “Bargehire 2008” consist of standard form or general contractual provisions. Unlike most other BIMCO forms there is no ‘Entire Agreement Clause” of any sort (cf. clause 41 of “Supplytime 2017”). Such provisions, if properly drafted are useful in shutting out attempts to bring in pre-contractual promises or assurances: see generally Chapter 5 above. Consideration should be given to the inclusion of such a clause which can usefully preclude reference by either party to the *va-et-vient* of contractual negotiations as a basis for grafting on to the contract terms some alleged collateral agreement.

6.76 The remaining provisions consist of the following:

i *Clause 26*: a general average clause providing for adjustment in accordance with the 1994 York-Antwerp Rules. This reflects the cargo-carrying aspect of barge service.

ii *Clause 27*: an assignment and sub-letting or sub-demise clause requiring the owner’s consent (not to be unreasonably withheld) to the charterer’s onward use of the vessel and also providing for the case where the owner wishes to sell the barge (also subject to the charterer’s consent, on the same terms). The explanatory notes counsel the owner in this event: “Should the owners sell the barge before or during the charterparty, with the charterers consent, the owners should assign the charterparty to the buyer and give the charterers the full details of the buyers and of the delivery date of the barge to the buyers. From that time onwards it will be the buyers who are responsible towards the charterers under this charter party.”

iii *Clause 28*: this is an option requiring a bank guarantee to be provided by the charterer as surety for the due performance of its obligations under the charterparty; no form of guarantee is suggested.

iv *Clause 29: Requisition/Acquisition*: this seems to be a historic remnant from older barge hire forms and caters for the compulsory requisitioning (not necessarily only in time of war but generally) or acquisition of the barge. It has particular resonance in certain operating environments (such as Venezuela) where compulsory “purchase” may suddenly be imposed. If the barge is “requisitioned for hire”, ie the authority compels the charterer to let the barge to it paying hire to the charterer (cf. the old “T99” charterparty imposed on vessels by HM Government in the Second World War) the charterparty remains in force and hire remains payable. However, any hire or compensation that the owner receives is paid to the charterers. In the event that the barge is confiscated due to compulsory acquisition; the charterparty is terminated from the date of such acquisition, although hire remains earned and payable up to the date of the acquisition.

v *Clause 30*: *War Risks/BIMCO Conwartime 2004*: as to this see Chapter 5 above and the commentary on the corresponding provision in clause 22 of “Supplytime 2017” and see Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 37.105 *et seq*.

vi *Clause 31*: this preserves the owner’s right to limit liability, cf. clause 25(d) of “Towcon 2008”, considered in Chapter 4 above. There is no provision in “Bargehire 2008” which even implicitly could be read as excluding such right: see also *Bahamas Oil Refining Company International Ltd v The Owners of the Cape Bari Tankschiffahrts GmbH & Co KG (The Cape Bari)* [2016] UKPC 20 and Chapter 13 below.

vii *Clause 32: Commission*. This clause reflects that the broker’s commission may only be earned wholly or in part upon hire being paid in full (or whatever remuneration is agreed having been paid). This clause provides for the party in default to pay the brokers and is probably directly enforceable by the brokers under the Contracts (Rights of Third Parties) Act 1999: see above in Chapter 4 and *Chitty on Contracts* (32nd edn, 2015), Vol. I, para. 15–044 *et seq*. The explanatory notes state, perhaps in special recognition of the

services of brokers in the barge sector, “This clause takes into account the brokers who facilitated the making of the fixture and states that the owners should pay them certain, enumerated commissions. Should the full hire or mobilisation/demobilisation fee not be paid due to a breach of the charter party, the liable party will have to indemnify the brokers for their lost commission.”

viii *Clause 33*: this is the standard BIMCO Dispute Resolution Clause, as to which see Chapter 4 and the commentary on the corresponding provision in “Towcon 2008”, clause 33. It provides the parties with three options: London arbitration and English law, New York arbitration and US law, or the laws of another jurisdiction as chosen by the parties and provides for mediation.

ix *Clause 34*: is a standard “notices” clause which provides as follows:

> (a) All notices given by either party or their agents to the other party or their agents in accordance with the provisions of this Charter Party shall be in writing.
> (b) For the purposes of this Charter Party, “in writing” shall mean any method of legible communication. A notice may be given by any effective means including, but not limited to, cable, telex, fax, e-mail, registered or recorded mail, or by personal service.

The explanatory notes are worth noting, given that the later BIMCO forms have opted for a less specific wording, which is arguably less satisfactory (cf. clause 38 of “Supplytime 2017” which refers only to ensuring that the notice is “effectively given”):

> In line with other recent BIMCO forms, the standard Notices Clause has been included in the revised BARGEHIRE in order to avoid having to repeat in other clauses that notices have to be in writing and also what actually constitutes “in writing.”
>
> The Clause provides that all notices given by either party must be in writing in a readable and understandable way capable of being a record.
>
> It should be noted that e-mail is listed as one of the acceptable methods and if one of parties publishes its e-mail address as part of its contact details then the other party may if it so wishes use that medium for notices.
>
> However, given the importance and gravity of some of the notices that may be sent under the contract the parties may choose to rely on methods which provide a confirmation of delivery to the recipient to avoid disputes at a later stage.

CHAPTER 7

Standard form contracts: (V) The BIMCO "Heavycon 2007"; "Heavyliftvoy" and "Projectcon" Forms

PART A. THE BACKGROUND TO THE FORMS

7.1 An aspect of the expansion of offshore activities connected with oil exploration and production in the 1970s and 1980s was the growth of the heavylift sector of the offshore industry, with an increased demand for specialised transportation of very large, very heavy and very voluminous cargoes such as oil rigs and production platforms and parts thereof.

7.2 For over a century, the sea transportation of heavy equipment and plant was effected principally by "wet" towage, that is, towage usually of the item itself, if capable of independent buoyancy and flotation. The use of floating drydocks under tow laden with a heavy cargo was also an occasional method. In the early 1960s, the major towage companies began to develop "dry" towage methods, involving very large purpose-built barges or transportation units which were designed for towage at sea and could therefore offer a safer, more navigable and quicker transportation method. From this, the design of the semi-submersible barge developed, providing a loading and transportation platform capable of loading and discharging by the float on and float off of the cargo. These barges were originally barges which required to lie aground for loading but in 1976 the first truly semi-submersible barge with buoyancy equipment allowing the barge to submerge horizontally without taking the bottom was put into commercial operation: Wijsmuller BV's "Ocean Servant I." Self-propelled heavylift vessels rapidly followed, with Wijsmuller's "Super Servant" in 1979 and "Mighty Servant" in 1983, eliminating the need for towage altogether (for an interesting account of the role of Wijsmuller in the early development of the modern heavylift sector, see F. van Hoorn, "Semi-Submersible Heavy-Lift Ships in Operation" Schip en Werf, (1990) No. 8, August 1990).

7.3 The modern heavylift sector is a highly specialised one, with a number of owners and operators with dedicated fleets of heavylift vessels, servicing the transportation needs associated with, for example, the oil and gas industry, port expansion projects, power plant construction and, more recently, the construction of wind farms. The sector handles the transportation of a very wide range of heavy and voluminous cargoes and many different types of heavylift vessel are in use, from semisubmersible heavylift ships and dock ships to non-submersible multi-purpose heavylift ships with sophisticated lifting gear for project cargoes and specialised un-geared heavylift carriers for container cranes and modules. Many of the newer types of vessel in the sector offer a wide spectrum of loading and discharging methods such as float on/float off; lift on/lift off and roll on/roll off by skidding on and off. A principal characteristic of heavylift operations is therefore the absence of standardisation of the cargo and its transportation requirements which necessitates individual transport planning and an industry bespoke form of contract.

7.4 With the growth of the heavy lift trade and the increase in chartering activity, the need for a uniform contract reflecting the particular peculiarities and hazards of this form of transportation became apparent. The position was bedevilled by a host of owner's and operator's own "house" forms often unthinkingly and inappropriately adapted from other forms. As with other species of BIMCO standard form contracts, resort was had to such BIMCO forms as were then current, with the "Towcon" and "Supplytime" forms being frequently used and adapted for purposes to which they were not suited. The increasing need for a dedicated heavylift transportation contract

led BIMCO to solicit interest from the heavylift companies in a uniform standard contract. The reaction was unanimously in favour and BIMCO set up a drafting team which in turn drew up the "Heavycon" form, being a "Standard Transportation Contract for Heavy and Voluminous Cargoes" in 1985. "Heavycon" proved to be a very successful form and one which came to be almost universally used by the major heavylift operators. Since that time, as BIMCO explains:

> The developments within the heavylift sector, which initiated the drafting of "Heavycon", has since continued at a great speed with more types of cargoes and vessels tailor made for the various cargoes coming on to the market. To reflect recent developments, "Heavycon" has now been updated through a thorough revision and re-issued with the code-name "Heavycon 2007." It was adopted by the Documentary Committee at its meeting in Copenhagen November 2007.

7.5 As before, the revision was carried out by a team of heavylift specialists, including some of the major heavylift operators and the Standard P&I Club (one of the major P&I Clubs in this niche sector), chaired by Mr Arie Peterse of BigLift Shipping.

7.6 Within the heavylift sector, there are different operational sub-sectors. Some operators specialise in what has come to be called the "super heavylift sector" where transportation is performed by vessels which load by float on/float off methods and/or which are equipped with cranes of capacities of 800 tons plus, capable of handling heavy goods and project loadings with individual weights of between 500 and 1,400 tons. The cargoes are usually single items or components destined for one client. For this the "Heavycon" form was originally designed and the 2007 revision has tailored the form still further to the specific operational needs of this sector. However, there are other operators in the so-called mid-sized field which carry heavy or voluminous cargoes as part of a specialised general cargo service, using lift on/lift off methods employing very powerful cranes or derricks or roll on/roll off loading and discharging. *Faute de mieux*, operators of such vessels used and adapted the "Heavycon" form for such carriage or transportation operations. However, as BIMCO and the operators recognised:

> There are, however, various points by which the midsized sector distinguishes from the super-heavylift sector, and which make "Heavycon" less appropriate to the midsized sector. In the midsized sector, eg, the cargo is often regarded as conventional cargo where the Hague/Hague Visby liability regime appropriately applies whereas "Heavycon" is based on a Knock for Knock liability regime.

7.7 There was therefore some demand "from heavy lift operators working in the mid-sized 'lift on/lift off' and roll on/roll off sector for a dedicated contract for their trade dealing with the carriage of on- and under-deck specialist cargo." The result of was the consideration of a dedicated form for the midsized heavy lift sector which was consigned by BIMCO to a separate "Heavycon" drafting team, drawing on the expertise of the "Heavycon" drafting committee and again chaired by Mr Arie Peterse. This led to the drafting of the "Heavyliftvoy" form, which was adopted by BIMCO in 2009.

7.8 The difference between the two forms of special voyage charter parties for the heavylift sector which are now in current use has been summarised by BIMCO in the following way in its explanatory notes to the "Heavyliftvoy" form:

> HEAVYLIFTVOY joins BIMCO's other heavy lift form HEAVYCON 2007. Although both are classed as special voyage charter parties for the heavy lift trade there is an important distinction between their uses and application.
>
> HEAVYCON 2007 is a "knock for knock" contract designed primarily for the semi-submersible vessels serving the super heavy lift market where cargoes are almost exclusively carried on deck and are, in most cases, sole cargoes.
>
> HEAVYLIFTVOY on the other hand embraces the conventional cargo liability regimes of the Hague/Hague-Visby Rules and is designed for the carriage of multiple shipments both above and below deck.
>
> HEAVYLIFTVOY offers a variety of loading and discharging options, providing for free-in or liner in-hook terms for loading and free-out or liner out-hook terms for discharging. Provision is made for

> the suitability for transportation and proper presentation of the cargo, including lifting and securing devices and also for the timely submission of drawings.

7.9 Various heavylift operators straddle both sectors, often using vessels of innovative design within their fleet so as to provide a flexible transportation platform for unusually configured and very large cargoes (an example is Rolldock Shipping BV's semi-submersible vessels with large cranes and adjustable weather decks and ro-ro ramps). The availability of the two different BIMCO forms allows such operators to select the most appropriate form for the type of cargo operation involved.

7.10 The heavylift sector has long specialised in the provision of transportation services for large-scale engineering projects both offshore and otherwise. In addition, similar smaller-scale transportation operations are provided by the use of a tug and a carrying barge or barges, often themselves highly specialised transportation units offering either lifting facilities or semi-submersible operation or both. Barges are commonly hired by oil companies, construction contractors and fabrication yards who use the barges for transportation and also the floating storage of heavy and voluminous cargoes, such as modules for offshore platforms, in long- and short-term contracts Where the barge is hired in by the client and used as its own leased equipment, the hiring in of the barge is usually done on bareboat or demise terms and the BIMCO "Bargehire" form first introduced in 1994 (and now "Bargehire 2008") is widely used. It corresponds in large part to a barge-specific version of BIMCO's standard and widely used form of bareboat charterparty, the "Barecon" form (in its current revision, "Barecon 2001") but accommodates the possibility of the barge-owner providing its own hull insurance for the benefit of the charterer (those provisions having been the subject of the 2008 revision), thereby making the charterparty a hybrid with time charter and demise charter aspects, but with the latter dominant. As BIMCO explains:

> Although the form is based on BIMCO's successful bareboat charter party, BARECON 89, barges are often chartered with owner's insurance made available to the charterers. In this mode the contract is more akin to a time charter. However, it differs from that form of contract in that the owners exercise no control over the barge during the contract period and will rarely even know the location of the barge.

7.11 A detailed analysis of "Bargehire 2008" is to be found in Chapter 6 above. Reference may also usefully be made when considering the standard form clauses of the "Bargehire" form to the commentary on the "Barecon" form given by Davis in *Bareboat Charters* (2nd edn, 2015) and to *Carver on Charterparties* (2017), chapter 6 (Stephen Hofmeyr QC).

7.12 Increasingly certain offshore operators provide a combined service, involving the provision of a tug and a barge as part for transportation. The service is therefore partly the provision of a towage service, the provision of a barge and the carriage of goods. This further hybrid has led to a need for a further specialised form. This resulted in the formulation by BIMCO, with industry specialists, of the "Projectcon" form in 2006.

> The PROJECTCON Charterparty is a niche document of the type for which BIMCO has become renowned, such as the SUPPLYTIME Charter. It is designed to cover the contractual requirements of providing a tug and barge for the carriage of a project cargo. Up until PROJECTCON was developed, those involved in this special trade often had to use a number of contracts to cover a single venture, such as BARGEHIRE 94, TOWCON and HEAVYCON, plus, in a number of cases, elements of SUPPLYTIME. The new contract brings together all the key elements from the variety of BIMCO forms previously used and distils them into a single comprehensive form.

7.13 With this form, what BIMCO aptly describes as "a suite of offshore and marine construction industry related standard documents", that suite comprising the "Tow" forms, the "Supplytime" and "Heavy" forms and "Bargehire", became complete. BIMCO added to the stable in 2013 a new form, "Windtime", which is a dedicated time charter standard form contract, based

on and a special variant of the "Supplytime" model, for offshore vessels operating in the marine wind farm sector (a brief commentary on this form is contained in Chapter 5 at Part D). Parties negotiating a contract on the basis of the "Heavycon 2007"; "Heavyliftvoy" and "Projectcon" Forms will need to bear in mind the changes made to the "Supplytime 2005" form by the 2017 revision of that form, as the template of "Supplytime 2005" together with that of "Towcon 2008", underpins much of the drafting of these forms.

PART B. THE "HEAVYCON 2007" FORM

7.14 The "Heavycon 2007" contract is a species of voyage charterparty and it contains many features of the ordinary voyage charterparty. The 2007 revision had as its purpose the "bringing up to date the terms and conditions of 'Heavycon' to reflect current commercial practice" in the heavylift sector and the intention of the drafting team, as explained by BIMCO, was:

> to make the "Heavycon" a suitable contract for the ocean carriage of heavy lifts, having sufficient flexibility to cover various loading and discharging methods, single or multiple loading and discharging ports, on or under deck stowage, entire or complete cargoes etc.

7.15 As noted above, the "Heavycon" form is specifically designed for use in super heavylift transportation operations with the special risks which these involve and it therefore follows the BIMCO "knock-for-knock" philosophy in relation to liabilities and mutual risk allocation. The process of revision which the form underwent in 2007 resembles in part that which was carried out for "Supplytime" in 2005 and for "Towcon" and "Towhire" in 2008, with the inclusion of many standard BIMCO omnibus terms; as BIMCO states:

> The drafting team has gone through every single provision of the original HEAVYCON to make sure that its provisions are brought up to date with current commercial practice. Furthermore, recent versions of BIMCO's standard clauses, eg BIMCO ice Clause for Voyage Charter parties, War Risks (VOYWAR 2004), BIMCO Dispute Resolution Clause. The result is a modern and comprehensive voyage charter party tailored to the specific needs of the heavylift sector.

7.16 It is relevant to note that the 2007 revision of "Heavycon" in many places followed the drafting of the (then) new "Projectcon" form of 2006. As the explanatory notes show, the drafting team where necessary sought to bring the wording of the "Heavycon" form in line with that of the "Projectcon" form and there are therefore now many similarities between the two forms.

7.17 Since 2009, the "Heavyliftvoy" form exists for smaller scale operations and more conventional heavy cargoes where a more conventional approach to liability based on ordinary responsibilities for cargo contained in, for example, the Hague and Hague-Visby Rules is appropriate. Careful consideration should therefore be given to which form is the better suited to the nature of the cargo to be carried and the special logistical requirements (and risks) posed by the transportation which is involved.

7.18 A facsimile of the "Heavycon 2007" form is set out in Appendix 8 to this book.

The structure of the form

7.19 As with the other BIMCO standard form contracts, "Heavycon 2007" consists of two separate parts: Part I comprising a series of boxes in which are to be entered the specific details of the services to be performed and the terms specific to the particular contract, such as remuneration and time constraints etc. and supplemented by an annex (Annex "A") providing for the allocation of various tasks and works in relation to the transportation service; Part II setting out the standard form clauses.

7.20 As with the "Towcon", "Towhire" and "Supplytime" forms, there is a "precedence" provision at the conclusion of Part I. This reflects the importance within "Heavycon" of Annex A:

> In the event of a conflict of conditions, the provisions of PART I and any additional clauses including Annex A (Demarcation of Scope of Work), shall prevail over those of PART II to the extent of such conflict but no further.

Part I and the "boxes"

7.21 Part I consists of 30 boxes which the parties will use to set out the specifically agreed features of the heavylift transportation contemplated. The most important of these are:

i Box 5: this provides for a full description of the cargo to be given by the charterer, including, of particular importance in heavylift operations, the minimum and maximum weights involved and whether the cargo is a sole or part cargo (in the latter case the owners having rights to call at other ports and to re-stow the cargo: see clause 3).

ii Box 6: the loading port(s).

iii Box 7: the discharging port(s). The box provides for the specification of the intended route from the loading port to the discharging port and reference to any canals or rivers which may be navigated during the voyage. This is of importance in connection with the deviation provisions in Part II (see clause 3).

iv Boxes 8 and 9: these provide for a definition of the loading and discharging methods which are to be employed and whether the cargo is to be loaded and discharged by float on/float off; lift on/lift off or "ro-ro" or a combination of these methods. In the heavylift context, the loading and discharging operations are often sophisticated logistical operations of considerable complexity and difficulty and it is important that the parties fully and properly define the methods which are to be used. The particular tasks to be carried out by the owners and the charterers respectively are defined by the parties in Annex A and care should be taken to ensure that there is proper and sufficient cross-referencing of the detail of the method to be carried out with the allocation of a party's responsibility for any particular aspects of the method in Annex A.

v Box 15: the identification of the marine surveyor or surveyors who are to be used in relation to the approval of the transportation for insurance purposes under clause 11. The performance of an approval survey or a marine warranty survey by the marine surveyor is usually a critical part of any major offshore operation: marine warranty surveys usually consist of providing independent third party review and approval of the planning, design and execution of high value/high risk marine construction and transportation or other marine operations on behalf of underwriters and their assureds, and for self-insured parties.

vi Box 23: bunker escalation figures: these give the bunker figures on which the parties have negotiated and based the freight rate for the transportation and by reference to which any savings or additional bunker costs fall to be worked out for the purposes of adjustment payments under clause 16.

vii Box 25: this provides for the party's choice of cargo liability regimes and whether the cargo is to be the subject of a separate bill of lading contract or is merely to be carried under the "Heavycon" charter with a non-negotiable receipt issued for the cargo (as is commonly the case where the cargo is a specialised one such as a reactor or parts of a drilling installation and which are being transported for installation, with no intention to sell or transfer property afloat.

viii Box 27: clause 37 gives the charterer a right to double-bank vessels alongside the transporting vessel for the purposes of cargo operations, they bearing any additional insurance costs to be specified in Box 27.

Annex "A" and the "Demarcation of Scope of Work"

7.22 As already noted, a major element of any heavylift operation and, *a fortiori*, of any super heavylift transportation is the handling of the cargo. The physical operations of loading and discharging the cargo to and from the heavylift vessel at the loading and discharging place and the stowage and securing of the cargo for transit are frequently major engineering and logistical exercises in their own right, given the size, weight, volume and configuration of the particular cargo and the likely incidents of the voyage. "Heavycon 2007" addresses these aspects specifically in Annex "A" which comprises a detailed "tick-box" check list of common operations and equipment requirements which are to be allocated to the charterer's or the owner's scope of work. BIMCO explains the purpose of this in this way:

> An Annex A (Demarcation of Scope of Work) has been added after Part II, in which the parties can specify other operations connected with eg the engineering, the performance of the voyage and the loading and discharging of the cargo. The Scope of Work divides these other operations between the parties. To avoid any conflicts between the Scope of Work and Part II, a box has been added in Part I indicating the default position in case of a conflict.

7.23 Annex "A" breaks down the activities involved into three (preliminary engineering; load-port operations and discharge port operations) and then lists the main activities usually involved under each stage such as, for example, "check of structural strength of Vessel's deck" and "obtaining plan approval of MWS [marine warranty surveyor: see Clause 11]" (see 1.6 and 1.8); "bringing cargo alongside Vessel within reach of Vessel's gear" and "supply of seafastening" (2.5 and 2.10) and "discharging by Vessel's gear, operated by Vessel's crew, as servants of the Charterer" and "deck cleaning by gauging/grinding" (3.5 and 3.10).

7.24 Annex "A" is frequently supplemented or modified in the light of the specific requirements and features of the cargo and transportation operation in question. It is an important part of the "Heavycon" form and provision is made for the parties' respective responsibilities in respect of loading and discharging under clause 4 on the assumption that there is a clear demarcation of individual responsibilities. As the notes state:

> A new Annex to HEAVYCON contains a checklist for various activities to be performed as part of the agreement. The parties should go through each activity in the list and designate which party will be responsible by ticking the appropriate box.

7.25 As the methods of loading and discharging are to be specified in Boxes 8 and 9, it is also necessary to ensure that the demarcation in Annex "A" adequately corresponds to and covers the aspects of the operations defined in these boxes (and vice versa).

Commentary on the provisions of Part II

7.26 Part II consists of the standard form BIMCO provisions; these are now 41 in number, with the increase in printed clauses being in large part due to the incorporation into the "Heavycon" form of the various BIMCO standard clauses which have been developed by BIMCO since "Heavycon" was first drafted in 1985 and which now form a standard part of the latest generation of BIMCO forms since 2005 such as "Towcon", "Supplytime" and "Projectcon." Reference may be made to the appropriate chapter dealing with these provisions where they occur in these other forms. The standard form provisions comprise the following clauses of "Heavycon 2007":

i *Clause 17:* the standard "BIMCO Ice Clause for Voyage Charter Parties" (cf. clause 8 of "Towcon 2008").
ii *Clause 28:* headed "Salvage" is a provision providing for a waiver by owners of any claim in salvage for services rendered to the charterer's cargo; it is in virtually identical

terms to the corresponding provision in "Supply-time 2005" contained in clause 18(c) and discussed in Chapter 5 above.

iii *Clause 29:* the common form "Both-to-Blame Collision Clause" (cf. clause 27 of "Supplytime 2005").

iv *Clause 30:* the standard "General Average and New Jason Clause" providing for the adjustment of general average in London (by default but with the right to opt for adjustment elsewhere) and under the 1994 York-Antwerp Rules (cf. clause 26 of "Supplytime 2005"; as before BIMCO make it plain that the later York-Antwerp Rules of 2004 are disapproved:

> BIMCO has decided that all new and revised BIMCO charter parties will refer only to "York-Antwerp Rules 1994." The previously used additional text to the effect of "or any subsequent modification thereto" will no longer be used. Although BIMCO considers the YAR 2004 to be a new set of Rules and not in any way a modification or amendment of the 1994 Rules (a view shared by the authors of the new Rules), it is felt that the clarification of the text will help avoid any possible misinterpretation of BIMCO's position.

v *Clause 31:* the current BIMCO war risks clause "War Risks (Voywar 2004)" (cf. clause 27 of "Towcon 2008").

vi *Clause 33:* a standard form interest provision providing for interest to be payable on overdue amounts at 1.5% *per* month or *pro rata*.

vii *Clause 36:* the current "BIMCO ISPS/MTSA Clause for Voyage Charter Parties 2005" (cf. clause 32 of "Towcon 2008").

viii *Clause 38:* a confidentiality provision in substantially the same terms as provided for by clause 33 of "Supplytime 2005."

ix *Clause 39:* the standard "BIMCO Dispute Resolution Clause" providing for three options as to law and jurisdiction with the default position being English law and LMAA arbitration and making provision for mediation (cf. clause 33 of "Towcon 2008"). Unlike the latest form of this clause (as seen in the new 2010 "Wreck" forms, eg clause 21 of "Wreckhire 2010" considered below in Chapter 9) there is no provision for the more recent LMAA Intermediate Claims Procedure (introduced in 2009 to supplement the existing small claims procedure) and reference is only made to the LMAA Small Claims Procedure. Consideration might be given to an amendment to clause 39 so as to allow the full flexibility of the current LMAA procedures to be available to the parties.

x *Clause 40:* the now customary BIMCO "Notices Clause" (cf. clause 35 of "Towcon 2008").

xi *Clause 41:* a variant of BIMCO's usual "Entire Agreement Clause" (cf. clause 38 of "Supplytime 2005").

7.27 Given that these provisions have been discussed earlier, reference may be made to the corresponding treatment of these provisions where they occur in the "Towcon 2008" and "Supplytime 2005" forms in Chapters 4 and 5 above.

Clause 1: definitions

7.28 The 2007 revision streamlined the drafting technique by setting out, in common with the new BIMCO style of drafting, an introductory provision providing definitions of the various major terms used in Part II by reference to the description or statement given in Part I. The former term "transportation unit(s)" employed in the original "Heavycon" form has been replaced with a single term "Vessel", BIMCO having done so specifically to reflect the fact that the form is to be used for the chartering of a single heavylift vessel: "Since vessels are the only means of transportation units, and since only one vessel is used in each transport, the reference to 'transportation unit(s)' has been replaced with 'vessel'" (cf. the "Projectcon" form which was designed

to cater for the chartering in of a tug *and* barge or barges as part of the "Vessels": see below). In addition, there is a specific definition of the "The Transportation" which is to be the subject of the services which links the carriage and any engineering, loading or discharging operations which are involved and which are dealt with in Annex "A":

> "The Transportation" shall mean the carriage of the Cargo and, as may be specified in Annex A (Demarcation of Scope of Work), the loading and discharging and all other operations connected therewith.

7.29 The freight payable under the contract will therefore extend to cover the cargo operations at either end and the carriage but not any mobilisation or demobilisation of the carrying vessel. Given that the vessel may require such operations before being able to commence the service and after the service, clause 14 of the "Heavycon 2007" form provides for the option to provide for payment of mobilisation and demobilisation fees where necessary and agreed: see below. Cf. clause 1 of the "Projectcon" form which uses the same definition in the context of the provision of a tug and barge combination and in respect of which the explanatory notes state:

> attention is drawn to the definition of "Transportation" which does not include mobilisation/demobilisation elements. This is because these are considered as items built into the freight rate. The risk of delay in connection with mobilisation and demobilisation rests with the owners under PROJECTCON and such risk is intended to be reflected in the agreed freight.

7.30 Careful consideration should be given to the scope of the service to which the "Heavycon" contract is to apply. For example, if a cargo is to be carried by a heavylift vessel almost to destination but, for reasons of sea room (for example the terminus of the cargo is reached through a canal or channel or over a bar which the heavylift vessel cannot use due to her size or draft or lies in restricted waters such as a fjord), the transportation is to be concluded by the owner providing a barge or by the cargo being floated off and towed the remainder of the way, then the "Heavycon" contract should be clearly expressed to cover this last leg (unless separate contractual arrangements are to be made, for example, by a separate "Projectcon" contract or "Towcon" contract) either by a suitable rider clause or, more easily, by an addition to Annex "A" so as to include this aspect within "the Transportation." If the defined "service" does not cover the separate leg because that is not adequately reflected in Annex "A", then arguments can arise, in the event of damage to the cargo which occurs during this leg, as to whether the knock-for-knock regime under clause 22 of the "Heavycon" contract applies after the cargo has been discharged from the vessel.

Clause 2: the contractual voyage

"2. Voyage

(a) It is agreed between the Owners and the Charterers that, subject to the terms and conditions of this Charter Party, the Cargo shall be transported by the Vessel from the Loading Port, or so near thereto as she may safely get and lie always safe and afloat, to the Discharging Port, or so near thereto as she may safely get and lie always safe and afloat.

(b) The Owners shall exercise due diligence in making the Vessel seaworthy before and at arrival at the Loading Port. The Owners shall perform the voyage with due despatch unless otherwise agreed."

The obligation to transport the cargo

7.31 Clause 2(a) defines the principal obligation upon the owners in standard voyage charterparty terms; cf. clause 1 of the Gencon form which is in similar terms. While the clause refers to a loading and discharging "Port" and this refers back to the "Ports" named in Boxes 6 and 7 respectively (as the definitions in clause 1 make clear), the older Gencon wording refers to "the loading port or place stated" and this may be more apt in the context of heavylift transportation where the transportation may involve the delivery of an item of plant offshore rather than to a

port in the usual sense: "There is a distinction drawn in many forms, as in the Gencon form, between a 'port' and a 'place', although there is a considerable overlap between the two. A 'port' is usually also a 'place'; so also a berth within a port is a 'place'. But not all loading and discharging 'places' might be considered to be a 'port'": see Cooke, *Voyage Charters* (3rd edn), para. 5.1. Given that the terms "Loading Port" and "Discharging Port" are defined by what is put in the relevant Boxes, provide that the place or location is correctly entered, this should occasion no difficulty in practice. Furthermore, under clause 4 the charterer is required to nominate the "the precise loading area or place within the agreed Loading Port" (and for the Discharging Port in like terms): see paras. (b) and (d). Clause 4 is discussed below.

The obligation as to the seaworthiness of the vessel

7.32 Clause 2(b) provides in standard terms for an obligation to exercise due diligence to make the vessel seaworthy at the outset which is broadly akin to that provided for in other voyage charterparties (eg clause 1 of the Asbatankvoy form) and in Article III, Rule 1 of the Hague Rules (as to the obligation of due diligence in general, see *Cooke on Voyage Charters* (4th edn, 2014), para. 85.95 *et seq*.), although see the discussion below as to the precise point of time taken at which the vessel is to be seaworthy. As is common in voyage charters, there is no continuing obligation of seaworthiness (cf. the position under a time charter and, by analogy, under clause 3(b) of "Supplytime 2005"). Consideration was given by BIMCO to this in the context of a heavylift operation during the 2007 revision but it was concluded that: "It was, however, felt that such an obligation is too onerous on the Owners, eg in cases where cargo shifts by reasons outside the Owners' control thereby making the vessel unseaworthy."

7.33 The original "Heavycon" wording provided that the vessel was to be seaworthy "at the commencement of the voyage" which as BIMCO recognised "would be the usual assumption under a conventional voyage charter party." This has been replaced with the phrase "before and at arrival at the Loading Port", apparently, according to the explanatory notes to the 2007 form, "In order to align the Sub-clause with the wording used in 'Projectcon'." No other explanation or justification is proffered by BIMCO.

7.34 The attempt to render the wording in the two different forms uniform for the sake of apparent consistency is, perhaps, unfortunate. The two forms of charter are different. Under the "Heavycon", the owner is providing to the charterer a single vessel (as the amendment in 2007 to the definition replacing "transportation unit(s)" with "Vessel" confirms; see also the explanatory notes: "Since vessels are the only means of transportation units, and since only one vessel is used in each transport, the reference to 'transportation unit(s)' has been replaced with 'vessel'." Under the "Projectcon" form (as discussed below), the owner provides to the charterer a combination of a tug and barge, being jointly defined as the "Vessels" the subject of the charter: see clause 1 and Box 4. The thinking behind the replacement of a warranty of seaworthiness which applies at the commencement of the voyage with one which applies only when the heavylift vessel arrives for loading is specific to the nature of the vessels (or at least, of one of them) being chartered under the "Projectcon" form. As the explanatory notes to that form, considered in greater detail below, state:

> The special nature of the trade means that there are circumstances where the barge, after arrival at the loading port, is not in a seaworthy condition due to the loading operations. This applies not only to submersible barges when submerged but also to ballastable barges. In the latter case a ballastable barge may be trimmed excessively or ballasted below her marks to accommodate the requirements of the loading operation.

7.35 As is further discussed below, the justification for limiting the application of the warranty of seaworthiness to the time of the arrival of the "Vessels" is questionable even in the specific context of the "Projectcon" form and can produce commercially undesirable uncertainty in that

context. However, it is still more questionable in the context of a heavylift operation using a heavylift vessel under "Heavycon" terms. At bottom, the "Heavycon" charter is one for the provisions of the services of a cargo carrying vessel, albeit a highly specialised one, on voyage charter terms. While the liabilities are dealt with on a knock-for-knock basis to reflect the special risks inherent in a super heavylift operation, the relationship remains that of carrier and shipper and the vessel would ordinarily be expected to be fit for the carriage both for the loading of the cargo itself and, once the cargo has been loaded on board and the voyage commences, for the laden voyage. This is certainly reflected in the midsized heavylift cargo context, where the dedicated form for such heavylift cargoes, "Heavyliftvoy" (see below) provides by clause 1(b) that "The Carrier shall exercise due diligence in making the Vessel seaworthy before and at the beginning of the loaded voyage", corresponding to the normal voyage charter position in relation to the fitness of the vessel for the carriage of cargo. It is unclear why the same approach should not be adopted for the larger heavylift cargoes on a single vessel under the "Heavycon 2007" form. In such a case, the cargo is loaded either by the charterer (by lift on or skidding on) or by the owner (by float on). The need for the vessel to be in all respects seaworthy for the relevant loading procedure and thereafter for the carriage is the same. While in some cases the distinction between seaworthiness on arrival and at the commencement of the voyage may be immaterial, it seems in principle unsatisfactory that the owners are not under an obligation to ensure that the vessel is seaworthy for the voyage and at the moment the voyage begins. Where the vessel arrives in a seaworthy condition at the loading port preparatory to what is to be a lengthy loading operation but subsequently becomes unseaworthy, due to a breakdown of equipment, before the voyage is commenced there would appear to be no breach and no obligation on the owners with the charterer taking the risk of supervening unseaworthiness before the voyage.

7.36 The justification which BIMCO draws in the explanatory notes for the "Projectcon" form (and which seems simply to have been transposed to the "Heavycon 2007" form given the explanatory notes to this form) is based, first, on the fact that a barge may not be seaworthy during the loading procedure because it has been submerged or is out of stability during ballasting operations (see the passage cited above). This overlooks the fact that the concept of seaworthiness is related to the type of vessel and the operations which it performs. If a super heavylift vessel is designed to submerge for loading then even in its submerged state, provided that it is structurally sound and with her machinery and equipment properly functioning, it is seaworthy as it is capable properly or performing the particular process of loading in accordance with ordinary industry standards for float on loading and it is capable of receiving the cargo safely and surfacing with it safely. The issue of temporary instability of the vessel at times during the loading operation again is capable of being accommodated within the concept of seaworthiness since the vessel's stability requirements for the purposes of loading may be different from those which would pertain once the vessel commences on the laden voyage. The vessel may be fit for loading and for the loading procedure, even if down to or temporarily out of her marks, being the service then immediately required of her, and thereafter when ballasted for the sea passage be fit for the intended laden voyage.

7.37 A second basis for the justification given by BIMCO in the "Projectcon" notes is that "In addition the owners may not necessarily be required to be in attendance during loading operations as the tug is not involved in this part of the procedure." This appears to reflect that under certain "Projectcon" fixtures the tug and barge arrive together with the tug then leaving the barge to be loaded by the charterer by itself and then returning to take the barge in tow. Even if sound in terms of the "Projectcon" form (but see below), there is no real analogy with the situation of a super heavylift vessel under "Heavycon 2007", which at all times during the loading operation is under the control of the owner and its master, who has express oversight and control of the loading operation even where effected by the charterer: see clause 4(b) and (c)(i), considered below. In float on loading, the loading procedure is usually one carried out by the owner in any

event; see clause 4(c)(ii). While there may be a more complicated division of responsibilities agreed between the parties (and contained in Annex "A") given the complexity of a super heavylift loading, the position is far more analogous to that of a normal loading operation where cargo is loaded on to the vessel, whether by the charterer or by the owner (as is the position under the "Heavyliftvoy" form).

7.38 Nor is the third basis given by BIMCO one which is properly applicable to the "Heavycon" context either. BIMCO draw the analogy in the explanatory notes, again in the specific "Projectcon" context, with the position under "Towcon" where the tugowner warrants the seaworthiness in these terms: "The Tugowner will exercise due diligence to tender the Tug at the place of departure in a seaworthy condition and in all respects ready to perform the towage" (see now clause 19 of "Towcon 2008"). Given that the tugowner merely provides the services of a tug to connect up to and tow a tow, the tow-worthiness of which is separately warranted by the hirer, it is perfectly sensible to require the tug to be seaworthy at the time of her arrival to connect up. There may be justification for the same approach in a tug-and-barge operation under "Projectcon" (but see below). But this, it might be thought, offers scant justification for providing that the super heavylift carrying vessel is only to be seaworthy on her arrival and before the lengthy loading process and the subsequent commencement of the voyage.

7.39 It is therefore suggested that consideration by given by the charterer to amending the terms of clause 2(b). A number of possibilities exist.

7.40 One is to revert to the standard voyage wording of "at the commencement of the voyage" used in the original "Heavycon" from. However, this, while apt in an ordinary voyage charter context for the carriage of a cargo on a voyage from one port to another, may itself not fully accommodate the specific features involved in a heavylift operation. As seen above, this will usually involve a specialised loading, preparatory to the departure of the laden heavylift vessel. At what stage is the vessel to be seaworthy: at the commencement of the loading or the commencement of the laden voyage? The situation may be addressed in one of three ways. First, the warranty of seaworthiness can be provided to start "at the commencement of the Transportation", using the definition of that term in clause 1 ("shall mean the carriage of the Cargo and, as may be specified in Annex A (Demarcation of Scope of Work), the loading and discharging and all other operations connected therewith"), but this leaves the problem of the vessel's seaworthiness at the time of sailing. Secondly, a double stage approach can be adopted, requiring the vessel to be seaworthy on arrival or at the commencement of the Transportation as well as on departure from the Loading Port. This would accommodate any concern as to unseaworthiness which arises during the loading procedure (if any) as expressed in the BIMCO "Projectcon" notes as cited above but still address the need for seaworthiness of the vessel at the time of sailing. A third option, and perhaps the most preferable, is to opt for the same obligation as that provided for by clause 1(b) of the "Heavyliftvoy" form: "before and at the beginning of the loaded voyage." This will require the owner to exercise due diligence to make the vessel seaworthy over the continuous period of time from (at least) the commencement of loading and thence until the vessel starts on the voyage: *Maxine Footwear Co v Canadian Government Merchant Marine* [1959] AC 589. It is however unsettled on the cases whether the warranty is engaged before the start of loading; cf. *Linea Naviera Paramaconi v Abnormal Load Engineering (The Sophie J)* [2001] 1 Lloyd's Rep 763 (tug and heavylift cargo carried by barge) and see *Cooke*, at para. 85.101.

7.41 The leading case of *Maxine Footwear Co v Canadian Government Merchant Marine* illustrates the utility of the "Heavyliftvoy" wording and the lacunae which are left by the "Heavycon 2007" wording of "before and at arrival at the Loading Port." After completion of loading but while the vessel was waiting to sail, some scupper pipes were found to be frozen. These were addressed by negligently heating them with a blow torch which ignited the piping insulation and caused a fire which resulted in the loss of the vessel. The House of Lords rejected the argument that the vessel was only required to be seaworthy *on* sailing and not *before* sailing. That would,

however, be an argument which was open on the old "Heavylift" form wording and, under the new wording in the "Heavycon 2007" form, any unseaworthiness caused by the scupper pipes or by the fire would occur (long) after the arrival of the vessel at the loading port and, accordingly, after the warranty had ended.

The obligation of dispatch

7.42 Clause 2(b) provides further for an obligation to prosecute the voyage with "due despatch." This merely reflects a term which would be implied at common law into any voyage charter to proceed with reasonable despatch and without deviation: see eg Cooke, at para. 9.4. It may be contrasted with more stringent terms such as "with the utmost despatch" which require the shortest and quickest route to be followed: given the parties' specification of the route in Box 7 this is unnecessary. The obligation will require the owner not only not to deviate but also to take reasonable steps that the vessel shall not proceed unnecessarily slowly, for example, where the bottom becomes fouled and would result in the voyage taking much longer than it otherwise would, by cleaning it: cf. London Arbitration 10/00 (LMLN 545). In the explanatory notes to the original "Heavycon" form (see BIMCO Bulletin no.1 of 1986) the example was given of slow steaming to save fuel: "This would mean that in cases when parties may agree upon the vessel performing at a reduced speed, for instance, for the purpose of conserving bunker fuel, it must be expressly agreed."

Clause 3: deviation; delays; part cargo

"3. Deviation/Delays/Part Cargo

(a) The Vessel has the liberty to sail without pilots, to tow and/or assist vessels in distress, to deviate for the purpose of saving life, to replenish bunkers and/or to deviate for the purpose of safety of the Cargo, crew, Vessel and for any other reasonable purpose.

(b) Without prejudice to the provisions of Clause 30 (General Average and New Jason Clause), should the Master decide, for the purpose of the safety of the Cargo, to deviate from the intended route which is stipulated in Box 7, the Charterers shall pay for all time lost as a consequence of the deviation at the demurrage rate stipulated in Box 19.

The time lost shall include all time used until the Vessel reaches the same or equidistant position to that where the deviation commenced and the Charterers shall also pay all additional expenses incurred by such deviation including bunkers, port charges, pilotage, tug boats, agency fees and any other expenses whatsoever incurred.

The Owners shall give prompt notification of any delay or deviation to the Charterers and any claims for additional compensation shall be supported by appropriate documentation.

(c) If the Vessel for reasons beyond the Owners' control is delayed at Loading Port and/or Discharging Port, including obtaining free pratique, customs, port clearance or other formalities, such delays shall be paid for by the Charterers at the demurrage rate stipulated in Box 19.

(d) Unless the Cargo is described as a full and complete cargo in Box 5, the Owners shall have the liberty of re-stowing the Cargo and of loading and of discharging other part cargoes for the account of other than the Charterers from places en route or not en route to places en route or not en route. The rotation of loading and discharging places shall be at the Owners" option. When the Owners exercise such option(s) this shall in no way constitute a deviation, notwithstanding anything else contained in this Charter Party."

7.43 Clause 3 deals principally with deviation. Clause 3(a) broadly corresponds to the common form of deviation clause found in many voyage charterparties, for example clause 3 of the Gencon form and reference may be made to the general commentary on permissible and impermissible deviations and the legal effect of deviation in *Cooke*, chapter 12, *passim*. For present purposes, clause 3(a) is a widely drawn variant of the common clause allowing deviations not only to save life but also to assist vessels in distress (the two not necessarily being the same: see

Scaramanga v Stamp (1880) 5 CPD 295 (CA); allowing calls to replenish bunkers even if the bunkering port and/or the taking on of bunkers is not part of the customary route (cf. *Reardon Smith v Black Sea Insurance* [1939] AC 562, eg *per* Lord Porter at 584)) and a new "general liberty" (as BIMCO describes it) to "deviate for any other reasonable purpose." While liberties to deviate are commonly read restrictively "and in such a way that the liberties which they confer are not inconsistent with the main objects of the contract" (*Cooke*, para. 12.15), much depends upon the commercial context of the contract and what may be regarded as unreasonable in an ordinary liner or general cargo context may be justifiable in a heavylift context, especially where necessity and safety may require a particular call to be made, for example, to effect repairs to the vessel or the lashings or seafastenings of the cargo (at least where this is not due to a breach of the applicable warranty of seaworthiness): see *Kish v Taylor* [1912] AC 604. While the liberty to deviate for any reasonable purpose provided for in clause 3(a) is ostensibly wide and appears to have been envisaged by BIMCO as being entirely "general", it is submitted that while the liberty would permit any call necessary for the vessel *qua* vessel as well as in relation to the cargo being carried, they would not permit a call for owner's or vessel purposes which are unconnected with the carriage of the particular cargo, eg for a repair to some item of equipment not needed for the service: see *US Shipping Board v Bunge* (1926) 42 TLR 174 *per* Lord Buckmaster at p. 175; *Thiess v Australian Steamships* [1955] 1 Lloyd's Rep 459.

7.44 Clause 3(a) permits deviation for the purposes of the safety of the cargo and clause 3(b) provides that in such a case (wherever such a deviation is deemed necessary by the master) the charterer is to pay for all time lost at the agreed demurrage rate. To balance the parties' interests, the owner is required to give prompt notice and to provide supporting documentation. In the case of unsafety of cargo which threatens both the cargo and the vessel itself (as may well occur in a case of shifting of a heavylift cargo), ordinary principles of general average may apply to any call at a port of refuge; clause 3(b) preserves this position and the ordinary operation of clause 30 (the General Average and New Jason Clause).

7.45 Clause 3(d) varies the position in respect of deviation where the vessel is not being used by the charterer for the carriage of a sole cargo. In the normal super heavylift context, it is rare for the heavylift vessel to be used for anything other than one item or set of items shipped by the charterer: the operation is bespoke for the particular large and heavy item or items and therefore no question of the cargo being a part cargo only will ordinarily arise. As BIMCO states: "It is, however, seldom that cargo intended for being carried on board heavylift vessels, are not a full cargo" (*sic*). However, "Heavylift 2007" permits part cargoes and this is reflected in the option in Box 5 which requires the parties to state whether the cargo is a part or full cargo. A recent unusual example where this has occurred is where two manufacturers supplied two items of equipment used in a power generation project; each chartered the same heavylift vessel on which its equipment formed a part cargo only. More rare still will be the situation, contemplated by clause 3(d), where the first booked cargo is a part cargo and the heavylift operator intends to fill the cargo carrying capacity by taking other spot heavy cargoes, effectively trading in "general", heavy, cargo. In such a case, the owner has the right to carry out any other cargo operation, both loading and discharging, irrespective of the effect which the other operations may have on the performance of the transportation: "from places en route or not en route to places en route or not *en route*. The rotation of loading and discharging places shall be at the Owners' option." This is a wide liberty and is probably explained by the highly specialised nature of a super heavylift vessel which, unlike a general cargo vessel may be one of the only possible transporters available; where the charterer is unwilling to charter the vessel on a "full cargo" basis paying the freight on that basis, the owner reserves the right to seek alternative cargoes anywhere where they may be found. Notwithstanding the very strong wording of the liberty, it is arguable that the court would regard the liberty as being necessarily cut back so as not to frustrate the main objects of the

charter entered into, by analogy with the cases on the liberty "to call at ports in any order": see eg *Glynn v Margetson* [1893] AC 351. In that case a (perishable) cargo was shipped at Malaga for Liverpool "with liberty to proceed to and stay at any port or ports in the Mediterranean, Levant, Black Sea or Adriatic, or on the coast of Africa, Spain, Portugal, France, Great Britain and Ireland for the purpose of delivery of coals, cargo or passengers or for any other purpose whatsoever." The House of Lords held that the liberty did not permit the vessel, after sailing from Malaga, to proceed to Burriana, 350 miles further away from Liverpool, before returning and making for Liverpool, Lord Herschell stating at 354:

> My Lords, the main object and intent, as I have said, of this charterparty is the carriage of oranges from Malaga to Liverpool. That is the matter with which the shipper is concerned; and it seems to me that it would be to defeat what is the manifest object and intention of such a contract to hold that it was entered into with a power to the shipowner to proceed anywhere that he pleased, to trade in any manner that he pleased, and to arrive at the port at which the oranges were to be delivered when he pleased.

7.46 Clause 3(c), curiously placed in the midst of these deviation provisions, provides that the charterer shall pay demurrage for delays at either port caused by the usual port, customs and health authority formalities, provided these are beyond the owner's control. Quarantine formalities and other health restrictions are dealt with by clause 7.

Clause 4: loading and discharging responsibilities

Generally

7.47 Clause 4 contains a detailed code specifying the parties' respective responsibilities in respect of the loading and discharging of the heavylift cargo. As already noted, these operations are often complex and costly engineering and logistical exercises. Clause 4 therefore addresses at some length each party's obligations. The aim of the BIMCO drafting team was to provide certainty and clarity to avoid disputes over who does what. Clause 4 should be read in conjunction with Annex "A" which also demarcates the "Scope of Work" in relation to the preliminary engineering and assessment, the loading and the discharging operations and Boxes 8 and 9 specifying the loading and discharging methods. It is convenient to consider clause 4 in stages.

Loading

"4. Loading and Discharging

(a) The Charterers shall have the Cargo in all respects ready for the said voyage at the Loading Port on the date for which notice of expected load readiness is given by the Owners as *per* Clause 9 (Advance Notices), but not before the date stated in Box 10 as first layday.

The Charterers shall nominate the precise loading area or place within the agreed Loading Port, which shall be always safe and accessible and suitable for the loading operation, upon receipt of the first notice given by the Owners pursuant to Clause 9 (Advance Notices), always subject to the approval of the Owners and the Master. Such approval shall not be unreasonably withheld.

(b) The Owners shall provide the equipment stated in Box 4 or in Annex A (Demarcation of Scope of Work) and shall in their own time and at their own expense prepare such equipment for the loading operations. All other equipment shall be provided by the Charterers. When the Cargo has been loaded and positioned, it shall be seafastened and/or lashed by the Owners at their expense, unless otherwise agreed in Annex A (Demarcation of Scope of Work), to the satisfaction of the Master.

(c) At the Loading Port, the Cargo shall be delivered by the Charterers without delay in the sequence required by the Master at any time during day or night, Saturdays, Sundays (or their local equivalent) and holidays included and shall be loaded by one or more of the following methods stated in Box 8:

(i) *If agreed in Box 8 that the Charterers shall perform the loading operations, the Cargo shall be placed on board and positioned by the Charterers to the full satisfaction of the Mas-

ter. The Charterers shall procure and pay for all labour and all necessary equipment other than that stated in Box 4. The Charterers shall have free use of the Vessel's gear operated by the Vessel's crew.

(ii) *If agreed in Box 8 that the Cargo shall be loaded by means of float-on method, the Charterers shall position the Cargo prior to loading at 50 metres or at an agreed distance from the Vessel's submerged deck to the full satisfaction of the Master. The Owners shall attach lines to the Cargo and shall position and secure the Cargo over the submerged deck by using winches and/or tugs. The Owners shall procure and pay the necessary labour and winchmen either from the crew or from shore. The Charterers shall procure and pay for workboats and tugs required for the positioning of the Cargo. The Owners shall have the right to use such workboats and tugs for the loading operation.**Indicate alternative(s) (i) or (ii), as agreed, in* Box 8."

Clause 4(a)–(c) regulates loading operations in terms of the provision of the cargo, necessary equipment and securing and the loading method(s) to be employed.

7.48 Under clause 4(a), the charterer is under the usual obligation to provide the cargo and to have the cargo ready for loading. The form identifies the precise date on which this obligation is to be performed, being the expected load readiness date notified by the owner under clause 9. In the ordinary voyage charter context, the obligation to provide the cargo is absolute and non-delegable such that it is insufficient if the charterer has exercised reasonable care to get the cargo there but has failed: see *Triton v Vitol (The Nikmary)* [2004] 1 Lloyd's Rep 55, esp. at para. 11. The charterer is also required to nominate the precise loading place within the loading port. As noted above, certain heavylift operations may either start from or finish at an offshore location: to give a common example, the transportation of a drilling rig from the builders to an offshore field and the description of the place as the "Loading Port" may technically be inapt but given that the parties are to agree upon the place of loading and discharging as specified in Part I, and then the charterer is to identify the specific location at that place, no difficulties arise in practice from the use of "Port" terminology.

7.49 Under clause 4(b) the basic division of responsibilities is set out. The provision of equipment is dealt with on the basis that the charterer is liable to provide all necessary equipment for the loading process save for the equipment which the owner is stated as being obliged to provide either in Box 4 or Annex "A." The overlap between the two places where the equipment to be provided by the owner in the form is perhaps unfortunate and may perhaps arise from the fact that Annex "A" has been added to the "Heavycon 2007" form which already previously provided in Part I for equipment matters thereby duplicating the provisions; it would seem desirable in order to avoid inconsistency or omission to list the equipment in one place or alternatively to ensure that a cross-reference is made between Box 4 and Annex A. Some operators use Box 4 to list equipment "additional to that itemised in Annex 'A'" thereby giving, in effect two separate lists. In such a case, it is necessary to amend clause 4(b) to replace the disjunctive "or" with "and." Others simply state in Box 4 "see Annex 'A'" which avoids any overlap. A critical part of the loading operation is the construction and fitting of suitable seafastenings by which the cargo is fixed to the heavylift vessel to secure it for the ocean passage. Each cargo and transportation requires tailor made engineering with the construction of fastening plates and structures, involving often considerable steel and welding work on deck and certification by the vessel's classification society as well as approval from the marine warranty surveyor (see clause 11). This is reflected in paragraph 2.10 and 2.11 of Annex "A" which separately lists for agreement the various tasks for which the owner or the charterer is to be responsible ("supply of seafastening; installation of seafastening; welding; NDT; obtaining MWS approval for sailing"). The default position is that seafastening is the responsibility of the heavylift operator who will have the necessary expertise, although it is not uncommon for the charterer to be made responsible for the supply of the materials and equipment necessary. Further structural modifications may be required to the carrying vessel, for example, the fabrication and fitting of sponsons to the hull to increase the deck carrying area underneath the cargo. This is usually dealt with by a discrete rider provision dealing with the costs of the same

(and of dismantling it at the end of the service and making good) and the consequences of obtaining class approval rather than an addition to Annex "A."

7.50 Clause 4(c) contains a series of optional provisions depending on what method of loading has been agreed upon, as specified by the parties in Boxes 8 and 9. Irrespective of the loading method, the owner, through the master, has the right to control the sequence of loading, a matter of importance given the engineering and stability considerations involved in the positioning of the cargo, if comprising multiple items. The clause provides for two loading options which are particular to the super heavylift context for which "Heavylift 2007" was revised. The first is for non-float on/float off-loading methods where the cargo is placed on board the vessel using either cranes or by jacking or skidding the cargo from the quayside to the vessel, using specialised hydraulic or other forms of jacking or traction equipment. In this case, the charterer performs the entire loading operation at its expense up to the final positioning of the cargo prior to lashing, securing and seafastening by the owner under clause 4(b) (if not contracted out of by the owner) and provides all necessary equipment unless otherwise agreed and stated in Box 4 (or, although this is not stated in clause 4(b), Annex "A"). In the case of a float on/float off loading, the charterer is responsible for bringing the cargo to the submerged vessel for the purposes of positioning and will therefore be responsible for making the necessary towage arrangements. The precise positioning of the cargo above the vessel is carried out by the vessel. The allocation of costs and expenses is between the marine expenses of the tug and any other smaller vessels required (eg for running lines and line handling) to be borne by the charterer and the use of manual labour and winch operators on the vessel, to be borne by the vessel.

7.51 The original version of "Heavycon" catered for lift on /lift off loading by the owner, using the vessel's own cranes or derricks. While this is certainly a feature of heavylift operations where cargo is craned on board the vessel using the vessel's own super capacity cranes or lifting gear, for example by non-submersible heavylift vessels such as project carriers, it is not usually provided by the super heavylift vessel and semi-submersible vessels are usually not fitted with cranes. As BIMCO states, somewhat sweepingly: "The additional options of loading and discharging methods stated in the original Sub-clauses 4.3.(a) and 4.6.(a) providing for the Owners loading/ discharging the Cargo with their own gear and tackle, have been deleted from HEAVYCON 2007 as these options are never used in the heavylift trade." However, the thinking appears to be that the "Heavycon 2007" form is designed exclusively for *non*-lift on /lift off operations, with these operations being regarded as part of the midsized heavylift sector which is to contract on the "Heavyliftvoy" form which contains provisions for loading on liner terms, where loading is carried out by the owner using the vessel's own gear as well as for loading by the charterer free in free out to the vessel.

Discharging

"(d) The Charterers shall name the precise discharging area or place within the Discharging Port, which shall be always safe and accessible and suitable for the discharging operation, well in advance of the Vessel's arrival, always subject to the approval of the Owners and the Master. Such approval shall not be unreasonably withheld.

At the Discharging Port the Charterers shall take delivery of the Cargo without delay in accordance with sub-clause (f) at any time during day or night, Saturdays, Sundays (or their local equivalent) and holidays included.

The entire discharge operation always to be done to the full satisfaction of the Master.

(e) Prior to actual discharge the Owners shall, unless otherwise agreed in Annex A (Demarcation of Scope of Work), remove all seafastening and/or lashing and prepare the Vessel for the discharge operation.

(f) The Cargo shall be discharged by one or more of the following methods stated in Box 9:

(i) *If agreed in Box 9 that the Charterers shall discharge the Cargo, the Charterers shall procure and pay for necessary winchmen and labour. The Charterers shall have free use of the Vessel's gear operated by the Vessel's crew.

(ii) *If agreed in Box 9 that the cargo shall be discharged by means of float off method, the Owners shall submerge the Vessel and float-off the Cargo. The Owners shall procure and pay the necessary labour and winchmen either from the crew or from shore. The Charterers shall procure and pay for workboats and tugs required for discharging the Cargo. The Owners shall have the right to use such workboats and tugs for the discharging operations.**Indicate alternative(s) (i) or (ii), as agreed, in* Box 9."

7.52 Clause 4(d), (e) and (f) contain mirror provisions to those in respect of loading. The charterer is to name the precise discharging area or place; unlike the position in relation to the loading place under clause 4(a), no set time is provided for save that notice shall be given "well in advance of the Vessel's arrival." Consideration should be given to stipulating for a more precise date by reference to the vessel's advance notice of arrival as provided for in clause 9(b) and Box 14 since there may be argument as to whether the place was named sufficiently in advance to allow the master to consider and assess it for the purposes of his approval and for the purposes of making the vessel and cargo ready for discharge. The owner is responsible for unsecuring the cargo and removing the seafastenings and preparing it for discharge. Clause 4(f) in relation to float on/float off discharge merely provides that the owner shall float the cargo off with the removal of the cargo from above the submerged hull and accordingly the charterer is responsible for receiving the cargo as soon as it is afloat and the submersion operation by the vessel is completed.

Other matters

"(g) All expenses associated with the Vessel such as harbour dues, pilotages, local tug assistance, if required, agency fees, fuel and lubricants shall be paid for by the Owners except as otherwise provided for in this Charter Party.

(h) Any compulsory shore labour connected with loading operations, lashing/seafastening, removal of lashing/seafastening and/or discharging operations required by local authorities or union regulations shall be for the Charterers' account."

7.53 Clause 4 concludes with two self-explanatory provisions as to the responsibility for vessel matters, which as is customary under a voyage charter are for the owner's account, and for shore labour, to be for charterer's account. The owner's responsibility for towage assistance should be noted; this extends only to such tug assistance as the vessel needs and does not extend to towage required in respect of the cargo in any flotation operation which is solely for charterer's account under clause 4(c)(ii) and (f)(ii).

Clause 5: necessary permits and licences

"5. Permits/Licences

(a) All necessary permits and/or licences pertaining to the loading and/or discharging operations shall be provided and paid for by the Charterers, unless such permits and/or licences can only be obtained by the Owners, in which case they shall be provided by the Owners but paid for by the Charterers.

The Owners and the Charterers shall assist each other in obtaining such permits and/or licences.

(b) Any delay caused by the Charterers in obtaining the permits and/or licences related to sub-clause 5(a) shall be at the Charterers' time and any time lost shall be paid for at the demurrage rate stipulated in Box 19."

7.54 Clause 5 originally provided for the charterer to be solely responsible for arranging and paying for all necessary licences required for the loading and discharging operation. The 2007 version, while continuing to make the charterer responsible for all costs and expenses and delays in relation to permits and licences, adopts a more pragmatic approach. The clause now imposes the obligation in the first instance on the charterer but recognises that there will be cases where the only proper applicant is the vessel owner, in which event the owner is obliged to do what is required, and now, in addition, provides for an express obligation of mutual assistance akin to

that which would ordinarily be implied in any event under the principle in *Mackay v Dick* (1881) 6 App Cas 251.

Clause 6: duties and taxes

"6. Duties, Taxes and Charges

The Charterers shall pay all duties, taxes and charges whatsoever levied or based on the Cargo and/or the freight at the Loading Port and/or Discharging Port irrespective of how the amount thereof may be assessed, including agency commission assessed on the basis of the freight."

7.55 A common feature of heavylift cargoes are difficulties which arise from the imposition of local taxes or duties or other monetary levies, very commonly at the place of destination where the cargo, typically extremely valuable, is fiscally assessed for importation purposes. Given the wide variety of jurisdictions to (or from which) which heavylift cargoes are carried and the eccentricity or unpredictability of the local fiscal regime, clause 6 provides in wide terms that any and all such taxes are for the charterer's account. While the tax may be payable by the charterer as the shipper, receiver or importer of the cargo (in which case the clause adds little), situations arise where the tax is assessed by reference to the cargo and is then levied on the importer and failing which on the vessel which has brought the cargo within the jurisdiction; this may result in the vessel being impounded for a tax payable in respect of the cargo by those who are the real importers of it. The explanatory notes state that is for this reason that the 2007 revision added a reference to taxes etc "based on the cargo": "In HEAVYCON 2007 it is clarified that the Charterers shall pay all duties etc. levied *or based* on the Cargo to take into account taxes levied on the Owners but based on the Cargo" (original emphasis). It is suggested that while this may have been the intention, it could have been more clearly and explicitly stated that any taxes which are referable to the cargo and which the owner is obliged to pay are to be reimbursed by the charterer. Compare the more specific terms used in the different context of the "Towcon 2008" form clause 9(c) of which provides that:

> All taxes, charges, costs, and expenses payable by the Hirer shall be paid by the Hirer direct to those entitled to them. If, however, any such tax, charge, cost or expense is in fact paid by or on behalf of the Tugowner (notwithstanding that the Tugowner shall under no circumstances be under any obligation to make such payments on behalf of the Hirer) the Hirer shall reimburse the Tugowner on the basis of the actual cost to the Tugowner upon presentation of invoice.

Clause 7: quarantine

"7. Quarantine

Unless due to health conditions on board the Vessel, any time lost as a result of quarantine formalities and/or health restrictions imposed or incurred at any stage of the voyage, including any such loss of time at the Loading Port and/or the Discharging Port, shall be paid for by the Charterers at the demurrage rate specified in Box 19. The Charterers shall also pay for all other expenses which may be incurred as a result thereof."

7.56 This is a self-explanatory provision. It makes the charterers responsible for delay and expense due to routine quarantine and local health restrictions (not including free pratique which is dealt with separately by clause 3(c): see above), for example where the vessel arrives during an epidemic or where special restrictions are applied to foreign vessels. Where the vessel is placed in quarantine as a result of infection on board amongst crew members, the charterer is not responsible for the time lost. The clause does not state what is then to be the consequence in terms of expense and time lost which might usefully be addressed if the vessel is trading to areas where quarantine control is particularly stringent. As the charterer pays freight, the loss of time

during the voyage will be for the owner's account. If the quarantine occurs during free time or demurrage (under clause 13) then if (but only if) the crew is rendered numerically insufficient for the service due to illness, the exception for "time lost by reason of deficiency of the master. Officers or crew" under clause 13(c) would arguably be engaged (see *Royal Greek Government v Minister of Transport* (1949) 82 L1 L Rep 196 and *Cosco Bulk Carrier Inc v Team-Up Owning Co (The Saldanha)* [2011] 1 Lloyd's Rep 187 *per* Gross J at para. 23).

Clause 8: commencement of laydays and cancellation of the charter

"8. Commencement of Loading/Cancelling Date

(a) The first layday shall be on or between the dates stated in Box 10 ('the Period').

(b) The Period shall be narrowed down to one firm date ('the First Layday') in accordance with the notification schedule in Box 11. If Box 11 is not filled in then the notification schedule is in Owners' option.

(c) Each narrowed Period shall always be within the previously notified Period and the number of days' notice shall always be prior to the first day of the previously notified Period.

(d) The cancelling date shall be the number of days stated in Box 12 after the First Layday ('the Cancelling Date'). If Box 12 is not filled in then fourteen (14) days shall apply.

(e) The date of commencement of the loading shall be at any time on or between the First Layday and the Cancelling Date, both dates inclusive, in the Owners' option. Should the Owners give notice of readiness prior to the First Layday, the Charterers may, at their option, accept such an earlier loading date and the time used shall count against the free time in accordance with Clause 13 (Free Time/Demurrage).

(f) Should it appear that the Vessel will not be ready to commence loading latest on the Cancelling Date the Owners shall immediately notify the Charterers. The Owners shall state a new cancelling date as soon as they are in a position to do so with reasonable certainty.

Within seventy – two (72) running hours after receipt of the Owners' notice as aforesaid and latest when the Vessel is ready for loading, whichever is the earlier, the Charterers shall advise the Owners whether they elect to cancel this Charter Party, failing such advice the new cancelling date as notified by the Owners shall become the Cancelling Date.

(g) Should the Charterers cancel the Charter Party in accordance with sub-clause (f), any amount paid to the Owners in advance and not earned shall be returned to the Charterers by the Owners.

(h) The Owners shall not be responsible for any loss or damages whatsoever incurred by the Charterers as a result of the Charterers cancelling this Charter Party in accordance with sub-clause (f) nor shall the Owners be responsible for any loss or damages whatsoever suffered by the Charterers as a result of the failure of the Vessel to be ready for loading latest on the Cancelling Date.

(i) Should the Cargo for reasons beyond the Owners' control not be loaded within fourteen (14) days after the free time for loading stated in Box 18 has expired, the Owners shall have the option to cancel this Charter Party or to sail with only part of the Cargo on board.

(j) If the Owners exercise their option to cancel the Charter Party in accordance with sub-clause (i), the Charterers shall pay to the Owners the applicable termination fee according to the provisions of Clause 21 (Termination) in addition to any demurrage incurred.

(k) If the Owners exercise their option to sail with part of the Cargo on board in accordance with sub-clause (i) the Charterers shall pay to the Owners the full freight stated in Box 16 in addition to any demurrage incurred."

7.57 This is a lengthy provision and may be compared with the much briefer corresponding provision found in other forms of voyage charterparty and, in the offshore context, as set out in clause 5 of "Towcon 2008" considered in Chapter 4 above. It in part resembles the corresponding provision in clause 9 of the "Projectcon" form.

7.58 Paragraphs (a)–(d) provides for the parties' agreement on the date of the start of laydays and the period for loading, with this date being narrowed down by subsequent notices as provided for in Box 11 or in the owner's option in the unlikely event that Box 11 is not filled out, and for

the cancelling date by which the vessel must be ready for loading (as the explanatory notes state: "It will seldom happen that Box 11 is not filled in as the notification schedule is a very important issue for the Charterers"). Loading is to take place between the two dates although provision is made for the position where the vessel is ready for loading before the period: para. (e).

7.59 Paragraph (f) deals with the position where the vessel is not ready to load by the cancelling date; as with clause 5 of the "Towcon" form, it provides for what is described as an "interpellation" procedure, under which the owner is required to give notice to the charterer as soon as it is known that the vessel will not be ready to load by the cancelling date and the charterer is required to elect. The clause provides for the giving of the notice by the owner and, once this has been done, the owner is further required to give a new proposed cancelling date "as soon as they are in a position to do so with reasonable certainty." This gives rise to a potential uncertainty as to the charterer's rights in that event. Paragraph (f) provides that the charterer has to elect whether or not to cancel the charterparty within 72 hours "after receipt of the Owners' notice as aforesaid", this referring back to the notification that the vessel will not be ready to load on or by the cancelling date (thereby avoiding the difficulty encountered with older versions of cancelling clauses – eg clause 10 of Gencon 1976 (see *The Helvetia S* [1960] 1 Lloyd's Rep 540 and *Cooke*, paras. 19.33–19.37). Accordingly, whether or not the owner gives an alternative date, as soon as it notifies the charterer that the date will be missed, the charterer has the option to cancel. In circumstances where the owner gives no alternative date at the time of giving its notice that it will not be ready, this places a charterer in a potential quandary: does it elect not to cancel, albeit with no firm alternative date yet proposed and thereby leave itself to load at such later date as the owner eventually proposes when it is "in a position to do so with reasonable certainty" or does it cancel? If the charterer elects in these circumstances not to cancel, it is very much thereafter at the mercy of the owner as to the new cancelling date. The obvious solution to this is to require the owner to give one notice in which it states that it will not be ready to load by the cancelling date *and* in which the owner is required to give the proposed alternative date. This would require only a slight amendment to para. (f) at lines 125–126. The explanatory notes appear to assume that the owner in giving the notice will at the same time give the new proposed date around which both parties can then operate with a degree of certainty:

> Of particular interest is this interpellation provision by which the Owners are entitled to set a new Cancelling Date in case it appears that the Vessel is not able to commence loading latest at the Cancelling Date. The provision is advantageous to both the Owners and the Charterers. With today's market and the high daily running costs for the specialised heavylift vessels, it would not be fair to the Owners, if they had to continue on a ballast voyage to the Loading Port not knowing whether the Charterers will accept the Vessel or not. The Sub-clause gives clear guidelines as to how to fix the new Cancelling Date. The Charterers, on the other hand, are helped to re-arrange their loading schedules if the Owners inform them according to the interpellation provision.

7.60 While that may have been the intention, the wording of para. (f) does not provide for this result, nor does it, *pace* BIMCO, give clear guidelines for fixing the new cancelling date in a case where the owner does not give such a date at the same time as giving the notice that the cancelling date cannot be met. The position may be compared and contrasted with the cancelling provision in clause 9(b) of the Gencon 1994 form which provides that the owners "shall notify the Charterers thereof without delay stating the expected date of the Vessel's readiness to load and asking whether the Charterers will exercise their option of cancelling the Charter party or agree to a new cancelling date"; see also clause 9(e) of the "Projectcon" form which assumes that the owner gives a new readiness date in the "interpellation" notice. Consideration should be given to an amendment in similar terms, albeit replacing date of readiness with the new cancelling date.

7.61 Clause 8 contains a lacuna in relation to the election by the charterer to accept a new cancelling date. Is it open to the owner to give a further notice under para. (f) if the vessel is further delayed so as to be unable to meet the new cancelling date which has come about under the paragraph? The language of the clause is general and the interpellation procedure is capable of being operated

repeatedly as the new date "shall become the Cancelling Date" and therefore para. (f) applies anew in respect of the new "Cancelling Date." Once again, the position under "Heavycon 2007" may usefully be compared with that under clause 9 of Gencon 1994. This provides for the single use by the owner of the similar procedure provided for in that clause in these terms: "The provisions of sub-clause (b) of this Clause shall operate only once, and in the case of the Vessel's further delay, the Charterers shall have the option of cancelling this Charter Party as *per* sub-clause (a) of this Clause."

7.62 Paragraphs (g) and (h) of clause 8 provide for the financial consequences of a cancellation by the charterer. As with other voyage charter cancelling provisions, the charterer's right of termination under the cancelling clause operates irrespective of breach on the part of the owner (and without prejudice to any rights which the charterer may otherwise have to terminate the charterparty): *The Democritos* [1976] 2 Lloyd's Rep 149 and see *Cooke*, para. 19.1 *et seq*. Paragraphs (g) and (h) however provide that where the charterer cancels under the mechanism provided the sole remedy open to the charterer is the return by the owner of any sums paid but not earned. Paragraph (h) makes it clear that the charterer foregoes any rights which it might otherwise have in damages "as a result of the failure of the Vessel to be ready for loading latest on the Cancelling Date." In this regard, it should be noted that the obligation of due despatch under clause 2(b) only applies to "the voyage" and does not, of itself apply to the approach voyage to the loading port. The thinking behind this exemption of the owner from liability is explained in the notes to the "Projectcon" form, in clause 9 of which clause 8 of "Heavycon 2007" was largely based:

> it appears to be common practice in the industry to contractually limit the owners' liability towards the charterers in the event of non-fulfilment of their obligations to deliver the barge [here, the Vessel] which results in claims made against the charterers by third parties.

7.63 Paragraphs (i)–(k) deal with the converse situation of the cargo not being ready for loading or not being loaded within the free time allowed for loading. In such a case, the owner has a right to cancel and the charterer is liable to pay the termination fee agreed under clause 21 and any demurrage incurred. There is no corresponding provision exempting the charterer from liability in damages, although it is arguably inherent and implicit in the concept of the termination fee that this is to operate as the owner's sole remedy; however, it would be sensible to provide for this in express terms similar to para. (h). Paragraph (i) gives the owner the right also to sail with the cargo part laden during the free time allowed. This offers a valuable alternative remedy to the owner who would otherwise face the prospect of having to discharge part cargo laden on board its vessel (with all the complexities involved therein in the heavylift sector) if it wishes to cancel. Thus, if a cargo of three large pieces is only part laden in the free time and the owner envisages considerable further delay in completing loading with an undesirable knock-on effect on the timing of the vessel, for example in light of the next booked heavylift operation, the owner can sail with whatever pieces have been loaded, with freight earned in full. This is a provision which was new to "Heavycon 2007" and the thinking behind it was described by BIMCO as follows:

> 8. (i) deals with the situation where the Charterers have not tendered the full cargo within a given period. Where previously the Owners" only option was to cancel the Charter Party, the Owners now have an option to sail with part of the Cargo. Furthermore, where previously the time limit was linked to the Notice of Readiness, it is now linked to the expiry of free time for loading. This is advantageous to the Charterers, because this gives them more time to tender the full Cargo.

Clause 9: advance notices

"9. Advance Notices

(a) *Advance Notices of Expected Load-readiness*

The Owners shall give notices of the expected day of the Vessel's arrival and/or readiness to load fourteen (14) days, seven (7) days and three (3) days in advance unless otherwise stated in Box 12.

Furthermore, the Owners shall give twenty-four (24) hours approximate notice of the expected hour of the Vessel's readiness to load.

(b) During the voyage the Owners shall give notice of expected time of arrival at Discharging Port with intervals of the number of days stipulated in Box 14."

7.64 The "Heavycon" form originally dealt both with notice in respect of Expected Load-Readiness and Notice of Readiness ("NOR"). In the 2007 form the Notice of Expected Load-readiness and Notice of Readiness are separated into two clauses "to create more clarity." Clause 9 now only deals with Notices of Expected Load-readiness, with clause 10 dealing with the ordinary Notice of Readiness.

7.65 The complexity of the loading and discharging arrangements involved in the transportation of most heavylift cargoes requires advance notice of the arrival of the vessel to be given by the owner to the charterer at both ends of the transit. Other forms of voyage charterparty (such as the Gencon 1976 form, line 5) include a "vessel expected ready to load" statement in the body of the charterparty. Such a statement has been held to constitute an undertaking on the part of the owner that, at the date of entering into the charterparty, it *bona fide*, honestly and in reasonable grounds expects the vessel to be ready to load on that date and to be, in law, a condition of the charterparty: see *The Mihalis Angelos* [1971] 1 QB 164. It is submitted that the special considerations (as to which see *Cooke*, para. 4.6) which led the House of Lords to that decision, in the context of an initial promise on the basis of which the charterparty was concluded, would not be applied to the successive notices of the owner's expectation as to the vessel's arrival and readiness to load under clause 9 and that any statement made by the owner would be an intermediate warranty, breach of which sounds only in damages; cf. *Associated Portland Cement Manufacturers v Houlder* (1917) 22 Com Cas 279 where the representation as to the vessel's readiness seems to have been made after the contract had been concluded, as here would be the case with the owner's various notices under the clause.

7.66 The implied requirement that the owner will state his expectation on reasonable grounds was explained by Kerr J in *R. Pagnan & Fratelli v NGJ Schouten* [1973] 1 Lloyd's Rep 349 at 358 as follows: "one must not only consider the information which was in fact known to the owner, but also any facts which he ought to have known or as to which he was put on enquiry." Accordingly, the owner will be liable if the notice was inaccurate due to negligence on the part of his own employees or agents (cf. *Efploia Shipping Corp v Canadian Transport* [1958] 2 Lloyd's Rep 449) but, arguably, will not be liable if it is due to information which he reasonably obtained from a third party and which there was no ground for doubting, eg information from a port authority which was negligently given.

Clause 10: notice of readiness

"10. Notice of Readiness

The Owners shall give notice of readiness as *per* Box 13 advising when the Vessel is ready to commence loading at the Loading Port and when the Vessel is ready to commence discharging at the Discharging Port as *per* Box 14. All notices may be given at any time of the day or night, Saturdays, Sundays (or their local equivalents) and holidays included and notwithstanding hindrances as referred to in Clause 3(c) (Deviations/Delays/Part Cargo)."

7.67 "A notice of readiness is a notification by the vessel that a state of readiness, whether to load or discharge, exists at the time when it is given": *Cooke*, para. 15.22. The "Heavycon" form previously specified the means by which the notice was to be given but this has been deleted in the 2007 revision of the form, and accordingly the notice can be given by any means, including orally (as under the Gencon 1976 form) to the person or persons specified in Box 13, although it is unusual for the notice not to be tendered in some documentary form, headed "notice of readiness"

and, to avoid dispute, it is plainly highly prudent to give it in some recorded form. The notice must, at a minimum, state that the vessel has now arrived at a place where she may tender notice (although this is not stated, this will be at the loading or discharging port defined in Boxes 6 and 7 respectively) and that the vessel is then and there presently ready to load or discharge, as the case may be. The requirements as to a valid notice of readiness, the definition of a vessel's "readiness" to load or discharge and the consequences of an invalid notice have been extensively considered in the ordinary voyage charterparty context and reference should be made to the detailed treatment of the case law in this context in *Cooke*, paras. 15.22–15.47. In essence, however, clause 10 requires the vessel to be ready in all respects material to the proposed loading or discharging, both physical and legally, at the time when the vessel tenders the notice, wherever the vessel is within the port at the time at which the notice is tendered: see *The Tres Flores* [1974] QB 264.

Clause 11: the condition of the cargo and the approval of the transportation

"11. Marine Surveyor/Condition of the Vessel and Cargo

(a) The Marine Surveyor(s) stated in Box 15 shall be appointed for this Transportation. If Box 15 has not been filled in the Charterers and the Owners shall agree on the appointment of Marine Surveyor(s) acceptable to the cargo underwriters.

(b) All relevant documentation required by the Marine Surveyor(s) for their approval of the Transportation shall be submitted to the Marine Surveyor at the earliest possible stage after this Charter Party is concluded, if not already submitted earlier. As soon as possible after submission of the relevant documentation, Transportation approval shall be given by the Marine Surveyor.

(c) The Charterers shall pay all expenses relating to the production of documentation related to the Cargo and/or the Charterers' equipment. The Owners shall pay all expenses relating to documentation related to the Vessel and all other equipment being provided by the Owners in the performance of the Transportation.

(d) The Charterers shall arrange and pay for all the Marine Surveyor(s) services, including approval of the Transportation.

(e) The Charterers warrant that the full description of the Cargo stated in Box 5 is correct and further warrant that the Cargo is in all respects tight, staunch, strong and in every way fit for the Transportation.

(f) Should the Cargo and/or its description not be in compliance with the aforesaid then the Owners shall have the option to cancel this Charter Party.

(g) If the Owners exercise their option to cancel the Charter Party in accordance with this Clause the Charterers shall pay to the Owners the applicable termination fee according to the provisions of Clause 21 (Termination)."

7.68 Clause 11 deals with two inter-related subjects: the condition of the cargo tendered by the charterer and its fitness for the envisaged transportation and the expert assessment and certification and approval of the intended transportation of that cargo on the vessel on the intended route (described in Box 7) given the anticipated sea and weather conditions by an independent marine warranty surveyor.

7.69 As to the first, by para. (e) the charterer warrants not only that the cargo is as described in Box 5 (both as to its general nature and as to the minimum and maximum weights there stated) but also that it is fit for transportation by the vessel, ie a warranty of seaworthiness or "carriage-worthiness" by which the charterer warrants that the cargo is in all respects fit for the intended sea carriage on the specific vessel which it has chartered. Given that the vessel and its heavylift cargo once the cargo is laden and seafastened on and to the vessel effectively forms a composite marine structure of considerable size and volume which the owner will navigate to destination, and given also that the owner will have little knowledge of or control over the preparation of the cargo for the carriage or of its physical attributes, the "Heavycon" form contains a warranty of carriage-worthiness which is perhaps unique to this form of carriage or transportation and which distinguishes it from other voyage charter contexts; it may usefully be compared

with the warranty of tow-worthiness which the hirer gives under clause 18 of "Towcon 2008." The warranty in "Heavycon 2007" uses the well-established "tight, staunch, string" language employed in relation to the carrying vessel under many voyage charter forms. Clause 11(e) may be compared with the "Heavyliftvoy" form, which in its clause 2(a) uses more specific language which addresses specifically certain considerations which may affect the fitness of the cargo: "fit for transportation with sufficient internal strength and with any loose parts properly secured, so as to withstand the forces to which it will be subjected during the loading operation, carriage and discharging operation." The importance of the description of the cargo which the charterer gives is underlined by paras. (f) and (g) which give the owner the right to cancel the charterparty and claim a termination fee in the event that the cargo does not comply with the matters warranted in para. (e).

7.70 The second subject dealt with by clause 11 is the all-important one of the marine warranty surveyor or "MWS": as the explanatory notes to the original version stated: "the Marine Surveyor's role is of great importance in the heavylift trade." The development of the role of the marine surveyor has been described (Harrison, "Marine Warranty Surveying for Offshore Projects" (2009) 23 A & NZ Mar LJ) in the following terms:

> the marine aspects of the temporary phases of an offshore project involved complex structures and floating facilities and had considerable additional potential risks over and above normal shipping operations. As such these risks needed to be covered under specific insurance policies which allowed coverage for operations such as the load out, towage, installation and hook up work thereafter of the project materials. In order to protect their interests in these policies, Underwriters saw the need for an additional specialist independent 3rd party role to review and approve these marine operations on their behalf and thus saw the introduction of another type of Marine Surveyor, the Marine Warranty Surveyor (MWS).
>
> Class Societies initially performed this role too, but this new requirement also saw rise to specialist firms of Marine Warranty Surveyors. These firms have over time gained the confidence of oil companies and offshore contractors as well as underwriters, the interests of all of whom they protect, and they are now the major providers of this service in most parts of the world.
>
> The MWS's primary function today remains to see that all reasonable steps are taken and appropriate criteria followed to ensure the safety of the project cargo, structure, unit or vessel throughout the periods from initial load out to final installation in the field or discharge at final destination.

The parties are required to agree on the appointment of a surveyor (to be paid for by the charterer: para. (d)) who considers from an expert standpoint the suitability of the cargo and the vessel for the intended transportation, based on full documentation provided by the charterer and the owner respectively (para. (c)) once the cargo has been loaded and secured on board the vessel under clause 4(b). The original explanatory notes stressed the importance of the obligation upon each party to provide the information necessary for the surveyor's assessment. This is an essential step in the approval procedure:

> The procedures used by the MWS for the completion of the defined scope will vary depending on the operation in question but will in general include operational procedures and engineering review, site and marine vessel and equipment surveys and attendance during specific marine operations. The Warranty Surveyor will require; that satisfactory plans and procedures are designed and prepared according to agreed codes or standards for the operation, that satisfactory preparations are carried out to the extent and in the manner approved for the operation, that the marine operations are then performed in accordance with the approved procedures and carried out in compliance with the governing codes, standards or overriding regulations of the region.
>
> When the required documentation has been approved, the prevailing environmental conditions have been found acceptable, and the necessary site, vessel and equipment surveys have been completed to the Warranty Surveyor's satisfaction, a Marine Operation Declaration (More commonly known as a Certificate of Approval) will be issued by the MWS, thus authorising the operation in question to proceed." (see Harrison, *op. cit*.)

7.71 The surveyor is required to approve (and clause 11 contemplates that he will ultimately approve) the transportation arrangements but in practice he may in certain cases make observations and recommendations as to features of the securing or positioning of the cargo or other operational aspects. Clause 11 is silent as to the consequences of such recommendations which, presumably, fall to be dealt with under the general code of the allocation of responsibilities for the loading operation and the costs and expenses incurred therein which are contained in clause 4, the Demarcation of Responsibility in Annex "A" and the duty in respect of the carriage-worthiness of the cargo under clause 11. Accordingly, if the surveyor recommends that certain measures be taken in respect of the cargo for example, the welding shut or blanking off of a void space which is open to the elements and which may affect stability or the securing or better securing of a jib assembly to impede its free movement in transit, then the charterer is likely to bear the responsibility under clause 11; if on the other hand the surveyor recommends that the cargo be re-positioned or that additional fastenings be employed, then this would be for the owner or for the charterer depending on which loading option was adopted, viz. either clause 4(c)(i) or (ii). Annex "A" also provides for the allocation of various tasks which may be engaged in this situation, although it is open to argument whether the simple task of "obtaining MWS approval before sailing" (referred to in para. 2.11 of the Annex) would by itself encompass and impose upon the designated party the responsibility for doing all that was necessary to obtain such approval, rather than merely identifying who is to liaise with the surveyor to obtain the approval which it is to give under clause 11(b). Consideration might usefully be given to a more express allocation of responsibilities in this regard.

7.72 Clause 11 is similarly silent on the position, admittedly somewhat uncommon, if the surveyor refuses to give approval for the transportation: usually the transportation has been carefully assessed and "pre-engineered" by both charterer and owner prior to contracting and approval of the surveyor is either forthcoming or conditional upon changes being made. The original "Heavycon" form in its clause 10.4 gave the charterer and the owner an option to cancel the charterparty in the situation where the surveyor did not give transportation approval. This has been deleted on the basis that, as stated by BIMCO, "However, since in practice the Marine Surveyor gives his approval when the cargo has been loaded and seafastened, the provision did not work." In other words, the right to cancel was deleted because it could only ever have been exercised at a time when the cargo was already on board and lashed. This deletion therefore leaves open the position where the cargo is on board but where the surveyor will not give the essential approval for its transportation. While resort can be had to concepts such as frustration or mutual mistake as to the achievability of the transportation agreed between the parties, it would have been preferable for a specific term to have been adopted which deals with this situation and which gives a right of cancellation (as was previously provided for) coupled with a definition of who is to bear the costs of unravelling the envisaged operation, in terms of discharging etc., with suitable cross-reference to the ordinary responsibilities for discharging as set out in clause 4 and Annex "A." It may be noted that if the sole reason for the surveyor refusing approval is that the cargo is not carriage-worthy then clause 11(f) and the owner's right to cancel is engaged in any event, irrespective of the fact that the cargo is already on board and seafastened.

Clause 12: freight

"12. Freight

(a) The freight stipulated in Box 16 shall be paid in instalments in accordance with Box 17. if Box 17 is not completed then freight shall be fully prepaid upon completion of loading against surrender of the HEAVYCONRECEIPT or HEAVYCONBILL whichever the case may be. The freight shall be deemed earned upon completion of loading and shall be non-returnable whether the Vessel and/or Cargo is lost or not lost and

whether lost due to perils of the sea or howsoever. The freight instalments shall be paid in full without any deductions in the currency and to the Owners' bank account stated in Box 17.

(b) In the event of change in applicable laws or regulations and/or interpretation thereof, resulting in an unavoidable and documented change of the Owners' costs after the date of entering into the Charter Party, freight shall be adjusted accordingly."

7.73 The "Heavycon" form, in the light of the special nature of and risks for the owner attendant upon the transportation of super heavylift cargoes, provides for payment of freight, either in instalments or by way of lump sum freight, which is to be deemed earned on shipment and is thereafter non-returnable whether the cargo be lost or not lost and irrespective of the cause of the loss. The "Heavyliftvoy" provides for a similar basis of freight: see clause 18(a).

7.74 The position is therefore the same as that which prevails where freight is ordinarily payable in advance and the freight is regarded as an "irrevocable payment at the risk of the shipper of the goods": *Allison v Bristol Marine Insurance Co* (1875) 1 App Cas 209 *per* Lord Selborne at 253. This is so even where the failure of the voyage is caused by the wrongful abandonment of the voyage by the shipowner: see eg *The Dominique* [1989] AC 1056. Absent any agreement upon a timetable for payment of freight by instalments (as set out in Box 17), the time at which the freight is earned and becomes payable is upon loading and surrender of a bill of lading or receipt for the goods; if the cargo or vessel is lost before such time no freight is due, even if the cargo has been loaded; cf. *Cia Naviera General S.A. v Kerametal Ltd* [1983] 1 Lloyd's Rep 373. In the special case of freight it has been long-settled that no right of set-off of claims for damages exists to extinguish or diminish claims for freight which claims are to be regarded effectively as "sacrosanct" – see *The Aries* [1977] 1 WLR 185 (HL); *The Dominique* [1989] AC 1056; and *The Khian Captain (No. 2)* [1986] 1 Lloyd's Rep 429; and see generally Cooke, *Voyage Charters* (4th edn, 2014), para. 13.63 *et seq*. This is confirmed by the wording which concludes para. (a).

7.75 Clause 12(a) provides that freight "shall be paid in full without any deductions." This is not the strongest wording (being unlikely, of itself, to exclude a right of set-off: see *Youell v Bland Welch* [1992] 2 Lloyd's Rep 127) and, notwithstanding the common law rule as to the sacrosanct nature of freight and against set-off against freight (see eg *Cooke* at para. 13.63 *et seq*.), consideration should be given to amending the form to provide for a more comprehensive insulation of freight from challenge, cf. the wording of clause 12 of "Projectcon" and clause 3(c) of "Towcon 2008" ("without any discount, deduction, set-off, lien, claim or counterclaim") which may protect the freight, once paid, from then being attached or frozen as security for a cross-claim of the charterer against the owner: see eg the consideration of similar wording in *CMA CGM Marseille v Petro Broker International (Formerly known as Petroval Bunker International)* [2011] EWCA Civ 461("Payment shall be made in full, without set-off, counterclaim, deduction and/or discount, free of bank charges"), discussed in Chapter 4 above in relation to the "Towcon 2008" clause 3(c).

7.76 Paragraph (b) is a new provision, inserted as part of the 2007 revision and, as the explanatory notes state, "refers to changes in relevant laws and/or regulations after the fixture. The wording 'the freight shall be adjusted accordingly' takes such changes into account and imposes an obligation on the parties to adjust the freight. Similar provisions are found in other offshore/drilling contracts and therefore acceptable to both Charterers and Owners."

Clause 13: free time and demurrage

"13. Free Time/Demurrage

(a) The Charterers are allowed the free time stipulated in Box 18 in the loading and discharging port(s) and for canal transit if applicable, Saturdays, Sundays (or their local equivalent) and holidays included. The free time at the Loading Port shall start counting when notice of readiness has been tendered, in accordance with Clause 10 (Notice of Readiness), whether in berth or not, unless loading has commenced earlier and shall

count until the Cargo is in all respects fully seafastened on board the Vessel and approved by the Marine Surveyor(s).

The free time at the Discharging Port shall start counting when notice of readiness has been tendered in accordance with Clause 10 (Notice of Readiness), whether in berth or not, unless discharge has commenced earlier and shall count until the Cargo is in all respects removed from the Vessel.

(b) Demurrage shall be payable for all time used in excess of the free time. The demurrage rate for the Vessel is the amount stipulated in Box 19 calculated *per* day or pro rata for part of a day.

(c) Free time shall not count and if the Vessel is on demurrage, demurrage shall not accrue for time lost by reason of deficiency of the Master, officers or crew or strike or lockout of the Master, officers or crew or by reason of breakdown of the Vessel or its equipment.

(d) Demurrage and other amounts which are calculated at the demurrage rate fall due day by day and are payable by the Charterers promptly, upon presentation of the Owners' invoice, to the Owners' bank account stated in Box 17."

7.77 Clause 13 is a basic laytime and demurrage provision common to other forms of voyage charterparties. Reference may be made to the outline given in Chapter 4 in relation to the similar provision in clause 6 of "Towcon 2008" and to Schofield, *Laytime and Demurrage* (7th edn, 2016). Under clause 13(a), free time (as laytime is referred to in the BIMCO forms, reflecting the usages of the tug and barge trade which have been followed in the heavylift sector which has developed from them, although the traditional terminology is used in the "Heavyliftvoy" form, given it being closer to a standard voyage charter for the carriage of goods) begins upon the giving by the vessel of the Notice of Readiness under clause 10, with no intervening period allowed as with other forms of voyage charterparty, such as the Gencon form. This is a change from the previous "Heavycon" form. The previous form has also been changed to include within the exceptions to free time and demurrage a standard exception where the vessel loses time due to fault or deficiency of the vessel for which the owner is now responsible, balancing the form between the charterer and the owner. These changes are explained as follows:

> Sub-clause 12.1. in the original HEAVYCON provided that free time at loading port(s) should start counting 6 running hours after notice of readiness has been tendered. In practice, loading operations start before the 6 running hours have expired, because both parties want the process to finish as quickly as possible, and there is no need to wait 6 hours before free time starts counting. Since the Sub-clause already recognized such earlier loading by stating "unless loading has commenced earlier" and since the "6 running hours" time frame is considered more relevant for the mid-size industry, the time frame has been deleted from Sub-clause 13.(a) in HEAVYCON 2007.
>
> The fourth paragraph of Sub-clause 12.1. in the original HEAVYCON dealt with situations in which free time did not count. Since there is a need for a provision dealing with delays caused by the Owners, Clause 13.(c) in HEAVYCON 2007 has been phrased broader to justify deletion of the fourth paragraph in the original Sub-clause 12.1.

Clause 14: mobilisation and demobilisation

"14. Mobilisation/Demobilisation

(a) *Mobilisation*

If agreed upon in Box 20 the Charterers shall pay the lump sum stipulated therein in respect of mobilisation, which amount shall be earned and non-returnable upon the Vessel's arrival in the Loading Port.

(b) *Demobilisation*

If agreed upon in Box 21 the Charterers shall pay the lump sum stipulated therein in respect of demobilisation, which amount shall be earned and non-returnable upon the Vessel's arrival in the Discharging Port.

(c) The mobilisation and demobilisation amounts shall be payable against the Owners' invoice."

7.78 As with clause 3(d) and (e) of "Towcon 2008" and as is standard in the offshore context, provision is made for the parties to agree upon mobilisation and demobilisation payments if appropriate given the vessel or the nature of the services to be provided by the vessel.

Clause 15: canal transit

"15. Canal Transit

(a) If the Transportation is scheduled to pass through the canal stated in Box 7, the Charterers shall be granted free time for any such transit, and such free time shall count against the number of hours stipulated in Box 18. If the Transportation is delayed beyond the free time stipulated therein, the Charterers shall pay for such extra transit time at the rate of demurrage stipulated in Box 19 and paid in accordance with Clause 13(d) (Free Time/Demurrage) and shall, in addition, pay for all other documented extra expenses thereby incurred. Canal transit time is defined as from arrival at pilot station or customary waiting place or anchorage, whichever is the earlier, and until dropping last outbound pilot when leaving for the open sea.

(b) The freight rate stipulated in Box 16 is based upon the Owners paying canal tolls limited to the amount stipulated in Box 22. Any increase in the canal tolls and/or any additional expenses imposed on the Transportation for the canal transit actually paid by the Owners shall be reimbursed by the Charterers to the Owners upon presentation of the Owners' invoice.

(c) Should the transit of a canal be made impossible for reasons beyond the Owners' control, the Charterers shall pay for all extra time by which the voyage is thereby prolonged at the rate of demurrage stipulated in Box 19 and paid in accordance with Clause 13(d) (Free Time/Demurrage).

The Charterers shall also pay all other expenses, including bunkers, in addition to those which would normally have been incurred had the Vessel been standing-by in port less the amount of canal tolls saved by the Owners for not having transitted the canal.

(d) Notwithstanding the provisions of sub-clause (c) the Owners may, at their sole discretion, instruct the Master to discharge the cargo at the nearest safe and reachable port or place and such discharge shall be deemed due fulfilment of the Charter Party. All provisions of this Charter Party regarding freight, discharge of the cargo, free time and demurrage as agreed for the original Discharging Port shall also apply to the discharge at the substitute port."

7.79 The original "Heavycon" made provision for canal transit and the granting of free time for such transits as well as provision for inability to use a canal forming part of the intended route (as described in Box 7). The same form of provision has been adopted by BIMCO in the other offshore forms starting with "Projectcon" in 2006 and now included within the latest "Towcon" revision: see clause 7 of "Towcon 2008." The clause is self-explanatory and is an improvement on the previous "Heavycon" clause which was obscure in relation to the adjustments to be made in respect of the saving of canal tolls or dues and knock-on effect on the cost to the owners of an alternative route, if possible. In the super heavylift context, as BIMCO states, "In practice the clause is only relevant if the transportation is scheduled to pass through either Panama and/or Suez" canals.

Clause 16: bunker escalation

"16. Bunker Escalation

This Charter Party is concluded on the basis of the price *per* metric ton and the quantity and grades of bunkers stated in Box 23.

If the price actually paid by the Owners for this quantity of bunkers should be higher, the difference shall be paid by the Charterers to the Owners.

If the price actually paid by the Owners for this quantity of bunkers should be lower, the difference shall be paid by the Owners to the Charterers."

7.80 The usual BIMCO provision, found in the other BIMCO forms considered in Chapters 4 and 5, to reflect movements in bunker prices is contained in clause 16 of "Heavycon 2007." The clause has been redrafted to avoid any room for dispute by stipulating that the parties are to state

the bunker prices by grade and type of bunkers to be used in Box 23 and the adjustment provisions are to operate in relation to this "benchmark." The previous "Heavycon" formula simply took the bunker prices (undefined) prevailing as at the date of the conclusion of the charterparty which offered room for argument as to the correct prevailing rate. This is now avoided and a simpler and better procedure is adopted. No provisions are included corresponding to those found in the "Towhire 2008" form at clause 4(a)(iv), for example as to the documents to be used to decide upon the adjustment. It is perhaps advisable to insert some such wording, modelled eg on the "Towcon" wording which is as follows:

> The log book of the Tug and copies of the bunker supplier's invoices shall be conclusive evidence of the quantity of bunkers consumed and the prices actually paid.

Clause 18: dangerous cargo

"18. Dangerous Cargo

If part of the Cargo is of an inflammable, explosive or dangerous nature or condition or at any stage may develop into such nature or condition it must be packed and stored or stowed in accordance with the IMO Dangerous Goods Code and/or other applicable regulations always to the full satisfaction of the Master. Any delay to the Transportation in this respect shall be paid for by the Charterers at the demurrage rate stipulated in Box 19 and in accordance with Clause 13(d) (Free Time/Demurrage)."

7.81 Unlike the "Supplytime 2005" form (see clause 6(c)(iii) considered above in Chapter 5), there is no express liberty to the charterer to ship dangerous cargo under "Heavycon 2007." However, clause 18 proceeds upon the basis that the charterer is entitled to ship such cargo. It provides for an obligation that the cargo, if dangerous, will be in dealt compliance with any applicable IMDG Code or other regulatory requirements. While the obligation is not stated expressly to be one upon the charterer, it follows from the fact that the Master's approval must be obtained that the charterer is required to satisfy the owner as to this requirement; see also the provision that any delays shall be for the charterer's account. No provision is made for the consequences of a failure by the charterer to notify the owner of any dangerous characteristics of the cargo, leaving the position to be determined in accordance with the common law and the rule in *Brass v Maitland* (1856) 6 E & B 470 which imposes an obligation on the shipper not to ship dangerous cargo without prior notice to the carrier which enables the carrier to take any necessary precautions: see generally *Cooke* at paras. 6.49 *et seq*. for an account of the general law. Consideration might be given where the cargo may consist of dangerous elements to a clause in similar terms to the liberty to ship dangerous goods contained in clause 6(c)(iii) of "Supplytime 2005", viz:

> Explosives and dangerous cargo, whether in bulk or packaged, provided proper notification has been given and such cargo is marked and packed in accordance with the national regulations of the Vessel and/or the International Maritime Dangerous Goods Code and/or other pertinent regulations. Failing such proper notification, marking or packing the Charterers shall indemnify the Owners in respect of any loss, damage or liability whatsoever and howsoever arising therefrom. The Charterers accept responsibility for any additional expenses (including reinstatement expenses) incurred by the Owners in relation to the carriage of explosives and dangerous cargo.

Clause 19: lien

"19. Lien

The Owners shall have a lien on the Cargo and any Charterers' equipment for all freight and all other expenses in relation to the Transportation, deadfreight, advances, demurrage, damages for detention, general average and salvage including costs for recovering same."

7.82 Clause 19 is in similar terms to the general form of lien clause contained in other voyage charterparties, see eg clause 8 of the Gencon 1976 form, discussed in detail in *Cooke*, chapter 17.

Clause 20: substitution

"20. Substitution

The Owners shall, at any time before the Cancelling Date, be entitled to substitute the Vessel named in Box 4 with another vessel of equivalent capability and capacity, provided such substitute vessel is approved by the Marine Surveyor(s) and subject also to the Charterers' prior approval, which shall not be unreasonably withheld. Nothing herein shall be construed as imposing on the Owners an obligation to make such substitution."

7.83 The right of the heavylift vessel owner to tender an alternative vessel of equal suitability to the contemplated service is an important one. Many heavylift operators have a number of other sister vessels or vessels of similar attributes and desire to have operational flexibility where, for example, a heavylift operation booked for one vessel can in fact be dealt with perfectly well by a different (smaller) vessel freeing the original (larger) vessel up for another operation. In the original "Heavycon" form this "owners' interest" was reflected by the fact that the owner's right to substitute was not subject to approval of any sort on the part of the charterer, provided the marine warranty surveyor approved the change. This produced dissatisfaction and has now been amended to make the provision a more balanced one, following the more recent text of "Projectcon" in 2006. As the explanatory notes state:

> The original wording did not make substitution subject to the Charterers' prior approval. This was considered to be unpractical for the Charterers' business and it is now added that the substitute vessel – in addition of being approved by the Marine Surveyor – is also subject "to the Charterers' prior approval, which shall not be unreasonably withheld." This phrase is also used in PROJECTCON.

Clause 21: termination

"21. Termination

(a) Notwithstanding anything else provided herein, the Charterers shall have the right to terminate this Charter Party prior to the Vessel's arrival at the first loading port against payment of the applicable amount stated in Box 24 less any prepaid freight.

(b) Furthermore, the Charterers shall have the right to terminate this Charter Party after the Vessel's arrival at the first loading port but not later than upon commencement of loading against payment of the applicable amount stated in Box 24 plus compensation for all time spent at the first loading port at the demurrage rate stated in Box 19 less any prepaid freight together with the actual expenses incurred by the Owners in preparation for the loading.

(c) If Box 24 is not filled in, this Clause shall be deemed to be deleted."

7.84 Clause 21 is an optional clause. If the parties agree that the charterer shall have the right to terminate the charterparty before arrival and/or after arrival but before the commencement of the loading of the cargo, they are required to state this in Box 24. If they do not do so, then the charter has no right of termination, save in the event of the owner's breach of the charterparty or under the cancelling provisions set out in clause 8(f), considered above. The former "Heavycon" was in like terms but provided that. if the relevant Box was not filled out, "this Clause shall not apply." Apparently, this was thought to give rise to potential argument as to whether the clause applied at all or whether it did apply and allowed termination even after loading began. While this seems somewhat unrealistic as a matter of construction, the new clause makes what was, arguably, clear, now pellucidly so.

Clause 22: liabilities and indemnities

"22. Liabilities and Indemnities

(a) Definitions

For the purpose of this Clause 'Owners' Group' shall mean: the Owners, and their contractors and sub-contractors, and employees of any of the foregoing.

For the purpose of this Clause 'Charterers' Group' shall mean: the Charterers, and their contractors, sub-contractors, co-venturers and customers (having a contractual relationship with the Charterers, always with respect to the job or project on which the Vessel is employed), and employees of any of the foregoing.

(b) Knock for Knock

Owners – Notwithstanding anything else contained in this Charter Party excepting Clauses 24(b) (Pollution), 29 (Both to Blame Collision Clause) and 30 (General Average and New Jason Clause), the Charterers shall not be responsible for loss of or damage to the property of any member of the Owners' Group, including the Vessel, any liability in respect of wreck removal and the expense of moving, lighting or buoying the Vessel, any liability in respect of personal injury or death of any member of the Owners' Group, and any liability in respect of other cargo on board not the subject of this Charter Party, arising out of or in any way connected with the performance of this Charter Party, even if such loss, damage, injury or death is caused wholly or partially by the act, neglect, or default of the Charterers' Group, and even if such loss, damage, injury or death is caused wholly or partially by unseaworthiness of any vessel; and the Owners shall indemnify, protect, defend and hold harmless the Charterers from any and against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of or in connection with such loss, damage, personal injury or death.

Charterers – Notwithstanding anything else contained in this Charter Party excepting Clause 24(a)(Pollution), 29 (Both to Blame Collision Clause) and 30 (General Average and New Jason Clause), the Owners shall not be responsible for loss of or damage caused to or sustained by the Cargo or the property of any member of the Charterers' Group, whether owned or chartered, any liability consequent upon delay to the Cargo, any liability in respect of wreck removal and the expense of moving, lighting or buoying the Cargo, any liability in respect of personal injury or death of any member of the Charterers' Group, arising out of or in any way connected with the performance of this Charter Party, even if such loss, damage, liability, injury or death is caused wholly or partially by the act, neglect or default of the Owners' Group, and even if such loss, damage, liability, injury or death is caused wholly or partially by the unseaworthiness of any vessel; and the Charterers shall indemnify, protect, defend and hold harmless the Owners from any and against all claims, costs, expenses, actions, proceedings, suits, demands, and liabilities whatsoever arising out of or in connection with such loss, damage, liability, personal injury or death."

7.85 The distinction between the "Heavycon 2007" and "Heavyliftvoy" form, as outlined above, is that "HEAVYCON 2007 is a "knock for knock" contract designed primarily for the semi-submersible vessels serving the super heavylift market where cargoes are almost exclusively carried on deck and are, in most cases, sole cargoes. HEAVYLIFTVOY on the other hand embraces the conventional cargo liability regimes of the Hague/Hague-Visby Rules and is designed for the carriage of multiple shipments both above and below deck." The carriage of cargo under the "Heavylift" form is therefore on knock-for-knock terms, similar to those which apply under the "Tow" 2008 forms considered in Chapter 4 and the "Supplytime 2005" form considered in Chapter 5. Clause 22 is an adapted form of the knock-for-knock provision contained in clause 14(a) and (b) of the "Supplytime 2005" and was modelled on it. As the explanatory notes state:

> The Clause has been amended to be consistent with the formula used in SUPPLYTIME 2005, in particular in respect of the division in Owners' and Charterers' Groups. The wording in SUPPLYTIME 2005 has been amended to suit a voyage charter party. However, to keep consistency between the Liabilities and Indemnities provisions of SUPPLYTIME 2005 and HEAVYCON 2007, only a minimum of changes has been made.
>
> 22.(b) clearly indicates that the Owners' and Charterers' liability is based on a Knock for Knock liability regime, which is common in the heavylift trade. In general, this means that the Charterers take responsibility for the Cargo whereas the Owners take responsibility for the Vessel. Each party pays the claims of its own group following an accident. The Knock for Knock liability regime applies irrespective of blame and seeks to save time and expense in connection with casualties.

Accordingly, reference should be made to the detailed analysis of clause 14 of "Supplytime 2005" in Chapter 5 above which analysis applies, *mutatis mutandis*, to clause 22 of "Heavycon 2007."

7.86 However, some important changes have been made to the "Supplytime" model for the purposes of the "Heavycon" form.

7.87 The first is that clause 22 of "Heavycon 2007", following the version of the knock-for-knock clauses used in the "Tow 2008" forms, makes express provision for each party bearing the liability for wreck removal of its property. Just as in the tug and tow context, where the tugowner and the hirer bear the liability of all matters relating to the wreck of the tug and the tow respectively (see eg clause 25(b)(i)(4) and (b)(ii)(4) of the "Towcon 2008" form), the "Heavycon" form makes similar provision in paras. (b)(i) and (ii). This recognises that, as with the sinking of a tow, in a casualty involving heavylift transportation, the sinking of the very large item or items of cargo carried on a super heavylift vessel and which breaks loose from the vessel and is lost overboard is a serious risk in heavylift operations. While the corresponding "Supplytime" clause makes no provision in this regard (save to deal with wreck of the hired vessel in clause 17), this is plainly a necessary and important difference between the "Supplytime" and "Heavycon" regimes.

7.88 The second is that clause 22(b)(ii) of "Heavycon 2007", unlike the corresponding provision in the "Supplytime" form (clause 14(b)(ii)), includes liability for delays to the cargo within the catalogue of matters for which the charterer is responsible and in respect of which the owner is not to be responsible by the following wording "the Owners shall not be responsible for [. . .] any liability consequent upon delay to the Cargo." In the ordinary case, where the transportation of the cargo is protracted, the charterer may incur a variety of losses depending on its relationship with the cargo.

7.89 The charterer may, perhaps rarely in the heavylift context (see eg the comments in the explanatory notes to clause 25 that "in the heavy lift trade it is often the case that a bill of lading is not required because no on-sale of the Cargo during transit is contemplated"), be shipping the item for sale at the place of destination; in such a case, the delay may lead to a loss of profit on the intended sale where the market falls (recoverable under *Koufos v C. Czarnikow, Ltd (The Heron II)* [1969] 1 AC 350). More usually in the super heavylift context, the cargo will be not be the subject of any intended sale during or following the carriage but will be being shipped by (or on behalf of) its owner and often being supplied pursuant to some larger framework of contracts (or a project) in which the major item is to form a part: a rig for use in an offshore field; a container lifting system for installation at a port or a substantial component part for fitting as part of the construction of some larger item or installation. In this, more common, case, the delay may lead to losses of profits or of production but may also lead to liability on the part of the charterer for late delivery to other parties in the larger framework of the contracts or the project. Given the need to have clear language when excluding liability for matters for which the owner would ordinarily be responsible at law even in a knock-for-knock context (see eg *Seadrill Management Services Ltd v OAO Gazprom (The Ekha)* [2010] 1 Lloyd's Rep 543 at paras. 174 and 182, cf. the more nuanced approach in *Transocean Drilling U.K. Ltd v Providence Resources Plc* [2016] EWCA Civ 372), the wording of the exclusion arguably relates, not to all loss and damage sustained by the charterer due to delay, but only to liability which the charterer incurs to others as a result of the delay and which the charterer seeks to pass on to the owner and to any attempt by third parties directly to claim against the owner in respect of the delay of the cargo and its consequences for the project. Where the clause seeks to exclude all loss and damage, the wording used is more general (eg "the Owners shall not be responsible for loss of or damage caused to or sustained by the Cargo"); where it seeks to protect the owner from liabilities, different language is employed (eg "any liability in respect of wreck removal and the expense of moving, lighting or buoying the Cargo, any liability in respect of personal injury or death of any member of the Charterers' Group").

7.90 The relationship between that exclusion and the mutual exclusion of consequential losses dealt with in clause 23 (see below) needs also to be borne in mind. If the narrower reading of the delay exclusion suggested above is correct, then financial loss suffered by the charterer itself remains recoverable, subject to the operation of clause 23. If the exclusion applies not only to liabilities of the charterer or owner to others but to the charterer's losses for delay, then all financial loss of the charterers (such as loss of profits or loss of use) would be excluded in all cases where they arise from delay in delivery of the cargo under clause 22 in any event and there would be no need to rely on clause 23 in relation to such losses.

7.91 The explanatory notes, both to the original "Heavycon" and "Heavycon 2007" shed no light on the question. These reflect that the delay provisions linked with the parties' choice of cargo documentation have now been made the subject of a separate provision (clause 25) and state merely that:

> Sub-clause 21.2. in the original HEAVYCON dealt with Charterers" liability for delays. Delays are not dealt with in Clause 22 of HEAVYCON 2007, because delays have been considered an issue completely different from the damages mentioned in Clause 22. The original Sub-clauses 21.3–21.5 has been moved to a separate Clause on Bills of Lading and Cargo Receipts. This is considered both more appropriate and logic. (*sic*).

Clause 23: consequential damages

"23. Consequential Damages

Neither party shall be liable to the other for any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Charter Party, and each party shall protect, defend and indemnify the other from and against all such claims from any member of its Group as defined in Clause 22 (Liabilities and Indemnities). 'Consequential damages' shall include, but not be limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance, whether or not foreseeable at the date of this Charter Party."

7.92 Just as the knock-for-knock provision in "Heavycon 2007" was based on the corresponding provision in "Supplytime 2005", so too the "consequential damages" provision reproduces *verbatim* clause 14(c) of "Supplytime 2005" discussed in Chapter 5. This therefore means, unfortunately, that the current version of the consequential damages clause is unsatisfactory and limited in its effective exclusion of the enumerated losses for the reasons discussed in that chapter. A simple solution is to separate out the individual heads of loss which it is intended to exclude and then separately to exclude consequential losses as there discussed. Alternatively, clause 23 can be simply replaced either by using the more modern and somewhat better drafted equivalent BIMCO provision in the new "Supplytime 2017" or "Windtime" forms, or the less new but still better versions in the "Tow 2008" forms, viz. as in clause 25(c) of "Towcon 2008" which provides:

"(c) Save for the provisions of Clauses 17, (Permits & Certification); 18, (Tow-worthiness of the Tow); 19, (Seaworthiness of the Tug); 22 (Termination by the Hirer) and 23 (Termination by the Tugowner), neither the Tugowner nor the Hirer shall be liable to the other party for

any loss of profit, loss of use or loss of production whatsoever and whether arising directly or indirectly from the performance or non performance of this Agreement, and whether or not the same is due to negligence or any other fault on the part of either party, their servants or agents, or

any consequential loss or damage for any reason whatsoever, whether or not the same is due to any breach of contract, negligence or any other fault on the part of either party, their servants or agents."

Clause 25(c) of "Towcon 2008" and Clause 14(b) of "Supplytime 2017" are considered in detail in Chapters 4 and 5 above, respectively.

Clause 24: pollution

"24. Pollution

(a) The Owners shall be liable for, and agree to indemnify, defend and hold harmless the Charterers against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of actual or threatened pollution damage and the cost of cleanup or control thereof originating from the Vessel or other property of the Owners.

(b) The Charterers shall be liable for, and agree to indemnify, defend and hold harmless the Owners against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of actual or threatened pollution damage and the cost of cleanup or control thereof originating from the Cargo or other property of the Charterers."

7.93 This provision is self-explanatory and is a welcome addition to the "Heavycon" form, filling an important lacuna. As BIMCO explains:

> The original HEAVYCON did not deal with pollution. However, since heavylift vessels and the cargo carried onboard can result in pollution, Clause 24 in HEAVYCON 2007 establishes who is responsible for pollution damage originating from the Vessel and from the Cargo.

7.94 The division of responsibility follows the basic knock-for-knock scheme adopted in clause 22 and follows the allocation of responsibility for pollution set out in the "Towcon 2008" form in clause 25(b)(i)(4) and (b)(ii)(4) and in the "Supplytime 2005" in clause 15.

Clause 25: bill of lading or cargo receipt

7.95 Clause 24 makes provision for the cargo documentation which is to be issued by the owner on receipt of the heavylift cargo shipped on board the vessel by the charterer. The parties elect either to have a bill of lading or a non-negotiable cargo receipt issued by the owner, in either case using a BIMCO bill of lading or receipt form, namely the "Heavyconbill" or "Heavyconreceipt" (facsimiles of which are set out in Appendices 8 and 9). The broad scheme of the clause remains that adopted in the original "Heavycon" form and reference may therefore usefully be made to the explanatory notes to that form which explain the thinking behind this provision. The provision now reads as follows:

"25. Bill of Lading or Cargo Receipt

The Owners and the Charterers shall agree and state in Box 25 whether a Bill of Lading or a non-negotiable Cargo Receipt will be issued by Owners upon loading of the Cargo.

(a) *Bill of Lading

If, as stated in Box 25, the Owners have agreed to issue a Bill of Lading, same shall be as *per* the HEAVYCONBILL form which shall incorporate all terms, conditions, liberties, clauses and exceptions of this Charter Party, including the Dispute Resolution Clause.

(i) The Owners shall not be liable for any loss, damage or delay to the Cargo in the period before loading and after discharge.
(ii) Unless otherwise agreed, the Cargo shall be shipped on deck at Shippers' risk and the Owners not to be responsible for any loss or damage or delay to the Cargo whatsoever and whether due to negligence of whosoever or howsoever arising and by whosoever caused, and the Bill of Lading issued hereunder shall be so clausedd.
(iii) If the Cargo is shipped under deck,
    1 The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924 ('the Hague Rules') as amended by the Protocol signed at Brussels on 23 February 1968 ('the Hague-Visby Rules') and as enacted in the country of shipment shall apply to this Contract. When the Hague-Visby Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination shall apply, irrespective of whether such legislation may only regulate outbound shipments.

2 When there is no enactment of the Hague-Visby Rules in either the country of shipment or in the country of destination, the Hague-Visby Rules shall apply to this Contract save where the Hague Rules as enacted in the country of shipment or if no such enactment is in place, the Hague Rules as enacted in the country of destination apply compulsorily to this Contract.
3 The Protocol signed at Brussels on 21 December 1979 ('the SDR Protocol 1979') shall apply where the Hague-Visby Rules apply, whether mandatorily or by this Contract.
4 The Carrier shall in no case be responsible for loss of or damage to cargo arising prior to loading, after discharging, or while the cargo is in the charge of another carrier, or with respect to deck cargo and live animals.

(b) *Cargo Receipt
If, as stated in Box 25, the Owners have agreed to issue a non-negotiable Cargo Receipt, same shall be as *per* the HEAVYCONRECEIPT form incorporating all terms, conditions, liberties, clauses and exceptions of this Charter Party, including the Dispute Resolution Clause.

(i) It is expressly agreed that neither the Hague Rules nor the Hague-Visby Rules nor any statutory enactment thereof shall apply to this Charter Party and to the Cargo Receipt, unless compulsorily applicable, in which case the Owners take all reservations possible under such applicable legislation, relating to the period before loading and after discharging and while the goods are in the charge of another carrier, and to deck cargo.
(ii) Unless otherwise agreed, the Cargo shall be shipped on deck at the Charterers' risk and the Owners not to be responsible for any loss or damage or delay to the Cargo whatsoever and whether due to negligence of whosoever or howsoever arising and by whosoever caused, and the Cargo Receipt issued hereunder shall be so claused.
(iii) If the Cargo is shipped under deck, the Cargo Receipt shall be claused as *per* sub-clause (ii) above.
(iv) The Cargo Receipt shall always be claused 'All Risks Insurance' has been placed for the full value of this cargo by the Charterers and in the name of the Charterers and the Owners.

(c) * *Indicate alternative 25(a)(Bill of Lading) or 25(b)(Cargo Receipt), as agreed, in Box 25*."

7.96 The super heavylift trade, dealing as it does with very large bespoke cargoes which are unlikely to be the subject of contracts for sale afloat or on CIF or FOB terms even where sold, has traditionally opted for the use of a non-negotiable cargo receipt rather than the issuance of a bill of lading, as for normal cargo shipments (and as reflected in the "Heavyliftvoy" form). The original explanatory notes to the first version of "Heavycon" therefore recorded that "It is understood in the heavy lift trade [that] in many instances . . . a bill of lading is not required because no on-sale of the cargo during transit is contemplated." The position remained the same at the time of the 2007 revision:

> Sub-clause (b) provides the parties with the possibility of using a non-negotiable Cargo Receipt since in the heavy lift trade it is often the case that a bill of lading is not required because no on-sale of the Cargo during transit is contemplated. The advantage of using a Cargo Receipt is also that it is not necessary to present the Cargo Receipt at the Discharge Port in order to receive the Cargo. The Cargo can be delivered to the receivers nominated by the Charterers on production of proof of identity without any documentary formalities.
>
> In both alternatives it is presumed that the Cargo will be shipped on deck. However, in the very rare cases where Cargo may be shipped under deck, both Sub-clauses contain suitable provisions takes into account such cases.

7.97 Cf. the position under the "Heavyliftvoy" form, where, consonant with the purpose of the form as an ordinary voyage charterparty for the carriage of heavy or voluminous goods, provision is made exclusively for the issuance of a bill of lading in the normal way: see clause 27. The form used is the "Heavyliftvoybill" which is substantially in identical terms to "Heavyconbill": see at Appendix 10.

7.98 The regime therefore adopted is that the parties must choose which basis to adopt. If they adopt a non-negotiable receipt, then the cargo is entirely at the charterer's risk, whether the cargo is carried on or under deck: see para. (b)(ii) and (iii): this corresponds with both the

knock-for-knock allocation of responsibility under clause 22(b)(ii) ("Owners shall not be responsible for loss of or damage caused to or sustained by the Cargo") and with the provision for the taking out by the charterer of all risks insurance cover for the cargo, naming the owner as co-assured under clause 26 (see below), a fact which is to be expressly stated in the cargo receipt. If they adopt a bill of lading, then the cargo, if it is carried in deck (as will almost invariably be the case in a super heavylift transportation), will again be entirely at the charterer's or shipper's risk: para. (a)(ii). This again is consistent with the knock-for-knock basis of liability and insurance position under both clauses 22 and 26. However, in the very rare case where cargo is carried under deck (which may occur for minor items accompanying the major items, such as tools, associated tackle or equipment to be fitted to the main item after discharge etc.) the carriage is governed by the Hague or Hague-Visby Rules with a clause paramount in common form set out in para. (a)(iii). No consideration is given in this context in the form or the explanatory notes as to how that standard cargo regime operates alongside the knock-for-knock regime which applies as between owner and charterer.

Clause 26: insurance

"26. Insurance

(a) Without prejudice to the Charterers' obligations and liabilities under this Charter Party, the Charterers shall ensure that there is taken out and maintained at all material times and throughout the duration of this Charter Party a policy or policies of insurance in respect of all loss or damage to the Cargo up to the full value of the Cargo including but not limited to a policy or policies comprising All Risks cargo cover and cover against liabilities to third parties (including liability in respect of death and injury and claims for consequential loss), and wreck removal of the Cargo. The Charterers shall arrange without cost to the Owners that the Owners shall be named as co-insured under the said policy or policies of insurance and the Charterers shall arrange that the underwriters waive the right of subrogation against the Owners.

The Charterers hereby agree to produce the original certificates of insurance maintained hereunder to the Owners or their appointed representatives when requested so to do.

(b) The Owners shall arrange at their expense such insurance(s) as required to protect the Charterers against the Owners' liabilities under Clause 22 (Liabilities and Indemnities).

The Owners hereby agree to produce the original certificate(s) of insurance maintained hereunder to the Charterers or their appointed representatives when requested to do so."

7.99 The explanatory notes state: "Closely related to the matters covered by Clause 22 (Liabilities and Indemnities) are the provisions concerning insurance laid down in Clause 26. Parties using the HEAVYCON 2007 Charter Party are advised to study carefully the provisions of both clauses." The emphasis on each party insuring itself in respect of the matters for which it undertakes liability under the knock-for-knock regime under clause 22 underlines the intention that each party shall be solely and wholly responsible for its own property and any risk of loss of or damage thereto, however it arises and even if due to the breach of the charterparty by the other. In insurance terms, it is open to the hirer or tug owner to lay off the risk by insuring its property, including the tow or the tug, on all risk terms and for each party to take out business interruption cover or loss of profits insurance as appropriate for the types of loss which might flow from the contract not being performed at all or from being misperformed. As assured, given the terms on which each have contracted with the knowledge of their respective insurers, there will have been a waiver of the right of recourse by way of subrogation, which will fall to be paid for in the premium. The position under clause 26 of "Heavycon 2007" may be compared with the analysis adopted in *Internet Broadcasting Corpn Ltd v Mar LLC* [2009] 2 Lloyd's Rep 295 where the judge (Gabriel Moss QC sitting as a deputy) construed a mutual exclusion of consequential loss narrowly because of his view that property insurance could not be obtained or was not available in respect of loss of or damage to property due to a deliberate breach of contract: see the detailed

discussion of that case in Chapter 4 above. The provision under clause 26 for insurance against the liabilities which each party agrees to bear, for example by the charterer over the cargo on "all risks" terms, demonstrates, it is submitted, the dubiety of the analysis adopted in that case, quite apart from the recent disapproval of the decision by Flaux J in *Astrazeneca UK Ltd v Albemarle International Corpn* [2011] EWHC 1574 (Comm).

Clause 27: cargo Himalaya clause

"27. Himalaya Cargo Clause

It is hereby expressly agreed that no servant or agent of the Owners (including every independent contractor from time to time employed by the Owners) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or owner of the Cargo or to any Holder of the Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on their part while acting in the course of or in connection with their employment and, but without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Owners or to which the Owners are entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Owners acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Owners are or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be their servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to this Charter Party.

The Owners shall be entitled to be paid by the Shipper, Consignee, owner of the cargo and/or Holder of the Bill of Lading (who shall be jointly and severally liable to the Owners therefore) on demand any sum recovered or recoverable by either such Shipper, Consignee, owner of the Cargo and/or Holder of the Bill of Lading or any other from such servant or agent of the Owners for any such loss, damage, delay or otherwise."

7.100 Clause 27 is a particularly widely drawn species of Himalaya clause in favour of the owner and those whom the owner employs to perform services in relation to the transportation. Such clauses are discussed above in Chapter 4. The explanatory notes reflect that it was drawn to apply to all servants, agents or contractors acting on behalf of the owner:

> The Clause protects the servants and agents of the Owners (including independent contractors) participating in the performance of the Transportation and is not limited to stevedores. It is designed to afford such servants or agents at least the same protection as the Owners have under Bills of Lading issued by them or on their behalf.

Clause 32: limitation of liability

"32. Limitation of Liability

Any provisions of this Charter Party to the contrary notwithstanding, the Owners shall have the benefit of all limitations of, and exemptions from, liability accorded to the owners or chartered owners of vessels by any applicable statute or rule of law for the time being in force, and the same benefits to apply regardless of the form of signatures given to this Charter Party."

7.101 This clause corresponds to the provision found in most other BIMCO forms; see eg clause 25(d) of "Towcon 2008" and clause 14(d) of "Supplytime 2005." See the discussion of this form of clause in the context of the English law of limitation of liability and the decision in *Smit v Mobius* [2001] CLC 1545 in Chapter 4 above. The specific reference to the "form of signatures" is explained in the explanatory notes as follows:

> The provisions of this Clause intend to cover, inter alia, the special problem of the American "Personal Contract Doctrine." Under this doctrine, claims arising out of the contracts binding on parties personally are not subject to limitation of liability. Clause 32 provides the Owners with the benefits of limitations of liability even though the Charter Party may be regarded as a "personal contract."

Clause 34: agency

"34. Agency

The Vessel shall be addressed to Owners' agents at port(s) of loading and discharging."

7.102 This is a somewhat curiously worded provision. While the explanatory notes state "This is a standard clause giving the owners the right to appoint the agents at port(s) of loading and discharging", the wording of "addressing the vessel" is archaic and unclear; cf. clause 13 of the Gencon 1976 form "In every case the Owners shall appoint his own Broker or Agent both at the port of loading and the port of discharge" (*sic*) and clause 20 of the "Heavyliftvoy" form: "The Carrier shall appoint and pay for agents at ports of loading and discharging and shall advise the Merchant of the agents' full style address as soon as possible." The ship's agent, appointed by the owner, "stands in the shoes of the shipowner and it is reasonable to suppose that he has authority to do whatever the shipowner has to do at the port": see *Blandy Brothers v Nello Simoni* [1963] 2 Lloyd's Rep 393 *per* Pearson LJ at 404. For a detailed treatment of the general law in relation to the ship's agents, see *Cooke*, chapter 23, *passim*.

Clause 35: brokerage

"35. Brokerage

The Owners shall pay a brokerage at the rate stated in Box 28(i) to the Broker(s) mentioned in Box 28(ii) on any freight, demurrage, mobilisation fee, demobilisation fee and/or termination fee paid under this Charter Party.

If the full amounts as aforesaid are not paid owing to breach of this Charter Party by either of the parties, the party liable therefor shall indemnify the Broker(s) against his or their loss of brokerage."

7.103 As the explanatory notes state, "This is a fairly standard brokerage clause as found in many charter parties. The parties should identify the names of the broker or brokers in Box 28 in Part I along with the amount of commission payable to each"; cf. for example clause 14 of the Gencon 1976 form. In accordance with ordinary principles of privity of contract, the mere fact that a broker is named in the charterparty (as it is envisaged by clause 35 and Box 28(ii) that he will be) does not render him a party to the contract which remains solely between the owner and the charterer. The position is now subject to the provisions of the Contracts (Rights of Third Parties) Act 1999, unless that Act is excluded by the parties pursuant to section 1(2). The scope and operation of the Act lies outside the scope of this work: as to this, see generally *Chitty on Contracts* (32nd edn, 2015), Vol. I, para. 15–044 *et seq*. An outline is given in the commentary in Chapter 4 above on the "Towcon 2008" Himalaya Clause (clause 26). A detailed account of the specific operation of the Act in relation to brokers named in the charterparty and the general law regarding brokerage matters is given in *Cooke*, chapter 24.

Clause 37: double banking

"37. Double Banking

(a) The Charterers shall have the right, where and when it is customary and safe for vessels of similar size and type to do so, to perform the loading and/or discharging operations while the Vessel lies or remains alongside another vessel or vessels of any size or description whatsoever or to order such vessels to come and remain alongside at such safe dock, wharf, anchorage or other place for transhipment, loading or discharging of the Cargo.

(b) The Charterers shall pay for and provide such assistance and equipment as may be required to enable any of the operations mentioned in this clause safely to be completed and shall give the Owners such advance notice as they reasonably can of the details of any such operations.

(c) Without prejudice to the generality of the Charterers' rights under (a) and (b), it is expressly agreed that the Master shall have the right to refuse to allow the Vessel to perform as provided in (a) and (b) if in his reasonable opinion it is not safe so to do.

(d) The Owners shall be entitled to insure any deductible under the Vessel's hull policy and the Charterers shall reimburse the Owners any additional premium(s) stated in Box 27(i) required by the Vessel's Underwriters and/or the costs stated in Box 27(ii) of insuring any deductible under the Vessel's hull policy."

7.104 Double-banking is a not uncommon feature of heavylift operations and this is now reflected by the incorporation within "Heavylift 2007", as a new provision, of an adapted version of the BIMCO "Double Banking Clause" which confines the permitted double-banking operations to heavylift cargo operations only, excluding other operations such as bunkering or repairs etc. Under the standard BIMCO provision, the risks attendant upon double banking are specifically set out in the clause (see para. (e) of the BIMCO "Double Banking Clause"). This has been omitted from the version incorporated within "Heavycon 2007" since under the knock-for-knock provisions under clause 22 the parties each bear the risk of loss of or damage to their own property or property for which they are responsible being the property of their "Group" (eg the charterer's group is defined by clause 22(a) as meaning "the Charterers, and their contractors, sub-contractors, co-venturers and customers (having a contractual relationship with the Charterers, always with respect to the job or project on which the Vessel is employed), and employees of any of the foregoing." Accordingly, if the vessel double banks alongside another vessel for the purposes of off-loading the cargo to it, that other vessel will almost certainly be one with which the charterer is in a contractual relationship and the charterer, on knock-for-knock principles, bears the risk of any damage to that other vessel as if it were its own. A similar situation applies where the vessel double-banks for owner's purposes. BIMCO considered that any specific allocation of double banking risks "conflicts with the Knock for Knock regime of the HEAVYCON.

PART C. THE "HEAVYLIFTVOY" FORM"

7.105 As described above, the "Heavyliftvoy" form sprang from the original "Heavycon" form and as an alternative to it, specially designed for the more routine carriage of heavylift cargoes both midsized and below by specialist carrying vessels usually fitted with cranes and derricks and designed for the carriage of multiple heavy or voluminous cargoes. The philosophy behind and the intended purpose of the form was described by on its launch in 2009 BIMCO as follows:

> The HEAVYYLIFTVOY voyage charterparty is a niche contract derived from BIMCO's CONLINEBOOKING Note. It is designed to provide the growing mid-sized heavy-lift sector with a purpose-made standard form to replace the current widespread use of amended booking notes. The key difference between HEAVYLIFTVOY and BIMCO's other well-used heavy-lift form, HEAVYCON 2007, is that the new form operates on the basis of conventional cargo liability regimes and not knock-for-knock. While HEAVYCON is designed for float on/float off cargo operations on semi-submersible vessels, the new HEAVYLIFTVOY is for lift on/lift off vessels loading parcel cargoes on and under deck.
>
> The new form offers a variety of loading and discharging options, providing for free-in or liner in-hook terms for loading and free-out or liner out-hook terms for discharging. Among the many comprehensive clauses, provision is made for the suitability for transportation and proper presentation of the cargo, including lifting and securing devices, and also for the timely submission of drawings.
>
> The new contract contains the full suite of BIMCO standard clauses covering issues such as dispute resolution, war risks, ISPS and trading in ice.

7.106 As is stated in the explanatory notes accompanying "Heavyliftvoy", the form "embraces the conventional cargo liability regimes of the Hague/Hague-Visby Rules and is designed for the carriage of multiple shipments both above and below deck."

7.107 The original intention of the BIMCO drafting committee (which as noted above, included representatives of major heavylift operators in the midsized sector and, one of the foremost specialists in the P&I cover of offshore risks, Mrs Barbara Jennings of the Standard Club) was to design a specialised booking note, following the form of the "Conlinebookingnote" which was commonly used in the trade. The intention was to provide for a contract on the terms of a booking note which would subsequently be replaced by a bill of lading. However, as the explanatory notes state:

> As drafting progressed it became apparent that the incorporation of a number of "voyage charter party" type terms and provisions not normally found in a booking note effectively changed the nature of the contract. For example, to provide for free-in/out loading and discharging terms there are references to laydays/cancelling and laytime, which are more familiar in a voyage charter party rather than a booking note.
>
> The Sub-committee in consultation with experts from BIMCO's Documentary Committee analysed the nature and purpose of a booking note and how it might be applied in the heavy lift trade. Under a conventional booking note, which is essentially a reservation note for cargo to be carried at a future date, the booking note ceases to have any function once a bill of lading is issued. The booking note is evidence of the carriage contract issued in the form of a bill of lading once the goods have been shipped. Although the booking note is a legally binding document on the parties, once the goods are shipped and the bill of lading is issued, the booking note has no further function and the bill of lading takes over as the binding contract between the Carrier and the lawful holder of the bill of lading.
>
> However, the intention for HEAVYLIFTVOY was that the "booking note" should survive the issuing of a bill of lading and remain binding on the merchant and carrier until the successful delivery of the cargo. Booking notes normally incorporate all the terms and conditions of the carrier's bill of lading (in much the same way that CONLINEBOOKINGNOTE incorporates all the terms and conditions of the CONLINEBILL Bill of Lading). Because the new contract is so extensive and because the provisions are not limited to liner terms, a standard bill of lading has been drafted to accompany HEAVYLIFTVOY, with the normal protective clauses and words of incorporation that draw in the terms and conditions from the booking note. The end result is a contract that is substantively different from a conventional booking note.
>
> For the above reasons the Documentary Committee decided to classify HEAVYLIFTVOY as a specialist voyage charter party rather than a booking note.

7.108 The "Heavyliftvoy" form which has emerged from the drafting procedure is therefore, in very large part, very close to a standard form of voyage charterparty, as its long title "Heavy Lift Voyage Charter Party" reflects, and it has borrowed many features from the Gencon form, both in its 1976 and 1994 revisions. As such, much of the law and commentary which has developed in relation to voyage charterparties in general will apply equally to the "Heavyliftvoy" form. Given the extensive treatment of the law relating to voyage charterparties and the consideration given of the Gencon and other voyage charter forms in Cooke, *Voyage Charters* (4th edn, 2014), the commentary below on the "Heavyliftvoy" form accordingly focuses upon those provisions or aspects of provisions in the "Heavyliftvoy" form which specifically concern questions as between offshore charterer and heavylift vessel owner or provider rather than generally as between owner and voyage charterer. For convenience, and as part of the commentary upon the "Heavyliftvoy" form, reference is made to the relevant passages in *Cooke* which touch upon the matters dealt with by those provisions of the BIMCO form and which correspond to general voyage charterparty provisions.

7.109 A facsimile of the "Heavyliftvoy" form is set out in Appendix 6 to this book.

The structure of the form

7.110 Like the other BIMCO standard form contracts, "Heavyliftvoy" consists of the customary two parts: Part I comprising the boxes in which are to be entered the specific details of the

services to be performed and the terms specific to the particular contract; Part II setting out the standard form clauses. A feature of Part II which is welcome is the logical organisation of the individual terms of the charterparty into six headed "Sections": (1) Definitions and Voyage; (2) Cargo; (3) Substitution/Laydays Date/Cancelling Date; (4) Loading; (5) Discharging, and (6) General.

7.111 Similarly, in common with all of the other BIMCO bi-partite forms, there is the usual "precedence" provision at the conclusion of Part I:

> In the event of a conflict of conditions, the provisions of PART I and any additional clauses, if agreed, shall prevail over those of PART II to the extent of such conflict but no further.

Part I and the "boxes"

7.112 Part I consists of 28 boxes in which the parties are to set out the specifically agreed features of the heavylift carriage contemplated. These are self-explanatory and follow in broad terms the types of information and representations given in the other species of BIMCO voyage contract or charter such as "Towcon 2008" and "Heavycon 2007." The following specific boxes, given the particular nature of the heavylift carriage, may be noted:

i Box 5: this provides for a detailed description of the cargo to be given by the charterer with six columns to be filled out, including, of particular importance in midsized heavylift operations, not only the weights involved but also the precise dimensions of the cargo and the cubic capacity which it possesses. Given the possibility of carriage on or under deck on the type of heavylift vessels which will use the form, clause 26 in Part II provides for an option to the carrier to carry on deck unless this option is expressly excluded in Box 5, column 6. As with the "Heavycon" form, the parties are to agree whether the cargo is a sole or part cargo (in the latter case the owners having rights to call at other ports and to re-stow the cargo: see clause 1(c) of Part I). The explanatory notes state in relation to Box 5:

> In Box 5 (Cargo) it is important that particular attention is paid to the requirements of column 6 – "deck option." Against each described item of cargo in Box 5 the parties should clearly indicate if the carrier has the option to ship the cargo on deck in accordance with Clause 26 (Deck Cargo). If the merchant does not want the carrier to have the option of shipping any of his items of cargo on deck at any time during the voyage, then 'NO' should be stated in column 6 against each listed cargo. If the intention of the parties is not clearly stated then the carrier will have the right to ship items of cargo on deck at the merchant's risk.

ii Box 8: the loading option adopted by the parties. The types of heavylift vessels using the form are usually equipped with very sophisticated and powerful cranes or derricks. This is reflected in the provision for the option whether the loading will be performed by the charterer using shore cranes or other lifting equipment (such as floating sheerlegs hired in) on ordinary "free-in" terms or by the owner using its own dedicated equipment on the vessel on "liner in" or "on the hook" terms. As BIMCO summarises:

> Boxes 8 and 9 deal with the loading and discharging conditions covering the agreement. The choice of loading and discharging terms take the form of tick boxes which provide four possible permutations: 1. Free-in/Free-out; 2. Liner-in hook/Liner-out hook; 3. Free-in/Liner-out hook; and 4. Liner-in hook/Free-out. If free-in/-out is selected then the amount of laytime must be specified in Box 8 and 9 for loading and discharging.

iii Box 9: provides for the same option in relation to the discharging of the cargo. Given that the heavy item may be loaded on at a port and have to be discharged at a project site,

the option as to "free in" *v* "liner" terms may be exercised differently given the different availability of suitable lifting equipment at either end.

iv Box 14: provides for the optional certification of the weight of the cargo for the purposes of clause 2(c) of Part II. Given the importance in cargo stowage and ship stability terms of the precise weight of the cargo, it is often desirable for this to be certified by an independent official body, together with the all-important calculation of the location of the cargo's centre of gravity.

Commentary on the provisions of Part II

7.113 Part II consists of the standard form BIMCO provisions. These are number 43, arranged, as stated above, into six separate sections. (1) Definitions and Voyage; (2) Cargo; (3) Substitution/Laydays Date/Cancelling Date; (4) Loading; (5) Discharging; and (6) General.

7.114 For present purposes, Section (3), containing clauses 5–9 dealing with substitution, laydays, cancelling date and the notices of readiness and advance notices corresponds to the equivalent provisions in the "Heavycon 2007" form, viz. clause 20 (substitution) and clauses 8–10 (laydays, notices of readiness and cancelling date) and is not considered further below. Reference may be made to Part B above.

7.115 Similarly Section (6) contains many provisions previously encountered elsewhere in this book in the commentary on other BIMCO forms and the now customary suite of standard BIMCO clauses for voyage charterparties. Reference may be made to the appropriate chapter dealing with these provisions where they occur in these other forms. The standard form provisions comprise the following clauses of "Heavyliftvoy":

i *Clause 19:* a standard clause dealing with the parties' respective responsibilities regarding the necessary permits and licences; this is in the same terms as clause 5 of "Heavycon 2007", considered above (cf. clause 8 of "Towcon 2008").

ii *Clause 20:* headed "Agents" is a provision providing for the appointment of agents by the carrier at both the ports of loading and discharge; it therefore adopts the same position as the "Heavycon 2007" form, albeit in much clearer language ("The carrier shall appoint and pay for agents at ports of loading and discharging") than that form's clause 34, considered above.

iii *Clause 22:* the common form "Canal Transit" clause. This is a much-simplified version of the clause found in "Heavycon 2007" (clause 15 considered above), although it adopts the same basic approach to free time during canal transit and blockage of canals: cf. clause 7 of "Towcon 2008" (discussed in Chapter 4) and clause 14 of "Projectcon" which are both worded in the same way as the "Heavyliftvoy" provision.

iv *Clause 28:* an interest provision providing for interest to be payable on overdue amounts at 1.5% *per* month or *pro rata* in the same terms as clause 33 of "Heavycon 2007."

v *Clause 29:* a standard form deviation provision similar to that found in clause 3 of the Gencon form, albeit in wider terms mirroring that used in clause 3(a) of "Heavycon 2007": see in relation to such clauses, the commentary on clause 24 of "Towcon 2008" in Chapter 4 above.

vi *Clause 31:* a Himalaya cargo clause in the same terms as clause 27 of "Heavycon 2007", considered above.

vii *Clause 32:* the standard form lien clause as contained in clause 19 of "Heavycon 2007."

viii *Clause 33:* the "BIMCO Ice Clause for Voyage Charter Parties" (cf. clause 8 of "Towcon 2008").

ix *Clause 35:* the common form "Both-to-Blame Collision Clause" (cf. clause 27 of "Supplytime 2005").

x *Clause 36:* the standard "General Average and New Jason Clause" providing for the adjustment of general average in London (by default but with the right to opt for adjustment elsewhere) and under the 1994 York-Antwerp Rules (cf. clause 26 of "Supplytime 2005").

xi *Clause 37:* the current BIMCO war risks clause "War Risks (Voywar 2004)" (cf. clause 27 of "Towcon 2008").

xii *Clause 38:* the current "BIMCO ISPS/MTSA Clause for Voyage Charter Parties 2005" (cf. clause 32 of "Towcon 2008").

xiii *Clause 40:* a brokerage provision in the same terms as clause 35 of "Heavycon 2007" considered above.

xiv *Clause 41:* the standard "BIMCO Dispute Resolution Clause" providing for three options as to law and jurisdiction with the default position being English law and LMAA arbitration and making provision for mediation (cf. clause 33 of "Towcon 2008"). As with the "Heavycon 2007" provision, clause 41 makes no provision for the more recent LMAA Intermediate Claims Procedure (introduced in 2009 to supplement the existing small claims procedure) and reference is only made to the LMAA Small Claims Procedure (compare the latest form of this clause, as seen in the new 2010 "Wreck" forms, eg clause 21 of "Wreckhire 2010" considered below in Chapter 9). Consideration might be given to an amendment to clause 41 so as to allow the full flexibility of the current LMAA procedures to be available to the parties.

xv *Clause 42:* the BIMCO "Notices Clause" (cf. clause 35 of "Towcon 2008").

xvi *Clause 43:* a further variant of BIMCO's usual "Entire Agreement Clause" (cf. clause 38 of "Supplytime 2005").

7.116 As before, given that these provisions have been discussed earlier, no further reference is made to them below and reference may be made to the corresponding treatment of these provisions where they occur in the forms cross-referenced above.

Definitions

"Definitions

'The Carrier' shall mean the party stated in Box 2.
'The Merchant' includes the party stated in Box 3, the shipper, receiver, consignee, the holder of the Bill of Lading, the owner of the Cargo and any person entitled to the possession of the Cargo.
'The Vessel' shall mean the vessel stated in Box 4. If no vessel is stated in Box 4 then the vessel designated by the Carrier shall be the Vessel.
'Loading Port' shall mean the port(s), place(s) or area(s) specified in Box 6.
'Discharging Port' shall mean the port(s), place(s) or area(s) specified in Box 7.
'The Cargo' shall mean any goods or equipment or other items described in Box 5.
'The Transportation' shall mean the carriage of the Cargo and the loading and discharging and all other operations connected therewith."

"Singular/Plural

In this Charter Party the singular includes the plural and vice versa as the context admits or requires."

7.117 The "Heavyliftvoy" form commences with the now common-form introductory provision providing definitions of the various major terms used in Part II by reference to the description or statement given in Part I. These are self-explanatory. As with the "Heavycon 2007" form, there is a specific definition of the "The Transportation" which is to be the subject of the services which links the carriage and any loading or discharging operations which are involved.

> "The Transportation" shall mean the carriage of the Cargo and the loading and discharging and all other operations connected therewith.

7.118 An oddity of the "Heavyliftvoy" form is that, although it is a voyage charter, the parties are not described as owner and charterer but as "Carrier" and "Merchant." This is explained by the drafting history of the form and its having started life as a form of booking note:

> Despite HEAVYLIFTVOY being classified as a specialised voyage charter party, BIMCO has retained the terms "Carrier" and "Merchant" found in CONLINEBOOKINGNOTE primarily because these are the terms in common usage in the trade. In this respect the definition of "Merchant" extends beyond the party named in Box 3 to also include, as it does in a booking note, the shipper, receiver, consignee, the holder of the bill of lading, the owner of the cargo and any person entitled to the possession of the cargo.

7.119 (The terms "owner" and "carrier" and "charterer" and "merchant" are used interchangeably in the commentary below.) The "Vessel" is defined in terms which refer either to a named vessel (identified in Box 4) or if none is named such vessel as the carrier subsequently "designates." Apparently, "The term 'designated' has been used because there is no formal nomination procedure to follow – although the parties are free to agree such a procedure if required."

Clause 1: scope of voyage

"1. Scope of Voyage

(a) It is agreed between the Carrier and the Merchant that, subject to the terms and conditions of this Charter Party, the Cargo shall be transported by the Vessel from the Loading Port, or so near thereto as she may safely get and lie always safe and afloat, to the Discharging Port, or so near thereto as she may safely get and lie always safe and afloat.
(b) The Carrier shall exercise due diligence in making the Vessel seaworthy before and at the beginning of the loaded voyage.
(c) Unless this Charter Party is for a complete or sole cargo as described in Box 5, the Carrier shall have the liberty of loading and/or discharging other part cargoes for the account of other merchants or shippers from/to port or ports en route or not en route. The rotation of loading and discharging ports or berths in those ports shall be in the Carrier's option.
The Carrier shall be at liberty to tranship, lighter, land and store the Cargo either on shore or afloat and reship and forward the same to the Discharging Port.
The exercise of any of these options by the Carrier shall in no way constitute a deviation, notwithstanding anything else contained in this Charter Party. The Merchant shall procure that the Carrier's options as provided for in this Clause shall be duly incorporated in Bills of Lading issued under this Charter Party.
*(d) The Carrier shall use its best endeavours to limit the Vessel's transit time from departure from last Loading Port to tendering notice of readiness at first Discharging Port to the number of days inserted in Box 21. If the transit time is exceeded for any reason within the Carrier's control, the Carrier's liability shall be limited to damages directly sustained by the Merchant but not exceeding the amount stated in Box 21 *per* day pro rata. Total damages shall be limited to the amount stated in Box 21. Delays due to weather and/or engine breakdown shall not be deemed to be within the Carrier's control.
*(e) The Carrier shall use its best endeavours to ensure that the Vessel arrives at the first Discharging Port by the date inserted in Box 22. If the date of tendering notice of readiness is later than the date stated in Box 22 for any reason within the Carrier's control, the Carrier's liability shall be limited to damages directly sustained by the Merchant but not exceeding the amount stated in Box 22 *per* day pro rata. Total damages shall be limited to the amount stated in Box 22. Delays due to weather and/or engine breakdown shall not be deemed to be within the Carrier's control.
**Sub-clauses 1(d) and 1(e) are optional provisions which shall only apply if either Box 21 or Box 22 is completed as appropriate*."

7.120 Clause 1 groups together a number of different obligations and responsibilities, on the basis that these all concern the "voyage" which is dealt with in Section (1). Thus:

i Paragraph (a) provides for the carriage to take place between the loading and discharging port or so near as the vessel may get always safely afloat. This is similar to the

provision in lines 8–18 of the Gencon 1976 form. As to the liberty involved in the concluding words of the paragraph, see *Cooke*, para. 5.101 *et seq*. As to safety of the ports generally, see below.

ii Paragraph (b) imposes an obligation of due diligence as to the seaworthiness of the vessel in fairly standard terms. Unlike the version of this provision in both the "Heavycon 2007" and "Projectcon" forms, the vessel is required to be seaworthy "before and at the beginning of the voyage", which corresponds to the basic Hague and Hague-Visby Rules position. Accordingly, this will require the owner to exercise due diligence to make the vessel seaworthy over the continuous period of time from (at least) the commencement of loading and thence until the vessel starts on the voyage: *Maxine Footwear Co v Canadian Government Merchant Marine* [1959] AC 589. As noted above, it is unsettled on the cases whether the warranty is engaged before the start of loading; cf. *Linea Naviera Paramaconi v Abnormal Load Engineering (The Sophie J)* [2001] 1 Lloyd's Rep 763 (tug and heavylift cargo carried by barge) and see *Cooke*, at para. 85.101.

iii Paragraph (c) provides for the granting of a liberty to the carrier in respect of the carrying out by the owner of cargo operations involving other part cargoes laden on board the vessel, if the cargo shipped is not the sole cargo, and the avoidance of any deviation by the vessel as a result: as to such a liberty at common law, see *Caffin v Aldridge* [1895] 2 QB 366 and 648. The paragraph is in identical terms to clause 3(d) of the "Heavycon 2007" form, considered above. Given the commercial rationale behind the "Heavy-liftvoy" form of providing a standard form of voyage charter for the carriage of more ordinary heavylift cargoes, while the carriage of part cargoes on a super heavylift vessel under "Heavycon" is likely to be uncommon, the carriage of part cargoes under the "Heavyliftvoy" is specifically envisaged by the drafters of the form.

> HEAVYLIFTVOY contemplates that the carrier will, unless otherwise agreed, use the vessel to carry cargoes for other merchants at the same time as the cargo agreed for the merchant under the contract. To clarify that the carrier's liberty to carry cargoes for other merchants only applies when the merchant under this charter party books a part cargo, Sub-clause (c) refers to 'complete or sole cargo' as the only exception to the carrier's usual liberty.
> The second paragraph provides the carrier with transhipment rights under the contract as commonly found in booking notes.
> Due to the fact that in this trade part cargoes are a common occurrence, the third paragraph gives the carrier the possibility to deviate to load and/or discharge other part cargoes without this constituting a deviation under the contract or any bill of lading issued under the contract.

Notwithstanding the wide terms of the liberty and the intentions of the drafting committee, there will be limitations on the freedom of the carrier to choose its port rotation to accommodate its other cargo operations and the carrier does not have a completely unfettered liberty: see the discussion in relation to clause 3(d) of the "Heavycon 2007" form and, generally, *Cooke*, para. 12.17 and *The Nour* [1999] 1 Lloyd's Rep 1.

iv Paragraphs (d) and (e) are optional provisions, and one or other may be selected by the suitable completion of Box 21 or 22 in Part I. They allow for the parties to agree that the carrier shall be under a super-added obligation to exercise best endeavours to have the cargo arrive at destination, either within a specified transit or voyage duration (para. (d)) or by a stated arrival date at the port of discharge. The obligation of best endeavours is a stringent one (for its content, see Chapter 4 above). It is submitted that absent any choice for either option, the ordinary position at common law applies and the carrier remains under an implied obligation in any event to commence and proceed upon the voyage

with reasonable despatch by analogy with the ordinary voyage charterparty position, where such an obligation exists unless expressly or impliedly excluded: see *The Kriti Rex* [1996] 2 Lloyd's Rep 171 at 191 and *Cooke*, para. 9.4.

7.121 Under a voyage charterparty which names the port or place at which loading and discharging is to take place with no choice open to the charterer as to the same (as would be the case with a choice between a range of named ports or, *a fortiori*, with a choice of any port in a stated geographical range), there is no implied promise by the charterer as to the safety of the port or place. This was long assumed to be the case (see eg *Cooke*, para. 5.35) but was recently confirmed by the Court of Appeal in *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc. (The Reborn)* [2009] 2 Lloyd's Rep 639. The liberty to the owner to proceed as near as the vessel may safely get would not, it is submitted, alter that position (cf. the view expressed by *Cooke* at para. 5.41 which appears to be to the contrary, albeit that the discussion there focuses on whether it might be argued, from the fact of the existence of the liberty, that an implied warranty of safety which would otherwise exist in respect of the choice of a port from a range of unnamed ports would be excluded; their view that it would not is correct but, in the different context of a single named port, the reasoning is different as there is no warranty of safety implied to start with and the liberty should not change that). In the "Heavyliftvoy" form, as in the "Heavycon 2007" form, the issue of the safety of the port and place where loading and discharging is to be effected is specifically addressed in the loading and discharging provisions: see below in relation to clauses 9(a) and 14(a) and the option for loading and discharging on "free in" and "free out" terms where the charterer warrants the safety of the place; cf. if the loading and discharging terms are "liner in hook" or "liner out hook" under clauses 10 and 15 where the owner is responsible for the choice of the place under clauses 10(a) and 15(a) and no warranty of safety is given by the charterer.

Clause 2: cargo requirements

"2. Cargo Requirements

(a) The Cargo tendered under this Charter Party shall be fit for Transportation with sufficient internal strength and with any loose parts properly secured, so as to withstand the forces to which it will be subjected during the loading operation, carriage and discharging operation. The Cargo shall be properly marked to indicate exact place(s) where piece(s) are to be slung and to indicate exact dimensions and weight and, to the extent necessary to enable the Carrier to lift the Cargo in a steady and stable manner, the location of the centre of gravity. Unless otherwise mutually agreed the Cargo shall be properly crated and/or boxed and fully stackable.
(b) The Cargo shall be equipped with sufficient, adequate and safely accessible lifting devices, eyes/lugs or slinging points always with guaranteed sufficient strength for the Transportation, all to the satisfaction of the Carrier. Any and all lifting equipment supplied by the Merchant, such as but not limited to, spreaders, beams, lugs, etc, shall be certified by a recognised classification society.
Any cradle(s)/support(s) for the Cargo shall be safely attached to the Cargo unless otherwise agreed and be of sufficient number and strength and be suitable for the carriage, so as to withstand acceleration forces which may be encountered during the Transportation, all to the satisfaction of the Carrier. If requested, the Merchant shall provide a certificate from a recognised classification society for the cradle(s)/support(s).
The Cargo shall be equipped with sufficient, adequate and safely accessible lashing points/eyes/lugs always with guaranteed sufficient strength for the Transportation, all to the satisfaction of the Carrier.
*(c) The Merchant shall, prior to Transportation, present a certificate of weight to the Carrier certified by an officially recognised authority for any Cargo exceeding the number of metric tons stated in Box 14. The report shall include the weight, and longitudinal and transverse location of the centre of gravity.
**If Box 14 is not filled in then this Sub-clause (c) shall not apply*.

(d) The Merchant shall present and be liable for transport drawings of any cargo exceeding 100 metric tons and for other cargo as required by the Carrier. The drawings shall indicate the position of lifting and lashing eyes and /or points and the position of footprint/cradle and centre of gravity. The drawings shall be presented in autocad and/or dxf format unless otherwise agreed.
(e) Notwithstanding acceptance of the Cargo by the Carrier the Merchant agrees to indemnify and hold the Carrier harmless for all claims, costs, expenses, actions, proceedings, suits, demands, and liabilities whatsoever arising out of or in connection with the Merchant's failure to comply with the requirements of this Clause.
(f) The Carrier shall not be responsible for any loss of or damage to the Cargo resulting from insufficient and/or unseaworthy packing/construction and/or any other failure of the Merchant to protect the Cargo for the loading or discharging or carriage by sea."

7.122 Clause 2 sets out a number of specific obligations on the merchant as to the cargo which it ships on board the vessel. These obligations reflect the very specialised nature both of the type of cargo which will be shipped under the form and of the stowage, securing, and transportation of the cargo, and the stability considerations involved from the vessel's standpoint. The responsibility of the charterer for the cargo to be shipped is therefore unusual in the context of a voyage charterparty, save for the shipment of dangerous goods. Under clause 2, the merchant assumes significant responsibilities to the carrier in respect of the cargo and its fitness for carriage. These go much further than the corresponding provision in clause 11(e) of "Heavycon 2007" (considered above) which simply requires that the cargo shall be as described in Part I and fit for the Transportation in every way. The detailed requirements set out in clause 2 reflect that whereas in a super heavylift transportation, there will often have been a detailed engineering exchange between the charterer and the owner given the very bespoke nature of the cargo and how it is to be loaded and secured and then discharged, in the midsized sector, the cargoes will be presented and received somewhat more in the nature of "general cargo", albeit of the heavylift variety. BIMCO therefore designed a clause which shifts the responsibility to the party who is better placed to know the attributes of the cargo and to prepare it for both handling and carriage:

> The purpose of this clause is to set the standards for the cargo in respect of its fitness to be transported, how it should be marked and where and how it should be lifted (ie lifting points/centre of gravity). Furthermore, the liability for failure to comply with the cargo requirements is placed on the merchant such that the carrier is not responsible for loss of or damage to cargo due to the merchant's failure to meet the required standards for the cargo.

Requirements as to the cargo

7.123 Paragraphs (a) and (b) requires the cargo not only to be "carriage-worthy" in all respects but also to be properly fitted with all necessary devices and adjuncts for the necessary cargo handling operations and securing once on board (together with any necessary plans and drawings: para. (d)). The requirements apply irrespective of which option the parties adopt under Sections (4) and (5) of the form as to loading and discharging responsibilities (free-in or liner: see below). The requirements are expressed in an omnibus manner without reference to any particular form of cargo but care should be taken to have in mind that different cargoes have different attributes and characteristics. Some heavylift cargoes may be boxed or packaged on skids, for example the smaller generating equipment and some railway vehicles, pipes and drilling machinery: para. (a) requires all cargo to be packaged or at least to be stackable as the default position. As BIMCO states "The last sentence of sub-clause 2(a) requiring cargo to be properly boxed or crated and fully stackable is a reference to general cargo items carried by the vessel and not to larger 'heavy lift' type cargoes." For other cargoes, the location of the centre of gravity may be highly relevant to which lifting points are to be used for the cargo and how and in what conditions it is to

be lifted. Paragraph (a) provides for this information to be given where it is necessary; as the explanatory notes state:

> The location of the centre of gravity is significant as there is risk of damage to the cargo if the load is imbalanced with the centre of gravity out of centre line. In such cases the carrier needs to know this before slinging the cargo so that the necessary lifting arrangement can be prepared. This concern does not generally apply to small cargo items and so the provision states that the centre of gravity should be marked only where it is necessary to load the cargo in a steady and stable manner.

7.124 Other cargoes may consist of a delicate cargo which is suspended or slung both for lifting and carriage purposes: a common example is in the transportation of large super yachts. Paragraph (b) provides for these and gives the carrier the right to require the merchant to satisfy it as to the adequacy of the arrangements. The true weight of the cargo is plainly highly material. Paragraph (c) allows the parties to agree (usually at the carrier's insistence) upon the certification of the weight of the object to be carried. This is plainly highly desirable in most cases where the cargo is not a general cargo item. The mis-declaration of cargo weight is not such a problem in the heavylift sector as in the general cargo and container one, but as the P&I Club bulletins and guides on heavylift cargoes reflect, it is a problematic area. In general terms, while the omnibus provisions of clause 2(a)–(d) should cover almost every cargo type, care is needed on the part of the carrier in booking a cargo to ensure that any special features or characteristics are covered by paras. (a)–(d) and that there is no need for a specific provision supplementing clause 2.

7.125 Certain aspects of the cargo and its fitments are required to be "all to the carrier's satisfaction." It is unclear as a matter of drafting whether the requirement on the charterer, for example to ensure that the cargo is "equipped with sufficient, adequate and safely accessible lifting devices, eyes/lugs or slinging points always with guaranteed sufficient strength for the Transportation, all to the satisfaction of the Carrier" under para. (b), is to be deemed fulfilled once the carrier pronounces itself satisfied or whether it provides for a double obligation not only to ensure that, objectively, the cargo is in that condition but also to satisfy the carrier where the carrier seeks to be satisfied. It is also unclear whether the carrier can be called upon by the merchant to rule on whether the cargo is satisfactory for the purposes of para. (b). Consideration should be given to whether the carrier's involvement in and satisfaction as to the cargo's characteristics could be more precisely identified. While under, for example, clause 4(c)(i) and (ii) of "Heavycon 2007", the same concept is employed in terms of the master's satisfaction, the context is a different one, being one where the owner is required to satisfy itself of something within its own purview, such as the positioning of the cargo on the super heavylift vessel or the float-on position of the cargo in relation to the submersible heavylift vessel, both matters within the heavylift operator's expertise; in the case of the assessment of the strength and adequacy of aspects of the *cargo*, the situation may be different. The explanatory notes suggest that the insertion was possibly designed in order to encourage the vessel to involve itself in assessing the suitability of the cargo rather than simply taking it on trust from the merchant:

> The phrase "all to the satisfaction of the Carrier" in relation to the cargo is included in order to be consistent with the use of the phrase in the rest of the charter party and to provide the carrier with a greater say in the number and disposition of handling and securing points and the arrangement and composition of cradles and supports. The phrase is not intended to increase the carrier's risk or liability but it was felt that to exclude the requirement to meet the carrier's satisfaction might result in the carrier accepting the arrangement of the cargo as sufficient without question.

7.126 But if and to the extent that the carrier does assess the cargo, make specific requirements of it or require changes to be made and then pronounces that the cargo is satisfactory in the given respects, it is perhaps optimistic to consider that the carrier has not laid itself open to a greater liability or risk, or, put another way, that he has not reduced the merchant's responsibilities or absolved the merchant of responsibility. The analogous position where a charterer takes an active

interest in the stowage of his cargo, and complains of some defects but makes no complaint of other obvious features of the stowage under a charterparty where the owner is responsible for stowage (either at common law or under liner or "gross" terms: see below in relation to clause 10) may usefully be considered. In such a case, the charterer will be precluded by estoppel by conduct from complaining of those features of the stow of which he made no complaint: see *Ismail v Polish Ocean Lines (The Ciechocinek)* [1976] 1 Lloyd's Rep 489, applying *Upper Egypt Produce Exporters v Santamana* (1923) 14 Ll L Rep 159, where the earlier cases were reviewed by Hill J at 162–163. Plainly where the carrier actively insists upon some aspect of the cargo or its securing points etc. which causes the loss, the position will be an *a fortiori* one.

7.127 While it is plainly sensible, where necessary, to allow the vessel to be able to have its requirements heard and complied with, if it is not intended to engage any liability on the part of the carrier in respect of the adequacy of the cargo and its arrangements, then other formulations of the clause may be preferable to make clear what the effect of this "satisfaction" on the part of the carrier is (and is not) to be. It might be thought that the aim of encouraging the owner and its crew to be pro-active in satisfying itself as to the safety of the arrangements could be more usefully addressed internally within the owner's organisation (or as between the owner and its insurers or P&I Club), given that this should ordinarily occur as a shipboard matter in any event, with the crew carrying out their duties to the owners and vice versa as to the safety of the vessel, rather than in the contract with the charterer where the charterer is entitled to rely upon the "satisfaction" process as endorsing the charterer's performance of its obligations under the contract.

The carrier's right to an indemnity

7.128 At first sight, an important reinforcement of the merchant's responsibility for the cargo is the provision of a wide indemnity in favour of the carrier for various liabilities which may arise as a result of the failure of the merchant to comply with its obligations under paras. (a)–(d). The wording of the indemnity is however perhaps unfortunate.

7.129 Presumably, what was intended was a comprehensive indemnity in favour of the carrier for any adverse consequence for it which results from a breach of clause 2 by the merchant, for example, the collapse of the cargo during the sea passage, due to it not being fit for the transportation because it did not have sufficient internal strength to withstand the ordinary stresses and moments of the voyage in breach of clause 2(a), which results in damage to the cargo itself, it breaking free from its lashings causing damage to other part cargo adjacent to the cargo and occasioning damage to the vessel's tank top and shell plating. While any claim or liability to the merchant would be likely to fall within the scope of the phrase "all claims, costs, expenses, actions, proceedings, suits, demands and liabilities", as would any claim made against the carrier by the owner of the other part cargo, the clause is not naturally apt to respond to loss and damage sustained by the owner. The emphasis appears to be on an indemnity against claims and demands which may be made upon the carrier by others and liabilities which the carrier may incur to other rather than direct loss sustained by the carrier.

7.130 The wording appears to have been taken from the BIMCO knock-for-knock provisions as formulated in the "Towcon" form and then used in other forms; however, the context in which it is used there is different. In the knock-for-knock situation the charterer agrees that the owner will be under no liability to it for damage to cargo or other charterer's property; in addition, and to protect the owner, the charterer agrees to protect the owner from any claims made, necessarily by itself but in reality by others, in respect of damage to that cargo or property: see eg clause 22(b)(i) of "Heavycon 2007" which states: "and the Owners shall indemnify, protect, defend and hold harmless the Charterers from any and against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of or in connection with such loss, damage, personal injury or death." It is therefore certainly arguable that the indemnity does not oblige the merchant to make

good loss and damage suffered by the vessel or carrier as a result of the cargo not being as warranted. While the meaning of "costs, expenses" is open to debate, those terms may be held to take their colour from the wording of which they form a part, which more naturally reads as dealings with claims, demands and actions against the carrier.

7.131 In one sense, the scope of the indemnity and the debate above may not matter in practical terms, since, irrespective of the scope of para. (e), the carrier has an action in damages for breach of clause 2 by the merchant and, indeed, since the indemnity – even in respect of what it covers – only operates in the event that the merchant is in breach and the carrier can establish both this and that the claim against it results from the breach. There is no guidance in the explanatory notes as to what the indemnity was meant to achieve and what its practical utility was intended to be.

Defence of insufficiency of packing

7.132 Paragraph (f) is a general defence of insufficiency of packaging, expanded to cover the various special matters covered in clause 2. As to the corresponding defence under Article IV, Rule 2(n) of the Hague and Hague-Visby Rules: see *Cooke*, para. 85.337 *et seq*. In that context, there is a potential overlap where the insufficiency of packing is apparent to the carrier in circumstances in which the carrier is under a duty to "clause" the bill of lading on receipt of the cargo. A possible analogy exists with the situation where the merchant tenders the cargo with patent defects in, for example the various securing points referred to in para. (b) and which are required to be to the carrier's satisfaction: the carrier satisfies itself that the arrangements are sufficient: can the carrier subsequently invoke para. (f)? Similarly, where the carrier satisfies itself but does so negligently without a proper inspection or enquiry, it might be argued that the carrier cannot rely on the defence in para. (f), at least where the merchant relied on the carrier's assessment and acceptance of the sufficiency of the arrangements.

Clause 3: cargo description

"3. Cargo description

(a) Cargo volume:

The volume of the Cargo (in cubic metres) will be assessed on the basis of the extreme length, width and height of each Cargo item, including transport cradle(s)/support(s) whether loose or fixed to the Cargo. Lashing eyes and lifting eyes will also be included in the measurement.

(b) Cargo weight:

The weight of the Cargo (in metric tons) includes the weight of cradle(s)/support(s) whether fixed to the Cargo or loose.

(c) Freight ton:

If the Cargo is described by freight ton, the total freight ton is calculated by taking the sum of the volume or weight (whichever is greatest) of each individual item."

7.133 As noted above, the merchant is required to give a detailed description of the cargo in the various columns provided for in Box 5. Clause 3 sets out the basis upon which the cargo's volume, weight and tonnage is to be calculated. This provides a uniform set of rules for the description of the cargo, avoiding conflicts, misunderstandings or confusion as to the basis of calculation employed. As the notes explain: "The Clause has been included to help avoid possible disputes in relation to cargo discrepancies as provided in Clause 4 below and possibly the division of costs over various part cargoes as *per* Clause 23 (Part Cargoes)."

Clause 4: cargo discrepancy

"4. Cargo discrepancy

If there is a discrepancy between the Cargo as described in Box 5, including shipping drawings provided by the Merchant, and the Cargo as tendered:

(a) where such discrepancies result in the Vessel not being able to load and/or accommodate and/or discharge the Cargo as tendered or any part thereof, the Merchant shall be responsible for all costs arising therefrom including but not limited to full deadfreight.

(b) where the volume and/or weight of the Cargo as tendered is greater, and the Carrier agrees to the Transportation, the Carrier has the right to charge additional freight pro rata of volume or weight as well as any additional costs the Carrier may thereby incur.

(c) where the volume and/or weight is less, the Carrier has the right to charge full freight for the Cargo as stated in Box 5.

(d) nothing herein shall be construed as imposing on the Carrier an obligation to load any cargo where there is a discrepancy with the Cargo described in Box 5."

7.134 This clause reflects the importance to the carrier (and to the merchant) of a precise and accurate description of the cargo. It deals with discrepancies between the cargo as described by the merchant in Box 5 and the actual cargo as presented.

7.135 The carrier has the right to refuse to ship the cargo if the volume and/or weight is different than that specified by the merchant and this results in the vessel being physically unable to load, carry or discharge the cargo. In that event, the carrier is entitled to be paid deadfreight: deadfreight is the term for damages to which an owner is entitled if the charterer fails to load the full amount of the cargo required under the terms of the charter and, where, as here no provision is made for the calculation of deadfreight, ordinary principles of damages apply. The ordinary measure of damages is the freight which would have been earned on the cargo short loaded or not loaded, less any extra expense which would have been incurred by the owners in loading, carrying and discharging the cargo (assuming loading and discharging is to be carried out by the owner): see *Cooke*, para. 21.86. Being an entitlement to damages, the carrier will be under a duty to mitigate and must take reasonable steps to obtain a substitute cargo if this is possible and economically reduces the overall loss. In many heavylift contexts, the cargo is so specialised that this may not be possible, but given the vessel's liberty to deviate where part cargoes are shipped (under clause 23) it may be possible to pick up a substitute or fill-up cargo elsewhere than at the port of loading for the cargo which is shut out because of the discrepancy. If the cargo is in excess of that described but can be accommodated and the carrier is willing to load the cargo, then the merchant will be liable to pay additional freight plus any additional relevant costs. If the cargo is less than described then the sub-clause gives the carrier the right, but not the obligation, to charge full freight.

Clauses 9 and 10: the loading of the cargo and the "free-in" and "liner-in hook" options

7.136 At common law, the allocation of responsibility for loading (and discharging) between charter or shipper and the owner is divided at the ship's rail: in *Harris v Best* (1892) 68 LT 76 Lord Esher MR described the position at p. 77 as follows:

> Loading is a joint act of the shipper or charterer and of the shipowner; neither of them is to do it alone, but it is to be the joint act of both. What is the obligation on each of them in that matter? Each is to do his own part of the work, and to do whatever is reasonable to enable the other to do his part. This puts upon the shipper the obligation of bringing the cargo alongside the ship, and of doing a certain part of the loading. What is that part of the loading? By universal practice the shipper has to bring the cargo alongside so as to enable the shipowner to load the ship within the time stipulated by the charterparty, and to lift that cargo to the rail of the ship. It is then the duty of the shipowner to be ready to take such cargo on board and to stow it in the vessel. The stowage of the cargo is the sole act of the shipowner.

7.137 The ship's rail offers an unsatisfactory dividing point in any modern cargo operation and the common law position is almost invariably displaced by specific loading provisions, see eg clause 5 of the Gencon 1976 form. The "Heavyliftvoy" form unsurprisingly follows the same approach. Section (4) of Part II contains a number of provisions concerned with the loading of the cargo. The explanatory notes sufficiently describe the general scheme of the loading provisions contained in clauses 9 and 10, which are alternatives one of which must be selected by the parties in Box 8 (with provision being made for the default position, if no specific election is made by the parties in Box 8, that clause 9 shall apply). In broad terms (but see below), clauses 9 and 10 echo the two standard options under the common form of voyage charterparty as to loading of "free-in" and "liner-in" or "gross terms"; cf. clause 5 of the Gencon form with its two options: (a) gross terms and (b) "f.i.o." Section (4) concludes "Clauses 9 and 10 are options. State in Box 6 which option shall apply. If Box 8 is left blank then Clause 9 shall apply."

