Extracts from SHIPPING and Law – a Handbook

Co-authored by Capt R Venkat and Capt S Pullat

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Letter of Commendation – 13 September 2011

Dear Captain Pullat,

I note that you have acknowledged in your Case Law Gist the assistance you have had in compiling it from my DMC's CaseNotes website @http://www.onlinedmc.co.uk.

I am delighted that you have found the website material useful in compiling your Gist and I am pleased to give you permission to use it.

I am impressed by the width and depth of your research into the legal cases that you cover and congratulate you on it. As a result, you have produced a resource that should be useful to everyone working in shipping and its related industries.

I note that Senior Advocate S. Venkiteswaran has written a foreword to your book and I would like to echo the comments he has made.

With kindest regards,

David Martin-Clark
Maritime Arbitrator & Commercial Mediator
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CASE LAW GISTS

Gists of cases are listed as per closely impacted sub-headings to suit easier grasping by practitioners of the profession, mariners included. Legal principles are brought out only in some cases to highlight complexities. In some, appeals are traced; some others may evolve further on appeal/over time and so must be kept track of.

Topics under which cases are listed:

CLASS
Ownership
Insurance
Clubs
Sales Contracts
Limitation of Liability
Cargo
Freighting
Containers & Logistics
Liners
Tramps
Charter Parties
Broking
Chartered Ships & Trades
Contract Of Affreightment
Voyage Charter
Time Charter
Bunkers
Agency
Ports
Pilotage
Terminals
Stevedores
Indemnities
Customs
Managers, Ship-management & ISM
Navigation
Salvage
Port of Refuge
General Average
Pollution
Criminalisation
Passengers
Stowaways
Piracy
Surveys
Jurisdiction
Arrest/Detention
Disputes -Various
Arbitration

Sources: mainly from David Martin-Clark's online dmc.co.uk, Sam Ignarski's Bow Wave, Maritime Advocate Online, LMAA, Club Newsletters ITIC, TT Club, ICA and from open sources from the Net etc under fair use doctrine.

Caveat: Do not extrapolate and generalise, as each case is invariably different; but principles may be grasped and applied. For proper assimilation, full judgment must be referred. An interesting one on appeal was found to be in 400 pages on the Net. Do pardon please, if room for misinterpretations have crept in, condensing cases to just a sentence or para. Further developments on principles/application need be kept abreast.

Caution when relying on Google search results –ensure that it is the pertinent case and check if remitted back, appeal allowed, pending or disputants have settled themselves.

Apart from obvious, short forms used following are: ECC –English Commercial Court (QBD- Queens Bench division, England & Wales) -the High Court, CA –Court of Appeal, FC- Federal Court, HL –House of Lords, SC –Supreme Court, Cir –Circuit, DJ –District Judge, Arb–Arbitration; Anr/Otr –another/other/s, AdC –Admiralty Court

CLASS

1.In Hellenic Investment V DNV 2006 US 5thCir held that ship buyer relying on seller's Class society surveys, is bound by forum chosen by Sellers and Class.
2.Class surveyors are not expected to employ extra-ordinary measures to find out defects that are not observable or found out; AMSTELSLOT (1963 HL) wherein latent defect was not discoverable by due diligence.
3.CLASS has not been found liable e.g.: LR in Tough Trader, ABS in Tatyana Powell etc mainly because of service liability indemnity in Contracts with owners.
4.In Great American Ins Co V BV 1972(and AMOCO CADIZ 1986 to some extent) it was held that compliance with Class rules was not enough to show seaworthiness, as maintenance & crewing issues also were involved.
5.That underlying principle after HERALD of FREE ENTERPRISE precipitated in International Safety Management Code '94 and soon enough in '94 owners, and Class was not found liable for TOLEDO due deficiencies in ISM system.
6.In Sun Dance Cruise CorpnV ABS in '94, US 2nd Cir CA held that owner is not entitled to rely on Class certs as guarantee of sound construction. Class's liability exclusion clause was found to be against public policy, but as per the East river SS case, it was ruled that such tort doctrine would apply only against economic loss and not against injury/death etc.
7.Two technical staff of Hellenic Register had received suspended prison sentences in the loss of the aged 93,000dwt IRON ANTONIS with 11 hands off Sri Lanka, when owners and managers were handed out three year terms.
8.NKK was fined 239K$ and handed out partially suspended sentences for the sinking of NUMBER ONE stating that the ship should not have been allowed to sail out. It was reduced on appeal.
9.In the case of sinking of dredger Cape De La Hague, a BV manager was held criminally liable by French Court and had to indemnify a crew member.
10.Away from shipping, in '97 for loss of six lives –so with criminal implications- Port Ramsgate walkway collapse, LR had to pay 0.5m £.
11 CMI's working group in '92, in the wake of SPERO (Belgium –sinking due to corrosion) and ELODIE II (***France –gross negligence)***etc, had pointed out that Class could soon be successfully sued in major cases.

12 Thereafter Class has been absolved in SUNDANCER ’94 UK& Nicholas HL (‘96) and impliedly relieved stating that DOT did not owe duty of care like Class (REEMAN ‘94) Court of Appeal. In MORNING WATCH lack of proximity (liability to third party) was the escape for Class; but in Nicholas H it was ‘not fair, just and reasonable’ that saved the day.

However, later the Civil Airline Authority has successfully been sued by a third party for personal injury sustained, for failing to detect defect -that led to crash- when issuing airworthiness certificate, and this could turn out to be a trend setter.Under negligence, Duty of care –with foreseeability and proximity, Standard of duty of care- generally expected and professional levels, and Loss – Causation and Remoteness are the tipping issues. Though doctors are increasingly being held liable & engineers too, in many jurisdictions, shipping professionals are yet to be framed so. Errors of Judgment (like navigation & management, being withdrawn in Rotterdam Rules on Cargo Carriage, but) is still an acceptable excuse.

13 The 2003 US Court of Appeals of Fifth Cir holding NKK liable to Otto Candies for SPEEDSTER, it should be noted was for ***negligent misrepresentation*** in tort. Given the expectations from professionals and corporations, it is fair to expect that, like Doctors, Engineers etc, liability would soon be thrust on CLASS, they in turn resorting to liability insurance -raising costs- cover backed up by broadened professional indemnity.
14 In TOUGH TRADER owners of a 1980 built bulker -who had bought it relying on Class survey certificates and conditions- having to undergo extensive repairs 10 months after special survey in April 2006, , have made serious allegations of fraud stating that such speedy deterioration of vessel could not have occurred due to natural wastage. There are said to be several other similar cases that have arisen in the last decade’s boom.
15 Spanish Atlantic coast pollution from PRESTIGE in 2002 ensuing protests and government actions has cast aspersions on Class. NY District Court Judge stating that there no case precedents and that the charges are disproportionate to the fees, issued summary judgment in 2010 holding Class ABS not liable for damages to Spain.
16 RINA along with Charterer TOTAL and Owner was convicted by French court in ERIKA case; it was upheld by Appeal Court in 2010. Final judgments on such ongoing cases are worth watching for developing trends.
17 In HAPPY RANGER owners were held liable for Class’s negligence (Class not being a party to case) in issuing an exemption certificate when it should not have been done.
18 In 2007 BOURBON DOLPHIN loss in North Sea, DNV that had issued the SMS Certs under ISM could obtain relief from legal liability under Norwegian law. But under other regimes like UK, relief may be available from civil suits (as Class does not owe duty of care under tort) but could be exposed to criminal liabilities if such claims eventuate.
19 Under English Law CLASS has not been found liable to third parties like Cargo interests. Likewise in US, but a Versailles Appeal Court has ruled that CLASS may be liable to cargo insurers. German rules are restrictive in claims against non-contracting parties but the courts have been turning liberal considering `professional warranty’.
20 Though Flag State administrations issue certificates, they cannot be sued was held by NZCA in NIVANGA (2003) Attorney-General V Wright & Otrs, the decision backed by English CA 1997 ruling that UK DoT like CLASS, did not owe duty of care.

OWNERSHIP

21 In Foresight Shpg Co V Union of India 2004, Canadian FC ruled that the Government controlled Shipping Corporation with distinct legal personality (constituted under Company Act) cannot be held liable for government's or its other corporation's liabilities. This was pursuant to a longstanding unpaid arbitration award against Food Corporation of India.
22 A court in Genoa in 2007 ordered a number of former senior executives of bankrupt Festival Cruises to pay up from their personal assets -while Owner who had pleaded innocence on the grounds that management was entrusted to executives, was not fined.
23 In SAMSUNG LOGIX 2009 vide application by Korean court appointed receiver to ECC under Cross Border Insolvency Regs 2006, holding that it is correct under UNCITRAL model law, moratorium sought by Korean receiver was granted since the firm had its Main Interest in Korea, so that proceedings could take place in Korea without interference with world-wide assets.
24 In Williams V Wilmington Trust US CA 2nd Cir held that Registered owner who had entered into bareboat charter, is not `owner' for seaman's wages etc.
25 That ownership on the basis of trust deed cannot be relied upon for in rem claim was held in Kent V Maria Luisa 2003 by Australian FC.
26 In the CAPE MORTON in 2005 full court of Australian FC found that the "owner" in Australia's '88 Admiralty Act for action in rem does not necessarily include the person registered as owner. A writ for cargo damage when "presumptive debtor" was the owner (buyer having not registered ownership change) was set aside finding that he was not the owner when proceedings were commenced.
27 In STX Pan Ocean V Bowen Basin Coal Group PL & Thomson '10 Australian FC in Sydney held the sole shareholder director acting as charterer personally liable for fraudulent misrepresentations while contracting and conduct during performance. Corporate veil was pierced by finding the controlling mind and significant damages were awarded.
28 In HALCYON STAR in 2011 Court of Rotterdam held that a creditor of maritime claim against a vessel's manager, may arrest a sister/beneficial vessel owned by the manager, ie: even if no connection exists between the claim and arrested ship.
29 Under "flying the flag of a contracting state" in 1952 Arrest Convention (similarly in '82 UNCLOS) Irish AC held in 2011 that an exempt unregistered yacht was a `ship' under Mercantile Marine act (likewise in UK too),and so it had jurisdiction.

INSURANCE

30 In NIMA S.A.R.L V Deves Insurance, due to cargo disappearance with a phantom (non existent ship) ship, ECA held that "all risks" Cargo policy had in fact not attached, and so the claim was denied because that fundamental was not fulfilled. (also PRESTOIKA and PACIFICA)
31 In THOR II (2004) in Thor Nav V Ingosstrakh, after trial of preliminary issues, ECC ruled that Marine Insurance Act 1906 requires more specific words than just `sum insured' for a policy to be construed as an `agreed' value policy. It was the core dispute wherein a particular amount had been mentioned and CTL was claimed.
32 US CA 11thCir held in 2006 that maritime lien for H&M insurance arises from the time the `necessary' was contracted; but it also was stated that for a vessel under arrest, approval from the court would have to be obtained for creating such a lien.
33 In Marina Offshore V China Insurance &Anr 2006 Singapore HC differing with lower court, held that under Marine Insurance Act implied seaworthiness applies only to voyage

policies and not time policies; express warranties have to be specific (and not general as for manning, routeing etc as in this case) and perils of the sea was the cause.
34 Nova Scotia CA ruled in '06 that burden of proof shifts to the insurer if they allege that assured did not exercise due diligence: in this case regarding broken tail shaft.
35 In Global Process Systems & Anr V Syarikat Takaful, ECC addressed inherent vice and inevitable loss (reaffirming Soya V White 1982 HL) in the loss of four legs of Jack up rigs under tow on a barge. As the proximate cause was found to be the inherent inability to withstand normal incidents of the voyage including weather reasonably to be expected, (it was agreed that loss occurred because of fatigue cracking caused by repeated bending of the legs while being towed on the barge through the sea) assured's claim for accident under all risks was turned down. ***On appeal, CA reversed*** it finding that the `leg breaking' wave was insured peril. UK's SC too affirmed that it ***was an insured peril and not inherent vice.***
36 In Sea emerald V Prominvestbank 2009 refund guarantees for new-buildings were signed by the Head of Nikolaev Regional Department of the seller's bank. As the yard could not raise funds to build vessels, procure equipment etc, it went into administrative bankruptcy. Since the ship in question was not completed or delivered, the buyer held the yard in default and made a demand on the refund guarantee. The bank argued that the guarantee was invalid and even if it was valid, it was discharged as the contract had been varied and so the claims fell outside the guarantee. After considering evidences and practices, the court decided that the head who had signed the guarantee had no authority and the bank had not ratified, and so the claim failed.
37 In NINA 2004 a bulk carrier had to be grounded softly off Singapore and flooded to put out coal fire in all holds, all expenses accruing under GA.
38 In Barden Mississippi Gaming LLC V Great Northern Ins 2011US CA 5th Cir held that an insurer did not have a duty to indemnify an additional insured as the policy provided cover only for named insured's sole negligence and named insured was only found 50% negligent in the underlying action. (in the same matter, earlier, the Court had held that the insured had a duty to defend because it was possible that additional insured could be found 100% liable. Later Jury had found both insured and additional insured each 50% negligent).

CLUBS

39 In TT Mutual Ins V New India Assurance 2003, ECC held that respondent was bound by Arbitration clause in plaintiff's client contract with P&I, even if it was not a party to it. Restraint injunction against pursuing claim in Finland also was granted. Court of Kotka – Finland had earlier held that it had jurisdiction (and so Club's Arb clause was not binding) as domicile of the associate of the carrier, and as the case was being pursued by third party (under local rules) against the insolvent firm.
40 In 2006 Norwegian SC ruled that membership in SKULD P&I Club does not constitute sufficient connection with Norway. A Mexican insurance firm had tried forum shopping arguing that membership in SKULD represented a capital asset.
41 That owners cannot limit for wharf damage and wreck removal under statutory debt was held by Singapore CA in SEAWAY collision damage to wharf. This is consistent with English Law PUTBUS (1969) and BERWYN (1977).
42 In the 2005 disappearance of Tug JUPITER 6 off South Africa, Indian SC in Nov'10 acknowledged the `without prejudice' payment (to court for disbursement) made by Club Correspondent on behalf of owners and its acceptance by seamen likewise -with respect to contentions and claims for higher compensations. SC had been critical of the administration on casualty investigation, follow up, corrective measures etc.

43 *Lok Adalat*–a kind of people's court- (of India State Legal Services Authority) in 2008 decreed payment to family of a deceased seaman who had died in an accident on JOUDI. The dependants had moved the court as owners had not responded.
44 Likewise, speeding liability claim and payment process through the route of ADR, in 2010 another case was settled in Chennai within 3months (as compared to about 6yrs for litigation) of accidental death aboard a tanker (TRIUMPH). The compromised settlement was paid and recorded with an undertaking not to pursue the case further.
45 In '98 tanker BAHAMAS leaked Sulphuric Acid while discharging in Brazil and to avoid explosion due to pressure build up in tanks (oxygen generated up by chemical reaction) when water leaked into cargo tanks, it was pumped out with water monitoring pH level to minimize pollution. A judge ordered stopping of such discharge and ouster of the vessel sought by public prosecutor based on professional advice on pollution effects.

As the defaulters failed to obey the orders, the government appointed another party to execute the removal. Several law suits had ensued. In 2010, salvage company and the P&I Club (covering the tanker) had filed a special appeal and the Club had pleaded that it was contractually not to be held liable.

Salvage company who had performed second operation, had protested against getting adversely affected by such loss of suit expenses. For the Superior FC, lawfulness of the firms taken to court rested on compliance with order given to mitigate pollution by owner and salvor employed. In Jan 2011, the appeal by all government bodies and arms was dismissed in a public interest civil law suit, without resolving on merits as far as P&I cover was concerned, but holding shipowners and cargo interests jointly and severally liable.

46 In IRISL V SMUA (2010) ECC, denying that the contract was frustrated, held that cover for pollution provided by Club remained valid, even after Financial Restrictions order of 2009, as the License under which the cover was given, permitted to continue cover and meet claims arising thereunder. (A pollution claim had arisen, immediately after Restrictions were ordered, and the issue was whether contract was frustrated).

SALES CONTRACTS

47 In an oil cargo discharge found with more water than what was on loading (within the 1% specified), on Appeal, it was held that there was lack of proof -by the party claiming- that additional water had been loaded. With reference to demurrage for delays connected with water, the Sales Contract provisions were ruled to be an independent code. As such, as regards laytime and demurrage provisions in Sales contract, their effect was separate.
48 In Azimut-Benett- V Healey 2010 in a yacht building cancellation, ECC held that liquidated damages for termination properly provided (drawn up with legal help, balance returnable etc) was not penalty. In obiter it was pointed out that insertion of "regardless of illegality, invalidity …" for the same was against public policy. Test for penalty was cited as `whether it was designed to deter one from defaulting, rather than whether or not it was a genuine pre-estimate of likely damages on breach'.
49 In Kronos Worldwide ltd V Sempra Oil Trdg, considering whether laytime will begin to run under Sales Contract without the opening of L/C by buyer, ECA held that seller is not obliged to perform any part of the loading operation and so laytime will not start. Nevertheless, laytime under CP would run independently as per provisions in it.
50 ECC in 2011 in B V S decided that `Scott V Avery' clause found in standard sales contract forms of FOSFA (Federation of Oilseeds and Fats Ass'n) and GAFTA (Grain &

Feed Trade Ass'n) has the effect of excluding power of Court to grant relief in support of Arb under S 44 of '96 Arb Act, including freezing injunctions.
51 In Suek AG V Glencore ECC held in '11 that generally a CIF Seller's obligation was only to nominate carrying v/l, ship goods and not impede delivery. Buyer is to arrange safe berth and even if v/l could not reach berth due to tides, Master was entitled to tender NOR.
52 In Binam V Owners of HONG MING, HK Court First instance Court finding rightful termination of an earlier sale due to buyer's failure to pay full amount, set aside an arrest warrant denying specific performance in '11, holding that calling for subsequent inspection in Hong Kong & trying to arrest for possession or share 'was a misuse of arrest process'.
53 In MARY NOUR 2008 ECA held that a contract of sale of unascertained goods was not frustrated, even if delivery is possible both physically and legally only if the seller's supplier chooses (for whatever reasons like government quota, controls) to make goods available for shipment.

Doctrine of frustration is a very limited as defence for failing to perform contracts and so, shipping that is exposed to such risks frequently**,** provides for the same widely through force majeure etc; but are normally strictly interpreted against the party pleading same.

LIMITATION OF LIABILITY

LoL is the underlying cardinal principle to support the marine adventure of shipping, without which –given the enormous risk/liabilities shouldered by shipping including jurisdictional nightmares- even the hardiest ones will not be willing risk takers. It enables to limit liability to prescribed amounts, unless the party concerned can be proved to have been grossly irresponsible as provided for in LL Convention. Hence most of the claims revolve around this concept, with not only owners, but also charterers, cargo interests and their agents/servants endeavouring to benefit from the same.

54 In MAKEDONIA 1962 it was held that shipowners had failed to exercise due diligence in not having taken proper care in appointment of ship's engineers.
55 In LADY GWENDOLEN ECA 1965, owners lost right to limitation (under1957 LLMC in pre-ISM days) for having failed to properly instruct the ship that had collided in fog, because the Master was said to have habitually navigated likewise.
56 In MARION 1984 HL in '77 incident of vessel anchoring on sub-sea pipeline and causing damage, held the right to limit was lost as owners had failed to `manage` the ship properly. The Master had used an old chart despite an up to date one being on board.
57 In ERT STEFANIE ECA '89 upholding Arb Award and ruling by ECC, denied limitation due to privity of a Director who was also a Tech Supdt.
58 In ICL Shpg & SMUA V Chin Tai Steel in the case of ICL VIKRAMAN sinking after collision in '97, sister ship arrest and release was on the basis of Club furnishing LOU, the final wording of which was settled by Singapore Court. Finding that owners had failed to exercise due diligence to make the vessel seaworthy, Arbitrators awarded cargo claim plus interest. Since limitation notice had not been issued initially, owners rectified the same by issuing claim form in English Admiralty Court and established a Limitation Fund by paying into court. Leave was granted to serve Claim form on Cargo interests with injunction on presenting LOU for cashing.

