

International Recent Developments: United Kingdom

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The purpose of this Article is to provide an overview of some important cases relating to charterparties and carriage of goods by sea decided in the United Kingdom during 2019. Given the nature of this Article, the selected cases are discussed only briefly, while some additional cases decided in 2019 are referred to in the footnotes.¹

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1. Other important shipping cases decided by the English courts in 2019 include *Alize 1954 v. Allianz Elementar Versicherungs AG* (The “CMA CGM Libra”) [2019] EWHC (Admiralty) 481, [2019] 1 Lloyd’s Rep. 595 (reviewing whether a defective passage plan rendered the vessel unseaworthy); *Aprile Spa v. Elin Mar. Ltd.* (The “Elin”) [2019] EWHC (Comm) 1001, [2020] 1 Lloyd’s Rep. 111 (deck cargo and exclusion clauses); *Classic Mar. Inc. v. Limbungen Makmur Sdn Bhd* [2019] EWCA (Civ) 1102, [2020] Lloyd’s Rep. 178 (examining the impact of charterparty force majeure clauses on assessment of damages); *Sveriges Angfartygs Assurans Forening* (The Swedish Club) v. *Connect Shipping Inc.* (The “Renos”) [2019] UKSC 29, [2019] 2 Lloyd’s Rep. 78 (discussing constructive total loss and measure of indemnity under a hull and machinery insurance policy incorporating the Institute Time Clauses Hulls (1/10/83)); *Suez Fortune Invs. Ltd. v. Talbot Underwriting Ltd.* [2019] EWHC (Comm) 2599, [2019] 2 Lloyd’s Rep. 485 (examining burden of proof under a war risks marine insurance policy); *Alianca Navegacao e Logistica Ltda v. Ameropa SA* (The “Santa Isabella”) [2019] EWHC (Comm) 3152 (reviewing choice of route and care for cargo under a voyage charterparty); *Quiana Navigation SA v. Pac. Gulf Shipping (Sing.) Pte Ltd.* (The “Caravos Liberty”) [2019] EWHC (Comm) 3171 (assessing the duration of the owner’s right to withdraw the vessel for failure to pay hire where the charterers also withheld hire in part in a previous installment); *Tankreederei GmbH & Co KG v. Marubeni Corp.* (The “Amalie Essberger”) [2019] EWHC (Comm) 3402 (analyzing the meaning of “supporting documents” in a demurrage claim); *Delta Kanaris Special Mar. Enter. v. Elemento Ltd.* [2019] EWHC (Comm) 2875 (freezing the charterer’s assets with a worldwide freezing injunction); *Rubicon Vantage Int’l Pte Ltd. v. KrisEnergy Ltd.* (The “Rubicon Vantage”) [2019] EWHC (Comm) 2012 (involving chartering guarantees); *Eleni Shipping Ltd. v. Transgrain Shipping BV* (The “Eleni P”) [2019] EWHC (Comm) 910 (reviewing time charterparty interpretation and capture by pirates); *Globalink Transp. & Logistics Worldwide LLP v. DHL Project & Chartering Ltd.* [2019] EWHC (Comm) 22 (discussing freight forwarders and the freight rule); *Nautical Challenge Ltd. v. Evergreen Marine (UK) Ltd.* [2019] EWHC (Admiralty) 163 (assessing recoverable damages in a collision action where both vessels were at fault and where the owner of one of the vessels was impecunious); *Boskalis Offshore Marine Contracting BV v. Atl. Marine & Aviation LLP* (The “Atlantic Tonjer”) [2019] EWHC (Comm) 1213, [2020] 1 Lloyd’s Rep. 171 (reviewing the interpretation of a payment clause under the *BIMCO Supplytime 2017 Charter Party for Offshore Support Vessels*); *Bilgent Shipping PTE Ltd. v. ADM Int’l Sarl* (The “Alpha Harmony”) [2019] EWHC (Comm) 2522 (involving the cancellation of a voyage charterparty on the grounds that a valid notice of readiness had not been given in time); *Navalmar UK Ltd. v. Ergo Versicherung AG* (The “BSLE Sunrise”) [2019] EWHC (Comm) 2860 (analyzing construction of general average guarantees).

