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The Impact on Marine Insurance from Japan's New Multi-Modal Transportation Act of 1989

(The Cargo Transport Enterprises Act of Japan 1989)

Tameyuki HOSOI*

Background

In Japan there have traditionally been many different kinds of parties engaged in the business of transportation of goods by various modes such as trains, trucks, ships and aircrafts, and those parties and their registrations, functions, etc. have been categorized and codified in various different acts for years.

The New Act

The Cargo Transport Enterprises Act of Japan 1989 (the "New Act") seeks to rationalize the regulatory schemes for multi-modal transport, combining the regulatory schemes for air, sea and land transport of cargoes to some extent.

The New Act was promulgated in late 1989 and was to be in effect from December 1990. However, due to its complexity and unfamiliarity with its scope and application by both industry participants and government regulators, its effective enforcement date, by which an already operating enterprise in a certain category must apply for its registration with the Japanese Government under the New Act, was delayed until the end of May 1991.

As part of its scope, the New Act seeks to reclassify the categories

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conventionally existing for carriers and various intermediaries involved in cargo transport. Those entities that fit under one of the New Act's categories, forwarders and cargo transport intermediaries, must register with the Ministry of Transportation. The New Act registration would entail heightened government supervision and regulation of the activities of those entities.

The New Act Classifications

In order to classify under the registration requirements of the New Act, an entity should either be deemed

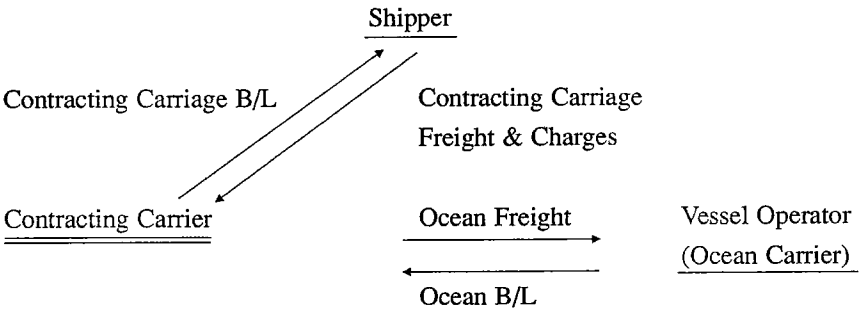
1) a contracting or constructive carrier ("Riyo Unso Jigyosha" in Japanese) or
2) a cargo transport intermediary ("Unso Toritsugi Jigyosha").

If an entity possesses or control any vessels in its own name, it is considered to be an actual owner ("Jitsu Unso Jigyosha"), i.e., Vessel Operating Common Carrier by water ("VOCC"), and is still the subject of the existing laws.

1. Contracting Carrier

Under the scope of the first category of the New Act, that of 1) a contracting carrier, an entity may be considered a contracting carrier if it acts just as if it were a constructive carriers by chartering a vessel owned or chartered by another company, and conduct the carriage in his own name and account. A Non-Vessel Operating Common Carrier by water ("NVOCC") is considered to be within this category.

Below is an illustration of this form: "Contracting Carriage":



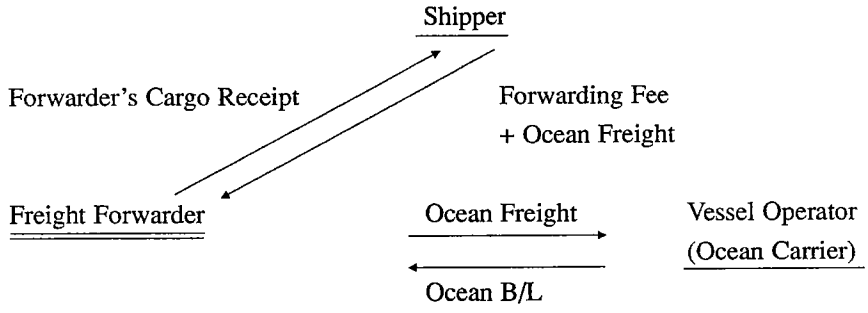
A Contracting Carrier shall acquire permission to commence business and also recognition on the terms and conditions of the contract of carriage including the fare rate from the Minister of Transport of Japan.

2. Cargo Transport Intermediary (Freight Forwarder)

The role of the intermediary, whether it is strictly an non-carrier facilitator or it is a contracting carrier, depends on the scope and nature of its business procedures.

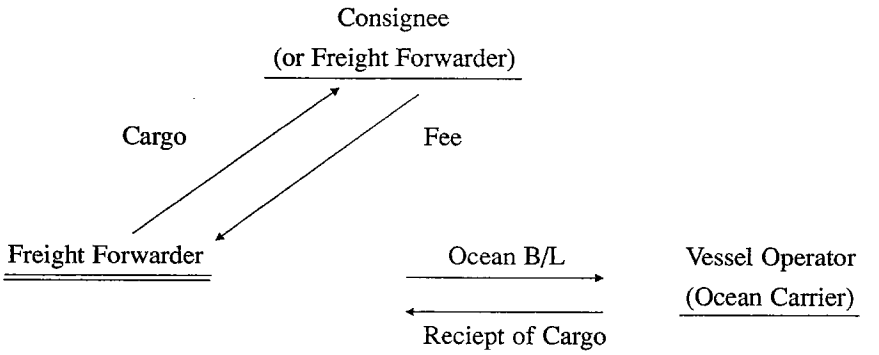
There are four typically characterized ways of carriage, as hereunder illustrated, within the category of Cargo Transport Intermediary.

Illustration 2-1: "Forwarding Contract" (Contract of Commission):



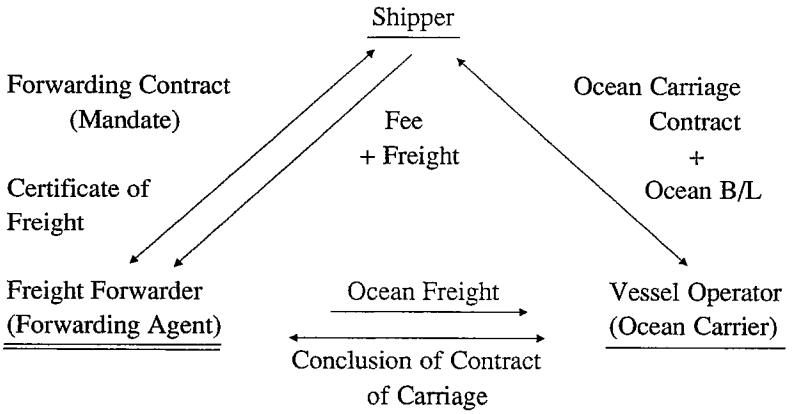
In the above Illustration 2-1, a Freight Forwarder conducts carriage in his own name but at the account of shipper.

Illustration 2-2: "Receipt of Cargo" in the name of Freight Forwarder:



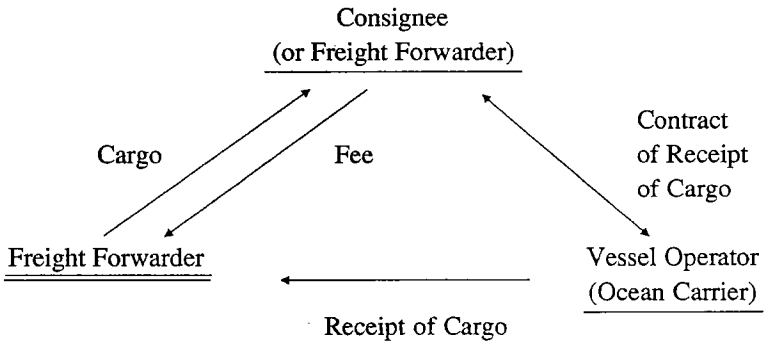
In the above Illustration 2-2, the Freight Forwarder receives in his own name but at the Consignee's account the cargo from the Vessel Operator upon the Contract of Receipt concluded with the Consignee:

Illustration 2-3: "Mandatory Freight Forwarding"



In the above Illustration 2-3, a Freight Forwarder acts in the name of the Shipper.

Illustration 2-4: "Mandatory Receipt of Cargo" in the name of Consignee:



In the above Illustration 2-4, the Freight Forwarder receives in the name of the Consignee the cargo from the Vessel Operator.

The Cargo Transport Intermediary (Freight Forwarder) must also register with the Ministry of Transport its name and terms and conditions of his business including the fee rate.

Sea Transport Broker (Shipping Intermediary)

To illustrate some of the considerations involved in the New Act registration, let me provide you with an example.

Question

A Question has arisen as to whether the reclassification of Contracting Carriers and Cargo Transport Intermediaries envisioned under the New Act will result in a representative's office in Japan of the European shipping corporation having to register under the New Act in one of their listed categories or if the representative's

office could retain its current classification as a shipping intermediary ("sea transport broker") as registered under the current Carriage by Sea Act of Japan 1949 (the "pre-New Act").

The representative in Japan of a European shipping corporation had been considered a shipping intermediary or "sea transport broker" under the pre-New Act definition in that it arranges for the shipping of cargo by means of containers yet as a limited intermediary, does not take much control of the actual shipping process. In fact, the representative's office in Japan signs itself in its business operations, such as in a Combined Transport Bill of Lading ("CT B/L"), as an "Agent for the Master." Hence the Master and/or his employer may be the carrier and not the representative's office in Japan.

The representative's office is, as a matter of formality, the Japanese foreign registered company for a European corporation, an entity belonging to the group of companies of the foreign entity. I was informed that the representative's office in Japan acts as a sort of intermediary, arranging to broker sea transport services between consignees and carriers. The usual practice thus far has been to work as agent for various companies in the parent European corporation's group. However, these companies are distinct legal entities with different operations and management.

A complication though, could be the relationship of the representative's office in Japan with a carrier in the group. The Japanese representative would be deemed a carrier if it is seen as merely a part of the carrier rather than a true separate entity. However, this issue depends more on the adequacy of corporate distinctness among the entities of the group rather than on the New Act considerations alone.

Under the scope of the second category of the New Act, that of 2) a Freight Forwarder or "Cargo Transport Intermediary", an entity may be considered to be a Cargo Transport Intermediary if it undertakes the forwarding or receiving of cargoes in its own name or as agent for the consignees.

Again, under 2), an entity engaged in business under its own name or for the

consignees did not seem to be the case for the Japanese representative of the European corporation's operation.

Tax Consideration and Potential Penalties

I was informed that the Tax Office currently treats the representative's office in Japan under the existing category of "sea transport broker" and considers as income only that portion of the commission which actually accrues to the representative's office in Japan. If the representative's office in Japan were deemed a contracting carrier or cargo transport intermediary or registered as such under the New Act, the Tax Office might switch its treatment to include as income the freight on the whole of the cargo, although it is recommended that more precise aspect of tax law should be consulted with a tax expert ("zeirishi" in Japanese).

Failure to register now, and subsequent determination that registration was necessary, could result in having to register in the future. However in the current situation, whether the representative's office in Japan needs to register, genuinely appears to be not necessary or at worst, uncertain. That consideration could be analyzed if or when the issue actually arises.

The maximum possible fine for not registering is one million yen in the case of contracting carrier, and 500,000 yen in the case of cargo transport intermediary. There are no personal or other liabilities. It is likely that even the maximum liability would not be imposed unless it appears that the representative's office in Japan had willfully avoided registration.

It should be noted as a precaution that the government of Japan does not usually issue any letter of confirmation for matters such as when an entity's (e.g., the representative's office in Japan) consultation with an officer of the Ministry of Transportation in charge of the interpretation and/or application of the New Act or such officer's determination that he or she does not consider it (the representative's office in Japan) to fall within any of the categories covered by the New Act.

Given the high costs of reassessment in the tax treatment for the

representative's office in Japan that could result from registration and from the imposition of greater regulatory requirements and control (e.g. you will then have to report to the Authorities the amount and rate of your freight on a port to port basis and its change in advance, and more over, the Authorities may instruct you to change your freight rate, whether it being a Contracting Carrier or Freight Forwarder), the one million yen fine appears small in comparison even if that were imposed.