Amongst issues considered were whether Arbitration is `legal proceedings' (which affirmed), whether Admiralty Court had jurisdiction to serve Claim form out of jurisdiction (also affirmed) and whether injunction was valid in respect of sister ship arrest and its

release on setting up fund. Because of prickly situation arising from Singapore HC's wording and Singapore not being a party to '76 LLMC, ECC held that injunction could not stand. Resultantly, Chin Tai Steel could drawdown Award against LOU, but would have to refund excess above limitation.

59 Charterers can limit liability to cargo interests under Limitation Convention as a Carrier & Charterers also, but not for salvage (CMA DJAKARTA CA 2003); appeal to HL was settled commercially, leaving uncertainties on such matters.
60 In LAKE MARION 2003 US CA 5th Cir held owners, managing agents & charterers as "vessel interests" jointly and severally liable for rust damage to steel coils caused by seawater during voyage, denying managing agents limitation 'under negligence'.
61 ECC held in Odfjell Seachem V Continentale des Petroles & otrs that where no cargo was there to be discharged, limitation clause does not apply. Normally, time limit would be when cargo was or should have been discharged. In addition to damages for repudiation, owners were allowed to claim demurrage accrued before CP was repudiated.
62 In Daewoo Heavy Ind & Anr V Klipriver Shpg & Anr ECA 2003 held that the carrier could limit liability, considering `any event' in Art IV Rule 5 of Hague rules, even when the cargo was stowed (in this case shifted from under deck to deck at an intermediate port) on deck but the BL had been issued as under-deck . He drew attention to that D**octrine of fundamental breach or breach of a fundamental term had been discredited by House of Lords in 1967 and 1980**, and so it (`any event') was simply a matter of simple construction. Cargo interests, he added could have opted for Hague-Visby or even declared value of cargo to provide for better compensation.
63 In Group Chegaray V P&O Containers (2003) US 11th Cir upheld Carrier's right to change shipper's description of cargo, thus reducing claims based on package limitation. Without permission of Shipper, the carrier had altered BL to read 42 packages (containing 2268 cartons) rather than "pallets". This has abetted to continue the saga of litigation regarding unitised `packages', cartons, crates etc on pallets in containers.
64 In Euro Cellular Distribution V Danzas & Anr '04 ECC dealt with as to which party has burden of proof for proving what happened when consignment is mysteriously lost. The cause of disappearance may determine whether the primary party can rely on limitation provided for. If goods were stolen, limitations could be applied, but for negligent release, that party would be liable for the full value.
65 In WESTERN REGENT 2005 ECA held that setting up of a Limitation Fund is not a pre-condition for the right to limit liability and for Court's jurisdiction to hear and determine limitation claim; such jurisdiction exists in that one, even if there was no action in respect of claim subject to limitation.
66 In Antara Koh V EngTou Offshore 2005 Singapore HC finding against owner denied liability limitation (even though ship management had been contracted out) for failure to have a proper maintenance system for off-shore crane.
67 In Haward & Anrs V Fawcett & Anrs HL held that for alternative 3yr limitation period for negligence under s 14(A) of Limitation Act '80 to apply, crucial date is when he first knew enough to investigate the possibility that the advice he received had been defective.
68 In Law Society V Stephton & Co HL held that, in contingent right of action, limitation period would not begin till, in specific case, claim being made.
69 In SUNRISE CRANE, Singapore CA held owners liable in tort for damages caused for discharging nitric acid without warning other ship; as such failure constituted "actual fault or privity" they were disentitled limitation under '57 LLMC (after which '76 LLMC was speedily incorporated into Singapore Merchant Shipping Act of '96 per Court's advice).

70 In Mazda Canada V Mitsui OSK 2007 COUGAR ACE Ontario Federal Court refused to uphold exclusive jurisdiction clause in BL and allowed a claim to be pursued under Canada's Maritime Liability act 2001. After considering natural forums, domicile of parties and witnesses, provisions in the newer 2001 Act, and the practice in Australia and New Zealand of denying exclusive foreign jurisdiction, since cargo was destined to Canada – thus having real and substantial connection, it was ruled that defendants failed to establish that Japan would be the more appropriate forum.

71 In In Birkenfield V Kendall & Yachting NZ 2008, NZ CA confirmed that once Limitation fund is set up and offered to the other, the party is entitled to permanent stay of action without admission of liability and so there is no need for trial to determine cause, for example collision in said case. As such, Limitation Fund brings finality to litigation without admission of liability and burden of trial costs.

72 In TASMAN PIONEER '07, NZ SC held that Hague Rules Art IV Rule 2(a) exemption applied to all acts or omissions of Masters and crew (also pilot and servants of carrier) in navigation and management, unless it amounted to barratry; motivation or intention being irrelevant. Resultantly, carriers are protected from cargo interests in such cases falling under these exceptions. (Time charterer was vicariously liable for Master's acts on his own initiative devoid of 'good faith' had been held by HC and affirmed by CA).

73 German Federal SC in '09 had held that for loss occurring during sea leg of combined transport, CTO can evoke limitation if loss was caused by recklessness/gross-negligence of sub-carrier. Gross negligence of sub-carrier is not attributable to CTO, if CTO was not to blame. (Loss bearing claimant could seek redress against the party in "gross negligence").

74 In APL SYDNEY 2009, the Federal Court of Australia held that the claims made were indeed consequential losses within the meaning of Art 2.1(a) and so limitations under '76LLMC will apply. (For supporting the decision, that ordinary meaning should be given to terms of treaty in the light of its objective and purpose, as required by Art 31 of Vienna Convention on Law of Treaties '69 was pointed out.) As a result of the ship dragging anchor in heavy weather and damaging gas pipelines, manufacturers using gas supplied through the pipeline (though not earning) had raised claims. (there were fears of leaking Gas bubbles enveloping the ship, causing buoyancy loss endangering ship)

75 In 2009 US 9th Cir CA in Mazda Motors & Indemnity Insurance co NA V COUGAR ACE, analyzing 5th Cir decision in Lykes Lines 2005and considering general ratification rules, enforced Japanese forum selection in an interim action.

76 In Edso Exporting LP v. Atlantic Compass, US DC for Southern District of NY in 2011 in the case of a shipment of a Crane without value declaration, found that freight was calculated on volume basis and hence ruled limitation too should be so. This typical Hague Rule matter did consider 'customary freight unit' and several cases connected with it. However, Hague-Visby and Rotterdam Rules define "package" as stated in the bill of lading; unpackaged goods or bulk goods limitation would be based on weight. Weight calculation would also apply to packaged goods, should the weight produce a higher limitation than that attained by using the per package calculation.

77 In the case of fishing v/l REALICE (Bell Canada & Otrs V Peracomo & Otrs) Canadian FC in 2011 held that neither the Skipper nor owner of v/l could limit liability, after having cut through submarine cable that the vessel's anchor had fouled, ***erroneously believing g***it to be abandoned (disused).

78 In '10 a Rotterdam Judge has ruled that Limitation of Liability is available to Slot Charterers under LLMC & CLNI (Convention De Strasbourg Sur La Limitation De La Responsibilite En Navigation Interieure)in collision between SICHEM ANNE (chem tanker)-MARGRETA bringing it in line as for head/sub charterers in MSC NAPOLI (ECC earlier governed by TYCHY (ECA) - under Ship arrest).

79 US 8th Cir CA has ruled in the matter of American Milling Co, that a crewing company cannot limit liability as it did not exercise sufficient authority over the vessel.

CARGO

80 In Smith V Bedouin Steam Navigation 1896 HL had held that owners were liable for cargo described in BL, unless they could prove that it was not shipped. Hague Visby Rules and COGSA incorporating it provide that statements in BL should be regarded as conclusive evidence when transferred to third parties in good faith.
81 From STARSIN 2000 it has evolved that, depending on construction of words used, a BL signed by Master need not be Charterers BL unless the contract was with them alone and the one signing BL has authority and does sign on their behalf. If alleged otherwise, owners must show that the signatory had no actual or ostensible authority. (As Charterers also can limit liability, a demise/identity clause is superfluous).
82 In Fireman's Fund V OOCL, NY City Civil Court granted summary judgment stating that the carrier owed no duties except those in BL, for over carrying a container destined to New York back to Japan and back again to New York.
83 In Habib Finance V APL & Otrs '02 Hong Kong HC stayed proceedings against NYK in HK for misdelivery in Chile, under a BL with exclusive jurisdiction clause in Tokyo, and a stamped clause (but printed clause not crossed out) providing for Arbitration in Chile.
84 In CHERRY '02 Singapore HC held that `Constructive possession' by holder of BL sufficed to `sue in conversion' though `actual possession' is called for usually.
85 In PIONEER GLORY & Anr v PT GE Astra Finance '02 Singapore CA ordered owner to compensate cargo interests for loss value of cargo caused by inordinate delay in delivery.
86 A Deputy HC Judge in Hong Kong ruled in '03 that a **warehouse operator** was in breach of Godown Warranty in storage contract, and so could not limit liability.
87 The Dubai Court of Cassation, stating that the insurers had not presented any evidence to disprove that loss of cargo had occurred, as alleged, due to force majeure as entered in vessel log book, meteorological reports and by court appointed expert, found in favour of the claimants for partial loss of sawn timber in pallets, in a subrogated case.
88 In Laemthong Intl V AMF & Co, ECA held that under Contracts (Rights of 3rd Parties) Act '99, Owners of vessel could proceed against receivers of cargo on LOI given to Charterer's agent, as they in effect were agents of charterers for effecting delivery.
89 In RAFAELA S 2005 in a landmark judgment HL held that `Straight consigned' or non-negotiable B/L is both a BL and document of title for the purposes of Hague/Hague-Visby Rules/COGSA and has to be surrendered for cargo release. In Carewins V Bright Fortune Hong Kong Court of Final appeal ruled likewise and it re-emphasises that carriers cannot be exculpated from liability for misdelivery. In Canada it has been upheld so, but not in US.
90 In Vastfame V Birkat '05 HK HC citing STARSIN (2003 HL) for prima facie evidence of carrier as shown in BL, held the latter liable for delivery without surrendering House BL, though they could recover from their local representative MOIRUD for misdelivery.
91 In PACIFIC VIGOROUS 2006 Singapore HC held in in rem proceedings against delivery without original BLs that by choosing to accept part payments from buyers, the sellers were not estopped and were not exercising `right to elect' as their rights were cumulative and not alternative.
92 In MERCINI LADY 2009 ECC held that, in the absence of any inconsistent terms, goods under FOB should not only (under statute and common laws) be (safe) of satisfactory quality on delivery and for reasonable time, but also remain so for the period specified or expected. ECA partially reversing the same ruled that it was not necessary to imply

additional common law term into an FOB sale contract to the effect that the goods would remain in accordance with contractual specification for a reasonable time after shipment.
93 In DARYA RADHE 2009 ECC held that `dangerous' goods under Common law and Hague rules were implied as those good likely to cause physical or legal danger to vessel or other goods and not those causing delay or expenses; as such mummified rats were held not so, and only as a cosmetic problem.
94 In SINOGREAT V Hin Leong Trading 2003 SGHC 91, confiscation of mis-declared cargo was held against party who had requested misdeclaration.
95 ECA in Soufflet Negoce v Bunge 2010 held that, under GAFTA 49 FOB contract "in readiness to load" did not import from charter parties technical aspects about NOR. It meant "physically and legally possible for Sellers to load". So an FOB seller is not entitled to refuse to load because holds of vessel nominated by buyer were unclean; but the risk of goods being damaged by shipment in unclean holds fell on buyers.
96 In a case where P&I letter of Guarantee (LoG) had become invalid, cargo insurers had to recover claim from their Recovery Agent. Cargo insurers on paying claim for cargo damage had obtained a conditional LoG (Club to reimburse if competent court finds owner liable) valid for an year. Recovery agents to whom the claim was passed on by the insurers had obtained extensions from shipowner but had overlooked the need to renew Club's LoG.
97 In BREMENMAC 2010 it was ruled for cargo delivery under LOI, owners need not know whether the party named in LOI is entitled to possession, but must ensure that the party they are delivering cargo to is the one named in LOI. Further, they should put charterers in proper notice before getting the detained vessel released because of alleged wrongful delivery so that they can demand to be compensated by charterers.
98 In Glencore V Transworld oil NARMADA SPIRIT 2011for failure to deliver goods under sales contract, ECC held that, Future price on date of non-delivery (as against swap price) is to be used for assessment of damages. Further, **for mitigation, savings if any on loss made on hedging (risk on price between purchase and sale contracts), is to be taken into account** when calculating damages.
99 In Choil Trdg V Sahara Energy Resources in PREM MALA wherein FOB sales price was fixed linked to a volatile index, ECC held in 2011 damages to include not only loss of market value due to off-spec –assessed at date of rejection- but also expenses/costs that ordinarily/naturally resulted from its disposal including net hedging close out as mitigation differential between dated FOB Sales and the original and new CIF contracts.

FREIGHTING

100 In Iceland Shpg Co V Mayflower 2005 US CA 5thCir held that freight is payable by anyone who had promised in writing or orally. Citing that there is nothing in general maritime law or in precedents concerning BL, it was unanimously declared by the three judges that COGSA was not the exclusive basis for freight liability.
101 In ASTROMAR V Hugo Neu, Arbitrators panel in New York denied owners claim for freight above lumpsum for cargo loaded more than anticipated, stating that charterers had the right to load deadweight down to the maximum draught available.
102 In BREMEN MAX 2009 ECC ruled that where charterers had given LOI to put up security in case vessel is arrested for release of cargo on their request without original BL, an order of specific performance requiring Charterer's to replace owner's security was an appropriate remedy to fulfill commercial purpose and the intention of LOI. It was also stated that owners need not enquire into whether the party to whom they are requested by charterer to deliver cargo is entitled to possession or not.

103 In Lykes Lines Ltd V BBC SEALAND, US CA 5thCir held that shipowner must perfect cargo lien (by actual notice to cargo owners) arising under CP before cargo owners pays freight, for the owner to assert such lien on cargo.

Failed, unperformed/unperformable contracts after recent boom has raised issues of major shortcomings including limitations of Contract law. Force *majure* is not an easy option or choice to fall back on, in such circumstances. It is recalled that ships had to detour rounding Cape when Suez was closed, for the same lower contracted freight rate.

104 In Oct'10, STAR BULK was said to have collected 24m$ against longstanding disputes after starting arbitration against repudiatory breach of period TCs.
105 Please refer developments after ECC dismissed Appeal against method of calculating Arbitration award of 5.5M$ to NCS **against early delivery** of NORTH PRINCE in Glory Wealth V North China Shipping in July 2010.

Index linked freighting is what is touted as the new found mantra for the post boom ills of the freight market, but it pre-empts the thrill and risk from shipping. Whether Freight Futures and Derivates were catalysts in crashing the market after driving it high remains to be understood but what the boom did was to raise the bar of costs to higher plateaus.

106 In BONI (94) for substantial delay in delivery of cargo and resultant loss of price, NY Arbitrators had held that hedging in (Oil) freighting was foreseeable but denied claim on the basis that what had been placed were not `hedges' within industry standards, but "if placed properly, they offer a large measure of price protection".
107 In July 2003, FMC had released an initial decision of Administrative Law Judge issuing a cease and desist order, and assessing civil penalty about 8M$ against a NVOCC in Hong Kong for violation of '84 Ocean shipping Act.
108 In Jarl Tra AB &Anrs V Convoys Ltd (2003), ECC held that a sub-bailee could exercise general right of lien against the owner, even though the contractual relationship was not direct. The wharfinger should do so, because the head contract permitted sub-contracting on `any terms'.
109 A shipowner's claim for sub-freights was upheld by US CA for 5th Cir, stating that the law had not drawn clear distinction between freight and sub-freight. Under time charter, owner was granted lien on all cargo and 'all' freights due. Charterer then let out this v/l on voyage and chartered another v/l on voyage but failed to make payments for both. Both the owners claimed maritime attachment and garnishment against voyage charter of the first ship. Thence the court ruled that sub-freights also would fall under 'all' freights.
110 In DG HARMONY (2005) re Calcium Hypochlorite, Southern District Court NY held PPG Industries –manufacturer & shipper in `strict liability' negligent and responsible for the fire that broke out leading to loss of v/l. Stating that the shippers were in the best position to know about the dangerous nature of the cargo, whether listed under IMDG or not, and even if they did not have notice of the actual volatility of the product. COGSA places onus on shippers; they have duty to warn carrier and so have liability to third parties without privity through BL. On Appeal, CA 2ndCir remanded in part absolving `strict liability'. In 2009, District Court entered judgment in favour of owners and charterers against PPG for the stipulated amount.

CONTAINERS & LOGISTICS

111 Dutch SC in NDS PROVIDER held that for cargo damage due to poor condition of containers supplied by carrier, v/l itself is to be considered unseaworthy imposing liabilities for breach; Dutch law not be applied for interpreting treaty containing uniform Intl law.
112 Against a '94 road accident claim in US (where liability for chassis under "over the road' is with shipowner through indemnity; others having limited insurance cover), 70m$ had to be paid by Korean owner for death of 6 children in a minivan whose fuel tank had exploded after running over tail light assembly that had fallen off of a truck. (Corruption starting with issue of fraudulent driving license to truck driver, eventually resulted in imprisonment of a prominent politician in '06).
113 In multimodal Through BL transportation to hinterlands, in Sompo Japan Ins V Union Pacific 2006, US CA 2nd Cir ruled that Carmack 1906 and Staggers Rail Act 1980 should take precedence over COGSA. The Court rejecting UP's reliance on US SC's decision in KIRBY 2004 stressed that the only principle established in that case was that the maritime contracts should be interpreted in the light of federal maritime law, but it does not follow that only federal laws apply to COGSA and that CARMAK does not play a role in governing the terms of domestic carriage portion.
114 However, in 2010 US SC by 6-3 majority ruled that liability under COGSA takes precedence over Carmack Amendment for imports in through BLs relieving carriers of the scare of different US liability regimes. Thus KKK V Regal-Beloit Corp became the stare decisis. Accordingly, Circuit vacated judgment of District Court in Mitsui Sumitomo Ins V Evergreen Marine Corp and noted that by SC's decision, Carmack Amendment did not apply to intermodal shipments originating outside US performed pursuant to through BLs of vessel owning carriers. It applies when cargo is received in US for intermodal transportation whether it initially originates in US itself for export, or as a *separate subsequent* shipment after import was landed/received.
115 After above case, in American Home Assurance V Panalpina 2011 plaintiff as subrogee impleaded sea carrier Maersk in a shipment originating in hinterland. US DC for SD of NY held that the first railroad carrier `received' the cargo and Carmack applied. Though option for declaring value and opting for higher than COGSA cover of 500US$/pkg was available in BL, since independent notice of Carmack applicability and option for opting out of it (as required under Staggers Act) was not given, liability could not be limited to COGSA.
116 In Mason & Dixon V Lapmaster Intl US 9th Cir CA in Jan '11 held that that Federal Carmack Amendment does not pre-empt State Law unless State Law enlarges or limits carrier's liability. Shipper Lapmaster and its insurer had brought claims against M&D the carrier and freight broker ITG for damage in transit. ITG had settled in good faith and moved for dismissal barring M&D claims. The Court also held that ITG & M&D were joint tortfeasors, and that M&D was liable for most of the damage.
117 In One Beacon Ins Co V Haas Industries US 9th Cir CA held that to limit liability under Carmack, Forwarders must on shipper's request provide the basis on which rate is offered, give opportunity to choose levels of liability, obtain agreement and issue a B/L prior to moving shipment. In said case liability was limited to 88$ but the Forwarder was awarded attorney fees of 45k$. It is to be noted that limiting liability is an established practice and it is the shipper's insurance (after settling assured) that contests on subrogation with forwarders/carriers etc often entailing high costs, but testing to establish precedents.
118 In M&U Imports V Parlux SpA '06 Victoria SC held Italian seller responsible for short delivery on the basis that the container had not been properly sealed.

