Offshore Contracts 1

**Chairman:** Rhys Clift – Hill Dickinson LLP

**Panellists:**
Sean O’Sullivan – 4 Pump Court
Elizabeth Blackburn QC – Stone Chambers
Robert Gay – Hill Dickinson LLP
Peter McLauchlan - Gardere Wynne Sewell LLP (Houston)

**Wednesday 13th January 2010**

**Venue:** Hill Dickinson, Irongate House, Duke’s Place,
London, EC3A 7LP
Introduction
Charterparties and contracts in the offshore industry often have liability provisions which are quite different from those usual in other maritime contracts and charterparties. This session will be examining the characteristic offshore regime by which each party agrees to bear liability for its own personnel and property, and it is also agreed that there will be no claims in respect of losses other than for personnel and property. Three speakers will consider how far this regime is effective under English law, and the fourth will comment from the point of view of US law.

The Centre will also be presenting a session in March on the insurance of offshore projects and liabilities arising from offshore operations. The issues at this first session will include:

- 'knock for knock' provisions, including those in Supplytime and Towcon/Towhire
- excluding 'consequential' damages
- 'gross negligence', complete non-performance, and other ways parties may try to escape from the liability regime

PART A
Exclusion Clauses in Offshore Contracts
An Outline of the Knock-for-Knock scheme

Sean O’Sullivan

PART B
Allocation of Risk and Exclusions in Offshore Marine Construction Contracts

Elizabeth Blackburn QC

PART C
The exclusion of Consequential Damages
&
“Any Consequential Damages Whatsoever”?

Robert Gay

PART D
Offshore Contracts

Peter McLauchlan

PART E
Appendices

PART F
Curricula Vitae
PART A

Exclusion Clauses in Offshore Contracts
An Outline of the Knock-for-Knock scheme

Sean O’Sullivan
Introduction

This talk explains how risks are allocated in two agreements which are commonly used in an offshore context.

- BIMCO “Towcon” International Ocean Towage agreement esp. its most recent version, TOWCON 2008.
- Both seek to allocate liabilities on a “knock-for-knock” basis.
Knock-for-Knock Schemes in General

- It is standard practice in the offshore industry to agree liabilities on a “knock-for-knock” basis.
- Knock-for-knock schemes are designed so that each party is responsible for injury/damage occurring to its own personnel and property.
- This is usually achieved by a combination of:
  - Exclusion clauses
  - Indemnity clauses
- The understanding underlying the allocation is that insurance will be obtained by each party to cover the losses that that party might suffer.
- This is supposed to avoid legal disputes to determine which party was responsible for a loss causing event.

The TOWCON and TOWCON 2008 (Part 1 of 4)

- Cross indemnity for liability arising out of personal injury and death:
  - TOWCON clause 18(1) contains indemnities whereby each party indemnifies the other “in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the towage or other service hereunder” to its own personnel.
- The Tugowner’s personnel are: The Master, Tug crew and any other servant or agent of the Tugowner; members of the Riding Crew provided by the Tugowner and any person whom the Tugowner provides onboard the Tow; and any other person onboard the Tug who is not a servant/agent of the Hirer or otherwise onboard at the Hirer’s request.
- The Hirer’s personnel are: The Master, the crew of the Tow and any other servant or agent of the Hirer; and any other person onboard the Tow for whatever purpose, except the Riding Crew or any other person whom the Tugowner provides on board the Tow.
- TOWCON 2008 Clause 25(a) adds new wording to clarify that the period of liability begins from the arrival of the tug at the pilot station or customary waiting place and ends when disconnection occurs at the place of destination.
Loss of or damage to (or caused to 3rd parties by) the vessels: TOWCON Clause 18(2) provides that the Tugowner and Hirer each agree to bear certain types of loss, damage and liability in full and without any right of recourse against the other whether or not due to “breach of contract, negligence or any other fault.” The losses which each party must bear are:

- Loss or damage to its vessel or property on board her, or loss or damages suffered in consequence thereof.
- Loss or damage done to third parties or their property by reason of “contact with [its vessel]” or obstruction created by the presence of [its vessel]” or losses consequent thereon.
- All liability in respect of wreck removal and pollution prevention relating to its vessel.

TOWCON 2008 Clause 25(b) makes two changes to the wording:

- Clause 25(b)(i)(1), together with clause 16(c) leaves the Hirer liable for loss or damage to the “towing gear and accessories”.
- Clause 25(b)(ii) clarifies that the Hirer shall be liable for the specified types of loss even where due “to the unseaworthiness of the Tug.”

Other financial losses: TOWCON Clause 18(3) also excludes liability “for loss of profit, loss of use, loss production or any other indirect or consequential damage for any reason whatsoever.” The exclusion does not apply to the breach of four specified clauses:

- Clause 11: the obligation on the tow and hirer to arrange for necessary permits and certification.
- Clause 12: the obligation upon the hirer to ensure the tow-worthiness of the tow.
- Clause 13: the obligation upon the tug owner to ensure the seaworthiness of the tug.
- Clause 16: the regime of rights and responsibilities in the event of the wrongful cancellation of the contract or the withdrawal of either tug or tow.

This clause and its TOWCON 2008 re-write is being addressed in detail by Mr. Gay.
The TOWCON and TOWCON 2008 (Part 4 of 4)

- Limits of the TOWCON Exclusion Clause? In “A Turtle” [2009] 1 Lloyd’s Rep 177, Mr Justice Teare considered TOWCON clause 18(2).

Teare J held that the defendant tugowner breached the contract by failing to provide a seaworthy tug and failing to exercise best endeavours to replenish the bunkers during the performance of the voyage once it became obvious the tug would run out of fuel. As a result, the tug ran out of fuel in the South Atlantic, the towage connection was released, and the tow lost.

Teare J said that read literally clause 18 was capable of applying to any breach, no matter how extreme. But in the context of the TOWCON as a whole, it applied only “so long as the tug owners are actually performing their obligations under the TOWCON, albeit not to the required standard.”

It remains to be seen in what circumstances tugowners would be said to have ceased “actually performing their obligations.” Short of releasing the tow and heading off to do something more lucrative, what conduct would suffice? What about purporting to perform using a tug which was obviously not up to the task? It has been suggested that the insurance concept of “wilful misconduct” may represent a more meaningful test.

The SUPPLYTIME 89 and SUPPLYTIME 2005 (Part 1 of 4)

- SUPPLYTIME 89 cl 12(a) excludes Charterer’s liability “arising out of or in any way connected with the performance” of the charterparty for loss of or damage to property of the Owner or their contractor’s or sub-contractors and for the personal injury or death of the Owner’s employees, contractors or subcontractors. There is no exclusion of liability in relation to third parties.

- SUPPLYTIME 89 cl 12(b) excludes Owner’s liability for loss of, damage to, or liability arising out of anything towed by the Vessel, cargo laden on the Vessel or her tow, property of the Charterers or their contractors or subcontractors and for the personal injury or death of the Charterer’s employees, contractors or subcontractors or anyone onboard anything towed by the Vessel.

- Each party undertakes to “indemnify, protect, defend and hold harmless the [other] from any and against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising” in connection with such losses.

- SUPPLYTIME 2005 clause 14(b) makes no substantive change to the above clauses but redrafts them by references to the “Owners’ Group” and “Charterer’ Group”, which are defined in clause 14(a).
The SUPPLYTIME 89 and SUPPLYTIME 2005 (Part 2 of 4)

- **Consequential Damages:** SUPPLYTIME 89 clause 12(c) states "Neither party shall be liable to the other for, and each party agrees to protect, defend and indemnify the other against, any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Charter Party, including, but not limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance."

- SUPPLYTIME 2005 cl.14(c) redrafts clause 12(c) without substantive change. Again, this will be addressed in more detail by Mr Gay.

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The SUPPLYTIME 89 and SUPPLYTIME 2005 (Part 3 of 4)

- **Hazardous and noxious substances:** SUPPLYTIME 89 clause 12(g) renders charterers liable and requires them to indemnify owners in respect of any losses, damages or liabilities incurred by owners or any third parties in respect of loss, damage, death, injury, pollution or otherwise arising directly or indirectly from the carriage on the vessel of hazardous or noxious substances at the charterers’ request.

- SUPPLYTIME 2005 cl14(f) redrafts this clause without substantive alteration.

- **Pollution:** SUPPLYTIME 89 clause 13(a) makes the owners liable for pollution due to the act or omission of the owners or their personnel which causes or allows a discharge or leak from the vessel, unless the discharge or leak emanates from cargo on or in the vessel or the pollution is covered by the provision of clause 12(g), i.e. results from the carriage of hazardous or noxious substances at the charterers’ request.

- **Clause 13(b) makes the charterers liable and requires them to indemnify the owners in respect of any other actual or potential pollution damage, even "where caused wholly or partly by the act, neglect or default of the Owners.""
The SUPPLYTIME 89 and SUPPLYTIME 2005 (Part 4 of 4)

- **Insurance:** SUPPLYTIME 89 clause 14(a) requires the owners to procure and maintain in effect for the duration of the charterparty with reputable insurers the insurances set out in Annex B, namely marine hull insurance, marine liability insurance, general third party liability insurance, workmen’s compensation and employer’s liability insurance for employees, comprehensive general automobile liability insurance, and such other insurance as may be agreed. The charterers must be named as co-insured upon request. Owners must upon request cause insurers to waive subrogation rights against charterers.

- **Clause 14(b)** requires owners upon request to furnish charterers with certificates of insurance sufficient for charterers to verify that owners have complied with the insurance requirements.

- **Clause 14(c)** enables charterers to purchase similar insurance themselves and to deduct the cost from any payment due to the owners, if owners fail to comply with their insurance requirements.

- **SUPPLYTIME 2005** makes no substantial amendment to the above scheme.

Conclusions

- The knock-for-knock schemes in the TOWCON and SUPPLYTIME provide what has been called a "crude but workable allocation of risk and responsibility" between the parties. (per Morison J in Smit International (Deutschland) GmbH v Josef Mobius GmbH [2001] CLC 1545).

- The combined effect of the exclusion and indemnity clauses (and/or mutual insurance obligations) is intended to create something very close to a no fault allocation of risk between the parties. Neither party (or its insurer) is able to make a claim against the other party (or its insurer), save in very limited circumstances.

- It is understood that the various risks associated with these offshore projects will then be covered by insurance.

Sean O’Sullivan
4 Pump Court
Exclusion Clauses in Offshore Contracts
An Outline of the Knock-for-Knock Scheme
January 2010

The TOWCON and SUPPLYTIME Exclusion Clauses

Sean O’Sullivan
4 Pump Court

Clause 18 of the TOWCON

18. Liabilities

1.(a) The Tugowner will indemnify the Hirer in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the towage or other service hereunder to any of the following persons:

   (i) The Master and members of the crew of the Tug and any other servant or agent of the Tugowner;

   (ii) The members of the Riding Crew provided by the Tugowner or any other person whom the Tugowner provides on board the Tow;

   (iii) Any other person on board the Tug who is not a servant or agent of the Hirer or otherwise on board on behalf of or at the request of the Hirer.

(b) The Hirer will indemnify the Tugowner in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the towage or other service hereunder to any of the following persons:

   (i) The Master and members of the crew of the Tow and any other servant or agent of the Hirer;

   (ii) Any other person on board the Tow for whatever purpose except the members of the Riding Crew or any other persons whom the Tugowner provides on board the Tow pursuant to their obligations under this Agreement.

2.(a) The following shall be for the sole account of the Tugowner without any recourse to the Hirer, his servants, or agents, whether or not the same is due to breach of contract, negligence or any other fault on the part of the Hirer, his servants or agents:

   (i) Loss or damage of whatsoever nature, howsoever caused to or sustained by the Tug or any property on board the Tug.

   (ii) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tug or obstruction created by the presence of the Tug.

   (iii) Loss or damage of whatsoever nature suffered by the Tugowner or by third parties in consequence of the loss or damage referred to in (i) and (ii) above.

   (iv) Any liability in respect of wreck removal or in respect of the expense of moving
or lighting or buoying the Tug or in respect of preventing or abating pollution originating from the Tug.

The Tugowner will indemnify the Hirer in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage. The Tugowner shall not in any circumstances be liable for any loss or damage suffered by the Hirer or caused to or sustained by the Tow in consequence of loss or damage howsoever caused to or sustained by the Tug or any property on board the Tug.

(b) The following shall be for the sole account of the Hirer without any recourse to the Tugowner, his servants or agents, whether or not the same is due to breach of contract, negligence or any fault on the part of the Tugowner, his servants or agents:

(i) Loss or damage of whatsoever nature, howsoever caused or sustained by the Tow.

(ii) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tow or obstruction created by the presence of the Tow.

(iii) Loss or damage of whatsoever nature suffered by the Hirer or by third parties in consequence of the loss or damage referred to in (i) and (ii) above.

(iv) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Tow or in respect of preventing or abating pollution originating from the Tow.

The Tugowner will indemnify the Tugowner in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage but the Hirer shall not in any circumstances be liable for any loss or damage suffered by the Tugowner or caused to or sustained by the Tug in consequence of loss or damage, howsoever caused to or sustained by the Tow.

3. Save for the provisions of Clauses 11, 12, 13 and 16 neither the Tugowner nor the Hirer shall be liable to the other party for loss of profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever.

4. Notwithstanding any provisions of this Agreement to the contrary, the Tugowner shall have the benefit of all limitations of, and exemptions from, liability accorded to the Owners or Chartered Owners of Vessels by any applicable statute or rule of law for the time being in force and the same benefits are to apply regardless of the form of signatures given to this Agreement.
Clause 25 of the TOWCON 2008

25. Liability and Indemnity

(a)

(i) The Tugowner will indemnify the Hirer in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death of any of the following persons, occurring during the towage or other service hereunder, from arrival of the Tug at the pilot station or customary waiting place or anchorage at the Place of Departure (whichever is sooner), until disconnection at the Place of Destination, however such geographic and/or time limits shall not apply to sub-clause 25(a)(i)2 below:

1. The Master and members of the crew of the Tug and any other servant or agent of the Tugowner;

2. The members of the riding crew provided by the Tugowner or any other person whom the Tugowner provides on board the Tow;

3. Any other person on board the Tug who is not a servant or agent of the Hirer or otherwise on board on behalf of or at the request of the Hirer.

(ii) The Hirer will indemnify the Tugowner in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the towage or other service hereunder to any of the following persons:

1. The Master and members of the crew of the Tow and any other servant or agent of the Hirer;

2. Any other person on board the Tow for whatever purpose except the members of the riding crew or any other persons whom the Tugowner provides on board the Tow pursuant to their obligations under this Agreement.

(b)

(i) The following shall be for the sole account of the Tugowner without any recourse to the Hirer, his servants, or agents, whether or not the same is due to breach of contract, negligence or any other fault on the part of the Hirer, his servants or agents:

1. Save for the provisions of Clause 16(c), loss or damage of whatsoever nature, howsoever caused to or sustained by the Tug or any property on board the Tug.

2. Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tug or obstruction created by the presence of the Tug.

3. Loss or damage of whatsoever nature suffered by the Tugowner or by third parties in consequence of the loss or damage referred to in (1) and (2) above.

4. Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Tug or in respect of preventing or abating pollution originating from the Tug.

The Tugowner will indemnify the Hirer in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage. The Tugowner shall not in any circumstances be liable for any loss or damage suffered by the Hirer or caused to or sustained by the Tow in
consequence of loss or damage howsoever caused to or sustained by the Tug or any property on board the Tug.

(ii) The following shall be for the sole account of the Hirer without any recourse to the Tugowner, his servants or agents, whether or not the same is due to breach of contract, negligence or any fault on the part of the Tugowner, his servants or agents:

1. Loss or damage of whatsoever nature, howsoever caused or sustained by the Tow.

2. Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tow or obstruction created by the presence of the Tow.

3. Loss or damage of whatsoever nature suffered by the Hirer or by third parties in consequence of the loss or damage referred to in (1) and (2) above.

4. Any liability in respect of wreck removal or in respect of the expense of moving or lightening or buoying the Tow or in respect of preventing or abating pollution originating from the Tow.

The Hirer will indemnify the Tugowner in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage but the Hirer shall not in any circumstances be liable for any loss or damage suffered by the Tugowner or caused to or sustained by the Tug in consequence of loss or damage, howsoever caused to or sustained by the Tow.

(c) Save for the provisions of Clauses 17 (Permits & Certification); 18, (Tow-worthiness of the Tow); 19, (Seaworthiness of the Tug); 22 (Termination by the Hirer) and 23 (Termination by the Tugowner), neither the Tugowner nor the Hirer shall be liable to the other party for

(i) any loss of profit, loss of use or loss of production whatsoever and whether arising directly or indirectly from the performance or non-performance of this Agreement, and whether or not the same is due to negligence or any other fault on the part of either party, their servants or agents,

(ii) any consequential loss or damage for any reason whatsoever, whether or not the same is due to any breach of contract, negligence or any other fault on the part of either party, their servants or agents.

(d) Notwithstanding any provisions of this Agreement to the contrary, the Tugowner shall have the benefit of all limitations of, and exemptions from, liability accorded to the Owners or Chartered Owners of Vessels by any applicable statute or rule of law for the time being in force and the same benefits are to apply regardless of the form of signatures given to this Agreement.
the request of the Charterers;
(b) detention in consequence of being driven into port or to anchorage through stress of weather or tiding to shallow harbours or river ports or ports with bars or suffering an accident to her cargo, when the expenses resulting from such detention shall be for the Charterers' account howeversoever incurred;
(c) detention or damage by ice;
(d) any act or omission of the Charterers, their servants or agents.

(b) Limitations - Nothing contained in this Charter Party shall be construed or held to deprive the Owners or the Charterers, as against any person or party, including as against each other, of any right to claim limitation of liability provided by any applicable law, statute or convention, save that nothing in this Charter Party shall create any right to limit liability. Where the Owners or the Charterers may seek an indemnity from the provisions of this Charter Party or against each other in respect of a claim brought by a third party, the Owners or the Charterers shall seek to limit their liability against such third party.

(i) All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Charter Party or by any applicable statute, rule or regulation for the benefit of the Charterers shall also apply to and be for the benefit of the Charterers' parent, affiliated, related and subsidiary companies; the Charterers' contractors, sub-contractors, clients, joint ventures and joint interest owners (always with respect to the job or project on which the Vessel is employed); their respective employees and their respective underwriters.
(ii) All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Charter Party or by any applicable statute, rule or regulation for the benefit of the Owners shall also apply to and be for the benefit of the Owners' parent, affiliated, related and subsidiary companies, the Owners' sub-contractors, the Vessel, its Master, Officers and Crew, its registered owner, its operator, its designated charterer(s), its respective employees and their respective underwriters.
(iii) The Owners or the Charterers shall be deemed to be acting as agent or trustee of and for the benefit of all such persons and parties set forth above, but only for the limited purpose of contracting for the extension of such benefits to such persons and parties.
(f) Mutual Waiver of Rights (Optional) - only applicable if stated in Box 26, but regardless of whether this option is exercised the other provisions of Clause 12 shall apply and shall be paramount.

In order to avoid disputes regarding liability for personal injury or death of employees or for loss of or damage to property, the Owners and the Charterers have entered into, or by this Charter Party agree to enter into, an Agreement for Mutual Indemnity and Waiver of Recourse (in a form substantially similar to that specified in ANNEX C) between the Owners, the Charterers and the various contractors and sub-contractors of the Charterers.

(g) Hazardous and Noxious Substances - Notwithstanding any other provision of this Charter Party to the contrary, the Charterers shall always be responsible for any losses, damages or liabilities suffered by the Owners, their employees, contractors or sub-contractors, by the Charterers, or by third parties, with respect to the Vessel or other property, personal injury or death, pollution or otherwise, which losses, damages or liabilities are caused, directly or indirectly, as a result of the Vessel's carriage of any hazardous and noxious substances in whatever form as ordered by the Charterers, and the Charterers shall defend, indemnify and hold harmless the Owners against any expense, loss or liability whatsoever however arising with respect to the carriage of hazardous or noxious substances.

