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SHIPPING AND ENERGY: THE ROLE OF THE LAW

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1 Introduction

Not too long ago, discussion of shipping and energy was of limited scope, being exclusively focused on the shipment of coal, the first major hydrocarbon to be used on an industrial scale.[1] The emergence of oil as dominant energy source in the twentieth century brought its own difficulties, including oil pollution following a succession of tanker incidents in the 1960s and 1970s. While newer sources of energy, such as natural gas, have since become increasingly important, coal, oil, and oil products continue to hold a vital part of the market share[2] and each generates its own share of legal difficulties, which are further explored in this Report.

2 Coal as energy and the law

The development of the ability to industrialise the processing of raw coal for use in agriculture, mining, manufacturing, lighting, and transportation was, in many respects, instrumental in driving the industrial revolution. Today, coal is primarily used in the generation of power and as fuel in the production of industrial materials.[3]

The specialised requirements of the transportation of coal, such as the emission of flammable gases and, depending on methane content, its liability to spontaneous combustion,[4] together with corrosion of the steel hull of the vessel owing to the presence of sulphur,[5] requires specialised vessels, bulk carriers, for carriage.[6] Safety concerns with bulk carriers have led to the International Maritime Solid Bulk Cargoes Code (IMSBC Code) which, pursuant to amendments to SOLAS chapter VI, is mandatory.[7] The carriage of coal is sufficiently specialised to have bred several charterparty forms: Amwelsh, Nipponcoal, Polcoalvoy,

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1 Also the basis for rudimentary cooking and, in certain climates, heating.

2 See, e.g., S Gordon, 'Shipping Market Update', Global Shipping Law Forum, 12 July 2017.

3 See Michael Tamvakis, *Commodity Trade and Finance* (2nd edn, Informa 2014) ch 5. See also Caroline Bain, *The Economist Guide to Commodities* (The Economist 2013) 125.

4 See, e.g., London Arbitration 20/86, (1986) 184 LMLN 3(3); *Virgo Steamship Co SA v Skaarup Shipping Corp (The Kapetan Georgis)* [1988] 1 Lloyd's Rep 352; *The Athanasia Comninos & Georges Chr Lemos* [1990] 1 Lloyd's Rep 277.

5 See, e.g., Philip Rogers, John Strange & Brian Studd, *Coal: Carriage by Sea* (2nd edn, LLP 1997) ch 7.

6 See also *Carefully to Carry* (UK P & I Club 2018) ch 7.

7 See Reg 1-2.

Richards Bay Coal Charterparty. Amwelsh is among the oldest of the charterparties, adopted in 1953 from the Chamber of Shipping Welsh Coal Charter of 1896. In the case of *Miguel de Larrinaga Steamship Co v DL Flack & Co*, Atkin LJ noted that the case arose

> out of the Chamber of Shipping Welsh Coal Charter of 1896, the demurrage clauses of which have proved a gold mine to the legal profession in the past and seem likely to be a source of profit to the legal profession in the future. The clauses in this or similar form have certainly been to the House of Lords once, many times before the Commercial Court, and a good many times before the Court of Appeal; and it may be that the eminent persons engaged in the industry and in shipping relating to it may think fit to take steps to make the clauses clearer than at present they are.[8]

Coal suffers from the negative image of being a 'dirty' fuel and, in that respect, it has tended increasingly to lag behind oil – and, increasingly, is also affected by the increasing demand for natural gas. Indeed, there has already been a fall-off in demand.[9]

3 Oil as energy and the law

Oil[10] rapidly caught the imagination of consumers, dethroning 'King Coal', but was also the subject of three substantial price crises in the 1970s and 1980s, deflated prices in the 1990s, a meteoric rise in the 2000s and a persistence around the US$100-per-barrel mark in the 2010s, followed by a further substantial fall.[11] More so than coal, therefore, oil is a volatile and risky commodity.[12] The carriage of oil, like coal, has spawned a whole series of major oil charterparty forms, the oldest of which is Asbatankvoy, formerly Exxonvoy 69, and itself developed from the Warshipoilvoy form.[13] All the oil majors[14] have their own forms, but it is the consequences of the wide-scale carriage of crude oil which has often dominated. As the late Lord Mustill[15] explained in *The Nagasaki Spirit*:

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8 (1925) 21 Ll L Rep 284, 288. See also *The Mozart* [1985] 1 Lloyd's Rep 239.

9 UNCTAD data reveals demand is flat: see *Review of Maritime Transport* (UNCTAD 2017) 10-11. See also *BP Statistical Review of World Energy* (66th edn, BP June 2017) 2.

10 See Tamvakis (2014) ch 2. See, further, Martin Stopford, *Maritime Economics* (3rd edn, Routledge 2009) 434.

11 Brent Crude is currently (26 March 2018) trading at US$70.36 per barrel.

12 See Stopford (1999) 237.

13 1942 (revised 1950).

