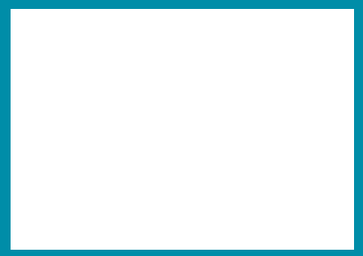
Shipping & International Trade Law

This second edition of *Shipping & International Law* aims to provide a first port of call for clients and lawyers to start to appreciate the issues in numerous maritime jurisdictions. Each chapter is set out in such a way that readers can make quick comparisons between the litigation terrain in each country, determining the differences between, for example, the rights of cargo interests to claim for cargo loss or damage in Italy and England.

A remarkable breadth of jurisdictions is covered, while the contributors are all leading lawyers in their countries and are ideally placed to provide practical, straightforward commentary on the inner workings of their respective legal systems.



SECOND EDITION 2015

Shipping & International Trade Law

General Editor: David Lucas, Hill Dickinson LLP

THE EUROPEAN LAWYER REFERENCE

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Jurisdictional comparisons **Second edition 2015**

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Published in 2014 by
Thomson Reuters (Professional) UK Limited
trading as Sweet & Maxwell
Friars House, 160 Blackfriars Road, London SE1 8EZ
(Registered in England & Wales, Company No 1679046.
Registered Office and address for service:
2nd floor, Aldgate House, 33 Aldgate High Street, London EC3N 1DL)

Printed and bound in the UK by Polestar UK Print Limited, Wheaton

A CIP catalogue record for this book is available from the British Library.
ISBN: 9780414029026

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Preface to the first edition

Cargill International SA Norman Hay

I am greatly honoured to be asked to write the preface to this timely worldwide review of shipping and trading law.

Over the last 30 years, the volume and variety of international trade in and shipping of commodities has grown dramatically. Liberalisation of global markets, and the need for commodity inputs as those markets have developed, have promoted this growth.

International shipping trade is central to the economy of the planet. Without it, there can be no increase in economic value which allows billions of people to raise themselves out of poverty.

However, as with all such rapid growth, there comes a parallel increase in risk associated with the commodities being transported and the vessels undertaking such transport.

The notion of risk in international trade goes back thousands of years and in each period of growth there has been the need for legal frameworks to handle disputes. The necessity for such legal systems is of utmost importance to the trade itself. Without such structures, an understanding of where risk occurs and how to mitigate it becomes clouded and there will be a drag on the growth of trade itself.

This book represents a milestone in providing an international comparative survey of legal risks, issues and indeed opportunities pertaining to shipping and trading activities. The volume takes a pragmatic approach by setting out a series of answers to questions that confront market participants to illustrate the variety and types of legal dispute that can arise, and to help managers and practitioners navigate through the risk areas.

The sheer size and complexity of the shipping and trading business would, on its own, lead to significant legal disputes. In addition, however, there has been a substantial increase in price volatility in the markets for the goods that these vessels carry. This volatility is increasing as the list of importing and exporting countries and the variety of the goods they trade also increases dramatically.

While the companies and businesses involved in international trade have adopted a wide variety of methods to limit their risk (eg, stringent counterparty credit control, surveillance technologies and sophisticated trading instruments), such methods are insufficient to reduce to zero default risk and the inevitable legal disputes.

This volume provides invaluable introductions to the diverse ways in

which the various legal systems address common forms of default and the legal remedies which are available to the parties to resolve their differences.

The majority of international trade and shipping contracts are governed by English Law. However, given the vast number of countries now engaged in trade, it is inevitable that other legal systems will impinge on the underlying contracts. This volume details and examines how such legal overlap can occur and presents new ideas on the implications and the methodologies that parties faced with legal disputes can adopt in such conflicting situations.

Without a doubt, this volume provides a unique set of insights into this complicated but incredibly important area of global trade and its authors and editors are to be commended on the quality of the analysis.

Norman Hay,
President, Cargill International SA
Geneva, 2011

Foreword to the first edition

Hill Dickinson LLP David Lucas

Until recently, shipping and commodities law was considered by the wider world to be a fairly esoteric specialism of restricted general relevance. Laymen hardly focused on vagaries of market movements (except during times of historic crisis such as the aftermath of the Yom Kippur War) let alone the transnational impact of those movements.

Now, all that has changed. Everyone in the world who has to buy food, fuel, garments or who has access to the media is only too well aware of the impact of fluctuations in commodity prices. They have seen the prices of, say, wheat and sugar soar (roughly doubling in the six months from June 2010), cotton rocket (almost quadrupling in the two years from early 2009), crude oil rise inexorably (almost tripling in the same period), back nearly to the dizzy heights reached before the collapse in mid-2008. Similar rises have been experienced with non-ferrous metals, iron ore, coal, fertilisers and numerous other commodities. The list is almost endless. All these price movements are, virtually without exception, overshadowed by the quite spectacular boom and bust of 2008.

Equally, freight rates have undergone even more spectacular convulsions with, for example, the Baltic Dry Index rising to well over 11,000 in mid-2008, before collapsing to less than a mere tenth of that figure within the space of a very few months.

The causes of this turmoil in the markets are too well known to merit repetition in this brief introductory Foreword. But what does merit consideration here is the stark way in which such turmoil illustrates the interconnectedness of the modern world. When China imports record quantities of crude oil, prices at the petrol pumps in Europe rise. When Russia suffers drought and bans wheat exports, the price of bread in Egypt soars.

This would not happen if the modern world economy were not so inextricably wedded to international trade on a vast scale. The world as it has fashioned itself could not exist without it. Although trade between nations and regions goes back to the ancient Phoenicians and perhaps beyond, the present level of global interdependence is unprecedented.

The rest of this volume will be devoid of statistics, so I hope I will be forgiven for offering just three sets of impressive figures which, I suggest, place in context the importance of the topics covered in this book:

- about 90 per cent of world trade is carried by the international shipping industry;

- according to the International Maritime Organisation, in 2008 (the last year for which figures are currently available) there were almost 53,000 cargo carrying ships with a total deadweight of almost 1.2 billion tonnes (almost double the figure for 1990). Cargo traffic exceeded 8 billion tonnes and almost 34 billion tonne miles were sailed; and
- seaborne trade in the main bulk cargoes (iron ore, grain, coal, bauxite/alumina and phosphate) grew from 448 million tonnes in 1970 to 1,997 million tonnes in 2007 and other dry cargoes grew from 676 million tonnes to 3,344 million tonnes in the same period.

