THE HONG KONG LAW LIBRARY

MARITIME LAW AND PRACTICE IN HONG KONG

THIRD EDITION

EDITOR-IN-CHIEF

The Honourable Mr Justice Barma JA

GENERAL EDITORS

Robert Merkin KC
and
Kyriaki Noussia

SWEET & MAXWELL

Michael Tsimplis
Professor, School of Law, City University of Hong Kong

Jason Toms
Consultant, Stephenson Harwood Hong Kong

Raymond Wong
Principal, Asia Maritime Adjusting

Xing Lijuan
Associate Professor, School of Law, Sun Yat-Sen University

Micky Yip
Pacific Chambers

Zhao Liang
Associate Professor, Southampton Law School, University of Southampton

CONTENTS

Foreword .... *v*
Preface .... *vii*
Table of Cases .... *xxvii*
Table of Legislation .... *lxxi*

CHAPTER 1 SHIP REGISTRATION *Xing Lijuan*

1. Introduction 1.001
2. Steps, Forms and Documents 1.007
3. Registrable Ships 1.013
   (a) Registrability 1.013
   (b) Ceasing of registrability 1.016
   (c) Qualified person 1.018
   (d) Representative person 1.019
4. Names, Marking, and Popular Colours of Ships 1.021
5. Measurement of Ships 1.026
6. Fees and Charges 1.028
7. The Register 1.030
8. Inspection and Rectification of Register 1.032
9. Certificate of Registry (CoR) 1.036
10. Provisional Registration 1.039
11. Ownership Registration 1.040
   (a) General provisions 1.040
   (b) Declarations 1.042
   (c) Transfer and transmission of ships 1.043
12. Demise Charter Registration 1.046
   (a) General provisions 1.046
   (b) Declarations 1.047
   (c) Sub-demise charters 1.048
13. Mortgage Registration 1.049
   (a) General provisions 1.049
   (b) Priority of mortgages 1.051
   (c) Power of disposal 1.052
   (d) Trusts and equities 1.055
   (e) Transfer, transmission, and discharge of mortgage 1.061
   (f) Mortgage on closure of registration 1.064
14. Registration of Government Ships 1.065

Professional Bookshop
www.pbookshop.com

15. Transitional Ships 1.069
16. Electronic Forms and Certificates 1.070
17. Closure of Registration 1.072
18. Crew and Manning of Ships 1.084
19. Ship Compliance and Quality Assurance 1.088
20. Contacts 1.092

CHAPTER 2 SALE AND PURCHASE OF SHIPS AND SHIP BUILDING — *Ronald Sum*

1. Introduction 2.001
   (a) A scenario 2.001
2. Sale and Purchase of a Ship 2.012
   (a) The shipbrokers 2.013
   (b) Should different companies be set up to hold different ships? 2.022
   (c) The negotiation stage 2.028
3. Memorandum of Agreement 2.040
   (a) An introduction to Saleform 2012 ....2.042
   (b) An introduction to Shipsale 22 ....2.054
4. Closing 2.071
5. Shipbuilding — Newbuilt 2.080
6. Parties to Shipbuilding Contracts 2.090
   (a) Seller — Shipyard 2.090
   (b) Shipyard brokers and agents 2.093
   (c) Buyer — contracting party or nominees 2.094
7. Possessory Lien 2.095
8. Guarantees in Shipbuilding Contract 2.101

CHAPTER 3 SHIP FINANCE — *Zhao Liang*

1. Introduction 3.001
2. Ship Finance Structure 3.002
   (a) Secured lending 3.003
   (b) Leasing 3.004
3. Ship Finance Documents 3.007
   (a) Term sheet 3.008
   (b) Loan agreement 3.010
   (c) Security documents 3.011
   (d) Conditions precedent documents 3.016
4. Loan Facility 3.017
   (a) The loan 3.017
   (b) Repayment and prepayment 3.022

   (c) Representations and warranties, and undertakings 3.025
   (d) Default and indemnity 3.028
   (e) Law and jurisdiction 3.032
5. Security Interests 3.033
   (a) Ship mortgage 3.034
   (b) Charge 3.040
   (c) Pledge 3.042
   (d) Lien 3.043
   (e) Assignment 3.045
6. Recent Developments 3.048

CHAPTER 4 BILLS OF LADING — *Andrew Rigden Green and Elizabeth Sloane*

1. Introduction 4.001
2. Sources of Hong Kong SAR Law 4.003
3. Functions of a Bill of Lading 4.011
   (a) Bill of lading as a receipt 4.012
   (b) Bill of lading as a document of title 4.059
4. Distinguishing Bills of Lading from Other Transport Documents 4.062
5. Trade Finance and Bills of Lading 4.075
6. Misdelivery and Letters of Indemnity 4.083
7. International Regulation 4.091
   (a) Application of Hague-Visby Rules in Hong Kong 4.092
   (b) Carrier's obligations under the Hague-Visby Rules 4.102
   (c) Carrier's exceptions from liability 4.108
   (d) Limitation of liability 4.116
   (e) Shipper's obligations 4.119
   (f) Limitation of actions 4.124
8. Remedies 4.128

CHAPTER 5 BAREBOAT CHARTERS — *Xing Lijuan*

1. Introduction 5.001
2. The Nature and Characteristics of Bareboat Charters 5.002
3. Applicable Laws in Hong Kong 5.010
   (a) Common law and equity 5.011
   (b) Contract law 5.015
   (c) Treaty provisions 5.022
   (d) Statutory obligations 5.023
4. Standard Contracts and Clauses 5.024
   (a) Barecon 89 ....5.025

Professional Boookshop
www.pbookshop.com

(b) Barecon 2001 ....5.027
(c) Barecon 2017 ....5.029
(d) Standard clauses 5.059
5. Issues, Terms and Cases 5.061
(a) *In rem* jurisdiction 5.062
(b) Sub-charters 5.081
(c) Maintenance and classification 5.084
(d) Payment of hire 5.086
(e) Withdrawal/termination 5.089
(f) Insurance 5.094
(g) Guarantee 5.096
(h) Liability against third parties 5.100
(i) Hire-purchase and purchase option 5.108
(j) Sanctions 5.113
(k) Dispute resolution 5.117

CHAPTER 6 VOYAGE CHARTERPARTY *Li Lianjun and Li Min*

1. Introduction 6.001
2. An Overview of the Gencon Charterparty 6.006
(a) Introduction 6.006
(b) Gencon 94 ....6.011
(c) Gencon 2022 ....6.063
3. Contract of Affreightment 6.072
(a) Introduction 6.072
(b) Standard form of contract of affreightment 6.075
(c) Main characteristics of the contract of affreightment 6.076
(d) Fairly evenly spread 6.079
(e) Nomination procedure 6.083
(f) Measure of damages 6.090
(g) Conclusion 6.094
4. Preliminary Voyage to the Loading Port 6.095
(a) Introduction 6.095
(b) The Gencon charterparty 6.097
(c) Position of the vessel at the date of the charterparty 6.101
(d) Date of "expected ready to load" 6.105
(e) Obligation to proceed to the loading port 6.107
(f) Cancelling clause 6.108
(g) Laycan 6.118

5. Loading Operation 6.121
(a) Division of responsibility between the owners and the charterers 6.121
(b) Stowage 6.148
6. Provision of Cargo 6.154
(a) Introduction 6.154
(b) Cargo 6.156
7. Laytime and Demurrage 6.199
(a) General principles 6.199
(b) Laytime 6.203
(c) Demurrage 6.251
8. Freight 6.261
(a) Overview 6.261
(b) Payment of freight 6.264
(c) Payment "in cash" 6.266
(d) Deadfreight 6.269
(e) Freight "deemed earned" on shipment 6.274
(f) No deduction or set off 6.282
9. Discharging and Delivery 6.290
(a) Process of delivery 6.290
(b) Delivery to person entitled 6.300
(c) Limitation of owners' liability 6.310
(d) Mixed or unidentifiable cargo 6.315