14 E.g. Shell, BP.

15 See Sir Richard Aikens, 'Lord Mustill and Maritime Law' [2017] LMCLQ 349.

> Crude oil and its products have been moved around the world by sea in large quantities for many years, and the risk that cargo or fuel escaping from a distressed vessel would damage the flora and fauna of the sea and shore, and would impregnate the shoreline itself, was always present; but so long as the amount carried by a single vessel was comparatively small, such incidents as did happen were not large enough to attract widespread attention. This changed with the prodigious increase in the capacity of crude oil carriers which began some three decades ago, carrying with it the possibility of a disaster whose consequences might extend far beyond the loss of the imperilled goods and cargo. Such a disaster duly happened, at a time when public opinion was already becoming sensitive to assaults on the integrity of the natural environment. Cargo escaping from the wreck of *Torrey Canyon* off the Scillies caused widespread contamination of sea, foreshore and wild life. The resulting concern and indignation were sharpened when *Amoco Cadiz* laden with 220,000 tons of crude oil stranded on the coast of France, causing pollution on an even larger scale, in circumstances which rightly or wrongly were believed to have involved a possibly fatal delay during negotiations with the intended salvors.[16]

The public outcry that followed the *Torrey Canyon*[17] and *Amoco Cadiz*[18] incidents spawned a series of liability and compensation conventions and the creation of the Legal Committee of the IMO, which now oversees such developments.[19] The international and compensation conventions[20] cover persistent hydrocarbon mineral oil[21] and provide for compensation for parties suffering loss as a result of marine oil pollution incidents. The scheme of the CLC[22] provides for strict liability[23] channeled to shipowners, with very limited exceptions,[24] but

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16 *Semco Salvage & Marine Pte Ltd v Lancer Navigation Co Ltd (The Nagasaki Spirit)* [1997] AC 455, 459.

17 See "Liberian Board of Investigation Report on Stranding of *Torrey Canyon*" (1967) 6 ILM 480.

18 See, e.g., *The Amoco Cadiz* [1984] 2 Lloyd's Rep 304.

19 See, N Gaskell, 'Energy Cargoes: Liability and the Environment', Global Shipping Law Forum, 12 July 2017, 16. See also Måns Jacobsson, 'The International Liability and Compensation Regime for Oil Pollution from Ships – International Solutions for a Global Problem' (2007) 32 Tulane Maritime LJ 1.

20 International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC); International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (Fund); Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (2003 Fund).

21 CLC 1992, Art 1.5.

22 See, e.g., *Assuranceforeningen Gard Gjensidig v The International Oil Pollution Compensation Fund* [2014] EWHC 1394 (Comm), [2014] 2 Lloyd's Rep 219, [6].

23 Not depending on proof of fault: see, e.g., *Landcatch Ltd* v *International Oil Pollution Compensation Fund* [1999] 2 Lloyd's Rep 316 (Ct of Session) 328.

24 See Art III.

subject to limitation of liability, calculated by reference to the tonnage of the vessel.[25] Shipowners are required to have insurance in respect of this liability[26] and claimants have a right of direct action against the insurer, which can also rely on these limits of liability.[27]

After enactment of the CLC in 1969, oil cargo interests argued that shipowners' limited liability was lagging behind rising damage mitigation costs and inflation, pushing the compensation burden for major spillages onto the oil importers. On the other hand, existing CLC 1969 contracting states, particularly those with sizeable tanker interests,[28] were concerned that national courts were breaking shipowner rights to limit liability, undermining the economic viability of the industry and the much vaunted equity of application of CLC. This led to a new CLC in 1992.[29]

The Fund Convention, managed by the IOPC Funds,[30] provides a second tier of compensation for parties who suffered loss by reason of oil pollution incidents, over and above the layer of compensation provided by the CLC. The IOPC Funds are an international organisation possessing legal personality which is recognised under both international law and the law of the United Kingdom.[31] The original 1971 Fund ceased to be in force from 24 May 2002 and was wound up from 31 December 2014.[32] The 1992 Fund[33] provides compensation in respect of amounts which are irrecoverable under the CLC either because shipowners are not liable under the CLC, or because the amounts in question cannot be recovered from shipowners, or because the limit under the CLC is too little to provide adequate compensation.[34] In addition

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25 Art V. Oil pollution is excluded from the LLMC 76/96: see Art 3(b).

26 Art VII.

27 Art VII.8.

28 e.g. Greece, Korea, Liberia.

29 Ratified by states representing 97.69% of the gross tonnage of the world's merchant fleet (Status of IMO Treaties, 5 March 2018).