Choice

The operation of the representative's office in Japan did not appear to fit directly within any of the new classifications of Contracting carriers and applicable Cargo Transport Intermediaries. The scope and interpretation of the New Act, even by government authorities themselves is still unclear. Registering under the New Act would result in much greater government supervision, monitoring and reporting requirements, and in potentially more unfavorable treatment by tax authorities. On the other hand, by not registering under the New Act, the representative's office in Japan faces, in the worst case, a liability limited to a fine of the one million yen.

In view of the above, the representative's office in Japan has chosen to continue its present course of operations and not register under the New Act, unless the representative's office in Japan were to change its business practice or its cargo handling procedures. The representative's office in Japan should note that the interpretation of the New Act has yet to be determined and registration could later be deemed necessary. However, the relatively light nature of the potential penalty in proportion to the possibility of expanded regulatory and tax treatment was also kept in mind.

Marketability

The limit of responsibility of a freight forwarder has sometimes be a matter

of dispute or litigation, for the freight forwarder's character was not necessarily clear under the conventional law.

Now that, however, the framework of the various types of activities in the cargo transportation business has been sorted out to some extent, the limit and border of legal responsibility of each Contracting Carrier and Cargo Transport Intermediary (Freight Forwarder) among carriers, agents, etc. seem to have become developed and clearer.

Some insurance entities have already started laboratory works to seek the marketability of their insurance to cover this field and how to re-form their insurance schemes.

COMPARISON OF A SUBROGATION CLAIM BETWEEN JAPANESE AND ENGLISH LAW

Takeo KUBOTA*

1. A subrogation claim in general

(1) Japanese law

When the insurer pays the insurance money to the assured, he is subrogated to all rights, which the assured has against a third party, to the extent of such a payment of the insurance (Article 662, Para. 1 of Japanese Commercial Code). The purpose of this Article is to prevent the assured from obtaining duplicated benefit in the subject-matter insured.

This transfer of the rights occurs automatically by the operations of law, which is not an assignment of rights by a contract, therefore a notice on such a subrogation to a debtor is not necessary. As well known, in a case of an assignment of rights, a notice on assignment to a third party's debtor is required.

As the legal effect of such a subrogation any lawsuit against a third party will be filed in the name of the insurer as all rights of the assured have been already transferred to the insurer. If a lawsuit is filed in the name of the assured, it will be in principle dismissed as he has no more right in the subject-matter insured.

(2) English law

Article 79 of the Marine Insurance Act 1906 in England provides for the rights of subrogation. This Act states that where the insurer pays for a total or a partial loss, he is thereby subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured.

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This article was presented by the author at the tenth ICMA's meeting in Vancouver in September, 1991.

However, although all rights and remedies of the assured are transferred to the insurer, any lawsuit against a third party has to be filed in the name of the assured. We understand that this will be the requirements under Common Law and Equity Law. The assured is obligated to allow the insurer to use his name and to corporate to enforce the insurer's claim.

(3) Problems when English subrogation claim is enforced in Japanese court

As stated earlier, under English law by the payment of insurance money all rights and remedies of the assured are transferred to the insurer. This part will be a matter of substantive law.

However, the question of who will be a qualified Plaintiff in a lawsuit, whether the insurer or the assured, will be a matter of procedural law.

It will be a common practice in each country to apply for law of forum for procedural matters. This principle also applies in Japan. Namely, it will be Japanese law to determine who will be a qualified Plaintiff in a lawsuit. Japanese courts will not be bound by foreign law, regulations or practice in this respect.

However, as far as a matter relates to substantive law, this part will be taken into consideration and adjudged on that basis. Therefore, in an English subrogation claim Japanese court will take into consideration of the legal effect of a subrogation under English law, namely all rights and remedies of the assured are transferred to the insurer by a subrogation, therefore the assured has no more right in respect of the subject-matter insured. The procedural aspect that a claim is filed in the name of the assured in England will not be taken into consideration in Japan.

As a result, an English subrogation claim has to be filed in Japan in the name of the insurer and any claim filed in the name of the assured will be dismissed under this principle.

A similar problem may arise in English court when a Japanese subrogation claim is filed there. The Japanese insurer who has been subrogated to all rights and remedies of the assured has to enforce his claim in English court in the name of the assured. This procedure may cause a problem when the assured goes

bankrupt or ceases trading.

2. Application of this principle to various cases

(1) Collision claim

In a collision case, normally, many interested parties will be involved such as the owners, charterers, cargo interests, hull & machinery insurers, P&I club, etc. In such a case, after payments of insurance monies, under the said principle, a claim against a third party has to be filed in the name of all insurers. This will be very complicated procedures in a litigation if so many insurers are involved in a collision case. It will be convenient to file and pursue a lawsuit only in the name of the shipowners since:

(a) If there are many Plaintiffs, they may appoint different attorneys to protect their own interests and also the litigation procedures will become more complicate than that of a single Plaintiff and more costly.
(b) In a collision case the shipowners have normally their own claims against the other party and in any event they have to pursue their own claims against the other party in their name. In addition, all evidences on a collision case will be under control of the shipowners.
(c) Any sum recovered from the other party will be distributed to the interested parties by readjustments of the adjusters.

For the above reasons it is a normal practice in Japan that payment of insurance money to the assured is given in a form of a loan by the insurer to the assured. As the payment is in a form of a loan the insurer is not subrogated to any rights which the assured has against a third party, and such rights and remedies still remain in the assured, therefore he will be able to enforce all insurer's claims in his name.

When any sum is recovered from the other party, this will be distributed to all the interested parties as repayment of a loan and the sum not recoverable will

be treated as payment of insurance money. The loan does not accrue any interest. This payment of insurance money in a form of a loan is recognized valid and reasonable commercial custom by Japanese Supreme Court (Judgment of the former Supreme Court dated 21st February, 1926) and this practice still continues in Japan.

(2) Cargo claim

As stated earlier, under Japanese law by the payment of insurance money cargo underwriters are subrogated to all rights and remedies of the assured, which will be shipper, consignee or the holder of a Bill of Lading, therefore the assured who received insurance money has no more rights to file a claim in his name. After payment of insurance money cargo underwriters will file a lawsuit against a carrier or a third party in their names and the assured is obligated under insurance policy to give his best cooperation to the underwriters to enforce their claim and supply relevant evidence and information.

It is not a practice to pay insurance money in a form of a loan as is in a case of collision, probably due to the practice that the same shipper's cargoes are insured by one cargo underwriter and litigation procedures will be quite simple.

We understand that under English law in a cargo claim a lawsuit is filed and pursued in the name of the assured.

3. Recovery of General Average Contribution paid by the insurer

In case General Average is caused by a fault or negligence of some party, the insurer who paid G.A. contribution will seek for recovery in his name against such a faulty party. In this case the same principle is applied that the insurer is subrogated to all rights and remedies which the assured has. A loan form is not used in the payment of General Average contribution by the insurer.

We understand that under English law the shipowner has both the right and obligation to recover in his name General Average expenditures from a faulty party on behalf of all cargo interests as well as his own behalf, and any recovery

from such a faulty party will be readjusted by the adjuster and distributed to cargo interests.

4. Remedies to pursue an English subrogation claim in Japan

As stated earlier, under English law a subrogation claim has to be pursued in the name of the assured, however this principle is not applied under Japanese law.

(1) In Japan a tactics is used quite often to enable a third party to file a lawsuit in his name, which is an assignment of a claim. By an assignment of a claim, all rights which the assignor has will be transferred to the assignee, and the assignee will be able to pursue the claim in his name against a third party debtor. We call this method "entrusting a lawsuit to a third party".

(2) The problem is Article 11 of Trust Law, which prohibits a transfer of a property or asset for the main purpose to enable the assignee to file a lawsuit against a third party debtor. In a case where a promissory note is endorsed to an assignee for the purpose to file a lawsuit in the name of the assignee, it is always adjudged that such an assignment of a claim is invalid. The purpose of this Article is to avoid abuse of a litigation and representation of a lawsuit by non-qualified attorney-at-law.

Under Japanese law in principle only a qualified lawyer can act in court proceedings except for a case in a summary court, which will deal with a small case only, less than ¥900,000 in a total claimed amount (about US$6,900).

(3) However, a recent tendency of Japanese courts is to allow "entrusting of a lawsuit" provided that such entrusting of a lawsuit will not violate the said Article 11 of Trust Law and has reasonable grounds (Judgment of the Supreme Court dated 11th November, 1970).

(4) If we apply this theory to the payment of insurance money, a subsequent subrogation to all rights by the insurer and filing a lawsuit in the name of the assured under English law, I consider, there will be strong grounds that the

filing of a lawsuit in the name of the assured will be an allowable entrusting of a lawsuit to the assued in the light of Japanese law, since the payment of insurance money, which is a transfer of asset, will arise under an insurance policy and not for the purpose to entrust a lawsuit to the assured, therefore does not violate the provisions of Trust Law.

If it is provided for in an insurance policy to the effect that the assured shall, if required by the insurer, enforce his rights and remedies against a third party to recover the insurance money paid by the insurer including filing a lawsuit in his name, such a clause will be deemed an agreement with the assured and the assured will be obligated under the insurance policy to enforce the claim against a third party in his name. The general terms and conditions contained in an insurance policy will be deemed valid generally unless such terms and conditions are very unreasonable in the light of the existing law.

(5) The above agreement under which the assured is obligated to file a lawsuit in his name will be a matter of a contract between two parties, therefore will be deemed as a substantive matter and has to be taken into consideration in Japanese proceedings.

This agreement will constitute in the light of Japanese law "entrusting of a lawsuit to the assured" which will be valid and allowable under Japanese law having regard to the nature of payment of insurance and special relationship between the insurer and the assured. As a result, an English subrogation claim can be enforced in Japan in the name of the assured as is in England, and relevant procedures can be simplified.

REVISION OF THE JAPANESE CARRIAGE OF GOODS BY SEA ACT

On 28th May 1992, the Japanese Diet passed "the Law for Revision of the Carriage of Goods by Sea Act" Bill.

The present Statute, enacted in 1957 to give effect to the 1924 Brussels Convention (or Hague Rules), has since that time governed the carriage of goods on foreign voyages. The Japanese Diet has repealed the 1924 Convention and ratified the 1979 SDR Protocol, as well as the 1968 Brussels Protocol (the so-called Visby Rules). The Bill was drafted to modify the present Act in line with 1979 Protocols.

The present Act has been changed in a number of respects, among these being:

The amount of limitation of liability

The present Act provides that the liability of the carrier shall be limited to ¥100,000 per package or unit. In the new Act this amount is increased to 666.67 SDRs per package or unit, or 2 SDRs per kilogramme, whichever is the higher. A container or pallet or similar article of transport is deemed to be the "package or unit" unless the number of packages or units in the container or similararticle is declared in the bill of lading. If the damage resulted from an act or omission of the carrier done with intent to cause damage, recklessly and with knowledge that damage would probably result, this limitation does not apply and the carrier will be liable for the entire amount of the loss.

The liability period

The present provisions regarding the liability period enables the carrier to be discharged from the liability for damage to or loss of the goods unless the claim is filed within one year from the date of delivery. To this provision is added the possibility that this period can be extended by agreement even if the carrier is not bona fide. The liability of a subcontractor to the carrier is not discharged until 3

months after the carrier pays the claim for damage or loss, or the claim against the carrier is filed.

The extension of application of the exemption or limitation of liability

The exemption or limitation of liability of the carrier under this act is extended to the liability of the carrier in tort and to the carrier's servants. In the latter case the total amount payable by the carrier and the servants shall not exceed the limitation amount payable by the carrier under the act.

This new Act is scheduled to come into force on the 1st of June, 1993.

JSE NEW RULES OF CONCILIATION

The newly established Rules of Conciliation of The Japan Shipping Exchange Inc. (JSE) came into operation on June 16, 1992.

Purpose of the Rules

According to Section 21 ("Mediation") of the JSE Rules of Maritime Arbitration, the Board [of arbitrators] may, at any stage of the arbitration proceedings, mediate between the parties for the whole or a part of the dispute. Under this section, many cases are settled through mediation conducted by arbitrators during arbitration proceedings.

The new Rules of Conciliation were established to meet the additional strong demand of the parties for settlement of disputes through conciliation before (or during - particulary when the parties file their dispute in arbitration or litigation for preserving their rights against prescription, but still want to solve their dispute amicably) arbitration or litigation proceedings, irrespective of the place of arbitration or litigation, which form of alternative dispute resolution would be more speedy and less costly.