> This Section provides the parties with a choice of loading terms – liner terms or free-in. If no choice is made by the parties the free-in terms will apply.
>
> Under the free-in terms it is up to the merchant to provide a berth and to load, stow, and lash etc. the cargo. The merchant may use the vessel's gear for loading and any lashing materials on board for securing the cargo. Time used and expenses/costs incurred in this respect is for the merchant's account.
>
> Under the liner-in hook terms the nomination of the berth, loading, stowing and lashing etc. is for the carrier's account. Loading should be done "fast as can" and time lost due to certain events on the carrier's side will be for the carrier's account as well.

Clause 9: "free-in"

"9. *Free-in

If Box 8 states 'Free-in':

(a) The Merchant shall arrange one good, safe, always accessible and swell free berth or anchorage, suitable for the intended operation, and where the Vessel can lie always afloat.

No later than the time of booking the Merchant shall advise the Carrier of any restrictions of the berth and access, if any, including but not limited to allowable ship's length, beam, draft and air draft.

(b) The Cargo shall be brought alongside the Vessel in a sequence as required by the Carrier and shall be loaded, stowed, lashed and seafastened by the Merchant at his risk and expense. The Carrier shall if so requested by the Merchant provide a stowage plan as soon as reasonably practicable.

(c) The Merchant has free use of Vessel's gear to load the Cargo, in daylight only, otherwise at the Master's discretion. Provided Port Authorities and shore labour unions permit, the Vessel's crew shall operate the gear, as servants of the Merchant. Use of the Vessel's crew shall be subject to ILO Convention (No. 180) or any subsequent amendments thereto regarding rest hours.

(d) The Merchant has free use of lashing materials and dunnage as far as on board. Provided Port Authorities and shore labour unions permit, the Vessel's crew shall assist the Merchant, as servants of the Merchant, in lashing heavy lifts over 20 metric tons unless otherwise agreed. Use of the Vessel's crew shall be subject to ILO Convention (no. 180) or any subsequent amendments thereto regarding rest hours.

(e) If Port Authorities or shore labour unions compel the Vessel to employ shore labour and/or equipment, any charges for such labour and/or equipment, whether used or not, shall be for the Merchant's account.

(f) Allowed laytime at the Loading Port shall be as stated in Box 8, Saturdays, Sundays (or their local equivalents) and holidays included.

Time shall count as laytime at the Loading Port, always in accordance with Sub-clause 6(c), as from the moment the Master tenders Notice of Readiness. Time used in moving from any place of waiting to the loading berth and/or any preparation time for the Vessel to be ready for loading shall not count.

Time shall cease counting when all Cargo is loaded, lashed and secured. Any time by which the time used exceeds the allowed laytime shall be paid as demurrage at the rate stated in Box 18 *per* day or pro rata.

Time shall not count if lost by reason of deficiency of the Master, officers or crew or strike or lockout of the Master, officers or crew or by reason of breakdown of the Vessel or its equipment.

(g) Any time lost under the provisions of Clauses 2, 4, 19, 27(c) shall count as laytime or if the Vessel is on demurrage, as time on demurrage."

7.138 This loading option corresponds to the ordinary voyage charterparty loading option for general cargo of "FIOST" (or free in and out stowed/trimmed) in so far as it applies to the loading and stowing of the cargo on board the vessel: see generally as to this: *Cooke*, para. 14.36 *et seq*. Given that the "Heavyliftvoy" provides for the possibility of different contractual regimes for loading and discharging in the light of the special needs of the heavylift trade and the different operational circumstances which may exist at either end in relation to availability of shore or other craneage and the need to use the heavylift vessel's specialised gear and that it is possible to have a "liner out" option for discharge, this option might therefore be described as a "FIST" option.

7.139 Paragraph (b) provides that the cargo is to be "loaded, stowed, lashed and seafastened by the Merchant at his risk and expense." While the wording does not go as far as the comparable Gencon 1976 form wording which states "The cargo shall be brought into the holds, loaded, stowed and/or trimmed . . . by the Charterers or their agents free of any risk, liability and expense whatsoever to the Owners", it is submitted that the clause removes from the owner and transfers to the charterer the entire responsibility for the operations in question. The wording of the paragraph is stronger than that considered by the House of Lords in *Court Line v Canadian Transport* [1940] AC 934 (where the clause read "Charterers are to load stow and trim the cargo at their expense under the supervision of the Captain . . ." and in relation it was held that the clause transferred to the charterer the business of loading and stowing the cargo, and thereby relieved the shipowners of all liability in respect of those operations) and by the Court of Appeal in *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc (The Jordan II)* [2003] 2 Lloyd's Rep 8, not taken on appeal to House of Lords [2005] 1 WLR 1363 (in relation to a clause providing "Shipper/Charterers/Receivers to put the cargo on board, trim and discharge the cargo free of expense to the vessel"). See also *Brys & Gylsen v Drysdale* (1920) 4 L1 L Rep 24. The result is that the carrier is under no liability to the merchant for damage caused by careless loading or discharging or bad stowage or lashing or seafastening and, if a bill of lading is issued by the merchant, the carrier is entitled to an indemnity from the merchant in respect of any liability which it may incur to the holder of the bill in respect of damage arising from those operations. Of importance, there is an implied term that the merchant will carry out the operations with reasonable care and so if damage is done to the vessel in and as a result of the improper carrying out of the loading operations, the merchant will be liable to the carrier for it: cf. in the voyage charterparty context: London Arbitration 8/93, LMLN 354 and, generally, *Cooke*, paras. 14.38 and 14.39.

7.140 Paragraph (a) deals with the place of loading and provides not only that it will be safe for the vessel but that it is in all respects suitable for the intended loading operation, ie in terms of shore facilities. As noted above, under the definitions the "Vessel" is defined in terms which refer either to a named vessel (identified in Box 4) or if none is named such vessel as the carrier subsequently "designates." The requirement on the merchant under para. (a) to give detailed information as to the berth and dimensional parameters is intended to allow a vessel to be booked on a "TBN" or "to be nominated" basis with the carrier subsequently selecting the appropriate vessel: "It is intended to give a wide description of the number of issues that may restrict the ship on the berth of which the merchant must inform the carrier, so that the carrier can select the right vessel to perform the charter.

7.141 Paragraphs (c) and (d) make provision, in the terms usually found in a voyage charterparty, for the use by the charterers of the vessel's gear and crew: see *Cooke*, para. 14.46 *et seq*. If no specific provision is agreed between the parties describing the capacity of the ship's gear the carrier's obligation, in line with authorities such as *Hang Fung Shipping Co v Mullion* [1966] 1

Lloyd's Rep 511, is probably to present the vessel with her existing gear properly maintained and in good working order to handle loads of its intended capacity. In the case of heavylift vessels, like tugs, the merchant will have ready access to the owner's published details of the vessel, either agreed or nominated; the particulars usually give full and precise detail of the vessel's gear and its capacities and any operational constraints.

7.142 Paragraphs (f) and (g) are laytime and demurrage provisions which are self-explanatory.

Clause 10: "liner-in hook"

"10. *Liner-in hook

If Box 8 states 'Liner-in hook':

(a) Unless the nature of the Cargo or any other reason relating to the Cargo dictates the use of a specific loading berth or place, the Carrier shall select, arrange and nominate the loading berth.

(b) If time lost under Clause 12 is due to port congestion the Merchant shall not be liable for the first consecutive seventy-two (72) hours of waiting time after the Carrier has tendered Notice of Readiness.

(c) The Cargo shall be brought alongside the Vessel by the Merchant at his risk and expense, within reach of the Vessel's gear unless otherwise stipulated by the Carrier, and in the sequence and manner required by the Carrier.

(d) The Cargo shall be loaded, stowed, lashed and seafastened by the Carrier. Hooking-on charges shall be for the Merchant's account. If the custom of the port is for all stevedoring costs for loading to be charged to the Carrier, 50% of such stevedoring costs shall be borne by the Merchant as hooking-on costs.

(e) The Cargo shall be brought alongside for loading as fast as the Vessel can receive, including, if required by the Carrier, outside ordinary working hours notwithstanding any custom of the port, in the Master's option during day, night, Saturdays, Sundays (or their local equivalents) and holidays included.

Detention at the rate as stated in Box 18 or pro rata shall be paid for any time lost after the First Layday, unless caused by reason of deficiency of the Master, officers or crew or strike or lockout of the Master, officers or crew or by reason of breakdown of the Vessel or its equipment. Stand-by costs of stevedores while the Vessel is on detention shall be paid by the Merchant. (f) Any time lost under the provisions of Clauses 2, 4, 11(b), 19, 27(c) shall count as detention at the rate as stated in Box 18 or pro rata thereof."

7.143 This option corresponds to the ordinary "gross terms" option, for example as contained in clause 5(a) of the Gencon 1976 form: see *Cooke*, para. 14.10. Paragraphs (c) and (d) provide for the cargo to be brought alongside to the vessel within reach of the vessel's lifting gear and tackle, and ready for hooking on. Thereafter from the moment of hooking on, the cargo is handled by the carrier. The carrier's responsibility for stowage, securing and seafastening will be that of the reasonably careful and prudent heavylift operator; cf. the position under an ordinary voyage charterparty ("of a stevedore of reasonable experience and diligence, having regard to the general state of knowledge and expertise prevailing at the time": *Cooke*, para. 14.23). Just as the charterer under the "free-in" terms undertakes to stow etc. carefully, so too it would seem there is no absolute liability for bad stowage in circumstances where the carrier acted with all reasonable care and could not by such care have prevented the cause of the defective stowage: see *Union Castle v Borderdale* [1919] 1 KB 612.

7.144 As noted above, where the charterer involves itself in the stowage and approves (or does not dissent from) arrangements made by the owner, *a fortiori* where the charterer insists upon some aspect of the stowage to which the owner assents, the charterer will be precluded from complaining of it: see *Upper Egypt Produce Exporters v Santamana* (1923) 14 Ll L Rep 159 where, after reviewing the authorities, Hill J stated at 163:

> I have considered these cases [viz. *Hovill v Stephenson*, 4 Car & P 469; *Major v White*, 7 Car & P, 41; *Hutchinson v Guion*, LJ 28, CP, 63 and 5 CB NS149, and *Ohrloff v Briscoll*, LR, 1 PC, 231: see at 162–163] very carefully. They seem to me to carry the law at least far enough to show that a shipper who takes an

> active interest in the stowage, and complaint of some defects but makes no complaint of others which are patent to him, cannot be heard to complain of that to which he has made no objection. I think that the onions were stowed 15 or 16 tiers high without a temporary deck by the leave and licence of Moufarege, and that he cannot be heard to complain of that. I therefore hold that, for the damage caused by reason of that defect, namely, stowing 15 or 16 tiers high without use of a temporary deck, the defendants are not answerable to Moufarege or Yeoward Bros. For the damage caused by the other defects they are answerable.

7.145 See also *Ismail v Polish Ocean Lines (The Ciechocinek)* [1976] 1 Lloyd's Rep 489 in which Lord Denning MR and Ormrod LJ analysed the effect of such conduct by the charterer as giving rise to an estoppel: see at 495, col. 2 and 497, col. 2 respectively.

7.146 Paragraph (a) provides that the carrier is to nominate the berth at which the cargo is to be loaded. This right of nomination will usually apply where the heavylift vessel is loading cargoes, using its own specialised lifting gear, as part of a semi-liner service in which the vessel calls at regular loading ports as part of that service (an example is the recent introduction of a number of heavylift semi-liner services by Beluga Shipping, one of the biggest heavylift operators). The merchant brings the cargo to the port for loading by the vessel. In certain cases, even on liner-in hook terms, the merchant may require the vessel to load at a specific port, ie close to the place of manufacture or where road and rail logistics do not permit the cargo to be loaded anywhere else. Paragraph (a) provides for this possibility. No express warranty of safety is given by the charterer in such a case as to the place of loading (cf. the position under "free in" terms) nor as to the port of loading, following the decision in *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] 2 Lloyd's Rep 639: see above in relation to clause 1(a).

7.147 Paragraphs (b), (e) and (f) of clause 10 are laytime and demurrage provisions which are, again, self-explanatory.

Clauses 11, 12 and 13: provisions common to both "free-in" and "liner-in hook" options

7.148 Section (4) concludes with provisions which deal with various matters which are common to whichever loading option has been adopted by the parties.

Clause 11: standard of seafastening

"**11.** (a) The Cargo shall be lashed/seafastened in accordance with the standards/regulations set out in Box 11 and to the satisfaction of the Master. If Box 11 is not filled in then the Carrier's lashing/seafastening standards shall apply.

(b) Any additional lashings/seafastenings required by the Merchant or the Cargo interests' Marine Warranty Surveyor shall be for the account of the Merchant."

7.149 This provides for the lashing and seafastening to be done in accordance with a set of agreed standards and to the Master's satisfaction. If the parties have not agreed a standard then the carrier's own lashing/seafastening standard is to be used. As with other aspects of the master's "satisfaction", considered above in relation to clause 2(b), issues arise as to whether, where the charterer is responsible for stowage under "liner-in" terms under clause 9 and is to lash, secure and seafasten thereunder, the owner's satisfaction of itself as to the standard and adequacy of the seafastenings may preclude the owner from complaining subsequently. Where the standard is a defined one, either by reference to classification society, statutory or national flag requirements, it is unclear what the addition of the "owner's satisfaction" usefully adds. If it is intended that the charterer is obliged to ensure that the securing is to the appropriate standard, then this potentially dilutes the obligation. While it is plainly essential for the owner by its crew to satisfy itself that all that needs to be done has been done, but this should ordinarily occur as a shipboard matter in any event, with the crew carrying out their duties to the owners and vice versa as to the safety of the vessel. It may be that this was similarly added to encourage the

vessel to be pro-active (see above in relation to clause 2: "it was felt that to exclude the requirement to meet the carrier's satisfaction might result in the carrier accepting the arrangement of the cargo as sufficient without question").

Clauses 12 and 13: swell, port congestion and time waiting to berth

"**12.** Time lost due to swell, port congestion and/or in waiting for loading berth on Vessel's arrival at or off the port or so near there unto as she may be permitted to approach shall count as laytime or detention (at the rate as stated in Box 18). Time lost due to swell and/or in waiting for berth not to count if the Carrier selected the loading berth as *per* sub-clause 10(a).

13. In case cumulative time lost due to swell, port congestion and/or waiting for loading berth and/or for the Cargo is over the number of hours stated in Box 20 (or if Box 20 is not filled in then seventy-two (72) hours shall apply) the Carrier shall have the option to cancel this Charter Party or to sail with only part of the Cargo on board. If the Carrier continues to wait, such waiting time shall count as laytime or detention (at the rate as stated in Box 18), unless the Merchant requests the Carrier to sail. If the Carrier continues to wait this shall not be considered as a waiver of any of his rights under this Charter Party, including his rights under this Clause 13 and the Carrier shall remain entitled at any time to cancel this Charter Party or sail with only part of the Cargo on board.

If the Carrier exercises his option at any time to cancel this Charter Party or sail with only part of the Cargo onboard, or if the Merchant requests the Carrier to sail, the Merchant shall be liable to pay deadfreight and accrued demurrage or detention at the rate stated in Box 18."

7.150 These provisions deal with the effect on laytime and demurrage of swell, port congestion and waiting to enter berth. Given the size of heavylift vessels and the delicacy of the cargo operations, it is not uncommonly the case that the cargo can only be loaded or discharged at certain places increasing the risk of having to wait to berth and of being affected by congestion at a particular set of berths. Similarly, swell poses considerable practical problems for heavylift operations (this being reflected by clauses 9(a) and 14(a) which requires the charterer under "liner-in" or "liner-out" to nominate a swell-free berth or anchorage).

7.151 Clause 13 provides for mutual rights in the event that the vessel is detained by one or more of these matters either beyond an agreed period or a default period of 72 hours. The intention behind the clause was to provide a balanced provision:

> To avoid excessive cumulative delays for the carrier due to swell and/or waiting for berth and/or cargo, the carrier has the right under Clause 13 to cancel or sail when the time lost has exceeded an agreed amount of time (72 hours – unless the parties have agreed otherwise in Part I). However, if the carrier chooses to wait, such waiting time will count as laytime or time on demurrage or be compensated at the detention rate. The carrier's decision will not prejudice any of his rights under this or any other clauses of the contract.
>
> Should the carrier choose to exercise his right to terminate or sail with only part cargo, the merchant is obliged to pay deadfreight and demurrage/damages for detention. The Clause also gives the merchant the right to call for the vessel to sail with only part cargo on board. This particular wording has been incorporated in order to avoid potential abuse by the carrier by sitting around collecting damages for detention instead of sailing against a payment of deadfreight.

Clauses 14 and 15: the discharging of the cargo and the "free-in" and "liner-in hook" options

7.152 Section (5) contains what are effectively mirror provisions to those contained in Section (4) with only necessary changes to reflect the different context of cargo discharging. The parties are required to choose between a "free-out" or "liner-out hook" option, with the default position being, as under Section (4), "free-out." The possible permutations are therefore "1. Free-in/Free-out; 2. Liner-in hook/Liner-out hook; 3. Free-in/Liner-out hook; and 4. Liner-in hook/Free-out." The explanatory notes state: "Similar to Section 4 – Loading, the Section on discharging gives the

parties the option to discharge on liner-out hook or free-out terms. If no choice is made the free-out terms will apply. The equivalent clauses in both sections have been drafted to mirror each other.

7.153 For convenience, the text of the clauses is set out below. No additional commentary is required. However, it may be noted that the practical question, common in the heavylift sector, of the necessity for the removal of seafastenings and any other structural arrangements made on board the vessel to secure the cargo is specifically addressed by clauses 11(c) and 11(e) where the discharging is to be effected by the charterer under the "liner-out" option. The charterer is required to pay for and carry out any "deck cleaning, including cutting, grinding, painting and removal and disposal of seafastening equipment" as the owner may require and time used for these purposes counts towards laytime or demurrage, as the case may be. There is no corresponding provision in the "Heavycon 2007" form to clause 11(c).

"14. *Free-out

If Box 9 states 'Free-out':

(a) The Merchant shall arrange one good, safe, always accessible and swell free berth or anchorage, suitable for the intended operation, and where the Vessel can lie always afloat.

No later than the time of booking the Merchant shall advise the Carrier of any restrictions of the berth and access, if any, including but not limited to allowable ship's length, beam, draft and air draft.

(b) The Cargo shall be unseafastened, unlashed and discharged by the Merchant at his risk and expense.

(c) If deck cleaning, including cutting, grinding, painting and removal and disposal of seafastening material, is required by the Carrier this shall be arranged and paid for by the Merchant.

(d) The Merchant has free use of the Vessel's gear to discharge the Cargo, in daylight only, otherwise at the Master's discretion. Provided Port Authorities and shore labour unions permit, the Vessel's crew shall operate the gear, as servants of the Merchant. Use of the Vessel's crew shall be subject to ILO Convention (no. 180) or any subsequent amendments thereto regarding rest hours.

(e) Provided Port Authorities and shore labour unions permit, the Vessel's crew shall assist the Merchant, as servants of the Merchant, in unlashing heavy lifts over 20 metric tons unless otherwise agreed. Use of the Vessel's crew shall be subject to ILO Convention (no. 180) or any subsequent amendments thereto regarding rest hours.

Time used for unlashing, unsecuring and deck cleaning shall count as laytime or time on demurrage.

(f) If Port Authorities or shore labour unions compel the Vessel to employ shore labour and/or equipment, any charges for such labour and/or equipment, whether used or not, shall be for the Merchant's account.

(g) Total laytime allowed at the Discharging Port as stated in Box 9, Saturdays, Sundays (or their local equivalents) and holidays included.

Time shall count at the Discharging Port as from the moment the Master tenders Notice of Readiness. Time used in moving from any place of waiting to the discharging berth and/or any preparation time for the Vessel to be ready for discharging shall not count. Should the Cargo not be unlashed, unsecured and discharged and the Vessel cleaned within the agreed laytime, demurrage shall be paid *per* day or pro rata at the rate as stated in Box 18. Laytime shall not count and if the Vessel is on demurrage, demurrage shall not accrue for time lost by reason of deficiency of the Master, officers or crew or strike or lockout of the Master, officers or crew or by reason of breakdown of the Vessel or its equipment.

(h) All Bills of Lading shall be marked: 'free-out'."

"15. *Liner-out hook

If Box 9 states 'Liner-out hook':

(a) Unless the nature of the Cargo or any other reason relating to the Cargo dictates the use of a specific discharging berth or place, the Carrier shall select, arrange and nominate the discharging berth.

(b) If time lost under clause 16 is due to port congestion the Merchant shall not be liable for the first consecutive seventy-two (72) hours of waiting time after the Carrier has tendered Notice of Readiness.

(c) The Cargo shall be received by the Merchant alongside the Vessel at his risk and expense, within reach of the Vessel's gear unless otherwise stipulated by the Carrier, and in the sequence and manner required by the Carrier.

(d) The Cargo shall be unseafastened, unlashed and discharged by the Carrier. Hooking-off charges shall be for the Merchant's account. If the custom of the port is for all stevedoring costs for discharging to be charged to the Carrier, 50% of such stevedoring costs shall be borne by the Merchant as hooking-off costs.

(e) The Cargo shall be received by the Merchant as fast as the Vessel can discharge, including, if required by the Carrier, outside ordinary working hours notwithstanding any custom of the port, in the Master's option during day, night, Saturdays, Sundays (or their local equivalents) and holidays included. For any time lost, unless caused by reason of deficiency of the Master, officers or crew or strike or lockout of the Master, officers or crew or by reason of breakdown of the Vessel or its equipment, detention at the rate as stated in Box 18 or pro rata and, if applicable, stand-by costs of stevedores, shall be paid by the Merchant.

**Clauses 14 and 15 are options. State in Box 9 which option shall apply. If Box 9 is left blank then Clause 14 shall apply*."

Clauses 16 and 17: provisions common to both "free-in" and "liner-in hook" options

7.154 Section (5) concludes with the discharge port version of the swell, port congestion and time waiting to berth provisions. These are identical save that, as the notes explain: "when the cumulative time lost exceeds an agreed number of days the carrier has the right to sail and discharge at another port instead of terminating, as the latter would not at that late stage be a meaningful option to the carrier."

"**16.** Time lost due to swell, port congestion and/or in waiting for discharging berth on Vessel's arrival at or off the port or so near there unto as she may be permitted to approach will count as laytime or be charged as time for which damages for detention are due at the rate as stated in Box 18. Time lost due to swell and/or in waiting for berth not to count if the Carrier selected the discharging berth as *per* sub-clause 15(a).

17. In case cumulative time lost due to swell, port congestion and/or waiting for discharging berth and/or for the Merchant's arrangements to receive the Cargo is over the number of hours stated in Box 20 (or if Box 20 is not filled in then seventy-two (72) hours shall apply) the Carrier shall have the option to order the Vessel to leave the port and discharge (part of) the Cargo in a port at the Carrier's option. The Carrier may agree at the Merchant's request to continue to wait and such waiting time shall count towards laytime or as time on demurrage or detention (at the rate as stated in Box 18). Such agreement by the Carrier to continue waiting shall not be considered as a waiver of any of his rights under this Charter Party, including his rights under this Clause 17, and the Carrier shall at any time remain entitled to order the Vessel to leave the port and discharge (part of) the Cargo in a port at the Carrier's option.

If the Carrier exercises his option at any time to order the Vessel to leave the port and discharge (part of) the Cargo in a port at Carrier's option, the Carrier's obligations under this Charter Party shall be deemed to be fulfilled and the Merchant shall be liable to pay any additional costs incurred by the Carrier and accrued demurrage or damages for detention. The Carrier's rights under this Clause 17 shall be without prejudice to any claim the Carrier may have against the Merchant under this Charter Party."

Clause 18: freight, demurrage and detention

"18. Freight/Demurrage/Detention

(a) The freight stipulated in Box 15 shall be paid within three (3) banking days after completion of loading or no later than prior to the commencement of discharge at the first Discharging Port, whichever occurs first. The freight shall be deemed earned upon completion of loading and shall be non-returnable whether the Vessel and/or Cargo is lost or not lost. The freight shall be paid in full without any deductions in the currency and to the Carrier's bank account stated in Box 16. Freight shall not be considered paid until received into the Carrier's bank account.

(b) Any sums for demurrage and/or detention shall be payable on receipt of the Carriers' invoice by the Merchant. Payments shall be made to the Carrier's bank account as stated in Box 16."

7.155 This freight provision is similar to that contained in other voyage charterparties: see eg Clause 4 of Gencon 1994. It provides for freight to be deemed earned on completion of loading as under clause 12 of the "Heavycon 2007" form (as to which see above). Payment is to be made the earlier of three banking days after loading or immediately before discharge commences. This is to reflect the frequency of very short-haul heavylift carriage: "However, unlike GENCON 1994, a grace period of three banking days after completion of loading has been included. In the event of a laden passage shorter than 3 days the merchant is required to pay freight no later than at breaking bulk."

Clause 21: terminal charges

"21. Terminal Charges

All terminal charges, including but not limited to wharfage, handling, storing, receiving, delivering, truck loading/truck unloading and towage of cargo, shall be for the account of the Merchant. If these charges are invoiced to the Carrier, then the Merchant shall promptly reimburse the Carrier."

7.156 This clause reinforces the basic division of ship and shore responsibilities. The merchant bears all shore costs charged by the loading or discharging terminal used, even if these are invoiced to the vessel or the owners in respect of wharfage or other matters.

Clause 23: part cargoes

"23. Part Cargoes

If this Cargo is one of several cargoes carried by the Vessel at the same time and the Vessel is diverted on account of ice, impediment to canal transit, or other risks for which diversion is authorised; or delayed in connection with canal transit; or subject to additional premia for transit of war risk zones, or the Cargo is subject to canal costs, or cargo dues, duties, taxes and other charges as agreed in Box 17; or bunker price adjustment; then all resulting sums and demurrage which Owner is thereby entitled to recover from multiple cargo interests, shall be apportioned based on the ratio of the freight tonnage (as defined in clause 3 (Cargo Description) of this Cargo to the total freight tonnage of all cargoes which are simultaneously so affected."

7.157 As noted above, the "Heavyliftvoy" form was designed for the "general" heavylift cargo trade and, to this end, it "contemplates that the carrier will, unless otherwise agreed, use the vessel to carry cargoes for other merchants at the same time as the cargo agreed for the merchant under the contract." As with the "Heavycon" form, the parties are to agree whether the cargo is a sole or part cargo (in the latter case the owners having rights to call at other ports and to re-stow the cargo: see clause 1(c) considered above). In addition, where they do so, demurrage and extra charges incurred in respect of various matters which would affect all of the various part cargoes equally, namely canal transits and ice and war risks, are to rateably apportioned between the cargoes by reference to the proportion which the cargo in question bears to the other affected cargoes, by tonnage.

Clause 24: taxes, dues and charges

"24. Taxes, Dues and Charges

(a) On the Vessel – The Carrier shall pay all dues, duties, taxes and other charges customarily levied on the Vessel, howsoever the amount thereof may be assessed.

(b) On the Cargo – The Merchant shall pay all dues, duties, taxes and charges levied on the Cargo at the port of loading/discharging, howsoever the amount thereof may be assessed.

*(c) On the Freight – Taxes levied on the freight shall be paid by the Carrier or the Merchant as agreed in Box 17.

(d) Canal costs – The Merchant shall pay any canal dues levied on the Cargo as well as any extra costs levied on the Vessel due to the nature of the Cargo.

**If Box 17 is not appropriately filled in, then the Merchant shall be liable for freight taxes under Sub-clause (c)*."

7.158 As with most other BIMCO forms, "Heavyliftvoy" seeks to address in advance the allocation of responsibility for any taxes, levies or other charges which may be incurred during and as a result of the service or carriage. The wording of clause 24 is based in part on that in clause 13 of the Gencon 1994 form (as to which see *Cooke*, para. 40.1). The basic division in paras. (a) and (b) of making each party responsible for the taxes etc. which are levied on its property, however they may be calculated is adopted: so a tax levied on the vessel as a vessel tax but which is calculated by reference to the value of the cargo is one which is borne by the owner. Paragraph (a) refers to charges "customarily levied on the Vessel" whereas para. (b) merely refers to charges "levied on the Cargo." No explanation is given for this insertion in the explanatory notes, which is similarly present in the corresponding provisions in clause 13 of Gencon 1994. It seems to draw a distinction between any charge which is levied on cargo and only charges which are usually or typically levied on the vessel. Consideration might be given to "balancing" the provision either by the deletion of "customarily" from para. (a) or the addition of it to para. (b). Paragraph (c) provides that the charterer is liable for taxes on freight payable to the owner absent contrary indication in Box 17: this mirrors clause 13(c) of Gencon 1994.

7.159 To reflect the possibility of canal transit and corresponding canal tolls and dues, para. (d) is a bespoke provision to "Heavyliftvoy." An example given in the explanatory notes shows how it is intended to operate: "a surcharge, which is based on cargo characteristics, is added to the vessel's transit fee when a vessel is passing the Suez Canal with cargo over 250t, floating cargoes, and cargo that extends beyond the vessel's side, etc."

Clause 25: bunker price adjustment

"25. *Bunker Price Adjustment

The freight stated in Box 15 is calculated on the basis of the bunker price on the date of the Charter Party quoted by the source stated in Box 19(i) based on the grade of bunkers and the bunker port stated in Box 19(ii) and (iii) (the 'Charter Party Price'). The freight rate shall be adjusted on the basis of the difference, if any, between the Charter Party Price and the bunker price from the same source for the same grade and bunker port on the date of the bill of lading (the 'Bill of Lading Price'). The freight shall be adjusted using the bunker adjustment factor set out in Box 19(iv). If the difference between the two prices is less than or equal to 5% no adjustment shall apply.

For each US$ 5 or part thereof whereby the Bill of Lading Price is more than 5% higher than the Charter Party Price, the Carrier shall increase the freight by the percentage stated in Box 19(iv).

For each US$ 5 or part thereof whereby the Bill of Lading Price is more than 5% lower than the Charter Party Price, the Carrier shall reduce the freight by the percentage stated in Box 19(iv).

**This Clause is optional. If Box 19 is not appropriately filled in, this Clause shall not apply*."

7.160 Voyage charterparties do not traditionally contain any mechanism for the adjustment of the freight once it has been agreed, still less any mechanism for adjustment to reflect the increased or cheaper cost to the owner of bunkers for the laden voyage. "Heavyliftvoy" is therefore highly unusual in this respect. While the intention behind clause 25 is not stated in the explanatory notes, it is presumably to reflect the fact that where the heavylift cargo is the sole cargo or one of a small number of large part cargoes, although the parties contract on the "Heavyliftvoy" form for reasons of cargo liabilities and loading/discharging options, their position is in some respects similar to that of the charterer and owner under the "Heavycon 2007" form where such adjustment is a standard term (see clause 16). Nevertheless, for good reason it is suggested, clause 25 is an optional provision and will not apply unless the parties choose it expressly by filling out Box 19.

7.161 Clause 25 provides for a much more complicated procedure for an adjusting payment between the parties to reflect the upward or downward movement in the price of bunkers, subsequent to the conclusion of the charterparty. The usual BIMCO provision, found in the other BIMCO forms considered in Chapters 4 and 5, to reflect movements in bunker prices is contained in clause 16 of "Heavycon 2007" and is discussed above and in those chapters. It provides simply for an adjustment payment comparing actual costs of bunkers used compared with the prices inserted in Part I as the prices prevailing at the time of the conclusion of the charterparty: the extra bunker cost or saving is paid one way or the other.

7.162 This may be a workable solution in the case where a tug is hired for a single towage, an offshore supply vessel is chartered in for a single service, or a super heavylift vessel is chartered for a sole cargo, where the two parties can inspect and exchange the necessary underlying documents (in the case of the "Towcon 2008" form, "(iv) The log book of the Tug and copies of the bunker supplier's invoices shall be conclusive evidence of the quantity of bunkers consumed and the prices actually paid": see clause 4(a), considered in Chapter 4 above). However, under a voyage charterparty where there are several charterers or shippers, each in respect of their own parcel or part cargo, it may have been thought better to provide a self-operating adjustment mechanism. This seems to be reflected in the following comment in the notes: "A method of adjustment of bunker costs is followed which reflects that part cargoes are carried for various merchants and over various stretches of the vessel's total voyage." The "Heavyliftvoy" provision accordingly provides for the parties to state a "benchmark" figure by reference to an independent source when concluding the contract and then to compare this with the figure produced by that source on a later date, which is taken as the bill of lading date. The difference, if sufficiently appreciable to trigger an adjustment, is then used to operate a pre-agreed adjustment.

7.163 The explanatory notes set out a very detailed exposition of the practical operation of the clause and for convenience this is reproduced below. Where the cargo shipped under a "Heavyliftvoy" charter is a sole cargo, the parties might usefully consider whether, if a bunker price adjustment is required, they should not delete clause 25 and revert to the same and much simpler formula used in clause 16 of the "Heavycon 2007" form.

"At the time of concluding the contract the parties need to agree what bunker price should apply to the contract as a "benchmark" for the bunker price adjustment. It may be that they wish to refer to bunker prices quoted by Bunkerworld or Platts or similar organisation. The name of the bunker price source must be entered in Box 19 along with the name of the port to be used for the benchmark and the grades of bunkers. For example, a completed Box 19 could appear as follows:

19. Bunker price adjustment (Cl. 25)

Source of bunker price: BUNKERWORLD
Bunker port: ROTTERDAM
Grade of bunkers (IFO 380/IFO 180/MDO/MGO): IFO 380
Freight adjustment percentage: 2%

If the HEAVYLIFTVOY charter party was dated 24 July 2009 then the price for IFO 380 in Rotterdam quoted by Bunkerworld would be US$402.00 *per* metric tonne.

To calculate any change in freight rate, the parties establish the Bunkerworld quoted price for the same grade of bunkers at the same port on the date of the bill of lading and work out the difference between the prices. Example:

Source	Port	Grade	Price at fixture date (24/7/09)	B/L date price (12/11/09)	$ Difference	% Difference
Bunkerworld	Rotterdam	IFO 380	$402.00	$430.00	+$28.00	7.00%

As can be seen from the table above the percentage difference for IFO 380 between the two dates is 7.0%. The adjustment mechanism contains a 5% buffer zone. So if the percentage difference is less than 5%, the freight is not adjusted. However, in this example the difference is greater than 5% and therefore the adjustment factor can be applied to increase the freight payable.

The point at which the adjustment factor applies is a figure 5% higher than the charter party price – in this case $402 + 5% = $422. For each $5 difference (or part thereof) between $422 and the bill of lading price ($430) the freight rate is to be adjusted by the agreed freight adjustment percentage (in this case 2%). The example below shows how the freight should be adjusted:

Original price plus 5% buffer = $402 + 5% = $422 (buffer price)

→*Difference between bill of lading price and buffer price = $430 – $422 = $8*

→*Freight is to be adjusted by 2% for each $5 (or part thereof) increase above buffer price, so in total, 4%:*

→*So, if original agreed freight = $110, adjusted freight = $110 + 4%*

→Conclusion: The freight rate is to be increased by $4.4 *per* tonne to $114.4

Similarly, a reduction in bunker price more than 5% below the charter party price will result in a discount for the merchant in respect of a reduced freight rate."

Clause 26: deck cargo

"26. Deck Cargo

Unless otherwise agreed and stated in Box 5, column 6, the Carrier shall have the option to ship the Cargo on deck.

(a) For non-US trade when cargo is carried on deck the following shall apply: Cargo carried on deck is at the Merchant's risk and the Carrier shall not be responsible for any loss or damage or delay to the Cargo whatsoever and whether due to negligence of whosoever or howsoever arising and by whosoever caused.

(b) For US trade when cargo is carried on deck the following shall apply: Cargo carried on deck is at the Merchant's risk as to all perils whatsoever inherent in such carriage and in all other respects subject to the terms of this Charter Party/Bill of Lading and the provisions of the Carriage of Goods by Sea Act of the United States, approved 16 April, 1936, notwithstanding Section 1(c) thereof.

and the Bill of Lading issued hereunder shall be so claused.

If Box 5, column 6 is not appropriately filled in, then the Carrier shall have the option to ship the Cargo on deck in accordance with this Clause."

7.164 While, in the super heavylift sector for which "Heavycon 2007" is intended, cargoes are almost invariably carried on deck, many heavylift cargoes in the midsized sector can be shipped on or under deck. Furthermore, where the heavylift vessel carries part cargoes (as for example on a semi-liner service), it will often be the case that cargo is discharged and re-stowed to permit a different stowage configuration necessitated by cargoes shipped on board at intermediate ports. The nature of the trade therefore usually requires the carrier to have considerable liberty as to where on the vessel to place the cargo and whether, if necessary, to move the cargo. Reflecting this, clause 26 provides that the carrier has the right to carry on or under deck in his choice, unless the parties specifically restrict the carriage to under deck (by marking Box 5, column 6 with a clear ouster of the right, viz. as the explanatory notes recommend by typing or writing in "NO"). The clause provides for two regimes, depending on whether or not the carriage is to be regarded as US trade. While "US trade" is not defined, it appears that it is intended to apply to any trade to which the US Harter Act would apply. The explanatory notes state in relation to clause 26(b):

> This important distinction has been made to reflect existing jurisprudence. The US Harter Act prohibits the carrier from relieving itself of liability for its own negligence. COGSA's exclusion of deck cargo from its coverage does not affect the applicability of the Harter Act in this respect to deck cargo. Although COGSA does not apply to deck cargo, the carrier may nevertheless include a clause in the bill of lading which makes COGSA applicable to cargo carried on deck. US courts have held that a clause making COGSA applicable to on-deck carriage does not violate the Harter Act and will be enforced. If the carrier does so, it will have the benefit of COGSA's defences and limitation of liability, such as the one-year statute of limitation, the error in navigation defence, and the $500 *per* package limitation.

7.165 In relation to clause 26(a) which applies to all other trade, the provision is a very common "at charterer's risk" form of provision.

7.166 This type of provision traditionally raises a number of difficulties in the context of ordinary voyage charterparties: see generally *Cooke*, para. 6.34 to which further reference should be made. In outline, the following points may be noted.

i Clause 26(a), by purporting not only to place the cargo at the charterer's risk, but also by seeking to exempt the owner from all liability in respect of the loss, damage or delay of the cargo "whether due to negligence of whosoever or howsoever arising and by whosoever caused", seeks to avoid the limited construction given to "bare" charterer's "risk" type provisions (see eg *Svennsons v Cliffe* [1932] 1 KB 490).

ii The addition of those or similar words has been held to be effective to exclude liability of the owner for negligence causing the loss of cargo: *The Danah* [1993] 1 Lloyd's Rep 351 and *Travers v Cooper* [1915] 1 KB 73.

iii It is debatable whether the words are sufficient to exclude liability on the part of the owner for the unseaworthiness of the vessel resulting from the manner of the stowage or the fact of the carriage of the cargo as deck cargo. In *Transocean Liners Reederei GmbH v Euxine Shipping Co Ltd (The Imvros)* [1999] 1 Lloyd's Rep 848, Langley J held at 853–854 that: "the words are clear. For cargo carried on deck the owners have no responsibility for loss or damage however caused. The exclusion covers any cause and there is no justification for excluding unseaworthiness as a cause." That decision was followed by Morison J in *Compania Sud American Vapores v ER Hamburg Schiff. (The Aconcagua)* [2006] 2 Lloyd's Rep 66 but was not followed by the Court of Appeal of Singapore in *Sunlight Mercantile v Ever Lucky Shipping* [2004] 2 Lloyd's Rep 174 (Singapore) where the words "howsoever caused" were held not sufficient to avoid liability for unseaworthiness through bad lashing of deck cargo; and see also the criticism of Baughen (2000) LMCLQ 295.

7.167 Clause 26 requires any bill of lading issued under the charterparty to be "so claused." This too gives rise to potential difficulties. The court has drawn a distinction between the effect of a "charterer's risk" and a "shipper's risk" clause. In the context of the former, which is the wording of clause 26(a), it is debatable whether if those words are to be incorporated into a bill of lading they would be read as operating as between the owner and the shipper or consignee or holder of the bill of lading: see *Cooke*, para. 6.34. While in the present wording in clause 26(a), the "risk" clause does not stand alone but is coupled with an exclusion of liability on the part of the owner, and this may lead to a different result, the following advice should nevertheless, it is submitted, be heeded (*Cooke*, para. 6.34):

> This uncertainty, and the complications discussed below, make it necessary that a properly worded disclaimer of responsibility for deck cargo is inserted in the bill of lading, if that is the desired result.

Clause 27: bills of lading

"27. Bills of Lading

(a) The Carrier shall issue a Bill of Lading as *per* the HEAVYLIFTVOYBILL form which shall incorporate all terms, conditions, liberties, clauses and exceptions of this Charter Party, including the Dispute Resolution Clause. The Merchant shall indemnify the Carrier against all consequences or liabilities that may arise from signing bills of lading other than the HEAVYLIFTVOYBILL to the extent that the terms of such bills of lading impose or result in the imposition of more onerous liabilities upon the Carrier than those assumed by the Carrier under this Charter Party.

(b) If the Merchant requires pre-paid Bills of Lading, freight shall be received by the Carrier prior to release of Bills of Lading.

(c) The Master shall deliver the Cargo only upon presentation of duly endorsed original Bills of Lading."

7.168 Clause 27 is a standard form bill of lading clause, which appears to be modelled on clause 10 of the Gencon 1994 form. The stated intention is that if a bill or bills of lading are to be issued they will be issued on the tailor-made BIMCO form, the "Heavyliftvoybill" form (a facsimile of which is at Appendix 10). Accordingly, at first sight, the right of the charterer to present bills for issuance and the obligation on the owner to issue bills is strictly limited to bills on that form. No other bill can be required by the charterer: *Garbis Maritime v Philippine National Oil (The Garbis)* [1982] 2 Lloyd's Rep 283.

7.169 Oddly, the clause goes on then to provide for an indemnity where the carrier issues a bill of lading on terms different from the prescribed "Heavyliftvoybill" form and which are more onerous than those terms. It is difficult to see the purpose or justification for this provision. Given that under clause 27 only the owner ("the carrier") may issue the bills and there is no right to charterers to issue them on behalf of the owners and given that the owners are entitled to refuse to sign anything other than a bill on the prescribed form, the indemnity seems otiose. Worse, it potentially gives rise to an argument to the charterer that while the clause contemplates the issuance of a bill on the prescribed form it nevertheless expressly contemplates (and therefore must be taken to permit) the issuance of other form bills as requested by the charterer for which the indemnity is the owner's protection, on the ground that the indemnity must be taken to have a real purpose and is only found in charterparties which permit a discretionary range as to the types and forms of bill: see clause 9 of the Gencon 1976 and clause 10 of the Gencon 1994 forms. The explanatory notes state that the purpose was one *ex abundante cautela*:

> the standard indemnity provision to protect the carrier in cases where a different and more onerous bill of lading is issued than the HEAVYLIFTVOYBILL. In such cases the merchant is liable to indemnify the carrier to the extent the terms and conditions of the issued bill of lading are more onerous than those of the pre-printed bill of lading. Although it is intended that bills of lading under HEAVYLIFTVOY are issued on its own named bill of lading it is felt to be prudent to include this extra safeguard for the carrier.

7.170 Unfortunately, the excess of caution in this case risks having produced the very situation against which it was designed to guard. There would be much to be said, if the intention is to limit any bills issued under this form to "Heavyliftvoybills" only, to limit clause 27(a) to its first sentence and to delete the rest of paragraph (a). There are many other forms of charterparty in general and specific trades which prescribe a specific bill form and permit nothing else (eg the Centrocon, Norgrain, Asbatankvoy and Nubaltwood forms) and they are perfectly workable: see *Cooke*, para. 18.185 *et seq*.

7.171 The law on bills of lading issued under voyage charterparties is extensive. It is covered in considerable detail in *Cooke* in chapter 18, *passim*.

Clause 30: merchant's option to terminate

"30. *Merchant's option to terminate

(a) Notwithstanding anything else provided herein, the Merchant shall have the right to terminate this Charter Party prior to the Vessel's arrival at the first loading port, place or area against payment of the applicable amount stated in Box 24 less any prepaid freight.

(b) Furthermore, the Merchant shall have the right to terminate this Charter Party after the Vessel's arrival at the first loading port, place or area but not later than upon commencement of loading against payment of the applicable amount stated in Box 24 plus compensation for all time spent at the first loading port, place or area at the demurrage or detention rate stated in Box 18 as well as the actual expenses incurred by the Carrier in preparation for the loading, less any prepaid freight.

**If Box 24 is not appropriately filled in, this Clause shall be deemed to be deleted*."

7.172 Voyage charterparties do not traditionally contain any right on the part of the voyage charterer to terminate the charterparty at will before the vessel arrives to load, still less after

arrival and before loading. It is a feature of the BIMCO forms that provision is made for rights of termination: see for example, the similar provision in clause 21 of the "Heavycon 2007" form. Clause 30 is an optional provision and unless Box 24 is duly filled out will not apply.

Clause 34: clause paramount

"34. BIMCO General Clause Paramount

The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924 ("the Hague Rules") as amended by the Protocol signed at Brussels on 23 February 1968 ("the Hague-Visby Rules") and as enacted in the country of shipment shall apply to this Contract. When the Hague-Visby Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination shall apply, irrespective of whether such legislation may only regulate outbound shipments. When there is no enactment of the Hague-Visby Rules in either the country of shipment or in the country of destination, the Hague-Visby Rules shall apply to this Contract save where the Hague Rules as enacted in the country of shipment or if no such enactment is in place, the Hague Rules as enacted in the country of destination, compulsorily applicable to shipments, in which case the provisions of such Rules shall apply.

The Protocol signed at Brussels on 21 December 1979 ("the SDR Protocol 1979") shall apply where the Hague-Visby Rules apply, whether mandatorily or by this Contract.

The Carrier shall in no case be responsible for loss of or damage to cargo arising prior to loading, after discharging, or while the cargo is in the charge of another carrier, or with respect to deck cargo and live animals."

7.173 The intention behind the drafting of the "Heavyliftvoy" form was to create a heavylift transportation contract which "embraces the conventional cargo liability regimes of the Hague/Hague-Visby Rules." This is given effect by a Clause Paramount, in very common form which, as applicable, are to "apply to this Contract." As between the owner and the charterer, the likely result of this is that the Rules apply not only in relation to the carriage of the cargo but also to other services rendered under the contract, if any (cf. the application of the Rules in the time charterparty context to ballast voyages and periods between consecutive voyages: see *Adamastos Shipping Co v Anglo-Saxon Petroleum Co* [1959] AC 133 and *Cooke*, para. 85.19). The subject of the application and content of the Rules is beyond the scope of this work: see generally *Cooke*, chapter 85; *Carver on Bills of Lading* (4th edn, 2017), chapter 9 and *Scrutton on Charterparties and Bills of Lading* (23rd edn, 2015), chapter 23.

Clause 39: BIMCO clause for special US Customs requirements

"39. BIMCO U.S. Customs Advance Notification/AMS Clause for Voyage Charter Parties

(a) If the Vessel loads or carries cargo destined for the US or passing through US ports in transit, the Carrier shall comply with the current US Customs regulations (19 CFR 4.7) or any subsequent amendments thereto and shall undertake the role of carrier for the purposes of such regulations and shall, in their own name, time and expense:

Have in place a SCAC (Standard Carrier Alpha Code);
Have in place an ICB (International Carrier Bond); and
Submit a cargo declaration by AMS (Automated Manifest System) to the US Customs.

(b) The Merchant shall provide all necessary information to the Carrier and/or its agents to enable the Carrier to submit a timely and accurate cargo declaration.

The Merchant shall assume liability for and shall indemnify, defend and hold harmless the Carrier against any loss and/or damage whatsoever (including consequential loss and/or damage) and/or any expenses, fines, penalties and all other claims of whatsoever nature, including but not limited to legal costs, arising from the Merchant's" failure to comply with any of the provisions of this Sub-clause. Should such failure result in any delay then, notwithstanding any provision in this Charter Party to the contrary, all time used or lost shall count as laytime or, if the Vessel is already on demurrage, time on demurrage.

(c) The Carrier shall assume liability for and shall indemnify, defend and hold harmless the Merchant against any loss and/or damage whatsoever (including consequential loss and/or damage) and any expenses, fines, penalties and all other claims of whatsoever nature, including but not limited to legal costs, arising from the Carrier's failure to comply with any of the provisions of Sub-clause (a). Should such failure result in any delay then, notwithstanding any provision in this Charter Party to the contrary, all time used or lost shall not count as laytime or, if the Vessel is already on demurrage, time on demurrage.

(d) The assumption of the role of carrier by the Carrier pursuant to this Clause and for the purpose of the US Customs Regulations (19 CFR 4.7) shall be without prejudice to the identity of carrier under any bill of lading, other contract, law or regulation."

7.174 In the aftermath of 9/11, the United States, as part of its panoply of enhanced security measures designed to protect the United States from terrorist activity or the supply of terrorist personnel or *matériel* by sea and through ports, introduced a system of advance notification of cargo destined for or carried through US ports which involves the carrying of a carrier codified identity, the possession of financial security in the form of a bond and the provision of cargo details by an automated manifest system by amendment of and addition to the US Customs Regulations (19 CFR 4.7). The US authorities declined to provide a general ruling as to the identity of the carrier, but instead suggested that the parties themselves agree who should be responsible. Various shipping bodies recommended that, in order to avoid uncertainties and disputes as to who should act as the carrier, owners entering into new charterparties or other transportation fixtures should insert a clause making it clear who would comply with the Regulations, including the filing of the manifest, SCAC (Standard Alpha Carrier Code), and ICB (International Carrier Bond).

7.175 Since a voyage charterparty is a contract of carriage, it is more sensible in general for owners to assume the obligation of the carrier for the purposes of the US Customs Regulations. BIMCO responded to this by drawing up in 2004 a standard clause which provides that the owner (the carrier under "Heavyliftvoy") is to be "the carrier" for the purposes of 19 CFR 4.7, for the provision of all necessary information by the merchant to the carrier for these purposes and a set of broad mutual indemnities by each party of the other in respect of any loss or damage which the other may sustain as a result of the party's failure to discharge its defined responsibilities. For more background on the clause, see BIMCO's Special Circular No. 2, 2004, 28 April 2004. Nevertheless, there will be cases where voyage charterers sometimes prefer to assume this responsibility, particularly if they already have their own SCAC and an ICB in place. In this event, clause 39 will need to be amended.

PART D. THE "PROJECTCON" FORM

7.176 A major part of heavylift transportation by sea is carried out by heavylift operators using very large specialised barges (or other forms of floating transportation unit; the term "barge" will be used hereafter for convenience) of a size and design which allow cargoes to be loaded and discharged by ro-ro methods or skidding on or which are semi-submersible allowing float on/float off loading and discharging and which are often of shallow draught. These are towed by the same operator, usually employing its own dedicated tug fleet. The term "project cargo" is frequently used to describe any shipment of cargo which cannot be containerised or otherwise packaged for ordinary carriage and which is considered "out-of-gauge." This includes cargo which is exceptionally heavy, long, wide or composed of complex components that must be disassembled, shipped and reassembled. Traditionally most project cargo operations involve heavy equipment for the oil and gas sector as well as construction industries and civil engineering.

7.177 As described above, the "Projectcon" form was specifically designed by BIMCO as a new knock-for-knock form of charterparty to cover the contractual requirements of providing a tug and barge for the carriage of a project cargo and to replace the attempts by operators to provide a suitable contract either by adapting a single BIMCO form such as "Towcon" or

"Supplytime" which was not suitable for the special characteristics of the service involved or by constructing a composite contract using multiple forms, typically "Towcon" for the tug and "Bargehire", "Heavycon" or "Supplytime" for the barge (which was often a heavylift barge). Its full title is therefore "Special Projects Charter Party.

7.178 Given that, as BIMCO states, "The new contract brings together all the key elements from the variety of BIMCO forms previously used and distils them into a single comprehensive form", for the present purposes of this work and of a commentary on the "Projectcon" form, there is a considerable degree of overlap with forms already considered in detail elsewhere in this work. This is particularly so with the newer "Heavycon 2007" form which has been "aligned" (as BIMCO has put it) in many respects to reflect the approach and wording of "Projectcon." Since, despite the differences in the two methods of transportation envisaged by the two forms of heavylift vessel and tug and barge combination, at bottom the transportation or carriage is of a particular cargo type with its special risks and peculiarities in terms of loading, carriage and discharging, this underlying similarity is perfectly explicable. As one very well-placed commentator described it at the time of its launch: "Projectcon" is the "Heavycon equivalent for Tug and Tow" (Barbara Jennings at the Standard Club's Offshore Forum 2004). However, as pointed out above (for example in relation to the obligation of seaworthiness under clause 2(b) of "Heavylift 2007") the attempt to streamline the two forms may sometimes put the goal of mutual consistency ahead of practical legal applicability. That said, much of the analysis of provisions of "Heavycon 2007" in Part A above will apply equally to the analysis of "Projectcon" below.

7.179 For the purposes of the commentary below, provisions common to other BIMCO forms which do not call for any reconsideration are first identified and suitable cross-reference made and the text then focuses on the specifically "Projectcon"-type provisions and any aspects of common form provisions which require particular mention in the context of the tug-and-barge combination to be employed for the carriage or transportation.

7.180 A facsimile of the form is set out in Appendix 10.

The structure of the form

7.181 Like the other BIMCO standard form contracts considered above, "Projectcon" consists of the customary two parts. There are no annexes providing for the specific definition or detail of the vessels, although these are sometimes added by way of an additional "vessel description" clause supplementing the short-form description given in Box 5. In common with all of the other BIMCO forms already considered, there is the usual "precedence" provision at the conclusion of Part I:

> In the event of a conflict of conditions, the provisions of PART I and any additional clauses, if agreed, shall prevail over those of PART II to the extent of such conflict but no further.

Part I and the "boxes"

7.182 Part I consists of 29 boxes in which the parties are to set out the specifically agreed features of the transportation operation. These are self-explanatory and follow in broad terms the usual types of information and representations given in the other BIMCO heavylift forms, both "Heavycon 2007" and "Heavyliftvoy." The following specific boxes, given the particular nature of the carriage of the cargo using a tug and barge combination, may be noted:

i Box 4: this provides for the identification of the "Vessels" to be provided by the owner and therefore provides for the giving of the "name, type and other particulars" of the tug (or tugs) and of the barge (or barges) which are to perform the transportation. Often, the owner will have published data or information sheets for the various vessels which form

part of his fleet and these can be referenced or appended as necessary by an additional clause. When filled out, this box will result in the items of description given becoming terms of the contract. They will almost invariably be regarded as intermediate or innominate terms, breach of which gives a right to damages and in certain cases may give rise to a right to terminate. Whereas in the simple towage context, it is the details of the tug and her towing capabilities that are the most important and which potentially give rise to claims (for example, when the towage takes longer than anticipated) in the project cargo context, the precise dimensions, draught, and deck area (amongst other characteristics) of the barge will be equally, if not perhaps more, important.

ii Box 5: this provides for a detailed description of the cargo to be given by the charterer, including, of particular importance in any heavylift operation, the maximum weight of the cargo. A feature of the information to be stated by the charterer in Box 5 is the inclusion of a requirement for a statement of "maximum expected draft of laden barge." Under clause 11(e), considered below, the charterer warrants that "the full description of the cargo mentioned in Box 5 is correct." "Cargo" is a defined term under clause 1, being defined as "any goods or equipment or other items mentioned in Box 5" and does not apply to the barge, which is one of the "Vessels." Further, the statement as to the expected draft of the laden barge is, self evidently, not a statement as to the cargo and, accordingly, may not be one which the charterer warrants is accurate under clause 11(e). As a piece of information, it may be capable of calculation by the charterer based on the weight of the cargo, the capacities of the barge and any ballasting considerations affecting the barge but it seems curious to include this information as part of the description of the "cargo."

iii Box 13: in the event that the charterer wishes under clause 4 to use the barge's own equipment (such as fitted cranes and winches) and the barge's ballasting systems, this provides for the remuneration payable to the barge engineer who is to be provided by the owner to operate or oversee the operation of the same.

iv Box 16: this requires the marine warranty surveyor to be identified and a timetable to be given for the obtaining of his approval of the vessels and the transportation. As with the corresponding provision under "Heavycon 2007" (clause 11), clause 14 of "Projectcon" provides for the appointment of a marine warranty surveyor to carry out an independent technical assessment of the feasibility and safety of the proposed transportation and of the suitability of the vessels to carry it out. The carrying out of a tug and barge transportation of a heavylift type cargo or project cargo raises particular potential problems, since the operation is not only a heavylift type operation but also a sophisticated towage operation with handling and control aspects which require a specialised assessment of expected sea and weather conditions during the intended transit.

Commentary on the provisions of Part II

7.183 Part II consists of 33 standard form BIMCO provisions. Many provisions have been previously discussed elsewhere in this book in the commentary on other BIMCO forms and the now customary suite of standard BIMCO clauses for voyage charterparties. Others are mirrored in substantially identical terms in the "Heavycon 2007" form, bearing in mind that in 2007 this form was remodelled in many respects to follow the earlier "Projectcon" form. Reference may be made to the appropriate chapter dealing with these provisions where they occur in these other forms and to Part B above. The standard form provisions comprise the following "Projectcon" clauses:

i *Clause 14*: the common form "Canal Transit" clause. This in substantially the same terms as the version of the clause found in "Heavycon 2007" (clause 15 considered above) and it therefore adopts the same approach to free time during canal transit and

blockage of canals provided for in other similar forms: cf. clause 7 of "Towcon 2008" (discussed in Chapter 4) and, albeit a rather simpler version, clause 22 of "Heavyliftvoy.

ii *Clause 15*: a bunker escalation provision in identical terms to that contained in clause 16 of "Heavycon 2007" (considered above). The mechanism adopted by the "Projectcon" is therefore the much simpler one of a payment of the actual additional cost or saving in respect of bunkers, rather than freight adjustment mechanism as adopted in the "Heavyliftvoy" form. Note that, like clause 16 of "Heavycon 2007", clause 15 of "Projectcon" makes no provision for what documentary materials are to be used to make the calculation and this could be usefully addressed (eg "The log book of the Tug and copies of the bunker supplier's invoices shall be conclusive evidence of the quantity of bunkers consumed and the prices actually paid").

iii *Clause 16*: the "BIMCO Ice Clause for Voyage Charter Parties" (cf. clause 8 of "Towcon 2008") amended, as the explanatory notes state: "to reflect the specific characteristics of the PROJECTCON Charter, such as 'Vessels' being used in plural and the fact that bills of lading are not be issued under PROJECTCON."

iv *Clause 17*: a "Dangerous Cargo" clause in identical terms to clause 18 of "Heavycon 2007" (considered above).

v *Clause 18*: the standard form lien clause as contained in clause 19 of "Heavycon 2007."

vi *Clause 19*: a "Substitution" clause giving the owner the right to substitute another vessel for either or both of the tug and the barge. Cf. clause 20 of "Heavycon 2007", considered above.

vii *Clause 20*: an optional clause providing for termination by the charterer at will on payment of an agreed sum, such termination permitted either before the arrival of the vessels or after arrival and before loading: cf. clauses 21 and 30 of "Heavycon 2007" and "Heavyliftvoy" respectively.

viii *Clause 23*: an "Insurance" clause in materially identical terms to clause 26 of "Heavycon 2007" (considered in Part B).

ix *Clause 24*: a Himalaya clause in similar terms to clause 26 of "Towcon 2008", considered in Chapter 4 above.

x *Clause 25*: the common form "Both-to-Blame Collision Clause" (cf. clause 27 of "Supplytime 2005"). The explanatory notes comment: "Although this standard clause rarely comes in to play, its incorporation into charterparties is required under the Club rules of P&I Clubs in the International Group of P&I Clubs. Consequently, the clause is included in PROJECTCON."

xi *Clause 26*: the standard "General Average and New Jason Clause" providing for the adjustment of general average in London (by default but with the right to opt for adjustment elsewhere) and under the 1994 York-Antwerp Rules (cf. clause 26 of "Supplytime 2005").

xii *Clause 27*: the current BIMCO war risks clause "War Risks (Voywar 2004)" (cf. clause 27 of "Towcon 2008").

xiii *Clause 28*: an interest provision providing for interest to be payable on overdue amounts at a rate to be agreed in Box 26; cf. clause 33 of "Heavycon 2007" which simply provides for interest at 1.5% *per* month or *pro rata*.

xiv *Clause 29*: headed "Agency" is a provision providing for the appointment of agents by the carrier at both the ports of loading and discharge; it adopts the same curious language used in clause 34 of "Heavycon 2007", rather than the clearer language used in clause 20 of the "Heavyliftvoy" form ("The carrier shall appoint and pay for agents at ports of loading and discharging").

xv *Clause 30*: a brokerage provision in the same terms as clause 35 of "Heavycon 2007" considered above.

xvi *Clause 31*: the standard "BIMCO Dispute Resolution Clause" providing for three options as to law and jurisdiction with the default position being English law and LMAA arbitration and making provision for mediation (cf. clause 33 of "Towcon 2008"). Once again, unlike the latest form of this clause (as seen in the new 2010 "Wreck" forms, eg clause 21 of "Wreckhire 2010" considered below in Chapter 9) there is no provision for the more recent LMAA Intermediate Claims Procedure (introduced in 2009 to supplement the existing small claims procedure) and reference is only made to the LMAA Small Claims Procedure. Consideration might be given to an amendment to clause 31 so as to allow the full flexibility of the current LMAA procedures to be available to the parties.

xvii *Clause 32*: the current "BIMCO ISPS/MTSA Clause for Voyage Charter Parties 2005" (cf. clause 32 of "Towcon 2008").

xviii *Clause 33*: the BIMCO "Notices Clause" (cf. clause 35 of "Towcon 2008").

xix *Clause 43*: a further variant of BIMCO's usual "Entire Agreement Clause" (cf. clause 38 of "Supplytime 2005").

7.184 As before, given that these provisions have been discussed earlier, no reference is made to them below and reference may be made to the corresponding treatment of these provisions where they occur in the forms cross-referenced above.

7.185 It may be noted that, while the other two forms making up the suite of contracts for the transportation of heavy and voluminous cargoes each contain an entire agreement clause (see clause 41 of "Heavycon 2007" and clause 43 of "Heavyliftvoy") and a corresponding provision has now been inserted in the latest revision of "Supplytime 2005" (see clause 38, considered in detail in Chapter 5 above), "Projectcon" contains no corresponding provision. This is probably due to the age of the form, since BIMCO appears to have begun to adopt such clauses in the revisions of forms dating only from 2005 onwards. Consideration should therefore be given to the insertion of a suitably drafted clause, bearing in mind the case law and the recent consideration of such clauses in, for example, *Axa Sun Life Services Ltd v Campbell Martin Ltd* [2011] EWCA Civ 133 (considered above in Chapter 5).

Definitions

"1. Definitions

In this Charter Party the following words and expressions shall have the meanings hereby assigned to them:

'Owners' shall mean the party identified in Box 2.
'Charterers' shall mean the party identified in Box 3.
'Vessels' shall mean the tug and barge as described in Box 4.
'Cargo' shall mean any goods or equipment or other items described in Box 5.
'Loading Port' shall mean the port(s) or place(s) specified in Box 6.
'Discharging Port' shall mean the port(s) or place(s) specified in Box 7.
'Transportation' shall mean the carriage of the cargo, including the towage of laden barges and, as the case may be, the loading, discharge and all other operations connected therewith."

7.186 The definitions reflect the special nature of the form with the term "the Vessels" meaning the combination of the tug and the barge. However, as will be seen below, different treatment is given in certain cases to each vessel with specific provisions in "Projectcon" dealing with the tug and the barge separately (see, for example, clause 9 in relation to "Commencement of Loading/Cancelling" where the readiness of the barge, not the tug, is fixed as the critical element in delivery for laytime and cancelling). A similar definition of "the Transportation" to that which is given in clause 1 of the "Heavycon 2007" form, amended to reflect the towage element in a

"Projectcon" operation, is given. As with the "Heavycon 2007" form, any mobilisation or demobilisation of the vessel is deemed included in the freight, the notes stating:

> attention is drawn to the definition of "Transportation" which does not include mobilisation/demobilisation elements. This is because these are considered as items built into the freight rate. The risk of delay in connection with mobilisation and demobilisation rests with the owners under PROJECTCON and such risk is intended to be reflected in the agreed freight.

The contractual voyage

"2. Voyage

(a) It is agreed between the Owners and the Charterers that, subject to the terms and conditions of this Charter Party, the cargo shall be transported by the Owners from the Loading Port(s), or so near thereto as the Vessels may safely get and lie always safe and afloat, to the Discharging Port(s), or so near thereto as they may safely get and lie always safe and afloat.

(b) The Owners shall exercise due diligence in making the Vessels seaworthy before and at arrival at the Loading Port. The Owners shall perform the voyage with due despatch unless otherwise agreed."

7.187 The clause reproduces clause 2 of "Heavycon 2007" (which was modelled on this earlier "Projectcon" provision), as to which see above.

Lying aground

7.188 Paragraph (a) provides for the voyage to be between named ports with an alternative open to the owner of stopping short if arrival, loading or unloading at the primary destination is prevented for an unreasonable time (excluding temporary obstacles such as tides and weather): *Dahl v Nelson* (1880) 6 App Cas 38 and *Cooke*, para. 5.102. As with the "Heavycon 2007" form, no express warranty of safety is given as to the named ports or places specified in Boxes 6 and 7, however, as part of the charterer's duty to nominate the precise loading or discharging place under clause 5(a) and (d) respectively the charterer is required to nominate only a place which is "always safe and accessible and suitable for the [loading/discharging] operation." A common feature of operations involving the use of submersible or semi-submersible barges to load or discharge by "float on/off" is the grounding of the barge. At common law, the requirement of safety implies that the vessel will lie always safely afloat and the taking of the ground (even if the vessel is designed for it and the bottom is safe for her) is only permitted under an express provision (or a custom of the port): see *Hale Brothers Steamship Co v Paul* (1914) 19 Com Cas 384; *Tregeglia v Smiths Timber* (1896) 1 Com Cas 360. The explanatory notes state as follows:

> The provision does not allow the vessels to lie "safely aground" – only "safely afloat." This is because the nature of the trade would require the preparation of the bed for the barge to sit aground. Consequently, if a situation arises where the parties want the barge to be able to sit safely aground they must provide for this separately in a rider clause.

7.189 While this is not correct, since the express wording applies not to the primary port named in either Box 6 or 7 but only to the place falling short of that port at which the owner in the appropriate circumstances elects to load or discharge (see *Dahl v Nelson* (1880) 6 App Cas 38 and *Cooke*, para. 5.102), the position at common law by which lying afloat is implied would apply in respect of the express warranty of the safety of the places nominated by the charterer under clause 5. It is necessary, as BIMCO suggests, to agree specifically to any grounding which it is proposed or envisaged that the barge will perform. A suitable "NAABSA" (not always afloat but safely aground) provision is usually found, frequently coupled with a rider clause making specific requirements as to the preparation of the bottom upon which the barge is to lie and with provision for a berth or bottom survey to be provided to the owner for its prior approval, not to be unreasonably withheld or in the owner's discretion (depending on the owner's position).

7.190 "*NAABSA*": In this connection, it may be noted that BIMCO has developed a recommended "NAABSA" wording to be added to the berth provision of its standard form charterparties, with the additional wording planned to take into consideration issues of indemnity for loss or damage arising out of lying aground (issued in 2013). As the explanatory notes to the wording state, this can usefully form the basis of negotiation: "The NAABSA wording is meant to be a starting point for negotiations and should be used only when NAABSA has been agreed by the owners. Should the owners have any reservations as to where they would accept NAABSA, ie, particular ports and places, they should ensure that such reservations are incorporated into their charter party." The BIMCO recommended NAABSA clause is as follows and seeks to cover: (a) the charterer's right to request that the vessel takes the ground, (b) a corresponding duty on the charterer, as the notes state, "to confirm in writing that vessels using that particular berth or place will lie on a soft bed and that vessels can lie safely aground, ie without suffering damage", and (c) an indemnity for the owner as the quid pro quo for the right, including an indemnity for costs and time of an underwater survey to check for damage, if so required by the owners' classification society:

> Always subject to the Owners' approval, which is not to be unreasonably withheld, the Vessel during loading and/or discharging may lie safely aground at any safe berth or safe place where it is customary for vessels of similar size, construction and type to lie, if so requested by the Charterers, provided always that the Charterers have confirmed in writing that vessels using the berth or place will lie on a soft bed and can do so without suffering damage.
>
> The Charterers shall indemnify the Owners for any loss, damage, costs, expenses or loss of time, including any underwater inspection required by class, caused as a consequence of the Vessel lying aground at the Charterers' request.

The obligation as to the seaworthiness of the vessels

7.191 Clause 2(b) provides for an obligation to exercise due diligence to make the vessel seaworthy at the outset. However, the precise time at which the obligation is to operate is stated to be "before and at arrival at the Loading Port." Under the original "Heavycon" form, the wording provided that the vessel was to be seaworthy "at the commencement of the voyage" which as BIMCO recognised "would be the usual assumption under a conventional voyage charter party" and which is broadly akin to that provided for in other voyage charterparties (eg clause 1 of the Asbatankvoy form) and in Article III, Rule 1 of the Hague Rules (as to the obligation of due diligence in general, see Cooke, *Voyage Charters* (4th edn, 2014), para. 85.98 *et seq*.). A different approach was taken when drafting "Projectcon" in 2004 and, as seen above in the commentary on "Heavycon 2007", the decision was taken by BIMCO "to align the Sub-clause [viz. clause 2(b) of 'Heavycon 2007'] with the wording used in 'Projectcon'." The appropriateness and legal effect of that wording in the "Heavycon 2007" context, given that the wording was specifically devised for "Projectcon" and for tug-and-barge transportation rather than heavylift vessel operations, is considered above in Part B.

7.192 As noted in that commentary, the apparent thinking behind a warranty of seaworthiness, which applies only when the tug and barge arrive for loading at the loading port and not at any time thereafter, is specific to the nature of the vessels (or at least, of one of them, namely the barge) being chartered under the "Projectcon" form. As the explanatory notes to that form state:

> The special nature of the trade means that there are circumstances where the barge, after arrival at the loading port, is not in a seaworthy condition due to the loading operations. This applies not only to submersible barges when submerged but also to ballastable barges. In the latter case a ballastable barge may be trimmed excessively or ballasted below her marks to accommodate the requirements of the loading operation.

7.193 As discussed above in relation to the "Heavycon 2007" form, the concept of "seaworthiness" is related to the type of vessel and the operations which it performs. To take an example: a bunker barge hired for the static storage of fuel for an offshore project and which it was intended

will be permanently anchored in a sheltered bay as a fuel storage facility and will not be required for navigation is "seaworthy" for the service if she is in all respects fit for the storage of fuel; for the sea and weather conditions which she is expected to encounter in the storage operation at the place where she is to be anchored and for vessels to lie alongside to load and discharge fuel. She is not required to be capable of navigation, at least save for shifting and ordinary re-anchoring manoeuvres in the bay. It would be otherwise if the barge were chartered for the provision of a shuttle service carrying bunkers and fuels between various places in an offshore site, covering a wide sea area. The requirement of seaworthiness would then require the vessel to be fit to withstand the incidents of the various sea voyages about the field which she was to perform.

7.194 The same analysis should apply where the requirements of the barge provided by the owner are different at different stages of the service. If a barge is designed to submerge wholly or partly for loading and to be capable of then being ballasted back for ocean towage and for the carriage of the cargo, then the requirements in terms of seaworthiness are different at each of the two stages. When the barge is in its submerged or semi-submerged state, before being ballasted back to a "sailing" condition once loaded, then, provided that it is structurally sound and with her ballasting machinery and any deck equipment properly functioning, it is seaworthy as it is capable properly or performing the particular process of loading in accordance with ordinary industry standards for float on loading and it is capable of receiving the cargo safely and surfacing or ballasting back with it safely. The temporary instability of the barge at times during the loading operation is capable of being accommodated within the concept of seaworthiness since the barge's stability requirements for the purposes of the specialised loading may be quite different from those which would apply once the barge is laden and ballasted back to a sailing condition in readiness for the sea passage and the towage of her commences. The barge may be fit for loading and for the loading procedure, even if down to or temporarily out of her marks, being the service then immediately required of her, and thereafter when ballasted for the sea passage be fit for the intended laden towage. BIMCO's explanatory note appears to contemplate seaworthiness as being a state solely referable to the fitness of the barge for the sea passage.

7.195 Even if the approach of fixing the time for seaworthiness to the time of the arrival of the "Vessels" at the loading port is justifiable in the context of the special considerations relating to the barge provided by the owners which are referred to by BIMCO in the passage just cited (but see further below as to this), under "Projectcon" the owner provides not only the barge but also the tug. Both of these comprise the "Vessels" referred to in clause 2(b) and, unlike elsewhere in the form where the barge is treated separately from the tug, clause 2(b) applies equally to both. It is difficult to see what the justification is for providing that the *tug* is required only to be seaworthy at the time she arrives at the loading port but not at any time thereafter, for example, over the period when the barge may require to be moved or manoeuvred for the loading operation and, more importantly, at the commencement of and for the towage itself, after the barge has been loaded. Under the equivalent warranty under "Towcon 2008", as set out in clause 19, the tug owner warrants that it "will exercise due diligence to tender the Tug at the place of departure in a seaworthy condition and in all respects ready to perform the towage", which envisages that the tug will be seaworthy for the towage operation at the time the towage connection is made and the towage is to begin, there being no intervening stage or operation between arrival and the commencement of the towage save for connection. The clause 2(b) approach is more difficult still to justify where the tug delivers the barge at the loading port and then leaves while the barge is loaded by the charterers (under clause 5) and then returns to take the barge in tow as often occurs and as the explanatory notes contemplate:

> In addition the owners may not necessarily be required to be in attendance during loading operations as the tug is not involved in this part of the procedure. However, after arrival at the loading port, the barge must be "towworthy", the responsibility of which rests with the party responsible for loading the cargo onto the barge – usually the charterers.

7.196 Is the tug required to be seaworthy only at the time of her first arrival at the loading port to drop the barge off, or at the time she returns to the loading port to take the barge in tow or at both times? Under clause 10(a), notice of readiness under the charterparty is to be given, unsurprisingly, when both "Vessels", tug and barge, "are ready to commence loading at the Loading Port" which would suggest that the warranty of seaworthiness of the tug applies only at the time of her first arrival although, under clause 9, the running of the laycan period and the availability of the charterer's right to cancel are hinged solely upon the "delivery" of the barge at the loading port by the tug, which might suggest that the later arrival of the tug to commence towage is the relevant time. The explanatory notes do not shed light on the problem, stating, somewhat confusingly:

> While the owners may not be able to guarantee the seaworthiness of the barge, they will still be in breach of contract if the lack of seaworthiness of either the tug or barge results in the owners not being able to fulfil their contractual obligations. As in TOWCON, the owners are only obliged to exercise due diligence to tender the tug at the place of departure in a seaworthy condition; but the tugowner gives no warranties, express or implied, beyond this point.

7.197 While drawing the parallel with the position under "Towcon 2008" (as considered above), the notes do not take account of the differences in a towage where the tug arrives to take the hirer's barge or other form of tow and is seaworthy at, effectively, the commencement of the towage, and a project cargo operation where the tug arrives with the barge and where the barge is loaded, often with some manoeuvring assistance from the tug but also sometimes in the absence of the tug, and the tug thereafter connects or returns to connect. There is a distinct lack of clarity as to precisely when the tug is to be seaworthy under clause 2(b). It would ordinarily be expected that the tug would be tendered on her arrival in a seaworthy condition, be seaworthy for any manoeuvring operations and be seaworthy for the towage at the time it commences. If the tug merely drops the barge off and subsequently is not involved until she returns to take up the laden barge, one would expect the tug to be seaworthy at this time rather than the moment of her first arrival.

7.198 Consideration should be given to a suitable amendment, in the light of the precise involvement of the tug and services to be rendered by her (in addition to the towage), to clarify the position. It is submitted that his would not materially alter the "balance" of the form but would merely make it clearer (cf. the opening comment in the explanatory notes: "incorporation of additional clauses, as with amendments to the standard text, may alter the balance of responsibilities and liabilities between the parties in the pre-printed form and, potentially, prejudice P&I cover"). At bottom, the owner is responsible for the seaworthiness of the vessels which it provides and their fitness for the transportation (and any other) service; compare the original "Heavycon" wording which provided that the vessel was to be seaworthy "at the commencement of the voyage" and the "Heavyliftvoy" wording stating "seaworthy before and at the beginning of the loaded voyage."

7.199 So much for the seaworthiness of the tug presented by the owner; what of the barge? The special considerations relating to the barge set out in the explanatory notes have been referred to above. As the note just cited states "the owners may not be able to guarantee the seaworthiness of the barge." This raises a number of issues. First, the owner can, and does, warrant the seaworthiness of the barge at the time of her arrival at the loading port in readiness for loading under clause 2(b) as it stands. That warranty would extend to the fitness of the barge for the ocean towage and for her loading, using whatever gear or equipment or features with which she is equipped for that process, eg ballasting for semi-submersible or submersible operations and cranes or winches. Secondly, the "Projectcon" form envisages the loading of the barge by the charterers, effectively on a "free-in" basis similar to that under the option in the "Heavyliftvoy" form (see clause 5(c), considered below) and "to the full satisfaction of the Owners and the Marine Warranty Surveyor." To that extent the charterer may be responsible for the stability of the barge during the

loading operation and, if it elects to use the ballasting equipment under clause 4(a), for ballasting her and otherwise readying her once laden for the towage under clause 4(a); however in submersible operations for "float on/float off" operations, it is the owner who is responsible for ballasting and this is included in the freight or demurrage under clause 4(c). Thirdly, once the loading and securing of the cargo is completed and the barge has been readied for towage, "Projectcon" is then silent as to who, if anyone, is responsible for the seaworthiness of the laden barge or, put another way, her tow-worthiness.

7.200 As to this, leaving aside stability and any particular aspects resulting from the barge being laden, one would expect that the owner would remain responsible for the seaworthiness of the barge as a barge for the towage; for example, as to her shell plating, her watertightness and fitness for navigation, and her fitness for towage such as the fastness of the towing connection points on deck. If, however, the barge is required only to be seaworthy on her initial arrival at the loading port as clause 2(b) provides, then the owner is under no obligation as to these matters at the commencement of the towage: if the plates spring and the barge is prone to leakage at some point after arrival of the barge, the owner's warranty apparently no longer applies.

7.201 When aspects of stability for the towage and matters affecting the tow-worthiness of the barge, resulting from the loading of the cargo and the ballasting of the tug for the towage, are concerned, the responsibilities of the parties are unstated.

7.202 In the usual towage context under the "Towcon" form, where the hirer provides the barge or other form of tow (and any cargo on it), the hirer is responsible for all aspects of her tow-worthiness. Clause 18(a) of "Towcon 2008" provides that "The Hirer shall exercise due diligence to ensure that the Tow shall, at the commencement of the towage, be in all respects fit to be towed from the place of departure to the place of destination." The responsibility for the stability of the barge and her ballasting or trimming is expressly addressed in clause 18(b): "The Hirer undertakes that the Tow will be suitably trimmed and prepared and ready to be towed at the time when the Tug arrives at the place of departure." The situation may be different in the "Projectcon" context, since not only is the barge provided by the owner, but the owner may be responsible for the ballasting operations where the barge is to be submerged for "float on/float off" loading under clause 4(c). In such a case, it is likely that there would be an implied obligation on the owner to carry out those operations exercising reasonable care. Further, if the old "Heavycon" regime could accommodate the heavylift vessel being seaworthy at the commencement of the voyage (which would have included her laden state and any stability considerations), it is difficult to see why the same should not apply, at least where the owner has not only provided the barge but also prepared it for the towage in the same way as an owner provides and prepares a heavylift vessel.

7.203 By contrast, where the charterer receives the barge from the owner and then loads and prepares it on its own for the towage under clauses 4(a) and 5(c), while it might be expected that the owner would remain responsible for the seaworthiness of the barge for navigation and towage as a barge at the commencement of the voyage (see above), it might also be expected that the charterer would be responsible for her fitness to be towed in her laden and ballasted condition, as under "Towcon 2008." The explanatory notes do not grapple either with the different responsibilities for barge and laden barge or for the different responsibilities where the barge is ballasted and trimmed by the owner and where she is ballasted and trimmed by the charterer. The assertion in the note, seen above, that:

> [h]owever, after arrival at the loading port, the barge must be "towworthy", the responsibility of which rests with the party responsible for loading the cargo onto the barge – usually the charterers

seems simplistic and omits to note that there is no warranty in "Projectcon" by the charterer as to tow-worthiness of the barge as there is in "Towcon 2008."

7.204 While it may be possible in the event of a casualty due to unseaworthiness of the barge, which results in the carriage being delayed or interrupted, to frame the liability in terms of a

breach by the owner or the charterer of an implied duty to load or ballast carefully, if there is to be a warranty of seaworthiness on the part of the owner as to both the tug and the barge under clause 2(b) at all, it is plainly preferable to have a clearly defined one which addresses the specific operation and the specific services which tug and barge are going to perform and which reflects which party is responsible for the tow-worthiness of the barge. Some suggestions as to possible alternative approaches to drafting have been considered in the commentary to clause 2(b) of the "Heavycon 2007" form in Part B above. These will require modification to reflect the tug and barge nature of a project cargo transportation operation under "Projectcon." It may, for example, be useful to make separate and specific provision for each vessel. Treating the "Vessels" in the same way for seaworthiness purposes, as "Projectcon" currently does is, it is submitted, inapt and a Procrustean solution to the problem, albeit one which results from the laudable attempt by BIMCO to weld together different forms in a simple way. A possible approach for consideration would therefore be as follows.

(1) To provide that the tug is to be seaworthy "before and at the commencement of the voyage": this will require the owner to exercise due diligence to make the tug seaworthy over the continuous period of time from the commencement of loading (at least) and during any pre-sailing operations in which the tug is involved and thence until the tug starts on the voyage: see by analogy *Maxine Footwear Co v Canadian Government Merchant Marine* [1959] AC 589. As noted above, it remains unsettled whether the warranty is engaged before the start of loading; cf. *Linea Naviera Paramaconi v Abnormal Load Engineering (The Sophie J)* [2001] 1 Lloyd's Rep 763 (tug and heavylift cargo carried by barge): see *Cooke*, at para. 85.101. Accordingly, if the tug is required to perform services after arrival at the loading port, both before and during loading, the wording would need to be expanded to cover the period from arrival onwards.
(2) To provide that the barge is to be seaworthy both on arrival and "before and at the commencement of the voyage" or "in all respects fit to be towed from the place of departure to the place of destination", expressly subject to (3).
(3) To make specific provision for the tow-worthiness of the barge in her laden condition to reflect the respective responsibilities of the parties for ballasting and trimming. The wording of the "Towcon 2008" form might usefully be adapted, eg "The owner [or the charterer, as the case may be, depending on who ballasted and trimmed the barge under Clause 4] undertakes that the barge will be suitably trimmed and prepared and ready to be towed at the commencement of the voyage."

7.205 In addition to the obligation of seaworthiness, whenever it attaches, the owner is also obliged to tender both vessels at the loading port "properly documented as regards trading certificates, classification and equipment": see clause 5(b).

The obligation of due despatch

7.206 Clause 2(b) contains an obligation of due despatch in the same terms as that in clause 2(b) of the "Heavycon 2007" form. The obligation of despatch is considered in the commentary to that provision above.

Clause 3: deviation and delays

"3. Deviation and Delays

(a) The Vessels have the liberty to sail without pilots, to tow and/or assist vessels in distress, to deviate for the purpose of saving life, to replenish bunkers and/or to deviate for the purpose of safety of the cargo, crew, Vessels and for any other reasonable purpose.

(b) Without prejudice to the provisions of Clause 26, should the Tug Master decide, for the purpose of the safety of the cargo, to deviate from the normal route which is stipulated in Box 7, or reduce speed, the Owners shall be entitled to receive from the Charterers additional compensation at the appropriate Delay rate as set out in Box 20 for all time spent by the Vessels at sea in excess of the time which would have been spent had such reduction of speed or deviation not taken place.

The time lost shall include all time used until the Vessels reach the same or equidistant position to that where the deviation commenced and the Charterers shall also pay all additional expenses incurred by such deviation including bunkers, port charges, pilotage, tug boats, agency fees and any other expenses whatsoever incurred.

The Owners shall give prompt notification of any delay or deviation to the Charterers and any claims for additional compensation shall be supported by appropriate documentation.

(c) If the Vessels for reasons beyond the Owners' control are being delayed at the Loading Port and/or the Discharging Port, including obtaining free pratique, customs and port clearance or other formalities, but not including delays caused by the late or non-arrival of the Tug, such delays shall be paid for by the Charterers at the Delay rate stipulated in Box 20."

7.207 Clause 3(a), (b) and (c) were, essentially, reproduced in clause 3 of the "Heavycon 2007" form when this was form redrafted, with the corresponding "Heavycon 2007" clause modelled on these provisions in "Projectcon." Reference is made to the commentary above in Part B. Unlike the "Heavycon 2007" form, no provision is made for the carriage of part cargoes under "Projectcon" and, accordingly, no liberty to deviate for the purposes of loading or discharging part cargoes is included (cf. clause 3(d) of "Heavycon 2007" considered above). The use in the project cargo trade of the tug and barge combination envisaged by the "Projectcon" form for the carriage of a part cargo, with other cargo loaded for another shipper or charterer, is apparently unusual. If this possibility should arise, it would be sensible to make suitable provision for a liberty to deviate following the "Heavycon 2007" term. The liberty to the owner to reduce speed or deviate "for the purpose of the safety of the cargo" at the cost of the charterer in delay payments for the additional time reflects the need for the tug, usually in bad sea conditions, to reduce speed so as to reduce stress and shock loading on the cargo and the cargo securing arrangements. However, such a liberty can give rise to abuse in certain cases and BIMCO had this in mind when coupling the liberty with an obligation on the owner to give notice at once to the charterer (enabling the charterer to check matters affecting the towage independently) and to provide supporting documentation subsequently (eg the log book and any messages between tug and owner).

> Clause 3(b) takes account of the situation where the tug master decides to deviate for the purpose of the safety of the cargo, in which case additional compensation can be claimed from the charterers. The owners are obliged to inform the charterers promptly of any delay or deviation. Any claim for additional compensation must be supported by appropriate documentation. This is done to protect the charterers against potential abuse by an owner who could reduce speed to save bunkers and still be compensated for the delay caused.

Clause 4: the parties' responsibilities for the ballasting of the barge for cargo operations

"4. Barge Engineer

(a) The barge machinery and ballasting equipment may be utilised by the Charterers subject to the Charterers always using a fully qualified barge engineer provided by the Owners. If the services of a barge engineer are required, the Charterers shall give the Owners 72 hours' notice in writing plus allowance for travelling time for each occasion the barge engineer is required. The Charterers agree to pay an amount *per* day as stated in Box 13 *per* barge engineer for a 10 hour working day including but

(b) The barge engineer shall be deemed to be a servant of the Charterers and the Charterers shall indemnify and hold the Owners harmless from and against all consequences and/or liabilities arising from the ballast operations.

(c) For float on/float off operations where the barge is to be submerged, all ballasting operations will be carried out by the Owners' personnel and the costs shall be included in the lumpsum price stated in Box 17 or delay rate stated in Box 20."

7.208 Clause 4 is a provision specific to "Projectcon." While it is headed "Barge Engineer", it deals generally with the parties' responsibilities for the all-important aspect of the ballasting of the barge for, during and after cargo operations (whether loading or discharging). As BIMCO states: "This Clause has been inserted to deal explicitly with liability for ballasting the barge and the use of barge engineers." The responsibility for ballasting and its impact on the seaworthiness of the laden barge and on its tow-worthiness has been considered in relation to clause 2(b) above.

7.209 The broad scheme of the clause is that the charterer has the option of using the barge's ballasting equipment under para. (a). If it exercises the option, it must use the services of a barge engineer provided by the owner (who will usually be the owner's barge captain) and the barge engineer so provided is deemed to be the charterer's servant under para. (b). The charterer in this case will be under an implied duty to the owner to ballast carefully and exercising reasonable care and the acts of the barge engineer will be regarded as its acts. Where the barge is presented for loading by the charterer under clause 5(c), the charterer will usually be responsible for carrying out the ballasting operations, although the owner may do so and will be responsible for carrying them out if the charterer does not do so. To reflect the delicacy of a "float on/float off" loading or discharging operation, under clause 5(c), lines 121–129 the owner carries out such an operation, at charterer's cost. This is reflected in terms of responsibility for ballasting under para. (c) which provides that in such a case the owner is responsible for ballasting. Similarly, it will owe an implied obligation to the charterer to carry out the ballasting exercising reasonable care and skill.

Clause 5: the parties' responsibilities for loading and discharging

"5. Loading and Discharging

(a) The Charterers shall have the cargo in all respects ready for the said voyage at the Loading Port on the delivery date.

The precise loading area or place within the agreed Loading Port, which shall be always safe and accessible and suitable for the loading operation, shall be nominated by the Charterers, always subject to the approval of the Owners and the Marine Warranty Surveyor. Such approval shall not be unreasonably withheld.

(b) The barge shall be delivered with cargo spaces free of any obstructions with all previous seafastenings removed and the Vessels shall be properly documented as regards trading certificates, classification and equipment. All other equipment shall be provided by the Charterers. When the cargo has been loaded and positioned, it shall be seafastened and/or lashed by the Charterers at their expense to the satisfaction of the Marine Warranty Surveyor.

(c) At the Loading Port, the cargo shall be delivered by the Charterers without delay at any time during day or night, Saturdays, Sundays and holidays included. The cargo shall be placed on board the barge and positioned by the Charterers to the full satisfaction of the Owners and the Marine Warranty Surveyor. The Charterers shall procure and pay for all labour and all necessary equipment other than that stated in Box 4. If agreed in Box 8 that the cargo shall be loaded by means of float-on method, the Charterers shall position the cargo over the barge's submerged deck to the full satisfaction of the Owners and the Marine Warranty Surveyor. The Owners shall attach lines to the cargo and shall position and secure the cargo over the submerged deck by using winches and/or tugs. The Charterers shall procure and pay the necessary labour and winchmen.

The Charterers shall procure and pay for workboats and tugs required for the positioning of the cargo. The Owners shall have the right to use such workboats and tugs for the loading operation.

(d) The precise discharging area or place within the Discharging Port and which shall be always safe and accessible and suitable for the discharging operation, shall be named by the Charterers well in advance of the Vessels' arrival, always subject to the approval of the Owners and the Marine Warranty Surveyor. Such approval shall not be unreasonably withheld.

At the Discharging Port the Charterers shall take delivery of the cargo without delay in accordance with Clause 5(e) at any time during day or night, Saturdays, Sundays and holidays included.

(e) Prior to actual discharge the Charterers shall, unless otherwise agreed, remove seafastening and/or lashing and prepare the barge for the discharge operation. The entire discharge operation shall always be done to the full satisfaction of the Marine Warranty Surveyor.

The Charterers shall discharge the cargo and shall procure and pay for the necessary equipment and labour for the discharge of the cargo.

If agreed in Box 9 that the cargo shall be discharged by means of float-off method, the Owners shall submerge the barge. The Charterers shall procure and pay the necessary winchmen.

The Charterers shall procure and pay for workboats and tugs required for discharging the cargo. The Owners shall have the right to use such workboats and tugs for the discharging operations. The Charterers shall take custody of the cargo as soon as afloat.

After the discharge operation the Charterers shall remove all remaining seafastening and/or lashing, unless otherwise agreed.

(f) Except as otherwise provided in this Charter Party, all agency charges, port charges (including compulsory charges for shore watchmen and garbage removal), light and canal dues, pilotage, local tug assistance, consular charges, and all other charges and expenses relating to the cargo and/or to the Vessels as a result of their employment hereunder shall be for the Charterers' account. All loading, seafastening, release, discharge and clean off costs shall be for the Charterers' account."

7.210 The explanatory notes state "In the tug and barge trade it is common practice that loading and discharging operations are carried out by and are the responsibility of the charterers. The only requirement that the owners have is to present the tug and barge load-ready at the nominated place." As considered above in terms of seaworthiness, while this may be an accurate summary of the position in relation to loading and discharging, sight should not be lost of the fact that "Projectcon" remains a voyage charterparty under which, subject to the knock-for-knock provisions in clause 21, the owner is also responsible for the safe carriage of the cargo to destination. Clause 5 reflects the basic practice by providing that, save for "float on/float off" operations, loading and discharging are to be carried out by the charterers. Clause 5 mirrors the similar allocation of responsibility contained in clause 4 of "Heavycon 2007", with necessary amendments to reflect the particular features of loading and discharging on and from a barge. In respect of "float on/float off" operations, clause 5(c) mirrors the similar provisions in relation to such operations for a heavylift vessel under "Heavycon 2007": see clause 4(c)(ii) and 4(f)(ii) considered above.

7.211 The charterers are required to carry out the loading and the discharging operation "to the full satisfaction of the Owners and the Marine Warranty Surveyor": see paras. (c) and (e). As to the effect of this qualification as regards the owner, at least where the owner involves itself in the operation and approves or requires changes to it as a condition of its approval, see above in relation to clause 2(b) of the "Heavycon 2007" form and the likely analogy with the voyage charterparty cases where the charterer involves itself in stowage being effected by the owners, eg *Upper Egypt Produce Exporters v Santamana* (1923) 14 L1 L Rep 159 and *Ismail v Polish Ocean Lines (The Ciechocinek)* [1976] 1 Lloyd's Rep 489.

7.212 Paragraphs (a) and (d) provide for the nomination by the charterer of the precise place for loading and discharging respectively and requires such places to be "always safe and accessible and suitable for" the operation: see above in relation to this requirement under clause 4(a) and (d) of "Heavycon 2007." Like the "Heavycon 2007" form, the place is required to be approved by the owner and the marine warranty surveyor.

7.213 The explanatory notes state "It is important to note that Clause 5 must be read in conjunction with clause 9 (Commencement of Loading/Cancelling) which regulates the owners' obligation to present the vessels to the charterers." This is not quite correct since clause 9, dealing with laycan periods and the charterer's right of cancellation, is based solely upon the delivery of the barge alone to the charterer. Given that it is the barge which is the unit on which the cargo is to be loaded by the charterer (or by the owner if by "float on"), for cancellation purposes it is the barge and the barge alone which is usually the charterer's sole concern. The tug's presentation by

the owner may be highly relevant if the tug is to be used to manoeuvre the barge but this is not dealt with by clause 9.

Clause 7: taxes

"7. Taxes

The Owners shall be responsible for the taxes stated in Box 24 and the Charterers shall be responsible for all other taxes.

In the event of change in local regulation and/or interpretation thereof, resulting in an unavoidable and documented change of the Owners' tax liability after the date of entering into the Charter Party, freight shall be adjusted accordingly."

7.214 This is a self-explanatory provision. The explanatory notes record:

> Clause 7 provides a balanced approach to the issue of taxes. A Box-reference is included in the clause whereby the owners are responsible for the taxes stated in the relevant box in Part I and the charterers are responsible for all other taxes. If the box in Part I is left blank the charterers are responsible for all taxes. This approach has been taken so that the tax burden is clear from the outset.

Clause 9: the period within which the barge is to be delivered and loaded, and the rights to cancel

"9. Commencement of Loading/Cancelling

(a) The barge shall be delivered to the Charterers within the period agreed in Box 10.

(b) The delivery period in Clause 9(a) shall be narrowed down by the Charterers to a delivery date in accordance with the delivery period notification schedule as stated in Box 11.

Each delivery window shall always be within the previously notified window and the number of days' notice shall always be counted from the first day in the window.

(c) Should the barge not be delivered according to Box 11 the Owners shall pay as compensation to the Charterers a daily rate as stated in Box 12 for each day, or pro rata for part thereof, counting from 2400 hours on the delivery date until the day and time delivery actually takes place, but in any event for not more than the number of days stated in Box 14. Such compensation shall be deemed liquidated damages and be the Charterers sole remedy for late delivery. Except for the purpose of assessing compensation in accordance with this Clause 9(c) the delivery date shall, in the event the Owners have given notice in accordance with Clause 9(e) below and the Charterers have not exercised their option of cancelling, be deemed to be the revised delivery date stated in the Owners' notice.

(d) Should the barge not be delivered latest the number of days stated in Box 14 after the delivery date the Charterers shall have the option of cancelling this Charter Party.

(e) If it appears that the barge will be delayed beyond the number of days stated in Box 14 after the delivery date, the Owners shall, as soon as they are in position to state with reasonable certainty the day on which the Vessels should be ready, give notice thereof to the Charterers asking whether they will exercise their option of cancelling and the option must then be declared within 48 hours of the receipt by the Charterers of such notice. If the Charterers do not then exercise their option of cancelling, the revised delivery date stated in the Owners' notice shall be regarded as the new delivery date for the purpose of this Clause.

(f) The Owners shall not be responsible for any loss or damages whatsoever incurred by the Charterers as a result of the Charterers cancelling this Charter Party as *per* Clause 9(d) nor shall the Owners be responsible for any loss or damages whatsoever suffered by the Charterers as a result of the failure of the barge to be ready for loading latest on the cancelling date agreed in Box 14 in the case that a new cancelling date has been agreed.

(g) If, for reasons beyond the Owners' control, the loading operation has not commenced within 14 days from tendering of notice of readiness, the Owners shall have the option of cancelling this Charter Party. If the Owners exercise their option of cancelling the Charter Party in accordance with this sub-clause, the Charterers shall pay to the Owners the applicable termination fee according to the provisions of Clause 20 in addition to any delay payment incurred. (h) If Box 14 is not appropriately filled in then 7 days shall apply."

7.215 This provision was used as the basis of the corresponding provision in "Heavycon 2007", clause 8, as to which see Part B above. There are two principal differences between the "Projectcon" and later "Heavycon 2007" versions.

7.216 The first is recognition of what may be special considerations in the project cargo trade. Under paras. (c) and (d) the late delivery of the barge is dealt with in two stages. The barge is required to be delivered at the loading port by the date narrowed down within the period stated in Box 10 by notices given by the charterer under Box 11. If it is not so delivered, the owner pays a daily rate compensation by way of fixed liquidated damages (and this is the charterer's sole remedy) for each day which elapses without the barge being delivered up to a maximum number of days stated by the parties in Box 14. Once this period expires without the barge being delivered, the charterer becomes entitled to cancel the charter, such cancellation being the sole right of the charterer. As the explanatory notes state:

> Non-delivery of a barge by the owners, or even a small delay, may have serious consequences for the charterers, not least when they are engaged in large construction projects in the offshore industry. However, it appears to be common practice in the industry to contractually limit the owners' liability towards the charterers in the event of non-fulfilment of their obligations to deliver the barge which results in claims made against the charterers by third parties. Therefore, contrary to what is normally found in BIMCO standard documents, this Clause effectively limits the owners' liability in the event they fail to deliver the barge as agreed. A distinction has been made between claims for damages caused by late delivery of the barge and those caused by non-delivery resulting in subsequent cancellation of the charter.

7.217 The second difference is that the so-called interpellation provision in para. (e), by which, if the owners are unable to meet the cancelling date, they are to give the charterers notice as soon as possible of the revised readiness date and request confirmation from the charterers as to whether they intend to cancel the charter, is a much clearer and more precise mechanism. This is because not only must the owner give notice that it is running late but it must also stipulate a new date on which the barge will be ready. If the charterer does not cancel, that date becomes the new cancelling date; cf. clause 9(b) of the Gencon 1994 form.

7.218 As with the "Heavycon 2007" provision, consideration should be given to limiting the owner to a single use of the "interpellation" provision in para. (e). Compare the wording of clause 9 of Gencon 1994 which makes this clear, as follows: "The provisions of sub-clause (b) [(e) in 'Projectcon'] of this Clause shall operate only once, and in the case of the Vessel's further delay, the Charterers shall have the option of cancelling this Charter Party as *per* sub-clause (a) of this Clause [(d) in 'Projectcon']."

Clause 10: notice of readiness and other advance notices

"10. Notices to the Charterers

(a) *Notice of Readiness*

The Owners shall give notice of readiness as *per* Box 15 advising when the Vessels are ready to commence loading at the Loading Port and when the Vessels are ready to commence discharge at the Discharging Port. All notices may be given at any time of the day, Fridays, Saturdays, Sundays and holidays included, whether within the official port limits or not, and notwithstanding hindrances as referred to in Clause 3(c).

(b) Prior to arrival at the Loading Port(s) the Owners shall keep the Charterers duly advised of the expected time of arrival of the barge.

(c) After departure from the Loading Port(s) the Owners shall give daily notice of expected time of arrival at Discharging Port(s)."

7.219 This clause mirrors clause 9 of "Heavycon 2007." Unlike clauses 5 and 9, which speak of the delivery of the barge alone, clause 10 refers to "when the Vessels are ready to commence

loading" (and "discharging"), referring to both the tug and the barge. This difference is not explained in the notes. Unlike clause 9 of "Heavycon 2007", clause 10 contains an additional obligation in para. (b) upon the owner to keep the charter advised of the imminent arrival of the barge. Presumably this was included, given what BIMCO has elsewhere on the notes recorded as a particular feature of project cargoes: "even a small delay, may have serious consequences for the charterers, not least when they are engaged in large construction projects in the offshore industry." For this reason, it is not uncommon to see a rider clause providing for a series of notices of expected time of arrival to be given by the owner, rather than leaving it general as para. (b) does.

Clause 11: marine warranty surveyor and approval of cargo and vessels

"11. Marine Warranty Surveyor(s)/Approval of the Vessels and Condition of the Cargo

(a) The Marine Warranty Surveyor(s) stated in Box 16 shall be appointed for this Transportation by the Charterers. If Box 16 has not been filled in, the Charterers shall appoint Marine Warranty Surveyor(s) acceptable to the cargo underwriters, subject to the Owners' approval which shall not be unreasonably withheld.

(b) The Marine Warranty Surveyor(s) shall approve the suitability of the Vessels for the Transportation as soon as possible, but no later than the date stated in Box 16. Should the Marine Warranty Surveyor(s) not give approval by the date stipulated in Box 16, either the Charterers or the Owners may elect to terminate this Charter Party and all freight paid or advanced by the Charterers to the Owners shall be promptly refunded.

(c) All documentation reasonably required of the Owners by the Marine Warranty Surveyor(s) for their approval of the Transportation shall be submitted to the Charterers at the earliest possible stage after this Charter Party is made, if not already submitted earlier. The Charterers shall pay all expenses relating to the production of documentation related to the cargo and/ or the Charterers' equipment. The Owners shall pay all expenses relating to documentation related to the Vessels and all other equipment being provided by the Owners in the performance of the Transportation.

(d) The Charterers shall arrange and pay for all the Marine Warranty Surveyor(s) services, including their approval of the Vessels and the Transportation.

(e) The Charterers warrant that the full description of the cargo mentioned in Box 5 is correct and further warrant that the cargo is in all respects tight, staunch, strong and in every way fit for the Transportation. Should the cargo and/or its description not be in compliance with the aforesaid then the Owners shall have the option to cancel this Charter Party. If the Owners exercise their option to cancel the Charter Party in accordance with this Clause the Charterers shall pay to the Owners the applicable termination fee according to the provisions of Clause 20."

7.220 This clause, save for minor drafting changes, is materially identical to clause 11 of "Heavycon 2007", considered in detail above. The clause is therefore similarly silent on the position if the surveyor refuses to give approval for the transportation. This is uncommon since the transportation has usually been carefully planned, assessed and its feasibility explored in detail by both charterer and owner prior to contracting and approval of the surveyor is either forthcoming or is conditional upon changes which he requires being made.

7.221 The importance of the role of the "MWS" has been considered above in relation to the "Heavycon 2007" form. In the tug and barge context, the risk assessment and risk management (including warranty survey) exercises for tug and tow transportation of items of project cargo will often be more involved. To give a random example of a major project cargo operation using tugs and barges (taken from *Oil and Gas Journal*, March 2007 and carried out by Mammoet Heavy Haul and Foss): the transportation from South Korea of 36 prefabricated modules (each measuring 280′ long × 45′ wide × 85′ tall and weighing up to 1,800 tons) involved in the construction of an LNG production facility at the northeast tip of Sakhalin Island in a remote, extreme environment in the Russian Far East, involving complex logistics as well as environmental constraints such as, typhoons and dangerous sea conditions requiring an ocean tow, followed by shallow water operations and the ballasting of the barges to allow float off. Accordingly, the "MWS"

assessment may range widely and will usually focus on a number of key practical and operational aspects of the towage risk, including the following:

i Suitability and condition of the barge, including assessment of adequate tonnage, dimensions, draft and freeboard, and the validation of up-to-date construction and safety certification (to be provided by the owner under clause 5(b)).
ii Power, operational capability and condition of tug(s), including adequate bollard pull, operational range (fuel/water/provisions) and validation of up-to-date construction, safety and communication certification.
iii Qualifications and experience of tug officers and crew, including specific towage training and hands-on experience.
iv Anticipated, seasonal weather conditions for the intended voyage – including the validation of any "weather windows", dates and/or conditions under which departure or continuance of voyage may be suspended.
v Passage planning and weather routing criteria for the intended voyage and the engagement of additional voyage risk management/risk monitoring procedures in relation to progress reporting weather conditions, port of refuge nominations/procedures.

Clause 12: freight

"12. Freight

The lumpsum freight shall be paid according to the schedule stated in Box 17. Each instalment shall be fully and irrevocably earned when due as set out in Box 17. Freight earned shall be non-returnable whether the Vessels and/or the cargo are lost or not lost and whether lost due to perils of the sea or howsoever. The freight and all other sums payable to the Owners under this Charter Party shall be payable without any discount, deduction, set-off, lien, claim or counter-claim, and shall be paid in the currency and into the Owners' bank account stated in Box 18."

7.222 Given that no bills of lading are to be issued, unlike the "Heavycon 2007" provision, which caters for freight to be payable on surrender of bills of lading if issued, clause 12 of "Projectcon" provides for freight in instalments. Otherwise, save in one respect, the clause mirrors clause 12 of "Heavycon 2007", as to which see Part B above. The difference lies in the fact that the "Projectcon" anti-deduction/no set-off wording is in the fuller and more comprehensive form found in other BIMCO forms, eg clause 3(c) of "Towcon 2008"; as to this wording and its effect, see Chapter 4 above.

Clause 13: free time and delay payments

"13. Free Time/Delay Payment

(a) The Charterers are allowed the free time stipulated in Box 19 in the Loading Port(s) and Discharging Port(s) and for canal transit if applicable, Fridays, Saturdays, Sundays and holidays included.

The free time at the Loading Port(s) shall start counting after notice of readiness has been tendered, in accordance with Clause 10(a), unless loading has commenced earlier and shall count until the cargo is in all respects fully seafastened on board the barge and approved by the Marine Warranty Surveyor(s).

The free time at the Discharging Port(s) shall start counting after notice of readiness has been tendered in accordance with Clause 10(a), unless discharge has commenced earlier and shall count until the cargo and all seafastenings/lashings are removed from the barge with deck cleaned and the barge is in all respects ready for sea.

Time lost in waiting for berth at loading or discharging port shall count as free time or time on delay. If the cargo is to be loaded and/or discharged by float-on/float-off method, time used for the actual loading and discharge operation (dry deck to dry deck) shall not count as free time or time on delay, unless such time used is due to reasons beyond the Owners' control.

(b) Delay payment shall be payable for all time used in excess of the free time.

The Delay rate for the Vessels is the amount stipulated in Box 20 calculated *per* day or pro rata for part of a day.

(c) Free time shall not count and delay payments shall not accrue for time lost by reason of strike or lockout of the Master, officers or crew or by reason of breakdown of the Vessels or the Owners' equipment.

(d) The delay payment and other amounts which are calculated at the delay rate fall due and are payable by the Charterers immediately upon presentation of the Owners' invoice to the Owners' bank account stipulated in Box 18.

Should more than 14 days of delay payment have accrued, the Owners are entitled to delay payment on account. The Owners may demand payment against presentation of invoices covering the first 14 days and thereafter for every 7 days."

7.223 In broad terms, clause 13 is reflected in the corresponding provision in the "Heavycon 2007" form. The terminology of free time and delay payments is used in place of laytime and demurrage in light of the practice in the tug and barge trade.

7.224 Special provision is however made for certain features of the barge operations. Under para. (a), time used in loading and discharging in "float on/float off" operations is not to count either as laytime or demurrage with the start and end points being defined as "dry deck to dry deck", which is a phrase which appears to be unique to the "Projectcon" form, viz. presumably (the explanatory notes are silent) from the moment after the barge begins her submersion operation and immediately before the barge's deck is first awash to the time immediately after the barge's decks are above water when she is being refloated in laden condition. This gives a precise and physically identifiable temporal point at both ends of the relevant "float on/off" operation.

7.225 The wording which follows, "unless such time used is due to reasons beyond the Owner's control" is not clear. Presumably what is meant is that during a normal loading or discharging operation of this kind, where the operation is interrupted due to circumstances falling outside the owner's control, time ceases to count. However, the relationship between that exception and the general exception to time running in para. (c) is not explained. Under para. (c) if there is a breakdown of equipment (eg ballasting pumps) which leaves the barge stuck on the bottom and unable to surface, time would not count during the period of subsea immobilisation. Under para. (a) time is not to count during the operation at all save where time is incurred during the operation "due to circumstances beyond the owner's control", which would suggest that, where some intervening circumstance arises, if it is beyond the owner's control, time counts but if it is not (for example a failure to repair a breakdown) it is to count. The explanatory notes are silent. As to "breakdown" generally: see the analogous concept of off-hire clauses such as clause 15 of the NYPE form: see Coghlin, Baker, *Time Charters* (7th edn, 2014), paras. 25.29 and 25.30 and, for example, *Giertsen v Turnbull* 1908 SC 1101 and *The Afrapearl* [2004] 2 Lloyd's Rep 305.

7.226 Paragraph (d) provides for a billing provision which is not found in clause 13 of the "Heavycon 2007" form.

Clause 21: "knock for knock" and mutual indemnities

"21. Liability and Indemnity

(a) *Definitions*

For the purpose of this Clause 'Owners' Group' shall mean: the Owners, and their contractors and subcontractors, and Employees, Servants or Agents of any of the foregoing.

For the purpose of this Clause 'Charterers' Group' shall mean: the Charterers, and their contractors, subcontractors, co-venturers and Charterers' customers with whom they have a contractual relationship in respect of the job or project on which the Vessels are employed, and Employees, Servants or Agents of any of the foregoing.

(b) Notwithstanding anything else contained herein, the Owners shall be liable for all loss or damage of whatsoever nature to or sustained by the Vessels, any liability in respect of wreck removal and the expense

of moving, lighting or buoying the Vessels, and any liability in respect of death or injury of any of the Owners' Group, and any liability in respect of other cargo on board not the subject of this Charter Party, all of which shall be for the sole account of the Owners without recourse to the Charterers, their servants or agents, and the Owners shall indemnify, defend and hold the Charterers harmless from and against any and all claims, losses, costs, damages and expenses of every kind and nature including legal expenses arising from the foregoing.

(c) Notwithstanding anything else contained herein, the Charterers shall be liable for all loss or damage or delay of whatsoever nature and howsoever caused to or sustained by the cargo, including any property operated, owned, hired and/or leased by any member of the Charterers' Group on board, and any liability in respect of wreck removal and the expense of moving, lighting or buoying the cargo, and any liability in respect of death or injury of any of the Charterers' Group, or the Marine Warranty Surveyor(s) personnel, and all liabilities consequent upon loss, damage or delay to the cargo, all of which shall be for the sole account of the Charterers without recourse to the Owners, their servants or agents or insurers and the Charterers shall indemnify, defend and hold all these harmless from and against any and all claims, losses, costs, damages and expenses of every kind and nature including legal expenses arising from the foregoing.

(d) *Consequential Damages*

Neither party shall be liable to the other for any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Charter Party, and each party shall protect, defend and indemnify the other from and against all such claims from any member of its Group as defined in Clause 21(a).

'Consequential damages' shall include, but not be limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance, whether or not foreseeable at the date of this Charter Party.

(e) Any provisions of this Charter Party to the contrary notwithstanding, the Owners shall have the benefit of all limitations of, and exemptions from, liability accorded to the Owners or chartered Owners of vessels by any applicable statute or rule of law for the time being in force, and the same benefits to apply regardless of the form of signatures given to this Charter Party."

7.227 Following a series of standard form provisions set out in clauses 14–20 covering canal transit, ice; bunker escalation, dangerous cargo, lien, substitution and rights of termination (as to which see above), clause 21 provides for liabilities and indemnities. Since the transportation of specialist project cargoes is closely akin to the heavylift trade and poses special risks both to cargo and the vessels employed, the "Projectcon" form adopts the traditional BIMCO knock-for-knock regime.

> Clauses 21(b) and (c) set out owners' liability and charterers' liability in a knock-for-knock liability regime (based on similar provisions found in SUPPLYTIME 89 and the new SUPPLYTIME 2005). This means that each party pays the claims of its own group following an accident. The principle applies irrespective of blame and seeks to save time and expense in connection with casualties.

7.228 Reference should therefore be made to the detailed analysis of clause 14 of "Supplytime 2005" in Chapter 5 above which analysis applies, *mutatis mutandis*, to clause 22 of "Heavycon 2007." Two points may be noted. The first is that the "Consequential Damages" provision in clause 21(c) is in the unsatisfactory "Supplytime 2005" wording and should be changed to a better formulation, either as adopted in the later "Towcon 2008" form (see clause 25(c)) or by the modern version adopted by BIMCO as seen in "Supplytime 2017" or "Windtime" or, if necessary, by a bespoke provision as described in Chapter 5. The second is that express provision is made for each party bearing the liability for wreck removal of its property. This recognises that, as with the sinking of a tow, in a casualty involving heavylift transportation by barge, the sinking of the very large item or items of cargo carried on a barge and which either breaks loose from the barge and is lost overboard or sinks following the capsizing of the barge is a serious risk. The solution adopted is therefore the same as in the context of simple tug and tow, where the tugowner and the hirer bear the liability of all matters relating to the wreck of the tug and the tow respectively (see eg clause 25(b)(i)(4) and (b)(ii)(4) of the "Towcon 2008" form). The "Heavycon 2007" form makes similar provision in its clause 22.

Clause 22: bills of lading, cargo notes and receipts

"22. Bills of Lading, Cargo Notes and Receipts

(a) No bills of lading will be issued for shipments under this Charter Party.

(b) The cargo shall be shipped on deck at the Charterers' risk and the Owners not to be responsible for any loss or damage or delay to the cargo whatsoever or howsoever arising and by whosoever caused.

(c) In the event of a conflict of conditions between this Charter Party and any cargo note or receipt issued in respect of any shipment hereunder, the terms, conditions, liberties, clauses and exceptions of this Charter Party, including Clause 31 (BIMCO Dispute Resolution Clause), shall prevail."

7.229 This provides that no bills of lading shall be issued. This reflects the fact that the charterer will usually own or be the sole person entitled to possession of the cargo at the discharging port. As the explanatory notes state:

> In the tug and barge sector it is common for the cargoes being carried to belong to the charterers and it is rarely the case that third party cargoes are carried. As a result, bills of lading or cargo receipts are rarely issued and Clause 22(a) reflects this practice. Should a cargo note or receipt be issued at the request of charterers then Clause 22(c) provides for the terms and conditions and dispute resolution clause of PROJECTCON to prevail in the event of a conflict of conditions.

7.230 The clause further provides, inevitably given the nature of the barge transportation of the cargo involved, that the cargo is to be carried on deck at the charterer's risk (as to the effect of this, even in the absence of the charterer bearing responsibility for loss of or damage to the cargo under the knock-for-knock provision in clause 21(b), see the commentary in relation to the "Heavyliftvoy" deck cargo clause, clause 26).

CHAPTER 8

Towage and salvage

PART A. PRELIMINARY CONSIDERATIONS

The historical relationship between towage and salvage

8.1 Before the advent of the steam tug, towage of one vessel by another as the rendering of a commercial service by a vessel dedicated to towage was all but unknown. All vessels were sailing ships and want of wind or the awkward set of the wind would affect all such vessels equally. While in port some small towage and manoeuvring would be carried out by oarsmen (as it was until relatively recently by the foyboatmen of the north-east coast eg at Shields: see *The MacGregor Laird* [1953] 2 Lloyd's Rep 259), towage in the sense in which it is understood today, and as has been considered in Chapter 1 above, did not exist.

8.2 This is not to say that towage as an operation did not exist. The towing of one vessel by another commonly arose, but it arose in the context of one vessel rendering assistance to another which was in distress, for example a vessel which had become stranded or which had lost her sails or her rudder. Towage rendered in such a context was usually simply a form, albeit perhaps the commonest form, of salvage assistance. Accordingly, towage when considered at law was considered in the context of a claim for salvage by one vessel in the respect of a salvage service rendered to another vessel the issues between the parties were whether the service satisfied the requirements for such a claim and what was the appropriate level of remuneration.

8.3 With the coming of the steam tug, towage as a commercial operation became possible and tug owners built up their businesses in ports and in the great rivers. Their tugs could be engaged by vessels for towage in all circumstances, the towage being constrained only by the initially limited boiler power of the early paddle tugs. The size and power of the tugs grew and tugs became involved in long ocean tows. The owners of the vessel towed were usually anxious to keep the tug within the terms of the contract which had been concluded between them, especially those as to remuneration. Equally, the tug owner would often be faced with weather and towing conditions which he had not anticipated and which made the bargain less advantageous; in such a case, he often sought to contend that the service which he had rendered was one which fell outside the contract and which entitled him to additional salvage remuneration.

8.4 With the development of the steam tug in the early part of the nineteenth century, the operations in which such tugs became engaged expanded from the mere expediting of the progress through the water of the sailing vessel under tow (cf. the definition given of towage by Dr Lushington in *The Princess Alice* (1849) 3 Wm Rob 138) to wider services concerning the handling of vessels. Historically, the emergence of the professional salvor, that is to say a person who keeps tugs and other vessels adapted for salvage work and ready for salvage work, followed the development of the large-scale towing companies. Such companies soon grew up in the large ports or where there were navigable waterways in which the sailing vessels particularly required handling and towing. By the end of the century, certain tug owners and operators had large fleets of tugs and such tugs were often very powerful. The tug operators were able to respond to requests for assistance from disabled vessels or vessels in distress and, indeed, to solicit salvage work from such vessels. Such salvage assistance was a useful adjunct to their usual field of operations and provided

employment for tugs which might otherwise be idle. Where the largest tug operators were situated, there grew up a commitment to and an experience in salvage which soon established their status as "professional" In Dutch and Scandinavian waters the tugs of three or four companies became established as the leaders in the provision of towage and salvage. The development of the salvage industry out of but as a part of the towage industry meant that increasingly towage and salvage contracts were kept separate. It also led to the growth of towage sub-contracts within the context of salvage as tug owners performing a salvage operation contracted in additional tugs from other operators.

The nature of salvage

8.5 Something as to the nature of salvage has been said above in Chapter 1. Salvage, unlike towage, has never been the subject of precise or satisfactory judicial definition. Indeed, it was stated by Lord Stowell in *The Governor Raffles* (1818) 2 Dods 14 at p. 17 that:

> It has been said that no exact definition of salvage is given in any of the books. I do not know that it has, and I should be sorry to limit it by any definition now.

8.6 However, the underlying principle upon which it operates has frequently been the subject of judicial comment. In *The Calypso* (1828) 2 Hagg 209 at pp. 217–218, Sir Christopher Robinson declared salvage "to be founded on the equity of remunerating private and individual services", while the distinguished American admiralty judge Story J stated in *The Henry Ewbank* (1883) 11 Fed Cas (Case No. 6376) 1166 at p. 1170:

> Salvage, it is true, is not a question of compensation *pro opera et labore* . . . it offers a premium by way of honorary reward, for a prompt and ready assistance to human sufferings for a bold and fearless intrepidity and for that affecting chivalry, which forgets itself in anxiety to save property, as well as life . . . a mixed question of public policy and private right.

8.7 The principal feature of salvage and its main point of distinction with towage is that salvage exists independently of any contract (although today commonly a form of contract is employed by salvor and salved such as the Lloyd's Open Form (LOF)) and depends on the satisfaction of various criteria before any claim to remuneration will lie. Notably, and in contrast with the concept of towage, the obligation of the vessel which is the subject of a salvage service to remunerate for that service is imposed by law irrespective of any contract. The rights of the salvor are, therefore, independent of any agreement while those of the tug provider arise solely *ex contractu*. The distinction between the two concepts was well-described in *The Troilus* [1950] P 92 by Denning LJ who, at p. 110, stated:

> The obligation on ship and cargo to pay for salvage services is imposed by law irrespective of any contract, express or implied, to that effect; whereas the obligation to pay for towage services arises, if at all, from a contract, express or implied, to pay for them. This difference points the way to the true distinction between the nature of the services. Salvage services arise when the ship is in such danger that the master has no real choice in the matter but must, as a reasonable man, accept them from somebody or lose his ship, or leave it in some remote place whereas towage services arise when the ship has reached such a position of safety that the shipowner has a freedom of choice either to refuse the service or to have repairs done locally or to contract for towage to get his ship home.

The non-contractual nature of the salvor's rights was also addressed by Sir James Hannen P in *The Five Steel Barges* (1890) 15 PD 142 at p. 146 in the following terms:

> The jurisdiction which the court exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract; but it does not necessarily do so. It is a legal liability arising out of the fact that property has been saved, that the owner of the property has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject.

See also *The Hestia* [1895] P 193 *per* Bruce J at pp. 199–200 and *The Tojo Maru* [1972] AC 242 *per* Lord Diplock at p. 292.

The 1989 Salvage Convention

8.8 The English law of salvage has been considerably affected by the recent enactment of the 1989 Salvage Convention by section 1(1) of the Merchant Shipping (Salvage and Pollution) Act 1994. That Act has been repealed and replaced by the new codification statute, the Merchant Shipping Act 1995. Pursuant to section 224(1) of the 1995 Act (corresponding to section 1(1) of the 1994 Act), the Convention is to have the force of law in the United Kingdom. The Convention represents a codification of the traditional English law principles of salvage together with the implementation of changes which have been adopted piecemeal over the decade since the revision of the Lloyd's Open Form of salvage agreement in 1980 relating principally to the remuneration of salvors in respect of services rendered in connection with environmental hazards. The Convention was brought into force on 1 January 1995 by the Merchant Shipping (Salvage and Pollution) Act 1994 (Commencement No. 2) Order 1994 (SI 1994 No. 2971). It is now the starting point in considering salvage questions. Since then there has been extensive revision and amendment of the Lloyd's Open Form (to produce LOF 2000, recently revised as LOF 2011) together with the introduction of the SCOPIC Clause (or "Special Compensation Protection and Indemnity Clause") in relation to the provision for special compensation to salvors for environmental services, in line with Article 14 of the Salvage Convention.

The essential criteria for salvage

8.9 The law of salvage and the application of salvage principles is beyond the scope of this book the leading texts are Kennedy and Rose, *Law of Salvage* (9th edn, 2017), edited by Dr Francis Rose, and *Brice on the Maritime Law of Salvage* (5th edn, 2012), being the original work of that title by the late Geoffrey Brice QC edited and extensively added to by John Reeder QC. One of the most compendious and authoritative guides to the 1989 Salvage Convention and to the interrelationship between the Convention and the English law of salvage as it stood before 1 January 1995 remains the commentary of Professor Nicholas Gaskell on the Merchant Shipping Act 1994 in *Current Law Statutes* (1994), Vol. II; see also valuable articles by Gaskell [1990] LMCLQ 352 and (1991) 16 *Tulane Maritime Law Journal* 1. However, a brief account of the general principles is necessary to put the relationship between towage and salvage service into context for the purposes of this book.

8.10 The principles of salvage will apply only where four essential requirements are met. From these requirements, the differences between towage and salvage are readily apparent.

Subject of salvage

8.11 There must be a recognised subject of salvage. Salvage can only arise if the service is rendered to an object or property which the law recognises as having to contribute salvage remuneration, whereas, as has been seen above, towage can be and frequently is performed in respect of a wide variety of water-borne objects. The most common objects recognised as proper subjects of salvage are ships and cargo. Following the enactment of the 1989 Salvage Convention, these subjects have been restated: "vessel means any ship or craft or structure capable of navigation", and "property means any property not permanently and intentionally attached to the shoreline" (see eg Article 1(b) and (c)). The older cases on the subject of salvage must be read with considerable caution in the light of these changes. Further, the definition of vessel in Article 1(b) of the Convention is different from that which has been adopted for purposes of Admiralty jurisdiction (ie section 24(1) of the Supreme Court Act 1981) and under section 313(1) of the Merchant Shipping Act 1995. There the definition of a "ship" is in terms of vessels used in navigation; the Salvage Convention definition is in terms of capability for navigation and is therefore wider. For the concept of a "ship" in these different contexts, see Chapter 13 below.

8.12 This requirement of being a proper subject of salvage gives rise to a potential problem in the field of towage where the tug may seek to assert salvage in relation to a service rendered to a water-borne object which does not correspond to a ship, vessel or boat – take for example a caisson or floating piece of machinery or a rig-part. The potential difficulties are exemplified by *The Gas Float Whitton* [1897] AC 337 (HL), but see especially the judgment of Lord Esher MR in the Court of Appeal, [1896] P 42 at pp. 63–64, which was approved by the House of Lords. In that case, the courts had to consider a service rendered to a gas float used as a fixed navigational aid which, while having a ship-shaped hull, was never intended for and was very ill-suited for navigation. It was held that the float was not a ship and therefore a service rendered to it was not salvage. Lord Esher MR stated that "whether salvage could be granted for the saving of what is called a lightship may be doubtful." This case must be of doubtful guidance following the definitions now given by the 1989 Salvage Convention where the object is one which at the time of the salvage is properly to be regarded as capable of navigation; however, where the object in question, while a floating one, is a static or fixed floating object incapable of being navigated, then Lord Esher's analysis remains consistent with the Article 1(b) definition. It may be noted that in *The North Goodwin No. 16* [1980] 1 Lloyd's Rep 71, it was not contested between the parties and the court accepted that a lightship under tow under the UK Standard Conditions was capable of being a subject in salvage (for the facts of this case see p. 70 above and p. 197 below). Compare also *The Boiler ex The Elephant* (1891) 64 LT 543, where salvage was recovered by a default judgment in respect of the saving of a ship's boiler found floating in open seas, although this case may have turned on the fact that wreck and derelict is a recognised object of salvage.

8.13 The problem arose acutely in the towage of objects used in the offshore industry, many of which corresponded with difficulty to inclusion in the recognised classes of salvage subject. It is submitted that many of the potential problems have been removed by the width of the definitions given by Article 1, especially that of "property" given by Article 1(c) which will be wide enough to cover almost all water-borne objects. However, a very important exclusion from subjects of salvage provided for by the 1989 Salvage Convention should be noted. By Article 3, it is stated that the Convention does not apply to "fixed or floating platforms or to mobile offshore drilling units" when the same "are on location engaged in the exploration, exploitation or production of sea-bed mineral resources." This will leave unaffected their status either as vessels or property when the same are under tow, provided they satisfy then the test of "vessel" or "property" under Article 1. In the case of a mobile offshore drilling unit or "MODU" under tow from A to B, it is likely that this will be regarded as a "vessel" under Article 1(b). Compare the approach of the court under the narrower definition of "ship" where objects such as backhoe dredger barges and MODU's have been held to be "ships" (see Chapter 14 below and see Shaw [1996] LMCLQ 202 at p. 210).

Danger

8.14 The subject of salvage must have encountered a marine peril or found itself in a position of danger which requires a salvage service in order to preserve it from loss or damage and bring it to a position of safety (see *The Wilhelmine* (1842) 1 Notes of Cases 376). In that case, Dr Lushington described (at p. 378) the presence of danger as one of the foundations of the existence of a right to salvage. The requirement of danger is not that the danger should be absolute or immediate, although it must be real and sensible (see Kennedy and Rose (*op. cit.*), at para. 5.005; see also *The Mount Cythnos* (1937) 58 L1 L Rep 18, in which Sir Boyd Merriman P stated at p. 25 that, for danger to be operative for salvage purposes, it must not be "fanciful but a real possibility"). As was confirmed in *The Charlotte* (1848) 3 W Rob 68 at p. 71 by Dr Lushington, it is sufficient that the subject of the service is facing or has encountered a state of affairs which might possibly expose it to loss or damage if the service in question were not rendered. In that case, a tow, en route from Bombay to Liverpool, became caught up among breakers during a violent gale with fog, rain

and heavy seas. She began to drift toward the rocks. The anchors were let go but did not hold. The masts, sails and rigging were cut as a last resort. A vessel was launched from the shore and those on board tried to board the tow without success. As the gale moderated, a second boat was launched and the tow was boarded. Subsequently, four boats took her in tow and, keeping her clear of the breakers, towed her to safety. Although she was in no immediate danger of being wrecked, Dr Lushington had no hesitation in finding that the service was one of salvage, stating at p. 71:

> It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute; it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered.

The danger can range from the risk of total loss to the risk of damage or even capture. As Dr Lushington went on to put it in *The Phantom* (1866) LR 1 A & E 58 at p. 60:

> It is not necessary that there should be absolute danger in order to constitute a salvage service, it is sufficient if there is a state of difficulty and reasonable apprehension.

Voluntariness

8.15 To constitute a salvage service, the service must be performed by a volunteer, that is to say by a person who is not under a pre-existing contractual or other legally recognised duty to perform that service (see *Brice*, para. 1–206). This is "an essential ingredient of the right to recover salvage" (*ibid*.). As Lord Stowell expressed it in a celebrated dictum in *The Neptune* (1824) 1 Hagg 227 at p. 236, for a person to be capable of being recognised by the court as a salvor that person must be:

> A person who, without any particular relation to a ship in distress, proffers any useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship.

8.16 It is this requirement which marks the great dividing line and difference between salvage and towage. Given that a tug can easily perform the same service either in the context of a salvage operation or in the context of a contract for services, the question has often arisen over whether a particular service rendered by the tug is a service which it was obliged to render pursuant to or which fell within the scope of what the tug had agreed to do under the tug's "pre-existing covenant." The importance of the question most commonly lies in the difference in remuneration: if the service is a contractual rate, the tug is entitled only to the contract rate or, if none has been agreed, to a *quantum meruit* assessed by reference to the value of the services, but if the service is salvage then the tug will be entitled to a usually enhanced level of remuneration.

8.17 The dividing line between what Bucknill, in *Tug and Tow* (2nd edn, 1927) at p. 1, described as "work done under a towage contract as distinguished from towage work done by a salvor" is a difficult but important question. It is considered below in Part B.

Success

8.18 To entitle the salvor to recover salvage remuneration the service must succeed in, or at least meritoriously contribute to, the preserving of the subject of the service from the danger or peril (see *Owners of the SS Melanie v Owners of the SS San Onofre* [1925] AC 246 and the famous speech of Lord Phillimore at pp. 262–263). As it was put by the 1910 Brussels Convention on Salvage, the service had to have had "a useful result" or "a beneficial result"; the 1989 Salvage Convention in its Articles 12.1 and 12.2 uses simply the term "a useful result." While this requirement has received some qualification in the field of services rendered for the attempted prevention of pollution or for the protection of the marine environment, in particular

under Article 14 of the 1989 Salvage Convention, the requirement remains a critical one in ordinary cases of salvage.

8.19 The contrast with towage is clear: under a towage contract the tug is entitled to be paid for the service rendered under and in accordance with the terms of the contract. Whether the service has been successful or has achieved the aim of the contract is not of itself decisive. So, where, as may occur, the contract provides for the payment of a lump sum to be earned at a particular stage in the towage service, the fact that the tow is lost or the contract is not performed thereafter will not affect the right to that payment, albeit that the tow may have a cross-claim. Remuneration for the towage service will ordinarily be made according to the terms of the contract or at a reasonable rate for the service on the basis of *quantum meruit*: see *The Glaisdale* (1945) 78 L1 L Rep 477, in which a tug was engaged to tow a steamer and encountered difficulties which necessitated the services of a second tug both tugs claimed salvage and, in dismissing their claims, Scott LJ noted at p. 478: "had the tugs asked for towage remuneration, the second tug would certainly have got a fair *quantum meruit*."

8.20 On a simple contractual basis, it follows that the towage service will be fully remunerated provided that it is properly performed and regardless of any success or failure in bringing the tow to safety (see *Anderson v Ocean Steamship Co* (1883) 13 QBD 651 at pp. 660–661, *per* Brett MR). Notwithstanding the view of Dr Lushington in *The Reward* (1841) 1 Wm Rob at 177, it is clear that a tug may conclude and perform a simple towage contract without giving rise to a claim for salvage, notwithstanding that the tow has suffered injury or damage and is faced with some danger (see again *Anderson v Ocean Steamship Co* (above)).

8.21 Connected with the typical towage contract is the case where salvage services are rendered under a contract which is a hybrid towage/salvage contract such services are usually referred to as "engaged services" and special considerations apply as to them (see eg the special equitable jurisdiction of the Admiralty Court referred to in Chapter 1 above). One such consideration flowing from the hybrid nature of such services is the absence of a requirement that the service be successful. This question and whether the concept of "engaged services" has survived the enactment of the 1989 Salvage Convention is considered further below in Part C.

PART B. FROM TOWAGE SERVICE TO SALVAGE SERVICE

8.22 The circumstances in which a towage service is converted into a salvage service can only be broadly defined. It is often very difficult to isolate the precise moment at which a salvage entitlement arises. As was stated by Lord Cranworth LC in *Boyse v Rossborough* (1857) 6 HLC 3 at p. 45 (in a passage worthy of A. P. Herbert's Lord Mildew), cited by Gorell Barnes J in *The Liverpool* [1893] P 154 at p. 161 on the question of the change from towage to salvage:

> There is no possibility of mistaking midnight for noon but at what precise moment twilight becomes darkness is hard to determine.

The issues and questions arising

8.23 Where a tug is engaged to tow a vessel, the extent of its obligations to perform the contract service will be defined by the contract, either by the express terms and conditions used by the parties or incorporated by them from one of the standard forms or, alternatively, in the absence of such express terms by the terms implied at common law and as discussed in the cases already considered above in Chapter 2, such as *The Minnehaha* and *The Julia*. However, the very nature of towage is such that very often the tug and tow will encounter conditions rather different from what was contemplated at the time the contract was made; these may require the tug to perform services of a different kind from those envisaged as being involved in the contract work. In such

circumstances, the tug will wish to seek additional remuneration. From the perspective of the tow, the contract must necessarily be taken to cover all ordinary eventualities and to have some latitude in the services which the tug may have to perform. Similarly, as has been seen, when a supervening peril occurs, the tug is under an obligation, by reason of the contractual relationship which already exists between the parties, to stand by and to assist the tow.

8.24 The Admiralty Court from the earliest days of its jurisdiction over towage cases sought to strike a balance between the interest of the tug to be properly remunerated for extra-contractual services and that of the tow to be sufficiently protected from attempts by the tug to escape from the confines of the towage contract. As it was put by Gorell Barnes J in *The Liverpool* [1893] P 154 at p. 164:

> I ought to say that, while it is the duty of the court to take care to adequately remunerate all salvors for salvage services, in order to encourage those services to be performed, and in this spirit salvage services are always looked upon in this Court, it is equally the duty of the court to see, where a towing contract has been made, that a little departure from the exact mode in which that contract is to be performed is not magnified so as to convert towage into salvage services.

The approach in *The Minnehaha*

8.25 The relationship between these issues was first considered in *The Minnehaha* (1861) 15 Moo PC 133 in the speech of Lord Kingsdown, part of which has already been referred to in Chapter 2. In that case, a contract of towage was held by the Privy Council to have been terminated by reason of the extreme weather conditions prevailing, the ebb tide and the breaking of the tug's hawser. The Privy Council's statement at pp. 152–154 of the law as to the test for the conversion of towage into salvage and as to the circumstances which are to be regarded as within and outside the original towage contract is definitive and exhaustive, and it merits citation in full:

> When a steam-boat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so and will do so under all circumstances and at all hazards; but she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill, and such a crew, tackle and equipments, as are reasonably to be expected in a vessel of her class.
>
> She may be prevented from fulfilling her contract by a *vis major*, by accidents which were not contemplated, and which may render the fulfilment of her contract impossible, and in such case, by the general rule of law, she is relieved from her obligations.
>
> But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. But if in the discharge of this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing-vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage. Whether this larger remuneration is to be considered as in addition to, or in substitution for, the price of towage is of little consequence practically. The measure of the sum to be allowed as salvage would, of course, be increased or diminished according as to whether the price of towage was or was not included in it. In the cases on this subject, the towage contract is generally spoken of as superseded by the right to salvage.
>
> It is not disputed that these are the rules which are acted upon in the Court of Admiralty, and they appear to their Lordships to be founded in reason and in public policy, and to be not inconsistent with legal principles.
>
> The tug is relieved from the performance of her contract by the impossibility of performing it, but if the performance of it be possible, and in the course of it in the ship in her charge is exposed, by unavoidable accident, to dangers which require from the tug services of a different class and bearing a higher rate of payment, it is held to be implied in the contract that she shall be paid at such higher rate.

> To hold, on the one hand, that a tug, having contracted to tow, is bound, whatever happens after the contract, though not in the contemplation of the parties, and at all hazards to herself, to take the ship to her destination or, on the other, that the moment the performance of the contract is interrupted, or its completion in the mode originally intended becomes impossible, the tug is relieved from all further duty, and at liberty to abandon the ship in her charge to her fate, would be alike inconsistent with the public interest.
>
> The rule as it is established guards against both inconveniences, and provides at the same time for the safety of the ship and the just remuneration of the tug. The rule has been long settled: parties enter into towage contracts on the faith of it and we should be extremely sorry that any doubt should be supposed to exist upon it.
>
> It is said that it has never been brought before us for decision. If so, considering how often the rule has been acted upon, the necessary inference is that it has never been made the subject of appeal because it has been universally acquiesced in.

8.26 From this judgment came the first articulation of a two-fold requirement for the circumstances in which a tug owner would be able to claim salvage, notwithstanding the existence of a towage contract: first, unforeseen difficulties in the completion of the tug's task which place the tow in danger; and, secondly, the incurring of risks and the performing of duties which were "not within the scope of the original engagement" or, as it was put later, the requirement from the tug of "services of a different class and bearing a higher rate of payment."

Its restatement in the later cases

8.27 In the later cases, while the test for the conversion of a towage service into a salvage service has been restated and rephrased, the two-fold requirement laid down by Lord Kingsdown and as summarised above has been followed faithfully.

8.28 The test for the entitlement of a tug already bound under a towage contract to claim a salvage award in respect of services rendered by it to the tow was certainly more succinctly set out by Hill J in *The Homewood* (1928) 31 L1 L Rep 336. In that case, a tug was engaged to tow a steamer under a contract which provided that if the tug became separated from the tow and was prevented from completing the contract, the tug would be paid *pro rata* for the distance towed. In the course of the voyage, the wind blew up and the hawser parted, causing the steamer to come adrift with no propulsion. She dropped her anchors and her master and crew were taken off by lifeboat. The weather then deteriorated to such a degree that nothing could be done to assist her. The tug nevertheless kept her under observation and, when the conditions eased, came alongside and put two men aboard. Hill J held that, in a towage of the kind in question, there must always be a risk of interruption and delay by bad weather, a risk that the hawser may part, and a risk that the tow may have to anchor. They were all matters within the scope of the contract. However, the contract did not contemplate that the crew of the tow would be taken off and that she would be left at anchor unmanned, nor that she would have to be towed without anchors, which it had been necessary to slip. Nor, it was said, did the contract contemplate that the tug would be used to put the crew of the steamer back aboard, as in fact occurred, and thereby incur risk of damage to the tug. In the circumstances, it was held that a salvage claim was appropriate. At p. 339 Hill J stated the applicable test in the following terms:

> To constitute a salvage service by a tug under contract to tow two elements are necessary: (1) that the tow is in danger by reason of circumstances which could not reasonably have been contemplated by the parties and (2) that risks are incurred or duties performed by the tug which could not reasonably be held to be within the scope of the contract.

8.29 The test laid down by Hill J in *The Homewood* was applied by Langton J in three leading cases in 1940 and 1941. In the first, *The Trevorian* (1940) 66 L1 L Rep 45, Langton J restated the test in this way at p. 49:

> The questions I have to ask myself are these: first, was the service which the [tug] undertook turned into a salvage service by reason of the fact that it differed in quality from the service she had originally undertaken?; and, secondly, as regards [the second tug], was she called upon to assist *The Trevorian* when *The Trevorian* was in a position of danger? . . . it has been said times without number that every incident or mishap that may take place in a towage service does not necessarily turn that towage service into anything else.

8.30 In the second, *The Glenbeg* (1940) 67 L1 L Rep 437, two tugs had been engaged to tow a vessel but in the course of the operation the vessel fouled her propeller on a buoy as a result of going too slowly. Accordingly, she was in an "uncomfortable and unpleasant position", although not one which was critical or imminently dangerous. However, she risked drifting against a nearby wall if her propeller came free. Langton J put the question at p. 441 in these terms, following Lord Kingsdown's alternative formulation of services falling outside the towage contract because they were services different due to "bearing a higher rate of payment":

> Is a ship in that condition, when tugs take her in tow, in a position which requires from the tugs services of a different class and therefore bearing a higher rate of payment than for ordinary towage? In other words, assuming that a contract had to be made to deal with the vessel in that condition, would the tug owner be ready to render services at the ordinary towage rate? The answer to that would obviously be "No."

The tug-masters agreed that the services which they had rendered did not really differ from what they would have done in the normal way. Langton J nevertheless felt obliged to ask himself the further question:

> were they called upon to exert skill of a character which would not be necessary at all, and is not, therefore, contemplated in the ordinary service of a tug to a ship going up river?

In answering this question in the affirmative, he awarded salvage on the basis that the tugs had exerted such skill both smartly and properly in rescuing the vessel from its position.

8.31 The last case in the trilogy is the decision in *The Domby* (1941) 69 L1 L Rep 161 in which the owners of a tug alleged that the tow grounded during performance of the towage contract. Langton J noted at p. 163:

> It has been laid down over and over again in this court that the work of contract tugs cannot be changed from that of contract into a matter of salvage merely because some unexpected incident happened to have taken place in the course of the towage. The whole of the circumstances must have changed in order to effect such a metamorphosis as to convert a contract of towage into salvage. If a vessel, which is being brought in by tugs under contract in circumstances of ordinary navigation, in fact gets into a position of real danger, and the services the tugs are called upon to perform are something quite different, not merely in quantity, but in quality, from what they were engaged to do, then it is proper that a claim of salvage should be admitted. But not every incident which happens to take place in the course of navigation can be admitted to bring a contract service into the far different realm of salvage.

On the facts, Langton J held that the tow was never aground, that the conditions were calm with an ordinary tide, and that she had room to manoeuvre. Accordingly, he held that the tow was in no danger and the claims of the tug owners to an entitlement to salvage were dismissed.

8.32 More recently, the two-fold requirement for conversion of towage into salvage was applied in *The North Goodwin No. 16* [1980] 1 Lloyd's Rep 71 by Sheen J In that case, a light vessel was in the tow of a tug and was to be passed to two other tugs in order to be towed on to a berth. The two tugs were engaged under the UK Standard Conditions. At the time at which the tugs were due to take over the tow there was a gale blowing and a swell estimated at between three and four metres. One tug took the view that the conditions were too poor to take over the tow. The original, therefore, proceeded to tow the light vessel into shore where it was hoped that the change-over could be effected with the benefit of shelter. The tug was manoeuvred accordingly,

but her master realised that he was too close to the shoreline and therefore swung to starboard. In the course of the turn, the hawser parted and the light vessel began to drift downwind. One of the other tugs went to the assistance of the light vessel, got a line aboard her, and towed her to an anchorage. That tug claimed a salvage reward in respect of that service. This was rejected by the court on the basis, first, that the light ship was not in danger despite the unforeseen circumstance since she had sufficient anchors to put out and, secondly, because in simply putting a line out to the light ship and towing her clear, the tug had not incurred risks or performed duties outside the scope of those contemplated by the contract. As Sheen J stated:

> *Northsider* came out on a towage contract. It is implied in all such contracts that the tug will do her duty in case of accident and do all she can to take care of and protect the ship. From time to time towing ropes do part. If *Northsider* had already taken the light vessel in tow and the tow rope had parted in precisely the same position as that in which it parted, and thereafter *Northsider* had made fast again, I do not think it would have been arguable that the tow was in danger by reason of circumstances which could not reasonably have been contemplated by the parties, or that risks were incurred or duties performed by the tug which could not reasonably be held to be within the scope of the contract. In these circumstances, it being conceded that *Northsider* had come out of the protection of the piers pursuant to the terms of her contract, I do not think it can properly be said that risk were incurred or duties performed which were not within the scope of the contract.

In concluding his judgment, Sheen J compendiously wrapped up the question in the following pragmatic test:

> The matter can be tested in another way. If, when *Northsider* came up with the light vessel, [the master] had offered the services of his tug on salvage terms, would that offer have been declined by [the captain of the light ship]? I have no doubt that it would have been declined.

8.33 It is clear from the decision of Hill J in *The Homewood* that the courts will examine the nature of the danger with which the tow is faced and the nature of the services contemplated by the parties at the time of making the contract as compared with those in fact rendered not separately, but in combination, or as it is put by the editors of *Kennedy and Rose* at para. 8.116, the two elements of the test will be "judged cumulatively, with particular emphasis on the danger present to the tow" (citing *The Strathnaver* (1875)1 App Cas 58 at 65). Nevertheless, it is helpful to consider how the content of each limb of the two-fold test has been approached by the courts.

The test as expressed in the salvage conventions

8.34 The common law approach was largely embodied in the Brussels Convention on Salvage 1910 which, by Article 4, provided:

> A tug has no right to remuneration for assistance to or salvage of the vessel she is towing or of the vessel's cargo, except where she has rendered exceptional services which cannot be considered as rendered in fulfilment of the contract of towage.

8.35 Although the Brussels Convention did not expressly in this article refer to the requirement of danger to the tow, given its general requirement of danger to the subject of salvage, this can be taken as implicit. The reflection of the English common law by the Brussels Convention rendered its formal incorporation in English law largely superfluous and unnecessary, although Articles 6, 10 and 11 were given statutory effect in sections 6–8 of the Maritime Conventions Act 1911. The common law principle is similarly reflected in the 1989 Salvage Convention whose Article 17 states:

> **Article 17: Services rendered under existing contracts.**
>
> No payment is due under the provisions of this Convention unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose.

8.36 It is submitted that the legal principles and the approach of the Admiralty Court in salvage and towage cases before the enactment are unaffected by Article 17 of the 1989 Salvage Convention and that this merely codifies the principle which the court has followed since the decision in *The Minnehaha*.

The first requirement: unforeseen circumstances putting tow in danger

8.37 The conversion of towage into salvage depends firstly on the tug encountering operating conditions or circumstances affecting those conditions which are outside the contemplation of the parties at the time of contracting. However, it is not enough that there are unforeseen circumstances which arise in the course of the towage contract, those circumstances must be such as to put the tow in danger in common with all salvage cases: the subject of the salvage (here the tow) must be in danger. As to the parameters of the requirement of danger in salvage, see in outline above and the commentaries in *Kennedy and Rose* and *Brice*.

Unforeseen circumstances

8.38 In assessing whether or not the conditions or circumstances are unforeseen, regard must be had to the contract of towage. The scope of the service which the tug undertakes to provide under the contract will be derived both from the express and implied terms of the contract and it will extend to cover all those services and to accept the risk of all of those eventualities which fall within the normal scope of operations which a tug will usually and reasonably supply and incur given the particular definition of the engagement. Thus, the circumstances which will be deemed to be within the contemplation of the parties will be different in the case of a contract for the towage of a vessel without the use of her main engines from Ushant to Santander via the Bay of Biscay in January from those in the case of a contract for the towage of a fully manned and powered VLCC from a berth at Fos to the roads in the clement weather and sea conditions of mid-August. The provisions of the contract are taken to extend to all problems or difficulties which might arise ordinarily in the course of its performance, for example interruptions during the towage – see *The Refrigerant* [1925] P 130, in which, at p. 140, Bateson J noted:

> In all these contracts it must be implied that the parties contemplate an interruption of the service. The price would be prohibitive if there was a guarantee that the towage would be without incident, and business could not be carried on on such terms.

8.39 Greater contractual remuneration *qua* salvage is therefore not available simply by reason of unforeseen difficulties alone (see *The Aboukir* (1905) 21 TLR 200 and *The Domby* (1941) 69 Ll L Rep 161). In the latter case, the tow grounded during the service but was in no danger and, as a consequence, Langton J held, at p. 163, that:

> the work of contract tugs cannot be changed from that of contract into a matter of salvage merely because some unexpected incident happens to take place in the course of the towage.

8.40 Nor is it available merely by reason of unexpected delay during the towage service. A good illustration of this is to be found in *The Lampas* (1933) 45 L1 L Rep 259, in which three tugs were engaged to turn a vessel at an oil jetty as she made to go alongside. The owners of the tugs claimed that in the course of the manoeuvre the vessel took the ground. Bateson J found as a fact that she was only smelling the ground and possibly sticking with her keel. The vessel was, he held, never in any real danger. Accordingly, at p. 262, he stated:

> I do not think in this case that the tugs did any more than could be expected from them according to their contract. They have got to keep the ship out of trouble – that is what they are taken for in narrow waters like this – and the slightly extra time (I think perhaps half an hour) they were engaged on this ship does not amount to anything more than what they could naturally be asked to do in taking a ship to

> her berth in this way. I do not think they rendered any extra services; I do not think they ran any extra risk, and, even if the ship was in a little danger, it was not sufficient to support a claim for salvage.

8.41 In respect of delay, see also *The Hjemmett* (1880) 5 PD 227, in which the tug owner's claim for detention or demurrage, arising out of delay to the towage operation caused by the refusal of the master of the towage operation to proceed with it until certain collision wreckage and damage to his vessel had been cleared and repaired, was dismissed by Sir Robert Phillimore. In *The Five Steel Barges* (1890) 15 PD 142, Sir James Hannen P remarked, at p. 144, of the tug owners:

> They must also have taken into consideration that they were liable to delays . . . No doubt it was somewhat longer than could have been expected but I do not attach great importance to the delay.

8.42 Other operational difficulties will not normally affect the nature of the service which is performed: see, eg *The Liverpool* [1893] P 154, in which the tow smelled the ground with a consequent risk of grounding and bottom damage, and in which the towing-hawser parted, without giving rise to salvage remuneration; similarly, *The Annapolis* (1861) Lush 355, in which the tow became entangled with a third vessel. For the same reasons, a deterioration in weather conditions will not normally or without more take the service rendered in such conditions outside the ambit of the contract. Thus, in *The Slaney* [1951] 2 Lloyd's Rep 538, the tow had lost the use of her engines, was at anchor in a wind which rose temporarily from a force 2 to a force 6 gusting 7, and required to be towed into port. Lord Merriman P found that, although the weather had deteriorated, there was nothing in that deterioration which was not expected or to be expected at that time of the year and that there was no service or duty performed by the tug which could not reasonably be held to be within the scope of the contract. In holding that the services of the tugs were "mere towage", he stated with characteristic terseness, at p. 543:

> We have all looked at the relevant passages . . . of the well-known textbook by the late Lord Justice Kennedy [ie *Kennedy on Salvage*], and bearing in mind that under the heading "Principles by which the right to salvage is governed", it is stipulated that, because fair or moderate weather changes to ordinary bad weather – ordinary bad weather – or because there is some damage to the tow, even that does not change towage into salvage, I am asked nevertheless to consider that this case comes within the proposition stated by the late Mr Justice Hill in *The Homewood* (1928) 31 L1 L Rep 336 at p. 339 . . . In my opinion, neither the one proposition nor the other is within measurable distance of being satisfied.

8.43 See also *The Galatea* (1858) Swab 349 and *The I.C. Potter* (1870) LR 3 A & E 292, in both of which good weather conditions rapidly deteriorated, although only to such an extent as to be no worse than might ordinarily be anticipated given the nature of the contract service being carried out. Similarly, ordinary difficulties in the service due to the condition of the tow or to the ordinary hazards of the operation, such as, typically, the parting of tow-lines, are difficulties which the tug owner is to be taken as having accepted. As Lord Kingsdown said in *The Minnehaha* (1861) 15 Moo PC 133 at p. 153:

> [The towing-vessel] does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task, because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser.

8.44 It follows that what is required in order to be able to set up the most basic claim for greater remuneration than that for which the contract provides on the basis of salvage is a significant change in the operating conditions of the towage service.

8.45 This is neatly illustrated by the more recent decision in *The Star Maria* [2003] 1 Lloyd's Rep 183. In that case, a tug (*Far Turbot*) was towing a vessel in poor weather conditions (force 7–8 winds with a 4-metre swell) as the emergency towing vessel in the Dover Strait, the vessel having become immobilised due to a flooded engine room. Towage was under way to Dover harbour

and the towage convoy arrived off the eastern entrance. The master of *Far Turbot* requested the assistance of *Dauntless* to assist in the task of bringing the casualty into the harbour. In response, *Dauntless* left Dover harbour and came up with the casualty, understanding and having accepted that it was required to make fast to the stern of the casualty and assist with steering the casualty through the harbour entrance. Such a service was one which *Dauntless* would have expected to be remunerated on the terms of the harbour board's commercial tariff rates. The *Dauntless* made fast to the stern of the casualty with a tow rope (not a heavy wire because all that was envisaged was steerage assistance). By this time the casualty was about eight cables due east of the eastern entrance. The wind was force 8–9, there was a 4-metre swell and, it being over one hour after high water, the tidal current off the eastern entrance was running in a north easterly direction when the tow line parted at 0509 and the *Dauntless*, being unable to pull the casualty's stern into the wind, nevertheless held her off shallow water. Nigel Teare QC (as a deputy) held, applying the principles set out in *The Homewood* (1928) 31 L1 L Rep 336 at p. 339, as follows at paras. 19 and 20:

> 19. I have no doubt that pursuant to those principles the services of *Dauntless* became services in the nature of salvage when, at about 05 29, the towage connection with *Far Turbot* parted. The casualty was then in danger of grounding which could not reasonably have been foreseen when *Dauntless* was instructed to assist *Far Turbot* and *Dauntless* incurred risks and performed duties which could not reasonably be held to be within the scope of her contractual duty to act as a steering tug.
>
> 20. The services remained in the nature of salvage until 06 05 when the towage connection with *Far Turbot* was re-established and all that *Dauntless* then had to do was assist in steering the casualty into Dover harbour. That was the service originally requested of her by *Far Turbot* on behalf of the owners of the casualty.

Circumstances creative of danger for the tow

8.46 As to the requirement that the unforeseen circumstances should put the tow in danger, the cases are clear, even if the expression of the requirement of danger is not express in the salvage conventions, as seen above. In *The I.C. Potter* (above), the tug *Retriever* was engaged to tow the *I.C. Potter* into Liverpool for £45. During the operation, a hurricane blew up and the vessels were placed in serious danger. The tug continued to tow and thereby prevented the tow from drifting upon a lee-shore. The wind soon moderated and the tug brought her tow to safety in Liverpool. The tug owner was awarded salvage in the sum of £500. In the course of his judgment, Sir Robert Phillimore stated at pp. 298–299:

> a contract once entered into cannot be broken merely because a change of weather or other supervening circumstances have rendered the execution of it more onerous than was anticipated . . . there must be among the supervening circumstances an element of serious danger, not in contemplation of the parties to the contract, in order to justify the abandonment of that contract and to found a salvage service . . . The continuance of the towage, therefore, in these circumstances, which placed both life and property in danger, became . . . a salvage service.

8.47 It was made clear by the judge that, in order to give rise to a salvage award, it was not necessary that the towage service for which the tug was engaged be interrupted but that it was necessary for the tow to be placed in danger by the new circumstances. Similarly, clear authority for this proposition that the unforeseen circumstance must be one productive of danger for the tow is provided by the decision in *The Dimitrios N. Bogiazides* (1930) 37 L1 L Rep 27. In that case, the claim of the owners of a tug to an entitlement to salvage failed on the ground that the tow was in no substantial danger and that the services were no more than towage services. The tow was at anchor in heavy gusts and squalls which affected her to some extent. However, the pilot on board used her engines to keep her in position and used the anchor to keep her head into the wind. The master nevertheless wished to engage the services of a tug and thus the tug was sent out in response to the vessel's signals. The tug made fast with no real difficulty and proceeded to

tow the vessel to a better position. The tug was assisted by the engines of the tow. In the course of his judgment, Bateson J commented at p. 32:

> In these circumstances, I cannot myself see how it can be said that this is a salvage service at all. It does not seem to me that this ship was in any real or apprehended danger either in herself or from her master's excitability . . . the Pilot had full control of the ship . . . it is a little difficult to say what [danger she was in], except that she had trouble in getting herself head to wind and had got her port anchor leading out behind her and could not very well get it up without some assistance from the tug at the time when she did get it up, and that was a position which might develop into danger if there had been a squall hard enough to overcome a sound ship with helm and engines . . . It seems to me a very remote possibility in order to say that something should be given by way of salvage award.

8.48 A similar approach to the requirement of danger was adopted by Hill J in *The Matina* (1920) 2 L1 L Rep 360. Two tugs were ordered to assist a steamer in docking, but during the towage operation the tow-rope upon which one tug was heaving parted and fouled the propeller of the steamer. The steamer then drifted and grounded. The tug then came to the westward of the steamer and began to push the starboard side in an attempt to free her, while the second tug continued to hold her bows steady. The steamer nonetheless remained aground. The tug then moved to the stern of the steamer and began to pull. After some minutes, with their engines full ahead, the tugs succeeded in pulling the steamer clear. On the basis that she had been rescued from a position of great danger by well and properly rendered services, the crew of the tugs claimed an entitlement to salvage. Hill J, applying the principles laid down in *The Minnehaha* (1861) 15 Moo PC 133 and *The Liverpool* [1893] P 154, asked the following questions (at p. 363):

> was the *Matina* in any immediate danger? . . . Did either of the tugs incur any risk or render any services beyond what was reasonably to be expected of her in the performance of the towage contract?

8.49 On the facts, Hill J held that there was no danger to her until, after some hours, the tide fell, and held also that she might have been got away by ropes carried out to the pier or by the ebb tide setting her off. Accordingly, he held that there was no immediate danger. As regards any risk of danger to the tugs, Hill J found that the second tug, in holding the steamer, did nothing beyond what was required in an ordinary docking; in respect of the other tug, a dictum from *The Liverpool*, was applied: "The tug is engaged for the purpose of avoiding dangers which a vessel of this size must to some extent run in entering a dock." Hill J added:

> One of those dangers is that a hawser may part and that the ship may be set out of position. In such an event, it is clearly the duty of the tug to make fast again and bring the ship back into position. I am not prepared to say that it is not her duty, if occasion calls for it, to push as well as to tow.

Accordingly, he found that the first tug did nothing beyond what would normally be expected of a docking operation, and that neither tug had performed in such a way as to convert the towage contract into a salvage service.

8.50 A further illustration of the principle which must be applied in determining the effect of a particular danger and the approach which must be adopted by the court is provided in *The Lolin* (1931) 39 L1 L Rep 182, in which three tugs came to the aid of a vessel. The vessel, in the tow of two tugs was alleged to have grounded. The plaintiff tug owners claimed that, with the additional assistance of the third tug, the vessel was refloated. Langton J found as a fact that the vessel did not ground as alleged, but that she may have touched the bottom. He commented at p. 184:

> one has to bear in mind that tugs engaged on an ordinary contract of towage service cannot in the performance of that service be debarred from claiming salvage where a real and unexpected danger has confronted the ship, and where they have been instrumental in saving her from that new, real and unexpected danger . . . in the first instance the court scrutinises narrowly the claim of vessels who are engaged upon towage services to be ranked as salvors, and having scrutinised it narrowly the court then goes on to consider, "was there in the circumstances a really new and unexpected danger."

In applying this statement of law to his findings of fact, Langton J went on to say at p. 188:

> is that [ie the touching] a danger, a new danger and a real danger, and is it such a change of circumstances as could not have been reasonably contemplated by the parties when they made the towage contract, and does it turn the case from towage into salvage? . . . I am quite satisfied that it does not.

8.51 However, in common with the ordinary salvage cases and the principles laid down in *The Charlotte* and *The Strathnaver* referred to above, the danger need not be immediate or absolute. In the towage case of *The Aztecs* (1870) 3 Asp MLC 326, the crew of a steamer found a casualty at anchor in a heavy breeze and were hailed by the captain. The casualty had suffered damage as a result of a collision and had lost much of her equipment, but was still able to steer. An agreement was reached that the steamer would tow the casualty into Harwich harbour, weather permitting. Every effort was made to bring the casualty in, but a sudden change of the wind to the north-east made the voyage impossible. The casualty was brought to an anchorage not far from where she was found. When the weather moderated, the casualty proceeded to safety. It was submitted by the owners of the casualty that the agreement had not been fulfilled and that the steamer could not therefore claim salvage. Sir Robert Phillimore held that fulfilment of the agreement was rendered impossible by a change in the weather, an Act of God, and that, accordingly, the services were in the nature of salvage. He held at p. 329:

> It is certainly a mistake as to the law of salvage to suppose that in order to constitute a salvage service a vessel must be in actual danger at the time when the services are rendered to her. The danger may be probable or imminent.

Danger to tow not of itself sufficient

8.52 However, the requirement is a dual one. A danger to the tow will not of itself necessarily entitle the tug to salvage remuneration or to abandon the towage contract in the absence of the circumstances unforeseen by the towage contract and the parties thereto. In *The Liverpool* [1893] P 154 at p. 160, Gorell Barnes J commented:

> I do not think that the argument . . . can be placed quite so high as counsel endeavoured to put it, namely, that in all cases of danger to the salved property, the tug is entitled to a salvage award.

8.53 The danger to the tow must be one which exposes her to damage if a service is not rendered to her and such that, viewed objectively, a reasonable person would engage a salvage service in consequence. In the recent case of *The Owners of the Sea Tractor v The Owners of the Tramp (The Tramp)* [2007] 2 Lloyd's Rep 363 a small coaster docking at Queensborough in the River Swale was caught by wind when unberthing and was unable to bring her bow round to head upstream unassisted with the risk of contacting a rubble-strewn bottom. David Steel J held that the applicable test was satisfied, this being (para. 19):

> I turn now to the question of whether *Tramp* was in sufficient danger to found a claim for salvage. Whilst the views of the master are of some persuasive influence, the test is essentially an objective one. The vessel must have encountered a situation which would expose it to damage if the service was not rendered, such that no reasonable person in charge of the venture would refuse a salvor's help if it was offered to him upon the condition of paying a salvage award: see Kennedy & Rose, *Law of Salvage*, 6th edn, para. 333.

8.54 In many cases, the dual aspect of the requirement of unforeseen circumstances creating danger for the tow has been subsumed in a reference to the presence of supervening danger which renders the contract incapable of performance in the contemplated way. While supervening danger as a term is of some utility, it should not be taken to replace the need both for the new circumstances and for the resultant danger. See the following instances where this type of approach has been adopted: "supervening circumstances" (*per* Sir Robert Phillimore in *The I.C. Potter* (1870)

LR 3 A & E 292 at pp. 298–299), "an unforeseen and extraordinary peril" (*per* Dr Lushington in *The Saratoga* (1861) Lush 318), and a "superior danger and service superior to towing" (again, *per* Dr Lushington, at first instance, in *The Minnehaha* (1861) Lush 335), which causes the duty under the towage agreement to be "abandoned" (see again *The I.C. Potter*), "vacated" (see again *The Minnehaha, per* Dr Lushington) or "supervened" (see again *The Saratoga, per* Dr Lushington).

No need for danger to the tug

8.55 It should be noted that while the unforeseen circumstances must be such as to put the tow into a situation of danger, it is not necessary that there be any danger presented thereby to the tug in order for salvage to be earned. This was made clear in *The Pericles* (1863) Br & L 80. In that case, a tug was engaged to tow a steamer and to dock her. During the course of the operation the steamer stuck in a basin and needed to be towed out again. In the course of towing her out, the tow-rope broke. Accordingly, she remained jammed with the tide falling. Along with other tugs, the original tug succeeded in freeing the steamer. Dr Lushington awarded salvage and stated that it is not a necessary element of salvage that there be risk to the salvor.

The second requirement: service or services outside the scope of the contract

8.56 Even if the tug and tow encounter unforeseen circumstances and even if these are such as to put the tow in danger, the tug will still not be entitled to salvage and will be confined to the contract if the services which the tug renders are within the scope of the contract. To take an example: the tow-line unexpectedly parts while tug and tow are navigating in a channel; there is an unforeseen current caused by an outfall pipe which pushes the tow towards the shore; the tug goes about and reconnects without danger or difficulty. The service is entirely what one would expect the tug to be ready routinely to perform under the contract. In such an event, the tug will have no claim in salvage. In Lord Kingsdown's words in *The Minnehaha* (cited above), was the service one "of a different class and bearing a higher rate of payment"? In Langton J's formulation in *The Trevorian* (1940) 66 L1 L Rep 45, did the service differ in quality from the service which the tug had originally undertaken? See also the approach taken in *The Star Maria* [2003] 1 Lloyd's Rep 183 to what was and was not foreseen as within the expectation of what needed to be done by a tug engaged in bad weather to assist another tug in bringing a dead ship into Dover harbour (cited above).

8.57 It follows that, in determining whether or not the services provided actually differ in their nature from those which are required under the contract of towage, the contractual services must be carefully defined and compared with those in fact provided, as is suggested by Dr Lushington in *The White Star* (1866) LR 1 A & E 68. In that case, a tow dragged and slipped from both anchors during a break in the performance of a towage contract; this was the result of a heavy gale. The tug went to the assistance of the tow and put the master ashore to bring off further anchors. Dr Lushington held that putting the master ashore was an extra service, not connected in any way with the towage, and which merited a salvage award. He stated at pp. 70–71:

> The real question is, what are the contracting parties reasonably supposed to have intended by the engagement, and what degree of alteration had they a right to expect, because to suppose that the performance of the service would always be of the same character would be absurd. I apprehend that, when a master of a vessel contracts with the master of a tug, it is upon the supposition that the wind and weather, and the time for performing the service, will be what are ordinary at the time of year, and that the sum contracted for is that which is supposed to be a sufficient remuneration for the ordinary performance of the voyage. It may be a short voyage if all the circumstances are favourable, and it may be a long one if they are unfavourable. I shall submit to you that when an engagement is made, a contract, for a specific time, that contract must be adhered to, and is not to be broken hastily, unless it be shown that circumstances have occurred which could not have been within the contemplation of the parties, and that, such is the state of circumstances, that to insist upon the contract and hold it binding

> would be contrary to all principles of justice and equity. It should be utterly impossible to define all such circumstances, but I think we should never have any doubt in saying in any particular case what they were, which would give a right to abandon the contract . . . If the tugs were merely ordinarily delayed in performing the service they must not have additional remuneration but if the delay was unexpected, and beyond all contemplation, they must have something additional.

8.58 Sometimes the question of whether or not a service is within the scope of the contract may be answered by the express terms. If the contract provides that the tug shall tow from A to B and that she will hold the tow up on arrival as necessary, the holding up will be within the service. Contrast a contract which simply provides for the towage as was considered in *The Albion* (1861) Lush 282, in which a tug was engaged to tow a steamer. Mid-way through the service, the vessels anchored. A gale arose and blew the steamer to sea, with loss of anchors and equipment. The tug was forced to shelter nearby. Once the weather had moderated, the tug put to sea to search for and to locate the steamer which, after considerable endeavour, she did. The steamer was then towed to London. The tug was awarded salvage for her efforts, including those in respect of the search and location of the steamer.

8.59 The situation is the same in the United States. In *Sinclair v Cooper* 108 US 352, a cargo vessel loaded with cotton engaged a tug to tow her down the Mississippi River. After towing for approximately 26 miles, tug and tow laid up at an anchorage for the night. Later in the evening, a fire was found to have started aboard the tow. With some speed, officers and crew of the tug, with the assistance of others, succeeded in extinguishing the blaze. Those aboard the tug claimed a salvage award on the ground that, in extinguishing the fire, they had performed a service which went beyond and was different in nature from that contemplated by the parties when the tug was initially engaged. In the course of the judgment, the court noted that:

> The contract . . . was to tow the ship, and did not include the rendering of any salvage service, by putting out fire or otherwise. Such a service, which . . . rescued the ship from an unforeseen and extraordinary peril, gave the owner, as well as the officers and crew of the towboat, a right to salvage.

8.60 See also *The Driade* [1959] 2 Lloyd's Rep 311 (an engaged tug employed to tow held up a vessel and thereby became entitled to salvage remuneration) and *The Mount Cythnos* (1937) 58 L1 L Rep 18 at p. 25, in which it was found that a tug which had in tow a vessel which subsequently became jammed in a dock entrance, and which succeeded in freeing the tow, was entitled to a salvage award. More recently, in *The North Goodwin No. 16* [1980] 1 Lloyd's Rep 71, a light vessel was in the tow of a tug bound for the River Tyne. She was to be passed to two tugs which were engaged under the UK Standard Conditions (above), which provide at clause 1(b)(v):

> Any service of whatsoever nature to be performed by the Tugowner other than towing shall be deemed to cover the period commencing when the tug . . . is placed physically at the disposal of the [liner] . . . or, if such be at a vessel, when the tug . . . is in a position to receive and forthwith carry out orders to come alongside and shall continue until the employment for which the tug . . . has been engaged is ended.

8.61 At the time at which one of the tugs was due to take over the tow there was a gale blowing. Accordingly, the tow was brought closer in to facilitate the pick-up but the line parted. The waiting tug came out in rough conditions and pulled the light ship clear. She claimed a salvage reward in respect of that service. Sheen J held, *inter alia*, that the service was entirely within the terms of the towage contract and that under the clause towing and the towage service had begun.

8.62 More typically, the contract will not cover the matter expressly. In such a case, just as with a question of foreseeability in damages, in examining the nature of the services in fact provided, it is necessary to ask what was in the reasonable contemplation of the parties when the agreement to tow was concluded. As it was put in *The Liverpool* [1893] P 154 by Gorell Barnes J at p. 160, citing *The Pericles* (1863) Br & L 80:

> there must be . . . something done either in the nature of risk run or extra services performed by the tug, beyond that which is included in the contemplation of the parties in the services which she is engaged to perform.

8.63 The operation of the reasonable contemplation test is well demonstrated in the decision of Sir James Hannen P in *The Five Steel Barges* (1890) 15 PD 142. In that case, a steam-tug took five steel barges in tow. The towage contract provided that if any of the barges broke adrift and were lost, the tug was still entitled to the full sum. In the course of the voyage, the wind blew so fiercely as to force the tug and barges to anchor. When the vessels left anchor, heavy seas were encountered and four of the barges broke adrift. The tug took the remaining barge back to the anchorage and then returned to search for the others. With much difficulty, the barges were brought back. Towage recommenced but the barges again broke adrift and three men were drowned. In the final event, three of the barges were towed to port by a second tug and the other two to their destination by the original tug. The President held that, notwithstanding that it was obvious at the time of making the contract that the towage was of a peculiar character, would be difficult at that time of year and would be carried out in exposed and dangerous waters, and despite the fact that some delay would be anticipated, the parties could not have contemplated a delay as long as that which occurred due to the violence of the weather, nor could they have contemplated the additional operations which were required to be performed. Accordingly, a salvage award was made independently of the towage contract. At p. 144 he stated:

> it is not necessary, in order to become entitled to salvage, that the supervening danger should be of such a character as to actually put an end to the towage contract. It is sufficient if the services rendered are beyond what can be reasonably supposed to have been contemplated by the parties entering into such a contract. It depends on the circumstances of each case whether or not the services are advanced in this way to a higher degree, so as to establish a right to salvage . . . The character of the contract is, of course, to be looked at, and the circumstances to which it related.

The burden and standard of proof

8.64 It is clear from these cases that the burden of proving the conversion of a service from one of towage to one of salvage lies upon the tug. The Admiralty Court has traditionally viewed claims to convert with, as the old cases put it, "extreme jealousy." Thus, in the *locus classicus* of *The Minnehaha* (1861) 15 Moo PC 133, in which the tug claimed that the services rendered by it fell outside the contract, Lord Kingsdown commented at p. 155 that: "their Lordships are of opinion that such cases require to be watched with the closest attention, and not without some degree of jealousy."

8.65 While the policy reasons behind imposing a stringent burden upon the tug were sound at the mid-point of the nineteenth century when the reported cases reflect an unscrupulousness on the part of certain tug owners and a willingness to take advantage of their tows, whether today the standard of proof is so exacting is highly questionable (cf. the comments of Captain Kovats, *The Law of Tugs and Towage* (1980), at p. 131).

8.66 Irrespective of the heaviness of the burden upon the tug, in proving their case and in discharging the burden upon them, the tug claiming as aspirant salvor must, as was made clear by Lord Kingsdown in *The Minnehaha* at p. 158, establish three essential elements:

> they must show that, the ship being in danger from no fault of theirs, they performed services which were not covered by their towage contract, and did all they could to prevent the danger.

8.67 In *The Maréchal Suchet* [1911] P 1, the position was summarised by Sir Samuel Evans P, who at p. 12 stated:

> The burden of proof is upon the plaintiff. It is a two-fold burden. They must show that they were not wanting in the performance of the obligations resting upon them under the towage contract and they must also account for [the casualty] by showing something like *vis major*, or an inevitable accident.

8.68 In that judgment, the President had relied upon the decision of the Court of Appeal in *The Robert Dixon* (1879) 5 PD 54, where it was observed by Brett LJ that

> it lies on [the plaintiffs] to show that the change occurred without any want of skill on their part, but by mere accident over which they had no control. The burden of proof on both the affirmative and the negative issues is on the plaintiffs, that is, both that there was an inevitable accident beyond their control, and that they showed no want of skill.