119 In Starrag V Maersk Inc 2007 USCA 9thCir held that Owner need not have notified shipper of clause in BL that extends per package limitation in US COGSA to any damage after unloading but before delivery. Maersk's CTBL is said to be in harmony and so specifically additional notices are not called for, to enforce package limitation.
120 In Datec Electronics V UPS 2007 HL finding that there indeed was a contract between consignor and carrier -though under standard terms, held that carrier was entitled to refuse high value consignments- once it was accepted. Further, as cause of loss `on balance of probabilities' was proven as theft by employee (evidenced from carrier's own CCTV) amounting to wilful misconduct, limitation was denied. However, since the parcel was accepted without knowledge about its value, similar cases may still succeed on `no contract' argument against misrepresentation and/or mistake.
121 Hong Kong DC in '08 has held a sender liable for outstanding freight charges despite sender's argument that it could not understand English or comprehend meaning of airway bill terms though it had signed on some of the airway bills (literally *not me, not mine,* pleading). The Court finding that the conditions of contract on back of the waybill had been properly incorporated, even though the customary practice was for the carrier to obtain payment for release of goods was argued by the sender who had contracted to sell on basis of buyer to pay freight, found against the sender, holding that terms contrary to express terms in contract could not be implied.
122 In Brinks Global & Ors V Igrox & Anr ECC held that there was sufficient close connection between theft (of silver bars from a container awaiting fumigation) by an employee and purpose of employment (for fumigation) to hold employer vicariously liable, as the risk was reasonably incidental.

LINERS

123 ECC in ACONCAGUA 2010 after exhaustive review of expert evidence held that while the time charterers/carriers under B/L were negligent in stowing dangerous cargo next to a fuel tank that was heated during the voyage, the sole cause of explosion was the chemical's abnormal characteristics, causing it to ignite at much lower temperature than could have been and was expected.

As during that particular voyage with cause of action alleged to be stowage, there was no necessity to (heat and) draw fuel from that tank, stowing the cargo next to it did not make the ship un-seaworthy. Hence, the loss had arisen from `error in management' and so the carrier was exempted from liability under Hague Rules Art IV 2(a). As such, Carrier was entitled to indemnity from shipper (backed by their insurers/bank) for payment to owners.

124 In MISC V Vista Australia ('03) strangely under MISC's own standard BL due to lack of clarity, in claims against third party for late return of containers, Victorian SC held that the carrier failed because, it was consigned to a freight forwarder who had despatched the box without opening, to the receiver.
125 In '11 FMC fined MOL 1.2M$ for alleged breaches of US Shipping Act including misdescription of commodities, unlawful equipment substitution, providing and entering into service contracts with unlicensed, untariffed and unbonded ocean transportation intermediaries; permitting use of service contracts by persons who were not parties to contracts; and providing transportation not in accordance with the rates and charges set forth in MOL's own published tariffs.

TRAMPS

126 In ASIA STAR 2010 Singapore CA ruled that the aggrieved party must take all reasonable steps to mitigate loss caused by defaulting party's breach and cannot recover damages which were avoidable but were sustained as a result of its own unreasonable action or inaction. However duty to mitigate has limits and does not oblige the aggrieved to bear great inconvenience or incur great expense. But for meeting objective standards of reasonableness, where substantial additional expenses were to be incurred in chartering a replacement vessel, aggrieved should notify defaulting party of the measures it intends to take in mitigation of the breach. The appeal was against HC for raising damages nearly five-fold from Assistant Registrar's award (which was reinstated) that was only for the difference between total freight amount that would have been paid for mitigation and the freight for the failed charter.
127 In Sylvia Shpg V Progress Bulk Carriers ECC held in '10 that time charterers could recover damages for loss of profits on a sub-charter that was cancelled due to repair delay, caused by owner's breach of maintenance clause. Classic test of remoteness (reasonable contemplation) was said to apply in this case regarding loss of sub-charter and profits that could have arisen there-from.
128 In Seagate Shpg V Glencore SILVER CONSTELLATION '08 on Rightship inspection compliance, ECC decided that owner was not obliged to provide a vessel with Rightship approval and maintain it during CP currency, as basic obligations are for seaworthiness and it did not extend to private and commercial requirements; but under clause 8 of the CP contracted, owners are obliged to permit such inspection and other vetting procedures, because they are required "as regards employment".
129 However, per HL in HILL HARMONY considering "where the vessel shall go and what she shall carry, how (in short) shall be used." vetting could fall under "management" and so developments on this should be watched out for.

CHARTER PARTIES

130 In Welex V Rosa Maritime ECC held that `Recap' constituted a CP and hence Arbitration provided therein will apply.
131 In England `subject details' is not binding as developed in Junior K, but in US per CA 2ndCir in Great Circle Lines V Matheson it is.
132 In Thoresen & Co V Favom Marine ECC held that subject details means `subject to contract'.
133 The 1995 charter of BIN HE with subject details was found to have been firmed up by a US Federal Judge and ordered for London Arbitration as contracted.
134 In 2001, 3 judge panel of 2ndCir affirmed the same; owners petitioned en banc (full bench) hearing with more than a dozen judges. After briefings from parties and amicus curiae (volunteered assistance), the full bench rehearing was turned down.
135 In EAGLE VALENCIA (2010) ECC, NOR submitted was alleged as invalid, as Free Pratique was not obtained within the next 6hrs as specifically laid out in Shell's SAC 22. Applying general principles, finding that the requirement was only to obtain FP before berthing, which in fact was done, NOR was accepted as valid, thus enabling the two days waiting time to be counted as used. It was stated that **SAC 22 was very badly drafted** and so was very difficult and perhaps not possible to interpret to achieve absolute coherence; thus one had to give the clause a fair and reasonable commercial construction, so far as language permitted. It may be a fair observation that in such cases of gross lack of clarity, additional costs could be imposed on the litigants.

BROKING

136 In Bernuth line V High Seas Shpg ECC 2005 notice of Arbitration by email was held valid (email being 'recognized means of communications') and so too proceedings and award that had followed.
137 PARAGON 1975 pursued as trend-setting `special case' clarified ambiguity of trading limits "..east of Panama Canal.." when owners rejected charterers orders to proceed to US Gulf, after Port Cartier where the ship had arrived as ordered became strike bound. Charterers succeeded in both hearings with costs, after prolonged enquiries with brokers and others on custom of trade and understanding of words used.
138 In VISFJORD 1988 wherein brokers had deducted commission from freight when remitting to owners, ECA ruled in favour of Brokers, stating that though they could not sue in their own name, it would **be unreasonable to deny them brokerage under equity.**
139 Brokers can pursue rightful claims themselves under Rights of Third Parties (Cleaves V Nisshin) Contracts Act '99 (earlier they had to recover through one of the contracting parties). In US a third party closely connected can invoke Arbitration (Astra Oil V Rover Nav) and can pursue brokerage.
140 In Standard Bank V Agrinvest Intl 2008 seeking anti-suit injunctions against US and Egypt proceedings, ECC had to go into syntax to decide on exclusivity issue, because of poor drafting. It had to surmise that in the absence of the word `exclusive', if the obligation is transitive it creates `exclusive' and if intransitive, it will not be.
141 In Electrosteel Castings V Scan-Trans S&C 2002, ECC on appeal against Arbitration, considering a recap telex with Scan-Trans as the Carrier and Booking Note with them as `agents', held that the latter should take precedence. Hence, Arbitrator –provided for in the former- had no jurisdiction based on permissibility of evidence on appeal as against evidence adduced before arbitrator (s 67 of '96 Arb Act).
142 It was held that a COA arbitration clause "arb/GA in Beijing and Chinese law to apply" for shipments between Valencia and China, was not valid either in Spain or China. In Spain, it was found to refer only for Arb under GA. In China for an Arb clause to be valid, their SC requires that to which arbitrational institution the dispute will be submitted to, as agreed by the parties, to be stated in the Arb clause.
143 In the sale of OCEANIC in 2008, US Environmental Protection Agency was said to have filed a federal complaint against the shipbroker for allegedly attempting to sell a PCB-filled (carcinogenic) vessel to overseas breaking yard. Generally, if broker (agent and any intermediary for that matter) is not privy to illegality of the dealings, he may not held guilty or liable; but when he is aware or expected to be aware (from law, decrees, public announcements, notifications etc) as a professional, the threshold test will be stricter.
144 Charter fraud was alleged in 2008 in Venezuelan dealings wherein without knowledge of owners, ships were recorded to have been hired at one rate and re-let at higher rate by a third party through collusion. Defendant's garnished assets were to be held as security whilst merit of cases was to be decided in agreed jurisdiction. When argued that Admiralty law could not be used against alleged fraud perpetrated ashore, judge rejecting it found that it would be considered maritime tort as underlying objective was maritime commerce.
145 Brokers/operators must be careful when committing charters on behalf of principals. For a ship fixed to One safe port Russia, Black Sea and asked to proceed to Odessa in Ukraine, broker had to bear higher costs for punitive tariffs at Odessa for FOC flagged ship.
146 On a series of sub-lets a v/l was fixed for final voyage to South Africa which was excluded in the head CP. A workable fixture was eventually agreed to but head charterers claimed substantial losses from the brokers.

147 A pool operator who loaded a tanker to US despite US exclusion under Demise charter, had to charter another one, arrange ship-to-ship transfer and compensate for time loss also.
148 In 2011 MBC is said to have settled substantial sums with brokers and owners against premature cancellation of a Panamax period charter entered into on June 2009.

CHARTERED SHIPS & TRADES

149 Charterer under `absolute and non-delegable duty' is obliged to provide cargo (can opt to cancel paying costs/damages) as in Grant V Coverdale 1884 held by HL and reiterated in Triton Navigation V VITOL SA 2003 by CA.
150 Comfort Letters issued to meet liabilities are only statement of intentions and will not be legally binding was held in Kleinwort Benson V Malaysian Mining by ECA in 1989, overturning a contrary decision of the commercial court. Likewise a promise to guarantee is only an intent, legally not a guarantee and so unenforceable.
151 Safe port is one where the ship can arrive, stay and depart as foreseeable at the time of giving orders: EASTERN CITY 1958 & HERMINE 1979. It must be prospectively and politically safe too. The approaches to port, channel, terminal, berth etc all must be safe. Temporary deficiency that the Master was not aware of, not warned and cannot be avoided etc will make it unsafe. Error or mistake by competent, licensed, certified personnel like pilot, berthing master etc will not make it unsafe.
152 In STAR B (2004), where a vessel had grounded as a consequence of both unsafe port and negligent navigation, Panel of Society of Maritime Arbitrators (SMA) by majority held that negligent navigation severed the connection between the accident and charterer's order to proceed to unsafe port, and so responsibility of the accident remained with the owners. The dissenting arbitrator, however, held that in such a case, under US law, responsibility for accident should be proportionately shared as per degree of fault.
153 ECC had held in Med Salvage & Towage V Seamar Trdg that a voyage charter party is not subject to an implied term for Safe Port, since that would be inconsistent with the expression provision of named port/berth which effectively places the onus (of safety) on owners. In 2009 CA upholding the same, held that there was no implied warranty as to the safety of berth nominated by charterer in a named port, where the named port itself was not subject to express safe port and/or berth warranty.

Port/berth/terminals nominations under T/C would have to be `safe' when charterer orders. In trades where port/s is/are spread apart, on nomination, ports and berths will have to be `safe' and sequencing will have to be on geographic rotation basis for performance.

154 In ARCHIMIDS 2008 (AIC LtdV Marine pilot Ltd) ECA held that `1 safe port Ventspils' contained a warranty by charterer as to the safety of the named port. On under loading of cargo due to silting, owner was awarded dead-freight since charterer could have loaded full quantity by ship-to-ship method, but had chosen not to do so.
155 In Flintermar V Sea Malta, ECA has held in 2005 that when responsibility for cargo operations was with the charterers, they were liable to indemnify owners for injury claim and its costs; repair costs too also as a matter of practice.
156 In ULLISES Shpg Corp V FAL Shpgco 2006 ECC held that a time charterer is liable to owner for confiscation and sale of ship for flouting UN sanctions, even if it did not know that it was loading contraband oil, because the mere act of loading unlawful merchandise was contrary to the relevant clause in SHELLTIME 4 charter party.
157 In Gearbulk Pool Ltd V Seaboard Shpg 2006 SC & CA of BC - Canada rejected efforts by owner and charterer to blame shipping agent for compensation they had to pay for cargo

damage, as quantity stowed on deck was not clearly inserted in BL. Agent had indemnified charterers –in contract between them- for loss arising from any variance between shipping agent's bill (SISCO Bills) and carrier's BL. They alleged negligence in that agent had failed to include proper exemption clause in BL to relieve carrier of liabilities.

Sawn timber stowed on deck -because it was not covered- was later contaminated by Soda Ash whilst discharging. Since quantity stowed on deck was not accurate –with possible error up to 100%, owner and charterer were denied benefit of exemption clause in Shipping Agent's Bill.

158 In 2006 for stowing Calcium Hypochlorite adjacent to bunker fuel that was heated, charterer was held liable in UK for fire and explosion that had ensued.
159 In Contship V PPG Industries (2006) US CA for 2nd Cir held that, although shipper is responsible under COGSA, in this case, carrier's stow and heating of the cargo was causative for the fire and explosion, and so they were liable.
160 In Tidebrook Maritime Corp V Vitol SA, FRONT COMMANDDER 2006, ECA held that laytime should count earlier than laycan, as charterer had consented in writing for early NOR, berthing and loading (but not for earlier laycan) and loading was done so.
161 In ASIA STAR 2006 Singapore HC held owners liable for damages to charterers for not exercising due diligence to present a suitably epoxy coated cargo-worthy tanker as per practice of trade and charterers requirement for a contracted shipment of veg oil. It was upheld by Singapore CA in 2007.
162 The charter of SAVANNAH BELLE was cancelled in late 2007 after waiting for 40days off Ivory Coast. For the 3M$ claim including demurrage, bottom cleaning for fouling and 0.5m$ for Arbitration costs, owners appealed to Court for a `garnishee order' freezing charterer's assets until the dispute was resolved.
163 In Golden Fleece Maritime V ST Shipping 2007 regarding modifications to tankers those were chartered out for period stretching after new regulations would come into force, it was held by ECC that owners had to exercise due diligence to restore vessel to carry cargo specified and to obtain certification to continue to trade in compliance with the new rules that had come into effect during the charter.
164 In Robinson V Orient Marine US CA for 5thCir held that the standard of duty owed by Charterers to longshoremen is same as that of owners. In the specific case, an injured had raised claims under Longshore and Harbour Workers' Compensation Act. It was held that negligently stacked plywood constituted a latent defect and triggered a duty to warn.
165 In Asoma Corp V SK Shipping US CA for 2ndCir has ruled that, between charterer and owner, forum selection in CP prevails over the one in BL.
166 In Antiparos ENE V SK Shipping 2008 ECA considering construction of clause 4 C Part II of ASBATANK VOY held (contrary to tentative view expressed in Cooke on voyage charters) that: owners are entitled to recover cost increase of bunkers supplied between the one contracted for first nomination and that for the subsequently changed one.
167 In VICKY-1 2008, ECA in one of the leading cases in damages for loss of a fixture consequent to damage suffered in collision, held that a 'time equalisation' method is more appropriate (than ballast/laden voyage method adopted in ARGENTINO 1889) stating that on balance of probabilities, it was not right to subject those damages to some 'percentage reduction' on the principles applicable in loss of a chance cases.
168 In AILSRA CRAIG 2009 ECA held that there was no condition precedent need for charterers to nominate a port within the delivery range where there was no express requirement to do so and implying so would be futile, before exercising option to cancel, as vessel would anyway have been unable to arrive so within canceling days.

169 In a London Arbitration in 2009 it was concluded that charterers were liable for collapse of stow (essentially due to lack of wedging) as they were responsible for loading and stowing, but under Master's approval/supervision. They were held to be in breach of agreed `standard clauses' and the documentation they had issued about loading and securing etc made no difference to the actual position. It was added that it would be rather unusual for crew to open/enter hatches at sea to check and relash.
170 In KOS 2010 when owners withdrew vessel from time charter for non-payment of hire, charterers threatened to arrest v/l for wrongful withdrawal and called for security to be put by owners which the owners did, but as the dispute was unresolved the cargo loaded was discharged and owners obtained a declaration from court that the withdrawal was `valid'. Resultantly, owners claimed for detention and use of the ship, as also bunkers consumed during that period and the security provided. ECC rejected them, as on withdrawal they did not apply.

Nonetheless, citing WINSON {(1982) CA)} owners were entitled as bailee, from bailor (charterer) of the cargo for costs incurred during bailment. Costs for Security provided was granted subject to its assessment of reasonableness, but not against breach of an implied term (to pay hire) and resulting arrest.
On appeal CA awarded only costs of bunkers consumed in pumping back cargo. Claim for storage costs at market rate was rejected as there was no emergency, necessity or accident. Over-ruling COLLINGROVE (1885), costs for providing and maintaining legal bond during withdrawal, was awarded as `incidental costs' only.

171 In Omak Maritime V Mamola Challenger (2010) ECC held that `reliance damages' be rationally explained as a species of expectation damages, and their award should not put claimant in a better position than in performance. Where as `reliance' could be deemed as trust placed on information given and garnered, expectation is one based on market dynamics. Under contracts, it is one of expectation of performance.
172 In FAR SERVICE (2010) the UK Supreme Court on appeal from Scottish Courts, interpreting indemnity/exception clauses in CP, held that the wording was wide enough to exclude charterer's liability to owner for vessel damage caused by charterer's own negligence, but it operated as an indemnity in respect of claims by third parties. The specific clause was noted to operate against third parties, excluding direct exposures of the contracting parties, from its heading, language and commercial sense, dividing risks.

CONTRACT OF AFFREIGHTMENT

173 In P V A in 2008 ECC upheld majority award of Arbitrators that under COA charterers were not entitled to change laycan dates once nominated and that the tribunal was fully entitled to treat their insistence on their right to do so as repudiatory since it evinced a clear intention not to be bound by nomination.
174 In ZIEMA LODZKA 2010 NY Arbitration panel in Final Award stated that 'nomination clause' is not a one under which CP can be cancelled. The Contract had been formed when subjects were lifted and the approval on nomination by all interested parties is to confirm that vessel conforms to terms of contract/suitabilities and if that had failed another ship would have been expected to be nominated, and fixture not cancelled. Lost revenue less expenses to be incurred plus interest were awarded as damages.
175 In KILDARE 2010, ECC in Zodiac V Fortescue, partially resolving compensation for early termination for 4.5 out of 5yrs (on Cape size market crash from 160,000$/d in Aug 2008 to 24,000$/d) of consecutive voyage charters held that mitigated earnings under

substitute employment as done should be taken into account. For balance period, Expert evidence on supply, demand and earnings projections OR periodic assessment by the court of tribunal on market earnings be considered. From such derived quantum, 1.5% each for early receipt of income and for catastrophic contingencies with reference to yield on US Treasury bonds are to be discounted.(This ruling not appealed against, but it was followed in Glory Wealth Shpg V Korea Line ECC '11 and permitted to appeal to CA).
176 In Stellar ShpgV Hudson Shpg ECC held in 2010 that where Arbitration was provided in a COA that was guaranteed, and both were in the same document agreed by guarantors & charterers, disputes arising therefrom be arbitrated.
177 In x V y (2011EWHC152) in dispute on modified CENTROCON Arb Clause in SYNACOMEX CP for consecutive voyages, ECC Judge concurred with Award that "within 12 months of final discharge OR termination of CP" for time bar are different –the former as per SIMONBURN per CA from the time of discharge of the relevant cargo, and for the latter, end of CP- the latter prevailed.

VOYAGE CHARTER

178 In Jamieson V Lawrie (1796) HL held that owners could recover demurrage up to the time vessel was ready for sailing after cargo work but not for the six months thereafter when v/l could not sail out due to bad weather -in this case ice bound by frozen water.
179 In Nolisement V Bunge & Born 1917 ECA held that though charterers were due for despatch for less laydays used, they were liable for damages for detention (for two out of three days allowing a day for BL issue) even during despatch days.
180 In MUNCASTER CASTLE 1961 it was held that duty to exercise due diligence to ensure seaworthiness is un-delegable; and to be done with prudence, care and skill.
181 In IPG V Seacarriers Count PL ECC 2006 it was held that a voyage charterer who nominated a port which proved to be unsafe because of grounding of two other ships in the interim was in breach of `safe port' warranty.

