

# **Seller Beware!**

**An analysis of the implementation of “As Is” principle on Norwegian Saleform 93 under English law for sale and purchase of second-hand vessels: A case study of the *Union Power* decision and a subsequent English court decision, the *Hirtenstein***



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## **Abbreviations**

MOA	:	Memorandum of Agreement
NOR	:	Notice of Readiness
NSF	:	Norwegian Saleform
SI	:	Statutory Instruments
SGA	:	UK Sale of Goods Act (as amended)

# 1 Introduction

English law most likely is still and will continue to be prominent in the world of shipping. That is why an English court decision, especially one that is related to shipping, may be of significant importance to the world of the shipping industry and possibly having a great impact on the industry.

Fishing and navigation are the oldest uses of the sea. Approximately ninety-five percent of goods for international trade are seaborne.<sup>1</sup> Thus, ships still play important role in today's world transport industry. With life expectancy between 20 – 30 years ships can be categorized as long-term assets. Hence with a ship, many times will we encounter multiple transfers of ownership between many parties.

The most common ways for people to acquire a ship is by shipbuilding contracts (with shipyard as the seller and customer as buyer) and by purchasing a second-hand vessel.<sup>2</sup> However, the latter would represent a much quicker and cheaper alternative to a shipbuilding project. Admittedly, the process of buying and selling second-hand ships is becoming more popular and becoming a very important activity in shipping industries, one with potentially serious legal consequences.<sup>3</sup>

As in most shipping contracts, there are several standard forms for the purpose of sale and purchase transactions of second-hand vessels. The individual agreements are usually negotiated by exchanging amended versions of the electronic template and eventually

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<sup>1</sup> (Churchill and Lowe 1999) p.255

<sup>2</sup> Other ways of acquiring a ship, among others through shipbuilding contracts, second-hand purchase, auction, by obtaining a majority shareholding in a shipowning corporation etc.

<sup>3</sup> (Strong and Herring 2010) p.xix

consolidating all changes in a final document subject to approval or details.<sup>4</sup> This type of agreement usually referred as MOA, and among those standard form contracts the most popular standard form for sale and purchase of second-hand vessels is the NSF in particular the NSF 1993 version (“NSF 93”).<sup>5</sup>

Despite its popularity, virtually every one of their 16 clauses has proved to be a fertile ground for dispute between sellers and buyers.<sup>6</sup> On 13<sup>th</sup> December 2012, the English Court had made a controversial judgment regarding the relationship between the NSF 93 and the SGA in an English law governed MOA. It has always been the subject of some speculation as to whether the NSF (both 1987 and 1993 versions) is an “as is, where is” contract that excludes terms as to satisfactory quality and fitness for purpose, which are implied into contracts of sale by the SGA. Nevertheless with the recent decision in *Dalmare SpA v Union Maritime Ltd and Valor Shipping Ltd*<sup>7</sup> (“*Union Power*”) has now given a little authority to such speculation.

However, following to *Union Power*, a recent English Court decision in 2014 namely *Michael Hirtenstein and Il Sole Limited v. Hill Dickinson LLP* (the “*Hirtenstein*”),<sup>8</sup> has shed some doubt on the *Union Power* decision in regards to the application of the implied terms in “as is” contracts.

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<sup>4</sup> (Falkanger, Bull and Brautaset 2011) p.77

<sup>5</sup> The Saleform now has its latest revision in 2012. Many references claim the NSF as the most widely used for sale and purchase of second-hand vessel.

<sup>6</sup> (Strong and Herring 2010) p.xv

<sup>7</sup> *Dalmare SpA v Union Maritime Ltd & Valor Shipping Ltd* (The *Union Power*) [2012] EWHC 3537 (Comm) (13 December 2012)

<sup>8</sup> [2014] EWCH 2711 (Comm)



## 1.1 The research topic

The *Union Power* decision is maybe one of the landmark decisions of the century. The writer feels it is necessary to undertake an analysis study of the decision, in particular on how the court can reach and come to such decision, since it can also have possible implications for sale and purchase contracts more generally.

According to NSF 93, sales are undertaken on the basis of the pre-contractual inspection of the vessel by the prospective buyer, which is also covered by the promises of the seller to deliver it in the same condition as inspected. In addition the vessel shall also be delivered with the agreed classification notation maintained free of average damage affecting class, together with the usual drydocking clause. As such, it is assumed that the buyer will have no more rights of protection other than the aforementioned. However, it was almost universally accepted that the NSF and in particular the NSF 93 was able to exclude terms as to satisfactory quality and fitness for purpose, which are implied into English law-governed contracts of sale by the SGA. But through the *Union Power* decision, the English High Court has turned those retained understandings up side down and put this debate to rest as it has been held that the implied term of satisfactory quality and fitness purpose of SGA are indeed to be implied into a English law-governed MOA using the NSF.

In addition, the court went further on the decision and made a provisional view that the words “as is, where is” apparently also do not exclude the statutory implied terms. It only excludes the right to reject the vessel upon delivery due to breach of statutory implied conditions, but leaving unaffected the right to claim damages for the buyer. Therefore with the inception of this decision, the public should also pay more attention to the legal principle *Caveat Venditor* (Seller Beware) because apparently sellers can be pursued by the buyer alleging for breaches of statutory implied terms after delivery.

However a recent authority, namely the *Hirtenstein*, gave some contradictory views about the application of the implied terms on “as is” contracts. It was suggested that applying the

implied terms in “as is” contracts may be contrary to the expectations of ordinary business people and too generous to the buyer.

Thus, this thesis will analyse and focus on questions raised in the *Union Power* decision i.e. (i) whether NSF 1993 is an “as is, where is” contract with the effect of excluding the statutory implied terms as of satisfactory quality? And the comparison between the approach taken in the *Union Power* and the *Hirtenstein* decisions as to (ii) whether the words “as is”, if they had been included in the sale contracts, would have been sufficient to exclude the statutory implied terms as to satisfactory quality and fitness for purpose, from the said decisions. As well as (iii) how one can safely exclude the implied terms in the NSF in particular, and in other sale and purchase contracts under English law?

## **1.2 The purpose of the thesis**

Even though the NSF 93, together with its previous version, are used as boilerplates for the sale and purchase of second-hand vessels, this standard form has rather high potential to create disputes between sellers and buyers. This is maybe due to arbitration being the most frequently used dispute settlement forum in resolving disputes concerning sale and purchase of second-hand vessel using the NSF. As a result, the award given in the process will be confidential and exclusively intended to the disputing parties, leaving nothing to be learned for other players in the shipping industry in order not to repeat the same mistakes or to guide when considering how the terms of the NSF are drafted and interpreted. Therefore the industry does not have enough authority to refer to. This inability to learn from the disputes arose means that certain beliefs and practices associated with the use of the standard forms within the industry can apparently be incorrect.

This is what exactly happened in the *Union Power* case. The court unexpectedly concluded that statutory implied terms in the SGA did apply to contracts of sale of second-hand vessels using the NSF as standard forms which were governed by English law. A clear and unequivocal wording is apparently very much needed in order to exclude such statutory

implied terms. Furthermore, the judgment also has wider contractual implications extending beyond ship sale and purchase because the judge expressed a provisional view on the scope of the words “as is where is”, which appear frequently in contracts for the sale and purchase of goods generally and not merely contracts for the sale of second-hand ships.

Conversely, in the recent *Hirtenstein* decision the judge expressed a differing view on the meaning of the words “as is where is” and whether they are sufficient to exclude the implied terms of SGA as to satisfactory quality and fitness for purpose.

Therefore this thesis will look at those issues, and consider how these implied terms can be excluded or retained, depending on the intention of the parties. This thesis will discuss the courts’ material findings and highlight areas of consideration for those drafting or making use of the NSF form, or indeed an MOA of any type. So that readers, especially players in the industry, can be fully informed of the consequences of their choices and the documentation effectively sets down their agreement.

### **1.3 Method and sources**

The methodology that is used in writing this thesis is based on an analysis of primary and secondary sources in regards to the topic. The observation of relevant English law cases becomes a significant element of this thesis. The observation of relevant legal cases as regards to the topic is conducted in sequential order. However, as the court had rendered a significant outcome in the *Union Power* case, this thesis will give attention to the application of English law in the NSF 93. And English law shall provide the legal framework for the analysis of the topic with legal sources that are used as follows:

This thesis will heavily rely on the decision of the High Court of England by the honourable Mr. Justice Flaux between *Dalmare SpA v. Union Maritime Ltd & Valor*

*Shipping Ltd*, dated 13 December 2012.<sup>9</sup> In addition this thesis will also rely on and discuss a subsequent English law decision namely *Hirtenstein v. Hill Dickinson LLP*,<sup>10</sup> which shed some contradictory views about the application of implied terms in “as is” contracts. Finally as a supplementary resource for this thesis other decisions from common law jurisdiction regarding the application of the SGA’s implied terms, or “as is” principle in a sale contract will be used which the writer found to be interesting, relevant and of potential interest to the readers. This thesis is not meant to be an exhaustive observation of every decision connected to the topic: it focuses on the most influential judgements only.

As the case was rooted in the interpretation of a phrase in the NSF 93, it will substantially rely on the said NSF and also its predecessor as well as successor versions as legal sources.

Statutory acts, in particular the SGA, are further important legal sources for this thesis, as the discussion will significantly refer to this act.

Writings of scholars and practitioners on the *Union Power* case and *Hirtenstein* case, the NSF, as well as the SGA are also valuable resources in the writing of this thesis.

#### **1.4 Outline of the thesis**

Chapter 1 of this thesis comprises the introduction, thesis purposes, method and structure, and lastly the thesis outline.

Then, the rest of this thesis will be structured as follows:

- Chapter 2 of the thesis will provide a discussion about the relationship between the NSF 93 and the SGA;

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<sup>9</sup> [2012] EWHC 3537 (Comm)

<sup>10</sup> [2014] EWHC 2711 (Comm)

- Chapter 3 of the thesis will provide an analysis of the English law approach taken by the judge in the case of the *Union Power* decision;
- Chapter 4 of the thesis will provide an analysis of the approach that the judge in *Hirtenstein* case took in interpreting “as is, where is” in sale and purchase contracts and a discussion about “Entire Agreement” clause in the NSF 2012 as one of the solutions to safely exclude the statutory implied terms;
- Lastly, Chapter 5 of the thesis will provide conclusion and further suggestion.

## 2 Relationship between the NSF and SGA

### 2.1 Basic classification of terms

English law recognizes that not all contractual obligations are of equal importance to the parties. Breaches of certain types of terms constitute repudiatory breaches, while breaches of other terms only give the right to claim damages for the non-breaching parties. It is therefore necessary to determine the classification of terms for this purpose, to consider the type of term broken and therefore whether this breach is repudiatory.<sup>11</sup>

For the above purpose there are three basic types of terms:

- **Conditions** are important terms which are said “to go to the root of the contract”; if they are broken, the breach is generally regarded as repudiatory. The non-breaching party will have the option of terminating the contract for the future or affirming it, in addition to the remedy of damages. Conditions can be directly contrasted with warranties.
- **Warranties** are less important terms which do not “go to the root of the contract”; the breach of such a term can be adequately compensated with a remedy of damages. Accordingly, breach of warranty is not a repudiatory breach and there can be no option for the non-breaching party to terminate or affirm. The only remedy for the non-breaching party will be damages.
- **Innominate (or intermediate) terms** defy rigid classification but appear to lie somewhere between a condition and warranty and might best be described as the type of term which may be broken in a number of different ways, not all of which would be serious. Therefore, whether a breach of an innominate term constitutes a repudiatory breach, giving rise to the option to terminate or affirm, will depend upon the effects of the breach and whether these effects are serious. If the effects are serious, the breach

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<sup>11</sup> Poole (2012) p.290

will be repudiatory and there is an option to terminate or affirm; whereas if the effects are not serious, the non-breaching party will be limited to a remedy of damages.<sup>12</sup>

The parties to a contract may, by wording used in the contract, agree that certain terms are to have the status of conditions. Courts have the power to look at the context in which such terms are used to see if the parties really intended that any breach of such term (however minor) would entitle the innocent party to terminate the contract.<sup>13</sup> From the authority in *Schuler (L.) A.G. v. Wickman Machine Tool Sales Ltd.*,<sup>14</sup> the House of Lords ruled that merely because a term of a contract was described as a condition did not necessarily mean it was a condition, and justified its decision by reference to the true intention of the parties.<sup>15</sup>

It should also be noted that the description of a contractual term as a warranty may also not be determinative of the status of that term: the courts have the power to consider whether the parties really intended that no breach of such a warranty (however significant) could entitle the innocent party to terminate the contract.<sup>16</sup>

Therefore, condition and warranties may be identified by reference to legislation, express wording used in the contract in question, and decisions in court cases and arbitration proceedings.<sup>17</sup>

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<sup>12</sup> *Ibid.* p.289, 290

<sup>13</sup> (Goldrein, Hannaford and Turner 2008) p.79

<sup>14</sup> [1973] 2 Lloyd's Rep. 53; [1974] AC. 235 (H.L.)

