

# OFFSHORE CONTRACTS AND LIABILITIES

EDITED BY  
BARIŞ SOYER  
AND  
ANDREW TETTENBORN

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# CONTENTS

<i>Authors' Biographies</i>	xi
<i>Foreword</i>	xix
<i>Preface</i>	xxi
<i>Table of Cases</i>	xxiii
<i>Table of Statutes</i>	xxxiii
<i>Table of Conventions and Rules</i>	xxxix

## **PART 1**

### **OFFSHORE CONTRACTS 1**

#### **CHAPTER 1 – BIMCO'S OFFSHORE CONTRACTS 3**

*Grant Hunter*

I. Introduction	3
II. Main characteristics of BIMCO standard contracts	4
III. Specialisation and offshore expansion	5
IV. New strategy, new documents	6
V. Offshore contracts: content, contractual structure and methodology	8
VI. Winds of change	9
VII. A new SUPPLYTIME	10

#### **CHAPTER 2 – KEY ASPECTS OF THE NEW WINDTIME FORM 11**

*Lars Rosenberg Overby*

I. Background	11
II. Industry specifics	12
III. Key aspects	13

#### **CHAPTER 3 – HEAVYCON 2007: LIABILITIES, EXCEPTIONS, INDEMNITIES 29**

*Simon Baughen*

I. Structure of the charter	30
II. The contractual voyage	31
III. Obligations of owners and charterers	32



## CONTENTS

IV.	Loading and discharge: who does what?	35
V.	Freight	36
VI.	Free time and demurrage	38
VII.	Cancellation and termination	42
VIII.	Bills of lading/cargo receipts	44
IX.	Protection of owners' servants and agents	45
X.	Knock-for-knock regime	46
XI.	Conclusion	51
CHAPTER 4 – KNOCK-FOR-KNOCK CLAUSES IN OFFSHORE CONTRACTS: THE FUNDAMENTAL PRINCIPLES		53
<i>Richard W. Williams</i>		
I.	Introduction	53
II.	The structure of the knock-for-knock scheme	56
III.	The scope of the knock-for-knock scheme	58
IV.	Conclusion	67
CHAPTER 5 – THE CONSTRUCTION OF MUTUAL INDEMNITIES AND KNOCK-FOR-KNOCK CLAUSES		68
<i>Simon Rainey QC</i>		
I.	Introduction: mutual indemnification clauses	68
II.	The courts' general approach to knock-for-knock	70
III.	Construing standard form contracts in general	77
IV.	Exemption and exclusion clause principles applied	84
V.	Conclusions	107
CHAPTER 6 – CONSEQUENTIAL LOSS EXCLUSION CLAUSES IN OFFSHORE CONTRACTS: THE NEED FOR GREATER CLARITY		108
<i>Chris Kidd</i>		
I.	Introduction	108
II.	Recoverable losses	109
III.	Exclusion of consequential loss	113
IV.	Issues of construction of consequential loss exclusion clauses	116
V.	Exemption clauses specific to offshore contracts	119
VI.	Conclusion	130
CHAPTER 7 – EXCLUDING CONSEQUENTIAL DAMAGES		133
<i>Robert Gay</i>		
I.	Introduction	133
II.	What such clauses are intended to achieve in the offshore industry	135
III.	The first line of attack: the established meaning of 'consequential'	137
IV.	The second line of attack: 'or' and 'including but not limited to'	150
V.	The third line of attack: the items in the list	154
VI.	The fourth line of attack: refusing to apply exclusion clauses	157
VII.	The justification of the lines of attack	161
VIII.	How to exclude consequential damages	174

## CONTENTS

CHAPTER 8 – WILFUL MISCONDUCT AND GROSS NEGLIGENCE EXCLUSIONS IN KNOCK-FOR-KNOCK PROVISIONS IN OFFSHORE CONTRACTS	181
<i>Elizabeth Blackburn QC and Jeremy Lightfoot</i>	
I. An introduction to knock-for-knock clauses in offshore contracts	181
II. Wilful misconduct	184
III. Gross negligence	187
CHAPTER 9 – KNOCK-FOR-KNOCK: THE P&I PERSPECTIVE	201
<i>Fabien Lerede</i>	
I. Preamble	201
II. The origins of the concept of knock-for-knock agreements	202
III. Application to P&I insurance	203
IV. Knock-for-knock and the pooling agreement	203
V. The requirement for a knock-for-knock agreement	204
VI. Conclusion	207
CHAPTER 10 – STANDARD CONTRACTS USED IN THE OFFSHORE INSURANCE SECTOR: CLEAR AND UNAMBIGUOUS?	209
<i>George Leloudas and Barış Soyer</i>	
I. Introduction	209
II. Insuring offshore drilling units and craft: contemporary practice	210
III. Using marine hull forms in the offshore sector	211
IV. Problems associated with standard clauses used to insure offshore craft or equipment: LSBDF 1972, LMOMUF 1996 and LSPF 1972/2009	219
V. Problems associated with standard clauses that set out the obligations of the assured	244
VI. Conclusions	249
<b>PART 2</b>	
<b>OFFSHORE LIABILITIES</b>	<b>251</b>
CHAPTER 11 – POLLUTION FROM OFFSHORE RIGS AND INSTALLATIONS: UK LAW	253
<i>Stephen Tromans QC</i>	
I. Setting the scene: the <i>Deepwater Horizon</i> incident	253
II. The west of Shetland environment	256
III. The Montara spill	256
IV. International law	258
V. EU law	259
VI. UK law	263
VII. Overall conclusions	272

## CONTENTS

CHAPTER 12 – THE NORWEGIAN PERSPECTIVE WITH REGARD TO LIABILITY REGIMES CONCERNING OIL RIGS AND INSTALLATIONS	274
<i>Erik Røsæg</i>	
I. Overview	274
II. The strict liability	275
III. Covered claims	280
IV. Security	281
V. Channelling and recourse	282
VI. Geographical scope	286
VII. Jurisdiction and procedure	287
CHAPTER 13 – OFFSHORE INJURY: WHOSE JURISDICTION, WHAT LAW?	289
<i>Andrew Tettenborn</i>	
I. Introduction	289
II. Issues relating to liability	290
III. Procedural matters	292
CHAPTER 14 – MARINE SPATIAL PLANNING: AN INCOMING TIDE OF OPPORTUNITY OR LIABILITY?	304
<i>Gregory Jones QC and David Graham</i>	
I. Introduction	304
II. Concepts	306
III. International legal and institutional context	310
IV. Background developments in the European Union	319
V. Marine spatial planning in the UK	333
VI. The European Commission's proposal	335
VII. Evaluation	341
VIII. Liabilities	349
IX. Conclusions	352
<b>APPENDICES</b>	<b>355</b>
1. <i>SUPPLYTIME 2005</i>	357
2. <i>WINDTIME</i>	374
3. <i>HEAVYCON 2007</i>	401
4. <i>Institute Time Clauses Hulls – Port Risks (20/7/87)</i>	419
5. <i>American Institute Hull Clauses (20/9/09)</i>	425
6. <i>London Market Offshore Mobile Unit Form</i>	432
7. <i>London Standard Platform Form 2009</i>	453
<i>Index</i>	465

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## FOREWORD

This book is the outcome of a colloquium held at the Institute of International Shipping and Trade Law (IISTL) at Swansea University in late 2013. As an attendee I can vouch for it being a striking example of the valuable work being conducted by the IISTL. The topics are all of pressing interest, since it is easy to forget that there is more to shipping practice than cargo, collision and charterparty claims. Offshore operations now account for a very sizeable proportion of all marine lawyers' time. In sheer value, much of the equipment involved would put a capesize container vessel in the shade; the logistics of utilising it to advantage are on the grandest scale; the losses at stake if it is disabled or unexploitable are massive; and all accidents import the hot breath of the coastal government unceasing in its desire to make sure everything is being done by the book. To deal with this, specialised forms are necessary: profits and losses turn on accuracy in the placing of risk and the correct positioning of insurance: and in between the ever-increasing whims of regulators and governments have to be humoured. It is these practical necessities that form the inspiration for this work. Thus, WINDTIME, specially adapted for offshore wind energy, is not only analysed but, more importantly, related to SUPPLYTIME, of which it is a variant: and there is excellent coverage of the vital HEAVYCON, perhaps one of the only forms where what is being carried is normally larger than what is carrying it. The channelling of liability gets, as it should, wide coverage, with very perceptive pieces on knock-for-knock agreements and the containing of consequential losses (both vital elements in the control of risk and avoidance of double insurance). Coupled with that is an excellent piece on precisely what insurance forms are appropriate, making the point that many participants in failing to use properly drafted clauses are greatly adding to their exposure. Added to all this are two pieces on public law (Norwegian offshore pollution liability and the planning aspects of offshore operations), and a chapter on the often-forgotten subject of personal injury liability. You have here a book, ably produced by Professors Soyer and Tettenborn, which anyone in offshore practice will need, if only because the other side will probably have it already.

*Sir David Steel*  
*Former Judge of the Commercial and Admiralty Courts*  
*Maritime Arbitrator*

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## PREFACE

Good money, they say, should go to those prepared to take risks to earn it. This is obviously true of those employed to work on offshore structures at the sharp end: but, as any practitioner will be happy to confirm, the same rule also applies in spades to a firm extending its commercial practice into areas where few lawyers previously ventured. Boosted billings there may be: but these come packaged with uncertainty, unpredictability and unquantifiable hazards.

This book, the product of the Ninth Annual Colloquium of the Institute of International Shipping and Trade Law (IISTL), held in September 2013, attempts to deal with one such area of uncharted legal waters: namely, liabilities arising from offshore operations, whether these be to pump oil, to mine manganese or to satisfy the insatiable appetite of politicians, industrialists and the thinking middle classes for unlimited guilt-free energy.

Like all the best books on developing parts of the law not previously subject to detailed coverage, this one starts with the tools lawyers actually use: in particular, the new, and thus esoteric, standard forms, such as WINDTIME or HEAVYCON. A number of experts take them apart, or point out why we need new agreements rather than trying to shoe-horn offshore agreements into the old forms, or provide an overview of the vital efforts of BIMCO in the background, without which confusion would have been confounded much worse. Passing on from that, we deal with ways of controlling the enormous potential liabilities that, like the grey North Sea swell, eddy ceaselessly round any offshore project with profits in the tens of millions, and hardware in the billions, constantly in hazard. In such a case pin-point accuracy in such matters as knock-for-knock agreements, exclusions, indemnities and the apportionment of consequential losses is necessary. Then, third, we take the opportunity to home in on the nature of some of these losses, be they property damage, personal injuries, environmental liabilities or whatever, before finally looking at the impact of planning and administrative considerations.

We are enormously grateful to many for making possible the Colloquium out of which this book grew. Swansea University, as ever, provided its unparalleled logistical support; the staff of the IISTL, who provided the essential unsung back-up without which these things cannot happen; the speakers and chairmen; and, in particular, the publishers Informa, whose constant and unstinting support has been a feature of the IISTL Colloquia for as long as some of us can remember. We would also like to take this opportunity to thank staff at Informa, in particular Faye Mousley and Alexia Sutton, for their assistance during the production of this book.