8.69 The approach of Brett LJ most succinctly explains the burden of proof in respect of the conversion from towage to salvage. The same approach is expressly approved in the judgment of Gorell Barnes J in *The Duc d'Aumale (No. 2)* [1904] P 60 at p. 71, and in the judgment of Bateson J in *The St. Patrick* (1929) 35 L1 L Rep 231 at p. 238.

The effect of "conversion into salvage" upon the towage contract

8.70 The common law is not entirely clear as to the precise effect of the circumstances which give rise to a salvage service upon the subsisting towage contract. As has been demonstrated above, a tug performing under a towage contract will normally be required unconditionally to complete it (see *The Minnehaha* (1861) 15 Moo PC 133). However, it is accepted that the emergence of a supervening circumstance may render the performance of the contract of towage impossible and will, arguably, bring it to an end. In *The Minnehaha* (*op. cit*.), Lord Kingsdown stated (at p. 153), in a passage already cited:

> If in the discharge of [the towage obligations], by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing-vessel incurs risks and performs duties which were not within the scope of her original engagement . . . the towage contract is generally spoken of as superseded by the right to salvage . . .
>
> The tug is relieved from the performance of her contract by the impossibility of performing it, but if the performance of it be possible, and in the course of it the ship in her charge is exposed, by unavoidable accident, to dangers which require from the tug services of a different class and bearing a higher rate of payment, it is held to be implied in the contract that she shall be paid at such higher rate.

See also *The Liverpool* [1893] P 154 at pp. 159–160, where Lord Kingsdown's speech to this effect was approved by the Court of Appeal as accurately representing the law.

8.71 In this context, the law of frustration and the Law Reform (Frustrated Contracts) Act 1943 will apply as normal. To this extent, charges payable under the agreement prior to the frustrating event are no longer payable. However, the common approach taken by the courts is that where, as a result of any performance by the tug under the contract of towage, the casualty has obtained a valuable benefit prior to the frustrating event, the court may exercise its discretion in ordering the tow to pay what is considered to be a reasonable sum by the tug. This approach is contained within section 1(3) of the 1943 Act. Modern towage contracts not infrequently include a provision to the effect that the terms of the contract are to apply notwithstanding any frustrating event and any inconsistency with the terms of the Act.

8.72 Where a towage service is subsequently converted to a salvage service, payment for each of the services will normally be separately assessed and remunerated. The difficulty arises in the way in which the operation of the contract is to be approached by the courts. The older authorities cited above suggest that the occurrence of a supervening event which gives rise to a salvage service justifies the abandonment of the towage contract. However, the prevailing view is well-settled, and is that the conversion to a salvage service may, though not necessarily, justify the abandonment of the towage contract but will often only give rise to its temporary "suspension", "vacation" or "supersession." Yet despite the plethora of different terms used, it seems clear that where supervening circumstances occur which do not permanently alter the contemplated and foreseen operating conditions, the towage contract is effectively suspended while the

supervening circumstances operate, but that it is not actually superseded or terminated. Accordingly, upon the termination of the special circumstances, the towage contract will recommence and the tug is obliged to recommence its contractual towage obligations in so far as that is possible in the post-salvage circumstances.

8.73 In the leading case of *The Leon Blum* [1915] P 90; [1915] P 290 (CA), Sir Samuel Evans P, after reviewing the leading authorities in the area (see [1915] P 90), distilled the various dicta and decisions as follows at p. 101:

> The right conclusion to draw from the authorities, I think, is that where salvage services (which must be voluntary) supervene upon towage services (which are under contract) the two kinds of service cannot co-exist during the same space of time. There must be a moment when the towage service ceases and the salvage service begins; and, if the tug remains at her post of duty, there may come a moment when the special and unexpected danger is over, and then the salvage service would end, and the towage service would be resumed. These moments of time may be difficult to fix, but have to be, and are, fixed in practice. During the intervening time the towage contract, in so far as the actual work of towing is concerned, is suspended. I prefer the word "suspended" to some of the other words which have been used, such as "superseded", "vacated", "abandoned", &c.

Similarly, in *The Five Steel Barges* (1890) 15 PD 142 at p. 144, Sir James Hannen P noted that:

> it appears to me that it is not necessary, in order to become entitled to salvage, that the supervening danger should be of such a character as to actually put an end to the towage contract. It is sufficient if the services rendered are beyond what can be reasonably supposed to have been contemplated by the parties entering into such a contract.

8.74 However, where the towage contract is actually frustrated because of some permanent change in circumstances and all further (contemplated) performance is brought to an end, a new contract may arise, giving effect to new rights. This issue was addressed by Sir Francis Jeune P in *The Madras* [1898] P 90, where at p. 94 he noted:

> [in the case of] an indivisible contract which cannot be fulfilled owing to circumstances for which neither party is to blame . . . I think there could be no question that the law holds neither party liable to fulfil that contract, or liable to consequences for not fulfilling it . . . Subject, of course, to this, that if there is a new contract to be implied by the acts of the parties, that gives rise to new rights.

8.75 Alternatively, it was suggested in *The Massalia* [1961] 2 QB 278 by Pearson J at pp. 312–314 that, in similar circumstances, the tow may be liable to pay for towage following the supervening circumstances on a *quantum meruit* basis. In appropriate circumstances, it may be the case that, albeit that the resumed towage operation takes place on the basis of the original terms, higher remuneration is due than would earlier have been the case by reason of the more arduous circumstances which prevail. Although the court would not have jurisdiction to raise the contractual rate for this reason, it may nonetheless be open to the court to recognise an implied obligation requiring higher remuneration for additional services. Such remuneration would be made either on the basis of *quantum meruit* or, perhaps, on a basis of quasi-contract or restitution by reason of the fact that the tow might otherwise be unjustly enriched to the detriment of the tug.

The relationship with salvage under the common forms of contract

8.76 The relevance and application of these common law principles may be qualified by the specific terms of the towage contract. The provisions of the standard form contracts which frequently govern the performance of a modern towage service are considered in detail in Chapters 3, 4 and 5 above. However, the relationship between contracts on such forms and the conversion into salvage may be briefly noted here.

8.77 The UK Standard Conditions for Towage and Other Services (1986) (discussed in Chapter 3 above) preserve the tug owner's common law entitlement to claim salvage and therefore leave the common law principles untouched, providing in clause 6 that:

> Nothing contained in these conditions shall limit, prejudice or preclude in any way any legal rights which the Tugowner may have against the Hirer including, but not limited to, any rights which the Tugowner or his servants or agents may have to claim salvage remuneration or special compensation for any extraordinary services rendered to vessels or anything aboard vessels by any tug or tender.

8.78 Similarly, the BIMCO standard form contracts and conditions, "Towcon 2008" and "Towhire 2008", while expressly covering the question of salvage, leave unaffected the common law position. In both forms, the relevant provision is in the same terms, albeit set out in clauses 21 ("Towcon") and Clause 19 ("Towhire") which each provide that:

> (a) Should the Tow break away from the Tug during the course of the towage service, the Tug shall render all reasonable services to re-connect the towline and fulfil this Agreement without making any claim for salvage.
>
> (b) if at any time the Tugowner or the Tugmaster considers it necessary or advisable to engage salvage services from any vessel or person on behalf of the Tug or Tow, or both, the Hirer hereby undertakes and warrants that the Tugowner or his duly authorised servant or agent including the Tugmaster have the full actual authority of the Hirer to accept such services on behalf of the Tow on any reasonable terms. Where circumstances permit the Tugowner shall consult with the Hirer on the need for salvage services for the Tow.

8.79 Clauses 21(a) and 19(a)(a) accordingly do little more than to rephrase the obligation upon the tug to render all reasonable services as enshrined in the decisions of *The Minnehaha* and *The Julia* and of which Dr Lushington stated in *The Galatea* (1858) Swab 349:

> the [tug] is bound by [the] engagement to do all that is necessary to facilitate the safe voyage of the ship from the one place to the other; and she is to take the chance of bad weather, which may occasion delay and inconvenience.

8.80 Clauses 21(b) and 19(b) deal merely with the question of conferring upon the tug by the tow of sufficient express authority to enter into salvage contracts with third parties on behalf of tug and/or tow in appropriate circumstances, with the presumption that the tug will communicate with the hirer before engaging salvage services, save only where time and available means of communication do not permit this. The comment by Reeder in *Brice on the Maritime Law of Salvage* (5th edn, 2012) at para. 1–319 that a right to salvage would subsist under clause 15 where "the tugowner has exhausted all reasonable efforts but a salvage service is still necessary, eg where the tow has grounded on a rocky shore and has been badly damaged so as to require the undertaking of a major salvage operation well outside mere towage" seems correct, albeit that it appears to pitch *The Minnehaha* test by reference to a rather more extreme example of a service outside or beyond towage.

8.81 The BIMCO/ISU "Salvcon" form, which is specifically designed to offer a form of sub-contract for hiring in a tug to assist a salvor in salvage and excluding any right on the part of that tug to claim salvage, is considered in Chapter 9 below. The relevant clauses are 8.3–8.5.

8.82 As has been seen above, ordinary principles of contractual construction will be applied in determining the precise requirements of contractual performance. Thus, where the contract grants an express right to claim salvage, it is submitted that the principles of construction at common law must be applied with rigour if the term amounts not merely to a clause preserving the right of the tug to claim salvage in a proper case, but to one which in effect operates as a clause allowing the tug to deem certain services to be salvage, whether or not the criteria for salvage are in fact made out. Such provisions are rare, but it is submitted that where the same fall to be construed they should be strictly construed. It is not, it is submitted, open to imply into the contract

a wider entitlement to claim salvage unless the same is clearly and expressly suggested by the words of the agreement. An example of such a provision has been considered in South Africa. In *The Manchester* [1981] (2) SA 798 (C), a vessel became immobilised 300 miles north-west of Walvis Bay. Repairs were effected at sea by the vessel's engineers, but the engines were finally stopped when it was thought to be dangerous to proceed any further. A tug was engaged to tow the vessel to Walvis Bay, which it duly did. The towage contract provided that the tug owners: "have the right to claim . . . salvage, if the services rendered to the said vessel should be such as to warrant a salvage award."

8.83 Burger J in, it is submitted, an unusual judgment, held the contract to entitle the tug owner to salvage "if justified by the circumstances." This was so, notwithstanding that the South African courts apply English case law principles in determining whether salvage is to be awarded. In the event, salvage was awarded despite the fact that only those services called for by the towage contract were performed. It is respectfully submitted that the approach adopted by Burger J is not in line with the established tests for construction and for the conversion of towage service into salvage. The decision can be compared with that in *Transnet Ltd t/a National Port Authority v M.V. Cleopatra Dream* [2011] ZASCA 12, where the Supreme Court of South Africa rejected an argument that a port clearing a vessel as an obstruction under a pre-existing legal duty was entitled nevertheless to claim salvage because the terms of the applicable port tariff permitted it to do so, even though it could not show "voluntariness" because of its legal obligations as harbour authority. (The Court also rejected the ambitious argument that voluntariness was not a requirement of salvage under the 1989 Convention.)

Towage contracts providing for "no salvage charges"

8.84 Occasionally, towage contracts provide for the exclusion of any right on the part of the tug owner to claim salvage. Such clauses are more common where the tug is engaged by the tow in circumstances where the tow is already in danger and where she seeks to avoid a salvage contract and prefers rather to bind the tug to a fixed-price contract. In such a case, the services of the tug are usually referred to as "engaged services" (as to which see in greater detail below).

8.85 Where the towage contract contains no express or implied exclusion of the recovery of a salvage award, the court may forthwith treat any service rendered under the contract as one of salvage if the necessary requirements discussed above are made out. In *The Charles Adolphe* (1856) Swab 153, in which a vessel was disabled and in distress from the moment at which the towage contract was agreed, Dr Lushington commented at p. 157 that, in the absence of an express exclusion clause or implied prohibition on the recovery of salvage, the service "cannot by possibility be compared to an ordinary towage service." However, the prima facie right to salvage may be expressly excluded, although the court will usually adopt a strict approach to construction requiring clear terms to achieve such an exclusion. It was stated by Lord Stowell in *The Waterloo* (1820) 2 Dods 433 at pp. 435–436 that:

> Where the exemption is claimed from a right otherwise universally allowed, and highly favoured in law, for the protection of those who are subjected to it . . . it is for their benefit that it exists under that favour of the law. It is what the law calls *jus liquidissimum*, the cleanest right that they who have saved lives and property at sea should be rewarded for such salutary exertions; and those who say that they are not bound to reward ought to prove their exemption in very definite terms, and by arguments of irresistible cogency.

8.86 However, assuming that a clear exclusion can be demonstrated and shown to be in accordance with public policy, recovery of a salvage award may properly be excluded. This was acknowledged by Lord Salvesen in *Clan Steam Trawling Co Ltd v Aberdeen Steam Trawling and*

Fishing Co Ltd 1908 SC 651 at p. 655, where he noted an agreement to exclude the payment of salvage charges:

> Such an agreement might conceivably be objected to as being contrary to public policy. But, assuming its validity, I think it must be clear, from the agreement, that the rendering of assistance to a vessel in distress shall not found a claim for remuneration. The right to obtain salvage remuneration is one very much favoured in law, and therefore cannot be excluded unless by express words or by very clear implication from the language used.

8.87 Similarly, and more recently, the High Court of Australia has made it clear that the exclusion of a right to salvage is very unlikely to operate by way of implication. Accordingly, express agreement will be required (see *Fisher v The Oceanic Grandeur* [1972] 2 Lloyd's Rep 396, *per* Stephen J at p. 407).

8.88 Nevertheless, an agreement which prima facie appears effectively to exclude a right to salvage may fail to have the desired effect if the agreement is intended to have effect only in certain circumstances and those circumstances alter. A classic illustration of the way in which an exclusion will fail to operate is to be found in *The Glenmorven* [1913] P 141, in which tug owners agreed to tow a vessel on a basis of "no cure, no pay, no claim to be made for salvage." This was treated by Sir Samuel Evans P as a contract to provide towage services to a partly disabled vessel manned by officers and crew. It was held that the abandonment of the vessel by the officers and crew without reasonable cause served to bring to an end the agreement as a whole, and that thereafter the tug owner's services were provided as salvage. Accordingly, £1,400 was awarded as salvage and £300 provided on a *quantum meruit* for the earlier service as towage. It is submitted that the principle which emerges is the normal common law principle that an express exclusion will only be effective in the precise event to which it is stated to apply. This principle received further confirmation in *The Queen Elizabeth* (1949) 82 L1 L Rep 803.

Effect upon the rights of the tug crew

8.89 It should be noted that the mere fact of a tug owner entering into a contract excluding salvage will not exclude claims by the crew and officers of the tug for salvage in a proper case; the owner has no authority to contract out of their individual rights (see *The Margery* [1902] P 157 and *The Leon Blum* [1915] P 90, both decisions of Sir Samuel Evans P).

The sub-contracting in of tugs in salvage services

8.90 With the retrenchment of the modern salvage industry and the rationalisation of many salvage operators' fleets, it is increasingly common for a salvor who engages in a salvage service and who has entered into an LOF contract to engage tugs under sub-contracts to assist him in performing the service. Thus a salvor may offer his services to a vessel in distress but, because he has no tug handy or because he needs more pulling power than he can readily dispose of, the salvor hires in the services of the necessary vessels from another tug owner.

8.91 In such a case, whether or not the sub-contractor can claim salvage will depend on the nature and terms of the sub-contract. It is submitted that, where a tug is engaged by a salvor to perform a particular service as part of a salvage operation in circumstances in which it is the common understanding of the parties that the tug is assisting in the performance of the salvor's salvage of the vessel but on ordinary terms, such as a daily rate of hire or a lump sum (whether on "no cure-no pay" terms or not), it will be a rare case in which the sub-contracted tug can assert a claim to salvage. While there is no contractual relationship between the sub-contracted tug and the vessel in distress, which is the position considered in the cases such as *The Homewood*, the tug is not rendering the services voluntarily, but rendering its normal services pursuant to the sub-contract. Just as a port authority may be under an obligation to provide a tug under its

statutory constitution and is thereby unable to claim salvage in respect of services which it renders pursuant to that constitution (see eg *The Mars and other Barges* (1948) 81 L1 L Rep 452 and *The Gregerso* [1973] QB 274), similarly a tug which is rendering a service to another vessel pursuant to and in accordance with the terms of a contract entered into by it with another tug, albeit a salvor, is not acting as a volunteer. Certain circumstances may alter the position. Thus, if a tug is engaged by a salvor under a sub-contract on a fixed daily rate to hold up a vessel in distress while the salvor performs the salvage service, and the tug is called upon to render very different services such as firefighting or emergency pumping out, a claim for salvage may lie against the vessel unless the sub-contract expressly prohibits such a claim in terms which are enforceable by the salvor.

8.92 The question has not been addressed specifically in any English case. However, the New South Wales Court of Appeal in *The Texaco Southampton* [1983] 1 Lloyd's Rep 94 touched upon the question. In that case, a vessel was disabled. Her owners contacted their usual tug supplier and requested a tug; no mention of salvage was made. The supplier, having no tugs available, engaged another tug under a sub-contract. The crew of the tug claimed salvage, but the court rejected the claim. It stated that in accordance with normal principles where a tug is engaged under a towage contract and does no more than perform what she was engaged to, she is not entitled to claim salvage. Here the court relied upon the existence of the sub-contract between the sub-contracted tug and the other tug supplier as barring the claim to salvage against the disabled vessel. This follows the approach set out above. A similar approach was adopted in the American case of *Nunley v The Dauntless* 863 F 2d 1190 (1989).

8.93 The terms of Article 17 of the 1989 Salvage Convention do not appear to change this analysis. Article 17 provides that no salvage payment is due "unless the services . . . exceed what can be reasonably considered as due performance of a contract entered into before the danger arose." This provision applies equally to the case where the service rendered for which it is desired to claim salvage is one rendered under a contract with the vessel salved or under a sub-contract with a salvor already engaged by that vessel.

8.94 In practical terms, a sub-contracted tug, if provided by a tug owner who himself has salvor status, will often enter into an agreement under which she becomes a joint salvor. In this connection, the standard form ISU sub-contract or "International Salvage Union Sub-contract (Award Sharing) 1991" form is frequently used; this enables the award obtained by the salvor to be shared with the sub-contracted tug on the basis of a determination before a salvage arbitrator of the contribution made by the sub-contractor to the success of the service and the remuneration awarded to the salvor as a result of it.

8.95 Alternatively, the sub-contract will be on terms that the hired-in tug foregoes any right to claim salvage (see under the standard form ISU sub-contracts (drafted with BIMCO) "Salvcon" and "Salvhire", considered in Chapter 9 below). Even if these forms are not used, certain major salvors will sub-contract on the same basis but using an ordinary towage form such as "Towcon", but amended with their own house "no claim for salvage" clauses.

The effect of misconduct by the tug

8.96 As has been seen, in *The Minnehaha* (1861) 15 Moo PC 133, Lord Kingsdown commented (at p. 155) that one of the matters to which the court had to have regard when considering the claim of the tug as aspirant salvor was whether the court would be warranted in finding that the danger and unforeseen conditions facing the tow were due to the tug. The effect of misconduct on the part of a salvor is fully considered in the leading salvage texts. In the special context of tug and tow, the effect of causative misconduct by the tug upon any subsequent salvage service which it may perform has been closely examined by the courts.

The early authorities

8.97 The position under earlier authority was well summarised in the speech of Lord Kingsdown in *The Minnehaha*, who at p. 155 observed:

> If the danger from which the ship has been rescued is attributable to the fault of the tug if the tug, whether by wilful misconduct, or by negligence, or by the want of that reasonable skill or equipments which are implied in the towage contract, has occasioned or materially contributed to the danger, we can have no hesitation in stating our opinion that she can have no claim to salvage. She can never be permitted to profit by her own wrong or default.

8.98 The early authorities largely stand for the proposition that misconduct on the part of the tug, which gives rise to the need for the salvage service which is eventually performed by the wrongdoing tug, will debar the tug from recovering any salvage award. In *The Cargo ex Capella* (1867) LR 1 A & E 356, two vessels collided and one subsequently effected a salvage service for the other. Dr Lushington held at p. 357:

> I look to the principle which ought to govern the case. In my mind, the principle is this, that no man can profit by his own wrong. This is a rule founded in justice and equity . . . The asserted salvors were the original wrongdoers it was by their fault that the property was placed in jeopardy. The rule would bar any claim by them for services rendered to the other ship which was a co-delinquent in the collision.

Similarly, in *The Duc d'Aumale (No. 2)* [1904] P 60, Gorell Barnes J commented at pp. 74–75:

> Both on principle and as a matter of good policy . . . it would not be desirable to encourage a crew to recover a salvage reward in such cases of tug and tow where the master of the tug has been one of the causes of the disaster from which the ship to which salvage services has been rendered is rescued . . . it would be bad policy to encourage sailors, as it were, to hope and expect that their master might get the ship he was towing into danger, so that they would have to render services for which they could recover.

8.99 The soundness of the earlier authorities must now be doubted in the light of the more recent authorities on the effect generally, and not just in the context of tug and tow, of misconduct on the part of the salvor which is causative of the need for salvage assistance.

The modern approach

8.100 The modern approach is found in the decision of the House of Lords in *The Beaverford v The Kafiristan* [1938] AC 136, which has been subsequently applied in *The Susan V Luckenbach* [1951] P 197 (CA). The speech of Lord Wright in the former case at pp. 141–154 sets out the prevailing view, founded upon the approach adopted by Sir Robert Phillimore in *The Glengaber* (1872) LR 3 A & E 534, that there is no principle of law which prevents a ship which has rendered a salvage service from obtaining a salvage award simply on the ground that she caused or, at least, was partly responsible for the damage which gave rise to the need for the salvage service. Accordingly, a tug which, by its own misconduct, gives rise to a danger which puts the tow in need of a salvage service which, in the final event, is rendered by that same tug, is not necessarily deprived of the opportunity to claim a salvage award. Lord Wright stated at p. 148:

> There does not seem to be any reason in equity why the salved vessel . . . should not pay the appropriate salvage remuneration merely because the salving vessel belongs to the same owners as the other colliding vessel. That fact seems to be irrelevant so far as concerns the usefulness and meritorious character of the actual services rendered. This is not less true when the possibility of the other colliding vessel being held to blame in whole or in part is taken into account.

8.101 Lord Wright went on to say, at pp. 148–149, that the maxim "that no man can profit by his own wrong" was wholly inapplicable. Although the decision in this case concerned a claim for salvage by a salving vessel in the same ownership as the wrongdoing vessel, and might therefore be distinguished from the position where the salving vessel is itself the wrongdoing

vessel, the speech of Lord Wright appears not to support such a distinction. He commented obiter at p. 149:

> It is, however, said that if the principle that no man can profit by his own wrong excludes a claim for salvage where the salving vessel is the colliding vessel, as was held in *The Cargo ex Capella*, and other cases, the same principle should apply where the salving and the negligently colliding vessel belong to the same owner, because the wrong is committed by the person who salves, acting in either case by his servants. I shall assume that the principle there is established. I am doubtful of the logic or equity of it . . . if the rule laid down in *The Cargo ex Capella* is at all sound.

Further, at p. 153 he added:

> It is only when the salving vessel is to blame for the collision that it seems that not only the members of the crew actually in fault, but the whole crew, however meritorious their services, are debarred. I feel doubt about the equity or policy of so sweeping a rule.

8.102 Similarly, it appears that the principle of circuity of action has no direct application. The approach to be taken by the courts is, first, to determine and assess any salvage award and, secondly to ascertain the responsibility for the collision or danger. Thus, it may be that the salvor is liable in damages to the owner of the casualty for his proportion of the responsibility. Accordingly, any salvage award would be reduced by the level of damages. Of course, were the damages to equal the quantum of the salvage award, nothing would be recoverable (see *The Beaverford v The Kafiristan* [1938] AC 136, *per* Lord Wright at pp. 148 and 152–153).

8.103 The principle upon which Gorell Barnes J relied in *The Duc d'Aumale (No. 2)* [1904] P 60 was described by Lord Wright (at p. 151) as being "of dubious soundness."

8.104 The provisions of Article 18 of the 1989 Salvage Convention confirm the approach of the court in *The Beaverford*. Article 18 provides, albeit in relation to a salvor, that:

> A salvor may be deprived of the whole or part of payment due under this Convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part or if the salvor has been guilty of fraud or other dishonest conduct.

8.105 It is interesting to note that the effect of misconduct as determined in *The Beaverford* is not reflected in the approach of the US courts, which continue to follow the earlier English authorities so that misconduct of a towage service which leads to the need for a salvage service will normally result in the tug being debarred from recovering salvage as a matter of principle. One of the earliest US cases on the issue is *The Homely* Fed. Cas. No. 661 (1876), in which a tug, in towing the vessel, caused her to ground by reason of the tug's negligence. A second tug was engaged to assist in the refloating of the vessel. Together, the two tugs succeeded in refloating the vessel and towing her to her destination. Both tugs claimed a salvage award. It was held that the second tug was entitled to an award, but that the first tug was not, by reason of the fact that the salvage service had been necessitated by the negligence of the first tug. The US courts have also, interestingly, held that where a towage service is rendered by tugs in common ownership, but a salvage service becomes necessary by reason of the misconduct of one, the other will not be debarred from recovering a salvage award. In *Hendry Corp v Aircraft Rescue Vessels* 113 F Supp 198 (1953), a number of aircraft rescue vessels were in the tow of two tugs in common ownership. Some of the tows went aground as a result of the negligence of one of the tugs. The second tug, still with its tows, provided assistance in refloating the stranded tows. The court awarded salvage to the second tug.

PART C. CONTRACTS FOR "ENGAGED SERVICES"

The nature of "engaged services"

8.106 A further category of services which falls neither into the category of towage nor, strictly, salvage is that generally referred to as "engaged services" or services at request. This category is

exceptional in that success is not a requirement. The nature of "engaged services" is well-illustrated by the decision in *The Undaunted* (1860) Lush 90, in which a vessel summoned assistance in terrible conditions having lost her anchors. She was approached by a second vessel and it was agreed that assistance would be provided. However, prior to the assistance being provided, the vessel was secured, partly by her own endeavours and partly with the efforts of a third vessel. Notwithstanding, the second vessel advanced a claim for salvage. In awarding salvage to the second vessel, Dr Lushington commented at p. 92:

> if men are engaged by a ship in distress, whether generally or particularly, they are to be paid according to their efforts made, even though the labour and service may not prove beneficial to the vessel. Take the case of a vessel at anchor in a gale of wind, hailing a steamer to lie by and be ready to take her in tow if required; the steamer does so, the ship rides out of the gale safely without the assistance of the steamer. I should undoubtedly hold in such a case that the steamer was entitled to a salvage reward.

8.107 Thus, salvage awards were made in *The Helvetia* (1894) 8 Asp MC 264, in which a request to tow was met without any tangible benefit, and in *The Cambrian* (1897) 8 Asp 263, in which a vessel was requested to stand by in circumstances in which it was anticipated that the crew on board the casualty would require imminent rescue although, in the event, no such rescue was necessary. In *The Helvetia* (1894) 8 Asp MC 264, Barnes J stated at p. 265:

> I speaking for myself, it seems to me that if there is in fact a request to render assistance . . . a request to attempt to tow the ship, and the service requested is in fact performed as far as it is possible to do it, and the ship is afterwards saved by other means, then the persons who rendered the services are . . . entitled to some salvage remuneration . . . it is almost obvious that in rendering these services they may be unsuccessful and may incur a great loss of time and much risk. I think it would deter them in such circumstances from attempting to render assistance if it were held that on rendering them at the request of the master of the ship they were not entitled to any reward at all unless the services proved actually beneficial to the ship.

8.108 However, in *The Renpor* (1883) 3 PD 115, it was held by the Court of Appeal that a vessel which stood by another at its express request, but which conferred no obvious benefit, recovered nothing by way of salvage. Brett MR commented at pp. 117–118:

> In order to found an action for salvage, there must be something saved more than life, which will form a fund from which salvage may be paid . . . It is said that under some circumstances if life is saved after the services of the salvors have been requested by the master of the ship which is in danger, the shipowner is bound to pay salvage, although there is no res saved, *The Undaunted* has been cited in support of this proposition . . . But *The Undaunted* is really no authority in favour of the plaintiffs' contention, because in that case the ship was saved, and therefore there was a fund from which payment could be made . . . . something must be saved in order to give valid grounds for a salvage action . . . there are two circumstances necessary in order to make an agreement binding on an owner; first, the contract must be made under a necessity; and, secondly, it must be made for his benefit.

8.109 Thus, it is submitted, that the principle of "engaged services" has only a limited ambit. Following the decision in *The Renpor*, it was held by Phillimore J in *The Dart* (1889) 8 Asp 481 that a vessel which was engaged to tow a casualty would not recover salvage in the absence of any benefit. In qualifying the principle in *The Undaunted*, Phillimore J noted that a vessel would get no award

> unless she gets it under the doctrine that she was engaged. If she had been engaged to stand by, or if she had been engaged to try and tow, then I should have been able to give her some award.

At p. 483 he again commented: "she was engaged to tow. I construe that to mean to tow into a port of safety, and she failed in doing that."

8.110 It would seem to follow that a salvage award will be earned where the vessel completes or fulfils the task for which she is engaged, albeit not, in doing so, conferring the success necessary at common law for a salvage award. In the absence of completing the task, it seems that no

award is merited an attempt at the engaged task will not suffice. The position is aptly illustrated in *The Marechal Sachet* [1911] P 1. However, in *The Benlarig* (1888) 14 PD 3, in which a casualty requested another vessel to tow her to Gibraltar and which the latter agreed to attempt to do although, in the event, leaving the casualty in a more dangerous position than before, Butt J held that no salvage award was payable, but that adequate remuneration was due for what had been done in fulfilment of the agreement. He stated at p. 6 that the contract between the parties was "not a contract merely to render salvage service, and certainly not a contract to take the vessel into Gibraltar but a contract [to] attempt to do so."

8.111 Accordingly, the precise terms and nature of the agreement will be crucial to the determination of whether or not the contract is one for "engaged services."

Have "engaged services" survived the 1989 Salvage Convention?

8.112 Article 12 of the 1989 Salvage Convention, in so far as material, provides as follows:

> 1. Salvage operations which have had a useful result give right to a reward.
>
> 2. Except as otherwise provided, no payment is due under this Convention if the salvage operations have had no useful result.

8.113 The article represents the ordinary position that a salvage service to earn remuneration must be successful or, put another way, must confer a benefit upon the object of the salvage service. The only exception to this principle provided for by the 1989 Salvage Convention is found in Article 14, which relates to environmental protection.

8.114 As has been seen above, the concept of "engaged services" represents a halfway house between pure salvage and pure towage; in circumstances of danger to a vessel which would qualify services rendered to her as salvage services, a tug is requested by the vessel to do or to perform a particular service, rather than the whole salvage itself. Thus a tug (or other vessel) might be engaged by a vessel with flooded holds to proceed at full speed to the nearest harbour to pick up some submersible pumps or materials with which to staunch an ingress of water. By virtue of the request (which is, perhaps, the essential feature of services which have been "engaged" – see eg *Kennedy and Rose* (9th edn) at para. 9.028), the tug is entitled to remuneration upon a salvage basis. As Professor Gaskell has crisply put it (*Current Law Statutes*, 1994, Vol. II, 29–12), "entitlement depends on the making of a request for services, even though they may not be of any use."

8.115 This species of a hybrid towage/salvage service may or may not fall within Article 12(1) of the 1989 Convention. If the engaged services have a useful result, then they will fall within the definition of "salvage operations which have had a useful result." But if they have not had a useful result because their performance has not proved possible (eg no submersible pumps were available) or because, even though performed in full pursuant to the request, they have conferred no benefit or have "had no useful result" (eg where the pumps, although obtained, were inoperable because of the suspension of cargo in the water which clogged the pump filters), then such services are, prima facie, within Article 12(2) of the 1989 Convention and entitle the provider of them to "no payment." See *Kennedy and Rose*, para. 9.040.

8.116 It is submitted that the combined effect of the provisions of the 1989 Convention and of the Merchant Shipping Act 1995 is that the legal concept of "engaged services" and the cases which have developed that concept may arguably no longer be good law (see eg *Gaskell* (*op. cit*.); cf. the views of *Brice and Reeder*, who submit they survive the Convention at para. 1–403 and the more muted views in line with Gaskell expressed in *Kennedy and Rose*, para. 9.040, p. 383). The material provisions are the following:

i Article 6(1) of the 1989 Convention provides that:

> "This Convention shall apply to any salvage operations save to the extent that a contract otherwise provides expressly or by implication."

ii Article 1(a) of the 1989 Convention defines "salvage operations" as follows:

> "Salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever."

iii By section 224(1) of the 1995 Act:

> "The provisions of [the 1989 Convention] as set out in Part I of Schedule 11 to this Act . . . shall have the force of law in the United Kingdom."

8.117 The combined effect of these provisions is that the terms of the 1989 Convention will apply as a matter of law to all salvage operations, as defined, unless the salvage operation in question is performed under a contract which either specifically or implicitly "contracts out" of the 1989 Convention.

8.118 "Engaged services" are, by their nature, acts or activities undertaken to assist a vessel or property in danger on navigable or other waters; accordingly, they are comprised within Article 1(a) of the 1989 Convention. As "salvage operations", "engaged services" fall within the scope of the 1989 Convention under Article 6(1). Unless, therefore, they can be regarded as being rendered under an engagement which expressly or impliedly excludes the operation of the 1989 Convention, such services will have to satisfy the requirement of success or "useful result" if they are to qualify for any reward (see Article 12 of the 1989 Convention, cited above).

8.119 Where the "engaged services" are rendered upon a clear contractual basis which addresses the issue of salvage and remuneration, little difficulty arises since the services will be rendered under a contract which excludes the 1989 Convention (see *Kennedy and Rose*, paras. 9.040 and 9.041). So, if a vessel in distress hires tug to ferry essential supplies on a daily hire basis with a clause excluding the right to claim salvage, the tug will be entitled to remuneration as agreed. However, the usual case of "engaged services" is where a vessel is engaged to render specific assistance without terms being agreed. On one view since the services are "engaged", it could be argued that the request carries with it a sufficient "implication" so as to exclude the 1989 Convention. The difficulty with such an argument is that it ignores the fact that the entitlement to remuneration for "engaged services" has never been recognised by the court as being contractual in any way (see eg *The Hestia* [1895] P 193) and that the court has always stressed the close affinity between pure salvage remuneration and remuneration for "engaged services." Thus remuneration for "engaged services" is not on a *quantum meruit* basis, as might be expected of a service done at request, but has always been assessed on a salvage basis (*The Undaunted* (1860) Lush 90; *The Maude* (1876) 3 Asp 338; see also *The Melpomene* (1873) LR 4 A & E 129).

8.120 Since "engaged services" represent a hybrid or special category of salvage service or of services treated as salvage and rewarded as such, they fall within the provisions of Articles 6(1) and 1(a). Unless the engagement is very clear in its terms, if the services are unsuccessful, under the codified law as set out under Article 12 of the 1989 Convention, no remuneration is payable.

8.121 The effect of the 1989 Convention upon "engaged services" (and upon other aspects of English salvage law) was the subject of debate in the House of Lords during the passage of the Merchant Shipping (Salvage and Pollution) Bill, in particular in relation to the rephrasing of the jurisdiction of the Admiralty Court in salvage matters as provided for by section 20(2)(j) of the Supreme Court Act 1981. That section was amended by para. 6 of Sched. 2 to the Merchant Shipping (Salvage and Pollution) Act 1994 to read as follows so as to give the Admiralty Court jurisdiction to hear and determine:

> (j) any claim –
>
> under the Salvage Convention 1989;
> under any contract for or in relation to salvage services or
> in the nature of salvage not falling within (i) or (ii) above; . . .

8.122 Certain speakers in the House of Lords plainly regarded this provision as preserving the additional features of the old law of salvage, such as that of "engaged services." However, it is submitted that all that it achieves is to preserve the jurisdiction of the Admiralty Court to hear and determine heads of salvage additional to those arising under the 1989 Convention if, but only if, those heads of salvage are not inconsistent with and are not to be treated as having been superseded by the new codification of the law which the 1989 Convention effects. This was the view of Lord Donaldson of Lymington who stated (*Hansard*, HL, Vol. 555, col. 697) that para. 6 of Sched. 2 was jurisdictional: "it neither adds to or subtracts from the Salvage Convention or anything else." If, therefore, the view above is correct and "engaged services" are inconsistent with the Salvage Convention, para. 2 of Sched. 2 by itself is insufficient to modify the Salvage Convention by engrafting on to it the concept of such services as an additional head of salvage.

8.123 The question of the survival of the concept of "engaged services" is one of the interesting questions arising out of the enactment of the 1989 Salvage Convention which will have to be addressed by the Admiralty Court.

PART D. SALVAGE OF A TUG AND TOW

8.124 Where a towage convoy is itself collectively the subject of a salvage service, ordinary principles of salvage law and practice will apply. The only particular area of potential difficulty is in relation to the identification of those vessels which are to contribute in salvage. Similar problems arise in the field of contribution in general average. The question that arises is whether the tug and tow are to be treated on a unitary basis as one contributing interest in salvage (or general average). In relation to general average, the matter has been the subject of discussion in particular cases and is addressed by the new York-Antwerp Rules of 1994 (as to this, see below in Chapter 13).

8.125 In salvage, there is no rule or principle by which tug and tow are to be treated as one in all cases. The question of contribution is answered by identifying which of the constituent parts of the towage convoy were in danger and whether, and, if so, in what circumstances and to what extent, salvage services were rendered to those constituent parts. To give some examples:

i A tug tows an unmanned water-borne object such as a dumb barge or a floating piece of equipment which is owned by the tug owner. Owing to an engine failure, both are in danger of stranding. They are salved. *Result*: the tug owner contributes in salvage on the basis of the salved value of the tug and the barge. See eg *The Rilland* [1979] 1 Lloyd's Rep 455, in which a tug towing a barge laden with a bucket-dredger owned by the tug owner were taken together to arrive at a salved value in respect of salvage services rendered to the whole convoy.

ii Take the previous example, but with the barge or equipment under tow being owned by a different party. *Result*: the tug owner and the tow owner separately contribute in salvage on the basis of the value of their own property taken separately.

iii A tug tows a barge or piece of equipment owned by the tug owner. Owing to an engine failure, both are in danger of stranding. The tow-line parts (or is slipped). As a result the barge is pushed towards the shore but the tug succeeds in anchoring herself and in arresting her drift. The barge alone is salved, the tug being in no danger. *Result*: the tug owner is liable to contribute in salvage as owner of the barge but only in respect of the property at risk, the barge, of which the salved value alone is relevant.

iv A tug tows a barge owned by a third party. Owing to an engine failure, both are in danger of stranding. The tow-line parts. Both tug and tow require to be salved. However, due to the windage of the barge, the services rendered to the barge are dangerous and difficult, while those to the tug merely consist of holding-up. *Result*: both tug and tow are liable

to contribute in salvage. Their respective contributions will be assessed separately both by reference to the different services provided to each and in relation to the separate value of each as the salved property.

8.126 As it is put in *Kennedy and Rose* at para. 4.047, the "imperative" task is to discern whether the tug and tow are facing a common danger; whether both benefit from the services rendered and whether they have the same or different services rendered to them. See also *Brice and Reeder*, who endorse the text in Part D above as it appeared in the first edition of this work (see footnote 50 to para. 3–30 at p. 230).

CHAPTER 9

The ISU standard form contracts for the provision of tugs to salvors for use in salvage: "Salvcon 2005" and "Salvhire 2005"

PART A. INTRODUCTION

9.1 The preceding chapter considered the interrelationship of towage and salvage from the perspectives of the provider of a service and of the recipient of that service and focused on the identification of the dividing line between the two types of service or assistance.

9.2 Towage and salvage will, however, often co-exist under the contractual arrangements in place between the various tugs or other ancillary vessels which make up a salvor's team present at a casualty. A salvor who is engaged to assist a casualty may often be operating far from his base or from the place where his salvage tugs are on salvage station. Similarly, a salvor may need additional tugs or tugs of different capacity or type to assist his own tugs in carrying out the salvage operation. In such cases the salvor will, by means of appropriate sub-contracts, bring in tugs or other vessels from third party tug owners or towage companies. Indeed, the entire salvage service may be performed by a tug or tugs not owned or operated by the salvor but which the salvor has sub-contracted in and which the salvage master will direct in the execution of the salvor's salvage plan.

9.3 The standard form of salvage contract, Lloyd's Open Form (LOF), recognises this situation by providing expressly that, in the performance of his salvage service under LOF, the salvor may do so by the use of sub-contractors and that he may recover salvage remuneration for all of the services rendered, whether by himself or his sub-contractors. The relevant provisions of the current form are clauses 13.2 and 13.3 of LOF 2011. These state:

> 13.2 The Contractors may engage the services of sub-contractors for the purpose of fulfilling their obligation under Clause A and B of the Agreement but the Contractors shall nevertheless remain liable to the Owners for the due performance of those obligations.
>
> 13.3 In the event that sub-contractors are engaged as aforesaid the contractors may claim salvage on behalf of the sub-contractors.

9.4 It will be noted that the form leaves it open to the salvor as to the basis upon which any sub-contract may be arranged. The salvor is free to decide for himself on what terms he will contract for additional tug assistance from third parties.

9.5 There are two main contractual bases on which this type of sub-contracting of the tug as respects the salvage service are commonly arranged.

9.6 The first is by means of a sub-contract under which the salvor agrees to share the salvage remuneration to be awarded upon the completion of a successful salvage which entitles the salvor to such remuneration. In other words, the salvor and the sub-contractor both render salvage to the casualty on the same basis of "no cure-no pay" and the remuneration of the subcontractor for his services is made by giving him a share of any eventual salvage award. Loosely put, the tug owner who is sub-contracted on this basis is effectively a co-salvor, albeit subordinate to the salvor head contractor.

9.7 This basis of sub-contracting is usually concluded on the standard form adopted by the International Salvage Union (ISU) for its members, the "International Salvage Union

Sub-Contract (Award Sharing) 2001" form (hereinafter the "ISU Sub-Contract 2001") which replaced the former 1994 form in light of the changes required to reflect SCOPIC. The form is now in common use even between non-members of the ISU. Its salient features are that it is a sub-contract between the salvor head contractor and sub-contractor employed where the salvor head contractor is performing salvage under LOF and under which the sub-contractor is engaged on "no cure-no pay" principles. The sharing of the remuneration, unless agreed, falls to be determined under LOF arbitration. The ISU Sub-Contract 2001, being a species of salvage rather than towage, is considered in detail in the leading texts to which reference may be made (see Brice, *Maritime Law of Salvage* (5th edn, 2012, edited by John Reeder QC), paras. 8–302 to 8–333 (where a detailed commentary on the ISU form will be found).

9.8 The second basis of sub-contracting is where the salvor hires in the tug or additional assistance at a fixed remuneration for the sub-contractor (whether lump sum or at a fixed daily or other rate) and under which there is no sharing of any eventual salvage remuneration to which the salvor may become entitled. Such sub-contracts represent ordinary contracts of towage (or allied services) between the salvor and the tug owner. They will usually contain provisions which exclude or restrict any right in the tug owner to claim salvage in respect of the work he is engaged to do, even if the circumstances in which that work may fall to be rendered become such as would effect the conversion from towage to salvage at common law. Instead of the relationship of co-salvor under a general LOF umbrella, where tugs are brought in on this sub-contractual basis, there will be two contractual regimes at work: the LOF salvage contract between salvor and the casualty, and the towage contract between the salvor and the sub-contracted tug owner.

9.9. Given that this basis of sub-contracting is effectively a sub-contract for towage services, albeit in the context of a salvage service being rendered by a salvor usually under LOF, various forms of contract form are used including the BIMCO standard forms "Towcon" and "Towhire." However, conscious of the special problems that can arise out of the relationship between towage and salvage under an ordinary contract of towage, as considered above in the preceding chapter, the salvage and towage industry felt the need for a dedicated standard form designed especially for use by salvors and tug owners where the contract of towage is a sub-contract of all or part of salvage services being provided by a salvor under a salvage contract.

PART B. THE "SALVCON 2005" AND "SALVHIRE 2005" FORMS

The genesis of the forms

9.10 Having formerly addressed the "award-sharing" basis of sub-contracting by the ISO Sub-Contract 1994, referred to above, the ISU, in response to this perceived need, turned to consider standard form fixed remuneration sub-contracts.

9.11 The ISU has drawn up standard form contracts for this type of sub-contract. These are the "Salvcon" and "Salvhire" forms; the forms were revised and the current version of the forms are "Salvcon 2005" and "Salvhire 2005." The two forms are supplied with "Guidance Notes" to assist those who use the forms with basic explanations of the main provisions of the forms. The notes explain the purposes of and intentions behind the forms. The "Salvcon" notes, for example, state:

> This Agreement "SALVCON" is intended to be used by a Salvor working under Lloyd's Form, or similar contract, who wishes to engage additional assistance, but on a lumpsum, non-award sharing basis, as distinct from the widely-used ISU Award Sharing Sub-Contractors Agreement or the alternative Daily Hire Sub-Contract Agreement. "SALVHIRE 2005."
>
> Equally a Tugowner who wishes to hire out his tug to a Salvor on a lumpsum basis, may offer its services on the basis of "SALVCON 2005."

9.12 As their names suggest the two forms mirror in general form the original versions of the BIMCO "Towcon" and "Towhire" forms: "Salvcon 2005" is a lump-sum contract and "Salvhire 2005" is a daily rate contract. As the ISU guidance notes explain:

> The format of the document is very similar to the BIMCO/ISU Towage Agreements, TOWCON/ TOWHIRE and the BIMCO/ISU Wreck Removal Agreements WRECKCON/WRECKHIRE. There being two parts to the Agreement.

9.13 The ISU guidance notes record the common use prior to the introduction of the two new ISU forms of the "Towcon" form, which itself was a form drawn up by a subcommittee of BIMCO with ISU and European Tugowners Association (ETA) members for ocean towage work (see Chapter 4 above):

> It will be seen that the content of the Agreement closely follows TOWCON, which until now has often been utilised by salvors when engaging additional assistance on a Lumpsum basis.

9.14 The use of the "Towcon" form by salvors and tug owners in the context of non-award sharing salvage sub-contracts was essentially *faute de mieux* since no other industry-approved form of towage contract existed. However, as the ISU explanatory notes to the original versions of the "Towcon" and "Towhire" forms had stated: "It should be stressed that both Agreements are intended for commercial towage work at sea and have no connection with part towing *or salvage*" (emphasis supplied).

9.15 Accordingly, while "Towcon" and "Towhire" were used as a template by the ISU for its new form of non-award sharing sub-contract, there are important differences between the two types of standard form.

9.16 As will be seen, the main differences between the "Towcon" and "Towhire" forms and the "Salvcon 2005" and "Salvhire 2005" forms lie in the provisions relating to the definition of the services, to the obligation on the tug owner when circumstances relating to the services change with the result of making performance more onerous, and to the exclusion or restriction of claims in salvage on the part of the tug owner.

9.17 Before the introduction of the "Salvcon" and "Salvhire" forms, major salvors, while using the "Towcon" form as the basis of their sub-contract on a non-award sharing basis, did so with certain "house" rider clauses to address the unsuitability of the towage contract form for salvage sub-contract work; for example, there exist the "Tsavliris Conditions" which were summarised in *Alexander G. Tsavliris Ltd v OIL Ltd (The Herdentor)* (19 January 1996, unreported – discussed above in Chapter 4 and set out at Appendix 22) by Clarke J as terms providing for no claim for salvage, full co-operation by the sub-contractor in providing logbooks and statements for the purposes of the salvor's claim and a confidentiality or "p. & c." clause.

9.18 The "Salvcon" and "Salvhire" forms in their original and revised 2005 forms contain similar provisions, which are considered below. However, in practice many major salvors continue to prefer to use their own "house" clauses with the "Towcon" or "Towhire" forms, rather than the ISU standard form contracts.

The nature of the two forms

9.19 As with the "Towcon" and "Towhire" forms, the "Salvcon 2005" and "Salvhire 2005" forms are essentially the same form in respect of all substantive provisions save for those that relate to the basis upon which the salvor is to remunerate the tug owner for the services provided under the contract. The two forms adopt the same two regimes as are adopted under the BIMCO forms:

i "Salvcon 2005": the full heading of Part I of the form is "International Salvage Union: Lumpsum Sub-Contract." Part II is headed "International Salvage Union Lumpsum Agreement." The services of the tug sub-contracted to it by the salvor are to be provided

to the salvor by the tug on a lump sum basis (ie a fixed price for a particular defined service either payable as one lump sum or in stages for particular stages of the defined service).

ii "Salvhire 2005": Part II is headed "International Salvage Union Agreement Daily Hire Agreement)." Under this form of sub-contract, the sub-contracted services of the tug are to be provided to the salvor at a daily rate of hire. As with the "Towhire" form, this type of towage contract is closely similar to a time charterparty or more usually to a "time charter trip" charter where the tug is brought in for a particular service of indeterminate duration but where the completion of the service defines the period of hire.

9.20 As the ISU guidance notes make clear, the ISU "Salvcon 2005" and "Salvhire 2005" forms are modelled on the previous versions of the BIMCO "Towcon" and "Towhire" forms considered in detail above in Chapter 4 in their current revisions of 2008; reference should be made to that chapter and to the fuller treatment of the earlier versions of those forms in the second edition for commentary on provisions which are common to both sets of forms and as indicated in this chapter. References in this chapter to "Towcon" and "Towhire" are to both the earlier and 2008 revised versions unless specifically stated.

PART C. THE "SALVCON 2005" FORM

The structure and organisation of the form

9.21 The "Salvcon 2005" form is reproduced in facsimile in Appendix 14. The form follows the BIMCO house-style and consists of the usual two parts: a section, Part I, consisting of a box-form schedule in which the particular details specific to the particular contract are to be entered (as the ISU guidance notes put it: "in which will be entered the Operational and Financial Matters") and a series of printed standard form clauses, Part II.

Part I of the "Salvcon 2005" form

9.22 Part I consists of 18 boxes, a much smaller number than are provided under the "Towcon" and "Towhire" forms since the object of the form is a service which is usually narrower in its scope and since the ISU form provides for a simplified system of boxes under which various details or information are to be entered grouped together in one box rather than having a box each. Details of the main boxes are as follows.

Box 4

9.23 This box deals with the details and specification of the vessel being hired under the contract. The vessel, as is explained by clause 1.2 of Part II of the form, can cover effectively any type of vessel which the salvor is hiring in to give it additional assistance. While the form is perhaps most commonly used for the hiring in of a tug or tugs, the form is designed for use for the services of all types of vessel. Under this box, the salient characteristics of the vessel will be set out (ie for a tug, her brake horse power, bollard pull, propulsion and manoeuvring capability etc.). Tug owners usually have available printed particulars of their individual tugs for supply to potential clients; these often contain photographs and line drawings of the tug, together with a full description of all characteristics and equipment (see eg the particulars put forward by tug owners and salvors in an LOF arbitration). It will often be convenient to refer to these in Box 4 and to append them to the agreement. However, care should be taken if this is done that all stated characteristics can be met and if any features are not relevant to the service (eg firefighting equipment not relevant to a straight tow or to assistance in reflotation) it may be advisable to strike these out.

9.24 For a specific service where particular attributes of the tug are important, it may be preferable to draw up a typed specification covering only the relevant matters and to annex this to the

agreement. See the ISU guidance notes, which envisage the appending to the agreement of some separate document rather than the insertion of the specification in Box 4 itself.

9.25 Even where the tug is a very well-known one in the industry, as many of the major salvage and ocean tugs are, it is advisable to set out the specification at the time of contracting rather than to allow the parties to contract on the basis of some perceived impression of what, for example, the "*Fighter*" or the "*Megas Alexandros*" is capable of from some past use of the tug.

Boxes 3 and 5

9.26 These boxes contain the details of the tug owner, his place of business and the identity of his P&I Club.

Boxes 6–8

9.27 These boxes relate to the casualty which is the subject of the salvage operation for which the vessel is being sub-contracted in by the salvor. Full details are to be given of the dimensions, location and condition of the casualty or vessel in distress and, importantly under item (j) of Box 6, "Any other casualty's details relevant to this Agreement." This will usually require the salvor as hirer who has this information, where it is not already known of by the tug owner, to set out matters that impact on the services which the tug is to render to the casualty. For example, if the casualty has no use of her main engines or of her rudder, such details will be relevant to the performance of the towage operation. Similarly, if a vessel is hired to assist in pumping out, any matters affecting the vessel's own ballast and bilge pumps will be relevant.

9.28 It is plainly in the hirer's interests to set out concisely and as fully as possible the circumstances relevant to the performance of the contract services to avoid any potential for argument at a later stage. This is especially the case in the context of a lump sum contract where the owner hires his tug or other vessel for a task or service to be specified in Box 9 (see below). The scope of the task or service will often depend on the precise nature of the casualty and the operational circumstances in which the tug will be called on to perform the same. If these are misrepresented or, more commonly, made insufficiently clear and explicit at the time of contracting, disputes can frequently arise with the tug owner contending that the circumstances of the casualty as they actually are, are different from those by reference to which he contracted for a lump sum and that he has performed additional work outside the contract. The ISU guidance notes give sensible advice, emphasised appropriately in bold, which the hirer will therefore do well to follow:

> The Hirer should ensure that he properly completes these details as the owner of the vessel to be provided is entitled to rely on this information as representing the actual state of affairs in respect of the casualty to which the services are to be provided.

In other words, "if in doubt, spell it out" and *not* "if in doubt, say nowt"!

Box 9

9.29 This box is headed "Services to be provided by the owner" and will contain, when filled out, one of the most important terms of the contract since it will define what it is that the owner agrees to do under the agreement and for which the hirer agrees to pay the lump sum remuneration. Very great care should be taken in drafting the details to be used in filling out this box to avoid the potential for dispute. Just as Boxes 6–8 require the hirer to "condescend upon particulars" of the casualty, Box 9 requires the owner to define carefully and precisely what services he will be rendering to ensure that the service is not of too vague a scope such that he ends up with a very onerous service which will leave him exposed to demands to do more than he envisaged but which is within the letter of the agreement. As ever, it is advisable to spell out the details of the service as fully as possible

to avoid future dispute and argument. To give an example of a case which went to the Commercial Court some years ago: the owner agreed to lift debris which had fallen from a barge involved on a coastal defence project. The barge capsized and required to be salved; the owner of a support vessel was engaged on the "Towcon" form "to remove from the seabed all stones from the barge." The intention was to lift six huge boulders which had been on the barge. With the boulders had been a quantity of loose stones and pebbles which had also fallen to the seabed. These presented a hazard to fishing nets and small yachts taking the ground. The hirer contended that lifting all of these were within the scope of the contract service; the owner contended that the reference to "stones" meant the six boulders. The matter went to court and the salvor's application for summary judgment was thrown out on the basis of the factual matrix or background to the agreement. However, the need for litigation could have been avoided had the contract service been properly defined and drafted.

9.30 It is for this reason that the ISU guidance notes emphasise (again in bold):

> As this is a Lumpsum Agreement it is most important that the Nature of the Services is set out as precisely as possible, as in the alternative there will be scope for disputes between the parties as to whether what had to be done was within, or outside, the lumpsum price.

9.31 The need to do so where a tug or other vessel is being hired in as additional assistance in the salving of a complex casualty is worth stressing because salvage operations can prove difficult to predict in scope and extent. If a tug is being hired in to assist in a reflotation attempt by pulling from the casualty's starboard quarter in tandem with three other tugs, that should be precisely stated. A looser formulation (eg "to assist the hirer in the reflotation of the m.v. 'Hard-aground' from the Plaat van Breskens") will expose the owner to greater potential liability and may offer a fruitful ground for dispute if, for example, the hirer decides to redeploy two of his tugs to a new casualty, leaving the hired in tug to shoulder the bulk of the work.

Boxes 10–16

9.32 These boxes provide for payment and allied matters. Box 10 contains the lump sum details and details of any stages in which the lump sum may be earned. Boxes 11 and 12 deal with free time and delay payments. Boxes 13–16 cover the mechanism for making payment, interest or late payment and, where applicable, security for payment.

Box 17

9.33 This box deals with proper law and for arbitration. As the explanatory notes record:

> Box 17 is in respect of Law and Arbitration. It should be noted that if the Box is left blank, English law with Arbitration in London will apply. Whilst, in the majority of cases it is likely that the Hirer will be rendering services to the casualty under Lloyd's Form, there is always the possibility that the Hirer may be engaged under some other contract, so there is provision for the parties to Arbitrate any dispute in another place, subject to the laws of that place.

Part II of the "Salvcon 2005" form

9.34 Part II of the form contains a preamble and 27 ISU standard form provisions. These are considered below.

9.35 As with the BIMCO form, provision is made for agreement between the parties on additional clauses: Box 18 provides for the number of any additional clauses to be entered therein. The order of precedence between the various provisions in Part I, Part II and any additional clauses is similarly defined in the ISU form by the concluding words of Part I:

> In the event of a conflict of terms and conditions, the Provisions of Part I and any additional clauses, if agreed, shall prevail over those of Part II to the extent of such conflict but no further.

9.36 The concluding words of Part I of the "Salvcon" form differ from those of the BIMCO "Towcon 2008" and "Towhire 2008" and the earlier versions of the two forms in two respects.

9.37 First, there is no general term that defines the obligation of the owner of the vessel as the subject of the agreement. Both of the BIMCO forms contain wording prior to the signature spaces by which the tug owner undertakes to "use his best endeavours to perform the towage or other services" to be carried out. This is because, unlike the "Towcon" form, the "Salvcon 2005" form contains a specific provision in Part II which deals with the owner's obligations to the hirer (clause 8).

9.38 Secondly, there is a warranty of authority by each of the signatories to the agreement that they have authority to bind their respective principals to the agreement which they are signing:

> The undersigned warrant that they have full power and authority to sign this Agreement on behalf of the parties represented by them.

9.39 While this gives comfort to each contracting party as to the authority of the representative of the other, its utility in practical terms is rather doubtful. At best, if one principal were to reject the contract as unauthorised and if no question of the actual or ostensible authority of the representative arose, the other party's remedy would lie only against the signatory for breach of his warranty; the use of that remedy would depend on the size of the claim and the assets of the signatory. See also clause 17 of Part II (considered below).

Commentary on Part II of the form

9.40 Part II of the form opens with a preamble which in its second and third recitals states that the salvor as the hirer wishes to hire the vessel specified in Box 4 of Part I from the "owner" on the terms set out in Part II and in any additional clauses. The first recital is important since it defines the hirer as a salvor and makes clear that the subject-matter of the contract is a casualty receiving salvage services: "Whereas the Hirer is engaged, or is about to become engaged, in rendering salvage services to the casualty described in Box 6, Part I of this Agreement."

9.41 This provides the contractual background for the special regime of a sub-contract in a salvage operation and for no claims by the owner for salvage in respect of the services which he performs.

Clause 1: definitions

"1.1 The term 'Casualty' shall include any vessel, craft, property, or part thereof, of whatsoever nature, including anything contained therein or thereon, such as but not limited to cargo and bunkers, as described in Box 6, Part I of this Agreement, in respect of which the Hirer is contracted to render salvage services.

1.2 The Term 'Vessel' in Box 4 of Part I, and in Part II of this Agreement, shall include, but not be limited to, harbour tugs, offshore/diving support vessels, anchor handling/supply tugs, salvage/ocean going tugs, floating cranes/sheer legs, barges and any other vessel, and/or any substitute vessel provided under clause 12 of this Agreement.

1.3 The term 'Owner', in Box 3, Part I and in Part II of this Agreement, shall include any Owner, Manager, Operator or Charterer of the vessel described in Box 4, Part I of this Agreement."

9.42 These definitions amplify the three concepts of the "casualty", the "vessel" hired under the agreement and the "owner" of that vessel with whom the hirer is contracting.

9.43 The first definition in clause 1.1 of the casualty makes it clear that the contract services are being rendered to the whole of the casualty which the salvor is engaged in salving and, even if the casualty is not fully defined in Box 6 as having a cargo or bunkers on board, then the definition provision includes such matters within the term "casualty." The definition of casualty shows that the agreement is apt to be used for any salvage service being carried out to any type of object (ie not necessarily a vessel or craft but any other property). Given the preamble to the contract

and the reference to "salvage services", the reference to "property" is to be read as one to property which is capable of being the object of salvage (as to this topic, see Chapter 8 above; for a detailed consideration of the topic, see Brice, *Maritime Law of Salvage* (5th edn, 2012), chapter 3 and Kennedy and Rose, *The Law of Salvage* (9th edn, 2017), chapter 4).

9.44 What if the salvor is engaged upon services in the nature of salvage to property which is not a proper object of salvage? For example, he is engaged on services to property falling within one of the exceptions in the 1989 Salvage Convention (eg under Article 1(c) of the Convention, "property . . . permanently and intentionally attached to the shoreline", or under Article 3, *ibid*., "fixed or floating platforms or . . . mobile offshore drilling units . . . on location engaged in the exploration, exploitation or production of sea-bed mineral resources"). If the sub-contract was on the ISU Sub-Contract 1994 form, then both salvor and co-salvor/sub-contractor would fail in a claim for any remuneration. Under the "Salvcon 2005" form, on one view the sub-contractor is being engaged to do a particular service for a particular price even though he has been engaged in the context of a putative salvage (see the first recital of the Preamble and see also clause 8.3). It would, however, in theory be open to the salvor who discovers that there was no salvage because the property salved was not an object of it to argue that the underlying basis of the sub-contract was salvage and that the sub-contractor's remuneration is dependent on salvage having been rendered. This argument is unattractive in the extreme and contrary to the express terms of the contract which require the owner to do a specified service to the casualty as defined, object of salvage or not, for a specified sum to be earned at a specified time or on a specified event. In the unlikely event of there being any uncertainty over this question, the owner should prior to contracting insert a suitably worded clause to the effect that the service will be performed and the lump sum earned irrespective of whether the casualty is a subject of salvage or not.

9.45 The second and third definitions add little to what is stated as to the "vessel" and the "owner" in Boxes 4 and 3. The definition of "vessel" in clause 1.2 shows that the agreement can be used for literally any type of vessel or craft or floating equipment powered or unpowered, widening the scope of the agreement so that it can be used to hire in any sort of floating object required by the salvor. Clause 1.3 merely gives the title "owner" to the person who has been named in Box 3 as the contracting party and as the person providing the "vessel" and its services; it does not have the effect (nor does it purport to do so) of binding to the contract the owner, manager, operator or charterer of the vessel, as is sometimes thought.

Clause 2: nature of services to be provided by the owner

"2. The services to be provided by the Owner are set out in Box 9, Part I of this Agreement, and/ or in any accompanying Annexe."

9.46 This clause merely records that the owner will provide the services set out in Box 9 or in any document appended to the contract for the purposes of Box 9. The very brevity of the provision emphasises the importance of very careful drafting in the context of Box 9 of what the services are which are to be provided; hence the emphasis of the ISU guidance notes to Box 9, set out above.

9.47 In all but the simplest cases, it will usually be desirable for the owner to draw up, in response to the hirer's enquiry for his vessel's services, a list in plain, clear language of what the tug or vessel will do and, where appropriate to assist in the definition of the service, to specify what it will not do. For example, if a tug is engaged to provide a constant water blanket over a casualty with its fire-fighting pumps for the purpose of keeping the deck cargo wet or cool so as to prevent spontaneous combustion, but is not being hired to provide full fire-fighting assistance in the event of any combustion developing, it is advisable to set out both what is and is not comprised within the service. It will be appreciated that, in a more complicated situation, the annex to Box 9 will (and should) set out effectively as if a separate contract document the specific obligations which the tug or vessel will undertake, their scope and any particular limits upon them.

Clause 3: price and conditions of payment

Lump sum

"3.1 The Hirer shall pay the Owner the sum set out in Box 10, Part I of this Agreement, (hereinafter referred to as the 'Lump Sum'). The Lump Sum price is based upon the condition of the casualty, the location of the casualty and the nature of the services to be provided as set out in Boxes 7, 8 and 9, Part I of this Agreement, and any Annexe(s) to this Agreement.

3.2 The Lump Sum shall be payable as set out in Box 10(b), Part I of this Agreement.

3.3 The Lump Sum and all other sums payable to the Owner under this Agreement shall be payable without any discount, deduction, set-off, lien, claim or counter claim, each instalment of the Lumpsum shall be fully and irrevocably earned at the moment it is due as set out in Box 10, Part I of this Agreement, vessel and or casualty lost or not lost, and all other sums shall be fully and irrevocably earned on a daily basis.

3.4 All payments by the Hirer shall be made in the currency and to the bank account specified in Box 13, Part I of this Agreement."

9.48 The "Salvcon 2005 "form, like the "Towcon" form on which it is modelled, contains in clauses 3.1–3.4 provisions setting out the amount of remuneration in the form of a lump sum payment and the event(s) or time(s) at which that lump sum (or parts of it) are deemed earned. There is also an "anti-deduction" clause. Clauses 3.1–3.4 of the "Salvcon", save in one respect, mirrors the language of clause 2(a)–(d) of the previous "Towcon" form and clause 3(a)–(c) of the 2008 revision of "Towcon"; see Chapter 4 above for a detailed consideration of the principles applicable to lump sum payment terms and to the potential problem which can arise where the "event" on which payment is earned consists of a multiple event (eg the arrival of "the tow" where "the tow" consists of two or more vessels, one of which does not arrive). Similar problems can arise under the "Salvcon 2005" form if the events or times stipulated in Box 10 are drafted imprecisely.

9.49 The one difference between the "Salvcon 2005" and the "Towcon" wording is the express reference to the lump sum identified in Box 10 being posited upon certain specific matters as recorded in Part I. Clause 3.1 states that the lump sum "is based upon the condition of the casualty, the location of the casualty and the nature of the services to be provided as set out in Boxes 7, 8 and 9" of Part I. This makes it clear that the price is directly linked to the accuracy and correctness of the details set out in those boxes. Thus, if the condition of the casualty is materially worse or different from that described in Box 7, the owner can argue that the lump sum price as agreed is no longer applicable, at least as a maximum cap on remuneration, and can argue that he is entitled to claim extra remuneration for the services provided so as to reflect any material increase in the work to be done or in the time taken or in the cost incurred in performing the service. Similarly, if the casualty's position has altered materially from that stated in Box 8 (eg because she is immobilised until assisted and is drifting), the owner can argue the same in respect of a material increase in the mobilisation passage to the casualty or extra steaming time. The position potentially works both ways. If, for example, a tug is hired in to assist by towing a casualty which is immobilised and with no steering capacity but on arrival the vessel is under power again and with rudder operation such that the service has become one essentially of standing by or keeping a line on as the vessel proceeds to a port of refuge, the hirer can argue that the lump sum is no longer payable but only a *quantum meruit* or remuneration fixed to the actual value of the services. There will be competing commercial interests in the drafting of the Boxes 7 and 8. The hirer may want to have the situation left as fluid as possible with margins for mutability of the casualty's situation built in to the contract (eg in defining the service as "to assist the tug 'Trusty' in towing the m.v. 'Sieve' to port of refuge Brest-Lisbon range following main engine breakdown; present status of engines/steering not known; reinstatement of main engine/steering for or during towage possible but not warranted", or in defining the position as "Off Azores in

present approximate position _ N, _ W but drifting south/south west with current and weather"). The tug owner, on the other hand, may prefer to have matters very much more precisely drawn.

9.50 The lump sum price is similarly linked to the precise service specified in answer to Box 9. If the vessel is called on to perform a service outside the terms of the defined service and performs the service requested, the owner will be entitled to additional remuneration on a *quantum valebat* basis calculated on a reasonable remuneration for the service if no additional price is agreed. Alternatively, the owner can decline to provide the extra service unless a price or rate is agreed in advance.

9.51 A curiosity of clause 3.1 is that it refers only to Boxes 7, 8 and 9 as being the basis for the lump sum price. This is odd given that Box 6 will contain the details of the casualty, many of which will also be relevant to the parties in fixing the service and the lump sum price (eg dimensions etc.). Further, Box 6, item (j) is provided for the entry of "Any other Casualty's details relevant to this Agreement." This looks like an oversight on the draftsman's part. It is recommended, therefore, that clause 3.1 be amended by the addition of a reference to Box 6 as well as to Boxes 7, 8 and 9.

Delay payments and overpayments

"3.5 Any delay payment due under this Agreement, as set out in Box 12 of Part I of this Agreement, shall be paid to the Owner as and when earned on presentation of the invoice.

3.6 Within 14 days of termination or completion of the Services set out in Box 9, Part I of this Agreement, and/or any annexe(s) hereto, the Owner shall return any overpayments to the Hirer."

9.52 These sub-paragraphs provide for the time at which any delay payments (under Box 12 and clause 5) are to be made, ie once earned as soon as the invoice has been presented, and for the time at which any overpayments are to be repaid after the service had ended, giving the hirer and owner 14 days to effect a final calculation of the balance of account.

Termination for non- or late payment

"3.7 If any amount payable under this Agreement has not been paid within seven, (7), calendar days of the due date, or if the security required in accordance with Box 16, Part I of this Agreement and Clause 17 below, is not provided within five, (5), banking days of the request by the Owner, then at any time thereafter the Owner shall be entitled to terminate this Agreement without prejudice to the sums already due from the Hirer and to any further rights or remedies which the Owner may have against the Hirer. Provided always that the Owner shall give the Hirer at least three, (3), working days' notice of its intention to exercise this right."

9.53 Clause 3.7 represents a standard procedure for a right of termination by the owner for late payment in charterparties. It also covers delay in putting up security under clause 17. The right to terminate is subject to a notice provision the terms of which should be carefully noted. While the right to terminate arises in the case of a given delay reckoned in "calendar days" for payment of sums due or in "banking days" for provision of security, the notice which has to be given is one requiring three "working days" after the expiry of the preceding calendar or banking days period as the case may be. Calendar days present no difficulty, but banking days and working days differ from country to country and often the contracting parties will not be situated in the same country. In such a case, it is sensible to stipulate which system of banking or working days is to be adopted. This part of the provision is a fairly standard form of "anti-technicality" clause of the type in common use in time charterparty hire provisions (see generally Coghlin, Baker, *Time Charters* (7th edn, 2014) at para. 16–90 *et seq*.). Accordingly, the notice must be clear and unambiguous: it must make it clear that the relevant sums have not been paid or the relevant security has not been provided punctually and it must give an absolute and unqualified ultimatum that unless the situation has been rectified within the three working days period the contract will be terminated.

Conditional notices are likely to be ineffective (see *The Afovos* [1982] 1 Lloyd's Rep 562 (CA), affirmed [1983] 1 Lloyd's Rep 335 (HL); see also *The Pamela* [1995] 2 Lloyd's Rep 249).

Clauses 4 and 5: free time and delay payments

"4. The Owner will set out in Box 11, Part I of this Agreement the amount of free time allowed to the Hirer within his Lump Sum price, and the specific purposes for which this free time may be utilised.

5. The Owner will also set out in Box 12 of Part I of this Agreement, the delay payment rates to be applied and the circumstances when such delay payments will be applicable."

9.54 The service provided by the owner is provided on lump sum terms. As with ordinary towage under the "Towcon" form, the lump sum will have been calculated in part upon the reasonably anticipated duration of the service, both in terms of mobilisation to the casualty, attendance upon and at the casualty and demobilisation and return to station. However, the owner will want to be protected financially against delays in being able to effect the contract service which would otherwise eat into the lump sum price. Under the "Towcon" form, provision is made for the fixing of a certain amount of time within which the towage connection is to be made which is regarded as included within the lump sum price. That is "free time", ie time which the hirer has free of additional charge and within the already agreed price. If the free time is exceeded, the hirer will become liable to pay for the excess time spent in the connection or disconnection of the tow under a system of "delay payments." See eg clause 2(f) and (g) of the earlier "Towcon" form and clauses 6(a) and (b) of the "Towcon 2008" form, considered in Chapter 4 above.

9.55 The "Salvcon 2005" form adopts a similar concept of "free time" or time allowed to the hirer which if exceeded results in liability to pay "delay payments" to the owner. Given that the form can be used for any and all types of additional assistance or service by tugs or other vessels and not just towage, the form does not provide for free time for a specific operation such as connection or disconnection, but leaves it to the parties to define. Usually, free time will be defined in terms of time allowed to the hirer at the start of and at the end of the service. Clause 4 provides that if free time is agreed upon, the amount of it shall be set out in Box 11 "and the specific purposes for which this free time may be utilised." It will therefore be necessary for the parties to agree if free time should be allowed for a specific operation or service and, if so, how much time is to be given to the hirer and for what purposes. Usually it will be the owner who will seek to protect himself by specifying what free time is included and for what (see the ISU guidance notes). The concept of free time is a useful one since it allows both parties to include within the service an estimated period prior to the start and after the end of the service to allow for ordinary operational constraints. The ISU guidance notes to Box 11 emphasise the practical importance of free time:

> Again, it is important that the parties agree on the use of Free Time and whether it is fully reversible, ie it can be used either at the commencement or at the completion of the services.

9.56 Clause 5 provides for the "delay payments" which will be payable by the hirer to the owner if the free time is exceeded. As with the system of free time and delay payments under the "Towcon" form, the nature of a delay payment under clause 5 of the "Salvcon 2005" form is equivalent to that of demurrage payable under an ordinary voyage charterparty. This equivalence and the consequences of it are considered in relation to the "Towcon" form in Chapter 4 above. Clause 5 requires the rate of delay payment to be stipulated, if agreed upon in Box 12. Various potential rates are provided for in Box 12 "At Sea", "In Port" or "At Anchor" which can be adapted for the particular service. It will be important to stipulate a rate of delay payment *per* day and *pro rata* as with ordinary demurrage rates. Clause 12 also requires the owner to set out "the circumstances when such delay payments will be applicable." Unlike the "Towcon 2008" form, clause 6(a) of which sets out when delay payments start and end, the "Salvcon 2005" form leaves this to be defined by the specific agreement of the parties.

9.57 It will usually be sufficient to use the "Towcon 2008" wording as a model, for example, where the service is one of making fast and assisting in a reflotation attempt:

> Should the Free Time be exceeded, Delay Payment(s) at the rate specified in Box 11 shall be payable until the tug commences pulling the casualty or until the tug is free to leave the casualty.

Clause 6: employment and area of operations

"6. The Vessel shall be employed in activities which are lawful in accordance with the law of the place of the vessel's flag and of the place of operations. Such place of operations shall always be within Institute Warranty limits which shall not be exceeded without the prior written approval of the Owners, and any necessary adjustment to the rate of hire. The hirer does not warrant the safety of the place of operations, or any other port or place to which they direct the vessel, but they will exercise care in issuing orders to the vessel, as if the vessel were their own property. (See also Clause 8.1 hereafter)."

9.58 The first sentence of clause 6, although not worded in terms of one or other party's obligations or responsibilities, constitutes a warranty by the hirer that he will not employ the vessel in any operation which would be contrary to the law of the vessel's flag or of the place where the service is to be performed. It also gives the owner the right to decline to perform a particular activity if the same is unlawful. The importance of this provision lies in the fact that salvage operations will often take place in the waters of jurisdictions where local law and regulations may be idiosyncratic (to say the least) and where operations by non-nationals either at all or without permits or compliance with local procedures are prohibited or restricted; the risk of arrest or seizure is often a real one and clause 6 (together with clause 10, which deals with permits) places the responsibility for non-infringement of local law upon the hirer who employs the vessel. As the ISU guidance notes state, this clause "requires that the salvage activities must be lawful."

9.59 The second sentence of clause 6 is similar to the usual time charterparty provisions as to trading only within IWL (see eg line 15 of the NYPE form; Coghlin, Baker, *Time Charters* (7th edn, 2014), para. 5.1 *et seq*.) and gives the hirer the right to ask the owner to allow the use of the vessel outside IWL at an additional rate of hire and/or with additional insurance costs (see the ISU guidance notes).

9.60 The third sentence differs importantly from the "Towcon" form. Under clauses 7 and 8 of the former "Towcon" form and clauses 13 and 14 of the 2008 revision, the hirer warrants to the tug owner that the place at which the tow is taken up, the "place of departure" and the place at which the tow is to be delivered, the "place of destination", are to be "safe and accessible for the Tug to enter, to operate in and . . . to leave." Under clause 6 of the "Salvcon 2005" form, it is expressly agreed that the hirer gives no warranty as to the safety of the place of operation or of any other place to which the vessel may be directed by the hirer during the contract service. The rationale behind this difference lies in the difference between ordinary ocean towage and assistance in a salvage operation. In the former, the hirer usually knows precisely where the tow is situated and the towage lies between ports or places the characteristics of which are known and which are charted and maintained. In the latter, the casualty can be anywhere and the local navigational conditions can be difficult to ascertain. Clause 6 removes the "Towcon" approach and makes the owner responsible for the safety of his own vessel at the place of operations.

9.61 The only warranty which the hirer gives is that he will "exercise care in issuing orders . . . as if the vessel were [his] own property." This offers the owner some potential for redress but it is unlikely to be of much practical utility unless the hirer directs the vessel negligently to a place which he knew or should as a prudent owner have known was unsafe. The standard of care will be that which he, the hirer, should take over his own vessels; the standard will therefore usually be that of a prudent salvor rendering assistance to a casualty by his own salvage tug and not that of an ordinary prudent navigator. Risks will have to be run by that salvor and if he properly runs those risks with his own vessels, the sub-contractor will have to run the same risks when carrying out the salvor's orders.

Clause 7: master and crew

"7.1 The Master shall carry out his duties promptly and the vessel shall perform these services by day and by night in accordance with the Hirer's requirements.

7.2 The navigation and management of the vessel shall be in the exclusive control and command of its Owners, Master and Crew."

9.62 Clause 7 deals with the position of the vessel's officers and crew during the service. Clause 8, which follows it (see below), lays down the specific obligation which the owner owes to the hirer in respect of the contract services. Given that clause 8 provides that the owner as the contractual party is the party responsible for the master and crew of the vessel and for their acts and omissions relevant to the performance of the contract service (as well, usually, as vicariously), clause 7 usually adds little to the contract. However, it does make clear that:

i operations are to be carried out by the crew on a 24 hour a day basis as requested by the hirer;
ii the master and crew are under the orders of the owner only ("exclusive control") and are not therefore under the orders of the hirer: orders to the vessel have to be given to the owners for action; and
iii the master must act "promptly" in carrying out his normal duties as master in the context of the service. The ISU guidance notes to this clause regard the master and crew as under this obligation; given that the master is responsible for crew operations, this will usually but not necessarily follow.

Clause 8: the owner's obligations

9.63 The heading of this clause is somewhat misleading since it deals not only with "the owner's obligations" in respect of the services to be performed to the casualty by the owner's vessel, but also contains in respect of the services the important provisions as to the "non-claimability" of salvage by the owner of the vessel. It is perhaps the key provision of the "Salvcon 2005" form and the major difference with the ordinary towage forms such as "Towcon."

Owner's obligations

"8.1 The Owner agrees to render the services set out in Box 9, Part I of this Agreement, or as otherwise reasonably requested by the Hirer during the services to the casualty identified in Box 6, Part I of this Agreement, and shall, subject to the provisions of Clause 6 hereof, carry out the reasonable instructions of the Hirer in relation to such services."

9.64 Clause 8.1 requires the owner to carry out the services which have been defined in Box 9. As seen above, it is therefore of paramount importance to the owner to have drawn up a sufficiently precise and full articulation of what those services are, what they involve or comprise and what, if anything, they exclude (see also the ISU guidance notes to Box 9). Clause 8.1 contains two further obligations on the owner. One is to "carry out the reasonable instructions of the Hirer in relation to the services." This is an essential adjunct to the services defined in Box 9. However well-defined these services are, the vessel is engaged in assisting the salvor in a salvage operation and will usually be carrying out those services under the direction and control of the salvor; the owner therefore is required to follow all reasonable instructions concerning how the contract services are to be performed.

9.65 Rather wider is the obligation "to render the services set out in Box 9 . . . or as otherwise reasonably requested by the Hirer during the services to the casualty identified in Box 6 . . .." The English of the wording does not read comfortably: is the obligation to render any services which may reasonably be requested or the Box 9 services in a manner as reasonably requested? If the latter, then this is already dealt with by the "reasonable instructions" part of the clause, just

considered. If the former, then it adds to the obligation to perform the Box 9 services a further obligation to do other services not referred to in Box 9. It is submitted that it is to be read in the latter sense but that the ambit of the services "as otherwise reasonably requested" must be limited by the words "during the services to the casualty." In other words, the hirer is entitled to request the owner to perform additional services incidental to or ancillary upon the Box 9 services. The clause should not be read as giving the hirer *carte blanche* to request a variety of other services unrelated to the Box 9 services. That this is the probable commercial intention of the wording is strongly suggested by the ISU guidance notes to Box 9 and their emphasis on setting out the "Nature of the Services as precisely as possible" so as to avoid disputes.

Protection of the environment

"8.2 Insofar as it is not inconsistent with the nature of the services to be rendered under this Agreement, the Owner and his Master and Crew will exercise due care to prevent or minimise damage to the environment."

9.66 Environmental protection during operations has long been a subject of pressing concern. The 1989 Salvage Convention by Article 8.1 imposes a duty on salvors, expressed to be a duty "to the owner of the vessel or other property in danger", to "carry out the salvage operations with due care." Article 8.1(b) provides that as part of that duty to the owner, the salvor shall owe a duty: "in performing the duty [to carry out the salvage operations with due care], to exercise due care to prevent or minimise damage to the environment."

9.67 A corresponding duty is imposed on the owner of the property being salved as part of his duty to "cooperate fully" with the salvor (Article 8.2). The current version of the LOF (LOF 2011) reinforces this by requiring the salvor to use best endeavours to prevent or minimise damage to the environment during the salvage. The topic is dealt with in detail in Brice, *The Maritime Law of Salvage* (5th edn, 2012) at para. 6–152 *et seq*.

9.68 The "Salvcon 2005" form reflects the general position in salvage by imposing a similar duty on the master and owner of the sub-contracted vessel. The obligation is qualified by the wording "Insofar as it is not inconsistent with the nature of the services to be rendered under this Agreement." However, the effect of this qualification is unclear. The ISU guidance notes do not comment upon it. It is presumably designed to cover the situation where the service itself is one which will or may involve damage to the environment (eg emptying bunker tanks from a stranded vessel). Given the potential legal liability of the owner and his vessel for any pollution incident for which his vessel or crew is responsible and the general obligation that the services will be lawful in the place of operation under clause 6, as well as the obligation (unqualified) upon the salvor under the 1989 Convention (and LOF if applicable), it is submitted that the qualification is of doubtful effect and would be better deleted.

9.69 The standard of care connoted by "due care" in clause 8.2 is that of reasonable care, at least where English law applies to the contract (see *Brice*, at para. 6–154). Where a different law applies (ie consequent upon the choice of another country other than England for arbitration under Box 17), the concept will take its content from whatever that law regards as "due care."

No claims for salvage

"8.3 The Owner accepts that the services to be rendered pursuant to this Agreement are in the nature of salvage services to the casualty identified in Box 6, Part I of this Agreement.

8.4 In consideration of the payment of the sums due under this Agreement, the Owner confirms that neither he, nor any of his servants or agents, nor any of his sub-contractors or their servants or agents, will make any claim of salvage and/or Special Compensation under Art. 14 of the 1989 Salvage Convention, or for payment under the Scopic Clause against the casualty, the subject of salvage services by the Hirer, or against any other property in the same ownership as the said casualty.

8.5 The Owner further agrees to indemnify the Hirer against the consequences of any such salvage claim by any of his servants or agents or his sub-contractors or their servants or agents, including interest and costs reasonably incurred in respect of such claim, provided that the Hirer gives notice in writing of such claim to the Owner as soon as they become aware of same. See Clause 17.3 hereof."

9.70 The main problem with the use of ordinary towage forms such as "Towcon" for salvage sub-contracts was the inappropriateness of the terms of those forms regarding the conversion of a service from towage under a contract into salvage and the right of the tug to claim salvage, notwithstanding the contract, if the circumstances required for such a conversion were present. Clause 15 of the former "Towcon" form (and now clause 21(a) of the "Towcon 2008" and clause 19 of the "Towhire 2008" form, both considered in Chapter 4 above) provides that if the tow breaks away, the tug is to use all reasonable services to reconnect "without making any claim for salvage." However, as already seen this does little than restate the ordinary common law rule (see eg in *The Annapolis* (1861) Lush 355 and *The Minnehaha* (1861) 15 Moo PC 133). The reconnection is part of the contract service and is therefore not salvage, but if the service goes beyond normal reconnection or falls to be rendered in unforeseen circumstances, then the service is ex-contractual and will be salvage. (See also *Brice*, at para. 1–326.)

9.71 To address this problem, the ISU in the "Salvcon 2005" form has provided for the express surrender by the owner of the sub-contracted vessel of any right to or claim to salvage:

i By clause 8.3, the owner accepts that the services which he is to render to the casualty are in the nature of salvage services. That is, he accepts that if the criteria for salvage are otherwise met, the services are such as would entitle him to salvage.

ii By clause 8.4, the owner undertakes that neither he nor any of those for whom he is responsible will make any claim for salvage or for special compensation (ie in respect of protection of the environment under Article 14 of the 1989 Salvage Convention, now specified in the 2005 revision of "Salvcon", together with an express reference to SCOPIC: see *Brice*, at para. 6–87 *et seq*.) from the owners of the casualty or of any other salved property. This clause gives the hirer an enforceable right against the owner to prevent him claiming salvage on specific performance principles or to claim damages in the event that the claim cannot be enjoined or prevented.

iii Following the BIMCO model of contractual indemnities, the owner is liable to indemnify the hirer "against the consequences" of any salvage claim which his servants, agents or sub-contractors and their servants or agents may make on being given notice of those claims. This enables the salvor to recover, for example, any shortfall in his salvage remuneration due to claims made by those referred to in the clause for salvage.

9.72 It will be seen that the uncertainties and scope for salvage claims inherent in the use of the "Towcon" form have been eliminated under the "Salvcon 2005" form and that a salvor can sub-contract a part of the salvage service to another operator on the basis that he and he alone is entitled to the salvage earned, while the sub-contracted operator will be confined in all circumstances to his contractual claim for lump sum remuneration (or hire if the "Salvhire 2005" form is used).

9.73 While the intentions of the ISU drafting committee was to exclude any right in the sub-contractor or "the owner" to claim salvage from the casualty – as can be seen from the wide words of clause 8.4, which prevents "any claim for salvage . . . against the casualty the subject of salvage services by the Hirer", the scope of the exclusion of the right to claim salvage is arguably circumscribed by the services which the owner is to render to the casualty pursuant to the "Salvcon 2005" contract. The purpose of clause 8.4 is to prevent the owner from claiming salvage for what he is brought in to do and for anything he does in and about or incidental to or as part of that contract service (eg on request by the hirer under clause 8.1). This is the explanation

for the presence of clause 8.3: the owner recognises that what he is engaged to do is salvage, but clause 8.4 renounces his claim for salvage in respect of those services.

9.74 In this way the lacuna left by clause 15 of the "Towcon" is addressed. However, while clause 8.4 will therefore exclude almost completely any claim to salvage by the owner, it is questionable whether it does so totally.

9.75 To take an example: a tug is hired in by a salvor under "Salvcon 2005." The services to be performed are defined as the deployment of an anti-pollution boom and the use of dispersants. The tug renders these services; however bad the escape and however involved the anti-pollution exercise, the owner will be unable to claim salvage or more appropriately Article 14 special compensation because of clause 8.4. If the owner is requested by the hirer under clause 8.1 to do some additional service related to the anti-pollution service, the same inability will apply. However, in a bout of heavy weather, the casualty breaks free from the other tugs holding her in her position and drifts away. The sub-contracted tug follows her and makes fast and holds her off rocks for a period until the other tugs can come up. Is that completely ex-contractual service caught by clause 8.4? It is strongly arguable that it is not. To address this sort of possibility, if it is a realistic one, in the circumstances of the particular case it would be advisable to widen the scope of the clause 8.4 exclusion of salvage and to provide for a sole remedy for *quantum valebat* or reasonable remuneration in any ex-contractual circumstances which may arise, such remedy to lie against the hirer alone.

Clause 9: hirer's representative

"A representative of the Hirer, who will be in operational control of the services with full authority to act on behalf of the Hirer, will be available during the salvage operations on the casualty."

9.76 This clause reflects the ordinary position under a salvage operation where the salvor has present at the casualty a salvage master; this can either be the master of the salvage tug or, more usually, the service is supervised and directed by a salvage specialist from the salvor's shore offices. The importance of this provision lies in the clothing of the representative with full authority to act on behalf of the hirer in unrestricted terms (ie as regards all matters concerning the service and the contract itself).

Clause 10: permits

"The Hirer shall obtain and maintain at its own cost all necessary licenses, approvals, authorizations or permits required to enable the Owner's vessel to undertake and complete the services without let or hindrance. The Owner shall provide the Hirer with all reasonable assistance in connection with the obtaining of such licenses, approvals, authorizations or permits."

9.77 Clause 10 mirrors the equivalent provision of the "Towcon" form, formerly clause 11 now clause 17 of "Towcon 2008" (considered in Chapter 4 above). It reinforces the undertaking in clause 6 of the "Salvcon 2005" form by the hirer that the activities under the contract will be lawful. In rather quaint language, redolent of an old UK passport ("without let or hindrance"), it warrants that all necessary permits and certifications will be obtained by the hirer. Unlike "Towcon", clause 10 of "Salvcon" does not contain an express provision dealing with loss, delay and expense to the owner caused by failure to comply with the clause. While recovery of the same as damages is implicit given the contractual obligation, it may be preferable where permits etc. are likely to be a problem to add a rider clause modelled on "Towcon 2008" clause 17(b), which provides, *mutatis mutandis*:

> Any loss or expense incurred by the [Owner] by reason of the Hirer's failure to comply with this Clause shall be reimbursed by the Hirer to the [Owner] and during any delay caused thereby the [Owner] shall receive additional compensation from the Hirer at the [Vessel's] Delay Payment rate specified in [Box 12(a) or (b) or (c) as applicable].

Clause 11: towing gear and equipment

"Subject to the provisions of Clause 16.1(v) hereof the Owner agrees to provide, free of cost to the Hirer, all tow wires, pennants, chains, springs, hawsers, shackles, bridles, any other towing gear and all salvage equipment carried on board the vessel."

9.78 This clause is self-explanatory and will give the hirer the use of all towing gear and other salvage equipment carried on board the vessel. Compare "Towcon 2008" clause 16(a), which is similar but appears to be wider, giving the hirer the use of all such gear "normally carried on board the Tug." If in doubt the owner should specify either by reference to the particulars of the tug or vessel given under Box 4 or by a separate schedule what is on board. The owner has the right under clause 16.1(v) to charge the hirer for lost or damaged towing gear (see below). The 2008 revision of "Towcon" provides in clause 16(c) for an express obligation on the part of the hirer to pay for the replacement or repair of any equipment which becomes lost, damaged or unusable during the service. Consideration should be given to including a similar provision in the "Salvcon 2005."

Clause 12: seaworthiness of the vessel

"The Owner will exercise due diligence to tender the vessel to the Hirer at the commencement of this Agreement in a seaworthy condition and in all respects ready to perform the services set out in Box 9, Part I of this Agreement, but the Owner gives no other warranties, express or implied."

9.79 This provision mirrors the "Seaworthiness of the Tug" provision contained in the old "Towcon" clause 13 and now set out in clause 19 of the "Towcon 2008." See generally Chapter 4 above and the commentary to "Towcon" clauses 18 and 19.

Clause 13: substitution of the vessel

"The Owner shall at all times have the right to substitute any vessel for any other vessel of adequate power, type and capability for the intended services, and shall be at liberty to supply a vessel belonging to others for the whole or part of the services under this Agreement. Provided however that the main particulars and capabilities of the substituted vessel shall be subject to the Hirer's prior approval, which approval shall not be unreasonably withheld."

9.80 This provision also mirrors the corresponding provision in "Towcon 2008" clause 20, except that the right of substitution is in terms of putting in one substitute vessel in substitution for the vessel the subject of the contract. Compare clause 20 of "Towcon 2008", which, in the context of pure towage, allows the substitution of "two or more tugs for one or one tug for two or more." Given that the sub-contract will usually be for a specific type of vessel or tug, the "Salvcon 2005" substitution clause provides for a single substitute only rather than a substitute "team." If the service is one of towage, consideration should be given to a suitable amendment to "Salvcon" to "Towcon" wording.

Clause 14: termination

"14.1 The Hirer has the right to terminate the services to be carried out by the Owner under this Agreement at any time, provided always that notice of such termination is given to the Owner in writing. In such event the Owner is entitled to be paid all stage payments due at that time, and a proportion of the balance of the Lump Sum price, calculated on a pro rata basis up to the time of termination, and any other amounts due in accordance with the provisions of Boxes 10 and 12, Part I of this Agreement, and Clause 16 hereof.

14.2 Such termination of the services will be carried out with all reasonable despatch by the Owner, subject always to permission from the relevant local authority and to the safety of personnel and equipment involved in the services. Any additional expenses arising directly as a consequence of the instructions to discontinue or terminate the services shall be for the account of the Hirer."

9.81 Clause 14 confers a simple right of termination of the contract upon the hirer which is in contrast to the more complex "cancellation or withdrawal" provisions contained in clause 16 of the former "Towcon" form (now split up between clauses 5, 22 and 23 of "Towcon 2008"). In this, the "Salvcon 2005" form gives effect to the commercial realities behind a salvage sub-contract: given that the hirer is engaged in a salvage operation, circumstances may change rapidly and may render the services of the sub-contracted vessel otiose, eg the casualty may be lost or the salvage abandoned or the salvage may be successful without the need for the sub-contracted services such as in a sudden reflotation or the repair of main engines etc. Accordingly, the salvor has the right to cancel the contract at any time upon payment of all sums due and any consequential costs together with a *pro rata* amount of the lump sum payment. The owner for his part undertakes in the event of such a termination to withdraw as quickly as is reasonable in the circumstances. The calculation of the *pro rata* basis is much simplified if the lump sum has been originally agreed to be payable in stages of clear demarcation.

Clause 15: time for payment and interest

"The Owner shall promptly invoice the Hirer for all sums payable under this Agreement. If any sums which become due and payable are not actually received by the Owner within the period specified in Box 14, Part I of this Agreement, they shall attract interest in accordance with the rate set out in Box 14, Part I."

9.82 This clause is self-explanatory.

Clause 16: extra costs

"16.1 The following expenses/costs, other than those normally payable by the owner at the ports or places of mobilisation and demobilisation, shall be paid by the Hirer as and when they fall due:

(i) all port expenses, pilotage charges, harbour and canal dues and all other expenses of a similar nature levied upon or payable in respect of the Owner's vessel arising out of these services.
(ii) all costs in connection with clearance, agency fees, visas, guarantees and all other expenses of such kind relating to these services.
(iii) all taxes and social security charges (other than those normally payable by the Owner in the country where it has its principal place of business and/or where the vessel is registered), stamp duties, or other levies payable in respect of or in connection with this Agreement, any import-export dues and any customs or excise duties.
(iv) all costs incurred due to the requirements of governmental or other authorities over and above those costs which would otherwise be reasonably incurred by the Owner in the execution of this Agreement.
(v) all costs incurred by the Owner in respect of towing gear, salvage equipment, other portable equipment, materials, or stores which are lost, damaged or sacrificed during the services, provided that such loss, damage or sacrifice is immediately notified in writing to the Hirer's representative, and provided any loss or damage does not arise as a result of negligence on the part of the Owner, his servants or agents.

16.2 If any such expenses/costs are in fact paid by or on behalf of the Owners, (notwithstanding that the Owner shall under no circumstances be under any obligation to make such payments on behalf of the Hirer), the Hirer shall reimburse the Owner on the basis of the actual cost to the Owner plus a handling charge of the percentage amount indicated in Box 15, Part I of this Agreement, upon presentation of invoice."

9.83 Clause 16.1 deals with the costs commonly incurred by the tug or vessel incidental to the performance of the contract service. Sub-paragraphs (i) and (ii) make it clear that the payment of such expenses is to be made in the first instance by the hirer himself as they fall due for payment and that the owner is under no obligation to fund the costs up-front and then claim

reimbursement, although he may do so under sub-para. (ii). This reflects the purely sub-contractual nature of the vessel's involvement in the hirer's overall salvage operation.

9.84 The items covered are the usual public administrative and governmental expenses, levies and charges incurred as a result of the service which would not otherwise be incurred by the owner. Clause 16.1(v) renders the hirer liable for all losses of or damage to towing and other gear used in the service subject to notice of such loss or damage to the salvage master on site. (Cf. the usual stevedore damage provisions in time charterparties.)

Clauses 17 and 18: security and insurance

"17. Security

17.1 The Hirer shall provide on signing of this Agreement, an irrevocable and unconditional bank guarantee in the sum and at the place indicated in Box 16, Part I of this Agreement, or other security to the satisfaction of the Owner.

17.2 Whether Box 16 of Part I be completed or not, the Owner may at any time require reasonable security, or reasonable further security, to be provided by the hirer to the satisfaction of the Owner for all or part of any amount which may be or become due under this Agreement. Such security shall be given on one or more occasions as and when required by the Owner.

17.3 In the event of a claim arising under the provisions of Clause 8.5 hereof, the Owner will provide the Hirer with security in respect of such claim. Such security shall be reasonable as to both amount and form."

"18. Insurance

18.1 In entering into this Agreement, the Owner warrants to the Hirer, that he is carrying adequate and sufficient insurances on his vessel for the nature of the services to be carried out under this Agreement.

18.2 Such insurances will include, but not necessarily be limited to the following:

(i) Hull insurance up to a level appropriate to the value of the vessel.
(ii) Protection & Indemnity Insurance.
(iii) Pollution Liability Cover up to at least US$500 million.
(iv) Employer's Liability Cover in accordance with the law of the flag of the vessel and/or the principal place of business of the Owner.
(v) Public Liability Cover in accordance with the law of the flag of the vessel and/or the principal place of business of the Owner.
(vi) Third Party Liability Cover in accordance with the law of the flag of the vessel and/or the principal place of business of the Owner."

9.85 Clause 17 gives the owner the right to require security from the hirer either at the outset of the agreement (clause 17.1) or at any stage during the currency of the agreement, eg to reflect changed circumstances affecting the hirer (clause 17.2). It is to be noted that there are no corresponding provisions in the hirer's favour. The hirer is entitled to security only in respect of any claims for salvage which have arisen contrary to the "no claim for salvage" provision in clause 8.5.

9.86 Clause 18 is a standard warranty in respect of adequate insurances. It was new to the original "Salvcon" and "Salvhire" forms and has no corresponding provision in the "Towcon 2008" form. Its introduction was felt necessary by the ISU to protect the position of the hirer (see the guidance notes to this clause). It should be noted that the insurance in respect of pollution liability cover should be at least US$500m: this type of pollution cover is expensive and is not in universal use. The ISU guidance notes therefore contain this caution:

> It should be noted that the Pollution Liability cover referred to under 18.2(iii) is not available to all tug owners/operators. Owners should be careful to advise the Hirer if this cover does not exist. Equally the Hirer should be careful to ascertain if this cover is in place for the tug/vessel in question.

9.87 The undertaking being one given by the owner in respect of all of the types of insurance listed, it is his primary responsibility before contracting to ensure that his insurance portfolio

satisfies clause 18.2 or, if it does not, that the appropriate deletions are made in the contractual negotiations. As the explanatory notes provide in relation to pollution insurance, often of critical importance and which may or may not be held by tug operators:

> It should be noted that the Pollution Liability Cover referred to under 18.2 (iii), is not available to all tug owners/operators. Owners should be careful to advise the Hirer if this cover does not exist. Equally the Hirer should be careful to ascertain if this cover is in place for the tug/vessel in question.

Clause 19: liabilities

9.88 The ISU were represented in the drafting committee stages which led to the production of the BIMCO "Towcon" and "Towhire" forms and to the introduction in those forms of what the ISU described in its explanatory notes to those forms of a "knock-for-knock" basis for dealing with liabilities between the tug owner and hirer. This was formerly contained in clause 18 of both "Towcon" and "Towhire" and is now set out in clauses 25 and 23 of "Towcon 2008" and "Towhire 2008" respectively. As the ISU recorded, this basis of liability was "in accordance with present day practice in the offshore industry." Unsurprisingly, the same approach was adopted by the ISU in relation to liabilities between hirer and vessel owner under the "Salvcon" form. As the ISU guidance notes state:

> the clause is taken from "Towcon"/"Towhire" with necessary amendments. It follows the standard "knock-for-knock" liability principles which are widely accepted today.

9.89 Reference should therefore be made to Chapter 4 above where clause 25, the corresponding "Towcon 2008" provision, is considered. In this chapter, only the few differences present in the "Salvcon 2005" form version of clause 25 in its clause 19 are touched on.

Injury to or death of those involved in the service (clauses 19.1 and 19.2)

"19.1 The Owner will indemnify and hold the Hirer harmless in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the services hereunder to any of the following persons:

- any servant or agent of the Owner
- any other person at or near the site of the operations for whatever purpose on behalf or at the request of the Owner.

19.2 The Hirer will indemnify and hold the Owner harmless in respect of any liability adjudged due or claim reasonably compromised arising from injury or death occurring during the services hereunder to any of the following persons:

- any servant or agent of the Hirer, or of the casualty.
- any other person at or near the site of the operations for whatever purpose on behalf or at the request of the Hirer."

9.90 Clauses 19.1 and 19.2 deal with the liabilities and settlements in respect of deaths of or injuries to those engaged in the services being rendered under the contract in broad terms and makes the hirer and owner responsible for their respective employees and others on their respective "teams." The clauses apply only to injury or death "occurring during the services hereunder." As with the old "Towcon" form and its corresponding provision in clause 18, there is no definition of when "the services hereunder" start and finish for the purposes of clauses 19.1 and 19.2, which could represent a potentially important lacuna if death or injury occur at the very outset or at the end of the services and when it may be uncertain whether the tug or vessel has in fact started on the service or has already completed it. For example, if a tug is engaged to come out from Flushing to assist in the reflotation of a vessel aground in the Humber, what are the temporal parameters of the "services"? Unlike the ordinary towage contract where a

timetable for connection etc. is given, from which a definition can be arrived at, the "Salvcon 2005" form is silent and it may therefore be advisable to define precisely when the service starts and ends. This has now been in part addressed by clause 25(a)(i) of the "Towcon 2008" form in relation to death and injury (with the further definition of the temporal and geographical period as "from arrival of the Tug at the pilot station or customary waiting place or anchorage at the Place of Departure (whichever is sooner), until disconnection at the Place of Destination"). Consideration should be given to a similar amendment of the "Salvcon 2005" form in terms appropriate to the service.

Loss of or damage caused to or by vessels involved (clauses 19.3 and 19.4)

"19.3 The following shall be for the sole account of the Owner without any recourse to the Hirer, its servants, or agents, whether or not the same is due to breach of contract, negligence or any other fault on the part of the Hirer, its servants or agents:

(i) Subject to the provisions of clause 16.1(v) hereof, loss or damage of whatsoever nature, howsoever caused to or sustained by the Owner's own or hired-in vessel.
(ii) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Owner's own or hired in vessel or obstruction created by the presence of such vessel.
(iii) Loss or damage of whatsoever nature suffered by the Owner or by third parties or their property in consequence of the loss or damage referred to in (i) and (ii) above.
(iv) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Owner's own or hired-in vessel or equipment, or in respect of preventing or abating pollution originating from the Owner's own or hired-in vessel or equipment.

The Owner will indemnify and hold the Hirer harmless in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage. The Owner shall not in any circumstances be liable for any loss or damage suffered by the Hirer or caused to or sustained by the casualty in consequence of loss or damage howsoever caused to or sustained by the vessel.

19.4 The following shall be for the sole account of the Hirer without any recourse to the Owner, its servants or agents, whether or not the same is due to breach of contract, negligence or any other fault on the part of the Owner, its servants or agents:

(i) Loss or damage of whatsoever nature caused to or suffered by the Hirer's own or other hired in vessel or equipment, or the Casualty, the subject of these services.
(ii) Loss or damage of whatsoever nature suffered caused to or suffered by third parties or their property by reason of contact with the Hirer's own or other hired in vessel or equipment or the Casualty or obstruction created by the presence of the Owner's own or other hired in vessel or equipment, or the Casualty.
(iii) Loss or damage of whatsoever nature suffered by the Hirer or by third parties or their property in consequence of the loss or damage referred to in (i) and (ii) above.
(iv) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Hirer's own or other hired in vessel or equipment, or the Casualty, the subject of these services, or in respect of preventing or abating pollution originating from the Hirer's own or other hired in vessel or equipment, or from the Casualty, the subject of these services.

The Hirer will indemnify and hold the Owner harmless in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage. The Hirer shall not in any circumstances be liable for any loss or damage suffered by the Owner or caused to or sustained by the vessel in consequence of loss or damage howsoever caused to or sustained by the Casualty."

9.91 Clause 19.3 renders the owner liable for all loss or damage sustained by his vessel or caused to others by his vessel. Clause 19.4 renders the hirer liable for the same not only in respect of his vessels but also in respect of the casualty. While clauses 19.3 and 19.4 follow the language and structure of clause 18(2)(a) and (b) of the old "Towcon" and in part with clause 25(b)(i) and (ii) of "Towcon 2008", the following significant differences are present:

i The bearing by the owner of all loss or damage to his vessel under clause 19.3(i) is subject to an exception in respect of towing gear and salvage and other equipment or stores "lost, damaged or sacrificed during the services" (unless due to the negligence of the owner or his servants). For such losses etc. the hirer has to pay the costs incurred by the owner in respect thereof pursuant to clause 16.1(v); this is preserved by clause 19.3. This approach is now is reflected in the current clause 16(c) and clause 25(b)(i)(1) of "Towcon 2008."

ii The hirer is responsible for all loss or damage sustained (and caused by) not only his own vessels but also by the casualty itself (see clause 19.4(i)). This represents an important exception to the responsibility of the owner for liability to third parties or their property "by reason of contact with the owner's own or hired in vessel" under clause 19.3(ii). The position under "Towcon" is that the tow is responsible for all contact damage etc. done by the tow, and the tug is responsible for all tug contact damage with any third party interest. Under "Salvcon 2005", the owner is not responsible for damage due to contact by his vessel with the casualty the subject of the services; that is the hirer's responsibility and the hirer is liable to indemnify the owner in respect of any claim made by the casualty against him for such damage. Given the wide definition of "casualty" in clause 1 as including cargo and bunkers, the hirer will similarly be responsible for any and all loss or damage sustained by these interests as a result of contact with the owner's vessel.

iii In the former version of "Salvcon", clauses 19.3(ii) and 19.4(ii) were at first, and even at second, sight difficult to reconcile, since clause 19.3(ii) provided that the owner was to be liable for loss or damage suffered by third parties "by reason of . . . obstruction created by the presence of such vessel", ie the owner's own or hired in vessel, while clause 19.4(ii) provided that the hirer is to be liable for loss or damage suffered by third parties "by reason of . . . obstruction created by the presence of the *Owner's* own or other hired in vessel or equipment, or the casualty", which was precisely the opposite result to that in clause 19.3(ii). It seemed likely that the reference to "Owner" in clause 19.4(ii) was a typographical error and should have read "Hirer." This has now been corrected in "Salvcon 2005."

Other (financial) losses and statutory limitations (clauses 19.5 and 19.6)

"19.5 Save as otherwise expressly stipulated in this Agreement neither the Owner nor the Hirer shall be liable to the other party for loss of profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever.

19.6 Notwithstanding any provisions of this Agreement to the contrary the Owner and the Hirer shall both have the benefit of all limitations of, and exemptions from liability, accorded to the owners, charterers, managers or operators of vessels by any applicable statute or rule of law for the time being in force and the same benefits to apply regardless of the form of signatures given to this Agreement."

9.92 These essentially follow the same wording as in the old "Towcon"; reference may be made to the cases on that wording cited in Chapter 4 above, particularly *Alexander G. Tsavliris Ltd v OIL Ltd (The Herdentor)*, unreported, 19 January 1996 (see Appendix 22), and *Ease Faith Ltd v Leonis Marine Management Ltd* [2006] 1 Lloyd's Rep 67. The only relevant difference is in clause 19.5 which, unlike clause 18(3) of the former "Towcon", does not identify specifically by number the provisions in respect of which this mutual exclusion of liability for certain losses is inapplicable. "Salvcon 2005" prefers the wording "Save as otherwise expressly stipulated in this Agreement." The likely result is that there is no right of recovery of these types of loss unless a clause expressly so provides; as none do on the printed form, then clause 19.5 operates as a total exclusion absent any typed clause.

Clauses 20–24 and 27: general provisions

9.93 Clause 20 is a standard form "Himalaya clause" (cf. "Towcon 2008" clause 26 and see Chapter 4 above):

"All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Agreement for the benefit of the Owner or the Hirer shall also apply to and be for the benefit of their respective sub-contractors, operators, masters, officers and crews and to and be for the benefit of all bodies corporate parent of, subsidiary to, affiliated with or under the same management as either of them, as well as all directors, officers, servants and agents of the same and to and be for the benefit of all parties performing services within the scope of this Agreement for or on behalf of the Owner or the Hirer as servants, agents and sub-contractors of such parties. The Owner or the Hirer shall be deemed to be acting as agent or trustee of and for the benefit of all such persons, entities and vessels set forth above but only for the limited purpose of contracting for the extension of such benefits to such persons, bodies and vessels."

9.94 Clause 21 is an "evidence" clause which is peculiar to the "Salvcon" form and which provides:

"The Owner confirms that he will provide all necessary assistance to the Hirer in respect of the presentation of the Hirer's salvage claim by the provision and retention of all evidence in his possession or control relating to the salvage services and to their contribution to same, including the provision of witness statements/reports, photographs, and any other relevant documentary evidence. The Hirer agrees that he will pay the Owner's reasonable costs relating to the provision of the above evidence."

9.95 This is an important provision from the hirer's perspective as the salvor since, if the service is successful, there will usually be an arbitration under LOF (ie LOF 2011), or a claim in salvage in private arbitration or before some competent court, to determine the salvage remuneration. The hirer as salvor will wish to put forward evidence dealing with the usual elements of a salvage claim: dangers; the services; special aspects of the services etc. For this he will need full access to and assistance from the sub-contractor in relation to the services or that part of the services performed by him.

9.96 Clause 22 is a standard confidentiality provision of the type commonly found in charterparty or commercial fixtures. Clause 23 contains general contractual "boilerplate" (cf. "Towcon 2008" clause 30).

9.97 Clause 24 is a "time for suit" provision in the same terms as those contained in clause 31 of the "Towcon 2008" form.

9.98 Clause 27 is a "warranty of authority" clause relating to the position of the owner of the tug or vessel in the following terms:

"If at the time of making this Agreement or providing any services under this Agreement at the request, express or implied, of the Hirer, the Owner is not the actual owner of the vessel identified in Box 4, Part I, the Owner warrants that it is authorised to make this Agreement."

9.99 The ISU guidance notes describe this as "the Standard Warranty . . . clause in relation to the person signing the Agreement in respect of the Vessel being hired." It differs materially from the corresponding provision in clause 29 of the "Towcon 2008" form and in clause 2 of the UK Standard Conditions, which deal with the position of the hirer of the tug. These provisions both purport to bind the tow owner to the contract where the hirer who engages the tug is not also the owner of the tow itself. Clause 27 of the "Salvcon 2005" form adopts a more pragmatic approach to the question of the tug or vessel being hired. The clause merely records that the person who contracts with the hirer and who is named as the "owner" warrants that he is authorised to make the contract if he is not the true owner of the vessel hired. This avoids the device of a deemed agency on behalf of the true owner, which is usually of very limited efficacy, and concentrates more realistically on the personal liability of the hirer if subsequently the owner of the vessel disowns or denies the contractual commitment affecting his vessel.

Clauses 25 and 26: law and arbitration procedure

9.100 The ISU "Salvcon 2005" being an approved form of sub-contract for use by salvors who most commonly render salvage services under the English law Lloyd's Open Form Salvage Contract (LOF), the contract provides for arbitration in a manner that is closely allied to arbitration under the LOF provisions for salvage arbitrators and for English law. As the ISU guidance notes state:

> It is anticipated that the majority of the users of this Agreement will be involved in rendering services to a casualty under Lloyd's Standard Form of salvage. For this reason, any dispute is to be referred to a member of the panel of Lloyd's Salvage Arbitrators.

9.101 Unless the parties expressly choose to derogate from this regime by completing Box 17 so as to nominate a place for arbitration other than England, then under clause 25 the following mechanism is put in place for dispute resolution:

"25.1 In the event that Box 17 of Part I is not completed then clauses 25.2 to 25.6 hereof shall apply.

25.2 This Agreement shall be governed by and construed in accordance with English law and any dispute arising out of this Agreement shall be referred to Arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force.

25.3 Any dispute arising hereunder shall be referred to the arbitrament of a sole Arbitrator, to be selected by the first party claiming arbitration from the persons currently on the panel of Lloyd's Salvage Arbitrators with a right of appeal from an award made by the Arbitrator to either party by notice in writing to the other within 28 days of the date of publication of the original Arbitrator's Award.

25.4 The Arbitrator on appeal shall be the person currently acting as Lloyd's Appeal Arbitrator under LOF 1995 or any standard revision thereof, including a power to order a payment on account of any monies due to the Owner pending final determination of any dispute between the parties hereto.

25.5 Both the Arbitrator and Appeal Arbitrator shall have the same powers as an Arbitrator and an Appeal Arbitrator under LOF 1995 or any standard revision thereof, including a power to order a payment on account of any monies due to the Owner pending final determination of any dispute between the parties hereto.

25.6 No suit shall be brought before another Tribunal, or in another jurisdiction, except that either party shall have the option to bring proceedings to obtain conservative seizure or other similar remedy against any assets owned by the other party in any state or jurisdiction where such assets may be found."

9.102 It will be noted that the great advantage of this mechanism is that arbitration will take place before a highly experienced salvage arbitrator and that there is a built-in right of appeal to the Lloyd's appeal arbitrator who will have been chosen from that arbitral pool. For details of the LOF salvage arbitration procedure, see generally Brice, *The Maritime Law of Salvage* (5th edn, 2012), chapter 8, especially para. 8–123 *et seq*.

9.103 If Box 17 is completed, clause 26 provides in concise terms for law and arbitration to follow that choice of arbitral *situs*.

"26.1 If Box 17 of Part I is completed and the parties nominate a place outside of England, then the provisions of clause 26.2 hereof shall apply.

26.2 Any dispute arising out of this Agreement shall be referred to Arbitration at the place indicated in Box 17, Part I of this Agreement, subject to the procedures applicable there. The laws of the place indicated in Box 17, Part I shall govern this Agreement."

9.104 As with the BIMCO "Towcon", "Towhire" and other forms, while it is open to the parties to identify another place for arbitration and another governing law, the ISU "Salvcon 2005" form has been drawn up on the premise of English law as the governing law and as a pendant to the English law governed LOF and other ISU sub-contracts. Many of the general provisions are "English" law terms (eg the Himalaya clause etc.). However, the ISU "Salvcon 2005" sub-contract is used by salvors who are rendering services under other and non-English law salvage forms and this was the ISU's contemplation. The guidance notes to clause 26 record that the clause

recognises the fact that a number of salvage services are performed under contracts other than Lloyd's form. Under this clause, the parties have the right to nominate another place for the hearing of any Arbitration.

PART D. THE "SALVHIRE 2005" FORM

9.105 The "Salvhire 2005" form is reproduced in facsimile in Appendix 15. It is to the "Salvcon 2005" form what the "Towhire" form is to "Towcon." It follows the same two-part approach – the only difference being that the basis of payment is daily hire and not lump sum. The salient provisions of "Salvcon" are all present in the same form save for minor drafting or textual changes to reflect the different financial basis on which the "Salvhire 2005" form operates. As a matter of everyday salvage and towage practice, use of the "Salvhire" form appears to have always been relatively rare, no doubt for sound commercial reasons which render a fixed price more attractive to a salvor contracting in. The differences correspond broadly to those between the "Towcon" and "Towhire" forms and call for no special commentary: see above in relation to the "Towhire 2008" form in Chapter 4.

CHAPTER 10

The BIMCO/ISU standard form contracts for wreck removal and marine services: "Wreckhire 2010"; "Wreckstage 2010" and "Wreckfixed 2010"

PART A. INTRODUCTION

10.1 An important element of the services rendered by the towage and salvage industry and the offshore services industry consists of wreck removal or similar activities following a collision or other casualty, or upon the cessation of hostilities. The importance of wreck removal in the offshore sector has been increased by the International Convention for the Removal of Wrecks 2007, also known as the Nairobi Convention or "ICRW" (as to which see: Professor N. Gaskell and C. Forrest, "The Wreck Removal Convention 2007" [2016] LMCLQ 60). This enables coastal states to take proportionate measures to remove wrecks which are located in their Exclusive Economic Zone or EEZ (see Article 2), if those wrecks constitute a danger to navigation or to the marine environment (see Articles 1(5) and 6). The Convention in addition to establishing the liability of the shipowner for his wreck and its removal (Articles 9 and 10) requires shipowners to obtain insurance cover for the costs of wreck removal (Article 12) and coastal states have the power of direct action against insurers. The insurance provisions apply to vessels of 300 GT and over and the definition of wreck includes objects that have been on board ships (Article 1(4)). Contracting states have the option under the Convention to extend the convention to wrecks within their territorial waters (Article 3). This is an attractive option and has caused more states to adopt the convention, because of the provisions for compulsory insurance and the right of direct action against the insurer. In the United Kingdom, the Wreck Removal Convention Act 2011 received Royal Assent on 12 July 2011 and entered into force on 14 April 2014, 12 months following the date on which 10 member states have signed it; at the date of writing some 16 states have adopted the Convention. The first report on the functioning of the Act (by the Secretary of State for Transport to the Transport Select Committee: *Post-Legislative Assessment of the Wreck Removal Convention Act 2011* (July 2016)) offers a useful perspective into the importance of the powers given to a state party under the Convention in the event of a major maritime casualty. For a forthcoming major modern work on the Convention (in addition to his existing article at [2016] LMCLQ 60) and the law of wreck, see Professor N. Gaskell, *Wreck Law*, publication of which is due in 2018.

10.2 Such services can be long, highly complex and operationally demanding and therefore usually very costly (for an admirable short account, see James Herbert, *The Challenges and Implications of Recovering Shipwrecks in the 21st Century* (2016)). Often the chief person footing the bill for such services is the P&I Club of the vessel concerned, either the victim of the casualty or the cause of it. In addition to wreck removal and clearance services, pollution aspects can render the services more difficult and with potentially wide liabilities. The International Salvage Union (ISU), with assistance from BIMCO, addressed the need in relation to these services for a standard form contract similar in form and conception to that drawn up for ocean towage operations (ie "Towcon" and "Towhire"). In 1993, two standard form contracts were adopted for use for such services by the ISU: these were the "Wreckcon" and "Wreckhire" forms. The former was a contract that provided for lump sum stage payments in respect of the service, while the latter was a daily (or other) fixed rate contract for the same. In broad ethos, the two forms corresponded to the "Towcon" and "Towhire" forms drawn up by BIMCO.

10.3 The two forms were almost uniformly taken up by the leading towage, salvage and offshore industry operators and became the principal basis upon which they agreed to render wreck removal and associated marine services. However, in use various difficulties arose over the effect of certain of the terms of "Wreckcon" and "Wreckhire." In particular, the parties usually responsible either for engaging these services or for paying for them, namely the P&I Clubs were dissatisfied with:

a what they perceived as a lack of balance between the interests of the hirer and the contractor with the contract being skewed in favour of the contractors in a way which had been avoided in the BIMCO towage forms "Towcon" and "Towhire"; and
b the unavailability in a standard form contract of a "no cure-no pay" type of lump sum contract where remuneration was earned only on the completion of the specified service with no remuneration being earned if the service did not produce the contractually stated completed result.

10.4 While attempts were made to amend the "Wreckcon" form to this end on an *ad hoc* basis, the "Wreckcon" form did not prove to be very comfortably adapted and uncertainties and points of dispute were introduced. As a result, non-standardised contracts had to be drafted on a casualty-by-casualty basis, which was unsatisfactory from the Clubs' and operators' points of view, as well as confusing. In 1998, the International Group of P&I Clubs requested the ISU to consider the development of a new standard form contract in simple "no cure-no pay" terms.

10.5 As the BIMCO/ISU official release accompanying the new forms which resulted from this initiative by the P&I Clubs stated:

> The original Wreck Removal and Marine Services Agreements, developed jointly by the International Salvage Union (ISU) and BIMCO, have served the industry for over six years. However, during the course of this period the International Group of P&I Clubs expressed its concern that the lump sum version, "Wreckcon', was balanced too much in favour of the Contractors. The P&I Clubs have emphasised that they support the concept of standardised agreements and recognise the benefits to be gained in terms of saving of time and legal costs from the adoption of such agreements. However, in the Clubs" view, there remains a number of circumstances in wreck removal operations where there is still a place for a traditional lump sum "no cure-no pay" agreement.
>
> Unfortunately, the existing "Wreckcon" Agreement does not embrace the concept of "no cure-no pay" and its structure is insufficiently flexible to permit the form to be amended easily for this purpose.

10.6 From 1998 onwards, the ISU, working together with BIMCO and the P&I Clubs and the International Chamber of Shipping, considered and drafted a "no cure-no pay" standard form of wreck removal contract and service. The ISU took the opportunity to clarify and update the existing "Wreckcon" and "Wreckhire" forms, taking into account the comments of the International Group of P&I Clubs and BIMCO. In 1999, three new forms were introduced: "Wreckstage 99", "Wreckhire 99" and "Wreckfixed 99." However, practice has demonstrated that the most popular and most commonly adopted form was the "Wreckhire 99" form. As David Steel J noted, after hearing evidence in a case where the parties had simply agreed to "BIMCO" terms without defining which specific set of BIMCO they were to be, "in connection with salvage services not on LOF the commonly and most used contract is BIMCO Wreckhire": *Tryggingarfelagio Foroyar P/F v CPT Empresas Maritimas SA* [2011] EWHC 589 (Admlty).

10.7 In early 2009 the International Group of P&I Clubs salvage sub-committee approached BIMCO seeking the implementation of a formal BIMCO revision exercise for "Wreckhire 1999." The view of the P&I Clubs was that although the 1999 agreement had served the industry well over some 10 years, certain amendments were necessary to introduce better cost control and to restore to the contract a more equal balance between the parties. As BIMCO has noted:

> One of the key issues that triggered the decision to revise the agreement was that the nature of wreck removal in respect of legislative and technical requirements has changed significantly in the 10 years

since the form was last revised. For instance, enhanced environmental concerns often now require the removal of bunkers from a stricken vessel in advance of or concurrent with a wreck removal operation. Because of the technical difficulties associated with bunker removal it has become increasingly difficult for insurers to place a cap on costs when faced with an indeterminate period of hire for marine services.

10.8 The decision was taken by BIMCO to embark upon a wholesale revision of all three forms and the revision process began in 2009, involving representatives of leading P&I Clubs and the International Group, leading salvors and the ISU and the Chamber of Shipping. The primary focus of the revision has been to update the most commonly used of the three wreck removal agreements "Wreckhire 99" and, in order to ensure consistency across all three wreck removal agreements, parallel amendments have been made, where appropriate, to the other two forms. The "Wreckhire 2010" form was published on 31 May 2011, with the other two forms following some months later in August 2011.

PART B. THE 2010 STANDARD "WRECK" FORMS

10.9 The new BIMCO/ISU standard form contracts for wreck removal and other allied marine services consist of three separate forms. The basic structure of the contract and of the obligations and responsibilities of the parties under it is broadly common to all three forms, the difference laying in the basis of remuneration payable for the services to be performed. As the BIMCO/ISU release relating to the 1999 forms stated and as remains the case with the 2010 revisions, the aim has been "to ensure, whenever possible, consistency between the three forms." Each of the three contract forms is described as "International Wreck Removal and Marine Services Agreement" with the particular basis of remuneration identified after the title in brackets and with a short-form appellation or "code name" for the form in the usual BIMCO house style.

i *"Wreckhire 2010": or "International [etc.] Agreement (Daily Hire)."* Here, as the name suggests the services are to be paid for at a daily rate of hire; the form is therefore the wreck removal counterpart of the "Towhire" and "Salvhire" forms. As BIMCO explained on the launch of the new 2010 form "Wreckhire 2010":

> contains some novel provisions which have been agreed as a means of encouraging a swift conclusion of operations and resolving on-site disputes more quickly. The new provisions include a bonus incentive scheme designed for operations over an extended duration, whereby the contractors will be paid an agreed bonus if the task is completed within the specified period; a time cap placed on completion of the salvage operation for operations over an extended period, after which the daily rate of hire will be reduced; and an expert evaluation process to expedite disputes over the application of standby rates.

References in this chapter to "Wreckhire" are to the new 2010 form unless otherwise indicated.

ii *"Wreckstage 2010": or "International [etc.] Agreement (Lump Sum-Stage Payments)."* The services to be performed by the contractor are to be paid for on a lump sum basis as with the services performed under "Towcon" and "Salvcon." Specific provision is made for the lump sum to be earned and to become payable in a series of stages. The system of adopting stages for part payment of a lump sum is in common use under both of the "Towcon" and "Salvcon" forms where the nature of the services makes this desirable, usually from the contractor or tug owner's commercial viewpoint rather than from that of the hirer. What "Wreckstage" does is to provide, as part of the standard form itself and in the scheme of the contract form, for a series or programme of stages and stage payments for the service, the subject of the contract. "Wreckstage 2010" replaces the old BIMCO "Wreckcon" form which dated from 1993.

iii "*Wreckfixed 2010": or "International [etc.] Agreement (Fixed Price 'No Cure-No Pay').*" The services to be performed under this form of contract notwithstanding its title, correspond to those under a lump sum contract albeit one where the lump sum is payable as one indivisible amount and is earned only upon the full completion of the contract services. Therefore it is a species of lump sum contract rather than, as its title might suggest, a contract analogous to one of salvage (cf. the title of the Lloyd's Standard Form of Salvage Agreement as "No Cure-No Pay", eg LOF 2011). As seen above, the concept of "no cure-no pay" was adopted in response to the P&I Clubs urging the drawing up of a fixed price earned or not earned basis of contract. The real difference between "Wreckfixed" and "Wreckstage" is that the former provides for one lump sum which is either earned or not, while the latter provides for a lump sum divided into separate amounts or, on one view, for a series of individual lump sum prices for particular portions of the contractual works or services. "Wreckfixed" with "Wreck stage" replaces the old BIMCO "Wreckcon" form, which provided for lump sum payment but which did not distinguish between a fixed price or stage payments, with a regime of two possible contracts with markedly different bases for remuneration. It is a feature of the unpredictability of wreck removal operations, save in straightforward situations, that offshore operators choose in preference to contract on the daily rate basis rather than by reference to a lump sum or staged payment basis.

10.10 In this chapter, the updated and revised "Wreckhire 2010" form, as that now in most common use, is considered first and, subsequently, the new "Wreckstage 2010" and "Wreckfixed 2010" forms are then considered. It should be noted that very many of the provisions in all three forms are common to such an extent that all of the common provisions are considered in the context of the "Wreckhire" form to which reference should be made when considering the "Wreckstage" and "Wreckfixed" forms, which are considered only in so far as they differ from "Wreckhire." In considering the "Wreck" contracts, reference should also be made to the commentary on the corresponding provisions in the "Salvcon" form set out in the preceding chapter as there are many similarities between the clauses (both in wording and concepts) of both types of forms. Facsimiles of each of the three forms, "Wreckhire 2010", "Wreckstage 2010" and "Wreckfixed 2010", are set out at Appendices 16, 17 and 18 respectively.

PART C. THE "WRECKHIRE 2010" FORM

The structure of the form

10.11 In common with other BIMCO standard form contracts, "Wreckhire 2010" consists of two separate parts: Part I comprising a series of boxes in which are to be entered the specific details of the services to be performed and the terms specific to the particular contract, such as remuneration and time constraints etc.; Part II setting out the standard form clauses. As with the "Towcon", "Towhire" and "Supplytime" forms, "In the event of a conflict of terms and conditions, the provisions of PART I including Additional Clauses, if any agreed, shall prevail over those of PART II to the extent of such conflict but no further."

Part I and the "boxes"

10.12 As with other BIMCO forms, the boxes are designed to contain the specific information agreed upon as the basis of the contract which is the subject of the printed clauses. Part I is largely unchanged from the "Wreckhire 99" format. The most important boxes are the following:

i Box 4, in which the specification and attributes of the vessel for which the services are engaged are to be set out. These will be important terms of the contract, constituting

warranties by the hirer to the contractor of the description of the vessel. Of particular potential importance are sub-boxes (viii), "details and nature of cargo", and (x), "any other Vessel details relevant to this agreement." While there is no duty of disclosure *uberrimae fides* in this context, the hirer arguably warrants that there are no other details relevant to the services to be rendered under the agreement, at least to his knowledge, if he does not fill out this box (cf. *The Kingalock* (1854) 1 Spinks A & E 263 considered above in Chapter 1). It is advisable either to set out fully any features of the vessel which are relevant or to refer to any inspection carried out by the contractor, eg "as surveyed by the contractors on [date]."

ii Box 5 provides for details of the condition of the vessel. This will be equally important since it will provide details of the state of the vessel and any disabilities or damages which she presents etc. which are relevant to the services. Even if the vessel is a sunken wreck, her condition will be important (eg particularly the state of her bunker tanks, the condition of the hull and structure (for example for a reflotation attempt)).

iii Box 6 provides for similar details of the "position of the Vessel" and the "condition of the Worksite." While the position of the vessel should in most cases present no difficulty, the same being precisely known, the details of the "condition of the Worksite" may present more practical problems. If the services are to be rendered to a vessel that has sunk in a particular depth of water and has fetched up on a particular bottom, these will be highly material to the services. If the bottom is identified as sand from a chart and a diving survey but is in fact more accurately described as silt and mud which increases the bottom suction, then this may have an effect on the difficulty of the particular service.

iv Box 7 completes this quartet of boxes with a definition of the "Nature of the Services." As with the "Salvcon" and "Salvhire" forms, it is important to have as clear a definition as possible of what the services will consist, both in terms of ensuring that the precise content of the contractor's obligation is known and in terms of delimiting the services so that additional services can be clearly identified as such without a dispute. A provision is made for "compliance with orders of competent authorities" with the party who is to obtain confirmation to be identified. This reflects the almost inevitable involvement of port or state authorities in a wreck removal operation.

v Box 9 provides for the identification of extra costs involved in the disposal of the wreck or vessel and for the identification of the particular party who is to bear such costs, be it contractor or company.

vi Box 10 provides for the new feature of the 2010 form, being the concept of the "Bonus Payment" with provision made for the amount of the bonus and when a full or partial bonus is earned, under the terms of clauses 11 and 12 of Part II.

vii Box 11 contains the detailed specific daily rates to be agreed for the wreck removal craft and equipment, with provision for stand-by rates and working rates.

10.13 The importance of Boxes 4–7 lies in the fact that taken together they define the service both in terms of what the contractor engages himself to do and in terms of the circumstances in which those services are to be rendered by him. (Cf. the corresponding boxes in the "Salvcon" form: see Chapter 8 above for equally applicable general comments on the details to be given in filling in these boxes.) As will be seen, the "Wreck" forms all provide for a mechanism by which substantial changes in the work to be done by the contractor or in the facilities which he needs to deploy to carry out that work (see eg clause 4 of the "Wreckhire" form) may be invoked by the parties to vary the contract remuneration, either upwards or downwards depending on whether the service becomes more difficult or easier to accomplish (see eg clause 4 of the "Wreckhire" form which provides that "The rates of Hire stated in Box II are based upon the Nature of the

Services, as set out in Box 7, Method of Work and Personnel, Craft and Equipment, as set out in Annexes I and II and the Description, Specifications, Position, Condition of the Vessel and Worksite, as set out in Boxes 4, 5 and 6"). This mechanism is founded upon a full and accurate exposition by the hirer of the details of his vessel, of her circumstances and of the place where the services are to be rendered. It is vitally important for the hiring company in these circumstances to give the fullest and most precise details possible, if known or, if not known, to make it clear what the "believed" position is in sufficient explicit terms. A feature of the "Wreckhire" form is that it does not contain an entire agreement clause, distinguishing it from the latest revision of the "Supplytime 2005 form" (see its clause 38). Therefore, it is open to parties to seek to refer to any pre-contractual "understandings" as to what the work comprised or excluded. However, this is no substitute for a clear and explicit definition, if possible in detail, of the services so far as they are known. Consideration might be given to inserting a clause similar to that in the "Supplytime" form (viz. "This Charter Party, including all Annexes referenced herein and attached hereto, is the entire agreement of the parties, which supersedes all previous written or oral understandings and which may not be modified except by a written amendment signed by both parties") in order to confine the parties to what has been inserted in Boxes 4–7.

10.14 Part I of the form concludes with express warranties of authority ("The undersigned warrant that they have full power and authority to sign this Agreement on behalf of the parties they represent"). By itself, this merely provides that the individual persons signing on each side themselves personally warrant that they are authorised. In the event that the contract was entered into without authority (actual or ostensible), then the only remedy of the aggrieved other party would be to sue the individual on his personal warranty. Part II contains a further warranty of authority provision (which is considered below) purporting to be a warranty by the company and the contractor as to the signatory's authority.

The Annexes to the form

10.15 The "Wreckhire" form, like the other new 2010 "Wreck" forms, provides for three Annexes. These are considered in further detail below in relation to the relevant clauses referring to the Annexes. For present purposes:

i The contractor has to set out in Annex I a detailed schedule of the "Personnel, Craft and Equipment" which he deems to be necessary for the performance of the services in the circumstances described in Boxes 4, 5 and 6. See below in relation to clauses 2 and 4.

ii The contractor has to set out in Annex II his method of work and, on Annex II itself, to allow for his "estimated time schedule." This will provide for the giving of details of the stages of the performance of the work as well as the way in which it is anticipated that it will be done. See below in relation to clauses 2 and 4.

iii Annex III sets out a standard format for "Contractor's Daily Reports" which the contractor is required to give to the company representative under clause 2.

Commentary on the provisions of Part II

Clause 1: definitions

10.16 The 2010 revision has added a number of important new definitions to the agreement and, in common with the new style of drafting, these are contained in an introductory provision so as to "improve the overall clarity of the form" and give "a consistent use of these defined terms through the Agreement." Linking definitions are given of the terms "Company", "Contractor",

"Services" and "Worksite." In addition, there is a specific definition of the "Vessel" which is to be the subject of the services.

"The term 'Vessel' shall include any vessel, craft, property or part thereof of whatsoever nature, including anything contained therein or thereon, such as but not limited to cargo and bunkers, as described in Box 4."

10.17 This is the same wide definition as was adopted in the ISU "Salvcon" form and which was used in the 1999 "Wreck" forms. Its purpose as the BIMCO/ISU release for the 1999 revision explained is "to give the Agreement as wide an application as possible." The standard form can therefore be used not only for a vessel but for specific aspects (eg the removal of cargo or the disposal of bunkers etc.). It is potentially narrower than the definition given in the ICRW since it refers to "anything contained therein or thereon" including cargo and bunkers but it is unclear whether that would apply to objects which were once but are no longer in or on the vessel. Thus, if the vessel sinks but in doing so sheds some of her deck cargo of containers over an area of the seabed, it might be argued that the service related only to the vessel and as such with her cargo in place. Cf. Article 1(4) of the ICRW which refers to "any part of a sunken or stranded ship including any object that is or has been on board such a ship." It would be desirable when drafting boxes 4–7 to cover precisely what the Vessel is and what the services to be rendered to her or other objects comprises and entails.

Clause 2: the services

"2. The Services

The Contractor agrees to exercise due care in rendering the Services which shall include, if applicable, the delivery and/or disposal of the Vessel. Insofar as it is not inconsistent with the nature of the services to be rendered under this Agreement, the Contractor will also exercise due care to prevent and minimise damage to the environment.

The Contractor shall provide the Personnel, Craft and Equipment set out in Annex I of this Agreement which the Contractor deems necessary for the services based upon the Specifications, Condition and Position of the Vessel and Worksite set out in Boxes 4, 5, and 6.

The Contractor's Method of Work shall be as described in Annex II, utilising the Personnel, Craft and Equipment described in Annex I.

The Contractor shall consult with the Company if there is any need for substantial change in the Method of Work, and/or Personnel, Craft or Equipment. In the event that time does not permit such consultation, or agreement to the proposed change(s) is unreasonably withheld, then the Contractor may proceed with such change(s). (See Clause 4 hereof).

The Contractor shall provide the Company's representative with daily reports in accordance with Annex III.

The party identified in Box 7(ii) of this Agreement shall be given all reasonable assistance by the other party in connection with obtaining confirmation from the competent authorities that the Company has complied with any orders issued by them."

10.18 Clause 2 is substantially unchanged from the 1999 version. The "Wreckhire" contract imposes an obligation of "due care" on the Contractor which follows the approach to the obligations of the salvor under the 1989 Salvage Convention. By clause 1, the "Services" are those defined in Box 7, as has been seen. The first paragraph of clause 2 has been amended to make the delivery and/or disposal of the vessel a "due diligence" type obligation on the part of the contractor. The previous reference to the contractor's "endeavour to deliver" has been removed and the obligation to exercise "due care" is applied to the entirety of the agreed services under the agreement, which may also include delivery and/or disposal of the vessel. The obligation of the contractor in respect of avoiding environmental damage is strengthened by the inclusion of an obligation not only to minimise but also to prevent such damage; this links with clause 24 dealing with responsibility for pollution.

10.19 Clause 2 in addition provides for the further amplification of those defined services in two annexes attached to the standard form.

10.20 First, the contractor has to set out in Annex I a detailed schedule of the "Personnel, Craft and Equipment" which he deems to be necessary for the performance of the services in the circumstances described in Boxes 4, 5 and 6. This description will form part of the contract and the hirer will therefore be taken to accept that this is what is necessary for the performance of the services or, at least, that he accepts that this is what the contractor has assessed as necessary and, to the extent he is able to do so, he accepts that assessment.

10.21 Secondly, the contractor has to set out in Annex II his method of work and, on Annex II itself, to allow for his "estimated time schedule." This will provide for the giving of details of the stages of the performance of the work as well as the way in which it is anticipated that it will be done. For example, in a simple reflotation:

> Seal hatch covers and block ventilators to holds. Weld by divers pad eyes on deck and secure lines to the tugs "Dauntless" and "Dainty" for holding position. Provide compressed air by hoses from the vessel "Blower" which shall be moored above. Clear away sand to free bottom using high pressure water hoses to be provided by the support vessel "Flusher." On the vessel coming free, the tugs "Dauntless" and "Dainty" shall hold steady until pumped out. The vessel will then be towed by both to Safe-to-lie Roads.

10.22 The contract recognises that in this sort of work, as in salvage with which it is closely related, uncertainties abound and what the parties have agreed on as suitable may be rendered insufficient by the actual circumstances experienced on the job itself. Clause 2 therefore permits the contractor to notify and consult with the hirer "if there is any need for substantial change" in the matters listed in Annexes I and II. The emphasis on "substantial" change is to reflect the fact that there must be some real and significant major reason for varying what has been agreed and the contractor has to take in his stride and as part of his risk allocation all but significant changes. However, it does leave open a window for dispute where different parties have a different appreciation of what is a sufficiently "substantial change." The "consultative" procedure may be dispensed with if there is not time and the contractor may proceed in an urgent case without the hirer's agreement. As will be seen, clause 2 is in any event subordinate to the main provision in this regard, clause 4 ("Change of Method of Work and/or Personnel, Craft or Equipment"), which deals with the question of the entitlement to additional remuneration where there has been a "change" under clause 2.

10.23 Two new provisions have been added at the end of clause 2. The first requires the contractor to give the company representative daily reports (the reports to be based on a standard format of "Contractor's Daily Reports" which is set out in Annex III). This is in a form very familiar to those operating in the offshore and drilling industries. The importance of these reports cannot be overstated. When disputes arise, the contemporary record signed off by the contractor and delivered to the hirer usually forms a very important part of the evidence and, even if the company merely signs them "for receipt only", if the reports are later alleged not accurately to have recorded matters, the hirer will bear the evidential burden of explaining why its contrary stance was not communicated to the contractor. The second new provision requires assistance to be given to the party named in Box 7 by the other party to assist in obtaining confirmation from the authorities of compliance with their orders. This corresponds with the responsibility under other forms for licences and permits and clarifies the chain of command in dealing with the local competent authorities, be they port or state.

Clause 3: company representative

"3. Company Representative

The methods and procedures to be employed in the Services shall at all times be discussed and agreed between the Company and the Contractor.

The Company's Representative will be available during the Services with the full authority to act on behalf of the Company. The Company Representative shall have full and unfettered access at all times to the site and to the Contractor's craft and equipment, unless such access is reasonably refused by the Contractor.

In addition, the Company will provide at its sole risk and expense sufficient officers or their equivalents, who are fully conversant with the cargo system and/or layout of the Vessel, and who should be in attendance when reasonably required during performance of the Services in order to provide advice as and when requested by the Contractor."

This clause has been amended in the 2010 revision and now deals with three matters.

10.24 The first is to create an obligation on both parties to liaise as to the way in which the defined services are to be carried out. While this usually follows as a matter of course, clause 3 now gives each party the right to have its views taken into account and discussed. While the concept of the hirer and the contractor having to agree upon the methods and procedure may give rise to problems operationally when the contractor, deploying professional skills (for example in the removal of bunkers underwater) seeks to direct the methods to be employed, it is likely that, even though the clause does not refer to an obligation not to withhold agreement unreasonably and later uses such language, this would be treated as a necessarily implied term, by analogy with the principle in *Mackay v Dick* (1881) 6 App Cas 251.

10.25 The second is the right of the contractor to have on site or easily available a representative of the hirer company able to bind the company; in the event of changes of circumstances or, simply, operational decisions which may inevitably crop up, the contractor will wish to be able to shorten the decision-making process with the hirer and, at the same time, to avoid potential disputes about whether a representative was or was not authorised to take a particular decision. The 2010 revision adds, by way of *quid pro quo*, a right of unfettered access by the representative to the site and the contractor's craft: this provides a valuable source of information and oversight to the hirer previously lacking in the 1999 version. Under the "Wreckstage" and "Wreck fixed" forms, the corresponding provision (also clause 3) is more limited, providing merely for the hirer to provide a representative during the performance of the services "if reasonably required by the Contractor"; this may reflect the greater degree of operational autonomy on the part of the contractor when fixed price, no cure-no pay services are being carried out as contrasted with the daily hire basis under the "Wreckhire" form.

10.26 The third is the discrete obligation of the hirer company to provide in all cases proper technical advice and information to the contractor regarding the vessel and its systems on site to the contractor. The wording largely corresponds to the 1999 wording which resulted from an amendment "to make it clear that the primary role of the ship's officer or equivalents, is to provide advice and not assistance to the contractor" (ISU release).

Clause 4: change of work method and/or personnel, craft and equipment

"4. Change of Method of Work and/or Personnel, Craft and Equipment

The Rates of Hire stated in Box 11 are based upon the Nature of the Services, as set out in Box 7, and the Personnel, Craft and Equipment, and Method of Work, as set out in Annexes I and II, as well as the Description, Specifications, Position, Condition of the Vessel and the Worksite, as set out in Boxes 4, 5 and 6.

(a) If before or during the performance of the Services, and without fault on the part of the Contractor, there is substantial change in the work to be done under this Agreement, or in the Personnel, Craft and Equipment required to undertake the Services due to any misdescription by the Company or error in the specification provided by the Company, upon which the Contractor has relied, or a material change in the position and/or condition of the Vessel or the worksite:

(i) the Contractor shall forthwith give notice in writing thereof to the Company and of the estimated additional costs to effect the Services;

(ii) any and all substantial changes to the nature of such Services which are agreed between the Contractor and the Company shall be drafted into a variation order by the Company, which shall be signed by the parties;
(iii) the parties shall, without delay, consult each other to reach agreement on the amount of the additional costs to be added to the Rates of Hire and any agreement shall be incorporated into the variation order.

(b) If, as a result of a material change in the position and/or condition of the Vessel, or the Worksite, subsequent to entering into this Agreement, the Services become easier to perform in terms of personnel, craft and/or equipment requirements, then:

(i) the Company may, subject to the provisions of Clause 10(d) hereof, seek a reduction in respect of the monies payable pursuant to Clause 10(a) hereof;
(ii) any and all substantial changes to the nature of such Services which are agreed between the Contractor and the Company shall be drafted into a variation order by the Company, which shall be signed by the parties;
(iii) the parties shall, without delay, consult each other to reach agreement on the amount of the additional costs to be deducted from the Rates of Hire and any agreement shall be incorporated into the variation order.

(c) Alternatively either party may refer the matter to expert evaluation in accordance with Clause 20 (Expert Evaluation) or to arbitration or mediation pursuant to Clause 21 (Arbitration and Mediation) for a decision on the reasonableness and quantum of such costs, or the claim by the Company for a reduction in remuneration, which shall be incorporated into the variation order.

In the event the matter is referred either to expert evaluation or arbitration or mediation the Contractor will continue to provide the Services, without prejudice to any claim for an adjustment to the remuneration."

10.27 As the original ISU release to the 1999 form stated (and as the BIMCO explanatory notes to the 2010 revision repeat), "problems may arise during any operations which require a substantial change of method or equipment." Problems also arise, however, where the anticipated task in fact is not as difficult or as demanding as thought at the time of contracting and the work and equipment contemplated as necessary are no longer needed or required in the same degree or at all. The 1993 "Wreck" forms provided simply for the position where there was a need for a change in the work to be done and for a revision upwards in the interest of the contractor of the remuneration to be paid. This was perceived as inequitable by the P&I Clubs because it was as commonly the case that operations which were perceived to be difficult and requiring particular equipment and methods turned out to be much more straightforward as it was the case that matters became more difficult. However, in the former case the contractor was entitled to retain the full lump sum or other agreed remuneration notwithstanding that the basis on which it had been agreed was much less arduous than the basis actually required:

> The particular instance they [the Clubs] gave as an example was a sunken vessel which had to be reduced [in height] to give a certain depth [or keel] clearance. Between agreeing the price and the commencement of operations the vessel had sunk into the sea bed; as a result the work required was significantly reduced.

(see the ISU release to the 1999 Revision). The ISU accepted that it was difficult to resist the logic that it was only fair and reasonable for clause 4 to be amended to work both ways; this was done in the 1999 revision. The 2010 revision substantially streamlines clause 4 and makes it easier and simpler to operate.

10.28 The scheme of the clause in relation to *upwards* variation due to the services becoming more difficult under para. (a) is as follows:

i The rate of hire is expressed to be based on the descriptions given in Boxes 4–7 of the vessel receiving the services and of the services themselves, as well as upon the detailed

description of the method of work and personnel, craft and equipment to be used as has been given in Annexes I and II (considered above). This re-emphasises the importance of careful and clear drafting of the particulars given in those boxes and in both of the two Annexes I and II.

ii If there is a substantial change in work to be done or equipment etc. required then notice may be given by the contractor of that fact and of the additional costs to perform the contract service.

iii That right does not arise if the need for that change is the contractor's own fault (eg the service is done too slowly or with the wrong equipment and as a result the vessel's ground reaction is greatly increased).

iv It only arises if there has been a misdescription by the company of some information which has been relied on by the contractor (akin to an innocent or negligent misrepresentation under the Misrepresentation Act 1967, as amended) *or* if there has been "a material change" in the vessel, her condition or the worksite.

v The parties can either try to agree an additional remuneration or, perhaps more usefully, submit the matter for determination by another, either under the new expert evaluation procedure provided for by clause 20 or to arbitration or mediation.

vi There is now no right on the part of the contractor to terminate the agreement in the event of a failure to agree upon the upward variation, as there was under the 1999 version of this clause. The parties must either reach agreement themselves or refer the matter to a third party to determine for them. This remedies what was perceived by many as a pro-contractor bias under clause 4.2 of the 1999 form, allowing the contractor to dictate an upward increase, which unless the hirer accepted, would give the contractor the right to terminate if other employment seemed desirable. There was no corresponding right on the part of the hirer when no agreement could be reached on a decrease where the work became easier.

vii The contractor is obliged to continue to render the services during the procedure, whether when trying to agree the increase with the hirer or while awaiting the determination of the third party.

10.29 The concept of a "material change in the position and/or condition of the Vessel, or the worksite" is left undefined. In particular, the question of "materiality to whom" is not stated. It is submitted that the concept has to be read linked with the concept of a "substantial change in the work [or] Equipment . . . due to" such a change. A change is therefore "material" for the purposes of clause 4(a) (and clause 4(b)) if it is one which renders a substantial change in work or equipment necessary.

10.30 In relation to *downwards* variations, the predecessor of clause 4(b) of the 2010 form (the 1999 clause 4.4), was introduced to address the concerns of the P&I Clubs as to lack of balance, as referred to above. It allows the hirer company to seek a reduction in the amount payable if there has been a "material change in the position and/or condition of the vessel or worksite." However, it is not an equivalent provision to that in clause 4(a). It defines "material" change in terms of it becoming "easier to perform in terms of personnel, craft and/or equipment." It does not include a reference to any change in "the Services" (cf. clause 4(a) dealing with the contractor). This is an odd oversight since the two situations may be different. Take and develop a little the example given by the P&I Clubs: a sunken vessel is to be reduced in height; the work involved requires the removal of her funnel and derricks and top deck of her accommodation: this is set out in Annex I. The work is to be done using two divers, one support vessel and an explosives specialist as set out in Annex II. The vessel sinks into the seabed such that only the funnel and derricks need to be removed, requiring less work and less time; the accommodation can be left intact. However, precisely the same "team" will still be required. The services have become

"easier to perform" but not "in terms of personnel, craft and/or equipment" and accordingly the contractor can arguably resist any downward variation. Compare the other way around where the contractor can seek additional remuneration for substantial extra work (ie where the services remain the same but will take longer) *or* for substantial changes in personnel, craft or equipment (ie where the services remain the same but more men and additional specialised equipment are required). It seems desirable in order to reflect a true balance between the parties to amend the form in this respect to make it operate in the same way for each party.

10.31 Clause 4(c) provides a method for resolving any inability to agree on the part of the parties. This now, with the deletion of the contractor's right to terminate, offers a prescribed alternative if the parties cannot agree. The inclusion of resort to the new expert evaluation procedure makes this a workable alternative. Under the former clause 4.3, the third party determination was a reference by the parties "to Arbitration in accordance with the provisions of this Agreement for a decision by the Arbitrator on the reasonableness and quantum of such extra costs." This was a cumbersome method, even allowing for the willingness of the parties and an arbitrator to adopt an expedited procedure. Following the use of the expert determination procedure common in other fields of the offshore industry, BIMCO has adopted a new expert evaluation procedure in clause 20 of the 2010 revision (see below). This is offered as an alternative and offers a much quicker method. As BIMCO states: "The previous method of referring the matter solely to arbitration was felt to be too slow and inefficient for this type of dispute where it is essential that work is not interrupted or delayed awaiting the outcome of an arbitrator's decision."

Clause 5: miscellaneous responsibilities of the parties

"5. Miscellaneous

(a) The Company shall arrange and pay for any marking of the Vessel and cautioning required. The Contractor shall arrange and pay for any marking or cautioning required in respect of its own equipment during the Services under this Agreement.

(b) The Contractor may make reasonable use of Vessel's machinery, gear, equipment, anchors, chains, stores and other appurtenances during and for the purposes of these Services free of expense but shall not unnecessarily damage, abandon or sacrifice the same or any property which is the subject of this agreement.

(c) Subject to approval of the Company, which shall not be unreasonably withheld, and subject to it being permitted by the competent authorities, the Contractor shall be entitled to remove, dispose or jettison cargo, or parts of the Vessel or equipment from the Vessel if such action is considered by the Contractor to be reasonably necessary to perform the Services under this Agreement.

(d) The Company will use its best endeavours to provide the Contractor with such plans and drawings of the Vessel, cargo manifests, stowage plans, etc. and such other information as the Contractor may reasonably require for the performance of the Services."

10.32 This clause is substantially unchanged from the 1999 version. It addresses important matters incidental to a wreck removal or similar operation viz. the marking of the wreck by the hirer company, the provision to the contractor of all necessary documentary information (going with clause 3) and the right of the contractor to seek approval for the company to remove, damage or destroy the vessel or her cargo in so far as is reasonably necessary for the services. In sub-clause (d) the strict obligation on the hirer to provide the contractor with plans, drawings and other data/information has been amended to one of "best endeavours" (the content of which is discussed in relation to Part I of the Towcon form in Chapter 4 above) as the hirer may physically not be in possession of some of the requested information. The contractor, while having the right to request the hirer to provide plans, drawings and information, must confine such requests to what is in reality reasonably necessary for the carrying out of the particular services.

Clause 6: permits

"6. Permits

All necessary licenses, approvals, authorisations or permits required to undertake and complete the Services without let or hindrance shall be obtained and maintained by the Contractor (see Clause 13(e) (Extra Costs)). The Company shall provide the Contractor with all reasonable assistance in connection with the obtaining of such licenses, approvals, authorisations or permits."

10.33 This clause is self-explanatory. The drafting history which lay behind it has been vexed and reflected an inability to agree between the ISU and the P&I Clubs on the proper allocation of responsibilities for permit and certification matters. The original "Wreck" forms imposed the obligation on the hirer company; the Clubs were unhappy with this, contending that it was for the contractor to arrange all necessary permits and licences for his operation at the worksite. The compromise solution adopted by the 1999 revision was to leave it to be contractually negotiated and agreed on a case-by-case basis and this followed "Salvcon" model (see Chapter 9 above). However, in the 2010 revision, the Clubs' position has now been adopted and now it is accepted by a contractor contracting under this form that it is its responsibility to procure and maintain all necessary permits and authorisations for the work. Given that environmental considerations are often involved in wreck removal, the contractor's responsibility is an important and sometimes an onerous one. The form adds, by way of balance, an obligation on the hirer to lend all reasonable assistance to the contractor. The explanatory notes record:

> This Clause deals with the need to obtain licences, approvals, authorisations and permits. The Permits Clause previously allowed for either party to be designated as responsible for obtaining permits. This has now been amended to make the Contractor solely responsible for this task although the Company is required to assist where necessary (for example in situations where a particular permit can only be issued to the shipowner or where the submission of certificates held by the shipowner is required). This amendment reflects the reality of salvage operations where the on-site contractor is best placed to obtain the necessary permits.

Clause 7: delays

"7. Delays

(a) Adverse Weather and Other Delays

In the event that the Contractor is prevented from progressing the Services due to adverse weather or sea conditions or any other reason outside the Contractor's control, the Standby Rate (Box 11(iii) and (iv)) shall apply. In such circumstances where there is a partial reduction in Services, there shall be an adjustment to the Daily Working Rate between the Working Rate and the Standby Rate to be agreed between the Contractor and the Company Representative.

(b) Contractor's Equipment and/or Personnel

If there is a breakdown of any of the Contractor's equipment or non-availability of personnel, the Company Representative and the Contractor shall consult each other to reach agreement on the amount of time lost as a result, if any. The Standby Rate shall apply for the agreed period.

(c) Hired-in Equipment and/or Personnel

The Contractor shall use its best efforts to ensure that appropriate standby rates of hire are agreed in any sub-contract agreement in the event of breakdown of their equipment or non-availability of their personnel. If there is a breakdown of equipment or non-availability of personnel, the Company Representative and the Contractor shall consult each other to reach agreement on the amount of time lost as a result, if any. The sub-contract standby rate shall only apply for the agreed period if such standby rates have been agreed with sub-contractors. The Contractor shall pass on to the Company the benefit of any off-hire or reduction in the rate of hire in respect of equipment or personnel hired-in by the Contractor.

(d) The Company Representative shall promptly advise the Contractor of all periods when they consider that Standby Rates shall apply and shall at the same time confirm same in writing to the Company and the Contractor.

(e) Sub-clauses 7(b) and 7(c) shall not apply for individual delays unless such delays exceed six (6) consecutive hours when the Standby Rate shall apply to the whole agreed delay period.

(f) In the event that the parties cannot reach agreement in respect of the applicable reductions in Sub-clauses 7(a), 7(b) or 7(c) above to the Daily Rates of Hire or the duration of such reduction, then the issue may be referred to expert evaluation in accordance with Clause 20 (Expert Evaluation) or to arbitration or mediation pursuant to Clause 21 (Arbitration and Mediation)."

10.34 This clause has been substantially rewritten as part of the 2010 revision. In general terms, it operates as an exception to the running of daily hire similar in its nature to an "off-hire" clause under a time charterparty (see Chapter 5 above in relation to the "Supplytime" form, and see generally Coghlin, Baker, *Time Charters* (7th edn, 2014), at para. 25–23 *et seq*.). The company can seek to put the contractor on a "standby rate" of remuneration in certain circumstances where the service is not being performed. However, the contractor is not "off-hire" but only on reduced hire. Thus Box 11 provides for the specifying of a number of different rates: (a) a daily rate for the contractor's craft and equipment; (b) a daily rate for the contractor's personnel; and (c) standby rates for each. The concept of different applicable rates with a reduced standby rate during interruptions to work is a common feature of the offshore industries.

10.35 The previous version of the clause was short and provided simply for the application of a reduced rate of hire in any case where "the Contractor is prevented from performing any meaningful work in and about the services under this Agreement due to any reason outside its control." As discussed in the second edition of this work, the concept of being prevented from performing "any meaningful work in and about" the services, was potentially a vague one. Under such an approach, provided that the contractor could do real work in some respect which was directly related to the performance of the services, the full rate remained payable. To take some examples considered in the second edition: the vessel fixed to raise the wreck is collided with, putting her out of action for a week; during that week while the vessel cannot be used as planned, the contractor shifts his teams to ready barges and cranes for the final stages post-raising. The contractor is performing "meaningful work in and about the services"; compare the same example where no such work has to be done and the contractor "employs" his men in routine equipment checks and painting etc. as part of general maintenance drill where no "meaningful work in and about" the contract services is being done.

10.36 The new version of the clause dispenses with the concept of "meaningful work in and about the services" and, in BIMCO's words "now offers a much more sophisticated method of dealing with delays encountered during" the contract services. The clause operates in the following way.

i Delays are treated differently corresponding to the type of event which has occurred and which occasions the interruption of the services.

ii In the case of delays due to sea or weather conditions "or any other reason outside the Contractor's control" then under para. (a) the Standby Rate agreed for both the craft and equipment and for personnel becomes the applicable rate of hire. The event must be one by which "the Contractor is prevented from progressing the Services." This requires a total prevention of the carrying out of the services before the Standby Rate applies, since para. (a) goes on to make special provision for "partial reduction in the Services." The concept of prevention of "progressing the Services" appears to be directed at the service then and there required of the contractor: the concept seems to be much closer to that in the off-hire clauses which provide for off-hire on a net loss of time basis when the particular service *then* being required of the vessel cannot be provided due to some supervening event or circumstances (see eg *The H.R. Macmillan* [1974] 1 Lloyd's Rep 311 (CA), *per* Lord Denning MR at p. 314; and *The Aquacharm* [1982] 1 Lloyd's Rep 7 (CA)). Accordingly, unlike the "meaningful work in and about the services" which may have required

the contractor to show that he could do nothing in relation to the services, even by taking a later stage of the work and doing it in place of the stage on which he was then engaged, the focus of the new clause is (sensibly) on the performance of the service then being carried out and an enquiry as to whether that cannot be carried out or "progressed.

iii Provision is now made for partial reduction of services (ie slower performance or performance with repeated interruptions but where the services can be carried on) in respect of which the parties are to agree an adjustment to the rate of hire between the normal working and the standby rates, with the use of a default mechanism if no agreement is possible, obliging the parties to remit the adjustment to a third party, either by expert evaluation under the new procedure introduced in the 2010 revision by clause 20 or by way of arbitration: this default mechanism for third party determination of rate adjustments where the parties cannot agree is a mechanism which is now adopted throughout clause 7: see clause 7(f).

iv In the case of delays due to breakdown of contractor's equipment or non-availability of the contractor's personnel, under para. (b) the standby rate applies for the affected period. There is no defined special rate different from the standby rate (as there frequently is in other offshore contracts, such as drilling contracts, where a "breakdown rate" is commonly found). This is perhaps a reflection that the form still, even in its 2010 revision, appears to be drawn from the contractor's perspective. Where para. (b) applies, the parties are required to agree on the amount of time lost and failing agreement are obliged to submit the matter to third party determination under clause 7(f). The clause is, perhaps unfortunately, silent on what the effect of the breakdown or non-availability is required to be before the standby rate is to apply. Unlike para. (a) which links the sea or weather conditions or other cause beyond the control of the contractor to the "prevention" of the contractor from "progressing the services", para. (b) is silent. It presumably cannot be intended to operate whenever there is a breakdown, for example of non-essential equipment, which has little or no effect on the services. It is not clear however whether the breakdown or crew matter must be such as to interrupt the services altogether (as would be suggested by the fact that the standby rate becomes payable: a situation which only applies under para. (a) in the case of a total interruption of the services and not a partial reduction of them, and which would therefore connote a similarly substantial effect) or can be one which causes a partial reduction in the services. The latter is a common consequence of a machinery or equipment breakdown. To take an example: three pumps are being used to pump out for reflotation and one (or two) suffers a breakdown. The service continues to be rendered without interruption but slower and the overall timetable is put out by a number of days. Under para. (a), the partial reduction would be dealt with specifically and the contractor would not be entitled to the working rate but, similarly, the hirer would not be entitled to a full reduction to the standby rate. It is submitted that on its wording and by its choice of the standby rate and use of the concept of "time lost", the clause only operates where there is a full interruption of the services, causing a net loss of time. Where there is a partial reduction in the services due to the contractor's machinery or men, the contractor is entitled to be paid throughout at the working rate. Consideration should be given by a hirer to the insertion of a provision relating to partial inefficiency and partial reduction of services in these circumstances, based on the para. (a) wording.

v In the case of a similar breakdown of equipment or non-availability of personnel of sub-contractors, para. (c) applies. It is not a very well drafted provision. It envisages that the contractor is to use its best efforts to agree "appropriate" standby rates with the sub-contractor and that, if such a standby rate has been agreed then it is that standby rate

which is to apply to the period of time lost (either as agreed between the parties or determined under clause 7(f)). No provision is made for what is to occur if there has been no agreement between the contractor and the sub-contractor on a standby-rate. It is therefore unclear whether, if there is a breakdown of an important piece of equipment which the contractor has sub-contracted in for the services and which breakdown results in the stoppage of the services, the contractor is entitled to claim the working rate on the basis that the equipment which has broken down is not his and therefore para. (b) is not engaged (it applying only to "Contractor's Equipment") and, although it is a sub-contractor's equipment, despite his best efforts he was unable to persuade the sub-contractor to agree to a standby rate. There is a suggestion in the wording that the sub-contract rate only applies if it has been agreed that this impliedly displaces the agreed para. (b) standby rate which it impliedly recognises would otherwise apply but this is difficult given the distinction between contractor's and sub-contractor's equipment drawn in the two paragraphs. It is therefore advisable for this situation to be specifically addressed when contracting. It might be said that since the contractor is responsible for performing the services, he takes the responsibility of sub-contractor problems which impinge on his ability to perform *vis-à-vis* the hirer and that, irrespective of who owns the equipment or employs the crew, where the work is interrupted, the hirer pays only the standby rate. The explanatory notes are, perhaps, optimistic in stating that "the provision more clearly sets out the position of the parties in the event of delays . . . caused by third party equipment or personnel hired in by the Contractor." Paragraph (c) gives the hirer the right to any other benefits which the contractor may receive under its contract with the sub-contractor as a result of the breakdown. This appears to apply irrespective of whether or not a standby rate has been agreed. It may be prudent if the sub-contracting in of essential equipment is a recognised feature of how the contractor is going to perform to insert a rider clause obliging the contractor to provide the hirer with copies of the relevant contracts with sub-contractors, at least once a breakdown or crew matter engaging para. (c) arises.

The clause has certain other features to note.

10.37 First, the clause puts the onus of its operation upon the hirer company who is under a duty, by its representative on site, to notify the contractor as soon as possible where an event or state of affairs triggering the application of a standby or reduced rate arises. This part of the clause has two purposes. The first is to prevent unmeritorious attempts to quibble the remuneration after the event when evidence may have ceased to exist; the second is to alert the contractor to a potential "standby" situation so that, if possible, he can remedy the same. Accordingly, para. (d) places the onus on the company representative to act swiftly to advise the contractor of any delays to which the representative feels the standby rate should apply. As the explanatory notes note: "The representative must also at that time inform the contractor and the company in writing (which would normally be done as part of the daily report and is consistent with SCOPIC obligations).

10.38 Secondly, there is provision for a grace period in the case of breakdowns and crew non-availability under paras. (b) and (c). The contractor (and sub-contractor) is allowed up to six hours of interruption of the services (ie "delays") since the triggering of the paragraphs applies only after a delay of six consecutive hours (after which the total delay is aggregated and subject to the standby rate) for the test is whether "the Contractor is prevented from performing any meaningful work in and about" the contract services. The test seems to be adapted. Thus the standby rate can only be invoked where no useful and appreciable work can be done by the contractor in connection with the contract services. This is in the contractor's favour and probably recognises realistically that short periods of breakdown occur, especially in the often difficult operating conditions of the worksite. BIMCO records: "Sub-clause (e) excludes from the standby

rate individual delays of 6 running hours or less duration. This 'free time' represents half a working day and is felt by the salvors to be a reasonable compromise. However, if the delay exceeds 6 hours then the entire delay period is to count at the standby rate."

10.39 Thirdly, while under the 2010 revision, the standby rate may be triggered by the prevention of work which results from certain defined circumstances within the control of the contractor (breakdown and crew availability), as before with clause 4 of the 1999 revision, the prevention of work must not otherwise be due to the contractor or to circumstances within his control. This contrasts with the ordinary position in relation to off-hire (see eg Coghlin, Baker, *Time Charters* (7th edn, 2014) at para. 25.46 *et seq*.). Thus if the vessel is unable to work (eg due to delays by the contractor's superintendent in ordering replacement parts), the clause does not operate. Compare if the parts were ordered in time but were held up in an air traffic controllers' strike. In the case of a breakdown, even where this results from the contractor's fault or lies within its control (for example, the unseaworthiness of the service providing craft), the reduced rate will be applicable. The ordinary position as to the right of the time charterer to claim damages for any loss where the contractor is in breach of contract and the delay is caused by the breach applies: see Coghlin, Baker, *Time Charters,* supra, para. 25.74.

Clause 8: suspension or termination

"8. Suspension or Termination

(a) The Company has the right to suspend or terminate the Services to be carried out under this Agreement at any time, provided always that notice of such suspension or termination is given to the Contractor in writing. In such event the Contractor is entitled to be paid all sums due at the time of suspension or termination in accordance with the provisions of Box 11.

(b) Such suspension or termination of the Services will be carried out with all reasonable despatch by the Contractor, subject always to the safety of Personnel, Craft and Equipment involved in the Services. Any additional direct expenses arising as a consequence of the instructions to suspend or terminate the Services shall be for the account of the Company.

(c) If permission to suspend or terminate is not given by the competent authorities, the Contractor shall be paid by the Company at the appropriate rate set out in Box 11 for Personnel, Craft and Equipment during any standby period, and the Company shall be liable for the Contractor's reasonable and necessary costs of continuing with the Services."

10.40 This clause remains unchanged from "Wreckhire 99" and it gives the hirer company the right to withdraw from the contract at any stage and at any time without the payment of a cancellation fee and remaining fully entitled to all sums earned by way of hire or other payments (as set out in Box 11). Unlike the corresponding right of termination under the 'Wreckstage" and "Wreckfixed" contracts (see clauses 8 and 7 of each form respectively), which is coupled with the payment of a cancellation fee, the hirer is entitled to terminate or suspend the services at will. This reflects the nature of the "Wreckhire" contract as one effectively of the day-to-day hiring of the contractor's services with payment of hire falling due *de diem in die*: see clause 10(b). Once notice has been given by the hirer, the contractor is under an obligation to withdraw from the services with all reasonable despatch, but taking account of any relevant operational constraints. Paragraph (c) makes provision for the situation where the relevant competent authority refuses to allow the contractor to be withdrawn and requires the contractor to continue to provide the services: in such a case, the contractor remains entitled to the appropriate daily rate, depending on the circumstances (and whether a working or a standby rate) and any special costs incurred as a result of having to comply with the competent authority's instructions.

10.41 The corresponding provisions in the "Wreckstage" and "Wreckfixed" contracts provide merely for a right of termination of the contract services on the part of the hirer. The "Wreckhire" form provides for a right not only of termination but also of *suspension*. The practical operation

of this is not worked out in clause 9. While one can understand an option on the part of the hirer to bring the services to an end and to require the contractor to withdraw with reasonable despatch, the option of the hirer to suspend the performance of the services is less comprehensible and fits less easily into the structure of clause 9. While para. (a) provides that the contractor is entitled to all sums "due at the time of suspension or termination in accordance with the provisions of Box 11", this makes sense in the context of termination, where the contractor is entitled to all sums earned up to termination, with any additional direct expenses of the termination (under para. (b)) but makes no provision for the different situation engaged in suspension, where the service is, presumably, temporarily interrupted for a period with a view to being subsequently recommenced. In such a case, is the contractor obliged to hold itself in readiness for recommencement or is it entitled to withdraw completely from the site (as para. (b) envisages)? If the works are merely being suspended, is the hirer entitled unilaterally to suspend the services for a finite period (say, two weeks) and, if it is, is the contractor entitled to be remunerated during the period of suspension in circumstances when it cannot demobilise fully? On one view, the contractor would be entitled in this example to invoke the delay payment regime under clause 7(a) since "the Contractor is prevented from progressing the Services due to . . . any other reason outside the Contractor's control." Given these uncertainties, it may be advisable either to delete the reference to suspension altogether and to restrict the clause to a simple right of termination (as under the other "Wreck" forms) or, if it is desired to confer on the hirer a right to suspend as well as to terminate, to expand the provision by a suitably drafted rider clause which sets out precisely what is to occur in the event that the services are temporarily suspended both in terms of the contractor's obligations and the hirer's obligations to pay an appropriate suspension day rate.

Clause 9: delivery or disposal of the vessel by the contractor

"9. Delivery and/or Disposal

(a) If applicable, the Vessel shall be accepted forthwith and taken over by the Company or its duly authorised representative at the Place of Delivery indicated in Box 8. References to delivery or the Place of Delivery shall include disposal or the Place of Disposal, if applicable.

The Place of Delivery and/or Disposal shall always be safe and accessible for the Contractor's own or hired-in craft and the Vessel to enter and operate in and shall be a place where the Contractor is permitted by governmental or other authorities to deliver and/or dispose of the Vessel.

In the event the Vessel is not accepted forthwith by the Company or delivery is prevented or delayed by action of governmental or other authorities outside the control of the Contractor, all costs necessarily incurred by the Contractor from the moment of the tender for delivery shall be for the account of the Company, and the Rates of Hire shall continue to be payable to the Contractor.

(b) If the Company fails, on completion of the Services, to take delivery of the Vessel within five (5) days of the Contractor tendering written notice of delivery or, if in the opinion of the Contractor the Vessel is likely to deteriorate, decay, become worthless or incur charges whether for storage or otherwise in excess of its value, the Contractor may, without prejudice to any other claims the Contractor may have against the Company, without notice and without any responsibility whatsoever attaching to the Contractor, sell or dispose of the Vessel and apply the proceeds of sale in reduction of the sums due to the Contractor from the Company under this Agreement. Any remaining proceeds will be refunded to the Company.

In the event that such sale or other disposal of the Vessel fails to raise sufficient net funds to pay the monies due to the Contractor under the terms of this Agreement, then the Company shall remain liable to the Contractor for any such shortfall.

(c) Reference to delivery and/or disposal of the Vessel shall include parts of the Vessel and/or cargo and/or any other thing emanating from the Vessel and such delivery may take place at different times and different places (see Box 8)."

10.42 This provision deals in a composite manner with both the situation where the vessel is to be recovered by the contractor and returned to the company and where the contractor is to

dispose of the vessel (or other property the subject of the services), eg by sinking the wreck in another place. Clause 9:

i obliges the contractor to deliver or dispose of the vessel at the agreed delivery place (with no right to the contractor to deliver or dispose of the same at an alternative place to that agreed upon where that place is one which the contractor considers that it is not possible or is not safe to use as the contractor may choose as is provided for in the "Wreckstage" and "Wreckfixed" forms: see below);

ii entitles the contractor to take steps to sell or dispose of the vessel in the event that the hirer fails promptly to take delivery of the vessel; and

iii entitles the contractor to take the same steps in cases where the contractor considers that the vessel is going to cost more to store than it is worth or is going to deteriorate and therefore requires a quick sale or disposal.

10.43 The clause has been amended in the 2010 revision specifically to take account of the situation where the contractor also agrees to dispose of the wreck or part of the wreck: see clause 9(c). As BIMCO states: " 'Part' of the wreck includes cargo and bunkers and it is recognised that disposal of such items may take place at different locations and at different times from the disposal of other parts of the wreck."

Clause 10: price and conditions of payment

"10. Payment

(a) The Company shall pay the Contractor the Daily Working and Standby Rates of Hire for Personnel, Craft and Equipment set out in Box 11(i)–(iv) and, if applicable, Reduced Daily Rates of Hire in accordance with Box 11(v).

(b) Such hire shall be fully and irrevocably earned on a daily basis and shall be non-returnable.

(c) Within 14 days of termination or completion of the Services set out in Box 7 the Contractor shall return any overpayments to the Company.

(d) All monies due and payable to the Contractor under this Agreement shall be paid without any discount, deduction, set-off, lien, claim or counterclaim.

(e) All payments to the Contractor shall be made in the currency and to the bank account stipulated in Box 12.