The economic interdependence of the modern world economy is reflected in the interdependence of its diverse national legal systems. Legal practitioners in the field of international trade, whether in law firms or in-house, will be only too familiar with the need, often the very urgent need, to seek advice, assistance or local intervention, whether in the courts or with local authorities, in jurisdictions worldwide. Although English law remains the most common choice of governing law in trade-related contracts and the English court or arbitral jurisdiction remains the most popular contractual forum, other legal systems and fora are frequently chosen (particularly with the burgeoning growth of international arbitration) and, irrespective of contractual choice, often become relevant to the challenges facing a party in crisis. Examples are boundless but include: a ship owner whose vessel faces arrest; a cargo owner whose goods face the exercise of a lien by the ship owner; a buyer who is seeking to prevent a bank from paying under a letter of credit against fraudulent documents; unexpectedly, a transaction suddenly involves dealings with a state or entity subject to UN, EU or US sanctions; an underwriter of cargo on board a vessel which has suffered a collision. Advice may be needed as a matter of extreme urgency in one or more relevant jurisdictions where the crisis is occurring.

The purpose of this volume is to give those involved, or potentially involved, in such a crisis a brief and readily accessible guide as to how the relevant issues might be approached in the affected jurisdiction or jurisdictions. Needless to say, it cannot be a substitute for formal advice from a lawyer well versed in the relevant legal system after he has been fully briefed, but it is hoped that the short summaries of key legal issues will assist those seeking to manage a crisis by focusing expectations and enabling them to brief local lawyers with an awareness of the opportunities and pitfalls afforded by the relevant legal system. Within the constraints of the format of this volume it has only been possible to provide summaries of the law in a limited number of legal systems. To those states not represented, and to those who had hoped for guidance as to the law in any of those states, I extend my apologies.

I could not have carried out my functions in the preparation of this book without the tireless efforts of many to whom my profuse thanks are gladly offered. Also thanks to the eminent lawyers in the various jurisdictions who had so unstintingly given their time and expertise in providing their respective chapters. My colleagues at Hill Dickinson LLP, Jeff Isaacs, Andrew Meads, Andrew Buchmann and David Pitlarge, provided enormous help

both in formulating and refining the questionnaire for each chapter (which had to be thoughtfully composed to elicit the most helpful responses from our contributors) and in contributing the substantive content of the English chapter. Kay O'Brien worked selflessly to coordinate the project and to keep it on track. Not least, my warm thanks are owed to Michele O'Sullivan, the International Director, Emily Kyriacou, the Commissioning Editor, and the editorial team, for both inspiring me and my colleagues to undertake this project and tirelessly bringing it to fruition.

David Lucas, Hill Dickinson
General Editor
London, 2011

Foreword to the second edition

Hill Dickinson LLP David Lucas

When the publishers asked Hill Dickinson to work with them on a second edition of this volume, my immediate reaction was that it might be premature, given that the basic principles in the various legal systems covered in the first edition were perhaps unlikely to have changed that much, if at all; and this book never claimed to cover more than basic principles, given that in the first edition 25 jurisdictions were covered within the span of just 400 pages.

However, it was pointed out to me that this would be an opportunity to expand the scope of the book to cover a number of jurisdictions which, for very good practical reasons, we had been unable to cover first time round. This opportunity has been seized with enthusiasm and I am delighted that this second edition has been expanded to cover some 36 jurisdictions, including many of considerable significance to the international trade and shipping community.

In the Foreword to the first edition, I described the commercial and geopolitical trends and convulsions, natural catastrophes and conflicts which so often underlay and drove the issues which had confronted international trade and shipping lawyers every day in their work: Such events did not of course cease with the first edition: a mere list of names, acronyms and words suffices to make the point: Syria, Ukraine, sanctions, OFAC, Costa Concordia, Ebola… This list could be expanded indefinitely.

Market prices of commodities and freight rates have of course continued to fluctuate – not as wildly, perhaps, as in some previous times, but sufficiently to drive defaults and thus to generate disputes between market participants. Meanwhile, statistics have continued to balloon. In the Forward to the first edition, I noted that in 2008 the world fleet of cargo carrying vessels accounted for a total deadweight of almost 1.2 billion tonnes; by January 2013 that figure had risen to 1.63 billion tonnes. Although the rate of growth of world GDP has slowed, nonetheless between 2008 and 2012 total cargo traffic increased from 8 to 9.2 billion tonnes. Just as trade continues to expand, so does the need for legal advice in multiple jurisdictions.

As before, it is my pleasure to thank the numerous contributors to this book for their support and time-consuming work aimed at making it as useful as possible to its readers. My colleagues at Hill Dickinson LLP, Jeff Isaacs and David Pitlarge have greatly contributed to the review and

updating of the English chapter. Not least, grateful thanks are due to the team at Thomson Reuters who have brought this second edition about: Emily Kyriacou, Katie Burrington, Dawn McGovern, Nicola Pender and Callie Leamy.

David Lucas, Hill Dickinson
General Editor
London, 2014

Israel

S Friedman & Co Amir Cohen-Dor

1. CONTRACTS OF CARRIAGE

1.1 Jurisdiction/proper law

1.1.1 In the absence of express provisions in a bill of lading (or charterparty), by what means will the proper law of the contract be determined?

Israeli courts will apply the common principle according to which the law to be applied is the proper law of the contract. Unless otherwise determined in the domestic law, the law of the jurisdiction where the bill of lading has been issued will be usually regarded as the proper law. Nevertheless, by virtue of the Israeli Carriage of Goods by Sea Ordinance as amended in 1992, the International Convention regarding the Unification of Certain Rules Regarding to Bills of Lading of 1924 as amended by the Hague Visby Rules applies to any bill of lading in respect of carriage of goods by sea in any vessel:

- from a port in Israel to another port, whether in Israel or outside of Israel;
- from a port in a country which is party to the 1924 Convention or to the Hague Visby Rules, or when the bill of lading was issued in a country which is party to the 1924 Convention or to the Hague Visby Rules;
- when they apply to the contract of carriage included in the bill of lading or the bill serves proof of its existence, whether according to a term stipulated in a contract or under the laws of the country whose laws apply to such contract;
- to a port in Israel, when the laws of the State of Israel apply to such carriage whether according to the contract of carriage, another agreement between the parties, or the determination of the court.

