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ETHICS IN MARITIME LAW – NEW ZEALAND

Judge Tom Broadmore

The Uluburun Wreck

Perhaps it was a dark and stormy night. The ship was nearing harbour. It was carrying a range of industrial and commercial cargoes from a number of places. The helmsman seems to have lost situational awareness and the ship struck a rocky headland.

It’s a story that sounds like it might end badly, and it does; but the situation does not differ markedly from those of hundreds of other casualties. For me, I am reminded of the stranding of Pacific Charger on Baring Head, at the entrance to Wellington Harbour, in April 1981.

The Uluburun ship sank. Sadly its crew seems to have perished and the cargo was lost. It had struck Cape Uluburun on the south coast of Turkey. Its wreck was not found until 1982. Give or take a few years, it sank in about 1300BC.

Seeing the remains of this ship and its cargo in the Underwater Archaeological Museum in Bodrum, Turkey, in June this year set me on a train of thought which has inspired part of what I have to say today. My hypothesis thus far is this. From the evidence of this ship and other recent discoveries in the Eastern Mediterranean region, inferences can be drawn as to the origins of maritime law. In particular, that it has a strong ethical foundation, which marks it out as different from other branches of the law.

So today I aim to develop this hypothesis by reference to examples. And, for those concerned about CLE points, I promise also to deal with ethics in a more traditional way, by discussing the topic with reference to lawyers and judges in New Zealand.

What Do We Mean By ‘Ethics’?

As lawyers, when we think of ethics in a legal context, our first thought is for the ethical standards expected of lawyers – in our case, lawyers practising maritime law. But that is too narrow a focus. Besides which, perhaps fortunately, there is not much material to work with. When we talk of ethics, we are, I believe, talking about the moral standards which govern behaviour. (I accept that these few words sweep lightly over two and a half thousand years of philosophical thought.)

In the context of maritime law, I address the way in which ethical considerations constrain behaviour in relation first to participants in the maritime sector – ship owners, cargo owners, insurers, charterers, officers and crew, port interests and all the other interests which go to make up the maritime world; secondly to maritime lawyers; and finally to judges.

Ethics and Participants in Maritime Activity

Whether they be individuals or organisations, the moral constraints operating on the behaviour of participants in maritime activity come from a number of sources:

1. Immemorial constraints. An obvious example is the duty laid on seafarers to go to the aid of those in distress, which now has a statutory basis.

2. Constraints arising from international conventions, primarily the United Nations Convention on the Law of the Sea,¹ and international instruments of various kinds; and customary international law.

¹ Judge of the District Court in Wellington, New Zealand. This paper was presented to the 2014 Annual Conference of the Maritime Law Association of Australia and New Zealand, held in Queenstown, New Zealand from 10–12 September 2014. In addressing some aspects of this paper I have drawn inspiration from an article by Marko Pavilja, ‘Essay on Ethics in International Maritime Law’ (2012) 47 European Transport Law 461. I also express my thanks to Lucy Kean, Research Counsel at the District Court in Wellington, for uncovering Mr Pavilja’s article and drawing my attention to other helpful material.

¹ (UNCLOS) 1982, 1833 UNTS 3.

**More About the Uluburun Wreck**

Before discussing these topics, however, I want to return to the Uluburun wreck to consider the inferences which may be drawn as to the sources of the ‘immemorial constraints’ to which I have just referred.

Analysis of the ship and its cargo suggest that it sailed from a Cypriot port or a port on the Levantine coast. The origins of the objects aboard the ship range geographically from the Baltic to Africa, and as far East as Mesopotamia. (Some writers say as far east as Afghanistan.) Items which were obviously cargo include ten tonnes of copper ingots and a further quantity of smaller copper ingots, and about one tonne of tin, again in ingots. (Alloyed with the tin, the copper would make about 11 tonnes of bronze). The tin must have come from the east. There were about 150 clay jars, packed for the most part with the resin of an ancient type of turpentine. There were about 175 glass ingots of a particular type matching those of Egyptian jars and Mycenaean pendant beads. Of the considerable quantity of miscellaneous cargo, I mention only logs of blackwood or ebony from Africa, ivory in the form of whole and partial elephant tusks, Cypriot pottery, and amber beads, obviously of Baltic origin. Significantly for me, there were a number of pan balance weights, implying a need to weight goods, presumably for the purposes of trade. Much of the cargo, or representative items from it, is displayed in the museum in Bodrum.

The strong inference to be drawn from the wreck and its cargo is that there was, nearly 3,500 years ago, an extensive commercial trade conducted by sea in the eastern Mediterranean. One writer asserts “[t]he scale of trade encompassing Egypt, the Near East, Italy and the Aegean in the late bronze age rivals that of today in economic complexity and political motivation.” Other writers concur that the bronze age economy was a market economy in the formal sense. Discovery of the sets of balance weights points strongly in that direction.

So in summary there is a strong case to be made that by the end of the 13th century BC there was a vigorous commercial sea borne trade in the eastern Mediterranean; and moreover a trade with networks extending far beyond the eastern Mediterranean itself – to Iran or Afghanistan for the tin, the Baltic for the amber, and Africa for the ebony and ivory.

It follows that we can look back at least 3,500 years to an era in which maritime trade was already flourishing. I ask myself, how was it organised? On what basis did owners of ships carry trade goods? Did they perhaps buy or sell on their own account? Did cargo owners accompany their goods on board? How were the goods bought, sold and paid for? What about insurance? These were the questions that came to mind as I stood before the cargo of the ship in Bodrum. They were, and remain, a mystery to me.

But I decline to believe that those matters were all left to chance or ad hoc arrangements. I opine that there were arrangements governing trade which were generally recognised by merchants and shippers – essentially because there must have been oral, but no less well known throughout the eastern Mediterranean for that. By way of example, the stories of the *Iliad* and *Odyssey* were transmitted orally for centuries before being written down in the 8th century BC; and even as late as the 5th century BC it was the sign of a man of standing that he should be able to recite the *Iliad* and the *Odyssey* by heart. (But they may indeed have been written down, centuries before we have until now suspected, as I shall soon discuss.)

In this light, the proposition that the Rhodians wrote down the basis of the law of general average in the 6th century BC is by no means farfetched; and if they wrote down the law of general average, why would they not have written down an overall maritime or commercial code?

Since I delivered this paper in Queenstown in June, I have been able to dip into a fascinating text which goes into some detail about trade in the Eastern Mediterranean in the Late Bronze Age, most vividly in its account of mercantile activity in the city of Ugarit in Northern Syria. The author speaks of clay tablets containing cuneiform texts which ‘...set out the regulations that defined the responsibility apportioned to owners, traders and crews for the safety of ships and cargo’.

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3 Copper was extensively mined in Cyprus during this period.


5 Ibid.
So clearly there is much more to be investigated on this topic, and it is apparent that what I have said thus far is a hypothesis which remains to be tested.\textsuperscript{6} A mould for casting copper ingots in the precise shape (‘oxhide’) of the Uluburun cargo has been found at Ugarit.

Having started off my journey with a lengthy diversion, let me know return to the constraints operating on the behaviour of participants in maritime activity which I identified earlier. In the light of the recent discoveries I have mentioned, however, there may be other and much earlier examples to consider.

\textbf{Immemorial Constraints}\textsuperscript{7}

The obligation to go to the aid of those in distress at sea is now contained in Article 10 of the Salvage Convention 1989 in the following terms: ‘[e]very master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea’.\textsuperscript{5}

That is an obvious example; but it is by no means the only one. From the time when the owners of ships first carried the goods of others for reward, the owners of those goods had no alternative but to trust, and did trust, the ship owner to care properly for their goods and deliver them at their destination. The constraint on ship owners evolved so that they bore the absolute liability of bailees subject only to the narrow exceptions arising from events outside the ship owner’s control, so the ethical obligation of the carrier as a trustee of his cargoes was reflected in the nature of the liabilities he bore.\textsuperscript{9}

The third example is the obligation of \textit{uberrimae fidei} – the obligation of the utmost good faith mutually owed between insurers and insureds. The relationship is built on trust as it has to be; and the law now recognises that trust, enforces it, and provides sanctions for its breach.

Fourthly there is the law of general average, which is arguably underpinned by the same ethical considerations. Some say that the principles of general average were first acknowledged in the laws of the Rhodians dating back to the middle years of the first millennium BC. That is at least possible in the light of what I have said earlier, but has not been conclusively demonstrated. But, almost as impressively, Justinian’s Digest (6th century AD) states the core proposition of general average that sacrifices made by one party to a venture for the benefit of all parties should be shared proportionately by all; and the Rules (or Rolls) of Oleron (1160 AD) confirm that principle in a manner which leaves no doubt that its basis is one of fairness between participants.

Finally, I note the privileged position which most states accord to seafarers in relation to their wages. It is common to acknowledge the existence of a maritime lien over a vessel for the wages of seafarers serving on it; and to accord a high level of priority to that lien on the distribution of the proceeds of sale. In New Zealand, the maritime lien for crew wages and its high level of priority have been described as ‘deeply embedded both in the common law and in New Zealand law’,\textsuperscript{10} and s 28 of the Maritime Transport Act 1994 (NZ) specifically provides that a seafarer cannot contract out of his rights of lien.

So it seems that some of the most fundamental aspects of maritime law have ancient foundations in the recognition of ethical obligations of trust, honesty, the protection of the disadvantaged, and fair dealing. I am not saying, of course, that in any particular case an individual participant in maritime activity will cheerfully accept an obligation to do the right thing: history, and cases such as that of the \textit{Insung No 1}, discussed below, teach differently. But the important point I wish to make is that the fundamental principles of maritime law arguably derived not from imposition by rulers or legislators, or even judges in the sense we would think of them today, but from centuries, even millennia, of experience and dispute resolution within the maritime community. The codes and cases merely record an accepted position.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{6} I have read that some two or three million such clay tablets have been collected, but only about 30,000 translated. So the prospects are not good for early progress on this topic.
\item \textsuperscript{7} Successive editions of the classic United States text, Gimore & Black, \textit{The Law of Admiralty}, contain compact and readable accounts of the historical origins of maritime law, on which I have drawn in completing this section.
\item \textsuperscript{8} International Convention on Salvage, 1989, 1953 UNTS 165. The Salvage Convention has the force of law in New Zealand: \textit{Maritime Transport Act 1994 (NZ)}, s 216. Additionally, s 32 of the \textit{Maritime Transport Act 1994 (NZ)} contains detailed provisions as to the duties of masters of New Zealand ships to render assistance to persons and vessels in danger or distress at sea.
\item \textsuperscript{9} Coggs \textit{v} Bernard (1703) 2 Ld Raym 909, which explicitly notes the necessity for shippers to trust carriers.
\item \textsuperscript{10} Turners \& Growers Exporters Ltd \textit{v} The Ship "Cornelis Verolme" [1997] 2 NZLR 110 at 125 (emphasis added).
\end{itemize}
\end{footnotesize}
International Conventions and the Like

In the flood of international law making which has followed the adoption of the International Convention for the Safety of Life at Sea 1974 (‘SOLAS’) and UNCLOS (much of it driven by the International Maritime Organisation (IMO)), it would be easy to overlook the importance of ethical considerations.

Further, it must be accepted that longstanding principles of public international law, such as the freedom of the seas, cannot be curtailed without international agreement. As the Court of Appeal said of that principle in Sellers v Maritime Safety Inspector:

That freedom, including the freedom of navigation, is one of the longest and best-established principles of international law. An essential feature of the freedom is that the state of nationality of a ship (the flag state) has exclusive jurisdiction over the ship when it is on the high seas. That proposition, to be found in art 92 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) to which New Zealand is party and which in this respect is considered to be declaratory of customary international law, is subject only to ‘exceptional cases expressly provided for in international treaties’ (1982 Int Leg Mat 1261). The exceptions are to be related to the recognition in art 87(2) that the freedoms of the high seas are to be exercised by all states with due regard for the interests of other states in their exercise of the freedoms.

Nevertheless, and despite that clear principle, the international community was prepared, in Articles 192 and 193 of UNCLOS, to assert boldly that, even though States had the sovereign right to exploit their natural resources, that right was constrained by their general obligation to protect and preserve the marine environment.

And Article 300 of UNCLOS states:

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

SOLAS, UNCLOS and other instruments such as the CLC Convention together provide a framework for international legislation on safety at sea, the protection of fish stocks, the protection and preservation of the maritime environment generally, and in respect of pollution in particular, the exploitation of states’ Exclusive Economic Zones and appurtenant areas of continental shelf, and the recognition and exploitation of the seabed below the High Seas as the common heritage of mankind – to identify the major areas of direct importance to non-state interests. From these and other international instruments, it is clear that States are being called on, and promise, to recognise and enforce ethical standards and social responsibility.

And finally, let us not overlook the Rotterdam Rules, which in Article 2 provide that:

… regard is to be had to [the Convention’s] international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

To come to a conclusion on this topic, it seems to me that public international law, in both its customary and treaty-based aspects, reflects respectively implicit understandings and explicit bargains reached between sovereign states exercising sovereign power, rather than the slow evolution of practices generally-accepted as fair into codes and statutes apparent in private maritime law. (As noted in Sellers, even such unquestionably immoral and unethical practices as the slave trade could be made unlawful on the high seas only by international agreement, and then only as recently as the later years of the nineteenth century.) But, for some time past, those international bargains have expressly required the observance of ethical standards and social responsibility.

New Zealand Statute Law

In this section I touch on a number of statutes bearing on maritime activity to identify their incorporation of international instruments into New Zealand law, or at least their reference to international instruments; and to note a common theme of recognition and enforcement of norms of social responsibility.

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11 1974, 1184 UNTS 278.
12 [1999] 2 NZLR 44, 47 (‘Sellers’).
15 [1999] 2 NZLR 44, 47.
Maritime Transport Act 1994 (NZ)
The preamble to the Act describes its scope in these terms:

An Act—

(a) (omitted)

(b) To enable the implementation of New Zealand's obligations under international maritime agreements; and

(c) To ensure that participants in the maritime transport system are responsible for their actions; and

(d) (omitted)

(e) (omitted)

(f) To protect the marine environment; and

(g) To continue, or enable, the implementation of obligations on New Zealand under various international conventions relating to pollution of the marine environment [and];

(h) (omitted)

(i) to regulate maritime activities and the marine environment in the exclusive economic zone and on the continental shelf as permitted under international law.

There are many provisions in the Act giving effect to these objectives. I have already mentioned s 28, as to seafarers’ rights of lien: that section is in a group of provisions with a lengthy heritage designed to ensure the safety, protection and comfort of seafarers; and s 32, which deals with persons and ships in danger or distress. Other provisions reflecting the community’s interest in ensuring that participants in the maritime industry behave in socially responsible ways deal with safety at sea, investigation of accidents, requirements as to survey, salvage, the carriage of dangerous cargo, deck cargo and livestock, extensive provisions concerning marine pollution, dumping and the like, the protection of the marine environment, and the organisation of the response to pollution incidents.

Health and Safety in Employment Act 1992 (NZ)

Much of this Act applies to New Zealand ships. Section 5 of the Act states:

[1]The object of this Act is to promote the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work.

Fisheries Act 1996 (NZ)

Section 5 of the Act states:

This Act shall be interpreted, and all persons exercising or performing functions, duties, or powers conferred or imposed by or under it shall act, in a manner consistent with—

(a) New Zealand's international obligations relating to fishing; and


And section 8 states:

Purpose

(1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.

(2) In this Act—

Ensuring sustainability means—
(a) Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and

(b) Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment:

Utilisation means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural wellbeing.

These provisions speak for themselves as to the underlying philosophy of the Act including the conservation of the fisheries resource in the interests of future generations and the protection of the environment: an approach which reflects the ethics of the international instruments to which I have already referred.

**Resource Management Act 1991 (NZ)**

Section 5 gives as the purposes of the Act the following:

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

**Employment Relations Act 2000 (NZ)**

Section 5 of the Act states its object as follows:

(a) to build productive employment relationships through the promotion of [good faith] in all aspects of the employment environment and of the employment relationship—

[(i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and]

(ii) by acknowledging and addressing the inherent inequality of … power in employment relationships; and

(some further material omitted)

(b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

Again the Employment Relations Act includes the features common to the statutes I have already referred to of ethical standards – in this case the observance of good faith and recognition of obligations of trust and confidence – and of reference to international instruments.

**A Recent Example**

That these statutes address real concerns can be illustrated by reference to a recent Coroner’s report. The report revealed multiple failings in the navigation and management of a South Korean fishing vessel, *Insung No. 1*, in the Ross Sea, leading to the deaths of 22 crew members. The vessel capsized when three-metre seas flooded the upper deck through its net-hauler shutter, which had foolishly been left open whilst the vessel was under way between trawls.
The 40 crew members and two observers came from six countries, but the safety manual was written only in Korean and the emergency and lifeboat instructions were only in Korean and English. When notified of the incident, the Master failed to direct closure of the net-hauler shutter and did not check the operation of the pumps, which in fact did not work. It was revealed that there had been no onboard emergency drills, no evacuation drills, and no training or drills in any aspect of safety. A distress beacon was not activated (although another Korean vessel was nearby and came to assist). The vessel’s stability had been compromised by the way in which fishing gear had been stowed on the upper deck. Those crew members who were unable to climb aboard a life raft soon perished in the freezing Antarctic waters.

The circumstances display a basic failure of morality and social responsibility on the part of the owners, never mind that they and the Master were no doubt in breach of numberless Korean requirements designed to prevent incidents of that kind from occurring, and to ameliorate the consequences if they did. Those requirements flow logically from the introduction of the Plimsoll line in 1874 over the determined opposition of British ship owners. The existence of those requirements, and their enforcement, bear witness, in my view, to the sense of social responsibility of enlightened ship owners as well as to the demands of the community; and the circumstances of the Insung No. 1 bear witness to the need for continued engagement by the community to ensure that the ethical standards of the majority are not subverted by the unscrupulous few.

**Ethics in New Zealand – The Lawyers**

For New Zealand lawyers, ethical standards are now contained in statutory rules made under the *Lawyers and Conveyancers Act 2006 (NZ)*. The formal title of these rules is ‘Rules of Conduct and Client Care for Lawyers’ (‘the Rules’). They extend over nearly 60 pages. I do not propose to discuss the rules in any detail, as their broad thrust will be familiar not only to New Zealand lawyers, but also to lawyers from other jurisdictions.

I mention in detail only Chapter 13 of the Rules. That chapter emphasises the overriding duty to the Court of a lawyer acting in litigation, the lawyer’s absolute duty of honesty to the Court and obligation not to mislead or deceive the Court, nor to act in a way that undermines the processes of the Court or the dignity of the judiciary.

Subject to those considerations, the Chapter emphasises the lawyer’s duty to act in the best interests of his or her client, to treat others involved in court processes with respect and to obtain and follow a client’s instructions on significant decisions in respect of the conduct of the litigation.

In my personal experience both as a lawyer and a judge, these requirements are observed without question by most lawyers most of the time (I express this cautiously only because of the possibility, which I cannot recall having encountered in practice or on the Bench, of anything other than an inadvertent breach of the rules).

The fact that the rules are so universally accepted and observed indicates, I believe, that their ultimate source and foundation is the ethical and moral standards of the profession as developed over many years, informed by the accumulated wisdom of practitioners wrestling with the day to day problems thrown up by their profession.

I acknowledge that maritime lawyers face a special hazard not often encountered by others. This hazard is their exposure to risk when their instructions come from overseas lawyers – or direct from overseas clients – seeking their assistance urgently to arrest a ship or take some other immediate action to protect the client’s interests. These risks include liability on undertakings (including to the Registrar under r 25.34(4)(b) of the High Court Rules for fees and expenses in connection with the arrest), for disclosure or non-disclosure under r 25.34(4)(a)(vi) in the context of an arrest, and on promises or representations made in affidavits or memoranda. There is no need for further exposition of this hazard.

Finally on this topic, I mention a New Zealand case\(^{16}\) in which a lawyer bravely commenced an admiralty action *in rem* in the High Court at Auckland naming as first defendant a foreign owned aircraft.

The circumstances were that a printing company called Hally Press had imported a printing press from Switzerland. The press was carried by air, and carriage was subject to the Warsaw Convention.\(^{17}\) Hally alleged that the press was damaged in transit, and advanced a claim of nearly NZ$ 1 million. It commenced an Admiralty action *in rem* and *in personam* against the carrying aircraft, Danzas as the freight forwarders, and

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Malaysian Airlines Systems (MAS) as owners of the aircraft. Fortunately no attempt was made to arrest the aircraft.\textsuperscript{18} It was quickly made clear to the plaintiff’s solicitors that a claim in rem against the aircraft could not succeed, and an arrangement was made for discontinuance against the aircraft, acceptance of service by MAS and a transfer of the claim to the ordinary civil jurisdiction of the High Court. The case is reported on the validity of the purported transfer of the proceedings to the civil jurisdiction.\textsuperscript{19} In the circumstances there can have been no doubt whatsoever but that there was no basis at all for invoking the admiralty jurisdiction of the High Court, or for naming the aircraft itself as a defendant - as of course would have been entirely permissible in the case of a ship had the press been shipped by sea.

In those circumstances, there seems to me to have been a question as to the ethical responsibilities of the plaintiff’s lawyers. It is hardly surprising that Chapter 13 of the Rules does not in terms specify that lawyers must not join parties to litigation when there is no basis in law for so doing; but (depending on what was known by the lawyer and what the client’s instructions were) the lawyer was arguably in breach of the absolute duty of honesty to the Court and of misleading or deceiving the Court under r 13.1 of the Rules.

**Ethics in New Zealand – The Judges**

The community expect judges to be independent, impartial, fearless, fair, firm but courteous, and diligent. I think that judges themselves hold that view of their obligations. Moreover I think the community would hold the view that most Judges observe most of those attributes most of the time. Or, perhaps more realistically, that there are few transgressions that come to notice.

The basis for these expectations is elusive, and perhaps not authoritatively articulated until as recently as 2003. In that year, the Bangalore Principles of Judicial Conduct (to which I shall soon return) were endorsed by the United Nations Human Rights Commission in Geneva.

Since I became a judge, I have operated on the basis that there are two cardinal obligations that I am legally bound to observe.

First, I must play my part in implementing the promise of King John in Article 40 of Magna Carta that ‘[t]o no-one will we sell, to no-one deny or delay right or justice.’

Secondly I must observe the oath which I took in the presence of some of you when I took office in 2005. By that oath I made this affirmation:

\[
\ldots \text{that I will well and truly serve Her Majesty, her heirs and successors, according to law, in the office of District Court Judge, and that I will do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will.}
\]

There is a wealth of material outside of those two core obligations, by or about judges, discussing the judicial process and community expectations of judges. For a judge whose judgments are subject to appeal, however, the judicial writing which makes the most impact is always the judgment of the appellate court on a judgment which one has written.

For the purposes of this paper, I intend to refer only to the Bangalore Principles and to the current Guidelines for Judicial Conduct prepared by and for the New Zealand judges and extending over some 25 pages.

**Bangalore Principles**

As summarised in the Guidelines, the stated intention of the Bangalore Principles is:

\[
\ldots \text{to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist}
\]

\textsuperscript{18} I confess to having attempted to arrest an aircraft myself, but in that case the basis was that it was part of the cargo on a ship in distress, and my client had salvaged it: *Buckingham v Aircraft Hughes 500D Helicopter Registration Mark C-GPUN* [1982] 2 NZLR 738.

\textsuperscript{19} See the detailed critique of the Court of Appeal decision by Paul Myburgh, elegantly entitled *Admiralty in Wonderland* [2005] LMCLQ 302.

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members of the Executive and Legislature, and lawyers and the public in general, to better understand and support the judiciary.\(^{20}\)

And the Principles themselves are, in summary, as follows:

(i) Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

(ii) Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also the process by which the decision is made.

(iii) Integrity is essential to the proper discharge of the judicial office.

(iv) Propriety, and the appearance of propriety, are essential to the performance of all of the activities of the judge.

(v) Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

(vi) Competence and diligence are prerequisites to the due performance of judicial office.\(^{21}\)

I do not intend to go through the Guidelines in any detail – the full text can be found online\(^{22}\) – but I will make some comments about aspects which seem particularly relevant to the issue of ethics, and about personal experiences which might illuminate some aspects of the Guidelines.

Judicial independence covers both constitutional independence – the independence of the judiciary from the legislative and executive arms of Government – and independence in the discharge of judicial duties.

I consider that judges in New Zealand (and no doubt Australia as well) are in a privileged position in that the principle of judicial independence is honoured in practice as well as in theory. As a District Court Judge, I often preside over Judge Alone Trials in which I not infrequently dismiss criminal charges laid by the police; and in reaching those decisions I sometimes have cause to disbelieve elements of the police case, and occasionally what I have been told by police officers. When I read or hear of what happens to judges in other countries whose decisions do not please the government, I am glad, not to say relieved, that I may make findings of that kind, adverse to the government or a government agency, but go home completely confident that no stones will be thrown through my windows, I will not be harassed in my personal life, my salary will not be stopped, and I will not be detained from pursuing my lawful activities. Sadly there are not many countries where the judges can confidently say that.

In New Zealand, there is potentially a problem about impartiality and disqualification for conflict of interest. New Zealand is a small country and Wellington is a small town. I have spent my entire university education and practising life in Wellington with the exception of 5 years in my late 20s when I was overseas. In that time, I have come to know many lawyers and many people and organisations who sometimes find themselves involved in litigation. Sometimes my next door neighbour, who is a capable lawyer, appears before me and sometimes lawyers I have known for 40 or more years. I have made a practice of ensuring that litigants know about those connections. I also sometimes say to them that just because I know someone, it doesn’t mean that I like them. As to the litigants themselves, or witnesses, I have to deal with issues on a case by case basis. In some cases, it is obvious that I should not hear the case. But most of the time there does not seem to be any real difficulty about my presiding – providing of course that all parties are aware of the connection. In the 9 years I have been on the Bench, I can recall only two or three cases where I have felt it advisable to disqualify myself.

As to behaviour in the courtroom, the Guidelines start with the observation that:

> The primary obligation of a judge is to determine the case before him or her according to law without being deflected from that obligation by desire for popularity or fear of criticism.\(^{23}\)


\(^{21}\)Ibid 5 [9].

\(^{22}\)Ibid.

\(^{23}\)Ibid 13 [46].
The Guidelines also emphasise the importance of maintaining an acceptable standard of behaviour in Court. At the same time, however, it emphasises that it is necessary for judges to:

...display such personal attributes as punctuality, courtesy, patience, tolerance and good humour. Any trial is a serious matter but that does not mean that occasional humour is out of place in a courtroom, provided it does not embarrass a party or witness or give the impression to a litigant that his or her case is not being taken seriously. Indeed, it sometimes relieves tension and thereby assists the trial process.24

I well recall Sir Thomas Eichelbaum, formerly Chief Justice of New Zealand and, as it happens, a foundation member of the New Zealand Branch of this Association, remarking that the main difference a lawyer from the early 20th Century would find upon observing a case today, would be that the judges were so courteous and good- humoured. But sometimes, alas, the reverse is true, even of me. I refrain from giving particulars in writing.

A particular feature of maritime litigation is that one or more parties may be foreign companies or individuals; and that evidence might be given in a foreign language, or in English by a witness for whom English is a second language. (There are now detailed requirements for the translation of all parts of criminal trials where defendants are not fluent in English.) When I was in practice, I represented a number of clients in cases of this kind. I recall several occasions when my clients were concerned about their prospects in defending criminal charges or in litigation involving New Zealand parties. Although I cannot say my clients succeeded in all of those cases, what I can say is that I never felt that national origin, language, or race had any bearing either on the attitude of the judge or on the outcome. And, of greater importance, neither did my clients so far as I am aware.

Before concluding, I record that litigants, and the public generally, have the right under the Judicial Commissioner and Judicial Conduct Panel Act 2004 (NZ) to make a complaint to the Judicial Conduct Commissioner about the conduct of a judge. Obviously enough, dissatisfaction with the legality or correctness of judicial decisions, where there is a right of appeal, is not a ground of complaint.

Over the last five years, complaints have ranged from 152 to 358 in number, of which only a tiny handful have proceeded beyond the Commissioner - that is, by referral of the complaint to the Head of Bench of the court in which the judge sits; or, in cases considered to be serious, by referral to a Judicial Conduct Panel for formal hearing, most likely in public.

If the decision of the panel is unfavourable to the judge, it is for the Attorney General to decide whether to initiate a process for removal of the judge. In the case of judges of the High Court and above, that requires Parliament to pass an appropriate motion addressed to the Governor General. There has been one instance in which the Commissioner considered that a complaint should be referred to a panel, but matters did not reach that stage as the judge chose to retire.

Conclusion

In all three aspects of the topic I have examined, I think it is possible to discern a clear ethical basis as a starting point for the evolution, first, of increasingly well- understood informal approaches to recurring problems, secondly of customary and increasingly written practices, leading ultimately to explicit and comprehensive codes which are the basis of our law today. I acknowledge the different evolution of international conventions, nevertheless leading to a similar outcome owing much to ethical considerations and perceptions of social responsibility.

What seems to me to be unique, certainly unusual, about this process is that in each of the three cases it has had its origins not in law-making by governments but in the collective and evolving experience of practitioners, increasingly documented and recorded, and only at a late stage of that evolution receiving the imprimatur of the state and, latterly, the global community.

For me, maritime law has always been different, challenging and engaging. I am glad to have had this opportunity of exploring another of its many facets.

24 Ibid 14 [49].
(Note: My paper, as originally posted on the MLAANZ website, did not include the material about the Uluburun wreck or the evidence of developed commercial trade in the eastern Mediterranean. I had intended to preface the written paper simply by one or two short comments about the wreck; but I became fascinated by the topic. This paper reflects my presentation at the conference).
THE SHIPOWNER’S LIEN ON SUB-FREIGHTS AND PERSONAL PROPERTY SECURITIES REGIMES

Matthew Woolley

In the event of default by a head charterer, a shipowner may advance a direct claim under the bill of lading against the shipper for freight, with an alternative claim against the charterer to enforce the charterparty lien on sub-freights. With maritime-related insolvencies increasingly common these claims are important to shipowners as they provide another method of debt recovery. This article explores the contentious shipowner’s lien on sub-freights payable to the charterer. Clear guidance on the nature of the lien has particular importance in New Zealand, Australia and other countries where statutory personal property securities regimes are operated. Finally, the article considers the nature of the lien in the light of the policy rationale underlying personal property security regimes.

1 Introduction

Two recent international decisions have seen appellate courts allow a shipowner to skip a chain of charterers and demand payment of freight directly from the shipper.1 Unsurprisingly, shipowners have welcomed these decisions as they provide additional protection where a charterer is in default.2 Given the prevalence of vessel chartering these decisions will have a far-reaching effect. The 20 leading container ship operators account for over 80% of international container shipping capacity.3 Around half of the ships operated by these shipping lines are chartered-in.4

In the event of an intermediate charterer becoming insolvent and defaulting, a shipowner may bring a claim for bill of lading freight and a claim to a lien over sub-freights payable to the charterer. A claim for bill of lading freight is likely to be the primary claim where goods are shipped on an ‘owner’s bill of lading’. This article examines what has often been advanced as an alternate basis of claim, the lien over sub-freights payable to the charterer. The article will argue that the true nature of the lien over sub-freights payable is that of an equitable charge. The author concludes that the introduction of personal property securities regimes in countries including Australia and New Zealand will demand shipowners register financing statements in respect of the lien on sub-freights if this avenue of debt recovery is to remain effective.

2 Background

The true nature of the lien on sub-freights included in the terms of many charterparties is the subject of differing judicial and scholarly views.5 To a vessel owner, a lien on sub-freights clause is important as it purports to give the owner the right to attach to sub-freights payable under sub-charterparties for payments in respect of the headcharter.

Two recent decisions by appellate courts, Dry Bulk Handy Holding in the United Kingdom and Byatt International in Canada represent a significant development in the law concerning charterparty chains where there is a default by an intermediate charterer.6 In both decisions the dispute arose because of the insolvency and subsequent default of Korea Line Corporation (KLC), an intermediate charterer to whom the respective shipowners had chartered vessels.

In Dry Bulk Handy Holding, Smith J did not uphold a claim to enforce the lien on sub-freights. Smith J concluded the lien clause was effective ‘with regard to the sub-freights that fell due after the cargo was loaded’.

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1 BCom, LLB (VUW), ATCL; Policy Analyst, Inland Revenue, New Zealand. The author has written this article in his personal capacity: the opinions expressed do not necessarily reflect those of Inland Revenue. The author thanks Dr Bevan Marten, Lecturer at Victoria University of Wellington, for his help and support throughout the researching and writing of this paper.
2 Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd; The Bulk Chile [2013] EWCA Civ 184 (14 March 2013) (‘Dry Bulk Handy Holding’); Byatt International SA v Canworld Shipping Company Limited; MV Loyalty 2013 BCCA 427 (‘Byatt International’).
3 Eric Stamford, ‘Canadian ruling allows owners to knock on shippers’ door for hire’ TradeWinds (Norway), 25 October 2013, 32.
5 Ibid.
7 Dry Bulk Handy Holding [2013] EWCA Civ 184 (14 March 2013); Byatt International 2013 BCCA 427.

(2014) 28 ANZ Mar LJ 69
but did not ‘provide for a lien over hire payable … under the trip charterparty’. On appeal the lien on sub-freight issue was not expressly considered.

In *Byatt International*, Byatt argued it had a valid lien against KLC, as per clause 18 of the NYPE 1946 form. At first instance the Court concluded that equitable principles prohibited the Court from enforcing the terms of the lien. Although Byatt successfully appealed the first instance decision, the Court of Appeal reasoned the lien on sub-freight issue did not require decision. Subsequently the Supreme Court of Canada denied an application for leave to appeal.

The relevance of these cases is they illustrate reluctance by the courts to grapple with the complex lien on sub-freights issue. With appellate courts in the United Kingdom and Canada called upon to consider similar issues, the decisions highlight the importance of certainty in this little-considered area of the law. At the opening of the 20th century it appears there was no authority on the point.