<sup>15</sup> “*The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it; and if they do intend it the more necessary it is that they shall make that intention abundantly clear.*”

<sup>16</sup> (Goldrein, Hannaford and Turner 2008) p.79; see also *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H., The Hansa Nord* [1975] 2 Lloyd's Rep.445 at 457

<sup>17</sup> (Goldrein, Hannaford and Turner 2008) p.67

Nevertheless, terms amounted as conditions can be excluded by the parties in an agreement with express agreement-which must be inconsistent with the SGA, a course of dealing between the parties, and usage (i.e. custom of the trade) which binds both parties.<sup>18</sup>

## **2.2 The NSF**

### **2.2.1 Brief History and Development of the NSF**

The purpose of having standardized forms for the purpose of sale and purchase transactions of second-hand vessels, as well as for many other shipping contracts, is to save time and legal expenses compared with creating such a contract from scratch. The forms under which second-hand ships were historically bought and sold are now inevitably lost in the mist of history,<sup>19</sup> but the NSF was and always be one of the leading forms for sale and purchase of second-hand ships. The NSF is believed to have been first issued more than 100 years ago. The earliest revision of the form in English is a 1948 copy entitled *Memorandum of Agreement*.<sup>20</sup>

The NSF was revised and adopted by The Baltic and International Maritime Conference (“BIMCO”) in 1956.<sup>21</sup> It was subsequently revised from time to time to conform to legal development and the evolving industry practice. In general such revised versions more or less cover the same ground such as: the identity of the seller and the buyer; brief description of the vessel to be sold; price and required deposit as well as place of payment;

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<sup>18</sup> SGA section 55

<sup>19</sup> (Strong and Herring 2010), p.1

<sup>20</sup> *Ibid.*

<sup>21</sup> From 1956 the Saleform was revised five times, i.e. in 1966, 1983, 1987, 1993, and 2012.



vessel inspection and drydocking or underwater inspection; the sale of bunkers remaining on board; the requirement for a transfer document and a certificate of deletion; an undertaking that the vessel is free from encumbrances and maritime liens at the time of delivery; also consequences if either party fails to perform its obligation as well as provide for arbitration.<sup>22</sup>

The 1948 revision of the form was perhaps the most modest version compared to later revised versions, as each revision becomes somewhat longer. For example, the issue of condition of the vessel on delivery, which in recent years has become the largest cause of disputes between sellers and buyers, is only briefly referred to in the printed text of the 1948 revision as follows: “The vessel, with everything belonging to her, stores, etc. shall be taken over as she is and the Vendor shall not be held responsible for possible faults and deficiencies.” The 1956 and 1966 revisions of the form, in general did not fundamentally alter the contractual balance between the parties.<sup>23</sup>

However, the first major shift in the balance between the parties was incorporated in NSF 1983 - that the vessel be delivered with present class free of recommendations and providing for notification to the Classification Society of any matters coming to the seller’s knowledge prior to delivery, which upon being reported to the Classification Society would lead to withdrawal of the vessel’s class, or to the imposition of a recommendation relating to her class.<sup>24</sup>

In 1987 the NSF was again amended by the revision in NSF 1987. This version is 150 lines long, and it still does not aim to be comprehensive and leaves it to the parties to add such further clauses in an appendix as they require. The basic character of the NSF as an “absolute” sale agreement and the present tense nature of the language in Clause 11 of the NSF remained unchanged.

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<sup>22</sup> (Strong and Herring 2010), p.2

<sup>23</sup> *Ibid.*

<sup>24</sup> See Norwegian Saleform 1983 cl. 11

On February 1994, after 11 years with insignificant changes, finally the NSF underwent substantial amendments when the NSF 93 was first published.<sup>25</sup> This NSF was intended to be more comprehensive than its predecessors. It is 283 lines long and it includes provision for nearly all of the topics normally covered under a contract for the sale and purchase of second-hand vessels. Such increase is mainly caused by the extension of clauses 6 (Drydocking/Diver's Inspection) and 8 (Documentation). It now also contains definitions, while a number of capitalized terms in the main text remain undefined. In this version, the language in Clause 11 has been changed into past tense form.<sup>26</sup> In addition some of the definitions are considered less than satisfactory.<sup>27</sup>

Lastly, the latest version of the Norwegian Shipbrokers' Association standard MOA for the sale and purchase of second-hand vessels is the NSF 2012. It was nearly 20 years after the inception of the NSF 93. The growing and widespread practice of amending the printed form, often by including several detailed additional clauses shows that the NSF 93 was indeed in need of revision. The decision to revise the NSF 93 followed from consultation with the global second-hand ship sale sector, it was felt that the industry would benefit from a modest update of this widely-used agreement.<sup>28</sup> The general principles and structure of the NSF have been retained, yet amendments<sup>29</sup> have been made to better reflect industry practice and to clarify certain issues prone to ambiguity or dispute. Time will eventually tell how successful this NSF will be in replacing its predecessor.

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<sup>25</sup> (Strong and Herring 2010), p.44

<sup>26</sup> "..., *she shall be delivered and taken over as she was at the time of inspection, fair wear and tear excepted.*"

<sup>27</sup> See the definition of "Banking Days" and "in writing" or "written" in the Saleform 1993.

<sup>28</sup> (Saleform 2012 lansert! 2012)

<sup>29</sup> For example, an "Entire Agreement" clause has been inserted in this 2012 version which will result in any previous agreements (whether oral or in writing) between the parties being of no further effect as they will have been superseded by the signed MOA.

However, any version of the NSF may not always be appropriate or sufficient in all cases. Rather, NSF may be regarded as a useful platform which can readily be adapted to the circumstances of a specific transaction.<sup>30</sup> Therefore sometimes amendments to the MOA are needed to meet the objectives of the parties. In spite of that, the advantages of using NSF is that the form is more certain, predictable, and widely recognizable.

### 2.2.2 Express terms on NSF 93 concerning condition of ship

In addition to the above classification, under English law there also is no formal requirement for a sale contract to be made in writing. However, in commercial transactions it is both sensible and usual for the parties' contractual relationship to be put in writing. Second-hand ship sale contracts are invariably written down and the vast majority of such contracts are based on one of the industry standard forms in current use.<sup>31</sup>

The most relevant clause under the NSF 93 in our case is section 11 as it concerns the condition on delivery of the ship. This section is claimed to produce the most disputes between sellers and buyers. It has been numbered since the 1956 revision of the Saleform.<sup>32</sup> And the full wording of the section is as follows:

<i>"11. Condition on delivery</i>	216
<i>The Vessel with everything belonging to her shall be at the Sellers' risk and expense until she is</i>	217
<i>delivered to the Buyers, but subject to the terms and conditions of this Agreement she shall be</i>	218
<i>delivered and taken over as she was at the time of inspection, fair wear and tear excepted.</i>	219
<i>However, the Vessel shall be delivered with her class maintained without condition/recommendation*,</i>	220

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<sup>30</sup> (Goldrein, Hannaford and Turner 2008) p.84

<sup>31</sup> *Ibid.* p.67

<sup>32</sup> (Strong and Herring 2010) p.154

<i>free of average damage affecting the Vessel's class, and with her classification certificates and</i>	221
<i>national certificates, as well as all other certificates the Vessel had at the time of inspection, valid and</i>	222
<i>unextended without condition/recommendation* by Class or the relevant authorities at the time of</i>	223
<i>delivery.</i>	224
<i>"Inspection" in this Clause 11, shall mean the Buyers' inspection according to Clause 4 a) or 4 b), if</i>	225
<i>applicable, or the Buyers' inspection prior to the signing of this Agreement. If the Vessel is taken over</i>	226
<i>without inspection, the date of this Agreement shall be the relevant date.</i>	227
<i>*Notes, if any, in the surveyor's reports which are accepted by the Classification Society</i>	228
<i>without condition/recommendation are not to be taken into account.</i>	229 <sup>4</sup>

Based on the above, we can see that there are express terms regarding the condition of the ship, as follows:

#### 2.2.2.1 Maintaining vessel's class free from condition/recommendation

The requirement that the vessel be class maintained free of recommendations began life as an additional clause commonly added to NSF 1966.<sup>33</sup> This phrase has a consequence that a vessel can be delivered not in the same condition as when it was inspected (in a sense, in a better condition). This is because, for example, the seller had altered the condition of the vessel so as to comply with class condition/recommendation, if he had become obliged between inspection and delivery. Any existence conditions/recommendations must be deleted prior delivery. The same applies to conditions/recommendations which may have arisen at a later stage, e.g. in connection with inspections pursuant to clause 6

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<sup>33</sup> (Crookenden 2008)

(Drydockings/Divers Inspection).<sup>34</sup> As a consequence, there is a possibility for the seller to deliver the vessel in a better condition than when the vessel was inspected by the buyer.

The Court of Appeal in *Buena Trader*<sup>35</sup> held the clause to be satisfied as long as the vessel was in class without recommendations even if the vessel suffered from defects of which the sellers were aware, that had they been notified to the classification society, would have resulted in class being withdrawn or a recommendation imposed.

In addition to the decisions in the said *Buena Trader* and also *Alfred Trigon*<sup>36</sup> we can see the generally accepted interpretation of the obligation to deliver in Class is that this is a “paper obligation” which can only be satisfied by production of a certificate from the classification society that the vessel maintains her class, provided of course that it does not make any reference to outstanding recommendations.<sup>37</sup>

#### 2.2.2.2 Free of average damage affecting class

Previously this phrase was a common additional clause to the NSF. In 1993 this phrase became part of the MOA, as it was included in the NSF 93.<sup>38</sup> A vessel may have suffered damage which has not yet led to any reaction from class. This clause obliges the seller to have such damage repaired, provided that it can be categorized as “average damage affecting the Vessel’s class”.<sup>39</sup> From the decision of the *Alfred Trigon* we can see that this is to mean damage affecting class which had been caused by a peril ordinarily covered by

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<sup>34</sup> (Falkanger, Bull and Brautaset 2011) p.116

<sup>35</sup> *Compania de Navegacion Pohing SA v Sea Tanker Shipping (Pte) Ltd (the Buena Trader)* [1978] 2 Lloyd’s Rep. 325 CA

<sup>36</sup> *Piccinini v Partrederiet Trigon II (the Alfred Trigon)* [1981] 2 Lloyd’s Rep. 333 CA.

<sup>37</sup> Strong (2010) p.161

<sup>38</sup> (Crookenden 2008)

<sup>39</sup> (Falkanger, Bull and Brautaset 2011) p.117

insurance. In other words, the vessel must have sustained damage recoverable under ordinary hull insurance.<sup>40</sup> It does not, therefore, cover defects arising through wear and tear and general old age. This interpretation was also adopted by Bingham J. in *The Star of Kuwait*<sup>41</sup> and by Leggatt J. in *The Great Marine*<sup>42</sup>. This express term may cause the seller to deliver the ship in a better condition than the condition on inspection.

#### 2.2.2.3 Condition as at the time of inspection, fair wear and tear excepted

The requirement for the vessel to be delivered with a “clean record” may cause the seller to bear some risk for “fair wear and tear”.<sup>43</sup> This obligation has not given rise to much difficulty of interpretation but factual issues can arise as to what, in fact, was the condition of the vessel at the time of inspection and whether damage was due to fair wear and tear.<sup>44</sup> Also, after some time, the effects of wear and tear may be so extensive that recommendations will be imposed by class. This again places a duty to repair on the seller.

#### 2.2.2.4 Obligation to notify class of matter coming to seller’s attention

The Seller’s obligation to “notify classification society of any matter coming to their knowledge, prior to delivery, which may lead to recommendation against class” was introduced 1983 revision of the NSF. As a consequence of the decision in the *Buena Trader*, this wording was added in the NSF 1983 and NSF 1987.