Regarding the application of the above provisions, the nationality of the vessel or the nationality of the carrier, shipper, consignee or any other person concerned is immaterial.

1.1.2 Will a foreign jurisdiction or arbitration clause necessarily be recognised?

Foreign jurisdiction clauses are generally recognised and enforceable by the Israeli courts, if determined by the courts to have been drafted so as to be regarded as exclusive jurisdiction clauses according to the guidelines prescribed in precedents of the Supreme Court. Nevertheless, even according to these precedents, the court retains jurisdiction and discretion to refrain from enforcing a foreign jurisdiction clause, if the circumstances of the specific case would require so. As far as arbitration clauses are concerned, Israel is a party to the New York Convention and according to the local

Arbitration Law, the courts are obliged to stay proceedings and honour an arbitration clause which is subjected to the said Convention.

1.1.3 In the event that an injunction or order preventing proceedings is obtained in the agreed jurisdiction (whether court or arbitration), will this be recognised in your court?

The Israeli legislation allows for enforcement of foreign judgments and arbitral awards, including an injunction or order preventing proceedings obtained in the agreed jurisdiction. The Israeli Enforcement of Foreign Judgments Law of 1958 provides that an Israeli court may declare a foreign judgment or order enforceable in Israel subject to several conditions: (1) that the court which gave the judgment or order was certified to give it; (2) that the judgment or order is final and is not subject to appeal; (3) that the judgment or order is enforceable in nature and does not contradict public policy; (4) that the judgment or order is enforceable in the country in which it was given; (5) that the judgment or order was given in a country which enforces Israeli judgments or orders.

1.1.4 Arbitration clauses:

1.1.4.1 Will an arbitration and/or a jurisdiction clause set out in an incorporated document (such as a charterparty referred to in a bill of lading) be recognised if its text is not set out in the contract in question?

See reply 1.1.2 above. Furthermore, the courts' tendency is sometimes to accept proven and credible arguments of cargo interests (consignees), according to which the incorporated documents were never shown to them and/or that they were not a contractual party thereto and/or that they may not be easily identified, lacking of necessary details (such as the date of the charterparty referred to, for instance) and hence may not be bound by their contents. There are contradicting precedents in this respect, and each case will be determined according to its specific circumstances.

1.1.4.2 Will the incorporation of an unsigned arbitration agreement into a contract be recognised?

In Israel the validity of a contract is not subjected to a written signed document. It will nevertheless be for the applicant to lift the onus of proof and persuade the court by admissible evidence that the counterparty agreed to the contents of the unsigned arbitration agreement.

1.1.5 In any event, will all of the provisions of a charterparty incorporated into a bill of lading contract be recognised? Specifically, if a charterparty with an arbitration clause is incorporated into a bill of lading, is it necessary for the incorporating words to make express mention of the arbitration clause of the charter?

Generally only provisions which are of relevance to the relevant party (consignee) would be recognised and see also reply 1.1.4.1 above. The chances of the court enforcing an arbitration clause which has not been specifically referred to in the bill of lading are nevertheless poor.

1.1.6 If a bill of lading refers to the terms of a charterparty, but without identifying it (eg, by date):

1.1.6.1 Will incorporation be recognised without such detail?

See reply to 1.1.6.2 below.

1.1.6.2 If so, which charterparty will be incorporated?

The few precedents of the courts show that the latter will be reluctant and usually refuse to enforce an arbitration clause included in a charterparty which may not be easily and clearly identified in the relevant bill of lading (dates, parties, etc).

1.2 Parties to the bill of lading contract

1.2.1 How is the carrier identified? In particular, what is the relationship between statements on the face of the bill and/or the signature by or on behalf of the Master and demise clauses/identity of carrier clauses?

In light of the common Uniform Customs and Practice for Documentary Credits ('UCP 600') no demise clauses/identity of carrier clauses are used by the major carriers in the Israeli trade, and hence there are no modern court precedents enforcing such demise clauses/identity of carrier clauses. Otherwise, demise clauses/identity of carrier clauses would theoretically be recognised by the courts on the basis of the contract laws.

1.2.2 Who is entitled to sue for loss or damage arising out of the carrier's alleged default? In particular, by what means, if at all, are rights under the contract of carriage transferred?

According to the Carriage of Goods by Sea Ordinance as amended in 1992, the party to which the cargo was consigned (hereinafter – the consignee), and the party to which the bill of lading was duly endorsed (hereinafter – the endorsee), are considered, as applicable, as a party to the bill of lading, and as such are entitled to all the rights arising from the transaction due to which the bill was made, and are subject to the obligations referring to such transaction in exercising its aforementioned rights.

These provisions will not prejudice:

- the right of delay in transit;
- the right to claim the shipping fees from the shipper of the goods or from their owners;
- any charge applicable to the consignee or endorsee due to receiving the goods.

1.3 Liability regimes

1.3.1 Which cargo convention applies – Hague Rules/Hague Visby Rules/ Hamburg Rules? If such convention does not apply, what, in summary, is the legal regime?

By virtue of the Israeli Carriage of Goods by Sea Ordinance as amended in 1992 (as amended Codex 1379, 5752 (22.1.1992)), the International Convention regarding the Unification of Certain Rules Regarding to Bills of Lading of 1924 as amended by the Hague Visby Rules applies.

1.3.2 Have the Rotterdam Rules been ratified?
No.

1.3.3 Do the Hague/Hague Visby Rules apply to straight bills of lading?
Yes.

1.3.4 Are any such rules compulsorily applicable to shipments either from your jurisdiction or to it (or both)?
The Rules apply:

- from a port in Israel to another port, whether in Israel or outside of Israel;
- from a port in a country who is party to the 1924 Convention or to the Hague Visby Rules, or when the bill of lading was issued in a country who is party to the 1924 Convention or to the Hague Visby Rules;
- when they apply to the contract of carriage included in the bill of lading or the bill serves as proof of its existence, whether according to a term stipulated in a contract or under the laws of the country whose laws apply to such contract;
- to a port in Israel, when the laws of the State of Israel apply to such carriage whether according to the contract of carriage, whether according to another agreement between the parties, or according to the determination of the court.