## 3 Lien on Sub-freights

Many standard form charterparties include a lien over ‘all sub-freights’ payable to the charterer. Clause 23 of the NYPE 1993 standard form charter stipulates:

> The Owners shall have a lien upon all cargoes and all sub-freights and/or sub-hire for any amounts due under this Charter Party, including general average contributions, and the Charterers shall have a lien on the Vessel for all monies paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once.

Clause 8 of the Gencon 1994 in slightly different language stipulates:

> The Owners shall have a lien on the cargo and on all sub-freights payable in respect of the cargo, for freight, deadfreight, demurrage, claims for damages and for all other amounts due under this Charter Party including costs of recovering the same.

### 3.1 The Legal Nature of a Lien on Sub-freights

In considering the legal nature of a lien on sub-freights included in a charterparty, the question is not simply one of contract construction. A similar approach to that taken in *Re Brumark Investments* should be adopted. *Re Brumark Investments* concerned the distinction between a floating and fixed charge, a distinction that has since been abrogated for jurisdictions with personal property securities regimes. Nevertheless, in this instance, *Re Brumark Investments* provides a useful framework. In *Re Brumark Investments* the Privy Council drew a distinction between characterisation and interpretation. Lord Millet, in delivering the advice of their Lordships, stated:

> … the court is engaged in a two stage process. At the first stage it must construe the instrument … to gather the intentions of the parties from the language they have used. But the object at this stage of the process …. is to ascertain the nature of the rights and obligations which the parties intended to grant each other …. Once these have been ascertained, the court can then embark on the second stage of the process which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties.

Personal property securities regimes in New Zealand and Australia have removed many common law security distinctions with the focus now on establishing the economic substance of the transaction. That said, both the New Zealand and Australian legislation continue to recognise all forms of security interest that existed prior to

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1. Ibid [49].
2. *Dry Bulk Handy Holding* [2013] EWCA Civ 184 (14 March 2013) [1].
3. *Byatt International* 2013 BCCA 427, 8 [18].
4. Nonetheless a discussion of the issues raised in these decisions is important given the current work being undertaken to develop an updated NYPE standard form charter. A final draft of a new NYPE form is expected to be submitted to Baltic and International Maritime Council’s (BIMCO) Documentary Committee in November 2014. See BIMCO, *Light at end of tunnel for NYPE update* (20 February 2014) <https://www.bimco.org/news/2014/02/20/light_at_end_of_tunnel_for_nype_update.aspx>.
5. *Taggart, Beaton & Co v James Fisher & Sons* [1903] 1 KB 391, 394 (CA) (*Taggart, Beaton & Co*).
6. The equivalent provision in the 1943 version is clause 18. The unamended clause 18 provides ‘the Owners shall have a lien upon … all sub-freights for any amounts due under this Charter […]’.
7. *Agnew v Commissioners of Inland Revenue* [2001] 2 AC 710 (*Re Brumark Investments*).
8. Ibid 725 [32].
commencement. However, there is no immediate need to fit post personal property securities interests into the old forms. The effect of the personal property securities regimes is considered in the final part of this article.

3.2 Construction

Using the approach in *Re Brumark Investments*, the first stage in determining the lien’s legal nature involves construing the instrument and gathering the intentions of the parties from the language they have used. Rules of construction developed for contracts in general ‘are equally applicable to charterparties and bills of lading.’

For simplicity, this analysis is restricted to a valid contract where one of the aforementioned standard form charterparties that includes a lien on sub-freights clause evidences in full the agreement as between the parties.

The starting point must be the general principles of contract construction. Lord Hoffman in *Investors Compensation Scheme Limited v West Bromwich Building Society* articulated the modern approach to interpreting contracts. This approach was adopted by the New Zealand Court of Appeal in *Boat Park Ltd v Hutchinson*. In both England and New Zealand almost every subsequent case has cited Lord Hoffmann’s formulation.

Nonetheless, contract interpretation is described as ‘one of the most contentious areas of the law of contract’ attracting ‘fundamental divisions among commentators, practitioners and judges’. The guiding principle from *West Bromwich Building Society*, although widely applied, is not always widely understood. The divergence between the guiding principle that ‘interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract’ and the idea that words must be given their plain meaning in the absence of inter alia manifest absurdity, or a proven technical usage is emphasised by David McLauchlan.

McLauchlan highlights that ‘the great majority of interpretation disputes that come before the courts have the common feature that the parties did not, at the time of formation, contemplate the situation that has arisen.’ If parties to a charterparty did not form an actual intention as to the meaning to be assigned to a lien on a sub-freights clause ‘the court can only seek to resolve the dispute by reference to the parties’ presumed intention.

A vessel owner presumably would only agree to charter their vessel on the basis the charterer will make all payments as agreed. Even where a charterer has a good credit rating a prudent shipowner will turn their mind to protecting themselves should payments not be made as they fall due. To a shipowner, a lien on sub-freights clause is important as it purports to give the owner the right to attach to sub-freights payable under sub-charterparties for payments in respect of the headcharter. In effect, this provides a shipowner with another method of debt recovery. If all goes well the shipowner avoids any involvement in the potentially messy collection of freight. Charterparties are often negotiated by shipbrokers and other industry players rather than lawyers. These shipbrokers and other industry players may not have considered the legal form of this method of debt recovery.

To illustrate the effect of the lien take a simple tripartite situation comprised of an owner, charterer and sub-charterer. Where both the charterer and sub-charterer fall into arrears the lien purports to provide the owner another method of debt recovery through the right to attach to sub-freights payable under the sub-charterparty for payments due in respect of the headcharter. This neat scenario explains the effect but fails to address the more realistic scenario where a dispute arises in a chain of four or more charterparties. Neither does the scenario explain what should happen if only some of the parties in the chain are in arrears.

Lord Alverstone CJ in *Tagart, Beaton & Co v James Fisher & Sons* summarised the effect of a lien on sub-freights:

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17 Section 17(3) of the *Personal Property Securities Act 1999 (NZ)* expressly confirms the continued existence of, *inter alia*, the floating charge. Section 12(1) of the *Personal Property Securities Act 2009 (Cth)* also expressly confirms the continued existence of, *inter alia*, the floating charge.

18 Bernard Eder and Thomas Scrutton, Scrutton on Charterparties and Bills of Lading (Sweet & Maxwell, 22nd ed, 2011), 20 [1-054].

19 *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 All ER 98 (HL) (‘West Bromwich’).

20 *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA).

21 Susan Glazebrook (ed), *LexisNexis, Commercial Law in New Zealand* (at Service 43) [4.1.3].


23 Ibid.

24 Ibid 10.

A lien such as this on a subfreight means a right to receive it as freight and to stop that freight at any time before it has been paid to the time charterer or his agent; but such a lien does not confer the right to follow the money paid for freight into the pockets of the person receiving it simply because that money has been received in respect of a debt which was due for freight.\textsuperscript{26}

Clarke J in \textit{Western Bulk Shipping III} cited and agreed with Lord Alverstone’s formulation of the lien’s effect.\textsuperscript{27} In \textit{The Spiros C} Rix LJ stated:

It is well established that a lien over sub-freights gives to the shipowner a right, where his time-charterer has defaulted, to step in and claim payment of such sub-freights to himself, provided that they have not already been paid.\textsuperscript{28}

Although the overall effect of the lien on sub-freights is widely accepted, the characterisation of the ‘lien’ does not enjoy such common understanding.

\textbf{3.3 Characterisation}

In the United Kingdom a clear binding statement has not yet been made by an appellate court as to the characterisation of the lien. This was noted in \textit{Western Bulk Shipowning III} by Clarke J who went on to highlight that decisions as to the lien on sub-freights nature ‘have been reached by judges at first instance of great distinction.’\textsuperscript{29} Briggs J in \textit{Cosco Bulk Carrier Co Ltd v Armada Shipping SA}\textsuperscript{30} considered that the judicial nature of the lien is ‘plainly ripe for consideration at least by the Court of Appeal.’\textsuperscript{31} That decision concerned a cross-border insolvency dispute over whether the lien could be considered the enforcement of security by a secured creditor. Briggs J was unprepared to rule on the nature of the lien as he considered it would ‘expose the parties to a possibly lengthy stay of the underlying dispute while a single issue in it was litigated up to, and possibly beyond, the Court of Appeal’.\textsuperscript{32} Similarly, in Australia, Carruthers J avoided deciding the nature of lien as he reasoned the dispute before him did not concern an amount due under the charter to which the lien could be exercised.\textsuperscript{33}

Fidelis Oditah surveyed six theories in categorising the lien on sub-freight. These were the mandate theory, the subrogation theory, the maritime lien theory, the equitable assignment theory, the equitable charge theory and the right of interception theory.\textsuperscript{34} After a brief explanation of each of these theories Oditah concluded the lien is ‘a personal contractual right of interception analogous to an unpaid seller’s right of stoppage in transit’.\textsuperscript{35} Over a decade later and prompted by the Privy Council decision in \textit{Re Brumark Investments}, Graeme Bowtle considered the issue.\textsuperscript{36} Bowtle concluded the lien on sub-freights has the characteristics of a floating charge and therefore ‘logically it would seem that the lien is a floating charge.’\textsuperscript{37}

In considering clause 18 of the NYPE 1946\textsuperscript{38} form Goff J, as he then was, recognised the clause provides for at least three liens and that the owners have a lien on ‘(1) all cargoes, and (2) all sub-freights, for any amounts due under the charter including general average contributions; and [3] the charterers have a lien on the ship for all moneys paid in advance and not earned.’\textsuperscript{39} Goff J went on to state ‘it is obvious that neither the owners’ lien for sub-freights, nor the charterers’ lien on the ship, can be a possessory lien.’\textsuperscript{40} This article only concerns the second of these ‘liens’: the lien on sub-freights for amounts due under the charterparty.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{26} \textit{Tagart, Beaton & Co} [1903] 1 KB 391, 395 (CA).
\item \textsuperscript{27} \textit{Western Bulk Shipowning III A/S v Carbofer Maritime Trading ApS & Ors} [2012] EWHC 1224 (11 May 2012) [34] (‘\textit{Western Bulk Shipowning III}’).
\item \textsuperscript{28} \textit{Tradegrain SA & Ors v King Diamond Marine Ltd} [2000] 2 Lloyd’s Rep 319, 323 [11].
\item \textsuperscript{29} \textit{Western Bulk Shipowning III} [2012] EWHC 1224 (11 May 2012) [32].
\item \textsuperscript{30} \textit{Cosco Bulk Carrier Co Ltd v Armada Shipping SA & Ors} [2011] EWHC 216 (Ch) (11 February 2011).
\item \textsuperscript{31} Ibid [51].
\item \textsuperscript{32} Ibid [52].
\item \textsuperscript{33} \textit{Mutual Export Corporation & Ors v Asia Australia Express Ltd & Ors; The Lukatotai Express} (1990) 103 FLR 32, 49 (NSWSC); see also \textit{Daebro Shipping Company Ltd v The Ship Go Star} (2012) 207 FCR 220, 241 [95].
\item \textsuperscript{34} Fidelis Oditah, ‘The juridical nature of a lien on sub-freights’ [1989] \textit{Lloyd’s Maritime & Commercial Law Quarterly} 191, 192.
\item \textsuperscript{35} Ibid 192.
\item \textsuperscript{36} Bowtle, above n 5.
\item \textsuperscript{37} Ibid.
\item \textsuperscript{38} The language of clause 18 of the standard form NYPE 1946 is the same as clause 23 of the NYPE 1993 except NYPE 1946 omits ‘sub-hire’. NYPE 1946 clause 18 stipulates that ‘the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter.’
\item \textsuperscript{39} \textit{Ellerman Lines Ltd v Lancaster Maritime Co Ltd & Ors; The Lancaster} [1980] 2 Lloyd’s LR 497, 501 (QB).
\item \textsuperscript{40} Ibid 501.
\end{itemize}
\end{footnotesize}
The parties cannot have intended for the lien to be a common law lien. This is explained in *Western Bulk Shipping III*: “[t]he problem arises because of the use of the word ‘lien’ which ordinarily refers to a right to retain possession of a chattel until payment of a sum due from its owner.” \(^{41}\) Sub-freight is money due that cannot be possessed so it is impossible to characterise the lien in the traditional legal sense.

This article considers in detail the realistic possibilities for the lien: namely whether it is an equitable lien, equitable charge, equitable assignment or a sui generis contractual right. None of these options appears to be an absolute fit. It is possible the lien on sub-freights is simply a legal mirage although three reasons compel the author to dismiss this possibility. First, the lien is a common charterparty term. Second, shipowners have relied on the lien for at least a century to recover amounts owing under the head charter. Third, there is no judicial consideration of this possibility.

### 3.3.1 Equitable lien

A lien may be legal or equitable. Although both share the common name, unlike a lien that arises at common law, an equitable lien is not dependent on possession.\(^{42}\) Deane *J in Hewett v Court* described an equitable lien as ‘a right against property which arises automatically by implication of equity to secure the discharge of an actual or potential indebtedness’.\(^{43}\) Deane *J observed:*

> The word ‘lien’ is used somewhat imprecisely in the phrase ‘equitable lien’ to describe not a negative right of retention of some legal or equitable interest but what is essentially a positive right to obtain, in certain circumstances, an order for the sale of the subject property or for actual payment from the subject fund.\(^{44}\)

*Snell’s Equity* describes an equitable lien by analogy to a charge stating ‘an equitable lien gives the lienee rights in the nature of a charge upon property until certain claims are satisfied.’\(^{45}\) In *Snell’s Equity* an equitable lien and an equitable charge are distinguished: ‘the equitable lien differs from an equitable charge only in that it arises by operation of equity, from the relationship between the parties, rather than by any act of theirs.’\(^{46}\) In *Waitomo Wools* Richmond *J cited Nicholls CJ’s comment in Re Price that ‘the words ‘charge’ and ‘lien’ are often interchangeable.’\(^{47}\)

In *Re Welsh Irish Ferries*, a decision concerning the lien on sub-freights Nourse *J conceptualised an equitable lien as ‘something which exists independently of possession and gives rise to a charge, but it arises by operation of law out of the relationship between the parties and not out of an express contract.’\(^{48}\) Deane *J in Hewett v Court* addressed the lien and charge distinction stating:

> Though called a lien, it is, in truth a form of equitable charge over the subject property in that it does not depend upon possession and may, in general, be enforced in the same way as any other equitable charge …\(^{49}\)

Fiona Burns argues the equitable lien and the equitable charge are confused.\(^{50}\) Burns suggests the distinction is simple, ‘the equitable charge is the creation of mutual intention of the chargor and the chargee, an equitable lien arises by implication of law.’\(^{51}\) In the situation discussed here the shipowner and charterer relationship is merely contractual, the parties have consented to the ‘lien’ and it is not necessary for it to arise by operation of law.

In *Snell’s Equity* the equitable lien is distinguished from other types of security stating ‘they arise by operation of law rather than because the parties consensually created a security interest’.\(^{52}\) An early edition of *Ashburner’s Principles of Equity* states:

\(^{41}\) Western Bulk Shipping III (2012) EWHC 1224 (11 May 2012) [37].

\(^{42}\) LexisNexis, Laws of New Zealand (at 25 March 2014) ‘Liens’ [19].

\(^{43}\) Hewett v Court (1983) 149 CLR 639, 663 (‘Hewett’).

\(^{44}\) Ibid 664.


\(^{46}\) Ibid.


\(^{48}\) In re Welsh Irish Ferries Ltd; The Ugland Trailer [1985] 1 Ch 471(QB) 478 (‘The Ugland Trailer’).

\(^{49}\) Hewett (1983) 149 CLR 639, 663.


\(^{51}\) Ibid 4.

\(^{52}\) McGhee, above n 45, [44-004].
There is no distinction between an equitable charge and an equitable lien, so far as regards their effect; but the word ‘lien’ is generally used to denote an equitable security which does not arise under an express contract.\textsuperscript{53} Neither Snell’s Equity or Ashburner’s Principles of Equity provides any direct authority for this proposition. Nonetheless the author agrees that the ‘lien’ on sub-freights cannot be an equitable lien as it arises under an express contract. Simply sharing the same terminology is not enough to claim the lien over sub-freights owing to the charterer is an equitable lien.

\subsection*{3.3.2 Equitable charge}

Lord Russell in The Nanfri considered, although only as a passing remark, that the lien on sub-freights operated ‘as an equitable charge upon what is due from the shipper to the charterer.’\textsuperscript{54} Although not directly on point, support is also found in the decision of Citibank NA v Hobbs Savill & Co Ltd.\textsuperscript{55} Nourse J in Re Welsh Irish Ferries Ltd was critical of the position taken by the parties in that decision for treating the lien as taking effect as an equitable assignment, as he considered it actually created an equitable charge.\textsuperscript{56}

It has been suggested there is a fundamental problem with the equitable charge analysis. Although the ‘lien’ may be described as operating like a charge it confers no proprietary interest in the sub-freight. This concerned the Privy Council in Re Brumark Investments where Lord Millett, delivering the judgment of their Lordships commented:

Apart from the obiter dictum of Lord Russell in the Federal Commerce case, the cases in which the lien has been characterised as an equitable charge are all decisions at first instance and none of them contains any analysis of the requirements of a proprietary interest.\textsuperscript{57}

A lien on sub-freight clause serves only to provide the shipowner the ability to intercept sub-freight. It is argued that to be a true equitable charge there would be some form of rights of tracing to follow moneys into the hands of a third party. Nourse J in Re Welsh Irish Ferries found this criticism unsatisfactory stating it confuses the nature of the right and the event which defeats it.\textsuperscript{58} Nourse J went on to state:

If, for example, the shipper were to make payment not to the charterer but to some third party who had notice of the lien, it could not be doubted that the shipowner could follow the money into the hands of the third party. The reason why he cannot follow it into the hands of the charterer is because it is the very event of payment to him which defeats the right.\textsuperscript{59}

The view of Nourse J is to be preferred over that of Lord Millett in this context. No principle exists that requires a charge over property such as a book debt to ‘carry with it the equivalent tracing rights to the destination of its realisation proceeds.’\textsuperscript{60} As this article is focused on the treatment of this right under personal property security regimes it is not necessary to further consider the common law difficulties of whether a security in book debts extends to any proceeds.\textsuperscript{61}

\subsection*{3.3.3 Equitable Assignment}

If the charge theory is correct it can provide only a restrictive right in respect of sub-freights directly owing to the charterer and would not extend to sub-sub-freights owing to a sub-charterer. The analysis may be more expansive if the nature of the lien takes effect as an equitable assignment rather than an equitable charge. This was considered in The Cebu (No 1) but Lloyd J did not consider the distinction further as the parties agreed ‘that in an ordinary three-party case the lien takes effect as an equitable assignment.’\textsuperscript{62}

\begin{itemize}
  \item \textsuperscript{53} Walter Ashburner and Denis Browne, Principles of Equity (Butterworth, 2\textsuperscript{nd} ed, 1933) 249.
  \item \textsuperscript{54} Federal Commerce & Navigation Co Ltd v Molenaa Alpha Inc & Ors; The Nanfri [1979] 1 Lloyd’s Rep 368, 371 (CA).
  \item \textsuperscript{55} Citibank N.A. v Hobbs Savill & Co Ltd; The Panglobal Friendship [1978] 1 Lloyd’s Rep 368, 371 (CA). Lord Denning was not considering the lien on sub-freights but he was considering a similar scenario and he believed it gave something in the nature of an equitable charge.
  \item \textsuperscript{56} The Ugland Trailer [1985] 1 Ch 471, 479-80 (QB).
  \item \textsuperscript{57} Re Brumark Investments [2001] 2 AC 710, [41].
  \item \textsuperscript{58} The Ugland Trailer [1985] 1 Ch 471, 478 (QB).
  \item \textsuperscript{59} Ibid.
  \item \textsuperscript{60} Mark Armstrong, ‘Return to first principle’ in New Zealand: charges over book debts are fixed – but the future’s not!’ (2000) 3 Insolvency Lawyer 102, 107.
  \item \textsuperscript{61} See Fidelis Oditha, Legal aspects of Receivables Financing (Sweet & Maxwell, 1991) 25; Armstrong, above n 60, 104.
  \item \textsuperscript{62} Care Shipping v Latin American Shipping [1982] 1 QB 1005, 1016 (QB) (‘The Cebu (No 1)’).
\end{itemize}
Typically an equitable assignment occurs when an assignment does not fulfil the statutory formalities for a legal assignment. Support for an equitable assignment theory can be found by: Steyn J in *The Attika Hope*, Lloyd J in *The Ugland Trailer*, Lloyd J in *The Cebu (No 1)*, Saville J in *The Annangel Glory*, and by Lord Steyn in *The Cebu (No 2)*. In *The Cebu (No 1)* Lloyd J stated in reference to the NYPE form:

> On the true construction of clause 18 I would hold that [the charterer] has assigned to the owners by way of equitable assignment, not only sub-freights due to it as charterers, but also any sub-freight due under any sub-sub-charter of which it is equitable assignee. In my view that is the clear intention of the parties to be derived from the language they have used in clause 18.

Lloyd J, in support of the equitable assignment theory, warned that other theories could be defeated by an unscrupulous charterer who arranged an in-house charter at the same rate. An unscrupulous charterer wanting to charter the vessel would own two companies; the first company would charter the vessel from the shipowner and then sub-charter the same vessel to the second company. This in-house charter would be at the same rate as the charter with the shipowner. If the first company defaults then according to the equitable charge analysis the shipowner can only recover any sub-freights owing from the second company to the first company. In a chain of charterers that goes beyond the tripartite situation the equitable assignment theory would prove effective in ensuring the shipowner can reach further down the chain to recover amounts owing under the head charter.

The assignment theory is more plausible when considered in the light of a charterer having a chose in action against the shipper. This limited right can only be acquired ‘by the shipowner by virtue of some assignment, necessarily equitable, made by the charterer.’ Such an equitable assignment would have to be conditional upon possible defeasance in the event of the shippers making payment to the charterer before receiving notice that payment should be made to the shipowner.

Traditionally the common law only allowed an equitable assignment where the property sought to be assigned was future or after-acquired. Where a charter contract is evidenced by one of the standard form charterparties considered, no services will have been performed by the charterer upon which sub-freights would be owing. Any assignment of sub-freights must be of future property meaning the assignment can only be equitable.

In New Zealand some of the difficulties with the common law approach to assigning future property have been overcome by virtue of s 53 of the *Property Law Act 2007* (NZ). This section provides an assignment ‘of an amount that will or may be payable under a right already possessed by the assignor … is to be treated as an assignment of a thing in action’.

The author views the equitable assignment theory as difficult to reconcile with what the parties could have intended. If the ‘lien’ takes effect as an equitable assignment then the shipowner has rights in all sub-freights owing. A charterer would not want to assign sub-freights owing to the shipowner when they are also paying hire. If all sub-freights owing are assigned then the charterparty doesn’t include an immediate right for the charterer to re-claim the residual that exceeds the hire. Such an assignment plainly assigns the sub-freights owing to the charterer to the shipowner.

As Michael Wilford points out:

> An owner will not normally even consider the exercise of his lien on sub-freights until hire or other amounts due from the time charterer are overdue, and often it takes time to find out the identity of sub-charterers.

The equitable assignment analysis presents difficulty with regards to when a shipowner should give notice to the sub-charterers of the assignment as to effect the assignment. Wilford recognises this, posing the question:

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65 *The Ugland Trailer* [1982] 1 Ch 471 (QB).
70 ibid 1018.
71 Fenton, above n 63, vol 1 [9.2].
72 *The Ugland Trailer* [1985] 1 Ch 471, 478 (QB).
73 *Lun v Thornton* (1845) 1 CB 379.
74 Wilford, above n 5, 148.
Should, then, an owner, against the possibility of future, give notices of the assignment to him of future sub-freights, to any and every sub-charterer of whose existence he becomes aware, even though the time charterer has, from the commencement of the charter, paid hire before the due dates for payment and no other moneys are due under the charter?  

3.3.4 Is the lien some kind of sui generis contractual or maritime right?

It is worth considering whether this could be some kind of sui generis contractual right with maritime law origins. The hurdle this analysis must broach is in trying to explain why a contract between A and B should give rights to B to sue C for money C owes to A. The most authoritative support for this is expressed by Lord Millett’s obiter comment in Re Brumark Investments.  

In Re Brumark Investments the first instance judge used the shipowner’s lien on sub-freights as an example of fixed charges over assets which are defeasible at the will of the charger. Lord Millett dismissed this stating:  

A Full Court comprised of Keane CJ, Rares JJ and Besanko JJ of the Federal Court of Australia, unanimously observed that weight should be given to Lord Millett’s comments as he sat with ‘Lords Bingham and Hobhouse, both of whom had extensive Admiralty experience and would have been unlikely to have joined in the opinion delivered by Lord Millett if they disagreed.’

In The Annangel Glory the shipowners submitted the nature of the lien was a contractual right ‘by way of an authority given to the owners to act as the charterer’s agents to collect sub-freights when amounts were due to owners under the head charter’ and that no question of assignment arose at all. Saville J dismissed the shipowner’s submission reasoning ‘that the parties intended to give the owners a right which the owners could exercise on their own behalf – not on behalf of the charterers – if amounts became due under the charter-party.’ An agency type analysis would afford a shipowner little real protection as ‘even after notice sub-charterers could not be prevented from paying the principal rather than the agent, nor would the owners (as agents only) have any title or right themselves to sue for the sub-freights.’

3.3.5 What is the most compelling approach?

It is the author’s view that the equitable charge theory provides the most realistic option. Although there is no simple and widely accepted definition of a floating charge, common characteristics include: the charge is over a fund of assets, the chargor has a superior yet limited power to alienate those assets free of the chargee’s interest, and the chargee invariably has security in identifiable future assets when acquired by the chargor.

The lien on sub-freights purports to allow a shipowner to ‘claim payment of such sub-freight to himself, provided that they have not already been paid’. This is analogous to the floating charge as the fund of assets is any sub-freights due, the chargee being the charterer has the ability to alienate those assets free of the shipowner’s interest, and the shipowner’s interest will continue in any future sub-freights owing.

4 The Effect of Personal Property Securities Regimes

The analysis in this paper specifically applies the New Zealand Personal Property Securities Act 1999 (PPSA). However, the New Zealand legislation is closely modeled after the Saskatchewan Personal Property Security

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75 Ibid 149.
76 Re Brumark Investments [2001] 2 AC 710. The judgment of Lord Bingham, Lord Nicholls, Lord Hoffman, Lord Hohhouse was delivered by Lord Millett.
77 Ibid 727 [38].
78 Ibid 727 [41].
81 Ibid 47.
82 Ibid 47.
83 McGhee, above 45, [40-002].
Act and draws heavily on North American models including the United States Uniform Commercial Code.\textsuperscript{85} The Australian legislation shares the same scheme as the PPSA.\textsuperscript{86}

In New Zealand the PPSA introduced ‘a new approach to rights in personal property falling within its scope.’\textsuperscript{87} The background to the PPSA is set out in \textit{Waller v New Zealand Bloodstock Ltd}:

The key features of our PPSA … are the adoption of a unitary concept of security (under which the legal forms by which security is obtained become largely irrelevant) and establishment of priority rules which depend primarily on time of registration save for the super-priority accorded to registered purchase money security interests (that is, in favour of unpaid vendors) over prior general securities.\textsuperscript{88}

Critical to determining whether rights in personal property fall within the scope of the personal property securities regimes is the concept of a security interest. Even if a lien on sub-freights constitutes a security interest it may still fall outside the scope of the regime if it fits within one of accepted interests to which the relevant regime does not apply.\textsuperscript{89}

4.1 Are ‘Sub-freights’ due to the Shipowner Personal Property?

The PPSA provides for seven broad classes of collateral; ‘chattel paper, documents of title, goods, intangibles, investment securities, money and negotiable instruments.’\textsuperscript{90} These categories are mutually exclusive and comprehensive of all personal property not otherwise excluded from the PPSA.\textsuperscript{91} Under the PPSA the categorisation may be important in determining the priority of competing security interests in collateral. An account receivable is not one of the seven categories of collateral but is considered a sub-category of intangibles.\textsuperscript{92} The term ‘account receivable’ is defined in s 16 of the PPSA as:

\[ (A) \text{monetary obligation that is not evidenced by chattel paper, an investment security, or by a negotiable instrument, whether or not that obligation has been earned by performance.} \]

In New Zealand the Court of Appeal clarified that accounts receivable are broader than merely book debts.\textsuperscript{93} A monetary obligation in the context of the PPSA means an existing obligation imposed on, or assumed by, one party to apply a certain sum of money to the other party on a specific or ascertainable future date.\textsuperscript{94} It is clear sub-freights owing to the charterer would constitute a monetary obligation and would constitute an account receivable for the purposes of the PPSA.

4.2 Is an Exception Applicable?

The lien exception in section 23(b) of the PPSA is worthy of consideration, if only because of the shared terminology. Section 23(b) provides the PPSA does not apply to a lien except as specified in Part 8. \textit{Garrow and Fenton’s Law of Personal Property in New Zealand} states that ‘[c]ontractual liens, which arise by contract, and can be contrasted with common law and statutory liens, may well come within the [PPSA].’\textsuperscript{95} As has already been discussed, the real nature of the shipowner’s lien on sub-freights is likely to be an equitable charge and would not be within the ambit of this exception.

4.3 Is a Lien on Sub-freights a Security Interest?

Central to the PPSA is the concept of ‘security interest’. If there is no security interest then the PPSA does not apply. The meaning of security interest in the New Zealand PPSA is in essence the same as that in equivalent Australian legislation.\textsuperscript{96} A security interest is defined in the New Zealand PPSA as:

\begin{footnotesize}
\begin{itemize}
\item[85] Laurie Mayne and Linda Widdup, \textit{Personal Property Securities Act : a conceptual approach} (Lexisnexis Butterworths, 2002) 2.
\item[87] \textit{J S Brooksbank v EXFTX} [2009] NZCA 122 (6 April 2009) [44].
\item[88] \textit{Waller v New Zealand Bloodstock Ltd} [2006] 3 NZLR 629 [14] (CA).
\item[89] See \textit{Personal Property Securities Act 1999} (NZ) s 23 and \textit{Personal Property Securities Act 2009} (Cth) s 8.
\item[90] \textit{Personal Property Securities Act 1999} (NZ) s 16 (‘personal property’).
\item[91] Ibid.
\item[92] \textit{Fenton}, above n 63, vol 2 [5.2.8].
\item[93] \textit{Strategic Finance Limited v Bridgman & Ors (in rec and in liq)} [2013] NZCA 357 (9 August 2013) [52].
\item[94] Ibid [54].
\item[95] Fenton, above n 63, vol 2 [4.1.2].
\item[96] See \textit{Personal Property Securities Act 2009} (Cth) s 12.
\end{itemize}
\end{footnotesize}
17 Meaning of ‘security interest’

(1) In this Act, unless the context otherwise requires, the term security interest—

(a) Means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to—

(i) The form of the transaction; and

(ii) The identity of the person who has title to the collateral; and

...

(3) Without limiting subsection (1), and to avoid doubt, this Act applies to a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment, or a flawed asset arrangement, that secures payment or performance of an obligation.

The starting point is the general meaning that a security interest is ‘an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation.’ Even if a transaction does not secure payment or performance of an obligation it may still be a deemed security interest where it is a floating charge. As this article has concluded a lien on sub-freights should be characterised as an equitable charge, it follows that s 17(3) would deem the lien to be a ‘security interest’. Even if the lien was not characterised as an equitable charge it is clear that a shipowner is in substance using such a clause to secure payment of hire due under the charter through the right to attach to sub-freights payable to the charterer.

4.4 Priority

A shipowner with a lien over sub-freights has a security interest that is subject to the PPSA regime. In dealing with an insolvent charterer it is unlikely a shipowner will be the only party seeking a security interest in the charterer’s accounts receivable. On the liquidation of a charterer the PPSA determines priorities between competing security interests.

To enforce the lien a shipowner must ensure the security interest has attached to the sub-freights owing, and that the security interest has been perfected. The lien will attach to accounts receivable once value has been given by the shipowner and the charterer has rights in the collateral. Value means ‘consideration that is sufficient to support a simple contract.’ The charter of a vessel would satisfy the value requirement but rights in the collateral are more difficult in this context. Rights in the collateral are necessary as without rights there is nothing to secure. If no sub-freights are owing to the charterer then there is no collateral and nothing that the shipowner can secure.

This will not preclude any security being provided: ‘a security agreement may provide for security interests in after-acquired property.’ A security interest in after-acquired property ‘attaches without specific appropriation by the debtor’. A charterparty that evidences a contract to charter a vessel would constitute a security agreement for the PPSA. Therefore the security interest will attach automatically each time sub-freights are owing to the charterer.

Perfection requires attachment and either registration of a financing statement or that the secured party has possession of the collateral. Sub-freights owing to the charterer are an account receivable and are not capable of possession and therefore cannot be perfected by possession. Therefore shipowners must register a financing statement to perfect the security interest in sub-freights owing to the charterer.