30 See <https://www.iopcfunds.org/>.

31 *Sindicato Unico de Pescadores del Municipio Miranda del Estado Zulia v International Oil Pollution Compensation Fund* [2015] EWHC 2476 (QB), [2016] 1 Lloyd's Rep 332, [8].

32 See, e.g., *Assuranceforeningen Gard Gjensidig v The International Oil Pollution Compensation Fund* [2014] EWHC 1394 (Comm), [2014] 2 Lloyd's Rep 219, [6].

33 Ratified by states representing 95.05% of the gross tonnage of the world's merchant fleet (Status of IMO Treaties, 5 March 2018).

34 See Art 4(1).

to the compensation payable to third parties, the Fund Convention provides for the payment to shipowners of the top slice of the CLC liability.[35]

It was assumed that the limits would be sufficient to cover a disaster but events tended to show that the agreed limits were out of date very quickly and, indeed, new disasters raised the prospect that the existing limits would not be high enough. Most notorious among these were the Maltese-registered tanker, the *Erika*,[36] which broke in two in the Bay of Biscay, 60 nautical miles off the coast of Brittany in December 1999 and spilled around 19,800 tonnes of heavy fuel oil (n°6), affecting 400km of the French coastline. Three years' later, in November 2002, a Bahamas-registered tanker, the *Prestige*,[37] leaked heavy fuel oil (n°2) some 30 kilometres off Cabo Finisterre, Spain, and then broke in two and sank off Vigo. The break-up and sinking released an estimated 63,272 tonnes of cargo, with the west coast of Galicia heavily contaminated and oil eventually affecting the north coast of Spain and France.

As a result of these incidents, the Supplementary Fund 2003 was enacted to provide a third tier of compensation over and above that available under the 1992 Fund Convention for pollution damage in the States that become parties to it. It has not, so far, secured substantial ratification by states.[38]

The above does not, however, include chemicals and other hazardous substances, which are the subject of the Hazardous and Noxious Substances Convention and Protocol,[39] but which is not currently in force.[40] Thus, until this occurs, such incidents will need to dealt with under domestic law, with limitation covered by the LLMC 1976.[41]

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35 Art 5(1).

36 See, e.g., *Commune de Mesquer v Total France SA* [2008] 2 Lloyd's Rep 672 (ECJ).

37 See, e.g., *The London Steamship Owners Mutual Insurance Association Ltd v The Kingdom of Spain (The Prestige)(No 2)* [2015] EWCA Civ 333, [2015] 2 Lloyd's Rep 33.

38 Ratified by states representing 17.39% of gross tonnage of the world's merchant fleet (Status of IMO Treaties, 5 March 2018).

39 The Hazardous and Noxious Substances Convention (HNS) 1996 and Protocol (HNS) 2010. See, Richard Shaw, 'Pollution of the Sea by Hazardous and Noxious Substances – Is a Workable International Convention on Compensation an Impossible Dream?' in Malcolm Clarke (ed), *Maritime Law Evolving* (Hart Publishing, 2013), ch 3.

40 See, particularly, <http://www.hnsconvention.org/>.

41 LLMC 1996, for those states that have ratified the Protocol of 1996 to the 1976 LLMC. See N Gaskell, 'Energy Cargoes: Liability and the Environment', Global Shipping Law Forum, 12 July 2017.

Although, as indicated, the various conventions have been widely ratified, ratification has not been uniform throughout the world and, even where it has, there remain difficult issues of jurisdiction, recognition and enforcement of judgments, and applicable law, to be resolved.[42] With oil such a valuable commodity, the hijacking and theft of oil cargoes has been problematic in some areas, such as the Gulf of Guinea.[43] Maritime crimes in the region interface with significant land-based networks which provide support for criminals. The signing of the Yaounde Code of Conduct,[44] designed to provide effective and practical measures to counter piracy and armed robbery at sea in the Gulf of Guinea, has been difficult to implement in a region where transnational organised crime, hijacking and oil theft is prevalent, and where institutions are weak and corruption is rife.

4 Bunkers and the law

Although a very small percentage of total world energy consumption, bunker[45] oil is a very important part of shipping and typically comprises the following types:

- MGO (Marine gas oil)
- MDO (Marine diesel oil)
- IFO (Intermediate fuel oil)
- MFO (Marine fuel oil)
- HFO (Heavy fuel oil)

Bunkers on vessels, other than tankers, fall outside the CLC/Fund compensation regime. Nevertheless, even small quantities of bunker fuels can cause enormous environmental damage. Thus, in 2009 the International Group of P & I Clubs reported that, in the period 2000 to 2009, there had been 595 bunker oil pollution incidents,[46] incurring costs to the Clubs, while the International Salvage Union (ISU) reports the salvage of significant quantities of

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[42] See W Anderson, 'The International Oil Pollution Compensation System and Private International Law', Global Shipping Law Forum, 12 July 2017.