Regarding the application of the above provisions, the nationality of the vessel or the nationality of the carrier, shipper, consignee or any other person concerned is immaterial.

1.4 Lien rights

1.4.1 To what extent will a lien on cargo be recognised? Specifically:

1.4.1.1 Will liens arising out of obligations under the bill of lading contract be enforceable as against the receiver for, eg, freight, deadfreight, demurrage, general average and any shipper's liabilities in respect of the cargo?
Yes. Nevertheless, the tendency of the local courts is to be guided by foreign precedents (especially English law precedents), and in cases of 'freight prepaid' bills of lading, the tendency would be to refrain from enforcing a lien for alleged unpaid freight.

1.4.1.2 Can the owner lien cargo for time charter hire? If so, is this limited to hire payable by the cargo owners?
Yes, and see reply 1.4.1.1 above. The extent of the lien, whether limited to hire payable by the cargo owners or otherwise would be dependent on the applicable law according to the charter party and the bill of lading.

1.4.1.3 Is it necessary for the owners to register its right to lien sub-freights as a charge against a charterer incorporated in your jurisdiction for that lien to be recognised in the event of the charterer's insolvency?
This issue of the registration of a lien has not been clearly resolved in the Israeli jurisprudence and is debated by scholars. Generally, however,

maritime liens executed on goods carried according to bills of ladings under the possession of an insolvent party, have been recognised and upheld in several cases by the liquidation courts as being valid and lawful.

2. COLLISIONS

2.1 Is the 1910 Collision Convention in force?

See reply 2.4 below.

2.2 To what extent are the Collision Regulations used to determine liability?

See reply 2.4 below.

2.3 On what grounds will jurisdiction be founded – what essentially is the geographical reach?

See reply 2.4 below.

2.4 Can a party claim for pure economic loss in the event of a collision?

The 1910 Collision Convention is not in force in Israel. Liability would therefore be determined according to the prevailing torts law if Israeli law is applied. Jurisdiction of the local courts may be established according to the Civil Law Procedure Regulations of 1984, if the relevant circumstances enabling service within or outside of the jurisdiction apply. With respect to the applicable law to be applied to the case, same shall be determined according to the doctrine of the law of the place where the wrongdoing occurred and lacking of same, according to the presumption on the equality of the law, namely by Israeli law. Pure economic loss may be claimed; however the court will accept same on the basis of the remoteness and foreseeability of the damages claimed.

3. SALVAGE

3.1 Has your country enacted any salvage conventions? If so, which one?

See reply 3.4 below.

3.2 In any event, what are the principal rules for obtaining non-contractual salvage? In the event that a salvage contract is signed, will this clearly displace any general law on salvage liabilities?

See reply 3.4 below.

3.3 What is the limitation period for enforcing salvage claims in your jurisdiction?

See reply 3.4 below.

3.4 To what extent can the salvor enforce its lien prior to the redelivery of ship/cargo?

No salvage conventions have been enacted by Israel.

In Israel, The Ports Ordinance of 1971 is the relevant legislation for handling of wrecks and salvage of ships in Israeli waters. This Ordinance provides that should a vessel be lost or abandoned in Israeli waters and it poses a danger for the navigation or docking of vessels, then the authorised authority (which is the Israeli Ports Company Ltd, a government company) may demand the wreck's removal by its owners. In case the owners do not cooperate then the authority may remove the wreck by itself and later sue the owners for costs or damages.

Additionally, The Wrecks and Salvage Ordinance (An Ordinance to Make Provision for Control over Wrecks and Payment of Salvage) of 1926 determines that where any services are rendered wholly or in part within the waters of Israel in saving life from any vessel, or in assisting any vessel which is wrecked, stranded or in distress, or saving the cargo or apparel of that vessel, or any part thereof, there shall be payable to the salvor by the owner of the vessel, cargo, apparel or wreck, a reasonable amount of salvage to be determined in case of dispute through mandatory arbitration. Salvage in respect of the preservation of life of any person belonging to the vessel shall be payable by the owner of the vessel in priority to all claims for savage payable by him. Should a salvage contract be signed by the parties, the contents of same shall govern their rights.

The Prescription Law generally allows a period of seven years to enforce a legal right in tort (this may be extended if specific circumstances detailed in the law are applicable).

The salvor enjoys the right to arrest property within *in rem* proceedings before the Admiralty Court. By the terms of the Israeli Admiralty Court Law of 1952, the District Court of Haifa, Israel, serves as an Admiralty Court, jurisdiction of which is derived from the old British Admiralty Court Acts of 1840 and 1861, according to which the Court has jurisdiction to decide in claims concerning, *inter alia*, salvage, towage, services rendered to a vessel and damage done by any ship. Furthermore, the Israeli Shipping Law (Vessels) of 1960 specifies several types of occurrences which give rise to a maritime lien over a vessel and the goods carried therein, and therefore provides the Admiralty Court jurisdiction to decide in claims which concern such liens, including for salvage rewards.

4. GENERAL AVERAGE ('GA')

4.1 Will any general average claim (whether under the contract, generally or GA securities) necessarily follow the contractual provisions in relation to general average, in particular, the chosen version of the York Antwerp Rules ('YAR')?

Such claim would be considered as a contractual claim and if contractual reference by incorporation is made to the YAR, the same would be enforced by the courts.

4.2 Time bars

4.2.1 Will general average claims under the contract of carriage be governed by any contractual time bar – in particular, any which might be

set out in the YAR (eg, YAR 2004)?
According to the local Prescription Law, the parties to an agreement have the right to shorten the period of prescription determined by the law, in an agreement in writing. It has not been ruled yet in Israeli jurisprudence whether a shorter time bar period applied by incorporation of the YAR into a contract of carriage fulfils the above requirement, but our tendency should be to assume a negative reply. Therefore, it is recommended to adopt as a sensible working assumption according to which the general prescription period would therefore be seven years, as from of the occurrence.

4.2.2 In the event that claims should be pursued under general average securities in your jurisdiction, what is the applicable time bar for such claims? Will this be affected by the provision of YAR 2004 Rule XXIII if 2004 YAR is specified in the relevant contract?
The period would be seven years as of the time of execution of the security or the time of the contractual liability and payment obligation entering into force (ie, from time of publishing of the GA adjustment, if properly drafted to that effect).