On Voyage Charter it is the owner's duty to satisfy that the port contracted to perform is safe in all respects for its intended use. Regardless, Master can refuse to enter unsafe ports, if indeed he was good reasons to justify so, enroute or on reaching there.

182 In KANGCHENJUNGA '90 HL held that on nomination, accepting and electing whether to call at a port is choice of the owner (it could be rejected).
183 In JOHANNA OLDENDROFF 1968 HL held that she was an arrived ship on arrival within the port area where ships usually lay, at the immediate and effective disposal of charterers. But in MARATHA ENVOY 1978 it was held under the same "Reid Test" that vessel had not arrived when waiting outside the named port.
184 The difference between port and berth arrival for NOR is as little as `London, one safe berth" and "One safe berth, London' as in FINIX 1975, depending on true construction of the CP clause wording.
185 HL ruled in KYZIKOS ('89) that usage of WIBON (whether in berth or not) was to convert a Berth CP to a Port CP, addressing congestion so that NOR could be tendered on arrival at commercial area; it would apply only when no berth was available
186 In HAPPY DAY (1998) ECA held that even though NOR was invalid, but since charterer's agent arranged berthing and cargo discharge –and hence charterers was privy and time would count. This was to set right earlier binding cases (where it was conceded laytime began on discharge, but not so in this case) and was not appealed against to HL.

187 In NORTGATE 2009 ECC held, that though a valid NOR could be tendered (to whom not specified in CP) on arrival at inner anchorage, terminal's acceptance of NOR from outer anchorage waived charterer's right to reject invalid NOR.
188 In Lia Oil SA VERG Petroli SA 2007 ECC held that owner's laytime statement is also invoice for supporting demurrage under Sales contract. Though party claiming demurrage may have raised so normally within 90 days of discharge, if payment remains unreceived, contractual claims if under English law is to be brought within 6 years from cause of action.
189 In CV Ankergracht V Stemcor '07 full court of Australian FC held vessels that had carried steel coils from Japan to Australia in northern winter, liable for corrosion damage caused by moisture. Carriers were found to have breached obligation to properly and carefully load, handle, stow, carry, keep, care for and discharge; as per expert's opinion ventilation should best have been avoided. The simple thumb rule `cold to hot ventilate not, and hot to cold ventilate bold' is recalled.
190 In GENERAL CAPINPIN 1991 HL held (because of peculiar wording "average rate of 1000mt basis 5 or more available workable hatches, pro rate if less, per weather working day") that the clause provided for an overall rate and not rate per hatch, meaning that 1000t/d if the v/l had 5 or more workable hatches at the start.
191 In Court Line V Canadian Transport it was held that Master has a right/duty to intervene positively to ensure proper stow/securing.
192 In Giant Shpg V Tauber Oil Co (2002), SMA NY reduced demurrage as there was previous cargo in the tanks. Interestingly, damages for detention were awarded to owners against incompetent contractor employed by charterers to remove residue.
193 The maxim `once on demurrage, always' need not always be true especially when vessel delays cargo work: refer KRITI ARTI and HELLE SKOU for interruption due to cleaning, though it started with rejection as an option for non-readiness.
194 In CAPE EQUINOX (2002) Fontier Intl V Swiss Marine ECC upheld Tribunal's award that demurrage would be payable during strike by the consignee's employees, stating that the exception provided for strike, did not exclude the same.
195 In NIKI V Global Companies 2007 SMA NY awarded under Hess pumping clause attached to ASBATANKVOY, where the tanker had not discharged within 24hrs or maintained 100psi at her manifold, the excess time taken to discharge more than 24hrs, could be deducted from demurrage incurred. The panel reluctantly rejected owner's contention that the excess time should be the difference between time taken and the time that would have been taken had the pressure been maintained based on ASDEM (an independent oil industry consultancy specialized in demurrage claims, arbitration etc) formula viz: $Q2=Q1x \sqrt{(h2/h1)}$, 1 & 2 being the averages achieved and warranted.

TIME CHARTER

196 In EVIA No.2 1982 HL addressing continued warranty of Safe Port, it was held that the port is to be safe in all respects at the time of nomination, though a prospectively safe one could become unsafe later -in which case an alternative port be nominated. (Applicability of this case to Voyage Charters to specified port remains unclear).

Under TC, responsibility (between owners & disponent owner) of nominating a safe port is on the charterer as laid out in NYPE & other CPs. Between the operator and cargo interests (shipper/trader/receiver) it would be for owners to verify safety and suitability. When fixtures are to a range of ports and port/terminal nominated only close to arrival (not on sailing or enroute), the nominator would be liable for safety.

197 In Afovos Shipping Co SA V Pagnan ’83 it was held that notice of withdrawal must be unambiguous and not a threat. What is due need not be specified, that can be left to charterers but there must be no uncertainty about withdrawal.
198 In Pan Ocean V Credit Corp TRIDENT BEAUTY ‘94 HL held that Charterers were not entitled to make deductions from advance hire agreed to be paid, however certain or genuine it may be seen to be, unless provided for in CP or agreed so by owners.
199 T/C being performed has priority over mortgagor bank, as it had attached on delivery but remained inchoate till breach, was held by US CA 5th Cir in ‘02.
200 In BUNGA SAGA LIMA (2002) Bottiglieri V Cosco, ECC dismissed application for Leave to appeal and Remission back to Tribunal, holding that Charterer had elected to preclude itself from off-hiring vessel or claiming for breach of obligation (delivery with unclean holds) and damages thereto, by accepting v/l as presented. Dirtiness of the holds had become an issue only for loading the second voyage cargo. Tribunal had been accused of serious irregularity in their findings/award and the remission request was in respect of incorrect application of the off-hire; the first failing, other too did.
201 In Western Bulk Carriers V Li Hai Maritime 2005 ECC held that full amount of hire is payable even if charterers are aware that there will be off-hire during next period of hire. In this case owners had withdrawn for disputed amount of only 500$, but their notice failing to comply with anti-technicality clause it became invalid.
202 Ship with bottom fouling and due for docking/survey may perform poorly and worse after prolonged anchorage in warm waters. So as in PAMPHILOUS 2002, if such fouling occurs during TC after delivery, owner may not be liable.
203 In HILL HARMONY when Master took Rhumb Line against Charterers Great Circle instructions across Pacific, incurring additional time and expenses, HL held that owner has to compensate. The Master’s reasoning for the longer route as not convincing enough. Charterers had the right to order Master on the employment of ship, but safety and other related matters will always remain in Master’s domain.
204 In SEA SUCCESS, Maritime V African Maritime Carriers, ECC held that for of Steel cargo, Master was only entitled to reject cargo if its description in BL (to be done later) would require it to be claused as to its apparent order and condition, so that BL to be signed would be accurate.
205 In David.A effect of Master’s clausing on value of the goods was addressed and ruled that Master could clause BL if he truly finds/believes that cargo is contaminated. It is his duty to do so, to protect innocent transferee.
206 In Speed/Fuel usage claims, two-stage test was established per DIDYMI 1988 basis under performance in good weather and in all weather through extrapolation by expert as necessary, thus applying deficiency for the full length of passages. Further, in GAS ENTERPRISER ’93 ECA held that deficiency of performance against speed and fuel usage warranty would apply not only in fair weather (usually under Beaufort force 4) but also in worse weather conditions also.
207 When `about’ was inserted for both and `all details about’ also, that CP did not warrant Speed & Fuel usage was held in LIPA 2001, but the burden of proof of the description rests with the owners per LENDOUDIS EVANGELOS II.
208 In Carmine V Hanjin ELEUTHETHERA 2003 in evidence it came about that charterers Hanjin had not ascertained sufficient facts to justify performance claims and hire deductions and so ECC held that it was not entitled to do so. Owners claim had arisen against hire deducted for alleged under performance/slow steaming over many voyages when Master had operated at requisite/slow steaming to arrive in time on laycan for voyage charters advised. ***Such instructions, it was held, were not orders to slow steam, but were only information for voyages to be performed***.

209 **Over performance** may seldom be credited to owner by charterer (Alpaca V Groupo Primex: The ARTESIA: SMA award) but is provided for in SHELLTIME and it usually applies to new-buildings as yet to be certain. If `equitable' deduction was agreed for performance, over-performance will also have to be compensated `equitably'.

210 In Hyundai V Furness Withy DORIC PRIDE 2004 on a single trip TC, ECC (referring MAREVA 1977 & JALAGOURI 2000) held detention for inspection by USCG (including the delayed inspection due to collision between two other vessels) was off-hire and not indemnified by charterer. It should be noted that normally such delays where charterers have nominated the port/range during time charter would be to their account and owners indemnified as in ISLAND ARCHON 1994. But in this case a usual TC clause was used for a trip TC –effectively a voyage charter.

211 In Golden Strait Corpn V NYK ECA 2005 held that in quantifying damages for wrongful repudiation of a period CP, an event occurring subsequent to termination, even when such occurrence is uncertain at termination, can be taken into account. In 2007 by majority HL upheld the same confirming that Charterer had to pay damages only for the period from termination till Iraq war broke out, stating that even if the war had not broken out, arbitrators would have had to estimate its prospects, and as the arbitrators did not assess damages until after the war, it was highly relevant. Since those who dissented did so on the need for certainty and since the maxim that innocent party is entitled for value lost on the date it was lost, further development in this regard could be expected.

212 In SALDHANA 2010 ECC upheld Arbitrators unanimous Award that the vessel on time charter (NYPE form was used) will continue to remain on hire during detention by pirates as all the exemptions in CP for off-hire e.g. average, accident, fortuity, default of crew etc would not apply. ("whatsoever" was not inserted in NYPE '46 in any other cause preventing full working of the vessel).The bespoke clause covering seizure, arrest, requisition or detention too, was considered not to encompass piracy.

213 In ZENOVIA 2009, ECC held that without prejudice qualification in 30day approximate redel notice will not give rise to promissory estoppel tantamount to contractual variation or waiver. On the basis of express term in CP on redelivery, it was not necessary also to imply (as it was obvious) that the charterer should not do anything in contradiction.

214 In DYNAMIC (2003) ECC pronounced that a time charterer could not claim that the v/l arrested whilst still on charter, was off-hire (due to lacuna of the particular clause relied on). Useful guidance on whether owners must accept wrongful delivery as repudiation of the charter or `elect' to keep it alive also was given.

215 Orders for last voyage has to be legitimate such that it should be performable during remaining period of CP. Extension options (duly exercised) and off hire periods due to breakdowns etc, can be taken into account for estimating such voyage completion. In KRITI AKTI V PetroleoBrasilieiro CA in 2004 (subtely differentiating with ASPA MARIA '76) held that both aforesaid days are to be added.

216 In Transfield V Mercator re ACHILLEAS 2008, HL held that Charterers were not liable for shipowners loss of profits on a subsequent fixture resulting from late delivery. It was added that liability for damages in contract had to be founded on the intention of the parties in commercial context, objectively ascertained, because all contractual liability was voluntarily undertaken. It would be in principle wrong to hold someone liable for risks for which people entering into such contract in their particular market would not reasonably be considered to have undertaken. General understanding in shipping was that damages were not recoverable for loss of a profitable following fixture.

217 In ELBRUS (2010) ECC upholding Arbitration award in the calculations for loss due to early redelivery on time charter ruled that any gains that accrue during that period should

be considered for set off. In this case, owners had benefitted by docking and letting out at higher rate during the early redelivered duration.
218 In NORTH PRINCE 2010 ECC upheld arbitration award, granting losses (without taking into account savings that had ensued) caused by early redelivery of a time chartered vessel. Since early redelivery to head owners was a commercial decision made by disponent owners, independent of the charterer's repudiatory breach, no credit for disponent owner's savings was given as it was not a choice the innocent party was obliged to take.
219 In MAMOLA CHALLENGER 2011 ECC rejecting Arbitrators Award for loss against non-performance of TC (v/l had not been delivered), stating that comparison should be made between actual situation and position that would have been had the contract been performed, held that since owners recovered more from substitute employment than the loss, their claim stood to fail.
220 In FESCO ANGARA 2010 ECC held that when bunkers are transferred along with ship on redelivery by charterers, it excluded suppliers' rights under Sale of Goods Act '79 s.25(1) against owners and so they were not liable for conversion, though there was retention clause in supply contract. As for `bailment' claim against owners, it was ruled as not sustainable, as suppliers should have been aware of charter and naturally consenting to sub-bailment, and so could not be placed in a better position vis-à-vis owners.
221 In SEA ANGEL '07 ECA held that delay of 3 or so months towards end of 20day TC caused by unlawful detention by port authorities did not frustrate it.

BUNKERS

222 Chief Engineer of P&O NEDLYOD FOS was convicted and fined for pollution caused while bunkering in Sydney stating that enough was not done to avoid pollution and for failure to expedite clean-up operations.
223 Crew of 17 including Master and Chief Engineer from eight different countries of AHTSV LEWEK SWAN were convicted and sentenced up to two years in prison in 2007 in Brunei for stealing and selling bunkers, and hiding the same by recording high usage.
224 In a case where bunkers were not properly specified in CP, and so Charterer had supplied after enquiring with Engine makers (though engines had been modified and required yet another quality), owners failed to get compensated for engine damage.
225 In '05 London Arbitrators awarded compensation for damages to ship's engines caused by bunkers supplied by charterers. In addition to bunker spec in CP, bunkers are to be reasonably suitable and fit for the purpose intended. The award included direct damages and consequential ones for loss of time.

AGENCY

226 In Junior Books V Veitchi 1983 HL held that a subcontractor employed by contractor working at premises of the principal would be liable in negligence based on degree of proximity, despite absence of privity. That `exclusion clause' will be applicable in such cases was held in Southern Water Authority V Carey 1985 by Official Referee.
227 In ATTIKA HOPE '88 Voyage charter freight was claimed by Time Charterers, a business Creditor of TC owner (under assignment) and Head owners. Though Voyage Charterer had paid Head owners, Court held, that on receiving notice of assignment, they had to pay (again) to business creditors.
228 In Meisterwerke V Damco 2004, Dutch Supreme Court held that agents who are empowered to issue BL on behalf of carriers, bind carriers who in turn will be liable to third parties in good faith with the agency liable to its principal.

229 Shipowner and its manager will not be bound by extension of time granted by time charterer's agent, there being no agency relationship. It was summarily held so in Ferrostaal V MV SEA BAISEN by US DC for Southern NY in '05.
230 In India, Middle East etc Ship's agent has been deemed to be the owner of cargo or vessel, and hence liable for storage and demurrage when consignee fails to clear cargo or Delivery Order is not issued (for various reasons). Various appeals to Supreme Court since 2006 have been pending. Under Sec 116 of Customs Act, Agents in India are liable for loss of revenue for short landing of cargo; this too has long litigatory record. Likewise in Pakistan, Bangla Desh and several West African ports. To protect themselves, agents could get indemnity letters backed by banks, from principals.
231 In INEZGANE 2008, Spanish SC holding that the old Art 586 (in which owner includes persons who represent ships in port) of Commercial Code is valid (since lower courts cannot repeal legislation) ruled that agents can be held liable for cargo damage that occurs at sea. Fearing avalanche of forum shopping claims ignoring choice of jurisdiction, agents are seeking cover and it is felt that since shipping practices have changed a lot over the interim period, the courts should take into consideration intent of legislation on behalf of its community rather than original understanding and ordinary meaning of words. In CLIFFORD MAERSK 2008 Spain's SC has held agent responsible for cargo disappearance at port of destination.
232 There may be subtle differences between implied/ostensible agencies in varying jurisdictions. In US, agency is established only by evidence of overt acts by the principal indicating agency relationship. Rejecting ostensible agency under English law (as in this case CP was not properly incorporated into BL), US CA 4thCir in Hawkspere Shpg V Intamex 2004, denied such agency between Carrier and Consolidator, since the latter's commission was earned from shippers.

PORTS

233 In '96 SEA EMPRESS grounding in Milford Haven port authority was held liable.
234 In RIGOLETTO '02 ECA denying Himalaya protection held that stevedores who had signed the shipment note in acknowledgement and stored a LOTUS SPIRIT car prior to shipment was 100% liable as bailee for breach of its general duty of care for its loss but could recover 60% from ABP Ports.
235 Port of Felixstowe was fined for the death of a crane driver in 2003, for failing to ensure the safety of its employee.
236 In Carisbrooke Shpg V Bird Port 2005ECC ruled that the port was negligent in causing damage to ship by failing to ensure careful inspection and dredging (though it was a NAABSA (not always afloat but safely aground) berth, adding that the port ought to have rigorous daily inspection system using even SONAR if necessary.
237 In City of Chicago V MV MORGAN US CA for 7thCir apportioned 50:50 allision (collision with stationary object) liability between the Tug and the bridge owner for not taking precautions.
238 New York Appeals Court (5 judge panel of Appellate division of State SC) in 2008, unanimously upheld 68% apportionment (32% on Terrorists) of damages on the Port Authority for the '93 WTC detonation of explosives in underground parking (killing 6 and injuring about 1000), because it had known but chose to ignore `extreme potentially catastrophic vulnerability'. Under State law, if one's liability is more than 50%, they can be forced to pay the full claims. Unlike 9/11, the federal government had not created a compensation fund and so if this ruling stands, the remaining plaintiffs could go for specific monetary awards.

239 In grounding of NEW DELHI EXPRESS Sea Span Shipmanagement & Sea Span Corp are reported to be suing USCG which maintains the buoy, National Ocean Service and National Oceanic and atmospheric administration that maintain charts for the area, in US District Court in NY, alleging that a navigational buoy that was relied upon by Master and Pilot while turning in fog, was 25yards away from its charted position. Earlier, National Transportation safety Board had blamed the pilot for grounding.
240 In an unreported case, a Port authority settled with owners for damage caused to ship by contact with an unmarked obstruction of a damaged beacon.
241 In American Trucking Association V City of LA, US 9th Cir CA ruled in 2011 that the requirement that port drayage drivers must be employees of licensed motor carriers was illegal, as Federal Admin'n Act (FAAA) pre-empted the State/Port from making such laws.

PILOTAGE

242 Though typically `territorial waters' the innocent passage granted to unarmed merchant ships through Dardanelles and Bosporus straits under non-compulsory pilotage is as per MONTREUX Convention of 1936. Countries locked in Black Sea have a clear need and understanding with Turkey.
243 In COSCO BUSAN striking San Francisco Bridge support in 2007 the pilot was convicted (US government also was tried to be blamed as the pilot had drug and alcohol abuse history) and given prison term, and the shipmanager paid heavily for its shortcomings and *post-facto* acts in management. Costs incurred by pilot of COSCO BUSAN reportedly was reimbursed by the ship/operator as the pilot was employed by them.
244 In California, vessels are to either take trip insurance cover for pilot or defend, indemnify/hold him harmless in the event of accidents due to his negligence. Unlike elsewhere, Pilots in Panama Canal take over responsibility for navigation.
245 In Saudi V Acomarit Maritime services US 3rd Cir CA ruled that the plaintiff Mooring Master failed to prove jurisdiction for pursuing his claim for injury for dropping him into water off Galveston in the high seas when transferring from one ship to another. Five such suits in US against the Swiss shipmanager headquartered in Bermuda were all dismissed on the same grounds.