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Lips Maritime Corp v. National Maritime Agency Co (the Star of Kuwait)* [1982] 2 Lloyd’s Rep. 641

<sup>42</sup> *Ateni Maritime Corp v. Great Marine Ltd (the Great Marine)* [1990] 2 Lloyd’s Rep. 250

<sup>43</sup> (Falkanger, Bull and Brautaset 2011) p.117

<sup>44</sup> (Crookenden 2008)

Disputes arose as to whether the sellers' obligation to notify arose in relation to defects coming to their knowledge from: the date of the contract; the last class inspection; buyer's inspection; or some other date.<sup>45</sup> These issues were resolved by the *Niobe*<sup>46</sup> in which the House of Lords held that there was no time limit as to when sellers became aware of a notifiable defect. The seller is obliged to note any defect throughout the whole procedure of sale including before the contract is written. The obligation is fulfilled on the date of delivery.

Unfortunately, this obligation for the sellers to notify class has been deleted from clause 11 NSF 93. And it also does not appear in NSF 2012. With this deletion, the buyers' position will be weakened as it reverts back to the position before 1983. However this obligation is still often added as an additional clause in NSF 93.

### 2.2.3 Classification of clause 11 of the NSF 93 and effect of breach

The authority as to whether a breach of an express term of clause 11 of the NSF 93 is a breach of a condition to delivery is not entirely clear. From the *Aktion*<sup>47</sup> that was held by Hirst J. we can see that obligations as to the vessel's condition similar to those now found in clause 11 NSF 93 do not amount to a conditions precedent to delivery but only innominate terms which would only entitle the buyer to reject if the breach is so serious that it deprives what the buyer supposedly received (benefit) from seller's performance as intended from the contract.

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<sup>45</sup> (Crookenden 2008)

<sup>46</sup> *Niobe Maritime Corp. v. Tradax Ocean Transportation SA (the Niobe)* [1995] 1 Lloyd's Rep 579

<sup>47</sup> *Aktion Maritime Corporation of Liberia v. S. Kamas & Brother Ltd. And Others (the Aktion)* 1 Lloyd's Rep 283

Hirst J. also held in the same case that NOR for delivery could be served even though the vessel was not ready for delivery at the time the notice was served. That part of his decision has been contradicted in the Court of Appeal in *Zegluga Polska v. T R Shipping*<sup>48</sup> and has in any event been superseded by a revision to the NSF which makes it clear that NOR can only be given when the vessel was ready for delivery.<sup>49</sup> Clause 5 under NSF 93 now provides that NOR can only be given when “the vessel is at the place of delivery and in every respect physically ready for delivery in accordance with this agreement.”

As well as reversing the effect of the decision in the *Aktion* as regards the NOR, the revision to clause 5 of the NSF 93 may also have reversed the effect of the decision as regards whether compliance with the clause 11 conditions of the NSF 93 is a condition precedent to delivery.<sup>50</sup> As a consequence it may also have reversed the buyer’s right in treating the contract in the event of a breach.

## **2.3 The SGA**

### **2.3.1 Brief introduction of the SGA**

The SGA received its Royal Assent on 6 December 1979 and came into force on 1 January 1980. It consolidates the law relating to the sale of goods. However, section 14 of the act that stipulates implied terms as to satisfactory quality or fitness for purpose were not brought into force until 19 May 1985.<sup>51</sup>

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<sup>48</sup> [1998] 2 Lloyds Rep 341.

<sup>49</sup> (Crookenden 2008)

<sup>50</sup> *Ibid.*

<sup>51</sup> See SGA section 14 (7), (8), and schedule 1 para.9; and SI 1983/1572



The SGA was originally named the Sale of Goods Bill. And it was drafted by Sir Mackenzie Chalmers in 1888. It was intended to only apply in the common law jurisdiction of England, Wales, and Ireland, but in the course of its passage through Parliament it was amended so as to extend its operation to Scotland.<sup>52</sup>

The SGA replaces the Sale of Goods Act 1893 and parts of a number of other enactments, and incorporated changes which had already been made in those Acts by amending legislation, principally the Consumer Credit Act 1974 section 192 (4) and Schedule 4 para.3; Unfair Contract Terms Act 1977 section 31(2) and Schedule 3, 4.<sup>53</sup>

Consequently, the SGA is expressed to be retrospective in its effect, so as to apply to all contracts of sale of goods made on or after 1 January 1894, when the Act of 1893 became operative. The wording of the SGA is not identical with that of the enactments which it consolidates, and in particular the definition of some statutory terms is altered. So far as concerns contracts made after 1 January 1980, there is no need to look beyond the substantive provisions,<sup>54</sup> but as regards contracts made earlier than that date, it is necessary in the case of particular sections to refer to the transitional provisions set out in Schedule 1.<sup>55</sup>

Since its enactment the SGA has been the subject of three amending acts, namely, the SGA, Sale and Supply of Goods Act 1994, and Sale of Goods (Amendment) Act 1995. It has also been subject to a number of minor statutory amendments.<sup>56</sup> Changes of much greater significance have been introduced by other legislation namely the Unfair Contract Terms Act 1977.<sup>57</sup>

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<sup>52</sup> (Bridge 2010) p.4

<sup>53</sup> (Bridge 2010) p.3

<sup>54</sup> SGA Section 1(4)

<sup>55</sup> (Bridge 2010) p.3

<sup>56</sup> *Ibid.* p.4

<sup>57</sup> *Ibid.*

The SGA, like its predecessor of 1893, applies to contracts for the sale of all types of goods.<sup>58</sup>

### 2.3.2 Classification of terms under the SGA

The parties to an agreement should bear in mind that in addition to the express terms set out in the contract, other terms may also be read and introduced into the contract even though they are not directly stated in written or spoken words. These terms (known as "implied terms") may be read into the contract as a result of applicable legislation.<sup>59</sup> The common law relating to the sale of goods was codified by the SGA. This SGA is one example of applicable legislation functioning as implied terms in a sale and purchase of goods contract, in particular second-hand vessels.

Just as express terms may be classified according to their relative importance, so some implied terms are also more important than others. In relation to the sale and purchase of second-hand vessels contracts, there are three SGA implied terms which are likely to be of most relevance:<sup>60</sup>

- Under section 13(1) of the SGA, a contract may be subject to an implied condition that the ship will correspond with the description given to her in the contract.
- By implication, under section 14(2) of the SGA, the ship must be of "satisfactory quality", this carries with it requirement that the ship must meet the standard that a "reasonable person" would consider satisfactory having regard to the description and price and "all other relevant circumstances". These other circumstances are not exhaustively listed and might include matters such as freedom from minor defects, durability and safety, and fitness for purpose.

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<sup>58</sup> *Ibid.* p.9

<sup>59</sup> (Goldrein, Hannaford and Turner 2008) p.67

<sup>60</sup> *Ibid.* p.67-68

- Under section 14 (3) of the SGA, a “fitness for purpose” condition may be implied into the contract. However, this condition will only apply where a ship is being sold in the course of business and where the purpose for which the ship is being purchased has been made known to sellers, unless it is unreasonable for buyers to rely on the sellers’ skill and judgment.

The above implied terms are treated as conditions of the contracts.<sup>61</sup>

However, some other types of terms are also reflected in the SGA, for example:

- Section 11(2) of the SGA represents a condition which gives rise to a right to reject the goods and treat the contract as repudiated. However where sellers are in breach of a condition, buyers may waive the condition or may elect to treat the breach of condition as a breach of warranty and not as a ground for treating the contract as repudiated;
- Section 61(1) of the SGA represents a warranty which gives rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated;
- Section 11(3) of the SGA says that whether a given contractual obligation is a condition or a warranty will depend in each case on the construction of the contract and an obligation may be a condition, although it is called a warranty in the contract. This represents innominate terms.

### 2.3.3 Characteristic of satisfactory quality

Under SGA section 14(2) goods are of “satisfactory quality” if they meet the standard that a “reasonable person” would regard as satisfactory. For second-hand goods, in this case second-hand vessels, it is not easy to assess their standard. Second-hand vessels may have been exposed to numerous hazards of the maritime world, and are bound to have some defects. Moreover, assessing the standard which a second-hand ship of a certain age and type should be expected to reach is something quite outside the judgement of a “reasonable

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<sup>61</sup> *Ibid.* p.79

person” unless knowledgeable about the shipping industry.<sup>62</sup> A more appropriate standard would be the expectations of a “reasonable buyer” of the ship as opposed to those of the particular buyer.<sup>63</sup>

Some guidance on the meaning of “satisfactory quality” may be derived from authorities on second-hand cars. In *Bartlett v. Sidney Marcus Ltd*,<sup>64</sup> the buyer of a second-hand car discovered serious defects in the clutch system a month after purchase. He claimed that the car did not meet the satisfactory standard. Lord Denning said that:<sup>65</sup>

*“...the car was far from perfect. It required a good deal of work to be done... But so do many second hand cars. The buyer should realise that... defects may appear sooner or later... Even when he buys from a dealer the most that he can require is that it should be reasonably fit for the purpose of being driven...”*

We should also note that price (“if relevant”) and “all other relevant circumstances” should also be put into account in assessing whether the goods are of satisfactory quality.<sup>66</sup> These may well be factors which militate against a ship being held to be of unsatisfactory quality, however it depends on the individual case.<sup>67</sup>

Malcolm Strong in *Sale of Ships: The Norwegian Saleform* expresses a view that some aspects of the goods which are to be assessed with reference to section 14(2)(B) of the SGA are difficult to apply to second-hand ships.<sup>68</sup> Furthermore he also views that in

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<sup>62</sup> (Strong and Herring 2010) p. 39.

<sup>63</sup> *Ibid.*, see also (Guest 2006) paras 11-031 and 11-032

<sup>64</sup> [1965] 1 W.L.R 1013

<sup>65</sup> *Ibid.* see at p.1017

<sup>66</sup> (Strong and Herring 2010) p.40

<sup>67</sup> See *Clegg v Olle Andersson (T/A Nordic Marine)* [2003] 2 Lloyd’s Rep 32 CA: yacht sold with an overweight keel was not of satisfactory quality.

<sup>68</sup> (Strong and Herring 2010) p.40

regards of the SGA section 14(2)(C) in particular letter (c) the word “ought to reveal” makes a scope for argument. The reasonable interpretation of this word is that, “*Buyer’s examination ‘if properly carried out’ ought to have revealed the defects in issue.*” Though in practice there could be difficulty in determining what a more thorough inspection would actually have revealed.<sup>69</sup>

#### 2.3.4 Characteristic of fitness for purpose

Characterisation of fitness for purpose is reflected in section 14(3) of the SGA. From that section and also by authority in *Stevenson v. Rogers*,<sup>70</sup> it may be said that the sellers of a second-hand vessel are selling the goods in the course of their shipping business, even if they only sell second-hand vessel at irregular intervals.

Subsequently, the next requirement for this fitness for purpose under the section is that the buyer should have made known to the seller any particular purpose for which the goods were being bought, this would usually be obvious in the context of the trade. However buyers that have a particular trade or voyage pattern in mind may not be disclosed to the sellers or referred to in negotiations.<sup>71</sup>

To succeed under this section, buyers must demonstrate that the sellers have not supplied goods “reasonably fit for that purpose”, in other words the purpose made known to the sellers. The fact that there is no precise authority in point makes apparent difficulty in application of this language to the sale of second-hand vessel. Yet from the case *Barlett v. Sidney Marcus Ltd* mentioned above, a second-hand car was reasonably fit for its purpose though requiring repairs. In a more maritime context, a camshaft supplied to a vessel which proved unsuited to the engine because of features peculiar to that vessel unknown to either

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<sup>69</sup> *Ibid.*

<sup>70</sup> [1999] 1 All ER 613

<sup>71</sup> (Strong and Herring 2010) p.41

party at the time, but which later worked satisfactorily in another vessel was fit for its purpose.<sup>72</sup>

However, in general, where buyers have tried to rely on the SGA implied terms they have preferred to base their case on allegation of unsatisfactory quality under section 14(2) rather than unfitness for purpose under section 14(3).<sup>73</sup>

## 2.4 Application of SGA Implied Terms into NSF

From the authority of *Ernst Behnke v. Bede Steam Shipping Company Ltd*<sup>74</sup> we can see that, under English law, vessels are categorized as goods that fall within the SGA as any other piece of machinery or equipment. In the absence of an effective term in the contract which clearly excludes their application, it is arguable that the statutory implied terms as to satisfactory quality and fitness for purpose will have application in a ship sale contract, unless these terms are inconsistent with the express terms of the contract in question.<sup>75</sup>

If the implied terms are held to apply, then application of the modified terms (with effect from 1994) to ships is not necessarily straightforward. To begin with, the implied term in the SGA section 14(2) applies to second-hand goods.<sup>76</sup> Furthermore, following the case of *Stevenson v. Rogers*, in which the Court of Appeal held that a sale of a fishing vessel was “in the course of business” and that habitual dealing was not required, means a “one off sale” was still “in the course of business”.