4.2.3 To what extent is any general average adjustment binding?
The basis of evaluation of the validity of a general average adjustment depends on the wording of the original agreement making reference to the same. If the agreement (bill of lading or charterparty terms) are clear and straight forward, and the parties' intention to be bound by same may be easily determined thereby, it is likely that the courts will recognise and enforce them. Nevertheless, a general average adjustment must be duly evidenced before the court in order for it to be admissible as evidence.

5. LIMITATION

5.1 What is the tonnage limitation regime in respect of claims against the vessel?

There are two primary facilities which impose a limitation of liability of a vessel, both of which are based on internationally accepted sets of rules:

- as noted above, the Hague Visby Rules incorporated to the Israeli law provides general defences and immunities to a carrier;
- the Israeli Shipping Law (Limitation on a Shipowners' Liability) of 1965 which incorporates the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships (Brussels, 10 October 1957). In a nutshell, this Convention provides a shipowner the opportunity to establish a limitation fund which will serve as a maximum exposure against the shipowner for a specific occurrence giving rise to the dispute. This tool has not been dealt with by Israeli courts extensively, but it remains in force and often serves as a catalyst for settlements.

5.2 Which parties can seek to limit?

According to the Convention the owners, charterers, managers and operators of the vessel can seek to limit.

5.3 What is the test for breaking the limitation?

According to the Convention the test for breaking limitation is proving actual fault or privity of the shipowners. According to local precedents, it appears that the onus would be on the shipowners to show that no actual fault or privity on their behalf existed in connection with the event or casualty.

5.4 To what degree do any limitation provisions found jurisdiction for the substantive claim?

Limitation provisions do not influence the jurisdiction of the local courts which is established according to the Civil Law Procedure Regulations of 1984, or alternatively the British Admiralty Court Acts of 1840 and 1861 or Israeli Shipping Law (Vessels) of 1960 depending on the merits of the claim and applicable circumstances.

5.5 Which package limitation figure applies.

The per package limitation is of 666.67 Special Drawing Rights ('SDRs') per package or 2 SDR per kilogram gross weight of the goods in accordance with the Hague Visby Rules.

6. POLLUTION AND THE ENVIRONMENT

6.1 Which Civil Liability Convention ('CLC') regime applies?

The International Convention on Civil Liability for Oil Pollution Damage of 1992 ('CLC') has been incorporated into the local Law for Liability for Oil Pollution Damages of 2004. The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage also dated 1992 as amended in London on 18 October 2000, is also in force by virtue of the same local Law for Liability for Oil Pollution Damages of 2004. According to the local Law for Liability for Oil Pollution Damages of 2004, the registered owner of the vessel retains liability for oil pollution. Clause 22(2)(d) of the said law explicitly excludes, where a cause of action for liability may be established according to the law, the liability, *inter alia*, of the vessel's charterers (without making any distinction between the various possible classifications of the charterer, ie, time, voyage or otherwise), managers or operators according to any other law, to the extent that said damage was not caused by an action or omission intentionally made by the aforesaid in order to cause the pollution or due to recklessness, made with the actual knowledge that the action will probably cause the damage.

The specific laws dealing with oil pollution do not impose, as such, liability on a charterer (time/voyage) or owner of the oil carried on board the vessel. Nevertheless, such liability may be established on the basis of the local tort laws, to the extent that negligence on part of the charterer or cargo owners may be established in connection with the pollution and damages caused thereby. Nevertheless, in case of damage or incident falling within the terms of the Law for Liability for Oil Pollution Damages of 2004, the aforesaid parties will be exempted from liability, unless it may be proved that their action or omission were intentionally made in order to cause the

pollution, or due to recklessness, made with the actual knowledge that the action will probably cause the damage.

Civil liability may be imposed also by virtue of the Seawater Pollution by Oil (Prevention) Ordinance (New Version) 1980, with the reservation that such law does not specifically impose liability on a charterer or owner of the oil carried on board the vessel. Otherwise and generally, according to various environmental laws in Israel the liability for environmental incidents will be imposed on the person that actually caused the environmental incident or that violated the provisions of the relevant environmental laws, and such laws include not only criminal penalties, but also liability for the costs of restoration of the damages caused thereby.

The main criminal law which may be applied to the circumstances (criminal proceedings), is the Seawater Pollution by Oil (Prevention) Ordinance (New Version), 1980, according to which if any oil is discharged, or allowed to escape from any vessel, any place on land, or any apparatus used for the purpose of transferring oil from or to any vessel to or from any place or land, the owner or master of the vessel from which the oil is discharged or allowed to escape, or the occupier of the land or the person having charge of the apparatus, as the case may be, shall be liable to a fine as determined. Furthermore, if he has once before been convicted of an offence under this section, or aggravated circumstances may be established, he shall be liable to a greater fine or imprisonment for a term of one year. The law does not impose liability on a charterer or owner of the oil carried on board the vessel, as such; however the same law does not exonerate possible criminal liability of other parties according to the general criminal law (such as, but not limited to, negligence causing damage to property or personal injury for instance).

The International Convention on Civil Liability for Bunker Oil Pollution Damage of 2001 which was adopted on 23 March 2001 entered into force internationally on 21 November 2008. However, the Israeli legislature has not yet commenced with the implementation of this new Convention into domestic law.

In general, according to the environmental laws in Israel, such as the Water Law 1959 and Clean Air Law 2008, the liability for environmental incidents will be imposed on the person that actually caused the environmental incident or that violated the provisions of the relevant environmental law. The criminal liability according to such environmental laws is strict liability. In general, pursuant to the Israeli Penal Law 1977, a person will not be found liable in strict liability offences if he can prove that he acted without criminal intent or negligence and did everything within his powers to prevent the offence.

The Water Law is intended to protect water sources in Israel, and places the responsibility on the party who by its act or omission causes and/or is likely to cause contamination of water sources. The Water Law provides the authorities with wide-ranging powers, including authority for the Water Commissioner to require from 'whomever has caused the contamination' to take all actions necessary in order to stop the pollution and restore the

situation to the *status quo ante* and to impose fines on those who infringe the order. In the event that the order for the correction of irregularities is not fulfilled, the Water Commissioner may do all that is stipulated in the order to correct the irregularity and to charge the polluter the costs thereof.

