

Commercial Arbitration



Sir Michael J. Mustill

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Second Edition

Butterworths

The Law and Practice of Commercial Arbitration in England

Second Edition

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Preface

When the first edition of this work was published in 1982 the law of arbitration was at a watershed. The Arbitration Act 1979 was beginning to exert its influence. The landmark decision of the House of Lords in *The Nema* had laid down guidelines for the future course of arbitration which indicated a bold change in direction for the principles governing appeals from an award, but without clearly describing where the guidelines were to lead. Two further decisions of the House of Lords in the *Bremer Vulkan* case and *The Hannah Blumenthal* had opened up entirely new territory in examining the contractual relationships involved in an arbitration, but had left many parts of the territory unexplored. It was clear, as we wrote at the time, that ‘the law of arbitration is on the move, but in precisely what direction it is impossible to say’.

Six and a half years later, the pace of progress has slackened but not faltered, and its general direction can now be more clearly perceived. The contractual analysis has been explored further in a number of decisions, notably *The Leonidas D* and *The Antclizo*, and valuable theoretical work has been done along the way, which is reflected in Chapter 32 of the present edition. But as a solution to the practical problem to which it was principally addressed, that of killing off moribund references, the contractual analysis has led to a virtual dead-end, from which the way forward can only be through legislation.

In contrast, the stream of authority flowing from *The Nema* has flowed through more fertile territory. The guidelines for appeals have been more fully worked out in decided cases and in amendments to the Rules of Court. In consequence, the principles and practice governing appeals from arbitrators’ decisions have become reasonably well settled. This has enabled us to remove much speculative material from Chapter 36 (Appeals), and to give a clearer and more concise picture of the procedure and how it works in practice. A number of decisions have clarified the scope of the arbitrator’s duty to give reasons for his award and what those reasons should contain: this topic, formerly discussed in Chapter 36, is now dealt with in Chapter 25 (Types of Award). The power of the Court to order further reasons for the purposes of an appeal is discussed, as previously, in Chapter 36.

As the number of successful applications for leave to appeal from arbitrators’ decisions has dwindled to a trickle, attention has been focused on other means of challenging awards. Consistently with the spirit underlying the 1979 Act, these challenges have been firmly resisted by the courts, except in those very few cases indeed where intervention has been necessary to remedy a real injustice. Attention has focused on topics such as bias, real or apparent (see pp. 249 et seq.), correcting mistakes in the award (see pp. 558–561), and adducing fresh evidence after the award (pp. 561–562). Little resort has been had to the other possible means of challenging an unappealable award which we mentioned in Chapter 37, no doubt because no case has arisen in which there has been a

sufficiently serious disregard of the law to warrant invoking any of the procedures which we there suggested. Moreover, attempts to treat certain types of error as going to the arbitrator's jurisdiction have been resisted as 'driving a juggernaut through the philosophy of the 1979 Act' (p. 555). The discussion of alternative remedies may, however, still be of value, if only to demonstrate their very limited sphere of application, and is retained in Chapter 37 under the new title 'Recourse against unappealable awards'.

In keeping with the spirit of the 1979 Act, the courts have continued to favour a benevolent approach to the construction of arbitration clauses, preferring if possible to give them a wide rather than a restricted meaning (see pp. 117–121). A similarly benevolent approach has been followed with regard to the construction of awards (pp. 570–571), to clauses excluding the possibility of an appeal on a question of law (p. 365), and towards the use of 'equity clauses' (Chapter 4).

There have been a number of important developments in the field of international commercial arbitration, and in consequence Chapter 4, formerly entitled 'Foreign arbitral law', has been substantially recast, and much new material added, under the new title 'The applicable law and the jurisdiction of the Court'. The reader will now find in this Chapter a discussion of the questions whether the arbitrator must apply the law to the substance of the dispute or to the procedure to be followed, and if so what law, whether English law (including the law of the EEC), foreign law, or some system of law derived from some international or transnational source; whether these questions are affected by the presence of an 'equity clause' or a provision for 'amiable composition'. (Some of this material was formerly in Chapter 37, where it was likely to be hidden from the reader by the unhelpful title – 'Procedures not by way of appeal' – with which the Chapter was previously labelled.) Important changes in the Rules of Court regarding service out of the jurisdiction of proceedings affecting arbitration have enabled a fuller account to be given of the jurisdiction of the English courts over international arbitrations, and the circumstances in which the courts will exercise or abstain from exercising jurisdiction.