13. Pollution

(a) Except as otherwise provided for in Clause 15(c)(iii), the Owners shall be liable for, and agree to indemnify, defend and hold harmless the Charterers against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of actual or potential pollution damage and the cost of decontamination or control thereof arising from acts or omissions of the Owners or their personnel which cause or allow discharge, spills or leaks from the Vessel, except as may emanate from cargo thereof or therein.
(b) The Charterers shall be liable for and agree to indemnify, defend and hold harmless the Owners from all claims, costs, expenses, actions, proceedings, suits, demands, liabilities, loss or damage whatsoever arising out of or resulting from any other actual or potential pollution damage, even where caused wholly or partially by the act, neglect or default of the Owners, their employees, contractors or sub-contractors, or by the unseaworthiness of the Vessel.

14. Insurance

(a) The Owners shall procure and maintain in effect for the duration of this Charter Party, with reputable insurers, the insurances set forth in ANNEX B. Policy limits shall not be less than those indicated. Reasonable deductibles are acceptable and shall be for the account of the Owners.
(b) The Charterers shall upon request be named as co-insured. The Owners

Note: The text is a legal document related to a uniform time charter party for offshore service vessels. It covers various aspects such as liability, indemnity, limitations, provisions, and insurance. The document is designed to provide a framework for the rights and responsibilities of the Owners and the Charterers in the context of offshore service vessel operations.
PART II
"SUPPLTIME 99" Uniform Time Charter Party for Offshore Service Vessels

shall upon request cause insurers to waive subrogation rights against the
Charterers (as encompassed in Clause 12(e)(ii)). Co-insurance and/or
waivers of subrogation shall be given only insofar as these relate to liabilities
which are properly the responsibility of the Owners under the terms of this
Charter Party.

(b) The Owners shall upon request furnish the Charterers with certificates of
insurance which provide sufficient information to verify that the Owners have
complied with the insurance requirements of this Charter Party.

(c) If the Owners fail to comply with the aforesaid insurance requirements, the
Charterers may, without prejudice to any other rights or remedies under this
Charter Party, purchase similar coverage and deduct the cost thereof from
any payment due to the Owners under this Charter Party.

15. Saving of Life and Salvage

(a) The Vessel shall be permitted to deviate for the purpose of saving life at
sea without prior approval of or notice to the Charterers and without loss of
Hire provided however that notice of such deviation is given as soon as
possible.

(b) Subject to the Charterers' consent, which shall not be unreasonably
withheld, the Vessel shall be at liberty to undertake attempts at salvage, it
being understood that the Vessel shall be off hire from the time she leaves
port or commences to deviate and shall remain off hire until she is again
in every ready way to resume the Charterers' service at a position which is not
less favourable to the Charterers than the position at the time of leaving port
or deviating for the salvage services.

All salvaged proceeds to the Vessel shall be divided equally between the
Owners and the Charterers, after deducting the Master's, Officers' and Crew's
share, legal expenses, value of fuel and lubricants consumed, hire of the
Vessel lost by the Owners during the salvage, repairs to damage sustained, if
any, and any other extraordinary loss or expense sustained as a result of the
salvage.

The Charterers shall be bound by all measures taken by the Owners in order
to secure payment of salvage and to fix its amount.

(c) The Owners shall waive their right to claim any award for salvage
performed on property owned by or contracted to the Charterers, always
provided such property is not the subject of the operation the Vessel was
chartered for, and the Vessel shall remain on hire when rendering salvage
services to such property. This waiver is without prejudice to any right of
the Charterer's Master, Officers and Crew may have under any other title.

If the Owners render assistance to such property in distress on the basis of
"no claim for salvage", then, notwithstanding any other provisions contained
in this Charter Party and even in the event of neglect or default of the Owners,
Master, Officers or Crew:

(i) The Charterers shall be responsible for and shall indemnify the Owners
against payments made, under any legal rights, to the Master, Officers
and Crew in relation to such assistance.

(ii) The Charterers shall be responsible for and shall reimburse the Owners
for any loss or damage sustained by the Vessel or her equipment by reason
of giving such assistance and shall also pay the Owners' additional expenses thereby incurred.

(iii) The Charterers shall be responsible for any actual or potential spill,
seepage and/or emission of any pollutant whatsoever caused occurring
within the offshore site and any pollution resulting therefrom
wheresoever it may occur and including but not limited to the cost of such
measures as are reasonably necessary to prevent or mitigate
pollution damage, and the Charterers shall indemnify the Owners
against any liability, cost or expense arising by reason of such actual or
potential spill, seepage and/or emission.

(iv) The Vessel shall not be off-hire as a consequence of giving such
assistance, or effecting repairs under sub-paragraph (ii) of (ii) of this
sub-clause, and time taken for such repairs shall not count against time
granted under Clause 11(d).

(v) The Charterers shall indemnify the Owners against any liability, cost
and/or expense whatsoever in respect of any loss of life, injury, damage
or other loss to person or property whatsoever arising from such
assistance.

16. Lien

The Owners shall have a lien upon all cargoes for all claims against the
Charterers under this Charter Party and the Charterers shall have a lien on
the Vessel for all monies paid in advance and not earned. The Charterers
will not suffer, nor permit to be continued, any lien or encumbrance incurred by them
or their subagents, which might have priority over the title and interest of the
Owners in the Vessel. Except as provided in Clause 52, the Charterers shall
indemnify and hold the Owners harmless against any lien of whatsoever
nature arising upon the Vessel during the Charter Period while she is under
the control of the Charterers, and against any claims against the Owners
arising out of the operation of the Vessel by the Charterers or out of any
neglect of the Charterers in relation to the Vessel or the operation thereof.

Should the Vessel be arrested by reason of claims or liens arising out of
her operation hereunder, unless brought about by the act or neglect of the
Charterers, the Charterers shall at their own expense take all reasonable steps
to secure that within a reasonable time the Vessel is released and at their own
expense put up to secure release of the Vessel.

17. Sublet and Assignment

(a) Charterers - The Charterers shall have the option of subletting, assigning
or chartering the Vessel to any person or company not competing with the
Owners, subject to the Owners' prior approval which shall not be
unreasonably withheld, upon giving notice in writing to the Owners, but the
original Charterers shall always remain responsible to the Owners for due
performance of the Charter Party and contractors of the person or company
taking such subletting, assigning or charter or any other person or company
involved in an intended sublet or assignment. On the basis that.Any
subletting, assigning or charter shall be deemed contractors of the
Charterers for all the purposes of this Charter Party. The Owners make it
a condition of such consent that additional Hire shall be paid as agreed
between the Charterers and the Owners having regard to the nature and
personality of any intended subtenant or assignee.

(b) If the Vessel is sublet, assigned or loaned to undertake rig
anchor handling and/or towing operations connected with equipment, other
than that used by the Charterers, then a daily increment to the Hire in the amount of
such as stated in Box 20 or pro rate shall be paid for the period between departure for
such operations and return to her normal duties for the Charter Party.

(2) Owners - The Owners may not assign or transfer any part of this Charter
Party without the written approval of the Charterers, which approval shall not be
unreasonably withheld.

Approved by the Charterers of such subletting or assignment shall not relieve
the Owners of their responsibility for due performance of the part of the
services which is sublet or assigned.

18. Substitute Vessel

The Owners shall be entitled at any time, whether before delivery or at any
other time during the Charter Period, to provide a substitute vessel subject to
the Charterers' prior approval which shall not be unreasonably withheld.

19. War

(a) Unless the consent of the Owners be first obtained, the Vessel shall not be
ordered nor continue to any port or place or on any voyage in which any
service which will bring the Vessel within a zone which is dangerous as a
result of any actual or threatened act of war, war, hostility, warlike
operations, acts of piracy or of hostility or malicious damage against this or
any other vessel or its cargo by any person, body or state whatsoever,
revolution, civil war, civil commotion or the operation of military law, nor
be exposed in any way to any risks or penalties whatsoever consequent upon
the imposition of sanctions, nor carry any goods that may in any way expose
her to any risks of seizure, capture, penalties or any other interference of
any kind whatsoever by the belligerent or fighting powers or parties or by
any government or rulers.

(b) Should the Vessel approach or be brought or ordered within such zone,
or be exposed in any way to the said risks, (i) the Owners shall be entitled from
time to time to insure their interest in the Vessel for such terms as they deem
fit to the open market value and also in the Hire against any of the risks
likely to be involved thereby, and the Charterers shall make a refund on
demand of any additional premium thereby incurred, and (ii) notwithstanding
the terms of Clause 11 Hire shall be payable for all time lost including any loss
owing to loss of or injury to the Master, Officers, Crew or passengers or to
refusal by any of them to proceed to such zone or to be exposed to such risks.

(c) In the event of additional Insurance premiums being incurred or the wages
of the Master and/or Officers and/or Crew and/or the cost of provisions and/or
stores for deck and/or engine room being increased by reason of or during
the existence of any of the matters mentioned in sub-clause (a) the amount of
any additional premium and/or increase shall be added to the Hire, and paid by
the Charterers on production of the Owners' account therefor, such
account being rendered monthly.

(d) The Vessel shall have liberty to comply with any orders or directions as to
departure, arrival, routes, ports of call, stoppages, destination, delivery or in
any other way whatsoever given by the government of the nation under whose
flag the Vessel sails or any other government or any person (or body) acting
or purporting to act with the authority of such government or by any
AGREEMENT FOR MUTUAL INDEMNITY AND WAIVER OF RECOOURSE

(Optional, only applicable if stated in Box 26 in PART I)

This Agreement is made between the Owners and the Charterers and is premised on the following:

(a) The Charterers and the Owners have entered into a contract or agreement dated as above regarding the performance of work or service in connection with the Charterers' operations offshore ("Operations");

(b) The Charterers and the Owners have entered into, or shall enter into, contracts or agreements with other contractors for the performance of work or service in connection with the Operations;

(c) Certain of such other contractors have signed, or may sign, counterparts of this Agreement or substantially similar agreements relating to the operations ("Signatory" or collectively "Signatories"); and

(d) The Signatories wish to modify their relationship at common law and avoid entirely disputes as to their liabilities for damage or injuries to their respective property or employees;

In consideration of the premises and of execution of reciprocal covenants by the other Signatories, the Owners agree that:

1. The Owners shall hold harmless, defend, indemnify and waive all rights of recourse against the other Signatories and their respective subsidiary and affiliate companies, employees, directors, officers, servants, agents, invitees, vessel(s), and insurers, from and against any and all claims, demands, liabilities or causes of action of every kind and character, in favour of any person or party, for injury to, illness or death of any employee of or for damage to or loss of property owned by the Owners (or in possession of the Owners by virtue of an arrangement made with an entity which is not a Signatory) which injury, illness, death, damage or loss arises out of the Operations, and regardless of the cause of such injury, illness, death, damage or loss even though caused in whole or in part by a pre-existing defect, the negligence, strict liability or other legal fault of other Signatories.

2. The Owners (including the Vessel) shall have no liability whatsoever for injury, illness or death of any employee of any other Signatory under the Owners' direction by virtue of an arrangement made with such other Signatory, or for damage to or loss of property of another Signatory in the Owners' possession by virtue of an arrangement made with such other Signatory. In no event shall the Owners (including the Vessel) be liable to another Signatory for any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Agreement, including, but not limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance.

3. The Owners undertake to obtain from their insurers a waiver of rights of subrogation against all other Signatories in accordance with the provisions of this Agreement governing the mutual liability of the Signatories with regard to the Operations.

4. The Owners shall attempt to have those of their sub-contractors which are involved in the Operations become Signatories and shall promptly furnish the Charterers with an original counterpart of this Agreement or of a substantially similar agreement executed by its sub-contractors.

5. Nothing contained in this Agreement shall be construed or held to deprive the Owners or the Charterers or any other Signatory as against any person or party, including as against each other, of any right to claim limitation of liability provided by any applicable law, statute or convention, save that nothing in this Agreement shall create any right to limit liability. Where the Owners or the Charterers or any other Signatory may seek an indemnity under the provisions of this Agreement as against each other in respect of a claim brought by a third party, the Owners or the Charterers or any other Signatory shall seek to limit their liability against such third party.

6. The Charterers shall provide the Owners with a copy of every counterpart of this Agreement or substantially similar agreement which is executed by another Signatory pertaining to the Operations, and shall, in signing this, and in every counterpart of this Agreement, be deemed to be acting as agent or trustee for the benefit of all Signatories.

7. This Agreement shall inure to the benefit of and become binding on the Owners as to any other Signatories on the later of the date of execution by the Owners and the date of execution of a counterpart of this Agreement or a substantially similar agreement by such other Signatory pertaining to the Operations.

8. Any contractor, consultant, sub-contractor, etc., performing work or service for the Charterers or another Signatory in connection with the Operations which has not entered into a formal contract for the performance of such work or service may nevertheless become a Signatory by signing a counterpart of this Agreement or a substantially similar agreement which shall govern, as to the subject of this Agreement, the relationship between such new Signatory and the other Signatories and also by extension its relationships with the Charterers.

9. This Agreement may be executed in any number of counterparts or substantially similar agreements as necessary but all such counterparts shall together constitute one legal instrument.
INSURANCE

Insurance policies (as applicable) to be procured and maintained by the Owners under Clause 14:

(1) Marine Hull Insurance. – Hull and Machinery insurance shall be provided with limits equal to those normally carried by the Owners for the Vessel.

(2) Protection and Indemnity (Marine Liability) Insurance. – Protection and Indemnity or Marine Liability Insurance shall be provided for the Vessel with a limit equal to the value under paragraph 1 above or U.S. $5 million, whichever is greater, and shall include but not be limited to coverage for crew liability, third party bodily injury and property damage liability, including collision liability, towers liability (unless carried elsewhere).

(3) General Third Party Liability Insurance. – Coverage shall be for:
   Bodily Injury   per person
   Property Damage per occurrence.

(4) Workmen’s Compensation and Employer’s Liability Insurance for Employees. – Covering non-employees for statutory benefits as set out and required by local law in area of operation or area in which the Owners may become legally obliged to pay benefits.

(5) Comprehensive General Automobile Liability Insurance. – Covering all owned, hired and non-owned vehicles, coverage shall be for:
   Bodily Injury   According to the local law.
   Property Damage In an amount equivalent to single limit per occurrence.

(6) Such other insurances as may be agreed.
PART II
SUPPLYTIME 2005 Time Charter Party for Offshore Service Vessels

13. Suspension of Hire
(a) If as a result of any deficiency of Crew or of the Owners' stores, strike of Master, Officers and Crew, breakdown of machinery, damage to hull or other accidents to the Vessel, the Vessel is prevented from working, no Hire shall be payable in respect of any time lost and any Hire paid in advance shall be adjusted accordingly provided always however that Hire shall not cease in the event of the Vessel being prevented from working as aforesaid as a result of:
(i) the carriage of cargo as noted in Clause 8(c)(iii) and (iv);
(ii) quarantine or risk of quarantine unless caused by the Master, Officers or Crew having communication with the shore at any infected area not in connection with the employment of the Vessel without the consent or the instructions of the Charterers;
(iii) deviation from her Charter Party duties or exposure to abnormal risks at the request of the Charterers;
(iv) detention in consequence of being driven into port or to an anchorage through stress of weather or for trading to shallow harbours or to river or ports with bar or foul weather or for causing an accident to her cargo, when the expenses resulting from such detention shall be for the Charterers' account whateversoever incurred;
(v) detention or damage by ice;
(vi) any act or omission of the Charterers, their servants or agents.
(b) Liability for Vessel not Working. — The Owners' liability for any loss, damage or delay sustained by the Charterers as a result of the Vessel being prevented from working by any cause whatsoever shall be limited to suspension of hire, except as provided in Clause 11(a)(iv).
(c) Maintenance and Drydocking. — Notwithstanding Clause 13(a), the Charterers shall grant the Owners a maximum of 24 hours on hire, which shall be cumulative, per month or pro rata for part of a month from the commencement of the Charter Period for maintenance and repairs including drydocking (hereinafter referred to as "maintenance allowance").
The Vessel shall be drydocked at regular intervals. The Charterers shall place the Vessel at the Owners' disposal clean of cargo, at a port (to be nominated by the Owners at a later date) having facilities suitable to the Owners for the purpose of such drydocking.
During reasonable voyage time taken in transit between such port and Area of Operation the Vessel shall be on hire and such time shall not be counted against the accumulated maintenance allowance. Hire shall be suspended during any time taken in maintenance repairs and drydocking in excess of the accumulated maintenance allowance.
In the event of loss time being taken by the Owners for repairs and drydocking or, alternatively, the Charterers not making the Vessel available for all or part of this time, the Charterers shall, upon expiration of earlier termination of the Charter Party, pay the equivalent of the daily rate of Hire than prevailing in addition to Hire otherwise due under this Charter Party in respect of all such time not so taken or made available.
Upon commencement of the Charter Period, the Owners agree to furnish the Charterers with the Owners' proposed drydocking schedule and the Charterers agree to make every reasonable effort to assist the Owners in adhering to such predetermined drydocking schedule for the Vessel.

14. Liabilities and Indemnities
(a) Definitions
For the purpose of this Clause "Owners' Group" shall mean: the Owners, and their contractors and subcontractors, and Employees of any of the foregoing.
For the purpose of this Clause "Charterers' Group" shall mean: the Charterers, and their contractors, subcontractors, co-venturers and customers (having a contractual relationship with the Charterers, always with respect to the job or project on which the Vessel is employed), and Employees of any of the foregoing.
(b) Knock for Knock
(i) Owners. — Notwithstanding anything else contained in this Charter Party excepting Clauses 8(c)(ii), 9(b), 9(c), 10(a), 11, 13(e), 14(e), 15(f), 16(c), 29 and 30, the Charterers shall not be responsible for loss of or damage to the property of any member of the Owners' Group, including the Vessel, or for personal injury or death of any member of the Owners' Group arising out of or in any way connected with the performance of this Charter Party, even if such loss, damage, injury or death is caused wholly or partially by the act, neglect, or default of the Charterers' Group, and even if such loss, damage, injury or death is caused wholly or partially by unseaworthiness of any vessel; and the Owners shall indemnify, protect, defend and hold harmless the Charterers from any and against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of or in connection with such loss, damage, personal injury or death.
(ii) Charterers. — Notwithstanding anything else contained in this Charter Party excepting Clauses 11, 15(a), 16 and 26, the Owners shall not be responsible for loss of, damage to, or any liability arising out of any action by the Vessel, any cargo laden upon or carried by the Vessel or her tow, the property of any member of the Charterers' Group, whether owned or chartered, including their Offshore Units, or for personal injury or death of any member of the Charterers' Group or of anyone on board or working on the Vessel, arising out of or in any way connected with the performance of this Charter Party, even if such loss, damage, liability, injury or death is caused wholly or partially by the act, neglect or default of the Owners' Group, and even if such loss, damage, liability, injury or death is caused wholly or partially by the unseaworthiness of any vessel; and the Charterers shall indemnify, protect, defend and hold harmless the Owners from any and against all claims, costs, expenses, actions, proceedings, suits, demands, and liabilities whatsoever arising out of or in connection with such loss, damage, liability, personal injury or death.
(c) Consequential Damages. — Neither party shall be liable for the other any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Charter Party, and each party shall protect, defend and indemnify the other from and against all such claims.
from any member of its Group as defined in Clause
14(a).

"Consequential damages" shall include, but not be
limited to, loss of use, loss of profits, shut-in or loss of
production and cost of insurance, whether or not
foreseeable at the date of this Charter Party.

(d) Limitation -

Nothing contained in this Charter Party shall be
construed or held to deprive the Owners or the
Charterers, as against any person or party, including
as against each other, of any right to claim limitation of
liability provided by any applicable law, statute or
convention, save that nothing in this Charter Party shall
create any right to limit liability. Where the Owners or
the Charterers may seek an indemnity under the
provisions of this Charter Party or against each other in
respect of a claim brought by a third party, the Owners
or the Charterers shall seek to limit their liability against
such third party.

(e) Himalaya Clause -

(i) All exceptions, exemptions, defences, Immunities,
limitations of liability, Indemnities, privileges and
conditions granted or provided by this Charter Party
or by any applicable statute, rule or regulation for
the benefit of the Charterers shall also apply to
and be for the benefit of the Charterers' parent,
affiliated, related and subsidiary companies; the
Charterers' contractors, sub-contractors, co-
venturers and customers (having a contractual
relationship with the Charterers, always with
respect to the job or project on which the Vessel is
employed); their respective Employees and their
respective underwriters.