[43] See, e.g., K Mbiah, 'Highjacking and oil theft in the Gulf of Guinea', Global Shipping Law Forum, 12 July 2017, 16.

[44] Revised in 2016. See <http://www.imo.org/en/OurWork/Security/WestAfrica/Documents/code_of_conduct%20signed%20from%20ECOWAS%20site.pdf>.

[45] Although originally referring to coal, the term has remained in use, although now meaning viscous liquid marine fuel oil. See Christopher Fisher & Jonathan Lux, *Bunkers: An Analysis of the Practical, Technical and Legal Issues* (3rd edn, Petrospot 2004) 275.

[46] See IMO LEG 96/6/2 28 (August 2009).

bunker oil in its annual survey reporting members' success in preventing marine pollution.[47] For this reason, the Bunkers Convention was adopted in London on 23 March 2001 and came into force on 21 November 2008.[48]

Disputes over bunkers have, however, also risen. These may be ascribed to a number of factors. The first is the rise and fall of bunker fuel prices, an important element in calculating the profitability or otherwise of a shipowners' or charterers' trade. A second consideration has been ongoing issues relating to the quality of bunkers, with a notable drop in standards in some parts of the world. A third factor, closely connected with the second, is the proliferation of bunker suppliers. In Singapore, the largest bunkering port in the world, stringent standards, covering documentation, equipment, procedures, and quality are maintained and carefully scrutinised.[49]

Problems may also arise in the case of bunkers because of the long chains between the physical supplier (seller) and the shipowner or charterer (buyer) at the other end, with a proliferation of traders and brokers in the middle. These difficulties were exposed in the OW Bunkers debacle. In March 2014, OW, at the time one of the largest bunker traders, went public with an IPO on the Nasdaq OMX Copenhagen Exchange; by early November that year its shares were suspended from trading and its management declared a loss of US$270m. The company filed for bankruptcy. The dramatic collapse of the company led to litigation all around the world, including Singapore.[50] Proceedings also took place in the UK, in the so-called *Res Cogitans* case. Initially heard in the Commercial Court,[51] the case was escalated to

[47] In 2016, 89, 492 tons of bunker fuel were salved (compared with 66,247 tons in 2015): see *International Salvage Union: Annual Review 2016*, 11.

[48] Ratified by states representing 92.62% of the gross tonnage of the world's merchant fleet (Status of IMO Treaties, 5 March 2018).

[49] See <https://www.mpa.gov.sg/web/portal/home/port-of-singapore/services/bunkering/bunkering-standards>.

[50] See, e.g., *Precious Shipping Public Co Ltd and others v OW Bunker Far East (Singapore) Pte Ltd* [2015] SGHC 187, [2015] 4 SLR 1229.

[51] *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)* [2015] EWHC 2022 (Comm), [2015] 2 Lloyd's Rep 563.

the Court of Appeal,[52] and then, by way of a further expedited appeal, to the Supreme Court of the United Kingdom.[53] As Lord Mance JSC explained

> The essential problem arises from the insolvency of the OW Bunker Group and the concerns of vessel owners that they may be exposed to paying twice over, once to their immediate bunker supply group now insolvent, and again to the ultimate source of the bunkers who may claim rights under a reservation of title or maritime lien. The concerns stem from what are understood to be fairly typical conditions on which bunkers are supplied worldwide.[54]

The contract terms provided for payment 60 days after delivery and included a retention of title clause under which property was not to pass to the vessel's owners until the bunkers had been paid for in full. The appeal raised the question whether the contract was a contract for the sale of goods, and therefore subject to the Sale of Goods Act 1979,[55] and if not, whether it was an implied term of the contract that OW would be able to pass title in the bunkers to them at the time when they were delivered or consumed. The judge dismissed the appeal and held that the contract was not one for the sale of goods. Further, as a matter of necessary implication, the contract imposed on OW an obligation to ensure that the permission which it gave the owners to use the bunkers immediately upon delivery was or became binding on whichever entity in the supply chain was or would become the owner of the goods. The Court of Appeal dismissed an appeal.[56]

The owners appeal to the Supreme Court was on the basis that the contract was one for the sale of goods or, alternatively, that it contained an implied term that OW would make timeous payment to its supplier. The Supreme Court held that OW's contract with the owners was a sui generis transaction, not a contract of sale. It offered a feature quite different from a contract of sale of goods, namely the liberty to consume all or any part of the bunkers supplied without acquiring property in them or having paid for them.

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52 [2015] EWCA Civ 1058, [2016] 1 Lloyd's Rep 228.

53 [2016] UKSC 23, [2016] 1 Lloyd's Rep 589; Jesse Ji, 'The imbroglio between delivery, resale, consumption and retention of title under bunker credit sales' (2016) 22 JIML 268.