## PREFACE

We sincerely hope that this collection will contribute to the understanding of law in this area, which is likely to expand in size in the near future due to the existence of a strong correlation between economic development and further exploitation of seabed mineral resources.

*Bariş Soyler*  
*Andrew Tettenborn*  
*February 2014, Swansea*

# TABLE OF CASES

Acergy Shipping Ltd <i>v.</i> Société Bretonne de Reparation Navale SAS (The Acergy Falcon) [2011] EWHC 2490 (Comm); [2012] 1 All ER (Comm) 369 .....	134
Achilleas, The <i>see</i> Transfield Shipping Inc. <i>v.</i> Mercator Shipping Inc. (The Achilleas) [2008] UKHL 48; [2009] 1 AC 61; [2008] 2 Lloyd's Rep 275 .....	142, 143
Addax Ltd <i>v.</i> Arcadia Petroleum Ltd [2000] 1 Lloyd's Rep 493 .....	296
Addison <i>v.</i> Denholm Ship Management (UK) Ltd [1997] ICR 770 .....	65
Aegean Sea Traders Corp. <i>v.</i> Repsol Petroleo SA (The Aegean Sea) [1998] 2 Lloyd's Rep 39 .....	33
Aello, The [1961] AC 135 (HL) .....	79–80
AIB Group (UK) plc <i>v.</i> Martin [2001] UKHL 63; [2002] 1 WLR 94 .....	244
AIG Europe (Ireland) Ltd <i>v.</i> Faraday Capital Ltd [2006] EWHC 2707 (Comm); [2007] Lloyd's Rep IR 267 .....	89
Aktieselskabet Reidar <i>v.</i> Arcos Ltd [1967] 1 AC 361 .....	195
Albert E Reed & Co. Ltd <i>v.</i> London & Rochester Trading Co., Ltd [1954] 2 Lloyd's Rep 463 .....	166
Albion, The [1952] 1 Lloyd's Rep 367 .....	166, 168
Alexander <i>v.</i> Railway Executive [1951] 2 KB 882 .....	248
Alfred McAlpine plc <i>v.</i> BAI (Run-Off) Ltd [2000] 1 Lloyd's Rep 437 .....	238
Allen N. Spooner & Son Inc. <i>v.</i> Connecticut Fire Ins. Co. 314 F2d 753 (1963) .....	186
Alpstream AG <i>v.</i> PK Airfinance Sàrl [2013] EWHC 2370 (Comm) .....	298
Anna H, The [1995] 1 Lloyd's Rep 11 .....	162
Antaios Compania Naviera SA <i>v.</i> Salen Rederierna AB [1985] AC 191 .....	34
A P J Priti, The [1987] 2 Lloyd's Rep 37 .....	63, 188, 197, 270
Armitage <i>v.</i> Nurse (1998) Ch 241 .....	244–5
Aspen Insurance UK Ltd <i>v.</i> Pectel Ltd [2008] EWHC 2804 (Comm); [2009] Lloyd's Rep IR 440 .....	40
Associated Portland Cement Manufacturers <i>v.</i> Houlder (1917) 22 Com Cas 279 .....	87, 88, 99, 107
AstraZeneca UK Limited <i>v.</i> Albemarle International Corporation [2011] EWHC 1574 (Comm); [2011] 2 CLC 252 .....	39
Athamas, The [1963] 1 Lloyd's Rep 287 (CA) .....	297
Atlantic Star, The [1974] AC 436] .....	199
Attorney-General of Belize <i>v.</i> Belize Telecom Ltd [2009] UKPC 10, [2009] 1 WLR 1988 .....	297
August 8, The [1983] 2 AC 450 .....	297
Banco, The [1971] P 137 .....	84, 198
Bank of Credit and Commerce International <i>v.</i> Ali [2001] UKHL 8; [2002] 1 AC 251 .....	296
Barrett <i>v.</i> Chevron USA Inc, 752 F 2d 129 (1985) .....	212
Baxendale <i>v.</i> Fane (The Lapwing) [1940] P 112 .....	



# TABLE OF CASES

Beazley Underwriting Ltd, Liberty Mutual Insurance Europe Ltd <i>v.</i> The Travelers Companies Inc. [2011] EWHC 1520 (Comm); [2012] 1 All ER (Comm) 1241	229, 231, 232
Bell Assurance Ass'n <i>v.</i> Licenses & General Insurance Corp. & Guarantee Fund Ltd (1923) 17 Ll L Rep 100	202
Beursgracht, The [2001] EWCA Civ 2051; [2002] Lloyd's Rep IR 335	246
BHP Petroleum Ltd <i>v.</i> British Steel plc and Dalmine SpA [1999] 2 Lloyd's Rep 583 (first instance); [2000] 2 Lloyd's Rep 277 (Court of Appeal)	116, 119, 123, 128, 129, 130, 141, 142, 143, 152, 153, 154, 155
Booth <i>v.</i> Phillips [2004] EWHC 1437 (Comm); [2004] 1 WLR 3292	294, 295
Brass <i>v.</i> Maitland (1856) 26 LJQB 49	34
Brazilian Rubber Plantations & Estates Ltd, Re [1911] 1 Ch 425	189–90
British Sugar <i>v.</i> NEI Power Projects (1988) 87 BLR 42	114, 140, 141, 148
British Waterways <i>v.</i> Royal & Son Alliance Insurance plc [2012] EWHC 460 (Comm); [2012] Lloyd's Rep IR 562	231
Burke <i>v.</i> UVEX Sports GmbH [2005] ILPr 26	295
C. A. Blackwell (Contractors) Ltd <i>v.</i> Gerling Allgemeine Verischerungs AG [2007] EWCA Civ 1450; [2008] Lloyd's Rep IR 529	82
Caledonia North Sea Ltd <i>v.</i> British Telecommunications plc ( <i>Piper Alpha</i> ) [2002] SC (HL) 117; [2002] 1 Lloyd's Rep 553	54, 55, 73, 114, 146, 179
Caledonia North Sea Ltd <i>v.</i> Kelvin International Services Ltd [2002] SC (HL) 117; [2002] 1 Lloyd's Rep 553 <i>see</i> Caledonia North Sea Ltd <i>v.</i> British Telecommunications plc ( <i>Piper Alpha</i> ) [2002] SC (HL) 117; [2002] 1 Lloyd's Rep 553	
Caledonia North Sea Ltd <i>v.</i> London Bridge Engineering Ltd [2002] SC (HL) 117; [2002] 1 Lloyd's Rep 553 <i>see</i> Caledonia North Sea Ltd <i>v.</i> British Telecommunications plc ( <i>Piper Alpha</i> ) [2002] SC (HL) 117; [2002] 1 Lloyd's Rep 553	
Camerata Property Inc. <i>v.</i> Credit Suisse Securities Europe Ltd [2011] EWHC 479 (Comm); [2011] 1 CLC 627	197, 199
Campbell <i>v.</i> Conoco (UK) Ltd [2002] EWCA Civ 704; [2003] 1 All ER (Comm) 35	228
Canada Rice Mills Ltd <i>v.</i> Union Marine & General Insurance Co. Ltd [1941] AC 55	212
Canada Steamship Lines <i>v.</i> The King [1952] AC 192	72, 91, 92, 126, 161
Canadian Salt Co <i>v.</i> The Ship Irving Cedar [2000] FC D-62	90
Cap Palos (1921) P 458	62, 103, 106, 158, 159
Cendor Mopu, The <i>see</i> Global Process Systems Inc. <i>v.</i> Syarikat Takaful Malaysia Bhd (The Cendor Mopu) [2011] UKSC 5, [2011] 1 Lloyd's Rep 560	
Chandler <i>v.</i> Cape plc [2012] EWCA Civ 525; [2012] 1 WLR 3111	291
Chartbrook Ltd <i>v.</i> Persimmon Homes Ltd [2009] UKHL 38; [2009] 1 AC 1101	78, 199
Chung Tak Lam <i>v.</i> United Kingdom (European Court of Human Rights), Fourth Section, 5 July 2001)	350
City Equitable Fire Insurance Co. Ltd, Re [1925] Ch 407	189
Civil and Marine Slag Cement Ltd <i>v.</i> Cambrian Stone Ltd [2000] All ER (D) 825 (QB)	114
Clark (Inspector of Taxes) <i>v.</i> Perks [2001] STC 1254	296
CMA GGM SA <i>v.</i> Classica Shipping Co. Ltd (The CMA Djakarta) [2004] EWCA Civ 114; [2004] 1 Lloyd's Rep 460	50, 65
Colour Quest Ltd <i>v.</i> Total Downstream UK [2009] EWHC 540 (Comm); [2009] 2 Lloyd's Rep 1	92–3
Commission <i>v.</i> France (Case C-239/03) [2004] ECR-I 9325	318
Commission <i>v.</i> Ireland (Case 113/80) [1982] 1 CMLR 706	343
Commission <i>v.</i> Ireland (Case C-459/03) [2006] ECR-I 4635	318
Commonwealth Smelting Ltd <i>v.</i> Guardian Royal Exchange Assurance Ltd [1984] 2 Lloyd's Rep 608	213
Commune de Mesquer <i>v.</i> Total France SA and Total International (Case C-188/07) [2008] 3 CMLR	260
Connolly Shaw Ltd <i>v.</i> A/S Det Nordenfeldske D/S (1934) 49 Ll L Rep 183 (KBD)	32