Features of the Rules

1) The conciliation proceedings are administered by the JSE in order to ensure the thorough compliance with the Rules and also to assist the parties to obtain a speedy resolution of their dispute at reasonable cost.
2) After reaching the settlement agreement through conciliation, the parties can make an arbitration agreement and appoint the conciliator as the arbitrator to convert the settlement agreement into an arbitration award in order to enhance the enforceability of their settlement agreement.

   The Conciliation Rules of the JSE have a unique provision: Section 16 of the Rules allows the parties by unanimous agreement to demand that the

conciliation proceedings be altered into arbitration proceedings in order to obtain an arbitral award having the same conclusion as the settlement agreement. In such a case, the parties shall make an arbitration agreement and appoint the conciliator as the arbitrator.

3) When there happens to be a dispute concerning the settlement agreement, the parties can resolve their dispute through arbitration by the JSE pursuant to an arbitration clause to that effect in their settlement agreement.

It may happen that the parties do not agree to an alteration of the conciliation proceedings into arbitration proceedings under Section 16, or that a particular party does not perform his obligations under the settlement agreement. Therefore, Section 17 of the JSE Conciliation Rules provides that the settlement agreement shall contain an arbitration clause which provides that any dispute arising out of the settlement agreement shall be submitted to arbitration by the JSE.

Guide book on the Rules

A guide book on our Conciliation Rules will be published this coming autumn, and delivered to readers of our Bulletin and to other interested persons upon request.

QUEST FOR A RATIONAL AND PROPER METHOD FOR THE PUBLICATION OF ARBITRAL AWARDS*

Kenji TASHIRO**

I. Introduction

While many of us clearly understand the importance of secrecy with regard to arbitration, certain arbitration centers choose to publish their arbitral awards while others do not. I would like to discuss which methods of publication are the most effective and in which situations publishing of awards should not be done.

It is safe to say that the secrecy of arbitration is one of the most important requirements in the system of the arbitration. This means, compared with the judiciary system, resolution of commercial disputes through arbitration relies heavily on the parties' agreement, i.e. the autonomy of the parties. Thus, the parties choose this system in order to resolve their disputes in private, free from the need to publish the results. This secrecy also makes sense from a commercial or business point of view.

Thus, it goes without saying that the arbitral proceedings should be conducted "in camera" in a private setting and persons other than those permitted to attend the arbitration by the parties or the arbitrators should not be allowed to obtain any information relating to the proceedings.

Due to the inherently private nature of the arbitration system as I mentioned above, it is understandable that the arbitration proceedings should be conducted

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* Any opinions or ideas expressed in this paper are only those of the author and do not represent those of The Japan Shipping Exchange or others.

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** The Japan Shipping Exchange, Inc.
Arbitration & Document Department

with their exclusivity in mind, and that those who are connected to the arbitral proceedings (i.e., arbitrators, secretaries engaging in the logistics, . . .) owe a strong duty of confidentiality.

It may be said, however, as will be discussed below, that the number of arbitral institution that take the position that the principle of the secrecy in arbitration can be moderated with regard to the publication of arbitral awards has recently been on the increase.

I am presently unaware of any international conventions or legal rules which expressly provide for the secrecy of arbitration. Nevertheless, when one looks at the arbitration rules of some institutions, there are some provisions which state for example, "The award may be made public only with the consent of both parties", or "Unless a party objects, the arbitral tribunal shall be entitled to publish the award. . . . . "

Based on these provisions, it appears that basically the awards can not be published unless certain conditions are fulfilled, since, as I already stated above, arbitration should be kept private by nature.[1]

It is a matter of course that one can not conclude that the arbitral proceedings can be made public by construing these provisions.[2]

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1. For a provision stipulating that the arbitral award can not be made public, see the British Columbia International Commercial Arbitration Centre (BCICAC) Rules 34. (8); it provides "The arbitral award shall not be made public except where disclosure is necessary for purposes of implementation or enforcement of the award."
2. For a provision stipulating that the arbitral proceedings (specially concerning hearing) must be closed, see The Rules of The Korean Commercial Arbitration Board (KCAB) Article 35. "Closed Proceedings"; it provides "The proceedings of the hearing shall be closed to the public." And also for a provision stating that the hearing can be conducted in open according to the request of the parties, see the Rules of China Maritime Arbitration Commission Section 3. "Hearing" Article 25; it provides "The arbitration tribunal shall not hear cases in open sessions. If both parties request hearings in open sessions, the arbitration tribunal shall decide thereon." In Japan, the Rules of The Japan Commercial Arbitration Association Rule 30 "Closed Proceedings" provides simply "The proceedings of the hearing shall be closed to the public".

II. The practice of publishing arbitral awards

1. The Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange Inc. (JSE) (Japan)

(1) Purpose

The Japan Shipping Exchange Inc. has been publishing awards for more than sixty-five years.

It appears that there are two main reasons given by the TOMAC for publishing arbitral awards. The first is that by publishing arbitral awards, one is capable of securing rational and trustworthy proceedings, the second is that by publishing arbitral awards, one can establish proper and adequate commercial usages or customs to be followed later on. The first reason involves the procedural aspect of the process, while the second is related to the substantive concerns. (However, it is needless to say that these functions are effecting each other.)

The first reason given above for the publishing of awards can be further broken down into three areas; i. securing the trust of the parties or the prospective parties in the arbitrators and institutions; ii. obtaining fair and adequate decisions from the arbitrators (this is also related to the second reason); and iii. offering the information to prospective parties to which facilitates their choice of an arbitrator. Concerning No. i., if the conclusions of the arbitration are opened to the public, this will secure not only the trust in the arbitrators and arbitration itself, but also in the entire arbitration system. Regarding No. ii., in the event decisions are made public, the arbitrators will be burdened with a higher responsibility to make extra sure that the decision being made is correct before it is released to the public in publishing form. This duty hardly exists when decisions are not published.

The desire to publish awards is based on a need to establish norms for commercial usages or customs and foreseeability among the decisions being made by arbitrators. Since judgments by courts regarding maritime matters have been relatively rare in this country and are more legalistic than practical, the maritime business community has been seeking a non-legalistic set of standards which can

be followed in the place of court decisions.

(2) JSE provisions

The rules of maritime arbitration of The Japan Shipping Exchange, Inc. contain a provision concerning the publication of the awards. Section 30 "Publication of the Award" provides, "The award given by the Board (of Arbitrators; tribunal) may be published unless both parties beforehand communicate their objections." According to this provision, publication will be made unless both parties make an objection beforehand to such publication. Thus, in practice, awards are usually published without the express consent when only one party makes an objection, or if the objection is made after preparations have begun to publish the award (i.e., when the printing has been completed).[3]

(3) Form of publication

A. Customary practice

Generally, the full text of the award is published, not the summary.

The names of the parties used to be published. However, almost all of them are now kept anonymous.[4] I can see no persuasive reasons for making the names of the parties public considering the inherent private nature of arbitration, and since the parties usually do not want to be known as the parties to the dispute. Furthermore, practically speaking, as far as the public is concerned, no useful purpose is served by publishing the names of the parties. What remains

3. It is needless to say that the parties have already consented to the publication at the moment when they have agreed to the JSE rules by arbitration agreement. See III. 3.(2). See also no.12, infra.
4. Historically speaking, the resolution through arbitration was regarded as the one which contributes to the stability of commercial customs specially in the maritime field (thus, there are many commercial men in the panel of the TOMAC). Thus, the JSE usually published the full text of awards. Further, it did not matter whether the names of the parties were kept anonymous or not since they could hardly be kept private even when the award was published through a partial publication.

nevertheless important as far as the public is concerned is the result and reasoning of the decision. Also, the publishing of names only brings on unnecessary curiosity. If I may give some reasons why naming a party to an arbitration would be a good idea, the first would be that by publishing the names of the parties the complete background of the dispute can be divulged. It also allows members of the same trade or business can kept up with problems in the business. Finally, despite all efforts to keep the names private, there is still the possibility that the parties' identities will be revealed. Due to the above considerations, I feel it is preferable to keep the names of the parties anonymous.

The awards are made public through the magazines published by the JSE, i.e. the "KAIUN" (The Shipping) and the "KAIJIHO KENKYU KAISHI" (The Maritime Law Review). English translations of the above appear in the Bulletin of The Japan Shipping Exchange Inc. With regard to prior awards, they are collected in the "NIPPON KAIJI CHYUSAIHANDAN ZENSHYU" (The collection of The Maritime Arbitral Awards, Vol.I ~ Vol.III).

I feel that the responsibility of publication should be held by the publisher alone, since the arbitrators should be removed from the responsibility of publishing for practical reason.

B. Publication withheld by the JSE

Basically, the JSE does not publish awards when both the parties expressly object to the publication beforehand (see, Section 30 of the JSE arbitration rules).

The JSE will also refrain from publishing awards when in its better judgment, or that of the arbitrators, it is thought better not to publish the award. The situations where it is decided that there should be no publication are as follows; i. where the publication of the award could be extremely adverse for the party's or parties' current or future commercial activities, or ii. where the award will adversely affect other parties in the same business. It can be said that the latter case is quite rare compared with the former.

The arbitrators or the JSE should consider all factors related to each individual arbitration before they make a decision whether or not to publish the awards.

In conclusion, it appears that the practice of publication used by the JSE heavily depends on the will of the parties and their interests since arbitration should remain a private and autonomous matter.

2. The Society of Maritime Arbitrators, Inc. (USA)

(1) Purpose

It is well-known that the SMA publishes arbitration awards in its Award Service.

The purpose of this activity is stated as follows;

"The awards, dating back to the 1950's, contain the essential factual background and the arbitrators' reasoning in support of their decisions. The reasoning is often of great value in giving insight into the practices and customs of the maritime industry. The awards therefore not only serve as a guide for the resolution of disputes, but also as a means of avoiding disputes when negotiating fixtures.

While New York arbitrators are not bound by previous awards, SMA panels, in an effort to maintain consistency, do take them into consideration."[5]

(2) SMA provisions

There is a provision concerning the publication of arbitration awards in the opening section of the SMA arbitration rules; c.f. Section 1. "Agreement of Parties", the second paragraph states "Unless stipulated to the contrary in advance, the parties agree, by consenting to these Rules, that the Award issued in consequence of their case may be published by the Society of Maritime Arbitrators, Inc. and/or its correspondents."

As was already stated, since in principle the decision of whether the award should be published or not is made with some consideration of the will of the

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5. See "A Comment on the Rules of the Society of Maritime Arbitrators, Inc. (New York)", Journal of Maritime Law and Commerce Vol.20, No.2, April, 1989, p.201.

parties, I feel this provision is reasonable with regard to its position by being provided at the beginning of the rules, so that it is likely to call the parties' attention to the publication of awards before they agree to this rules. However, it is unclear whether this provision would protect parties who seek not to have their decision published. Also, it is unclear whether the SMA would refrain from publishing awards in situations where caution is warranted.

(3) Method of publication

The method of publication by the SMA is stated as follows; "Most important, however, is the SMA Award Service, which publishes the full text of virtually all arbitration awards by Society members. The subscription list includes owners, charterers, law firms, and brokers, both in the United States and abroad."[6]

I have been unable to find any further explanations to add to this comment on this internationally well-known award service.

3. Other provisions under several arbitration rules[7]

The other provisions taken from various arbitration rules regarding the

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6. Ibid.
7. The China Maritime Arbitration Commission publishes "Selection of Awards and Conciliation Statements", and The Korean Commercial Arbitration Board publishes the summary of their awards without providing for the publication of awards in their rules.
According to a comment regarding the publication of awards in the "Guide to Arbitration Practice in Korea" by the KCAB, it is stated that: "In commercial arbitration, the proceedings of arbitration are conducted in camera. Those persons who have a direct interest in the arbitration are entitled to attend the hearings. However, it is within the discretion of the tribunal to determine the priority of the attendance of any such persons. It is the general practice that the KCAB has never published any awards. However, for research and educational purposes some select cases are occasionally published in the official journal of the KCAB "Journal of Commercial Arbitration". In any event anonymous names of persons, firms, addresses are always used in such published accounts." This interesting comment states a useful model upon which to base a system in which the decision of whether or not to publish awards takes into account secrecy or confidentiality of arbitrartion.

publication of awards will be referred to below for comparison.