(f) If any amount payable under this Agreement has not been paid within seven (7) days of the due date, or if the security required in accordance with Clause 15 (Security) is not provided within five (5) banking days following the request by the Contractor, then at any time thereafter the Contractor shall be entitled to terminate this Agreement without prejudice to the sums already due to the Contractor and to any further rights or remedies which the Contractor may have against the Company, provided always that the Contractor shall give the company at least three (3) working days' written notice of its intention to exercise this right.

(g) The Contractor shall promptly invoice the Company for all sums payable under this Agreement. If any sums which become due and payable are not actually received by the Contractor within the period specified in Box 13, they shall attract interest in accordance with the rate set out in Box 13."

10.44 This remains a standard form hire clause: see eg the commentary given above in relation to the corresponding provisions in the other BIMCO time charterparty forms: see Chapter 4 above in relation to clause 2 of the "Towhire" form and Chapter 5 above in relation to clause 10 of the "Supplytime" form. The clause is largely self-explanatory and is adequately summarised in the explanatory notes as follows:

> Clause 10 is fundamental to the proper working of the Agreement and deals with the rates of hire for personnel, craft and equipment (sub-clause 10(a)); provides that such hire is fully and irrevocably

earned on a daily basis and is non-returnable (sub-clause 10(b)); provides for overpayments to be made back to the Company (sub-clause 10(c)); provides for payment to be made to the Contractor without deduction (sub-clause 10(d)); deals with the nominated bank account for payment (sub-clause 10(e)); gives a right of termination in the event that payment is not made in accordance with the terms of the Agreement, or if security is not provided in accordance with the provisions of Clause 13 (sub-clause 10(f)); and enables the Contractors to charge the Company interest at the agreed rate in the event any sums due and payable are not received by the Contractors within the agreed period.

10.45 The only substantial change to the wording in the 2010 revision is made in subclause (a) which now includes a reference to the application of a reduced rate of hire when an agreed date is passed or a period of time has lapsed reflecting the provisions of the new 2010 clause 11 (Reduced Rate of Hire).

Clause 11: bonus for prompt completion by the contractor

"11. Bonus

If the Contractor completes the Services to the satisfaction of the Company:

(a) (i) before the date or within the period stated in Box 10(ii), the Company shall pay the Contractor the bonus set out in Box 10(i); or
(ii) on or after the date or outside the period stated in Box 10(ii), but before the date or within the period stated in Box 10(iii), the Company shall pay the bonus set out in Box 10(i) reduced pro-rata on a daily basis from 100 *per* cent (100%) on the date or period stated in Box 10(ii) down to zero on or after the date or period stated in Box 10(iii).

(b) Delays (Clause 7) shall not affect the dates or periods to be applied for the purposes of this Clause 11."

10.46 This new clause provides for the payment of a bonus if the contractors are able to complete the task within the agreed schedule. It is one of the new features which have been designed by BIMCO to enhance the commercial attractiveness and flexibility of the form from the hirer's point of view, driven by the P&I Clubs, while retaining its attractiveness for contractors. As BIMCO stated at the time of launching "Wreckhire 2010" the form "contains some novel provisions which have been agreed as a means of encouraging a swift conclusion of operations and resolving on-site disputes more quickly. The new provisions include a bonus incentive scheme designed for operations over an extended duration, whereby the contractors will be paid an agreed bonus if the task is completed within the specified period." The new bonus provision is designed to work as part of a number of provisions which seek to ensure a prompt completion of the service and represents effectively a *quid pro quo* to the new clause 12 which provides for a time cap placed on completion of the salvage operation for operations over an extended period, after which the daily rate of hire falls to be reduced (see below). The 2010 form therefore, by clause 11, rewards the contractor for early completion and adds a financial incentive for that result and, under clause 12, penalises the contractor for overruns. Recognising that difficulties may ensue, provision is made for adjustments to rates in cases of unavoidable delay by clause 7 with the new expert evaluation process to expedite disputes over the application of standby rates contained in clause 20.

10.47 The result is a much more flexible approach to the remuneration of the contractor which seeks to strike an equitable balance between the parties. The bonus is payable on a sliding scale: 100% is payable if the work is completed before or on the primary agreed date set out in Box 10(ii); if it is completed after that primary date but before the secondary agreed date, then the bonus is reduced over the intervening period *pro rata* from the primary agreed date until the secondary date. Once the secondary date has been passed without the works being completed, no bonus is payable by the hirer and the reduced daily rate of hire provided for in accordance with clause 12 (Reduced Rate of Hire) thereafter applies.

Clause 12: reduced daily rate of hire for late completion

"12. Reduced Daily Rates of Hire

If the Contractor fails to complete the Services and, if applicable, deliver and/or dispose of the Vessel at the place(s) indicated in Box 8 within the period or on or before the date stated in Box 10(iii), the Daily Rates of Hire shall be reduced in accordance with Box 11(v). Delays (Clause 7) shall not affect the dates or periods to be applied for the purposes of this Clause 12."

10.48 As seen above, the new clause 12 is the pendant provision to the bonus mechanism provided for by clause 10 and adds the stick to the carrot, penalising the contractor for any overrun beyond the secondary agreed date (referred to in the explanatory notes as the "date for completion") by a reduction in the hire payable as part of the applicable day rates, both standby and working and both for the contractor's own and hired in equipment and personnel. The reduction in the rates of hire is expressed to occur irrespective of the impact of delays on the timetable for the works: "Delays (Clause 7) shall not affect the dates or periods to be applied for the purposes of this Clause 12." The effect of this is that, while delays due to the interruption of the work due to causes dealt with under clause 7 will result in reductions to the applicable rate during the works, those delays have no impact upon the applicable base rate for the working and standby rates; the base rates are automatically reduced in all cases once the works have taken longer than the secondary agreed date or date of completion and irrespective of the fact that the works may only have exceeded that date due to delays beyond the contractor's control. This is very much a recasting of the "Wreckhire" form in the hirer's favour and responds to considerable pressure from the P&I Clubs dissatisfied with a sometimes leisurely approach to wreck removal operations adopted by certain salvors when other salvage work is absent as a means of keeping their craft and personnel otherwise engaged. As the explanatory notes record:

> This is the complementary provision to Clause 11 (Bonus) providing a "carrot and stick" incentive scheme to the contractors to complete the salvage operation within agreed time limits. Its inclusion is pivotal to the P&I Club's concern that salvage operations have been taking too long to complete and that salvors need to be put under some pressure to expedite operations.

Clause 13: extra costs incurred in relation to the services

"13. Extra Costs

The following shall be paid by the Company as and when they fall due:

(a) all port expenses, pilotage charges, harbour and canal dues and all other expenses of a similar nature levied upon or payable in respect of the Vessel and the Contractor's own or hired-in craft;

(b) the costs of the services of any assisting tugs when reasonably deemed necessary by the Contractor or prescribed by port or other authorities;

(c) all costs in connection with clearance, agency fees, visas, guarantees and all other expenses of such kind;

(d) all taxes and social security charges (other than those normally payable by the Contractor in the country where it has its principal place of business), stamp duties, or other levies payable in respect of or in connection with this Agreement, any import – export dues and any customs or excise duties;

(e) all costs incurred in obtaining and maintaining licences, approvals, authorisations or permits required to undertake and complete the Services in accordance with Clause 6 (Permits);

(f) all costs incurred due to requirements of governmental or other authorities or unions over and above those costs which would otherwise be reasonably incurred by the Contractor in the execution of the Agreement;

(g) all reasonable costs of transportation of equipment and the travel and accommodation costs of Personnel identified in Annex I, (other than the crews of craft utilised in the Services);

(h) all costs incurred by the Contractor in respect of portable salvage equipment, materials, or stores which are lost, damaged or consumed during the Services;

(i) all costs in respect of fuels and lubricants consumed during the Services, unless included in the Daily Rates.

If any such costs are in fact paid by or on behalf of the Company by the Contractor, the Company shall reimburse the Contractor on the basis of the actual cost to the Contractor plus a handling charge of the percentage amount indicated in Box 14(i) for Clause 13(a)–(h) costs or Box 14(ii) for Clause 13(i) costs, upon presentation of invoice."

10.49 This clause performs an important purpose by providing a clear and explicit statement dealing with the parties' respective responsibilities for bearing the most common classes or heads of extra cost thrown up by the operation. The clause lists nine items of costs and expenses which are to be for the hirer's account ranging from the local port, pilotage and harbour dues to costs of replacing portable equipment lost, damaged or consumed during the services. These are largely self-explanatory and correspond to the broad allocation of expenses under most forms of time charterparty and as adopted in the "Towhire" form. Given that the service is being provided on a daily hire basis, the commercial balance struck is for the hirer to meet the most common additional costs of the operation with such costs not being deemed as being included in the rate of hire being paid; cf. the position under the "Wreckfixed" form where the lump sum is deemed to cover all such costs, which are solely for the contractor's account.

10.50 Three paragraphs of the itemised expenses and costs may be noted. Paragraph (e), added in the 2010 revision, obliges the company to meet the cost of obtaining and maintaining licences and permits needed to undertake the operation, although the obtaining of these remains the responsibility of the contractor under clause 6. Paragraph (h), dealing with "all costs incurred by the Contractor in respect of portable salvage equipment, materials or stores which are lost, damaged or consumed during the Services" is potentially unlimited in scope, simply addressing any items used, damaged or lost by the contractor at any time during the service. Consideration might usefully be given to adding a further qualification that links the loss, damage and consumption to the services being performed, ie not only during, but also as a result of the performance by the contractor of, the services. Paragraph (i) is a new item, added in the 2010 revision, and remedies an omission in the 1999 version of the form which contained no clear statement of the charterer's (or hirer's) responsibility for bunkers.

10.51 Lastly, as BIMCO notes: "The final paragraph of Clause 13 has been amended to require the Company to reimburse the Contractor for any costs paid on the Company's behalf plus any agreed handling charge."

Clause 14: extra costs incurred in disposing of the vessel

"14. Extra costs of disposal of the Vessel

All extra costs incurred resulting from the disposal of the Vessel shall be for the account of the party stated in Box 9(i). If the Company is the party stated in Box 9(i) and any such costs are paid by or on behalf of the Company by the Contractor, the Company shall reimburse the Contractor on the basis of the actual cost to the Contractor plus a handling charge of the percentage amount indicated in Box 9(ii) upon presentation of invoice."

10.52 Part of the approach of BIMCO to the revision of the "Wreckhire" form was to seek to eliminate any areas of uncertainty with the potential for dispute by making the parties address likely or possible occurrences during the services. One such is the incurring of additional costs by the contractor in disposing of the vessel, potentially of significance given pollution and environmental concerns. The parties should address the responsibility for such costs in Part I (Box 9(i)). As the explanatory notes state:

> This is a new Clause introduced to cover any additional costs relating to the disposal of the vessel or parts of the vessel (for example, the disposal of bunkers from a vessel may incur an importation tax

charged by the state where the disposal takes place). This provision allows for the parties to agree beforehand which party should be responsible for such costs. Similar to Clause 13 (Extra Costs), the Contractor is to be reimbursed if it pays any costs which should be for the Company's account and may also charge a handling fee.

Clause 15: security

"15. Security

The Company shall provide on signing of this Agreement an irrevocable and unconditional security in a form and amount as agreed between the parties.

If required by the Contractor and also in the event that initially no security is requested, the Company shall provide security or further security in a form and amount as agreed between the parties for all or part of any amount which may be or become due under this Agreement. Such security shall be given on one or more occasions as and when required by the Contractor."

10.53 This is a standard provision in the "Wreck" forms. The 1993 form required security to be in the form of a bank guarantee; the fact that this was the standard wording led parties to insist on such a guarantee rather than any other form of equivalent security because "that's what the form says." The "Wreckhire 99" form deleted this requirement, and security can be, as the ISU stated in the notes to the 1999 form, 'in any form as agreed between the parties." This clause remains unchanged from "Wreckhire 99."

Clause 16: liabilities

"16. Liabilities

(a) The Contractor will indemnify and hold the Company harmless in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the Services hereunder to any of the following persons:

(i) any servant, agent or sub-contractor of the Contractor;
(ii) any other person at or near the site of the operations for whatever purpose on behalf or at the request of the Contractor.

(b) The Company will indemnify and hold the Contractor harmless in respect of any liability adjudged due or claim reasonably compromised arising from injury or death occurring during the Services hereunder to any of the following persons:

(i) any servant, agent or sub-contractor of the Company;
(ii) any other person at or near the site of the operations for whatever purpose on behalf or at the request of the Company.

(c) Neither the Company nor its servants, agents or sub-contractors shall have any liability to the Contractor for loss or damage of whatsoever nature sustained by the Contractor's owned or hired-in craft or equipment (excluding portable salvage equipment, materials or stores which are lost, damaged, or consumed during the Services), whether or not the same is due to breach of contract, negligence or any other fault on the part of the Company, its servants, agents or sub-contractors.

(d) Neither the Contractor nor its servants, agents or sub-contractors shall have any liability to the Company for loss or damage of whatsoever nature sustained by the Vessel, whether or not the same is due to breach of contract, negligence or any other fault on the part of the Contractor, its servants, agents or sub-contractors.

(e) Neither party shall be liable to the other party for:

(i) any loss of profit, loss of use or loss of production whatsoever and whether arising directly or indirectly from the performance or non-performance of this Agreement, and whether or not the same is due to negligence or any other fault on the part of either party, their servants, agents or sub-contractors; or
(ii) any consequential loss or damage for any reason whatsoever, whether or not the same is due to any breach of contract, negligence or any other fault on the part of either party, their servants, agents or sub-contractors."

10.54 As the guidance notes drawn up by the ISU to assist users of the standard "Wreck 99" forms stated, in the context of the "Wreckcon 99" form but equally applicable to the liabilities and indemnities provision common to all of the "Wreck" forms: "This clause has proved particularly troublesome throughout the history of the original 'Wreckcon'." In the drafting of the clause in its original incarnation in the "Wreckcon" form, the drafting sessions involving, *inter alia*, the BIMCO with ISU representatives, modelled the wording on the "knock-for-knock" wording which had commended itself to BIMCO in, for example, in the original versions of the standard form towage contracts "Towcon" and "Towhire." Clause 18 of those forms (now clause 25 of the 2008 revisions) dealt with the liability for the person or property of each contracting party, together with their liabilities to third parties and their liability for wreck removal in relation to their own vessels. This model was adopted for the equivalent "Wreckcon" and other "Wreck" contract clauses. However, the P&I Clubs objected to the coverage within the clause of indemnities in respect of pollution liabilities and they proposed the form of clause which was subsequently adopted as the basis for the "Wreck" liabilities clause.

10.55 Notwithstanding that they were in part the architects of the "Wreck" liabilities clause, with the experience of the "Wreckcon" forms in use, the Clubs raised objections in the drafting sessions leading to the new 1999 forms to the wording of the 1993 clause and, in particular, to the width of its scope in so far as it included liabilities to third parties and wreck removal liabilities. As the guidance notes summarised their position:

> they consider that third party claims should be covered by the common law of negligence for which a Contractor can obtain suitable insurance cover, the cost of which will form part of his lumpsum price, and that the party liable to remove a subsequent wreck should meet such claims through his own P. and I. Club cover or other liability insurance.

This was accepted in the drafting of clause 14 of the "Wreck" forms with the clause being effectively cut back to deal solely with loss or damage to property of the contractor or hirer company.

10.56 Like its model, clause 18 of the original "Towcon" form, in its original form the "Wreck" clause provided by its clause 14.4 for the preservation of rights to limit liability. The Clubs made representations that this sub-clause should be deleted as, in their view, "it could be used to argue that if a contractor is liable to a third party and is unable to limit his liability", the company should indemnify the contractor for any excess and this could result in the company accepting liabilities in excess of his own limit of liability. Clause 14.4 was therefore omitted in the 1999 revision.

10.57 The resultant clause 14 therefore dealt with death or injury to each party's personnel (clauses 14.1.1 and 14.1.2, now clauses 16(a) and (b) of Wreckhire 2010); with loss or damage to each party's own vessel (clause 14.2.1 and 14.2.2, now clauses 16(c) and (d)) and with a mutual exclusion for consequential and other specified losses (clause 14.3; now clause 16(e)). Clause 16 is, save for the consequential loss exclusion in clause 16(e), largely unchanged from the 1999 revision: paras. (a), (b), (c) and (d) have all been slightly modified to include "sub-contractors" (which reflects the common use by salvors of third party sub-contractors).

10.58 The ambit of the exclusion of the liability for the loss of or damage to the contractor's equipment in clause 16(c) is necessarily wider than that for the company's vessel under clause 16(d) since the contractor will have put into the operation not merely his vessel or vessels but usually a wealth of valuable equipment. Exclusion, however, is expressly provided from this clause for "portable salvage equipment, materials or stores which are lost, damaged or consumed during the Services" the cost of which is to be borne by the hirer under clause 13(h) dealing with "Extra Costs." As noted above, it may be advisable to restrict the ambit of clause 13(h) to limit its operation to loss, damage or use or to such items not only during, but also as a result of, the performance by the contractor of, the services; if this is done, it will be necessary to reflect this by a suitable cross-reference within clause 16(c).

10.59 The mutual exclusion of consequential loss in clause 16(e) is new and replaces the old portmanteau approach of clause 14.3 ("for loss of profit, loss of use, loss of production or any other indirect or consequential loss or damage") with the new form of wording adopted in the "Towcon 2008" and "Towhire 2008" forms, commented upon in detail in Chapter 4 above. BIMCO states:

> Clause 16 provides the usual knock for knock provisions common in offshore contracts. Subclause 16(e) is new and replaces the old consequential losses provision which was felt to be ineffective. The new wording is taken from TOWHIRE 2008 the consequential losses provision of which has been positively received by lawyers previously critical of BIMCO consequential liability provisions.

Generally, reference should be made to the expanded treatment of the knock-for-knock clause in the "Tow" 2008 forms set out in Chapter 4 above.

10.60 In addition to the standard knock-for-knock provisions relating to each party's employees and property, "Wreckhire 2010" now makes further express provision for knock-for-knock allocation of responsibilities in clause 24(b) and (c): see below.

Clauses 17–19 and 22: standard provisions (Himalaya clause; lien; time for suit; notices)

10.61 The form contains familiar standard provisions which are common to other BIMCO/ISU forms. Clause 17 is a "Himalaya" clause, with some differences of wording from that in other BIMCO forms due to the request by BIMCO to include a reference to the benefit of the contract's exemption extending to the vessel's owners if the hirer company is only the demise or bareboat charterer to deal with potential problems in practice reported by BIMCO. Clause 18 is a lien clause. Clause 19 is a two-stage "time for suit" clause with a 12-month time period running from the completion of the service or notice of a third party claim for the giving of notice and with a subsequent period of one year for the bringing of suit running from the date of the notification of the claim. The clauses are unchanged in the 2010 revision, save that in clause 19 "The previous reference to notification by 'telex, facsimile, cable or otherwise in writing' has been deleted because methods and forms of notification are now dealt with by a new Notices Clause (see Clause 22)." Clause 22 is a standard notice provision, common to the recent generation of BIMCO forms and commented on above in relation to clause 35 of "Towcon 2008": "The Clause provides that all notices must be in writing and sent using one of the prescribed formats. The clause also sets out when notices given under the Agreement take effect depending on the method of communication used.

Clause 20: expert evaluation of alteration of rates of hire and losses of time under clauses 4 and 7

"20. Expert Evaluation

(a) If the parties are unable to agree the alteration to costs or rates under Clause 4(a) or Clause 4(b) or the adjustment to the Daily Working Rate or the time lost under Clauses 7(a), 7(b) or 7(c), then either party may request an expert evaluation in accordance with the following procedure:

(i) The party seeking the evaluation shall propose three (3) experts from the persons currently on the Panel of Special Casualty Representatives maintained by the Salvage Arbitration Branch of the Corporation of Lloyd's to the other party in writing having checked that the proposed experts are available and willing to be appointed. The other party may select one of the proposed experts by responding in writing within twenty-four (24) hours. The party seeking the evaluation will then, as soon as possible (and in any event in less than twelve (12) hours) appoint the expert selected by the other party or, if none has been selected, one of the three (3) experts proposed (hereinafter "the Expert").

(ii) Both parties shall provide short written statements to the Expert setting out their arguments within forty-eight (48) hours of their acceptance of instructions and shall provide copies of their statement to the other party.

(iii) The Expert shall, within seventy-two (72) hours of receipt of written statements, advise the parties in writing of the alteration to costs and/or rates or of the adjustment to the Daily Working Rate or time lost. The Expert may also provide short reasons explaining the evaluation.

(iv) The Expert's rate of remuneration shall be the applicable rate plus bonus as set from time to time by the SCOPIC Committee for a Salvage Master. The costs of the Expert shall be paid by the party seeking the expert evaluation, but such party shall then be entitled to recover fifty *per* cent (50%) of the Expert's fees from the other party.

(b) If the Expert's evaluation is not agreed by both parties, the Company shall in any event make payments to the Contractor calculated in accordance with the evaluation. Such payments shall be on a provisional basis and without prejudice to the parties' rights to seek a determination in accordance with Clause 21 (Arbitration and Mediation)."

10.62 Clause 20 is new to the 2010 revision and is designed to make the processes contemplated in the "Wreckhire" form of the parties seeking to agree, under clause 4, upon increased or reduced rates for more difficult or easier work and, under clause 7, upon time lost due to delays more workable. The previous version merely provide for arbitration in the event that the parties were (as was not infrequently the case) unable to agree. It does so by adopting a mechanism analogous to one common in the offshore industry in the production context, that of an expert evaluation. The BIMCO explanatory notes explain the position in this way:

> Wreckhire 2010 introduces a new method of dealing with certain types of dispute under the Agreement – notably disputes relating to the application of standby rates (Clause 7) and additional costs following a change to the nature of the services (Clause 4). It was felt that the standard BIMCO Dispute Resolution Clause used in most BIMCO forms is simply not well suited to resolving issues that require a more or less on-the-spot decision so that work is not interrupted. Conventional arbitration lacks the infrastructure and expertise to determine such types of disputes.

Clause 20 envisages a two-stage procedure

10.63 First, in the event that the parties are unable to agree, either party has the right to call for an expert evaluation and must put forward three names from the panel of Special Casualty Representatives (SCRs) maintained by Lloyd's Salvage Arbitration Branch from which the other party may choose one expert (or failing which the party seeking the evaluation chooses one expert). There is then an expedited procedure with submissions within two days and the expert's ruling (with or without reasons) in a further three days after submissions. The expert is to be paid for up front by the party requesting the evaluation, but the other party is liable to bear 50% of the costs. The SCR Panel comprises a body of carefully selected experts in the salvage field who are available for appointment by a shipowner under the LOF Special Compensation or SCOPIC Clause. SCRs are highly experienced salvage professionals, often retired salvage masters, and they are appointed to the panel by a committee representing the P&I Clubs; the International Salvage Union; the International Union of Marine Insurers and the International Chamber of Shipping.

10.64 Unlike some other expert evaluation procedures under which the parties agree to be bound by the expert's decision (often without reasons) on a "pendulum" basis (ie he prefers one or other submission but cannot put forward his own different solution), the expert's decision is not final and binding and is merely persuasive. In the event that either or both of the parties do not subsequently approve and agree the ruling, the matter then proceeds to arbitration under clause 21. However, in the interim, the decision of the expert takes temporary effect pending the arbitral decision. As BIMCO explains:

> It is important to note that the evaluation is not binding on either party. The intention is to take impartial advice so as to not delay or further delay the salvage operation. The parties only agree that whatever the SCR proposes is given immediate effect but without prejudicing their right to resolve the dispute by conventional arbitration methods set out in Clause 21 at a later date.

Clause 21: arbitration and mediation

"21. Arbitration and Mediation

This Clause 21 applies to any dispute arising under this Agreement.

(a) *This Agreement shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Agreement shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The reference shall be to a sole arbitrator ('Arbitrator'), to be selected by the first party claiming arbitration from the persons currently on the Panel of Lloyd's Salvage Arbitrators with a right of appeal from an award made by the Arbitrator to either party by notice in writing to the other within twenty-eight (28) days of the date of publication of the original Arbitrator's Award.

The Arbitrator on appeal shall be the person currently acting as Lloyd's Appeal Arbitrator.

No suit shall be brought before another Tribunal, or in another jurisdiction, except that either party shall have the option to bring proceedings to obtain conservative seizure or other similar remedy against any assets owned by the other party in any state or jurisdiction where such assets may be found.

Both the Arbitrator and Appeal Arbitrator shall have the same powers as an Arbitrator and an Appeal Arbitrator under LOF 2000 or any standard revision thereof, including a power to order a payment on account of any monies due to the Contractor pending final determination of any dispute between the parties hereto.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

In cases where the claim or any counterclaim exceeds the sum agreed for the LMAA Small Claims Procedure and neither the claim nor any counterclaim exceeds the sum of US$400,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Intermediate Claims Procedure current at the time when the arbitration proceedings are commenced.

(b) *This Agreement shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Agreement shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgement may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.

(c) *This Agreement shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Agreement shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(d) Notwithstanding 21(a), 21(b) or 21(c) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Agreement. In the case of a dispute in respect of which arbitration has been commenced under 21(a), 21(b) or 21(c) above, the following shall apply:

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within fourteen (14) calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further fourteen (14) calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitrator or such person as the Arbitrator may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.
(v) Either party may advise the Arbitrator that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Arbitrator may take the mediation timetable into account when setting the timetable for steps in the arbitration.
(vi) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.
(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Arbitrator except to the extent that they are disclosable under the law and procedure governing the arbitration.

(*Note: The parties should be aware that the mediation process may not necessarily interrupt time limits*.)

(e) If Box 15 in PART I is not appropriately filled in, Sub-clause 21(a) of this Clause shall apply. Sub-clause 21(d) shall apply in all cases.

**Sub-clauses 21(a), 21(b) and 21(c) are alternatives; indicate alternative agreed in Box 15*."

10.65 Clause 21 rewrites the former arbitration provision of "Wreckhire 99", both building on the special features of arbitration adopted in that form of using Lloyd's Salvage Arbitrators who are experts in resolving salvage-related disputes and adapting the current BIMCO standard dispute resolution clause used in the 2008 revisions of the "Towcon" and "Towhire" forms. The clause therefore offers the choice of an applicable law and arbitration venue from a choice of English law/London arbitration with arbitration to take place before a Lloyd's salvage arbitrator with a right to appeal to the Lloyd's appeal arbitrator under Lloyd's Open Form; US law/New York arbitration with arbitration to take place under Society of Maritime Arbitrators (SMA) rules; or an *ad hoc* choice of law and arbitration as chosen and agreed by the parties. In default of the parties' choice, the English law and arbitration option applies. The special procedure of arbitration adopted where English law and arbitration is adopted or applies was explained in the explanatory notes to the 1999 "Wreck" forms ("Although BIMCO normally endeavours to have its standard law and arbitration clause incorporated into its recommended forms, the specialised nature of the 'Wreckstage 99' agreement makes it more sensible to provide arbitration in London before a member of the existing Panel of Lloyd's arbitration, who are experts in this field") and is repeated in similar terms in the current notes.

10.66 Clause 21 incorporates not only the LMAA Small Claims Procedure (adopted in 2006 and forming part of the corresponding provisions in "Towcon" and "Towhire" 2008) but also the more recent LMAA Intermediate Claims Procedure (introduced in 2009 to supplement the existing small claims procedure). The clause also adopts the new standard form BIMCO mediation provision which permits the parties to refer all or part of a dispute, for which arbitration has been commenced, to mediation: see generally the commentary in relation to clause 33 of "Towcon 2008" in Chapter 4 above.

Clause 23: insurance

"23. Insurance

(a) The Contractor warrants that throughout the period of this Agreement it will maintain full cover against normal P&I risks including salvors' liabilities as evidenced by a Certificate of Entry issued by a P&I Club or insurer acceptable to the Company and shall comply with all the requirements of the policy.

(b) The Company warrants that throughout the period of this Agreement it will maintain full cover against normal P&I risks for the Vessel as evidenced by a Certificate of Entry issued by a P&I Club or insurer stated in Box 4(ix) and shall comply with all the requirements of the policy."

10.67 Clause 23 is a provision new to "Wreckhire 2010" and provides for each party to warrant appropriate insurance cover; given the potential in a wreck removal for the operation of marine

risks and liabilities to third parties, this is a small but important amendment. The hirer accordingly warrants that the vessel has full P&I cover and the contractor in its turn warrants that it is insured against P&I Risks including salvor liability.

Clause 24: duties as to avoidance of pollution and knock-for-knock for pollution liabilities

"24. Pollution

(a) The Contractor shall exercise due care throughout the performance of the Services to prevent and minimise damage to the environment and shall also put in place, maintain and implement throughout the Services a pollution response plan which meets the requirements of the competent authorities and the Company Representative. The Contractor shall provide the Company with a copy of the pollution response plan on request by the Company.

(b) The Company shall indemnify and hold the Contractor harmless in respect of any and all consequences of any pollution which results from any discharge or escape of any pollutant from the Vessel except where such pollution arises as a consequence of the negligence of the Contractor, its sub-contractors, its agents and/or servants.

(c) The Contractor shall indemnify and hold the Company harmless in respect of any and all consequences of any pollution which results from any discharge or escape of any pollutant from its own or from hired-in craft."

10.68 Clause 24 is also a new provision introduced in the 2010 revision. It obliges the contractor to exercise "due care", ie reasonable care and skill, both to prevent and to minimise damage to the environment; as part of that obligation, the contractor is required to draw up and have in place an oil spill response plan which must not only satisfy the requirements of the local competent authority but also of the hirer's representative.

10.69 Sub-clauses (b) and (c) provide knock-for-knock provisions in relation to pollution from the wreck and the contractor's vessels. This operates on the basis of the traditional offshore industry division of responsibility between pollution originating from the contractor's vessel (in drilling terms, the "soap, rope and dope" responsibility) and that originating from the wreck. Importantly the allocation of this latter responsibility is subject to an exception in the hirer's favour where the pollution originating from the vessel is due to the contractor's negligence. This corresponds with the positive duty on the contractor imposed by para. (a).

Clause 25: rotation and replacement of craft, equipment and personnel

"25. Rotation and replacement of craft, equipment and personnel

The Contractor shall have the right to rotate and replace any craft, equipment and personnel with other suitable replacement craft, equipment and personnel subject to the approval of the Company Representative, which shall not be unreasonably withheld."

10.70 Clause 25 is a further provision new to "Wreckhire 2010." In BIMCO's words, it "basically gives the Contractor the right to swap resources/equipment in and out of the salvage operation for maintenance and/or fatigue-relief purposes", subject to the hirer's consent which is not to be withheld unreasonably.

Clause 26: general provisions

10.71 Clause 26 comprises a number of standard general provisions of the boilerplate variety, now found in the later revisions of the BIMCO forms. The clause therefore sets out a severability of provisions term; various grammatical and construction rules (including the irrelevance of headings an aid to construction); a standard form provision seeking to prevent waiver of entitlement under the contract to cases where the waiver is written and signed by both parties, and the usual BIMCO warranty of authority. These provisions are discussed, where necessary, in the commentary to "Towcon

2008" and "Supplytime 2005" in Chapters 4 and 5 above. In addition, clause 26(b) provides that no benefit is being conferred on any third party under the contract (save in the case of the express Himalaya clause) thereby excluding *pro tanto* the operation of the Contracts (Rights of Third Parties) Act 1999. As the explanatory notes state, this is one of other: "additional clauses commonly added to wreck removal and other marine service agreements used in the salvage/offshore industry."

PART D. THE "WRECKSTAGE 2010" FORM

10.72 Little needs to be said about this form, which almost entirely mirrors the "Wreckhire 2010" form in all of its provisions save for those dealing with suspension and termination; delivery and disposal and, in particular, the different basis of remuneration, that of a lump sum payment earned in stages as stage payments rather than a daily rate of hire. These different provisions are clauses 8, 9, 10 and 11.

Clause 8: suspension or termination

"8. Termination

(a) The Company may terminate this Agreement at any time prior to commencement of mobilisation of either the Personnel or the Craft or the Equipment identified in Annex I, whichever may be the first, upon payment of the Cancellation Fee set out in Box 14.

(b) The Contractor, with the agreement of the Company, which shall not be unreasonably withheld, may terminate this Agreement without any further liability if completion of the Services or any agreed change of work under Clause 4 (Change of Method of Work and/or Personnel, Craft and Equipment) hereof, utilising the Personnel, Craft and Equipment set out in Annex I, or any amendment thereto, becomes technically or physically impossible. In the event of such termination, the Contractor shall be entitled to payment of all monies due in accordance with the provisions of Boxes 9, 12 and 13.

(c) If permission to terminate is not given by the competent authorities, the Contractor shall be paid by the Company at the Delay Payment Rate set out in Box 13 for Personnel, Craft and Equipment during any standby period, and the Company shall be liable for the Contractor's reasonable and necessary costs of continuing with the Services."

10.73 This clause remains unchanged from clause 8 of "Wreckstage 99." This clause gives the hirer company the right to withdraw from the contract before the contractor's vessels etc. have been mobilised on payment of a cancellation fee and the right to the contractor to withdraw if the services (whether or not amended by a substantial change under clauses 2 and 4) have become "technically or physically impossible." While the latter right would exist at common law with the doctrine of frustration, the form sensibly addresses it with a specific provision which enables the contractor in a proper case to rely upon a simply expressed contractual right rather than to have to invoke the legal complications of frustration and the test in cases such as *Davis Contractors v Fareham Urban District Council* [1956] AC 696. Unlike the corresponding right of termination under the "Wreckhire" form which gives the hirer company the right to withdraw from the contract at any stage and at any time without the payment of a cancellation fee and remaining fully entitled to all sums earned by way of hire or other payments (as set out in Box 11), the right of termination under the "Wreckstage" and "Wreckfixed" contracts (see clauses 8 and 7 of each form respectively), is a limited one, coupled with the payment of a cancellation fee, the hirer is entitled to terminate or suspend the services at will. The "Wreckstage" and "Wreckfixed" contracts provide merely for a right of termination of the contract services on the part of the hirer, unlike the "Wreckhire" form which also provides for a right to suspend the services (as discussed above). Curiously, the heading of clause 8 borrows the "Wreckhire" heading, referring to both "Suspension or Termination" notwithstanding that there are no suspension provisions; cf. the previous heading in the earlier 1999 version of the form which (correctly) was "Termination" only.

Clause 9: delivery or disposal

"9. Delivery and/or Disposal

(a) If applicable, the Vessel shall be accepted forthwith and taken over by the Company or its duly authorised representative at the Place of Delivery indicated in Box 8. References to delivery or the Place of Delivery shall include disposal or the Place of Disposal, if applicable.

The Place of Delivery and/or Disposal shall always be safe and accessible for the Contractor's own or hired-in craft and the Vessel to enter and operate in and shall be a place where the Contractor is permitted by governmental or other authorities to deliver and/or dispose of the Vessel.

In the event the Vessel is not accepted forthwith by the Company or delivery is prevented or delayed by action of governmental or other authorities outside the control of the Contractor, all costs necessarily incurred by the Contractor from the moment of the tender for delivery shall be for the account of the Company.

These costs shall be in addition to any delay payment as set out in Box 13.

(b) If it is considered by the Contractor to be impossible or unsafe for the Vessel to be delivered or disposed of at the place indicated in Box 8 and the Company is unable to nominate an acceptable alternative place, the Contractor is at liberty to deliver or dispose of the Vessel at the nearest place it can reach safely and without unreasonable delay, provided delivery or disposal at such place is permitted by governmental or other authorities, and such delivery or disposal shall be deemed due fulfilment by the Contractor of this Agreement.

The Company shall reimburse the Contractor for any additional time used pursuant to this Sub-clause 9(b) at the Delay Payment Rate set out in Box 13, and shall be liable to the Contractor for any additional expenses arising under this Sub-clause.

(c) In the event the Vessel is delivered under the control of pumps and/or compressors or other equipment the Company shall with all due dispatch arrange for their own equipment and operators to replace the Contractor's equipment and operators.

Until such replacement the Company shall pay the Contractor for the use of its equipment and operators at reasonable rates as from the day of delivery until and including the day of arrival of the equipment and personnel at the Contractor's base, plus any additional costs relating thereto and incurred by the Contractor.

(d) If the Company fails, on completion of the Services, to take delivery of the Vessel within five (5) days of the Contractor tendering written notice of delivery or, if in the opinion of the Contractor the Vessel is likely to deteriorate, decay, become worthless or incur charges whether for storage or otherwise in excess of its value, the Contractor may, without prejudice to any other claims the Contractor may have against the Company, without notice and without any responsibility whatsoever attaching to the Contractor, sell or dispose of the Vessel and apply the proceeds of sale in reduction of the sums due to the Contractor from the Company under this Agreement. Any remaining proceeds will be refunded to the Company.

In the event that such sale or other disposal of the Vessel fails to raise sufficient net funds to pay the monies due to the Contractor under the terms of this Agreement then the Company shall remain liable to the Contractor for any such shortfall.

(e) Reference to delivery and/or disposal of the Vessel shall include parts of the Vessel and/or cargo and/or any other thing emanating from the Vessel and such delivery may take place at different times and different places (see Box 8)."

10.74 This lengthy provision deals with the situation where the vessel is to be recovered by the contractor and returned to the company. It gives to the contractor rights:

a to deliver the vessel at an alternative place to that agreed upon where that place is one which it is not possible or not safe to use as the contractor may choose at the company's expense and with such delivery being "due fulfilment" of the contract for the purposes of triggering the lump sum payment;
b to require the company to replace any compressors or pumps being used by the contractor to keep the vessel afloat for redelivery; and
c to sell the vessel if not taken delivery of by the company within a short period of notice of delivery if the vessel (or other property) is deteriorating or too costly to store and keep.

The clause is therefore more tailored to the contractor than is the corresponding provision in clause 9 of the "Wreckhire" form which contains no corresponding right in the contractor to deliver or dispose of the vessel at some place other than the place agreed where it considers that this is impossible or unsafe.

Clause 10: price and conditions of payment

"10. Payment

(a) The Company shall pay the Contractor the Lump Sum set out in Box 9, which amount shall be due and payable as set out in Box 9.

(b) Each instalment of the Lump Sum shall be fully and irrevocably earned at the moment it is due as set out in Box 9. Any other monies due under this Agreement shall be fully and irrevocably earned on a daily basis or pro rata.

(c) All monies due and payable to the Contractor under this Agreement shall be paid without any discount, deduction, set-off, lien, claim or counterclaim.

(d) All payments to the Contractor shall be made in the currency and to the bank account stipulated in Box 10.

(e) If any amount payable under this Agreement has not been paid within seven (7) days of the due date, or if the security required in accordance with Clause 12 (Security) is not provided within five (5) banking days following the request by the Contractor, then at any time thereafter the Contractor shall be entitled to terminate this Agreement without prejudice to the sums already due to the Contractor and to any further rights or remedies which the Contractor may have against the Company, provided always that the Contractor shall give the Company at least three (3) working days' written notice of its intention to exercise this right.

(f) The Contractor shall promptly invoice the Company for all sums payable under this Agreement. If any sums which become due and payable are not actually received by the Contractor within the period specified in Box 11, they shall attract interest in accordance with the rate set out in Box 11."

10.75 These are standard provisions and are similar in effect and wording to the lump sum provisions in both the "Towcon" form and the "Salvcon" form. Clause 10(b) provides that each instalment of the lump sum is fully and irrevocably earned at the moment it becomes due; the effect (which the P&I Clubs were disenchanted with) is that once each stage of the service is completed, the relevant portion of the lump sum becomes earned and it is only the balance that remains to be earned or, as it was put in the guidance notes accompanying the original 1999 form, "which remains on a 'no cure no pay' basis." Thus, if the raising of a wreck involves six stages with only the final fifth and sixth stages being the raising of the wreck, if the wreck is not raised or the attempt fails, the hirer company is liable to pay for all the abortive preliminary steps even though they have produced no useful result and the work remains to be done, usually under a new contract.

Clause 11: extra costs

"11. Extra Costs

The following shall be paid as and when they fall due by the respective parties as indicated in Box 12:

(a) all port expenses, pilotage charges, harbour and canal dues and all other expenses of a similar nature levied upon or payable in respect of the Vessel and the Contractor's own or hired-in craft;

(b) the costs of the services of any assisting tugs when reasonably deemed necessary by the Contractor or prescribed by port or other authorities;

(c) all costs in connection with clearance, agency fees, visas, guarantees and all other expenses of such kind;

(d) all taxes and social security charges (other than those normally payable by the Contractor in the country where it has its principal place of business), stamp duties, or other levies payable in respect of or in connection with this Agreement, any import – export dues and any customs or excise duties;

(e) all costs incurred in obtaining and maintaining licences, approvals, authorisations or permits required to undertake and complete the Services in accordance with Clause 6 (Permits);

(f) all costs incurred due to requirements of governmental or other authorities or unions over and above those costs which would otherwise be reasonably incurred by the Contractor in the execution of the Agreement;

(g) all costs incurred by the Contractor in respect of portable salvage equipment, materials, or stores which are reasonably sacrificed during the disposal or other operations of the Vessel; If any such costs are in fact paid by or on behalf of one party by the other party, the party on whose behalf the payment has been made shall reimburse the paying party on the basis of the actual cost to the paying party plus a handling charge of the percentage amount indicated in Box 12(iii) upon presentation of invoice."

10.76 Under clause 13 of the "Wreckhire 2010" form, the extra costs itemised in the same list which appears in clause 11 of the "Wreckstage" form are all for the hirer's account. Under the "Wreckstage" form, it is for the parties to agree on who bears which costs and special provision is made in Box 12 of Part I for the parties to specify their respective cost bearing responsibilities. This reflects the fact that under a stage-payment contract, there may be a balance to be struck as to who bears what costs at each stage. Cf. the position under the "Wreckfixed" form, where all such itemised costs are for the contractor's account, and deemed included in the lump sum which is to be paid.

PART E: THE "WRECKFIXED 2010" FORM

General description of the form

10.77 The "Wreckfixed 2010" form is similar in all respects to the "Wreckstage" and "Wreckhire" form except in its terms relating to the basis of remuneration and the incidence of extra costs which may become due during the course of the contract. It is a simplified version of the earlier "Wreckcon" form and the 2010 "Wreckstage" and "Wreckhire" forms because it provides:

i for one fixed price for the service which is either earned on the contractually defined completion or termination of that service or is not; if it is not, no other remuneration is payable, viz. "no cure-no pay";
ii for no delay payments or weather delays, leaving the contractor solely responsible for all delays in and interruptions of the rendering of the contract services; and
iii for all extra costs in and about the contract services to be borne by the contractor alone.

10.78 There are therefore no Boxes 9(ii)–(vii) corresponding to those in "Wreckstage" for the stages on which portions of the overall lump sum are deemed earned and Box 9 provides for one "fixed price" as a simple lump sum payment, as does the corresponding "Price and Conditions of Payment" clause (clause 9(a)). Clause 10 dealing with "Extra Costs" takes the same list of heads of extra costs as seen above in clause 13 of "Wreckhire 2010" and in clause 12 of "Wreckstage 2010", but provides simply that these are to be borne by the contractor alone. As the guidance notes state, "the terms are onerous for the contractor."

10.79 However, the form is otherwise closely similar to "Wreckstage" in that it remains a species of lump sum contract, albeit one for *one* lump sum earned indivisibly and on one event rather than in stages.

10.80 In reality, while "the terms are onerous for the Contractor" and as the original guidance notes went on to state "there is nothing to prevent such matters [ie relating to delays, extra costs etc.] from being re-introduced by mutual agreement on a case-by-case basis", it was envisaged that the shipowners and, more importantly, their P&I Clubs' preferred version would be the simple standard form "no cure-no pay" as contained in "Wreckfixed 99", although it was thought that there would still be an important commercial place for stage payments (eg in a very major wreck removal project or where the project consists of tackling a number of aspects, such as the clearing

from a channel of the fore and aft parts of a casualty which have sunk in different places). It was therefore said in 1999 that "there can be no doubt that the P&I insurers will [and already do] invariably request offers to be based upon the new 'Wreckfixed 99' agreement", unless the counteracting commercial considerations are very much in the contractor's favour. However, the position has changed and the current popularity of the daily hire basis of contracting has been reflected in the fact that the revision of the "Wreckhire" form was BIMCO's priority, as was the enhancing of this form with the bonus and cap provisions of the new "Wreckhire 2010" considered above. The lump sum basis seems presently to be much less used than was anticipated. Far fewer changes have been made to the "Wreckfixed" (and "Wreck stage") forms as a result, with the changes being largely cosmetic to bring them into line with the new structure of the "Wreckhire" form.

Differences with the provisions of "Wreckstage 2010"

10.81 It is convenient to point out the main differences in Part II of "Wreckfixed 2010" from the standard "Wreckstage" clauses consequent upon the "no cure-no pay" basis of remuneration:

i Clause 9 provides for an indivisible lump sum payment due in one instalment on completion.
ii Clause 10 provides for all extra costs as defined in sub-clauses 10(a)–(f) to be borne by the contractor.

CHAPTER 11

Collisions involving tug and tow

PART A. PRELIMINARY REMARKS

The scope of the chapter

11.1 This chapter considers the relationship between the tug and her tow in the event of a collision and how the question of the liability of each, both for its own acts and for those of the other, is addressed by the courts. In the ordinary course of events, a collision at sea between two or more vessels will give rise to a cause of action in negligence in the event of navigational fault or omission on the part of one or more vessels which results in loss or damage to another vessel. Physical contact between vessels is not the only instance where a vessel may sue another for negligence in navigation: a vessel may proceed too fast and cause a wash which damages another vessel; a vessel by its negligent navigation may force another vessel to take evasive action which results in that vessel colliding or stranding.

11.2 The special features in the case of tug and tow are, first, the contract of towage which regulates duties, obligations and liabilities between tug and tow (as seen in Chapter 2 above); secondly, the immateriality of that contract to a third vessel which is involved in a collision with tug and/or tow in determining which of tug and/or tow is liable; thirdly, the question of the apportionment of liability which arises where tug, tow and third party vessels are in collision; and lastly, the special navigational considerations which a towage convoy or flotilla will often present to other vessels under way. This last aspect can, given the wide variety of seaborne objects under tow and the potential for a modern towage convoy or flotilla to extend over very great areas of navigable waters, raise particular difficulties: for example, with convoys of tuna cages and, especially, arrays of seismic streamers (as to which see *The Western Neptune and The St Louis Express* [2010] 1 Lloyd's Rep 158, considered further below).

11.3 A general treatment of collision law and practice is beyond the scope of this book. See for a detailed treatment of the subject Marsden and Gault, *Collisions at Sea* (14th edn, 2016) and Sturt, *The Collision Regulations* (2nd edn, 1984). For the general regime of collision liabilities and apportionment of liability, see Meeson and Kimbell, *Admiralty Jurisdiction and Practice* (4th edn, 2011) which also contains a detailed modern account of the Admiralty Court practice in collision cases; see also a useful account in *The Law and Practice of Admiralty Matters* (2nd edn, 2016) by Professor Sarah Derrington and James Turner QC.

Navigation and the Collision Regulations

Navigation and navigational rules

11.4 The duties upon a vessel in relation to navigation arise from two sources: first, from the ordinary duty to exercise reasonable care and skill, in other words, the duties of good seamanship; and, secondly, from the Collision Regulations which lay down navigational "Rules." The history of the formal regulation of the rules of the road at sea dates back to 1840 when five rules of seamanship, three for sailing vessels and two for steamships, were promulgated by Trinity House. Increased regulation by the Board of Trade followed, with new codifications in 1863 and 1910. Following World War II, international agreement was reached on rules of navigation in 1948.

11.5 The current position is that the International Regulations for Preventing Collisions at Sea adopted at the Inter-Governmental Maritime Consultative Organisation, or IMCO, conference in London in 1972 have had force of law in the United Kingdom since 1983. In their present form, the Regulations have force of law pursuant to the Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1989 (SI 1989 No. 1798). The Secretary of State for Transport has a general power under section 85 of the Merchant Shipping Act 1995 to make regulations for safety at sea; this power is used to effect change to the Collision Regulations where necessary.

The role of the Collision Regulations

11.6 The interrelationship between the ordinary dictates of good seamanship and the Collision Regulations is a pragmatic one. As was said by Sheen J in *The Roseline* [1981] 2 Lloyd's Rep 410 at p. 411, the Regulations very often state in codified form what has long been recognised as a rule of good seamanship and of common sense. For present purposes, the position can be summarised as follows.

11.7 First, failure to comply with the Collision Regulations in circumstances which mean that the Regulations have been wrongfully contravened (see below) is a criminal offence and the owner of the vessel, the master and any person having the conduct of the vessel may be detained by the Department of Transport.

11.8 Secondly, a contravention of the Regulations formerly resulted in the vessel in contravention being deemed to be at fault in the event of a collision, irrespective of whether the breach of the Regulations played any causative part in the collision (*per* section 17 of the Merchant Shipping Act 1873). This statutory presumption of fault was abolished by section 4 of the Maritime Conventions Act 1911. However, while proof of a breach of the Regulations is of itself now neutral in a civil collision action until the plaintiff proves that the vessel was thereby at fault and that the fault caused or contributed to the collision or other loss or damage, a strong inference of fault or of negligent conduct will usually arise if it is shown that the Regulations were breached, leaving the plaintiff to establish causation. Compare the position in the United States, which still corresponds to that in the United Kingdom between 1873 and 1911: the leading case is *The Philadelphia* 86 US 125 (1873) under which, once a breach of the Regulations is made out, the rule is laid down that "the burden rests upon the ship of showing not merely that her fault might not have been one of the causes or that it was probably not, but that it could not have been."

11.9 Thirdly, the Collision Regulations, while laying down rules of navigation, provide also for the impact of special circumstances to which the rules may not adequately apply and to which they may not properly be applicable. The 1972 Regulations themselves state, by Rule 2(b), that "in construing and complying with these Rules due regard is to be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger."

11.10 Lastly, as already noted, the Collision Regulations co-exist with the ordinary duty of good seamanship. Accordingly, as has been succinctly stated (see *Sturt*, at p. 24, para. 1.14):

> Nothing in the 1972 Rules exonerates any vessel, or its owner, master or crew, from the consequences of any neglect to comply with the Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

The general scheme for apportioning liability in collisions between vessels

11.11 Where two or more vessels collide and more than one vessel is at fault in some respect which is causative of the collision and of the resultant damage sustained, their liability in respect of the collision will be apportioned in accordance with section 187(1) of the Merchant Shipping Act 1995 (replacing section 1(1) of the Maritime Conventions Act 1911), which requires the

court to assess "the proportion of the degree to which each vessel was at fault." If no assessment is possible, then the liability is to be apportioned equally (see section 187(2) of the 1995 Act, a relic of the old pre-1911 law). In practice, the court approaches apportionment in the same way as it approaches the question of contributory negligence under the Law Reform (Contributory Negligence) Act 1945 (see eg *Davies v Swan Motor Co Ltd* [1949] 2 KB 291 (CA) at p. 319; and *The Miraflores and Abadesa* [1966] P 18 (CA) at p. 33E).

11.12 Where two or more vessels are at fault they may seek contribution from the other vessel(s) at fault so as to reduce the proportion to be borne in money terms of the whole claim to a proportion that is equivalent to the degree to which the particular vessel was herself at fault. Section 189(1) of the Merchant Shipping Act 1995 provides:

> Where loss of life or personal injuries are suffered by any person on board a ship owing to the fault of that ship and any other ship or ships, and a proportion of the damages is recovered against the owners of one of the ships which exceeds the proportion in which she was in fault, they may recover by way of contribution the amount of the excess from the owners of the other ship or ships to the extent to which those ships were respectively at fault.

PART B. NAVIGATION BY TUG AND TOW

The role of the towage contract

11.13 As seen above in Chapter 2, pursuant to the terms implied at common law which found their most detailed exposition in the decisions of the Privy Council in *The Julia* (1861) 14 Moo PC 210 and *The Minnehaha* (1861) 15 Moo PC 133, the tug owes a duty to the tow to exercise all reasonable care and skill in and about the towage operation, including the navigation of the tow. Similarly, the tow owes a duty to the tug so to dispose herself in navigational matters as not to prevent the fulfilment of the towage operation by the tug. Very often, there will be a considerable overlap between the duties owed by tug and tow *inter se* in the performance of the towage contract and those owed to others in the navigation of the towage convoy. Thus, as part of its duty to the tow, the tug is required to proceed at a proper and safe speed. That duty is usually co-extensive with that owed to other vessels. Similarly, the tow, if directing the navigation, is required to stop the tug proceeding either at all or at an inappropriate speed in fog or where there are obstacles to navigation. The duty is owed both to the tug and to other vessels that may be encountered by tug and tow. However, while the implied duties on tug and tow are framed in terms of the proper fulfilment of the contract (or as Lord Kingsdown put it in *The Julia*, "an engagement that each vessel would perform its duty in completing it" and, in *The Minnehaha*, "[the tug] does engage that she will use her best endeavours" for that purpose (ie the contract "to tow a vessel from one point to another")), the duty of care upon each vessel which is owed to other vessels and owners of other maritime property will extend wider and will be defined by the requirement upon each vessel to exercise care not just towards each other but also to third parties.

11.14 The statement by Lord Sterndale MR in *The Francis Batey* (1921) 8 Ll L Rep 247 in relation to the position of the tow is equally applicable as regards the tug's and tow's individual duties to third parties in respect of their joint activities:

> I think it is very important to maintain what I think is the law as laid down by all the cases, that although the tug may be in charge of the navigation, that does not dispense the tow from taking the ordinary precautions that ought to be taken, and that a tow has no right to go about without any look-out and to allow herself to run blindly into danger, simply because the tug is in charge of the navigation.

The duties upon the tug

11.15 The general incidents of the duty of the tug to navigate herself and her tow safely have been considered above in the context of the tug's contractual obligations (see Chapter 2). From

the perspective of third party vessels, the essential features of the duty of good seamanship and prudent and skilful navigation as it impinges upon a tug with a tow are the following:

i Notwithstanding that the tug may receive her orders as to navigation from the tow, the tug is under a separate duty to take such course as will carry her tow and herself clear of collision and avoid other damage (see *The Sinquasi* (1880) 5 PD 241 and *Spaight v Tedcastle* (1881) 6 App Cas 217). The point was re-emphasised recently in *The Western Neptune and The St Louis Express* [2010] 1 Lloyd's Rep 158, a case involving the towage of an array of seismic streamers which was run over at night. This was described by the court as three towing or assisting vessels "the furthest 1 miles away, a length of tow of over 4 miles and an array of stern buoys about mile wide, the convoy presented as akin to a vessel 4 miles long and 1 mile wide proceeding at 5 knots" with an exclusion zone around it. "Given the length of the tow and the lack of manoeuvrability this proposed exclusion zone was understandable and legitimate. Nevertheless the implications were quite far reaching. The request amounted to seeking to enforce a 'no-go' zone covering 54 square miles of ocean" (see paras. 38 and 39). David Steel J reiterated (para. 39) that "Whilst not unique, the convoy was by any standard unusual and called for appropriate warnings to shipping. Such should not have been and was, in some respects, not confined to VHF messages transmitted in the event of encountering an approaching vessel." He continued, after an analysis of the effect of the requirements for lights and shapes under the Collision Regulations (see below) at para. 80:

> The fact that the array had limited lighting and presented limited radar visibility merely emphasises the need for vigorous efforts to give effective warnings to other vessels of the requirement to give *Western Neptune* a very wide berth. An analogous example of such an obligation on the part of the towing vessel is to be found in *Thomas Stone (Shipping) Ltd v The Admiralty (The Albion)* [1953] 1 Lloyd's Rep 239.

ii This is especially so in waters that present special difficulties for a towage convoy such as narrow channels or other waters which are confined in sea-room or which are made so by press of other shipping. In such waters, the tug will usually have the special burden of deciding upon course and speed changes and of responding to sudden difficulties (see *The Isca* (1886) 12 PD 34 and *The Sinquasi* (above)).

iii The separate duty upon the tug to take care both for herself, her tow and other vessels encountered will, where necessary, require the tug to make her own appreciation of the situation where the tow gives an order to the tug. If that order is incorrect or if it is an improper or negligent order and this can be appreciated by the tug exercising reasonable care and seamanship, then the order should be refused and the tug should take her own course as she sees fit. As Dr Lushington crisply put it in *The Duke of Manchester* (1846) 4 Notes of Cases 575 at p. 582:

> The vessel and the lives of the crew are not to be risked because there is a law which imposes the ordinary responsibility upon one individual . . . It is not for [the tug], knowing the danger, to maintain, as it were, a sulky silence, and make herself, as it were, instrumental in the destruction of life and property.

iv The tug's separate duty will most often be particularly acute in questions of speed. See eg *The American and The Syria* (1874) LR 6 PC 127 in which the *American*, towing the *Syria*, saw another vessel shortly ahead. The towing vessel should have reduced speed but instead attempted to cross in front of the other vessel. She collided with her and then the *Syria* under tow was pulled into collision with her and sank her. The tug was held solely to blame. This is especially so in conditions of reduced visibility such as fog (see *The Challenge and Duc d'Aumale* [1905] P 198).

v It is also acute in questions of look-out where the tug is under a duty to keep a good look-out not only for herself but also for her tow, even when the same is manned, since

the latter cannot always see ahead or do so in the same way. In *The Jane Bacon* (1878) 27 WR 35 (CA), it was stated that it was the duty of the vessel towing to keep a look-out for both herself and the tow.

vi As for the tug's duties as to lights being burned on or shapes being exhibited by the tow, see below and a helpful recent overview in *The Western Neptune and The St Louis Express* [2010] 1 Lloyd's Rep 158.

The duties upon the tow

11.16 As the dicta by Buckley LJ in *The SS Devonshire* [1912] P 21 (CA) (cited in Chapter 2 above) and by Lord Sterndale MR in *The Francis Batey* (above) make clear, the tow, even though she may be completely under the impulsion and direction of the tug, is not thereby relieved of her own separate duty to exercise reasonable care and good seamanship in the navigation of the towage convoy, so far as she is able. The extent of her duty will vary according to her own capabilities. The following examples may be considered:

i If the tow is fully manned and capable of independent propulsion and steerage, she will often be required to give orders as to the navigation both of herself and the tug, at least when the towage convoy is in open sea (see eg *The Niobe* (1888) 13 PD 55 and *The Energy* (1870) LR 3 A & E 48; cf. where the convoy is in crowded waters (as to which see above)).

ii If the tow is a vessel not capable of such independent means of navigation, such as a dumb barge, she will still be required to exercise care in all matters which she can influence, such as her lights (see *The Albion* [1952] 1 Lloyd's Rep 38) and the keeping of a proper look-out on board her both for herself and the tug (see *The Francis Batey* (1921) 6 Ll L Rep 389).

11.17 An interesting example of the way in which the duty of seamanship will be dependent upon the state and condition of the tow is given by *The Marmion* (1913) 29 TLR 646. In this case, a vessel was under tow by two tugs. She collided with another vessel; the tow had no steam up on her main engine; the head tug was blowing a signal indicating that she was about to turn; there was no signal from the tow. The court held that it was good seamanship not to blow the whistle on board the tow when there was no steam on the main engine as the whistle would indicate the existence of such steam and the consequent inference would be that the tow could work her main engines.

11.18 Whatever the state or condition of the tow, provided that she is manned (and if she is of a type of vessel which should be manned when under tow, such as a dumb barge upon a busy river, then failure to man her may, of itself, amount to a failure to exercise good seamanship – see *The Harlow* [1922] P 175), then certain paramount duties will always be imposed upon her. First, it is her duty to warn the tug of any navigational dangers that she perceives to threaten either the tug, herself or both tug and tow (see the colourful, if antique and dangerous, method of warning the tug by "girting the tug" which it was held that the tow should have used in *The Niobe* (1888) 13 PD 55). Secondly, the tow must follow the tug faithfully in her course and, in the absence of an obviously ill-considered improper movement by the tug, be diligent in altering course to follow that of the tug (see eg *The Jane Bacon* (above)). Thirdly, and often very importantly, the tow must always be alert as to the possibility of having to slip the tow-line (see *The Energy* (above)).

Special aspects of the Collision Regulations

11.19 The Collision Regulations lay down navigational rules and requirements that are of general application. However, certain provisions specifically applicable to tug and tow and some general provisions that arise in a towage context should be noted. These provisions fall into three categories.

Lights and shapes

11.20 Rule 24 makes specific and detailed provision for the lights and shapes to be exhibited by vessels towing and being towed (or pushing and being pushed) where the towing or pushing vessel is a power-driven vessel. It is set out in Appendix 19.

11.21 Special questions have arisen in the past in relation to the respective obligation of tug and tow as to lights.

11.22 One such question arises as to the circumstances in which it is the responsibility of the tug to burn towing lights, but that of the tow to burn such lights to show she is at anchor. In *The Romance* [1901] P 15, a pair of tugs had in tow a vessel which was being taken to a nearby anchorage. The tugs carried their towing and side lights, but the tow carried lights indicating that she was at anchor. In the course of the towage operation, a collision took place between the tow and a fourth vessel, necessitating a salvage service eventually being performed by one of the tugs for the benefit of the tow. In defence to the claim of the tug to a salvage award, the tow contended that the collision that gave rise to the alleged salvage service occurred only by reason of the negligence of the tugs in exhibiting inappropriate and misleading light configurations. In holding that the contention failed, Gorell Barnes J stated that the lights displayed by each of the vessels were appropriate and correct, including those of the tow itself. In a similar case, *The Devonian* [1901] P 221, a vessel lay at anchor in the River Mersey. She carried appropriate lights, and a tug to which she was made fast and which, albeit not towing, was standing by on her starboard side, burned its masthead and side lights as opposed to its towing lights. The *Devonian* collided with the vessel at anchor. The latter brought proceedings against the *Devonian*, which argued that the collision had resulted from a misleading light display by the tug standing by the casualty. In line with the decision in *The Romance*, Sir Francis Jeune P, with the subsequent approval of the Court of Appeal, held that the tug, albeit not actually in the process of towing, was "attached for the purpose of towing" and, accordingly, by not burning towing lights had displayed inappropriate lights. This was so, notwithstanding that there was no tension on the towing hawser at the time of the collision.

11.23 A further issue that arose in *The Devonian*, was the extent to which a tow owes a duty to a third party to ensure that its tug is exhibiting appropriate lights. The Court of Appeal, affirming the decision of Sir Francis Jeune P, held that the failure of the tug standing by the casualty to display appropriate lights barred recovery against the *Devonian*. In setting out the test, Sir Francis Jeune P stated ([1901] P 221):

> Were the two (the tug and the tow) in such a position towards one another that the control of the tow over the tug was practicable and possible? . . . I should say that in all those cases where liability has been established, it has been because the tow was in a position to exercise control, and that control over the tug ought to have been applied.

11.24 The position is the same in reverse, it may be noted. A tug or towing vessel will be liable for damage resulting from the display of improper lights by its tow, as was held in *The Mary Hounsell* (1879) 4 PD 204. See also *The Albion* [1953] 2 Lloyd's Rep 82.

11.25 Further complications are presented by towage convoys or flotillas of unusual form, such as the towage of arrays of seismic streamers or semi-submerged tuna cages which occupy a large area of sea-room and may either be invisible, being below the water and suspended between the towing vessel and aft or midpoint buoys or very low in the water presenting little or no radar or other visual profile. In *The Western Neptune and The St Louis Express* [2010] 1 Lloyd's Rep 158 (considered further below), compliance with the requirements of Rule 24(g) and (h) was argued to be impractical in a case where the "tow" was made up of "a spread of 10 streamers and six gun arrays . . . Each streamer extended for about 8,030 m (4.34 miles) astern of the vessel. With each of the streamers maintained about 120 m apart the total width of the spread was some 1,080 m. They were being towed at a depth of 12 m." The court accepted this argument but held

that it imposed an even more stringent duty on the tug to indicate the presence of the array by all other means possible:

> The claimants contended that such constituted appropriate compliance with sub-rule (h). It was submitted that it was impractical to exhibit the prescribed lights and that all possible measures had been taken to light or at least to indicate the presence of the object.
>
> 61. The proposition that it was impractical to exhibit the prescribed lights was not controversial at least in the sense that it was not possible to light the length of the array at intervals not exceeding 100 m. But it was the Elder Brethren's view (and I share it) that the vast unlit space astern of *Western Neptune* presented a considerable hazard to and from other vessels. Whether a separate streamer designed to carry lights at reasonable intervals (even if much more than 100 m) was wholly impractical is somewhat surprising, although it would no doubt be costly and inconvenient. Nonetheless it is accepted by the court that it was impractical albeit, with some reluctance.
>
> 62. But accepting the fact that such lighting is to be treated as unrealistic (and it certainly seems to accord with the practice in the industry) merely emphasises the high standard of care required to indicate the presence of the array by other means. This leads to considering such means under four headings: (i) Buoy lights; (ii) Strobe lights; (iii) Radar transponders; (iv) VHF warnings.

11.26 In that case, the failure to take sufficient steps in this regard led to an apportionment of blame of one-third to Western Neptune (para. 115); it seems clear that the apportionment would have been higher against the towage convoy but for the very poor lookout and "sloppy practices on board the bridge of the St Louis Express" which cut across the path of the convoy (para. 111).

Sound signals

11.27 Rule 35, which is also set out in Appendix 19, makes provision for sound signals in restricted visibility whether by day or night. It makes specific provision for the sound signals to be made by tug and tow in such visibility. The signals to be sounded are the following:

i *By the tug*: pursuant to Rule 35(c), a vessel engaged in towing or pushing another vessel shall, instead of sounding the usual signals, "sound at intervals of not more than two minutes three blasts in succession, namely, one prolonged followed by two short blasts."

ii *By the tow*: pursuant to Rule 35(e), a vessel towed (or if there is a flotilla of more than one towed vessel, the last of the towed vessels) if she is manned is to sound "at intervals of not more than two minutes four blasts in succession, namely, one prolonged followed by three short blasts." To promote the avoidance of confusion in dissonance between tug and tow, Rule 35(e) further provides that:

> When practicable, this signal shall be made immediately after the signal made by the towing vessel.

11.28 Where tug and tow are acting as pushing and pushed vessels and "are rigidly connected in a composite unit", then they are to be treated as an ordinary power-driven vessel and are to obey the ordinary sound signals in restricted visibility set out in Rule 35(a) and (b).

Navigational rules

11.29 How are tug and tow to be treated as regards the body of the Rules regulating navigation? The towage convoy, at its least numerous, will comprise two vessels or one vessel (the tug) and one other type of water-borne object. Are the vessels to be treated as one or as separate vessels? How is the water-borne object to be treated?

Application to water-borne objects

11.30 To take the latter case first: the Rules "apply to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels" (Rule 1(a)). Rule 3(a) defines "vessel" in the following manner:

> (a) The word "vessel" includes every description of water craft, including non-displacement craft and sea planes, used or capable of being used as a means of transportation on water.

11.31 A tug will, accordingly, be treated as sea-going within the meaning of the Rules if upon the high seas or waters connected therewith. While the Rules will also apply to the tow if the tow is a "water craft used or capable of being used as a means of transportation on water", if the tow consists of a water-borne object, such as a caisson or other object which does not resemble a "water craft", the Rules will not apply to her (or it).

11.32 However, the application of the Rules to the tug in such a case will mean that the Rules will have to be observed by the tug, both on her own behalf and that of the tow, and that third party vessels encountering tug and tow in navigation may have to adapt their navigation to the special constraints imposed by an unwieldy towage convoy. In particular, the Rules make special provision for a vessel restricted in her ability to manoeuvre "being a vessel which from the nature of her work is restricted in her ability to manoeuvre as required by these Rules and is therefore unable to keep out of the way of another vessel" – see Rule 3(g), which by sub-para. (vi) includes within the non-definitive list of instances of such vessels the case of:

> (vi) a vessel engaged in a towing operation which severely restricts the towing vessel and her tow in their ability to deviate from their course.

11.33 An example of the difficulties in the application of the Collision Regulations to the more specialised forms of towage convoy encountered in modern offshore practice is *The Western Neptune and The St Louis Express* [2010] 1 Lloyd's Rep 158. As noted above, the towage convoy was made up of a towing vessel, *Western Neptune*, with an array of streamers out astern of her and over a wide area; the streamers ended in aft buoys but were mostly submerged (to repeat: "a spread of 10 streamers and six gun arrays ('the array'). Each streamer extended for about 8,030 m (4.34 miles) astern of the vessel. With each of the streamers maintained about 120 m apart the total width of the spread was some 1,080 m. They were being towed at a depth of 12 m": para. 5). The question arose whether the array was to be treated as part of the *Western Neptune*. The Court (David Steel J with assessors) held that it was, even though large parts of the convoy – the streamers – were underwater:

> 50. Before turning to the question of exhibiting lights at night I should first deal with the question as to whether the array is to be treated as part of *Western Neptune* for the purposes of collision avoidance under the rules. Rule 3(g) of the 1996 Collision Regulations provides that a vessel restricted in its ability to manoeuvre includes one engaged in a towing operation which severely restricts the towing vessel (and the tow) in its ability to deviate from its course. This clearly encompasses *Western Neptune*. In the result, by virtue of rule 18, *St Louis Express* was obliged to keep out of the way of her to the extent that the two vessels were in sight of one another.
>
> 51. Rule 3(g) provides that vessels shall be deemed to be in sight of one another only when one can be observed visually from the other. There is no difficulty of *St Louis Express* becoming visually in sight of *Western Neptune*. But the reverse is not so easy. In one sense the vessel that could be seen was the *Western Neptune* and nothing else save for the flashing lights on the aft buoys. Indeed any reading of the CPA would be off *Western Neptune*. Does the array form part of the vessel from the perspective of the rules?
>
> 52. I asked the Elder Brethren for assistance on this hypothetical issue. Their response was as follows:
>
> Rule 7d (ii), (Risk of Collision) speaks about bearing movement when approaching a very large vessel or a tow in the context of judging whether risk of collision exists. To this extent it would appear that a tow is to be considered as being similar to a very large vessel, and to be judged as such, in the context of the Rules.

> From a practical point of view the tow always has to be treated as a part of the towing vessel for the purposes of collision avoidance since it has no life or being outside of the towing vessel and is unable to take any form of unilateral action. WESTERN NEPTUNE's array, as a tow part of which was on the surface, must therefore be considered as an integral part of WESTERN NEPTUNE herself.
>
> 53. I accept that advice and against that background I turn to the issue of both shapes and lights bearing in mind the need for consistency of treatment in the two different situations.

Tug and tow: how treated

11.34 As to the first case: are tug and tow to be treated as one (composite) vessel or two separate vessels? In the earliest days of towage, a tug and tow under way were treated as a composite unit and as one (extended) vessel for the purposes of collision regulations. The rule was put pithily by the Privy Council in *The Cleadon* (1860) 14 Moo PC 97, in which a tug and tow collided with a third vessel at night. The decision of the Privy Council was summarised by Dr Lushington in this report of the decision (at (1860) Lush 158) as follows:

> The vessel towed and the vessel towing are to be considered as one long steamer for the conduct of which the vessel towed is responsible and the vessel being so towed at night is bound to avoid other vessels.

See also *The American and The Syria* (1874) LR 6 PC 127 at p. 132.

11.35 From Dr Lushington's summary of the rule, it is evident that the rule sprang from two different sources. First, from the practical considerations of two vessels under way together, so long as the towage was maintained, they were incapable of independent navigation – in other words, a composite of vessels but essentially acting as one single vessel. Secondly, and unsupportable since 1912, the presumption (largely fostered by Dr Lushington) is that the tow is presumed to be responsible for the acts of the tug and that the command of the towage convoy should not be treated as a divided command but as one single command, with that command or "control" reposing in the tow.

11.36 While this presumption received its long overdue quietus in the House of Lords decision in *The SS Devonshire v The Barge Leslie* [1912] AC 634, for the purposes of the Collision Regulations the tug and tow convoy are frequently treated as one vessel. But it will be a question of fact in each case dependent upon the circumstances of the towage. Thus, if the tow is unmanned, the tug and tow will often be one navigational unit in practice and treated as such under the Regulations. In such a case, the tug will for many purposes not be mistress of her own movements and will be severely limited in her power and ability to stop or to reduce the tow's speed or to make sudden changes in the course of which either of them follow through the water. In *The Lord Bangor* [1898] P 28, a barque was in tow of a tug in St. George's Channel. A steamship crossed and the tug and tow heard her whistle signals (as the steamship heard their signals). It was held that the tug and tow could not have stopped or gone slower than they did and were not to blame for the ensuing collision. Sir Francis Jeune P summarised the findings of the Trinity Masters sitting as assessors as follows (at p. 33):

> Now, no one can doubt that the case of *The Knarwater* shews that many of the ordinary obligations of a steamer are shared by a tug and her tow, because to a great extent the tow and tug together partake of the nature of a steamer. They are bound in many cases by the same rules, and there are a great many things which a steamer ought to do which a tow and tug can and ought to do. Is that true in this particular case? Assume that the obligation on a steamer was to stop, is there anything in the nature of things in the case of a tow and tug which makes a modification of that rule essential? On this point I have consulted the Trinity Masters, and they tell me that they think there is. Of course a tug can do a good many things with her tow in the way of stopping and altering her course. If she is approaching another vessel she can tow ahead or astern, or a variety of things of that kind, but where it is a matter of stopping, apart from the question of casting off, is it practicable for a tug and tow to reduce themselves to a condition of absolute standstill? The Trinity Masters tell me that in their judgment it is not, and

> one can see that that is the commonsense of the matter. If a tug absolutely stops what happens? The weight of the wire rope will draw the tow up to the tug, and if it be a screw there will be risk of fouling the propeller. Then it becomes necessary for the tug to go ahead a little bit, and she must draw the tow after her, and so you cannot obtain a position of absolute standstill. In this case was the movement of the tug and tow more than was necessary, they being a tug and tow? The facts appear clear that it was about as slow as it possibly could be.

11.37 Compare *The Challenge and Duc d'Aumale* [1905] P 198 in which, on similar facts, it was found that the tug could have stopped and taken way off the tow and that she was to blame for the collision. If, on the other hand, the tow is well able to respond herself and can shape her own course, then the factual classification of both as one vessel may be less appropriate. Similarly, the sea-room available to the towage convoy may well bear on whether they are to be treated as one or two vessels: on the open sea, it may be convenient and practical to treat them as one (large) navigational unit; this may be unrealistic in the narrow confines of a harbour or channel.

11.38 Even when treated as "one long steamer" for the purposes of the Collision Regulations, tug and tow will often be treated as a special sort of steamer to which particular considerations apply. In *The Arthur Gordon* (1861) Lush 270, the Privy Council qualified the position of tug and tow as a single navigational unit by stating that in the ordinary course it was nevertheless inappropriate to treat the unit as if a free vessel under way; a third vessel owed a duty to have regard to her special features and to keep out of the way of tug and tow. Similarly in *The La Plata* (1857) Swa 220, Dr Lushington held that in applying the starboard hand rule in a narrow channel, while tug and tow were to be treated as if one vessel, some latitude was appropriate and the rule should be applied more flexibly than in the case of a single free vessel navigating alone. See also *The Kingston-By-Sea* (1850) 3 W Rob 155.

11.39 The "one long steamer" (or, perhaps, a modern variant of it, viz. "the one long streamer") approach was applied, as seen above, in *The Western Neptune and The St Louis Express* [2010] 1 Lloyd's Rep 158 (a case involving the towage of an array of seismic streamers).

PART C. COLLISION BETWEEN TUG AND TOW

The relevance of the contract

11.40 In almost all modern cases of collision between tug and tow, the position is covered by the express provisions of the contract. Section 187(5) of the Merchant Shipping Act 1995 (replacing section 1(1)(c) of the Maritime Conventions Act 1911) expressly preserves the right of parties to contract out of the regime for the apportionment of liability laid down by the Act. Various possible solutions, usually at the expense of the tow, are adopted by the standard forms of contract as have been seen above. The most common are:

i a provision which deems the crew of the tug to be the servants of the tow with the result that no claim based on the negligence of such crew can be brought by the tow, since, as between tug and tow, the tow is their employer, not the tug;

ii a provision which renders the tow liable to indemnify the tug for all damage sustained by the tug, however caused and whether or not by the tug's own negligence; this is often coupled with a provision by which the tow agrees to hold the tug harmless in respect of loss or damage sustained by the tow or for any liabilities which the tug may incur in respect of the same; and

iii under the more balanced regime adopted in the BIMCO standard forms of contract, the tug or tow each agree alone to bear the risk of loss and damage to their respective vessels even if caused by the other and to indemnify each other in respect of any liabilities which each may incur in respect of loss or damage to the other's property.

Where the contract is silent

11.41 Where the contract is silent and where the collision is due to negligent navigation rather than to some separate and distinct breach of contract (such as an unseaworthy tug or one with defective towing gear), then in the event that the tug is alone at fault, it will be liable and, in the event that tug and tow are both to blame, then the ordinary rules of apportionment and of cross-actions or counterclaims will apply. See Part D below, where these rules are considered in relation to collision with their vessels.

PART D. COLLISIONS DURING THE TOWAGE WHICH INVOLVE A THIRD VESSEL

The irrelevance of the contract

11.42 As has been seen above, when considering the respective liabilities of tug and tow in the case of a collision involving a third vessel, while any contractual provisions such as those just considered above which render the tow (or the tug) responsible or liable for the acts of tug (or tow) in respect of negligent navigation are binding as between tug and tow, they are of no effect between tug and tow and the third vessel. The third vessel is entitled (and obliged) to identify, first, the actual wrongdoer whose acts or omissions caused the collision and, secondly, the person who in law is responsible for that person's acts. As the court remarked in *The MSC Panther and The Ericbank* [1957] 1 Lloyd's Rep 57 at pp. 63–64:

> In all the circumstances I agree with counsel for the plaintiffs that it is necessary to decide, first, whether anyone was to blame, and, if so, who, for the fact that the *Trishna* and the *MSC Panther* came into contact, and secondly, whether the failure to stop the propeller of the *MSC Panther* was blameworthy and, if so, to whom the blame is to be imputed. It clearly required the combination of contact between the vessels with the fact of the propeller being in motion to bring about the major part of the damage.

11.43 This results from the straightforward application of the rule of privity of contract while the towage contract regulates the mutual rights and responsibilities of tug and tow, as regards a third party the contract is irrelevant as a *res inter alios acta*. An example of this principle can be seen in *The Socrates and The Champion* [1923] P 76. In that case, a vessel sued the owners of a tow and its tug for collision damage resulting from the tug's negligence. Hill J held that it was not open to the tug to contend that, by reason of the fact that the crew of the tug were contractually obliged to, and did, obey the commands of the tow, it bore no responsibility and that it was not itself negligent:

> The tug was co-operating in an operation which was negligent as regards the [casualty] or any other ships in the river. The master [of the tug] was the servant of the owners [of the tug]. He was, it is true, under a contractual obligation to obey the orders received from the [tow]. He may have been under a legal obligation to obey the orders of the pilot of the [tow] if, as I suppose, pilotage was compulsory . . . If he co-operates in an operation which is negligent as regards the rest of the world, is it any answer to say "I did it because I had voluntarily put myself under the orders of another person"? I think not. *Qua* the [casualty], the [tug] cannot be regarded as an innocent ship.

The doctrine of control

11.44 The factual question as to the identity of the individual person or persons who are at fault in navigation is often straightforward, but it leaves unanswered the question of which of tug and tow is to be regarded as responsible for their actions *vis-à-vis* a third party involved in the collision.

11.45 This question is usually answered by identifying which of tug and tow was in control of the navigation of the towage convoy at the relevant time. The question of control arises between tug

and tow and is often to be answered by a consideration of the practical consequences of the contract. Even though the contract cannot of itself bind the third party, the factual state of affairs as to navigation of the towage convoy which results from it will often be an important factor in the assessment to be carried out by the third party as to which of tug and tow was in control at the time of the collision.

The old law

11.46 The cases before the turn of the nineteenth century adopted a fairly absolute presumption that the tug was the servant of the tow in all cases. In *The Ticonderoga* (1857) Swa 215, Dr Lushington dealt with the position of a vessel which, pursuant to the terms of a governing charterparty, was bound to engage the services of a tug. In the course of the towing operation the vessel came into contact with and damaged a third vessel by reason of fault on the part of the towing vessel. Dr Lushington set out a broad statement of principle:

> In cases of one vessel coming into collision with another, and the vessel proceeded against having been in charge of a steamer, there can be no doubt whatever that the vessel which has the steamer in her employ is responsible both for her own acts and those of the steamer.

11.47 Similarly, in *The Sinquasi* (1880) 5 PD 241, a tug, which was officially in the charge of the tow, improperly and without warning or approval altered course. The sudden alteration brought the tow into collision with a pier head at the opening to the Regent's Canal Basin. Sir Robert Phillimore, in line with the decision in *The Ticonderoga*, held that the tow was liable for the damage to the pier, stating at p. 244: "The tug was the servant of the *Sinquasi* and the *Sinquasi* is responsible for what the tug did."

11.48 Doubts as to the validity of this approach came to be expressed from about 1885. In *The Stormcock* (1885) 5 Asp MLC 470, in which a tug towing at night collided with a third vessel, Sir James Hannen P, who found that the tow was in no respect negligent, notwithstanding that both counsel admitted that the tow was liable for the actions of the tug, commented in relation to the "presumption":

> I confess I have been somewhat astonished to find to what extent that principle has been carried by my learned predecessors. But for those decisions, apparently based, according to Dr Lushington, on considerations of expediency, that there should not be divided command, I myself should have been inclined to think that the decisions of the American courts establish a rule more in conformity with my own ideas of justice; that is, that the particular circumstances should be looked at in each case to see whether the tug or the tow, or both, are liable.

11.49 Despite this obvious inclination toward what is now the prevailing approach to the doctrine of control, the President abided by the earlier decisions of Dr Lushington. However, further progress was made in his decision in *The Niobe* (1888) 13 PD 55, which concerned a tug which, while towing, collided with a third vessel which proceeded to sue the tow. The tug admitted liability, but both tug and tow were held to be liable, the tow on the basis that it had failed to keep a good look-out and had failed to check the speed of the tug. Sir James Hannen P stated that:

> I agree that in a towage at sea with a long scope it is more difficult for the tow to communicate with the tug, and if it had been shown that the *Flying Serpent* (the tug), by some sudden manoeuvre which those on board the *Niobe* (the tow) could not control, had brought about the collision, I should have held the *Niobe* blameless.

11.50 This general implied acknowledgement that a tow is not always liable for the acts of its tug also gained the approval of the Court of Appeal in *The Morgengry and Blackcock* [1900] P 1, where at p. 10, it was observed by A. L. Smith LJ: "a tow is not always responsible for the acts of its tug, though in many cases it is." Further recognition came with the decision of Sir Francis Jeune P in *The Devonian* [1901] P 221 where, at p. 229, the emphasis upon the circumstances of

the case in contrast with a supposed intendment of liability was expressed as the question: "Were the two (the tug and tow) in such a position towards one another that the control of the tow over the tug was practicable and possible?" while Lord Alverstone CJ observed at p. 237:

> Speaking for myself, I think that if two vessels are so attached, and are under such management and control that they move practically as one vessel, the tow is responsible for the action of the tug.

The test in The Devonshire

11.51 This principle of fixing the tow with responsibility for the fault of the tug regardless of which vessel actually had control of the navigation of the convoy was overruled by the decision of the House of Lords in *SS Devonshire (Owners) v The Barge Leslie (Owners)* [1912] AC 634, which held that the tow will not be held liable for the acts and omissions of her tug unless those on board and in charge of the tug, who were responsible for the wrongful acts, were actually acting under the control of the tow. This is not a question of law, as once it was considered, but an issue of fact, to be determined in each case according to its own circumstances: see *per* Lord Ashbourne at p. 648 and Lord Atkinson at p. 656 (and note also Lord Atkinson's reference at p. 655 to the question of which vessel possessed the "governing power").

11.52 While the pre-*Devonshire* cases must now be treated with caution, often the factual circumstances considered in those cases and the result arrived at offer useful guidance in identifying where control for the navigation lies. Examples of these cases are referred to in Chapter 2.

11.53 A recent useful example of the principles set out above is given by the Canadian decision in *Greig Shipping A/S v The Owners of the Dubai Fortune* (2012) FC 1110 (Federal Court). The *Dubai Fortune* was berthing in Vancouver with assistance from a number of tugs, including the tug *Tiger Shark 2*. That tug during her manoeuvring struck the propeller of a vessel lying in berth, the *Star Hansa*. The owners of that vessel sued the *Dubai Fortune* on the basis of its vicarious liability for the acts of the *Tiger Shark 2*, being the tow which had engaged that tug to assist her. The court rejected the claim on the basis that there had been no relevant relationship of "control" either for the purposes of general principles of vicarious liability (as stated by the House of Lords in *Mersey Docks & Harbour Board v Coggins & Griffiths (Liverpool) Ltd* [1947] AC 1) or for those of "control" of the towage operation (as dealt with in the *S.S. Devonshire v The Barge Leslie* and as restated in similar terms in the Federal Court decision of *Hamilton Marine v Engineering Ltd v CSL Group Inc* [1995] FCJ 739)).

11.54 Lemieux J summarised the principle at para. 49 as follows:

> [. . .] the question of which vessel is in the control is a question of fact to be determined in every case [. . .] the focus of the enquiry is on the relevant negligent act in question, who was entitled to give orders to prevent the negligent act causative of the injury, ie control the act; the way in which the act involving the negligence was done.

The court held that in terms of the negligent act, this was one solely on the part of the *Tiger Shark 2*, "cutting a corner." In terms of control, at para. 50, after a detailed review of the evidence, the judge stated:

> The pilots [on the *Dubai Fortune*] did not give the tug masters engaged in the berthing anything but general orders to the assist tugs and none to the line tug, the *Shark*. The pilots conceded that they do not control how a tug master manoeuvres or drives [sic] his tug; it is within the prerogative of the tug masters to implement the pilots' general orders. The evidence is overwhelming the control test is not made out by the Plaintiff.

"Control" not necessarily decisive

11.55 The mere fact of the tug or the tow having control over the navigation will not of itself be necessarily decisive of liability for the collision. No vessel is a passive spectator. Each vessel

remains always under an obligation to exercise reasonable care in and about her navigation simply as a matter of self-help and of a duty owed to others (see Buckley LJ's dictum in *The Devonshire* [1912] P 21, cited above (see Chapter 2 above). Thus. if a tug is in control of the navigation of a dumb barge manned by a lighterman and she proceeds too fast, causing the barge to bear down on another vessel, the barge may be solely at fault, irrespective of the question of control, if the collision could have been avoided by merely slipping the tow-line in good time. Similarly, where a tug is under the orders of the tow which is directing navigation and has control of the same, the tug will still be solely to blame if she negligently manoeuvres in executing an otherwise proper order given to her by the tow. The tug may also be liable if the order given by the tow is one which, if the tug had exercised its own seamanlike appreciation of the position, was patently negligent and should not have been followed, but which the tug nevertheless heedlessly obeys.

Liabilities between tug, tow and third party vessel

Third party vessel not to blame

11.56 Where a collision occurs between tug and/or tow and a third party vessel and the third party vessel is innocent of blame, the possible liabilities of tug and tow, depending on the allocation of fault and the incidence of control (and assuming them to be in separate and not common ownership), can be summarised as follows:

i Where a tow collides with a third vessel and is solely to blame, the tow will be solely liable.

ii Where a tug, with a vessel in tow, collides with a third vessel and is solely to blame, the tug will be solely liable.

iii Where a tug and tow are in collision with an innocent third vessel by reason of fault on the part of the tow:

  a the tow owners will be liable; and
  b the tug owners may also be liable if the collision resulted, even in part, from an error on the part of the tug in directing the course of the tug or, in the case of the example referred to above, the tug being negligent in its navigation by its obedience to the unseamanlike orders of the tow.

iv Where a tow collides with a third vessel by reason only of the fault of the tug:

  a the tug owners will be liable; and
  b the tow owners may be liable also if it is demonstrated that, in all the circumstances, the tow retained control of the navigation of both tug and tow (see eg *The Umona* [1914] P 141).

v Where a tug and/or its tow collide with a third vessel and both tug and tow are to blame, both will be jointly and severally liable.

Third party vessel also to blame

11.57 Where a tug and/or tow collide with a third vessel which is also to blame, liability between the vessels will be apportioned according to the relative gravity of their respective faults pursuant to section 187 of the Merchant Shipping Act 1995 (replacing section 1 of the Maritime Conventions Act 1911) in the ordinary way. This provides in so far as material:

> 187(1) Where, by the fault of two or more ships, damage or loss is caused to one or more of those ships, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each ship was in fault.

> (2) If, in any such case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.
>
> . . .
>
> (4) Nothing in this section shall operate so as to render any ship liable for any loss or damage to which the fault of the ship has not contributed.

11.58 The rule now contained within section 187 of the 1995 Act has been held to apply in circumstances where, notwithstanding its wording, the vessels at fault were not themselves in collision. This will often be very material in the case of a collision involving an innocent barge and a tug and third vessel both at fault. In *The Cairnbahn* [1914] P 25, a hopper barge collided with a steamship, the *Cairnbahn*, while being towed. The owners of the barge brought proceedings against the tug which towed them and the steamship. The steamship, at the same time, brought a counterclaim against the tug. On the facts, the steamship and the tug were held to be equally to blame for the collision. The steamship satisfied the entire claim of the barge and then sought to recover half of its payment from the wrongdoing tug, relying on section 1 of the Maritime Conventions Act 1911 (corresponding now to section 187 of the Merchant Shipping Act 1995). The owners of the tug contended that section 1 was not applicable because the actual vessels in collision in their case were not both wrongdoers. The Court of Appeal held that the Act was applicable. At pp. 32–33 Lord Sumner observed:

> Why does not s.1, sub-s.1, of the Maritime Conventions Act 1911 [ie see now section 187(1) of the Merchant Shipping Act 1995] apply to this case? Though damage may be caused to a vessel, loss cannot be, nor is the phrase "damage is caused to a vessel" apt to express simply that the vessel is damaged. Loss is caused to the owners and charterers of the vessel, and damage is caused to them too when the vessel is damaged. I think the section regulates rights and liabilities between parties in fault and extends to pecuniary prejudice, which may accrue, legally and not too remotely, to persons interested in vessels by reason of the faulty navigation of persons for whom they are responsible. The word "loss" is wide enough to include that form of pecuniary prejudice which consists in compensating third parties for wrong done to them by the fault of persons for whose misconduct the party prejudiced must answer. It covers the sum recovered by the owners of the hopper against the owners of the *Cairnbahn*. To say that damage to the hopper is not loss to the *Cairnbahn* so as to be loss or damage caused to one or more of "those vessels", namely, those vessels which are at fault, is to make this remedial legislation unexpectedly onesided. Is the jurisdiction to apportion the consequences between the vessels in fault to stop short at the consequences to the vessel and not to extend to the consequences to the owners? I cannot doubt that where the jurisdiction to apportion such consequences applies it is meant to apply widely.

At p. 38, Warrington J put the matter more shortly:

> I am, therefore, of opinion that, according to the true construction of the Act, all damage or loss to one or more of the vessels in fault is to be apportioned between those vessels, whether it arises from collision between them or not.

11.59 The section will also apply to a claim by a tow against her tug for loss or damage which the tow has suffered by reason of the joint negligence of both tug and tow, for both of these are wrongdoing vessels within the ambit of the provision (see *The Francis Batey* (1921) 8 Ll L Rep 247).

The effect of common ownership of tug and tow

11.60 The analysis of the position above may be complicated where the tug and tow are in common ownership, and therefore irrespective of questions of navigational control of tug over tow or vice versa, the seagoing entity formed of tug and tow is indeed "one long steamer" (to borrow the expression used in *The Cleadon* (1860) 14 Moo PC 97, as summarised by Dr Lushington in his report of the decision at (1860) Lush 158) in single ownership where one owner is responsible for the negligence of the navigation of tug and tow as constituent parts of one operation. In such a case, it is artificial to consider the tow as one vessel and the tug as another: the

person liable *in personam* for the collision between, for example, a dumb barge which is innocent in navigational terms, in the sense that it obeyed whatever course and impulsion was imparted to it by those on the tug, and a third party vessel is the same person who owns both vessels and who is the employer of and vicariously liable for the negligence of the crew on the tug (and of any crew present on the barge).

11.61 It is necessary to distinguish the question of liability *in rem* and *in personam*. An action *in personam* will of course lie against the common owner and the claimant can rely upon the negligence of the tug and those on board her as founding its cause of action, regardless of control issues and regardless of the fact that the tow was in strict navigational terms passive and innocent. An action *in rem* will however only lie against the vessel at fault (leaving aside sister-ship arrest issues). While a claim *in rem* could be made against the tug as such a vessel by reason of her direction of the towage, can a claim also be made against the tow where on view she was not at fault? It is suggested that such a claim will lie against the "innocent" tow in reliance upon the negligence of those on board the tug as persons for whom the owner of the tow (as owner of the tug) is liable.

11.62 The position was considered in *The Ran; The Graygarth* [1922] P 80 (discussed in further detail below in the context of limitation of liability and the issue of the aggregation of tug and tow). There, a tug (*Graygarth*) towed a flotilla of barges. One barge, the *Ran*, was owned by the tug owner. The tug negligently navigated the barge which collided with a third vessel. That vessel brought an action *in rem* against the *Ran* alleging "wrongful navigation of the *Ran* by the servants of the defendants" (ie those on board the tug). The Court of Appeal held that the allegation was made out and that, accordingly, the relevant vessel (ie "the ship" which improperly navigated) was the *Ran* and not the *Graygarth*. As Lord Sterndale MR in an important passage put the matter at pp. 86–87:

> The question of the liability of tug and tow always raises the issue as to whether the persons on the tug, where the tug is negligent, were the servants of the owners of the tow. Butt J. said in The Quickstep 15 P. D. 196, 199: "The real question is whether or not the relation of master and servant exists between the defendants, the owners of the vessel towed, and the persons in charge of the navigation of the steam tug," [. . .]. In the present case it is quite clear that those on board the tow were not participating in the navigation and that the navigation was controlled by the tug. What then is the position where the tug and tow belong to the same owners? In my opinion the tow is improperly navigated by the servants of the owners of the tow, although these servants may be upon the tug. It does not matter where they are. If they are the servants of the owners of the tow, and they are navigating the tow, the owners of the tow are liable for the negligence of the tow, and that is the vessel they are improperly navigating. The tug may be improperly navigated, but that does not prevent the tow being also improperly navigated. [. . .] It seems to me that it obviously must be so. If you have got a vessel in tow, and she is improperly navigated by your servants who are in control of the navigation, it does not matter where they are, you are responsible for their improper navigation. I should have thought that was quite clear on principle, and I think it is clear on authority. I think it is shown by *The Devonshire* in the House of Lords and by what I have read from *The Quickstep*.

To similar effect, Atkin LJ (with whom Younger LJ appears to have agreed) stated at p. 90:

> There may be nobody on the tow to direct her, but the tug is provided by the owners of the tow under such circumstances that the crew of the tug are in fact the servants of the owners of the tow. Under those circumstances it appears to follow logically and necessarily that the improper navigation, which, *ex hypothesi*, is that of those on board the tug who are improperly navigating the tow, is the improper navigation of the servants of the owners of the tow for which the owners of the tow are responsible. That seems to me to establish the liability.

11.63 As Lord Sterndale MR also explained, the owners could equally have been liable *qua* owners of the *Graygarth* for the negligent navigation by the tug of the barge as *qua* owners of

the *Ran* for the negligence of the tow-owners' men on the tug. He continued (in the passage cited above from p. 86):

> the action having been brought against the owners of the *Ran*, they, as represented by their bail, could only be responsible if the *Ran* was improperly navigated and such improper navigation caused the collision. As owners of the *Graygarth* they might be liable also, but in the action in which they were sued as owners of the *Ran* they could only be responsible if the *Ran* was improperly navigated.

This passage was relied upon, in the different context of limitation of liability, as establishing the equal liability of the owners and of both vessels, tug and innocent tow in common ownership, in *The Harlow* [1922] P 175, *per* Sir Henry Duke P at p. 186.

> Similarly in *The Umona* [1914] P 141, Sir Samuel Evans P, in a fittingly terrestrial image building on Dr Lushington's maritime one of "one long steamer", put it in this way at 145: "The facts proved establish that the servants of the owners of the Ellen were to blame for the collision. That they navigated from the tug does not affect the liability of the owners of the tug and barge, any more than the liability on land would be affected if a driver of a steam traction engine drawing wagons belonging to the same owner negligently caused one of his wagons to come into collision with and injure a passer-by or a carriage."

11.64 It follows that for the purposes of the enquiry under section 187(1) of the Merchant Shipping Act 1995 ("Where, by the fault of two or more ships, damage or loss is caused to one or more of those ships"), where the tug and tow are in common ownership and the tug is at fault and where the tow is not (or vice versa), then the tow is a vessel at fault for the purposes of collision liability. She will have attributed to her, through the medium of the single ownership of both vessels, the fault of the tug in navigating the tow (or in the converse situation, where the tug is innocent but the tow controls the navigation and is at fault, the tug will have the fault of the tow attributed to it). In Lord Sterndale MR's words (at p. 86): "The question of the liability of tug and tow always raises the issue as to whether the persons on the tug [or tow] where the tug [or tow] is negligent were the servants of the owners of the tow [or tug].

11.65 The position is different where the third party vessel is in common ownership with the tug or the tow and where the tug or the tow is innocent. There the fault of the third party vessel (which is not in any sense controlling the navigation of either tug or tow) cannot be attributed to the innocent tug or tow. Its fault in navigation is personal to that vessel; the fact that its owners own another independently navigated vessel which is not at fault is irrelevant. Those conning the third party vessel do not remotely have the con of the tug or the tow whom they happen (negligently) to encounter in navigation. The all-important connection between the tug and the tow both by the nature of the operation and the commonality of ownership which underpins the dicta in *The Ran; The Graygarth* is absent. Further, in such a case, the claimant single owner can only allege fault on the part of its own employees on both of the offending vessels with the result that the person liable *in personam* is, in each case, itself.

CHAPTER 12

Towage and limitation of liability

PART A. LIMITING LIABILITY: GENERAL PRINCIPLES

Historical background

A question of policy

12.1 The right in English law of a shipowner to limit his liability to a fixed sum calculated by reference to the tonnage of his vessel in the event of loss or damage caused to others by his vessel or his crew, rather than by his personal fault or omission, is of considerable antiquity (the first statute of limitation of liability was in 1734, 7 Geo. 2, c. 15). The right is a creature of statute and, although it may appear to work injustice in certain cases, it is well-settled as a matter of public policy and is (arguably) defensible upon these grounds As Lord Denning MR summarised the position in *The Bramley Moore* [1964] P 200 at p. 220: "but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience."

12.2 A detailed consideration of the law relating to limitation of liability is outside the scope of this book. For a still valuable detailed account, including the historical background and comparative analysis with other jurisdictions, see Professor N. Gaskell (ed.), *Limitation of Shipowners' Liability: The New Law* (1986); for a compendious modern overview, see Griggs, Williams and Farr, *Limitation of Liability* (4th edn, 2004).

12.3 However, a consideration of the historical development of the statutory limitation of a shipowner's liability is necessary in order to put into context the decisions of the English courts on certain important limitation questions touching upon tug and tow.

The English approach

12.4 The English statutory approach to limitation of liability became gradually defined during the eighteenth and nineteenth centuries (see eg the Responsibility of Shipowners Act 1813 and the Merchant Shipping Act 1854). Certain features of that approach set it apart from corresponding developments in the law of the United States and of other ship-owning nations, such as the Scandinavian states. The features of the English approach were five-fold:

i The shipowner was entitled to limit his liability to a sum of money calculated by reference to a fixed sum multiplied by the tonnage of the offending vessel rather than upon the value of the ship after the casualty.

ii The claims in respect of which the shipowner could invoke limitation were confined, at first, to claims in respect of damage to property with, thereafter, a special limitation category for claims for death and personal injury.

iii The "fund" produced by the tonnage calculation was to be distributed between the claimants *pro rata* in proportion to the size of their claims one to another (cf. the approach in other jurisdictions which adopted a gradation of claimants on principles akin to those regulating priorities *in rem*).

iv The English approach restricted the application of limitation of liability to claims arising on any one distinct occasion rather than permitting its application to a simple aggregation of all claims which had accrued at the date of the casualty.

v The right to limit liability was lost in the event that the loss and damage or casualty resulted from personal fault on the part of the shipowner himself rather than from the negligence or default of his crew.

Section 503 of the Merchant Shipping Act 1894

12.5 These principles were reflected in the first of the modern statutes dealing with limitation of liability, the Merchant Shipping Act 1894 in its section 503. As originally enacted, section 503 provided for a system of limitation based on a fixed sum *per* ton of the vessel's tonnage, calculated in accordance with the Act. The right to limit granted to shipowners was lost in the event that the relevant "occurrence" took place "with their actual fault or privity.

12.6 The English law of limitation of liability remained that enacted in the 1894 Act. In 1924, the Comité Maritime International was prominent in the adoption and promotion of an International Convention on Limitation which allowed the shipowner the right to choose between limiting on the basis of a sum *per* ton (corresponding closely to the English system) and the value of the vessel and its freight. The United Kingdom did not accede to the Convention which remained, consequently, of limited effect, although it was adopted by several important ship-owning nations.

12.7 Following World War II, further progress was made at the international and conventional level. The 1957 Convention Relating to the Limitation of Liability of Owners of Sea-going Ships was the result. This Convention marked the international recognition and adoption of the English statutory approach set out in the 1894 Act, coupled with a much wider application of the right of limit to cover, in practice, all liabilities in respect of loss and damage occasioned by the shipowner's operation of a vessel. The close correspondence between the 1957 Convention and the English statutory system led to the amendment of the 1894 Act by the Merchant Shipping (Liability of Shipowners and Others) Act 1958 to implement the 1957 Convention.

12.8 The Merchant Shipping Acts 1979, 1981 and 1984 made further changes to the 1894 Act, principally to change the limitation figures to Special Drawing Right figures and to increase the limitation fund.

The Merchant Shipping Act 1979 (replaced by the Merchant Shipping Act 1995): the new regime

12.9 The limitation figures adopted by the Convention were little higher than those used in the nineteenth century UK statutes. The inadequacy and insufficiency of these rapidly became apparent in the 1960s. The growing awareness of oil pollution risks and the consequent adoption in 1969 of the Convention on Civil Liability for Oil Pollution Damage with a greatly increased limitation figure for oil pollution damage led the CMI to start work on the revision of the 1957 Convention.

12.10 The 1976 Convention which resulted made a radical change to the approach of the 1957 Convention. While liability was still to be limited by reference to a limitation figure or "fund" calculated on the basis of the defendant vessel's tonnage, that limit was greatly increased. (Although the increase did little more than to reflect what was, in 1976, the level of limit used in the 1924 Convention, scaled up for the change in money values.) In return for the increase in the level of the limitation fund, the Convention abandoned the test of "actual fault or privity" on the part of the owner seeking to limit liability as the test for conduct which removed the right to limit and replaced it with a much more exacting test from the point of view of the claimant seeking to break the limit. In the words of Article 4:

> A person shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

12.11 The change in the test for conduct barring limitation has resulted in a change in the burden of proof in the ordinary limitation action. Whereas, under the old 1894 and 1958 Merchant Shipping Acts, the burden was on the shipowner asserting his right to limit to establish that the casualty had occurred without his actual fault or privity, under the 1976 Convention the burden is on the claimant to establish intention or recklessness on the part of the shipowner under Article 4 (see eg *The Bowbelle* [1990] 1 Lloyd's Rep 532 (Sheen J)). In practice, in all but the rarest cases it will be extremely difficult for a claimant to discharge the burden, notwithstanding that under the Civil Procedure Rules he may seek discovery before deciding whether or not to contest the owner's limitation action.

12.12 The 1976 Convention was enacted by the Merchant Shipping Act 1979. That Act, in so far as material, has been repealed and replaced by the new codification statute, the Merchant Shipping Act 1995.

The framework of the 1976 Convention and the Merchant Shipping Act 1995

12.13 For present purposes, the relevant provisions of the 1976 Convention in addition to Article 4 may be noted.

i *Who can limit liability?* By Article 1 of the Convention, "shipowners and salvors" as defined in the Convention may limit liability. "Shipowner" means "the owners, charterer, manager and operator of a sea-going ship" and "salvor" means "any person rendering services in direct connection with salvage operators" (see Article 1(2) and (3)). The express inclusion of salvors as persons entitled to limit remedies the deficiency in the 1957 Convention identified in *The Tojo Maru* [1972] AC 242. As to the effect of the inclusion of "charterers", see *CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)* [2004] 1 Lloyd's Rep 460, *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35 and the consideration below under Part E.

ii *In respect of what claims can limitation be invoked?* Articles 2 and 3 define those claims for which limitation may and may not be invoked. Claims for salvage, general average and oil pollution damage are excluded (see Article 3(a) and (b)). In practice, claims arising out of towage will fall under Article 2(2)(a) as:

> Claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom.

iii *What is the limit?* Article 6 sets out the limitation figures in "Units of Account" defined in Article 8 as IMF Special Drawing Rights (SDRs). The limit is in respect of "liability for claims" (other than passenger claims) and is calculated by reference to the tonnage of the ship. Article 9 deals with the aggregation of claims and provides, by para. (1), that the limit of liability is to be applied "to the aggregate of all claims which arise on any distinct occasion.

iv *How does one limit?* Chapter III of the Convention (Articles 11–14) makes provision for the constitution and operation of the "Limitation Fund.

v *Can one contractually exclude the right to limit?* It has occasionally been suggested that the right to limit is one which cannot be contractually given up. This is of potential importance in the operation of indemnity provisions such as those found in the BIMCO mutual indemnification or knock-for-knock provisions such as clause 18 of "Towcon 2008" or clause 14 of "Supplytime 2017." The suggestion was roundly dismissed by

the Privy Council in *Bahamas Oil Refining Company International Ltd v The Owners of the Cape Bari Tankschiffahrts GmbH & Co KG (The Cape Bari)* [2016] UKPC 20. The Board having identified the question as solely one of construction of the Convention (and any enabling legislation) as to whether or not it was permissible to contract out of the right to limit, held that "there is nothing in the Convention, and in particular in articles 2.1 and 2.2, which prohibits the right to contract out of the right to limit liability by means of contracts of indemnity or otherwise": para. 26. Further it may be noted that in the *travaux préparatoires*, the common view was recorded (before an attempt by Liberia to introduce a non-contracting out provision) that "It goes without saying that limitation is barred if the contract implies a waiver of the right of limitation": see the IMO's collected *travaux* for the 1976 Convention, at Article 2(2) (available for download online).

Special questions arising in relation to tug and tow

12.14 In the field of towage, limitation of liability raises four particular questions:

i Can limitation be invoked at all in respect of the tug and tow – ie is the tug and is the tow a "sea-going ship" within Article 1(2)?
ii Assuming both tug and tow to be ships for the purposes of the Convention, are they to be treated as one ship for the purposes of limitation, so that their tonnages are aggregated to make a bigger fund?
iii How is the test of "any distinct occasion" to be operated in respect of tug and tow and damage occurring at various stages during the towage service?
iv Can limitation be invoked in respect of claims by tug against tow or by tow against tug?

PART B. APPLICATION OF THE LIMITATION CONVENTION TO "SHIPS"

The relevant wording of the 1976 Convention

12.15 Under Article 1(1) of the 1976 Convention, shipowners (and salvors) as defined in the Convention may limit their liability in accordance with the rules set out in it. A "shipowner" is defined by Article 1(2) as meaning "the owner, charterer, manager or operator of a sea-going ship." Under Article 2 of the Convention, which defines those claims in respect of which a person is entitled to invoke limitation, such claims are defined as being claims "in respect of loss of life or personal injury or loss of or damage to property", which loss of life, injury or other loss or damage occurs "on board or in direct connection with the ship.

12.16 Accordingly, the person entitled to invoke the limit must be a "shipowner" and, in most cases, the claim in respect of which the limit is invoked must be a claim arising out of the operation and/or arising in connection with "the ship." The Convention gives no definition of "ship" other than that it is to be "sea-going."

The position in English law

12.17 The Merchant Shipping Act 1995 (and its predecessor, the Merchant Shipping Act 1979) in enacting the 1976 Convention extends and defines its application to "shipowners."

a Pursuant to para. 2 of Part II of Sched. 7 to the Merchant Shipping Act 1995, which sets out special provisions having effect in connection with the Convention, "the right to limit liability" under the Convention is to apply "in relation to any ship whether sea-going or not and the definition of 'shipowner' in paragraph 2 of Article 1 shall be

construed accordingly." This extends the right to limit, for example, to small non-sea-going vessels, such as small river or harbour tugs.

b Paragraph 12 of Part II of Sched. 7 states that references to "ship" in the Convention are to "include" (the definition given is, accordingly, not comprehensive or definitive): "any structure (whether completed or not or in the course of completion) launched and intended for use in navigation as a ship or part of a ship.

This definition should be read together with those given in the Merchant Shipping Act of 1894 and in following Acts, in relation to which a considerable body of authority has grown up. This is referred to in greater detail in Chapter 13 below. While the definition directly addresses the question of incomplete newbuildings (cf. *The Andalusian* (1878) 3 PD 182, in which the court held that a newly launched vessel not yet fully fitted out and not yet registered while (probably) a "ship" was not one in a condition to be registered or flagged as such), the definition leaves unaffected decisions such as *The Gas Float Whitton* [1897] AC 337, which held that an unmanned gas float shaped like a ship but fixed in position as a navigational aid was not a ship. It is submitted that floating structures such as rigs or platforms as well as large objects that are capable of flotation and being waterborne (such as drydocks or caissons) will not be "ships" for the purposes of limitation under the 1976 Convention and the Merchant Shipping Act 1995. See further on the nature of objects under tow as "ships" for statutory purposes (eg admiralty jurisdiction, in Chapter 14 below).

PART C. THE AGGREGATION OF TUG AND TOW FOR THE PURPOSES OF THE LIMITATION FUND

The question of aggregation: the "flotilla issue"

12.18 A towage convoy or "flotilla" will usually consist of a small but powerful tug, or a combination of such tugs, and a much larger vessel under tow. Alternatively, there may be one such tug pulling (or pushing) a flotilla of barges or other objects (eg two vessels in tandem tow or more specialised convoys, for example convoys of tuna cages or arrays of seismic streamers (as to which see *The Western Neptune and The St Louis Express* [2010] 1 Lloyd's Rep 158, considered further below)). The tonnage of the tug(s), while often not negligible, will for the purposes of the limitation of liability usually tend to produce a very small limitation fund. This was especially so under the regime of the Merchant Shipping Acts in which the limitation figures had long been rendered nugatory by the erosion of inflation. While this erosion was intended to be addressed by the 1976 Convention, the position today is largely unchanged. The tonnage of the tow, where the tow is a large vessel, will often present a much more attractive tonnage to be applied in the calculation of the limitation fund than the tug.

12.19 The disparity between tug and tow in their respective potential limitation funds if approached separately has encouraged attempts to apply the same approach as has been seen in the context of the collision liabilities, namely, to treat tug and tow as "one long steamer" and to aggregate their respective tonnages for limitation purposes. The issue of whether or not a towage convoy is to be treated as one unit for limitation purposes is usually referred to in the books and cases as "the flotilla issue." The issue may be shortly stated: are the tonnages of tug and tow to be treated as one aggregate tonnage for limitation purposes and, if so, in what circumstances?

12.20 Compared with other jurisdictions, the resolution of this issue by the English courts has proved pragmatic and straightforward. Nevertheless, since the court has often professed itself to be reaching the result it does by reference to the language of the limitation statute and since there is no modern English authority on the position under the 1976 Convention and the Merchant Shipping Act 1995 or its predecessor, the Merchant Shipping Act 1979, it is necessary to have in mind the sequence of the authorities and the different statutory provisions being considered.

A helpful composition of the various incarnations of section 503 of the 1894 Act can be found in Gaskell (ed.), *Limitation of Shipowners' Liability: The New Law* (1986), pp. 333–341.

The cases before the Merchant Shipping Act 1958

The wording of the 1894 Act

12.21 Taking the case of damage done by a ship to another as an example, section 503(1) of the Merchant Shipping Act 1894 provided, in so far as material, as follows:

"The owners of a ship . . . shall not, where all or any of the following occurrences take place without their actual fault or privity (that is to say,)

. . .

(d) Where any loss or damage is caused to any other vessel . . . by reason of the improper navigation of the ship; be liable to damages beyond the following amounts (that is to say,)

. . .

(ii) In respect of loss of or damage to vessels . . . an aggregate amount . . . for each ton of their ship's tonnage."

12.22 The wording of the section plainly sought to achieve the result that an owner of a ship which had caused loss or damage to another by her improper navigation was entitled to limit his liability by reference to the tonnage of that ship.

The cases

12.23 The question of aggregation specifically arose in two cases.

12.24 However, it is first necessary to consider the decision in *The Ran; The Graygarth* [1922] P 80 which has given rise to much debate. In that case, a tug (*Graygarth*) towed a flotilla of barges. One barge, the *Ran*, was owned by the tug owner. The tug negligently navigated the barge which collided with a third vessel. That vessel brought an action *in rem* against the *Ran* alleging "wrongful navigation of the *Ran* by the servants of the defendants" (ie those on board the tug). The Court of Appeal held that the allegation was made out and that, accordingly, the relevant vessel (ie "the ship" which improperly navigated) was the *Ran* and not the *Graygarth*. Atkin LJ (with whom Younger LJ appears to have agreed) dealt with the case simply as one of whether negligence in towing could be attributed to the tow as a question of the operation of the doctrine of "control." As he put it at p. 20:

> there may be circumstances in which the tow, whether or not she has got persons on board her, is being navigated by the tug, and under those circumstances if she is navigated so as negligently to damage another vessel, then it seems to me that it is the tow that is being improperly navigated, and the only question then arising is whether the defendants, the owners of the tow, are responsible for that improper navigation. That will depend on whether or not those on board the tug are or are not the servants of the owners of the tow to navigate the tow, and they may be so because they are in the ordinary position in which there are a skilled crew on the tow and the tug has to obey their orders. But the facts may be otherwise. There may be nobody on the tow to direct her, but the tug is provided by the owners of the tow under such circumstances that the crew of the tug are in fact the servants of the owners of the tow. Under those circumstances it appears to follow logically and necessarily that the improper navigation, which, *ex hypothesi*, is that of those on board the tug who are improperly navigating the tow, is the improper navigation of the servants of the owners of the tow for which the owners of the tow are responsible. That seems to me to establish the liability.

Lord Sterndale MR put it similarly at p. 86:

> The question of the liability of tug and tow always raises the issue as to whether the persons on the tug where the tug is negligent were the servants of the owners of the tow.

12.25 Having reached a decision on "control" and on the liability of the *tow* (which may or may not have been sound on the facts), the decision of the Court of Appeal that limitation was therefore to be

calculated by reference to the tow's and not the tug's towage was unexceptional. As the tow was found to be the vessel liable and as the action lay against the tow, the tow was the vessel whose tonnage was to be used for limitation. Despite the complications that arose in relation to this decision in *The Bramley Moore* [1964] P 200 (see below), it is submitted that this case is more a "control" case than one which assists on the question of aggregation (see also Bucknill, *Tug and Tow* (2nd edn, 1927), p. 81).

12.26 This interpretation of the decision was adopted by Sir Henry Duke P in *The Harlow* [1922] P 175, the first true aggregation case. A tug, *Harlow*, towed five dumb barges; tug and tow were all owned by the same person. A vessel was struck by the tug and one of the barges, the *Silver*; another barge, the *Sokoto*, was lashed to the colliding barge and by her weight and momentum contributed to the damage. It was found as a fact that all the vessels had been negligent in navigation (they had been on the wrong side of the channel) but that only the *Harlow, Silver* and *Sokoto* were held to have caused (or in the case of the *Sokoto* to have contributed to) the damage done. The owners of the flotilla relied on *The Ran* to justify limitation by reference to the tonnage of the barge *Silver* only. They did so on the basis of a common ownership argument. The President rejected this view of *The Ran* and relied upon the following words of Lord Sterndale in that case (p. 186):

> The Master of the Rolls, it will be seen, said this, "the action having been brought against the owners of the *Ran*, they, as represented by their bail, could only be responsible if the *Ran* was improperly navigated and such improper navigation caused the collision. As owners of the *Graygarth* they might be liable also, but in the action in which they were sued as owners of the *Ran* they could only be responsible if the *Ran* was improperly navigated." The *Ran* was found to have been improperly navigated, and judgment went against her owners accordingly. To say that this decision proceeded upon a rule that the vessel in collision can alone be involved in liability is directly contrary to the statement of the Master of the Rolls with regard to the owners, that "as owners of the *Graygarth* they might be liable also."

12.27 The court held that limitation was to be calculated by reference to the aggregate tonnage of those units of the flotilla which were at fault and which had played a part in the damage: the *Harlow* and the two barges, *Silver* and *Sokoto*.

12.28 See also the second true aggregation case, *The Freden* (1950) 83 Ll L Rep 427, in which *The Harlow* was applied (tug and three barges in common ownership all negligently navigated; one barge collided with a vessel; it was held that the tonnage of the tug and of that barge were to be taken but not the tonnage of the other barges which did not cause or contribute to the damage). Compare *The Rhône v Peter AB Widener* [1993] 1 Lloyd's Rep 600 (Canadian Supreme Court).

12.29 It will be seen that the critical questions for the court, which apply whether or not tug and tow are in common ownership, were:

i Which vessel or vessels was or were at fault?
ii Which of those vessels at fault caused or contributed to the damage?

The cases following the Merchant Shipping Act 1958

The wording of the 1894 Act, as amended by the 1958 Act

12.30 Section 503(1) of the Merchant Shipping Act 1894 was amended by the Merchant Shipping Act (Liability of Shipowners and Others) Act 1958. For present purposes, the only material change was in para. (d), which was amended to define an occurrence in respect of which limitation could be inserted:

> Where any loss or damage is caused to any property . . . through the act or omission of any person (whether on board the ship or not) in the navigation or management of the ship.

This replaced the 1894 wording of loss or damage caused "by reason of the improper navigation of the ship."

The decision in The Bramley Moore *(1964)*

12.31 This slight change in the wording effected by the 1958 Act was heavily relied upon by the Court of Appeal in *Alexandra Towing v Millet (Owners) and Egret (Owners), The Bramley Moore* [1964] P 200. A tug, *The Bramley Moore*, had two barges (*Millet* and *Buckwheat*), owned by third parties, in tow on the River Mersey. One of the barges, *Millet*, collided with another vessel, the *Egret*, and sank. The *Millet* sued the *Egret* and *The Bramley Moore* and, both of these vessels being held to blame, judgment was given in the barge's favour against the tug and in favour of the *Egret* on her counterclaim against the tug. *The Bramley Moore* commenced a limitation action against the barge *Millet* and the *Egret* and contended that her limit of liability should be calculated by reference to the tonnage of the tug alone. Cairns J upheld that claim and rejected the argument that the tug's limitation was to be assessed by reference to the aggregate tonnage of the tug and the two barges even though the barges were separately owned. The Court of Appeal upheld that decision.

12.32 Lord Denning MR, giving the judgment of the Court of Appeal, considered what the law was prior to the 1958 Act. He summarised the applicable principles as they appeared to be, absent the decision in *The Ran; The Graygarth* [1922] P 80, as follows at p. 217:

> But the section requires you also to look at the cause of the damage. That is clear from the words "by reason of." And in a case where those on the tug are negligent, and those on the barge are not, the cause of the damage is in truth the improper navigation of the tug, not the improper navigation of the barge. It is the tug which is the cause of all the trouble. That is, at any rate, the way in which these cases have been regarded in the past. Take first the case of tug and tow where those on board the tug are negligent and those on the tow are not, and the negligence of those on the tug causes the tow to come into collision with another vessel. Tug and tow belong to different owners. No one has ever suggested that the owners of the tug cannot limit their liability at all. On the contrary, it has been generally assumed that liability is limited to the tonnage of the tug: see *The Vigilant* and *The Ant*. This must be on the assumption that the damage is "by reason of the improper navigation of" the tug, but not "by reason of the improper navigation of" the tow. Take next the cases where those on the tug are negligent and also those on the tow, and their combined negligence causes the tow to come into collision with another vessel. In such cases, the owners of the tug can limit their liability according to the tonnage of the tug and the owners of the tow can limit their liability according to the tonnage of the tow. When the damaged vessel makes claims against both, the limit is the combined limit. If both tug and tow are in the same ownership, the limit is found by taking the aggregate tonnage of those vessels whose negligence caused the collision: see *The Harlow*. No one has ever suggested in any such case that the owners of the tug cannot limit their liability at all.

12.33 He then dealt with the troublesome decision in *The Ran*. At first instance, Cairns J, at [1964] P 205, had analysed this case as being a decision that where an action had been commenced *in rem* against *the tow* for negligent navigation, and where the negligent navigation, being the navigation of the tow by the tug, was attributable to the tow, then the tug (as the person liable *in personam* for the acts of the tow) could limit by reference to the tonnage of the offending vessel, that is, the tow. Notwithstanding the rather strained nature of the exercise performed by the Court of Appeal in *The Ran*, it is submitted (see above) that this analysis is formally correct. Perhaps in reaction to the forceful argument based on *The Ran* advanced before the Court of Appeal by Henry Brandon QC (as he then was) in support of the argument for aggregating tonnage of tug and tow, the Court of Appeal chose a different route: to explain *The Ran* as a "special case" on common ownership of tug and tow. As Lord Denning MR put it at p. 218:

> Viewing the cases as they stood before 1958, I think that the general rule in these tug and tow cases was that the owners of the tug could limit their liability by reference to the tonnage of the tug, but that, in cases where tug and tow were in the same ownership, there was a special exception, based on no logical ground, whereby the limit was to be found by taking the tonnage of the tow.

12.34 This ignored the fact that no aggregation was performed by the Court of Appeal in *The Ran*. Oddly, Lord Denning isolated the relevant features of the decision in *The Ran*, but, in

reaching his conclusion on the pre-1958 law, did not base his analysis of what exactly *The Ran* had decided upon them. As he put it (p. 218):

> The decision seems to have depended on two factors: (i) the fact that tug and barge were both in the same ownership; (ii) the fact that the action by the owners of the damaged vessel was an action *in rem* against the owners of the barge. I cannot myself see the relevance of either of those factors.

12.35 The Court of Appeal then distinguished *The Ran* on the basis that the decision was no longer applicable given the different wording of the 1958 Act:

> Since the Act of 1958, Mr Brandon's argument cannot hold water. The logical difficulty [ie the decision in *The Ran* as interpreted by the Court of Appeal] has been dispelled. Section 503 has been amended by the Act of 1958.

12.36 The Court of Appeal then stated the position under the amended section 503 (it is submitted, considerably overstating the importance of *The Ran*):

> Let me apply this to a tug and tow case such as we have been considering. If those on board the tug are negligent and those on board the tow are not, and the tow comes into collision with another vessel, then clearly the damage is caused through an "act or omission of any person on board the tug." If you insert the appropriate words into the section as now amended, it reads in this way: "The owners of a tug shall not, where damage 'is caused through any act or omission of any person on board' the tug, be liable in damages" beyond an amount calculated on the tonnage of the tug. So read, it seems clearly to cover the case where those on the tug are negligent and those on the tow are not. It shows that the owners of the tug can limit their liability according to the tonnage of the tug.
>
> The amendment of 1958 therefore makes it clear that the previous practice was right and makes it doubtful whether *The Ran* is any longer good law.

The decision in The Sir Joseph Rawlinson *(1972) and later cases*

12.37 In *The Bramley Moore*, the victim of the collision had sought to argue that although the tug and tow were separately owned, these should be aggregated on the basis of *one* "ship" having caused the collision. The decision in that case was considered in a case of common ownership of tug and tow in *London Dredging Co v Greater London Council (The Sir Joseph Rawlinson)* [1972] 2 Lloyd's Rep 437. The limitation action was brought by London Dredging Co as owner of the tug and a dumb barge. The tug and tow collided with a GLC dredger which sank. Of the tug and tow, the tug was negligent but there was no negligence on the part of anyone on board the tow. The tug applied to limit on the basis of her tonnage alone; the GLC contended that the tonnage of both tug and tow should be the basis of limitation:

> The issue is on what basis the owners of a tug and tow can limit their liability for collision damage where there was negligence for which they are liable on the part of the person in charge of the tug but no negligence on the part of anyone on the tow. More particularly the issue is whether the present case, although one of common ownership of tug and tow, is covered by the decision . . . in a case called *The Bramley Moore*.

12.38 It was argued on behalf of the dredger that the tonnages of tug and tow should be aggregated. The argument rested on two propositions: first, that the word "ship" in section 503 could apply to more than one ship on the basis that, under the Interpretation Act 1889, the singular includes the plural and that the context of section 503 requires no different result; and secondly, and more importantly, that where a person in charge of a tug with a tow attached is negligent in his navigation and if the tug and the tow thereby cause damage to the property of a third party, then it is in accordance with the authorities to refer to that negligent person as having been negligent in the navigation *not only* of the tug *but also* of the tow. Reliance was placed on *The Ran*, *The Harlow* and *The Freden*.

12.39 Kerr J was impressed by the logical cogency of the argument that common ownership was to be distinguished from the separate ownership considered in *The Bramley Moore*. As he put it (at p. 440):

> Thirdly, Mr Thomas submitted that there is nothing intrinsically anomalous in a result which distinguishes between cases of common ownership and cases where the tug and tow are in different ownerships. He said that when an owner is employing (to use a neutral term) more than one of his ships in circumstances in which more than one is involved in one collision, then there is nothing anomalous in a result whereby his liability is higher than if only one ship had been involved.
>
> Here again it seems to me that Mr Thomas is correct in principle. The section is based on the tonnage of a ship, which is intended to reflect her value and size, so that it follows that the greater the tonnage, the greater the potential limited liability. It therefore seems to me that there is nothing anomalous in a result whereby an owner is under a greater liability, albeit limited, if two of his ships are involved in a collision than one if only one is involved. Indeed, in the present case by far the greater amount of the damage was done by the barge.

And at p. 445:

> In my view, he is right in saying that there is nothing in *The Bramley Moore* standing in the way of the correctness of the view taken in *The Ran* that a person on a tug can be negligent in navigating both the tug and the tow, because Lord Denning himself recognises this.

12.40 However, he considered himself to be bound by the decision of the Court of Appeal in that case, ie that the position pre-1958 (either under *The Ran* or otherwise) had been changed by the 1958 Act. Referring to the passage in Lord Denning MR's judgment cited above, Kerr J stated (at p. 445):

> It seems to me that on the basis of that passage the only causative negligence, which is the negligence to which one must look, must in cases such as this be regarded as negligence in the navigation of the tug, and not negligence in the navigation of the tow or negligence in the navigation of both the tug and tow. Accordingly, whilst it is apparently still correct to say that a person who negligently navigates a tug towing something may be negligent in the navigation both of the tug and tow, in particular where the damage is caused wholly or as in the present case partly by the tow, it seems to me that the effect of the decision of the Court of Appeal is that the causative negligence is in such cases to be treated as negligence in the navigation of the tug alone. I also consider that if this is the correct approach to the statutory position before 1958, then one cannot say that this has been altered by the 1958 Act.

12.41 He reluctantly (see p. 446, col. 1) held that the London Dredging Co could limit its liability by reference to the tonnage of the tug alone (circa £5,000), rather than by reference to the aggregated tonnage of tug and barge (circa £27,000).

12.42 This approach was followed in *The Smjeli* [1982] 2 Lloyd's Rep 74, in which a tug and a very large dumb barge, the *Transporter III*, were in common ownership. The barge hit groynes at Folkestone. The district council sued the owners. It is important to note that the council not only alleged negligence in the navigation of the tug but that it also alleged specific acts of negligence on the part of the owners in preparing the barge for the voyage (in relation to proper towing-lines of adequate strength). Accordingly, the claim was for negligence within the owning company on the part of *both* "the tug" *and of* "the tow" owned by that company.

12.43 Sheen J considered *The Bramley Moore* and commented that the case concerned negligence on the part of *the tug* alone, ie the barge "merely followed in the wake of the tug and if the tug proceeded too fast so did the" barge (p. 80). He then stated (*ibid*.):

> It seems to me that the first question is: What acts or omissions give rise to liability in damages? Then follows the second question: Has a limit been set upon the damages payable by the tortfeasor? Applying those questions to the "tug and tow" cases, if a barge has been brought into collision by reason of the negligent conduct of the tug-master (even if he is guilty of several faults), the totality of his negligence gives rise to one cause of action. It does not assist to describe the act or omission in

the navigation of the tug also as "negligent navigation of the tow" because s. 503 does not provide a statutory cause of action, it prescribes a limit to the amount of damages payable. One cause of action gives rise to one (limited) liability. However, this case does not arise out of a collision, and there is more than one distinct cause of action. The defendants are liable in damages for acts of negligence which occurred before the flotilla left Rotterdam, and they are admittedly liable in negligence for negligence which occurred at sea.

The writ is a writ *in rem* against two ships. Two separate writs could have been issued, one against *Transporter III* and the other against *Smjeli*. My judgment does not depend upon any procedural point. I mention this only to give emphasis to the point that the defendants are liable to the plaintiffs on two unconnected causes of action.

12.44 He proceeded to deal with the separate claims against the separate vessels and the separate limitation funds which resulted (pp. 80–81).

The plaintiffs' cause of action against *Transporter III* arises out of negligent acts or omissions which occurred when making the arrangements for the towage of the barge before she left Rotterdam. A claim for damages would have been successful if a servant of the barge owners was guilty of those acts or omissions regardless of who owned the tug. The owners of the barge are not liable to damages beyond an amount calculated by reference to her tonnage, namely £62,078. I can see no reason why that liability should be limited to a lesser sum because the owners of that barge also own the tug.

The plaintiffs also have a cause of action against *Smjeli*. It is admitted in the amended further and better particulars of the fifth and final version of the defence that Captain Vukusic was negligent in his navigation of *Smjeli* in causing or allowing the fuse wire to part and in failing to seek shelter towards North Foreland and instead attempting to hold the tow in the Dover Strait. For these acts of negligence, the defendants have admitted liability in damages limited to the sum of £23,602.

Accordingly, I give judgment for the plaintiffs for the sum of £85,680 and interest thereon.

A summary of the law before the Merchant Shipping Act 1979 (now the Merchant Shipping Act 1995)

12.45 It is submitted that following the decision in *The Bramley Moore*, the position prior to the Merchant Shipping Act 1979 (now re-enacted as part of the Merchant Shipping Act 1995) can be summarised by the following propositions:

1. The owner of each vessel in the towage flotilla (ie tug and tow or each tow if more than one) is entitled to limit his liability by reference to the tonnage of his own vessel.
2. The question of which vessel is to be taken as the vessel by reference to which the limitation figure is to be calculated depends on which vessel is alleged to have been at fault and, by that fault, to have caused the casualty in respect of which the right to limit is invoked.
3. There is no difference in principle between the position where tug and tow are separately owned or are in common ownership.
4. Thus, in the following examples:

    a. Tug and tow separately owned: tug (or tow) alone to blame. Tug's (or tow's) tonnage used for limitation (see eg *The Bramley Moore* [1964] P 200).
    b. Tug and tow in common ownership: tug (or tow) alone to blame. Tonnage of tug (or tow) alone is taken (see eg *The Sir Joseph Rawlinson* [1972] 2 Lloyd's Rep 437).
    c. Tug and tow separately owned: both to blame. Each owner can limit by reference to the tonnage of his individual vessel alone.
    d. Tug and tow in common ownership: both to blame. The position is the same as in (c) with the only difference being that one single person can limit by reference to the two separate vessels and the two funds which result. The common owner can therefore limit by reference to the tonnage of both of his vessels, albeit that they remain treated

as separate vessels giving rise each to its own fund for the claim in so far as it relies on and invokes the fault of the particular vessel (see eg *The Smjeli* [1982] 2 Lloyd's Rep 74: a two vessel, two fund but common owner case, as explained above).

5 Where the towage flotilla is made up of several objects under tow, and some of which, but not others, are at fault and are involved in the collision, limitation is by reference to those objects which were at fault and whose fault caused the collision: see *The Harlow* [1922] P 175 (five barges; one at fault with one lashed to her: limitation by reference to the two barges). See also the illuminating Canadian decision in *The Rhône v Peter AB Widener* [1993] 1 Lloyd's Rep 600 (Canadian Supreme Court). The above-suggested summary of the case law in the first edition of this work was approved by Morison J in *Smit v Mobius* (2001), considered in detail below as "correct, supported as it is by a sound analysis of the case law."

A comparison: the Canadian and American cases

12.46 The Canadian courts have reached a different result on statutory wording very similar to that of the Merchant Shipping Act 1958.

12.47 In *Monarch Towing Co v British Columbia Cement Co* [1957] SCR 816, a tug towed a barge which it had under lease. A cargo of cement was loaded on board the barge, which was unmanned. During the towage the barge grounded and sank, rendering the cargo a total loss. The tug sought to limit liability. The Supreme Court of Canada aggregated the tonnage of tug and barge on the basis that the correct approach was to take the tonnage of the whole of that part of the flotilla which was at fault. Although there may have been special reasons for this decision on the basis of a finding, based on a concession, that tug and tow were both at fault, the decision reflected the earlier decision in *Pacific Express v Salvage Princess* (1940) Ex CR 230 (at p. 234) and has been followed as laying down a general principle. That principle was summarised in *The Kathy K* [1972] 2 Lloyd's Rep 36 by Heald J at first instance at p. 47:

> I hold also that the plaintiffs are entitled to calculate on the basis of the combined tonnage of tug and tow. Liability must be calculated on the aggregate tonnage of the wrongdoing mass: *Pacific Express* . . . *Monarch Towing*.

12.48 The same approach was adopted in the Supreme Court ([1976] 1 Lloyd's Rep 153 at p. 164). In *The Kathy K*, a yacht was sunk with loss of life by a barge towed by a tug. The tug had negligently increased the scope of the towing-line and had increased speed also. The relevant statute, section 649 of the Canada Shipping Act 1970, was in almost identical terms to the English 1958 Act. Applying English principles, the court should have held that the tug was alone at fault and its tonnage alone was relevant. The English decisions do not appear to have been cited to the Canadian court, or, if they were, the court did not see fit to refer to them.

12.49 The American cases have developed in a yet further direction and one of considerable complexity. A distinction is drawn between whether limitation of liability is invoked against a third party with whom there is no contractual relationship (ie a pure claim in tort, for example arising out of a collision) or against a claimant in contract (eg where a barge is towed under a contract and if it or its cargo is lost). In the context of a tort claim, the vessel "actively responsible" determines the limit, with any vessel which is merely "a passive instrument" left out of account even if in common ownership. Hence the tug alone is most usually taken as the limitation tonnage (see *Liverpool Brazil and River Plate SN Co v Brooklyn Eastern District Terminal*, 251 US 48 (1919)). However, in the context of a contract claim, if tug and tow are in common ownership, they are to be taken together as the "offending vessel" (see *The Columbia* 73 F. 226 (9th Cir. 1896), as applied in *Sacramento Navigation Co v Salz*, 273 US 326 (1927)). On this involved question, see further Parks and Cattell, *Law of Tug, Tow and Pilotage* (3rd edn, 2009) at pp. 337–341.

The Merchant Shipping Act 1995 (replacing the Merchant Shipping Act 1979) and the 1976 Limitation Convention

The relevant wording

12.50 Article 2 of the 1976 Convention defines the claims which are subject to limitation in a wider way than that adopted by the 1894 and 1958 Acts. In respect of a claim for loss of or damage to property, Article 2(1)(a) provides:

"(1) Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

(a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom."

The current state of the law on aggregation

12.51 It is submitted that in the absence of any contrary intention shown by the language of the Merchant Shipping Act 1995 (and its predecessor the 1979 Act) or the 1976 Limitation Convention, the present law will remain that which was applied in *The Bramley Moore*, *The Sir Joseph Rawlinson* and *The Smjeli*.

12.52 The only material difference in wording is between that of the 1958 Act, which restricted limitation to liability in damages for loss or damage to property or for loss of life caused "through the act or omission of any person . . . in the navigation or management of *the ship*" (emphasis supplied), and that of Article 2 of the 1976 Convention, which defines the claims in respect of which limitation can be invoked as being claims "whatever the basis of liability may be" in respect of various types of loss and damage, and death and injury "occurring on board or in direct connexion with the operation of *the ship*" (emphasis supplied). Limitation under the 1976 Convention is by reference to the tonnage of that ship (see Article 6).

12.53 It is submitted that the 1976 Convention makes no change to the law under the 1958 Act. The causal connection between the fault of the vessel and the liability incurred or claim arising, while expressed in wider terms ("on board or in direct connexion with the operation of the ship"), is still clearly present in the 1976 Convention, hence the adjective "direct." While certain commentators (Davison and Snelson, *The Law of Towage* (1990), p. 87) have suggested that the wider wording of the 1976 Convention enables the court to sidestep the older cases and to aggregate the tonnage of tug and tow, it is difficult to see why this should be so on the language of Article 2(1). The two-stage approach adopted by Sheen J in *The Smjeli* [1982] 2 Lloyd's Rep 74 at p. 80 (ie "What acts or omissions give rise to liability in damages? . . . Has a limit been set on the damages payable by the tortfeasor?") is unaffected by the 1976 Convention. To take the example of a tug and tow in common ownership. If the tug alone is negligent and damage is caused as a result to another vessel, that vessel will have a cause of action or claim against the tug owner. That claim will be one that falls within Article 2(a) of the 1976 Convention as a "claim in respect of . . . damage to property . . . occurring in direct connexion with the operation of the ship", ie the tug. Limitation under Article 6 will be by reference to the tonnage of "the ship", ie the tug. The tonnage of the tow is irrelevant since the claim is one in respect of damage occurring in connection with the operation of *the tug*, since it is the tug's fault which gives rise to the claim. The fact that the tow is involved as well because it forms part of the flotilla is immaterial; the damage, properly regarded, does not "occur in direct connexion with the operation of the tow" which played no part and against which no claim lies.

12.54 The importance of the change in the wording in Article 2(1) and, in particular, of the words "whatever the basis of liability may be" (much relied on by Davison and Snelson) is that it addresses and surmounts the problem of decisions such as *The Kirknes* [1957] P 51, which

excluded limitation in respect of indemnity claims because the liability was not one "in damages" within the 1894 and 1958 Acts. It is not (cf. Davison and Snelson) addressing the question of limitation in flotillas of vessels in respect of claims arising in relation to their operation.

The special problem of the flotilla's physical structure

12.55 While the decision of the Court of Appeal in *The Bramley Moore* [1964] P 200 disposed of the apparent principle that negligent navigation by a tug in a towage flotilla in respect of the tow could be treated as the independent negligent navigation of the tow (see *The Sir Joseph Rawlinson*, above), in none of the English decisions addressing the flotilla issue has the physical structure of the flotilla been considered. This is understandable in that in none of the decided cases was the flotilla constituted by anything but a standard towing arrangement of a tug towing behind it one or more tows connected only by ropes. It follows that the possible treatment of a tug and tow as a single, purpose-built, manoeuvrable unit would raise novel considerations. It is submitted that a tug and tow which are designed to operate together and which have the design, structure and manoeuvrability of one vessel should for limitation purposes be treated as one. (Compare the approach in general average under Rule B of the York-Antwerp Rules 1994 and 2004 and as the inspiration of that rule, Rule XXV of the Rhine Rules (see Chapter 12 below).) To adopt a different approach would be unrealistic. Further, if tug and tow, when operating together, carry the lighting arrangement of a single navigable unit within Rule 24(b) of the International Regulations for the Prevention of Collisions at Sea 1972, this adds greater strength to the argument that they are factually and for limitation purposes to be considered as one and that their tonnages ought to be aggregated. This view gains support from the decision of the Canadian Supreme Court in *The Kathy K* [1976] 1 Lloyd's Rep 153 (considered above), in which it was held that for the purposes of limitation the relevant tonnage is the aggregate of "the wrongdoing mass" of the vessels contributing to the damage, and from the decision in *The Harlow* [1922] P 175, where Sir Henry Duke P considered in a similar way the question of the "massing" of the five barges and their "combined weight and momentum" (at p. 184) and held that the tonnage of a barge which was closely lashed to the barge at fault was to be taken with that barge for the purpose of limitation (both being in common ownership). In *The Rhône v Peter AB Widener* [1993] 1 Lloyd's Rep 600, the Canadian Supreme Court looked at (a) the tonnage of the vessels in the flotilla causing the alleged damage, and also (b) that of the vessel responsible for the overall navigation of the flotilla itself, if at fault.

PART D. LIMITATION OF CLAIMS "ARISING ON ANY DISTINCT OCCASION"

The wording of the 1976 Convention

12.56 A frequent problem is where the plaintiff asserts separate claims arising out of several incidents: is he able to recover against a separate limitation fund in respect of each incident? The 1976 Convention follows the approach and wording of the 1958 Act in looking to whether or not the claims can be said to arise "on any distinct occasion." Article 9(1) of the 1976 Convention therefore states:

"1. The limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinct occasion:

(a) against the person or persons mentioned in paragraph 2 of Article 1 and any person for whose act, neglect or default he or they are responsible or . . ."

12.57 The question is highly fact sensitive and will involve a consideration of how bound up the separate incidents are as one "occasion." Given the possibility of several incidents causing loss or damage during one towage operation, the meaning of "any distinct occasion" has been considered specifically in towage cases.

The cases

12.58 In *The Rajah* (1872) LR 3 A & E 539, a tug was standing by near a steamer preparing to take her in tow. A ship collided with the tow and immediately afterwards with the tug, which sank. Sir Robert Phillimore rejected an argument that there were two collisions and hence two distinct occasions. He stated at p. 542:

> In the present case, although the *Rajah* came into collision with two ships, yet the collision with each of these ships took place if not at the same moment of time, yet substantially at the same time and on the same occasion and the whole damage seems to have been caused by one act of improper navigation.

12.59 In *The Harlow* [1922] P 175, a tug towing five barges in the same ownership as the tug collided with a vessel as a result of its own negligent navigation. As a result of the collision, the tug's steering gear jammed while she sought to turn in the river, bringing her into collision with another vessel. The incident was treated as one single uninterrupted occasion. Sir Henry Duke P held that the two collisions occurred on a single and distinct occasion and required that the claims of both plaintiffs be proved against a single limitation fund.

12.60 If there are two separate acts of negligence of a different kind, even where one follows directly upon the other, the court may take the view that there are two occasions. For an illustration in a non-towage case, see *The Lucullite* (1929) 33 Ll L Rep 186. A vessel moored alongside another began to range against her in poor weather. In order to avoid further damage, she cast off but struck a third vessel, which she sank. The owners of the wrongdoing vessel contended that both vessels were damaged on a single distinct occasion. The court rejected this argument, holding that the loss of the third vessel was not a necessary consequence of the collision with and casting-off from the second. Accordingly, the two collisions were held to be two separate and distinct events meriting two separate limitation funds.

PART E. APPLICATION OF LIMITATION CONVENTION BETWEEN TUG AND TOW

How the question arises

12.61 Thus far, the right and ability of tug and tow to limit liability to a third party with whom the tug and/or the tow collide have been considered. However, collisions frequently occur between the tug and the tow. Is the regime of limitation of liability under the 1976 Convention and the Merchant Shipping Act 1979 available to tug and tow for limitation of liability for claims *inter se*? The position between tug and tow will usually be governed by a contract either on one of the standard forms considered in this book, such as "Towcon 2008", "Towhire 2008" or "Supplytime 2017", or on some other specific contractual basis. The problem of limitation between tug and tow will therefore depend in part upon the position under the contract of towage as well as in part upon that under the Limitation Convention.

The position under the 1976 Convention

12.62 Article 1 of the Convention provides as follows:

"1. Shipowners and salvors, as hereinafter defined, may limit their liability . . . for claims set out in Article 2.

2. The term "shipowner" shall include the owner, charterer, manager or operator of a seagoing ship."

12.63 It is clear and well settled that, absent any express term of the contract, an owner of a ship is entitled to invoke limitation against any claim against him brought either by (i) a third party, or (ii) a charterer of his vessel or other contract party who has the use of his vessel. As seen

above, in the ordinary towage contract context, whatever the form, the towage contract is akin in many respects to a charterparty whether it be a voyage charter or a time charter. Accordingly, the tug will, subject to the terms of the towage contract, be entitled in principle to invoke limitation against claims by the tow.

12.64 Less clear until more recently was whether the inclusion of "charterer" within the definition of "shipowner" in Article 1 of the 1976 Convention means that the charterer is entitled to limit his liability in respect of a claim brought against him by the shipowner – in terms of tug and tow, the owner of the tow and hirer of the tug limiting his liability for a claim by the tugowner. On one view, the language of the 1976 Convention and especially of Article 1 allows a "charterer" to limit *any* liability of his in respect of claims within the scope of the Convention. Further, if a shipowner can limit his liability to his charterer, then the 1976 Convention can be read as allowing the corresponding liability, that of charterer to shipowner, to be limited. The contrary view is that limitation of liability has been developed as a concept based on the *shipowner's* liability to third parties. In this context, the inclusion of "charterer" within the definition of "shipowner" by Article 1 was to cover the situation where the charterer is effectively the shipowner, eg because he is carrier under bills of lading or is otherwise sued as being "the ship" because he is charterer of it.

12.65 In *The Aegean Sea* [1998] 2 Lloyd's Rep 39, this issue arose in a claim by a voyage charterer of a tanker on the "Asbatankvoy" form to be entitled to limit his liability to the shipowners in respect of a claim by the shipowners for an alleged breach of the safe port warranty in the charter, which led to the stranding and explosion of the vessel and to the shipowners incurring large pollution liabilities to third parties. Thomas J held (at p. 49):

> It follows from the development of limitation prior to the 1976 Convention and the way in which the 1976 Convention is structured and its language that, in my view, it does not provide (and is not intended to provide) an entitlement to charterers to limit where the shipowner brings the type of claims I am concerned with against the charterers. Such claims cannot in principle, in my view, be reasonably brought within its language.

12.66 In *CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)* [2003] 2 Lloyd's Rep 50, David Steel J took the same approach as Thomas J, concluding also that the charterer had to be acting *qua* owner in order to come within Article 1(2). The facts of that case concerned an explosion and fire on board the vessel caused by containers of bleaching powder. In arbitration the charterers were held liable to the owners for breach of a time charterparty providing that the vessel was to be employed in carrying lawful merchandise excluding any goods of a dangerous, injurious, flammable or corrosive nature. The charterers sought to limit their liability, which was refused by the arbitrators. The charterers appealed to the High Court on the issue of limitation of liability and David Steel J held, in relation to Article 1(2) that before a charterer was entitled to limit his liability he must be acting as shipowner, which he defined as undertaking an activity usually associated with ownership to the extent that he operated or managed the vessel.

12.67 However, to the surprise of some, the Court of Appeal in *The CMA Djakarta*, [2004] 1 Lloyd's Rep 460 rejected both the approach of Thomas and David Steel JJ as inconsistent with the unqualified use of the term "charterer" by the 1976 Convention. Longmore LJ, giving the leading judgment, summarised the position as follows as to the correct meaning of Article 1 (at para. 13):

> Two matters are immediately noticeable. First, two classes of persons are accorded the right to limit, shipowners and salvors; secondly the word "shipowner" is defined and is said to mean "the owner, charterer, manager or operator of a seagoing ship." This dichotomy was relied upon by both Mr Justice Thomas and Mr Justice David Steel by way of assisting them to their conclusion that a charterer could only limit his liability when he was acting as if he were a shipowner or, in other words, if he was acting in the management or operation of the vessel. Failure to prevent the loading of a dangerous cargo was then said by Mr Justice David Steel not to be an act of managing or operating a ship under time charter so that the right to limit could not arise. To my mind this places a gloss on the word "charterer" which is by no means apparent from the words used. Of course, the dichotomy relied on exists but the

> mere fact that "charterer" is part of the definition of the word "shipowner" cannot of itself mean that a charterer (an expression otherwise unqualified) has to be acting as if he were a shipowner before he can limit his liability. To my mind the ordinary meaning of the word "charterer" connotes a charterer acting in his capacity as such, not a charterer acting in some other capacity.

12.68 While the Court of Appeal was sympathetic to the argument that one could not limit in respect of the liability for the loss of the vessel for which the limitation was calculated, it considered that this led to a restriction of the type of claim in respect of which liability could be limited under Article 2 but not to a restriction of the person in general entitled to limit liability under Article 1. As Longmore LJ stated (at para. 25), referring to the judgment of Thomas J in *The Aegean Sea*:

> Mr Justice Thomas said this . . . :
>
> "In my view the combined effect of these articles is important. As there is provision for a fund for those categorized as shipowners and that fund is to cover both charterers and owners, it is difficult to see how charterers can claim the benefit of limitation through that fund where a claim is brought against them by owners. Owners are entitled to the benefit of limitation for a claim by charterers as that claim is being brought by charterers not when performing a role in the operations of the ship or when undertaking the responsibility of a shipowner, but in a different capacity, usually through their interest in the cargo being carried."
>
> While I entirely agree with this passage from *The Aegean Sea*, the considerations advanced by the Judge to my mind more effectively support a conclusion that the claims in respect of which an owner or a charterer can limit do not include claims for loss or damage to the ship relied on to calculate the limit rather than a conclusion that a charterer can only limit in respect of operations he does *qua* owner.

12.69 The House of Lords gave permission to appeal in respect of the decision of the Court of Appeal (confirming the proper arguability and general importance of the point) and the appeal was due to be heard in 2005 but, unfortunately, the case was settled shortly before the appeal hearing. The position has been confirmed in respect of "slot charterers" who have also been held to be within the term "charterer", applying *The CMA Djakarta*, see *Metvale Ltd v Monsanto International SARL (The MSC Napoli)* [2009] 1 Lloyd's Rep 246, *per* Teare J at paras. 17–21.

12.70 The perennial debate as to the correctness of the Court of Appeal's approach has now finally been concluded by the decision of the Supreme Court, albeit obiter, in *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35. The court unanimously concluded that the Court of Appeal's reasoning was correct. The leading speech given by Lord Clarke of Stone-cum-Ebony JSC essentially reiterated the analysis of Longmore LJ in the earlier decision. Lord Clarke stated at para. 81 that "The critical part of his [viz. Longmore LJ's] reasoning is to my mind [. . .] where he said that that wording was not apt to cater for a case where the very ship, by reference to the tonnage of which limitation is to be calculated, is lost or damaged because the loss envisaged is loss to something other than that ship herself" and at para. 84 that "I [. . .] conclude that the ordinary meaning of article 2(1)(a) does not extend the right to limit to a claim for damage to the vessel by reference to the tonnage of which limitation is to be calculated."

12.71 It follows that (as suggested in the earlier editions of this work) that it is now beyond argument that, in respect of a claim by the tug against the tow as charterer or hirer of the tug, on the present state of authority the tow as charterer of the tug is a person entitled to limit its liability to the tug under the 1976 Limitation Convention, where Article 2 applies.

12.72 The Court of Appeal stressed in *The CMA Djakarta* that while a charterer was a person entitled to limit, the entitlement in any given case to limit would depend upon the claim that is brought against him and as to whether that is a claim which falls within Article 2. The decision of the Supreme Court in *The Ocean Victory* further confirms this position. As Longmore LJ stated at para. 34:

> This decision will mean that a charterer's ability to limit will depend on the type of claim that is brought against him rather than the capacity in which he was acting when his liability was incurred. It may be said this construction of the 1976 Convention is less certain and less straightforward than

trying to ascertain the capacity in which the charterer is acting. I do not think, however, that that would be right. To analyse a claim is primarily a legal task and is a familiar one to charterers, their insurers and advisers. The capacity in which a charterer acts is primarily a factual matter which may require evidence as well as analysis of a somewhat esoteric legal concept. It is doubtless inaccurate to say that of all the claims that could be brought by an owner against a charterer, it will only be liability to indemnify the shipowner in respect of cargo claims that he will be able to limit. But I cannot at the moment easily think of any other category where limitation is likely to apply.

The decision in *Smit v Mobius*

12.73 Compare *Smit International v Josef Mobius* [2001] CLC 1545 (Morison J), referred to above in Chapter 4 in relation to clause 25 of the "Towcon 2008"/"Towhire 2008" form. In that case it was argued by the tow that it was entitled to limit its liability to the tug. The circumstances in which the liability arose were as follows. Smit hired its tug *Janus* to Mobius under the "Towhire" form for towage services over a six-month period in the Kiel Canal. During the charterparty, a barge owned by Mobius, the *MC34*, was being towed by the *Janus* when it collided with a third party vessel, the *Weser*. The *Weser* claimed damages from Smit and the tug, which claim Smit settled. Smit then claimed an indemnity in respect of the settlement from Mobius pursuant to clause 18(2)(b) of the "Towhire" form (now clause 25(b)(ii) of the "Towcon 2008" form). Mobius, somewhat belatedly, claimed limitation in respect of the clause 18(2)(b) claim.

12.74 On a trial of preliminary issues before Morison J, the judge recorded that "the limitation defence" was "not as fully argued as counsel might perhaps have wished." In particular, the decision in *The Aegean Sea* (*op. cit*.) was not cited. Although *The Aegean Sea* was not cited and so no point was taken on the entitlement of the tow hirer to limit *qua* charterer, Smit argued that Mobius was not entitled to limit because Smit's claim was not one falling within Article 2(1)(a) of the Convention, which requires a claim to be one "in respect of . . . loss of or damage to property . . . occurring on board . . . or in direct connection with the operation of the ship." Smit contended that Mobius' claim:

i arose independently of any events occurring on board or in direct connection with the operation of the ship, *viz*. the tug;
ii arose wholly under a contractual provision, the then clause 18(2)(b) of "Towhire" (now clause 23(b)(ii) of "Towcon 2008"); and
iii was one which arose irrespective of breach of contract, negligence or fault on the part of Smit.

12.75 Mobius agreed that the loss claimed for by Smit was caused by the operation of the tug, but under clause 18(2)(b) responsibility for the loss was placed on the tow: it was therefore a claim in respect of damage to property (the third party vessel *Weser*) occurring in direct connection with the operation of "the ship", being "the tug."

12.76 Morison J held that the clause 18(2)(b) claim by tug against tow for an indemnity against a liability of tug to a third party vessel, as a claim arising in direct connection with the operation of the tug notwithstanding the liability of tow to tug for that claim, was contractual under the knock-for-knock "Towhire" regime. This is submitted to be the correct approach: Article 2(1)(a) deals with classes of claim closely limited to ship operation. If as part and parcel of performing a towage operation the tug suffers loss by incurring liability to a third party for its overall control of the towage being effected by its tug, the claim brought by the tug against another is a claim in sufficiently direct connection with the operation of the tug. It makes no difference that the actual collision occurred between the tow being towed by the tug.

12.77 It was further argued by Smit that Mobius had contracted out of the right to limit under the Convention by clause 18(4) of "Towhire" (now clause 23(c) of "Towhire 2008"): as to this

argument, see Chapter 4 above. As explained there, following the decision of the Privy Council in *Bahamas Oil Refining Company International Ltd v The Owners of the Cape Bari Tankschiffahrts GmbH & Co KG (The Cape Bari)* [2016] UKPC 20, clear words will be required in any clause intended to exclude the right to limit liability. A mere indemnity or knock-for-knock provision, such as clause 18 of the "Towcon 2008", will not suffice. As it was put by the Board at para. 31: "The Board accepts the submission that, for a party to be held to have abandoned or contracted out of valuable rights arising by operation of law, the provision relied upon must make it clear that that is what was intended." In the special context of the well-known and important ability to limit liability under an international convention, the Board at para. 51 approved the words of Reyes J in *Sun Wai Wah Transportation Ltd v Cheung Kee Marine Services Co Ltd* [2010] 1 HKLRD 833 (at para. 11):

> When the parties entered into the Indemnity Agreement, they must be taken to have done so in the context of a shipowner (such as Sun Wai) being able to apply for limitation under the Convention even in respect of a liability to indemnify. In the absence of clear words to the contrary, I do not think that I can read the references to full indemnification in the Indemnity Agreement as meaning other than a full indemnity within the terms of what the Convention permits.

CHAPTER 13

Tug and tow and general average

PART A. THE SPECIAL ISSUES ARISING

General average and the York-Antwerp Rules

13.1 It is beyond the scope of this book to give any account of the law and practice relating to general average. The leading general text on this subject is Lowndes and Rudolf, *The Law of General Average and the York-Antwerp Rules* (14th edn, 2013, now edited by Richard Cornah and John Reeder QC). A basic definition of general average can be taken as follows (see Cooke, *Voyage Charters* (4th edn, 2014), para. 20.1):

> The principle which underlines general average is that where any property at risk in a maritime adventure is sacrificed where extraordinary expenditure is incurred, for the common safety, the owners of any property at risk should constitute to the loss and expense in proportion to the values of their property which has survived.

See also Rule A of the York-Antwerp Rules 1974, and section 66 of the Marine Insurance Act 1906.

13.2 General average and its principles have been long settled; they are perhaps one of the oldest facets of the law merchant, with their origins in the Rhodian law as epitomised by Justinian's digest as the *Lex Rhodia de Iactu* and in the *Rolls of Oleron*, pre-dating the crusades. In the nineteenth century, the principles and practices of general average were codified internationally in sets of rules originally with the "Glasgow Rules" of 1860 and the "York Rules" of 1864 and culminating in the York-Antwerp Rules of 1887. These rules have been revised and amended on frequent occasions (ie 1890, 1924 and 1950) and charterparties and maritime contracts frequently contain clauses which specify both where the general average adjustment is to take place (of importance, since the practice of adjusters varies from country to country) and that it shall be adjusted pursuant to a particular version of the York-Antwerp Rules. Until the end of the last century, the revision in current use had been that of the York-Antwerp Rules of 1974. Indeed, many standard form printed charters even in the 21st century still refer to the 1974 Rules in their general average provisions.

13.3 In accordance with the usual practice, the York-Antwerp Rules are reviewed, in principle, every quarter century. The International Convention on Salvage 1989 led to a piecemeal amendment of the 1974 Rules in 1990 (ie Article VI). Since then, the Rules have been further considered and revised. On 7 October 1994, the plenary session of the Comité Maritime International held in Sydney adopted a further revised text of the Rules to be designated the York-Antwerp Rules 1994. The Comité further recommended that the 1994 Rules should be applied in all adjustments as soon as practicable after 31 December 1994. An approved text was published (see the CMI Yearbook) and the 1994 Rules rapidly replaced the 1974 Rules in current use.

13.4 The 1994 Revision was of importance for tug and tow since it specifically addressed the applicability of general average within the relationship of tug and tow.

13.5 Unusually, there was pressure after the adoption of the 1994 Rules for an alternative form of the Rules to be available with a much narrower scope of general average expenses. This pressure was led by the International Union of Marine Insurers (IUMI) who had conducted an unsuccessful campaign during the formulation of the 1994 Rules to restrict their scope. The IUMI returned to the fray almost immediately afterwards with a request to the CMI in 1998

for consideration to be given to further reform of the York-Antwerp Rules, principally to try to reduce the number of general average expenses to pure "common peril/common safety" situations (thereby impacting heavily on port of refuge expenses) and excluding salvage from general average. A more modest revision of the Rules ensued with the York-Antwerp Rules 2004 at the Vancouver Conference of 2004. The Rules of 2004 were and have continued to be highly controversial: "the first occasion when a new set of Rules had been approved without a consensus between shipowning and other interests" as Lowndes and Rudolf, *The Law of General Average and the York-Antwerp Rules* (13th edn, 2008) notes (para. 00.111: see generally its section 3 for a full account of the background to the 2004 Rules). The new Rules were opposed by shipowning interests such as Intertanko; Intercargo; the International Chamber of Shipping and, of importance especially for the offshore industry, BIMCO.

13.6 For the present purposes of this chapter, confined as it is to tug and tow and general average, the 2004 Rules and the changes therein to the York-Antwerp Rules 1994 are of little significance and accordingly the main differences may be explored elsewhere. There is also an important practical reason why the 1994 Rules are likely to be those encountered in offshore contracts: this is because where a BIMCO standard form contains provisions for general average (cf. the new Supplytime 2017 form which now omits reference to general average altogether), BIMCO has specifically set its face against the adoption of the 2004 Rules for the purposes of any of its standard form contracts. This is so except for those older forms which have not been revised and will therefore still apply to whatever the current Rules are by the words "or by any subsequent modification thereto" or "as may be amended" (see Supplytime 1985 clause 21) added to the reference to the 1974 or 1994 Rules, unless these are deleted by specific amendment). As seen above, BIMCO explains its position as follows, for example in the explanatory notes to the "Supplytime 2005" form:

> As will be seen, in accordance with other General Average Clauses, General Average shall be adjusted in London and in accordance with York-Antwerp Rules 1994, unless otherwise agreed. Furthermore, although a new set of York-Antwerp rules have come in to force in 2004, it was the decision of BIMCO's Documentary Committee that all new and revised charter parties should maintain the reference to adjustment in accordance with York-Antwerp Rules 1994, please refer to Special Circular No. 2, 24 February, 2005.

13.7 Essentially, BIMCO's position in 1994 was and remains, despite attempts to persuade it to change its stance (see Special Circular No. 1 of July 2007 which remains extant) that it was premature to introduce a new set of Rules after only 10 years and before the 1994 Rules had "settled" and, this was particularly the case since the changes pressed for and reflected in the 2004 Rules were largely unnecessary (see *Lowndes and Rudolf* for a convenient account and also the 2007 Special Circular, obtainable on the BIMCO website). BIMCO has specifically recommended striking any reference to subsequent modifications in its unamended forms and providing expressly that only the 1994 Rules shall apply (Special Circular, *passim*). For these reasons, it is likely that the 1994 Rules will be the operative Rules under most if not all offshore contracts (as contracting parties opt to stay within them guided by the standard terms) and, indeed, more widely and generally in most other charterparties and other contracts of affreightment.

Questions specific to tug and tow

13.8 Two questions arise in the law relating to general average which impact upon the relationships between tug and tow:

i To what extent are towage expenses incurred by a vessel recoverable as general average expenses?
ii To what extent do the principles of general average apply as between tug and tow themselves?

PART B. RECOVERY OF TOWAGE EXPENSES IN GENERAL AVERAGE

Summary of the position

13.9 Despite some conflicting passages in the cases, it is well settled that where a vessel, in a time of peril to the common maritime adventure, enters into a towage contract for the common safety, that act is capable of amounting to a general average act provided that the other requirements of general average, and in particular of Rules A and C of the York-Antwerp Rules, are satisfied. The relevant portions of Rules A and C of the 2004 Revision of the Rules for present purposes provide as follows (the text is the same as that in the 1994 and 1974 Revisions):

"RULE A

There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

RULE C

Only such losses, damages or expenses which are the direct consequences of the general average act shall be allowed as general average."

13.10 Accordingly, in order to be able to recover the expense incurred under the towage contract as a general average expense from the respective contributing interests, the vessel towed which entered into the contract must establish that:

i the entry into the towage contract was a general average act, that is, that the entry into the contract was intentionally and reasonably made for the common safety and for the preservation of the interests in the common maritime adventure; and
ii the expenses incurred under that contract are the direct consequence of the entry into the towage contract.

The leading cases

13.11 The application of these requirements is usefully demonstrated in the few cases on this topic.

13.12 In *Anderson Tritton & Co v Ocean SS Co* (1884) 10 App Cas 107, a laden vessel grounded on a sand bank in the River Yangtse. She engaged another vessel to tow her off under a form of contract used by that vessel in such circumstances pursuant to which the vessel would pay a fixed sum and all costs of repairs to any damage which the towing vessel incurred. The vessel was successfully refloated and sought to recover a proportion of the fixed sum and cost of repairs from cargo interests. The Court of Appeal upheld the general average nature of the expense in principle, but sent the case back to the jury to determine what the reasonable amount of that expense properly chargeable to general average should be. As Lord Blackburn stated (at p. 117):

> I think that the disbursement, in so far as it is a disbursement for the salvation of the whole adventure from a common imminent peril, may be properly charged to general average. But I think that there is neither reason nor authority for saying that the whole amount which the owners choose to pay is, as a matter of law, to be charged to general average.

13.13 Reliance on this authority did not avail the owners in *Société Nouvelle d'Armement v Spillers & Bakers Ltd* [1917] 1 KB 865. A sailing vessel had to sail to Sharpness, Bristol from Queenstown just after the sinking of the *Lusitania* by a submarine and after her crew had seen the corpses from that vessel being brought ashore at Queenstown. To avoid possible torpedo attack by submarine, the vessel engaged a tug to tow her to Bristol so as to speed the passage and make

the vessel more able to alter course. She sought to recover the cost in general average. Sankey J held that the chance peril of being torpedoed was not a sufficiently imminent peril capable of giving rise to general average.

13.14 The application of Rules A and C of the York-Antwerp Rules was considered in striking circumstances arising out of two towage contracts each concluded on the UK Standard Conditions (considered in Chapter 3 above) in *Australian Coastal Shipping Commission v Green* [1971] 1 QB 456 at p. 481 (CA). In that case, two separate instances of tug assistance were in issue involving two vessels. The *Bulwarra* lost her moorings in heavy weather and engaged a tug on the UK Standard Conditions to hold her up. The tug did so, but due to the tug's unseaworthiness she was wrecked when the tow-line parted and fouled her propeller. The vessel was, however, saved from harm. The owners successfully resisted the tug's claim for an indemnity under the UK Standard Conditions and in doing so incurred some irrecoverable costs in defending the tug's claim. The other vessel, the *Wangara*, grounded and engaged another tug on the same Conditions to tow her off. The tug did so, but, once again, the tow-line parted and fouled the tug's propeller. The tug required to be salved and claimed the cost of salvage from the vessel under the UK Standard Conditions indemnity provision. The vessel was held liable for the claim in full and had also to pay the tug's costs of the action. The vessel sought to recover these different heads of expense from their insurers as general average losses. The Court of Appeal held that the entry by the vessels in both cases into a towage contract was a general average act. As Lord Denning MR put it (at p. 481, referring to *Anderson Tritton*): "I have no doubt that the towage contract is a 'general average act'. It was intentionally and reasonably made for the common safety."

13.15 The indemnity provisions of the UK Standard Conditions were held to be a reasonable and usual provision in towage contracts such that they did not break the chain of causation from the general average act:

> If the indemnity clause had been unreasonable and such that the master ought never, in justice to the cargo owners, to have agreed to it, then I think that the expenditure would not flow from the general average act. But, seeing that the indemnity clause here was reasonable, then I think the expenditure flowed directly from the general average act. The indemnity was quite reasonable. So was the expenditure under it. It was the direct consequence of the general average act and must be accepted as a general average loss.

13.16 As to the well-established reasonableness of such provisions, see also *The Luna* [1920] P 22.

The adjusters' rules of practice

13.17 The Association of Average Adjusters has from time to time adopted "rules of practice" which in effect form the "customary rules of English average adjusting." These rules were preceded by other rules called "Customs of Lloyd's." These rules can be found in *Lowndes and Rudolf* in appendix 3. Those touching upon towage or salvage as akin to towage are as follows:

i Rule F.12 relating to "Expenses at a Port of Refuge" (Custom of Lloyd's, amended 1890–1891) which, in so far as material, provides:

> When a ship puts into a port of refuge on account of accident and not in consequence of damage which is itself the subject of general average, then, on the assumption that the ship was seaworthy at the commencement of the voyage, the Custom of Lloyd's is as follows:
>
> (a) All costs of towage, pilotage, harbour dues, and of other extraordinary expenses, incurred in order to bring the ship and cargo into a place of safety, are general average. Under the term 'extraordinary expenses' are not included wages or victuals of crew, coals, or engine stores, or demurrage.

ii In connection with Rule F.12 should be read Rule F.14: "Towage from Port of Refuge" (1876). This provides:

> That if a ship be in a port of refuge at which it is practicable to repair her, and if, in order to save expense, she be towed thence to some other port, then the extra cost of such towage shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure.

See generally *Lowndes and Rudolf* as to English practice under this rule at para. F.08.

PART C. GENERAL AVERAGE AS BETWEEN TUG AND TOW

The fundamental requirements for general average

13.18 As has been seen above, for there to be a general average act, Rule A of the York-Antwerp Rules, reflecting the principles of general average at common law, requires the act to be one in relation to the preservation of a "common maritime adventure" which is threatened by a "peril." The typical example of a common maritime adventure is a laden cargo ship where the interests which make up the common adventure are the ship and the cargo. Even where there exists such a common adventure an act will not amount to a general average act unless it is for the purpose of preserving the *whole* adventure and not just one interest in the same. In other words, the peril referred to in Rule A must be a common peril facing all the interests making up the adventure (see *Lowndes and Rudolf*, para. A.20).

Practical importance for tug and tow

13.19 The practical importance of the application of general average principles for tug and tow can be seen in considering a common enough set of facts. A tug is towing a flotilla of two barges or other water-borne objects in different ownership; the weather worsens and the tug is threatened by the barges which are surging forward. The tug disconnects to save herself and as a result the barges collide and both sink. Can both of the tows recover this loss in general average from the tug? Changing the facts, if one of the barges is unaffected by the disconnection but the other barge is driven ashore and wrecked as a result of it, can that tow recover its loss from the tug or from the tug and the surviving barge?

13.20 Two separate questions will therefore arise in practice:

i Can tug and tow form a "common maritime adventure" for the purposes of general average?

ii In the circumstances in which they are to be so regarded, when and upon what basis are the various interests which may be bound up in the adventure (for example the tug; barge no. 1; barge no. 2; the owners of the cargo laden on board each barge) liable to contribute in general average?

The importance of the York-Antwerp Rules 1994 and 2004

13.21 As to the question whether a tug and tow form a "common maritime adventure" for the purposes of the application of general average, this question is differently answered in different jurisdictions. In certain common law jurisdictions (eg the United States), the answer to the question is that tug and tow do not form a common adventure and that, accordingly, general average does not arise between tug and tow either at common law or under the York-Antwerp Rules of 1974 (and earlier). However, other jurisdictions have adopted the contrary view (eg Norway). The position in English law later is more uncertain and is considered in more detail

below. In order to achieve uniformity of approach and with a view to clarifying the situation, the International Sub-Committee of the Comité Maritime International as part of its revision of the York-Antwerp Rules proposed a specific Rule dealing with tug and tow and clarifying their inclusion within the body of ordinary general average principles. This new Rule was adopted by the CMI's Plenary Session in Sydney in 1994. It is considered in detail below.

13.22 The application of the York-Antwerp Rules 1994 depends on their express incorporation as the basis of the adjustment of general average in the towage contract (or the charterparty or contract of carriage). Since the 1994 Rules are still relatively recent, older forms of contracts are likely to continue to refer by way of standard form general average clauses to the York-Antwerp Rules 1974 (see eg clause 21 of the "Supplytime 89" form) or, as is the case in standard form "pure" towage contracts, to make no reference at all to general average. In such a case, the pre-1994 Rules position will continue to apply. For this reason, it is considered below.

13.23 Tug owners, tow owners and hirers under towage and offshore service contracts which involve towage should accordingly consider the specific incorporation of the York-Antwerp Rules 1994 in their contracts so as clearly to put themselves within the regime of general average. However, it must be noted that as the editors of *Lowndes and Rudolf* put it in para. B13: "it is hardly surprising that there has been no rush by tugowners to incorporate the York-Antwerp Rules within their contracts of towage" – the reason being that most standard form contracts contain either wide exemption clauses (eg the UK Standard Conditions, clause 4) or "knock-for-knock" mutual risk allocation clauses (eg clause 18 of the "Towcon and "Towhire" forms) which will operate to exclude the liability of the tug owner in general average. Similarly, where the contract in question is not akin to one of carriage where the property of both parties is bound up in a common adventure and may face perils which threaten that adventure, then the general incorporation of general average provisions may not sit comfortably with (and may indeed not be relevant in the light of) the other express terms. The "Supplytime 2017" form, for this reason, has now omitted any form of general average provision.

The position prior to the 1994 Rules

Commonality of adventure

13.24 In English law there is no authority which decides that tug and tow are or are not to be treated as a common maritime adventure. It is submitted that there is a good reason for this absence of authority. The question as to what is the nature of the maritime adventure being undertaken by tug and tow is a question which will be one of fact and of the construction of the towage contract in each case. For example, if the towage is one of a fully manned vessel being conned by her own master who is making his own navigational decisions in tandem with those of the tug, there may be little identity between tug and tow as units in the operation and no commonality of adventure. On the other hand, if the tug is towing a flotilla of dumb barges or an unmanned drilling installation, while the contract is not one of carriage or affreightment, tug and tow are engaged on one common adventure, with the tow under one single control and with both vessels deployed in one series of interlinked and independent operations to bring the tow to its destination. It is very little dissimilar in its commonality of adventure to that of the ordinary situation of the carriage of goods; all that is different is that the goods are being conducted by a vessel rather than carried in one.

13.25 The test of whether or not the towage "adventure" is one in the sense of being an adventure where different interests are involved but which are subject to one controlling mind as to the navigation of the tug and tow, at least at the particular stage of the towage when the peril arises, receives support in *Lowndes and Rudolf* at para. B.01:

> unless there be independent commanders on board the various units of a linked flotilla, each capable of making independent decisions and giving effect thereto, all units and the cargoes they carry are engaged in a common maritime adventure which could be subject to a collective general average.

13.26 It is respectfully submitted that this approach is consistent with principle and accords with common sense.

13.27 Although the question of common adventure has never been addressed by the English courts in the context of tug and tow, it has been the subject of a small body of American cases. These have been described as "of rather doubtful authority" (see *Lowndes and Rudolf*, at para. B.02); the doubtfulness, it is submitted, arises from the difficulties in reconciling the authorities both *inter se* and with the general principles of general average.