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I. Charterparties

A. *The Obligation to Keep the Vessel in Class During the Term of the Charter*

Last year saw an important Court of Appeal decision, *Silverburn Shipping (IOM) Ltd. v. Ark Shipping Co. (The “Arctic”)*,² regarding the classification of a contract term requiring the charterer to keep the vessel in class throughout the charter period. On October 17, 2012, a bareboat charterparty on an amended standard Barecon 89 form was entered into between the owners and charterers, whereby the owners bareboat chartered their tug *Arctic* for a period of fifteen years.³ At clause 9A, the charterparty required the charterer to keep the vessel “with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times.” In Box 10, it was stated that the vessel was to be classed by Bureau Veritas.⁴

The vessel was delivered to the charterers on October 18, 2012.⁵ On October 31, 2017, the vessel arrived at the Caspian port of Astrakhan, Russia, for repairs and maintenance. Before entering a drydock for repairs, on November 6, 2017, her class certificates expired some five years after her last special survey.⁶ Just over a month later, on December 7, 2017, the owners terminated the charterparty. The termination notice relied, inter alia, on the vessel’s class having expired contrary to clause 9A of the charterparty and the charterer having failed to maintain the vessel in a good state in accordance with good commercial practice.⁷

Following the charterer’s refusal to return the vessel, denying any breach, the owners commenced arbitration proceedings on an urgent basis with a view to obtaining a partial award for a declaration that their termination was lawful. The owners requested, inter alia, an order for delivery up of the vessel pursuant to section 48(5) of the Arbitration Act 1996.⁸

2. *Silverburn Shipping (IOM) Ltd. v. Ark Shipping Co. (The “Arctic” I)* [2019] EWCA (Civ) 1161, [2019] 2 Lloyd’s Rep. 603 (Eng.).

3. *Id.* at [1], [2019] 2 Lloyd’s Rep. at 604.

4. *Id.* at [2], [8], [2019] 2 Lloyd’s Rep. at 604-05.

5. *Id.* at [14], [2019] 2 Lloyd’s Rep. at 606.

6. *Id.* at [16], [2019] 2 Lloyd’s Rep. at 606.

7. *Id.* at [17], [2019] 2 Lloyd’s Rep. at 606.

8. *Id.* at [18], [2019] 2 Lloyd’s Rep. at 606.

The tribunal dismissed the owners' application on two main grounds:

- (1) The obligation under clause 9A of the charterparty only required the charterers to reinstate expired class certificates "within a reasonable time"⁹ and
- (2) The obligation was not a condition of the charterparty, entitling the owners to terminate.¹⁰

Since the owners appealed the tribunal's award, these two points of law came before Carr J for review. As regards the first issue, Carr J did not hesitate to hold that the tribunal erred in finding that the classification obligation was only an obligation to reinstate expired class certificates within a reasonable time.¹¹ The obligation was held to be an absolute one.¹²

Drawing guidance from Rix LJ's judgment in *B.S. & N. Ltd. (BVI) v. Micado Shipping Ltd. (Malta) (The "Seaflower")*¹³ and the learned author of *Bareboat Charters*,¹⁴ Carr J further took the view that, conceptually, there was a "natural and ready" distinction between a vessel's physical condition/maintenance and her classification.¹⁵ Unlike the former, the latter was a matter of status, the breach of which was readily and objectively ascertainable. In support of this, she also relied on (a) the structure and wording of the clause, and (b) the difficulties in marrying an obligation to take immediate action to have repairs done with a classification obligation, the breach of which might be wholly unrelated to any need to carry out repairs.¹⁶

For the purposes of dealing with the second issue, the judge referred to a number of cases where the courts provided valuable guidance on the distinction between conditions, innominate terms, and warranties.¹⁷

9. *Id.* at [22], [2019] 2 Lloyd's Rep. at 607.

10. *Id.*

11. *Silverburn Shipping (IOM) Ltd. v. Ark Shipping Co. (The "Arctic" II)* [2019] EWHC (Comm) 376 [44], [2019] 1 Lloyd's Rep. 554, 564 (Eng.).

12. *Id.* at [66], [2019] 1 Lloyd's Rep. at 568.

