

# **What Have Ships Ever Done for You? The Impact of Maritime Law<sup>1</sup>**

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University of Cambridge**

1. I thank the University of Cambridge and in particular the Downing Professor of Laws, Prof Sarah Worthington QC for this kind invitation to speak. I also thank of course Allen and Overy for sponsoring the Lecture. It is an immense honour and privilege to be invited to deliver this Lecture; it is among the most prestigious in Cambridge.

2. Almost exactly a month ago in Hong Kong, I attended a Symposium organized by the Academy of Law of the Law Society in Hong Kong in which the theme was *Commercial Law through the Courts : Rebalancing the*

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<sup>1</sup> I wish to acknowledge the assistance I have received from the Judicial Assistants of the Hong Kong Court of Final Appeal : Mr Jeff Chan LLB (Hong Kong), LLM (UCL, London), Barrister; Mr Hui Sui Hang LLB (UCL, London), Solicitor; Ms Katrina Lee LLB (Dunelm), LLM (Hong Kong), Barrister; Ms Jacquelyn Ng BA (Warwick), LLB (Cantab), Barrister; Ms Amanda Xi LLB (Hong Kong), Solicitor.

*Relationship between the Courts and Arbitration.* This was intended as a debate over the conflict between on the one hand the contribution arbitration has made to the administration of justice and, on the other, what many see as the stifling of the development of (in particular) commercial law by the paucity of cases going through the courts. Some controversy was caused by a lecture of that title delivered by the Lord Chief Justice, Lord Thomas of Cwmgiedd earlier this year.<sup>2</sup> In that Lecture, Lord Thomas gave his view that the development of commercial arbitration had gone too far and this had had a definite and adverse impact on the development of the common law. The Lecture provoked a heated response from arbitrators and those sympathetic to arbitration. Lord Thomas' suggestion that perhaps the law ought to be changed to allow more arbitration awards to come before the courts for further consideration was met with a strong criticism that this

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<sup>2</sup> This was the BAILII (The British and Irish Legal Information Institute) Lecture 2016 delivered on 9 March 2016.

would be a wholly retrograde step. Lord Saville of Newdigate, writing in a letter to *The Times*<sup>3</sup> asked rhetorically, “Why, in other words, should they [commercial litigants] be obliged to finance the development of English commercial law?”

3. I of course see both points of view and, depending on the hat I wear, agree with both. As a lawyer, I admire the way how the law has developed historically through commercial cases going through the courts. Great names have contributed significantly to the development of commercial law; to name just a few, Lord Mansfield, Scrutton LJ, Lord Devlin, Lord Reid, Lord Diplock, Lord Wilberforce, Lord Goff of Chieveley and Lord Bingham of Cornhill.<sup>4</sup>

4. Wearing my hat as a Chief Justice however and looking overall at the administration of justice, there can be

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<sup>3</sup> *Reforms will threaten London's place as a world arbitration centre.* *The Times*, 28 April 2016.

<sup>4</sup> Fear of embarrassing the great commercial judges of today prevents me from naming them.

no dispute that arbitration has made significant contributions to commercial dispute resolution and is here to stay. The changes made to arbitration legislation in Hong Kong, as well as elsewhere, incline ever more towards a virtual exclusion of the courts. In a busy, overstretched legal jurisdiction such as Hong Kong (and England), arbitration has relieved much of the strain on the court system to ensure that justice is delivered expeditiously and efficiently.

5. However, it is in my capacity as a lawyer that I deliver this evening's Lecture. When Prof Worthington first suggested that I might perhaps be persuaded to speak, my first reaction was indeed to suggest the importance of shipping law to commercial jurisprudence. This elicited the following response from her :-

“I can see the title already ..... ‘What have ships done for the common law?’ Yes, that could certainly work.

I remember Roy Goode once telling me that if you wanted to know what the common law rule was about anything, you could see what the maritime rule was, and the common law (on land) rule was typically precisely the opposite!? But some very serious maritime lawyers tell me this is not true”.

I thank Prof Worthington for enabling to come up with the title.

6. Maritime law brings back many good memories for me. I spent a year’s pupillage doing maritime law. On my

first day of pupillage<sup>5</sup>, I worked on a set of papers in a case called *A/S Awilco of Oslo v Fulvia S.p.A. di Navigazione of Cagliari (The Chikuma)*. The facts involved a time charterparty and the owners' right to withdraw through non-payment of hire by the time charterers. The withdrawal clause in the charterparty was in standard form. The case went to arbitration, a special case was stated by the arbitrator (Mr Donald Davies) and the matter proceeded all the way to the House of Lords. The case is reported.<sup>6</sup> By that time, I was well into practice in Hong Kong. However, two of my former pupilmasters in London were against each other.<sup>7</sup> One part of the speech of Lord Bridge of Harwich has relevance to the themes of legal certainty and perceived commercial justice which I shall develop presently :-

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<sup>5</sup> With Mr V V Veeder (now QC), in the same Chambers as Lord Saville and Lord Thomas.

<sup>6</sup> [1981] 1 WLR 314.

<sup>7</sup> Mr Veeder was led by Christopher Staughton QC (later Staughton LJ), Mr Roger Buckley QC (later Buckley J) was led by Andrew Leggatt QC (Leggatt LJ).