# TABLE OF CASES

Conocophillips (UK) Ltd <i>v.</i> Patenrederei MS Jonk [2010] EWHC 1214 (Comm) .....	295, 300, 301
Convery <i>v.</i> Dublin County Council [1996] 3 IR 153 .....	351
Cooley <i>v.</i> Ramsley [2008] EWHC 129 (QB); [2008] IL PR 27 .....	294
Cosco Bulk Carrier Co. Ltd <i>v.</i> Team-Up Owning Co. Ltd [2010] EWHC 1340 (Comm); [2011] 1 Lloyd's Rep 187 .....	19
Cowell <i>v.</i> Yorkshire Provident Life Assurance Co. (1901) 17 TLR 452 .....	246
Coxe <i>v.</i> Employers' Liability Assurance Corporation Ltd [1916] 2 KB 629 .....	224
Croudace Construction Ltd <i>v.</i> Cawoods Concrete Ltd [1978] 2 Lloyd's Rep 55 (CA).....	48, 99, 114, 126, 140, 143
Cullen <i>v.</i> Butler (1816) M & S 461 .....	216
Dairy Containers Ltd <i>v.</i> Tasman Orient CV [2004] UKPC 22; [2005] 1 WLR 215 .....	79
Dalmare SpA <i>v.</i> Union Maritime Ltd (The Union Power) [2012] EWHC 3537 (Comm); [2013] 1 Lloyd's Rep 509 .....	81, 83
Davidson <i>v.</i> Burnard (1868) LR 4 CP 117 .....	216, 217
Dawsons Ltd <i>v.</i> Bonnin [1922] 2 AC 413 .....	245
Dedgdon <i>v.</i> Pembroke (1874) LR 9 QB 581 .....	212
Deepak Fertilisers & Petrochemical Corporation <i>v.</i> ICI Chemicals & Polymers Ltd [1999] 1 Lloyd's Rep 387 .....	51, 114, 120, 122, 149, 150, 151
Deepwater Horizon, In Re, 710 F3d 338 (2013).....	208
Deichland, The [1990] 1 QB 361 .....	297, 298
Delian Spirit, The [1972] 1 QB 103; [1971] 1 Lloyd's Rep 506 .....	34, 39
Democritos, The [1976] 2 Lloyd's Rep 149 (CA) .....	43
Derbyshire, The [1988] AC 276 .....	291
Deutsche Bank AG <i>v.</i> Sebastian Holdings Inc [2013] EWHC 3463 (Comm) .....	188
Deverne II <i>see</i> Vitesse Yacht Charters SL <i>v.</i> Spiers (The Deverne II) [2003] EWHC 2426 (Admlty) [2004] 1 Lloyd's Rep 179 .....	297
Dictator, The [1892] P 304 .....	37
Dominique, The [1989] 1 Lloyd's Rep 431 (HL) .....	221
Dudgeon <i>v.</i> Pembroke (1877) 2 App Cas 284 .....	295
Dumez France SA <i>v.</i> Hessische Landesbank (Case 228/88) [1990] E.C.R. I-49; [1990] ILPr 299 .....	231, 232
Dunthorne <i>v.</i> Bentley [1996] RTR 428 .....	
Ease Faith <i>v.</i> Leonis Marine Management Ltd [2006] EWHC 232 (Comm); [2006] 1 Lloyd's Rep 673 .....	90, 120, 122, 126, 130, 145
E. E. Caledonia Ltd <i>v.</i> Orbit Valve Co. Europe [1994] 1 WLR 221; [1994] 1 WLR 1515 .....	75, 91, 107, 270
Elvanite Full Circle Ltd <i>v.</i> AMEC Earth & Environmental (UK) Ltd [2013] EWHC 1191 (TCC); (2013) 148 Con LR 127 .....	180
Environmental Systems Pty Ltd <i>v.</i> Peerless Holdings Pty Ltd [2008] VSCA 26 Nettle JA .....	131
Eso Malaysia, The [1975] QB 198 .....	290
Evangelos Theta, The [1971] 2 Lloyd's Rep 200 .....	34
Ferryways NV <i>v.</i> Associated British Ports [2008] EWHC 225 (Comm); [2008] 1 Lloyd's Rep 639 .....	48, 118, 119, 120, 125, 130, 152, 154
Firestone Tyre & Rubber Co. Ltd <i>v.</i> Vokins & Co. Ltd [1951] 1 Lloyd's Rep 32 .....	167
Forder <i>v.</i> Great Western Ry Co. [1905] 2 KB 532 .....	63, 185
Frans Maas (UK) Ltd <i>v.</i> Samsung Electronics (UK) Ltd [2004] EWHC 1502 (Comm); [2004] 2 Lloyd's Rep 251 .....	170, 171, 172, 173
Fraser <i>v.</i> Furman (Productions) Ltd [1967] 1 WLR 898 .....	236, 239
Fraser <i>v.</i> John N. Ward & Son Ltd, 1987 SLT 513 .....	293, 295
Friends Provident Life & Pensions Ltd <i>v.</i> Sirius International Insurance Corp. [2004] EWHC 1799 (Comm); [2005] Lloyd's Rep IR 135 .....	245, 246, 248
Front Commander, The [2006] EWCA Civ 944; [2006] 2 Lloyd's Rep 251 .....	39

# TABLE OF CASES

Gemma, The [1899] P 285 .....	297
Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Limited [1994] AC 689 ....	76, 93, 94, 95
Global Process Systems Inc. v. Syarikat Takaful Malaysia Bhd (The Cendor Mopu) [2011] UKSC 5; [2011] 1 Lloyd's Rep 560 .....	212, 219, 221, 227
Glynn v. Margetson [1893] AC 351 .....	32
Granville Oil & Chemicals Ltd v. Davis Turner & Co Ltd [2003] 2 Lloyd's Rep 356 .....	170
Great Scottish & Western Ry Co. Ltd v. British Railways Board, Transcript, 10 February 2000 .....	191, 199
Grill v. General Iron Screw Collier Co (1866) LR 1 CP 600 .....	187
Hadley v. Baxendale (1854) 9 Ex 341 .....	48, 51, 98–9, 108, 109, 110, 111, 113, 115, 116, 117, 118, 123, 124, 125, 128, 130, 131, 137, 140, 141, 142, 143, 144, 145, 146, 147, 179, 180
Hain SS Co. Ltd v. Tate & Lyle Ltd [1936] 2 All ER 597 .....	161
Happy Day, The [2002] EWCA Civ 1068; [2002] 2 Lloyd's Rep 487 (CA) .....	39
Harty v. Sabre International Security Ltd (formerly SIS Iraq Ltd) [2011] EWHC 852 (QB) .....	293
Hawksley v. Outram [1892] 3 Ch. 359 .....	89
Hellespont Ardent <i>see</i> Red Sea Tankers Ltd v. Papchristidis (The Hellespont Ardent) (1997) 2 Lloyd's Rep 547	
Herdenter, The <i>see</i> Tsavlis, Alexander v. OSA Marine Ltd (The Herdentor) (unreported, 1996)	
Heron II, The <i>see</i> Koufos v. C Czarnikow Ltd (The Heron II) [1969] 1 AC 350; [1967] 2 Lloyd's Rep 457	
Hewison v. Meridian Shipping Service Pte Ltd [2002] EWCA Civ 1821; [2003] ICR 766 .....	291
HIH Casualty and General Insurance Ltd v. Chase Manhattan Bank [2003] UKHL 6; [2003] 2 Lloyd's Rep 61 .....	91, 93–4, 170
Himalaya, The [1954] 2 Lloyd's Rep 267 .....	23
Hinton v. Dibbin (1842) 2 QB 646 .....	187
Hobbs v. Marlowe [1978] AC 16 .....	202
Homburg Houtimport BV v. Agrosin Private Ltd, The Starsin [2003] UKHL 12, [2003] 1 Lloyd's Rep 571; [2004] 1 AC 715 (HL).....	45, 171, 219
Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26 .....	246
Horabin v. British Overseas Airways Corporation [1952] 2 Lloyd's Rep 450 .....	185
Hotel Services Ltd v. Hilton International Hotels Ltd [2000] Build LR 235 .....	115, 131, 142, 179
ICDL GCC Foundation FZ-LLC v. European Computer Driving Licence Foundation Ltd [2012] IESC 55 .....	188
Interfoto Library Ltd v. Stiletto Visual Programmes Ltd [1989] 1 QB 433 .....	165
Internet Broadcasting Corp. Ltd v. Mar LLC (MARHedge) [2009] EWHC 884 (Ch); [2009] 2 Lloyd's Rep 295 .....	61, 86, 87, 97, 99, 103, 104, 107, 157, 159, 169–74
Internet Broadcasting Corp. Ltd v. Mar LLC [2009] EWHC 884 (Ch); [2009] 2 Lloyd's Rep 295 .....	88
Intertanko v. Secretary of State for Transport (Case C-308/06) [2008] ECR I-4057 .....	319
Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896 (HL) .....	77, 82, 84, 94, 198
Investors in Industry Commercial Properties Ltd v. South Bedfordshire DC [1986] QB 1034 .....	352
J J Lloyd Instruments Ltd v. Northern Star Insurance Co. Ltd (The Miss Jay Jay) [1987] 1 Lloyd's Rep 264 .....	221, 227
John F. Hunt Demolition Ltd v. ASME Engineering Ltd [2007] EWHC 1507 (TCC); [2008] Bus LR 558 .....	290
JP Morgan Chase Bank v. Springwell Navigation Corp [2008] EWHC 1793 (Comm) .....	189, 190

# TABLE OF CASES

JP Morgan Chase Bank <i>v.</i> Springwell Navigation Corp [2010] EWCA Civ 1221; [2010] 2 CLC 705 .....	190
Kane <i>v.</i> New Forest District Council (No. 1) [2001] EWCA Civ 878; [2002] 1 WLR 312 .....	351
Karin Vatis, The [1988] 2 Lloyd's Rep 330 (CA) .....	37
Karp <i>v.</i> Hulst, 209 NYS2d 128, affd 9 NY 2d 857, 216 NYS2d 99, 175 NE2d 465 (1961).....	192
KG Bominflot Bunkergesellschaft für Mineralöle mbH & Co. <i>v.</i> Petroplus Marketing AG (The Mercini Lady) [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep 442 .....	84
Kiddle <i>v.</i> Lovett (1885) 16 QBD 605 .....	290
Koelzsch <i>v.</i> Luxembourg (C-29/10) [2011] IRLR 514 .....	301
Koufos <i>v.</i> C Czarnikow Ltd (The Heron II) [1969] 1 AC 350; [1967] 2 Lloyd's Rep 457 .....	110, 114
Kronhofer <i>v.</i> Maier (Case C-168/02) [2004] ILPr 27 .....	295
K/S Merc-Scandia XXXXII <i>v.</i> Certain Lloyd's Underwriters (The Mercandian Continent) [2001] EWCA Civ 1275; [2001] 2 Lloyd's Rep 563 .....	248
Kudos Catering (UK) Limited <i>v.</i> Manchester Central Convention Complex Ltd [2013] EWCA Civ 38 [2013] 2 Lloyd's Rep 270 .....	87–8, 99–100, 104, 105, 107, 128
Lacey Footwear (Wholesale) Ltd <i>v.</i> Bowler International Freight Ltd [1997] 2 Lloyd's Rep 369 .....	165
Lamb Head Shipping Co. Ltd <i>v.</i> Jennings (The Marel) [1992] 1 Lloyd's Rep 402 .....	212
Lam <i>v.</i> Brennan [1997] 3 PLR 22, C.A. ....	350, 351
Ledger <i>v.</i> MacGregor Energy Services Ltd 2000 GWD 39-1464 .....	290
Leonis SS Co. Ltd <i>v.</i> Rank (Joseph) Ltd (No. 2) (1908) 13 Com Cas 161 .....	38
Levison <i>v.</i> Patent Steam Carpet Cleaning Co. Ltd [1978] 1 QB 69 .....	166, 167
Lewis <i>v.</i> Great Western Railway Co (1877) 3 QBD 195 .....	184
Leyland Shipping Co. Ltd <i>v.</i> Norwich Union Fire Insurance Society Ltd [1918] AC 350 .....	212, 221, 229
Liberty Mutual Insurance <i>v.</i> HSBC Bank plc [2002] EWCA 691 .....	94
Linda, The [1988] 1 Lloyd's Rep 175 .....	297
Lloyds TSB General Insurance Holdings <i>v.</i> Lloyds Bank Group Insurance Co. Limited [2003] UKHL 48; [2003] 4 All ER 43 .....	229
London Fire & Emergency Planning Authority <i>v.</i> Halcrow Gilbert Associates Ltd [2007] EWHC 2546 (TCC); (2008) 24 Const LJ 103 .....	151
Louis Dreyfus & Co. <i>v.</i> Lauro [1938] 60 Ll L Rep 94 .....	33
Maciej Rataj, The (Case C-406/92) [1994] ECR I-5439; [1995] 1 Lloyd's Rep 302 .....	297
Mair <i>v.</i> Railway Passengers Assurance Co. Ltd (1877) 37 LT 356 .....	224
Manifest Shipping Co. Ltd <i>v.</i> Uni-Polaris Insurance Co. Ltd (The Star Sea) [2001] UKHL 1; [2003] 1 AC 469 .....	240
Marc Rich <i>v.</i> Bishop Rock Marine Co. Ltd [1994] 1 WLR 1071 .....	352
Marex Financial Ltd <i>v.</i> Fluxo-Cane Overseas Ltd [2010] EWHC 2690 (Comm).....	188
Margaronis Navigation Agency Ltd <i>v.</i> Henry W. Peabody & Co. (London) Ltd [1965] 1 Lloyd's Rep 173 .....	41
Marielle Bolten, The [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648 (QBD) .....	45
Marika M, The [1981] 2 Lloyd's Rep 622 .....	19
Markerstudy Insurance Co. Ltd <i>v.</i> Endsleigh Insurance Services Ltd [2010] EWHC 281 (Comm).....	151, 154
Matthew Hall Ortech Ltd <i>v.</i> Tarmac Roadstone Ltd (1997) 87 BLR 96 .....	82
Matthews <i>v.</i> Kuwait Bechtel Corp [1959] 2 QB 57 .....	293, 295
Maxine Footwear Co. Ltd <i>v.</i> Canadian Government Merchant Marine Ltd [1959] AC 589 .....	33
McCain Foods GB Ltd <i>v.</i> Eco-Tec (Europe) Ltd [2011] EWHC 66 (TCC); [2011] CILL 2989 .....	114
McDermid <i>v.</i> Nash Dredging Co. Ltd [1987] AC 2906 .....	290