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<sup>72</sup> *Slater v. Finning Ltd* [1997] AC 473 HL; see also *Ibid.* p.41; see also (Guest 2006) paras 11-057, 11-058.

<sup>73</sup> (Strong and Herring 2010) p.41.

<sup>74</sup> See *Ernst Behnke v. Bede Steam Shipping Company Ltd* [1927] 27 Lloyd’s Rep 24 KBD

<sup>75</sup> (Goldrein, Hannaford and Turner, *Ship Sale and Purchase* 2012) p.255

<sup>76</sup> (Atiyah, Adams and MacQueen 2005) p.168

Traditionally, the general assumption is that the provisions of clause 11, especially with the words “as she was” (previously “as she is”), are able and sufficient to prevent the SGA implied terms from applying. Undoubtedly the position of the buyer will be significantly improved should the implied terms, in particular section 14 of the SGA - which according to its sub section (6) is regarded as “conditions”, apply to the MOA using the NSF.

However there are two views among key players and practitioners as to whether the SGA implied terms apply to the NSF, or whether the express terms in NSF are sufficient to exclude the SGA implied terms. Such views are as follows:

#### 2.4.1 NSF able to exclude SGA implied terms

The first view is the people who take the traditional assumption mentioned above, i.e. that NSF is able to exclude the application of the SGA implied terms. With this view the buyers of second-hand vessel will be subject to various significant limitations on their ability to bring claims against the sellers based on the quality of vessel that has been sold to them.

To begin with, in regards to application of the implied terms into the NSF, section 55 of the SGA lays down some following tests:

*"(1) Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Unfair Contract Terms Act 1977) be negated or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract;*

*(2) an express term does not negative a term implied by this Act unless inconsistent with it."*

From an old authority the 1929 case of *Lloyd Del Pacifico v. Board of Trade* (“*Lloyd Del Pacifico*”),<sup>77</sup> the Court of Appeal made findings that the phrase “with all faults and errors of description” in the sale contract of a second-hand ship prevented the application of the first part of section 14 of the SGA, even though it did not specifically decide that the SGA implied terms could not apply to such sale contract. The court was also not impressed by the buyer’s argument based on section 14 (2) of the SGA for the implied condition that the goods should be of “merchantable quality”. The court rejected such arguments by reference to the fact that the ship was sold to “class standards”.

This approach from *Lloyd Del Pacifico* would also be consistent with other authorities in the *Morning Watch*,<sup>78</sup> the *Brave Challenger*,<sup>79</sup> and the Saskatchewan Court of Appeal in *Macleod v. Ens*,<sup>80</sup> which have defined the term “as is” in a very broad manner which, if it is submitted, is sufficient to meet the requirement of an express agreement to negative the rights and liabilities which might be implied by the SGA.<sup>81</sup>

Malcolm Strong in his book mentioned above expresses a view that if the whole of the first two sentences of clause 11 in NSF 93 are considered, the case for inconsistency with the implied terms looks stronger. The first sentence makes it clear that the starting point is delivery of the vessel in the same condition as when inspected. This cannot reasonably be interpreted as connoting only a loss of the right to reject, as there is an express reference to the vessel’s condition which may well have been a factor in the price and terms which the parties have agreed. Furthermore he then said that the word “However” (in line 220) clearly qualifies the proposition in the first sentence by introducing specific standards which the

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<sup>77</sup> *Lloyd Del Pacifico v. Board of Trade* [1930] 36 Lloyd’s Rep.16.

<sup>78</sup> *Mariola Marine Corporation v. Lloyd’s Register of Shipping* [1990] 1 Lloyd’s Rep.547.

<sup>79</sup> *Indigo International Holdings Ltd and another v. The Owners and/or Demise Charterers of the vessel “Brave Challenger”* [2003] EWHC 3145.

<sup>80</sup> *Macleod v. Ens* [1983] 135 DLR 365

<sup>81</sup> (Strong and Herring 2010) p.35



vessel is to meet, i.e. delivery in Class without condition/recommendation and delivery free of average damage.<sup>82</sup>

In addition, the test for “quality” is fixed by reference to the actual condition of the ship at the time of the clause 4 inspection that states the following:

“4. Inspections	30
a)* The Buyers have inspected and accepted the Vessel's classification records. The Buyers have also inspected the Vessel at/in on	31 32
and have accepted the Vessel following this inspection and the sale is outright and definite, subject only to the terms and conditions of this Agreement.	33 34
b)* The Buyers shall have the right to inspect the Vessel's classification records and declare whether same are accepted or not within	35 36
The Sellers shall provide for inspection of the Vessel at/in	37
The Buyers shall undertake the inspection without undue delay to the Vessel. Should the Buyers cause undue delay they shall compensate the Sellers for the losses thereby incurred.	38 39
The Buyers shall inspect the Vessel without opening up and without cost to the Sellers.	40
During the inspection, the Vessel's deck and engine log books shall be made available for examination by the Buyers. If the Vessel is accepted after such inspection, the sale shall become outright and definite, subject only to the terms and conditions of this Agreement, provided the Sellers receive written notice of acceptance from the Buyers within 72 hours after completion of such inspection.	41 42 43 44 45
Should notice of acceptance of the Vessel's classification records and of the Vessel not be received by the Sellers as aforesaid, the deposit together with interest earned shall be released immediately to the Buyers, whereafter this Agreement shall be null and void.	46 47 48
* 4a) and 4b) are alternatives; delete whichever is not applicable. In the absence of deletions, alternative 4a) to apply.	49 50”

Therefore it is whether, at such time, the ship was of “satisfactory quality” or not. In other words, to impose an additional requirement that the ship must be of satisfactory quality is to negate the very purpose of the clause 4 inspection and the “as was” test, and is therefore inconsistent with the express terms of clause 11 of the NSF 93.<sup>83</sup>

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<sup>82</sup> (Strong and Herring 2010) p.37

<sup>83</sup> (Goldrein, Hannaford og Turner, Ship Sale and Purchase 2012) p.256

## 2.4.2 NSF insufficient to exclude the implied terms

Practitioners that are of this view contend that while clause 11 of the NSF does set out its own quality of benchmark, the express provisions do not go far enough to negate the application of the statutory implied terms.<sup>84</sup> In other words, it refers to the requirement for the strict construction of an exemption clause, so that if the contract does not in terms expressly exclude the application of the implied terms in the SGA, they should nevertheless apply.<sup>85</sup> Similarly, if it is possible to interpret clause 11 as not being inconsistent with the additional requirement that the ship be of satisfactory quality, then this ambiguity is sufficient in itself to demonstrate that the test under section 55 for the exclusion of the statutory implied terms has not been met.<sup>86</sup>

According to section 14 of the SGA, a term as to satisfactory quality is implied into a contract when “the seller sells goods in the course of a business”. In relation with that, from the authority in point as previously mentioned,<sup>87</sup> a case about a fisherman who sold his boat, it was held that the mere fact that a shipowner’s business is the chartering and trading of ships, and that a ship sale is only an occasional or unique activity does not mean that such a sale is not in the course of that shipowner’s business.

There is nothing in the SGA that limits the application of the implied terms to sale contracts of new goods, yet there is still little authority as to application of the implied terms to second-hand goods. However, from *Bartlett v. Sidney Marcus Ltd*,<sup>88</sup> it was held

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<sup>84</sup> *Ibid.*

<sup>85</sup> (Strong and Herring 2010) p.35-36

<sup>86</sup> (Goldrein, Hannaford og Turner, Ship Sale and Purchase 2012) p. 256

<sup>87</sup> *Stevenson v. Rogers* [1999] 1 All ER 613

<sup>88</sup> [1965] 1 W.L.R 1013

that statutory implied terms apply to second-hand goods in regards of the sale of second-hand car.<sup>89</sup>

Section 55 (1) of the SGA then contemplates that implied terms may be negated by express agreement, by the course of dealing between the parties, or by such usage as binds both parties to the contract. Nevertheless, these “course of dealing” and “usage” terms are notoriously difficult to prove.<sup>90</sup> Therefore in the absence of the said two means, the test then comes down to whether the statutory terms are inconsistent with express terms of the contract.

In contrast with the decision in *Lloyd Del Pacifico* mentioned above, an authority from *Chris Hill Ltd v. Ashington Piggeries*<sup>91</sup> held that a similar clause, “goods shall be taken with all faults and defects, damaged or inferior”, was held to exclude only the right to reject. It did not affect the right to claim damages for breach of implied terms. Compared with, the phrase “sold as seen and inspected” in relation to a second-hand car were held to exclude the implied warranty of merchantable quality under the previous version of the SGA (1893).<sup>92</sup> On the contrary, a different view was expressed in *Cavendish-Woodhouse Ltd v. Manley*,<sup>93</sup> in which “bought as seen” was held to mean simply that the customer had seen the goods. However both cases were concerned with offences under the Trade Descriptions regulation.<sup>94</sup>

In London arbitrations, the majority of the awards given have held the statutory terms to be implied into Norwegian Saleforms contracts.<sup>95</sup>

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<sup>89</sup> See (Bridge 2010) p.564

<sup>90</sup> (Crookenden 2008), see also (Strong and Herring 2010) p.36

<sup>91</sup> [1972] AC 441

<sup>92</sup> *Hughes v. Hall* (1981) RTR 431

<sup>93</sup> *Cavendish-Woodhouse Ltd v. Manley* 82 LGR 376

<sup>94</sup> (Crookenden 2008)

<sup>95</sup> *Ibid.*

In one arbitration award, the arbitrators reaction to the seller's argument about the words "as she was at the time of inspection" or "as she is at the time of inspection" in NSF 93 or NSF 87, as cited by Mr. Crookenden QC (one of the tribunal in the *Union Power* case) in his paper issued before the case arose,<sup>96</sup> was:

*"We also mention that the sellers' 'as is' argument has no appeal to us. Many sale and purchase contracts are on this basis but this is made clear by use of the well-known words 'as is', used by those involved in the ship sale and purchase market. No such words were in our contract."*

The above arguments were of the seller's that the terms of clause 11 and in particular the words "as she was at the time of inspection" have the same meaning as "as is". Mr. Crookenden QC in his aforesaid paper then said that if any case were to be run on the basis of a usage, then evidence of such usage would be required. He thought it was difficult to see how, if the standard wording of clause 11 is not inconsistent with the statutory terms, that a clause stating that the sale is on an "as is" basis is so. Thus, it may be that the arbitrators were intending to refer to some usage in the sale and purchase market as to the meaning of "as is". However he doubted to a great extent, that there is a sufficiently clear and universal meaning attached to the words in the market.

Mr. Crookenden furthermore considered that the arbitrators in the above-mentioned cases were correct to hold that the statutory implied terms applied to NSF contracts, and were not inconsistent with the express terms of the contract, and that any court would reach the same conclusion. The requirement that an express term must be "inconsistent" with the statutory terms in order to negate them is a difficult test to overcome. In particular:<sup>97</sup>

- The mere fact that the NSF includes detailed provisions regarding the condition of the vessel on delivery, which might imply an intention on the part of the contracting

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<sup>96</sup> *Ibid.*

<sup>97</sup> (Crookenden 2008)

parties not to include the statutory terms which overlap substantially with the express terms, is insufficient to exclude them;

- The provisions for inspection in clause 4 are not inconsistent with the statutory terms but do provide some protection for any defects which such inspection ought to have revealed;
- The provision in clause 11 that the vessel shall be taken over "as she is at the time of inspection" is not inconsistent with the implied terms in that it is not inconsistent with a right to claim damages for unsatisfactory quality or unfitness for purpose; and
- Even an additional clause that the vessel will be delivered "as is" would not in his view be inconsistent with the statutory implied terms. Either such a clause could be interpreted as a reference back to clause 11 or a mere truism. All goods are delivered "as is" at the time of delivery.

The clause held in the *Lloyd del Pacifico* case to exclude the statutory implied terms might well not now be held as sufficient. At that time there was no "inconsistency" test to overcome and although "without any allowance or abatement" might reasonably be understood to exclude any comeback for unsatisfactory quality, construed strictly, it could be limited to excluding abatement or reduction in price but not a claim for damages. On the other hand, the effect of *Christopher Hill Ltd v. Ashington Piggeries* (above) may also reasonably be argued as the decision did not intend to set out rigid propositions as to the implication of the statutory terms. Sale of toxic animal feedstuff represents a basic failure of the purpose of the agreement. Sale of a partially defective second-hand ship is not in the same category of contractual failure. On any view the sale of a second-hand ship is a highly unusual type of sale of goods contract.<sup>98</sup>

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<sup>98</sup> (Strong and Herring 2010) p.38

### **3 The *Union Power* decision**

#### **3.1 Background and facts of the case**

A dispute arose following the sale of a vessel, a 1994 built motor tanker “Calafuria”, which then named “Union Power” (the “Vessel”), for US\$7 million in 2009 between Dalmare SpA (the “Sellers”) and (1) Union Power Limited; (2) Valor Shipping Limited (the “Buyers”).