CHAPTER 7 TIME CHARTERPARTY *Li Lianjun and Li Min*

1. Introduction 7.001
2. An Overview of the New York Produce Exchange 46 Charterparty 7.003
(a) Introduction 7.003
(b) Preamble 7.007
(c) Clauses 7.021
3. Description of the Vessel 7.064
(a) Introduction 7.064
(b) When must the vessel comply with the description? 7.067
(c) Condition or innominate term 7.070
(d) Whether strict compliance required 7.088
4. Delivery of the Vessel 7.096
(a) What constitutes delivery 7.096
(b) Time of delivery 7.99
(c) Place of delivery 7.114
(d) Condition of vessel 7.119
(e) Non-contractual tender of delivery 7.131

Professional Bookshop
www.pbookshop.com

5. Duration of the Charterparty 7.136
(a) Introduction 7.136
(b) Fixed duration 7.146
(c) Variable duration 7.148
(d) Hire payable until redelivery 7.164
(e) Last legitimate voyage 7.165
6. Payment of Hire and Withdrawal for Non-Payment of Hire 7.172
(a) General principles 7.172
(b) Payment of hire 7.174
(c) Withdrawal for non-payment of hire 7.195
(d) Right to claim damages upon withdrawal: is payment of hire a condition? 7.210
7. Off-Hire Clause 7.228
(a) Off-hire clause 7.228
(b) Preventing the full working of the vessel 7.231
(c) Off-hire events 7.243
(d) Period off-hire clause and net loss of time clause 7.256
(e) Act or omission of the charterers or their agents 7.258
8. Employment and Agency 7.260
(a) Employment clauses 7.260
(b) Indemnity 7.278
(c) Agency 7.297
9. Bunkers 7.301
(a) Charterers' obligation to provide 7.301
(b) Quantity 7.302
(c) Quality 7.318
(d) Causation and the burden of proof 7.322
(e) Mitigation 7.325
(f) Property in bunkers 7.329
10. Liens 7.333
(a) General principles 7.333
(b) Owners' lien over cargoes 7.339
(c) Owners' lien over sub-freights 7.362
(d) Charterers' lien on the vessel 7.397
11. Redelivery of the Vessel 7.404
(a) Introduction 7.404
(b) Charterers' duties with respect to redelivery 7.409
(c) Time of redelivery 7.413
(d) Damages for wrongful redelivery 7.424
(e) Place of redelivery 7.435
(f) Notice of redelivery 7.440
(g) Redelivery in like good order 7.447

CHAPTER 8 MARINE INSURANCE

Robert Merkin KC and Kyriaki Noussia

1. Introduction 8.001
2. Scope of Marine Insurance Ordinance 8.005
(a) Marine insurance defined 8.005
(b) Marine adventure and maritime perils defined 8.007
3. Insurable Interest 8.009
(a) Definition and consequences of lack of interest 8.009
(b) Timing of insurable interest 8.014
(c) Specific illustrations of insurable interest 8.017
4. Assignment 8.027
5. Disclosure and Representations 8.034
(a) Utmost good faith 8.034
(b) Disclosure by the assured 8.036
(c) Disclosure by agent effecting insurance 8.040
(d) Representations pending negotiation of contract 8.042
6. The Contract and the Policy 8.044
(a) When the contract is deemed to be concluded 8.044
(b) Contract must be embodied in a policy 8.046
(c) What policy must specify 8.049
(d) Designation of subject matter 8.051
(e) Voyage and time policies 8.052
(f) Valued and unvalued policies 8.055
(g) Floating policy by ship or ships 8.057
(h) Construction of terms in policy 8.060
7. The Premium 8.062
(a) Amount of premium 8.062
(b) Payment of premium 8.064
(c) Return of premium 8.069
8. Double Insurance 8.072
9. Warranties 8.076
(a) Nature of warranties 8.076
(b) Implied wartime warranties 8.084
(c) Warranty of good safety 8.086
(d) Warranty of seaworthiness 8.087
(e) Warranty of legality 8.096
10. The Voyage 8.097
(a) Commencement and duration of risk 8.097
(b) Sailing for different destination 8.108
(c) Change of voyage 8.109
(d) Deviation and delay 8.111

Professional Bookshop www.pbookshop.com

11. Insured Perils and Excluded Perils 8.119
(a) Proximate cause 8.119
(b) Insured perils 8.121
(c) Perils not covered 8.123
(d) Perils of the seas 8.125
(e) Crew negligence 8.130
(f) *The Inchmaree* clause 8.131
(g) Wilful misconduct 8.133
(h) Delay 8.134
(i) Inherent vice 8.135
(j) Ordinary wear and tear 8.137
12. Marine Insurance Losses 8.139
(a) Forms of loss 8.139
(b) Actual total loss 8.141
(c) Constructive total loss 8.143
(d) Partial losses 8.153
13. Measure of Indemnity 8.154
(a) Principles of measurement 8.154
(b) Total loss 8.159
(c) Partial loss of ship 8.160
(d) Partial loss of freight 8.162
(e) Partial loss of goods 8.163
(f) General average contributions and salvage charges 8.164
(g) Liabilities to third parties 8.166
(h) Successive losses 8.167
(i) Suing and labouring clause 8.169
14. Subrogation 8.179
15. Prohibition on Gambling on Loss by Marine Perils 8.184

CHAPTER 9 COLLISION CLAIMS

Micky Yip

1. Introduction 9.001
2. The Definitions of "Collision" and "Vessel" 9.007
3. Principles of Liability in Collision Claims 9.012
4. Making Claims on Collision 9.018
5. Standard of Care and Burden of Proof 9.023
(a) *Res ipsa loquitur* 9.030
6. Causation and Remoteness 9.037
(a) Causation 9.037
(b) *Novus actus interveniens* 9.045

(c) Inevitable accident 9.054
(d) Contributory negligence 9.059
7. The Convention on the Intentional Regulations for Preventing Collisions at Sea 1972 ....9.065
(a) *Part A — General* 9.071
(b) *Part B — Steering and sailing rules* 9.081
(c) Part C — Lights and shapes 9.150
8. Apportionment of Liability 9.152
(a) Case law on apportionment 9.158
9. Time Limitation 9.168
10. Collision Claims in Practice 9.172
(a) The Preliminary Act 9.172
(b) The Nautical Assessor 9.178
11. The Lamma IV Inquiry 9.182
Appendix 444

CHAPTER 10 SALVAGE

Jason Toms

1. History 10.001
2. What Is Salvage? 10.005
3. The Law of Salvage in Hong Kong 10.008
4. The Elements of Salvage 10.010
(a) Recognised subject of salvage 10.013
(b) Danger 10.024
(c) The salvor must be a volunteer 10.035
(d) Salvage service 10.048
5. Calculating the Amount of the Salvage Reward 10.050
(a) The salved value of the vessel and other property 10.055
(b) The skill and efforts of the salvors in preventing or minimising damage to the environment 10.058
(c) The measure of success obtained by the salvor 10.060
(d) The nature and degree of danger 10.062
(e) The skill and efforts of the salvors in salving the vessel, other property and life 10.065
(f) The time used and expenses and losses incurred by the salvors 10.068
(g) The risk of liability and other risks run by the salvors or their equipment 10.074
(h) The promptness of the services rendered 10.078
(i) The availability and use of vessels or other equipment intended for salvage operations 10.079
(j) The state of readiness and efficiency of the salvor's equipment and the value thereof 10.081
6. Treasure Hunters and State Immunity 10.088

Professional Bookshop
www.pbookshop.com

7. Environmental Protection — Special Compensation 10.093
   (a) "Threat," "substantial damage" and "coastal waters" 10.102
   (b) Increment 10.105
   (c) Security 10.107
   (d) "Fair rate" 10.110
8. Salvage Contracts 10.113
   (a) The Lloyds Open Form 10.114
   (b) Other "Standard" Forms 10.122
9. Limitation 10.123
   (a) Time limits 10.124
   (b) Limitation of liability 10.126