“Where, as here, they embody in their contracts common form clauses, it is, to my mind, of overriding importance that their meaning and legal effect should be certain and well understood. The ideal at which the courts should aim, in construing such clauses, is to produce a result, such that in any given situation both parties seeking legal advice as to their rights and obligations can expect the same clear and confident answer from their advisers and neither will be tempted to embark on long and expensive litigation in the belief that victory depends on winning the sympathy of the court. This ideal may never be fully attainable, but we shall certainly never even approximate to it unless we strive to follow clear and consistent principles and

steadfastly refuse to be blown off course by the supposed merits of individual cases.”<sup>8</sup>

7. I developed a shipping practice in my early years in practice as a barrister; at least for as long as I was still able to read the reverse of bills of lading! I did both ‘wet’ (strictly admiralty law such as arrests and collisions) as well as ‘dry’ (mainly cargo claims). It was a real pleasure for me being reminded of this part of my practice when the Hong Kong Court of Final Appeal heard two cases with a maritime flavour in the last few years. One involved a collision resulting in the sinking of a vessel in a buoyed channel in Hong Kong waters.<sup>9</sup> The factual part of the court’s judgment was written by Lord Clarke of Stone-cum-Ebony, a well known Admiralty lawyer. The second case was a rarity in Hong Kong (and in recent years, anywhere), a case involving

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<sup>8</sup> At 322.

<sup>9</sup> *Kulemesin v HKSAR* (2013) 16 HKCFAR 195.



marine insurance.<sup>10</sup> This was the only judgment I have written on marine insurance, having written many opinions on the subject when in practice, and gave me an opportunity to acknowledge the assistance I gained from two lawyers whom I admire : the present Downing Professor of Laws (her book on Equity<sup>11</sup>) and Lord Mansfield.

8. Enough reminiscences and back to a more serious discussion. In this talk, I shall try without getting too much into intricacies or technicalities, to provide some views on the impact of the maritime law. Maritime law really needs no introduction and the usual starting point is to refer to the well-known statement of Lord Goff of Chieveley in the Wilberforce Lecture of 1998, “For the English the characteristic commercial contract is a contract for the

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<sup>10</sup> *Hua Tyan Development Ltd v Zurich Insurance Co Ltd* (2014) 17 HKCFAR 493.

<sup>11</sup> *Equity* (2<sup>nd</sup> ed.) (Clarendon Law Series, OUP).

carriage of goods by sea.”<sup>12</sup> It is true that the content of English commercial law, being one of the jewels of the common law, has greatly influenced the development of commercial law all over the World. Individual cases may not always have been followed, but they have invariably influenced. For example, in Australia, the emphasis has perhaps more been on the development of equitable principles but the influence of English commercial law has without doubt been significant. Certainly, as we shall see, English commercial law has been greatly influential on the common law of Hong Kong.<sup>13</sup>

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<sup>12</sup> “*The Future of the Common Law*” (1997) 46 ICLQ 745, at 751.

<sup>13</sup> Hong Kong is a common law jurisdiction. It is prescribed in the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (effectively Hong Kong’s own constitution) that the “common law and rules of equity” apply (Article 8) and that “the judicial system previously practised in Hong Kong shall be maintained” (Article 81). A number of eminent judges from the United Kingdom and Australia currently sit as members of the Court of Final Appeal : Lord Neuberger of Abbotsbury, Lord Phillips of Worth Matravers, Lord Hoffmann, Lord Millett, Lord Walker of Gestingthorpe, Lord Collins of Mapesbury and Lord Clarke of Stone-cum-Ebony (UK); Justice Murray Gleeson (formerly Chief Justice of the High Court of Australia), Justice William Gummow (formerly of the High Court of Australia) and Justice James Spigelman (formerly Chief Justice of New South Wales) (Australia).

9. A number of extremely learned and interesting articles have been written about the influence of maritime law and I shall be referring to some of them. Chief among these has been the classic piece by Prof Francis Reynolds QC “*Maritime and other influences on the commercial law*”.<sup>14</sup> It is not my intention to repeat the themes in that or indeed any other paper – I cannot possibly hope tonight to reach these depths of learning – but wish instead to focus, in the maritime context, on what I see to be two principles of the common law that can be said at times to pull in different directions. These are the need for legal certainty as contrasted with the need to develop the law to arrive at just results (or what may be perceived to be just results). I have found this potential conflict and the way it has been considered by the English courts to be the most interesting aspect of maritime law, and it is this facet that has in my view contributed significantly to

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<sup>14</sup> [2002] LMCLQ 182.

the richness of the common law. The contribution lies in the very fact that it provokes more thought, sometimes even controversy, and this must as a matter of principle be conducive to the continuing development of the law. In the study of law, I dare say most in this room will perhaps not disagree with this statement.

## **A. Classification of Terms**

10. Before I analyse this further, it is of course uncontroversial to maintain that the contribution of maritime law to the common law has been immense. As I have remarked, many learned commentators have already written on this contribution. The famous case of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha*<sup>15</sup> and the analysis contained in the judgment of Diplock LJ of the circumstances

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<sup>15</sup> [1962] 2 QB 26.

in which a contract can be discharged when one party fails to do that which has been agreed to be done, is one of the most iconic and written about cases in the law of contract. It dealt with a problem that had taxed the English courts “for centuries, probably ever since *assumpsit* emerged as a form of action distinct from covenant and debt.”<sup>16</sup> The problem was that it was not possible in some cases, without causing injustice, simply to classify terms of contract as either conditions or warranties (the breach of which had the consequence either enabling an innocent party to terminate the contract or merely, in the case of a breach of warranty, to claim damages<sup>17</sup>), but that it was important to look at the consequences of breach. From this came the concept of intermediate or innominate terms.<sup>18</sup> The analysis embarked

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<sup>16</sup> At Pg. 66-67.