13.28 In *The J P. Donaldson* 167 US 599, 17 S. Ct. 951 (1897), a tug contracted to tow two barges laden with cargo from Buffalo to Michigan via the Great Lakes. The barges were at all times fully manned and equipped with separate crew and a barge master who, while subject to the navigational control of the tug, nevertheless had otherwise full control over the cargoes and barges and was able to slip the towing connections when he wanted to do so. A storm arose during the towage and threatened to drive the tug ashore. The tug cut the tow-lines in order to save herself. Subsequently, the barges were washed ashore and they and their cargoes were lost. The barge owners claimed contribution from the tug in general average. The Supreme Court rejected the claim principally upon the basis that the tow was manned and under separate command and that in such circumstances the tug-master had no authority on behalf of the barges as constituent elements of the venture to decide to sacrifice a part of them for the common good. As the court put it:

> And if the question is presented whether the barge should be run ashore for the purpose of saving her cargo . . . the decision of the question whether such stranding or jettison should or should not be made is within the exclusive control of the master of the particular barge, and in no degree under the control of the master of the tug.

13.29 In *Loveland Co Inc v United States* 1963 AMC 260, 207 F Supp 450, the tug and tow, two laden barges, were in common ownership, which was not the case in *The JP Donaldson*. The barges were unmanned. The tug grounded and the two barges collided with her. The tug refloated herself. One of the barges had sustained damage and was leaking. The tug pushed her aground to prevent her from sinking and then continued with the voyage towing the remaining barge. The grounded barge was subsequently pulled off and towed to her destination by another tug. On these facts, it is difficult to see how any question of general average arose since there was no danger threatening the whole venture, just a danger of sinking confronting the holed barge. The court nevertheless held that all were liable to contribute in general average. This case has been regarded by certain US commentators (see Gilmore & Black, *The Law of Admiralty* (2nd edn, 1975) at paras. 5–9, pp. 259–260) as establishing the principle that "where . . . the vessel in tow is a mere barge under the control for all purposes of the master of the towing vessel, it would seem that the venture is actually one." While this is one way of distinguishing it from the previous decision, it has to be said that it is difficult to discern what principle guided the court. It relied upon the difference between a contract of towage in *The JP Donaldson* and a contract of affreightment in the case before it, but what difference this would make to the commonality of adventure, save to treat the latter as, in effect, one contract of carriage to which all were to be regarded as interested to the same extent, is not clear.

13.30 In the more recent Canadian decision of *Northland Navigation Co Ltd v Patterson Boiler Works Ltd* (1983) 2 CF59, a tug was towing a cargo-laden barge in heavy weather. The tug was "pooped" by a stern sea which led to the flooding of her engine room and engine difficulties. The tug slipped the towing connection and sailed to safe haven. As a result, the laden barge stranded on rocks. The barge was a total loss but the cargo was salved. The court held the tug's action in casting off the barge was a general average sacrifice. This was, it is submitted, plainly correct: the

act of casting off was exactly analogous to an act of jettison of cargo. However, the court went on to hold that while the salvage attempts of barge and cargo were allowable in general average, the tug was not liable to contribute in general average because the common peril had ended and the tug was in safety. This contradicts the earlier finding that the casting off itself was a general average act done to save *both* tug *and* tow (as the court stated, "it may well be that the tug and tow were in danger of going down, if the barge had not been set free") and seems to be wrong in principle. Compare the position under the new Rule B of the 1994 Revision, considered below.

13.31 It is submitted that these authorities give very little guidance in determining whether or not the tug and tow are to be regarded as a common maritime adventure and that the matter has to be resolved by first principles and by reference to the facts of each case. The origin of general average and the reason why it does not apply in relation to carriage by land or air is the common maritime adventure which the different interests are bound up in when prosecuting a voyage by sea (see eg *Morrison Steamship Co v The Greystoke Castle* [1947] AC 265). In most cases, the towage of one object by another where the tow depends on the tug to be brought to her destination and where the tug seeks to bring her there so as to earn the remuneration under the towage contract will amount to a common adventure on any realistic view.

The basis of contribution between the respective interests

13.32 Contribution will arise only when some or all of the units which form part of the towage convoy and which are engaged on the common adventure are threatened by a common peril and are threatened to the same extent by that peril. The principle is easy enough to state in the light of Rule A of the York-Antwerp Rules, but the application of it to the case of tug and tow and to the very different factual situations involved from those involved in the ordinary case of carriage of goods by and in a vessel raises difficulties. The different possible results can best be considered by taking various hypothetical examples, as was done in relation to contribution in salvage in Chapter 7:

i The simplest case is where a tug towing a barge suffers some mechanical failure while on an ocean voyage which prevents her from continuing with the towage. She has to put in for repairs but given the weather and sea conditions or because it is not possible to anchor the tow, the barge cannot be left and has to be taken into the port of refuge. Both tug and tow are faced with the same position, namely, that the towage cannot be continued without putting into the port of refuge. In such a case, the tow would be liable to contribute in general average in respect of the costs of putting in and of repairing the tug.

ii If the example in (i) above is modified slightly by considering the same facts with the towage taking place in confined waters and with it being possible to anchor the barge safely while the tug puts in for the necessary repairs before recommencing, the position is changed. The barge is in no danger and is not concerned by the need to put in for repairs. In such a case, the barge is not liable to contribute in general average to the expenses incurred by the tug.

iii A tug tows a flotilla of five barges. During the towage, two barges collide with each other. One is badly holed and her cargo is at risk of wetting. The other, in ballast, seems unaffected. The tug puts the barge safely aground and continues with the towage. The other barge involved in the collision develops problems and is left at a port of refuge for repairs. In this case, neither the tug nor the three other barges are put in peril and are unaffected by the casualty affecting the two barges. While general average will apply in respect of the first incident as between the barge and her cargo with cargo liable to contribute in respect of salvage or other remedial measures, neither the tug nor the four barges are liable to contribute. In respect of the second incident, since only one interest is imperilled (the barge being empty), general average does not arise.

iv A tug is towing a flotilla of five barges. During the towage which is taking place in a narrow channel, the line to one barge parts and the barge is carried by the current ahead of the flotilla and strands, blocking the channel. She requires to be lightened and refloated. In this case, all of the vessels making up the flotilla are imperilled in the same way and they, together with cargo, will be liable to contribute in general average in respect of the costs of the operation.

v A tug tows a water-borne object. A heavy storm gets up. The tug slips the line so as to be able to manoeuvre more easily and so as to be able to save herself but she thereby effectively dooms the tow to founder or to strand. In this case, there is a clear analogy with the well-established category of general average sacrifice of jettison of cargo. The tow is sacrificed to save the tug and, accordingly, the loss of the tow or the expenses of salving her fall to be treated in general average as expenses to be contributed to by the tug.

vi If the example in (v) above is modified so that the tow is a powered vessel capable of independent navigation and both tug and tow are threatened by the storm to an equal degree with their only chance of survival being to cut the tow-line, the position is different. After their separation, the tug and tow are independent units of navigation and any accident or hazard which happens to them is unconnected with the decision to terminate the towage. In the event of either of them sustaining loss or damage, that loss or damage is not a general average sacrifice.

The York-Antwerp Rules 1994/2004 and the new Rule B

13.33 The new Rule B introduced by the York-Antwerp Rules 1994, and unchanged in the York-Antwerp Rules 2004 (save for the numbering of sub-paragraphs, somewhat eccentrically: see *Lowndes and Rudolf*, para. B.08), addresses these questions specifically. It provides as follows:

"(1) There is a common maritime adventure when one or more vessels are towing or pushing another vessel or vessels, provided that they are all involved in commercial activities and not in a salvage operation.

When measures are taken to preserve the vessels and their cargoes, if any, from a common peril, these Rules apply.

(2) A vessel is not in common peril with another vessel or vessels if by simply disconnecting from the other vessel or vessels she is in safety but if the disconnection is itself a general average act, the common maritime adventure continues."

13.34 The International Sub-Committee of the Comité Maritime International charged with the revision of the York-Antwerp Rules modelled this rule on a corresponding rule in the Rhine Rules, which make provision for general average in relation to water transport on the River Rhine, following representations from the British Maritime Law Association and the Association Internationale des Dispacheurs Européens. Water transport on the River Rhine by its nature has a considerable volume of barge traffic and problems between tug and tow in relation to the application of the rules of general average commonly arise. The position is now governed by Rule XXV of these Rules, entitled "Convoys", which is in very similar form to the new Rule except that since it is dealing with convoys, its starting point is a definition of the convoy situation to which it applies (Rule XXV of the Rhine Rules is cited in *Lowndes and Rudolf*, at para. B.07. Therefore, the Rule deals with a situation where there is a "group of vessels coupled with each other in such a way that none of the vessels has any independent movement" (eg a press of barges all lashed together and lashed to a tug which is pulling or, commonly, pushing). Rule XXV has proved to be a useful and pragmatic resolution of the commonest problems to arise.

13.35 Rule B is largely self-explanatory, but some points arising on the new Rule may be noted (cf. the views expressed in *Lowndes and Rudolf* in para. B14 that parts are badly expressed).

Commonality of maritime adventure

13.36 The first paragraph of the Rule, numbered (1), provides specifically for the commonality of maritime adventure in the case of tug and tow (or where the operation is a pushing operation) without differentiation between the possible forms of tow or of the towage operation. Accordingly, in the case of every towage convoy and whether the tow is a dry-dock or a cargo-vessel or the service is a short port tow or a long ocean towage, the convoy is treated for the purposes of general average as one maritime adventure. This provision has the compelling merit of simplicity and realism.

13.37 The only limitation upon this provision is that it excludes towage when performed as part of a salvage operation from the concept of a common maritime adventure and confines the Rule to commercial towage operations. This avoids the possibility of a general average within a general average, for example where a salvor's tug working under a salvage contract breaks down and requires repair and thereby imperils tug and tow; in such a case, the salvor will not be able to invoke general average and seek a contribution from the salved interests. There was some opposition to this restriction from Dutch representatives present at the Plenary Session in Sydney.

Measure as to general average

13.38 The second paragraph of the Rule numbered (1) sets out the test for whether or not a particular measure is a general average one falling within the Rules. The measure must be one taken to preserve the vessels and their cargoes if any from a common peril. This paragraph adds little to the position as it would have been had such words been absent given the well-settled requirement of a common peril. For this reason, certain representatives argued that the paragraph was superfluous.

Tow-line slipped to save vessel(s)

13.39 Of more purpose is the third paragraph of Rule B, numbered (2), which deals with the most difficult question of general average between tug and tow, namely where the tow-line is slipped to save one or other or both vessels. The third paragraph follows Rule XXV of the Rhine Rules fairly closely, except possibly that the requirement that the vessel shall be in safety may be regarded as a lesser one than that under the Rhine Rules that the vessel shall be placed in safety. It is submitted that the Rule's object is clear and that the minor linguistic differences between the two sets of Rules are immaterial (cf. the views of the editors of *Lowndes and Rudolf*, at para. B.14, who are rather more critical of the drafting of this portion of Rule B). The test is: can the vessel make herself safe by slipping the line?

13.40 Under this paragraph, there are two possible constructions. The first is that if a vessel in the flotilla, which is facing a common danger threatening each element in the flotilla, can escape from that danger by slipping the line, then on doing so it is not liable to contribute in general average. As it was put in the first edition of this work:

> Under this paragraph, if a vessel can make herself safe by doing so, then there is no common peril. So, if a tug and tow are being driven ashore and by slipping the line the tug can avoid the danger, then there is no common peril. So also, if a tug and tow are on course to strand and the tow can avoid doing so by simply casting off the line, there is no such peril.

13.41 Alternatively, the paragraph can be read as dealing with the situation where, as the editors of *Lowndes and Rudolf* formerly put it in para. B.14 of the previous (12th) edition at p. 131, "there is a peril but it affects only a single unit of the flotilla and is not common to them all." The editors continued:

> In such situations, by simply disconnecting the imperilled unit, the other units will continue in safety and there is no sound reason why they should contribute to the cost of any measures taken to preserve the affected unit.

13.42 It was suggested in the second edition of this work that the correct starting point was the language of the Rule itself which deals expressly with the situation where a vessel, prior to or in the absence of disconnection, *is* in a common peril with another vessel or other vessels engaged in the common maritime adventure of towage dealt with in the Rule's first paragraph (cf. the wording of the Rhine Rule XXV). The former interpretation suggested by *Lowndes and Rudolf* (as cited above) started from the wrong place because it assumed *a priori* that the peril affects only a single unit and is not common to them all (ie there is one "imperilled unit"). Rule B to the contrary, like Rhine Rule XXV, assumes a common peril threatening all or a number of vessels, but deals with the situation where one vessel can escape from that peril by disconnecting itself.

13.43 The view of *Lowndes and Rudolf* in the 12th edition that the plain effect of the words of Rule B and Rhine Rule XXV cannot have been intended was based upon a distaste for its practical effect, ie that the tug "will almost invariably be better placed to survive any threatening emergency" than the unmanned and unpowered tows and can walk away from general average, leaving the tows to *sauvent qui peuvent* (see para. B.14 of the 12th edn). This seemed a doubtful rationale for the construction which was proposed and was not supported by any reference to the adjustment practice under the Rhine Rule XXV itself. The problem with that view was that while the tug may be better placed, it is not necessarily the case and that the Rule should be given its plain meaning. If a member of a flotilla (tug or tow) can escape from danger by unilateral action such that it no longer shares the common danger, its involvement in the commonality of the peril has ceased. That commonality is the foundation and the sole foundation of the liability to contribute in general average.

13.44 The subsequent and now the current editions of *Lowndes and Rudolf* endorse the first construction and the views expressed in the second edition of *The Law of Tug and Tow* at pp. 319–320: see para. B.14 of the 14th edn (and of the 13th edn) where it is stated:

> Contrary to the view expressed in the 12th edition, there appears to be no adequate reason to restrict its operation to the case where the peril, while it may affect all units in the connected state, is intrinsic to one unit of the flotilla, such as the case where one of a flotilla of barges is damaged in a collision and leaking, or is one fire; certainly the language lends no support to such a restrictive interpretation. The effect of the provision is therefore that, because of its engine power and manoeuvrability, a tug which disconnects from the barge which she is towing, for example in order to save herself from damage or foundering in heavy weather, will frequently (but not always) be relieved by this provision of any obligation to contribute to damage to the barge consequent upon disconnection.

Disconnection an act of general average: continuation of common adventure

13.45 The third paragraph also deals with two further and inter-connected matters.

13.46 The first arises out of the words "but if the disconnection is itself a general average act." This provides express recognition of that the act of disconnection may itself be a general average act, that is, where the act of slipping the tow-line (for example) is an act of sacrifice in the interests of the common safety of the towage convoy or flotilla. This deals with the position, for instance, where the line is slipped to save one or more of the elements of the convoy but where the act of doing so does not of itself immediately place the disconnecting vessel in safety. To take an example: a tug and tow are faced with heavy weather and are in danger from the fact of being connected the line is let go to preserve both tug and tow with the intention of reconnecting later; thereafter, the tow strands or both vessels suffer a casualty. Similarly, it deals with the case where both the tug and tow are faced by a common peril and one or other vessel slips the line in order to improve its chances of safety, albeit diminishing the other vessel's prospects of safety (see *Lowndes and Rudolf*, at para. B.16). For example, where the tug and a barge in ballast in tow are being driven on to rocks and the tow cuts the line to increase its prospects, as a light ship, of

floating further off. There are plainly parallels with the ordinary general average position regarding jettison in a case where a tug cuts itself free from its tow or vice versa to save itself (see eg the 12th edition of *Lowndes and Rudolf*, para. B16 at p. 132).

13.47 The second matter is that, where the disconnection is itself a general average act because the vessels are in common peril and one or other seeks to put itself into safety, "the common maritime adventure continues." This is additional wording to the Rhine Rule XXV and is somewhat open-ended. Under the new Rule B therefore, the fact of disconnection does not of itself end the common maritime adventure. Although separated, the tug and tow are treated as one adventure still, so that sacrifices incurred by one or other or both fall to be treated in general average. The third paragraph of Rule B therefore directly addresses the situation encountered in *Northland Navigation v Patterson Boiler Works*, considered above and reverses the effect of that decision. It unfortunately leaves open the question as to when the "common maritime adventure" comes to an end. That will depend on the facts. If the towage convoy manages to resume connection and proceeds to destination then there is no difficulty. Similarly, if the tow is washed ashore and refloated and taken to a place of safety and the tug puts into a port of refuge, then the time for adjustment is, *semble*, the time at which the adventure comes to an end short of destination: see Rule G and the decision in *Fletcher v Alexander* (1868) LR 3 CP 375, considered in *Lowndes and Rudolf* (13th edn, 2008) at para. G.32. Difficult questions can arise in relation to particular expenses incurred at the port(s) of refuge: these are now considered in detail in the 13th edition of *Lowndes & Rudolf,* at para. B.18.

CHAPTER 14

Admiralty jurisdiction

Historical background

14.1 As has been seen above in Chapter 8, before the advent of the steam tug, towage, as an operation distinct from a towage service rendered to a vessel in distress in the context of salvage, was exceptionally rare. The Court of Admiralty had long exercised jurisdiction in salvage cases (see the magisterial analysis of the sources and origins of this jurisdiction given by Lord Esher MR in *The Gas Float Whitton (No. 2)* [1896] P 42 at p. 47 *et seq*.). However, with the development of towage as a separate field of marine operation, quite distinct from salvage, an important lacuna in the jurisdiction of court became apparent: the Admiralty Court had no jurisdiction to deal with ordinary towage cases. As Dr Lushington stated (in *The Wataga* (1856) Swa 165 at p. 167, adopted by the Court of Appeal in *The Heinrich Bjorn* (1885) 10 PD 48 at p. 52):

> The court, prior to the statute, had jurisdiction over salvage and damage but, under limitation as to locality, it had not over simple towage which was only then coming into use.

14.2 Accordingly, "all demands for towage . . . were cognisable in the courts of common law alone" (*per* Dr Lushington in *The Ocean* (1845) 2 W Rob 368 at p. 370). See further Roscoe, *The Admiralty Jurisdiction and Practice* (5th edn, 1931), p. 187, footnote (d); and Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800* (1970), p. 41). For a contrary view suggesting that possibly there was "at least a theoretical historical jurisdiction over towage other than within the body of a county", see Meeson and Kimbell, *Admiralty Jurisdiction and Practice* (4th edn, 2011) at para. 2.092.

14.3 With the rapid increase in towage work (in 1840, Thomas Carlyle described a night walk by the River Thames as punctuated by tugs "snorting about the river, each with a lantern at its nose"), this lacuna became increasingly important. The matter was considered by a Select Parliamentary Committee charged with considering generally the widening of the Admiralty jurisdiction. This reported in 1833, but initially nothing was done. Jurisdiction was conferred upon the Admiralty Court in respect of towage for the first time by section 6 of the Admiralty Court Act 1840 (3 and 4 Vict., c. 65), which reached the statute book largely as a result of the efforts of Dr Lushington.

14.4 The first reported decision on towage in the Admiralty Court (or elsewhere) appears to be *The Betsey* (1843) 2 Wm Rob 167 (see Parks & Cattell, *The Law of Tug, Tow and Pilotage* (3rd edn, 1994), p. 6).

Present-day Admiralty jurisdiction

14.5 The present successor to section 6 of the 1840 Act is section 20 of the Senior Courts Act 1981 (previously the Supreme Court Act 1981: see now the Constitutional Reform Act 2005, sect. 59 and Sched. 11, pt. I, para. 1(1)), which provides as follows:

"20. Admiralty Jurisdiction of High Court.

(1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say:
  (a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);

. . .

(2) The questions and claims referred to in sub-section (1)(a) are:

. . .

(k) any claim in the nature of towage in respect of a ship or an aircraft;

. . ."

14.6 It is beyond the scope of this book to consider the features of the Admiralty jurisdiction in any detail: for these, see McGuffie, *Admiralty Practice* (1964), and the leading modern account by *Admiralty Jurisdiction and Practice* by Nigel Meeson QC and John Kimbell (4th edn, 2011); see also the excellent treatments by Professor Sarah Derrington and James Turner, *The Law and Practice of Admiralty Matters* (2nd edn, 2017) and, in relation to the relatively voluminous authority being produced by the still busy admiralty courts of *inter alia* Australia, Singapore and Hong Kong, by Damien Cremean, *Admiralty Jurisdiction: Law and Practice – Australia, New Zealand. Singapore, Hong Kong and Malaysia* (4th edn, 2015). For a different perspective (with many fresh insights) Dr Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (2008), is also worth consulting, being the successor to her earlier *Modern Admiralty Law (with Risk Management Aspects)* (2001). Reference should also be made to the Civil Procedure Rules, Part 61 on Admiralty Claims and the accompanying Practice Direction together with the detailed notes thereto (which benefit from the editorship of Master Jervis Kay QC, Admiralty Registrar). However, in the context of the present work, certain features in respect of the jurisdiction over towage should be noted.

Features of the jurisdiction in respect of towage

Jurisdiction in rem

14.7 Pursuant to section 21(4) of the Senior Courts Act 1981, provided that the claim in the nature of towage arises in connection with a ship and that the person who would be liable on the claim if it were brought against the person (ie *in personam* rather than *in rem*) was at the time the cause of action arose the owner, charterer or someone in possession or control of the ship, then an action *in rem* can be brought either against that ship, if the person who would be liable is, at the time of the action being brought, either the owner or demise charterer of the vessel, or against any other ship of which that person is the owner at the time of the action being brought (ie any "sister ship").

14.8 If an action *in rem* can be brought under section 21(4), the plaintiff has the right to arrest the ship and, in the event of obtaining judgment, can proceed to the sale of the same in satisfaction of his judgment if no security has been put up to obtain the release of the vessel from arrest.

No maritime lien

14.9 Certain claims falling within the Admiralty jurisdiction give rise to a maritime lien. The effect of the lien is to allow the action *in rem* to be brought and the right of arrest to be exercised against the ship in connection with which the claim arises irrespective of subsequent changes in ownership (see section 21(3) of the 1981 Act). As Sir John Jervis stated in *The Bold Buccleugh* (1851) 7 Moo PC 267: "This claim or privilege travels with the thing into whosoever's possession it may come" (p. 284).

14.10 Although salvage claims give rise to a maritime lien, claims in the nature of towage do not. In *Westrup v Great Yarmouth Steam Carrying Co* (1889) 43 Ch D 241, it was argued, by reference to some indications in two cases in the 1840s, that towage was to be treated in the same

way as salvage. This argument was rejected by Kay J who applied the following dictum of the Court of Appeal in *The Heinrich Bjorn* (1885) 10 PD 48 at p. 53, a case on necessaries:

> It has been suggested that the way in which necessaries are associated with salvage and damage implies an intention to give in respect of necessaries the same lien as existed in respect of salvage, but the argument is not satisfactory, especially when it is observed that necessaries are more closely associated with towage, which gave no lien, than with salvage or damage.

14.11 The point has been treated as decided since that time. See also *per* Fry LJ in *The Heinrich Bjorn (op. cit.)* at p. 53; *per* Lord Bramwell in the House of Lords (1886) 11 App Cas 270; and *The Sara* (1889) 14 App Cas 209.

Towage in respect of a ship

14.12 Section 20(2)(k) gives jurisdiction in respect of "any claim in the nature of towage in respect of *a ship*" (emphasis supplied). This effects a potentially significant restriction upon the ambit of the jurisdiction when considering water-borne objects which cannot be described as "a ship." (A detailed consideration of the relevant principles as to the construction of the term "ship" as used in section 20 and on which there is an extensive literature is beyond the scope of this book. A more exhaustive account of the case law generally on "ships", "vessels" etc, tracing floating objects from launch to scrapping and demolition, with reference to the relevant Commonwealth case law, is given in Rainey, "What is a 'Ship' under the 1952 Arrest Convention?" [2013] LMCLQ 50. For an interesting and informative comparative study, see S. Gahlen, "Ships revisited: a comparative study" (2014) 20 JIML 252.) The position for section 20(2)(k) purposes may be summarised as follows:

i Section 24(1) of the Senior Courts Act 1981 defines "ship." The definition given is that "Ship' includes every description of vessel used in navigation", and includes a hovercraft.

ii However, the Merchant Shipping Act 1921 by section 1(1) defined "ship" as including "every description of lighter, barge or like vessel used in navigation in Great Britain however propelled", except if used in non-tidal waters (except harbours).

iii "Vessel" is not defined in the Senior Courts Act 1981 as such but, as a term which was used in and defined by the Merchant Shipping Act 1894, has given rise to a considerable body of authority. Section 742 of the 1894 Act defined "vessel" as including "any ship or boat or other description of vessel used in navigation." In *Steedman v Scofield* [1992] 2 Lloyd's Rep 163, in which Sheen J had to consider whether a "jet-ski" was a vessel used in navigation, the learned judge defined a boat as conveying:

> the concept of a structure, whether it be made of wood, steel or fibreglass, which by reason of its concave shape provides buoyancy for the carriage of persons or goods,

and a vessel as being:

> a hollow receptacle for carrying goods or people . . . it includes every description of watercraft used or capable of being used as a means of transportation on water.

In *Steedman*, the jet-ski was of a type which could only be mounted and steered by its driver or user once it was under way. Cf. the decision of the Court of Criminal Appeal in *R v Goodwin* [2006] 1 Lloyd's Rep 432 (over which Lord Philips of Worth Matravers CJ presided) in relation to a jet-ski of a different construction being one which had sufficient buoyancy that it could be boarded and sat in whether under way or not: the court held that this type of object was capable of fall-

ing within the first part of the definition, viz. "every description of vessel" under the Merchant Shipping Act 1985. Lord Phillips (at [15]–[17]) considered that the structure of the jet ski in question in that case, which had a concave hull thereby creating buoyancy, was such that it was not possible to conclude that it was not a vessel. It may be noted that in *Environment Agency v Gibbs* [2016] EWHC 843(Admin), a case concerning houseboats, the view was expressed in the Divisional Court (*per* Teare J at [60] that the term "vessel" itself carries within it the need to be able to show some ability to be used in navigation:

> The requirement that a vessel has a navigational function can arise, as it did in R. *v* Goodwin, from the definition in the Merchant Shipping Act that a vessel must be "used in navigation." But it also arises from the ordinary and natural meaning of vessel, as is clear from The Craighall, Merchants' Marine Insurance Company *v* North of England P. & I. Association and Polpen Shipping *v* Commercial Union in which cases there was no definition of ship or vessel.

iv In the enactment of the new codifying statute, the Merchant Shipping Act 1995, the word "vessel" has been replaced throughout by the word "ship." Section 742 of the 1894 Act and its definition are now replaced by section 313(1) of the 1995 Act with the same definition given in section 24(1) of the Senior Courts Act 1981 (see (i) above).

v As to the phrase "used in navigation", this connotes both a vessel of the type used in navigation and one used in navigable waters: see for a compendious consideration of the cases *Derrington and Turner*, paras. 2.68–2.76, with much useful reference to Commonwealth authority (and also *Meeson and Kimbell*, paras. 2.005–2.025). It is submitted that the present starting point (and terminus) in authority on the meaning of this phrase is now the decision in *R. v Goodwin,* in which the Court of Criminal Appeal, having held that the jet-ski in question was capable of being a "vessel" (para. 17), held that it was not used in navigation (para. 27):

> After considering these and other authorities, we have come to the conclusion that for a vessel to be "used in navigation" under the Merchant Shipping Acts it is not a necessary requirement that it should be used in transporting persons or property by water to an intended destination, although this may well have been what navigation usually involved when the early Merchant Shipping Acts were enacted. What is critical in the present case is, however, whether, for the purposes of the Merchant Shipping Act definition of ship, navigation is "the planned or ordered movement from one place to another" or whether it can extend to "messing about in boats" involving no journey at all.

While the Court of Criminal Appeal stressed in *Goodwin* that it was construing the Merchant Shipping Act term and not that in the Senior Courts Act 1981 (see eg paras. 18 and 32), the text is the same in both statutes and it is difficult to see why the statutory context should lead to a different result for the purposes of admiralty jurisdiction. The *Goodwin* test was applied to a rigid inflatable boat or "RIB" of a design and construction that was intended to be capable of operating offshore, which distinguished it from a jet-ski type craft albeit used for short pleasure trips, in *Michael v Musgrove t/a YNYS Ribs (The Sea Eagle)* [2012] 2 Lloyd's Rep 37.

The fastening on to a test of craft being used "for having fun on the water without the object of going anywhere" is an imprecise one and one which is apt to describe many more substantial vessels used for similar recreational purposes (as *Derrington and Turner* point out: para. 2.69). Cf. by way of example in support of the suggested imprecision of this test, the decision in *R v Carrick District Council, ex p. Prankerd (The Winnie Rigg)* [1998] 2 Lloyd's Rep 675 in which a moored yacht, used solely for recreational purposes and as a holiday home and which was charged council tax in consequence, was taken for repairs to Plymouth after having been moored in Truro harbour for 15 years. The yacht was subsequently distrained for harbour dues under the

Harbours, Docks and Piers Clauses Act 1847. The issue was whether the yacht was a ship or vessel used for navigation. Lightman J held that it was, having regard to its past trips to Truro for repairs, and that its current user was not relevant, as was its lack of independent means of propulsion (para. 14). That case may be compared with *Environment Agency v Gibbs* [2016] EWHC 843(Admin) where the Divisional Court rejected an argument that houseboats on the River Ouse were not "vessels" within the meaning of the term in Article 2 of the Environment Agency (Inland Waterways) Order 2010 because they had no navigational attributes. As Lindblom LJ put it at [33]:

> The salient facts, in my view, are the construction of the "living quarters" on top of the raft made of polystyrene and concrete blocks . . ., the absence of "keel or ballast" and "means of propulsion."., and the evident instability of the whole structure once assembled, its lack of navigability and the awkwardness of moving it from one place to another . . . As [Counsel] submitted, these two "houseboats" are actually floating houses. They were constructed, and are used, as homes on water, not to "carry" people or things or to be "propelled or moved" across the water. On a realistic view of the facts in this case, they are not "vessels" for the purposes of the Inland Waterways Order.

14.13 Examples of what has and has not been held to be a ship or vessel abound in the cases. In the final analysis, it will be a question of fact in each case and often a matter of first impression. As Scrutton LJ put it with characteristic simplicity in *Merchants Marine Insurance Co v North of England P&I* (1926) 23 Com Cas 165 in relation to the question of whether a pontoon crane was a "ship" (it was held not to be so):

> I find myself in the not very courageous position of saying that all the contribution I can make is to say that I am not convinced that the learned judge below was wrong. One might possibly take the position of the gentleman who dealt with the elephant by saying he could not define an elephant but he knew what it was when he saw one and it may be that this is the foundation of the learned judge's judgment, that he cannot define "ship or vessel" but he knows this thing is not a ship or vessel. I should have liked to have given a definition here because considering that these words are the words in every ordinary marine policy and in every Club policy, and that they are also, with some addition, the words in the Merchant Shipping Act, it is rather a pity that the courts are not able to give a definition of the words, which was constantly turning up in a mercantile transaction.

14.14 The reconciliation of the cases with the latest approach taken in *Goodwin*, appears to be an instinctive and common sense view that things which are built for and capable of being used in navigation on navigable waters are within the phrase, even if not so used in fact, whereas objects which, while in theory capable of being used for such navigation, were never designed for it and are not usually used for in objective terms are not: in other words, it might be said, only a more nuanced and intellectually elaborate version of Scrutton LJ's approach to the definition of the pachyderm.

14.15 Thus, held to be a "ship" or "vessel" have been barges incapable of independent propulsion (see eg *The Harlow* [1922] P 175); a floating crane incapable of independent propulsion (see eg *R v St. John Shipbuilding* (1981) 126 DLR (3d) 353); a land reclamation dredger vessel-shaped and capable of propulsion but often fixed in one place for long periods (see eg *Cook v Dredging & Construction Co Ltd* [1958] 1 Lloyd's Rep 334); and, assumed and conceded to have been a ship, a floating light-ship incapable of self-propulsion (see eg *The North Goodwin No. 16* [1980] 1 Lloyd's Rep 71).

14.16 The following have been held not to be "ships": a gas float anchored in a fixed position and used as a navigational light, rather like a light ship (see eg *The Gas Float Whitton (No. 2)* [1897] AC 337 (HL), but cf. *The North Goodwin No. 16* above); a dismasted vessel used as a coal hulk (see eg *European & Australian Royal Mail v P. & O*. (1866) 14 LT 704); and a newbuilding launched but as yet without means of propulsion having been fitted (see eg *The Andalusian* (1878) 3 PD 182). A raft of wood, that is, logs lashed together for towage, was held not to be a "ship" by Dr Lushington in *A Raft of Timber* (1844) 2 W Rob 251, although this was

doubted by Lord Herschell in *The Gas Float Whitton (op. cit.)* at p. 345, cited with approval in *Environment Agency v Gibbs* at para. 66. Contrary to what many textbooks (including the previous editions of this work) state, a newbuilding launched but as yet without means of propulsion having been fitted has been treated as a ship, albeit not one capable of being registered/flagged under the terms of the then statute: see *The Andalusian* (1878) 3 PD 182 and Rainey [2013] LMCLQ 50. This reflects an analysis that an object designed to be a ship and built as a ship but not yet completed to be able to be used as a ship but in the process of being so completed is (or at least may be) properly to be regarded as a ship or vessel used in navigation provided that it is afloat.

14.17 Of great potential importance in terms of the arrest jurisdiction for towage is where the object under tow is a structure used in the offshore or drilling industry. Such structures such as rigs or platform or mobile offshore drilling units (MODUs) or structures such as floating accommodation units or "flotels", are frequently the subject of towage. Are they to be regarded as ships? What of a submersible craft, such as an ROV? (See *Cyber Sea Technologies v Underwater Harvester ROV* [2002] FCT 794: a decision of the Federal Court of Canada on the more expansive wording of the Canadian legislation; held: probably within the definition of "ship"). Each case will turn on its facts. However, the term "every description of vessel used in navigation" used in section 24(1) of the Senior Courts Act 1981 and in section 313(1) of the Merchant Shipping Act 1995 places the emphasis on the actual use – in objective terms by reference to how such objects are generally used and navigated – of the structure for navigation, not upon its design for navigation where the design characteristics of the object are not naturally ones which connote navigability (see Dr Mandaraka-Sheppard, *Modern Maritime Law and Risk Management*, section 1.3.1). The analysis of the Divisional Court in a different context in *Environment Agency v Gibbs* is instructive. For example, Teare J noted in the context of the particular "stationary" houseboats in that case at para. 66 that "I accept that some rafts can be vessels . . . . But the rafts on which the living quarters have been placed in this case are very different. Their real work was not to be navigated and to be used for transport but to provide a stationary platform on which living quarters could be erected and supported. Navigation was not a significant part of their function." Compare the sophisticated floating accommodation units used in the offshore industry: in *Addison v Denholm Ship Management* (UK) Ltd. [1997] ICR 770 a "flotel" was held to be a "ship" as it was of vessel-form hull and was designed and used in sea transits.

14.18 If a structure, like a MODU, is self-navigating, even partially, then, however unlike a vessel it looks structurally, as a floating navigable structure it would appear to fit the definition. The recent cases point up the potential arguments but show the flexible, purposive approach taken by the courts when faced with *sui generis* floating structures.

14.19 In *Targe Towing Ltd v The Von Rocks* [1998] 2 Lloyd's Rep 198, the Irish Supreme Court had to consider whether a backhoe dredger barge was a ship. The barge had no bow, no stern, no means of self-propulsion and no wheelhouse. It could only be moved by dismantling "legs" and being extensively prepared for towage. The Supreme Court held that nevertheless the barge was a "ship" and was "used for navigation" as it was a structure designed and constructed for the purposes of carrying out specific activities on the water, was capable of movement on the water and spent considerable periods of time being moved at sea under tow. The absence of self-propulsion was not necessarily decisive.

14.20 In *Global Marine Drilling Co v Triton Holdings Ltd (The Sovereign Explorer)*, a MODU was arrested in Scotland. A motion for recall of arrestment, *inter alia*, on the ground that the MODU was not a ship was dismissed by the court (Lord Marnoch): see [2001] 1 Lloyd's Rep 60 (on another aspect of the case).

14.21 In *Perks v Clark* [2001] 2 Lloyd's Rep 431, the issue was whether jack-up drilling rigs, which were towed from one location to another to drill for oil, were "ships" for the purposes of the Income and Corporation Taxes Act 1988, which made more generous provisions in relation to seafarers serving on ships. Reversing the decision of the judge below, and restoring that of the Commissioners, the Court of Appeal held that such rigs were ships:

> so long as "navigation" is a significant part of the function of the structure in question, the mere fact that it is incidental to some more specialised function, such as dredging or the provision of accommodation, does not take it outside the definition.
>
> There may be an issue of degree as to the significance of the navigation on the facts of a particular case, but that, as the observations of Scrutton LJ show, is a question for the fact-finding tribunal. Those examples also show that "navigation" does not necessarily connote anything more than "movement across water"; the function of conveying persons and cargo from place to place (in the judge's words) is not an essential characteristic.

See *per* Carnwath J at para. 42. Both the *Von Rocks* and *Perks* decisions were quoted with approval in *R v Goodwin* (see *per* Lord Phillips CJ at paras. 22–26) and by the Divisional Court in *Environment Agency v Gibbs* (see *per* Teare J at paras. 56–57).

14.22 Where the subject-matter of the towage is not a "ship", Admiralty *in rem* jurisdiction may still be able to be established under another head of section 20(2) of the Senior Courts Act 1981, such as section 20(2)(h). Some of these other potential heads of jurisdiction are considered below.

Claims in the nature of towage

14.23 There are very few cases on what is or is not a claim "in the nature of towage." However, it is submitted that certain principles can be discerned.

14.24 "Towage" is to be interpreted widely so as to include all usual tug-provided services. In *The Leoborg* [1962] 2 Lloyd's Rep 146, Hewson J stated in relation to the corresponding section of the earlier Act:

> Under Sect. 1(1)(k) of the Administration of Justice Act, 1956, there is Admiralty jurisdiction for any claim in the nature of towage in respect of a ship. It is not claimed that actual towage was performed in respect of this ship, but that escorting services were provided from outside the Hook of Holland to Schiedam.
>
> In my view, such escorting services by a tug from outside a port into a port are services in the nature of towage.

However, the term "towage" will not be wide enough to extend to many common offshore industry services.

14.25 "Claims in the nature of towage" is, prima facie, a narrow phrase and is apt to be confined merely to claims for towage remuneration (see eg the claim in *Westrup v Great Yarmouth Steam Co* (1889) 43 Ch D 241). It is submitted that it is uncertain whether jurisdiction under para. (k) extends to claims other than those simply brought by the tug for monies due in respect of towage performed by it. The 1840 Act introduced the jurisdiction in respect of towage in conjunction with jurisdiction in respect of claims regarding necessaries and most authors treat towage claims in a similar way (see eg Roscoe, *The Admiralty Jurisdiction and Practice* (5th edn, 1931) at pp. 187–188; and Bucknill, *Tug and Tow* (2nd edn, 1927) at p. 72).

14.26 Cases where the claim is one by the tow against the tug, such as for breach of the contract of towage, seem always to have been brought under other heads of Admiralty jurisdiction. Thus, in *The Isca* (1886) 12 PD 34, a claim by a tow against her tug for negligently canting her into a bridge was brought under the head of "any claim arising out of any agreement made in relation to the use or hire of any ship", which corresponds to section 20(2)(h) of the Senior Courts Act 1981 but not as a claim in the nature of towage (cf. *Meeson and Kimbell*, footnote 230

to para. 2.094, which appears to be incorrect). It was held that the claim plainly fell within this head of jurisdiction. Similarly, in *The Conoco Britannia* [1972] 1 Lloyd's Rep 342, a claim was brought by a tug against the tow under a contract on the UK Standard Conditions for an indemnity in respect of the loss of the tug in a collision with the tow. The claim was held to be within the same head of Admiralty jurisdiction which provided in the same terms as section 20(2)(h) of the 1981 Act which now provides, *viz*.:

> (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.

Brandon J stated (at p. 345):

> For the plaintiffs it was argued that all three claims came within para. (h). It was said that they were claims arising out of an agreement relating to the use or hire of a ship, namely the tug *Hullman*. For the defendants it was argued that the words "relating to the use or hire of a ship" should be construed *ejusdem generis* with the preceding words in para. (h), namely "relating to the carriage of goods in a ship" and should accordingly be given a narrow construction which would not cover the case of a towage contract under which a tug is hired to attend on and assist a ship. I am of the opinion that there is no reason for giving a restricted meaning to the words, "relating to the use or hire of a ship." It seems to me that the words in their ordinary and natural meaning are amply wide enough to cover the case of the hire of a tug under a towage contract, and, even if this Act stood alone without any history behind it, I should be of that opinion. The point is, however, to my mind, put almost beyond doubt, when one does consider the history of the jurisdiction in this matter.

In relation to the argument that the claim fell equally under the head of jurisdiction in respect of claims "in the nature of towage", Brandon J declined to pronounce a view but confined himself (at p. 346) to saying this:

> I have, therefore, no hesitation in holding that the first ground relied on by counsel for the defendants is bad. As I am of that opinion, it is not necessary that I should express a conclusion on the question whether the claims would come within certain other paragraphs of sect. 1(1) which have been canvassed, namely, (d), (e) and (k). Since it is unnecessary to express an opinion on those questions, I do not propose to do so. I shall only say that I think that there are arguable points in relation to them.

14.27 Contrast the decision in *The Valsesia* [1927] P 115. In that case, the owners of two tugs brought an action *in rem* against a foreign steamship for the price agreed with the agents of the ship for the performance of a towage job. The tugs were unable to perform the contract owing to the negligence of the crew of the tow. Hill J, in awarding damages *in personam* against the owners of the tow, who had appeared to the writ *in rem*, said that it must be a judgment *in personam*, because an action for negligence in the performance of such a contract as this did not give rise to a writ *in rem*.

Other available heads of jurisdiction

14.28 As the discussion above shows, it is often possible to bring a claim arising in respect of a towage contract under a head of Admiralty jurisdiction other than the "towage" head provided for in section 20(2)(k). This will be useful where the subject-matter of the towage is not "a ship" or where there is doubt as to whether it is or not (eg a drilling rig or other specialised water-borne object), or where the service rendered by the tug is far removed from "towage" *simpliciter*, or where the claim is not one for monies due under a towage contract in respect of a towage service and it is wished to avoid the potential pitfalls of "a claim in the nature of towage.

14.29 In addition to section 20(2)(h) of the Supreme Court Act 1981, considered above, the following other potential heads of jurisdiction should be borne in mind (for a detailed consideration of each, see *Meeson and Kimbell*; *Derrington and Turne*r; and also *Cremean*:

i section 20(2)(d): "any claim for damage received by a ship" (eg tug or tow damaged);
ii section 20(2)(e): "any claim for damage done by a ship" (eg tug or tow damaged): note particularly the valuable insights in *Cremean* on this head of jurisdiction;
iii section 20(2)(f) relating to claims for loss of life and personal injury;
iv section 20(2)(g): "any claim for loss of or damage to goods carried in a ship" (eg a barge's cargo, or equipment being conveyed by a supply vessel); and
v section 20(2)(q) relating to claims in respect of general average acts.

APPENDIX 1

UK STANDARD CONDITIONS FOR TOWAGE AND OTHER SERVICES (revised 1986)*

1 (a) The agreement between the Tugowner and the Hirer is and shall at all times be subject to and include each and all of the conditions herein after set out

(b) for the purposes of these conditions

(i) 'towing' is any operation in connection with the holding, pushing, pulling, moving, escorting or guiding of or standing by the Hirer's vessel, and the expressions 'to tow', 'being towed' and 'towage' shall be defined likewise

(ii) 'vessel' shall include any vessel, craft or object of whatsoever nature (whether or not coming within the usual meaning of the word 'vessel') which the Tugowner agrees to tow or to which the Tugowner agrees, at the request, express or implied, of the Hirer, to render any service of whatsoever nature other than towing

(iii) 'tender' shall include any vessel, craft or object of whatsoever nature which is not a tug but which is provided by the Tugowner for the performance of any towage or other service

(iv) The expression 'whilst towing' shall cover the period commencing when the tug or tender is in a position to receive orders direct from the Hirer's vessel to commence holding, pushing, pulling, moving, escorting, guiding or standing by the vessel or to pick up ropes, wires or lines, or when the towing line has been passed to or by the tug or tender whichever is the sooner, and ending when the final orders from the Hirer's vessel to cease holding, pushing, pulling, moving, escorting, guiding or standing by the vessel or to cast off ropes, wires or lines has been carried out, or the towing line has been finally slipped, whichever is the later, and the tug or tender is safely clear of the vessel

(v) Any service of whatsoever nature to be performed by the Tugowner other than towing shall be deemed to cover the period commencing when the tug or tender is placed physically at the disposal of the Hirer at the place designated by the Hirer, or, if such be at a vessel, when the tug or tender is in a position to receive and forthwith carry out orders to come alongside and shall continue until the employment for which the tug or tender has been engaged is ended. If the service is to be ended at or off a vessel the period of service shall end when the tug or tender is safely clear of the vessel or, if it is to be ended elsewhere, then when any persons or property of whatsoever description have been landed or discharged from the tug or tender and/or the service for which the tug or tender has been required is ended.

(vi) The word 'tug' shall include 'tugs', the word 'tender' shall include 'tenders', the word 'vessel' shall include 'vessels', the word 'Tugowner' shall include 'Tugowners', and the word 'Hirer' shall include 'Hirers'.

(vii) The expression 'tugowner' shall include any person or body (other than the Hirer or the owner of the vessel on whose behalf the Hirer contracts as provided in Clause 2 hereof) who is a party to this agreement whether or not he in fact owns any tug or tender and the expression 'other Tugowner' contained in Clause 5 hereof shall be construed likewise

2 If at the time of making this agreement or of performing the towage or of rendering any service other than towing at the request, express or implied, of the Hirer, the Hirer is not the Owner of the vessel referred to herein as 'the Hirer's vessel', the Hirer expressly represents that he is authorised to make and does make this agreement for and on behalf of the owner of the said vessel subject to each and all of these conditions and agrees that both the Hirer and the Owner are bound jointly and severally by these conditions

3 Whilst towing or whilst at the request, express or implied, of the Hirer rendering any service other than towing, the master and crew of the tug or tender shall be deemed to be the servants of the Hirer and under the control of the Hirer and/or his servants and/or his agents and anyone on board the Hirer's vessel who may be employed and/or paid by the Tugowner shall likewise be deemed to be the servant of the Hirer and the Hirer shall accordingly be vicariously liable for any act or omission by any such person so deemed to be the servant of the Hirer

4 Whilst towing, or whilst at the request, either expressed or implied, of the Hirer rendering any service of whatsoever nature other than towing –

(a) The Tugowner shall not (except as provided in Clauses 4 (c) and (e) hereof) be responsible for or be liable for

(i) damage of any description done by or to the tug or tender, or done by or to the Hirer's vessel or done by or to any cargo or other thing on board or being loaded on board or intended to be loaded on board the Hirer's vessel or the tug or tender or to or by any other object or property

or

(ii) loss of the tug or tender or the Hirer's vessel or of any cargo or other thing on board or being loaded on board or intended to be loaded on board the Hirer's vessel or the tug or tender or any other object or property

or

(iii) any claim by a person not a party to this agreement for loss or damage of any description whatsoever,

arising from any cause whatsoever, including (without prejudice to the generality of the foregoing) negligence at any time of the Tugowner his servants or agents, unseaworthiness, unfitness or breakdown of the tug or tender, its machinery, boilers, towing gear, equipment, lines, ropes or wires, lack of fuel, stores, speed or otherwise and

(b) The Hirer shall (except as provided in Clauses 4(c) and (e)) be responsible for, pay for and indemnify the Tugowner against and in respect of any loss or damage and any claims of whatsoever nature or howsoever arising or caused, whether covered by the provisions of Clause 4(a) hereof or not, suffered by or made against the Tugowner and which shall include, without prejudice to the generality of the foregoing, any loss of or damage to the tug or tender or any property of the Tugowner even if the same arises from or is caused by the negligence of the Tugowner his servants or agents.

(c) The provisions of Clauses 4(a) and 4(b) hereof shall not be applicable in respect of any claims which arise in any of the following circumstances:–

(i) All claims which the Hirer shall prove to have resulted directly and solely from the personal failure of the Tugowner to exercise reasonable care to make the tug or tender seaworthy for navigation at the commencement of the towing or other service. For the purpose of this Clause the Tugowner's personal responsibility for exercising reasonable care shall be construed as relating only to the person or persons having the ultimate control and chief management of the Tugowner's business and to any servant (excluding the officers and crew of any tug or tender) to whom the Tugowner has specifically delegated the particular duty of exercising reasonable care and shall not include any other servant of the Tugowner or any agent or independent contractor employed by the Tugowner

(ii) All claims which arise when the tug or tender, although towing or rendering some service other than towing, is not in a position of proximity or risk to or from the Hirer's vessel or any other craft attending the Hirer's vessel and is detached from and safely clear of any ropes, lines, wire cables or moorings associated with the Hirer's vessel. Provided always that, notwithstanding the foregoing, the provisions of Clauses 4(a) and 4(b) shall be fully applicable in respect of all claims which arise at any time when the tug or tender is at the request, whether express or implied, of the Hirer, his servants or his agents, carrying persons or property of whatsoever description (in addition to the Officers and crew and usual equipment of the tug or tender) and which are wholly or partly caused by, or arise out of the presence on board of such persons or property or which arise at anytime when the tug or tender is proceeding to or from the Hirer's vessel in hazardous conditions or circumstances.

(d) Notwithstanding anything hereinbefore contained, the Tugowner shall under no circumstances whatsoever be responsible for or be liable for any loss or damage caused by or contributed to or arising out of any delay or detention of the Hirer's vessel or of the cargo on board or being loaded on board or intended to be loaded on board the Hirer's vessel or of any other object or property or of any person, or any consequence thereof, whether or not the same shall be caused or arise whilst towing or whilst at the request, either express or implied, of the Hirer rendering any service of whatsoever nature other than towing or at any other time whether before during or after the making of this agreement

(e) Notwithstanding anything contained in Clauses 4 (a) and (b) hereof the liability of the Tugowner for death or personal injury resulting from negligence is not excluded or restricted thereby.

5 The Tugowner shall at any time be entitled to substitute one or more tugs or tenders for any other tug or tender or tugs or tenders. The Tugowner shall at any time (whether before or after the making of this agreement between him and the Hirer) be entitled to contract with any other Tugowner (hereafter referred to as 'the other Tugowner') to hire the other Tugowner's tug or tender and in any such event it is hereby agreed that the Tugowner is acting (or is deemed to have acted) as the agent for the Hirer, notwithstanding that the Tugowner may in addition, if authorised whether expressly or impliedly by or on behalf of the other Tugowner, act as agent for the other Tugowner at any time and for any purpose including the making of any agreement with the Hirer. In any event should the Tugowner as agent for the Hirer contract with the other Tugowner for any purpose as aforesaid it is hereby agreed that such contract is and shall at all times be subject to the provisions of these conditions so that the other Tugowner is bound by the same and may as a principal sue the Hirer thereon and shall have the full benefit of these conditions in every respect expressed or implied herein

6 Nothing contained in these conditions shall limit, prejudice or preclude in any way any legal rights which the Tugowner may have against the Hirer including, but not limited to, any rights which the Tugowner or his servants or agents may have to claim salvage remuneration or special compensation for any extraordinary services rendered to vessels or anything aboard vessels by any tug or tender. Furthermore, nothing contained in these conditions shall limit, prejudice, or preclude in any way any right which the Tugowner may have to limit his liability.

7 The Tugowner will not in any event be responsible or liable for the consequences of war, riots, civil commotions, acts of terrorism or sabotage, strikes, lockouts, disputes, stoppages or labour disturbances (whether he be a party thereto or not) or anything done in contemplation or furtherance thereof or delays of any description, howsoever caused or arising, including by the negligence of the Tugowner or his servants or agents.

8 The Hirer of the tug or tender engaged subject to these conditions undertakes not to take or cause to be taken any proceedings against any servant or agent of the Tugowner or other Tugowner, whether or not the tug or tender substituted or hired or the contract or any part thereof has been sublet to the owner of the tug or tender, in respect of any negligence or breach of duty or other wrongful act on the part of such servant or agent which, but for this present provision, it would be competent for the Hirer so to do and the owners of such tug or tender shall hold this undertaking for the benefit of their servants and agents.

9 (a) The agreement between the Tugowner and the Hirer is and shall be governed by English Law and the Tugowner and the Hirer hereby accept, subject to the proviso contained in sub-clause (b) hereof, the exclusive jurisdiction of the English Courts (save where the registered office of the Tugowner is situated in Scotland when the agreement is and shall be governed by Scottish Law and the Tugowner and the Hirer hereby shall accept the exclusive jurisdiction of the Scottish Courts)

(b) No suit shall be brought in any jurisdiction other than that provided in sub-clause (a) hereof save that either the Tugowner or the Hirer shall have the option to bring proceedings in rem to obtain the arrest of or other similar remedy against any vessel or property owned by the other party hereto in any jurisdiction where such vessel or property may be found

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APPENDIX 2

Towcon 2008*

Recommended by: International Salvage Union (ISU)

Explanatory Notes for TOWCON 2008 are available from BIMCO at www.bimco.org

BIMCO

TOWCON 2008

International Ocean Towage Agreement
(Lump Sum)
PART I

1. Date and place of Agreement	
2. Tugowner/place of business (Cl. 1)	3. Hirer/place of business (Cl. 1)
4. Tow (name and type)	5. Gross tonnage/displacement tonnage
6. Maximum length/maximum breadth & towing draught (fore and aft)	7. Flag and place of registry
8. Registered owners	9. Classification society
10. P. & I. liability insurers	11. General condition of tow
12. Particulars of cargo and/or ballast and/or other property on board the tow	
13. Tug (name and type)	14. Flag and place of registry
15. Gross tonnage	16. Classification Society
17. P. & I. liability insurers	
18. Certificated bollard pull (if any)	19. Indicated BHP
20. Estimated daily average bunker oil consumption in good weather and smooth water (a) at full towing power with tow (b) at full sea speed without tow	
21. Winches and main towing gear	
22. Nature of service(s) (Cl. 2)	23. Contemplated route (state restricted waters if any (Cl. 1, 7 and 24)

(continued)

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TOWCON 2008
International Ocean Towage Agreement (Lump Sum)

24. Place of Departure (Cl. 13)	25. Place of Destination (Cl. 14)
26. Free time at place of departure (Cl. 6(a))	27. Free time at place of destination (Cl. 6(a))
28. Free Time for transiting canals and Restricted Waters (Cl. 6(a))	
29. Notices (Place of Departure) (Cl. 13(c)) (a) Initial departure period (from/to) (b) Initial departure notice (days notice/days period) (c) Final departure period and notice (days notice/days period) (d) Final departure time and date notice (days notice) (e) Notices to be given to	30. Delay payment (Cl. 6, 7, 8(c), 17(b), 24(a), 27(f), 28 and 32(b)) (a) Port rate (b) Sea rate 31. Riding crew to be provided by (also state number to be provided) (Cl. 15) 32. If riding crew provided by Tug owner state amount per man per day payable by Hirer (Cl. 15)
33. Lump sum towage price (also state when each instalment due and payable) (Cl. 3) (a) Lump sum towage price (b) amount due and payable on signing Agreement (c) amount due and payable on sailing of tug & tow from place of departure (d) amount due and payable on passing of tug and tow off (e) amount due and payable on arrival of tug & tow at place of destination	34. Payment of lump sum & other amounts (state currency, mode of payment, place of payment and bank account) (Cl. 3)
35. Interest rate (%) per annum to run from (state number of days) after any sum is due (Cl. 11)	36. Security (state sum, by whom to be provided and when) (optional, only to be filled in if expressly agreed) (Cl. 12, 23)
37. Current cost of tug's bunker oil (also state type of bunkers) (Cl. 4)	38. Cancelling date (Cl. 5)
39. Termination fee (Cl. 22)	40. Dispute resolution (Cl. 33) (state whether alternative (a), (b) or (c) of Clause 33 agreed) **(c) -**
41. Numbers of additional clauses, covering special provisions, if agreed	

It is mutually agreed between the party mentioned in Box 2 (hereinafter called "the Tugowner") and the party mentioned in Box 3 (hereinafter called "the Hirer") that the Tugowner shall, subject to the terms and conditions of this Agreement which consists of PART I including additional clauses, if any agreed and stated in Box 41, and PART II and Annex A, use his best endeavours to perform the towage or other service(s) as set out herein. In the event of a conflict of terms and conditions, the provisions of PART I and any additional clauses, if agreed, shall prevail over those of PART II and Annex A to the extent of such conflict but no further.

 (continued)

TOWCON 2008
International Ocean Towage Agreement (Lump Sum)

Signature (Tugowner)	Signature (Hirer)

TOWCON 2008
International Ocean Towage Agreement (Lump Sum)

1. General	
(a). Vessel's name	Previous name(s):
(b) Builder:	Year:
(c) Type:	Modification(s):
(d) Classification and Society:	
(e) Flag:	Port of registry:
(f) Date of next scheduled drydocking:	
(g) LR/IMO number: /	

2. Performance			
(a) Bollard pull (tonnes):		Certificate date:	
(b) Speed/Consumption (in ballast): Daily fuel consumption in fair weather, per 24 hours:			
Maximum speed:	knots	tonnes plus	litres luboil
Economic speed:	knots	tonnes plus	litres luboil
Standby (main engines secured):		tonnes plus	litres luboil
(c) Type(s) and grade of fuel and lubeoil used:			

(continued)

TOWCON 2008
International Ocean Towage Agreement (Lump Sum)

3. Dimensions and capacities		
(a) L.O.A. (metres):	Breadth (metres):	Depth (metres):
Max draught, metres:	Minimum draught, metres:	
(b) Deadweight (metric tonnes):	(c) GT/NT: /	
(d) Suez/Panama tonnages: /	Certificate(s):	
Fuel maximum:		

4. Machinery:
BHP/Number of engines: /
Engine builder:
Generators:
(d) Bow thruster(s):
Stern thruster(s):

5. Towing equipment	
(i) Towing winches (type/make):	
(ii) Stern roller:	
(iii) Shark jaws:	(iv) Towing pins:
Towing wires and equipment:	
(i) Towing wires and equipment:	(ii) Certificate numbers and dates:

(continued)

TOWCON 2008
International Ocean Towage Agreement (Lump Sum)

Main tow wires:
Spare tow wires(s) (state if on/off winch):
Pennants, chains, bridles and other towing equipment:

6. **Navigation and communication equipment:**			
Radar 1:		Radar 2:	
DGPS navigator:		AIS:	
SSAS:		ECDIS:	
Chart plotter:			
Echo sounder:		Gyro compass:	
DGPS navigator:		Speed log:	
SSB:		VHF:	
GMDSS:			
Satcom:	Tel:	Fax:	E-mail:
Mobile phone(s):			
Other e.g., Navtex:			

7. **Firefighting equipment:**	
Class:	Water spray:
Portable:	
Monitors:	

TOWCON 2008
International Ocean Towage Agreement (Lump Sum)

8. **Accommodation:**	
Crew:	Passengers:
Cabins:	Air-conditioned (yes/no)
Heating:	
Hospital:	

9. **Standby/Rescue and safety equipment:**
Lifeboat(s)/Workboat:
Zodiac/RIB:
Survival suits and equipment:

PART II
TOWCON 2008

1. Definitions

"Tugowner" means the party stated in Box 2.
"Hirer" means the party stated in Box 3.
"Tug" means the vessel or vessels as described in Boxes 13 to 16.
"Tow" means one or more vessels or objects of whatsoever nature including anything carried thereon as described in Boxes 4 to 12.
"Voyage" means the voyage described in Boxes 24 and 25.
"Restricted Waters" for the purpose of this Contract means the waterways described in Box 23.

2. Basis of the Agreement

The Tugowner agrees to render the service(s) to the Tow as set out in Box 22.

3. Price and Conditions of Payment

(a) The Hirer shall pay the Tugowner the sum set out in Box 33 (hereinafter called "the Lump Sum").

(b) The Lump Sum shall be payable as set out in Boxes 33 and 34.

(c) The Lump Sum and all other sums payable to the Tugowner under this Agreement shall be payable without any discount, deduction, set-off, lien, claim or counter-claim, each instalment of the Lump Sum shall be fully and irrevocably earned at the moment it is due as set out in Box 33, Tug and/or Tow or part of Tow lost or not lost, and all other sums shall be fully and irrevocably earned on a daily basis as per Box 30.

(d) All payments by the Hirer shall be made in the currency and to the bank account specified in Box 34.

4. Bunker Price Adjustment

(a) This Agreement is concluded on the basis of the price per metric tonne of bunker oil stated in Box 37.

(b) If the price actually paid by the Tugowner for bunker oil consumed during the Voyage should be higher, the difference shall be paid by the Hirer to the Tugowner.

(c) If the price actually paid by the Tugowner for bunker oil consumed during the Voyage should be lower, the difference shall be paid by the Tugowner to the Hirer.

(d) The log book of the Tug and copies of the bunker supplier's invoices shall be conclusive evidence of the quantity of bunkers consumed and the prices actually paid.

5. Extension to Cancelling Date

Should the Tug not be ready to commence the towage at the latest at midnight on the date indicated in Box 38, the Hirer shall have the option of cancelling this Agreement and shall be entitled to claim damages for detention if due to the wilful default of the Tugowner.

(a) Should the Tugowner anticipate that the Tug will not be ready, he shall notify the Hirer thereof without delay stating the expected date of the Tug's readiness and ask whether the Hirer will exercise his option to cancel.

(b) Such option to cancel must be exercised within forty-eight (48) hours after receipt of the Tugowner's notice, otherwise the third day after the date stated in the Tugowner's notice shall be deemed to be the new agreed date to commence the towage in accordance with this Agreement.

6. FreeTime/Delay Payments

(a) The Free Time specified in Boxes 26 and 27 shall be allowed for the connecting and disconnecting of the Tow, transiting canals and Restricted Waters and all other purposes relating thereto. Free Time shall commence when the Tug arrives at the pilot station at the place of departure or the Tug and Tow arrives at the pilot station at the place of destination or anchors or arrives at the usual waiting area off such places or, in the case of canals and Restricted Waters, as from arrival at the pilot station or customary waiting place or anchorage, whichever is the earlier, and until dropping last outbound pilot when leaving for the open sea. Free Time for transiting canals and Restricted Waters shall be as stated in Box 28. Should the Free Time be exceeded, Delay Payments at the rate specified in Box 30 shall be payable until the Tug and Tow sail from the place of departure or the Tug is free to leave the place of destination.

(b) Any Delay Payment due under this Agreement shall be paid to the Tugowner as and when earned on presentation of the invoice.

7. Canal and Restricted Waters Transit

(a) If the contemplated route of the Tow, according to Box 23 will involve a transit of a canal or Restricted Waters, the Hirer is granted free time for any such transit, and such free time shall count against the number

PART II
TOWCON 2008

of hours stipulated in Box 28. If the Tow is delayed beyond the free time stipulated therein, unless the Tugowner is responsible for such delay, the Hirer shall pay for such extra transit time at the Delay Payments rate stipulated in Box 30 and shall, in addition, pay for all other documented extra expenses thereby incurred. Canal or Restricted Waters transit time is defined as from arrival at pilot station or customary waiting place or anchorage, whichever is the earlier, until dropping last outbound pilot when leaving for the open sea.

(b) Should the transit of a canal or Restricted Waters be made impossible for reasons beyond the Tugowner's control, the Hirer shall pay for all extra time by which the voyage is thereby prolonged at the Delay Payments rate stated in Box 30.

8. Ice Clause for Tug and Tow

(a) The Tug shall not be obliged to force ice, but subject to the Tugowner's prior approval having regard to its size, construction and class, it may follow ice-breakers.

(b) The Tug shall not be required to enter or remain in any ice bound port or area, nor any port or area where lights, lightships, markers or buoys have been, or are about to be withdrawn by reason of ice, nor where on account of ice there is, in the Tugmaster's sole discretion, a risk that, in the ordinary course of events, the Tug will not be able to safely enter the place of departure to connect to the Tow, or depart from the place of departure with the Tow. In addition, if, on account of ice, the Tugmaster in his sole discretion considers it unsafe to proceed to, or to enter, the place of destination for fear of the Tug and/or Tow being frozen in and/ or damaged, he shall be at liberty to proceed to the nearest ice free port or safe place and there await the Hirer's instructions.

(c) Any delay, deviation or additional expenses arising out of or in connection with the performance of this Agreement caused by or resulting from ice shall be for the Hirer's account and any delay payments shall be paid at the rate stated in Box 30.

(d) Any additional insurance premiums and/or calls required by the Tug's insurers due to the Tug entering or remaining in any ice bound port or area shall be for the Hirer's account.

9. Additional Charges and Extra Costs

(a) The Hirer shall appoint his agents at the place of departure and place of destination and ports of call or refuge and shall provide such agents with adequate funds as required.

(b) The Hirer shall bear and pay as and when they fall due:

(i) All port expenses, pilotage charges, harbour and canal dues and all other expenses of a similar nature, including those incurred under the provisions of Clause 24(b) (Necessary Deviation or Slow Steaming), levied upon or payable in respect of the Tug and the Tow.

(ii) All taxes, (other than those normally payable by the Tugowner in the country where he has his principal place of business and in the country where the Tug is registered) stamp duties or other levies payable in respect of or in connection with this Agreement or the payments of the Lump Sum or other sums payable under this Agreement or the services to be performed under or in pursuance of this Agreement, any Customs or Excise duties and any costs, dues or expenses payable in respect of any necessary permits or licenses.

(iii) The cost of the services of any assisting tugs when deemed necessary by the Tugmaster or prescribed by Port or other Authorities.

(iv) All costs and expenses necessary for the preparation of the Tow for towing (including such costs or expenses as those of raising the anchor of the Tow or tending or casting off any moorings of the Tow).

(v) The cost of insurance of the Tow

(c) All taxes, charges, costs, and expenses payable by the Hirer shall be paid by the Hirer direct to those entitled to them. If, however, any such tax, charge, cost or expense is in fact paid by or on behalf of the Tugowner (notwithstanding that the Tugowner shall under no circumstances be under any obligation to make such payments on behalf of the Hirer) the Hirer shall reimburse the Tugowner on the basis of the actual cost to the Tugowner upon presentation of invoice.

10. War Risk Escalation Clause

The Lump Sum is based and assessed on all war risk insurance costs applicable to the Tugowner in respect of the contemplated voyage in effect on the date of this Agreement. In the event of any subsequent increase

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or decrease in the actual costs, the Hirer or the Tugowner, as the case may be, shall reimburse to the other the amount of any increase or decrease in such war risk insurance costs.

11. Interest

If any amounts due under this Agreement are not paid when due, then interest shall accrue and shall be paid in accordance with the provisions of Box 35, on all such amounts until payment is received by the party to whom it is due.

12. Financial Security

The Hirer undertakes to provide, if required by the Tugowner, security to the satisfaction of the Tugowner in the form and in the sum, at the place and at the time indicated in Box 36 as a guarantee for due performance of the Agreement. Such security shall be returned to the guarantor when the Hirer's financial obligations under this Agreement have been met in full.
*(*Optional, only applicable if Box 36 filled in).*

13. Place of Departure

(a) The Tow shall be tendered to the Tugowner at the Place of Departure stated in Box 24.

(b) The place of connection and departure shall always be safe and accessible for the Tug to enter, to operate in and for the Tug and Tow to leave and shall be a place where such Tug is permitted to commence the towage in accordance with any local or other rules, requirements or regulations and shall always be subject to the approval of the Tugowner which shall not be unreasonably withheld.

(c)

(i) The Tow shall be ready to sail from the Place of Departure between the dates indicated in Box 29 (a), hereinafter called the Initial Departure Period.

(ii) The Hirer shall give the Tugowner such notice as is stipulated in Box 29 in respect of:

(1) Initial Departure Notice (Box 29 (b)) which shall be the number of days' notice of the number of days period falling within the Initial Departure Period as to when the Tow will be ready to sail from the Place of Departure;

(2) Final Departure Period and Notice (Box 29 (c)) which shall be the number of days' notice of the number of days period falling within the Initial Departure Period as to when the Tow will be ready to sail from the Place of Departure; and

(3) Departure Time and Date Notice (Box 29 (d)) which shall be the number of days notice of the time and date of sailing of the Tow which shall fall within the Final Departure Period.

(iii) The Tow shall be offered to the Tugowner, duly certificated in accordance with Box 9, Sub-clause (b) above and Clauses 17 (Permits and Certification) and 18 (c) (Tow-worthiness of the Tow) and otherwise in accordance with the terms and conditions of this Agreement.

(d) If the Hirer fails to comply strictly with the provisions of Sub-clause (c) above the date of departure shall be deemed to be either the last day of the Initial Departure Period or the last day of the Final Departure Period, whichever is earlier, and this date shall be binding for all consequences arising in respect of Delay Payments and any other payments due or charges incurred in the performance of this Agreement.

14. Place of Destination

(a) The Tow shall be accepted and taken over by the Hirer immediately upon arrival at the Place of Destination stated in Box 25.

(b) The place of disconnection shall always be safe and accessible for the Tug and Tow to enter, to operate in, and for the Tug to leave and shall be a place where such Tug is permitted to redeliver the Tow in accordance with any local or other rules, requirements or regulations and shall always be subject to the approval of the Tugowner, which shall not be unreasonably withheld.

15. Riding Crew

(a) Riding crew for the Tow, if so requested by the Hirer, shall be provided by the party stated in Box 31. The number of riding crew shall be as stated in Box 31. All costs and expenses for such personnel will be for the account of the Hirer and such personnel shall be at all times under the orders of the Tugmaster. If the riding crew are provided by the Tugowner the Hirer shall pay to the Tugowner the amount per man per day stated in Box 32. If the riding crew are provided by the Hirer they shall not be deemed to be the servants or agents

of the Tugowner. Permission for the Hirer to provide a riding crew on the Tow as well as the composition and suitability of the riding crew shall always be in the discretion of the Tugowner.

(b) It shall be the Hirer's responsibility to provide the riding crew with suitable accommodation, food, fresh water, life saving appliances and all other requirements as necessary to comply with the laws and regulations of the Flag of the Tug and/or Tow and of the States through the territorial waters of which the Tug will pass or enter. It is a requirement that the members of the riding crew shall be able to speak and understand a language which is mutual to the Tug and Tow.

(c) In the event that the Tugowner provides a riding crew for the Tow for its own purposes, all costs and expenses for such personnel shall be for the account of the Tugowner.

16. Towing Gear and Use of Tow's Gear

(a) The Tugowner agrees to provide free of cost to the Hirer the use of all tow wires, bridles and other towing gear carried on board the Tug for the purpose of the towage or other services to be provided under this Agreement. The Tow shall be connected up in a manner within the discretion of the Tugmaster.

(b) The Tugowner may make reasonable use at his discretion of the Tow's gear, power, anchors, anchor cables, radio, communication and navigational equipment and all other appurtenances free of cost during and for the purposes of the towage or other services to be provided under this Agreement.

(c) The Hirer shall pay for the replacement of any towing gear and accessories should such equipment become lost, damaged or unserviceable during the service(s), other than as a result of the Tugowner's negligence.

17. Permits and Certification

(a) The Hirer shall arrange at his own cost and provide to the Tugowner all necessary licences, authorisations and permits required by the Tug and Tow to undertake and complete the contractual voyage together with all necessary certification for the Tow to enter or leave all or any ports of call or refuge on the contemplated voyage.

(b) Any loss or expense incurred by the Tugowner by reason of the Hirer's failure to comply with this Clause shall be reimbursed by the Hirer to the Tugowner and during any delay caused thereby the Tugowner shall receive additional compensation from the Hirer at the Tug's Delay Payment rate specified in Box 30.

18. Tow-worthiness of the Tow

(a) The Hirer shall exercise due diligence to ensure that the Tow shall, at the commencement of the towage, be in all respects fit to be towed from the place of departure to the place of destination.

(b) The Hirer undertakes that the Tow will be suitably trimmed and prepared and ready to be towed at the time when the Tug arrives at the place of departure and fitted and equipped with such shapes, signals, navigational and other lights of a type required for the towage.

(c) The Hirer shall supply to the Tugowner or the Tugmaster, on the arrival of the Tug at the place of departure a certificate of tow-worthiness for the Tow issued by a recognised firm of Marine Surveyors or Survey Organisation, provided always that the Tugowner shall not be under any obligation to perform the towage until in his discretion he is satisfied that the Tow is in all respects trimmed, prepared, fit and ready for towage but the Tugowner shall not unreasonably withhold his approval.

(d) No inspection of the Tow by the Tugowner shall constitute approval of the Tow's condition or be deemed a waiver of the foregoing undertakings given by the Hirer.

19. Seaworthiness of the Tug

The Tugowner will exercise due diligence to tender the Tug at the place of departure in a seaworthy condition and in all respects ready to perform the towage, but the Tugowner gives no other warranties, express or implied.

20. Substitution of Tugs

The Tugowner shall at all times have the right to substitute any tug or tugs for any other tug or tugs of adequate power (including two or more tugs for one, or one tug for two or more) at any time whether before or after the commencement of the towage or other services and shall be at liberty to employ a tug or tugs belonging to other tugowners for the whole or part of the towage or other service contemplated under this Agreement. Provided however, that the main particulars of the substituted tug or tugs shall be subject to the Hirer's prior

approval, but such approval shall not be unreasonably withheld.

21. Salvage

(a) Should the Tow break away from the Tug during the course of the towage service, the Tug shall render all reasonable services to re-connect the towline and fulfil this Agreement without making any claim for salvage.

(b) If at any time the Tugowner or the Tugmaster considers it necessary or advisable to engage salvage services from any vessel or person on behalf of the Tug or Tow, or both, the Hirer hereby undertakes and warrants that the Tugowner or his duly authorised servant or agent including the Tugmaster have full actual authority of the Hirer to accept such services on behalf of the Tow on any reasonable terms. Where circumstances permit the Tugowner shall consult with the Hirer on the need for salvage services for the Tow.

22. Termination by the Hirer

(a) At any time prior to the departure of the Tow from the place of departure the Hirer may terminate this Agreement upon payment of the termination fee set out in Box 39. If termination takes place whilst the Tug is en route to the place of departure or after the Tug has arrived at or off the place of departure then in addition to the said termination fee the Hirer shall pay any additional amounts due under this Agreement.

(b) In the event that the towage operation is terminated after departure from the place of departure, but before the Tow arrives at the place of destination without fault on the part of the Tugowner, his servants or agents, the Tugowner shall be entitled to be paid, and if already paid to retain, all sums payable according to Box 33, accrued Delay Payments and any other amounts due under this Agreement. The above amounts are in addition to any damages the Tugowner may be entitled to claim for breach of this Agreement.

23. Termination by the Tugowner

(a) The Tugowner may, without prejudice to any other remedies he may have, withdraw from and terminate this Agreement and leave the Tow in a place where the Hirer may take repossession of it and be entitled to payment of the Lump Sum less expenses saved by the Tugowner and all other payments due under this Agreement, upon any one or more of the following grounds:

(i) If there is any delay or delays (other than delay caused by the Tug) at the place of departure exceeding in aggregate fourteen (14) days.

(ii) If there is any delay or delays (other than a delay caused by the Tug) at any port or place of call or refuge exceeding in aggregate fourteen (14) days.

(iii) If the financial security as may be required according to Box 36 is not given within seven (7) running days of the Tugowner's request to provide security.

(iv) If the Hirer has not accepted the Tow within seven (7) running days of arrival at the place of destination.

(v) If any amount payable under this Agreement has not been paid within seven (7) running days of the date such sums are due.

(b) Before exercising his option of withdrawing from this Agreement as aforesaid, the Tugowner shall give the Hirer 48 hours' notice of his intention so to withdraw.

24. Necessary Deviation or Slow Steaming

(a) If the Tug during the course of the towage or other service under this Agreement puts into a port or place or seeks shelter or is detained or deviates from the original route as set out in Box 23, or slow steams because either the Tugowner or Tugmaster reasonably consider

(i) that the Tow is not fit to be towed; or

(ii) the towing connection requires rearrangement; or

(iii) repairs or alterations to or additional equipment for the Tow are required to safeguard the venture and enable the Tow to be towed to destination; or

(iv) it would not be prudent to do otherwise on account of weather conditions actual or forecast; or because of any other good and valid reason outside the control of the Tugowner or Tugmaster, or because of any delay caused by or at the request of the Hirer, this Agreement shall remain in full force and effect, and

the Tugowner shall be entitled to receive from the Hirer additional compensation at the appropriate Delay Payment rate as set out in Box 30 for all time spent in such port or place and for all time spent by the Tug at sea in excess of the time which would have been spent had such slow steaming or deviation not taken place.

(b) The Tug shall at all times be at liberty to go to the assistance of any vessel in distress for the purpose of saving life or property or to call at any port or place for bunkers, repairs, supplies, or any other necessaries or to land disabled seamen, but if towing the Tug shall leave the Tow in a safe place and during such period this Agreement shall remain in full force and effect, including the provisions of Clause 9(b)(i).

(c) Any deviation howsoever or whatsoever by the Tug or by the Tugowner not expressly permitted by the terms and conditions of this Agreement shall not amount to a repudiation of this Agreement and the Agreement shall remain in full force and effect notwithstanding such deviation.

25. Liability and Indemnity

(a)

(i) The Tugowner will indemnify the Hirer in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death of any of the following persons, occurring during the towage or other service hereunder, from arrival of the Tug at the pilot station or customary waiting place or anchorage at the Place of Departure (whichever is sooner), until disconnection at the Place of Destination, however such geographic and/or time limits shall not apply to sub-clause 25(a)(i)(2) below:

(1) The Master and members of the crew of the Tug and any other servant or agent of the Tugowner;

(2) The members of the riding crew provided by the Tugowner or any other person whom the Tugowner provides on board the Tow;

(3) Any other person on board the Tug who is not a servant or agent of the Hirer or otherwise on board on behalf of or at the request of the Hirer.

(ii) The Hirer will indemnify the Tugowner in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the towage or other service hereunder of any of the following persons:

(1) The Master and members of the crew of the Tow and any other servant or agent of the Hirer;

(2) Any other person on board the Tow for whatever purpose except members of the riding crew or any other persons whom the Tugowner provides on board the Tow pursuant to its obligations under this Agreement.

(b)

(i) The following shall be for the sole account of the Tugowner without any recourse to the Hirer, his servants, or agents, whether or not the same is due to any breach of contract, negligence or any other fault on the part of the Hirer, his servants or agents:

(1) Save for the provisions of Clause 16 (c), loss or damage of whatsoever nature, howsoever caused to or sustained by the Tug or any property on board the Tug.

(2) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tug or obstruction created by the presence of the Tug.

(3) Loss or damage of whatsoever nature suffered by the Tugowner or by third parties in consequence of the loss or damage referred to in (1) and (2) above.

(4) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Tug or in respect of preventing or abating pollution originating from the Tug.

The Tugowner will indemnify the Hirer in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage. The Tugowner shall not in any circumstances be liable for any loss or damage suffered by the Hirer or caused to or sustained by the Tow in consequence of loss or damage howsoever caused to or sustained by the Tug or any property on board the Tug.

(ii) The following shall be for the sole account of the Hirer without any recourse to the Tugowner, his servants

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or agents, whether or not the same is due to any breach of contract (including as to the seaworthiness of the Tug), negligence or any other fault on the part of the Tugowner, his servants or agents:

(1) Loss or damage of whatsoever nature, howsoever caused to or sustained by the Tow.

(2) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tow or obstruction created by the presence of the Tow.

(3) Loss or damage of whatsoever nature suffered by the Hirer or by third parties in consequence of the loss or damage referred to in (1) and (2) above.

(4) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Tow or in respect of preventing or abating pollution originating from the Tow.

The Hirer will indemnify the Tugowner in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage but the Hirer shall not in any circumstances be liable for any loss or damage suffered by the Tugowner or caused to or sustained by the Tug in consequence of loss or damage, howsoever caused to or sustained by the Tow.

c) Save for the provisions of Clauses 17, (Permits & Certification); 18, (Tow-worthiness of the Tow); 19, (Seaworthiness of the Tug); 22 (Termination by the Hirer) and 23 (Termination by the Tugowner), neither the Tugowner nor the Hirer shall be liable to the other party for

(i) any loss of profit, loss of use or loss of production whatsoever and whether arising directly or indirectly from the performance or non performance of this Agreement, and whether or not the same is due to negligence or any other fault on the part of either party, their servants or agents, or

(ii) any consequential loss or damage for any reason whatsoever, whether or not the same is due to any breach of contract, negligence or any other fault on the part of either party, their servants or agents.

(d) Notwithstanding any provisions of this Agreement to the contrary, the Tugowner shall have the benefit of all limitations of, and exemptions from, liability accorded to the owners or chartered owners of vessels by any applicable statute or rule of law for the time being in force and the same benefits are to apply regardless of the form of signatures given to this Agreement.

26. Himalaya Clause

All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Agreement or by any applicable statute rule or regulation for the benefit of the Tugowner or Hirer shall also apply to and be for the benefit of:

(a) demise charterers, sub-contractors, operators, Master, officers and crew of the Tug or Tow and,

(b) all bodies corporate, parent of, subsidiary to, affiliated with or under the same management as either the Tugowner or Hirer, as well as all directors, officers, servants and agents of the same and

(c) all parties performing services within the scope of this Agreement for or on behalf of the Tug or Tugowner or Hirer as servants, agents and sub-contractors of such parties.

The Tugowner or Hirer shall be deemed to be acting as agent or trustee of and for the benefit of all such persons, entities and vessels set forth above but only for the limited purpose of contracting for the extension of such benefits to such persons, bodies and vessels.

27. War and Other Risks

(a) For the purpose of this Clause, the words:

(i) "War Risks" shall include any actual, threatened or reported:

war; act of war; civil war; hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy; acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever); by any person, body, terrorist or political group, or the Government of any State whatsoever, which, in the reasonable judgement of the Master and/or the Tugowners, may be dangerous or are likely to be or to become dangerous to the Tug, her Tow, crew or other persons on board the Tug or Tow.

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(ii) "Other Risks" shall include any actual, threatened or reported:

arrest or restraint of princes, rulers or people; insurrections; riots or civil commotions; disturbances; acts of God; epidemics; quarantine; labour troubles; labour obstructions; strikes; lock-outs; embargoes; seizure of the Tow under legal process or any other cause outside the control of the Tugowner as a result of which it would be impossible or unsafe or commercially impracticable for the Tug or Tow or both to enter or attempt to enter or leave or attempt to leave the place of departure or any port or place of call or refuge or to reach or attempt to reach or enter the port or place of destination of the Tow and there deliver the Tow and leave again, all of which safely and without unreasonable delay, the Tug may leave the Tow or any part thereof at the place of departure or any other port or place where the Hirer may take repossession and this shall be deemed a due fulfillment by the Tugowner of this Agreement and any outstanding sums and all extra costs of delivery at such place and any storage costs incurred by the Tugowner shall thereupon become due and payable by the Hirer.

(b) The Tug, unless prior written consent of the Tugowners has first been obtained, shall not be required to continue to or through, any port, place, area or zone (whether of land or sea), or any waterway or canal, where it appears that the Tug, her Tow, the crew or other persons on board the Tug or Tow, in the reasonable judgement of the Master and/or the Tugowners, may be, or are likely to be, exposed to War or Other Risks. Should the Tug be within any such place as aforesaid, which only becomes subject to War or Other Risks, or is likely to be or to become subject to War or Other Risks, after her entry into it, she shall be at liberty to leave such place or area.

(c)

(i) The Tugowners may effect war risks insurance in respect of the Hull and Machinery of the Tug and their other interests (including, but not limited to, loss of earnings and detention, the crew and their Protection and Indemnity Risks), and the premiums and/or calls therefor shall be for their account.

(ii) If the Underwriters of such insurance should require payment of additional premiums and/or calls because, pursuant to the Hirers' orders, the Tug is within, or is due to enter and remain within, or pass through any area or areas which are specified by such Underwriters as being subject to additional premiums because of War Risks, then the actual additional premiums and/or calls paid shall be reimbursed by the Hirers to the Tugowners at the same time as the next payment of the hire is due, or upon delivery of the Tow, whichever occurs first.

(d) If the Tugowners become liable under the terms of employment to pay to the crew of the Tug, or any riding crew of the Tow, any War Risk related bonus or additional wages in respect of sailing into a War Risk area, then the actual War Risk related bonus or additional wages paid shall be reimbursed to the Tugowners by the Hirers at the same time as the next payment of hire is due, or upon delivery of the Tow, whichever occurs first.

(e) The tug shall have liberty:-

(i) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery, or in any other way whatsoever, which are given by the Government of the Nation under whose flag the Tug sails, or other Government to whose laws the Tugowners are subject, or any other Government, body or group whatsoever acting with the power to compel compliance with their orders or directions;

(ii) to comply with the orders, directions or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance;

(iii) to comply with the terms of any resolution of the Security Council of the United Nations, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Tugowners are subject, and to obey the orders and directions of those who are charged with their enforcement;

(iv) to call at any other port to change the crew or any part thereof or other persons on board the Tug or Tow when there is reason to believe that they may be subject to internment, imprisonment or other sanctions.

(f) If the performance of this Agreement or the voyage to the place of departure would in the ordinary course of events require the Tug and/or Tow to pass through or near to an area where after this Agreement is made there is or there appears to be danger of such area being blocked or passage through being restricted or made hazardous by War or Other Risks then:

(i) The Tug shall not be required to pass through any blockade, whether such blockade be imposed on all

vessels, or is imposed selectively in any way whatsoever against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever, or to proceed to an area where she shall be subject, or is likely to be subject to, search and/or confiscation.

(ii) If the Tug has not entered such area en route to the place of departure, or having entered has become trapped therein, the Hirer shall pay a Delay Payment at the rate specified in Box 30 for every day of the resulting delay. Provided that if the delays under this Clause amount to more than 14 days in aggregate either party hereto shall be entitled to terminate this Agreement by giving notice in which event, save for liabilities already accrued, neither party shall be under any further liability to the other but the Tugowner shall not be bound to repay to the Hirer any payments already made and all amounts due shall remain payable.

(iii) If the Tug and Tow whilst en route to the place of destination have not entered such area during the course of the towage or other service the Hirer shall pay Delay Payment at the rate indicated in Box 30 for every day by which the towage is prolonged by reason of waiting for such area to become clear and/or safe and/or by reason of proceeding by a longer route to avoid or pass such area in safety.

(iv) If the Tug and Tow whilst en route to the place of destination have become trapped in such area during the course of the towage or other service, the Hirer shall pay a Delay Payment at the rate specified in Box 30 for every day of the resulting delay.

(g) If in accordance with their rights under the foregoing provisions of this Clause, the Tugowners refuse to proceed from the place of departure or to the place of destination, or any one or more of them, they shall immediately notify the Hirers requesting them to nominate a place for redelivery of the Tow. Failing such nomination by the Hirers within 48 hours of the receipt of such notice and request, the Tugowners may redeliver the Tow at any place where the Hirer can take repossession of the Tow.

(h) If in compliance with any of the provisions of this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Agreement.

28. Lien

Without prejudice to any other rights which he may have, whether *in rem* or *in personam*, the Tugowner, by himself or his servants or agents or otherwise shall be entitled to exercise a possessory lien upon the Tow in respect of any sum howsoever or whatsoever due to the Tugowner under this Agreement and shall for the purpose of exercising such possessory lien be entitled to take and/or keep possession of the Tow; provided always that the Hirer shall pay to the Tugowner by himself or his servants or agents or otherwise

all reasonable costs and expenses and all costs of recovering same, including legal fees, howsoever or whatsoever incurred by or on behalf of the Tugowner by himself or his servants or agents or otherwise in exercising or attempting or preparing to exercise such lien and the Tugowner by himself or his servants or agents or otherwise shall be entitled to receive from the Hirer the Tug's Delay Payment at the rate specified in Box 30 for any reasonable delay to the Tug resulting therefrom.

29. Warranty of Authority

If at the time of making this Agreement or providing any service under this Agreement other than towing at the request, express or implied, of the Hirer, the Hirer is not the owner of the Tow referred to in Box 4, the Hirer expressly represents that he is authorised to make and does make this Agreement for and on behalf of the owner of the said Tow and agrees that both the Hirer and the owner of the Tow are bound jointly and severally by the provisions of this Agreement.

30. General

(a) If any one or more of the terms, conditions or provisions in this Agreement or any part thereof shall be held to be invalid, void or of no effect for any reason whatsoever, the same shall not affect the validity of the remaining terms, conditions or provisions which shall remain and subsist in full force and effect.

(b) For the purpose of this Agreement unless the context otherwise requires the singular shall include the plural and vice versa.

31. Time for Suit

Save for the indemnity provisions under Clause 25 (Liability and Indemnity) of this Agreement, any claim which may arise out of or in connection with this Agreement or of any towage or other service to be performed hereunder shall be notified within 6 months of delivery of the Tow or of the termination of the towage or other service for any reason whatever, and any suit shall be brought within one year of the time when the cause

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of action first arose. If either of these conditions is not complied with the claim and all rights whatsoever and howsoever shall be absolutely barred and extinguished.

Any extension of time granted by the Tugowner to the Hirer or any indulgence shown relating to the time limits set out in this Agreement shall not be a waiver of the Tugowner's right under this Agreement to act upon the Hirer's failure to comply with the time limits.

32. BIMCO ISPS/MTSA Clause 2005

(a)

(i) The Tugowner shall comply with the requirements of the International Code for the Security of Ships and of Port Facilities and the relevant amendments to Chapter XI of SOLAS (ISPS Code) relating to the Tug and "the Company" (as defined by the ISPS Code). If trading to or from the United States or passing through United States waters, the Tugowner shall also comply with the requirements of the US Maritime Transportation Security Act 2002 (MTSA) relating to the Vessel and the "Owner" (as defined by the MTSA).

(ii) Upon request the Tugowner shall provide the Hirer with a copy of the relevant International Ship Security Certificate (or the Interim International Ship Security Certificate) and the full style contact details of the Company Security Officer (CSO).

(iii) Loss, damages, expense or delay (excluding consequential loss, damages, expense or delay) caused by failure on the part of the Tugowner or "the Company"/"Owner" to comply with the requirements of the ISPS Code/MTSA or this Clause shall be for the Tugowner's account, except as otherwise provided in this Agreement.

(b)

(i) The Hirer shall provide the Tugowner and the Tugmaster with their full style contact details and, upon request, any other information the Tugowner requires to comply with the ISPS Code/MTSA.

(ii) Loss, damages or expense (excluding consequential loss, damages or expense) caused by failure on the part of the Hirer to comply with this Clause shall be for the Hirer's account, except as otherwise provided in this Agreement, and any delay caused by such failure shall be paid at the delay payment rate stated in Box 30.

(c) Provided that the delay is not caused by the Tugowner's failure to comply with its obligations under the ISPS Code/MTSA, the following shall apply:

(i) Notwithstanding anything to the contrary provided in this Agreement, the Vessel shall be entitled to tender Notice of Readiness even if not cleared due to applicable security regulations or measures imposed by a port facility or any relevant authority under the ISPS Code/MTSA.

(ii) Any delay resulting from measures imposed by a port facility or by any relevant authority under the ISPS Code/MTSA shall be paid at the delay payment rate stated in Box 30, unless such measures result solely from the negligence of the Tugowner, Tugmaster or crew or the previous trading of the Tug, the nationality of the crew or the identity of the Tugowner's managers.

(d) Notwithstanding anything to the contrary provided in this Agreement, any costs or expenses whatsoever solely arising out of or related to security regulations or measures required by the port facility or any relevant authority in accordance with the ISPS Code/MTSA including, but not limited to, security guards, launch services, vessel escorts, security fees or taxes and inspections, shall be for the Hirer's account, unless such costs or expenses result solely from the negligence of the Tugowner's, Tugmaster or crew or the previous trading of the Tug, the nationality of the crew or the identity of the Tugowner's managers. All measures required by the Tugowner to comply with the Ship Security Plan shall be for the Tugowner's account.

(e) If either party makes any payment which is for the other party's account according to this Clause, the other party shall indemnify the paying party.

33. BIMCO Dispute Resolution Clause

(a) *This Agreement shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Agreement shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause. The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced. The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the

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other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

(b) *This Agreement shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Agreement shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgment may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.
In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.
(c) *This Agreement shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Agreement shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(d) Notwithstanding (a), (b) or (c) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Agreement.

In the case of a dispute in respect of which arbitration has been commenced under (a), (b) or (c) above, the following shall apply:-

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within 14 calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further 14 calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(v) Either party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.

(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are disclosable under the law and procedure governing the arbitration.

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(Note: The parties should be aware that the mediation process may not necessarily interrupt time limits.)

(e) If Box 40 is not appropriately filled in, sub-clause (a) of this Clause shall apply. Sub-clause (d) shall apply in all cases.

**Note: Sub-clauses (a), (b) and (c) are alternatives; indicate alternative agreed in* Box 40.

34. Security for Claims

Either party shall have the option to bring proceedings *in rem,* but only to obtain security or other similar remedy for claims arising under this Agreement against any vessel or property owned by the other party in any state or jurisdiction where such vessel or property may be found.

35. BIMCO Notices Clause

(a) All notices given by either party or their agents to the other party or their agents in accordance with the provisions of this Agreement shall be in writing.

(b) For the purposes of this Agreement, "in writing" shall mean any method of legible communication. A notice may be given by any effective means including, but not limited to, cable, telex, fax, e-mail, registered or recorded mail, or by personal service.

APPENDIX 3

Towhire 2008*

Recommended by: International Salvage Union (ISU)

Explanatory Notes for TOWHIRE 2008 are available from BIMCO at www.bimco.org

BIMCO

TOWHIRE 2008

International Ocean Towage Agreement
(Daily Hire)

PART I

1. Date and place of Agreement	
2. Tugowner/place of business (Cl. 1)	3. Hirer/place of business (Cl. 1)
4. Tow (name and type) (Cl. 1)	5. Gross tonnage/displacement tonnage
6. Maximum length/maximum breadth & towing draught (fore and aft)	7. Flag and place of registry
8. Registered owners	9. Classification society
10. P. & I. liability insurers	11. General condition of tow
12. Particulars of cargo and/or ballast and/or other property on board the tow	
13. Tug (name and type) (Cl. 1)	14. Flag and place of registry
15. Gross tonnage	16. Classification Society
17. P. & I. liability insurers	
18. Certificated bollard pull (if any)	19. Indicated BHP
20. Estimated daily average bunker oil consumption in good weather and smooth water (a) full towing power with tow (b) at full sea speed without tow	
21. Winches and main towing gear	
22. Nature of service(s) (Cl. 2)	
23. Place of departure (Cl. 11) / 24. Date of departure	25. Place of destination (Cl. 12)
26. Contemplated route (Cl. 22)	
27. Notices (state number of hours/days notice of arrival of tug at place of departure and to whom to be given)	28. Notices (state number of hours/days notice of arrival of tug and tow at place of destination and to whom to be given)

(continued)

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(continued)

TOWHIRE
INTERNATIONAL OCEAN TOWAGE AGREEMENT (DAILY HIRE) **PART I**

29. Riding crew to be provided by (also state number to be provided) (Cl. 13)	30. If riding crew provided by Tugowner state amount per man per day payable by Hirer (Cl. 13)
31. Mobilisation payment (optional, only to be filled in if expressly agreed) (Cl. 3(d))	32. Demobilisation payment (optional, only to be filled in if expressly agreed) (Cl. 3(e))
33. Daily rate of hire and advance payment period(s) (Cl. 3(b)(i))	34. Payment of hire and for riding crew (if any) (state currency, mode of payment, place of payment and bank account) (Cl. 3(g))
35. Minimum period of hire, if any agreed	36. Commencement of period of hire Cl. 3(a))
37. Termination of period of hire (Cl. 3(a))	38. Cancelling date, if any agreed (Cl. 5(a))
39. Interest rate (%) per annum to run from (state number of days) after any sum is due (Cl. 9)	40. Security (state sum, by whom to be provided and when) (optional, only to be filled in if expressly agreed) (Cl. 10) and 21(iii))
41. Cost of bunker oil and lubricating oils (state whether included or excluded from daily rate of hire; if included state type of bunkers and cost per metric tonne (per litre for lubricating oils) (Cl. 4)	
42. Termination fee (Cl. 20)	43. Dispute resolution (Cl. 31) (state whether alternative (a), (b) or (c) of Clause 31 agreed) **(c) -**
44. Numbers of additional clauses, covering special provisions, if agreed	

It is mutually agreed between the party stated in Box 2 (hereinafter called "the Tugowner") and the party stated in Box 3 (hereinafter called "the Hirer") that the Tugowner shall, subject to the terms and conditions of this Agreement which consists of PART I including additional clauses, if any agreed and stated in Box 44, PART II and Annex A use its best endeavours to perform the towage or other service(s) as set out herein. In the event of a conflict of terms and conditions, the provisions of PART I and any additional clauses, if agreed, shall prevail over those of PART II and Annex A to the extent of such conflict but no further.

Signature (Tugowner)	Signature (Hirer)

PART II
TOWHIRE 2008 (Daily Rate)

1. Definitions

"Tugowner" means the party stated in Box 2.

"Hirer" means the party stated in Box 3.

"Tug" means the vessel or vessels as described in Boxes 13 to 21.

"Tow" means one or more vessels or objects of whatsoever nature including anything carried thereon as described in Boxes 4 to 12.

"Voyage" means the voyage described in Boxes 23 and 25.

2. Basis of the Agreement

The Tugowner agrees to render the service(s) to the Tow as set out in Box 22.

3. Price and Conditions of Payment

(a) The Hirer shall pay the Tugowner the amount of hire set out in Box 33 per day or pro rata for part of a day (hereinafter called the "Tug's Daily Rate of Hire") from the time stated in Box 36 until the time stated in Box 37.

(b)

(i) The Tug's Daily Rate of Hire shall be payable in advance as set out in Box 33 all hire due hereunder shall be fully and irrevocably earned and non-returnable on a daily basis.

(ii) In the event of the Tug being lost, hire shall cease as of the date of the loss. If the date of the loss cannot be ascertained, then, in addition to any other sums which may be due, half the rate of hire shall be paid, calculated from the date the Tug was last reported until the calculated arrival of the Tug at her destination provided such period does not exceed 14 days.

(iii) In the event of part of the Tow being lost, hire shall continue until the Tug arrives at its destination. In the event of the Tow being lost, hire shall continue until the Tug arrives at its destination or such nearer place, at the Tugowner's discretion, provided such period does not exceed 14 days.

(c) Within l4 days of the termination of the services hereunder by the Tugowner, the Tugowner will if necessary adjust in conformance with the terms of this Agreement hire paid in advance. Any hire paid by the Hirer but not earned under this Agreement and which is refundable thereunder shall be refunded to the Hirer within 14 days of receipt of the Tugowner's adjustment of hire.

(**d)** *If agreed, the Hirer shall pay the sum set out in Box 31 by way of a mobilisation charge. This sum shall be paid on or before the commencement of the Tug's voyage to the place of departure, and shall be non-returnable,Tug and/or Tow lost or not lost.

(e) *If agreed, the Hirer shall pay the sum set out in Box 32 by way of a demobilisation charge. This amount shall be paid Tow lost or not lost, on or before the termination by the Tugowner of his services under this Agreement.

(f) The Hire and any other sums due and payable to the Tugowner under this Agreement (or any part thereof) shall be paid without any discount, deduction, set-off, lien, claim or counterclaim**.**

(g) All payments by the Hirer shall be made in the currency and to the bank account specified in Box 34.

**Sub-clauses (d) and (e) are optional and shall only apply if agreed and stated in Box 31 and 32.*

4. *Bunkers

(a) Daily Rate of Hire including Bunkers - Bunker Price Adjustment

(i) In the event that the Daily Rate of Hire includes the cost of bunkers then this Agreement is concluded on the basis of the price per metric tonne of bunker oil stated in Box 41.

(ii) If the price actually paid by the Tugowner for bunker oil consumed during the Voyage should be higher, the difference shall be paid by the Hirer to the Tugowners.

(iii) If the price actually paid by the Tugowner for bunker oil consumed during the Voyage should be lower, the difference shall be paid by the Tugowner to the Hirer.

(iv) The log book of the Tug and copies of the bunker supplier's invoices shall be conclusive evidence of the quantity of bunkers consumed and the prices actually paid.

b) *Daily Rate of Hire excluding Bunkers

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TOWHIRE 2008 (Daily Rate)

(i) In the event that the Daily Rate of Hire excludes the cost of bunkers then the Hirer shall pay to the Tugowner the cost of the bunkers and lubricants consumed by the Tug in fulfilling the terms of this Agreement.

(ii) The Tug shall be delivered with sufficient bunkers and lubricants on board for the tow to the first bunkering port (if any) or destination and be re-delivered with not less than sufficient bunkers to reach the nearest bunkering port en route to the Tug's next port of call.

(iii) The Hirer upon delivery and the Tugowner upon re-delivery shall pay for the bunkers and lubricants on board at the current contract price at the time at the port of delivery and re-delivery or at the nearest bunkering port.

c) Bunker Quality

(i) If the Hirer supplies fuel it shall be of the specifications and grades stated in Box 41. The fuels shall be of a stable and homogeneous nature and unless otherwise agreed in writing, shall comply with ISO standard 8217:1996 or any subsequent amendments thereof as well as with the relevant provisions of MARPOL.

(ii) The Chief Engineer shall co-operate with the Hirer's bunkering agents and fuel suppliers and comply with their requirements during bunkering, including but not limited to checking, verifying and acknowledging sampling, reading or soundings, meters etc. before, during and/or after delivery of fuels. During delivery four representative samples of all fuels shall be taken at a point as close as possible to the Tug's bunker manifold. The samples shall be labelled and sealed and signed by suppliers, Chief Engineer and the Hirer or their agents. Two samples shall be retained by the suppliers and one each by the Tug and the Hirer. If any claim should arise in respect of the quality or specification or grades of the fuels supplied, the samples of the fuels retained as aforesaid shall be analysed at an independent laboratory by a qualified analyst.

**sub-clauses (a) and (b) are options. State agreed option in Box 41. If no option stated then sub-clause (b) apply.*

5. Extension to Cancelling Date

(a) Should the Tug not be ready to commence the towage at the latest at midnight on the date indicated in Box 38, the Hirer shall have the option of cancelling this Agreement and shall be entitled to claim damages for detention if due to the wilful default of the Tugowner.

(b) Should the Tugowner anticipate that the Tug will not be ready, he shall notify the Hirer thereof without delay stating the expected date of the Tug's readiness and ask whether the Hirer will exercise his option to cancel. Such option to cancel must be exercised within forty-eight (48) hours after the receipt of the Tugowner's notice, otherwise the third day after the date stated in the Tugowner's notice shall be deemed to be the new agreed date to commence the towage in accordance with this Agreement.

6. Ice Clause for Tug and Tow

(a) The Tug shall not be obliged to force ice, but subject to the Tugowner's prior approval having regard to its size, construction and class, it may follow ice-breakers.

(b) The Tug shall not be required to enter or remain in any ice bound port or area, nor any port or area where lights, lightships, markers or buoys have been, or are about to be withdrawn by reason of ice, nor where on account of ice there is, in the Tugmaster's sole discretion, a risk that, in the ordinary course of events, the Tug will not be able to safely enter the place of departure to connect to the Tow, or depart from the place of departure with the Tow. In addition, if, on account of ice, the Tugmaster in his sole discretion considers it unsafe to proceed to, or to enter, the place of destination for fear of the Tug and/or Tow being frozen in and/or damaged, he shall be at liberty to proceed to the nearest ice free port or safe place and there await the Hirer's instructions.

(c) Any delay, deviation or additional expenses arising out of or in connection with the performance of this Agreement caused by or resulting from ice shall be for the Hirer's account and the Tug shall remain on Hire.

(d) Any additional insurance premiums and/or calls required by the Tug's insurers due to the Tug entering or remaining in any ice bound port or area shall be for the Hirer's account.

7. Additional Charges and Extra Costs

(a) The Hirer shall appoint his agents at the place of departure and place of destination and ports of call or

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refuge and shall provide such agents with adequate funds as required.

(b) The Hirer shall bear and pay as and when they fall due:

(i) All port expenses, pilotage charges, harbour and canal dues and all other expenses of a similar nature, including those incurred under the provisions of Clause 22(b) (Necessary Deviation), levied upon or payable in respect of the Tug and the Tow.

(ii) All taxes, (other than those normally payable by the Tugowner in the country where he has his principal place of business and in the country where the Tug is registered) stamp duties or other levies payable in respect of or in connection with this Agreement or payments of hire or other sums payable under this Agreement or services to be performed under or in pursuance of this Agreement, any Customs or Excise duties and any costs, dues or expenses payable in respect of any necessary permits or licences.

(iii) The cost of the services of any assisting tugs when deemed necessary by the Tugmaster or prescribed by Port or other Authorities.

(iv) All costs and expenses necessary for the preparation of the Tow for towing (including such costs or expenses as those of raising the anchor of the Tow or tending or casting off any moorings of the Tow).

(v) The cost of insurance of the Tow.

(c) All taxes, charges, costs, and expenses payable by the Hirer shall be paid by the Hirer direct to those entitled to them. If, however, any such tax, charge, cost or expense is in fact paid by or on behalf of the Tugowner (notwithstanding that the Tugowner shall under no circumstances be under any obligation to make such payments on behalf of the Hirer) the Hirer shall reimburse the Tugowner on the basis of the actual cost to the Tugowner upon presentation of invoice.

8. War Risk Escalation Clause

The rate of hire is based and assessed on all war risk insurance costs applicable to the Tugowner in respect of the contemplated voyage in effect on the date of this Agreement. In the event of any subsequent increase or decrease in the actual costs, the Hirer or the Tugowner, as the case may be, shall reimburse to the other the amount of any increase or decrease in such war risk insurance costs.

9. Interest

If any amounts due under this Agreement are not paid when due, then interest shall accrue and shall be paid in accordance with the provisions of Box 39, on all such amounts until payment is received by the party to whom it is due.

10. *Financial Security

The Hirer undertakes to provide, if required by the Tugowner, security to the satisfaction of the Tugowner in the form and in the sum, at the place and at the time indicated in Box 40 as a guarantee for due performance of the Agreement. Such security shall be returned to the guarantor when the Hirer's financial obligations under this Agreement have been met in full.

(*Optional, only applicable if Box 40 filled in).

11. Place of Departure

(a) The Tow shall be tendered to the Tugowner at the Place of Departure stated in Box 23.

(b) The place of connection and departure shall always be safe and accessible for the Tug to enter, to operate in and for the Tug and Tow to leave and shall be a place where such Tug is permitted to commence the towage in accordance with any local or other rules, requirements or regulations and shall always be subject to the approval of the Tugowner which shall not be unreasonably withheld.

12. Place of Destination

(a) The Tow shall be accepted and taken over by the Hirer immediately upon arrival at the Place of Destination stated in Box 25.

(b) The place of disconnection shall always be safe and accessible for the Tug and Tow to enter, to operate in, and for the Tug to leave and shall be a place where such Tug is permitted to redeliver the Tow in accordance

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with any local or other rules, requirements or regulations and shall always be subject to the approval of the Tugowner, which shall not be unreasonably withheld.

13. Riding crew

(a) Riding crew for the Tow, if so requested by the Hirer, shall be provided by the party stated in Box 29. The number of riding crew shall be as stated in Box 29. All costs and expenses for such personnel will be for the account of the Hirer and such personnel shall be at all times under the orders of the Tugmaster. If the riding crew are provided by the Tugowner the Hirer shall pay to the Tugowner the amount per man per day stated in Box 30. If the riding crew are provided by the Hirer they shall not be deemed to be the servants or agents of the Tugowner. Permission for the Hirer to provide a riding crew on the Tow as well as the composition and suitability of the riding crew shall always be in the discretion of the Tugowner.

(b) It shall be the Hirer's responsibility to provide the riding crew with suitable accommodation, food, fresh water, life saving appliances and all other requirements as necessary to comply with the laws and regulations of the Flag of the Tug and/or Tow and of the States through the territorial waters of which the Tug will pass or enter. It is a requirement that the members of the riding crew shall be able to speak and understand a language which is mutual to the Tug and Tow.

(c) In the event that the Tugowner provides a riding crew for the Tow for its own purposes, all costs and expenses for such personnel shall be for the account of the Tugowner.

14. Towing Gear and Use of Tow's Gear

(a) The Tugowner agrees to provide free of cost to the Hirer the use of all tow wires, bridles and other towing gear carried on board the Tug for the purpose of the towage or other services to be provided under this Agreement. The Tow shall be connected up in a manner within the discretion of the Tugmaster.

(b) The Tugowner may make reasonable use at his discretion of the Tow's gear, power, anchors, anchor cables, radio, communication and navigational equipment and all other appurtenances free of cost during and for the purposes of the towage or other services to be provided under this Agreement.

(c) The Hirer shall pay for the replacement of any towing gear and accessories should such equipment become lost, damaged or unserviceable during the service(s), other than as a result of the Tugowners' negligence.

15. Permits and Certification

(a) The Hirer shall arrange at his own cost and provide to the Tugowner all necessary licences, authorisations and permits required by the Tug and Tow to undertake and complete the contractual voyage together with all necessary certification for the Tow to enter or leave all or any ports of call or refuge on the contemplated voyage.

(b) Any loss or expense incurred by the Tugowner by reason of the Hirer's failure to comply with this Clause shall be reimbursed by the Hirer to the Tugowner and during any delay caused thereby the Tug shall remain on hire.

16. Tow-worthiness of the Tow

(a) The Hirer shall exercise due diligence to ensure that the Tow shall, at the commencement of the towage, be in all respects fit to be towed from the place of departure to the place of destination.

(b) The Hirer undertakes that the Tow will be suitably trimmed and prepared and ready to be towed at the time when the Tug arrives at the place of departure and fitted and equipped with such shapes, signals, navigational and other lights of a type required for the towage.

(c) The Hirer shall supply to the Tugowner or the Tugmaster, on the arrival of the Tug at the place of departure a certificate of tow-worthiness for the Tow issued by a recognised firm of Marine Surveyors or Survey Organisation, provided always that the Tugowner shall not be under any obligation to perform the towage until in his discretion he is satisfied that the Tow is in all respects trimmed, prepared, fit and ready for towage but the Tugowner shall not unreasonably withhold his approval.

(d) No inspection of the Tow by the Tugowner shall constitute approval of the Tow's condition or be deemed a waiver of the foregoing undertakings given by the Hirer.

17. Seaworthiness of the Tug

The Tugowner will exercise due diligence to tender the Tug at the place of departure in a seaworthy condition

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and in all respects ready to perform the towage, but the Tugowner gives no other warranties, express or implied.

18. Substitution of Tugs

The Tugowner shall at all times have the right to substitute any tug or tugs for any other tug or tugs of adequate power (including two or more tugs for one, or one tug for two or more) at any time whether before or after the commencement of the towage or other services and shall be at liberty to employ a tug or tugs belonging to other tugowners for the whole or part of the towage or other service contemplated under this Agreement. Provided however, that the main particulars of the substituted tug or tugs shall be subject to the Hirer's prior approval, but such approval shall not be unreasonably withheld.

19. Salvage

(a) Should the Tow break away from the Tug during the course of the towage service, the Tug shall render all reasonable services to re-connect the towline and fulfil this Agreement without making any claim for salvage.

(b) If at any time the Tugowner or the Tugmaster considers it necessary or advisable to engage salvage services from any vessel or person on behalf of the Tug or Tow, or both, the Hirer hereby undertakes and warrants that the Tugowner or his duly authorised servant or agent including the Tugmaster have the full actual authority of the Hirer to accept such services on behalf of the Tow on any reasonable terms. Where circumstances permit the Tugowner shall consult with the Hirer on the need for salvage services for the Tow.

20. Termination by the Hirer

(a) At any time prior to the departure of the Tow from the place of departure the Hirer may terminate this Agreement upon payment of the termination fee set out in Box 42. If termination takes place whilst the Tug is en route to the place of departure or after the Tug has arrived at or off the place of departure then in addition to the said termination fee the Hirer shall pay any additional amounts due under this Agreement.

(b) In the event that the towage operation is terminated after departure from the place of departure, but before the Tow arrives at the place of destination without fault on the part of the Tugowner, his servants or agents, the Tugowner shall be entitled to be paid, and if already paid to retain, all sums payable according to Box 33 and any other amounts due under this Agreement. The above amounts are in addition to any damages the Tugowner may be entitled to claim for breach of this Agreement.

21. Termination by the Tugowner

(a) The Tugowner may without prejudice to any other remedies he may have, withdraw from and terminate this Agreement and leave the Tow in a place where the Hirer may take repossession of it and be entitled to payment of cancellation fee or hire, whichever is the greater, and all other payments due under this Agreement, upon any one or more of the following grounds:

(i) If there is any delay or delays (other than delay caused by the Tug) at the place of departure exceeding in aggregate fourteen (14) days.

(ii) If there is any delay or delays (other than a delay caused by the Tug) at any port or place of call or refuge exceeding in aggregate fourteen (14) days.

(iii) If the financial security as may be required according to Box 40 is not given within seven (7) running days of the Tugowner's request to provide security.

(iv) If the Hirer has not accepted the Tow within seven (7) running days of arrival at the place of destination.

(v) If any amount payable under this Agreement has not been paid within seven (7) running days of the date such sums are due.

(b) Before exercising his option of withdrawing from this Agreement as aforesaid, the Tugowner shall give the Hirer 48 hours' notice of his intention so to withdraw.

22. Necessary Deviation

(a) If the Tug during the course of the towage or other service under this Agreement puts into a port or place or seeks shelter or is detained or deviates from the original route as set out in Box 26 because either the Tugowner or Tugmaster reasonably consider

(i) that the Tow is not fit to be towed; or

(ii) the towing connection requires rearrangement; or

(iii) repairs or alterations to or additional equipment for the Tow are required to safeguard the venture and enable the Tow to be towed to destination; or

(iv) it would not be prudent to do otherwise on account of weather conditions actual or forecast; or because of any other good and valid reason outside the control of the Tugowner or Tugmaster, or because of any delay caused by or at the request of the Hirer, this Agreement shall remain in full force and effect.

(b) The Tug shall at all times be at liberty to go to the assistance of any vessel in distress for the purpose of saving life or property or to call at any port or place for bunkers, repairs, supplies, or any other necessaries or to land disabled seamen, but if towing the Tug shall leave the Tow in a safe place and during such period this Agreement shall remain in full force and effect, including the provisions of Clause 7(b)(i), but any period so spent by the Tug in fulfilling or attempting to fulfil the purposes permitted by this sub-paragraph other than for normal replenishment of bunkers or fresh water or supplies shall not entitle the Tugowner to recover from the Hirer the Daily Rate of Hire for the said period.

(c) Any deviation howsoever or whatsoever by the Tug or by the Tugowner not expressly permitted by the terms and conditions of this Agreement shall not amount to a repudiation of this Agreement and the Agreement shall remain in full force and effect notwithstanding such deviation, save that no hire shall be paid for the period of such deviation, and shall be without prejudice to any other remedies which the Hirer may have against the Tugowner.

23. Liability and Indemnity

(a)

(i) The Tugowner will indemnify the Hirer in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death of any of the following persons, occurring during the towage or other service hereunder, from arrival of the Tug at the pilot station or customary waiting place or anchorage at the Place of Departure (whichever is sooner), until disconnection at the Place of Destination, however such geographic and/or time limits shall not apply to sub-clause 23(a)(i)2. below:

(1) The Master and members of the crew of the Tug and any other servant or agent of the Tugowner;

(2) The members of the riding crew provided by the Tugowner or any other person whom the Tugowner provides on board the Tow;

(3) Any other person on board the Tug who is not a servant or agent of the Hirer or otherwise on board on behalf of or at the request of the Hirer.

(ii) The Hirer will indemnify the Tugowner in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the towage or other service hereunder of any of the following persons:

(1) The Master and members of the crew of the Tow and any other servant or agent of the Hirer;

(2) Any other person on board the Tow for whatever purpose except the members of the riding crew or any other persons whom the Tugowner provides on board the Tow pursuant to their obligations under this Agreement.

(b)

(i) The following shall be for the sole account of the Tugowner without any recourse to the Hirer, his servants, or agents, whether or not the same is due to any breach of contract, negligence or any other fault on the part of the Hirer, his servants or agents:

(1) Save for the provisions of Clause 14(c), loss or damage of whatsoever nature, howsoever caused to or sustained by the Tug or any property on board the Tug.

(2) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tug or obstruction created by the presence of the Tug.

(3) Loss or damage of whatsoever nature suffered by the Tugowner or by third parties in consequence of the loss or damage referred to in (1) and (2) above.

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(4) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Tug or in respect of preventing or abating pollution originating from the Tug.

The Tugowner will indemnify the Hirer in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage. The Tugowner shall not in any circumstances be liable for any loss or damage suffered by the Hirer or caused to or sustained by the Tow in consequence of loss or damage howsoever caused to or sustained by the Tug or any property on board the Tug.

(ii) The following shall be for the sole account of the Hirer without any recourse to the Tugowner, his servants or agents, whether or not the same is due to any breach of contract (including as to the seaworthiness of the Tug), negligence or any other fault on the part of the Tugowner, his servants or agents:

(1) Loss or damage of whatsoever nature, howsoever caused to or sustained by the Tow.

(2) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tow or obstruction created by the presence of the Tow.

(3) Loss or damage of whatsoever nature suffered by the Hirer or by third parties in consequence of the loss or damage referred to in (1) and (2) above.

(4) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Tow or in respect of preventing or abating pollution originating from the Tow.

The Hirer will indemnify the Tugowner in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage but the Hirer shall not in any circumstances be liable for any loss or damage suffered by the Tugowner or caused to or sustained by the Tug in consequence of loss or damage howsoever caused to or sustained by the Tow.

(c) Save for the provisions of Clauses 15, (Permits & Certification); 16, (Tow-worthiness of the Tow); 17, (Seaworthiness of the Tug); 20 (Termination by the Hirer) and 21 (Termination by the Tugowner), neither the Tugowner nor the Hirer shall be liable to the other party for

(i) any loss of profit, loss of use or, loss of production whatsoever and whether arising directly or indirectly from the performance or non performance of this Agreement, and whether or not the same is due to negligence or any other fault on the part of either party, their servants or agents, or

(ii) any consequential loss or damage for any reason whatsoever, whether or not the same is due to any breach of contract, negligence or any other fault on the part of either party, their servants or agents.

(d) Notwithstanding any provisions of this Agreement to the contrary, the Tugowner shall have the benefit of all limitations of, and exemptions from, liability accorded to the owners or chartered owners of vessels by any applicable statute or rule of law for the time being in force and the same benefits are to apply regardless of the form of signatures given to this Agreement.

24. Himalaya Clause

All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions

granted or provided by this Agreement or by any applicable statute rule or regulation for the benefit of the Tugowner or Hirer shall also apply to and be for the benefit of:

(a) demise charterers, sub-contractors, operators, Master, officers and crew of the Tug or Tow and,

(b) all bodies corporate, parent of, subsidiary to, affiliated with or under the same management as either the Tugowner or Hirer, as well as all directors, officers, servants and agents of the same and

(c) all parties performing services within the scope of this Agreement for or on behalf of the Tug or Tugowner or Hirer as servants, agents and sub-contractors of such parties.

The Tugowner or Hirer shall be deemed to be acting as agent or trustee of and for the benefit of all such persons, entities and vessels set forth above but only for the limited purpose of contracting for the extension of such benefits to such persons, bodies and vessels.

25. War and Other risks

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(a) For the purpose of this Clause, the words:

(i) "War Risks" shall include any actual, threatened or reported:

war; act of war; civil war; hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy; acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever); by any person, body, terrorist or political group, or the Government of any State whatsoever, which, in the reasonable judgement of the Master and/or the Tugowners, may be dangerous or are likely to be or to become dangerous to the Tug, her Tow, crew or other persons on board the Tug or Tow.

(ii) "Other Risks" shall include any actual, threatened or reported:
arrest or restraint of princes, rulers or people; insurrections; riots or civil commotions; disturbances; acts of God; epidemics; quarantine; labour troubles; labour obstructions; strikes; lock-outs; embargoes; seizure of the Tow under legal process or for any other cause outside the control of the Tugowner as a result of which it would be impossible or unsafe or commercially impracticable for the Tug or Tow or both to enter or attempt to enter or leave or attempt to leave the place of departure or any port or place of call or refuge or to reach or attempt to reach or enter the port or place of destination of the Tow and there deliver the Tow and leave again, all of which safely and without unreasonable delay, the Tug may leave the Tow or any part thereof at the place of departure or any other port or place where the Hirer may take repossession and this shall be deemed a due fulfilment by the Tugowner of this Agreement and any outstanding sums and all extra costs of delivery at such place and any storage costs incurred by the Tugowner shall thereupon become due and payable by the Hirer.

(b) The Tug, unless prior written consent of the Tugowners has first been obtained, shall not be required to continue to or through, any port, place, area or zone (whether of land or sea), or any waterway or canal, where it appears that the Tug, her Tow, the crew or other persons on board the Tug or Tow, in the reasonable judgement of the Master and/or the Tugowners, may be, or are likely to be, exposed to War or Other Risks. Should the Tug be within any such place as aforesaid, which only becomes subject to War or Other Risks, or is likely to be or to become subject to War or Other Risks, after her entry into it, she shall be at liberty to leave such place or area.

(c)

(i) The Tugowners may effect war risks insurance in respect of the Hull and Machinery of the Tug and their other interests (including, but not limited to, loss of earnings and detention, the crew and their Protection and Indemnity Risks), and the premiums and/or calls therefor shall be for their account.

(ii) If the Underwriters of such insurance should require payment of additional premiums and/or calls because, pursuant to the Hirers' orders, the Tug is within, or is due to enter and remain within, or pass through any area or areas which are specified by such Underwriters as being subject to additional premiums because of War Risks, then the actual additional premiums and/or calls paid shall be reimbursed by the Hirers to the Tugowners at the same time as the next payment of hire is due, or upon delivery of the Tow, whichever occurs first.

(d) If the Tugowners become liable under the terms of employment to pay to the crew of the Tug, or any riding crew of the Tow, any War Risk related bonus or additional wages in respect of sailing into a War Risk area, then the actual War Risk related bonus or additional wages paid shall be reimbursed to the Tugowners by the Hirers at the same time as the next payment of hire is due, or upon delivery of the Tow, whichever occurs first.

(e) The Tug shall have liberty:-

(i) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery, or in any other way whatsoever, which are given by the Government of the Nation under whose flag the Tug sails, or other Government to whose laws the Tugowners are subject, or any other Government, body or group whatsoever acting with the power to compel compliance with their orders or directions;

(ii) to comply with the orders, directions or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance;

(iii) to comply with the terms of any resolution of the Security Council of the United Nations, the effective

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orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Tugowners are subject, and to obey the orders and directions of those who are charged with their enforcement;

(iv) to call at any other port to change the crew or any part thereof or other persons on board the Tug or Tow when there is reason to believe that they may be subject to internment, imprisonment or other sanctions.

(f) If the performance of this Agreement or the voyage to the place of departure would in the ordinary course of events require the Tug and/or Tow to pass through or near to an area where after this Agreement is made there is or there appears to be danger of such area being blocked or passage through being restricted or made hazardous by the War or Other Risks then:

(i) The Tug shall not be required to pass through any blockade, whether such blockade be imposed on all vessels, or is imposed selectively in any way whatsoever against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever, or to proceed to an area where she shall be subject, or is likely to be subject to search and/or confiscation.

(ii) If the Tug has not entered such area en route to the place of departure, or having entered has become trapped therein for a period of more than fourteen (14) days, either party hereto shall be entitled to terminate this Agreement by giving notice in which event, save for liabilities already accrued, neither party shall be under any further liability to the other but the Tugowner shall not be bound to repay to the Hirer any payments already made and all amounts due shall remain payable.

(iii) If the Tug and Tow whilst en route to the place of destination have not entered such area during the course of the towage or other service the Hirer shall continue to pay the Daily Rate of Hire for every day by which the towage is prolonged by reason of waiting for such area to become clear and/or safe and/ or by reason of proceeding by a longer route to avoid or pass such area in safety.
(iv) If the Tug and Tow whilst en route to the place of destination have become trapped in such area during the course of the towage or other service either party shall, after a period of fourteen (14) days from the commencement of such trapping, be entitled to terminate this Agreement by telex, cable or other written notice, in which event, save for liabilities already accrued, neither party shall be under any further liability to the other but the Tugowner shall not be bound to repay to the Hirer any payment already made and all amounts due shall remain payable.

(g) If in accordance with their rights under the foregoing provisions of this Clause, the Tugowners refuse to proceed from the place of departure or to the place of destination, or any one or more of them, they shall immediately notify the Hirers requesting them to nominate a place for redelivery of the Tow. Failing such nomination by the Hirers within 48 hours of the receipt of such notice and request, the Tugowners may redeliver the Tow at any place where the Hirer can take repossession of the Tow.

(h) If in compliance with any of the provisions of this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Agreement.

26. Lien

Without prejudice to any other rights which he may have, whether in rem or in personam, the Tugowner, by himself or his servants or agents or otherwise shall be entitled to exercise a possessory lien upon the Tow in respect of any sum howsoever or whatsoever due to the Tugowner under this Agreement and shall for the purpose of exercising such possessory lien be entitled to take and/or keep possession of the Tow; provided always that the Hirer shall pay to the Tugowner by himself or his servants or agents or otherwise all reasonable costs and expenses and all costs of recovering same, including legal fees, howsoever or whatsoever incurred by or on behalf of the Tugowner by himself or his servants or agents or otherwise in exercising or attempting or preparing to exercise such lien and the Tugowner by himself or his servants or agents or otherwise shall be entitled to receive from the Hirer the Tug's Daily Rate of Hire throughout any reasonable delay to the Tug resulting therefrom.

27. Warranty of Authority

If at the time of making this Agreement or providing any service under this Agreement other than towing at the request, express or implied, of the Hirer, the Hirer is not the Owner of the Tow referred to in Box 4, the Hirer expressly represents that he is authorised to make and does make this Agreement for and on behalf of the Owner of the said Tow and agrees that both the Hirer and the Owner of the Tow are bound jointly and severally by the provisions of this Agreement.

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28. General

(a) If any one or more of the terms, conditions or provisions in this Agreement or any part thereof shall be held to be invalid, void or of no effect for any reason whatsoever, the same shall not affect the validity of the remaining terms, conditions or provisions which shall remain and subsist in full force and effect.
(b) For the purpose of this Agreement unless the context otherwise requires the singular shall include the plural and vice versa.

29. Time for Suit

(a) Save for the indemnity provisions under Clause 23 (Liability and Indemnity) of this Agreement, any claim which may arise out of or in connection with this Agreement or of any towage or other service to be performed hereunder shall be notified within 6 months of delivery of the Tow or of the termination of the towage or other service for any reason whatever, and any suit shall be brought within one year of the time when the cause of action first arose. If either of these conditions is not complied with the claim and all rights whatsoever and howsoever shall be absolutely barred and extinguished.

(b) Any extension of time granted by the Tugowner to the Hirer or any indulgence shown relating to the time limits set out in this Agreement shall not be a waiver of the Tugowner's right under this Agreement to act upon the Hirer's failure to comply with the time limits.

30. BIMCO ISPS/MTSA Clause 2005

(a)

(i) The Tugowner shall comply with the requirements of the International Code for the Security of Ships and of Port Facilities and the relevant amendments to Chapter XI of SOLAS (ISPS Code) relating to the Tug and "the Company" (as defined by the ISPS Code). If trading to or from the United States or passing through United States waters, the Tugowner shall also comply with the requirements of the US Maritime Transportation Security Act 2002 (MTSA) relating to the Vessel and the "Owner" (as defined by the MTSA).

(ii) Upon request the Tugowner shall provide the Hirer with a copy of the relevant International Ship Security Certificate (or the Interim International Ship Security Certificate) and the full style contact details of the Company Security Officer (CSO).

(iii) Loss, damages, expense or delay (excluding consequential loss, damages, expense or delay) caused by failure on the part of the Tugowner or "the Company"/"Owner" to comply with the requirements of the ISPS Code/MTSA or this Clause shall be for the Tugowner's account, except as otherwise provided in this Agreement.

(b)

(i) The Hirer shall provide the Tugowner and the Tugmaster with their full style contact details and, upon request, any other information the Tugowner requires to comply with the ISPS Code/MTSA. Where sub-letting is permitted under the terms of this Agreement, the Hirer shall ensure that the contact details of all sub-hirers are likewise provided to the Tugowner and the Tugmaster. Furthermore, the Hirer shall ensure that all sub-lets they enter into during the period of this Agreement contain the following provision:

"The Hirer shall provide the Tugowner with their full style contact details and, where sub-letting is permitted under the terms of the agreement, shall ensure that the contact details of all sub-hirers are likewise provided to the Tugowners".

(ii) Loss, damages, expense or delay (excluding consequential loss, damages, expense or delay) caused by failure on the part of the Hirer to comply with this Clause shall be for the Hirer's account, except as otherwise provided in this Agreement.

(c) Notwithstanding anything else contained in this Agreement, all delay, costs or expenses whatsoever arising out of or related to security regulations or measures required by the port facility or any relevant authority in accordance with the ISPS Code/MTSA including, but not limited to, security guards, launch services, vessel escorts, security fees or taxes and inspections, shall be for the Hirer's account, unless such delay, costs or expenses result solely from the negligence of the Tugowner, Tugmaster or crew. All measures required by the Tugowner to comply with the Ship Security Plan shall be for the Tugowner's account.

(d) If either party makes any payment which is for the other party's account according to this Clause, the other party shall indemnify the paying party.

31. BIMCO Dispute Resolution Clause

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(a) *This Agreement shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Agreement shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause. The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced. The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

(b) *This Agreement shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Agreement shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgment may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.

(c) *This Agreement shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Agreement shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(d) Notwithstanding (a), (b) or (c) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Agreement.

In the case of a dispute in respect of which arbitration has been commenced under (a), (b) or (c) above, the following shall apply:

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within 14 calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further 14 calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(v) Either party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall

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continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.
(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are disclosable under the law and procedure governing the arbitration.

(Note: The parties should be aware that the mediation process may not necessarily interrupt time limits.)

(e) If Box 43 is not appropriately filled in, sub-clause (a) of this Clause shall apply. Sub-clause (d) shall apply in all cases.
**Note: Sub-clauses (a), (b) and (c) are alternatives; indicate alternative agreed in Box 43.*

32. Security for Claims

Either party shall have the option to bring proceedings in rem, but only to obtain security or other similar remedy for claims arising under this Agreement against any vessel or property owned by the other party in any state or jurisdiction where such vessel or property may be found.

33. BIMCO Notices Clause

(a) All notices given by either party or their agents to the other party or their agents in accordance with the provisions of this Agreement shall be in writing.

(b) For the purposes of this Agreement, "in writing" shall mean any method of legible communication. A notice may be given by any effective meansincluding, but not limited to, cable, telex, fax, e-mail, registered or recorded mail, or by personal service.

APPENDIX 4

Supplytime 2017

BIMCO

SUPPLYTIME 2017

TIME CHARTER PARTY FOR OFFSHORE SUPPORT VESSELS **PART I**

1. Place and date of contract		
2. Owners/Place of business (full style address and e-mail)	3. Charterers/Place of business (full style address and email)	
4. Vessel´s name and IMO number (ANNEX A)	5. Date of delivery (Cl. 2(a))	6. Cancelling date and time (Cl. 2(a) and (c))
7. Port or place of delivery (Cl. 2(a))	8. Port or place redelivery/notice of redelivery (Cl. 2(d)) (i) Port or place of redelivery (ii) Number of days´ notice of redelivery	
9. Period of hire (Cl. 1(a))	10. Extension of period of hire (optional) (Cl. 1(b)) (i) Period of extension (ii) Advance notice for declaration of option (days)	
11. Automatic extension period to complete voyage or well (Cl. 1(c)) (i) Voyage or well (state which) (ii) Maximum extension period (state number of days)	12. Mobilisation fee (Cl. 2(b)) (i) Lump sum (ii) When due	
13. Early termination of charter (state amount of hire payable) (Cl. 34(a)) (i) State yes, if applicable (ii) If yes, state amount of hire payable	14. Number of days´ notice of early termination (Cl. 34(a))	15. Demobilisation fee (lump sum) (Cl. 2(e) and Cl. 34(a))
16. Area of Operation (Cl. 6(a) and Cl.12(c))	17. Employment of vessel restricted to (state nature of services(s)) (Cl. 6(a))	
18. Specialist operations (Cl. 6(b)) (i) State if vessel may be used for ROV operations (ii) State if vessel may be employed as a diving platform	19. Fuel (Cl. 10) (i) Quantity of fuel on delivery (ii) Payment method for fuel (state 10(c)(i) or (ii)) (iii) Pre-agreed price of fuel (iv) Fuel specifications and grades for fuel supplied by Charterers	

20. Charter hire (Cl. 12(a), (d), (e) and Cl. 33(e)) (i) State rate and currency (ii) Exchange rate		21. Extension hire (if agreed, state rate) (Cl 12(b))	
22. Invoicing for hire and other payments (Cl 12(d)) (i) State whether to be issued in advance or arrears (ii) State by whom to be issued if other than the party stated in Box 2 (iii) State to whom to be issued if addressee other than stated in Box 3		23. Payments (state mode and place of payment; also state beneficiary and bank account) (Cl 12(e))	
24. Payment of hire, bunker invoices and disbursements for Charterers' account (state maximum number of days) (Cl. 12(e))		25. Interest rate payable (Cl. 12(e))	26. Maximum audit period (Cl. 12(g))
27. Meals (state rate agreed) (Cl. 6(d)(i))	28. Accommodation (state rate agreed) (Cl. 6(d)(i))	29. Sublet (state amount of daily increment of charter hire) (Cl. 20)	
30. War cancellation (indicate countries agreed) (Cl. 23)			
31. Taxes (payable by Owners) (Cl. 32)			
32. Off-hire (state period) (Cl. 34(d)) (i) Single consecutive (ii) Combined			
33. Dispute resolution (state (a), (b), (c) or (d) of Cl. 37, as agreed; if (c) agreed also state whether Singapore or English law to apply; if (d) agreed also state the place of the law governing the Charter Party and place of arbitration) (Cl. 37) (d) -			
34. Numbers of additional clauses covering special provisions, if agreed			

It is mutually agreed that this Charter Party shall be performed subject to the conditions contained in the Charter Party consisting of PART I, including additional clauses, if any agreed and stated in Box 34, and PART II as well as ANNEX A and ANNEX B. In the event of a conflict of conditions, the provisions of PART I shall prevail over those of PART II and ANNEX A and ANNEX B to the extent of such conflict but no further.

Signature (Owners)	Signature (Charterers)

ANNEX A to Time Charter Party for Offshore Support Vessels
Code name: SUPPLYTIME 2017

VESSEL SPECIFICATION

General

a) Company (as defined by the ISM Code) — Name / Address
b) Vessel name
c) Built — Builder — Year
d) Type of vessel
e) Full class notation
f) Flag and Port of Registry
g) IMO No.

Dimensions

a) L.O.A.
b) Beam
c) Depth
d) Max draft
e) Max deadweight
f) GT/NT /

Dedicated Cargo Capacities — Pumps and discharge rates:

a) Potable water
b) Drill water
c) Fuel
d) Oil Based mud and SG
e) Brine and SG
f) Base Oil
g) Methanol
h) Special products
i) Dry bulk — Number of tanks and compressors

Main Cargo Deck

a) Clear deck area (L x B)
b) Deck area less safety zones (M2)
c) Deck load at 1.0m CoG
d) Min point loading (T/M2)
e) Reefer points
f) Safe havens Y/N (description)
g) Tugger winches
h) Capstans

Propulsion

a) Type — Conventional/diesel-electric/hybrid/other
b) Main engines/generators — Make, model, number and power
c) Auxiliary generators — Make, model, number and power
d) Shaft alternators — Number and power
e) Emergency generator — Make, model and power
f) Bow thrusters — Number, type and power
g) Stern thrusters — Number, type and power
h) Propellers and rudders — Number and type

Cranes

a) Crane No. 1
b) Crane No. 2
c) Crane No. 3

d) Crane No. 4

Towing and Anchor Handling

a) Max bollard pull and Effective bollard pull (date and result)
b) Make and type of winch
c) Tow drum (max pull/brake/wire capacity)
d) Spare tow wire (length)
e) Work drum(s) (max pull/brake/wire capacity)
f) Storage drums (capacity/powered)
g) Chain lockers (M3)
h) Chain/wire stoppers (type/SWL)
i) Stern roller (dimensions/SWL)

Communications

a) MMSI No.
b) GMDSS areas
c) Fixed VHF
d) Fixed UHF
e) VSAT facilities

Dynamic Positioning

a) IMO class (1, 2 or 3)
b) Class society DP notation
c) Make and model of DP computers
d) Reference systems
   i)
   ii)
   iii)
   iv)
   v)
   vi)
e) Date of last FMEA trial

Accommodation

a) Total LSA
b) SPS certificate
c) One berth cabins
d) Two berth cabins
e) Other cabins

Standby and Firefighting

a) Standby/rescue certificate Issued by Survivor No.
b) Firefighting class (I, II or III)
c) No. of pumps and monitors

Additional

a) Safe manning certificate
b) Owners manning level
c) Date of last CMID/OVID
d) FRC/MOB boat (No., type and capacity)
e) Helideck CAA Cert, D-rating and max loading

ANNEX B to Time Charter Party for Offshore Support Vessels
Code name: SUPPLYTIME 2017

INSURANCE

Insurance policies (as applicable) to be obtained and maintained by the Owners under Clause 17 (Insurance):

(1) Marine Hull Insurance – Hull and Machinery Insurance shall be provided with limits equal to those normally carried by the Owners for the Vessel.

(2) Protection and Indemnity (Marine Liability Insurance) – Protection and Indemnity (P&I) or Marine Liability Insurance with coverage equivalent to the cover provided by members of the International Group Protection and Indemnity Associations with a limit of cover no less than USD for any one event. The cover shall include liability for collision and damage to fixed and floating objects to the extent not covered by the insurance in (1) above.

(3) General Third Party Liability Insurance – To the extent not covered by the insurance in (2) above, coverage shall be for:

Bodily Injury per person

Property Damage per occurrence

(4) Workmen's Compensation and Employer's Liability Insurance for Employees – To the extent not covered in the insurance in (2) above, covering Owners' employees and other persons for whom Owners are liable as employer pursuant to applicable law for statutory benefits as set out and required by local law in area of operation or area in which the Owners may become legally obliged to pay benefits.

(5) Such other insurances as may be agreed.

PART II
SUPPLYTIME 2017 Time Charter Party for Offshore Support Vessels

Definitions

"Affiliates" means a company, partnership, or other legal entity which controls, is controlled by, or is under common control with, a party. For the purposes of this definition, the term "control" means the direct or indirect ownership of fifty per cent (50%) or more of the issued share capital or any kind of voting rights in a company, partnership, or legal entity, and "controls", "controlled" and "under common control" shall be construed accordingly.

"Banking Days" means days on which banks are open in the places stated in Box 2 and Box 3.

"Charterers" means the party stated in Box 3.

"Charterers' Group" means any of the following:

(i) Charterers and Charterers' clients (of any tier); and

(ii) co-venturers of any of the foregoing; and

(iii) Affiliates of any of the foregoing; and

(iv) contractors and sub-contractors (of any tier); and

(v) Employees of any of the foregoing;

but always related to the work or project on which the Vessel is employed.

"Crew" means the Master, officers, ratings and any other personnel on board the Vessel and in each case provided by the Owners.

"Employees" means employees, directors, officers, servants, agents or invitees.

"Offshore Units" means any vessel, offshore installation, structure and/or mobile offshore unit used in offshore operations.

"Owners" means the party stated in Box 2.

"Owners' Group" means:

(i) Owners; and

(ii) Owners' Affiliates; and

(iii) contractors and sub-contractors (of any tier); and

(iv) Employees of any of the foregoing

but always related to the work or project on which the Vessel is employed.

"Parties" means the Owners and the Charterers.

"Vessel" means the vessel named in Box 4 and with particulars stated in ANNEX A.

1. Charter Period

(a) The Owners let and the Charterers hire the Vessel for the period as stated in Box 9 from the time the Vessel is delivered to the Charterers.

PART II
SUPPLYTIME 2017 Time Charter Party for Offshore Support Vessels

(b) Subject to Subclause 12(b) (Hire and Payments – Extension of Hire), the Charterers have the option to extend the Charter Period in direct continuation for the period stated in Box 10(i), but such an option must be declared in accordance with Box 10(ii).

(c) The Charter Period shall automatically be extended for the time required to complete the voyage or the drilling, testing, completing and/or abandoning of the single borehole including any side-track thereof ("Well") (whichever is stated in Box 11(i)) in progress, such time shall not exceed the period stated in Box 11(ii). The Charterers shall not instruct the Vessel to commence a voyage or Well unless they reasonably expect it to be completed within the Charter Period including the time required for transit to the port or place of redelivery and demobilisation.

2. Delivery and Redelivery

(a) Delivery - (i) The Vessel shall be delivered to the Charterers between the dates stated in Box 5 and Box 6 at the port or place specified in Box 7.

(ii) Subject to Subclause 2(b) (Delivery and Redelivery – Mobilisation), the Vessel shall be delivered to the Charterers free of all cargoes and with her cargo tanks clean to applicable industry standards. The port or place of delivery shall be such that the Vessel will always lie safely afloat.

(b) Mobilisation – The Charterers shall pay the lump sum mobilisation fee, without discount, as stated in Box 12 upon the delivery of the Vessel.

(c) Cancelling – If the Vessel is not delivered by the cancelling date and time stated in Box 6, the Charterers shall be entitled to cancel this Charter Party. However, if the Owners know or ought reasonably to know that they will be unable to deliver the Vessel by the cancelling date, they shall give notice in writing to the Charterers thereof as soon as reasonably practicable stating in such notice the date and time by which they will be able to deliver the Vessel. The Charterers may within twenty-four (24) hours of receipt of such notice give notice in writing to the Owners cancelling this Charter Party. If the Charterers do not give such notice, then the later date specified in the Owners' notice shall be substituted for the cancelling date for all the purposes of this Charter Party. In the event the Charterers cancel the Charter Party, it shall terminate on terms that neither party shall be liable to the other for any losses incurred by reason of the non-delivery of the Vessel or the cancellation of the Charter Party.

(d) Redelivery – The Vessel shall be redelivered on the expiration or earlier termination of this Charter Party free of cargo and with cargo tanks clean to applicable industry standards at the port or place as stated in Box 8(i) or such other port or place as may be mutually agreed. The Charterers shall give not less than the number of days' notice in writing of their intention to redeliver the Vessel, as stated in Box 8(ii).

(e) Demobilisation – Except in the event of termination due to the Owners' repudiatory breach, the Charterers shall pay the lump sum demobilisation fee without discount in the amount as stated in Box 15 which amount shall be paid on the expiration or on earlier termination of this Charter Party.

(f) Cargo and services – Should the Owners agree to the Vessel loading and transporting cargo and/or property and/or undertaking any other service for the Charterers en route to the port of delivery or from the port of redelivery, then all terms and conditions of this Charter Party shall apply to such loading and transporting and/or other service exactly as if performed during the Charter Period excepting only that any lump sum fee agreed in respect thereof shall be payable and earned on loading or commencement of the service as the case may be, the Vessel and/or cargo and/or property lost or not lost.

3. Condition of Vessel

(a) At the date of delivery the Vessel shall be of the description and class as specified in ANNEX A, attached hereto, and in a thoroughly efficient state of hull and machinery.

PART II
SUPPLYTIME 2017 Time Charter Party for Offshore Support Vessels

(b) The Owners shall exercise due diligence to maintain the Vessel in such class and in every way fit for the service stated in Clause 6 (Employment and Area of Operation) throughout the period of this Charter Party.

4. Structural Alterations and Additional Equipment

The Charterers shall have the option, at their expense, of making structural alterations to the Vessel or installing additional equipment, both requiring the written consent of the Owners, which shall not be unreasonably withheld. Unless otherwise agreed, the Vessel is to be redelivered reinstated and all additional equipment removed, at the Charterers' expense, to her condition on delivery, fair wear and tear excepted. The Vessel is to remain on hire during any period of these alterations or reinstatement. The Charterers shall at all times be responsible for repair and maintenance of any such alteration or additional equipment. However, the Owners may, upon giving notice, undertake any such repair and maintenance at the Charterers' expense, when necessary for the safe and efficient performance of the Vessel. The equipment installed by the Charterers shall not become the property of the Owners.

5. Surveys, Audits and Inspections

(a) Surveys – Upon delivery and redelivery of the Vessel, the Parties shall jointly appoint an independent surveyor for the purposes of determining and recording in writing:

(i) the type and quantity of fuel;

(ii) the quantity of potable water remaining onboard; and

(iii) the cleanliness and condition of the cargo tanks, as at the time of the Vessel's delivery and redelivery respectively.

The Parties shall jointly share the time and expenses of such surveys.

(b) Audits and inspections – Prior to delivery the Owners shall provide the Charterers with such information and documentation as the Charterers may reasonably require to conduct a vessel audit, survey or inspection, upon reasonable notice.

Provided that audits, assessments, surveys or inspections can be accomplished without hindrance to the working or operation of or delay to the Vessel, and subject to prior consent, which shall not be unreasonably withheld, the Owners shall provide full access to the Vessel prior to delivery for the Charterers or their appointed auditor to carry out vessel audits, assessments, surveys and inspections.

The Charterers shall have the right at any time during the Charter Period, subject to reasonable prior notice, to conduct, or have conducted, any audits, assessments, surveys or inspections of the Vessel.

The cost for all such audits, assessments, surveys and inspections shall be for the Charterers' account.

The Owners and the Crew shall assist the Charterers with the audits, assessments, surveys and inspections.

The results, conclusions and any recommendations arising from such audits, assessments, surveys and inspections shall be presented to the Owners for review and reasonable time to comment prior to inclusion on OVID, CMID or similar systems.

6. Employment and Area of Operation

(a) Employment – The Vessel shall be employed in offshore activities which are lawful in accordance with the law of the place of the Vessel's flag and/or registration and of the place of operation. Such

activities shall be restricted to the service(s) as stated in Box 17, and to voyages between any good and safe port or place and any place or Offshore Units where the Vessel can safely lie always afloat within the area of operation as stated in Box 16 (Area of Operation), which shall always be within International Navigation Limits. The Charterers do not warrant the safety of any such port or place or Offshore Units but shall exercise due diligence in issuing their orders to the Vessel and having regard to her capabilities and the nature of her employment.

(b) ROV operations and diving platform – Unless otherwise stated in Box 18(i), the Charterers shall not have the right to use the Vessel for ROV operations. Unless otherwise stated in Box 18(ii), the Vessel shall not be employed as a diving platform.

(c) Permission and licences – Relevant permission and licences from responsible authorities for the Vessel to enter, work in and leave the Area of Operation shall be obtained by the Charterers and the Owners shall make reasonable efforts to assist the Charterers in securing such permission and licences. Where necessary the Charterers shall assist the Owners in obtaining work permits and visas for the Crew to work in the Area of Operation.

(d) The Vessel's space – All the Vessel's tanks, decks, and usual places of loading and accommodation throughout the Charter Period shall be at the Charterers' disposal reserving proper and sufficient space for the Vessel's Crew, tackle, apparel, furniture, provisions and stores. The Charterers shall be entitled to carry, so far as space and certification is available and for their purposes in connection with their operations:

(i) Persons other than Crew, other than fare paying, and for such purposes to make use of the Vessel's available accommodation (as per ANNEX A). The Owners shall provide suitable provisions and requisites for such persons for which the Charterers shall pay at the rate as stated in Box 27 per meal and at the rate as stated in Box 28 per day for the provision of bedding and services for persons using available accommodation.

(ii) Lawful cargo whether carried on or under deck.

(iii) Explosives, dangerous goods, and toxic and/or noxious substances whether in bulk or packaged, provided proper notification has been given and such cargo is marked and packed in accordance with the national regulations of the Vessel and/or the International Maritime Dangerous Goods Code and/or other applicable regulations.

7. Master and Crew

(a) The Crew shall carry out their duties promptly and the Vessel shall render all reasonable services within her capabilities by day and by night and at such times and on such schedules as the Charterers may reasonably require without any obligation on the Charterers to pay to the Owners or the Crew any excess or overtime payments. The Charterers shall furnish the Master with all instructions and sailing directions and the Vessel and Crew shall keep full and correct records accessible to the Charterers or their agents.

(b) (i) No bills of lading shall be issued for shipments under this Charter Party.

(ii) The Master shall sign cargo documents as directed by the Charterers in the form of receipts that are non-negotiable documents and which are clearly marked as such.

(iii) The Charterers shall indemnify the Owners against all liabilities that may arise from the signing of such cargo documents in accordance with the directions of the Charterers to the extent that the terms of such cargo documents impose more onerous liabilities than those assumed by the Owners under the terms of this Charter Party.

(c) The Crew, if required by the Charterers, will connect and disconnect electric cables and cargo hoses when placed on board the Vessel in port as well as alongside the Offshore Units; will operate the

machinery on board the Vessel for loading and unloading cargoes; and will hook and unhook pre-slung cargo on board the Vessel when loading or discharging alongside Offshore Units. If any of this work is not permitted by the port regulations or the seamen and/or labour unions, the Charterers shall make, at their own expense, whatever other arrangements may be necessary.

(d) If the Charterers have reason to be dissatisfied with the conduct of any member of the Crew, the Owners on receiving particulars of the complaint shall promptly investigate the matter and if the complaint proves to be well founded, the Owners shall as soon as reasonably possible make appropriate changes in the appointment.

(e) The entire operation, navigation, and management of the Vessel shall be in the exclusive control and command of the Owners and the Crew. The Vessel will be operated and the services hereunder will be rendered as requested by the Charterers, subject always to the exclusive right of the Owners or the Master to determine whether operation of the Vessel may be safely undertaken. In the performance of the Charter Party, the Owners are deemed to be an independent contractor, the Charterers being concerned only with the results of the services performed.

8. Owners to Provide

(a) The Owners shall provide and pay for:

(i) all provisions, wages and all other expenses of the Crew;

(ii) all maintenance and repair of the Vessel's hull, machinery and equipment; and

(iii) except as otherwise provided in this Charter Party:

(1) all insurance on the Vessel;
(2) all dues and charges directly related to the Vessel's flag and/or registration;
(3) all deck, cabin and engine room stores, lubricants, ropes and wires required for ordinary ship's purposes and for mooring alongside in harbour; and
(4) all fumigation expenses and sanitation certificates.

The Owners' obligations under this Clause extend to cover all liabilities for consular charges appertaining to the Crew, customs or import duties arising at any time during the performance of this Charter Party in relation to the personal effects of the Crew, and in relation to the stores, provisions and other matters as aforesaid which the Owners are to provide and/or pay for. The Owners shall refund to the Charterers any sums they or their agents may have paid or been compelled to pay in respect of such liability.

(b) On delivery the Vessel shall be equipped at the Owners' expense with any towing and anchor handling equipment specified in ANNEX A.

9. Charterers to Provide

(a) While the Vessel is on hire the Charterers shall provide and pay for all fuel and water, dispersants and firefighting foam, and transport thereof, port charges, pilotage and boatmen and canal steersmen (whether compulsory or not), launch hire (unless incurred in connection with the Owners' business), light dues, tug assistance, canal, dock, harbour, tonnage and other dues and charges, agencies and commissions incurred on the Charterers' business, costs for security or other watchmen, costs for quarantine (if occasioned by the nature of the cargo carried or the ports visited whilst employed under this Charter Party but not otherwise).

(b) The Charterers shall provide and pay for the loading, back-loading and discharging of cargoes when not done by the Crew, the cleaning of cargo tanks, the discharging and disposal of waste products deriving from their operations, all necessary pad eyes, shackles, wires, chains, bottle-screws, load-binders and other similar items required for securing any special, exceptional, unusual or heavy lift

deck cargoes, except as provided by the Owners, all ropes, slings, wires, stops, cargo hoses, spreaders and special runners actually used for loading, back-loading and discharging cargoes. Any and all cargo loading, securing, back-loading and discharging equipment shall always have been properly tested and certified as applicable regulations require.

(c) Upon entering into this Charter Party or in any event no later than the time of delivery of the Vessel the Charterers shall provide the Owners with copies of any operational plans or documents which are necessary for the safe and efficient operation of the Vessel. All documents received by the Owners shall be returned to the Charterers on redelivery.

(d) The Charterers shall pay for customs duties, all permits, import duties (including costs involved in establishing temporary or permanent importation bonds), and clearance expenses, for the Vessel and/or equipment, required for or arising out of this Charter Party.

(e) The Charterers shall pay for any replacement of any anchor handling/towing/lifting wires and accessories which have been placed on board by the Owners or the Charterers, should such equipment be lost or damaged, other than as a result of the Owners' negligence.

(f) The Charterers shall pay for any fines, taxes or imposts levied and provide any financial security required in the event that contraband and/or unmanifested drugs and/or cargoes are found to have been shipped as part of the cargo. The Vessel shall remain on hire during any time lost as a result therof. However, if the Crew are involved in smuggling, any financial security required and any fines, taxes or imposts shall be provided and paid for by the Owners and the Vessel shall be off hire during any time lost as a result thereof.

10. Fuel

(a) Upon delivery – The Vessel shall be delivered with no less fuel on board than the quantity stated in Box 19(i).

(b) Upon redelivery – The Vessel shall be redelivered with no less fuel on board than the quantity required by the Vessel to reach, at economical speed, the nearest port where fuel of the specification and grade as stated in Box 19(iv) is available.

(c) Payment for fuel – The payment, crediting and accounting of fuel remaining on board the Vessel at the time of delivery and redelivery of the Vessel shall be either in accordance with Subclause 10(c)(i) or 10(c)(ii) below, as indicated in Box 19(ii). If Box 19(ii) is left blank, Subclause 10(c)(i) shall apply.

(i) The Charterers shall purchase and pay the Owners for all the fuel on board at the time of delivery at the substantiated price paid by the Owners at the last loading of fuel and the Owners shall purchase and credit the Charterers for all the fuel on board at the time of redelivery at the substantiated price paid by the Charterers at the last loading of fuel. The quantities of fuel shall be those recorded on the Vessel's delivery and redelivery surveys (see Clause 5 (Surveys, Audits and Inspections); or

(ii) The Charterers shall pay the Owners, or the Owners shall credit the Charterers, for the difference in the quantity of fuel on board between the delivery and redelivery of the Vessel by reference to the delivery and redelivery surveys (see Clause 5 (Surveys, Audits and Inspections). In the event that the price paid by the Charterers for the quantity of fuel consumed, or credited by the Owners for fuel loaded, is a pre-agreed price, this shall be the price stated in Box 19(iii). Where the price of fuel is not pre-agreed, Box 19(iii) shall be left blank and the price shall be the substantiated price paid for the Vessel's last loading of fuel.

(d) Loading of fuel – The Charterers shall supply fuel of the specifications and grades as stated in Box 19(iv). The fuels shall be of a stable and homogenous nature and unless otherwise agreed in writing, shall comply with the latest edition of ISO Standard 8217 as well as with the relevant provisions of MARPOL. The Chief Engineer shall co-operate with the Charterers' bunkering agents and fuel suppliers and comply with their requirements relating to the fuel, including but not limited to, checking,

verifying and acknowledging sampling, reading or sounding and metering, before, during and after the loading of fuel. During delivery representative samples of all fuels shall be taken at a point as close as possible to the Vessel's fuel manifold. Each of the samples shall be divided into a minimum of four (4) sub-samples, labelled and sealed and signed by the suppliers, Chief Engineer and the Charterers or their agents. One sub-sample shall be retained on board for MARPOL purposes and the remaining samples distributed between the Owners, the Charterers and the suppliers. If any claim should arise in respect of the quality or specification or grades of the fuel supplied, the samples of the fuel retained as aforesaid shall be analysed by a qualified and independent laboratory, jointly appointed by the Parties, whose analysis as regards the characteristics of the fuel shall be binding on the Parties concerning the characteristics tested for. If one or more of the fuel samples are found not to be in compliance with the specification as agreed in the paragraph above, the Charterers shall meet the cost of this analysis, otherwise the same shall be for the Owners' account.

(e) Compliance - The Vessel's Chief Engineer, or nominee, may at any time before or during the loading of any fuel, stop the loading if such person reasonably believes that it does not comply with Subclause 10(d) until such time as the Charterers or the fuel supplier have reasonably demonstrated their compliance with Subclause 10(d). The Vessel shall remain on hire during any stoppage of loading under this Clause.

(f) The Owners shall not be held liable for any reduction in the Vessel's speed, performance and/or increased fuel consumption nor for any time lost arising as a result of any fuel not complying with Subclause 10(d) and the Vessel shall remain on hire.

11. BIMCO ISPS/MTSA Clause for Time Charter Parties 2005

(a) (i) The Owners shall comply with the requirements of the International Code for the Security of Ships and of Port Facilities and the relevant amendments to Chapter XI of SOLAS (ISPS Code) relating to the Vessel and "the Company" (as defined by the ISPS Code). If trading to or from the United States or passing through United States waters, the Owners shall also comply with the requirements of the US Maritime Transportation Security Act 2002 (MTSA) relating to the Vessel and the "Owner" (as defined by the MTSA).

(ii) Upon request the Owners shall provide a copy of the relevant International Ship Security Certificate (or the Interim International Ship Security Certificate) to the Charterers. The Owners shall provide the Charterers with the full style contact details of the Company Security Officer (CSO).

(iii) Except as otherwise provided in this Charter Party, loss, damages, expense or delay (excluding consequential loss, damages, expense or delay) caused by failure on the part of the Owners or "the Company"/"Owner" to comply with the requirements of the ISPS Code/MTSA or this Clause shall be for the Owners' account.

(b) (i) The Charterers shall provide the Owners and the Master with their full style contact details and, upon request, any other information the Owners require to comply with the ISPS Code/MTSA. Furthermore, the Charterers shall ensure that all sub-charter parties they enter into during the period of this Charter Party contain the following provision: "The Charterers shall provide the Owners with their full style contact details and, where sub-letting is permitted under the terms of the charter party, shall ensure that the contact details of all sub-charterers are likewise provided to the Owners".

(ii) Except as otherwise provided in this Charter Party, loss, damages, expense or delay (excluding consequential loss, damages, expense or delay) caused by failure on the part of the Charterers to comply with this Clause shall be for the Charterers' account.

(c) Notwithstanding anything else contained in this Charter Party all delay, costs or expenses whatsoever arising out of or related to security regulations or measures required by the port facility or any relevant authority in accordance with the ISPS Code/MTSA including, but not limited to, security guards, launch services, tug escorts, port security fees or taxes and inspections, shall be for the Charterers' account,

unless such costs or expenses result solely from the Owners' negligence. All measures required by the Owners to comply with the Ship Security Plan shall be for the Owners' account.

(d) If either party makes any payment which is for the other party's account according to this Clause, the other party shall indemnify the paying party.

12. Hire and Payments

(a) Hire – The Charterers shall pay hire due for the Vessel at the rate stated in Box 20(i) per day or pro rata for part thereof from the time that the Vessel is delivered to the Charterers until the expiration or earlier termination of this Charter Party.

(b) Extension hire – If the option to extend the Charter Period under Subclause 1(b) (Charter Period) is exercised, the hire for such extension shall, unless stated in Box 21, be agreed between the Parties. Should the Parties fail to reach an agreement, then the Charterers shall not have the option to extend the Charter Period.

(c) Adjustment of hire – The hire shall be adjusted to reflect documented changes, after the date of entering into the Charter Party, in the Owners' costs arising from changes in laws and regulations, or the implementation thereof, within the Area of Operation stated in Box 16 governing the Vessel, its Owners and/or its Crew or this Charter Party or in the application thereof.

(d) Invoicing – All invoices shall be issued in the contract currency stated in Box 20(i). In respect of reimbursable expenses incurred in currencies other than the contract currency, the rate of exchange into the contract currency shall be stated in Box 20(ii). Invoices covering hire and any other payments due shall be issued monthly as stated in Box 22(i) and at the expiration or earlier termination of this Charter Party. If Subclause 10(c)(i) (Fuel – Payment for Fuel) applies, fuel on board at delivery shall be invoiced at the time of delivery.

(e) Payments – Payments of hire, fuel invoices and disbursements for the Charterers' account shall be received within the number of days stated in Box 24 from the date of receipt of the invoice. Payment shall be received in the currency stated in Box 20(i) in full without discount or set-off to the account stated in Box 23. However, any advances for disbursements made on behalf of and approved by the Owners may be deducted from hire due. If payment is not received by the Owners within five (5) Banking Days following the due date the Owners are entitled to charge interest at the rate stated in Box 25 on the amount outstanding from and including the due date until payment is received.

If the Charterers reasonably believe an incorrect invoice has been issued, they shall notify the Owners promptly, but in no event no later than the due date, specifying the reason for disputing the invoice. The Charterers shall pay the undisputed portion of the invoice but shall be entitled to withhold payment of the disputed amount. The Owners shall be entitled to charge interest at the rate stated in Box 25 on such disputed amounts where resolved in favour of the Owners. The balance payment (together with any applicable interest) shall be received by the Owners within five (5) Banking Days after the dispute is resolved. Should the Charterers' claim be valid, a corrected invoice shall be issued by the Owners.

(f) Suspension and termination - (i) Where there is a failure to make punctual payment of hire or other sums due and payable by the Charterers to Owners, the Owners shall promptly notify the Charterers in writing of such failure and require payment within five (5) days.

(ii) At any time while hire or other sums due and payable by the Charterers to Owners remain outstanding the Owners shall be entitled to suspend the performance of any or all of their obligations under this Charter Party until such time as all the hire due to the Owners under the Charter Party has been received by the Owners. Throughout any period of suspended performance under this Clause, the Vessel shall remain on hire. The Owners' right to suspend performance under this Clause shall be without prejudice to any other rights they may have under this Charter Party.

(iii) If after five (5) days of the written notification referred to in Subclause 12(f)(i) the sums referred to have still not been received, the Owners may at any time while such sums remain outstanding terminate the Charter Party. The right to terminate shall be exercised promptly and in writing and is not dependent upon the Owners first exercising the right to suspend performance of their obligations under the Charter Party pursuant to Subclause 12(f)(ii) above. The receipt by the Owners of all sums due from the Charterers after the five (5) day period referred to above has expired but prior to the notice of termination shall be deemed a waiver of the Owners' right to terminate the Charter Party. The Owners' right to terminate under this Clause shall be without prejudice to any other rights they may have under this Charter Party.

(iv) Where the Owners choose not to exercise any of the rights afforded to them by this Clause in respect of any particular late payment of hire, or a series of late payments of hire, or other sums due and payable by the Charterers to Owners under the Charter Party, this shall not be construed as a waiver of their right either to suspend performance under Subclause 12(f)(ii) or to terminate the Charter Party under Subclause 12(f)(iii) in respect of any subsequent late payment under this Charter Party.

(v) The Charterers shall indemnify the Owners in respect of any liabilities incurred by the Owners under cargo documents issued pursuant to Subclause 7(b) (Master and Crew) as a consequence of the Owners' proper suspension of any or all of their obligations under this Charter Party or termination of this Charter Party.

(g) Audit – The Charterers shall have the right to appoint an independent qualified accountant to audit the Owners' books directly related to work performed under this Charter Party at any time after the conclusion of the Charter Party, up to the expiry of the period stated in Box 26, to determine the validity of the Owners' charges hereunder. The Owners undertake to make their records available for such purposes at their principal place of business during normal working hours. Any discrepancies discovered in payments made shall be promptly resolved by invoice or credit as appropriate.

13. Off-hire

(a) Off-hire and exceptions – If as a result of any deficiency of Crew or of the Owners' stores, strike of Crew, breakdown of machinery and/or equipment (excluding any equipment installed on the Vessel by the Charterers pursuant to Clause 4 (Structural Alterations and Additional Equipment), damage to hull or other accidents to the Vessel, the Vessel is prevented from working, no hire shall be payable in respect of any time lost and any hire paid in advance shall be adjusted accordingly provided always however that hire shall not cease in the event of the Vessel being prevented from working as aforesaid as a result of:

(i) the carriage of cargo as noted in Subclause 6(d)(iii) (Employment and Area of Operation – The Vessel's Space);

(ii) quarantine or risk of quarantine unless caused by the Crew having communication with the shore or other vessel at any infected area not in connection with the employment of the Vessel, without the consent or the instructions of the Charterers;

(iii) deviation from the Vessel's Charter Party duties or exposure to abnormal risks at the request of the Charterers;

(iv) detention in consequence of being driven into port or to anchorage through stress of weather or trading to shallow harbours or to rivers or ports with bars or suffering an accident to its cargo, when the expenses resulting from such detention shall be for the Charterers' account howsoever incurred;

(v) detention or damage by ice;

(vi) any act or omission of the Charterers' Group; or

(vii) any force majeure event as stated in Clause 35 (Force Majeure).

(b) Liability for Vessel not working – The Owners' liability for any loss, damage or delay sustained by the Charterers as a result of the Vessel being prevented from working by any cause whatsoever, including negligence on the part of a member of the Owners' Group, shall be limited to suspension of hire, except as provided in Subclause 11(a)(iii) (BIMCO ISPS/MTSA Clause for Time Charter Parties), whether or not the Vessel is off-hire.

(c) Maintenance and drydocking

(i) Maintenance – Notwithstanding Subclauses 13(a) and 13(c)(ii), the Owners shall be entitled to twenty-four (24) hours on hire per month or pro rata, which shall be cumulative, from the commencement of the charter period for the purposes of maintenance, survey, repair and dry-docking (Maintenance Days). During any such Maintenance Days, the Charterers' obligations under Subclause 9(a) (Charterers to Provide) shall be suspended.

Using, or not using Maintenance Days shall be the Owners decision alone and they shall give the Charterers reasonable notice of their intention to use such days and how many. Hire shall not be payable for accumulated Maintenance Days not used by the Owners. However, hire for any Maintenance Days which, at the Charterers' request, have not been used shall be payable on redelivery or earlier termination of the Charter Party.

(ii) Dry-docking – The Charterers shall permit the Vessel to dry-dock at regular intervals in accordance with its classification society requirements. Unless on-hire by reason of accumulated Maintenance Days, the Vessel shall be off-hire from the time the Charterers place it at the Owners' disposal. The Vessel shall go back on hire from the time it is placed at the Charterers' disposal at the place where it was originally released.

Whenever a dry-docking is required, the Charterers shall beforehand remove any cargo, and clean any cargo tanks as necessary to effect such dry-docking, after which the Vessel shall be placed at the Owners' disposal. The Vessel shall be returned to the Charterers when it has completed dry-docking and returned to the port or place where it was placed at the Owners' disposal. The Owners choice of dry-dock location shall always be reasonable as to time and cost, both to themselves and to the Charterers.

At the commencement of the charter period, the Owners shall provide the Charterers with the Vessel's class dry-docking schedule for the charter period, including any options to extend.

14. Liabilities and Indemnities

(a) Knock for knock

(i) Owners – Notwithstanding anything else contained in this Charter Party excepting Subclauses 9(e) (Charterers to Provide), 14(c) (Liabilities and Indemnities – Limitations), and 18(c) (Saving of Life and Salvage), the Charterers shall not be responsible for loss of or damage to any property of any member of the Owners' Group, including the Vessel, or for personal injury or death of any member of the Owners' Group, arising out of or in any way connected with the performance or non-performance of this Charter Party whatsoever and in any circumstances, even if such loss, damage or personal injury or death is caused wholly or partially by the act, neglect, breach of duty (whether statutory or otherwise) or default of the Charterers' Group, and even if such loss, damage or personal injury or death is caused wholly or partially by the unseaworthiness of any vessel; and the Owners shall indemnify, protect, defend and hold harmless the Charterers' Group from any and against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of or in connection with such loss, damage, personal injury or death.

(ii) Charterers – Notwithstanding anything else contained in this Charter Party excepting Clauses 9(e) (Charterers to provide) and 16 (Wreck Removal), the Owners shall not be responsible for loss of,

damage to, or any liability arising out of anything towed by the Vessel, any cargo laden upon or carried by the Vessel or her tow, any property of any member of the Charterers' Group, whether owned or chartered, including their Offshore Units, or for personal injury or death of any member of the Charterers' Group or of anyone on board anything towed by the Vessel, arising out of or in any way connected with the performance or non-performance of this Charter Party whatsoever and in any circumstances, even if such loss, damage, liability or personal injury or death is caused wholly or partially by the act, neglect, breach of duty (whether statutory or otherwise) or default of the Owners' Group, and even if such loss, damage, liability or personal injury or death is caused wholly or partially by the unseaworthiness of any vessel; and the Charterers shall indemnify, protect, defend and hold harmless the Owners' Group from any and against all claims, costs, expenses, actions, proceedings, suits, demands, and liabilities whatsoever arising out of or in connection with such loss, damage, liability, personal injury or death.

(b) Excluded losses – Notwithstanding anything else contained in this Charter Party neither party shall be liable to the other for:

(i) any loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those provided by contractors or subcontractors of any tier or by third parties), loss of profits or anticipated profits; loss of product; loss of business; business interruption; loss of or deferral of drilling rights; loss, restriction or forfeiture of licences, concession or field interest; loss of revenue, shut in, loss of production, deferral of production, increased cost of working; cost of insurance; or any other similar losses whether direct or indirect; and

(ii) any consequential or indirect loss whatsoever;

arising out of or in connection with the performance or non-performance of this Charter Party even if such loss is caused wholly or partially by the act, neglect, breach of duty (whether statutory or otherwise) or default of the indemnified party, and even if such loss is caused wholly or partially by the unseaworthiness of any vessel, and the Owners shall indemnify, protect, defend and hold harmless the Charterers' Group from such losses suffered by the Owners' Group and the Charterers shall indemnify, protect, defend and hold harmless the Owners' Group from such losses suffered by the Charterers' Group.

(c) Limitations – Nothing contained in this Charter Party shall be construed or held to deprive the Owners or the Charterers, as against any person or party, including as against each other, of any right to claim limitation of liability provided by any applicable law, statute or convention, save that nothing in this Charter Party shall create any right to limit liability. Where the Owners or the Charterers may seek an indemnity under the provisions of this Charter Party or against each other in respect of a claim brought by a third party, the Owners or the Charterers shall seek to limit their liability against such third party.

(d) Himalaya clause – All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Charter Party or by any applicable statute, rule or regulation for the benefit of the Charterers shall also apply to and be for the benefit of the Charterers' Group and their respective underwriters.

All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Charter Party or by any applicable statute, rule or regulation for the benefit of the Owners shall also apply to and be for the benefit of the Owners' Group and their respective underwriters; the Vessel and its registered owners; and the Crew.

The Owners or the Charterers shall be deemed to be acting as agent or trustee of and for the benefit of all such persons and parties set forth above, but only for the limited purpose of contracting for the extension of such benefits to such persons and parties.

15. Pollution

(a) Except as otherwise provided for in Subclause 18(c)(iii) (Saving of Life and Salvage), the Owners shall be liable for, and agree to indemnify, defend and hold harmless the Charterers against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of actual or threatened pollution damage due to discharge, spills or leaks from the Vessel, except as may emanate from cargo thereon or therein and the cost of cleanup or control thereof even if such claims, costs expenses, actions proceedings, suits, demands and liabilitities are caused wholly or partially by the act, neglect, breach of duty (whether statutory or otherwise) or default of the Charterers' Group.

(b) The Charterers shall be liable for and agree to indemnify, defend and hold harmless the Owners from all claims, costs, expenses, actions, proceedings, suits, demands, liabilities, loss or damage whatsoever arising out of or resulting from any other actual or threatened pollution damage, even if such claims, costs, expenses, actions, proceedings, suits, demands, liabilities, loss or damage are caused wholly or partially by the act, neglect, breach of duty (whether statutory or otherwise) or default of the Owners' Group, and even if such loss, damage or liability is caused wholly or partially by the unseaworthiness of the Vessel.

(c) The Charterers shall, upon giving notice to the Owners or the Master, have the right (but shall not be obliged) to place on board the Vessel and/or have in attendance at the site of any pollution or threatened incident one or more Charterers' representative to observe the measures being taken by Owners and/or national or local authorities or their respective servants, agents or contractors to prevent or minimise pollution damage and to provide advice, equipment or manpower or undertake such other measures, at Charterers' risk and expense, as are permitted under applicable law and as Charterers believe are reasonably necessary to prevent or minimise such pollution damage or to remove the threat of pollution damage.

16. Wreck Removal

If the Vessel becomes a wreck and has to be removed by order of any lawful authority having jurisdiction over the area where the Vessel is placed or as a result of compulsory law, the Owners shall be liable for any and all expenses in connection with the lighting, marking, raising, removal, destruction of the Vessel.

17. Insurance

(a) (i) The Owners shall obtain and maintain in effect for the duration of this Charter Party, with reputable insurers, the insurances set forth in ANNEX B. Policy limits shall not be less than those indicated. Reasonable deductibles are acceptable and shall be for the account of the Owners.

(ii) The Charterers shall upon request be named as co-insured. The Owners shall upon request cause insurers to waive subrogation rights against the Charterers' Group. Co-insurance and/or waivers of subrogation shall be given only insofar as these relate to liabilities which are properly the responsibility of the Owners under the terms of this Charter Party.

(b) The Owners shall upon request furnish the Charterers with copies of certificates of insurance which provide sufficient information to verify that the Owners have complied with the insurance requirements of this Charter Party.

(c) If the Charterers takes out insurance that covers risks for which they indemnify Owners, the Charterers shall ensure that their underwriters waive subrogation rights against the Owners Group, but only insofar as these relate to liabilities which are properly the responsibility of the Charterers under the terms of this Charter Party

18. Saving of Life and Salvage

(a) The Vessel shall be permitted to deviate for the purpose of saving life at sea without prior approval of or notice to the Charterers and without loss of hire provided however that notice of such deviation is given as soon as possible.

(b) Subject to the Charterers' consent, which shall not be unreasonably withheld, the Vessel shall be at liberty to undertake attempts at salvage, it being understood that the Vessel shall be off-hire from the time it leaves port or commences to deviate and it shall remain off-hire until it is again in every way ready to resume the Charterers' service at a position which is not less favourable to the Charterers than the position at the time of leaving port or deviating for the salvage services. All salvage monies earned by the Vessel shall be divided equally between the Parties, after deducting the Crew's share, legal expenses, value of fuel consumed, hire of the Vessel lost by the Owners during the salvage, repairs to damage sustained, if any, and any other extraordinary loss or expense sustained as a result of the salvage. The Charterers shall be bound by all measures taken by the Owners in order to secure payment of salvage and to fix its amount.