CHAPTER 11 TUG AND TOW *Michael Tsimplis*

1. Introduction 11.001
2. Towage and Salvage 11.006
3. Towage and Bailment 11.027
4. The Contract of Towage 11.037
   (a) Implied terms to a contract of towage 11.041
   (b) The United Kingdom standard terms and conditions for towage and other services 1986 and the 2024 revision 11.051
   (c) Open Ocean Towage: TOWHIRE 11.071
   (d) Open Ocean Towage: TOWCON 11.086
   (e) Other issues 11.093
5. Damage to Third Party Property during the Towage Operation 11.094

CHAPTER 12 GENERAL AVERAGE AND THE YORK-ANTWERP RULES *Raymond Wong, William Lai, Ronald Sum and David Fong*

1. Introduction 12.001
2. Elements of a General Average Act 12.020
   (a) Extraordinary sacrifice or expenditure 12.020
   (b) Intentionally and reasonably made or incurred 12.023
   (c) Common safety 12.031
   (d) Time of peril 12.032
   (e) Common maritime adventure 12.037
   (f) Rule C causation/consequences 12.041
   (g) Rule D effect of fault 12.044
   (h) Success 12.051
3. Sacrifice 12.053
   (a) Rule I: Jettison of cargo 12.054

   (b) Rule II: Loss or damage by sacrifices for the common safety 12.058
   (c) Rule III: Extinguishing fire on shipboard 12.060
   (d) Rule IV: Cutting away wreck 12.062
   (e) Rule V: Voluntary stranding 12.065
   (f) Rule VII: Damage to machinery and boilers 12.068
   (g) Rule VIII: Expenses lightening a ship when ashore and consequent damage 12.073
   (h) Rule IX: Cargo, ship's materials and stores used for fuel 12.074
   (i) Rule XII: Damage to cargo in discharging, etc 12.077
   (j) Rule XV: Loss of freight 12.078
4. Expenditure 12.081
   (a) Rule F substituted expenses 12.081
   (b) Rule VI salvage remuneration 12.090
   (c) Repairs 12.096
   (d) Port of refuge expenses 12.106
   (e) Rule XXI interest on losses allowed in general average 12.128
   (f) Piracy expenses 12.129
   (g) Adjustment fee 12.132
5. General Average Security 12.133
6. Insurance 12.139
7. Procedural Matters 12.143

CHAPTER 13 MARINE POLLUTION *Edward Alder and Micky Yip*

1. Introduction 13.001
2. Prevention of Pollution 13.005
3. The 1992 Civil Liability Convention 13.006
   (a) What is a "ship"? 13.008
   (b) Pollution damage 13.013
   (c) Persistent oil 13.014
   (d) The three cases 13.023
   (e) Defences against liability 13.041
   (f) Limitation of liability 13.045
   (g) Breaking limitation 13.047
   (h) Compulsory insurance requirement 13.049
   (i) Jurisdiction of the admiralty court 13.053
   (j) Time limit and service 13.056
4. International Oil Pollution Compensation Fund 13.059
   (a) Contributions to the fund 13.061
   (b) Compensation for persons suffering pollution damage 13.065
5. Bunker Oil Pollution 13.069

Professional Boookshop
www.pbookshop.com

6. Liability for Pollution from Hazardous and Noxious Substances 13.070
(a) Prohibitions on uncertified carriage and discharge 13.079
(b) Defences 13.085
7. Liability for Discharge of Oil or Mixture Containing Oil from Ships in Hong Kong 13.086
8. Common Law Liability for Pollution 13.092

CHAPTER 14 CARRIAGE OF PASSENGERS AND LUGGAGE

Micky Yip

1. Introduction 14.001
2. General Principles 14.007
(a) General duty of care 14.007
(b) Contract of carriage 14.019
(c) Authority of the master 14.026
(d) Dangerous articles 14.032
(e) Compulsory third-party risks insurance 14.035
3. The Application of the Athens Convention 1974 in Hong Kong 14.037
4. Distinction between Carrier and Performing Carrier under the Athens Convention 14.066
5. The Basis of Liability of the Carrier under the Athens Convention 1974 ....14.073
6. Claims for Death and Personal Injuries of Passengers 14.078
7. Contributory Fault of Passengers 14.089
8. Criminal Offence Involving Carriage of Passengers 14.095
9. Quantum of Damages for Death and Personal Injury 14.100
10. Claims for Luggage of Passengers 14.102
11. Time Limitation 14.111
12. Competent Jurisdiction 14.119
13. Athens Convention and the Conventions on Limitation of Liability for Maritime Claims 1976 ....14.124
(a) Limitation under the Athens Convention 14.124
(b) Limitation under the Convention on Limitation of Liability for Maritime Claims 1976 ....14.137

CHAPTER 15 PILOTAGE

Michael Tsimplis

1. Introduction 15.001
2. Compulsory Pilotage and Liability 15.004
3. The Nineteenth Century Exemption of Liability for the Pilot's Fault 15.007
4. The Pilot's Authority 15.009
5. Liability of the Master for the Pilot's Faults 15.011
6. Statutory Organisation of Pilotage in Hong Kong 15.017
7. Exemptions to Compulsory Pilotage 15.022
8. Implementation of Compulsory Pilotage 15.026

9. Deficient Pilotage and Accidents 15.029
10. Reporting of Accidents 15.033
11. Limitation of Liability for the Pilot 15.034
12. Exclusion of Liability for Governmental Entities 15.039
13. Pilotage and Salvage 15.049

CHAPTER 16 JURISDICTION AND APPLICABLE LAW

Poomintr Sooksripaisarnkit

1. Introduction 16.001
2. Jurisdiction 16.002
(a) Service 16.002
3. Challenges to Jurisdiction 16.020
(a) There is a foreign jurisdiction agreement 16.026
(b) There is a more appropriate forum elsewhere 16.058
4. Anti-Suit Injunction 16.074
5. Applicable Law 16.094
(a) Applicable law to torts 16.095
(b) Applicable law to contracts 16.119
6. A Short Note on the Application of Foreign Law 16.149

CHAPTER 17 ENFORCEMENT OF MARITIME CLAIMS

Damien Laracy and Felix Cheung

1. Introduction 17.001
2. Action *in rem* and the Arrest Convention 1952 ....17.005
3. Maritime Liens and Statutory Claims 17.009
4. Using the *in rem* Arrest to Establish Substantive Jurisdiction 17.023
5. The Transferability of Maritime Liens and Statutory Rights *in rem* 17.025
6. Arresting *in rem* 17.033
(a) Arresting based on a maritime lien 17.033
(b) Arresting based on a Statutory Rights *in rem* 17.035
(c) Multiple claims and "piggybacking" 17.081
(d) Enforcing via an action *in rem* after obtaining an *in personam* judgment in Hong Kong 17.092
(e) Enforcing via an action *in rem* after obtaining an *in personam* judgment in an overseas country 17.095
(f) Enforcing via an action *in rem* after obtaining an arbitral award 17.099
(g) Arrest and the insolvency of the *in personam* defendant 17.105
(h) Sovereign and Crown immunity 17.121
(i) *The recognition of foreign maritime liens* 17.132

Professional Boookshop
www.pbookshop.com

7. Evidence in Support of an Application for Arrest 17.144
(a) The duty of full and frank disclosure 17.146
(b) The burden of proof when challenging an arrest 17.154
8. The Hybrid Action *in rem* and *in personam* 17.155
9. Entering Default Judgment for an Action *in rem* 17.164
10. Judicial Sale (*pendente lite*) of the Vessel 17.169
11. Priorities 17.172
12. Anticipating an Arrest 17.176
13. Security for Release of the Arrested Vessel 17.179
14. Costs of the Arrest 17.189
15. Damages for Wrongful Arrest 17.192
16. Cross Undertaking in Damages 17.201
17. Other *in personam* Enforcement and Security Options 17.206
18. Enforcement of Arbitration Awards 17.217