<sup>17</sup> This was the dichotomy which had traditionally, prior to *Hongkong Fir*, been the position : see Chitty on Contracts Vol. 1 (32<sup>nd</sup> ed.) at para. 13-019.

<sup>18</sup> *Hongkong Fir* at Pg. 70. The use of these terms as such is not to be found in that case but in other cases such as *The Hansa Nord* [1976] QB 44 (per Lord Denning MR) and *Bunge Corporation, New York v Tradax Export SA Panama* [1981] 1 WLR 711, at 714 (per Lord Wilberforce).

on by Diplock LJ was a compelling and lucid one. Although it has since been said<sup>19</sup> that his reasoning was not, as has been put, “wholly novel, indeed revolutionary”<sup>20</sup> – this owing to cases like *Universal Cargo Carriers Corporation v Citati*<sup>21</sup> – the important point to bear in mind for present purposes is that the opportunity to embark on the brilliant analysis undertaken by Lord Justice Diplock came about because of the nature of maritime contracts. In most contract cases, the point as to innominate terms would simply not have arisen. However, it arose in *Hongkong Fir* due to the nature of the standard term regarding a shipowner’s obligation to provide a seaworthy vessel in charterparties.<sup>22</sup> As was stated by Diplock LJ, the undertaking to provide a seaworthy vessel could be broken in

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<sup>19</sup> See, for example, the discussion of *Hongkong Fir* by Prof Donal Nolan (the Professor of Private Law at Oxford) in “*Landmark Cases in the Law of Contract*” (Hart Publishing, 2008) at Pg. 269-297.

<sup>20</sup> Prof Tony Weir “*Contract – The Buyer’s Right to Reject Defective Goods*” [1976] Cambridge Law Journal 33 at 35.

<sup>21</sup> [1957] 2 QB 401; [1957] 1 WLR 979.

<sup>22</sup> In *Hongkong Fir*, the relevant clause in the time charterparty required that the vessel be “in every way fitted for cargo service” and that the owners should also “maintain her in a thoroughly efficient state in hull and machinery”.

a number of ways with different consequences ranging in severity :-

“As my brethren have already pointed out, the shipowners' undertaking to tender a seaworthy ship has, as a result of numerous decisions as to what can amount to “unseaworthiness,” become one of the most complex of contractual undertakings. It embraces obligations with respect to every part of the hull and machinery, stores and equipment and the crew itself. It can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel.”

11. The only point I am trying to make is that the peculiar characteristics inherent in a marine adventure give

rise to potentially complicated questions of law; questions which do not necessarily arise in other commercial contexts.

Another example of this is the case that provided huge difficulties for law students (like me) to grasp – *Suisse Atlantique*.<sup>23</sup>

## **B. Privity of Contract**

12. The complexities arising out of the obligation to provide a seaworthy vessel, fundamental to shipping since ancient times, give rise as we have just seen to a quite revolutionary way of looking at the terms of a contractual relationship. Another characteristic peculiar to contracts involving the carriage of goods by sea is the complex number of contractual relationships that can exist in a marine adventure. This is succinctly summarised by Prof Francis

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<sup>23</sup> *Suisse Atlantique Soci é d'Armement Maritime S.A. v N.V. Rotterdamsche Kolen Centrale* [1967] 1 AC 361.



Rose<sup>24</sup>, “..... marine adventures are frequently governed not by one contract between only two parties but by a complexity of different, even if interrelated, arrangements between a variety of parties. For these reasons sea transport has required more extensive and complex law than other forms of transport.”<sup>25</sup>

13. What Prof Rose then alludes to is the aspect of marine insurance in which the different risks assumed by the participants in a marine adventure are allocated and in this way, rated and insured. Insurance is indeed an important aspect but the liabilities of the different participants towards each other have also to be determined. Here, complications may arise when one party not in a contractual relationship with another person, makes a claim against that person. The

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<sup>24</sup> The Senior Research Fellow at the Commercial Law Centre based in Harris Manchester College, Oxford.

<sup>25</sup> *English Private Law* (edited by Prof Andrew Burrows) : Chapter 11 “Carriage of Goods by Sea” (3<sup>rd</sup> ed.) at para. 11.04.

ability to sue does not cause any difficulty; an absence of a contractual relationship will not prevent an action in tort. I am of course in this context referring to the paradigm of a cargo owner making a claim against a carrier in respect of loss or damage to goods carried on a ship. On the assumption that at the time of the loss or damage, the plaintiff had legal ownership or a possessory title, a claim in tort will be available. A claim in tort will, however, not be available where the interest of the claimant in the goods is merely a contractual one. In a shipping context, given the fact that the relevant goods will always be the subject of a series of sales and sub-sales (this is inherent in international sales of goods), questions over title to sue can be a real one (and sometimes unfairness may be occasioned) but the principle is well known : see *Candlewood Navigation Co Ltd v Mitsui OSK Lines Ltd and Another (The Mineral Transporter)*<sup>26</sup>; *Leigh*

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<sup>26</sup> [1986] AC 1.