TERMINALS

246 A bulk loading company in USWC was fined in '08 for arranging water affected potash that was unsaleable, to be dumped at sea by a ship. Part of the fine went to environmental projects run by National Fish & Wildlife fund.
247 In Nice Trade V UPS SCS Korea 2008, Korean SC held that the carrier could limit liability and the terminal too through Himalaya Clause. Claimants had tried to pursue the terminal for negligence but it was of no avail. Carrier had carried the cargo containing organic peroxides in reefers at -18^{o}C but had not advised the terminal of the need to maintain low temperature; so it was not done, the cargo caught fire and claim ensued.
248 Container terminals being the last and first handling containers from ships, there is increasing demand and liabilities related thereto for accurate weighing and screening of containers. There has even been a proposal to transship containers to/from offshore facilities to US ports/terminals to ensure security.
249 Ports and Terminals in the private sector in some cases are facing issues on land allocation and coastal zone for special economic developments. These may be due to the method employed by the government, e.g. because the land acquired for a private mini car

project in India by an Act of 1884 was for `public purpose', it had to shelved due to public protest and relocated far away in the sub-continent just before production was to start.
250 In Ferryways NV V ABP 2008 ECC has held that the shipowner had a right to be indemnified by the Terminal operator for compensation payable of a crew killed by equipment operated by sub-contractor of the terminal operator.
251 In 2010, US Customs and Border Protection (CBP) had announced positive changes to crew parole status for vessels engaged in US offshore lighterage. US CG Authorisation Act in 2010 requires port/terminal facilities to provide system for seamen and others to board and depart vessels in a timely manner at no cost to individuals.

STEVEDORES

252 FIOST, cargo interests arranging to handle cargo would remain responsible for damage to cargo, and not owners unless on liner terms when carrier has the onus to carefully load, stow and discharge; ref Renton V Palmyra HL1957.
253 That owners are not liable was reaffirmed by HL in Jindal Iron & Steel V Islamic Shpg JORDAN II 2005. HL also confirmed that the carrier –under freedom of contract- is free to contract out of obligation under Art III Rule 2 of Hague Rules to load, stow and discharge cargo; changes pursued by UNCITRAL is expected to make such freedom explicit (as inArt 13.2 & 17.3(1) of Rotterdam Rules).
254 An LMAA Award of '10 rejected that insertion of "charterers shall perform cargo handling at their risk and expense under supervision **and direction** of captain" did not transfer "responsibility" to owners, but it only reinforced the captain's right to intervene.
255 In MARLENE GREEN '08, maritime arbitrators in NY by majority rejected owner's claim that responsibility for loading/stowage should be on charterers under FILO (Free In, Liner Out) under a Liner Booking Note, due to lack of clear and explicit language for shifting the same; Master is duty bound to correct improper stowage that would threaten seaworthiness and safety.
256 When there is a clause prohibiting liens for supply of services in the contract, stevedores may not be able to exercise maritime lien, arrest etc as ruled by US CA 5thCir in 2003. Same ruling also held that automatic acknowledgment of notice by fax would suffice to prove that the party had knowledge of the same.
257 Pointing out that stevedores do include right to exercise lien (Jarl Tra AB & Otrs V Convys Ltd 2003), in 2003 ECC ruled that Stevedores as sub-contractors of carrier could detain and sell cargo (ref Swedish Papers to Chatham) if the carrier had right under BL to sub-contract. In the said case as stevedore had taken part payment after carrier went into 'administration', they could not exercise lien on all cargo realize their out-standings.
258 In PRETORIA 2011Rotterdam Court held that for claiming damages from stevedores, it has to be proven that they had not exercised the care that can be reasonably expected. (Under common law negligence is easily arguable).

INDEMNITIES

259 In shipping and related transportation including different modes of connectivity and carriage, it can be traced back to 1954 on to passenger ship HIMALAYA when a passenger sued Captain and crew successfully as owner/carrier had excluded themselves of contractual liability through a specific term in the ticket. (Such unfair exclusions against clients and consumers may no longer be valid); owner would have compensated the captain/crew against monetary loss incurred during course of duty.

260 In a landmark 2004 judgment US Supreme Court (Norfolk Southern Railway V James Kirby) holding that the US Federal maritime law (not the state law) governs disputes under multimodal BLs, ruled that Rail and Road transport companies would be protected by Himalaya clauses in intermodal BL negotiated by Ocean carriers. The court citing that the transporters were agents for 'single, limited purpose' of for limiting liabilities, stated that it would be absurd if Himalaya clause could protect a carrier's subcontractor as against an intermediary but not the ultimate cargo owner.

261 In PACIFIC '06 USCA 2nd Cir ruled that Carmack 1906 & Staggers Rail Act '80 should take precedence over COGSA. Rejecting UP's reliance on US SC's decision in KIRBY 2004 it was stressed that only principle established in that case was that maritime contracts should be interpreted in the light of federal maritime law, but it does not follow that only federal laws apply to COGSA and that CARMAK does not play a role in governing the terms of domestic carriage portion. Finally in 2010 US SC by 6-3 majority ruled that liability under COGSA takes precedence over Carmack Amendment for imports in Through BLs relieving carriers of the scare of different US liability regimes.

262 Over the years Railroads, Terminals, Barges etc have all been able to benefit from such indemnity, though there are jurisdictions where the precedent is still getting established. Airfreight & courier industry also provides for such indemnity pass-ons in Air Way Bills.

263 In Whitesea V El Paso Rio Clara, pursuant to General Average, a trial court, distinguishing STARSIN case as worded differently (limiting parties to BL), determining impact of Himalaya Clause on right of third party carriers pertaining to Hague-Visby Rules and Consumer Protection Legislation, decided that the covenant not to sue in Himalaya clause was applicable.

264 It is to be noted that ***under Rotterdam Rules, such protection to maritime carriers will not be effective*** as, though it entitles these parties to protection of the said Rules, it prohibits any clauses that lessens their liabilities.

265 In Pacific Carriers V BNP Australia '04, Australian HC ruled that a bank that also signed a Letter of Indemnity for release of cargo was liable to the carrier (and could not claim that the officer who had so signed lacked authority).

266 In Nantong Garments & Hellman Intl Fwdrs V Silking Development & Lerner Stores (HCCL 117/1994) in 2011 Hong Kong first instance Court ordered that Letters of Indemnity issued for rerouting cargo, dating back to 2002 be honoured.

267 In GESCO V Far East Chartering & Binani Cement ECC in '11 held that owner could enforce LOI given to voyage charterer by cargo receiver based on which cargo had been delivered. The Judge however doubted whether owners also had a good claim under a so-called unilateral contract with the receiver, as they were not aware of offer of indemnity at the time of cargo delivery.

CUSTOMS

268 US justice department imposed criminal penalties against TRANSOCEAN and TIDEWATER, for bypassing customs regulations –aided by Panalpina -in Nigeria, and obtaining favourable tax assessments in Azerbaijan. The fine was imposed on US companies (applicable to US nationals) for breaching US laws.

269 In Customs & Excise Commissioners V Barclays Bank ('04) ECA held that the bank was liable for negligently permitting a `freezing order' to be broken. Since in any case that would not have made up for revenue loss, bank had to make up shortfall, since it was a mistake, contempt of court was not pursued.

MANAGERS, SHIPMANAGEMENT & ISM

270 In KUZMA GNIDASH (2002) Hong Kong Admiralty Judge held that claims by managers against owners relating to commissions earned on freight, payment for services rendered to ships and hire of containers (for the ships) fell under his jurisdiction.
271 In the sinking related case of MSC CARLA in '97, the Korean yard that had lengthened the ship was said to have escaped liability under tort for product liability of shipyards in a landmark US Appeal court, only because time bar of 10years under Korean law. The 2nd Cir US CA stating that the place where wrongful act done being Korea, Korean rules applied and it barred, under 'statute of repose', claims against Hyundai (yard) by cargo interests including P&I Club. (The trial court had ordered Hyundai to pay North of England 20M$ against indemnity put up).
272 For dumping oil-contaminated grain from JUNEAU in China Sea in '99, Chairman & CEO of Sabine Transportation Co was convicted by Jury for conspiracy, obstruction, presenting false statements and defrauding, leading to fines and imprisonment.
273 In GONEN 2002, Guanghou Weichong (Dry Dock) took 70 days instead of the estimated nine days and so Swedish Club pursued owner's claim through Gaungzhou maritime court successfully.
274 IN Keppel FELS V International Coatings &Anr (2002) Singapore HC, held that defendants by failing to advise need for surface preparation, were liable.
275 In NEPTUNE DORADO 2000 on detention for 30 safety violations including ballast leak into cargo tanks, by USCG and on follow up by US Attorney for Northern District of California, FBI & EPA, owners & operators were fined and placed on 3yr probation and asked to implement corporate compliance agreement. Captain and former Captain were also fined, the later for not advising new Captain of defects; they were banned from US waters for an year and ordered to undergo re-training and re-certification.
276 Singapore HC in 2006 cast liability on OEM (original equipment manufacturer) and a sub-contractor who had refurbished an equipment, for damage caused to a ship, finding that though the contract was with OEM, it did not bar tort claim against subcontractors.
277 The then president of Algerian state owned CNAN shipping firm was along with senior executives was sentenced to 15yrs imprisonment for negligence in 2006 for their part in the sinking of BECHAR on 13 Nov 2004 with loss of 16 lives. The port authority was also accused for not assisting the disabled vessel.
278 Owners and operators of MED TAIPEI agreed in 2006 to pay 3.25M$ to resolve allegations that 15 containers lost overboard in 2004 caused long term damage to Monterey Bay National Marine Sanctuary
279 In Parsons Corp & Ors V HAPPY RANGER 2006, owners were held liable by ECC for failure to exercise due diligence at delivery of a new Heavy lift vessel, wherein double hook configuration had been changed to single hook and failure to test the same had led to accident as per experts. As the court was very critical of specialist owners, they argued – disputing that hooks were 'loose gear'- that there was no need to run separate tests & they were entitled to rely on Class/certificates issued by builder. It was ruled that the hook should have been tested under Lloyds rules as `loose gear', to 122% of 250T SWL plus 20T, to 325T.
280 Norwegian Commission of enquiry into BOURBON DOLPHIN (2007) sinking reported design weakness, failure to set up, audit, enforce & apply safety procedures were causative and apportioned blame on to several parties including Norwegian Maritime Directorate, its Inspectorate, Class DNV, Owners & Managers, citing system failure of the requisite vessel specific operations, training & familiarisation.

281 Owners and Managers of UK registered CAP HENRI was fined in 2009 by a Flag State Magistrate's Court for not complying with specifics in Exemption certificate covering Life Saving Appliances. A lifeboat had been damaged during drill and as alternative Life rafts were allowed to be fitted temporarily for three months; but this not followed and vessel had continued trading.
282 For non-compliance of minimum rest period aboard MAERSK PATRAS, its manager was fined on guilt admission in 2010; also for failing to improve matters.
283 Inadequacy of ISM system was pointed out as causative in TOLEDO 1995 and owners/managers held to be liable.
284 US CA 5th Cir ruled in a collision between two OSV in fog in Mississippi that vessel deficient in ISM (Safety manager, training, audit, evaluation etc) was un-seaworthy.
285 In Kyles V Easter Car Liners 2004 Georgia CA held that rolling of the vessel while loading causing cargo to fall down injuring a port worker seriously was held to indicate violation of ISM.

That ship Masters have over-riding authority and final responsibility is provided for in SMS by clearly stating so. Master is to implement safety and environment protection policy, motivate crew for the same, issue appropriate instructions in clear and simple manner, verify that requirements are being met and review SMS for its effectiveness reporting deficiencies to management for correction.

286 In 2004 in Hasty V Trans atlas Boats, US 5thCir CA ruled that the Master violated company policy by allowing an intoxicated seaman to come on board (who later assaulted another seaman).
287 Singapore HC held in RSS Courageous collision with ANL Indonesia that the Trainee OOW of the former had to be held to the same standards as a reasonably qualified and competent OOW and was criminally negligent for causing death by collision.
288 In VOS PIPER 2007 incident, a Scottish Court fined Master of the OSV for allowing drunken crew to return to the vessel against management policy. The Chief Officer who had returned back drunk, fell down the stairs and died. Possible criminal liabilities of the port facility that allowed drunken sailors to enter remained untested.
289 In USA V Canal Barge Co Inc USCA 6th Cir had decided in 2011that a vessel's crew's failure to immediately report hazardous condition aboard to USCG amounted to a knowing and wilful criminal violation of Ports & Waterways Safety Act. Hazardous conditions are that may affect safety involving collision, allision, fire, explosion, grounding, leaking, damage, injury/illness or manning shortage.
290 In 2011 four executives of Danish Clipper Group were imprisoned and 90 fined for falling foul of the law for having received bonuses into foreign bank accounts.

NAVIGATION

291 MATCO AVON '68 grounding near Shah Allum shoal in Arabain Gulf, was said to be due to a **fatigue**d navigator dossing off on watch after hectic loading activity in port earlier.
292 In Cape Hatteras V Kelly Candies, recalling a decision of 1882, US CA of 5thCir has held that owners could sue Mate of the former for causing collision due to negligence.
293 In the grounding and loss of TIRRANA 1966, Norwegian SC had held that the State was not liable stating that failure of light buoy was not "substantial and unexpected deviation" from safety services.
294 Swedish Supreme Court held Swedish Hydrographic Office vicariously liable in grounding of TSESIS in 1977 due to incorrect marking of rock on charts.

295 Earlier in an unreported case of grounding of QE2 between Nantucket and Martha's Vineyard off US East coast, US hydrographic office was not held liable since survey was conducted using `state of the art' techniques when done in 1939.
296 Norway's National map agency (hydrographer) was held partly liable for dereliction of duty in the sinking of ROCKNESS 2004 with loss of life after hitting an uncharted rock. As there was contributory negligence by ship's crew compensation was reduced to that extent. On appeal, agency and the pilot also was cleared of charges.
297 In 2001, 2nd Mate of DUTCH AQUAMARINE was sentenced to one year imprisonment for manslaughter for its collision with ASH caused due to negligent watch-keeping in the English Channel. Masters have been fined and jailed for high alcohol content, certificates have been suspended/withdrawn etc
298 Russian Master of a Cambodian logger that capsized after ignoring warnings in Hatsukaichi in 2004 during typhoon causing deaths was jailed for criminal negligence.
299 In ANANGEL ENDEAVOUR (2004) a US DC denied a cargo claimant's motion set aside a maritime attachment, because there was a question of fact as to whether Both-to-Blame collision clause in BL was applicable and could give rise to indemnity against them. Such contingent liability, could give rise to maritime lien.
300 In Crowley Marine V Maritrans '06 US CA for 9thCir held that agreed manoeuvres between two vessels do not constitute a special circumstance excusing violation of COLREGS. Narrowly construing Rule 2, Court declined to adopt analysis of several older cases as they conflicted with plain meaning. Court added such deviation would be applicable only when adherence to COLREGS could lead to "impending unavoidable collision" in which case "departure from rules must be no more than necessary".
301 In Eleftheria V Hakki Deval 2006 ECC –assisted by nautical assessors, displacing old 50:50 apportionment for collision in restricted visibility, held due to its speed, poor look out and surprise course alteration, that Eleftheria was to bear two-thirds.
302 After the case was remitted back by US CA 2ndCir, District Court for Southern NY, apportioned liabilities 63% to KARIBA, 20% to CLARY and 17% to TRICOLOR for a collision between KARIBA and TRICOLOR causing the latter to capsize and sink. TRICOLOR was held to have no liability to cargo under `error in navigation' defence and so allowed to limit liability. **CLARY was denied limitation.** This is one of the recent cases wherein a vessel that had not collided, was blamed for failure to take action.
303 Louisiana officials are seeking arrest of KITION naming the tanker, ship manager, P&I Club and two tug companies for striking a bridge and damaging it, alleging that the ship should not have been turned so close to the bridge, but farther well away. Arresting anywhere internationally is sought as vessel is trading far away and not calling or scheduled to call ports within jurisdiction for quite a while.
304 ZIM MEXICO III Master was convicted by US Jury in '06 for toppling of shore carne and death of crane repairer, when the ship contacted the crane, while unberthing, due to failure of bow thruster that the Master was aware of.
305 In 2006, Japanese CG filed formal complaints against Masters of GIANT STEP, ELLIDA ACE and OCEAN VICTORY for professional negligence. Similar cases have occurred off Sydney and Newcastle Australia, off NW Europe, USA etc.
306 In PNSL Berhard V Darlymple Marine Svcs 2007, it was held by Queensland SC that the Master and crew of the tug were negligent for failing to take timely action while towing. Various underlying issues including Standard Conditions of towage, `in relation to transportation of goods', 'while towing' (tugs steering had failed at the time of accident) etc were considered, but the tug was found liable.
307 In '07 Master of SANTA REGINA was fined by a DJ in New Zealand for delayed reporting of `near miss navigation incident' to Maritime Safety Authority by four days.

308 In '09 Dutch water police is said to have boarded a laden tanker on berthing, alleged contravention of routeing measures between German Bight and North Hinder (enroute from Baltic to Europort) and issued a notice with fine of €5500 as proposed by Public Prosecutor in Amsterdam for out of court settlement. The Notice was disputed and fine not paid, as Coast Guard had advised Master on VHF that the Deep Water route was discretionary when queried about his not following it with draught of 11.6m. No follow up action was reported. The Notice had referred to British Admiralty Sailing Directions, Dutch Pilot and Netherlands chart that was a guide for passage planning. The tanker had not had Dutch publications on board and the British one had not mentioned such mandatory compliance.

This incident highlights need for proper planning, awareness and compliance. The navigators had not properly studied the BA Sailing Directions. They had verified the TSS using the IMO Ships Routeing guide but the mandatory application of certain routes in Part G of the publication was not seen as there was no clear cross reference to it in the section giving details of TSS.

309 In 2011 Master of MEL OLIVER was sentenced by a US DJ in a FC to 3yrs for leaving the vessel with an under-licensed employee. The operator towing company, its co-owner and licensed apprentice who steered the vessel in Master's absence were also sentenced for causing collision and pollution.
310 For sending out a false radio distress and stating that he and crew were abandoning a vessel, one J G Baldwin was given jail terms and fined by a US District Judge.
311 Tonga SC in PRINCESS ASHIKA 2011 sentenced Director of Marine, Managing Director, Master and First Mate to prison terms and fined the ferry owning firm on manslaughter and un-seaworthiness charges.
312 In MSC PRESTIGE and SAMCO EUROPE '07 clear visibility night collision, AdC assisted by Elder Brethren of Trinity House as assesses in '11 apportioning liability 60:40, finding causative factors as poor lookout, over reliance on VHF/ARPA, failure to take timely bold action, call Master, sound signals etc, ***observed that optional light signal supplementing sound signal per rule 34 (b) Colregs were not used***. Case laws of British Aviator '64 Angelic Spirit '94, Mineral Dampier '01etc were recalled to proportion blame per MIOM 1 Limited & Anr v Sea Echo ENE'10 based on the degree of fault.

SALVAGE

313 That Salvors have no title to goods salved was re-established in TITANIC (2002) in admiralty case in salvors trying to dispose of artefacts recovered; it goes against common (mis)understanding that finders are keepers; keepers yes, not owners but.
314 For statutory services rendered by duty-bound agencies assisting, saving, salvaging etc may not be eligible for claims. In USA V Ex USS CABOT/DEDALO 5thCir CA '02, CG's salvage claim in duty under Federal Water Pollution Control act was turned down.
315 In OCEAN CROWN **Admiralty Court** in '11 held that in assessing salvage award, risk of future downturn was not a factor to be considered even under `principle of encouragement'. AMERIQUE principle that **a high salved value** must not raise quantum disproportionately to services rendered, is to apply to all cases whether simple or complex. Appeal from "Appeal Arbitrator's Award" (against Salvage arbitrators' award) was remitted back to the former. Appeals, if any, from AdC lies to CA and SC (Legal Committee of HL).
316 In Sea Tractor V Tramp ECC 2007, the ship was held liable for salvage charges to tug for assistance after she got into manoeuvring trouble -earlier declining use of tug advised

by Pilot. It was objectively decided by the Judge with advice from Nautical assessors stating that the vessel must have encountered a situation exposing it to damage if the service was not used, such that no reasonable person would refuse such salvage help.

317 In VOUTAKOS '08, ECC QBD ***Admiralty Court considering a rare appeal from LOF*** Arbitration award concerning 'disparity principle', held that though it is flawed and unworkable, commercial towage rates were relevant for useful cross-check by way of providing floor rates for deciding salvors' claims.