A. UNCITRAL Arbitration Rules

Article 32. "Form and Effect of the Award, 5. simply provides, "The award may be made public only with the consent of both parties."

B. Rules of the German Maritime Arbitration Association

Section 14 "Award", 8. stipulates, "Unless a party objects, the arbitral tribunal shall be entitled to publish the award under the condition that no specifying details, especially the names of the parties, other than the name of the vessel shall be referred to."

C. American Arbitration Association International Arbitration Rules

Article 27 ("Awards, Decisions and Rulings"), 5. provides "An award may be made public only with the consent of all parties or as required by law."

III. Quest for a rational or proper method of publication

1. What kind of information should be made public?

(1) Should the full text or only the summary be published?

The answer to this question may be closely connected with question No. (2) below. If the names of the parties should not be made public, one can conclude that any facts or details which are closely connected to the identity of the parties, and therefore would likely to divulge such names, should be kept secret. Also, allusions made to the name of a vessel, or details of a transaction in which only a few companies are likely to engage etc., should be kept secret.[8]

I feel that the names of the parties should be kept anonymous in principle. Also if there is some possibility that the names of the parties would become known

8. See a provision of the GMAA rules, supra.

should the full text be published, I feel the publisher should, in this case, summarize the text. However, the full text should become available through publication if the names of the parties can not be kept private through a partial publication. Also, the publisher does not have to summarize the text, if it is enough for keeping the identity of the parties private to make their names anonymous. It is needless to say that the full text is much more useful for study than a partially published text.

(2) Should the names of the parties or the arbitrators be kept anonymous?

As I have already mentioned, I believe that basically the names of the parties should be anonymous unless the parties otherwise agree.[9] However, the publisher should be allowed to publish names with the full text of the award after a certain period of time (five years or ten years, perhaps) has passed.

Concerning the names of arbitrators, I feel that it is useful for the prospective parties to be able to appoint their arbitrators in the event the names of the arbitrators are made public.

2. Which publisher should be used to publish the award?

In the case of an institutional arbitration, the institution,without any doubts, is the best party to publish the award not only because it can make decisions properly concerning any questions about the publication (i.e., with regard to whether a full text or not should be used, or whether the publication should be anonymous or not), but also because the likelihood of illicit publications or leaks in publication could be prevented as well.[10]

In the case of ad hoc arbitration, the situations is very different. I do not have any ideas with regard to the way publication should be made with regard to ad

9. For circumstances in which, without the consent of the parties, an award can legitimately be made public, see Hunter, "Publication of Arbitration Awards". [1987] 3 LMCLQ 139, p. 141.
10. See Hunter, op. cit. supra, n.9, pp. 139–140.

hoc arbitration since there might be a few cases where the parties would agree to publication in ad hoc arbitration unless, of course, they chose to follow the UNCITRAL Rules. In the above situation, the problem of unauthorized publication is likely to arise.[11]

3. When the publication of the award should not be made public

(1) General

In general, the publication of an award should be dependent on the parties' consent. Therefore, if they agree not to publish the award (or do not agree to such publication), or take objection to the publication, a publisher should then withhold publication. Also in practice, there seems to be no provision which would state otherwise.

(2) The intentions of the parties

All provisions concerning publication listed above provide that the parties' consent is necessary in order for there to be authorization for an institution or the arbitrators to publish awards. It is comparatively clear in the case of the SMA rules. However, in most situations, the parties usually agree at the onset of arbitration to follow certain rules in the beginning (before arbitration begins) in the initial arbitration agreement. Also, one can find many arbitration rules which have provisions stating that the parties have agreed to resolve their disputes within these rules. Accordingly, if arbitration rules which the parties have agreed to follow have a provision to authorize institutions or arbitrators to publish awards, one can say that the parties have also agreed to the publication.[12]

However in practice, the patterns of such provisions are varied. Under the

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11. See Hunter, op. cit. supra, n.9. See also Samuel, "The Unauthorized Publication of Arbitration Awards", [1989] 2 LMCLQ 158.

12. Under the UNCITRAL rules, there is a provision that requires an additional consent of the parties for publication.

SMA rules, the parties must stipulate to the contrary in advance if they do not want the award to be made public. Therefore, the consent of both parties is required to prevent the publication before agreement to use the rules is made. This provision of the JSE rules also requires the consent of both parties to prevent publication. However, the parties can still make an objection before the JSE prepares to publish the award. Thus, the parties can decide whether they object to the publication or not even after the award is given.

In one example, a provision of the GMAA rules states "Unless a party objects". Therefore, a party's objection alone is required to prevent the publication. However, it is not clear when it is too late for a party to make such objection.

I believe that the secrecy of arbitration is one of the most important features of the arbitral system. As I have already stated, the parties, in one way, choose this system to resolve their disputes in secret for commercial reasons. And I have already mentioned, the publication of an award should be subject to the consent of the parties. Accordingly, I conclude that the publisher should withhold the publication of an award when one of the parties takes an objection to it. However, this conclusion will be effected in the case that publication should be in summary form, and/or in the case that the names of the parties should be kept anonymous.[13]

The parties, in my view, have to make their objections to the publication expressly, not tacitly, when they have agreed to the provision in advance which authorizes the institution or the arbitrators to publish the award under the underlying conditions.

(3) Discretion by the institutions or arbitrators

The provision concerning the publication of award usually stipulates or implies that the parties have agreed to authorize the institution or arbitrators to publish the award. Thus, the institution or arbitrators have the discretion with regard to whether or not they should withhold the publication.

The circumstances which the institutions or arbitrators may take into

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13. See, supra, no. 7.

consideration before they decide to withhold the publication are suggested in the case of the JSE.[14]

IV. Conclusion

I believe that the publication of an arbitral award should not become a kind of sanction or punishment unless the parties have agreed otherwise. The interests of the parties and the demand for establishing proper and adequate commercial usages or customs (i.e., lex mercatoria) should be carefully considered by the institutions or arbitrators authorized to publish so as to create an equitable balance.

14. See, II. 1. (3)B., supra.

THE BURDEN OF PROOF AND ALLEGATIONS OF UNSEAWORTHINESS WHEN A VESSEL DISAPPEARS IN CALM SEAS

Robert MARGOLIS*

On occasion a vessel disappears in calm seas with all hands. In such a case, where no eye-witness testimony in available, nor post-casualty survey possible, it is often difficult to establish the cause of the loss. The lack of evidence may have serious consequences for marine insurers or the assured, because liability will then commonly fall according to where the burden of proof lies.

In a situation such as this, the incidence of the burden of proof is relevant to both the hull insurer and the cargo insurer:[1]

> the hull insurer will be liable under the hull policy only if the assured can establish that the loss was due to a peril insured against;
>
> the cargo insurer will, under the usual policy of insurance, be liable to indemnify the cargo owner, but then he will have a claim under subrogated rights against the carrier, who will be able to avoid liability only if he can establish that the loss of the cargo was due to a cause for which he is not responsible, or for which his liability is excluded.

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1. A third situation in which the incidence of the burden of proof is of importance is where the survivor of a deceased seaman brings an action against the shipowner for "wrongful death", alleging, say, that the vessel was unseaworthy: see Waddle v. Wallsend [1952] 2 Lloyd's Rep. 105. This issue, perhaps the most unfortunate of all, is not one with which I am at present concerned; however, the general principles set out in this paper are applicable to it.

Furthermore, in these cases, respectively, the liability of the insurer can be avoided, or the liability of the shipowner established, if it can be shown by the party so alleging that the vessel was at the relevant time unseaworthy.

My purpose here is to demonstrate the significance of the incidence of the burden of proving unseaworthiness by explaining how the incidence, or location, of the burden of proof is determined under English law, by setting out where the burdens lie in the present kind of case, especially in relation to the burden of proving unseaworthiness, and finally, by suggesting how the burden of proof in relation to an allegation of unseaworthiness may be met.

To begin, I would make the following two points:

1. The incidence, or location, of the burden of proof matters;
2. The incidence of the burden of proof is not necessarily a matter of logic; it is a question of precedent, or of a fixed legislative rule. In novel cases, it is a matter of policy.

The Incidence of the Burden of Proof Matters

There is perhaps no better example of this than the recent House of Lords decision in The Popi M [1985] 2 Lloyd's Rep. 1.

In this case, the assured's vessel 'Popi M' was lost in calm seas and fair weather while sailing in the Eastern Mediterranean. The assured claimed under a time policy of marine insurance for loss caused by perils of the sea, in particular, a collision with a submarine. The underwriters refused to pay on the policy, arguing that the loss was due to the defective, deteriorated and decayed condition of the vessel.

The trial judge held that, although the submission of the assured that the loss was caused by a collision was "inherently improbable", the possibility of the cause being due to wear and tear having been ruled out, on a balance of probabilities the assured's explanation would be accepted.

The House of Lords reversed the decision of the High Court (and of the Court

of Appeal, which had affirmed the decision at trial), Lord Brandon, speaking for the House, saying at 6:

> In my opinion, Mr. Justice Bingham adopted an erroneous approach to this case by regarding himself as compelled to choose between two theories, both of which he regarded as extremely improbable, or one of which he regarded as extremely improbable and the other of which he regarded as virtually impossible. He should have born in mind, and considered carefully in his judgment, the third alternative which was open to him, namely, that the evidence left him in doubt as to the cause of the aperture in the ship's hull, and that, in these circumstances, the shipowners had failed to discharge the burden of proof which was on them.

The burden of proof on the shipowners to which Lord Brandon refers is the burden of establishing that the loss was due to a peril insured against. As the shipowners were unable to satisfy this burden, the underwriters were held not to be liable under the policy.

Similarly, in the leading case of The Glendarroch (1894) 7 Asp. M.C. 420, the Court of Appeal determined the issue of whether a shipowner was liable to an owner of cargo damaged by seawater by holding that the burden was on the cargo owner to establish that the loss was due to the negligence of the shipowner's servants, rather than on the shipowner to establish want of negligence, and this the cargo owner could not do. Initially, the trial judge, whose decision was reversed on appeal, had held the converse, that is, that although the shipowner had established that the loss was due to an excepted peril, there was on the shipowner the further onus to establish want of negligence, and as the shipowner failed to so establish, the cargo owner succeeded at trial.

The Incidence of the Burden of Proof

Under English adjectival law, that is, the law of evidence and procedure, the

incidence of the burden of proof follows the application of two principles.

First, the facts which must be proved in order for the plaintiff to succeed in the trial are determined according to the applicable substantive law, and the pleadings relevant thereto. Second, to these pleadings is applied the maxim "he who asserts must prove".

Regarding the first principle, that the burden of proof is determined by the substantive law, it must be acknowledged that this is possible only after the substantive law has been definitively expressed, for in novel situations, in particular, where the issue of burdens has never been addressed, it may properly be said that the expression of the substantive rule depends on where, as a matter of policy, the court, or the legislature, has determined the burden should lie.

Consider, for example, the case where there is an exception to a general liability, but only where the party relying on the exception is not guilty of fault.[2]

In The Glendarroch the bill of lading contained the customary exception of loss by peril of the sea. Further, it was held to be an implied term of the contract as evidenced by the bill of lading that, to be excepted, such a loss by a peril of the sea must not have been produced by (the negligence of) the shipowner's seamen. The shipowner proved that the loss was due to an excepted peril.

The substantive rule is clear, but how it is expressed will determine on whom the burden of proving negligence lies; or, a decision as to the party on whom the onus lies will determine how the substantive rule is stated.

In The Glendarroch the substantive rule was expressed as follows:

> The shipowner is relieved if the loss is a loss by perils of the sea. But then you have to read in the [implied term]. You must read in "Except the loss is by perils of the sea, unless or except that loss is the result of the negligence of the captain or sailors of the owners.

This being so, according to the ordinary practice, each party would have to

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2. The best analysed example of this is Joseph Constantine Steamship, Ltd. v. Imperial Smelting Corp., Ltd. [1942] A.C. 154 (H.L.), noted by Julius Stone in (1944) 60 L.Q.R. 262.

prove the part of the matter which lies upon him. That is, he who asserts must prove.