CHAPTER 18 LIMITATION OF LIABILITY *Sakinah Sat*

1. Introduction 18.001
2. Applicable Laws on Limitation of Liability 18.003
(a) The 1976 Limitation Convention 18.003
(b) Carriage of Passengers and Luggage by Sea 18.035
(c) Carriage of Goods by Sea 18.053
(d) Liability and Compensation for Oil Pollution 18.058
(e) Collision Damage Liability and Salvage 18.081
(f) Limitation Actions: Practice and procedure 18.087

CHAPTER 19 MARITIME ARBITRATION *David Fong*

1. Introduction 19.001
2. Documents-Only Arbitration 19.012
3. Small Claims Procedure 19.019
4. Preliminary Meeting 19.028
5. Preliminary Issue 19.031
6. Standard Forms of Contract 19.034
(a) Interpretation 19.038
(b) Inconsistency of terms 19.039
7. The Arbitral Tribunal 19.049
(a) Qualifications 19.049
(b) Centrocon arbitration clause 19.063
(c) Number of arbitrators and umpire 19.069
8. Incorporation of Charterparty into Bill of Lading 19.082

(a) Arbitration clause: the traditional approach 19.085
(b) Arbitration clause: exceptions to the traditional approach 19.090
(c) CONGENBILL 19.094
(d) Arbitration clause: the reformulated approach 19.102
(e) Other types of clauses that may face incorporation problems 19.111
(f) The validity of the arbitration clause itself 19.121
(g) Conclusion 19.123
9. Arrest of Ship in Arbitration 19.129
(a) Pre-arbitral award arrest for provision of security 19.131
(b) Post-arbitral award arrest for enforcement of awards 19.143
(c) Use of *Mareva* (freezing) injunction as a means for arrest 19.166
(d) Emergency arbitrator 19.176
10. Multi-Party Arbitrations 19.179
(a) Co-operation of parties 19.188
(b) String arbitration 19.192
(c) Indemnity action 19.195
(d) Statutory consolidation 19.205
(e) Consolidation under institute's arbitration rules 19.217
(f) Concurrent proceeding 19.223
(g) Joinder 19.230
11. Governing Law of Arbitration Agreement 19.235
(a) Case law 19.240
(b) The "validation principle" 19.254
(c) Summary 19.259

CHAPTER 20 CRIMINAL LAW AT SEA *Pui Yin Lo*

1. Introduction 20.001
2. Offence under Universal Jurisdiction: Piracy 20.004
3. Offences on the High Seas 20.020
4. Offences on Board Ships 20.025
5. Offences in Hong Kong Waters 20.036
(a) Endangering persons at sea 20.037
(b) Shipping and port control 20.038
(c) Operating vessel or performing duties on board vessel under influence of alcohol or drugs 20.041
(d) Fishing and fisheries 20.042
(e) Customs 20.045
(f) Immigration 20.046
(g) Summary 20.047

Index 853

Professional Boookshop www.pbookshop.com

TABLE OF CASES

Hong Kong

Adhiguna Meranti, The [1987] HKLR 904 ....16.061, 16.065, 16.097, 16.069
A-G of Hong Kong v Kwok A Sing (1873) 3 LR
5 PC 179 (PC) 20.005, 20.009, 20.015
AIG Europe Ltd v Fast-Link Express Ltd [2017] 3 HKLRD 112 ....18.087
Al Dhabiyyah, The [1999] 4 HKC 414 (HC) 4.057
Alacrity, The [1994] 2 HKC 659 ....17.183
Alas, The [2014] 4 HKLRD 160 ....17.094, 17.101, 17.104, 17.153,
17.168, 19.148, 19.152, 19.163, 19.164, 19.166
Alas, The [2015] 6 HKC 557 (CA) 17.102
Al Dhabiyyah, The [1994] 4 HKC 414 ....17.179
Ali Ah Saleh v Falcon Insurance Co (Hong Kong) Ltd
(DCCJ 6260/2002, [2003] HKEC 1585) 8.012, 8.033
Almerinda, Re (2001) 4 HKCFAR 350 ....18.057
Almojil 61, The [2014] 4 HKLRD 313 (CFI) 17.057, 17.061, 17.079
Almojil 61, The [2015] 3 HKLRD 598 (CA), [2015]
HKCA 268 ....1.057, 1.058, 2.026, 17.053, 17.057, 17.062
Amigo, The [1991] 2 HKC 491 ....17.015, 17.151
Andros, The [1986] 1 HKC 277, [1987] 2 HKC 48, [1988]
1 HKLR 239 (PC) 4.126
AO Smith Electrical Products (Changzhou) Co Ltd v Blue Anchor
Line [2012] 1 HKLRD 301 ....4.064
Asian Atlas, The [2008] 3 HKLRD 461 ....17.007, 17.082, 17.149, 17.150
Astel-Peiniger Joint Venture v Argos Engineering & Heavy
Industries Co Ltd [1995] 1 HKLR 300 ....4.045
Bahadur v Secretary for Security [2000] 2 HKC 486 ....4.009
Bakri Bunker Trading Co Ltd v Owners of and Other Persons interested in
the Ship "Neptune" [1986] HKLR 345 ....2.027
Banque Worms v Owners of the Ship or Vessel "Maule" (The Maule) [1995]
2 HKC 769 (CA) 17.194, 17.195, 19.172
BBG Glory, The [2017] 5 HKLRD 394 ....1.057
Benchmark Electronics v Cargo Container Line Ltd [2019]
HKCA 1101 ....4.033, 4.034
Benchmark Electronics (Thailand) PCL v Cargo Container Line Ltd [2019] 5
HKLRD 223 ....18.057
Blue Bridge, Re [2003] 1 HKLRD C2 ....1.057, 1.060
Bo Shi Ji 393, The [2015] 3 HKLRD 424 ....1.057, 17.044, 17.061
Bright Shipping Ltd v Changhong Group (HK) Ltd [2018]
HKCFI 2474 ....16.069, 17.023
Bright Shipping Ltd v Changhong Group (HK) Ltd [2019]
HKCA 246, [2019] 2 HKLRD 220 ....16.069
Brij, The [2001] 1 Lloyd's Rep 431 ....4.086
Britannia, The [1998] 1 HKC 221 ....19.137
Calandra Shipping Co Ltd v Noor Maritime Ltd [2014]
2 HKLRD 242 ....18.103

Professional Books Shop
www.pbookshop.com

January 2025, vessels between 400 GT and 5,000 GT and offshore vessels over 5,000 GT which call at EU ports will also become subject to the scheme. Shipowners and operators are now required to measure and report on the carbon emissions of their vessels which call at EU ports over each calendar year. Financiers therefore require that their borrowers comply with their EU ETS obligations so that they are not subject to penalties.

3.051 Several major interbank lending rates including LIBOR under shipping loans have now been discontinued. Most financiers in ship finance have settled for their preferred replacement reference rate for dollars. The LMA also published various drafting options for loan agreements depending on whether the parties wish to use the Term SOFR (Secured Overnight Lending Rate). In Hong Kong, the Hong Kong Interbank Offered Rate (HIBOR) is the rate on which Hong Kong dollar-denominated instruments are traded between banks in Hong Kong. There has been no formal announcement that HIBOR will be discontinued. Ship finance parties need to consider which rate is to be incorporated in their loan agreements for ship finance.

CHAPTER 4

BILLS OF LADING

Andrew Rigden Green and Elizabeth Sloane

PARA.