(c) The Owners shall waive their right to claim any award for salvage performed on property owned by or contracted to the Charterers' Group, always provided such property was the object of the operation the Vessel was chartered for, and the Vessel shall remain on hire when rendering salvage services to such property. This waiver is without prejudice to any right the Crew may have under any title. If the Owners render assistance to such property in distress on the basis of "no claim for salvage", then, notwithstanding any other provisions contained in this Charter Party and even in the event of neglect or default of the Owners or Crew:

(i) The Charterers shall be responsible for and shall indemnify the Owners against payments made, under any legal rights, to the Crew in relation to such assistance.

(ii) The Charterers shall be responsible for and shall reimburse the Owners for any loss or damage sustained by the Vessel or her equipment by reason of giving such assistance and shall also pay the Owners' additional expenses thereby incurred.

(iii) The Charterers shall be responsible for any actual or potential spill, seepage and/or emission of any pollutant howsoever caused occurring within the offshore site and any pollution resulting therefrom wheresoever it may occur and including but not limited to the cost of such measures as are reasonably necessary to prevent or mitigate pollution damage, and the Charterers shall indemnify the Owners against any liability, cost or expense arising by reason of such actual or potential spill, seepage and/or emission.

(iv) The Vessel shall not be off-hire as a consequence of giving such assistance, or effecting repairs under Subclause 18(c)(ii), and time taken for such repairs shall not count against time granted under Subclause 13(c) (Off-hire – Maintenance and Drydocking).

(v) The Charterers shall indemnify the Owners against any liability, cost and/or expense whatsoever in respect of any loss of life, injury, damage or other loss to person or property howsoever arising from such assistance.

19. Lien

The Owners shall have a lien upon all cargoes, fuel and equipment owned by the Charterers for all claims against the Charterers under this Charter Party and the Charterers shall have a lien on the Vessel for all monies paid in advance and not earned. The Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the Owners in the Vessel.

Should the Vessel be arrested by reason of claims or liens arising out of its operation hereunder, unless brought about by the act or neglect of the Owners, the Charterers shall at their own expense take all reasonable steps to secure that within a reasonable time the Vessel is released and at their own expense put up security to release the Vessel. Except as provided in Clause 14 (Liabilities and Indemnities) and unless brought about by the act or neglect of the Owners, the Charterers shall indemnify and hold the Owners harmless against any lien of whatsoever nature arising upon the Vessel during the Charter Period while it is under the control of the Charterers, and against any claims

against the Owners arising out of the operation of the Vessel by the Charterers or out of any neglect of the Charterers in relation to the Vessel or the operation thereof.

20. Sublet and Assignment

(a) Charterers – The Charterers shall have the option of subletting, assigning or loaning the Vessel to any person or company not competing with the Owners, subject to the Owners' prior approval which shall not be unreasonably withheld or delayed, upon giving notice in writing to the Owners, but the original Charterers shall always remain responsible to the Owners for due performance of the Charter Party. The person or company taking such subletting, assigning or loan and their contractors and sub-contractors shall be deemed included in the Charterers' Group for all the purposes of this Charter Party. The Owners make it a condition of such consent that additional hire shall be paid as agreed between the Charterers and the Owners in Box 29, having regard to the nature and period of any intended service of the Vessel.

(b) Owners – The Owners may not assign or transfer any part of this Charter Party without the written approval of the Charterers, which approval shall not be unreasonably withheld or delayed. Approval by the Charterers of such subletting or assignment shall not relieve the Owners of their responsibility for due performance of the part of the services which is sublet or assigned.

21. Substitute Vessel

The Owners shall be entitled at any time, whether before delivery or at any other time during the Charter Period, to provide a substitute vessel of at least equivalent capability, subject to the Charterers' prior approval which shall not be unreasonably withheld or delayed.

22. BIMCO War Risks Clause "CONWARTIME 2013"

(a) For the purpose of this Clause, the words:

(i) "Owners" shall include the shipowners, bareboat charterers, disponent owners, managers or other operators who are charged with the management of the Vessel, and the Master; and

(ii) "War Risks" shall include any actual, threatened or reported:

war, act of war, civil war or hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy and/or violent robbery and/or capture/seizure (hereinafter "Piracy"); acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the government of any state or territory whether recognised or not, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or may become dangerous to the Vessel, cargo, crew or other persons on board the Vessel.

(b) The Vessel shall not be obliged to proceed or required to continue to or through, any port, place, area or zone, or any waterway or canal (hereinafter "Area"), where it appears that the Vessel, cargo, crew or other persons on board the Vessel, in the reasonable judgement of the Master and/or the Owners, may be exposed to War Risks whether such risk existed at the time of entering into this Charter Party or occurred thereafter. Should the Vessel be within any such place as aforesaid, which only becomes dangerous, or may become dangerous, after entry into it, the Vessel shall be at liberty to leave it.

(c) The Vessel shall not be required to load contraband cargo, or to pass through any blockade as set out in Subclause 22(a), or to proceed to an Area where it may be subject to search and/or confiscation by a belligerent.

(d) If the Vessel proceeds to or through an Area exposed to War Risks, the Charterers shall reimburse to the Owners any additional premiums required by the Owners' insurers and the costs of any additional insurances that the Owners reasonably require in connection with War Risks.

(e) All payments arising under Subclause 22(d) shall be settled within fifteen (15) days of receipt of Owners' supported invoices or on redelivery, whichever occurs first.

(f) If the Owners become liable under the terms of employment to pay to the crew any bonus or additional wages in respect of sailing into an Area which is dangerous in the manner defined by the said terms, then the actual bonus or additional wages paid shall be reimbursed to the Owners by the Charterers at the same time as the next payment of hire is due, or upon redelivery, whichever occurs first.

(g) The Vessel shall have liberty:

(i) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery, or in any other way whatsoever, which are given by the government of the nation under whose flag the Vessel sails, or other government to whose laws the Owners are subject, or any other government of any state or territory whether recognised or not, body or group whatsoever acting with the power to compel compliance with their orders or directions;

(ii) to comply with the requirements of the Owners' insurers under the terms of the Vessel's insurance(s);

(iii) to comply with the terms of any resolution of the Security Council of the United Nations, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement;

(iv) to discharge at any alternative port any cargo or part thereof which may expose the Vessel to being held liable as a contraband carrier;

(v) to call at any alternative port to change the crew or any part thereof or other persons on board the Vessel when there is reason to believe that they may be subject to internment, imprisonment, detention or similar measures.

(h) If in accordance with their rights under the foregoing provisions of this Clause, the Owners shall refuse to proceed to the loading or discharging ports, or any one or more of them, they shall immediately inform the Charterers. No cargo shall be discharged at any alternative port without first giving the Charterers notice of the Owners' intention to do so and requesting them to nominate a safe port for such discharge. Failing such nomination by the Charterers within 48 hours of the receipt of such notice and request, the Owners may discharge the cargo at any safe port of their own choice. All costs, risk and expenses for the alternative discharge shall be for the Charterers' account.

(i) The Charterers shall indemnify the Owners for claims arising out of the Vessel proceeding in accordance with any of the provisions of Subclauses 22(b) to (h) which are made under any bills of lading, waybills or other documents evidencing contracts of carriage.

(j) When acting in accordance with any of the provisions of Subclauses 22(b) to (h) of this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Charter Party.

23. War Cancellation Clause

Either party may cancel this Charter Party on the outbreak of war (whether there be a declaration of war or not) between any two or more of the countries stated in Box 30.

PART II
SUPPLYTIME 2017 Time Charter Party for Offshore Support Vessels

24. BIMCO Ice Clause for Time Charter Parties

(a) The Vessel shall not be obliged to force ice but, subject to the Owners' prior approval having due regard to its size, construction and class, may follow ice-breakers.

(b) The Vessel shall not be required to enter or remain in any icebound port or area, nor any port or area where lights, lightships, markers or buoys have been or are about to be withdrawn by reason of ice, nor where on account of ice there is, in the Master's sole discretion, a risk that, in the ordinary course of events, the Vessel will not be able safely to enter and remain at the port or area or to depart after completion of loading or discharging. If, on account of ice, the Master in the Master's sole discretion considers it unsafe to proceed to, enter or remain at the place of loading or discharging for fear of the Vessel being frozen in and/or damaged, the Master shall be at liberty to sail to the nearest ice-free and safe place and there await the Charterers' instructions.

(c) Any delay or deviation caused by or resulting from ice shall be for the Charterers' account and the Vessel shall remain on-hire.

(d) Any additional premiums and/or calls required by the Vessel's underwriters due to the Vessel entering or remaining in any icebound port or area, shall be for the Charterers' account.

25. BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties

(a) For the purposes of this Clause, the words:

"Disease" means a highly infectious or contagious disease that is seriously harmful to humans.

"Affected Area" means any port or place where there is a risk of exposure to the Vessel, crew or other persons on board to the Disease and/or to a risk of quarantine or other restrictions being imposed in connection with the Disease.

(b) The Vessel shall not be obliged to proceed to or continue to or remain at any place which, in the reasonable judgement of the Master/Owners, is an Affected Area.

(c) If the Owners decide in accordance with Subclause 25(b) that the Vessel shall not proceed or continue to an Affected Area they shall immediately notify the Charterers.

(d) If the Vessel is at any place which the Master in the Master's reasonable judgement considers to have become an Affected Area, the Vessel may leave immediately, with or without cargo on board, after notifying the Charterers.

(e) In the event of Subclause 25(c) or 25(d) the Charterers shall be obliged, notwithstanding any other terms of this Charter Party, to issue alternative voyage orders. If the Charterers do not issue such alternative voyage orders within forty-eight (48) hours of receipt of the Owners' notification, the Owners may discharge any cargo already on board at any port or place. The Vessel shall remain on hire throughout and the Charterers shall be responsible for all additional costs, expenses and liabilities incurred in connection with such orders/delivery of cargo.

(f) In any event, the Owners shall not be obliged to load cargo or to sign, and the Charterers shall not allow or authorise the issue on the Owners' behalf of, bills of lading, waybills or other documents evidencing contracts of carriage for any Affected Area.

(g) The Charterers shall indemnify the Owners for any costs, expenses or liabilities incurred by the Owners, including claims from holders of bills of lading, as a consequence of the Vessel waiting for and/or complying with the alternative voyage orders.

(h) If, notwithstanding Subclauses 25(b) to (f), the Vessel does proceed to or continue to or remain at an Affected Area:

(i) The Owners shall notify the Charterers of their decision but the Owners shall not be deemed to have waived any of their rights under this Charter Party.

(ii) The Owners shall endeavour to take such reasonable measures in relation to the Disease as may from time to time be recommended by the World Health Organisation.

(iii) Any additional costs, expenses or liabilities whatsoever arising out of the Vessel visiting or having visited an Affected Area, including but not limited to screening, cleaning, fumigating and/or quarantining the Vessel and its crew, shall be for the Charterers' account and the Vessel shall remain on hire throughout.

(i) The Vessel shall have liberty to comply with all orders, directions, recommendations or advice of competent authorities and/or the Flag State of the Vessel in respect of arrival, routes, ports of call, destinations, discharge of cargo, delivery or in any other respect whatsoever relating to issues arising as a result of the Vessel being or having been ordered to an Affected Area.

(j) If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation, nor shall it be or give rise to an off-hire event, but shall be considered as due fulfilment of this Charter Party. In the event of a conflict between the provisions of this Clause and any implied or express provision of this Charter Party, this Clause shall prevail to the extent of such conflict, but no further.

(k) The Charterers shall indemnify the Owners if after the currency of this Charter Party any delays, costs, expenses or liabilities whatsoever are incurred as a result of the Vessel having visited an Affected Area during the currency of this Charter Party.

(l) The Charterers shall ensure that this Clause shall be incorporated into all sub-charters and bills of lading, waybills or other documents evidencing contracts of carriage issued pursuant to this Charter Party.

26. Health, Safety and Environment

The Owners shall comply with and adhere to all applicable international, national and local regulations pertaining to health, safety and the environment, and such Charterers' instructions as appended hereto, provided such instructions do not conflict with the Vessel's flag state obligations.

27. Drugs and Alcohol Policy

The Owners undertake that they have, and shall maintain for the duration of this Charter Party, a policy on Drugs and Alcohol Abuse applicable to the Vessel (the "D & A Policy") that meets or exceeds the standards in the OCIMF Guidelines for the Control of Drugs and Alcohol Onboard Ship 1995 (or any subsequent amendments). The Owners shall exercise due diligence to ensure that the D & A Policy is understood and complied with on and about the Vessel. An actual impairment, shall not in and of itself mean that the Owners have failed to exercise due diligence.

28. BIMCO Anti-Corruption Clause for Charter Parties

(a) The Parties agree that in connection with the performance of this Charter Party they shall each:

(i) comply at all times with all applicable anti-corruption legislation and have procedures in place that are, to the best of its knowledge and belief, designed to prevent the commission of any offence under such legislation by any member of its organisation or by any person providing services for it or on its behalf; and

(ii) make and keep books, records, and accounts which in reasonable detail accurately and fairly reflect the transactions in connection with this Charter Party.

(b) If a demand for payment, goods or any other thing of value ("Demand") is made to the Master or the Owners by any official, any contractor or sub-contractor engaged by or acting on behalf of Owners or Charterers or any other person not employed by Owners or Charterers and it appears that meeting such Demand would breach any applicable anti-corruption legislation, then the Master or the Owners shall notify the Charterers as soon as practicable and the Parties shall cooperate in taking reasonable steps to resist the Demand.

(c) If, despite taking reasonable steps, the Demand is not withdrawn, the Master or the Owners may issue a letter of protest, addressed or copied to the Charterers. If the Master or the Owners issue such a letter, then, in the absence of clear evidence to the contrary, it shall be deemed that any delay to the Vessel is the result of resisting the Demand and (as applicable):

(i) the Vessel shall remain on hire; or

(ii) any time lost as a result thereof shall count as laytime or (if the Vessel is already on demurrage) as time on demurrage.

(d) If either party fails to comply with any applicable anti-corruption legislation it shall defend and indemnify the other party against any fine, penalty, liability, loss or damage and for any related costs (including, without limitation, court costs and legal fees) arising from such breach.

(e) Without prejudice to any of its other rights under this Charter Party, either party may terminate this Charter Party without incurring any liability to the other party if:

(i) at any time the other party or any member of its organisation has committed a breach of any applicable anti-corruption legislation in connection with this Charter Party; and

(ii) such breach causes the non-breaching party to be in breach of any applicable anti-corruption legislation.

Any such right to terminate must be exercised without undue delay.

(f) Each party represents and warrants that in connection with the negotiation of this Charter Party neither it nor any member of its organisation has committed any breach of applicable anti-corruption legislation. Breach of this Subclause 28(f) shall entitle the other party to terminate the Charter Party without incurring any liability to the other.

29. MLC 2006

For the purposes of this Clause:

"MLC" means the International Labour Organization (ILO) Maritime Labour Convention (MLC 2006) and any amendment thereto or substitution thereof.

"Charterers' Personnel" shall mean any Employees of each of the Charterers' Group who are on board the Vessel.

(a) The Owners shall provide the Charterers with a copy of Part I of the Declaration of Maritime Labour Compliance for the Vessel and the Charterers shall be responsible for ensuring compliance with the following requirements of MLC as applicable to the Vessel and as they may apply to the Charterers' Personnel:

(i) Minimum age;

(ii) Medical certificate;

(iii) Training and qualifications;

(iv) Recruitment and placement;

(v) Employment agreements;

(vi) Wages;

(vii) Hours of work and rest;

(viii) Entitlement to leave;

(ix) Repatriation;

(x) Compensation for the Vessel's loss or foundering;

(xi) Liability for sickness, injury and death; and

(xii) Health and safety protection and accident prevention, to the extent that these are under the Charterers' control.

(b) Prior to any Charterers' Personnel boarding the Vessel and upon Owners' request at any time thereafter, the Charterers shall provide written evidence, to the reasonable satisfaction of the Owners, of the Charterers' compliance with their obligations under this Clause.

(c) Without prejudice to Subclause 14(b) (Liabilities and Indemnities – Excluded losses), the Charterers shall indemnify, protect, defend and hold harmless the Owners from any and all claims, costs, expenses, actions, proceedings, suits, demands, and liabilities whatsoever arising out of or in connection with the Charterers' failure to meet any of their obligations under this Clause, and the Vessel shall remain on hire in respect of any time lost as a result thereof.

30. BIMCO Sanctions Clause for Time Charter Parties

(a) The Owners shall not be obliged to comply with any orders for the employment of the Vessel in any carriage, trade or on a voyage which, in the reasonable judgement of the Owners, will expose the Vessel, Owners, managers, Crew, the Vessel's insurers, or their re-insurers, to any sanction or prohibition imposed by any State, Supranational or International Governmental Organisation.

(b) If the Vessel is already performing an employment to which such sanction or prohibition is subsequently applied, the Owners shall have the right to refuse to proceed with the employment and the Charterers shall be obliged to issue alternative voyage orders within 48 hours of receipt of Owners' notification of their refusal to proceed. If the Charterers do not issue such alternative voyage orders the Owners may discharge any cargo already loaded at any safe port (including the port of loading). The Vessel to remain on hire pending completion of Charterers' alternative voyage orders or delivery of cargo by the Owners and Charterers to remain responsible for all additional costs and expenses incurred in connection with such orders/delivery of cargo. If in compliance with this Subclause 30(b) anything is done or not done, such shall not be deemed a deviation.

(c) The Charterers shall indemnify the Owners against any and all claims whatsoever brought by the owners of the cargo and/or the holders of bills of lading and/or sub-charterers against the Owners by reason of the Owners' compliance with such alternative voyage orders or delivery of the cargo in accordance with Subclause 30(b).

(d) The Charterers shall ensure that this Clause shall be incorporated into all sub-charters and bills of lading issued pursuant to this Charter Party.

31. BIMCO Designated Entities Clause for Charter Parties

(a) The provisions of this Clause shall apply in relation to any sanction, prohibition or restriction imposed on any specified persons, entities or bodies including the designation of specified vessels or fleets under United Nations Resolutions or trade or economic sanctions, laws or regulations of the European Union or the United States of America.

(b) Owners and Charterers respectively warrant for themselves (and in the case of any sublet, Charterers further warrant in respect of any sub-charterers, shippers, receivers, or cargo interests) that at the date of this fixture and throughout the duration of this Charter Party they are not subject to any of the sanctions, prohibitions, restrictions or designation referred to in Subclause 31(a) which prohibit or render unlawful any performance under this Charter Party or any sublet or any bills of lading. Owners further warrant that the nominated vessel, or any substitute, is not a designated vessel.

(c) If at any time during the performance of this Charter Party either party becomes aware that the other party is in breach of warranty as aforesaid, the party not in breach shall comply with the laws and regulations of any Government to which that party or the Vessel is subject, and follow any orders or directions which may be given by any body acting with powers to compel compliance, including where applicable the Owners' flag state. In the absence of any such orders, directions, laws or regulations, the party not in breach may, in its option, terminate the Charter Party forthwith or, if cargo is on board, direct the Vessel to any safe port of that party's choice and there discharge the cargo or part thereof.

(d) If, in compliance with the provisions of this Clause, anything is done or is not done, such shall not be deemed a deviation but shall be considered due fulfilment of this Charter Party.

(e) Notwithstanding anything in this Clause to the contrary, Owners or Charterers shall not be required to do anything which constitutes a violation of the laws and regulations of any State to which either of them is subject.

(f) Owners or Charterers shall be liable to indemnify the other party against any and all claims, losses, damage, costs and fines whatsoever suffered by the other party resulting from any breach of warranty as aforesaid.

(g) Charterers shall ensure that this Clause is incorporated into all sub-charters, contracts of carriage and bills of lading issued pursuant to this Charter Party.

32. Taxes

The Owners shall be responsible for the taxes stated in Box 31 and the Charterers shall be responsible for all other taxes. In the event of a change in local regulation and/or interpretation thereof, resulting in an unavoidable and documented change of the Owners' tax liability after the date of entering into the Charter Party or the date of commencement of employment, whichever is the earlier, hire shall be adjusted accordingly.

33. Lay-up

The Charterers shall at any time during the Charter Period have the option to require the Owners to place the Vessel in lay-up in accordance with the following process:

(a) The Charterers shall notify the Owners in writing of their intention to lay-up the Vessel including a date for the commencement of the lay-up and its estimated duration. The Charterers shall nominate a safe port or place where the Vessel shall be laid up.

(b) The Owners shall within seven days, provide the following responses in writing to the Charterers:

(i) the Owners' approval, which shall not be unreasonably withheld or delayed, of the nominated port or place of lay-up, or, if not approved, provide an alternative port or place;

(ii) the Owners' description and justification of the nature and extent of the lay-up;

(iii) the Owners' reasonable estimate of costs to place the Vessel in lay-up and the time required;

(iv) the Owners' reasonable daily savings during the period the Vessel is in lay-up and the amount of reduced hire during the period of lay-up; and

(v) the Owners' reasonable estimate of costs to reactivate the Vessel at the end of the period in lay-up and the time required.

(c) Upon receipt of the information in Subclause 33(b) above, the Charterers shall, within seven (7) days, confirm to the Owners if they require the Vessel to be laid-up. The Owners shall, upon receipt of the confirmation by and orders from the Charterers to lay-up the Vessel, take all actions necessary to effect the laying-up of the Vessel.

(d) The Vessel's hire rate shall be reduced to the amount specified by the Owners in Subclause 33(b)(iv), from the date the Vessel is in the port or place agreed and commences to effect lay-up. The Charterers shall pay the reasonably incurred costs of laying-up and of reactivating the Vessel.

(e) The Charterers shall give the Owners no less than thirty (30) days prior written notice when they require the Vessel to be reactivated and ready in all respects to accept the Charterers' voyage instructions. The Vessel's hire rate shall revert to the Hire specified in Box 20(i) thirty (30) days following receipt by the Owners of the reactivation notice, or once the Vessel is again fully operational and able to comply with the Charterers' voyage instructions, whichever is the earlier.

(f) Should the Vessel continue to be in lay-up on the date of expiry, or earlier termination of this Charter Party, the Charterers shall pay the Owners:

(i) a lump sum equal to thirty (30) days Charter hire at the reduced charter rate;

(ii) the amount specified in Subclause 33(b)(v);

(iii) a demobilisation fee for the Vessel, equal to the time and costs necessary for the Vessel to transit from its port or place of lay-up to its port or place of redelivery under this Charter Party; and

(iv) any other amounts due to the Owners under this Charter Party.

(g) Any of the Owners' obligations under this Charter Party that cannot be complied with as a direct result of the Vessel being laid-up shall be suspended, but only for the duration of the period that the Vessel is in lay-up.

(h) During any period the Vessel is in lay-up, the right to earn Maintenance Days under Subclause 13(c) shall be suspended but without effect to any such Maintenance Days already accumulated.

34. Early Termination

(a) <u>At Charterers' convenience</u>
The Charterers may terminate this Charter Party at any time by giving the Owners written notice of termination as stated in Box 14, upon expiry of which, this Charter Party will terminate. Upon such termination, Charterers shall pay the compensation for early termination stated in Box 13(ii) and the demobilisation fee stated in Box 15, as well as hire or other payments due under the Charter Party up to the time of termination. If Box 13(i) is left blank, this Clause 34(a) shall <u>not</u> apply.

(b) <u>For cause</u>
If any of the events listed in subclauses (i)-(vi) ("Termination Event") occur, either party in respect of the events listed in subclauses (i), (ii), (iv) and (v), and the non-defaulting party in respect of the events listed in subclauses (iii) and (vi), may give written notice of its intention to terminate this Charter Party unless the Termination Event is remedied within fourteen (14) days of receipt of the notice by the other party. If the Termination Event has not been so remedied then the notifying party may

terminate this Charter Party with immediate effect upon giving written notice of termination latest within three (3) days of expiry of the 14 days' notice.

(i) Requisition
If the government of the state of registry and/or the flag of the Vessel, or any agency thereof, requisitions for hire or title or otherwise takes possession of the Vessel during the Charter Period.

(ii) Confiscation
If any government, individual or group, whether or not purporting to act as a government or on behalf of any government, confiscates, requisitions, expropriates, seizes or otherwise takes possession of the Vessel during the Charter Period (other than by way of arrest for the purpose of obtaining security).

(iii) Bankruptcy
If either party has a petition presented for its winding up or administration or any other action is taken with a view to its winding up (otherwise than for the purpose of solvent reconstruction or amalgamation), or becomes bankrupt or commits an act of bankruptcy, or makes any arrangement or composition for the benefit of creditors, or has a receiver or manager or administrative receiver or administrator or liquidator appointed in respect of any of its assets, or suspends payments, or anything analogous to any of the foregoing under the law of any jurisdiction happens to it, or ceases or threatens to cease to carry on business, without prejudice to the accrued rights of that party.

(iv) Loss of Vessel
If the Vessel is lost or becomes a constructive total loss, or is missing. In the case of termination, Hire shall cease from the date the Vessel was lost or, in the event of a constructive total loss, from the date of the event giving rise to such loss. If the date of loss cannot be ascertained or the Vessel is missing, payment of Hire shall cease from the date the Vessel was last reported.

(v) Force Majeure
If a force majeure condition as defined in Clause 35 (Force Majeure) prevents or hinders the performance of the Charter.

(vi) Insurance
If the Owners have not procured the insurance policies in accordance with Clause 17 (Insurance) on delivery or any such insurance policies lapse during the Charter Period.

Termination as a result of any of the above mentioned causes shall not relieve the Charterers of any obligation for Hire and any other payments due up to the date of termination.

(c) Repudiatory Breach
If either party is in repudiatory breach of its obligations under this Charter party, the other party shall have the right to terminate this Charter Party with immediate effect by giving notice in accordance with Clause 38 (Notices) without prejudice to any other rights which the terminating party may have under this Charter Party.

(d) Off-hire – In the event the Vessel is off-hire under this Charter Party due to events stated in Subclause 13(a) (Off-hire – Off-hire and exceptions) for:

(i) a single consecutive period which exceeds that stated in Box 32(i) including any extensions which have been declared; or

(ii) combined periods which exceed that stated in Box 32(ii) in aggregate including any extensions which have been declared,

and the Owners have not provided a substitute vessel pursuant to Clause 21 (Substitute Vessel), this Charter Party may be terminated by the Charterers by giving notice in accordance with Clause 38 (Notices) without prejudice to any other rights which either party may have under this Charter Party.

PART II
SUPPLYTIME 2017 Time Charter Party for Offshore Support Vessels

35. Force Majeure

Neither party shall be liable for any loss, damage or delay due to any of the following force majeure events and/or conditions to the extent the party invoking force majeure is prevented or hindered from performing any or all of their obligations under this Charter Party, provided they have made all reasonable efforts to avoid, minimize or prevent the effect of such events and/or conditions:

(a) acts of God;

(b) any government requisition, control, intervention, requirement or interference;

(c) any circumstances arising out of war, threatened act of war or warlike operations, acts of terrorism, sabotage or piracy, or the consequences thereof;

(d) riots, civil commotion, blockades or embargoes;

(f) earthquakes, landslides, floods or other extraordinary weather conditions;

(g) strikes, lockouts or other industrial action, unless limited to the Employees of the party seeking to invoke force majeure;

(h) fire, accident, explosion except where caused by negligence of the party seeking to invoke force majeure;

(i) any other similar cause beyond the reasonable control of either party.

The party seeking to invoke force majeure shall notify the other party in writing within five (5) days of the occurrence of any such event/condition.

36. Confidentiality

All information or data provided or obtained in connection with the performance of this Charter Party is and shall remain confidential and not be disclosed without the prior written consent of the other party, provided however that each party may disclose confidential information to its Affiliates, subcontractors, and its/their respective auditors and Employees to the extent required for the performance of this Charter Party or for legal or compliance purposes. The Parties shall use their best efforts to ensure that such information shall not be disclosed to any third party by any of their Affiliates, sub-contractors, Employees and agents. This Clause shall not apply to any information or data that has already been published or is in the public domain. All information and data provided by a party is and shall remain the property of that party.

37. BIMCO Dispute Resolution Clause 2016

(a)* This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within fourteen (14) calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the fourteen (14) days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the fourteen (14) days specified, the party

referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of the sole arbitrator shall be binding on both Parties as if he had been appointed by agreement.

Nothing herein shall prevent the Parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of USD 100,000 (or such other sum as the Parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

(b)* This Charter Party shall be governed by U.S. maritime law or, if this Charter Party is not a maritime contract under U.S. law, by the laws of the State of New York. Any dispute arising out of or in connection with this Charter Party shall be referred to three (3) persons at New York, one to be appointed by each of the Parties hereto, and the third by the two so chosen. The decision of the arbitrators or any two of them shall be final, and for the purposes of enforcing any award, judgment may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the SMA Rules current as of the date of this Charter Party.

In cases where neither the claim nor any counterclaim exceeds the sum of USD 100,000 (or such other sum as the Parties may agree) the arbitration shall be conducted in accordance with the SMA Rules for Shortened Arbitration Procedure current as of the date of this Charter Party.

(c)* This Charter Party shall be governed by and construed in accordance with Singapore**/English** law.

Any dispute arising out of or in connection with this Charter Party, including any question regarding its existence, validity or termination shall be referred to and finally resolved by arbitration in Singapore in accordance with the Singapore International Arbitration Act (Chapter 143A) and any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The arbitration shall be conducted in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration (SCMA) current at the time when the arbitration proceedings are commenced.

The reference to arbitration of disputes under this Clause shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator and give notice that it has done so within fourteen (14) calendar days of that notice and stating that it will appoint its own arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the fourteen (14) days specified. If the other party does not give notice that it has done so within the fourteen (14) days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both Parties as if he had been appointed by agreement.

Nothing herein shall prevent the Parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of USD 75,000 (or such other sum as the Parties may agree) the arbitration shall be conducted before a single arbitrator in accordance with the SCMA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

***Delete whichever does not apply. If neither or both are deleted, then English law shall apply by default.*

(d)* This Charter Party shall be governed by and construed in accordance with the laws of the place mutually agreed by the Parties and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(e) The Parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Charter Party. In the case of any dispute in respect of which arbitration has been commenced under Subclause 37(a), 37(c) or 37(d), the following shall apply:

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within fourteen (14) calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the Parties shall thereafter agree a mediator within a further fourteen (14) calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the Parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the Parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(v) Either Party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms, each Party shall bear its own costs incurred in the mediation and the Parties shall share equally the mediator's costs and expenses.

(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are disclosable under the law and procedure governing the arbitration.

(Note: The Parties should be aware that the mediation process may not necessarily interrupt time limits.)

**Subclauses 37(a), 37(b), 37(c) and 37(d) are alternatives; indicate alternative agreed in Box 33.*

If Box 33 in PART I is not appropriately filled in, subclause (a) of this Clause shall apply. Subclause 37(e) shall apply in all cases except for alternative 37(b).

38. Notices

Either party giving notice under this Charter Party shall ensure that it is effectively given and such notice shall be treated as received during the recipients' office hours. If such notice is sent outside the recipients' office hours it shall be treated as received during the recipients' next working day. For the purpose of giving notices the Owners' contact details are stated in Box 2 and the Charterers' contact details are stated in Box 3.

PART II
SUPPLYTIME 2017 Time Charter Party for Offshore Support Vessels

39. Headings

The headings of this Charter Party are for identification only and shall not be deemed to be part hereof or be taken into consideration in the interpretation or construction of this Charter Party.

40. Severance

If by reason of any enactment or judgment any provision of this Charter Party shall be deemed or held to be illegal, void or unenforceable in whole or in part, all other provisions of this Charter Party shall be unaffected thereby and shall remain in full force and effect.

41. Entire Agreement

This Charter Party, including all Annexes referenced herein and attached hereto, is the entire agreement of the Parties, which supersedes all previous written or oral understandings and which may not be modified except by a written amendment signed by both Parties.

42. Singular/Plural

The singular includes the plural and vice versa as the context admits or requires.

APPENDIX 5
Supplytime 2005*

BIMCO

BIMCO
TIME CHARTER PARTY FOR OFFSHORE SERVICE VESSELS
CODE NAME: SUPPLYTIME 2005 **PART I**

1. Place and date of contract		
2. Owners/Place of business (full style, address, e-mail and fax no.)	3. Charterers/Place of business (full style, address, e-mail and fax no.)	
4. Vessel´s name and IMO number (ANNEX A)	5. Date of delivery (Cl. 2(a) and (c))	6. Cancelling date (Cl. 2(a) and (c))
7. Port or Place of delivery (Cl. 2(a))	8. Port or place redelivery/notice of redelivery (Cl. 2(d)) (i) Port or place of redelivery (ii) Number of days´ notice of redelivery	
9. Period of hire (Cl. 1(a))	10. Extension of period of hire (optional) (Cl. 1(b)) (i) Period of extension (ii) Advance notice for declaration of option (days)	
11. Automatic extension period to complete voyage or well (Cl. 1(c)) (i) Voyage or well (state which) (ii) Maximum extension period (state number of days)	12. Mobilisation charge (Cl. 2(b)(i)) (i) Lump sum (ii) When due	
13. Early termination of charter (state amount of hire payable) (Cl. 31(a)) (i) State yes, if applicable (ii) If yes, state amount of hire payable	14 Number of days´ notice of early termination (Cl. 31(a))	15. Demobilisation charge (lump sum) (Cl. 2(e) and Cl. 31 (a))
16. Area of operation (Cl. 6(a))	17. Employment of vessel restricted to (state nature of services(s)) (Cl. 6(a))	
18. Specialist operations (Cl. 6(a)) (i) State if vessel may be used for ROV operations (ii) State if vessel may be employed as a diving platform	19. Bunkers (Cl. 10) (i) Quantity of bunkers on delivery and redelivery (ii) Price of bunkers on delivery (iii) Price for bunkers on redelivery (iv) Fuel specifications and grades for fuel supplied by Charterers	
20. Charter hire (state rate and currency) (Cl. 12(a) , (d) and (e))	21. Extension hire (if agreed, state rate) (Cl 12(b))	
22. Invoicing for hire and other payments (Cl 12(d)) (i) State whether to be issued in advance or arrears (ii) State by whom to be issued if other than the party stated in Box 2 (iii) State to whom to be issued if addressee other than stated in Box 3	23. Payments (state mode and place of payment; also state beneficiary and bank account) (Cl 12(e))	

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continued

24. Payment of hire, bunker invoices and disbursements for Charterers' account (state maximum number of days) (Cl. 12(e))		25. Interest rate payable (Cl. 12(e))	26. Maximum audit period (Cl. 12(g))
27. Meals (state rate agreed) (Cl. 6(c)(i))	28. Accommodation (state rate agreed) (Cl. 6(c)(i))	29. Sublet (state amount of daily increment of charter hire) (Cl. 20)	
30. War Cancellation (indicate countries agreed) (Cl. 23)			
31. General Average (Place of settlement – only to be filled in if other than London) (Cl. 26)			
32. Taxes (Payable by Owners) (Cl. 30)			
33. Breakdown (State period) (Cl. 31(b)(v))			
34. Dispute resolution (state (a), (b) or (c) of Cl. 34, as agreed; if (c) agreed also state Place of Arbitration) (Cl. 34) **(c) -**			
35. Numbers of additional clauses covering special provisions, if agreed.			

It is mutually agreed that this Contract shall be performed subject to the conditions contained in the Charter consisting of PART I, including additional clauses, if any agreed and stated in Box 35, and PART II as well as ANNEX "A" and ANNEX "B" as annexed to this Charter. In the event of a conflict of conditions, the provisions of PART I shall prevail over those of PART II and ANNEX "A" and ANNEX "B" to the extent of such conflict but no further.

Signature (Owners)	Signature (Charterers)

ANNEX "A" to Time Charter Party for Offshore Service Vessels
Code Name: SUPPLYTIME 2005

VESSEL SPECIFICATION

1. General

(a) Owner: Name:
Address:

(b) Operator: Name:
Address:

(c) Vessel's Name: Builder:

(d) Year built:

(e) Type:

(f) Classification and Society:

(g) Flag:

(h) Date of next scheduled drydocking:

2. Performance

(a) Certified Bollard Pull (Tonnes):

(b) Speed/Consumption (Non-Towing)
(Approx. Daily Fuel Consumption) (Fair Weather)

Max Speed: Kts (app.) Tonnes
Service Speed: Kts (app.) Tonnes
Standby (main engines secured): Tonnes

(c) Approx. Towing/Working Fuel Consumption
Engine Power 100% Tonnes

(d) Type(s) and Grade(s) of Fuel Used:

3. Dimensions and Capacities/Discharge Rates

(a) L.O.A. (m): Breadth (m): Depth (m):
Max Draught (m):

(b) Deadweight (metric tons):

		Discharge Rate	
(c)	* Cargo Fuel max (m^3):	/hr at	head
(d)	* Drill Water max (m^3):	/hr at	head
(e)	Potable Water (m^3):	/hr at	head
(f)	Dry Bulk (m^3): in Tanks	/hr at	head
(g)	Liquid Mud (m^3):	/hr at	head

(max. SG)
State type of recirculation system i.e.
mechanical agitation, centrifugal pumps etc.

(h) Cargo Deck Area (m^2): Capacity (m.t.):
Length (m) x Breadth (m):
Load Bearing Capacity

(i) Heavy Weight Brine (m^3):
(max. SG) /hr at head

** Multipurpose Tanks yes/no:*

4. Machinery

(a) BHP Main Engines:

(b) Engine Builder:

(c) Number of Engines and Type:

(d) Generators:

(e) Stabilisers:

(f) Bow Thruster(s):

(g) Stern Thruster(s):

(h) Propellers/Rudders:

(i) Number and Pressure Rating of Bulk Compressors:

(j) Fuel Oil Metering System:

5. Towing and Anchor Handling Equipment

(a) (i) Stern Roller (Dimensions):
(ii) Anchor Handling/Towing Winch: *I*
(iii) Rig Chail Locker Capacity (linear feet of 3 in. Chain):
(iv) Tugger Winches:
(v) Chain Stopper Make and Type:

(b) (i) Towing Wire:
(ii) Spare Towing Wire:
(iii) Work Wire:
(iv) Spare Work Wire:
(v) Other Anchor Handling Equipment
(e.g. Pelican Hooks, Shackles, Stretchers etc.):

6. Radio and Navigation Equipment

(a) Radios
Single Side Band:
VHF:
Satcom:

(b) Electronic Navigation Equipment:

(c) Gyro:

(d) Radar:

(e) Autopilot:

(f) Depth Sounder:

7. Fire Fighting Equipment

(a) Class (FF1, FF2, FF3, other):

(b) Fixed:

(c) Portable:

8. Accommodation

(a) Crew: (b) Passengers:

9. Galley

(a) Freezer Space (m^3):

(b) Cooler (m^3):

10. Additional Equipment

(a) Mooring Equipment:

(continued)

ANNEX "A"

VESSEL SPECIFICATION

(b) Joystick:		**11. Standby/Survivor Certificate**	Yes/No
(c) Other:		Nos:	

ANNEX "B" to Time Charter Party for Offshore Service Vessels
Code Name: SUPPLYTIME 2005

INSURANCE

Insurance policies (as applicable) to be procured and
maintained by the Owners under Clause 17:

(1) Marine Hull Insurance. – Hull and Machinery Insurance shall be provided with limits equal to those normally carried by the Owners for the Vessel.

(2) Protection and Indemnity (Marine Liability Insurance. –
Protection and Indemnity (P&I) or Marine Liability Insurance with coverage equivalent to the cover provided by members of the International Group Protection and Indemnity Associations with a limit of cover no less than USD
for any one event. The cover shall include liability for collision and damage to fixed and floating objects to the extent not covered by the insurance in (1) above.

(3) General Third Party Liability Insurance. – To the extent not covered by the insurance in (2) ABOVE, Coverage shall be for:
Bodily Injury per person
Property Damage per occurrence.

(4) Workmen's Compensation and Employer's liability Insurance for Employees. –
To the extent not covered in the insurance in (2) above, covering Owners' employees and other persons for whom Owners are liable as employer pursuant to applicable law for statutory benefits as set out and required by local law in area of operation or area in which the Owners may become legally obliged to pay benefits.

(5) (Comprehensive General Automobile Liability Insurance. –
Covering all owned, hired and non-owned vehicles, coverage shall be for:
Bodily Injury According to the local law.
Property Damage In an amount equivalent to
single limit per occurrence.

(6) Such other insurances as may be agreed.

PART II
SUPPLYTIME 2005 Time Charter Party for Offshore Service Vessels

Definitions

"Owners" shall mean the party stated in Box 2

"Charterers" shall mean the party stated in Box 3

"Vessel" shall mean the vessel named in Box 4 and with particulars stated in ANNEX "A"

"Well" shall mean the time required to drill, test, complete and/or abandon a single borehole including any side-track thereof.

"Offshore Unit" shall mean any vessel, offshore installation, structure and/or mobile unit used in offshore exploration, construction, pipe-laying or repair, exploitation or production.

"Employees" shall mean employees, directors, officers, servants, agents or invitees.

1. Charter Period

(a) The Owners let and the Charterers hire the Vessel for the period as stated in Box 9 from the time the Vessel is delivered to the Charterers.

(b) Subject to Clause 12(b), the Charterers have the option to extend the Charter Period in direct continuation for the period stated in Box 10(i), but such an option must be declared in accordance with Box 10(ii).

(c) The Charter Period shall automatically be extended for the time required to complete the voyage or well (whichever is stated in Box 11(i)) in progress, such time not to exceed the period stated in Box 11(ii).

2. Delivery and Redelivery

(a) Delivery. - Subject to Clause 2(b) the Vessel shall be delivered by the Owners free of cargo and with clean tanks at any time between the date stated in Box 5 and the date stated in Box 6 at the port or place stated in Box 7 where the Vessel can safely lie always afloat.

(b) Mobilisation. –

(i) The Charterers shall pay a lump sum mobilisation charge as stated in Box 12 without discount.

(ii) Should the Owners agree to the Vessel loading and transporting cargo and/or undertaking any other service for the Charterers en route to the port of delivery or from the port of redelivery, then all terms and conditions of this Charter Party shall apply to such loading and transporting and/or other service exactly as if performed during the Charter Period excepting only that any lump sum freight agreed in respect thereof shall be payable and earned on shipment or commencement of the service as the case may be, the Vessel and/or goods lost or not lost.

(c) Cancelling. - If the Vessel is not delivered by midnight local time on the cancelling date stated in Box 6, the Charterers shall be entitled to cancel this Charter Party. However, if the Owners will be unable to deliver the Vessel by the cancelling date, they may give notice in writing to the Charterers at any time prior to the delivery date as stated in Box 5 and shall state in such notice the date by which they will be able to deliver the Vessel. The Charterers may within 24 hours of receipt of such notice give notice in writing to the Owners cancelling this Charter Party. If the Charterers do not give such notice, then the later date specified in the Owners' notice shall be substituted for the cancelling date for all the purposes of this Charter Party. In the event the Charterers cancel the Charter Party, it shall terminate on terms that neither party shall be liable to the other for any losses incurred by reason of the non-delivery of the Vessel or the cancellation of the Charter Party.

(d) Redelivery. - The Vessel shall be redelivered on the expiration or earlier termination of this Charter Party free of cargo and with clean tanks at the port or place as stated in Box 8(i) or such other port or place as may be mutually agreed. The Charterers shall give not less than the number of days notice in writing of their intention to redeliver the Vessel, as stated in Box 8(ii).

(e) Demobilisation. - The Charterers shall pay a lump sum demobilisation charge without discount in the amount as stated in Box 15 which amount shall be paid on the expiration or on earlier termination of this Charter Party.

3. Condition of Vessel

(a) The Owners undertake that at the date of delivery under this Charter Party the Vessel shall be of the description and Class as specified in ANNEX "A", attached hereto, and in a thoroughly efficient state of hull and machinery.

(b) The Owners shall exercise due diligence to maintain the Vessel in such Class and in every way fit for the service stated in Clause 6 throughout the period of this Charter Party.

4. Structural Alterations and Additional Equipment

The Charterers shall, at their expense, have the option of making structural alterations to the Vessel or installing additional equipment with the written consent of the Owners, which shall not be unreasonably withheld. Unless otherwise agreed, the Vessel is to be redelivered reinstated, at the Charterers' expense, to her original condition. The Vessel is to remain on hire during any period of these alterations or reinstatement. The Charterers shall at all times be responsible for repair and maintenance of any such alteration or additional equipment. However, the Owners may, upon giving notice, undertake any such repair and maintenance at the Charterers' expense, when necessary for the safe and efficient performance of the Vessel.

5. Survey

The Owners and the Charterers shall jointly appoint an independent surveyor for the purpose of determining and agreeing in writing, the condition of the Vessel, any anchor handling and towing equipment specified in ANNEX "A", and the quality and quantity of fuel, lubricants and water at the time of delivery and redelivery hereunder. The Owners and the Charterers shall jointly share the time and expense of such surveys.

6. Employment and Area of Operation

(a) The Vessel shall be employed in offshore activities which are lawful in accordance with the law of the place of the Vessel's flag and/or registration and of the place of operation. Such activities shall be restricted to the service(s) as stated in Box 17, and to voyages between any good and safe port or place and any place or offshore unit where the Vessel can safely lie always afloat within the Area of Operation as stated in Box 16 which shall always be within International Navigation Limits and which shall in no circumstances be exceeded without prior agreement and adjustment of the Hire and in accordance with such other terms as appropriate to be agreed; provided always that the Charterers do not warrant the safety of any such port or place or offshore unit but shall exercise due diligence in issuing their orders to the Vessel as if the Vessel were their own property and having regard to her capabilities and the nature of her employment.

Unless otherwise stated in Box 18(i), the Charterers shall not have the right to use the Vessel for ROV operations. Unless otherwise stated in Box 18(ii), the Vessel shall not be employed as a diving platform.

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(b) Relevant permission and licences from responsible authorities for the Vessel to enter, work in and leave the Area of Operation shall be obtained by the Charterers and the Owners shall assist, if necessary, in every way possible to secure such permission and licences.

(c) The Vessel's Space. - The whole reach and burden and decks of the Vessel shall throughout the Charter Period be at the Charterers' disposal reserving proper and sufficient space for the Vessel's Master, Officers, Crew, tackle, apparel, furniture, provisions and stores. The Charterers shall be entitled to carry, so far as space is available and for their purposes in connection with their operations:

(i) Persons other than crew members, other than fare paying, and for such purposes to make use of the Vessel's available accommodation not being used on the voyage by the Vessel's Crew. The Owners shall provide suitable provisions and requisites for such persons for which the Charterers shall pay at the rate as stated in Box 27 per meal and at the rate as stated in Box 28 per day for the provision of bedding and services for persons using berth accommodation.

(ii) Lawful cargo whether carried on or under deck.

(iii) Explosives and dangerous cargo whether in bulk or packaged, provided proper notification has been given and such cargo is marked and packed in accordance with the national regulations of the Vessel and/or the International Maritime Dangerous Goods Code and/or other pertinent regulations. Failing such proper notification, marking or packing the Charterers shall indemnify the Owners in respect of any loss, damage or liability whatsoever and howsoever arising therefrom. The Charterers accept responsibility for any additional expenses (including reinstatement expenses) incurred by the Owners in relation to the carriage of explosives and dangerous cargo.

(iv) Hazardous or noxious substances, subject to Clause 14(f), proper notification and any pertinent regulations.

(d) Laying-up of Vessel. - The Charterers shall have the option of laying up the Vessel at an agreed safe port or place for all or any portion of the Charter Period in which case the Hire hereunder shall continue to be paid but, if the period of such lay-up exceeds 30 consecutive days, there shall be credited against such Hire the amount which the Owners shall reasonably have saved by way of reduction in expenses and overheads as a result of the lay-up of the Vessel.

7. Master and Crew

(a) (i) The Master shall carry out his duties promptly and the Vessel shall render all reasonable services within her capabilities by day and by night and at such times and on such schedules as the Charterers may reasonably require without any obligations of the Charterers to pay to the Owners or the Master, Officers or the Crew of the Vessel any excess or overtime payments. The Charterers shall furnish the Master with all instructions and sailing directions and the Master and Engineer shall keep full and correct logs accessible to the Charterers or their agents.

(ii)(1) No Bills of Lading shall be issued for shipments under this Charter Party.

(2) The Master shall sign cargo documents as directed by the Charterers in the form of receipts that are non-negotiable documents and which are clearly marked as such.

(3) The Charterers shall indemnify the Owners against all liabilities that may arise from the signing of such cargo documents in accordance with the directions of the Charterers to the extent that the terms of such cargo documents impose more onerous liabilities than those assumed by the Owners under the terms of this Charter Party.

(b) The Vessel's Crew if required by Charterers will connect and disconnect electric cables, fuel, water and pneumatic hoses when placed on board the Vessel in port as well as alongside the offshore units; will operate the machinery on board the Vessel for loading and unloading cargoes; and will hook and unhook cargo on board the Vessel when loading or discharging alongside offshore units. If the port regulations or the seamen and/or labour unions do not permit the Crew of the Vessel to carry out any of this work, then the Charterers shall make, at their own expense, whatever other arrangements may be necessary, always under the direction of the Master.

(c) If the Charterers have reason to be dissatisfied with the conduct of the Master or any Officer or member of the Crew, the Owners on receiving particulars of the complaint shall promptly investigate the matter and if the complaint proves to be well founded, the Owners shall as soon as reasonably possible make appropriate changes in the appointment.

(d) The entire operation, navigation, and management of the Vessel shall be in the exclusive control and command of the Owners, their Master, Officers and Crew. The Vessel will be operated and the services hereunder will be rendered as requested by the Charterers, subject always to the exclusive right of the Owners or the Master of the Vessel to determine whether operation of the Vessel may be safely undertaken. In the performance of the Charter Party, the Owners are deemed to be an independent contractor, the Charterers being concerned only with the results of the services performed.

8. Owners to Provide

(a) The Owners shall provide and pay for all provisions, wages and all other expenses of the Master, Officers and Crew; all maintenance and repair of the Vessel's hull, machinery and equipment as specified in ANNEX "A"; also, except as otherwise provided in this Charter Party, for all insurance on the Vessel, all dues and charges directly related to the Vessel's flag and/or registration, all deck, cabin and engineroom stores, cordage required for ordinary ship's purposes mooring alongside in harbour, and all fumigation expenses and de-ratisation certificates. The Owners' obligations under this Clause extend to cover all liabilities for consular charges appertaining to the Master, Officers and Crew, customs or import duties arising at any time during the performance of this Charter Party in relation to the personal effects of the Master, Officers and Crew, and in relation to the stores, provisions and other matters as aforesaid which the Owners are to provide and/or pay for and the Owners shall refund to the Charterers any sums they or their agents may have paid or been compelled to pay in respect of such liability.

(b) On delivery the Vessel shall be equipped, if appropriate, at the Owners' expense with any towing and anchor handling equipment specified in ANNEX "A" .

9. Charterers to Provide

(a) While the Vessel is on hire the Charterers shall

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provide and pay for all fuel, lubricants, water, dispersants, firefighting foam and transport thereof, port charges, pilotage and boatmen and canal steersmen (whether compulsory or not), launch hire (unless incurred in connection with the Owners' business), light dues, tug assistance, canal, dock, harbour, tonnage and other dues and charges, agencies and commissions incurred on the Charterers' business, costs for security or other watchmen, and of quarantine (if occasioned by the nature of the cargo carried or the ports visited whilst employed under this Charter Party but not otherwise).

(b) At all times the Charterers shall provide and pay for the loading and unloading of cargoes so far as not done by the Vessel's crew, cleaning of cargo tanks, all necessary dunnage, uprights and shoring equipment for securing deck cargo, all cordage except as to be provided by the Owners, all ropes, slings and special runners (including bulk cargo discharge hoses) actually used for loading and discharging, inert gas required for the protection of cargo, and electrodes used for offshore works, and shall reimburse the Owners for the actual cost of replacement of special mooring lines to offshore units, wires, nylon spring lines etc. used for offshore works, all hose connections and adaptors, and further, shall refill oxygen/acetylene bottles used for offshore works.

(c) Upon entering into this Charter Party or in any event no later than the time of delivery of the Vessel the Charterers shall provide the Owners with copies of any operational plans or documents which are necessary for the safe and efficient operation of the Vessel. All documents received by the Owners shall be returned to the Charterers on redelivery.

(d) The Charterers shall pay for customs duties, all permits, import duties (including costs involved in establishing temporary or permanent importation bonds), and clearance expenses, both for the Vessel and/or equipment, required for or arising out of this Charter Party.

(e) The Charterers shall pay for any replacement of any anchor handling/towing/lifting wires and accessories which have been placed on board by the Owners or the Charterers, should such equipment be lost, damaged or become unserviceable, other than as a result of the Owners' negligence.

(f) The Charterers shall pay for any fines, taxes or imposts levied in the event that contraband and/or unmanifested drugs and/or cargoes are found to have been shipped as part of the cargo and/or in containers on board. The Vessel shall remain on hire during any time lost as a result thereof. However, if it is established that the Master, Officers and/or Crew are involved in smuggling then any financial security required shall be provided by the Owners.

10. Bunkers

(a) Quantity at Delivery/Redelivery.– The Vessel shall be delivered with at least the quantity of fuel as stated in Box 19 (i) and the Vessel shall be redelivered with about the same quantity as on delivery, provided always that the quantity of fuels at redelivery is at least sufficient to allow the Vessel to safely reach the nearest port at which fuels of the required type or better are available.

(b) Purchase Price. – The Charterers shall purchase the fuels on board at delivery at the price prevailing at the time and port of delivery unless otherwise stated in Box 19 (ii) and the Owners shall purchase the fuels on board at redelivery at the price prevailing at the time and port of redelivery unless otherwise stated in Box 19 (iii). The Charterers shall purchase the lubricants on board at delivery at the list price and the Owners shall purchase the lubricants on board at redelivery at the list price.

(c) Bunkering. – The Charterers shall supply fuel of the specifications and grades stated in Box 19 (iv). The fuels shall be of a stable and homogeneous nature and unless otherwise agreed in writing, shall comply with ISO standard 8217:1996 or any subsequent amendments thereof as well as with the relevant provisions of MARPOL. The Chief Engineer shall co-operate with the Charterers' bunkering agents and fuel suppliers and comply with their requirements during bunkering, including but not limited to checking, verifying and acknowledging sampling, reading or soundings, meters etc. before, during and/or after delivery of fuels. During delivery four representative samples of all fuels shall be taken at a point as close as possible to the Vessel's bunker manifold. The samples shall be labelled and sealed and signed by suppliers, Chief Engineer and the Charterers or their agents. Two samples shall be retained by the suppliers and one each by the Vessel and the Charterers. If any claim should arise in respect of the quality or specification or grades of the fuels supplied, the samples of the fuels retained as aforesaid shall be analysed by a qualified and independent laboratory.

(d) Liability . – The Charterers shall be liable for any loss or damage to the Owners caused by the supply of unsuitable fuels or fuels which do not comply with the specifications and grades set out in Box 19 (iv) and the Owners shall not be held liable for any reduction in the Vessel's speed performance and/or increased bunker consumption nor for any time lost and any other consequences arising as a result of such supply.

11. BIMCO ISPS/MTSA Clause for Time Charter Parties

(a) (i) The Owners shall comply with the requirements of the International Code for the Security of Ships and of Port Facilities and the relevant amendments to Chapter XI of SOLAS (ISPS Code) relating to the Vessel and "the Company" (as defined by the ISPS Code). If trading to or from the United States or passing through United States waters, the Owners shall also comply with the requirements of the US Maritime Transportation Security Act 2002 (MTSA) relating to the Vessel and the "Owner" (as defined by the MTSA).

(ii) Upon request the Owners shall provide a copy of the relevant International Ship Security Certificate (or the Interim International Ship Security Certificate) to the Charterers. The Owners shall provide the Charterers with the full style contact details of the Company Security Officer (CSO).

(iii) Except as otherwise provided in this Charter Party, loss, damages, expense or delay (excluding consequential loss, damages, expense or delay) caused by failure on the part of the Owners or "the Company"/"Owner" to comply with the requirements of the ISPS Code/MTSA or this Clause shall be for the Owners' account.

(b) (i) The Charterers shall provide the Owners and the Master with their full style contact details and, upon request, any other information the Owners require to comply with the ISPS Code/MTSA. Furthermore, the Charterers shall ensure that all sub-charter parties they enter into during the period of this Charter Party contain the following provision:

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"The Charterers shall provide the Owners with their full style contact details and, where sub-letting is permitted under the terms of the charter party, shall ensure that the contact details of all sub-charterers are likewise provided to the Owners".

(ii) Except as otherwise provided in this Charter Party, loss, damages, expense or delay (excluding consequential loss, damages, expense or delay) caused by failure on the part of the Charterers to comply with this Clause shall be for the Charterers' account.

(c) Notwithstanding anything else contained in this Charter Party all delay, costs or expenses whatsoever arising out of or related to security regulations or measures required by the port facility or any relevant authority in accordance with the ISPS Code/MTSA including, but not limited to, security guards, launch services, tug escorts, port security fees or taxes and inspections, shall be for the Charterers' account, unless such costs or expenses result solely from the Owners' negligence. All measures required by the Owners to comply with the Ship Security Plan shall be for the Owners' account.

(d) If either party makes any payment which is for the other party's account according to this Clause, the other party shall indemnify the paying party.

12. Hire and Payments

(a) Hire. - The Charterers shall pay Hire for the Vessel at the rate stated in Box 20 per day or pro rata for part thereof from the time that the Vessel is delivered to the Charterers until the expiration or earlier termination of this Charter Party.

(b) Extension Hire. - If the option to extend the Charter Period under Clause 1(b) is exercised, Hire for such extension shall, unless stated in Box 21, be agreed between the Owners and the Charterers. Should the parties fail to reach an agreement, then the Charterers' shall not have the option to extend the Charter Period.

(c) Adjustment of Hire. - The rate of hire shall be adjusted to reflect documented changes, after the date of entering into the Charter Party or the date of commencement of employment, whichever is earlier, in the Owners' costs arising from changes in the Charterers' requirements, or regulations governing the Vessel and/or its Crew or this Charter Party or the application thereof.

(d) Invoicing. - All invoices shall be issued in the contract currency stated in Box 20. In respect of reimbursable expenses incurred in currencies other than the contract currency, the rate of exchange into the contract currency shall be that quoted by the Central Bank of the country of such other currency as at the date of the Owners' invoice. Invoices covering Hire and any other payments due shall be issued monthly as stated in Box 22(i) or at the expiration or earlier termination of this Charter Party. Notwithstanding the foregoing, bunkers and lubricants on board at delivery shall be invoiced at the time of delivery.

(e) Payment s. - Payments of Hire, bunker invoices and disbursements for the Charterers' account shall be received within the number of days stated in Box 24 from the date of receipt of the invoice. Payment shall be made in the currency stated in Box 20 in full without discount to the account stated in Box 23.
However, any advances for disbursements made on behalf of and approved by the Owners may be deducted from Hire due.
If payment is not received by the Owners within 5 banking days following the due date the Owners are entitled to charge interest at the rate stated in Box 25 on the amount outstanding from and including the due date until payment is received.
Where an invoice is disputed, the Charterers shall notify the Owners before the due date and in any event pay the undisputed portion of the invoice but shall be entitled to withhold payment of the disputed portion provided that such portion is reasonably disputed and the Charterers specify such reason. Interest will be chargeable at the rate stated in Box 25 on such disputed amounts where resolved in favour of the Owners.
Should the Owners prove the validity of the disputed portion of the invoice, balance payment shall be received by the Owners within 5 banking days after the dispute is resolved. Should the Charterers' claim be valid, a corrected invoice shall be issued by the Owners.

(f) (i) Where there is a failure to pay Hire by the due date, the Owners shall notify the Charterers in writing of such failure and further may also suspend the performance of any or all of their obligations under this Charter Party until such time as all the Hire due to the Owners under the Charter Party has been received by the Owners. Throughout any period of suspended performance under this Clause, the Vessel is to be and shall remain on Hire. The Owners' right to suspend performance under this Clause shall be without prejudice to any other rights they may have under this Charter Party.

(ii) If after 5 days of the written notification referred to in Clause 12(f)(i) the Hire has still not been received the Owners may at any time while Hire remains outstanding withdraw the Vessel from the Charter Party. The right to withdraw is to be exercised promptly and in writing and is not dependent upon the Owners first exercising the right to suspend performance of their obligations under the Charter Party pursuant to Clause 12(f)(i) above. The receipt by the Owners of a payment from the Charterers after the five day period referred to above has expired but prior to the notice of withdrawal shall not be deemed a waiver of the Owners' right to cancel the Charter Party.

(iii) Where the Owners choose not to exercise any of the rights afforded to them by this Clause in respect of any particular late payment of Hire, or a series of late payments of Hire, under the Charter Party, this shall not be construed as a waiver of their right either to suspend performance under Clause 12(f)(i) or to withdraw the Vessel from the Charter Party under Clause 12(f)(ii) in respect of any subsequent late payment under this Charter Party.

(iv) The Charterers shall indemnify the Owners in respect of any liabilities incurred by the Owners under the Bill of Lading or any other contract of carriage as a consequence of the Owners' proper suspension of and/or withdrawal from any or all of their obligations under this Charter Party.

(g) Audit. - The Charterers shall have the right to appoint an independent chartered accountant to audit the Owners' books directly related to work performed under this Charter Party at any time after the conclusion of the Charter Party, up to the expiry of the period stated in Box 26, to determine the validity of the Owners' charges hereunder. The Owners undertake to make their records available for such purposes at their

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principal place of business during normal working hours. Any discrepancies discovered in payments made shall be promptly resolved by invoice or credit as appropriate.

13. Suspension of Hire

(a) If as a result of any deficiency of Crew or of the Owners' stores, strike of Master, Officers and Crew, breakdown of machinery, damage to hull or other accidents to the Vessel, the Vessel is prevented from working, no Hire shall be payable in respect of any time lost and any Hire paid in advance shall be adjusted accordingly provided always however that Hire shall not cease in the event of the Vessel being prevented from working as aforesaid as a result of:

(i) the carriage of cargo as noted in Clause 6(c)(iii) and (iv);

(ii) quarantine or risk of quarantine unless caused by the Master, Officers or Crew having communication with the shore at any infected area not in connection with the employment of the Vessel without the consent or the instructions of the Charterers;

(iii) deviation from her Charter Party duties or exposure to abnormal risks at the request of the Charterers;

(iv) detention in consequence of being driven into port or to anchorage through stress of weather or trading to shallow harbours or to river or ports with bars or suffering an accident to her cargo, when the expenses resulting from such detention shall be for the Charterers' account howsoever incurred;

(v) detention or damage by ice;

(vi) any act or omission of the Charterers, their servants or agents.

(b) Liability for V essel not W orking. – The Owners' liability for any loss, damage or delay sustained by the Charterers as a result of the Vessel being prevented from working by any cause whatsoever shall be limited to suspension of hire, except as provided in Clause 11(a)(iii).

(c) Maintenance and Drydocking. – Notwithstanding Clause 13(a), the Charterers shall grant the Owners a maximum of 24 hours on hire, which shall be cumulative, per month or pro rata for part of a month from the commencement of the Charter Period for maintenance and repairs including drydocking (hereinafter referred to as "maintenance allowance"). The Vessel shall be drydocked at regular intervals. The Charterers shall place the Vessel at the Owners' disposal clean of cargo, at a port (to be nominated by the Owners at a later date) having facilities suitable to the Owners for the purpose of such drydocking. During reasonable voyage time taken in transits between such port and Area of Operation the Vessel shall be on hire and such time shall not be counted against the accumulated maintenance allowance. Hire shall be suspended during any time taken in maintenance repairs and drydocking in excess of the accumulated maintenance allowance. In the event of less time being taken by the Owners for repairs and drydocking or, alternatively, the Charterers not making the Vessel available for all or part of this time, the Charterers shall, upon expiration or earlier termination of the Charter Party, pay the equivalent of the daily rate of Hire then prevailing in addition to Hire otherwise due under this Charter Party in respect of all such time not so taken or made available. Upon commencement of the Charter Period, the Owners agree to furnish the Charterers with the Owners' proposed drydocking schedule and the Charterers agree to make every reasonable effort to assist the Owners in adhering to such predetermined drydocking schedule for the Vessel.

14. Liabilities and Indemnities

(a) Definitions

For the purpose of this Clause "Owners' Group" shall mean: the Owners, and their contractors and sub-contractors , and Employees of any of the foregoing. For the purpose of this Clause "Charterers' Group" shall mean: the Charterers, and their contractors, sub-contractors, co-venturers and customers (having a contractual relationship with the Charterers, always with respect to the job or project on which the Vessel is employed), and Employees of any of the foregoing.

(b) Knock for Knock

(i) Owners. - Notwithstanding anything else contained in this Charter Party excepting Clauses 6(c)(iii), 9(b), 9(e), 9(f), 10(d), 11, 12(f)(iv), 14 (d), 15 (b), 18(c), 26 and 27, the Charterers shall not be responsible for loss of or damage to the property of any member of the Owners' Group, including the Vessel, or for personal injury or death of any member of the Owners' Group arising out of or in any way connected with the performance of this Charter Party, even if such loss, damage, injury or death is caused wholly or partially by the act, neglect, or default of the Charterers' Group, and even if such loss, damage, injury or death is caused wholly or partially by unseaworthiness of any vessel; and the Owners shall indemnify, protect, defend and hold harmless the Charterers from any and against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of or in connection with such loss, damage, personal injury or death.

(ii) Charterers. - Notwithstanding anything else contained in this Charter Party excepting Clause 11, 15(a), 16 and 26, the Owners shall not be responsible for loss of, damage to, or any liability arising out of anything towed by the Vessel, any cargo laden upon or carried by the Vessel or her tow, the property of any member of the Charterers' Group , whether owned or chartered, including their Offshore Units, or for personal injury or death of any member of the Charterers' Group or of anyone on board anything towed by the Vessel, arising out of or in any way connected with the performance of this Charter Party, even if such loss, damage, liability, injury or death is caused wholly or partially by the act, neglect or default of the Owners' Group, and even if such loss, damage, liability, injury or death is caused wholly or partially by the unseaworthiness of any vessel; and the Charterers shall indemnify, protect, defend and hold harmless the Owners from any and against all claims, costs, expenses, actions, proceedings, suits, demands, and liabilities whatsoever arising out of or in connection with such loss, damage, liability, personal injury or death.

(c) Consequential Damages.-

Neither party shall be liable to the other for any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Charter Party, and each party shall protect, defend and indemnify the other from and against all such claims

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from any member of its Group as defined in Clause 14(a).

"Consequential damages" shall include, but not be limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance, whether or not foreseeable at the date of this Charter Party.

(d) Limit ations.-

Nothing contained in this Charter Party shall be construed or held to deprive the Owners or the Charterers, as against any person or party, including as against each other, of any right to claim limitation of liability provided by any applicable law, statute or convention, save that nothing in this Charter Party shall create any right to limit liability. Where the Owners or the Charterers may seek an indemnity under the provisions of this Charter Party or against each other in respect of a claim brought by a third party, the Owners or the Charterers shall seek to limit their liability against such third party.

(e) Himalaya Clause.-

(i) All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Charter Party or by any applicable statute, rule or regulation for the benefit of the Charterers shall also apply to and be for the benefit of the Charterers' parent, affiliated, related and subsidiary companies; the Charterers' contractors, sub-contractors, co-venturers and customers (having a contractual relationship with the Charterers, always with respect to the job or project on which the Vessel is employed) ; their respective Employees and their respective underwriters.

(ii) All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Charter Party or by any applicable statute, rule or regulation for the benefit of the Owners shall also apply to and be for the benefit of the Owners' parent, affiliated, related and subsidiary companies, the Owners' contractors, sub-contractors, the Vessel, its Master, Officers and Crew, its registered owner, its operator, its demise charterer(s), their respective Employees and their respective underwriters.

(iii) The Owners or the Charterers shall be deemed to be acting as agent or trustee of and for the benefit of all such persons and parties set forth above, but only for the limited purpose of contracting for the extension of such benefits to such persons and parties.

(f) Hazardous or Noxious Subst ances.

Notwithstanding any other provision of this Charter Party to the contrary, the Charterers shall always be responsible for any losses, damages or liabilities suffered by the Owners' Group, by the Charterers, or by third parties, with respect to the Vessel or other property, personal injury or death, pollution or otherwise, which losses, damages or liabilities are caused, directly or indirectly, as a result of the Vessel's carriage of any hazardous or noxious substances in whatever form as ordered by the Charterers, and the Charterers shall defend, indemnify the Owners and hold the Owners harmless for any expense, loss or liability whatsoever or howsoever arising with respect to the carriage of hazardous or noxious substances.

15. Pollution

(a) Except as otherwise provided for in Clause 18(c)(iii), the Owners shall be liable for, and agree to indemnify, defend and hold harmless the Charterers against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of actual or threatened pollution damage and the cost of cleanup or control thereof arising from acts or omissions of the Owners or their personnel which cause or allow discharge, spills or leaks from the Vessel, except as may emanate from cargo thereon or therein.

(b) The Charterers shall be liable for and agree to indemnify, defend and hold harmless the Owners from all claims, costs, expenses, actions, proceedings, suits, demands, liabilities, loss or damage whatsoever arising out of or resulting from any other actual or threatened pollution damage, even where caused wholly or partially by the act, neglect or default of the Owners, their Employees, contractors or sub-contractors or by the unseaworthiness of the Vessel.

(c) The Charterers shall, upon giving notice to the Owners or the Master, have the right (but shall not be obliged) to place on board the Vessel and/or have in attendance at the site of any pollution or threatened incident one or more Charterers' representative to observe the measures being taken by Owners and/or national or local authorities or their respective servants, agents or contractors to prevent or minimise pollution damage and to provide advice, equipment or manpower or undertake such other measures, at Charterers' risk and expense, as are permitted under applicable law and as Charterers believe are reasonably necessary to prevent or minimise such pollution damage or to remove the threat of pollution damage.

16. Wreck Removal

If the Vessel becomes a wreck and is an obstruction to navigation and has to be removed by order of any lawful authority having jurisdiction over the area where the Vessel is placed or as a result of compulsory law, the Owners shall be liable for any and all expenses in connection with the raising, removal, destruction, lighting or marking of the Vessel.

17. Insurance

(a) (i) The Owners shall procure and maintain in effect for the duration of this Charter Party, with reputable insurers, the insurances set forth in ANNEX "B".

Policy limits shall not be less than those indicated. Reasonable deductibles are acceptable and shall be for the account of the Owners.

(ii) The Charterers shall upon request be named as co-insured. The Owners shall upon request cause insurers to waive subrogation rights against the Charterers (as encompassed in Clause 14(e)(i)). Co-insurance and/or waivers of subrogation shall be given only insofar as these relate to liabilities which are properly the responsibility of the Owners under the terms of this Charter Party.

(b) The Owners shall upon request furnish the Charterers with copies of certificates of insurance which provide sufficient information to verify that the Owners have complied with the insurance requirements of this Charter Party.

(c) If the Owners fail to comply with the aforesaid insurance requirements, the Charterers may, without prejudice to any other rights or remedies under this Charter Party, purchase similar coverage and deduct the cost thereof from any payment due to the Owners under this Charter Party.

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18. Saving of Life and Salvage

(a) The Vessel shall be permitted to deviate for the purpose of saving life at sea without prior approval of or notice to the Charterers and without loss of Hire provided however that notice of such deviation is given as soon as possible.

(b) Subject to the Charterers' consent, which shall not be unreasonably withheld, the Vessel shall be at liberty to undertake attempts at salvage, it being understood that the Vessel shall be off-hire from the time she leaves port or commences to deviate and she shall remain off-hire until she is again in every way ready to resume the Charterers' service at a position which is not less favourable to the Charterers than the position at the time of leaving port or deviating for the salvage services. All salvage monies earned by the Vessel shall be divided equally between the Owners and the Charterers, after deducting the Master's, Officers' and Crew's share, legal expenses, value of fuel and lubricants consumed, Hire of the Vessel lost by the Owners during the salvage, repairs to damage sustained, if any, and any other extraordinary loss or expense sustained as a result of the salvage.

The Charterers shall be bound by all measures taken by the Owners in order to secure payment of salvage and to fix its amount.

(c) The Owners shall waive their right to claim any award for salvage performed on property owned by or contracted to the Charterers, always provided such property was the object of the operation the Vessel was chartered for, and the Vessel shall remain on hire when rendering salvage services to such property. This waiver is without prejudice to any right the Vessel's Master, Officers and Crew may have under any title.

If the Owners render assistance to such property in distress on the basis of "no claim for salvage", then, notwithstanding any other provisions contained in this Charter Party and even in the event of neglect or default of the Owners, Master, Officers or Crew:

(i) The Charterers shall be responsible for and shall indemnify the Owners against payments made, under any legal rights, to the Master, Officers and Crew in relation to such assistance.

(ii) The Charterers shall be responsible for and shall reimburse the Owners for any loss or damage sustained by the Vessel or her equipment by reason of giving such assistance and shall also pay the Owners' additional expenses thereby incurred.

(iii) The Charterers shall be responsible for any actual or potential spill, seepage and/or emission of any pollutant howsoever caused occurring within the offshore site and any pollution resulting therefrom wheresoever it may occur and including but not limited to the cost of such measures as are reasonably necessary to prevent or mitigate pollution damage, and the Charterers shall indemnify the Owners against any liability, cost or expense arising by reason of such actual or potential spill, seepage and/or emission.

(iv) The V essel shall not be off-hire as a consequence of giving such assistance, or effecting repairs under Clause 18(c)(ii), and time taken for such repairs shall not count against time granted under Clause 13(c).

(v) The Charterers shall indemnify the Owners against any liability, cost and/or expense whatsoever in respect of any loss of life, injury, damage or other loss to person or property howsoever arising from such assistance.

19. Lien

The Owners shall have a lien upon all cargoes and equipment for all claims against the Charterers under this Charter Party and the Charterers shall have a lien on the Vessel for all monies paid in advance and not earned. The Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the Owners in the Vessel. Except as provided in Clause 14, the Charterers shall indemnify and hold the Owners harmless against any lien of whatsoever nature arising upon the Vessel during the Charter Period while she is under the control of the Charterers, and against any claims against the Owners arising out of the operation of the Vessel by the Charterers or out of any neglect of the Charterers in relation to the Vessel or the operation thereof.

Should the Vessel be arrested by reason of claims or liens arising out of her operation hereunder, unless brought about by the act or neglect of the Owners, the Charterers shall at their own expense take all reasonable steps to secure that within a reasonable time the Vessel is released and at their own expense put up bail to secure release of the Vessel.

20. Sublet and Assignment

(a) Charterers. - The Charterers shall have the option of subletting, assigning or loaning the Vessel to any person or company not competing with the Owners, subject to the Owners' prior approval which shall not be unreasonably withheld, upon giving notice in writing to the Owners, but the original Charterers shall always remain responsible to the Owners for due performance of the Charter Party. The person or company taking such subletting, assigning or loan and their contractors and sub-contractors shall be deemed contractors of the Charterers for all the purposes of this Charter Party. The Owners make it a condition of such consent that additional Hire shall be paid as agreed between the Charterers and the Owners in Box 29, having regard to the nature and period of any intended service of the Vessel.

(b) Owners. - The Owners may not assign or transfer any part of this Charter Party without the written approval of the Charterers, which approval shall not be unreasonably withheld. Approval by the Charterers of such subletting or assignment shall not relieve the Owners of their responsibility for due performance of the part of the services which is sublet or assigned.

21. Substitute Vessel

The Owners shall be entitled at any time, whether before delivery or at any other time during the Charter Period, to provide a substitute vessel, subject to the Charterers' prior approval which shall not be unreasonably withheld.

22. BIMCO War Risks Clause "CONWARTIME 2004"

(a) For the purpose of this Clause, the words:

(i) "Owners" shall include the shipowners, bareboat charterers, disponent owners, managers or other operators who are charged with the management of the Vessel, and the Master; and

(ii) "War Risks" shall include any actual, threatened or reported: war; act of war; civil war; hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy; acts of terrorists; acts of hostility or malicious damage;

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blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever); by any person, body, terrorist or political group, or the Government of any state whatsoever, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel.

(b) The Vessel, unless the written consent of the Owners be first obtained, shall not be ordered to or required to continue to or through, any port, place, area or zone (whether of land or sea), or any waterway or canal, where it appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgement of the Master and/or the Owners, may be, or are likely to be, exposed to War Risks. Should the Vessel be within any such place as aforesaid, which only becomes dangerous, or is likely to be or to become dangerous, after her entry into it, she shall be at liberty to leave it.

(c) The Vessel shall not be required to load contraband cargo, or to pass through any blockade, whether such blockade be imposed on all vessels, or is imposed selectively in any way whatsoever against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever, or to proceed to an area where she shall be subject, or is likely to be subject to a belligerent's right of search and/or confiscation.

(d) (i) The Owners may effect war risks insurance in respect of the Hull and Machinery of the Vessel and their other interests (including, but not limited to, loss of earnings and detention, the crew and their Protection and Indemnity Risks), and the premiums and/or calls therefor shall be for their account.

(ii) If the Underwriters of such insurance should require payment of premiums and/or calls because, pursuant to the Charterers' orders, the Vessel is within, or is due to enter and remain within, or pass through any area or areas which are specified by such Underwriters as being subject to additional premiums because of War Risks, then the actual premiums and/or calls paid shall be reimbursed by the Charterers to the Owners at the same time as the next payment of hire is due, or upon redelivery, whichever occurs first.

(e) If the Owners become liable under the terms of employment to pay to the crew any bonus or additional wages in respect of sailing into an area which is dangerous in the manner defined by the said terms, then the actual bonus or additional wages paid shall be reimbursed to the Owners by the Charterers at the same time as the next payment of hire is due, or upon redelivery, whichever occurs first.

(f) The Vessel shall have liberty:-

(i) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery, or in any other way whatsoever, which are given by the Government of the Nation under whose flag the Vessel sails, or other Government to whose laws the Owners are subject, or any other Government, body or group whatsoever acting with the power to compel compliance with their orders or directions;

(ii) to comply with the order, directions or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance;

(iii) to comply with the terms of any resolution of the Security Council of the United Nations, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement;

(iv) to discharge at any other port any cargo or part thereof which may render the Vessel liable to confiscation as a contraband carrier;

(v) to call at any other port to change the crew or any part thereof or other persons on board the Vessel when there is reason to believe that they may be subject to internment, imprisonment or other sanctions.

(g) If in accordance with their rights under the foregoing provisions of this Clause, the Owners shall refuse to proceed to the loading or discharging ports, or any one or more of them, they shall immediately inform the Charterers. No cargo shall be discharged at any alternative port without first giving the Charterers notice of the Owners' intention to do so and requesting them to nominate a safe port for such discharge. Failing such nomination by the Charterers within 48 hours of the receipt of such notice and request, the Owners may discharge the cargo at any safe port of their own choice.

(h) If in compliance with any of the provisions of sub-clauses (b) to (g) of this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Charter Party.

23. War Cancellation Clause 2004

Either party may cancel this Charter Party on the outbreak of war (whether there be a declaration of war or not)

(a) between any two or more of the following countries: the United States of America; Russia; the United Kingdom; France; and the People's Republic of China, or,

(b) between the countries stated in Box 30.

24. BIMCO Ice Clause for Time Charter Parties

(a) The Vessel shall not be obliged to force ice but, subject to the Owners' prior approval having due regard to its size, construction and class, may follow ice-breakers.

(b) The Vessel shall not be required to enter or remain in any icebound port or area, nor any port or area where lights, lightships, markers or buoys have been or are about to be withdrawn by reason of ice, nor where on account of ice there is, in the Master's sole discretion, a risk that, in the ordinary course of events, the Vessel will not be able safely to enter and remain at the port or area or to depart after completion of loading or discharging. If, on account of ice, the Master in his sole discretion considers it unsafe to proceed to, enter or remain at the place of loading or discharging for fear of the Vessel being frozen in and/or damaged, he shall be at liberty to sail to the nearest ice-free and safe place and there await the Charterers' instructions.

(c) Any delay or deviation caused by or resulting from ice shall be for the Charterers' account and the Vessel shall remain on-hire.

(d) Any additional premiums and/or calls required by

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the Vessel's underwriters due to the Vessel entering or remaining in any icebound port or area, shall be for the Charterers' account.

25. Epidemic/Fever

The Vessel shall not be ordered to nor bound to enter without the Owners' written permission any place where fever or epidemics are prevalent or to which the Master, Officers and Crew by law are not bound to follow the Vessel.

Notwithstanding the terms of Clause 13, Hire shall be paid for all time lost including any lost owing to loss of or sickness to the Master, Officers, Crew or passengers or to the action of the Crew in refusing to proceed to such place or to be exposed to such risks.

26. General Average and New Jason Clause

General Average shall be adjusted and settled in London unless otherwise stated in Box 31, according to York-Antwerp Rules, 1994.

Hire shall not contribute to General Average. Should adjustment be made in accordance with the law and practice of the United States of America, the following provision shall apply:

"In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Owners are not responsible, by statute, contract or otherwise, the cargo, shippers, consignees or owners of the cargo shall contribute with the Owners in General Average to the payment of any sacrifices, loss or expenses of a General Average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo.

If a salving vessel is owned or operated by the Owners, salvage shall be paid for as fully as if the said salving vessel or vessels belonged to strangers. Such deposit as the Owners, or their agents, may deem sufficient to cover the estimated contribution of the cargo and any salvage and special charges thereon shall, if required, be made by the cargo, shippers, consignees or owners of the cargo to the Owners before delivery".

27. Both-to-Blame Collision Clause

If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Owners in the navigation or the management of the Vessel, the Charterers will indemnify the Owners against all loss or liability to the other or non-carrying ship or her owners insofar as such loss or liability represent loss of or damage to, or any claim whatsoever of the owners of any goods carried under this Charter Party paid or payable by the other or non-carrying ship or her owners to the owners of the said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the Vessel or the Owners. The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than or in addition to the colliding ships or objects are at fault in respect of a collision or contact.

28. Health and Safety

The Owners shall comply with and adhere to all applicable international, national and local regulations pertaining to health and safety, and such Charterers' instructions as may be appended hereto.

29. Drugs and Alcohol Policy

The Owners undertake that they have, and shall maintain for the duration of this Charter Party, a policy on Drugs and Alcohol Abuse applicable to the Vessel (the "D & A Policy") that meets or exceeds the standards in the OCIMF Guidelines for the Control of Drugs and Alcohol Onboard Ship 1995 as amended from time to time.

The Owners shall exercise due diligence to ensure that the D & A Policy is understood and complied with on and about the Vessel. An actual impairment, shall not in and itself mean that the Owners have failed to exercise due diligence.

30. Taxes

Within the day rate the Owners shall be responsible for the taxes stated in Box 32 and the Charterers shall be responsible for all other taxes.

In the event of change in the Area of Operation or change in local regulation and/or interpretation thereof, resulting in an unavoidable and documented change of the Owners' tax liability after the date of entering into the Charter Party or the date of commencement of employment, whichever is the earlier, Hire shall be adjusted accordingly.

31. Early Termination

(a) At Charterers' Convenience. - The Charterers may terminate this Charter Party at any time by giving the Owners written notice of termination as stated in Box 14, upon expiry of which, this Charter Party will terminate. Upon such termination, Charterers shall pay the compensation for early termination stated in Box 13 and the demobilisation charge stated in Box 15, as well as Hire or other payments due under the Charter Party up to the time of termination. Should Box 13 be left blank, Clause 31(a) shall not apply.

(b) For Cause. - If either party becomes informed of the occurrence of any event described in this Clause that party shall so notify the other party promptly in writing and in any case within 3 days after such information is received. If the occurrence has not ceased within 3 days after such notification has been given, this Charter Party may be terminated by either party, without prejudice to any other rights which either party may have, under any of the following circumstances:

(i) Requisition. - If the government of the state of registry and/or the flag of the Vessel, or any agency thereof, requisitions for hire or title or otherwise takes possession of the Vessel during the Charter Period.

(ii) Confiscation. - If any government, individual or group, whether or not purporting to act as a government or on behalf of any government, confiscates, requisitions, expropriates, seizes or otherwise takes possession of the Vessel during the Charter Period (other than by way of arrest for the purpose of obtaining security).

(iii) Bankruptcy. - In the event of an order being made or resolution passed for the winding up, dissolution, liquidation or bankruptcy of either party (otherwise than for the purpose of reconstruction or amalgamation) or if a receiver is appointed or if it suspends payment or ceases to carry on business.

(iv) Loss of Vessel. – If the Vessel is lost or becomes a constructive total loss, or is missing unless the Owners promptly state their intention to provide, and do in fact provide, within 14 days of the Vessel being lost or missing, at the port or place from which the Vessel last sailed (or some other

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mutually acceptable port or place) a substitute vessel pursuant to Clause 21. In the case of termination, Hire shall cease from the date the Vessel was lost or, in the event of a constructive total loss, from the date of the event giving rise to such loss. If the date of loss cannot be ascertained or the Vessel is missing, payment of Hire shall cease from the date the Vessel was last reported.

(v) Breakdown. - If, at any time during the term of this Charter Party a breakdown of the Owners' equipment or Vessel result in the Owners being unable to perform their obligations hereunder for a period exceeding that stated in Box 33 and have not initiated reasonable steps within 48 hours to remedy the non-performance or provided a substitute vessel pursuant to Clause 21.

(vi) Force Majeure. - If a force majeure condition as defined in Clause 32 prevents or hinders the performance of the Charter Party for a period exceeding 15 consecutive days from the time at which the impediment causes the failure to perform if notice is given without delay or, if notice is not given without delay, from the time at which notice thereof reaches the other party.

(vii) Default. - If either party is in repudiatory breach of its obligations hereunder.

Termination as a result of any of the above mentioned causes shall not relieve the Charterers of any obligation for Hire and any other payments.

32. Force Majeure

Neither party shall be liable for any loss, damage or delay due to any of the following force majeure events and/or conditions to the extent the party invoking force majeure is prevented or hindered from performing any or all of their obligations under this Charter Party, provided they have made all reasonable efforts to avoid, minimize or prevent the effect of such events and/or conditions:

(a) acts of God;

(b) any Government requisition, control, intervention, requirement or interference;

(c) any circumstances arising out of war, threatened act of war or warlike operations, acts of terrorism, sabotage or piracy, or the consequences thereof;

(d) riots, civil commotion, blockades or embargoes;

(e) epidemics;

(f) earthquakes, landslides, floods or other extraordinary weather conditions;

(g) strikes, lockouts or other industrial action, unless limited to the Employees of the party seeking to invoke force majeure;

(h) fire, accident, explosion except where caused by negligence of the party seeking to invoke force majeure;

(i) any other similar cause beyond the reasonable control of either party.

The party seeking to invoke force majeure shall notify the other party in writing within 2 working days of the occurrence of any such event/condition.

33. Confidentiality

All information or data provided or obtained in connection with the performance of this Charter Party is and shall remain confidential and not be disclosed without the prior written consent of the other party. The parties shall use their best efforts to ensure that such information shall not be disclosed to any third party by any of their sub-contractors, Employees and agents. This Clause shall not apply to any information or data that has already been published or is in the public domain.

All information and data provided by a party is and shall remain the property of that party.

34. BIMCO Dispute Resolution Clause

***(a)** This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause. The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

***(b)** This Charter Party shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Charter Party shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgement may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.

***(c)** This Charter Party shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

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(d) Notwithstanding (a), (b) or (c) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Charter Party.

In the case of a dispute in respect of which arbitration has been commenced under (a), (b) or (c) above, the following shall apply:

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within 14 calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further 14 calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(v) Either party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.

(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are disclosable under the law and procedure governing the arbitration.

(Note: The parties should be aware that the mediation process may not necessarily interrupt time limits.)

If Box 34 in PART I is not appropriately filled in, sub-clause 34(a) of this Clause shall apply. Sub-clause (d) shall apply in all cases.

** Sub-clauses 34(a), 34(b) and 34(c) are alternatives; indicate alternative agreed in Box 34.*

35. Notices

(a) All notices given by either party or their agents to the other party or their agents in accordance with the provisions of this Charter Party shall be in writing.

(b) For the purposes of this Charter Party, "in writing" shall mean any method of legible communication. A notice may be given by any effective means including, but not limited to, cable, telex, fax, e-mail, registered or recorded mail, or by personal service.

36. Headings

The headings of this Charter Party are for identification only and shall not be deemed to be part hereof or be taken into consideration in the interpretation or construction of this Charter Party.

37. Severance

If by reason of any enactment or judgement any provision of this Charter Party shall be deemed or held to be illegal, void or unenforceable in whole or in part, all other provisions of this Charter Party shall be unaffected thereby and shall remain in full force and effect.

38. Entire Agreement

This Charter Party, including all Annexes referenced herein and attached hereto, is the entire agreement of the parties, which supersedes all previous written or oral understandings and which may not be modified except by a written amendment signed by both parties.

APPENDIX 6
Windtime*

Explanatory Notes for WINDTIME are available from BIMCO at www.bimco.org

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PART I

WINDTIME

Standard Offshore Wind Farm Personnel Transfer and Support Vessel Charter Party

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1. Place and Date of Contract:			
2. Owners/Place of business (full style address, e-mail and fax)			
3. Charterers/Place of business (full style address, e-mail and fax)			
4. Vessel's name and IMO number (if applicable) (ANNEX A)			
5. Date of delivery (Cl. 2(a))		**6. Cancelling date** (Cl. 2(a), (c) and (f))	
7. Port or Place of delivery (Cl. 2(a))			
8. Port or place redelivery/notice of redelivery (Cl. 3(a))			
(i) Port or place of redelivery			
(ii) Number of days' notice of redelivery			
9. Period of hire (Cl. 1(a) and 16(c))	**10. Extension of period of hire** (optional) (Cl. 1(b))		**11. Automatic extension period to complete immediate services** (state maximum period) (Cl. 1(c))
	(i) Period of extension		
	(ii) Advance notice for declaration of option (days)		
12. Mobilisation charge (Cl. 2(b))		**13. Demobilisation charge** (state lump sum) (Cl. 3(b) and Cl. 31(a))	
(i) Lump sum			
(ii) When due			
14. Liquidated damages for delay (if applicable, state daily amount and also maximum number of days or amount to apply) (Cl. 2(f))		**15. Late delivery** (state option (d), (e) or (f) from Clause 2 (Delivery))	
16. Offshore Accommodation and Meals (state whether provided and paid for by Owners or Charterers) (Cl. 8(e))		**17. In-water survey** (Cl. 6(b)) (state if independent surveyor to be jointly appointed)	
18. Area of operation (Cl. 7(a))		**19. Employment of vessel restricted to** (state nature of services(s)) (Cl. 7(a))	
20. Specialist Operations (Cl. 7(a))		**21. Bunkers** (State fuel specifications and grades for fuel supplied by Charterers) (Cl. 12(b))	
(i) State if vessel may be used for ROV operations			
(ii) State if vessel may be employed as a diving platform			

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WINDTIME Standard Offshore Wind Farm Personnel Transfer and Support Vessel Charter Party

22. Charter hire (state rate and currency) (Cl. 2(f), 8(a)(ii), 14(a), (d) and (e)		**23. Extension hire** (if agreed, state rate) (Cl. 14(b))	
(i) Working Day rate			
(ii) Excess hourly rate			
(iii) 24 hour rate			
24. Working Day (state actual times and number of hours per day e.g., Mon-Sun, 7am to 7pm) (also state incl/excl public holidays)		**25. Notice period for change of Working Day** (if left blank, fourteen (14) days shall apply) (Cl. 8(a)(iii))	
26. Invoicing for hire and other payments (Cl. 14(d))			
(i) State whether to be issued in advance or arrears			
(ii) State by whom to be issued if other than the party stated in Box 2			
(iii) State to whom to be issued if addressee other than stated in Box 3			
27. Payments (state mode and place of payment; also state beneficiary and bank account) (Cl. 14(e))			
28. Payment of hire, bunker invoices and disbursements for Charterers' account (state maximum number of days) (Cl. 14(e))			
29. Interest rate payable (Cl. 14(e))		**30. Maximum audit period** (Cl. 14(g))	
31. Limitation of liability (state percentage of total sum of hire) (Cl. 16(c))		**32. Sublet** (state amount of daily increment of charter hire) (Cl. 22(a))	
(i) Owners' limitation			
(ii) Charterers' limitation			
33. War Cancellation (indicate countries agreed) (Cl. 25)		**34. Early termination of charter** (state amount of hire payable) (Cl. 31(a))	
		(i) State "yes", if applicable	
		(ii) If "yes", state amount of hire payable	
35. Number of days' notice of early termination (Cl. 31(a))		**36. Breakdown** (state period) (Cl. 31(d))	
		(i) Single consecutive	
		(ii) Combined	
37. Communication with Owners (state full contact details for communicating with the Owners) (Cl. 35)		**38. Communication with Charterers** (state full contact details for communicating with the Charterers) (Cl. 35)	
39. Dispute resolution (state (a), (b), (c) or (d) of Cl. 34, as agreed; if (c) agreed also state whether Singapore or English law to apply; if (d) agreed also state place of arbitration) (Cl. 34))			
(d) -			
40. Numbers of additional clauses covering special provisions, if agreed.			

It is mutually agreed that this Contract shall be performed subject to the conditions contained in the Charter consisting of PART I, including additional clauses, if any agreed and stated in Box 40, and PART II as well as ANNEX "A" (Vessel Specification) and ANNEX "B" (Insurance) as annexed to this Charter. In the event of a conflict of conditions, the provisions of PART I shall prevail over those of PART II and ANNEX "A" and ANNEX "B" to the extent of such conflict but no further.

Signature (Owners)	**Signature (Charterers)**

ANNEX "A" (Vessel Specification)
BIMCO Standard Offshore Wind Farm Personnel Transfer and Support Vessel Charter Party
Code Name: WINDTIME

VESSEL SPECIFICATION

1. General

(a) Owner: Name:
Address:

(b) Vessel's Name:
Builder:

(c) Year built:

(d) Type:

(e) Classification and Society:

(f) Flag:

(g) IMO number (if applicable):

(h) Date of next scheduled drydocking:

2. Performance

(a) Calculated Bollard Push (kN):

(b) Speed/Consumption (Approx. Hourly Fuel Consumption) (in good weather)

(i) Max Speed: , Knots (app.): , Litres/Hour:

(ii) Service Speed with max. passengers and half fuel load:, Knots (app.) :, Litres/Hour:

(iii) Standby (main engines secured): , Knots (app.): , Litres/Hour:

(c) Type and Grade of Fuel Used:

3. Dimensions and Capacities

(a) L.O.A. (m):
Breadth (m):
Depth (m):
Max Draught (m):

(b) Deadweight (metric tons):

(c) Cargo Deck Area (m^2):
Forward: Aft:

(d) Capacity (metric tons):
Forward: Aft:

(e) Length (m) x Breadth (m):

(f) Load Bearing Capacity (tonnes per m^2):

(g) Maximum number of passengers:

4. Machinery

ANNEX "A"

(a) BHP Main Engines:

(b) Engine Builder:

(c) Number of Engines and Type:

(d) Generators:

(e) Stabilisers/Intercepters/Ride Control Systems:

(f) Bow Thruster(s):

(g) Stern Thruster(s):

(h) Propellers/Rudders/Jets:

5. Radio and Navigation Equipment

(a) Communications Equipment

MF/HF Radio: GMDSS VHF:

Satcom: Cell phone:

Wireless Broadband:

(b) Electronic Navigation Equipment

ECDIS:

Speed log:

Anemometer:

(c) Gyro or Satellite compass:

(d) Radar:

(e) Autopilot:

(f) Depth Sounder:

(g) Additional electronic safety equipment

Recording Camera(s): SAR Finder:

EPIRB: Class A AIS:

SART:

6. Additional Equipment

(a) Joystick:

(b) Access System:

(c) Fuel Supply pump and delivery hose, litres/hour at metres head:

(d) Pressure washer for cleaning boat landings:

(e) Crane (SWL at max radius):

(f) Other:

ANNEX "B" (Insurance)
BIMCO Standard Offshore Wind Farm Personnel Transfer and Support Vessel Charter Party
Code Name: WINDTIME

INSURANCE

Insurance policies (as applicable) to be procured and maintained by the Owners under Clause 19 (Insurance):

(1) Marine Hull Insurance
Hull and Machinery Insurance shall be provided with limits equal to those normally carried by the Owners for the Vessel.

(2) Protection and Indemnity (Marine Liability Insurance)
Protection and Indemnity (P&I) or Marine Liability Insurance with coverage equivalent to the cover provided by members of the International Group Protection and Indemnity Associations with a limit of cover no less than USD for any one event. The cover shall include liability for collision and damage to fixed and floating objects to the extent not covered by the insurance in (1) above.

(3) General Third Party Liability Insurance
To the extent not covered by the insurance in (2) above, coverage shall be for:
Bodily Injury per person
Property Damage per occurrence.

(4) Workmen's Compensation and Employer's liability Insurance for Employees
To the extent not covered in the insurance in (2) above, covering Owners' employees and other persons for whom Owners are liable as employer pursuant to applicable law for statutory benefits as set out and required by local law in area of operation or area in which the Owners may become legally obliged to pay benefits.

(5) Such other insurances as may be agreed.

PART II
WINDTIME Standard Offshore Wind Farm Personnel Transfer and Support Vessel Charter Party

Definitions

"Banking Day" shall mean a day on which banks are open in the places stated in Box 2 and Box 3 and, where a remittance is in US dollars, in New York.

"Charterers" shall mean the party stated in Box 3.

"Charterers' Group" shall mean: the Charterers, and their contractors, sub-contractors, co-venturers and customers (having a contractual relationship with the Charterers, always with respect to the job or project on which the Vessel is employed), and Employees of any of the foregoing.

"Employees" shall mean employees, directors, officers, servants, agents or invitees.

"Offshore Unit" shall mean any installation, structure, mobile unit and/or vessel used in offshore wind farm construction, cable-laying, repair, maintenance, power generation or distribution.

"Owners" shall mean the party stated in Box 2.

"Owners' Group" shall mean: the Owners, and their contractors and sub-contractors, and Employees of any of the foregoing.

"Vessel" shall mean the vessel named in Box 4 and with particulars stated in ANNEX "A"

"Day" means a clear working day (Saturdays, Sundays and local public holidays excluded) at the recipients' place of business stated in Boxes 2 or 3, as applicable.

"Working Day" means a working day of the number of hours specified in Box 24.

"Working Hours" means the number of hours stated in Box 24, as may be amended in accordance with Clause 8(a)(iii).

1. Charter Period

(a) The Owners let and the Charterers hire the Vessel for the period as stated in Box 9 from the time the Vessel is delivered to the Charterers (the "Charter Period").

(b) Subject to Clause 14(b), the Charterers have the option to extend the Charter Period in direct continuation for the period stated in Box 10(i), but such an option must be declared in accordance with Box 10(ii).

(c) The Charter Period shall automatically be extended for the time required to complete the immediate task being performed, such time not to exceed the period stated in Box 11.

2. Delivery

(a) Delivery

Subject to Clause 2(c) the Vessel shall be delivered by the Owners at any time between the date stated in Box 5 and the date stated in Box 6 at the port or place stated in Box 7 where the Vessel can safely lie always afloat. The Owners shall exercise reasonable endeavours to keep the Charterers informed of the Vessel's estimated time of arrival at the port or place of delivery stated in Box 7.

(b) Mobilisation

The Charterers shall pay a lump sum mobilisation charge as stated in Box 12 without discount.

(c) Cancelling

If the Vessel is not delivered by midnight local time on the cancelling date stated in Box 6, the Charterers shall be entitled to cancel this Charter Party. However, if the Owners know or ought reasonably to know that they will be unable to deliver the Vessel by the cancelling date, they shall give notice in writing to the Charterers thereof as soon as reasonably practicable stating in such notice the date by which they will be able to deliver the Vessel. The Charterers may within

three (3) days of receipt of such notice give notice in writing to the Owners cancelling this Charter Party. If the Charterers do not give such notice, then the later date specified in the Owners' notice shall be substituted for the cancelling date for all the purposes of this Charter Party.

***(d)** In the event the Charterers cancel the Charter Party, it shall terminate on terms that neither party shall be liable to the other for any losses incurred by reason of the non-delivery of the Vessel or the cancellation of the Charter Party.

***(e)** In the event the Charterers cancel the Charter Party or accept late delivery, it shall be without prejudice to any other rights either party may have.

***(f)** The Owners shall pay liquidated damages per day or pro rata for part of a day as stated in Box 14 (if Box 14 is left blank a rate equal to the Charter hire rate stated in Box 22 shall apply) from midnight local time on the original cancelling date stated in Box 6, (irrespective of any substitution to that cancelling date in accordance with Sub-clause 2(c)) until such time as: (i) the Owners have delivered the Vessel or (ii) the Owners have delivered a substitute vessel pursuant to Clause 23 (Substitute Vessel) or (iii) the Charterers have cancelled this Charter Party in accordance with Sub-clause 2(c). The Owners' responsibility to pay liquidated damages under this Clause shall be subject to the maximum limitation stated in Box 14. Without prejudice to the Charterers' right to cancel this Charter Party in accordance with Clause 2(c), the Owners' liability to pay liquidated damages under this Clause shall be the Charterers' sole and exclusive remedy for late delivery of the Vessel.

**Sub-clauses (d), (e) and (f) are options. Indicate in Box 15 which option to apply. If Box 15 is not appropriately filled in, Sub-clause (f) of this Clause shall apply.*

3. Redelivery

(a) Redelivery
The Vessel shall be redelivered on the expiration or earlier termination of this Charter Party free of cargo at the port or place as stated in Box 8(i) or such other port or place as may be mutually agreed. The Charterers shall give not less than the number of days' notice in writing of their intention to redeliver the Vessel, as stated in Box 8(ii).

(b) Demobilisation
The Charterers shall pay a lump sum demobilisation charge without discount in the amount as stated in Box 13 which amount shall be paid on the expiration or on earlier termination of this Charter Party by the Charterers pursuant to Clause 31(a) or by the Owners pursuant to Clause 31(c).

4. Condition of Vessel

(a) The Owners undertake that at the date of delivery under this Charter Party the Vessel shall be of the description and Class (or in the event the Vessel is not Classed, the Vessel shall be approved by the relevant regulatory authority) as specified in ANNEX "A", attached hereto, and in a thoroughly efficient state of hull and machinery.

(b) The Owners shall exercise due diligence to maintain the Vessel as specified in ANNEX "A" and in such Class and in every way fit for the service stated in Clause 7 (Employment and Area of Operation) throughout the period of this Charter Party.

5. Structural Alterations and Additional Equipment

The Charterers shall, at their expense, have the option of making structural alterations to the Vessel or installing additional equipment, subject to Class approval if applicable, with the written consent of the Owners, which shall not be unreasonably withheld. Unless otherwise agreed, the Vessel is to be redelivered reinstated, at the Charterers' expense, to her original condition. The Vessel is to remain on hire during any period of these alterations or reinstatement. The Charterers shall at all times be responsible for repair and maintenance of any such alteration or additional equipment. However, the

Owners may, upon giving notice, undertake any such repair and maintenance at the Charterers' expense, when necessary for the safe and efficient performance of the Vessel.

6. Vessel Audit and Survey

(a) Prior to delivery the Owners shall provide the Charterers with such information and documentation as the Charterers may reasonably require to conduct a health, safety, quality and environmental (HSQE) vessel audit, upon reasonable notice.

Provided that it can be accomplished at ports of call, without hindrance to the working or operation of or delay to the Vessel, and subject to prior consent, which shall not be unreasonably withheld, the Owners shall provide full access to the Vessel prior to delivery for the Charterers or their appointed auditor to carry out a HSQE vessel audit and any reasonable actions required to be carried out by the Owners shall be implemented within a reasonable time. The Owners and the crew shall assist the Charterers with the audit. The parties shall bear their own expenses for such surveys.

(b) The Owners and the Charterers shall jointly conduct an in-water survey (or if stated in Box 17 appoint an independent surveyor to conduct such survey) for the purpose of determining and agreeing in writing, the condition of the Vessel, any equipment specified in ANNEX "A", and the quality and quantity of fuel, lubricants and water at the time of delivery and redelivery hereunder. The Owners and the Charterers shall jointly share the time and expense of such surveys.

7. Employment and Area of Operation

(a) The Vessel shall be employed in lawful activities in accordance with the law of the place of the Vessel's flag and/or registration and of the place of operation. Such activities shall be restricted to the service(s) as stated in Box 19, and to voyages between any good and safe port or place and any place or Offshore Unit where the Vessel can safely lie always afloat within the Area of Operation as stated in Box 18 which shall always be within International Navigation Limits and which shall in no circumstances be exceeded without prior agreement and adjustment of the Hire and in accordance with such other terms as appropriate to be agreed; provided always that the Charterers do not warrant the safety of any such port or place or Offshore Unit but shall exercise due diligence in issuing their orders to the Vessel as if the Vessel were their own property and having regard to her capabilities and the nature of her employment. Unless otherwise stated in Box 20, the Vessel shall not be employed as a diving and/or ROV platform.

(b) Relevant permission and licences from responsible authorities for the Vessel to enter, work in and leave the Area of Operation shall be obtained and paid for by the Charterers and the Owners shall assist, if necessary, in every way possible to secure such permission and licences.

(c) The Vessel's Space
The whole reach and burden and decks of the Vessel shall throughout the Charter Period be at the Charterers' disposal reserving proper and sufficient space for the Vessel's Master, officers, crew, tackle, apparel, furniture, provisions and stores. The Charterers shall be entitled to carry:

(i) Persons other than crew members, provided such persons are not paying fares.

(ii) Lawful cargo whether carried on or under deck.

(iii) Explosives and dangerous cargo whether in bulk or packaged, provided proper notification has been given by the Charterers and the appropriate Flag State approval has been obtained by the Owners and such cargo is marked and packed in accordance with the national regulations of the Vessel and/or the International Maritime Dangerous Goods Code and/or other pertinent regulations. Failing such proper notification, marking or packing the Charterers shall indemnify the Owners in respect of any loss, damage or liability whatsoever and howsoever arising therefrom. The Charterers accept responsibility for any additional expenses (including

reinstatement expenses) incurred by the Owners in relation to the carriage of explosives and dangerous cargo.

(iv) Toxic or noxious substances, subject to Clause 16(f), proper notification and any pertinent regulations.

8. Master and Crew

(a) Working Hours

(i) Working Day - The Master shall carry out his duties promptly and the Vessel shall render all reasonable services within her capabilities during the Working Day at such times and on such schedules as the Charterers may reasonably require without any obligations of the Charterers to pay to the Owners or the Master, officers or crew of the Vessel any excess or overtime payments.

(ii) Excess Working Hours - Should the Charterers require the Vessel to work in excess of the agreed Working Day in any one day they shall, as soon as practicable, notify the Owners, provided that such excess shall not result in the crew working hours exceeding those permitted by applicable laws and regulations. If the Charterers' use of the Vessel exceeds the Working day they shall pay the Owners for each extra hour at the Excess hourly rate stated in Box 22. Crew working hours for a Working Day shall include time taken to refuel and ready the Vessel at the beginning of the Working Day as well as shutting the Vessel down and ensuring that it is safe to be left unattended at the end of the Working Day.

(iii) Change in Working Hours - Should the Charterers require the Vessel to increase the Working Day to a twenty-four (24) hour working day, they shall give the Owners the number of days' notice stated in Box 25.

(b) Cargo Documents

(i) No Bills of Lading shall be issued for shipments under this Charter Party.

(ii) The Master shall sign cargo documents as directed by the Charterers in the form of receipts that are non-negotiable documents and which are clearly marked as such.

(iii) The Charterers shall indemnify the Owners against all liabilities that may arise from the signing of such cargo documents in accordance with the directions of the Charterers to the extent that the terms of such cargo documents impose more onerous liabilities than those assumed by the Owners under the terms of this Charter Party.

(c) Crew Tasks

The Vessel's crew if required by Charterers will connect and disconnect electric cables, fuel, water and pneumatic hoses when placed on board the Vessel in port as well as alongside the Offshore Units; will operate the equipment on board the Vessel for loading and unloading cargoes; and will hook and unhook cargo on board the Vessel when loading or discharging alongside Offshore Units. If the port regulations or the seamen and/or labour unions do not permit the crew of the Vessel to carry out any of this work, then the Charterers shall make, at their own expense, whatever other arrangements may be necessary, always under the direction of the Master.

(d) Vessel Operation

The Charterers shall furnish the Master with all instructions and sailing directions and the Master and Engineer shall keep full and correct logs accessible to the Charterers or their agents.

The entire operation, navigation, and management of the Vessel shall be in the exclusive control and command of the Owners, their Master, officers and crew. The Vessel will be operated and the services hereunder will be rendered as requested by the Charterers, subject always to the exclusive right of the Owners or the Master of the Vessel to determine whether operation of the Vessel may be safely undertaken. In the performance of the Charter Party, the

Owners are deemed to be an independent contractor, the Charterers being concerned only with the results of the services performed.

(e) Offshore Accommodation and Meals
If the Owners and the Charterers agree that the Vessel shall remain offshore overnight during some or all of the Charter Period then, notwithstanding Clause 10 (Owners to Provide), accommodation and meals for the Master, officers and crew shall be provided and paid for by the party named in Box 16 or, if left blank, by the Charterers.

9. Conduct

(a) If the Master has reason to be dissatisfied with the conduct of any persons placed on board the vessel by the Charterers, the Master shall have the right to refuse to carry any such persons. On receiving particulars of the complaint the Charterers shall promptly investigate the matter and if the complaint proves to be well founded, the Charterers shall as soon as reasonably possible take appropriate disciplinary action against such persons or, in the case of sub-contractors, require their employers to take such action.

(b) If the Charterers have reason to be dissatisfied with the conduct of the Master or any Officer or member of the crew, the Owners on receiving particulars of the complaint shall promptly investigate the matter and if the complaint proves to be well founded, the Owners shall as soon as reasonably possible make appropriate changes in the appointment.

10. Owners to Provide

The Owners shall provide and pay for all provisions, wages and all other expenses of the Master, officers and crew; all lubricants, maintenance and repair of the Vessel's hull, machinery and equipment as specified in ANNEX "A"; also, except as otherwise provided in this Charter Party, for all insurance on the Vessel, all dues and charges directly related to the Vessel's flag and/or registration, all deck, cabin and engine room stores cordage required for ordinary ship's purposes mooring alongside in harbour, and all fumigation expenses and ship sanitation certificates. The Owners' obligations under this Clause extend to cover all liabilities for consular charges appertaining to the Master, officers and crew, customs or import duties arising at any time during the performance of this Charter Party in relation to the personal effects of the Master, officers and crew, and in relation to the stores, provisions and other matters as aforesaid which the Owners are to provide and/or pay for and the Owners shall refund to the Charterers any sums they or their agents may have paid or been compelled to pay in respect of such liability.

11. Charterers to Provide

(a) While the Vessel is on hire the Charterers shall provide and pay for all fuel, water, dispersants, and transport thereof, port charges, pilotage and boatmen and canal steersmen (whether compulsory or not), launch hire (unless incurred in connection with the Owners' business), light dues, tug assistance, canal, dock, harbour, tonnage and other dues and charges, agencies and commissions incurred on the Charterers' business, costs for security or other watchmen, and of quarantine (if occasioned by the nature of the cargo carried or the ports visited whilst employed under this Charter Party but not otherwise).

(b) At all times the Charterers shall provide and pay for the loading and unloading of cargoes so far as not done by the Vessel's crew, cleaning of cargo tanks, all necessary dunnage, uprights and shoring equipment for securing deck cargo, all cordage except as to be provided by the Owners, all ropes, slings and special runners actually used for loading and discharging, inert gas required for the protection of cargo, and electrodes used for services under this Charter Party, and shall reimburse the Owners for the actual cost of replacement of special mooring lines to Offshore Units, wires, nylon spring lines etc. used for the services under this Charter Party, all hose connections and adaptors, and further, shall refill oxygen/acetylene bottles used in the provision of the services.

(c) Upon entering into this Charter Party or in any event no later than the time of delivery of the Vessel the Charterers shall provide the Owners with copies of any operational plans or

documents which are necessary for the safe and efficient operation of the Vessel. All documents received by the Owners shall be returned to the Charterers on redelivery.

(d) The Charterers shall pay for customs duties, all permits, import duties (including costs involved in establishing temporary or permanent importation bonds), and clearance expenses, both for the Vessel and/or equipment, required for or arising out of this Charter Party.

(e) The Charterers shall pay for any replacement of any lifting slings/wires and fuel transfer hoses and accessories which have been placed on board by the Owners or the Charterers, should such equipment be lost, damaged or become unserviceable, other than as a result of the Owners' negligence.

(f) The Charterers shall provide and pay for all visas and working permits required by their personnel. In the event that Charterers' personnel have been embarked on the Vessel without holding the required visa or working permits, the Charterers shall pay any fines, costs, or repatriation expenses.

(g) The Charterers shall pay for any fines, taxes or imposts levied in the event that contraband and/or unmanifested drugs and/or cargoes are found to have been shipped as part of the cargo and/or in containers on board provided by the Charterers. The Vessel shall remain on hire during any time lost as a result thereof.

(h) The Owners shall provide any financial security required and pay for any fines, taxes or imposts levied in the event that contraband and/or unmanifested drugs and/or cargoes are found on board or about the Vessel other than as part of the cargo and/or in containers on board. The Vessel shall be placed off hire during any time lost as a result thereof.

12. Bunkers

(a) Purchase Price

Charterers or Owners, as applicable, shall pay the shortfall or excess in the quantity of fuels remaining on board at redelivery as compared to the quantity on board at delivery at the price prevailing at the time and port of redelivery.

(b) Bunkering

The Charterers shall supply fuel of the specifications and grades stated in Box 21. The fuels shall be of a stable and homogeneous nature and suitable for burning in the Vessel's engines and unless otherwise agreed in writing, shall comply with ISO standard 8217:2010 or any subsequent amendments thereof as well as with the relevant provisions of MARPOL, if applicable. The crew shall co-operate with the Charterers' bunkering agents and fuel suppliers and comply with their reasonable requirements during bunkering, including but not limited to checking, verifying and acknowledging sampling, reading or soundings, meters etc. before, during and/or after delivery of fuels.

(c) Liability

The Charterers shall be liable for any loss or damage to the Owners caused by the supply of fuels which are not in accordance with (b) above and the Owners shall not be held liable for any reduction in the Vessel's speed performance and/or increased bunker consumption nor for any time lost and any other consequences arising as a result of such supply.

13. BIMCO ISPS/MTSA Clause for Time Charter Parties

(a)

(i) The Owners shall comply with the requirements of the International Code for the Security of Ships and of Port Facilities and the relevant amendments to Chapter XI of SOLAS (ISPS Code) relating to the Vessel and "the Company" (as defined by the ISPS Code). If trading to or from the United States or passing through United States waters, the Owners shall also comply with the requirements of the US Maritime Transportation Security Act 2002 (MTSA) relating to the Vessel and the "Owner" (as defined by the MTSA).

(ii) Upon request the Owners shall provide a copy of the relevant International Ship Security Certificate (or the Interim International Ship Security Certificate) to the Charterers. The Owners shall provide the Charterers with the full style contact details of the Company Security Officer (CSO).

(iii) Except as otherwise provided in this Charter Party, loss, damages, expense or delay (excluding consequential loss, damages, expense or delay) caused by failure on the part of the Owners or "the Company"/"Owner" to comply with the requirements of the ISPS Code/MTSA or this Clause shall be for the Owners' account.

(b)

(i) The Charterers shall provide the Owners and the Master with their full style contact details and, upon request, any other information the Owners require to comply with the ISPS Code/MTSA. Furthermore, the Charterers shall ensure that all sub-charter parties they enter into during the period of this Charter Party contain the following provision: "The Charterers shall provide the Owners with their full style contact details and, where sub-letting is permitted under the terms of the charter party, shall ensure that the contact details of all sub-charterers are likewise provided to the Owners".

(ii) Except as otherwise provided in this Charter Party, loss, damages, expense or delay (excluding consequential loss, damages, expense or delay) caused by failure on the part of the Charterers to comply with this Clause shall be for the Charterers' account.

(c) Notwithstanding anything else contained in this Charter Party all delay, costs or expenses whatsoever arising out of or related to security regulations or measures required by the port facility or any relevant authority in accordance with the ISPS Code/MTSA including, but not limited to, security guards, launch services, tug escorts, port security fees or taxes and inspections, shall be for the Charterers' account, unless such costs or expenses result solely from the Owners' negligence. All measures required by the Owners to comply with the Ship Security Plan shall be for the Owners' account.

(d) If either party makes any payment which is for the other party's account according to this Clause, the other party shall indemnify the paying party.

14. Hire and Payments

(a) Hire

The Charterers shall pay hire for the Vessel at the rate stated in Box 22 per Working Day or pro rata for part thereof from the time that the Vessel is delivered to the Charterers until the expiration or earlier termination of this Charter Party ("Hire").

(b) Extension Hire

If the option to extend the Charter Period under Clause 1(b) is exercised, Hire for such extension shall, unless stated in Box 23, be agreed between the Owners and the Charterers. Should the parties fail to reach an agreement, then the Charterers' shall not have the option to extend the Charter Period.

(c) Adjustment of Hire

The rate of Hire shall be adjusted to reflect documented changes, after the date of entering into the Charter Party or the date of commencement of employment, whichever is earlier, in the Owners' costs arising from changes in the Charterers' requirements, or laws and regulations governing the Vessel and/or its crew or this Charter Party or the application thereof.

(d) Invoicing

All invoices shall be issued in the contract currency stated in Box 22. In respect of reimbursable expenses incurred in currencies other than the contract currency, the rate of exchange into the contract currency shall be that quoted by the Central Bank of the country of such other currency as at the date of the Owners' invoice. Invoices covering Hire and any other payments due shall

be issued monthly as stated in Box 26 or at the expiration or earlier termination of this Charter Party.

(e) Payments
Payments of Hire and disbursements for the Charterers' account shall be received within the number of days stated in Box 28 from the date of receipt of the invoice. Payment shall be made in the currency stated in Box 22 in full without discount to the account stated in Box 27. However, any advances for disbursements made on behalf of and approved by the Owners may be deducted from Hire due. If payment is not received by the Owners within five (5) Banking Days following the due date the Owners are entitled to charge interest at the rate stated in Box 29 on the amount outstanding from and including the due date until payment is received. Where an invoice is disputed, the Charterers shall notify the Owners before the due date and in any event pay the undisputed portion of the invoice but shall be entitled to withhold payment of the disputed portion provided that such portion is reasonably disputed and the Charterers specify such reason. Interest will be chargeable at the rate stated in Box 29 on such disputed amounts where resolved in favour of the Owners. Should the Owners prove the validity of the disputed portion of the invoice, balance payment shall be received by the Owners within five (5) Banking Days after the dispute is resolved. Should the Charterers' claim be valid, a corrected invoice shall be issued by the Owners.

(f)

(i) Where there is a failure to pay Hire by the due date, the Owners shall notify the Charterers in writing of such failure and further may also suspend the performance of any or all of their obligations under this Charter Party until such time as all the Hire due to the Owners under the Charter Party has been received by the Owners. Throughout any period of suspended performance under this Clause, the Vessel is to be and shall remain on Hire. The Owners' right to suspend performance under this Clause shall be without prejudice to any other rights they may have under this Charter Party.

(ii) If after five (5) days of the written notification referred to in Clause 14(f)(i) the Hire has still not been received the Owners may at any time while Hire remains outstanding withdraw the Vessel from the Charter Party.

(1) The right to withdraw is to be exercised promptly and in writing and is not dependent upon the Owners first exercising the right to suspend performance of their obligations under the Charter Party pursuant to Clause 14(f)(i) above.

(2) The receipt by the Owners of a payment from the Charterers after the five (5) day period referred to above has expired but prior to the notice of withdrawal in accordance with (1) above shall not be deemed a waiver of the Owners' right to withdraw the Vessel from the Charter Party.

(iii) Where the Owners choose not to exercise any of the rights afforded to them by this Clause in respect of any particular late payment of Hire, or a series of late payments of Hire, under the Charter Party, this shall not be construed as a waiver of their right either to suspend performance under Clause 14(f)(i) or to withdraw the Vessel from the Charter Party under Clause 14(f)(ii) in respect of any subsequent late payment under this Charter Party.

(g) Audit
The Charterers shall have the right to appoint an independent chartered accountant to audit the Owners' books directly related to work performed under this Charter Party at any time, up to the expiry of the period stated in Box 30, to determine the validity of the Owners' charges hereunder. The Owners undertake to make their records available for such purposes at their principal place of business during normal working hours. Any discrepancies discovered in payments made shall be promptly resolved by invoice or credit as appropriate.

15. Off hire

(a) If as a result of any deficiency or default of crew or of the Owners' stores, strike of Master, officers and crew, breakdown of the Vessel's machinery (excluding any machinery installed on the Vessel by the Charterers pursuant to Clause 5 (Structural Alterations and Additional Equipment)), damage to hull or other accidents to the Vessel, the Vessel is prevented from working, no Hire shall be payable in respect of any time lost and any Hire paid in advance shall be adjusted accordingly provided always however that Hire shall not cease in the event of the Vessel being prevented from working as aforesaid as a result of:

(i) the carriage of cargo as noted in Clause 7(c)(iii) and (iv);

(ii) quarantine or risk of quarantine unless caused by the Master, officers or crew having communication with the shore at any infected area not in connection with the employment of the Vessel without the consent or the instructions of the Charterers;

(iii) deviation from her Charter Party duties or exposure to abnormal risks at the request of the Charterers;

(iv) detention in consequence of being driven into port or to anchorage through stress of weather or trading to shallow harbours or to river or ports with bars or sandbanks, or suffering an accident to her cargo, when the expenses resulting from such detention shall be for the Charterers' account howsoever incurred;

(v) detention or damage by ice; or

(vi) any act or omission of the Charterers, their servants or agents.

(b) Liability for Vessel not Working
The Owners' liability for any loss, damage or delay sustained by the Charterers as a result of the Vessel being prevented from working by any of the events referred to in Clause 15(a), except if caused by the Owners' failure to comply with their obligations pursuant to Clause 4(b), shall be limited to suspension of hire.

(c) Maintenance
Notwithstanding Clause 15(a), the Charterers shall grant the Owners a maximum of one (1) Working Day on hire, which shall be cumulative, per month or pro rata for part of a month from the commencement of the Charter Period for maintenance (hereinafter referred to as "maintenance allowance"). The Owners shall use all reasonable endeavours to carry out maintenance during periods of non-utilisation of the Vessel. During reasonable voyage time taken in transit to and from the port where the maintenance will be performed, the Vessel shall be on hire and such time shall not be counted against the accumulated maintenance allowance. Hire shall be suspended during any time taken in maintenance in excess of the accumulated maintenance allowance.

In the event of less time being used for maintenance than is granted in the maintenance allowance the Charterers shall, upon expiration or earlier termination of the Charter Party, pay the equivalent of the daily rate of Hire then prevailing in addition to Hire otherwise due under this Charter Party in respect of all such time not so taken or made available.

(d) Should the Vessel deviate or put back during a voyage for a reason which causes hire to be suspended pursuant to Clause 15(a) of this Charter Party, hire shall cease to be payable from the commencement of such deviation until the time when the Vessel is again ready to resume her service from a position not less favourable to the Charterers than that at which the deviation commenced, provided always that due allowance shall be given for any distance made good towards the Vessel's destination and any bunkers saved. However, should the Vessel be driven into port or anchorage by stress of weather or by any cause for which the Charterers are responsible under this Charter Party the Vessel shall remain on hire and all costs thereby incurred shall be for the Charterers' account.

(e) In the event that the Owners fail to procure the insurance policies required in accordance with Clause 19(a)(i) or if any such insurance policies lapse during the Charter Period, the Charterers shall be entitled not to use the services of the Vessel and the Vessel shall be off hire from the time when the Charterers give notice to the Owners to this effect until the Owners have established that the said insurance policies have been effected or the Charterers terminate this Charter Party in accordance with Clause 31(b)(vi).

16. Liabilities and Indemnities

(a) Knock for Knock

(i) Owners

Notwithstanding anything else contained in this Charter Party excepting Clauses 7(c)(iii), 11(b), 11(e), 11(g), 12(c), 13, 16(c), 16(f), 17(b), and 20(c), the Charterers shall not be responsible for loss of or damage to the property of any member of the Owners' Group, including the Vessel, or for personal injury or death of any member of the Owners' Group arising out of or in any way connected with the performance or non-performance of this Charter Party, even if such loss, damage, injury or death is caused wholly or partially by the act, neglect, gross neglect or default of the Charterers' Group, and even if such loss, damage, injury or death is caused wholly or partially by unseaworthiness of any vessel; and the Owners shall indemnify, protect, defend and hold harmless the Charterers from any and against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of or in connection with such loss, damage, personal injury or death, unless such loss, damage, injury or death has resulted from the Charterers' Group's act or omission committed with the intent to cause same or recklessly and with knowledge that such loss, damage, injury or death would probably result.

(ii) Charterers

Notwithstanding anything else contained in this Charter Party excepting Clauses 13, 17(a), and 18, the Owners shall not be responsible for loss of, damage to, or any liability arising out of anything towed by the Vessel, any cargo laden upon or carried by the Vessel or her tow, the property of any member of the Charterers' Group, whether owned or chartered, including their Offshore Units, or for personal injury or death of any member of the Charterers' Group or of anyone on board anything towed by the Vessel, arising out of or in any way connected with the performance or non-performance of this Charter Party, even if such loss, damage, liability, injury or death is caused wholly or partially by the act, neglect, gross neglect or default of the Owners' Group, and even if such loss, damage, liability, injury or death is caused wholly or partially by the unseaworthiness of any vessel; and the Charterers shall indemnify, protect, defend and hold harmless the Owners from any and against all claims, costs, expenses, actions, proceedings, suits, demands, and liabilities whatsoever arising out of or in connection with such loss, damage, liability, personal injury or death, unless such loss, damage, injury or death has resulted from the Owners' Group's act or omission committed with the intent to cause same or recklessly and with knowledge that such loss, damage, injury or death would probably result.

(b) Consequential Damages

Neither the Owners nor the Charterers shall be liable to the other party for:

(i) any loss of profit, loss of use or loss of production whatsoever and whether arising directly or indirectly from the performance or non-performance of this Charter Party, and whether or not the same is due to negligence or any other fault on the part of either party, their servants or agents, or

(ii) any consequential loss or damage for any reason whatsoever, whether or not the same is due to any breach of contract, negligence or any other fault on the part of either party, their servants or agents.

(c) Limitations

Except as provided in the following Clauses:

Clause 10 (Owners to Provide);
Clause 11 (Charterers to Provide);

Clause 12(c) (Bunkers - Liability);
Clause 14 (Hire and Payments);
Clause 16(a) (Liabilities and Indemnities – Knock for Knock);
Clause 16(f) (Liabilities and Indemnities – Toxic or Noxious Substances);
Clause 17 (Pollution);
Clause 18 (Wreck Removal);
Clause 20(c) (Saving of Life and Salvage); and
Clause 21 (Liens and Claims);

the liability of either party shall in no event whatsoever exceed the amount stated in Box 31 (or, if left blank, twenty per cent (20%) of the total sum of hire due pursuant to the Charter Period stated in Box 9) for any loss, damage, delay or expense of whatsoever nature, and howsoever arising out of the Charter Party.

Nothing contained in this Charter Party shall be construed or held to deprive the Owners or the Charterers, as against any person or party, including as against each other, of any right to claim limitation of liability provided by any applicable law, statute or convention, save that nothing in this Charter Party shall create any right to limit liability. Where the Owners or the Charterers may seek an indemnity under the provisions of this Charter Party or against each other in respect of a claim brought by a third party, the Owners or the Charterers shall seek to limit their liability against such third party.

(d) Mutual exclusion
In the event that either party fails to perform the Charter Party, or unequivocally indicates its intention not to perform it, in a way which thereby permits the other party to treat the Charter Party as at an end other than under the terms of the Charter Party, any such claim that the other party may have shall not be limited or excluded by the terms of this Charter Party.

(e) Himalaya Clause
(i) All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Charter Party or by any applicable statute, rule or regulation for the benefit of the Charterers shall also apply to and be for the benefit of the Charterers' parent, affiliated, related and subsidiary companies; the Charterers' contractors, sub-contractors, co-venturers and customers (having a contractual relationship with the Charterers, always with respect to the job or project on which the Vessel is employed); their respective Employees and their respective underwriters.

(ii) All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Charter Party or by any applicable statute, rule or regulation for the benefit of the Owners shall also apply to and be for the benefit of the Owners' parent, affiliated, related and subsidiary companies, the Owners' contractors, sub-contractors, the Vessel, its Master, officers and crew, its registered owner, its operator, its demise charterer(s), their respective Employees and their respective underwriters.

(iii) The Owners or the Charterers shall be deemed to be acting as agent or trustee of and for the benefit of all such persons and parties set forth above, but only for the limited purpose of contracting for the extension of such benefits to such persons and parties.

(f) Toxic or Noxious Substances
The Charterers shall always be responsible for any losses, damages or liabilities suffered by the Owners' Group, by the Charterers, or by third parties, with respect to the Vessel or other property, personal injury or death, pollution or otherwise, which losses, damages or liabilities are caused, directly or indirectly, as a result of the Vessel's carriage of any toxic or noxious substances in whatever form as ordered by the Charterers, and the Charterers shall defend, indemnify the Owners and hold the Owners harmless for any expense, loss or liability whatsoever or howsoever arising with respect to the carriage of toxic or noxious substances.

17. Pollution

(a) Except as otherwise provided for in Clause 20(c)(iii), the Owners shall be liable for, and agree to indemnify, defend and hold harmless the Charterers against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of actual or threatened pollution damage and the cost of cleanup or control thereof arising from acts or omissions of the Owners or their personnel which cause or allow discharge, spills or leaks from the Vessel, except as may emanate from cargo thereon or therein.

(b) The Charterers shall be liable for and agree to indemnify, defend and hold harmless the Owners from all claims, costs, expenses, actions, proceedings, suits, demands, liabilities, loss or damage whatsoever arising out of or resulting from any actual or threatened pollution damage emanating from anything towed by the Vessel, cargo laden upon or carried by the Vessel or her tow, the property of any member of the Charterers' Group, whether owned or chartered, including their Offshore Units, even where caused wholly or partially by the act, neglect or default of the Owners, their Employees, contractors or sub-contractors or by the unseaworthiness of the Vessel.

(c) The Charterers shall, upon giving notice to the Owners or the Master, have the right (but shall not be obliged) to place on board the Vessel and/or have in attendance at the site of any pollution or threatened incident one or more Charterers' representative(s) to observe the measures being taken by Owners and/or national or local authorities or their respective servants, agents or contractors to prevent or minimise pollution damage and to provide advice, equipment or manpower or undertake such other measures, at Charterers' risk and expense, as are permitted under applicable law and as Charterers believe are reasonably necessary to prevent or minimise such pollution damage or to remove the threat of pollution damage.

18. Wreck Removal

If the Vessel becomes a wreck and is an obstruction to navigation and has to be removed by order of any lawful authority having jurisdiction over the area where the Vessel is placed or as a result of compulsory law, the Owners shall be liable for any and all expenses in connection with the raising, removal, destruction, lighting or marking of the Vessel.

19. Insurance

(a)

(i) The Owners undertake that at time of delivery under this Charter Party and throughout the Charter Period the insurance policies set forth in ANNEX "B" shall be in effect, with reputable insurers. Policy limits shall not be less than those indicated. Reasonable deductibles are acceptable and shall be for the account of the Owners.

(ii) The Charterers shall upon request be named as co-insured. The Owners shall upon request cause insurers to waive subrogation rights against the Charterers (as encompassed in Clause 16(e)(i)). Co-insurance and/or waivers of subrogation shall be given only insofar as these relate to liabilities which are properly the responsibility of the Owners under the terms of this Charter Party.

(b) The Owners shall upon request furnish the Charterers with copies of certificates of insurance which provide sufficient information to verify that the Owners have complied with the insurance requirements of this Charter Party.

20. Saving of Life and Salvage

(a) The Vessel shall be permitted to deviate for the purpose of saving life at sea without prior approval of or notice to the Charterers and without loss of Hire provided however that notice of such deviation is given as soon as possible.

(b) Subject to the Charterers' consent, which shall not be unreasonably withheld, the Vessel shall be at liberty to undertake attempts at salvage, it being understood that the Vessel shall be off-hire from the time she leaves port or commences to deviate and she shall remain off-hire until she is again in every way ready to resume the Charterers' service at a position which is not less favourable to the Charterers than the position at the time of leaving port or deviating for the

salvage services. All salvage monies earned by the Vessel shall be divided equally between the Owners and the Charterers, after deducting the Master's, officers' and crew's share, legal expenses, value of fuel and lubricants consumed, Hire of the Vessel lost by the Owners during the salvage, repairs to damage sustained, if any, and any other extraordinary loss or expense sustained as a result of the salvage. The Charterers shall be bound by all measures taken by the Owners in order to secure payment of salvage and to fix its amount.

(c) The Owners shall waive their right to claim any award for salvage performed on property owned by or contracted to the Charterers, always provided such property was the object of the operation the Vessel was chartered for, and the Vessel shall remain on hire when rendering salvage services to such property. This waiver is without prejudice to any right the Vessel's Master, officers and crew may have under any title. If the Owners render assistance to such property in distress on the basis of "no claim for salvage", then, notwithstanding any other provisions contained in this Charter Party and even in the event of neglect or default of the Owners, Master, officers or crew:

(i) The Charterers shall be responsible for and shall indemnify the Owners against payments made, under any legal rights, to the Master, officers and crew in relation to such assistance.

(ii) The Charterers shall be responsible for and shall reimburse the Owners for any loss or damage sustained by the Vessel or her equipment by reason of rendering such assistance and shall also pay the Owners' additional expenses thereby incurred.

(iii) The Charterers shall be responsible for any actual or potential spill, seepage and/or emission of any pollutant howsoever caused occurring within the offshore site and any pollution resulting therefrom wheresoever it may occur and including but not limited to the cost of such measures as are reasonably necessary to prevent or mitigate pollution damage, and the Charterers shall indemnify the Owners against any liability, cost or expense arising by reason of such actual or potential spill, seepage and/or emission.

(iv) The Vessel shall not be off-hire as a consequence of giving such assistance, or effecting repairs under Clause 20(c)(ii), and time taken for such repairs shall not count against time granted under Clause 15(c).

(v) The Charterers shall indemnify the Owners against any liability, cost and/or expense whatsoever in respect of any loss of life, injury, damage or other loss to person or property howsoever arising from such assistance.

21. Lien and Claims

The Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the Owners in the Vessel. Except as provided in Clause 16 (Liabilities and Indemnities), the Charterers shall indemnify and hold the Owners harmless against any lien of whatsoever nature arising upon the Vessel during the Charter Period while she is under the control of the Charterers, and against any claims against the Owners arising out of the employment of the Vessel by the Charterers or out of any neglect of the Charterers in relation to the Vessel or the operation thereof.

Should the Vessel be arrested by reason of claims or liens arising out of her operation hereunder, unless brought about by the act or neglect of the Owners, the Charterers shall at their own expense take all reasonable steps to secure that within a reasonable time the Vessel is released and at their own expense put up bail to secure release of the Vessel.

22. Sublet and Assignment

(a) Charterers

The Charterers shall have the option of subletting, assigning or loaning the Vessel to any person or company not competing with the Owners, subject to the Owners' prior approval which shall not be unreasonably withheld or delayed, upon giving notice in writing to the Owners, but the original Charterers shall always remain responsible to the Owners for due performance of

the Charter Party. The person or company taking such subletting, assigning or loan and their contractors and sub-contractors shall be deemed contractors of the Charterers for all the purposes of this Charter Party. The Owners make it a condition of such consent that additional Hire shall be paid as agreed between the Charterers and the Owners in Box 32, having regard to the nature and period of any intended service of the Vessel.

(b) Owners
The Owners may not assign or transfer any part of this Charter Party without the written approval of the Charterers, which approval shall not be unreasonably withheld or delayed. Approval by the Charterers of such subletting or assignment shall not relieve the Owners of their responsibility for due performance of the part of the services which is sublet or assigned.

23. Substitute Vessel

The Owners shall be entitled at any time, whether before delivery or at any other time during the Charter Period, to provide a substitute vessel of equivalent capability, subject to the Charterers' prior approval which shall not be unreasonably withheld or delayed.

24. BIMCO War Risks Clause CONWARTIME 2013

(a) For the purpose of this Clause, the words:

(i) "Owners" shall include the shipowners, bareboat charterers, disponent owners, managers or other operators who are charged with the management of the Vessel, and the Master; and

(ii) "War Risks" shall include any actual, threatened or reported:

war, act of war, civil war or hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy and/or violent robbery and/or capture/seizure (hereinafter "Piracy"); acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the government of any state or territory whether recognised or not, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or may become dangerous to the Vessel, cargo, crew or other persons on board the Vessel.

(b) The Vessel shall not be obliged to proceed or required to continue to or through, any port, place, area or zone, or any waterway or canal (hereinafter "Area"), where it appears that the Vessel, cargo, crew or other persons on board the Vessel, in the reasonable judgement of the Master and/or the Owners, may be exposed to War Risks whether such risk existed at the time of entering into this Charter Party or occurred thereafter. Should the Vessel be within any such place as aforesaid, which only becomes dangerous, or may become dangerous, after entry into it, the Vessel shall be at liberty to leave it.

(c) The Vessel shall not be required to load contraband cargo, or to pass through any blockade as set out in Sub-clause (a), or to proceed to an Area where it may be subject to search and/or confiscation by a belligerent.

(d) If the Vessel proceeds to or through an Area exposed to War Risks, the Charterers shall reimburse to the Owners any additional premiums required by the Owners' insurers and the costs of any additional insurances that the Owners reasonably require in connection with War Risks.

(e) All payments arising under Sub-clause (d) shall be settled within fifteen (15) days of receipt of Owners' supported invoices or on redelivery, whichever occurs first.

(f) If the Owners become liable under the terms of employment to pay to the crew any bonus or additional wages in respect of sailing into an Area which is dangerous in the manner defined by the said terms, then the actual bonus or additional wages paid shall be reimbursed to the Owners by the Charterers at the same time as the next payment of hire is due, or upon redelivery, whichever occurs first.

(g) The Vessel shall have liberty:

(i) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery, or in any other way whatsoever, which are given by the government of the nation under whose flag the Vessel sails, or other government to whose laws the Owners are subject, or any other government of any state or territory whether recognised or not, body or group whatsoever acting with the power to compel compliance with their orders or directions;

(ii) to comply with the requirements of the Owners' insurers under the terms of the Vessel's insurance(s);

(iii) to comply with the terms of any resolution of the Security Council of the United Nations, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement;

(iv) to discharge at any alternative port any cargo or part thereof which may expose the Vessel to being held liable as a contraband carrier;

(v) to call at any alternative port to change the crew or any part thereof or other persons on board the Vessel when there is reason to believe that they may be subject to internment, imprisonment, detention or similar measures.

(h) If in accordance with their rights under the foregoing provisions of this Clause, the Owners shall refuse to proceed to the loading or discharging ports, or any one or more of them, they shall immediately inform the Charterers. No cargo shall be discharged at any alternative port without first giving the Charterers notice of the Owners' intention to do so and requesting them to nominate a safe port for such discharge. Failing such nomination by the Charterers within 48 hours of the receipt of such notice and request, the Owners may discharge the cargo at any safe port of their own choice. All costs, risk and expenses for the alternative discharge shall be for the Charterers' account.

(i) The Charterers shall indemnify the Owners for claims arising out of the Vessel proceeding in accordance with any of the provisions of Sub-clauses (b) to (h) which are made under any bills of lading, waybills or other documents evidencing contracts of carriage.

(j) When acting in accordance with any of the provisions of Sub-clauses (b) to (h) of this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Charter Party.

25. War Cancellation

Either party may cancel this Charter Party on the outbreak of war (whether there be a declaration of war or not) between the countries stated in Box 33.

26. BIMCO Ice Clause for Time Charter Parties

(a) The Vessel shall not be obliged to force ice but, subject to the Owners' prior approval having due regard to its size, construction and class, may follow ice-breakers.

(b) The Vessel shall not be required to enter or remain in any icebound port or area, nor any port or area where lights, lightships, markers or buoys have been or are about to be withdrawn by reason of ice, nor where on account of ice there is, in the Master's sole discretion, a risk that, in the ordinary course of events, the Vessel will not be able safely to enter and remain at the port or area or to depart after completion of loading or discharging. If, on account of ice, the Master in his sole discretion considers it unsafe to proceed to, enter or remain at the place of loading or discharging for fear of the Vessel being frozen in and/or damaged, he shall be at liberty to sail to the nearest ice-free and safe place and there await the Charterers' instructions.

(c) Any delay or deviation caused by or resulting from ice shall be for the Charterers' account and the Vessel shall remain on-hire.

(d) Any additional premiums and/or calls required by the Vessel's underwriters due to the Vessel entering or remaining in any icebound port or area, shall be for the Charterers' account.

27. Health and Safety and the Environment

The Owners shall comply with and adhere to all applicable international, national and local regulations pertaining to health and safety, and the environment, and such Charterers' instructions as may be appended hereto.

28. Compliance with Laws and Regulations

The parties will not do or permit to be done anything which might cause any breach or infringement of the laws and regulations of the Flag State, or of the places where the Vessel trades.

29. Drugs and Alcohol Policy

The Owners undertake that they have, and shall maintain for the duration of this Charter Party, a policy on Drugs and Alcohol Abuse applicable to the Vessel (the "D & A Policy") that meets or exceeds the standards in the OCIMF Guidelines for the Control of Drugs and Alcohol Onboard Ship 1995 as amended from time to time. The Owners shall exercise due diligence to ensure that the D & A Policy is understood and complied with on and about the Vessel. An actual impairment, shall not in and itself mean that the Owners have failed to exercise due diligence.

30. Taxes

Each party shall pay taxes due on its own profit, income and personnel. The Charterers shall pay all other taxes and dues arising out of the operation or use of the Vessel during the Charter Period. In the event of change in the Area of Operation or change in local regulation and/or interpretation thereof, resulting in an unavoidable and documented change of the Owners' tax liability after the date of entering into the Charter Party or the date of commencement of employment, whichever is the earlier, Hire shall be adjusted accordingly.

31. Early Termination

(a) At Charterers' Convenience

The Charterers may terminate this Charter Party at any time by giving the Owners written notice of termination as stated in Box 35, upon expiry of which, this Charter Party will terminate. Upon such termination, Charterers shall pay the compensation for early termination stated in Box 34 and the demobilisation charge stated in Box 13, as well as Hire or other payments due under the Charter Party up to the time of termination. If Box 34 is left blank, this Clause 31(a) shall not apply.

(b) For Cause

If either party becomes aware of the occurrence of any event described in this Clause that party shall so notify the other party promptly in writing of such occurrence and its intention to terminate if it does not cease within three (3) Days after such notification has been given. If the occurrence has not ceased within three (3) Days after such notification has been given, this Charter Party may be terminated by either party by giving notice to the other party in accordance with Clause 35 (Notices), (unless the event is caused by a breach of Charter Party by the terminating party), without prejudice to any other rights which the terminating party may have, under any of the following circumstances:

(i) Requisition

If the government of the state of registry and/or the flag of the Vessel, or any agency thereof, requisitions for hire or title or otherwise takes possession of the Vessel during the Charter Period.

(ii) Confiscation

If any government, individual or group, whether or not purporting to act as a government or on behalf of any government, confiscates, requisitions, expropriates, seizes or otherwise takes possession of the Vessel during the Charter Period (other than by way of arrest for the purpose of obtaining security).

(iii) Bankruptcy
If the other party has a petition presented for its winding up or administration which is not discharged within fourteen (14) days of presentation or any other action is taken with a view to its winding up (otherwise than for the purpose of reorganisation or amalgamation without insolvency), or become bankrupt or commits an act of bankruptcy, or makes any arrangement or composition for the benefit of creditors, or has a receiver or manager or administrative receiver or administrator or liquidator appointed in respect of any of its assets, or suspends payments, or has anything analogous to any of the foregoing under the law of any jurisdiction occur to it, or ceases or threatens to cease to carry on business, without prejudice to the accrued rights of that party.

(iv) Loss of Vessel
If the Vessel is lost or becomes a constructive total loss, or is missing unless the Owners promptly state their intention to provide, and do in fact provide, within 14 days of the Vessel being lost or missing, at the port or place from which the Vessel last sailed (or some other mutually acceptable port or place) a substitute vessel pursuant to Clause 23 (Substitute Vessel). In the case of termination, Hire shall cease from the date the Vessel was lost or, in the event of a constructive total loss, from the date of the event giving rise to such loss. If the date of loss cannot be ascertained or the Vessel is missing, payment of Hire shall cease from the date the Vessel was last reported.

(v) Force Majeure
If a force majeure condition as defined in Clause 32 (Force Majeure) prevents or hinders the performance of the Charter Party for a period exceeding fifteen (15) consecutive days from the time at which the impediment begins to prevent or hinder performance if notice is given without delay or, if notice is not given without delay, from the time at which notice thereof reaches the other party.

(vi) If the Owners have not procured the insurance policies in accordance with Clause 19(a)(i) on delivery or any such insurance policies lapse during the Charter Period.

Termination as a result of any of the above mentioned causes shall not relieve the Charterers of any obligation for Hire and any other payments due up to the date of termination.

(c) Default
If either party is in repudiatory breach of its obligations under this Charter party, the other party shall have the right to terminate this Charter Party with immediate effect by giving notice in accordance with Clause 35 (Notices) without prejudice to any other rights which the terminating party may have under this Charter Party.

(d) Off hire
In the event the Owners are unable to perform their obligations under this Charter Party due to events stated in Clause 15(a) for:

(i) a single consecutive period which exceeds that stated in Box 36(i) or, if left blank, twenty per cent (20%) of the total Charter Period, including any extensions which have been declared; or

(ii) combined periods which exceed that stated in Box 36(ii) in aggregate, or if left blank twenty-five per cent (25%) of the total Charter Period, including any extensions which have been declared,

and the Owners have not provided a substitute vessel pursuant to Clause 23 (Substitute Vessel), this Charter Party may be terminated by the Charterers by giving notice in accordance with Clause 35 (Notices) without prejudice to any other rights which either party may have under this Charter Party.

32. Force Majeure

Neither party shall be liable for any loss, damage, liquidated damages or delay due to any of the following force majeure events and/or conditions to the extent the party invoking force majeure is prevented or hindered from performing any or all of their obligations under this Charter Party, provided they have made all reasonable efforts to avoid, minimize or prevent the effect of such events and/or conditions:

(a) acts of God;

(b) any Government requisition, control, intervention, requirement or interference;

(c) any circumstances arising out of war, threatened act of war or warlike operations, acts of terrorism, sabotage or piracy, or the consequences thereof;

(d) riots, civil commotion, blockades or embargoes;

(e) epidemics;

(f) earthquakes, landslides, floods or other extraordinary weather conditions;

(g) strikes, lockouts or other industrial action, unless limited to the Employees of the party seeking to invoke force majeure;

(h) fire, accident, explosion except where caused by negligence of the party seeking to invoke force majeure;

(i) any other similar cause beyond the reasonable control of either party.

The party seeking to invoke force majeure shall notify the other party in writing within two (2) Days of the occurrence of any such event/condition.

33. Confidentiality

All information or data provided or obtained in connection with the performance of this Charter Party is and shall remain confidential and not be disclosed without the prior written consent of the other party and shall not be used for any purpose other than in the performance of this Charter Party. The parties shall use their best efforts to ensure that such information shall not be disclosed to any third party by any of their sub-contractors, Employees and agents. All information and data provided by a party is and shall remain the property of that party.

This Clause shall not apply to any information or data:

(a) that has already been published or is in the public domain; or

(b) which a party may be entitled or is bound to disclose under compulsion of law; or

(c) is requested by any regulatory authority; or

(d) as may be disclosed to any parent company or company in the same group of which a party forms part; or

(e) as may be necessary to disclose for the proper administration or implementation of this Charter Party; or

(f) as may be disclosed to a party's professional advisers for the proper performance of their professional services; or

(g) as may be required in the event of actual or pending court or arbitration proceedings which may arise out of or in connection with this Charter Party; or

(h) as may be required to be disclosed pursuant to a supply contract, which directly or indirectly references this Charter Party and any rates referenced herein.

34. BIMCO Dispute Resolution Clause 2013

(a)* This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within fourteen (14) calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the fourteen (14) days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the fourteen (14) days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of USD 100,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

In cases where the claim or any counterclaim exceeds the sum agreed for the LMAA Small Claims Procedure and neither the claim nor any counterclaim exceeds the sum of USD 400,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Intermediate Claims Procedure current at the time when the arbitration proceedings are commenced.

(b)* This Charter Party and any non-contractual obligations arising out of it shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Charter Party shall be referred to three (3) persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgment may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim exceeds the sum of USD 100,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc.

(c) This Contract shall be governed by and construed in accordance with Singapore**/English** law.

Any dispute arising out of or in connection with this Contract, including any question regarding its existence, validity or termination shall be referred to and finally resolved by arbitration in Singapore in accordance with the Singapore International Arbitration Act (Chapter 143A) and any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The arbitration shall be conducted in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration (SCMA) current at the time when the arbitration proceedings are commenced.

The reference to arbitration of disputes under this clause shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator and give notice that it has done so within fourteen (14) calendar days of that notice and stating that it will appoint its own arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the fourteen (14) days specified. If the other party does not give notice that it has done so within the fourteen (14) days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of USD 75,000 (or such other sum as the parties may agree) the arbitration shall be conducted before a single arbitrator in accordance with the SCMA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

(d)* This Charter Party shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(e) Notwithstanding (a), (b), (c) or (d) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Charter Party. In the case of a dispute in respect of which arbitration has been commenced under (a), (b), (c) or (d) above, the following shall apply:

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within 14 calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further 14 calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(v) Either party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.

(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are disclosable under the law and procedure governing the arbitration.

(Note: The parties should be aware that the mediation process may not necessarily interrupt time limits.)

(f) If Box 39 is not appropriately filled in, sub-clause (a) of this Clause shall apply. Sub-clause (e) shall apply in all cases.

** Sub-clauses (a), (b), (c) and (d) are alternatives; indicate alternative agreed in Box 39.*
*** Singapore and English law are alternatives; if Sub-clause (c) agreed also indicate choice of Singapore or English law in Box 39. If neither or both are indicated in Box 39, then English law shall apply by default.*

35. Notices

Any party giving notice under this Charter Party shall ensure that it is effectively given and such notice shall be treated as received during the recipients' office hours. If such notice is sent outside the recipients' office hours it shall be treated as received during the recipients' next working day. For the purpose of giving notices the Owners' contact details are stated in Box 37 and the Charterers' contact details are stated in Box 38.

36. Severance

If by reason of any enactment or judgment any provision of this Charter Party shall be deemed or held to be illegal, void or unenforceable in whole or in part, all other provisions of this Charter Party shall be unaffected thereby and shall remain in full force and effect.

37. Entire Agreement

This Charter Party, including all Annexes referenced herein and attached hereto, is the entire agreement of the parties and supersedes all previous written or oral understandings relating to the obligations contained herein and which may not be modified except by a written amendment signed by both parties.

38. Headings

The headings of this Charter Party are for identification only and shall not be deemed to be part hereof or be taken into consideration in the interpretation or construction of this Charter Party.

39. Singular/Plural

The singular includes the plural and vice versa as the context admits or requires.

APPENDIX 7

Bargehire 2008*

BARGEHIRE 2008

Standard Barge Charter Party

PART I

1. Shipbroker	2. Place and Date
3. Owners/Place of business (Cl.1)	4. Charterers/Place of business (Cl.1)
5. Barge's name, Call Sign and Flag (Cl. 1 & 13(c))	
6. Type of Barge (Cl.1)	7. GT/NT (Cl.1) /
8. When/Where built (Cl.1)	9. Total DWT (abt.) in metric tons on summer freeboard (Cl.1)
10. Class (Cl. 1 and Society 13(a))	11. Date of last special survey by the Barge's classification society (Cl.1)
12. Further particulars of Barge (Cl.1)	
13. Charter Party period (also state options, if any) (Cl. 2)	14. Port or Place of delivery (Cl. 3)
15. Port or Place of redelivery (Cl. 22)	16. Mobilisation/Demobilisation Fee (Currency and method of payment, when and where payable) (Cl. 4)
17. Initial delivery period (Cl. 6(a))	
18. Delivery period notification schedule (Cl. 6(b)) Number of days' notice — Delivery Period Delivery Date	19. Daily compensation for late delivery (Cl. 7(a)) 20. Compensation for late delivery (state lumpsum) (Cl. 7 and Cl. 22) 21. State amount per day per ballast engineer (Cl. 14) 22. Ballast engineer overtime expenses (state amount per hour per ballast engineer) (Cl. 14(b))
23. Trading limits (Cl. 8)	
24. Charter hire (Cl. 15(a))	25. Rate of interest per annum applicable acc. to Cl. 15 (f)

continued

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continued **BARGEHIRE 2008**
STANDARD BARGE CHARTER PARTY PART I

26. Currency and method of payment (Cl. 15(b))	27. Place of payment, also state beneficiary and bank account (Cl. 15(b))
28. Hull, Machinery and War Risk Insurance (Cl.16) (tick applicable option) 16(a)(i) (Owners to insure) OR 16 (a)(ii) (Charterers to insure)	29. Protection and Indemnity Insurance (Cl. 17) (tick applicable option) 17(a) (Owners to insure) OR 17 (b) (Charterers to insure)
30. Value of the Barge (Marine and War Risks Insurance) (Cl. 13(a) and 16 (f))	31. State the amount of franchise(s)/deductibles, if any (Cl. 18(b))
32. Bank guarantee/bond (sum and place) (Cl. 28) (optional)	33. Brokerage commission and to whom payable (Cl. 32)
34. Dispute Resolution (state whether alternative (a), (b) or (c) of Clause33 agreed; if (c) agreed, also state place of arbitration) (if box not filled in, Cl. 33(a) shall apply) (Cl. 33) **(c) -**	35. Number of additional clauses covering special provisions, if agreed

PREAMBLE - It is mutually agreed that this Contract shall be performed subject to the conditions contained in this Charter Party which shall include PART I, including additional clauses, if any agreed and stated in Box 35, and PART II. In the event of a conflict of conditions, the provisions of PART I shall prevail over those of PART II to the extent of such conflict but no further.

Signature (Owners)	Signature (Charterers)

PART II
BARGEHIRE 2008 Standard Barge Charter Party

1. Definitions

In this Charter Party, the following terms shall have the meanings hereby assigned to them:
"The Owners" shall mean the party stated in Box 3.
"The Charterers" shall mean the party stated in Box 4.
"The Barge" shall mean the Barge named in Box 5 and with particulars as specified in Boxes 6 to 12.

2. Period of Charter Party

(a) In consideration of the hire detailed in Box 24, the Owners let and the Charterers hire the Barge for the period stated in Box 13.

(b) The Charterers shall give a minimum of ten (10) days' notice (unless otherwise stated in Box 13) of their intention to use any optional period(s) as stated in Box 13.

3. Delivery

(a) The Barge shall be delivered and accepted by the Charterers at the port or place stated in Box 14.

(b) The Owners undertake that, at delivery, the Barge shall be of the description set out in PART I hereof. The Barge shall be delivered with cargo spaces free of any obstructions with all previous seafastenings removed and shall be properly documented as regards trading certificates, classification and equipment.

(c) Delivery by the Owners of the Barge and acceptance of the Barge by the Charterers shall constitute a full performance by the Owners of all the Owners' obligations under this Clause 3, and thereafter the Charterers shall not be entitled to make or assert any claim against the Owners on account of any conditions, representations or warranties expressed or implied with respect to the Barge.

4. Mobilisation and/or Demobilisation

Any mobilisation and/or demobilisation fee, if applicable, shall be paid as set out in Box 16.

5. Substitution

The Owners shall have the right to substitute the Barge, at any time up to fifteen (15) days prior to the delivery date, with an equivalent Barge suitable for the purpose of this Charter Party, subject to the Charterers' approval which shall not be unreasonably withheld. Such substitution shall have no effect on the hire rates, terms and conditions of this Charter Party, save that any documented additional costs for preparing the substitute Barge for the service shall be for the Owners' account. The Charterers shall notify the Owners of the approximate additional cost, if any, within five (5) working days after the Owners advise the Charterers of their intention to substitute the Barge.

6. Time for Delivery

(a) The Barge shall be delivered to the Charterers within the period agreed in Box 17.

(b) The delivery period in sub-clause (a) shall be narrowed down by the Charterers in accordance with the delivery period notification schedule as stated in Box 18.

(c) The declared delivery period shall always be within the previous declared delivery period and the number of days' notice shall always be counted from the first day in the declared delivery period.

7. Cancelling

(a) Should the Barge not be delivered according to Box 18 the Owners shall pay as compensation to the Charterers a daily rate as stated in Box 19 for each day or part thereof counting from 0000 hours on the delivery date until the date delivery actually takes place or an amount as stated in Box 20, whichever is the lesser. For the purpose of assessing compensation in accordance with this Clause 7(a) the delivery date shall, in the event the Owners have given notice in accordance with Clause 7(d) below and the Charterers have not exercised their option of cancelling, be deemed to be the revised delivery date stated in the Owners' notice.

(b) Should the Barge not be delivered at the latest seven (7) days after the delivery date the Charterers shall have the option of cancelling this Charter Party and the Owners shall pay to the Charterers the amount stated in Box 20.

(c) Unless the late delivery is caused by the Owners' negligence or wilful default, the compensation stated in Boxes 19 and 20, respectively, shall be the Charterers' sole financial remedy for damages arising out of the late delivery.

(d) If it appears that the Barge will be delayed beyond seven (7) days after the delivery date, the Owners

PART II
BARGEHIRE 2008 Standard Barge Charter Party

shall, as soon as they are in a position to state with reasonable certainty the day on which the Barge should be ready, give notice thereof to the Charterers asking whether they will exercise their option of cancelling and the option must then be declared within forty-eight (48) hours of the receipt by the Charterers of such notice. If the Charterers do not then exercise their option of cancelling, the revised delivery date stated in the Owners' notice shall be regarded as the new delivery date for the purpose of this Clause.

(e) Nothwithstanding any other provision in this Charter Party the Charterers shall have the right to cancel this Charter Party prior to delivery on payment of hire for the firm period as set out in Box 13.

8. Trading Limits

(a) The Barge shall be employed within its technical capabilities for work in inland, coastal and offshore waters without limit as to trading areas, but always in lawful trades for the carriage of suitable lawful merchandise within the trading limits indicated in Box 23.

The Charterers undertake not to employ the Barge or suffer the Barge to be employed otherwise than in conformity with the terms of the instruments of insurance (including any warranties expressed or implied therein) without first obtaining, either by themselves or through the Owners, the consent to such employment by the Barge's insurers and complying with such requirements as to extra premium or otherwise as the insurers may prescribe. The Charterers shall keep the Owners advised of the intended employment of the Barge.

(b) Without the prior written consent of the Owners, the Barge shall not enter any ice-bound ports, places or waters or any ports where lights or lightships have been or are about to be withdrawn by reason of ice or where there is a risk that in the ordinary course of events the Barge will not be able on account of ice to safely enter the port, use the port, or leave after having completed loading or discharging.

9. Excluded Cargoes

Notwithstanding any provisions to the contrary in this Charter Party it is agreed that nuclear fuels or radioactive materials or waste shall not be loaded or carried under this Charter Party. Stone or similar cargo shall not be carried unless the Owners' prior written consent is obtained.

10. Surveys

(a) The Owners and the Charterers shall appoint a mutually acceptable qualified marine surveyor to determine and provide written reports on the condition of the Barge (including internal inspection of the tank compartments to establish the condition of the bottom of the Barge) together with its equipment, machinery and spares at the times of delivery and redelivery hereunder. It is agreed between the parties hereto that the survey reports shall be taken as conclusive evidence of the condition of the Barge and its equipment on delivery and redelivery.

In the event of damage to the Barge during the Charter Party period, the appointed marine surveyor shall in his off-hire survey report assess the cost for repairing such damage and the time required for such repairs and these figures shall be binding on both parties, except for damage recoverable under the Barge's insurance.

(b) The cost for the on-hire survey and off-hire survey shall be shared equally between the Owners and the Charterers. Loss of time, if any, in connection with the on-hire survey, shall be borne by the Owners. The off-hire survey shall be conducted in the Charterers' time. In each case the cost of any docking and undocking, if required, in this connection shall be for the Charterers' account.

11. Inventories and Consumable Oil and Stores

A complete inventory of the Barge's entire equipment, outfit, appliances and of all consumable stores onboard the Barge shall be made by the marine surveyor on delivery and again on redelivery. On redelivery the Charterers shall pay for all bunkers, lubricating oil, water, paints, oils, ropes and other consumable stores used during the charter period and charged at cost.

12. Inspection

(a) The Owners shall have the right at any time to inspect or survey the Barge or instruct a duly authorised surveyor to carry out such survey on their behalf to ascertain the condition of the Barge and satisfy themselves that the Barge is being properly repaired and maintained.

(b) The costs of the inspection or survey shall be borne by the Owners and the inspection shall not hamper the Charterers' operations. All time in respect of inspection, survey or repairs shall count as time on-hire and

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BARGEHIRE 2008 Standard Barge Charter Party

shall form part of the Charter Party period. The Owners have the right to require the Barge to be surveyed and/or dry-docked for inspection at normal classification intervals on the dates stated in Box 11. The costs of such dry-docking shall be for the account of and in the time of the party responsible for maintaining class according to Clause 16.

(c) All incidents occurring to the Barge shall immediately be reported in writing to the Owners and the Charterers shall, whenever required by the Owners, furnish them with full information in writing regarding any casualties or other accidents or damage to the Barge.

13. Maintenance and Operation

(a) The Barge shall during the Charter Party period be in the full custody and at the absolute disposal for all purposes of the Charterers and under their complete control in every respect. The Charterers warrant that the tug(s) used shall be of a suitable size and capability for the proposed towing services. The Charterers shall maintain the Barge, her machinery, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice.

The Charterers shall take immediate steps to have necessary repairs done within a reasonable time failing which the Owners shall have the right of withdrawing the Barge from the service of the Charterers without noting any protest and without prejudice to any claim the Owners may otherwise have against the Charterers under the Charter Party.

Unless otherwise agreed, in the event of any improvement, structural changes or expensive new equipment becoming necessary for the continued operation of the Barge by reason of new Class requirements or by compulsory legislation costing more than five per cent. (5%) of the Barge's marine insurance value as stated in Box 30, then the extent, if any, to which the rate of hire shall be varied and the ratio in which the cost of compliance shall be shared between the parties concerned in order to achieve a reasonable distribution thereof as between the Owners and the Charterers having regard, inter alia, to the length of the period remaining under the Charter Party shall, in the absence of agreement, be referred to arbitration according to Clause 33.

(b) The Charterers shall at their own expense and by their own procurement navigate, operate, supply, fuel and repair the Barge whenever required during the Charter Party period and they shall pay all charges and expenses of every kind and nature whatsoever incidental to their use and operation of the Barge under this Charter Party, including all taxes except those taxes payable on the Owners' income in the country of registration of the Barge and/or the Owners' registered office.

(c) During the currency of this Charter Party, the Barge shall retain her present name as indicated in Box 5 and shall remain under and fly the flag as indicated in Box 5, provided however that the Charterers shall have the liberty to paint the Barge in their own colours, install and display their insignia and fly their own house flag. Painting and re-painting, instalment and re-instalment shall be for the Charterers' account and time used thereby shall count as time on hire.

(d) The Charterers shall make no structural changes to the Barge or changes in the machinery, appurtenances or spare parts thereof without in each instance securing the Owners' prior written approval thereof. If the Owners so approve, the Charterers shall, at their expense and in their time, restore the Barge to its former condition before the termination of the Charter Party, if the Owners so require.

(e) The Charterers shall have the use of all outfit, equipment and appliances on board the Barge at the time of delivery, provided the same or their substantial equivalent shall be returned to the Owners on redelivery in the same good order and condition as when received, ordinary wear and tear excepted. The Charterers shall from time to time during the Charter Party period replace such items of equipment as shall be damaged beyond ordinary wear and tear. The Charterers shall procure that all repairs to or replacement of any damaged, worn or lost parts or equipment be effected in such manner (as regards workmanship, specification and quality of materials) as not to diminish the value of the Barge. The Charterers have the right to fit additional equipment at their expense and risk but the Charterers shall remove such equipment at the end of the period at their cost and prior to the redelivery of the Barge, unless otherwise mutually agreed in advance and in writing. The Barge's ballast tanks shall be used for ballast water only.

(f) It is expressly understood that the Barge shall be moored in ports or places to lie safely, always afloat at any time of tide.

(g) Towage of the Barge in tandem or as a double tow, that is by the same tug(s) but together with any other

floating object, is not permitted unless the Owners' prior written consent is obtained.

14. Ballast Engineer

(a) The Barge may be ballasted, and if submersible, submerged and surfaced by the Charterers subject to the Charterers always using a competent ballast engineer for such operations.

(b) In case the Charterers request in writing and the Owners agree to provide a competent ballast engineer, a notice for same of seventy-two (72) hours plus allowance for travelling time to be given by the Charterers for every occasion the Owners' ballast engineer is required. The Charterers agree to pay to the Owners an amount per day as stated in Box 21 per ballast engineer for up to ten (10) hours' work per day including but not limited to travelling time and/or time for standby associated therewith. For any hour in excess of ten (10) hours per day the Charterers shall pay an amount per hour as stated in Box 22 for each ballast engineer. In addition the Charterers shall pay all travel expenses, accommodation expenses and meals for each ballast engineer, all according to the Owners' invoice, and reimburse the Owners for any advance payments they have made in this respect.

(c) The ballast engineer shall at all times follow the orders and directions of the Charterers. The Charterers shall indemnify and hold the Owners harmless from and against all costs, claims, damages, expenses, losses, liabilities and penalties arising out of or in connection with the ballast operations. All liabilities in respect of death and personal injury relating to the ballast engineer shall be the responsibility of the party providing the ballast engineer.

(d) The Charterers shall provide the ballast engineer with safe access to the Barge. Throughout the time that the ballast engineer is on board the Barge the Charterers shall ensure that they, their client, or their sub-contractors shall have a representative in attendance who will keep in contact with the ballast engineer.

15. Hire

(a) The Charterers shall pay to the Owners for the hire of the Barge at the rate per calendar day stated in Box 24 commencing from the date of its delivery to the Charterers. Hire to continue until the date when the Barge is redelivered by the Charterers to the Owners.

(b) Payment of hire shall be made in cash without discount every month in advance on the first day of each month, in the currency and in the manner indicated in Box 26 and at the place stated in Box 27.

(c) Payment of hire for the first and last month's hire if less than a full month shall be calculated proportionally according to the number of days in the particular calendar month and advance payment shall be effected accordingly.

(d) Should the Barge be lost or missing, hire shall cease from the date and time when she was lost or last heard of. Any hire paid in advance shall be adjusted accordingly.

(e) Time shall be of the essence in relation to payment of hire hereunder. In default of punctual and regular payment as herein specified, the Owners may require the Charterers to make payment of the amount due within ninety-six (96) running hours of receipt of notification from the Owners, failing which the Owners shall have the right to withdraw the Barge without prejudice to any other claim the Owners may have against the Charterers under this Charter Party. Further, so long as the hire remains unpaid, the Owners shall be entitled to suspend the performance of any and all of their obligations hereunder and shall have no responsibility whatsoever for any consequences thereof in respect of which the Charterers hereby indemnify the Owners. Hire shall continue to accrue and extra expenses resulting from such suspension shall be for the Charterers' account.

(f) Any delay in payment of hire shall entitle the Owners to interest at the rate per annum as agreed in Box 25.

16. Hull, Machinery and War Risks Insurance, Responsibilities and Classification

Sub-clauses 16(a)(i) and 16(a)(ii) are options. State option in Box 28. If Box 28 is not appropriately filled in then Sub-clause 16(a)(i) shall apply.

(a) (i) *Owners to insure* - The Barge shall be kept insured by the Owners at their expense against marine and war risks. All insurance policies shall be in the name of the Owners and with the Charterers named as co-assured with a waiver of subrogation in favour of the Charterers. The Owners at the request of the Charterers shall apply to their insurers to include Charterers' nominated principals as co-assured.

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The Owners shall provide the Charterers with evidence of the placing of the above insurances.

The Owners shall keep the Barge with unexpired classification and with other required certificates in force at all times during the Charter Party period.

(ii) *Charterers to insure* - The Barge shall be kept insured by the Charterers at their expense against marine and war risks. Such marine and war risks insurances shall be arranged by the Charterers to protect the interests of the Owners, the Charterers, and mortgagees (if any), and the Charterers shall be at liberty to protect under such insurances the interests of any managers they may appoint. The terms of the insurance policies are to be approved by the Owners. All insurance policies shall be in the name of the Charterers and with the Owners named as co-assured with a waiver of subrogation in favour of the Owners. The Charterers at the request of the Owners shall apply to their insurers to include Owners' nominated principals as co-assured. The Charterers shall provide the Owners with evidence of the placing of the above insurances.

The Charterers shall keep the Barge with unexpired classification and with other required certificates in force at all times during the Charter Party period.

(b) In the event that any act or negligence of the Charterers shall vitiate any of the insurances herein provided, the Charterers shall pay to the Owners all losses and indemnify the Owners against all claims and demands which would otherwise have been covered by such insurances.

(c) Should the Barge become an actual, constructive, compromised or agreed total loss under the insurances required under sub-clause (a) of this Clause, all insurance payments for such loss shall be paid to the Owners, who shall distribute the moneys between themselves and the Charterers according to their respective interests. The Charterers undertake to notify the Owners of any occurrences in consequence of which the Barge is likely to become a loss as described above.

(d) If the Barge becomes an actual, constructive, compromised or agreed total loss under the insurances arranged by the Owners or the Charterers in accordance with sub-clause (a) of this Clause, this Charter Party shall terminate as of the date of such loss.

(e) The Charterers shall, upon the request of the Owners, promptly execute such documents as may be required to enable the Owners to abandon the Barge to the insurers and claim a constructive total loss.

(f) For the purpose of insurance coverage against marine and war risks under the provisions of sub-clause (a) of this Clause, the value of the Barge is the sum indicated in Box 30.

17. Protection and Indemnity Insurance and Liability

Sub-clauses 17(a) and 17(b)are options. State option in Box 29. If Box 29 is not appropriately filled in then Sub-clause 17(a) shall apply.

(a) *Owners' P&I cover* - The Barge shall be kept insured by the Owners at their expense against Protection and Indemnity risks and any risks against which it is compulsory to insure for the operation of the Barge, including maintenance of financial security. The Owners shall name the Charterers as joint entrants on their P&I cover. The Owners shall provide the Charterers with evidence of the placing of the above insurances. The Charterers shall be liable in all circumstances for the following:

(i) All loss or damage suffered by third parties caused by the Barge and/or its equipment including liabilities arising out of, but not limited to, personal injury and death, collision, dock damage, pollution and wreck removal.

In addition the Charterers shall be liable for and insure in all circumstances and provide evidence to the Owners of the following:

(ii) Any sums whatsoever in consequence of the cargo becoming a wreck or obstruction to navigation.

(iii) All loss of or damage to cargo, howsoever caused, including wreck or debris removal of cargo, and/or for damage caused by the cargo, including personal injury and death.

(b) *Charterers' P&I cover* - Notwithstanding any separate P&I insurances that the Owners may have, the Barge shall be kept insured by the Charterers at their expense against Protection and Indemnity risks and any risks against which it is compulsory to insure for the operation of the Barge. The terms of the P&I insurances

are to be approved by the Owners. The Charterers shall establish and provide evidence of financial security or responsibility in respect of oil or other pollution damage as required by any government, including federal, state or municipal or other division or authority thereof, to enable the Barge, without penalty or charge, lawfully to enter, remain at, or leave any port, place, territorial or contiguous waters of any country, state or municipality in performance of this Charter Party without any delay. The Charterers shall make and provide evidence of all arrangements by bond or otherwise as may be necessary to satisfy such requirements at the Charterers' sole expense and the Charterers shall indemnify and hold harmless the Owners against all consequences whatsoever for any failure or inability to do so. The Charterers shall provide the Owners with evidence of the placing of the above insurances.

The Charterers shall indemnify and hold the Owners harmless against any claims arising from the losses and/or damage set out in (i), (ii) and (iii) below, including possible loss of time on hire.

The Charterers shall be liable for and insure in all circumstances and provide evidence to the Owners of the following:

(i) All loss of or damage to cargo, howsoever caused, including wreck or debris removal of cargo, and/or for damage caused by the cargo, including personal injury and death.

(ii) Any sums whatsoever in consequence of the cargo becoming a wreck or obstruction to navigation.

(iii) All loss or damage suffered by third parties caused by the Barge and/or its equipment including liabilities arising out of, but not limited to, personal injury and death, collision, dock damage, pollution and wreck removal.

18. Repairs

(a) The Charterers shall, subject to the approval of the Owners or the Owners' insurers, effect all insured repairs and the Charterers shall undertake settlement of all expenses in connection with such repairs as well as all insured charges, expenses and liabilities. If Sub-clause 16(a)(i) applies the Charterers shall be secured reimbursement through the Owners' insurers for such expenditure upon presentation of accounts.

(b) The Charterers also to remain responsible for and to remedy damage and settle costs and expenses incurred thereby in respect of all other damage not covered by the insurances and/or not exceeding any possible franchise(s) or deductibles as stated in Box 31. All such franchise(s) or deductibles, which are applicable for each and every incident, are for the Charterers' account.

(c) All time used for repairs under the provisions of this Clause, including any deviation, shall count as time on hire and shall form part of the Charter Party period.