But who is to assert, as I have said, depends on the formulation of the substantive rule, not just its content. As Julius Stone convincingly demonstrates in his important analysis of the Joseph Constantine Steamship Line case in (1944) 60 L.Q.R. at pp. 282 and 280, "there is no distinction in meaning between a qualification within a rule, and an exception to it". That is, every qualification of a class can equally be stated without any change of meaning as an exception to a class not so qualified.

Therefore, in the present case, we could say either:

> A shipowner is under an absolute obligation to deliver the cargo in good condition except the loss is by an excluded peril, unless the loss is the result of the negligence of the shipowner or his servants; or
>
> A shipowner is under an absolute obligation to deliver the cargo in good condition except the loss is by an excepted peril not produced by his or his servants' fault.

There is no difference in meaning between the two formulations, that is, the substantive law on the point is the same whether we express it one way or the other, yet the way it is expressed might tell us whether the burden of proving negligence is on the cargo owner (the first formulation) or on the shipowner (the second formulation).

In a novel situation, that is, in a case where the incidence of the burden of proof has not already been established, the court in determining on whom the burden lies will consider a number of policy matters. For example, the court may state the substantive rule in such a way that the burden or proof is on the party with the best access to the facts necessary to make proof.

Or, the court may place the burden in such a way that injustice will be done in the fewest number of cases. If I may rewrite Stone's example:

> Let it be assumed that in the great majority of cases loss by peril of the sea is not due to the fault of the shipowner; and let it be assumed that in these cases it is usually impossible to establish negligence of the shipowner's servants one way or the other. A rule requiring the shipowner to negative negligence will then ex hypothesi do injustice to the great majority of shipowners; while on the other hand, a rule requiring the cargo owner to prove negligence will ex hypothesi do injustice to only a small minority of plaintiffs.

If the premises assumed above are indeed true, then the formulation of the rule in The Glendarroch is a fair and reasonable one. But it may be that one or the other is not correct: it may be that in the majority of cases losses due to perils of the sea are in fact produced by the shipowner's negligence; more likely, it is probable in these cases that it is often possible to establish the negligence of the shipowner one way or another, and that, moreover, it is easier for the shipowner to negative negligence, even though that requires his proving a negative, than it is for the cargo owner positively to establish negligence.

Such analyses are, perhaps, interesting exercises, but they are only of practical value in novel situations. After so many years and incidents, it is relatively well established where the burdens lie when a vessel is lost in calm seas: the common law rules are set out in a definitive way in the cases; the legislature has set out in statutes other rules in such a way that the incidence of the burdens regarding them are evident or, if not, the burdens under these statutory rules have been determined by the courts; the burdens are determined expressly in the relevant contract or, more usually, impliedly by the wording of the provisions therein;[3] or, lastly, the legislature has on occasion expressly stated on whom the burden of proving the existence of a particular fact is to lie.

Thus, my purpose now is to attempt to set out the incidence of the burdens in

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3. An example of this is the due diligence requirement in the so-called Inchmaree Clause commonly inserted in a policy of hull insurance, discussed infra at fn. 15.

a coherent fashion, and to suggest how these burdens might be met.

When cargo sues for breach of the contract of carriage

In the usual case where the ship is lost at sea, and the cargo owner is suing the shipowner for non-delivery of the goods, the initial burden on the cargo owner will be to prove the contract of carriage and non-delivery (The Glendarroch, at 421).

The shipowner may defend against the claim for non-delivery by proving, if the goods were carried under a bill of lading and his rights and liabilities thereunder are governed by the Hague or Hague-Visby Rules, that the loss was caused by a peril excepted in Art. IV, rule 2 of the Rules (The Torenia [1983] 2 Lloyd's Rep. 210 (Q.B., Com. Ct.) at 216-19).

If the shipowner is able to establish that the loss is caused by a peril listed in Art. IV, r. 2, the cargo owner, in order to succeed in his claim, may then prove that the loss nevertheless resulted from the unseaworthiness of the vessel (see The Torenia at 217-18; Art. IV, r. 1 of the Hague and Hague-Visby Rules).[4]

The Hague Rules on this point follow, with some modification, the common law, according to which, by virtue of an implied warranty, a complete answer to the shipowner's proof that the loss was due to an excepted peril was that it was nevertheless caused by unseaworthiness (Atlantic Shipping & Trading Co. Ltd. v. Louis Dreyfus & Co. (1922) 10 Ll.L.Rep. 707 (H.L.)).

And, regarding the burden of proof at common law, Sir Gorrel Barnes P. said in The Northumbria [1906] P. 292 at 298: "If a prima facie case of perils of the

4. Tetley, in Marine Cargo Claims (3rd ed., 1988) at pp. 273-74 gives a different order of proof, based on the dicta of Lord Somervell in Maxime Footwear Co. Ltd. v. Canadian Government Merchant Marine [1959] A.C. 589 (P.C.) at 602-03, than I provide here. Professor Tetley's suggested order of proof is inconsistent with the very clear order set out by Hobhouse J. in The Torenia at 218. Moreover, an argument of the cargo owners following Tetley's order of proof, that is, that the shipowner must establish that the Art. IV, r. 2 peril (here a stranding) occurred without want of due diligence, was expressly rejected by Phillips J. in The Theodegmon [1990] 1 Lloyd's Rep. 52 (Q.B., Com. Ct.) at 55.

sea is made out, and the plaintiffs allege unseaworthiness, it is upon the plaintiffs that the burden of proving unseaworthiness rests".

However, and this is where the Hague Rules diverge from the common law, the shipowner will not be liable for loss arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the shipowner to make the ship seaworthy (Art. IV, r. 1).

The Rules expressly provide that:

> Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.

Finally, even if the shipowner fails to establish that he exercised due diligence to make the ship seaworthy, he will not necessarily lose his case, for the Commercial Court has recently held that even if the shipowner has failed to prove that in all respects he exercised due diligence to make the vessel seaworthy, he may still avoid liability by proving that in so far as he did fail to exercise the required due diligence, this did not cause or contribute to the casualty (see The Yamatogawa [1990] 2 Lloyd's Rep. 39, where, after reviewing a mass of technical expert evidence regarding what is the exercise of due diligence in the case of an inspection of an epicyclic reduction gear unit, Hobhouse J. concluded that due diligence was not exercised but that even had it been exercised, the defect in the gearbox would not have been discovered, such that the shipowners were not liable under the Hague Rules for any loss suffered by the cargo owners and therefore were not precluded from claiming from them a general average contribution).

It may be of interest to note here that in this kind of situation, as we saw earlier, the substantive rule is the same whether we express it as:

> The shipowner will be liable for loss resulting from the unseaworthiness of his vessel unless either he exercised due diligence to make the vessel seaworthy or the loss would have resulted even had he exercised due diligence;

in which case the burden of proving that the loss would have occurred despite the exercise of due diligence is on the shipowner (as in The Yamatogawa), or

> The shipowner will be liable for loss resulting from the unseaworthiness of his vessel which would have been avoided by the exercise of due diligence, unless he exercised due diligence to make the vessel seaworthy,

in which case the burden of proving that the failure to exercise due diligence caused the loss is on the cargo owner.

As we can see, the substantive content of the rule in both cases is the same, but the way in which it is stated reflects, or determines, the incidence of the burden of proof.

In fact, in The Yamatogawa there is no discussion of the reason for placing the burden of proof on the shipowner rather than on the cargo owner, although it may be that the wording of Art. IV, r. 1 requires this (which may be doubted, as the wording of this rule seems to place the burden of the cargo owner[5]), or it may be that in the majority of cases where the shipowner fails to exercise due diligence to make the vessel seaworthy it is this failure which causes the loss, such that should there be no evidence on the issue either way, in the majority of cases justice will be done by holding against the shipowner.

Proving unseaworthiness

Under the Hague Rules, after the cargo owner has proved the contract of carriage and non-delivery, and the shipowner has replied by proving an Art. IV, r. 2 defence, the cargo owner may yet succeed by proving that the loss was caused

5. Article IV, r. 1 of the Hague Rules reads in part: "Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy...".

by the unseaworthiness of the vessel.[6]

Given that when a vessel is lost suddenly with all hands there may be little or no evidence regarding the casualty, and because the cargo owner will seldom have access to information relating to the seaworthiness of the vessel (such as maintenance records and survey reports), proof of unseaworthiness by the cargo owner will often be a difficult task.

Such a cargo owner, with no evidence of the cause of loss, might therefore be able to do no better than to ask the court to infer from the fact that the vessel sank in calm waters that she was unseaworthy.

However, under English law, "there is no presumption of law that a ship is unseaworthy because she breaks down or even sinks from an unexplained cause" (Payne and Ivamy, Carriage of Goods by Sea (1989, 13th ed.) at p. 18).

On the other hand, "where a ship, shortly after leaving port and without any apparent reason sinks or leaks, the mere facts afford prima facie evidence of unseaworthiness, which must be rebutted": Scrutton, Charterparties and Bills of Lading (1984, 19th ed.) at p. 86; see also Payne and Ivamy at pp. 18-19 and Tetley, Marine Cargo Claims (1988, 3rd. ed.) at p. 379.

To reconcile these two statements, an understanding of the English law of evidence relating to presumptions is required.

I must preface these remarks with the caveat that in this area of the law there is considerable confusion, in particular as a result of the want of a consistent terminology; but as it is not my purpose here to review the law of presumptions, but to describe it only to the extent necessary to allow the reader to understand how presumptions allow the cargo owner to meet the burden of proving seaworthiness without producing a mass of evidence, I will present only the version of the law I find most convincing.

Cross (Evidence, 7th ed., 1990) says that the structure of all true presumptions

6. However, it must be shown by the cargo owner that the loss was caused by the unseaworthiness, for if unseaworthiness is proved but the causal connection is not, the shipowner may rely on the Art. IV, r. 2 exceptions and need not prove exercise of due diligence to make the ship seaworthy: Minister of Food v. Reardon Smith Line [1951] 2 Lloyd's Rep. 265. Compare the incidence of the burden of proof in this case with that in The Yamatogawa.

requires the proof of a so-called "basic" fact, from which may be inferred, with varying degrees of strength, the so-called "presumed" fact. For example, from the basic fact that a vessel sank shortly after leaving port, it may be presumed that she left port in an unseaworthy condition.

There are three kinds of presumptions. The first is that from the basic fact the existence of the presumed fact may be inferred as a matter of logic only. This, the weakest of the presumptions, has no effect upon the burden of proof. In fact, because of this, it is difficult and not particularly useful to distinguish such a presumption from a simple logical inference: from the fact that a ship is old and was not regularly maintained, we infer (presume) she was unseaworthy. But we are not required to do so.

The second kind of presumption is the kind alluded to in the statement of Scrutton, set out above. It is described as an "evidential presumption" by Cross. It requires that if the basic fact is proved, the presumed fact must be taken to be established in the absence of evidence to the contrary. Thus, if it is proved that a vessel is lost shortly after leaving port, the court will hold (it must presume) that it was unseaworthy at the beginning of the voyage unless the shipowner adduces some evidence to rebut this inference. In the case of an evidential presumption, however, the shipowner need not prove seaworthiness; he is obliged only to adduce some evidence (how much is not clear) to the contrary, and then the presumption is spent. The (so-called legal) burden of establishing unseaworthiness remains on the cargo owner, and if he does not prove unseaworthiness, he will lose.

The third kind of presumption is the "legal presumption", or the presumption of law, as mentioned by Payne and Ivamy, above. In this case, if the basic fact is proved, the court must hold that the presumed fact is proved, unless the opposite party can prove on a balance of probability that the presumed fact does not exist.