We have taken account of the legislation, mainly fragmentary in character, which has touched on the law of arbitration since the previous edition. The most significant is the Civil Jurisdiction and Judgments Act 1982, which affects arbitration in a number of ways (pp. 87, 92, 394–341, 483–484). There has been new legislation concerning the powers of an arbitrator to award interest: this is discussed, together with the somewhat wider powers which may in some cases exist under the common law. Section 10(3) of the Arbitration Act 1985 was passed to fill a gap in the powers with regard to default appointments of arbitrators which we identified in the first edition. Note has also been taken of the Companies Act 1985 and the Insolvency Act 1986 (Chapter 11), as well as of the Supply of Goods and Services Act 1982 (p. 229). We have also considered whether to include discussion of the Consumer Arbitration Agreements Act 1988, but have concluded that it lies outside the scope of a work concerned with commercial arbitration.

Space does not permit us to enumerate the many other changes which will be found in the text. These have tended to increase the length of the book. To compensate for this, some of the Appendices have not been reproduced, namely Appendix 1, Part 1 (Statutes no Longer in Force), Appendix 3 (Special case), Appendix 4 ('Manifest disregard' under United States law), and Appendix 5

(Fact and law). On the other hand Appendix 1 has been enlarged to include the Arbitration (International Investment Disputes) Act 1966, not only for the inherent interest of its provisions, but also because of its developing practical importance in the field of international commercial arbitration. A new Appendix 3 contains the text of the UNCITRAL Model Law, whose influence on the development of arbitration law in the United Kingdom and elsewhere is likely to be far-reaching. A new Appendix 4 contains the text of the principal Arbitration Rules in common use in commercial arbitration in England, namely the Rules of Conciliation and Arbitration of the International Chamber of Commerce, the UNCITRAL Arbitration Rules, the London Maritime Arbitrators' Association Terms (1987), the Rules of the London International Court of Arbitration, and the Institute of Civil Engineers' Arbitration Procedure (1983).

Of the very large number of decisions concerning arbitration which have been reported since the first edition, not all have merited attention in the text. So far as possible, however, we have noted every case which has served to enlarge a proper understanding of the law of arbitration. Inevitably there may be accidental omissions, as there were in the previous edition, and we extend our gratitude to all those readers who have brought to our attention cases or topics deserving of mention in the text, as well as some manifest errors, in the hope and expectation that others will continue to do so in the future.

We also wish to express our gratitude to our publishers for their kindness in agreeing to the preparation of a new index, and for their unfailing support and patience throughout the preparation of the manuscript for publication.

The law is stated on the basis of cases reported and legislation published on or before 1 January 1989.

M.J.M.
S.C.B.

Table of statutes

References in this Table to *Statutes* are to Halsbury's Statutes of England (Fourth Edition) showing the volume and page at which the annotated text of the Act may be found. Page references printed in **bold** type indicate where the Act is set out in part or in full.

	PAGE		PAGE
Administration of Justice Act 1920 (22 <i>Statutes</i> 277)		Arbitration (1698)	432, 665
s 12(1)	422	preamble	433
Administration of Justice Act 1932	271	Arbitration Act 1889.	272, 444
Administration of Justice Act 1956 (22 <i>Statutes</i> 295)	271	s 1	32, 416, 445, 447, 498, 520, 548, 663
s 51	422	2	175, 516, 531
Administration of Justice Act 1970 (2 <i>Statutes</i> 598; 4 <i>Statutes</i> 691)	273	3	272, 660
s 4	265, 702	4	657
(3)	266	5	446, 660
(5)	266, 269, 712	6	446, 658
44	389, 420	7(a)	662
Sch 3.	702 , 713	(b)	619, 664
para 2, 3.	268	(c).	405, 663
4	268	8	662
5	268, 269	9	516, 662
6	268, 269	10	665
7(1)	407	11	665
8	270	(2)	446
9	268, 269, 714	12	418, 445, 667
10	269	13–17	271
11	268, 666	18	662
12	270	19	448, 664
Administration of Justice Act 1977 (11 <i>Statutes</i> 690; 22 <i>Statutes</i> 334)		20	667
s 4(1), (2), (4)	680	23, 24	668
18(2)	667	27	446, 498, 668
32(4)	680	28	669
Sch 5 Pt I	680	Sch 1.	33, 175, 296, 445, 503, 516, 531, 657, 658, 662, 663
Administration of Justice Act 1982 (11 <i>Statutes</i> 886)		Arbitration Act 1934.	619
s 15(6)	391	s 2	657
Sch 1 Pt IV.	391	3	498, 666
Administration of Justice Act 1985 (41 <i>Statutes</i> 105)	189	4	659
s 58	660	(1)	362
69(5)	660	5	660
Sch 9 para 15	660	(1), (2)	658
Appellate Jurisdiction Act 1876 (11 <i>Statutes</i> 563)	649	6	516, 662
s 3	704	7	662
		8(1)	662
		(2)	657
		9	448, 619
		10	418, 667
		11	664

