

Goode and McKendrick

on

COMMERCIAL LAW

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FINANCIAL TIMES



SIXTH EDITION

BY

EWAN MCKENDRICK

Penguin Reference

Goode and McKendrick on Commercial Law

Roy Goode is Emeritus Professor of Law in the University of Oxford and Emeritus Fellow of St John's College, Oxford. A former solicitor, later a barrister and Queen's Counsel, he held chairs at Queen Mary College, University of London, and at Oxford, where he was Norton Rose Professor of English Law until his retirement in 1998. He is an Honorary Bencher of Inner Temple, a Fellow of the British Academy, of Goodenough College and of the Royal Society of Arts and is an Honorary Fellow of Queen Mary. He holds honorary doctorates from the University of London and the University of East Anglia. He was for fifteen years a member, and is currently an honorary member, of the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT). He was knighted in 2000 for services to academic law.

Roy Goode served as chairman or member of several government committees. He has lectured extensively in this country and abroad and is the author of a number of standard textbooks and monographs. His leisure interests include chess, walking and browsing in bookshops. He is married with one daughter and lives in Oxford.

Ewan McKendrick is Herbert Smith Professor of English Private Law at the University of Oxford, where he is also a Pro-Vice-Chancellor and a Fellow of Lady Margaret Hall. He is the author of a number of key works on contract law and commercial law, and is an editor of *Chitty on Contracts*. He is a barrister in practice with a leading set of commercial chambers in London and is a Bencher of Gray's Inn.

Goode and McKendrick on Commercial Law

Sixth Edition

Professor Ewan McKendrick QC (Hon)

Professor of English Private Law, University of Oxford,

Fellow of Lady Margaret Hall

Professor of Anglo-American Private Law, University of Leiden

Barrister, 3 Verulam Buildings and Bencher of Gray's Inn



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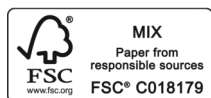
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Contents

Preface	xviii
Foreword to the First Edition	xxi
Preface to the First Edition	xxii
Acknowledgements	xxv
List of Figures	xxvi
Table of Statutes	xxix
Table of Statutory Instruments	xliii
Table of Codes	xlix
Table of European Treaties and Legislation	li
Table of Conventions and Model Laws	lv
Table of Uniform Rules, Uniform Trade Terms and Restatements	lix
Table of Cases	lxi

PART ONE THE FOUNDATIONS OF COMMERCIAL LAW

1 The Nature and Sources of Commercial Law	3
1. The law merchant	3
2. The founding of English commercial law	6
3. The nature of commercial law	8
4. The interests to be protected	10
5. The principal sources of commercial law	12
6. The limitations of judicial precedent	26
7. The problem of language	28
8. The importance of certainty	30
9. The challenge of technology	32

2	Basic Concepts of Personal Property	37
1.	Classification of rights	38
2.	Property and obligation	41
3.	Personal property defined	42
4.	The distinguishing characteristics of personal property	43
5.	Legal ownership	45
6.	Equitable ownership	53
7.	Possession	57
8.	Dealings in goods	61
9.	Dealings in intangibles	62
10.	Essential elements for the consensual transfer of real rights	65
11.	Conflicting claims to pure personalty	67
12.	The effect of transfers by a non-owner	73
13.	Identifying the object of a transfer obligation	75
14.	The protection of property rights through the law of torts	78
3.	Some Aspects of Contract Law	81
1.	The nature and function of contract law	81
2.	Contract, tort and restitution	83
3.	Promise and bargain	84
4.	Contract as a reflection of the will of the parties	90
5.	Formation and avoidance	91
6.	The classification of statements made in a contractual setting	99
7.	Ascertaining the contract terms	103
8.	Construing the contract	113
9.	Restrictions on what can be validly stipulated	119
10.	The privity rule and its consequences	131
11.	Variation and novation	134
12.	Waiver and estoppel	136
13.	Remedies for misrepresentation	138
14.	Performance of the contract	141
15.	Remedies for breach of contract	142
16.	Defences to a contract claim	166
17.	Illegality	166

18.	Impediments to performance and the doctrine of frustration	175
4	Commercial Contracts	181
1.	Commercial and non-commercial contracts	181
2.	Contract types and structures	182
3.	Factors influencing the choice	188
4.	Market contracts and their organization	194
5.	The legal power of the market	201
5	Agency in Commercial Transactions	205
1.	The concept of agency	207
2.	Sources of agency law	208
3.	Types of agent	210
4.	Authority and power of an agent	212
5.	Actual, apparent, and usual authority	214
6.	Conditions needed to be able to invoke apparent authority	215
7.	Ratification of acts done without authority	217
8.	Relations between principal and agent	217
9.	Position of third party: agency disclosed	222
10.	Position of third party: agency undisclosed	223
11.	Termination of the agent's authority	224
12.	Dispositions by and to A	226

PART TWO DOMESTIC SALES

6	A Brief History of Sales Law	229
7	The Contract of Sale: Its Nature and Function	237
1.	Ambit of the Sale of Goods Act	237
2.	The language of the Sale of Goods Act	240
3.	The contract of sale defined	242
4.	The significance of the statutory definition	256
5.	Documentary and non-documentary sales	259
6.	Consumer sales	259

8	The Passing of the Property	261
1.	Identification of the contract goods	261
2.	Property: some general aspects	269
3.	Claims to goods forming part of a bulk	275
4.	The time when property passes to the buyer	285
9	Risk and Frustration	299
1.	The meaning of 'risk'	299
2.	The general principle of risk: <i>res perit domino</i>	301
3.	Wholly unascertained goods	302
4.	Quasi-specific goods	303
5.	Identified goods	305
6.	Goods supplied on approval or on 'sale or return'	316
7.	Insurance	316
8.	The Sale of Goods Act rules on frustration	318
9.	Effect of frustration at common law	321
10	Delivery	323
1.	The concept of delivery	323
2.	The relationship between implied terms and the delivery obligation	324
3.	Modes of delivery	325
4.	The delivery point	330
5.	Time of delivery	331
6.	Expenses of delivery	331
7.	Excuses for non-delivery	332
8.	The buyer's duties	332
9.	Instalment deliveries	332
10.	Remedies for non-delivery	340
11	The Statutory Implied Terms in Favour of the Buyer	341
1.	Conditions and warranties	341
2.	Title, freedom from encumbrances and quiet possession	345
3.	Correspondence with description	353
4.	Quality	362

5.	Fitness for purpose	379
6.	Correspondence with sample	390
7.	The exclusion of liability for fitness, quality and correspondence with description or sample	391
8.	Should further terms be implied?	396
12	Rejection and its Consequences	399
1.	The right to reject	400
2.	Time of rejection	402
3.	Mode of rejection	403
4.	Effectiveness of notice to reject	403
5.	Loss of right to reject	404
6.	The effect of improper rejection	404
7.	The effect of lawful rejection	405
8.	The right to cure	406
13	Acceptance	411
1.	The meaning of 'acceptance'	411
2.	Acceptance as non-rejection of an imperfect tender	411
3.	An outline of changes to the rules on acceptance	412
4.	What constitutes acceptance?	413
5.	The effect of acceptance	423
14	The Buyer's Remedies for Misrepresentation or Breach by the Seller	427
1.	The remedies in outline	427
2.	Anticipatory breach	432
3.	Non-delivery	433
4.	Delay in delivery	442
5.	Tender of non-conforming goods	445
6.	Defect in seller's title	446
7.	Damages for breach of warranty	446
8.	'Available market'	451
9.	The relevance of sub-contracts by the buyer	453
10.	A critique of the market-price rule	456

11.	Remedies of the consumer buyer	459
15	Duties of the Buyer and Remedies of the Seller for Misrepresentation or Breach	465
1.	Duties of the buyer	465
2.	The seller's remedies in outline	465
3.	Taking of delivery	466
4.	Acceptance	467
5.	Payment	467
6.	Rescission of the contract	471
7.	Anticipatory breach	472
8.	Refusal to take delivery	477
9.	Non-acceptance	478
10.	Delay in taking delivery	484
11.	Remedies for non-payment	484
16	Title Conflicts between Seller or Buyer and Third Parties	493
1.	The competing claims for protection	494
2.	The nemo dat rule and its common law exceptions	495
3.	Statutory exceptions to the nemo dat rule	502
4.	Conflicts as to proceeds	524
5.	Remedies in a conflict situation	524
6.	Proposals for reform	526
 PART THREE MONEY, PAYMENT AND PAYMENT SYSTEMS		
17	Money	531
1.	The legal meaning of 'money'	532
2.	The different forms that money may take	537
3.	Claims to money	545
18	Payment and Payment Systems	555
1.	Payment: an introduction	555
2.	Payment systems	560
3.	Legal effects of interbank credit transfers	570

4.	Completion of payment of an in-house credit transfer	573
5.	Contract netting (netting by novation)	574
6.	Settlement	575
19	Instruments Generally	579
1.	What is an instrument?	579
2.	Classes of instrument	580
3.	Historical background of instruments	581
4.	The autonomy of the payment obligation	584
5.	Certainty and unconditionality?	585
6.	The negotiable instrument as an abstract payment undertaking	585
7.	Decline in the importance of instruments	586
20	Bills of Exchange	587
1.	The statutory definition	587
2.	Issue and acceptance	589
3.	Transfer of bills of exchange	594
4.	The holder	596
5.	Accommodation parties and accommodation bills	604
6.	Liabilities of parties	605
7.	Prerequisites of enforcement	614
8.	Remedies for dishonour	618
9.	Defences to a claim on a bill	620
10.	Discharge of bills of exchange	631
11.	Effect of bill on underlying contract	632
12.	Security over bills	633
13.	Advantages of a bill	634
21	Other Instruments	637
1.	Promissory notes	637
2.	Bankers' drafts	638
3.	Travellers' cheques	639
4.	Negotiable instruments as investment securities	641

PART FOUR SECURED FINANCING

22	The Classification and Characteristics of Credit and Security	651
1.	The nature and forms of credit	652
2.	The secured creditor versus the unsecured creditor	656
3.	Consensual security	658
4.	Legal security	720
5.	The incidents of real security	725
6.	Attachment, perfection and priorities	725
7.	The transfer of security rights	725
23	The Creation, Enforcement and Transfer of Security Rights	727
1.	The grant of security: contract and conveyance	727
2.	The ingredients of attachment	730
3.	Effect of attachment	736
4.	Enforcement of the security	740
5.	Transfer of the security	745
6.	Assignment of security without debt, and vice versa	750
24	Principles of Perfection and Priorities	751
1.	The need to perfect	751
2.	Methods of perfection	751
3.	Priorities: some general points	758
4.	Registration requirements and their impact on priorities	763
5.	The after-acquired property clause and the purchase-money security interest	779
6.	Circularity problems	781
7.	General conclusions on perfection and priorities under English law	784
25	The Floating Charge	787
1.	Evolution of the charge	787
2.	The nature of the charge	789
3.	Creation of the charge	793
4.	Crystallization of the charge	795
5.	Effect of crystallization as between chargor and chargee	800

6.	Effect of crystallization as between chargee and third parties	801
7.	Priorities	801
8.	The future of the floating charge	804

PART FIVE SPECIFIC FORMS OF SECURED BUSINESS FINANCE

26	General Financing Considerations	809
1.	Selecting the security instrument	809
2.	The assets cycle	815
3.	Types of finance required	817
4.	The functional classification of collateral	818
27	Conditional Sale and Hire-Purchase	819
1.	The financing technique	819
2.	Conditional sale	823
3.	Hire-purchase	825
4.	Relations between finance house and dealer	832
5.	Relations between dealer and buyer or hirer in direct collection transactions	833
6.	Tracing proceeds of authorized resales	834
28	The Finance Lease	835
1.	The nature of the finance lease	835
2.	Reasons for use	837
3.	Setting up the transaction	838
4.	The triangular relationship	839
5.	The rights and duties of lessor and lessee inter se	841
6.	The lessor and the supplier	844
7.	More developed structures	844
8.	The lessor and third parties	849
29	Financing against Stock and Receivables	851
1.	Stocking finance	852
2.	Receivables financing	858

30	Guarantees	873
1.	The legal nature of a guarantee	874
2.	Types of guarantee	879
3.	Unilateral nature of the contract	905
4.	Relations between creditor and guarantor	906
5.	Rights of the guarantor against the debtor	912
6.	Discharge of the guarantor	915
7.	Contribution between guarantors	918

PART SIX CORPORATE INSOLVENCY

31	Principles of Corporate Insolvency Law	923
1.	Historical background of the principles of corporate insolvency law	923
2.	Winding up distinguished from bankruptcy	927
3.	The regimes of corporate insolvency	927
4.	The objectives of corporate insolvency law	927
5.	The cardinal principles of corporate insolvency law	928
6.	Subsidiary principles	936
7.	The winding-up process	936
8.	Vulnerable transactions	941
9.	Administrative receivership	947
10.	Administration in corporate insolvency law	948
11.	Restructuring	953
12.	Liability of directors for improper trading	954
13.	Cross-border insolvencies	957

PART SEVEN INTERNATIONAL TRADE AND FINANCE

32	The Characteristics and Organization of International Sales Transactions	967
1.	Characteristics of international sales transactions	967
2.	Trends in export procedures	968
3.	Problems peculiar to export sales	970
4.	Sources of law	970

5.	The delivery point on sale to an overseas buyer	971
6.	A typical export transaction	979
7.	Documents in export sales	989
8.	Breach of duty to tender documents	1023
33	The Vienna Convention on International Sales	1025
1.	Sphere of application of the CISG	1028
2.	Formation of the contract	1036
3.	Rights and duties of the parties	1037
34	Documentary Sales	1045
1.	Strict f.o.b.	1045
2.	Extended f.o.b.	1053
3.	C.i.f.	1054
35	The Financing of International Trade	1067
1.	Payment arrangements generally	1067
2.	The documentary bill	1068
3.	The documentary credit: nature, mechanism and relationships	1069
4.	Documentary credits: grounds for withholding or blocking payment	1116
5.	The transfer of a credit and its proceeds	1129
6.	Back-to-back credits	1139
7.	Raising of funds by seller against drafts or credits	1140
8.	Raising of finance by buyer on security of imported goods	1141
9.	Demand guarantees, performance bonds and standby credits	1149
36	Rights and Duties of the Sea Carrier	1167
1.	Sources of law	1168
2.	Application of the Hague-Visby Rules	1172
3.	The parties to the contract of carriage	1174
4.	Formation and evidence of the contract	1177
5.	Duties and liabilities of the carrier under or by virtue of the contract of carriage	1178
6.	Evidence and burden of proof in contractual claims against the carrier	1192

7.	Duties and liabilities of the shipper	1194
8.	Transfer and loss of contractual rights against the carrier	1197
9.	Carrier's rights against transferees	1199
10.	Claims against the carrier and others in tort	1200
11.	Claims based on bailment and sub-bailment	1201
12.	To whom defences and limitations of liability are available	1202
13.	Multimodal transport operations	1204
37	Conflict of Laws	1215
1.	Jurisdiction	1216
2.	Recognition and enforcement of foreign judgments	1237
3.	Applicable law	1244
4.	Foreign money obligations	1267

PART EIGHT THE RESOLUTION OF COMMERCIAL DISPUTES

38	Commercial Litigation	1273
1.	Litigation and its alternatives	1273
2.	The nature of litigation	1277
3.	The Civil Procedure Rules and the courts	1283
4.	The interim stages	1292
5.	Judgment without trial	1292
6.	Stages in a contested Queen's Bench action	1294
7.	Forum non conveniens	1313
8.	Anti-suit injunction	1315
9.	Interim applications	1316
10.	Commercial litigation costs	1325
11.	Enforcement	1326
12.	Commercial litigation appeals	1329
13.	Transnational litigation	1330
39	Commercial Arbitration	1333
1.	The nature of arbitration	1333
2.	Arbitration versus litigation	1334

3. Types of commercial arbitration	1336
4. The development of English arbitration law	1340
5. The sources of arbitration law	1341
6. The arbitration agreement	1344
7. Principles of English arbitration law	1347
8. The principles examined	1348
9. Effectiveness of the agreement to arbitrate	1363
10. The conduct of the arbitration	1365
11. Judicial review of arbitral awards	1375
12. The enforcement of an English arbitral award	1380
13. International commercial arbitration and investor-state arbitration	1381

PART NINE ENVOI

40 Final Reflections	1393
1. Are there principles of commercial law?	1393
2. The philosophical foundations of commercial law	1394
3. Should commercial law be codified?	1395
4. Towards a new <i>lex mercatoria</i> ?	1400
Index	1405

Preface

In preparing this edition I have endeavoured to maintain the approach which Roy Goode established as the hallmark of this book, namely a blend of theory, practice and rigorous analysis of legal doctrine combined with an emphasis on the underlying principles and concepts which both drive and inform the law. The latter emphasis has become much harder to maintain given the increase in the technicality and level of detail to be found in much modern legislation and the factual complexity of many of the commercial cases which currently come before the courts of this country.

The backdrop to the preparation of this edition has been a period of extraordinary uncertainty. Initially, the focus of that uncertainty was the protracted nature of the UK's departure from the EU following on from the referendum of June 2016. While the departure of the UK from the EU on 31 January 2020 provides a measure of certainty, it is the end of the transition period on 31 December 2020 that will likely prove to be the more critical date in terms of the future shape of the law. This uncertainty is most marked in areas such as the law relating to jurisdiction (on which see chapter 37) which depends to a considerable degree on reciprocity and where it is impossible at the time of writing to predict with any degree of accuracy the precise future shape of the law. The future relationship between the UK and the EU will be a subject to which it will be necessary to return in more detail in future editions. However, the bigger cause or source of uncertainty is the current COVID-19 pandemic which is proving to be the greatest global challenge for at least a generation. Some of the challenges created by the pandemic are immediately apparent, such as the terrible loss of life and the impact of the virus on the physical and mental health of so many people. In commercial terms its impact is beginning to be seen in the growing number of business failures and the astonishing levels of government borrowing. But some of its enduring challenges, at least for commercial law, may turn out to be ones that are not immediately apparent. The cash that was in my wallet in mid-March is still there. This is not because of my unwillingness to spend money attributable to my Scottish heritage but is due entirely to the fact that business no longer wants my cash. Our lives have suddenly moved from the physical world to the virtual world and to a world of electronic communications and payments. Not only do we increasingly communicate with one another online rather than in person, but it is likely that old paper-based systems will be more speedily replaced by electronic equivalents. Examples that come to mind in the commercial world include greater use of electronic bills of lading, new forms of payment systems and new methods of making payment. Perhaps we may

even see a quicker demise in the use of cash so that my concern about the money languishing in my wallet will soon be a concern of the past! Of course, much will depend on the likely duration of the pandemic. But at this point in time it is hard to envisage that we will all go back to our old ways of working, and the new methods of doing business will raise challenges to which commercial law must respond.

The period since the publication of the last edition of this work has seen numerous changes to various aspects of commercial law. This edition includes analysis of a number of high-profile Supreme Court decisions on aspects of commercial law (including retention of title clauses, insolvency and letters of credit). It also deals with Incoterms[®] 2020 and the Business Contract Terms (Assignment of Receivables) Regulations 2018. The Corporate Governance and Insolvency Act 2020, which passed through Parliament with almost unprecedented speed, came too late to be included in this edition. The chapters on payment and money have been substantially re-written to reflect the extensive changes that have taken place in the regulation of payment systems, the increasing reliance on electronic communications and the emergence of cryptocurrencies. The decision has also been taken to delete the chapter on cheques given their reduced significance in the modern world. Readers who wish to know about the law relating to cheques are referred to earlier editions of this book. Recent developments in commercial contract law covered in this edition include the principles applicable to the interpretation of contracts, the regulation of no reliance and basis clauses and the emergence of negotiating damages. More generally, new sections have been added on the importance of certainty in commercial law and the relationship between law and technology, particularly as it relates to cryptoassets, cryptocurrencies and electronic signatures.

I am particularly grateful to Grace Cheng of Field Court Chambers for taking on the responsibility for chapters 38 and 39 and for being so willing to help out when I was struggling to adhere to the timetable for the delivery of the manuscript.

Nigel Voak and Erica Lai of LexisNexis provided excellent support at various points in the production of the book. I am particularly grateful to Nigel for his time and attention to detail as the book went through the production process. I would also like to thank the LN Tables Department and Andrew Turner for their assistance with the preparation of the tables and the index.

I would also like to thank a number of people who supplied or provided assistance in connection with the supply of various forms and standard terms which are an important part of this work: Marie-Dominique Fraidérik of International Chamber of Commerce, Robert Keen of British International Freight Association, Emily Pope and Adam Lockhart of Maersk Line, Kevin Clarke and Keith Stern of Lloyd's of London, Fiona Day of Lloyd's Banking Group, Leslie Kovacs of International Bullion and Metal Brokers (London) Ltd and Graham Haxton-Bernard of the Consumer Credit Trade Association.

I continue to be indebted to Roy for his friendship, encouragement and his undimmed enthusiasm for the subject-matter of this book. He has been, and continues to be, a wise guide and remains as keen as ever to engage in debates about the shape of the modern law and the response which the law should

Preface

provide to new ways of doing business. On a more practical level he provided invaluable help in lending me some of his books from his extensive library during lockdown.

My greatest debt continues to be to my wife, Rose, without whose support in so many ways this new edition would never have seen the light of day.

Writing a significant part of the new edition in lockdown is an experience I hope not to have to repeat. While online communication has been invaluable during this very difficult period in our lives, there is no substitute for the physical classroom where ideas can be exchanged, explored and tested and to which we hope to be able to return as soon as it is safe to do so.

The law is stated on the basis of the information available to me as at 1 June 2020.

Ewan McKendrick
Lady Margaret Hall
Oxford
31 July 2020

Foreword to the First Edition

No task is easier than that of finding authors wanting to write legal textbooks. As editor of this legal series, I have set myself a very much more difficult problem. My approach is to identify a basic legal subject which, because of changed circumstances, is no longer adequately covered and then to ask whether the writer exists who in my view is capable of filling the gap.

That is how we came to publish Stanley de Smith's *Constitutional and Administrative Law*. Obviously if such rigorous requirements are imposed new books will not appear as regularly as in some other series. De Smith's book is already in its fourth edition as this second book in the series is published. Why has it been chosen? Commercial law is a classic example of the weakness of so much textbook writing in Britain. Any reasonably competent legal scholar can mug up the statutes and reported decisions in a field like commercial law and present an acceptable account of their import. The essence of commercial law is in commercial transactions. It by no means follows that the accident of litigation indicates fully how these transactions are carried out. What is called for is a synthesis of the theory underlying commercial relationships and the practice which governs their operation. That synthesis also necessitates a blending of the purely commercial elements with the underlying principles of the law of property and trusts.

It would be unreasonable, if not impossible, to expect this tremendous burden to be borne either by a mere academic commercial lawyer or by a practitioner. I knew of only one English lawyer with decades of experience in the practice of commercial law who also holds a chair in commercial law. I was therefore delighted when I persuaded Professor Roy Goode to write this book. Nobody has previously attempted to combine an analysis of fundamental principles with a description of typical commercial transactions, in which the nature of the business operation, the roles of the parties and the function of the various documents devised are all explained. In this way the student will have the best opportunity ever given to him of learning what happens in commercial legal life. He will certainly become acquainted for the first time with many vital commercial matters which have never been aired in the reported cases. I believe that reading this book will be an equally profitable experience for legal practitioners, especially those who do not specialize exclusively in commercial law, but who are none the less frequently called upon to draft and advise on commercial documents.

H. Street

Preface to the First Edition

When Penguin Books invited me in 1973 to contribute a book on commercial law to the 'Foundations in Law' series edited by Professor Harry Street, I accepted with both enthusiasm and trepidation: enthusiasm, because this is the book I have always wanted to write; trepidation, because of the high standard set by the previous volume in the series and the formidable task of reducing to manageable compass such a vast field of law.

In the event, the task was far harder than I had ever imagined, and a work that was to have been written in five years took me eight, a delay caused in part by my habit of writing my best thoughts on the back of bus tickets and then losing them. I would have liked to spend a further eight years on the text before exposing it to the public gaze, but this might have strained even the legendary patience of Penguin and of their editor, Michael Dover.

Every author builds on the labours of his predecessors. There are several good books on commercial law, and on specific aspects of the subject; I freely acknowledge my indebtedness to those who have gone before me in this field. They are too numerous to mention here, but my principal sources have been identified at appropriate points throughout the book. However, in a number of respects the present volume seeks to break new ground.

In the first place, I have treated as within the purview of commercial law all those legal principles, from whatever branch of law they are drawn, which regularly surface in commercial disputes. It has long seemed to me that there is an unfortunate gulf between the commercial lawyer and the property and equity lawyer. Contract, sale of goods and negotiable instruments are accepted as falling within the domain of the former, equitable interests and conflicting real rights within the latter's field of expertise. But in the world of business, problems do not divide themselves into such neat packages. The seller or buyer of goods is likely to need finance, for which purpose he will usually be asked to furnish security. The financier will be concerned to establish the priority of his security interest and its validity in the event of the debtor's bankruptcy or liquidation. The typical commercial problem is a mixture of contract, sales law, tort, property, equity and trusts. The practitioner has to be familiar with the principles of each of these fields of law in order to be able to give sound advice to his client. So this book devotes a substantial amount of attention to principles of property law and of equitable obligation. Also included are topics which have hitherto been treated as the exclusive preserve of textbooks on company law – in particular, floating charges, receivership and liquidation.

Secondly, despite its size the book is concerned primarily with principles. It is a foundation book, in keeping with the title of the series, but it is not elementary. The greatest difficulty confronting the student lies not in the sophisticated rule but in the fundamental concept. Rules may change, concepts are more permanent. Hence it is the theoretical framework of a subject which demands the closest attention, for it is this that endures when the detailed rule has passed into oblivion. Chapters 2, 3, 6, 16 and 25–28 are the key conceptual chapters. Chapter 2, devoted to basic concepts of personal property, is, perhaps, the most important in the whole book and was also the most difficult to write, if only because so much of personal property law is conceptually obscure, and every time one thinks one has at last discovered the eternal truth it turns out to be a mirage. The full significance of the principles set down in this chapter will not become apparent until the reader has progressed further into the book, and he should return to it regularly to see how those principles are applied in specific situations.

The treatment of security interests in chapters 25–27 marks a departure from the normal method of presenting this topic in English textbooks, though it would in many respects be familiar to an American commercial lawyer. I have also essayed some new thoughts on that most brilliant of creations of the common law, the floating charge, which continues to present a whole range of difficult conceptual problems, despite a century of case law. (Law students seem to experience difficulty with charges. I retain an affectionate memory of the second-year student who, when asked in a property paper to describe the satisfaction of a charge over land, answered that in his experience there was nothing to equal fox-hunting!)

This book falls broadly into two halves, though not so divided sequentially. The first is concerned with theory and is relatively abstract. The second is devoted to what may be termed applied commercial law, in which I have attempted to show how typical financing operations are set up, the parties involved, the documents and forms of security used and the relevance of the principles previously enunciated to the resolution of a variety of common practical problems.

The application of theory to a specific dispute is rarely as clear cut as would be suggested by a reading of the textbooks. It is inevitable, indeed essential, that this should be so. A map which matched the actual ground, point for point, would defeat its purpose. A textbook which sought to encompass all possible variations would be unusable. The surgeon operating on a patient knows that his knife will reveal, not the clear divisions of the body revealed by Gray's *Anatomy*, but a slippery mass of blood, muscle and bone in which a certain amount of searching may be necessary to locate the organ on which he wishes to operate. But Gray's *Anatomy* remains an indispensable tool for the medical student, for the body does possess a structure and it is only by sharpening the principal features in a somewhat unreal way that the student can obtain a perception of their relationship to one another. The same is true of the legal textbook for the student of law.

It is surprising how many legal questions arising in day-to-day practice have not been the subject of a reported case. It is in this situation that resort must be had to first principles. I have not hesitated to explore a number of legal

problems which have yet to come before the courts, for in many ways these are the most interesting.

The book is thus designed to assist the practitioner as well as the student. But the analysis of the practical problems has been provided not simply to furnish a solution for the practising lawyer but also to illumine the principle for the student and to show how fundamental legal concepts constantly surface in a new form.

Finally, I have striven to convey the intellectual excitement of commercial law, which has constantly to adapt itself to the challenge of new business methods, new instruments and new technology.

I should like to acknowledge my indebtedness to Professor Street, whose advice has been invaluable and who saved me from several errors. I have many others to thank for the fact that this book has finally seen the light of day: my long-suffering secretary, Mrs Nicky Jones, who was responsible for the typing of much of the earlier drafts; the Rushgrove Secretarial Agency, for their help with the typing in the later stages; Mrs Anne Shotts, who came to my rescue by completing a mountain of typing in an impossibly short space of time; one of my former students, Miss Philippa Hughes, who read the entire text, completed various missing references and pointed out a number of infelicities; Mr Julian Burling, who at an earlier stage helped me greatly with literature searches; business and professional friends and acquaintances, who cheerfully accommodated my propensity for asking questions and gave me a great deal of assistance in answering my inquiries; colleagues and students, past and present, whose ideas and comments contributed to my better understanding of a number of problem areas discussed in the text; Mrs Anne Lyons, who once again has come to my help with a first-class index; Mrs Breda Farrington, who performed a similar service in the preparation of the tables; the printers Hazell Watson & Viney Ltd, who set the text so meticulously; and the staff of Penguin Books, headed by Michael Dover, for all their work and for their endless patience.

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The law is stated on the basis of materials available to me as at 1 May 1982.

Faculty of Laws, R. M. Goode
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List of Figures

3.1	Standard-term conditions of sale	106
4.1	Financing of sales on credit	183
4.2	Tripartite relationships	184
4.3	Chains, loops and circles	184
4.4	The distinction between assignment and novation	185
4.5	The distinction between assignment and a sub-participation	186
4.6	Simple securitization by sale of receivables	187
5.1	Agency models	206
20.1	Bill of exchange (face)	590
20.2	Bill of exchange (back)	596
20.3	The liability chain under a bill of exchange	607
20.4	(a) Bill of exchange with quasi-indorser (face), (b) Bill of exchange with quasi-indorser (back)	610
20.5	Bill of exchange: negotiation and renegotiation (back)	612
21.1	Promissory note	638
22.1	Fixed and floating charge	664
27.1	The parties to a direct collection transaction	821
27.2	Block discounting	822
27.3	Hire-purchase agreement outside the Consumer Credit Act 1974	828
28.1	Simple triangular leasing structure. Lessor buys equipment and lets it on lease. Two contracts, no contractual relationship between supplier and lessee (except by collateral contract)	840
28.2	Purchase by intending lessee as disclosed agent. Lessee buys equipment as disclosed agent of lessor and takes it on lease	845

28.3	Purchase by intending lessee as apparent principal. Lessee buys equipment as apparent principal, but in reality as agent for lessor, and takes lease. Two contracts, but supplier has alternative claim against lessor as undisclosed principal	846
28.4	Novation. Sale by supplier to lessee, followed by novation, involving cancellation of original sale (at least as regards transfer of title and payment obligation), resale to lessor and lease	846
28.5	Purchase by lessee, sale and lease-back. Sale by supplier to lessee, who resells to lessor and takes lease back. Three contracts, no contractual relationship between supplier and lessor	847
28.6	Leveraged lease by funder acquiring equipment. Funder grants lease to leasing company with permission to sub-lease to end-user and takes charge over sub-lease agreement and sub-rentals	848
28.7	Leveraged lease by way of loan. Leveraged lease in which lender or loan syndicate advances price of equipment to lessor by way of non-recourse loan on the security of the equipment and lease rentals. Lender has no contractual relationship with supplier or lessee	849
30.1	Structure of guarantee and primary liability relationships	876
30.2	'All-moneys' continuing guarantee and indemnity	881
32.1	Shipping instructions	983
32.2	Standard shipping note	984
32.3	Received for shipment bill of lading	987
32.4	Shipped bill of lading	988
32.5	Certificate of marine insurance	1004
32.6	Packing list	1012
32.7	Ship's delivery order	1015
32.8	Non-negotiable sea waybill	1016
32.9	Forwarder's certificate of receipt	1017
35.1	Request for collection of foreign bill of exchange and/or documents	1070
35.2	Application to open documentary credit	1078
35.3	Acceptance credit advised by issuing bank direct	1086
35.4	The parties to a confirmed credit	1104
35.5	Request for transfer of a transferable credit	1132
35.6	Flow of documents and money on transfer of a credit	1136

List of Figures

35.7	Flow of documents and money under a back-to-back credit	1140
35.8	Trust receipt	1145
35.9	Standby letter of credit	1152
35.10	Structure of three-party demand guarantee	1156
35.11	Structure of four-party demand guarantee	1156
35.12	Tender guarantee	1158
35.13	Performance guarantee	1160
38.1	The High Court of England and Wales	1287
38.2	Particulars of claim	1297
38.3	Defence and counterclaim	1299
38.4	Reply and defence to counterclaim	1301

Table of Statutes

Administration of Estates Act 1925		Arbitration Act 1996 (2 <i>Statutes</i> 566) – <i>cont.</i>	
s 9 (1)	23.51	s 34 (2) (e)	39.69, 39.73
Administration of Justice Act 1920 (22		37	39.70
<i>Statutes</i> 441)	37.52	38 (1), (2)	39.74
s 12 (1)	39.108	(3), (4)	39.74
Administration of Justice Act 1970 (11		39	39.08
<i>Statutes</i> 825)		(1)	39.76
s 36	23.34	(3)	39.76
44a	37.102	40	39.61
Agricultural Holdings Act 1986 (1 <i>Statutes</i>		41 (3)–(7)	39.75
779)		42	39.81
s 84	39.17	43	39.81
Agriculture Act 1970 (1 <i>Statutes</i> 424)		44	39.55, 39.81, 39.86
s 72	11.08	45	39.81
Arbitration Act 1950 (2 <i>Statutes</i> 534)		(1)	39.86
.....	39.18	46 (1)	39.42, 39.104
s 4 (1)	39.54	(b)	39.24
Arbitration Act 1975		(2), (3)	39.42
.....	39.108	47	39.77
s 1	39.54	48 (5)	39.79
Arbitration Act 1979		52 (3), (4)	39.78
.....	39.18, 39.84, 39.85	53	39.21, 39.78
Arbitration Act 1996 (2 <i>Statutes</i> 566)		66	39.94, 39.108
.. 1.28, 39.15, 39.18, 39.20, 39.22,		(3)	39.94
39.60		67	39.76, 39.87, 39.88, 39.89,
s 1	39.25	39.101	
(a), (b)	39.06	68	39.63, 39.76
2 (1)	39.21	(2) (b)	39.90
3	39.20	(3)	39.90
4 (1)	39.32, 39.54	69	39.29, 39.76
5	39.19	(1)	39.24, 39.91
7	39.53	(3)	39.91
9	39.55	(b)	39.92
(4)	39.36	70 (2)	39.89
18	39.24, 39.27	72 (1)	39.89
24 (1) (a)	24.42, 39.43	73	39.81
30	39.98	(1) (a)	39.89
(1)	39.87	(2) (a), (b)	39.89
(2)	39.54	82 (1)	39.91
31 (1)	39.52, 39.89	85 (2)	39.14
(2)	39.89	86, 87	39.14
32	39.51, 39.81, 39.86	89–91	39.16
(4)	39.51	93	38.02
33	39.32	94–98	39.17
(1)	39.29, 39.30	95 (2)	39.21
34	39.67	100 (1)	39.106
34 (1)	39.32	(2) (b)	39.78

Table of Statutes

Arbitration Act 1996 (2 <i>Statutes</i> 566) – <i>cont.</i>	
s 101	39.106
103	39.106
Sch 2	38.02
Arbitration (International Investment Disputes) Act 1966 (2 <i>Statutes</i> 544)	
.....	39.108
Arbitration (Scotland) Act 2010	
.....	39.19
Banking Act 2009	
Pt 1 (ss 1–89)	17.21
2 (ss 90–135)	17.21, 31.30
3 (ss 136–168)	17.21
s 184, 185	18.11
206	18.11
252	24.32
Bankruptcy Act (1623)	
.....	22.22
Bankruptcy Act (1861)	
.....	31.04
Bankruptcy Act (1914)	
.....	31.04, 31.06
s 38 (c)	22.22
44 (1)	20.45
Bills of Exchange Act 1704	
.....	18.10
Bills of Exchange Act 1882 (5 <i>Statutes</i> 414)	
.....	1.61, 4.41, 6.08, 15.08, 18.29, 19.07, 21.11, 22.22, 40.13
s 1 (3)	20.04
2	20.08, 20.26
3	20.04
(1)	20.03, 20.15, 20.18
(2)	20.03, 20.06
(3) (b)	20.04
(4)	20.12
(a)	20.40
5–11	20.05
5 (1)	20.04
(2)	20.04, 20.112, 21.04, 21.06
7 (1), (2)	20.04
(3)	20.107, 20.110, 20.111
8 (1)	20.22, 20.23
(4), (5)	20.22
9 (1), (2)	20.15
10 (1)	20.11, 20.13
(2)	20.13
11	20.17
12	20.06, 20.12, 20.30
13 (2)	20.12
14 (3)	20.12
15	20.25
16 (1)	20.75
17 (2) (a)	20.09
19 (2) (c)	20.19
20	20.28, 20.71
(1)	20.06, 20.69
21 (1)	20.08
22 (1), (2)	20.102
23	20.09, 20.50
(1)	20.113
(2)	20.104

Bills of Exchange Act 1882 (5 <i>Statutes</i> 414) – <i>cont.</i>	
s 24	20.109
25	20.101
26	20.103
27 (1) (b)	20.32
(2) ...	20.33, 20.44, 20.95, 20.130
28 (1)	20.50
(2)	20.48, 20.49, 20.130
29 (1)	20.37
(b)	20.38
(2)	20.45
(3)	20.47
30 (1)	20.33
(2)	20.31, 20.37
31 (1)	20.20
(3)	20.30, 20.71
(4)	20.20
32 (5)	20.72
34 (3)	20.108
(4)	20.30
35	20.72
35 (1)	20.23
37	20.71
38 (1)	20.30
(2)	20.130
(3)	20.30
39 (1)–(4)	20.78
41 (1) (a)	20.30
42	8.111
43 (2)	20.10, 20.79
45	20.17, 20.19, 20.79, 20.81
(1)	20.82
(2)	20.46, 20.82
(3)	20.30, 20.82
(4)	20.80
46 (2) (e)	20.83
(4)	20.19
47 (1)	20.79, 20.82
48	20.84
49 (1)	20.84
(3)	20.85
(5), (7)	20.84
(12)	20.84
50 (1)	20.86
(2) (c)	20.86
51 (1), (2)	20.87
(4), (5)	20.87
52 (1)	20.80
(3)	20.84
(4)	20.50, 20.82
53–58	20.50
54 (2)	20.53, 20.102
(a)	20.96
55	20.50, 20.66, 20.67, 20.69
55 (1)	20.60, 20.102, 20.110
(a)	30.47
(b)	20.96
(2) (b)	20.96
.....	20.63, 20.110, 21.03
(a)	30.47
(b)	20.53

Bills of Exchange Act 1882 (5 <i>Statutes</i> 414) – <i>cont.</i>	Bills of Sale Act (1878) Amendment Act 1882 (5 <i>Statutes</i> 491) – <i>cont.</i>
s 55 (2) (c) 20.36, 20.64, 20.94	s 7 23.34, 23.35
56 20.50, 20.68, 20.69, 20.73	7A 23.35
57 20.10, 20.50, 20.54, 20.57	8 .. 22.22, 23.11, 23.45, 24.09, 24.57
(1) 20.89, 20.90, 20.91	17 23.45
(2) 20.90	Bills of Sale Act 1890 (5 <i>Statutes</i> 501)
58 (2), (3) 20.50, 20.75	 22.22
59 20.21, 20.27	s 1 24.30, 35.149
(1) .. 20.30, 20.82, 20.98, 20.121,	Bills of Sale Act 1891 (5 <i>Statutes</i> 502)
20.122, 20.124	 22.22
60 20.82, 20.83, 20.85, 20.87	s 1 35.148
61 20.122	Bribery Act 2010 18.20
62 (1), (2) 20.123	Capital Allowances Act 2001
63 (1) 20.123	s 219 28.04
64 (1) 20.41, 20.114, 20.123	220 28.12
(2) 20.114	221 28.10
65–68 20.25	225 22.5
69 19.20, 20.30, 20.124, 21.07	229 (3) 28.11
70 18.18, 20.124, 21.07	Carriage by Air Act 1961 (4 <i>Statutes</i> 19)
72 37.65	 36.86
73 19.16, 19.17	Carriage by Air and Road Act 1979 (4
74–81 19.17	<i>Statutes</i> 58) 36.86
76 1.002	Carriage by Air (Supplementary Provisions)
79 21.06	Act 1962 (4 <i>Statutes</i> 47)
80 21.06	 36.86
83 (1) 21.02	Carriage by Railway Act 1972
88 21.02	 36.86
Pt IVA (ss 89A–89F)	Carriage of Goods by Road Act 1965 (38
..... 18.22	<i>Statutes</i> 145) 36.86
s 89A 19.18, 20.04	Carriage of Goods by Sea Act 1924
89B–89F 19.18	s 1 36.11
89 (1) 21.02, 21.03	3 36.11
(2) 21.02, 21.03	Carriage of Goods by Sea Act 1936
90 20.119	 36.22
(1) 20.43	Carriage of Goods by Sea Act 1971 (39
91 (1) 20.18	<i>Statutes</i> 370) .. 32.49, 32.56, 32.59,
96 (2) 20.02	36.44
97 (2) 1.07	s 1 (1) (c) 36.16
Bills of Lading Act 1855	(2) 36.11
..... 32.49, 32.63, 32.85, 36.86	(3) 36.16
s 1 8.33, 32.53, 36.24, 36.64	(4) 36.15
1 (2) 36.65	(5) 32.66
2 32.63	(6), (7) 36.16
(1) 36.24, 36.65	1A 36.44
(4), (5) 36.65	Carriage of Goods by Sea Act 1992 (39
5 (1) 36.65	<i>Statutes</i> 502) 8.33, 36.1, 32.49,
(2) 36.65	32.63, 36.65, 36.86,
Bills of Sale Act 1854	39.34
..... 22.22, 22.30, 23.21, 24.30, 26.09,	s 1 32.49, 32.56
40.14	(4) 32.85
Bills of Sale Act 1878 (5 <i>Statutes</i> 476)	(5) 32.73
... 629, 22.30, 23.21, 24.10, 24.30,	2 (1) 32.64, 32.65, 32.85
26.09, 40.14	(2) 36.65
s 4 35.148, 35.149	3 (1) 36.67
8 23.45	4 32.65, 36.52
10 23.45	5 (1) 36.24
Bills of Sale Act (1878) Amendment Act	Carta Mercatoria 1303
1882 (5 <i>Statutes</i> 491)	 1.02
..... 20.02	Charging Orders Act 1979 (22 <i>Statutes</i>
s 4 23.12	502) 22.74
5 22.22, 23.11	

Table of Statutes

Charging Orders Act 1979 (22 <i>Statutes</i> 502)	
– <i>cont.</i>	
s 1, 2	38.124
3 (4)	38.124
Cheques Act 1957 (5 <i>Statutes</i> 468)	
s 1	20.27
2	20.27
4	21.06
(2)	21.06
5	21.06
Civil Aviation Act 1982 (4 <i>Statutes</i> 96)	
s 76 (2)	4.17
Sch 4	37.03
Civil Evidence Act 1995	
	38.59
s 1	39.67
Civil Jurisdiction and Judgments Act 1982	
(11 <i>Statutes</i> 1104)	
s 3D	37.05
4B	37.53
18	37.52
25 (1)	38.98
33 (1)	37.49
34	37.49, 37.50
Sch 4	37.08
Civil Procedure Act 1997	
s 1, 2	38.14
7	38.103
Coinage Act 1971 (10 <i>Statutes</i> 168)	
s 2	17.06, 32.45
Common Law Procedure Act 1854 (5 <i>Statutes</i> 412)	
s 78	2.15
Companies Act 1862	
	31.05
Companies Act 1948	
s 302	22.40
Companies Act 1985 (8 <i>Statutes</i> 88)	
	31.05, 31.06
S 349(4)	20.105
617	31.49
Companies Act 2006	
	24.28, 26.09, 31.43, 31.50
s 51, 52	20.105
83	20.105
126	24.16
172 (3)	31.71
754	24.63
754 (1), (2)	25.32
859	22.37
859A	4.14, 20.126, 22.05, 22.06, 22.26, 22.27, 22.30, 22.31, 22.57, 22.59, 23.07, 24.15, 24.22, 24.33, 24.50, 28.28, 29.18, 31.17, 35.148, 35.150
(1)	24.31
(2)	24.33, 24.35
(3)	24.34
(6)(a)–(c)	24.31
(7)(b)	24.31
859B	24.30, 24.31

Companies Act 2006 – <i>cont.</i>	
s 859C	24.33
859D	24.33
859D (1)–(3)	24.34
859E	23.07, 24.33
859F	24.33, 24.54
859G	24.34
859H	4.14, 22.31, 22.50, 24.12, 24.22, 24.52, 24.53, 24.57, 29.45
(1)	24.50
(3)	24.50, 29.20
(4)	24.50
859I (2)(a)	24.35
(4)	24.36
(6)(b)	24.36
859K	24.34, 25.30
859L	24.35, 24.36
859M	24.39
(2)(b)	24.39
(3)	24.39
859J	24.34
859O	24.34
859P	24.35
859Q	24.13, 24.35
859R (1), (2)	24.35
860 (4), (5)	24.12
(7)	24.30
(f)	20.126
861 (3)	20.126
(4)	24.30
863(1)	24.30
869 (6) (b)	24.36
876	24.35
893	24.13
894	24.13
993	24.09, 31.72
994	31.30
1012	2.32
1029–1034	2.32
1282	31.35
1282 (1)	25.32
PT 26	31.70
Company Directors Disqualification Act 1986 (8 <i>Statutes</i> 837)	
s 4	31.72
(1)(a)	31.74
10	31.72, 31.74
15A	31.77
15B (1)	31.77
(3)	31.77
15C	31.77
Competition Act 1998	
	3.165
s 18	3.28
Consumer Credit Act 1974 (11 <i>Statutes</i> 15)	
	4.02, 16.62, 16.100, 26.08, 27.05, 27.26, 38.20
s 8 (3)	23.34
9 (1)	22.05
10 (1) (a), (b)	22.11
15 (2)	23.34
56	27.25

Consumer Credit Act 1974 (11 Statutes 15) – <i>cont.</i>	
s 56 (2)	11.103
61 (1)	3.29
65	3.35
67	3.35
76 (1)	23.34
87 (1)	23.34, 23.35
100	27.19, 27.20
103	23.35
105 (1)	30.21
123 (2)	20.45
125 (2)	20.45
126	23.34
189 (1)	23.34
Sch 4	
para 3	11.103
Constitutional Reform Act 2005	
s 7(2)	38.21
Consumer Insurance (Disclosure and Representations) Act 2012	
.....	3.74
Consumer Protection Act 1987	
Pt I (ss 1–9)	1.14
s 46	7.37
Consumer Rights Act 2015	
.....	1.10, 1.34, 7.07, 7.42, 8.01, 10.06, 11.51, 11.62, 11.121, 11.133, 11.135, 12.05, 14.67, 33.02, 40.14
Pt 1 (ss 1–60)	14.37, 27.03
s 1	28.12
(1)	11.59
(2)	3.82
(3)	3.78
(4)	7.21
2	9.07
(1)	3.78
(2)	3.78, 3.83, 7.23, 11.59
(3)	3.83, 7.23, 11.59
(8)	7.20
3	3.78
4 (1)	7.25, 8.01
(2)	7.25, 8.01
5	3.77
(1)	7.15
(2)	7.21
6	3.78, 3.77
7	3.78, 3.77, 27.21, 28.13
9 .	3.61, 11.01, 11.08, 11.53, 11.136, 12.05, 14.66, 14.68, 14.69, 27.21, 27.22, 28.13
(1)	11.57
(2)	11.69
(c)	3.47
(3)	11.74
(4)	11.57
(5)–(7)	3.47, 11.85
(8)	11.57
10 .	3.61, 11.01, 11.08, 11.53, 11.95, 11.136, 12.05, 14.66, 14.68, 14.68, 14.69, 27.21 28.13

Consumer Rights Act 2015 – *cont.*

s 11 .	3.61, 11.01, 11.08, 11.48, 11.51, 11.136, 12.05, 14.66, 14.68, 14.69, 27.21, 28.13
(1)	3.78, 11.29
(2)	11.29
(3)	3.78, 11.29
(4)	11.10
(5)	3.78
12	3.61, 11.11, 11.136, 14.66, 14.68, 27.21, 28.13
13 ...	3.61, 3.79, 11.01, 11.01, 11.53, 11.125, 11.136, 12.05, 14.66, 14.68, 14.69 27.21, 28.13
13 (1)	3.78
14, 15 ...	3.61, 11.01, 11.136, 14.66, 14.68, 14.69, 27.21
15A	3.61, 14.66, 14.68, 27.21
(1)	12.04
15B	3.61, 14.66, 14.68, 27.21
(1)(b)	12.03
16	3.61, 11.01, 11.53, 11.136, 12.05, 14.66, 14.68, 14.69, 27.21
17	3.61, 11.01, 11.11, 11.136, 14.66, 14.68, 14.69, 27.21
18 .	3.61, 11.01, 11.136, 14.68, 27.21
(1)	11.53
19	11.5, 13.30
(3)	12.05, 13.03, 14.69
(4)	14.69
(6)	14.69
(9)–(12)	14.68
(13)	12.01
20	11.5, 12.10, 13.30, 14.03
(1)	12.05, 14.71
(2)	12.05, 14.70
(4)	14.71
(5), (6)	12.01, 12.05, 14.71
(7)	12.01, 12.05, 12.06
(a)	13.03, 14.69
(b)	14.69
(8)	12.05, 12.06, 14.69
(9) ...	12.05, 12.06, 13.03, 14.69
(10)–(17) ...	12.05, 12.06, 13.03, 14.69
20(18) ...	12.05, 12.06, 13.03, 14.69
20 (19)–(21)	14.69
21	11.5, 13.30
22	11.5, 13.30, 14.03
(1)	12.05, 13.03, 14.70
(2)	12.05, 13.03
(3), (4)	12.05, 13.03, 14.70
(4)	12.05, 13.03
(6)	12.03
(7), (8)	12.05
(9)–(11)	12.06
23	11.5
(2) (b)	14.69
(3)	12.17, 14.72
(4)–(7)	14.69
24	11.5, 14.03, 14.71, 14.71
(1)–(3)	14.72

Consumer Rights Act 2015 – *cont.*

s 24 (5)	12.06
(a)–(c)	14.72
(6)–(8)	14.72
(10)–(14)	14.72
25 (1)–(3)	13.31
(8)	13.31
26	3.82
(1)–(7)	10.45
27	3.82
28	10.46
(2)	10.13
(3)	10.25
29	9.36
(2)–(4)	9.02, 9.07, 9.16, 9.39
30	30.05
31	11.136, 28.20
(1)(a)	11.53
(c)	11.48
(i)	11.25
(2), (3)	11.25, 11.48
34–41	3.61
47	28.20
49	3.61
50	3.61
51–53	3.61, 11.10
54	11.10
57	28.20
59 (1)	10.07
58 (2)	14.69
(3)	14.72
(7)	14.72
Pt 2 (ss 61–76)	3.73, 14.01
s 62 (1)	3.83
(4)	3.83
(5)	3.84
63 (1)	3.84
64 (1)–(5)	3.85
67	3.85
70	3.85
76 (2)	3.82
Sch 1	3.82
2	3.78, 3.83
Pt 1	3.84
Sch 3	3.85
5	3.85
Contracts (Applicable Law) Act 1990 (11 <i>Statutes</i> 237)	37.62, 39.36
s 2 (2)	37.82
3 (3)	37.67
Sch 1	37.64
Contracts (Rights of Third Parties) Act 1999	3.88, 3.123, 4.16, 27.27, 28.14, 28.20, 37.17, 36.13, 39.27
s 1	36.04, 36.13
(1) (a), (b)	3.89
(2)	3.89
(3), (4)	3.90
(6)	3.89, 36.78
(5)	28.15
2–5	3.90
6 (5)	3.87, 36.04, 36.78

Contracts (Rights of Third Parties) Act 1999 – <i>cont.</i>	
s 6 (5) (a)	36.13
Contract (Third Party Rights) (Scotland) Act 2017	28.15
Copyright, Designs and Patents Act 1988 (11 <i>Statutes</i> 337)	
s 91	23.02, 23.20
Coronavirus Act 2020	38.12
Corporate Insolvency and Governance Act 2020	31.08
s 8(2)	31.67
County Courts Act 1984 (11 <i>Statutes</i> 603)	
s 69	15.55
99	22.74
Courts Act 2003	
Schedule 7	
para 7	38.124
8	38.124
10	16.93
11	2.82, 16.93
12	16.93
Courts and Legal Services Act 1990	
s 58–58AA	38.11
Crime and Courts Act 2013	
s 21	38.21
Criminal Law Act 1977 (12 <i>Statutes</i> 668)	
s 6	16.100, 27.16
(1)	23.33
Currency and Bank Notes Act 1954 (4 <i>Statutes</i> 467)	17.07
s 1 (2)	17.06
(6)	17.06
Customs and Excise Management Act 1979 (13 <i>Statutes</i> 153)	
s 139	16.93
Sch 3	16.93
Decimal Currency Act 1969 (10 <i>Statutes</i> 154)	
s 2 (1)	20.15
Digital Economy Act 2010	38.67
Digital Economy Act 2017	38.67
Electronic Communications Act 2000	3.29
Enterprise Act 2002	31.07, 31.08, 31.35, 31.53, 31.54, 31.59
s 248	23.40
250	23.40, 25.18
European Communities Act 1972 (10 <i>Statutes</i> 735)	1.34
s 2 (1)	1.30, 1.35
European Communities (Amendment) Act 2002	1.30
European Union Act 2002	1.31

European Union (Withdrawal Agreement) Act 2020	1.35	Foreign Judgments (Reciprocal Enforcement) Act 1933 (22 <i>Statutes</i> 447)	37.52
s 25 (1)–(3)	1.35	Pt I (ss 1–7)	39.108
39 (1)	1.34	s 10A	39.108
European Union (Withdrawal) Act 2018	1.34	Forgery Act 1861	20.97
s 1A, 1B	1.35	s 24	20.98
2 (1), (2)	1.35	Forgery and Counterfeiting Act 1981 s 1	20.97
3 (1), (2)	1.35	9	20.98
4	1.35	(1)	20.97, 20.113
5 (1)	1.36	24	20.99, 20.100
(4)	1.36	Fraud Act 2006	17.38
6 (1) (a), (b)	1.36	s 1	16.90
(2)	1.36	Fraudulent Conveyances Act 1571	22.22
(4)–(5D)	1.36	Gambling Act 2005 s 335(1)	4.41
European Union (Withdrawal) (No. 2) Act 2019	1.34	Health and Safety at Work etc Act 1974 (19 <i>Statutes</i> 796) s 2	3.61
Export Control Act 2002	32.32	Hire–Purchase Act 1938 s 8 (2)	4.16
Factors Act 1823	16.17, 16.26, 40.14	(3)	11.131
Factors Act 1825	16.26, 40.14	Hire Purchase Act 1964 (11 <i>Statutes</i> 3) Pt III (ss 27–29)	2.75, 16.26, 16.72, 27.21
Factors Act 1842	16.26, 40.14	s 27	16.83
Factors Act 1877	16.26, 40.14	(1)	16.74
Factors Act 1889 (1 <i>Statutes</i> 45)	5.12, 16.18	(2)	16.75, 16.85
s 1	16.35, 16.37, 16.38	(3), (4)	16.89
1 (2)	16.36	(5)	16.73
2	16.30, 16.42, 16.69, 32.58	(6)	11.19, 16.88, 16.90
2 (1)	16.33, 16.34, 16.37, 16.39	28	16.91
(2)	16.41	29 (1)	16.74, 16.76
(3)	16.40	(2)	16.78
(4)	16.41	(3)	16.82
3	16.34	(4)	16.75
4	16.34	(5)	16.85
5	16.42	Hire–Purchase Act 1965 s 54	6.09
7 (1), (2)	16.45	Housing Grants, Construction and Regen- eration Act 1996 s 108	38.06
8 ... 2.82, 16.42, 16.46, 16.47, 16.49, 16.50, 16.54, 16.64, 16.66, 16.67, 16.68, 16.69, 32.58		Human Rights Act 1998 (7 <i>Statutes</i> 497)	3.01
8 (1)	16.51	Income Tax Act 2007 s 874	26.13
9 ... 1.49, 16.30, 16.42, 16.49, 16.55, 16.57, 16.58, 16.59, 16.60, 16.61, 16.63, 16.64, 16.65, 16.68, 16.69, 16.70, 16.71, 16.73, 27.21, 32.58		Infants Relief Act 1874	3.32
10	16.55	Insolvency Act 1985 (4 <i>Statutes</i> 708)	22.22, 23.40, 31.04
Financial Services Act 1986 (30 <i>Statutes</i> 162)	21.20	Insolvency Act 1986 (4 <i>Statutes</i> 721)	31.04, 31.06, 31.07, 31.34, 31.38, 22.31
Financial Services and Markets Act 2000	4.29	Pt I (ss 1–7)	31.57, 31.70
s 22	21.20	2 (ss 8–27)	31.55
285 (1)	18.15	s 11 (3) (c)	2.26, 2.40
412	4.41	29 (2)	31.53
Financial Services (Banking Reform) Act 2013 Pt 5 (ss 39–110)	18.11	33	25.30
s 41 (1), (2)	18.15	39	25.30
43, 44	18.16		
Forcible Entry Act 1381	16.100, 27.16		
Forcible Entry Act 1623	16.100, 27.16		