97 Personal Property Securities Act 1999 (NZ) s 17(1)(a).
98 Ibid s 17(1)(b).
99 Ibid s 40(1).
100 Ibid s 16 (‘value’).
101 Ibid s 43.
102 Ibid s 44.
103 Ibid s 16 (‘security agreement’).
104 Ibid s 41(1).
A shipowner with a purchase money security interest (PMSI) in an account receivable has priority over non-PMSI in the same account receivable given by the same charterer if the PMSI is perfected no later than 10 working days after attachment.\textsuperscript{105} A shipowner cannot claim to have a PMSI over sub-freights owing as the shipowner is not selling the vessel and the lien does not enable the charterer to acquire rights in the sub-freights owing.\textsuperscript{106}

If sub-freights owing are paid to the charterer the collateral will have disappeared. In this respect the PPSA remedies common law tracing problems as a security interest in collateral automatically extends to the proceeds.\textsuperscript{107} The definition of proceeds expressly includes ‘a payment made in total or partial discharge of … an intangible’.\textsuperscript{108} Sub-freights owing are an account receivable and an account receivable is a sub-category of intangibles for the purposes of the PPSA. If a shipowner has a perfected security interest then the shipowner will also have a perfected security interest in any payments made against the sub-freight owing. This is a sensible result and addresses the concern that an unscrupulous charterer could arrange an in-house charter at the same rate to defeat the effect of the lien.\textsuperscript{109}

A shipowner that has not perfected their security interest in sub-freights owing will not have priority to those sub-freights as against another party with a perfected security interest in the sub-freights owing.\textsuperscript{110} If the shipowner had perfected its security interest in sub-freights then in the above scenario priority would be accorded to the party that perfected first.\textsuperscript{111} This means priority will accord to the party that was first to register its interest whether or not attachment had occurred at the point at which that step was taken.\textsuperscript{112}

A charterer may use the strength of its broader accounts receivable, including any sub-freights owing, as collateral. Large lenders such as banks are likely to have a general security agreement that gives a security interest in all present and after-acquired property. In addition it is ‘not uncommon for a party contemplating taking a security interest to register a financing statement in respect of its security interest in advance of the transaction being consummated.’\textsuperscript{113} This will make it difficult for a shipowner chartering a vessel to an already established business to be first to register in respect of sub-freights owing.\textsuperscript{114}

Conflict of laws provisions in personal property securities regimes can present a priority trap. For example, a search of the personal property securities register in New Zealand will not return security interests registered in other countries unless they have also been registered in New Zealand. Given the international nature of shipping shipowners should be alert to this issue. However, the issue demands more consideration than the scope of this article can provide.

4.5 Is this the ‘Right’ Result?

Given the prevalence of vessel chartering, it seems likely a large number of vessels would be sailing the ocean today under charter agreements that include lien on sub-freights type clauses. The \textit{Companies Act 1989 (UK)} specifically excluded a shipowner’s lien on sub-freights from being a registerable charge, in essence reversing the decision in \textit{Re Welsh Irish Ferries}.\textsuperscript{115} The relevant provision required a commencement order to be put into effect and no such order was ever made.\textsuperscript{116} At a legislative level the issue remains unresolved and continues to feature on the United Kingdom law reform agenda. In 2004 the United Kingdom Law Commission proposed that it be made clear ‘contractual liens over sub-freights are not charges and therefore are not registerable.’\textsuperscript{117}

\begin{thebibliography}{99}
\bibitem{105}ibid s 75.
\bibitem{106}ibid s 16 (‘purchase money security interest’).
\bibitem{107}ibid s 45(1).
\bibitem{108}ibid s 16 (‘proceeds’).
\bibitem{109}The \textit{Cebu (No 1)} [1982] 1 QB 1005, 1018 (QB).
\bibitem{110}Personal Property Securities Act 1999 (NZ) s 66(a).
\bibitem{111}ibid s 66(b).
\bibitem{112}ibid s 66(b).
\bibitem{114}A shipowner dealing with a charterer in liquidation must be wary of preferential creditor regimes. In New Zealand preferential claims are set out in the \textit{Companies Act 1993 (NZ)}, schedule 8, clause 1. These claims include liquidator’s fee, unpaid PAYE and GST to Inland Revenue, and unpaid wages of employees. These claims have priority over even secured creditors with a security interest in a company’s accounts receivable. A secured creditor’s interest will not be subordinated to the extent it is a perfected purchase money security interest (PMSI).
\bibitem{115}\textit{Companies Act 1989 (UK)} s 93.
\bibitem{116}Part IV, sections 92 – 107 relating to the registration of charges on companies’ property has not been brought into effect in accordance with s 215(2).
\bibitem{117}United Kingdom Law Commission, \textit{Registration of Security Interests: company charges and property other than land}, Consultation Paper No 164 (2002) [5.42].
\end{thebibliography}
The United Kingdom’s desire to exclude a shipowner’s lien on sub-freights is premised on the idea that registration is commercially unfeasible. Often a charterparty will be short in duration: this may make taking steps toward registration inconvenient. Adding weight to this argument is that to reduce transaction costs charterparties are often negotiated by shipbrokers and other industry players rather than lawyers.

Oditah argued that registration under the United Kingdom companies charges regime would ‘defeat the commercial purpose of the lien’. However, if the commercial purpose of the lien is to provide a shipowner with another method of debt recover then it is difficult to distinguish the lien from other types of security interests the PPSA regime captures.

Aubrey Diamond in his report on English security interests in property recommended registration of the lien on sub-freights under the English companies charges regime should not be required. Diamond reasoned:

Although it may be said that avoidance of the lien for non-registration would cause no great hardship, since it is suggested that such liens are rarely relied upon, it must be remembered that it is a criminal offence for the company not to register a charge. Moreover, since the standard forms of charterparty are used throughout the world, by companies from many different countries, it would be inappropriate to delete the clause from the forms in common use merely because British companies might seek not to rely on it.

Personal property securities regimes do not seek to criminalise parties that fail to register security interests. Instead these regimes incentivise parties to register their security interests through priority rules. If shipowners rarely rely upon such liens there should be little complaint that they are captured by personal property security regimes.

Re Welsh Irish Ferries concerned the registration of a lien on sub-freights under the United Kingdom companies charges regime. In that decision Nourse J stated:

... there would be no useful purpose in registration, the whole object of which is to warn unsuspecting creditors that the debtor company has charged its assets, whereas anyone who deals with a corporate charterer will know that it must have created liens on sub-freights.

The author disagrees with the view of Nourse J and considers the rationale behind personal property securities regimes to outweigh any such considerations. A unitary concept of security that disregards the forms by which security is obtained should be the fundamental consideration. This view exposes the perennial tension between maritime lawyers and insolvency practitioners. If there is a policy question here, it is where a shipowner with a lien over sub-freights should rank in priority to other claims. This is consistent with the idea that personal property securities regimes regulate the priority of relative security interests and not the form required to create a security interest.

5 Conclusion

A claim made to enforce a lien on sub-freights clause in a charterparty is likely to be advanced where goods are carried on a sub-charter without any bill of lading. It is well established that a lien over sub-freights gives the shipowner a right to step in and claim payment of sub-freight to himself. The equitable assignment, equitable lien and sui generis contractual right theories on characterising this ‘lien’ on close inspection are unsatisfactory. It is the author’s view that the equitable charge theory is the most realistic characterisation of the lien.

Personal property securities regimes that use a ‘substance over form’ approach to defining security interests are likely to capture the lien on sub-freights. It is clear that a shipowner is in substance using the lien to secure the payment of hire due under the charter through the right to attach to sub-freights payable to the charterer. To enforce the security interest shipowners should register a financing statement. It may be difficult even after registration for a shipowner to gain priority in respect of sub-freights owing to the charterer, especially where the charterer has previously given security to a third party in all present and after-acquired property.

118 Ibid [5.41].
119 Ibid, above n 61, 86.
Requiring registration of the lien on sub-freights is consistent with the rationale of a unitary concept of security that underlies personal property securities regimes. Given the prevalence of vessel chartering, shipowners should review charterparties in countries such as New Zealand and Australia with a view to registering the lien on sub-freights, or looking to other ways of securing amounts payable under the head charter.
CAN'T TOUCH THAT? POSSIBLE SOLUTIONS TO THE PROBLEMS OF SOVEREIGN IMMUNITY ATTACHING TO THE SUNKEN WARSHIPS OF CHUUK LAGOON

Michael Kirby*

The wrecks of 52 World War II era warships are corroding on the floor of a pristine lagoon in the Federated States of Micronesia (‘the wrecks’). The corrosion is slowly causing the hulls of the wrecks to lose their structural integrity. The inevitable conclusion is that the wrecks will eventually break up. Inside these wrecks are millions of litres of heavy bunker oil, meaning that when the oil spills the pristine marine environment and the local economy will be devastated.

Until now, no action has been taken by the Federated States of Micronesia due both to legal uncertainties as to whether the Federated States of Micronesia had legal authority to interfere with the wrecks and a lack of financial resources to undertake the very costly removal process. The process has undoubtedly been complicated by the fact that Japan claims ownership over the wrecks but has not provided assistance in dealing with the environmental problems that have stemmed from them. This paper attempts, first, to suggest a solution that is both legally defensible and financially feasible for the Federated States of Micronesia and, second, to explain why Japan may have been unwilling to assist the Federated States of Micronesia to solve a certain environmental problem. I will argue that there are two options available to the Federated States of Micronesia: first, the oil can be salvaged from the wrecks or, second, the rights to the oil can be sold in exchange for its removal. The Federated States of Micronesia is entitled to deal with the wrecks because preventing an oil spill that will cause significant damage to the coastline and marine environment within its territory is consistent with territorial sovereignty and the rights of the coastal State. I will also show that Japan is unwilling to remove the oil because it may not be cost efficient for them to do so.

This paper will be developed in three parts. The first part will examine the current context, demonstrating how the ships were lost and the extent of the environmental problem. By way of background, I will consider why Japan has not sought to assist the Federated States of Micronesia despite continuing to assert title to the wrecks. In the second part, I will explain the law that surrounds sunken warships and the role played by sovereign immunity in preventing interference with warships. This section will also demonstrate that the salvage of the cargo to prevent damage to the marine environment is consistent with rights found in treaty and customary law and that a state of necessity could be invoked to ensure that salvage operations could be undertaken. The third part will explain how an operation to remove the oil could be carried out and the obstacles posed by modern salvage law.

This research has implications for the rights of coastal States to salvage sunken warships, the laws of environmental salvage, immunity and state responsibility. It should also be noted that whilst I have made every attempt to accurately represent the legal and factual matrix in the Federated States of Micronesia, the small and developing nature of the State meant that recent data and primary legal sources were often difficult to obtain.

1 Background

The Federated States of Micronesia is an archipelagic nation made up of four groups of islands spread over more than two million square kilometres of the Pacific Ocean. It is also one of the world’s poorest nations with a population of just over 102,000 people.1 The Japanese navy militarily took possession of the islands that now make up the Federated States of Micronesia and other surrounding island nations in 1914. Japan was granted a League of Nations mandate over the islands at the end of World War I. After the defeat of Japan in World War II, the islands that now comprise the Federated States of Micronesia became part of the Trust Territory of the Pacific Islands under the administration of the United States.2

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One of the local regions of the Federated States of Micronesia is Chuuk. Chuuk is an atoll: a ring-shaped reef that encloses a lagoon and is surrounded by open sea. The lagoon Chuuk encloses is approximately 63 kilometres across. From 1939 Chuuk Lagoon (then known as Truk Lagoon) was used as a base for the Imperial Japanese Navy. On the 17th and 18th of February 1944 the United States attacked the Japanese naval base at Chuuk with hundreds of aircraft; 45 Japanese ships were sunk and another 27 were damaged in two days. The Japanese military base was subject to continuous bombing raids throughout the war to ensure that the base was unable to be utilised by Japanese forces for offensive purposes. Another seven ships were sunk during the later American and British bombing campaigns of Chuuk in April and June 1944. The 52 sunken Japanese warwrecks all lie within the lagoon.

The Japanese ships sunk by the bombing raids have now been corroding on the floor of the lagoon for almost 70 years. In 2002, a corrosion expert from the Western Australian Museum, Dr Ian MacLeod, predicted that the ships would start to break up in approximately 10 – 15 years. Whether the ships have started to break up yet is unclear, but it is well known that some of the ships have started to leak oil. If Dr MacLeod is correct, there is a short period of time available in which to remove the oil from the wrecks. This is compounded by two factors. The first is that the rate of corrosion increases with time. The second factor is that the oil cannot be removed if the corrosion is too advanced.

It is imperative that the oil is removed if an environmental disaster is to be avoided. It is possible that the wrecks contain up to 32 million litres of heavy crude and bunker oil. At that rate, experts say that a comparison with the Exxon Valdez oil spill or the Deepwater Horizon disaster in the Gulf of Mexico is not unreasonable, as the confined nature of the lagoon will magnify the effects of any spill. Maritime casualties elsewhere in the Federated States of Micronesia have highlighted the potential for harm. In 2002, the M/V Kyowa Violet struck a reef upon entering Colonia Harbor, Yap State. Although the Kyowa Violet was only within the harbour for thirty to forty-five minutes, the resulting oil spill did extensive damage to the mangroves and other marine resources. The Supreme Court of the Federated States of Micronesia assessed the damage at almost USD 3 million. This means that any oil spill will certainly cause an environmental disaster that will most likely kill many marine species that live within the lagoon. Any spill that does occur will have at least two significant ramifications for the islanders that live around Chuuk Lagoon: first, as many of them are subsistence fishermen, an oil spill would quickly contaminate their food supply; and second, the economy will suffer as dive tourism, which forms a large part of the economy, declines.

### 1.1 Why Has Japan Not Rendered Assistance?

In 2009, the President of the Federated States of Micronesia, on resolution of the Congress, requested the assistance of the Governments of Japan and the United States to ‘abate and remedy the environmental damages..."
Problems of Sovereign Immunity Attaching to the Sunken Warships of Chuuk Lagoon

[sic] to Chuuk Lagoon, including but not limited to the fuel leakage.\textsuperscript{18} The United States was invited for two reasons: first, the \textit{Compact of Free Association} between the United States and the Federated States of Micronesia places responsibilities on the United States with respect to environmental protection;\textsuperscript{19} second, the United States lost a number of aircraft during the February 1944 bombing raids of Chuuk that may be contributing to the environmental problem.\textsuperscript{20}

The President of the Federated States of Micronesia wrote to request assistance from the United States and Japanese embassies again in 2011.\textsuperscript{21} Japan’s Parliamentary Senior Vice-Minister For Foreign Affairs, Dr Tsuyoshi Yamaguchi replied to this request stating that '[t]he Government of Japan is now considering what assistance we can do [sic]'.\textsuperscript{22} No other assistance has been forthcoming. It is possible that diplomatic options are still being worked through and evaluated. However, if there continues to be no response from the Japanese authorities, it invites the question: why?

The answer seems to lie in economic feasibility. In 2005 there were news reports that an American salvor had been given permission by the Japanese Government to salvage the \textit{I-52} submarine.\textsuperscript{23} An American bomber sank the \textit{I-52} submarine in June 1944, approximately 1000 miles from the French coast.\textsuperscript{24} The \textit{I-52} submarine is a war grave, however, it is notable for allegedly containing nearly USD 30 million in gold bullion.\textsuperscript{25} The agreement between the salvor and the Japanese Government has not been disclosed. The reports also indicated that the salvors may have been allowed to work unsupervised.\textsuperscript{26}

The approval to salvage the \textit{I-52} submarine demonstrates that Japan has no principled opposition to the salvage of World War II wrecks. This is significant because it means that there are conditions under which the Japanese Government will permit salvage; it is just a matter of satisfying those conditions. As the \textit{I-52} submarine was carrying valuable cargo, it may be surmised that the possible economic advantage assisted in the decision to permit the salvage. It would seem that the highly costly nature of an operation to remove oil from up to 52 ships, with little possibility of a benefit to Japan, would lead to the conclusion that such an undertaking was deemed not to be economically beneficial or in Japan’s interests.

\section{The Governance Regime}

International law applies to the salvage of the sunken warships as the interests of more than one State are involved. There are four sources of international law: international conventions; international customs that evidence a general practice that are accepted as law; the general principles of law recognised by ‘civilised nations’; and judicial or scholarly works that may assist in interpreting the rules of law.\textsuperscript{27}

There is no international treaty that deals with sunken warships specifically. The conventions that apply to sunken ships, the \textit{International Convention on Salvage, 1989}, the \textit{1910 International Convention for the Unification of Certain Rules of Law related to Assistance and Salvage at Sea and Protocol of Signature} and the \textit{International Convention for the Removal of Wrecks} have all had warships and ships on government non-commercial service excluded from their application.\textsuperscript{28} This means that the ordinary laws of maritime salvage do not apply to sunken warships, unless the flag State provides otherwise. In this case, Japan, the flag State, has not made such provisions. The only exception to this general exclusion is found in Article 5 of the \textit{International

\textsuperscript{18} Resolutions of the 15\textsuperscript{th} Federated States of Micronesia Congress, Seventh Special Session (March 16 – 25 2009), ‘Requesting the President of the Federated States of Micronesia to request assistance from the United States and Japan to deal with fuel leaks from World War II wrecks in Chuuk Lagoon’, Resolution Committee Reports 15-204 (adopted March 25 2009).
\textsuperscript{20} The United States lost 25 aircraft: Bailey, above n 6, 165.
\textsuperscript{22} Ibid.
\textsuperscript{24} Ryall, above n 23.
\textsuperscript{25} The submarine is supposed to contain 146 gold bars: Ibid.
\textsuperscript{26} Talmadge, above n 23; Ryall, above n 23.
\textsuperscript{27} \textit{Statute of the International Court of Justice} art 38(1).
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Convention on Salvage, 1989. This exception provides that the International Convention on Salvage, 1989 does not affect salvage operations ‘by or under the control of’ public authorities. However, the Federated States of Micronesia has not signed the International Convention on Salvage, 1989. Therefore, the only treaty law that applies to the sunken warships is the United Nations Convention on the Law of the Sea insofar as it sets out the rights and obligations of the flag and coastal States.

The 1982 United Nations Convention on the Law of the Sea is the starting point for modern maritime law. Under the United Nations Convention on the Law of the Sea, different rights are conferred on the flag State and the coastal State in different maritime zones. There are four maritime zones: high seas, exclusive economic zone, contiguous zone and the territorial sea. These maritime zones constitute a sliding scale of degrees of control over the ship, from the exclusive jurisdiction of the flag State on the high seas to the exclusive jurisdiction of the coastal State in the territorial sea. Internal waters are not generally considered to be a maritime zone. Instead, they are deemed to be the sovereign territory of the coastal State where the exclusive jurisdiction of the coastal State applies. Article 6 of the United Nations Convention on the Law of the Sea permits the baseline of an atoll to be measured from the seaward low-water line of the fringing reef. In this case, the waters of Chuuk Lagoon are deemed to be internal waters because the lagoon is on the landward side of the reef and the baseline. As the ships have been sunk in internal waters, the Federated States of Micronesia possesses exclusive jurisdiction over the wrecks.

Whilst there is no specific international treaty law that concerns historic sunken warships, customary international law on the topic should be considered. To establish customary international law there must be a majority of States that consistently engage in a practice and that practice must be undertaken because States believe it to be lawfully required. To date, there has been no consistent State practice concerning the treatment of sunken warships.

There are two main theories that underpin national judicial jurisprudence on the topic: express abandonment and implied abandonment. The theory of implied abandonment holds that abandonment by a State can be implied through conduct or the passage of time. If the ship is abandoned, the State surrenders title to the wreck. The express abandonment theory posits that the State owns all sunken warships in perpetuity and that title to a warship can only be altered by an express act of abandonment by the State, such as executive or legislative action. States that adhere to the express abandonment theory include the United States, France, Germany, Russian Federation, Spain and the United Kingdom. Few other States have had to deal with abandonment of sunken vessels so it is unclear what position they would take.

Most States adopt a theory of express abandonment with respect to their own warships, however, application of this theory seems to be ad hoc. The United States for example found that express abandonment was required in the case of the CSS Alabama, where the United States sought to recover a bell from a treasure hunter, but implied abandonment was found to be sufficient in the cases of the USS Texas. In the USS Texas case the United States Government were sued for damage caused to a vessel that struck the improperly marked wreck of the warship. These decisions do not purport to be based on international law but they do illustrate the different theories as applied to American warships.

Relevantly for this inquiry, Japanese policy adheres to the express abandonment theory. This means that Japan believes that the Federated States of Micronesia cannot interfere with the warships unless Japan expressly...
abandons the vessels. I have been unable to find any evidence that Japan has expressed an intention to abandon the ships in Chuuk Lagoon.42

Perhaps the most relevant position would be that of the Federated States of Micronesia, as it would be the courts of the Federated States of Micronesia that would determine whether the ships could be salvaged. Despite an extensive review of the authorities, the position of the Federated States of Micronesia is unclear.43 Where there is no local authority on point, the Supreme Court of the Federated States of Micronesia tends to rely on jurisprudence from the United States Supreme Court.44 This could suggest that an express abandonment theory may be preferred. However, it has been my observation that some of the previous cases dealing with sunken warships have been decided in a manner that was convenient for the government of the forum state. For example, in the case of the USS Texas the finding that the vessels had been abandoned saved the government from having to pay the owners of ships that ran upon the wrecks. In the case of the La Galga, a Spanish frigate sunk in American territorial waters, Spain’s involvement in the litigation and a US State Department amicus curiae brief prompted the Court to find that express abandonment should be preferred, thereby avoiding a diplomatic incident with Spain.45 Therefore, the courts of the Federated States of Micronesia may defer to the position adopted by the government towards efforts to salvage the wrecks.

2.1 Competing Sovereignties

The lack of established customary international law requires reliance on other established principles of law, such as those found in the United Nations Convention on the Law of the Sea. As noted above, the Japanese wrecks concerned have all been sunk inside Chuuk Lagoon, which is surrounded by an atoll.46 According to Articles 6 and 8 of the United Nations Convention on the Law of the Sea, the waters of the lagoon are internal waters as they are on the landward side of the baseline. Therefore, the Japanese ships were sunk in the internal waters of the Federated States of Micronesia.

It is important that the ships were sunk in internal waters because the coastal State possesses full sovereignty over its internal waters.47 This means that without immunity warships would be subject to all laws of the coastal State. Floating warships are protected by sovereign immunity. The question is whether warships sunk in internal waters continue to enjoy that immunity or if they lose the immunity and become subject to the laws of the coastal State.

2.1.1 Sovereign Immunity of the Flag State

Sovereign immunity is ‘a plea relating to the adjudicative and enforcement jurisdiction of national courts which bars the municipal courts of one State from adjudicating the disputes of another.’48

Warships have historically been subjects of sovereign immunity. This is widely seen as having been established by the United States Supreme Court in the 1812 case The Schooner Exchange v McFaddon.49 The Exchange was an American merchant ship that had been requisitioned on the high seas, in violation of international law, by agents of the French Emperor Napoleon. The ship was subsequently converted to an armed public vessel. The petitioners sought the return of the ship when the armed vessel entered an American port to seek shelter from poor weather. Three important principles from the judgment of Chief Justice Marshall have endured. Firstly, all sovereigns are equal – one sovereign should not be required to be subject to the jurisdiction of another.50 Secondly, immunity from the laws of the sovereign is considered to derive from the consent of that sovereign;51 and thirdly, the capacity of warships to carry out acts of the State mean that they should enjoy

42 It should be noted that only English materials have been examined.
43 See cases such as Pan Oceania Maritime Services (Guam) Ltd v Micronesia Shipping Inc, 7 FSM Intrm. 37 (Pohnpei 1995), 38 (Federated States of Micronesia Supreme Court) <http://fsmlaw.org/fsm/decisions/vol7/7fsm037_039.htm>; M/V Kyowa Violet, 14 FSM Intrm. 403 (Yap 2006) (Findings of Fact and Law – Trial), 418 (Federated States of Micronesia Supreme Court); M C Jumbo Rock Carrier III, 16 FSM Intrm. (Yap 2009) (Federated States of Micronesia Supreme Court) <http://www.pacchi.org/fm/cases/FMSC/2009/43.html>.
47 The Schooner Exchange 11 US (7 Cranch) 116 (1812), 137.
48 Ibid 143.
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immunity.\textsuperscript{52} The case was widely cited beyond the United States as a correct articulation of the law of sovereign immunity with respect to warships, including by the International Law Commission.\textsuperscript{53}

Today, a distinction is drawn between the theory of absolute immunity and the modern theory of restrictive immunity. The theory of absolute immunity posited that immunity was granted because the foreign and equal sovereign should not have to be subject to the jurisdiction of another. The modern restrictive doctrine recognises that States should not be entitled to sovereign immunity for purposes that have no connection to their public or governmental functions. The United Nations Convention on Jurisdictional Immunities of States and Their Property, which will come into force if two more states ratify the convention, is based on the restrictive doctrine.\textsuperscript{54} This means that States can invoke immunity with respect to warships, naval auxiliaries or vessels owned or operated by a State for government non-commercial purposes, but not for commercial operations.\textsuperscript{55} Warships are afforded immunity under the customary rule because it has been assumed that warships are held for a public purpose.\textsuperscript{56} That is, warships have the capacity to carry out acts of the State.\textsuperscript{57} The principle that warships that have the capacity to carry out public acts of the State and should be granted immunity Whilst in port is widely accepted and has been recognised in cases in the United States, France and the United Kingdom.\textsuperscript{58}

For this reason there is no doubt that floating warships are protected by sovereign immunity in the ports they visit.\textsuperscript{59} However, the question that needs to be answered is whether that immunity continues if the vessel is sunk within the confines of the internal waters. Whether sunken warships are entitled to immunity is highly contested. There are two schools of thought: the first supports perpetual title of the flag State to the wreck, whilst the second promotes a loss of immunity due to the invalidation of the basis for its conferral.

Rand Pixa strongly advocates in favour of perpetual title to sovereign wrecks.\textsuperscript{60} The central pillar of Pixa’s argument is that the State is perpetual and so is its interest in its property.\textsuperscript{61} Pixa seeks to justify the theory of express abandonment by arguing that the public of the State has an interest in the ship that is not extinguished by its sinking.\textsuperscript{62} Allowing the flag State to retain title until such time as the State decides to relinquish title to the wreck is appropriate on the high seas, where the flag State is the only State with a valid claim to the wreck of the warship. However, it is inappropriate in contexts where the warship threatens to impact upon the coastal State.

Dr Valentina Vadi recognises that sovereign immunity is afforded to warships because of their function.\textsuperscript{63} The function of a warship is to have the capacity to carry out military activities. It is well accepted that military activities are \textit{jure imperii} or the public acts of the State.\textsuperscript{64} Therefore, at least theoretically, when the ship loses the capacity to carry out these public acts, the ship should also lose the immunity conferred upon it because it is no longer able to perform the function for which the immunity was conferred.\textsuperscript{65} In this case, as the Japanese warships are no longer able to carry out the \textit{jure imperii} of Japan they should no longer be entitled to enjoy any sovereign immunity that may have attached to them.

Pixa and Vadi represent the two competing abandonment theories. Pixa’s is presently the more internationally dominant as it recognises the interests of the flag State and the unwillingness of States to surrender their interests in military wrecks. It is, however, inappropriate where the interests of more than one State are involved. Vadi’s view is less popular with flag States but it is more consistent with the principles of sovereign immunity. The difficulty with Vadi’s argument is recognising when the ship is no longer capable of carrying out

\begin{footnotesize}
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\item \textsuperscript{52} Ibid 144.
\item \textsuperscript{53} International Law Commission, Report of the International Law Commission on the work of its Thirty-Second Session, Chapter IV (Jurisdictional Immunities of States and Their Property), UN Doc A/35/10 (1980) art 6, 145.
\item \textsuperscript{54} United Nations Convention on Jurisdictional Immunities of States and Their Property, 2005, 44 ILM 803.
\item \textsuperscript{55} Ibid art 16.
\item \textsuperscript{56} Fox, above n 48, 636.
\item \textsuperscript{57} Valentina Vadi, ‘International Law and the Uncertain Fate of Military Sunken Vessels’ (2009) 19 Italian Yearbook of International Law 253, 265.
\item \textsuperscript{58} The Schooner Exchange 11 US (7 Cranch) 116 (1812), 145; The Parlement Belge (1879) 4 PD 129; Littrell v United States (No 2) [1994] 4 All ER 203; Allians Via Insurance v United States Court d’appel Aix en Provence [Aix en Provence Court of Appeal], 3 September 1999 reported in 127 IER 148, cited in Fox, above n 48, 566.
\item \textsuperscript{59} Tanaka, above n 35, 79; Fox, above n 48, 721.
\item \textsuperscript{61} Ibid.
\item \textsuperscript{62} Ibid.
\item \textsuperscript{63} Vadi, above n 57.
\item \textsuperscript{64} Ibid.
\item \textsuperscript{65} Ibid.
\end{itemize}
\end{footnotesize}
the acts of State. The fact that ships can be salvaged indicates that sinking alone may be insufficient to constitute incapacity. In any event, Japan is likely to continue to insist on express abandonment.

2.1.2 The Territorial Sovereignty of the Coastal State

The claim of the coastal State is based upon its territorial sovereignty. Possession of a defined territory is an essential component of statehood. Territorial sovereignty is the supreme power to make and enforce laws within that territory. However, domestic sovereign power does not exist in a vacuum. States are still expected to adhere to the principles of international law.

International obligations imply both rights and responsibilities. There is an assumption that international actors that enjoy immunity will not cause disturbance or threaten other States. Where floating warships fail to follow the laws of the coastal State in the territorial sea (or internal waters) the host State has the right to ask the vessel to leave the territorial sea immediately. Such a direction cannot be given to a wreck. In the case of the Chuuk Lagoon wrecks, Japan has been asked to remove the oil that poses a hazard to the environment. It does not follow that because the sunken vessel once enjoyed immunity it possesses an unfettered right to pollute the environment of the coastal State. Instead, the coastal State as the dominant power, with rights to make and enforce law within the territory, can exercise that power over the vessel to prevent imminent damage to the State.

2.2 Environmental Measures

Part XII of the United Nations Convention on the Law of the Sea concerns ‘Protection and Preservation of the Marine Environment’. This part sets out the rights of the coastal State and the obligations of vessels to protect the marine environment.

2.2.1 Implications of Sovereign Immunity – Does Article 236 Apply?

Article 236 of the United Nations Convention on the Law of the Sea provides:

> The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels… owned and operated by a State and used, for the time being, only on government non-commercial service…

It is accepted that all of the ships sunk in Chuuk Lagoon fall within the scope of this article, as the ships were all either warships within the meaning of Article 29 of the United Nations Convention on the Law of the Sea or were ‘for the time being, on government non-commercial service’. The implication of this is that any United Nations Convention on the Law of the Sea provision that concerns the marine environment is rendered inapplicable in this context. This deprives the coastal State of any legal basis to interfere with a warship based on the provisions of United Nations Convention on the Law of the Sea that concern the marine environment.

Article 235 of the United Nations Convention on the Law of the Sea provides that States are to provide ‘prompt and adequate compensation’ for any damage that is caused by their vessels to the natural marine environment. This would provide for a retroactive response to any oil spill and would therefore make it likely that Article 236 applies to sunken warships because Article 235 provides a remedy for any environmental damage caused by the warship. Should an oil spill occur, the Government of the Federated States of Micronesia may be able to use this provision to their advantage. However, it does not strengthen the Federated States of Micronesia’s hand in proactively dealing with the oil before it spills.

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68 Ibid Pt XII.
69 Ibid art 236 (emphasis added).
2.2.2 The Case for Intervention in Part XII of the United Nations Convention on the Law of the Sea

There are a number of provisions that empower the coastal State to take actions to prevent damage to the marine environment. Article 194 of the United Nations Convention on the Law of the Sea requires States to take measures to ‘prevent, reduce and control pollution of the marine environment from any source’.

Under Article 211(4) of the United Nations Convention on the Law of the Sea, coastal States are permitted to make laws within their territorial sea ‘in the exercise of their sovereignty’ to prevent pollution, provided those laws do not ‘hamper the innocent passage of foreign vessels’.

One of the Federated States of Micronesia’s stronger arguments in favour of intervention is that taking emergency action is consistent with the rights of the coastal State. Article 221 of the United Nations Convention on the Law of the Sea provides that:

1. *Nothing in this Part* shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, *from pollution* or threat of pollution following a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

2. For the purposes of this article, ‘maritime casualty’ means a collision of vessels, stranding or other incidence of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

There is a tension between this article and Article 236. The opening words of Article 221 provide that ‘nothing in this part’ shall prejudice the rights of States, yet Article 236 appears to prejudice the rights of States with respect to warships. One resolution to this tension is that Article 236 relates to ‘protection and preservation of the marine environment’ provisions of the convention whilst Article 221 is a re-codification of a position that was established in customary international law by the Torrey Canyon incident and codified in the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

In March 1967 a super-tanker known as the Torrey Canyon hit a reef outside the territorial sea of the United Kingdom. The pollution, if permitted to continue to leak, posed a major environmental problem to the coastline and environmental interests of the United Kingdom. Other salvage options were not possible so Her Majesty’s Government ordered the Royal Navy and Royal Air Force to set fire to the wreck and sink it. That was the first time that a State had intervened outside its own territory with a view to environmental protection. At that time it was unclear whether the United Kingdom had any jurisdiction to intervene, however, in response, the Government of the United Kingdom organised the International Legal Conference on Marine Pollution Damage of 1969. That meeting confirmed that there was a right to intervene in customary international law. However, that customary right does not extend to warships that are beyond the waters of the territory.

In coastal waters the coastal State undoubtedly possesses exclusive jurisdiction. Therefore, if there is a right to take measures that are proportional to the threat beyond territorial waters it stands to reason that where the coastal State possesses greater control than the same right exists. Article 221 of the United Nations Convention on the Law of the Sea can be enlivened to deal with the Chuuk Lagoon wrecks as the measures taken will be proportional, the measures will follow maritime casualties and an oil spill could reasonably be expected to result in ‘major harmful consequences’. The removal of the oil to avoid an environmental disaster, in circumstances that would only minimally interfere with the wrecks themselves would be a proportional measure. Whilst military action does not appear to have been considered as a possible form of ‘maritime casualty’ there is no

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72 Ibid art 194.
73 Ibid art 211(4).
74 Ibid art 221 (emphasis added).
75 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, 970 UNTS 14049, arts I - VII.
77 Ibid.
78 Ibid.
79 Ibid.
80 Ibid.
81 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, 970 UNTS 14049, art I(2).
82 Forrest, above n 34, 85.
doubt that it was an external factor that caused damage to the vessel. Also, given the volume of oil and the impending threat to the economy, I believe that the harmful consequences criterion would be satisfied. Therefore, intervention to remove the oil is consistent with the rights of the coastal State.