# TABLE OF CASES

Metcalfe v. Britannia Ironworks (1877) 2 QBD 423 (CA).....	39
Metropolitan Life Insurance v. Noble Lowndes, 84 NY 2d 430, 643 NE2d 504 (1994) .....	193
Millar's Machinery Co. Ltd v. David Way & Son (1935) 40 Com Cas 204 (CA) .....	114, 138, 139, 140, 145, 148, 149
Miramar, The [1984] AC 676 .....	42
Mir Steel v. Morris [2012] EWCA Civ 1397; [2013] 2 All ER (Comm) 54 .....	86, 91
Mitsubishi Corporation v. Eastwind Transport (The Irbenskiy Proliv) [2004] EWHC 2924 (Comm); [2005] 1 Lloyd's Rep 383 .....	102
Moel Tryvan Shipping Co Ltd v. Andrew Weir & Co. [1910] 2 KB 844 .....	42
Motis Exports Ltd v. Dampskibsselskabet AF 1912 A/S [2000] 1 Lloyd's Rep 211 .....	171
Mudlark, The [1911] P 116 .....	296
Municipal Mutual Ltd v. Sea Insurance Co Ltd [1996] 2 Lloyd's Rep 265 .....	244
Municipal Mutual Ltd v. Sea Insurance Co Ltd [1998] Lloyd's Rep IR 421 .....	229
National Semiconductors (UK) Ltd v. UPS Ltd [1996] 2 Lloyd's Rep 212 .....	186
Naviera de Canarias SA v. Nacional Hispanica Aseguradora SA (The Playa de las Nieves) [1978] AC 853 .....	226
Newona, The (1920) 4 Ll L Rep 156 .....	103
Newton-Sealey v. Armor Group Services Ltd [2008] EWHC 233 (QB) .....	290
Nolisement (Owners) v. Bunge & Born [1917] 1 KB 160 .....	41
Nomarchiaki Aftodioikisi Aitolokarnanias v Ipourgos Perivallontos (Case C-43/10) [2013] Env LR 21 .....	347
Odenbreit v. FBTO Schadeverzekeringen NV (C-463/06) [2007] ECR I-11321; [2008] 2 All ER (Comm) 733 .....	295
Overend Gurney & Co v. Gibb (1872) LR 5 HL 480 .....	189, 190
Owusu v. Jackson (C-281/02) [2005] ECR I-1383; [2005] QB 801 .....	292
Peabody Donation Fund v. Sir Lindsay Parkinson & Co Ltd [1985] AC 210 .....	352
Pentecost v. London District Auditor [1951] 2 KB 759 .....	187
Perrett v. Collins [1998] 2 Lloyd's Rep 255 .....	352
Petersen v. Dunn & Co. (1895) 1 Com Cas 8 .....	41
Philcox v. Civil Aviation Authority (1995) 92(27) LSG 33 .....	352
Phillips v. Barker (1821) 5 B & Ald 161 .....	216
Phillips v. Rafiq [2007] EWCA Civ 74; [2007] 1 WLR 1351 .....	83
Photo Production Ltd v. Securicor Transport Ltd [1980] AC 827 .....	85, 97, 103, 161, 162, 163, 164, 171
Pigott Foundations Ltd v. Shepherd Construction Ltd (1993) 67 BLR 48 .....	141, 180
Piper Alpha, The <i>see</i> Caledonia North Sea Ltd v. British Telecommunications plc ( <i>Piper Alpha</i> ) [2002] SC (HL) 117; [2002] 1 Lloyd's Rep 553 .....	298
Po, The [1991] 2 Lloyd's Rep 206 .....	298
Polestar Maritime v. YHM Shipping (The Rewa) [2012] EWCA Civ 153; [2012] 1 Lloyd's Rep 510 .....	81, 83
Porter v. Zurich Insurance Co. [2009] EWHC 376 (QB); [2010] Lloyd's Rep IR 373 .....	249
Prinsengracht, The [1993] 1 Lloyd's Rep 41 .....	298
Promet Engineering (Singapore) Pte Ltd v. Sturge (The Nukila) [1997] 2 Lloyd's Rep 146 .....	213
Pteroti Cia Naviera SA v. National Coal Board [1958] 1 QB 469 .....	39
Pythia, The [1982] 2 Lloyd's Rep 160 .....	19
R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295 .....	344
R. (An Taisce) v. Secretary of State for Energy and Climate Change [2013] EWHC 4161 (Admin).....	349
R (D) v. Worcestershire CC [2013] EWHC 2490 (Admin), [2013] BLGR 741 .....	343

# TABLE OF CASES

R (MA & Others) v. Secretary of State for Work and Pensions [2013] EWHC 2213 (QB); [2013] Eq LR 972 .....	343
Raffinerie Mediterranée (ERG) SpA v. Ministero dello Sviluppo economico (Case C-378/08) [2010] 3 CMLR 9 .....	260
Rainy Sky SA v. Kookmin Bank [2011] UKSC 50; [2012] 1 Lloyd's Rep 34 .....	78, 199
Rauch v. Underwriters of Lloyd's at London, 320 F.2d 525 (1963) .....	224–5
Red Sea Tankers Ltd v. Papchristidis (The Hellepont Ardent) [1997] 2 Lloyd's Rep 547 .....	64, 191, 192, 194, 195, 196, 197, 199, 270
Regus (UK) Ltd v. Epcot Solutions Ltd [2008] EWCA Civ 361; [2009] 1 All ER (Comm) 586 .....	151, 172
Resolute, The [2009] 1 Lloyd's Rep 225 .....	199
Réunion Uuropéenne SA v. Bevarchtingskantor BV (Case C-51/97) [1998] ECR I-06511 .....	287
Robb v. Salamis (M & I) Ltd [2006] UKHL 56; [2007] 2 All ER 97 291Royal Exchange Assurance (of London) Corp v Kingsley Navigation Co Ltd [1923] AC 235 .....	229
R. v. Secretary of State for Transport ex parte Factortame Ltd (Case C-48/93 and Case C-420/11) [1996] ECR I-1029 .....	350
Saint Line Ltd v. Richardsons Westgarth & Co Ltd [1940] 2 KB 99 .....	114, 138, 149
Saldanha v. Fulton Navigation Inc. [2011] EWHC 1118 (Admlty); [2011] 2 Lloyd's Rep 206 .....	293, 297
Salemink v. Raad van bestuur van het Uitvoeringsinstituut Werknemersverzekeringen (Case C-347/10), unreported .....	319
Samuel (P) & Co. Ltd v. Dumas [1924] AC 431 .....	212
Satef-Huttenes Albertus SpA v. Paloma Tercera Shipping Co. SA (The Pegase) [1981] 1 Lloyd's Rep 175 .....	144–5
Seadrill Management Services Ltd v OAO Gazprom (The Ekha) [2009] EWHC 1530 (Comm); [2010] 1 Lloyd's Rep 543; [2010] EWCA Civ 691; [2011] 1 All ER (Comm) 1077 .....	47, 76, 77, 94, 104
Sealion Shipping Ltd Toisa Horizon Inc. v. Valiant Insurance Co. (The Toisa Pisces) [2012] EWHC 50 (Comm); [2002] 1 Lloyd's Rep 252 .....	234, 235, 236, 237, 240, 242, 243
Sea Servizi Ecologici Affossamenti Srl v. Muliceiro Serviços Marítimos Ltd (The Aveiro) [2007] EWHC 2639 (Comm) .....	135
Shared Network Services Ltd v. Nextiraone UK Ltd [2012] EWCA Civ 1171 .....	88
Shawinigan Ltd v. Vokins & Co. Ltd [1961] 2 Lloyd's Rep 153 .....	195
Shipping Developments Corporation SA v. Sojuzneftexport [1971] 1 Lloyd's Rep 50 .....	41
Sigma Finance Corp, Re (In Administration) [2009] UKSC 2, [2010] 1 All ER 571 .....	199
Siney v. Dublin Corporation [1980] IR 40 .....	351
Sirius International Insurance v. FAI General Insurance [2004] UKHL 54; [2005] 1 Lloyd's Rep 461 .....	78
Smedvig Ltd v. Elf Exploration UK plc (The Super Scorpio II) [1998] 2 Lloyd's Rep 659 .....	62
Smith v. South Wales Switchgear Ltd [1978] 1 WLR 165 .....	71, 72, 91
Smith v. Wilson (1832) 3 B & Ad 728 .....	179
Smit International (Deutschland) GmbH v. Josef Mobius Baugesellschaft mbH & Co. [2001] CLC 1545 .....	47, 48, 50, 56, 74, 104, 105–6, 134, 183, 201
Sohyde Drilling & Marine Co v. Coastal States Gas Producing Co, 644 F 2d 1132 (1981) .....	296
South Australia Asset Management Corp v. York Montague Ltd [1997] AC 191 .....	112
Spencer-Franks v. Kellogg Brown & Root Ltd [2008] UKHL 46; [2009] 1 All ER 269 SC (HL) 159 .....	291
Spiliada Maritime Corp v. Cansulex Ltd [1987] AC 460 .....	294
Spread Trustee Co Ltd v. Hutcheson [2011] UKPC 13; [2012] 2 AC 194 .....	188
Spurling (J) Ltd v. Bradshaw [1956] 1 WLR 461 .....	165