Table of Statutes

Insolvency Act 1986 (4 Statutes 721) – *cont.*

s 40	25.32
40 (2)	25.23
44 (1)	23.40
46	25.30
72A	23.40, 25.17, 25.18, 25.18, 31.54, 29.01
72B–72G	23.40, 25.17, 25.18, 31.54, 29.01
72H	23.40, 25.17, 25.18, 29.01, 31.54
73 (1)	31.30
84 (1)	31.30
87 (1)	31.11
99 (3)	31.69
100 (2)	31.30, 31.32
112	31.12
115	31.23
116	31.30
122 (1) (f), (g)	31.30
123 (1) (a), (b)	31.30, 31.31
(e)	31.30
(2)	31.31
(2B)	31.30
124, 125	31.30
127	31.18, 23.22, 31.51
129 (2)	24.55
130	31.11
156	31.21
165	31.32
167	31.32
(1)	31.11
175	31.69
(1)	31.21
(1A), (1B)	31.21
(2) (a)	31.21
(b)	25.23, 25.32, 31.21, 31.35
176	31.35
176ZA	25.32, 31.21, 31.40
176ZB	31.39
176A	25.32, 31.35
183 (3)	22.74
213	31.71, 31.72
214	31.73, 31.75, 31.76
214 (4), (5)	31.72, 31.73
(7)	31.74
215	31.74
233 (2) (a)	31.23
238	31.40, 31.42, 31.51
238 (4)	31.40
(5)	31.40, 31.43
239	31.42
(4)	31.44
(5)	31.45
240 (1), (2)	31.41, 31.44
(3)	31.41
241	31.40
(1) (c)	31.45, 31.48
244	31.51
245	23.26, 25.32, 24.65
(2)	23.28, 31.49

Insolvency Act 1986 (4 Statutes 721) – *cont.*

s 245 (5)	31.46
246ZA	31.69, 31.71
246ZB	31.69, 31.72, 31.73
246ZD	31.76
251	25.32
267	30.28
287	23.50
306	23.50
325 (2)	22.55
344	24.15, 29.20
346 (1), (5)	22.74
423–425	22.13, 31.51
424 (2)	22.13
426	31.81, 31.82
Sch B1	31.55
para 2 (b)	719
3	31.59, 31.62
(4)	23.40
(b)	30.43
6	31.59
10–13	31.59
12 (1)	31.60
13 (1)	31.60
14	23.40, 25.18, 31.59
(2), (3)	31.59
26	31.59
36	31.59
37	31.55
40	31.63
41	31.63
42	31.63, 29.18
43	31.63, 29.18
44	29.18
(1)–(5), (7)	31.63
(7)	31.63
45	25.30
46 (2)–(4)	25.30
49	31.66
53 (1)	31.66
55 (2)	31.66
59 (1)	31.65
60A	31.67
61, 62	31.65
65	31.58
65 (1)	31.33
(2)	25.23, 25.32, 31.35
(3)	31.33
(b)	25.32
66	25.32, 31.30, 31.55
69	31.65
74 (1)	31.68
76	31.69
78–79	31.69
84	31.55, 31.69
99 (3) (b)	25.32
Sch 4	30.32
para 5	31.11
Sch 6	
para 8–11	31.36
13 (1), (2)	31.36

Insolvency Act 1994 (4 <i>Statutes</i> 1129)		Law of Property Act 1925 (37 <i>Statutes</i> 120)	
.....	31.07	– <i>cont.</i>	
Insolvency Act 2000		s 109 (2)	23.40
.....	31.07	114	23.46, 23.56
Insolvency (No 2) Act 1994 (4 <i>Statutes</i>		115 (2)	23.46
1130)	31.07	136	2.54, 23.46, 23.47, 23.48
Insurance Act 2015		198	24.22, 24.26
.....	3.74	199 (1) (i)	24.28
Interpretation Act 1978 (41 <i>Statutes</i> 985)		205 (1) (ix)	7.20
Sch 1	3.30, 16.79	Law of Property (Miscellaneous Provisions)	
Joint Stock Companies Act 1844		Act 1989 (37 <i>Statutes</i> 658)	
.....	31.05	s 1	3.34
Land Charges Act 1925		(1)	3.11
.....	24.30	2 (1)	3.29, 3.31, 23.10, 23.11
s 13 (2)	24.28	(3)	3.29
Land Charges Act 1972 (37 <i>Statutes</i> 569)		Law Reform (Enforcement of Contracts)	
.....	23.10, 24.09	Act 1954	
s 4–7	24.57	s 1	6.09
4 (5)	24.27, 24.68	Law Reform (Miscellaneous Provisions)	
18 (5)	24.22	Scotland Act 1990	
Land Registration Act 1925 (37 <i>Statutes</i>		s 66	39.18
423)	24.30	Sch 7	39.18
Land Registration Act 2002		Law Reform (Frustrated Contracts) Act	
.....	24.09, 24.26	1943 (11 <i>Statutes</i> 215)	
s 23 (1) (a)	23.46	.....	9.53
(2) (a)	23.46	s 1 (2)	3.180
30 (1)	24.57	(3)	3.180
49 (1)	24.22	2 (4)	10.46
(4)	24.22	(5)	3.180
51	2.26	(c)	9.52
Sch 2		Legal Aid, Sentencing and Punishment of	
para 10, 11	23.46	Offenders Act 2012	
Landlord and Tenant Act 1985 (23 <i>Statutes</i>		s 44 (6)	38.11
345)		Limitation Act 1980 (24 <i>Statutes</i> 698)	
s 11	3.61	.....	11.24
Late Payment of Commercial Debts		s 3 (2)	2.32
(Interest) Act 1998		16	23.41
s 8, 9	15.55	17	2.32
Law of Property Act 1925 (37 <i>Statutes</i> 120)		36	23.42
s 1 (2)	2.20	Magistrates' Courts Act 1980 (27 <i>Statutes</i>	
(3)	2.36	143)	
(6)	2.28	s 87a	31.60
2	2.86	125ZA	22.74
34 (1)	2.28	Marine Insurance Act 1906 (22 <i>Statutes</i> 17)	
36 (2)	2.28	s 50 (1), (3)	32.74
40	3.29, 3.35, 23.10	Maritime Convention Act 1911	
52 (1)	23.11	s 1	36.40
53 (1) (c) ..	2.35, 21.19, 23.11, 23.46	Mercantile Law Amendment Act 1856 (11	
60 (1)	2.12	<i>Statutes</i> 213)	
86	23.46	s 3	30.21
87	2.36	5	30.35
87 (1)	2.26, 23.16, 23.20, 23.32,	Merchant Shipping Act 1894	
	23.46	.....	36.07
88, 89	2.86	s 493, 494	36.36
91 (2)	23.37	499	36.36
94	24.21, 24.23	503	36.44
(2)	24.22	Merchant Shipping Act 1979	
97	24.27, 24.68	.....	36.11
101	23.35, 23.39	ss 17–19	36.44
104	2.86	Sch 4	
109	23.39		

Table of Statutes

Merchant Shipping Act 1979 – *cont.*

Sch 4 – *cont.*

Pt I 36.44

Merchant Shipping Act 1995 (39 *Statutes* 509)

s 185 36.12, 36.44

187–190 36.40

Sch 1

para 8 24.57

Sch 7 36.12, 36.44

Mercantile Law Amendment Act 1856

s 5 23.53, 23.54, 30.35

Minors' Contracts Act 1987 (6 *Statutes* 350)

s 2 30.29

Misrepresentation Act 1967 (29 *Statutes* 978)

s 1 8.27, 13.04

(a), (b) 3.46

2 11.71

(1) 3.06, 3.44, 3.98, 3.99, 14.10

(2) 3.08, 3.99

3 3.70, 3.80, 3.81, 3.97, 3.99

4 (1) 11.05

Patents Act 1977 (33 *Statutes* 138)

s 33 (1) (a) 24.30

(3) (b) 24.30

Pension Schemes Act 1993 (33 *Statutes* 580)

Sch 4 31.36

Policies of Assurance Act 1867

s 1 23.47

Powers of Attorney Act 1971

s 4 5.38

Proceeds of Crime Act 2002

..... 18.20

s 335 18.20

Protection of Trading Interests Act 1980

(47 *Statutes* 391) 38.131

s 5 37.51

Registered Designs Act 1949 (33 *Statutes* 78)

s 19 (1) 24.30

Restrictive Trade Practices Act 1956

..... 29.05

Sale and Supply of Goods Act 1994 (39 *Statutes* 222)

..... 1.07, 6.09, 11.54,

11.64, 11.70, 11.81,

11.82, 11.145, 13.20

Sale of Goods Act 1893

..... 2.21, 1.09, 6.08, 7.03, 11.04,

11.06, 11.70, 11.130, 11.131, 40.13

s 11 (1) (c) 6.09, 11.05, 13.30

12, 13 6.09

14 (3) 6.09

(6) 6.09

15 6.09

22(2) 6.09

24 6.09

25 6.09, 16.26

Sale of Goods Act 1893 – *cont.*

s 25 (1) 16.17, 16.46, 16.50, 16.73

(2) 16.71

35 6.09

55 6.09

55A 6.09

61 (2) 1.07

62(1A) 6.09

Sale of Goods Act 1979 (39 *Statutes* 68)

..... 1.61, 3.60, 3.61, 6.08, 7.03, 7.20,

7.32, 7.33, 7.35, 7.42, 8.01, 8.10,

8.37, 8.78, 9.09, 9.26, 9.42, 9.47,

11.38, 11.70, 11.144, 12.01, 12.07,

12.21, 14.01, 14.29, 14.67, 15.08,

16.53, 17.29, 22.33, 27.05, 27.11,

27.14, 33.25, 33.26

s 1 7.28

2 7.13, 7.17, 7.28, 7.31

(1) 7.14, 7.15, 8.26, 17.13

(5) 7.25, 9.49

4 11.131

5 (1) 7.27, 8.72

(2) 7.26

(3) 7.16, 7.25, 7.27, 7.28, 8.77,

8.81, 8.90

(4), (5) 7.28

6 .. 7.08, 7.12, 8.06, 8.07, 8.09, 9.03,

9.48, 9.49, 11.133, 34.37

7 .. 7.08, 7.12, 8.06, 8.07, 8.09, 8.29,

9.03, 9.21, 9.38, 9.41, 9.48, 9.49,

9.50, 9.51, 9.52

10 (1) 3.144, 10.43

11 (1)(c) 12.12

(2) 12.08

(4) .. 10.44, 11.143, 12.12, 12.17,

12.27, 13.02, 13.06, 13.30, 13.38,

14.41

12 10.01, 10.05, 11.08, 11.12,

11.14, 11.17, 11.18, 11.19, 11.20,

11.21, 11.25, 11.131, 11.133, 11.134

11 (4A) 13.30

12 15.11, 34.28

(1) 7.27, 11.27, 16.89

(2) 11.24, 11.135

(3) 7.29, 7.30, 8.25, 11.28,

11.135

(4) 11.135

(5) 11.27, 11.28, 11.135

13 3.113, 10.01, 10.05, 11.08,

11.29, 11.35, 11.48, 11.51, 11.126,

11.131, 11.133, 11.14, 11.51

13 (1A) 11.29

(1) 11.46

(3) 11.31

14 3.113, 10.01, 10.05, 11.08,

11.14, 11.55, 11.62, 11.67, 11.116,

11.126, 11.131, 11.133, 11.141,

15.11

14 (1) .. 11.52, 11.53, 11.112, 11.133

(2) 11.57, 11.68, 11.73, 11.98,

11.130

(2A) 11.68, 11.71

Sale of Goods Act 1979 (39 Statutes 68) –
cont.

s 14 (2B)	.. 11.74, 11.75, 11.76, 11.111
(e)	 11.82
(2C)	 11.57, 11.64, 11.66
(a)	 11.149
(c)	 11.68
(3)	 11.73, 11.95, 11.97, 11.98, 11.106, 11.111, 11.112, 11.117, 11.121, 11.149
(b)	 11.103, 11.104
(4)	 11.57
(5)	 11.60, 11.95
(6)	 11.54, 11.58, 11.71, 11.95
15	 3.113, 10.01, 10.05, 11.08, 11.53, 11.125, 11.126, 11.131, 11.133, 11.141, 15.11
(2) (a)	 11.127, 11.128
(c)	 11.68, 11.127, 11.128
15A	 3.113, 3.144, 3.146, 10.06, 11.51, 13.06, 13.13, 33.27
Pt III (ss 16–26)	 7.30
s 16	. 8.01, 8.08, 8.12, 8.16, 8.54, 8.81, 8.92, 8.100, 9.12, 15.16, 32.64, 34.13, 34.27
17	 7.08, 8.01, 8.09, 8.79, 8.100, 32.53
(1)	 8.81, 34.27
(2)	 8.80
18	 8.06, 8.07, 8.80, 8.91, 8.107
r 1	 1.48, 7.08, 7.11, 7.17, 8.07, 8.09, 8.80, 8.81, 8.82, 8.83, 8.84, 8.85, 8.86, 8.87, 8.88 8.90, 8.95, 11.20
2	 8.80, 8.88, 8.90, 8.95, 9.27
3	 7.08, 8.81, 8.89, 8.90
4	 8.102, 8.103, 8.104, 8.105, 8.106, 9.04, 9.41, 9.41
(a)	 16.61
5	 7.08, 8.91, 8.93, 8.94, 8.95, 8.98, 8.99, 10.13, 11.20, 11.35
(1)	 8.77, 8.92, 10.03, 34.13, 34.14, 34.15
(2)	 8.92, 8.96, 9.31, 10.03, 10.13, 291, 34.13
(3)	.. 8.100, 34.15, 34.25, 36.71
s 19	. 7.08, 8.01, 8.09, 8.81, 8.90, 8.91, 8.113
(1)	 8.60, 8.107, 8.108, 10.13
(2)	 8.107, 8.108, 10.18, 34.14
(3)	 8.111, 15.59, 34.30
20	. 8.01, 8.54, 9.02, 9.03, 9.06, 9.07, 9.13, 9.13, 9.28, 9.41, 9.49, 10.03
(1)	.. 8.29, 9.04, 9.16, 9.19, 34.16
(2)	. 8.100, 9.10, 9.16, 9.22, 15.32
(3)	 9.16
(4)	 8.29
20A	 2.89, 7.39, 8.08, 8.28, 8.52, 8.53, 8.54, 8.55, 8.56, 8.57, 8.59, 8.71, 9.07, 9.12, 9.49, 10.09, 32.64, 34.13, 34.27, 35.149
(2)	 8.60, 8.61, 8.70

Sale of Goods Act 1979 (39 Statutes 68) –
cont.

s 20A (4)	 8.65, 9.40
(5)	 8.68
(6)	 8.59
20B	.. 8.01, 8.52, 34.13, 32.64, 34.27
(1)–(2)	 8.71
(3)(b)	 8.71
21	 16.73
(1)	 7.04, 7.27, 16.09, 16.10, 16.13, 16.14, 16.28, 16.70
23	. 16.29, 16.31, 16.31, 16.32, 16.60
24	 2.45, 2.82, 3.75, 7.27, 11.20, 15.71, 16.47, 16.58, 16.59, 16.64, 32.58
25	... 3.75, 7.27, 16.26, 16.55, 16.66, 27.21, 27.22, 32.58
(1)	 16.58, 27.13, 37.86
(2)	 16.62
(4)	 13.31
26	 32.79
27	. 10.01, 10.05, 13.01, 15.07, 15.53
28	 3.142, 10.01, 10.05, 10.43, 15.02, 15.09, 15.11, 15.54, 34.12
29	 10.01, 10.05, 10.18, 10.21
(1)	 10.14, 10.23
(2)	 10.16, 15.05, 15.11
(3)	 10.25
(4)	 10.09
(5)	 10.25
(6)	 10.26
30	 10.01, 10.05, 11.39, 13.33
(1)	 13.31, 33.31
(2)	 13.02, 13.04, 13.31
(2A)	 13.06, 13.13, 13.31
(a)	 13.35
(b)	 13.37
(2B)	 13.31
(4)	 13.04, 13.05
(5)	 13.31, 13.32
31	. 10.01, 10.05, 12.25, 13.04, 13.33
(1)	 10.29, 10.30, 10.31, 10.43, 13.35, 13.36
(2)	 10.29, 10.40, 10.45
(3)	 10.29
32	 9.03, 10.01, 10.05
(1)	 9.32, 9.33, 10.03, 10.12, 10.13, 10.13, 10.14, 10.15, 10.16, 10.18, 15.64
(2)	 9.07, 9.32, 9.36, 9.37
(3)	... 9.07, 9.32, 9.36, 9.36, 9.37, 10.14, 10.18, 34.07
(4)	 9.36, 10.13
33	. 9.03, 9.07, 9.33, 9.34, 9.35, 9.40, 10.01, 13.33
34	 13.14
(1)	 13.04, 13.05
(6)	 12.22
35	 12.12, 13.01, 13.04, 13.04, 13.07, 13.09, 13.10, 33.30
(1)	 13.08
(b)	. 13.11, 13.13, 13.14, 13.18

Table of Statutes

Sale of Goods Act 1979 (39 Statutes 68) – cont.

s 35 (2)	13.05, 13.08, 13.26
(4)	12.09, 13.14, 13.19, 13.34
(5)	13.05, 13.20, 13.21
(6)	13.05
(a)	13.14, 13.24
(b)	13.14, 13.16, 13.17, 13.28, 13.29
(7)	10.44, 13.07
35A	10.44, 13.04, 13.05, 13.06, 13.07
36(1), (2)	12.11
37	9.22, 15.32, 15.52
(1)	15.04, 15.31
(2)	15.31
38 (1) (a), (b)	15.59
(2)	15.59
39 (2)	15.60
41 (1), (2)	15.61
42	15.63
44	15.64
45	9.30, 10.13
45 (1)	15.64
(3)–(5)	15.64
(7)	15.65
46	10.13
(1), (2), (4)	15.64
47 (1)	15.63
(2) (a)	15.63, 16.55
(b)	16.55
48 (1)	15.62, 15.68, 15.71
(2)	15.68, 15.69, 15.71, 16.56
(3)	15.68, 15.70, 15.72
(4)	15.68, 15.72
Pt VA (ss 48A–48F)	14.66
s 49 (1)	8.30, 15.10, 15.13, 15.14, 34.05
(2)	15.10, 15.13, 15.14, 15.16
50	15.30, 15.33
(2)	15.38, 15.42
(3)	13.01, 15.26, 15.35, 15.38, 15.39, 15.39, 15.40, 15.42
51 (1)	14.17
(2)	14.17, 14.19
(3)	3.75, 3.131, 14.18, 14.19, 14.51, 15.26
52	7.07
(1)	8.01, 14.07
53	10.06
(1)	11.21, 14.06, 14.13
(a)	33.31
(2)	14.41
(3)	14.41
(4)	14.06
54	14.05, 14.17, 14.19, 15.30, 15.39, 15.44
55	11.30
(1)	9.49, 11.48, 11.132, 11.133
(1A)	11.132

Sale of Goods Act 1979 (39 Statutes 68) – cont.

s 55 (2)	11.132
55A	11.131
59	13.20
(1)	10.02
61 (1)	7.08, 7.16, 7.17, 7.19, 7.20, 7.23, 7.25, 8.05, 8.08, 8.56, 8.57, 8.73, 9.16, 9.40, 9.49, 10.07, 11.35, 11.41, 11.59, 11.103, 16.52
(3)	16.44
(4)	15.61
(5)	8.87
62	7.05
(1)	7.05, 8.05
(2)	1.07, 7.05, 7.06, 7.07, 9.48, 13.29
(4)	2.50, 7.05, 7.15, 7.18, 7.25
Sch 1	
para 53	14.66
Sale of Goods (Amendment) Act 1994 (39 Statutes 221)	
s 1	6.09, 16.29
3 (2)	6.09
Sale of Goods (Amendment) Act 1995 (39 Statutes 227)	6.09, 8.37, 8.70
Sale of Horses Act 1555	6.09
Sale of Horses Act 1558	6.09
Securities Exchange Act 1934	
s 10 (b)	39.34
Small Business, Enterprise and Employment Act 2015	
s 13	18.22, 19.18
129	31.67
Pt 10	31.08
State Immunity Act 1978 (10 Statutes 756)	
	37.08
s 2	39.99
3 (1) (a)	39.88, 39.98
9 (1)	39.88
13 (2), (4)	39.98
14 (1), (2)	39.98
Statute of Acton Burnell 1283	1.03
Statute of Frauds 1677 (11 Statutes 211)	
s 4	1.57, 3.29, 3.30, 3.31, 30.21
17	6.09
Statute of Merchants 1285	1.03
Statute of the Staple 1353	
cc 5, 6, 8, 20, 21	1.03
Supply of Goods and Services Act 1982 (39 Statutes 132)	1.25, 3.61, 7.36, 7.37
s 4	7.38
(2)	4.34
13	3.60, 7.38

Supply of Goods (Implied Terms) Act 1973 (11 <i>Statutes</i> 8) ... 1.25, 3.61, 11.54, 11.62, 11.64, 11.98, 11.114, 11.116, 11.131	Unfair Contract Terms Act 1977 (11 <i>Statutes</i> 220) – <i>cont.</i>
s 8 3.145	s 3 ... 11.48, 11.133, 762, 1082, 1264, 28.14
10 (2) 11.58	5 3.82
Senior Courts Act 1981 (11 <i>Statutes</i> 966)	6 ... 1.26, 3.82, 11.30, 11.66, 11.131
s 6 (1) (b) 38.20	(1) 11.12, 11.135
33 (1) 38.69	(a) 8.25, 11.134
(2) 38.68	(1A) 11.48, 11.121
34 (3) 38.69	(3) 11.121
35A 15.55	7 3.82, 28.14
37 (1) 38.100	(1A) 28.20
(3) 38.96	9 3.82
49 (2) 22.38, 22.71	10 11.135
(3) 38.77	11 1.26, 11.131
67 38.76	(5) 11.138
68 38.02	13 11.66
69 (1) 38.02	(1) 3.79
70 38.02	27 (2) 11.131
72 38.107	Sch 2 1.26, 3.82, 11.131, 11.137, 11.141, 11.142, 11.143
Terrorism Act 2000 18.20	Uniform Law on International Sales Act 1967 (39 <i>Statutes</i> 6)
Theft Act 1968 (12 <i>Statutes</i> 488)	s 1 (3) 33.02
s 1 16.88, 16.90	Unsolicited Goods and Services Act 1971 (39 <i>Statutes</i> 64) 8.105
31(2) 6.09	Value Added Tax Act 1994 (48 <i>Statutes</i> 669)
Theft (Amendment) Act 1996 17.38	s 6 (2) (c) 29.13
Third Parties (Rights against Insurers) Act 2010 9.37	Wireless Telegraphy Act 2006
Torts (Interference with Goods) Act 1977 (45 <i>Statutes</i> 874) 14.09, 16.96	s 99 16.93
s 1 16.96	101 16.93
2 (1), (2) 16.96	
3 16.03, 16.96, 22.66	
3 (1) 16.99	
(2) 2.15	
(a), (b) 38.126	
(6) 2.94, 16.96	
4 (2) 38.69	
6 ... 2.94, 16.03, 16.96, 16.99, 22.66	
8 (1) 2.21, 2.23, 16.96	
11 (2) 8.26	
12 22.66	
(6) 16.93	
13 22.66	
(2) 16.93	
Trade Descriptions Act 1968 (39 <i>Statutes</i> 31) 1.14, 11.33	
Trade Marks Act 1994 (48 <i>Statutes</i> 114)	
s 25 (3) 24.30	
Tribunals, Courts and Enforcement Act 2007	
s 62 22.74, 38.124	
Sch 12 16.93	
para 4 (3) 22.74	
Unfair Contract Terms Act 1977 (11 <i>Stat- utes</i> 220) 1.26, 3.73, 3.78, 5.26, 6.09, 11.53, 11.133, 14.01	
s 2 11.133	

Australia

New South Wales Contracts Review Act 1980 3.70
New South Wales Sale of Goods Act s 12 9.21

Germany

Arbitration Law 1998 art 1040 (3) 39.50
--

Hong Kong

Arbitration Ordinance 1997 s 6b 39.06
--

Netherlands

Arbitration Act 1986 39.06

New Zealand

Contractual Remedies Act 1979 3.42

United States

Table of Statutes

Federal Arbitration Act 1925		US Carriage of Goods by Sea Act	
s 1303 (8)	39.33	.....	36.46
Pomerene Act 1916			
s 29	32.56		

Table of Statutory Instruments

Business Contract Terms (Assignment of Receivables) Regulations 2018, SI 2018/1254	29.41	Civil Procedure Rules 1998, SI 1998/3132 – <i>cont.</i>	
reg 1 (2), (3)	29.28	r 2.4	38.02
2	29.29, 29.30	PD 2B	
(1)–(3)	29.28	para 6.1	38.02
3 (2)	29.29	r 3.1 (2) (a)	38.55
(4), (5)	29.29	(k)	38.08
4	29.30	(3)	37.34
(a)–(c)	29.30	(8)	38.63
(d)–(k)	29.30	3.3 (1)	38.40
Capital Requirements (Capital Buffers and Macro-prudential Measures) Regulations 2014, SI 2014/894	4.23	3.4 (2)	38.40
Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002, SI 2002/263	38.63	3.8 (3)	38.55
Carriage of Goods by Sea Act 1971 (Commencement) Order 1977, SI 1977/981	36.11	3.9 (1)	38.63
Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, SI 2019/479	37.48	PD 3A	
para 84	37.05	para 4.1	38.40
89	37.05	Pt 6	37.28
Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018, SI 2018/1124	37.05, 37.39	r 6.3	38.45
Civil Jurisdiction and Judgments Order 2001, SI 2001/3929		6.4 (1)	38.45
Sch 1		6.17 (2)	38.45
para 9 (2)	37.09	6.33	38.45
(3)	37.09	6.36	38.45, 37.33
(6)	37.09	6.37	37.35
Civil Procedure Rules 1998, SI 1998/3132	38.14	(1)	37.33
r 1.1 (2)	38.15	(3)	37.33
1.3	38.15	PD 6B	37.33, 37.36
1.4 (2)	38.57	para 3.1	37.34
(e)	38.15, 38.37	(3)	37.34
		(4A)	37.36
		(6)	37.34
		(a)–(d)	37.35
		(7), (8)	37.35
		Pt 7	38.42, 38.48, 38.54, 38.62, 38.66
		r 7.2 (1), (2)	37.12
		7.4 (1) (b)	38.45
		(2)	38.45
		7.5 (1), (2)	38.45
		PD 7A	
		para 3.3	38.42
		Pt 8	38.50, 38.60, 38.66
		r 8.1 (2) (a)	38.42
		(5)	38.51
		(6)	38.42
		8.2(a)	38.42
		8.3	38.50
		PD 8A	38.30
		r 9.1	38.49

Table of Statutory Instruments

Civil Procedure Rules 1998, SI 1998/3132 –

cont.

Pt 10	37.32
11	37.32; 38.47
r 11.2	37.32
11.4, 11.5	37.32
Pt 12	38.29
r 12.3	38.29
(2)	38.47
(3)	38.34
PD 12	
para 1.2, 1.3	38.29
r 14.3	38.47
15.4 (1)	38.48
15.5 (2)	38.55
15.8	38.51
15.8 (a)	38.55
Pt 16	
r 16.3	38.44
16.5	38.44
(1), (5)	38.47
PD 16	
para 3.1	38.43
3.2	38.43
9	37.109
r 17.1	38.56
PD 18	
para 1.2	38.52
Pt 19	
r 19.4	2.55
19.5A	2.41, 16.96
(3)	2.21
Pt 20	38.16, 38.47, 38.51
r 20.2	38.53
20.7 (3)	38.54
22.1	38.16
PD 22	
para 4.1–4.3	38.16
r 23.3	38.86
23.4 (1)	38.84
23.7 (1)	38.84
23.8	38.83
PD 23A	
para 3	38.85
9.1	38.87
13.2	38.120
Pt 24	38.47
r 24.2	35.110, 38.38
24.4 (1), (3)	38.38
24.5 (1), (2)	38.38
PD 24	
para 5.2	22.74
r 25.1 (1) (c) (i)	22.74
(v)	16.93
(e)	38.69
(f)	38.96
(h)	38.104
(i), (j)	38.69, 38.96
25.2 (2)	38.87
25.5 (1) (a), (b)	38.69
(2)	38.86

Civil Procedure Rules 1998, SI 1998/3132 –

cont.

r 25.6	38.92
25.7	38.91
25.12	22.74, 38.112
25.13 (2)	38.113
25.14	38.112
PD 25A	38.98
para 3.1	38.100
7	38.107
7.2	38.106
Pt 26	38.62
r 26.3	38.51
(3)	38.58
(4), (5)	38.59
(6)	38.60
26.3 (6A)	38.55
26.8	38.57
PD 26	
para 8.1(1)(d)	38.58
Pt 27	
r 27.14 (2)	38.120
Pt 28	
r 28.5(2)	38.59
PD 28	38.59
r 29.2 (2)	38.60
31.4	38.63
31.5	38.66
(1) (a)	38.64
31.6	38.64
31.12 (2)	38.65
31.15	38.63
31.22 (1)	38.63
Pt 31	38.63
PD 31B	38.63
para 5 (3)	38.63
Pt 32	38.70
r 32.1 (2)	38.08
32.2	38.76
32.14	38.15
34.8–34.12	38.76
34.13	38.133
34.16–34.21	38.133
Pt 34	15.36
35	
r 35.3	38.70
PD 35	38.70
r 35.3	38.70
Pt 36	38.58, 38.71, 38.113
r 36.2	22.74
36.3	22.74
36.4 (2)	38.73
36.5 (1)	38.72
36.9 (1)	38.73
36.11	18.07
36.13	38.73
36.14	38.73
36.16 (1)	38.72
(2)	38.72
36.17	38.73

Civil Procedure Rules 1998, SI 1998/3132 –

<i>cont.</i>	
Pt 37	
r 37.2	18.07
37.3	18.07
PD 37	
para 2, 3	18.07
r 38.2 (2)	38.77
39.2 (3)	38.76
39.5 (2)	38.76
44.2 (4)	38.116, 38.120
(5)	38.116
(6)	38.117
44.3 (2), (3)	38.122
44.10 (1)	38.120
45.38(1)	38.120
Pt 48	
r 48.1, 48.2	38.11
PD 48	38.11
51Z	38.12
r 52.3 (1), (2)	38.127
(6)	38.127
52.6 (1)	38.127
52.12 (1)–(3)	38.128
52.13 (2) (a), (b)	
	38.128
(3)	38.128
(4)–(6)	38.129
52.16	38.127
PD 51U	38.66
para 2.5	38.63
PD 52B	
para 8.3	38.75
PD 52C	
para 31	38.75
Pt 55	2.18
58	
r 58.1	38.29
58.1 (2)	38.25
58.3	38.25
58.4 (1), (2)	38.30
58.5 (2)	38.44
(3)	38.44
58.6 (1)	38.49
(2)	38.49
58.8 (2)	38.30
58.10 (1)	38.52
58.11	38.23, 38.28
58.13 (1), (3)	38.61
PD 58	38.25, 38.29
para 1.2 (2)	38.125
2.1	38.42
2.3, 2.4	38.42
3.1	38.88
9	38.46, 38.88
10 (2), (6)	38.61
PD 58B	
para 8.3	38.75
PD 58C	
para 31	38.75
Pt 59	38.27

Civil Procedure Rules 1998, SI 1998/3132 –

<i>cont.</i>	
Pt 69	22.74
r 69.2 (1) (C)	38.124
PD 69	
para 5	38.124
r 70.1 (2) (a), (b)	38.124
70.3	38.124
71.2	38.124
Pt 72	22.74, 38.124
73	38.124
83	
r 83.9	38.124
83.13 (1)	38.126
83.14 (1), (2)	38.126
Pt 89	38.124
89.3	38.124
Pre-Action Protocols	
Pre-action Conduct and Protocols	
	38.28, 38.116
para 3	38.18
15 (c)	38.18
16	38.18
Courts Guides	
Admiralty and Commercial Courts Guide	
	38.26
para A2.1	38.23
A3.2	38.24
B4.7	38.16
B4.8	38.28
B7.1	38.46
B7.6	38.45
B9.1 (b)	38.49
B9.2	38.49
B9.4 (a)	38.45
B11	38.29
B13.5	38.28
C1.1 (b)	38.27
C1.2 (b), (c)	38.27
C1.5	38.16
C1.8	38.16
C2.1 (a)	38.46
C2.3	38.46
C3.2	38.49
C4.3	38.52
C4.4	38.55
C5.2	38.16
D2.1	38.62
D4.3, D4.4	38.62
D5	38.62
D5.2	38.62
D6.3 (b)	38.62
D7.1, D7.2	38.62
D7.5 (a)	38.62
F1.4	38.62, 38.88
F2.1–F2.3	38.62, 38.89
F3.1	38.62, 38.89
F5.1	38.62, 38.89
F5.5	38.75
F6.1	38.62, 38.89
F15.5	38.62

Table of Statutory Instruments

Civil Procedure Rules 1998, SI 1998/3132 – <i>cont.</i>		Damages-Based Agreements Regulations 2013, SI 2013/609	
para F15.7	38.98		38.11
F15.12	38.106	Electronic Money Regulations 2011, SI 2011/99	17.22
H4.2, H4.3	38.133	art 2 (1)	17.22
K3.1	38.125	(2)	17.22
Appendix 4	38.27	3	17.22
5	38.98, 38.104	Electronic Identification and Trust Services for Electronic Transactions (Amendment etc) (EU Exit) Regulations 2019, SI 2019/89	3.31
10		Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660	39.31
para 1	38.112	Export Control Order 2008, SI 2008/3231	32.32
Appendix 11		Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226	31.52
para 125	38.98	reg 3	24.32, 25.17
Appendix 16		4	22.32
para 1	38.112	4 (4)	22.31
Professional Negligence Pre-Action Protocol	38.27, 38.28	8	22.31
Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053		18	23.42
	1.34, 5.08, 5.09	Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979	17.57, 18.40, 31.52
reg 2 (1)–(4)	5.13	Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544	
3	5.26, 5.27	art 77 (1)	21.20
4	5.29, 5.31	84 (1)–(4)	4.29
5	5.26, 5.29	85 (1)	4.29
5 (2)	5.27, 5.31	(2) (a)	4.29
6	5.32	High Court and County Court Jurisdiction (Amendment) Order 2014, SI 2014/821	
6 (1)	5.30	Insolvency Act 1986 (Prescribed Part) Order 2003, SI 2003/2097	25.32
7–10	5.32	art 3	31.35
11 (1)	5.32	Insolvency Act 1986, Section 72A (Appointed Date) Order 2003, SI 2003/2095	31.51
(3)	5.32	art 2	31.51
15	5.38	Insolvency (Amendment) (EU Exit) Regulations 2019, SI 2019/146	31.84, 31.85
17 (3)–(6)	5.39	reg 116	
18, 19	5.39	Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996	31.36
Companies Act 2006 (Amendment of Part 25) Regulations 2013, SI 2013/600	22.15, 24.13, 24.31	art 4	31.36
Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015, SI 2015/17		Insolvency Rules 1986, SI 1986/1925	31.07
reg 24(1)(b)(c)	20.105	r 2.86	37.109
Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277	1.14, 8.105	3.2	25.30
Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013/3134	3.35, 8.105	4.91	37.109
Cross-Border Insolvency Regulations 2006, SI 2006/1030		Insolvency Rules 2016, SI 2016/1024	31.08
Sch 1		r 3.35	31.66
art 3	31.84	3.51	31.69
3 (1)	31.84		
16 (3)	31.81		
3	31.84		
9	31.83		
11, 12	31.83		
15, 16	31.83		
28	31.83		

Insolvency Rules 2016, SI 2016/1024 – <i>cont.</i>	
r 3.53 (1) (j)	31.69
4.5	25.30
6.42 (4)	31.21
6.44	31.21
14.1	31.20
14.2	31.20
(1)	31.33
14.12	31.69
14.16	31.35
14.19 (1), (2)	31.35
14.24, 14.25	22.40
14.43	22.56
Pt 4 Ch 2	25.30
Insolvent Partnerships Order 1994, SI	
1994/2421	31.30
art 7–10	220.3
Law Applicable to Contractual Obligations	
and Non-Contractual Obligations	
(Amendment etc) (EU Exit) Regulations	
2019, SI 2019/834	37.55, 37.63, 39.36
Legal Aid, Sentencing and Punishment of	
Offenders Act 2012 (Commencement	
No. 5 and Saving Provision) Order	
2013 (SI 2013/77)	38.11
Merchant Shipping (Convention on	
Limitation of Liability for Maritime	
Claims) (Amendment) Order 1998, SI	
1998/1258	36.44
Money Laundering, Terrorist Financing and	
Transfer of Funds (Information on the	
Payer) Regulations 2017, SI 2017/692	
.....	18.20
Mortgaging of Aircraft Order 1972, SI	
1972/1268	24.30
art 14 (1)	24.57
Payment Services Regulations 2017, SI	
2017/752	
reg 2 (1)	18.19
66, 67	18.19
74–77	18.19
81–96	18.19
100	18.19
Taking Control of Goods Regulations 2013	
SI 2013/1894	
reg 4	38.124
13	38.124
15, 16	38.124
19	38.124
Unfair Terms in Consumer Contracts	
Regulations 1994, SI 1994/3159	
.....	3.83
Unfair Terms in Consumer Contracts	
Regulations 1999, SI 1999/2083	
.....	3.83

Table of Codes

France		Uniform Commercial Code (UCC) – cont.	
Code Civil		s 2–105 (4)	8.52
art 1104	3.74	207	3.53
1382–1386	40.08	210 (3)	37.98
2279	16.06	302	3.73
		401	8.28, 8.36
		502	8.28, 8.36
		508	12.21
		608	13.23
		615 (b)	3.178
		706	14.63, 15.46
		712	14.65
		713	14.65
		Article 3	20.02
		4A	17.38, 17.43, 18.21, 18.26
		5	
		s 5–109 (a)	35.31
		111	35.120
		114 (2)	35.115
		Article 8	
		s 8–106	24.16
		Article 9	1.09, 16.08, 22.45, 22.78, 24.12, 24.70, 24.71, 25.33, 37.87
		s 9–102	22.15
		102 (a) (11)	26.26
		103 (b)	24.58
		205	29.10
Belgium			
Judicial Code			
art 1717 (4)	39.39		
1718	39.39		
Germany			
Arbitration Law 1998			
art 1040 (3)	39.50		
German BGB			
art 242	374		
Switzerland			
Swiss Civil Code	40.09		
United States			
Uniform Commercial Code (UCC)			
.....	40.09, 40.14, 40.15		
s 1–201(b) (35)	22.15		
203	3.74		
Article 2	8.36, 14.65		

Table of European Treaties and Legislation

EU-UK Withdrawal Agreement		86/653/EEC (EEC Directive on the Co-ordination of the Laws of Member States Relating to Self-Employed Commercial Agents) – <i>cont.</i>	
.....	1.34	art 15	5.38
art 67 (1) (a)	38.80	17	5.32
Single European Act 1986		(2)(b), (c)	5.39
.....	1.30	18–19	5.32, 5.39
Treaty Establishing the European Economic Community (Treaty of Rome) 1957		91/13/EC	1.35
art 81	39.36, 39.37	93/6/EEC (Capital Adequacy Directive)	
82	39.36, 39.37	.....	578
85, 86	39.36	93/13/EEC (EEC Directive on Unfair Contract Terms)	
Treaty of Amsterdam 1997		.....	3.83, 7.42
.....	1.30	97/5/EC (EC Directive on cross-border credit transfers)	4.67
Treaty of Maastricht 1992		97/7/EC (EC Directive on the protection of consumers in respect of distance contracts—Statement)	
.....	1.30	.....	7.42
Treaty of Nice 2001		98/26/EC (EC Directive on settlement finality in payment and securities settlement systems)	
.....	1.30	.....	31.52, 37.103
Treaty of Lisbon	1.30	99/44/EC (Directive on aspects of sale of consumer goods)	1.35, 6.10, 7.42
art 50	1.33	99/93/EC (Electronic Signatures Directive)	
Treaty on the Functioning of the European Union		art 5	3.31
art 101	39.36, 39.37	2002/47/EC (Directive on financial collateral arrangements)	
102	39.36, 39.37	.....	24.03, 31.52, 37.102
128 (1)	17.18	art 2 (2)	25.12
84/450/EEC (EEC Misleading Advertising Directive)	7.42	4	23.42
85/374/EEC (EC Directive on Product Liability)	1.28	6 (1)	22.31
85/577/EEC (EEC Directive on Contracts Negotiated away from Business Premises)	7.42	2007/64/E (Directive on Consumer Credit)	
86/653/EEC (EEC Directive on the Co-ordination of the Laws of Member States Relating to Self-Employed Commercial Agents)	5.08, 5.09, 5.10, 1.35	.....	3.33, 7.42
.....		2008/48/EU (Directive on Consumer Credit)	
art 3	5.32	.....	3.33, 7.42
4	5.29	2009/110/EC (Directive on Consumer Credit)	
5	5.26, 5.29, 5.32	.....	17.09
6	5.32	2011/83/EU (Directive on Consumer Rights)	
6 (1)	5.30	.....	3.35, 7.42
7–10	5.32		
11 (1)	5.32		
(3)	5.32		

Table of European Treaties and Legislation

2013/36/EU (Directive on Capital Requirements)	22.03	European Parliament and Council Regulation 593/2008 on law applicable to contractual obligations (Rome I) – <i>cont.</i>	
2015/2366/EU (Directive on Payment Services in the Internal Market)	18.19, 22.03	art 7 (3)	37.70
2019/771/EU (Directive on contracts for the sale of goods)	6.10, 7.42, 14.66	8	37.72
2019/1023/EU (Directive on preventive restructuring frameworks)	31.70	(1)	37.71
Council Regulation 1346/2000 on insolvency proceedings	40.19	9	37.71
Council Regulation 44/2001 on jurisdiction and the recognition of judgments in civil and commercial matters (Brussels I Regulation)	1.28, 37.04, 37.05	(1)	37.80
Council Regulation EC 805/2004 creating Enforcement Order	37.45	(2), (3)	37.81
Council Regulation EC 1896/2006 for Payment Procedure Order	37.45	10	37.67
European Parliament and Council Regulation 864/2007 on law applicable to non-contractual obligations (Rome II)	37.63	(1), (2)	37.78
European Parliament and Council Regulation 593/2008 on law applicable to contractual obligations (Rome I)	1.28, 37.55, 37.62, 37.63, 37.44, 37.66, 37.83, 33.07, 39.36, 39.103, 39.104, 40.18	11	37.67
Recital (11)	37.67	(1)	37.95
(12)	37.55, 37.67	(4)	37.78
(13)	37.68	12 (1)(b)	37.78
(14)	37.68	(2)	37.78
(17)	37.74	13	37.78
(38)	37.96	14	37.97, 37.99
art 1 (2) (a)	37.78	(1)	37.94, 37.96
(d), (e)	37.65	(2)	37.98
(g)	37.67	19 (2), (3)	37.73
2	37.66	20	37.56
3	37.72, 37.78, 37.79	21	37.70, 37.82
3 (1)	37.67, 37.68, 37.69	24	37.55
(2)	37.69	27 (2)	37.100
(3), (4)	37.71	European Parliament and of the Council Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast)	
(5)	37.67	 1.28, 35.03, 37.04, 37.06, 37.07, 37.45, 38.29, 37.44, 37.48, 38.45, 38.78, 38.98, 38.131, 39.24, 39.24, 39.35, 39.35, 39.103, 39.104, 40.19	
4	37.69, 37.72, 37.78, 37.79	Recital (12)	37.08, 39.55
4 (1) ... 37.73, 37.74, 37.75, 37.76, 37.77		(20)	37.11
(a)–(c)	37.74	(24)	37.26
(2)	37.75, 37.76, 37.78	art 1 (1)	37.08
(3)	37.78	(2)(b)	37.08
(4), (5)	37.76	2	38.77
5	37.72, 37.91	4	37.15, 37.19, 37.24, 37.27, 38.79
(2)	37.70	5	37.14
6	37.72	6	37.08, 37.29
(2)	37.71	(1)	37.28
7	37.72	7	37.24
		7 (1) 37.16, 37.17, 37.18, 37.19	
		(b)	37.21
		(2)	37.16
		(5)	37.16, 37.23
		8	37.14
		(1)–(3)	37.24, 37.34
		9–16	37.14
		17, 18	37.10, 37.14
		18 (1)	37.11, 37.28
		19–21	37.14
		21 (2)	37.28
		22	37.14
		23	37.14, 37.28
		24 37.09, 37.10, 37.12, 37.14, 37.25, 37.27, 37.28, 37.46	

European Parliament and of the Council
Regulation 1215/2012 on jurisdiction
and the recognition and enforcement of
judgments in civil and commercial mat-
ters (Brussels I recast) – *cont.*

art 25	37.10, 37.11, 37.14, 37.25, 37.28
25 (4), (5)	37.11
26	37.10, 37.14
29	37.12
30 (1), (3)	37.12
32	37.12
33, 34	37.26, 38.79
35 (1) (a)	37.47
36	37.45
37 (1), (3)	37.45
38 (a)	37.45
(b)	37.46
39	37.45
42 (1)	37.45
(4)	37.45
43 (1)–(3)	37.45
44	37.46
44 (2)	37.45
45 (1) (a)	37.82
(b)–(d)	37.47
(e)	37.46
(3)	37.46
47	37.46
51	37.45
52	37.47
53	37.45

European Parliament and of the Council
Regulation 1215/2012 on jurisdiction
and the recognition and enforcement of
judgments in civil and commercial mat-
ters (Brussels I recast) – *cont.*

art 62 (2)	37.09
63 (1), (2)	37.09
71	37.08
73 (2)	37.08

European Parliament and of the Council
Regulation 575/2013 on prudential
requirements for credit institutions and
investment firms

4.23

European Parliament and of the Council
Regulation 910/2014 on electronic
identification and trust services for
electronic transactions in the internal
market and repealing Directive
1999/93/EC (eIDAS Regulation)

art 25 (1), (2)	3.31
-----------------	------

European Parliament and of the Council
Regulation on Insolvency Proceedings
(EIR) 848/2015

(EIR) 848/2015	....	1.35,	31.76,	31.86
art 1 (2)	.....		31.85,	31.86
2 (10)	.....		31.86,	31.87
3 (1)	.....		31.86,	31.87
(2)–(4)	.....		31.86,	31.87
7 (1)	.....			31.88
(2)	.....			31.88
(m)	.....			31.89
8 (4)	.....			31.89
19 (1)	.....			31.87

Table of Conventions and Model Laws

Arb-Med-Arb Protocol (AMA Protocol)	38.03
Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968	1.28, 37.03, 8.45
art 2	38.78
Brussels Protocol 1968 revising the Hague Rules 1924 relating to Bills of Lading	32.49
art 2, 3	36.09
6	36.07
Brussels Protocol 1979 further revising the Hague Rules	36.44
Cape Town Convention on International Interests in Mobile Equipment	
art 1 (nn)	3.30
2 (2)	37.91
(4)	37.91
7	37.91
16–29	37.91
48	1.32
51	37.91
Aircraft Equipment Protocol 2001	37.91
art XVII	1.32
Luxembourg Protocol	37.91
Collision Convention 1910	36.40
Convention concerning International Carriage by Rail 1980 (COTIF Convention)	36.86
Convention for the Unification of Certain Rules for International Carriage by Air on 28 May 1999 (Montreal Convention)	36.86
Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 (Warsaw Convention)	36.86
Convention on the Contract for the International Carriage of Goods by Road 1956 (CMR Convention)	36.86
Convention on the Law Governing Transfer of Title in International Sales of Goods 1958	37.83
Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019	1.28, 37.44, 37.54, 39.94, 39.109
art 26, 27	1.32
European Convention for the Protection of Human Rights and Fundamental Freedoms 1950	
art 6	37.47, 38.76, 39.63
6 (1)	37.51, 39.29
European Convention on Products Liability in Regard to Personal Injury and Death 1977	1.28
Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR) 1956	1.28
Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes 1930	20.02
art 7	20.92
45	20.84
Hague Convention on Choice of Court Agreements 2005	1.28, 37.44, 39.29
art 1 (1)	37.40
2	37.40
5	37.40
(1), (2)	37.41
6	37.40
(1) (a)–(e)	37.41
8	37.40
(1), (2)	37.53
9	37.40, 37.53
11	37.53
22	37.40

Table of Conventions and Model Laws

Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary 2002	37.102
art 18	1.32
Hague Convention on the Law Applicable to Contracts for the International Sale of Goods 1986	1.28, 33.02, 37.83
Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters	38.133
Hague Rules 1924	36.07, 36.11, 36.22, 36.30
Hague-Visby Rules	
... 36.01, 36.07, 36.09, 30.10, 36.11, 36.17, 36.25, 36.29, 36.31, 36.38, 36.52, 36.86, 36.87, 36.97, 32.87	
art I (b)	36.15
(e)	36.26
III	36.29
r 1 . 36.27, 36.30, 36.34, 36.41, 36.54, 36.58, 36.77	
2	36.28, 36.41
3 (a), (b)	36.32
proviso	36.32
r 4	36.52
5	36.56
6	36.30, 36.50, 36.51
8	36.28, 36.41, 36.42
art IV	36.06, 36.34
r 1	36.28, 36.44, 36.54, 36.77
2 .. 36.39, 36.41, 36.44, 36.54, 36.77	
(a)	36.34
4	36.34, 36.77
5	36.30, 36.56
(a)	36.44, 36.97
(c)	36.44, 36.47
(e)	36.49
6	36.58, 36.59
8	36.28, 36.42
art VI	36.30
VII	36.42
X	36.11, 36.14, 36.15, 36.16
Hamburg Rules 1978	
... 36.17, 36.44, 36.87, 36.88, 36.94	
art 8	
r 1	36.50
art 9	
r 1	36.29
art 31	36.09
International Convention for the unification of certain rules relating to Arrest of Sea-going Ships 1952 (Lugano II)	37.43, 37.49
London Convention on the Limitation of Liability for Maritime Claims 1976	36.12, 36.44
art 4	36.49
8	36.44
Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988	37.03, 37.04, 38.45, 38.98
New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958	37.08, 37.54, 39.05, 39.07, 39.19, 39.35, 39.57, 39.78, 39.94, 39.106, 39.108, 39.109
art II (3)	39.54
V	39.07, 39.41, 39.94, 39.106
V (1) (a)	39.21, 39.40
(e)	39.21, 39.40
(2)	39.21
VII	39.40, 39.41
Principles on Choice of Law in International Commercial Contracts (Hague Principles)	1.28
Rome Convention on the Law Applicable to Contractual Obligations 1980	1.28, 37.62, 37.63, 37.64 37.67, 37.69, 37.91, 39.36
art 4 (1)	37.73
(4)	37.90
(5)	37.77
7 (1)	37.82, 39.36
12	37.97
Stockholm Convention 1960 Establishing the European Free Trade Association	1.28
UNCITRAL Model Law on Cross-Border Insolvency 1997	1.28, 31.81
UNCITRAL Model Law on Electronic Commerce 1996	1.28
art 6 (1)	3.30
UNCITRAL Model Law on Electronic Signatures 2001	1.28
UNCITRAL Model Law on International Commercial Arbitration 1985	1.28, 1.29
UNCTAD Convention on International Multimodal Transport of Goods 1980	32.88, 36.86, 36.87
art 1 (1), (3)	36.88
2 (2)	36.88
3 (1), (2)	36.88
5	36.89
8	36.89
10	36.89
11	36.89
14 (1)	36.90
15	36.90
16 (1)	36.91
17	36.91
18 (1), (2), (4), (5), (7)	36.92
19	36.92
31	36.92

UNIDROIT Convention on Agency in the International Sale of Goods 1983		United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG) – <i>cont.</i>	
art 12	5.33	art 19 (1)–(3)	33.24
13	5.05, 5.10	22	33.24
14 (2)	5.33	24	33.24
UNIDROIT Convention on International Factoring 1988	1.28, 29.52, 40.18	25	33.06, 33.17, 33.22, 33.27, 33.29
art 4 (1)	3.30	28	33.17
6 (1), (2)	3.29	34	33.22, 33.32
18	37.99	35 (2) (d)	33.26
UNIDROIT Convention on International Financial Leasing 1988		(3)	33.22
.....	1.28	36	33.22
art 8	28.15	37	33.22, 33.32
10	28.15	38 (1)	33.30
UNIDROIT Convention on Substantive Rules for Intermediated Securities 2009		39	33.29
art 2 (1)	37.102	39 (1), (2)	33.30
4 (1)	37.102	40	33.22
5	37.102	43 (2)	33.22
19	37.102	44	33.22
UNIDROIT Convention on Substantive Rules for Intermediated Securities 2013		46 (2), (3)	33.28, 33.29
.....	1.28	47	33.28
Uniform Law on the Formation of Contracts for the International Sale of Goods 1964	33.02	48 (1)	33.32
Uniform Law on the International Sales of Goods 1964 (ULIS)		49	33.20, 33.22
.....	33.06	(1)	33.30, 33.32
art 1	33.08	(a)	33.28, 33.29
3	33.02	(b)	33.28
36 (1)	33.28	50	33.31, 33.38
United Nations Convention on the Assignment of Receivables in International Trade 2001		51	33.28
.....	1.28, 40.18	63	33.28
art 5 (c)	3.30	64 (1) (a), (b)	33.28
United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG)	1.28, 33.02, 33.05, 33.12, 33.13, 33.15, 33.19, 37.83	67	33.35
art 1	33.08	68	33.22, 33.35
1 (1)	33.07, 33.11	69	33.35
(a)	33.07, 33.08, 33.09, 33.11, 33.17	70	33.35
(b)	33.07, 33.09, 33.11	71 (1)	33.33
(2)	33.07	72 (1)	33.33
2	32.02, 33.16, 37.83	73	33.28
3	33.07, 33.20	74–76	33.20
4	33.18	78	33.04, 33.06, 33.22
6	33.17, 33.20, 33.39	79	33.04, 33.27, 33.38, 33.39
7 (1)	33.20, 33.21, 33.21	(1)	33.36
(2)	37.83, 33.19, 33.21, 33.22	(3), (4)	33.37
10	33.07	(5)	33.36
11	33.23	81	33.28
12	33.17	82 (1)	33.29
16 (1)	33.24	92	33.10, 33.11
(2) (a), (b)	33.24	95	33.09, 33.10, 33.11, 33.20
18 (2), (3)	33.24	96	33.10, 33.20, 33.23
		United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the “Rotterdam Rules”)	
		... 32.66, 32.73, 32.88, 36.44, 36.100	
		Preamble	32.88
		art 1 (1)	32.88, 36.99
		(18)–1 (20)	32.66
		6, 7	36.99
		26	32.88, 36.99
		82	32.88, 36.99
		94	36.99

Table of Conventions and Model Laws

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit 1995	1.28	United Nations Convention on Transparency in Treaty-based Investor- State Arbitration (New York, 2014)	1.28
art 14	35.160	Vienna Convention on Contracts for the International Sale of Goods 1974	9.02, 32.27, 33.01, 33.03
19 (1)	35.117	art 19	3.53
20	35.160	24 (4)	37.90
United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (Singapore Convention on Mediation)	1.28, 39.102	48	12.21

Table of Uniform Rules, Uniform Trade Terms and Restatements

CMI Uniform Rules for Sea Waybills 1990	32.04, 32.79
CMI Rules for Electronic Bills of Lading 1990	32.04
ICC Rules of Arbitration 2012	39.19, 39.59
art 41	39.37
ICC Rules of Arbitration 2014	39.19
ICC Rules of Conciliation and Arbitration 1998	
art 4 (2)	39.13
11 (1)	39.43
21 (2)	33.14
ICC Rules for a Pre-Arbitral Referee Procedure 1990	38.06
ICC Uniform Rules for Contract Bonds	
art 7 (j)	30.14
LCIA Rules 1998	39.55, 39.59
art 1	39.13
25.1 (iii)	39.75
UNCITRAL Arbitration Rules 1976	
art 33 (1)	39.42
UNCITRAL Arbitration Rules 2010	
art 35 (1)	39.42
UNCITRAL Arbitration Rules 2013	39.24, 39.101
art 6 (2)	39.10
(4)	39.10
UNCITRAL Model Law on Cross-Border Insolvency (1997)	31.76
UNCITRAL Model Law on Electronic Commerce (1996)	
art 6 (1)	3.30
UNCITRAL Model Law on Electronic Transferable Records (2017)	1.28
UNCITRAL Model Law on International Commercial Arbitration	39.18, 40.18
art 1 (1)	39.16
(3)	39.14
16 (1)	39.53
UNCITRAL Model Law on International Commercial Arbitration – <i>cont.</i> art 28 (1), (2)	39.42
UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018)	1.28
UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)	1.28
UNCITRAL Model Law on Secured Transactions (2016)	1.28
UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration	39.10
UNCTAD/ICC Rules for Multimodal Transport Documents (ICC 481) 1992	36.87, 36.94
r 1 (a)	36.94
2 (a)	36.94
(d)	36.94
5	36.94
11 (a)	36.94
(c)	36.94
13	36.95
14	36.96
UNIDROIT Principles of International Commercial Contracts	5.10
art 2.1.11	3.53
Ch 2, s 2 (art 2.2.1–2.2.10)	5.10
UNIDROIT Principles of International Contracts	
art 6.2.1	3.174
6.2.2, 6.2.3	3.174, 33.38
6.111	3.174
Uniform Customs and Practice for Documentary Credits 1993 (UCP 500)	1.23, 35.28
art 2	35.26
3	35.20