1. Introduction 4.001
2. Sources of Hong Kong SAR Law 4.003
3. Functions of a Bill of Lading 4.011
   (a) Bill of lading as a receipt 4.012
   (b) Bill of lading as a document of title 4.059
4. Distinguishing Bills of Lading from Other Transport Documents 4.062
5. Trade Finance and Bills of Lading 4.075
6. Misdelivery and Letters of Indemnity 4.083
7. International Regulation 4.091
   (a) Application of Hague-Visby Rules in Hong Kong 4.092
   (b) Carrier's obligations under the Hague-Visby Rules 4.102
   (c) Carrier's exceptions from liability 4.108
   (d) Limitation of liability 4.116
   (e) Shipper's obligations 4.119
   (f) Limitation of actions 4.124
8. Remedies 4.128

Professional Bookshop
www.pbookshop.com

1. Introduction

4.001 The bill of lading is the single most important document in international trade, trade finance, and maritime law. Much has been written on bills of lading and the purposes of this chapter is not to reproduce what others have written, but rather to consider the law of the Hong Kong Special Administrative Region (SAR) as it applies to bills of lading.

4.002 For a comprehensive common law analysis of bills of lading, readers are referred to the following seminal texts on the subject: Carver on Bills of Lading,[1] Bills of Lading, Sir Richard Aikens and others,[2] and Scrutton on Charterparties and Bills of Lading.[3] This chapter is intended to supplement the analysis of those texts for Hong Kong readers.

2. Sources of Hong Kong SAR Law

4.003 There are a number of international shipping conventions that apply in Hong Kong. Some of these are agreements to which the People's Republic of China is not a party. Provision is made for such agreements to apply in Hong Kong under art.153 of the Basic Law:[4]

> "The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region.
>
> International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements."

4.004 The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924, as amended by the Protocol signed at Brussels on 23 February 1968 and by the Protocol signed at Brussels on 21 December 1979 (Hague-Visby Rules) are given the force of law in Hong Kong by the Carriage of Goods by Sea Ordinance (Cap.462) (COGSO). COGSO is the primary

Professional Boookshop
www.pbookshop.com

---

[1] FD Rose and FMB Reynolds KC, *Carver on Bills of Lading* (British Shipping Laws, Sweet & Maxwell, 5th ed, 2022).

[2] Sir R Aikens, R Lord KC, M Bools KC, M Bolding, KS Toh SC and M Golby, *Bills of Lading* (Informa, 3rd ed, 2020 © 2021).

[3] C Smith KC, D Walsh, H Bennett, S Berry KC, J Foxton, *Scrutton on Charterparties and Bills of Lading* (Sweet and Maxwell, 25th ed, 2024).

[4] The Basic Law is the constitutional document of the Hong Kong SAR which sets out policies regarding Hong Kong and enshrines the concept of "*one country two systems*" into Hong Kong SAR law.

legislation in Hong Kong that regulates rights and liabilities in respect of the carriage of goods by sea. The Hague-Visby Rules as they apply under Hong Kong SAR law are considered in the section of this chapter on international regulation at Section 8 below.

4.005 The United Nations Convention for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (known as the Rotterdam Rules) and the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978) (known as the Hamburg Rules) have not been ratified by or on behalf of the Hong Kong SAR, and at the time of publication are not expected to be.

4.006 In addition to COGSO, the other main source of Hong Kong SAR law pertinent to any discussion of bills of lading is the Bills of Lading and Analogous Shipping Documents Ordinance (Cap.440) (BLSDO). This legislation deals with the doctrine of privity of contract and title to sue under Hong Kong SAR law with respect to bills of lading, sea waybills and ships' delivery orders. BLSDO came into force in Hong Kong on 1 March 1994 and replaced the Bills of Lading Ordinance 1886, which was Hong Kong legislation of equivalence to the Bills of Lading Act 1855 in the United Kingdom.[5] BLSDO has effect in Hong Kong without prejudice to the application of the Hague-Visby Rules, so far as the Rules have the force of law in Hong Kong.[6]

4.007 With respect to electronic trade documents, Hong Kong does not at the time of publication have any legislation in relation to electronic bills of lading, although the possibility for such regulations to be made exists under BLSDO.[7] The purpose of such legislation would be to ensure that digital trade documents hold the same legal validity and character as their paper counterparts.

4.008 In the 2025–2026 Budget Speech,[8] it was announced that the Hong Kong SAR Government will consider legislative amendments to facilitate digitalisation of trade documents with reference to the United National Commission on International Trade Law Model Law on Electronic Transferable Records (2017) (MLETR).[9] It is expected that a proposal for the introduction of legislation dealing with electronic bills of lading and other trade documents will be made in the course of 2026.

4.009 With respect to case authority as a source of Hong Kong SAR law, Hong Kong Courts apply the common law doctrine of precedent. Decisions of the Judicial Committee of the Privy Council delivered before 1 July 1997 are binding.[10] As from 1 July 1997, the

[5] LN 105 of 1994, Bills of Lading and Analogous Shipping Documents Ordinance (85 of 1993) (Commencement) Notice 1994.

[6] BLSDO s.8.

[7] See BLSDO s.7(1): "The Secretary for Commerce and Economic Development may by regulation make provision for the application of this Ordinance to cases where a telecommunications system or any other information technology is used for effecting transactions corresponding to (a) the issue of a document to which this Ordinance applies; (b) the endorsement, delivery or other transfer of such a document; or (c) the doing of anything else in relation to such a document. (2) Regulations under subsection (1) may (a) make such modifications as the Secretary for Commerce and Economic Development considers appropriate in connection with the application of this Ordinance to any case mentioned in that subsection; and (b) contain supplemental, incidental, consequential and transitional provisions."

[8] Speech by the Financial Secretary, the Hon Paul MP Chan moving the Second Reading of the Appropriation Bill 2025 Wednesday, 26 February 2025 (2025–2026 Budget Speech).

[9] 2025–2026 Budget Speech, p.108.

[10] *Bahadur v Secretary for Security* [2000] 2 HKC 486. Decisions of the Privy Council made before 1 July 1997 form part of the common law of Hong Kong.

Hong Kong Court of Final Appeal has served as Hong Kong's highest Court and all lower Courts and Tribunals in Hong Kong follow and are bound by decisions of the Court of Final Appeal.

4.010 Article 84 of the Basic Law provides that English and other common law case authorities will be considered persuasive, however they will not be binding on Hong Kong Courts.

> "The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions."

3. Functions of a Bill of Lading

4.011 Legislative definitions of a bill of lading and its functions are hard to find. However, Hong Kong recognises the traditional three functions of a bill of lading in line with the common law, firstly as a receipt for goods shipped on board a vessel, secondly as evidence of a contract of carriage of goods by sea, and thirdly as a document of title for the goods therein described.

(a) Bill of lading as a receipt

4.012 Although COGSO does not contain a definition of a bill of lading, the Schedule to COGSO brings into force the Hague-Visby Rules. Pursuant to art.III, the carrier is required on demand to issue a bill of lading which describes the leading marks necessary for the identification of the goods loaded, the quantity or weight, and the apparent order and condition of the goods. Although this is not stipulated in the Hague-Visby Rules, the date on which the goods are shipped on board will be other important information that is required by the shipper.

4.013 According to COGSO, the bill of lading is prima facie evidence of the receipt by the carrier of the goods described. Incorrect or inaccurate statements may give rise to claims for breach of contract or misrepresentations under the Misrepresentation Ordinance (Cap.284).

4.014 **Leading marks**: In *Hui Chi Yuk v Uni-Top Air and Seafreight (HK) Ltd*[11] it was accepted, by reference to English law, that leading marks in a bill of lading will have probative value in identifying the goods.

4.015 **Weight and quantity**: Statements as to the weight or quantity of the goods loaded on board are often qualified with the words "weight and quantity unknown". These words are intended to defeat the *"prima facie"* evidence of the weight or quantity loaded. The decision of the House of Lords in *Attorney-General of Ceylon v Scindia Steam Navigation Co Ltd*[12] was followed by the Hong Kong court in *Winkenson Impex Co*

[11] (DCCJ 2092/2009, [2011] HKEC 570).

[12] [1962] AC 60.

Professional Boooks shop www.pbookshop.com

Ltd v Haverton Shipping Ltd.[13] The effect of which is that the cargo interest will be required to prove that the stated goods were in fact loaded.