# TABLE OF CASES

Starsin, The <i>see</i> Homburg Houtimport BV <i>v.</i> Agrosin Private Ltd, The Starsin [2003] UKHL 12, [2003] 1 Lloyd's Rep 571; [2004] 1 AC 715 (HL)	
Steel <i>v.</i> State Line SS Co (1877) 3 App Cas 72	48
Stocznia Gdanska SA <i>v.</i> Gearbulk Holdings Ltd [2009] EWCA Civ 75; [2009] 1 Lloyd's Rep 461	176
Stocznia Gdanska SA <i>v.</i> Latvian Shipping Co [1998] 1 WLR 574	94
Sucden Financial Ltd <i>v.</i> Fluxo-Cane Overseas Ltd [2010] EWHC 2133 (Comm), [2010] 2 CLC 216	188
Suisse Atlantique Société d'Armement SA <i>v.</i> NV Rotterdamsche Kolen Centrale [1967] 1 AC 361	61, 85, 87, 89, 96, 97
Sunderland <i>v.</i> Louth County Council [1990] ILRM 658	351
Super Scorpio II, The [1998] 2 Lloyd's Rep 659	134
Supershield Ltd <i>v.</i> Siemens Building Technology FE Ltd [2010] EWCA Civ 7; [2010] 1 Lloyd's Rep 349	112, 113
Swiss Bank Corporation <i>v.</i> Brink's-Mat Ltd [1986] 2 Lloyd's Rep 79	96, 103, 104
Sylvia Shipping Co. Ltd <i>v.</i> Progress Bulk Carriers Ltd [2010] EWHC 542 (Comm); [2010] 2 Lloyd's Rep 81	112, 113
Szalatnay-Stacho <i>v.</i> Fink [1947] KB 1	299
Sze Hai Tong Bank Co Ltd <i>v.</i> Rambler Cycle Co Ltd [1959] AC 576; [1959] 2 Lloyd's Rep 114 (PC)	85, 167, 168, 171, 172
Tasman Orient Line CV <i>v.</i> New Zealand China Clays Ltd [2010] NZSC 37; [2010] 2 Lloyd's Rep 13	163
Tate Gallery (Trustees) <i>v.</i> Duffy Construction Ltd & Anor (No. 2) [2007] EWHC 912 (TCC); [2008] Lloyd's Rep IR 159	243
Tektrol Ltd <i>v.</i> International Insurance Co. of Hanover Ltd [2005] EWCA Civ 845; [2005] 2 Lloyd's Rep 701	245
Tesco Stores Ltd <i>v.</i> Secretary of State for the Environment [1995] 1 WLR 759	344
Texas Instruments Ltd <i>v.</i> Nason (Europe) Ltd [1991] 1 Lloyd's Rep 146	185
TFW Printers Ltd <i>v.</i> Interserve Project Services Ltd [2006] EWCA Civ 875; [2006] 2 CLC 106	82–3
Thames & Mersey Marine Insurance Co Ltd <i>v.</i> Hamilton, Fraser & Co (The Inchmaree) (1887) 12 App Cas 484	234
Thames Trains Ltd <i>v.</i> HSE [2003] EWCA Civ 720	352
Thomas Cook Group Ltd <i>v.</i> Air Malta [1997] 2 Lloyd's Rep 399	185
Thomas Wilson, Sons & Co <i>v.</i> Owners of the cargo per the Xantho (The Xantho) (1887) 12 App Cas 503	221
Thompson <i>v.</i> Hopper (1856) 6 E & B 172	221
Thwaites <i>v.</i> Aviva Assurances [2010] ILPr 47; [2010] Lloyd's Rep IR 667	295
TM Noten BV <i>v.</i> Harding [1990] 3 Lloyd's Rep 283	221
Toomey <i>v.</i> Banco Vitalicio de España SA de Seguros y Reaseguros [2004] EWCA Civ 622; [2005] Lloyd's Rep IR 423	246
Tor Line AB <i>v.</i> Alltrans Group of Canada Ltd (The TFL Prosperity) [1984] 1 WLR 48 (HL)	96–7, 99, 103
Tradigrain SA <i>v.</i> Intertek Testing Services (ITS) Canada Ltd [2007] EWCA Civ 154; (2007) 1 CLC 154	63, 187, 188
Transfield Shipping Inc <i>v.</i> Mercator Shipping Inc (The Achilleas) [2008] UKHL 48; [2009] 1 AC 61; [2008] 2 Lloyd's Rep 275	111, 112, 113, 115, 142, 144–5, 147
Tsavliris, Alexander <i>v.</i> OSA Marine Ltd (The Herdentor) (unreported, 1996)	56, 98, 103, 118, 120, 121, 122, 124, 130, 153, 155, 157, 175, 177
Turtle, The A (A Turtle Offshore SA & Anor <i>v.</i> Superior Trading Inc) [2008] EWHC 3034 (Admlty); [2009] 1 Lloyd's Rep 177	19, 43, 56, 61, 62, 100, 102, 105, 106, 107, 158, 168–9, 173, 205

## TABLE OF CASES

Ulyanovsk, The [1990] 1 Lloyd's Rep 425 .....	41
Universal Cargo Carriers Corp. v. Citati [1957] 2 QB 401 .....	44
Valiant Insurance Co v. Sealion Shipping Ltd [2012] EWCA Civ 1625; [2013] 1 Lloyd's Rep 108 .....	234
Van de Walle, Criminal Proceedings against, Re (Case C-1/03) [2004] E.C.R. I-7613; [2005] 1 CMLR 8 .....	260
Versloot Dredging BV v. HDI-Gerling Industrie Versicherung AG (The DC Merwestone) [2013] EWHC 1666 (Comm); [2013] 2 Lloyd's Rep 131 .....	212, 234, 235, 237, 238, 239, 240, 241
Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd [1949] 2 KB 528 .....	110, 114
Vitesse Yacht Charters SL v. Spiers (The Deverne II) [2003] EWHC 2426 (Admlty); [2004] 1 Lloyd's Rep 179 .....	138
Von Rocks, The [1998] 2 Lloyd's Rep 198 .....	296
Walters v. Whessoe Ltd [1968] 2 All ER 816 .....	61
Ward v. McMaster [1988] IR 337 .....	351
Watson v. British Boxing Board of Control Ltd [2001] QB 1134, CA .....	352
Wayne Tank and Pump Co Ltd v. Employers Liability Assurance Corp Ltd [1974] QB 57 .....	221
Weber v. Universal Ogden Services Ltd (C-37/00) [2002] ECR I-2013; [2002] QB 1189 .....	295, 300, 301
West India Telegraph Co v. Home & Colonial Insurance Co (1880) 6 QBD 51 .....	217
Wilsons & Clyde Coal Co Ltd v. English [1938] AC 57 .....	290
Wilson v. Brett (1843) 11 M&W 113 .....	63, 187
Wink v. Croatia Osiguranje DD [2013] EWHC 1118 (QB) .....	294
Xin Yang, The and An Kang Jiang, The [1996] 2 Lloyd's Rep 217 .....	297
Yarm Road Ltd v. Hewden Tower Cranes Ltd [2003] EWCA Civ 1127; (2003) 90 Con LR 1 .....	80



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# TABLE OF STATUTES

Civil Contingencies Act 2004, .....	265	ss. 90–91 .....	352
Civil Liability (Contribution) Act 1978		s. 92 .....	352
s. 1(4) .....	290	s. 102 .....	352
Consumer Protection Act 1987		s. 104 .....	352
Part I .....	291	s. 108 .....	352
s. 1(2)(b) .....	292	Sch. 5 .....	333
s. 1(2)(c) .....	292	Sch. 6	
s. 45 .....	292	para 3 .....	333
Contracts Rights of Third Parties Act		para 9 .....	333
1999 .....	45	para 13 .....	333
Employer's Liability (Defective Equipment)		para 15 .....	333
Act 1969 .....	290	para 15(1) .....	333
Enterprise and Regulatory Reform Act 2013		Marine Insurance Act (MIA) 1906	
s. 69 .....	291	s. 39(5) .....	239
Equality Act 2010		s. 39(5) .....	241
s. 149 .....	343	s. 55(1) .....	220, 221
Food and Environmental Protection Act		s. 55(2) .....	223
1985		s. 55(2)(a) .....	64, 228
Part I .....	265	Merchant Shipping Act 1995	
Health and Safety at Work etc. Act 1974		ss. 137–140 .....	264
s. 84 .....	291	s. 313(1) .....	218
Libel Act 1843		s. 313(1) .....	296
s. 2 .....	188–9	Sch.7 .....	269
Marine (Scotland) Act 2010		Petroleum (Production) Act 1934 .....	263
s. 5 .....	334	Petroleum Act 1998 .....	263
Marine Act (Northern Ireland) 2013 .....	335	Planning Act 2008 .....	334
Marine and Coastal Access Act 2009 .....	333–5	Planning and Compulsory Purchase Act	
s. 44 .....	333	2004	
s. 49 .....	333	s. 20(5) .....	346
s. 50 .....	333	s. 64(5) .....	346
s. 51 .....	333	Pollution Prevention and Control Act 1999	
s. 58(1) .....	334	s. 3 .....	264
s. 58(4) .....	334	Road Traffic Act 1938	
s. 60 .....	333	s.145(3)(a) .....	231
s. 65 .....	334	Sale of Goods Act 1893	
s. 66 .....	334	s. 51(2) .....	139
s. 85 .....	352	s. 55 .....	93
		Sale of Goods Act 1979 .....	83

## TABLE OF STATUTES

Senior Courts Act 1981		Offshore Installations (Emergency Pollution Control) Regulations 2002	264
s. 20	296	Offshore Installations (Prevention of Fire and Explosion, and Emergency Response) Regulations 1995 (SI 1995/743)	291
s. 20(2)(f)	296	Offshore Installations and Wells (Design and Construction, etc) Regulations 1996 (SI 1996/913)	291
s. 21(4)	296	Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005	264
s. 24(1)	296	Pipelines Safety Regulations 1996 (SI 1996/825)	291
Third Parties (Rights against Insurers) Act 1930	296	Provision and Use of Work Equipment Regulations (SI 1998/2306)	291
Third Parties (Rights against Insurers) Act 2010			
s. 1(1)	296		
Unfair Contract Terms Act 1977	161, 165, 171, 172		
<b>Statutory Instruments</b>			
Civil Jurisdiction (Application to Offshore Renewable Energy Installations, etc.) Order 2009 (SI 2009/1743)		<b>EU legislation</b>	
Art. 5	293, 295	Brussels Regulation I (Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters)	302
Civil Jurisdiction (Offshore Activities) Order 1987/2197		Art. 2	292
Art. 2	290, 300	Art. 2(1)	294
Art. 3	293, 295	Art. 5(3)	294, 295
Civil Procedure Rules	293	Art. 9	295
BPD 6		Art. 9.1(b)	295
para 2.3(1)	293	Art. 11(2)	295, 296
para 3.1(9)	293	Art. 19.2(a)	295
para 6.3.1(6)	293	Art. 19.2(b)	295
para 6.9(2).7	293	Art. 71	303
para 9(2).7	293	Art. 71(1)	298
Credit Ratings Agencies (Civil Liability) Regulations 2013 (SI 2013 No 1637), implementing Regulation 1060/2009		Brussels Regulation I (Revised) (Council Regulation (EC) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters)	294
Art. 35a	198	Council Decision 98/249/EC of 7 October 1997 on the conclusion of the Convention for the protection of the marine environment of the north-east Atlantic	258
Diving at Work Regulations 1997 (SI 1997/2776)	291	Decision 884/2004/EC of the European Parliament and of the Council amending Decision No 1692/96/EC on Community Guidelines for the development of the trans-European transport network (trans-European transport strategy)	336
Food Safety (Fishery Products and Live Shellfish) (Hygiene) Regulations 1998	265	Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products	291, 302
Health and Safety at Work etc. Act 1974 (Application outside Great Britain) Order 2013 (SI 2013/240)		Art. 2	292
Art. 4	291		
Art. 6	291		
Art. 8	291		
Art. 9	291		
Marine Licensing (Appeals) Regulations (Northern Ireland) 2011/80	352		
Marine Licensing (Notices Appeals) Regulations 2011/936	352		
Marine Licensing (Notices Appeals) (Wales) Regulations 2011/923	352		
Marine Licensing Appeals (Scotland) Regulations 2011/203 (Scottish SI)	352		