The Vessel and her records had been inspected by the Buyers in the usual way on 18 August 2009 in Piraeus and the Buyers’ surveyor found nothing of significance. They failed to pick up a reference in the classification records to an incident in October 2002 relating to damage to the no. 1 crankpin of the main engine.

The parties entered into an MOA based on the NSF 93 on 4 September 2009 with English law as prevailing law. As the vessel changed class upon transfer of ownership, it was delivered by a new classification society, ABS, to the sellers on 1 October 2009 at Tuzla, Turkey pursuant to the MOA. Hereupon a special survey was undertaken also by ABS. She was drydocked immediately after delivery, various repairs were carried out and the vessel’s third special survey was carried out. As they failed to take reference on that no. 1 crankpin, during that survey, they only opened the crankpin bearings of the no. 2 and 4 units and were found to be in satisfactory condition. On that basis, ABS credited all of the crankpins in good order. In addition the Vessel undertook a sea-trial and, apart from a minor oil leak, the main engine operated satisfactorily.

Just over a month later, the Vessel sailed from Tuzla to Malta on a ballast voyage and, only some 30 hours after she departed from Tuzla, the main engine broke down. On opening the crankcase, it was found that the no. 1 crankpin bearing had failed. The vessel was towed to

Greece for investigation and repairs and it was found that the crankpin was significantly undersize and oval.

The Buyers commenced arbitration proceedings in London to recover loss and damage suffered as a result of the above incident.

After hearing detailed factual and expert evidence, the tribunal (comprising Simon Crookenden QC, Michael Baker-Harber and Simon Gault) concluded that the ovality of the no. 1 crankpin was the cause of the main engine breakdown. The tribunal also found that the ovality had developed to such a state at the time of delivery that the crankpin bearing was likely to fail within a short period of normal operation of the main engine after delivery of the vessel.

The Buyers argued that, in those circumstances, the sellers were in breach of the MOA either because: (1) the ovality was “average damage affecting class” within clause 11; or (2) because there was a breach of the implied term as to satisfactory quality implied into the MOA by virtue of section 14(2) of the SGA.

The Sellers denied that any SGA terms were to be implied into the MOA. They argued that the terms of clause 11 were inconsistent with the SGA implied terms in that the vessel was sold “as she was”.

The tribunal rejected Sellers’ arguments and agreed with the Buyers’ on point (2) but rejected their argument on point (1) above, holding that the implied term as to satisfactory quality was to be implied into the MOA. Therefore the Sellers were in breach of that term and the Buyers’ claim succeeded in full.

Upon that decision the Sellers applied for, and on 21 August 2012, obtained permission to appeal on the following question of law:

*“Whether a term as to satisfactory quality is implied into the Contract / MOA by Section 14 of the Sale of Goods Act 1979?”*

For the purposes of that application, it was accepted by the Buyers that the above question of law was of general public importance as this question had arisen many times in London arbitrations but surprisingly had never been addressed directly by the English courts. Therefore The Honourable Mr. Justice Hamblen gave permission on the basis that the decision of the tribunal was open to serious doubt.

However, the Seller lost the battle again in this phase. The Court agreed with the tribunal and dismissed the appeal.

### **3.2 The Arbitral Award**

As the case was first brought before arbitration, the award given in the process was confidential and exclusively intended to the disputing parties. The arbitrators in the arbitration were Mr. Simon Crookenden QC, Mr. Michael Baker-Haber, and Mr. Simon Gault (“the tribunal”), and the award was given on 8 May 2012. However from the High Court decision<sup>99</sup> in paragraph [10] we can see the important part of the award (i.e. paragraphs [53] to [61]) which deals with the issue as to whether the terms in SGA section 14 are to be implied into an English law-governed MOA.

The tribunal in the proceedings suggested that at the outset the inconsistency test in section 55(2) of the SGA needs to be determined. That section 55(2) states that:

*“An express term does not negative a term implied by this Act unless inconsistent with it.”*

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<sup>99</sup> *Dalmare SpA v Union Maritime Ltd & Valor Shipping Ltd (The Union Power)* [2012] EWHC 3537 (Comm) (13 December 2012)



According to the tribunal the above section provides a statutory test as to whether the SGA implied terms are negated by express terms in the contract. Therefore the normal rules for the construction of a contract, by which a court or tribunal seeks to ascertain the presumed intentions of the parties from words they have used,<sup>100</sup> do not apply.

The tribunal considered the views taken in the cases of *the Morning Watch* and *the Brave Challenger* (mentioned above) that an accepted and understood meaning of the phrase “as is, where is” is that the purchaser takes a vessel as he finds it, or is a simply truism, meaning that clearly any vessel must be as it is and where it is on delivery. On the other hand, “as she was” phrase in Saleform 93 does not have the same meaning.

The phrase “as she was” under clause 11 of the SGA 93 was viewed by the tribunal to record that as the vessel remains in the possession of the sellers until delivery, the buyers were entitled to receive the vessel in the same condition as when inspected. And, save for wear and tear, where the vessel was subject to a class condition, recommendation, or an average damage affecting class, the seller is contractually obliged to repair and rectify the condition or recommendation prior to delivery.

The sale therefore, viewed by the tribunal, is not simply a sale of the vessel at the date of inspection. In that case, the phrase “as she was” can be read consistently with the other requirements of clause 11 despite the fact that those provisions can require the seller to deliver a vessel in a better condition than when inspected.

Consequently, it is difficult to see how SGA terms can be inconsistent with the “as she was” phrase in the NSF 93, as the SGA terms if implied can also require the seller to deliver a vessel in a better condition than she was when inspected. Therefore the tribunal concluded that the SGA terms are not inconsistent with the words “as she was” in clause 11

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<sup>100</sup> This is known as objective approach. English law uses this kind of approach to determine the existence of agreement (see Poole (2012) p.26-29).

of the NSF 93, and thus the SGA terms as to satisfactory quality are implied into the contract.

### **3.3 The two questions of law**

The judge in the High Court, the Honorable Mr. Justice Flaux, noted that the question “*whether a term as to satisfactory quality is implied into the Contract/MOA by section 14 of the SGA*” had arisen many times in London arbitrations but surprisingly had never been addressed directly by the English Court.

In deciding how to approach the question, the judge accepted the Buyers’ submission that this required two stages: **firstly**, to determine whether the MOA was, in fact, an “*as is*” or “*as is, where is*” contract (assuming that phrase has the effect of excluding the SGA implied terms); and **secondly**, if so, whether the term “*as is*” or “*as is, where is*” is sufficient to exclude section 14(2) of SGA. The judge referred to these as the “*narrow*” and “*wider*” issues respectively. Should the tribunal be right in its analysis, namely that the MOA was not equivalent to an “*as is, where is*” basis of contract, then the appeal must fail and the court would not have to decide the second wider question.

### **3.4 Interpretation of the phrase “As she was ...” in the NSF 93 before the decision**

Before the inception of this High Court decision, most scholars, practitioners, and market players in the world of the sale and purchase of second-hand vessels had the view that NSF 93 and its predecessors is an “*as is*” or “*as is, where is*” contract.<sup>101</sup> That second-hand ships

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<sup>101</sup> (Strong and Herring 2010) p.157; *see also* (Falkanger, Bull and Brautaset 2011) p.116: “*The starting point is that the sale is “as is”, see clause 11. ... the ‘as is’ stipulation is primarily connected with inspection as per clause 4 letters a and b (cf. lines 225-227).*”

are bought and sold to a class standard, not to a standard of reasonable quality. As a consequence the use of the phrase in clause 11 of the NSF 93 had the effect of excluding the implied condition of satisfactory quality as required by section 14(2) of the SGA.<sup>102</sup>

The main English case authorities for this position are the *Morning Watch*<sup>103</sup> and the *Brave Challenger*.<sup>104</sup>

Phillips J. set out his obiter views in the said *Morning Watch* decision as follows:<sup>105</sup>

*“The term ‘as is’ has clearly recognised meaning in a contract of sale. The purchaser takes the object sold as he finds it without any warranty as to quality or condition.”*

In addition, in the *Brave Challenger* Steele J considered the term “as is where is” to negative any implication of terms under section 14 of the SGA. Apparently a Canadian case *MacLeod v. Ens*<sup>106</sup> which was held a decade earlier, came to the same conclusion with the position as the *Brave Challenger*.

Even though the judicial views in the above *Morning Watch* and *Brave Challenger* can be said to have been given “orbiter”, meaning that they are not strictly part of the main reasons for the court’s decision, those decisions accord with generally accepted meaning of this term among English lawyers practising in this field: that the buyers take the vessel in the condition and state she was in at the point defined in contract, all faults included.<sup>107</sup>

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<sup>102</sup> (Mandraka-Sheppard 2013) ch. 11.9

<sup>103</sup> [1990] 1 Lloyd’s Rep. 547

<sup>104</sup> [2003] EWHC 3154

<sup>105</sup> [1990] 1 Lloyd’s Rep. 547 pp. 555-556

<sup>106</sup> [1983] 135 DLR 365

<sup>107</sup> (Strong and Herring 2010) p.157

It was believed that there would be difficulties in defining what the term “satisfactory quality” should properly mean in relation to the sale and purchase of a second-hand ship. Particularly where the sale is by reference to a classification standard which has been recognised by the court as a minimum standard only.<sup>108</sup> Furthermore, the words “as she is” are concerned with the Vessel’s condition and not her description. Therefore they have no effect on the implication of a condition as to compliance with description under section 13 of the SGA.<sup>109</sup>

### **3.5 Reasoning of the High Court Judge**

#### **3.5.1 The Narrow Issue**

In answering this narrow issue, namely whether the clause 11 of the NSF 93 was equivalent to an “as is, where is” basis contract (assuming that phrase has the effect of excluding the SGA implied terms), the judge stressed several important points as follows:

##### **3.5.1.1 The requirement of specific words**

Firstly, the judge agreed with the tribunal and made it clear that the correct starting point is that the section 14 implied terms of the SGA will apply to a contract for the sale and purchase of second-hand goods, including second-hand ships, as to any other English law contract for the sale of goods, unless the parties had expressly contracted out of those implied terms bearing in mind the requirements of section 55(2) of the SGA.<sup>110</sup> There is no room for any kind of presumption that the SGA implied terms are inappropriate to a commercial contract, nor even that they are easily excluded in a commercial contract.

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<sup>108</sup> *Ibid.* p.157.

<sup>109</sup> *Ibid.* p.158.

<sup>110</sup> *Ernst Behnke v. Bede Steam Shipping Company Ltd* [1927] 27 Lloyd’s Rep 24 KBD

However, if commercial parties wanted to exclude the statutory implied term, they were free to do so by express and clear words.

In relation to that, the judge pointed out that, as reiterated most recently by Rix LJ in the *Mercini Lady*<sup>111</sup> and Cooke J in *Air Transworld*,<sup>112</sup> that a clear language must be used in the contract, if the statutory implied terms which are conditions of the contract of sale not mere warranties,<sup>113</sup> are to be excluded.

The judge concluded and agreed with the tribunal that the obligation that the vessel was to be delivered “as she was at the time of inspection” was essentially saying that there should be no change in the condition of the vessel between the time of inspection and delivery. The phrase said nothing about what the sellers obligations are, either on inspection or delivery, in relation with the quality of the vessel. It was only directed to the possibility of

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<sup>111</sup> *Bominflot v. Petroplus Marketing (the Merciny Lady)* [2010] EWCA Civ 1145

<sup>112</sup> *Air Transworld Ltd v. Bombardier Inc* [2012] EWHC 243 (Comm). It was a case of sale of an aircraft. The contract of sale included a detailed and far ranging exclusion in these terms:

*“4.1 THE WARRANTY, OBLIGATIONS AND LIABILITIES OF SELLER AND THE RIGHTS AND REMEDIES OF BUYER SET FORTH IN THE AGREEMENT ARE EXCLUSIVE AND ARE IN LIEU OF AND BUYER HEREBY WAIVES AND RELEASES ALL OTHER WARRANTIES, OBLIGATIONS, REPRESENTATIONS OR LIABILITIES, EXPRESS OR IMPLIED, ARISING BY LAW, IN CONTRACT, CIVIL LIABILITY OR IN TORT, OR OTHERWISE, INCLUDING BUT NOT LIMITED TO A) ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND B) ANY OTHER OBLIGATION OR LIABILITY ON THE PART OF SELLER TO ANYONE OF ANY NATURE WHATSOEVER BY REASON OF THE DESIGN, MANUFACTURE, SALE, REPAIR, LEASE, OR USE OF THE AIRCRAFT OR RELATED PRODUCT AND SERVICES DELIVERED OR RENDERED HEREUNDER OR OTHERWISE.”*

<sup>113</sup> See Section 14(6) of the SGA

change in condition. On the other hand the term “as is where is” meant the state and condition as it is in and where it is in on delivery. Given such requirements for the sellers to attend conditions or recommendations, it would not be accurate to describe the sale in clause 11 of the NSF 93 as an “as is, where is” basis sales. Therefore they do not and cannot exclude the implied term as to satisfactory quality under section of 14(2) of SGA.