Table of Uniform Rules, Uniform Trade Terms and Restatements

Uniform Customs and Practice for Documentary Credits 1993 (UCP 500) – <i>cont.</i>	
art 6 (c)	35.28
8(b)	35.26
9 (a) (iv)	35.97, 35.98
18	35.87
20–38	35.89
20b	35.64
30	32.87
43	35.70
Uniform Customs and Practice for Documentary Credits for Electronic Presentation (eUCP)	
.....	32.49
Uniform Customs and Practice (UCP 600)	
... ..	32.49, 35.11, 35.12, 35.21, 35.28, 35.41, 35.42, 35.43, 35.44, 35.45, 35.46, 35.48, 35.141, 35.160
art 1	35.42
2	35.12, 35.15, 35.22, 35.23, 35.26, 35.29, 35.34, 35.115
3	35.26, 35.92
4 (a)	35.20, 35.52
(b)	35.20
5	35.60
6 (a)	35.24, 35.96
(b)	35.30
(c)	35.97
(d) (i)	35.80
(ii)	35.24
7	35.23
(a)	35.98
(b)	35.49
(c)	35.31, 35.88
8	35.23
(a)	35.93
(i)	35.98
(ii)	35.37, 35.95
(b)	35.49
(c)	35.31, 35.88
9	35.115
(a)	35.23, 35.95
12 (a)	35.23, 35.37, 35.95
(b)	35.31
13 (b) (iii)	35.88
(c)	35.88
14	35.66, 35.120
(a)	35.60
(c)	35.80, 35.89
(d), (e)	35.70, 35.89
(h)	35.63
16 (b)	35.72
(c) (i), (ii)	35.90
(iii) (a), (b)	35.90
(d)–(g)	35.90
17 (a)	35.64
(b)	35.64, 35.65
(c), (d)	35.66
18 (c)	35.89
19	32.87, 35.73, 35.89
20 (a) (i)	36.17

Uniform Customs and Practice (UCP 600) – <i>cont.</i>	
art 20 (c), (d)	35.89
21	32.87, 35.89
22–26	35.89
27	32.64, 35.87, 35.89
28	35.89
30(a), (b)	35.71
35	35.46
37	35.46, 35.82, 35.86, 35.87, 35.94
38	35.127
(a), (b)	35.128
(d)	35.132
(g)	35.131
(h)	35.130
39	35.137, 35.139
Uniform Rules for Collections 1995 (URC 552)	
	1.23
Uniform Rules for a Combined Transport Document (ICC 298) 1975	
.....	32.31, 32.88, 36.87
art 2.1	36.97
2.6	36.97
4.1	36.97
5.1	36.97
6.1	36.97
6.3, 6.4	36.97
10	36.97
Uniform Rules for Contract Bonds (ICC 524) 1994	
	1.23
Uniform Rules for Contract Guarantees (ICC 325) 1978	
	35.158
Uniform Rules for Demand Guarantees (ICC 458) 1992 .	
	1.23, 35.155, 35.159
art 2	35.161
6 (c)	35.166
15 ..	35.87, 35.170, 35.171, 35.173
23	35.173
Uniform Rules for Demand Guarantees (URGD 758) 2010	
.....	35.09, 35.87, 35.154, 35.155, 35.157
art 1 (d)	35.160
2	35.161, 35.162, 35.164
3(b)	35.166
4(b)	35.166
5 (a)	35.167
(b)	35.167, 35.169
15	35.171, 35.172
(a), (b)	35.170
19 (a)	35.166
23 (a)	35.173
(b)	35.174
(c)	35.173, 35.174
(d)	35.173
(e)	35.173
(f)	35.173
25 (b)(i)–(iii)	35.175
27–29	35.169
30	35.87, 35.169

Table of Cases

A

A v C [1981] QB 956	38.97
AA v Persons unknown who demanded Bitcoin on 10th and 11th October 2019 [2019] EWHC 3556 (Comm), [2020] 4 WLR 35	1.62, 2.16, 17.26
ABN Amro Bank NV v Chiyu Banking Corpn Ltd [2001] 2 HKLRD 175	24.46
ABN Amro Commercial Finance plc v McenGinn [2014] EWHC 1674 (Comm), [2014] 2 Lloyd's Rep 333, [2014] All ER (D) 206 (May)	30.07
AEG (UK) Ltd v Logic Resource Ltd [1996] CLC 265, CA	3.50
AKAS Jamal v Moolla Dawood, Sons & Co [1916] 1 AC 175, 85 LJPC 29, 60 Sol Jo 139, 114 LT 1, 32 TLR 79, PC	15.41
AMB Imballaggi Plastici SRL v Pacflex Ltd [1999] 2 All ER (Comm) 249, [1999] All ER (D) 640	5.13
AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft mbh [2015] EWCA Civ 143, [2015] QB 699, [2015] 3 WLR 282, [2016] 1 All ER (Comm) 486, [2015] All ER (D) 304 (Feb)	37.13
ASM Shipping Ltd v Harris [2007] EWHC 1513 (Comm), [2008] 1 Lloyd's Rep 61, (2007) Times, 6 August, [2007] ArbLR 5, [2007] Bus LR D105, [2007] All ER (D) 364 (Jun)	39.81
ASM Shipping Ltd of India v TTMI Ltd of England [2005] EWHC 2238 (Comm), [2006] 2 All ER (Comm) 122, [2005] ArbLR 5, [2005] All ER (D) 271 (Nov)	39.90
ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (1990) 27 FCR 460	7.20
Abbey National Building Society v Cann [1991] 1 AC 56, [1990] 1 All ER 1085, [1990] 2 WLR 832, 60 P & CR 278, [1990] 2 FLR 122, [1990] Fam Law 397, 22 HLR 360, 11 LDAB 607, [1990] 17 LS Gaz R 32, [1990] NLJR 477, HL	24.60, 24.69
Abbey National plc v JSF Finance & Currency Exchange Co Ltd [2006] EWCA Civ 328, [2006] All ER (D) 474 (Mar)	21.06
Abbhi v Slade (trading as Richard Slade and Co) [2019] EWCA Civ 2175, [2019] Costs LR 2039, [2019] All ER (D) 48 (Dec)	30.07
Ablynx NV v VHSquared Ltd [2019] EWCA Civ 2192, [2020] 2 All ER 601, [2020] 1 WLR 1412, [2020] 1 All ER (Comm) 512, [2019] All ER (D) 64 (Dec)	37.10
Abouloff v Oppenheimer & Co (1882) 10 QBD 295, 52 LJQB 1, 31 WR 57, [1881–5] All ER Rep 307, 47 LT 325, CA	37.40
Abrahams (S) & Sons, Re [1902] 1 Ch 695, 71 LJ Ch 307, 9 Mans 176, 50 WR 284, 46 Sol Jo 281, 86 LT 290, 18 TLR 336	24.53
Abuja International Hotels Ltd v Meridien SAS [2012] EWHC 87 (Comm), [2012] 1 Lloyd's Rep 461, [2012] NLJR 213, [2012] All ER (D) 169 (Jan)	39.90
Accentuate Ltd v Asigra Inc [2009] EWHC 2655 (QB), [2010] 2 All ER (Comm) 738, [2009] 2 Lloyd's Rep 599, [2009] All ER (D) 306 (Oct)	39.36
Ace Imports Pty Ltd v Companhia de Navegacio Lloyd Brasileiro, The Esmeralda I [1988] 1 Lloyd's Rep 206, NSW SC	36.83
Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GLEN SpA [2001] EWCA Civ 1477, [2002] 4 All ER 468, [2002] 1 WLR 566, [2002] BLR 44, [2001] All ER (D) 137 (Oct); affd [2003] UKHL 17, [2003] 2 AC 541, [2003] 2 All ER 615, [2003] 2 WLR 1060, [2003] 2 All ER (Comm) 331, 88 ConLR 208, [2005] 1 BCLC 606, [2003] NLJR 563, [2003] BLR 207, (2003) Times, 4 April, 147 Sol Jo LB 418, [2004] 1 LRC 25, [2003] All ER (D) 69 (Apr)	30.17

Adams v Cape Industries plc [1990] Ch 433, [1991] 1 All ER 929, [1990] 2 WLR 657, [1990] BCLC 479, [1990] BCC 786, [1990] 11 LS Gaz R 36	37.31, 37.49
Adler v Dickson [1955] 1 QB 158, [1954] 3 All ER 397, [1954] 3 WLR 696, [1954] 2 Lloyd's Rep 267, 98 Sol Jo 787, CA	36.75
African Export-Import Bank v Shebah Exploration & Production Company Ltd [2017] EWCA Civ 845, [2018] 2 All ER 144, [2018] 1 WLR 487, [2018] 1 All ER (Comm) 535, [2017] 2 Lloyd's Rep 111, 173 ConLR 53, [2017] All ER (D) 177 (Jun)	3.78
Agip (Africa) Ltd v Jackson [1991] Ch 547, [1992] 4 All ER 451, [1991] 3 WLR 116, 135 Sol Jo 117	2.67, 16.94, 17.38, 17.39, 17.40
Agnew v IRC [2001] UKPC 28, [2001] 2 AC 710, [2001] 3 WLR 454, [2001] Lloyd's Rep Bank 251, [2001] 2 BCLC 188, [2001] BCC 259, [2001] 5 LRC 478, [2001] All ER (D) 21 (Jun), CSRC vol 25 iss 13/1	22.27, 22.59, 25.05, 29.11
Agnew v Lansforsakringbolagens AB [2001] 1 AC 223, [2000] 1 All ER 737, [2000] 2 WLR 497, [2000] 1 All ER (Comm) 321, [2000] Lloyd's Rep IR 317, [2000] 09 LS Gaz R 39, [2000] All ER (D) 201, HL	37.18
Agricultores Federados Argentinos Sociedad Cooperativa Ltda v Ampro SA Commerciale, Industrielle et Financière [1965] 2 Lloyd's Rep 157	12.20, 34.06
Agricultural Mortgage Corpn plc v Woodward (1994) 70 P & CR 53, [1996] 2 FCR 796, [1996] 1 FLR 226, [1996] Fam Law 149, [1995] 1 BCLC 1, [1994] BCC 688, [1995] 1 EGLR 1, [1995] 04 EG 143	31.40
Agroexport State Enterprise for Foreign Trade v Compagnie Européenne de Céréales [1974] 1 Lloyd's Rep 499	3.178, 34.11
Aiglon Ltd and L'Aiglon SA v Gau Shan Co Ltd [1993] 1 Lloyd's Rep 164, [1993] BCLC 1321	38.97
Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd and Securicor (Scotland) Ltd [1983] 1 All ER 101, [1983] 1 WLR 964, [1983] 1 Lloyd's Rep 183n, 127 Sol Jo 508, [1983] LS Gaz R 2156, 1982 SLT 377, HL	3.77
Air Transworld Ltd v Bombardier In [2012] EWHC 243 (Comm), [2012] 2 All ER (Comm) 60, [2012] 1 Lloyd's Rep 349, [2012] NLJR 504, [2012] Bus LR D109, [2012] All ER (D) 193 (Mar)	11.130
Airbus Industrie GIE v Patel [1999] 1 AC 119, [1998] 2 All ER 257, [1998] 2 WLR 686, [1998] 1 Lloyd's Rep 631, [1998] 18 LS Gaz R 32, [1998] NLJR 551, 142 Sol Jo LB 139, [1999] 2 LRC 438, HL	38.81
Airservices Australia v Ferrier (1996) 185 CLR 483	31.48
Ajayi (t/a Colony Carrier Co) v RT Briscoe (Nigeria) Ltd [1964] 3 All ER 556, [1964] 1 WLR 1326, 108 Sol Jo 857, PC	3.96
Akbar Khan v Attar Singh [1936] 2 All ER 545, 80 Sol Jo 718, PC	21.02
Akers v Samba Financial Group [2017] UKSC 6, [2017] 2 All ER 799, [2017] 2 WLR 713, [2017] 2 All ER (Comm) 97, [2017] 1 BCLC 151, 20 ITEL 554, 167 NLJ 7733, (2017) Times, 06 February, [2017] AC 424, [2017] WTLR 373, [2017] BPIR 263, [2017] All ER (D) 06 (Feb), SC	2.33, 31.51
Al Wahab, The. See Amin Rasheed Shipping Corpn v Kuwait Insurance Co, The Al Wahab	
Alan (W J) & Co Ltd v El Nasr Export and Import Co (1972) 9 LDAB 266, [1972] 2 QB 189, [1972] 2 All ER 127, [1972] 2 WLR 800, [1972] 1 Lloyd's Rep 313, 116 Sol Jo 139	35.77
Alan Ramsay Sales & Marketing Ltd v Typhoo Tea Ltd [2016] EWHC 486 (Comm), [2016] 4 WLR 59, [2016] All ER (D) 72 (Mar)	5.39
Alaskan Trader, The. See Clea Shipping Corpn v Bulk Oil International Ltd, The Alaskan Trader	
Alati v Kruger (1955) 94 CLR 216, ALR 1047, [1956] QSR 306, 29 ALJ 512, Aus HC	3.97, 3.98
Albacruz (Cargo Owners) v Albazero (Owners), The Albazero [1977] AC 774, [1976] 3 All ER 129, [1976] 3 WLR 419, [1976] 2 Lloyd's Rep 467, 120 Sol Jo 570, 126 NLJ 953, HL	3.123, 34.27
Albazero, The. See Albacruz (Cargo Owners) v Albazero (Owners), The Albazero Albarmarle Supply Co Ltd v Hind & Co [1928] 1 KB 307, 97 LJKB 25, [1927] All ER Rep 401, 71 Sol Jo 777, 138 LT 102, 43 TLR 783, CA	22.66
Aldridge v Johnson (1857) 7 E & B 885, 26 LJQB 296, 3 Jur NS 913, 5 WR 703	7.36
Alecos M, The. See Sealace Shipping Co Ltd v Oceanvoice Ltd, The Alecos M	

Alev, The. See Vantage Navigation Corpn v Suhail and Saud Bahwan Building Materials Inc, The Alev	
Alexander v Vane (1836) 5 LJ Ex 187, 2 Gale 57, 1 M & W 511, Tyr & Gr 865, 150 ER 537, Exch Ct	30.33
Alexander (as representative of the 'Property118 Action Group') v West Bromwich Mortgage Company Ltd [2016] EWCA Civ 496	38.11
Ali v Petroleum Company of Trinidad and Tobago [2017] UKPC 2, [2017] 2 LRC 567, [2017] IRLR 432, [2017] ICR 531, [2017] All ER (D) 133 (Mar), PC	3.57
Ali Shipping Corpn v Shipyard Trogir [1998] 2 All ER 136, [1999] 1 WLR 314, [1998] 1 Lloyd's Rep 643	39.62
Alimport v Soubert Shipping [2000] 2 Lloyd's Rep 447	36.52
Alize 1954 v Allianz Elementar Versicherungs AG [2019] EWHC 481 (Admlty), [2019] 2 All ER (Comm) 679, [2019] Bus LR 1453, [2019] 1 Lloyd's Rep 595, [2019] All ER (D) 89 (Mar); affd [2020] EWCA Civ 293, [2020] All ER (D) 35 (Mar)	36.27, 36.34, 36.41, 36.54
All Trades Distributors Ltd v Agencies Kaufman Ltd (1969) 113 Sol Jo 995, CA	20.115
Allan (JM) (Merchandising) Ltd v Cloke [1963] 2 QB 340, [1963] 2 All ER 258, [1963] 2 WLR 899, 61 LGR 304, 107 Sol Jo 213, CA	3.160
Allester (David) Ltd, Re [1922] 2 Ch 211, 91 LJ Ch 797, [1922] B & CR 190, 3 LDAB 264, [1922] All ER Rep 589, 66 Sol Jo 486, 127 LT 434, 38 TLR 611	35.150
Alliance Bank JSC v Aquanta Corporation [2012] EWCA Civ 1588, [2013] 1 All ER (Comm) 819, [2013] 1 Lloyd's Rep 175, [2012] All ER (D) 230 (Dec)	37.36
Allianz Insurance plc (Formerly Cornhill Insurance plc) v Tonicstar Ltd (on its own behalf and behalf of the other corporate members of Lloyd's Syndicates 62, 1861 and 2255) [2018] EWCA Civ 434, [2018] 2 All ER (Comm) 1080, [2018] Bus LR 2347, [2018] Lloyd's Rep IR 221, 168 NLJ 7787, [2018] All ER (D) 125 (Mar)	39.24
Allianz SpA v West Tankers Inc: C-185/07 [2009] AC 1138, [2009] ECR I-663, [2009] 3 WLR 696, [2009] 1 Lloyd's Rep 413, (2009) Times, 13 February, [2009] All ER (D) 82 (Feb), sub nom West Tankers Inc v Riunione Adriatica di Sicurtà SpA, The Front Comor: C-185/07 [2009] 1 All ER (Comm) 435, [2009] All ER (EC) 491, [2008] 2 Lloyd's Rep 661, ECJ	37.08, 37.13, 38.81
Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D [1983] 3 All ER 737, [1984] 1 WLR 1, [1983] 2 Lloyd's Rep 411, 127 Sol Jo 729; revsd [1985] 2 All ER 796, [1985] 1 WLR 925, [1985] 2 Lloyd's Rep 18, 129 Sol Jo 431, [1985] LS Gaz R 2160	3.32
Allied Mills Ltd v Gwydir Valley Oilseeds Pty Ltd [1978] 2 NSWLR 26, NSW CA	9.17
Al Nehayan v Kent [2018] EWHC 333, [2018] 1 CLC 216 (Comm)	3.75
Alternative Power Solution Ltd v Central Electricity Board [2014] UKPC 31, [2014] 4 All ER 882, [2015] 1 WLR 697, [2014] 2 All ER (Comm) 1096, 164 NLJ 7623, [2015] 2 LRC 623, [2014] All ER (D) 55 (Sep)	35.109
Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd [1976] 2 All ER 552, [1976] 1 WLR 676, [1976] 1 Lloyd's Rep 443, 9 LDAB 426, 120 Sol Jo 95	17.40, 22.33, 27.28
Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd [1982] QB 84, [1981] 3 All ER 577, [1981] 3 WLR 565, [1982] 1 Lloyd's Rep 27, 125 Sol Jo 623	3.97
Amco Enterprises Pty Ltd v Wade [1968] Qd R 445	7.20
Amec Civil Engineering Ltd v Secretary of State for Transport [2005] EWCA Civ 291, [2005] 1 WLR 2339, 101 ConLR 26, [2005] BLR 227, [2005] 12 EG 219 (CS), (2005) Times, 22 March, [2005] ArblR 4, [2005] All ER (D) 280 (Mar)	39.33
American Cyanamid Co v Ethicon Ltd [1975] AC 396, [1975] 1 All ER 504, [1975] 2 WLR 316, [1975] FSR 101, [1975] RPC 513, 119 Sol Jo 136, HL	38.93
Amin Rasheed Shipping Corpn v Kuwait Insurance Co, The Al Wahab [1984] AC 50, [1983] 2 All ER 884, [1983] 3 WLR 241, [1983] 2 Lloyd's Rep 365, 127 Sol Jo 492, HL	37.56
Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd [1975] AC 561, [1975] 1 All ER 968, [1975] 2 WLR 779, 119 Sol Jo 301, PC	3.165
Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd [2013] EWCA Civ 577, [2013] 4 All ER 377, 148 ConLR 1, [2013] BLR 400, [2013] PLSCS 117, [2013] All ER (D) 305 (May)	3.145
Anderson, Re [1911] 1 KB 896, 80 LJKB 919, 18 Mans 217, 104 LT 221	31.17

Andrew, Re, ex p Official Receiver (Trustee) [1937] Ch 122, [1936] 3 All ER 450, 106 LJ Ch 195, [1936–7] B & CR 205, 80 Sol Jo 932, 155 LT 586, 53 TLR 90, CA	22.74
Andrews v Hopkinson [1957] 1 QB 229, [1956] 3 All ER 422, [1956] 3 WLR 732, 100 Sol Jo 768	27.27
Angel Bell, The. See Iraqi Ministry of Defence v Arcepey Shipping Co SA (Gillespie Bros intervening), The Angel Bell	
Anglia Television Ltd v Reed [1972] 1 QB 60, [1971] 3 All ER 690, [1971] 3 WLR 528, 115 Sol Jo 723	3.09
Anglo-African Merchants Ltd v Bayley [1970] 1 QB 311, [1969] 2 All ER 421, [1969] 2 WLR 686, [1969] 1 Lloyd's Rep 268, 113 Sol Jo 281	5.24
Anglo-Continental Holidays Ltd v Typaldos (London) Ltd [1967] 2 Lloyd's Rep 61, 111 Sol Jo 599, CA	3.126
Anglo-Oriental Carpet Manufacturing Co, Re [1903] 1 Ch 914, 72 LJ Ch 458, 10 Mans 207, 51 WR 634, 88 LT 391	24.55
Anglo-Russian Merchant Traders Ltd and John Batt & Co (London) Ltd, Re [1917] 2 KB 679, 86 LJKB 1360, 61 Sol Jo 591, 116 LT 805, CA	34.11
Angove's Pty Ltd v Bailey [2016] UKSC 47, [2016] 1 WLR 3179	2.12, 5.25, 5.38
Ankar Pty Ltd v National Westminster Finance (Australia) Ltd (1987) 162 CLR 549, 70 ALR 641, 61 ALJR 245, Aus HC	30.39
Annand & Thompson Pty Ltd v Trade Practices Commission (1979) ATPR 40-116	11.71
Anonima Petroli Italiana SpA and Neste Oy v Marlucidez Armadora SA, The Filiatra Legacy [1991] 2 Lloyd's Rep 337, CA	34.27
Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios [1985] AC 191, [1984] 3 All ER 229, [1984] 3 WLR 592, [1984] 2 Lloyd's Rep 235, 128 Sol Jo 564, [1984] LS Gaz R 2776, HL	3.68, 39.91
Antaios, The. See Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios	
Antares, The. See Kenya Railways v Antares Co Pte Ltd, The Antares	
Anticosti Shipping Co v Viateur St Amand [1959] 1 Lloyd's Rep 352, [1959] SCR 372, 19 DLR (2d) 472, Can SC	36.23
Anton Durbeck GmbH v Den Norske Bank ASA [2003] EWCA Civ 147, [2003] QB 1160, [2003] 4 All ER 543, [2003] 2 WLR 1296, [2003] 2 All ER (Comm) 411, [2003] 12 LS Gaz R 29, (2003) Times, 6 February, [2003] All ER (D) 16 (Feb)	37.23
Aqaba Container Terminal (Pvt) Co v Soletanche Bachy France SAS [2019] EWHC 471 (Comm), [2020] 1 All ER (Comm) 86, [2019] 1 Lloyd's Rep 431, 169 NLJ 7845, [2019] All ER (D) 183 (Mar)	39.55
Arab Bank Ltd v Ross [1952] 2 QB 216, [1952] 1 All ER 709, 6 LADAB 286, 96 Sol Jo 229, [1952] 1 TLR 811, CA	20.41
Arab Bank plc v Merchantile Holdings Ltd [1994] Ch 71, [1994] 2 All ER 74, [1994] 2 WLR 307, 69 P & CR 410, [1994] 1 BCLC 330, [1993] BCC 816, [1994] 12 LS Gaz R 37	23.37
Aramis, The [1989] 1 Lloyd's Rep 213, (1988) Financial Times, 22 November, CA	36.64
Ark Shipping Co LLC v Silverburn Shipping (IoM) Ltd [2019] EWCA Civ 1161	3.145
Archbolds (Freightage) Ltd v S Spanglett Ltd (Randall, third party) [1961] 1 QB 374, [1961] 1 All ER 417, [1961] 2 WLR 170, 105 Sol Jo 149, CA	3.166
Arcos Ltd v EA Ronaasen & Son [1933] AC 470, 45 Ll L Rep 33, 102 LJKB 346, 38 Com Cas 166, [1933] All ER Rep 646, 77 Sol Jo 99, 149 LT 98, 49 TLR 231, HL	3.113, 11.30, 12.03, 13.35, 33.29
Ardennes, SS (Cargo Owners) v SS Ardennes (Owners) [1951] 1 KB 55, [1950] 2 All ER 517, 84 Ll L Rep 340, 94 Sol Jo 458, 66 (pt 2) TLR 312	36.23
Argentum Lex Wealth Management Ltd v Giannotti [2011] EWCA Civ 1341'	31.32
Argo Caribbean Group Ltd v Lewis [1976] 2 Lloyd's Rep 289, CA	30.07, 30.33
Argy Trading Development Co Ltd v Lapid Developments Ltd [1977] 3 All ER 785, [1977] 1 WLR 444, [1977] 1 Lloyd's Rep 67, 120 Sol Jo 677	3.93
Aries Tanker Corp'n v Total Transport Ltd, The Aries [1977] 1 All ER 398, [1977] 1 WLR 185, [1977] 1 Lloyd's Rep 334, 121 Sol Jo 117, HL	36.50
Aries, The. See Aries Tanker Corp'n v Total Transport Ltd, The Aries	
Arkin v Borchard Lines Ltd [2005] EWCA Civ 655, [2005] 3 All ER 613, [2005] 1 WLR 3055, [2005] 2 Lloyd's Rep 187, [2005] NLJR 902, (2005) Times, 3 June, [2005] 4 Costs LR 643, [2005] All ER (D) 410 (May)	38.11

Armagas Ltd v Mundogas SA, The Ocean Frost [1986] AC 717, [1986] 2 All ER 385, [1986] 2 WLR 1063, [1986] 2 Lloyd's Rep 109, 2 BCC 99, 197, 130 Sol Jo 430, [1986] LS Gaz R 2002, [1986] NLJ Rep 511, HL	5.11, 5.20
Armaghdown Motors Ltd v Gray [1963] NZLR 5	13.14
Armar Shipping Co Ltd v Caisse Algérienne d'Assurance et de Réassurance, The Armar [1981] 1 All ER 498, [1981] 1 WLR 207, [1980] 2 Lloyd's Rep 450, 125 Sol Jo 79	37.70
Armour v Thyssen Edelstahlwerke AG [1991] 2 AC 339, [1990] 3 All ER 481, [1990] 3 WLR 810, [1991] 1 Lloyd's Rep 95, [1991] BCLC 28, [1990] BCC 925, 134 Sol Jo 1337, 1990 SLT 891, HL	22.32
Armstrong DLW GmbH v Winnington Networks Ltd [2012] EWHC 10 (Ch), [2013] Ch 156, [2012] 3 All ER 425, [2012] 3 WLR 835, [2012] Bus LR 1199, [2012] 05 LS Gaz R 19, [2012] NLJR 181, [2012] All ER (D) 64 (Jan)	2.16
Arnhold Karberg & Co v Blythe, Green, Jourdain & Co [1915] 2 KB 379, 34 LJKB 1673, 21 Com Cas 1, 113 LT 185, 31 TLR 351; affd sub nom Karberg and Co v Blythe, Green, Jourdain and Co Limited [1916] 1 KB 495, 85 LJKB 665, 13 Asp MLC 235, 21 Com Cas 174, 60 Sol Jo 156, 114 LT 152, 32 TLR 186, [1914–15] All ER Rep Ext 1221, CA	34.21, 34.34
Arnold v Britton [2015] UKSC 36, [2015] AC 1619, [2016] 1 All ER 1, [2015] 2 WLR 1593, [2015] 2 P & CR 282, [2015] HLR 627, 165 NLJ 7657, (2015) Times, 19 June, [2015] All ER (D) 108 (Jun)	1.49, 3.65
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Atari Corp'n (UK) Ltd v Electronics Boutique Stores (UK) Ltd [1998] QB 539, [1998] 1 All ER 1010, [1998] 2 WLR 66, [1997] 33 LS Gaz R 27, 141 Sol Jo LB 168	8.104, 12.10
Atkinson v Denby (1863) 7 H & N 934, 31 LJ Ex 362, 8 Jur NS 1012, 10 WR 389, 158 ER 749, [1861–73] All ER Rep Ext 2294, sub nom Danby v Atkinson 7 LT 93, Ex Ch	3.169
Atlantic Baron, The. See North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron	
Atlantic Computer Systems plc, Re [1992] Ch 505, [1992] 1 All ER 476, [1992] 2 WLR 367, [1991] BCLC 606, [1990] BCC 859	2.40, 31.57
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Atlantic Emperor (No 2), The. See Rich (Marc) & Co AG v Società Italiana Impianti PA, The Atlantic Emperor (No 2): C-190/89	
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Azémar v Casella (1867) LR 2 CP 677, 36 LJCP 263, 15 WR 998, 16 LT 571, Ex Ch	11.39

B

BMP Global Distribution Inc v Bank of Nova Scotia 2009 SCC 15, [2009] 5 LRC 307, Can SC	17.38, 17.39
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BTP Tioxide Ltd v Pioneer Shipping Ltd and Armada Marine SA, The Nema. See Pioneer Shipping Ltd v BTP Tioxide Ltd	
B2C2 Ltd v Quoine PTC Ltd [2019] SGHC (I) 03	1.61, 1.62, 2.16, 17.26
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Bacon (MC) Ltd, Re [1990] BCLC 324, [1990] BCC 78, 11 LDAB 534	31.42
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Barber v NWS Bank plc [1996] 1 All ER 906, [1996] 1 WLR 641, [1996] RTR 388, [1995] NLJR 1814, [2001] GCCR 2001	11.13, 16.90
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Barker v Baxendale-Walker [2018] EWHC 2245 (Ch), [2018] All ER (D) 127 (Aug)	31.07
Barker v Bell [1971] 2 All ER 867, [1971] 1 WLR 983, 115 Sol Jo 364, [1999] GCCR 471	16.83
Barleycorn Enterprises Ltd, Re, Mathias and Davies (a firm) v Down [1970] Ch 465, [1970] 2 All ER 155, [1970] 2 WLR 898, 114 Sol Jo 187	31.35
Barr v Gibson (1838) 7 LJ Ex 124, 1 Horn & H 70, 3 M & W 390	6.05
Barrow, Lane and Ballard Ltd v Phillip Phillips & Co Ltd [1929] 1 KB 574, 98 LJKB 193, 34 Com Cas 119, [1928] All ER Rep 74, 72 Sol Jo 874, 140 LT 670, 45 TLR 133	9.49, 9.52
Bartlett v Sidney Marcus Ltd [1965] 2 All ER 753, [1965] 1 WLR 1013, 109 Sol Jo 451, CA	11.58, 11.71, 11.110
Bates v Lord Hailsham of St Marylebone [1972] 3 All ER 1019, [1972] 1 WLR 1373, 116 Sol Jo 584	38.95
Bates v Post Office Ltd [2019] EWHC 606 (QB), [2019] All ER (D) 100 (Mar) .	3.50, 3.75
Baumwoll Manufactur von Carl Scheibler v Furness [1893] AC 8, 62 LJQB 201, 7 Asp MLC 263, 1 R 59, 68 LT 1, 9 TLR 71, [1891–4] All ER Rep Ext 1710, HL	36.19
Beale v Taylor [1967] 3 All ER 253, [1967] 1 WLR 1193, 111 Sol Jo 668	11.37
Beam Tube Products Ltd, Re. See Fanshaw v Amav Industries Ltd	
Bear Stearns Bank plc v Forum Global Equity Ltd [2007] EWHC 1576 (Comm), [2007] All ER (D) 103 (Jul)	14.56
Bechervaise v Lewis (1872) LR 7 CP 372, 41 LJCP 161, 20 WR 726, 26 LT 848	30.29
Bechuanaland Exploration Co v London Trading Bank Ltd [1898] 2 QB 658, 67 LJQB 986, 3 Com Cas 285, 1 LDAB 279, 79 LT 270, 14 TLR 587	21.17, 21.18
Beckett v Tower Assets Co Ltd [1891] 1 QB 1, 60 LJQB 56, 7 TLR 21; on appeal [1891] 1 QB 638, 55 JP 438, 60 LJQB 493, 39 WR 438, 64 LT 497, 7 TLR 400, [1891–4] All ER Rep Ext 2038, CA	7.25
Bedford Insurance Co Ltd v Instituto de Resseguros do Brasil [1985] QB 966, [1984] 3 All ER 766, [1984] 3 WLR 726, [1984] 1 Lloyd's Rep 210, [1985] FLR 49, 128 Sol Jo 701, [1985] LS Gaz R 37, 134 NLJ 34	5.21
Begley Industries v Cramp [1978] 2 NZLR 207	22.08
Behn v Burness (1863) 3 B & S 751, 32 LJQB 204, 9 Jur NS 620, 1 Mar LC 329, 2 New Rep 184, 11 WR 496, 122 ER 281, 8 LT 207, Ex Ch	11.05
Behnke v Bede Shipping Co Ltd [1927] 1 KB 649, 96 LJKB 325, 17 Asp MLC 222, 32 Com Cas 134, [1927] All ER Rep 689, 71 Sol Jo 105, 136 LT 667, 43 TLR 170	7.07, 14.07
Behrend & Co v Produce Brokers' Co [1920] 3 KB 530, 90 LJKB 143, 15 Asp MLC 139, 25 Com Cas 286, [1920] All ER Rep 125, 124 LT 281, 36 TLR 775	10.31
Belgian Grain and Produce Co Ltd v Cox & Co (France) Ltd (1919) 1 Ll L Rep 256, [1919] WN 308, 317, CA	35.126
Bell v Lever Bros Ltd [1932] AC 161, 101 LJKB 129, 37 Com Cas 98, [1931] All ER Rep 1, 76 Sol Jo 50, 146 LT 258, 48 TLR 133, HL	3.33, 7.26
Bell Group Finance (Pte) Ltd v Bell Group (UK Holdings) Ltd [1996] BCC 505	31.32
Belmont Park Investments PTY Ltd v BNY Corporate Trustee Services Ltd [2011] UKSC 38, [2012] 1 AC 383, [2012] 1 All ER 505, [2011] 3 WLR 521, [2011] Bus LR 1266, [2012] 1 BCLC 163, [2011] BCC 734, (2011) Times, 15 August, [2011] BPIR 1223, [2011] All ER (D) 259 (Jul)	31.25, 31.26, 31.27

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Bem Dis a Turk Ticaret S/A TR v International Agri Trade Co Ltd, The Selda [1999] 1 All ER (Comm) 619, [1999] 1 Lloyd's Rep 729	15.42, 15.44
Benaim & Co v Debono [1924] AC 514, 93 LJPC 133, [1924] All ER Rep 103, 131 LT 1, PC	13.14
Benatti v WPP Holdings Italy SRL [2007] EWCA Civ 263, [2007] 1 WLR 2316, [2007] 2 All ER (Comm) 525, [2008] 1 Lloyd's Rep 396, (2007) Times, 16 April, [2007] All ER (D) 460 (Mar)	37.13
Bence Graphics International Ltd v Fasson UK Ltd [1998] QB 87, [1997] 1 All ER 979, [1997] 3 WLR 205, [1996] 40 LS Gaz R 25, [1996] NLJR 1577, 140 Sol Jo LB 227	14.33, 14.41, 14.57
Benedetti v Sawiris [2013] UKSC 50, [2014] AC 938, [2013] 4 All ER 253, [2013] 3 WLR 351, [2013] 2 All ER (Comm) 801, 149 ConLR 1, [2013] All ER (D) 210 (Jul)	37.12
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Bentsen v Taylor Sons & Co (No 2) [1893] 2 QB 274, 63 LJQB 15, 7 Asp MLC 385, 4 R 510, 42 WR 8, 69 LT 487, 9 TLR 552, CA	3.156
Berger & Co Inc v Gill & Duffus SA [1984] AC 382, [1984] 2 WLR 95, 128 Sol Jo 47, [1984] LS Gaz R 429, sub nom Gill & Duffus SA v Berger & Co Inc [1984] 1 All ER 438, [1984] 1 Lloyd's Rep 227, HL	12.01, 12.18, 15.21, 15.23, 32.78, 32.83, 34.40
Berkshire, The [1974] 1 Lloyd's Rep 185	36.21
Berliner Verkehrsbetriebe (BVG), Anstalt des Öffentlichen Rechts v JP Morgan Chase Bank NA: C-144/10 [2011] ECR I-3961, [2011] 1 WLR 2087, [2011] 2 All ER (Comm) 877, [2011] Bus LR 1061, [2011] All ER (D) 192 (May), ECJ	37.10
Bernardi v National Sales Corp'n Ltd [1931] 2 KB 188, 100 LJKB 386, 36 Com Cas 270, [1931] All ER Rep 320, 145 LT 48, 47 TLR 380	20.71
Berndtson v Strang (1867) LR 4 Eq 481, 36 LJ Ch 879, 15 WR 1168, 16 LT 583; on appeal (1868) LR 3 Ch App 588, 37 LJ Ch 665, 3 Mar LC 154, 16 WR 1025, 19 LT 40, CA in Ch	36.37
Bernstein v Pamson Motors (Golders Green) Ltd [1987] 2 All ER 220, [1987] RTR 384, [1987] BTLC 37	11.86, 13.22
Berridge v Berridge (1890) 44 Ch D 168, 59 LJ Ch 533, 38 WR 599, 63 LT 101	30.51
Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG: C-256/00 [2002] ECR I-1699, [2003] 1 WLR 1113, [2004] 1 All ER (Comm) 521, [2004] All ER (EC) 229, [2003] All ER (D) 280 (May), ECJ	37.19
Beswick v Beswick [1968] AC 58, [1967] 2 All ER 1197, [1967] 3 WLR 932, 111 Sol Jo 540, HL	3.86
Beverley Acceptances v Oakley [1982] RTR 417, CA	16.35, 16.42
Bhoja Trader, The. See Intraco Ltd v Notis Shipping Corp'n, The Bhoja Trader	
Biddle v Bond (1865) 29 JP 565, 6 B & S 225, 34 LJQB 137, 11 Jur NS 425, 5 New Rep 485, 13 WR 561, 122 ER 1179, [1861-73] All ER Rep 477, 12 LT 178	2.23
Biggin & Co Ltd v Permanite Ltd [1951] 1 KB 422, [1950] 2 All ER 859, 66 TLR (pt 2) 944; revsd [1951] 2 KB 314, [1951] 2 All ER 191, 95 Sol Jo 414, [1951] 2 TLR 159, CA	14.41
Bilta (UK) Ltd (in liq) v Nazir [2015] UKSC 23, [2015] 2 All ER 1083, [2015] 2 WLR 1168, [2015] 2 All ER (Comm) 281, [2015] 1 BCLC 443, (2015) Times, 06 May, [2015] All ER (D) 149 (Apr), sub nom Jetivia SA v Bilta (UK) Ltd [2015] 2 Lloyd's Rep 61	3.162, 31.71
Birkett v Acorn Business Machines Ltd [1999] 2 All ER (Comm) 429, [1999] 31 LS Gaz R 35	3.172
Birkmyr v Darnell. See Buckmyr v Darnall	
Birmingham, Re, Savage v Stannard [1959] Ch 523, [1958] 2 All ER 397, [1958] 3 WLR 10, 102 Sol Jo 454	22.67

Bishopsgate Investment Management Ltd (in liq) v Homan [1995] Ch 211, [1995] 1 All ER 347, [1994] 3 WLR 1270, [1994] BCC 868, 12 LDAB 660, [1994] 36 LS Gaz R 37, 138 Sol Jo LB 176	17.41
Bishopsgate Motor Finance Corp'n Ltd v Transport Brakes Ltd [1949] 1 KB 322, [1949] 1 All ER 37, [1949] LJR 741, 93 Sol Jo 71, 65 TLR 66, CA	16.04, 16.35
Bisset v Wilkinson [1927] AC 177, 96 LJPC 12, [1926] All ER Rep 343, 136 LT 97, 42 TLR 727, PC	3.40
Black Ant Co Ltd (in admin), Re, [2014] EWHC 1161 (Ch), [2014] 2 EGLR 179, [2014] All ER (D) 122 (Apr)	24.20
Blackburn Bobbin Co Ltd v TW Allen & Sons Ltd [1918] 2 KB 467, 87 LJKB 1085, 119 LT 215, 34 TLR 508, CA	14.19
Blesard v Hirst (1770) 5 Burr 2670, 98 ER 402	20.84
Bloxsome v Williams (1824) 3 B & C 232, 1 C & P 294, 336, 2 LJOS 224, 5 Dow & Ry KB 82, 107 ER 720	3.159
Blue Sky One Ltd v Mahan Air [2010] EWHC 631 (Comm), [2010] NLJR 843, [2010] All ER (D) 02 (Jun)	37.90
Bocotra Construction Pte Ltd v A-G (No 2) [1995] 3 LRC 423, Sing CA ... 35.118, 35.166	
Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, [1957] 1 WLR 582, 101 Sol Jo 357, 1 BMLR 1	3.60, 7.38
Bolivinter Oil SA v Chase Manhattan Bank [1984] 1 All ER 351n, [1984] 1 WLR 392, [1984] 1 Lloyd's Rep 251, 128 Sol Jo 153	38.99
Bolt and Nut Co (Tipton) Ltd v Rowlands Nicholls & Co Ltd [1964] 2 QB 10, [1964] 1 All ER 137, [1964] 2 WLR 98, 107 Sol Jo 909, CA	20.124
Bolton v Mahadeva [1972] 2 All ER 1322, [1972] 1 WLR 1009, 116 Sol Jo 564 3.117	
Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce (1996) 140 DLR (4th) 463, Can SC	19.111
Bonacina, Re, Le Brasseur v Bonacina [1912] 2 Ch 394, 81 LJ Ch 674, 19 Mans 224, 56 Sol Jo 667, 107 LT 498, 28 TLR 508, CA	37.57
Bond Worth Ltd, Re [1980] Ch 228, [1979] 3 All ER 919, [1979] 3 WLR 629, 123 Sol Jo 216	2.34, 25.06, 25.11, 26.24
Bondina Ltd v Rollaway Shower Blinds Ltd [1986] 1 All ER 564, [1986] 1 WLR 517, [1986] ECC 260, [1986] FLR 266, [1986] BCLC 177, 130 Sol Jo 264, [1986] LS Gaz R 36, [1986] NLJ Rep 116	20.104
Bonnard v Dott [1906] 1 Ch 740, 75 LJ Ch 446, 94 LT 656, 22 TLR 399, CA	3.169
Booth Steamship Co Ltd v Cargo Fleet Iron Co Ltd [1916] 2 KB 570, 85 LJKB 1577, 13 Asp MLC 451, [1916–17] All ER Rep 938, 115 LT 199, 32 TLR 535, CA	36.37
Boral Formwork & Scaffolding Pty Ltd v Action Makers Ltd (in administrative receivership) [2003] NSWSC 713	35.119
Borax Co, Re, Foster v Borax Co [1901] 1 Ch 326, 70 LJ Ch 162, 49 WR 212, 45 Sol Jo 138, 83 LT 638, 17 TLR 159, CA	25.16
Borden (UK) Ltd v Scottish Timber Products Ltd [1981] Ch 25, [1979] 3 All ER 961, [1979] 3 WLR 672, [1980] 1 Lloyd's Rep 160, 123 Sol Jo 688	22.35
Borealis AB (formerly Borealis Petrokemi AB) v Stargas Ltd (Bergesen DY A/S, third party), The Berge Sisar [2001] UKHL 17, [2002] 2 AC 205, [2001] 2 All ER 193, [2001] 2 WLR 1118, [2001] 1 All ER (Comm) 673, [2001] 1 Lloyd's Rep 663, [2001] 20 LS Gaz R 43, [2001] All ER (D) 268 (Mar)	36.68
Borrowman, Phillips & Co v Free and Hollis (1878) 4 QBD 500, 48 LJQB 65, 40 LT 25, CA	12.19, 12.20
Boss Group Ltd v Boss France SA [1997] 1 WLR 351, CA	37.18
Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 Ch D 339, [1886–90] All ER Rep 65, 59 LT 345, CA	15.20
Bourkmire v Darnell. See Buckmyr v Darnall	
Bourne v Mason (1668) 2 Keb 454, 457, 527, 1 Vent 6, 86 ER 5	1.04
Bournemouth and Boscombe Athletic Football Club Co Ltd v Manchester United Football Club Ltd (1980) Times, 22 May, CA	3.57
Bou-Simon v BGC Brokers LP [2018] EWCA Civ 1525, [2019] 1 All ER (Comm) 955, 179 ConLR 32, [2018] All ER (D) 59 (Aug)	3.57
Bowes v Shand (1877) 2 App Cas 455, 46 LJQB 561, 3 Asp MLC 461, 25 WR 730, [1874–80] All ER Rep 174, 36 LT 857, HL	11.39, 34.08
Bowlay Logging Ltd v Domtar Ltd (1978) 87 DLR (3d) 325, [1978] 4 WWR 105, BC SC	14.26

Table of Cases

Bowmaker (Commercial) Ltd v Day [1965] 2 All ER 856n, [1965] 1 WLR 1396, 109 Sol Jo 853	11.18
Bowmakers Ltd v Barnet Instruments Ltd [1945] KB 65, [1944] 2 All ER 579, 114 LJKB 41, 89 Sol Jo 22, 172 LT 1, 61 TLR 62, [1999] GCCR 71, CA	2.21, 3.169
Boyd & Co Ltd v Louca [1973] 1 Lloyd's Rep 209	34.02
Boyer v Thomson [1995] 2 AC 628, [1995] 3 All ER 135, [1995] 3 WLR 36, [1995] 31 LS Gaz R 33, [1995] NLJR 922, 1995 SC (HL) 15, 1995 SLT 875, HL	11.60
Brac Rent-A-Car International Inc, Re [2003] EWHC 128 (Ch), [2003] 2 All ER 201, [2003] 1 WLR 1421, [2003] 1 BCLC 470, [2003] BCC 248, [2003] 14 LS Gaz R 28, (2003) Times, 24 February, [2003] BPIR 531, [2003] All ER (D) 98 (Feb)	31.86
Brady v Brady [1989] AC 755, [1988] 2 All ER 617, [1988] 2 WLR 1308, [1988] BCLC 579, 4 BCC 390, 11 LDAB 112, 132 Sol Jo 820, HL	22.14
Braemar Investments Ltd, Re [1989] Ch 54, [1988] 3 WLR 596, [1988] BCLC 556, 4 BCC 366, 132 Sol Jo 1181	24.54
Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd [2008] EWHC 426 (TCC), [2008] 2 All ER (Comm) 493, [2008] 1 Lloyd's Rep 608, [2008] BLR 321, [2008] Bus LR D137, [2008] All ER (D) 222 (Mar)	39.22
Bragg v Villanova (1923) 40 TLR 154, DC	13.27
Braithwaite v Foreign Hardwood Co [1905] 2 KB 543, 74 LJKB 688, 10 Asp MLC 52, 10 Com Cas 189, 92 LT 637, 21 TLR 413, [1904–7] All ER Rep Ext 1613, CA	15.20, 15.25
Braithwaite v Thomas Cook Travellers Cheques Ltd [1989] QB 553, [1989] 1 All ER 235, [1989] 3 WLR 212, 11 LDAB 207, 133 Sol Jo 359, [1989] 16 LS Gaz R 35, [1988] NLJR 233	21.12
Bramhill v Edwards [2004] EWCA Civ 403, [2004] 2 Lloyd's Rep 653, [2004] All ER (D) 42 (Apr)	11.66
Brandao v Barnett (1846) 12 Cl & Fin 787, 3 CB 519, 8 ER 1622, [1843–60] All ER Rep 719, 7 LTOS 525, HL	22.66
Brandon v Leckie (1972) 29 DLR (3d) 633, [1972] 6 WWR 113, Alta SC	16.71
Brandt (H O) & Co v H N Morris & Co Ltd [1917] 2 KB 784, 87 LJKB 101, [1916–17] All ER Rep 925, 117 LT 196, CA	34.11
Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd [1924] 1 KB 575, 93 LJKB 646, 16 Asp MLC 262, 29 Com Cas 57, [1923] All ER Rep 656, 130 LT 392, CA	36.64
Branwhite v Worcestor Works Finance Ltd [1969] 1 AC 552, [1968] 3 All ER 104, [1968] 3 WLR 760, 112 Sol Jo 758, [1999] GCCR 397, HL	27.25
Braunstein v Accidental Death Insurance Co (1861) 1 B & S 782, 31 LJQB 17, 8 Jur NS 506, 121 ER 904, 5 LT 550	3.57
Breadner v Granville-Grossman [2001] Ch 523, [2000] 4 All ER 705, [2001] 2 WLR 593, 2 ITEL 812	1.49
Bremer Handelsgesellschaft mbH v J H Rayner & Co Ltd [1978] 2 Lloyd's Rep 73; revsd [1979] 2 Lloyd's Rep 216, CA	34.04
Bridges v Berry (1810) 3 Taunt 130, 128 ER 51	20.84
Bridges and Salmon Ltd v The Swan (Owner), The Swan [1968] 1 Lloyd's Rep 5, PDA	5.34
Brightlife Ltd, Re [1987] Ch 200, [1986] 3 All ER 673, [1987] 2 WLR 197, [1986] BCLC 418, 2 BCC 99, 359, 131 Sol Jo 132, [1987] LS Gaz R 653 ...	22.42, 22.63, 25.18, 25.21
Brighton and Hove City Council v Audus [2009] EWHC 340 (Ch), [2010] 1 All ER (Comm) 343, [2009] 2 EGLR 131, [2009] 09 EG 192 (CS), [2009] All ER (D) 25 (Mar)	22.27
Brimnes, The. See Brimnes, The, Tenax Steamship Co Ltd v The Brimnes (Owners)	
Brimnes, The, Tenax Steamship Co Ltd v The Brimnes (Owners) [1973] 1 All ER 769, [1972] 2 Lloyd's Rep 465, sub nom Tenax Steamship Co Ltd v Reinante Transoceania Navegacion SA, The Brimnes [1973] 1 WLR 386, 117 Sol Jo 244; affd [1975] QB 929, [1974] 3 All ER 88, [1974] 3 WLR 613, [1974] 2 Lloyd's Rep 241, 118 Sol Jo 808	17.18, 18.35
Bristol & West plc v Bartlett [2002] EWCA Civ 1181, [2002] 4 All ER 544, [2003] 1 WLR 284, [2002] 2 All ER (Comm) 1105, [2003] HLR 292, [2003] 1 EGLR 85, [2003] 01 EG 69, [2002] 33 EGCS 97, (2002) Times, 9 September, [2002] All ER (D) 516 (Jul)	23.38

Bristol Airport plc v Powdrill [1990] Ch 744, [1990] 2 All ER 493, [1990] 2 WLR 1362, [1990] BCLC 585, [1990] 17 LS Gaz R 28, 1 S & B AvR IV/121, sub nom Paramount Airways Ltd, Re, Bristol Airport plc v Powdrill [1990] BCC 130	2.26
Bristol and West Building Society v Mothew (t/a Stapley & Co) [1998] Ch 1, [1996] 4 All ER 698, [1997] 2 WLR 436, [1996] NLJR 1273, [1997] PNLR 11, 140 Sol Jo LB 206, sub nom Mothew v Bristol & West Building Society 75 P & CR 241	5.25
Bristol Tramways etc Carriage Co Ltd v Fiat Motors Ltd [1910] 2 KB 831, 79 LJKB 1107, [1908–10] All ER Rep 113, 103 LT 443, 26 TLR 629, CA	11.70
British Airways Board v Laker Airways Ltd [1985] AC 58, [1984] 3 All ER 39, [1984] 3 WLR 413, 128 Sol Jo 531, [1984] LS Gaz R 2849, 134 NLJ 746, HL	38.81
British American Tobacco Switzerland SA v H Essers Security Logistics BV [2015] UKSC 65, [2015] 3 WLR 1173, [2016] RTR 1, (2015) Times, 16 November, [2015] All ER (D) 239 (Oct)	37.12
British and Beningtons Ltd v North Western Cachar Tea Co Ltd [1923] AC 48, 13 Ll L Rep 67, 92 LJKB 62, 28 Com Cas 265, [1922] All ER Rep 224, 128 LT 422, HL ...	15.21, 15.22
British and Commonwealth Holdings plc v Quadrex Holdings Inc (No 2) (1988) Times, 8 December	38.91
British Eagle International Airlines Ltd v Compagnie Nationale Air France [1975] 2 All ER 390, [1975] 1 WLR 758, [1975] 2 Lloyd's Rep 43, 119 Sol Jo 368, HL ...	18.40, 22.40, 31.26
British Fermentation Products Ltd v Compair Reavell Ltd [1999] 2 All ER (Comm) 389, 66 ConLR 1, [1999] BLR 352, [1999] All ER (D) 606	3.78
British Imex Industries Ltd v Midland Bank Ltd [1958] 1 QB 542, [1958] 1 All ER 264, [1958] 2 WLR 103, [1957] 2 Lloyd's Rep 591, 7 LDAB 171, 102 Sol Jo 69 .	35.70, 35.126
British Motor Trade Association v Salvadori [1949] Ch 556, [1949] 1 All ER 208, [1949] LJR 1304, 65 TLR 44	3.88
British Provident Life and Fire Assurance Society, Re, Stanley's Case (1864) 4 De GJ & Sm 407, 33 LJ Ch 535, 10 Jur NS 713, 4 New Rep 255, 12 WR 894, 10 LT 674	25.06
British Steel Corp v Granada Television Ltd [1981] AC 1096, [1981] 1 All ER 417, [1980] 3 WLR 774; on appeal sub nom British Steel Corp v Granada Television Ltd [1981] AC 1096, 1121, [1981] 1 All ER 417, 435, [1980] 3 WLR 774, 797, 124 Sol Jo 376, CA; affd [1981] AC 1096, 1144, [1981] 1 All ER 417, 452, [1980] 3 WLR 774, 818, 124 Sol Jo 812, HL	38.67
British Steel Corp v Cleveland Bridge and Engineering Co Ltd [1984] 1 All ER 504, [1982] Com LR 54, 24 BLR 94	3.32
Britvic Soft Drinks Ltd v Messer UK Ltd [2002] 1 Lloyd's Rep 20, [2001] All ER (D) 102 (May); affd sub nom Britvic Soft Drinks v Messer UK Ltd [2002] EWCA Civ 548, [2002] 2 All ER (Comm) 321, (2002) Times, 22 May, [2002] All ER (D) 303 (Apr)	11.89, 11.138
Brocklesby v Temperance Permanent Building Society [1895] AC 173, 59 JP 676, 64 LJ Ch 433, 11 R 159, 43 WR 606, 72 LT 477, 11 TLR 297, [1895–9] All ER Rep Ext 2099, HL	16.19, 24.19
Brogstetter v Fabrication de Montres Normandes EURL: C-548/12 [2014] QB 753, [2014] 2 WLR 1600, [2014] 1 All ER (Comm) 965, [2014] All ER (D) 258 (Mar), ECJ	37.17
Brown (B S) & Sons Ltd v Craiks Ltd [1970] 1 All ER 823, [1970] 1 WLR 752, 114 Sol Jo 282, 1970 SC 51, 1970 SLT 141, HL	11.71, 11.104
Brown v Edgington (1841) 5 JP 276, 10 LJCP 66, Drinkwater 106, 2 Man & G 279, 2 Scott NR 496, 133 ER 751	6.07
Brown v KMR Services Ltd [1995] 4 All ER 598, [1995] 2 Lloyd's Rep 513, [1995] 32 LS Gaz R 29	14.43
Brown v Metropolitan Police Comr (Equality and Human Rights Commission intervening) [2019] EWCA Civ 1724, [2020] 3 All ER 273, [2020] 1 WLR 1257, [2020] PIQR Q59, 169 NLJ 7862, [2019] Costs LR 1633, [2019] All ER (D) 124 (Oct)	38.11
Brown v Muller (1872) LR 7 Exch 319, 41 LJ Ex 214, 21 WR 18, 27 LT 272, Exch Ct	3.149
Brown v Raphael [1958] Ch 636, [1958] 2 All ER 79, [1958] 2 WLR 647, 102 Sol Jo 269, CA	3.40
Brown v Sheen and Richmond Car Sales Ltd [1950] 1 All ER 1102, [1950] WN 316	27.27