54 At [2].

55 c 54. See also the Sale of Goods Act 1979, cap 393 (Singapore).

56 [2015] EWCA Civ 1058, [2016] 1 Lloyd's Rep 228.

This decision has caused ripples throughout the industry and among commercial lawyers. In many respects, the outcome was disappointing[57] and has had some impact on bunkering contracts, increasing transaction costs, making the nature of such contracts uncertain. It has, moreover, also diminished the importance of the Sale of Goods Act 1979.[58] Thus, s 2(1) of the Act, which provides a definition of the contract of sale, has usually been interpreted with a degree of discretion, and it is submitted ought to have been interpreted as a contract of sale.

Following the Court of Appeal decision,[59] BIMCO recommended to purchasers of marine fuels that they incorporate into their bunker supply agreements the words 'The United Kingdom Sale of Goods Act shall apply to this Contract'. The BIMCO Terms 2015 (Standard Bunker Contract) so provides[60] but a team of key stakeholders including owners, traders, physical suppliers, P&I Club and legal representatives, is looking at a revision of this contract and studying a range of problems arising out of the OW Bunker bankruptcy, including the owners' risk of double payment for bunkers.

5 Newer sources of energy and the law

Newer sources of energy are now focused on natural gas,[61] a substantial growth area because of pressure to develop clean energy sources and also to minimise greenhouse gases in shipping.[62] The largest consumers of gas today are in the electricity-generating industry,[63] followed by buildings and industry.[64]

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[57] Although cf. James Kennedy, 'Bunkering Contracts: Commentary on Djakhongir Saidov, "Sales Law Post-*Res Cogitans*"', Global Shipping Law Forum, 12 July 2017.

[58] See, e.g., D Saidov, 'Bunkering contracts – Sales Law Post *Res Cogitans*', Global Shipping Law Forum, 12 July 2017, 16.

[59] [2015] EWCA Civ 1058, [2016] 1 Lloyd's Rep 228; Andrew Tettenborn, 'Of bunkers and retention of title: When is a sale not a sale?' [2016] LCMLQ 24.

[60] See cl 25.

[61] For information on current reserves, see also *BP Statistical Review of World Energy* (66th edn, BP June 2017) 26. See, further, Tamvakis (2014) ch 4; Stopford (2009) 478.

[62] As to which, see E Hughes, 'Recent developments at IMO in respect of reduction of GHG emissions from ships' Global Shipping Law Forum, 13 July 2017; RJ Heffron, 'Powering Ships in the Global Warming Era: should the law incentivise ecofriendly choices? How?' Global Shipping Law Forum, 13 July 2017.

[63] e.g., Singapore, where more than 90% of Singapore's electricity is generated using imported natural gas: see <https://www.slng.com.sg/website/content.aspx?wpi=Importance+of+LNG+to+Singapore&mmi=27&smi=117>.

[64] Bain (2013) 138.

Liquid Petroleum Gas (LPG),[65] the generic name for propane, ethane, and butane, all of which are produced from crude oil, natural gas fields and oil refining, is important. There are, however, specialised requirements for the carriage of LPG,[66] which must be transported by sea under pressure at ambient temperature, or fully refrigerated at temperatures ranging from minus 30°C and minus 48°C, or semi-refrigerated under a combination of pressure and reduced temperature. Liquid Natural Gas (LNG),[67] has become even more important than LPG and is now the third most important energy source transported by sea after oil and coal. LNG is typically comprised of 70-90 per cent methane and the remainder natural ethane, propane and butane.[68] The process of liquefying natural gas reduces it in volume by around 600 per cent, typically when it is also cooled to minus 162°C.

As might be expected, the available standard forms have tended to map the major suppliers. Leading standard forms include Gasvoy and Gastime[69] and the GIIGNL[70] voyage form, LNGVOY (2012), and Shell LNGTime 2 (2016). Such forms are usually ignored in standard texts on charterparties,[71] possibly because they have not (yet) generated a body of case law.[72]

In an economic downturn, there may be particular difficulties with re-negotiating such charterparties,[73] particularly when either party commences insolvency proceedings. Prior to insolvency, there is a risk that attempting to re-negotiate will amount to a repudiation of the contract, in which case the innocent party may seek damages or insist on maintaining the charterparty. There is also an issue as to whether re-negotiation of the charterparty is an act of mitigation on the part of an owner.[74] Following insolvency, there is always the possibility that the liquidator might disclaim the charterparty, as onerous property.[75] Other difficulties