(d) Notwithstanding Sub-clause 16(d) the Charterers shall remain responsible for Class survey costs in respect of such damages or repairs.

19. Ballast Water Management

(a) All ballast water operations shall be conducted in accordance with the International Convention for the Control and Management for Ships' Ballast Water and Sediments or other similar legislation as applicable. The Charterers shall maintain a ballast water management plan approved by the marine warranty surveyor and ensure that all ballast water operations are conducted in accordance with the plan including obtaining approvals and/or licences as required.

(b) At the Charterers' request the Owners shall provide ballast engineers to conduct the ballast water exchange in accordance with the Charterers' ballast water management plan. The Charterers shall arrange for the transfer of the ballast engineers to and from the Barge.

(c) All costs arising from compliance with legislation including, but not limited to, the development of the ballast water management plan, permits, licences, engineering studies, provision of ballast engineers and delays to the Barge, shall be for the account of the Charterers.

(d) Should ballast water have to be treated or discharged into another vessel or ashore, the costs and time for such activities will be for the account and responsibility of the Charterers.

(e) The Charterers shall indemnify and hold harmless the Owners with regard to all liabilities, damages, and/or additional time and costs arising from or as a result of ballast water operations in accordance with

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this Clause.

20. Force Majeure

Neither party shall be liable for any loss, damage or delay due to any of the following force majeure events and/or conditions to the extent the party invoking force majeure is prevented or hindered from performing any or all of their obligations under this Charter Party, provided they have made all reasonable efforts to avoid, minimize or prevent the effect of such events and/or conditions:

(a) acts of God;

(b) any Government requisition, control, intervention, requirement or interference;

(c) any circumstances arising out of war, threatened act of war or warlike operations, acts of terrorism, sabotage or piracy, or the consequences thereof;

(d) riots, civil commotion, blockades or embargoes;

(e) epidemics;

(f) earthquakes, landslides, floods or other extraordinary weather conditions;

(g) fire, accident, explosion except where caused by negligence of the party seeking to invoke force majeure;

(h) any other similar cause beyond the reasonable control of either party.

The party seeking to invoke force majeure shall notify the other party in writing within two (2) working days of the occurrence of any such event/condition.

21. Consequential Loss

Except as elsewhere provided in this Charter Party, neither the Owners nor the Charterers shall be responsible for any consequential loss, howsoever caused, including but not limited to damage or decline in the market value of the Barge or goods during delays, loss of profit or loss of business opportunities in respect of any claim that the one may have against the other.

22. Redelivery

(a) Upon the expiration of this Charter Party, the Charterers shall redeliver the Barge safely moored at the port or place stated in Box 15. Such port/place of redelivery to be always safe and accessible for the tug and the Barge, and where they can lie always safe and afloat at all tides. The Barge shall be redelivered to the Owners in the same or as good a structure, state, condition and class as that in which she was delivered, ordinary wear and tear excepted, with cargo spaces free of any obstructions with all previous seafastenings removed and shall be properly documented as regards trading certificates, classification and equipment.

(b) If the Charterers, for any reason whatsoever, fail to redeliver the Barge on expiry of the Charter Party period, or any amendment to same which has to be agreed in advance and in writing, the Owners shall be entitled to the agreed rate or to the market rate for that period, whichever is the higher, increased by the amount stated in Box 20. Unless the late redelivery is caused by the Charterers' negligence or wilful default, this compensation shall be the Owners' sole financial remedy for damages arising out of late redelivery.

23. Early Redelivery

Upon giving fifteen (15) days' prior notice to the Owners, the Charterers shall, notwithstanding any other provision of this Charter Party, be entitled to effect early redelivery of the Barge and to terminate this Charter Party at any time during the period of the Charter Party as agreed according to Clause 2, provided however, that if exercising this option, the Charterers shall pay hire for the remainder of the period of the Charter Party as agreed according to Clause 2.

24. Non-Lien and Indemnity

The Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the Owners in the Barge.

(a) The Charterers shall indemnify and hold the Owners harmless against any lien of whatsoever nature arising upon the Barge during the Charter Party period while she is under the control of the Charterers and on any claims against the Owners arising out of or in relation to the operation of the Barge by the Charterers. Should the Barge be arrested by reason of claims or liens arising out of her operation hereunder by the Charterers,

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the Charterers shall at their own expense take all reasonable steps to secure that within a reasonable time the Barge is released and at their own expense put up bail to secure release of the Barge.

(b) The Owners shall indemnify and hold the Charterers harmless against any lien or claim of whatsoever nature arising upon the Barge during the Charter Party arising out of the operation of the Barge by Owners or former charterers prior to the delivery of the Barge to Charterers pursuant to this Charter party. Should the Barge be arrested by reason of claims or liens arising out of her operation by Owners or former charterers prior to the delivery hereunder, the Owners shall at their own expense take all reasonable steps to secure the release of the Barge and at their own expense put up bail to secure the release of the Barge. All time that is lost as a result of such an arrest shall be for Owners' account.

25. Lien

The Owners shall have a lien upon all cargoes and sub-freights and sub-hire for all claims under this Charter Party and the Charterers shall have a lien on the Barge for all moneys paid in advance and not earned.

26. General Average

General Average, if any, shall be adjusted according to the York-Antwerp Rules 1994.
The Charter Party hire not to contribute to General Average.

27. Assignment and Sub-Demise

The Charterers shall not assign this Charter Party nor sub-demise the Barge except with the prior consent in writing of the Owners, which shall not be unreasonably withheld, and subject to such terms and conditions as the Owners shall approve.

If, after obtaining the Charterers' agreement, which shall not be unreasonably withheld, the Owners sell the Barge, either prior to delivery or during the performance of this Charter Party, the Owners shall have the right and be obliged to assign and transfer this Charter Party to the buyer of the Barge upon giving the Charterers prompt notice in writing of the buyers' full style and the time when the Barge will be delivered to the buyers and the assignment will become effective. As from that time the Owners shall be relieved from all obligations and liabilities under this Charter Party and wherever the term the Owners appears it shall thereafter be considered as a reference to the buyers.

28. Bank Guarantee*

The Charterers undertake to furnish, before delivery of the Barge, a first class bank guarantee or bond acceptable to the Owners in the sum and at the place as indicated in Box 32 as guarantee for full per formance of their obligations under this Charter Party.
**(Optional, only to apply if Box 32 is filled in).*

29. Requisition/Acquisition

(a) In the event of the requisition for hire of the Barge by any governmental or other competent authority (hereinafter referred to as "requisition for hire") irrespective of the date during the Charter Party period when "requisition for hire" may occur and irrespective of the length thereof and whether or not it be for an indefinite or a limited period of time, and irrespective of whether it may or will remain in force for the remainder of the Charter Party period, this Charter Party shall not be deemed thereby or thereupon to be frustrated or otherwise terminated and the Charterers shall continue to pay the stipulated hire in the manner provided by this Charter Party until the time when the Charter Party would have terminated pursuant to any of the provisions hereof, always provided, however, that in the event of "requisition for hire" any requisition hire or compensation received or receivable by the Owners shall be payable to the Charterers during the remainder of the Charter Party period or the period of the "requisition for hire", whichever be the shorter.

The hire under this Charter Party shall be payable to the Owners from the same time as the requisition hire is payable to the Charterers.

(b) In the event of the Owners being deprived of their ownership in the Barge by any compulsory acquisition of the Barge or requisition for title by any governmental or other competent authority (hereinafter referred to as "compulsory acquisition"), then, irrespective of the date during the Charter Party period when "compulsory acquisition" may occur, this Charter Party shall be deemed terminated as of the date of such "compulsory acquisition". In such event charter hire to be considered as earned and to be paid up to the date and time of such "compulsory acquisition".

30. War Risks (CONWARTIME 2004)

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(a) For the purpose of this Clause, the words:

(i) "Owners" shall include the bargeowners, bareboat charterers, disponent owners, managers or other operators who are charged with the management of the Barge, and the Master; and

(ii) "War Risks" shall include any actual, threatened or reported: war; act of war; civil war; hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy; acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever); by any person, body, terrorist or political group, or the Government of any state whatsoever, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or are likely to be or to become dangerous to the Barge, her cargo, crew or other persons on board the Barge.

(b) The Barge, unless the written consent of the Owners be first obtained, shall not be ordered to or required to continue to or through, any port, place, area or zone (whether of land or sea), or any waterway or canal, where it appears that the Barge, her cargo, crew or other persons on board the Barge, in the reasonable judgement of the Master and/or the Owners, may be, or are likely to be, exposed to War Risks. Should the Barge be within any such place as aforesaid, which only becomes dangerous, or is likely to be or to become dangerous, after her entry into it, she shall be at liberty to leave it.

(c) The Barge shall not be required to load contraband cargo, or to pass through any blockade, whether such blockade be imposed on all vessels, or is imposed selectively in any way whatsoever against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever, or to proceed to an area where she shall be subject, or is likely to be subject to a belligerent's right of search and/or confiscation.

(d) (i) The Owners may effect war risks insurance in respect of the Hull and Machinery of the Barge and their other interests (including, but not limited to, loss of earnings and detention, the crew and their protection and Indemnity Risks), and the premiums and/or calls therefor shall be for their account.

(ii) If the Underwriters of such insurance should require payment of premiums and/or calls because, pursuant to the Charterers' orders, the Barge is within, or is due to enter and remain within, or pass through any area or areas which are specified by such Underwriters as being subject to additional premiums because of War Risks, then the actual premiums and/or calls paid shall be reimbursed by the Charterers to the Owners at the same time as the next payment of hire is due, or upon redelivery, whichever occurs first.

(e) If the Owners become liable under the terms of employment to pay to the crew any bonus or additional wages in respect of sailing into an area which is dangerous in the manner defined by the said terms, then the actual bonus or additional wages paid shall be reimbursed to the Owners by the Charterers at the same time as the next payment of hire is due, or upon redelivery, whichever occurs first.

(f) The Barge shall have liberty:-

(i) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery, or in any other way whatsoever, which are given by the Government of the Nation under whose flag the Barge sails, or other Government to whose laws the Owners are subject, or any other Government, body or group whatsoever acting with the power to compel compliance with their orders or directions;

(ii) to comply with the orders, directions or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance;

(iii) to comply with the terms of any resolution of the Security Council of the United Nations, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement;

(iv) to discharge at any other port any cargo or part thereof which may render the Barge liable to confiscation as a contraband carrier;

(v) to call at any other port to change the crew or any part thereof or other persons on board the Barge when

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there is reason to believe that they may be subject to internment, imprisonment or other sanctions.

(g) If in accordance with their rights under the foregoing provisions of this Clause, the Owners shall refuse to proceed to the loading or discharging ports, or any one or more of them, they shall immediately inform the Charterers. No cargo shall be discharged at any alternative port without first giving the Charterers notice of the Owners' intention to do so and requesting them to nominate a safe port for such discharge. Failing such nomination by the Charterers within forty-eight (48) hours of the receipt of such notice and request, the Owners may discharge the cargo at any safe port of their own choice.

(h) If in compliance with any of the provisions of sub-clauses (b) to (g) of this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Charter Party.

31. Limitation of Liability

Notwithstanding any provisions of this Charter Party to the contrary, the Owners shall have the benefit of all limitations of, and exemptions from, liability accorded to the Owners or chartered Owners of Barges by any applicable statute or rule of law for the time being in force, and the same benefits to apply regardless of the form of signatures given to this Charter Party.

32. Commission

The Owners shall pay commission to the brokers named in Box 33 on any hire, mobilisation and/or demobilization fee paid under the Charter Party. If the full hire or fee is not paid owing to breach of Charter Party by either of the parties, the party liable therefor shall indemnify the brokers against their loss of commission.

33. BIMCO Dispute Resolution Clause

(a) *This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause. The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced. The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

(b) *This Charter Party shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Charter Party shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgement may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.

(c) *This Charter Party shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Charter Party shall be referred

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to arbitration at a mutually agreed place, subject to the procedures applicable there.

(d) Notwithstanding (a), (b) or (c) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Charter Party.
In the case of a dispute in respect of which arbitration has been commenced under (a), (b) or (c) above, the following shall apply:-

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within 14 calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further 14 calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(v) Either party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.

(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are disclosable under the law and procedure governing the arbitration.

(Note: The parties should be aware that the mediation process may not necessarily interrupt time limits.)
If Box 34 in is not appropriately filled in, sub-clause (a) of this Clause shall apply. Sub-clause (d) shall apply in all cases.
**Note: Sub-clauses (a), (b) and (c) are alternatives; indicate alternative agreed in Box 34.*

34. BIMCO Notices Clause

(a) All notices given by either party or their agents to the other party or their agents in accordance with the provisions of this Charter Party shall be in writing.

(b) For the purposes of this Charter Party, "in writing" shall mean any method of legible communication. A notice may be given by any effective means including, but not limited to, cable, telex, fax, e-mail, registered or recorded mail, or by personal service.

APPENDIX 8

Heavycon 2007*

HEAVYCON 2007

STANDARD HEAVYLIFT CHARTER PARTY

PART I

1. **Place and date of Contract**	
2. **Owners/place of business** (Cl. 1.)	3. **Charterers/place of business** (Cl. 1.)
4. **Vessel** (name, type and other particulars; also description of Owners' equipment) (Cl. 1, Cl. 4(b) and Cl. 20)	
5. **Cargo** (full description of cargo; indicate whether full and complete cargo or part cargo; also state minimum/maximum weight of cargo) (Cl. 1, and Cl. 3(d))	
6. **Loading port(s)** (Cl. 1.)	7. **Discharging port(s) and intended route from loading port(s) to discharging port(s) to** (including canals and rivers) (Cl. 1, Cl. 3(b) and Cl. 15)
8. **Loading method(s)** (indicate alternative(s): (i) or (ii), as agreed) (Cl. 4(c))	9. **Discharging method(s)** (indicate alternative(s): (i) or (ii), as agreed) (Cl. 4(f))
10. **The Period** (state dates) (Cl. 4(a) and Cl. 8(a))	11. **Notification schedule** (Cl. 8(b))
12. **Layday period** (state number of days) (Cl. 8(d))	
13. **Notices for loading to be given to** (Cl. 10)	14. **Notices for discharging** (state interval periods and to whom to be given) (Cl. 9(b) and Cl. 10)
15. **Marine Surveyor(s) and date for transportation approval** (Cl. 11)	
16. **Freight** (Cl. 8(k), Cl. 12 and Cl. 15(b))	17. **Freight and demurrage, etc. payment** (instalments, currency and where payable; also state owners' bank account) (Cl. 12 and Cl. 13)
18. **Free time** free time for loading: (Cl. 8 (i)) days total free time for loading/discharging and canal transit (if applicable) (Cl. 13(a) and Cl. 15(a)) days	19. **Demurrage rate per day** (Cl. 3(b), Cl. 3(c), Cl. 5(b), Cl. 7, Cl. 13, Cl. 15(c), Cl. 18 and Cl. 21)
20. **Mobilisation charge** (if agreed, state lump sum amount) (Cl. 14)	21. **Demobilisation charge** (if agreed, state lump sum amount) (Cl. 14)
22. **Canal transit costs** (if any) limited to (Cl. 15(b))	23. **Bunker Escalation** (Cl. 16) Grade: quantity: . price: per metric ton Grade: quantity: t. price: per metric ton
24. **Termination Fee(s)** (state amount(s) if agreed) (Cl. 21)	25 **Liability for cargo** (state whether Bill of Lading or Cargo Receipt) (Cl. 25)
26. **General average shall be adjusted/settled at** (Cl. 30)	27. **Double banking** (Cl. 37) (i) State Owners' additional premiums, if any (ii) State Owners' additional costs for insuring deductible, if any
28. **Brokerage and to whom payable** (Cl. 35) (i) Rate (ii) Broker(s)	29. **Dispute Resolution** (Cl. 39) (state whether alternative (a), (b) or (c) of Clause 39 agreed) **(c) -**
30. **Numbers of additional clauses covering special provisions, if agreed**	

It is mutually agreed that this Contract shall be performed subject to the conditions contained in the Contract consisting of PART I including additional clauses, if any agreed and stated in Box 30 and PART II including Annex A (Demarcation of Scope of Work). In the event of a conflict of conditions, the provisions of PART I and any additional clauses including Annex A (Demarcation of Scope of Work) shall prevail over those of PART II to the extent of such conflict but no further.

Signature (Owners)	**Signature** (Charterers)

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Annex A
Demarcation of Scope of Work

	Activity	Select party responsible for each task
1.	**Engineering**	
1.1	calculation of dynamic forces during seavoyage	
1.2	engineering and preparation of lifting plan(s)	
1.3	engineering and preparation of lashing / seafastening plan(s)	
1.4	engineering and preparation of load spreading plan(s)	
1.5	check of structural strength of Cargo during loading / discharging and sea transportation	
1.6	check of structural strength of Vessel's deck	
1.7	preparation of transportation manual	
1.8	obtaining plan approval of MWS	
2.	**loadport**	
2.1	arrangement of berth	
2.2	preparation of vessel for loading	
2.3	supply of load spreading	
	installation of load spreading	
2.4	supply of slings, shackles	
	supply of spreader / lifting beams	
	preparation for lifting	
2.5	bringing Cargo alongside Vessel within reach of Vessel's gear	
2.6	hooking on	
2.7	loading by Vessel's gear; operated by Vessel's crew, as servants of the Charterer	
2.8	ballasting of Vessel during loading	
2.9	arrangement and costs of stevedoring (if compulsory)	
2.10	supply of seafastening	
	installation of seafastening	
	welding	
	NDT	
2.11	obtaining MWS approval for sailing	
3.	**discharge port**	
3.1.	arrangement of berth	
3.2.	preparation of vessel for discharging	
3.3.	cutting of seafastening / delashing	
3.4.	supply of slings, shackles	
	supply of spreader / lifting beams	
	preparation for lifting	
3.5.	discharging by Vessel's gear; operated by Vessel's crew, as servants of the Charterer	
3.6.	receiving Cargo alongside Vessel within reach of Vessel's gear	
3.7.	hooking off	
3.8.	ballasting of Vessel during discharging	
3.9.	arrangement and costs of stevedoring (if compulsory)	
3.10.	removal of seafastening	
	removal of load spreading	
	deck cleaning by gauging / grinding	

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1. Definitions

In this Charter Party the following words and expressions shall have the meanings hereby assigned to them.

"The Owners" shall mean the party identified in Box 2.
"The Charterers" shall mean the party identified in Box 3.
"The Vessel" shall mean the vessel described in Box 4.
"Loading Port" shall mean the port(s), place(s) or area(s) specified in Box 6.
"Discharging Port" shall mean the port(s), place(s) or area(s) specified in Box 7.
"The Cargo" shall mean any goods or equipment or other items described in Box 5.
"The Transportation" shall mean the carriage of the Cargo and, as may be specified in Annex A (Demarcation of Scope of Work), the loading and discharging and all other operations connected therewith.

2. Voyage

(a) It is agreed between the Owners and the Charterers that, subject to the terms and conditions of this Charter Party, the Cargo shall be transported by the Vessel from the Loading Port, or so near thereto as she may safely get and lie always safe and afloat, to the Discharging Port, or so near thereto as she may safely get and lie always safe and afloat.

(b) The Owners shall exercise due diligence in making the Vessel seaworthy before and at arrival at the Loading Port. The Owners shall perform the voyage with due despatch unless otherwise agreed.

3. Deviation/Delays/Part Cargo

(a) The Vessel has the liberty to sail without pilots, to tow and/or assist vessels in distress, to deviate for the purpose of saving life, to replenish bunkers and/or to deviate for the purpose of safety of the Cargo, crew, Vessel and for any other reasonable purpose.

(b) Without prejudice to the provisions of Clause 30 (General Average and New Jason Clause), should the master decide, for the purpose of the safety of the Cargo, to deviate from the intended route which is stipulated in Box 7, the Charterers shall pay for all time lost as a consequence of the deviation at the demurrage rate stipulated in Box 19.

The time lost shall include all time used until the Vessel reaches the same or equidistant position to that where the deviation commenced and the Charterers shall also pay all additional expenses incurred by such deviation including bunkers, port charges, pilotage, tug boats, agency fees and any other expenses whatsoever incurred.

The Owners shall give prompt notification of any delay or deviation to the Charterers and any claims for additional compensation shall be supported by appropriate documentation.

(c) If the Vessel for reasons beyond the Owners' control is delayed at Loading Port and/or Discharging Port, including obtaining free pratique, customs, port clearance or other formalities, such delays shall be paid for by the Charterers at the demurrage rate stipulated in Box 19.

(d) Unless the Cargo is described as a full and complete cargo in Box 5, the Owners shall have the liberty of re-stowing the Cargo and of loading and of discharging other part cargoes for the account of other than the Charterers from places enroute or not enroute to places enroute or not enroute. The rotation of loading and discharging places shall be at the Owners' option. When the Owners exercise such option(s) this shall in no way constitute a deviation, notwithstanding anything else contained in this Charter Party.

4. Loading and Discharging

(a) The Charterers shall have the Cargo in all respects ready for the said voyage at the Loading Port on the date for which notice of expected load readiness is given by the Owners as per Clause 9 (Advance Notices), but not before the date stated in Box 10 as first layday.

The Charterers shall nominate the precise loading area or place within the agreed Loading Port, which shall be always safe and accessible and suitable for the loading operation, upon receipt of the first notice given by the Owners pursuant to Clause 9 (Advance Notices), always subject to the approval of the Owners and the Master. Such approval shall not be unreasonably withheld.

(b) The Owners shall provide the equipment stated in Box 4 or in Annex A (Demarcation of Scope of Work) and shall in their own time and at their own expense prepare such equipment for the loading operations. All other equipment shall be provided by the Charterers. When the Cargo has been loaded and positioned, it shall be seafastened and/or lashed by the Owners at their expense, unless otherwise agreed in Annex A

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(Demarcation of Scope of Work), to the satisfaction of the Master.

(c) At the loading port, the Cargo shall be delivered by the Charterers without delay in the sequence required by the Master at any time during day or night, Saturdays, Sundays (or their local equivalent) and holidays included and shall be loaded by one or more of the following methods stated in Box 8:

(i) *If agreed in Box 8 that the Charterers shall perform the loading operations, the Cargo shall be placed on board and positioned by the Charterers to the full satisfaction of the Master. The Charterers shall procure and pay for all labour and all necessary equipment other than that stated in Box 4. The Charterers shall have free use of the Vessel's gear operated by the Vessel's crew.

(ii) *If agreed in Box 8 that the Cargo shall be loaded by means of float-on method, the Charterers shall position the Cargo prior to loading at 50 metres or at an agreed distance from the Vessel's submerged deck to the full satisfaction of the Master. The Owners shall attach lines to the Cargo and shall position and secure the Cargo over the submerged deck by using winches and/or tugs. The Owners shall procure and pay the necessary labour and winchmen either from the crew or from shore.

The Charterers shall procure and pay for workboats and tugs required for the positioning of the cargo. The Owners shall have the right to use such workboats and tugs for the loading operation.

** Indicate alternative(s) (i) or (ii), as agreed, in Box 8.*

(d) The Charterers shall name the precise discharging area or place within the discharging port, which shall be always safe and accessible and suitable for the discharging operation, well in advance of the Vessel's arrival, always subject to the approval of the Owners and the Master. Such approval shall not be unreasonably withheld.

At the discharging port the Charterers shall take delivery of the Cargo without delay in accordance with sub-clause (f) at any time during day or night, Saturdays, Sundays (or their local equivalent) and holidays included.

The entire discharge operation always to be done to the full satisfaction of the Master.

(e) Prior to actual discharge the Owners shall, unless otherwise agreed in Annex A (Demarcation of Scope of Work), remove all seafastening and/or lashing and prepare the Vessel for the discharge operation.

(f) The Cargo shall be discharged by one or more of the following methods stated in Box 9:

(i) *If agreed in Box 9 that the Charterers shall discharge the Cargo, the Charterers shall procure and pay for the necessary equipment and labour. The Charterers shall have free use of the Vessel's gear operated by the Vessel's crew.

(ii) *If agreed in Box 9 that the Cargo shall be discharged by means of float off method, the Owners shall submerge the Vessel and float-off the Cargo. The Owners shall procure and pay the necessary labour and winchmen either from the crew or from shore.

The Charterers shall procure and pay for workboats and tugs required for discharging the Cargo. The Owners shall have the right to use such workboats and tugs for the discharging operations.

** Indicate alternative(s) (i) or (ii), as agreed, in Box 9.*

(g) All expenses associated with the Vessel such as harbour dues, pilotages, local tug assistance, if required, agency fees, fuel and lubricants shall be paid for by the Owners except as otherwise provided for in this Charter Party.

(h) Any compulsory shore labour connected with loading operations, lashing/seafastening, removal of lashing/seafastening and/or discharging operations required by local authorities or union regulations shall be for the Charterers' account.

5. Permits/Licences

(a) All necessary permits and/or licences pertaining to the loading and/or discharging operations shall be provided and paid for by the Charterers, unless such permits and/or licences can only be obtained by the Owners, in which case they shall be provided by the Owners but paid for by the Charterers.

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The Owners and the Charterers shall assist each other in obtaining such permits and/or licences.

(b) Any delay caused by the Charterers in obtaining the permits and/or licences related to sub-clause 5(a) shall be at the Charterers' time and any time lost shall be paid for at the demurrage rate stipulated in Box 19.

6. Duties, Taxes and Charges
The Charterers shall pay all duties, taxes and charges whatsoever levied or based on the Cargo and/or the freight at the Loading Port and/or Discharging Port irrespective of how the amount thereof may be assessed, including agency commission assessed on the basis of the freight.

7. Quarantine
Unless due to health conditions on board the Vessel, any time lost as a result of quarantine formalities and/ or health restrictions imposed or incurred at any stage of the voyage, including any such loss of time at the Loading Port and/or the Discharging Port, shall be paid for by the Charterers at the demurrage rate specified in Box 19. The Charterers shall also pay for all other expenses which may be incurred as a result thereof.

8. Commencement of Loading/Cancelling Date
(a) The first layday shall be on or between the dates stated in Box 10 ("the Period").

(b) The Period shall be narrowed down to one firm date ("the First Layday") in accordance with the notification schedule in Box 11. If Box 11 is not filled in then the notification schedule is in Owner's option.

(c) Each narrowed Period shall always be within the previously notified Period and the number of days' notice shall always be prior to the first day of the previously notified Period.

(d) The cancelling date shall be the number of days stated in Box 12 after the First Layday ("the Cancelling Date"). If Box 12 is not filled in then fourteen (14) days shall apply.

(e) The date of commencement of the loading shall be at any time on or between the First Layday and the Cancelling Date, both dates inclusive, in the Owners' option. Should the Owners give notice of readiness prior to the First Layday, the Charterers may, at their option, accept such an earlier loading date and the time used shall count against the free time in accordance with Clause 13 (Free Time/Demurrage).

(f) Should it appear that the Vessel will not be ready to commence loading latest on the Cancelling Date the Owners shall immediately notify the Charterers. The Owners shall state a new cancelling date as soon as they are in a position to do so with reasonable certainty.

Within seventy-two (72) running hours after receipt of the Owners' notice as aforesaid and latest when the Vessel is ready for loading, whichever is the earlier, the Charterers shall advise the Owners whether they elect to cancel this Charter Party, failing such advice the new cancelling date as notified by the Owners shall become the Cancelling Date.

(g) Should the Charterers cancel the Charter Party in accordance with sub-clause (f), any amount paid to the Owners in advance and not earned shall be returned to the Charterers by the Owners.

(h) The Owners shall not be responsible for any loss or damages whatsoever incurred by the Charterers as a result of the Charterers cancelling this Charter Party in accordance with sub-clause (f) nor shall the Owners be responsible for any loss or damages whatsoever suffered by the Charterers as a result of the failure of the Vessel to be ready for loading latest on the Cancelling Date.

(i) Should the Cargo for reasons beyond the Owners' control not be loaded within fourteen (14) days after the free time for loading stated in Box 18 has expired, the Owners shall have the option to cancel this Charter Party or to sail with only part of the Cargo on board.

(j) If the Owners exercise their option to cancel the Charter Party in accordance with sub-clause (i), the Charterers shall pay to the Owners the applicable termination fee according to the provisions of Clause 21 (Termination) in addition to any demurrage incurred.

(k) If the Owners exercise their option to sail with part of the Cargo on board in accordance with sub-clause (i) the Charterers shall pay to the Owners the full freight stated in Box 16 in addition to any demurrage incurred.

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9. Advance Notices

(a) Advance Notices of Expected Load-readiness
The Owners shall give notices of the expected day of the Vessel's arrival and/or readiness to load fourteen (14) days, seven (7) days and three (3) days in advance unless otherwise stated in Box 13. Furthermore, the Owners shall give twenty-four (24) hours approximate notice of the expected hour of the Vessel's readiness to load.

(b) During the voyage the Owners shall give notice of expected time of arrival at the Discharging Port with intervals of the number of days stipulated in Box 14.

10. Notice of Readiness

The Owners shall give notice of readiness as per Box 13 advising when the Vessel is ready to commence loading at the loading port and when the Vessel is ready to commence discharge at the discharging port as per Box 14. All notices may be given at any time of the day or night, Saturdays, Sundays (or their local equivalent) and holidays included and notwithstanding hindrances as referred to in Clause 3(c) (Deviation/ Delays/Part Cargo).

11. Marine Surveyor/Condition of the Vessel and Cargo

(a) The Marine Surveyor(s) stated in Box 15 shall be appointed for this Transportation. If Box 15 has not been filled in the Charterers and the Owners shall agree on the appointment of Marine Surveyor(s) acceptable to the cargo underwriters.

(b) All relevant documentation required by the Marine Surveyor(s) for their approval of the Transportation shall be submitted to the Marine Surveyor at the earliest possible stage after this Charter Party is concluded, if not already submitted earlier. As soon as possible after submission of the relevant documentation, Transportation approval shall be given by the Marine Surveyor.

(c) The Charterers shall pay all expenses relating to the production of documentation related to the Cargo and/or the Charterers' equipment. The Owners shall pay all expenses relating to documentation related to the Vessel and all other equipment being provided by the Owners in the performance of the Transportation.

(d) The Charterers shall arrange and pay for all the Marine Surveyor(s) services, including approval of the Transportation.

(e) The Charterers warrant that the full description of the Cargo stated in Box 5 is correct and further warrant that the Cargo is in all respects tight, staunch, strong and in every way fit for the Transportation.

(f) Should the Cargo and/or its description not be in compliance with the aforesaid then the Owners shall have the option to cancel this Charter Party.

(g) If the Owners exercise their option to cancel the Charter Party in accordance with this Clause, the Charterers shall pay to the Owners the applicable termination fee according to the provisions of Clause 21 (Termination).

12. Freight

(a) The freight stipulated in Box 16 shall be paid in instalments in accordance with Box 17. If Box 17 is not completed then freight shall be fully prepaid upon completion of loading against surrender of the HEAVYCONRECEIPT 2007 or HEAVYCONBILL 2007 whichever the case may be. The freight shall be deemed earned upon completion of loading and shall be non-returnable whether the Vessel and/or Cargo is lost or not lost and whether lost due to perils of the sea or howsoever. The freight instalments shall be paid in full without any deductions in the currency and to the Owners' bank account stated in Box 17.

(b) In the event of change in applicable laws or regulations and/or interpretation thereof, resulting in an unavoidable and documented change of the Owners' costs after the date of entering into the Charter Party, freight shall be adjusted accordingly.

13. Free Time/Demurrage

(a) The Charterers are allowed the free time stipulated in Box 18 in the loading and discharging port(s) and for canal transit if applicable, Saturdays, Sundays (or their local equivalent) and holidays included.

The free time at the Loading Port shall start counting when notice of readiness has been tendered, in accordance with Clause 10 (Notice of Readiness), whether in berth or not, unless loading has commenced earlier and shall count until the cargo is in all respects fully seafastened on board the Vessel and approved

by the Marine Surveyor(s).

The free time at the Discharging Port shall start counting when notice of readiness has been tendered in accordance with Clause 10 (Notice of Readiness), whether in berth or not, unless discharge has commenced earlier and shall count until the cargo is in all respects removed from the Vessel.

(b) Demurrage shall be payable for all time used in excess of the free time. The demurrage rate for the Vessel is the amount stipulated in Box 19 calculated per day or pro rata for part of a day.

(c) Free time shall not count and if the Vessel is on demurrage, demurrage shall not accrue for time lost by reason of deficiency of the Master, officers or crew or strike or lockout of the Master, officers or crew or by reason of breakdown of the Vessel or its equipment.

(d) Demurrage and other amounts which are calculated at the demurrage rate fall due day by day and are payable by the Charterers promptly, upon presentation of the Owners' invoice, to the Owners' bank account stated in Box 17.

14. Mobilisation/Demobilisation
(a) Mobilisation
If agreed upon in Box 20 the Charterers shall pay the lump sum stipulated therein in respect of mobilisation, which amount shall be earned and non-returnable upon the Vessel's arrival in the loading port.

(b) Demobilisation
If agreed upon in Box 21 the Charterers shall pay the lump sum stipulated therein in respect of demobilisation, which amount shall be earned and non-returnable upon the Vessel's arrival in the discharging port.

(c) The mobilisation and demobilisation amounts shall be payable against the Owners' invoice.

15. Canal Transit
(a) If the Transportation is scheduled to pass through the canal stated in Box 7, the Charterers shall be granted free time for any such transit, and such free time shall count against the number of hours stipulated in Box 18. If the Transportation is delayed beyond the free time stipulated therein, the Charterers shall pay for such extra transit time at the rate of demurrage stipulated in Box 19 and paid in accordance with Clause 13(d) (Free Time/Demurrage) and shall, in addition, pay for all other documented extra expenses thereby incurred. Canal transit time is defined as from arrival at pilot station or customary waiting place or anchorage, whichever is the earlier, and until dropping last outbound pilot when leaving for the open sea.

(b) The freight rate stipulated in Box 16 is based upon the Owners paying canal tolls limited to the amount stipulated in Box 22. Any increase in the canal tolls and/or any additional expenses imposed on the Transportation for the canal transit actually paid by the Owners shall be reimbursed by the Charterers to the owners upon presentation of the Owners' invoice.

(c) Should the transit of a canal be made impossible for reasons beyond the Owners' control, the Charterers shall pay for all extra time by which the voyage is thereby prolonged at the rate of demurrage stipulated in Box 19 and paid in accordance with Clause 13(d) (Free Time/Demurrage).

The Charterers shall also pay all other expenses, including for bunkers, in addition to those which would normally have been incurred had the Vessel been standing-by in port less the amount of canal tolls saved by the Owners for not having transitted the canal.

(d) Notwithstanding the provisions of sub-clause (c) the Owners may, at their sole discretion, instruct the Master to discharge the cargo at the nearest safe and reachable port or place and such discharge shall be deemed due fulfilment of the Charter Party. All provisions of this Charter Party regarding freight, discharge of the cargo, free time and demurrage as agreed for the original discharging port shall also apply to the discharge at the substitute port.

16. Bunker Escalation
This Charter Party is concluded on the basis of the price per metric ton and the quantity and grades of bunkers stated in Box 23.

If the price actually paid by the Owners for this quantity of bunkers should be higher, the difference shall be paid by the Charterers to the Owners.

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If the price actually paid by the Owners for this quantity of bunkers should be lower, the difference shall be paid by the Owners to the Charterers.

17. BIMCO Ice Clause for Voyage Charter Parties

The Vessel shall not be obliged to force ice but, subject to the Owners' approval having due regard to its size, construction and class, may follow ice-breakers.

(a) Port of Loading

(i) If at any time after setting out on the approach voyage the Vessel's passage is impeded by ice, or if on arrival the loading port is inaccessible by reason of ice, the Master or Owners shall notify the Charterers thereof and request them to nominate a safe and accessible alternative port.

If the Charterers fail within 48 running hours, Sundays and holidays included, to make such nomination or agree to reckon laytime as if the port named in the Charter Party were accessible or declare that they cancel the Charter Party, the Owners shall have the option of cancelling the Charter Party. In the event of cancellation by either party, the Charterers shall compensate the Owners for all proven loss of earnings under this Charter Party.

(ii) If at any loading port the Master considers that there is a danger of the Vessel being frozen in, and provided that the Master or Owners immediately notify the Charterers thereof, the Vessel may leave with cargo loaded on board and proceed to the nearest safe and ice free place and there await the Charterers' nomination of a safe and accessible alternative port within 24 running hours, Sundays and holidays excluded, of the Master's or Owners' notification. If the Charterers fail to nominate such alternative port, the vessel may proceed to any port(s), whether or not on the customary route for the chartered voyage, to complete with cargo for the Owners' account.

(b) Port of Discharge

(i) If the voyage to the discharging port is impeded by ice, or if on arrival the discharging port is inaccessible by reason of ice, the Master or Owners shall notify the Charterers thereof. In such case, the Charterers shall have the option of keeping the Vessel waiting until the port is accessible against paying compensation in an amount equivalent to the rate of demurrage or of ordering the Vessel to a safe and accessible alternative port.

If the Charterers fail to make such declaration within 48 running hours, Sundays and holidays included, of the Master or Owners having given notice to the Charterers, the Master may proceed without further notice to the nearest safe and accessible port and there discharge the cargo.

(ii) If at any discharging port the Master considers that there is a danger of the Vessel being frozen in, and provided that the Master or Owners immediately notify the Charterers thereof, the Vessel may leave with cargo remaining on board and proceed to the nearest safe and ice free place and there await the Charterers' nomination of a safe and accessible alternative port within 24 running hours, Sundays and holidays excluded, of the Master's or Owners' notification. If the Charterers fail to nominate such alternative port, the Vessel may proceed to the nearest safe and accessible port and there discharge the remaining cargo.

(c) On delivery of the cargo other than at the port(s) named in the Charter Party, all conditions of the Bill of Lading shall apply and the Vessel shall receive the same freight as if discharge had been at the original port(s) of destination, except that if the distance of the substituted port(s) exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port(s) shall be increased proportionately.

18. Dangerous Cargo

If part of the Cargo is of an inflammable, explosive or dangerous nature or condition or at any stage may develop into such nature or condition it must be packed and stored or stowed in accordance with the IMO Dangerous Goods Code and/or other applicable regulations always to the full satisfaction of the Master. Any delay to the Transportation in this respect shall be paid for by the Charterers at the demurrage rate stipulated in Box 19 and in accordance with Clause 13(d) (Free Time/Demurrage).

19. Lien

The Owners shall have a lien on the Cargo and any Charterers' equipment for all freight and all other expenses in relation to the Transportation, deadfreight, advances, demurrage, damages for detention, general average and salvage including costs for recovering same.

20. Substitution

The Owners shall, at any time before the Cancelling Date, be entitled to substitute the Vessel named in Box 4

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with another vessel of equivalent capability and capacity, provided such substitute vessel is approved by the Marine Surveyor(s) and subject also to the Charterers' prior approval, which shall not be unreasonably withheld. Nothing herein shall be construed as imposing on the Owners an obligation to make such substitution.

21. Termination

(a) Notwithstanding anything else provided herein, the Charterers shall have the right to terminate this Charter Party prior to the Vessel's arrival at the first loading port against payment of the applicable amount stated in Box 24 less any prepaid freight.

(b) Furthermore, the Charterers shall have the right to terminate this Charter Party after the Vessel's arrival at the first loading port but not later than upon commencement of loading against payment of the applicable amount stated in Box 24 plus compensation for all time spent at the first loading port at the demurrage rate stated in Box 19 less any prepaid freight together with the actual expenses incurred by the Owners in preparation for the loading.

(c) If Box 24 is not filled in, this Clause shall be deemed to be deleted.

22. Liabilities and Indemnities

(a) Definitions

For the purpose of this Clause "Owners' Group" shall mean: the Owners, and their contractors and sub-contractors, and employees of any of the foregoing.

For the purpose of this Clause "Charterers' Group" shall mean: the Charterers, and their contractors, sub-contractors, co-venturers and customers (having a contractual relationship with the Charterers, always with respect to the job or project on which the Vessel is employed), and employees of any of the foregoing.

(b) Knock for Knock

(i) Owners - Notwithstanding anything else contained in this Charter Party excepting Clauses 24(b) (Pollution), 29 (Both to Blame Collision Clause) and 30 (General Average and New Jason Clause), the Charterers shall not be responsible for loss of or damage to the property of any member of the Owners' Group, including the Vessel, any liability in respect of wreck removal and the expense of moving, lighting or buoying the Vessel, any liability in respect of personal injury or death of any member of the Owners' Group, and any liability in respect of other cargo on board not the subject of this Charter Party, arising out of or in any way connected with the performance of this Charter Party, even if such loss, damage, injury or death is caused wholly or partially by the act, neglect, or default of the Charterers' Group, and even if such loss, damage, injury or death is caused wholly or partially by unseaworthiness of any vessel; and the Owners shall indemnify, protect, defend and hold harmless the Charterers from any and against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of or in connection with such loss, damage, personal injury or death.

(ii) Charterers - Notwithstanding anything else contained in this Charter Party excepting Clause 24(a) (Pollution), 29 (Both to Blame Collision Clause) and 30 (General Average and New Jason Clause), the Owners shall not be responsible for loss of or damage caused to or sustained by the Cargo or the property of any member of the Charterers' Group, whether owned or chartered, any liability consequent upon delay to the Cargo, any liability in respect of wreck removal and the expense of moving, lighting or buoying the Cargo, any liability in respect of personal injury or death of any member of the Charterers' Group, arising out of or in any way connected with the performance of this Charter Party, even if such loss, damage, liability, injury or death is caused wholly or partially by the act, neglect or default of the Owners' Group, and even if such loss, damage, liability, injury or death is caused wholly or partially by the unseaworthiness of any vessel; and the Charterers shall indemnify, protect, defend and hold harmless the Owners from any and against all claims, costs, expenses, actions, proceedings, suits, demands, and liabilities whatsoever arising out of or in connection with such loss, damage, liability, personal injury or death.

23. Consequential Damages

Neither party shall be liable to the other for any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Charter Party, and each party shall protect, defend and indemnify the other from and against all such claims from any member of its Group as defined in Clause 22 (Liabilities and Indemnities).

"Consequential damages" shall include, but not be limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance, whether or not foreseeable at the date of this Charter Party.

24. Pollution

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(a) The Owners shall be liable for, and agree to indemnify, defend and hold harmless the Charterers against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of actual or threatened pollution damage and the cost of cleanup or control thereof originating from the Vessel or other property of the Owners.

(b) The Charterers shall be liable for, and agree to indemnify, defend and hold harmless the Owners against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of actual or threatened pollution damage and the cost of cleanup or control thereof originating from the Cargo or other property of the Charterers.

25. Bill of Lading or Cargo Receipt

The Owners and the Charterers shall agree and state in Box 25 whether a Bill of Lading or a non-negotiable Cargo Receipt will be issued by Owners upon loading of the Cargo.

(a) *Bill of Lading

If, as stated in Box 25, the Owners have agreed to issue a Bill of Lading, same shall be as per the HEAVYCONBILL 2007 form which shall incorporate all terms, conditions, liberties, clauses and exceptions of this Charter Party, including the Dispute Resolution Clause. Furthermore, the following Sub-clauses (a)(i) - (a)(iii), which are not part of HEAVYCON, shall be incorporated into the HEAVYCONBILL 2007.

(i) The Owners shall not be liable for any loss, damage or delay to Cargo in the period before loading and after discharge.

(ii) Unless otherwise agreed, the Cargo shall be shipped on deck at Shippers' risk and the Owners not to be responsible for any loss or damage or delay to the Cargo whatsoever and whether due to negligence of whosoever or howsoever arising and by whosoever caused, and the Bill of Lading issued hereunder shall be so claused.

(iii) If the Cargo is shipped under deck,

(1) The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924 ("the Hague Rules") as amended by the Protocol signed at Brussels on 23 February 1968 ("the Hague-Visby Rules") and as enacted in the country of shipment shall apply to this Contract. When the Hague-Visby Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination shall apply, irrespective of whether such legislation may only regulate outbound shipments.

(2) When there is no enactment of the Hague-Visby Rules in either the country of shipment or in the country of destination, the Hague-Visby Rules shall apply to this Contract save where the Hague Rules as enacted in the country of shipment or if no such enactment is in place, the Hague Rules as enacted in the country of destination apply compulsorily to this Contract.

(3) The Protocol signed at Brussels on 21 December 1979 ("the SDR Protocol 1979") shall apply where the Hague-Visby Rules apply, whether mandatorily or by this Contract.
(1) The Carrier shall in no case be responsible for loss of or damage to cargo arising prior to loading, after discharging, or while the cargo is in the charge of another carrier, or with respect to deck cargo and live animals.

(b) *Cargo Receipt

If, as stated in Box 25, the Owners have agreed to issue a non-negotiable Cargo Receipt, same shall be as per the HEAVYCONRECEIPT form incorporating all terms, conditions, liberties, clauses and exceptions of this Charter Party, including the Dispute Resolution Clause.

(i) It is expressly agreed that neither the Hague Rules nor the Hague-Visby Rules nor any statutory enactment thereof shall apply to this Charter Party and to the Cargo Receipt, unless compulsorily applicable, in which case the Owners take all reservations possible under such applicable legislation, relating to the period before loading and after discharging and while the goods are in the charge of another carrier, and to deck cargo.

(ii) Unless otherwise agreed, the Cargo shall be shipped on deck at the Charterers' risk and the Owners not to be responsible for any loss or damage or delay to the cargo whatsoever and whether due to negligence of whosoever or howsoever arising and by whosoever caused, and the Cargo Receipt issued hereunder shall be so claused.

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(iii) If the Cargo is shipped under deck, the Cargo Receipt shall be claused as per sub-clause (ii) above.

(iv) The Cargo Receipt shall always be claused "All Risks Insurance has been placed for the full value of this cargo by the Charterers and in the name of the Charterers and the Owners."

(c) * *Indicate alternative 25(a)(Bill of Lading) or 25(b)(Cargo Receipt), as agreed, in Box 25.*

26. Insurance

(a) Without prejudice to the Charterers' obligations and liabilities under this Charter Party, the Charterers shall ensure that there is taken out and maintained at all material times and throughout the duration of this Charter Party a policy or policies of insurance in respect of all loss or damage to the Cargo up to the full value of the Cargo including but not limited to a policy or policies comprising All Risks cargo cover and cover against liabilities to third parties (including liability in respect of death and injury and claims for consequential loss), and wreck removal of the Cargo. The Charterers shall arrange without cost to the Owners that the Owners shall be named as co-insured under the said policy or policies of insurance and the Charterers shall arrange that the underwriters waive the right of subrogation against the Owners.

The Charterers hereby agree to produce the original certificates of insurance maintained hereunder to the Owners or their appointed representatives when requested so to do.

(b) The Owners shall arrange at their expense such insurance(s) as required to protect the Charterers against the Owners' liabilities under Clause 22 (Liabilities and Indemnities).

The Owners hereby agree to produce the original certificate(s) of insurance maintained hereunder to the Charterers or their appointed representatives when requested to do so.

27. Himalaya Cargo Clause

It is hereby expressly agreed that no servant or agent of the Owners (including every independent contractor from time to time employed by the Owners) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or owner of the Cargo or to any Holder of the Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on their part while acting in the course of or in connection with their employment and, but without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Owners or to which the Owners are entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Owners acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Owners are or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be their servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to this Charter Party.

The Owners shall be entitled to be paid by the Shipper, Consignee, owner of the Cargo and/or Holder of the Bill of Lading (who shall be jointly and severally liable to the Owners therefor) on demand any sum recovered or recoverable by either such Shipper, Consignee, owner of the Cargo and/or Holder of the Bill of Lading or any other from such servant or agent of the Owners for any such loss, damage, delay or otherwise.

28. Salvage

The Owners shall waive their right to claim any award for salvage performed on property owned by or contracted to the Charterers, always provided such property was the object of the operation the Vessel was chartered for, and the Vessel shall remain on hire when rendering salvage services to such property. This waiver is without prejudice to any right the Vessel's Master, officers and crew may have under any title.

If the Owners render assistance to such property in distress on the basis of "no claim for salvage", then, notwithstanding any other provisions contained in this Charter Party and even in the event of neglect or default of the Owners, Master, officers or crew:

(a) The Charterers shall be responsible for and shall indemnify the Owners against payments made, under any legal rights, to the Master, officers and crew in relation to such assistance.

(b) The Charterers shall be responsible for and shall reimburse the Owners for any loss or damage sustained by the Vessel or her equipment by reason of giving such assistance and shall also pay the Owners' additional expenses thereby incurred.

(c) The Charterers shall be responsible for any actual or potential spill, seepage and/or emission of

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any pollutant howsoever caused occurring within the offshore site and any pollution resulting therefrom wheresoever it may occur and including but not limited to the cost of such measures as are reasonably necessary to prevent or mitigate pollution damage, and the Charterers shall indemnify the Owners against any liability, cost or expense arising by reason of such actual or potential spill, seepage and/or emission.

(d) The Charterers shall indemnify the Owners against any liability, cost and/or expense whatsoever in respect of any loss of life, injury, damage or other loss to person or property howsoever arising from such assistance.

29. Both-to-Blame Collision Clause

If the Vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, neglect or default of the Master, mariner, pilot or the servants of the Owners in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Owners against all loss or liability to the other or non-carrying vessel or her Owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of the said cargo, paid or payable by the other or non-carrying vessel or her owners to the owners of said cargo and set-off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying vessel or Owners.

The foregoing provisions shall also apply where the owners, operators or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

30. General Average and New Jason Clause

General average shall be adjusted and settled in London unless otherwise stated in Box 26, according to the York/Antwerp Rules, 1994, but if, notwithstanding the provisions specified in Box 26, the adjustment is made in accordance with the law and practice of the United States of America, the following clause shall apply:

"In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, Owners are not responsible, by statute, contract or otherwise, the goods, shippers, consignees or owners of the goods shall contribute with Owners in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods. If a salving vessel is owned or operated by Owners, salvage shall be paid for as fully as if the said salving vessel or vessels belonged to strangers. Such deposit as Owners, or their agents, may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to Owners before delivery".

31. War Risks (VOYWAR 2004)

(a) For the purpose of this Clause, the words:

(i) "Owners" shall include the shipowners, bareboat charterers, disponent owners, managers or other operators who are charged with the management of the Vessel, and the Master; and

(ii) "War Risks" shall include any actual, threatened or reported:

War; act of war; civil war; hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy; acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever); by any person, body, terrorist or political group, or the Government of any state whatsoever, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel.

(b) If at any time before the Vessel commences loading, it appears that, in the reasonable judgement of the Master and/or the Owners, performance of the Charter Party, or any part of it, may expose, or is likely to expose, the Vessel, her cargo, crew or other persons on board the Vessel to War Risks, the Owners may give notice to the Charterers cancelling this Charter Party, or may refuse to perform such part of it as may expose, or may be likely to expose, the Vessel, her cargo, crew or other persons on board the Vessel to War Risks; provided always that if this Charter Party provides that loading or discharging is to take place within a range of ports, and at the port or ports nominated by the Charterers the Vessel, her cargo, crew, or other persons onboard the Vessel may be exposed, or may be likely to be exposed, to War Risks, the Owners shall first require the Charterers to nominate any other safe port which lies within the range for loading or discharging, and may only cancel this Charter Party if the Charterers shall not have nominated such safe

port or ports within 48 hours of receipt of notice of such requirement.

(c) The Owners shall not be required to continue to load cargo for any voyage, or to sign Bills of Lading for any port or place, or to proceed or continue on any voyage, or on any part thereof, or to proceed through any canal or waterway, or to proceed to or remain at any port or place whatsoever, where it appears, either after the loading of the cargo commences, or at any stage of the voyage thereafter before the discharge of the cargo is completed, that, in the reasonable judgement of the Master and/or the Owners, the Vessel, her cargo (or any part thereof), crew or other persons on board the Vessel (or any one or more of them) may be, or are likely to be, exposed to War Risks. If it should so appear, the Owners may by notice request the Charterers to nominate a safe port for the discharge of the cargo or any part thereof, and if within 48 hours of the receipt of such notice, the Charterers shall not have nominated such a port, the Owners may discharge the cargo at any safe port of their choice (including the port of loading) in complete fulfilment of the Charter Party. The Owners shall be entitled to recover from the Charterers the extra expenses of such discharge and, if the discharge takes place at any port other than the loading port, to receive the full freight as though the cargo had been carried to the discharging port and if the extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the normal and customary route, the Owners having a lien on the cargo for such expenses and freight.

(d) If at any stage of the voyage after the loading of the cargo commences, it appears that, in the reasonable judgement of the Master and/or the Owners, the Vessel, her cargo, crew or other persons on board the Vessel may be, or are likely to be, exposed to War Risks on any part of the route (including any canal or waterway) which is normally and customarily used in a voyage of the nature contracted for, and there is another longer route to the discharging port, the Owners shall give notice to the Charterers that this route will be taken. In this event the Owners shall be entitled, if the total extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the normal and customary route.

(e) (i) The Owners may effect war risks insurance in respect of the Hull and Machinery of the Vessel and their other interests (including, but not limited to, loss of earnings and detention, the crew and their Protection and Indemnity Risks), and the premiums and/or calls therefor shall be for their account.

(ii) If the Underwriters of such insurance should require payment of premiums and/or calls because, pursuant to the Charterers' orders, or in order to fulfil the Owners' obligation under this Charter Party, the Vessel is within, or is due to enter and remain within, or pass through any area or areas which are specified by such Underwriters as being subject to additional premiums because of War Risks, then the actual premiums and/or calls paid shall be reimbursed by the Charterers to the Owners within 14 days after receipt of the Owners' invoice. If the Vessel discharges all of her cargo within an area subject to additional premiums as herein set forth, the Charterers shall reimburse the Owners for the actual additional premiums paid which may accrue from completion of discharge until the Vessel leaves such area or areas referred to above. The Owners shall leave the area as soon as possible after completion of discharge.

(f) The Vessel shall have liberty:-

(i) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery or in any way whatsoever which are given by the Government of the Nation under whose flag the Vessel sails, or other Government to whose laws the Owners are subject, or any other Government which so requires, or any body or group acting with the power to compel compliance with their orders or directions;

(ii) to comply with the orders, directions or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance;

(iii) to comply with the terms of any resolution of the Security Council of the United Nations, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement;

(iv) to discharge at any other port any cargo or part thereof which may render the Vessel liable to confiscation as a contraband carrier;

(v) to call at any other port to change the crew or any part thereof or other persons on board the Vessel when there is reason to believe that they may be subject to internment, imprisonment or other sanctions;

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(vi) where cargo has not been loaded or has been discharged by the Owners under any provisions of this Clause, to load other cargo for the Owners' own benefit and carry it to any other port or ports whatsoever, whether backwards or forwards or in a contrary direction to the ordinary or customary route.

(g) If in compliance with any of the provisions of sub-clauses (b) to (e) of this Clause anything is done or not done, such shall not be deemed to be a deviation, but shall be considered as due fulfilment of the Charter Party.

32. Limitation of Liability
Any provisions of this Charter Party to the contrary notwithstanding, the Owners shall have the benefit of all limitations of, and exemptions from, liability accorded to the owners or chartered owners of vessels by any applicable statute or rule of law for the time being in force, and the same benefits to apply regardless of the form of signatures given to this Charter Party.

33. Interest
If any amounts due under this Charter Party are not paid when due, then interest at the rate of 1.5% per month or pro rata for part of a month shall be paid on all such amounts until payment is received.

34. Agency
The Vessel shall be addressed to Owners' agents at port(s) of loading and discharging.

35. Brokerage
The Owners shall pay a brokerage at the rate stated in Box 28(i) to the Broker(s) mentioned in Box 28(ii) on any freight, demurrage, mobilisation fee, demobilisation fee and/or termination fee paid under this Charter Party.

If the full amounts as aforesaid are not paid owing to breach of this Charter Party by either of the parties, the party liable therefor shall indemnify the Broker(s) against his or their loss of brokerage.

36. BIMCO ISPS/MTSA Clause for Voyage Charter Parties 2005
(a) (i) The Owners shall comply with the requirements of the International Code for the Security of Ships and of Port Facilities and the relevant amendments to Chapter XI of SOLAS (ISPS Code) relating to the Vessel and "the Company" (as defined by the ISPS Code). If trading to or from the United States or passing through United States waters, the Owners shall also comply with the requirements of the US Maritime Transportation Security Act 2002 (MTSA) relating to the Vessel and the "Owner" (as defined by the MTSA).

(ii) Upon request the Owners shall provide the Charterers with a copy of the relevant International Ship Security Certificate (or the Interim International Ship Security Certificate) and the full style contact details of the Company Security Officer (CSO).

(iii) Loss, damages, expense or delay (excluding consequential loss, damages, expense or delay) caused by failure on the part of the Owners or "the Company"/"Owner" to comply with the requirements of the ISPS Code/MTSA or this Clause shall be for the Owners' account, except as otherwise provided in this Charter Party.

(b) (i) The Charterers shall provide the Owners and the Master with their full style contact details and, upon request, any other information the Owners require to comply with the ISPS Code/MTSA.

(ii) Loss, damages or expense (excluding consequential loss, damages or expense) caused by failure on the part of the Charterers to comply with this Clause shall be for the Charterers' account, except as otherwise provided in this Charter Party, and any delay caused by such failure shall count as laytime or time on demurrage.

(c) Provided that the delay is not caused by the Owners' failure to comply with their obligations under the ISPS Code/MTSA, the following shall apply:

(i) Notwithstanding anything to the contrary provided in this Charter Party, the Vessel shall be entitled to tender Notice of Readiness even if not cleared due to applicable security regulations or measures imposed by a port facility or any relevant authority under the ISPS Code/MTSA.

(ii) Any delay resulting from measures imposed by a port facility or by any relevant authority under the ISPS Code/MTSA shall count as laytime or time on demurrage, unless such measures result solely from the

negligence of the Owners, Master or crew or the previous trading of the Vessel, the nationality of the crew or the identity of the Owners' managers.

(d) Notwithstanding anything to the contrary provided in this Charter Party, any costs or expenses whatsoever solely arising out of or related to security regulations or measures required by the port facility or any relevant authority in accordance with the ISPS Code/MTSA including, but not limited to, security guards, launch services, vessel escorts, security fees or taxes and inspections, shall be for the Charterers' account, unless such costs or expenses result solely from the negligence of the Owners, Master or crew or the previous trading of the Vessel, the nationality of the crew or the identity of the Owners' managers. All measures required by the Owners to comply with the Ship Security Plan shall be for the Owners' account.

(e) If either party makes any payment which is for the other party's account according to this Clause, the other party shall indemnify the paying party.

37. Double Banking

(a) The Charterers shall have the right, where and when it is customary and safe for vessels of similar size and type to do so, to perform the loading and/or discharging operations while the Vessel lies or remains alongside another vessel or vessels of any size or description whatsoever or to order such vessels to come and remain alongside at such safe dock, wharf, anchorage or other place for transhipment, loading or discharging of the Cargo.

(b) The Charterers shall pay for and provide such assistance and equipment as may be required to enable any of the operations mentioned in this clause safely to be completed and shall give the Owners such advance notice as they reasonably can of the details of any such operations.

(c) Without prejudice to the generality of the Charterers' rights under (a) and (b), it is expressly agreed that the Master shall have the right to refuse to allow the Vessel to perform as provided in (a) and (b) if in his reasonable opinion it is not safe so to do.

(d) The Owners shall be entitled to insure any deductible under the Vessel's hull policy and the Charterers shall reimburse the Owners any additional premium(s) stated in Box 27(i) required by the Vessel's Underwriters and/or the costs stated in Box 27(ii) of insuring any deductible under the Vessel's hull policy.

38. Confidentiality

All information or data provided or obtained in connection with the performance of this Charter Party is and shall remain confidential and not be disclosed without the prior written consent of the other party except as may be required by either party to comply with their obligations under this Charter Party. The parties shall use their best efforts to ensure that such information shall not be disclosed to any third party by any of their sub-contractors, employees and agents. This Clause shall not apply to any information or data that has already been published or is in the public domain.

All information and data provided by a party is and shall remain the property of that party.

39. BIMCO Dispute Resolution Clause

(a) *This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint Its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the

appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

(b) *This Charter Party shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Charter Party shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgment may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.

(c) *This Charter Party shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(d) Notwithstanding (a), (b) or (c) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Charter Party.

In the case of a dispute in respect of which arbitration has been commenced under (a), (b) or (c) above, the following shall apply:

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within 14 calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further 14 calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(v) Either party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.

(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are disclosable under the law and procedure governing the arbitration.

(Note: The parties should be aware that the mediation process may not necessarily interrupt time limits.)

If Box 29 is not appropriately filled in, sub-clause (a) of this Clause shall apply. Sub-clause (d) shall apply In all cases.

* *Sub-clauses (a), (b) and (c) are alternatives; indicate alternative agreed in Box 29.*

40. BIMCO Notices Clause

(a) All notices given by either party or their agents to the other party or their agents in accordance with the provisions of this Charter Party shall be in writing.

(b) For the purposes of this Charter Party, "in writing" shall mean any method of legible communication. A notice may be given by any effective means including, but not limited to, cable, telex, fax, e-mail, registered

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or recorded mail, or by personal service.

41. Entire Agreement

This Charter Party, including all Annexes referenced herein and attached hereto, constitutes the entire agreement of the parties and no promise, undertaking, representation, warranty or statement by either party prior to the date of this Charter Party stated in Box 1 shall affect this Charter Party. Any modification of this Charter Party shall not be of any effect unless in writing signed by or on behalf of the parties.

APPENDIX 9

Heavyliftvoy*

BIMCO

HEAVYLIFTVOY

HEAVY LIFT VOYAGE CHARTER PARTY

PART I

First published 2009

Explanatory Notes for HEAVYLIFTVOY are available from BIMCO at www.bimco.org

1. Place and date of Contract (Cl. 43)

2. Carrier/Place of business (Definitions) (Cl. 1)	3. Merchant/Place of business (Definitions) (Cl. 1)

4. Vessel (name, type and other particulars) (Definitions) (Cl. 1 and 5)

5. Cargo (state whether complete, sole or part cargo) (Definitions, Cl. 1, 2 and 26)

Description	Number	Dimensions	Weight	m³	Deck option

6. Loading port(s) (Definitions) (Cl. 1)	7. Discharging port(s) (Definitions) (Cl. 1)
8. Loading conditions (Cl. 9 and 10) (indicate either (i) or (ii) to apply) (I) free-in: laytime: hours (II) liner-in hook:	9. Discharging conditions (Cl. 14 and 15) indicate either (i) or (ii) to apply) (I) free-out: laytime: hours (II) liner-out hook:
10. Layday period (Cl. 6) (I) First layday (II) Cancelling date	11. Standard of lashing/sea fastening (Cl. 11)
12. Notification Schedule (Cl. 8) (I) Loading port: (II) Discharging port:	13. Notices to be given to (Cl. 8)
14. Certificate of weight (Cl. 2(c)) (state weight of cargo)	15. Freight (Cl. 18)
16. Freight and demurrage etc., payment (amount, currency and where payable; also state Carrier's bank account) (Cl. 18)	17. Freight tax (Cl. 23 and 24) (state whether payable by Carrier or Merchant)
18. Demurrage/Damages for detention rate per day (Cl. 9, 10, 12, 13, 14, 15, 16, 22 and 30))	19. Bunker price adjustment (Cl. 25) (i) Source of bunker price: (ii) Grade of bunkers (IFO 380/IFO 180/MDO/MGO): (iii) Bunker port: (iv) Bunker adjustment factor (state percentage):
20. Cumulative waiting time (Cl. 13 and 17) (state max. number of hours)	

Version 1.1

(continued)

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Heavy Lift Voyage Charter Party **PART I**

Continued

21. Transit time (Cl. 1(d)) (complete only if Cl. 1(d) to apply) (i) Max. Number of days: (ii) Daily damages rate: (iii) Total damages:	22. Arrival at discharge port (Cl. 1(e)) (complete only if Cl. 1(e) to apply) (i) Latest arrival date: (ii) Daily damages rate: (iii) Total damages:
23. Canal transit (Cl. 22) (i) Canal: (ii) Maximum transiting hours:	24. Termination fees (state amount) (Cl. 30)
25. General average shall be adjusted/settled at (Cl. 36)	26. Brokerage and to whom payable (Cl. 40) (i) Rate: (ii) Broker(s):
27. Dispute resolution (state whether alternative (a), (b) or (c) of Clause 41 agreed) **(c) -**	28. Number of additional clauses covering special provisions, if agreed

It is mutually agreed between the party stated in Box 2 (hereinafter called "the Carrier") and the party stated in Box 3 (hereinafter called "the Merchant") that this contract shall be performed subject to the terms and conditions of this Contract which consists of PART I including additional clauses, if any agreed and stated in Box 28, and PART II. In the event of a conflict of terms and conditions, the provisions of PART I and any additional clauses, if agreed, shall prevail over those of PART II to the extent of such conflict but no further.

Signature (Carrier)	Signature (Merchant)

PART II
HEAVYLIFTVOY - Heavy Lift Voyage Charter Party

SECTION 1 – DEFINITIONS AND VOYAGE

Definitions

"The Carrier" shall mean the party stated in Box 2.

"The Merchant" includes the party stated in Box 3, the shipper, receiver, consignee, the holder of the Bill of Lading, the owner of the Cargo and any person entitled to the possession of the Cargo.

"The Vessel" shall mean the vessel stated in Box 4. If no vessel is stated in Box 4 then the vessel designated by the Carrier shall be the Vessel.

"Loading Port" shall mean the port(s), place(s) or area(s) specified in Box 6.

"Discharging Port" shall mean the port(s), place(s) or area(s) specified in Box 7.

"The Cargo" shall mean any goods or equipment or other items described in Box 5.

"The Transportation" shall mean the carriage of the Cargo and the loading and discharging and all other operations connected therewith.

Singular/Plural

In this Charter Party the singular includes the plural and vice versa as the context admits or requires.

1. Scope of Voyage

(a) It is agreed between the Carrier and the Merchant that, subject to the terms and conditions of this Charter Party, the Cargo shall be transported by the Vessel from the Loading Port, or so near thereto as she may safely get and lie always safe and afloat, to the Discharging Port, or so near thereto as she may safely get and lie always safe and afloat.

(b) The Carrier shall exercise due diligence in making the Vessel seaworthy before and at the beginning of the loaded voyage.

(c) Unless this Charter Party is for a complete or sole cargo as described in Box 5, the Carrier shall have the liberty of loading and/or discharging other part cargoes for the account of other merchants or shippers from/to port or ports en route or not en route. The rotation of loading and discharging ports or berths in those ports shall be in the Carrier's option.

The Carrier shall be at liberty to tranship, lighter, land and store the Cargo either on shore or afloat and reship and forward the same to the Discharging Port.

The exercise of any of these options by the Carrier shall in no way constitute a deviation, notwithstanding anything else contained in this Charter Party. The Merchant shall procure that the Carrier's options as provided for in this Clause shall be duly incorporated in Bills of Lading issued under this Charter Party.

∗ (d)The Carrier shall use its best endeavours to limit the Vessel's transit time from departure from last Loading Port to tendering notice of readiness at first Discharging Port to the number of days inserted in Box 21. If the transit time is exceeded for any reason within the Carrier's control, the Carrier's liability shall be limited to damages directly sustained by the Merchant but not exceeding the amount stated in Box 21per day pro rata. Total damages shall be limited to the amount stated in Box 21. Delays due to weather and/or engine breakdown shall not be deemed to be within the Carrier's control.

∗(e) The Carrier shall use its best endeavours to ensure that the Vessel arrives at the first Discharging Port by the date inserted in Box 22. If the date of tendering notice of readiness is later than the date stated in Box 22 for any reason within the Carrier's control, the Carrier's liability shall be limited to damages directly sustained by the Merchant but not exceeding the amount stated in Box 22 per day pro rata. Total damages shall be limited to the amount stated in Box 22. Delays due to weather and/or engine breakdown shall not be deemed to be within the Carrier's control.

**Sub-clauses 1(d) and 1(e) are optional provisions which shall only apply if either Box 21 or Box 22 is completed as appropriate.*

SECTION 2 – CARGO

2. Cargo Requirements

(a) The Cargo tendered under this Charter Party shall be fit for Transportation with sufficient internal strength and with any loose parts properly secured, so as to withstand the forces to which it will be subjected during

the loading operation, carriage and discharging operation. The Cargo shall be properly marked to indicate exact place(s) where piece(s) are to be slung and to indicate exact dimensions and weight and, to the extent necessary to enable the Carrier to lift the Cargo in a steady and stable manner, the location of the centre of gravity. Unless otherwise mutually agreed the Cargo shall be properly crated and/or boxed and fully stackable.

(b) The Cargo shall be equipped with sufficient, adequate and safely accessible lifting devices, eyes/lugs or slinging points always with guaranteed sufficient strength for the Transportation, all to the satisfaction of the Carrier. Any and all lifting equipment supplied by the Merchant, such as but not limited to, spreaders, beams, lugs, etc, shall be certified by a recognised classification society.

Any cradle(s)/support(s) for the Cargo shall be safely attached to the Cargo unless otherwise agreed and be of sufficient number and strength and be suitable for the carriage, so as to withstand acceleration forces which may be encountered during the Transportation, all to the satisfaction of the Carrier. If requested, the Merchant shall provide a certificate from a recognised classification society for the cradle(s)/support(s).

The Cargo shall be equipped with sufficient, adequate and safely accessible lashing points/eyes/lugs always with guaranteed sufficient strength for the Transportation, all to the satisfaction of the Carrier.

* (c) The Merchant shall, prior to Transportation, present a certificate of weight to the Carrier certified by an officially recognised authority for any Cargo exceeding the number of metric tons stated in Box 14. The report shall include the weight, and longitudinal and transverse location of the centre of gravity.

**If Box 14 is not filled in then this Sub-clause (c) shall not apply.*

(d) The Merchant shall present and be liable for transport drawings of any cargo exceeding 100 metric tons and for other cargo as required by the Carrier. The drawings shall indicate the position of lifting and lashing eyes and /or points and the position of footprint/cradle and centre of gravity. The drawings shall be presented in autocad and/or dxf format unless otherwise agreed.

(e) Notwithstanding acceptance of the Cargo by the Carrier the Merchant agrees to indemnify and hold the Carrier harmless for all claims, costs, expenses, actions, proceedings, suits, demands, and liabilities whatsoever arising out of or in connection with the Merchant's failure to comply with the requirements of this Clause.

(f) The Carrier shall not be responsible for any loss of or damage to the Cargo resulting from insufficient and/or unseaworthy packing/construction and/or any other failure of the Merchant to protect the Cargo for the loading or discharging or carriage by sea.

3. Cargo Description

(a) Cargo volume:
The volume of the Cargo (in cubic metres) will be assessed on the basis of the extreme length, width and height of each Cargo item, including transport cradle(s)/support(s) whether loose or fixed to the Cargo. Lashing eyes and lifting eyes will also be included in the measurement.

(b) Cargo weight:
The weight of the Cargo (in metric tons) includes the weight of cradle(s)/support(s) whether fixed to the Cargo or loose.

(c) Freight ton:
If the Cargo is described by freight ton, the total freight ton is calculated by taking the sum of the volume or weight (whichever is greatest) of each individual item.

4. Cargo Discrepancy

If there is a discrepancy between the Cargo as described in Box 5, including shipping drawings provided by the Merchant, and the Cargo as tendered:

(a) where such discrepancies result in the Vessel not being able to load and/or accommodate and/or discharge the Cargo as tendered or any part thereof, the Merchant shall be responsible for all costs arising therefrom including but not limited to full deadfreight.

(b) where the volume and/or weight of the Cargo as tendered is greater, and the Carrier agrees to the Transportation, the Carrier has the right to charge additional freight pro rata of volume or weight as well as any

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additional costs the Carrier may thereby incur.

(c) where the volume and/or weight is less, the Carrier has the right to charge full freight for the Cargo as stated in Box 5.

(d) nothing herein shall be construed as imposing on the Carrier an obligation to load any cargo where there is a discrepancy with the Cargo described in Box 5.

SECTION 3 – SUBSTITUTION / LAYDAYS DATE / CANCELLING DATE

5. Substitution

At any time before the Cancelling Date the Carrier shall be entitled to substitute the Vessel with another vessel of equivalent capability and capacity, subject to the Merchant's approval which shall not be unreasonably withheld. Such substitute vessel shall hereinafter be the "Vessel". Nothing herein shall be construed as imposing on the Carrier an obligation to make such substitution.

6. Laydays/Cancelling

(a) The First Layday shall be the date stated in Box 10(i).

(b) The Cancelling Date shall be the date stated in Box 10(ii). If Box 10(ii) is not filled in then the Cancelling Date shall be fourteen (14) calendar days after the First Layday.

(c) The Vessel shall be ready for loading at any time on or between the First Layday and the Cancelling Date, both dates inclusive, in the Carrier's option. Should the Carrier give Notice of Readiness prior to the First Layday, the Merchant may, at his option, accept such an earlier loading date and, in accordance with Sub-clause 9(f), the actual time used prior to the First Layday shall count as laytime.

(d) Should it appear that the Vessel will not be ready to commence loading latest on the Cancelling Date the Carrier shall immediately notify the Merchant. The Carrier shall notify the Merchant of a proposed new cancelling date as soon as it is in a position to do so with reasonable certainty.

(e) Within seventy-two (72) running hours after the Carrier has notified the Merchant of the new cancelling date as aforesaid and latest when the Vessel is ready for loading, whichever is the earlier, the Merchant shall advise the Carrier whether they elect to cancel this Charter Party. Failing such advice the new cancelling date as notified by the Carrier shall become the Cancelling Date.

(f) Should the Merchant cancel the Charter Party in accordance with Sub-clause (e), any amount paid to the Carrier in advance and not earned shall be returned to the Merchant by the Carrier. If Box 24 (Termination fee(s)) is filled in then such termination fees shall not apply to this Clause.

(g) The Carrier shall not be responsible for any direct or indirect loss or damages whatsoever, whether foreseeable or not, incurred by the Merchant as a result of the Merchant cancelling this Charter Party in accordance with Sub-clause (e) nor shall the Carrier be responsible for any direct or indirect loss or damages whatsoever, whether foreseeable or not, suffered by the Merchant as a result of the failure of the Vessel to be ready for loading latest on the Cancelling Date.

7. Notice of Readiness

Upon Vessel's arrival at the customary anchorage or port or if the Vessel is already within the port area, at each port or place of loading and discharging, the Master or his agents shall tender notice to the Merchant that the Vessel is ready to load or discharge cargo, whether in port or not, whether in berth or not, whether customs cleared or not, whether free pratique granted or not.

8. Advance Notices

(a) Advance Notices of Expected Load-readiness

The Carrier shall give notices to the parties named in Box 13 of the expected day of the Vessel's arrival and/or readiness to load fourteen (14) days, seven (7) days and three (3) days in advance unless otherwise stated in Box 12(i). Furthermore, the Carrier shall give twenty-four (24) hours approximate notice of the expected hour of the Vessel's readiness to load.

(b) During the voyage the Carrier shall give notice to the parties named in Box 13 of expected day of arrival at the Discharging Port with intervals of the number of days stipulated in Box 12(ii). Furthermore, the Carrier shall give twenty-four (24) hours approximate notice of the expected hour of the Vessel's readiness

to discharge.

(c) Should the Master become aware of damage to the Cargo during the Transportation, the Carrier shall promptly notify the Merchant.

(d) All notices to be given in accordance with the provisions of Clause 42 (BIMCO Notices Clause).

SECTION 4 – LOADING

9. *Free-in

If Box 8 states "Free-in":

(a) The Merchant shall arrange one good, safe, always accessible and swell free berth or anchorage, suitable for the intended operation, and where the Vessel can lie always afloat.

No later than the time of booking the Merchant shall advise the Carrier of any restrictions of the berth and access, if any, including but not limited to allowable ship's length, beam, draft and air draft.

(b) The Cargo shall be brought alongside the Vessel in a sequence as required by the Carrier and shall be loaded, stowed, lashed and seafastened by the Merchant at his risk and expense. The Carrier shall if so requested by the Merchant provide a stowage plan as soon as reasonably practicable.

(c) The Merchant has free use of Vessel's gear to load the Cargo, in daylight only, otherwise at the Master's discretion. Provided Port Authorities and shore labour unions permit, the Vessel's crew shall operate the gear, as servants of the Merchant. Use of the Vessel's crew shall be subject to ILO Convention (No. 180) or any subsequent amendments thereto regarding rest hours.

(d) The Merchant has free use of lashing materials and dunnage as far as on board. Provided Port Authorities and shore labour unions permit, the Vessel's crew shall assist the Merchant, as servants of the Merchant, in lashing heavy lifts over 20 metric tons unless otherwise agreed. Use of the Vessel's crew shall be subject to ILO Convention (no. 180) or any subsequent amendments thereto regarding rest hours.

(e) If Port Authorities or shore labour unions compel the Vessel to employ shore labour and/or equipment, any charges for such labour and/or equipment, whether used or not, shall be for the Merchant's account.

(f) Allowed laytime at the Loading Port shall be as stated in Box 8, Saturdays, Sundays (or their local equivalents) and holidays included.

Time shall count as laytime at the Loading Port, always in accordance with Sub-clause 6(c), as from the moment the Master tenders Notice of Readiness. Time used in moving from any place of waiting to the loading berth and/or any preparation time for the Vessel to be ready for loading shall not count.

Time shall cease counting when all Cargo is loaded, lashed and secured. Any time by which the time used exceeds the allowed laytime shall be paid as demurrage at the rate stated in Box 18 per day or pro rata.

Time shall not count if lost by reason of deficiency of the Master, officers or crew or strike or lockout of the Master, officers or crew or by reason of breakdown of the Vessel or its equipment.

(g) Any time lost under the provisions of Clauses 2, 4, 19, 27(c) shall count as laytime or if the Vessel is on demurrage, as time on demurrage.

10. *Liner-in hook

If Box 8 states "Liner-in hook":

(a) Unless the nature of the Cargo or any other reason relating to the Cargo dictates the use of a specific loading berth or place, the Carrier shall select, arrange and nominate the loading berth.

(b) If time lost under Clause 12 is due to port congestion the Merchant shall not be liable for the first consecutive seventy-two (72) hours of waiting time after the Carrier has tendered Notice of Readiness.
(c) The Cargo shall be brought alongside the Vessel by the Merchant at his risk and expense, within reach of the Vessel's gear unless otherwise stipulated by the Carrier, and in the sequence and manner required by the Carrier.

(d) The Cargo shall be loaded, stowed, lashed and seafastened by the Carrier. Hooking-on charges shall

be for the Merchant's account. If the custom of the port is for all stevedoring costs for loading to be charged to the Carrier, 50% of such stevedoring costs shall be borne by the Merchant as hooking-on costs.

(e) The Cargo shall be brought alongside for loading as fast as the Vessel can receive, including, if required by the Carrier, outside ordinary working hours notwithstanding any custom of the port, in the Master's option during day, night, Saturdays, Sundays (or their local equivalents) and holidays included.

Detention at the rate as stated in Box 18 or pro rata shall be paid for any time lost after the First Layday, unless caused by reason of deficiency of the Master, officers or crew or strike or lockout of the Master, officers or crew or by reason of breakdown of the Vessel or its equipment. Stand-by costs of stevedores while the Vessel is on detention shall be paid by the Merchant.

(f) Any time lost under the provisions of Clauses 2, 4, 11(b), 19, 27(c) shall count as detention at the rate as stated in Box 18 or pro rata thereof.

11. (a) The Cargo shall be lashed/seafastened in accordance with the standards/regulations set out in Box 11 and to the satisfaction of the Master. If Box 11 is not filled in then the Carrier's lashing/seafastening standards shall apply.

(b) Any additional lashings/seafastenings required by the Merchant or the Cargo interests' Marine Warranty Surveyor shall be for the account of the Merchant.

12. Time lost due to swell, port congestion and/or in waiting for loading berth on Vessel's arrival at or off the port or so near there unto as she may be permitted to approach shall count as laytime or detention (at the rate as stated in Box 18). Time lost due to swell and/or in waiting for berth not to count if the Carrier selected the loading berth as per sub-clause 10(a).

13. In case cumulative time lost due to swell, port congestion and/or waiting for loading berth and/or for the Cargo is over the number of hours stated in Box 20 (or if Box 20 is not filled in then seventy-two (72) hours shall apply) the Carrier shall have the option to cancel this Charter Party or to sail with only part of the Cargo on board. If the Carrier continues to wait, such waiting time shall count as laytime or detention (at the rate as stated in Box 18), unless the Merchant requests the Carrier to sail. If the Carrier continues to wait this shall not be considered as a waiver of any of his rights under this Charter Party, including his rights under this Clause 13 and the Carrier shall remain entitled at any time to cancel this Charter Party or sail with only part of the Cargo on board.

If the Carrier exercises his option at any time to cancel this Charter Party or sail with only part of the Cargo onboard, or if the Merchant requests the Carrier to sail, the Merchant shall be liable to pay deadfreight and accrued demurrage or detention at the rate stated in Box 18.

**Clauses 9 and 10 are options. State in Box 8 which option shall apply. If Box 8 is left blank then Clause 9 shall apply.*

SECTION 5 - DISCHARGING

14. *Free-out

If Box 9 states "Free-out":

(a) The Merchant shall arrange one good, safe, always accessible and swell free berth or anchorage, suitable for the intended operation, and where the Vessel can lie always afloat.

No later than the time of booking the Merchant shall advise the Carrier of any restrictions of the berth and access, if any, including but not limited to allowable ship's length, beam, draft and air draft.

(b) The Cargo shall be unseafastened, unlashed and discharged by the Merchant at his risk and expense.

(c) If deck cleaning, including cutting, grinding, painting and removal and disposal of seafastening material, is required by the Carrier this shall be arranged and paid for by the Merchant.

(d) The Merchant has free use of the Vessel's gear to discharge the Cargo, in daylight only, otherwise at the Master's discretion. Provided Port Authorities and shore labour unions permit, the Vessel's crew shall

operate the gear, as servants of the Merchant. Use of the Vessel's crew shall be subject to ILO Convention (no. 180) or any subsequent amendments thereto regarding rest hours.

(e) Provided Port Authorities and shore labour unions permit, the Vessel's crew shall assist the Merchant, as servants of the Merchant, in unlashing heavy lifts over 20 metric tons unless otherwise agreed. Use of the Vessel's crew shall be subject to ILO Convention (no. 180) or any subsequent amendments thereto regarding rest hours.

Time used for unlashing, unsecuring and deck cleaning shall count as laytime or time on demurrage.

(f) If Port Authorities or shore labour unions compel the Vessel to employ shore labour and/or equipment, any charges for such labour and/or equipment, whether used or not, shall be for the Merchant's account.

(g) Total laytime allowed at the Discharging Port as stated in Box 9, Saturdays, Sundays (or their local equivalents) and holidays included.

Time shall count at the Discharging Port as from the moment the Master tenders Notice of Readiness. Time used in moving from any place of waiting to the discharging berth and/or any preparation time for the Vessel to be ready for discharging shall not count. Should the Cargo not be unlashed, unsecured and discharged and the Vessel cleaned within the agreed laytime, demurrage shall be paid per day or pro rata at the rate as stated in Box 18. Laytime shall not count and if the Vessel is on demurrage, demurrage shall not accrue for time lost by reason of deficiency of the Master, officers or crew or strike or lockout of the Master, officers or crew or by reason of breakdown of the Vessel or its equipment.

(h) All Bills of Lading shall be marked: "free-out".

15. *Liner-out hook

If Box 9 states "Liner-out hook":

(a) Unless the nature of the Cargo or any other reason relating to the Cargo dictates the use of a specific discharging berth or place, the Carrier shall select, arrange and nominate the discharging berth.

(b) If time lost under Clause 16 is due to port congestion the Merchant shall not be liable for the first consecutive seventy-two (72) hours of waiting time after the Carrier has tendered Notice of Readiness.

(c) The Cargo shall be received by the Merchant alongside the Vessel at his risk and expense, within reach of the Vessel's gear unless otherwise stipulated by the Carrier, and in the sequence and manner required by the Carrier.

(d) The Cargo shall be unseafastened, unlashed and discharged by the Carrier. Hooking-off charges shall be for the Merchant's account. If the custom of the port is for all stevedoring costs for discharging to be charged to the Carrier, 50% of such stevedoring costs shall be borne by the Merchant as hooking-off costs.

(e) The Cargo shall be received by the Merchant as fast as the Vessel can discharge, including, if required by the Carrier, outside ordinary working hours notwithstanding any custom of the port, in the Master's option during day, night, Saturdays, Sundays (or their local equivalents) and holidays included.

For any time lost, unless caused by reason of deficiency of the Master, officers or crew or strike or lockout of the Master, officers or crew or by reason of breakdown of the Vessel or its equipment, detention at the rate as stated in Box 18 or pro rata and, if applicable, stand-by costs of stevedores, shall be paid by the Merchant.

16. Time lost due to swell, port congestion and/or in waiting for discharging berth on Vessel's arrival at or off the port or so near there unto as she may be permitted to approach will count as laytime or be charged as time for which damages for detention are due at the rate as stated in Box 18. Time lost due to swell and/or in waiting for berth not to count if the Carrier selected the discharging berth as per sub-clause 15(a).

17. In case cumulative time lost due to swell, port congestion and/or waiting for discharging berth and/or for the Merchant's arrangements to receive the Cargo is over the number of hours stated in Box 20 (or if Box 20 is not filled in then seventy-two (72) hours shall apply) the Carrier shall have the option to order the Vessel to leave the port and discharge (part of) the Cargo in a port at the Carrier's option. The Carrier may agree at the Merchant's request to continue to wait and such waiting time shall count towards laytime or as time on demurrage or detention (at the rate as stated in Box 18). Such agreement by the Carrier to continue waiting shall not be considered as a waiver of any of his rights under this Charter Party, including his rights under this

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Clause 17, and the Carrier shall at any time remain entitled to order the Vessel to leave the port and discharge (part of) the Cargo in a port at the Carrier's option.

If the Carrier exercises his option at any time to order the Vessel to leave the port and discharge (part of) the Cargo in a port at Carrier's option, the Carrier's obligations under this Charter Party shall be deemed to be fulfilled and the Merchant shall be liable to pay any additional costs incurred by the Carrier and accrued demurrage or damages for detention. The Carrier's rights under this Clause 17 shall be without prejudice to any claim the Carrier may have against the Merchant under this Charter Party.

**Clauses 14 and 15 are options. State in Box 9 which option shall apply. If Box 9 is left blank then Clause 14 shall apply.*

SECTION 6 – GENERAL

18. Freight/Demurrage/Detention

(a) The freight stipulated in Box 15 shall be paid within three (3) banking days after completion of loading or no later than prior to the commencement of discharge at the first Discharging Port, whichever occurs first. The freight shall be deemed earned upon completion of loading and shall be non-returnable whether the Vessel and/or Cargo is lost or not lost. The freight shall be paid in full without any deductions in the currency and to the Carrier's bank account stated in Box 16. Freight shall not be considered paid until received into the Carrier's bank account.

(b) Any sums for demurrage and/or detention shall be payable on receipt of the Carriers' invoice by the Merchant. Payments shall be made to the Carrier's bank account as stated in Box 16.

19. Permits/Licences

(a) All necessary permits and/or licences pertaining to the loading and/or discharging operations shall be provided and paid for by the Merchant, unless such permits and/or licences can only be obtained by the Carrier, in which case they shall be provided by the Carrier but paid for by the Merchant.

(b) The Carrier and the Merchant shall assist each other by providing any information required to obtain such permits and/or licences.

20. Agents

The Carrier shall appoint and pay for agents at ports of loading and discharging and shall advise the Merchant of the agent's full style address as soon as practicable.

21. Terminal Charges

All terminal charges, including but not limited to wharfage, handling, storing, receiving, delivering, truck loading/truck unloading and towage of cargo, shall be for the account of the Merchant. If these charges are invoiced to the Carrier, then the Merchant shall promptly reimburse the Carrier.

22. Canal Transit

(a) If the Transportation is scheduled to pass through the canal stated in Box 23, the Merchant shall be granted free time for any such transit, as stipulated in Box 23. If the canal's transit time exceeds the free time stipulated therein, the Merchant shall pay for such extra transit time at the rate stated in Box 18 and shall, in addition, pay for all other documented extra expenses thereby incurred. Canal transit time is defined as from arrival at pilot station or customary waiting place or anchorage, whichever is the earlier, and until dropping last outbound pilot when leaving for the open sea.

(b) Should the transit of a canal be made impossible for reasons beyond the Carrier's control, the Merchant shall pay the Carrier for all extra time by which the voyage is thereby prolonged at the rate stated in Box 18.

The Merchant shall also pay all other expenses, including bunkers, in addition to those which would normally have been incurred had the Vessel been standing-by in port less the amount of canal tolls saved by the Carrier for not having transited the canal.

(c) Notwithstanding the provisions of Sub-clause (b) the Carrier may, at its sole discretion, instruct the Master to discharge the Cargo at the nearest safe and reachable port or place and such discharge shall be deemed due fulfilment of the Charter Party. All provisions of this Charter Party regarding freight, discharge of the Cargo, laytime, demurrage and payments for detention as agreed for the original Discharging Port shall

also apply to the discharge at the substitute port.

23. Part Cargoes

If this Cargo is one of several cargoes carried by the Vessel at the same time and the Vessel is diverted on account of ice, impediment to canal transit, or other risks for which diversion is authorised; or delayed in connection with canal transit; or subject to additional premia for transit of war risk zones, or the Cargo is subject to canal costs, or cargo dues, duties, taxes and other charges as agreed in Box 17; or bunker price adjustment; then all resulting sums and demurrage which Owner is thereby entitled to recover from multiple cargo interests, shall be apportioned based on the ratio of the freight tonnage (as defined in Clause 3 (Cargo Description) of this Cargo to the total freight tonnage of all cargoes which are simultaneously so affected.

24. Taxes, Dues and Charges

(a) On the Vessel - The Carrier shall pay all dues, duties, taxes and other charges customarily levied on the Vessel, howsoever the amount thereof may be assessed.

(b) On the Cargo - The Merchant shall pay all dues, duties, taxes and charges levied on the Cargo at the port of loading/discharging, howsoever the amount thereof may be assessed.

*(c) On the Freight - Taxes levied on the freight shall be paid by the Carrier or the Merchant as agreed in Box 17.

(d) Canal costs -The Merchant shall pay any canal dues levied on the Cargo as well as any extra costs levied on the Vessel due to the nature of the Cargo.

**If Box 17 is not appropriately filled in, then the Merchant shall be liable for freight taxes under Sub-clause (c).*

25. *Bunker Price Adjustment

The freight stated in Box 15 is calculated on the basis of the bunker price on the date of the Charter Party quoted by the source stated in Box 19(i) based on the grade of bunkers and the bunker port stated in Box 19(ii) and (iii) (the "Charter Party Price"). The freight rate shall be adjusted on the basis of the difference, if any, between the Charter Party Price and the bunker price from the same source for the same grade and bunker port on the date of the bill of lading (the "Bill of Lading Price"). The freight shall be adjusted using the bunker adjustment factor set out in Box 19(iv). If the difference between the two prices is less than or equal to 5% no adjustment shall apply.

For each US$ 5 or part thereof whereby the Bill of Lading Price is more than 5% higher than the Charter Party Price, the Carrier shall increase the freight by the percentage stated in Box 19(iv).
For each US$ 5 or part thereof whereby the Bill of Lading Price is more than 5% lower than the Charter Party Price, the Carrier shall reduce the freight by the percentage stated in Box 19(iv).

**This Clause is optional. If Box 19 is not appropriately filled in, this Clause shall not apply.*

26. Deck Cargo

Unless otherwise agreed and stated in Box 5, column 6, the Carrier shall have the option to ship the Cargo on deck.

(a) For non-US trade when cargo is carried on deck the following shall apply:
Cargo carried on deck is at the Merchant's risk and the Carrier shall not be responsible for any loss or damage or delay to the Cargo whatsoever and whether due to negligence of whosoever or howsoever arising and by whosoever caused.

(b) For US trade when cargo is carried on deck the following shall apply:
Cargo carried on deck is at the Merchant's risk as to all perils whatsoever inherent in such carriage and in all other respects subject to the terms of this Charter Party/Bill of Lading and the provisions of the Carriage of Goods by Sea Act of the United States, approved 16 April, 1936, notwithstanding Section 1(c) thereof, and the Bill of Lading issued hereunder shall be so claused.

If Box 5, column 6 is not appropriately filled in, then the Carrier shall have the option to ship the Cargo on deck in accordance with this Clause.

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27. Bills of Lading

(a) The Carrier shall issue a Bill of Lading as per the HEAVYLIFTVOYBILL form which shall incorporate all terms, conditions, liberties, clauses and exceptions of this Charter Party, including the Dispute Resolution Clause. The Merchant shall indemnify the Carrier against all consequences or liabilities that may arise from signing bills of lading other than the HEAVYLIFTVOYBILL to the extent that the terms of such bills of lading impose or result in the imposition of more onerous liabilities upon the Carrier than those assumed by the Carrier under this Charter Party.

(b) If the Merchant requires pre-paid Bills of Lading, freight shall be received by the Carrier prior to release of Bills of Lading.

(c) The Master shall deliver the Cargo only upon presentation of duly endorsed original Bills of Lading.

28. Interest

If any amounts due under this Charter Party are not paid when due, then interest at the rate of 1.5% per month or pro rata for part of a month shall be paid on all such amounts until payment is received.

29. Deviation

The Vessel has liberty to sail without pilots, to tow and/or assist vessels in distress, to deviate for the purpose of saving life, to replenish bunkers and/or to deviate for the purpose of safety of the Cargo, crew, Vessel and for any other reasonable purpose.

30. *Merchant's option to terminate

(a) Notwithstanding anything else provided herein, the Merchant shall have the right to terminate this Charter Party prior to the Vessel's arrival at the first loading port, place or area against payment of the applicable amount stated in Box 24 less any prepaid freight.

(b) Furthermore, the Merchant shall have the right to terminate this Charter Party after the Vessel's arrival at the first loading port, place or area but not later than upon commencement of loading against payment of the applicable amount stated in Box 24 plus compensation for all time spent at the first loading port, place or area at the demurrage or detention rate stated in Box 18 as well as the actual expenses incurred by the Carrier in preparation for the loading, less any prepaid freight.

**If Box 24 is not appropriately filled in, this Clause shall be deemed to be deleted.*

31. Himalaya Cargo Clause

It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the Cargo or to any holder of Bills of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on their part while acting in the course of or in connection with their employment and, but without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be its servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to this Charter Party.

The Carrier shall be entitled to be paid by the shipper, consignee, owner of the Cargo and/or holder of Bills of Lading (who shall be jointly and severally liable to the Carrier therefor) on demand any sum recovered or

recoverable by either such shipper, consignee, owner of the Cargo and/or holder of Bills of Lading or any other from such servant or agent of the Carrier for any such loss, damage, delay or otherwise.

32. Lien

The Carrier shall have a lien on the Cargo and all sub-freights payable in respect of the Cargo for freight, deadfreight, demurrage, claims for damages and for all other amounts due under this Charter Party and all costs of recovering same, including legal fees.

33. BIMCO Ice Clause for Voyage Charter Parties

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The Vessel shall not be obliged to force ice but, subject to the Carrier's approval having due regard to its size, construction and class, may follow ice-breakers.

(a) Port of Loading

(i) If at any time after setting out on the approach voyage the Vessel's passage is impeded by ice, or if on arrival the loading port is inaccessible by reason of ice, the Master or Carrier shall notify the Merchant thereof and request them to nominate a safe and accessible alternative port.

(ii) If the Merchant fails within 48 running hours, Sundays and holidays included, to make such nomination or agree to reckon laytime as if the port named in the Charter Party were accessible or declare that they cancel the Charter Party, the Carrier shall have the option of cancelling the Charter Party. In the event of cancellation by either party, the Merchant shall compensate the Carrier for all proven loss of earnings under this Charter Party.

(iii) If at any loading port the Master considers that there is a danger of the Vessel being frozen in, and provided that the Master or Carrier shall immediately notify the Merchant thereof, the Vessel may leave with cargo loaded on board and proceed to the nearest safe and ice free place and there await the Merchant's nomination of a safe and accessible alternative port within 24 running hours, Sundays and holidays excluded, of the Master's or Carrier's notification. If the Merchant fails to nominate such alternative port, the vessel may proceed to any port(s), whether or not on the customary route for the chartered voyage, to complete with cargo for the Carrier's account.

(b) Port of Discharge

(i) If the voyage to the discharging port is impeded by ice, or if on arrival the discharging port is inaccessible by reason of ice, the Master or Carrier shall notify the Merchant thereof. In such case, the Merchant shall have the option of keeping the Vessel waiting until the port is accessible against paying compensation in an amount equivalent to the rate of demurrage or of ordering the Vessel to a safe and accessible alternative port.

(ii) If the Merchant fails to make such declaration within 48 running hours, Sundays and holidays included, of the Master or Carrier having given notice to the Merchant, the Master may proceed without further notice to the nearest safe and accessible port and there discharge the cargo.

(iii) If at any discharging port the Master considers that there is a danger of the Vessel being frozen in, and provided that the Master or Carrier immediately notify the Merchant thereof, the Vessel may leave with cargo remaining on board and proceed to the nearest safe and ice free place and there await the Merchant's nomination of a safe and accessible alternative port within 24 running hours, Sundays and holidays excluded, of the Master's or Carrier's notification. If the Merchant fails to nominate such alternative port, the Vessel may proceed to the nearest safe and accessible port and there discharge the remaining cargo.

(c) On delivery of the cargo other than at the port(s) named in the Charter Party, all conditions of the Bill of Lading shall apply and the Vessel shall receive the same freight as if discharge had been at the original port(s) of destination, except that if the distance of the substituted port(s) exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port(s) shall be increased proportionately.

34. BIMCO General Clause Paramount

The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924 ("the Hague Rules") as amended by the Protocol signed at Brussels on 23 February 1968 ("the Hague-Visby Rules") and as enacted in the country of shipment shall apply to this Contract. When the Hague-Visby Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination shall apply, irrespective of whether such legislation may only regulate outbound shipments. When there is no enactment of the Hague-Visby Rules in either the country of shipment or in the country of destination, the Hague-Visby Rules shall apply to this Contract save where the Hague Rules as enacted in the country of shipment or if no such enactment is in place, the Hague Rules as enacted in the country of destination, compulsorily applicable to shipments, in which case the provisions of such Rules shall apply.

The Protocol signed at Brussels on 21 December 1979 ("the SDR Protocol 1979") shall apply where the Hague-Visby Rules apply, whether mandatorily or by this Contract.

The Carrier shall in no case be responsible for loss of or damage to cargo arising prior to loading, after

discharging, or while the cargo is in the charge of another carrier, or with respect to deck cargo and live animals.

35. Both-to-Blame Collision Clause

If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the Vessel, the owners of the Cargo carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said Cargo, paid or payable by the other or non-carrying ship or her owners to the owners of said Cargo and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying Vessel or Carrier. The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact.

36. General Average and New Jason Clause

General Average shall be adjusted and settled in London unless otherwise stated in Box 25, according to the York/Antwerp Rules, 1994, but if, notwithstanding the provisions specified in Box 25, the adjustment is made in accordance with the law and practice of the United States of America, the following clause shall apply:
"In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible, by statute, contract or otherwise, the goods, shippers, consignees or owners of the goods shall contribute with the Carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods. If a salving vessel is owned or operated by the Carrier, salvage shall be paid for as fully as if the said salving vessel or vessels belonged to strangers. Such deposit as the Carrier, or their agents, may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the Carrier before delivery".

37. War Risks (VOYWAR 2004)

(a) For the purpose of this Clause, the words:

(i) "Carrier" shall include the shipowners, bareboat charterers, disponent owners, managers or other operators who are charged with the management of the Vessel, and the Master; and

(ii) "War Risks" shall include any actual, threatened or reported:

War; act of war; civil war; hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy; acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever); by any person, body, terrorist or political group, or the Government of any state whatsoever, which, in the reasonable judgement of the Master and/or the Carrier, may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel.

(b) If at any time before the Vessel commences loading, it appears that, in the reasonable judgement of the Master and/or the Carrier, performance of the Charter Party, or any part of it, may expose, or is likely to expose, the Vessel, her cargo, crew or other persons on board the Vessel to War Risks, the Carrier may give notice to the Merchant cancelling this Charter Party, or may refuse to perform such part of it as may expose, or may be likely to expose, the Vessel, her cargo, crew or other persons on board the Vessel to War Risks; provided always that if this Charter Party provides that loading or discharging is to take place within a range of ports, and at the port or ports nominated by the Merchant the Vessel, her cargo, crew, or other persons onboard the Vessel may be exposed, or may be likely to be exposed, to War Risks, the Carrier shall first require the Merchant to nominate any other safe port which lies within the range for loading or discharging, and may only cancel this Charter Party if the Merchant shall not have nominated such safe port or ports within 48 hours of receipt of notice of such requirement.

(c) The Carrier shall not be required to continue to load cargo for any voyage, or to sign Bills of Lading for any port or place, or to proceed or continue on any voyage, or on any part thereof, or to proceed through any canal or waterway, or to proceed to or remain at any port or place whatsoever, where it appears, either

after the loading of the cargo commences, or at any stage of the voyage thereafter before the discharge of the cargo is completed, that, in the reasonable judgement of the Master and/or the Carrier, the Vessel, her cargo (or any part thereof), crew or other persons on board the Vessel (or any one or more of them) may be, or are likely to be, exposed to War Risks. If it should so appear, the Carrier may by notice request the Merchant to nominate a safe port for the discharge of the cargo or any part thereof, and if within 48 hours of the receipt of such notice, the Merchant shall not have nominated such a port, the Carrier may discharge the cargo at any safe port of his choice (including the port of loading) in complete fulfilment of the Charter Party. The Carrier shall be entitled to recover from the Merchant the extra expenses of such discharge and, if the discharge takes place at any port other than the loading port, to receive the full freight as though the cargo had been carried to the discharging port and if the extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the normal and customary route, the Carrier having a lien on the cargo for such expenses and freight.

(d) If at any stage of the voyage after the loading of the cargo commences, it appears that, in the reasonable judgement of the Master and/or the Carrier, the Vessel, her cargo, crew or other persons on board the Vessel may be, or are likely to be, exposed to War Risks on any part of the route (including any canal or waterway) which is normally and customarily used in a voyage of the nature contracted for, and there is another longer route to the discharging port, the Carrier shall give notice to the Merchant that this route will be taken. In this event the Carrier shall be entitled, if the total extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the normal and customary route.

(e)

(i) The Carrier may effect war risks insurance in respect of the Hull and Machinery of the Vessel and their other interests (including, but not limited to, loss of earnings and detention, the crew and their Protection and Indemnity Risks), and the premiums and/or calls therefor shall be for its account.

(ii) If the Underwriters of such insurance should require payment of premiums and/or calls because, pursuant to the Merchant's orders, or in order to fulfil the Carrier's obligation under this Charter Party, the Vessel is within, or is due to enter and remain within, or pass through any area or areas which are specified by such Underwriters as being subject to additional premiums because of War Risks, then the actual premiums and/or calls paid shall be reimbursed by the Merchant to the Carrier within 14 days after receipt of the Carrier's invoice. If the Vessel discharges all of her cargo within an area subject to additional premiums as herein set forth, the Merchant shall reimburse the Carrier for the actual additional premiums paid which may accrue from completion of discharge until the Vessel leaves such area or areas referred to above. The Carrier shall leave the area as soon as possible after completion of discharge.

(f) The Vessel shall have liberty:

(i) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery or in any way whatsoever which are given by the Government of the Nation under whose flag the Vessel sails, or other Government to whose laws the Carrier is subject, or any other Government which so requires, or any body or group acting with the power to compel compliance with their orders or directions;

(ii) to comply with the orders, directions or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance;

(iii) to comply with the terms of any resolution of the Security Council of the United Nations, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Carrier is subject, and to obey the orders and directions of those who are charged with their enforcement;

(iv) to discharge at any other port any cargo or part thereof which may render the Vessel liable to confiscation as a contraband carrier;

(v) to call at any other port to change the crew or any part thereof or other persons on board the Vessel when there is reason to believe that they may be subject to internment, imprisonment or other sanctions;

(vi) where cargo has not been loaded or has been discharged by the Carrier under any provisions of this Clause,

to load other cargo for the Carrier's own benefit and carry it to any other port or ports whatsoever, whether backwards or forwards or in a contrary direction to the ordinary or customary route.

(g) If in compliance with any of the provisions of Sub-clauses (b) to (f) of this Clause anything is done or not done, such shall not be deemed to be a deviation, but shall be considered as due fulfilment of the Charter Party.

38. BIMCO ISPS/MTSA Clause for Voyage Charter Parties 2005

(a)

(i) The Carrier shall comply with the requirements of the International Code for the Security of Ships and of Port Facilities and the relevant amendments to Chapter XI of SOLAS (ISPS Code) relating to the Vessel and "the Company" (as defined by the ISPS Code). If trading to or from the United States or passing through United States waters, the Carrier shall also comply with the requirements of the US Maritime Transportation Security Act 2002 (MTSA) relating to the Vessel and the "Owner" (as defined by the MTSA).

(ii) Upon request the Carrier shall provide the Merchant with a copy of the relevant International Ship Security Certificate (or the Interim International Ship Security Certificate) and the full style contact details of the Company Security Officer (CSO).

(iii) Loss, damages, expense or delay (excluding consequential loss, damages, expense or delay) caused by failure on the part of the Carrier or "the Company" / "Owner" to comply with the requirements of the ISPS Code/MTSA or this Clause shall be for the Carrier's account, except as otherwise provided in this Charter Party.

(b)

(i) The Merchant shall provide the Carrier and the Master with their full style contact details and, upon request, any other information the Carrier requires to comply with the ISPS Code/MTSA.

(ii) Loss, damages or expense (excluding consequential loss, damages or expense) caused by failure on the part of the Merchant to comply with this Clause shall be for the Merchant's account, except as otherwise provided in this Charter Party, and any delay caused by such failure shall count as laytime or time on demurrage.

(c) Provided that the delay is not caused by the Carrier's failure to comply with its obligations under the ISPS Code/MTSA, the following shall apply:

(i) Notwithstanding anything to the contrary provided in this Charter Party, the Vessel shall be entitled to tender Notice of Readiness even if not cleared due to applicable security regulations or measures imposed by a port facility or any relevant authority under the ISPS Code/MTSA.

(ii) Any delay resulting from measures imposed by a port facility or by any relevant authority under the ISPS Code/MTSA shall count as laytime or time on demurrage, unless such measures result solely from the negligence of the Carrier, Master or crew or the previous trading of the Vessel, the nationality of the crew or the identity of the Carrier's managers.

(d) Notwithstanding anything to the contrary provided in this Charter Party, any costs or expenses whatsoever solely arising out of or related to security regulations or measures required by the port facility or any relevant authority in accordance with the ISPS Code/MTSA including, but not limited to, security guards, launch services, vessel escorts, security fees or taxes and inspections, shall be for the Merchant's account, unless such costs or expenses result solely from the negligence of the Carrier, Master or crew or the previous trading of the Vessel, the nationality of the crew or the identity of the Carrier's managers. All measures required by the Carrier to comply with the Ship Security Plan shall be for the Carrier's account.

(e) If either party makes any payment which is for the other party's account according to this Clause, the other party shall indemnify the paying party.

39 BIMCO U.S. Customs Advance Notification/AMS Clause for Voyage Charter Parties

(a) If the Vessel loads or carries cargo destined for the US or passing through US ports in transit, the Carrier shall comply with the current US Customs regulations (19 CFR 4.7) or any subsequent amendments thereto and shall undertake the role of carrier for the purposes of such regulations and shall, in their own name, time

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and expense:

(i) Have in place a SCAC (Standard Carrier Alpha Code);

(ii) Have in place an ICB (International Carrier Bond); and

(iii) Submit a cargo declaration by AMS (Automated Manifest System) to the US Customs.

(b) The Merchant shall provide all necessary information to the Carrier and/or its agents to enable the Carrier to submit a timely and accurate cargo declaration.

The Merchant shall assume liability for and shall indemnify, defend and hold harmless the Carrier against any loss and/or damage whatsoever (including consequential loss and/or damage) and/or any expenses, fines, penalties and all other claims of whatsoever nature, including but not limited to legal costs, arising from the Merchant's' failure to comply with any of the provisions of this Sub-clause. Should such failure result in any delay then, notwithstanding any provision in this Charter Party to the contrary, all time used or lost shall count as laytime or, if the Vessel is already on demurrage, time on demurrage.

(c) The Carrier shall assume liability for and shall indemnify, defend and hold harmless the Merchant against any loss and/or damage whatsoever (including consequential loss and/or damage) and any expenses, fines, penalties and all other claims of whatsoever nature, including but not limited to legal costs, arising from the Carrier's failure to comply with any of the provisions of Sub-clause (a). Should such failure result in any delay then, notwithstanding any provision in this Charter Party to the contrary, all time used or lost shall not count as laytime or, if the Vessel is already on demurrage, time on demurrage.

(d) The assumption of the role of carrier by the Carrier pursuant to this Clause and for the purpose of the US Customs Regulations (19 CFR 4.7) shall be without prejudice to the identity of carrier under any bill of lading, other contract, law or regulation.

40. Brokerage

The Carrier shall pay brokerage at the rate stated in Box 26(i) to the Broker(s) stated in Box 26(ii) on any freight, demurrage, detention, and/or termination fee paid under this Charter Party.
If the full amounts as aforesaid are not paid owing to breach of this Charter Party by either of the parties, the party liable therefor shall indemnify the Broker(s) against his or their loss of brokerage.

41. BIMCO Dispute Resolution Clause

*(a) This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause. The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced. The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

*(b) This Charter Party shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Charter Party shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for

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the purposes of enforcing any award, judgement may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the Rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.

*(c) This Charter Party shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(d) Notwithstanding (a), (b) or (c) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Charter Party.

In the case of a dispute in respect of which arbitration has been commenced under (a), (b) or (c) above, the following shall apply:-

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within 14 calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further 14 calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(v) Either party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.

(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are disclosable under the law and procedure governing the arbitration.

(Note: The parties should be aware that the mediation process may not necessarily interrupt time limits.)

(e) If Box 27 is not appropriately filled in, Sub-clause (a) of this Clause shall apply. Sub-clause (d) shall apply in all cases.

**Note: Sub-clauses (a), (b) and (c) are alternatives; indicate alternative agreed in Box 27.*

42. BIMCO Notices Clause

(a) All notices given by either party or their agents to the other party or their agents in accordance with the provisions of this Charter Party shall be in writing.

(b) For the purposes of this Charter Party, "in writing" shall mean any method of legible communication. A notice may be given by any effective means including, but not limited to, cable, telex, fax, e-mail, registered or recorded mail, or by personal service.

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43. Entire Agreement

This Charter Party constitutes the entire agreement of the parties and no promise, undertaking, representation, warranty or statement by either party prior to the date of this Charter Party stated in Box 1 shall affect this Charter Party. Any modification of this Charter Party shall not be of any effect unless in writing signed by or on behalf of the parties.

APPENDIX 10
Projectcon*

First issued by BIMCO February 2006

BIMCO
SPECIAL PROJECTS CHARTER PARTY
CODE NAME: PROJECTCON

PART I

1. Place and date of Contract	
2. Owners/place of business (Cl. 1)	3. Charterers/place of business
4. Vessels (name, type and other particulars) (Cl. 1) Tug: Barge:	
5. Cargo (full description of cargo and state maximum weight of cargo and maximum expected draft of laden barge) (Cl. 1 & 11(e))	
6. Loading port(s)/place(s) (Cl. 1)	7. Discharging port(s)/place(s) and intended route from loading port(s)/place(s) to discharging port(s)/place(s) (Cl. 1, 3(b) & 13(a))
8. Loading method(s) (Cl. 5(c))	9. Discharging method(s) (Cl. 5(e))
10. Initial Delivery Period (Cl. 9(a))	11. Delivery Period Notification Schedule (Cl. 9(b) and (c)) Number of days' notice:
12. Daily compensation for late delivery (Cl. 9(c))	Delivery Window:
13. Barge Engineer (State amount) (Cl. 4(a)) Daily rate: Overtime rate (per hour):	
14. Cancelling (State number of days after delivery date) (Cl. 9(c), 9(d), 9(e), 9(f) & 9 (h))	15. Notices for delivery to be given to (Cl. 10(a))
16. Marine Warranty Surveyor(s) and date for approval of Vessels (Cl. 11(a) & 11(b))	
17. Freight and Payment Schedule (Cl. 12 & Cl. 14(b))	18. Payment of Freight, Delay Payments, etc. (currency and where payable; also state Owners' bank account) (Cl. 12 & Cl. 13(d))
19. Free time at loading/discharging port(s)/places(s) and canal transit (if applicable) (Cl. 13(a) & 14(a)	20. Delay rate per day (Cl. 3(b), 3(c), 6(b), 8, 13(b), 14(a), 14(c), 17 & 20(b)) In Port: At Sea:
21. Canal transit costs (if any) limited to (Cl. 14(b))	22. Price per metric ton of bunker oil and quantity (Cl. 15)
23. Termination Fee(s) (state amount(s) with schedule, if agreed) (Cl. 20(a) & 20(b))	24. Taxes (Cl. 7)
	25. General average shall be adjusted/settled at (Cl. 26)
26. Interest rate (%) per annum to run from (state number of days) after any sum is due (Cl. 28)	27. Brokerage and to whom payable (Cl. 30)
28. Dispute Resolution (state 31(a), 31(b) or 31(c) of Cl. 31, as agreed; if 31(c) agreed state place of arbitration) (Cl. 31) **(c) -**	29. Additional clauses, if agreed

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It is mutually agreed that this Contract shall be performed subject to the conditions contained in the Contract consisting of PART I including additional clauses, if any agreed and stated in Box 29, and PART II. In the event of a conflict of conditions, the provisions of PART I and any additional clauses shall prevail over those of PART II to the extent of such conflict but no further.

Signature (Owners)	Signature (Charterers)

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PART II
PROJECTCON - Special Projects Charter Party

1. Definitions

In this Charter Party the following words and expressions shall have the meanings hereby assigned to them:
"Owners" shall mean the party identified in Box 2.
"Charterers" shall mean the party identified in Box 3.
"Vessels" shall mean the tug and barge as described in Box 4.
"Cargo" shall mean any goods or equipment or other items described in Box 5.
"Loading Port" shall mean the port(s) or place(s) specified in Box 6.
"Discharging Port" shall mean the port(s) or place(s) specified in Box 7.
"Transportation" shall mean the carriage of the cargo, including the towage of laden barges and, as the case may be, the loading, discharge and all other operations connected therewith.

2. Voyage

(a) It is agreed between the Owners and the Charterers that, subject to the terms and conditions of this Charter Party, the cargo shall be transported by the Owners from the Loading Port(s), or so near thereto as the Vessels may safely get and lie always safe and afloat, to the Discharging Port(s), or so near thereto as they may safely get and lie always safe and afloat.
(b) The Owners shall exercise due diligence in making the Vessels seaworthy before and at arrival at the Loading Port. The Owners shall perform the voyage with due despatch unless otherwise agreed.

3. Deviation and Delays

(a) The Vessels have the liberty to sail without pilots, to tow and/or assist vessels in distress, to deviate for the purpose of saving life, to replenish bunkers and/or to deviate for the purpose of safety of the cargo, crew, Vessels and for any other reasonable purpose.
(b) Without prejudice to the provisions of Clause 26, should the Tug Master decide, for the purpose of the safety of the cargo, to deviate from the normal route which is stipulated in Box 7, or reduce speed, the Owners shall be entitled to receive from the Charterers additional compensation at the appropriate Delay rate as set out in Box 20 for all time spent by the Vessels at sea in excess of the time which would have been spent had such reduction of speed or deviation not taken place.
The time lost shall include all time used until the Vessels reach the same or equidistant position to that where the deviation commenced and the Charterers shall also pay all additional expenses incurred by such deviation including bunkers, port charges, pilotage, tug boats, agency fees and any other expenses whatsoever incurred.
The Owners shall give prompt notification of any delay or deviation to the Charterers and any claims for additional compensation shall be supported by appropriate documentation.
(c) If the Vessels for reasons beyond the Owners' control are being delayed at the Loading Port and/or the Discharging Port, including obtaining free pratique, customs and port clearance or other formalities, but not including delays caused by the late or non-arrival of the Tug, such delays shall be paid for by the Charterers at the Delay rate stipulated in Box 20.

4. Barge Engineer

(a) The barge machinery and ballasting equipment may be utilised by the Charterers subject to the Charterers always using a fully qualified barge engineer provided by the Owners. If the services of a barge engineer are required, the Charterers shall give the Owners 72 hours notice in writing plus allowance for travelling time for each occasion the barge engineer is required. The Charterers agree to pay an amount per day as stated in Box 13 per barge engineer for a 10 hour working day including but not limited to travelling time and/or time for standby associated therewith. For any hour in excess of 10 hours per day the Charterers shall pay the amount per hour of the overtime rate per barge engineer stated in Box 13. In addition the Charterers shall pay all travel expenses, accommodation expenses and meals for each barge engineer, all according to the Owners' invoice, at cost plus 10% and reimburse the Owners for any advance payments they have made in this respect. Payment shall be made on receipt of the Owners' invoice.
(b) The barge engineer shall be deemed to be a servant of the Charterers and the Charterers shall indemnify and hold the Owners harmless from and against all consequences and/or liabilities arising from the ballast operations.
(c) For float on/float off operations where the barge is to be submerged, all ballasting operations will be carried out by the Owners' personnel and the costs shall be included in the lumpsum price stated in Box 17 or delay rate stated in Box 20.

5. Loading and Discharging

(a) The Charterers shall have the cargo in all respects ready for the said voyage at the Loading Port on the delivery date.
The precise loading area or place within the agreed Loading Port, which shall be always safe and accessible and suitable for the loading operation, shall be nominated by the Charterers, always subject to the approval of the Owners and the Marine Warranty Surveyor. Such approval shall not be unreasonably withheld.
(b) The barge shall be delivered with cargo spaces free of any obstructions with all previous seafastenings removed and the Vessels shall be properly documented as regards trading certificates, classification and equipment. All other equipment shall be provided by the Charterers. When the cargo has been loaded and positioned, it shall be seafastened and/or lashed by the Charterers at their expense to the satisfaction of the Marine Warranty Surveyor.
(c) At the Loading Port, the cargo shall be delivered by the Charterers without delay at any time during day or night, Saturdays, Sundays and holidays included.
The cargo shall be placed on board the barge and positioned by the Charterers to the full satisfaction of the Owners and the Marine Warranty Surveyor. The Charterers shall procure and pay for all labour and all necessary equipment other than that stated in Box 4.
If agreed in Box 8 that the cargo shall be loaded by means of float-on method, the Charterers shall position the cargo over the barge's submerged deck to the full satisfaction of the Owners and the Marine Warranty Surveyor. The Owners shall attach lines to the cargo and shall position and secure the cargo over the submerged deck by using winches and/or tugs. The Charterers shall procure and pay the necessary labour and winchmen.
The Charterers shall procure and pay for workboats and tugs required for the positioning of the cargo. The Owners shall have the right to use such workboats and tugs for the loading operation.
(d) The precise discharging area or place within the Discharging Port and which shall be always safe and accessible and suitable for the discharging operation, shall be named by the Charterers well in advance of the Vessels' arrival, always subject to the approval of the Owners and the Marine Warranty Surveyor. Such approval shall not be unreasonably withheld.
At the Discharging Port the Charterers shall take delivery of the cargo without delay in accordance with Clause 5(e) at any time during day or night, Saturdays, Sundays and holidays included.
(e) Prior to actual discharge the Charterers shall, unless otherwise agreed, remove seafastening and/or lashing and prepare the barge for the discharge operation. The entire discharge operation shall always be done to the full satisfaction of the Marine Warranty

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Surveyor.
The Charterers shall discharge the cargo and shall procure and pay for the necessary equipment and labour for the discharge of the cargo.
If agreed in Box 9 that the cargo shall be discharged by means of float-off method, the Owners shall submerge the barge. The Charterers shall procure and pay the necessary winchmen.
The Charterers shall procure and pay for workboats and tugs required for discharging the cargo. The Owners shall have the right to use such workboats and tugs for the discharging operations. The Charterers shall take custody of the cargo as soon as afloat.
After the discharge operation the Charterers shall remove all remaining seafastening and/or lashing, unless otherwise agreed.
(f) Except as otherwise provided in this Charter Party, all agency charges, port charges (including compulsory charges for shore watchmen and garbage removal), light and canal dues, pilotage, local tug assistance, consular charges, and all other charges and expenses relating to the cargo and/or to the Vessels as a result of their employment hereunder shall be for the Charterers' account. All loading, seafastening, release, discharge and clean off costs shall be for the Charterers' account.

6. Permits/Licences
(a) All necessary permits and/or licences pertaining to the Transportation shall be provided and paid for by the Charterers.
If required, the Owners shall assist the Charterers in obtaining such permits and/or licences.
(b) Any delay by the Charterers in obtaining the permits and/or licences related to Clause 6(a) shall be at the Charterers' time and any time lost shall be paid for at the Delay rate stipulated in Box 20.

7. Taxes
The Owners shall be responsible for the taxes stated in Box 24 and the Charterers shall be responsible for all other taxes.
In the event of change in local regulation and/or interpretation thereof, resulting in an unavoidable and documented change of the Owners' tax liability after the date of entering into the Charter Party, freight shall be adjusted accordingly.

8. Quarantine
Unless due to health conditions on board the Vessels, any time lost as a result of quarantine formalities and/ or health restrictions imposed or incurred at any stage of the voyage, including any such loss of time at the Loading Port and/or the Discharging Port, shall be paid for by the Charterers at the Delay rate specified in Box 20. The Charterers shall also pay for all other expenses which may be incurred as a result thereof.

9. Commencement of Loading/Cancelling
(a) The barge shall be delivered to the Charterers within the period agreed in Box 10.
(b) The delivery period in Clause 9(a) shall be narrowed down by the Charterers to a delivery date in accordance with the delivery period notification schedule as stated in Box 11.
Each delivery window shall always be within the previously notified window and the number of days' notice shall always be counted from the first day in the window.
(c) Should the barge not be delivered according to Box 11 the Owners shall pay as compensation to the Charterers a daily rate as stated in Box 12 for each day, or pro rata for part thereof, counting from 2400 hours on the delivery date until the day and time delivery actually takes place, but in any event for not more than the number of days stated in Box 14. Such compensation shall be deemed liquidated damages and be the Charterers sole remedy for late delivery. Except for the purpose of assessing compensation in accordance with this Clause 9(c) the delivery date shall, in the event the Owners have given notice in accordance with Clause 9(e) below and the Charterers have not exercised their option of cancelling, be deemed to be the revised delivery date stated in the Owners' notice.
(d) Should the barge not be delivered latest the number of days stated in Box 14 after the delivery date the Charterers shall have the option of cancelling this Charter Party.
(e) If it appears that the barge will be delayed beyond the number of days stated in Box 14 after the delivery date, the Owners shall, as soon as they are in position to state with reasonable certainty the day on which the Vessels should be ready, give notice thereof to the Charterers asking whether they will exercise their option of cancelling and the option must then be declared within 48 hours of the receipt by the Charterers of such notice. If the Charterers do not then exercise their option of cancelling, the revised delivery date stated in the Owners' notice shall be regarded as the new delivery date for the purpose of this Clause.
(f) The Owners shall not be responsible for any loss or damages whatsoever incurred by the Charterers as a result of the Charterers cancelling this Charter Party as per Clause 9(d) nor shall the Owners be responsible for any loss or damages whatsoever suffered by the Charterers as a result of the failure of the barge to be ready for loading latest on the cancelling date agreed in Box 14 in the case that a new cancelling date has been agreed.
(g) If, for reasons beyond the Owners' control, the loading operation has not commenced within 14 days from tendering of notice of readiness, the Owners shall have the option of cancelling this Charter Party.
If the Owners exercise their option of cancelling the Charter Party in accordance with this sub-clause, the Charterers shall pay to the Owners the applicable termination fee according to the provisions of Clause 20 in addition to any delay payment incurred.
(h) If Box 14 is not appropriately filled in then 7 days shall apply.

10. Notices to the Charterers
(a) *Notice of Readiness*
The Owners shall give notice of readiness as per Box 15 advising when the Vessels are ready to commence loading at the Loading Port and when the Vessels are ready to commence discharge at the Discharging Port. All notices may be given at any time of the day, Fridays, Saturdays, Sundays and holidays included, whether within the official port limits or not, and notwithstanding hindrances as referred to in Clause 3(c).
(b) Prior to arrival at the Loading Port(s) the Owners shall keep the Charterers duly advised of the expected time of arrival of the barge.
(c) After departure from the Loading Port(s) the Owners shall give daily notice of expected time of arrival at Discharging Port(s).

11. Marine Warranty Surveyor(s)/Approval of the Vessels and Condition of the Cargo
(a) The Marine Warranty Surveyor(s) stated in Box 16 shall be appointed for this Transportation by the Charterers. If Box 16 has not been filled in, the Charterers shall appoint Marine Warranty Surveyor(s) acceptable to the cargo underwriters, subject to the Owners' approval which shall not be unreasonably withheld.
(b) The Marine Warranty Surveyor(s) shall approve the suitability of the Vessels for the Transportation as soon as possible, but no later than the date stated in Box 16. Should the Marine Warranty Surveyor(s) not give approval by the date stipulated in Box 16, either the Charterers or the Owners may elect to terminate this Charter Party and all freight paid or advanced by the

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Charterers to the Owners shall be promptly refunded.
(c) All documentation reasonably required of the Owners by the Marine Warranty Surveyor(s) for their approval of the Transportation shall be submitted to the Charterers at the earliest possible stage after this Charter Party is made, if not already submitted earlier. The Charterers shall pay all expenses relating to the production of documentation related to the cargo and/or the Charterers' equipment. The Owners shall pay all expenses relating to documentation related to the Vessels and all other equipment being provided by the Owners in the performance of the Transportation.
(d) The Charterers shall arrange and pay for all the Marine Warranty Surveyor(s) services, including their approval of the Vessels and the Transportation.
(e) The Charterers warrant that the full description of the cargo mentioned in Box 5 is correct and further warrant that the cargo is in all respects tight, staunch, strong and in every way fit for the Transportation. Should the cargo and/or its description not be in compliance with the aforesaid then the Owners shall have the option to cancel this Charter Party. If the Owners exercise their option to cancel the Charter Party in accordance with this Clause the Charterers shall pay to the Owners the applicable termination fee according to the provisions of Clause 20.

12. Freight

The lumpsum freight shall be paid according to the schedule stated in Box 17. Each instalment shall be fully and irrevocably earned when due as set out in Box 17. Freight earned shall be non-returnable whether the Vessels and/or the cargo are lost or not lost and whether lost due to perils of the sea or howsoever. The freight and all other sums payable to the Owners under this Charter Party shall be payable without any discount, deduction, set-off, lien, claim or counter-claim, and shall be paid in the currency and into the Owners' bank account stated in Box 18.

13. Free Time/Delay Payment

(a) The Charterers are allowed the free time stipulated in Box 19 in the Loading Port(s) and Discharging Port(s) and for canal transit if applicable, Fridays, Saturdays, Sundays and holidays included.
The free time at the Loading Port(s) shall start counting after notice of readiness has been tendered, in accordance with Clause 10(a), unless loading has commenced earlier and shall count until the cargo is in all respects fully seafastened on board the barge and approved by the Marine Warranty Surveyor(s).
The free time at the Discharging Port(s) shall start counting after notice of readiness has been tendered in accordance with Clause 10(a), unless discharge has commenced earlier and shall count until the cargo and all seafastenings/lashings are removed from the barge with deck cleaned and the barge is in all respects ready for sea.
Time lost in waiting for berth at loading or discharging port shall count as free time or time on delay. If the cargo is to be loaded and/or discharged by float-on/float-off method, time used for the actual loading and discharge operation (dry deck to dry deck) shall not count as free time or time on delay, unless such time used is due to reasons beyond the Owners' control.
(b) Delay payment shall be payable for all time used in excess of the free time.
The Delay rate for the Vessels is the amount stipulated in Box 20 calculated per day or pro rata for part of a day.
(c) Free time shall not count and delay payments shall not accrue for time lost by reason of strike or lockout of the Master, officers or crew or by reason of breakdown of the Vessels or the Owners' equipment.
(d) The delay payment and other amounts which are calculated at the delay rate fall due and are payable by the Charterers immediately upon presentation of the Owners' invoice to the Owners' bank account stipulated in Box 18.
Should more than 14 days of delay payment have accrued, the Owners are entitled to delay payment on account. The Owners may demand payment against presentation of invoices covering the first 14 days and thereafter for every 7 days.

14. Canal Transit

(a) If the Transportation is scheduled to pass through a canal according to Box 7, the Charterers are granted free time for any such transit, and such free time shall count against the number of hours stipulated in Box 19. If the Transportation is delayed beyond the free time stipulated therein, unless the Owners are responsible for such delay, the Charterers shall pay for such extra transit time at the Delay rate stipulated in Box 20 and shall, in addition, pay for all other documented extra expenses thereby incurred. Canal transit time is defined as from arrival at pilot station or customary waiting place or anchorage, whichever is the earlier, and until dropping last outbound pilot when leaving for the open sea.
(b) The freight rate stipulated in Box 17 is based upon the Owners paying canal tolls limited to the amount stipulated in Box 21. Any increase in the canal tolls and/or any additional expenses for the canal transit actually paid by the Owners shall be reimbursed by the Charterers to the Owners upon presentation of the Owners' invoice.
(c) Should the transit of a canal be made impossible for reasons beyond the Owners' control, the Charterers shall pay for all extra time by which the voyage is thereby prolonged at the Delay rate stated in Box 20.
The Charterers shall also pay all other expenses, including for bunkers, in addition to those which would normally have been incurred had the Vessels been standing-by in port less the amount of canal tolls saved by the Owners for not having transitted the canal.

15. Bunker Escalation

This Charter Party is concluded on the basis of the price per metric ton and the quantity of bunker oil stated in Box 22.
If the price actually paid by the Owners for this quantity of bunker oil should be higher, the difference shall be paid by the Charterers to the Owners.
If the price actually paid by the Owners for this quantity of bunker oil should be lower, the difference shall be paid by the Owners to the Charterers.

16. Ice

The Vessels shall not be obliged to force ice but, subject to the Owners' approval having due regard to their size, construction and class, may follow ice-breakers.
(a) *Port of Loading*
(i) If at any time after setting out on the approach voyage the Vessels' passage is impeded by ice, or if on arrival the Loading Port is inaccessible by reason of ice, the Master or Owners shall notify the Charterers thereof and request them to nominate a safe and accessible alternative port. If the Charterers fail within 48 running hours, Sundays and holidays included, to make such nomination or agree to reckon free time as if the port named in the Charter Party were accessible or declare that they cancel the Charter Party, the Owners shall have the option of cancelling the Charter Party. In the event of cancellation by either party, the Charterers shall compensate the Owners for all proven loss of earnings under this Charter Party.
(ii) If at any Loading Port the Master considers that there is a danger of the Vessels being frozen in, and provided that the Master or Owners immediately notify the Charterers thereof, the Vessels may leave with cargo loaded on board and proceed to the

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nearest safe and ice free place and there await the Charterers' nomination of a safe and accessible alternative port within 24 running hours, Sundays and holidays excluded, of the Master's or Owners' notification. If the Charterers fail to nominate such alternative port, the Vessels may proceed to any port(s), whether or not on the customary route for the chartered voyage, to complete with cargo for the Owners' account.

(b) *Port of Discharge*

(i) If the voyage to the Discharging Port is impeded by ice, or if on arrival the Discharging Port is inaccessible by reason of ice, the Master or Owners shall notify the Charterers thereof. In such case, the Charterers shall have the option of keeping the Vessels waiting until the port is accessible against paying compensation in an amount equivalent to the delay rate or of ordering the Vessels to a safe and accessible alternative port.

If the Charterers fail to make such declaration within 48 running hours, Sundays and holidays included, of the Master or Owners having given notice to the Charterers, the Master may proceed without further notice to the nearest safe and accessible port and there discharge the cargo.

(ii) If at any Discharging Port the Master considers that there is a danger of the Vessels being frozen in, and provided that the Master or Owners immediately notify the Charterers thereof, the Vessels may leave with cargo remaining on board and proceed to the nearest safe and ice free place and there await the Charterers' nomination of a safe and accessible alternative port within 24 running hours, Sundays and holidays excluded, of the Master's or Owners' notification. If the Charterers fail to nominate such alternative port, the Vessels may proceed to the nearest safe and accessible port and there discharge the remaining cargo.

(iii) On delivery of the cargo other than at the port(s) named in the Charter Party, all conditions of any cargo note or receipt issued in respect of any shipment hereunder shall apply and the Vessels shall receive the same freight as if discharge had been at the original port(s) of destination, except that if the distance of the substituted port(s) exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port(s) shall be increased proportionately.

17. Dangerous Cargo

If part of the cargo is of an inflammable, explosive or dangerous nature or condition or at any stage may develop into such nature or condition it must be packed and stored or stowed in accordance with IMO Dangerous Goods Code and/or other applicable regulations always to the full satisfaction of the Master. Any delay to the Transportation in this respect shall be paid for by the Charterers at the Delay rate stipulated in Box 20.

18. Lien

The Owners shall have a lien on the cargo and any Charterers' equipment for all freight and all other expenses in relation to the Transportation including deadfreight, advances, delay payments, damages for detention, general average and salvage including costs for recovering same.

19. Substitution

The Owners shall be entitled at any time before delivery to provide substitute Vessels, provided such substitute Vessels are approved by the Marine Warranty Surveyor(s) and subject also to the Charterers' prior approval, which shall not be unreasonably withheld.

20. Termination

(a) Notwithstanding anything else provided herein, the Charterers shall have the right to terminate this Charter Party prior to the barge's arrival at the first Loading Port against payment of the applicable amount stipulated in Box 23.

(b) Furthermore, the Charterers shall have the right to terminate this Charter Party after the barge's arrival at the first Loading Port but not later than upon commencement of loading against payment of the applicable amount stipulated in Box 23 plus compensation for all time spent at the first Loading Port at the Delay rate stipulated in Box 20 together with the actual expenses incurred by the Owners in preparation for the loading.

(c) If Box 23 is not appropriately filled in then this Clause shall not apply.

21. Liability and Indemnity

(a) *Definitions*

For the purpose of this Clause "Owners' Group" shall mean: the Owners, and their contractors and sub-contractors, and Employees, Servants or Agents of any of the foregoing.

For the purpose of this Clause "Charterers' Group" shall mean: the Charterers, and their contractors, sub-contractors, co-venturers and Charterers' customers with whom they have a contractual relationship in respect of the job or project on which the Vessels are employed, and Employees, Servants or Agents of any of the foregoing.

(b) Notwithstanding anything else contained herein, the Owners shall be liable for all loss or damage of whatsoever nature to or sustained by the Vessels, any liability in respect of wreck removal and the expense of moving, lighting or buoying the Vessels, and any liability in respect of death or injury of any of the Owners' Group, and any liability in respect of other cargo on board not the subject of this Charter Party, all of which shall be for the sole account of the Owners without recourse to the Charterers, their servants or agents, and the Owners shall indemnify, defend and hold the Charterers harmless from and against any and all claims, losses, costs, damages and expenses of every kind and nature including legal expenses arising from the foregoing.

(c) Notwithstanding anything else contained herein, the Charterers shall be liable for all loss or damage or delay of whatsoever nature and howsoever caused to or sustained by the cargo, including any property operated, owned, hired and/or leased by any member of the Charterers' Group on board, and any liability in respect of wreck removal and the expense of moving, lighting or buoying the cargo, and any liability in respect of death or injury of any of the Charterers' Group, or the Marine Warranty Surveyor(s) personnel, and all liabilities consequent upon loss, damage or delay to the cargo, all of which shall be for the sole account of the Charterers without recourse to the Owners, their servants or agents or insurers and the Charterers shall indemnify, defend and hold all these harmless from and against any and all claims, losses, costs, damages and expenses of every kind and nature including legal expenses arising from the foregoing.

(d) *Consequential Damages*

Neither party shall be liable to the other for any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Charter Party, and each party shall protect, defend and indemnify the other from and against all such claims from any member of its Group as defined in Clause 21(a).

"Consequential damages" shall include, but not be limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance, whether or not foreseeable at the date of this Charter Party.

(e) Any provisions of this Charter Party to the contrary

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notwithstanding, the Owners shall have the benefit of all limitations of, and exemptions from, liability accorded to the Owners or chartered Owners of vessels by any applicable statute or rule of law for the time being in force, and the same benefits to apply regardless of the form of signatures given to this Charter Party.

22. Bills of Lading, Cargo Notes and Receipts

(a) No bills of lading will be issued for shipments under this Charter Party.

(b) The cargo shall be shipped on deck at the Charterers' risk and the Owners not to be responsible for any loss or damage or delay to the cargo whatsoever or howsoever arising and by whosoever caused.

(c) In the event of a conflict of conditions between this Charter Party and any cargo note or receipt issued in respect of any shipment hereunder, the terms, conditions, liberties, clauses and exceptions of this Charter Party, including Clause 31 (BIMCO Dispute Resolution Clause), shall prevail.

23. Insurance

(a) Without prejudice to the Charterers' obligations and liabilities under this Charter Party, the Charterers shall take out and, in their name and at their expense, maintain at all material times and throughout the duration of this Charter Party a policy or policies of insurance in respect of all loss or damage to the cargo up to the full value of the cargo including but not limited to a policy or policies comprising All Risks cargo cover and cover against liabilities to third parties (including liability in respect of death and injury and claims for consequential loss), and wreck removal of the cargo. The Charterers shall arrange at their expense that the Owners shall be named as co-insured under the said policy or policies of insurance and arrange that the underwriters waive the right of subrogation. Co-insurance and waiver of subrogation shall be given only in so far as these relate to liabilities which are properly the responsibility of the Charterers under the terms of this Charter Party. The Charterers hereby agree to produce the original certificates of insurance maintained hereunder to the Owners or their appointed representatives when requested so to do.

(b) The Owners shall arrange at their expense such insurance(s) as required to protect the Charterers against the Owners' liabilities under Clause 21(b). The Owners hereby agree to produce the original certificate(s) of insurance maintained hereunder to the Charterers or their appointed representatives when requested to do so.

24. Himalaya Clause

(a) All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Charter Party or by any applicable statute, rule or regulation for the benefit of the Charterers shall also apply to and be for the benefit of the Charterers' parent, affiliated, related and subsidiary companies; the Charterers' contractors, sub-contractors, clients, joint venturers and joint interest owners (always with respect to the job or project on which the tug and barge are employed); their respective employees and their respective underwriters.

(b) All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Charter Party or by any applicable statute, rule or regulation for the benefit of the Owners shall also apply to and be for the benefit of the Owners' parent, affiliated, related and subsidiary companies, the Owners' contractors, sub-contractors, the tug, its Master, Officers and Crew, the barge, their registered owner, their operator, their demise charterer(s), their respective employees and their respective underwriters.

(c) The Owners or the Charterers shall be deemed to be acting as agent or trustee of and for the benefit of all such persons and parties set forth above, but only for the limited purpose of contracting for the extension of such benefits to such persons and parties.

25. Both-to-Blame Collision Clause

If the Vessels come into collision with another vessel as a result of the negligence of the other vessel and any act, neglect or default of the Master, mariner, pilot or the servants of the Owners in the navigation or in the management of the Vessels, the owners of the cargo carried hereunder will indemnify the Owners against all loss or liability to the other or non-carrying vessel or her Owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of the said cargo, paid or payable by the other or non-carrying vessel or her Owners to the owners of said cargo and set-off, recouped or recovered by the other or non-carrying vessel or her Owners as part of their claim against the carrying Vessels or Owners. The foregoing provisions shall also apply where the owners, operators or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

26. General Average and New Jason Clause

General Average shall be adjusted and settled in London unless otherwise stated in Box 25, according to the York/ Antwerp Rules, 1994.

Should adjustment be made in accordance with the law and practice of the United States of America, the following clause shall apply:

"In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Owners are not responsible, by statute, contract or otherwise, the cargo, shippers, consignees or owners of the cargo shall contribute with the Owners in general average to the payment of any sacrifices, loss or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo. If a salving vessel is owned or operated by the Owners, salvage shall be paid for as fully as if the said salving vessel or vessels belonged to strangers. Such deposit as the Owners, or their agents, may deem sufficient to cover the estimated contribution of the cargo and any salvage and special charges thereon shall, if required, be made by the cargo, shippers, consignees or owners of the cargo to the Owners before delivery".

27. War Risks (VOYWAR 2004)

(a) For the purpose of this Clause, the words:

(i) "Owners" shall include the shipowners, bareboat charterers, disponent owners, managers or other operators who are charged with the management of the Vessels, and the Master; and

(ii) "War Risks" shall include any actual, threatened or reported: war; act of war; civil war; hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy; acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever); by any person, body, terrorist or political group, or the Government of any state whatsoever, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or are likely to be or to become dangerous to the Vessels, their cargo, crew or other persons on board the Vessels.

(b) If at any time before the Vessels commence loading, it appears that, in the reasonable judgement of the Master and/or the Owners, performance of the Charter Party, or any part of it, may expose, or is likely

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to expose, the Vessels, their cargo, crew or other persons on board the Vessels to War Risks, the Owners may give notice to the Charterers cancelling this Charter Party, or may refuse to perform such part of it as may expose, or may be likely to expose, the Vessels, their cargo, crew or other persons on board the Vessels to War Risks; provided always that if this Charter Party provides that loading or discharging is to take place within a range of ports, and at the port or ports nominated by the Charterers the Vessels, their cargo, crew, or other persons on board the Vessels may be exposed, or may be likely to be exposed, to War Risks, the Owners shall first require the Charterers to nominate any other safe port which lies within the range for loading or discharging, and may only cancel this Charter Party if the Charterers shall not have nominated such safe port or ports within 48 hours of receipt of notice of such requirement.

(c) The Owners shall not be required to continue to load cargo for any voyage, or to sign Bills of Lading for any port or place, or to proceed or continue on any voyage, or on any part thereof, or to proceed through any canal or waterway, or to proceed to or remain at any port or place whatsoever, where it appears, either after the loading of the cargo commences, or at any stage of the voyage thereafter before the discharge of the cargo is completed, that, in the reasonable judgement of the Master and/or the Owners, the Vessels, their cargo (or any part thereof), crew or other persons on board the Vessels (or any one or more of them) may be, or are likely to be, exposed to War Risks. If it should so appear, the Owners may by notice request the Charterers to nominate a safe port for the discharge of the cargo or any part thereof, and if within 48 hours of the receipt of such notice, the Charterers shall not have nominated such a port, the Owners may discharge the cargo at any safe port of their choice (including the port of loading) in complete fulfilment of the Charter Party. The Owners shall be entitled to recover from the Charterers the extra expenses of such discharge and, if the discharge takes place at any port other than the Loading Port, to receive the full freight as though the cargo had been carried to the Discharging Port and if the extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the normal and customary route, the Owners having a lien on the cargo for such expenses and freight.

(d) If at any stage of the voyage after the loading of the cargo commences, it appears that, in the reasonable judgement of the Master and/or the Owners, the Vessels, their cargo, crew or other persons on board the Vessels may be, or are likely to be, exposed to War Risks on any part of the route (including any canal or waterway) which is normally and customarily used in a voyage of the nature contracted for, and there is another longer route to the Discharging Port, the Owners shall give notice to the Charterers that this route will be taken. In this event the Owners shall be entitled, if the total extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the normal and customary route.

(e) (i) The Owners may effect war risks insurance in respect of the Hull and Machinery of the Vessels and their other interests (including, but not limited to, loss of earnings and detention, the crew and their Protection and Indemnity Risks), and the premiums and/or calls therefor shall be for their account.

(ii) If the Underwriters of such insurance should require payment of premiums and/or calls because, pursuant to the Charterers' orders, or in order to fulfil the Owners' obligation under this Charter Party, the Vessels are within, or are due to enter and remain within, or pass through any area or areas which are specified by such Underwriters as being subject to additional premiums because of War Risks, then the actual premiums and/or calls paid shall be reimbursed by the Charterers to the Owners within 14 days after receipt of the Owners' invoice. If the Vessels discharge all of her cargo within an area subject to additional premiums as herein set forth, the Charterer shall reimburse the Owners for the actual additional premiums paid which may accrue from completion of discharge until the Vessels leave such area or areas referred to above. The Owners shall leave the area as soon as possible after completion of discharge.

(f) The Vessels shall have liberty:-

(i) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery or in any way whatsoever which are given by the Government of the Nation under whose flag the Vessels sail, or other Government to whose laws the Owners are subject, or any other Government which so requires, or any body or group acting with the power to compel compliance with their orders or directions;

(ii) to comply with the orders, directions or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance;

(iii) to comply with the terms of any resolution of the Security Council of the United Nations, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement;

(iv) to discharge at any other port any cargo or part thereof which may render the Vessels liable to confiscation as a contraband carrier;

(v) to call at any other port to change the crew or any part thereof or other persons on board the Vessels when there is reason to believe that they may be subject to internment, imprisonment or other sanctions;

(vi) where cargo has not been loaded or has been discharged by the Owners under any provisions of this Clause, to load other cargo for the Owners' own benefit and carry it to any other port or ports whatsoever, whether backwards or forwards or in a contrary direction to the ordinary or customary route.

(g) If in compliance with any of the provisions of sub-clauses (b) to (f) of this Clause anything is done or not done, such shall not be deemed to be a deviation, but shall be considered as due fulfilment of the Charter Party.

28. Interests

If any amounts due under this Charter Party are not paid when due, then interest at the rate stated in Box 26 shall be paid on all such amounts until payment is received.

29. Agency

The Vessels shall be addressed to Charterers' agents at Port(s) of Loading and Port(s) of discharging.

30. Brokerage

The Owners shall pay a brokerage at the rate stated in Box 27 to the Broker(s) mentioned in Box 27 on any freight, delay payment and/or termination fee paid under this Charter Party.

If the full amounts as aforesaid are not paid owing to

PART II
PROJECTCON - Special Projects Charter Party

breach of this Charter Party by either of the parties, the party liable therefor shall indemnify the Broker(s) against his or their loss of brokerage.

31. BIMCO Dispute Resolution Clause

*) **(a)** This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause. The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

*) **(b)** This Charter Party shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Charter Party shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgement may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.

*) **(c)** This Charter Party shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(d) Notwithstanding (a), (b) or (c) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Charter Party.

In the case of a dispute in respect of which arbitration has been commenced under (a), (b) or (c) above, the following shall apply:

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within 14 calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further 14 calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitration Tribunal ("the Tribunal") or such person as the Tribunal may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(v) Either party may advise the Tribunal that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Tribunal may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.

(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Tribunal except to the extent that they are disclosable under the law and procedure governing the arbitration.

(Note: the parties should be aware that the mediation process may not necessarily interrupt time limits.)

(e) If Box 28 in Part I is not appropriately filled in, Clause 31(a) of this Clause shall apply. Clause 31(d) shall apply in all cases.

*) *Clauses 31(a), 31(b) and 31(c) are alternatives; indicate alternative agreed in Box 28.*

32. BIMCO ISPS/MTSA Clause for Voyage Charter Parties

(a) (i) The Owners shall comply with the requirements of the International Code for the Security of Ships and of Port Facilities and the relevant amendments to Chapter XI of SOLAS (ISPS Code) relating to the Vessel and "the Company" (as defined by the ISPS Code). If trading to or from the United States or passing through United States waters, the Owners shall also comply with the requirements of the US Maritime Transportation Security Act 2002 (MTSA) relating to the Vessel and the "Owner" (as defined by the MTSA).

(ii) Upon request the Owners shall provide the Charterers with a copy of the relevant International Ship Security Certificate (or the Interim International Ship Security Certificate) and the full style contact details of the Company Security Officer (CSO).

(iii) Except as otherwise provided in this Charter Party, loss, damages, expense or delay (excluding consequential loss, damages, expense or delay) caused by failure on the part of the Owners or "the Company"/"Owner" to comply with the requirements of the ISPS Code/MTSA or this Clause shall be for the Owners' account.

(b) (i) The Charterers shall provide the Owners and the Master with their full style contact details and, upon request, any other information the Owners require to comply with the ISPS Code/MTSA.

PART II
PROJECTCON - Special Projects Charter Party

(ii) Except as otherwise provided in this Charter Party, loss, damages or expense (excluding consequential loss, damages or expense) caused by failure on the part of the Charterers to comply with this Clause shall be for the Charterers' account and any delay caused by such failure shall count as laytime or time on demurrage.

(c) Provided that the delay is not caused by the Owners' failure to comply with their obligations under the ISPS Code/MTSA, the following shall apply:

(i) Notwithstanding anything to the contrary provided in this Charter Party, the Vessel shall be entitled to tender Notice of Readiness even if not cleared due to applicable security regulations or measures imposed by a port facility or any relevant authority under the ISPS Code/MTSA.

(ii) Any delay resulting from measures imposed by a port facility or by any relevant authority under the ISPS Code/MTSA shall count as laytime or time on demurrage, unless such measures result solely from the negligence of the Owners, Master or crew or the previous trading of the Vessel, the nationality of the crew or the identity of the Owners' managers.

(d) Notwithstanding anything to the contrary provided in this Charter Party, any costs or expenses whatsoever solely arising out of or related to security regulations or measures required by the port facility or any relevant authority in accordance with the ISPS Code/MTSA including, but not limited to, security guards, launch services, tug escorts, port security fees or taxes and inspections, shall be for the Charterers' account, unless such costs or expenses result solely from the negligence of the Owners, Master or crew or the previous trading of the Vessel, the nationality of the crew or the identity of the Owners' managers. All measures required by the Owners to comply with the Ship Security Plan shall be for the Owners' account.

(e) If either party makes any payment which is for the other party's account according to this Clause, the other party shall indemnify the paying party.

33. BIMCO Notices Clause

(a) All notices given by either party or their agents to the other party or their agents in accordance with the provisions of this Charter Party shall be in writing.

(b) For the purposes of this Charter Party, "in writing" shall mean any method of legible communication. A notice may be given by any effective means including, but not limited to, cable, telex, fax, e-mail, registered or recorded mail, or by personal service.

APPENDIX 11

Heavyconbill 2007*

BIMCO

HEAVYCONBILL 2007

BILL OF LADING

To be used with the HEAVYCON 2007 charter party

Page 1

Shipper	Bill of Lading No.	Reference No.
Consignee	Vessel	
Notify address	Port of loading	
	Port of discharge	
Shipper's description of goods		Gross weight
(a) Quantity carried on deck	(b) Quantity carried under deck	

Unless specifically indicated in (b) above, all cargo is carried on deck at Shipper's risk; the Carrier not to be responsible for any loss or damage or delay to such cargo whatsoever and whether due to negligence of whosoever or howsoever arising and by whosoever caused.

Issued pursuant to CHARTER PARTY dated

Freight payable in accordance with the Charter Party

SHIPPED at the Port of Loading in apparent good order and condition on board the Vessel for carriage to the Port of Discharge or so near thereto as the Vessel may safely get the goods specified above.
Weight, measure, quality, quantity, condition, contents and value unknown.
IN WITNESS whereof the Master or Agent of the said Vessel has signed the number of Bills of Lading indicated below all of this tenor and date, any one of which being accomplished the others shall be void.

FOR CONDITIONS OF CARRIAGE SEE OVERLEAF.

Date shipped on board	Place and date of issue	Number of original Bills of Lading

Signature:

(i) Master

Master's name and signature

Or

(ii) as Agent for the Master

Agent's name and signature

Or

(iii) as Agent for the Owner*

Agent's name and signature

Owner

*if option (iii) filled in, state Owner's name above

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Conditions of Carriage

(1) All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the War Risks Clause (Clause 31) and the Dispute Resolution Clause (Clause 39), are herewith incorporated. If this Bill of Lading covers a transport for which no Charter Party has been agreed, the terms of the HEAVYCON 2007 Charter Party shall be deemed to be incorporated in this Bill of Lading.

(2) If the cargo is shipped under deck.
The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924 ("the Hague Rules") as amended by the Protocol signed at Brussels on 23 February 1968 ("the Hague-Visby Rules") and as enacted in the country of shipment shall apply to this Contract. When the Hague-Visby Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination shall apply, irrespective of whether such legislation may only regulate outbound shipments.

When there is no enactment of the Hague-Visby Rules in either the country of shipment or in the country of destination, the Hague-Visby Rules shall apply to this Contract save where the Hague Rules as enacted in the country of shipment or if no such enactment is in place, the Hague Rules as enacted in the country of destination apply compulsorily to this Contract.
The Protocol signed at Brussels on 21 December 1979 ("the SDR Protocol 1979") shall apply where the Hague-Visby Rules apply, whether mandatorily or by this Contract.

The Carrier shall in no case be responsible for loss of or damage to cargo arising prior to loading, after discharging, or while the cargo is in the charge of another carrier, or with respect to deck cargo and live animals.

(3) General Average
General average shall be adjusted, stated and settled according to York-Antwerp Rules 1994 in London unless another place is agreed in the Charter Party.

Cargo's contribution to general average shall be paid to the Carrier even when such average is the result of a fault, neglect or error of the Master, Pilot or Crew.

(4) New Jason Clause
In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible, by statute, contract or otherwise, the cargo, shippers, consignees or the owners of the cargo shall contribute with the Carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo. If a salving vessel is owned or operated by the Carrier, salvage shall be paid for as fully as if the said salving vessel or vessels belonged to strangers. Such deposit as the Carrier, or their agents, may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the cargo, shippers, consignees or owners of the goods to the Carrier before delivery.

(5) Both-to-Blame Collision Clause
If the Vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, neglect or default of the Master, Mariner, Pilot or the servants of the Carrier in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying vessel or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or non-carrying vessel or her owners to the owners of said cargo and set-off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying Vessel or the Carrier.
The foregoing provisions shall also apply where the owners, operators or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

For particulars of cargo, freight,
destination, etc., see overleaf.

APPENDIX 12

Heavyconreceipt 2007*

BIMCO

HEAVYCONRECEIPT 2007

NON-NEGOTIABLE CARGO RECEIPT

To be used with the HEAVYCON 2007 charter party

Charterers	CR No.	Reference no.
	Vessel	
Notify address	Port of loading	
	Port of discharge	
Charterer's description of goods		Gross weight
(a) Quantity carried on deck	(b) Quantity carried under deck	

Unless specifically indicated in (b) above, all cargo is carried on deck at Shipper's risk; the Carrier not to be responsible for any loss or damage or delay to such cargo whatsoever and whether due to negligence of whosoever or howsoever arising and by whosoever caused.

Issued pursuant to CHARTER PARTY dated:	**RECEIVED** on board for carriage the goods as specified above according to Charterer's declaration in apparent good order and condition – unless otherwise stated herein – weight, measure, marks, numbers, quality, quantity, contents and value unknown.
Freight payable in accordance with the Charter Party	This document only serves as a Cargo Receipt as per Clause 25(b) of the HEAVYCON 2007 Charter Party dated as indicated on page 1 of this Cargo Receipt. FOR FURTHER DETAILS SEE OVERLEAF.
	Date received on board / Place and date of issue
Carrier's name:	Signature: (i) .....Carrier Carrier's signature Or (ii) .....Master Master's name and signature Or (iii) .....Agent* Agent's name and signature *for and on behalf of Carrier/Master (delete as appropriate)

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HEAVYCONRECEIPT 2007

NON-NEGOTIABLE CARGO RECEIPT

To be used for shipments under the HEAVYCON 2007 charter party

Page 2

Conditions of Carriage

The goods shipped under this Cargo Receipt will be delivered to the Party nominated by the Charterers or their authorised agent, on production of proof of identity without any documentary formalities. The Owners shall exercise due care to ensure that delivery is made to the proper party. However, in case of incorrect delivery, no responsibility will be accepted unless due to fault or neglect on the part of the Owners.

The transportation of the goods described on page 1 of this Cargo Receipt is subject to the HEAVYCON 2007 Charter Party, all the terms, conditions, liberties, clauses and exceptions of which, including the Dispute Resolution Clause, shall be deemed to be incorporated in this Cargo Receipt and shall constitute the Contract of Carriage and no bills of lading will be issued.

If the cargo is shipped under deck, it is expressly agreed that neither the Hague Rules nor the Hague-Visby Rules nor any statutory enactment thereof shall apply either to this Cargo Receipt or to the Contract of Carriage, unless compulsorily applicable, in which case the Owners take all reservations possible under such applicable legislation, relating to the period before loading and after discharging and while the goods are in the charge of another carrier, and to deck cargo.

All Risks insurance has been placed for the full value of this cargo by the Charterers and in the name of the Charterers and the Owners.

For particulars of cargo, freight,
destination, etc., see overleaf.

APPENDIX 13

Heavyliftvoybill*

BIMCO

HEAVYLIFTVOYBILL

BILL OF LADING

To be used with the HEAVY LIFT VOY CHARTER PARTY

Shipper	Bill of Lading No.	Reference No.

Consignee	Vessel

Notify Address	Port of loading
	Port of discharge

Shipper's description of goods	State whether goods carried on or under deck	Gross weight, kg	Measurement, m³

(a) Quantity carried on deck	(b) Quantity carried under deck

Unless specifically indicated above, all cargo is carried on deck at Shipper's risk; the Carrier not to be responsible for any loss or damage or delay to such cargo whatsoever and whether due to negligence of whosoever or howsoever arising and by whosoever caused.

Issued pursuant to HEAVYLIFTVOY dated:

SHIPPED at the Port of Loading in apparent good order and condition on the Vessel for carriage to the Port of Discharge or so near thereto as the Vessel may safely get the goods specified above.

Weight, measure, quality, condition, contents and value unknown.

IN WITNESS whereof the Master or Agent of the said Vessel has signed the number of Bills of Lading indicated below all of this tenor and date, any one of which being accomplished the others shall be void.

FOR CONDITIONS OF CARRIAGE SEE OVERLEAF.

Freight payable in accordance with HEAVYLIFTVOY dated:

Date shipped on board	Place and date of issue	Number of original Bills of Lading

Signature

(i). .....Master

Master's name and signature

Or

(ii) .....as Agent for the Master

Agent's name and signature

Or

(iii) .....as Agents for the Owner*

Agent's name and signature

.....Owner

***if option (iii) filled in, state Owner's name above**

HEAVYLIFTVOYBILL
BILL OF LADING
To be used with the HEAVYLIFTVOY Charter Party
Page 2

Conditions of Carriage

(1) All terms and conditions, liberties and exceptions of the HEAVYLIFTVOY Charter Party, dated as overleaf, including the War Risks Clause (Clause 37) and the Dispute Resolution Clause (Clause 41), are herewith incorporated. If this Bill of Lading covers a transport for which no Charter Party has been agreed, the terms of the HEAVYLIFTVOY Charter Party shall be deemed to be incorporated in this Bill of Lading.

(2) If the cargo is shipped under deck.
The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924 ("the Hague Rules") as amended by the Protocol signed at Brussels on 23 February 1968 ("the Hague-Visby Rules") and as enacted in the country of shipment shall apply to this Contract. When the Hague-Visby Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination shall apply, irrespective of whether such legislation may only regulate outbound shipments.

When there is no enactment of the Hague-Visby Rules in either the country of shipment or in the country of destination, the Hague-Visby Rules shall apply to this Contract save where the Hague Rules as enacted in the country of shipment or if no such enactment is in place, the Hague Rules as enacted in the country of destination apply compulsorily to this Contract.

The Protocol signed at Brussels on 21 December 1979 ("the SDR Protocol 1979") shall apply where the Hague-Visby Rules apply, whether mandatorily or by this Contract.

The Carrier shall in no case be responsible for loss of or damage to cargo arising prior to loading, after discharging, or while the cargo is in the charge of another carrier, or with respect to deck cargo and live animals.

(3) General Average
General average shall be adjusted, stated and settled according to York-Antwerp Rules 1994 in London unless another place is agreed in the Charter Party.

Cargo's contribution to general average shall be paid to the Carrier even when such average is the result of a fault, neglect or error of the Master, Pilot or Crew.

(4) New Jason Clause
In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible, by statute, contract or otherwise, the cargo, shippers, consignees or the owners of the cargo shall contribute with the Carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo. If a salving vessel is owned or operated by the Carrier, salvage shall be paid for as fully as if the said salving vessel or vessels belonged to strangers. Such deposit as the Carrier, or their agents, may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the cargo, shippers, consignees or owners of the goods to the Carrier before delivery.

(5) Both-to-Blame Collision Clause
If the Vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, neglect or default of the Master, Mariner, Pilot or the servants of the Carrier in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying vessel or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or non-carrying vessel or her owners to the owners of said cargo and set-off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying Vessel or the Carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

2

For particulars of cargo, freight, destination, etc., see overleaf.

APPENDIX 14

Salvcon 2005*

1: Date and Place of Agreement	INTERNATIONAL SALVAGE UNION LUMPSUM SUB-CONTRACT **S A L V C O N 2 0 0 5** **PART I**
2: Hirer; Place of Business	3: Owner; Place of Business: (Part II, Clause 11.3)
4: Detail and Specification of Vessel Hired under this Agreement; (Part II, Clauses 1.2, 1.3 & 27)	
5. Name of Owner's P&I Insurers	
6: Details of Casualty; (Part II, Preamble, Clauses 1.1, 8.1 & 8.3) a) Name: b) Flag: c) Place of Registry: d) Owners: e) Length: f) Beam: g) Maximum Draft: h) Displacement: i) Details and Nature of Cargo j) Any other Casualty details relevant to this Agreement:	
7: Condition of Casualty; (Part II, Clause 3.1)	
8: Location of Casualty; (Part II, clause 3.1)	

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LUMPSUM AGREEMENT	**SALVCON 2005** **PART I**
9: Nature of Services to be provided by the Owner; (Part II, Clauses 2, 3.1, 3.6, 8.1 & 12)	
10: Payment Details; (Part II, Clauses 3.1, 3.2, 3.3 & 14.1) a) Lumpsum Price b) Stage Payments; (i) (ii) (iii)	
11. Free Time; (Part II, Clause 4)	
12. Delay Payment Rates; (Part II, Clauses 3.5, 5 & 14.1) a) At Sea: b) In Port: c) At Anchor:	
13: Payment Details; (Part II, Clause 3.4) Currency: Bank: IBAN No.: Address: Sort Code: Swift Code No.: Account No.: Account Name: Reference:	
14: Time for Payment & Interest; (Part II, Clause 15) Monies not paid within …… calendar days of presentation of Owner's invoice shall attract interest of …….. percent per month.	
15: Extra Costs; (Part II, Clause 16.2) Handling charge of …… percent to be applied	16: Security Requirements; (Part II, Clauses 3.7, 17.1 & 17.2)
17: Law and Arbitration; (Part II, Clauses 25 & 26) Arbitration to take place at: If this Box is left blank then Part II, Clause 25.1 shall apply	
18: Number of Additional Clauses	

The undersigned warrant that they have full power and authority to sign this Agreement on behalf of the parties represented by them. In the event of a conflict of terms and conditions, the provisions of Part I, and any additional Clauses, if agreed, shall prevail over those of Part II to the extent of such conflict but no further.

…… ……
FOR AND ON BEHALF OF THE HIRER FOR AND ON BEHALF OF THE OWNER

WHEREAS the hirer is engaged or is about to become engaged in rendering salvage services to the casualty described in Box 6 Part I of this Agreement.

AND WHEREAS the hirer wishes to hire from the Owner the vessel described in Box 4 Part I of this Agreement.

NOW IT IS HEREBY AGREED that the terms and conditions of Parts I and II of this Agreement and any additional clauses and/or annexes hereto shall apply as follows:

1. **DEFINITIONS**

1.1 The term "Casualty" shall include any vessel, craft, property or part thereof of whatsoever nature including anything contained therein or thereon such as, but not limited to cargo and bunkers as described in Box 6 of Part I of this Agreement in respect of which the hirer is contracted to render salvage services.

1.2 The term "Vessel" in Box 4 of Part I and in Part II of this Agreement shall include but not be limited to harbour tugs, offshore/diving support vessels, anchor handling/supply tugs, salvage/ ocean-going tugs, floating cranes/ sheer legs, barges and any other vessel and/or any substitute vessel provided under Clause 13 of this Agreement.

1.3 The term "Owner" in Box 3 Part I and in Part II of this Agreement shall include any owner, manager, operator or charterer of the vessel described in Box 4 Part I of this Agreement.

2. **NATURE OF SERVICES TO BE PROVIDED BY THE OWNER**

The services to be provided by the Owner are set out in Box 9 Part I of this Agreement and/or in any accompanying annex.

3. **PRICE AND CONDITIONS OF PAYMENT**

3.1 The Hirer shall pay the Owner the sum set out in Box 10 Part I of this Agreement (hereinafter referred to as the "Lump Sum"). The Lump Sum price is based upon the condition of the Casualty, the location of the Casualty and the nature of the services to be provided as set out in Boxes 7, 8 and 9 in Part I of this Agreement and any annex(s) to this Agreement.

3.2 The Lump Sum shall be payable as set out in Box 10(b) Part I of this Agreement.

3.3 The Lump Sum and all other sums payable to the Owner under this Agreement shall be payable without any discount, deduction, set-off, lien, claim or counterclaim and each instalment of the Lump Sum shall be fully and irrevocably earned at the moment it is due as set out in Box 10 Part I of this Agreement, Vessel and/or Casualty lost or not lost and all other sums shall be fully and irrevocably earned on a daily basis.

3.4 All payments by the Hirer shall be made in the currency and to the bank account specified in Box 13 Part I of this Agreement.

3.5 Any delay payment due under this Agreement as set out in Box 12 of Part I of this Agreement shall be paid to the Owner as and when earned on presentation of the invoice.

3.6 Within 14 days of termination or completion of the services set out in Box 9 Part I of this Agreement and/or any annex(s) hereto the Owner shall return any overpayments to the Hirer.

3.7 If any amount payable under this Agreement has not been paid within seven (7) calendar days of the due date or if the security required in accordance with Box 16 Part I of this Agreement and Clause 17 below is not provided within five (5) banking days of the request by the Owner, then at any time thereafter the Owner shall be entitled to terminate this Agreement without prejudice to the sums already due from the Hirer and to any further rights or remedies which the Owner may have against the Hirer provided always that the Owner shall give the Hirer at least three (3) working days' notice of its intention to exercise this right.

4. **FREE TIME**

The Owner will set out in Box 11 Part I of this Agreement the amount of free time allowed to the Hirer within his Lump Sum price and the specific purposes for which this free time may be utilised.

5. **DELAY PAYMENTS**

The Owner will also set out in Box 12 of Part I of this Agreement the delay payment rates to be applied and the circumstances when such delay payments will be applicable.

6. **EMPLOYMENT AND AREA OF OPERATIONS**

The Vessel shall be employed in activities which are lawful in accordance with the law of the place of the Vessel's flag and of the place of operations. Such place of operations shall always be within Institute Warranty Limits which will not be exceeded without the prior written approval of the Owners and any

necessary adjustment to the rate of hire. The Hirer does not warrant the safety of the place of operations or any other port or place to which they direct the Vessel, but they will exercise care in issuing orders to the Vessel as if the Vessel were their own property (see also Clause 8.1 hereafter).

7. **MASTER AND CREW**

7.1 The Master shall carry out his duties promptly and the Vessel shall perform these services by day and by night in accordance with the Hirer's requirements.

7.2 The navigation and management of the Vessel shall be in the exclusive control and command of its Owners, Master and crew.

8. **THE OWNER'S OBLIGATIONS**

8.1 The Owner agrees to render the services set out in Box 9 Part I of this Agreement or as otherwise reasonably requested by the Hirer during the services to the Casualty identified in Box 6 Part I of this Agreement and shall, subject to the provisions of Clause 6 hereof, carry out the reasonable instructions of the Hirer in relation to such services.

8.2 Insofar as it is not inconsistent with the nature of the services to be rendered under this Agreement, the Owner and his Master and crew will exercise due care to prevent or minimise damage to the environment.

8.3 The Owner accepts that the services to be rendered pursuant to this Agreement are in the nature of salvage services to the Casualty identified in Box 6 Part I of this Agreement.

8.4 In consideration of the payment of the sums due under this Agreement the Owner confirms that neither he nor any of his servants or agents nor any of his sub-contractors nor their servants or agents will make any claim for salvage and/or Special Compensation under Art. 14 of the 1989 Salvage Convention, or for payment under the Scopic Clause, against the Casualty, the subject of the salvage services by the Hirer, or against any other property in the same ownership as the said Casualty.

8.5 The Owner further agrees to indemnify the Hirer against the consequences of any such salvage claim by any of his servants or agents or his sub-contractors or their servants or agents including interest and costs reasonably incurred in respect of such claim provided that the Hirer gives notice in writing of such claim to the Owner as soon as they become aware of same. See Clause 17.3 hereof.

9. **HIRER'S REPRESENTATIVE**

A representative of the Hirer who will be in operational control of the services with full authority to act on behalf of the Hirer (query you said Owner?) will be available during the salvage operations on the Casualty.

10. **PERMITS**

The Hirer shall obtain and maintain at its own cost all necessary licenses, approvals, authorisations or permits required to enable the Owner's Vessel to undertake and complete the services without let or hindrance. The Owner shall provide the Hirer with all reasonable assistance in connection with the obtaining of such licenses, approvals, authorisations or permits.

11. **TOWING GEAR AND EQUIPMENT**

Subject to the provisions of Clause 16.1 (v) hereof, the Owner agrees to provide free of cost to the Hirer all tow wires, pennants, chains, springs, hausers, shackles, bridles and any other towing gear and all salvage equipment carried on board the Vessel.

12. **SEAWORTHINESS OF THE VESSEL**

The Owner will exercise due diligence to tender the Vessel to the Hirer at the commencement of this Agreement in a seaworthy condition and in all respects ready to perform the services set out in Box 9 Part I of this Agreement, but the Owner gives no other warranties express or implied.

13. **SUBSTITUTION OF THE VESSEL**

The Owner shall at all times have the right to substitute any vessel for any other vessel of adequate power, type and capability for the intended services and shall be at liberty to supply a vessel belonging to others for the whole or part of the services under this Agreement. Provided, however, that the main particulars and capabilities of the substituted vessel shall be subject to the Hirer's prior approval which approval shall not be unreasonably withheld.

14. **TERMINATION**

14.1 The Hirer has the right to terminate the services to be carried out by the Owner under this Agreement at any time provided always that notice of such termination is given to the Owner in writing. In such event the Owner is entitled to be paid all stage payments due at that time and a proportion of the balance of the Lump Sum price calculated on a pro rata basis up to the time of termination and any other amounts due in accordance with the provisions

of Boxes 10 and 12 Part I of this Agreement and Clause 16 hereof.

14.2 Such termination of the services will be carried out with all reasonable despatch from the Owner, subject always to permission from the relevant Local Authority and to the safety of personnel and equipment involved in the services. Any additional expenses arising directly as a consequence of the instructions to discontinue or terminate the services shall be for the account of the Hirer.

15. **TIME FOR PAYMENT AND INTEREST**

The Owner shall promptly invoice the Hirer for all sums payable under this Agreement. If any sums which become due and payable are not actually received by the Owner within the period specified in Box 14 Part I of this Agreement, they shall attract interest in accordance with the rate set out in Box 14 Part I.

16. **EXTRA COSTS**

16.1 The following expenses/costs other than those normally payable by the Owner at the ports or places of mobilisation and de-mobilisation shall be paid by the Hirer as and when they fall due.

(i) All port expenses, pilotage charges, harbour and canal dues and all other expenses of a similar nature levied upon or payable in respect of the Owners' Vessel arising out of these services.

(ii) All costs in connection with clearance, agency fees, visas, guarantees and all other expenses of such kind relating to these services.

(iii) All taxes and social security charges (other than those normally payable by the Owner in the country where it has its principal place of business and/or where the Vessel is registered), stamp duties or other levies payable in respect of or in connection with this Agreement, any import-export dues and any customs or excise duties.

(iv) All costs incurred due to the requirements of Governmental or other authorities over and above those costs which would otherwise be reasonably incurred by the Owner in the execution of this Agreement.

(v) All costs incurred by the Owner in respect of towing gear, salvage equipment, other portable equipment, materials or stores which are lost, damaged or sacrificed during the services provided that such loss, damage or sacrifice is immediately notified in writing to the Hirer's representative and provided any loss or damage does not arise as a result of negligence on the part of the Owner, his servants or agents.

16.2 If any such expenses/costs are in fact paid by or on behalf of the Owner (notwithstanding that the Owner shall under no circumstances be under any obligation to make such payments on behalf of the Hirer) the Hirer shall reimburse the Owner on the basis of the actual cost to the Owner plus a handling charge of the percentage amount indicated in Box 15 Part I of this Agreement upon presentation of invoice.

17. **SECURITY**

17.1 The Hirer shall provide on signing of this Agreement an irrevocable and unconditional Bank guarantee in the sum and at the place indicated in Box 19 Part I of this Agreement or other security to the satisfaction of the Owner.

17.2 Whether Box 19 of Part I be completed or not the Owner may at any time require reasonable security or reasonable further security to be provided by the Hirer to the satisfaction of the Owner for all or part of any amount which may be or become due under this Agreement. Such security shall be given on one or more occasions as and when required by the Owner.

17.3 In the event of a claim arising under the provisions of Clause 6.4 hereof, the Owner will provide the Hirer with security in respect of such claim. Such security shall be reasonable as to both amount and form.

18. **INSURANCE**

18.1 In entering into this Agreement the Owner warrants to the Hirer that he is carrying adequate and sufficient insurances on his Vessel for the nature of the services to be carried out under this Agreement.

18.2 Such insurances will include, but not necessarily be limited to the following:

(i) Hull insurance up to a level appropriate to the value of the Vessel.

(ii) Protection and Indemnity Insurance.

(iii) Pollution liability cover up to at least US $500 million.

(iv) Employers' liability cover in accordance with the law of the flag of the Vessel and/or the principal place of business of the Owner.