Table of Cases

Brown's Estate, Re, <i>Brown v Brown</i> [1893] 2 Ch 300, 62 LJ Ch 695, 3 R 463, 41 WR 440, 37 Sol Jo 354, 69 LT 12	30.44
<i>Brown Shipley & Co Ltd v Alicia Hosiery Ltd</i> [1966] 1 Lloyd's Rep 668, 116 NLJ 1144, CA	20.115
<i>Browner International Ltd v Monarch Shipping Co Ltd, The European Enterprise</i> [1989] 2 Lloyd's Rep 185	36.16
<i>Browning v Provincial Insurance Co of Canada</i> (1873) LR 5 PC 263, 2 Asp MLC 35, 21 WR 587, 28 LT 853	5.36
<i>Bryen & Langley Ltd v Boston</i> [2005] EWCA Civ 973, [2005] All ER (D) 507 (Jul)	3.84
<i>Buchler v Talbot</i> [2004] UKHL 9, [2004] 2 AC 298, [2004] 1 All ER 1289, [2004] 2 WLR 582, [2004] 1 BCLC 281, [2004] NLJR 381, (2004) Times, 5 March, 148 Sol Jo LB 299, [2004] 5 LRC 405, [2004] All ER (D) 89 (Mar), sub nom <i>Leyland Daf Ltd, Re</i> [2004] BCC 214	25.32, 31.20, 31.35
<i>Buckmyr v Darnall</i> (1703) 2 Ld Raym 1085, sub nom <i>Burkmire v Darnel</i> 6 Mod Rep 248, Holt KB 606, sub nom <i>Birkmyr v Darnell</i> 1 Salk 27, sub nom <i>Bourkmire v Darnell</i> 3 Salk 15, sub nom <i>Birkmyr v Darnell</i> 91 ER 26	30.07
<i>Bulgrains & Co Ltd v Shinhan Bank</i> [2013] EWHC 2498 (QB), [2013] All ER (D) 339 (Jul)	35.68, 35.90
<i>Bulk Oil (Zug) AG v Sun International Ltd and Sun Oil Trading Co</i> [1983] 1 Lloyd's Rep 655, [1983] Com LR 68, 127 Sol Jo 857; affd [1984] 1 All ER 386, [1984] 1 WLR 147, [1983] 2 Lloyd's Rep 587, 127 Sol Jo 857, [1984] LS Gaz R 36	3.154
<i>Bunge & Co Ltd v Tradax England Ltd</i> [1975] 2 Lloyd's Rep 235	34.05, 34.08
<i>Bunge & Co Ltd v Tradax Ocean Transportation SA, The New Prosper</i> [1991] 2 Lloyd's Rep 93	34.05
<i>Bunge Corpn v Tradax SA</i> [1981] 2 All ER 513, [1981] 1 WLR 711, [1981] 2 Lloyd's Rep 1, 125 Sol Jo 373, HL	3.144, 34.05
<i>Bunge Corpn v Vegetable Vitamin Foods (Pte) Ltd</i> [1985] 1 Lloyd's Rep 613	35.49
<i>Bunge SA v Adm Do Brasil Ltd</i> [2009] EWHC 845 (Comm), [2010] 1 All ER (Comm) 784, [2009] 2 Lloyd's Rep 175, [2009] All ER (D) 174 (Apr)	36.59
<i>Bunge SA v Kyla Shipping Co Ltd, The Kyla</i> [2013] EWCA Civ 734, [2013] 3 All ER 1006, [2013] 2 All ER (Comm) 577, [2013] 2 Lloyd's Rep 463, 164 NLJ 7624, [2013] All ER (D) 181 (Jun)	39.91
<i>Bunge SA v Nidera BV</i> (formerly known as <i>Nidera Handelscompagnie BV</i>) [2015] UKSC 43, [2015] 3 All ER 1082, [2015] 2 All ER (Comm) 789, [2015] Bus LR 987, [2015] 1 Lloyd's Rep 469, 165 NLJ 7661, [2015] All ER (D) 03 (Jul)	14.13, 14.19, 14.61
<i>Burkmire v Darnel</i> . See <i>Buckmyr v Darnall</i>	
<i>Burrows v Rhodes</i> [1899] 1 QB 816, 63 JP 532, 68 LJQB 545, 48 WR 13, [1895–9] All ER Rep 117, 43 Sol Jo 351, 80 LT 591, 15 TLR 286	3.160
<i>Business Application Specialists Ltd v Nationwide Credit Corpn Ltd</i> (Marn Garage (Camberley) Ltd, third party) [1988] RTR 332, [1988] BTLC 461, [1988] CCLR 135, [1999] GCCR 1225, CA	11.70
<i>Butler Machine Tool Co Ltd v Ex-Cell-O Corpn (England) Ltd</i> [1979] 1 All ER 965, [1979] 1 WLR 401, 121 Sol Jo 406	3.53
<i>Butterworth v Kingsway Motors Ltd</i> [1954] 2 All ER 694, [1954] 1 WLR 1286, 98 Sol Jo 717	11.18, 11.21
<i>By Appointment (Sales) Ltd v Harrods Ltd</i> [1977] CA Transcript 465, CA	16.44, 24.45
<i>Byron v Eastern Caribbean Amalgamated Bank</i> (Antigua and Barbuda) [2019] UKPC 16, [2019] All ER (D) 63 (May), PC	3.55

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<i>C v D</i> [2007] EWCA Civ 1282, [2008] 1 All ER (Comm) 1001, [2008] Bus LR 843, [2008] 1 Lloyd's Rep 239, 116 ConLR 230, (2008) Times, 16 January, [2007] ArbLR 10, [2007] All ER (D) 61 (Dec)	39.21
<i>C and P Haulage (a firm) v Middleton</i> [1983] 3 All ER 94, [1983] 1 WLR 1461, 127 Sol Jo 730	14.26
<i>CCC Films (London) Ltd v Impact Quadrant Films Ltd</i> [1985] QB 16, [1984] 3 All ER 298, [1984] 3 WLR 245, 128 Sol Jo 297	3.09
<i>CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd</i> [2015] SGCA 24, [2015] 3 SLR 1041	35.119

CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS Northern Pioneer Schiffahrtsgesellschaft mbH & Co [2002] EWCA Civ 1878, [2003] 3 All ER 330, [2003] 1 WLR 1015, [2003] 1 All ER (Comm) 204, [2003] 1 Lloyd's Rep 212, [2003] 09 LS Gaz R 28, (2002) Times, 31 December, [2002] ArbLR 11, [2002] All ER (D) 286 (Dec)	39.91
CTI Group Inc v Transclear SA, The Mary Nour [2008] EWCA Civ 856, [2009] 2 All ER (Comm) 25, [2008] Bus LR 1729, [2008] 2 Lloyd's Rep 526, [2008] All ER (D) 290 (Jul)	3.177
Cable & Wireless plc v IBM United Kingdom Ltd [2002] EWHC 2059 (Comm), [2002] 2 All ER (Comm) 1041, [2002] NLJR 1652, [2003] BLR 89, [2002] All ER (D) 277 (Oct)	38.03
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Calderbank v Calderbank [1976] Fam 93, [1975] 3 All ER 333, [1975] 3 WLR 586, [1976] Fam Law 93, 119 Sol Jo 490	38.71
Cameco Inc v S.S. American Legion [1975] 1 Lloyd's Rep 295	36.46
Cammell v Sewell (1860) 5 H & N 728, 29 LJ Ex 350, 6 Jur NS 918, 8 WR 639, 157 ER 1371, 2 LT 799, Ex Ch	37.85, 37.86, 37.88
Cammell Laird & Co Ltd v Manganese Bronze and Brass Co Ltd [1934] AC 402, 103 LJBK 289, 39 Com Cas 194, [1934] All ER Rep 1, 151 LT 142, 50 TLR 350, HL	7.21, 11.70
Campbell Mostyn (Provisions) Ltd v Barnett Trading Co [1954] 1 Lloyd's Rep 65, CA	15.41
Campden Hill Ltd v Chakrani [2005] EWHC 911 (Ch), [2005] All ER (D) 238 (May)	17.41
Canada Law Book Co v Boston Book Co (1922) 64 SCR 182, 66 DLR 209, Can SC	11.39
Canada Trust Co v Stolzenberg (No 2) [2002] 1 AC 1, [2000] 4 All ER 481, [2000] 3 WLR 1376, HL	37.09
Canadian Acceptance Corp Ltd v Regent Park Butcher Shop Ltd (1969) 3 DLR (3d) 304, Man CA	28.18
Canadian Highlander, The. See Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander	
Canadian Klockner Ltd v D/S A/S Flint, The Mica [1973] 2 Lloyd's Rep 478, Can FC; on appeal sub nom Federal Commerce and Navigation Co Ltd v Canadian Klockner [1975] 2 Lloyd's Rep 371	36.21
Canary Wharf (BP4) T1 Ltd and other companies v European Medicines Agency [2019] EWHC 335 (Ch), 183 ConLR 167, [2019] EGLR 17, [2019] PLSCS 37, 169 NLJ 7831, [2019] All ER (D) 154 (Feb)	3.175, 3.176
Canastrand Industries Ltd v the Ship Lara S [1993] 2 FC 553	36.22
Canterbury Seed Co v Ward (1895) 13 NZLR 96, NZ CA	13.14
Canyon Offshore Ltd v GDF Suez E&P Nederland BV [2014] EWHC 3810 (Comm), [2015] Bus LR 578, [2014] All ER (D) 301 (Nov)	18.07
Cape Asbestos Co Ltd v Lloyds Bank Ltd [1921] WN 274, 3 LDAB 314	35.20
Capital and Counties Bank Ltd v Gordon [1903] AC 240, 72 LJBK 451, 8 Com Cas 221, 51 WR 671, 2 LDAB 35, [1900–3] All ER Rep 1017, 88 LT 574, 19 TLR 462, HL	21.06
Capital Finance Co Ltd v Donati (1977) 121 Sol Jo 270, CA	3.127
Capital Finance Co Ltd v Stokes [1969] 1 Ch 261, [1968] 3 All ER 625, [1968] 3 WLR 899, 19 P & CR 791, 9 LDAB 91, 112 Sol Jo 746, 207 Estates Gazette 1227	22.67
Capital Home Loans Ltd v Countrywide Surveyors Ltd [2011] 3 EGLR 153, CC	18.09
Car and Universal Finance Co Ltd v Caldwell [1965] 1 QB 525, [1964] 1 All ER 290, [1964] 2 WLR 600, 108 Sol Jo 15, CA	3.100, 3.101, 15.17, 15.18
Car Giant Ltd v Mayor and Burgesses of the London Borough of Hammersmith [2017] EWHC 464 (TCC), [2017] 2 Costs LO 235, [2017] All ER (D) 104 (Mar)	38.04
Car Trim GmbH v KeySafety Systems Srl: C-381/08 [2010] ECR I-1255, [2010] 2 All ER (Comm) 770, [2010] Bus LR 1648, [2010] All ER (D) 286 (Feb), ECJ	37.20
Cardiff Workmen's Cottage Co Ltd, Re [1906] 2 Ch 627, 75 LJ Ch 769, 13 Mans 382, 50 Sol Jo 696, 95 LT 669, 22 TLR 799, [1904–7] All ER Rep Ext 1217	22.13
Carewatch Care Services Ltd v Focus Care Services Ltd [2014] EWHC 2313 (Ch), [2014] All ER (D) 163 (Jul)	3.76

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Cretan Harmony, The. See Cretanor Maritime Co Ltd v Irish Marine Management Ltd, The Cretan Harmony	
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D

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<i>Dodds v Yorkshire Bank Finance Ltd</i> [1992] CCLR 92, [1999] GCCR 1621 ..	16.77, 16.84
<i>Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening</i> [2009] EWHC 716 (Comm), [2010] 1 All ER (Comm) 473, [2009] 2 Lloyd's Rep 123, [2009] All ER (D) 119 (Apr)	3.89
<i>Dominion Credit and Finance Ltd v Marshall (Cambridge) Ltd</i> , (2 March 1993, unreported)	16.11
<i>Dominique, The. See Bank of Boston Connecticut v European Grain and Shipping Ltd, The Dominique</i>	
<i>Don King Productions Inc v Warren</i> [2000] Ch 291, [1999] 2 All ER 218, [1999] 3 WLR 276, [1999] 1 Lloyd's Rep 588, [2000] 1 BCLC 607, [1999] EMLR 402, [1998] All ER (D) 794	29.41
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<i>Donohue v Armco Inc</i> [2001] UKHL 64, [2002] 1 All ER 749, [2002] 1 All ER (Comm) 97, [2002] 1 Lloyd's Rep 425, [2002] 4 LRC 478, [2001] All ER (D) 178 (Dec)	37.13
<i>Downing v Al Tameer Establishment</i> [2002] EWCA Civ 721, [2002] 2 All ER (Comm) 545, [2002] BLR 323, [2002] ArbLR 12, [2002] All ER (D) 342 (May)	39.54
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E

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Eco Swiss China Time Ltd v Benetton International NV: C-126/97 [1999] ECR I-3055, [1999] 2 All ER (Comm) 44, [2000] 5 CMLR 816, [1999] All ER (D) 574, ECJ	39.36
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Effer SpA v Kantner: 38/81 [1982] ECR 825, [1984] 2 CMLR 667, ECJ	37.18
Effort Shipping Co Ltd v Linden Management SA, The Giannis NK [1998] AC 605, [1998] 1 All ER 495, [1998] 2 WLR 206, [1998] 1 Lloyd's Rep 337, [1998] 07 LS Gaz R 32, [1998] NLJR 121, 142 Sol Jo LB 54, HL	36.58, 36.59
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Ehrmann Bros Ltd, Re, Albert v Ehrmann Bros Ltd [1906] 2 Ch 697, 75 LJ Ch 817, 13 Mans 368, 95 LT 664, 22 TLR 734, CA	22.13, 24.56
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El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA [2004] FCAFC 202, [2004] 2 Lloyd's Rep 537, Aus FC	36.47
Elafi, The. See Karlshamns Oljefabriker v Eastport Navigation Corp'n, The Elafi	
Elbinger AG v Armstrong (1874) LR 9 QB 473, 38 JP 774, 43 LJQB 211, 23 WR 127, 30 LT 871	14.32, 14.33
Eichholz v Bannister (1864) 17 CBNS 708, 34 LJCP 105, 11 Jur NS 15, 5 New Rep 87, 13 WR 96, 144 ER 284, sub nom Eicoltz v Bannister 12 LT 76	6.07
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Eleftherotria (Owners) v Despina R (Owners), The Despina R [1979] AC 685, [1979] 1 All ER 421, [1978] 3 WLR 804, [1979] 1 Lloyd's Rep 1, 122 Sol Jo 758, HL	37.109
Elektrim SA v Vivendi Universal SA (No 2) [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep 8, [2007] ArbLR 20	39.06
Elissar, The. See Johnson v Crédit Lyonnais Co	
Ellenborough, Re, Towry Law v Burne [1903] 1 Ch 697, 72 LJ Ch 218, 51 WR 315, 47 Sol Jo 255, 87 LT 714, [1900-3] All ER Rep Ext 1171	23.10
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Elphick v Barnes (1880) 5 CPD 321, 44 JP 651, 49 LJQB 698, 29 WR 139, CPD	9.05, 9.41
Elwin v O'Regan and Maxwell [1971] NZLR 1124	16.71
Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168, [2011] 2 All ER (Comm) 223, [2010] 3 EGLR 165, [2010] 43 EG 99 (CS), [2010] All ER (D) 193 (Oct)	3.148
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Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb" and other companies [2020] EWCA Civ 574	39.20, 39.21, 39.22, 39.55
Ennis, Re, Coles v Peyton [1893] 3 Ch 238, 62 LJ Ch 991, 7 R 544, 69 LT 738, CA	30.47
Equitas Insurance Ltd v Municipal Mutual Insurance Ltd [2019] EWCA Civ 718, [2020] 1 All ER 16, [2019] 3 WLR 613, [2019] 2 All ER (Comm) 843, 169 NLJ 7839, [2019] All ER (D) 112 (Apr)	39.62
Equitable Trust Co of New York v Dawson Partners Ltd (1926) 27 Ll L Rep 49, HL	35.68

Equiticorp Finance Group Ltd v Cheah. See Cheah Theam Swee v Equiticorp Finance Group Ltd	
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Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218, 27 WR 65, [1874–80] All ER Rep 271, 39 LT 269, sub nom New Sombrero Phosphate Co v Erlanger 48 LJ Ch 73, HL	3.103
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Erste Group Bank AG v JSC 'VMZ Red October' [2015] EWCA Civ 379, [2015] All ER (D) 135 (Apr)	37.38
Ert Stefanie, The. See Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd	
Esal (Commodities) Ltd and Reltor Ltd v Oriental Credit Ltd and Wells Fargo Bank NA [1985] 2 Lloyd's Rep 546, CA	35.170
Esberger & Son Ltd v Capital and Counties Bank [1913] 2 Ch 366, 82 LJ Ch 576, 20 Mans 252, 3 LDAB 65, 109 LT 140	23.07
Esmeralda I, The. See Ace Imports Pty Ltd v Companhia de Navegacio Lloyd Brasileiro, The Esmeralda I	
Esso Bernicia, The. See Esso Petroleum Co Ltd v Hall Russell & Co Ltd and Shetland Islands Council, The Esso Bernicia	
Esso Petroleum Co Ltd v Hall Russell & Co Ltd and Shetland Islands Council, The Esso Bernicia [1989] AC 643, [1989] 1 All ER 37, [1988] 3 WLR 730, [1989] 1 Lloyd's Rep 8, 132 Sol Jo 1459, HL	23.55
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Esteve Trading Corpn v Agropec International, The Golden Rio [1990] 2 Lloyd's Rep 273	14.55, 34.08
Etablissements A de Bloos Sprl v Société en Commandite par Actions Bouyer: 14/76 [1976] ECR 1497, [1977] 1 CMLR 60, ECJ	37.19
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Etablissements Somafer SA v Saar-Ferngas AG: 33/78. See Somafer SA v Saar-Ferngas AG: 33/78	
Etihad Airways PJSC v Flöther [2019] EWHC 3107 (Comm), [2020] 2 WLR 333	37.11, 39.24
Eugenia, The. See Ocean Tramp Tankers Corpn v V/O Sovfracht, The Eugenia	
Euro-Asian Oil SA (formerly Euro-Asian Oil AG) v Credit Suisse AG [2018] EWCA Civ 1720, [2019] 1 All ER (Comm) 706, [2019] 1 Lloyd's Rep 444, [2018] All ER (D) 69 (Aug)	14.56, 34.20
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European Asian Bank AG v Punjab and Sind Bank (No 2) [1983] 2 All ER 508, [1983] 1 WLR 642, [1983] 1 Lloyd's Rep 611, [1983] Com LR 128, 10 LDAB 411, 127 Sol Jo 379	35.33
European Enterprise, The. See Browner International Ltd v Monarch Shipping Co Ltd, The European Enterprise	
Evans v Rival Granite Quarries Ltd [1910] 2 KB 979, 79 LJKB 970, 18 Mans 64, 54 Sol Jo 580, 26 TLR 509, CA	25.06, 25.17, 25.18, 25.19, 25.27
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Ewart v Latta (1865) 4 Macq 983, HL	30.37
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Export Credits Guarantee Department v Universal Oil Products Co [1983] 2 All ER 205, [1983] 1 WLR 399, [1983] 2 Lloyd's Rep 152, 127 Sol Jo 408, 23 BLR 106, 133 NLJ 662, HL	3.141

F

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FKI Engineering Ltd v Stribog Ltd [2011] EWCA Civ 622, [2011] 1 WLR 3264, [2012] 1 All ER (Comm) 549, [2011] Bus LR 1410, [2011] 2 Lloyd's Rep 387, [2011] 23 LS Gaz R 17, [2011] All ER (D) 290 (May)	37.12
FSHC Group Holdings Ltd v Glas Trust Corporation Ltd [2019] EWCA Civ 1361, [2020] 1 All ER 505, [2020] 2 WLR 429, [2020] 1 All ER (Comm) 719, 187 ConLR 1, [2019] All ER (D) 10 (Aug)	3.69
Factortame Ltd v Secretary of State for Transport (No 2). See R v Secretary of State for Transport, ex p Factortame Ltd (No 2)	
Fairfax Gerrard Holdings Ltd v Capital Bank plc [2006] EWHC 3439 (Comm), [2007] 1 Lloyd's Rep 171, [2006] All ER (D) 380 (Nov); revsd [2007] EWCA Civ 1226, [2008] 1 All ER (Comm) 632, [2008] 1 Lloyd's Rep 297, [2008] BPIR 332, [2007] All ER (D) 410 (Nov)	16.36, 16.44
Fairway Magazines Ltd, q	
Re [1993] BCLC 643, [1992] BCC 924	31.46
Falco Privatstiftung v Gisela Weller-Lindhorst: C-533/07 [2009] ECR I-3327, [2010] Bus LR 210, [2009] All ER (D) 14 (May), ECJ	37.19
Fanshaw v Amav Industries Ltd [2006] EWHC 486 (Ch), [2007] 2 BCLC 732, [2006] All ER (D) 246 (Feb), sub nom Beam Tube Products Ltd, Re [2006] BCC 615	25.05, 29.10
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Farina v Home (1846) 16 LJ Ex 73, 16 M & W 119, 153 ER 1124, 8 LTOS 277, Exch Ct	2.45
Farley v Skinner [2001] UKHL 49, [2002] 2 AC 732, [2001] 4 All ER 801, [2001] 3 WLR 899, 79 ConLR 1, [2001] 3 EGLR 58, [2001] 49 EG 120, [2001] 48 EG 131, [2001] 40 LS Gaz R 41, [2001] BLR 1, [2001] 42 EGCS 139, 145 Sol Jo LB 230, [2001] All ER (D) 153 (Oct)	3.130
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Feakins v Department for Environment Food and Rural Affairs. See Department for Environment Food and Rural Affairs v Feakins	
Feast Contractors Ltd v Roy Vincent Ltd [1974] 1 NZLR 212	11.71
Federal Commerce and Navigation Co Ltd v Canadian Klockner. See Canadian Klockner Ltd v D/S A/S Flint, The Mica	
Federal Commerce and Navigation Ltd v Molena Alpha Inc, The Nanfri, The Benfri, The Lorfri [1978] QB 927, [1978] 3 All ER 1066, [1978] 3 WLR 309, [1978] 2 Lloyd's Rep 132, 122 Sol Jo 347; affd [1979] AC 757, [1979] 1 All ER 307, [1978] 3 WLR 991, [1979] 1 Lloyd's Rep 201, 122 Sol Jo 843, HL	36.60
Federal Discount Corp'n v St Pierre (1962) 32 DLR (2d) 86, [1962] OR 310, Ont CA	20.120
Federspiel (Carlos) & Co SA v Charles Twigg & Co Ltd [1957] 1 Lloyd's Rep 240	8.96, 34.13
Feldaroll Foundry plc v Hermes Leasing (London) Ltd [2004] EWCA Civ 747, [2004] 24 LS Gaz R 32, 148 Sol Jo LB 630, [2004] All ER (D) 138 (May)	11.59
Fellus v National Westminster Bank plc (1983) 133 NLJ 766	21.12
Felthouse v Bindley (1862) 11 CBNS 869, 31 LJCP 204, 10 WR 423, 142 ER 1037; affd (1863) 1 New Rep 401, 11 WR 429, 7 LT 835, Ex Ch	8.105
Fenton, Re, ex p Fenton Textile Association Ltd [1931] 1 Ch 85, 99 LJ Ch 358, [1929] B & CR 189, [1930] All ER Rep 15, 74 Sol Jo 387, 143 LT 273, 46 TLR 478, CA	30.32
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Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, [1942] 2 All ER 122, 111 LJKB 433, 86 Sol Jo 232, 167 LT 101, 58 TLR 308, HL	3.173
Ficom SA v Sociedad Cadex Ltda [1980] 2 Lloyd's Rep 118	35.18
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Filatona Trading Ltd v Navigator Equities Ltd [2020] EWCA Civ 109, [2020] All ER (D) 41 (Feb)	5.33, 5.37
Filiatra Legacy, The. See Anonima Petroli Italiana SpA and Neste Oy v Marlucidez Armadora SA, The Filiatra Legacy	
Finance Houses Association Ltd's Agreement, Re (1965) LR 5 RP 366, [1965] 3 All ER 509, [1965] 1 WLR 1419, 109 Sol Jo 813	29.05
Financial Times Ltd v Interbrew SA [2002] EWCA Civ 274, [2002] 2 Lloyd's Rep 229, [2002] 16 LS Gaz R 37, (2002) Times, 21 March, [2002] EMLR 446, [2002] All ER (D) 106 (Mar)	38.67
Financings Ltd v Baldock [1963] 2 QB 104, [1963] 1 All ER 443, [1963] 2 WLR 359, 107 Sol Jo 15, [1999] GCCR 175, CA	3.127, 28.18
Fine Art Society Ltd v Union Bank of London Ltd (1886) 17 QBD 705, 51 JP 69, 56 LJQB 70, 35 WR 114, 1 LDAB 70, 55 LT 536, 2 TLR 883, CA ..	8.26, 16.90
Finlay (James) & Co Ltd v NV Kwik Hoo Tong Handel Maatschappij [1929] 1 KB 400, 98 LJKB 251, 17 Asp MLC 566, 34 Com Cas 143, [1928] All ER Rep 110, 140 LT 389, 45 TLR 149, CA	3.138, 34.43
Finn-Kelcey Re, Tyson v Kelcey. See Kelcey, Re, Tyson v Kelcey	
Fiona, The. See Mediterranean Freight Services Ltd v BP Oil International Ltd, The Fiona	
Fiona Trust and Holding Corp v Privalov [2007] UKHL 40, [2007] 4 All ER 951, [2007] 2 All ER (Comm) 1053, [2007] Bus LR 1719, [2008] 1 Lloyd's Rep 254, 114 ConLR 69, (2007) Times, 25 October, 151 Sol Jo LB 1364, [2008] 4 LRC 404, [2007] All ER (D) 233 (Oct)	37.11, 39.24, 39.53
Fiorentino Comm Giuseppe Srl v Farnesi [2005] EWHC 160 (Ch), [2005] 2 All ER 737, [2005] 1 WLR 3718, [2005] 1 All ER (Comm) 575, [2005] BCC 771, (2005) Times, 3 March, [2005] All ER (D) 176 (Feb), CSRC vol 28 iss 25/2	20.83
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First National Bank plc v Thompson [1996] Ch 231, [1996] 1 All ER 140, [1996] 2 WLR 293, 72 P & CR 118, [1995] 32 LS Gaz R 30, 139 Sol Jo LB 189	3.21
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Firstpost Homes Ltd v Johnson [1995] 4 All ER 355, [1995] 1 WLR 1567, [1995] NPC 135, [1996] 1 EGLR 175, [1995] 28 LS Gaz R 30, [1996] 13 EG 125, 139 Sol Jo LB 187	3.29
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Fletcher v Tayleur (1855) 17 CB 21, 25 LJCP 65, 139 ER 973, 26 LTOS 60 ..	14.32, 35.123

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Florence Land and Public Works Co, Re, ex p Moor (1878) 10 Ch D 530, 48 LJ Ch 137, 27 WR 236, 39 LT 589, [1874–80] All ER Rep Ext 1651, CA	25.26
Flory v Denny (1852) 21 LJ Ex 223, 7 Exch 581, 19 LTOS 158	2.31
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Foakes v Beer (1884) 9 App Cas 605, 54 LJQB 130, 33 WR 233, [1881–85] All ER Rep 106, 51 LT 833, HL	3.13
Focke & Co Ltd v Thomas Robinson, Sons & Co Ltd (1935) 52 Ll L Rep 334	32.78
Foley v Hill (1848) 2 HL Cas 28, 9 ER 1002, [1843–60] All ER Rep 16, HL	17.20
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Forbes v Jackson (1882) 19 Ch D 615, 51 LJ Ch 690, 30 WR 652, [1881–5] All ER Rep 863, 48 LT 722	30.35
Forbes, Forbes, Campbell & Co v Pelling, Stanley & Co (1921) 9 Ll L Rep 202	35.76
Ford v Beech (1848) 11 QB 852, 17 LJQB 114, 12 Jur 310, 116 ER 693, 11 LTOS 45, Exch	3.64
Ford, Re, ex p Trustee [1900] 2 QB 211, 48 WR 688, 44 Sol Jo 488, 82 LT 625, 16 TLR 399, sub nom Re Ford, ex p Maclister 69 LJQB 690, 7 Mans 281	22.74
Fores v Johnes (1802) 4 Esp 97	3.160
Forman & Co Pty Ltd v The Liddesdale [1900] AC 190, 69 LJPC 44, 9 Asp MLC 45, 82 LT 331, PC	3.117
Forman v Wright (1851) 11 CB 481, 20 LJCP 145, 15 Jur 706	20.116
Forres (Lord) v Scottish Flax Co Ltd [1943] 2 All ER 366, 87 Sol Jo 381, CA	4.38
Forsikringsaktieselskapet Vesta v Butcher, Bain Dawles Ltd and Aquacultural Insurance Services Ltd [1989] AC 852, [1989] 1 All ER 402, [1989] 2 WLR 290, [1989] 1 Lloyd's Rep 331, 133 Sol Jo 184, [1989] 11 LS Gaz R 42, HL	3.157
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Forthright Finance Ltd v Carlyle Finance Ltd [1997] 4 All ER 90, [1997] CCLR 84, [1999] GCCR 2177	27.12
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Fortis Bank SA/NV v Indian Overseas Bank [2011] EWHC 538 (Comm), [2012] 1 All ER (Comm) 41, [2011] 2 Lloyd's Rep 33, [2011] 2 Lloyd's Rep 190, [2011] All ER (D) 231 (Mar)	35.90
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Foster v Driscoll, Lindsay v Attfield, Lindsay v Driscoll [1929] 1 KB 470, 98 LJBK 282, 4 LDAB 232, [1928] All ER Rep 130, 140 LT 479, 45 TLR 185, CA	37.81
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Four Point Garage Ltd v Carter [1985] 3 All ER 12	16.63, 16.66
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French v Gething [1922] 1 KB 236, 91 LJKB 276, [1922] B & CR 30, [1921] All ER Rep 415, 66 Sol Jo 140, 126 LT 394, 38 TLR 77, CA	2.47
Frith v Frith [1906] AC 254, 75 LJPC 50, 54 WR 618, 94 LT 383, 22 TLR 388, [1904–7] All ER Rep Ext 1281, PC	5.36
Future Express, The [1992] 2 Lloyd's Rep 79; on appeal [1993] 2 Lloyd's Rep 542, CA	2.45, 32.54

G

G v de Visser: C-292/10 [2013] QB 168, [2012] 3 WLR 1523, (2012) Times, 22 June, ECJ	37.09
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GKN Centrax Gears Ltd v Matbro Ltd [1976] 2 Lloyd's Rep 555, 120 Sol Jo 401, CA	14.27
GKN Contractors Ltd v Lloyds Bank plc (1985) 30 BLR 48, CA	35.94
Gabarron v Kreeft (1875) LR 10 Exch 274, 44 LJ Ex 238, 3 Asp MLC 36, 24 WR 146, 33 LT 365, Exch Ct	8.110
Gabriel, Wade and English Ltd v Arcos Ltd (1929) 34 Ll L Rep 306, 73 Sol Jo 483	13.37
Gaekwar of Baroda (Maharanee) v Wildenstein [1972] 2 QB 283, [1972] 2 WLR 1077, 116 Sol Jo 221, sub nom Maharanee Baroda v Wildenstein [1972] 2 All ER 689	37.31
Galatia, The. See Golodetz (M) & Co Inc v Czarnikow-Rionda Co Inc, The Galatia	
Gallagher v Shilcock [1949] 2 KB 765, [1949] 1 All ER 921, [1949] LJ 1721, 93 Sol Jo 302, 208 LT 24, 65 TLR 496	15.72
Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd (1987) 163 CLR 236, [1987] ASC 57, 472, 72 ALR 321, 61 ALJR 415, Aus HC	16.52
Gamerco SA v ICM/Fair Warning (Agency) Ltd [1995] 1 WLR 1226, [1995] EMLR 263	3.173
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Garey v Pyke (1839) 10 Ad & El 512, 2 Per & Dav 427	7.36
Garfitt v Allen (1887) 37 Ch D 48, 57 LJ Ch 420, 36 WR 413, 57 LT 848	23.32
Garrard v James [1925] Ch 616, 94 LJ Ch 234, 69 Sol Jo 622, 133 LT 261	30.29
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Gatoil International Inc v Panatlantic Carriers Corp'n, The Rio Sun [1985] 1 Lloyd's Rep 350	11.24
'Gazprom' OAO, Re: C-536/13 (2015) C-536/13, ECLI:EU:C:2015:316, [2015] 1 WLR 4937, [2015] 2 All ER (Comm) 1023, [2015] All ER (EC) 711, [2015] 1 Lloyd's Rep 610, [2015] All ER (D) 136 (May), EUCJ	37.08, 39.55

Gebrüder Metelmann GmbH & Co KG v NBR (London) Ltd [1984] 1 Lloyd's Rep 614; on appeal [1984] 1 Lloyd's Rep 614, CA	4.28
Gedding v Marsh [1920] 1 KB 668, 89 LJB 526, [1920] All ER Rep 631, 122 LT 775, 36 TLR 337	11.62
Geden Operations Ltd v Dry Bulk Handy Holdings Inc, The M/V Bulk Uruguay [2014] EWHC 885 (Comm), [2014] 2 All ER (Comm) 196, [2014] 2 Lloyd's Rep 66, 164 NLJ 7601, [2014] All ER (D) 271 (Mar)	3.148
Geldof Metaalconstructie NV v Simon Carves Ltd [2010] EWCA Civ 667, [2010] 4 All ER 847, [2011] 1 Lloyd's Rep 517, 130 ConLR 37, [2010] NLJR 878, [2010] BLR 401, (2010) Times, 21 June, [2011] Bus LR D61, [2010] All ER (D) 69 (Jun)	22.71
General Distributors Ltd v Paramotors Ltd [1962] SASR 1	16.19
General Reinsurance Corp'n v Forsakringsaktiebolaget Fennia Patria [1983] QB 856, [1983] 3 WLR 318, [1983] 2 Lloyd's Rep 287, 127 Sol Jo 389, CA	1.22
German Graphics Graphische Maschinen GmbH v Schree: C-292/08 (2009) C-292/08, [2009] ECR I-8421, [2009] All ER (D) 75 (Sep)	37.12
Gestoras Pro Amnistia v EU Council: C-354/04 P (2007) C-354/04 P, ECLI:EU:C:2007:115, [2007] ECR I-1579, [2008] All ER (EC) 65, [2007] 2 CMLR 525, [2007] All ER (D) 354 (Feb), EUCJ	31.84
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Giannis NK, The. See Effort Shipping Co Ltd v Linden Management SA, The Giannis NK	
Gibbons Holdings Ltd v Wholesale Distributors Ltd [2007] NZSC 37, [2008] 3 LRC 632	3.68
Giedo Van Der Garde BV v Force India Formula One Team Ltd [2010] EWHC 2373 (QB), [2010] All ER (D) 122 (Sep)	8.25
Gilchrist, Watt and Sanderson Pty Ltd v York Products Pty Ltd [1970] 3 All ER 825, [1970] 1 WLR 1262, 114 Sol Jo 571, sub nom York Products Pty Ltd v Gilchrist Watt and Sanderson Pty Ltd [1970] 2 Lloyd's Rep 1, [1970] 2 NSW 156, PC	36.74
Gill (Stewart) Ltd v Horatio Myer & Co Ltd [1992] QB 600, [1992] 2 All ER 257, [1992] 2 WLR 721	3.79
Gill & Duffus SA v Berger & Co Inc. See Berger & Co Inc v Gill & Duffus SA	
Gillett v Holt [2001] Ch 210, [2000] 2 All ER 289, [2000] 3 WLR 815, [2000] 1 FCR 705, [2000] FLR 266, [2000] Fam Law 714, [2000] 12 LS Gaz R 40, [2000] All ER (D) 299	3.15
Giumelli v Giumelli (1999) 1 ITEL 603, [2000] 3 LRC 120, Aus HC	3.21
Glencore Energy UK Ltd and another company v Freeport Holdings Ltd [2019] EWCA Civ 388, [2019] 2 All ER (Comm) 731, [2019] Bus LR 2809, [2019] 2 Lloyd's Rep 109, [2019] All ER (D) 25 (Apr)	36.08
Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce (Lorico) [1997] 4 All ER 514, [1997] 2 Lloyd's Rep 386	34.08, 34.42
Glencore International AG v Bank of China [1996] 1 Lloyd's Rep 135, 13 LDAB 209	35.47, 35.64
Glencore International AG v Metro Trading Inc [2001] 1 All ER (Comm) 103, [2001] 1 Lloyd's Rep 284, [2000] All ER (D) 1467	37.84
Global Europe Trader Ltd, Re [2009] EWHC 602 (Ch), [2009] 2 BCLC 18, [2009] BPIR 446, [2009] All ER (D) 297 (Mar)	21.24
Globe Master Management Ltd v Boulus-Gad Ltd [2002] EWCA Civ 313, [2002] All ER (D) 39 (Mar)	3.175
Godard v Gray (1870) LR 6 QB 139, 40 LJQB 62, 19 WR 348, 24 LT 89	37.38
Godts v Rose (1855) 17 CB 229, 25 LJCP 61, 1 Jur NS 1173, 4 WR 129, 139 ER 1058, 26 LTOS 240	10.10
Gold Reserve Inc. v Bolivarian Republic of Venezuela [2016] EWHC 153 (Comm), [2016] All ER (D) 67 (Feb)	39.98
Goldcorp Exchange Ltd (in receivership), Re [1995] 1 AC 74, [1994] 2 All ER 806, [1994] 3 WLR 199, [1994] 2 BCLC 578, [1994] NLJR 792, sub nom Kensington v Unrepresented Non-allocated Claimants [1994] 24 LS Gaz R 46, 138 Sol Jo LB 127, PC	2.45, 8.27, 8.37, 8.48, 8.50
Golden Endurance Shipping SA v RMA Watanya SA [2014] EWHC 3917 (Comm), [2015] 2 All ER (Comm) 435, [2015] 1 Lloyd's Rep 266, [2014] All ER (D) 290 (Nov)	36.18

Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd [2012] EWCA Civ 265, [2012] 3 All ER 842, [2012] 1 WLR 3674, [2012] 2 All ER (Comm) 978, [2012] 1 Lloyd's Rep 542, [2013] IP & T 130, [2012] NLJR 425, [2012] All ER (D) 83 (Mar)	3.30, 30.21, 37.67
Golden Rio, The. See Esteve Trading Corpn v Agropec International, The Golden Rio	
Golden Strait Corpn v Nippon Yusen Kubishika Kaisha [2007] UKHL 12, [2007] 2 AC 353, [2007] 3 All ER 1, [2007] 2 WLR 691, [2007] 2 All ER (Comm) 97, [2007] Bus LR 997, [2007] 2 Lloyd's Rep 164, [2007] NLJR 518, (2007) Times, 30 March, [2007] 5 LRC 363, [2007] All ER (D) 457 (Mar)	14.14, 14.54
Goldsmith v Rodger [1962] 2 Lloyd's Rep 249, CA	7.07
Goldsohl v Goldman [1915] 1 Ch 292, 84 LJ Ch 228, [1914–15] All ER Rep 257, 59 Sol Jo 188, 112 LT 494, CA	3.158
Golodetz (M) & Co Inc v Czarnikow-Rionda Co Inc, The Galatia [1979] 2 All ER 726, [1980] 1 WLR 495, [1979] 2 Lloyd's Rep 450; affd [1980] 1 All ER 501, [1980] 1 WLR 495, [1980] 1 Lloyd's Rep 453, 124 Sol Jo 201	32.64, 34.23
Goodlife Foods Ltd v Hall Fire Protection Ltd [2018] EWCA Civ 1371, 178 ConLR 1, [2018] BLR 491	1.11, 3.50, 3.82
Goodwin v Gray (1874) 22 WR 312	30.33
Goodwood Investments Holdings Inc. v Thyssenkrupp Industrial Solutions AG [2018] EWHC 1056 (Comm), [2018] All ER (D) 41 (May)	39.62, 39.81
Gordon, Re, ex p Navalchand [1897] 2 QB 516, 66 LJQB 768, 4 Mans 141, 46 WR 31	22.74
Goss v Lord Nugent (1833) 5 B & Ad 58, 2 LJKB 127, 2 Nev & MKB 28, 110 ER 713, [1824–34] All ER Rep 305	3.67, 3.88
Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander [1929] AC 223, 32 Ll L Rep 91, 98 LJKB 181, 17 Asp MLC 549, 34 Com Cas 94, [1928] All ER Rep 97, 140 LT 202, 45 TLR 63, HL	36.53
Gothaer Allgemeine Versicherung AG v Samskip GmbH: C-456/11 [2013] QB 548, [2013] 2 WLR 520, [2012] All ER (D) 316 (Nov), ECJ	37.45
Gough v Everard (1863) 2 H & C 1, 32 LJ Ex 210, 2 New Rep 169, 11 WR 702, 159 ER 1, 8 LT 363, Exch Ct	2.45
Government of United States of America v Montgomery (No 2) [2004] UKHL 37, [2004] 4 All ER 289, [2004] 1 WLR 2241, [2004] NLJR 1184, (2004) Times, 29 July, 148 Sol Jo LB 942, [2004] All ER (D) 402 (Jul)	37.51
Governments Stock and Other Securities Investment Co Ltd v Manila Rly Co [1897] AC 81, 66 LJ Ch 102, 45 WR 353, 75 LT 553, 13 TLR 109, HL	25.18
Graanhandel T Vink BV v European Grain and Shipping Ltd [1989] 2 Lloyd's Rep 531	12.10, 12.11
Graham v Freer (1980) 35 SASR 42	7.07
Grain Union Co SA Antwerp v Hans Larsen A/S Aalborg (1933) 18 Asp MLC 449, 38 Com Cas 260, [1933] All ER Rep 342, 150 LT 78, 49 TLR 540	34.25
Spar Shipping AS v Grand China Logistics Holding (Group) Co; The Spar Capella, The Spar Vega and Spar Draco [2016] EWCA Civ 982, [2017] 4 All ER 124, [2017] 2 All ER (Comm) 701, [2017] Bus LR 663, [2016] 2 Lloyd's Rep 447, [2016] All ER (D) 67 (Oct)	3.145
Grange v Quinn [2013] EWCA Civ 24, [2013] 1 P & CR 279, [2013] 2 EGLR 198, [2013] All ER (D) 246 (Jan)	14.27
Grant v Australian Knitting Mills Ltd [1936] AC 85, 105 LJPC 6, [1935] All ER Rep 209, 79 Sol Jo 815, 154 LT 18, 52 TLR 38, PC	3.130, 11.35, 11.70, 11.89, 11.99
Grant v Norway (1851) 10 CB 665, 20 LJCP 93, 15 Jur 296, 138 ER 263, 16 LTOS 504	36.52
Grantham v Hawley (1615) Hob 132, 80 ER 281	8.74
Gray v G-T-P Group Ltd [2010] EWHC 1772 (Ch), [2011] 1 BCLC 313, [2011] BCC 869, [2010] All ER (D) 80 (May)	25.13
Great Eastern Shipping Co Ltd v Far East Chartering Ltd, The Jag Ravi [2012] EWCA Civ 180, [2012] 2 All ER (Comm) 707, [2012] 1 Lloyd's Rep 637, [2012] All ER (D) 99 (Mar)	3.89
Great Elephant Corporation v Trafigura Beheer BV, The Crudesky [2012] EWHC 1745 (Comm), [2013] 1 All ER (Comm) 415, [2012] 2 Lloyd's Rep 503, [2012] All ER (D) 190 (Jun); revsd [2013] EWCA Civ 905, [2013] 2 All ER (Comm) 992, [2014] 1 Lloyd's Rep 1, [2013] All ER (D) 315 (Jul)	11.15, 11.24

Table of Cases

Great Northern Rly Co v Swaffield (1874) LR 9 Exch 132, 43 LJ Ex 89, [1874–80] All ER Rep 1065, 30 LT 562, ExCh	36.36
Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd, The Great Peace [2002] EWCA Civ 1407, [2003] QB 679, [2002] 4 All ER 689, [2002] 3 WLR 1617, [2002] 2 All ER (Comm) 999, [2002] 43 LS Gaz R 34, [2002] NLJR 1616, (2002) Times, 17 October, [2002] All ER (D) 184 (Oct)	3.33
Greaves & Co (Contractors) Ltd v Baynham, Meikle & Partners [1975] 3 All ER 99, [1975] 1 WLR 1095, [1975] 2 Lloyd's Rep 325, 119 Sol Jo 372, [1975] 2 EGLR 81, 4 BLR 56	3.66, 7.38
Grébert-Borgnis v Nugent (1885) 15 QBD 85, 54 LJQB 511, 1 TLR 434, CA	14.27
Green (R W) Ltd v Cade Bros Farms [1978] 1 Lloyd's Rep 602	3.78, 1.137
Green v Wynn (1868) LR 7 Eq 28, 38 LJ Ch 76, 17 WR 72, 19 LT 553; affd (1869) LR 4 Ch App 204, 38 LJ Ch 220, 17 WR 385, 20 LT 131, CA in Ch	30.41
Greenclose Ltd v National Westminster Bank Plc [2014] EWHC 1156 (Ch), [2014] 2 Lloyd's Rep 169, [2014] 2 BCLC 486, [2014] All ER (D) 127 (Apr)	3.76
Green Deal Marketing Southern Ltd v Economy Energy Trading Ltd [2019] EWHC 507 (Ch), [2019] 2 All ER (Comm) 191, [2019] All ER (D) 79 (Mar)	5.09, 5.39
Greenwood v Bennett [1973] QB 195, [1972] 3 All ER 586, [1972] 3 WLR 691, [1972] RTR 535, 116 Sol Jo 762	2.94
Griffin v Weatherby (1868) LR 3 QB 753, 9 B & S 726, 37 LJQB 280, 17 WR 8, 18 LT 881	5.31
Griffiths v Peter Conway Ltd [1939] 1 All ER 685, CA	11.111
Griffiths v Yorkshire Bank plc [1994] 1 WLR 1427, [1994] 36 LS Gaz R 36 ..	25.25, 25.28
Groom (C) Ltd v Barber [1915] 1 KB 316, 84 LJKB 318, 12 Asp MLC 594, 20 Com Cas 71, [1914–15] All ER Rep 194, 59 Sol Jo 129, 112 LT 301, 31 TLR 66	34.33, 34.34, 34.35
Grovewood Holdings plc v James Capel & Co Ltd [1995] Ch 80, [1994] 4 All ER 417, [1995] 2 WLR 70, [1994] 2 BCLC 782, [1995] BCC 760, [1994] NLJR 1405	31.76
Guaranty Trust Co of New York v Hannay & Co [1918] 2 KB 623, 87 LJKB 1223, [1918–19] All ER Rep 151, 119 LT 321, 34 TLR 427, sub nom Guaranty Trust Co of New York v Hannay 3 LDAB 176, CA	19.55

H

HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [2003] 2 Lloyd's Rep 61, [2003] Lloyd's Rep IR 230, 147 Sol Jo LB 264, [2003] All ER (D) 272 (Feb)	3.77, 5.26, 31.82
HPJ UK Ltd (in admin), Re [2007] BCC 284	31.33
Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd [2010] EWCA Civ 1335, [2011] QB 943, [2011] 2 WLR 1165, [2011] Bus LR 692, [2010] All ER (D) 277 (Nov)	20.114
Hadley v Baxendale (1854) 23 LJ Ex 179, 9 Exch 341, 18 Jur 358, 2 WR 302, 156 ER 145, [1843–60] All ER Rep 461, 2 CLR 517, 23 LTOS 69, Exch Cr ..	3.134, 14.17, 14.25, 14.41, 14.42, 14.43, 14.44, 15.38, 35.81
Hain Steamship Co Ltd v Tate and Lyle Ltd [1936] 2 All ER 597, 55 Ll L Rep 159, 19 Asp MLC 62, 41 Com Cas 350, 80 Sol Jo 68, 155 LT 177, 52 TLR 617, HL	36.33
Halesowen Presswork and Assemblies Ltd v Westminster Bank Ltd [1971] 1 QB 1, [1970] 3 All ER 473, [1970] 3 WLR 625, 114 Sol Jo 735; revsd sub nom National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd [1972] AC 785, [1972] 1 All ER 641, [1972] 2 WLR 455, [1972] 1 Lloyd's Rep 101, 9 LDAB 253, 116 Sol Jo 138, HL	18.04
Halifax Life Ltd v Equitable Life Assurance Society [2007] EWHC 503 (Comm), [2007] 2 All ER (Comm) 672, [2007] 1 Lloyd's Rep 528, [2007] Bus LR D101, [2007] All ER (D) 212 (Mar)	39.01
Halifax plc v Chandler [2001] EWCA Civ 1750, [2001] All ER (D) 177 (Nov)	38.99
Halki Shipping Corp'n v Sopex Oils Ltd [1998] 2 All ER 23, [1998] 1 WLR 726, [1998] 1 Lloyd's Rep 465, [1998] NPC 4, 142 Sol Jo LB 44	39.33
Hall (R and H) Ltd and W H Pim Junior & Co's Arbitration, Re (1928) 30 Ll L Rep 159, 33 Com Cas 324, [1928] All ER Rep 763, 139 LT 50, HL	14.27, 14.57, 14.58, 14.59, 14.60

Hallett's Estate, Re (1880) 13 Ch D 696, 49 LJ Ch 415, 28 WR 732, [1874–80] All ER Rep 793, 42 LT 421, CA	17.39, 17.40
Halliburton Company v Chubb Bermuda Insurance Ltd [2018] EWCA Civ 817, [2018] 3 All ER 709, [2018] 2 All ER (Comm) 819, [2018] 1 Lloyd's Rep 638, [2018] Lloyd's Rep IR 402, 180 ConLR 23, [2018] BLR 375, [2018] All ER (D) 105 (Apr)	39.45
Halpern v Halpern [2007] EWCA Civ 291, [2008] QB 195, [2007] 3 All ER 478, [2007] 3 WLR 849, [2007] 2 All ER (Comm) 330, [2007] 2 Lloyd's Rep 56, (2007) Times, 14 May, [2007] All ER (D) 38 (Apr)	3.101, 37.68
Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, [2004] 4 All ER 920, [2004] 1 WLR 3002, 81 BMLR 108, [2004] 22 LS Gaz R 31, [2004] NLJR 769, (2004) Times, 27 May, 148 Sol Jo LB 629, [2004] 3 Costs LR 393, [2004] All ER (D) 125 (May)	38.04
Hamilton, Young & Co, Re, ex p Carter [1905] 2 KB 772, 74 LJKB 905, 12 Mans 365, 54 WR 260, 2 LDAB 98, 93 LT 591, 21 TLR 757, CA	35.150
Hamer v Sidway 27 NE 256 (1891)	3.13
Hammer and Barrow v Coca Cola [1962] NZLR 723	13.16, 13.18, 13.20, 13.28
Hammond & Co v Bussey (1887) 20 QBD 79, 57 LJQB 58, 4 TLR 95, CA	14.27
Hampton v Minns [2002] 1 WLR 1, [2002] 1 All ER (Comm) 481, [2001] 20 LS Gaz R 41, [2001] All ER (D) 66 (Mar)	30.24
Hamsard 3147 Ltd v Boots UK Ltd [2013] EWHC 3251 (Pat), [2013] All ER (D) 12 (Nov)	3.76
Hannah Blumenthal, The. See Wilson (Paal) & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal	
Hansa Nord, The. See Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord	
Hansson v Hamel and Horley Ltd [1922] 2 AC 36, 10 Ll L Rep 199, 507, 91 LJKB 433, 15 Asp MLC 546, 27 Com Cas 321, 3 LDAB 255, [1922] All ER Rep 237, 66 Sol Jo 421, 127 LT 74, 38 TLR 466, HL	32.64, 35.70
Harb v HRH Prince Abdul Aziz [2015] EWCA Civ 481, [2016] 2 WLR 533, [2016] 2 LRC 150, [2015] All ER (D) 122 (May)	39.98
Harbottle (R D) (Mercantile) Ltd v National Westminster Bank Ltd [1978] QB 146, [1977] 2 All ER 862, [1977] 3 WLR 752, 121 Sol Jo 745	35.167
Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] QB 701, [1993] 3 All ER 897, [1993] 3 WLR 42, [1993] 1 Lloyd's Rep 455, [1993] 14 LS Gaz R 42	39.53
Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd [1970] 1 QB 447, [1970] 1 All ER 225, [1970] 2 WLR 198, [1970] 1 Lloyd's Rep 15, 114 Sol Jo 29	3.77, 3.82, 14.24
Hardy & Co v Hillerns and Fowler [1923] 2 KB 490, 92 LJKB 930, 29 Com Cas 30, [1923] All ER Rep 275, 67 Sol Jo 618, 129 LT 674, 39 TLR 547, CA .	13.10, 13.16, 13.28
Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd [1991] 1 QB 564, [1990] 1 All ER 737, [1990] 3 WLR 13, [1990] NLJR 90	11.45, 11.46
Harlow & Jones Ltd v American Express Bank Ltd and Creditanstalt-Bankverein (third party) [1990] 2 Lloyd's Rep 343	35.45
Harlow and Jones Ltd v Panex (International) Ltd [1967] 2 Lloyd's Rep 509 .	15.44, 34.04
Harmer v Cornelius (1858) 22 JP 724, 5 CBNS 236, 28 LJCP 85, 4 Jur NS 1110, 6 WR 749, 141 ER 94, [1843–60] All ER Rep 624, 32 LTOS 62	3.60
Harmony Care Homes Ltd Re [2009] EWHC 1961 (Ch)	29.10
Harris v Rickett (1859) 4 H & N 1, 28 LJ Ex 197, 157 ER 734, 32 LTOS 389, Exch Ct	3.69
Harris v Wyre Forest District Council [1988] QB 835, [1988] 1 All ER 691, [1988] 2 WLR 1173, 87 LGR 19, 20 HLR 278, 132 Sol Jo 91, [1988] 1 EGLR 132, [1988] 7 LS Gaz R 40, [1988] NLJR 15, [1988] 05 EG 57; sub nom Smith v Eric S Bush (a firm), Harris v Wyre Forest District Council [1990] 1 AC 831, [1989] 2 All ER 514, [1989] 2 WLR 790, 87 LGR 685, 21 HLR 424, 17 ConLR 1, 11 LDAB 412, 133 Sol Jo 597, [1989] 1 EGLR 169, [1989] NLJR 576, [1989] 17 EG 68, 18 EG 99, HL	3.79
Hartley v Case (1825) 4 B & C 339, 1 C & P 676, 3 LJOSKB 262, 6 Dow & Ry KB 505, 107 ER 1085	8.111
Hartley v Hymans [1920] 3 KB 475, 90 LJKB 14, 25 Com Cas 365, [1920] All ER Rep 328, 124 LT 31, 36 TLR 805	3.144, 10.24
Hartog v Colin and Shields [1939] 3 All ER 566	3.32
Harvey v Dunbar Assets plc [2013] EWCA Civ 952, [2013] All ER (D) 400 (Jul)	30.21

Table of Cases

Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579, [2012] QB 549, [2011] 1 All ER 190, [2012] 2 WLR 199, [2011] 1 All ER (Comm) 985, [2012] Bus LR 1, [2010] All ER (D) 273 (May)	37.78
Hay v Carter [1935] Ch 397, 104 LJ Ch 220, [1935] All ER Rep 482, 152 LT 445, CA	30.50
Hayman & Son v M'Lintock (1907) 44 SLR 691, 1907 SC 936, 9 F 936, 15 SLT 63, Ct of Sess	2.45
Hazell v Hammersmith and Fulham London Borough Council [1992] 2 AC 1, [1991] 1 All ER 545, [1991] 2 WLR 372, 89 LGR 271, 11 LDAB 635, [1991] RVR 28, HL	4.42
Head v Tattersall (1871) LR 7 Exch 7, 41 LJ Ex 4, 20 WR 115, 25 LT 631, Exch Ct	12.18, 13.16
Healy v Howlett & Sons [1917] 1 KB 337, 86 LJKB 252, 116 LT 591	8.96, 9.09
Heap v Motorists' Advisory Agency Ltd [1923] 1 KB 577, 92 LJKB 553, [1922] All ER Rep 251, 67 Sol Jo 300, 129 LT 146, 39 TLR 150	16.43, 16.44
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465, [1963] 2 All ER 575, [1963] 3 WLR 101, [1963] 1 Lloyd's Rep 485, 8 LDAB 155, 107 Sol Jo 454, HL ...	14.10, 35.94
Heilbut, Symons & Co v Buckleton [1913] AC 30, 82 LJKB 245, 20 Mans 54, [1911–13] All ER Rep 83, 107 LT 769, HL	3.41, 6.03
Helby v Matthews [1895] AC 471, 60 JP 20, 64 LJQB 465, 11 R 232, 43 WR 561, [1895–9] All ER Rep 821, 72 LT 841, 11 TLR 446, [1999] GCCR 21, HL	7.23, 8.103, 16.61, 27.12
Hellenic Steel Co v Svolamar Shipping Co Ltd, The Komninos S [1991] 1 Lloyd's Rep 370, CA	36.15
Helstan Securities Ltd v Hertfordshire County Council [1978] 3 All ER 262, 76 LGR 735	29.41, 35.139
Henderson v Merrett Syndicates [1995] 2 AC 145, [1994] 3 All ER 506, [1994] 3 WLR 761, [1994] NLJR 1204, [1994] 4 LRC 355, HL	3.01
Hendrikman v Magenta Druck & Verlag GmbH: C-78/95 [1997] QB 426, [1996] ECR I-4943, [1997] 2 WLR 349, [1996] All ER (EC) 944, [1996] ILPr 752, ECJ	37.47
Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd [2001] QB 388, [2001] 1 All ER 257, [2000] 3 WLR 1824, [2000] 2 All ER (Comm) 960, [2000] 2 Lloyd's Rep 625, 72 ConLR 1, [2000] NLJR 867, [2000] BLR 509, [2000] All ER (D) 1104	39.89
Hepburn v A Tomlinson (Hauliers) Ltd [1966] AC 451, [1966] 1 All ER 418, [1966] 2 WLR 453, [1966] 1 Lloyd's Rep 309, 110 Sol Jo 86, HL	9.43
Herne Bay Steam Boat Co v Hutton [1903] 2 KB 683, 72 LJKB 879, 9 Asp MLC 472, 52 WR 183, [1900–3] All ER Rep 627, 47 Sol Jo 768, 89 LT 422, 19 TLR 680, CA	3.169
Heron II, The. See Koufos v C Czarnikow Ltd, The Heron II	
Hersom v Bennett [1955] 1 QB 98, [1954] 3 All ER 370, [1954] 3 WLR 737, 98 Sol Jo 805	5.35
Heskell v Continental Express Ltd [1950] 1 All ER 1033, 83 Ll L Rep 438, [1950] WN 210, 94 Sol Jo 339	36.23
Hewett v Court (1983) 149 CLR 639, Aus HC	22.67
Hewitt v Loosemore (1851) 9 Hare 449, 21 LJ Ch 69, 15 Jur 1097, 89 RR 526, 68 ER 586, 18 LTOS 133	24.26
Heywood v Wellers [1976] QB 446, [1976] 1 All ER 300, [1976] 2 WLR 101, [1976] 2 Lloyd's Rep 88, 120 Sol Jo 9	3.130
Hickman v Haynes (1875) LR 10 CP 598, 44 LJCP 358, 23 WR 872, 32 LT 873, [1874–80] All ER Rep Ext 2182, CPD	15.39
Hickox v Adams (1876) 3 Asp MLC 142, 34 LT 404, CA	32.74
Highbury Pension Fund Management Co v Zirfin Investments Management Ltd [2013] EWCA Civ 1283, [2014] Ch 359, [2014] 1 All ER 674, [2014] 2 WLR 1129, [2014] 1 BCLC 118, [2014] 1 P & CR 225, [2013] All ER (D) 336 (Oct)	23.54
High Commissioner for Pakistan in the United Kingdom v National Westminster Bank plc [2015] EWHC 55 (Ch), [2015] All ER (D) 107 (Jan)	39.99
Hill & Sons v Edwin Showell & Sons Ltd (1918) 87 LJKB 1106, sub nom John Hall & Son Ltd v Edwin Showell & Sons Ltd 62 Sol Jo 715, 119 LT 651, HL	15.45