In the case with which we are at present concerned, the cargo owner can establish unseaworthiness in three ways:

1. He can prove facts which directly show that the vessel was unseaworthy when she began her voyage. For example, the cargo owner might show, by adducing

survey reports or eye-witness testimony, that the vessel's hull plating was severely corroded or that her pumps were not in working order;

2. He can prove facts from which it may be inferred as a matter of logic that the vessel is unseaworthy.[7] For example, after adducing evidence as to the age of the vessel and the fact that she has not undergone the regular maintenance appropriate to a vessel of that age, the cargo owner may invite the court to hold that the vessel is unseaworthy; and
3. He can prove the basic fact that the vessel was lost shortly after leaving port in calm seas and ask the court to presume that she was unseaworthy when she commenced her voyage.[8]

Because the cargo owner will not readily have access to evidence, if indeed it exists, of the facts necessary to prove unseaworthiness in the first two ways mentioned above, especially when the loss is a relatively small one and the cost of obtaining such information is high, perhaps requiring the commencement of a

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7. A recent example of such an inference is found in The Jute Express [1991] 2 Lloyd's Rep. 55 (Q.B., Ad. Ct.), where cargo owners sought to prove, in order to defend against a claim by the shipowners for a general average contribution, that the vessel was unseaworthy because she was not properly manned. The court was asked to presume that because an incompetent officer is more likely to contribute to the causes of a collision than a competent officer, the fact of a collision is proof of incompetence. Sheen J., after reviewing the employment history of the master, said at 60: "It seems to me impossible to draw the inference that he was not properly qualified to hold the position of master of "Jute Express" from the fact that he was involved in a collision". Thus, the cargo owner was held not to have established unseaworthiness.
8. In The Theodegmon [1990] 1 Lloyd's Rep. 52 (Q.B., Com. Ct.), Phillips J. remarked that, in a case where the carrying vessel had stranded in the Orinoco River at a point where the navigable channel was broad and the current constant, "The fact of the stranding raises the inference that something untoward occurred". But this inference of unseaworthiness was quickly spent when a mass of evidence as to the cause of the stranding was adduced. From the evidence of a failed steering system the judge concluded: "The fact that the steering system failed so soon after the commencement of the voyage raises an inference, which has not be [sic] rebutted, that the steering system was not in proper working order at the commencement of the voyage and thus that "Theodegmon" was unseaworthy at this stage". In the event, the shipowners were unable to prove exercise of due diligence, and the cargo owners succeeded in their claim.

law suit in order to obtain the survey and maintenance reports by way of discovery and inspection,[9] the cargo owner will frequently have no alternative but to rely on the evidential presumption of unseaworthiness to establish unseaworthiness.

The effect of this presumption is, in the rather technical language of English adjectival law, to "shift" the so-called evidential, or tactical, burden regarding seaworthiness of the vessel from the cargo owner to the shipowner. Once the cargo owner proves the basic fact that the vessel was lost in calm seas, a burden arises in the shipowner to adduce some evidence to show the vessel was in fact seaworthy. However, the shipowner need not prove that the vessel was on a balance of probabilities seaworthy; he need only adduce some evidence, say a recent survey report, to rebut the presumption of unseaworthiness, and then the cargo owner will lose the case unless he (the cargo owner) can, on a balance of probabilities, prove that the vessel was unseaworthy when she commenced her voyage.

Thus, so it is said, the legal burden of proving unseaworthiness on a balance of probabilities rests always with the cargo owner, but if he adduces evidence that the vessel was lost in calm seas, there arises in the shipowner, by operation of the presumption of unseaworthiness, an evidential burden to adduce some evidence to rebut the presumption, but he need not prove seaworthiness on a balance of probabilities. That is, the legal burden regarding unseaworthiness does not shift; there is, in the words of Payne and Ivamy, "no presumption of law that a ship is unseaworthy because she breaks down or even sinks from an unexplained cause".

That the presumption of unseaworthiness is an evidential presumption only is clear from the following statement of Hobhouse J. in The Torenia at 213:

> Whereas in the days of wooden ships or in the days when the design of steel ships and their construction was less advanced or the forces they were

9. Consider also the common situation alluded to in The Hellenic Dolphin [1978] 2 Lloyd's Rep. 336, where Lloyd J. allowed the cargo owners to amend their pleadings regarding unseaworthiness at the opening of trial because, as he said at 344, "This is a case in which the owners were quite exceptionally backward in giving proper discovery".

liable to encounter were less well known and understood there may have been many instances where unexplained losses at sea gave rise to no inference of unseaworthiness, it will now be rare for such an inference not to arise in the absence of some overwhelming force of the sea or some occurrence affecting the vessel from outside.

If the shipowner does not produce evidence in rebuttal, the cargo owner will be held to have established unseaworthiness.

Two questions arise: what kind of evidence may be adduced to rebut the presumption; and how persuasive must be the evidence adduced by the shipowner to rebut the presumption of unseaworthiness.

Regarding the first question, it may be said that evidence of at least three kinds may be adduced to rebut the presumption:

1. direct evidence may be adduced to show that although lost in calm seas, the loss was due not to unseaworthiness, but positively to some other cause, say, collision with a submarine or grounding on an uncharted rock;[10]
2. positive evidence may be adduced to show that the vessel was not unseaworthy, for example, oral testimony of a surveyor who had made a recent special survey; or
3. evidence may be adduced from which the court may infer that the vessel was seaworthy when she commenced her voyage, for example, evidence that she was in class, or that she was newly built or regularly maintained. In the recent case of The Marel [1992] 1 Lloyd's Rep. 402 (Q.B., Com. Ct.), a case where underwriters refused to pay on a policy of hull insurance, Judge Diamond Q.C. acknowledged that "there are circumstances where a shipowner may be able to discharge the burden of proof resting on him [to prove the loss was due to a peril insured against] by proving that the vessel was seaworthy on sailing and by seeking to establish by inference a case of a loss due to an unascertained

10. Such evidence may not be sufficient to establish the peril on a balance of probabilities, but it may be enough to rebut the presumption.

peril of the seas" (at 406). If the shipowner can establish seaworthiness at the time of the loss in an insurance case by adducing evidence of class and inspection at the commencement of the voyage, it must be that such evidence will go some way to rebut the presumption of unseaworthiness in the case where a vessel is lost in calm seas.

Regarding the second question, that is, how persuasive must be the evidence of the shipowner to rebut the presumption of unseaworthiness, Lloyd J. said in The Hellenic Dolphin [1978] 2 Lloyd's Rep. 336 at 339:

> The burden in relation to unseaworthiness does not shift. Naturally, the Court can draw inferences... But if at the end of the day, having heard all the evidence and drawn all the proper inferences, the Court is left on the razor's edge, the cargo-owner fails on unseaworthiness and the shipowners are left with their defence of perils of the sea.

This is undoubtedly true generally, but if the only evidence of the cargo owner is the basic fact of a vessel being lost in calm seas, from which the fact of unseaworthiness is presumed, Lloyd J. is, I suggest, stating the force of the presumption too strongly.

The evidence adduced by the shipowner to rebut the presumption of unseaworthiness need not be so great as to leave the Court on the razor's edge, or in, as Cross says at p. 146, a "state of equilibrium". The shipowner ought to succeed if he adduces just enough evidence to preclude the Court from saying that, on a balance of probabilities, the vessel was not seaworthy.

That is, the shipowner need not adduce sufficient evidence to make the court uncertain as between seaworthy and not; it will be enough if he can merely challenge whether it is appropriate to draw the presumption in the circumstances.

This is the lesson learned from the Popi M. To rebut the presumption of unseaworthiness the shipowner might adduce evidence that the vessel was lost in calm seas by collision with a submarine. The court may not believe on a balance of probabilities that there was such a collision, but it may believe that there was

a one-third chance of such a collision. If the presumption of unseaworthiness placed a legal burden on the shipowner to prove seaworthiness, he would not discharge it by evidence of the collision with a submarine. On the other hand, because the presumption shifts only the evidential burden, I suggest that the court would be wrong in holding that the presumption of unseaworthiness was maintainable when there was evidence in rebuttal was that there was a one third chance that she collided with a submarine, even if that were the only evidence in rebuttal.

That is, the evidence of the shipowner need not take the Court to the razor's edge before he can succeed; how much evidence is necessary is, however, unclear.

Proving due diligence to make the vessel seaworthy

Once the cargo owner has proved unseaworthiness, the shipowner becomes under a legal burden to prove that he exercised due diligence to make his vessel seaworthy.

Under the Hague and Hague-Visby Rules, Art. IV, r. 1, whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier (who is, usually, the shipowner).

Thus, if the cargo owner is able to prove unseaworthiness, either by positive evidence or by relying on the fact that the vessel sank for no apparent reason in calm seas, the shipowner must establish that he exercised due diligence to make his ship seaworthy, or he will be liable to the cargo owner.

To do this, the shipowner may be required, as a matter of tactics, to produce logbooks, ship's papers, faxes and telexes, class certificates, survey reports and maintenance records going back several years in order both to demonstrate a system of inspection and operation which meets the standards of due diligence, and to show compliance with that system in fact.[11]

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11. From these same documents, especially where they reveal that the vessel was poorly or not regularly maintained, or that the shipowner did not correct recommendations of a survey, the

It is not my purpose in this paper to review all the acts or omissions of a shipowner which may be said to constitute a failure to exercise due diligence. Indeed, this might be an impossible task, and at least it is a task the results of which are unlikely to justify the effort. An appreciation of the standard of due diligence required of the shipowner is achieved only through practical experience and a detailed reading of the caselaw: two recent decisions, The Yamatogawa and The Theodegmon [1990] 1 Lloyd's Rep. 52 (Q.B., Com. Ct.), are good examples of the mass of detail into which the court must delve in order to determine this issue.

Nevertheless, a short consideration of what constitutes the exercise of due diligence may give some suggestions as to what are the consequences of placing the burden of proof regarding the matter on the shipowner.[12]

Succinctly put, "Due diligence means doing everything reasonable, not everything possible. The term is practically synonymous with reasonable or ordinary care" (The Hamildoc 1950 AMC 1973 (Que. C.A.) at 1985).

An example of the application of this definition is The Hellenic Dolphin [1978] 2 Lloyd's Rep. 557. In that case the shipowner, to establish that he had exercised due diligence, proved that the vessel at all material times was fully classed and that she had, immediately prior to the loss, undergone her annual drydocking. Intermediate examinations attended by a superintending engineer were carried out at the end of each round trip to her home port, and routine inspections were carried out by the master and chief officer in the course of the voyage. Lloyd J.

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cargo owner may invite the court to infer unseaworthiness as a matter of logic; such an inference must be distinguished, as previously explained, from a presumption of unseaworthiness.

12. It may be noticed that the shipowner will often delegate to others certain responsibilities related to the maintaining of the vessel in a seaworthy condition, for example, responsibility for repair, or for conducting surveys and inspections. In such a case, the shipowner will not escape liability merely by proving that he exercised due diligence in selecting the delegate; the shipowner will not be held to have exercised due diligence unless the delegate did: The Munster Castle [1961] 1 Lloyd's Rep. 57 (H.L.). In The Yamatogawa, supra, the Commercial Court held that failure of an NKKK classification society surveyor to examine properly the vessel's reduction gear was a want of due diligence for which the shipowner was liable.

agreed with the comment of the shipowner's chief engineer made during cross-examination:

> If there is no obvious physical damage and we find no damage during the periodic survey, what else can we do.

The cargo owners sought to answer the shipowner's case on due diligence by challenging the system, and the performance or implementation of it on the particular occasion. On these issues Lloyd J. made the following comments:

1. unless there is something to put the master on notice, such as an unusually heavy bump, it cannot be expected that intermediate examinations should be made at the turn-around port as well as the home port, because, realistically, a balance must be struck;
2. the shipowner is not required to issue written instructions regarding every facet of operation of the vessel, for example, regarding reporting of every fresh indent. Such reports ought to be made, but it is not a failure to exercise due diligence if there are no written instructions to that effect, since an owner is entitled to assume that a certified master knows at least the most elementary features of his job, without having to be reminded in writing;
3. provided that he is properly certified and appropriately experienced,[13] the fact that the vessel is the master's first command cannot be said to be a failure by the shipowner to exercise due diligence.

Thus, evidence that the vessel was maintained and operated according to the standards and systems usual and proper in the industry may be adduced for two purposes: to rebut the presumption of unseaworthiness that arises when a vessel is lost in calm seas; and to establish that due diligence was exercised to make the

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13. Conversely, it was held in The Jute Express [1991] 2 Lloyd's Rep. 55 (Q.B., Ad. Ct.) that the fact of collision (or, more generally, loss) is not strong evidence that the master is incompetent, notwithstanding that "an incompetent officer is more likely to contribute to the causes of a collision than a competent officer"; a fortiori it is not strong evidence that the shipowner failed to exercise due diligence in employing such a master (see the comments of Sheen J. quoted supra at fn. 7).

vessel seaworthy at the commencement of the voyage.