(ii) All exceptions, exemptions, defences, Immunities,
limitations of liability, Indemnities, privileges and
conditions granted or provided by this Charter Party
or by any applicable statute, rule or regulation for
the benefit of the Owners shall also apply to and
be for the benefit of the Owners' parent, affiliated,
related and subsidiary companies, the Owners'
contractors, sub-contractors, the Vessel, its Master,
Officers and Crew, its registered owner, its operator,
its demise charterer(s), their respective Employees
and their respective underwriters.

(iii) The Owners or the Charterers shall be deemed
to be acting as agent or trustee of and for
the benefit of all such persons and parties set forth
above, but only for the limited purpose of
contracting for the extension of such benefits to
such persons and parties.

(f) Hazardous or Noxious Substances,

Notwithstanding any other provision of this Charter Party
to the contrary, the Charterers shall always be
responsible for any losses, damages or liabilities
suffered by the Owners' Group, by the Charterers, or
by third parties, with respect to the Vessel or other
property, personal injury or death, pollution or otherwise,
which losses, damages or liabilities are caused, directly
or indirectly, as a result of the Vessel's carriage of any
hazardous or noxious substances in whatever form as
ordered by the Charterers, and the Charterers shall
defend, indemnify the Owners and hold the Owners
harmless for any expense, loss or liability whatsoever
or howsoever arising with respect to the carriage of
hazardous or noxious substances.

15. Pollution

(a) Except as otherwise provided for in Clause 18(c)(ii)

the Owners shall be liable for, and agree to indemnify,
defend and hold harmless the Charterers against all
claims, costs, expenses, actions, proceedings, suits,
demands and liabilities whatsoever arising out of actual
or threatened pollution damage and the cost of cleanup
or control thereof arising from acts or omissions of the
Owners or their personnel which cause or allow
discharge, spills or leaks from the Vessel, except as may
emanate from cargo thereon or therein.

(b) The Charterers shall be liable for and agree to
indemnify, defend and hold harmless the Owners from
all claims, costs, expenses, actions, proceedings, suits,
demands, liabilities, loss or damage whatsoever arising
out of or resulting from any other actual or threatened
pollution damage, even where caused wholly or partially
by the act, neglect or default of the Owners, their
Employees, contractors or sub-contractors or by the
unseaworthiness of the Vessel.

(c) The Charterers shall, upon giving notice to the
Owners or the Master, have the right (but shall not be
obliged) to place on board the Vessel and/or have in
attendance at the site of any pollution or threatened
incident one or more Charterers' representatives to
observe the measures being taken by Owners and/or
national or local authorities or their respective servants,
agents or contractors to prevent or minimise pollution
damage and to provide advice, equipment or manpower
or undertake such other measures, at Charterers' risk
and expense, as are permitted under applicable law
and as Charterers believe are reasonably necessary to
prevent or minimise such pollution damage or to remove
the threat of pollution damage.

16. Wrecks Removal

If the Vessel becomes a wreck and is an obstruction to
navigation and has to be removed by order of any lawful
authority having jurisdiction over the area where the
Vessel is placed or as a result of compulsory law, the
Owners shall be liable for any and all expenses in
connection with the raising, removal, destruction,
lighting or marking of the Vessel.

17. Insurance

(a) (i) The Owners shall procure and maintain in
effect for the duration of this Charter Party, with
reputable insurers, the insurances set forth in
ANNEX "B". Policy limits shall not be less than those indicated.
Reasonable deductibles are acceptable and shall
be for the account of the Owners.

(ii) The Charterers shall upon request be named as
co-insured. The Owners shall upon request cause
insurers to waive subrogation rights against
the Charterers (as encompassed in Clause 14(e)(ii)).
Co-insurance and/or waivers of subrogation shall
be given only insofar as these relate to liabilities
which are properly the responsibility of the Owners
under the terms of this Charter Party.

(b) The Owners shall upon request furnish the
Charterers with copies of certificates of insurance which
provide sufficient information to verify that the Owners
have complied with the insurance requirements of this
Charter Party.

(c) If the Owners fail to comply with the aforesaid
insurance requirements, the Charterers may, without
prejudice to any other rights or remedies under this
Charter Party, purchase similar coverage and deduct
the cost thereof from any payment due to the Owners
under this Charter Party.

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INSURANCE

Insurance policies (as applicable) to be procured and maintained by the Owners under Clause 17:

(1) **Marine Hull Insurance.** — Hull and Machinery Insurance shall be provided with limits equal to those normally carried by the Owners for the Vessel.

(2) **Protection and Indemnity (Marine Liability Insurance.** — Protection and Indemnity (P&I) or Marine Liability Insurance with coverage equivalent to the cover provided by members of the International Group Protection and Indemnity Associations with a limit of cover no less than USD500,000 for any one event. The cover shall include liability for collision and damage to fixed and floating objects to the extent not covered by the insurance in (1) above.

(3) **General Third Party Liability Insurance.** — To the extent not covered by the insurance in (2) ABOVE, Coverage shall be for:

- Bodily Injury per person
- Property Damage per occurrence.

(4) **Notwithstanding the Compensation and Employer’s Liability Insurance for Employees.** — To the extent not covered in the insurance in (2) above, covering Owners’ employees and other persons for whom Owners are liable as employer pursuant to applicable law for statutory benefits as set out and required by local law in area of operation or area in which the Owners may become legally obliged to pay benefits.

(5) **Comprehensive General Automobile Liability Insurance.** — Covering all owned, hired and non-owned vehicles, coverage shall be for:

- Bodily Injury According to the local law.
- Property Damage In an amount equivalent to single limit per occurrence.

(6) Such other insurances as may be agreed.
PART B

Allocation of Risk and Exclusions in Offshore Marine Construction Contracts

Elizabeth Blackburn QC
Allocation of Risk and Exclusions in Offshore Marine Construction Contracts

Seminar Notes

By Elizabeth Blackburn QC

The Speaker:

Elizabeth Blackburn QC has particular expertise in large scale casualty work where there are related conflict of laws and jurisdictional issues and complex expert issues relating to naval architecture, hydrography, meteorology and geo-technology; shipping and the international carriage of goods; international trade and associated finance; damage to offshore installations; marine insurance and P&I issues; shipbuilding, in particular superyacht construction; maritime limitation of liability; collision, salvage and towage disputes, and maritime heritage and wreck disputes. In December 2009 Elizabeth was appointed as a first instance arbitrator on the Lloyd’s Open Forum Arbitration Panel.

She is recommended as a leading shipping silk in both The Legal 500 and Chambers & Partners where she has been described as being “beloved by solicitors for always having the facts at her fingertips”, valued for her ability in wet disputes and jurisdictional matters, “industry sources say that she has a strong grasp of the law relating to pollution.”

She was part of the UK Delegation at the May 2003 IOPC Supplementary Fund Diplomatic Conference, and has been involved in the finalising and implementation of the Nairobi Wreck Removal Convention 2007. She is also the legal member of the Department of Culture’s Advisory Committee on Historic Wreck Sites.

Elizabeth Blackburn sits as an arbitrator and has been appointed as a sole arbitrator in a number of international trade/finance/shipping disputes by the ICC International Court of Arbitration on the recommendation of the National Committee.

Elizabeth was heavily involved for much of 2008 in a substantial dispute relating to the pulling over of an offshore structure during installation in the Turkish Akcakoca Fields, acting for the owners and operators of the field: the MICOPERI 30. As in many of Elizabeth’s cases, the expert evidence was wide ranging, including offshore engineering and construction issues, the safe working practices of the offshore industry and the insurances available in the market to cover offshore construction projects and well drilling. The case was particularly concerned with the WELCAR 2001 Offshore Construction Project Policy of insurance, P&I cover for specialist operations and the contract works exclusion.
Standard Off Shore Marine Construction Contracts and the allocation of risk:

1. Each oil or gas company will have its own preferred contract form, but a common approach to allocating risk can be found in the UK LOGIC General Conditions of Contract for Marine Construction Edition 2 October 2004, and can be summarised as follows:

   (a) The risk of loss or damage to the contract works (defined as the “Permanent Works” in LOGIC), while they are in the care, custody and control of the Contractor prior to handover of the works, is borne by the Contractor, unless the loss or damage is occasioned by War Risks or Nuclear Risks, or by any negligent act or omission of the Company Group (usually the Operator of the oil or gas field), or by a force majeure event as defined in the contract. (This responsibility also extends to Company provided items while in the possession or control of the Contractor).

   (b) In contrast to the allocation of risk in relation to the contract works, when it comes to risk to own property and personnel (or property provided by each party), the usual arrangement is that each party assumes liability for damage to its own property or injury to its own personnel regardless of fault by means of mutual or reciprocal indemnities and this will also extend to consequential financial losses resulting from own property loss or damage. (These arrangements are commonly known as “knock for knock” provisions and will be discussed by Sean O’Sullivan).

   (c) In respect of third party liabilities, the position normally is that there is a mutual indemnity where each party holds the other harmless from third party claims for personal injury or damage to property caused by that party’s own negligence or breach of duty and the indemnity creates an obligation on the relevant party to insure the residual risk. (In this context, third parties are defined as being any entity other than a member of the Company Group or the Contractor Group as defined). However, there are different provisions relating to claims arising from pollution, or from wreck or from loss or damage to permanent third party oil and gas production facilities and pipelines.

   (d) For example, under clause 22.2(d) of the LOGIC contract, the Company agrees to indemnify the Contractor in relation to loss of or damage to permanent third party oil and gas production facilities and pipelines (and consequential losses arising therefrom) as are specified in the relevant Appendix to the Contract where such loss or damage arises from or relates to or is in connection with the performance or non performance of the Contract. This indemnity, however, only extends to loss or damage to specified permanent third party oil and gas production facilities and pipelines which are within a 500 metre radius of any working barge or vessel which is at the time directly engaged in the construction or installation of the Permanent Work, but not while such working barge or vessel is in transit to or from the area where the Permanent Work is to be constructed or installed or when performing any other operations.

   (e) Pollution: Under clause 22.3 of the LOGIC provisions, the Company agrees to assume the pollution risk arising from, relating to or in connection with the performance or non performance of the Contract, if the pollution emanates from the Company Group’s reservoir or its property or the specified permanent production facilities and pipelines referred to above and shall save, indemnify, defend and hold harmless the Contractor Group from and against any claim of whatsoever nature arising from such pollution, except if the damage is damage

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1 Intended to apply to pipelaying; offshore installation; subsea construction; inspection repair and maintenance using diving and other support vessels

2 Meaning “the property of the Company arising from the work”
or injury to the property or personnel of the Contractor Group. The Contractor assumes the same risk (under clause 22.4) if the pollution occurs on the premises of the Contractor Group or emanates from the Contractor Group property and equipment, except if the damage is damage or injury to the Company Group's property (located at the worksite, and excluding the Permanent works) or to personnel of the Company Group.

(f) Wreck: The Contractor normally bears the risk of removing any wreckage (and when appropriate marking or lighting any wreck or debris) arising from or relating to the performance of the works, or wreckage of the property, equipment, vessels etc provided by the Contractor Group when the removal is required by law or government authority, or where the wreck interferes with the Company’s operations, or is a hazard to fishing or navigation. The indemnity provided by the Contractor applies irrespective of any negligence or breach of duty by the Company, but there is no obligation to indemnify, if the knock for knock provisions relating to the Company Group property are applicable, or if clause 22.3 of the LOGIC conditions (pollution from Company Group property) is applicable. However, where the Company provides the transportation to the offshore worksite for the Contractor’s Group property and the Company elects to, or is required by law or government authority to recover, remove and mark or light any wreck of such property, then the Company will provide an indemnity to the Contractor’s Group, except where the incident results from the negligence or breach of duty of the Contractor Group.

(g) Parties may agree that the Contractor’s liability for damage to the Permanent Works should be contractually capped. They usually agree provisions relating to the Contractor limiting his overall liability, but such an agreed limit does not apply, inter alia, to the above indemnity liabilities assumed by the Contractor, nor to the provisions relating to the Contractor’s insurance obligations which are discussed below.

Insurance required:

2. Under the LOGIC conditions, the Company is to arrange Construction All Risks (“CAR”) insurance, and is to include the Contractor, Subcontractors and affiliates as additional assureds. The policy is to be endorsed to require the underwriters to waive any rights of recourse, including subrogation rights against the same persons. However, liability for deductibles is for the account of the Contractor. The Company may decide at its discretion not to arrange CAR insurance, in which case the Company has to advise the Contractor accordingly and the Company shall provide an indemnity instead to the Contractor, its subcontractors and affiliates.

3. The LOGIC Conditions provide that the Contractor shall arrange Employers Liability Insurance; General Third Party Liability insurance (in a specified sum) for any incident or series of incidents covering the operations of the Contractor in the performance of the Contract; Third Party and Passenger Liability Insurance and other motor insurance; and marine hull and machinery insurance including war risk coverage, and collision liability in respect of all vessels used by the Contractor Group in the performance of the work, again in a specified sum; Protection and Indemnity Insurance including wreck and debris removal and oil pollution liability in respect of all vessels, craft or floating equipment owned, leased or hired by the Contractor Group in the performance of the Work. Apart from the Employers Liability Insurance, the Contractor agrees to name the Company, Co-Venturers and affiliates as additional assureds and to ensure that the policies are endorsed to provide that underwriters waive any rights of recourse, including in particular subrogation rights against the same persons.
4. Specialist Operations Cover: A Contractor often obtains the required insurance to cover his potential liabilities by purchasing the specialist operations cover provided by the Protection and Indemnity Clubs (P&I Clubs) because CAR policies usually exclude, inter alia, watercraft liability.

5. Insurance issues will be more fully discussed at the second Offshore evening in March 2010.

Gross Negligence and wilful misconduct exclusions in “Knock for Knock provisions”:

6. There is a growing antipathy to allowing an indemnity to be provided to a party that has been guilty of causative gross negligence or wilful misconduct. For example, in the USA, a number of states do not permit a party to contract out of liability where there has been such conduct. More and more offshore contracts now include provisions that purport to exclude from the “knock for knock” regime losses caused by gross negligence or wilful misconduct.

7. The Court of Appeal indicated in *Tradigrain S.A. v Intertek* [2007] EWCA Civ 154, that the term “gross negligence” although often found in commercial documents has never been accepted by English civil law as a concept distinct from simple negligence, but it is clear from one of the cases cited (*Armitage v Nurse* [1998] Ch 241, another decision of the Court of Appeal) that English law does appear to accept that there is a difference in degree between simple negligence and gross negligence, and that parties can exclude liability for gross negligence.

8. The attention of the Court of Appeal in the *Tradigrain* case was not drawn to an important decision of Mance J as he then was, in which he decided that as a matter of English Law, gross negligence is intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. As a matter of ordinary language and general impression the concept of gross negligence is capable of embracing not only conduct undertaken with actual appreciation of the risks involved but also serious disregard of or indifference to an obvious risk: see the judgment of Mance J as he then was in *The Hellespont Ardent* [1997] 2 Lloyd’s Rep. 547.

9. In that case, one of the contracts which contained the relevant gross negligence provision was governed by New York law. Mance J summarised that whether United States or English principles were applied, the concept of gross negligence in the relevant clauses did not involve, necessarily, any subjective mental element of appreciation of risk. It may include, conduct which a reasonable person would perceive to entail a high degree of risk of injury to others, coupled with heedlessness or indifference to or disregard of the consequences. The heedlessness, indifference or disregard need not be conscious. Mance J concluded that whether one looked at the American authorities or to the simple meaning of the words without attributing to them any special meaning under New York law, the concept of gross negligence embraces serious negligence amounting to reckless disregard, without any necessary implication of consciousness of the high degree of risk or the likely consequences of the conduct on the part of the person acting or omitting to act. The type of reckless conduct which was required to found gross negligence could either be:

(a) where the actor knows, or has reason to know, of facts which create a high degree of risk of physical harm to another and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk; or

(b) where the actor has such knowledge, or reason to know, of the facts, but does not realise or appreciate the high degree of risk involved, although a reasonable man in his position would do so.

(c) However, for either type of conduct, to be reckless it must not only be unreasonable,
but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.

10. Mance J pointed out that factors which went to the crassness or blatancy of a defendant’s conduct were relevant, and these would include (a) the seriousness or otherwise of any injury which might arise; (b) the degree of likelihood of its arising and (c) the extent to which someone takes any care at all. As the judge said, “these are all potentially material when considering whether particular conduct should be regarded as so aberrant as to attract the epithet of gross negligence”. However, he also added that if obvious steps had been completely omitted to guard against or cater for a risk that could have very serious consequences, then the fact that in many or most cases the risk was not likely to materialize would not automatically defeat a charge of gross negligence. All the circumstances have to be weighed and balanced.

11. Definitions of gross negligence have been included in various offshore contracts, one being:

“An intentional and conscious or reckless disregard of good and prudent oil and gas field practice and/or of any of the terms of this Contract in utter disregard of avoidable and harmful consequences but shall not include any act, omission or error of judgment or mistake made in the exercise in good faith of any function, authority or discretion which in the exercise of such good faith is justifiable by special circumstances, including but not limited to safeguarding of life, property or the environment and other emergencies.”

12. The English Court will be particularly concerned with whether there has been such a departure from generally accepted standards of safety management and whether there has been such a serious disregard of or indifference to an obvious risk as to warrant a finding of gross negligence. (In this respect, it should be particularly noted that the principle underlying the way of working generally practised in the offshore industry is to identify potential hazards or risks beforehand and to ensure by way of “redundancy” (i.e. having two systems in parallel such that if one system fails, the other will be in place to prevent injury or damage) and by the adoption and following of formal procedures, that any carelessness by an individual which may happen to occur will not result in injury to persons or serious damage to property.)

Wilful Misconduct:

13. Wilful misconduct applies not only to the situation where the person who did the relevant act knew that he was doing something wrong, knew it at the time, and yet did it just the same, but also to the situation where the person who did the act, did it quite recklessly not caring whether he was doing the right or the wrong thing, and regardless of the results of his conduct.

14. In Lewis v Great Western Railway (1877) 3 Q.B.D. 195 at page 206, Bramwell L.J held that wilful misconduct in the relevant exclusion clause meant

“... misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be wilful. It has been said, and, I think, correctly, that, perhaps one condition of “wilful misconduct” must be that the person guilty of it should know that mischief will result from it. But to my mind there might be other “wilful misconduct.” I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told, “Now this may or may not be a right thing to do.” He might say, “Well I do not know which is right, and I do not care: I will do this.” I am much inclined to think that that would be “wilful misconduct”, because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be wilful misconduct.
Is there any evidence of such wilful misconduct here? I really think there is not. It is said that more cheeses were packed in this truck than there ought to have been, and that they were packed in the wrong way. Well I think there is abundant evidence that if these cheeses had been packed at some place in Cheshire or Shropshire, where they are commonly packed, in order to come to London, they would have been packed differently, and that the right conclusion for the learned judge to have drawn from the evidence would have been that men who were in the habit of packing them and usually packing in a different manner, must have known that by packing them in this way they were packing them in an unusual, and therefore presumably wrong, way. But I cannot think that there was evidence in this case to show, or on which the learned judge could properly find, that the men who packed these cheeses, who were in London, a place from which much Cheshire cheese is probably not exported, knew that they were doing wrong, or at all events, that they were aware that mischief might result, and that they, improperly, failed to inform themselves as to whether mischief would or would not result from it ....

15. Brett LJ at page 210 also indicated that “if it is brought to [the actor’s] notice that what he is doing, or omitting to do, may seriously endanger the things which are to be sent, and he wilfully persists in doing that against which he is warned, careless whether he may be doing damage or not, then I think he is doing a wrong thing, and that that is misconduct, and that, as he does it intentionally, he is guilty of wilful misconduct; or if he does, or omits to do something which everybody must know is likely to endanger or damage the goods, then it follows that he is doing that which he knows to be a wrong thing to do. Care must be taken to ascertain that it is not only misconduct but wilful misconduct, and I think that those two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission.”

16. In *Forder v Great Western Railway* [1905] 2 K.B. 532, Lord Alverstone, the Chief Justice defined wilful misconduct as meaning misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows or appreciates that it is wrong conduct on his part in the existing circumstances to do or fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure or omission regardless of consequences. Lord Alverstone went on to add “or acts with reckless carelessness, not caring what the results of his carelessness may be.”