## TABLE OF STATUTES

Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora (Habitats Directive)	Art. 9	329
Art. 6	Art. 9(1)	328, 329
	Art. 9(3)	329
Art. 6	Art. 10	329
Directive 94/22/EC of the European Parliament and of the Council on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons	Art. 10(1)	328
	Art. 11	329
	Art. 11(1)	328
	Art. 12	329
	Art. 13	330
	Art. 13(1)	328
Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (Water Framework Directive)	Art. 13(2)	328
	Art. 13(3)	328
Art. 2(1)(a)	Art. 13(4)	329
Art. 3(1)(b)	Art. 13(5)	330
	Art. 13(6)	330
	Art. 13(10)	328
	Art. 14	330
	Arts. 15–16	330
Directive 2001/42/EC of the European Parliament and of the Council on the assessment of the effects of certain plans and programmes on the environment (strategic environmental assessment)	Art. 20	330
Annex I	Art. 21	330
Art. 3(2)(a)	Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste (Waste Framework Directive)	
Art. 3(2)(b)	(WFD) (2008/98/EC)	260, 261
Art. 5(1)	Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources (Renewables Directive)	336
Art. 7	Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC	
Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive)	Art. 1(1)	338, 342
Art. 2(6)	Art. 1(2)	338, 342, 348
Art. 7, 261	Art. 2(1)	338
Directive 2008/56/EC of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive)	Art. 3	347
Art. 1	Art. 3(1)	338
Art. 1(1)	Art. 3(2)	338
Art. 1(2)	Art. 3(3)	338
Art. 1(3)	Art. 4	262, 263
Art. 1(4)	Art. 4(2)	342
Art. 3(2)	Art. 4(3)	338
Art. 3(4)	Art. 5	338, 339, 340, 342, 343, 345, 346, 347
Art. 3(5)	Art. 5(1)	347
Art. 3(8)	Art. 5(2)(b)	347
Art. 4	Art. 5(3)	347
Art. 5(1)	Arts. 5–8	342
Art. 7	Art. 6	338, 339, 343, 345
Art. 8	Art. 7	276, 338, 339, 343, 347, 350
	Art. 7(1)	340
	Art. 8	338, 340, 343
	Art. 9	343

# TABLE OF STATUTES

Art. 10(1) .....	340	Treaty on European Union (Maastricht)	
Art. 11 .....	340, 347	1992	
Art. 12 .....	339, 340, 343–4, 345, 348	Title II	
Art. 12(1) .....	348	para 38 .....	307
Art. 13 .....	339, 341	Treaty on the Functioning of the EU	
Art. 14 .....	341	(TFEU), 2012	
Art. 15 .....	341, 348	Art. 15 .....	260
Art. 16 .....	341	Art. 43 .....	341
Art. 16(1)(b) .....	345	Art. 43(2) .....	335
Art. 18 .....	341	Art. 100(2) .....	335, 341
Art. 19 .....	341	Art. 191(1) .....	341
Art. 39 .....	263	Art. 191(2) .....	260
Recommendation of the European		Art. 192(1) .....	335, 341
Parliament and of the Council of		Art. 192(2) .....	341
30 May 2002, concerning the		Art. 192(2)(b) .....	307
implementation of Integrated		Art. 194(2) .....	335, 341
Coastal Zone Management in			
Europe (2002) .....	319		
Regulation 1255/2011 on Integrated			
Maritime Policy .....	332		
Regulation 2371/2002 of 20 December			
2002 on the conservation and			
sustainable exploitation of fisheries			
resources under the Common			
Fisheries Policy (Common			
Fisheries Policy) .....	336		
Rome I (Regulation (EC) No 593/2008			
of the European Parliament and of the			
Council of 17 June 2008 on the law			
applicable to contractual obligations)			
Art. 8 .....	299, 302		
Art. 25 .....	303		
Rome II (Regulation (EC) 864/2007 of			
the European Parliament and of the			
Council of 11 July 2007 on the law			
applicable to non-contractual			
obligations)			
Art. 3 .....	298		
Art. 4 .....	299		
Art. 4(1) .....	299, 300, 301		
Art. 4(2) .....	299, 300, 302		
Art. 4(3) .....	299, 300, 301		
Art. 4(3)(1) .....	300		
Art. 5 .....	301–2		
Art. 5(1) .....	302		
Art. 5(1)(b) .....	302		
Art. 5(1)(c) .....	302		
Art. 5(2) .....	302		
Art. 14 .....	299, 300		
Art. 15 .....	298		
Art. 18 .....	296		
Art. 28 .....	303		
Treaty Establishing the European			
Community (Nice Treaty, 2002)			
Art. 130 .....	307		
Arts. 174–175 .....	326		
		<b>Foreign statutes</b>	
		<b>Australia</b>	
		Offshore Petroleum and Greenhouse	
		Gas Storage Act 2006 (Cth) .....	257
		<b>Denmark</b>	
		Merchant Shipping Law	
		s. 61 .....	25
		s. 392 .....	19
		ss. 372–394 .....	14
		<b>Germany</b>	
		Insurance Contract Law	
		s. 115(1).2 .....	296
		<b>Norway</b>	
		Act (No. 59/1984 relating to Creditors’	
		Rights to Satisfaction of Claims)	
		s. 2-2 .....	281
		Domstolloven, 13 August 1915, No. 5	
		s. 38 .....	288
		Insurance Contracts Act (No. 69/1989) .....	274
		Maritime Code (No. 3/1994) .....	275
		s. 177 .....	288
		s. 191 .....	284
		s. 193 .....	282, 285
		s. 193(c) .....	284
		s. 194 .....	284
		s. 197 .....	283
		s. 204 .....	285
		s. 209 .....	284
		s. 251 .....	284
		Merchant Shipping Law ( <i>Soloven</i> )	
		s. 392 .....	19
		Petroleum Act (No. 72/1996) .....	274, 284
		s. 1-6(c) .....	283
		s. 1-6(d) .....	275
		s. 1-6(d) .....	283

# TABLE OF STATUTES

s. 3-3 .....	275	s. 57 .....	275
s. 3-3 .....	281	s. 57(a) .....	280
s. 6 .....	288	s. 57(b)–(e) .....	280
s. 6-2 .....	282	s. 58 .....	280
s. 6-4 .....	282	Torts Act (No. 26/1969 relating to	
s. 7-1 .....	275, 280, 283, 287	Compensation in Certain	
s. 7-2 .....	286, 287	Circumstances) .....	275
s. 7-3 .....	275, 276	s. 4-2 .....	277
s. 7-4 .....	282, 285, 286, 287	s. 5-2 .....	277
s. 7-5 .....	285	s. 5-3 .....	276
s. 7-6 .....	275, 287		
s. 7-7 .....	288	<b>United States</b>	
s. 7-8 .....	288	Clean Water Act 1972 .....	254, 255
s. 10-7 .....	281	Oil Pollution Act 1990 .....	254, 270, 272
s. 10-8 .....	276	Resources and Ecosystems Sustainability,	
Pollution Act (No. 6/1981) .....	279	Tourist Opportunities and Revived	
s. 4 .....	274	Economies of the Gulf Coast States	
s. 54 .....	274	Act 2012 .....	254

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# TABLE OF CONVENTIONS AND RULES

Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (UNECE), 1998 .....	263	Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (CLEE), 1977 .....	265
Arrest Convention (International Convention Relating to the Arrest of Sea-Going Ships) 1952 .....	297, 298	Dublin Declaration on North Sea Pollution, 2010 .....	259
Barcelona Convention concerning the Protection of the Mediterranean Sea against Pollution (1976) .....	258, 318	European Convention on Human Rights (ECHR) Art. 6 .....	350
Bonn Agreement of 1983 between countries bordering on the North Sea, and Action Plan 2010 .....	259	Fisheries Convention (Convention on Fishing and Conservation of the Living Resources of the High Seas) 1958 Art. 1(2) .....	305
Brussels Convention on Limitation of Liability of Owners of Sea-Going Ships (1957) .....	267	Art. 2 .....	305
Bunkers Convention (International Convention on Civil Liability for Bunker Oil Pollution Damage (2001) .....	283	Fund Convention (International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage) 1992 .....	283
CBD (Convention on Biological Diversity) .....	312–15, 318	Hague/Hague-Visby Rules (International Convention for the Unification of Certain Rules of Law relating to Bills of Lading), 1924/1968 .....	29, 44, 163
Art. 3 .....	313	Art. III(1) .....	33
Art. 5 .....	313	Art. III(8) .....	45
Art. 6 .....	312–13	Helsinki Convention (HELCOM) for protection of the marine environment of the Baltic Sea, 1992 .....	258, 316
Art. 23 .....	313	International Convention on Civil Liability for Oil Pollution Damage (1969) .....	268
Civil Liability Convention (International Convention on Civil Liability for Oil Pollution Damage) (CLC), 1992 .....	283	Liability Convention (Convention on Civil Liability for Oil Pollution Damage	
Art. 3(4)(f) .....	284		
Collision Convention (Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels) 1910 .....	303		
Art. 2 .....	303		
Art. 2.1(a) .....	303		
Art. 3(e) .....	303		
Art. 4 .....	303		
Art. 7 .....	303		