	PAGE
Arbitration Act 1934— <i>contd</i>	
s 12	664
(2)	405, 408
13	664
14	498, 665
15	552, 665
16(3)–(5)	668
(6)	667
17	664
20	668
21	498, 658
(2)	668
(3)	662
(5)	669
Sch 1	662
Sch 2	668
Sch 3	658
Arbitration Act 1950 (2 <i>Statutes</i> 535)	4, 53, 54, 269, 425, 443
s 1	45, 51, 56, 88 158, 184, 185, 221, 232, 248, 374, 436, 446, 451, 480, 498, 499, 500, 504, 526, 527, 528, 529, 530, 534, 656 , 703
2	51, 57, 656
(1)	137, 152, 720
(2)	152
3	51, 57, 656
(1)	137, 152, 424
(2)	152
4	45, 46, 51, 138, 268, 331, 390, 462, 464, 471, 474, 475, 500, 518, 528, 657
(1)	57, 122, 123, 124, 137, 159, 161, 179, 446, 460, 462, 463, 465, 466, 467, 468, 469, 471, 472, 476, 482, 483, 485, 486, 492, 501, 681, 705
(2)	465, 466
5	51, 57, 268, 483, 657
6	51, 56, 172, 174, 175, 178, 198, 657
7	51, 56, 178, 180, 181, 182, 183, 185, 529, 658 , 703
(a)	173, 186, 187, 188, 231, 527, 528, 529, 533, 534, 545
(b)	172, 180, 183, 495
8	51, 56, 658
(1)	173, 181, 190, 258, 362
(2)	262, 317
(3)	57, 88, 172, 184, 268, 703
9	51, 56, 57, 362, 659 , 713

	PAGE
Arbitration Act 1950— <i>contd</i>	
s 9(1)	178, 181, 187, 188, 362
(2)	362
10	57, 172, 175, 176, 177, 178, 179, 182, 183, 185, 190, 248, 268, 337, 495, 529, 534, 659 , 713
(a)	51, 169, 178, 183, 187, 268, 529, 566
(b)	172, 173, 177, 179, 187, 188, 190, 509, 528, 533, 534, 544
(c)	189, 191, 262, 529
(d)	189, 191, 509, 533, 534, 544
(2)	56, 176, 189
(3)	189
11	272, 660
12	57, 88, 331, 390, 661
(1)	51, 53, 56, 292, 293, 294, 316, 319, 323, 324, 328, 334, 493, 508, 681
(2)	51, 53, 56, 351
(3)	51, 53, 56, 293
(4)	51, 53, 57, 268, 350, 351, 721
(5)	51, 57, 268
(6)	51, 57, 92, 268, 296, 324, 328, 329, 332, 341, 535, 718
(a)	336, 337
(b)	319, 323
(c)	356
(d)	344, 350
(e)	331, 332, 334, 338
(f)	332, 338
(g)	331, 332, 334, 335
(h)	330, 331, 338, 342, 523
13	51, 56, 164, 165, 315, 532, 534, 662
(1)	383, 516
(2)	383, 516, 703
(3)	158, 183, 184, 231, 245, 268, 374, 498, 509, 526, 527, 528, 531, 534, 544, 703
14	51, 56, 371, 372, 385, 620, 662 , 713
15	51, 56, 387, 389, 662
16	51, 56, 138, 414, 663
17	51, 56, 405, 406, 407, 559, 663
18	156, 240, 663
(1)	51, 145, 233, 234, 237, 238, 239, 240, 395, 401, 402
(2)	51, 237, 239, 241, 270, 360, 403
(3)	57, 284