13. *Id.* at [41], [2019] 1 Lloyd's Rep. at 564 (citing *B.S. & N. Ltd. (BVI) v. Micado Shipping Ltd. (Malta) (The "Seaflower")* [2001] 1 Lloyd's Rep. 341, 347-48 (Eng.)).

14. *Id.* at [39], [2019] 1 Lloyd's Rep. at 564 (citing MARK DAVIS, *BAREBOAT CHARTERS* para. 11.3 (2d ed. 2005)).

15. *Id.* at [41], [2019] 1 Lloyd's Rep. at 564.

16. *Id.* at [43], [2019] 1 Lloyd's Rep. at 564.

17. *Id.* at [46]-[52], [2019] 1 Lloyd's Rep. at 564-66 (first citing *Bunge Corp. v. Tradax Export SA* [1981] 2 Lloyd's Rep. 1 (HL) (Eng.); then citing *The Seaflower* [2001] 1 Lloyd's Rep. at 350-51; then citing *Spar Shipping AS v. Grand China Logistics Holding (Grp.) Co. (The "Spar Capella," "Spar Vega" and "Spar Draco")* [2016] EWCA (Civ) 982 [52]-[53], [58]-[59], [62],

Minding not to construe a clause as a condition too readily, she nevertheless concluded that the classification obligation was indeed to be construed as a condition of the charterparty.¹⁸ One of the main grounds for her decision was certainty: to classify the classification obligation as a condition carried clear and important advantages in terms of certainty.¹⁹

Following Carr J's decision, the charterers appealed to the Court of Appeal. The sole question on the appeal was whether the classification obligation contained in clause 9A was a condition or an innominate term.²⁰ Overturning Carr J's decision, the Court of Appeal unanimously found that the term was an innominate term both "textually and contextually."²¹ The main pillars of the decision were, *inter alia*, as follows:

- (1) Only one kind of breach of the classification obligation was possible: either the vessel was in class or she was not. Although a significant factor, this was outweighed by a number of others.²²
- (2) Found in the middle of clause 9A, the classification obligation was considered to be closely connected with the maintenance obligations stated therein. Construing clause 9A as a whole, the Court of Appeal took the view that it would be wholly exceptional for such a term regarding physical maintenance, extending over the entirety of a charter period, to amount to a condition.²³
- (3) Treating the class obligation as a condition would bring about "disproportionate consequences destructive of a long-term contractual relationship."²⁴
- (4) Absent a provision to that effect, a continuing obligation in a charterparty regarding the vessel's physical state is typically not construed as a condition.²⁵

[93], [2016] 2 Lloyd's Rep. 447, 457-60, 466 (Eng.); and then citing *Cehave M.V. v. Bremer Handelgesellschaft m.b.h. (The "Hansa Nord")* [1975] 2 Lloyd's Rep. 445, 457 (AC) (Eng.).

18. *Id.* at [54], [2019] 1 Lloyd's Rep. at 566.

19. *Id.* at [62], [2019] 1 Lloyd's Rep. at 567.

20. *The Arctic I*, [2019] EWCA (Civ) 1161 [2], [2019] 2 Lloyd's Rep. 603, 604 (Eng.).

21. *Id.* at [53], [2019] 2 Lloyd's Rep. at 612 (quoting *Wood v. Capita Ins. Servs. Ltd.* [2017] UKSC 24 [13]).

22. *Id.* at [57], [2019] 2 Lloyd's Rep. at 612.

23. *Id.* at [58]-[59], [2019] 2 Lloyd's Rep. at 612-13.

24. *Id.* at [81], [2019] 2 Lloyd's Rep. at 616. A contrary view was taken on this matter by Carr J at the first instance, who was of the opinion that to treat the classification obligation as a condition did not engage the risk of permitting trivial breaches to have disproportionate consequences. See *The Arctic II*, [2019] EWHC (Comm) 376 [62], [2019] 1 Lloyd's Rep. 554, 567 (Eng.).

25. *The Arctic I*, [2019] EWCA (Civ) at [60], [2019] 2 Lloyd's Rep. at 613.