Hill v Spread Trustee Co Ltd [2006] EWCA Civ 542, [2007] 1 All ER 1106, [2007] 1 WLR 2404, [2007] Bus LR 1213, [2007] 1 BCLC 450, [2006] BCC 646, (2006) Times, 10 July, [2006] BPIR 789, [2006] All ER (D) 202 (May)	31.42
Hilmarton Ltd v Omnium de Traitement et de Valorisation (OTV) Cass le civ (23 March 1994, unreported)	39.40
Hing Yip Hing Fat Co Ltd v Daiwa Bank Ltd [1991] 2 HKLR 35, HK HC	35.70
Hiram Walker & Sons Ltd v Dover Navigation Co Ltd (1949) 83 L1 L Rep 84	36.20
Hirji Mulji v Cheong Yue Steamship Co Ltd [1926] AC 497, 95 LJPC 121, 17 Asp MLC 8, 31 Com Cas 199, [1926] All ER Rep 51, 134 LT 737, 42 TLR 359, PC	3.66, 3.174
Hiscox v Outhwaite [1992] 1 AC 562, [1991] 3 All ER 641, [1991] 3 WLR 297, [1991] 2 Lloyd's Rep 435, HL	39.78
Hitachi Shipbuilding and Engineering Co Ltd v Viefel Cia Naviera SA [1981] 2 Lloyd's Rep 498, CA	38.99
Hitchcock v Cameron [1977] 1 NZLR 85	13.14
Hitchcock v Humfrey (1843) 12 LJCP 235, 7 Jur 423, 5 Man & G 559, 6 Scott NR 540, 134 ER 683, 1 LTOS 109	30.44
Hoenig v Isaacs [1952] 2 All ER 176, [1952] 1 TLR 1360, CA	3.117
Hollandia, The [1983] 1 AC 565, [1982] 3 All ER 1141, [1982] 3 WLR 1111, 126 Sol Jo 819, sub nom Morviken, The [1983] 1 Lloyd's Rep 1, [1983] Com LR 44, HL ...	36.08, 36.11, 37.80
Hollicourt (Contracts) Ltd (in liq) v Bank of Ireland [2001] Ch 555, [2001] 1 All ER 289, [2001] 2 WLR 290, [2001] 1 All ER (Comm) 357, [2001] Lloyd's Rep Bank 6, [2001] 1 BCLC 233, [2000] BCC 1210, (2000) Times, 1 November, [2001] BPIR 47, [2000] All ER (D) 1480	31.51
Holman v Johnson (1775) 1 Cowp 341	3.169
Holme v Brunskill (1878) 3 QBD 495, 42 JP 757, 47 LJQB 610, 38 LT 838, CA	30.41
Holmes (Eric) (Property) Ltd, Re [1965] Ch 1052, [1965] 2 All ER 333, [1965] 2 WLR 1260, 8 LDAB 349, 109 Sol Jo 251	24.31
Holroyd v Marshall (1862) 10 HL Cas 191, 33 LJ Ch 193, 9 Jur NS 213, 138 RR 108, 11 WR 171, 11 ER 999, [1861–73] All ER Rep 414, 7 LT 172, HL ...	23.03, 23.21, 25.01, 25.12
Holterman Ferho Exploitatie BV v von Bullesheim: C-47/14 (2015) C-47/14, ECLI:EU:C:2015:574, [2016] IRLR 140, [2016] ICR 90, [2015] All ER (D) 72 (Sep)	37.17
Homburg Houtimport BV v Agrosin Private Ltd, The Starsin [2003] UKHL 12, [2004] 1 AC 715, [2003] 2 All ER 785, [2003] 2 WLR 711, [2003] 1 All ER (Comm) 625, [2003] 1 Lloyd's Rep 571, [2003] 19 LS Gaz R 31, (2003) Times, 17 March, [2003] All ER (D) 192 (Mar)	3.50, 36.17, 36.52
Homes v Smith [2000] Lloyd's Rep Bank 139, [2000] All ER (D) 2568	17.18, 18.02, 18.06
Honam Jade, The. See Phibro Energy AG v Nissho Iwai Corpn and Bomar Oil Inc, The Honam Jade	
Honck v Muller (1881) 7 QBD 92, 50 LJQB 529, 29 WR 830, 45 LT 202, CA	10.30, 10.45
Hong Kong & Shanghai Banking Corpn Ltd v G D Trade Co Ltd [1998] CLC 238, 14 LDAB 59	20.17, 20.24, 20.32
Hong Kong and Shanghai Banking Corpn Ltd v Jurong Engineering Ltd [2000] 2 SLR 54	30.15
Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26, [1962] 1 All ER 474, [1962] 2 WLR 474, [1961] 2 Lloyd's Rep 478, 106 Sol Jo 35, CA ...	3.145, 11.50
Hongkong and Shanghai Banking Corpn v Kloeckner & Co AG [1990] 2 QB 514, [1989] 3 All ER 513, [1990] 3 WLR 634, [1989] 2 Lloyd's Rep 323, [1989] BCLC 776, 11 LDAB 360, [1990] 27 LS Gaz R 42	35.56
Honyvem Informazioni Commerciali Srl v De Zotti: C-465/04 [2006] ECR I-2879, [2006] All ER (D) 343 (Mar), ECJ	5.39
Hookway (F E) & Co Ltd v Alfred Isaacs & Sons [1954] 1 Lloyd's Rep 491	11.128
Hopkinson v Rolt (1861) 9 HL Cas 514, 34 LJ Ch 468, 7 Jur NS 1209, 9 WR 900, 5 LT 90, [1861–73] All ER Rep Ext 2380, HL	24.20, 24.21, 24.23, 24.24
Horace Holman Group Ltd v Sherwood International Group Ltd [2001] All ER (D) 83 (Nov)	7.20
Horne and Hellard, Re (1885) 29 Ch D 736, 54 LJ Ch 919, 53 LT 562	25.19

Table of Cases

Horsler v Zorro [1975] Ch 302, [1975] 1 All ER 584, [1975] 2 WLR 183, 29 P & CR 180, 119 Sol Jo 83	3.100
Horst (E Clemens) Co v Norfolk and North American Steamship Co Ltd (1906) 11 Com Cas 141, 22 TLR 403	32.55
Hortico (Australia) Pty Ltd v Energy Equipment Co (Australia) Pty Ltd (1985) 1 NSWLR 545, NSW SC	35.119
Houda, The. See Kuwait Petroleum Corpn v I and D Oil Carriers Ltd, The Houda	
Hounga v Allen [2014] UKSC 47, [2014] 4 All ER 595, [2014] 1 WLR 2889, [2014] IRLR 811, [2014] ICR 847, (2014) Times, 06 August, 39 BHRC 412, [2015] 3 LRC 155, [2014] EqLR 559, [2014] All ER (D) 289 (Jul)	3.156
Hounslow London Borough Council v Twickenham Garden Developments Ltd [1971] Ch 233, [1970] 3 All ER 326, [1970] 3 WLR 538, 69 LGR 109, 114 Sol Jo 603, 7 BLR 81	3.146
House of Spring Gardens Ltd v Waite [1991] 1 QB 241, [1990] 2 All ER 990, [1990] 3 WLR 347, [1990] 28 LS Gaz R 44	37.51
Household Machines Ltd v Cosmos Exporters Ltd [1947] KB 217, [1946] 2 All ER 622, [1947] LJR 578, 176 LT 49, 62 TLR 757	14.26
Household Products Co Ltd and Federal Business Development Bank, Re (1981) 124 DLR (3d) 325, Ont HC	25.25
Howard v Pickford Tool Co Ltd [1951] 1 KB 417, 95 Sol Jo 44, CA	3.142
Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd [1978] QB 574, [1978] 2 All ER 1134, [1978] 2 WLR 515, [1978] 1 Lloyd's Rep 334, 122 Sol Jo 48, 9 BLR 34	3.99
Howe, Re, ex p Brett (1871) LR 6 Ch App 838, 40 LJ Bcy 54, 19 WR 1101, 25 LT 252, [1861–73] All ER Rep Ext 1305, CA in Ch	30.37
Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd [1978] 1 Lloyd's Rep 161, CA	35.167
Hubbuck v Helms (1887) 56 LJ Ch 536, 35 WR 574, 56 LT 232, 3 TLR 381	25.16
Hughes v Liverpool Victoria Legal Friendly Society [1916] 2 KB 482, 85 LJKB 1643, [1916–17] All ER Rep 918, 115 LT 40, 32 TLR 525, CA	3.162
Hughes v Metropolitan Rly Co (1877) 2 App Cas 439, 42 JP 421, 46 LJQB 583, 25 WR 680, [1874–80] All ER Rep 187, 36 LT 932, HL	3.95
Hughes v Pendragon Sabre Ltd trading as Porsche Centre Bolton [2016] EWCA Civ 18, [2016] 1 Lloyd's Rep 311, [2016] All ER (D) 184 (Jan)	8.77, 10.21, 14.24, 14.52
Hughes v Pump House Hotel Co [1902] 2 KB 190, 71 LJKB 630, 50 WR 660, 2 LDAB 25, [1900–3] All ER Rep 480, 86 LT 794, 18 TLR 654, CA	23.14
Humber Ironworks and Shipbuilding Co, Re, Warrant Finance Co's Case (1869) LR 4 Ch App 643, 38 LJ Ch 712, 17 WR 780, 20 LT 859, CACH	31.34
Humfrey v Dale (1857) 7 E & B 266	3.59
Hunter v Moss [1994] 3 All ER 215, [1994] 1 WLR 452, [1994] 8 LS Gaz R 38, 138 Sol Jo LB 25	2.90
Hunter v Prinsep (1808) 10 East 378, 103 ER 818, [1803–13] All ER Rep 446	36.60
Hussman (Europe) Ltd v Al Ameen Development & Trade Co [2000] 2 Lloyd's Rep 83	39.70
Hussmann (Europe) Ltd v Pharaon (formerly trading as Al Ameen Development and Trade Establishment) [2003] EWCA Civ 266, [2003] 1 All ER (Comm) 879, [2003] 19 LS Gaz R 29, (2003) Times, 12 March, 147 Sol Jo LB 298, [2003] ArbLR 25, [2003] All ER (D) 17 (Mar)	39.87
Hyman v Nye (1881) 6 QBD 685, 45 JP 554, [1881–5] All ER Rep 183, 44 LT 919	6.05
Hyundai Engineering and Construction Co Ltd v Vigour Ltd [2005] BLR 416	38.03
Hyundai Heavy Industries Co Ltd v Papadopoulos [1980] 2 All ER 29, [1980] 1 WLR 1129, [1980] 2 Lloyd's Rep 1, 124 Sol Jo 592, HL	3.142, 7.21, 30.25

I

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ING Bank NV v Ros Roca SA [2011] EWCA Civ 353, [2012] 1 WLR 472, [2012] Bus LR 266, [2011] All ER (D) 39 (Apr)	3.97

Ibrahim v Barclays Bank plc [2012] EWCA Civ 640, [2013] Ch 400, [2012] 4 All ER 160, [2013] 2 WLR 768, [2012] 2 All ER (Comm) 1167, [2012] 2 Lloyd's Rep 13, [2012] 2 BCLC 1, [2012] NLJR 843, [2012] All ER (D) 25 (Jun)	35.52
Illingworth v Houldsworth. See Yorkshire Woolcombers Association Ltd, Re, Houldsworth v Yorkshire Woolcombers Association Ltd	
Impact Funding Solutions Ltd v AIG Europe Insurance Ltd (formerly known as Chartis Insurance (UK) Ltd) [2016] UKSC 57, [2017] AC 73, [2017] 4 All ER 169, [2016] 3 WLR 1422, [2017] 2 All ER (Comm) 863, [2016] Bus LR 1158, [2017] Lloyd's Rep IR 60, (2016) Times, 07 November, [2016] 6 Costs LO 903, [2016] All ER (D) 168 (Oct), SC	3.57
Ind Coope & Co Ltd, Re, Fisher v Ind Coope & Co Ltd [1911] 2 Ch 223, 80 LJ Ch 661, 55 Sol Jo 600, 105 LT 356	29.45
Independent Automatic Sales Ltd v Knowles and Foster [1962] 3 All ER 27, [1962] 1 WLR 974, 8 LDAB 91, 106 Sol Jo 720	23.07, 24.30, 24.50
India (Republic) v India Steamship Co Ltd, The Indian Endurance, The Indian Grace [1993] AC 410, [1993] 1 All ER 998, [1993] 2 WLR 461, [1993] 1 Lloyd's Rep 387, [1993] 14 LS Gaz R 45, HL	37.50
India (President of) v Lips Maritime Corpn, The Lips [1988] AC 395, [1987] 3 All ER 110, [1987] 3 WLR 572, [1987] 2 Lloyd's Rep 311, 131 Sol Jo 1085, [1987] LS Gaz R 2765, [1987] NLJ Rep 734, HL	35.124, 35.125
India (Union) v McDonnell Douglas Corpn [1993] 2 Lloyd's Rep 48	39.22, 39.39
Indian Endurance (No 2), The, Republic of India v India Steamship Co Ltd [1998] AC 878, [1997] 4 All ER 380, [1997] 3 WLR 818, [1998] 1 Lloyd's Rep 1, [1997] 43 LS Gaz R 29, [1997] NLJR 1581, 141 Sol Jo LB 230, HL	37.50
Indian Oil Corpn Ltd v Greenstone Shipping SA (Panama), The Ypatianna [1988] QB 345, [1987] 3 All ER 893, [1987] 3 WLR 869, [1987] 2 Lloyd's Rep 286, 131 Sol Jo 1121, [1987] LS Gaz R 2768	8.42
Industrie Chimiche Italia Centrale and Cerealfin SA v Alexander G Tsavlis & Sons Maritime Co, Panchristo Shipping Co SA and Bula Shipping Corpn, The Choko Star [1990] 1 Lloyd's Rep 516, CA	5.15
Industrie Tessili Italiana Como v Dunlop AG: 12/76 [1976] ECR 1473, [1977] 1 CMLR 26, ECJ	37.19
Inglis v Stock. See Stock v Inglis	
Ingmar GB Ltd v Eaton Leonard Inc [2001] All ER (D) 448 (Jul)	5.32
Ingmar GB Ltd v Eaton Leonard Technologies Inc: C-381/98 [2000] ECR I-9305, [2001] 1 All ER (Comm) 329, [2001] All ER (EC) 57, [2001] 1 CMLR 215, [2000] GCCR 4477, [2000] All ER (D) 1759, ECJ	5.26
Ingram v Little [1961] 1 QB 31, [1960] 3 All ER 332, [1960] 3 WLR 504, 104 Sol Jo 704, CA	3.33
IRC v Rowntree & Co Ltd [1948] 1 All ER 482, 41 R & IT 364, [1948] TR 37, 92 Sol Jo 296, CA	22.08
Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV: C-133/08 [2010] QB 411, [2009] ECR I-09687, [2010] 3 WLR 24, [2010] 1 All ER (Comm) 613, [2010] All ER (EC) 1, [2010] Bus LR 808, [2010] 2 Lloyd's Rep 400, [2009] All ER (D) 71 (Oct), ECJ	37.77
Interdil Srl v Fallimento Interdil Srl: C-396/09 [2011] ECR I-9915, [2012] Bus LR 1582, [2012] BCC 851, [2011] BPIR 1639, [2011] All ER (D) 195 (Oct), ECJ	31.84
Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433, [1988] 1 All ER 348, [1988] 2 WLR 615, [1988] BTLC 39, 132 Sol Jo 460, [1988] 9 LS Gaz R 45, [1987] NLJ Rep 1159	3.50
International Air Transport Association v Ansett Australia Holdings Ltd [2008] HCA 3, [2008] BPIR 57	22.41
International Business Machines Co v Sheherban (1925) 1 DLR 684	11.79
International Factors Ltd v Rodriguez [1979] QB 351, [1979] 1 All ER 17, [1978] 3 WLR 877, 122 Sol Jo 680	2.56, 2.95, 29.26
International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co (1958) 100 CLR 644, 32 ALJR 160, Aus HC	7.23
International Milling Co v The Perseus [1958] 2 Lloyd's Rep 272	36.17
International Minerals and Chemical Corpn v Karl O Helm AG [1986] 1 Lloyd's Rep 81	35.124, 35.125, 37.110
International Paper Co v Spicer (1906) 4 CLR 739, 13 ALR 481, 7 SRNSW 621, Aus HC	5.19

Intraco Ltd v Notis Shipping Corp'n, The Bhoja Trader [1981] 2 Lloyd's Rep 256, [1981] Com LR 184, CA	35.114
Investment C/JSC v Krygyz Mobil Tel Ltd [2011] UKPC 7, [2011] 4 All ER 1027, [2012] 1 WLR 1804, [2012] 1 All ER (Comm) 319, [2011] 5 LRC 746, [2011] All ER (D) 144 (Mar)	37.33, 37.34, 37.37, 37.38
Investors' Compensation Scheme Ltd v West Bromwich Building Society, Investors' Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society [1998] 1 All ER 98, [1998] 1 WLR 896, [1998] 1 BCLC 493, [1997] CLC 1243, [1997] NLJR 989, [1997] PNLR 541, HL	1.43, 1.45, 1.48, 3.64
Inwards v Baker [1965] 2 QB 29, [1965] 1 All ER 446, [1965] 2 WLR 212, 109 Sol Jo 75, CA	3.15
Ipswich Borough Council v Fisons plc [1990] Ch 709, [1990] 1 All ER 730, [1990] 2 WLR 108, 134 Sol Jo 517, [1990] 1 EGLR 17, [1990] 04 EG 127	39.01
Iran (Islamic Republic of) v Barakat Galleries Ltd [2007] EWCA Civ 1374, [2009] QB 22, [2009] 1 All ER 1177, [2008] 1 All ER 1177, [2008] 3 WLR 486, [2008] 2 All ER (Comm) 225, 152 Sol Jo (no 2) 29, [2007] All ER (D) 372 (Dec)	37.86
Iran Vojdan, The. See Dubai Electricity Co v Islamic Republic of Iran Shipping Lines, The Iran Vojdan	
Iraqi Ministry of Defence v Arcepey Shipping Co SA (Gillespie Bros intervening), The Angel Bell [1981] QB 65, [1980] 1 All ER 480, [1980] 2 WLR 488, [1980] 1 Lloyd's Rep 632, 124 Sol Jo 148	38.99
Ireland v Livingston (1872) LR 5 HL 395, 41 LJQB 201, 1 Asp MLC 389, [1861–73] All ER Rep 585, 27 LT 79, HL	34.24
Irish Bank Resolution Corporation Ltd (in special liq) v Camden Market Holdings Corp [2017] EWCA Civ 7, [2017] 2 All ER (Comm) 781, [2017] All ER (D) 64 (Jan)	3.57
Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd [2010] EWHC 2661 (Comm), [2011] 2 All ER (Comm) 609, [2011] 1 Lloyd's Rep 195, [2010] All ER (D) 261 (Oct)	3.159
Islington London Borough Council v Uckac [2006] EWCA Civ 340, [2006] 1 WLR 1303, [2006] 2 FCR 668, [2006] HLR 651, (2006) Times, 19 April, [2006] All ER (D) 441 (Mar), sub nom Islington London Borough Council v Uckac [2006] 1 FCR 668	3.100, 3.155
Islwyn Borough Council v Newport Borough Council [1994] ELR 141, (1993) Times, 28 June, 6 Admin LR 386, CA	3.155
Istel (AT & T) Ltd v Tully [1993] AC 45, [1992] 3 All ER 523, [1992] 3 WLR 344, [1992] 32 LS Gaz R 37, [1992] NLJR 1089, 136 Sol Jo LB 227, HL	38.107

J

J. & B. Caldwell Ltd v Logan House Retirement Home Ltd [1999] 2 NZLR 99	14.19
J & H Ritchie Ltd v Lloyd Ltd [2007] UKHL 9, [2007] 2 All ER 353, [2007] 1 WLR 670, [2007] 1 All ER (Comm) 987, [2007] Bus LR 944, [2007] 1 Lloyd's Rep 544, [2007] NLJR 403, (2007) Times, 8 March, 2007 SC (HL) 89, [2007] SLT 377, 151 Sol Jo LB 397, [2007] All ER (D) 109 (Mar)	12.21, 13.05, 13.25
J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd [1975] 1 Lloyd's Rep 162	36.29
J Pereira Fernandes SA v Mehta [2006] EWHC 813 (Ch), [2006] 2 All ER 891, [2006] 1 WLR 1543, [2006] 1 All ER (Comm) 885, [2006] IP & T 546, (2006) Times, 16 May, [2006] All ER (D) 264 (Apr), sub nom Mehta v J Pereira Fernandes SA [2006] 2 Lloyd's Rep 244	3.30, 3.31
JD Brian Ltd (in liq), Re [2015] IESC 62, Ir SC	25.19
JP Morgan Chase Bank v Springwell Navigation Corp [2010] EWCA Civ 1221, [2010] All ER (D) 08 (Nov)	3.97
JSC Commercial Bank Privatbank v Kolomoisky [2019] EWCA Civ 1708, [2020] 2 All ER 319, [2020] 2 WLR 993, [2020] 1 All ER (Comm) 555, 169 NLJ 7861, [2019] All ER (D) 86 (Oct)	37.24, 37.26
Jackson v Horizon Holidays Ltd [1975] 3 All ER 92, [1975] 1 WLR 1468, 119 Sol Jo 759	3.126, 3.130
Jackson v Rotax Motor and Cycle Co [1910] 2 KB 937, 80 LJKB 38, 103 LT 411, CA	10.45, 11.79, 11.84

Jackson v Royal Bank of Scotland plc [2005] UKHL 3, [2005] 2 All ER 71, [2005] 1 WLR 377, [2005] 1 All ER (Comm) 337, [2005] 1 Lloyd's Rep 366, (2005) Times, 2 February, 149 Sol Jo LB 146, [2005] 5 LRC 564, [2005] All ER (D) 280 (Jan)	14.43
Jackson v Union Marine Insurance Co Ltd (1874) LR 10 CP 125, 44 LJCP 27, 2 Asp MLC 435, 23 WR 169, [1874–80] All ER Rep 317, 31 LT 789, Ex Ch	3.145, 3.176
Jackson and Bassford Ltd, Re [1906] 2 Ch 467, 75 LJ Ch 697, 13 Mans 306, 95 LT 292, 22 TLR 708	23.10, 24.31
Jade International Steel Stahl und Eisen GmbH & Co KG v Robert Nicholas (Steels) Ltd [1978] QB 917, [1978] 3 All ER 104, [1978] 3 WLR 39, [1978] 2 Lloyd's Rep 13, 122 Sol Jo 294	20.38, 20.95
Jansz v GMB Imports Pty [1979] VR 581	8.92
Jarvis v Swans Tours Ltd [1973] QB 233, [1973] 1 All ER 71, [1972] 3 WLR 954, 116 Sol Jo 822	3.130
Jarvis v Williams [1955] 1 All ER 108, [1955] 1 WLR 71, 99 Sol Jo 73, CA	2.95
Jeffcott v Andrews Motors Ltd [1960] NZLR 721, NZ CA	16.69
Jennings v Rice [2002] EWCA Civ 159, [2003] 1 P & CR 100, [2003] 1 FCR 501, [2002] 1 FCR 501, [2002] NPC 28, [2002] WTLR 367, [2002] All ER (D) 324 (Feb)	3.20
Jerome v Bentley & Co [1952] 2 All ER 114, [1952] WN 357, 96 Sol Jo 463, [1952] 2 TLR 58	16.20
Jetivia SA v Bilta (UK) Ltd. See Bilta (UK) Ltd (in liq) v Nazir	
Jet2.com Ltd v Blackpool Airport Ltd [2012] EWCA Civ 417, [2012] 2 All ER (Comm) 1053, 142 ConLR 1, [2012] All ER (D) 24 (Apr)	3.32
Jewson Ltd v Kelly [2003] EWCA Civ 1030, [2003] All ER (D) 470 (Jul), sub nom Jewson Ltd v Boyhan [2004] 1 Lloyd's Rep 505	11.70, 11.97, 11.104, 11.107, 11.117
Jian Sheng Co v Great Tempo SA [1998] 3 FC 418	36.22
Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 WLR 1363, [2005] 1 All ER (Comm) 1, [2005] 1 Lloyd's Rep 57, (2004) Times, 26 November, [2004] All ER (D) 388 (Nov), HL	36.28
Jivraj v Hashwani [2011] UKSC 40, [2012] 1 All ER 629, [2011] 1 WLR 1872, [2012] 1 All ER (Comm) 1177, [2012] 1 CMLR 307, [2011] Bus LR 1182, [2011] 2 Lloyd's Rep 513, [2011] IRLR 827, [2011] ICR 1004, [2011] NLJR 1100, (2011) Times, 04 August, [2011] EqLR 1088, [2011] All ER (D) 246 (Jul) ...	39.28, 39.31, 39.32, 39.59
Joblin v Watkins and Roseveare (Motors) Ltd [1949] 1 All ER 47, 64 TLR 464	16.35
Jobson v Johnson [1989] 1 All ER 621, [1989] 1 WLR 1026, 4 BCC 488, [2001] GCCR 1243	28.17
John Grimes Partnership Ltd v Gubbins [2013] EWCA Civ 37, 146 ConLR 26, [2013] 2 EGLR 31, [2013] BLR 126, [2013] All ER (D) 30 (Feb)	3.134, 14.26
John Hall & Son Ltd v Edwin Showell & Sons Ltd. See Hill & Sons v Edwin Showell & Sons Ltd	
Johnson v Agnew [1980] AC 367, [1979] 1 All ER 883, [1979] 2 WLR 487, 39 P & CR 424, 123 Sol Jo 217, 251 Estates Gazette 1167, HL	3.36
Johnson v Crédit Lyonnais Co (1877) 3 CPD 32, 42 JP 548, 47 LJQB 241, 26 WR 195, 37 LT 657, CA	16.19
Johnson v Taylor Bros & Co Ltd [1920] AC 144, 89 LJKB 227, 25 Com Cas 69, 64 Sol Jo 82, 122 LT 130, 36 TLR 62, [1918–19] All ER Rep Ext 1210, HL	34.30
Johnston v Boyes [1899] 2 Ch 73, 68 LJ Ch 425, 47 WR 517, 43 Sol Jo 457, 80 LT 488	18.06
Johnstone v Bloomsbury Health Authority [1992] QB 333, [1991] 2 All ER 293, [1991] 2 WLR 1362, [1991] IRLR 118, [1991] ICR 269, [1991] 2 Med LR 38	3.79
Johnstone v Cox (1881) 19 Ch D 17, 30 WR 114, 45 LT 657, CA	24.15, 29.31
Jones (FC) & Sons (a firm) Trustee v Jones [1997] Ch 159, [1996] 4 All ER 721, [1996] 3 WLR 703, [1996] 19 LS Gaz R 29, 140 Sol Jo LB 123, [1996] BPIR 644	2.35
Jones (R E) Ltd v Waring and Gillow Ltd [1926] AC 670, 95 LJKB 913, 32 Com Cas 8, 4 LDAB 37, [1926] All ER Rep 36, 70 Sol Jo 736, 135 LT 548, 42 TLR 644, HL	20.38
Jones v Bright (1829) 5 Bing 533, Dan & L 304, 7 LJOSCP 213, 3 Moo & P 155, 130 ER 1167	6.05, 6.07
Jones v Gallagher (t/a Gallery Kitchens and Bathrooms) [2004] EWCA Civ 10, [2005] 1 Lloyd's Rep 377	13.21, 13.24

Table of Cases

Jones v Gibbons (1804) 9 Ves 407	23.56
Jones v Gordon (1877) 2 App Cas 616, 47 LJ Bcy 1, 26 WR 172, 37 LT 477, HL	20.43, 20.119
Jones v Hope [1880] WN 69, 3 TLR 247, CA	5.23
Jones v Just (1868) LR 3 QB 197, 9 B & S 141, 37 LJQB 89, 16 WR 643, 18 LT 208, [1861–73] All ER Rep Ext 1975	6.07, 11.66, 14.41
Jones v Smith (1841) 1 Hare 43, 11 LJ Ch 83, 6 Jur 8, 58 RR 22; on appeal (1841) 1 Ph 244, 66 ER 943	24.46
Jones, Re, ex p Nichols (1883) 22 Ch D 782, 52 LJ Ch 635, 31 WR 661, [1881–5] All ER Rep 170, 48 LT 492, CA	23.22
Jorden v Money (1854) 5 HL Cas 185, 23 LJ Ch 865, 101 RR 116, 10 ER 868, [1843–60] All ER Rep 350, 24 LTOS 160, HL	3.12, 3.95
Jordeson & Co v Stora Kopparbergs Bergslags Akt (1931) 41 Ll L Rep 201	13.15
Joseph v Lyons (1884) 15 QBD 280, 54 LJQB 1, 33 WR 145, 51 LT 740, 1 TLR 16, CA	2.18
Josling v Kingsford (1863) 13 CBNS 447, 32 LJCP 94, 9 Jur NS 947, 1 New Rep 328, 11 WR 377, 7 LT 790	11.39
Julia, The. See Comptoir d'Achat et de Vente du Boerenbond Belge S/A v Luis de Ridder Ltda, The Julia	

K

KG Bominflot Bunkergesellschaft fur Mineraloele mbH & Co v Petroplus Marketing AG, The Mercini Lady [2010] EWCA Civ 1145, [2011] 2 All ER (Comm) 522, [2011] 1 Lloyd's Rep 442, [2010] All ER (D) 174 (Oct)	9.34, 11.53, 11.82, 11.130
KH Enterprise v Pioneer Container, The Pioneer Container [1994] 2 AC 324, [1994] 2 All ER 250, [1994] 3 WLR 1, [1994] 1 Lloyd's Rep 593, [1994] 18 LS Gaz R 37, PC	36.71
Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2020] EWCA Civ 6, [2020] All ER (D) 79 (Jan)	3.91
Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV [2019] EWCA Civ 10, [2019] 3 All ER 979, [2019] 1 WLR 3514, [2019] 2 All ER (Comm) 315, [2019] All ER (D) 125 (Jan)	5.37
Kanchenjunga, The. See Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp'n of India, The Kanchenjunga	
Karberg and Co v Blythe, Green, Jourdain and Co Limited See Arnhold Karberg & Co v Blythe, Green, Jourdain & Co	
Karflex Ltd v Poole [1933] 2 KB 251, 102 LJKB 475, [1933] All ER Rep 46, 149 LT 140, 49 TLR 418	3.77
Karlshamns Oljefabriker v Eastport Navigation Corp'n, The Elafi [1982] 1 All ER 208, [1981] 2 Lloyd's Rep 679, [1981] Com LR 149	8.22, 8.100, 8.101, 11.15
Karsales (Harrow) Ltd v Wallis [1956] 2 All ER 866, [1956] 1 WLR 936, 100 Sol Jo 548, CA	3.77
Kásler v OTP Jelzálogbank Zrt: C-26/13 [2014] 2 All ER (Comm) 443, [2014] Bus LR 664, [2014] GCCR 4600.157, ECJ	3.85
Kaupthing Singer and Friedlander Ltd (in admin), Re [2011] UKSC 48, [2012] 1 AC 804, [2012] 1 All ER 883, [2011] 3 WLR 939, [2012] 1 BCLC 227, [2011] Bus LR 1644, [2012] BCC 1, [2011] 42 LS Gaz R 21, [2011] NLJR 1485, (2011) Times, 14 November, [2011] BPJR 1706, [2011] All ER (D) 158 (Oct), SC	31.07
Kaupthing Singer & Friedlander Ltd in administration) v UBS AG [2014] EWHC 2450 (Comm), [2014] All ER (D) 200 (Jul)	18.02
Kasumu v Baba-Egbe [1956] AC 539, [1956] 3 All ER 266, [1956] 3 WLR 575, 100 Sol Jo 600, PC	3.169
Kaufman (J) Ltd v Cunard Steamship Co Ltd [1965] 2 Lloyd's Rep 564, Exch Ct	36.53
Keeble v Combined Lease Finance plc [1999] GCCR 2065	16.75
Keighley, Maxsted & Co v Durant [1901] AC 240, 70 LJKB 662, [1900–3] All ER Rep 40, 45 Sol Jo 536, 84 LT 777, 17 TLR 527, HL	5.23
Keighley, Maxted & Co and Bryan, Durant & Co (No 2), Re (1894) 7 Asp MLC 418, 70 LT 155, CA	32.64
Kelcey, Re, Tyson v Kelcey [1899] 2 Ch 530, 68 LJ Ch 472, 48 WR 59, 43 Sol Jo 720, sub nom Re Finn-Kelcey, Tyson v Kelcey 81 LT 354	23.04

Kelly v Cooper [1993] AC 205, [1992] 3 WLR 936, 41 WIR 80, [1993] 3 LRC 476, [1994] 1 BCLC 395, [1992] 43 LS Gaz R 30, (1992) Times, 5 November, PC	5.25
Kelly v Fraser [2012] UKPC 25, [2013] 1 AC 450, [2012] 3 WLR 1008, [2013] 1 All ER (Comm) 296, [2012] ICR 1408, [2013] 1 LRC 705, [2012] All ER (D) 145 (Jul)	5.20, 5.21
Kelner v Baxter (1866) LR 2 CP 174, 36 LJCP 94, 12 Jur NS 1016, 15 WR 278, 15 LT 213, [1861–73] All ER Rep Ext 2009	5.23
Kemp v Falk (1882) 7 App Cas 573, 52 LJ Ch 167, 5 Asp MLC 1, 31 WR 125, 47 LT 454, HL	2.45
Kendall (Henry) & Sons (a firm) v William Lillico & Sons Ltd [1969] 2 AC 31, [1968] 2 All ER 444, [1968] 3 WLR 110, [1968] 1 Lloyd's Rep 547, 112 Sol Jo 562, HL	3.58, 11.70, 11.89, 11.90, 11.109, 11.112, 37.71
Kensington v Unrepresented Non-allocated Claimants. See Goldcorp Exchange Ltd (in receivership), Re	
Kenya Railways v Antares Co Pte Ltd, The Antares [1987] 1 Lloyd's Rep 424, CA	36.10, 36.30
Kerr v Postnov (2019) C-25/18, ECLI:EU:C:2019:376, 169 NLJ 7840, [2019] All ER (D) 41 (May), EUCJ	37.17
King v Marshall (1864) 33 Beav 565, 34 LJ Ch 163, 10 Jur NS 921, 4 New Rep 258, 12 WR 971, 55 ER 488, 10 LT 557	25.06
Kingsley v Sterling Industrial Securities Ltd [1967] 2 QB 747, [1966] 2 All ER 414, [1966] 2 WLR 1265, 110 Sol Jo 267, CA	22.27
Kinsela v Russell Kinsela Pty Ltd (1986) 4 ACLC 215, 10 ACLR 395, 4 NSWLR 722, CA	22.14
Kirkham v Attenborough [1897] 1 QB 201, 66 LJQB 149, 45 WR 213, [1895–9] All ER Rep 450, 41 Sol Jo 141, 75 LT 543, 13 TLR 131, CA	8.104, 16.61
Kitto v Bilbie, Hobson & Co (1895) 2 Mans 122, 15 R 188, 72 LT 266, 11 TLR 214	16.52
Kleinjan and Holst NV Rotterdam v Bremer Handelsgesellschaft mbH Hamburg [1972] 2 Lloyd's Rep 11	34.43
Kleinwort Benson Ltd v Glasgow City Council [1999] 1 AC 153, [1997] 4 All ER 641, [1997] 3 WLR 923, [1997] NLJR 1617, 141 Sol Jo LB 237, [1997] All ER (D) 43, HL	37.18
Kleinwort Benson Ltd v Malaysia Mining Corpn Bhd [1989] 1 All ER 785, [1989] 1 WLR 379, [1989] 1 Lloyd's Rep 556, 5 BCC 337, 11 LDAB 306, 133 Sol Jo 262, [1989] 16 LS Gaz R 35, [1989] NLJR 221	3.32, 30.15
Klomps v Michel: 166/80 [1981] ECR 1593, [1982] 2 CMLR 773, ECJ	37.47
Knatchbull-Hugessen v SISU Capital Ltd [2014] EWHC 1194 (QB), [2014] All ER (D) 120 (Jun)	3.32
Knight Machinery (Holdings) Ltd v Rennie 1994 SC 338, Ct of Sess	3.79
Knutsford, SS Ltd v Tillmanns & Co. See Tillmanns & Co v SS Knutsford Ltd	
Kolfor Plant Ltd v Tilbury Plant Ltd (1977) 121 Sol Jo 390	14.37
Kolmar Group AG v Traxpo Enterprises PVT Ltd [2010] EWHC 113 (Comm), [2011] 1 All ER (Comm) 46, [2010] 2 Lloyd's Rep 653, [2010] All ER (D) 26 (Feb)	35.76
Komninos S, The. See Hellenic Steel Co v Svolamar Shipping Co Ltd, The Komninos S	
Kongress Agentur Hagen GmbH v Zeehaghe BV: 365/88 [1990] ECR I-1845, ECJ	37.24
Konkola Copper Mines plc v Coromin [2005] EWHC 898 (Comm), [2005] 2 All ER (Comm) 637, [2006] Lloyd's Rep IR 71, [2005] All ER (D) 180 (May); affd [2006] EWCA Civ 5, [2006] 1 All ER (Comm) 437, [2006] 1 Lloyd's Rep 410, [2007] Lloyd's Rep IR 247, [2006] 06 LS Gaz R 32, [2006] All ER (D) 83 (Jan)	37.25
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Koza Ltd v Akcil [2019] UKSC 40, [2020] 3 All ER 97, [2019] 1 WLR 4830, [2020] 1 BCLC 399, [2019] All ER (D) 157 (Jul), SC	37.03, 37.10
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Table of Cases

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Kreditbank Cassel GmbH v Schenkers Ltd [1927] 1 KB 826, 96 LJKB 501, 32 Com Cas 197, 4 LDAB 64, [1927] All ER Rep 421, 71 Sol Jo 141, 136 LT 716, 43 TLR 237, CA	20.97, 20.100
Krell v Henry [1903] 2 KB 740, 72 LJKB 794, 52 WR 246, [1900–3] All ER Rep 20, 89 LT 328, 19 TLR 711, CA	3.176
Krombach v Bamperski: C-7/98 [2001] QB 709, [2000] ECR I-1935, [2001] 3 WLR 488, [2001] All ER (EC) 584, ECJ	37.46, 37.82
Kronprinzessin Margareta, The [1921] 1 AC 486, 90 LJP 145, 15 Asp MLC 170, 124 LT 609, sub nom The Hilding (Part Cargoes Ex) 37 TLR 199, PC	34.15
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Kum v Wah Tat Bank Ltd [1971] 1 Lloyd's Rep 439, PC	3.59, 36.86
Kursell v Timber Operators and Contractors [1927] 1 KB 298, 95 LJKB 569, 135 LT 223, 42 TLR 435, CA	8.87
Kuwait Airways Corpn v Iraqi Airways Co [1995] 3 All ER 694, [1995] 1 WLR 1147, [1995] 2 Lloyd's Rep 317, [1995] 32 LS Gaz R 28, HL	39.98
Kuwait Petroleum Corpn v I and D Oil Carriers Ltd, The Houda [1994] 2 Lloyd's Rep 541, CA	36.35
Kwei Tek Chao (t/a Zung Fu Co) v British Traders and Shippers Ltd [1954] 2 QB 459, [1954] 3 All ER 165, [1954] 3 WLR 496, [1954] 2 Lloyd's Rep 114, 98 Sol Jo 592	12.16, 13.14, 13.27, 14.30, 14.56, 34.42
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Kyokuyo Co Ltd v AP Møller-Maersk A/S (trading as 'Maersk Line') [2018] EWCA Civ 778, [2018] 3 All ER 1009, [2018] 2 All ER (Comm) 503, [2018] Bus LR 1481, [2018] 2 Lloyd's Rep 59, [2018] All ER (D) 90 (Apr)	36.15, 36.47
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L

LHF Wools Ltd, Re [1970] Ch 27, [1969] 3 All ER 882, [1969] 3 WLR 100, 113 Sol Jo 363	31.30
Laconia, The. See Mardorf Peach & Co Ltd v Attica Sea Carriers Corpn of Liberia, The Laconia	
Laemthong International Lines Co Ltd v Artis, The Laemthong Glory (No 2) [2005] EWCA Civ 519, [2005] 2 All ER (Comm) 167, [2005] 1 Lloyd's Rep 688, [2005] All ER (D) 50 (May)	3.86
Lagden v O'Connor [2003] UKHL 64, [2004] 1 AC 1067, [2004] 1 All ER 277, [2003] 3 WLR 1571, [2004] RTR 377, [2004] Lloyd's Rep IR 315, [2003] NLJR 1869, (2003) Times, 5 December, 147 Sol Jo LB 1430, [2003] All ER (D) 87 (Dec) .	14.24, 35.124
Lake v Brutton (1856) 8 De GM & G 440, 25 LJ Ch 842, 2 Jur NS 839, 27 LTOS 294	30.35
Lamb (W T) & Sons v Goring Brick Co Ltd [1932] 1 KB 710, 101 LJKB 214, 37 Com Cas 73, [1931] All ER Rep 314, 146 LT 318, 48 TLR 160, CA	7.23
Lambert v Lewis. See Lexmead (Basingstoke) Ltd v Lewis	
Lamont (James) & Co Ltd v Hyland Ltd (No 2) [1950] 1 KB 585, 588, [1950] 1 All ER 929, 94 Sol Jo 336, 66 (pt 1) TLR 940, CA	20.118
Lamont (James) & Co Ltd v Hyland Ltd [1950] 1 KB 585, [1950] 1 All ER 341, 94 Sol Jo 179, 66 (pt 1) TLR 937, CA	20.115
Lamplough v Brathwait (1615) 1 Brownl 7, Hob 105, Moore KB 866, 80 ER 255	1.04
Lamplugh Iron Ore Co Ltd, Re [1927] 1 Ch 308, 96 LJ Ch 177, [1927] B & CR 61, [1926] All ER Rep 682, 136 LT 501	30.35
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Laurie and Morewood v John Dudin & Sons [1926] 1 KB 223, 95 LJKB 191, 31 Com Cas 96, [1925] All ER Rep 414, 134 LT 309, 42 TLR 149, CA	2.45
Lauritzen (J) AS v Wijsmuller BV, The Super Servant Two [1990] 1 Lloyd's Rep 1, CA	3.178
Lavin v Johnson [2002] EWCA Civ 1138, [2002] All ER (D) 501 (Jul)	22.27, 22.29
Lawlor v Sandvik Mining and Construction Mobile Crushers and Screens Ltd [2013] EWCA Civ 365, [2013] 2 Lloyd's Rep 98, [2013] All ER (D) 216 (Apr)	37.67
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Lazenby Garages Ltd v Wright [1976] 2 All ER 770, [1976] 1 WLR 459, 120 Sol Jo 146	14.52, 15.43
Leadbitter v Farrow (1816) 5 M & S 345, 105 ER 1077	20.103
Leaf v International Galleries [1950] 2 KB 86, [1950] 1 All ER 693, 66 (pt 1) TLR 1031, CA	7.07
Lease Management Services Ltd v Purnell Secretarial Services Ltd (Canon (South West) Ltd, third party) (1994) 13 Tr LR 337, [1994] CCLR 127, [1999] GCCR 1841, CA	28.14, 28.20
Leathertex Divisione Sintetici SpA v Bodeltex BVBA: C-420/97 [1999] ECR I-6747, [1999] 2 All ER (Comm) 769, (1999) Times, 26 October, [1999] All ER (D) 1058, ECJ	37.19
Leavey (J) & Co Ltd v George H Hirst & Co Ltd [1944] 1 KB 24, [1943] 2 All ER 581, 113 LJKB 229, 88 Sol Jo 7, 169 LT 353, 60 TLR 72, CA	14.26
Leduc v Ward (1982) 45 MLR 652	36.24
Lee v Griffin (1861) 1 B & S 272, 30 LJQB 252, 7 Jur NS 1302, 9 WR 702, 121 ER 716, [1861–73] All ER Rep 191, 4 LT 546	7.21
Lee v York Coach and Marine [1977] RTR 35, CA	13.14
Leggett v Taylor (1965) 50 DLR (2d) 516, BC SC	11.45
Lehman Brothers Europe Ltd (in administration), Re [2017] EWHC 2031 (Ch), [2018] 2 All ER 367, [2018] 2 All ER (Comm) 75, [2018] Bus LR 439, 167 NLJ 7759, [2017] All ER (D) 44 (Aug)	31.07
Lehman Brothers International (Europe) (in administration), Re [2017] UKSC 38, [2018] AC 465, [2018] 1 All ER 205, [2017] 2 WLR 1497, [2018] 1 All ER (Comm) 629, [2017] 2 BCLC 149, (2017) Times, 29 May, [2017] All ER (D) 102 (May), SC	31.07, 37.109
Lehman Brothers International (Europe) (in admin), Re [2012] EWHC 2997 (Ch), [2014] 2 BCLC 295, [2012] All ER (D) 32 (Nov)	21.24, 22.15, 22.20, 23.07, 25.13
Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon [1986] AC 785, [1986] 2 All ER 145, [1986] 2 WLR 902, [1986] 2 Lloyd's Rep 1, 130 Sol Jo 357, [1986] LS Gaz R 1810, [1986] NLJ Rep 415, HL	2.95, 8.27, 8.33, 36.71
Lena, The. See Kydon Compania Naviera SA v National Westminster Bank Ltd, The Lena	
Leonardo SpA v Doha Bank Assurance Co LLC [2020] QIC (A) 1	36.159
Leonidas D, The. See Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D	
Les Laboratoires Servier v Apotex Inc [2014] UKSC 55, [2015] AC 430, [2015] 1 All ER 671, [2014] 3 WLR 1257, [2015] RPC 303, [2015] IP & T 1, 164 NLJ 7631, (2014) Times, 17 November, [2014] All ER (D) 328 (Oct)	3.162
Lesotho Highlands Development Authority v Impregilo SpA [2005] UKHL 43, [2006] 1 AC 221, [2005] 3 All ER 789, [2005] 3 WLR 129, [2005] 2 All ER (Comm) 265, [2005] 2 Lloyd's Rep 310, 101 ConLR 1, [2005] NLJR 1046, [2005] 27 EG 220 (CS), (2005) Times, 6 July, [2006] 2 LRC 178, [2005] ArbLR 41, [2005] All ER (D) 363 (Jun)	39.53, 39.90
L'Estrange v F Graucob Ltd [1934] 2 KB 394, 103 LJKB 730, [1934] All ER Rep 16, 152 LT 164, DC	3.50
Levey & Co v Goldberg [1922] 1 KB 688, 91 LJKB 551, 28 Com Cas 244, 127 LT 298, 38 TLR 446, [1922] All ER Rep Ext 842	10.27
Lewis v Averay [1972] 1 QB 198, [1971] 3 All ER 907, [1971] 3 WLR 603, 115 Sol Jo 755	3.33

Table of Cases

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Leyland Daf Ltd, Re. See Buchler v Talbot	
Libyan American Oil Co (LIAMCO) v Government of the Libyan Arab Republic (1981) 20 ILM 151, (1981) VI YBCA 89	39.98
Libyan Arab Foreign Bank v Bankers Trust Co [1989] QB 728, [1989] 3 All ER 252, [1989] 3 WLR 314, [1988] 1 Lloyd's Rep 259, 133 Sol Jo 568 .	1.22, 17.18, 18.29, 37.108
Liesbosch, Dredger (Owners) v SS Edison (Owners) [1933] AC 449, 102 LJP 73, 77 Sol Jo 176, sub nom The Edison 45 Ll L Rep 123, 18 Asp MLC 380, 38 Com Cas 267, [1933] All ER Rep 144, 149 LT 49, 49 TLR 289, HL	35.123
Light v TY Europe Ltd [2003] EWCA Civ 693, [2004] 1 Lloyd's Rep 693, [2003] 38 LS Gaz R 33, (2003) Times, 21 August, [2003] All ER (D) 445 (Jul)	5.08
Lilley v Doubleday (1881) 7 QBD 510, 46 JP 708, 51 LJQB 310, [1881–5] All ER Rep 406, 44 LT 814	9.16
Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 AC 85, [1993] 3 All ER 417, [1993] 3 WLR 408, 36 ConLR 1, [1993] 45 LS Gaz R 39, [1993] NLJR 1152, 137 Sol Jo LB 183, HL	3.123, 29.41
Lindholst & Co A/S v Fowler [1988] BCLC 166, 4 BCC 776	20.105
Lindsay & Co v Cundy. See Cundy v Lindsay	
Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 AC 548, [1992] 4 All ER 512, [1991] 3 WLR 10, 12 LDAB 73, [1991] NLJR 815, 135 Sol Jo LB 36, HL ...	17.30, 17.36, 17.42
Lips, The. See India (President of) v Lips Maritime Corp'n, The Lips	
Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555, [1957] 1 All ER 125, [1957] 2 WLR 158, [1956] 2 Lloyd's Rep 505, 121 JP 98, 101 Sol Jo 106, HL	3.63
Little v Courage (1994) 70 P & CR 469, [1995] CLC 164, CA	3.32
Liverpool City Council v Irwin [1977] AC 239, [1976] 2 All ER 39, [1976] 2 WLR 562, 74 LGR 392, 32 P & CR 43, 13 HLR 38, 120 Sol Jo 267, 238 Estates Gazette 879, 963, HL	3.57, 3.66
Llanelli Rly and Dock Co v London and North Western Rly Co (1873) LR 8 Ch App 942, 42 LJ Ch 884, 21 WR 889, 29 LT 357, CA in Ch; affd (1875) LR 7 HL 550, 45 LJ Ch 539, 23 WR 927, 32 LT 575, HL	3.150
Lloyd's Register of Shipping v Societe Campenon Bernard: C-439/93 [1995] ECR I-961, [1995] All ER (EC) 531, ECJ	37.23
Lloyds and Scottish Finance Ltd v Cyril Lord Carpets Sales Ltd [1992] BCLC 609, 129 NLJ 366, HL	22.36, 29.19
Lloyds and Scottish Finance Ltd v Williamson [1965] 1 All ER 641, [1965] 1 WLR 404, 109 Sol Jo 10, CA	11.23, 16.24
Lloyds Bank Ltd v Bundy [1975] QB 326, [1974] 3 All ER 757, [1974] 3 WLR 501, [1974] 2 Lloyd's Rep 366, 9 LDAB 365, 118 Sol Jo 714	3.73
Lloyds Bank plc v Independent Insurance Co Ltd [2000] QB 110, [1999] 2 WLR 986, [1999] 1 All ER (Comm) 8, 14 LDAB 461, [1999] 03 LS Gaz R 31, [1998] All ER (D) 633	17.36
Lloyds TSB Bank plc v Clarke [2002] UKPC 27, [2002] 2 All ER (Comm) 992, [2003] 1 LRC 590, [2002] All ER (D) 485 (May)	22.58
Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc (Scotland) [2013] UKSC 3, [2013] 2 All ER 103, [2013] 1 WLR 366, 2013 SCLR 569, [2013] All ER (D) 158 (Jan), sub nom Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc 2013 Scot (D) 15/1	3.65
Lock International plc v Beswick [1989] 3 All ER 373, [1989] 1 WLR 1268, [1989] IRLR 481, 133 Sol Jo 1297, [1989] NLJR 644	38.108
Lockett v A and M Charles Ltd [1938] 4 All ER 170, 82 Sol Jo 951, 159 LT 547, 55 TLR 22	7.21
Loder v Kekulé (1857) 3 CBNS 128, 27 LJCP 27, 4 Jur NS 93, 5 WR 884, 30 LTOS 64	14.41
Lomas v JFB Firth Rixson Inc [2012] EWCA Civ 419, [2012] 2 All ER (Comm) 1076, [2012] 2 Lloyd's Rep 548, [2013] 1 BCLC 27, [2012] All ER (D) 29 (Apr)	31.27
Lomard North Central plc v Blower [2014] EWHC 2267 (Ch), [2014] BPIR 1501	30.24
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Lombard North Central plc v Butterworth [1987] QB 527, [1987] 1 All ER 267, [1987] 2 WLR 7, [1986] BTLCL 382, 130 Sol Jo 681, [1986] LS Gaz R 2750, [1999] GCCR 1025	3.127, 28.17
London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd [1971] Ch 499, [1971] 1 All ER 766, [1971] 2 WLR 257, 22 P & CR 108, 114 Sol Jo 912, 217 Estates Gazette 531	22.67
London And Globe Finance Corporation Re [1902] 2 CH 416	22.16
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London Wine Co (Shippers) Ltd, Re [1986] PCC 121	2.45, 8.48
Long v Lloyd [1958] 2 All ER 402, [1958] 1 WLR 753, 102 Sol Jo 488, CA	7.07
Longbottom (H) & Co Ltd v Bass, Walker & Co Ltd [1922] WN 245, CA ..	10.40, 10.43, 12.20
Lonsdale (t/a Lonsdale Agencies) v Howard & Hallam Ltd [2007] UKHL 32, [2007] 4 All ER 1, [2007] 1 WLR 2055, [2007] 2 All ER (Comm) 621, [2008] Bus LR 788, [2008] 1 Lloyd's Rep 78, [2007] IRLR 825, [2007] ICR 1338, (2007) Times, 10 July, [2007] All ER (D) 41 (Jul)	5.09, 5.39
Lorimer v Smith. See Lorymer v Smith	
Lorna I, The. See Compania Naviera General SA v Kerametal Ltd, The Lorna I	
Lorymer v Smith (1822) 1 B & C 1, 1 LJOSKB 7, 107 ER 1, sub nom Lorimer v Smith 2 Dow & Ry KB 23	6.05
Love (Gregory) & Co, Re, Francis v Gregory Love & Co [1916] 1 Ch 203, 85 LJ Ch 281, [1916] HBR 42, 60 Sol Jo 221, 114 LT 395, 32 TLR 210, [1914–15] All ER Rep Ext 1215	23.10, 24.31
Lowe v Dixon (1885) 16 QBD 455, 34 WR 441	30.43
Lowe v Lombank Ltd [1960] 1 All ER 611, [1960] 1 WLR 196, 104 Sol Jo 210, CA	4.16
Lowe v W Machell Joinery Ltd [2011] EWCA Civ 794, [2012] 1 All ER (Comm) 153, 138 ConLR 48, [2011] BLR 591, [2011] All ER (D) 115 (Jul)	11.53, 11.73, 11.112
Lowick Rose LLP (in liq) v Swynson Ltd [2017] UKSC 32, [2018] AC 313, [2017] 3 All ER 785, [2017] 2 WLR 1161, [2017] 4 LRC 305, 171 ConLR 75, 167 NLJ 7743, (2017) Times, 02 May, [2017] All ER (D) 52 (Apr), SC	23.53
Lowther v Harris [1927] 1 KB 393, 96 LJKB 170, [1926] All ER Rep 352, 136 LT 377, 43 TLR 24	16.37
Lubbe v Cape plc [2000] 4 All ER 268, [2000] 1 WLR 1545, [2000] 2 Lloyd's Rep 383, 144 Sol Jo LB 250, [2000] 5 LRC 605, HL	37.38, 38.80
Lubell (Rolfe) & Co v Keith [1979] 1 All ER 860, [1979] 2 Lloyd's Rep 75, 123 Sol Jo 32	20.104
Lucan (Earl), Re, Hardinge v Cobden (1890) 45 Ch D 470, 60 LJ Ch 40, 39 WR 90, 63 LT 538	23.05
Lucas (T) & Co Ltd v Mitchell [1974] Ch 129, [1972] 3 All ER 689, [1972] 3 WLR 934, 116 Sol Jo 711	3.165
Luke et Al' v Lyde (1759) 2 Burr 882	40.21
Lukoil Asia Pacific PTE Ltd v Ocean Tankers (PTE) Ltd, The Ocean Neptune [2018] EWHC 163 (Comm), [2018] 2 All ER (Comm) 108, [2018] 1 Lloyd's Rep 654, [2018] All ER (D) 12 (Feb)	3.63
Lumley v Gye (1853) 2 E & B 216, 22 LJQB 463, 17 Jur 827, 1 WR 432, 118 ER 749, [1843–60] All ER Rep 208	3.88
Lumley v Wagner (1852) 1 De GM & G 604, 21 LJ Ch 898, 16 Jur 871, 42 ER 687, [1843–60] All ER Rep 368, 19 LTOS 264	3.115
Lummus Agricultural Services Ltd Re [1999] BCC 953	31.32
Lunn v Thornton (1845) 1 CB 379, 14 LJCP 161, 9 Jur 350, 135 ER 587, 4 LTOS 417	2.31
Lupton v White (1808) 15 Ves 432, 33 ER 817, [1803–13] All ER Rep 356	8.42
Luxor (Eastbourne) Ltd v Cooper [1941] AC 108, [1941] 1 All ER 33, 110 LJKB 131, 46 Com Cas 120, 85 Sol Jo 105, 164 LT 313, 57 TLR 213, HL	3.57