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65 See Packard (2009) 231.
66 See also *Carefully to Carry* (UK P & I Club 2018) ch 22.
67 Ibid, 229. See also Stopford (2009) 483; *Carefully to Carry* (UK P & I Club 2018) ch 23.
68 This also falls within IMDG Code, Class 2.1.
69 These are both BIMCO approved forms.
70 i.e. the International Group of Liquified Natural Gas Importers: <http://www.giignl.org/>.
71 But cf Lindsey East, 'Drafting of LNG charters' (2009) 23 ANZ Maritime LJ 19.
72 Although see *American Overseas Marine Corp v Golar Commodities Ltd (The LNG Gemini)* [2014] EWHC 1347 (Comm), [2014] 2 Lloyd's Rep 113.
73 See J Chuah, 'Renegotiation of energy charters in economically challenging times', Global Shipping Law Forum, 12 July 2017.
74 See now *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain (The New Flamenco)* [2017] UKSC 43, [2017] 1 WLR 2581.
75 Insolvency Act 1986, c 45, s 178.

may include the fact that the liquidators do not know anything at all about shipping and are intent on grabbing any valuable assets, wherever they might be.[76]

Another recent important area of development is floating LNG,[77] 'FLNG', which makes the production, liquefaction and storage of natural gas possible at sea, with LNG transferred directly from the floating facility to specific carriers, for convenient shipping to countries around in the world.[78] This offers a cost effective solution to the development of stranded fields, with the ability to relocate the vessel to other fields once the original field is depleted, reducing decommissioning costs as well as the relative cost of getting new fields online. The legal ramifications of such developments are still being worked out, notably whether such 'vessels' are ships or vessels under the principal international maritime conventions[79] and also under domestic law.[80] The UK Merchant Shipping Act 1995[81] provides that a ship 'includes every description of vessel used in navigation',[82] while a more elaborate Singapore equivalent[83] provides that

> 'ship' means any kind of vessel used in navigation by water, however propelled or moved and includes — (a) a barge, lighter or other floating vessel; (b) an air-cushion vehicle, or other similar craft, used wholly or primarily in navigation by water; and (c) an off-shore industry mobile unit …[84]

A further aspect of the law still to be tested in the context of FLNG is the application of core shipping standards, such as seaworthiness, to such vessels.[85] In the carriage of goods by sea

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[76] See G Lambrou, 'Commentary on "Renegotiation of energy charters in economically challenging times"', Global Shipping Law Forum, 12 July 2017.

[77] T Hewitt & C Ryan, 'What's different about floating LNG – A legal and commercial perspective' (2010) 28 J of Energy and Natural Resources Law 503.

[78] See <https://www.shell.com/energy-and-innovation/natural-gas/floating-lng.html> (Shell); <https://www.petronasofficial.com/floating-lng/> (Petronas).

[79] Not, for example, under the CLC 1992, where a ship is 'any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted of the carriage of oil in bulk as cargo …' (Art I.1). Under the Bunkers Convention, a ship is 'any seagoing vessel and seaborne craft, of any type whatsoever' (Art 1(1)).

[80] See Simon Rainey QC, 'What is a "ship" under the 1952 Arrest Convention?' [2013] LMCLQ 50, 51. See also Alexandros Ntovas, 'The advent of FLNG facilities, and the ensuing question over their regulatory status in law', Global Shipping Law Forum, 13 July 2017.

[81] c 21.

[82] s 313(1). See *The Environment Agency v Gibbs* [2016] EWHC 843 (Admin); [2016] 2 Lloyd's Rep 69, [63]. A mobile offshore drilling rig has been held to be a ship: see *Global Marine Drilling Company Ltd v Triton Holdings Ltd (The Sovereign Explorer) (No 1)* (Court of Session, 23 November 1999).

[83] Merchant Shipping Act 1995 (rev ed 1996), cap 179.

[84] s 2(1).

[85] See T Nikaki, 'What does "seaworthiness" mean for FLNGs?', Global Shipping Law Forum, 13 July 2017.

the requirement to provide a seaworthy vessel[86] attaches at the commencement of the voyage[87] and, in some cases, there can be a continuing obligation to maintain the vessel in a seaworthy condition.[88] It is arguable whether it is appropriate to apply similar standards to FLNG.

6 Switch bills of lading and energy contracts

Although there is sometimes talk of the imminent demise of paper bills of lading in favour of electronic equivalents or blockchain, the wholesale replacement of paper bills of lading is still something of a pipedream and here to stay, at least for the time being, especially given the traditional reluctance of commercial parties to replace well-known and understood practices.[89] As explained by Lord Steyn in *The Rafaela S*:

> [The bill of lading] operates as: (a) a receipt by the carrier acknowledging the shipment of the goods on a particular vessel for carriage to a particular destination; (b) a memorandum of the terms of the contract of carriage, which will usually have been concluded before the signing of the document; (c) a document of title to the goods which enables the consignee to take delivery of the goods at their destination or to dispose of them by the indorsement and delivery of the bill of lading.[90]

No less in the energy trades than other trades, shipowners are sometimes placed under commercial pressure by one or more parties to issue a replacement or additional set of bills of lading, such being known as 'switch'[91] bills of lading.[92]

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[86] For detailed consideration in the context of charterparties, see Stephen Girvin, 'The Obligation of Seaworthiness: Shipowner and Charterer', NUS Centre for Maritime Law Working Paper 17/11, <https://law.nus.edu.sg/cml/wps.html>.