The Maintenance of Cleanliness Law 1984 is intended to ensure cleanliness throughout the country and makes any person who discards waste (including fuels) in public places and/or dirties public places criminally responsible. The term 'public place' has been broadly interpreted by the courts.

Fines can be imposed for breaches of the provisions of the Maintenance of Cleanliness Law. This law also provides the authority to issue a cleaning order, whereby the polluting party is required to restore the situation to the *status quo ante*. If the order is not carried out, the authorities can carry it out themselves and charge the polluter double the expenses incurred.

The Environment Protection Law (The Polluter Payer) (Legislation Amendments) 2008 came into force on 28 August 2008. According to the Environment Protection Law, any person that produces any profit or other benefit as a result of an environmental offence under various environmental laws in Israel might be subject to a penalty equal to the aforementioned profit or benefit in addition to other penalisation.

7. SECURITY AND ARREST

7.1 Is your jurisdiction a party to any particular arrest convention? If so, which one?

No.

7.2 Which claims afford a maritime lien in your jurisdiction?

The major maritime lien would be the one resulting from a mortgage debt. According to the Shipping Law (Vessels) of 1960, a charge to secure a mortgage debt shall take precedence over any other charge except for a limited list of charges enjoying a first lien on the vessel, which are in summary as follows:

(1) the expenses incurred in order to bring about the sale of a vessel;
(2) port dues and similar fees;
(3) expenses of guarding and maintaining of the vessel from the day of her entry to the last port to the day of her sale;
(4) crew wages and other payments claimed by the crew;
(5) salvage claims;
(6) compensation for the death or bodily injury of passengers in the vessel;
(7) compensation for damage resulting from collision at sea or from other navigational accident;.
(8) payments in connection with supplies or services provided to the vessel. Notwithstanding the foregoing, the Shipping Law provides that the only lien which has no priority over a mortgage is that under this paragraph (8).

7.3 In any event, to what extent does a mortgagee have priority over claims for loss and damage which are not maritime liens?

The priority would be absolute.

7.4 Is there any suggestion that an arrest claim might lead to the founding of substantive jurisdiction?
Yes. *In rem* proceedings properly instituted are deemed to establish the jurisdiction of the Admiralty Court.

7.5 To what extent can sister/associated ships be arrested?
Sister ship arrest is presently not recognised in Israeli jurisprudence.

7.6 Is it possible to arrest ships for claims arising out of (a) MOAs; (b) ship repair; and (c) ship construction contracts?
The Admiralty Court has jurisdiction over any claim for the building, equipping or repairing of any ship, if at the time of the institution of the cause the ship or her proceeds thereof are under the arrest of the Court. In the past this last precondition did not prevent arrest of a vessel by the Admiralty Court, in spite of not being originally arrested, as the Court was willing to consider such cause of action as falling within the term 'necessaries supplied', which also grants jurisdiction to the Admiralty Court, without any similar precondition.

7.7 To what degree can an arrest be anticipated/prevented by the lodging of security?
According to Rule 159 of the Vice Admiralty Rules of 1883, any person desiring to prevent the arrest of any property may file a notice, undertaking within three days after being required to do so, to give bail to any action that may be brought against the property, and thereupon the registrar shall enter a caveat in the caveat warrant book.

7.8 If a vessel can be arrested, by what means can the claim be secured? Specifically:
7.8.1 Can an arresting party insist on a cash deposit or a bail bond?
Yes, but in previous cases the Admiralty Court was persuaded to order that a P&I LOG will be considered as sufficient security, in spite of the arresting party's objection.

7.8.2 Will the court accept a letter of guarantee from a protection and indemnity club?
Yes.

7.8.3 Does any guarantee have to be provided by a domestic bank or other acceptable guarantor?
There are no rigid rules in this respect. The matter is dependent upon an agreement reached by the parties, and if such is lacking the Court will decide on the basis of the arguments submitted by the parties.

7.9 Briefly summarise the further security options: eg, freezing orders, attachment of debts due to the defendant, etc.
Various attachment orders may be issued by the civil courts but given that

they are subjected to various preconditions (including depositing counter security), they are not implemented or used in maritime cases. It is to be noted that either before or after final judgment the Admiralty Court may order that the vessel under arrest by the Court be appraised, or be sold with or without appraisal, by public auction or by private contract. If the vessel is deteriorating in value, the Court may order it to be sold forthwith and the sale proceeds shall serve as substitute security for the claim, pending judgment.

8. CONTRACTS OF SALE OF GOODS

8.1 Jurisdiction/proper law

8.1.1 In the absence of express provision in a contract of sale, by what means will the proper law of the contract be determined?

Israeli courts will apply the proper law of the contract. Otherwise, Israeli courts will generally respect a choice of law provision in a contract that designates a foreign governing law, provided that: (a) the choice of law provision expressly states which foreign law applies; (b) the designated law, as applied, will not violate the principles of justice in the State of Israel; and (c) the agreement will not be considered illegal in Israel or otherwise in violation of public policy.

It should be noted that where the choice of law provision in a contract is not exclusive (ie, the choice of law provision does not expressly state which foreign law will apply or the choice of law provision does not use terms that emphasise the exclusivity of the specific 'chosen' law), Israeli courts may apply Israeli law as the governing law of the contract. In the event that an Israeli court presides over a dispute that is governed by non-Israeli law, each party will be required to produce expert testimony in order to prove the foreign law as a matter of fact.

The choice of law provision will govern only substantive law issues (eg, the interpretation of the contract or other issues regarding the performance of the agreement) applicable to the contract. However, the court may not apply foreign law to procedural matters, or to technical matters relating to the contract.

It should be emphasised that application of the choice of law provision by the Israeli courts will generally relate only to matters of contract law. Other matters or legal principles not covered by the contract could be subject to Israeli law, such as tort law.

8.1.2 Will a foreign jurisdiction or arbitration clause necessarily be recognised? In the event that proceedings can be commenced before your court notwithstanding such provisions, can such proceedings be challenged?