Although discussed in the context of a bareboat charterparty, the decision provides clear rules and guidance that can be applied to other forms of a charterparty. Under English law, while the obligation of seaworthiness has always been classified as an innominate term,²⁶ the legal position regarding class was considered to be different and complex. In *Routh v. Macmillan*, a statement regarding the ship's class at the time of the contract conclusion was classed as a condition.²⁷ The decision was followed by a line of English cases, establishing the principle that a statement about a vessel's class is a condition, provided that it does not involve a promise that she will remain in class throughout the entire charter period.²⁸ The Court of Appeal's decision in *The "Arctic"* has now made it clear that an obligation with a promise that the vessel will remain in class throughout the charter period is presumed to be an innominate term unless a contrary intention is made clear in the charterparty.²⁹

The "Arctic" gives a clear warning that, in a modern battleground of an interpretative dispute regarding the treatment of a class obligation, the real question no longer lies between certainty and non-certainty. Following Hamblen LJ's decision in *Spar Shipping AS v. Grand China Logistics Holding (Group) Co. (The "Spar Capella," "Spar Vega" and "Spar Draco")*,³⁰ the Court of Appeal in *The "Arctic"* was minded not to place too much emphasis on certainty in order to avoid a presumption that terms are conditions, particularly in the case of a continuing obligation in a long-term charterparty.³¹ With this approach, the court also steered clear of the risk of permitting trivial breaches to have disproportionate consequences.

While the impact of the decision is likely to be far-reaching, the decision does not provide a panacea in the case of an interpretative dispute regarding the treatment of a non-continuing obligation. In such cases, desire for certainty will potentially triumph over the perceived benefits of classifying obligations as innominate terms.

26. See *H.K. Fir Shipping Co. v. Kawasaki Kisen Kaisha, Ltd. (The "Hong Kong Fir")* [1962] 2 QB 26, [1961] 2 Lloyd's Rep. 478 (Eng.).

27. *Routh v. Macmillan* (1863) 159 Eng. Rep. 310, 315 (Eng.).

28. See, e.g., *The Seaflower*, [2001] 1 Lloyd's Rep. 341, 350-51 (Eng.); *Cosmos Bulk Transp. Inc. v. China Nat'l Foreign Trade Transp. Corp. (The "Apollonius")* [1978] 1 Lloyd's Rep. 53, 61-62 (Eng.).

29. *The Arctic I*, [2019] EWCA (Civ) at [62], [2019] 2 Lloyd's Rep. at 613.

30. *Spar Shipping AS v. Grand China Logistics Holding (Grp.) Co. (The "Spar Capella," "Spar Vega" and "Spar Draco")* [2016] EWCA (Civ) 982, [2016] 2 Lloyd's Rep. 447 (Eng.).

31. *The Arctic I*, [2019] EWCA (Civ) at [29], [2019] 2 Lloyd's Rep. at 608.

II. Carriage of Goods by Sea

A. *The Fire Exception Under the Hague-Visby Rules (Article IV Rule 2(b))*

Last year saw another important Court of Appeal decision, *Glencore Energy UK Ltd. v. Freeport Holdings Ltd. (The “Lady M”)* discusses the scope of application of the fire exception in article IV, rule 2(b) of the Hague and Hague-Visby Rules.³² More specifically, the primary issue raised before the Court of Appeal was whether the fire exception was capable of exempting the carrier from liability to the cargo interest for damages caused by fire, where that fire was caused by barratry.³³

The facts of the case were straightforward. On May 14, 2015, while the *Lady M* (the vessel) was carrying a cargo of fuel oil from Taman, Russia, to Houston, Texas, a fire started on board.³⁴ Consequently, the owners of the vessel (the Owners) arranged for salvage, and the vessel was towed to Las Palmas in the Canary Islands, where general average was declared.³⁵

The owners of the cargo (Glencore) initiated litigation proceedings in the Commercial Court claiming damages of such sums as it had incurred in the salvage operation, and the costs of defending salvage arbitration proceedings.³⁶ Glencore alleged breaches of contracts of carriage contained in or evidenced by four bills of lading dated April 28, 2015, and alleged a breach of bailment in the alternative.³⁷

Since the contracts of carriage were subject to the Hague-Visby Rules, Glencore pleaded its claim in conventional form, referring to article III, rules 1 and 2.³⁸ In defending against Glencore’s claim, the Owners relied, inter alia, on article IV, rule 2(b), which provided:

Article IV

....