17. In *Horabin v British Overseas Airways Corporation* [1952] 2 Lloyd’s Rep. 450, a case concerned with the Carriage by Air Act 1932, Barry J defined wilful misconduct as occurring when the person who did the act knew that he was doing something wrong, and knew it at the time, and yet did it just the same, or alternatively that the person who did the act did it quite recklessly not caring whether he was doing the right or the wrong thing, quite regardless of the effect of what he was doing upon the safety (in that case) of the aircraft and the passengers for which and for whom he was responsible. However, the wilful misconduct had to be the direct or immediate cause of the accident.

18. As was also discussed in the *Horabin* case, it would be wrong to add up various acts or omissions of a minor character and take them to amount to misconduct as a whole; and the mere fact that something was done contrary to plans, instructions or standards of safe flying with the knowledge of the pilot (in that case) did not necessarily establish wilful misconduct on this part, because in the exigencies of a flight, the pilot might consciously depart from instructions, taking the view that it was in the best interests of safety.

19. In the context of the Criminal Damage Act 1971, the House of Lords held in *R v G* [2004] 1 AC 1034, that it had to be shown that the defendant’s state of mind was culpable in that he acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and

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4 This definition was adopted in a CMR case, *Texas Instruments v Nason* [1991] 1 Lloyd’s Rep. 146
it was, in the circumstances, known to him, unreasonable to take the risk; but that a defendant could not be regarded as culpable so as to be convicted of the offence, if due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions.

20. The Offshore Contract can further specify, for example, that the relevant wilful misconduct must occur at a very senior Managerial level, and can further define wilful misconduct as being (for example) an intentional, conscious or reckless disregard of any contractual provision or of good and prudent oil/gas field management practice. In such circumstances, for the relevant senior Management to be guilty of wilful misconduct:

(a) There would have to have been an intentional or conscious disregard at a very Senior Management level of either a contractual provision or of good and prudent oil (or gas) field management practice (breach of which could obviously cause mischief), and the relevant person must have known at the time that his conduct was wrong and serious mischief would result from his conduct, or alternatively, if he must have known at the time that what he was doing or omitting to do could cause serious mischief, and he wilfully persisted, careless of whether the mischief would occur or not. His actions must also have been causative.

(b) Alternatively, there would have to have been, at a very Senior Managerial level, an obvious disregard of either a contractual provision or of good and prudent oil (or gas) field management (breach of which could obviously cause mischief), with the relevant person not caring at the time whether their conduct was wrongful or not, and not caring what the results of their carelessness might be and whether serious mischief would or would not result from it. Again the person’s actions must have been causative.

(c) However, if the relevant person genuinely did not appreciate or foresee the mischief involved in his actions, then the requisite mental element will not be established.

21. In the context of marine insurance, and in particular the meaning of the words “wilful misconduct” in section 55(2) (a) of the Marine Insurance Act, although there is authority that recklessness could be included within the concept of wilfulness in the context of insurance, legal commentators consider that the matter is not beyond doubt.

Elizabeth Blackburn QC
Stone Chambers
January 2010

5 i.e. everybody in the industry must know such an act or omission was likely to cause serious mischief.
6 “(2) In particular (a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew.”
8 Based on the decision in Papadimetriou v Henderson (1939) 64 Ll.L.Rep 345
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PART C

The exclusion of Consequential Damages
&
“Any Consequential Damages Whatsoever”?

Robert Gay
The exclusion of “Consequential Damages”

Presentation for the London Shipping Law Centre
13 January 2010
Robert Gay
1. The context of the wordings

The structure including an exclusion of “consequential losses” is used very widely in the oil and gas industries, in contracts of all sorts.

One purpose is that a contractor for an oil company should not become liable for the loss of an oilfield or an interruption in production from an oilfield.

This can be seen in the Supplytime wording where “shut-in” explains the sort of “loss of production” which is particularly intended.
2. Meaning of “consequential” under English Law

“Consequential” is explained in terms of the “second rule” in Hadley -v- Baxendale
• that is, in terms of types of loss which could only be foreseen with information about specific facts.

This is opposed to losses which fall under the “first rule” in Hadley -v- Baxendale
• losses which could be foreseen on the basis of ordinary general knowledge are considered “direct” as opposed to “indirect/consequential”.
2. Meaning of “consequential” under English Law

This is thoroughly established at the level of Court of Appeal as the meaning of “indirect” and “consequential” whenever they occur in exclusion clauses.

More about Hadley -v- Baxendale

Hadley -v- Baxendale itself establishes a single principle

When considering “remoteness” in contract, the Courts are not concerned with whether the defendant actually foresaw the consequence, or only should be deemed to have foreseen it as a part of “ordinary general knowledge”
More about Hadley -v- Baxendale

There is a continuum of cases

Because it is necessary to give a sense to the word “consequential” in exclusion clauses, it has been necessary to insert a knife and split apart this continuum.

\[\text{per Sedley LJ in Hotel Services -v- Hilton at paragraph [15]}\]

More about Hadley -v- Baxendale

“The degree of knowledge assumed under the first limb depends on the nature of the business relationship between the contracting parties”.

\[\text{per Lord Walker in The “ACHILLEAS” at paragraph [67]}\]
3. The interpretation of “loss of profit”/ “loss of use”

The Towcon clause is not one-sided but a mutual exclusion.

Nevertheless, the Towcon clause is an exclusion clause, and is interpreted restrictively.

“Loss of profit”

In *The “HERDENTOR”*:

- A diminution in the price (or the salvage award received) is *not* a “loss of profit”
- This is a very strict “in respect of” interpretation
3. The interpretation of “loss of profit”/ “loss of use”

It is submitted that this strict “in respect of” interpretation should not be followed.

3. The interpretation of “loss of profit”/ “loss of use”

In The “NAPORISTYI” “loss of profit” is interpreted as “loss of profit from the future use of the tow (or, of the tug)”
3. The interpretation of “loss of profit”/“loss of use”

However, it is submitted that this interpretation of “loss of profit” also should not be followed.

- It is not attractive to be making a distinction between loss of profit from the use of the tow at the destination, and loss of profit from the sale of the tow at the destination.

“Loss of use”

In *The “HERDENTOR”* it is said that the wording does not exclude a claim by the hirer for loss of the use of the tug.
3. The interpretation of “loss of profit”/“loss of use”

“Loss of use”

In London Arbitration 1/02 it was held that the wording excluded claims for a loss of use of other equipment rented by the charterers and of personnel connected therewith.

4. Surprising consequences

Some business interruption losses (loss of profit, loss of use, loss of production, etc) will be of types which could be foreseen on the basis of ordinary general knowledge.
4. **Surprising consequences**

Therefore, these business interruption losses will be considered “direct” and will not be excluded by a clause excluding liability for “consequential losses”.

Thus, the exclusion of “consequential losses” is not doing the job which the market expected it would do.
4. Surprising consequences

“Indirect or consequential losses including but not limited to . . .”

This has been interpreted by the Courts in such a way that the established meaning of “indirect”/“consequential” controls the interpretation of the whole of the wording.

Thus, the wording as a whole is interpreted as only excluding items in the list to the extent that they are not foreseeable on the basis of ordinary general knowledge.
4. **Surprising consequences**

Therefore, the wording as a whole will not exclude liability for the whole of “loss of profits”/“loss of use” etc.

(points from sections 6 to 8 of my written paper)

- The original authorities related to one-sided guarantee (and similar) clauses.
- It may be easier to escape in the case of a mutual exclusion.
(points from sections 6 to 8 of my written paper)

- There is reasoning in two of the original first instance judgments, that it will not be an acceptable interpretation to hold that the party has excluded liability for all damages.
- It will be easier to escape if there is a clearly visible type of liability which is substantial and not commercially absurd, and which is not excluded.

(points from sections 6 to 8 of my written paper)

- An acceptable clause may have to allow damages which are appropriate not only in the case of a merchant who busy for re-sale, but in the case of an end-user who purchases goods or services for use.
(points from sections 6 to 8 of my written paper)

- An acceptable clause may have to allow the recovery of the cost of substitute goods or services when obtained at short notice and for a high price.

(points from sections 6 to 8 of my written paper)

Is it acceptable to allow the high cost of substitute goods and services, but exclude liability for the lost profits/downtime losses which may be the justification for getting in substitutes at a very high price?
(points from sections 6 to 8 of my written paper)

Is it acceptable that if a substitute can be obtained at a high price, then this cost may be recoverable, but if a substitute cannot be obtained at all, then the party who has not been provided with the services they contracted for may not be able to recover anything at all?

9. First alternative: a list and everything like them

“The Contractor shall not be liable to the Operator Group for any spread costs . . ., loss of production, loss of product, loss of use, loss of revenue, profit or anticipated profit, delay, business interruption and other similar losses”.
9. First alternative: a list and everything like them

This avoids using the words “indirect” and “consequential”.

- There may be a problem about finding a genus to which all the items in the list belong.
- However, it should be possible to apply “similar” in a case by case way.
9. **First alternative: a list and everything like them**

It may be attractive to bring back the word “consequential”, but it must be made absolutely clear that the word is being defined afresh, from scratch, in order to avoid being “sucked into” the established meaning.

10. **Second alternative: a list and “consequential” damages**

“In no event shall . . be liable for loss of anticipated profits, catalyst, raw materials and products or for indirect or consequential damage”.
10. Second alternative: a list and “consequential” damages

A structure of two limbs, excluding separately
(i) the list of types of loss and
(ii) “indirect and consequential damage” in the meaning established by the decisions of the Court of Appeal.

This should work as intended.

Deepak -v- ICI (CA).
10. Second alternative: a list and “consequential” damages

Logically, it should be possible to combine the list “and other similar losses” with the two-limbed structure.

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Towcon (pre - 2008)

“Loss of profit, loss of use, loss of production or any other indirect or consequential damage”.
Towcon (pre - 2008)

One interpretation (Rix J in *BHP -v- British Steel*) read it as if it said “loss of profit, loss of use, etc and indirect or consequential damage”.

i.e. as if it had the two-limbed structure.

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Towcon (pre - 2008)

The other interpretation (Clarke J in *The “HERDENTOR”*) “Indirect or consequential damage” controls the whole.
Towcon 2008

The two-limbed structure
Should work as intended.

Supplytime 89

“Any consequential damages whatsoever, including, but not limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance”
Supplytime 89

Interpreted in *London Arbitration 1/02* as if it had said “*any consequential damages whatsoever and loss of use, loss of profits, etc*”.

i.e. as if it had the two-limbed structure.

Supplytime 89

But this may not be compatible with the way the Courts have interpreted *including but not limited to* has been interpreted. Also, the tide appears to be setting in favour of the *The “HERDENTOR”*. 
Supplytime 2005

“Neither party shall be liable to the other for any consequential damages whatsoever”

“Consequential damages” shall include, but not limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance, whether or not foreseeable at the date of this Charter Party”.

Supplytime 2005

The changes are intended to escape from the established meaning of “consequential”. 
Supplytime 2005

However, in Supplytime 2005 the word “consequential” is not defined afresh, from scratch.

Supplytime 2005

Also, the words added at the end are addressing the wrong distinction.
“ANY CONSEQUENTIAL DAMAGES WHATSOEVER”?  

1. Introduction: the context of the wordings  

1.1. The final target of this paper will be the words in the Supplytime 89 form at clause 12(c):  

“any consequential damages whatsoever . . . including, but not limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance.”  

and the corresponding words in Supplytime 2005 at clause 14(c):  

“‘Consequential damages’ shall include, but not be limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance, whether or not foreseeable at the date of this Charter Party.”  

1.2. I will also deal with the related wording in the Towcon form, where there is a list of types of loss followed by “or any other indirect or consequential damage”.  

1.3. However, I would like at the beginning also to quote from a rather different context. In his judgment in the Buncefield litigation, Mr Justice David Steel quoted from correspondence exchanged between in-house lawyers for Total and Fina with regard to the management agreements for the sites at Buncefield and Avonmouth, in which one in-house lawyer wrote to the other:  

“My proposal is that we follow the standard North Sea principle that where a company is acting as operator on a no gain no loss basis that they be indemnified for their actions or omissions on a full indemnity basis regardless of negligence and that any liability that accrues due to it’s wilful misconduct expressly excludes any liability for consequential losses.”  

This passage illustrates the point that the overall structure including an exclusion of “consequential losses” is used very widely in the oil and gas industries, in contracts of all sorts.  

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1.4. Underlying this exclusion there are two related concerns. One is that parties who have contracted to provide services to oil companies should not find themselves exposed to the enormous liabilities which might arise from the loss of an oilfield, or from a delay in production from an oilfield. The other, related, concern is that the cost of development projects as a whole should not be increased by the purchase of unnecessary insurance, which (in one way or another) will in the end be paid for by the oil company as customer.

1.5. Arrangements with regard to insurance will be dealt with at another session of this Centre, in March 2010. However, put very briefly, in the case of liability to personnel (which is required by law to be insured) and in the case of property exposures which the customer chooses to protect by insurance, the concern is that the overall cost should not be increased because the same exposures might be insured by two or three times over, once by way of the oil company’s property insurance or Construction All Risks insurance, again by way of the contractor’s liability insurance, and perhaps a third time by way of a sub-contractor’s liability insurance. In the case of exposures which the oil company chooses not to insure, as may be the case with regard to business interruption losses, the concern may rather be that if the oil company has chosen not to insure these exposures for itself, the cost of the project should not be increased by the contractor and sub-contractor taking out liability insurance in respect of these exposures, for which the customer will in the end have to pay.

1.6. The first concern, that a contractor should not be liable in respect of loss or delay to production from an oilfield can be seen clearly in the drafting of the Supplytime form. This form was originally drafted to fit the situation where the charterer would itself be an oil company, engaging a vessel to work in the area of the oil company’s installations. Therefore, the wording includes “shut-in or loss of production”, with these two phrases in the list being conjoined because they are referring to the same sort of loss, and the two phrases explain one another: the sort of “loss of production” which is particularly intended is the shut-in of an oil field.

1.7. In the sections which follow, I will begin by considering the meanings given to the phrases which are the building blocks of these clauses (first the meaning of “consequential damages” or “consequential loss”, and then the individual types of loss which may be included in the list) and then go on to consider the ways in which clauses may be built up out of these building blocks and how the clauses will be interpreted. The interpretation of this wording requires to be considered in detail because where the interpretation is clear, it produces results which are contrary to the general expectations of the market, and also because in many cases the application of standard wording remains surprisingly unclear.
1.8. I will not be giving the same detailed attention to the remainder of the clause as found in the Supplytime form. I should say briefly, however, that the wording does not expressly say that the parties will not be liable for “consequential damages” **even if they result from negligence or from the unseaworthiness of any vessel.** However, in relation to Supplytime at least, there is a clear tendency to interpret the clause as excluding liability for “consequential damages” (whatever those may turn out to be) even if the party whose liability is being excluded has been negligent. For example, in *London Arbitration 1/02*, the tribunal held, in the summary report, that in the context of clause 12 of Supplytime as a whole, the wording of the clause was wide enough to exclude liability for losses even if the breach causing the loss involved negligence. In *Sea Servizi Ecologici Affossamenti Srl –v- Muliceiro Servicos Maritimos Ltda* the charterers were contending that the exclusion in clause 12(c) of Supplytime 89 does not cover cases where the “consequential damages” have been caused by negligence. An arbitration tribunal had held that a claim (which the charterers admitted was a claim for “consequential damages”) was excluded even if the damages had resulted from negligence, and Mr Justice Andrew Smith refused permission for an appeal to the High Court, saying that he accepted that this was a question of law of general public importance (and which on the basis of the facts found by the tribunal would substantially affect the rights of the parties) but that he did not consider that the tribunal’s decision was open to serious doubt.

1.9. The wording of the Supplytime form includes “**any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Charter Party**”. I leave it to Mr O’Sullivan to comment on whether the words “or non-performance” may be sufficient to mean that a shipowner who simply refuses altogether to perform a charterparty, or who simply refuses to go on performing, is protected against claims in respect of “consequential damages”.

2. **The meaning of “consequential”**

2.1. It is now thoroughly established at the level of the Court of Appeal that in the context of exclusion clauses the word “consequential” is equivalent to “indirect”, and the distinction between loss or damage which is “consequential / indirect” and loss or damage which is “direct” is to be explained in terms of the two “rules in

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3 *Sea Servizi Ecologici Affossamenti Srl –v- Muliceiro Servicos Maritimos Ltda* [2007] EWHC 2639 (Comm), 10 October 2007, unreported (transcript by Beverley Nunnery), [14], [16] to [17]. (The judgment also explains that a further question relating to unseaworthiness was not pursued, [16].)
Hadley -v- Baxendale”. Loss and damage which follows in the ordinary course of things, and so falls under the first rule in Hadley -v- Baxendale is considered “direct”. Loss which does not follow in the ordinary course of things, but only follows by reason of special circumstances, and so falls under the second rule in Hadley -v- Baxendale, is considered as “indirect” and “consequential”.

2.2. When defining “direct” and “indirect” / “consequential” the authorities use definitions both in terms of the way things happen (what consequences would follow in the ordinary course of things) and in terms of what people know (what a reasonable person would foresee without being informed of specific facts). However, it is clear that the controlling definition will be in terms of what people know. Thus, an exclusion of “consequential” loss or damages will exclude only those types of loss which a reasonable person would only have foreseen if they were given information with regard to specific facts, that is, it will not exclude those types of loss which a reasonable person would have foreseen on the basis of a general knowledge of the way in which things ordinarily happen.

3. The interpretation of “loss of use”, “loss of profits” etc.

3.1. In The “Herdentor”4 Mr Justice Clarke (as he then was) had to consider the words in the Towcon form at clause 18.3:

“... neither the Tugowner nor the Hirer shall be liable to the other party for loss of profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever.”

3.2. When considering the question whether the claim being advanced by the charterers was excluded as being a claim for “loss of profit”, Mr Justice Clarke began by accepting that this clause is a mutual exception, rather than being included for the benefit of only one party. However, he continued by saying:

“On the other hand, the clause is an exemption clause because it excludes liability for loss which would otherwise be recoverable as damages at common law. As such, it is for the party relying upon it to bring the facts clearly within it. In that sense it must be construed against the party who seeks to rely upon it on the facts of the particular case.”5


5 The “Herdentor”, at page 21 of the transcript.
3.3. In *The “Naporisty”* Mr Justice Andrew Smith had to consider the same clause in the Towcon form and once again had to construe the expression “loss of profit”. He said:  

“In construing the expression ‘loss of profit’ in clause 18(3), it seems to me significant (i) that the expression, being in an exclusion clause, is to be interpreted contra proferenten, that is to say, without imposing a strained meaning on the words, the clause is to be interpreted in the event of ambiguity restrictively against the party seeking to rely upon it on the facts of the particular case; (ii) that clause 18(3) is a clause in a standard form agreement that is directed to excluding liability of both the hirer and the tug owner; . . .”

3.4. It appears to be a settled approach that, even when the clause in question is not a one-sided exclusion but mutual, the items in the list are to be construed restrictively.

3.5. In *The “Herdentor”* the charterers (Tsavliris) were alleging that the owners had wrongfully withdrawn the tug before the completion of the contractual services, and were claiming damages in respect of the reduced amount of the salvage award which Tsavliris had recovered in respect of the salvage services for which they had engaged the tug, and also in respect of the reduced share of this salvage award which they had received under an ISU sub-contract with Pentow. (Pentow had provided other tugs which were used by Tsavliris in providing the salvage services, and when the owners of “Herdentor” had withdrawn her, Tsavliris had had to retain two tugs from Pentow for the last stage of the services, rather than using “Herdentor” and only one tug from Pentow.)

3.6. Mr Justice Clarke held that the claim should not be treated as a claim for loss of profit, but was “more akin to a claim in respect of a diminution in the price”.  

“Tsavliris have received less for the services rendered by them than they would have done. I do not think that that reduction is properly to be categorised as a loss of profit of the kind contemplated by clause 18.3.”

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7. At paragraph [142]

8. At page 22 of the transcript.
3.7. If this approach is followed, then items such as “loss of profit” will be interpreted in a very strict way, such that a claim will only be excluded if it is a claim which is precisely in respect of loss of profit. However, it may be doubted whether this very restricted approach is correct, both as a matter of principle and as a matter of authority.

3.8. As a matter of principle, there appears to be something commercially unreal about the result. After all, why does a reduction in the price received matter to any business? Presumably, because (and only because) it leads to a reduction in the “bottom line”.