*and Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)*.<sup>27</sup> Incidentally, this strict legal position is now somewhat mollified. For example, a claim in tort will be possible if the legal owner (who would have title to sue) is joined. This possibility was dealt with by Lord Brandon of Oakbrook in *The Aliakmon*<sup>28</sup> and confirmed to be the law by the Court of Appeal in *Shell UK Ltd v Total UK Ltd*.<sup>29</sup> It is perhaps also noteworthy that in *The Aliakmon*, it was additionally argued by Mr Anthony Clarke QC<sup>30</sup> that it should suffice if an equitable interest could be shown in the relevant goods. This was rejected on the basis that the Sale of Goods Act 1893 drew no distinction between legal and equitable ownership. I mention this now because the seeming reluctance of the common law to allow equitable principles to

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<sup>27</sup> [1986] AC 785.

<sup>28</sup> At 812 C-E.

<sup>29</sup> [2011] 1 QB 86.

<sup>30</sup> Lord Clarke of Stone-cum-Ebony.

govern international transactions has been the source of adverse comments from time to time.

14. Where a claim in tort is possible, the practical problem which arises is this : in a cargo claim, the ultimate carrier may wish to rely on exemption clauses contained in the contract of carriage made by it with another person but finds itself unable to do so by reason of the lack of privity of contract with the cargo owner who is suing. In the shipping scenario, this arises most commonly where owners of cargo (A) engage an intermediate carrier (B) to transport goods by sea and that intermediate carrier enters into a contract of carriage with the ultimate carrier (C). There is damage or loss, A sues C and C wishes to rely on an exemption clause in its contract with B. There may be more intermediaries in other situations but this example is the simplest to make the point.

15. Under the strict doctrine of privity of contract, C cannot rely on the exemption clause through lack of privity of contract : see *Midland Silicones Ltd v Scruttons Ltd*.<sup>31</sup> A simple enough proposition which in most situations will probably yield a right result, and certainly has promoted consistency and certainty in the law. However, in a complex set of relationships which underlie carriage by sea and also given the risks inherent in such carriage, the strict doctrine may result in an injustice. By ‘injustice’ I am of course using it in the sense of commercial inexpediency, not in the sense of personal injustice or in any human rights sense.

16. Limitation of liability is of the essence in a marine adventure. There is perhaps no form of commercial contract dealt with by the common law in which the exemption clause has featured more prominently. This also filters through to

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<sup>31</sup> [1962] AC 446.

other forms of carriage as well : by air, road and rail. Exemption clauses also feature a lot in consumer contracts but in this area, this is now largely governed by statute. In the carriage of goods by sea, it is easy to see why limitation of liability is of critical commercial importance, so much so that not only has statute intervened, international conventions also prescribe limits.<sup>32</sup> At the level of the law of contract, we see from many of the major shipping cases that at the heart of them has been the attempt to exclude or limit liability.<sup>33</sup>

17. In the example I have earlier referred to, C (the actual carrier) wishes to limit its liability to A (the cargo owner), having been at pains to ensure this by the terms of its contract with the intermediary B. An inability to do so was obviously commercially undesirable for the reasons just

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<sup>32</sup> Merchant shipping statutes such as the Merchant Shipping Acts. Examples of conventions include the Hague Rules, the Hague Visby Rules, the Convention on Limitation of Liability for Maritime Claims 1976.

<sup>33</sup> In *Suisse Atlantique* (fn 22 above), the fundamental issue determined by the House of Lords was directly related to the limitation of the damages payable following a failure to perform sufficient voyages under the charterparty.

articulated. This undesirability was put in the following way by Lord Goff of Chieveley in *The Mahkutai*<sup>34</sup> (which I will refer to again) and the commercial rationale for an exemption clause was stated :-

“In more recent years the pendulum of judicial opinion has swung back again, as recognition has been given to the undesirability, especially in a commercial context, of allowing plaintiffs to circumvent contractual exception clauses by suing in particular the servant or agent of the contracting party who caused the relevant damage, thereby undermining the purpose of the exception, and so redistributing the contractual allocation of risk which is reflected in the freight rate and in the parties' respective insurance arrangements.”

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<sup>34</sup> [1996] AC 650, at 661E.

18. This passage lays emphasis on the commercial inter-relationships that occur in shipping, involving not just the carrier, goods owners and intermediaries but also beyond them, insurers and reinsurers. It is about money and profit from beginning to end; this after all is commerce distilled into its essential ingredient.

19. Commercial law found a number of methods to tackle this “undesirability”. It is enough for me to refer to just a few of the cases to make the point that they are all shipping cases and also the point that it was not coincidental that they happened to be shipping cases. The nature of shipping itself gave rise to the problems faced and determined by the courts. The cases, two from Hong Kong, are all decisions of the Judicial Committee of the Privy Council :-



(1) *New Zealand Shipping Co Ltd v AM Satterthwaite (The Eurymedon)*<sup>35</sup> marked the first significant reaction against what was seen to be the harshness (or commercial undesirability) of *Midland Silicones*. There, by the device of the Himalaya Clause<sup>36</sup>, a third party (in that case stevedores) could take advantage of protection under a contract through agency principles. Commercial expediency certainly favoured such a result and, as Lord

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<sup>35</sup> [1975] AC 154.