The Arbitration Law 1968 provides that the parties may resolve disputes by way of arbitration in accordance with the terms of an arbitration agreement entered between them. While parties are conducting arbitration procedures, any proceeding filed with the court in connection with the same dispute will be, subject to certain conditions, postponed and stayed. At the request of a party to the arbitration and subject to certain conditions specified in

the Arbitration Law, the ruling of the arbitrator may be approved, cancelled, supplemented or returned to the arbitrator for additional ruling by court. Subject to the provisions of any international treaty applicable to such arbitration to which Israel is a party, these rules apply to an arbitration conducted out of Israel as well. As far as arbitration clauses are concerned, Israel is a party to the New York Convention and according to the local Arbitration Law, the courts are obliged to stay proceedings and honour an arbitration clause which is subjected to the said Convention.

8.1.3 In the event that an injunction or order preventing proceedings is obtained in the agreed jurisdiction (whether court or arbitration), will this be recognised by your court?

The Israeli legislation allows for enforcement of foreign judgments and arbitral awards, including an injunction or order preventing proceedings obtained in the agreed jurisdiction. The Israeli Enforcement of Foreign Judgments Law of 1958 provides that an Israeli court may declare a foreign judgment or order enforceable in Israel subject to several conditions: (1) that the court which gave the judgment or order was certified to give it; (2) that the judgment or order is final and is not subject to appeal; (3) that the judgment or order is enforceable in nature and does not contradict public policy; (4) that the judgment or order is enforceable in the country in which it was given; (5) that the judgment or order was given in a country which enforces Israeli judgments or orders.

8.2 Arbitration clauses:

8.2.1 What are the essential elements for the recognition of an arbitration agreement?

The Arbitration Law 1968 provides that the parties may resolve disputes by way of arbitration in accordance with the terms of an arbitration agreement entered between them. As far as arbitration clauses are concerned, Israel is a party to the New York Convention and according to the local Arbitration Law, the courts are obliged to stay proceedings and honour an arbitration clause which is subjected to the said Convention. Naturally proper evidence must be submitted showing the agreement of the parties to resolve their dispute by way of arbitration.

8.3 Passing of title/property/risk

8.3.1 What terms if any are implied by your rules as to the passing of:

8.3.1.1 title (property) to the goods?

See reply 8.3.2 below.

8.3.1.2 risk?

See reply 8.3.2 below.

8.3.2 In relation to the passing of title and risk, do your rules apply even if the underlying contract applies another law?

Incoterms 2010 delivery terms are recognised by the Israeli courts. Moreover,

it is a general principle of contract law that the content of a contract can be whatever the parties agree upon, save in exceptional circumstances. International trade is commonly governed by the terms of the Incoterms 2010 and hence determination of the above issues would be covered by such terms.

Otherwise, the Israeli Sales Law 1968 contains provisions on when title and risk will pass and where the delivery point is. However, parties can exclude said provisions of the law by contract.

Pursuant to section 4(b) of the Israeli Sales Law and section 6 of the supplement of the Israeli Sales Law (International Sale of Goods) 1999, the parties to a contract have the right to exclude the terms and conditions of said laws, respectively and to agree on different terms and conditions to those set forth in said laws.

8.4 Description and quality

8.4.1 Do your rules imply terms on (a) the description of the goods and/or (b) their quality?

See reply 8.3.2 above.

8.5 Performance

8.5.1 Delivery: What provisions does your law make as to delivery of the goods (eg, on timing and method of delivery)?

See reply 8.5.3 below.

8.5.2 Acceptance: When is the buyer deemed to have accepted the goods?

See reply 8.5.3 below.

8.5.3 Payment: In the absence of express provision, by when must a buyer pay for the goods?

Provisions with regard to timing of payment, as well as who bears responsibility for carriage, insurance, loading and discharge as well as particulars of delivery or acceptance in international trade are commonly governed by the Incoterms 2010. Moreover, it is a general principle of contract law that the content of a contract can be whatever the parties agree upon, save in exceptional circumstances. Nevertheless, the Israeli Sales Law (International Sale of Goods) 1999, which incorporated the Vienna Convention (Israel's accession to which was ratified on 16 August 2001), and which applies to contracts of sale of certain types of goods between parties whose places of business are in different states under various conditions, does contain various provisions on payment (Articles 54–59), on delivery (especially Articles 31–34) and passing of risk (Articles 66–70) though parties can exclude said law by contract.

8.6 Other terms

8.6.1 Classification of terms:

8.6.1.1 Do your rules differentiate between warranties (breach of which only entitles the innocent party to damages) and conditions (breach of which also entitles him to terminate the contract), and if so what is the effect?

Israeli contract law does not differentiate between warranties and conditions, but rather between non-fundamental and fundamental breach of contracts, each of them entitling the suffering parties with slightly different remedies (the difference mainly refers to the immediate or conditional right of cancellation of the contract) following breach.

8.6.1.2 In English law, we also have the concept of intermediate (or innominate) terms. Breach of such terms may have differing effects depending on the gravity of the consequences of the breach. Do you have a similar concept under your system?
No.

8.6.2 Exemption clauses

8.6.2.1 Do your courts recognise exemption (ie, exclusion) clauses, such as *force majeure*?
Yes.

8.6.2.2 What are the key requirements for relying on an exemption clause?
The issue would be mainly relevant in case of a standard sales contract governed by Israeli law. The Standard Contracts Law of 1982 would apply. According to this law, a customer is entitled to challenge any contractual term included therein by claiming that the condition under deliberation – having regard to the totality of the conditions of the contract and to other circumstances – involves an undue disadvantage to customers or an unfair advantage to the supplier, likely to lead to a deprivation of customers. In such a case, the court may annul or vary the condition of a standard contract. According to said law, there are several conditions which shall be presumed to be unduly disadvantageous, amongst which (partial list): a condition relieving the supplier, fully or partially, of a responsibility he would have to bear under law but for that condition, or unreasonably restricting the responsibility he would have to bear by virtue of that contract but for that condition and/or, a condition conferring on the supplier an unreasonable right to rescind, or to suspend or defer the performance of the contract or to alter any material obligation imposed on him by the contract, and more.

8.7 Remedies

8.7.1 What are the seller's remedies where the buyer is in breach of contract?

See reply 8.7.3 below.

8.7.2 What are the buyer's remedies where the seller is in breach of contract?

See reply 8.7.3 below.

8.7.3 Are there any general limitations on the remedies available?

If the Israeli Sales Law (International Sale of Goods) 1999, which

incorporated the Vienna Convention is applicable, then the remedies are as contained therein. Otherwise the contractual remedies available to the suffering party are enforcement, compensation and cancellation, each of them being applicable according to the circumstances of the contract and the breach. Pure economic loss or consequential damages may be claimed; however the court will accept same on the basis of the remoteness and foreseeability of the damages claimed.