3.9. Also, it is part of the background against which such clauses should be construed that they are intended (in general terms) to exclude losses of the general type of business interruption. A commercial person might well say that if the rules as to what constitutes the “factual matrix” within which a contract is to be construed exclude this sort of general understanding of the purpose of the clause, then the rules as to what constitutes the “factual matrix” should be changed. This is not a question of admitting evidence of the negotiations between the individual parties to a particular contract, but rather of the genesis of standard-form wording.

3.10. As a matter of authority, it may be observed that although the point which we have discussed just above, that (in Mr Justice Clarke’s view) Tsavliris’ claim in respect of a reduction in the amount of salvage award which they received was not a claim in respect of loss of profit, was a ratio of his judgment in The “Herdentor”, there was also a second, alternative, ratio. Tsavliris had claimed the same amount both as a reduction in the amount of salvage award which they received and as an increase in the cost to Tsavliris of providing the salvage services over and above the costs which would have been incurred if “Herdentor” had performed the services required under the contract between Tsavliris and her owners. Mr Justice Clarke held that if instead of having to make greater use of a Pentow tug or tugs under the ISU sub-contract Tsavliris had chartered in another tug at a daily rate of hire, but at a higher rate of hire than had been payable to the owners of “Herdentor”, a claim in respect of that higher cost would not be a claim for loss of profit and would not be excluded by clause 18.3. The Judge was then able to continue that it should not make any difference whether the higher cost of a

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9 The relevant part of Tsavliris’ pleading is set out at page 6 of the transcript, and the Judge notes the point that the amounts claimed as loss of salvage award and as increased costs were the same at page 10 of the transcript.

10 At pages 22-23 of the transcript: the point was conceded by counsel for the owners, but the Judge commented that in his judgment counsel had been right to make that concession.
substitute tug was incurred by way of a daily rate of hire or by way of an increase in the amount payable to the sub-contractor under an ISU sub-contract.11

3.11. In The “Naporisty” the hirer was alleging that the tug had failed to proceed on the voyage with proper despatch, and as a result the arrival of tug and tow at the destination had been delayed. The tow was a vessel which the hirer was selling for scrap to a yard at the destination, and as a result of the delayed arrival of the tow the hirer received a lower price for the scrap. Once again, the tug owners responded that this claim was excluded as a claim for “loss of profit”.

3.12. Although Mr Justice Andrew Smith says that he is “encouraged” by the decision in The “Herdentor” and indeed repeats the words of Mr Justice Clarke “is more akin to a diminution of price than a loss of profit”, in fact the ratio of Mr Justice Andrew Smith is not the same as the first ratio of Mr Justice Clarke in The “Herdentor”. Indeed, Mr Justice Andrew Smith says that “there are few, if any, losses suffered by a commercial concern that could not be described as amounting to or producing a reduction in the profits, or loss of profit, in this very general sense, for the concern as a whole and for a particular venture or part of the business.” That remark seems to me directly contrary to Mr Justice Clarke’s very restrictive interpretation that the claim to be excluded must be in respect of loss of profit, specifically. (Mr Justice Andrew Smith proceeds to interpret the phrase “loss of profit” in clause 18(3) of Towcon as relating only to claims for “loss of productive use of the tow”, an interpretation which will be discussed below.)

3.13. It is suggested, therefore, that the very restrictive approach of Mr Justice Clarke to “loss of profit” should not be followed.

3.14. By way of authority in relation to this approach, there are also two points in the judgments of Mr Justice Rix and of the Court of Appeal in BHP –v- British Steel.12

3.15. It may tell against the restrictive “in respect of” approach that in the Court of Appeal it is said that the way in which the claimants choose to calculate their claim is not decisive.13

11 At page 24 of the transcript.


13 “The method of calculation does not signify the character of the loss”, per Evans LJ at [57], and “The way in which the claimants choose to calculate their claim is not decisive.” per May LJ at [88].
3.16. It might also tell against a strict “in respect of” interpretation that Mr Justice Rix held that where losses are claimed on the basis of mitigation, the loss incurred by way of mitigation must be treated for the purposes of an exclusion of listed kinds of loss as though it was a loss of the kind sought to be avoided.\(^\text{14}\)

3.17. However, the last point, about expenses incurred in way of mitigation, is not clear. The Court of Appeal in \textit{BHP –v- British Steel} expressly declined to decide this point.\(^\text{15}\) The situation may well be that the high costs of getting in substitute equipment at short notice are incurred in order to avoid the losses which would otherwise be incurred in way of lost production or wasted expenditure on the hire of other components of a “spread”, but still it may be an acceptable position that under a clause intended to exclude losses of the type of business interruption the cost of getting in a substitute vessel or substitute equipment may be recoverable, while the loss of production or wasted costs which are avoided might not have been recoverable.

3.18. Quite separately from that very restrictive “in respect of” interpretation, in \textit{The “Naporisty”}\textsuperscript{14} Mr Justice Andrew Smith interpreted the term “\emph{loss of profit}” in clause 18(3) of Towcon as relating to claims for “\emph{loss of productive use of the tow}” (and “\emph{loss of productive use of the tug}”).\(^\text{16}\) However, it is respectfully suggested that this interpretation is strained, and should not be followed.

3.19. First, it may not be appropriate to interpret the wording simply by reference to its context in Towcon, and without regard to the point that this is standard-form wording which has its genesis outside that limited context.

3.20. Second, within the specific context of Towcon, it seems a surprising result that, on the one hand, if the hirer intends to use the tow when it arrives at the destination, then a claim for loss of use of the tow by reason of delay on the voyage will be excluded, but on the other hand, if the hirer intends not to use the tow but to sell it upon arrival at destination, then a claim for loss of profit on the sale by reason of delay on the voyage will not be excluded. It is respectfully suggested that commercial parties cannot be supposed to have intended such a distinction, and therefore this interpretation should be rejected.

3.21. Third, Mr Justice Andrew Smith began his discussion of this point by observing [continuing the quotation begun in paragraph (3.3) of this paper]:

\(^{14}\) [1999] 2 Lloyd’s Rep 583 at 600 col.1.

\(^{15}\) \textit{Per} Evans LJ at [63], \textit{per} May LJ at [85].

\(^{16}\) \textit{The Naporisty}, [144]
“(iii) that the clause excludes liability for loss of use and loss of production as well as liability for loss of profit, and that the expression ‘loss of profit’ is to be interpreted as being ejusdem generis”.

3.22. It is respectfully suggested that a correct application of “ejusdem generis” to a list such as this involves recognising that the items in the list are intended as wide general types of loss.

3.23. With regard to “loss of use” in the Towcon clause, Mr Justice Clarke said in The “Herdentor”:

“I do not think that the expression ‘loss of use’ in clause 18.3 can have been intended to refer to loss of use of the tug by the hirer of the tug”.17

3.24. With regard to “loss of use” in the Supplytime clause, the arbitrators in London Arbitration 1/0218 held that damages for the loss of use of other equipment rented by the charterers would be excluded by the words “loss of use” in Supplytime 89 clause 12(c).

3.25. There might be a question of detail as to whether a claim in respect of wasted wages of personnel who could do no work is to be considered as a claim for “loss of use”. However, the nub of the complaint is not that the employer has had to pay the wages (which the employer would have had to pay in any event) but that the employer has not been able to get any productive work out of the personnel, because an essential part of the whole “spread” was not there, or was not functioning. Although it may be a little unnatural to speak of “using” people as distinct from things, this is in substance a claim for loss of use of the personnel in question. In London Arbitration 1/02 the arbitrators held that damages relating not only to “the loss of use of other equipment rented by the charterers” but also relating to “the loss of use . . . of personnel connected therewith” fell under the words “loss of use” in Supplytime 89 clause 12(c).

17 At the foot of page 20 of the transcript.

18 London Arbitration 1/02 585 Lloyd’s Maritime Law Newsletter (17 April 2002).
4. The surprising consequences

4.1. The effects of the way that English law interprets the word “consequential” may be very surprising for those who use and rely upon clauses excluding liability for “consequential losses”.

4.2. We began with the thought that at the origin of such clauses is the intention that a contractor should not find itself liable in respect of an oil company’s business interruption losses, and in particular should not be liable for “shut-in”, that is, the loss of production from an oil or gas field. (There was also the related thought that a contractor should not be driven to buy insurance in respect of a possibly liability for an interruption in production from an oil or gas field.)

4.3. However, in very many cases it will follow naturally from the sort of work which the contractor is doing and the place where the contractor is to do it, that if things go wrong the result may well be an interruption in production (or, in the case of construction work, a delay in First Oil or First Gas). Anyone who has the most general understanding of the sort of work which the contractor is to do will “contemplate” the possibility that if the contractor fails to take proper care, the result may be a shut-in or loss of production.

4.4. Thus, at least some possibilities of shut-in / loss of production fall under the first rule in *Hadley -v- Baxendale*. Therefore, liability for these possibilities of shut-in / loss of production will not be excluded by an exclusion of “consequential losses”. So, an exclusion of “consequential losses” will not do the job which the market was expecting that it would do.

4.5. The position is no better if (as appears to be usual in the oil and gas industry and in offshore contracts) the wording of the exclusion states that it excludes liability for “consequential damages including but not limited to [a list of types of loss, which will usually include items such as “loss of profit”, “loss of use”, and “shut-in or loss of production”].

4.6. The English Courts resolutely reject the argument that by using such wording the parties have shown that they do not intend the meaning of “consequential” in terms of the second rule in *Hadley -v- Baxendale*, but rather intend a different meaning, which would include the whole of the general types of loss listed (for instance, the whole of “loss of profit” and the whole of “loss of use”). Rejecting this argument, the English Courts resolutely read such wording in a way which is controlled by the established interpretation of the word “consequential”.

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4.7. For example, in *Leicester Circuits Ltd –v- Coates Brothers Plc*, the Court of Appeal was considering a clause which spoke of “consequential or incidental damage of any kind whatsoever . . . including without limitation any indirect loss or damage such as operating loss, loss of clientele . . .”. The Court said:

“The loss of clientele has to be of a kind which is truly ‘consequential’ before it can be excluded. The words ‘or incidental’ are too vague to distract from the requirement that the word ‘consequential’ is to be understood in the sense adopted by this court in *Croudace Construction Ltd –v- Cawoods Concrete Products Ltd.*”

4.8. Again, in *Ferryways NV –v- ABP* Mr Justice Teare was dealing with a clause in ABP’s terms providing:

“Where the Company is in breach of its obligations in respect of the Services or under any Contract or any duties it may have as bailee of the Goods it shall have no liability to the Customer in contract, tort, negligence, breach of statutory duty or otherwise for any loss, damage, costs or expenses of any nature whatsoever incurred or suffered by the Customer which is of an indirect or consequential nature including without limitation the following:

i) loss or deferment of profit;
ii) loss or deferment of revenue;
iii) loss of goodwill;
iv) loss of business;
v) loss or deferment of production or increased costs of production;
vi) the liabilities of the Customer to any other party.”

4.9. The claim being brought by Ferryways against ABP related to sums paid by Ferryways in way of repatriation costs and death benefit in respect of the Chief Engineer of one of their vessels, who had been killed when he was hit by a vehicle while supervising loading and unloading operations at one of ABP’s ports. It was agreed that the sums paid by Ferryways were in respect of a “liability of the Customer to any other party”. It was also agreed that the possibility that the “Customer” might have to pay sums in way of such repatriation expenses and

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19 *Leicester Circuits Ltd –v- Coates Brothers Plc* [2003] EWCA Civ. 290, [63] (the Court dealt with the clause briefly, in an obiter passage.)

death benefit was a possible consequence of negligence by ABP’s employees which fell within the first rule in Hadley -v- Baxendale. The Judge held that the clause did not exclude ABP’s liability in respect of Ferryways’ liability to make such payments.

4.10. Mr Justice Teare said:

“Clause 9 (c) provides that liability for such losses as are ‘of an indirect or consequential nature’ is excluded. In the light of the well-recognised meaning which has been accorded to such words in a variety of exemption clauses by the courts from 1934 to 1999 it would require very clear words indeed to indicate that the parties’ intention when using such words was to exclude losses which fall outside that well-recognised meaning . . .

The important question therefore is whether the words in clause 9 ‘including without limitation the following’ indicate clearly that the parties were giving their own definition of indirect or consequential losses so as to include the specified losses even if they are the direct and natural result of the breach in question. In my judgment those words do not provide the sort of clear indication which is necessary for the defendant’s argument. The parties are merely identifying the type of losses (without limitation) which can fall within the exemption clause so long as the losses meet the prior requirement that they are ‘of an indirect or consequential nature’. Had the parties intended that liability for losses which were the direct and natural result of the breach could be excluded they would hardly have described such losses as ‘indirect or consequential’.”

4.11. The effect is that the words following “including but not limited to” add nothing at all. What is excluded is only “consequential losses” as defined by the second rule in Hadley -v- Baxendale. This effect is noted, and accepted, by Mr Justice Andrew Smith in The “Naporystyi”. The Judge notes the points made by Rainey on Tug and Tow, including:

“Secondly, it is said that if the clause excludes liability only for consequential losses, the specific exclusion of liability for loss of profit, loss of use and loss of production is otiose.”

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21 Ferryways at paragraphs [83] and [84]. The Judge was deciding a series of preliminary issues, and this passage is the ratio for his answer to one of these questions.
However, Mr Justice Andrew Smith says that he does not find these criticisms convincing\(^ {22} \) and two paragraphs later he comments:

“It is true that loss of profits is capable of being a direct loss, but it need not be. For my part I do not find it remarkable that parties seeking to exclude all indirect loss but being particularly concerned about indirect loss of profit should agree upon a provision that makes specific reference to loss of profits.”\(^ {23} \)

4.12. Once again, this interpretation may well be surprising and very unwelcome to those who use and rely upon such exclusion clauses. They may well have thought that they had expressly excluded the possibility that the contractor might be liable for the oil company’s shut-in or loss of production, and may find out that they had not excluded liability for the possibilities of shut-in or loss of production which would follow naturally from negligence by the contractor and so fall within the first rule in Hadley -v- Baxendale.

4.13. There are two possible reactions from the Courts to the market’s surprise. One is to say that the aim of English commercial law is certainty and predictability. It matters that there should be a rule, and it does not matter so much what the rule is and whether the rule is considered fair, as it matters that the rule should be certain. Given a certain rule, merchants may organise their transactions on the basis of this rule.

4.14. This first reaction is clearly illustrated by the judgment of the Court of Appeal in British Sugar plc –v- NEI Power Projects Ltd. In this case Lord Justice Waller (with whom the other two Lord Justices agreed) said:-

“Secondly, in any event once a phrase has been authoritatively construed by a court in a very similar context to that which exists in the case in point, it seems to me that a reasonable businessman must more naturally be taken to be having the intention that the phrase should bear the same meaning as construed in the case in point. It would again take very clear words to persuade a court to construe the phrase differently.”\(^ {24} \)

\(^{22}\) The “Naporisty”, [147].

\(^{23}\) The “Naporisty”, [149].

4.15. On the other hand, in *Caledonia North Sea Ltd –v- British Telecommunications plc* Lord Hoffmann set out the meaning of “indirect or consequential losses” as established by the decisions of the English Court of Appeal, and then said:

“My Lords, I would wish to reserve the question of whether, in the context of the contracts in the Hotel Services and similar cases, the construction adopted by the Court of Appeal was correct.”

4.16. It may be observed that this was not the view of Their Lordships as a whole, but only an *obiter* comment by Lord Hoffmann individually, and that Lord Hoffmann has perhaps been more concerned that other Judges that the law should not have specific “rules of construction”, which give to words a meaning different from the meaning that ordinary people (without knowledge of the specific “rules of construction”) would see. It may be that with the retirement of Lord Hoffmann, there will again be a climate in which English law will acknowledge that it has rules of construction which do not simply articulate the way in which ordinary people would interpret wording, but may be contrary to what ordinary people would understand.

4.17. Nevertheless, it is striking that (so to put it) the way in which the market understands such clauses refuses to lie down and conform to what the Courts have decided they should mean. Of course, if parties consult a competent English lawyer before making their contracts, they will receive advice as to how any clause using the words “consequential” or “indirect” will be interpreted. However, it seems that those who have made such contracts continue to take advice after a claim has arisen, and continue to find it surprising and alarming when they are told how the clause which they have used will be interpreted under English law. It might be said that where the market of those who use a particular type of contract or a particular type of clause, understand it in a different way from the way in which lawyers have understood it, then it is the business of a system of law which aims to be commercial to adapt itself to the market’s understanding.

4.18. Since the question is open at the level of the Supreme Court (as it now is), it may be worth pausing to consider whether it would be possible for English law to adopt a different meaning for the word “consequential”.

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25 *Caledonian North Sea Ltd –v- British Telecommunications plc* [2002] UKHL 4, [2002] 1 Lloyd’s Rep 553, [99] and [100].

26 Indeed, if evidence shows that persons in Suffolk use the words “a dozen rabbits” to mean 10 rabbits, then a contract between two Suffolk persons for the sale of “two dozen rabbits” must be interpreted as meaning 20 rabbits.
5. Building a house on sand?

5.1. A further reason why it might be appropriate for English law to adopt a different meaning for the word “consequential” is that the distinction between the two rules in Hadley -v- Baxendale proves upon examination not to be straightforward to apply. It is as if the Courts have been trying to make a clear definite rule for the interpretation of exclusion clauses using the word “consequential” by translating them into a distinction between types of consequences which is itself not a clear and definite distinction.

5.2. Indeed, it is striking that at the same time as the Court of Appeal has been insisting repeatedly that the meaning of the word “consequential” is to be given by the distinction between the two rules in Hadley -v- Baxendale, the Courts in other cases have been saying that in Hadley -v- Baxendale there is no distinction between two rules, but rather a single rule with regard to the attribution of knowledge (or perhaps the acceptance of responsibility) to parties at the time when they are making a contract. In The “Achilleas” Lord Walker quoted with approval a passage from the judgment of Mr Justice Robert Goff in The “Pegase” where Mr Justice Robert Goff stated “the principle in Hadley -v- Baxendale is now no longer stated in terms of two rules, but rather in terms of a single principle – though it is recognised that the application of the principle may depend on the degree of relevant knowledge held by the defendant at the time of the contract in the particular case. This approach accords very much to what actually happens in practice; the courts have not been over-ready to pigeon-hole the cases under one or other of the so-called rules in Hadley -v- Baxendale, but rather to decide each case on the basis of the relevant knowledge of the defendant.”

5.3. After all, when considering whether a type of loss is too “remote” to be recovered as damages of breach of contract, the Court will be satisfied (subject to questions about “acceptance of responsibility”) if it is established that the defendant knew that this type of loss was a possible consequence. The Court will not be concerned to enquire whether the defendant knew this as a part of ordinary general knowledge (so that it would fall under the “first rule”) or by way of information about specific facts (so that it would fall under the “second rule”).

5.4. However, it may be said in response that there is something over-sophisticated about this denial of a distinction between the two “rules”. When the defendant actually has the knowledge in question, it does not matter on what basis he has it.

However, the law with regard to “remoteness” in contract will certainly require some notion of “ordinary general knowledge”, which will define those consequences which are never too “remote”, regardless of whether the defendant was aware of those possibilities or not. Indeed, if the law as to “remoteness” in contract develops to give the primary role not to knowledge but to “acceptance of responsibility” / the “scope” of contractual obligations, then a robust notion of such “ordinary general knowledge” may well be required. It may well be that a party is to be deemed to have accepted responsibility for those possible consequences which fall within “ordinary general knowledge”, but with further consequences it may be necessary not only for the claimant to show that the defendant was aware of them as possible consequences, but also to show that the defendant should be considered to have “accepted responsibility” for them.

5.5. Nevertheless, it may still be difficult in practice to apply the distinction between the two “rules in Hadley -v- Baxendale” in a way which will let us distinguish between types of loss which are “consequential” and types of loss which are not “consequential”.

5.6. This difficulty was raised by Mr Justice Rix in BHP –v- British Steel. He said:

“I find it [this topic] conceptually difficult. In effect the critical reasoning of the authorities is to lay stress on what may be contemplated as occurring in the ordinary course of things. That is both direct, natural and immediate; everything else is indirect or consequential. The difficulty I have is that what may be contemplated as happening in the ordinary course of things depends on the parties’ knowledge, actual or imputed.”