<sup>36</sup> The Himalaya Clause was in the following terms :-

“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 goods or to any holder of this bill of lading for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of or in connection with his employment and, 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 his 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 the contract in or evidenced by this bill of lading.”

When I was in pupillage, it was often rumoured that Mr Michael Mustill QC (Lord Mustill) had drafted the clause (he was counsel for the appellant stevedores in that case) but this is probably unlikely. A clause in similar form had been in use in the United States since at least 1968 : see the reference to the case of *Carle and Montanari Inc v American Export Isbrandtsen Lines Inc* [1968] 1 Lloyd's Rep 260 (at 168-169). What is clear, however, is that the form of the clause fitted in very well with the views of Lord Reid in *Midland Silicones* regarding the possibility of using principles of agency to protect third parties. This view had in turn found some support in the judgment of Denning LJ in *Adler v Dickson* [1955] 1 QB 158 (the ship in that case was called The Himalaya, after which the Himalaya Clause is named).

Wilberforce who wrote the judgment for the majority<sup>37</sup>, said<sup>38</sup>, “to give the [stevedores] the benefit of the exemptions and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document ..... It should not be overlooked that the effect of denying validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get round exemptions (which are almost invariable and often compulsory) accepted by shippers against carriers, the existence, and presumed efficacy, of which is reflected in the rates of freight.” The earlier point about the inter-relationships in a shipping context, all with a view to financial profit, is again emphasised.

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<sup>37</sup> Viscount Dilhorne and Lord Simon of Glaisdale dissented. Each of their dissenting judgments was longer than Lord Wilberforce’s judgment for the majority. The other judges were Lord Hodson and Lord Salmon.

<sup>38</sup> At 169B-C.

(2) In the context of a cargo claim made by an owner of goods (A) against a carrier (C) who is not in a direct contractual relationship with A but who has a contract with an intermediary (B), another device that has been developed by the courts is the concept of bailment on terms. This occurs when an owner of cargo (A) contracts with another person (B) to have goods shipped to a destination and this contract of carriage contains a provision to sub-contract the obligation of carriage to other people. When the intermediate carrier (B) then sub-contracts the carriage to the actual carrier (C), this will inevitably be subject to another contract of carriage between the actual carrier and the intermediate one. A sues C for damage or loss and C wishes to rely on an exclusion clause in its contract with B. There is no privity of contract

between A and C. However, in a bailment analysis, A has bailed its goods to B who in turn sub-bails to C. C will be able to rely on the terms of its contract with B in any claim by A, provided on the facts of the case, A has either authorised B to enter into a contract containing such terms or consented to such terms. This analysis was adopted by the Privy Council on appeal from Hong Kong in *The Pioneer Container*.<sup>39</sup> In that case, it was held on the facts that the cargo owner had so authorized or consented. The relevant provision in the contract of carriage with the intermediate carrier (B) was in the following terms :-

“The carrier shall be entitled to sub-contract on any terms the whole or any part of the handling, storage

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<sup>39</sup> [1994] 2 AC 324.

or carriage of the goods and any and all duties whatsoever undertaken by the carrier in relation to the goods.”

The particular term sought to be relied on was an exclusive jurisdiction clause, not strictly speaking an exemption clause. The Privy Council, however, was of the view that to allow the carrier to rely on the exclusive jurisdiction clause “would be in accordance with the reasonable commercial expectations of those who engage in this type of trade, and that such incorporation will generally lead to a conclusion which is eminently sensible in the context of the carriage of goods by sea.”<sup>40</sup>

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<sup>40</sup> At Pg. 347C-D per Lord Goff of Chieveley.

(3) Bailment on terms was revisited by the Privy Council from Hong Kong in *The Mahkutai*<sup>41</sup>, in which is contained a very useful legal historical account of the law regarding privity of contract in the shipping context.<sup>42</sup> There, the position was the opposite of that in *The Pioneer Container* : here C (the actual carrier) was seeking to rely on a term in the contract between A and B (the cargo owner and the intermediate carrier), again an exclusive jurisdiction clause. It was held that the actual carrier could not so rely on this clause. There was a limit to how far contractual principles could be stretched. If the facts could not be comfortably fitted into the operation of Himalaya Clause (requiring agency) or the principles of bailment on terms (requiring authorisation or consent), then it

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<sup>41</sup> See para. 17 above.

<sup>42</sup> See the judgment of Lord Goff of Chieveley at 658-665.

would simply be wrong to force a result, however desirable it may be commercially. It should be noted that even the invention of these two devices was not without criticism. Many eminent commentators have over the years been somewhat critical of the reasoning in *The Eurymedon*. Lord Bingham of Cornhill referred to “the undoubted artificiality of the reasoning” in that case.<sup>43</sup>

20. If the matter had to be put on a more concrete, uncontroversial footing, statutory intervention was necessary. In England, the Contract (Rights of Third Parties) Act 1999 provides a statutory basis for exceptions to the doctrine of privity of contract<sup>44</sup>. According to the Law Commission Report which led to the statute being passed<sup>45</sup>, its central

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<sup>43</sup> *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715, at para. 34.

<sup>44</sup> This was adopted in Hong Kong in the Contracts (Rights of Third Parties) Ordinance, Cap. 623.

<sup>45</sup> On *Privity of Contract : Contracts for the Benefit of Third Parties* Law Commission No. 242 (1996).

purpose was basically to enable third parties to acquire rights under a contract if this was what was intended. Prof Reynolds refers to this statute as cutting the “Gordian knot of privity.”<sup>46</sup> Time will tell whether this is correct but I am sure many more interesting situations will present themselves at some point.