# TABLE OF CONVENTIONS AND RULES

Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 1977 .....	275	Art. 10(2)(c) .....	316
London Convention on Limitation of Liability for Maritime Claims 1924		Art. 32 .....	319
Art. 1 .....	65	Protocol on Integrated Coastal Zone Management in the Mediterranean (2011) .....	318
Art. 10 .....	65	Supplementary Fund Protocol (1992) to International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage .....	283
London Convention on Limitation of Liability for Maritime Claims 1957		United Nations Convention on the Law of the Sea (UNCLOS) 1982 .....	310–11, 318, 336
Art. 6(2) .....	65	Arts. 3–5 .....	311
London Convention on Limitation of Liability for Maritime Claims 1976 .....	303	Art. 19(2) .....	311
Art. 1 .....	65	Art. 21(1) .....	311
Art. 1(2) .....	66	Art. 22(1) .....	311
Art. 1(4) .....	66	Art. 25(1) .....	311
Art. 1(5) .....	66	Art. 56 .....	300, 311
Art. 2 .....	51	Art. 58(2) .....	300
Art. 4 .....	21	Art. 60 .....	311
Protocol of 1996 .....	22, 65, 268	Art. 60(2) .....	295
Sch. 7, Part I .....	268	Art. 61(2) .....	311
London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972		Arts. 61–73 .....	305
Art. 15(5) .....	268–9	Art. 62(1) .....	311
Lugano Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), 2007 .....	288	Art. 62(5) .....	311
Art. 5(3) .....	287	Art. 65 .....	311
Nordic Environmental Convention 1974		Art. 66(4) .....	311
Art. 3 .....	287	Art. 67(1)(3) .....	311
Art. 13 .....	287	Arts. 116–120 .....	305
OPRC (International Convention on Oil Pollution Preparedness, Response and Co-operation) 1990 .....	258	Arts. 118–120 .....	311
OSPAR (Convention for the Protection of the Marine Environment of the North-East Atlantic), 1992 .....	258, 315–16, 318	Art. 192 .....	311
Art. 2(1) .....	315	Arts. 192–237 .....	305
Art. 2(3) .....	316	Art. 211 .....	311
Art. 10(2)(a) .....	316	Art. 266 .....	311
		Art. 277 .....	311
		Warsaw Convention 1929	
		Art. 25 .....	185–6
		York-Antwerp Rules 1994 .....	31

PART 1

OFFSHORE  
CONTRACTS

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## CHAPTER 1

# BIMCO'S OFFSHORE CONTRACTS

*Grant Hunter\**

I. Introduction.....	3	V. Offshore contracts: content, contractual structure and methodology.....	8
II. Main characteristics of BIMCO standard contracts.....	4	VI. Winds of change.....	9
III. Specialisation and offshore expansion.....	5	VII. A new SUPPLYTIME.....	10
IV. New strategy, new documents...	6		

## I. INTRODUCTION

The BIMCO<sup>1</sup> is renowned worldwide for its work on developing standard forms of contract for the shipping industry. Sitting alongside the multitude of conventional cargo charterparties is a suite of offshore standard contracts, most notably SUPPLYTIME, which is one of the organisation's most widely used contracts. The offshore sector has become a major focus for BIMCO's documentary work. The wide range of specialised offshore-related contracts represent a significant and important part of BIMCO's portfolio of standard forms. Sales of SUPPLYTIME outstrip even that of conventional dry cargo voyage charterparties such as the GENCON form.

The involvement of BIMCO in the offshore sector dates back to the nascent beginnings of North Sea oil and gas exploration. But BIMCO's involvement in the development of standard forms of charterparty goes back much further. The historical aspect of BIMCO's work has played a major role in building the organisation's reputation and establishing trust from non-traditional sectors of the shipping industry in BIMCO's documentary products.

In 2013, BIMCO's Documentary Committee, which is responsible for reviewing and approving all new and revised BIMCO clauses and contracts, celebrated its

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<sup>1</sup> BIMCO is an international shipping association providing a wide range of services to its global membership of stakeholders who have vested interests in the shipping industry, including shipowners, operators, managers, brokers and agents. The association's main objective is to facilitate the commercial operations of its membership by means of developing standard contracts and clauses, and providing quality information, advice and education.

centenary in Paris where the first meeting took place. The inaugural meeting in the spring of 1913 brought together the so-called ‘Copenhagen Committee’ (a small group of BIMCO members who drafted the organisation’s first ever charterparty, BALTCO, in 1908), members of the UK Chamber of Shipping’s own Documentary Committee, and lastly, but most significantly, representatives of the major P&I clubs.

In 1913 BIMCO’s documentary aspirations were to create the first truly international standard forms of charterparty. The objective was to draw up contracts that were fair, balanced and acceptable to each party and couched in terms that could be readily understood by laymen. Changing market fortunes with roller-coaster freight rates were as much a feature of shipping in the early years of the twentieth century as they are in present times. Recognising that a charterparty written to address only the current status of the market would have a short shelf-life, BIMCO resolved to prepare contracts that were ‘market neutral’ – suitable for use by shipowners in both good and bad times.

The involvement of the major P&I clubs from the very outset was critical to the success of the venture. By inviting the major P&I clubs to participate in its documentary work, BIMCO aimed to create charterparties that shipowners could use without the need for modification, safe in the knowledge that their P&I cover would not be prejudiced by their use. While the shipping industry has seen some dramatic developments during the last 100 years, these basic principles continue to form the bedrock of BIMCO’s documentary activities today.

The shipowners and P&I club representatives that gathered in Paris in 1913 to discuss uniform terms for charterparties would be much heartened to learn that their ambition to create harmonised internationally acceptable contracts and clauses has continued to resonate through the decades to the present time. To the highly risk-aware offshore oil and gas sector, the ‘risk-management’ philosophy instilled into BIMCO’s documentary work from earliest times is an important factor in the appeal of using BIMCO contracts.

## II. MAIN CHARACTERISTICS OF BIMCO STANDARD CONTRACTS

### A. Uniformity

One of the key features of BIMCO’s diverse range of standard forms of contract is uniform terms. Back in 1913, voyage charterparties for the coal, grain and timber trades were the predominant contract in use in the industry and were commonly issued by individual merchants incorporating terms generally favourable to themselves. The concept of developing ‘uniform terms of charter’ to make it less easy for the advantaged to impose unreasonable terms upon the disadvantaged in a freight rate negotiation was proposed by Adolf Carl, the first President of BIMCO, in 1905. In 1908, the Baltic and White Sea Conference (as BIMCO was then known) adopted its very first charterparty, BALTCO.

## **B. Ethical dimension**

BALTCON succeeded because it introduced an 'ethical dimension' to charterparties of 'fairness' and 'balance' – characteristics sadly lacking in the charterparties prevalent at the time. Although there was initial scepticism about BIMCO's objectives, it was soon realised that balanced documents conferred a long-term benefit on an industry which, even in those days, was exposed to the same turbulent freight market conditions that we have today. Uniformity of charterparty terms also brought with it the prospect of reducing the risk of potential disputes by the consistent use of clear and comprehensible language. BIMCO takes pride in the fact that its standard forms of contract are rarely the subject of court cases or arbitration solely on the basis of the interpretation of their terms alone.

## **III. SPECIALISATION AND OFFSHORE EXPANSION**

In the years that followed the Second World War new specialised shipping activities emerged. Containerisation, reefers, liquefied gas and chemical carriers, and cement carriers all required the use of specialised charterparties.

In the mid-1970s, BIMCO expanded its range of charterparties to include an offshore support vessel time charterparty – SUPPLYTIME – its first foray into the offshore world. Although BIMCO has subsequently developed a comprehensive portfolio of offshore industry-related standard forms, the 'mother' of all these contracts is undoubtedly the SUPPLYTIME form, first published in 1975 and subsequently amended in 1989 and 2005.

SUPPLYTIME was born out of the rapid expansion of oil and gas exploration and production into the deeper waters of the North Sea and other areas of the world in the 1970s, and the need for a uniform set of contractual terms to govern the provision of services by the specialist vessels needed to support these activities. Prior to the development of SUPPLYTIME, many support vessels were chartered using in-house contracts or adapted standard time charter forms, neither of which were ideally suited to address the peculiarities and hazards of this special trade. The publication of SUPPLYTIME created a relationship between BIMCO and the offshore industry that has continued for nearly forty years. The offshore sector has become the most supportive user of BIMCO standard forms of contract and regularly approaches the organisation with requests for revisions of well-used forms to reflect changes in commercial practice or legal developments as well as with requests for new types of contract.

SUPPLYTIME has for many years been among the top-ten BIMCO forms sold to the industry. It has stood shoulder-to-shoulder next to other BIMCO contract stalwarts such as GENCON, BARECON and SHIPMAN. In 2013, SUPPLYTIME 2005 became BIMCO's number-one best-selling document – reflecting not only the continuing growth in this sector, but also the importance that the offshore industry places on the availability and use of BIMCO standard contracts. However, the original SUPPLYTIME from 1975 was highly favourable towards owners and encountered resistance in the industry. Its development was further evidence of a general malaise that had worked its way into BIMCO's approach to standard charterparties at that time.

By the 1970s many in the shipping industry felt that BIMCO had in some way lost sight of its original objective to produce ‘balanced’ charterparties and felt that many of its products had become too owner-friendly and favourable towards certain shipping nations.

#### IV. NEW STRATEGY, NEW DOCUMENTS

In the mid-1980s, under the presidency of Dr Helmut Sohmen and Documentary Chairmanship of Nils-Gustaf Palmgren, BIMCO developed a new documentary strategy to reaffirm its position as the leading producer of standard forms of contract for the shipping industry.

It was decided that the organisation should focus on developing one document for each niche of shipping and to establish a thorough and consistent process to govern the review and adoption of new and revised documents by the Documentary Committee. Most importantly, the strategy re-introduced the need for balance in BIMCO forms – to ensure that the interests of both parties were fairly represented. In addition, the new strategy recognised the need to broaden the scope of BIMCO charterparties to encompass other jurisdictions such as the United States. It was at this point that BIMCO also introduced what has become its trademark box-layout that has featured in the majority of its contracts ever since.

##### **A. TOWCON and TOWHIRE**

With the new strategy to develop a contract for each shipping niche, BIMCO embarked on a campaign to increase its range of specialised documents for the growing offshore oil and gas sector. International ocean towage was one key area lacking uniform charter terms. The International Salvage Union and the European Tug Association approached BIMCO in the 1980s with a request for assistance in drawing up two standard ocean towing agreements: TOWCON and TOWHIRE. These ground-breaking contracts introduced a mutual allocation of risk for international towage whereby each party bore the risks to their own vessel and obtained insurance to cover those specific risks. This so-called ‘knock-for-knock’ regime helped to avoid duplicate insurance and reduced claims. In line with the documentary strategy the towage agreements also brought a greater degree of balance between the parties than previously used contracts, which heavily favoured tug owners.

Published in 1985, TOWCON and TOWHIRE quickly gained widespread acceptance in the ocean towage sector and remain the predominant form used for this activity today. The forms were revised in 2008 to reflect changes in commercial practice, law and regulations and to bring greater clarity to some of the provisions which had, over the course of time, been the subject of disputes.

##### **B. HEAVYCON**

With the need to develop offshore infrastructure in ever deeper waters came a new type of ship designed to carry very large, heavy and voluminous ‘cargo’: the super-heavylift float-on/float-off ship used to transport very large offshore structures from

fabrication yards to offshore sites. BIMCO responded to industry demand for a standard charterparty for this type of ship with the publication in 1987 of HEAVYCON, which was most recently revised in 2007.