2.3 A State of Necessity

One branch of the law between States is the law of State Responsibility. The doctrine that is applicable here is the ‘state of necessity’. A ‘state of necessity’ can be invoked to excuse the breach of international obligations when a State sees that it is ‘necessary to protect an essential State interest’. 84 The law governing when a ‘state of necessity’ may be invoked is found in Article 25 of the Draft Articles on State Responsibility of States for Internationally Wrongful Acts that relevantly provides: 85

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless the act:

(a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

Proposing the concept, Special Rapporteur Robert Ago outlined that a ‘state of necessity’ may only be invoked where there is a: 86

factual situation in which a State asserts the existence of an interest of such vital importance to it that the obligation it may have to respect a subjective right of another State must yield because respecting it would, in view of the circumstance, be incompatible with safeguarding the national interest in question.

In this case, the Federated States of Micronesia would not be required to observe Article 236 of the United Nations Convention on the Law of the Sea or Japan’s sovereign immunity if it means that it could extract the oil and save the marine environment.

The environment is widely considered to be an ‘essential interest of the State’. 87 This is expressly found in the International Law Commission Report as an example of a ‘necessity of the State’. 88 There is also case law that supports this position. In the Gabcikovo-Nagymaros case the International Court of Justice found that an environmental catastrophe would be sufficient to found a ‘state of necessity’. 89 In that case, the court also found that Article 25 of the Draft Articles on State Responsibility of States for Internationally Wrongful Acts reflected customary international law. 90

An oil spill would constitute a ‘grave and imminent peril’. In the International Law Commission’s Report, the Commission considered the case of the Torrey Canyon. The Commission noted that the British Government did not seem to advance any legal basis for its actions other than that all other possible courses of action had failed. 91 Therefore the International Law Commission found that: 92

[E]ven if the shipowner had not abandoned the wreck and even if he had tried to oppose its destruction, the action taken by the British Government would have had to be recognized as internationally lawful because of a state of necessity.

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88 Ibid.
89 Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Judgment) [1997] ICJ Rep 92, [52]-[53].
90 The judgment considered the Draft Articles on State Responsibility art 33 that preceded the final text: Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Judgment) [1997] ICJ Rep 92, [52]-[53].
91 Ibid.
92 Ibid.
Furthermore, the International Law Commission opined that a ‘state of necessity’ could still be invoked in areas that were not covered by treaties.

The Federated States of Micronesia has similarly done everything that it reasonably can. Chuuk State has tried to protect the wrecks so they do not corrode further. The Federated States of Micronesia invited Japan to remove the oil. Given that the consequences for the Federated States of Micronesia are great and the detriment to Japan seems slight, this would seem to be exactly the type of circumstance for which the ‘state of necessity’ provision exists. Therefore, the Federated States of Micronesia should invoke a state of necessity and breach their international obligations with Japan, if necessary, to avoid this imminent peril.

3 Feasibility

3.1 Removing the Oil

The oil may be able to be removed from the ships through a process known as hot-tapping.\(^93\) Hot-tapping involves drilling small holes into the tanks and heating the oil with a steam lance to make it more viscous; the oil is then removed.\(^94\) This is not a process that can remove all of the oil but it can remove a significant part of it, dramatically reducing the impact when the remaining oil is released into the lagoon.\(^95\) Hot-tapping has been employed to remove oil from at least two sunken warships, the USS *Mississinewa* and the German heavy cruiser *Blücher*.

The *USS Mississinewa* was an oil tanker with the United States Third Fleet during World War II. On 20 November 1944 the tanker was attacked by a suicide submarine and sank inside the Ulithi Lagoon in what is now Yap State, Federated States of Micronesia.\(^96\) The wreck lay undiscovered until 2001. In August 2001, a typhoon damaged the *USS Mississinewa* causing it to leak oil. In two months it leaked between 70 000 and 90 000 litres of oil and caused a ‘State of Emergency’ to be declared.\(^97\) The President of the Federated States of Micronesia requested the assistance of the United States to deal with the leak.\(^98\) The United States’ Chief of Naval Operations specifically authorised and funded a team to plug the leak and to remove approximately 4300 gallons of oil from the ship using hot-tapping.\(^99\) Another crew returned in January 2003 to remove 1.8 million gallons of oil.\(^100\) The United States Navy sold the recovered oil in Singapore to offset the cost of the oil removal operations.\(^101\) The operation cost USD 5 million dollars.\(^102\)

The removal of the oil from the *USS Mississinewa* demonstrates two factors. First, the salvage of oil from the *USS Mississinewa* shows that action can be swiftly taken if both the flag and coastal States are willing to cooperate. The second factor learnt from the American salvage is that the oil in the sunken warships can be salvaged and sold at a marketable rate. Another pertinent case in which the oil may have been sold is the case of the *Blücher*.\(^103\)

The *Blücher* was a German heavy cruiser assigned to lead the invasion of Oslo during World War II.\(^104\) The *Blücher* was noticed by the Norwegian’s and was sunk in the Dronhok Sound by shore-based batteries and torpedoes.\(^105\) Oil leaks from World War II wrecks in the early 1990s led the Norwegian Pollution Control Authority to conduct a comprehensive study of the wrecks and the risks they posed to the environment.\(^106\) The

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\(^93\) Australian Broadcasting Corporation, above n 9, (Ian MacLeod).
\(^94\) Ibid.
\(^95\) Idaas, above n 11, 735.
\(^97\) Ibid 176.
\(^98\) Ibid.
\(^100\) Ibid 1-6.
\(^101\) Ibid 5-5.
\(^103\) There is anecdotal evidence that the oil from the *Blücher* was sold but I have been unable to verify this from any reliable source written in English.
\(^106\) Idaas, above n 11, 733.
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*Blücher* was one of the wrecks that posed the greatest threat to the environment and was therefore one of the first to have its tanks emptied. The Norwegian Pollution Control Authority hoped to remove approximately 1560 tons of oil from the ship.\(^{107}\) The operation cost more than USD 7 million dollars.\(^{108}\)

Of course, the fact that the oil was removed from each vessel does not of itself prove that the extraction was lawful. The autonomous nature of the Norwegian wreck program, and the lack of any mention of negotiation with the German government also indicate that the removal of oil from the *Blücher* was not dependant upon the consent of the German government.\(^{109}\) It seems most likely that these operations were undertaken under provisions similar to those found in Article 5 of the *International Convention on Salvage, 1989*.\(^{110}\) Article 5 of the *International Convention on Salvage, 1989* provides that the convention will not interfere with the ability of public authorities to conduct salvage programs.\(^{111}\) Norway is not a party to the *International Convention on Salvage, 1989* and therefore its experience may prove to be instructive for the Federated States of Micronesia.

### 3.2 Payment Options

One of the most significant barriers to preventing this catastrophe is the Federated States of Micronesia’s limited capacity to pay for the removal operation. The Federated States of Micronesia’s economy is one of the weakest in the world. In 2012, the Federated States of Micronesia’s Gross Domestic Product was only USD 327 million.\(^{112}\) This made it the sixth smallest economy of the 190 countries surveyed by the World Bank.\(^{113}\) This means that the Federated States of Micronesia cannot pay a commercial party to extract the oil from the wrecks. Instead, the Federated States of Micronesia has two options: first, it could request a salvor to remove the oil (‘sale option’), or; second, it could sell or assign the rights to the oil in exchange for its removal (‘sale option’).

#### 3.2.1 Salvaging the Oil

As noted above, neither the *1910 International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea and Protocol of Signature* or the *International Convention on Salvage, 1989* permit the salvage of warships.\(^{114}\) However, the Federated States of Micronesia is not a party to either convention. What law should then be used to fill the gap? As salvage law differs from State to State, the most applicable law would be the principles of salvage law as applied in the Federated States of Micronesia.

Where a ship or its cargo is in a place of danger, a salvor may attempt to salvage that property. If the salvor obtains a ‘useful result’ the salvor is entitled to a salvage reward.\(^{115}\) A salvage reward is secured by a maritime lien against the salved property. To ensure that the lien can be satisfied, the salvor may seek to arrest the vessel. In the Federated States of Micronesia, an arrest application involves the National Police serving notices on the property and with the owner of the property or the owner’s agent.\(^{116}\) This provides the owner with notice and gives them the opportunity to defend the action.

In this case, there are many problems facing a prospective salvor. First, as noted above, the salvage conventions do not apply to warships. Second, the Supreme Court of the Federated States of Micronesia has been quite clear that Title 19 of the *Federated States of Micronesia Code* does not permit a maritime lien against ‘any government vessel engaged in non-commercial service’.\(^{117}\) Where a foreign government owns the vessel, the law of the Federated States of Micronesia states that:\(^{118}\)

\(^{107}\) Ibid 735.

\(^{108}\) Forrest, above n 102.

\(^{109}\) Despite searches I was unable to find anything written in English that would confirm or deny this position: Idaas, above n 11, 733.


\(^{112}\) World Bank, above n 1.

\(^{113}\) The Federated States of Micronesia was ranked 185\(^{11}\) of 190 economies. It is interesting to note that five of the bottom six economies are in the Micronesian archipelago (Federated States of Micronesia, Palau, Marshall Islands, Kiribati and Tuvalu): Ibid.


\(^{115}\) 19 FSM § 918(1).

\(^{116}\) *FSM Supplemental Rules for Certain Admiralty and Maritime Claims*, r. E(4)(b).

\(^{117}\) *M/V Caroline Voyager*, 15 FSM Intrm. 97 (Pon. 2007), 70.

\(^{118}\) 19 FSM § 927 (emphasis added).
by any legal process of, nor any proceeding in rem against, non-commercial cargoes owned by a government and entitled, at the time of the salvage operations, to sovereign immunity under generally accepted and recognized principles of international law.

This means that the ship and its cargo cannot be arrested unless the ‘government of that nation consents’. There can also be no action in rem against the cargo if, at the time of the salvage operation, the cargo is entitled to sovereign immunity.

As noted above, sovereign immunity is a plea of non-justiciability before the courts of another sovereign State.119 As a plea of immunity, it is possible to waive that immunity. Where a foreign government has notice of the arrest and fails to turn up to make its plea that the court does not have jurisdiction, can the failure to exercise the plea be taken as tacit consent to the exercise of jurisdiction by the court?

It is more likely than not that the above question will be resolved in the negative. Title 19 Chapter 9 of the Federated States of Micronesia Code that regulates ‘Wreck and Salvage’ states that the provisions of the chapter do not apply to ‘craft of defense forces or other non-commercial vessels entitled to sovereign immunity under generally recognised principles of international law, unless the flag states decide otherwise’.120

Any successful argument will therefore need to demonstrate to the court that the ships are not entitled to ‘sovereign immunity under generally recognised principles of international law’. An argument invoking a doctrine of necessity may be used to defeat the claim to sovereign immunity.

Even if the Court arrested the ship, modern salvage law may make it difficult to make such an operation feasible. The ceiling for a salvage reward is one hundred per cent of the salvaged property.121 However, no one presently knows how much oil could potentially be recovered. The amount of oil held within the ships could be ascertained by an acoustic survey, the method used by the Norwegian Pollution Control Authority to assess the extent of their potential liability.122 Therefore, it is not possible to estimate whether any prospective salvage venture would be able to cover the cost of its operations. It is also not possible for the salvor to recover special compensation for minimising damage to the environment as the International Convention on Salvage, 1989 does not apply.123 However, the market devised contractual replacement for Article 14, the Special Compensation Protection & Indemnity Clause (SCOPIC) may be applicable if it was included in the relevant salvage contract.

3.2.2 The Sale Option

Under a sale option, the Federated States of Micronesia may be able to sell their rights to the oil to a third party in exchange for its recovery. The benefit of the sale option is that the recovering party could deal with the oil as they chose. This would be beneficial to the recovering party because it would mean that they could sell the oil on the open market to subsidise the cost of the recovery operation rather than trying to enforce a salvage reward by ordering judicial sale of the salvaged property. There are reports that the oil recovered from the USS Mississinewa124 and the Blücher125 were sold. It may also be more beneficial to the Federated States of Micronesia as they may be able to obtain some financial benefit from selling the oil. However, given the cost of any recovery effort, the amount obtained may be limited.

The sale option is available on one of two bases. The first is that the ability to deal with the oil, after its removal, falls within the ambit of the claim of necessity that invalidates sovereign immunity. Any recovery operation must, somehow, be paid for. As established above, the ‘state of necessity’ doctrine allows a State not to conform with an international obligation owed to another State. In this case, Article 236 of the United Nations Convention on the Law of the Sea and Japanese sovereign immunity need to be impaired for the recovery operation to take place at all. Therefore, if the essential State interest can only be protected if the operation is able be funded, I would argue that the sale of the oil should be considered to be a necessary part of protecting the marine environment. If the funding is necessary to ensure removal of the oil, its removal and sale should be

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119 Fox, above n 48, 9.
120 19 FSM § 901(2).
122 Idaas, above n 11, 734.
123 International Convention on Salvage, 1989, 1953 UNTS 193, art 14; 19 FSM § 901 also precludes 19 FSM § 920.
124 Supervisor of Salvage and Diving, above n 99, 5-5.
125 There is anecdotal evidence that the oil from the Blücher was sold but I have been unable to verify this from any reliable source written in English.
considered one act rather than two. The sale option could also be exercised if diplomatic negotiations come to fruition and Japan abandons or fails to assert a claim of sovereign immunity.

4 Conclusion

As the wrecks corrode further, the Federated States of Micronesia must examine its options to mitigate the risk of an oil spill. Failure to do so is likely to end in considerable environmental and economic damage to Chuuk State and the Federated States of Micronesia more generally. There are sound economic and diplomatic reasons for the Federated States of Micronesia to avoid offending Japan. Japan pays the Federated States of Micronesia a considerable sum each year to extensively fish in its Exclusive Economic Zone. The most recent and reliable evidence from the early 2000s, places Japan’s contribution at 75% of the Federated States of Micronesia’s fishing revenue. However, that cannot be allowed to overshadow the risk to the marine environment.

The place of sunken warships in international law as objects of sovereign immunity complicates the task of removing the oil. The exclusion of warships from the salvage conventions and the prohibition on the salvage of warships without the consent of the flag State in the national law of the Federated States of Micronesia makes the task no easier. However, where the potential for damage is so great, legal solutions must be available.

In considering this case and the location of the vessels within the State’s internal waters, a case can be made that the Federated States of Micronesia could intervene to prevent damage to the marine environment of its territory ‘in the exercise of their sovereignty’ under Article 221 of the United Nations Convention on the Law of the Sea. Alternatively, given the extensive detriment that may befall the Federated States of Micronesia, they would be well within their rights to invoke a ‘state of necessity’ under Article 25 of the Draft Articles on State Responsibility of States for Internationally Wrongful Acts. The environment is considered to be an ‘essential State interest’ and the Federated States of Micronesia has done everything else that it can reasonably do to prevent a major spill. The doctrine of necessity would seem to be available in international law for the very circumstances in which the Federated States of Micronesia now finds itself. The right should be exercised if there is a possibility that a spill could be avoided.

The ultimate question on the feasibility of any removal operation will be determined by the state of the vessels themselves. As noted above, the rate of corrosion increases with time. The vessels have now been on the bottom for 70 years. It is likely that there is still time to mount a salvage operation before the hulls become too fragile to puncture. However, if nothing is done and the hulls become too fragile to puncture, there may even more troubled times ahead for this archipelagic nation that already suffers disadvantage.

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126 This is only true though if the sale is necessary and no other method can be found.
131 Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Judgment) [1997] ICJ Rep 92, [52]-[53].
THE MARITIME PERFORMING PARTY AND THE SCOPE OF THE ROTTERDAM RULES

Nicholas Bond*

1 Introduction

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (hereinafter the ‘Rotterdam Rules’ or the ‘Rules’)¹ would, if adopted, significantly change the liability regime surrounding the international carriage of goods by sea.

The Rules seek to harmonise and modernise the law surrounding the international carriage of goods by sea.² For the first time in an international carriage convention, the Rules allow for modern developments such as volume contracts³ and electronic transport records.⁴ They establish detailed rules of liability, with a clearly shifting burden of proof.⁵ They modernise the permitted exemptions from liability.⁶ Significantly, the Rules may even apply inland.⁷ Arguably the most far-reaching development, however, relates to an even more fundamental issue: who will the Rules apply to?

Previous international maritime conventions, such as New Zealand’s current liability regime (the ‘Hague-Visby Rules’),⁸ have focused primarily on carriers. The Rotterdam Rules go further, by introducing the ‘maritime performing party’ (‘MPP’) concept. MPPs are parties which take on certain of the carrier’s obligations during the port-to-port leg of the carriage. For example, a stevedore which undertakes the carrier’s obligation to load or unload the vessel would be an MPP. Previous conventions have been silent on the liability of such parties. Under the Rules, these MPPs take on the carrier’s liabilities.⁹ They also take on the carrier’s defences and limits of liability.¹⁰

The Rules have been slow to gather the 20 ratifications required to enter into force (at present only Spain, Togo and the Republic of Congo have ratified).¹¹ The United States has, however, taken some steps towards ratification.¹² There is reason to believe that once the United States ratifies the Rules, other nations will follow.¹³ It is therefore worthwhile to examine the nature of the MPP concept, how it is intended to improve the scope of the Rules, and whether it succeeds.

2 Overview of the MPP Concept

The MPP under the Rotterdam Rules is a subcategory of ‘performing party’ (‘PP’). Essentially, a PP is a person other than the contracting ‘carrier’ who undertakes components of the carrier’s obligations under the carriage

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³ Rotterdam Rules preamble.

⁴ Ibid art 80.

⁵ Ibid art 8.

⁶ Ibid art 17.


⁸ Rotterdam Rules art 12(1).


¹⁰ Rotterdam Rules 19(1).

¹¹ Ibid arts 4(1), 19(1).


contract. An MPP is a PP to the extent that it acts within the port-to-port segment (‘maritime leg’) of the carriage.

This geographic distinction is significant because (as noted) the Rotterdam Rules may apply beyond the maritime leg. The Rules extend obligations to the carrier from the place of receipt to the place of delivery under the contract of carriage. Either receipt or delivery may be inland. The total contract of carriage may therefore cover several legs: an ‘inland leg’ from the place of receipt to the port of loading, a maritime leg from arrival at the port of loading to departure from the port of discharge, and a second inland leg from the port of discharge to the place of delivery. Where the carrier subcontracts any of its obligations on an inland legs, the party which undertakes them will be a PP but not an MPP. Only parties which undertake the carrier’s obligations on the maritime leg will be MPPs.

For example, a freight forwarder (acting as a principal) might contract with a shipper to carry milk powder from Hawera to Shanghai. The freight forwarder arranges for KiwiRail to carry the goods from Hawera to Port Taranaki, and for a shipowner to carry the goods to Shanghai.

In this scenario the freight forwarder is the ‘carrier’, even though it does not physically perform any of the carriage itself. It entered into a contract of carriage with the shipper. KiwiRail is a PP, but not an MPP. It carries the goods from the place of receipt to the port, but takes no part in the maritime leg. The shipowner is an MPP. It carries the goods during the maritime leg. The stevedores and others involved in loading and handling the goods at Port Taranaki are also MPPs. They load and handle the goods during the maritime leg.

Whether a party is the carrier, a PP, or an MPP will determine the scope of its potential liability under the Rules. The carrier, under the Rules, is liable to the cargo interest over the entire carriage period for loss, damage or delay. It is liable for breaches caused by PPs (including MPPs). If KiwiRail or the shipowner damaged the goods, the freight forwarder (as ‘carrier’) would be liable to the cargo interest.

The Rules also impose joint and several liability on MPPs. As it has received the goods in a Contracting State (New Zealand), the shipowner would be liable under the Rules for any damage, loss or delay caused in the maritime leg while it had custody of the goods or was performing an activity under the carriage contract. PPs which are not MPPs have no liability under the Rules. KiwiRail would have no liability under the Rules for any damage, loss or delay that it caused. A cargo interest that wished to pursue KiwiRail would need to rely on another cause of action outside the Rules.

Liabilities and obligations are coupled with defences and limits to liability under the Rules. Carriers and MPPs may raise the defences contained in the Rules against any action, whether founded in contract, tort, or otherwise whereas PPs may not.

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14 Rotterdam Rules art 1(6):
(a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, storage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.
(b) ‘Performing party’ does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

Note that the text as originally passed omitted ‘keeping’ from the obligations listed in art 1(6)(a). This was apparently a drafting oversight, and was subsequently corrected in January 2013: see Michael F Sturley, ‘Amending the Rotterdam Rules: technical corrections to the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea’ (2012) 18 Journal of International Maritime Law 423.

15 Rotterdam Rules art 1(7): “Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

16 Ibid art 1(1).
17 Ibid arts 5(1), 12(1).
19 Rotterdam Rules art 1(5): “Carrier” means a person that enters into a contract of carriage with a shipper.
20 Ibid art 17(1).
21 Ibid art 18(a).
22 Ibid art 20.
23 Ibid art 19(1).
24 In New Zealand any claim would need to be under the Carriage of Goods Act 1979 (NZ) (‘COGA’), as s 6 of that Act excludes liability under any other cause of action (eg. in tort or bailment). However, as an ‘actual carrier’, Kiwirail would have no direct liability to the cargo interest under COGA in most circumstances: see COGA s 11(1).
25 Rotterdam Rules art 4(1).
3 Background – The Scope of Existing Conventions

The MPP concept reflects the drafters’ dissatisfaction with the scope of existing international maritime carriage conventions.26 Those conventions have arguably struggled to keep up with developments in international carriage of goods since the introduction of the Hague Rules in 1924.

3.1 The Hague/Hague-Visby Rules

The Hague Rules envisage carriage as a transaction solely between two parties: the shipper and the carrier. The ‘carrier’ includes the shipowner or charterer who enters into a contract with a shipper.27 The Hague Rules impose obligations on the carrier,28 and provide defences for the carrier.29 However, their scope does not extend to any other party which a carrier might engage to handle the goods. A stevedore subcontracted to unload the carrier’s vessel, for instance, would have neither obligations nor defences under the Hague Rules.

The Hague Rules were amended by the Visby Protocol in 1968. Article 4 bis makes only a modest extension to the scope of the Hague Rules. It extends the defences and limitations of liability to a “servant or agent of the carrier”. It does not, however, extend any of the obligations or liabilities of the carrier. Nor does it apply if the servant or agent in question is an ‘independent contractor’. Consequently, as with the original Hague Rules, subcontractors fall outside this limited scope.

This is a significant omission. Subcontracting is an integral part of international shipping, especially in multimodal carriage contracts. Not only do carriers subcontract functions such as loading and unloading goods to independent stevedores, they frequently subcontract some (or all) of the carriage itself.30 Restricting the scope of coverage to a notional single ‘carrier’ fails to reflect industry practice and can cause difficulties.

In The Starsin, for instance, much rested on whether the shipowner (which had physically carried the goods, but which was arguably not named as carrier in the bill of lading) was the ‘carrier’.31 The House of Lords unanimously concluded that it was not. They considered that the (insolvent) charterer was the ‘carrier’. The cargo owners therefore had no claim in contract against the shipowner under the Hague-Visby Rules.32 The MPP concept in the Rotterdam Rules is intended to account for such a situation. Under the Rotterdam Rules, even if the shipowner in the Starsin was not the contracting ‘carrier’, it would still have been an MPP. It was performing the carrier’s obligations during the maritime leg and so would have been liable to the cargo owners.

The Hague and Hague-Visby Rules also physically limit their scope from ‘tackle-to-tackle’ (i.e. from when the goods are loaded aboard the ship until they are discharged).33 Again, this fails to reflect the reality of modern carriage, in which the carrier or its subcontractors will take charge of the goods well before loading. Modern carriage, particularly container carriage, is frequently ‘door-to-door’ (i.e. from the consignor’s place of business to the consignee’s place of business).34 Failing to account for this can cause problems.

In Fletcher Panel Industries Ltd v Ports of Auckland Ltd, for instance, the plaintiffs (whose goods should have been loaded aboard a ship but were instead left behind on the wharf) found their claim time-barred by New Zealand’s domestic Carriage of Goods Act 1979 (NZ) (COGA).35 The Hague-Visby Rules did not apply because the goods had not yet reached the ship’s hook.

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27 Hague Rules art 1(a).
28 Ibid art 3.
29 Ibid art 4.
32 Further claims based in tort turned on whether the shipowners’ liability was excluded by a Himalaya clause, and on whether title over the goods had passed to the cargo owners at the time they were damaged. Neither of these issues would have been relevant to a claim made under the Hague-Visby Rules.
33 Hague Rules art 1(e).
34 UNCITRAL, Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]: General remarks on the sphere of application of the draft instrument UN Doc A/CN9/WGIII/ WP29 (31 January 2003), [25] (‘General Remarks’): ‘Of the 60 million containers carried worldwide in the year 2000, container liner operators carried 50% of them on a multimodal basis.’
34 [1992] 2 NZLR 231 (‘Fletcher Panel’).
The Rotterdam Rules are intended to have a broader geographic scope. They apply to the carrier from the place of receipt to the place of delivery. Consequently, in door-to-door multimodal transport, the Rules will apply door-to-door. MPPs are covered from the arrival of the goods at the port of loading to their departure from the port of discharge (i.e. ‘port-to-port’). In a scenario like Fletcher Panel, the defendant port terminal operator would be an MPP. The Rotterdam Rules would apply.

3.2 Himalaya Clauses

Maritime carriage contracts frequently seek to circumvent some of the limitations of the Hague/Hague-Visby Rules by means of a Himalaya clause, which extends the carrier’s defences and limits of liability to its subcontractors. Himalaya clauses sit uncomfortably with the doctrine of privity of contract. To give effect to them, the Courts have required the creation of a notional contract between the shipper and the subcontractor through the agency of the carrier. While this approach is arguably artificial, Himalaya clauses have nevertheless been widely accepted as a ‘def’ commercial response to the shortcomings of the Hague/Hague-Visby Rules. They prevent cargo interests from sidestepping convention limits of liability within the Hague/Hague-Visby Rules by pursuing claims against parties other than the ‘carrier’.

While it may be ‘def’, this use of contractual terms to extend the Hague/Hague-Visby Rules to subcontractors creates a peculiar asymmetry. While carriers may extend their defences and limits of liabilities to their subcontractors, they do not extend their convention obligations. A cargo interest wishing to make a claim against a subcontractor must find another basis for its claim, such as tort or baillment.

Furthermore, Himalaya clauses are frequently coupled with extremely broad exclusions of subcontractors’ liability, and with ‘circular indemnity clauses’. A circular indemnity clause provides that the cargo interest will not claim against the carrier’s subcontractors, and that if they nevertheless do so, they will indemnify the carrier for the consequences. For example, if a cargo interest were to successfully claim against a negligent stevedore, that stevedore might in turn be entitled to recover the judgment sum from the carrier. Were it to do so, the carrier would then be entitled under the circular indemnity clause to recover that sum from the cargo interest. In other words, the ‘circular’ effect is that the cargo interest might ultimately find itself required to meet its own claim.

Therefore, while Himalaya clauses plug a gap in the scope of the Hague/Hague-Visby Rules, they are an unbalanced solution. They do not put subcontractors on the same legal footing as the carrier. Instead, they are intended to discourage suit against subcontractors in almost all situations. This position clearly suits the

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36 Rotterdam Rules art 12(1).
37 However, the parties may contract for a narrower scope, provided it is not less than tackle-to-tackle: Rotterdam Rules art 12(3).
38 See, eg. cl 15(b) of the Conlinebill 2000: ‘...exemption from liability, limitation, condition and liberty herein contained and every right, defence, and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled, shall also be available and shall extend to protect every agent of the Carrier acting as aforesaid.’
39 The four-part test is laid out by Lord Reid in Scrutons Ltd v Midland Silicones Ltd [1962] AC 446, 474 (‘Midland Silicones’): first, the bill of lading must make it clear that the stevedore is intended to be protected by the provisions which limit liability; second, the bill of lading must make it clear that the carrier is contracting as the stevedore’s agent with respect to applying those provisions to the stevedore; third, the carrier has authority from the stevedore to do so; fourth, any difficulties about consideration moving from the stevedore are overcome. While Lord Reid’s test was not met in Midland Silicones, it was subsequently used to uphold a Himalaya clause in New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd (‘The Eurymedon’) [1975] AC 154, where the majority found that consideration was satisfied by the stevedore performing its services to discharge the goods.
40 The Starlin [2004] 1 AC 715, 744 [34] (Lord Bingham). See Frank Smeelamanks, The Maritime Performing Party in the Rotterdam Rules 2009’ [2010] European Journal of Commercial Contract Law 72, [17] fn 49 for a list of cases upholding Himalaya clauses in various common law and civil jurisdictions. Interestingly, while Himalaya clauses are in theory valid under New Zealand law, they may be effectively defunct: COGA will apply to parties handling the goods before loading and after discharge. COGA s 8(7) requires that to substitute liability on ‘declared terms’ (i.e. the Hague-Visby Rules) for COGA’s default ‘limited risk’ liability, a contract must be ‘freely negotiated between the parties’. This will rarely be true of Himalaya clauses, which are usually standard-form. See: Paul Myburgh, ‘National Summary New Zealand’ in William Tetley, Marine Cargo Claims (International Shipping Publications, 4th ed, 2008) 2527, 2531. In any case, there will usually be little reason for a subcontractor to seek to have a Himalaya clause upheld: COGA’s package-based limit of liability will generally be lower than the Hague-Visby Rules’ per-kilo limit.
43 See, eg. cl 15(a) of the Conlinebill 2000: ‘It is hereby expressly agreed that no servant or agent of the Carrier (which for the purpose of this Clause includes every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Merchant under this Contract of carriage for any loss, 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.’
44 See, eg. cl 15(e) of the Conlinebill 2000: ‘The Merchant undertakes that no claim shall be made against any servant or agent of the Carrier and, if any claim should nevertheless be made, to indemnify the Carrier against all consequences thereof.’
interests of subcontractors very well. It may also benefit carriers (who may be able to negotiate a better rate with their subcontractors), but it reduces cargo interests’ options. Consequently, the carrier’s subcontractors take all the benefits of the Hague/Hague-Visby Rules but none of the burdens.

The Rotterdam Rules are intended to adopt a more balanced approach. MPPs are granted Himalaya-style protection: they receive the carrier’s defences and limits of liability. However, this protection comes at a cost: MPPs also take on the carrier’s obligations and liabilities. The result is that those parties who take the benefits of the Rules also take the burdens.

3.3 The Hamburg Rules


Firstly, the Hamburg Rules bring subcontractors into the convention regime. The Hamburg Rules allow cargo interests to claim against both ‘carriers’ and ‘actual carriers’. The ‘carrier’, as in the Rotterdam Rules, is the person who concludes a carriage contract with a shipper. An ‘actual carrier’ is a person to whom the carrier entrusts ‘the performance of the carriage of the goods, or part of the carriage’. It bears the responsibilities of the carrier for the part of the carriage which it performs. Under the Hamburg Rules, a shipowner in a Starsin-type scenario would be an actual carrier if it was not the carrier.

Secondly, the Hamburg Rules extend inland, albeit to a much more limited extent than the Rotterdam Rules. The carrier (or actual carrier) is responsible for the goods during the period in which it is in charge of the goods at the port of loading, during the carriage and at the port of discharge. This port-to-port application is a significant improvement on the tackle-to-tackle boundaries of the Hague/Hague-Visby Rules, although it falls well short of the carrier’s potential door-to-door liability in the Rotterdam Rules. It is essentially the same port-to-port scope as the MPP provisions in the Rotterdam Rules.

The MPP concept in the Rotterdam Rules is closely related to the ‘actual carrier’ in the Hamburg Rules. Both refer to parties other than the carrier who perform the carrier’s obligations during the maritime leg. However, the MPP is designed to be broader in application than the actual carrier. The drafters of the Rotterdam Rules disliked the terminology of the Hamburg Rules. They considered that the term ‘actual carrier’ suggests that the contracting carrier is not ‘actually’ a carrier. Furthermore, it was thought to imply that only those parties who ‘carry’ the goods were included, as opposed to those who (for instance) store or handle the goods.

It is not entirely clear whether the actual carrier definition in the Hamburg Rules encompasses parties who handle the goods but do not ‘carry’ them. It refers only to those entrusted with ‘carriage’. A broad reading might extend this to any obligation undertaken under a contract of carriage. However, it is uncertain whether this reading was intended by the Hamburg drafters. The Rotterdam Rules are intended to address this problem by explicitly defining a PP (and therefore an MPP) as undertaking obligations with respect to receipt, loading, handling, care and so on. They are intended to clearly apply to activities other than ‘carriage’.

The Rotterdam Rules are also intended to better accommodate modern door-to-door carriage. MPPs under the Rotterdam Rules will only be liable within the same port-to-port scope as the Hague actual carrier, but the

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46 Rotterdam Rules arts 4(1), 19(1).
47 Ibid 19(1).
50 Hamburg Rules art 1(1).
51 Ibid art 1(2).
52 Ibid art 10(2).
53 Ibid art 4(1).
57 Sturley, ‘Scope of coverage’, above n 54, 149 fn 80.
carrier’s liability is wider. It will be liable for the entire duration of the carriage – potentially extending beyond the port-to-port liability of the Hamburg carrier.58

3.4 The OTT Convention

The Hamburg Rules are not the only attempt to update the international maritime carriage liability regime prior to Rotterdam. One proposed convention that would cover many of the same parties as the MPP provisions in the Rotterdam Rules is the 1991 United Nations Convention on the Liabilities of Operators of Transport Terminals in International Trade (the ‘OTT Convention’).

That convention deals with ‘operators of transport terminals’ (‘OTTs’). An OTT is a person who undertakes to take in charge goods involved in international carriage, in order to perform or procure transport-related services with respect to those goods in an area under his control or in which he has a right of access or use.59 This definition might include parties engaged in loading, unloading, stowing or storing goods being transported. Unlike the Hague/Hague, Hamburg, or Rotterdam Rules, the OTT Convention applies even if the goods are not carried by sea.