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MCI WorldCom Ltd, Re, MCI WorldCom Ltd v Primus Telecommunications Ltd [2002] EWHC 2436 (Ch), [2003] 1 BCLC 330, [2003] BPIR 667, [2002] All ER (D) 237 (Nov)	31.30
MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd (FKA OB Singapore Operations Pte Ltd) [2010] SGCA 36, [2011] 4 LRC 1, Sing CA	3.134
MIG Trust Ltd, Re [1933] Ch 542, 102 LJ Ch 179, [1933] B & CR 91, 149 LT 56, 49 TLR 299, CA; affd sub nom Peat (Sir William Henry) v Gresham Trust Ltd [1934] AC 252, [1934] All ER Rep 82, 151 LT 63, 50 TLR 345, sub nom MIG Trust Ltd, Re 103 LJ Ch 173, [1934] B & CR 33, HL	22.13
MK International Development Co Ltd v Housing Bank [1991] 1 Bank LR 74, CA	20.44
MS Fashions Ltd v Bank of Credit and Commerce International SA (in liq) (No 2) [1993] Ch 425, [1993] 3 All ER 769, [1993] 3 WLR 220, [1993] BCLC 1200, [1993] BCC 360, [1993] 21 LS Gaz R 40, [1993] NLJR 651, 137 Sol Jo LB 132, CA	30.29
MSC Mediterranean Shipping Co SA v Owners of the Tychy [2001] 1 Lloyd's Rep 10, [2000] All ER (D) 1352; revsd [2001] EWCA Civ 1198, [2001] 2 Lloyd's Rep 403, [2001] All ER (D) 321 (Jul)	4.08, 3.92
MSC Mediterranean Shipping Company SA v Cottonex Anstalt [2015] EWHC 283 (Comm), [2015] 2 All ER (Comm) 614, [2015] 1 Lloyd's Rep 359, [2015] All ER (D) 172 (Feb)	3.151
MVV Environment Devonport Ltd v NTO Shipping GmbH & Co. KG [2020] EWHC 1371 (Comm)	36.17
MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2016] EWCA Civ 553	3.13, 3.91, 3.96
Macartney, Re, Macfarlane v Macartney [1921] 1 Ch 522, 90 LJ Ch 314, 65 Sol Jo 435, 124 LT 658	37.51
McCarthy & Stone Ltd v Julian S Hodge & Co Ltd [1971] 2 All ER 973, [1971] 1 WLR 1547, 22 P & CR 1040, 115 Sol Jo 607	2.76
McCutcheon v David MacBrayne Ltd [1964] 1 All ER 430, [1964] 1 WLR 125, [1964] 1 Lloyd's Rep 16, 108 Sol Jo 93, 1964 SC (HL) 28, HL	3.58
McDonald v Empire Garage (Blackburn) Ltd (1975) Times, 7 October	11.58
Macdonald v Whitfield (1883) 8 App Cas 733, 52 LJPC 70, 32 WR 730, 1 LDAB 48, 49 LT 446, [1881-5] All ER Rep Ext 1483, PC	20.71
McDougall v Aeromarine of Emsworth Ltd [1958] 3 All ER 431, [1958] 1 WLR 1126, [1958] 2 Lloyd's Rep 345, 102 Sol Jo 860	10.24, 12.20, 14.03
McGee Group Ltd v Galliford Try Building Ltd [2017] EWHC 87 (TCC), 170 ConLR 203	3.77
McEntire v Crossley Bros Ltd [1895] AC 457, 64 LJPC 129, 2 Mans 334, 11 R 207, [1895-9] All ER Rep 829, 72 LT 731, [1895] 1 IR 308, [1999] GCCR 11, HL	22.29
Maciej Rataj, The, Tatry (cargo owners) v Maciej Rataj: C-406/92 [1999] QB 515, [1994] ECR I-5439, [1999] 2 WLR 181, [1995] All ER (EC) 229, [1995] 1 Lloyd's Rep 302, [1995] IL Pr 81, ECJ	37.08
Mackay v Dick (1881) 6 App Cas 251, 8 R 37, 29 WR 541, 18 SLR 387, HL	3.57, 34.05
MacKenzie v Royal Bank of Canada [1934] AC 468, 103 LJPC 81, 78 Sol Jo 471, 151 LT 486, PC	3.101
McLean (as Administrators of Dent Company (a partnership) (in administration)) v Berry [2016] EWHC 2650 (Ch), [2017] Ch 422, [2017] 3 WLR 198, [2017] BPIR 164, [2016] All ER (D) 18 (Nov)	23.54
Macmillan Inc v Bishopsgate Investment Trust plc (No 3) [1995] 3 All ER 747, [1995] 1 WLR 978; on appeal [1996] 1 All ER 585, [1996] 1 WLR 387, [1995] 43 LS Gaz R 25, [1995] TLR 573, 139 Sol Jo LB 225	37.99
McParland & Partners Ltd and another company v Whitehead [2020] EWHC 298 (Ch), [2020] Bus LR 699, [2020] All ER (D) 106 (Feb)	38.66
McRae v Commonwealth Disposals Commission (1950) 84 CLR 377, [1951] ALR 771, 25 ALJ 425, Aus HC	7.25, 7.26
McTear and v Engelhard [2016] EWCA Civ 487, [2016] All ER (D) 187 (May)	38.15

MacWilliam (JI) Co Inc v Mediterranean Shipping Co SA, The Rafaela S [2005] UKHL 11, [2005] 2 AC 423, [2005] 2 All ER 86, [2005] 2 WLR 554, [2005] 1 All ER (Comm) 393, [2005] 1 Lloyd's Rep 347, (2005) Times, 21 February, [2005] All ER (D) 236 (Feb)	32.56, 36.15
Madell v Thomas & Co [1891] 1 QB 230, 60 LJQB 227, 39 WR 280, 64 LT 9, 7 TLR 170, CA	3.69
Mahamdia v People's Democratic Republic of Algeria: C-154/11 [2014] All ER (EC) 96, [2013] ICR 1, (2012) Times, 16 October, [2012] All ER (D) 333 (Jul), ECJ	37.08
Maharane Baroda v Wildenstein. See Gaekwar of Baroda (Maharane) v Wildenstein	
Mahmoud and Ispahani, Re [1921] 2 KB 716, 90 LJKB 821, 26 Com Cas 215, [1921] All ER Rep 217, 125 LT 161, 37 TLR 489, CA	3.160
Malik v BCCI SA (in liq) [1998] AC 20, [1997] 3 All ER 1, [1997] 3 WLR 95, [1997] IRLR 462, [1997] ICR 606, [1997] 94 LS Gaz R 33, [1997] NLJR 917, HL	3.130
Mahonia Ltd v JP Morgan Chase Bank [2003] EWHC 1927 (Comm), [2003] 2 Lloyd's Rep 911	35.53, 35.102
Maine Spinning Co v Sutcliffe & Co (1917) 87 LJKB 382, 23 Com Cas 216, [1916-17] All ER Rep 537, 118 LT 351, 34 TLR 154	34.09
Makers (UK) Ltd (t/a Allied Services) v BSS Group Plc [2011] EWCA Civ 809, [2011] All ER (D) 185 (Jul)	11.102
Mallett v McMonagle [1970] AC 166, [1969] NI 91, [1969] 2 All ER 178, [1969] 2 WLR 767, [1969] 1 Lloyd's Rep 127, 6 KIR 322, 113 Sol Jo 207, HL	3.132
Mambre Saccharine Co v Corn Products Co. See Manbre Saccharine Co Ltd v Corn Products Co Ltd	
Man (E D and F) Ltd v Nigerian Sweets and Confectionery Co Ltd [1977] 2 Lloyd's Rep 50	35.77
Manbre Saccharine Co Ltd v Corn Products Co Ltd [1919] 1 KB 198, [1918-19] All ER Rep 980, 120 LT 113, sub nom Mambre Saccharine Co v Corn Products Co 88 LJKB 402, 24 Com Cas 89, 3 LDAB 202, 35 TLR 94	32.74, 34.33, 34.34, 34.35
Manchester Liners Ltd v Rea Ltd [1922] 2 AC 74, 91 LJKB 504, 27 Com Cas 274, [1922] All ER Rep 605, 66 Sol Jo 421, 127 LT 405, 38 TLR 526, HL	11.102
Manchester Trust Ltd v Furness, Withy & Co Ltd [1895] 2 QB 539, 8 Asp MLC 57, 1 Com Cas 39, 14 R 739, 44 WR 178, 73 LT 110, sub nom Manchester Trust Ltd v Turner, Withy & Co Ltd 64 LJQB 766, 11 TLR 530, CA	16.44, 24.45, 36.19
Manifatture Tessile Laniera Wooltex v J B Ashley Ltd [1979] 2 Lloyd's Rep 28, CA	13.21
Manila, The. See Procter & Gamble Philippine Manufacturing Corp'n v Peter Cremer GmbH & Co, The Manila	
Manx Electricity Authority v JP Morgan Chase Bank [2003] EWCA Civ 1324, [2003] BLR 477, 147 Sol Jo LB 1205, [2003] All ER (D) 52 (Oct)	35.169
Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd [1934] 1 KB 148, 103 LJKB 513, 39 Com Cas 89, [1933] All ER Rep 15, 150 LT 69, 50 TLR 58, CA	10.37, 10.45
Marbig Rexel Pty Ltd v ABC Container Line NV, The TNT Express [1992] 2 Lloyd's Rep 636, NSW SC	36.83
Mardorf Peach & Co Ltd v Attica Sea Carriers Corp'n of Liberia, The Laconia [1977] AC 850, [1977] 1 All ER 545, [1977] 2 WLR 286, [1977] 1 Lloyd's Rep 315, 121 Sol Jo 134, HL	18.07
Maredelanto Cia Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos [1971] 1 QB 164, [1970] 3 All ER 125, [1970] 3 WLR 601, [1970] 2 Lloyd's Rep 43, 114 Sol Jo 548	3.144, 15.23
Mareva Cia Naviera SA v International Bulkcarriers SA, The Mareva [1980] 1 All ER 213, [1975] 2 Lloyd's Rep 509, 9 LDAB 393, 119 Sol Jo 660	35.114, 38.95
Mareva, The. See Mareva Cia Naviera SA v International Bulkcarriers SA, The Mareva	
Margarine Union GmbH v Cambay Prince Steamship Co Ltd [1969] 1 QB 219, [1967] 3 All ER 775, [1967] 3 WLR 1569, [1967] 2 Lloyd's Rep 315, 111 Sol Jo 943	36.71
Marilyn L, The. See Jarvis v Williams	
Marine Star, The. See Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA, The Marine Star	
Maritime Insurance Co Ltd v Assecurancz-Union von 1865 (1935) 52 LI L Rep 16	39.42
Maritime National Fish Ltd v Ocean Trawlers Ltd [1935] AC 524, 104 LJPC 88, 18 Asp MLC 551, [1935] All ER Rep 86, 79 Sol Jo 320, 153 LT 425, PC	3.178

Table of Cases

Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd [2015] UKSC 72, [2015] 3 WLR 1843, [2016] 1 P & CR 221, 163 ConLR 1, 166 NLJ 7680, (2015) Times, 14 December, [2015] All ER (D) 24 (Dec)	3.55, 3.57
Maronier v Larmer [2002] EWCA Civ 774, [2003] QB 620, [2003] 3 All ER 848, [2002] 3 WLR 1060, [2003] 1 All ER (Comm) 225, [2002] 28 LS Gaz R 30, (2002) Times, 13 June, 146 Sol Jo LB 161, [2002] All ER (D) 449 (May)	37.47
Marrache v Ashton [1943] AC 311, [1943] 1 All ER 276, 112 LJPC 13, 87 Sol Jo 174, 59 TLR 142, PC	37.108
Marsh v Keating (1834) 1 Bing NC 198, 8 Bli NS 651, 2 Cl & Fin 250, 1 Mont & A 592, 1 Scott 5, 6 ER 1149, [1824–34] All ER Rep 226, HL	17.39
Martin v Reid (1862) 11 CBNS 730, 31 LJCP 126, 5 LT 727	24.06
Martindale v Booth (1832) 3 B & Ad 498, 1 LJKB 166, 110 ER 180	22.22
Martinez v Cooper (1826) 2 Russ 198, 38 ER 309, Ct of Ch	16.19
Marubeni Hong Kong and South China Ltd v Government of Mongolia [2005] EWCA Civ 395, [2005] 1 WLR 2497, [2005] 2 All ER (Comm) 289, [2005] 2 Lloyd's Rep 231, (2005) Times, 22 April, [2005] All ER (D) 117 (Apr)	30.14
Marvin v Wallis (1856) 6 E & B 726, 25 LJQB 369, 2 Jur NS 689, 4 WR 611, 27 LTOS 182	2.45, 16.52
Mash and Murrell Ltd v Joseph I Emanuel Ltd [1962] 1 All ER 77n, [1962] 1 WLR 16n, [1961] 2 Lloyd's Rep 326, 105 Sol Jo 1007, CA	9.34, 11.82, 11.87
Mason v Burningham [1949] 2 KB 545, [1949] 2 All ER 134, [1949] LJLR 1430, 93 Sol Jo 496, 65 TLR 466, CA	14.40
Mathew v Blackmore (1857) 1 H & N 762, 26 LJ Ex 150, 5 WR 363, 156 ER 1409, 28 LTOS 325, Exch Ct	22.37
Mauritius Commercial Bank Ltd v Hestia Holdings Ltd [2013] EWHC 1328 (Comm), [2013] 2 All ER (Comm) 898, [2013] 2 Lloyd's Rep 121, [2013] All ER (D) 311 (May)	37.70
Maxform SpA v Mariani & Goodville Ltd [1979] 2 Lloyd's Rep 385; affd [1981] 2 Lloyd's Rep 54, CA	20.105
Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd [1959] AC 589, [1959] 2 All ER 740, [1959] 3 WLR 232, [1959] 2 Lloyd's Rep 105, 103 Sol Jo 561, PC	36.41
Maxwell Communications Corpn plc (No 3), Re [1993] BCC 369	22.54
Mayfair Photographic Supplies (London) Ltd v Baxter, Hoare & Co Ltd and Stembridge [1972] 1 Lloyd's Rep 410	36.72
Mayhew v Crickett (1818) 1 Wils Ch 418, 2 Swan 185, 37 ER 178, Ct of Ch	23.54
M'Combie v Davies (1805) 6 East 538, 2 Smith KB 557, 102 ER 1393	8.26
Medina v Stoughton (1700) 1 Ld Raym 593, 1 Salk 210, Holt KB 208, 91 ER 188	6.03
Mediterranean Freight Services Ltd v BP Oil International Ltd, The Fiona [1994] 2 Lloyd's Rep 506, CA	36.51
Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc, The Reborn [2009] EWCA Civ 531, [2010] 1 All ER (Comm) 1, [2009] 2 Lloyd's Rep 639, [2009] NLJR 898, [2009] All ER (D) 83 (Jun)	3.57
Meek v Kettlewell (1842) 1 Hare 464, 11 LJ Ch 293, 6 Jur 550, 66 ER 1114; on appeal (1843) 1 Ph 342, 13 LJ Ch 28, 7 Jur 1120, 41 ER 662, [1843–60] All ER Rep 1109, 2 LTOS 205	23.10
Mehta v J Pereira Fernandes SA. See J Pereira Fernandes SA v Mehta	
Melachrinou v Nickoll and Knight [1920] 1 KB 693, 89 LJKB 906, 25 Com Cas 103, [1918–19] All ER Rep 856, [1918–19] All ER Rep 857, 122 LT 545, 36 TLR 143	14.13, 14.19, 14.64
Melluish (Inspector of Taxes) v BMI (No 3) Ltd [1996] AC 454, [1995] 4 All ER 453, [1995] 3 WLR 630, [1995] STC 964, 68 TC 1, [1995] 40 LS Gaz R 23, 139 Sol Jo LB 220, HL	7.20
Menelaou v Bank of Cyprus UK Ltd [2013] EWCA Civ 1960, [2014] 1 WLR 854, [2013] 2 P & CR 411, [2013] All ER (D) 33 (Jul); affd sub nom Bank of Cyprus UK Ltd v Menelaou [2015] UKSC 66, [2016] AC 176, [2015] 3 WLR 1334, [2015] 2 Lloyd's Rep 585, [2016] 1 BCLC 335, 166 NLJ 7676, (2015) Times, 07 December, [2015] All ER (D) 38 (Nov)	2.70, 23.52, 23.53, 30.36
Mengiste v Endowment Fund for the Rehabilitation of Tigray [2013] EWHC 599 (Ch), [2013] All ER (D) 230 (Mar)	37.31

Mercantile Bank of Sydney v Taylor [1893] AC 317, 57 JP 741, 1 R 371, 9 TLR 463, PC	3.69, 30.41
Mercantile Credit Co Ltd v Hamblin [1965] 2 QB 242, [1964] 3 All ER 592, [1964] 3 WLR 798, 108 Sol Jo 674, CA	16.18
Mercantile International Group plc v Chuan Soon Huat Industrial Group Ltd [2002] EWCA Civ 288, [2002] 1 All ER (Comm) 788, [2002] All ER (D) 105 (Mar)	5.13
Mercer v Craven Grain Storage Ltd [1994] CLC 328, HL	8.43
Merchant Banking Co of London v Phoenix Bessemer Steel Co (1877) 5 Ch D 205, 46 LJ Ch 418, 25 WR 457, 36 LT 395	10.45
Mercuria Energy Trading Pte Ltd v Citibank NA [2015] EWHC 1481 (Comm), [2015] All ER (D) 221 (May)	10.10
Merry v Green (1841) 10 LJMC 154, 7 M & W 623, 151 ER 916, [1835–42] All ER Rep 281, Exch Ct	2.40
Merthyr (South Wales) Ltd (FKA Blackstone (South Wales) Ltd) v Merthyr Tydfil County Borough Council [2019] EWCA Civ 526	3.68
Mersey Steel and Iron Co v Naylor, Benzon & Co (1884) 9 App Cas 434, 53 LJQB 497, 32 WR 989, [1881–5] All ER Rep 365, 51 LT 637, HL	10.45
Messiniaki Tolmi, The. See Astro Exito Navegacion SA v Chase Manhattan Bank NA, The Messiniaki Tolmi	
Metals Ltd v Diamond [1930] 3 DLR 886, Alta SC	13.14
Metcalfe v Archbishop of York (1833) 6 Sim 224, 4 LJ Ch 154, 58 ER 577; affd (1836) 1 My & Cr 547, 6 LJ Ch 65, 40 ER 485, Ct of Ch	23.03
Metropolitan Electric Supply Co Ltd v Ginder [1901] 2 Ch 799, 65 JP 519, 70 LJ Ch 862, 49 WR 508, 45 Sol Jo 467, 84 LT 818, 17 TLR 435, [1900–3] All ER Rep Ext 1545	7.07
Metropolitan Water Board v Dick Kerr & Co [1918] AC 119, 16 LGR 1, 82 JP 61, 87 LJBK 370, 23 Com Cas 148, [1916–17] All ER Rep 122, 62 Sol Jo 102, 117 LT 766, 34 TLR 113, HL	3.159
Metula, The. See Shell International Petroleum Ltd v Seabridge Shipping Ltd, The Metula	
Meyer (Montague L) Ltd v Kivisto (1929) 35 Ll L Rep 265, 74 Sol Jo 58, 142 LT 480, 46 TLR 162, [1929] All ER Rep Ext 795, CA	11.30
Meyer (Montague L) Ltd v Travaru A/B H Cornelius of Gamleby (1930) 37 Ll L Rep 204, 74 Sol Jo 466, 46 TLR 553	11.39
Meyerstein v Barber (1866) LR 2 CP 38, 36 LJCP 48, 12 Jur NS 1020, 2 Mar LC 420, 15 WR 173, 15 LT 355; on appeal (1867) LR 2 CP 661, 36 LJCP 289, 15 WR 998, 16 LT 569, Ex Ch; affd sub nom Barber v Meyerstein (1870) LR 4 HL 317, 39 LJCP 187, 3 Mar LC 449, 18 WR 1041, 22 LT 808, [1861–73] All ER Rep Ext 1810, HL	24.06
Michael Gerson (Leasing) Ltd v Wilkinson [2001] QB 514, [2001] 1 All ER 148, [2000] 3 WLR 1645, [2000] 2 All ER (Comm) 890, [2000] 35 LS Gaz R 37 ...	2.45, 10.10, 16.52
Microbeads AG v Vinhurst Road Markings Ltd [1975] 1 All ER 529, [1975] 1 WLR 218, 31 P & CR 19, [1975] 1 Lloyd's Rep 375, [1976] RPC 19, 119 Sol Jo 81	11.22, 11.24
Midland Bank Ltd v Reckitt [1933] AC 1, 102 LJBK 297, 37 Com Cas 202, 4 LDAB 298, [1932] All ER Rep 90, 76 Sol Jo 165, 148 LT 374, 48 TLR 271, HL	20.101
Midland Silicones Ltd v Scruttons Ltd. See Scruttons Ltd v Midland Silicones Ltd	
Mihalis Angelos, The. See Maredelanto Cia Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos	
Miliangos v George Frank (Textiles) Ltd [1976] AC 443, [1975] 3 All ER 801, [1975] 3 WLR 758, [1975] 2 CMLR 585, [1976] 1 Lloyd's Rep 201, 9 LDAB 408, 119 Sol Jo 774, HL	20.90, 37.109
Millar (Andrew) & Co Ltd v Taylor & Co Ltd [1916] 1 KB 402, 85 LJBK 346, 60 Sol Jo 140, 114 LT 216, 32 TLR 161, CA	3.159
Millars of Falkirk Ltd v Turpie 1976 SLT (Notes) 66, Ct of Sess	11.79
Miller (James) & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 583, [1970] 1 All ER 796, [1970] 2 WLR 728, [1970] 1 Lloyd's Rep 269, 114 Sol Jo 225, 214 Estates Gazette 111, HL	3.68, 39.22
Miller v Race (1757) 1 Burr 452, 2 Keny 189, 96 ER 1151	17.17
Miller Associates (Australia) Pty Ltd v Bennington Pty Ltd (1975) 7 ALR 144, [1975] 2 NSWLR 506, NSW SC	20.23
Millett v Van Heek & Co [1921] 2 KB 369, 90 LJBK 671, 65 Sol Jo 356, 125 LT 51, 37 TLR 411, sub nom Millett v Van Heek [1921] All ER Rep 519, CA	14.13

Mills v Fowkes (1839) 5 Bing NC 455, 8 LJCP 276, 2 Arn 62, 3 Jur 406, 7 Scott 444, 132 ER 1174	18.09
Ministry of Health v Simpson. See Diplock, Re, Diplock v Wintle	
Minster Trust Ltd v Traps Tractors Ltd [1954] 3 All ER 136, [1954] 1 WLR 963, 98 Sol Jo 456	14.41
Miramichi, The [1915] P 71, 84 LJP 105, 13 Asp MLC 21, 1 P Cas 137, 59 Sol Jo 107, 112 LT 349, 31 TLR 72, P, D and Admlty	34.27
Misa v Currie. See Currie v Misa	
Mitchell (George) (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 AC 803, [1983] 2 All ER 737, [1983] 3 WLR 163, [1983] 2 Lloyd's Rep 272, [1983] Com LR 209, HL	3.77, 11.137
Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537, [2014] 2 All ER 430, [2014] 1 WLR 795, [2014] BLR 89, [2013] 6 Costs LR 1008, [2013] All ER (D) 314 (Nov)	38.15
Mitchell, Cotts & Co v Steel Bros & Co Ltd [1916] 2 KB 610, 85 LJKB 1747, 13 Asp MLC 497, 22 Com Cas 63, [1916–17] All ER Rep 578, 115 LT 606, 32 TLR 533	36.59
Mitchell, Re, Freelove v Mitchell [1913] 1 Ch 201, 82 LJ Ch 121, [1911–13] All ER Rep 187, 57 Sol Jo 213, 108 LT 34	30.32
Mitsubishi Motors Corp'n v Soler Chrysler-Plymouth Inc (1985) 473 US 614, 87 L Ed 444 1985, 105 S Ct 3346	39.34
Mitsui and Co Ltd v Beteiligungsgesellschaft LPG Tankerflotte MBH and Co, The Longchamp [2017] UKSC 68, [2018] 1 All ER 545, [2018] 1 All ER (Comm) 815, [2017] Bus LR 1909, [2018] 1 Lloyd's Rep 1, (2017) Times, 07 November, [2017] All ER (D) 127 (Oct), SC	36.39
Mitsui & Co Ltd v Flota Mercante Grancolombiana SA, The Ciudad de Pasto and The Ciudad de Neiva [1989] 1 All ER 951, [1988] 1 WLR 1145, [1988] 2 Lloyd's Rep 208, 132 Sol Jo 1182, [1988] 34 LS Gaz R 54	8.108, 34.14
M'Myn, Re, Lightbown v M'Myn (1886) 33 Ch D 575, 55 LJ Ch 845, 35 WR 179, 55 LT 834	30.35
Modelboard Ltd v Outer Box Ltd [1993] BCLC 623, [1992] BCC 945	22.35
Modern Terrazo Ltd Re [1998] NZLR 160	25.26
Modern Transport Co Ltd v Ternstrom & Roos (1924) 19 Ll L Rep 345	34.06
Mohammad Habib Ullah (Sheik) v Bird & Co (1921) 37 TLR 405, PC	14.20, 14.56
Molling & Co v Dean & Son Ltd (1901) 18 TLR 217, DC	13.16, 13.27
Molton Finance Ltd, Re [1968] Ch 325, [1967] 3 All ER 843, [1967] 3 WLR 1561, 111 Sol Jo 791	22.61
Momm (t/a Delbrueck & Co) v Barclays Bank International Ltd [1977] QB 790, [1976] 3 All ER 588, [1977] 2 WLR 407, [1976] 2 Lloyd's Rep 341, 120 Sol Jo 486	18.35
Money Markets International Stockbrokers Ltd (in liq) v London Stock Exchange Ltd [2001] 4 All ER 223, [2002] 1 WLR 1151, [2001] 2 All ER (Comm) 344, [2001] 2 BCLC 347, (2001) Times, 25 September, [2001] BPIR 1044, [2001] All ER (D) 117 (Jul)	4.37
Montage (G & H) GmbH v Irvani [1990] 2 All ER 225, [1990] 1 WLR 667, [1990] 1 Lloyd's Rep 14, 11 LDAB 483, 134 Sol Jo 425	20.66
Montecchi v Shimco (UK) Ltd [1979] 1 WLR 1180, [1980] 1 Lloyd's Rep 50, 123 Sol Jo 551, CA	38.97
Montrod Ltd v Grundkotter Fleischvertriebs GmbH [2001] EWCA Civ 1954, [2002] 3 All ER 697, [2002] 1 WLR 1975, [2002] 1 All ER (Comm) 257, [2001] All ER (D) 335 (Dec)	35.116
Moorcock, The (1889) 14 PD 64, 58 LJP 73, 6 Asp MLC 373, 37 WR 439, [1886–90] All ER Rep 530, 60 LT 654, 5 TLR 316, CA	3.57
Moore & Co and Landauer & Co's Arbitration, Re [1921] 2 KB 519, 90 LJKB 731, 26 Com Cas 267, [1921] All ER Rep 466, 125 LT 372, 37 TLR 452, CA	11.39
Moorgate Mercantile Co Ltd v Twitchings [1977] AC 890, [1976] 2 All ER 641, [1976] 3 WLR 66, [1976] RTR 437, 120 Sol Jo 470, HL	16.11, 16.18, 16.23
Morgan (J P) Europe Ltd v Primacom AG [2005] EWHC 508 (Comm), [2005] 2 All ER (Comm) 764, [2005] 2 Lloyd's Rep 665, [2005] All ER (D) 03 (Apr)	37.12
Morgan v Larivière (1875) LR 7 HL 423, 44 LJ Ch 457, 23 WR 537, 32 LT 41, HL	35.49
Morgan v Russell & Sons [1909] 1 KB 357, 78 LJKB 187, 53 Sol Jo 136, 100 LT 118, 25 TLR 120, DC	7.20

Morguard Investment v De Savoye (1990) 52 BCLR 2d 160, [1990] 3 SCR 1077, 76 DLR (4th) 256, [1991] 2 WWR 217, Can SC	37.49
Morison v London County and Westminster Bank Ltd [1914] 3 KB 356, 83 LJKB 1202, 19 Com Cas 273, 3 LDAB 91, [1914–15] All ER Rep 853, 58 Sol Jo 453, 111 LT 114, 30 TLR 481, CA	20.98, 20.126
Morley v Attenborough (1849) 13 JP 427, 18 LJ Ex 148, 3 Exch 500, 13 Jur 282, 154 ER 942, [1843–60] All ER Rep 1045, 12 LTOS 532, Exch Ct	6.07
Morley v Morley (1858) 25 Beav 253, 6 WR 360, 53 ER 633	23.56
Morphitis v Bernasconi [2003] EWCA Civ 289, [2003] Ch 552, [2003] 2 WLR 1521, [2003] 2 BCLC 53, [2003] BCC 540, [2003] 19 LS Gaz R 30, (2003) Times, 12 March, 147 Sol Jo LB 300, [2003] BPIR 973, sub nom Morphites v Bernasconi [2003] All ER (D) 33 (Mar)	31.72
Morrell v Studd and Millington [1913] 2 Ch 648, 83 LJ Ch 114, 58 Sol Jo 12, 109 LT 628, [1911–13] All ER Rep Ext 1426	3.94
Morris v Bank of India [2005] EWCA Civ 693, [2005] 2 BCLC 328, (2005) Times, 19 July, [2005] BPIR 1067, [2005] All ER (D) 242 (Jun), CSRC vol 29 iss 8/2, sub nom Bank of India v Morris [2005] BCC 739	31.72
Morrison (James) & Co Ltd v Shaw, Savill and Albion Co Ltd [1916] 2 KB 783, 86 LJKB 97, 13 Asp MLC 304, 22 Com Cas 81, [1916–17] All ER Rep 1068, 61 Sol Jo 9, 115 LT 508, 32 TLR 712, CA	36.32
Morritt, Re, ex p Official Receiver (1886) 18 QBD 222, 56 LQJB 139, 35 WR 277, 56 LT 42, 3 TLR 266, CA	23.35
Mortgage Business plc v O'Shaughnessy [2012] EWCA Civ 17, [2012] 1 WLR 1521, [2012] 1 P & CR 393, [2012] 1 EGLR 89, [2012] 15 Estates Gazette 96, [2012] 05 EG 82 (CS), sub nom Cook v The Mortgage Business plc [2012] All ER (D) 203 (Jan); affd on other grounds sub nom Southern Pacific Mortgages Ltd v Scott (Mortgage Business plc intervening) [2014] UKSC 52, [2015] 1 All ER 277, [2014] 3 WLR 1163, [2014] HLR 747, [2015] 1 EGLR 3, 164 NLJ 7633, (2014) Times, 28 October, [2015] WTLR 1067, [2014] All ER (D) 251 (Oct)	24.61
Morviken, The. See Hollandia, The	
Moschi v Lep Air Services Ltd [1973] AC 331, [1972] 2 All ER 393, [1972] 2 WLR 1175, 116 Sol Jo 372, HL	3.142, 30.24, 30.27, 30.28, 30.44, 30.45
Moss v Hancock [1899] 2 QB 111, 63 JP 517, 68 LJQB 657, 19 Cox CC 324, 47 WR 698, 43 Sol Jo 479, 80 LT 693, 15 TLR 353, DC	17.16
Mothew v Bristol & West Building Society. See Bristol and West Building Society v Mothew (t/a Stapley & Co)	
Motis Exports Ltd v Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg [2000] 1 All ER (Comm) 91, [2000] 1 Lloyd's Rep 211, [2000] 03 LS Gaz R 37	36.35
Motor Credits (Hire Finance Ltd) v Pacific Motor Auctions Pty Ltd (1963) 109 CLR 87, Aus HC; revsd sub nom Pacific Motor Auctions Pty Ltd v Motor Credits (Hire Finance) Ltd [1965] AC 867, [1965] 2 All ER 105, [1965] 2 WLR 881, 109 Sol Jo 210, PC	16.24, 16.43, 16.50
Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp'n of India, The Kanchenjunga [1990] 1 Lloyd's Rep 391, (1990) Times, 19 February, HL	3.93, 12.20
Motorola Credit Corp v Uzan [2003] EWCA Civ 752, [2004] 1 WLR 113, [2003] 32 LS Gaz R 34, (2003) Times, 19 June, 147 Sol Jo LB 752, [2003] All ER (D) 150 (Jun)	38.98
Mount (D F) Ltd v Jay and Jay (Provisions) Co Ltd [1960] 1 QB 159, [1959] 3 All ER 307, [1959] 3 WLR 537, [1959] 2 Lloyd's Rep 269, 103 Sol Jo 636	16.65
Mount Sophia Pte Ltd v Join-Aim Pte Ltd [2012] SGCA 28, 150 ConLR 21, Sing CA	35.118
Mubarak Ali v Wali Mohamed & Co (1938) 18 KLR 23	16.71
Mucklow v Mangles (1808) 1 Taunt 318, 127 ER 856	8.97
Multiservice Bookbinding Ltd v Marden [1979] Ch 84, [1978] 2 All ER 489, [1978] 2 WLR 535, 35 P & CR 201, 122 Sol Jo 210, [1999] GCCR 517	3.73
Munro (Robert A) & Co Ltd v Meyer [1930] 2 KB 312, 99 LJKB 703, 35 Com Cas 232, [1930] All ER Rep 241, 143 LT 565	10.45, 11.39
Murray v Parker (1854) 19 Beav 305, 52 ER 367	3.69
Murray v Bernard [2015] EWHC 2395 (Ch), [2015] 5 Costs LO 567	38.04
Myers v Kestrel Acquisitions Ltd [2015] EWHC 916 (Ch), [2015] All ER (D) 11 (Apr)	3.76

NLA Group Ltd v Bowers [1999] 1 Lloyd's Rep 109	3.64
Napier and Ettrick (Lord) v RF Kershaw Ltd [1993] AC 713, [1993] 1 All ER 385, [1993] 2 WLR 42, [1993] 1 Lloyd's Rep 197, [1993] 9 LS Gaz R 43, 137 Sol Jo LB 44, HL	23.52
National Bank of Kazakhstan v Bank of New York Mellon SA/NV, London Branch [2020] EWHC 916 (Comm)	38.12
National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675, [1981] 1 All ER 161, [1981] 2 WLR 45, 43 P & CR 72, 125 Sol Jo 46, HL	3.159, 3.176
National Commercial Bank (Jamaica) Ltd v Hew [2003] UKPC 51, 63 WIR 183, [2004] 2 LRC 396, [2003] All ER (D) 402 (Jun)	3.73
National Employers' Mutual General Insurance Association Ltd v Jones [1990] 1 AC 24, [1987] 3 All ER 385, [1987] 3 WLR 901, [1987] BTLC 125, 131 Sol Jo 1154, [1987] LS Gaz R 2458; affd [1990] 1 AC 24, [1988] 2 All ER 425, [1988] 2 WLR 952, [1988] RTR 289, 132 Sol Jo 658, [1988] NLJR 118, HL	7.27, 16.49
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Paul v Speirway Ltd (in liq) [1976] Ch 220, [1976] 2 All ER 587, [1976] 2 WLR 715, 31 P & CR 353, 120 Sol Jo 331	23.49
Pavia & Co SpA v Thurmann-Nielsen [1952] 2 QB 84, [1952] 1 All ER 492, [1952] 1 Lloyd's Rep 153, 6 LDAB 254, 96 Sol Jo 193, [1952] 1 TLR 586, CA	35.79
Payne v Elsdon (1900) 17 TLR 161	8.25, 11.27
Payzu Ltd v Saunders [1919] 2 KB 581, 89 LJKB 17, [1918–19] All ER Rep 219, 121 LT 563, 35 TLR 657, CA	9.17, 12.22, 13.35
Peachdart Ltd, Re [1984] Ch 131, [1983] 3 All ER 204, [1983] 3 WLR 878, [1983] BCLC 225, 127 Sol Jo 839, [1984] LS Gaz R 204	22.35
Peacock v Pursell (1863) 14 CBNS 728, 32 LJCP 266, 10 Jur NS 178, 2 New Rep 282, 11 WR 834, 8 LT 636	20.81
Peak Hotels and Resorts Ltd, Re Crumpler (joint liquidators of Peak Hotels and Resorts Ltd) v Candey Ltd [2019] EWCA Civ 345, [2020] 1 BCLC 505, [2019] Bus LR 1758, 169 NLJ 7833, [2019] BPIR 623, [2019] All ER (D) 48 (Mar)	25.32

Table of Cases

Pearl Petroleum Company Ltd v Kurdistan Regional Government of Iraq [2015] EWHC 3361 (Comm), [2016] 4 WLR 2, [2016] 1 Lloyd's Rep 441, [2015] All ER (D) 193 (Nov)	39.98
Pearson v Lehman Brothers Finance SA [2010] EWHC 2914 (Ch), [2010] All ER (D) 232 (Nov); affd [2011] EWCA Civ 1544, [2012] 2 BCLC 151, [2011] All ER (D) 202 (Dec)	21.24
Pearson (S) & Son Ltd v Dublin Corpn [1907] AC 351, 77 LJPC 1, [1904–7] All ER Rep 255, 97 LT 645, HL	3.72
Pearson v Rose and Young Ltd [1951] 1 KB 275, [1950] 2 All ER 1027, 94 Sol Jo 778, 66 (pt 2) TLR 886, CA	16.18, 16.39, 16.43
Peat (Sir William Henry) v Gresham Trust Ltd. See MIG Trust Ltd, Re	
Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511, [2006] All ER (D) 70 (Apr)	3.97
Peer Voss v APL Co Pte Ltd [2002] 2 Lloyd's Rep 707	32.56
Pellegrini v Italy (Application No 30882/96) (2001) 35 EHRR 44, ECtHR	37.51
Penarth Dock Engineering Co Ltd v Pounds [1963] 1 Lloyd's Rep 359	15.32
Pendlebury v Walker (1841) 4 Y & C Ex 424, 10 LJ Ex Eq 27, 5 Jur 334, 160 ER 1072, Exch Ct	30.47
Pennington v Waine [2002] EWCA Civ 227, [2002] 4 All ER 215, [2002] 1 WLR 2075, [2002] 2 BCLC 448, [2002] All ER (D) 24 (Mar), sub nom Pennington v Crampton (2002) Times, 1 April	3.14
People, The. See KH Enterprise v Pioneer Container, The Pioneer Container	
Performing Right Society Ltd v B4U Network (Europe) Ltd [2013] EWCA Civ 1236, [2014] Bus LR 207, (2013) Times, 25 October, [2013] All ER (D) 28 (Nov)	23.21
Perkins v Bell [1893] 1 QB 193, 62 LJQB 91, 4 R 212, 41 WR 195, [1891–4] All ER Rep 884, 37 Sol Jo 130, 67 LT 792, 9 TLR 147, CA	13.15, 13.27
Perrin v Morgan [1943] AC 399, [1943] 1 All ER 187, 112 LJ Ch 81, 87 Sol Jo 47, 168 LT 177, 59 TLR 134, HL	17.05
Persons identified in Schedule 1 of the Claim Form (the SL Claimants) v Tesco plc [2019] EWHC 2858 (Ch), [2020] Bus LR 250, [2019] All ER (D) 174 (Oct)	21.24, 40.16
Peruvian Guano Co Ltd v Dreyfus Bros & Co [1892] AC 166, 61 LJ Ch 749, 7 Asp MLC 225, 66 LT 536, 8 TLR 327, [1891–4] All ER Rep Ext 1834, HL	2.94
Pesticcio v Huet [2004] EWCA Civ 372, [2004] NLJR 653, 148 Sol Jo LB 420, [2004] All ER (D) 36 (Apr)	3.73
Petch v Tutin (1846) 15 LJ Ex 280, 15 M & W 110, 153 ER 782, Exch Ct	8.74
Peter v Russell (1716) 1 Eq Cas Abr 321, Gilb Ch 122, 2 Vern 726, 23 ER 1076, Ct of Ch	24.19
Peter Cremer, Westfaelische Central Genossenschaft GmbH and Intergraan NV v General Carriers SA, The Dona Mari. See Cremer v General Carriers SA	
Peter der Grosse, The (1875) 1 PD 414, P, D and Admlty; affd (1876) 3 Asp MLC 195, 34 LT 749, CA	36.53
Peter Pan Manufacturing Corpn v Corsets Silhouette Ltd [1963] 3 All ER 402, [1964] 1 WLR 96, [1963] RPC 45, 108 Sol Jo 97	3.115
Petromec Inc v Petroleo Brasileiro SA Petrobras [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep 121, [2005] All ER (D) 209 (Jul)	3.32
Petruchová v FIBO Group Holdings Ltd., Case: C-208/18., [2020] CEC 326	37.10
Peyman v Lanjani [1985] Ch 457, [1984] 3 All ER 703, [1985] 2 WLR 154, 48 P & CR 398, 128 Sol Jo 853	13.12
Pfeiffer (E) Weinkellerei-Weineinkauf GmbH & Co v Arbutnot Factors Ltd [1988] 1 WLR 150, [1987] BCLC 522, 3 BCC 608, [1987] BTLC 207, 132 Sol Jo 89, [1988] 6 LS Gaz R 38	22.34, 29.51
P4 Ltd v Unite Integrated Solutions plc [2006] EWHC 2640 (TCC), [2006] All ER (D) 352 (Oct)	16.50
Phibro Energy AG v Nissho Iwai Corpn and Bomar Oil Inc, The Honam Jade [1991] 1 Lloyd's Rep 38, CA	10.24
Philips Hong Kong Ltd v A-G of Hong Kong (1993) 61 BLR 41, 9 Const LJ 202, PC	3.141
Phillips v Brevin Dolphin Bell Lawrie Ltd [2001] UKHL 2, [2001] 1 All ER 673, [2001] 1 WLR 143, [2001] 1 BCLC 145, [2001] BCC 864, [2001] 12 LS Gaz R 43, (2001) Times, 18 January, 145 Sol Jo LB 23, [2001] BPIR 119, [2001] All ER (D) 84 (Jan)	31.40

Phillips v Brooks Ltd [1919] 2 KB 243, 88 LJKB 953, 24 Com Cas 263, [1918–19] All ER Rep 246, 121 LT 249, 35 TLR 470	3.33
Phillips Products Ltd v Hyland [1987] 2 All ER 620, [1987] 1 WLR 659n, 129 Sol Jo 47, [1985] LS Gaz R 681, Tr L 98	3.79
Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd, Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat [1988] QB 216, [1987] 2 All ER 152, [1987] 2 WLR 512, [1986] 2 Lloyd's Rep 552, 131 Sol Jo 257, [1987] LS Gaz R 1055	3.161
Phonogram Ltd v Lane [1982] QB 938, [1981] 3 All ER 182, [1981] 3 WLR 736, [1982] 3 CMLR 615, [1981] Com LR 228, 125 Sol Jo 527	19.105
Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, [1980] 1 All ER 556, [1980] 2 WLR 283, [1980] 1 Lloyd's Rep 545, 124 Sol Jo 147, 130 NLJ 188, HL	3.77, 3.82, 36.33
Pike v The Indian Hotels Company Ltd [2013] EWHC 4096 (QB)	37.38
Pilkington v Wood [1953] Ch 770, [1953] 2 All ER 810, [1953] 3 WLR 522, 97 Sol Jo 572	3.138
Piller (Anton) KG v Manufacturing Processes Ltd [1976] Ch 55, [1976] 1 All ER 779, [1976] 2 WLR 162, [1976] FSR 129, [1976] RPC 719, 120 Sol Jo 63	38.103, 38.105
Pim v Campbell. See Pym v Campbell	
Pinnock Bros v Lewis and Peat Ltd [1923] 1 KB 690, 92 LJKB 695, 28 Com Cas 210, 67 Sol Jo 501, 129 LT 320, 39 TLR 212	11.39
Pinto Leite & Nephews, Re, ex p Visconde des Oliveira [1929] 1 Ch 221, 98 LJ Ch 211, [1928] B & CR 188, [1928] All ER Rep 371, 140 LT 587	29.31
Pioneer Container, The. See KH Enterprise v Pioneer Container, The Pioneer Container	
Pioneer Shipping Ltd v BTP Tioxide Ltd [1982] AC 724, [1981] 2 All ER 1030, [1981] 3 WLR 292, [1981] Com LR 197, 125 Sol Jo 542, sub nom BTP Tioxide Ltd v Pioneer Shipping Ltd and Armada Marine SA, The Nema [1981] 2 Lloyd's Rep 239, HL	39.91, 39.176
Pitts v Jones [2007] EWCA Civ 1301, [2008] QB 706, [2008] 1 All ER 941, [2008] 2 WLR 1289, [2008] 1 All ER (Comm) 548, [2008] Bus LR 1279, [2008] 1 BCLC 613, (2007) Times, 19 December, [2007] All ER (D) 93 (Dec)	30.07
Playa Larga and The Marble Islands, The. See Empresa Exportadora de Azucar v Industria Azucarera Nacional SA, The Playa Larga and The Marble Islands	
Playa Larga, The (Owners of Cargo lately laden on board) v I Congreso del Partido (Owners), Marble Islands, The (Owners of Cargo lately laden on board) v I Congreso del Partido (Owners), I Congreso del Partido [1983] 1 AC 244, [1981] 2 All ER 1064, [1981] 3 WLR 328, [1981] 2 Lloyd's Rep 367, 125 Sol Jo 529, HL	1.40
Pledge v Buss (1860) John 663, 6 Jur NS 695	30.41
Pluczenik Diamond Company NV v W Nagel (a firm) [2018] EWCA Civ 2640, [2019] 2 All ER 194, [2019] 1 All ER (Comm) 497, [2019] Bus LR 692, [2019] 1 Lloyd's Rep 36, 169 NLJ 7822, [2018] All ER (D) 09 (Dec)	5.09, 5.13, 5.39
Polak v Everett (1876) 1 QBD 669, 46 LJQB 218, 24 WR 689, [1874–80] All ER Rep 991, 35 LT 350, CA	30.41
Polhill v Walter (1832) 3 B & Ad 114, 1 LJKB 92, 110 ER 43, [1824–34] All ER Rep 161	20.103, 20.106
Polly Peck International plc v Nadir (No 2) [1992] 4 All ER 769, [1992] 2 Lloyd's Rep 238, [1993] BCLC 187, [1992] NLJR 671	38.99
Polsky v S and A Services [1951] 1 All ER 185, [1951] WN 136; on appeal [1951] 1 All ER 1062n, [1951] WN 256, 95 Sol Jo 414, CA	22.27
Poole v Smith's Car Sales (Balham) Ltd [1962] 2 All ER 482, [1962] 1 WLR 744, 106 Sol Jo 284, CA	9.41
Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd, The New York Star [1980] 3 All ER 257, [1981] 1 WLR 138, [1980] 2 Lloyd's Rep 317, 124 Sol Jo 756, PC	3.77, 36.76
Portbase Clothing Ltd, Re [1993] Ch 388, [1993] 3 All ER 829, [1993] 3 WLR 14, [1993] BCLC 796, [1993] BCC 96, 12 LDAB 332	22.48, 24.65, 24.67
Portsmouth City Council v Ensign Highways Ltd [2015] EWHC 1969 (TCC), [2015] LGR 791, 161 ConLR 71, [2015] BLR 675, [2015] All ER (D) 146 (Jul)	3.76
Pound (A V) & Co Ltd v M W Hardy & Co Inc [1956] AC 588, [1956] 1 All ER 639, [1956] 2 WLR 683, [1956] 1 Lloyd's Rep 255, 100 Sol Jo 208, HL	34.11
Poussard v Spiers and Pond (1876) 1 QBD 410, 40 JP 645, 45 LJQB 621, 24 WR 819, 34 LT 572	3.176

Table of Cases

Powell Duffryn plc v Petereit: C-214/89 (1992) C-214/89, ECLI:EU:C:1992:115, [1992] ECR I-1745, (1992) Times, 15 April, [1992] ILP 300, EUCJ	37.11
Power v Sharp Investments Ltd [1994] 1 BCLC 111, [1993] BCC 609	31.49
Power Curber International Ltd v National Bank of Kuwait SAK [1981] 3 All ER 607, [1981] 1 WLR 1233, [1981] 2 Lloyd's Rep 394, [1981] Com LR 224, 125 Sol Jo 585	35.114
Preist v Last [1903] 2 KB 148, 72 LJKB 657, 51 WR 678, 47 Sol Jo 566, 89 LT 33, 19 TLR 527, [1900–3] All ER Rep Ext 1033, CA	11.96, 11.99, 11.100, 11.106
Prenn v Simmonds [1971] 3 All ER 237, [1971] 1 WLR 1381, 115 Sol Jo 654, HL	3.68
President of India v La Pintada Cia Navigacion SA [1985] AC 104, [1984] 2 All ER 773, [1984] 3 WLR 10, [1984] 2 Lloyd's Rep 9, 128 Sol Jo 414, HL	35.124
Priyanka Shipping Ltd v Glory Bulk Carriers PTE Ltd; The CSK Glory [2019] EWHC 2804 (Comm), [2019] 1 WLR 6677, [2020] 1 All ER (Comm) 1040, [2019] All ER (D) 176 (Oct)	3.115
Price v Neal (1762) 3 Burr 1354, 1 Wm Bl 390, 97 ER 871	20.55
Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd [2013] EWHC 3066 (Comm), [2014] 1 All ER (Comm) 813, [2014] 1 Lloyd's Rep 255, 164 NLJ 7625, [2013] All ER (D) 172 (Oct)	39.90
Priminds Shipping (HK) Co Ltd v Noble Chartering Inc [2020] EWHC 127 (Comm), [2020] All ER (D) 33 (Feb)	32.66
Print Concept GmbH v GEW (EC) Ltd [2001] EWCA Civ 352, [2001] All ER (D) 29 (Mar)	37.75
Procter & Gamble Philippine Manufacturing Corpn v Peter Cremer GmbH & Co, The Manila [1988] 3 All ER 843	34.42
Proctor & Gamble Philippines Manufacturing Corpn v Kurt A Becher GmbH & Co KG [1988] 2 Lloyd's Rep 21, CA	34.45
Profit Investment Sim SpA v Ossi: C-366/13 (2016) ECLI:EU:C:2016:282, (2016) Times, 31 May, [2016] All ER (D) 44 (May), ECJ	37.18
Property Discount Corpn Ltd v Lyon Group Ltd [1980] 1 All ER 334, [1981] 1 WLR 300, 124 Sol Jo 614; affd [1981] 1 All ER 379, [1981] 1 WLR 300, 125 Sol Jo 185	23.13
Prout v Gregory (1889) 24 QBD 281, 59 LJQB 118, 7 Morr 1, 38 WR 204, 61 LT 696	22.55
Prudential Assurance Co Ltd v Ayres [2007] EWHC 775 (Ch), [2007] 3 All ER 946, [2007] 2 EGLR 31, 151 Sol Jo LB 504, [2007] All ER (D) 43 (Apr); revsd [2008] EWCA Civ 52, [2008] 1 All ER 1266n, [2009] 1 All ER 1266n, [2008] 1 EGLR 5, [2008] 16 EG 154, [2008] All ER (D) 90 (Feb)	3.89
Puerto Buitrago, The. See Attica Sea Carriers Corpn v Ferrostaal Poseidon Bulk Reederei GmbH, The Puerto Buitrago	
Pulbrook v Lawes (1876) 1 QBD 284, 40 JP 452, 45 LJQB 178, 34 LT 95, DC	3.35
Purpoint Ltd, Re [1991] BCLC 491, [1991] BCC 121	31.75
Pym v Campbell (1856) 6 E & B 370, 25 LJQB 277, 2 Jur NS 641, 4 WR 528, sub nom Pim v Campbell 27 LTOS 122	3.69
Pyrene Co Ltd v Scindia Navigation Co Ltd [1954] 2 QB 402, [1954] 2 All ER 158, [1954] 2 WLR 1005, [1954] 1 Lloyd's Rep 321, 98 Sol Jo 354	34.01, 34.08, 36.15

R

R v A-G for England and Wales [2003] UKPC 22, 147 Sol Jo LB 354, [2003] EMLR 499, [2004] 1 LRC 132, [2003] All ER (D) 246 (Mar)	3.35, 3.73
R v Consolidated Churchill Copper Corpn Ltd (1978) 90 DLR (3d) 357, [1978] 5 WWR 652, BC SC	25.22
R v Grantham [1984] QB 675, [1984] 3 All ER 166, [1984] 2 WLR 815, 79 Cr App Rep 86, [1984] Crim LR 492, [1984] BCLC 270, 10 LDAB 473, 128 Sol Jo 331, [1984] LS Gaz R 1437	31.72
R v Greig [1931] VLR 413	23.03
R v Heron [1982] 1 All ER 993, sub nom R v Heron, R v Storey, R v Thomas [1982] 1 WLR 451, 75 Cr App Rep 7, [1982] Crim LR 430, 126 Sol Jo 242, HL	7.03
R v King, R v Chinn [1992] QB 20, [1991] 3 All ER 705, [1991] 3 WLR 246, 93 Cr App Rep 259, [1991] Crim LR 906, 135 Sol Jo LB 76	18.30

R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38, [2002] 4 All ER 654, [2002] 1 WLR 2956, [2003] LGR 23, [2002] HLR 1021, (2002) Times, 18 October, [2002] All ER (D) 235 (Oct)	3.49, 3.68
R v Preddy, R v Slade [1996] AC 815, [1996] 3 All ER 481, [1996] 3 WLR 255, [1996] 2 Cr App Rep 524, 160 JP 677, [1996] Crim LR 726, [1996] 31 LS Gaz R 29, [1996] NLJR 1057, 140 Sol Jo LB 184, HL	17.38
R v Secretary of State for Transport, ex p Factortame Ltd (No 2) [1991] 1 AC 603, [1990] 3 WLR 818, [1990] 3 CMLR 375, [1990] 2 Lloyd's Rep 365n, [1991] 1 Lloyd's Rep 10, 134 Sol Jo 1189, [1990] 41 LS Gaz R 36, [1990] NLJR 1457, sub nom Factortame Ltd v Secretary of State for Transport (No 2) [1991] 1 All ER 70, HL	1.31
R v Sunair Holidays Ltd [1973] 2 All ER 1233, [1973] 1 WLR 1105, 57 Cr App Rep 782, 137 JP 687, [1973] Crim LR 587, 117 Sol Jo 429	3.40
R v Wheeler (1990) 92 Cr App Rep 279, CA	11.19
R & B Customs Brokers Co Ltd v United Dominions Trust Ltd (Saunders Abbott (1980) Ltd, third party) [1988] 1 All ER 847, [1988] 1 WLR 321, [1988] RTR 134, [1988] BTLC 52, 132 Sol Jo 300, [1988] 11 LS Gaz R 42, [1999] GCCR 1195	11.59
RBG Resources plc v Banque Cantonale Vaudoise [2004] 3 SLR 421	8.57, 8.58
RBRG Trading (UK) Ltd v Sinocore International Co. Ltd [2018] EWCA Civ 838, [2019] 1 All ER (Comm) 810, [2018] 2 Lloyd's Rep 133, [2018] All ER (D) 111 (Apr)	39.108
RPS Prodotti Siderurgici SRL v Sea Mass (owners), The Sea Maas [2000] 1 All ER 536, [1999] 1 All ER (Comm) 945, [1999] 2 Lloyd's Rep 281	36.28
RTZ Corpn plc v Connelly [1998] AC 854, [1997] 3 WLR 373, HL ..	37.38, 38.20, 38.80
Radford v de Froberville [1978] 1 All ER 33, [1977] 1 WLR 1262, 35 P & CR 316, 121 Sol Jo 319, 7 BLR 35	3.126
Raffles v Wichelhaus (1864) 2 H & C 906, 33 LJ Ex 160, 159 ER 375, Exch Ct	3.32, 8.15
Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC [2001] EWCA Civ 68, [2001] QB 825, [2001] 3 All ER 257, [2001] 2 WLR 1344, [2001] 1 All ER (Comm) 961, [2001] 1 Lloyd's Rep 597, [2001] 09 LS Gaz R 38, 145 Sol Jo LB 45, [2001] All ER (D) 182 (Jan)	37.97
Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123, [2011] Bus LR D65, [2010] All ER (D) 111 (Jun)	3.81
Rainbow v Howkins [1904] 2 KB 322, 73 LJKB 641, 53 WR 46, 48 Sol Jo 494, 91 LT 149, 20 TLR 508	16.18
Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2012] 1 All ER 1137, [2011] 1 WLR 2900, [2012] 1 All ER (Comm) 1, [2012] Bus LR 313, [2012] 1 Lloyd's Rep 34, 138 ConLR 1, [2011] NLJR 1558, [2012] BLR 132, (2011) Times, 18 November, [2011] All ER (D) 19 (Nov)	3.65, 30.30
Rama Corpn Ltd v Proved Tin and General Investments Ltd [1952] 2 QB 147, [1952] 1 All ER 554, 96 Sol Jo 197, [1952] 1 TLR 709	5.21
Ramburs Inc v Agrifert SA [2015] EWHC 3548 (Comm), [2016] Bus LR 135, [2015] All ER (D) 75 (Dec)	34.06
Ramsay v Margrett [1894] 2 QB 18, 63 LJQB 513, 1 Mans 184, 9 R 407, [1891-4] All ER Rep 453, 70 LT 788, 10 TLR 355, CA	2.47
Randall v Newson (or Newsom) (1877) 2 QBD 102, 46 LJQB 259, 25 WR 313, 36 LT 164, CA	11.112
Range v Corporation de Finance Belvédère' (1970) 48 Can Bar Rev 309	20.120
Rapalli v K L Take [1958] 2 Lloyd's Rep 469, CA	11.79, 11.84
Rapid Discount Corpn v Thomas E Hiscott Ltd (1977) 76 DLR (3d) 450, Ont HC	20.114
Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and Government of the Republic of Indonesia (as interveners) [1978] QB 644, [1977] 3 All ER 324, [1977] 3 WLR 518, [1977] 2 CMLR 470, [1977] 2 Lloyd's Rep 397, 121 Sol Jo 706	38.97
Rayner (J H) & Co Ltd v Hambro's Bank Ltd [1943] KB 37, [1942] 2 All ER 694, 74 Ll L Rep 10, 112 LJKB 27, 5 LDAB 334, 86 Sol Jo 302, 167 LT 380, 59 TLR 21, CA	35.61
Reardon Smith Line Ltd v Hansen-Tangen [1976] 3 All ER 570, [1976] 1 WLR 989, [1976] 2 Lloyd's Rep 621, 120 Sol Jo 719, HL	3.32, 11.39