### **C. HEAVYLIFTVOY**

Whereas HEAVYCON is designed for single very large items carried on deck, the heavylift sector also operates 'mid-sized' heavylift vessels used for transporting project cargoes. These mid-sized 'lift-on/lift-off' carriers often transport equipment above and below deck and carry cargo for more than one client. Until HEAVYLIFTVOY was developed, contracts for these types of cargoes were frequently concluded using liner booking notes, which were a less than ideal vehicle for the purpose. Following the revision of HEAVYCON in 2007, it was proposed to draft a new charterparty specifically for this sector. The result was the 2009 HEAVYLIFTVOY, which provides heavylift operators with a choice of contract depending on the type of heavylift operation in which they are engaged.

### **D. BARGEHIRE**

While specialised super heavylift vessels play an essential role in transporting the very largest and most voluminous cargoes for the offshore industry, specialised semi-submersible barges towed by tugs are the more common method of transportation for the majority of offshore-related equipment and infrastructure. The benefit of using a barge is that it can be delivered to the place where the cargo is to be loaded and then left until cargo securing operations have been completed and tug assistance is once again required. Barges are commonly hired on a bareboat charter basis, and in 1994 BIMCO developed BARGEHIRE 94 based on the widely used BARECON 89 bareboat charterparty form. BARGEHIRE was updated in 2008 to reflect changes in commercial practice and new regulations, such as those relating to ballast water management. Of significant note is the insurance arrangements for the barge, which are commonly the responsibility of the barge owners under BARGEHIRE. This has created an interesting variant of a pure bareboat charterparty more akin to short term or seasonal bareboat charters sometimes used in the ferry or cruise industry.

### **E. PROJECTCON**

The use of semi-submersible barges for the transportation of large cargoes for the offshore sector requires the use of ocean-going tugs. However, the overall operation of tug and barge with cargo often relies on the use of several contracts, such as TOWCON for the tug and BARGEHIRE or HEAVYCON for the barge. The differing contractual structures between these contracts has on occasion given rise to a conflict of provisions. To address this problem and provide the industry with a purpose-made 'special projects' charterparty for tug and barge combinations, BIMCO developed PROJECTCON in 2005, which incorporated the same 'knock-for-knock' liability regime found in SUPPLYTIME and TOWCON/TOWHIRE.



## F. WINDTIME

The most recent addition to the suite of BIMCO offshore contracts is the WINDTIME time charterparty for offshore wind farm personnel transfer vessels. As countries, particularly around Western Europe, seek alternative methods of generating power, the offshore wind farm industry has grown rapidly in response in the past few years. The world's largest offshore wind farm is located in UK waters and is capable of generating enough electricity to power half a million homes through its 175 turbines.

BIMCO has worked together with wind farm companies, such as Dong and Siemens, and crew transfer vessel operators, such as Turbines Transfers Ltd, over a period of two-and-a-half years to develop the first standard contract for this new sector of the offshore industry. WINDTIME, which is modelled on the SUPPLYTIME 2005 contract, was published in July 2013. A first fixture was concluded in August the same year, and numerous fixtures have followed during 2013.

## V. OFFSHORE CONTRACTS: CONTENT, CONTRACTUAL STRUCTURE AND METHODOLOGY

Throughout its history of developing standard forms of contract BIMCO has relied on its own Documentary Committee and wider membership to provide the necessary expertise. Wherever possible, representatives of both sides to a contract are invited to participate in the drafting process. BIMCO is a practical organisation and the focus is very much on the commercial aspects of the contract to ensure that the commercial needs of the relevant industry are properly taken into account when drafting. Essential legal and insurance input is provided mainly through the members of the Documentary Committee, many of whom are lawyers or P&I practitioners. In some instances, major law firms will offer their assistance with particular projects and this help is always gratefully accepted.

The role of the BIMCO Secretariat is to ensure that standard forms of contract produced by various sub-committees all have the same 'look and feel' and structure as other recently produced BIMCO contracts. The sub-committees rely on the Secretariat to inform them of the latest editions of core clauses such as War Risks and Dispute Resolution that are common to almost all BIMCO forms.

The common factor between the sub-committees of six to ten people who draft the contracts and the sixty-strong Documentary Committee that reviews and ultimately approves each new or revised standard form is that they all give their time freely to the various projects. BIMCO does not 'employ' people to draft its documents – they are written for the industry by those in the industry with appropriate knowledge and expertise who share the firm belief in the benefits to a particular sector of the industry that a standard form of contract brings.

The development of a new contract or the revision of an existing one is not a quick process, but it is thorough. BIMCO standard forms can often take two years or more to reach the point where they are approved for publication by the Documentary

Committee.<sup>2</sup> During that time the Committee will have reviewed the progress of the draft document every six months and provided feedback and comment. Sub-committees often meet as regularly as once a month for a full day's drafting work.

When revising a contract, the sub-committee will have to take into account a most important factor: how much of the contract should be revised? Changes in commercial practice and legal and regulatory developments are obvious reasons for amendments, but sub-committees also have to consider whether poorly worded provisions that have not given rise to any known disputes should be improved or left alone. The temptation is, of course, to try to produce the most clearly worded document possible. However, for users of a current edition of a widely used standard form, 'improved' wordings in a revised edition can sometimes be a double-edged sword. A change of wording may suggest a problem with the old wording – even though the old provision may not have given rise to any issues in practice.

Changes often bring uncertainty. New versions of standard forms are not adopted by the industry overnight: they take time, often several years, to 'bed in'. Too many changes to a very successful standard document can make it difficult for users to get the contract accepted by their counterparts. If the industry does not embrace a new edition within the first few years, chances are the document may fail and the industry will continue to use the earlier edition.

This was the dilemma faced by the sub-committee tasked with the revision of the highly successful but perhaps not so elegantly worded SUPPLYTIME 89. Time and again the sub-committee deliberated over provisions that were poorly phrased but which were not known to have given rise to any problems in commercial practice. The sub-committee resolved, in most cases, not to try to fix what wasn't broken. Some may say this was a missed opportunity to clarify some 'grey areas', but the fact is SUPPLYTIME 2005 has become BIMCO's number-one best-selling document. No-one can know for sure whether a significant re-write of SUPPLYTIME 89 would have been equally well received by the industry, but back in 2003 the sub-committee was of the unanimous view that a complete re-write, even if it brought greater clarity, would not be welcomed by the offshore sector who were so familiar with and relied upon the SUPPLYTIME 89 wording.

## VI. WINDS OF CHANGE

During the drafting of WINDTIME the sub-committee conducted a fairly critical analysis of the SUPPLYTIME 2005 provisions on which the wind farm contract is based. The wind farm sector is very differently constructed to the offshore oil and gas industry and feels less hide-bound by the risk-reward ratio arguments around which some of the provisions of SUPPLYTIME are based. As a result WINDTIME is arguably more 'balanced' than SUPPLYTIME. More importantly, its refined provisions attempt to resolve many of the concerns levelled towards some of the less well-worded provisions of SUPPLYTIME.

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<sup>2</sup> For the current membership of the Documentary Committee, see [www.bimco.org/About/Board\\_Committees/Documentary\\_Committee.aspx](http://www.bimco.org/About/Board_Committees/Documentary_Committee.aspx), accessed 31 January 2014.

Many of the owners who operate in the wind farm industry as well as in the offshore oil and gas sector will no doubt read with interest what the WINDTIME sub-committee has done to produce the new variant of SUPPLYTIME. It is quite likely that we may see users of SUPPLYTIME beginning to ‘borrow’ provisions from WINDTIME. This is not in the best interests of ‘standardisation’ of contract forms as it is likely to result in an uneven approach and the development of various in-house ‘hybrid’ versions of SUPPLYTIME.

## VII. A NEW SUPPLYTIME

In November 2013 BIMCO Documentary Committee met in Copenhagen and agreed that the revision of SUPPLYTIME 2005 should be given priority on the organisation’s work programme for 2014.<sup>3</sup> Useful lessons were learned from the development of WINDTIME and these will no doubt be applied by the members of the sub-committee that will be appointed to undertake the revision of SUPPLYTIME. This is a project that will be very closely followed by the offshore industry. Stakeholders will be invited to have their say and to contribute ideas and suggestions. Case law will provide important reading material for the drafters who will be selected for the task based on commercial, operational, legal and P&I expertise.

Although the revision of SUPPLYTIME is unlikely to be a swift process it will be a thorough one. BIMCO’s Documentary Committee will want to review the draft at each stage of the development process until it is entirely satisfied that it meets the needs of the industry and conforms to BIMCO documentary policy. Before it is put forward for adoption, the new draft SUPPLYTIME will be the subject of an industry-wide consultation – making sure that users have the opportunity to review and comment on the draft before it reaches the publication stage. The offshore industry has always taken a very proactive stance towards BIMCO documents, always keen to suggest new types of contract and to press for the revision of existing ones when they are felt to have become outdated. More than ever, BIMCO will work together with the offshore sector on the revision of SUPPLYTIME to give it the clarity and consistency of wording that will provide users with a greater degree of certainty when using the form.

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<sup>3</sup> The other significant ongoing projects relate to the revision of NYPE 93 and Standard Bunker Contract 2001.

## CHAPTER 2

# KEY ASPECTS OF THE NEW WINDTIME FORM

*Lars Rosenberg Overby\**

I. Background .....	11	III. Key aspects .....	13
II. Industry specifics .....	12		

### I. BACKGROUND<sup>1</sup>

Work on the standard BIMCO charterparty for offshore wind farm personnel transfer and support vessels began in 2010. Representatives of the English National Workboat Association, which among other things services the wind farm industry with crew transfer vessels ('CTVs') felt the need for a standard contract that could reduce time-consuming negotiations and allow contracts to be concluded smoothly. BIMCO was approached with the suggestion that the organisation should take on producing a standard contract for the industry. BIMCO agreed and formed a sub-committee consisting of representatives from shipowners, charterers, brokers and P&I clubs, as well as lawyers with industry experience.

The aim of the sub-committee was to draft a contract that was in sync with the practical reality of the business and which could simplify contracting. It was decided to base the contract on SUPPLYTIME 2005, which has been the basis for many offshore wind farm charterparties, involving both installation and crew transfer vessels. This standard form is, however, not a balanced document and could in some respects benefit from amendment.<sup>2</sup>

SUPPLYTIME 2005<sup>3</sup> has been used in the industry for a number of years. Possibly, this is because some of the pioneers in the market came with an offshore oil and gas background and because this standard form appears to be the most appropriate among the forms available (or maybe the least inappropriate). Soon, however, significant changes to suit the purpose of the individual contract were required by charterers. Often these changes were aimed at achieving contract terms

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<sup>1</sup> The history of the charterparty is described in detail in the explanatory notes published by BIMCO.

<sup>2</sup> S. Rainey, *The Law of Tug and Tow and Offshore Contracts*, 3rd edn (Informa, 2011), contains helpful comments on the SUPPLYTIME 2005 form and identifies issues for consideration. This book is referred to below simply as 'Rainey'.

<sup>3</sup> Frequently referred to in the industry as the 'BIMCO form'.