It may be said with some confidence that where the only evidence of the cargo owner is the fact that the vessel was lost in calm seas, he is unlikely to succeed in proving that the vessel was unseaworthy unless he can use the shipowner's own documents relating to maintenance, repair and system to do so.

From a practical point of view, most cases where a vessel is lost in calm seas with all hands will therefore turn on this evidence, which will, as we have seen, and as appeared in The Hellenic Dolphin, be adduced by the shipowner and challenged by the cargo owner.

When the assured shipowner must sue to be indemnified under the hull policy

As in other claims under a hull policy, where a vessel is lost with all hands in calm seas, for the shipowner to recover under his policy of hull insurance he must prove the existence of the policy,[14] that he had an insurable interest in the subject-matter insured, and that the cause of the loss was a peril insured against.[15]

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14. There are a number of defences available to the insurer against a claim under the policy. For example, he may avoid it on the ground that the assured failed to disclose a material fact (s. 18 of the MIA 1906); or that he made an untrue representation as to a material matter of fact or belief (s. 20); or that, in the case of a voyage policy, the vessel deviated from, or changed, the contemplated voyage (ss. 45–46).

15. In the common event that an Inchmaree, or Liner Negligence, Clause is incorporated in the contract of insurance, a difficult problem regarding proof of due diligence and seaworthiness may arise. Under the Inchmaree Clause (see the Institute Voyage Clauses, Hulls 4.2) the loss must not have resulted from want of due diligence by the assured. In the event of loss due to an Inchmaree Clause peril, say, "any latent defect in the machinery or hull", the onus is on the assured to prove the peril occurred without his failure to exercise due diligence (see The Brentwood [1973] 2 Lloyd's Rep. 232 (B.C.S.C.); the point was left open on appeal (1974) 48 DLR (3d) 310 (B.C.C.A.)). Such a latent defect may of course be unseaworthiness, but although there are apparently no English cases on the point, the American cases support the view that the Inchmaree Clause in this respect is valid, and Arnould, in Law of Marine Insurance and Average (11th ed., 1981) at p. 551 in Vol. II, says that in so far as unseaworthiness is covered by the Clause, the

According to Lord Brandon in The Popi M at 2–3:

> The burden of proving, on a balance of probabilities, that the ship was lost by perils of the sea, is and remains throughout on the shipowners. Although it is open to underwriters to suggest and seek to prove some other cause of loss, against which the ship was not insured, there is no obligation on them to do so. Moreover, if they chose to do so, there is no obligation on them to prove, even on a balance of probabilities, the truth of their alternative case.

However, notwithstanding that the shipowner should succeed in proving that the loss was due to a peril insured against, the insurer may nevertheless avoid liability under the policy by proving, in the case of a voyage or a "mixed" policy on a ship, that the vessel was unseaworthy at the commencement of the voyage, or, in the case of a time policy, that the vessel was, with the privity of the assured, sent to sea in an unseaworthy state and the loss was attributable to such unseaworthiness.

Thus, in cases where the insurer seeks to avoid a policy on the basis of unseaworthiness, the burden of proving unseaworthiness is on him.

Before discussing this burden in greater detail, I will mention the interesting situation where the assured assumes the burden to proving seaworthiness.

Where the assured proves seaworthiness

As we have seen, to succeed in a claim under the policy of insurance, the assured must prove, inter alia, that the loss was due to a peril insured against.

In rare cases, in what Judge Diamond in The Marel at 412 called "the reverse of the usual position", the assured will attempt to establish the seaworthiness of

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express coverage must prevail over the implied warranty and therefore an underwriter cannot rely on a latent defect as a breach of the warranty of seaworthiness in a policy incorporating the Institute Voyage Clauses.

the vessel in order to prove that the vessel must have been lost due to a peril insured against. That is, the Court is asked to infer, from the fact that the vessel was seaworthy on sailing, that she was lost due to a peril of the sea, albeit unascertained.

This possibility was recently acknowledged in The Popi M, both by Sir John Donaldson M.R. (as he then was) in the Court of Appeal, and by Lord Brandon in the House of Lords, although it has a relatively venerable pedigree, beginning perhaps with the dicta of Brett J. (later Lord Esher) in Anderson v. Morice (1874) L.R. 10 C.P. 58. And in Skandia Insurance Co. Ltd. v. Skoljarev [1979] 26 A.L.R. 1 (Aust. H.C.), Mason J. said at 13:

> Although there is nothing in all this to throw the burden of proof of seaworthiness on to the insured, there is one class of case in which the insured will find it necessary to establish seaworthiness in order to prove his case. This is where the insured, having no direct evidence of loss due to a fortuitous event insured against seeks to establish by inference a case of loss due to an unascertained peril of the sea.

This inference was apparently elevated, at least by the assured, to a principle in The Popi M, Lord Brandon saying therein at 4, "The shipowners relied in their pleadings, and sought to rely at trial, on the principle that, if a seaworthy ship sinks in unexplained circumstances in good weather and calm seas, there is a rebuttable presumption that she was lost by perils of the sea".

In the event, the argument of the assured failed in that case because, first, there was in fact evidence as to the cause of the loss, and second, on the evidence it was not possible in any case to make a finding as to whether the vessel was seaworthy or not.

In The Marel, similarly, Judge Diamond, Q.C. found that there was some evidence to indicate that the vessel was in some respects unseaworthy, for example, that there was an ingress of water into one of the holds that was caused by unseaworthiness, but that in any case, even if an inference could be drawn that the vessel was seaworthy, in the circumstances of the case, it would not further

be held that this was enough to establish that the vessel was lost due to perils of the sea. That is, from all the facts taken together, it could not be said that the present inference, that a seaworthy vessel lost in calm seas was lost due to a peril insured against, was sufficient in itself to discharge the burden on the assured.

In some cases, however, for example where no evidence as to the cause of the loss is available, the assured may prove loss by a peril insured against by proving that the vessel commenced her voyage in a seaworthy condition, at least when the policy effectively covers all risks. In such a case, once the seaworthiness is established, there may be an evidential burden on the insurer to challenge the assured's allegation of seaworthiness, and as, ex hypothesi, there is no evidence of the cause of the loss, the insurer will be liable under the policy.

Proof of unseaworthiness

Notwithstanding that the assured has established that the loss was due to a peril insured against, the insurer can avoid liability if he can establish that the loss was due to unseaworthiness. The precise requirements regarding proof of unseaworthiness depend on whether the policy was for a voyage, a period of time, or for mixed voyage and time.

Moreover, the incidence of the burden of proof is established by precedent with reference to the specific content of the differing substantive rules.

Voyage policy on a ship

In the law of marine insurance, a "warranty" is a condition which must be strictly complied with, and a breach of warranty by the assured discharges the insurer from liability as from the date of the breach: The Good Luck [1991] 2 Lloyd's Rep. 191 (H.L.) at 202-03 per Lord Goff.[16]

16. Much of the common law and language relating to marine insurance was developed in the mid-eighteenth century by Lord Mansfield and during the following one hundred years by his

It is provided in s. 39(1) of the Marine Insurance Act 1906 that there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

Should the insurer attempt to rely on this section to avoid the contract of insurance on the ground that the vessel was unseaworthy at the beginning of the voyage,[17] he must prove the unseaworthiness.

In Pickup v. Thames and Mersey Marine Insurance Co. Ltd. (1878) 4 Asp. M.C. 43 (C.A.), a case of a policy on freight, Brett L.J. said at 45:

> The burden of proof upon a plea of unseaworthiness raised upon a policy of marine insurance lies upon the defendant who alleges the unseaworthiness; and, as far as the burden of proof goes, i.e., the burden of proof on the pleadings, it never shifts at all, but remains the same from the beginning to the end.

When the vessel sinks with all hands it may be difficult for the insurer to adduce sufficient evidence to satisfy the court on a balance of probabilities that the vessel was unseaworthy. In the case where the evidence of maintenance records and survey reports does not give rise to an inference of unseaworthiness,

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King's Bench and Queen's Bench successors. On the other hand, the modern law of contract and its terminology developed in the latter part of the nineteenth century, and therefore the vocabulary of the Marine Insurance Act 1906, which is a codification of the often venerable decisions of the common law courts, and the vocabulary of modern contract law, differ. In contract law, including the law of carriage of goods by sea, a "warranty" is a term the breach of which may give rise to a claim for damages but will never entitle the innocent party to terminate the contract: see Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha, Ltd. [1962] 2 Q.B. 26 (C.A.).

17. It will be noted that the requirement that the vessel be seaworthy at the beginning of the voyage is an absolute one, and the assured will be unable to succeed under the policy notwithstanding that he used due diligence to make the vessel seaworthy at the commencement of the voyage. Moreover, if the vessel is lost for reasons unrelated to the unseaworthiness, the insurer will nevertheless not be liable: see the statement to this effect of Lord Goff in The Good Luck, at 202–03.

and there is no direct evidence, say of surveyors, as to the unseaworthy condition of the vessel, the assured may still rely on the evidential presumption that a vessel which sinks in calm seas in unseaworthy.

Brett L.J. in Pickup v. Thames and Mersey went on to say at 45:

> But, when the evidence of facts is given, it is often said that certain presumptions, which are really inferences of fact, arise and shift the burden of proof, and so they do as a matter of reasoning and as a matter of fact; and it is true to say, as a matter of reasoning and as a matter of fact, that where a ship sails from a port and sinks to the bottom of the sea, or becomes exceedingly leaky very soon after she has sailed, and there is nothing in the weather to account for such a disaster, she was unseaworthy when she started... and if a jury, with no other evidence than that were to find the contrary, it would be such a finding against the reasonable inference of facts that anybody would say that it was a verdict against evidence.

That is, if he is able to assert the presumption, the insurer will succeed in discharging the burden upon him, unless the assured, in turn, adduces sufficient evidence in rebuttal. In the words of Brett L.J., once again at 45, "The assured must, therefore, show facts to prove that she was seaworthy before starting".

If the assured can do so, then from all the evidence the court must be satisfied on a balance of probabilities that the vessel was unseaworthy, or the assured must succeed in his claim.

Time policy on a ship

In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure; but s. 39(5) of the Marine Insurance Act 1906 provides that "where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness".

To avoid a time policy on the basis of unseaworthiness, three things must be

shown:

1. that the ship was sent to sea in an unseaworthy state;
2. that she was so sent with the privity of the assured;
3. that the loss was due to the unseaworthiness in respect of which the assured was privy.

This third requirement is not evident from the wording of the sub-section, but in Thomas v. Tyne and Wear Steamship Freight Insurance Association (1917) 14 Asp. M. C. 87 (K.B.D.) Atkin J. interpreted s. 39(5) to mean that the insurer is not to be liable only in the case of a loss attributable to unseaworthiness to which the assured is privy. At 88 he said:

> When a ship is sent to sea in a state of unseaworthiness in two particulars, and the assured is privy to the one and not to the other, the insurer is not protected unless the loss is caused by the particular unseaworthiness to which the insurer was privy.[18]

Regarding all three requirements, the burden of proof is on the insurer. Thus, the insurer must prove unseaworthiness at the time the vessel was sent to sea, privity of the assured, and that the loss was due to the particular unseaworthiness to which the assured was privy: The Eurysthenes [1976] 2 Lloyd's Rep. 171 (C.A.), per Lord Denning at 179, per Geoffrey Lane L.J. at 188.[19]

We have already considered in some detail the ways in which the insurer might establish unseaworthiness: by direct evidence; by inference from the vessel's history; by the presumption of unseaworthiness.

Regarding the further requirement that the insurer must prove that the vessel

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18. The same view was taken by Roskill L.J. in The Eurysthenes at 184, wherein he said: "There must be causative unseaworthiness of which he [the assured] knew and in which he concurred".
19. Geoffrey Lane L.J. said at 188: "For the owners to lose their cover it must be shown that the ship was sent to sea in an unseaworthy condition and that that was done with the privity of the assured".

was unseaworthy with the privity of the assured, what is meant by "privity" is examined in depth and perhaps definitively in The Eurysthenes. Therein, Lord Denning, giving the leading judgment of the Court of Appeal, held at 178 that "privity" means in this context knowledge and concurrence not only in the facts which constitute unseaworthiness but also knowledge that those facts indeed rendered the ship unseaworthy.