Moreover, the fact that the phrase “as she was” was capable of more than one interpretation, meant the phrase could not operate as an exclusion clause. The judge cited a reaction made by the arbitrators in another arbitration cited by Mr. Crookenden QC (one of the tribunals of this case in arbitration) in his aforementioned paper<sup>114</sup> as follows:

*“We also mention that the sellers’ ‘as is’ argument has no appeal to us. Many sale and purchase contracts are on this basis but this made clear by use of the well-known words ‘as is’ used by those involved in the ship sale and purchase market. No such words were in our contract.”*

In this case the judge said to have followed the strict approach to construction of terms alleged to exclude the statutory implied terms consistently adopted by the courts, up to and including the decision of Cooke J in *Air Transworld*, that “*the fact that even on the sellers’ best case the words must have more than one meaning is fatal to the sellers’ case that these words exclude the statutory implied terms.*” Such implied terms were considered as basic principle arising by operation of law, which are valuable to the buyers and which it should not be assumed would be lightly given up. The Sellers, however, did not challenge this principle which was asserted by the Buyers in the proceedings.

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<sup>114</sup> (Crookenden 2008)

### 3.5.1.2 Inconsistency with the implied terms issue

The judge then said to have agreed with the submissions of the Buyers' counsel that the obligation, as regards class in the second sentence of clause 11 of the NSF 93, do not impinge on the obligation to deliver a vessel in a satisfactory quality imposed by the implied terms, therefore the inconsistency test was not met. The obligations in regards to class in that clause 11 of the NSF 93 was indeed considered to complement or supplement the obligation to deliver the vessel in a satisfactory condition rather than being inconsistent with it.

This interpretation was considered by the judge as consistent with the principle, “*express conditions or warranties will normally be construed as additional to the implied terms.*”<sup>115</sup> Such express conditions or warranties were deemed as “*not qualifying the [implied condition] but inserted for the benefit of the buyer.*”<sup>116</sup>

### 3.5.1.3 Absence of cogent evidence of market custom

In the proceedings the Sellers also argued that the second-hand vessels sold pursuant to MOAs on Saleform were simply sold to a class standard, not a standard of satisfactory quality under the SGA, as is the market expectation. The judge was unimpressed with this argument and considered this as merely an unconvincing assertion, as the Sellers had chosen not to present evidence regarding custom and practice in the second-hand vessels' market. The judge noted that from the discussion in the textbook referred by the Buyers' counsel<sup>117</sup> the market does not speak with one voice on that issue, and the short answer for the expectation of market point is that if the language used in the contract has consequences as a matter of English law which “the market” did not intend, then the language used

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<sup>115</sup> (Bridge 2010) para. [11-068]

<sup>116</sup> *Bigge v. Parkinson* (1862) 7 H & N 955

<sup>117</sup> See (Goldrein, Hannaford and Turner, *Ship Sale and Purchase* 2008) para. [6.9.3]

should be changed to accord with that expectation. Indeed the latest NSF 2012 includes wording designed to make it clear that the statutory implied terms are excluded.

In addition according to section 55(1) of the SGA, aside from express agreement, the implied terms could also be excluded by evidence of course of dealing or usage. Course of dealing or usage is a matter of fact which must be proved by evidence. However to be of legal effect, custom or course of dealing must be certain, universal and considered by market participants as binding. On the other hand if any case were to be run on the basis of usage, then the evidence of such usage would be required. However, it is notoriously difficult to prove a “usage”.<sup>118</sup> Thus, one can say that to escape from the implied terms is not easy.

#### 3.5.1.4 Different meaning of “being in class” and a vessel is of “satisfactory quality”

The court noted that classification does not constitute a guarantee that proper technical standards are maintained at all times, or that the ship is free of significant damage or even that the ship is seaworthy,<sup>119</sup> this was considered by the judge as a basic reason to highlight the need for the protection by the implied terms. Bearing in mind that it is a basic principle arising by operation of law, which is valuable to the Buyers and which it should not be assumed would be lightly given up by the Buyers. However, parties are still at liberty to expressly exclude the SGA regime if they so wish.

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<sup>118</sup> (Strong and Herring 2010) p. 36; See also *Kum and another v. Wah Tat Bank* [1971] 1 Lloyd's Rep. 439 P.C.

<sup>119</sup> (Goldrein, Hannaford and Turner, *Ship Sale and Purchase* 2012) p.43



### 3.5.1.5 Buyers' position on the interpretation of "As she was"

As an alternative position the Buyers also relied upon the principle enunciated in *Christopher Hill Limited v. Ashington Piggeries Limited*<sup>120</sup> that the first sentence of clause 11 of the NSF should be read down as excluding the right to reject the vessel whilst not precluding the Buyers from claiming damages for breach of the implied term as to satisfactory quality. The clause under consideration in that case is provided as follows:

*"3. The goods to be taken with all faults and defects, damaged or inferior, if any, at valuation to be arranged mutually or by arbitration."*

The judge in that case, Davies LJ, stated in his decision that,

*"A clause of this nature must be read strictly, when it is put forward by one party as limiting or restricting what would otherwise be the ordinary legal right of the opposite party: as here, the plaintiffs' right to recover for the failure to supply goods corresponding with the contractual description. No authority needs to be cited for that well-established principle. The words of the clause are capable of being read, and should be read, as purporting (whether effectively or not, we need not to say to consider) to exclude the buyer's right to reject the goods for faults and defects; but not as purporting to exclude the buyer's right to recover from the seller compensation for any consequential damage ..."*

As this approach was approved by the House of Lords,<sup>121</sup> the Judge in the *Union Power* then expressed, that if the point had arisen for decision, he would have been prepared to read down the first sentence of clause 11 of the NSF 93 in accordance with this approach.<sup>122</sup>

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<sup>120</sup> [1969] 2 Lloyd's Rep 425 at 468

<sup>121</sup> *Dalmare SpA v Union Maritime Ltd & Valor Shipping Ltd (The Union Power)* [2012] EWHC 3537 (Comm) (13 December 2012) para.75

<sup>122</sup> *Ibid* para.76

### 3.5.1.6 Conclusion on the narrow issue

Under English law the sale of a ship, whether it is newly built or second-hand, is a sale of goods for the purposes of the SGA and accordingly the implied terms of the SGA apply to ship sales. The court agreed with the established law that a clear and unequivocal language must be used in order to exclude the statutory implied terms. It follows that the words “as she was” in the first sentence of clause 11 of the NSF 93 (line 218) merely recorded the requirement that the vessel be delivered in the same state as at the time of inspection, fair wear and tear excepted. In other words, the buyers were entitled to delivery of the vessel in the same condition as when inspected, and where the vessel was subject to a Class condition, recommendation, or an average damage affecting class as at the time of inspection the seller was contractually obliged to repair, rectify the aforementioned prior delivery.

On the other hand, the term “as is where is” meant the state and condition as it is in and where it is on delivery. There is no obligation to repair and rectify in a “as is, where is” sale.

Given that clause 11 of the NSF 93 required the sellers to attend to a condition, recommendation, or an average damage affecting class, they did not have the same impact as words such as “as is where is”. The court then concluded that, *“the words ‘as she was’, in the context of the first sentence of clause 11, are incapable of bearing the same meaning as the free-standing words ‘as is, where is’ in a sale contract, assuming for the purpose of the argument that those words do exclude the statutory implied terms.”* Hence, it is not an “as is” provision.

The judge agreed with the tribunal on this matter and this alone should have been enough to dispose the sellers’ appeal.

### 3.5.2 The Wider Issue

As the court had reached its conclusion for the narrow issue, it was not necessarily for the court to decide the second wider question, namely whether the words “as is” are apt to exclude the statutory implied terms as to satisfactory quality and fitness for purpose. However the judge made an orbiter comment in regards to the question that may have a persuasive value should the issue ever arise in the future.

In answering this question the court’s first approach was to deal with the Sellers’ submission that “as is”, in cases such as *The Morning Watch* is modern shorthand for “*the [vessel] shall be taken with all faults and errors of description*”, and also the clause in *Lloyd del Pacifico*.<sup>123</sup> Those cited cases by the Sellers were considered by the court to be an assertion only as no evidence had been put before the court by the Sellers about it or about the genesis of “as is”.

Furthermore as Davies LJ said in *Ashington Piggeries* in regards to the “all faults clause” that, “[*the ‘all faults’ clause*] is hallowed by antiquity, if by nothing else. Its words are obscure, and its interpretation gave rise to prolonged arguments.”, was considered by the court as hardly a promising start for a provision whose modern shorthand is said to exclude the statutory implied terms.

Secondly the judge mentioned, that should the exclusion operate it is not encompassing everything, as from a reference cited by the judge the words “as is” or “as she is” are only concerned with the condition of the vessel not with her description.<sup>124</sup> So it is only excluding the implication of section 14 of the SGA and not section 13 of the SGA as to compliance with description. However the fact of absence of some customary meaning, that was still considered by the judge, did not explain how such words are sufficiently clear

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<sup>123</sup> “*with all faults and errors of description*”

<sup>124</sup> (Strong and Herring 2010) pp.157-158, para.14-10

to exclude conditions as to satisfactory quality and fitness for purposes implied by section 14 of the SGA. From the said reference cited by the judge it can be seen that the words “as is” are not a term of art.

Thirdly, even if the argument that the words “as is” are correct to have the effect of excluding the SGA implied terms, the fact that those implied terms are condition; as well as that the “as is” words do not have a customary meaning; and also are not a term of art, it will make a confusion and paradox toward the authorities on the need for clear words to be used to exclude statutory implied condition. Such arguments were successfully argued in the *Air Transworld*, while unsuccessfully argued in *The Mercini Lady*. Those examples were considered to have suggested that such words had different meaning than what the Sellers had contended.

The judge noted there were no English cases authorities that considered whether the phrase “as is” is inconsistent with the statutory implied terms in the light of section 55 (2) of the SGA. The aforementioned cases namely, *The Morning Watch*, *The Brave Challenger*, and the *Ashington Piggeries* were not of assistance to the issue. Similarly neither were the Canadian cases,<sup>125</sup> even though they certainly suggest that the term “as is” does normally exclude the statutory implied terms completely. However, like *The Morning Watch* and *The Brave Challenger*, in the absence of some customary meaning they do not analyse how the words “as is” can be said to be sufficiently clear and equivocal to exclude the statutory implied terms.

However the court did not agree with the Buyers’ submission that the words “as is” do not exclude the implied terms at all, saying that it deprives the words of any real meaning and reduces them to the truism identified by the tribunal at paragraph [56] of the award. Then finally the court leaned towards the approach of the Court of Appeal in the *Ashington Piggeries* case which says that all the words “as is” do, is exclude the right to reject the

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<sup>125</sup> *Macleod v. Ens* (1983) 135 DLR 3d 365; *Smith v. Lasko* [1987] 5 WWR 412; *Radul v. Daudrich* [1983] 6 WWR 278.

vessel, but leave unaffected the right to claim damages for breach of the implied condition as to satisfactory quality. The court viewed that as the context of the statement by Phillips J in *The Morning Watch*.<sup>126</sup>

In conclusion as the principle and approach of interpretation of the clause in the *Ashington Piggeries* above was approved by the House of Lords, the judge in the *Union Power* then decided a provisional view that “as is” provision should be read down as excluding the right to reject the vessel, whilst leaving the right to claim damages for breach of the implied terms as to description, satisfactory quality, and fitness for purpose unaffected.