Reed v Norris (1837) 2 My & Cr 361, 6 LJ Ch 197, 1 Jur 233, 40 ER 678, Ct of Ch	30.36
Rees v Berrington (1795) 2 Ves 540	30.40
Rees, Re, ex p National Provincial Bank of England (1881) 17 Ch D 98, 29 WR 796, 1 LDAB 24, 44 LT 325, CA	31.33
Reeves v Capper (1838) 5 Bing NC 136, 8 LJP 44, 1 Arn 427, 2 Jur 1067, 6 Scott 877, 132 ER 1057, [1835–42] All ER Rep 164	22.22, 24.06
Refco Inc v Eastern Trading Co [1999] 1 Lloyd's Rep 159, CA	38.98
Regal (Hastings) Ltd v Gulliver (1942) [1967] 2 AC 134, [1942] 1 All ER 378, HL	2.70
Regazzoni v KC Sethia (1944) Ltd [1958] AC 301, [1957] 3 All ER 286, [1957] 3 WLR 752, [1957] 2 Lloyd's Rep 289, 101 Sol Jo 848, HL	37.81
Regent OHG Aisenstadt und Barig v Francesco of Jermyn Street Ltd [1981] 3 All ER 327, [1981] Com LR 78	10.45, 13.33
Régie Nationale des Usines Renault SA v Maxicar SpA: C-38/98 [2000] ECR I-2973, [2000] IP & T 1119, [2000] All ER (D) 639, ECJ	37.47
Regus (UK) Ltd v Epcot Solutions Ltd [2008] EWCA Civ 361, [2009] 1 All ER (Comm) 586, [2008] All ER (D) 199 (Apr)	3.78
Rehder v Air Baltic Corpn: C-204/08 [2009] ECR I-6073, [2010] Bus LR 549, [2009] All ER (D) 153 (Jul), ECJ	37.22
Reid v Buckinghamshire Healthcare NHS Trust [2015] EWHC B21 (Costs) (28 October 2015)	38.04
Reinhold & Co and Hansloh's Arbitration, Re (1896) 12 TLR 422	32.64
Reis, Re, ex p Clough [1904] 2 KB 769, 73 LJB 929, 11 Mans 229, 53 WR 122, 48 Sol Jo 506, 91 LT 592, 20 TLR 547, [1904–7] All ER Rep Ext 1669, CA; on appeal sub nom Clough v Samuel [1905] AC 442, 74 LJB 918, 12 Mans 347, 54 WR 114, 93 LT 491, 21 TLR 702, HL	23.21
Reisch Montage AG v Kiesel Baumaschinen Handels GmbH: C-103/05 [2006] ECR I- 6827, [2006] All ER (D) 174 (Jul), ECJ	37.24
Reliance Industries Ltd v Enron Oil and Gas India Ltd [2002] 1 All ER (Comm) 59, [2002] 1 Lloyd's Rep 645, [2002] BLR 36, [2001] ArbLR 54, [2001] All ER (D) 342 (Nov)	39.91
Republic of Haiti v Duvalier [1990] 1 QB 202, [1989] 1 All ER 456, [1989] 2 WLR 261, [1989] 1 Lloyd's Rep 111, [1989] 2 LS Gaz R 38, [1988] NLJR 234	38.98
Reuter Hufeland & Co v Sala & Co (1879) 4 CPD 239, 48 LJQB 492, 4 Asp MLC 121, 27 WR 631, 40 LT 476, [1874–80] All ER Rep Ext 1552, CA ..	10.38, 10.41, 10.43, 10.45
Revenue and Customs Comrs v Football League Ltd [2012] EWHC 1372 (Ch), [2012] Bus LR 1539, [2013] 1 BCLC 285, [2012] 24 LS Gaz R 20, [2012] NLJR 781, (2012) Times, 28 June, [2012] All ER (D) 214 (May)	31.26, 31.28
Rewia, The [1991] 2 Lloyd's Rep 325, (1991) Financial Times, 12 July, CA	36.19
Rhodes v Forwood (1876) 1 App Cas 256, 47 LJQB 396, 24 WR 1078, [1874–80] All ER Rep 476, 34 LT 890, HL	3.57
Rhodian River and Rhodian Sailor, The. See Rhodian River Shipping Co SA and Rhodian Sailor Shipping Co SA v Halla Maritime Corpn, The Rhodian River and Rhodian Sailor	
Rhodian River Shipping Co SA and Rhodian Sailor Shipping Co SA v Halla Maritime Corpn, The Rhodian River and Rhodian Sailor [1984] 1 Lloyd's Rep 373, [1984] BCLC 139	5.19
Rich (Marc) & Co AG v Società Italiana Impianti PA, The Atlantic Emperor (No 2): C-190/89 [1992] 1 Lloyd's Rep 624, ECJ	37.49
Richards v Delbridge (1874) LR 18 Eq 11, 43 LJ Ch 459, 22 WR 584	23.04
Richardson, Re, ex p St Thomas's Hospital (Governors) [1911] 2 KB 705, 80 LJB 1232, 18 Mans 327, 105 LT 226, CA	30.32
Richardson Greenshields of Canada (Pacific) Ltd v Keung Chak-Kiu and Hong Kong Futures Exchange Ltd [1989] 1 HKLR 476	4.41
Riddiford v Warren (1901) 20 NZLR 572, NZ CA	7.07
Rio Sun, The. See Gatoil International Inc v Panatlantic Carriers Corpn, The Rio Sun	
Rio Tinto Zinc Corpn v Westinghouse Electric Corpn, RTZ Services Ltd v Westinghouse Electric Corpn [1978] AC 547, [1978] 1 All ER 434, [1978] 2 WLR 81, 122 Sol Jo 23, HL	38.128

River Gurara (owners of cargo lately on board) v Nigerian National Shipping Line Ltd, The River Gurara [1998] QB 610, [1997] 4 All ER 498, [1997] 3 WLR 1128, sub nom River Gurara, The [1998] 1 Lloyd's Rep 225, sub nom Nigerian National Shipping Line Ltd v River Gurara (cargo owners) [1997] 33 LS Gaz R 27	36.46
River Gurara, The. See River Gurara (owners of cargo lately on board) v Nigerian National Shipping Line Ltd, The River Gurara	
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Simpson v Connolly [1953] 2 All ER 474, [1953] 1 WLR 911, 97 Sol Jo 490	7.36
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Siskina, The. See Siskina (Cargo Owners) v Distos Cia Naviera SA, The Siskina	
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Spiliada, The. See Spiliada Maritime Corpn v Cansulex Ltd, The Spiliada	
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Stacey v Hill [1901] 1 KB 660, [1901] 1 QB 660, 70 LJKB 435, 8 Mans 169, 49 WR 390, 45 Sol Jo 325, 84 LT 410, 17 TLR 311, CA	30.45
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Stadhard v Lee (1863) 3 B & S 364, 32 LJQB 75, 9 Jur NS 908, 1 New Rep 433, 11 WR 361, 122 ER 138, 7 LT 850	3.57
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Stadium Finance Ltd v Robbins (or Robins) [1962] 2 QB 664, [1962] 2 All ER 633, [1962] 3 WLR 453, 106 Sol Jo 369, CA	16.43
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Star Texas, The, See Star Shipping AS v China National Foreign Trade Transportation Corpn, The Star Texas	
Starlight Shipping Company v Allianz Marine & Aviation Versicherungs AG, The Alexandros T [2014] EWCA Civ 1010, [2014] 2 Lloyd's Rep 544, [2015] Lloyd's Rep IR 49, [2014] All ER (D) 206 (Jul)	37.13
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Stimpson v Smith [1999] Ch 340, [1999] 2 All ER 833, [1999] 2 WLR 1292, [1999] 15 LS Gaz R 29, [1999] NLJR 414, [1999] All ER (D) 254	30.43

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Street v Blay (1831) 2 B & Ad 456, 109 ER 1212, [1824–34] All ER Rep 329	11.05, 13.11
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Stroud Architectural Systems Ltd v John Laing Construction Ltd (1993) 35 ConLR 135, [1994] 2 BCLC 276, [1994] BCC 18	24.50
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Sum Cheong Piling Pte Ltd [2002] 1 SLR 1	35.118
Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission [1994] 1 Lloyd's Rep 45	39.13
Sumpter v Hedges [1898] 1 QB 673, 67 LJQB 545, 46 WR 454, 42 Sol Jo 362, 78 LT 378, CA	3.117
Sumukan Ltd v Commonwealth Secretariat [2007] EWCA Civ 1148, [2008] 2 All ER (Comm) 175, [2008] Bus LR 858, [2008] 1 Lloyd's Rep 40, 116 ConLR 17, (2007) Times, 18 December, [2007] ArbLR 57, [2007] All ER (D) 253 (Nov)	39.87
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Surrey County Council v Bredero Homes Ltd [1993] 3 All ER 705, [1993] 1 WLR 1361, [1993] 1 EGLR 37, [1993] 25 EG 141, 137 Sol Jo LB 135	3.117
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Swan v Barber (1879) LR 5 Ex D 130, 49 LJQB 253, 4 Asp MLC 264, 28 WR 563, 42 LT 490, CA	36.66
Swire v Redman (1876) 1 QBD 536, 24 WR 1069, [1874–80] All ER Rep 1255, 35 LT 470	30.37, 30.41
Swiss Bank Corp v Lloyds Bank Ltd [1982] AC 584, [1980] 2 All ER 419, [1980] 3 WLR 457, 124 Sol Jo 741; affd [1982] AC 584, [1981] 2 All ER 449, [1981] 2 WLR 893, 125 Sol Jo 495, HL	22.24, 22.46, 22.63, 23.03
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TNT Express Nederland BV v AXA Versicherung AG: C-533/08 [2010] ECR I-4107, [2011] RTR 136, [2010] All ER (D) 47 (May), ECJ	37.12
TNT Express, The. See Marbig Rexel Pty Ltd v ABC Container Line NV, The TNT Express	
TSB Bank plc v Camfield [1995] 1 All ER 951, [1995] 1 WLR 430, [1995] 2 FCR 254, [1995] 1 FLR 751, [1995] Fam Law 298, 27 HLR 205, 12 LDAB 707, [1995] 03 LS Gaz R 37, [1995] NLJR 215	3.98
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Tailby v Official Receiver (1888) 13 App Cas 523, 58 LJQB 75, 37 WR 513, [1886–90] All ER Rep 486, 60 LT 162, 4 TLR 726, HL .. 2.60, 23.03, 23.13, 23.21, 23.26	
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Tarrabochia v Hickie (1856) 1 H & N 183, 26 LJ Ex 26, 156 ER 1168, Exch Ct	3.145
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Tayeb v HSBC Bank plc [2004] EWHC 1529 (Comm), [2004] 4 All ER 1024, [2004] 2 All ER (Comm) 880, [2004] NLJR 1217, [2004] All ER (D) 65 (Jul)	18.13, 18.20, 18.31, 18.32
Taylor v Blakelock (1886) 32 Ch D 560, 56 LJ Ch 390, 55 LT 8, CA	20.32
Taylor v Bowers (1876) 1 QBD 291, 46 LJQB 39, 24 WR 499, [1874–80] All ER Rep 405, 34 LT 938, CA	3.169
Taylor v Caldwell (1863) 27 JP 710, 3 B & S 826, 32 LJQB 164, 2 New Rep 198, 11 WR 726, 122 ER 826, [1861–73] All ER Rep 24, 8 LT 356	3.176
Taylor v Oakes, Roncoroni & Co (1922) 27 Com Cas 261, 66 Sol Jo 556, 127 LT 267, 38 TLR 517, [1922] All ER Rep Ext 866, CA	15.20, 15.21, 15.22
Taylor v Plumer (1815) 3 M & S 562, 2 Rose 457, 105 ER 721, [1814–23] All ER Rep 167	17.39
Taylor v Russell [1892] AC 244, 61 LJ Ch 657, 41 WR 43, 36 Sol Jo 379, 66 LT 565, 8 TLR 463, HL	2.76
Taylor v Van Dutch Marine Holding Ltd (TCA Global Credit Master Fund LP, third party) [2017] EWHC 636 (Ch), [2017] 4 All ER 627, [2017] 1 WLR 2571, [2018] 1 All ER (Comm) 250, [2018] 1 BCLC 275, 167 NLJ 7741, [2017] All ER (D) 175 (Mar)	38.98
Taylor Woodrow Holdings Ltd v Barnes & Elliott Ltd [2006] EWHC 1693 (TCC), [2006] 2 All ER (Comm) 735, 110 ConLR 171, [2006] BLR 377, [2006] ArbLR 61, [2006] All ER (D) 05 (Jul)	39.81

Table of Cases

Tecnicas Reunidas Saudia for Services and Contracting Co. Ltd v Korea Development Bank [2020] EWHC 968 (TCC), [2020] All ER (D) 197 (Feb)	35.159, 36.16
Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd [1968] 2 QB 545, [1968] 2 All ER 886, [1968] 3 WLR 205, [1968] 2 Lloyd's Rep 37, 112 Sol Jo 501	5.37, 11.39, 11.114
Tekdata Interconnections Ltd v Amphenol Ltd [2009] EWCA Civ 1209, [2010] 2 All ER (Comm) 302, [2010] 1 Lloyd's Rep 357, [2009] All ER (D) 208 (Nov)	3.53
Tenax Steamship Co Ltd v Reinante Transoceania Navegacion SA, The Brimnes. See Brimnes, The, Tenax Steamship Co Ltd v The Brimnes (Owners)	
Teo Siew Har v Lee Kuan Yew [1999] 4 SLR 560	38.98
Tetley v Shand (1871) 20 WR 206, 25 LT 658	12.19
Texaco Ltd v Eurogulf Shipping Co Ltd [1987] 2 Lloyd's Rep 541	34.05
Thacker v Hardy (1878) 4 QBD 685, 43 JP 221, 48 LJQB 289, 27 WR 158, 39 LT 595, CA	3.60
Thai Airways International Public Company Ltd v KI Holdings Co Ltd (formerly known as Koito Industries Ltd) [2015] EWHC 1250 (Comm), [2016] 1 All ER (Comm) 675, [2015] All ER (D) 92 (May)	3.131
Thakkar v Patel (2017) [2017] EWCA Civ 117, [2017] 2 Costs LR 233	38.04
Thalès Air Defence BV v GIE Euromissile (18 November 2004, unreported), Paris Court of Appeal	39.35
The Anthony II [1966] 2 Lloyd's Rep 437	36.22
The David Agmashenebeli (cargo owners) v The David Agmashenebeli (owners) [2002] EWHC 104 (Admlty), [2002] 2 All ER (Comm) 806, [2003] 1 Lloyd's Rep 92, [2002] All ER (D) 535 (May)	32.66, 36.32
The Edison. See Liesbosch, Dredger (Owners) v SS Edison (Owners)	
The Eurymedon. See New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd	
The Hilding (Part Cargoes Ex). See Kronprinsessan Margareta, The	
Themehelp Ltd v West [1996] QB 84, [1995] 4 All ER 215, [1995] 3 WLR 751, 13 LDAB 34	35.108
The Mormacvega [1974] 1 Lloyd's Rep 296	36.29
Theotokos, The. See Oceanica Castelana Armadora SA v Mineralimportexport (Barclays Bank International Ltd intervening), The Theotokos	
The State of Florida v Espinoza No F 14-2923 (Fla 11th Cir Ct 2016)	17.28
The Yue You 902 [2019] SGHC 106	36.65
Third Chandris Shipping Corp'n v Unimarine SA, The Pythia, The Angelic Wings, The Genie [1979] QB 645, [1979] 2 All ER 972, [1979] 3 WLR 122, [1979] 2 Lloyd's Rep 184, 123 Sol Jo 389, CA	38.97
Thomas v Brown (1876) 1 QBD 714, 45 LJQB 811, 24 WR 821, 35 LT 237, [1874-80] All ER Rep Ext 2108	3.35
Thomas v Ken Thomas Ltd [2006] EWCA Civ 1504, [2007] Bus LR 429, [2007] 1 EGLR 31, 150 Sol Jo LB 1396, [2007] BPIR 959, [2006] All ER (D) 100 (Oct)	18.09
Thomas v Nottingham Incorporated Football Club Ltd [1972] Ch 596, [1972] 1 All ER 1176, [1972] 2 WLR 1025, 9 LDAB 245, 116 Sol Jo 96	30.32
Thompson (W L) Ltd v Robinson (Gunmakers) Ltd [1955] Ch 177, [1955] 1 All ER 154, [1955] 2 WLR 185, 99 Sol Jo 76	14.52, 15.42
Thoni GmbH & Co KG v RTP Equipment Ltd [1979] 2 Lloyd's Rep 282, CA	20.116, 20.118
Thorley (Joseph) Ltd v Orchis Steamship Co Ltd [1907] 1 KB 660, 76 LJKB 595, 10 Asp MLC 431, 12 Com Cas 251, 51 Sol Jo 289, 96 LT 488, 23 TLR 338, CA	36.33
Thorner v Major [2009] UKHL 18, [2009] 3 All ER 945, [2009] 1 WLR 776, 12 ITEL 62, [2009] 3 FCR 123, [2009] 2 FLR 405, [2009] Fam Law 583, [2009] 2 EGLR 111, [2009] NLJR 514, [2009] 13 EG 142 (CS), (2009) Times, 26 March, 153 Sol Jo (no 12) 30, [2009] 2 P & CR D5, [2009] All ER (D) 257 (Mar), sub nom Thorner v Curtis [2009] 2 P & CR 269	3.15
Thornett and Fehr v Beers & Son [1919] 1 KB 486, 88 LJKB 684, 24 Com Cas 133, 120 LT 570	11.66
Thornbridge Ltd v Barclays Bank plc [2015] EWHC 3430 (QB), [2016] All ER (D) 16 (Jan)	3.80
Thyssen Steel Co v M/V Kavos Yarakas 50 F 3d 1349 (1995)	36.22
Tidal Energy Ltd v Bank of Scotland plc [2014] EWCA Civ 1107, [2015] 2 All ER 15, [2015] 2 All ER (Comm) 38, [2014] Bus LR 1167, [2014] 2 Lloyd's Rep 549, 164 NLJ 7619, (2014) Times, 28 August, [2014] All ER (D) 33 (Aug)	4.38, 18.13, 18.31

Tigana Ltd v Decoro Ltd [2003] EWHC 23 (QB), [2003] All ER (D) 09 (Feb)	5.37
Tilley v Bowman Ltd [1910] 1 KB 745, 79 LJKB 547, 17 Mans 97, [1908–10] All ER Rep 952, 54 Sol Jo 342, 102 LT 318	15.18, 31.16
Tillman v Egon Zehnder Ltd [2019] UKSC 32, [2020] AC 154, [2020] 1 All ER 477, [2019] 3 WLR 245, [2019] 2 BCLC 143, [2019] IRLR 838, [2019] ICR 1223, [2019] All ER (D) 16 (Jul), SC	3.165
Tillmanns & Co v SS Knutsford Ltd [1908] 1 KB 185; affd [1908] 2 KB 385, 77 LJKB 778, 13 Com Cas 244, 24 TLR 454, sub nom Knutsford, SS Ltd v Tillmanns & Co 99 LT 399, CA; on appeal [1908] AC 406, 77 LJKB 977, 11 Asp MLC 105, 13 Com Cas 334, [1908–10] All ER Rep 549, 99 LT 399, 24 TLR 786, HL	36.21
Tinn v Hoffmann & Co (1873) 29 LT 271	3.53
Tinsley v Milligan [1994] 1 AC 340, [1993] 3 All ER 65, [1993] 3 WLR 126, [1994] 2 FCR 65, [1993] 2 FLR 963, HL	2.21, 3.162
Tito v Waddell (No 2) [1977] Ch 106, [1977] 3 All ER 129, [1977] 2 WLR 496, 121 Sol Jo 10	3.126
Toby Construction Products Pty Ltd v Computa Bar (Sales) Pty Ltd [1983] 2 NSWLR 48, NSW SC	7.20
Todd v Robinson (1825) Ry & M 217	16.18
Toepfer v Continental Grain Co Ltd [1973] 1 Lloyd's Rep 289; affd [1974] 1 Lloyd's Rep 11, 117 Sol Jo 649, CA	32.78
Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd [1902] 2 KB 660, 71 LJKB 949, 51 WR 81, 87 LT 465, 18 TLR 827, CA; affd [1903] AC 414, 72 LJKB 834, 52 WR 143, [1900–3] All ER Rep 386, 89 LT 196, 19 TLR 677, HL	4.07
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52, [2005] 3 LRC 548, Aus HC	3.50
Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd [1955] 2 All ER 657, [1955] 1 WLR 761, 72 RPC 209, 99 Sol Jo 470, HL	3.96
Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd [1972] 1 QB 318, [1971] 3 All ER 1226, [1971] 3 WLR 979, 115 Sol Jo 848, 220 Estates Gazette 1591	15.57
Toussaint v Martinnant (1787) 2 Term Rep 100, 100 ER 55, [1775–1802] All ER Rep 336	30.31
Townsend, Re, ex p Parsons (1886) 16 QBD 532, 55 LJQB 137, 3 Morr 36, 34 WR 329, 53 LT 897, 2 TLR 253, CA	24.07
Toyota Tsusho Sugar Trading Ltd v Prolat SRL [2014] EWHC 3649 (Comm), [2015] 1 Lloyd's Rep 344, 165 NLJ 7635, [2014] All ER (D) 105 (Nov)	39.19
Tracomin SA v Nathaniel Gibbs (Canada) Ltd and Bridge [1985] 1 Lloyd's Rep 586	39.44
Tradax Export SA v European Grain and Shipping Ltd [1983] 2 Lloyd's Rep 100 ...	12.11, 12.12, 12.18
Traders Group Ltd v Gouthro (1969) 9 DLR (3d) 387	16.39
Tradigrain v State Trading Corpn of India [2005] EWHC 2206 (Comm), [2006] 1 All ER (Comm) 197, [2006] 1 Lloyd's Rep 216, [2005] All ER (D) 206 (Oct)	35.168
Trans Trust SPRL v Danubian Trading Co Ltd [1952] 2 QB 297, [1952] 1 All ER 970, [1952] 1 Lloyd's Rep 348, 96 Sol Jo 312, [1952] 1 TLR 1066, CA	35.76, 35.124
Transbus International Ltd, Re [2004] EWHC 932 (Ch), [2004] 2 All ER 911, [2004] 1 WLR 2654, [2004] 2 BCLC 550, [2004] BCC 401, [2004] All ER (D) 293 (Apr)	31.67
Transco plc v Stockport Metropolitan Borough Council [2003] UKHL 61, [2004] 2 AC 1, [2004] 1 All ER 589, [2003] 3 WLR 1467, [2004] 1 P & CR D28, 91 ConLR 28, [2003] NLJR 1791, (2003) Times, 20 November, 147 Sol Jo LB 1367, [2004] 4 LRC 314, [2003] All ER (D) 255 (Nov)	16.75
Transcontainer Express Ltd v Custodian Security Ltd [1988] 1 Lloyd's Rep 128, [1988] 1 FTLR 54, CA	36.71
Transfield Shipping Inc of Panama v Mercator Shipping Inc of Monrovia, The Achilleas [2008] UKHL 48, [2009] AC 61, [2008] 4 All ER 159, [2008] 3 WLR 345, [2008] 2 All ER (Comm) 753, [2008] Bus LR 1395, [2008] 2 Lloyd's Rep 275, [2008] NLJR 1040, (2008) Times, 10 July, 152 Sol Jo (no 29) 30, [2008] All ER (D) 117 (Jul)	3.134, 14.26, 14.43
Transocean Drilling UK Ltd v Providence Resources plc; The GSF Arctic III [2016] EWCA Civ 372, [2016] 2 All ER (Comm) 606, [2016] 2 Lloyd's Rep 51, 165 ConLR 1, [2016] BLR 360, 166 NLJ 7696, [2016] All ER (D) 68 (Apr)	3.77

Table of Cases

Transocean Liners Reederei GmbH v Euxine Shipping Co Ltd, The Imvros [1999] 1 All ER (Comm) 724, [1999] 1 Lloyd's Rep 848	36.32
Transpacific Eternity SA v Kanematsu Corp, The Antares III [2002] 1 Lloyd's Rep 233, [2001] All ER (D) 33 (Aug)	8.108
Travers (Joseph) & Sons Ltd v Longel Ltd (1947) 64 TLR 150	11.45
Trentham (G Percy) Ltd v Archital Luxfer Ltd [1993] 1 Lloyd's Rep 25, 63 BLR 44, CA	3.26
Tribe v Tribe [1996] Ch 107, [1995] 4 All ER 236, [1995] 3 WLR 913, 71 P & CR 503, [1996] 1 FCR 338, [1995] 2 FLR 966, [1996] Fam Law 29, [1995] 32 LS Gaz R 30, [1995] NLJR 1445, 139 Sol Jo LB 203	3.164
Trollope and Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 2 All ER 260, [1973] 1 WLR 601, 117 Sol Jo 355, 9 BLR 60, HL	3.57
Truk (UK) Ltd v Tokmakidis GmbH [2000] 2 All ER (Comm) 594, [2000] 1 Lloyd's Rep 543	12.09, 13.21
Trump International Golf Club Ltd v Scottish Ministers (Scotland) [2015] UKSC 74, (2016) Times, 01 January, 2016 SLT 9, 2016 SCLR 67, [2015] All ER (D) 155 (Dec)	3.55
Tsakiroglou & Co Ltd v Noble Thorl GmbH [1962] AC 93, [1961] 2 All ER 179, [1961] 2 WLR 633, [1961] 1 Lloyd's Rep 329, 105 Sol Jo 346, HL	3.175
Turner v Goldsmith [1891] 1 QB 544, 60 LJB 247, 39 WR 547, [1891–4] All ER Rep 384, 64 LT 301, 7 TLR 233, CA	3.57
Turner v Grovit [2001] UKHL 65, [2002] 1 All ER 960, [2002] 1 WLR 107, [2002] 1 All ER (Comm) 320, [2002] IRLR 358, [2002] ICR 94, [2001] All ER (D) 179 (Dec); refd sub nom Turner v Grovit: C-159/02 [2005] 1 AC 101, [2004] ECR I-3565, [2004] 3 WLR 1193, [2004] 2 All ER (Comm) 381, [2004] All ER (EC) 485, [2004] 2 Lloyd's Rep 169, [2004] IRLR 899, [2005] ICR 23, (2004) Times, 29 April, [2004] All ER (D) 259 (Apr), ECJ	38.81
Turner v Sampson (1911) 27 TLR 200	16.18, 16.39
Tweedle v Atkinson (1861) 25 JP 517, 1 B & S 393, 30 LJB 265, 8 Jur NS 332, 9 WR 781, 121 ER 762, [1861–73] All ER Rep 369, 4 LT 468	1.04, 3.83
Twinsectra Ltd v Yardley [2002] UKHL 12, [2002] 2 AC 164, [2002] 2 All ER 377, [2002] 2 WLR 802, [2002] NLJR 469, (2002) Times, 25 March, [2003] 2 LRC 114, [2002] All ER (D) 321 (Mar)	3.75, 17.40
Two Israeli Companies v Government of African State (1976) YB CA 133	39.23
Twyne's Case (1601) 3 Co Rep 80b, 76 ER 809, [1558–1774] All ER Rep 303, sub nom Chamberlain v Twyne Moore KB 638	22.22

U

UCB Leasing Ltd v Holtom (t/a David Holtom & Co) [1987] RTR 362, [1987] NLJ Rep 614, [1999] GCCR 1127, CA	11.86
UBS AG New York v Fairfield Sentry Ltd (in liq) (British Virgin Islands) [2019] UKPC 20, 94 WIR 306, [2019] 4 LRC 412, [2019] 2 BCLC 1, [2019] BPIR 1054, [2019] All ER (D) 122 (May), PC31.82	
UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch), [2019] All ER (D) 39 (Sep)	3.76
Underwood Ltd v Burgh Castle Brick and Cement Syndicate [1922] 1 KB 343, 91 LJB 355, [1921] All ER Rep 515, 126 LT 401, 38 TLR 44, CA	8.87
Union Carbide v Fednav Ltd (1997) 131 FTR 241	36.22
Union Discount Co Ltd v Zoller (Union Cal Ltd, Pt 20 defendant) [2001] EWCA Civ 1755, [2002] 1 All ER 693, [2002] 1 WLR 1517, [2002] 03 LS Gaz R 25, [2001] NLJR 1769, (2001) Times, 10 December, 145 Sol Jo LB 276, [2001] All ER (D) 312 (Nov)	37.13
United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare: C-184/12 [2014] 1 All ER (Comm) 625, [2014] 1 Lloyd's Rep 161, [2013] All ER (D) 305 (Oct), ECJ	37.80
United Bank of Kuwait plc v Sahib [1995] 2 All ER 973, [1995] 2 WLR 94, [1996] 1 FLR 379, [1996] Fam Law 87; affd [1997] Ch 107, [1996] 3 All ER 215, [1996] 3 WLR 372, 73 P & CR 177, [1996] 2 FLR 666, [1997] Fam Law 17, [1996] NPC 12, 13 LDAB 288	23.11

United City Merchants (Investments) Ltd and Glass Fibres and Equipments Ltd v Royal Bank of Canada, Vitrorefuerzos SA and Banco Continental SA (incorporated in Canada) [1983] 1 AC 168, [1982] 2 All ER 720, [1982] 2 WLR 1039, [1982] 2 Lloyd's Rep 1, [1982] Com LR 142, 10 LDAB 350, 126 Sol Jo 379, HL	35.53, 35.107, 35.110
United Dominions Trust (Commercial) Ltd v Pidgeon (14 November 1963 unreported)	227.27
United Railways of Havana and Regla Warehouses Ltd, Re, Tomkinson v First Pennsylvania Banking and Trust Co [1961] AC 1007, [1960] 2 All ER 332, [1960] 2 WLR 969, 104 Sol Jo 466, HL	37.109
United Scientific Holdings Ltd v Burnley Borough Council [1978] AC 904, [1977] 2 All ER 62, [1977] 2 WLR 806, 75 LGR 407, 33 P & CR 220, 121 Sol Jo 223, 243 Estates Gazette 43, HL	3.113
United States of America v Atlantic Mutual Insurance Co [1952] 1 Lloyd's Rep 520	36.40
United States of America v Faiella 39 F Supp, 3d 544	17.28
United States of America v Inkley [1989] QB 255, [1988] 3 All ER 144, [1988] 3 WLR 304, 132 Sol Jo 995, [1988] 26 LS Gaz R 42	37.51
United States of America v Nolan [2015] UKSC 63, [2016] 1 All ER 857, [2015] 3 WLR 1105, [2016] 1 CMLR 1344, [2016] IRLR 34, [2015] ICR 1347, 165 NLJ 7674, [2015] All ER (D) 183 (Oct)	39.99
United States of America v Ulbricht 1:14-cr-00068-KB	17.28
United Trading Corp'n SA and Murray Clayton Ltd v Allied Arab Bank Ltd [1985] 2 Lloyd's Rep 554n, CA	35.94, 35.109
Unity Finance Ltd v Woodcock [1963] 2 All ER 270, [1963] 1 WLR 455, 107 Sol Jo 214, CA	30.45
Universal Steam Navigation Co Ltd v James McKelvie & Co [1923] AC 492, 92 LJKB 647, 16 Asp MLC 184, 28 Com Cas 353, 67 Sol Jo 593, 129 LT 395, 39 TLR 480, HL	5.34
Universal Stock Exchange Ltd v Strachan [1896] AC 166, 60 JP 465, 65 LJQB 429, 44 WR 497, [1895-9] All ER Rep 751, 74 LT 468, HL	4.41
Universal Thermosensors Ltd v Hibben [1992] 3 All ER 257, [1992] 1 WLR 840, [1992] FSR 361, [1992] 26 LS Gaz R 31, [1992] NLJR 195	38.107
University of Wales v London College of Business Ltd [2015] EWHC 1280 (QB), [2015] All ER (D) 76 (Jun)	3.78
Upfill v Wright [1911] 1 KB 506, 80 LJKB 254, 55 Sol Jo 189, 103 LT 834, 27 TLR 160	3.161
Urquhart, Lindsay & Co Ltd v Eastern Bank Ltd [1922] 1 KB 318, 91 LJKB 274, 27 Com Cas 124, 3 LDAB 250, [1921] All ER Rep 340, 126 LT 534	35.125
Uxbridge Permanent Benefit Building Society v Pickard [1939] 2 KB 248, [1939] 2 All ER 344, 108 LJKB 757, 83 Sol Jo 297, 160 LT 407, 55 TLR 579, CA	20.100
Uzinterimpex JSC v Standard Bank plc [2008] EWCA Civ 819, [2008] Bus LR 1762, [2008] 2 Lloyd's Rep 456, (2008) Times, 12 August, [2008] All ER (D) 196 (Jul) ...	35.169

V

VFS Financial Services Ltd v J F Plant Tyres Ltd [2013] EWHC 346 (QB), [2013] 1 WLR 2987, [2013] 1 Lloyd's Rep 462, [2013] GCCR 11714, [2013] All ER (D) 319 (Feb)	16.76
VTB Capital plc v Nutritek International Corp [2013] UKSC 5, [2013] 2 AC 337, [2013] 1 All ER 1296, [2013] 2 WLR 398, [2013] 1 All ER (Comm) 1009, [2013] 1 Lloyd's Rep 466, [2013] 1 BCLC 179, [2013] All ER (D) 47 (Feb)	37.38
VTB Commodities Trading DAC v JSC Antipinsky Refinery (Petraco Oil Company SA intervening) [2020] EWHC 72 (Comm), [2020] 1 WLR 1227	17.07
Vacwell Engineering Co Ltd v BDH Chemicals Ltd [1971] 1 QB 88, [1969] 3 All ER 1681, [1969] 3 WLR 927, 7 KIR 286, 113 Sol Jo 639; revsd [1971] 1 QB 111n, [1970] 3 All ER 553n, [1970] 3 WLR 67n, 114 Sol Jo 472	3.58
Valilas v Januzaj [2014] EWCA Civ 436, [2015] 1 All ER (Comm) 1047, 154 ConLR 38	3.145
Vanda Compania Ltda of Costa Rica v Societe Maritime Nationale of Paris, The Ile Aux Moines [1974] 2 Lloyd's Rep 502	14.27

Table of Cases

Vantage Navigation Corp'n v Suhail and Saud Bahwan Building Materials Inc, The Aleve [1989] 1 Lloyd's Rep 138	3.13
Vargas Pena Apezteguia y Cia SAIC v Peter Cremer GmbH [1987] 1 Lloyd's Rep 394	12.12
Varley v Whipp [1900] 1 QB 513, 69 LJQB 333, 48 WR 363, 44 Sol Jo 263 ..	8.20, 11.35
Vauxhall Motors Ltd (formerly General Motors UK Ltd) v Manchester Ship Canal Co Ltd [2019] UKSC 46, [2020] 2 All ER 81, [2019] 3 WLR 852, [2019] PLSCS 202, [2019] All ER (D) 141 (Oct), SC	1.53, 1.54, 3.146, 28.16
Vedanta Resources Plc v Lungowe [2019] UKSC 20, [2019] 3 All ER 1013, [2019] 2 WLR 1051, [2019] 2 All ER (Comm) 559, 169 NLJ 7837, [2019] All ER (D) 57 (Apr), SC	37.15, 37.24
Venezuela, The [1980] 1 Lloyd's Rep 393	36.17
Veracruz I, The. See Veracruz Transportation Inc v VC Shipping Co Inc and Den Norske Bank A/S, The Veracruz I	
Veracruz Transportation Inc v VC Shipping Co Inc and Den Norske Bank A/S, The Veracruz I [1992] 1 Lloyd's Rep 353, CA	38.97
Verein für Konsumenteninformation v Amazon EU Sàrl ECLI:EU:C:2016:603 C-191/15	37.65
Verein für Konsumenteninformation v Henkel: C-167/00 [2002] ECR I-8111, [2003] 1 All ER (Comm) 606, [2003] All ER (EC) 311, [2003] GCCR 4497, [2002] All ER (D) 01 (Oct), ECJ	37.18
Vic Mill Ltd, Re [1913] 1 Ch 183, 82 LJ Ch 117, 57 Sol Jo 211, 108 LT 25, [1911–13] All ER Rep Ext 1532; affd [1913] 1 Ch 465, 82 LJ Ch 251, 57 Sol Jo 404, 108 LT 444, [1911–13] All ER Rep Ext 1532, CA	15.44, 15.47
Victoria Housing Estates Ltd v Ashpurton Estates Ltd. See Ashpurton Estates Ltd, Re Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528, [1949] 1 All ER 997, 93 Sol Jo 371, 65 TLR 274, CA	3.134, 14.31, 14.35
Victoria Steamboats Ltd, Re, Smith v Wilkinson [1897] 1 Ch 158, 66 LJ Ch 21, 45 WR 134, 75 LT 374	25.16
Vidler & Co (London) Ltd v R Silcock & Sons [1960] 1 Lloyd's Rep 509	34.11
Vigers Bros v Sanderson Bros [1901] 1 KB 608	11.30
Vinden v Hughes [1905] 1 KB 795, 74 LJKB 410, 53 WR 429, 2 LDAB 81, 49 Sol Jo 351, 21 TLR 324	20.111
Vistafjord, The. See Norwegian American Cruises A/S (formerly Norwegian American Lines A/S) v Paul Mundy Ltd, The Vistafjord	
Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277, [1939] 1 All ER 513, 108 LJPC 40, 19 Asp MLC 257, 44 Com Cas 123, 83 Sol Jo 295, 160 LT 579, 55 TLR 402, PC	36.11, 37.60
Vitol S.A v Beta Renewable Group S.A. [2017] EWHC 1734 (Comm), [2018] 1 All ER (Comm) 260, 173 ConLR 116, [2017] All ER (D) 56 (Jul)	34.05
Vitol SA v Norelf Ltd, The Santa Clara [1996] AC 800, [1996] 3 All ER 193, [1996] 3 WLR 105, [1996] 2 Lloyd's Rep 225, [1996] 26 LS Gaz R 19, [1996] NLJR 957, HL	3.142, 3.148
Vizcaya Partners Ltd v Picard [2016] UKPC 5, [2016] 3 All ER 181, [2016] 1 All ER (Comm) 891, [2016] 2 LRC 658, [2016] 1 BCLC 683, [2016] Bus LR 413, [2016] All ER (D) 66 (Feb), PC	37.49
Vlassopulos (N & J) Ltd v Ney Shipping Ltd, The Santa Carina [1977] 1 Lloyd's Rep 478, 121 Sol Jo 10, CA	5.33
Volcafe Ltd v Compania Sud Americana De Vapores SA (trading as CSAV) [2018] UKSC 61, [2019] AC 358, [2019] 2 All ER 81, [2018] 3 WLR 2087, [2019] 1 All ER (Comm) 397, [2019] 1 Lloyd's Rep 21, 169 NLJ 7822, [2018] All ER (D) 16 (Dec), SC	36.05, 36.28, 36.39, 36.41
Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd [2010] EWHC 2443 (Ch), [2011] 2 All ER (Comm) 307, 132 ConLR 32, [2010] All ER (D) 86 (Oct)	30.10, 35.154

W

WS Tankship II B.V. v Kwangju Bank Ltd [2011] EWHC 3103 (Comm), [2011] All ER (D) 234 (Nov)	35.155
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WWF-World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Entertainment Inc [2007] EWCA Civ 286, [2008] 1 All ER 74, [2008] 1 WLR 445, [2008] 1 All ER (Comm) 129, [2007] Bus LR 1252, [2008] IP & T 136, [2007] All ER (D) 13 (Apr)	3.117
Wadsworth v Lydall [1981] 2 All ER 401, [1981] 1 WLR 598, 125 Sol Jo 309	15.09, 35.124
Wagg (Helbert) & Co Ltd's Claim, Re [1956] Ch 323, [1956] 1 All ER 129, [1956] 2 WLR 183, 100 Sol Jo 53	37.99
Wait and James v Midland Bank (1926) 31 Com Cas 172	8.100, 8.101
Wait, Re [1927] 1 Ch 606, 96 LJ Ch 179, [1927] B & CR 140, [1926] All ER Rep 433, 71 Sol Jo 56, 136 LT 552, 43 TLR 150, CA	8.15, 8.28, 8.37, 14.07
Wake v Hall (1880) 7 QBD 295, 45 JP 340, 50 LJQB 545, 44 LT 42, CA; affd (1883) 8 App Cas 195, 47 JP 548, 52 LJQB 494, 31 WR 585, 48 LT 834, [1881–51] All ER Rep Ext 1548, HL	7.20
Walford v Miles [1992] 2 AC 128, [1992] 1 All ER 453, [1992] 2 WLR 174, 64 P & CR 166, [1992] 1 EGLR 207, [1992] NLJR 123, [1992] 11 EG 115, HL	3.32
Walker v Linom [1907] 2 Ch 104, 76 LJ Ch 500, 51 Sol Jo 483, 97 LT 92	24.19
Walker v Roston (1842) 11 LJ Ex 173, 9 M & W 411, 152 ER 174, Exch Ct	5.31
Walkers, Re, Winsor and Hamm and Shaw, Son & Co [1904] 2 KB 152, 9 Com Cas 174, sub nom Walkers, Winsor and Hamm v Shaw, Son & Co 73 LJKB 325, 53 WR 79, 48 Sol Jo 277, 90 LT 454, 20 TLR 274	11.84
Wallace v Evershed [1899] 1 Ch 891, 68 LJ Ch 415, 6 Mans 351, 80 LT 523, 15 TLR 335	25.06
Wallace v Universal Automatic Machines Co [1894] 2 Ch 547, 63 LJ Ch 598, 1 Mans 315, 7 R 316, [1891–4] All ER Rep 1156, 70 LT 852, 10 TLR 501, CA	25.26
Wallis & Simmonds (Builders) Ltd, Re [1974] QB 94, [1974] 1 All ER 561, [1974] 1 WLR 391, 28 P & CR 37, [1974] 1 Lloyd's Rep 272, 118 Sol Jo 203	22.61
Wallis v Woodyear (1855) 2 Jur NS 179	23.54
Wallis, Re, ex p Jenks [1902] 1 KB 719, 71 LJKB 465, 9 Mans 136, 50 WR 430, 46 Sol Jo 340, 86 LT 237, 18 TLR 414	31.17
Walton Harvey Ltd v Walker and Homfrays Ltd [1931] 1 Ch 274, 29 LGR 241, [1930] All ER Rep 465, 144 LT 331, CA	3.178
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387, 76 ALR 513, 62 ALJR 110, Aus HC	3.21
Wanganyi Motors (1963) Ltd v Broadlands Finance Ltd (1988) 2 NZBLC 103	12.20
Ward (R V) Ltd v Bignall [1967] 1 QB 534, [1967] 2 All ER 449, [1967] 2 WLR 1050, 111 Sol Jo 190	15.59, 15.71, 15.72, 15.75
Ward v Royal Exchange Shipping Co Ltd, ex p Harrison (1887) 6 Asp MLC 239, 58 LT 174	29.45
Warinco AG v Samor SpA [1979] 1 Lloyd's Rep 450, CA; affd [1979] 3 All ER 64n, [1979] 1 WLR 884n, [1979] 2 Lloyd's Rep 425n, HL	10.39, 10.45
Warman v Southern Counties Car Finance Corp'n Ltd, WJ Ameris Car Sales (Third Party) [1949] 2 KB 576, [1949] 1 All ER 711, [1949] LJR 1182, 93 Sol Jo 319, [1999] GCCR 79	8.24, 14.39
Warner Bros Pictures Inc v Nelson [1937] 1 KB 209, [1936] 3 All ER 160, 106 LJKB 97, 80 Sol Jo 855, 155 LT 538, 53 TLR 14	3.115
Warren v Drukkerij Flach BV [2014] EWCA Civ 993, [2015] 1 Lloyd's Rep 111	5.39
Waters v Widdows [1984] VR 503	24.65, 24.67
Watford Electronics Ltd v Sanderson CFL Ltd [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696, [2002] FSR 299, [2001] IP & T 588, [2001] BLR 143, [2001] All ER (D) 290 (Feb)	3.70, 3.75, 3.77, 11.138
Wathes (Western) Ltd v Austins (Menswear) Ltd [1976] 1 Lloyd's Rep 14, 119 Sol Jo 527, 9 BLR 113, CA	3.77
Watkin Jones & Son Ltd v Lidl UK GmbH [2002] EWHC 183 (TCC), 86 ConLR 155, [2002] All ER (D) 340 (Feb)	39.33
Watkins-Johnson Co and Watkins-Johnson Ltd v Islamic Republic of Iran (1990)	33.15
Watson v Duff Morgan and Vermont (Holdings) Ltd [1974] 1 All ER 794, [1974] 1 WLR 450, 117 Sol Jo 910	24.56
Watson, Re, ex p Official Receiver in Bankruptcy (1890) 25 QBD 27, 59 LJQB 394, 7 Morr 155, 38 WR 567, 63 LT 209, 6 TLR 332, [1886–90] All ER Rep Ext 1227, CA	22.27

Watt v Mortlock [1964] Ch 84, [1963] 1 All ER 388, [1963] 2 WLR 626, 107 Sol Jo 235	30.32
Watt v Westhoven [1933] VLR 458	7.07
Watteau v Fenwick [1893] 1 QB 346, 56 JP 839, 5 R 143, 41 WR 222, [1891–4] All ER Rep 897, 37 Sol Jo 117, 67 LT 831, 9 TLR 133	5.18, 5.19, 16.20
Webb v Chief Constable of Merseyside Police [2000] QB 427, [2000] 1 All ER 209, [2000] 2 WLR 546, [1999] 47 LS Gaz R 33, 144 Sol Jo LB 9	2.21
Webb v Hewett (1857) 3 K & J 438, 69 ER 1181, 29 LTOS 225	30.41
Weber v Weber: C-438/12 (2014) C-438/12, ECLI:EU:C:2014:212, [2015] Ch 140, [2015] 2 WLR 213, [2014] All ER (D) 110 (Apr)	37.12
Webster v Higgin [1948] 2 All ER 127, 92 Sol Jo 454, CA	3.77
Wehner v Dene Steam Shipping Co [1905] 2 KB 92, 74 LJKB 550, 10 Com Cas 139, 21 TLR 339	36.19
Weiner v Harris [1910] 1 KB 285, 79 LJKB 342, 15 Com Cas 39, [1908–10] All ER Rep 405, 54 Sol Jo 81, 101 LT 647, 26 TLR 96, CA	16.37
Weiner v Gill [1906] 2 KB 574, 75 LJKB 916, 11 Com Cas 240, [1904–07] All ER Rep 773, 50 Sol Jo 632, 95 LT 438, 22 TLR 699, CA	8.106
Welcome Financial Services Ltd v Nine Regions Ltd [2010] 2 Lloyd's Rep 426	16.81
Weld-Blundell v Stephens [1920] AC 956, 89 LJKB 705, [1920] All ER Rep 32, 64 Sol Jo 529, 123 LT 593, 36 TLR 640, HL	3.134
Welsh Development Agency v Export Finance Co Ltd [1992] BCLC 148, [1992] BCC 270	22.27, 22.36
Wertheim v Chicoutimi Pulp Co [1911] AC 301, 80 LJPC 91, 16 Com Cas 297, [1908–10] All ER Rep 707, 104 LT 226, PC	14.33
West v Ian Finlay & Associates (a firm) [2014] EWCA Civ 316, 153 ConLR 1, [2014] 2 EGLR 63, [2014] BLR 324, [2014] All ER (D) 281 (Mar)	3.83
WestLB AG v Philippine National Bank [2012] SGHC 162	37.97
West London Commercial Bank Ltd v Kitson (1883) 12 QBD 157; affd (1884) 13 QBD 360, 53 LJQB 345, 32 WR 757, 1 LDAB 54, 50 LT 656, CA	20.103
West Tankers Inc v Riunione Adriatica di Sicurtà SpA, The Front Comor: C-185/07. See Allianz SpA v West Tankers Inc: C-185/07	
Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd [1999] QB 740, [1998] 4 All ER 570, [1998] 3 WLR 770, [1998] 2 Lloyd's Rep 111; affd [2000] QB 288, [1999] 3 All ER 864, [1999] 3 WLR 811, [1999] 1 All ER (Comm) 865, [1999] 2 Lloyd's Rep 65, [1999] BLR 279, [1999] All ER (D) 486	39.53, 39.108
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669, [1996] 2 All ER 961, [1996] 2 WLR 802, 95 LGR 1, 13 LDAB 444, [1996] NLJR 877, 140 Sol Jo LB 136, HL	17.41
Western Bulk Shipowning III A/S v Carbofer Maritime Trading ApS (The Western Moscow) [2012] EWHC 1224 (Comm), [2012] 2 All ER (Comm) 1140, [2012] 2 Lloyd's Rep 163, [2012] All ER (D) 134 (May)	22.59
Western Fish Products Ltd v Penwith District Council [1981] 2 All ER 204, 77 LGR 185, 38 P & CR 7, 122 Sol Jo 471, [1978] JPL 623	3.15
Western Wagon and Property Co v West [1892] 1 Ch 271, 61 LJ Ch 244, 40 WR 182, 36 Sol Jo 91, 66 LT 402, 8 TLR 112	23.03
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Westminster Chemicals and Produce Ltd v Eichholz and Loeser [1954] 1 Lloyd's Rep 99	39.46
Westwood Shipping Lines Inc. v Universal Schiffahrtsgesellschaft MBH (formerly Gmb Schiffahrts GmbH) [2012] EWHC 3837 (Comm), [2013] 1 Lloyd's Rep 670, [2013] All ER (D) 138 (Feb)	39.65
Wheatley v Silkstone and Haigh Moor Coal Co (1885) 29 Ch D 715, 54 LJ Ch 778, 33 WR 797, 52 LT 798	25.25
Whistler International Ltd v Kawasaki Kisen Kaisha Ltd [2001] 1 AC 638, [2001] 1 All ER 403, [2000] 3 WLR 1954, [2001] 1 All ER (Comm) 76, [2001] 1 Lloyd's Rep 147, [2001] 07 LS Gaz R 41, [2000] NLJR 1856, (2000) Times, 13 December, 145 Sol Jo LB 6, [2001] 4 LRC 142, [2000] All ER (D) 2178, HL	36.34
White v City of London Brewery Co (1889) 42 Ch D 237, 58 LJ Ch 855, 38 WR 82, 61 LT 741, 5 TLR 553, CA	23.40
White v Jones [1995] 2 AC 207, [1995] 1 All ER 691, [1995] 2 WLR 187, [1995] 3 FCR 51, [1995] NLJR 251, 139 Sol Jo LB 83, HL	3.85

White and Carter (Councils) Ltd v McGregor [1962] AC 413, [1961] 3 All ER 1178, [1962] 2 WLR 17, 105 Sol Jo 1104, 1962 SC (HL) 1, 1962 SLT 9, HL	3.141, 3.151
White & Osmond (Parkstone) Ltd Re (30 June 1960, unreported)	31.72
Whittington v Seale-Hayne (1900) 44 Sol Jo 229, 82 LT 49, 16 TLR 181	3.102
Wibau Maschinenfabric Hartman SA v Mackinnon, Mackenzie & Co, The Chanda [1989] 2 Lloyd's Rep 494	36.30
Wickham Holdings Ltd v Brooke House Motors Ltd [1967] 1 All ER 117, [1967] 1 WLR 295	16.98
Wight v Eckhardt Marine GmbH [2003] UKPC 37, [2004] 1 AC 147, [2003] 3 WLR 414, 62 WIR 42, [2003] 5 LRC 408, [2004] 2 BCLR 539, [2003] BCC 702, (2003) Times, 6 June, [2003] All ER (D) 185 (May), PC	31.34
Williams & Co Ltd (t/a Williams Leasing) v McCauley Parsons & Jones [1994] CCLR 78, [1999] GCCR 1375, CA	27.25
Williams v Burlington Investments Ltd (1977) 121 Sol Jo 424, HL	23.10, 24.26, 24.31
Williams v Cohen (1871) 25 LT 300	34.16
Williams v Phillips (1957) 41 Cr App Rep 5, 121 JP 163, DC	2.40
Williams v Reynolds (1865) 6 B & S 495, 34 LJQB 221, 11 Jur NS 973, 6 New Rep 293, 13 WR 940, 12 LT 729	14.20
Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1, [1990] 1 All ER 512, [1990] 2 WLR 1153, [1990] 12 LS Gaz R 36, [1989] NLJR 1712, 48 BLR 75	3.13, 3.88
Williams Bros v E T Agius Ltd [1914] AC 510, 83 LJBK 715, 19 Com Cas 200, [1914–15] All ER Rep 97, 58 Sol Jo 377, 110 LT 865, 30 TLR 351, HL	14.20, 14.56
Williamson v Rider [1963] 1 QB 89, [1962] 2 All ER 268, [1962] 3 WLR 119, 8 LDAB 53, 106 Sol Jo 263, CA	20.17
Willis, Percival & Co, Re, ex p Morier (1879) 12 Ch D 491, 49 LJ Bcy 9, 28 WR 235, 40 LT 792, [1874–80] All ER Rep Ext 1503, CA	18.04
Wilmot v Alton [1897] 1 QB 17, 66 LJQB 42, 4 Mans 17, 45 WR 113, [1895–9] All ER Rep 188, 75 LT 447, 13 TLR 58, CA	23.22
Wilson (Paal) & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal [1983] 1 AC 854, [1983] 1 All ER 34, [1982] 3 WLR 1149, [1983] 1 Lloyd's Rep 103, 126 Sol Jo 835, HL	3.32
Wilson v Kelland [1910] 2 Ch 306, 79 LJ Ch 580, 17 Mans 233, 2 LDAB 245, 54 Sol Jo 542, 103 LT 17, 26 TLR 485	24.46
Wilson v Rickett, Cockerell & Co Ltd [1954] 1 QB 598, [1954] 1 All ER 868, [1954] 2 WLR 629, 98 Sol Jo 233, CA	11.62
Wilson, Holgate & Co Ltd v Belgian Grain and Produce Co Ltd [1920] 2 KB 1, 89 LJBK 300, 14 Asp MLC 566, 25 Com Cas 1, 3 LDAB 209, 122 LT 524, 35 TLR 530	32.74
Wimble, Sons & Co v Rosenberg & Sons [1913] 3 KB 743, 82 LJBK 1251, 12 Asp MLC 373, 18 Com Cas 65, 302, 57 Sol Jo 784, 109 LT 294, 29 TLR 752, CA	10.18, 34.07
Windschuegl v Irish Polishes Ltd [1914] 1 IR 33	34.11
Winkworth v Christie, Manson and Woods Ltd [1980] Ch 496, [1980] 1 All ER 1121, [1980] 2 WLR 937	37.85
Winkworth v Edward Baron Development Co Ltd [1987] 1 All ER 114, [1986] 1 WLR 1512, 53 P & CR 378, [1987] 1 FLR 525, [1987] Fam Law 166, [1987] BCLR 193, 3 BCC 4, 130 Sol Jo 954, [1987] LS Gaz R 340, HL	22.14
Winsley Bros v Woodfield Importing Co [1929] NZLR 480	11.79, 11.84
Winson, The. See China-Pacific SA v Food Corpn of India, The Winson	
Wirth v Weigel Leygonie & Co Ltd [1939] 3 All ER 712, 83 Sol Jo 690, 161 LT 243	20.04
Wiskin v Terdoch Bros Pty Ltd (1928) 34 ALR 242, VLR 387, 49 ALT 245	10.16
Wolmershausen v Gullick [1893] 2 Ch 514, 62 LJ Ch 773, 3 R 610, [1891–4] All ER Rep 740, 68 LT 753, 9 TLR 437	30.32
Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173, [2017] 4 All ER 615, [2017] 2 WLR 1095, [2018] 1 All ER (Comm) 51, 171 ConLR 1, 167 NLJ 7741, [2017] All ER (D) 182 (Mar), SC	1.49, 3.64, 3.65
Wood v Sureterm Direct Ltd [2015] EWCA Civ 839, [2015] All ER (D) 328 (Jul)	3.62
Wood v TUI Travel plc (trading as First Choice) [2017] EWCA Civ 11, [2018] QB 927, [2018] 2 WLR 1051, [2017] 2 All ER (Comm) 734, [2017] 1 Lloyd's Rep 322, [2017] PIQR P153, 167 NLJ 7732, [2017] All ER (D) 53 (Jan)	7.31, 7.34

Table of Cases

Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA: C-19/09 [2010] ECR I-2121, [2010] 1 WLR 1900, [2010] Bus LR 1050, [2010] 2 Lloyd's Rep 114, [2010] All ER (D) 130 (Mar), ECJ	37.22
Woodar Investment Development Ltd v Wimpey Construction (UK) Ltd [1980] 1 All ER 571, [1980] 1 WLR 277, 124 Sol Jo 184, HL	3.148
Woodchester Equipment (Leasing) Ltd v British Association of Canned and Preserved Foods Importers and Distributors Ltd [1995] CCLR 51, [1999] GCCR 1923, CA	27.25
Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1971] 2 QB 23, [1971] 1 All ER 665, [1971] 2 WLR 272, [1971] 1 Lloyd's Rep 25, 115 Sol Jo 56; affd [1972] AC 741, [1972] 2 All ER 271, [1972] 2 WLR 1090, [1972] 1 Lloyd's Rep 439, 116 Sol Jo 392, HL	37.104
Woodroffes (Musical Instruments) Ltd, Re [1986] Ch 366, [1985] 2 All ER 908, [1985] 3 WLR 543, [1985] BCLR 227, 10 LDAB 497, 129 Sol Jo 589, [1985] LS Gaz R 3170	24.65, 25.16, 25.17
Woodworth v Conroy [1976] QB 884, [1976] 1 All ER 107, [1976] 2 WLR 338, 119 Sol Jo 810	22.66
Worcester Works Finance Ltd v Cooden Engineering Co Ltd [1972] 1 QB 210, [1971] 3 All ER 708, [1971] 3 WLR 661, 115 Sol Jo 605	16.50
Worcester Works Finance Ltd v Ocean Banking Corp'n Ltd (1972), unreported	16.91
Wormell v RHM Agriculture (East) Ltd [1987] 3 All ER 75, [1987] 1 WLR 1091, [1987] BTLC 385, 131 Sol Jo 1085, [1987] LS Gaz R 2197	11.63
Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA [2012] EWCA Civ 1629, [2013] 1 All ER (Comm) 1191, [2014] 1 Lloyd's Rep 266, [2013] BLR 74, [2013] Bus LR D76, [2012] All ER (D) 56 (Dec)	30.14, 35.154
Wulff v Jay (1872) LR 7 QB 756, 41 LJQB 322, 20 WR 1030, 27 LT 118	30.42

Y

Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321, 146 ConLR 39, [2013] BLR 147, [2013] Bus LR D53, [2013] All ER (D) 227 (Feb)	3.75
Yasuda Fire and Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd [1995] QB 174, [1995] 3 All ER 211, [1995] 2 WLR 49, [1995] 1 Lloyd's Rep 525	5.08, 5.23
Yates v Hoppe (1850) 9 CB 541, 19 LJCP 180, 14 Jur 372, 137 ER 1003, 15 LTOS 25	5.31
Yemgas Fzco v Superior Pescadores SA Panama [2016] EWCA Civ 101, [2016] All ER (D) 231 (Feb)	36.11
Yeoman Credit Ltd v Gregory [1963] 1 All ER 245, [1963] 1 WLR 343, [1962] 2 Lloyd's Rep 302, 8 LAB 128, 107 Sol Jo 315	20.72
Yeoman Credit Ltd v Latter [1961] 2 All ER 294, [1961] 1 WLR 828, 105 Sol Jo 300, CA	30.07
Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55, [2008] 4 All ER 713, [2008] 1 WLR 1752, [2009] 1 All ER (Comm) 205, 11 ITELR 530, [2008] 3 EGLR 31, (2008) Times, 8 September, 152 Sol Jo (no 31) 31, [2008] All ER (D) 419 (Jul)	3.20
Yonge v Reynell (1852) 9 Hare 809, 68 ER 744	30.36
York Products Pty Ltd v Gilchrist Watt and Sanderson Pty Ltd. See Gilchrist, Watt and Sanderson Pty Ltd v York Products Pty Ltd	
Yorkshire Woolcombers Association Ltd, Re, Houldsworth v Yorkshire Woolcombers Association Ltd [1903] 2 Ch 284, 72 LJ Ch 635, 10 Mans 276, 88 LT 811, CA; affd sub nom Illingworth v Houldsworth [1904] AC 355, 73 LJ Ch 739, 12 Mans 141, 53 WR 113, 91 LT 602, 20 TLR 633, HL	25.04, 25.19
Youell v La Reunion Aérienne [2009] EWCA Civ 175, [2009] 2 All ER (Comm) 1071, [2009] Bus LR 1504, [2009] 1 Lloyd's Rep 586, (2009) Times, 27 March, [2009] All ER (D) 112 (Mar)	39.55
Young v Anglo American South Africa Ltd [2014] EWCA Civ 1130, [2014] Bus LR 1434, [2014] 2 Lloyd's Rep 606, (2014) Times, 21 August, [2014] All ER (D) 22 (Sep)	37.10

Young and Marten Ltd v McManus Childs Ltd [1969] 1 AC 454, [1968] 2 All ER 1169, [1968] 3 WLR 630, 67 LGR 1, 112 Sol Jo 744, 9 BLR 77, 207 Estates Gazette 797, HL	3.60, 7.37
Your Response Ltd v Datateam Business Media Ltd [2014] EWCA Civ 281, [2015] QB 41, [2014] 4 All ER 928, [2014] 3 WLR 887, [2014] 2 All ER (Comm) 899, [2015] IP & T 175, [2014] All ER (D) 156 (Mar)	7.20
Ypatianna, The. See Indian Oil Corp'n Ltd v Greenstone Shipping SA (Panama), The Ypatianna	
Yuanda (UK) Company Ltd v Brookfield Multiplex Construction Europe Ltd and another company [2020] EWHC 468 (TCC), 189 ConLR 26, [2020] All ER (D) 51 (Mar)	35.109
Yuchai Dongte Special Purpose Automobile Company Ltd v Suisse Credit Capital (2009) Ltd [2018] EWHC 2580 (Comm), [2019] 1 Lloyd's Rep 457, [2018] All ER (D) 48 (Oct)	35.48
Yukong Line Ltd of Korea v Rendsburg Investments Corp'n of Liberia [1996] 2 Lloyd's Rep 604, CA	3.154
Yuzhny Zavod Metall Profil LLC v Eems Beheerder BV (The Eems Solar) [2013] 2 Lloyd's Rep 487	36.28

Z

Z Ltd v A-Z and AA-LL [1982] QB 558, [1982] 1 All ER 556, [1982] 2 WLR 288, [1982] 1 Lloyd's Rep 240, 10 LDAB 309, 126 Sol Jo 100	38.97
ZX v Ryanair DAC (2019) C-464/18, ECLI:EU:C:2019:311, [2019] 1 WLR 4202, [2019] 2 All ER (Comm) 834, [2019] 1 Lloyd's Rep 538, 169 NLJ 7838, [2019] All ER (D) 83 (Apr), EUCJ	37.10, 37.23
Zegna III Holdings Inc (in administration), Re; BLV Realty [2009] EWHC 2994 (Ch), [2010] BPIR 277	31.68
Zinc Hotels (Investment) Ltd v Beveridge [2018] EWHC 1936 (Ch), 168 NLJ 7805, [2018] BPIR 1840, [2018] All ER (D) 172 (Jul)	31.07
Zuhail K and Selin, The [1987] 1 Lloyd's Rep 151, [1987] 1 FTLR 76	30.30

Decisions of the European Court of Justice are listed below numerically. These decisions are also included in the preceding alphabetical list.