21. There is no doubt that the enactment of the 1999 Act was influenced by those cases just discussed. In *The Mahkutai*, Lord Goff, in referring to the “technical nature [of the principle employed – bailment on terms – to avoid the harshness of the doctrine of privity, this being] all too apparent” said that “the time may well come when, in an appropriate case, it will fall to be considered whether the courts should take what may legitimately be perceived to be the final, and perhaps inevitable, step in this development, and recognise in these cases a fully-fledged exception to the

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<sup>46</sup> “Maritime and other influences on the common law” [2002] LMCLQ 182, at 185.



doctrine of privity of contract, thus escaping from all the technicalities with which the courts are now faced in English law.” In para. 2.35 of the Law Commission Report referred to earlier, it is stated : “While our proposed reform would reach the same result as in *The Mahkutai* ..... It would bring about at a stroke what Lord Goff regarded as a desirable development in that it would sweep away the technicalities applying to the enforcement by expressly designated third parties of exclusion clauses.”

### **C. Contributory Negligence**

22. This would not have been the first occasion in which major statutory reforms extending well beyond the maritime context have been much influenced by maritime jurisprudence. The law of negligence, especially where the act or omission of the plaintiff has contributed to the injury or

loss claimed, had for many years been dogged by the development of principles which appear to have exacerbated rather than elucidated. In the 19<sup>th</sup> Century, the law was painfully simple. Contributory negligence was at one stage a complete defence to a claim in negligence. The injustice of such a simple proposition was easy to see but rather than adopt what may appear to have been a more common-sense approach, the courts invented refinements such as the so-called “last opportunity” rule. This was the rule which derived principally from cases like *Davies v Mann*<sup>47</sup> and *British Columbia Electric Railway Co Ltd v Loach*.<sup>48</sup> The rule was most clearly put by Viscount Simon in *The Boy Andrew*<sup>49</sup> :-

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<sup>47</sup> (1842) 10 M and W 546. This is the famous case in which the plaintiff’s donkey had been tethered and allowed to graze on a public highway. The defendant’s wagon was driven too fast and killed the donkey. It was held that in spite of the plaintiff’s negligence, since the defendant had the last opportunity to avoid the accident, he was liable in full.

<sup>48</sup> [1916] 1 AC 719.

<sup>49</sup> [1948] AC 140, at 148.

“The principle of *Davies v Mann* has often been explained as amounting to a rule that when both parties are careless, the party which has the last opportunity of avoiding the results of the other’s carelessness is alone liable”.

23. You do not need me to tell you how over the years this principle must have caused the greatest difficulties of evidence in practical terms. And over the years meant a period of over a century. The difficulties and unsatisfactory nature of the last opportunity approach, however, did not apply to admiralty actions involving collisions where the courts took a more common-sense approach : where both parties are negligent, both are to blame and an apportionment of liability can be undertaken. The Maritime Conventions Act 1911 provided a statutory basis for this approach in collision cases. This approach was consistent with the civil law

approach.<sup>50</sup> The position is best articulated by Lord Birkenhead LC in *The Volute*<sup>51</sup> :-

“Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* rule, might, on the other hand, invoke

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<sup>50</sup> Paul Mitchell : *A History of Tort Law 1900-1950* (CUP) at 309-310.

<sup>51</sup> [1922] AC 129, at 144. Lord Birkenhead (the former FE Smith) was a most distinguished lawyer. His speech in *The Volute* attracted a rare show of praise from his colleagues. Lord Shaw of Dunfermline said in his concurring speech, “I would venture to concur with my noble and learned friend on my left (Viscount Finlay) as to the quality of that judgment.”

the prior negligence as being part of the cause of the collision so as to make it a case of contribution.

And the Maritime Conventions Act with its provisions for nice qualifications as to the quantum of blame and the proportions in which contribution is to be made may be taken as to some extent declaratory of the Admiralty rule in this respect”.

24. The common sense of the shipping cases eventually influenced a change in the law generally. The Law Reform (Contributory Negligence) Act 1945 was passed after many years of deliberation by the Law Revision Committee. It is still in force and its terms have been adopted in many common law jurisdictions.<sup>52</sup>

## **D. Remedies**

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<sup>52</sup> Among them Hong Kong. First introduced in 1951, the relevant provision is now s21 of the Law Amendment and Reform (Consolidation) Ordinance Cap. 23.

25. I have now used the term 'common-sense' a number of times and this of course by itself in a vacuum means very little. In the commercial context, it has to be equated with two concepts that have featured in maritime cases : the perceived justice of a case and the need for certainty. The latter concept, certainty, is of considerable importance because of the complex inter-relationships arising in commerce as I have earlier identified. And of course, I would reiterate the point that everything in commercial life is geared towards one objective : money and the making of profits. As we have seen, in a marine adventure for example, certainty is required so that profits and cost estimates may be calculated, insurances effected and so on. And as we have also seen, many of the cases decided by the courts recognise the need for certainty to meet the expectations of the commercial world. This was after all the rationale for the establishment of the Commercial Court in England and gave rise to a common view that the

courts were part of a “service industry” (not the term I would use but it gets the message across). As Devlin J said in *St John Shipping Corporation v Joseph Rank Ltd*<sup>53</sup> :-

“The Commercial Court was introduced in England ..... so that it might solve the disputes of commercial men in a way which they understood and appreciated, and it is a particular misfortune for it if it has to deny that service to any except those who are clearly undeserving of it.”