### **3.6 Discussion**

The *Union Power* decision was the first decision on the application of the SGA implied terms to NSF 93. Before this decision, there was a firm understanding in the market that the buyers get what they see, subject to vessel being in a class, and free of average damage affecting class. But from this decision we can see that apparently the standard wording in clause 11 of the NSF 93 (in particular in its first sentence: “... as she was ...”) was deemed to be insufficient to exclude the implied terms under the SGA. Both the arbitral tribunal and the court made clear that this wording did not, in and of itself, exclude the statutory implied terms, and found that such wording was only part of a temporal obligation to deliver the vessel in the same condition as she was at the time of inspection. No obligations of the sellers were mentioned in those words, either on inspection or delivery, in regards of the quality of the vessel. Unfortunately the fact that the Sellers complied with this obligation (the damage to the crankpin existed already at the time of the inspection and at the time of delivery), and that the vessel remained in class, was not considered to be inconsistent with the implied terms of the SGA as to the vessel being of satisfactory quality.

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<sup>126</sup> See footnote no. 105 above.

In addition, the Sellers argued that market expectation towards the issue was that second-hand vessels are bought and sold to a class standard and not a standard of reasonable quality. The judge expressed doubt as to whether the market spoke with one voice on that issue, noting that no evidence of market practice had been provided before the court. Given the fact that the words “as she was” were capable of more than one interpretation and also that the sellers had not sought to adduce evidence on the issue, such words could not operate as an exclusion clause.

The court also gave a provisional view in regards with the “as is, where is” (or similar wording such as “with all faults” or with all faults of description and errors of description” or “without warranty”), might not be enough to exclude a seller’s statutory liability under the SGA. This wording will only exclude the right to reject a vessel but leaves the right to claim damages for breach of statutory implied terms of satisfactory quality and fitness for purpose unaffected. This conclusion surely reduces the nature of the said implied terms from conditions to warranties. Consequently, the best course of action for a prudent seller wishing to exclude statutory quality regime under the SGA is to include express and unambiguous wording to the effect that such implied terms are excluded from the agreement between the parties.

One other thing that is considered as remarkable and controversial by practitioners was that the judge refused to allow the seller to appeal this judgement to the Court of Appeal, with consequence that no appeal was possible.<sup>127</sup> It is an issue of some general concern that, under English law, in cases involving an appeal from an arbitration award, a High Court Judge can both decide a matter of the present type and determine whether his judgement can be reviewed by a higher court.<sup>128</sup>

Moreover it is difficult to imagine how the standard of “satisfactory quality” will be set up or applicable for a second-hand vessel that has been in trading for decades.

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<sup>127</sup> (Herring and Khan 2013); See also (Curtis 2013)

<sup>128</sup> (Curtis 2013)

However a judge in a Norwegian Court may have a different approach in resolving the above case. The former managing director of Nordisk, Mr. Georg Scheel, said in one article<sup>129</sup> that, “*While these judgements may be logical and well-reasoned from a legal point of view, a Norwegian court would normally give considerable more weight to information about the perception of the legal position in the market, and assume that the parties intended to make a contract in accordance with this general understanding.*” He continued to say, “*In England, such commercial arguments seem to be of lesser importance, and the requirements for submitting evidence of a relevant market practice seem to be stricter than in Norway.*” Looking to his comments, it seems that Norwegian court would apply subjective approach in determining the existence of agreement.

Note that in *The Rainy Sky*,<sup>130</sup> the UK Supreme Court confirmed the principle laid down in *Wickman v. Schuler*<sup>131</sup> that, if the words of a contract have an ambiguous meaning, the court will interpret them in a manner that most accords with "business common sense". There is no requirement for a party to prove that the alternative interpretation is entirely unreasonable. It seems that this approach was not replicated, both in arbitration and in the High Court in the *Union Power* case.

The relevance of this decision extends beyond ship sale and purchase contracts, since the SGA may well imply terms into all “as is” contracts for the sale and purchase of goods governed by English law, unless expressly excluded. This decision also enlarges the rights of the buyer beyond the express terms contained in NSF 93 and also other sale and purchase of goods contracts.

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<sup>129</sup> (Mulrenan 2013)

<sup>130</sup> *Rainy Sky SA and others v. Kookmin Bank* [2011] UKSC 50

<sup>131</sup> [1973] UKHL 2

## **4 Interpretation of “As is, where is” in subsequent English Court decision of *Hirtenstein* case and the Entire Agreement provision in the MOA**

### **4.1 Interpretation of “As is, where is” in subsequent English Court decision, the *Hirtenstein***

The *Union Power* case has sparked some controversy, given that it seemed to run contrary to the commercial expectations. Following the said decision, there has been a recent new English court decision namely *Michael Hirtenstein, Il Sole Limited v. Hill Dickinson LLP*<sup>132</sup> (the “*Hirtenstein*”), which contradicts the decision made in the *Union Power* in interpreting the term “As is, where is”.

The main issues in the dispute are actually not relevant to the *Union Power* case. However what is of interest is the Judge’s observation on the meaning of “as is, where is” and the decision in the *Union Power*.

#### **4.1.1 Brief overview on the *Hirtenstein* decision and background of the case**

This case was about a dispute arising from a Cayman Island businessman, Michael Hirtenstein in relation to the purchase of a second-hand motor yacht, namely *Il Sole*, for £ 3.6 million from UK property developer Christian Candy. The yacht *Il Sole* had been sold to a company of which Mr. Hirtenstein was the beneficial owner. Mr. Hirtenstein agreed to buy the yacht “as is, where is”, and planned to propose to his girlfriend on board.

The transaction was arranged in a short timeframe. The yacht was offered to Mr. Hirtenstein on 12 July 2010. And just one day after that Mr. Hirtenstein instructed his

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<sup>132</sup> [2014] EWHC 2711 (Comm)



solicitors, Hill Dickinson, to act for him and requested that the sale to be completed by 16 July 2010.

Notwithstanding the short time scale, the transaction was successfully completed by 14:14 on 16 July 2010. An hour or so afterwards, there was a major failure of the yacht's starboard engine. Substantial repair works were needed.

Mr. Hirtenstein sought to recover his losses first from Mr. Candy (the selling company having been liquidated) and then from his solicitors on the grounds of negligence.

The *Il Sole* had been purchased from its previous owner, Candyscape Ltd., a special purpose company in turn owned by a Mr Candy. Although the yacht had been sold on an "as is, where is" basis, Mr. Hirtenstein's solicitors (the "Defendants") had been able to negotiate a limited warranty from Candyscape Ltd., promising that the yacht was in "good" mechanical condition. However, Mr Hirtenstein's potential claim for breach of warranty against Candyscape Ltd. was, in reality, worthless. The yacht had been the company's only major asset, and it was now in liquidation.<sup>133</sup>

However, Mr. Hirtenstein had been told by the Defendants, not long after contractually committing himself to buy the yacht, that a personal guarantee from Mr. Candy had been obtained. It was said that this guarantee covered Candyscape Ltd.'s warranty that the yacht was in good mechanical condition.

And so it was that Mr. Hirtenstein instituted proceedings against Mr Candy, claiming under the guarantee. However, in preparing that claim, the Defendants realised that they had made a mistake. Contrary to what they had previously believed, it transpired that the guarantee did not cover Candyscape Ltd.'s warranty. Any claim against Mr. Candy under the guarantee, because that warranty had been breached, would fail. Mr. Hirtenstein

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<sup>133</sup> (Scrivener 2014)

accordingly started proceedings against the Defendants, arguing that they had negligently failed to obtain a guarantee which was wide enough to apply to breaches of the warranty.

The Defendants, represented by Nigel Tozzi QC and James Leabeater of 4 Pump Court, accepted that they were negligent in having thought that there was a personal guarantee from Mr Candy wide enough to cover Candyscape Ltd.'s warranty. However they denied that Mr Hirtenstein had suffered any loss. They argued that, even if they had asked for a guarantee which covered the warranty, Mr. Candy would not have provided one.

In giving judgment, Leggatt J. agreed that the defendants had been negligent in thinking there was a guarantee which applied to the warranty. Whilst a reasonably competent solicitor could have decided to not seek a guarantee from Mr. Candy, so as to ensure the transaction successfully went ahead, such a solicitor would also have told Mr. Hirtenstein of this decision. That had not happened here, and a breach of duty was established.

This conclusion was, however, only a pyrrhic victory for Mr. Hirtenstein. Leggatt J. went on to find that, even if the Defendants had asked for a guarantee which covered the warranty, Mr. Candy would not have given one. Since Mr. Hirtenstein would have gone ahead with the transaction even had he known there was no such guarantee, the Defendants' negligence had not caused any loss and therefore the plaintiff was entitled to judgment for only nominal damages.<sup>134</sup>

#### 4.1.2 Interpretation of "As is, where is" in the *Hirtenstein* decision

Although the main issues in the dispute are actually not relevant to the *Union Power* case, what is interesting is the court's interpretation of the "as is, where is" phrase in approaching the issues of liability and causation of the case. The sale was affected by a Memorandum of Agreement on the Mediterranean Yacht Brokers Association ("MYBA")

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<sup>134</sup> *Ibid.*

standard terms, which expressly excludes every “*representation, condition or warranty...implied by statute*”. Such wording makes no prospect that any term as to satisfactory quality could be implied by virtue of the SGA. The judge saw an opportunity to comment on the controversial judgment, namely the *Union Power*, regarding the implication of such terms where a sale is expressed to be on an “as is, where is” basis.

The judge’s observation on the meaning of “as is, where is” is expressed in paragraphs 51-56 of the decision.<sup>135</sup>

Firstly the court noted that, the Yacht was offered for sale to Mr. Hirtenstein, and he agreed in principle to buy it “as is, where is”. Leggatt J regarded that phrase as self-explanatory and clearly signified that the buyer would acquire the Yacht in whatever condition the boat was in at the time of purchase with no right to complain subsequently if the boat should turn out to have any defect.

This was considered by the court as the exact interpretation that Mr Hirtenstein understood as he explained in evidence, “*I didn't know at the time what in the boat world that meant from a legal standpoint. I took it ... almost like a property sort of thing, where I would be buying it with the way it is. ... I am buying it with its beauty and the warts.*”<sup>136</sup>

The court also noted that Mr Hirtenstein's understanding was also apparent at the time. In an email which Mr Hirtenstein sent to Mr. Candy on 12 July 2010 at 11.13, he confirmed his agreement to buy the Yacht on Mr Candy's terms and emphasised his enthusiasm for the deal by stating: “*My word is as good as a signed contract.*” Mr Hirtenstein went on to say, “*Let me know your thoughts or what subtleties I may want to know about the boat since I understand I am taking her 'as is, where is'.*”<sup>137</sup>

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<sup>135</sup> *Michael Hirtenstein, Il Sole Limited v. Hill Dickinson LLP* [2014] EWHC 2711 (Comm)

<sup>136</sup> *Ibid.* para 52

<sup>137</sup> *Ibid.* para 53

Leggatt J at this point took that Mr Hirtenstein here to be acknowledging that he was taking the risk of any fault in the Yacht's condition and appealing to Mr Candy as a fair and honourable person to tell him of any fault or imperfection known to Mr Candy of which a buyer would want to be aware.

Mr Hirtenstein's understanding of what it meant to buy the Yacht "as is, where is" was shared by a solicitor who is very experienced in this field, namely Mr. Lawson. It would appear also to have been consistent with the general understanding in the yacht trade. That was evidenced by a standard form of addendum to the MYBA MOA which is used for "as is, where is" sales. This addendum provides that the buyer waives any right to a sea trial or condition survey and that *"all express or implied warranties or conditions statutory or otherwise are hereby excluded"*.

The judge then referred to the provisional view expressed in the *Union Power* case by Flaux J that the words "as is" when included in a contract for the sale of goods are not by themselves sufficient to exclude the conditions as to satisfactory quality and fitness for purpose implied by the Sale of Goods Act, and only exclude the right to reject the goods for breach of those conditions. Leggatt J further stated that, *"In a contract between commercial parties such an interpretation would seem to me to be generous to the buyer. Drawing such a distinction between the right to reject and the right to damages and treating the words "as is" as excluding the former but not the latter seems to me most unlikely to reflect the expectations of ordinary business people or to be an interpretation that would occur to anyone other than an ingenious lawyer."*<sup>138</sup>

The judge then concluded the discussion and settled without hesitation that Mr. Hirtenstein, Mr Candy, their solicitors, and the broker all understood that buying the Yacht "as is, where is" meant that Mr. Hirtenstein would get the Yacht in its existing condition, good or bad, with no subsequent recourse against the seller for any fault which the Yacht might turn out to have.