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

....

32. *Glencore Energy UK Ltd. v. Freeport Holdings Ltd. (The “Lady M” I)* [2019] EWCA (Civ) 388, [2019] 2 Lloyd’s Rep. 109 (Eng.).

33. *Id.* at [1], [2019] 2 Lloyd’s Rep. at 111.

34. *Id.* at [2], [2019] 2 Lloyd’s Rep. at 111.

35. *Id.*

36. *Id.* at [3], [2019] 2 Lloyd’s Rep. at 111.

37. *Id.*

38. *Id.* at [4]-[5], [2019] 2 Lloyd’s Rep. at 111.

(b) Fire, unless caused by the actual fault or privity of the carrier.³⁹

In response to the Owners' reliance on the fire exception, Glencore argued that the exception was not applicable to fires caused by barratry. In support of this, Glencore referred to preexisting common law cases.⁴⁰ Prior to the Hague Rules, the common law position was that contractual defenses in bills of lading were inapplicable when the excluded peril was caused by intentional acts of wrongdoing by the carrier's servants or agents, i.e., barratry.⁴¹

Glencore also relied on two overseas authorities. The first was the decision of the United States Court of Appeals for the Fourth Circuit in *In re Intercontinental Properties Management, S.A.*⁴² There, the court considered whether shipowners could rely on the exception under rule 4.2(q) of the U.S. Carriage of Goods by Sea Act in the case of barratry by a crew member, Supardi.⁴³ Holding that the acts of Supardi fell within the excluding proviso therein, the Fourth Circuit held that the shipowners could not bring themselves within the exception.⁴⁴ The relevance of the decision came from the court's reasoning, stating:

Finally, the construction is suggested by considering Supardi's act as one of classic barratry Before cargo damage law was codified, barratry was one of the exceptions to liability traditionally listed by the carrier in bills of lading. Many of these were carried into the specific exceptions in para 4(2) of COGSA. Barratry was not; and as perhaps the most obvious conceivable example of "fault" of a seaman servant, its intended inclusion within the general [rule 2(q)] clause reference to servant fault seems a construction compelled by any common sense reading. From this it would appear that barratry was simply not intended to be an exculpatory cause of loss under COGSA.⁴⁵

39. *Id.* at [4], [2019] 2 Lloyd's Rep. at 111.

40. *Id.* at [67], [71]-[77], [2019] Lloyd's Rep. at 119-20 (first citing *Polemis v. Furness, Withy & Co.* [1921] 3 KB 560, [1921] 8 Lloyd's List LR 351 (Eng.); then citing *Taylor v. The Liverpool & Great W. Steam Co.* (1874) 9 LRQB 546, 550 (Eng.); then citing *Steinman & Co. v. The Angier Line 1887 Ltd.* [1891] 1 QB 619, 624 (Eng.); and then citing *The Chasca* (1875 LRA & E 446, 449 (Eng.)).

41. *Id.* at [67], [2019] 2 Lloyd's Rep. at 119.

42. *Id.* at [80], [2019] 2 Lloyd's Rep. at 120 (citing *In re Intercont'l Props. Mgmt., S.A.*, 604 F.2d 254, 1979 AMC 1680 (4th Cir. 1979)).

43. *In re Intercont'l Props. Mgmt.*, 604 F.2d at 264, 1979 AMC at 1692-93.

44. *Id.* at 265-66, 1979 AMC at 1695.

45. *The Lady M I*, [2019] EWCA (Civ) 388 at [82], [2019] 2 Lloyd's Rep. at 120 (quoting *In re Intercont'l Props. Mgmt.*, 604 F.2d at 265-66, 1979 AMC at 1695) (citing SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING art. 113, at 239 (18th ed. 1974)).