8.8 Time limit

8.8.1 What is the statutory limitation period?

The Prescription Law generally allows a period of seven years to enforce a legal right in tort or contract (this may be extended if specific circumstances detailed in the law are applicable).

8.8.2 Do your courts uphold shorter contractual limitation periods?

According to the local Prescription Law, the parties to an agreement have the right to shorten the period of prescription determined by the law in a written agreement.

8.9 Finance

8.9.1 In what circumstances is it possible for your courts to prevent payment out under:

8.9.1.1 a letter of credit?

See reply 8.9.1.2.

8.9.1.2 performance bonds?

Usually severe fraud must be proved *prima facie* in order to obtain an *ex parte* injunction preventing such payment.

8.9.2 What does one have to show to prevent payment out?

Credible evidence must be provided to the court showing severe fraud in order to persuade the court to issue a temporary injunction order.

8.10 Security

8.10.1 What remedies are available to obtain security for the claim:

8.10.1.1 where the substantive claim is being litigated?

See reply 8.10.1.2 below.

8.10.1.2 where the substantive claim is not being litigated in your jurisdiction?

Several temporary remedies are possible; the temporary attachment being the most common remedy. A temporary attachment order shall be made only in the case of an action for an amount of money; however, in the case of an action for a specific object the court may order the attachment of the object that is sued for. The court may make a temporary attachment order for assets of the respondent that are in his possession, in the petitioner's possession or in a holder's possession, on the basis of *a priori* credible

evidence – that there is a reasonable suspicion that not making the order will make it difficult to execute the judgment.

The court may also, by order, appoint a temporary receiver for certain assets of the respondent that are in his possession or in the possession of a holder, if it is satisfied – on the basis of *a priori* credible evidence – that there is a reasonable suspicion that the value of the assets will be considerably lowered or that the respondent or a person on his behalf will conceal or destroy the assets, or that the assets were produced in the course of the act or omission that is the subject of the action or were used for its performance.

According to precedents of the Supreme Court, such temporary remedies are also available to secure proceedings on the substantive claim having been properly commenced in a foreign jurisdiction.

8.10.2 Must the applicant have already commenced substantive proceedings (whether by litigation or arbitration) to be able to obtain security?

The court may grant a temporary remedy before action has been brought, if it is satisfied that that is justified under the circumstances of the case, provided that the order is conditional on action being brought within seven days after the order was made or within some other period set by the court because of special circumstances that shall be recorded.

8.10.3 Is there a distinction between the remedies available for a claim which is subject to litigation and one which is referred to arbitration?

No.

8.10.4 What tests are applied to establish a right to each remedy?

The Court may make a temporary attachment order for assets of the respondent that are in his possession, in the petitioner's possession or in a holder's possession, and if it is satisfied – on the basis of *a priori* credible evidence – that there is a reasonable suspicion that not making the order will make it difficult to execute the judgment.

The court may issue a stay of exit from Israel order against a respondent, if it is satisfied – on the basis of *a priori* credible evidence – that there is a reasonable suspicion that he is about to leave Israel permanently or for a prolonged period and that that is liable to create substantial difficulties for any proceeding or the execution of any judgment. If the respondent is a foreign resident, a stay of exit order against him shall not be made, except under exceptional circumstances and for special reasons that shall be recorded.

The court may – by an order subject to the provisions of Article 1 – appoint a person to carry out a search, to photograph, to copy or to seize assets found on premises, if it is satisfied on the basis of *a priori* credible evidence that there is a reasonable suspicion that the respondent or some other person on his behalf is about to hide or to destroy the assets, and that that would raise real difficulties to the conduct of the proceedings.

The court may, by order, appoint a temporary receiver for certain assets

of the respondent that are in his possession or in the possession of a holder, if it is satisfied – on the basis of *a priori* credible evidence – that there is a reasonable suspicion that the value of the assets will be considerably lowered or that the respondent or a person on his behalf will conceal or destroy the assets, or that the assets were produced in the course of the act or omission that is the subject of the action or were used for its performance, and that not making the order will create substantial difficulties for the execution of a judgment.

In its decision on the grant of the temporary remedy, the type of remedy, its extent and conditions – including the pledge that the petitioner shall provide – the court shall, *inter alia*, take these considerations into account:

- the harm that will be caused to the petitioner, if the temporary remedy is not granted, as compared to the harm that will be caused to the respondent if the temporary remedy is granted, and also the harm liable to be caused to the holder or to some other person;
- whether the petition was made in good faith, whether granting the remedy is just and proper under the circumstances of the case, and whether it does not cause harm in excess of what is necessary.

8.10.5 Is the applicant required to provide counter security, and if so by what means?

The court shall not grant a temporary remedy, except subject to the provision of an undertaking as well as a guarantee it deems sufficient to compensate for any harm that will have been caused to a person addressed by the order in consequence of the order having been made, if the action is stopped or if the order lapses for any other reason. The court may exempt the applicant from providing a guarantee, if it finds it just and proper to do so because of special reasons that shall be recorded. The court may order that a pledge be deposited in addition if it is satisfied that that is just and proper under the circumstances. The amount of the pledge shall not exceed approximately ILS 50,000; the Court may, if it finds that it is justified to do so because of special circumstances that shall be recorded, increase the amount of the pledge to more than the said amount, or it may make the order conditional on the provision of some other pledge.

8.10.6 What exposure does an applicant have for damages if the attachment is deemed wrongful?

If the attachment is deemed wrongful its exposure is the full provable damages on the basis of the remoteness and foreseeability of the damages claimed. Such damages should however be claimed in an independent action.

8.11 Enforcement

8.11.1 Is your country a signatory to the New York Convention?

Yes.

8.11.2 To what extent is the New York Convention applied in practice?

The New York Convention is commonly applied.

8.12 Vienna Convention

8.12.1 Is your country a signatory?

The Israeli Sales Law (International Sale of Goods) 1999 incorporated the Vienna Convention (Israel's accession to which was ratified on 16 August 2001).

9. GENERAL FORMALITIES

9.1 Does a lawyer require a formal power of attorney to be able to act?

Yes.

9.2 Do claim documents (and their translation) require notarisation?

Yes.

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