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<sup>138</sup> *Ibid.* para.55

## **4.2 Implication of the outset of *Hirtenstein* decision**

The *Hirtenstein* decision seems to support the view that the terms “as is” or “as is where is” are terms of art when it comes to sale of goods contracts, and that such terms are inconsistent with any right of recourse in regards to the condition of the goods, they are therefore inconsistent with the statutory implied terms under section 14 of the SGA.

However, the *Union Power* is still an authority for the issue that the words “as she was” in clause 11 of the NSF 93 are not the same as “as is, where is” and do not of themselves exclude the SGA implied terms. Nevertheless, since neither the judge in the *Union Power* case nor in the *Hirtenstein* case gave decisive judgments, the question as to whether “as is, where is” on its own is sufficient to exclude SGA remains unclear. As a result the public still have no clear authorities in regards to this matter and on what are the buyers’ rights in the event of breach in a “as is” contract.

Given the uncertainty until there is a binding decision, the best possible course is still to expressly exclude the statutory implied terms of satisfactory quality and fitness for purpose, if that is intended by the parties.

## **4.3 The Entire Agreement Clause in the NSF 2012**

### **4.3.1 Introduction**

Many scholars and practitioners consider and suggest that the NSF 2012 version as a solution to the ambiguity of the issue - whether the clause 11 in the NSF 93 is sufficient to exclude the SGA implied terms as to satisfactory quality and fitness for purpose, because the NSF 2012 version has the so-called Entire Agreement clause.

Under the NSF 2012, the Entire Agreement clause is expressed in clause 18. The full wording of the clause is as follows:

<i>“18. Entire Agreement</i>	<i>400</i>
<i>The written terms of this Agreement comprise the entire agreement between the Buyers and</i>	<i>401</i>
<i>The Sellers in relation to the sale and purchase of the Vessel and supersede all previous</i>	<i>402</i>
<i>agreements whether oral or written between the Parties in relation thereto.</i>	<i>403</i>
<i>Each of the Parties acknowledges that in entering into this Agreement it has not relied on and</i>	<i>404</i>
<i>shall have no right or remedy in respect of any statement, representation, assurance or</i>	<i>405</i>
<i>warranty (whether or not made negligently) other than as is expressly set out in this Agreement.</i>	<i>406</i>
<i>Any terms implied into this Agreement by any applicable statute or law are hereby excluded to</i>	<i>407</i>
<i>the extent that such exclusion can be legally made. Nothing in this Clause shall limit or exclude</i>	<i>408</i>
<i>any liability for fraud.</i>	<i>409”</i>

This Entire Agreement clause has just been inserted in the NSF 2012 and did not appear in NSF previous versions including in the earlier NSF 93. However it is not entirely clear whether the reason for inserting this Entire Agreement clause was as a response to conform with the market expectation, namely that the second-hand vessels sold pursuant to MOAs on Saleform were simply sold to a class standard, not a standard of satisfactory quality under the SGA. Yet the revision of the NSF 93 was made and it was considered by the public as an improvement of the NSF 93.

#### 4.3.2 The purpose of the Entire Agreement clause in the NSF 2012

In the *Union Power* decision the judge agreed that one of the two routes for the parties of sale contracts to be able to have contracted out the implied terms under the SGA is by using a clear and unequivocal statement of an alternative regime as to quality, which was wholly inconsistent with the section 14(2) implied term as to satisfactory quality, such as an entire agreement clause.<sup>139</sup>

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<sup>139</sup> *Dalmare SpA v Union Maritime Ltd & Valor Shipping Ltd* (The Union Power) [2012] EWHC 3537 (Comm) (13 December 2012) para.24

From clause 18 of the NSF 2012 we can conclude that the purposes of the Entire Agreement clause in the NSF 2012 are as follows:

*Firstly*, the lines 401 – 403 of clause 18 in NSF 2012 provide that the terms of the contract shall supersede all previous oral or written agreement between the parties in relation to the sale and purchase of the ship. Therefore the two main purposes of the provisions in these lines are to prevent the presumption that the written contract contains all of the terms of the agreement from being displaced, and also to prevent one of the parties from relying on pre-contract statements or documents to add to, vary, or contradict the term of the written contract (for example, by contending that a pre-contractual statement or document creates a collateral warranty or some other form of side agreement).<sup>140</sup>

*Secondly*, lines 404 – 406 of the clause are designed to exclude the liability of a party for pre-contractual representation that has not been incorporated as terms of the sale contract or commonly know as “mere representation” in legal terms. Nevertheless, these non-reliance provisions may not be effective if, for example, the author of the representations actually knew that its counterparty was relying on pre-contractual representations not set out in the contract. This reinforces the need for an express exclusion of liability in relation to pre-contractual representations not set out in the contract, in addition to a non-reliance provision. These lines seek to address both the non-reliance point and to expressly provide that neither party shall have any right or remedy in respect of pre-contractual statements that are not expressly set out in the contract. However this clause 18 will not operate to exclude or limit any liability of fraud.<sup>141</sup>

And *lastly*, lines 407 – 409 seek to exclude any terms that might otherwise be implied into the contract by operation of applicable statute of law. While the provision has been drafted in general terms as to reflect the aim of the NSF to be able to work under any system of

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<sup>140</sup> (Goldrein, Hannaford and Turner, *Ship Sale and Purchase 2012*) p.253

<sup>141</sup> *Ibid.* pp.254-255.

law, its inclusion is intended specifically to address the terms as to satisfactory quality and fitness for purpose implied by the SGA.<sup>142</sup>

#### 4.3.3 Implication of the Entire Agreement clause of the NSF 2012 towards the issue of excluding the statutory implied terms of the SGA

With the outset of the NSF 2012 in February 2012 containing the Entire Agreement clause in clause 18, in particular in lines 407 – 409, it is viewed that this version of NSF is able to exclude the SGA regime. Further to that because of its alleged effectiveness, it is also considered that parties can also adopt the wording in this clause 18 of NSF 2012 in the NSF 93 to exclude the SGA implied terms, if they wish to use the NSF 93.

Accordingly sellers who use the NSF 2012 with its standard clause 18 should be safe from the risk of claims from the buyer in relation to defects coming to light after delivery. Conversely, buyers of second-hand vessels that would like to rely on the statutory implied terms will need to amend the NSF 2012 to include such terms.

According to NSF 2012 Explanatory Notes, the Entire Agreement clause in NSF 2012 should remove the uncertainty concerning the sale of ships under English law and a potential obligation on the sellers to ensure that the vessel is of a “satisfactory quality and fit for purpose”, a difficult obligation to meet, as well as under any other applicable law which could otherwise open up for implied warranties. Therefore it should effectively exclude the implied terms of the SGA.<sup>143</sup>

However until there is a decisive judgment from the court, it is difficult to be 100% certain on the issue of whether clause 18 effectively excludes the implied terms of the SGA.

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<sup>142</sup> *Ibid.* p.255.

<sup>143</sup> (Saleform 2012 Explanatory Notes n.d.)



## 5 Conclusions and Further Suggestions

### 5.1 Conclusions

In light of the above discussion towards the problem matters raised, we can sum up the following:

1. The *Union Power* case is an authority for the proposition that the words "as she was" in section 11 of the NSF 93 are not the same as "as is, where is" and do not of themselves exclude the SGA implied terms. From the said decision the judge agreed that the starting point was that the sale of a ship is a sale of goods for the purposes of the SGA and accordingly the implied terms of the SGA apply to ship sales, unless it is expressly excluded. The court agreed with the established law that a clear and unequivocal language must be used in order to exclude the statutory implied terms.

Furthermore, the words "as she was" in clause 11 of the NSF 93 are a necessary part of a sentence which is recording the obligation to deliver the vessel in the same condition as she was when inspected. Such words are part of a temporal obligation which arises because, usually, there will be a period of time between inspection and delivery. No obligations of the sellers are expressed by those words, either on inspection or delivery, as regards the quality of the vessel. On the other hand, the phrase "as is, where is" means that the purchaser takes a vessel as he finds it, or in other words, clearly a vessel must be as it is and where it is on delivery.

In addition, the further obligations of the sellers in clause 11 to repair, rectify or delete the vessel prior to delivery of a class condition, recommendation, or an average damage affecting class, where the vessel was subject to any of them can be read consistently with other requirements of clause 11 of the NSF 93. Similarly the SGA regime, if implied, can also require the seller to deliver a vessel in a better condition

than she was when inspected. Such consistency made the inconsistency test set out in the section 55(2) irrelevant.

Therefore the Judge concluded that the words “as she was” in the context of the first sentence of clause 11, are incapable of bearing the same meaning as the free-standing words “as is, where is” in a sale contract, assuming for the purpose of the argument that those words do exclude the statutory implied terms. Admittedly statutory implied terms as to satisfactory quality and fitness for purpose are implied into the NSF 93 through Section 14 of the SGA.

2. With the inception of the *Hirtenstein* decision, now we have two contradictory judgements regarding whether the words “as is”, if they had been included in the sale contracts, would have been sufficient to exclude the statutory implied terms as to satisfactory quality and fitness purpose.

In the *Union Power* the judge expressed a view that there was considerable force in the argument of the buyer that the words “as is” are not expressly inconsistent with the statutory implied terms so as to exclude them. Conversely, the judge felt that to interpret them as not excluding the implied terms at all would deprive them of any real meaning. Therefore the judge expressed a provisional view that the words would exclude the right to reject the vessel but leaving the right to claim damages for breach of implied terms unaffected. This view surely reduces the weight of statutory implied terms from conditions to warranties.

On the contrary, in the *Hirtenstein* the judge viewed the phrase “as is, where is” as self-explanatory and clearly signified that the buyer would acquire the Yacht in whatever condition the boat was at the time of purchase, with no right to complain subsequently if the boat should turn out to have any defect. He considered that the judge’s provisional view in the *Union Power* was generous to the buyer and that treating the phrase “as is” as excluding the right to reject the vessel, but not the right to

claim damages for breach of the implied terms, was unlikely to reflect the “expectation of ordinary business people.” The *Hirtenstein* case therefore supports the view that the terms “as is” or “as is where is” are “terms of art” when it comes to contracts for the sale of goods. Further that such terms are inconsistent with any further right of recourse in respect to the condition of the goods, as well as that they are therefore inconsistent with the implication of warranties under section 14 of the SGA.

3. Since both of decisions in the *Union Power* or in the *Hirtenstein* were provisional and indecisive the best possible course to exclude the statutory implied terms of satisfactory quality and fitness for purpose is still by using a clear, express, unequivocal and unambiguous wording as in the case of *Air Transworld*,<sup>144</sup> or by a clear and unequivocal statement of an alternative regime as to quality which is wholly inconsistent with the implied terms in section 14(2) of the SGA, such as an entire agreement clause, if that is intended by the parties.

## 5.2 Further Suggestions

In regards to the current situation where there are two English Commercial Court cases with apparently contradictory view points, both buyers and sellers should exercise caution when entering into sale and purchase agreements.

In case of a situation where a buyer wishes to have the protection of the SGA it is recommended that the sale and purchase contract is concluded on the NSF 93, in which case in the event there is a post-delivery default they will be able to sue for damages to the sellers. Alternatively, the buyer can conclude the sale and purchase contract using the NSF 2012 version, but exclude clause 18 so that they can still sue damages to the seller for post-delivery breach.

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<sup>144</sup> [2012] EWHC 243 (Comm)

Conversely, in the event that the seller wishes an immunity from being sued by buyers for post-delivery breach as regards to satisfactory quality and fitness for purpose, it would be prudent for sellers to expressly exclude the statutory implied terms of the SGA (Section 14), by expressly contracting out as in the case of the detailed clause considered by Cooke J in *Air Transworld Ltd*,<sup>145</sup> or by a clear and unequivocal statement of an alternative regime as to quality which is wholly inconsistent with the section 14(2) of the SGA, such as an entire agreement clause. It is also safer for the parties to conclude the sale and purchase contract by using MOA based on an unamended NSF 2012 (or perhaps to amend it to make it even clearer) where the seller cannot face claims for unsatisfactory quality and fitness for purposes under English law. The 2012 version of the Norwegian Saleform purports to do that by means of a general exclusion of all implied terms under clause 18.

However the effectiveness of NSF 2012, in particular its clause 18, in excluding the statutory implied terms as to satisfactory quality and fitness for purpose under SGA still needs to be tested by a future English Court decision. Until then it is difficult to be 100% certain on the issue of whether clause 18 effectively excludes the implied terms of the SGA.

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<sup>145</sup> [2012] EWHC 243 (Comm); see also footnote no. 112 above.

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