318 In United salvage V Louis Dreyfus '07 Australian FC denied claim for 20% value saved for averting a potential 'global failure'. Considering all facts, even though the ship laden with 160kt coal had run aground in Gladstone harbour with 3200T fuels, after steering gear failed. The trial judge in Federal Court in Sydney concluded that salvage operations were not undertaken in `relatively extreme' conditions or circumstances and awarded only A$850,000. On Appeal, the Full Court upheld the award, stating that the risk of `global failure' was only remote.

319 In an effort to take Admiralty case to Jury in USA, Lockheed succeeded through a petition in US CA 4thCir for a writ of mandamus to direct the district court to try its claim before a Jury. The Appeals Court ruled that right to Jury trial cannot be lost because the insurer had obtained a `declaratory judgment' and designated the action as one under general admiralty jurisdiction. The issue in case was whether insurer has to indemnify its assured. In normal course, assured would have sued for breach of contract but under `saving to suitors' clause assured would have been entitled to Jury trial, added the Court.

320 In 1983 **landing of a UK's Sea Harrier Vertical take-off & landing jet on Spanish container ship ALRAIGO** off Portugal, 0.57m£ salvage claim was shared between the crew and owners on 60:40 basis.

321 Brooklyn FC awarded salvage claim to tug, crew member of tug as also chief officer of the Staten island ferry for their efforts during the first half hour after the ferry crash onto the terminal (in 2003 killing 11 and injuring seventy) for rendering assistance that satisfied elements of salvage under common law (maritime peril, voluntary aid and success). The Chief Officer had filed his own salvage claim and succeeded.

322 Reportedly, there was no salvage claim in the case of an aircraft landing on Hudson River in US in 2010. Saving any property may be claimable, but not saving life as it is a natural duty of anyone present or concerned; bravery awards may be given though.

323 In Sailing Vessel ILENE SMA Arbitrators through their final award found that the salvors had been grossly overpaid through Interim salvage award (as per the Convention) and called for reimbursement of 95%.

324 Salvage operator TITAN was denied arbitration in London (mainly to limit liability) as per Arb clause in Salvage agreement by US CA 9th Cir in '11, for the extensive damage caused to a reef during salvage of CAPE FLATTERY in '05 off Hawaii.

PORT of REFUGE

325 In the grounding of Isabel III in Lakshadweep Islands 2006, Kerala HC quashing the case against the crew of illegal entry, ruled that the foreign vessel had rights of innocent safe passage under UNCLOS, the grounding had occurred due to bad weather and that the Administrator of the islands has a duty to repatriate shipwrecked crew under MS Act.

GENERAL AVERAGE

326 In Mora Shpg V Axa Corporate Solutions 2005, ECA has held that the choice of Jurisdiction for guarantee under GA (by cargo interests to owners) is that of insurers based on where they want to settle.
327 A missing split pin is believed to have grounding of ferry QUEEN OF OAK BAY in 2005. It damaged/sank 28 pleasure boats in a marina near a terminal in Vancouver, when its engine governor became disconnected (due to absence of split pin on the securing nut on governor linkage of No. 1 engine) while reducing propeller pitch. Internal communication disturbance/failure interfered with efforts to stop the ferry ploughing on to the dock full of waiting passengers. A natural General Average act! The enquiry was very critical of management procedures, practices and inspections.

POLLUTION
328 In the case of SITKA II 1996 (reported as in Morrison V Peacock 2002) Australian HC ruled that pollution caused by a burst hose of a crane (due to rusted sleeve of the hose) whilst it may have been due to `damage' –including wear and tear- under its natural and ordinary meaning, oil discharge should have been prevented by reasonable precautions. Since pollution falls under strict liability with the defaulter having to pay up, it is imperative that all preventive measures are taken. Planned Maintenance System (PMS) should address all relevant issues and risks in this regard.
329 For 2000 pollution, Master and owners of CARMEN were fined in Sydney for bilge water overflow. As Master had not done `all that he could have done to avoid pollution', (he had joined only 3weeks earlier and had assumed bilge tank had high level alarm), the court declined to give him the benefit of doubt by refusing to record `guilt proven but decline to convict', and dismiss the charge.
330 A fishing vessel and its Captain in 2001 in USA were the first federal fisheries prosecution based exclusively on vessel-tracking data gathered by the satellite-based Vessel Monitoring System
331 In 2002 Directors of Boyang Maritime Fisheries Korea, two senior managers and the Firm were heavily fined for pollution off USA. Master and two chief engineers from vessels operated by them were convicted and sentenced. Doo Hyun Kim, Master of KHANA was the first captain to be sentenced to prison for crimes arising out of the illegal discharge of oil at sea.
332 In 2005 TRANS ARCTIC observed with 20m slick in its wake was ordered into Brest and fined, but part of the fine was suspended as some fine was ordered by the flag state authorities in Norway. Reportedly, the set ***off was due to the provisions in Montego Bay Convention that if flag state pursues action, the other state must drop such proceedings.***
333 For grounding of bulker NEW CARISSA at Coos Bay in US, owner paid for `negligent trespass', funds towards state's legal fee and wreck removal.
334 In Filipowski Barbara V Magnavia S MBH & Co 2007, New South Wales Land & Environment Court, considering that the owner was neither overtly complicit nor in breach of due care and diligence, imposed a fine of only A$25K instead of the maximum of A$10m, as the quantity of oil that had leaked out from bow thrusters was surmised to be little, despite the two experts estimating higher volumes.
335 Negligence of authorities in not maintaining navigational aids, depths etc- are difficult to prove or litigate; liabilities of `agents and servants' also are not provided for. Ships and Masters have been held up for prolonged periods in such cases, e.g. NISSOS AMORGOS ('97) in Venezuela, with the port authorities and local jurisdiction taking difficult stands.

336 However, “no evidence of negligence” was concluded by USCG in ATHOS 1 pollution in 2004 on striking submerged pipe debris whilst under pilotage. The counter claim of owner against the terminal was dismissed in 2011 by USDC holding that the wharfinger was obligated to survey waters close to entrance, berth and exit, and not obligated to survey under federal anchorage area.

337 US CA for 5thCir ruled in PACIFIC RUBY that neither law of the flag doctrine nor UNCLOS (which US has not ratified) limits US government from exercising jurisdiction to prosecute violations of US criminal laws committed in its ports. It is on this basis that falsified records -incorrect log entries made regarding disposal of oily water at sea (not in US jurisdiction), presented to authorities as proof of compliance of international conventions are treated as criminal, and fines and jail terms imposed on ship crew etc. (Pollution at sea can only be reported to Flag state, not tried in US)

338 In FREJA JUTLANDIC the superintendent and managers were indicted and fined, and given custodial sentence for persuasively instructing ships to dispose pollutants at sea.

339 For damaging coral reef off Florida by dropping anchor on it, a liner agreed to pay for hiring contractor to repair the reef, without admitting guilt. Compensation for reef damages have been claimed by Indonesia, Egypt etc when vessels have run aground on them.

340 ***Chief Engineer Mylonakisex- GEORGIOS M (2010) has reverse-sued*** in a Texan court the ship/fleet in rem and owners/directors/operators etc, after conviction for pollution by using fixed bypass lines (not temporary ‘magic pipes’) that had been fitted earlier. Statements and testimonies used for convicting were found to be erroneous & influenced by others. Compensation is claimed against alleged scape-goating. Owners and related businesses interests have counter-sued.

341 Michigan’s state law calls for ships to obtain permits from its environmental department certifying the standard of no exchange or full treatment (refrain from dumping or have approved equipment to sanitise) of ballast water was upheld in Federal Court in 2008 (it could be appealed to SC though). Michigan is the only Great Lakes state to have such a law after 185 invasive species were detected in the lakes, having arrived in ballast.

342 For DEEPWATER HORIZON explosion & pollution 2010, BP –the well owner had held Halliburton -whose cement `seal’ had failed- accountable for improper conduct, errors and omissions, including fraud and concealment. Suits were filed against Transocean Ltd Deepwater Horizon's owner & operator, and Cameron Intl Corp which had manufactured blowout preventer. Halliburton had countersued for negligent misrepresentation, business disparagement and defamation, citing inaccurate information provided.

Decontamination sites were set up by USCG (for inbound vessels to US) with costs including that for pilotage to BP’s account; outbound vessels were also eligible for such claims. Vessels operators becoming liable to third parties -for damage caused by fouled/oiled hull- also could raise claims, properly documented of course. Carnival vide bundled lawsuit had sued multitude respondents including BP, Transocean & Halliburton for losses incurred.

343 Major Cruise lines have admitted to pollution along US coast in non-compliance with ballast and grey-water (from laundry etc) discharges and have been fined.

344 In ‘11 Spain imposed pre-trial spill fine on RAS MOHAMED to allow vessel sail, after suspected pollution was spotted by surveillance plane; same to be refunded if exonerated.

345 In City of LA V San Pedro Boat Works 9th Cir CA held that `owner’ liability under Federal environment liability (CERLA) did not extend to those having possessory interests conveyed to them by owners. (They could have `operator’ liability though); the case concerned severe soil and ground water pollution.

346 Owner of 245GT SATTHA was fined by Cairns (Aust) Magistrate Court in 2011for grounding damage to Great Barrier alleging unseaworthiness against short-manning.

347 Owners of pollution control vessel CASITAS in 2008 agreed to pay $2.8m$ through a consent decree, for damages caused to reef near North island off Pearl atoll near Honolulu, when v/l grounded in 2005. The 270GT vessel was cleaning debris from seabed under contract to NOAA.

CRIMINALISATION

348 ERIKA and PRESTIGE pollutions have been sailor-unfriendly. Apart from EU, other countries also are treating oil pollution (soon all kinds of pollution too perhaps) as criminal offence.
349 India has detained crew of ASIAN FOREST in '07 for shipwreck/pollution, though caused by unsafe Iron ore fines with higher than permissible moisture content, though ostensibly on pollution/wreck removal issues. Most countries, in the wake of accidents and incidents (Korea HEIBI SPIRIT, Norway FULL CITY) have been becoming stricter in pursuing seafarers to ensure liability compensations.
350 In Mangouras V Spain in 2010 it was held by European Court of Human Rights that 3m€ bail set for release did not breach right to security and liberty under Art5. It was not based on Captain's affordability but on capacity of party posting bail (P&I Club) as also taking into consideration public outcry.

PASSENGERS

351 In Carnival Cop V Carlisle, Florida SC held that under Federal Maritime Law owner is not vicariously liable for medical negligence of shipboard physician.
352 In ZENITH (2004) of Celebrity Cruises, an American passenger, alleging rape by a ship's steward ashore, successfully claimed compensation, suing the foreign flagged operator in US; limitation of liability was refused on the basis of `strict' liability.
353 A man was arrested in 2010 for releasing stern anchor of cruise ship RYNDAM while cruising at sea off USA. He was identified by mustering all and from CCTV footage and claimed he was inebriated; when found guilty he may be imprisoned and fined.

STOWAWAYS

354 Master and crew have been charged and held back (PESCADORES 2003) for ill-treating them.
355 Master of SIETE OCEANOS was detained in Brazil in 2001, accused of holding a stowaway in chains and was charged with risk of sentence up to 3 years in prison.

PIRACY

356 In Hicks V Palington 1590 Moore's cargo given to pirates was considered as GA.
357 Piracy payment falls under GA was enunciated in Barnard V Adams (51US 270 1850).
358 Rationale for recovery of ransom paid as Sue & Labour expense under English law stems from Royal Boskalis Westminister V Mountain 1999.

Ransom payment is not illegal since the repeal of 1782 Ransom Act. The Norwegian Marine insurance Plan '96 (2007) does not differentiate between piracy and war risks. The difference between piracy and terrorism (as to what the funds are put used for) is a new development and the US ban on payment to pirates, has raised the need to address it, as non-compliance could be prosecuted against.

359 A container ship was detained while transiting Suez canal in 2010 with armed guards to protect against piracy
360 In '10 Rotterdam District court sentenced 5 Somali men for piracy with 5yr prison terms claiming `universal jurisdiction in the Criminal Code for cases of piracy on open sea stating it was not contrary to any international convention. Article 5 of the European on Human Rights was not held to be in breach for the 40 day delays before trial, as no consequence followed from that in criminal proceedings.
361 In Nov 2010, 11 Somali pirates were sentenced to six years prison terms by a Court in Seychelles for pirating a Spanish fishing vessel in March.
362 A pirate was sentenced to lengthy prison terms in 2010 by US District Courts of Virginia & Columbia; 5 pirates convicted by US (Virginia) Jury was sentenced to 80 yrs.
363 In Masefield V Amlin 2011 ECA held that ransom payments to pirates are not illegal or contrary to public policy. Relying on HL view on piracy threat vis-à-vis liberty of crews, the ruling after about 500yrs on piracy, precludes spate of ATL/CTL claims. The Court commented that "bribery or constructive bribery may well be" illegal. Drawing direct comparison with Bribery Act 2010, it commented that ransom payment is not prima facie a bribe "done for the purpose of obtaining an improper advantage". Hence ransom may not contravene the Bribery Act.

SURVEYS

364 In Berhard V Canada '04 heard in Federal court, owners of LANTAU PEAK obtained damages from Canadian Govt for 4 months of detention regarding PSC findings under SOLAS/ISM, but on appeal the Federal CA reversed the decision stating that in such discretionary measures, the judge did not have power to review merits of any `lawful & reasonable' decision taken by qualified inspectors.
365 In AIC Ltd V ITS Testing Services (UK) 2006 ECC held that the inspection company had used a different test method in breach of its instructions, secretly re-tested and concealed results from seller and buyer, for which it was liable in breach and deceit. It was partly reversed on appeal by CA (2006), ITS Testing was found liable for losses sustained due to problems at discharge; finding of deceit was overturned, but liability for concealment was time bar missed and the case was remitted back for disposal.
366 In Exxonmobil Sales & Supply Corpn V Texaco Ltd, ECC accepted expert evidence that it was customary practice of inspectors to retain samples of oil tested for reasonable periods. Implying a term that samples must be retained, samples of oil taken at load port was taken as final. Even though it was not retained for 90 days as required in the sales contract, since its test result was final and binding on both the parties, other arguments raised were not accepted by the court.
367 A US District Court sentenced a former NDT (non-destructive testing) inspector of a shipyard to 3yrs imprisonment for falsifying welding certification
368 Surveyors and firms have been sued for shortcomings in their professional work e.g. improper/inadequate lashing for heavy/expensive equipment for transportation

JURISDICTION

369 In '02 Master & Ch.Eng of BAOLANG were found guilty of violating the Chinese law that bans foreign seafarers staying ashore overnight, and fined.
370 In HYUNDAI LIBERTY '02 in suit pursued by insurer, it was held that a US NVOCC acting as agent of shipper is bound by carrier's BL chosen forum.

371 On board, Flag state rules apply on all matters of labour, work, safety, discipline, food, accommodation etc. Criminal prosecution for alleged murder on a ship is to be effected by the courts of the flag state and in some cases, lack of evidence may be the decisive point, e.g. TAJIMA wherein two Philippinos were set free by Panama in the case of murder of a Japanese 2nd Officer on a Panamanian ship.
372 On the Panamanian JIN BI, the Japanese Master was murdered by a crew member reportedly during its `unarmed innocent' passage through Malacca Strait. Action was not taken by the coastal states or Singapore where she called and new Master joined.
373 But if the death/murder occurs in territorial waters, the coastal state could investigate; even if such crime had occurred enroute e.g. CHAMPION PIONEER.
374 In 2008, Pakistan banned entry of Taiwanese vessels into its territorial waters, on the grounds that Taiwan is a part of China. Affidavits (instead of usual travel documents) are said to be in use for obtaining travel and business visas between the two countries.
375 In 2008 Australian Maritime safety Authority (AMSA) exercised powers bestowed by Intervention Convention and ordered MSC LUGANO that was a potential danger, to be towed away from the Western Australian Coast.
376 In 2008 Master of CORAL SEA sentenced to 14yrs prison term, was said to be innocent and released due to international pressure (he was arrested along with Mate and Bosun for drug smuggling), but the Mate went on hunger strike, lost his mind and died in hospital after repatriation. The Croatian Master after release is said to be seeking compensation from Greece for wrongful arrest and detention.
377 Master and 1st Off of ASTRO SATURN and B ATLANTIC were jailed in Venezuela for drugs attached to vessel's hull by smugglers. (mini-submarines & divers are in use)
378 A crew member of MAERSK ALABAMA during first attack on her by pirates off Somalia has sued Maersk, claiming that the ship was an unsafe work place.
379 In 2010, Japan decided against the indictment of Capt Qixiong detained in Japan for colliding with two Japanese CG vessels while fishing in disputed waters. (It was only after China stopped export of rare earth metals.)
380 Korean Master of STX DAISY was sentenced to prison in '10 after having found with high blood alcohol content in Juan de Fuca strait. Crew have been arrested for fishing in port waters without permit (when there was a seasonal fishing ban that the crew were not aware) and an officer who had stepped on the wharf to read draught marks was reportedly shot dead for ignoring the guard's warnings.
381 In Brier V North Star Marine 1990, New Jersey DC held that though LOF was signed for salvage (under Miranda Act for Salvors) of a boat within its jurisdiction for maritime lien by two US citizens, it had jurisdiction and declared that the dispute fell outside the New York Convention.
382 The US SC by a majority decision in Spector V NCL has held that American Disabilities Act (ADA) applies in some respects to foreign flag cruise ships in US territorial waters, but its `readily achievable standards' be construed to avoid structural modifications so as not to violate SOLAS.
383 The Seamens Manslaughter Statute (title 18 Sec 1115 of US Criminal Code) generally criminalises misconduct, negligence or inattention to duties by captain, engineer, pilot, manager, owner, operator, charterer etc and provides for fines & imprisonment. It was used to extract guilty pleas from pilot and shore officials after Staten Island ferry mishap in 2003. Its history goes back to 1800s when many lost lives from boiler explosions and fires. The 1838 Act was to demand utmost vigilance by attaching criminal liability and punish those responsible for negligence. The 1852 Act that followed mandated safety equipment, hydrostatic testing etc and provides the basis for development of USCG inspections.

384 In the ANDREW J BARBERI 2003 ferry slamming into pier in New York, the management had pleaded guilty to negligent manslaughter causing death; a manager Captain ashore for not enforcing two-pilot rule and the ferry Captain too for causing death.
385 Master of fishing vessel HAI SHUN was charged in '06 with failure to render assistance to persons in distress within Federal States of Micronesia EEZ and faced fines and imprisonment. Those unaided in distress may have had civil recourse for abandonment as it was alleged that VTMS (Vessel Traffic management system) was switched off many times to distort evidence.
386 Ship Masters are under moral/legal obligations to rescue those in need is underlined clearly in EU law. Once landed, they will be processed, asylum granted or repatriated. It is recalled that a US Naval Commander was demoted for not saving and picking up distressed migrants in China sea after Vietnam war.
387 In ASEAN PIONEER (2004), UCO Bank V Golden Shore Transportation, due to lack of evidence demonstrating a genuine desire of respondent for a trial in India as a decisive factor, Singapore CA upheld that, despite exclusive Indian jurisdiction in BL, there were strong grounds for maintaining Singapore jurisdiction. On the request of UCO's customer fresh BLs had been issued without the return of original BLs. UCO who had opened Letters of Credit, had claimed damages against which stay was being sought.
388 Searching and sealing during blockades, especially those enforcing UN Resolutions have to be complied with. Boarding and high-handed search of crew after restraining them on NISHA in Dec 2001 in international waters, enroute to UK and similar ones elsewhere are in violation of UNCLOS.
389 In '95, the Guardia Civil (of Spain) had boarded a yacht without permission of the crew and found drugs on board. The Audiencia Nacional sentenced crew to prison terms on the basis of subsequent confessions that made it unnecessary for the court to rely on evidence obtained on boarding (illegally without permission). It was quashed by The Tribunal supreme on the grounds that it was it was made possible only by the unconstitutional boarding.
390 So in another case, Guardia Civil having spotted a vessel sailing without a flag and in breach of other provisions of territorial and international laws, obtained permission from a judge and consulate of the country they understood to be the flag state, boarded and found cocaine on board and such boarding was found to be legitimate by the Tribunal Supremo.
391 Under Proliferation security Initiative many FOC flag states with disproportionate tonnage to their economic activity) have agreed with major naval powers that boarding be done if permission was not forthcoming within a reasonable period after request.
392 US CA 9th Cir dismissing appeal asserting that California's policing powers is 3miles as MARPOL ratified Federal law applies, considering health concerns, ruled favouring California Air Resources Board that fuel used by ships up to 24 miles off can be regulated to control **pollution** emissions. It was to prevent ships endangering coast whilst changing over fuels off coast. It will be in force till US-Canadian Emission Control Area (ECA) requiring vessels within 200 miles off US and Canadian coasts to use fuels with sulphur content below 1% from Aug 2012.
393 Two officers of B ATLANTIC were detained in Venezuela in 2007, tried in 2010 without evidence against them and sentenced to 9 year prison terms for cocaine found attached to hull. In '11 they were transferred to Ukraine under Strasbourg Convention prisoner exchange treaty, and released because of lack evidence.