[87] '… before and at the beginning of the voyage': Hague (and Hague-Visby) Rules, Art III, r 1.

[88] Particularly time charterparties. But cf also the Rotterdam Rules, Art 14.

[89] See, e.g., the practice of issuing bills of lading in sets: see *Glyn, Mills & Co v East & West India Dock Co* (1882) 7 App Cas 591, 605; *Sanders v Maclean* (1883) 11 QBD 327, 342-343.

[90] *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 AC 423, [38].

[91] Also known as 'split' or 'global' bills of lading. See M Goldby, "Bills of Lading and Energy Cargoes – Managing the Risks of Switch Bills of Lading', Global Shipping Law Forum, 12 July 2017.

[92] See Toh Kian Sing, 'Of straight and switch bills of lading' [1996] LMCLQ 416.

This is a practice fraught with danger,[93] as was revealed by the case of *Hubbersty v Ward*,[94] where a shipper endorsed the original two sets, representing two parcels of cargo, to one party. The shipper, by fraud, induced the master of the ship to issue a second set of bills of lading, representing the sum of both parcels, to another party to whom the goods were delivered. The original party sued the shipowner for misdelivery and Pollock CB held that 'when a captain has signed bills of lading for a cargo that is actually on board his vessel, his power is exhausted; he has no right or power, by signing other bills of lading for goods that are not on board, to charge his owner'.[95] It therefore goes too far to say, as Selvam J did, in *Samsung Corp v Devon Industries Sdn Bhd* that:

> The practice of cutting and releasing 'global bills of lading' is perfectly in order provided the authentic bills of lading issued to the real shippers, the true owners of the cargo at that stage, have been accomplished, that is that they have been received lawfully by the defendants duly indorsed and surrendered to the shipowners or their agents. In other words shipowners may issue 'global bills of lading' in exchange for the first set of bills of lading issued to the shippers.[96]

In modern trading, switch bills may be requested for the following reasons:

- splitting or merging goods[97]
- changing the shipper
- changing the consignee
- changing the notify party
- changing the port of origin (as the seller does not want the buyer to know the origin of the goods)[98]
- changing the cargo description

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93 See *Noble Resources Ltd v Cavalier Shipping Corporation (The Atlas)* [1996] 1 Lloyd's Rep 642, 644.

94 (1853) 8 Exch Rep 330. See also *Samsung Corp v Devon Industries Sdn Bhd* [1995] SGHC 246, [1995] 3 SLR(R) 603.

95 At 334.

96 [1995] SGHC 246, [1995] 3 SLR(R) 603, [10].

97 See, e.g., *BNP Paribas v Pacific Carriers Ltd* [2002] NSWCA 379, [14].

98 See, e.g., *Noble Resources Ltd v Cavalier Shipping Corporation (The Atlas)* [1996] 1 Lloyd's Rep 642.

Difficulties may well arise where the reason for the request to issue switch bills is so as to avoid export duties or embargoes. In such circumstances, the bills of lading may be unenforceable on the grounds of policy as the parties have conspired to break customs law.[99]

A question which often arises is who may request such a switch. Typically, this may be the seller (shipper) of the goods – particularly where it is desired to protect confidential information or, as occurred in *AP Moller-Maersk A/S v Sonaec Villas Cen Sad Fadoul*,[100] where the seller had not been paid by the buyer. Its rights therefore included a right to order the goods to be delivered otherwise than to the named consignee and to agree to the issue of a substitute bill, as had occurred.[101] Such rights of suit[102] acquired by the original consignees were lost when the original bills of lading were cancelled and replaced.[103] This highlights an additional point, which is that the 'holder' of the bill of lading, who has rights under legislation,[104] should also consent to any switching.

The next issue that can arise concerns the terms on which the carrier should agree to issue switch bills. It is of paramount importance that it should require the return to it of the full original set of bills of lading and their cancellation. Failure to do so will mean that the original bills of lading will still be in circulation and, as documents of title, could be used to obtain delivery of the cargo.[105] In *Elder Dempster Lines v Zaki Ishag (The Lycaon),*[106] a set of received for shipment bills of lading named a particular party as consignee but the bills of lading were pledged to a bank which insisted that the consignee should be named as notify party only. When the bank demanded shipped bills of lading these were issued to the shipper. The court held that, in the circumstances, it was irresponsible to issue the shipped bills of lading without a very good explanation as to what had happened to the original bills of lading. No such

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99 When trade between mainland China and other countries was prohibited, it was common for Hong Kong to be used as the port and to issue 'customs' switch bills. As the only fraud was against the customs authorities (who actually turned a blind eye), not against the parties, such bills of lading were enforceable.