The second case Glencore referred to was the New Zealand Supreme Court decision in *Tasman Orient Line CV v. New Zealand China Clays Ltd. (The “Tasman Pioneer”)*.⁴⁶ There, the Supreme Court held that the shipowners were entitled to rely on article IV, rule 2(a) (“Act, neglect or default of master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship”).⁴⁷ In so holding, the Supreme Court endorsed, obiter, the view that the exception did not cover barratry, but the Supreme Court did not provide sufficient reasoning for this view.⁴⁸

At the first instance, Popplewell J decided a number of preliminary issues. In so doing, he proceeded on the assumption that the fire was started deliberately by the chief engineer with intent to cause damage.⁴⁹ The two main issues for determination were:

- (1) whether the conduct of the chief engineer constituted barratry;⁵⁰ and
- (2) whether article IV, rule 2(b) was capable of exempting the owners from liability if the fire was deliberately or barratrously caused.⁵¹

Regarding the first issue, Popplewell J concluded that whether the chief engineer’s conduct would fall within the definition of barratry depended on further facts about the chief engineer’s actual mental state.⁵² Given the absence of any clearly pleaded case, let alone evidence, regarding this matter, the question of whether the master’s act constituted barratry was not decided.⁵³ However, this became less of an issue when Popplewell J said that the application of the fire exception did not depend on how the fire was caused, whether barratrously or not.⁵⁴

Following Glencore’s appeal, the Court of Appeal upheld Popplewell’s decision, declining to follow the decision of the New Zealand Supreme Court in *The “Tasman Pioneer.”*⁵⁵ Regarding the

46. *Id.* at [84]-[86], [2019] 2 Lloyd’s Rep. at 120-21 (citing *Tasman Orient Line CV v. New Zealand China Clays Ltd. (The “Tasman Pioneer”)* [2010] NZSC 37, [2010] 2 Lloyd’s Rep. 13 (N.Z.)).

47. *The Tasman Pioneer* [2010] NZSC at [38], [2010] 2 Lloyd’s Rep. at 19.

48. *See The Lady M I*, [2019] EWCA (Civ) at [84], [2019] 2 Lloyd’s Rep. at 120-21.

49. *Glencore Energy UK Ltd. v. Freeport Holdings Ltd. (The “Lady M” II)* [2017] EWHC (Comm) 3348 [4] (Eng.).

50. *Id.* at [5].

51. *Id.*

52. *Id.* at [26].

53. *Id.* at [63].

54. *Id.*

55. *The Lady M I*, [2019] EWCA (Civ) 388 [85], [2019] 2 Lloyd’s Rep. 111, 121 (quoting *The Lady M II*, [2017] EWHC (Comm) 3348 at [4]).

Fourth Circuit's reasoning in *Matter of Intercontinental Properties Management, S.A.*, the Court of Appeal took the view that the reasoning should not apply to all exceptions in article IV, rule 2, as it was specific to article IV, rule 2(q).⁵⁶ The court preferred not to give any weight to the preexisting common law cases, where no settled meaning of "fire" was provided.⁵⁷

The decision upholds the literal interpretation, taking the firm view that "discussions and resolutions in travaux préparatoires may illustrate in broad terms the context, object and purpose of an international convention, but in the case of the Hague [Hague-Visby] Rules this can be ascertained without recourse to travaux préparatoires."⁵⁸ While limiting the use of the *travaux préparatoires* to certain cases, the decision also questions the influence of the preexisting common law rules on the interpretation of the Hague and Hague-Visby Rules. Given the significant role of the common law in the development of the law of international carriage of goods by sea, the preexisting common law rules were previously considered to have a role in the interpretation of the Hague and Hague-Visby Rules.⁵⁹ The decision in *The "Lady M"* has now paved the way for further discussions on this matter.

56. *Id.* at [83], [2019] 2 Lloyd's Rep. at 120.

57. *Id.* at [78]-[79], [122], [2019] 2 Lloyd's Rep. at 120, 125.

58. *Id.* at [42], [2019] 2 Lloyd's Rep. at 116.

59. As happened in the case of *Stag Line, Ltd. v. Foscolo Mango & Co.* [1932] AC 328 (HL), (1931) 41 Lloyd's List LR 165 (Lord Macmillan) (Eng.); see also Melis Özdel, *The EU and the Carriage of Goods by Sea Under Private Law and EU Regulation*, in EU MARITIME TRANSPORT LAW para. 46 (Henning Jessen & Michael Jurgen Werner eds., 2016); GUENTER TREITEL & F.M.B. REYNOLDS, CARVER ON BILLS OF LADING 642-43, § 9-097 (3d ed. 2011).