The scope of the OTT Convention stands out from other carriage conventions. Unusually, it does not deal with carriers. It explicitly excludes them.60 It deals exclusively with OTTs. The intention is to fill the gaps within existing carriage regimes, rather than to create a whole new carriage regime with a greater scope.61

This unique scope leads to an interesting result. Maritime carriage conventions have traditionally defined their scope by reference to a party’s relationship to a single notional ‘carrier’.62 This approach is arguably outdated, and ill-suited to dealing with the arrangements which may arise in multimodal transport. For instance, a shipper (perhaps acting through a freight forwarder) might arrange for goods to be carried by sea from Auckland to Sydney, stored in a warehouse, then carried by road to Canberra. The warehouse operator has no relationship with either the sea or road carrier. It has been engaged directly by the shipper. It would not be captured by a carrier-centric convention. It does, however, take the goods in charge. It would be captured by the OTT Convention.

The OTT Convention has proven to be a political failure. It has not gathered the five ratifications needed to enter into force. Its limited, ‘gap-filling’ scope is partly to blame. For a start, it may not fill all gaps. The OTT Convention’s period of responsibility63 will usually align comfortably with the similarly-worded provisions in the Hamburg Rules,64 but it may continue to leave gaps between OTTs and carriers operating under the Hague/Hague-Visby Rules.65

Furthermore, the OTT Convention’s limited scope means that its limits of liability sit uneasily alongside the limits in the conventions it is intended to supplement. International maritime carriage conventions have historically provided for much lower limits of liability than road and rail conventions.66 To accommodate this, the OTT Convention provides for a lower limit of liability if the goods have been handed to the OTT immediately after carriage by sea or inland waterway, or if the OTT hands the goods over for such carriage.67 Nevertheless, this lower ‘maritime’ limit of liability of 2.75 SDR/kg exceeds not only the per-kg limit in the

58 Rotterdam Rules art 12(1): ‘The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.’
60 Ibid art 1(a).
62 The Hague-Visby Rules, for instance, grant defences to a ‘servant or agent of the carrier’. An actual carrier in the Hamburg Rules is a person to whom performance ‘has been entrusted by the carrier’.
63 OTT Convention art 3.
64 Hamburg Rules art 4.
65 This was a key criticism from the United States: see UNCITRAL, Liability of operators of transport terminals: compilation of comments by Governments and international organizations on the draft Convention on the Liability of Operators of Transport Terminals in International Trade: report of the Secretary General UN Doc A/CN9/319 (1990), 157 (‘OTT Compilation of Comments’). This concern may be exaggerated, however. A gap should only arise in the (rare) case where a carrier loads or unloads the goods itself: see Roger Harris, ‘Liability Equals Responsibility: Canadian Marine Transport Terminal Operators in the 1990s’ (1993) 21 Canadian Business Law Journal 229, 248.
67 OTT Convention art 6(1)(b). The ‘maritime’ limit of liability of SDR 2.75/kg compares to a limit of SDR 8.33/kg otherwise. ‘SDR’ is the Special Drawing Right as defined by the International Monetary Fund.
SDR protocol to the Hague-Visby Rules (2 SDR/kg), but also the Hamburg Rules’ 2.5 SDR/kg limit.\(^68\) Unsurprisingly, this provoked criticism that terminal operators should not be faced with higher limits of liability than maritime carriers.\(^69\)

The Rotterdam Rules, by contrast, provide for an even higher per-kg limit of liability than the OTT Convention (3 SDR/kg), but this limit applies equally to both carriers and MPPs. Unlike the OTT Convention, the Rules’ broader scope provides a level playing field and ensures that all gaps are filled.

3.5 The Multimodal Convention

Another international carriage convention which has not gathered the support required to enter into force is the 1980 Multimodal Convention.\(^70\) That convention would govern multimodal transport only.\(^71\) It imposes obligations and liabilities only upon ‘multimodal transport operators’ (‘MTOs’), who have concluded a multimodal transport contract. Unimodal carriers (including subcontractors of an MTO) are left to be governed by existing unimodal regimes such as the Hague/Hague-Visby Rules.

This multimodal focus naturally leads to a broader geographic scope than is found in the unimodal Hague/Hague-Visby or Hamburg Rules. The Multimodal Convention is not limited to the maritime leg. It would cover the entire carriage (potentially door-to-door).\(^72\) It is designed as a ‘uniform’ regime which would govern the entire multimodal carriage even where another regime might also apply.

This door-to-door scope is generally beneficial for cargo interests, who will benefit from a single, predictable liability regime governing the entire contract of carriage.\(^73\) However it raises the prospect of a conflict with the unimodal conventions which the Multimodal Convention is intended to supplement.\(^74\) The MTO is especially vulnerable to discrepancies between conventions. An MTO subject to the Multimodal Convention’s liability regime may be unable to pursue adequate recourse against a subcontractor subject to a lower limit of liability under a unimodal regime. This is among the reasons why the Multimodal Convention has received little support among major shipping nations.\(^75\)

The prospect of a conflict of conventions is reduced in the Rotterdam Rules. For a start, the Rules bring both the multimodal ‘carrier’ and its unimodal MPPs into the same convention during the maritime leg. Both will face the same limits of liability. Outside the maritime leg, the drafters of the Rules favoured a ‘limited network’ approach over the ‘uniform’ approach of the Multimodal Convention. Where another international convention applies, the Rules will give way.\(^76\) This will go some way to ensuring that carriers’ liabilities are aligned with those of their unimodal subcontractors.\(^77\)

A further quirk of the Multimodal Convention is that while it imposes obligations and liabilities only upon MTOs, it extends the MTO’s defences and limits of liability to its subcontractors (as under a Himalaya clause).\(^78\) This ‘Himalaya’ protection produces a windfall for the MTO’s subcontractors. Many of these subcontractors will already fall within the scope of a unimodal convention. Passing on the defences of the Multimodal Convention to them does not put them on the same footing as the MTO. It merely allows them to pick and choose whichever liability regime minimises their burden in the instant case.\(^79\)

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\(^68\) \textit{Hamburg Rules} art 6(1)(a).

\(^69\) UN\textit{CITRAL, OTT Compilation of Comments}, above n 65, at 153, 154, 156, 158, 164, 169.


\(^71\) Multimodal Convention art 2.

\(^72\) Multimodal Convention art 14(1).

\(^73\) Ralph De Wit, \textit{Multimodal Transport: Carrier Liability and Documentation} (Lloyd’s of London Press, 1995) [2.162].


\(^77\) Although carriers may still face a shortfall in recourse against subcontractors governed by a mandatory domestic regime such as COGA.

\(^78\) Multimodal Convention art 20(2).

\(^79\) Diamond, above n 74, 62.
3.6 The Rotterdam Rules: An Opportunity

The drafters of the Rotterdam Rules were well aware of the flaws in the scope of previous international maritime carriage conventions. The Rules were an opportunity to improve upon them. They were an opportunity to:

1. Take into account subcontractors and other parties involved in the carriage other than a single, notional ‘carrier’;
2. Take into account the reality of door-to-door, multimodal carriage;
3. Provide a clear and certain scope of application; and
4. Be sufficiently politically acceptable to achieve ratification by major shipping nations.\(^{80}\)

The mechanism which the drafters developed to achieve this is the MPP.

4 The Maritime Performing Party Concept

The MPP, as already noted, is a subcategory of PP. It is a PP to the extent that it acts within the maritime leg.

The drafters originally intended that the Rules should apply the carrier’s obligations to all PPs, irrespective of whether they acted within the maritime leg or not. The CMI’s final Draft Instrument on Transport Law (which became UNCITRAL’s Preliminary Draft Instrument on the Carriage of Goods by Sea) made no mention of MPPs. It dealt only with PPs, which bore the carrier’s responsibilities and liabilities (and enjoyed their rights and immunities) regardless of whether they performed their services within the maritime leg or not.\(^{81}\)

The decision to restrict PP liability to the maritime leg arose from broader discussions as to the scope of the Rules. The original CMI drafts contemplated that the convention should apply door-to-door, in order to reflect practice in the container trade.\(^{82}\) However, a number of members of the UNCITRAL Working Group objected to door-to-door coverage. They preferred a port-to-port scope.\(^{83}\)

Those members argued that a port-to-port convention would be more politically acceptable.\(^{84}\) Many delegates were reluctant to overturn domestic inland carriage regimes that favoured either the carrier or cargo interests.\(^{85}\) Further pressure was applied by industry groups (notably the Association of American Railroads (AAR)), which lobbied heavily against overturning ‘existing and well-established’ systems of liability.\(^{86}\)

The port-to-port proponents also argued that a door-to-door convention might be difficult to reconcile with existing inland carriage regimes. Inland PPs would be subject to different regimes depending on whether or not door-to-door carriage involved a sea leg.\(^{87}\) Some inland PPs might not even be aware that their carriage formed one leg of an international carriage contract governed by the Rules. They might find themselves subject to liabilities beyond what they were insured for.\(^{88}\) In New Zealand, for instance, an inland PP which thought it was subject to the package limitation of COGA might be rudely surprised to discover it was subject to the weight limitation of the Rules.\(^{89}\)

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\(^{80}\) These themes were acknowledged by the drafters as intertwined: Sturley ‘The Treatment of Performing Parties’, above n 30, 230-232.

\(^{81}\) CMI, ‘CMI Draft Instrument on Transport Law’ in CMI Yearbook 2001 (CMI, 2001) 532, art 6.3.1 (‘CMI Final Draft’).


\(^{84}\) Ibid [28]; UNCITRAL, Preliminary draft instrument on the carriage of goods [by sea]: Proposal by Canada UN Doc A/CN9/WGII/WP23 (21 August 2002), [4].


\(^{86}\) UNCITRAL, Preparation of a draft instrument on the carriage of goods [by sea]: Compilation of replies to a questionnaire on door-to-door transport and additional comments by States and international organizations on the scope of the draft instrument UN Doc A/CN9/WGII/WP28 (31 January 2003), 32 (‘Compilation of Replies on Scope’). Sturley suggests that the AAR may have been concerned more with minimising the liability of its members than with promoting good public policy; its position sits uncomfortably with its criticism elsewhere of the lack of uniformity in the existing US liability regime: see Michael F Sturley, ‘Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo’ (2009) 40 Journal of Maritime Law and Commerce 1, 38–39.

\(^{87}\) UNCITRAL, 9th Session Report, above n 83, [29].

\(^{88}\) van der Ziel, above n 85, 309.

\(^{89}\) The COGA package limitation was recently increased from NZD 1500 to NZD 2000 by the Carriage of Goods Amendment Act 2013 (NZ). The new COGA package limitation is actually higher than the package limitation in the Rules (SDR 875/unit = NZD 1578.80/unit as
In response, it was argued that a port-to-port convention was simply not ambitious enough to be worthwhile. It would do little to further harmonise transport law. It would merely be ‘…a further convention of restricted application in an area of international law which is overburdened with competing legislation, creating further disharmony.’ Such a convention, it was submitted, would be unlikely to gather much support.

The final solution was put forward by the United States as part of a package of proposals developed in consultation with affected industries. This package was characterised as a necessary commercial compromise between competing interests. The United States’ solution was to use the MPP concept to split the scope of the Rules. The Rules would provide a door-to-door liability regime between contracting parties (i.e. the carrier and the cargo interests). They would also provide a substantive port-to-port liability regime for MPPs. However, they would neither create new causes of action nor pre-empt existing causes of action against inland PPs. Nor would they interfere with inland PPs’ existing rights to rely on a Himalaya clause.

This is a practical solution. It neatly retains the desired door-to-door coverage, while addressing the problem of imposing maritime liability on unaware inland carriers. The contracting carrier and cargo interests are aware of the maritime element. They will be liable under the Rules for the entire carriage (except insofar as a competing international convention applies). They can insure themselves accordingly. Any other party involved in the carriage will only be liable under the Rules if they perform their activities in the maritime leg. This makes sense, as parties performing their activities in the maritime leg should expect to be governed by a maritime liability regime, and will not typically be subject to a competing inland liability regime.

4.1 Alternative Approaches

Could the drafters have done better? One alternative approach was suggested by Italy. Like the United States’ approach, the Italian proposal would have applied the Rules door-to-door with respect to the carrier. Unlike the United States’ approach, the Rules would not have given way to other international regimes. The Rules would effectively have operated as a uniform multimodal convention with respect to the carrier.

Under the Italian proposal, ‘performing parties’ would have been subject to the Rules, but would be distinguished from ‘performing carriers’ (i.e. parties engaged by the carrier to perform part of the carriage). Performing carriers would be subject to whatever law would otherwise apply to their contract with the carrier (be it an international convention or domestic law such as COGA).

This approach has the virtue of giving the cargo interest a more predictable cause of action against the carrier. The Rules will not be ousted by any other international convention. However, a uniform approach runs into the same difficulties that have stifled the adoption of the Multimodal Convention, such as the possibility of a shortfall in recourse for carriers. Furthermore the distinction between ‘performing parties’ and ‘performing carriers’ seems hard to justify. If an inland performing carrier should be subject to domestic law, why should an inland warehouse operator be subject to the Rules? The United States’ approach, based on the MPP, draws a more principled boundary.

Another possible approach – which the drafters did not consider – is suggested by the OTT Convention. The OTT Convention provides that to constitute ‘international carriage’ (and therefore to fall within the scope of the convention), the place of departure and place of destination must be identified as being in two different states.
when the goods are taken in charge by the terminal operator.\footnote{OTT Convention art 1(c). See also UNCITRAL, \textit{Report of the Working Group on International Contract Practices on the work of its tenth session} UN Doc A/CN9/287 (1987), [131]–[135].} If the international nature of the carriage is not identified, the OTT Convention will not apply.

This approach could have been adopted in the Rotterdam Rules. The drafters could have made inland PPs liable under the Rules provided the international maritime nature of the carriage was sufficiently identified to them. This would have allowed them to retain a door-to-door scope for PPs while avoiding the ‘unaware inland carrier’ problem. However, it would probably have created more problems than it solved, raising difficult questions of fact as to whether the international maritime nature of the carriage was evident. The United States’ approach avoids this by – in effect – assuming that MPPs will always be sufficiently aware of the nature of the carriage, and inland PPs unaware.

Sturley – almost apologetically – describes the philosophy of the Rules as ‘pragmatic’.\footnote{Sturley, ‘Transport Law for the twenty-first century’, above n 26, 24.} He writes that proposals making ‘perfect sense on a theoretical or logical level’ were abandoned in the face of industry opposition.\footnote{Ibid 25.} He cites the failure to cover inland PPs as an example of this.

In fact, the drafters have nothing to apologise for. The split door-to-door/port-to-port scope is an effective solution to a genuine problem, and still provides for a more ambitious liability regime than ever before. MPPs are liable within the same port-to-port scope as the Hamburg Rules, but carriers are liable for the entire carriage. Furthermore, the Rules go beyond even the Multimodal Convention by imposing obligations – not just defences – on the carrier’s subcontractors.

\section*{5 The PP/MPP Definitions: ‘Performing Party’}

In order to achieve the desired scope, the Rules include lengthy definitions for both the PP and MPP. These definitions indicate the drafters’ intention to achieve a very specific coverage, driven by their policy concerns. Each element of the definition is significant. Some aspects of the definitions were controversial. Others are potentially problematic. There remains uncertainty in their scope of application.

Article 1(6) of the Rotterdam Rules provides a definition of a ‘Performing party’:

\begin{enumerate}
\item “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.
\item “Performing party” does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.
\end{enumerate}

\subsection*{5.1 ‘Performing party’ means a person other than the carrier…}

A carrier in the Rules is a person who enters into a contract of carriage with a shipper.\footnote{Rotterdam Rules art 1(5).} A PP, by contrast, has no direct contractual relationship with the shipper.

The PP concept cuts across contractual niceties. It encompasses parties who play a role in performing the contract of carriage, even though they are not themselves a party to that contract. Like the ‘actual carrier’ definition in the Hamburg Rules, the PP concept is intended to embrace subcontractors of the contracting ‘carrier’. These parties have no direct contractual relationship with the shipper, who may not even be aware of their existence. Nevertheless, they are involved in performing the contract of carriage.

If a shipowner in a \textit{Starsin}-type scenario carries (and damages) the goods, there is little utility in debating whether it did so as a contracting ‘carrier’ or not. The drafters were correct to recognise that a modern international maritime carriage convention must extend its reach to parties beyond the contracting ‘carrier’.

\begin{thebibliography}
\item Ibid 25.
\item Rotterdam Rules art 1(5).
\end{thebibliography}
5.2 …that performs or undertakes to perform…

The reach of the PP definition extends to include not just parties who ‘perform’ the carrier’s obligations, but also those who ‘undertake to perform’. This ensures the coverage of parties who undertake to physically perform part of the carriage but who completely fail to do so, such as a stevedore who undertakes to load goods but in fact leaves them sitting on the wharf (as in Fletcher Panel).

It also extends to cover parties that never intended to physically perform any obligations themselves. Just as a carrier may subcontract to other parties, those parties may further subcontract some or all of the physical performance. By covering parties that ‘undertake’ to perform, the PP definition ensures that every party in the contractual chain remains a PP, even if they do not physically perform any of the carriage themselves. The decision to cover such ‘paper carriers’ was the subject of considerable controversy.

The early CMI drafts defined the PP as a person who performs, undertakes to perform, or ‘proceries to be performed’ the carrier’s responsibilities. This conveys even more clearly the intention to cover every party in the contractual chain. However, it was vigorously opposed by the International Federation of Freight Forwarders Associations (FIATA). FIATA argued that the cargo interest should have an action only against the carrier and the party which physically carries the goods. No action should lie against paper carriers. The definition was accordingly narrowed to cover only those who ‘physically perform or fail to perform’.

This decision was later reversed by the UNCITRAL Working Group. Proponents of the reversal argued that including those who undertake to perform would protect the interests of cargo claimants, by giving them a direct cause of action against every party in a contractual chain. It would ensure that cargo claimants would be able to directly pursue whichever PP was at fault without requiring a multiplicity of actions to work through the contractual chain.

In fact, the definition does more than that. Cargo claimants will not be limited to suing just those who are directly at fault. Article 19(3) provides that MPPs are liable for the acts and omissions of their subcontractors. By including those who ‘undertake’ to perform in the PP (and therefore MPP) definition, the Rules allow cargo claimants to pursue a paper carrier anywhere in the contractual chain, even if it is not directly at fault. Opponents characterised this as creating causes of action against parties which were not the ‘proper’ defendants.

This criticism can be rebutted. A paper carrier – even if it is not directly at fault – may still be a ‘proper’ defendant. Allowing the cargo interest to sue anyone in the contractual chain provides them with the broadest possible options for pursuing a remedy when the parties directly at fault are insolvent or cannot be identified. It provides a more satisfactory allocation of risk.

Suppose, for instance, that a paper carrier engages two subcontractors to perform the obligations it has undertaken: a stevedore to load goods, and a shipowner to carry them to a destination port. If the goods are damaged but it is unclear which subcontractor has damaged them (i.e. the damage is not ‘localised’), the cargo interest will still have a remedy against the paper carrier. The paper carrier, not the cargo interest, will shoulder the liability for the subcontractors it has engaged.

A remedy against a paper carrier will often be unnecessary in such a case. The cargo interest will also have a remedy against the original contracting carrier (who is liable for the entire duration of the carriage). But where the original contracting carrier is insolvent or based in an inconvenient jurisdiction, the cargo interest may prefer a remedy against the paper carrier. They should have it. As Sturley, Fujita and van der Ziel put it: ‘[i]f a party

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305 Michael F Sturley, Tomotaka Fujita and Gertjan van der Ziel, The Rotterdam Rules: the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Sweet & Maxwell, 2010), [5.147].
308 CMI, CMI Final Draft, above n 81, art 1.17.
310 Ibid [36].
311 Rotterdam Rules art 19(3); ‘A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier’s obligations under the contract of carriage…’
312 UNCITRAL, 12th Session Report, above n 109, [37].
undertakes to perform any of the carrier’s obligations, it should not escape its promise simply by passing the duty to another person.113

5.3 …any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, keeping, carriage, care, unloading or delivery of the goods…

Only certain, specific, listed obligations are included in the PP definition. Receipt, loading, handling and so on are the obligations which are imposed on the carrier by Article 13(1) of the Rules. The drafters considered them to be the ‘core’ obligations of the carrier relating to the goods.114

While a carrier may undertake further non-core obligations under a contract of carriage, a subcontractor which performs only those additional obligations will not be a PP. For instance, as part of a contract of carriage, a carrier might undertake to obtain a phytosanitary certificate for a cargo of logs being carried from Tauranga to Tokyo. A subcontracted party whose only role was to obtain that certificate would not be a PP.

The list of specific obligations in the PP definition arguably provides for a clearer field of application than the Hamburg Rules’ ‘actual carrier’ definition. However, there is still room for disagreement as to exactly what the listed obligations extend to.

The drafters appear to have had in mind a restrictive reading of the listed obligations. Parties they had in mind as PPs included ocean carriers, stevedores and terminal operators. Parties which they did not consider would be PPs included a security company guarding a container yard, an intermediary preparing documents for the carrier, or a ship yard which repairs a vessel.115 The underlying idea seems to be that a party will be a PP if it performs activities directly related to cargo-handling and carriage.116

There is room for the courts to apply a more liberal interpretation. Making a vessel seaworthy could arguably be considered one of the carrier’s obligations with respect to ‘carriage’ or ‘care’ of the goods. Issuing a bill of lading or other documents might be considered one of the carrier’s obligations with respect to ‘receipt’ of the goods. Guarding a container yard could be construed as ‘care’.

It would be unfortunate if the courts were to overextend the scope of the listed obligations. It would be better to adopt a more restrained interpretation. PPs who are found to be MPPs will face direct liability under the Rules. Parties such as shipyards or security guards are only loosely connected to the contract of carriage. A shipyard may foresee that if it fails to make a ship seaworthy, its future cargo may be damaged. However, it has no way of knowing the nature of that cargo or its value. It would be very difficult to secure appropriate insurance. It is better that the risk lies with parties who can adequately insure against it: the carrier (up to the Rules’ limit of liability), and the cargo interest (for any shortfall).

5.4 …to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

A person is only a PP to the extent that they act (directly or indirectly) at the carrier’s request or under the carrier’s supervision or control.

This element of the definition is an improvement on previous maritime conventions. By including parties who act under the carrier’s ‘supervision and control’ (even if they may not act at its ‘request’), the definition reinforces that it is the functions which a party performs which are significant, not the underlying contractual arrangements. It avoids dwelling on contractual formalities, or whether the party is a ‘servant or agent’ of the carrier.117

This approach is admirable. It ensures that the Rules will provide a more reliable cause of action for cargo claimants. It furthers the Rules’ objective of enhancing uniformity in cargo claims. However, it does not go as far as it could have. Not all parties which handle the goods during the course of carriage will be included. A

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113 Sturley, Fujita, and van der Ziel, above n 105, [5.147].
115 Ibid.
116 Smeele, above n 40, [38].
117 CMI, CMI October 2000 Draft, above n 55, 123.
customs authority would not be a PP, for instance: while it handles the goods, it acts neither at the carrier’s request, nor under its supervision or control.\textsuperscript{118}

This might lead to some awkward results: a cargo interest would have a claim under the Rules against a private warehouse operator who negligently allowed goods to be stolen, but would have no convention-based claim against a customs authority which made the same mistake. It would need to pursue its claim outside the Rules.

This result is necessary because the Rules impose vicarious liability on the carrier for the acts and omissions of PPs.\textsuperscript{119} It is reasonable to impose such liability on the carrier for those parties which it has requested perform the carriage or which it has some control over, but it would be unreasonable to impose liability against them for the acts or omissions of a party which they neither chose nor control.

Nevertheless, it is a missed opportunity. There would be value in giving cargo interests a direct convention-based claim against parties who handle the goods but who do not answer to the carrier. This could have been achieved by redrafting the PP definition to focus on a party’s relationship to the goods (as in the OTT Convention). The vicarious liability provision could in turn have been redrafted to specify that the carrier was liable only for PPs acting at its request, or under its control or supervision.

### 5.5 “Performing party” does not include any person that is retained, directly or indirectly, by a shipper… instead of by the carrier.

Loading, handling, stowing and unloading the goods are usually the carrier’s obligations.\textsuperscript{120} However, the Rules expressly provide that these functions may instead be performed by the shipper (or by the ‘documentary shipper’,\textsuperscript{121} ‘controlling party’\textsuperscript{122} or consignee), rather than the carrier.\textsuperscript{123} This would be the case under a FIOST (‘free in, out, stowed and trimmed’) clause, for instance.

This element of the PP definition clarifies that in such cases, a subcontractor employed by the shipper is not a PP (and therefore cannot be an MPP). A result of this is that under the Rotterdam Rules, as with previous maritime carriage conventions, a stevedore who damages cargo while loading will enjoy the Rules’ defences and limits of liability if he is retained by the carrier, but not if he is retained by the shipper.

This result is again a consequence of imposing vicarious liability on the carrier for the actions of PPs. It reflects the view that has developed in the English courts with respect to FIOST clauses under the Hague-Visby Rules.\textsuperscript{124} A carrier should not be liable for the negligence of stevedores retained by the cargo owners. While it is reasonable that they be liable for the actions of those PPs they have themselves chosen, it is unreasonable that they be held liable for the actions of people selected by the shipper.\textsuperscript{125}

**It would be an odd state of things if one were to hold that a shipowner who has no contract whatever with the stevedore, and who cannot say to the stevedore: You have broken your contract with me, and therefore I will not have you any longer in my vessel; and who has no control over what is to be paid to the stevedore, should be responsible for the failure of the stevedore to do his duty.**

Excluding parties retained by the shipper from the PP definition avoids unfairly imposing vicarious liability on the carrier. But it is another missed opportunity. Bringing all parties retained by the shipper into a maritime carriage convention would have further unified the liability regime. It is not clear why a ‘carrier’ retained by the shipper should enjoy the defences and limits of liability granted by the Rules, while other parties retained by the shipper should not.

\textsuperscript{118} Starley, Fujita and van der Ziel, above n 105, [5.150].

\textsuperscript{119} Rotterdam Rules art 18(a).

\textsuperscript{120} Ibid 13(1).

\textsuperscript{121} Ibid 1(9): ‘a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.’

\textsuperscript{122} Ibid 1(13): ‘the person that pursuant to article 51 is entitled to exercise the right of control.’ Depending on the circumstances, this may be the shipper, consignee, documentary shipper or another designated person, or the holder of a negotiable transport document (electronic or otherwise).

\textsuperscript{123} Ibid 13(2).

\textsuperscript{124} See, eg., Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc (‘The Jordan II’) [2005] 1 WLR 1363. The English approach is not shared universally. In the United States, for instance, the carrier’s liability for negligence in loading and stowing cargo (under the Carriage of Goods by Sea Act) has been held to be non-delegable: see Associated Metals & Minerals Corp 978 F 2d 47 (2nd Cir, 1992), 51.

Again, an OTT-style definition of PP and a redrafted vicarious liability provision could have included parties retained by the shipper within the Rules, while ensuring that carriers were not unfairly held liable for their actions.

6 The PP/MPP Definitions: ‘Maritime Performing Party’

The MPP is defined in Article 1(7) of the Rules:

‘Maritime performing party’ means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

6.1 ‘Maritime performing party’ means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations...

The MPP definition raises an immediate question. A PP will be an MPP to the extent that it performs or undertakes to perform ‘any of the carrier’s obligations’ during the maritime leg. The question is which obligations are meant to be encompassed by this definition?

One possibility is that the drafters intended to limit the obligations to those listed in the PP definition (receipt, loading, handling, and so on). An MPP is, after all, a subcategory of PP. On that reading, a PP which performs additional obligations other than those listed in the PP definition would be an MPP only while performing the listed obligations. It would not be an MPP (and would therefore not be subject to direct liability) while performing its additional obligations. An alternative reading is that the drafters meant ‘any of the carrier’s obligations’ to be read literally, covering any obligation whether listed in the PP definition or not. An MPP which performs additional obligations will be an MPP for the whole of its work.

The two readings may lead to significantly different consequences. One notable obligation which the carrier undertakes, but which is not listed in the PP definition, is the obligation to exercise due diligence to make and keep the ship seaworthy. Atamer points out that if the limited reading is correct, it would produce a ‘surprising’ result. Shipowners will frequently be MPPs, not carriers, under the Rules (where, for instance, a freight forwarder acts as the carrier). On the limited reading, such shipowners would not be MPPs (and would therefore bear no liability under the Rules) with respect to any failure to keep their ships seaworthy.

Atamer nevertheless considers that the drafting history of the rules indicates that the limited reading was intended. Early drafts of the PP always referred only to the carrier’s ‘core’ obligations. When the MPP concept was subsequently introduced, the drafters’ concern was with altering the geographic scope (i.e. the maritime leg), not the functional scope. By choosing to define the MPP as “a PP”, Atamer argues, the drafters made it clear that only those persons involved with the listed obligations would qualify as an MPP.

Atamer’s conclusion can be questioned, however. He is correct to say that only parties who undertake the listed obligations can be PPs (and therefore MPPs), but it does not follow that parties who undertake those obligations will then cease to be MPPs while they are engaged in other activities. Quite the opposite is true: the drafting history indicates that they will continue to be MPPs. The MPP definition must be read in the context of the obligations and liabilities that the Rules impose upon the MPP.

While early drafts of the PP definition referred only to the ‘core’ obligations, the liability provisions did not limit the PP’s liability to those obligations. If a party undertook a listed responsibility, it would be a PP.

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126 Rotterdam Rules art 14(а).
127 Kerim Atamer, ‘Construction Problems in the Rotterdam Rules regarding the Performing and Maritime Performing Parties’ (2010) 41 Journal of Maritime Law and Commerce 469, 493. This is a case where the detailed drafting of the Rules has increased ambiguity rather than reduced it. Under the simpler drafting of the Hamburg Rules, there would be no doubt that an ‘actual carrier’ shipowner is responsible for the seaworthiness of its vessel. Article 1(2) designates it an ‘actual carrier’ because it has been entrusted with carriage, and art 10(2) therefore subjects it to all of the responsibilities of the carrier.
129 See, eg, UNCITRAL, Draft instrument on the carriage of goods [wholly or partly] [by sea] UN Doc A/CN9/WGIII/WP32 (4 September 2003), art 1(c) (‘UNCITRAL 2003 Draft’): ‘Performing party’ means a person other than the carrier that physically performs [or undertakes to perform] any of the carrier’s responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage. The term ‘performing party’ does not include any person who is retained by a shipper or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee.
by virtue of being a PP, it would be subject to all the responsibilities and liabilities of the carrier – not just the listed ‘core’ obligations.\(^{130}\)

The drafters subsequently introduced the MPP concept to place a geographical limit on which parties would bear the carrier’s obligations and liabilities. Parties outside the maritime leg would no longer bear any liability, but there is nothing to indicate that the drafters intended to change the position for parties operating within the maritime leg. Just as in the early drafts, parties who meet the MPP definition should be liable for whatever obligations they undertake. A literal reading of the MPP definition would achieve this.

On this interpretation, a shipyard which undertakes to make a vessel seaworthy is not an MPP. It has not met the threshold requirement that it be a PP, as it (probably) has not undertaken any of the obligations listed in the PP definition. By contrast, a shipowner which undertakes to make and keep its vessel seaworthy is an MPP. It has undertaken to ‘carry’ the goods, so it is a PP. It will therefore continue to be an MPP with respect to all the obligations it undertakes, including seaworthiness. This interpretation of the definition is supported by the drafting history, and avoids ‘surprising’ results. It is the interpretation that the courts should adopt.

6.2 …during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship.

While the drafters were correct to limit the direct liability of MPPs to the maritime leg, this decision does cause some potential difficulties. The drafters considered that the maritime leg would be better defined using a ‘geographical’ approach rather than a ‘functional’ approach.\(^{131}\) A PP is an MPP not by virtue of the activities it performs, but by virtue of where it performs them: between arrival at the port of loading and departure from the port of discharge. Unfortunately this raises the awkward question of what constitutes a ‘port’. As in the Hamburg Rules, the drafters chose not to define ‘port’ in the Rules. Instead they left the matter to be determined under national law, due to differing views on what constituted a ‘port’ in different geographic conditions.\(^{132}\)

Leaving such questions to national law creates uncertainty in the Rules. Atamer notes that in the past there has been considerable litigation over when a ship has ‘arrived at the port’ in the context of laytime and demurrage under a voyage charterparty.\(^{133}\) He predicts that the Rules may well see similar litigation arise in bill of lading cases as to where the ‘landside’ limits of the port are to be drawn.

The position in New Zealand remains to be determined. Is a port limited simply to the terminal immediately adjacent to the water? Could a nearby container yard or cargo consolidation area be included? What about an ‘inland port’ freight hub which delivers cargo directly to the seaside terminal, such as Port of Tauranga’s Metroport, or Port of Auckland’s Wiri freight terminal? What about public roads connecting two terminals of a single port, such as the Tauranga Harbour Bridge between Port of Tauranga’s Sulphur Point terminal and its Mount Maunganui terminal?

In New Zealand, s 2 of the Maritime Transport Act 1994 (NZ) provides that for the purposes of that Act, “port”:\(^{134}\)

- (a) Means an area of land and water intended or designed to be used either wholly or partly for the berthing, departure, movement, and servicing of ships; and
- (b) includes any place in or at which ships can or do (i) load or unload goods: (ii) embark or disembark passengers; and
- (c) also includes a harbour

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\(^{130}\) See, eg. Ibid, art 15(1) (variant 1): A performing party is subject to the responsibilities and liabilities imposed on the carrier under this instrument, and entitled to the carrier’s rights and immunities provided by this instrument during the period in which it has custody of the goods; and

\(^{131}\) UNCITRAL, 12th Session Report, above n 109, [30].


\(^{133}\) Atamer, above n 127, 483–484.

\(^{134}\) The Act was recently amended by the Maritime Transport Amendment Act 2013 (NZ). Prior to that amendment, s 2 provided simply that ‘port includes place and harbour’.