5.7. Mr Justice Rix went on to illustrate this by reference to Croudace –v- Cawoods, which is the case in which the Court of Appeal definitively adopted the interpretation of “consequential” in terms of the second “rule in Hadley -v- Baxendale”.

5.8. In Croudace –v- Cawoods the claimants were a firm of builders, and the defendants were suppliers of building materials (specifically, masonry blocks). There was a delay in the supply of the masonry blocks, and it was held that losses for the builders such as the idle time of workmen who could do no work because there were no masonry blocks on the site were direct and natural consequences and not excluded as “consequential”.

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5.9. However, this would not be a direct consequence if the contract was a sale of masonry blocks by a supplier to a builder’s merchant. In order for the consequence to be considered as “direct” and “natural”, it has to be known to the seller, and not merely known to the seller but treated as part of “ordinary general knowledge”, that the building materials are being supplied not to someone who wants to sell them but to someone who wants to use them. (In Croudace -v- Cawoods, the masonry blocks were purchased for delivery at a building site.)

5.10. The resulting difficulty in applying the distinction may be best illustrated by Addax -v- Arcadia Petroleum. In this case, Addax sold a quantity of crude oil to Arcadia FOB at a Nigerian terminal. Addax bought the cargo from the Nigerian national oil company. There was a delay by Arcadia in taking delivery, which resulted in a later date for the bill of lading, which in turn meant that Addax had to pay a higher price to the Nigerian national oil company.

5.11. At this point, the facts become more complicated. Addax was not claiming for the difference in the price payable to the Nigerian national oil company under Addax’s purchase contract. Addax had “hedged” that exposure by way of entering into (first) futures contracts for quantities equal and opposite to the amounts sold to Arcadia and bought from the Nigerian national oil company and (secondly) contracts for differences covering the possible difference between prices in the futures market and the physical prices which Addax would be receiving from Arcadia and paying to the Nigerian national oil company. Addax was claiming the cost of unscrambling these arrangements and remaking them following the delay by Arcadia in taking delivery.

5.12. The contract between Addax and Arcadia provided that “In no event shall seller or buyer be liable for indirect or consequential damages”, and Arcadia said that losses incurred in way of unscrambling and remaking hedging transactions would fall under the second rule in Hadley -v- Baxendale, and therefore would be “consequential”.

5.13. Mr Justice Morison determined that Addax were entitled to recover the amount they were claiming. His first ratio was that the normal measure of damages for a seller in the case where a buyer has failed to accept delivery on time is any difference against the seller between the price which the seller would have received from the buyer if the buyer had accepted delivery on time, and the price to which the seller was entitled on the basis of the date when the buyer actually

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29 BHP-v- British Steel, at page 599.

accepted delivery, and this this normal measure would have yielded an amount of damages greater than the loss which Addax had actually suffered and were actually claiming.\(^{31}\) (It appears obviously correct that where the amount claimed is less than the amount of the normal and obvious measure of damages, an exclusion for "consequential" loss should not "bite" on this claim.)

5.14. However, the Judge also held (and it appears that this may have been a second ratio):

"It was, I think, wholly foreseeable that if the claimants took a position [that is, in relation to the Nigerian national oil company] which was otherwise than back-to-back with their contract with the defendants, they would cover their position with one of a multitude of hedging transactions available. While the contract instrument used may well vary from trade to trade (or possibly trader to trader) the defendants must have foreseen the need for the claimants to get cover."\(^{32}\)

5.15. On this basis, Mr Justice Morison held that the losses arising from unscrambling and remaking the hedging arrangements fell under the first rule in *Hadley -v- Baxendale*, and therefore would in any event not be excluded by the exclusion of "consequential damages".

5.16. However, with respect, that conclusion appears incorrect. No doubt Arcadia were well aware that Addax would engage in one sort or another of complicated hedging transaction. However, this was not a part of "ordinary general knowledge", nor was it something which followed from the nature of the contract by which Arcadia bought from Addax a quantity of crude oil FOB at a Nigerian terminal. Rather, it was something that Arcadia would have known because Arcadia themselves were sophisticated oil traders, and as such would have been well aware of the sort of thing which sophisticated oil traders would be doing. To me, that appears to be a clear example of the second rule in *Hadley -v- Baxendale*.

5.17. Of course, what is significant here is not the question which is correct, out of the view taken by Mr Justice Morison and the view taken by the writer. Rather, what is significant is the fact that it is possible to take two such opposed views, which illustrates the way in way it may prove difficult in practice to apply a distinction between the two rules in *Hadley -v- Baxendale*.

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\(^{31}\) [2000] 1 Lloyd’s Rep 493, 496

\(^{32}\) [2000] 1 Lloyd’s Rep 493, 496
5.18. Also, and apart from the practical difficulties in applying this distinction, it may be said that the distinction between the two rules in Hadley -v- Baxendale is the wrong sort of distinction. It may be said that what is naturally intended by a distinction between “consequential” and non- “consequential” losses is a distinction in terms of the way that things generally happen, as between those consequences which occur in the ordinary way of things, and those consequences which only occur by reason of special facts. In place of a distinction in terms of the way things happen, the English Courts have substituted a distinction in terms of what people know, and this is a distinction which is drawn not in terms of what ordinary people generally know, but rather in terms of what people who are making the type of contract in question would generally know. As Lord Walker says in The “Achilleas”:

“The degree of knowledge assumed under the first limb [of Hadley –v- Baxendale] depends on the nature of the business relationship between the contracting parties.”

This does not correspond even approximately to a distinction between what usually happens and what only happens by reason of special facts.

6. Digging deeper into the authorities

6.1. The three cases in which the established interpretation of “consequential” was developed are Millar’s Machinery Co Ltd –v- David Way & Son, which was decided by the Court of Appeal in 1935, Saint Line Ltd –v- Richardson, Westgarth & Co Ltd, which was decided by Mr Justice Atkinson in 1940, and Croudace Construction Ltd –v- Cawoods Concrete Products Ltd, which was decided by the Court of Appeal in 1978.

6.2. Intellectually, the development of this interpretation is unsatisfying. In Millar’s case, the report of the decision of the Court of Appeal is only a brief summary (surprisingly brief, given that the report of the decision of Mr Justice Branson at first instance appears relatively full). According to the summary, Lord Justice Maugham said:

33 The “Achilleas”, at [67].

34 (1934-5) 40 Com.Cas. 204

35 [1940] 2 KB 99

36 [1978] 2 Lloyd’s Rep 55
“On the question of damages, the word ‘consequential’ had come to mean ‘not direct,’ and the damages recovered by the defendants on the counterclaim arose directly from the plaintiffs’ breach of contract under section 51(2) of the Sale of Goods Act, 1893. The plaintiffs’ machine would not do the work, and the defendants were entitled to get the best substitute they could for it.”

According to the summary, Lord Justice Roche agreed:

“that the damages recovered by the defendants on the counterclaim were not merely ‘consequential,’ but resulted directly and naturally from the plaintiffs’ breach of contract. The machine would not do its work, and the defendants were entitled to reject it and to claim damages . . .”

6.3. The Lord Justices were adopting an interpretation quite different from the one adopted by Mr Justice Branson at first instance. Mr Justice Branson had interpreted the words in the clause in question “we do not accept responsibility for consequential damages” in the context of the remainder of the clause, which was dealing with the replacement of defective parts under guarantee, so that Mr Justice Branson had interpreted these words as relating to damage arising from delay while parts were being replaced under the guarantee. However, it appears that the Lord Justices were interpreting the words “we do not accept responsibility for consequential damages” as not being confined to the context of the clause in which they were, but as having some general meaning in relation to the contract as a whole.

6.4. When Lord Justice Maugham said “had come to mean”, it might appear that he was intending to refer to previous decisions in which the word “consequential” had been interpreted. However, it seems that in subsequent cases the industry of counsel has been unable to uncover any relevant authority prior to Millar’s, St Line, and Croudace.

6.5. Thus, it is not clear why Lord Justices Maugham and Roche consider it might be natural to interpret the word “consequential” in terms of the second rule in Hadley -v- Baxendale.

6.6. In the subsequent cases in the Court of Appeal, the Court simply treats itself as bound by previous authority. Croudace is decided on the basis that Millar’s is

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binding authority (and, even if it were not strictly binding, the Court should follow it as authoritative). Next, in 1997, British Sugar was decided on the basis of the authority of Millar and Croudace. Lord Justice Waller said:

“With Court of Appeal authority construing a phrase in a very similar context, and another Court of Appeal saying that the view previously expressed is binding in yet another similar context, it would take some radical difference in language or a radical difference in context to persuade yet a further Court of Appeal not to construe the phrase the same way.”

6.7. However, two points at least may be noted from the judgments in Millar, Saint Line, and Croudace.

6.8. In both Millar and Saint Line the clauses in question were guarantee clauses, of the type where a manufacturer undertakes that during a guarantee period the manufacturer will repair or replace defective parts and workmanship, but the manufacturer excludes any other obligation or liability, apart from the repair or replacement of defective parts and workmanship during the guarantee period. Similarly, in Croudace the suppliers of the masonry blocks were limiting their liability to free replacement of any materials or goods which were shown not to be of the quality or specification ordered or to be defective, and were intending to exclude all other liability.

6.9. Thus, first, these were one-sided exclusion clauses. In Saint Line Mr Justice Atkinson said:

“In determining whether the clause is a defence to these claims for damages it must be remembered where a contracting party seeks to protect himself from liability for damages recoverable by law for breach of contract he must do so in clear and unambiguous language.”

Similarly, in Croudace at first instance, Mr Justice Parker said:

“I was referred by Mr Keating to a number of textbooks and authorities in which the word ‘consequential’ is given a much wider meaning, but I


40 [1940] 2 KB 99, 103.
did not find them helpful. What I have to determine is the meaning of the word in the clause before me and wider meanings in other contexts and for other purposes do not assist.

In approaching this question, I do so on the basis that the clause, being an exclusion clause, will only exclude what can be brought clearly within the words used.”

6.10. Secondly, the reasoning in some of the judgments includes the thought that, for one reason or another, it will not be acceptable if the party in breach is not liable for any damages at all, and therefore the interpretation of “consequential damages” has to leave some damages for which the party in breach may be held liable. In Millar at first instance, Mr Justice Branson said:

“I think that under our law parties are at liberty to agree that one party shall supply goods to the other at a certain price, but that if he fails to do so the others will have no remedy against damages; but that would be a very curious agreement and would need to be made in the clearest and most unambiguous terms. The contention of the plaintiffs amounts to this, that they could contract to deliver goods but from mere caprice they could at the last moment refuse to deliver and yet would not be liable to pay any damages. That does not seem to me to be a likely contract for business men to enter into, and I decline to put such a construction upon the documents in this case.”

In Croudace at first instance Mr Justice Parker said:

“It is in my judgment clearly intended that the defendants should be under some liability for delay . . . Furthermore, on the plain wording of cl.4 itself, there is no intention to relieve from liability for all loss and damage only for such loss or damage which is properly described as ‘consequential’.

The problem is, therefore, to determine, in effect, what it was which was intended to survive the exclusion.”

41 [1978] 2 Lloyd's Rep 55, 58 col.1

42 (1934) 40 Com.Cas. 204, 207-8.

6.11. Therefore, if English law is to adopt a different meaning for the word “consequential”, it may be more easy to do so in relation to exclusion clauses which are not one-sided, but rather make a mutual exclusion from liability. (As we have seen in relation to “loss of profit”, Judges may consider that even mutual exclusion clauses require to be construed restrictively, but still the reading may be less restrictive if the exclusion clause is not one-sided.)

6.12. Also, there may need to be a clearly visible type of liability which is not to be “consequential”, and so is not to be excluded. It may also be necessary that this should be a substantial type of liability, such that it does not appear “commercially absurd” that the parties should have intended this type of liability to be recoverable, while other types of liability are to be excluded.

7. There Is No Alternative?

7.1. It is remarkably difficult to find an alternative general concept of “consequential loss” which will cover (and so exclude from liability) those business interruption losses which the market expects should be excluded by a clause in terms of “consequential damages”.

7.2. In the next section of this paper, the definition of “normal” and “consequential” damages offered by McGregor on Damages will be considered. However, I will begin by considering briefly some other attempts which may be made.

7.3. The most obvious idea is to try to distinguish between a thing itself and its consequences. In a way, this is what is attempted by McGregor’s distinction between the market value of goods and services and other losses/damages, which will be considered below. However, if we were to attempt to make such a distinction more widely than in the case of goods and services which are bought and sold, then it would certainly break down. The law does not award damages in respect of “the thing itself”, but in respect of certain consequences. Damages for death are not in respect of the life which has been lost itself, but a nominal amount in respect of “bereavement”, and substantial damages in respect of the loss of what the dead person’s dependants would have expected to receive from the dead person. Damages for personal injury are not in respect of the injury “itself”, but a relatively small amount in respect of “pain and suffering” (which is itself an ongoing consequence) and far larger amounts in respect of loss of earnings and the cost of care. Damages in respect of damage to property are not in respect of the object
“itself”, but in respect of the cost of repairs or of replacement (which are themselves a sort of consequence of the damage).44

7.4. It may be natural to attempt a distinction in terms of time, between earlier consequences and later ones. However, this is unlikely to capture what is intended, because business interruption losses, and also losses in way of workmen and equipment standing idle, will begin to clock up right away45, while more “direct” losses such as costs of repair or replacement will not be incurred right away.

7.5. Again, it may be natural to attempt something in terms not simply of time but of causal sequence. Given the sequence “For want of a nail, a horse was lost . . . .”, it is natural to try to draw a line which will block off the consequences at the end of the sequence (the lost battle, the lost kingdom). This is a part of what may be meant, and it should not be simply discarded, but it begs the question of the point at which the line is to be drawn. Is it that the loss of the horse is a “direct”/”natural” consequence, while the loss of the rider is “consequential”? Also, consequences do not follow in a single sequence, but branch out in all directions. It may be necessary to cut off some branches (for example, the business interruption losses which are “clocking up”) before the development in terms of time has reached the main consequence which is considered as “direct”/”natural”.

7.6. I would suggest that a common-sense idea of what is “consequential” would be in terms of what follows given the ordinary way in which things happen, and what only follows because of extra facts which are specific to a particular case. However, of course this requires a notion what happens in the ordinary course of things, that is, of the basic background facts which are to be assumed, as distinct from the extra facts which are specific to a particular case.

7.7. It is not altogether surprising that English judges, who express disdain for “metaphysics”, have “ducked out” of the question what would happen in the ordinary course of things, and have replaced it with the question what a reasonable person would expect to happen. Nor is it surprising that, in turn, the question what a reasonable person would expect to happen does not receive a single answer: what a person expects, will inevitably depend on what sort of background knowledge the person has.

44 As Mr Justice Atkinson said in Saint Line “all damage is in a sense consequential”[1940] 2 KB 99.103; and Lord Justice Sedley said in Hotel Services Ltd -v- Hilton International Hotels (UK) Ltd “all recoverable loss is literally consequential”[2000] BLR 235, 238.

45 In Croudace Mr Justice Parker observed that the cost of idle men and plant, etc “begins to clock up at once”, [1978] 2 Lloyd’s Rep 55, 58 col.2.
7.8. The fate of these various attempts may be significant in what follows, because of the way in which, as it appears, the Courts profess not to understand the ideas involved, and tend to assimilate all of them to the established idea that what is "direct" is what a reasonable person would expect without being informed of specific facts. For example, in *Saint Line* it appears that counsel for the defendants attempted to make a distinction between what was “immediate” and what was “remote in point of time”.

Mr Justice Atkinson refused to understand the word “immediate” in terms of time, as distinct from what “flows directly”, with “directly” being understood in terms of the contrast made in *Millar*.

8. **McGregor** on “normal” and “consequential” damages

8.1. The distinction which *McGregor* offers is:

“The normal loss is that loss which every claimant in a like situation will suffer; the consequential loss is that loss which is special to the circumstances of the particular claimant. In contract the normal loss can generally be stated as the market value of the property, money or services that the claimant should have received under the contract, less either the market value of what he does receive or the market value of what he would have transferred but for the breach. Consequential losses are anything beyond this normal measure, such as profits lost or expenses incurred through the breach, . . .”

8.2. However, the allied suggestion that the non-“consequential” measure of damages for delay in delivery should be the difference in market value, that is, the difference between the market value of the goods at the time when they should have been delivered and the market value of the goods at the time when they were delivered, was clearly put to the Court of Appeal in *Croudace*, and was equally clearly rejected by the Court.

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46 [1940] 2 KB 99, 101, in the argument of counsel for the respondents.

47 [1940] 2 KB 99, 104.


49 [1978] 2 Lloyd’s Rep 55, 61 col.2 “The second possible meaning”, rejected at 62. *McGregor* itself was cited in *British Sugar* (1997) 87 BLR 42 (CA), 48, and *Hotel Services* [2000] BLR 235 (CA), [9], and was rejected by the Court on both occasions.
8.3. It may be said that a “normal” measure in terms of market value is (like the prima facie measures of damages stated in the Sale of Goods Act) appropriate in the case where the purchaser is a merchant who is buying goods for re-sale, but is not appropriate where the purchaser is an end-user and is buying the goods in order to use them. As Mr Justice Parker said in Croudace with regard to the allied measure of damages for delay in delivery:

“When selling building materials to a contractor for delivery on a building site, the difference in the value of the materials is, as a matter of common sense, wholly irrelevant.”

It may be said that there is no reason to treat the case of an end-user of goods as any less “normal” than the case of a merchant who buys for re-sale. In the case of services as distinct from goods, it must be more “normal” for the purchaser to be an end-user.

8.4. Certainly, a measure of damages in terms of “market value” can only be appropriate in cases where there is an available market in which the goods or services required can readily be obtained. In Millar Mr Justice Branson said:

“Normally speaking, if a person contracts to deliver goods to another and fails to do so the damages are the difference between the price of the goods which he ought to have delivered and the market price. Here the plaintiffs agreed to supply a machine which would do certain work; they broke their contract, and if the defendants could have gone into the market and bought another machine the damages would have been the difference between the price which they had agreed to pay the plaintiffs and the price of the other machine. The position is in fact more complicated because these machines are not standardised articles which can be bought anywhere; they have to be manufactured


51 A charter of a vessel is a contract for services. In the case of cargo vessels, very often those who take vessels on time charter are doing so in order to charter them out. However, this is less usual in the case of offshore vessels and indeed the Supplytime form does not allow a restricted right to sub-charter.

52 (1934) 40 Com.Cas. 204, 208. It should be noted that formally this judgment is not authoritative, because the Court of Appeal upheld the decision of Mr Justice Branson on different grounds. However, parts of the judgment of Mr Justice Branson in this case have been cited in subsequent judgments with evident approval.
to meet the circumstances of the particular customer. One has to see what the defendants could reasonably have done to make good the damage occasioned to them by the plaintiffs' breach of contract. According to their evidence they did the only possible thing, they went to people who could supply one of these machines at short notice and had to pay some £1,450 for it. I think the proper measure of damages is the sum which the defendants had to spend to put themselves in the position in which they would have been if the plaintiffs had carried out their contract.  

8.5. It may well be suggested that any acceptable concept which is to replace the presently-established meaning of “consequential” has to allow as not “consequential” the cost of obtaining substitute goods or services, even if this is a high cost caused by the need of an end-user to obtain replacement goods or services at short notice.

8.6. However, the question immediately arises whether it will be “commercially absurd” and so not easily accepted by judges for the position to be that an exclusion of “consequential damages” will not exclude the high cost of obtaining replacements at short notice, but will exclude business interruption losses and losses in terms of wasted time for workman and equipment. Given that in reality the high costs of getting in replacements at short notice may only be incurred in order to avoid or mitigate losses in terms of business interruption and downtime, it may seem surprising that the losses which are being avoided cannot be recovered, but the high cost of avoiding these losses may be. It may seem worse than surprising, to the point of being “commercially absurd”, that if replacements can be obtained at short notice then the high cost of obtaining them may be recovered, but if replacements cannot be obtained at all then the end-user may not be able to recover any damages at all.

8.7. These surprising results constitute the chief difficulty for the practical suggestions which will be considered in the next two sections of this paper. I would suggest that the first consequence, that an exclusion clause may prevent the recovery of business interruption losses and downtime, but may allow the high cost of bringing in substitutes to avoid such losses, is not so absurd as to be unacceptable,

53 It may also be appropriate to compare *Saint Line*, where there was an exclusion of “indirect or consequential damages”, but the defendant engine-builders did not contest a claim in respect of the difference in cost of procuring similar engines, [1940] 2 KB 99, 100.