4.016 **Date**: The statement of the date of shipment can be very important for traders and inaccuracies of date are likely to expose a carrier to an action in damages for negligent misstatement at best and potentially deceit or fraud (*Standard Chartered Bank v Pakistan National Shipping Corporation*[14] which concerned fraudulently ante-dated bills of lading has been cited with approval by the Hong Kong courts on many occasions including by the Court of Final Appeal in *Re Guy Kwok-Hung Lam*[15]).

4.017 **Evidential value**: As to the evidential value of representations made in the bills of lading, s.6 of the BLSDO states:

> "A bill of lading which —
>
> (a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and
>
> (b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading,
>
> shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment."

4.018 Prior to the COGSO and the BLSDO the Hong Kong court in *Winkenson Impex Co Ltd v Haverton Shipping Ltd*[16] recognised the common law prima facie presumption set out in *Henry Smith & Co v Bedouin Steam Navigation Co Ltd*[17] that the bill of lading was a receipt for goods shipped on board. Importantly, that case also recognised that with containerised goods, the carrier had no possibility of ascertaining the contents of containers, thus, the prima facie presumption does not arise.

4.019 This analysis is consistent with other leading common law cases for bulk cargoes regarding the apparent condition. In *Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi*,[18] the Hong Kong court followed *The David Agmashenebeli*[19] stating that it was the Master of the vessel's duty to form and honest and reasonable, non-expert opinion of the apparent condition of the cargo from observation. The obligation is a duty of "relatively low order but capable of objective evaluation". Failure to accurately state the order and condition on the bill of lading, may lead to claims of fraudulent misrepresentation against the carrier. This is frequently known as clausing the bill of lading.

[13] [1985] HKLR 141.
[14] [1995] 2 Lloyd's Rep 365.
[15] [2023] HKCFA 9.
[16] [1985] HKLR 141.
[17] (1896) AC 70.
[18] [2015] 2 HKLRD 866.
[19] [2003] 1 Lloyd's Rep 92.

4.020 The risk of an action will be particularly acute where the bill of lading has passed into the hands of a third party and the representations as to the condition of the cargo progress from being prima facie evidence, to conclusive evidence.

4.021 **Bill of lading as evidence of a contract of carriage**: Hong Kong follows the common law principle which was summed up in *The Ardennes*[20] by Goddard CJ stating that the "bill of lading is not in itself the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms". This dictum was affirmed in Hong Kong on many occasions including *Ascoba Co Ltd v Safco International Freight Corporation*.[21]

4.022 The judge in *Ascoba* goes on to say that in the vast majority of cases the contract of carriage is made without formality and before the issue of the bill of lading. It is therefore beholden on parties to a bill of lading to ascertain what the terms of that contract in fact are. This will include important questions as to who are the parties to the contract, what are their obligations, what is the applicable law, and whether or not there is an agreed forum for dispute resolution.

4.023 **Who are the parties**: Under Hong Kong law there is a strongly held doctrine of privity of contract, ie, only parties to a contract have obligations and can enforce rights under it (subject to some modifications introduced by the Contracts (Rights of Third Parties) Ordinance (Cap.623). This doctrine presents difficulties for bills of lading which are transferrable documents of title.

4.024 On its face therefore a bill of lading could not be effective to transfer rights and obligations as only the original parties to the contract could enforce rights, unless there was a novation every time the bill of lading was transferred. The BLSDO cures this position stating at s.4(1) that "a person who becomes the lawful holder of a bill of lading shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract." Thus effectively treating new holders of bills of lading as if they were original parties to the contract of carriage.

4.025 Further s.4(4) expressly states that where the transferee has suffered loss or damage by reason of a breach of the contract of carriage, he will be entitled to exercise all the rights under that contract. Under s.4(5) rights of previous holders of the bill of lading will be extinguished by virtue of the transfer of the bill of lading.

4.026 Section 5 clarifies that the transfer under s.4(1) is not limited to the transfer of rights but extends to liabilities under the contract of carriage such that upon transfer of a bill of lading there is a complete transfer of rights, obligations and liabilities to the transferee (save for those of the original parties to the bill of lading).

4.027 This apparently simple mechanism for transferring rights and obligations which would otherwise be prevented by the doctrine of privity follows the United Kingdom's Carriage of Goods by Sea Act 1992. However, the mechanism is not without its challenges. The principal questions arise are (1) who is the holder, ie, the person entitled to

[20] [1951] 1 KB 55, 59–60.
[21] (DCCJ 1463/2004, [2005] HKEC 932).

Professional Bookshop
www.pbookshop.com

bring the claim; (2) how do parties identify the terms of the contract of carriage; and (3) what terms and conditions from the original contract of carriage are transferred.

4.028 Further, although in principle it would seem straightforward, the question of the identity of the carrier also requires a careful analysis of not just the bill of lading but the whole contract of carriage.

4.029 **Identity of the carrier**: Pursuant to COGSO the "Carrier" under the Hague-Visby Rules, which have the force of law in Hong Kong, "includes the owner or the charterer who enters into a contract of carriage with a shipper". This is generally understood to be, therefore, the person, or the person on whose behalf the bills of lading are signed. If they are signed by the master, then they are considered to be owners' bills, this is because the captain is the servant of the shipowner (*The Berkshire*[22]). In that instance the registered owner of the ship would appear to be the carrier with the relevant obligations under the contract of carriage. However, where the vessel has been bareboat chartered, the master will not be the servant of the owner and the carrier will in fact be the bareboat charterer. Further, if someone other than the master or the shipowner is identified by the signature, that other person may be the carrier. This could be the time charterer, an agent, or even another party.

4.030 The leading English case of *The Starsin*[23] has been cited with approval in Hong Kong in the context of the identity of the carrier in bills of lading by Stone J in *Vastfame Camera Ltd v Birkart Globistics Ltd*.[24] In *The Starsin* the bill of lading was signed by charterers "as carriers". However, the bill of lading contained further conflicting clauses:

(1) a definitions clause which defined carrier as the person on whose behalf the bill had been signed;

(2) a Himalaya Clause which purported to absolve the charterer from any liability as carrier;

(3) an identity of carrier clause which identified the carrier as the shipowner; and

(4) a "demise" clause which purported to make the charterer the agent for the shipowner or demise (bareboat) charterer as the case may be.

4.031 The House of Lords agreed with the first instance judge that the bills of lading were in fact charterers' bills — that is the contractual carrier was the charterer on whose behalf bills of lading had been signed. In *Vastfame* Birkart argued that the so called "house bill of lading" issued by them as freight forwarders only obliged Birkart to arrange for the transport. The judge however, found that it was plain and clear that, notwithstanding similar clauses as contained in *The Starsin* bills, the intention was that Birkart would be the carrier and therefore was liable for misdelivery of the goods.

22 [1974] 1 Lloyd's Rep 185.
23 [2004] 1 AC 715.
24 (HCCL 63/2002, [2005] HKEC 1555).

4.032 Similarly in *Hong Kong Hua Guang Industrial Co v Midway International Ltd*[25] the freight forwarder tried to argue that they were merely the agent for an undisclosed principal who had in fact carried the cargo. The Court of Appeal held that, despite the fact that the forwarder had not in fact carried the cargo, they were the principal under the contract of carriage as the identity of the carrier could not have been known by the bill of lading holder.

4.033 Bringing a claim against the wrong carrier can be fatal for a claimant in light of strictly applied limitation periods applicable under COGSO. Both *The Jay Bola*[26] and *The Leni*[27] were cited with approval by the Hong Kong court in *Benchmark Electronics v Cargo Container Line Ltd*[28] and *Win's Marine Trading Co v Wan Hai Line (HK) Ltd*.[29] In *Win's Marine Trading* the Hong Kong court refused leave to join the carrier as a defendant after the time bar had expired in circumstances where the plaintiff had mistakenly sued the agent instead of the contractual carrier.