26. The last part of this quote is perhaps a reference to the aspect of justice (or perceived justice) which can at times be at odds with commercial certainty. In the area of remedies for breach of contract, these two concepts have at times collided, and these have arisen in maritime situations. The

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<sup>53</sup> [1957] QB 267, at 289.

importance of remedies is of course obvious in the commercial context : to put it bluntly, this is where the money is. Prof Reynolds is of the view that maritime law has been the most influential in the area of remedies.<sup>54</sup>

27. The controversial decision of the House of Lords in *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)*<sup>55</sup> provides a good illustration of this conflict. There, a time charterparty was repudiated by the charterers by an early redelivery and this was accepted by the shipowners (anticipatory breach repudiating a contract and the repudiation is accepted). A clause in the charterparty provided for the right of either party to cancel the charter should war or hostilities break out between two or more of a number of countries including the USA, the UK and Iraq. At the time the charterparty was terminated (by the acceptance of

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<sup>54</sup> *The Inaugural Ebsworth and Ebsworth Maritime Law Lecture 1992* at Pg. 3.

<sup>55</sup> [2007] 2 AC 353.



the charterer's repudiation), no war or hostilities were in sight. However, subsequently, the Gulf War broke out which would, if the charterparty was still alive, have activated the cancellation clause. The important question for present purposes was : even though the event which would have triggered the cancellation clause came after the termination of the contract, could that event nonetheless be taken into account to limit the amount of damages payable by the defaulting charterers to the shipowners? The normal rule of damages in a situation of anticipatory breach of contract (as in all breaches of contract) is that the innocent party is to be put into the same position as if the contract had been performed. This usually means, subject to the duty to mitigate, that where there is an available market, the innocent party is entitled to the difference between the hire rate under the breached charterparty and the hire rate in the available market at the

time of breach, if this difference results in loss.<sup>56</sup> As Lord Bingham put it, this legal position governs whatever the “actual facts” are and the rationale is “one of simple commercial fairness”.<sup>57</sup> Such a legal position is a certain one and would normally make the peculiar facts of any case quite irrelevant. As I have said, the relevant time to look at damages is the date of breach. What may have happened afterwards would be quite immaterial.

28. However, the majority of the House of Lords<sup>58</sup> differed from this basic approach and took into account the event of war (which actually happened) to limit the amount of damages. Instead of assessing damages using the duration of the unexpired period of the breached charterparty, the court would limit the time until the outbreak of war. Rather than

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<sup>56</sup> This is a summary of the statement of general principle contained in the speech of Lord Bingham of Cornhill at paras. 8 to 11.

<sup>57</sup> At para. 10.

<sup>58</sup> Lord Scott of Foscote, Lord Carswell and Lord Brown of Eaton-under-Heywood.

assess damages as at the date of breach – the normal position – the majority looked at the matter with the benefit of hindsight. This approach can be simply stated : this accorded with perceived justice and common sense. The perceived injustice would be that if no account was taken of real events, the shipowners would be over-compensated. As a matter of principle, the point can be put in this way : why should the court speculate in a make believe situation (inherent in the assessment of damages for an anticipatory breach which has been accepted) when it should base itself on what actually happened? As Lord Bingham put it, “In non-judicial discourse the point has been made that you need not gaze into the crystal ball when you can read the book.”<sup>59</sup>

29. The reasoning of the majority can be said to be persuasive and the approach has subsequently found favour,

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<sup>59</sup> At para. 12.

this time unanimously, by the Supreme Court in *Bunge SA v Nidera BV*.<sup>60</sup> But then so was the reasoning of the minority and the dissenting judgments are powerful ones.<sup>61</sup> The reasoning of the minority was also based on principle and emphasised the need for certainty in commercial contracts. Lord Bingham of Cornhill could not have put it more strongly when he said <sup>62</sup> : “The importance of certainty and predictability in commercial transactions has been a constant theme of English commercial law at any rate since the judgment of Lord Mansfield CJ in *Vallejo v Wheeler* (1774) 1 Comp. 143, 153 .....” Lord Walker of Gestingthorpe expressed a concurring view in his speech. The minority’s criticism of the majority position has force. What hitherto had been a workable certain formula for damages is suddenly then thrust in any given case into uncertainty (and therefore

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<sup>60</sup> [2015] 3 All ER 1082.

<sup>61</sup> Of Lord Bingham of Cornhill and Lord Walker of Gestingthorpe.

<sup>62</sup> At para. 23.

potential unfairness) in that the quantum of damages may depend on fortuitous occurrences not apparent at the date of termination and which may only come to light depending on the speed of the relevant legal proceedings. In this scenario, commercial people may find it hard to calculate profits, liabilities and to insure accordingly. It may also place legal advisers in a difficult position when advising on whether an anticipatory breach should be accepted.