	PAGE
Arbitration Act 1950— <i>contd</i>	
s 18(4)	51, 397, 401, 405, 407, 408, 560, 703
(5)	51, 703
(13)	51
19	51, 57, 240, 664 , 703
(1)	233, 234, 236, 238, 239, 240, 241, 403
(2)	236, 238
(4)	241
19A	391, 392, 393, 394
(1)	391
(2)	393
20	25, 51, 56, 383, 389, 420, 664
21	51, 57, 366, 448, 664, 704, 714
(1)	43, 549, 567, 704
(a)	590, 621
(2)	567, 704
22	23, 51, 57, 269, 383, 519, 558, 565, 567, 598, 599, 600, 665 , 704, 720, 721
(1)	22, 548, 549, 550, 566
23	51, 57, 248, 268, 269, 366, 519, 665 , 704
(1)	158, 164, 184, 232, 374, 498, 526, 527, 528, 530, 534, 544, 548, 555, 558, 565, 720
(2)	22, 447, 544, 565, 567, 720, 721
24	51, 57, 183, 501, 502, 517, 665
(1)	135, 184, 197, 232, 253, 481, 500, 521, 527, 528, 580
(2)	116, 135, 156, 269, 327, 479, 498, 499, 500, 501, 502, 503, 517, 527, 704, 711
(3)	479, 500, 501, 502, 503, 518, 527
25	51, 57, 197, 268, 500, 501, 666 , 704
(1)	163, 173, 188, 189, 446, 498, 502, 527, 529, 532, 533
(2)	163, 172, 188, 497, 498, 499, 500, 502, 504, 517, 529
(a)	183, 184, 189, 509, 519, 529, 532
(b)	158, 465, 497, 498, 499, 500, 501, 519, 529, 532, 544, 565
(4)	163, 164, 272, 479, 481, 497, 517, 518, 544

	PAGE
Arbitration Act 1950— <i>contd</i>	
s 26	29, 38, 51, 57, 88, 151, 270 338, 341, 387, 388, 389, 416, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 556, 617, 639, 666 , 704, 705, 723
(2)	341, 420
27	13, 51, 57, 62, 88, 197, 198, 207, 208, 210, 211, 212, 213, 214, 215, 268, 481, 667
28	51, 331, 407, 667 , 713
(1)	403
29	667
(2)	56, 653, 714
(3)	56, 653, 714
30	151, 668 , 714
31	51, 668 , 711, 714
(1)	714
32	43, 46, 47, 53, 54, 228, 418, 423, 463, 467, 501, 668 , 713
33	668
34	177, 668
35	669
(1)	426
36	671
(1)	426
(2)	415
37	671
(1)	150, 426
(a)	62
(d)	424
(2)	426
(a)	91
(b)	62
(3)	427
38	421, 672
(1), (2)	427
39	424, 672
40	672
(a)	423
(b)	426
41	672
42	673
44	674
(3)	445, 447, 520
Sch 1	426, 657, 674
Sch 2	425, 675
Arbitration Act 1975 (2 Statutes 603)	4, 53 54, 331, 422, 424, 446
s 1	89, 122, 123, 124, 129, 138, 158, 161, 268, 341, 390, 460, 462, 463, 464, 465, 466, 467, 471, 473, 484, 500, 501, 507, 514, 518, 705
(1)	8, 137, 297, 485