4.034 In *Benchmark*[30] the plaintiff had sued Cargo Container Line (CCL) and cited the address of CCL in Malta in the writ. On service of the writ in Malta it was discovered that CCL was not in fact the contractual carrier. The plaintiff amended its writ and sought and obtained leave to serve out of the jurisdiction on CCL in BVI. CCL BVI applied to set aside the writ (which had been issued on the last day of the limitation period) on the basis that the plaintiff had sued the wrong party, the amendment of the address in the writ was in fact the substitution of a new party, and the cause of action had been extinguished. The Court of Appeal applied the test in *Davies v Elsby Brothers Ltd*:[31] the question to be answered is what would a reasonable man reading the document understand it to mean. On a reading of the writ, the judges considered that it was clear that the plaintiff had always intended to sue CCL BVI and that and that the Maltese address was clearly a mistake therefore suit had been commenced within time.

4.035 It was held in *The China & South Sea Bank v Juntex*,[32] where a bill of lading has been signed by an agent but that agent does not in fact have authority to sign the bill of lading, the agent will become personally liable to the bill of lading holder for breach of warranty of authority.

4.036 **Identity of persons entitled to sue**: The person with rights of suit under a bill of lading is its holder. Section 2(2) of the BLSDO (which is essentially identical to s.5(2) of

Professional Bookshop
www.pbookshop.com

25 [2000] 2 HKC 348.
26 *Zainalabdin Payabi and Baker Rasti Lari v Armstel Shipping Corporation (the Jay Bola)* [1992] 2 Lloyds Rep 62 a writ was issued against the former shipowners of the Jay Bola, the Hague-Visby limitation period had expired and the writ had expired. The Plaintiff sought to join the correct shipwoners to the action. This was refused by the English court.
27 *Transworld Oil (USA) Inc v Minos Companies Naviera SA* [1999] 2 Lloyd's Rep 48 action was brought within time by a party who did not have title to sue under the bill of lading. After the expiry of the limitation period, the party with title applied to join the proceedings. This was rejected by the court as the time bar had already expired.
28 [2019] HKCA 1101.
29 [1999] 3 HKC 701.
30 [2019] HKCA 1101.
31 [1961] 1 WLR 170.
32 *The China and South Sea Bank, Ltd v Juntex Ltd t/a Juntex International Shipping Agency, Choy Ka Woo, Chan Ka Fai and Choy Yuk Ling* [1997] HKCU 806 (Unreported, No A3583/1996, 21 July 1997) (CFI).

COGSA 1992) sets out that this means a person who, having come into possession of the bill by good faith:

(1) Has possession of the bill and by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates.

(2) Has possession of the bill as a result of the completion, by delivery of the bill, of any endorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill.

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

4.037 In order to ascertain the holder of the bill of lading an examination of the chain of indorsements will be necessary. The leading English cases of *The Aegean Sea*[33] and *Erin Schulte*[34] were applied by the Hong Kong court in *Calm Ocean Shipping SA v Win Goal Trading Ltd*.[35] Thus, both the transferor and the transferee of the bill of lading must have the intention to transfer and receive the bill. Possession alone is not a sufficient condition to make someone a holder of the bill of lading. In the *Erin Schulte* the bank only became the holder of the bills when it accepted them (in that instance by paying under the documentary credit).

4.038 The English and the Singapore positions appear to have diverged following the decision of the Singapore High Court in *The Dolphina*[36] where it was held that in circumstances where the indorsement on its face appeared regular, and as far as the party receiving the bill thought it was regular, but the indorsement was in fact fraudulent, this would not constitute "completion of an endorsement". We consider that Hong Kong is likely to follow the English position in reliance on the principles of *bona fide purchaser for value*.

4.039 **Terms of the contract of carriage**: As set out in *The Ardennes* and in *Ascoba* the bill of lading is evidence of a contract of carriage, or as stated in *Carewins*[37] a "memorandum of the terms of the contract of carriage". The contract of carriage will frequently have been formed at a time prior to the issue of the bill of lading and may exist in more than one document.

4.040 Bills of lading tend to be in two general forms: (1) a long form with extensive clauses in the body of the document; and (2) a short form which may incorporate the terms of a charterparty or some other document. Whether and what terms will be implied into a bill of lading contract will be governed by standard principles of contractual interpretation.

[33] [1998] 2 Lloyd's Rep 39.
[34] [2015] 2 Lloyd's Rep 97.
[35] [2016] 1 HKLRD 149.
[36] [2012] 1 Lloyd's Rep 304.
[37] *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* (2009) 12 HKCFAR 185.

4.041 Basic terms implied by common law into a simple contract where A agrees with B to carry goods by sea from Port X to Port Y include (1) the obligations of the carrier as to seaworthiness; (2) the obligations of the carrier as to care of cargo; (3) the obligation of the carrier to proceed without deviation; (4) the obligation of the carrier to proceed with reasonable despatch; (5) the obligations of the shipper as to the shipment of dangerous cargo; and (6) obligations of the shipper to load and discharge in a reasonable time. See below discussion on the Hague-Visby Rules.

4.042 Where terms are incorporated into a bill of lading from another document, the extent to which those terms have been effectively incorporated will depend on (1) the words of incorporation used; (2) the type of provision to be incorporated; and (3) the wording of the document that is to be incorporated.

4.043 It is a long accepted principle of common law that general words of incorporation incorporate "only those clauses of the charterparty which are applicable to the contract contained in the bill of lading".[38] This was specifically laid out in the leading case of *Thomas v Portsea*[39] where specifically the House of Lords rejected a submission that general words of incorporation were effective to incorporate an arbitration clause in a charterparty.

4.044 Specifically Lord Atkinson said: "I think it would be a sound rule of construction to adopt that when it is sought to introduce into a document like a bill of lading — a negotiable instrument — a clause such as this arbitration clause, not germane to the receipt, carriage, or delivery of the cargo or the payment of freight — the proper subject-matters with which the bill of lading is conversant — this should be done by distinct and specific words, and not by such general words as those written in the margin of the bill of lading in this case."

4.045 *Thomas v Portsea* has received judicial consideration in Hong Kong. In *Astel-Peiniger v Argos Engineering*[40] the court had to consider whether a sub-sub-contract relating to the development of Hong Kong International Airport was subject to the arbitration agreement set out in the head contract. This is in the context of the fact that Hong Kong arbitration law had diverged from English law with the adoption of the UN Model Law on International Commercial Arbitration.

4.046 Kaplan J stated "In the light of my construction of Article 7(2) of the Model Law discussed above, I am therefore quite satisfied that insofar as Thomas v Portsea is authority for the proposition that the arbitration clause must be specifically referred to before it can be satisfactorily incorporated, it has no application in Hong Kong."

4.047 While the decision in *Astel* was no doubt correct on its facts, the total ousting of the rule in *Thomas v Portsea* in Hong Kong law was addressed in the *Yue You 903*.[41] In this case cargo was delivered without production of the original bills of lading and the bank sought to enforce its rights as lawful holders. Proceedings were issued in

[38] *Gardner v Trechmann* (1884) 15 QBD 154.
[39] [1912] AC 1.
[40] *Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd* [1995] 1 HKLR 300.
[41] *OCBC Wing Hang Bank Ltd v Kai Sen Shipping Co Ltd* [2020] HKCFI 375.

Professional Boookshop www.pbookshop.com

CHAPTER 6

VOYAGE CHARTERPARTY

*Li Lianjun and Li Min**

PARA.