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The New Zealand courts might well choose to apply that definition to the Rules in order to achieve consistency with other areas of maritime activity. However that definition was not drafted with cargo claims in mind, much less the Rules. It will not resolve all ambiguity. Inland areas such as Metroport are probably excluded. But the definition leaves room for doubt with respect to areas closer to the water.

The inclusion of a carefully drafted definition of ‘port’ would probably have improved the Rules. Domestic law will frequently be ambiguous on the point. It is to be regretted that fundamental disagreement has made such a definition politically impossible. The consequences may be significant, particularly with respect to the liability of ‘inland carriers’.

6.3 An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

While the MPP definition is primarily geographic, it contains a functional exception. The Rules generally provide that a PP will be an MPP to the extent that it performs its services in the maritime leg. A PP which performs some of the carrier’s obligations within the maritime leg and some outside it will be an MPP only with respect to its activities within the maritime leg. However, the position is different for “inland carriers”. An inland carrier will be an MPP only if it performs its services exclusively within a port area. This is intended to encompass parties such as forklift drivers whose only role is to carry goods from one wharf to another. An inland carrier which performs any services outside the port area, by contrast, will not be an MPP even with respect to any services which it performs within the port area.

The goal of the provision is to ensure that inland carriers such as railroads and truckers will almost never fall within the MPP definition. During the drafting process both the AAR (through the United States delegation) and the International Road Transport Union (IRU) argued that their members should be excluded from the MPP definition altogether. The AAR argued that its members’ role is virtually always to move goods into or out of a port rather than to move goods within the port. Its activities within the port are merely incidental.

Excluding inland carriers from the MPP definition unless they perform their services exclusively within a port area makes sense. If the Rules do not apply to inland carriers door-to-door, then they should not apply at all. The overwhelming majority of most inland carriers’ service is non-maritime. It would unnecessarily complicate claims if an inland carrier was subject to different liability regimes depending on whether or not the goods were damaged in a port area.

In particular it would cause problems in cases where the damage cannot be localised. It might be apparent that goods were damaged by an inland carrier, but unclear exactly where that damage occurred. By ensuring that inland carriers who perform services outside the port area are not MPPs, the Rules ensure that a single (domestic) liability regime will apply to them, no matter where the damage occurs. This should simplify claims. There are, however, some downsides to excluding inland carriers from the MPP definition.

A particular problem is that ‘inland carrier’ is not defined in the Rules. It is clear that ‘carrier’ here is not being used in the sense used throughout the rest of the Rules (i.e. a person who contracts with a shipper). ‘Carrier’ here is a functional term describing the nature of the services being performed: an “inland carrier” is a person who physically carries goods inland. This functional language is used to distinguish these ‘inland carriers’ from other PPs located inland who the drafters considered should nevertheless be MPPs (such as stowage planners).

This distinction is not as clear as the drafters might have hoped. ‘Inland carrier’ obviously includes single-service carriers such as truckers and railroads. It obviously excludes single-service stowage planners and the


136 UNCITRAL, Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: Proposal of the United States of America on the definition of “maritime performing party” UN Doc A/CN9/WGIII/ WP84 (28 February 2007) (“USA Proposal on “MPP”’); UNCITRAL Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: Proposals by the International Road Transport Union (IRU) concerning articles 1(7), 28 and 90 of the draft convention UN Doc A/CN9/WGIII/ WP90 (27 March 2007).

137 UNCITRAL, USA Proposal on “MPP”, above n 136, [2].

138 UNCITRAL, 19th Session Report, above n 132, [145]. A stowage planner may perform its services in an office outside port, but it nevertheless undertakes an obligation of the carrier on the maritime leg.
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like, but the drafters do not appear to have considered how the term might apply to multi-service logistics providers which provide both inland carriage services and other non-carriage services.

For instance, a company might provide stevedoring and marshalling services within a port area, plus warehousing outside the port area, and transport to that warehouse. Transportation to the warehouse would constitute ‘inland carriage’, and would not be exclusively within the port area. Would such a company be considered an ‘inland carrier’? If so, would it therefore be excluded from being an MPP with respect to its stevedoring operations? What about its marshalling services (i.e. intra-port carriage)?

What if that company did not undertake to arrange transport to its warehouse? It would ‘carry’ the goods exclusively intra-port, but its storage at the warehouse would constitute a ‘service’ not performed exclusively within the port area. Would it then be excluded from being an MPP?

On a broad reading of the provision, any PP that physically carried goods inland would be an ‘inland carrier’, irrespective of its other activities. If it performed any services outside the port area (carriage or otherwise), it would be excluded as an MPP with respect to all of its activities.

This interpretation conforms to the literal wording of the Rules, and would be certain, but it goes too far. It would certainly capture the kinds of single-service carriers that the drafters had in mind. However, it would also seem to extend the exception to parties for whom inland carriage is only an incidental part of their activities (e.g. transporting goods to a warehouse across the street from the port). The situation is the reverse of that raised by the AAR. Why should a party which performs almost all its activities in port have its liability (and its defences) under the Rules ousted by incidental carriage activities outside the port?

A more restricted reading might hold that an ‘inland carrier’ was a person that solely undertook to perform carriage services. A person which undertook any non-carriage services would be an MPP with respect to all its services in port (including carriage), even if it undertook to carry goods outside the port area.

This reading goes too far in the other direction. While it would limit the exception to the single-service rail and road carriers which the drafters had in mind, it would fail to capture all of them. Such providers might find themselves outside the exception should they perform incidental non-carriage activities (e.g. warehousing goods overnight at a freight hub). On this restricted reading, performing such extra duties would mean that they were no longer “inland carriers”, even though the vast bulk of their work was inland carriage. This is clearly not what the drafters intended.

A similar but more flexible interpretation might hold that an ‘inland carrier’ was a person who preponderantly undertook to perform carriage services. This would be a better interpretation. It gets closer to what the drafters intended. It would capture all single-service carriers, and exclude merely incidental carriers. But it would also leave a lot of uncertainty in between. It is simply not clear what proportion of carriage-to-non-carriage services would classify a party as an ‘inland carrier’.

The best interpretation, however, is a functional split. A PP which undertakes to perform inland carriage services is an ‘inland carrier’, (and therefore excluded as an MPP) only while performing its carriage services. They would not be an inland carrier (and so could still be an MPP) while performing non-carriage services.

This ‘split’ interpretation sits a little uncomfortably with the wording of the provision. The provision refers to ‘inland carriers’ rather than e.g. ‘parties who undertake to carry goods inland’. The chosen wording suggests that a party either is or is not an ‘inland carrier’, not that it may be an inland carrier at some times but not at others. Furthermore the provision refers to the “services” provided by an inland carrier, rather than e.g. the ‘carriage’. Again, this suggests that the drafters intended to capture all services provided by parties designated as ‘inland carriers’. They probably intended that railways and truckers would not be MPPs even if they provided non-carriage services in port. On this preferred interpretation, it is submitted that they would be.

Nevertheless, the split interpretation best resolves the problem raised by the multi-service logistics provider: a problem which the drafters failed to recognise. Those parties will be excluded from the Rules to the extent that they act like the single-service carriers the drafters intended to exclude. They will fall within the Rules to the extent that they act like the port-service providers which the drafters intended to include.
7 The Liability/Defence Provisions

Determining whether a party falls within the MPP definition is important because MPPs potentially face direct liability to cargo interests under the Rules. They may also be entitled to the carrier’s defences and limits of liability. However, not all MPPs will necessarily fall within the scope of the liability and defence provisions.

The key MPP liability provision in the Rules is Article 19(1). Article 19(1) provides that an MPP shares the same obligations and liabilities as the carrier. It also shares the carrier’s defences and limits of liability. Like the actual carrier in the Hamburg Rules, the MPP takes ‘the bitter with the sweet’.

Article 19(1) applies provided that:

(a) The MPP has received, delivered, or performed its activities with respect to the goods in a Contracting State; and

(b) The loss was caused between the goods’ arrival at the port of loading and their departure from the port of discharge, while the MPP either had custody of the goods or was performing an activity contemplated by the contract of carriage.

The second of these conditions does little to alter the scope of application. It largely just restates the MPP definition. The first condition, however, appears to be a more real restriction on which MPPs will receive the carrier’s liabilities and defences. The carrier’s obligations and liabilities will be imposed on an MPP only if it receives, delivers, or performs its activities in a Contracting State. Similarly, only MPPs who receive, deliver, or perform their activities in a Contracting State will be entitled to the carrier’s defences and limits of liability. MPPs outside Contracting States will receive neither liabilities nor defences.

However, Article 19(1) is not the only provision in the Rules which deals with MPPs’ defences. When looking at the Rules as a whole, the position on MPPs outside Contracting States is not so clear. Article 4(1) also extends the carrier’s defences and limits of liability to MPPs. It specifies that these defences and limits apply to any proceedings ‘whether founded in contract, in tort, or otherwise’. It does not specify that those defences and limits will be available only to MPPs who receive/deliver/perform their activities in a Contracting State.

What is the correct position here? Will an MPP which performs its services in a non-Contracting State be entitled to the carrier’s defences and limits of liability, or not? If a stevedore in Australia, a non-Contracting State, negligently damaged goods while loading them on board a ship bound for New Zealand, a Contracting State, could that stevedore rely on the Rules’ limits of liability if it was sued in tort?

One possibility is that Article 4(1) simply means what it says. All MPPs are entitled to the Rules’ defences and limits of liability, irrespective of whether or not they act in a Contracting State. On that view, the extension of

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139 Article 19(1): ‘A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier’s defences and limits of liability as provided for in this convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place:

(i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship and either

(ii) while the maritime performing party had custody of the goods or

(iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.’

140 Starley, ‘The Treatment of Performing Parties’, above n 30, 235. This might be contrasted with the situation under the Hague and Hague-Visby Rules, where carriers pass only the “sweet” on to their subcontractors through Himalaya clauses.

141 The original text of art 19(1) contained an ambiguity which was subsequently corrected in January 2013. Article 19(1)(b) initially did not include the words ‘and either’ prior to requirement (ii). Without those words, the article could be interpreted as imposing the carrier’s liabilities on an MPP for damage occurring anywhere in the port-to-port segment, even while it was not participating in the carriage and had no custody of the goods. For instance, a stevedore which had loaded goods in Auckland could arguably have been liable for damage caused by a stevedore unloading those goods in Hong Kong. See Starley, ‘Amending the Rotterdam Rules’, above n 14, 427.

142 Rotterdam Rules art 4(1): ‘Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

(a) The carrier or a maritime performing party;

(b) The master, crew or any other person that performs services on board the ship; or

(c) Employees of the carrier or a maritime performing party.’
defences and limits of liability by Article 19(1) is simply redundant.\textsuperscript{143} This is plausible. It would not be the only redundancy in the Rules.\textsuperscript{144}

The alternative possibility is that Article 4(1) is impliedly limited by Article 19(1). Only MPPs in Contracting States will have the Rules’ defences and limits of liability. On balance, I consider that the drafting history of the Rules better supports this interpretation.

Article 4(1) was included in the earliest drafts of the Rules, under the heading ‘non-contractual claims’.\textsuperscript{145} Its function was seen throughout the drafting process as to ensure that the convention was not circumvented by a party taking a non-contractual claim.\textsuperscript{146} This purpose was seen as distinct from the provisions extending ‘Himalaya’ protection under Article 19.\textsuperscript{147}

By contrast, Article 19(1)(a) was a relatively late addition to the Rules. The drafters’ intention was that the Rules should not apply to MPPs without a ‘connecting factor’ to a Contracting State.\textsuperscript{148} An MPP which did not perform its duties in a Contracting State would not be subject to a direct cause of action under the Rules, but nor would it enjoy the same defences and limits of liability.\textsuperscript{149}

The drafters appear not to have noticed that by inserting this new condition they created an apparent inconsistency with Article 4. Their intention, however, had they turned their minds to it, would seem to be that the expansive language of Article 4 should be impliedly limited by the conditions in Article 19. MPPs in non-Contracting States who receive no liabilities should not receive defences. The bitter should be taken with the sweet.

There is a very real possibility that the courts might overlook this drafting history and extend the Rules’ defences to all MPPs. Nikaki takes this approach, for instance. She writes:\textsuperscript{150}

\begin{quote}
Other maritime parties, namely those that perform the carrier’s obligations in ports not located in a contracting state are afforded the protection of art.4.1 in any event, since, whilst they do not bear a carrier’s liability under the Rotterdam Rules, they are open to actions in tort or any other legal basis that may be available to the cargo owners under the applicable national law.
\end{quote}

It would be unfortunate if the courts were to adopt this approach. Nikaki correctly acknowledges that the defences and limits of liability in Article 19(1) ‘counterbalance’ the liabilities imposed under that section.\textsuperscript{151} However, her expansive interpretation of Article 4(1) upsets that balance. On her interpretation, MPPs in Contracting States would receive both liabilities and defences, while MPPs in non-Contracting States would receive the Rules’ defences but no corresponding liabilities. This would be contrary to the policy of the Rules. The drafters considered it would be inappropriate to impose liabilities on parties with no connection to a Contracting State. It would be just as inappropriate to grant defences to them.

Of course, in many cases it will not matter which approach is taken. Even where the Rules themselves do not extend the carrier’s defences and limits of liability, a carrier may do so by means of a Himalaya clause. Where such a clause is present, it may extend the scope of the Rules’ defences to MPPs in non-Contracting States even if Article 4(1) does not.

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\textsuperscript{144} In fact, art 4(1)(b) and 4(1)(c) are themselves arguably redundant, as the ‘master, crew or any other person that performs services on board the ship’ and ‘employees of the carrier or a maritime performing party’ will almost invariably be MPPs, and therefore covered by art 4(1)(a). See Sturley, Fujita and van der Ziel, above n 105, [5.191].

\textsuperscript{145} See, eg. CMI October 2000 Draft, above n 55, art 5.10; UNCITRAL, UNCITRAL Preliminary Draft Instrument, above n 114, art 6.

\textsuperscript{146} UNCITRAL, Report of Working Group III (Transport Law) on the work of its tenth session (Vienna, 16-20 September 2002) UN Doc A/CN9/525 (7 October 2002), [101] (‘10th Session Report’).


\textsuperscript{148} UNCITRAL, Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]: Proposal by Finland on scope of application, freedom of contract and related provisions UN Doc A/CN9/WGIII/WP61 (27 January 2006), [44].

\textsuperscript{149} UNCITRAL, 19th Session Report, above n 132, [83].

\textsuperscript{150} Nikaki, ‘The statutory Himalaya-type protection’, above n 143, 411.

\textsuperscript{151} Ibid.
8 Himalaya Clauses and the Rotterdam Rules

Articles 4 and 19 of the Rules have been described as extending a statutory ‘Himalaya’-type protection to MPPs, but this will not render Himalaya clauses redundant. They will continue to appear in carriage contracts. A comprehensively drafted Himalaya clause will extend the scope of the Rules’ defences to situations not covered by the Rules themselves.

For instance (as already noted) a Himalaya clause will extend the Rules’ defences and limits of liability to an MPP which performs its activities outside a Contracting State. While it may be inappropriate for an international convention to grant defences to parties with no connection to a Contracting State, there is nothing to prevent individual parties doing so as a matter of contract.

A Himalaya clause might also be used to protect PPs who are not MPPs (such as most inland carriers). Again, while the drafters considered that defences should flow with obligations, parties may choose to contract otherwise.

Furthermore, Articles 4 and 19 extend only Convention defences. A Himalaya clause could be used to extend any further contractual defences not provided for by the Rules.

8.1 Volume Contracts

There may also be scope to use a Himalaya clause to extend limits of liability under a volume contract. The ‘volume contract’ is an innovation in the Rotterdam Rules. It is a carriage contract ‘that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time’. A major shipper such as Fonterra, for instance, might use a volume contract to cover multiple shipments of milk powder.

Article 80(1) provides that ‘as between the carrier and the shipper’ a volume contract may derogate from almost any of the rights, obligations and liabilities imposed by the Rules. A volume contract might set a lower limit of liability than the Rules, or conceivably even exclude liability altogether.

Such derogation would apply between the carrier and shipper. It would also apply between the carrier and ‘any person other than the shipper’ (e.g. a consignee) provided that person was adequately informed and gave its express consent. However, nothing is said about the position as between the shipper and a person other than the carrier. Could a Himalaya clause be used to extend the carrier’s lower limit of liability to an MPP?

The drafters probably did not intend that it could. Article 80(1) refers only to the carrier, not the MPP. It may be contrasted with Article 81(a), which provides that a contract of carriage may exclude or limit the obligations or liability of ‘both the carrier and a maritime performing party’ if the goods are live animals. However, the wording of Article 80(1) still leaves some doubt. Whether a court is willing to apply a Himalaya clause in such circumstances may depend upon that court’s view of the legal basis for Himalaya protection generally.

At common law, the English courts’ view is that a valid Himalaya clause establishes a contract between a stevedore (for example) and the cargo interest, with the carrier acting as the stevedore’s agent. This approach is acknowledged to be an ‘artificial’ but ‘def’ method of complying with the doctrine of privity of contract. In the context of the Rules, it is difficult to see how an artificial contract constructed between an MPP and a shipper could be said to operate “as between the carrier and the shipper”. Consequently Article 80(1) would not excuse derogation from the MPP’s liabilities even exclude liability altogether.

Courts in the United States, by contrast, take a less strict position on privity of contract. They see no need to construct an artificial contract between MPP and shipper. Himalaya protection is conferred directly under the contract between the carrier and the shipper, under the ‘third party beneficiary’ rule. Under that rule, a

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153 Smeele, above n 40, [21].
154 Rotterdam Rules art 1(2).
155 Rotterdam Rules art 80(5).
157 The Starsin [2004] 1 AC 715, [34].
contractual promise (such as a promise to extend defences to a third party) may create a duty to the ‘intended beneficiary’, which that intended beneficiary may enforce.\textsuperscript{159} Civil law jurisdictions similarly understand the Himalaya clause as a stipulation for the benefit of a third party.\textsuperscript{160}

A United States court might conclude that the duty created by the Himalaya clause exists ‘as between’ the shipper and the MPP, and therefore that Article 80(1) does not apply. But they might alternatively conclude that that duty is created by a contract between the carrier and the shipper, and so operates ‘as between’ them. On the latter view, the Himalaya clause would be permitted to derogate from the Rules, granting an MPP lower limits of liability than the Rules provide.

The approach in New Zealand may turn on the construction of the specific clause. Under the \textit{Contracts (Privity) Act} 1982 (NZ), if a contract confers a benefit on a person who is not a party to it, that person may sue for the benefit as though they were a party.\textsuperscript{161} However, the person in question must be ‘designated by name, description, or reference to a class’.\textsuperscript{162} If the Himalaya clause can satisfy this requirement, then the courts might consider that it operates ‘as between’ the carrier and shipper, being contained in their contract. If so, it could extend the benefits of a volume contract to an MPP.

9 Practical Consequences

The Rules give cargo interests a direct cause of action against MPPs, but it remains to be seen to what extent they will use it. Certainly there is some concern that the Rules will enable a flood of cargo claims to be brought against terminal operators and other MPPs.

Neame, for instance, suggests that terminal operators at present are ill-equipped to deal with a multitude of claims from a large number of individual cargo claimants.\textsuperscript{163} Their systems and processes, he says, are designed for handling a small number of claims channelled through shipping lines. Similarly, Williams argues that ‘channelling’ claims in other areas of maritime activity has facilitated claims and minimised administration costs.\textsuperscript{164} He implies that allowing direct claims against MPPs will achieve the opposite.

These concerns may be overstated. In fact, while the Rules allow direct claims against MPPs, their practical effect may well be to channel disputes to the carrier.\textsuperscript{165} If recovery against MPPs is limited to the same levels as are imposed on the carrier, there will usually be little incentive to target them. The MPP’s liability is limited to the period during which it participated in performance or had custody of the goods. Showing that the damage occurred during a particular MPP’s period of responsibility will frequently be difficult without impractical, expensive inspection of the goods whenever the goods change hands.\textsuperscript{166} The carrier, by contrast, is liable under Article 17 for the entire duration of the carriage. Claiming against the carrier therefore avoids the difficulty of showing exactly where the damage occurred.

Of course there will still be cases where an MPP may be the preferred target, particularly where the cause of the damage is clear (goods dropped from a crane, for instance). A cargo interest may prefer to claim against an MPP in the same jurisdiction over a carrier in a foreign jurisdiction, or against an MPP which is solvent over a carrier which is not. Allowing claims under the Rules against MPPs in these cases will not likely increase costs. If anything, it may reduce them. Parties may be spared expensive foreign litigation, and cargo interests will have a uniform cause of action whether they are suing the carrier or an MPP.

PPs who are not MPPs will remain outside the Rules’ liability regime. It will often be more practical for a cargo interest to pursue a carrier under the Rules than to claim against a PP under e.g. tort or a domestic carriage

\textsuperscript{159} American Law Institute, \textit{Restatement (Second) of the Law of Contracts} (1981) §304.
\textsuperscript{160} Smeele, above n 40, [17] n 51.
\textsuperscript{161} \textit{Contracts (Privity) Act} 1982 (NZ) s 4, 8. The UK has passed similar legislation: the \textit{Contracts (Rights of Third Parties) Act} 1999 (UK) s 31.
\textsuperscript{162} \textit{Contracts (Privity) Act} 1982 (NZ) s 4.
\textsuperscript{163} Craig Neame, ‘What impact will the Rotterdam Rules have on shipowners?’ \textit{Brittania News} (online), July 2010 <www.brittaniapandi.com>, 14.
\textsuperscript{164} Richard Williams, ‘The Rotterdam Rules: Winners and Losers’ (2010) 16 \textit{Journal of International Maritime Law} 191, 209. A notable example of channelling claims in maritime law is the \textit{Convention on Limitation of Liability for Maritime Claims} (LLMC 1976), 1977, 1456 UNTS 221. Article 13(1) provides that where a shipowner constitutes a limitation fund in respect to a claim, a claimant is barred from exercising a right against any of the shipowner’s other assets (e.g. arresting a ‘sister’ ship). This channels all claims to the limitation fund, preventing a multiplicity of proceedings against ships in different jurisdictions.
\textsuperscript{165} Sturley, Fujita and van der Ziel, above n 105, [5.187].
\textsuperscript{166} Smeele, above n 40, [53].
regime such as COGA. Direct claims against PPs are likely to arise in much the same circumstances as they will arise against MPPs.

10 Conclusion

International maritime carriage has come a long way since the advent of the Hague Rules. The Hague and Hague-Visby Rules remain the dominant international maritime carriage regimes worldwide, but their limited scope is increasingly outdated.

In particular, the Hague/Hague-Visby Rules’ concept of carriage performed by a single ‘carrier’ fits poorly with the modern reality of carriage performed by a multiplicity of subcontractors. Similarly, their tackle-to-tackle scope is inadequate for dealing with the multimodal door-to-door carriage arrangements which are commonplace in the container trade. Himalaya clauses provide a partial but inadequate solution. While they extend defences and limits of liability to subcontractors, they fail to extend obligations and liabilities.

Previous attempts to update the Hague/Hague-Visby Rules have had limited success. The Hamburg Rules’ port-to-port to port scope improves upon the Hague/Hague-Visby Rules, but falls short of door-to-door coverage. The ‘actual carrier’ definition is of uncertain application to subcontractors who do not ‘carry’ the goods. The OTT Convention extends its scope by reference to the goods rather than a ‘carrier’, and the Multimodal Convention operates door-to-door, but neither fits comfortably with the conventions they are intended to supplement, and they have been political failures.

The Rotterdam Rules are a considerable step forward. They have the most ambitious scope of any maritime carriage convention to date. The split scope achieved through the MPP concept accounts for the modern realities of subcontracting and door-to-door transport. Cargo interests have the certainty of a door-to-door liability regime against the carrier, and the safety of a direct cause of action against MPPs in the maritime leg (provided they have a connection to a Contracting State). Limiting the MPP’s liability to the maritime leg ably defuses concerns that the Rules might be unfairly applied to inland parties unaware that they were participating in international maritime carriage.

The drafters could have gone further. Whilst they succeeded in ensuring that ‘paper carriers’ fall within the regime, they could have further unified the liability regime by encompassing all parties who handle the goods, even if they were engaged by the shipper or operated outside the carrier’s control. A simple redrafting of the vicarious liability provisions would have protected carriers from unfair exposure to liability arising from MPPs they had not chosen.

The drafting also leaves some ambiguities in the Rules’ scope, with the potential to cause problems. What activities will constitute ‘receipt, loading, handling’ and so on? Will MPP shipowners be responsible for the seaworthiness of their vessels? What constitutes a ‘port’? When and to what extent should a multi-service logistics provider be considered an ‘inland carrier’? Will an MPP in a non-Contracting State be protected by the Rules’ defences and limits of liability? Can a Himalaya clause extend the defences and limits of liability in a volume contract to MPPs? The drafting history and policy of the Rules may suggest some answers to these questions, but they all carry the potential for future litigation.

Despite these lingering questions, the core concept of the MPP is sound. It is a savvy political compromise which enables to Rules to combine door-to-door coverage with subcontractor liability. Should the Rotterdam Rules come into force, they would significantly improve upon the limited scope of existing international maritime carriage conventions, particularly in Hague/Hague-Visby nations such as New Zealand. I wish them luck.

167 Nikaki and Soyer, above n 76, 304 n 3.
Damage to the environment as a result of pollution from ships has increasingly become a serious concern for the legislature and the public. This is particularly so considering the long term threat that such pollution can have on the environment which can, in turn, result in serious commercial and public use consequences. Marine and estuarine water quality is important to preserve and it is in this context that these two decisions of Justice Sheehan, which were heard together in the Land and Environment Court of New South Wales, arise.

The decisions concern two charges under s 8(1) of Marine Pollution Act 1987 (NSW) (‘MPA’) against the owner of the MV “Magdalene” and its Master. This section provides that a strict liability offence is committed by both the Owner and Master of a ship that discharges ‘oil’, or an ‘oily mixture’, into state waters. In this case, the Owner and the Master pleaded guilty to charges under s 8(1) arising from a serious oil spill incident in Newcastle Harbour, NSW on 25 August 2010. Accordingly, the hearings were sentencing hearings.

The maximum fines for these charges, following major increases in 2002, are $10 million for a body corporate (such as the owner), and $500,000 for a natural person (such as, here, the defendant Master, Captain Volodymyr Vazhnenko).

The decisions are important as they arise out of the second largest oil spill in the history of New South Wales, and the largest oil spill in 10 years following the Laura D’Amato incident in 1999. They provide useful guidance on the sentencing procedure to be followed by a court and show that a prosecution of this kind can be simplified using an Agreed Statement of Facts in order to reduce the costs of both the prosecutor and defendants.

Facts

The MV “Magdalene”, was registered in Monrovia, Liberia, and was a bulk carrier with a deadweight tonnage of 149,530 commissioned in 1989. On 25 August 2010, at approximately 1030 hours, while berthed at Kooragang Berth 4 in the Port of Newcastle, the MV "Magdalene" commenced deballasting the number 6 starboard double bottom ballast tank. During the deballasting, between 1030 and 1400 hours on the 25th of August, oil was discharged from this tank into the Hunter River at the Port of Newcastle. The MV "Magdalene" discharged into the Hunter River, on her port side, ‘a mixture of oily water’, containing 72,000 litres of ‘heavy fuel oil’.

Tank No 6 was relatively low in the ship and was between the cargo hold and the outside shell of the hull adjacent to, and having a common steel wall with, a fuel tank. This is a common arrangement for older ships. It was common ground that oil came into the ballast tank as a result of a 15mm diameter hole in the internal transverse bulkhead between the ballast and HFO tanks. This oil would have leaked into the ballast tank over an extended period of time prior to the MV “Magdalene”’s arrival in Australia.

Following observation of the spill at approximately 1400 hours, an extensive boom containment action commenced at about 1545 hours. Clean-up operations commenced the next morning, and continued until 8 October 2010 when the clean-up was finalised with a total costs to the Port of Newcastle of $1,913,197.23. Difficulties were encountered with the clean-up due to the thickness of the oil. Accordingly, a longer than anticipated manual clean-up operation was required.

The oil was originally observed up to approximately 100 metres from the K4 and K5 berths, and around the ships docked at them (MV “Magdalene” and MV “Citrus”), and the slick spread into other parts of the harbour. The oil had reached up into the North Arm of the Hunter River, at the entrance of the Stockton Channel about one nautical mile south of the Stockton Bridge, by 1430-1500 hours on 26 August 2010, affecting mangroves and sand beaches, and the Hunter Wetlands National Park. The Hunter Wetlands National Park is a Wetlands park of international significance under the Ramsar Convention on Wetlands of International Importance. This

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1 1971, 996 UNTS 245.
area comprises the Stockton Sand Spit, an important roosting area for 37 species of international migratory birds. The movement of the oil spill into and within the Park was caused by strong westerly winds and tidal action.

**Causation**

In finding that this was a significant spill which was neither intentional nor reckless, but that the spill would have caused less damage had steps reasonably available to prevent it sooner were implemented, the Court made the following findings with respect to causation:

(a) Because the sounding pipes lacked perforations, the manual soundings did not detect oil in the ballast tank. Additional checking of the tank was needed, before de-ballasting commenced, especially with the increased risk of corrosion as a result of the tank's having been empty for a time (together with a risk of significant environmental damage).

(b) A 'proper watch' should have been in place, especially in the absence of perforated pipes, but ‘there was no watch [kept], nor any system [in place] to ensure a watch was kept on 25 August 2010’, and the discharge, which occurred between 1030 and 1400 hours on that day was not observed by the crew, until the ship was advised of the spill, by the coal terminal operator, at 1500 hours. The experts agree that, quite apart from tank inspection prior to the commencement of de-ballasting, a proper watch system during de-ballasting ought to have detected contamination at an early stage, without the risk of significant environmental damage.

(c) A ‘highly prudent’ owner and a ‘highly prudent’ Master, in the above circumstances, ‘would have ordered an inspection of the ballast tank be conducted before use. This, whilst not a class requirement or invariable international practice, was a simple and cost-effective measure available to the defendants to prevent a foreseeable risk of environmental harm’.

**Sentencing**

The court held that in determining the penalties in a case of this kind regard must be had to ss 3A, 10, 21A, 22, and 23 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). These are lengthy provisions which detail the purposes of sentencing, when a section 10 order should be granted (which refers to an order that no conviction be recorded although the offender is found guilty of an offence), the aggravating and mitigating factors in sentencing, how a guilty plea should be taken into account, and the power of a court to reduce penalties for assistance provided to law enforcement authorities.

**Seriousness**

The court made it clear that in arriving at its sentence, it must pay close attention to the legislature's decision on the current maximum penalty for a particular offence. In addition, it must seek guidance from comparable cases, or from the range of penalties imposed in all relevant cases, as each involves consideration of the scale of objective seriousness of the offences in question. It is this scale of seriousness, by reference to the maximum penalty under the MPA which ultimately determines the size of the fine imposed. The court noted that this is a difficult task. In applying these provisions, the court obtained guidance from the general range or scale of objective seriousness as set out in *Environment Protection Authority v Orange City Council*:

0-10% of the maximum penalty being the "lowest" seriousness;

10-30% of the maximum penalty being "low to mid" seriousness;

30-60% of the maximum penalty being "mid-range" seriousness;

60-80% "of the maximum penalty being “mid to high” seriousness; and

80-100% of the maximum penalty being the "highest" seriousness.

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2 *Newcastle Port Corporation v MS Magdalene Schifffahrtsgesellschaft MBH; Newcastle Port Corporation v Vazhnenko* [2013] NSWLEC 210 (11 December 2013) [162].

In determining where the seriousness of the offences in question fell, the principle of evenhandedness as detailed in *Chief Executive of the Office of Environment and Heritage v Bombala Investments Pty Ltd* was of fundamental importance to the court. This sentencing principle requires the court to have regard to the general pattern of sentencing for offences of the kind being considered and to carefully identify the factual differences among the cases, checked against any legislative movement in penalties. Legislative alterations to penalties was an important consideration in the MV “Magdalene” decision because in 2002, following the *Laura D’Amato* (which the court found was the only comparable offence to the offences in question), the MPA underwent major revision which resulted in substantial increases in penalties in cases where commercial vessels were involved. The maximum for a corporation increased from $1.1M to $10M, and from $220,000 to $500,000 for individuals, increases which seriously altered the historic relativity between the penalties (the ratio of 5:1 became 20:1).

The Court found that *D’Amato* caused many more concerns than the MV “Magdalene” and based on objective seriousness considerations, was 50% of the worst case. Accordingly, it was of mid-range seriousness. The spread of oil following the MV “Magdalene” incident was not as severe: it did not create any serious odour problem; it did not kill as much vegetation; and it created no public health or explosion risks, such as occurred in *D’Amato*. The environmental consequences lasted less than two months but in *D’Amato* they persisted for longer than five months. In addition, in *D’Amato* there was demonstrable human negligence.

With respect to the increases in the size of the fine since *D’Amato*, the court held that deterrence of Owners was a clear legislative objective of the multiplication of the maximum corporate penalty by a factor of nine, while the individuals' maximum went up by a factor of only 2.25. However, following *Cabonne Shire Council v Environment Protection Authority*, it remains necessary to address the facts of the particular case with due regard to the current maximum penalty and the seriousness of the offence, and regard to the need for deterrence thereby indicated, together with all other relevant matters. Accordingly, the increase in penalty under the MPA did not mean that the fine would be increased by the same percentage the maximum penalty was increased. Offences of low criminality remain offences of low criminality even if the maximum penalty is increased.

Balancing these facts, the court then held that before consideration of any statutory aggravating or mitigating factors, this incident should be assessed at somewhere near, but certainly not more than, 20% of the theoretical worst case. Accordingly, it was of mid-range seriousness. The maximum for a corporation increased from $1.1M to $10M, and from $220,000 to $500,000 for individuals, increases which seriously altered the historic relativity between the penalties (the ratio of 5:1 became 20:1).