(v) Public liability cover in accordance with the law of the flag of the vessel and/or the principal place of business of the Owner.

(vi) Third party liability cover in accordance wit the law of the flag of the Vessel and/or the principal place of business of the Owner.

19. **LIABILITIES**

19.1 The Owner will indemnify and hold the Hirer harmless in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the services hereunder to any of the following persons:

- any servant or agent of the Owner

- any other person at or near the site of the operations for whatever purpose on behalf or at the request of the Owner.

19.2 The Hirer will indemnify and hold the Owner har mless in respect of any liability adjudged due or claim reasonably compromised arising from injury or death occurring during the services hereunder to any of the following persons:

- any servant or agent of the Hirer or of the casualty

- any other person at or near the site of the operations for whatever purpose on behalf or at the request of the Hirer.

19.3 The following shall be for the sole account of the Owner without any recourse to the Hirer his servants or agents whether or not the same is due to breach of contract, negligence or any other fault on the part of the Hirer his servants or agents.

(i) Subject to the provisions of Clause 15.1 (vi) hereof loss or damage of whatsoever nature howsoever caused to or sustained by the Owners' own or hired-in vessel.

(ii) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Owners' own or hired-in vessel, or obstruction created by the presence of such vessel.

(iii) Loss or damage of whatsoever nature suffered by the Owner or by third parties or their property in consequence of the loss or damage referred to in (i) and (ii) above.

(iv) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Owners' own or hired-in vessel or equipment or in respect of preventing or abating pollution originating from the Owners' own or hired-in vessel or equipment.

The Owner will indemnify and hold the Hirer harmless in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage. The Owner shall not in any circumstances by liable for any loss or damage suffered by the Hirer or caused to or sustained by the Casualty in consequence of a loss or damage howsoever caused to or sustained by the Vessel.

19.4 The following shall be for the sole account of the Hirer without any recourse to the Owner, his servants or agents whether or not the same is due to breach of contract, negligence or any other fault on the part of the Owner, its servant or agents.

(i) Loss or damage of whatsoever nature howsoever caused to or sustained by the Hirers' own or other hired-in vessel or equipment or to the Casualty, the subject of these services.

(ii) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Hirers' own or other hired-in vessel or equipment, or the Casualty or obstruction created by the presence of such vessel or equipment, or the Casualty.

(iii) Loss or damage of whatsoever nature suffered by the Hirer or by third parties or their property in consequence of the damage referred to in (i) or (ii) above.

(iii) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Owners' own or other hired-in Vessel or equipment or the Casualty, the subject of these services or in respect of preventing or abating pollution from the Hirers' own or other hired-in vessel or equipment or from the Casualty, the subject of these services.

The Hirer will indemnify and hold the Owner harmless in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage. The Hirer shall not in any circumstances be liable for any loss or damage suffered by the Owner or caused to or sustained by the Vessel in consequence of loss or damage

howsoever caused to or sustained by the Casualty.

19.5 Save as otherwise expressly stipulated in this Agreement, neither the Owner nor the Hirer shall be liable to the other party for loss of profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever.

19.6 Notwithstanding any provisions of this Agreement to the contrary, the Owner and the Hirer shall both have the benefit of all limitations of and exemptions from liability accorded to the Owners, Charterers, Managers or Operators of vessels by any applicable statute or rule of law for the time being in force and the same benefits are to apply regardless of the form of signatures given to this Agreement.

20. **HIMALAYA CLAUSE**

All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted provided by this Agreement for the benefit of the Owner or the Hirer shall also apply to and be for the benefit of their respective sub-contractors, operators, Masters, Officers and crews and to and be for the benefit of all bodies corporate, parent of, subsidiary to, affiliated with or under the same management as either of them, as well as all Directors, Officers, servants and agents of the same and to and be for the benefit of all parties performing services within the scope of this Agreement for or on behalf of the Owner or the Hirer as servants, agents and sub-contractors of such parties. The Owner or the Hirer shall be deemed to be acting as agent or trustee of and for the benefit of all such persons and entities of the vessels set forth above but only for the limited purpose of contracting for the extension of such benefits to such persons ,bodies and vessels.

21. **EVIDENCE**

The Owner confirms that he will provide all necessary assistance to the Hirer in respect of the presentation of the Hirer's salvage claim by the provision and retention of all evidence in his possession or control relating to the salvage services and to their contribution to same including their provision of witness statements/ reports, photographs and any other relevant documentary evidence. The Hirer agrees that he will pay the Owners' reasonable costs relating to the provision of the above evidence.

22. **CONFIDENTIALITY**

The terms and conditions of this Agreement are confidential between the parties hereto. Neither party shall disclose such matters to any third party without the prior approval of the other party to this Agreement provided always that the Hirer may provide details of this Agreement in any arbitration or other legal proceedings relating to his salvage claim against the Casualty, the subject of these services.

23. **GENERAL**

23.1 If any or more terms, conditions or provisions in this Agreement or any part thereof shall be held to be invalid, void or of no effect for any reason whatsoever, the same shall not affect the validity of the remaining terms, conditions or provisions which shall remain and subsist in full force and effect.

23.2 For the purposes of this Agreement unless the context otherwise requires, the singular shall include the plural and vice versa.

23.3 Any extension of time granted by the Owner to the Hirer or any indulgence shown relating to the time limits set out in this Agreement shall not be a waiver of the Owner's right under this Agreement to act upon the Hirer's failure to comply with the time limits.

24. **TIME FOR SUIT**

Save for the indemnity provisions under Clauses 6.5, 18 and 19 hereof, any claim which may arise out of or in connection with this Agreement or any of the services performed hereunder shall be notified by telex, facsimile, e-mail, cable or otherwise in writing to the party against whom such claim is made within 6 months of completion or termination of the services hereunder and any suit shall be brought within one year of the time when the cause of action first arose. If either of these conditions is not complied with the claim and all rights whatsoever and howsoever shall be absolutely barred and extinguished.

25. **LAW AND ARBITRATION PROCEDURE**

25.1 In the event that Box 20 of Part I is not completed, then Clauses 25.2 to 25.6 hereof shall apply.

25.2 This Agreement shall be governed by and construed in accordance with English law and any dispute arising out of this Agreement shall be referred to Arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force.

25.3 Any dispute arising hereunder shall be referred to the arbitrament of a sole arbitrator to be selected by the first party claiming arbitration from the persons currently on the panel of Lloyd's Salvage Arbitrators with a

right of appeal from an award made by the arbitrator to either party by notice in writing to the other within 28 days of the date of publication of the original arbitrator's award.

25.4 The arbitrator on appeal shall be the person currently acting as Lloyd's Appeal Arbitrator or by agreement of the parties another member of the panel of Lloyd's Salvage Arbitrators.

25.5 No suit shall be brought before another Tribunal or in another jurisdiction except that either party shall have the option to bring proceedings to obtain conservative seizure or other similar remedy against any assets owned by the other party in any state or jurisdiction where such assets may be found.

25.6 Both the arbitrator and appeal arbitrator shall have the same powers as an arbitrator and appeal arbitrator under LOF 2000 or any standard revision thereof including the power to order a payment on account of any monies due to the Owner pending final determination of any disputes between the parties hereto.

26. **ALTERNATIVE LAW AND ARBITRATION PROCEDURE**

26.1 If Box 20 of Part I is completed and the parties nominate a place outside of England, then the provisions of Clause 26.2 hereof shall apply.

26.2 Any dispute arising out of this Agreement shall be referred to arbitration at the place indicated in Box 20 Part I of this Agreement subject to the procedures applicable there. The laws of the place indicated in Box 20 Part I shall govern this Agreement.

27. **WARRANTY OF AUTHORITY**

If at the time of making this Agreement or providing any services under this Agreement at the request express or implied of the Hirer the Owner is not the actual owner of the Vessel identified in Box 4 Part I, the Owner warrants that it is authorised to make this Agreement.

APPENDIX 15

Salvhire 2005*

1. Date and Place of Agreement:	DAILY HIRE AGREEMENT **SALVHIRE 2005** **PART I**
2. Hirer; Place of Business:	3. Owner; Place of Business: (Part II - Clause 1.3)
4. Detail and Specification of Vessel hired under this Agreement; (Part II - Preamble and Clauses 1.2, 1.3, 2 and 26).	
5. Name of Owner's P&I Association:	
6. Details of Casualty; (Part II - Preamble, Clauses 1.1, 6.1 and 6.3) a) Name: b) Flag: c) Place of Registry: d) Owners: e) Length: f) Beam: g) Maximum draft: h) Displacement: i) Details and Nature of Cargo: j) Any other Casualty's details relevant to this Agreement:	
7. Condition of Casualty:	
8. Location of Casualty:	

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DAILY HIRE AGREEMENT	**SALVHIRE 2005** **PART I**
9. Nature of Services to be provided by the Owner: (Part II - Clauses 6.1, 10 and 13.3)	
10. Vessel Rates of Hire; (including Bunkers, Lubricating Oil and Water): (Part II - Clauses 12.1 and 13.1) a) Working Rate, (not towing): b) Towing Rate: c) Standby Rate: (i) At Anchor - (ii) At Sea - (iii) In Port -	
11. Mobilisation/Demobilisation Fee, (if applicable): (Part II - Clauses 12.1 and 13.1)	
12. Hire to commence from: (Part II - Clause 2 and 13.2)	13. Hire to terminate at: (Part II - Clause 2 and 13.2)
14. Minimum Number of Days Hire: (Part II - Clauses 2, 12.1 and 13.1)	15. Maximum duration of hire: (Part II - Clauses 2, 3 and 13.2)
16. Payment Details: (Part II - Clause 13.5) Currency: Bank: Address: Sort Code: Account Number: Account Name: Reference:	
17. Time for Payment and Interest: (Part II - Clause 14) Monies not paid within calendar days of presentation of the Owner's invoice shall attract interest of percent per month.	
18. Extra Costs: (Part II - Clause 15.2) Handling Charge of percent to be applied.	19. Security Requirements: (Part II - Clauses 13.6, 16.1 and 16.2)
20. Law and Arbitration: (Part II - Clauses 24 and 25) Arbitration to take place at : If this Box left blank then Part II, Clause 24.1 shall apply.	
21. Number of Additional Clauses:	

The undersigned warrant that they have full power and authority to sign this Agreement on behalf of the parties represented by them. In the event of a conflict of terms and conditions, the provisions of Part I and any additional clauses, if agreed, shall prevail over those of Part II to the extent of such conflict but no further.

....

FOR AND ON BEHALF OF THE HIRER FOR AND ON BEHALF OF THE OWNER

WHEREAS the hirer is engaged or is about to become engaged in rendering salvage services to the casualty described in Box 6 Part I of this Agreement.

AND WHEREAS the hirer wishes to hire from the Owner the vessel described in Box 4 Part I of this Agreement.

NOW IT IS HEREBY AGREED that the terms and conditions of Parts I and II of this Agreement and any additional clauses and/or annexes hereto shall apply as follows:

1. **DEFINITIONS**

1.1 The term "Casualty" shall include any vessel, craft, property or part thereof of whatsoever nature including anything contained therein or thereon such as, but not limited to cargo and bunkers as described in Box 6 of Part I of this Agreement in respect of which the hirer is contracted to render salvage services.

1.2 The term "Vessel" in Box 4 of Part I and in Part II of this Agreement shall include but not be limited to harbour tugs, offshore/diving support vessels, anchor handling/supply tugs, salvage/ocean-going tugs, floating cranes/ sheer legs, barges and any other vessel and/or any substitute vessel provided under Clause 11 of this Agreement.

1.3 The term "Owner" in Box 3 Part I and in Part II of this Agreement shall include any owner, manager, operator or charterer of the vessel described in Box 4 Part I of this Agreement.

2. **PERIOD OF HIRE**

The Owner lets the Vessel named in Box 4 Part I of this Agreement to the Hirer for the period covered by Boxes 12 and 13 in Part I of this Agreement as may be modified by Boxes 14 and 15 in Part I of this Agreement.

3. **REDELIVERY**

Unless an extension of the hire period is granted in writing to the hirer by the Owner, the hirer shall redeliver the Vessel within the maximum duration of hire set out in Box 15 Part I of this Agreement.

4. **EMPLOYMENT AND AREA OF OPERATIONS**

The Vessel shall be employed in activities which are lawful in accordance with the law of the place of the Vessel's flag and of the place of operations. Such place of operations shall always be within Institute Warranty Limits which will not be exceeded without the prior written approval of the Owners and any necessary adjustment to the rate of hire. The hirers do not warrant the safety of the place of operations or any other port or place to which they direct the Vessel, but they will exercise care in issuing orders to the Vessel as if the Vessel were their own property.

5. **MASTER AND CREW**

5.1 The Master shall carry out his duties promptly and the Vessel shall perform these services by day and by night in accordance with the hirers' requirements.

5.2 The navigation and management of the Vessel shall be in the exclusive control and command of its Owners, Master and crew.

6. **THE OWNER'S OBLIGATIONS**

6.1 The Owner agrees to render the services set out in Box 9 Part I of this Agreement or as otherwise reasonably requested by the hirer during the services to the casualty identified in Box 6 Part I of this Agreement and shall, subject to the provisions of Clause 5 hereof, carry out the reasonable instructions of the hirer in relation to such services.

6.2 Insofar as it is not inconsistent with the nature of the services to be rendered under this Agreement, the Owner and his Master and crew will exercise due care to prevent or minimise damage to the environment.

6.3 The Owner accepts that the services to be rendered pursuant to this Agreement are in the nature of salvage services to the casualty identified in Box 6 Part I of this Agreement.

6.4 In consideration of the payment of the sums due under this Agreement the Owner confirms that neither he nor any of his servants or agents nor any of his sub-contractors nor their servants or agents will make any claim for salvage and/or Special Compensation under Art. 14 of the 1989 Salvage Convention, or for payment under the Scopic Clause, against the Casualty, the subject of salvage services by the hirer, or against any other property in the same ownership as the said casualty.

6.5 The Owner further agrees to indemnify the Hirer against the consequences of any such salvage claim by any of his servants or agents or his sub-contractors or their servants or agents including interest and costs reasonably incurred in respect of such claim provided that the Hirer gives notice in writing of such claim to the Owner as soon as they become aware of same. See Clause 16.3 hereof.

7. **HIRER'S REPRESENTATIVE**
A representative of the Hirer who will be in operational control of the services with full authority to act on behalf of the Hirer will be available during the salvage operations on the Casualty.

8. **PERMITS**
The Hirer shall obtain and maintain at its own cost all necessary licenses, approvals, authorisations or permits required to enable the Owners' vessel to undertake and complete the services without let or hindrance. The Owner shall provide the Hirer with all reasonable assistance in connection with the obtaining of such licenses, approvals, authorisations or permits.

9. **TOWING GEAR AND EQUIPMENT**
Subject to the provisions of Clause 15.1 (vi) hereof, the Owner agrees to provide free of cost to the Hirer all tow wires, pennants, chains, springs, haulers, shackles, bridles and any other towing gear and all salvage equipment carried on board the vessel.

10. **SEAWORTHINESS OF THE VESSEL**
The Owner will exercise due diligence to tender the Vessel to the Hirer at the commencement of this Agreement in a seaworthy condition and in all respects ready to perform the services set out in Box 9 Part I of this Agreement, but the Owner gives no other warranties express or implied.

11. **SUBSTITUTION OF THE VESSEL**
The Owner shall at all times have the right to substitute any vessel for any other vessel of adequate power, type or capability for the intended services and shall be at liberty to supply a vessel belonging to others for the whole or part of the services under this Agreement. Provided, however, that the main particulars and capabilities of the substituted vessel shall be subject to the Hirer's prior approval which approval shall not be unreasonably withheld.

12. **DISCONTINUANCE OR TERMINATION**
12.1 Notwithstanding the provisions of Clause 2 hereof, the Hirer has the right to discontinue or terminate the services to be carried out by the Owner under this Agreement at any time provided always that notice of such discontinuance or termination is given to the Owner in writing. In such event the Owner is entitled to be paid all sums due at the time of discontinuance or termination including any mobilisation/de-mobilisation charge and any other amounts due in accordance with the provisions of Boxes 10, 11 and 14 of Part I of this Agreement.
12.2 Such discontinuation or termination of the services will be carried out with all reasonable despatch from the Owner, subject always to permission from the relevant Local Authority and to the safety of personnel and equipment involved in the services. Any additional expenses arising directly as a consequence of the instructions to discontinue or terminate the services shall be for the account of the Hirer.

13. **PRICE AND CONDITIONS OF PAYMENT**
13.1 The Hirer shall pay all hire due under Boxes 10, 11, 14 of Part I of this Agreement in accordance with the appropriate daily rates of hire, which rates shall apply pro rata for parts of a day.

13.2 Such hire shall be fully and irrevocably earned on a daily basis and shall be non-refundable. Hire shall commence in accordance with the provisions of Box 12 in Part I of this Agreement and subject to the provisions of Clause 12 hereof shall continue until the Vessel is redelivered to its Owner at the place indicated in Box 13 within the period set out in Box 15 in Part I of this Agreement.

13.3 Within 14 days of termination or completion of the services set out in Box 9 in Part I of this Agreement, the Owner shall return any overpayments to the Hirer.

13.4 All monies due and payable to the Owner under this Agreement shall be paid without any discount, deduction, set-off, lien, claim or counterclaim.

13.5 All payments to the Owner shall be made in the currency and to the bank account stipulated in Box 16 at Part I of this Agreement.

13.6 If any amount payable under this Agreement has not been paid within 7, (seven), calendar days of the due date, or if the security required in accordance with Box 19 Part I of this Agreement and Clause 16 below is not provided within 5, (five), banking days of the request by the Owner then any time thereafter the Owner shall be entitled to terminate this Agreement without prejudice to the sums already due from the Hirer and to any further rights or remedies which the Owner may have against the Hirer. Provided always that the Owner shall give the Hirer at least 3, (three), working days' notice of its intention to exercise this right.

14. **TIME FOR PAYMENT AND INTEREST**

The Owner shall promptly invoice the Hirer for all sums payable under this Agreement. If any sums which become due and payable are not actually received by the Owner within the period specified in Box 17 of Part I of this Agreement they shall attract interest in accordance with the rate set out in Box 17 Part I.

15. **EXTRA COSTS**

15.1 The following expenses/costs other than those normally payable by the Owner at the ports or places of mobilisation and de-mobilisation shall be paid by the Hirer as and when they fall due.

(i) All port expenses, pilotage charges, harbour and canal dues and all other expenses of a similar nature levied upon or payable in respect of the Owners' Vessel arising out of the services.

(ii) All costs in connection with clearance, agency fees, visas, guarantees and all other expenses of such kind relating to these services.

(iii) All taxes and social security charges (other than those normally payable by the Owner in a country where it has is principal place of business and/or where the Vessel is registered), stamp duties or other levies payable in respect of or in connection with this Agreement, any import-export dues and any customs or excise duties.

(iv) All costs incurred due to the requirements of Governmental or other authorities over and above those costs which would otherwise be reasonably incurred by the Owner in the execution of this Agreement.

(v) All costs incurred by the Owner in respect of the towing gear, salvage equipment, other portable equipment, materials or stores which are lost, damaged or sacrificed during the services provided that such loss, damage or sacrifice is immediately notified in writing to the Hirer's representative and provided any loss or damage does not arise as a result of negligence on the part of the Owner, his servants or agents.

15.2 If any such expenses/costs are in fact paid by or on behalf of the Owner (not-withstanding that the Owner shall under no circumstances be under any obligation to make such payments on behalf of the Hirer) the Hirer shall reimburse the Owner on the basis of the actual cost to the Owner plus a handling charge of the percentage amount indicated in Box 18 Part I of this Agreement upon presentation of invoice.

16. **SECURITY**

16.1 The Hirer shall provide on signing of this Agreement an irrevocable and unconditional Bank guarantee in the sum and at the place indicated in Box 19 Part I of this Agreement or other security to the satisfaction of the Owner.

16.2 Whether Box 19 of Part I be completed or not the Owner may at any time require reasonable security or reasonable further security to be provided by the Hirer to the satisfaction of the Owner for all or part of any amount which may be or become due under this Agreement. Such security shall be given on one or more occasions as and when required by the Owner.

16.3 In the event of a claim arising under the provisions of Clause 6.4 hereof, the Owner will provide the Hirer with security in respect of such claim. Such security shall be reasonable as to both amount and form.

17. **INSURANCE**

17.1 In entering into this Agreement the Owner warrants to the Hirer that he is carrying adequate and sufficient insurances on his Vessel for the nature of the services to be carried out under this Agreement.

17.2 Such insurances will include, but not necessarily be limited to the following:

(i) Hull insurance up to a level appropriate to the value of the Vessel.

(ii) Protection and Indemnity Insurance.

(iii) Pollution liability cover up to at least US $500 million.

(iv) Employers' liability cover in accordance with the law of the flag of the Vessel and/or the principal place of business of the Owner.

(v) Public liability cover in accordance with the law of the flag of the vessel and/or the principal place of business of the Owner.

(vi) Third party liability cover in accordance with the law of the flag of the Vessel and/or

the principal place of business of the Owner.

18. **LIABILITIES**

18.1 The Owner will indemnify and hold the Hirer harmless in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the services hereunder to any of the following persons:

- any servant or agent of the Owner

- any other person at or near the site of the operations for whatever purpose on behalf or at the request of the Owner.

18.2 The Hirer will indemnify and hold the Owner harmless in respect of any liability adjudged due or claim reasonably compromised arising from injury or death occurring during the services hereunder to any of the following persons:

- any servant or agent of the Hirer or of the casualty

- any other person at or near the site of the operations for whatever purpose on behalf or at the request of the Hirer.

18.3 The following shall be for the sole account of the Owner without any recourse to the Hirer his servants or agents whether or not the same is due to breach of contract, negligence or any other fault on the part of the Hirer his servants or agents.

(i) Subject to the provisions of Clause 15.1 (v) hereof loss or damage of whatsoever nature howsoever caused to or sustained by the Owners' own or hired-in vessel.

(ii) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Owners' own or hired-in vessel, or obstruction created by the presence of such vessel or equipment.

(iii) Loss or damage of whatsoever nature suffered by the Owner or by third parties or their property in consequence of the loss or damage referred to in (i) and (ii) above.

(iv) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Owners' own or hired-in vessel or equipment or in respect of preventing or abating pollution originating from the Owners' own or hired-in vessel or equipment.

The Owner will indemnify and hold the Hirer harmless in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage. The Owner shall not in any circumstances by liable for any loss or damage suffered by the Hirer or caused to or sustained by the Casualty in consequence of a loss or damage howsoever caused to or sustained by the Vessel.

18.4 The following shall be for the sole account of the Hirer without any recourse to the Owner, his servants or agents whether or not the same is due to breach of contract, negligence or any other fault on the part of the Owner, its servant or agents.

(i) Loss or damage of whatsoever nature howsoever caused to or sustained by the Hirers' own or other hired-in vessel or equipment or to the Casualty, the subject of these services.

(ii) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Hirers' own or other hired-in vessel or equipment, or obstruction created by the presence of such vessel or equipment, or the Casualty.

(iii) Loss or damage of whatsoever nature suffered by the Hirer or by third parties or their property in consequence of the damage referred to in (i) or (ii) above.

(iv) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Owners' own or other hired-in Vessel or equipment or the Casualty the subject of these services, or in respect of preventing or abating pollution from the Hirers' own or other hired-in vessel or equipment or from the Casualty, the subject of these services.

The Hirer will indemnify and hold the Owner harmless in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage. The Hirer shall not in any circumstances be liable for any loss or damage suffered by the Owner or caused to or sustained by the Vessel in consequence of loss or damage

howsoever caused to or sustained by the Casualty.

18.5 Save as otherwise expressly stipulated in this Agreement, neither the Owner nor the Hirer shall be liable to the other party for loss of profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever.

18.6 Notwithstanding any provisions of this Agreement to the contrary, the Owner and the Hirer shall both have the benefit of all limitations of and exemptions from liability accorded to the Owners, Charterers, Managers or Operators of vessels, by any applicable statute or rule of law for the time being in force and the same benefits are to apply regardless of the form of signatures given to this Agreement.

19. **HIMALAYA CLAUSE**

All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Agreement for the benefit of the Owner or the Hirer shall also apply to and be for the benefit of their respective sub-contractors, operators, Masters, Officers and Crews and to and be for the benefit of all bodies corporate, parent of, subsidiary to, affiliated with or under the same management as either of them, as well as all Directors, Officers, servants and agents of the same and to and be for the benefit of all parties performing services within the scope of this Agreement for or on behalf of the Owner or the Hirer as servants, agents and sub-contractors of such parties. The Owner or the Hirer shall be deemed to be acting as agent or trustee of and for the benefit of all such persons and entities of the vessels set forth above but only for the limited purpose of contracting for the extension of such benefits to such persons, bodies and vessels.

20. **EVIDENCE**

The Owner confirms that he will provide all necessary assistance to the Hirer in respect of the presentation of the Hirer's salvage claim by the provision and retention of all evidence in his possession or control relating to the salvage services and to their contribution to same including their provision of witness statements/ reports, photographs and any other relevant documentary evidence. The Hirer agrees that he will pay the Owners' reasonable costs relating to the provision of the above evidence.

21. **CONFIDENTIALITY**

The terms and conditions of this Agreement are confidential between the parties hereto. Neither party shall disclose such matters to any third party without the prior approval of the other party to this Agreement provided always that the Hirer may provide details of this Agreement in any arbitration or other legal proceedings relating to his salvage claim against the Casualty, the subject of these services.

22. **GENERAL**

22.1 If any one or more terms, conditions or provisions in this Agreement or any part thereof shall be held to be invalid, void or of no effect for any reason whatsoever, the same shall not affect the validity of the remaining terms, conditions or provisions which shall remain and subsist in full force and effect.

22.2 For the purposes of this Agreement unless the context otherwise requires, the singular shall include the plural and vice versa.

22.3 Any extension of time granted by the Owner to the Hirer or any indulgence shown relating to the time limits set out in this Agreement shall not be a waiver of the Owner's right under this Agreement to act upon the Hirer's failure to comply with the time limits.

23. **TIME FOR SUIT**

Save for the indemnity provisions under Clauses 6.5, 17 and 18 hereof, any claim which may arise out of or in connection with this Agreement or any of the services performed hereunder shall be notified by facsimile, e-mail, or otherwise in writing to the party against whom such claim is made within 6 months of completion or termination of the services hereunder and any suit shall be brought within one year of the time when the cause of action first arose. If either of these conditions is not complied with the claim and all rights whatsoever and howsoever shall be absolutely barred and extinguished.

24. **LAW AND ARBITRATION PROCEDURE**

24.1 In the event that Box 20 of Part I is not completed, then Clauses 24.2 to 24.6 hereof shall apply.

24.2 This Agreement shall be governed by and construed in accordance with English law and any dispute arising out of this Agreement shall be referred to Arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force.

24.3 Any dispute arising hereunder shall be referred to the arbitrament of a sole arbitrator to be selected by the first party claiming arbitration from the persons currently on the panel of Lloyd's Salvage Arbitrators with a right of appeal from an award made by the arbitrator to either party by notice in writing to the other within 28 days of the date of publication of the original arbitrator's award.

24.4 The arbitrator on appeal shall be the person currently acting as Lloyd's Appeal Arbitrator, or by agreement of the parties, another member of the panel of Lloyd's Salvage Arbitrators.

24.5 No suit shall be brought before another Tribunal or in another jurisdiction except that either party shall have the option to bring proceedings to obtain conservative seizure or other similar remedy against any assets owned by the other party in any state or jurisdiction where such assets may be found.

24.6 Both the arbitrator and appeal arbitrator shall have the same powers as an arbitrator and appeal arbitrator under LOF 2000 or any standard revision thereof, including the power to order a payment on account of any monies due to the Owner pending final determination of any disputes between the parties hereto.

25. **ALTERNATIVE LAW AND ARBITRATION PROCEDURE**

25.1 If Box 20 of Part I is completed and the parties nominate a place outside of England, then the provisions of Clause 25.2 hereof shall apply.

25.2 Any dispute arising out of this Agreement shall be referred to arbitration at the place indicated in Box 20 Part I of this Agreement subject to the procedures applicable there. The laws of the place indicated in Box 20 Part I shall govern this Agreement.

26. **WARRANTY OF AUTHORITY**

If at the time of making this Agreement or providing any services under this Agreement at the request express or implied of the Hirer the Owner is not the actual owner of the Vessel identified in Box 4 Part I, the Owner warrants that it is authorised to make this Agreement.

APPENDIX 16

Wreckhire 2010*

Explanatory Notes for WRECKHIRE 2010 are available from BIMCO at www.bimco.org

BIMCO — INTERNATIONAL SALVAGE UNION

WRECKHIRE 2010

INTERNATIONAL WRECK REMOVAL AND MARINE SERVICES AGREEMENT (DAILY HIRE)

PART I

1. Place and Date of Agreement	
2. Contractor/Place of Business (Cl. 1)	3. Company/Place of Business (Cl. 1)
4. Vessel Specifications (Cl. 1, 2, 4)	
(i) Name	(ii) Flag
(iii) IMO Number	(iv) Place of Registry
(v) Length/Beam/Depth //	(vi) Maximum Draft
(vii) GT/NT/DWT //	(viii) Details and Nature of Cargo
(ix) P&I Club/insurer(Cl. 23 (b))	(x) Any other Vessel details relevant to this Agreement
5. Condition of Vessel (Cl. 2, 4)	6. Position of Vessel and Condition of Worksite (Cl. 1, 2, 4)
7. Nature of Services (Cl. 1, 2, 4, 10(c)) (i) Nature of services: (ii) Compliance with orders of competent authorities (state party to obtain confirmation):	8. Place of Delivery and/or Disposal of Vessel (Cl.9(a), 9(c),12)
9. Extra costs of disposal of Vessel(Cl. 14) (i) state which party is responsible for costs and/or division between the parties: (ii) handling charge, if applicable (state percentage):	10. Bonus payment/Reduced hire (Cl. 11, 12) (i) Amount of Bonus (state either total amount or percentage of the total payable under Agreement) (ii) Full bonus (state applicable date or commencement date/event and subsequent period in days for full bonus) (iii) Pro rata bonus/reduced hire (state applicable date or commencement date/event and subsequent period in days for pro rata bonus after which reduced hire to apply)
11. Payment and Rates of Hire (Cl. 7, 8(a), 8 (c), 10(a), 12)	
(i) Daily Working Rate for Craft and Equipment (Cl.10(a))	(ii) Daily Working Rate for Personnel (Cl.10(a))
(iii) Daily Standby Rate for Craft and Equipment (Cl. 7)	(iv) Daily Standby Rate for Personnel (Cl. 7)
(v) Reduced Daily Rates of Hire (Cl. 10(a), 12) (a) Daily Working Rate for Craft and Equipment: (b) Daily Working Rate for Personnel: (c) Daily Standby Rate for Craft and Equipment:	(vi) Payment of the appropriate Working Rate of Hire is to be made in advance every (state number of days) (a) Commencing from: (b) and continuing until: (c) with a minimum payment of hire in any event (state number

continued

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(continued) PART I

(d) Daily Standby Rate for Personnel:	of days hire)
12. Payment Details (Cl. 10(e))	
(i) Currency	
(ii) Bank	(iii) Address
(iv) Account Number	(v) Account Name
13. Time of Payment and Interest (state period within which sums must be received by the Contractor and rate of interest per month) (Cl. 10(g))	14. Extra Costs (state percentage to be applied) (Cl. 13) (i) General handling charge (Cl. 13(a)-13(h)) (ii) Fuels and lubricants handling charge (Cl. 13(i))
15. Arbitration and Mediation (state Cl. 21 (a), 21 (b) or 21 (c) of Cl. 21 as agreed; if 21 (c) agreed, also state place of arbitration) (Cl. 21) (if not appropriately filled in, Clause 21(a) shall apply) **(c) -**	16. Number of Additional Clauses covering special provisions, if agreed

It is agreed that this Agreement shall be performed subject to the Terms and Conditions which consist of PART I, including Additional Clauses, if any agreed, and PART II, as well as Annex I (SCHEDULE OF PERSONNEL, CRAFT AND EQUIPMENT), Annex II (METHOD OF WORK AND ESTIMATED TIME SCHEDULE), and Annex III (CONTRACTOR'S DAILY REPORTS) or any other Annexes attached to this Agreement.

In the event of a conflict of terms and conditions, the provisions of PART I including Additional Clauses, if any agreed, shall prevail over those of PART II to the extent of such conflict but no further.

The undersigned warrant that they have full power and authority to sign this Agreement on behalf of the parties they represent.

Signature (for and on behalf of **the Contractor**)	Signature (for and on behalf of **the Company**)

continued

(continued) PART I

ANNEX I (SCHEDULE OF PERSONNEL, CRAFT AND EQUIPMENT)
INTERNATIONAL WRECK REMOVAL AND MARINE SERVICES AGREEMENT (DAILY HIRE)
CODE NAME: WRECKHIRE 2010

Dated:

Vessel:

Schedule of Personnel, Craft and Equipment (Cl. 2, 4 and 13(g))

continued

(continued) PART I

ANNEX II (METHOD OF WORK AND ESTIMATED TIME SCHEDULE)
INTERNATIONAL WRECK REMOVAL AND MARINE SERVICES AGREEMENT (DAILY HIRE)
CODE NAME: WRECKHIRE 2010

Dated:

Vessel:

Method of Work and Estimated Time Schedule (Cl. 2 and 4)

continued

(continued) PART I

ANNEX III (CONTRACTOR'S DAILY REPORTS)
INTERNATIONAL WRECK REMOVAL AND MARINE SERVICES AGREEMENT (DAILY HIRE)
CODE NAME: WRECKHIRE 2010

Date	Report no
Status of wreck:	
Vessel	
Cargo	
Bunkers	
Status of wreck site:	

Weather on location:			
	1200	2400	Forecast next 24 hours
Wind direction & speed (Bft)			
Swell direction & height (m)			
Wave height & max wave height (m)			
Long range forecast (5 days):			

Services:
- performed in last 24 hours:
- planned for next 24 hours:

Vessels:					
Name	On hire	Standby rate	Reduced rate	Off hire	Remarks
Demobilised, inoperative or damaged – insert under "Remarks"					

Equipment:					
Description	On hire	Standby rate	Reduced rate	Off hire	Remarks
Demobilised, inoperative, consumed, lost or damaged – insert under "Remarks"					

continued

(continued) PART I

Personnel:					
Name	On hire	Standby rate	Reduced rate	Off hire	Remarks
Demobilised, inoperative or injured – insert under "Remarks"					

Areas of concern:
Health & safety
Environmental
Other

Comments:
Contractor's Representative
Company Representative

Signed:			
Company Representative			
Contractor's Representative			
	Name	Position	Signature

Contractor's Daily Reports (Cl. 2).

continued

WRECKHIRE 2010 - International Wreck Removal and Marine Services Agreement (Daily Hire)
PART II

1. Definitions

"Company" means the party stated in Box 3.
"Contractor" means the party stated in Box 2.
"Services" means the services stated in Box 7.
"Vessel" means any vessel, craft, property, or part thereof, of whatsoever nature, including anything contained therein or thereon, such as but not limited to cargo and bunkers, as described in Box 4.
"Worksite" means the position of the Vessel stated in Box 6.

2. The Services

The Contractor agrees to exercise due care in rendering the Services which shall include, if applicable, the delivery and/or disposal of the Vessel. Insofar as it is not inconsistent with the nature of the Services to be rendered under this Agreement, the Contractor will also exercise due care to prevent and minimise damage to the environment.

The Contractor shall provide the Personnel, Craft and Equipment set out in Annex I of this Agreement which the Contractor deems necessary for the Services based upon the Specifications, Condition and Position of the Vessel and Worksite set out in Boxes 4, 5 and 6.

The Contractor's Method of Work and Estimated Time Schedule shall be as described in Annex II, utilising the Personnel, Craft and Equipment described in Annex I.

The Contractor shall consult with the Company if there is any need for substantial change in the Method of Work and/or Personnel, Craft or Equipment. (See Clause 4 (Change of Method of Work and/or Personnel, Craft and Equipment) hereof).

The Contractor shall provide the Company Representative with daily reports in accordance with Annex III.

The party identified in Box 7(ii) of this Agreement shall be given all reasonable assistance by the other party in connection with obtaining confirmation from the competent authorities that the Company has complied with any orders issued by them.

3. Company Representative

The methods and procedures to be employed in the Services shall at all times be discussed and agreed between the Company and the Contractor.

The Company Representative will be available during the performance of the Services with the full authority to act on behalf of the Company. The Company Representative shall have full and unfettered access at all times to the site and to the Contractor's craft and equipment, unless such access is reasonably refused by the Contractor.

In addition, the Company will provide at its sole risk and expense sufficient officers or their equivalents, who are fully conversant with the cargo system and/or layout of the Vessel, and who should be in attendance when reasonably required during the performance of the Services in order to provide advice as and when requested by the Contractor.

4. Change of Method of Work and/or Personnel, Craft and Equipment

The Rates of Hire stated in Box 11 are based upon the Nature of the Services, as set out in Box 7, Method of Work, and Personnel, Craft and Equipment, as set out in Annexes I and II, and the Description, Specifications, Position, Condition of the Vessel and the Worksite, as set out in Boxes 4, 5 and 6.

(a) If before or during the performance of the Services, and without fault on the part of the Contractor, there is a substantial change in the Services, and/or in the Personnel, Craft and Equipment required to undertake the Services due to any misdescription by the Company or error in the specification provided by the Company, upon which the Contractor has relied, or a material change in the position and/or condition of the Vessel or the Worksite:

(i) The Contractor shall forthwith give notice in writing thereof to the Company and of the estimated additional costs to effect the Services;

(**ii)** Any and all substantial changes to the nature of such Services which are agreed between the Contractor and the Company shall be drafted into a variation order by the Company, which shall be signed by the parties;

(iii) The parties shall, without delay, consult each other to reach agreement on the amount of the additional costs to be added to the Rates of Hire and any agreement shall be incorporated into the variation order.

(b) If, as a result of a material change in the position and/or condition of the Vessel or the Worksite, subsequent to entering into this Agreement, the Services become easier to perform in terms of the work and/or Personnel, Craft and/or Equipment requirements, then:

(i) The Company may, subject to the provisions of Clause 10(d) hereof, seek a reduction in respect of the monies

payable pursuant to Clause 10(a) hereof;

(ii) All such material changes which are agreed by the Contractor and the Company shall be drafted into a variation order by the Company, which shall be signed by the parties;

(iii) The parties shall, without delay, consult each other to reach agreement on the amount of the costs to be deducted from the Rates of Hire and any agreement shall be incorporated into the variation order.

(c) Alternatively either party may refer the matter to expert evaluation in accordance with Clause 20 (Expert Evaluation) or to arbitration or mediation pursuant to Clause 21 (Arbitration and Mediation) for a decision on the reasonableness and quantum of such costs, or the claim by the Company for a reduction in remuneration, which shall be incorporated into the variation order.

In the event the matter is referred either to expert evaluation or arbitration or mediation the Contractor will continue to provide the Services, without prejudice to any claim for an adjustment to the remuneration.

5. Miscellaneous

(a) The Company shall arrange and pay for any marking of the Vessel and cautioning required. The Contractor shall arrange and pay for any marking or cautioning required in respect of its own equipment during the Services under this Agreement.

(b) The Contractor may make reasonable use of the Vessel's machinery, gear, equipment, anchors, chains, stores and other appurtenances during and for the purposes of these Services free of expense but shall not unnecessarily damage, abandon or sacrifice the same or any property which is the subject of this Agreement.

(c) Subject to approval of the Company which shall not be unreasonably withheld, and subject to it being permitted by the competent authorities, the Contractor shall be entitled to remove, dispose of or jettison cargo, or parts of the Vessel, or equipment from the Vessel if such action is considered by the Contractor to be reasonably necessary to perform the Services under this Agreement.

(d) The Company will use its best endeavours to provide the Contractor with such plans and drawings of the Vessel, cargo manifests, stowage plans, etc., and such other information as the Contractor may reasonably require for the performance of the Services.

6. Permits

All necessary licences, approvals, authorisations or permits required to undertake and complete the Services without let or hindrance shall be obtained and maintained by the Contractor (see Clause 13(e)).
The Company shall provide the Contractor with all reasonable assistance in connection with the obtaining of such licences, approvals, authorisations or permits.

7. Delays

(a) Adverse Weather and Other Delays
In the event that the Contractor is prevented from progressing the Services due to adverse weather or sea conditions or any other reason outside the Contractor's control, the Standby Rate (Box 11(iii) and (iv)) shall apply. In such circumstances where there is a partial reduction in Services, there shall be an adjustment to the Daily Working Rate between the Working Rate and the Standby Rate to be agreed between the Contractor and the Company Representative.

(b) Contractor's Equipment and/or Personnel
If there is a breakdown of any of the Contractor's equipment or non-availability of personnel, the Company Representative and the Contractor shall consult each other to reach agreement on the amount of time lost as a result, if any. The Standby Rate shall apply for the agreed period.

(c) Hired-in Equipment and/or Personnel
The Contractor shall use its best efforts to ensure that appropriate standby rates of hire are agreed in any sub-contract agreement in the event of breakdown of their equipment or non-availability of their personnel.
If there is a breakdown of equipment or non-availability of personnel, the Company Representative and the Contractor shall consult each other to reach agreement on the amount of time lost as a result, if any.
The sub-contract standby rate shall only apply for the agreed period if such standby rates have been agreed with sub-contractors. The Contractor shall pass on to the Company the benefit of any off-hire or reduction in the rate of hire in respect of equipment or personnel hired-in by the Contractor.

(d) The Company Representative shall promptly advise the Contractor of all periods when they consider that Standby Rates shall apply and shall at the same time confirm same in writing to the Company and the Contractor.

(e) Sub-clauses 7(b) and 7(c) shall not apply for individual delays unless such delays exceed six (6) consecutive hours when the Standby Rate shall apply to the whole agreed delay period.

(f) In the event that the parties cannot reach agreement in respect of the applicable reductions in Sub-, 7(b) or 7(c) above to the Daily Rates of Hire or the duration of such reduction, then the issue may

be referred to expert evaluation in accordance with Clause 20 (Expert Evaluation) or to arbitration or mediation pursuant to Clause 21 (Arbitration and Mediation).

8. Suspension or Termination

(a) The Company has the right to suspend or terminate the Services to be carried out under this Agreement at any time, provided always that notice of such suspension or termination is given to the Contractor in writing. In such event the Contractor is entitled to be paid all sums due at the time of suspension or termination in accordance with the provisions of Box 11.

(b) Such suspension or termination of the Services will be carried out with all reasonable despatch by the Contractor, subject always to the safety of Personnel, Craft and Equipment involved in the Services. Any additional direct expenses arising as a consequence of the instructions to suspend or terminate the Services shall be for the account of the Company.

(c) If permission to suspend or terminate is not given by the competent authorities, the Contractor shall be paid by the Company at the appropriate rate set out in Box 11 for Personnel, Craft and Equipment during any standby period, and the Company shall be liable for the Contractor's reasonable and necessary costs of continuing with the Services.

9. Delivery and/or Disposal

(a) If applicable, the Vessel shall be accepted forthwith and taken over by the Company or its duly authorised representative at the Place of Delivery indicated in Box 8. References to delivery or the Place of Delivery shall include disposal or the Place of Disposal, if applicable.

The Place of Delivery and/or Disposal shall always be safe and accessible for the Contractor's own or hired-in craft and the Vessel to enter and operate in and shall be a place where the Contractor is permitted by governmental or other authorities to deliver and/or dispose of the Vessel.

In the event the Vessel is not accepted forthwith by the Company or delivery is prevented or delayed by action of governmental or other authorities outside the control of the Contractor, all costs necessarily incurred by the Contractor from the moment of the tender for delivery shall be for the account of the Company, and the Rates of Hire shall continue to be payable to the Contractor.

(b) If the Company fails, on completion of the Services, to take delivery of the Vessel within five (5) days of the Contractor tendering written notice of delivery or, if in the opinion of the Contractor the Vessel is likely to deteriorate, decay, become worthless or incur charges whether for storage or otherwise in excess of its value, the Contractor may, without prejudice to any other claims the Contractor may have against the Company, without notice and without any responsibility whatsoever attaching to the Contractor, sell or dispose of the Vessel and apply the proceeds of sale in reduction of the sums due to the Contractor from the Company under this Agreement. Any remaining proceeds will be refunded to the Company.

In the event that such sale or other disposal of the Vessel fails to raise sufficient net funds to pay the monies due to the Contractor under the terms of this Agreement, then the Company shall remain liable to the Contractor for any such shortfall.

(c) Reference to delivery and/or disposal of the Vessel shall include parts of the Vessel and/or cargo and/or any other thing emanating from the Vessel and such delivery may take place at different times and different places (see Box 8).

10. Payment

(a) The Company shall pay the Contractor the Daily Working and Standby Rates of Hire for Personnel, Craft and Equipment set out in Box 11(i)-(iv) and, if applicable, Reduced Daily Rates of Hire in accordance with Box 11(v).

(b) Such hire shall be fully and irrevocably earned on a daily basis and shall be non-returnable.

(c) Within 14 days of termination or completion of the Services set out in Box 7 the Contractor shall return any overpayments to the Company.

(d) All monies due and payable to the Contractor under this Agreement shall be paid without any discount, deduction, set-off, lien, claim or counterclaim.

(e) All payments to the Contractor shall be made in the currency and to the bank account stipulated in Box 12.

(f) If any amount payable under this Agreement has not been paid within seven (7) days of the due date, or if the security required in accordance with Clause 15 (Security) is not provided within five (5) banking days following the request by the Contractor, then at any time thereafter the Contractor shall be entitled to terminate this Agreement without prejudice to the sums already due to the Contractor and to any further rights or remedies which the Contractor may have against the Company, provided always that the Contractor shall give the

WRECKHIRE 2010 - International Wreck Removal and Marine Services Agreement (Daily Hire)
PART II

Company at least three (3) working days' written notice of its intention to exercise this right.

(g) The Contractor shall promptly invoice the Company for all sums payable under this Agreement. If any sums which become due and payable are not actually received by the Contractor within the period specified in Box 13, they shall attract interest in accordance with the rate set out in Box 13.

11. Bonus

If the Contractor completes the Services to the satisfaction of the Company:

(a)

(i) before the date or within the period stated in Box 10(ii), the Company shall pay the Contractor the bonus set out in Box 10(i); or

(ii) on or after the date or outside the period stated in Box 10(ii), but before the date or within the period stated in Box 10(iii), the Company shall pay the bonus set out in Box 10(i) reduced pro-rata on a daily basis from 100 per cent (100%) on the date or period stated in Box 10(ii) down to zero on or after the date or period stated in Box 10(iii).

(b) Delays (Clause 7) shall not affect the dates or periods to be applied for the purposes of this Clause 11.

12. Reduced Daily Rates of Hire

If the Contractor fails to complete the Services and, if applicable, deliver and/or dispose of the Vessel at the place(s) indicated in Box 8 within the period or on or before the date stated in Box 10(iii), the Daily Rates of Hire shall be reduced in accordance with Box 11(v). Delays (Clause 7) shall not affect the dates or periods to be applied for the purposes of this Clause 12.

13. Extra Costs

The following shall be paid by the Company as and when they fall due:

(a) all port expenses, pilotage charges, harbour and canal dues and all other expenses of a similar nature levied upon or payable in respect of the Vessel and the Contractor's own or hired-in craft;

(b) the costs of the services of any assisting tugs when reasonably deemed necessary by the Contractor or prescribed by port or other authorities;

(c) all costs in connection with clearance, agency fees, visas, guarantees and all other expenses of such kind;

(d) all taxes and social security charges (other than those normally payable by the Contractor in the country where it has its principal place of business), stamp duties, or other levies payable in respect of or in connection with this Agreement, any import - export dues and any customs or excise duties;

(e) all costs incurred in obtaining and maintaining licences, approvals, authorisations or permits required to undertake and complete the Services in accordance with Clause 6 (Permits);

(f) all costs incurred due to requirements of governmental or other authorities or unions over and above those costs which would otherwise be reasonably incurred by the Contractor in the execution of the Agreement;

(g) all reasonable costs of transportation of equipment and the travel and accommodation costs of Personnel identified in Annex I, (other than the crews of craft utilised in the Services);

(h) all costs incurred by the Contractor in respect of portable salvage equipment, materials, or stores which are lost, damaged or consumed during the Services;

(i) all costs in respect of fuels and lubricants consumed during the Services, unless included in the Daily Rates.

If any such costs are in fact paid by or on behalf of the Company by the Contractor, the Company shall reimburse the Contractor on the basis of the actual cost to the Contractor plus a handling charge of the percentage amount indicated in Box 14(i) for Clause 13(a) - (h) costs or Box 14(ii) for Clause 13(i) costs, upon presentation of invoice.

14. Extra Costs of disposal of Vessel

All extra costs incurred resulting from the disposal of the Vessel shall be for the account of the party stated in Box 9(i). If the Company is the party stated in Box 9(i) and any such costs are paid by or on behalf of the Company by the Contractor, the Company shall reimburse the Contractor on the basis of the actual cost to the Contractor plus a handling charge of the percentage amount indicated in Box 9(ii) upon presentation of invoice.

15. Security

The Company shall provide on signing this Agreement an irrevocable and unconditional security in a form and amount as agreed between the parties.

If required by the Contractor and also in the event that initially no security is requested, the Company shall

provide security or further security in a form and amount as agreed between the parties for all or part of any amount which may be or become due under this Agreement. Such security shall be given on one or more occasions as and when reasonably required by the Contractor.

16. Liabilities

(a) The Contractor will indemnify and hold the Company harmless in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the Services hereunder to any of the following persons:

(i) any servant, agent or sub-contractor of the Contractor;

(ii) any other person at or near the site of the operations for whatever purpose on behalf or at the request of the Contractor.

(b) The Company will indemnify and hold the Contractor harmless in respect of any liability adjudged due or claim reasonably compromised arising from injury or death occurring during the Services hereunder to any of the following persons:

(i) any servant, agent or sub-contractor of the Company;

(ii) any other person at or near the site of the operations for whatever purpose on behalf or at the request of the Company.

(c) Neither the Company nor its servants, agents or sub-contractors shall have any liability to the Contractor for loss or damage of whatsoever nature sustained by the Contractor's owned or hired-in craft or equipment (excluding portable salvage equipment, materials or stores which are lost, damaged, or consumed during the Services), whether or not the same is due to breach of contract, negligence or any other fault on the part of the Company, its servants, agents or sub-contractors.

(d) Neither the Contractor nor its servants, agents or sub-contractors shall have any liability to the Company for loss or damage of whatsoever nature sustained by the Vessel, whether or not the same is due to breach of contract, negligence or any other fault on the part of the Contractor, its servants, agents or sub-contractors.

(e) Neither party shall be liable to the other party for:

(i) any loss of profit, loss of use or loss of production whatsoever and whether arising directly or indirectly from the performance or non-performance of this Agreement, and whether or not the same is due to negligence or any other fault on the part of either party, their servants, agents or sub-contractors; or

(ii) any consequential loss or damage for any reason whatsoever, whether or not the same is due to any breach of contract, negligence or any other fault on the part of either party, their servants, agents or sub-contractors.

17. Himalaya Clause

All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Agreement for the benefit of the Contractor or the Company shall also apply to and be for the benefit of their respective sub-contractors, operators, the Vessel's owners (if the Company is the demise/bareboat charterer), masters, officers and crews and to and be for the benefit of all bodies corporate parent of, subsidiary to, affiliated with or under the same management as either of them, as well as all directors, officers, servants and agents of the same and to and be for the benefit of all parties performing Services within the scope of this Agreement for or on behalf of the Contractor or the Company as servants, agents and sub-contractors of such parties. The Contractor or the Company shall be deemed to be acting as agent or trustee of and for the benefit of all such persons, entities and Vessels set forth above but only for the limited purpose of contracting for the extension of such benefits to such persons, bodies and Vessels.

18. Lien

Without prejudice to any other rights which the Contractor may have, whether *in rem* or *in personam*, the Contractor shall be entitled to exercise a possessory lien upon the Vessel in respect of any amount howsoever or whatsoever due to the Contractor under this Agreement and shall for the purpose of exercising such possessory lien be entitled to take and/or keep possession of the Vessel, provided always that the Company shall pay to the Contractor all reasonable costs and expenses howsoever or whatsoever incurred by or on behalf of the Contractor in exercising or attempting or preparing to exercise such lien.

19. Time for Suit

Any claim which may arise out of or in connection with this Agreement or any of the Services performed hereunder shall be notified to the party against whom such claim is made, within twelve (12) months of completion or termination of the Services hereunder, or within twelve (12) months of any claim by a third party, whichever is later. Any suit shall be brought within twelve (12) months of the notification to the party against whom the claim is made. If either of these conditions is not complied with, the claim and all rights whatsoever

and howsoever shall be absolutely barred and extinguished.

20. Expert Evaluation

(a) If the parties are unable to agree the alteration to costs or rates under Clause 4(a) or Clause 4(b) or the adjustment to the Daily Working Rate or the time lost under Clauses 7(a), 7(b) or 7(c), then either party may request an expert evaluation in accordance with the following procedure:

(i) The party seeking the evaluation shall propose three (3) experts from the persons currently on the Panel of Special Casualty Representatives maintained by the Salvage Arbitration Branch of the Corporation of Lloyd's to the other party in writing having checked that the proposed experts are available and willing to be appointed. The other party may select one of the proposed experts by responding in writing within twenty-four (24) hours. The party seeking the evaluation will then, as soon as possible (and in any event in less than twelve (12) hours) appoint the expert selected by the other party or, if none has been selected, one of the three (3) experts proposed (hereinafter "the Expert").

(ii) Both parties shall provide short written statements to the Expert setting out their arguments within forty-eight (48) hours of their acceptance of instructions and shall provide copies of their statement to the other party.

(iii) The Expert shall, within seventy-two (72) hours of receipt of written statements, advise the parties in writing of the alteration to costs and/or rates or of the adjustment to the Daily Working Rate or time lost. The Expert may also provide short reasons explaining the evaluation.

(iv) The Expert's rate of remuneration shall be the applicable rate plus bonus as set from time to time by the SCOPIC Committee for a Salvage Master. The costs of the Expert shall be paid by the party seeking the expert evaluation, but such party shall then be entitled to recover fifty per cent (50%) of the Expert's fees from the other party.

(b) If the Expert's evaluation is not agreed by both parties, the Company shall in any event make payments to the Contractor calculated in accordance with the evaluation. Such payments shall be on a provisional basis and without prejudice to the parties' rights to seek a determination in accordance with Clause 21 (Arbitration and Mediation).

21. Arbitration and Mediation

This Clause 21 applies to any dispute arising under this Agreement.

(a) *This Agreement shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Agreement shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The reference shall be to a sole arbitrator ("Arbitrator"), to be selected by the first party claiming arbitration from the persons currently on the Panel of Lloyd's Salvage Arbitrators with a right of appeal from an award made by the Arbitrator to either party by notice in writing to the other within twenty-eight (28) days of the date of publication of the original Arbitrator's Award.

The Arbitrator on appeal shall be the person currently acting as Lloyd's Appeal Arbitrator.

No suit shall be brought before another Tribunal, or in another jurisdiction, except that either party shall have the option to bring proceedings to obtain conservative seizure or other similar remedy against any assets owned by the other party in any state or jurisdiction where such assets may be found.

Both the Arbitrator and Appeal Arbitrator shall have the same powers as an Arbitrator and an Appeal Arbitrator under LOF 2000 or any standard revision thereof, including a power to order a payment on account of any monies due to the Contractor pending final determination of any dispute between the parties hereto.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

In cases where the claim or any counterclaim exceeds the sum agreed for the LMAA Small Claims Procedure and neither the claim nor any counterclaim exceeds the sum of US$400,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Intermediate Claims Procedure current at the time when the arbitration proceedings are commenced.

(b) *This Agreement shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Agreement shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgement may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.

(c) *This Agreement shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Agreement shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(d) Notwithstanding 21(a), 21(b) or 21(c) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Agreement. In the case of a dispute in respect of which arbitration has been commenced under 21(a), 21(b) or 21(c) above, the following shall apply:

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within fourteen (14) calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further fourteen (14) calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitrator or such person as the Arbitrator may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(v) Either party may advise the Arbitrator that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Arbitrator may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.

(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Arbitrator except to the extent that they are disclosable under the law and procedure governing the arbitration.

(Note: The parties should be aware that the mediation process may not necessarily interrupt time limits.)

(e) If Box 15 in PART I is not appropriately filled in, Sub-clause 21(a) of this Clause shall apply. Sub-clause 21(d) shall apply in all cases.

**Sub-clauses 21(a), 21(b) and 21(c) are alternatives; indicate alternative agreed in Box 15.*

22. Notices Clause

(a) All notices given by either party or their agents to the other party or their agents in accordance with the provisions of this Agreement shall be in writing and shall, unless specifically provided in this Agreement to the contrary, be sent to the address for that other party as set out in Boxes 2 and 3 or as appropriate or to such other address as the other party may designate in writing.

A notice may be sent by registered or recorded mail, facsimile, electronically or delivered by hand in accordance with this Sub-clause 22(a).

(b) Any notice given under this Agreement shall take effect on receipt by the other party and shall be deemed to have been received:

(i) if posted, on the seventh (7^{th}) day after posting;

(ii) if sent by facsimile or electronically, on the day of transmission; or

(iii) if delivered by hand, on the day of delivery.

And in each case proof of posting, handing in or transmission shall be proof that notice has been given, unless proven to the contrary.

23. Insurance

WRECKHIRE 2010 - International Wreck Removal and Marine Services Agreement (Daily Hire)
PART II

(a) The Contractor warrants that throughout the period of this Agreement it will maintain full cover against normal P&I risks including salvors' liabilities as evidenced by a Certificate of Entry issued by a P&I Club or insurer acceptable to the Company and shall comply with all the requirements of the policy.

(b) The Company warrants that throughout the period of this Agreement it will maintain full cover against normal P&I risks for the Vessel as evidenced by a Certificate of Entry issued by a P&I Club or insurer stated in Box 4(ix) and shall comply with all the requirements of the policy.

24. Pollution

(a) The Contractor shall exercise due care throughout the performance of the Services to prevent and minimise damage to the environment and shall also put in place, maintain and implement throughout the Services a pollution response plan which meets the requirements of the competent authorities and the Company Representative. The Contractor shall provide the Company with a copy of the pollution response plan on request by the Company.

(b) The Company shall indemnify and hold the Contractor harmless in respect of any and all consequences of any pollution which results from any discharge or escape of any pollutant from the Vessel except where such pollution arises as a consequence of the negligence of the Contractor, its sub-contractors, its agents and/or servants.

(c) The Contractor shall indemnify and hold the Company harmless in respect of any and all consequences of any pollution which results from any discharge or escape of any pollutant from its own or from hired-in craft.

25. Rotation and Replacement of Craft, Equipment and Personnel

The Contractor shall have the right to rotate and replace any craft, equipment and personnel with other suitable replacement craft, equipment and personnel subject to the approval of the Company Representative, which shall not be unreasonably withheld.

26. General Provisions

(a) Severability

If, in any legal proceedings, it is determined that any provision of this Agreement is unenforceable under applicable law, then the unenforceable provision shall automatically be amended to conform to that which is enforceable under the law. In any event, the validity or enforceability of any provision shall not affect any other provision of this Agreement, and this Agreement shall be construed and enforced as if such provision had not been included.

(b) Third Party Beneficiaries

Except as specifically provided for elsewhere in this Agreement, this Agreement shall not be construed to confer any benefit on any third party not a party to this Agreement nor shall this Agreement provide any rights to such third party to enforce any provision of this Agreement.

(c) Waiver

No benefit or right accruing to either party under this Agreement shall be waived unless the waiver is reduced to writing and signed by both the Contractor and the Company. The failure of either party to exercise any of its rights under this Agreement, including but not limited to either party's failure to comply with any time limit set out in this Agreement, shall in no way constitute a waiver of those rights, nor shall such failure excuse the other party from any of its obligations under this Agreement.

(d) Warranty of Authority

The Contractor and the Company each warrant and represent that the person whose signature appears in Part I above is its representative and is duly authorized to execute this Agreement as a binding commitment of such party.

(e) Singular/Plural

The singular includes the plural and vice versa as the context admits or requires.

(f) Headings

The headings to the clauses and appendices to this Agreement are for convenience only and shall not affect its construction or interpretation.

APPENDIX 17

Wreckstage 2010*

Explanatory Notes for WRECKSTAGE 2010 are available from BIMCO at www.bimco.org

WRECKSTAGE 2010

INTERNATIONAL WRECK REMOVAL AND MARINE SERVICES AGREEMENT (LUMP SUM – STAGE PAYMENTS)

PART I

1. Place and Date of Agreement	
2. Contractor/Place of Business (Cl. 1)	3. Company/Place of Business (Cl. 1)
4. Vessel Specifications (Cl. 1, 2, 4)	
(i) Name	(ii) Flag
(iii) IMO Number	(iv) Place of Registry
(v) Length/Beam/Depth //	(vi) Maximum Draft
(vii) GT/NT/DWT //	(viii) Details and Nature of Cargo
(ix) P&I Club/insurer (Cl. 20(b))	(x) Any other Vessel details relevant to this Agreement
5. Condition of Vessel (Cl. 2, 4)	6. Position of Vessel and Condition of Worksite (Cl. 1, 2, 4)
7. Nature of Services (Cl. 1, 2, 4) (i) Nature of services: (ii) Compliance with orders of competent authorities (state party to obtain confirmation):	8. Place of Delivery and/or Disposal of Vessel (Cl. 9(a), 9(b), 9(e))
9. Payments (Cl. 4, 8(b), 10(a), 10(b))	
(i) Lump Sum (in figures and words)	(ii) Amount due and payable on signing this Agreement
	(iii) Amount due and payable on
(iv) Amount due and payable on	(v) Amount due and payable on
(vi) Amount due and payable on	(vii) Amount due and payable on
10. Payment Details (Cl. 10(d))	
(i) Currency	
(ii) Bank	(iii) Address
(iv) Account Number	(v) Account Name

continued

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(continued) PART I

11. Time of Payment and Interest (state period within which sums must be received by the Contractor and rate of interest per month) (Cl. 10(f))	12. Extra Costs (state percentage to be applied) (Cl. 4(a)(iii), 8(b), 11, 13(c)) (i) Contractor shall be responsible for and pay for the following extra costs (ii) Company shall be responsible for and pay for the following extra costs (iii) Handling Charge to be applied, where applicable (state percentage)
13. Delay Payment Rate (Cl. 4(a)(iii), 7, 8(b), 8(c), 9(a), 9(b))	14. Cancellation Fee (Cl. 4(a)(iii), 8(a))
15. Number of Unworkable Days due to Adverse Weather or Sea Conditions (Cl. 7(a))	16. Number of Additional Clauses covering special provisions, if agreed
17. Arbitration and Mediation (state Cl. 18(a), 18(b) or 18(c) of Cl. 18 as agreed; if 18(c) agreed, also state place of arbitration) (Cl. 18) (if not appropriately filled in, Clause 18(a) shall apply) **(c) -**	

It is agreed that this Agreement shall be performed subject to the Terms and Conditions which consist of PART I, including Additional Clauses, if any agreed, and PART II, as well as Annex I (SCHEDULE OF PERSONNEL, CRAFT AND EQUIPMENT), Annex II (METHOD OF WORK AND ESTIMATED TIME SCHEDULE), and Annex III (CONTRACTOR'S DAILY REPORTS) or any other Annexes attached to this Agreement.

In the event of a conflict of terms and conditions, the provisions of PART I including Additional Clauses, if any agreed, shall prevail over those of PART II to the extent of such conflict but no further.

The undersigned warrant that they have full power and authority to sign this Agreement on behalf of the parties they represent.

Signature (for and on behalf of **the Contractor**)	Signature (for and on behalf of **the Company**)

continued

ANNEX I (SCHEDULE OF PERSONNEL, CRAFT AND EQUIPMENT)
INTERNATIONAL WRECK REMOVAL AND MARINE SERVICES AGREEMENT (LUMP SUM – STAGE PAYMENTS)
CODE NAME: WRECKSTAGE 2010

Dated:

Vessel:

Schedule of Personnel, Craft and Equipment (Cl. 2, 4 and 8)

continued

ANNEX II (METHOD OF WORK AND ESTIMATED TIME SCHEDULE)
INTERNATIONAL WRECK REMOVAL AND MARINE SERVICES AGREEMENT (LUMP SUM – STAGE PAYMENTS)
CODE NAME: WRECKSTAGE 2010

Dated:

Vessel:

Method of Work and Estimated Time Schedule (Cl. 2 and 4)

continued

(continued) PART I

ANNEX III (CONTRACTOR'S DAILY REPORTS)
INTERNATIONAL WRECK REMOVAL AND MARINE SERVICES AGREEMENT (LUMP SUM – STAGE PAYMENTS)
CODE NAME: WRECKSTAGE 2010

Date	Report no
Status of wreck:	
Vessel	
Cargo	
Bunkers	
Status of wreck site:	

Weather on location:			
	1200	2400	Forecast next 24 hours
Wind direction & speed (Bft)			
Swell direction & height (m)			
Wave Height & max wave height (m)			
Long range forecast (5 days):			

Services:
- performed in last 24 hours:
- planned for next 24 hours:

Areas of concern:
Health & safety
Environmental
Other

Comments:

continued

(continued) PART I

Contractor's Representative
Company's Representative

Signed:			
Company's Representative			
Contractor's Representative			
	Name	Position	Signature

Contractor's Daily Reports (Cl. 2)

continued

WRECKSTAGE 2010 - International Wreck Removal and Marine Services Agreement
(Lump Sum-Stage Payments)
PART II

1. Definitions

"Company" means the party stated in Box 3.
"Contractor" means the party stated in Box 2.
"Services" means the services stated in Box 7.
"Vessel" means any vessel, craft, property, or part thereof, of whatsoever nature, including anything contained therein or thereon, such as but not limited to cargo and bunkers, as described in Box 4.
"Worksite" means the position of the Vessel stated in Box 6.

2. The Services

The Contractor agrees to exercise due care in rendering the Services which shall include, if applicable, the delivery and/or disposal of the Vessel. Insofar as it is not inconsistent with the nature of the Services to be rendered under this Agreement, the Contractor will also exercise due care to prevent and minimise damage to the environment.

The Contractor shall provide the Personnel, Craft and Equipment set out in Annex I of this Agreement which the Contractor deems necessary for the Services based upon the Specifications, Condition and Position of the Vessel and Worksite set out in Boxes 4, 5 and 6.

The Contractor's Method of Work and Estimated Time Schedule shall be as described in Annex II, utilising the Personnel, Craft and Equipment described in Annex I.

The Contractor shall consult with the Company if there is any need for substantial change in the Method of Work and/or Personnel, Craft or Equipment. In the event that time does not permit such consultation, or agreement to the proposed change(s) is unreasonably withheld, then the Contractor may proceed with such change(s). (See Clause 4 (Change of Method of Work and/or Personnel, Craft and Equipment) hereof).

The Contractor shall provide the Company or the Company Representative, if in attendance, with daily reports in accordance with Annex III.

The party identified in Box 7(ii) of this Agreement shall be given all reasonable assistance by the other party in connection with obtaining confirmation from the competent authorities that the Company has complied with any orders issued by them.

3. Company Representative

If reasonably required by the Contractor a representative of the Company will be available during the performance of the Services with the full authority to act on behalf of the Company.

In addition, the Company will provide at its sole risk and expense sufficient officers or their equivalents, who are fully conversant with the cargo system and/or layout of the Vessel, and who should be in attendance when reasonably required during the performance of the Services in order to provide advice as and when requested by the Contractor.

4. Change of Method of Work and/or Personnel, Craft and Equipment

The Lump Sum stated in Box 9 is based upon the Nature of the Services, as set out in Box 7, Method of Work, and Personnel, Craft and Equipment, as set out in Annexes I and II, and the Description, Specifications, Position, Condition of the Vessel and the Worksite, as set out in Boxes 4, 5 and 6.

(a) If before or during the performance of the Services, and without fault on the part of the Contractor, there is a substantial change in the Services, and/or in the Personnel, Craft and Equipment required to undertake the Services due to any misdescription by the Company or error in the specification provided by the Company, upon which the Contractor has relied, or a material change in the position and/or condition of the Vessel or the Worksite:

(i) The Contractor shall forthwith give notice in writing thereof to the Company and of the estimated additional costs to effect the Services;

(ii) Any and all substantial changes to the nature of such Services which are agreed between the Contractor and the Company shall be drafted into a variation order by the Company, which shall be signed by the parties;

(iii) The parties shall, without delay, consult each other to reach agreement on the amount of the additional costs to be added to the Lump Sum and any agreement shall be incorporated into the variation order. In the event that the parties are unable to reach agreement on the additional costs within 5 days of the Contractor providing details of the extra costs, either party may terminate the Services under this Agreement, without prejudice to any claim the Contractor may have under this Sub-clause 4(a), provided always that such termination is permitted by the competent authorities. In such event the Contractor is entitled to be paid all sums due at the time of termination in accordance with the provisions of Boxes 9, 12, 13 and 14. If permission to terminate is not given by the competent authorities the Contractor shall be paid by the Company at the Delay Payment Rate set out in Box 13 during any standby period, and the Company shall be

liable for the Contractor's reasonable and necessary costs of continuing with the Services.

(b) If, as a result of a material change in the position and/or condition of the Vessel or the Worksite, subsequent to entering into this Agreement, the Services become easier to perform in terms of the work and/or Personnel, Craft and/or Equipment requirements, then:

(i) The Company may, subject to the provisions of Clause 10(c) hereof, seek a reduction in respect of the monies payable pursuant to Clause 10(a) hereof;

(ii) All such material changes which are agreed by the Contractor and the Company shall be drafted into a variation order by the Company, which shall be signed by the parties;

(iii) The parties shall, without delay, consult each other to reach agreement on the amount of the costs to be deducted from the Lump Sum and any agreement shall be incorporated into the variation order.

(c) Alternatively either party may refer the matter to expert evaluation in accordance with Clause 17 (Expert Evaluation) or to arbitration or mediation pursuant to Clause 18 (Arbitration and Mediation) for a decision on the reasonableness and quantum of such costs, or the claim by the Company for a reduction in remuneration, which shall be incorporated into the variation order.

In the event the matter is referred either to expert evaluation or arbitration or mediation the Contractor will continue to provide the Services, without prejudice to any claim for an adjustment to the remuneration.

5. Miscellaneous

(a) The Company shall arrange and pay for any marking of the Vessel and cautioning required. The Contractor shall arrange and pay for any marking or cautioning required in respect of its own equipment during the Services under this Agreement.

(b) The Contractor may make reasonable use of Vessel's machinery, gear, equipment, anchors, chains, stores and other appurtenances during and for the purposes of these Services free of expense but shall not unnecessarily damage, abandon or sacrifice the same or any property which is the subject of this Agreement.

(c) Subject to approval of the Company which shall not be unreasonably withheld, and subject to it being permitted by the competent authorities, the Contractor shall be entitled to remove, dispose of or jettison cargo, or parts of the Vessel, or equipment from the Vessel if such action is considered by the Contractor to be reasonably necessary to perform the Services under this Agreement.

(d) The Company will use its best endeavours to provide the Contractor with such plans and drawings of the Vessel, cargo manifests, stowage plans, etc., and such other information as the Contractor may reasonably require for the performance of the Services.

6. Permits

All necessary licences, approvals, authorisations or permits required to undertake and complete the Services without let or hindrance shall be obtained and maintained by the Contractor (see Clause 11(e)).
The Company shall provide the Contractor with all reasonable assistance in connection with the obtaining of such licences, approvals, authorisations or permits.

7. Delays

(a) Adverse Weather and Other Delays
In the event that the Contractor is prevented from progressing the Services due to adverse weather or sea conditions in excess of the number of days set out in Box 15, or due to any other reason outside the Contractor's control, the Contractor shall receive from the Company additional compensation – per working day or pro rata – at the rate set out in Box 13, for the time the Contractor is delayed in commencing or continuing the Services with the customary progress.

(b) Contractor's Equipment and/or Personnel
If there is a breakdown of any of the Contractor's equipment or non-availability of personnel, the Contractor shall consult the Company, or the Company Representative if applicable, to reach agreement on the amount of time lost as a result, if any. The Delay Payment Rate shall apply for the agreed period.

(c) Hired-in Equipment and/or Personnel
The Contractor shall use its best efforts to ensure that an appropriate Delay Payment Rate is agreed in any sub-contract agreement in the event of breakdown of their equipment or non-availability of their personnel. If there is a breakdown of equipment or non-availability of personnel, the Contractor shall consult the Company, or the Company Representative if applicable, to reach agreement on the amount of time lost as a result, if any. The sub-contract Delay Payment Rate shall only apply for the agreed period if such Delay Payment Rate has been agreed with sub-contractors. The Contractor shall pass on to the Company the benefit of any off-hire or reduction

in the rate of hire in respect of equipment or personnel hired-in by the Contractor.

(d) The Contractor shall promptly advise the Company, or the Company Representative if applicable, of all periods when they consider that the Delay Payment Rate shall apply and shall at the same time confirm same in writing to the Company, or the Company Representative if applicable.

(e) Sub-clauses 7(b) and 7(c) shall not apply for individual delays unless such delays exceed six (6) consecutive hours when the Delay Payment Rate shall apply to the whole agreed delay period.

(f) In the event that the parties cannot reach agreement in respect of the applicable reductions in Sub-clauses 7(a), 7(b) or 7(c) above to the Delay Payment Rate or the duration of such reduction, then the issue may be referred to expert evaluation in accordance with Clause 17 (Expert Evaluation) or to arbitration or mediation pursuant to Clause 18 (Arbitration and Mediation).

8. Termination

(a) The Company may terminate this Agreement at any time prior to commencement of mobilisation of either the Personnel or the Craft or the Equipment identified in Annex I, whichever may be the first, upon payment of the Cancellation Fee set out in Box 14.

(b) The Contractor, with the agreement of the Company, which shall not be unreasonably withheld, may terminate this Agreement without any further liability if completion of the Services or any agreed change of work under Clause 4 (Change of Method of Work and/or Personnel, Craft and Equipment) hereof, utilising the Personnel, Craft and Equipment set out in Annex I, or any amendment thereto, becomes technically or physically impossible. In the event of such termination, the Contractor shall be entitled to payment of all monies due in accordance with the provisions of Boxes 9, 12 and 13.

(c) If permission to terminate is not given by the competent authorities, the Contractor shall be paid by the Company at the Delay Payment Rate set out in Box 13 for Personnel, Craft and Equipment during any standby period, and the Company shall be liable for the Contractor's reasonable and necessary costs of continuing with the Services

9. Delivery and/or Disposal

(a) If applicable, the Vessel shall be accepted forthwith and taken over by the Company or its duly authorised representative at the Place of Delivery indicated in Box 8. References to delivery or the Place of Delivery shall include disposal or the Place of Disposal, if applicable.

The Place of Delivery and/or Disposal shall always be safe and accessible for the Contractor's own or hired-in craft and the Vessel to enter and operate in and shall be a place where the Contractor is permitted by governmental or other authorities to deliver and/or dispose of the Vessel.

In the event the Vessel is not accepted forthwith by the Company or delivery is prevented or delayed by action of governmental or other authorities outside the control of the Contractor, all costs necessarily incurred by the Contractor from the moment of the tender for delivery shall be for the account of the Company.

These costs shall be in addition to any delay payment as set out in Box 13.

(b) If it is considered by the Contractor to be impossible or unsafe for the Vessel to be delivered or disposed of at the place indicated in Box 8 and the Company is unable to nominate an acceptable alternative place, the Contractor is at liberty to deliver or dispose of the Vessel at the nearest place it can reach safely and without unreasonable delay, provided delivery or disposal at such place is permitted by governmental or other authorities, and such delivery or disposal shall be deemed due fulfilment by the Contractor of this Agreement.

The Company shall reimburse the Contractor for any additional time used pursuant to this Sub-clause 9(b) at the Delay Payment Rate set out in Box 13, and shall be liable to the Contractor for any additional expenses arising under this Sub-clause.

(c) In the event the Vessel is delivered under the control of pumps and/or compressors or other equipment the Company shall with all due dispatch arrange for their own equipment and operators to replace the Contractor's equipment and operators.

Until such replacement the Company shall pay the Contractor for the use of its equipment and operators at reasonable rates as from the day of delivery until and including the day of arrival of the equipment and personnel at the Contractor's base, plus any additional costs relating thereto and incurred by the Contractor.

(d) If the Company fails, on completion of the Services, to take delivery of the Vessel within five (5) days of the Contractor tendering written notice of delivery or, if in the opinion of the Contractor the Vessel is likely to deteriorate, decay, become worthless or incur charges whether for storage or otherwise in excess of its value, the Contractor may, without prejudice to any other claims the Contractor may have against the Company,

without notice and without any responsibility whatsoever attaching to the Contractor, sell or dispose of the Vessel and apply the proceeds of sale in reduction of the sums due to the Contractor from the Company under this Agreement. Any remaining proceeds will be refunded to the Company.

In the event that such sale or other disposal of the Vessel fails to raise sufficient net funds to pay the monies due to the Contractor under the terms of this Agreement then the Company shall remain liable to the Contractor for any such shortfall.

(e) Reference to delivery and/or disposal of the Vessel shall include parts of the Vessel and/or cargo and/or any other thing emanating from the Vessel and such delivery may take place at different times and different places (see Box 8).

10. Payment

(a) The Company shall pay the Contractor the Lump Sum set out in Box 9, which amount shall be due and payable as set out in Box 9.

(b) Each instalment of the Lump Sum shall be fully and irrevocably earned at the moment it is due as set out in Box 9. Any other monies due under this Agreement shall be fully and irrevocably earned on a daily basis or pro rata.

(c) All monies due and payable to the Contractor under this Agreement shall be paid without any discount, deduction, set-off, lien, claim or counterclaim.

(d) All payments to the Contractor shall be made in the currency and to the bank account stipulated in Box 10.

(e) If any amount payable under this Agreement has not been paid within seven (7) days of the due date, or if the security required in accordance with Clause 12 (Security) is not provided within five (5) banking days following the request by the Contractor, then at any time thereafter the Contractor shall be entitled to terminate this Agreement without prejudice to the sums already due to the Contractor and to any further rights or remedies which the Contractor may have against the Company, provided always that the Contractor shall give the Company at least three (3) working days' written notice of its intention to exercise this right.

(f) The Contractor shall promptly invoice the Company for all sums payable under this Agreement. If any sums which become due and payable are not actually received by the Contractor within the period specified in Box 11, they shall attract interest in accordance with the rate set out in Box 11.

11. Extra Costs

The following shall be paid as and when they fall due by the respective parties as indicated in Box 12:

(a) all port expenses, pilotage charges, harbour and canal dues and all other expenses of a similar nature levied upon or payable in respect of the Vessel and the Contractor's own or hired-in craft;

(b) the costs of the services of any assisting tugs when reasonably deemed necessary by the Contractor or prescribed by port or other authorities;

(c) all costs in connection with clearance, agency fees, visas, guarantees and all other expenses of such kind;

(d) all taxes and social security charges (other than those normally payable by the Contractor in the country where it has its principal place of business), stamp duties, or other levies payable in respect of or in connection with this Agreement, any import - export dues and any customs or excise duties;

(e) all costs incurred in obtaining and maintaining licences, approvals, authorisations or permits required to undertake and complete the Services in accordance with Clause 6 (Permits);

(f) all costs incurred due to requirements of governmental or other authorities or unions over and above those costs which would otherwise be reasonably incurred by the Contractor in the execution of the Agreement;

(g) all costs incurred by the Contractor in respect of portable salvage equipment, materials, or stores which are reasonably sacrificed during the disposal or other operations of the Vessel;

If any such costs are in fact paid by or on behalf of one party by the other party, the party on whose behalf the payment has been made shall reimburse the paying party on the basis of the actual cost to the paying party plus a handling charge of the percentage amount indicated in Box 12(iii) upon presentation of invoice.

12. Security

The Company shall provide on signing this Agreement an irrevocable and unconditional security in a form and amount as agreed between the parties.

If required by the Contractor and also in the event that initially no security is requested, the Company shall

provide security or further security in a form and amount as agreed between the parties for all or part of any amount which may be or become due under this Agreement. Such security shall be given on one or more occasions as and when reasonably required by the Contractor.

13. Liabilities

(a) The Contractor will indemnify and hold the Company harmless in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the Services hereunder to any of the following persons:

(i) any servant, agent or sub-contractor of the Contractor;

(ii) any other person at or near the site of the operations for whatever purpose on behalf or at the request of the Contractor.

(b) The Company will indemnify and hold the Contractor harmless in respect of any liability adjudged due or claim reasonably compromised arising from injury or death occurring during the Services hereunder to any of the following persons:

(i) any servant, agent or sub-contractor of the Company;

(ii) any other person at or near the site of the operations for whatever purpose on behalf or at the request of the Company.

(c) Neither the Company nor its servants, agents or sub-contractors shall have any liability to the Contractor for loss or damage of whatsoever nature sustained by the Contractor's owned or hired-in craft or equipment (excluding portable salvage equipment, materials or stores which are reasonably sacrificed during the disposal or other operations on the Vessel, unless the Contractor is the party responsible for such costs as indicated in Box 12 (i)), whether or not the same is due to breach of contract, negligence or any other fault on the part of the Company, its servants, agents or sub-contractors.

(d) Neither the Contractor nor its servants, agents or sub-contractors shall have any liability to the Company for loss or damage of whatsoever nature sustained by the Vessel, whether or not the same is due to breach of contract, negligence or any other fault on the part of the Contractor, its servants, agents or sub-contractors.

(e) Neither party shall be liable to the other party for:

(i) any loss of profit, loss of use or loss of production whatsoever and whether arising directly or indirectly from the performance or non-performance of this Agreement, and whether or not the same is due to negligence or any other fault on the part of either party, their servants, agents or sub-contractors, or

(ii) any consequential loss or damage for any reason whatsoever, whether or not the same is due to any breach of contract, negligence or any other fault on the part of either party, their servants, agents or sub-contractors.

14. Himalaya Clause

All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Agreement for the benefit of the Contractor or the Company shall also apply to and be for the benefit of their respective sub-contractors, operators, the Vessel's owners (if the Company is the demise/bareboat charterer), masters, officers and crews and to and be for the benefit of all bodies corporate parent of, subsidiary to, affiliated with or under the same management as either of them, as well as all directors, officers, servants and agents of the same and to and be for the benefit of all parties performing Services within the scope of this Agreement for or on behalf of the Contractor or the Company as servants, agents and sub-contractors of such parties. The Contractor or the Company shall be deemed to be acting as agent or trustee of and for the benefit of all such persons, entities and Vessels set forth above but only for the limited purpose of contracting for the extension of such benefits to such persons, bodies and Vessels.

15. Lien

Without prejudice to any other rights which the Contractor may have, whether *in rem* or *in personam*, the Contractor shall be entitled to exercise a possessory lien upon the Vessel in respect of any amount howsoever or whatsoever due to the Contractor under this Agreement and shall for the purpose of exercising such possessory lien be entitled to take and/or keep possession of the Vessel, provided always that the Company shall pay to the Contractor all reasonable costs and expenses howsoever or whatsoever incurred by or on behalf of the Contractor in exercising or attempting or preparing to exercise such lien.

16. Time for Suit

Any claim which may arise out of or in connection with this Agreement or any of the Services performed hereunder shall be notified to the party against whom such claim is made, within twelve (12) months of completion or termination of the Services hereunder, or within twelve (12) months of any claim by a third party,

whichever is later. Any suit shall be brought within twelve (12) months of the notification to the party against whom the claim is made. If either of these conditions is not complied with, the claim and all rights whatsoever and howsoever shall be absolutely barred and extinguished.

17. Expert Evaluation

(a) If the parties are unable to agree the alteration to costs under Clause 4(a) or Clause 4(b) or the adjustment to the Delay Payment Rate or the time lost under Clauses 7(a), 7(b) or 7(c), then either party may request an expert evaluation in accordance with the following procedure:

(i) The party seeking the evaluation shall propose three (3) experts from the persons currently on the Panel of Special Casualty Representatives maintained by the Salvage Arbitration Branch of the Corporation of Lloyd's to the other party in writing having checked that the proposed experts are available and willing to be appointed. The other party may select one of the proposed experts by responding in writing within twenty-four (24) hours. The party seeking the evaluation will then, as soon as possible (and in any event in less than twelve (12) hours) appoint the expert selected by the other party or, if none has been selected, one of the three (3) experts proposed (hereinafter "the Expert").

(ii) Both parties shall provide short written statements to the Expert setting out their arguments within forty-eight (48) hours of their acceptance of instructions and shall provide copies of their statement to the other party.

(iii) The Expert shall, within seventy-two (72) hours of receipt of written statements, advise the parties in writing of the alteration to costs or of the adjustment to the Delay Payment Rate or time lost. The Expert may also provide short reasons explaining the evaluation.

(iv) The Expert's rate of remuneration shall be the applicable rate plus bonus as set from time to time by the SCOPIC Committee for a Salvage Master. The costs of the Expert shall be paid by the party seeking the expert evaluation, but such party shall then be entitled to recover fifty per cent (50%) of the Expert's fees from the other party.

(b) If the Expert's evaluation is not agreed by both parties, the Company shall in any event make payments to the Contractor calculated in accordance with the evaluation. Such payments shall be on a provisional basis and without prejudice to the parties' rights to seek a determination in accordance with Clause 18 (Arbitration and Mediation).

18. Arbitration and Mediation

This Clause 18 applies to any dispute arising under this Agreement.

(a) *This Agreement shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Agreement shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The reference shall be to a sole arbitrator ("Arbitrator"), to be selected by the first party claiming arbitration from the persons currently on the Panel of Lloyd's Salvage Arbitrators with a right of appeal from an award made by the Arbitrator to either party by notice in writing to the other within twenty-eight (28) days of the date of publication of the original Arbitrator's Award.

The Arbitrator on appeal shall be the person currently acting as Lloyd's Appeal Arbitrator.

No suit shall be brought before another Tribunal, or in another jurisdiction, except that either party shall have the option to bring proceedings to obtain conservative seizure or other similar remedy against any assets owned by the other party in any state or jurisdiction where such assets may be found.

Both the Arbitrator and Appeal Arbitrator shall have the same powers as an Arbitrator and an Appeal Arbitrator under LOF 2000 or any standard revision thereof, including a power to order a payment on account of any monies due to the Contractor pending final determination of any dispute between the parties hereto.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

In cases where the claim or any counterclaim exceeds the sum agreed for the LMAA Small Claims Procedure and neither the claim nor any counterclaim exceeds the sum of US$400,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Intermediate Claims Procedure current at the time when the arbitration proceedings are commenced.

(b) *This Agreement shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Agreement shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing

any award, judgement may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.

(c) *This Agreement shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Agreement shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(d) Notwithstanding 18(a), 18(b) or 18(c) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Agreement. In the case of a dispute in respect of which arbitration has been commenced under 18(a), 18(b) or 18(c) above, the following shall apply:

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within fourteen (14) calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further fourteen (14) calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitrator or such person as the Arbitrator may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(v) Either party may advise the Arbitrator that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Arbitrator may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.

(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Arbitrator except to the extent that they are disclosable under the law and procedure governing the arbitration.

(Note: The parties should be aware that the mediation process may not necessarily interrupt time limits.)

(e) If Box 17 in PART I is not appropriately filled in, Sub-clause 18(a) of this Clause shall apply. Sub-clause 18(d) shall apply in all cases.

**Sub-clauses 18(a), 18(b) and 18(c) are alternatives; indicate alternative agreed in Box 17.*

19. Notices Clause

(a) All notices given by either party or their agents to the other party or their agents in accordance with the provisions of this Agreement shall be in writing and shall, unless specifically provided in this Agreement to the contrary, be sent to the address for that other party as set out in Boxes 2 and 3 or as appropriate or to such other address as the other party may designate in writing.

A notice may be sent by registered or recorded mail, facsimile, electronically or delivered by hand in accordance with this Sub-clause 19(a).

(b) Any notice given under this Agreement shall take effect on receipt by the other party and shall be deemed to have been received:

(i) if posted, on the seventh (7^{th}) day after posting;

(ii) if sent by facsimile or electronically, on the day of transmission; or

(iii) if delivered by hand, on the day of delivery.

And in each case proof of posting, handing in or transmission shall be proof that notice has been given, unless

proven to the contrary.

20. Insurance

(a) The Contractor warrants that throughout the period of this Agreement it will maintain full cover against normal P&I risks including salvors' liabilities as evidenced by a Certificate of Entry issued by a P&I Club or insurer acceptable to the Company and shall comply with all the requirements of the policy.

(b) The Company warrants that throughout the period of this Agreement it will maintain full cover against normal P&I risks for the Vessel as evidenced by a Certificate of Entry issued by a P&I Club or insurer stated in Box 4(ix) and shall comply with all the requirements of the policy.

21. Pollution

(a) The Contractor shall exercise due care throughout the performance of the Services to prevent and minimise damage to the environment and shall also put in place, maintain and implement throughout the Services a pollution response plan which meets the requirements of the competent authorities and the Company, or the Company Representative if applicable. The Contractor shall provide the Company with a copy of the pollution response plan on request by the Company.

(b) The Company shall indemnify and hold the Contractor harmless in respect of any and all consequences of any pollution which results from any discharge or escape of any pollutant from the Vessel except where such pollution arises as a consequence of the negligence of the Contractor, its sub-contractors, its agents and/or servants.

(c) The Contractor shall indemnify and hold the Company harmless in respect of any and all consequences of any pollution which results from any discharge or escape of any pollutant from its own or from hired-in craft.

22. Rotation and Replacement of Craft, Equipment and Personnel

The Contractor shall have the right to rotate and replace any craft, equipment and personnel with other suitable replacement craft, equipment and personnel subject to the approval of the Company, or the Company Representative if applicable, which shall not be unreasonably withheld.

23. General Provisions

(a) Severability

If, in any legal proceedings, it is determined that any provision of this Agreement is unenforceable under applicable law, then the unenforceable provision shall automatically be amended to conform to that which is enforceable under the law. In any event, the validity or enforceability of any provision shall not affect any other provision of this Agreement, and this Agreement shall be construed and enforced as if such provision had not been included.

(b) Third Party Beneficiaries

Except as specifically provided for elsewhere in this Agreement, this Agreement shall not be construed to confer any benefit on any third party not a party to this Agreement nor shall this Agreement provide any rights to such third party to enforce any provision of this Agreement.

(c) Waiver

No benefit or right accruing to either party under this Agreement shall be waived unless the waiver is reduced to writing and signed by both the Contractor and the Company. The failure of either party to exercise any of its rights under this Agreement, including but not limited to either party's failure to comply with any time limit set out in this Agreement, shall in no way constitute a waiver of those rights, nor shall such failure excuse the other party from any of its obligations under this Agreement.

(d) Warranty of Authority

The Contractor and the Company each warrant and represent that the person whose signature appears in Part I above is its representative and is duly authorized to execute this Agreement as a binding commitment of such party.

(e) Singular/Plural

The singular includes the plural and vice versa as the context admits or requires.

(f) Headings

The headings to the clauses and appendices to this Agreement are for convenience only and shall not affect its construction or interpretation.

APPENDIX 18
Wreckfixed 2010*

Explanatory Notes for WRECKFIXED 2010 are available from BIMCO at www.bimco.org

BIMCO AND MARINE INTERNATIONAL SALVAGE UNION

WRECKFIXED 2010

INTERNATIONAL WRECK REMOVAL SERVICES AGREEMENT (FIXED PRICE – "NO CURE, NO PAY")

PART I

1. Place and Date of Agreement	
2. Contractor/Place of Business (Cl. 1)	3. Company/Place of Business (Cl. 1)
4. Vessel Specifications (Cl. 1, 2, 4)	
(i) Name	(ii) Flag
(iii) IMO Number	(iv) Place of Registry
(v) Length/Beam/Depth //	(vi) Maximum Draft
(vii) GT/NT/DWT //	(viii) Details and Nature of Cargo
(ix) P&I Club/insurer (Cl. 19(b))	(x) Any other Vessel details relevant to this Agreement
5. Condition of Vessel (Cl. 2, 4)	6. Position of Vessel and Condition of Worksite (Cl. 1, 2, 4)
7. Nature of Services (Cl. 1, 2, 4, 9(a)) (i) Nature of services: (ii) Compliance with orders of competent authorities (state party to obtain confirmation):	8. Place of Delivery and/or Disposal of Vessel (Cl. 8(a), 8(b), 8(e))
9. Payments (Cl. 4, 9(a)) Fixed Price (in figures and words)	10. Payment Details (Cl. 9(c)) (i) Currency (ii) Bank (iii) Address (iv) Account Number (v) Account Name
11. Time of Payment and Interest (state period within which sums must be received by the Contractor and rate of interest per month) (Cl. 9(e))	12. Cancellation Fee (Cl. 7(a))
13. Arbitration and Mediation (state Cl. 17(a), 17(b) or 17(c) of Cl. 17 as agreed; if 17(c) agreed, also state place of arbitration) (Cl. 17) (if not appropriately filled in, Clause 17(a) shall apply) **(c) -**	14. Number of Additional Clauses covering special provisions, if agreed

It is agreed that this Agreement shall be performed subject to the Terms and Conditions which consist of PART I, including Additional Clauses, if any agreed, and PART II, as well as Annex I (SCHEDULE OF PERSONNEL, CRAFT AND EQUIPMENT), Annex II (METHOD OF WORK AND ESTIMATED TIME SCHEDULE), and Annex III (CONTRACTOR'S DAILY REPORTS) or any other Annexes attached to this Agreement.

In the event of a conflict of terms and conditions, the provisions of PART I including Additional Clauses, if any agreed, shall prevail over those of PART II to the extent of such conflict but no further.

The undersigned warrant that they have full power and authority to sign this Agreement on behalf of the parties they represent.

Signature (for and on behalf of **the Contractor**)	Signature (for and on behalf of **the Company**)

continued

ANNEX I (SCHEDULE OF PERSONNEL, CRAFT AND EQUIPMENT)
INTERNATIONAL WRECK REMOVAL AND MARINE SERVICES AGREEMENT (FIXED PRICE – "NO CURE, NO PAY")
CODE NAME: WRECKFIXED 2010

Dated:

Vessel:

Schedule of Personnel, Craft and Equipment (Cl. 2, 4 and 7)

First published 1999, Revised 2010
Approved by the International Salvage Union (ISU)

Printed by BIMCO's *idea*

continued

ANNEX II (METHOD OF WORK AND ESTIMATED TIME SCHEDULE)
INTERNATIONAL WRECK REMOVAL AND MARINE SERVICES AGREEMENT (FIXED PRICE – "NO CURE, NO PAY")
CODE NAME: WRECKFIXED 2010

Dated:

Vessel:

Method of Work and Estimated Time Schedule (Cl. 2 and 4)

continued

ANNEX III (CONTRACTOR'S DAILY REPORTS)
INTERNATIONAL WRECK REMOVAL AND MARINE SERVICES AGREEMENT (FIXED PRICE – "NO CURE, NO PAY")
CODE NAME: WRECKFIXED 2010

Date	Report no
Status of wreck:	
Vessel	
Cargo	
Bunkers	
Status of wreck site:	

Weather on location:			
	1200	2400	Forecast next 24 hours
Wind direction & speed (Bft)			
Swell direction & height (m)			
Wave Height & max wave height (m)			
Long range forecast (5 days):			

Services:
- performed in last 24 hours:
- planned for next 24 hours:

Areas of concern:
Health & safety
Environmental
Other

Comments:
Contractor's Representative
Company's Representative

continued

Signed:			
Company's Representative			
Contractor's Representative			
	Name	Position	Signature

Contractor's Daily Reports (Cl. 2)

continued

WRECKFIXED 2010 - International Wreck Removal and Marine Services Agreement
(Fixed Price – "No Cure, No Pay")
PART II

1. Definitions

"Company" means the party stated in Box 3.
"Contractor" means the party stated in Box 2.
"Services" means the services stated in Box 7.
"Vessel" means any vessel, craft, property, or part thereof, of whatsoever nature, including anything contained therein or thereon, such as but not limited to cargo and bunkers, as described in Box 4.
"Worksite" means the position of the Vessel stated in Box 6.

2. The Services

The Contractor agrees to exercise due care in rendering the Services which shall include, if applicable, the delivery and/or disposal of the Vessel. Insofar as it is not inconsistent with the nature of the Services to be rendered under this Agreement, the Contractor will also exercise due care to prevent and minimise damage to the environment.

The Services shall be rendered under the principle of no cure, no pay.

The Contractor shall provide the Personnel, Craft and Equipment set out in Annex I of this Agreement which the Contractor deems necessary for the Services based upon the Specifications, Condition and Position of the Vessel and Worksite set out in Boxes 4, 5 and 6.

The Contractor's Method of Work and Estimated Time Schedule shall be as described in Annex II, utilising the Personnel, Craft and Equipment described in Annex I.

The Contractor shall consult with the Company if there is any need for substantial change in the Method of Work and/or Personnel, Craft or Equipment. In the event that time does not permit such consultation, or agreement to the proposed change(s) is unreasonably withheld, then the Contractor may proceed with such change(s), subject to any necessary approval of the authorities. (See Clause 4 (Change of Method of Work and/or Personnel, Craft and Equipment) hereof).

The Contractor shall provide the Company or the Company Representative, if in attendance, with daily reports in accordance with Annex III.

The party identified in Box 7(ii) of this Agreement shall be given all reasonable assistance by the other party in connection with obtaining confirmation from the competent authorities that the Company has complied with any orders issued by them.

3. Company Representative

If reasonably required by the Contractor a representative of the Company will be available during the performance of the Services with the full authority to act on behalf of the Company.

In addition, the Company will provide at its sole risk and expense sufficient officers or their equivalents, who are fully conversant with the cargo system and/or layout of the Vessel, and who should be in attendance when reasonably required during the performance of the Services in order to provide advice as and when requested by the Contractor.

4. Change of Method of Work and/or Personnel, Craft and Equipment

The Fixed Price stated in Box 9 is based upon the Nature of the Services, as set out in Box 7, Method of Work, and Personnel, Craft and Equipment, as set out in Annexes I and II, and the Description, Specifications, Position, Condition of the Vessel and the Worksite, as set out in Boxes 4, 5 and 6.

(a) If before or during the performance of the Services, and without fault on the part of the Contractor, there is a substantial change in the Services, and/or in the Personnel, Craft and Equipment required to undertake the Services due to any misdescription by the Company or error in the specification provided by the Company, upon which the Contractor has relied, or a material change in the position and/or condition of the Vessel or the Worksite:

(i) The Contractor shall forthwith give notice in writing thereof to the Company and of the estimated additional costs to effect the Services;

(ii) Any and all substantial changes to the nature of such Services which are agreed between the Contractor and the Company shall be drafted into a variation order by the Company, which shall be signed by the parties;

(iii) The parties shall, without delay, consult each other to reach agreement on the amount of the additional costs to be added to the Fixed Price and any agreement shall be incorporated into the variation order. In the event that the parties are unable to reach agreement on the additional costs within 5 days of the Contractor providing details of the extra costs, either party may terminate the Services under this Agreement, without prejudice to any claim the Contractor may have under this Sub-clause 4(a), provided always that such termination is permitted by the competent authorities. If permission to terminate is not given by the competent authorities, then the Contractor will continue to provide the Services set out in Box 7, without prejudice to his claim for additional remuneration.

(b) If, as a result of a material change in the position and/or condition of the Vessel or the Worksite, subsequent to entering into this Agreement, the Services become easier to perform in terms of the work and/or Personnel, Craft and/or Equipment requirements, then:

(i) The Company may, subject to the provisions of Clause 9(b) hereof, seek a reduction in respect of the monies payable pursuant to Clause 9(a) hereof;

(ii) All such material changes which are agreed by the Contractor and the Company shall be drafted into a variation order by the Company, which shall be signed by the parties;

(iii) The parties shall, without delay, consult each other to reach agreement on the amount of the costs to be deducted from the Fixed Price and any agreement shall be incorporated into the variation order.

WRECKFIXED 2010 - International Wreck Removal and Marine Services Agreement
(Fixed Price – "No Cure, No Pay")
PART II

(c) Alternatively either party may refer the matter to expert evaluation in accordance with Clause 16 (Expert Evaluation) or to arbitration or mediation pursuant to Clause 17 (Arbitration and Mediation) for a decision on the reasonableness and quantum of such costs, or the claim by the Company for a reduction in remuneration, which shall be incorporated into the variation order.

In the event the matter is referred either to expert evaluation or arbitration or mediation the Contractor will continue to provide the Services, without prejudice to any claim for an adjustment to the remuneration.

5. Miscellaneous

(a) The Company shall arrange and pay for any marking of the Vessel and cautioning required. The Contractor shall arrange and pay for any marking or cautioning required in respect of its own equipment during the Services under this Agreement.

(b) The Contractor may make reasonable use of the Vessel's machinery, gear, equipment, anchors, chains, stores and other appurtenances during and for the purposes of these Services free of expense but shall not unnecessarily damage, abandon or sacrifice the same or any property which is the subject of this Agreement.

(c) Subject to approval of the Company which shall not be unreasonably withheld, and subject to it being permitted by the competent authorities, the Contractor shall be entitled to remove, dispose of or jettison cargo, or parts of the Vessel, or equipment from the Vessel if such action is considered by the Contractor to be reasonably necessary to perform the Services under this Agreement.

(d) The Company will use its best endeavours to provide the Contractor with such plans and drawings of the Vessel, cargo manifests, stowage plans, etc., and such other information as the Contractor may reasonably require for the performance of the Services.

6. Permits

All necessary licences, approvals, authorisations or permits required to undertake and complete the Services without let or hindrance shall be obtained and maintained by the Contractor (see Clause 10(e)). The Company shall provide the Contractor with all reasonable assistance in connection with the obtaining of such licences, approvals, authorisations or permits

7. Termination

(a) The Company may terminate this Agreement at any time prior to commencement of mobilisation of either the Personnel or the Craft or the Equipment identified in Annex I, whichever may be the first, upon payment of the Cancellation Fee set out in Box 12.

(b) The Contractor, with the agreement of the Company, which shall not be unreasonably withheld, may terminate this Agreement without any further liability if completion of the Services or any agreed change of work under Clause 4 (Change of Method of Work and/or Personnel, Craft and Equipment) hereof, utilising the Personnel, Craft and Equipment set out in Annex I, or any amendment thereto, becomes technically or physically impossible.

8. Delivery and/or Disposal

(a) If applicable, the Vessel shall be accepted forthwith and taken over by the Company or its duly authorised representative at the Place of Delivery indicated in Box 8. References to delivery or the Place of Delivery shall include disposal or the Place of Disposal, if applicable.

The Place of Delivery and/or Disposal shall always be safe and accessible for the Contractor's own or hired-in craft and the Vessel to enter and operate in and shall be a place where the Contractor is permitted by governmental or other authorities to deliver and/or dispose of the Vessel.

In the event the Vessel is not accepted forthwith by the Company all costs incurred by the Contractor from the moment of tender for delivery shall be for the account of the Company. However, in the event that delivery is prevented or delayed by action of governmental or other authorities, even if outside the control of the Contractor, all costs necessarily incurred by the Contractor from the moment of the tender for delivery shall be for the account of the Contractor.

(b) If it is considered by the Contractor to be impossible or unsafe for the Vessel to be delivered or disposed of at the place indicated in Box 8, and the Company is unable to nominate an acceptable alternative place, the Contractor is at liberty to deliver or dispose of the Vessel at the nearest place it can reach safely and without unreasonable delay, provided delivery or disposal at such place is permitted by governmental or other authorities, and such delivery or disposal shall be deemed due fulfilment by the Contractor of this Agreement.

(c) In the event the Vessel is delivered under the control of pumps and/or compressors or other equipment the Company shall with all due dispatch arrange for their own equipment and operators to replace the Contractor's equipment and operators.

Until such replacement the Company shall pay the Contractor for the use of its equipment and operators at reasonable rates as from the day of delivery until and including the day of arrival of the equipment and personnel at the Contractor's base, plus any additional costs relating thereto and incurred by the Contractor.

(d) If the Company fails, on completion of the Services, to take delivery of the Vessel within five (5) days of the Contractor tendering written notice of delivery or, if in the opinion of the Contractor the Vessel is likely to deteriorate, decay, become worthless or incur charges whether for storage or otherwise in excess of its value, the Contractor may, without prejudice to any other claims the Contractor may have against the Company, without notice and without any responsibility whatsoever attaching to the Contractor, sell or dispose of the Vessel and apply the proceeds of sale in reduction of the sums due to the Contractor from the Company under this Agreement. Any remaining proceeds will be refunded to the Company.

In the event that such sale or other disposal of the Vessel fails to raise sufficient net funds to pay the monies due to the Contractor under the terms of this Agreement then the Company shall remain liable to the Contractor for any such shortfall.

(e) Reference to delivery and/or disposal of the Vessel shall include parts of the Vessel and/or cargo and/or any other thing

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emanating from the Vessel and such delivery may take place at different times and different places (see Box 8).

9. Payment

(a) The Company shall pay the Contractor the Fixed Price set out in Box 9, which amount shall be due and payable upon completion of the Services as described in Box 7.

(b) All monies due and payable to the Contractor under this Agreement shall be paid without any discount, deduction, set-off, lien, claim or counterclaim.

(c) All payments to the Contractor shall be made in the currency and to the bank account stipulated in Box 10.

(d) If any amount payable under this Agreement has not been paid within seven (7) days of the due date, or if the security required in accordance with Clause 11 (Security) is not provided within five (5) banking days following the request by the Contractor, then at any time thereafter the Contractor shall be entitled to terminate this Agreement without prejudice to the sums already due to the Contractor and to any further rights or remedies which the Contractor may have against the Company, provided always that the Contractor shall give the Company at least three (3) working days' written notice of its intention to exercise this right.

(e) The Contractor shall promptly invoice the Company for all sums payable under this Agreement. If any sums which become due and payable are not actually received by the Contractor within the period specified in Box 11, they shall attract interest in accordance with the rate set out in Box 11.

10. Extra Costs

The follwing shall be paid by the Contractor as and when they fall due:

(a) all port expenses, pilotage charges, harbour and canal dues and all other expenses of a similar nature levied upon or payable in respect of the Vessel and the Contractor's own or hired-in craft;

(b) the costs of the services of any assisting tugs when reasonably deemed necessary by the Contractor or prescribed by port or other authorities;

(c) all costs in connection with clearance, agency fees, visas, guarantees and all other expenses of such kind;

(d) all taxes and social security charges, stamp duties, or other levies payable in respect of or in connection with this Agreement, any import - export dues and any customs or excise duties;

(e) all costs incurred in obtaining and maintaining licences, approvals, authorisations or permits required to undertake and complete the Services in accordance with Clause 6 (Permits);

(f) all costs incurred due to requirements of governmental or other authorities or unions over and above those costs which would otherwise be reasonably incurred by the Contractor in the execution of the Agreement.

11. Security

The Company shall provide on signing this Agreement an irrevocable and unconditional security in a form and amount as agreed between the parties.

If required by the Contractor and also in the event that initially no security is requested, the Company shall provide security or further security in a form and amount as agreed between the parties for all or part of any amount which may be or become due under this Agreement. Such security shall be given on one or more occasions as and when reasonably required by the Contractor.

12. Liabilities

(a) The Contractor will indemnify and hold the Company harmless in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the Services hereunder to any of the following persons:

(i) any servant, agent or sub-contractor of the Contractor;

(ii) any other person at or near the site of the operations for whatever purpose on behalf or at the request of the Contractor.

(b) The Company will indemnify and hold the Contractor harmless in respect of any liability adjudged due or claim reasonably compromised arising from injury or death occurring during the Services hereunder to any of the following persons:

(i) any servant, agent or sub-contractor of the Company;

(ii) any other person at or near the site of the operations for whatever purpose on behalf or at the request of the Company.

(c) Neither the Company nor its servants, agents or sub-contractors shall have any liability to the Contractor for loss or damage of whatsoever nature sustained by the Contractor's owned or hired-in craft or equipment (excluding portable salvage equipment, materials or stores which are reasonably sacrificed during the disposal or other operations on the Vessel), whether or not the same is due to breach of contract, negligence or any other fault on the part of the Company, its servants, agents or sub-contractors.

(d) Neither the Contractor nor its servants, agents or sub-contractors shall have any liability to the Company for loss or damage of whatsoever nature sustained by the Vessel, whether or not the same is due to breach of contract, negligence or any other fault on the part of the Contractor, its servants, agents or sub-contractors.

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(e) Neither party shall be liable to the other party for:

(i) any loss of profit, loss of use or loss of production whatsoever and whether arising directly or indirectly from the performance or non-performance of this Agreement, and whether or not the same is due to negligence or any other fault on the part of either party, their servants, agents or sub-contractors; or

(ii) any consequential loss or damage for any reason whatsoever, whether or not the same is due to any breach of contract, negligence or any other fault on the part of either party, their servants, agents or sub-contractors.

13. Himalaya Clause

All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Agreement for the benefit of the Contractor or the Company shall also apply to and be for the benefit of their respective sub-contractors, operators, the Vessel's owners (if the Company is the demise/bareboat charterer), masters, officers and crews and to and be for the benefit of all bodies corporate parent of, subsidiary to, affiliated with or under the same management as either of them, as well as all directors, officers, servants and agents of the same and to and be for the benefit of all parties performing Services within the scope of this Agreement for or on behalf of the Contractor or the Company as servants, agents and sub-contractors of such parties. The Contractor or the Company shall be deemed to be acting as agent or trustee of and for the benefit of all such persons, entities and Vessels set forth above but only for the limited purpose of contracting for the extension of such benefits to such persons, bodies and Vessels.

14. Lien

Without prejudice to any other rights which the Contractor may have, whether *in rem* or *in personam*, the Contractor shall be entitled to exercise a possessory lien upon the Vessel in respect of any amount howsoever or whatsoever due to the Contractor under this Agreement and shall for the purpose of exercising such possessory lien be entitled to take and/or keep possession of the Vessel, provided always that the Company shall pay to the Contractor all reasonable costs and expenses howsoever or whatsoever incurred by or on behalf of the Contractor in exercising or attempting or preparing to exercise such lien.

15. Time for Suit

Any claim which may arise out of or in connection with this Agreement or any of the Services performed hereunder shall be notified to the party against whom such claim is made, within twelve (12) months of completion or termination of the Services hereunder, or within twelve (12) months of any claim by a third party, whichever is later. Any suit shall be brought within twelve (12) months of the notification to the party against whom the claim is made. If either of these conditions is not complied with, the claim and all rights whatsoever and howsoever shall be absolutely barred and extinguished.

16. Expert Evaluation

(a) If the parties are unable to agree the alteration to costs under Clause 4(a) or Clause 4(b), then either party may request an expert evaluation in accordance with the following procedure:

(i) The party seeking the evaluation shall propose three (3) experts from the persons currently on the Panel of Special Casualty Representatives maintained by the Salvage Arbitration Branch of the Corporation of Lloyd's to the other party in writing having checked that the proposed experts are available and willing to be appointed. The other party may select one of the proposed experts by responding in writing within twenty-four (24) hours. The party seeking the evaluation will then, as soon as possible (and in any event in less than twelve (12) hours) appoint the expert selected by the other party or, if none has been selected, one of the three (3) experts proposed (hereinafter "the Expert").

(ii) Both parties shall provide short written statements to the Expert setting out their arguments within forty-eight (48) hours of their acceptance of instructions and shall provide copies of their statement to the other party.

(iii) The Expert shall, within seventy-two (72) hours of receipt of written statements, advise the parties in writing of the alteration to costs. The Expert may also provide short reasons explaining the evaluation.

(iv) The Expert's rate of remuneration shall be the applicable rate plus bonus as set from time to time by the SCOPIC Committee for a Salvage Master. The costs of the Expert shall be paid by the party seeking the expert evaluation, but such party shall then be entitled to recover fifty per cent (50%) of the Expert's fees from the other party.

(b) If the Expert's evaluation is not agreed by both parties, the Company shall in any event make payments to the Contractor calculated in accordance with the evaluation. Such payments shall be on a provisional basis and without prejudice to the parties' rights to seek a determination in accordance with Clause 17 (Arbitration and Mediation).

17. Arbitration and Mediation

This Clause 17 applies to any dispute arising under this Agreement.

(a) *This Agreement shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Agreement shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The reference shall be to a sole arbitrator ("Arbitrator"), to be selected by the first party claiming arbitration from the persons currently on the Panel of Lloyd's Salvage Arbitrators with a right of appeal from an award made by the Arbitrator to either party by notice in writing to the other within twenty-eight (28) days of the date of publication of the original Arbitrator's Award.

The Arbitrator on appeal shall be the person currently acting as Lloyd's Appeal Arbitrator.

No suit shall be brought before another Tribunal, or in another jurisdiction, except that either party shall have the option to bring proceedings to obtain conservative seizure or other similar remedy against any assets owned by the other party in any state or jurisdiction where such assets may be found.

Both the Arbitrator and Appeal Arbitrator shall have the same powers as an Arbitrator and an Appeal Arbitrator under LOF

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2000 or any standard revision thereof, including a power to order a payment on account of any monies due to the Contractor pending final determination of any dispute between the parties hereto.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.

In cases where the claim or any counterclaim exceeds the sum agreed for the LMAA Small Claims Procedure and neither the claim nor any counterclaim exceeds the sum of US$400,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Intermediate Claims Procedure current at the time when the arbitration proceedings are commenced.

(b) *This Agreement shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and any dispute arising out of or in connection with this Agreement shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purposes of enforcing any award, judgement may be entered on an award by any court of competent jurisdiction. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc. current at the time when the arbitration proceedings are commenced.

(c) *This Agreement shall be governed by and construed in accordance with the laws of the place mutually agreed by the parties and any dispute arising out of or in connection with this Agreement shall be referred to arbitration at a mutually agreed place, subject to the procedures applicable there.

(d) Notwithstanding 17(a), 17(b) or 17(c) above, the parties may agree at any time to refer to mediation any difference and/or dispute arising out of or in connection with this Agreement. In the case of a dispute in respect of which arbitration has been commenced under 17(a), 17(b) or 17(c) above, the following shall apply:

(i) Either party may at any time and from time to time elect to refer the dispute or part of the dispute to mediation by service on the other party of a written notice (the "Mediation Notice") calling on the other party to agree to mediation.

(ii) The other party shall thereupon within fourteen (14) calendar days of receipt of the Mediation Notice confirm that they agree to mediation, in which case the parties shall thereafter agree a mediator within a further fourteen (14) calendar days, failing which on the application of either party a mediator will be appointed promptly by the Arbitrator or such person as the Arbitrator may designate for that purpose. The mediation shall be conducted in such place and in accordance with such procedure and on such terms as the parties may agree or, in the event of disagreement, as may be set by the mediator.

(iii) If the other party does not agree to mediate, that fact may be brought to the attention of the Tribunal and may be taken into account by the Tribunal when allocating the costs of the arbitration as between the parties.

(iv) The mediation shall not affect the right of either party to seek such relief or take such steps as it considers necessary to protect its interest.

(v) Either party may advise the Arbitrator that they have agreed to mediation. The arbitration procedure shall continue during the conduct of the mediation but the Arbitrator may take the mediation timetable into account when setting the timetable for steps in the arbitration.

(vi) Unless otherwise agreed or specified in the mediation terms, each party shall bear its own costs incurred in the mediation and the parties shall share equally the mediator's costs and expenses.

(vii) The mediation process shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to the Arbitrator except to the extent that they are disclosable under the law and procedure governing the arbitration.

(Note: The parties should be aware that the mediation process may not necessarily interrupt time limits.)

(e) If Box 13 in PART I is not appropriately filled in, Sub-clause 17(a) of this Clause shall apply Sub-clause 17(d) shall apply in all cases.

**Sub-clauses 17(a), 17(b) and 17(c) are alternatives; indicate alternative agreed in Box 13.*

18. Notices Clause

(a) All notices given by either party or their agents to the other party or their agents in accordance with the provisions of this Agreement shall be in writing and shall, unless specifically provided in this Agreement to the contrary, be sent to the address for that other party as set out in Boxes 2 and 3 or as appropriate or to such other address as the other party may designate in writing.

A notice may be sent by registered or recorded mail, facsimile, electronically or delivered by hand in accordance with this Sub-clause 18(a).

(b) Any notice given under this Agreement shall take effect on receipt by the other party and shall be deemed to have been received:

(i) if posted, on the seventh (7th) day after posting;

(ii) if sent by facsimile or electronically, on the day of transmission; or

(iii) if delivered by hand, on the day of delivery.

And in each case proof of posting, handing in or transmission shall be proof that notice has been given, unless proven to the contrary.

19. Insurance

(a) The Contractor warrants that throughout the period of this Agreement it will maintain full cover against normal P&I risks including salvors' liabilities as evidenced by a Certificate of Entry issued by a P&I Club or insurer acceptable to the Company and shall comply with all the requirements of the policy.

(b) The Company warrants that throughout the period of this Agreement it will maintain full cover against normal P&I risks for the Vessel as evidenced by a Certificate of Entry issued by a P&I Club or insurer stated in Box 4(ix) and shall comply with all the requirements of the policy.

20. Pollution

(a) The Contractor shall exercise due care throughout the performance of the Services to prevent and minimise damage to the environment and shall also put in place, maintain and implement throughout the Services a pollution response plan which meets the requirements of the competent authorities and the Company, or the Company Representative if applicable. The Contractor shall provide the Company with a copy of the pollution response plan on request by the Company.

(b) The Company shall indemnify and hold the Contractor harmless in respect of any and all consequences of any pollution which results from any discharge or escape of any pollutant from the Vessel except where such pollution arises as a consequence of the negligence of the Contractor, its sub-contractors, its agents and/or servants.

(c) The Contractor shall indemnify and hold the Company harmless in respect of any and all consequences of any pollution which results from any discharge or escape of any pollutant from its own or from hired-in craft.

21. Rotation and Replacement of Craft, Equipment and Personal

The Contractor shall have the right to rotate and replace any craft, equipment and personnel with other suitable replacement craft, equipment and personnel subject to the approval of the Company, or the Company Representative if applicable, which shall not be unreasonably withheld.

22. General Provisions

(a) Severability

If, in any legal proceedings, it is determined that any provision of this Agreement is unenforceable under applicable law, then the unenforceable provision shall automatically be amended to conform to that which is enforceable under the law. In any event, the validity or enforceability of any provision shall not affect any other provision of this Agreement, and this Agreement shall be construed and enforced as if such provision had not been included.

(b) Third Party Beneficiaries

Except as specifically provided for elsewhere in this Agreement, this Agreement shall not be construed to confer any benefit on any third party not a party to this Agreement nor shall this Agreement provide any rights to such third party to enforce any provision of this Agreement.

(c) Waiver

No benefit or right accruing to either party under this Agreement shall be waived unless the waiver is reduced to writing and signed by both the Contractor and the Company. The failure of either party to exercise any of its rights under this Agreement, including but not limited to either party's failure to comply with any time limit set out in this Agreement, shall in no way constitute a waiver of those rights, nor shall such failure excuse the other party from any of its obligations under this Agreement.

(d) Warranty of Authority

The Contractor and the Company each warrant and represent that the person whose signature appears in Part I above is its representative and is duly authorized to execute this Agreement as a binding commitment of such party.

(e) Singular/Plural

The singular includes the plural and vice versa as the context admits or requires.

(f) Headings

The headings to the clauses and appendices to this Agreement are for convenience only and shall not affect its construction or interpretation.

APPENDIX 19

Rules 24 and 35 of Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1989 (SI 1989 No. 1798)

Rule 24 of Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1989 (SI 1989 No. 1798)

Rule 24 Towing and pushing

(a) A power-driven vessel when towing shall exhibit:
  (i) instead of the light prescribed in Rule 23(a)(i) or (a)(ii), two masthead lights in a vertical line. When the length of the tow, measuring from the stern of the towing vessel to the after end of the tow exceeds 200 metres, three such lights in a vertical line;
  (ii) sidelights;
  (iii) a sternlight;
  (iv) a towing light in a vertical line above the sternlight;
  (v) when the length of the tow exceeds 200 metres, a diamond shape where it can best be seen.

(b) When a pushing vessel and a vessel being pushed ahead are rigidly connected in a composite unit they shall be regarded as a power-driven vessel and exhibit the lights prescribed in Rule 23.

(c) A power-driven vessel when pushing ahead or towing alongside, except in the case of a composite unit, shall exhibit:
  (i) instead of the light prescribed in Rule 23(a)(i) or (a)(ii), two masthead lights in a vertical line;
  (ii) sidelights;
  (iii) a sternlight.

(d) A power-driven vessel to which paragraph (a) or (c) of this Rule applies shall also comply with
Rule 23(a) (ii).

(e) A vessel or object being towed, other than those mentioned in paragraph (g) of this Rule, shall exhibit:
  (i) sidelights;
  (ii) a sternlight;
  (iii) when the length of the tow exceeds 200 metres, a diamond shape where it can best be seen.

(f) Provided that any number of vessels being towed alongside or pushed in a group shall be lighted as one vessel,
  (i) a vessel being pushed ahead, not being part of a composite unit, shall exhibit at the forward end sidelights;
  (ii) a vessel being towed alongside shall exhibit a sternlight and at the forward end, sidelights.

(g) An inconspicuous, partly submerged vessel or object, or combination of such vessels or objects being towed, shall exhibit:
  (i) if it is less than 25 metres in breadth, one all-round white light at or near the forward end and one at or near the after end except that dracones need not exhibit a light at or near the forward end;
  (ii) if it is 25 metres or more in breadth, two additional all-round white lights at or near the extremities of its breadth;
  (iii) if it exceeds 100 metres in length, additional all-round white lights between the lights prescribed in sub-paragraphs (i) and (ii) so that the distance between the lights shall not exceed 100 metres;
  (iv) a diamond shape at or near the aftermost extremity of the last vessel or object being towed and if the length of the tow exceeds 200 metres an additional diamond shape where it can best be seen and located as far forward as is practicable.

(h) Where from any sufficient cause it is impracticable for a vessel or object being towed to exhibit the lights or shapes prescribed in paragraph (e) or (g) of this Rule, all possible measures shall be taken to light the vessel or object towed or at least to indicate the presence of such vessel or object.

(i) Where from any sufficient cause it is impracticable for a vessel not normally engaged in towing operations to display the lights prescribed in paragraph (a) or (c) of this Rule, such vessel shall not be required to exhibit those lights when engaged in towing another vessel in distress or otherwise in need of assistance. All possible measures shall be taken to indicate the nature of the relationship between the towing vessel and the vessel being towed as authorized by Rule 36, in particular by illuminating the towline.

Rule 35 of Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1989 (SI 1989 No. 1798)

Rule 35 Sound signals in restricted visibility

In or near an area of restricted visibility, whether by day or night, the signals prescribed in this Rule shall be used as follows:

(a) A power-driven vessel making way through the water shall sound at intervals of not more than 2 minutes one prolonged blast.

(b) A power-driven vessel underway but stopped and making no way through the water shall sound at intervals of not more than 2 minutes two prolonged blasts in succession with an interval of about 2 seconds between them.

(c) A vessel not under command, a vessel restricted in her ability to manoeuvre, a vessel constrained by her draught, a sailing vessel, a vessel engaged in fishing and a vessel engaged in towing or pushing another vessel shall, instead of the signals prescribed in paragraphs (a) or (b) of this Rule, sound at intervals of not more than 2 minutes three blasts in succession, namely one prolonged followed by two short blasts.

(d) A vessel engaged in fishing, when at anchor, and a vessel restricted in her ability to manoeuvre when carrying out her work at anchor, shall instead of the signals prescribed in paragraph (g) of this Rule sound the signal prescribed in paragraph (c) of this Rule.

(e) A vessel towed or if more than one vessel is towed the last vessel of the tow, if manned, shall at intervals of not more than 2 minutes sound four blasts in succession, namely one prolonged followed by three short blasts. When practicable, this signal shall be made immediately after the signal made by the towing vessel.

(f) When a pushing vessel and a vessel being pushed ahead are rigidly connected in a composite unit they shall be regarded as a power-driven vessel and shall give the signals prescribed in paragraphs (a) or (b) of this Rule.

(g) A vessel at anchor shall at intervals of not more than one minute ring the bell rapidly for about 5 seconds. In a vessel of 100 metres or more in length the bell shall be sounded in the forepart of the vessel and immediately after the ringing of the bell the gong shall be sounded rapidly for about 5 seconds in the after part of the vessel. A vessel at anchor may in addition sound three blasts in succession, namely one short, one prolonged and one short blast, to give warning of her position and of the possibility of collision to an approaching vessel.

(h) A vessel aground shall give the bell signal and if required the gong signal prescribed in paragraph

(g) of this Rule and shall, in addition, give three separate and distinct strokes on the bell immediately before and after the rapid ringing of the bell. A vessel aground may in addition sound an appropriate whistle signal.

(i) A vessel of 12 metres or more but less than 20 metres in length shall not be obliged to give the bell signals prescribed in paragraphs (g) and (h) of this Rule. However, if she does not, she shall make some other efficient sound signal at intervals of not more than 2 minutes.

(j) A vessel of less than 12 metres in length shall not be obliged to give the above-mentioned signals but, if she does not, shall make some other efficient sound signal at intervals of not more than 2 minutes.

(k) A pilot vessel when engaged on pilotage duty may in addition to the signals prescribed in paragraphs (a),(b) or (g) of this Rule sound an identity signal consisting of four short blasts.

APPENDIX 20

Netherlands Tug Owners Conditions 1951

According to the law of the Netherlands, unless otherwise stipulated expressly and in writing, the towage within Dutch territorial waters carried out by a Dutch tugowner will be undertaken subject to the Conditions; outside the Netherlands the Conditions have to be expressly incorporated into the contract in order to bind the owner of the tow.

Article 1

The Tug Owners only make available their equipment and personnel on all waters and in all places in and outside the Netherlands on the following conditions:

Ship means in these conditions—unless the contrary is expressed—any vessel or floating object or unit which is towed, assisted, salved and/or moved under its own power in the Netherlands or Overseas, which is being assisted, supplied with steam and/or to which personnel is made available and to which or for which any other work is done.

Article 2

The Management decides for the execution of the work which tug and what personnel are to be employed for the required service.

Article 3

The work is carried out if possible in rotation of the orders received and until the place of destination or until such point as the tug and/or ship can reach safely on account of depth of water, bridges, sluices, locks or of any other reason whatsoever.

Distress signals will be attended to in priority.

If at the time agreed upon the ship is not ready or is not seaworthy or is not prepared for towage to the satisfaction of the management, then the Company is in default by the simple effluxion of time and liable to compensate the Tug Owner for all loss and/or damage.

The Tug Owner undertakes to make every effort in order to reach the place of destination without however giving any binding undertaking thereto.

Article 4

Unless otherwise agreed upon the contract price is due and payable before the commencement of the work.

Article 5

During the execution of the contract the ship may not cause any delay whatsoever.

Should such delay nevertheless occur the Company shall be in default by the mere occasion of the delay and responsible to the Tug Owners for any loss/or damage.

Article 6

The Company or the owner of the ship shall take for their account all damages also if sustained by third parties even if due to any fault or negligence on the part of the Tug Owners or of persons on board of the tug, including pilots, or of the personnel of the Tug Owners or any personnel supplied by the Tug Owners or to any defective equipment of the Tug Owners, or for which the Tug Owners might be held liable on any other ground.

Nevertheless, however, the Tug Owners will take for their account:

1. damage, which the tugs may have sustained by their own defects or through faults or negligence of their Masters and crews;
2. damage done to vessels or property of third parties through collision with the tugs and in so far as which the Company or the owner(s) of the ship can prove that this damage has not been contributed to or was caused by the ship.

Whenever pursuant to the provisions of this clause any damage is for account of the Company or the owner(s) of the ship neither the Tug Owners nor any other party who may have been instructed by the Tug Owners to carry out the work either entirely or in part shall be responsible for such damage, but the Company or the owner(s) shall be responsible to indemnify and keep indemnified the Tug Owners or any other party performing the work by order of the Tug Owners against all claims that third parties may have on account of this damage against the Tug Owners and/or other contractors whether jointly with the Company or owner(s) of the ship and to indemnify the other contractors against any damage to the boats of the other contractors in the same way as if this damage had been to the boats of the Tug Owners.

Article 7

In case of storm, drift ice, dense fog and darkness and in general in weather not favourable for navigation at the judgment of the Master of the tug, the tugs shall not be bound to tow.

If, however, the service of the tugs should be required in drift ice, the tariff shall no longer be in force and a special agreement shall have to be arranged.

If the hindrances as specified above should occur during the work, the Master of the Tug may cast off the ship or floating object towed, whenever in his judgment there will be danger for the tug.

He is bound, however, to take the ship and floating objects cast off in tow again when the circumstances necessitating the casting off have entirely disappeared; such again at his discretion.

Article 8

The Tug Owners and/or the Masters of the tugs are entitled without being liable for any loss and/or damage of whatever nature, to interrupt the work in order to go to the assistance of vessels in distress.

Article 9

The rates specified in the tariff of the Tug Owners shall not be applicable to ships which have struck a leak, which have lost their rudder, have sustained damage to the engines or have sustained other damage and in general also the ships which, without having sustained any damage, are in danger; but a special agreement will have to be arranged.

In case the Tug Owners have rendered any extraordinary services, which cannot be considered to be in performance of the towage contract, the Tug Owners shall be entitled to separate remuneration.

Article 10

The Tug Owners shall be entitled in case the contract has not been performed or, if it has already been partially performed by them, to cancel the contract entirely or for the unperformed part in the event of war or warlike operations in or outside Europe; prohibitions, restrictions and controls of shipping; requisitioning of ships; revolution, riots; civil commotions; blockade; strikes; lock-outs; abnormal increases in price and wages; scarcity of fuel and similar events, which in the judgment of the Tug Owners may prevent or impede the performance of the contract and the return voyage of the tugs to the Netherlands; by devaluation respectively depreciation of the currency in which the contract has been entered into, also at such change in circumstances that it must reasonably be assumed that the Tug Owners under those altered circumstances would not, or not on the same conditions, have entered into the contract.

Article 11

Those who make use of the Tug Owners' services accept conditions with which they are deemed to be fully conversant.

This agreement shall be subject to the Law of the Netherlands.

The settlement of all disputes arising from this agreement shall, to the exclusion of any other judge, be submitted to the District Court at Rotterdam subject to the right of appeal against the decision of the said Court, in accordance with the provisions of the Law of the Netherlands.

Article 12

These conditions which have been deposited with the Central Offices of the District Courts of Rotterdam and Amsterdam shall be referred to as the

"NETHERLANDS TUG OWNERS CONDITIONS 1951".

(Deposited with the Central Offices of the District Courts of Rotterdam and Amsterdam on the 15th of November, 1951.) [*Translation*]

APPENDIX 21

Scandinavian Tugowners Standard Conditions of the Year 1959 Revised 1974 and 1985

The tugboat enterprise (hereinafter called the Company) provides towage services on the following conditions.

(1) Definitions

The expression Hirer in these conditions means the body or person who has ordered the service or on whose behalf the service has been ordered.

The expression damage in these conditions means economical losses of all kinds including but not limited to total loss, damage, loss of income and expenses and also loss of and damage to cargo on board of the vessel in tow.

(2) The Company's liability towards the Hirer

The Company is not liable for damage caused to the Hirer in connection with the towage service unless the damage is a consequence of fault or neglect on the part of the Company's management. The Company is, however, not liable for fault or neglect committed by a person of the Company's management in such a person's capacity of master of a tug or member of its crew.

The Hirer is not in any case entitled to damages from a master of a tug, a member of its crew, a pilot, or anybody else in the service of the Company.

The liability of the Company shall in any case not exceed SEK 100.000.

(3) The Hirer's liability towards the Company

The Hirer shall indemnify the Company for all damage caused to the Company in connection with the towage service unless the Hirer shows that neither the Hirer nor somebody for whose acts the Hirer is liable totally or partly has caused the damage by fault or neglect.

Should the Company be held liable for damage caused to a third party in connection with the towage service, the Hirer shall indemnify the Company unless the Company

would have been liable towards the Hirer in case the damage had been suffered by the Hirer.

In case of dispute, the Danish, respectively the Norwegian, respectively the Swedish text shall apply.

APPENDIX 22

Alexander G. Tsavliris Ltd v *OIL Ltd (The Herdentor)*, judgment of the Hon. Mr Justice Clarke of 19 January 1996 (unreported)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT

1992 Folio No.2557

Royal Courts of Justice

Friday, 19th January 1996

Before:

MR. JUSTICE CLARKE
(In Chambers)

B E T W E E N:

ALEXANDER G. TSAVLIRIS & SONS
MARITIME COMPANY — Plaintiffs

– and –

OSA MARINE LIMITED
(trading as O.I.L. MARINE LTD.) — Defendants

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MR. M. HOWARD, Q.C. and MISS V. SELVARATNAM (instructed by Messrs. Holman Fenwick & Willan) appeared on behalf of the Plaintiffs.

MR. J. RUSSELL, Q.C. and MR. S. RAINEY (instructed by Messrs. Alsop Wilkinson) appeared on behalf of the Defendants.

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE CLARKE: This is an application by the defendants for the determination of the following questions under R.S.C. O.14A:

1.1 Are the plaintiffs' alleged losses as pleaded in paragraphs 9(i) and 9(ii) of the re-amended points of claim and as further particularised in further and better particulars dated 6th February 1995, 11th May 1995, 6th June 1995 and 14th September 1995 "loss of profit" and/or "loss of use" and/or "loss of production" and/or "any other indirect or consequential damage" within the meaning and upon the true construction of clause 18(3) of the Towhire form?

1.2 If the answer to 1.1 is in any respect yes, are the defendants relieved pursuant to clause 18.3 from any liability in respect of the claims made by the plaintiffs in the action?

The defendants (whom I shall call "OSA") submit that the answer to question 1.1 is yes. The plaintiffs (whom I shall call "Tsavliris") submit, on the other hand, that the Court should not determine that question now. They submit that it should be determined at the trial of the action which is fixed for hearing in early February. Alternatively they submit that the answer to the question is no.

Background

Tsavliris claim damages for the alleged breach of an agreement made between Mr. Tim Cowley of Marint Offshore Services (UK) ("Marint") on their behalf and Mr. John White on behalf of OSA during the afternoon of 30th August 1991.

The following is, as I understand it, common ground or at least can properly be assumed for the purposes of this

application. The motor tanker "ATLAS PRIDE" was carrying a cargo of 240,062 tonnes of Arabian light crude oil on a voyage to Brazil. At the time of the agreement she had developed a leakage. She was down by the head and was in need of assistance or potential assistance off East London in South Africa.

Both Mr. Cowley and Mr. White were aware that the South African tug owners and salvors, Pentow Marine (Pty) Ltd. ("Pentow") were offering LOF to the owners of the "ATLAS PRIDE". The purpose of the agreement was to enable Tsavliris to provide the services of the "HERDENTOR" to the "ATLAS PRIDE", presumably instead of those at Pentow. I am not sure whether there was any discussion of the terms upon which Tsavliris would be assisting the "ATLAS PRIDE", although it is reasonably clear from the terms of the recap telex (referred to below) that Tsavliris intended to use the "HERDENTOR" in order to render salvage services to the "ATLAS PRIDE". There is at present no evidence as to what, if anything, was contemplated by either Mr. Cowley or Mr. White or, indeed, as to what each appreciated that the other contemplated would or might happen if the "HERDENTOR" should be withdrawn by OSA before the end of the contractual services.

It was agreed between Tsavliris and OSA that the "HERDENTOR" would provide assistance to the "ATLAS PRIDE". At 16:19 on 30th August 1991 Mr. Cowley of Marint sent the following recap telex to Mr. White of OSA:

"Here Marint (UK)

"Ref: 'ATLAS PRIDE' 248000 dwt reported fully laden with Arabian light crude and leaking in approx. posn. 40 NM south of East London

"Telecons. refer.

"Behalf Tsavliris confirm agreement to terms offered and for sake of good order herewith recap as flws:

"– Basis ahts 'HERDENTOR' 9460 bhp 125 ton bp.

– Dayrate USD 15,000 – incl. fuel/lubes (MOB/DEMOB + escort)

– Dayrate USD 20,000 – incl. fuel/lubes (towing incl. TTL 5 pct for div. here)

– Del/redel Cape Town

– Basis BIMCO tow hire + Tsav. conditions which summarised as flws:

– No claim for salvage

– Full co-operation of tugows/master/crew in gathering of statements and provision of log book extracts.

– Full confidentiality of fixture

– Payment every 5 days in advance

"Ends.

"Chrtrs. rqst that tug depart Cape Town immediately and give position/speed report every 12 hours pls.

"Kindly confirm time of departure of tug from Cape Town – also need tug's callsign pls.

"Await yrs."

It is thus common ground that the contract was subject inter alia to the standard BIMCO Towhire agreement. Tsavliris say that OSA agreed that the "HERDENTOR" would continue to assist the "ATLAS PRIDE" so long as required. They say that OSA were in repudiatory breach of the contract in the following circumstances: The "HERDENTOR" proceeded to the casualty pursuant to the contract arriving at about 10:50 on 1st September 1991. She thereafter made fast to the casualty and towed and/or held the casualty into the wind and swell in

accordance with the instructions of Tsavliris' salvage officer on site until shortly before 15:30 on 11th September 1991. At that time the master of the "HERDENTOR" told the salvage officer that he had been instructed to slip the tow and proceed to Cape Town. Despite protests on behalf of Tsavliris that the "HERDENTOR" was still required under the terms of the contract, at about 16:50 on the same day the "HERDENTOR" slipped the tow and left. She never returned. Tsavliris say that in so doing OSA were in repudiatory breach of the contract which they had no alternative but to accept and that as a result they have suffered loss and damage. It is that loss and damage which they seek to recover in this action.

OSA deny that they were in breach of the contract. In particular, they deny that the contract was for the hire of the "HERDENTOR" to Tsavliris for the purpose of rendering towage and other services to the "ATLAS PRIDE" as long as they were required by Tsavliris. They say that the contract was for the provision of the tug to escort and/or tow the "ATLAS PRIDE" from her position 50 miles off East London to False Bay (subsequently changed to Algoa Bay) and that by the time the "HERDENTOR" left, OSA's obligations under the contract had been fully discharged. In this regard OSA rely extensively upon what they say is the factual matrix in which the contract was made.

What the terms of the contract were is a question for determination at the trial after the Court has heard the evidence of inter alios Mr. Cowley and Mr. White. For present purposes I assume that Tsavliris' case is correct and that OSA

were in repudiatory breach of the contract when the "HERDENTOR" left the casualty on 11th September 1991.

The LOF

Tsavliris entered into LOF 1990 with the owners of the "ATLAS PRIDE" and her cargo freight, bunkers and stores on 30th August 1991 which was of course the same day as the contract between Tsavliris and OSA. Tsavliris subsequently entered into an ISU sub-contract with Pentow but not until the 5th September 1991. The ISU sub-contract was thus entered into some time after the agreement between Tsavliris and OSA on 30th August. There is at present no evidence as to whether Mr. Cowley and Mr. White contemplated that such a sub-contract might be made when they made their agreement, nor is there any evidence what the other appreciated or would have appreciated in that regard.

The claim

Tsavliris' case is pleaded in paragraph 9 of the re-amended points of claim as follows:

> "9. By reason of the Defendants' aforementioned breach, the Plaintiffs have suffered loss, damage and expense for which the Defendants are liable.
>
> "Particulars:
>
> "(i) Following the conclusion of the aforementioned contract with the Defendants, and in reliance upon it, the Plaintiffs entered into an agreement with the Owners of the m.t. "ATLAS PRIDE" to salve the "ATLAS PRIDE", her cargo, bunkers and stores, on the terms of a Lloyds Open Form Salvage Agreement 1990 ('LOF 1990'). The reward payable to the Plaintiffs will obtain[sic] pursuant to LOF 1990 and/or the proportion thereof payable to them under an ISU Sub-contract made between

the Plaintiffs and South African based salvors, Pentow Marine (Pty) Ltd., dated 5th September 1991, is liable to be reduced by reason of the "HERDENTOR"'s abandonment of the casualty and/or will be less than it otherwise would have been had the "HERDENTOR" remained on site and performed the services required of her by the Plaintiffs. The Plaintiffs are therefore entitled to recover that loss as damages, to be assessed;

"(ii) the additional cost to the Plaintiffs of providing services to the "ATLAS PRIDE" over and above the costs that would have been incurred had the "HERDENTOR" performed the services required of her under her contract with the Plaintiffs, to be assessed."

Paragraph 9 originally included the following:

"(iii) loss of reputation in general, and in the tanker market in particular, to be assessed."

That part of the claim pleaded in paragraph 9(iii) has now been abandoned.

As pleaded in paragraphs 9(i) and (ii), the heads of claim appear to be cumulative not alternative. On 14th September 1995 Tsavliris gave further particulars of their case as follows.

"1. It is the Plaintiffs' case that had the "HERDENTOR" remained on site and performed the services required of her by the Plaintiffs, then the role of the Plaintiffs' sub-contractors, Pentow Marine (Pty) Ltd. ('Pentow'), in the performance of salvage services to the "ATLAS PRIDE" would have been significantly reduced. In particular –

"(a) the "HERDENTOR" would have assumed the role of the Pentow tug "CAUSEWAY SALVOR", thereby enabling the "CAUSEWAY SALVOR" to be released by 12:00 on 12th

September 1991. Hereafter, this scenario will be referred to as "Scenario 1").

Further or alternatively,

"(b) The "HERDENTOR" would have assumed the role of the "CAUSEWAY SALVOR" as in (i) above until the commencement of the two from Algoa Bay to Cape Town, whereupon she would have assumed the role of the Pentow tug "JOHN ROSS" in towing the "ATLAS PRIDE" to Cape Town, enabling the "JOHN ROSS" to be released on about 18th September 1991, with the "CAUSEWAY SALVOR" taking over the role of escort tug during the tow. Hereafter, this scenario will be referred to as "Scenario 2").

"2. Sums claimed under paragraph 9(i)

"(a) Scenario 1

"The loss suffered by the Plaintiffs in Scenario 1 amount to **£186,760**, calculated as follows:

"(1) actual LOF salvage award (including uplift): £3,802,000;

"(2) proportion of (1) awarded to the Plaintiffs under the ISU sub-contract: £2,102,000;

"(3) salvage award that would have been made by the LOF arbitrator under Scenario 1: £3,909,600;

"(4) proportion of (3) that would have been awarded to the Plaintiffs by the arbitrator under the ISU sub-contract under Scenario 1: £2,409,600;

"(5) thus, an additional £307,600 (i.e. (4) minus (2)) would have been recovered by the Plaintiffs under Scenario 1;

"(6) deduct from (5) the additional "HERDENTOR" hire payable under Scenario 1, namely £120,840 (see calculation attached at Appendix A);

"(7) thus, the net loss suffered by the Plaintiffs under Scenario 1 amounts to **£186,760**.

"(b) Scenario 2

"The loss suffered by the Plaintiffs in Scenario 2 amounts to **£339,645**, calculated as follows:

"(1) actual LOF salvage award (including uplift): £3,802,00;

"(2) proportion of (1) awarded to the Plaintiffs under the ISU sub-contract: £2,102,00;

"(3) salvage award that would have been made by the LOF arbitrator under Scenario 2: £3,802,000;

"(4) proportion of (3) that would have been awarded to the Plaintiffs by the arbitrator under the ISU sub-contract under Scenario 2: £2,602,000;

"(5) thus, an additional £500,000 (i.e. (4) minus (2)) would have been recovered by the Plaintiffs under Scenario 2;

"(6) deduct from (5) the additional "HERDENTOR" hire payable under Scenario 2, namely £160,355 (see calculation attached at Appendix B);

"(7) thus, the net loss suffered by the Plaintiffs under Scenario 2 amounts to **£339,6445**.

"3. Sums claimed under Paragraph 9(ii)

"(a) **Scenario 1**

"The additional costs incurred by the Plaintiffs amount to **£219,062**, calculated as follows:

"(1) sum awarded to Pentow under ISU sub-contract: £1,700,00;

"(2) actual "HERDENTOR" hire cost until departure on 11th September 1991: £139,902.34;

"(3) Total of (1) plus (2) = £1,500,00;

"(4) sum that would have been awarded to Pentow under the ISU sub-contract under Scenario 1: £1,500,00;

"(5) "HERDENTOR" hire cost under Scenario 1: £120,840 (see Appendix A);

"(6) Total costs under Scenario 1 (i.e. (4) plus (5)) = £1,620,840.

"(7) increased costs borne by the Plaintiffs in Scenario 1 = (3) minus (6) = **£219,062**.

"(b) Scenario 2

"The additional costs incurred by the Plaintiffs amount to **£479,547**, calculated as follows:

"(1) sum awarded to Pentow under the ISU sub-contract: £1,700,00;

"(2) actual "HERDENTOR" hire cost until departure on 11th September 1991; £139,902.34;

"(3) Total of (1) plus (2) = £1,839,902;

"(4) sum that would have been awarded to Pentow under the ISU sub-contract under Scenario 2: £1,200,000;

"(5) "HERDENTOR" hire cost under Scenario 2: £160,355 (see Appendix B);

"(6) Total costs under Scenario 2 (i.e. (4) plus (5)) = £1,360,355;

"(7) increased costs borne by the Plaintiffs in Scenario 2 = (3) minus (6) = **£479,547**."

Mr. Russell has pointed out on behalf of OSA that the claim under paragraph 9(ii) contains an error. He submits that when the error is corrected it can be seen that there is no difference between the claim as advanced in paragraph 9(i) and 9(ii). The error is that in paragraph 3(a)(5) and 3(b)(5) of the particulars the figure for "HERDENTOR" hire cost" represents the notional additional cost of £120,840 and £160,355 calculated on the hypothesis that the "HERDENTOR" had continued to perform the work under Scenario 1 and Scenario 2 respectively, whereas it should be the total cost. I accept that submission. I also accept the further submission that when the correct figures are included, the amounts claimed under paragraphs 9(i) and (ii) are the same.

The basis of the claim can be summarised as follows: Tsavliris say that but for the breach of contract (a) the total sum awarded under LOF 1990 would have been greater than it was in fact; and (b) their share of that greater sum under the ISU sub-contract would have been greater than it was because the "HERDENTOR" would have provided more services than in fact it did and the Pentow contribution would have been less. There is an issue between the parties as to whether that is so or not, but for the present purposes I assume that Tsavliris are correct.

The present issue

Mr. Russell submits on behalf of OSA that Tsavliris' claim is in essence a claim for loss of profit or, alternatively, loss of use or perhaps even loss of production and that as such it is excluded by clause 18.3 of the Towhire terms and conditions. It is common ground that the contract was

subject to clause 18.3 like the other terms of Part II of the Towhire. It is I think also common ground that like any other clause in a contract, clause 18.3 must be construed in the context of the contract as a whole which must in turn be set in or against its factual matrix or surrounding circumstances.

Clause 18.3 cannot therefore be construed in isolation, but having proper regard to the contractual scheme of which it is a part. So, for example, Sir Thomas Bingham M.R. said this in Arbuthnot v. Fagin and Deeny v. Gooda Walker Ltd., which is a surprisingly unreported decision of the Court of Appeal made on the 30th June 1993 at pp.8–9.

> "Courts will never construe words in a vacuum. To a greater or less extent, depending on the subject matter, they will wish to be informed of what may variously be described as the context, the background, the factual matrix or the mischief. To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it is expected to take effect is in my view pedantic, sterile and productive of error. But that is not to say that an initial judgment of what an instrument was, or should reasonably have been intended to achieve, should be permitted to override the clear language of the instrument, since what an author says is usually the surest guide to what he means. To my mind construction is a composite exercise, neither uncompromisingly literal nor unswervingly purposive. The instrument must speak for itself, but it must do so in situ and not be transposed to the laboratory for microscopic analysis."

See also per Steyn L.J. at pp.12–14.

For present purposes nothing turns on the so-called "Tsavliris conditions" which are summarised in the recap telex as no claim for salvage, full cooperation by OSA in providing statements and log books for the purposes of Tsavliris' claim for salvage and a promise of confidentiality.

The BIMCO Towhire form contains two parts. The first part contains a series of boxes, the contents of which are to prevail over the terms set out in Part II if there is any inconsistency between them. For present purposes Part I should I think be assumed to define the nature of the service as including a promise by OSA that the "HERDENTOR" would continue to assist the casualty so long as Tsavliris wanted her to do so. Part II includes inter alia the following provisions:

"11. Permits and Certification

"(a) The Hirer shall arrange at his own cost and provide to the Tugowner all necessary licenses, authorizations and permits required by the Tug and Tow to undertake and complete the contractual voyage together with all necessary certification for the Tow to enter or leave all or any ports of call or refuge on the contemplated voyage.

"(b) Any loss or expense incurred by the Tugowner by reason of the Hirer's failure to comply with this Clause shall be reimbursed by the Hirer to the Tugowner and during any delay caused thereby the Tug shall remain on hire.

"12. Tow-worthiness of the Tow

"(a) The Hirer shall exercise due diligence to ensure that the Tow shall, at the commencement of the towage, be in all respects fit to be towed from the place of departure to the place of destination.

"(b) The Hirer undertakes that the Tow will be suitably trimmed and prepared and ready to be towed at the time when the Tug arrives at the place of departure and fitted and equipped with such shapes, signals, navigational and other lights of a type required for the towage.

"(c) The Hirer shall supply to the Tugowner or the Tugmaster on the arrival of the Tug at the place of departure an unconditional certificate of tow-worthiness for the Tow issued by a recognised firm of Marine Surveyors or Survey Organisation, provided always that the Tugowner shall not be under any obligation to perform the towage until in his discretion he is satisfied that the Tow is in all respects trimmed, prepared, fit and ready for towage but the Tugowner shall not unreasonably withhold his approval.

"(d) No inspection of the Tow by the Tugowner shall constitute approval of the Tow's condition or be deemed a waiver of the foregoing undertakings given by the Hirer.

"13. Seaworthiness of the Tug

"The Tugowner will exercise due diligence to tender the Tug at the place of departure in a seaworthy condition and in all respects ready to perform the towage, but the Tugowner gives no other warranties, express or implied.

"16 Cancellation and Withdrawal

"(a) At any time prior to the departure of the Tow from the place of departure the Hirer may cancel this Agreement upon payment of the cancellation fee set out in Box 42. If cancellation takes place whilst the Tug is on route to the place of departure or after the Tug has arrived at or off the place of departure then in addition to the said cancellation fee the Hirer shall pay any additional amounts due under this Agreement.

"(b) In the event that the towage operation is terminated after departure from the place of departure, but before the Tow arrives at the place of destination without fault on the part of the Tugowner, his servants or agents, the Tugowners shall be entitled to be paid, and if already paid to retain all sums payable according to Boxes 31/34 and any other amounts due under this Agreement. The above amounts are in addition to any damages the Tugowner may be entitled to claim for breach of this Agreement.

"(c) The Tugowner may without prejudice to any other remedies he may have leave the Tow in a place where the Hirer may take repossession of it and be entitled to payment of cancellation fee or hire, whichever is the greater, and all other payments due under this agreement upon any one or more of the following grounds:

"(i) if there is any delay or delays (other than delay caused by the Tug) at the place of departure exceeding in aggregate 21 running days.

"(ii) if there is any delay or delays (other than a delay caused by the Tug) at any port or place of call or refuge exceeding in aggregate 21 running days.

"(iii) if the security as may be required according to Box 40 is not given within 7 running days of the Tugowner's request to provide security.

"(iv) if the Hirer has not accepted the Tow within 7 running days of arrival at the place of destination.

"(v) if any amount payable under this Agreement has not been paid within 7 running days of the date such sums are due.

"(d) Before exercising his option of withdrawing from this agreement as aforesaid, the Tugowner shall if practicable give the Hirer 48 hours notice (Saturdays,

Sundays and Public Holidays excluded) of his intention so to withdraw.

"(e) Should the Tug not be ready to commence the towage at the latest at midnight on the date, if any, indicated in Box 38, the Hirer shall have the option of cancelling this agreement and shall be entitled to claim damages for detention if due to the wilful default of the Tugowner. Should the Tugowner anticipate that the Tug will not be ready, he shall notify the Hirer thereof by telex cable or otherwise in writing without delay stating the expected date of the Tug's readiness and ask whether the Hirer will exercise his option to cancel. Such option to cancel must be exercised within 48 hours after the receipt of the Tugowner's notice, otherwise the third day after the date stated in the Tugowner's notice shall be deemed to be the new agreed date to commence the towage in accordance with this Agreement.

"18. Liabilities

"1. (a) The Tugowner will indemnify the Hirer in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the towage or other service hereunder to any of the following persons:

"(i) The Master and members of the crew of the Tug and any other servant or agent of the Tugowner;

"(ii) The members of the Riding Crew provided by the Tugowner or any other person whom the Tugowner provides on board the Tow;

"(iii) Any other person on board the Tug who is not a servant or agent of the Hirer or otherwise on board on behalf of or at the request of the Hirer.

(b) The Hirer will indemnify the Tugowner in respect of any liability adjudged due or claim reasonably compromised arising from injury or death occurring

during the towage or other service hereunder to any of the following persons:

"(i) The Master and members of the crew of the Tow and any other servant or agents of the Hirer;

"(ii) Any other person on board the Tow for whatever purpose except the members of the Riding Crew or any other persons whom the Tugowner provides on board the Tow pursuant to their obligations under this Agreement.

"2. (a) The following shall be for the sole account of the Tugowner without any recourse to the Hirer, his servants, or agents, whether or not the same is due to breach of contract, negligence or any other fault on the part of the Hirer, his servants or agents:

"(i) Loss or damage of whatsoever nature, howsoever caused to or sustained by the Tug or any property on board the Tug.

"(ii) Loss or damage of whatsoever nature caused in or suffered by third parties or their property by reason of contact with the Tug or obstruction created by the presence of the Tug.

"(iii) Loss or damage of whatsoever nature suffered by the Tugowner or by third parties in consequence of the loss or damage referred to in (i) and (ii) above.

"(iv) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Tug or in respect of preventing or abating pollution originating from the Tug.

"The Tugowner will indemnify the Hirer in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage. The Tugowner shall not in any circumstances be liable for any loss or damage suffered by the Hirer or caused to or sustained by the Tow in

consequence of loss or damage howsoever caused to or sustained by the Tug or any property on board the Tug.

"(b) The following shall be for the sole account of the Hirer without any recourse to the Tugowner, his servants or agents, whether or not the same is due to breach of contract, negligence or any fault on the part of the Tugowner, his servants or agents;

"(i) Loss or damage of whatsoever nature, howsoever caused to or sustained by the tow.

"(ii) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tow or obstruction created by the presence of the Tow.

"(iii) Loss or damage of whatsoever nature suffered by the Hirer or by third parties in consequence of the loss or damage referred to in (i) and (ii) above.

"(iv) Any liability in respect of wreck removal in respect of the expenses of moving or lighting or buoying the Tow or in respect of preventing or abating pollution originating from the Tow.

"The Hirer will indemnify the Tugowner in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage but the Hirer shall not in any circumstances be liable for any loss or damage suffered by the Tugowner or caused to or sustained by the Tug in consequence of loss or damage, howsoever caused in or sustained by the Tow.

"3. Save for the provisions of Clauses 11, 12, 13 and 16 neither the Tugowner nor the Hirer shall be liable to the other party for loss of profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever.

"4. Notwithstanding any provisions of this Agreement to the contrary, the Tugowner shall have the benefit of all limitations of, and exemptions from, liability accorded to the Owners or Chartered Owners of Vessels by any applicable statute or rule of law for the time being in force and the same benefits are to apply regardless of the form of signatures given to this Agreement."

As I have already indicated, Mr. Russell submits on behalf of OSA that Tsavliris' claim is a claim for loss of profit or for loss of use and that it is not recoverable as damages by reason of clause 18.3 of Part II of Towhire. His argument may be summarised as follows. Clause 18.3 is part of a contractual scheme which carefully divides responsibility between the parties to the contract. For that reason it is not a clause inserted for the benefit of one party or the other, but of both parties. Thus, clause 11 provides for the hirer to provide necessary permits and certification and for the tugowner to be reimbursed for any loss incurred by the tugowner as a result of any failure by the hirer to do so; such loss would include loss of profit which is not excluded by clause 18.3 because of the saving provision in the opening words of the clause.

Clauses 12 and 13 provide in effect that the hirer will exercise due diligence to ensure the towworthiness of the tow and that the tugowner will exercise due diligence to ensure the seaworthiness of the tug. Any breach by one party of those obligations would give the other a claim for damages which could include a claim for loss of profit. Such a claim would not be excluded by clause 18.3, again because the saving provisions in

the opening words of the clause expressly apply to clauses 12 and 13.

Clause 16 provides a code which governs what is to happen in the event of cancellation and withdrawal. In the ordinary case clause 16(a) gives the hirer an option to cancel before "departure of the tow". However, I do not think that either party contends that that is applicable here. In any event, for present purposes I should I think assume that it is not and that Box 42 is expressed to be not applicable.

Clause 16(b) provides in effect that if the towage operation is terminated after the tow has begun through no fault of the tugowner, the tugowner will continue to be entitled to payment and that any such payment will be in addition to any damages to which he may be entitled for breach of the agreement. Those damages might of course include loss of profit. Any such damages would not be excluded by clause 18.3, again because of the saving in its opening words.

Clause 18 contains a code apportioning liabilities between the parties as set out in the clause. Mr. Russell submits that in these circumstances loss of profit, loss of use or, indeed, loss of production caused by a repudiatory breach of the contract of the kind alleged here is excluded by clause 18.3. He submits that there is no need for an express reference to circumstances in which the tow or the contract is abandoned by the tugowner without lawful excuse because, save as provided in clauses 11, 12, 13 and 16, clause 18.3 excludes loss of profit, loss of use and loss of production "for any reason whatsoever". Mr. Russell submits that those words should be

given their ordinary and natural meaning and that such losses are therefore excluded even when caused by a deliberate repudiatory breach of the contract of the kind alleged here.

Mr. Howard submits on behalf of Tsavliris that clause 18.3 does not protect OSA for a number of reasons. They include the following:

(1) The clause should not be construed as suggested by OSA because so to construe it would be to give it a construction which is inconsistent with the main purpose and intent of the contract.

(2) The Tsavliris claim is not a claim for "loss of profit, loss of use or loss of production".

(3) Even if it is, the clause excludes only claims for indirect losses whereas Tsavliris' claim is a claim for a direct loss.

It is convenient to consider the second point first.

(2) Is the Tsavliris claim a claim for "loss of profit, loss of use or loss of production?

Mr. Russell's principal submission under this head is that the claim is for loss of profit. He recognises, I think, that if it is not a claim for loss of profit it is difficult to regard it as a claim for loss of use or loss of production. In any event, I cannot see how the claim could fairly be regarded as a claim for loss of production, nor, as it seems to me, is it a claim for loss of use. I do not think that the expression "loss of use" in clause 18.3 can have been intended to refer to loss of use of the tug by the hirer of the tug.

The question is, therefore, whether the claim is a claim for loss of profit? There was some discussion at the hearing as to the correct approach to the proper construction of clauses of this kind. Mr. Russell points out that clause 18.3 was included for the benefit of both parties, so that neither party can properly be regarded as the proferens as against whom it should be construed. I accept that submission.

On the other hand, the clause is an exemption clause because it excludes liability for loss which would otherwise be recoverable as damages at common law. As such, it is for the party relying upon it to bring the facts clearly within it. In that sense it must be construed against the party who seeks to rely upon it on the facts of the particular case. In the instant case, that is OSA. That does not, however, mean that the clause should be given a strained construction. It should be given its ordinary and natural meaning in its context in the contract and having regard to the purpose and intent of the contract as a whole.

Mr. Russell submits that the claim is for loss of profit on the ground that on Tsavliris' case they have made less profit as a result of the breach than they would otherwise have done. Mr. Howard submits, on the other hand, that that is an artificial approach. He submits that the true position is that Tsavliris have received less money as payment for their services than they would have done. It has therefore in effect cost them more. It is as if they have suffered a diminution in the price which they were to receive for the salvage services.

As stated above, there are two elements of the claim. The first is that on Tsavliris' case the overall award was less than it would otherwise have been and the second, and crucial element, is that the share of that award received by Tsavliris under the ISU sub-contract is less than it would otherwise have been. As Mr. Howard points out, whether that involves less profit than would otherwise have been made depends upon whether the services were in fact profitable. It may be that they were, but it seems to me that it is somewhat artificial to treat Tsavliris' claim as a claim for loss of profit.

I accept Mr. Howard's submission that it is more akin to a claim in respect of a diminution in the price. Tsavliris have received less for the services rendered by them than they would have done. I do not think that that reduction is properly to be categorised as a loss of profit of the kind contemplated by clause 18.3.

I would add this consideration. Mr. Russell concedes, I think, that if instead of having to make greater use of a Pentow tug or tugs under the sub-contract Tsavliris had chartered in another tug at a higher cost, a claim in respect of that higher cost would not be a claim for loss of profit or, indeed, a claim for loss of use or production within the meaning of clause 18.3. He makes that concession because otherwise the effect of clause 18.3 would be that the parties agreed that where the tugowner withdrew the tug in repudiatory breach of the agreement, the hirer would be entitled to no damages whenever the tug was withdrawn. Mr. Russell was in my judgment right to

make that concession because it seems to me to be inconceivable that the parties intended so to provide.

Mr. Russell submits that the reason why a hire cost of that kind would be recoverable is that it would not be a loss of profit, loss of use or loss of production within the meaning of clause 18.3. He submits, however, that the position is different on the facts of the instant case where the alleged loss is a smaller share of the LOF arbitration award under the ISU sub-contract. He draws attention to the terms of the sub-contract. In particular he draws attention to clauses 2(a) and (b) and 4(a) which provides so far as material as follows:

"2. The Contractor Agrees:

"(a) to engage the Sub-Contractor on "No Cure – No Pay" terms to assist him in the performance of his obligations under the LOF.

"(b) To share with the Sub-Contractor the Salvage Remuneration as finally awarded under the LOF or as agreed by the parties thereto and received by the Contractors; . . .

"4. (a) From the time when this Agreement is concluded all sums paid or payable by way of Salvage Remuneration due under the LOF or this Agreement shall be owned in law by the Contractor and the Sub-Contractor jointly and shall be subject to a trust in favour of the Contractor and Sub-Contractor as beneficiaries. . . . "

The monies received by Tsavliris under the LOF 1990 were thus to be treated as trust monies owned by the Tsavliris and Pentow jointly pending determination of how they were to be shared between them.

Mr. Russell submits that in these circumstances this is not a case where the cost of employing the Pentow tug is higher than it would otherwise have been, but is a case where the Tsavliris profit is less than it would have been but for the breach and that the claim is excluded by the clause. In my judgment, however, that is too narrow a distinction to have been contemplated by the draftsman of the clause. It seems to me to be most unlikely that the draftsman intended the loss to be excluded in the one case but not the other. The effect of the breach is in both cases that Tsavliris would have in effect to pay more to the owner of the substitute tug (in this case Pentow). If the Pentow tug had been chartered in at a greater rate of hire it would have cost Tsavliris more. In the instant case Tsavliris have in effect had to pay more becuase they have received less than they would otherwise have done out of the award made against the owners of the "ATLAS PRIDE" and their cargo under the LOF.

In my judgment that is the substance of the matter even if the monies received under the Lloyd's form are properly regarded as trust property. It is in my judgment artificial to describe Tsavliris' loss as a loss of profit within the meaning of the clause in the one case but not the other. For the reasons which I have tried to give, on the assumed facts of the instant case, I accept Mr. Howard's submission that the loss is more akin to a diminution of price than a loss of profit. In all the circumstances I have reached the conclusion that Tsavliris' claim is not a claim for loss of profit within the meaning of clause 18.3 and that it is not therefore excluded by the clause.

Mr. Howard submits that I should not make a determination of any of these questions of construction under R.S.C. O.14A having regard to the history of the matter and to the fact that there is a short trial of the remaining issues in the action fixed for February which is in the very near future. Mr. Russell submits, on the other hand, that the question of construction can and should be determined now because there is no need for further evidence of factual matrix.

I have reached the conclusion that on the question whether on the assumed facts the claim is a claim for loss of profit there is no reason why the matter should not be determined under R.S.C. O.14A. For the reasons which I have tried to give, I determine under R.S.C. O.14A that the plaintiffs' claim is not excluded on the ground that it is a claim for loss of profit within the meaning of clause 18.3.

That conclusion makes it strictly unnecessary to consider the other two submissions advanced by Mr. Howard which I have identified above. However, in deference to the submissions made by the parties and in case the Court of Appeal should take a different view, I shall do so shortly.

It is convenient to consider next the third of Mr. Howard's submissions.

(3) Does the clause exclude only indirect losses?

Mr. Howard submits that even if Tsavliris' claim is correctly categorised as a claim for loss of profit, it is not a loss of profit within the meaning of clause 18.3 because it was a direct loss of profit, whereas clause 18.3 excludes only claims for indirect loss of profit, loss of use or loss of production. It

is common ground that if it is a claim for loss of profit at all, it is a claim for direct loss of profit because it results directly from the necessity to make greater use of Pentow as a result of the wrongful withdrawal of the "HERDENTOR". The question is whether such a loss of profit is excluded.

Mr. Howard relies upon the immediate context in which the words appear. Thus, the clause provides that neither party shall be liable to the other for "loss of profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever". Mr. Howard submits that the natural meaning of that expression is that only indirect losses in each category are excluded. I accept that submission. It does seem to me that if those words are construed by themselves, the expression "any other indirect or consequential damage" (my emphasis) gives content to the meaning of "loss of profit, loss of use" and "loss of production" and strongly suggests that only indirect losses of profit, use and production are to be excluded together with any other indirect or consequential damage which may occur.

Mr. Russell does not I think strongly submit to the contrary if attention is limited to those words, but he submits that it is wrong to look at the words so restrictively and that when regard is had to the whole clause set in the context of the contract as a whole, it can be seen that direct losses of profit, use and production are excluded by the clause. He so submits for two main reasons. The first is that he says that the reference to "other indirect and consequential losses" is a reference back to the provisions of clause 18.1 and 18.2. The

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second is that he says that clauses 11, 12, 13 and 16 include claims for direct losses of this type and since the opening words of clause 18.3 exclude liabilities imposed by those clauses, the losses excluded must include direct losses.

I am unable to accept either reason as a sufficient basis for giving other than its ordinary and natural meaning to the expression quoted above. As to the first reason, the word "other" in the expression "any other indirect or consequential damage" does not naturally relate back to clauses 18.1 and 18.2. On the contrary, such a construction would be very artificial. As I have already said, the natural meaning of "other" is that it relates back to the words immediately preceding it and that it makes clear that it is only "indirect losses of profit, use and production" which are to be excluded.

As to the second reason it appears to me that the saving for the provisions of clauses 11, 12, 13 and 16 would be required whether both direct and indirect losses or only indirect losses were intended to be excluded by clause 18.3 Thus, if only indirect losses of profit are excluded by clause 18.3 without the saving words, indirect losses claimable under clauses 11, 12, 13 and 16 would be excluded. The same would be true if clause 18.3 excluded both direct and indirect losses.

It follows that the existence of the saving words and the fact that both direct and indirect losses are in principle recoverable under those clauses are neutral factors in the determination of the question whether the clause excludes both direct and indirect losses or only indirect losses.

For these reasons I accept both Mr. Howard's second and third submissions, namely that Tsavliris' alleged loss is not excluded by the clause because it is not a loss of profit and, even if it is, it is not an indirect loss of profit of the kind excluded by clause 18.3.

As in the case of the question raised by Mr. Howard's second submission, his third submission also seems to me to raise a point which can be determined under R.S.C. O.14A. I should add two considerations. The first is that Mr. Howard relies in this connection on a number of authorities including Croudace Construction Ltd. v. Cawoods Concrete Products Ltd. [1978] 2 Lloyd's Rep. 55. There is nothing in that decision which is inconsistent with the conclusions which I have reached, but I have not found it of any real assistance in deciding how to construe the contract in the instant case because it is a decision on a different clause in a different contract.

The second consideration is that there is, as I see it, no inconsistency between the conclusions which I have reached and the scheme of the contract referred to by Mr. Russell and set out above. On the contrary, it would in my judgment be very surprising if the parties had agreed that in circumstances of this kind Tsavliris would not recover any loss sustained as a result of receiving a lower share of the salvage remuneration as a result of the alleged repudiatory breach of the contract. As I see it, Mr. Howard's construction is consistent with the object and purpose of the contract.

Finally, I turn briefly to Mr. Howard's first submission.

(1) Should the clause in any event be construed as contended for by Tsavliris in order to give effect to the main object and intent of the contract?

I think that Mr. Howard would, if necessary, make the same submission as that described by Bingham J. in Swiss Bank Corporation v. Brink's-Mat Ltd. [1986] 2 Lloyd's Rep. 79 at 92, where he said this with regard to the exclusion clause (clause 13) relied upon in that case:

> "The plaintiff submitted that clause 13 was not apt to protect Brink's-Mat where valuable goods had been lost by the theft or conspiracy to rob of Brink's-Mat servant. It would defeat the object of the contract altogether if such a thing could occur with no (or nominal) liability on Brink's-Mat. The clause must therefore be limited and modified to the extent necessary to enable effect to be given to the main objects and intent of the contract. In support of this submission reliance was placed on a number of authorities which included Kenyon Son & Craven Ltd. v. Baxter Hoare & Co. Ltd. [1971] 1 Lloyd's Rep. 232; Suisse Atlantique Societe d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale [1966] 1 Lloyd's Rep. 529; [1967] 1 A.C. 361; Alexander v. Railway Executive [1951] 2 K.B. 882; Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd. [1959] 2 Lloyd's Rep. 114; [1959] A.C. 576; Glynn v. Margetson Co. Ltd. [1893] A.C. 351; Tor Line AB v. Alltrans Group of Canada Ltd. [1984] 1 Lloyd's Rep. 123; [1984] 1 W.L.R. 48; and Firestone Tyre & Rubber Co. Ltd. v. Vokins & Co. Ltd. [1951] 1 Lloyd's Rep. 32."

In relation to that submission Bingham J. cited passages from the speeches of Lord Wilberforce in Suisse Atlantique at pp.562 and 482B and in Photo Production Ltd. v. Securicor

Transport Ltd. [1980] 1 Lloyd's Rep. 545; [1980] A.C. 827 at 549 and 842–3. He added:

> "Lord Diplock concurred in these reasons. He pointed out (at pp.554 and 851A) that the Court was not entitled to reject the exclusion clause however unreasonable the Court might think it to be, if the words used were clear and fairly susceptible of one meaning only. He also held (at pp.554 and 851B) that in commercial contracts negotiated between business men capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it was wrong to place a strained construction upon words in an exclusion clause which were clear and fairly susceptible of one meaning only.
>
> "My task, therefore, is to construe clause 13(i) and 3(iii) in the context of the contract as a whole and of the business relationship between these parties. In doing so, I regard the words used as clear and fairly susceptible of one meaning only. Brink's-Mat are to be 'under no liability whatsoever however arising' save in a case falling within clause 13(i). I do not see how the draftsman could have made his intention plainer. In a contract where the owner of the goods was to insure them and Brink's-Mat were not, I do not find this allocation of risk surprising. Nor does the clause in my judgment remove the substratum of the contract or vitiate the contractual intention of the parties."

Mr. Howard submits that this is not a case in which the words used are clear and susceptible of one meaning only excluding OSA's liability for Tsavliris' loss so that the principle does not apply. For the reasons which I have tried to give in relation to Mr. Howard's second and third submissions,

I accept that submission. Moreover, I have already expressed my view that the conclusions which I have reached are consistent both with the wording of the clause and the purpose of the contract.

I would only add this. If those conclusions were held to be wrong and it were held that the words of clause 18.3 are clear and susceptible of only one meaning, namely, the exclusion of Tsavliris' claim in this case, the question might arise whether the Court should nevertheless decline so to construe the clause or to modify the clause, perhaps by a process of implication, to the extent necessary (as Bingham J. put it) to enable effect to be given to the main object and intent of the contract. There are I think difficulties in the way of Tsavliris in advancing an argument along those lines (assuming it to be otherwise permissible to do so) because if, contrary to my conclusions, it were held that the hirer under the Towhire agreement could recover by way of damages for the alleged repudiatory breach the extra cost of hiring any substitute tug, but not the type of loss sustained on the facts of this case, it might not be easy to say that the main object and intent of the contract was frustrated.

However, before finally determining this point it would I think be preferable to hear the evidence of those who made the contract as to what, for example, each contemplated and what each contemplated that the other contemplated as to the possibility or likelihood or otherwise of Tsavliris entering into a sub-contract with Pentow on ISU terms either in any event

or in the event of OSA withdrawing the "HERDENTOR" in repudiatory breach of the agreement.

I shall therefore express no concluded view upon this point at this stage. It is not necessary to do so, since in the light of my earlier conclusions it would only be potentially relevant if those conclusions were held to be wrong. If either party wishes to adduce evidence relevant to it at the trial, I shall consider what, if any, directions to give relevant to such evidence.

Conclusion

For the reasons which I have tried to give, my conclusion is that the answer to question 1.1 set out above is no. Question 1.2 does not arise. I so determine under R.S.C. O.14A. It follows that if the plaintiffs are otherwise entitled to succeed, their claim is not excluded by clause 18.3 of Part II of Towhire. That conclusion makes it unnecessary for me to examine the way in which the defendants' attempts to have the question of construction of clause 18.3 determined have developed since they advanced the point for the first time last year.

I should like to end by thanking counsel for their assistance and apologise for the length of this judgment.

LATER

Mr. JUSTICE CLARKE: It appears to me that the application in December was an application to strike out the O.14A summons. That application failed and it appears to me that the costs of that application should follow the event in the ordinary way.

The plaintiffs should pay the defendants' costs of that earlier summons, that is to say, the summons to strike out the O.14A application. If there were any other costs of the December application, obviously they will have to be treated separately.

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[All references are to paragraph number save for the appendices which are referenced to by page number and shown in *italics*]