30. Nevertheless, it is not my place to venture any opinion extra-judicially on the correctness of cases like *The Golden Victory*. Many learned writers have done that already.<sup>63</sup> My emphasis, rather, is on the development, exposition and application of legal principles in situations brought about by the uniqueness of shipping and how these

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<sup>63</sup> See, for example, Treitel : *Assessment of Damages for Wrongful Repudiation* (2007) 123 LQR 9; Coote : *Breach, anticipatory breach, or the breach anticipated?* (2007) 123 LQR 503; Morgan : *A Victory for Justice over Commercial Certainty* [2007] CLJ 263; Michael Mustill : *The Golden Victory – Some Reflections* (2008) 124 LQR 569.

have influenced other spheres of commercial law. On the damages part, I would just further refer – but not discuss, for this Lecture is already too long – to the very interesting decision of the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*.<sup>64</sup> There, again owing to a unique feature in shipping, this time regarding large fluctuations in freight rates, difficult questions of remoteness were raised, requiring an ingenious development (contained in the speeches of Lord Hoffmann, Lord Hope of Craighead and Lord Walker of Gestingthorpe) of the concept of “assumption of responsibility” in the context of remoteness and foreseeability of damage. This is a concept which effectively limits what could otherwise be a massive monetary liability placed on contract breakers in situations of fluctuating market prices and chain contracts. It suggests that however foreseeable a type of damage may be, there will be no liability

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<sup>64</sup> [2009] 1 AC 61.

to compensate unless the contract breaker can be said somehow to have assumed responsibility for it. This is an interesting development and represents yet another vital discussion of the type of problems arising from the principle of remoteness of damage. The concept of assumption of responsibility has been applied in Hong Kong to breaches of contracts for the sale of property : see the joint judgment of Ribeiro and Fok PJJ in *Richly Bright International Ltd v De Monsa Investments Ltd*.<sup>65</sup> Like freight rates, property prices in Hong Kong can fluctuate dramatically. One can envisage that the concept of “assumption of responsibility” can give rise to uncertainty. This point was made by Baroness Hale of Richmond in her speech in *The Achilles*<sup>66</sup> :-

“Another answer to the question, given as I understand it by my noble and learned friends, Lord

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<sup>65</sup> (2015) 18 HKCFAR 232 (Ma CJ, Ribeiro, Tang and Fok PJJ and Lord Walker of Gestingthorpe NPJ).

<sup>66</sup> At para. 92.

Hoffmann and Lord Hope, is that one must ask, not only whether the parties must be taken to have had this type of loss within their contemplation when the contract was made, but also whether they must be taken to have had liability for this type of loss within their contemplation then. In other words, is the charterer to be taken to have undertaken legal responsibility for this type of loss? What should the unspoken terms of their contract be taken to be? If that is the question, then it becomes relevant to ask what has been the normal expectation of parties to such contracts in this particular market.”

In an attempt to highlight the two concepts I have been discussing, a warning was sounded also by Baroness Hale<sup>67</sup> :-

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<sup>67</sup> At para. 93.



“Although its result in this case may be to bring about certainty and clarity in this particular market, such an imposed limit on liability could easily be at the expense of justice in some future case.”

## **E. Conclusion**

31. To conclude, we are all familiar with concepts of justice, fairness, commercial expediency and the need for certainty. Over the years, as I have tried to touch on, shipping cases by their very nature have enriched our understanding of these concepts and indeed the law in general. Further, what must not be underestimated is the depth of academic writings on maritime law and it is perhaps right to say that in no other area of law has such learning been more utilised by the courts. A glance at some of the cases referred to earlier will confirm

this. Lord Goff of Chieveley paid a tribute to academic jurists in *The Spiliada*<sup>68</sup> and I echo this postscript :-

“I feel that I cannot conclude without paying tribute to the writings of jurists which have assisted me in the preparation of this opinion ..... They will observe that I have not agreed with them on all points; but even when I have disagreed with them, I have found their work to be of assistance. For jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding”.

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<sup>68</sup> [1987] AC 460, at 488.

32. Many interesting legal challenges and questions lie ahead, as yet unresolved. I have already mentioned the more limited role courts have in determining maritime cases by reason of the extension of dispute resolution by arbitration. Yet, maritime law needs further development. We have not reached the stage where all that is required is a straight forward application of established law to facts. The relevance of equity to maritime law, for example, is an area ripe for further development. The decision of the House of Lords in *The Scaptrade*<sup>69</sup> restricted the application of equity. In that case, the House of Lords refused to apply the equitable concept of relief against forfeiture to a time charterparty where the shipowner had withdrawn the vessel following a late payment of hire by the charterer. To have applied this concept would not be consistent with commercial certainty. Lord Diplock quoted from the judgment of Robert Goff LJ in

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<sup>69</sup> [1983] 2 AC 694. This case incidentally also discusses *The Chikuma* referred in para. 6 above.

the Court of Appeal in the same case : “It is of the utmost importance in commercial transactions that, if any particular event occurs which may affect the parties’ respective rights under a commercial contract, they should know where they stand.”<sup>70</sup> This case attracted criticism. As Justice Gummow, the well-known Equity judge, has said of that decision<sup>71</sup> “is the issue of personal services, so plain to Lord Diplock and the coterie of common law judges who comprised the House,<sup>72</sup> so plain to equity lawyers?” This rivalry between equity lawyers and commercial lawyers can perhaps be a suitable subject in this Lecture for another day. It would be an interesting Lecture!

Geoffrey Ma

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<sup>70</sup> At 703-4.

<sup>71</sup> Finn : *Essays in Equity* (1985) at Pg. 42.

<sup>72</sup> Lord Keith of Kinkel, Lord Scarman, Lord Roskill and Lord Bridge of Harwich.