**Mitigating/Aggravating factors**

With respect to the aggravating and mitigating sentencing factors in section 21A(2) and (3) of the *Crimes Sentencing Procedure Act 1999* (NSW), the Court followed the decision in *Plath v Rawson*. Although a prosecution under the *National Parks and Wildlife Act 1974*, the Court made clear this judgment set out a useful ‘checklist’ of relevant considerations to be factored into the setting of a penalty for any environmental offence.

The decision is quoted at length and should be the first port of call for any guilty party looking to consider the factors which may aggravate or mitigate the sentence imposed by the court.

It was held that facts adverse to the defendant must be proved beyond reasonable doubt, and those favorable to the defendant need be proved only on the balance of probabilities. The absence of any mitigating factors proven in favour of the defendant is not an aggravating factor against the defendant.

Harm in the context of this prosecution was considered by the court to be the only aggravating factor under section 21A(2). In this matter the harm was found to have been substantial and significant but not long lasting and permanent. The harm was considered to be environmental harm only and comprised the following:

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5 [2013] NSWLEC 210 (11 December 2013) [238].
6 Ibid [239].
7 Ibid [245].
9 [2013] NSWLEC 210 (11 December 2013) [249].
11 [2013] NSWLEC 210 (11 December 2013) [251].
12 Ibid [252].
13 Ibid [43].
(a) oil contamination of pelicans;

(b) oil spotting of protected saltmarsh and mangrove vegetation;

(c) contamination of invertebrate animals on mudflats; and

(d) the production and disposal of oil contaminated waste.

In terms of mitigating factors, the Court considered that the following facts were mitigation factors: 14

1. this offence is not part of any planned or organised criminal activity;

2. neither defendant is known to have any criminal record;

3. neither defendant has seen his/her character questioned; and

4. both have good prospects of rehabilitation.

It was also held that the Owner's payment of the clean-up costs, and its preparedness to pay the legal costs of both itself and the Master were matters operating to the credit of the owner. 15

The Court then considered the impact of the guilty plea of the defendants. 16 The Court applied, in full, the principles stated in R v Thomson; R v Houlton. 17 Those principles set a maximum guilty discount of 25% with the discount ranging from 10-25 per cent at the judge's discretion. Early pleas in matters where there are complex issues about which evidence will have to be gathered and adduced will attract the maximum discount.

The co-operation and assistance of the defendants was also considered and credit was given to the Owner for its formal admission of liability within three months, well before the commencement of proceedings, to the Master for his, and to both defendants for the preparedness of the Master (and his crew) to participate, subject to the limitations of entirely appropriate legal advice, in the prosecution's investigation. 18 However, in the context of a MPA prosecution it was held that only a modest discount should be given for the crew's co-operation. This is because sections 10, 50 and 53 of the MPA impose very strict obligations on ship owners and crew in respect of frankness and cooperation, and prescribe serious penalties for their breach.

The contrition and remorse of the defendants were considered mitigating factors pursuant to the decision in Environment Protection Authority v Waste Recycling and Processing Corporation. 19 The court followed this decision which held contrition and remorse will be more readily shown by the offender taking actions, rather than offering smooth apologies through their legal representative. 20 In the MV "Magdalene" proceedings, there was not just smooth apologies from counsel (genuine contrition was shown in affidavits); steps were taken to rectify harm, prevent further pollution and to address the cause of the offence.

In relation to these mitigating factors listed above which do not have defined discounts (only a plea of guilty does) the Court held that undefined percentages will be added to the guilty discounts. It was made clear that in the context of environmental prosecutions, discounts of 30-50% were not uncommon and often reached as high as 40%. However, when considering such discounts, the court was adamant to make clear that the penalty must still bear a reasonable relationship to the objective seriousness of the offence which is necessary to preserve the public's confidence in courts. 21 Accordingly, adopting these concerns and following the comments in SZ v The Queen 22 that generally discounts for assistance to authorities range from 20 to 50% and are only more than 40% in exceptional circumstances, the Court reduced the fine by one third due to the early guilty pleas, co-operation,
remorse, pre-trial payment of clean-up and the commitment to pay costs. Accordingly, the owner’s fine was reduced to $1.2 million down from $1.8 million.\textsuperscript{23}

The Master

With respect to the Master, the Court held that the offence was more of a system or command failure rather than one where there was neglect on the part of the master. The Court also held it was not part of the Master’s duties to take personal charge of the port operations of the ship and that he was entitled to rely upon other personnel, namely the second and third officers who were on deck, to do a better job. The Court considered the Owner, not the Master, were vicariously liable for their failings. Likewise the need for perforated sounding pipes or procedures to compensate for their absence were matters for the Owner not the Master. Acknowledging that the granting of a s 10 order under the Crimes (Sentencing Procedure) Act 1999 (NSW) order is not free from difficulty, or doubt, the Court ordered that no conviction be recorded against the Master, despite his guilt.\textsuperscript{24}

Conclusion

This decision clearly indicates that sentencing of environmental offences is a methodical process. Accordingly, certain actions can increase the fine imposed and certain early actions can decrease the fine imposed. Guilty parties seeking to minimise the penalty imposed though plead guilty as soon as possible, and then implement as many post-offence mitigating factors as possible such as assisting authorities, taking steps to rectify any harm caused and taking steps to prevent occurrence of a similar incident again. Appropriately advised clients could obtain a 30-40\% reduction in the penalty imposed for an offence.

If you are advising a client on their exposure to a penalty, remember that the principle of evanhandedness is the best starting point, so find cases with comparable factual circumstances and conduct your own assessment of objective seriousness of the offence your client is charged.

Furthermore, this decision indicates that in the context of a statutory offence where the legislature has recently increased the maximum penalties under the relevant statute, this does not necessarily mean that the applicable fine will be increased by the same percentage increase in the maximum penalty available under statute.

Finally, the decision is a reminder of the importance of clear, established procedures for watch-keeping, and inspections and maintenance so that Owners as well as Masters are alert to when additional precautions may be required to prevent a marine pollution incident.

As an aside, the Marine Pollution Act 2012 (NSW) commenced earlier this year replacing the Marine Pollution Act 1987 (NSW). While the regime for the offences that are the subject of this decision remains largely unchanged, the new Act introduces several significant new offences and obligations. In particular, both Masters and Owners must prepare and carry emergency plans for pollution incidents involving oil and noxious liquid substances; there are new offences relating to pollution by harmful substances in packaged form, garbage and sewage; additional reporting obligations, and a new regime of marine pollution notices.

\textsuperscript{23} [2013] NSWLEC 210 (11 December 2013) [279].
\textsuperscript{24} Ibid [308].

(2014) 28 ANZ Mar LJ

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This case note discusses the recent judgment of the United States District Court of Louisiana in relation to liability for the blowout of the Macondo well and loss of the Deepwater Horizon in the Gulf of Mexico in 2010. This judgment, in what is called the ‘Phase One Trial’, in the case In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, was handed down by the Court on 4 September 2014.

The various legal proceedings concerning liability for the catastrophe are complex, with many claims, counter-claims and cross-claims among the companies involved. In order to understand the purpose and scope of these particular court proceedings, and thus the relevance and importance of the judgment, Part 1 of this review briefly describes the background to the incident, including the parties involved and the major statutes and sources of law giving rise to liability and claims for compensation. Part 2 sets out the Court’s findings of fact in relation to the causes of the blowout and explosion and the Court’s conclusions of law. Part 3 concludes the article.

1 Background to the Incident

1.1 Background Facts

The Deepwater Horizon incident occurred on the 20th of April 2010, when a blowout, explosions and fire occurred aboard the Mobile Offshore Drilling Unit (MODU) called the Deepwater Horizon (hereafter, the ‘Horizon’). At the time of the incident, the Horizon was in the process of temporarily abandoning the Macondo well, which was drilled on the outer continental shelf of Louisiana. The blow-out preventer (BOP) failed to prevent hydrocarbons – oil and gas – from seeping from the well onto the Horizon. The explosion and fire occurred when the gas found an ignition source. Eleven men died and at least seventeen others were injured. Several vessels attempted to extinguish the fire, but the Horizon burned continuously until mid-morning on the 22nd of April, when it capsized and sank into the Gulf of Mexico. Due to the descent of the rig, the marine riser (a pipe that connects the rig to the BOP) collapsed and broke. As a result, millions of gallons of oil discharged into the Gulf of Mexico over the following 87 days after the incident. The well was capped and the discharge halted on the 15th of July 2010. In mid-September, a relief well intercepted the Macondo well and permanently sealed it with cement.1

1.2 Key Players

BP Exploration and Production Inc (BPXP) was the primary leaseholder of Mississippi Canyon Block 252 (MC 252), within which the Macondo well was drilled. BPXP held a 65% interest in a joint venture arrangement to drill the Macondo well, with Anadarko Petroleum Corp holding a 25% interest and MOEX Offshore 2007 LLC (Mitsui Oil Exploration of Japan) holding a 10% interest. As joint venturers, these three companies faced liability over loss and damage resulting from the blowout and subsequent explosion.

BP America Production Company contracted with Transocean Holdings LLC to drill the Macondo well. BP America Production Company and BPXP together are often referred to as ‘the BP entities’, or simply ‘BP’.

The ‘Transocean entities’, collectively referred to as ‘Transocean’, are also key parties. There are 4 Transocean companies, all of which are subsidiaries of Transocean Ltd. Triton Asset Leasing GmbH owned the Deepwater Horizon. Transocean Holdings LLC chartered the Horizon from Triton Asset Leasing GmbH and held the

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1 See for the above facts, In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, (MDL 2179) ‘Findings of Fact and Conclusions of Law Phase One Trial’, Rec Doc 13,355, --- F Supp 2d ---. 2014 WL 4375933 (ED La, 4 September 2014) (hereafter referred to as the ‘Judgment’).
Gross Negligence under the US Clean Water Act and General Maritime Law

The Deepwater Horizon incident gave rise to thousands of claims by individuals and businesses for personal injury, damage to property and economic loss, as well as government claims, and various cross- and counter-claims by the companies involved. Over 3,000 cases with over 100,000 named claimants were filed in state and federal courts against BP, its joint venturers and contractors, under general maritime law, the Oil Pollution Act 1990, and state tort law, in all five affected US states. On 10 August 2010, the United States Panel on Multidistrict Litigation transferred most federal cases to the United States District Court for the Eastern District of Louisiana (hereafter ‘the Court’) as Multidistrict Litigation No. 2179 (‘MDL 2179’), titled In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010.

The Court adopted a 3-phase trial proceeding focussing on two cases in MDL 2179: United States v BP Exploration and Production Inc et al and In re Triton Asset Leasing GmbH, et al. Judge Carl Barbier is presiding over the litigation. This paper is concerned with the judgment in the Phase One Trial, the scope and relevance of which are best explained in relation to three major areas of law/liability that are raised in United States v BP Exploration and Production and In re Triton Asset Leasing.

1.3 Civil Penalties for Violation of the Federal Clean Water Act

The federal Clean Water Act (‘CWA’) establishes administrative, civil and criminal penalties for water pollution. Section 33 USC §1321(b)(7) sets out civil penalty provisions for ‘any person’ who is the ‘owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil is discharged’ into water, in violation of the provisions of the CWA. At the time of the discharge of oil from the Macondo well, the CWA imposed a maximum penalty of USD 1,000 for the unlawful discharge of oil into water, unless the discharge was the result of ‘gross negligence or willful misconduct’, in which case the maximum penalty was USD 4,300 per barrel.

2 Ibid [28], [32].
3 BP has entered into settlements regarding payments for medical, property damage and economic loss claims. By June 2014, BP had paid approximately USD 11 billion to individuals and businesses by means of the following mechanisms: initial payments by the BP Claims programme from 5 May 2010 to 22 August 2010; claims paid by the Gulf Coast Claims Facility from 23 August 2010 to 4 June 2012; and two Court-approved settlements, namely the Economic and Property Loss Settlement Agreement (approved on 21 December 2012 and confirmed by the Fifth Circuit Court of Appeals on 10 January 2013) and the Medical Benefits Settlement Agreement (approved on 11 January 2013, with appeals dismissed by the Fifth Circuit Court of Appeals on 11 February 2014). Claimants did not have to accept payment under the GCCF or take part in the Court-approved settlements, thus there are a large number of outstanding claims yet to be resolved by litigation: Deloitte, Civil Liability, Financial Security and Compensation Claims for Offshore Oil and Gas Activities in the European Economic Area, Final Report Prepared for European Commission – DG Energy (2014). Mitsui & Co and Andarako agreed to pay BP nearly USD 1.1 billion and USD 4 billion respectively, to resolve their share of liability for these private suits: G Chazan, ‘U.S. Energy Firm to Contribute $4 Billion to Gulf of Mexico Disaster Costs, Drop Lawsuit Against Well Operator’, The Wall Street Journal, 18 October 2011, http://online.wsj.com/news/articles/SB10001424052970204346104576636264279485124.
5 As both cases are before the Court for all purposes and are proceedings in Admiralty, they may be tried without a jury.
6 33 USC §1321(b). In December 2013, these amounts were adjusted for inflation, to USD 2,300 and USD 5,300 respectively.
BP failed to settle the case with the US government and the trial took place from February-April 2013.\footnote{10} A key issue before the Court in the Phase 1 trial was whether BP was ‘merely’ negligent or grossly negligent. If the violation of the CWA was the result of ‘gross negligence or wilful misconduct’, BP would be liable to pay the maximum amount of the civil penalty, which is nearly USD 4,300 per barrel.\footnote{11} The Court needed to determine first, as a question of law, the legal meaning of ‘gross negligence or wilful misconduct’; and secondly, as a question of fact, whether BP was grossly negligent. These findings comprise much of the judgment in the Phase One trial.

1.3.2 General Maritime Law and the Shipowner’s Limitation of Liability Act

General maritime law applies if a tort is committed in the navigable waters of the USA. Claims for federal maritime torts are brought under Admiralty law. Liability under general maritime law may be limited pursuant to the Shipowner’s Limitation of Liability Act,\footnote{12} which ‘allows a vessel owner and demise charterers to petition a Court to declare that the owners or not liable, or in the alternative, that liability is limited to the value of the vessel after the accident plus ‘pending freight’ (monies earned and accruing to the vessel)’.\footnote{13}

In the Phase One Trial, the Court considered and apportioned liability between BP, Halliburton and Transocean under general maritime tort law. These findings will be crucial to resolving the liability of the many legal claims made against the companies. In In re: The Complaint and Petition of Triton Asset Leasing GmbH, et al Transocean filed a petition to limit its liability under general maritime law pursuant to the Shipowners Limitation of Liability Act, requesting the Court to declare a limitation value of USD 26.7 million.\footnote{14} Thousands of claims have been filed against the Transocean entities in that action, and in this trial the Court determined whether Transocean is entitled to limit its liability.

1.3.3 Federal Oil Pollution Act of 1990

The key federal Act regulating liability and compensation for oil pollution damage arising from offshore exploitation is the Oil Pollution Act 1990 (OPA90).\footnote{15} Although it is the major federal Act setting out liability for

\footnote{9} This is consistent with an earlier ruling relating that BP, Anadarko and Transocean may be held liable for civil penalties under the CWA: In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010 (MDL 2179), Order and Reasons [As to Motions for Partial Summary Judgment Regarding Liability under the CWA and OPA], Rec Doc 5809, 844 F Supp 2d 746, 761 (ED La, 22 February, 2012), 23-24. A panel of the Court of Appeals recently affirmed this ruling: In re Deepwater Horizon, 753 F 3d 570, (5th Cir, 4 June 2014). The Anadarko entities are not parties to the Phase One trial because of an earlier Court ruling that the Anadarko entities could not be held negligent in relation to the drilling operations at the well: In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010 (MDL 2179), Order and Reasons [As to Motions to Dismiss the B1 Master Complaint], Rec Doc 3830 (ED La, 26 August 2011), 27-29. MOEX is not a party to United States v. BP or the Phase One trial having settled the case against it regarding its liability for civil penalties under the CWA: In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010 (MDL 2179), [Consent Decree Between the United States and MOEX Offshore 2007 LLC]; US Environment Protection Authority, MOEX Offshore 2007 LLC Settlement (17 February 2012) <http://www2.epa.gov/enforcement/moex-offshore-2007-llc-settlement>; Transocean is no longer party to that part of the action concerning civil penalties for breaching the CWA, having agreed to plead guilty and pay a USD 400 million criminal fine, and a USD 1 billion civil penalty, to settle the case against it: In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010 (MDL 2179), [Partial Consent Decree Between the Plaintiff United States of America and Defendants Triton Asset Leasing Gmbh, Transocean Holdings LLC, Transocean Offshore Deepwater Drilling Inc., and Transocean Deepwater Inc] Rec Doc 8608 (ED La, 19 February 2013).

\footnote{10} On 14 November 2013, BP agreed to plead guilty to criminal liability and entered into a settlement with the Department of Justice to pay some USD 4 billion in criminal fines and penalties. BP also pleaded guilty and settled a case with the Securities and Exchange Commission, agreeing to pay USD 255 million in penalties: US Department of Justice, ‘BP Exploration and Production Inc Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes and Obstruction of Congress Surrounding Deepwater Horizon Incident’, Justice News, 15 November 2012, http://www.justice.gov/opa/pr/2012/November/12-ag-1369.html.

\footnote{11} The statutory maximum in the case of gross negligence or wilful misconduct is USD 3,000: 33 U.S.C. § 1321(b)(7)(D). One federal regulation increased this amount to USD 4,000. A different regulation increased it to USD 4,300: 40 C.F.R. § 19.4; 33 C.F.R. § 27.3.

\footnote{12} 46 USC § 30501 et seq.


\footnote{15} Oil Pollution Act 1990, codified at 33 USC §§ 2701-2761 (2006). The OPA90 does not pre-empt state laws that impose additional liability so victims are able to bring additional claims under general maritime law (as well as under state legislation and common law actions, including actions in tort law: Oil Pollution Act 1990, 33 USC § 2718(a) (2006).}
oil pollution damage, the findings of the Court in the Phase One Trial in relation to the OPA90 form a relatively minor part of the judgment, and so will be described briefly in only this part of the paper.

Under OPA90, each ‘responsible party’ for a vessel or a facility from which oil is discharged is liable for ‘removal costs and damages’ that result from such incident.16 The OPA90 sets out a range of damages which may be claimed by private persons and/or government entities.17 The ‘responsible party’ for an offshore facility is the lessee or permittee of the area in which the facility is located.18 A ‘facility’ is ‘any structure, group of structures, equipment, or device (other than a vessel)’ used for exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil.19 As the remains of the drilling apparatus at the subsea Macondo well satisfied the definition of a ‘facility’ while oil and gas were flowing into the ocean from the subsea well, the lessee BPXP was designated as a ‘responsible party’ for the subsurface discharge of oil.20

The OPA90 imposes strict but limited liability.21 For offshore installations, liability is limited to USD 75 million plus all removal costs.22 However, these limits on liability do not apply if the incident was ‘proximately caused by’ the ‘gross negligence or willful misconduct’ of – or the violation of an applicable Federal safety, construction, or operating regulation by – the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party.23

The Deepwater Horizon is the first oil spill from a MODU/offshore facility that resulted in removal costs and damages exceeding the liability limits under the OPA90. In June 2010, BP agreed to waive the USD 75 million cap.24 Thus the issue of whether the cap on liability in the OPA90 in relation to BP is somewhat moot. Nonetheless, a request by the US government that the Court make a formal legal finding that the OPA90 limitations on liability did not apply to BP because there had been a ‘violation of an applicable safety, construction or operating regulation’ by BP as a responsible party was denied by the Court in a previous ruling.25 In the Phase One trial, the Court reversed this earlier ruling, holding it erred in denying the request, and that the alleged violation of two federal regulations in fact constituted ‘the violation of an applicable safety, construction or operating regulation’ by the responsible party, BP, for the purpose of removing the limitation on liability.26

Transocean’s potential liability under the OPA90 was less clear-cut. The responsible party for oil discharged from a vessel is ‘any person owning, operating, or demise chartering the vessel’.27 The liability for a discharge of oil from a MODU, which falls within the definition of a ‘vessel’, is somewhat complicated. A MODU can be used as an offshore facility, for example, when it is used to drill for oil; or it may not be operated as a facility, for example, if it simply moving from one sea location to another. The general liability scheme for MODUs for ‘removal costs and damages’ in 33 USC § 2702 depends on how the MODU is being used at the time of the discharge.28 Suffice to say here that the Court, in an earlier ruling, held that Transocean, as owner/operator of the Horizon, a MODU operating as a facility, was not a ‘responsible party’ with respect to the subsurface discharge of oil from the Macondo well, and therefore not liable for damages and removal costs under 33 USC § 2702.29

18 Ibid § 2701(32)(C) (2006). It may also be the holder of a right of use and easement granted under applicable state law or the Outer Continental Shelf Lands Act (43 USC §1301-1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee).
20 In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010 (MDL 2179), Order and Reasons [As to the Cross-Motions for Partial Summary Judgment Regarding Liability under the CWA and OPA], Rec Doc 5809, 844 F Supp 2d 746, 755 (ED La., 22 February 2012), 14.
21 Oil Pollution Act 1990, 33 USC §§ 2702(d) and 2703(a) (2006). The OPA90 allows exceptions from liability in only very limited situations.
23 Ibid, 33 USC § 2704(c)(1).
26 Judgment [602].
28 In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010 (MDL 2179), Order and Reasons [As to the Cross-Motions for Partial Summary Judgment Regarding Liability under the CWA and OPA], Rec Doc 5809, 844 F Supp 2d 746, 755 (ED La Feb 22, 2012), 5-11.
29 Ibid 14.
However, the OPA also places liability on an owner/operator of a MODU for removal costs incurred by the federal or state governments (but not damages) under a completely separate section, 33 USC § 2704(c)(3), which provides that:

all removal costs incurred by the United States Government or any State or local official or agency in connection with a discharge ... of oil from any Outer Continental Shelf facility or a vessel carrying oil as cargo from such a facility shall be borne by the owner or operator of such facility or vessel.

In United States v BP Exploration and Production Inc the US government sought a declaratory judgment regarding Transocean’s liability for government removal costs under 33 USC § 2704(c)(3). In the Phase One Trial, the Court found that Transocean (excluding the entities Transocean Ltd and Triton Asset Leasing GmbH) was an ‘operator’ under this section and therefore liable for government removal costs. However, the Court found that Transocean’s liability for these removal costs ultimately shifted to BP by virtue of a contractual indemnity in the drilling contract. 30

2 Findings of Fact and Conclusions of Law: Phase One Trial

There have been numerous enquiries, reports and articles about the causes of the Deepwater Horizon incident. 31 All the reports demonstrate that a number of failures of equipment and safety procedures contributed to the blowout. Conflicting evidence about the causes of the blowout led to a number of claims and counter-claims between BP, Transocean and Halliburton.

In the Phase One trial, in order to determine and apportion liability in negligence, the Court addressed fault determinations relating to the loss of well control, the ensuing explosion and fire, the loss of the Deepwater Horizon, and the initiation of the release of oil from the well. 32 It is the Court’s ‘Findings of fact and conclusions of law’ that are reviewed in this paper. The Phase Two trial, which took place in September-October 2013, addressed issues relating to the conduct or omissions relevant to stopping the flow of hydrocarbons from the well, and will give judgment on the amount of oil released into the Gulf of Mexico. The Court is yet to hand down its judgment in regards to the Phase Two trial. The Phase Three trial, which will begin on 20 February 2015, will contain an assessment of the amount BP and Anadarko must pay in civil penalties under the CWA. 33

2.1 Causes of the Incident – Substantive Findings of Fact

It is beyond the scope of this paper to examine in detail all the technical fact findings made by the Court. These take up some two-thirds of the judgment. Nonetheless, as an understanding of the key findings of fact in relation to the causes of the blowout and explosion is necessary to understand the decisions regarding negligence and the apportionment of liability, some of these findings are set out in this section. The technical descriptions are simplified for the purposes of this review.

2.1.2 Production Casing

‘Casing is a large diameter pipe placed inside a drilled-out section of a well to isolate the adjacent geological formation from the well. After a well has been drilled to total depth, additional pipes are installed to allow oil and gas to be moved to the surface. These lengths are called ‘production casing’ or ‘production liners’. One of the issues to be decided by the Court was whether BP was reasonable in using a certain type of production casing called a ‘long string production casing’ instead of a ‘production liner with tieback’. The Court found the

30 Judgment [609].
32 Judgment [13].
33 Anadarko remains potentially liable for civil penalties under CWA 33 USC §1321(b)(7) on the basis of strict liability, although in the absence of negligence, the amount of the penalty, to be determined in the Phase 3 trial, will be at the lower end of the spectrum (i.e. up to USD 1,000 per barrel).
decision was not unreasonable, given the advantages and disadvantages of each type, and that the use of long string production casing did not cause or contribute to the blowout.\(^\text{34}\)

### 2.1.3 Cement Issues

When a well is to be abandoned, the bottom of the well is plugged with cement grout (‘cement’) to provide a physical barrier that prevents hydrocarbons escaping from the well after abandonment. Cement placed in the bottom of the well is called ‘production casing cement’. A production casing cement job may fail for a number of reasons. The cement may seep out of the well into the surrounding geological formations; it may be placed incorrectly in the well; it may become contaminated with drilling fluids, allowing hydrocarbons to escape; and/or the composition of the cement may be inadequate. It was accepted that the cement job performed in relation to the Macondo well failed; however, determining why it failed was a major and extremely contentious issue.

Cement on the Horizon had to be pumped down the production casing and out of the ‘reamer shoe’ located at the very bottom of the production casing, which contains three small holes through which fluid could pass. On arrival at the bottom of the casing, the cement does a ‘U-turn’ and passes up the annulus, the space between the steel production casing and the wall of the well, to provide a barrier between the hydrocarbon-bearing zones and the well. Prior to pumping the cement, a mechanical device called a float collar must be converted from a two-way valve to a one-way valve. The purpose of the float collar is to prevent unused cement pumped into the annulus from flowing back into the casing. In unconverted mode, fluids can move up or down the casing through the float collar; after conversion to a one-way valve, fluids cannot flow back up the casing through the float collar to the rig. At the Macondo well, the float collar was located at the top of the ‘shoe track’, this being the bottom 189 feet of the production casing.

The Court found that (contrary to submissions by BP): the float collar failed to convert to a one-way valve;\(^\text{35}\) BP never verified the float collar converted; and that BP should have but did not attempt to verify that the float collar converted by attempting to ‘reverse circulate’, that is, pump drilling fluid down the annulus and up into the casing. If the float collar had converted, reverse circulation would not have been possible because the closed valves would have prevented drilling fluid moving up through the float collar.\(^\text{36}\) Further, the Court found that during attempts to convert the float collar, the shoe track breached,\(^\text{37}\) and that most of the cement pumped into the well therefore exited the casing through the breach in the shoe track rather than through the reamer shoe. Consequently, no cement was placed in the annulus below the breach point, and little or no cement was placed in the shoe track below the breach point. Hydrocarbons later entered the well casing through the breach in the shoe track.\(^\text{38}\)

The Court found that the failure to place the cement correctly in the well was the reason the production casing cement job failed to achieve zonal isolation, and led to the blowout of the Macondo well.\(^\text{39}\) In other words, improper placement of cement was a ‘direct cause’ of the blowout.

Given the critical importance of the cement as a barrier to blowouts, tests have been developed to detect any problems with cement jobs and to ensure the integrity of the entire system. Thus, the question as to why parties failed to detect the cement job was not a success, was also a crucial issue.

### The Cement Bond Log

The Court found that BP’s failure to run a test called a cement bond log (CBL) was negligent. When the Macondo cement job was performed, a team from Schlumberger was standing on the Horizon and could have performed a CBL. BP, who was responsible for deciding whether or not to run a CBL – and whose internal best practices stated a CBL should be performed – decided not to run a CBL and sent the Schlumberger team back to shore.\(^\text{40}\)

\(^{34}\) Judgment [83].
\(^{35}\) Ibid [134]-[144].
\(^{36}\) Ibid [129], [131].
\(^{37}\) Ibid [145]-[157].
\(^{38}\) Ibid [158]-[169], [178].
\(^{39}\) Ibid [232].
\(^{40}\) Ibid [182]-[185].
The Court found BP had ‘multiple reasons’ to suspect the cement job would fail to achieve zonal isolation – including the fact that concern had been expressed that the float collar had not converted and the casing had been breached – and performing a CBL would have resolved some of these suspicions. The Court identified risks BP had knowingly assumed in relation to the cement job, and held that BP’s knowledge of these risks should have motivated it to run the CBL. The Court went on to state that:

a prudent well operator in BP’s position, knowing what BP knew at the time, would have run a CBL. ... The fact that BP did not opt for the CBL when the necessary people and equipment were already on location leads the Court to believe BP’s decision was primarily driven by a desire to save time and money, rather than ensuring the well was secure.

If BP had performed the CBL, it would have shown the top of the sealing was not where it should have been, and therefore that the cement was improperly placed, at which point BP could have attempted to remediate the cement job before proceeding with abandonment. Accordingly, the Court found BP’s decision not to run a CBL was ‘a substantial cause of the blowout, explosion and spill’.

The Negative Pressure Test

The purpose of a negative pressure test is to confirm the integrity of the entire well, including the casing, cement outside the casing, and cement in the shoe track. It was agreed by all parties that the negative pressure test is a safety-critical test.

During the test, some of the drilling mud circulating through the well is displaced with a lighter fluid, such as seawater. This reduces the pressure on the hydrocarbon-bearing geological formations around the well, and the well becomes underbalanced; that is, pressure coming from the hydrocarbon-bearing formations is greater than pressure exerted on the formation from fluid inside the casing. Once the appropriate amount of drilling mud has been displaced, any built-up pressure is bled out of the well casing. The pressure test is then performed by monitoring either the pressure on the drill pipe, or by monitoring for flow from the well to the rig. If pressure remains at zero, the well is secure. If pressure increases, it indicates hydrocarbons are flowing into what should be a closed system. The test is ‘pass/fail’ – if there is any pressure, the test has failed, and the well is not secure.

In the case of the Macondo well, the test was performed by measuring pressure on the drill pipe. Some 45 minutes after it started, the test results indicated there were ‘significant anomalies that should have indicated that the well potentially was in communication with the reservoir, or at least that the test had failed’. Instead of declaring the test a failure, the BP Well Site Leaders concluded the test should be run on another pipe, called a ‘kill line’. When shifting the test to the kill line, pressure on the drill pipe was again bled to zero. Subsequent monitoring revealed that although pressure on the kill line remained at zero level, pressure on the drill pipe steadily rose to 1,400 psi, where it remained until the test was concluded around 7:55pm. The test was declared a success by the BP Well Site Leaders, with whom the Transocean drill crew agreed. A BP Well Site Leader instructed the Transocean crew to proceed with displacing the remaining mud in the riser with seawater. At this point, as pressure from the drilling mud provided the only barrier to the flow of hydrocarbons, given the cement job had failed, the well became underbalanced, leading to a ‘kick’, then the blowout and eventual ignition of gas and explosion on the rig.

The Court found that the 1,400 psi reading ‘absolutely’ precluded a determination the well was secure, and the test should have been declared a failure. If the negative pressure test had been correctly interpreted, the blowout, explosion, fire and oil spill would have been averted. The Court thus found the misinterpretation of the negative pressure test was a ‘substantial cause’ of the blowout, explosion, fire and oil spill.

The Court also found that BP was responsible for designing the procedures for the test, supervising the test and ultimately determining whether the test was a success. However, the Transocean crew were responsible for

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41 Ibid [190].
42 Ibid [192].
43 Ibid [195].
44 Ibid [196].
45 Ibid [236]-[238].
46 Ibid [243].
47 Ibid [243]-[245].
48 Ibid [252].
49 Ibid [65].
carrying out and monitoring the test, and could not be forced to proceed if they saw something was incorrect. Both BP and Transocean were aware of, and discussed the anomalies, and on the basis of the results from the kill line, agreed the well was secure. Both incorrectly attributed pressure on the drill pipe to a phenomenon not known to exist in the context of negative pressure tests, called the ‘bladder effect’. Accordingly both were responsible for misinterpretation of the negative pressure test; and indeed admitted as much when they pleaded guilty to certain crimes arising from the incident.\(^{50}\)

However, the Court found that BP was more culpable than Transocean. BP was ultimately responsible for declaring the test a success or failure. BP had multiple onshore technical personnel to assist in interpreting the results and resolving issues with the test, and in fact one of the BP Well Site Leaders discussed the test with an onshore engineer by telephone.\(^{51}\) Despite evidence that the onshore engineer understood the test could not be considered a success and informed the BP Well Site Leader of this and how to troubleshoot the problem, BP did not instruct the Transocean crew to re-run the test. Had they done so immediately after the call concluded, or even half an hour afterwards, Transocean would have stopped the mud pumps and closed the annular preventer in the BOP. This alone would have secured the well and prevented the blowout. The drill crew would have been in a position to circulate the well back to drilling mud and return it to a state of balance, and the blowout would have been avoided.\(^{52}\)

The Court also found the decision to use lost circulation material (LCM) as a spacer between the mud and seawater during the test likely clogged the kill line and led to the zero pressure reading from the kill line. The Court found that as the decision to use LCM as a spacer was made only to save time and money, and could not be justified on any technical or ‘operational’ ground, the decision was unreasonable, and another reason why BP was more culpable in relation to the negative pressure test than Transocean.\(^{53}\)

### 2.1.4 Failure of the Blowout Preventer (BOP)

A third contentious issue concerned the reasons for failure of the blow out preventer (BOP). The drill pipe passes through the BOP, which is located on the seabed at the top of the well. The BOP can prevent the escape of hydrocarbons from the well by sealing the area between the drill pipe and the marine riser. The BOP also contains blind shear rams (BSRs), which are designed to cut through the drill pipe, thereby preventing oil and gas from reaching the rig. It was agreed that the BSRs activated at some time after the explosions and before the Horizon sank. It was also undisputed that they failed to cut through the drill pipe because the drill pipe had moved off-centre, and was partially outside the range of the BSR blades, preventing the BSRs from fully closing and sealing the well. However, the time of activation and reason for failure of the BSRs were disputed by the parties.