	PAGE
Arbitration Act 1975 (2 <i>Statutes</i> 603)— <i>cont'd</i>	
s 1(2), (4)	466
2	426, 705
3	705
(1)(a)	723
(2)	415
4	421, 425, 706 , 723
5	706
(1)	424
(2)	425
(b)	62, 63
(d)	62
(e)	90, 91
(3)	149, 150, 425
(4)	425
(5)	425, 547
6	423, 707
7	707
(1)	53, 54, 106, 149, 424, 463
8	708
(2)(a)	651
(b)	667
(c)	151, 668
(d)	668
(e)	669
Arbitration Act 1979 (2 <i>Statutes</i> 608)	4,
	53, 54, 88, 431, 432, 583, 653
s 1	87, 242, 366, 373, 377, 383, 544, 549, 574, 596, 609, 619, 620, 621, 622, 623, 624, 627, 630, 645, 709 , 717
(1)	35, 548, 553, 585, 586, 622
(2)	23, 269, 568, 586, 603, 616, 617, 618, 619, 620, 720, 721, 722, 724
(a)	400
(b)	376, 619, 620
(3)	269, 587
(a)	375, 603
(b)	601, 615, 623, 630, 634
(4)	266, 269, 587, 601, 603, 615, 619, 621, 623
(5)	374, 379, 405, 549, 557, 587, 595, 599, 600, 619, 630, 721, 808
(a)	373
(b)	630, 634
(6)	378
(a)	374, 595, 596
(b)	374, 379
(6A)	630
(7)	266, 587, 604, 619, 620
(a), (b)	627

	PAGE
Arbitration Act 1979 (2 <i>Statutes</i> 608)— <i>cont'd</i>	
s 1(8)	617
2	157, 216, 269, 297, 366, 373, 380, 401, 526, 573, 574, 621, 622, 623, 625, 626, 627, 717
(1)	297, 498, 586, 620, 621, 623, 626, 721
(a)	630, 634
(b)	630, 631
(2)	622, 623, 624, 625
(b)	623, 624
(3)	266, 587, 604, 619, 626
(a), (b)	627
2A	630, 631
3	35, 49, 72, 76, 91, 266, 274, 354, 561
(1)	71, 267, 373, 499, 586, 634, 635, 638
(c)	297, 526, 586
(2)	635
(3)	586
(5)	586
(6)	586, 635
(7)	631, 632, 633
4	35, 490, 603, 608, 635, 711
(1)	632
(ii)	632, 634
(2)(a)	633
(3)	633
(5)	269
5	53, 88, 296, 452, 508, 521, 523, 536, 537, 539, 540, 541, 542, 712 , 721
(1)	539
(2)	267, 539, 540, 541, 542, 543, 544, 785
(3)	267, 269
6	713
(1)	190, 658
(2)	48, 171, 173, 188, 362, 659
(3)	189, 660
(4)	158, 176, 660
7	713
(1)	620
(a)	624
(c)	151
(e)	53, 54
(2)	653, 715
8(3)(b)	664
(c)	704
(4)	631
Arbitration Act (Northern Ireland) 1937	
s 4	681, 705
16	706
21(1)	718