54 Compare London Arbitration 1/02, where the claims which the tribunal allowed to proceed “related to the hire or purchase of equipment to substitute for items alleged not to be working”.
provided a clause has been clearly drafted so as to exclude business interruption losses and downtime.\textsuperscript{55}

8.8. However, it may be so “absurd” that the Courts would strain to avoid accepting a clause which has the consequence, that if the defendant is the owner of a drilling vessel and wrongfully withdraws it from the claimant’s service, or negligently fails to carry out any repairs so that it breaks down, then if the claimant can obtain a replacement drilling vessel at a very high cost then that cost will be recoverable, but if the claimant cannot get a replacement drilling vessel “for love or money” then in this more extreme situation the claimant cannot recover anything. The suggestions which I will consider in the two following sections may perhaps only be workable if clauses can be drafted in such a way as to allow the claimant to recover substantial damages in this more extreme situation.

9. **First alternative: a list and everything like them**

9.1. In the remainder of this paper, I will assume that the established meaning of the word “consequential” is to be treated as beyond challenge, and will observe the ways in which the market has set about getting the sort of exclusions which it desires despite the interference of the English Courts.

9.2. I have encountered the following wording in a contract for the provision of a drilling ship:

“The Contractor shall not be liable to the Operator Group [for] any spread costs (such as hire or other charges payable to owners of vessels or equipment and the cost of keeping the Operator Group vessels on location), loss of production, loss of product, loss of use, loss of revenue, profit or anticipated profit, delay, business interruption and other similar losses”.

9.3. This wording avoids describing the exclusion as an exclusion of “consequential losses” and therefore avoids any interference by the established definition of the word “consequential”. The problems with “consequential damages including but not limited to” are sidestepped altogether. Of course, the problem will remain that the individual items of the list will be read restrictively, in the way discussed in section 2 of this paper.

\textsuperscript{55} In a way, the position is no different from that under a Construction All Risks insurance, which is an insurance against property damage and not against business interruption losses, but which may specifically permit claims to include the high cost of sending replacement parts by the quickest means possible. No-one would call the provisions of such a policy commercially absurd.
9.4. As far as I am aware at present, there is no direct authority on how the words “and other similar losses” in such a clause would be treated. For the reasons discussed in the previous two sections of this paper, it might well prove an uphill task to find a single genus or class to which all the types of loss in the list would belong and which would define “other similar losses”, without turning out to be the second rule in Hadley -v- Baxendale.

9.5. However, it should be possible to approach “other similar losses” on a case by case basis, asking whether the type of loss which is being claimed is similar to spread costs, or similar to loss of production, and so forth. Proceeding in this way, there would be no need for any single overall genus or class.\(^{56}\)

9.6. As discussed previously, a clause of this type is more likely to be effective if it is a mutual exclusion, and it is more likely to be effective if it is made clear that some substantial measure of damages is not excluded.

9.7. It would be prudent to say expressly and clearly that the established meaning of “consequential” is not intended. I would recommend, for example, adding to the wording quoted at the beginning of this section “whether direct or indirect, and whether or not considered consequential under English law”.

9.8. It might be attractive to use the word “consequential”, because the use of this word may make it easier to sell the exclusion clause to the other party. However, it would then be necessary to avoid any infection from the presently-established meaning of the word “consequential”. (The fate of “consequential damages including but not limited to” should stand as a warning of what may happen if the use of the word “consequential” in a contract is not completely distanced from the presently-established meaning of the word.) It would be necessary to make it absolutely clear that the word consequential is being defined afresh, from scratch, in exactly the same way as if it were an artificial word such as “shmonsequential”. For example, it might be safe to have a contract with a definitions section at the beginning including a definition of “consequential damages” in terms of a list of types of loss followed by “and other similar losses, whether direct or indirect, and whether or not considered consequential under English law”, and then to go on to use the phrase “consequential damages” in the body of the contract.

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\(^{56}\) This line of approach is parallel to the approach which is adopted in relation to an off-hire clause such as the one in the 1948 NYPE form, with the words “any other cause” but without “whatsoever”. With such a clause, it is required that any other cause which is to put the vessel off-hire must be similar to the causes listed in the clause, but it is accepted that the causes listed in the clause do not form one single class, and so the requirement that any other cause must be “similar” is dealt with by asking, case by case, whether the other cause which is being advanced is similar to a cause in the list, or to a way in which a cause in the list has already been extended by previous authority.
10. Second alternative: a list and “consequential” damages

10.1. There should be no problem with an exclusion clause which excludes by two separate limbs, first, the list and, by the second limb, “consequential” losses or damages in the meaning presently established by the decisions of the Court of Appeal.

10.2. For example, in Deepak –v- ICI the Court of Appeal considered this clause:

“and in no event shall DAVY by reason of its performance or obligation under this CONTRACT be liable in tort or for loss [of] anticipated profits, catalyst, raw materials and products or for indirect and consequential damage.”

10.3. In interpreting this clause, the Court treated “loss of anticipated profits” separately from “indirect or consequential damage”. “Indirect or consequential damage” was interpreted in the way established by Croudace, but the Court also said:

“The direct and natural result of the destruction of the plant was that Deepak was left without a methanol plant, the reconstruction of which would cost money and take time, losing for Deepak any methanol production in the meantime. Wasted overheads incurred during the reconstruction of the plant, as well as profits lost during that period, are no more remote as losses than the cost of reconstruction. Lost profits cannot be recovered because they are excluded in terms, not because they are too remote.”

10.4. Therefore, subject to the point that there may be difficulty in the way of any exclusion which does not leave open the possibility of recovering some damages which are substantial and not “commercially absurd”, there is no reason why a clause with this two-limbed structure should not be effective as intended.

10.5. Logically, if it is possible (as explained in the last section of this paper) to have a list “and any other similar losses”, and if it is also possible to have a two-limbed structure with a list and then, separately, “indirect / consequential” losses, then it should also be possible to combine these two ideas.


58 Deepak (CA), [90] (emphasis added).
10.6. The market has produced clauses with this combined structure. For example, I have seen a contract for the supply of equipment for the conversion of a vessel into a FPSO worded as follows:

“36.1 Except as otherwise provided under Article 36.2 Contractor shall not be liable to Company, whether in contract, in tort or otherwise at law, for any Consequential Loss.

36.3 Company shall not be liable to Contractor, whether in contract, in tort or otherwise at law, for any Consequential Loss.

36.4 For the purpose of this Article 36 Consequential Loss means:

(a) Loss of profits, loss of anticipated profit, loss of revenue, loss of contracts, loss of use, loss of opportunity, down time costs and the costs of obtaining or maintaining finance or any similar economic or financial loss, whether direct or indirect; and
(b) indirect or consequential damages, costs, losses or expenses of whatever nature.

10.7. Subject to the same point that there may be difficulty in the way of any exclusion which does not leave open the possibility of recovering some substantial damages, there seems to be no reason why a clause with this combined structure should not be effective as intended.

11. The clauses in Towcon and Supplytime

11.1. The wording in the pre-2008 Towcon form is:

“neither the Tugowner nor the Hirer shall be liable to the other party for loss of profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever.”

11.2. Wording with a similar “shape” was considered by Mr Justice Rix in BHP – v- British Steel. The clause read:
“Neither the Supplier nor the Purchaser shall bear any liability to the other . . . for loss of production, loss of profits, loss of business or any other indirect losses or consequential damages . . .”

11.3. Mr Justice Rix interpreted this wording in the same way as the Court of Appeal had interpreted the wording in *Deepak –v- ICI*. That is, he disregarded the word “other”, gave the items such as “loss of profits” their natural meanings, gave the words “any indirect losses or consequential damages” their meaning as established by the decisions of the Court of Appeal (including the decision of the Court of Appeal in *Deepak –v- ICI*, where the Court had reversed Mr Justice Rix on this point), and treated the clause as a whole as excluding both the list of items (such as “loss of profits”) and “any indirect losses or consequential damages”.

11.4. On the other hand, three years previously Mr Justice Clarke had considered the Towcon wording in *The “Herdentor”* and held that the natural meaning was that only indirect losses in each category were excluded:

“It does seem to me that if those words are construed by themselves, the expression ‘any other indirect or consequential damage’ (my emphasis) gives content to the meaning of ‘loss of profit, loss of use’ and ‘loss of production’ and strongly suggest that only indirect losses of profit, use and production are to be excluded together with any other indirect or consequential damage which may occur.”

11.5. In effect, this reading insists that the word “other” makes it impossible to take apart the list of types of loss from the words “indirect or consequential damage”. It also refuses to allow that the list of types of loss might show that the parties intended to depart from the established meaning of “indirect or consequential” (as we saw previously, the position taken by the Courts has been that it will take a clearer indication than that to allow a departure from the established meaning). Therefore, this reading makes the established meaning of “indirect or consequential” control the interpretation of the items in the list, in the same way as happened with “consequential damages including but not limited to” in *Leicester Circuits* and *Ferryways*.

11.6. The judgment of Mr Justice Rix in *BHP* does not refer to *The “Herdentor”*, and there is no reason to suppose that *The “Herdentor”* (an unreported judgment on the interpretation of a maritime contract) would have been cited to Mr Justice Rix in

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60 *The Herdentor*, at page 26 of the transcript.
BHP. The choice between these two interpretations of the “shape” of the pre-2008 Towcon clause involves a delicate exercise in the doctrine of precedent.

11.7. On one side, when BHP proceeded to the Court of Appeal, it appears that the Lord Justices may have assumed the correctness of the approach taken by Mr Justice Rix. Lord Justice Evans held that a claim for deferral of production was barred by the exclusion of “loss of production . . . or any other indirect losses or consequential damages.”

61 Lord Justice May also held that this claim was barred simply because it was a claim in respect of “loss of production” and any resulting loss would be a “loss of profits” / “loss of business”.

11.8. Formally speaking, this point in the judgment of Mr Justice Rix is ratio. The Judge was considering a series of preliminary issues, and this was the ratio for his answer to the third issue before him. However, the support given by the judgments in the Court of Appeal may be only obiter, in that both Lord Justices say that they consider that the answer given to the first issue makes it unnecessary to answer the third issue. Lord Justice Evans says that he is only indicating shortly what the issues and the relevant facts are and expressing his “provisional” views and Lord Justice May says that it is “strictly unnecessary” to decide the second or third issues, and he will therefore “consider these issues more briefly.”

11.9. On the other side, if what was said by the Court of Appeal in Leicester Circuits were to apply directly to the “shape” of the pre-2008 Towcon clause, then it would tell in favour of the approach in The “Herdentor”. However, it may well be possible to distinguish Leicester Circuits and Ferryways, because Leicester Circuits and Ferryways were considering clauses in which the words “indirect / consequential losses” came first and so it was more natural to treat these words as controlling the whole of the phrase than it is with the “shape” of the Towcon clause, where the list of separate types of loss comes first and the words in terms of “indirect / consequential losses” come after them.

11.10. It appears that, strictly speaking, the view of Mr Justice Clarke on the “shape” of the Towcon clause may be obiter. His first reason for holding that the claim of Tsavliris


63 At paragraph [49] (mis-numbered “[39]”).

64 At paragraph [78]. The wording of the assent by the third Judge in the Court of Appeal (Lord Lloyd) also indicates that what is said by the Court of Appeal with regard to the third issue was only obiter.
was not excluded was the interpretation of “loss of profit” which was discussed in section 2 of this paper. When he goes on to consider the further submission with regard to the “shape” of the clause he says:

“That conclusion makes it strictly unnecessary to consider the other two submissions advanced by Mr Howard [counsel for Tsavliris] which I have identified above. However, in deference to the submissions made by the parties and in case the Court of Appeal should take a different view, I shall do so shortly.”

11.11. In *The “Naporistyi”* Mr Justice Andrew Smith was considering the pre-2008 Towcon clause, and the views of both Mr Justice Clarke in *The “Herdentor”* and Mr Justice Rix in *BHP* were cited. The Judge preferred the view of Mr Justice Clarke, and in terms of precedent it is considered to have a special significance when a third Judge of the High Court decides to follow the view previously expressed by one Judge over the view previously expressed by another Judge. However, in this case it does not appear that the judgment of the Court of Appeal in *BHP* was referred to. Also, what Mr Justice Andrew Smith says is itself *obiter*. He decided the issue before him on the basis of his interpretation of the words “loss of profit”. He then said:

“If this is so, it is not necessary for Ease Faith to rely upon their alternative argument that clause 18(3) excludes liability only for indirect, and not direct loss of profit. However, I should briefly express my view of this argument.”

11.12. I would suggest that of the two views in play, the view of Mr Justice Rix is preferable, because it comes closer to representing what the market who use such clauses would intend, and I would also suggest that as a matter of authority the view taken by Mr Justice Rix is still open. However, I must recognise that the tide seems to be setting in the direction of the view taken by Mr Justice Clarke in *The “Herdentor”*.

11.13. The wording of the corresponding provision in Towcon 2008 is:

“... neither the Tugowner nor the Hirer shall be liable to the other party for

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65 At page 25 of the transcript.

66 [2006] 1 Lloyd’s Rep at [146].
(i) any loss of profit, loss of use or loss of production whatsoever and whether arising directly or indirectly from the performance or non-performance of this Agreement . . ., or

(ii) any consequential loss or damage for any reason whatsoever . . .

11.14. This wording has the structure of a list and then, separately, “consequential loss or damage” and, as I explained in the previous section of this paper, there is no reason why wording with this two-limbed structure should not be effective in the way intended.

11.15. In Supplytime 89 the wording is “any consequential damages whatsoever, including, but not limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance.”

11.16. In London Arbitration 1/02 the tribunal interpreted this in a way parallel to the approach of the Court of Appeal in Deepak and the approach of Mr Justice Rix in BHP, so that a claim which was in respect of “loss of use” was excluded without any need to determine whether the loss was “direct / natural” or “consequential”. I have also seen another arbitration award on the same wording which adopts the same approach. I would suggest that this approach comes closer to what the market would intend, and so should be preferred to the alternative, which is to let the whole clause be controlled by the word “consequential”.

11.17. However, arbitrators are not unanimous in this approach. In Sea Servizi Ecologici Affossamenti –v– Muliceiro Servicos Maritimos Ltda, it is apparent that the arbitrators (who were Cherie Booth QC and Belinda Bucknall QC) had held with regard to a claim in respect of sixteen omissions and breaches which were said to have caused the charterers loss of time, and hence financial losses, that the question whether these losses were excluded by clause 12(c) of the Supplytime ‘89 form “depended upon whether they could be categorised as consequential losses and that would need to be determined by a full hearing with evidence”.

11.18. Moreover, the approach taken by the tribunal in London Arbitration 1/02 may not be open on the basis of the decisions of the Courts. What was said by the Court of Appeal in Leicester Circuits and the decision of Mr Justice Teare in Ferryways are unchallenged authority with regard to a clause of the “shape” “consequential losses including but not limited to” holding that the whole phrase is controlled by the words

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67 [2007] EWHC 2639 (Comm), [4]

68 At paragraph [7].
“indirect / consequential”. The only ground on which these cases might be distinguished is that they related to one-sided exclusion clauses, whereas the clause in Supplytime ’89 is a mutual exclusion. However, as we have seen previously, it appears to be accepted that even mutual exclusion clauses are to be construed restrictively, and so this may not be an adequate ground of distinction.

11.19. Besides, even if the interpretation adopted by the tribunal in London Arbitration 1/02 is at present open as a matter of authority, it seems unlikely that it will remain open. It seems that with regard to clauses with the “shape” of the pre-2008 Towcon wording, the tide is setting in the direction of The “Herdentor”. If The “Herdentor” is accepted with regard to that wording, then the position with regard to the Supplytime 89 wording will be a fortiori and the Supplytime 89 wording will have to be interpreted as completely controlled by the word “consequential” in its established meaning. 69

11.20. In Supplytime 2005 the wording has two paragraphs, the first of which says “Neither party shall be liable to the other for any consequential damages whatsoever”, and then the second says:

“Consequential damages’ shall include, but not be limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance, whether or not foreseeable at the date of this Charter Party.”

11.21. The changes from Supplytime 89 must have been aimed at making the clause be interpreted in such a way that the list of types of loss would be independent of the word “consequential” and not restricted by the presently established meaning of “consequential” in terms of the second rule in Hadley -v- Baxendale. 70 However, it is very doubtful whether these changes will achieve that aim.

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69 As mentioned previously, it is more natural to treat the words “indirect / consequential” as controlling the whole phrase in the case where these words come first than in the case where the list of types of losses comes first and the words “indirect / consequential” follow after them. Thus, if The “Herdentor” is accepted in relation to the “shape” of the Towcon clause the position with regard to the Supplytime 89 clause will follow a fortiori.

70 BIMCO published a clause-by-clause comparison with commentary on the differences between Supplytime 89 and Supplytime 2005. However, the commentary on Supplytime 2005 clause 14(c) does not spell out clearly the reasons for these changes. It describes clause 14(c) as concerning “performance claims under the charter party” and says:

“The wording of the previous Clause 14(c) was considered to be slightly vague and it is felt that the new wording expresses the intention of the provision more clearly.”
11.22. The putting of the words “consequential damages” into quotation marks, does not make clear an intention to define the words afresh, from scratch. On the contrary, the words “consequential damages” are used (without any quotation marks) in the first paragraph of the clause, and in the second paragraph the words “include, but not be limited to” are not words which give a fresh definition from scratch, but rather words which attempt to extend an existing and pre-supposed definition.

11.23. The words added at the end of the second paragraph “whether or not foreseeable at the date of this Charter Party” will not have the same effect as the wording suggested earlier in this paper “whether direct or indirect, and whether or not considered consequential under English law.” The words added in Supplytime 2005 are directed at the wrong target, since the correct target is the distinction between what was foreseeable as likely to happen in the ordinary way of things and what was only foreseeable on the basis of information about specific facts.

11.24. On the basis of the caselaw, the wording in Supplytime 2005 also will be interpreted as only excluding losses which fall under the second rule in Hadley –v- Baxendale, so that losses which could be foreseen on the basis of ordinary general knowledge will not be excluded.
PART D

Offshore Contracts

Peter McLauchlan
OFFSHORE CONTRACTS

January 13, 2010

Presented by:
Peter A. McLauchlan
Gardere Wynne Sewell LLP
1000 Louisiana, Suite 3400
Houston, TX  77002-5011
Advantages of Knock for Knock

- Reduces overall cost of defending claims for all parties involved in an operation
  - Avoids multiple counsel
  - Avoids cross claims between defendants
  - Avoids extraneous costs that can far exceed the value of the worker’s claim

- Certainty
  - You know you will only have to pay for your own employees’ losses
Basic Rules - Breadth

- Indemnitee Class
- Triggering Class
- Indemnity Scope

Contractor agrees to indemnify **Company, its officers, directors and employees**, from and against **all claims** without limit and without regard to the cause or causes thereof or the negligence or fault (active or passive) of any party or parties including the sole, joint or concurrent negligence of **Company**, **arising in connection herewith** in favor of **Contractor’s employees**.
**Indemnitee Class**
- Company
  - Parent / Subsidiary / Affiliate
  - All Employees

**Triggering Class**
- Contractor
  - Any Tier Subcontractors
  - All Employees

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**Narrow Knock for Knock**
- Each party agrees to indemnify the other for injuries to their own employees.

**Example Language**

*Contractor* agrees to indemnify Operator, its officers, directors and employees, from and against all claims without limit and without regard to the cause or causes thereof or the negligence or fault (active or passive) of any party or parties including the sole, joint or concurrent negligence of Operator, arising in connection herewith in favor of *Contractor's employees*.

**Mirror-Image for Operator**
**Narrow Knock for Knock Scenario**

- Contractor employee
- Operator
- who pays?
- Contractor

**Expanded “Triggering” Class**

Operator’s Obligation

Operator agrees to indemnify Contractor, its officers, directors and employees, from and against all claims without limit and without regard to the cause or causes thereof or the negligence or fault (active or passive) of any party or parties including the sole, joint or concurrent negligence of Contractor, arising in connection herewith in favor of Operator’s employees, contractors (except Contractor), subcontractors and their employees and invitees.
**Expanded Breadth**

Contractor agrees to indemnify **Company, its parent, subsidiary and affiliated companies, and its and their officers, directors and employees**, from and against all claims without limit and without regard to the cause or causes thereof or the negligence or fault (active or passive) of any party or parties including the sole, joint or concurrent negligence of Company, arising in connection herewith in favor of **Contractor’s employees, subcontractors of any tier and their employees**.