100 [2010] EWHC 355 (Comm), [2011] 1 Lloyd's Rep 1.

101 At [52].

102 Carriage of Goods by Sea Act 1992, c 50.

103 [2010] EWHC 355 (Comm), [2011] 1 Lloyd's Rep 1, [41].

104 i.e. the Carriage of Goods by Sea Act 1992, c 50, s 2(1) (and see the definition of holder in s 5(2)).

105 Cf, e.g., *Islamic Republic of Iran Shipping Lines v Phiniqia International Shipping LLC* [2014] HKEC 1205.

106 [1983] 2 Lloyd's Rep 548.

explanation had, in fact, been forthcoming; moreover, the explanation as to why the second set of bills of lading were urgently required were thin and unconvincing.[107]

When switch bills of lading are issued, there can be difficulty in ascertaining which date the new bills of lading should contain. In *Guaranty Trust of New York v Van den Berghs Ltd*,[108] Scrutton LJ held that the new bills of lading should expressly state two dates, the actual date of loading and the actual date of issue; merely stating the original date of shipment would be a 'deliberate untruth'.[109] The date can also have ramifications for the invoice under the sale contract[110] and under any financing arrangements pursuant to the UCP 600, where the port of loading and discharge must also be stated in the credit.[111]

If the place of issue in the switch bills of lading is different to those in the original bills of lading, this can also have ramifications for the applicable legal regime, particularly if the original bills of lading were issued in a state in which the Hague-Visby Rules are mandatorily applicable.[112] Similar difficulties can occur, if the place of discharge is different, such as in a jurisdiction that applies the Hamburg Rules,[113] which are mandatorily applicable to inbound cargoes.[114]

Other difficulties can arise where charterparties are involved. Thus, the charterparty may specify that the charterers have the right to issue switch bills of lading:

> In case the destination … in the initial set of bills of lading would be different to the actual destination ... charterers … to have the right … to issue … new set of bills of lading under the following formal conditions … (d) new sets of bills of lading to be faxed to owners for their approval authority.[115]

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[107] At 552.
[108] (1925) 22 Ll L Rep 447.
[109] At 455.
[110] Such being mandatory in most c.i.f. sales (see, e.g., GAFTA 10, cl 11(b)) and f.o.b. sales (See FOSFA 53, cl 14).
[111] UCP 600, Art 20(a)(iii).
[112] i.e. pursuant to Art X.
[113] See Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011) 846.
[114] See Art 2(1)(b).
[115] *Ascot Commodities NV v Northern Pacific Shipping (The Irini A)(No 2)* [1999] 1 Lloyd's Rep 189.

In such a case, it is important that the switch bills of lading comply with the terms of the clause.[116] In the absence of such a clause, however, the shipowner cannot be required to accept such instructions,[117] although it is that such would be within the scope of any time charterparty 'employment' clause and hence within an express / implied indemnity provision.

In conclusion, when it comes to switch bills of lading, there is a thin line to tread. Even requiring a letter of indemnity (LOI) may not assist the shipowner.[118] Although usually enforceable,[119] where fraud is proved the letter of indemnity may be unenforceable.[120]

7 Conclusion

Energy law, in all its dimensions, is an increasingly important aspect of shipping and maritime law. As the above discussion demonstrates, the arrival of newer sources of energy has generated a number of legal difficulties. Some of these issues, notably the response to pollution from oil and bunkers, have been addressed by international regulation, led by the IMO. Other difficulties have dictated a response at the regional level. However, regulatory issues are not the mainstay of cases in the courts; as the above discussion shows, commercial maritime law issues have continued to feature in most common law jurisdictions, most notably (though not exclusively) following the OW Bunkers debacle. There is every reason to expect that this will continue in the future.

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[116] *Islamic Republic of Iran Shipping Lines v Phiniqia International Shipping LLC* [2014] HKCFI 1280.

[117] See *Mendala III Transport v Total Transport Corp (The Wilomi Tanana)* [1993] 2 Lloyd's Rep 41.

[118] For an example, see <www.oocl.com/singapore/eng/localinformation/eforms/.../LOI_for_switch_bl.doc>.

[119] *Miskin Manor Shipping Co Ltd v Herbert Clarke & Sons (Erith) Ltd* (1927) 29 Ll L Rep 282, 285 (Mackinnon J).

[120] See *Brown, Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 QB 621; John Weale, 'Clean bills of lading and letters of indemnity' (2017) 23 JIML 338.