The BOP could be operated manually from the Horizon, or function automatically in one of two ways. The ‘Automatic Mode Function’ (AMF) would automatically close the BSRs in certain emergency conditions, such as loss of power and communication with the Horizon. When this occurred the control pods on the BOP, running on battery power, would activate the BSRs. The parties agreed these conditions were met shortly after the explosions at 9:49pm on 20 April 2012. Alternatively, the ‘Autoshear function’ would close the BSRs if a part of the BOP called the Lower Marine Riser Preventer (LMRP) detached from the rest of the BOP. Two hours before the Horizon sank at 10:10pm on 22 April 2012, a remotely operated vehicle simulated detachment of the LMRP, which should have activated the Autoshear function and closed the BSRs, unless they had already.\(^{54}\)

After considering the evidence, the Court found that the BSRs did not activate when AMF conditions were met on 20 April 2010, due to improper maintenance on the BOP. The batteries in one of two control pods – the blue pod – were depleted and, thus, it failed to activate the BSRs on 20 April because its battery was too weak. The yellow pod failed to activate the BDRs because one of the coils in its solenoid valve was reverse-wired.\(^{55}\) There was also conflicting evidence about whether the BSRs would have cut the drill pipe if they had activated on 20 April 2010. Although there was ‘much conflicting testimony on this issue, after weighing all the evidence’, the Court found it ‘more likely than not’ that the drill pipe would have been centred at the time AMF conditions

\(^{50}\) Ibid [256]-[261].
\(^{51}\) Ibid [262]-[264].
\(^{52}\) Ibid [266]-[272].
\(^{53}\) Ibid [292]-[299].
\(^{54}\) Ibid [381]-[385].
\(^{55}\) Ibid [386]-[389].
were met on 20 April 2010, and that therefore the BSRs would have fully sheared the drill pipe and sealed the well, had they been activated by AMF.\textsuperscript{56}

Both BP and Transocean were required to maintain the BOP system to ensure the equipment functions properly; however under the contract between BP and Transocean, Transocean was responsible for maintaining the Horizon’s BOP. Despite Transocean’s own policy of changing pod batteries every year, and the manufacturer Cameron’s recommendation that the batteries be replaced every year, Transocean had not replaced the blue pod’s batteries since November 2007. This omission occurred despite the Horizon’s Senior Subsea Supervisor informing Transocean’s Rig Manager-Asset for the Horizon the batteries had not been changed since November 2007, and despite Transocean’s knowledge that the batteries on the pods were depleted. Furthermore, there was alternative technology available with rechargeable batteries and battery monitoring that could have incorporated into the Horizon’s BOP, but was not. Accordingly, the Court found Transocean responsible for failing to maintain the BOP and breaching the relevant Federal safety standard. The Court declined to find BP responsible.\textsuperscript{57}

It had been argued that BP should have used Cameron’s double ‘V’ Shear Rams (DVs) instead of the single-V Shearing Blind Ram. However, the Court found the decision to use the BSRs instead of DVs did not prevent the BOP from sealing the well. It was also argued that BP should have configured the BSRs differently. The Court rejected this argument, finding the configuration was not causal, nor was it shown that the selected configuration was ‘below industry standard, below regulatory standards, or otherwise unreasonable’.\textsuperscript{58}

\subsection{2.1.5 Other Acts and Omissions}

The judgment discusses various other failures by BP and Transocean in relation to well control activities after displacement of the mud with seawater, which were held to be contributing causes.\textsuperscript{59} BP was found responsible for various failures in well control and monitoring, including BPs decision to allow certain operations to be permitted simultaneously during displacement, thus, for example, impeding the ability of the Transocean crew, and Halliburton mudloggers responsible for monitoring flows of muds from the well, from doing their jobs properly.\textsuperscript{60} Another contributing cause concerned Transocean’s failure to divert the flow of hydrocarbons overboard. When oil and gas began to seep onto the deck of the Horizon from the well, these could have been diverted overboard to minimize the risk of explosion. However, Transocean pre-set certain equipment to send the hydrocarbon flows to the mud-gas separator. As the mud-gas separator was not designed for such large volumes of hydrocarbons, it was quickly overwhelmed, and hydrocarbons continued amassing on the Horizon, with the gas finding an ignition point and exploding.\textsuperscript{61}

Evidence was also presented in relation to other failures of performance on the part of Transocean and BP which, however, were found not to have been causative in law.\textsuperscript{62} One important issue that was dealt with extremely briefly by the Court (in 3 paragraphs) was its finding that BP had in place a process safety management system for the Horizon. A process safety management system is a ‘disciplined, highly organized set of approaches and strategies designed to prevent catastrophic failures involving complex engineered, human based systems [which] includes components dedicated to hazard identification, risk analysis, and risk management’.\textsuperscript{63} At the time of the Deepwater Horizon incident, US law did not require companies to have safety and environmental management systems (SEMS) in place, and one of the developments stemming from the incident has been the introduction of a legal requirement to have in place SEMS, precisely because of BP’s perceived failings in this area.\textsuperscript{64}

In the context of other reports and publications which have been highly critical of BP’s lack of a proper process safety system, which are seen as essential to the management of catastrophic risk in hazardous industries, the sparseness of the judgment on this point is disappointing.\textsuperscript{65} The Court simply stated that BP has in place a

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{56} Ibid [405].
  \item \textsuperscript{57} Ibid [406]-[420].
  \item \textsuperscript{58} Ibid [421], [425].
  \item \textsuperscript{59} Not all of these will be examined in this review.
  \item \textsuperscript{60} Ibid [361]-[367].
  \item \textsuperscript{61} Ibid [349]-[360].
  \item \textsuperscript{62} For example, the configuration of detection and alarm systems on the Horizon, and general rig maintenance issues: see ibid [461]-[466].
  \item \textsuperscript{63} Ibid [468].
  \item \textsuperscript{65} See for example, Hopkins above n 31, who argues BP had failed to translate process safety into its drilling operations in the Gulf of Mexico.
\end{itemize}
\end{footnotesize}
process safety management system for the Horizon which “applied” to the Horizon by virtue of adopting and “bridging” the contractor’s safety management system and which although ‘not perfect’, was not shown by the evidence to be defective or a cause of the blowout, explosion and fire. This is extremely unclear, giving no guidance as to how Transocean’s management system applied to BP, nor its failings. Given that the existence of a proper SEMS is a crucial system within companies for preventing precisely the types of series of failure and omissions that occurred in relation to the Macondo well blowout, the finding it was not defective or a causative factor without giving any legal reasoning is scarcely satisfying. It also avoids an extremely interesting legal issue, which would have been whether in law BP’s failure to have in place a SEMS could have led to a finding of gross negligence, as although SEMS were viewed internationally by the industry as part of good practice, they were not legally required under US law at the time.

2.2 Conclusions of Fact and Law

2.2.1 Liability of BPXP and BP under the Clean Water Act

The Legal Meaning of ‘Gross Negligence’

The CWA does not provide for a definition of ‘gross negligence or wilful misconduct’. Although BP and the United States ‘more or less agreed’ on the meaning of ‘wilful misconduct’, they did not agree on the meaning of ‘gross negligence’.

The US Government argued that gross negligence differs from ordinary negligence only in degree, not in kind. While ‘ordinary negligence’ is a ‘failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstances’, ‘gross negligence’ is ‘an extreme departure from the care required under the circumstance or a failure to exercise even slight care’. In contrast, BP argued that gross negligence requires not only an extreme departure from the care required, but also a ‘culpable mental state’, which, BP submitted, requires the actor to have ‘actual, subjective awareness of the risk involved, but nevertheless proceed with conscious indifference to the rights, safety or welfare of others’.

The US Government and BP agreed that ‘wilful misconduct’ requires a mental or subjective element. BP argued that both ‘gross negligence’ and ‘wilful misconduct’ require a ‘culpable mental state’, but that ‘wilful misconduct’ requires a more culpable state of mind than gross negligence. ‘Wilful misconduct’, according to BP, requires actual intent to cause injury, and/or knowledge that conduct will ‘naturally or probably cause injury’ i.e. constructive intent or recklessness. According to the Court, BP’s submission places ‘reckless conduct’ in both ‘wilful misconduct’ and ‘gross negligence’; whereas the US Government’s submission avoids this overlap by confining ‘reckless conduct’ to ‘wilful misconduct’.

The Court agreed with the submission of the US Government, holding that the phrase ‘gross negligence or wilful misconduct’ is disjunctive under the CWA, which suggests the terms have different meanings. Referring to a particular provision of the OPA90, which allows wilful misconduct on the part of a third party, but not gross negligence, to provide a financial guarantor with a defence against liability, the Court finds the OPA90 treats wilful misconduct as ‘distinct from, and more egregious than, gross negligence’. Stating that ‘gross negligence’ and ‘wilful misconduct’ have the same meanings under the CWA and OPA90, the Court concludes the CWA also treats ‘wilful misconduct’ as conduct ‘distinct from, and more egregious than, gross negligence’. The Court goes on to conclude that because the CWA distinguishes gross negligence or wilful misconduct, ‘reckless conduct’ cannot be included in both terms. As both parties agreed ‘reckless conduct’ is included in ‘wilful misconduct’, ‘reckless conduct’ cannot also be included in ‘gross negligence’.

Both BP and the US presented cases supporting their respective definitions of ‘gross negligence’. The Court, by looking at the travaux préparatoires for the CWA, found that a pre-OPA90 version of the CWA used ‘wilful negligence or wilful misconduct’ as the standard for enhanced civil penalties. The Fourth Circuit interpreted the term ‘wilful misconduct’ to mean ‘reckless disregard for the probable consequences of a voluntary act of

66 Judgment [482].
67 Ibid [483].
68 Ibid [484].
69 Ibid [486].
70 Ibid [487].
71 Ibid [490].
72 Ibid [491].
73 Ibid [492].
Gross Negligence under the US Clean Water Act and General Maritime Law

omissions’. However, the fact the OPA90 replaced ‘wilful negligence’ with ‘gross negligence’ in the CWA must suggest that Congress intended a different and lower standard to apply, particular as a purpose of the OPA90 is to increase the deterrent effect civil penalties have on oil pollution.

The Court therefore held that the US Government’s definition of ‘gross negligence’ is correct. Thus, gross negligence is defined as ‘an extreme departure from the care required under the circumstance or a failure to exercise even slight care’, and does not require a culpable mental state.

Despite approving the definition submitted by the US Government, the Court does not proceed to use only that definition. Perhaps somewhat unfortunately for the clarity of the law in this case, after the trial briefings were complete, the Fifth Circuit issued an opinion on the meaning of the phrase ‘gross negligence’ in the CWA in United States v Citgo Petroleum Corp. The Court refers to the opinion in Citgo as ‘vague’, and states it is unclear as to the standard the Fifth Circuit applied in that case. Although the Court was of the view that the US provided the correct definition of ‘gross negligence’, because of Citgo, the Court chose to proceed on the assumption that ‘gross negligence’ is equivalent to ‘recklessness’, and to analyze the facts under that standard too.

The Court refers to the Restatement (Second) of Torts for a definition of ‘recklessness’:

The actor’s conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

While the definitions of gross negligence or recklessness may often be vague, it is clear that both refer to acts that are clearly inappropriate, that is, to acts that all reasonable observers consider to be inappropriate.

The Finding of Fact: BP was Grossly Negligent

The Court found that as a matter of fact, BPXP acted ‘recklessly’, thereby meeting the standard of both ‘wilful misconduct’ and ‘gross negligence’, whether the latter is defined to include recklessness or not. BP’s behaviour was grossly negligent in relation to a ‘single act’ of gross negligence and wilful misconduct, this being its conduct in relation to the negative pressure test, undertaken to determine well integrity; and in relation to a series of negligent acts, which taken together constituted gross negligence.

Negative pressure test

The Court accepted the opinion of a credible expert witness that the negative pressure test is the ‘most critical test that is run prior to removing the blowout preventer’. BP’s failures in relation to the negative pressure test were thus identified by the Court as a ‘single act’ of gross negligence.

As regards the standard of care expected, the Court held first, that the offshore oil industry in general faces a raised standard of care for offshore drilling because the magnitude of the potential harm associated with a blowout, explosion, and oil spill is great in terms of severity.

Secondly, the Court held that the negative pressure test at the Macondo well ‘demanded a level of care exceeding the high care typically required during such a test’. In this particular case, the complexity surrounding the drilling of the Macondo well (deep water, high pressure and high temperature) raised the standard of care required. BP’s knowledge of the complexity should, according to the Court, have heightened

55 Judgment [495].
56 723 F 3d 547 (5th Cir. 2013) (‘Citgo’).
57 The conflicting discussion in Citgo is cited in fn 190 of the Judgment [121].
58 Judgment [498].
59 American Law Institute, Restatement (Second) of Torts (1977) § 500; Exxon Shipping v Baker, 554 US 471, 493-4 (‘Baker’).
61 Judgment [499].
62 Ibid [236].
63 Ibid [511].
64 Ibid [502].
their vigilance during the negative pressure test, because the test would determine whether the cement and casing are providing a barrier to flow. The negative pressure test is a particularly critical part of the temporary abandonment program, and the risk of foreseeable harm associated with interpreting a negative pressure test is great both in terms of severity and probability. In addition, there were other decisions being made by BP that added risk that the cement job or the negative pressure test would fail, of which BPXP personnel were also aware. According to the Court, all those circumstances should have led to a higher caution surrounding the negative pressure test, beyond the high alert status it already demanded.

According to the Court, it was BP’s responsibility as the operator, to interpret a negative pressure test and declare it a pass or fail. However, BP’s Well Site Leader on the rig erroneously declared the test successful, even though BP’s onshore senior drilling engineer in Houston expressed doubts about the test. The Court found that a reasonable company man in the Well Site Leader’s position would have concluded the test was a failure, and that it needed to be conducted again. Neither the Well Site Leader nor the onshore senior drilling engineer ordered a new negative test, even though they, as well as other BPXP personnel, were well aware of the complexity of the operation, and some of the personnel felt there was little chance the cementing job would succeed.

The Court also stated that BP’s Well Site Leader should have understood the negative pressure test could not have been considered a success even before he spoke with the senior onshore engineer, and his conversation with the engineer should have confirmed what he already understood. Conducting a new negative pressure test is a precaution that imposed an extremely light burden compared to the foreseeable consequences that could and did, result from the misinterpretation. Consequently, the Court found that the Well Site Leader’s misinterpretation of the test and subsequent failure to order a new one constituted an extreme departure from the care required under the circumstances, as did the senior onshore engineer’s failure to order a new test, or pursue the matter further with the Well Site Leader, or at the very least investigate the situation from his computer (which he did not do). BP was thus found vicariously liable for gross negligence.

The Court also found that the Well Site Leader and senior onshore engineer acted recklessly with respect to the negative pressure test, because they, and other BPXP personnel in this case, likely knew of facts that would have led a reasonable company man in the industry to realize that deeming the negative pressure test successful and displacing the mud from the well would probably result in injuries, death and severe property damage. Thus, the oil discharged into the sea was a result of the wilful misconduct of BP for the purposes of the CWA under the definition submitted by both the US government and BP, as well as satisfying the definition of gross negligence submitted by BP.

Series of negligent acts

The Court also found there were a number of negligent acts and omissions committed by BPXP that resulted in the discharge of oil, which taken together, resulted in gross negligence and wilful misconduct under the CWA. The technical nature, role and importance of these acts and omissions are described and explained in the Judge’s findings of fact. BPXP’s series of negligent acts and omissions that caused the blowout, explosion and oil spill, and which taken together, evinced an extreme deviation from the standard of care and conscious disregard of known risks, included:

- drilling the final 100 feet of the well with little or no drilling margin, a decision which an expert witness whom the Court found to be credible, viewed as “one of the most dangerous things [he] had ever seen in [his] 20 years’ experience” and “totally unsafe”;

- running the production casing with the float collar in unconverted mode and without a shoe filter;

- failing to verify whether the float collar converted by reverse circulating the well;

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85 Ibid [509].
86 Ibid [503].
87 See ibid [510] for a list of these factors and decisions.
88 Ibid [510].
89 Ibid [511].
90 Ibid [513].
91 Ibid [513]-[515].
92 Ibid [518]-[519].
93 Ibid [519]-[520].
94 Ibid [19].
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- not conducting a CBL to test the success of the cement job;
- using LCM as a spacer for the displacement and negative pressure test;
- misinterpreting the negative pressure test;
- allowing simultaneous operations to occur during displacement; and
- failing to provide a displacement schedule to the Transocean drill crew.

The Court states that ‘notably’, the decisions relating to drilling the final 100 feet, the CBL and LCM-Spacer were ‘profit-driven decisions’. Furthermore, BP was also negligent in pumping foamed cement without a stability test. While cement instability did not cause the actual mode of failure, this is ‘another instance of BP proceeding in the face of a known risk and therefore lends further support to the conclusion that BP’s conduct was reckless’.

**BPXP is Vicariously Liable for the Actions of its Employees**

BP argued that BPXP could not be held liable for the enhanced penalties under the CWA when the gross negligence or willful misconduct was conducted by its employees and not authorized by BPXP. The Court rejected this argument. After examining the relevant provisions of the CWA, the Court held that a corporation is vicariously liable under the CWA’s enhanced penalty provisions for the gross negligence and/or willful misconduct of its employees. The Court therefore did not find it necessary to determine on the facts of the case whether BPXP authorized or ratified the misconduct, or whether the BP personnel were managerial agents.

**2.2.2 Liability of BP, Halliburton and Transocean under Maritime Law**

As regards BP, the Court found that based on its discussion of BPXP’s behaviour in relation to determining penalties under the CWA, and the reasons stated there, BP’s conduct was also reckless under general maritime law, and a substantial cause of the blowout, explosion and oil spill.

The Court also found that in many instances, Transocean’s conduct fell below the standard of care. These instances include:

- the drill crew’s misinterpretation of the negative pressure test;
- the drill crew’s failure to detect the pressure anomaly between 9:08 pm and 9:14pm;
- the drill crew’s failure to perform a flow check followed by immediately shutting in the well at 9:31pm;
- the drill crew’s failure to divert flow overboard;
- the master’s failure to timely activate the Emergency Disconnect Sequence (EDS); and
- Transocean’s failure to properly maintain the BOP.

However, the Court goes on to state that BP had a hand in most of these failures. For example, BP was ultimately responsible for the erroneous interpretation of the negative pressure test and problems stemming from this misinterpretation, and not Transocean. Furthermore, Transocean’s failures occurred ‘in a relatively short time frame and in the context of a situation that escalated rapidly’, and the company had ‘limited time to react

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95 Ibid [521].
96 Ibid [521].
97 Ibid [522]-[531].
98 Ibid [530]-[531].
100 Judgment [549].
101 Ibid [551].
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properly’. In contrast, BP’s failures occurred over a longer time frame, and it could ‘consider its choices’. Thus, the Court found that while Transocean’s conduct was negligent, its share was considerably less than that of BP, because Transocean’s failures largely concerned its inability to stop the catastrophe that was set in motion by BP. Also, the Court took into account the ‘proper actions’ of Transocean’s crew after the explosion, stating that BP’s conduct lacked ‘similar balance’.

The Court further ruled that Transocean cannot limit its liability under the Shipowners Limitation of Liability Act. The limit on a vessel owner’s liability limit under the Act is removed if the negligence that caused the damage was within the ‘privity or knowledge’ of the owner. In this case, the Court held the negligence that caused the damage was within the privity or knowledge of the owner, Transocean, and therefore refused to limit Transocean’s liability under general maritime law.

As to Halliburton, the Court found the particular type of foamed cement provided by Halliburton was not stable, but that this was not a direct cause of the blowout. Although the company’s failure in relation to the unstable foamed cement was ‘egregious’, including not only failures before the incident, but also the company’s ‘post incident’ behaviour involving ‘off the side’ cement tests and destroyed computer simulations, to the extent that claims against Halliburton were based on a strict products liability theory under maritime law, the claims failed in the light of the finding that the composition of the cement was not a cause of the blowout. As regards Halliburton’s failure concerning well monitoring, this was relatively small when compared to others’ failures, and the failure was shared by Transocean. The Court thus concluded that while Halliburton was negligent – a finding relevant to claims in tort, if not under a strict products liability theory under maritime law – it was considerably less so than BP and Transocean.

BP (BPXP and BP America Production Co, but not BP plc), Transocean (Transocean Holdings LLC, Transocean Deepwater Inc and Transocean Offshore Deepwater Drilling, but not Transocean Ltd and Triton Asset Leasing GmbH) and Halliburton were all at fault for the blowout, explosion and oil spills. While BP’s conduct was found to be reckless, Transocean and Halliburton were both found to be negligent. The Court apportioned liability as follows: 67% for BP; 30% for Transocean; and 3% for Halliburton.

The Court found that the behaviour of BP’s employees was egregious enough for exemplary or punitive damages to be appropriate, although the Court decided, based on a Fifth Circuit precedent, that BP cannot be held liable for punitive damages under general maritime law. However, it is possible BP may be liable for punitive damages under other tort laws, for example, state tort law or the law of other Circuits. After considering the evidence, the Court found BP plc, Transocean Ltd and Triton not liable for punitive damages under general maritime law.

3 Conclusion

A number of conclusions can be drawn from this judgment, of both general application, and in particular to the offshore oil and gas industry. For the purposes of the both the US Clean Water Act and general maritime law in the US, ‘gross negligence’ can be defined as ‘an extreme departure from the care required under the circumstances or a failure to exercise even a slight care’, and does not require a ‘culpable mental state’, namely recklessness. However, given that the Court found BP to be reckless on the facts and therefore guilty of both

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102 Ibid [554].
103 Ibid.
104 Ibid [555].
105 Ibid [556].
106 46 U.S.C. § 30505; ibid [587].
107 Judgment [201]-[232].
108 Ibid [558].
109 Ibid [559].
110 Ibid [558].
111 Ibid [560].
112 Ibid [543].
113 In the matter of P&E Boat Rentals, 872 F 2d 642, 652-53 (5th Cir, 1989), discussed in ibid [563]-[567].
114 Judgment [545]
115 The State of Alabama had asked the Court to make separate findings as to the liability for punitive damages under the law of other Circuits, as not all Circuits follow the same rules as that of the Fifth. To that end, the Court discusses the Ninth Circuit maritime rule and the First Circuit maritime rule and determines punitive liability would attach to BPXP: ibid [567]-[571].
116 The Court makes no finding in relation to punitive damages against Halliburton. Halliburton had previously entered into a settlement regarding the payment of punitive damages: In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010 (MDL 2179) [Notice of Filing of HESI Punitive Damages and Assigned Claims Settlement Agreement ] Rec Doc 13,346 (ED La, 9 February, 2014).
gross negligence and wilful misconduct, it is difficult on the basis of this case alone to discern the type of behaviour that is more than ‘merely negligent’, and yet satisfies the definition of ‘gross negligence’ without also being reckless.

In general, the standard of care expected of the offshore oil and gas industry in the US is a raised standard of care because the magnitude of the potential harm associated with a blowout, explosion, and oil spill is great in terms of severity and probability. In addition, the particular conditions faced in drilling a particular well may also raise the standard of care expected. For example, circumstances such as deepwater, high temperatures and pressure, and the type of geological formations may elevate the standard of care that is required. Thus, for example, in the Arctic and other harsh environments, operators are likely to face a higher standard of care regarding offshore drilling than in less complex environments. A company’s knowledge of the complexity involved in drilling a particular well should further heighten their vigilance.

A series of negligent acts and omissions may lead to a finding of gross negligence, as may a single act or omission. In particular, undertaking and correctly interpreting a negative pressure test, which has only a pass/fail result, plays a crucial role in discharging the duty of care. This is because the negative pressure test is a ‘particularly critical’ part of the temporary abandonment program, with the risk of foreseeable harm to persons and property (and the environment) associated with misinterpreting a negative pressure test being great both in terms of severity and probability. A company’s knowledge of any complexities involved in drilling a particular well should heighten their vigilance during a negative pressure test.

Where company personnel do not order a new test on a failed negative pressure test, this will likely on its own be grounds for a finding of gross negligence as ‘an extreme departure from the care required under the circumstances’, given that financial cost involved in undertaking such a test is slight, ‘compared to the risk of foreseeable harm associated with interpreting a negative pressure test incorrectly’. Furthermore, where there are a number of reasons that cumulatively give reason to suspect a cement job may have failed, the knowledge of these factors, as well as the misinterpretation of and failure to order a new negative pressure test, may lead to a finding of recklessness.

The authors therefore recommends that to meet the standard of care required for offshore drilling, a company should, as a matter of course, require and conduct a CBL (despite the cost) and train staff to ensure always that a negative pressure test is repeated if pressure or flow is found, and to cease work as a matter of course upon a ‘fail’, until a positive test has been issued. As regards other practices, companies should also be aware that where a decision is made to depart from an ‘accepted practice’ only to save time and money, and cannot be justified on any technical or ‘operational’ ground in the circumstances of drilling the particular well, the decision may well be found to be unreasonable and a breach of the standard of care required.
BOOK REVIEW

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The problem of piracy is an age-old one, almost as ancient as seafaring itself. However, the character, costs and consequences of piratical endeavour across the world’s seas and oceans in contemporary times has been a variable story specific to particular geographical and political-cultural contexts. Initially, in the 1990s, shipping industry and maritime user state concern was directed at the alleged growth in the rate of piratical incidents in Southeast Asia, particularly in and around Indonesian waters. The focus of international concern quickly shifted in the mid 2000s to the Horn of Africa, though, as the threat to international shipping and good order at sea posed by Somali pirates began to spiral out of control. And, just as the Somali problem is now seemingly under control, ever greater concern is currently focused upon the problem in the Gulf of Guinea, where attacks, largely but not exclusively conducted by Nigerians involved in the Niger Delta insurgency, have been on the rise.

It is in these contexts that this book has been produced, to address legal issues related to the international law of piracy and its adequacy, and practical arrangements to counter the piracy threat, particularly in light of the Somalia experience.

There are a number of potential warning signs with this book. First, as an edited volume with its origin in a workshop, one can typically expect significant variability in chapter quality. Second, the European and international perspectives promised in the book’s subtitle may be slightly misleading: aside from one American contributor, all others are either European or Europe-based. As the initial workshop was sponsored by the European Commission, there exists the obvious potential for a narrowly European Union-centric approach to the volume. Third, the book could have been a purely academic exercise sans policy relevance. Happily, none of these concerns are particularly well founded. It is a well-edited book with an overall high standard of individual chapter content. Although it does have a strong Europe bias, this is perhaps unsurprising given the heavy commitments made by European states to combat the Somali pirate threat, both within the auspices of the European Union as part of EU NAVFOR Operation Atalanta and as NATO members. Most encouragingly, contributors include legal advisors to the Council of the European Union, NATO, the UK Foreign and Commonwealth Office, and the US State Department, which adds extra credibility to the book.

It is a substantial volume, including 40 pages listing cited cases, legislation and international legal instruments, an introduction; and 15 extensively footnoted chapters divided into three parts: Part I on the underlying legal norms related to piracy and counter-piracy operations; Part II on specific national, regional and international approaches to dealing with aspects of the threat; and Part III on new policy, legal and conceptual approaches to the piracy problem.

Article 101 of the 1982 UN Convention on the Law of the Sea (LOSC)\(^1\) sets out the international legal definition of the transnational crime of piracy, closely derived from that established in the 1958 High Seas Convention.\(^2\) The three most salient features of the LOSC definition are that two ships (or aircraft), victim and pirate, must be involved; that the crime must be carried out for ‘private ends’; and that it must occur on the high seas, including the exclusive economic zone (EEZ) due to LOSC Article 58(2), which applies Articles 88 to 115 on the high seas also to the EEZ. The meaning, provenance and alleged inadequacies of the LOSC definition are discussed in detail in the book’s first chapter, written by senior legal scholar, Robin Churchill, co-author of what was for two decades the standard law of the sea textbook. He evaluates a number of criticisms of the LOSC definition of piracy, including the lack of clarity in the definition regarding the precise meaning of ‘acts of violence or detention, or any act of depredation’ and ‘private ends.’\(^3\) He also critiques the LOSC for not requiring parties to establish legislative jurisdiction over the crime: without such implementing legislation it is not possible for

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\(^1\) 1833 UNTS 3.
\(^2\) 450 UNTS 11.
states to arrest and prosecute pirates under universal jurisdiction, as established by LOSC Article 105. As later chapters in Part II discuss in more depth, this has been a significant shortcoming in efforts to combat Somali pirates. It should be noted, however, that even in cases where treaties do establish such legislative jurisdiction requirements, it does not follow that parties to the relevant treaty always actually enact implementing legislation, or that that legislation is either adequate or consistent with treaty intent. The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention)\(^1\) may be an example of that particular phenomenon.

Most interesting, perhaps, is Churchill’s discussion of ‘private ends’ and, in particular, whether acts of environmental protest or terrorism at sea could satisfy the private ends requirement – as opposed to the widely held assumption that such acts are conducted for political ends – and thus potentially constitute piracy. In the former case he rejects the argument made by Belgian and American courts in two cases that environmental protest could be conducted for private ends. More controversially, though, he argues that ‘insofar as the rationale for labelling conduct as piracy is that it constitutes an indiscriminate and violent menace to shipping … terrorist acts generally fall within such conduct’ (p. 17). The following chapter by Douglas Guilfoyle on piracy and terrorism adopts the same argument based on a review of the legal history of the meaning of ‘private ends.’ He argues that the original and more sensible use of the term related to the exclusion of attacks on ships by insurgents in civil war contexts (for which he uses the term ‘public violence’) from definitions of piracy, which could better be covered by the laws of armed conflict. Thus he concludes that the ‘correct dichotomy’ is better viewed as ‘private/public, not private/political,’ meaning that ‘an act of piracy would remain piracy, even if committed for political motives’ (p. 52). Rather less controversial, on the other hand, is Guilfoyle’s argument that the SUA Convention, in addition to its intent to suppress certain politically motivated offences, might also be used to prosecute some piratical acts, including potentially in circumstances where the LOSC may not necessarily apply.

At a mammoth 85 pages, the first chapter of Part II by two legal advisors to the Council of the European Union provides an incredibly comprehensive survey of EU policy and practice in combating piracy, which is largely focused on the considerable experience gained over the past decade in the waters off Somalia. This comprehensive approach is understandable but does have a downside, involving considerable overlap with other chapters, including those dealing with the legal definition of piracy, the use of force, the potential applicability of international humanitarian law, human rights issues and prisoner transfer agreements.

One theme that arises repeatedly is the extent to which counter-piracy operations may invoke the law of armed conflict. The question of the applicability of international humanitarian law is often raised in the Somalia situation in part due to the fact that the series of UN Security Council resolutions negotiated to combat Somali piracy have been adopted under Chapter VII of the UN Charter. However, as Achilles Skordas’ initial concluding chapter of Part III notes, the resolutions do not determine that Somali piracy itself constitutes a threat to peace and security, and argues that the usual constraints of international law usually applied to law enforcement at sea also apply in this case. This is consistent with Thilo Marauhn’s chapter on the limits of international humanitarian law in counter-piracy operations, which states bluntly that there is ‘no role to play for the laws of war’ and that counter-piracy operations need to ‘be understood as law enforcement activities’ (p.68). Marauhn further notes that one reason confusion sometimes abounds is a misguided assumption that ‘the use of military force per se triggers the application of international humanitarian law.’

It is notable that governments and navies involved in counter-piracy operations off Somalia enjoy far greater clarity of understanding of this issue than do certain legal scholars, although it is the experience of this reviewer with the education of naval officers over a number of years that some operators do share the confusion. This may in part be due to the fact that some naval officers have participated in maritime security (i.e. counter-terrorism) operations in the northern Indian Ocean, in which occupants of suspect vessels potentially could be viewed as both criminals and enemy combatants. Pirates, on the other hand, ought more obviously be treated solely as criminals, which is one reason why the clouing (rather than clarifying) arguments by the likes of Churchill and Guilfoyle that terrorists should be viewed as acting for ‘private ends’ are unhelpful.

Perhaps the most intriguing perspective in the book is that provided by Skordas, who argues that the costly and sometimes ineffectual use of naval forces (due to a frequent unwillingness to arrest and prosecute, and therefore deter, pirates, and the inappropriate application of human rights and refugee law to Somali pirates, inter alia) has given rise to the greater acceptance amongst governments and the International Maritime Organization of the role of private maritime security companies in the protection of shipping in the waters off Somalia. In fact he

\(^1\) 1678 UNTS 221.
goes further, suggesting that ‘self-regulation’ could be the future to safeguarding navigation globally, with the maritime industry taking the lead by integrating private security ‘in the overall system of activities and risk management’ of the industry and ‘formulating globally applicable rules and best management practices’ (p. 325). This is provocative but possibly points to a fruitful future policy evolution for international shipping. His is also the only chapter to address, albeit all too briefly, the important consideration that there are many groups who have prospered from Somali piracy other than the pirates themselves, not least of whom are City of London financiers and ransom negotiators.

Perhaps Skordas aside, there is little in the book that could be considered new or ground breaking; an unsurprising result given the copious amounts written on the subject over the past decade. In practice the book deals only with piracy in generic terms and with the Somalia case. The one chapter comparing Somali piracy with the problem in Southeast Asian waters is not entirely satisfactory, and none addresses the Gulf of Guinea. It might have been better, then, to somehow reflect the Somalia focus in the title. If one accepts such a focus, then the only substantive criticism to be made is that there are no industry perspectives represented here. The perspectives of shippers, charterers, marine insurers, commercial maritime lawyers and the like would have enriched the content, particularly given the arguments, noted briefly above, made in the Skordas chapter. A minor but unfortunate omission is a list of acronyms, which made some chapters difficult to follow given the extent of acronym usage.

Overall, though, this is a handsomely produced and timely book, which brings analysis of the law of piracy fully up to date, incorporating the wealth of experience gained in combating Somali pirates over recent years. It represents a useful reference volume and is recommended.