ARREST/Detention

394 Admiralty jurisdiction of High Courts can be invoked to arrest, not only for maritime lien, but for other restraints also. Arrest of a ship for enforcement of maritime lien demonstrates recovery effort against debts, liabilities etc (Lien can be exercised without arresting also). Normally the subject vessel must be in jurisdiction for in rem action. Singapore does entertain in rem writ and issue arrest orders valid for six months, so that it can be executed when vessels make short calls, call during weekend, holidays etc.

395 In JUTHA RAJPRUEK (2003) ECA in Cargo interests V Club held that it was not necessary that the v/l or a sister one be physically in jurisdiction, for the court to be competent in respect of in rem proceedings. In this case it was so necessary, for business efficacy, to interpret the Letter of Undertaking provided by the Club.

396 In Freret Marine Supply V Harris Trust, and Savings Bank & Effjohn Cruise V A&L Sales, US CA 5th Cir held, that neither a credit agreement between cruise operator and guarantor, nor surety bond which applied to the vessels gave rise to maritime lien.

397 Mareva injunction –a discretionary remedy freezing assets pending determination, when there is real danger that they may be disposed of- was granted by Singapore CA in LANGSA (2002) to shipper of cargo against owner for cargo damage sued and being pursued, as the owner was feared to be to be disposing off assets.

398 In Feoso V Faith Maritime Singapore (DAPHNE L 2003)), Singapore CA finding for defendant, held, that head charterer could enforce contractual lien and dismissed charge of `conversion'. FAITH had called the tanker back from China (where cargo was being tried to be misdeclared and sold under switch BL), got the cargo appraised by the Sheriff through the court, sold the cargo and credited proceeds to the court. Releasing the funds, balance in demurrage and interest also was ordered to be paid.

399 In Asian Atlas 2010 Hong Kong CA held that where a party sued by owner for **damage caused to ship**, claim for indemnity in respect of joint liability with co-defendants does not come under Admiralty jurisdiction which applies only for damage ***done by*** ship.

400 In ITS V Convenience Container & Anr ships, HK Admiralty HC ruled that, sale of the vessel does not prevent claimants from subsequently issuing writs against the proceeds before they are disbursed by the court

401 In OW Bunker Trading Co V MV MAWASHI AL GASSEEM '07, FC of Australia held that a bank's mortgage over a vessel does not include bunker or lubes because those cannot be considered as physical parts of ship.

402 Canadian Federal CA rendered a decision in LANNER 2008 enforcing maritime lien in favour of bunker suppliers. It held that valid choice of US law suffices to give bunker suppliers maritime lien outranking ship mortgages under Canadian priorities ranking.

403 In UAB Garant V ALEKSANDR K (wherein the case had become complicated by 4th arrest due to forfeiture of v/l to government for breaches of fisheries legislation), New Zealand HC in 2007 held that re-arrests are allowable in some circumstances. There were issues related to jurisdiction in Admiralty of forfeiture as statutory penalty etc, for which the full judgment should be referred.

404 Indian Coast Guard ordered HAN SPLENDOR in 2008 when trying to flee from a court order not to sail till a consignment in dispute was unloaded without the permission of the Court and Coast Guard. Whilst this need not be considered an arrest, Master will be liable for breaking such order resulting in contempt of court, fine and arrest itself.

405 NEW STAR sailed out of Nakhodka in 2009 without port clearance after buyer of the rice cargo found that it was spoiled. Russian Border Guard vessels chased and fired at her. She encountered heavy storm after leaving territorial waters, had engine failure, was abandoned by crew taking to liferafts, started sinking and some crew were rescued. Cases

like these raise a lot of questions and one would leave oneself to liabilities by publishing conclusions without verifying facts from authorities, authorised surveys etc. But that the Master may be prosecuted for sailing away is obvious, and it is fair comment to say that he may have been advised/instructed so, and those who had done so will lose claims.

406 In KALLANG 2009 not only an anti-suit injunction was given (against proceedings in another jurisdiction contrary to provisions in contract) but also damages in respect of loss of use of vessel during arrest against the party who had obtained detention. In the end, insurer Axa Senegal was found liable in tort for procuring cargo interest's breach of contract, to arbitrate disputes in London as anti-suit injunction had been granted.

407 In Trans-Tec V HARMONY, in 2008, US 9thCir CA enforced a US choice of law clause allowing bunker supplier to enforce lien against vessel in rem, for bunkers ordered by time charterer (Kien Hung) in a non-US port. (Suppliers prefer/insist on US law as it is considered more in rem friendly; the best defence could be conflict of laws ensuring that applicable law (based on where contracted) does not enforce US choice of law).

408 Bankers and Mortgagors may arrest to recover overdue payments and as an ultimate measure when the enterprise flounders. That Bankers do not owe duty of care to obtain best price or while arresting (with cargo) to dispose was ruled in Den Norse Bank V Acemex Management in TROPICAL REEFER 2003 by CA. However, ***in obiter*** (para 28 of judgment 2003 EWCA Civ 1559) it was stated that in proper circumstances third party might have right against interfering mortgagee.

409 Canadian Federal Court in FC Yachts V Splash Holdings, ruled that whilst builders (before ownership passing on delivery) had action against payment default, they had no right in rem against the yachts against the mortgagee.

410 In See Dongwa Leasing V Halla Liberty 2002, it was ***held that an intervener (on behalf of defendant) had to provide security for costs***.

411 In ITS Inc V Convenience Container 2006, it was held that admiralty jurisdiction and remedies cannot be avoided by liquidation. HK Admiralty in rejecting its challenge drew upon authorities from Australian HC also.

412 India was the first to allow arrest by P&I Club for unpaid premium (SEA SUCCESS) bringing it under `necessaries'; SEA Success (3 ships) was remitted back by SC to Bombay HC for reappraisal. Others have followed suit later even for H&M premiums. H&M cover being not compulsory (rules can be expected on this soon), the cover will need be taken to satisfy lenders with mortgage, and the policy assigned to.

413 Once the ship is arrested, the crew may be employed to look after the ship on behalf of the Sheriff, as it happened with AQUARIUS III in Singapore in 2001. In such case, their post-arrest wages and expenses would come under Sheriff's expenses and so will have priority for settlement.

414 In Indian Overseas bank V ORIENTAL LILY etc 2005, Hong Kong HC threw out an application to renew writ in rem, as the bank had failed to demonstrate that reasonable attempts had been made to arrest –even though that ship and sister ones had called in jurisdiction few times- after commencing action for cargo mis-delivery a year before.

415 In PLOPENI (2005) the Malta Court (disregarding earlier cases regarding POKER) considering action in rem by International Paint against the 2nd Bareboat charterers with the vessel being present in jurisdiction held her to be liable, regardless of order was by the first bareboat charterer which had been terminated. *Appeal pending!*

416 In an unpublished decision (reported by Holland & Knight in 2005) US CA for 11thCir is said to have held arrest as invalid (after sale ship arrested in US for bunker supply in Singapore for Panamanian ship owned by Maltese firm with contract negotiated in Greece) for bunker supply under Greek law, as Greece has not provided maritime lien for provision of necessaries.

417 In Motor-Services Hugo Stamp V Regal Empress US CA 11thCir 2006 has held that communications equipment aboard are part of operational gear and subject to enforceable maritime lien as it fell under `appurtenant' and was essential to the ship's mission, though the equipment belonged to and was operated by MTN a third party.
418 In Pan United V Owners of DILMUN FULMAR and Interveners, Singapore HC ruling that a `settlement agreement' between a yard and its debtor was not eligible for admiralty claim, ruled that, re-arrest by plaintiff was malafide and abuse of process, as following affirmation of the settlement agreement the original admiralty action had been superseded and that gave rise to a new cause of action for a which a fresh action had to be started. Settlement agreement had been worded such a way that if compromise deal was broken, the plaintiffs could assert their former rights. Though compromises generally discharge all claims and counters, unless expressly provided for their revival in breach, as per general rule of contracts upon repudiatory breach by one, the other has a right to elect whether to affirm or treat it as discharged. Hence so.

(Re-arrests in rem are possible, by order of court, if in fact the first cause of action was not properly settled when/after arrest was lifted by the court itself)

419 In Continental Ins V ORSULA (2003) US CA 7th Cir, stating that the aggrieved was commercially sophisticated and presumed to know where the harbour is, dismissed an admiralty action, as it was also time barred. Whereas the BL had provided for Federal District Court, action had been brought in Federal Court in Chicago and so justified as Benton Harbour (Indiana) was within Port of Chicago for Customs purposes.
420 Scuttling ships have occurred in crashed markets (recently even in boom market when increased value must have been tempting) and in some cases surveyors have been able to establish and verify facts from survivors –often after some delays, in one case a surveyor befriending the bosun in his village after few years- and recommend refusal of payment to the assureds. In the notorious case of SALEM a laden VLCC was said to have been sunk after discharging cargo in South Africa (when SA was apartheid isolated), but the crew who came ashore were interviewed and facts established, insurers thereby denying loss; perhaps the loss was compensated by the SA government.

Rule B in US Admiralty and Maritime law permits attachment of assets up to disputed amount if defendant is not `found' within the district. Alternative that evolved during last decade's crash was to have business registration there and appoint local agent for service to preclude seizure by being "found". If Government has majority holding in the defendant firm, sovereign immunity will prevail too. Application of Rule B does not depend upon maritime/possessory lien, but it must warrant admiralty jurisdiction. If the defendant has property (bank account, real estate etc) it may be attached under `quasi-in rem jurisdiction'.

421 Under Rule B attachment, Electronic Funds in Transfers (EFT) in transit through NY intermediary banks from/to defendant's account- can be frozen –pending a final decision in court or arbitration- by ordering Banks and they can be charged for non-compliance, per Winter Storm V TPI 2nd Cir '02.
422 As most of shipping's US$ funds gets transferred via New York, Rule B did become very effective. It did not have jurisdiction for S&P dealings since "sale of a vessel is not a maritime contract" (per ADA 1918) as ruled by a NY judge in Kalafrana V Sea Gull.
423 In SCI V Jaldhi 2009, US CA 2nd Cir held that because funds in transit are not property of originator or beneficiary, they cannot be attached. Appeal vide certiorari writ to SC was

turned down (a Judge being an Appeals court judge in same case recusing). In HAWKNET it was further held to be retroactive.
424 In Eitzen Bulk v Ashapura Minechem '11US CA 2nd Cir remitted back to DC instructing release of funds held under Rule B attachment stating that equitable considerations to vacate pre-Jaldhi attachments –used by lower court to deny release of funds- were forbidden (vide Sinoying Logistics V Yi Da Xin Trading). Funds transferred to suspense accounts (on attaching) against which judgment was not executed were not considered any different (as in Scanscot Shpg V Metales Tracomex US 2nd Cir '10) too.

Plaintiff initially had attached funds in EFTs and garnishee banks transferred them into suspense accounts. Later Arb Award in London was obtained and US DC had entered full judgment for the same(before JALDHI)which was not appealed against. After JALDHI, Ashapura filed a motion to vacate attachments. The DC had upheld the attachments as an exercise of equity powers, against which Ashapura had appealed. The AC ruling underscores invalidity of attachments of EFTs and such orders given before JALDHI.

425 In Exxon Corp V Central Gulf Lines US SC (reversing a 150yr old `bright line' rule that agency contracts were excluded from admiralty jurisdiction –holding that they should be considered maritime where "services provided under them are maritime in nature") has in '10 moved bunker supply arranged by agent (per agency contract) to maritime category.
426 In Norfolk Southern V Kirby too it was held that multimodal carriage was `essentially maritime' even though it involved non-maritime legs, and is governed by maritime law.

DISPUTES: Various (on Principles of law and others)

427 A Mumbai Court in 2011 had ruled that the burden lies on the respondent to prove the valid **service of notice**, and mere signature or acknowledgement by unknown person in itself is not sufficient to accept that the notices were duly served.
428 In Toll (FGCT) PL V Alphapharm PL, Australia HC –on appeal from District & CA, over-ruling the lower courts, held that **Contract exemption clauses** –where such clauses were common industry practice- signed by the claimants were valid and effective, as printed provision inserted above signature space inviting the signatory to read the conditions on reverse would suffice.
429 In Great Peace V Tsavliris 2002 CA reconsidering its 1950 ruling and reconciling with a 1932 HL judgment, held that a **mistake does not make a contract void.**
430 In Holmes V Atlantic Sounding Co (2005) a US Court decided that **floating platform*** that did not have engine or propeller, but could be moved by repositioning anchors **is a vessel** as covered under "water-borne structure (which) is practically capable of being used for transportation on navigable waters. Since such enunciation varies widely amongst jurisdiction, one must be cautious as most admiralty and marine matters hinge on correction application of the word vessel/craft etc.
431 HL had held that the GLASS FLOAT WHITTON 2 **structure* like a boat but without engines was not a vessel** under Merchant Shipping Act.
432 That even **a dinghy* if used for pleasure, is not a vessel under MSA** was held in Curtis V Wild in 1991.
433 **Since ships* is an ordinary English word and so its meaning is an issue of fact and not law, Rig is considered a ship** and comes under similar aspects for Tax, was held by ECA in Gen Commissioners V Inland revenue in 2001.
*** IUMI** (Intl Union of Marine Insurers), considering the various crafts (including ferries, offshore and newly evolving ones) is calling for new definition of what constitutes a ship.

434 USCA 11th Cir in City of Riviera Beach V Certain unnamed V/l in '11 (in efforts by a municipal marina to enforce its rules and owners of vessels at the marina to resist such changes) ruled that an undocumented houseboat* is a vessel for admiralty jurisdiction.

435 In July '07 a **challenge from a broad coalition of shipping industry interests** comprised of Intertanko, Intercargo, Lloyds Register, International Salvage Union and Greek Shipping Co-operation Committee against UK's secretary of State for Transport, was allowed by the ECC to proceed to the European Court of Justice for Judicial **review of EU Ship Source Pollution Directive criminalising accidental pollution**, purporting to apply within EU member states territorial waters and EEZ, on high seas, and ships flying any flags–addressing whether it is contrary to innocent passage and whether "serious negligence" is consistent with legal certainty.

436 **INTERTANKO and others** have diplomatically and through litigation been successful in stemming regulations drawn up US coastal States not in consonance with each other, making it difficult and impractical for ships/tankers to comply.

437 In Blyth V Birmingham Waterworks 1856, **Negligence** was defined as 'omission to do something which a reasonable man, guided upon by those considerations, which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do'.

438 In Donoghue V Stevenson 1932 (decomposed snail in Ginger beer) per HL, **duty of care** is owed to all persons who are so closely and directly affected by an act that ought reasonably to have them in contemplation as being so affected when directing the mind to the acts or omissions that are in question.

439 Spanish SC in 2001 held a **bank in breach of its obligations** under UCP Art 15of for Documentary Credits produced by ICC, and so liable to buyers of goods under documents falsified by sellers.

440 In ELPA 2001 ECC held that even if BL under which a third party claim was brought was not issued in accordance with CP, ('96) **InterClub apportionment** would apply. The new InterClub Agreement is effective from September 2011.

441 Hong Kong Court of First Instance in Parakou Shipping v Jinhui Shipping & Ors in 2010 held that **abuse of process jurisdiction can be extended to prevent a party from mounting an illegitimate collateral attack against a previous arbitration decision**. Courts will scrutinise facts of each case carefully to see if there exists any manifest unfairness or the potential to bring the administration of justice into disrepute by allowing the litigation to proceed. And since the cited case was an attack on arbitral decision, and thus an abuse of process, plaintiff's claim was struck out.

442 **INS ANGRE firing warning shots intercepted Bahamas flagged ship** off the coast in 2010 forcing it to return to Mumbai after she had left without discharging cargo. The joint operations by Navy and Coast Guard followed a police complaint about criminal breach of trust by crew of DYNAMIC STRIKER. The vessel laden with coal had arrived and anchored. Buyers were said to have paid for the cargo and their agent had complained that the vessel was trying to flee without discharging.

443 In Habas Sinai V Sometal Sal, ECC held in 2010 that **general words of incorporation "all the rest will be same as our previous contracts",** incorporated arbitration clause, without need for specific words of reference.

444 In USA V Atlantic Mutual 1952, *Both to Blame clause* was held to be invalid as a violation of rules forbidding carriers from stipulating against negligence.

445 In BOLESLAW CHRORBY 1974 it was ruled that `standard of skill and care to be applied is that of the ordinary mariner and not of an extraordinary one, and seamen under criticism should be judged by reference to the situation as it reasonably appeared to them at the time, and not by hindsight'.

446 In Rohlig V Rock [2011] ECA relying on Lord Wilberforce in ARIES (wherein it was ruled that once the time had expired any claim has "not merely become unenforceable by action, it simply ceased to exist") unanimously upheld the 9 month Time-Bar of BIFA (British International Freight Association) 2005 finding that it **was not unfair under Unfair Contract Terms** Act (UCTA). It was also ruled that prompt payment was expected and counter claims per se were not precluded.

447 St Petersburg Cassation Court in 2011 **awarded damages for cancellation (for excessive delays) of shipbuilding contracts** placed in 2004 to Odfjell against Sevmash. It was an appeal against international arbitration award enforcement upheld by the state commercial court. Appeal to Russian SC later, after paying the full amount to Arkhangelsk court also was turned down.

448 European Court of Justice held in '10 in Akzo Nobel case that **legal professional privilege does not extend to communications between a firm and its in-house lawyers** during EC (European Commission) competition investigations. ECJ clarified that exchanges with lawyer must be connected to `the client's rights of defence' and they must emanate from `independent' lawyers who are not bound to the client.

449 Cruise lines -Carnival, Royal Caribbean & Celebrity-were awarded heavy claims by Jury for break-down/failures of Rolls-Royce Mermaid propulsion pods (causing cancellation of scheduled services), **against replacements** (past & future), fraud and breach of warranties; but a Court later disallowed the warranty-breach award.

450 NYSE listed Horizon was **fined in 2011for price fixing and many shipping executives sent to prison** though two top executives escaped with plea bargaining. Dividend was suspended for fear of credit default, and plans set afoot to sell logistics business. Crowley & Sea Star also agreed to pay fines against Class action suits for price fixing in the Puerto Rico trade.

451 In Oceanbulk Shipping & Trading SA v TMT Asia Ltd & Ors 2011 relating to a dispute under ***forward freight agreements***, UK SC recognised a new ***exception to the "'without prejudice***" rule. **Known as 'interpretation exception'** by which disclosures in the course of 'without prejudice' negotiations may be admissible as an aid to the construction of the agreement resulting from those negotiations.

452 In NTS V Orchard Tankers 2011, ECC held in substance that time limits for proceedings provided in contracts are **"claim barring" rather than "remedy barring".** The case was about seller's right to dispute buyer's cancellation (due to delay) and resolve instituting arbitration within 30 days.

453 In Dallah RE&TH Co V Pakistan Ministry of Religious Affairs, the UK SC agreeing with CA and First instance but not with Tribunal, applying French Law, held that it did not merely have power to review tribunal's finding on its competence but could determine issue afresh by retrying. In this specific case, as a Trust had been set up by the government to avoid direct liability, it was held that ruling against a party not a signatory to an arbitration agreement and enforcement of award against it, had to be carefully considered.