However, knowledge in this context means not only positive knowledge but also the sort of knowledge expressed in the phrase "turning a blind eye". If, says Lord Denning at 178, a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry — so that he should not know it for certain — then he is to be regarded as knowing the truth. However, this "turning a blind eye" is much more than being merely negligent as to the truth, which is not, in this context, the same as knowledge.

The onus on the insurer of proving actual knowledge of the assured is not one easily discharged. Recognizing this, Lord Denning acknowledged that privity might be established by inference. He said at 179:

> It may be inferred from evidence that a reasonably prudent owner in his place would have known the facts and have realized that the ship was not reasonably fit to be sent to sea.

Although the term "evidential presumption" is not used by Lord Denning, it may be argued that the inference discussed here is in fact a presumption of the kind which requires the assured to adduce evidence or concede the issue. Lord Denning described the way in which this inference might be rebutted in terms which suggest that it is an "evidential presumption":

> But, if the shipowner satisfies the Court that he did not know the facts or did not realize that they rendered the ship unseaworthy, then he ought not to be held privy to it, even though he was negligent in not knowing.

The difficulty for the insurer is that the presumption of unseaworthiness is most useful when there is no evidence as to the cause of the loss, except that the

vessel was lost in calm seas, but from that presumption the further inference that the assured was privy to the unseaworthiness cannot properly be drawn.

The insurer must adduce some evidence before the court will infer that the assured was privy to the unseaworthiness. In this case, the presumption of unseaworthiness may continue to operate in tandem with the direct evidence of the cause of the loss, but will not be so important as in the case of, say, unseaworthiness under a voyage policy.

Mixed policy on a ship

Section 25(1) of the Marine Insurance Act 1906 provides that a contract of marine insurance "for both voyage and time may be included in the same policy".

In The Al-Jubail IV [1982] 2 Lloyd's Rep. 637, the Singapore Court of Appeal held that where a vessel was insured for 12 months from and on a voyage from Singapore to the Persian Gulf and while trading within the Gulf, she was insured under a "mixed" policy.

Moreover, the Singapore Court held that, although the Marine Insurance Act 1906 does not cover the matter in s. 39, under a mixed policy on a ship a warranty of unseaworthiness will be implied in the same way as if the mixed policy were a voyage policy; therefore the insurer can avoid the policy regardless of the privity of the assured to the unseaworthiness.

Conclusion

There remains to be considered the issue: can it happen that the shipowner will be liable to cargo, but still be able to succeed in a claim under his hull policy; and can the converse happen.

Or will it necessarily be the case that when a vessel is lost with all hands in calm seas that either the vessel can be proved unseaworthy by both cargo insurer and hull insurer, so that the one can succeed in a claim against the shipowner and the other can refuse to pay under the policy, or both insurers must be unable to

establish unseaworthiness. And, even if unseaworthiness is established, is this enough.

The answer may depend on where the burdens lie, and of course this will depend on the (formulation of the) substantive law.

Consider the case of goods carried on a vessel insured for a voyage. If the vessel is lost in calm seas, the shipowner may plead one of the Hague (-Visby) Rules exception to avoid liability. The cargo owner may assert the presumption of unseaworthiness to establish the liability of the shipowner, who may in turn prove due diligence and therefore avoid liability.

Nevertheless, although successful against the cargo owner, the shipowner may be unable to claim under his insurance, for the insurer can rely on the presumption of unseaworthiness, and due diligence is not an answer to this; the presumption of unseaworthiness must be rebutted, or the insurer will not be liable

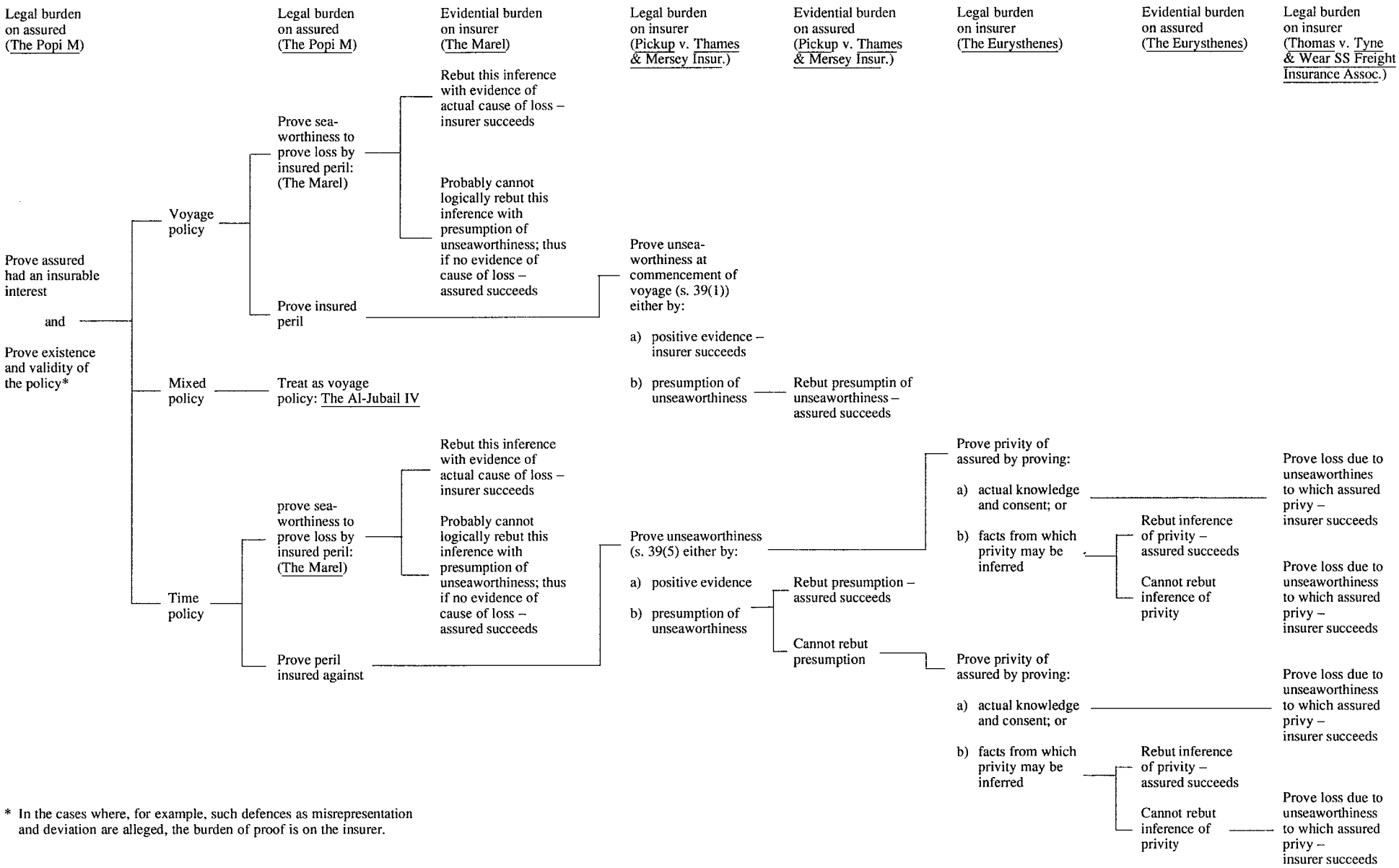
In The Antigoni [1990] 1 Lloyd's rep. 45 (Q.B., Ad. Ct.) just the converse result obtained. There, the cargo owner proved unseaworthiness due to engine breakdown and the shipowner was unable to establish that the ship's engineers had exercised due diligence to maintain the vessel in a seaworthy condition. Thus, the cargo insurers, under subrogated rights, succeeded against the shipowners.

On the other hand, the shipowners are said to have recovered for the engine breakdown and its consequences from their insurers. The policy contained an Inchmaree Clause, which would have operated to permit recovery in this case, provided the assured or his servants had exercised due diligence, which here, of course, they had not.

There are other situations possible, for example, the case where the vessel is insured under a time policy. The cargo owner might rely on the presumption of unseaworthiness but that is not enough for the insurer, who must also show privity, and therefore, in such a case, cargo insurers may succeed, but hull insurers fail.

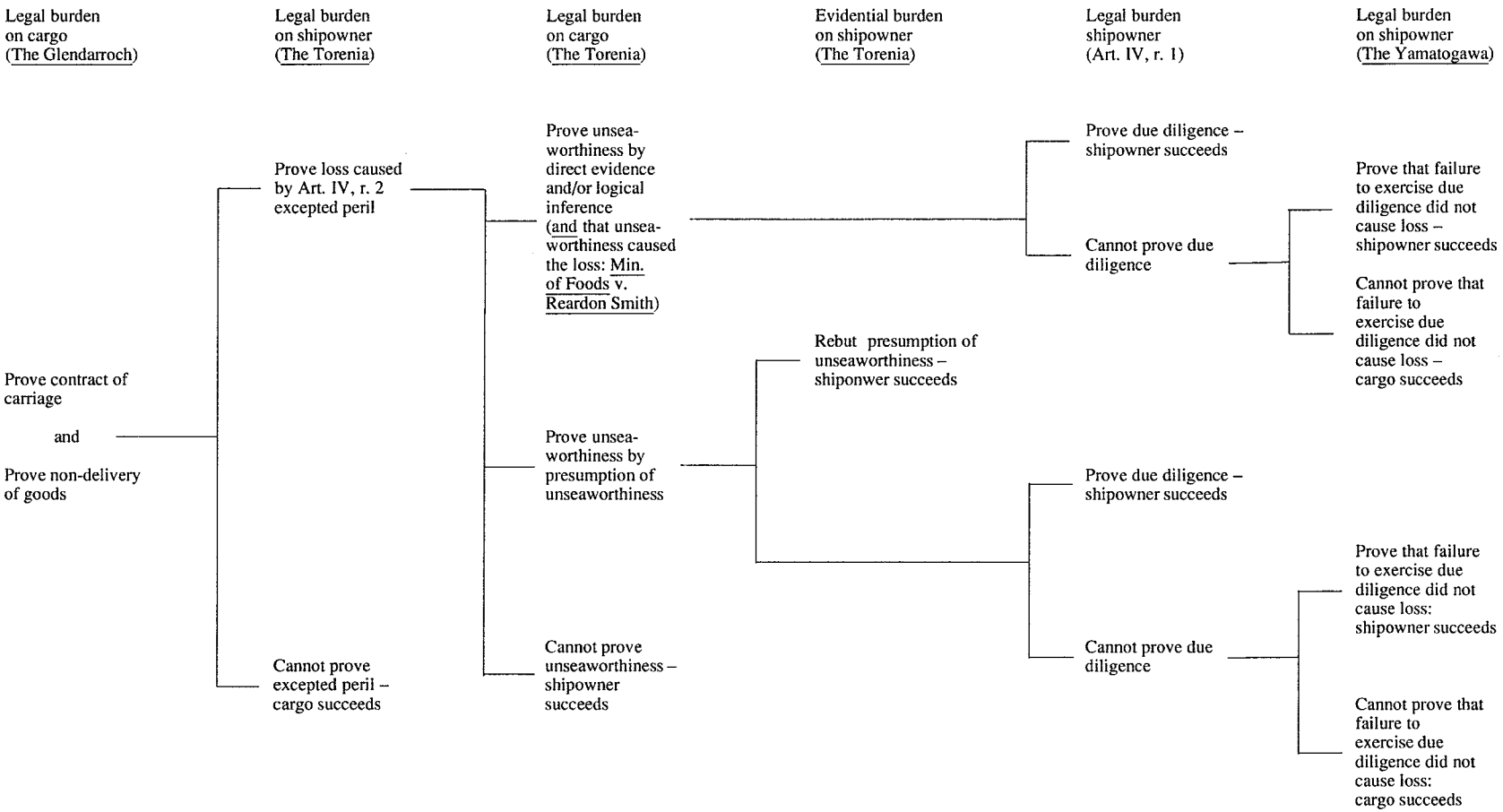
Given the number of possible permutations, it is perhaps more useful to have had the rules explained than to have been given a table of the results. It is hoped that the reader of this paper can now work out the answers on his own.

When the assured sues for indemnity under a hull policy



* In the cases where, for example, such defences as misrepresentation and deviation are alleged, the burden of proof is on the insurer.

When cargo sues for a breach of the contract of carriage



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