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**Triggering Class Scenario**

- **Operator’s Indemnity Obligation: Subcontractor**

```
Operator
Subcontractor
          | s u e s                   | Drilling Contractor
          |                           |
          | who pays?                 | Operator
```

Expanded “Indemnitee” Class

Contractor agrees to indemnify Operator, its officers, directors and employees, subcontractors and their employees and invitees from and against all claims without limit and without regard to the cause or causes thereof or the negligence or fault (active or passive) of any party or parties including the sole, joint or concurrent negligence of Operator, arising in connection herewith in favor of Contractor's employees, subcontractors and their employees and invitees.

“Pass Through” Indemnity

- Contractual pass-through claims – must express clear and unequivocal intent to indemnify third-parties’ fault.

Contractor agrees to indemnify Operator, its officers, directors and employees, from and against all claims, direct or indirect, including Operator's contractual indemnity obligations to its contractors, subcontractors, and invitees, . . . in favor of Contractor’s employees, subcontractors and their employees and invitees.
**Expanded Indemnitee Class**

- Contractor Employee
  - Sues
- Operator’s Service Contractor
  - Who Pays?
  - Contractor

**PROBLEMS: EXPANDED KNOCK FOR KNOCK**

- Contractor has no input on who the Operator hires
  - Operator’s Sub Could Be “Fly By Night Operation”
- Not necessarily reciprocal
- Disproportionate Exposure Given Number of Contractor Employees on Site
- Operator’s Sub’s More Likely to Have Active Negligence
- Defense Advantage in Only Defending Operator – Chapter 95 (Texas)
Breaux v. Halliburton, 562 F.3d 358 (5th Cir. Mar. 2009)

- **Basic facts**
  - Helicopter disaster in 2004
  - Helicopter left Galv. headed for offshore vessel
  - Helicopter operated by Era

- **Contracts**
  - Halliburton & Rowan – master agreement
  - Era (Rowan subsidiary) & Unocal – transportation
  - Choice of law – Maritime, then Texas

- **Suit by families of Halliburton employees**

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Rowan / Halliburton agreement

Contractor [Halliburton] shall at all times be responsible for and hold harmless and indemnify company [Rowan] from and against all claims arising in connection herewith in favor of contractor, its parents, subsidiary and affiliated companies, each of their respective officers, directors and employees, ... on account of illness, injury, or death of contractor’s group or damage to or loss of property owned, rented or provided by Contractor’s Group ...

**Indemnitee Class**

Defined to include Rowan’s subsidiaries and affiliates
Unocal / Era agreement

CONTRACTOR [Era] hereby agrees ... to release, defend, and indemnify COMPANY [Unocal] ... and its contractors and subcontractor(s) of any tier ... irrespective of whether any indemnitee hereunder may be alleged or proven to have been negligent (including but not limited to active, passive, sole, joint, concurrent, comparative, contractual and gross negligence) ... from and against any and all liability arising out ... All claims, liabilities, demands, actions, damages, losses, and expenses ... resulting from [Era’s] ownership, operation, maintenance or use of aircraft under the Contract ...

### Triggering Class
Includes Halliburton as Unocal’s contractor

### Indemnity Scope
Includes contractual liability, encompassing Era’s indemnity claims against Halliburton under the Rowan/Halliburton agreement.
Breaux v. Halliburton

“The Rowan/Halliburton Agreement applies under these facts and requires Halliburton to indemnify Era for the Breaux claims …. Unfortunately, the Era/Unocal Agreement functions to preclude Era from obtaining the benefits of the Rowan/Halliburton Agreement.”


Contractor agrees to indemnify Company, its officers, directors and employees, from and against all claims without limit and without regard to the cause or causes thereof or the negligence or fault (active or passive) of any party or parties including the sole, joint or concurrent negligence of Company, arising in connection herewith in favor of Contractor’s employees.

- does not mean direct or proximate causation
- requires only a “general nexus” between the contractor's obligations and the detriment for which indemnity is sought.

[See also Atofina]

- Basic facts
  - Parker #21-B had to be moved prior to H.Katrina
  - Could not be moved to the intended safe harbor because BNSF’s bridge was down
  - During H.Katrina, Parker #21-B allided with the bridge

- Contract
  - Parker (drilling contractor) – Browning Oil (operator)
  - Choice of law – Maritime

- Suit brought by BNSF v. Parker and Browning Oil

14.13 Indemnity Obligation: Except as otherwise expressly limited herein, it is the intent of the parties hereto that all indemnity obligations and/or liabilities assumed by such parties under terms of this Contract, including, without limitation, Paragraphs 14.1 through 14.12 hereof, be without limit and without regard to the cause or causes thereof ... the negligence of any party or parties, whether such negligence be sole, joint or concurrent, active or passive.
7.04 Hurricane/Severe Weather:
In the event that it should become necessary to cease rig operations due to hurricane conditions ... Operator [Browning] will be responsible for tug costs and rig moving rate if conditions require the rig to be moved off of Operator’s [Browning’s] location to safe harbor and back again.

7.06 Operator [Browning] shall be responsible for guidance and supervision during mobilization and demobilization into and away from field and directing rig on and off location. Responsibility for these services, access routes and all damages (including oyster settlements and sea grasses) caused by mobilization or demobilization of rig and marine equipment shall be borne by Operator [Browning].

BNSF R.R. Co. v. Parker Drilling

- Indemnity defined by the scope of accepted liabilities
- For safe harbor, the operator was responsible for costs only
- For mob/demob, the operator was responsible for costs AND damages
- Since safe harbor moves ≠ mob/demob, operator owed no indemnity
Scope – Gross negligence

- Federal Maritime Law
  - No indemnification for gross negligence
    - Becker v. Tidewater, Inc., 581 F.3d 256 No. 08-30183 (5th Cir. Aug. 2009)
    - Houston Exploration Co. v. Halliburton Energy Servs., Inc., 269 F.3d 528, 531 (5th Cir. 2001)
    - See Todd Shipyards Corp. v. Turbine Service, Inc., 674 F.2d 401, 410-11 (5th Cir. 1982)

Scope – Gross negligence

- Texas Law
  - Unsettled whether:
    - “Negligence” includes gross negligence
    - Gross negligence is susceptible to indemnification
- **Webb v. Lawson**, 911 S.W.2d 457 (Tex.App.—San Antonio 1995, writ dism’d w.o.j.) (indemnification for negligence includes “all shades and degrees of its own negligence, including gross negligence”)

- **RLI Ins. Co. v. Union Pacific R. Co.**, 463 F.Supp.2d 646 (S.D.Tex. 2006) (applying Texas law) (the general phrase “regardless of any negligence” within a pre-injury release includes gross negligence)

- **Atlantic Richfield Co. v. Petroleum Personnel, Inc.**, 768 S.W.2d 724 (Tex. 1989) (refusing to address whether the term “negligence” includes gross negligence or intentional injury)

- **Fairfield Ins. Co. v. Stephens Martin Paving, LP**, 246 S.W.3d 653 (Tex. 2008) (expressing “no opinion” on whether or not public policy prevents indemnification for another’s gross negligence)

### Choice of Law

- Parties can **negotiate** and choose the substantive law of a particular state.

- The parties’ choice will be upheld unless:
  - another state has a more significant relationship to the transaction; **and**
  - the law of the chosen forum violates a fundamental public policy of the other state; **and**
  - that state has a materially greater interest in determining the particular issue

Choice of Law


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### Choice of Law

<table>
<thead>
<tr>
<th>Oklahoma</th>
<th>Maritime</th>
<th>Texas</th>
<th>Louisiana</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contract Negotiation</td>
<td>Job Site</td>
<td>Principal Office</td>
<td>Contractor’s Principal Office</td>
</tr>
<tr>
<td>Corporate Domicile</td>
<td>Contract Perform</td>
<td>Contract Performance</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Insurer’s Preference</td>
<td>Indemnity Obligation</td>
<td></td>
</tr>
</tbody>
</table>

1. O.C.S.L.A. (adopts adjacent state)
2. Need a back-up law

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Anti-Indemnity Acts (need insurance)
Choice of Law

- *King v. I.E. Miller*, 970 So. 2d 703 (La.App. 2007)

LOIA should invalidate these indemnity agreements

Choice of Law

- **Lanclos:**
  - No unequal bargaining power
  - Contractor seeking to enforce indemnity obligation
- **King:**
  - Chooses to apply Texas law instead
  - No inequity in upholding indemnity agreement for contractor
No Choice of Law Provision

- If no choice of law, then the court typically applies the “most significant relationship” test:
  - place of contracting
  - place of negotiation
  - place of performance
  - location of subject matter of the contract
  - domicile of the contracting parties
- *Sonat Exploration v. Cudd Pressure Control*, 271 S.W.3d 228 (Tex. 2008)
Independent Contractor Language

“Contractor shall perform all work as an independent contractor. Neither Contractor nor its agents or employees shall be the agents or employees of Owner. . . . .”

Painter v. Momentum Energy

Preamble language did not overcome “Independent Contractor Provision” and did not provide the control over the operative details needed to establish control.

“Carve Outs” in Contract

Beware of the following clause:

“Notwithstanding anything to the contrary herein, ....

Exculpatory Clauses

- Should be conspicuous – bigger, bolder, set apart by headings
- Must express clear and unequivocal intent
Consequential Damages

- Actual damages contain two types:
  - Direct
  - Consequential

- Direct damages are the usual result of defendant’s wrongful conduct; they flow naturally and necessarily from the wrong.

- Consequential damages result naturally but not necessarily from the wrongful conduct.

Consequential Damages

- Clearly set forth what you want:
  - Project delays
  - Reservoir damages
For more information regarding these issues, please contact:

Peter McLauchlan
(713) 276-5730
pmclauchlan@gardere.com
PART E

APPENDICES

Separate Document

I  Towcon pre 2008
II  Towcon 2008
III  Supplytime '89
IV  Supplytime 2005

Reproduced, courtesy of BIMCO
PART F

Curricula Vitae
SEAN O’SULLIVAN

Qualifications
MA (Oxon) History 1st Class
Dip Law (City)
Year of Call 1997
Admitted to practise in the Cayman Islands
Registered as an advocate in the Dubai International Financial Centre Courts

Public Access
Qualified to undertake Public Access work

Recommendations
Sean O’Sullivan is recommended as a leading junior in Legal 500 and Chambers & Partners for commercial litigation, commercial arbitration, energy, shipping, commodities and insurance and reinsurance. Comments have included:

- absolutely first class
- has an exceptional grasp of the law, is a very persuasive advocate and has great maturity
- a quick thinking advocate
- effective and commercial
- extremely intelligent and a delight to work with
- one of a very few barristers who have credible offshore knowledge

Practice
Sean has a wide-ranging commercial practice with a particular emphasis on:

- Energy
- Shipping and commodities
- Insurance and reinsurance
- Professional negligence

His experience covers insolvency and conflict of laws, as well as interim remedies such as freezing, anti-suit and other injunctions.

Energy
Sean is instructed in a range of upstream disputes but especially shipbuilding, ship conversion,
ship repair, ship sale and purchase, and offshore construction disputes which have an energy aspect as a result of the service for which the ship or project is intended.

His clients include shipyards, buyers, owners and designers and he has been involved in disputes about all aspects of the different projects.

He also acts for oil companies, traders and contractors in relation to disputes about oil exploitation and drilling for or transportation of oil and gas. He is instructed in a number of cases concerning sales of oil and gas and other fuels including biofuels.

**Recent examples of work include:**

- Acting in an LCIA arbitration about the construction of one of the world’s largest semi-submersible drilling rigs.
- Acting in an ICC arbitration with its seat in Geneva concerning the design and construction of gas platforms for offshore Iran.
- Acting for a power company in an ICC arbitration concerning the sale and purchase of a quantity of biofuel.
- Acting for the joint venture partners operating an oil field in relation to a claim arising out of the loss of a support structure and the associated well during construction.
- Acting for the claimant, an oil trader, in a Commercial Court case concerning the sale of Russian fuel oil.
- Acting for an international oil trader in a series of related actions in the Commercial Court concerning a chain of sales of a cargo of crude oil which was alleged to have been contaminated by water.
- Acting for the drilling contractor in a dispute about the performance of a deep-sea drilling contract, concerning drilling off the coast of India.
- Acting for a power company in a claim for fraud arising out of a number of sales of fuel oil.
- Advising the buyers with regard to a dispute about the building of an oil/product tanker.

**Shipping and commodities**

In addition to energy-related transactions, Sean is often instructed in ‘dry’ shipping disputes concerning charterparties, bill of lading contracts and the equivalent, and commodities/sale of goods disputes more generally.

**Recent examples of work include:**

- Acting for the owner of an oil rig lost while being towed from Brazil to Singapore in relation to claims and counterclaims arising out of the towing contract.
- Acting for a shipowner in relation to the loss during transportation of a heavy lift vessel.
- Acting for a shipowner in relation to the cancellation of a number of liftings of under a COA as a result of alleged reduced demand.
- Acting for a charterer in a dispute concerning the giving of a notice of redelivery which subsequently came to be revoked.
- Acting for a bank in relation to the unraveling of a ship-financing transaction following the collapse of a ferry line.
• Acting for shipowners in a Commercial Court action involving urgent applications for the appointment of receivers concerning the refusal by a receiver to take discharge of a rice cargo. The case was of particular significance because it provided a novel approach to the problem and resulted in a landslide of other applications by both ship owners and charters with similar difficulties.

• Acting for a shipowner in an arbitration concerning the purported cancellation of a long-term time charter.

• Acting for brokers in a large claim for commission in relation to the arrangement of various time charters.

Insurance and re-insurance

Sean is variously instructed in coverage and other insurance related disputes, both marine and non-marine, relating to both primary layers as well as reinsurance. His instructions range from small coverage disputes to high value reinsurance arbitrations.

Experience includes:

• Acting for reinsurers in 2 related disputes concerning the payment of long tail asbestos claims.

• Acting for a reinsured in relation to a claim for additional premium arising out of a long term arrangement for the reinsurance of retail life and critical illness cover.

• Acting for a mutual fund in relation to a claim brought by a member following a fire.

• Acting for reinsurance managers in a dispute arising out of an agreement for the management of two US reinsurers in runoff.

• Acting for London market insurers in a coverage dispute in the Commercial Court concerning alleged damage to a Fabergé clock.

• Acting for reinsurers in relation to a number of related claims brought by Equitas.

• Advising a Lloyd’s Syndicate with regard to the avoidance of stop loss policies written for a US captive.

Professional negligence

Sean has extensive experience in this field and is regularly instructed by both claimants and indemnity insurers in relation to professional negligence disputes, in particular those concerning solicitors, accountants, auditors and insurance brokers.

Experience includes:

• Acting for insurance brokers in a large claim brought by a client concerning the extent of their insurance cover for an explosion at a chemical plant.

• Acting for insurance brokers in a claim concerning commercial vehicle insurances for a large haulage company.

• Acting for financial advisers in a claim concerning advice allegedly given about tax efficient offshore investments.

• Acting for a hedge fund administrator in a claim against its accountants concerning the filing of returns.

• Acting for solicitors and their indemnity insurers in a wide range of negligence claims spanning everything from conveyancing, through the conduct of litigation, to M&A work.
Robert Gay
Solicitor
Hill Dickinson LLP

Robert previously taught at Universities in the U.S. and England. After gaining a commendation in the CPE and passing Bar School, he was called to the Bar in 1993. He served pupillage at 7 King’s Bench Walk (specialising in shipping/insurance) and at chambers in Lincoln’s Inn specialising in property/company law. Robert joined Hill Taylor Dickinson (now Hill Dickinson) in 1994, and was admitted as a solicitor in 1996. His work is mostly dry shipping and marine insurance. He has considerable experience of charterparty disputes and cases involving proceedings in foreign jurisdictions. He has also been involved with disputed claims for General Average contributions, charterparties for offshore vessels under the Supplytime form, contracts for carriage by heavy lift vessels, and questions over coverage arising in relation to insurance wordings in the energy market. Robert is a supporting member of the London Maritime Arbitrators Association, and a member of the Education and Events Sub-Committee of the London Shipping Law Centre. In the 1998/99 session Robert was also a visiting lecturer at University College London, teaching charterparties on the Master of Laws/Diploma course. His publications on shipping law include substantial articles on:


He is preparing a commentary on Shelltime and ShellLNGTime for publication by Intertanko.
Area(s) of Expertise

- Trial
  - Alternative Dispute Resolution/ADR
  - Commercial Litigation
  - Energy and Energy Services
  - Transportation
  - Marine and Aviation

Practice Emphasis

Peter A. McLauchlan concentrates on marine, energy, transportation and commercial matters. He has over 20 years of experience handling transactions and litigation concerning all aspects of exploration, development, production, refining, transportation and marketing of oil, gas and petrochemicals. Mr. McLauchlan has tried and appealed cases in Texas, Louisiana, New York and Pennsylvania, and is fluent in Spanish. He has litigated, arbitrated and mediated matters relating to refinery explosions, oilfield blowouts, toxic tort, water, land and air pollution, aviation investigations and disasters, vessel collisions and allisions, salvage, towage, liens and seizures, general average, governmental fines, intellectual property, engineering and naval architect errors and omissions, labor disputes, contracts and indemnity and re-insurance coverage. Mr. McLauchlan has also assisted clients with international corporate formation, mergers acquisitions and with the purchase, sale and financing of offshore rigs and vessels. He has experience in negotiating and drafting contracts, charters and financing documents. He routinely counsels clients in methods to minimize risk and solve problems in their business operations. Mr. McLauchlan is AV Peer Review Rated by Martindale-Hubbell.

Prior to being called to the bar, Mr. McLauchlan worked as captain and chief engineer with a California-based shipping company and as a representative for a major shipping company in the Gulf South.

Education

- J.D., St. John's University School of Law (1985)
- B.S., United State Merchant Marine Academy, with honors (1981)
  - Marine Engineering and Nautical Science

Publications

Publications

- Author, FPSOs, Shuttling and Environmental Liability, SNAME Tex. (Feb. 2000).

**Presentations**

• Speaker, Address at the Transportation Law Institute: Delayed Arrivals in Aviation Law (2007) (authored paper for proceedings).
• Speaker, Address at the Canadian Transportation Lawyer’s Association Annual Conference: Recent Development in U.S. and Canadian Aviation Law (2006) (authored paper for conference proceedings).
• Speaker, Address at the University of Texas School of Law and Admiralty Conference: Admiralty and Bankruptcy: More Questions Than Answers (2004) (authored paper for conference proceedings).
• Speaker, Address at the University of Texas School of Law Admiralty and Maritime Law Conference: Maritime Liens and Seizures (1995) (authored paper for conference proceedings).

**Other Engagements**

• Panelist, London Shipping Law Centre Maritime Business Forum (Jan. 13, 2010).

**Professional Affiliations**

• Admitted to practice before:
  • Texas State Courts
  • New York State Courts
  • U.S. District Court for all districts of Texas
  • U.S. District Courts for Southern and Eastern Districts of New York
  • U.S. Court of Appeals for the Third and Fifth Circuits
• Member, State Bar of Texas
• Member, New York State Bar Association
• Member, American Bar Association
• Member, Houston Bar Association
  • Council Member, International Law Section
• Member, Association of the Bar of the City of New York
• Fellow, College of the State Bar of Texas (1995 – present)
• Adjunct Professor, Transportation Law, Denver University School of Law
• Member, Transportation Lawyer’s Association
  • Chairman, Aviation Committee
• Member, International Air Transport Association
• Member, Maritime Law Association of the U.S.
• Member, Ibero-American Maritime Law Association
• Member, Houston Maritime Arbitration Association
• Member, Society of Naval Architects and Marine Engineers
• Member, Association of International Petroleum Negotiators
• Member, University of Texas School of Law Admiralty and Maritime Law Conference Planning Committee
• Member, Who’s Who in American Law

**Honors and Awards**

Recognized, AV Preeminent Rating (5.0 out of 5), Martindale-Hubbell Attorney Directory