454 In Shell Egypt V Dana Gas ECC held in '11 that **unequivocal termination** of contract (under a mistaken fact in said case) **precluded one from relying on other repudiatory breaches** committed by the other to justify termination and claiming of damages.

455 A freight forwarder was held **vicariously liable** for damages caused by the admitted negligence of a motor carrier and its driver by Appellate Court of Illinois in 2011 in Sperl V CHRW Inc. (Vicarious liability holds operator liable for acts of third party as if the former was in latter's shoes). Though the motor carrier was an independent contractor and there was no negligence in its selection/ retention, the forwarder was held liable as they were well involved.

456 In ROWAN 2011 ECC held that TBOOK (to the best of owner's knowledge) observed that it does not make an obligation beyond the extent of owner's actual knowledge ordinarily required in the course of business. But after hearing expert witnesses, stating that `approval' in the context of oil majors should be considered in its ordinary plain English language, held that it amounted to a warranty that it (approvals) would be maintained.
457 In Eminence Property Dev V KC Heaney ECA in 2011 decided that an **innocent mistake** by a party in its grounds for declaring sale contract to be at an end was not a repudiatory breach of contract because, it did not demonstrate a clear intention by that party to abandon the contract and/or refuse altogether to perform. Underlying principles for legal test were set out as: whether the contract breaker has shown intention to abandon and refuse to perform -depriving the other of benefits; it is highly fact-sensitive, comparisons are of limited value and hence distinguished from `cynical manipulation' in NANFRI; all circumstances should be taken into account for objective assessment as subjective intention may not be necessarily decisive and so application of legal test may not be easy –as evidenced by divergent views of Lords in Woodar V Wimpey HL '80.
458 In Nanjing Tianshun Shpg V Orchard Tankers ECC in '11 in appeal against Arb Award held that on termination of shipbuilding contract by buyer, if provision for Arbitration (30d) was not used, 6yr limit cannot be fallen back on even for refund guarantee, though express waiver and absolute barring were not so mentioned.
459 In ISPAT Ind V Western Bulk: SABRINA 1, ECC in 2011 upheld damages awarded to owner for repudiatory breach amounting to hire that would have been earned during estimated duration of charter. Holding a short duration Time Charter with route and cargo intented declared as a TC (not a VC) and lack of mitigation by charterers, it was also found that Rule B attachment proceedings for security in NY were not in breach of Arbitration provision as in KALLANG, but in line with RENA K (as for merits).
460 In Carboex V Louis Dreyfus in 2011, ECC ruling on **Strike clause** in Amwelsh CP (rejecting Arbitrators award based on HL ruling on WIBON in MARWOOD, said to be obiter and not of sound reasoning) based on `ordinary meaning' of beyond the control of charterers -authority AMSTELMOLEN, held that congestion/delays due to effects of a pre-arrival strike should not count as laytime and be excepted.
461 In Yap V Thenamaris Philippines SC in 2011 ruled in favour of a **seaman's 10yr old claim** against deliberate breach of his employment contract.
462 In SIBOHELLE where **error had crept in** (in the name of owner between fixture recap and actual performance –conclusively proven by payment of freight), in '11 ECC relying on Shogun Finance V Hudson '03 HL as to conclusive evidence of contracting party, overturned Arb award on invalidity of demurrage claim raised.
463 In Quail V CVC Tur "PACIFIC" US in 2011, 11th Cir CA remanded back to DC for further proceedings finding it was too early in the case for the DC to have denied jurisdiction based on whether asset transfer had taken place within territorial reach. Apart from the preceding on Securities fraud under Securities Act & SEC, the Court also ruled that as part of the same case, the DC had `supplementary jurisdiction' vide admiralty jurisdiction over putative maritime tort claims alleged against Shipmanager, CLASS etc.
464 Australian Federal Court in'11 ordered a union to pay compensation of A$1.5m for a strike at Pluto LNG project and permanently restrained them from wildcat action at any of Woodside Petroleum's LNG ventures
465 In Jones V Kaney UK SC held in '11 that ***Expert witnesses*** *have no immunity* from liability for negligently performing their duties &for negligent preparing of joint witness statements too. Resultantly their liability insurance will go up.
466 In JSC BTA Bank V Mukhtar Ablyazov & Ors ECC, staying proceedings (pursuant to Sec of '96 Arb Act) in '11 on **`case management grounds'** against 3rd & 7th defendants,

held, that the claimant Bank had failed to show that Arbitration agreement was null & void, as the claims were inseparable from those against others.

467 In '08 Dunlop was fined by US DoJ for bid **rigging/price fixing** for marine hoses. In '11 Bridgestone also agreed to settle such allegation/fines paying substantial fine.

468 Indian SC in '11 held that `**provisions of Indian Penal Code** have been extended to offences committed by any Indian citizen in any place beyond India by virtue of s4, subject to limitations imposed under s 188 CPC, viz: seeking consent of central government'.

469 A division bench of Indian SC in 2011 after analysing English, American and other cases held that Ethiopian Airlines was not entitled **to sovereign immunity** with respect to commercial transactions, adding that it is in consonance with rulings in other countries and with growing international law principle of restrictive immunity. It was in remitting back an aggrievement against order of National Consumer Disputes Redressal Commission to a State Commission to decide claims for delay in delivery & deterioration of goods on merits.

470 US CA 9th Cir in a historic decision in 2011had ruled in UPS-SCS V Qantas that an international air forwarder should be guaranteed a right of indemnity against the ultimately responsible custodial airline (in a subrogated '06 case started on the eve of 2yr limitation per Montreal Convention). But in earlier interpretations under `**statute of repose'** there were time bar issues **unique to air cargo with no such analogous injustice in sea and surface carriages.** This newfound indemnify right with equality between forwarders and airlines had been questioned vide Petition for Writ of certiorari in US SC in May '11.

471 In Democratic Republic of Congo & Otrs V FG Hemisphere Associates LLC, Hong Kong Court of Final Appeal in a **landmark decision** ruled by majority that issue of **State immunity is within the realm of foreign affairs** and has to be referred to Standing Committee of National People's Congress of China (for final decision), and so the court, provisionally, had no jurisdiction whether it be sovereign or commercial activities.

ARBITRATION

472 In a Policy dtd 5th Aug 1555 for shipment in a sailing vessel from Calicut to Lisbon it was found to be stated "and if the goods will be that the said ship shall not well proceed, we promise to remit it to honest merchants and not go to the law"; a clear intent of wanting to avoid the litigation/courts.

473 In SNE V JOC on 1976 sales contract dispute on 33 oil shipments worth 100M$, the arbitral tribunal held that, though contract was void (not executed by authorized representatives), the arbitration agreement was separable, was a procedural contract (independent of material-legal contract), it had jurisdiction and awarded 200M$ applying Soviet principles of restitution. Enforcement was denied at first instance on the ground that the contract was invalid `ab inito', but it was reversed on appeal.

474 In BAZIAS 3&4 ('93) ECA held that a binding Arbitration agreement between the parties calling for stay of action in rem, need not prevent a party from seeking arrest warrant to obtain security.

475 Arrest may be for obtaining possession and not security as in BRITANNIA ('98) (HK) where demise charterer had refused to deliver back to owners.

476 In Three Shpg V Harebell Shpg in '04 ECC affirmed that there is no need for both parties to have option to refer disputes to arbitration; one would suffice.

477 In Guangzhou Dockyards V ENE Aegiali, ECC held in 2010 that on true construction, the Arbitration agreement did not provide for appeals to court on questions of fact and that in any event, it was so neither permissible under the '96 Act nor by agreement.

478 In Jurong Eng V Black & Veatch Singapore, Singapore HC held that, in the absence of any specifications in the Arbitration clause, SIAC Domestic Arbitration Rules would apply, even though they were not in existence when contracted.
479 Singapore HC in Front Row v. Daimler South East Asia Pte Ltd ruled that failure of arbitrator to consider a party's submissions on disputed issue amounted to breach of natural justice as a consequence of which the award had to be set aside.
480 From R. V Sussex Justices Ex p. McCarthy, the oft quoted **dictum "Justice should not only be done, but should manifestly and undoubtedly be seen to be done"**, has been derived as a cardinal principle in determining the tests of bias. In ASM Shipping V Bruce Harris & Ors (2007) ECC where third arbitrator stood down on **apparent bias**, judge did not accept that, if one is tainted with bias, it will invariably affect others.
481 Ocean tankers were awarded damages from Cyprus government by arbitrator over disputes regarding tankers chartered for carriage of water during drought.
482 In ONGC & Anr V Collector of Central Excise Indian SC had held in '95 that litigation of disputes between government agencies should be avoided or resorted to only after exhausting provisions for resolving through empowered agencies and through arbitration.
483 In Olympus Infrastructure V Meena Vijay Khaitan & Ors Indian SC in '99 has observed that even `specific performance can be referred to arbitrators, if indeed such was provided in the arbitration clause.
484 In Sundaram Finance V NEPC Indian SC in '99, stating that proceedings commenced only when request to refer dispute to arbitration was received by other party, held that courts could pass interim awards "before", in this case to preserve right of ownership.
485 In Bhatia International V Bulk Trading Indian SC had held that unless parties exclude expressly or impliedly, whole of Part I of '96 Indian Arb Act applied to foreign awards.
486 Based on the above, Indian SC granted leave to challenge the NY Convention applicable LCIA (London Court of International Arbitration) final award in Satyam case, since the foreign award had to be performed in India -but was seen to have disregard for Indian laws. Do note that Sovereignty, National Jurisdiction, Public Policy etc would always overbear performance of foreign awards in their domain.
487 In ONGC V SAW Pipes 2003 Indian SC, expanding it to instances of arbitration award's findings being opposed to substantive provisions of Indian Law, to the Act or to the terms of the contract, has **imparted wide interpretation for `public policy'.**
488 In BK Gupta V Union of India 2007, a former Judge was appointed as Arbitrator to resolve the dispute by Gauhati HC stating that even **when Award is set aside, the agreement between parties is not severed**. Perhaps this is a recourse to avoid delays, clear backlogs and avoid purposeful appeal to courts as delaying tactics.
489 Madras HC (India) in 2009 stating that an arbitral award did not satisfy requirements of a decree for the purpose of Sec 9(2) of Insolvency Act, citing a SC judgment, dismissed the petition of Industrial Dev Syndicate against in 2009.
490 In Citation Infowares V Eqinox Corporation 2009 Indian SC ruled that sole arbitrator would be appointed by it, since obligations under the contract were completed in India and since there was no implied exclusion of such jurisdiction in arbitration clause; it re-emphasised the earlier ruling on Part I of the Act in Bhatia Intl V Bulk Trdg. The termination clause providing Californian Law and single arbitrator was under dispute.
491 In Magma Leasing V Potluri M & Anr Indian SC held that Arbitration agreement survives even when the contract is breached, and that the lower courts, instead of hearing, must direct cases to arbitration if such provisions had been made.
492 Hearing a Special Leave Petition (SLP appeal) Indian SC in V.M.V "B.C" & anr V STC 1999, ruled that Arbitration provided for in BL under CP should be given effect to.

Any security or property given against arrest in action in rem should be retained as security for satisfying the arbitration award.

493 In Kamatchi Amman Const V Div Railway Manager (2010), Indian SC held, that **where parties had agreed so, no interest will be payable during *pendent lite*** (pending litigation). Importing some ratios of old Act of 1940, it was held that Arbitrators could not opt to award such interest, since parties had not exercised option `unless otherwise agreed by parties' (mentioned fifteen times in the '96 Act). Post award only 10% interest was awarded (though 18% applies `unless award otherwise directs'). Do note that in the absence of Unfair Contract Rules, such one sided clauses do survive.

494 An Indian HC in 2011 has ruled that once the issues were found to be arbitrable, they are not open to challenge on such procedural matters.

495 In Sea Trade Maritime corp V Hellenic Mutual War Risks Assn ECC held that general words of incorporation would suffice to import Arbitration clause from Rules of War Risk Assn into Contract of Marine Insurance. This is to be distinguished with two contract cases of CP-BL or Insurance-Reinsurance where incorporation has to be strict.

496 US CA 2ndCir has ruled that Arb panels can compel non-parties to appear & provide testimony & documents at hearings held in connection with disputes before them.

497 HL in Lesotho Highlands Dev Authority V Impreglio SA & Anr 2005, decided that though Tribunal had probably committed error of law but since parties had excluded right of appeal (under s.69) it was not necessary to decide that issue. The view that s.48(4) gave tribunals wide discretion beyond that given in litigation, about awarding monies in different currencies, though not argued to conclusion, was dismissed.

498 In Exfin V Tolani Shipping 2006 ECC held that even if liability was admitted and it remain unpaid, dispute exists which can be submitted to arbitration. The charterers position that there was no dispute was untenable, **did not make commercial sense and could be seen only as delaying tactics and as such costs were awarded against them.**

499 In ENGEDI 2001 Singapore HC held that a stay of in rem proceedings against the vessel could not be granted as there was no agreement between Plaintiff and The Res (the Ship). The intervener/the then owner was not a party to any arbitration agreement and could not be forced to litigate in another forum –in that case London Arbitration.

500 In MUSTAFA NEVAT (2003) SMA NY, denying application of the doctrine of "preclusion of collateral estoppel", called for Arbitration to proceed on merits of owner's claim, against charterer's motion. Owners had been held responsible by Chinese court and were trying to obtain indemnity from Charterers.

501 In Stolt-Nielsen V Animal-feeds Intl Corp, US Federal district Court for Southern NY overturned an Arbitration Panel's decision permitting Class action arbitration where it was not so provided for. US CA for 7thCir then ruled that it is the Arbitrators rather than courts or arbitration institution that should decide on consolidation since it is a procedural matter. Later (at the urging of BIMCO, INTERTANKO, SMA, ASBA etc in amicus curiae), US SC in 2010 held that where a CP is silent on whether Class Action is permitted, Arbitrators have no power to impose the same on the parties.

502 Society of Maritime Arbitrators NY in Travel Wizard and Charterer V Clipper Cruise Line held that terrorist attacks in NY (that caused fall in cruise bookings) in Sep 2001 were too remote as defense of force majeure for a cruise off Australia in Nov 2002. It was also added that there was no defense based on impossibility of performance because those events did not prevent charterers from paying hire when due.

503 In Fiona Trust Holding & OtrsV Yuri Privalov & Otrs, HL relying on Sec 7 of '96 Act, unanimously held that all disputes including validity of agreement itself, should be referred to Arbitration, as would be intended by parties for commercial transactions. Provision for Arbitration in a Contract is a `distinct agreement' and can be void or voidable only for

reasons that relate directly to arbitration agreement itself. (Claims under this dispute were settled on confidential basis between parties involved).
504 In Royal & Sun Alliance V BAE Systems 2008 London HC has held that since under '96 Act s 69 (2)(b) any party may appeal to court on question of law arising out of award, there is no need to seek leave of the court for appeal.
505 Unlike other countries COGSA claim can be resolved through Arbitration in Australia.
506 In a case concerning chain of three sale of goods contract involving French and New Zealand companies, French Supreme Court in 2008 confirmed that **in a chain of contracts in which title is successfully transferred, arbitration provision too is automatically so transferred** as an ancillary element to the right to sue which itself is ancillary to the transferred substantive right. The Court also restated *kompetenz-kompetenz* principle enabling arbitral tribunals to rule on their own jurisdiction.
507 In LACERTA 2008, New York Arbitrators by majority *denied application from owner to consolidate arbitration* against charterer and two sub-charterers (all under SMA NY) as proceedings were not commenced against sub-charterers, stating that *if so permitted it will amount to creating a right of "class action".*
London V New York for maritime Arbitration is an on-going debate with Singapore as a newer choice. Awards are published in NY unless objected and costs are given to the prevailing party, whereas LMAA does not publish awards. In NY, if legal issues are pre-dominant in the particular dispute, the appointed arbitrators often choose a lawyer as Chairman, whereas the Solicitor-Barrister approach persists in London. Generally, choice of jurisdiction will also be dependent on possibility of enforcing the award like parties to NY Convention or bilateral agreements facilitating the same.

It can be debated (has been tested to no avail) that **Arbitrators should be purely commercial men**, but since awards have to stand tests of law (effectively making them as good as legal verdicts), errors of law have to be avoided; appeals are usually granted easily for such errors. Lawyers with good exposure to commercial matters of shipping so are often preferred against those without any law background. Parties who would like to avoid appeals can agree so early, utilise LMAA's **fast track methods or opt for *ex aequo et bono* empowering arbitrators as amiable compositeur**.

508 In case involving collision of a vessel owned by West Tankers chartered to ERG Petroli, with a jetty owned by the latter, in a landmark decision, European Court of Justice ruled that it is inconsistent with EC Reg 44/2001 (earlier Brussels Convention) for a court of a European member state to allow anti-suit injunction to restrain a party from commencing or continuing proceedings in another member state on grounds that it is in breach of Arb agreement. Allianz SpA who as insurer had paid ERG, commenced proceedings in Italy and West Tankers in turn sought declaration that English Arb clause was binding and an injunction to restrain further steps by ERG; both were granted by ECC. Bypassing CA, the case was fast-tracked and **HL had referred it to ECJ.** Such issues being very critical further developments need be watched and followed.
509 In AES U-KH Plant LLP V U-KH Plant JSC ECA in '11 –relying on Civil Jurisdiction & Judgments Act '82 s 32, refusing recognition of an earlier Kazak judgment that Arb agreement was contrary to Kazak public policy and hence void- upheld vide a declaration that disputes were to be arbitrated, issuing anti-suit injunction.
510 In West Tankers V Allianz SpA & Anr ECC in 2011 refused application to set aside an order granting leave to enforce an English arbitration award when proceedings on same dispute were going on in Italy. Thus the court protected the primacy of Arb award against inconsistent judgment against it elsewhere.

511 In WADI SUDR 2011ECA held that the Spanish judgment was not against public policy (though English law may have reached a different conclusion) as in the context of action for damage for breach of BL, arbitration clause was not incorporated, as it fell within the exception of ECR 44/2001.
512 In Gao Haiyan V Keeneye Holdings Hong Kong HC in 2011, declined to enforce an arbitration award obtained in China on the basis of bias in Med-Arb process, though a Chinese Court had dismissed a challenge against the award on bias.
513 In Sovarex SA V Romero Alvarez SA ECC in '11 refused to stay or dismiss Sovarex's application to enforce arbitration award under s 66, though Spanish proceedings were pending appeal. As there was a triable issue as to validity of contract (and Arb) had been concluded, the judge directed that the factual issue of jurisdiction be determined.
514 In ATHENA 2011 ECC held that owner THOR's salvors CPT (whose salvage services had been terminated) had discharged burden of proof by establishing that BIMCO Wreckhire form and its London Arbitration clause applied, and so granted permanent anti-suit injunction. ***Trial costs for this preliminary issue was reported to be 1M$.***

Enforcement of Foreign Insolvency Judgments in the English Courts

Barrister Ravi Aswani, writing in the newsletter of Stone Chambers reports on a recent decision of the English Court of Appeal. In the Matter of New Cap Reinsurance Corporation Limited (In Liquidation) [2011] EWCA Civ 971 which is an example of a topical insolvency case whose origins lie in the insurance context.

The Appellants were Lloyd's syndicates who sought to challenge the decision of Lewison J who ordered that they should pay an Australian reinsurance company (and its liquidator who together were the Respondents) various sums as ordered by a court in Australia.

The basis of this application against them was that having obtained this Australian order, the Respondents sought to enforce it in the English courts under s426 of the Insolvency Act 1986 (and/or under common law).

Any party, Aswani says. which wishes to obtain the assistance of the English Court in connection with a foreign judgment for the payment of sums of money made in the insolvency context should take the same approach as it would had that foreign judgment not been made in an insolvency context, i.e. seek to register it under the the Foreign Judgments (Reciprocal Enforcement) Act 1933.

Read the report in full at:-

http://tinyurl.com/6zput3x