1. Introduction 6.001
2. An Overview of the Gencon Charterparty 6.006
   (a) Introduction 6.006
   (b) Gencon 94 .... 6.011
      (i) Gencon Part 1 .... 6.011
      (ii) Gencon Part 2 .... 6.018
   (c) Gencon 2022 .... 6.063
3. Contract of Affreightment 6.072
   (a) Introduction 6.072
   (b) Standard form of contract of affreightment 6.075
   (c) Main characteristics of the contract of affreightment 6.076
   (d) Fairly evenly spread 6.079
   (e) Nomination procedure 6.083
   (f) Measure of damages 6.090
   (g) Conclusion 6.094
4. Preliminary Voyage to the Loading Port 6.095
   (a) Introduction 6.095
   (b) The Gencon charterparty 6.097
   (c) Position of the vessel at the date of the charterparty 6.101
   (d) Date of "expected ready to load" 6.105
   (e) Obligation to proceed to the loading port 6.107
   (f) Cancelling clause 6.108
   (g) Laycan 6.118
5. Loading Operation 6.121
   (a) Division of responsibility between the owners and the charterers 6.121
      (i) Common law position 6.121
      (ii) FIO/FIOST terms 6.123
         (A) Gencon 6.126
            (I) *Costs/risks* 6.128
            (II) *Cargo handling gear* 6.131
            (III) Stevedore damages 6.132
         (B) Hague-Visby Rules 6.138

* We would like to thank our current and former colleagues at Reed Smith Richards Butler LLP, in particular Donald Sham, Cheryl Yu, Angus Yu, Alex Ngai, Patrick Chong, Tina Wong, Jonathan Hooi, Ada Yeung, Christina Wen, Arthur Lam and Susanna Chiu for their helpful research and assistance in the preparation of this chapter.

Professional Boookshop
www.pbookshop.com

1. Introduction

6.001 A voyage charterparty, as opposed to a time charterparty, is a contract between the owners of a certain vessel, and the charterers of the vessel (the party hiring the vessel), for the carriage of the charterers' goods from one destination to another (hence the term "voyage"). In return for providing such a service, the owners are paid some consideration, known as freight, which covers the costs of operating the vessel (including paying for the crew, bunkers and other maintenance expenses), and also ideally, for some profit. Freight can be paid by either a lump sum, or can be charged per unit of cargo (eg per tonne).

6.002 As this kind of charterparty is one of the most common kinds of carriage of goods by sea contract, there are a number of standard forms that are commonly used by parties (so that users can be familiar with a set form of contractual terms). Among them, the most common and most frequently discussed is the Gencon[1] Charterparty, due to its widespread applicability to various types of cargoes. The Gencon form was issued and recommended by the Baltic and International Maritime Council (BIMCO).

6.003 A similar type of contract is the contract of affreightment (COA), which is a contract for a series of voyages involving bulk cargoes. These contracts[2] are different to voyage charterparties in the sense that they do not restrict the vessel on which the goods are carried, but are general charters for the carriage of goods from one destination to another, on any number of ships. A certain ship is then nominated for any particular voyage under a COA. For example, these contracts may apply to a fleet of similar ships to transport a certain type of goods. In a sense, this type of contract is a more general form of voyage charterparty.

6.004 In considering a voyage charterparty, it is possible to divide the entire process into a series of phases. Briefly, first there is the preliminary voyage of the vessel to the loading port, sometimes known as the "approach voyage," which is when the ship travels to the port where the goods are to be loaded. Then, at the loading port, there is the loading operation, which is when the charterers' goods are loaded on to the owners' vessel by stevedores (who are normally deemed the agents of the charterers, but subject to agreement under the charterparty). There are certain issues which arise when considering how the charterers will provide cargo to the vessel. During the loading operation, as the ship will have to be berthed at a port, there are charges to be paid to the port. Typically, the owners will allot a certain amount of time for the loading/discharging of goods at a port. This is known as laytime. If loading or unloading time exceeds the agreed laytime, then demurrage (a compensation fee for being late) has to be paid. Similarly, if the charterers can load the goods in less time than the allotted laytime, then under some charters, the charterers may be awarded money (usually half of demurrage), which is known as "despatch."

Professional Bookshop
www.pbookshop.com

---

[1] For a sample copy, see https://www.bimco.org/contractual-affairs/bimco-contracts/contracts/gencon-2022/ (visited 9 February 2025).

[2] For a sample copy, see https://www.bimco.org/-/media/BIMCO/Contracts-and-Clauses/Contracts/Sample-copies/Sample-copy-GENCOA.ashx (visited 25 November 2019).

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

2. An Overview of the Gencon Charterparty

(a) Introduction

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

6.007 Gencon was first issued in 1922 (Gencon 22), revised in 1976 (Gencon 76), in 1994 (Gencon 94) and most recently in 2022 (Gencon 2022). Each revision has attempted to address the previous issues that may have arisen due to the potential lack of clarity in the Gencon forms.

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

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

6.010 Although the latest version of Gencon is Gencon 2022, which was published by BIMCO in October 2022, Gencon 94 is still commonly adopted by the parties in the industry, with a body of case law on the terms of Gencon 94. The discussions below will therefore focus on Gencon 94, followed by a separate section on the main updates in Gencon 2022.

(b) Gencon 94

(i) *Gencon Part 1*

6.011 In Part 1 of the Gencon form, there are a number of blanks to be filled in by the parties. This information sets out the basic details expected by the parties. With reference to the numbers given on the Gencon form, the boxes request the names and details of the: (1) shipbroker; (2) place and date of the agreement; (3) owners; (4) charterers; (5) the vessel's name; (6) the gross tonnage (GT) or net tonnage (NT) of the vessel; and (7) the deadweight tonnage. The GT of a vessel is calculated using all of the enclosed space within the ship, while the NT gives the volume of all the cargo spaces on the ship. The provision of either the GT or NT is in compliance with the International Convention on Tonnage Measurement of Ships (1969).

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

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

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

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

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

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

Professional Bookshop
www.pbookshop.com

(ii) *Gencon Part 2*

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

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

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

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

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

---

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

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

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

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

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

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

---

[7] [1932] AC 328.

Professional Bookshop www.mbookshop.com

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

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

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

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

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

6.033 In order for laytime to start running, the vessel must give a notice of readiness (NOR), to inform the charterers that the vessel is at port. However, a situation may arise where

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

a vessel arrives at a port, and is ready to commence loading or unloading, but because of the situation at the port, the vessel is unable to berth. Still, in this kind of situation, cl.6(c) gives power to the owners to give an NOR to commence laytime, so long as the vessel is at the port and ready to berth (even if it is unable to actually berth).

6.034 Clause 7 sets out the agreement on Demurrage. The position on the Gencon for demurrage is relatively simple. If the charterers run over time, and exceeds the agreed laytime or "free time," then demurrage is payable at the rate agreed, or pro rata for any part of the day. If the charterers then fail to pay demurrage, the owners can give written notice to the charterers, who must within 96 hours pay the demurrage. If it is not paid, the owners are entitled to terminate the charterparty and claim damages for the termination of the charterparty.

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

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

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

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

6.039 In essence, this clause dampens the common law standard, as decided in *Moel Tryvan Ship Co Ltd v Andrew Weir & Co*.[9] The position is that the charterers can cancel the charter at any time after the expiry of the cancelling date, until the vessel reaches the loading port and an NOR is given. The cancelling clause is inserted for the benefit of

[9] [1910] 2 KB 844.

Professional Boookshop www.pbookshop.com

the charterers, and for this reason, the owners are still obliged to go to the loading port, so long as the charterers do not exercise its rights. However, under cl.9 of Gencon 94, this previously powerful right has been somewhat curtailed.

6.040 Clause 10 deals with how the bills of lading should be dealt with. As BIMCO had intended the Gencon 94 to be used with Congenbill 1994, this clause makes specific reference to this standard form bill of lading to be used. In fact, it is to the effect that if this clause stands unamended, the master is not bound to sign a bill of lading which is not on the Congenbill form. The shipper is entitled to ask that the master signs the bills of lading, although the master is of course free to clause a bill of lading where necessary. This clause also provides that if there is liability on the owners arising from the bills of lading that are beyond the liabilities as contemplated under the charterparty, then the charterers must indemnify the owners for the excess liability.

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

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

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

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

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

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

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

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

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

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

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

Professional Bookshop www.obookshop.com