12/76: Industrie Tessili Italiana Como v Dunlop AG [1976] ECR 1473, [1977] 1 CMLR 26, ECJ	37.19
14/76: Etablissements A de Bloos Sprl v Société en Commandite par Actions Bouyer [1976] ECR 1497, [1977] 1 CMLR 60, ECJ	37.19
42/76: de Wolf v Harry Cox BV [1976] ECR 1759, [1977] 2 CMLR 43, ECJ	37.45
33/78: Somafer SA v Saar-Ferogas AG [1978] ECR 2183, sub nom Etablissements Somafer SA v Saar-Ferogas AG: 33/78 [1979] 1 CMLR 490, ECJ	37.23
150/80: Elefanten Schuh GmbH v Jacqmain [1981] ECR 1671, [1982] 3 CMLR 1, ECJ	37.10
166/80: Klomps v Michel [1981] ECR 1593, [1982] 2 CMLR 773, ECJ	37.47
38/81: Effer SpA v Kantner [1982] ECR 825, [1984] 2 CMLR 667, ECJ	37.18
102/81: Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG [1982] ECR 1095, ECJ	39.36, 39.37
266/85: Shenavai v Kreisler [1987] ECR 239, [1987] 3 CMLR 782, ECJ	37.15
365/88: Kongress Agentur Hagen GmbH v Zeehaghe BV [1990] ECR I-1845, ECJ	37.24
C-190/89: Rich (Marc) & Co AG v Società Italiana Impianti PA, The Atlantic Emperor (No 2) [1992] 1 Lloyd's Rep 624, ECJ	37.49
C-214/89 (1992) C-214/89: Powell Duffryn plc v Peterreit., ECLI:EU:C:1992:115, [1992] ECR I-1745, (1992) Times, 15 April, [1992] ILP 300, EUCJ	37.11
C-351/89: Overseas Union Insurance Ltd v New Hampshire Insurance Co [1992] 1 QB 434, [1992] 2 All ER 138, [1991] ECR I-3317, [1992] 2 WLR 586, [1992] 1 Lloyd's Rep 204, ECJ	37.45

C-26/91: Societe Jakob Handte et Cie GmbH v Societe Traitements Mecano-Chimiques des Surfaces (TMCS) [1992] ECR I-3967, (1992) Times, 19 August, ECJ	37.17
C-129/92: Owens Bank Ltd v Bracco (No 2) [1994] QB 509, [1994] 1 All ER 336, [1994] ECR I-117, [1994] 2 WLR 759, ECJ	37.12
C-288/92: Custom Made Commercial Ltd v Stawa Metallbau GmbH [1994] ECR I-2913, [1994] IL Pr 516, ECJ	37.25
C-406/92: Maciej Rataj, The, Tatty (cargo owners) v Maciej Rataj [1999] QB 515, [1994] ECR I-5439, [1999] 2 WLR 181, [1995] All ER (EC) 229, [1995] 1 Lloyd's Rep 302, [1995] IL Pr 81, ECJ	37.08
C-341/93: Danvaern Production A/S v Schuhfabriken Otterbeck GmbH & Co [1995] ECR I-2053, [1995] ILPr 649, ECJ	37.24
C-439/93: Lloyd's Register of Shipping v Societe Campenon Bernard [1995] ECR I-961, [1995] All ER (EC) 531, ECJ	37.23
C-78/95: Hendrikman v Magenta Druck & Verlag GmbH [1997] QB 426, [1996] ECR I-4943, [1997] 2 WLR 349, [1996] All ER (EC) 944, [1996] ILPr 752, ECJ	37.47
C-269/95: Benincasa v Dalkit Srl [1997] ECR I-3767, [1998] All ER (EC) 135, [1999] GCCR 4101, ECJ	37.10
C-351/96: Drouot Assurances SA v Consolidated Metallurgical Industries (CMI Industrial Sites) [1999] QB 497, [1998] ECR I-3075, [1999] 2 WLR 163, [1998] All ER (EC) 483, [1998] 34 LS Gaz R 34, [1998] All ER (D) 220, ECJ	37.12
C-126/97: Eco Swiss China Time Ltd v Benetton International NV [1999] ECR I-3055, [1999] 2 All ER (Comm) 44, [2000] 5 CMLR 816, [1999] All ER (D) 574, ECJ	39.36
C-420/97: Leathertex Divisione Sintetici SpA v Bodetex BVBA [1999] ECR I-6747, [1999] 2 All ER (Comm) 769, (1999) Times, 26 October, [1999] All ER (D) 1058, ECJ	37.19
C-7/98: Krombach v Bamberski [2001] QB 709, [2000] ECR I-1935, [2001] 3 WLR 488, [2001] All ER (EC) 584, ECJ	37.46, 37.82
C-38/98: Régie Nationale des Usines Renault SA v Maxicar SpA [2000] ECR I-2973, [2000] IP & T 1119, [2000] All ER (D) 639, ECJ	37.47
C-381/98: Ingmar GB Ltd v Eaton Leonard Technologies Inc [2000] ECR I-9305, [2001] 1 All ER (Comm) 329, [2001] All ER (EC) 57, [2001] 1 CMLR 215, [2000] GCCR 4477, [2000] All ER (D) 1759, ECJ	5.24
C-387/98: Coreck Maritime GmbH v Handelsveem BV [2000] ECR I-9337, [2000] All ER (D) 1762, ECJ	37.27
C-167/00: Verein für Konsumenteninformation v Henkel [2002] ECR I-8111, [2003] 1 All ER (Comm) 606, [2003] All ER (EC) 311, [2003] GCCR 4497, [2002] All ER (D) 01 (Oct), ECJ	37.18
C-256/00: Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG [2002] ECR I-1699, [2003] 1 WLR 1113, [2004] 1 All ER (Comm) 521, [2004] All ER (EC) 229, [2003] All ER (D) 280 (May), ECJ	37.19
C-334/00: Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH [2002] ECR I-7357, [2002] All ER (D) 89 (Sep), ECJ	37.17
C-111/01: Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV [2003] ECR I-4207, (2003) Times, 14 May, [2003] All ER (D) 93 (May), ECJ	37.12
C-159/02: Turner v Grovit [2005] 1 AC 101, [2004] ECR I-3565, [2004] 3 WLR 1193, [2004] 2 All ER (Comm) 381, [2004] All ER (EC) 485, [2004] 2 Lloyd's Rep 169, [2004] IRLR 899, [2005] ICR 23, (2004) Times, 29 April, [2004] All ER (D) 259 (Apr), ECJ	38.81
C-281/02: Owusu v Jackson (t/a Villa Holidays Bal-Inn Villas) [2005] QB 801, [2005] ECR I-1383, [2005] 2 WLR 942, [2005] 2 All ER (Comm) 577, [2005] 1 Lloyd's Rep 452, (2005) Times, 9 March, [2005] All ER (D) 47 (Mar), ECJ ..	37.25, 37.34, 38.78
C-539/03: Roche Nederland BV v Primus [2006] ECR I-6535, [2007] FSR 106, [2006] All ER (D) 186 (Jul), ECJ	37.24
C-354/04: Gestoras Pro Amnistia v EU Council: P (2007) C-354/04 P, ECLI:EU:C:2007:115, [2007] ECR I-1579, [2008] All ER (EC) 65, [2007] 2 CMLR 525, [2007] All ER (D) 354 (Feb), EUCJ	31.84
C-465/04: Honyvem Informazioni Commerciali Srl v De Zotti [2006] ECR I-2879, [2006] All ER (D) 343 (Mar), ECJ	5.39
C-103/05: Reisch Montage AG v Kiesel Baumaschinen Handels GmbH [2006] ECR I-6827, [2006] All ER (D) 174 (Jul), ECJ	37.24

C-386/05: Color Drack GmbH v Lexx International Vertriebs GmbH [2007] ECR I-3699, [2010] 1 WLR 1909, [2008] 1 All ER (Comm) 168, [2008] All ER (EC) 1044, [2010] Bus LR 1044, [2007] All ER (D) 51 (May), ECJ	37.22
C-98/06: Freeport plc v Arnoldsosson [2008] QB 634, [2007] ECR I-8319, [2007] All ER (D) 160 (Oct), ECJ	37.24
C-185/07: Allianz SpA v West Tankers Inc [2009] AC 1138, [2009] ECR I-663, [2009] 3 WLR 696, [2009] 1 Lloyd's Rep 413, (2009) Times, 13 February, [2009] All ER (D) 82 (Feb), sub nom West Tankers Inc v Riunione Adriatica di Sicurtà SpA, The Front Comor: C-185/07 [2009] 1 All ER (Comm) 435, [2009] All ER (EC) 491, [2008] 2 Lloyd's Rep 661, ECJ	37.08, 37.13, 38.40, 39.55
C-339/07: Seagon v Deko Marty Belgium NV [2009] ECR I-767, [2009] 1 WLR 2168, [2009] Bus LR 1151, [2009] BCC 347, [2009] All ER (D) 112 (Feb), ECJ	31.86, 37.08
C-348/07: Semen v Deutsche Tamoil GmbH [2009] ECR I-2341, [2009] 2 All ER (Comm) 243, [2009] 3 CMLR 389, [2009] 1 Lloyd's Rep 653, [2009] All ER (D) 271 (Mar), ECJ	5.39
C-420/07: Orams v Apostolides [2009] ECR I-3571, [2011] 2 WLR 324, [2010] 1 All ER (Comm) 950, (2009) Times, 1 May, [2009] All ER (D) 89 (May), ECJ	37.47
C-533/07: Falco Privatstiftung v Gisela Weller-Lindhorst [2009] ECR I-3327, [2010] Bus LR 210, [2009] All ER (D) 14 (May), ECJ	37.19
C-133/08: Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV [2010] QB 411, [2009] ECR I-09687, [2010] 3 WLR 24, [2010] 1 All ER (Comm) 613, [2010] All ER (EC) 1, [2010] Bus LR 808, [2010] 2 Lloyd's Rep 400, [2009] All ER (D) 71 (Oct), ECJ	37.77
C-204/08: Rehder v Air Baltic Corp'n [2009] ECR I-6073, [2010] Bus LR 549, [2009] All ER (D) 153 (Jul), ECJ	37.22
C-292/08: German Graphics Graphische Maschinen GmbH v Schee C-292/08, [2009] ECR I-8421, [2009] All ER (D) 75 (Sep)	37.08
C-381/08: Car Trim GmbH v KeySafety Systems Srl [2010] ECR I-1255, [2010] 2 All ER (Comm) 770, [2010] Bus LR 1648, [2010] All ER (D) 286 (Feb), ECJ	37.20
C-533/08: TNT Express Nederland BV v AXA Versicherung AG [2010] ECR I-4107, [2011] RTR 136, [2010] All ER (D) 47 (May), ECJ	37.12
C-19/09: Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA [2010] ECR I-2121, [2010] 1 WLR 1900, [2010] Bus LR 1050, [2010] 2 Lloyd's Rep 114, [2010] All ER (D) 130 (Mar), ECJ	37.22
C-396/09: Interedil Srl v Fallimento Interedil Srl [2011] ECR I-9915, [2012] Bus LR 1582, [2012] BCC 851, [2011] BPIR 1639, [2011] All ER (D) 195 (Oct), ECJ	31.78
C-144/10: Berliner Verkehrsbetriebe (BVG), Anstalt des Öffentlichen Rechts v JP Morgan Chase Bank NA [2011] ECR I-3961, [2011] 1 WLR 2087, [2011] 2 All ER (Comm) 877, [2011] Bus LR 1061, [2011] All ER (D) 192 (May), ECJ	37.10
C-213/10: F-Tex SIA v Lietuvos-Anglijos UAB "Jadecloud-Vilma" [2013] Bus LR 232, ECJ	37.08
C-292/10: G v de Visser [2013] QB 168, [2012] 3 WLR 1523, (2012) Times, 22 June, ECJ	37.09
C-133/11: Folien Fischer AG v Ritrama SpA [2013] QB 523, [2013] 2 WLR 373, [2014] 1 All ER (Comm) 569, [2012] All ER (D) 13 (Dec), ECJ	37.15
C-154/11: Mahamdia v People's Democratic Republic of Algeria [2014] All ER (EC) 96, [2013] ICR 1, (2012) Times, 16 October, [2012] All ER (D) 333 (Jul), ECJ	37.08
C-456/11: Gothaer Allgemeine Versicherung AG v Samskip GmbH [2013] QB 548, [2013] 2 WLR 520, [2012] All ER (D) 316 (Nov), ECJ	37.45
C-9/12: Corman-Collins SA v La Maison du Whisky SA [2014] QB 431, [2014] 2 WLR 494, [2014] 1 All ER (Comm) 882, [2013] All ER (D) 240 (Dec), ECJ	37.20
C-184/12: United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare [2014] 1 All ER (Comm) 625, [2014] 1 Lloyd's Rep 161, [2013] All ER (D) 305 (Oct), ECJ	37.80
C-328/12: Schmid v Hertel [2014] 1 WLR 633, 164 NLJ 7593, [2014] BPIR 504, [2014] All ER (D) 221 (Jan), ECJ	31.86
C-438/12: Weber v Weber C-438/12, ECLI:EU:C:2014:212, [2015] Ch 140, [2015] 2 WLR 213, [2014] All ER (D) 110 (Apr)	37.12
C-548/12: Brogsitter v Fabrication de Montres Normandes EURL [2014] QB 753, [2014] 2 WLR 1600, [2014] 1 All ER (Comm) 965, [2014] All ER (D) 258 (Mar), ECJ	37.17

Table of Cases

C-26/13: Kásler v OTP Jelzálogbank Zrt [2014] 2 All ER (Comm) 443, [2014] Bus LR 664, [2014] GCCR 4600.157, ECJ	3.85
C-352/13: Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV: (2015) C-352/13, ECLI:EU:C:2015:335, [2015] QB 906, [2015] 3 WLR 909, [2015] 5 CMLR 285, [2015] All ER (D) 50 (Jun), EUCJ	37.11, 37.24
C-536/13: 'Gazprom' OAO, Re: (2015) C-536/13, ECLI:EU:C:2015:316, [2015] 1 WLR 4937, [2015] 2 All ER (Comm) 1023, [2015] All ER (EC) 711, [2015] 1 Lloyd's Rep 610, [2015] All ER (D) 136 (May), EUCJ	37.08, 39.55
C-47/14: Holterman Ferho Exploitatie BV v von Bullesheim C-47/14, ECLI:EU:C:2015:574, [2016] IRLR 140, [2016] ICR 90, [2015] All ER (D) 72 (Sep)	37.17
C-359/14 and C-475/14 (Joined Cases): 'ERGO Insurance' SE v 'PZU Lietuva' UAB DK ECLI:EU:C:2016:40, [2016] All ER (D) 48 (Feb), ECJ	37.65
C-191/15: Verein für Konsumenteninformation v Amazon EU Sàrl ECLI:EU:C:2016:603 C-191/15	37.65
C-208/18: Petruchová v FIBO Group Holdings Ltd., Case, [2020] CEC 326	37.10
C-464/18: ZX v Ryanair DAC (2019), ECLI:EU:C:2019:311, [2019] 1 WLR 4202, [2019] 2 All ER (Comm) 834, [2019] 1 Lloyd's Rep 538, 169 NLJ 7838, [2019] All ER (D) 83 (Apr), EUCJ	37.10, 37.23

PART ONE

The Foundations of Commercial Law

THE NATURE AND SOURCES OF COMMERCIAL LAW

1. THE LAW MERCHANT

1.01 One of the most powerful influences on human activity is the driving force of trade. Governments may be overthrown, wars may break out, large areas of a country may be devastated by natural disaster, but somehow traders find ways of establishing and continuing business relationships. The inventiveness of the scientist and the engineer in matters physical is matched by the ingenuity of the trader in constantly developing new sales techniques, new instruments to accommodate more efficiently the requirements of the commercial community, new methods of surmounting hurdles thrown up by the law or by the actions of government.

1.02 In the history of English law there have been few developments that have captured the imagination as strongly as the medieval law merchant, which for hundreds of years subsisted as a distinct source of rights, administered by courts in which the merchants themselves were judges, before ultimately becoming redundant because of the adaptation of the common law itself to commercial needs and usages.¹ The maritime courts, the courts of the fairs and boroughs,² and the staple courts, in company with other commercial courts of the Middle Ages, determined disputes involving foreigners not by English domestic law but according to the ‘general law of nations’ based on mercantile codes and customs such as the Laws of Oléron³ and reflecting international

¹ See generally Selden Society (H. Hall (ed)), *Select Cases on the Law Merchant* (1908–32), vols I (ed C. Gross) and II and III; F. R. Sanborn, *Origins of the Early English Maritime and Commercial Law* (1930); W. S. Holdsworth, *A History of English Law*, 17 vols (7th edn, 1956–72): vol 1, pp 562–573; vol 5, pp 60–154; vol 8, pp 99–300; L. Trakman, *The Law Merchant: The Evolution of Commercial Law* (1983); W. Bewes, *The Romance of the Law Merchant* (1923, reprinted 1986). The earliest known text on the English law merchant is by the anonymous author of *Lex Mercatoria*, which recent scholarship dates as completed in about 1286. See for a detailed analysis M. E. Basile, J. F. Bestor, D. R. Coquillette and C. Donahue, *Lex Mercatoria and Legal Pluralism: A Late Thirteenth Century Treatise and Its Afterlife* (1998).

² Known as courts of piepowder because they ‘were frequented by chapmen of dusty feet, who wandered from mart to mart’ (Gross, *Select Cases*, p xiv).

³ Oléron, an island off the west coast of France, was for some while in the ownership of the English Crown as a commune of the province of Guienne (Aquitaine). The decisions of its

1.02 The Nature and Sources of Commercial Law

maritime and commercial practice. To these courts, as to their counterparts elsewhere in the civilized world, came not only our own merchants but foreign traders from all parts of Europe, content to have their disputes resolved by tribunals which, though located in England, were required to have an equal number of English and foreign merchants as jurors⁴ and were conversant with foreign mercantile usage and with the concepts of the civil law as well as the common law. The characteristics of these commercial courts were speed in adjudication (a particularly essential requirement for the foreign trader), a realistic attitude towards the proof of facts, a relative freedom from technical rules of evidence and procedure that plagued the common law courts and an acceptance of the fact that the customs of merchants generated rights which required international recognition and which, for the stability of the European markets, needed to be interpreted in a broadly uniform fashion, with an overriding requirement of good faith.⁵

1.03 Special statutes were enacted in the Middle Ages for the benefit of the merchant community generally and traders from overseas in particular. These prescribed speedy justice for foreign merchants;⁶ the application of the law merchant, and the paramountcy of the merchant courts, in mercantile disputes;⁷ and a procedure for formal acknowledgement of indebtedness under writings obligatory (promissory notes) by the taking and enrolment of statutory recognizances which, upon the debtor's default, gave the creditor a statutory title to his lands and chattels until payment, coupled with a right to have the debtor committed to prison indefinitely until the debt was paid.⁸

1.04 The adaptability of the *lex mercatoria* was especially notable in the recognition of negotiable instruments. Well before the birth of the English law

mercantile community were treated as of the highest authority in England, and the Rolls of Oléron were promulgated by Richard I and reproduced in the Black Book of the Admiralty and in comparable local publications.

⁴ Carta Mercatoria 1303.

⁵ A requirement curiously lacking in present law as a prerequisite for the exercise of legal (as opposed to equitable) remedies. See para 3.74. For a fascinating account of the detailed rules imposed by the market for the protection of the customer, including the prohibition of sales by the back doors of houses or by candlelight, see W. H. Hamilton, 'The Ancient Maxim Caveat Emptor' (1931) 50 Yale LJ 133.

⁶ Carta Mercatoria 1303; Statute of the Staple 1353, 27 Edw III, stat 2, c 20. Speedy trial was indeed the essence of disputes among merchants. Dr Charles Gross gives a vivid illustration of the celerity of the procedure by reference to an action tried in the piepowder court of Colchester in 1458 (Gross, *Select Cases*, vol I, p xxvi): 'The plaintiff sued for the recovery of a debt at 8 am and the defendant was summoned to appear at 9 o'clock. He did not come at that hour and the sergeant was ordered to distrain him to come at 10 o'clock, at which hour he made default. Similar defaults were recorded against him at 11 and 12 o'clock. At the latter session judgment was given in favour of the plaintiff, and appraisers were ordered to value the defendant's goods which had been attached. They made their report at 4 o'clock, and the goods were delivered to the plaintiff.'

⁷ Statute of the Staple, cc 5, 6, 8 and 21.

⁸ Statute of Merchants (also known as the Statute of Acton Burnell) 1283, 11 Edw I, as amended by the Statute of Merchants 1285, 13 Edw I; Statute of the Staple. But if the defendant remained in prison for more than three months, through failing to avail himself of the statutory right given to him to sell his land and chattels himself within that period in order to pay the debt, the creditor had to pay for the cost of keeping him provided with bread and water for the duration of his stay in prison.

of contract, the law merchant accepted that a right to a sum of money embodied in a bill of exchange or promissory note could be conferred even though the instrument was not under seal.⁹ When the common law did ultimately come to recognize the binding force of executory agreements, it imposed restrictions of a kind not operated by the merchant courts. Thus the common law required that the consideration for a promise should not be a past consideration¹⁰ and should move from the promisee.¹¹ But such rules were largely bypassed by the *lex mercatoria* which, indeed, went much further, treating a bill of exchange as transferable by mere delivery, with any requisite indorsement (when the common law did not recognize the assignability of debts at all) and even laying down that in given conditions the holder of a bill could acquire a better title to it than his transferor and take free from equities,¹² contrary both to the common law principle *nemo dat quod non habet*¹³ and to the equitable rule that the assignee of a chose in action takes subject to equities.¹⁴

1.05 Nevertheless, England contributed relatively little to the evolution of the medieval law merchant. As the centre of European commercial life, Italy had pride of place in the development of the law merchant in the Middle Ages. Not only were its cities powerful and its institutions for the resolution of commercial disputes highly organized but its merchants and lawyers were extremely creative in the development of maritime and commercial instruments, such as the bill of lading and the bill of exchange, and institutions, such as banking and insurance, all of which gave rise to a corpus of substantive rules based on mercantile usage. Such was the emphasis on commercial usage rather than technical law that lawyers were barred from taking part in the proceedings. The influence of the Italian merchants was felt throughout Europe, so that even the great fairs of Champagne were dominated by Italians.¹⁵ By contrast, the trade dynamic that powered the *lex mercatoria* in Italy was lacking in England, which in the Middle Ages was relatively

⁹ The best modern analysis is by J. S. Rogers, *The Early History of Bills and Notes* (1995). See also J. Milnes Holden, *The History of Negotiable Instruments in English Law* (1995); Street, *Foundations of Legal Liability* (1906), vol II, pt III; and J. S. Rogers, *The End of Negotiable Instruments: Bringing Payment Systems Law Out of the Past* (2012).

¹⁰ *Lampleigh v Braithwait* (1615) Hob 105; *Roscorla v Thomas* (1842) 3 QB 234.

¹¹ *Bourne v Mason* (1669) 1 Vent 6, 2 Keb 454, 457, 527; *Crow v Rogers* (1726) 1 Stra 592. But other cases, such as *Dutton v Poole* (1677) 2 Lev 210, were to the opposite effect, and the rule that consideration must move from the promisee was not conclusively settled until *Tweddle v Atkinson* (1861) 1 B & S 393.

¹² Rogers, *The Early History of Bills and Notes*, ch 8; Milnes Holden, *Negotiable Instruments*, p 64. Lord Mansfield used to try cases with a special jury comprising experienced merchants, whose opinions he greatly valued and whom he frequently invited to dine with him in order to develop a clearer understanding of prevailing commercial practice.

¹³ See para 16.05.

¹⁴ See para 24.18. Similarly, the development of the bill of lading as a document of title to sea-borne goods resulted in the courts' acceptance of the right of the indorsee of the bill to recover the goods comprised in it from the shipowner even if title had not passed and the shipowner had not attorned to the indorsee. See further para 32.53.

¹⁵ Sanborn, *Maritime and Commercial Law*, p 159, citing F. Morel, *Les Juridictions Commerciales au Moyen Age* (1897), p 160, and P. Huvelin, *Essai Historique sur le Droit des Marchés et des Foires*, p 280.

1.05 *The Nature and Sources of Commercial Law*

backward in commerce. So the local courts – which were not truly specialized commercial courts but rather courts of general jurisdiction over matters arising in their locality while they were sitting¹⁶ – were concerned mainly with the resolution of disputes concerning smaller internal transactions¹⁷ and dealt with them to a considerable extent within the framework of the common law, albeit with modifications of evidence and procedure, and a few substantive rules, to reflect the need for rapid decisions before the fair or market ended and to ensure the efficacy of commercial contracts. But the central courts were active in commercial matters and though their proceedings could be formalistic and protracted, they were nevertheless building up a body of law applicable to commercial transactions, in addition to which they were often required to give decisions in accordance with the law merchant and for that purpose regularly sought expert evidence from the merchants themselves. Thus modern scholars have tended to reject the traditional, rather romanticized, view of the medieval English law merchant as a separate corpus of law and to regard it instead as ‘the factual matrix within which certain types of contract are made’¹⁸ and its rules as largely procedural in character, offering speedy justice and the relaxation of technical requirements of pleading and evidence.¹⁹

1.06 Ultimately, the merchant courts, with the Court of Admiralty, were vanquished by the courts of common law, partly because through the rise of *assumpsit* the courts became able to offer more efficacious contract remedies, partly because of the fact that the proceedings of some of the local courts fell into disrepute and partly because of the general desire of the central courts to increase their jurisdiction. The decline of the Staple Courts and the Court of Admiralty was largely due to one man, Sir Edward Coke, whose passionate devotion to the common law and the common law courts, and whose fierce hostility to all their competitors, resulted in the acquisition by the common law courts of most of the country’s commercial litigation. The adaptation of the common law to the requirements of the merchants and the eventual integration of the *lex mercatoria* into the common law were to be brought about by two outstanding commercial lawyers, Chief Justice Holt and Lord Mansfield.

2. THE FOUNDING OF ENGLISH COMMERCIAL LAW

1.07 As has been mentioned, the *lex mercatoria* was international rather than English and when the courts of common law, under the direction of Coke CJ, began to displace the merchant courts in the early part of the seventeenth century, they did not adopt the *lex mercatoria* as a corpus of law for disputes

¹⁶ Rogers, *The Early History of Bills and Notes*, p 25.

¹⁷ Holdsworth, *English Law*, vol V, p 113.

¹⁸ J. Baker, ‘The Law Merchant as a Source of English Law’ in W. Swadling and G. Jones (eds), *Essays in Honour of Lord Goff* (1999) at p 96.

¹⁹ See, for example, J. H. Baker, ‘The Law Merchant and the Common Law Before 1700’ (1979) 38 CLJ 295, reproduced in J. H. Baker (ed), *The Legal Profession and the Common Law: Historical Essays* (1986), ch 19; Rogers, *The Early History of Bills and Notes*, ch 1. It may be noted, however, that the common law was largely procedural in character, and that in the Middle Ages the distinction between substantive and procedural law was less sharp than it is today.

between merchants but, though borrowing certain of its rules, continued in the main to apply the principles of common law with which they were familiar, while making gradual adjustments designed to satisfy the merchant that he could get as good a service from them as he had previously enjoyed from his own courts. But the approach was unsystematic and some of the deviations from the law merchant were unfortunate.²⁰ The moulding of the diffuse collections of rules into a coherent body of commercial law was largely the work of Lord Mansfield, who is rightly considered the founder of English commercial law. Building upon the earlier labours of Holt CJ, who had laid the foundations of the law relating to negotiable instruments, bailment and agency, Lord Mansfield proceeded to reduce the vast mass of case law on commercial disputes to an ordered structure, combining a mastery of the common law with a profound knowledge of foreign legal systems and a deep insight into the methods and usages of the mercantile world. By the time of his retirement, the law merchant had become fully absorbed into the common law, so that a century later the draftsman of the Bills of Exchange Act 1882 and the Sale of Goods Act 1893 was able to provide in both statutes that ‘the rules of the common law, *including the law merchant*,’ (emphasis added) should continue to apply to bills of exchange and contracts of sale respectively.²¹

1.08 In the nineteenth century the formulation of the principles of commercial law in all its major aspects was further developed and refined in the writings of a series of outstanding commercial lawyers, notably Benjamin, Blackburn, Story and Chalmers, who produced leading treatises on the law of sale; Charlesworth and Smith, whose works on commercial law became classics; Byles and Chalmers, who provided a detailed treatment of the law relating to bills of exchange; and Palmer, whose work on company law became the practitioner’s *vade mecum*. It is a testimony to the impact of these intellectual giants that the leading work of several of them continues to be published in current editions under the author’s name; and though it is many years since Smith’s lucid and trenchant works were last produced, they are still occasionally used as a reference for relevant case law. Throughout the nineteenth century a strong influence continued also to be exercised by the works of the great French jurist Pothier, of the previous century, who indeed was not infrequently cited in English judgments as possessing the highest authority on questions of English commercial law.²²

1.09 The close of the nineteenth century was illumined by the fine statutory draftsmanship of Sir Mackenzie Chalmers, whose Bills of Exchange Act 1882 and Sale of Goods Act 1893 were adopted almost verbatim throughout

²⁰ One of the most pernicious examples was the invention by the common law of the maxim *caveat emptor*, which had had no place in the law merchant or, indeed, in Roman law or the civil law. See Hamilton, n 5.

²¹ Bills of Exchange Act 1882, s 97(2); Sale of Goods Act 1893, s 61(2), since replaced by the Sale of Goods Act 1979, s 62(2).

²² See *Cox v Troy* (1822) 5 B & Ald 474, per Best CJ. Sir Mackenzie Chalmers, the draftsman of the Sale of Goods Act, was profoundly influenced by Pothier’s *Traité du Contrat de Vente* (1806), as is evident from the frequent references to Pothier in his own work *The Sale of Goods Act*, 1893, notably in the Introduction to the first edition (1894).

the Commonwealth and, as regards the latter Act, in the United States in its model code, the Uniform Sales Act.²³ Thereafter, English commercial law began to lose its international flavour, less interest being shown in mercantile developments overseas as this country, caught up in a huge expansion of trade, sought to wrestle with commercial problems almost entirely in terms of its own law and trading practices. Inevitably, the assumption of mercantile jurisdiction by the common law courts, applying the rules of common law, resulted in the loss of flexibility and sensitivity to current trade usage that had characterized the old merchant courts. Indeed, despite the enlightened approach adopted by Lord Mansfield and those of his successors who were kindred spirits, the merchant must frequently have wondered whether the common understanding of traders in particular markets as to the effect of typical commercial instruments counted for anything in the courts, which as late as 1873 were subscribing to the view that, while it was open to merchants to establish rights by trade usage, they could not subsequently rely on a new usage to displace the rights so established.²⁴ As we hope to demonstrate, the courts of today, if reluctant to disturb settled rules, the observance of which is so conducive to the certainty for which business people crave, are nonetheless more receptive to the impact of new trade customs and more alive to the importance of effectuating the presumed intention of the contracting parties.²⁵ Moreover, with the globalisation of international trade and finance many scholars have detected the emergence of a new *lex mercatoria* as a transnational, autonomous legal system,²⁶ a subject to which we shall return when discussing international commercial arbitration.²⁷

3. THE NATURE OF COMMERCIAL LAW

1.10 Commercial law is that branch of law which is concerned with rights and duties arising from the supply of goods and services in the way of trade.²⁸ Its

²³ This Act, drafted by Professor Samuel Williston, was promulgated in 1906 and amended in 1921. It was widely adopted before being replaced by the Uniform Commercial Code (UCC) in 1952. The UCC is subject to ongoing revision, and from time to time new articles are added. The most radical part of the UCC is Article 9, relating to secured transactions, which has attracted much interest throughout the common law world; see further para 24.70.

²⁴ *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374, per Blackburn J at 386, disapproved in *Goodwin v Robarts* (1875) LR 10 Ex Ch 337, per Cockburn CJ at 352.

²⁵ See para 1.21. See also A. Rodger, 'The Codification of Commercial Law in Victorian Britain' (1992) 108 LQR 570; R. M. Goode, 'Twentieth Century Developments in Commercial Law' (1983) 3 *Legal Studies* 283; Lord Irvine of Lairg 'The Law: An Engine for Trade' (2001) 64 MLR 333; R. M. Goode, 'Removing the Obstacles to Commercial Law Reform' (2007) 123 LQR 602.

²⁶ See, for example, K. P. Berger, *The Creeping Codification of the Lex Mercatoria* (1999), ch 2.

²⁷ See ch 39.

²⁸ It is conventional to treat commercial law as confined to personal property and the provision of services. But at certain points it is inescapably entwined with land law. Thus, title to goods may be lost through annexation to land, as a fixture. More important, services include the provision of finance, which is frequently secured on land by a mortgage or by a fixed or floating charge; and no treatment of commercial interests can be considered complete without at least some consideration of the nature of a floating charge and priority problems arising from conflicting security interests in land. See chs 23–25.

scope is not clearly defined, and no two textbooks seem to adopt the same approach as to the spheres of commercial activity that ought properly to be included in a work on the subject. There are, indeed, some who question whether commercial law is a subject at all, suggesting that the apparent monolith is in reality no more than an agglomeration of distinct subjects (sale, negotiable instruments, carriage of goods and the like), the boundaries of which may overlap but which otherwise share little in common beyond the underlying foundations of the law of contract. We shall revert to this contention in the concluding chapter.²⁹ For the present, it suffices to make the point that the old law merchant has long ceased to be a separate corpus of law³⁰ and that, unlike most civil law systems, English law does not possess a commercial code, nor does it formally subject transactions between merchants to a regime different from that of the ordinary civil law regulating transactions with or between non-traders.³¹ That said, there is emerging an increasingly sharp divide between the legal regulation of transactions between two commercial parties acting within the ordinary scope of their business and transactions concluded between a trader or merchant and a consumer (the latter being an individual who is acting for purposes that are wholly outside the individual's trade, business, craft or profession).³² As we shall note,³³ transactions between a trader and a consumer are now more heavily regulated with the aim of providing a greater level of protection to the legitimate interests of the consumer. The latter regulation is largely beyond the scope of this book.

1.11 Nevertheless, as we shall see, principles have developed, and statutory provisions have been enacted, which are peculiar to dealings of a mercantile character.³⁴ Of cardinal importance in this respect is the impact of usages of trade on the rights of the parties. But this is not the only respect in which the law indirectly marks off commercial from consumer transactions. Thus, a contractual provision which in a contract between merchants may be interpreted in accordance with its natural and ordinary meaning may in a contract between a merchant and a consumer be subject to a stricter construction against the merchant and in favour of the consumer. Again, the mercantile character of the contract in dispute has in the past influenced the court in deciding whether to strike down an exemption clause, and this approach is

²⁹ Chapter 40. In Continental Europe commercial law is considered to include company law, whereas English lawyers treat the latter as a distinct branch of law and regard commercial law as concerned primarily with transactions rather than with institutions.

³⁰ Indeed, it was never an organized body of law at all, rather a diffusion of uncodified usage.

³¹ Contrast the position in civil law countries, where it is usual to have a commercial code to regulate relations between merchants or those engaging in contracts of a mercantile character. As to the narrowing of the gap between civil law and commercial law, see B. Kozolchyk, 'The Commercialization of Civil Law and the Civilization of Commercial Law' (1979) 40 Louisiana L Rev 3. See also G. Samuel, 'Civil and Commercial Law: a Distinction Worth Making?' (1986) 102 LQR 569.

³² The clearest example of this divide is to be found in the Consumer Rights Act 2015 which is perhaps the most ambitious legislative intervention in the law relating to the relationship between a trader and a consumer.

³³ See para 1.15.

³⁴ See paras 40.02 ff for a discussion of the principles and policies of commercial law.

1.11 *The Nature and Sources of Commercial Law*

now reflected in legislation.³⁵ In other words, a court is likely to be more willing to uphold the validity of an exemption clause in a contract between two commercial parties on the basis that the clause is the means voluntarily chosen by the parties to allocate the risk of the occurrence of a particular set of circumstances.³⁶ But where the same clause is found in a contract between a trader and a consumer, it is less likely that the clause will be the product of a negotiation between two informed parties. Rather, it may be a term which has been imposed by the trader on the consumer and on that basis may be subject to a higher level of scrutiny by the courts.

1.12 The underlying motif that marks out the legal treatment of commercial transactions is a recognition of the need to protect the free flow of trade and to avoid as far as possible the application of rules that will operate to the disadvantage of the bona fide purchaser in the ordinary course of business.³⁷ Examples can be found of situations in which Parliament has been more sensitive to this need than the courts. So, for example, on every occasion when legislation has been passed to cut down the scope of the *nemo dat* rule in favour of the innocent purchaser, the courts have striven to preserve the *nemo dat* rule by a restrictive interpretation of the relevant statute.³⁸ But the task of maintaining a fair balance is far from easy. The process by which goods are marketed is often complex. Many interests are involved and these may conflict. It is impossible to have a clear perception of commercial law without at least a basic understanding of the mechanism of the transaction under consideration, the parties affected and the documents they employ. Thus, the rules evolved by the courts in relation to c.i.f. contracts will be meaningful to the reader only if he or she is able to visualize the sequence of operations involved in the ordering and movement of goods, the impact of new and speedier methods of transportation, the hazards that may arise for one party or another at different stages of the transaction and the way in which provision may be made against such hazards by the parties in their agreements or by rules of law where the agreements are silent.³⁹ Again, the law relating to documentary credits and the rights and duties of parties to negotiable instruments cannot be understood without a basic knowledge of the main stages in the journey of the documents involved, from the time when application is made for their issue to the point of their ultimate destination. All this we shall try to explain in due course.

4. THE INTERESTS TO BE PROTECTED

1.13 Inevitably, commercial law continues to be dominated by the sale of goods (although in an economy where services play an increasingly important

³⁵ See para 3.78.

³⁶ *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371, [2018] BLR 491, [103].

³⁷ For a general discussion of the philosophical foundations of English commercial law, see Roy Goode, *Commercial Law in the Next Millennium* (the 1997 Hamlyn Lectures), pp 12 ff.

³⁸ See para 1.49 and 16.04.

³⁹ See chs 34, 36.

role, the continued domination of the contract of sale may be open to doubt); and central to this subject is the contract between seller and buyer. But sales are not the concern of the parties alone. There are many other interests which require protection by the law. The consuming public at large needs safeguards to ensure that products put on the market will not be injurious to life or health; that they will not be held to ransom by monopolies or restrictive trade practices or be deceived by false or misleading advertising; and that trading activity will be controlled to the extent necessary to protect the national economy.⁴⁰ The activities of a particular seller are of concern also to sellers in a similar line of business, who are entitled to protection against unfair trading, eg through passing off or infringement of a patent or trade mark or through inducement of a breach of contract subsisting between them and third parties. The owner of goods disposed of without his authority has an interest to protect, as has a purchaser who in good faith buys from one not entitled to sell, or a repairer who in good faith executes work on goods deposited with him for repair by a person not owning the goods or authorized to order repairs. Special classes of buyer may need distinct legislative protection, for example buyers on credit or at auction. The operations of all traders are of concern to their creditors, particularly in the event of insolvency.

1.14 It will be obvious, therefore, that the law relating to commercial transactions goes well beyond the law of contract, invading the provinces of property, tort, equity, restitution or unjust enrichment, company and insolvency law, and entering to a significant degree into the public law sector. Thus, a retail buyer injured by a defective product may have a strict liability claim against the manufacturer by statute⁴¹ or at common law for negligence;⁴² a party innocently purchasing goods comprised in an undischarged hire-purchase agreement may be exposed to an action for conversion,⁴³ while a restitutionary claim may be made to the proceeds received by the hirer: a security interest created in a credit transaction may be vulnerable in the event of the debtor's bankruptcy or liquidation;⁴⁴ a supplier of goods to which a false

⁴⁰ In bygone years Parliament went to quite extraordinary lengths to fulfil this objective. Thus in the reign of Charles II, in order to deal with a glut of wool resulting from restrictions on the export of this commodity, statutes were passed making it an offence for a person to be buried in a shroud not made entirely of sheep's wool or to be put in a coffin lined or faced with material other than sheep's wool (18 Car 2, c.4 (1666), replaced by Car 2, stat 1, c 3 (1678), as amended by 32 Car 2, c 1 (1680)). This remarkable piece of legislation was not repealed until 1814 (14 Geo 3, c 108).

⁴¹ Consumer Protection Act 1987, Pt I, implementing (though imperfectly) the European Directive on Product Liability 85/374/EEC. The subject of product liability forms part of consumer law and is not discussed in the present work. For a detailed examination of the statutory provisions, see C. J. Miller and R. S. Goldberg, *Product Liability* (2nd edn, 2004) and for a detailed comparative analysis see S. Whittaker (ed), *The Development of Product Liability* (2014) and S. Whittaker, *Liability for Products: English Law, French Law and European Harmonisation* (2005). The best, albeit now somewhat dated theoretical treatment of product liability within the wider context of civil liability as a whole is by Jane Stapleton, *Product Liability* (1994), a perceptive work which poses some fundamental questions as to the purpose and policy of a product liability regime.

⁴² For which the reader is referred to textbooks on the law of tort.

⁴³ See para 16.01.

⁴⁴ See paras 31.37–31.52.

1.14 *The Nature and Sources of Commercial Law*

trade description has been applied may incur a liability to prosecution,⁴⁵ whether or not guilty of any breach of contract. Moreover, commercial law is not confined to goods, but extends to a vast range of transactions relating to documents and services, including finance, carriage of goods and insurance.

1.15 In this book the emphasis is on commercial transactions, that is, transactions in which both parties deal with each other in the course of business, whether as merchants or as provider and recipient of financial or other services supplied for business purposes. Though some reference is made to consumer transactions in the context of unfair contract terms,⁴⁶ we shall not be concerned with other aspects of consumer protection, a vast subject which merits a volume to itself and to which several excellent publications are now devoted.⁴⁷

5. THE PRINCIPAL SOURCES OF COMMERCIAL LAW

(i) Contract

1.16 While many branches of the common law affect business transactions, the foundation on which commercial law rests is the law of contract. Commercial transactions are, after all, specific forms of contract, and while each type of commercial contract is governed by rules peculiar to that type, all are subject to the general principles of contract law except to the extent to which these have been displaced by statute or by mercantile usage.⁴⁸

1. *Express and implied terms generally*

1.17 When considering the law-making capacity of the parties themselves, one must avoid the assumption that they have necessarily negotiated each individual term. Certain basic terms will, of course, be bargained in almost every transaction, such as the *res* which is to be the subject of the contract and the price to be paid for it; and many commercial contracts are indeed hammered out by the parties term by term, and can truly be said to represent their own creation, to which they may be assumed to have addressed their minds. But a large number of commercial agreements are standard-term contracts and are not individually negotiated. Indeed, it would be impossible for business to cope with the enormous volume of bargains conducted daily if every term of every agreement, no matter how consistent the pattern of business, had to be negotiated step by step between the parties. The standard-term contract is thus

⁴⁵ Under the Trade Descriptions Act 1968 and see also the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277).

⁴⁶ See para 3.83.

⁴⁷ See, for example, G. Woodroffe, C. Willett and C. Twigg-Flesner, *Woodroffe and Lowe's Consumer Law and Practice* (10th edn, 2016). For rather more dated, but nevertheless still helpful consideration, see *Cranston's Consumers and the Law* (3rd edn, eds C. Scott and J. Black, 2000) and B. Harvey and D. Parry, *Law of Consumer Protection and Fair Trading* (6th edn, 2000). See also in relation to product liability, the literature referred to in n 41.

⁴⁸ See paras 1.21 and 3.59.

an essential feature of business life, and some such contracts are so widely adopted as to become in effect non-parliamentary statutes, attracting detailed analysis in textbooks and a body of case law as disputes are referred to the courts or to arbitration.⁴⁹

1.18 Where the supplier is in a substantial way of business, the standard-term contract may be of his own making, or that of his lawyers. Many law firms now produce standard contract terms, commonly known as ‘boilerplate’ clauses, which they habitually insert into the contracts they negotiate on behalf of their clients. Such clauses deal with matters such as choice of law, jurisdiction, exclusion or limitation of liability, force majeure, termination of the contract and retention of title.⁵⁰ But frequently business people use standard contracts devised by others, for example the particular trade association to which they belong,⁵¹ often without much familiarity with the detail of the contract or understanding of its legal implications. The problem becomes still more acute in relation to international transactions,⁵² for which many model contracts have been settled by international organizations, such as the International Chamber of Commerce.⁵³ In such cases the document is required to accommodate the needs of parties who *ex hypothesi* are operating in different states and are governed by different systems of law, so that the scope for ignorance or misunderstanding of the legal effects of the contract is greatly increased. This does not, however, alter the fact that the parties to the contract, in adopting the standard terms, are making their own law,⁵⁴ and such model contracts perform an increasingly valuable function as traders become familiar with them. They also have a considerable role to play in any future harmonisation of contract law, given that the boilerplate clauses which appear in many modern international commercial transactions frequently exhibit a close family resemblance.⁵⁵

⁴⁹ Prime examples are the JCT forms of building contract, to which complete textbooks have been devoted and which have been the subject of many reported cases.

⁵⁰ See generally R. Christou, *Boilerplate: Practical Clauses* (8th edn, 2019).

⁵¹ For the most important standard commodity contracts, see C. Murray, D. Holloway and D. Timson-Hunt (eds), *Schmitthoff's Export Trade: The Law and Practice of International Trade* (12th edn, 2012), paras 32–010 ff. Standard forms of contract used in consumer credit transactions are published by the Consumer Credit Trade Association (see <http://www.ccta.co.uk>).

⁵² English law does not in general draw a formal distinction between national and international transactions so far as sources of law are concerned.

⁵³ For example, the ICC Model Commercial Agency Contract (2015 edition, ICC Publication No 766E) and Model Distributorship Contract (No 646).

⁵⁴ For a general discussion, see C. Schmitthoff, ‘The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions’ (1968) 17 ICLQ 551. When criticizing standard contracts and model codes, it is important to avoid the assumption that faulty drafting or misconceived policy is necessarily the responsibility of the draftsman. Many such contracts and codes are born only after a lengthy gestation period involving prolonged examination and negotiations. Often the parties settle for less than the best in order to secure a compromise that will save the work as a whole. Those who pour scorn on what are undoubtedly defective features in many contracts and codes would do well to remember that the best is often the enemy of the good.

⁵⁵ See generally E. McKendrick, *The Creation of a European Law of Contracts: The Role of Standard Form Contracts and Principles of Interpretation* (2004).

1.19 *The Nature and Sources of Commercial Law*

1.19 Frequently, the parties to a contract do not set out all the terms in the contract itself but find it convenient to incorporate terms by reference to a variety of other documents, eg standard contract terms published by an independent body or group of institutions, a model code of practice or usage, a set of standard trade terms or definitions.

1.20 As we shall see, English law has a somewhat extended view of what constitutes a consensual undertaking, in the sense that a contract is considered to embrace not only express terms (including terms incorporated by reference) and terms implied in fact or from a prior course of dealing⁵⁶ but also rights and duties implied by law or by mercantile usage, which in other systems would be regarded as constituting independent, non-consensual norms.⁵⁷

2. *Uncodified custom and usage*

1.21 Of great importance as a source of obligation in commercial contracts are the unwritten customs and usages of merchants.⁵⁸ The impact of these on the content and interpretation of contract terms cannot be overstated. It is, perhaps, this feature above all which distinguishes commercial from other contracts, a distinction not formally adopted by the law.⁵⁹ The fertility of the business mind and the fact that a practice which begins life by having no legal force acquires over time the sanctity of law are key factors to which the commercial lawyer must continually be responsive. Is a particular document a document of title? The House of Lords or other appellate court may have said no, possibly more than once. But how long ago was the ruling given? Cannot it now be said, in another time, that the acceptance of this document as a document of title in mercantile usage is so entrenched as to justify according it legal recognition as such? Is a payment instrument outside the Bills of Exchange Act negotiable? In principle, yes, if so accepted by the mercantile community, which may happen immediately or only over time.

1.22 What is it that gives binding force to unwritten mercantile usage? Is it the express or implied adoption of the usage by the parties in their contract? Or does mercantile usage have independent normative force? The question has been much debated in the context of international commercial arbitration and the controversy as to the existence of an international *lex mercatoria*.⁶⁰ In some legal systems the binding force of mercantile usage does not depend on adoption by contract,⁶¹ but in the theory of English law a usage takes effect as

⁵⁶ See para 3.58.

⁵⁷ See below.

⁵⁸ See further para 3.59.

⁵⁹ A custom is a rule of a particular locality, whereas a usage is a settled practice of a particular trade or profession, but often the two terms are used interchangeably. See generally 32 *Halsbury's Laws of England* (5th edn, 2019), title 'Custom and Usage'.

⁶⁰ For a careful and authoritative examination of the issue, see O. Toth, *The Lex Mercatoria in Theory and Practice* (2017) and see also para 1.42.

⁶¹ See C. M. Schmitthoff, *International Trade Usages*, a research report prepared for the Institute of International Business Law and Practice of the International Chamber of Commerce (1987), pp 25 ff.