	PAGE		PAGE
Arbitration Clauses (Protocol) Act 1924:	446	Common Law Procedure Act 1854 (5	
s 1	657	Statutes 344)	271, 432, 440, 442
(1)	465	s 3	442
(2)	669	5	52, 443, 444, 619, 664
Arbitration (Foreign Awards) Act 1930:	425,	7	443
	673	8	405, 443, 548, 665
s 1	669	11	443, 657
8	465, 657	12	660
Arbitration (International Investment		13	658
Disputes) Act 1966 (2 Statutes 577):	421	14	658
s 1	679	15	516, 662
2	680	17	52, 442
3, 4	681	Common Law Procedure Amendment	
5-7	682	Act (Ireland) 1856	673
8, 9	683	Companies Act 1985 (8 Statutes 107)	
Bills of Lading Act 1855 (39 Statutes 422)		s 525(2)	153
s 1	137	539(1)(a)	153
Carriage of Goods by Road Act 1965 .	422	598(2)	153
s 4	719	610(1)	153
(1)	422	695	200
7(1)	422	726(1)	336
Carriage of Goods by Sea Act 1971 (39		County Courts Act 1959 (11 Statutes 399)	
Statutes 831)	196	s 40	666
Carriage of Passengers by Road Act 1974		92	714
s 5	720	107	639
Civil Evidence Act 1968 (17 Statutes 155)		County Courts Act 1984 (11 Statutes 411)	
s 10	356	s 64	274
(3), (4)	355	Courts Act 1971 (11 Statutes 623)	
18(1)	354, 355	s 56(1)	702
Civil Evidence Act 1972 (17 Statutes 185)		Sch 8 para 60	702
s 5(2)	356	Crown Proceedings Act 1947 (13 Statutes	
Civil Jurisdiction and Judgments Act		16)	
1982 (11 Statutes 903)		s 25	151
s 2	87	Evidence (Proceedings in Other Juris-	
3(3)	87	dictions) Act 1975 (17 Statutes 190)	
(b)	485	s 8(2)	681
25	718	Sch 2	681
(3)	92	Finance Act 1949 (41 Statutes 233)	
(c)	343	s 35	384
(7)	92	Sch 8	384
26	160, 339, 340, 341, 718	Foreign Judgments (Reciprocal Enforce-	
(1)	341	ment) Act 1933 (22 Statutes 283):	719,
(b)	341		723
32	483, 484, 719	s 6	422
(1)(b), (c)	484	8	415
(3), (4)	484	Foreign Tribunals Evidence Act 1856 .	683
33	720	Insolvency Act 1986 (4 Statutes 717)	
(1)(b)	484	s 14, 42	153
34	415	285(1)	152
50	484	(3)(b)	153
Sch 13 Pt II para 6	339	314(1)	152
Civil Procedure Act 1833	441	Sch 1 para 5, 6	153
s 25	441	Sch 5 Pt 1 para 6	152
39	436, 516, 662	International Transport Conventions	
40, 41	662	Act 1983 (36 Statutes 560)	
Common Law Procedure Act 1852 (23		s 6	719
Statutes 32)		11(2)	720
s 46	441	Interpretation Act 1978 (41 Statutes 899)	
		s 7	182, 200

	PAGE		PAGE
Interpretation Act 1978 (41 <i>Statutes</i> 899)		Singapore Arbitration Act	
s 11	715	s 3	498
Judgments Act 1838 (22 <i>Statutes</i> 261)	416	Solicitors Act 1932	
s 17	389	s 69	663
Judicature (Northern Ireland) Act 1978 (31 <i>Statutes</i> 465)		State Immunity Act 1978 (10 <i>Statutes</i> 641)	
s 55	683	s 1, 9	151
122(1)	683	13(2)(b)	152
(2)	673	(4)	152
Sch 5 Pt II	683	Statute Law (Revision) Act 1978 (41 <i>Statutes</i> 927)	673
Sch 7	673	Statutory Instruments Act 1946 (41 <i>Statutes</i> 717)	673
Law of Property Act 1925 (27 <i>Statutes</i> 341)	138	Supply of Goods and Services Act 1982 (39 <i>Statutes</i> 161)	
s 136	137	s 13	229
Law Reform (Frustrated Contracts) Act 1943 (11 <i>Statutes</i> 209)	112, 243	Supreme Court Act 1981 (11 <i>Statutes</i> 756):	626,
s 1(3)	515		627
Law Reform (Miscellaneous Provisions) Act 1934 (17 <i>Statutes</i> 312)		s 16	619, 629, 710
s 1	391	(1)	630
Law Reform Miscellaneous Provisions (Scotland) Act 1966	673	18	717
Leasehold Reform Act 1967	639	(1)(g)	630
Limitation Act 1980 (24 <i>Statutes</i> 629)	169,	20	632
177, 195, 196, 206, 211,		37(3)	342
418		39	617
s 7	182, 418	49	569
8	418	51(1)	145
10	182	68	272
34	178, 198, 200, 716	(1)	271, 273
(1)	195, 196	(6)	272
(2)	197	(7)	271
(3)	56, 176, 198, 199	84	672, 680
(4)	56, 198, 200	148	710
(b), (c)	178	(2), (3)	710
(5)	197, 565	152(1)	680, 681
35	216	Sch 5	672, 680, 681, 710
39	196	Supreme Court of Judicature Act 1873	
Merchant Shipping Act 1894 (39 <i>Statutes</i> 424)		s 10	271
s 496(3)	667	19	618
Merchant Shipping Act 1974 (39 <i>Statutes</i> 875)		56, 57, 83	271
s 6(4)	720	Supreme Court of Judicature Act 1884	
Merchant Shipping (Oil Pollution) Act 1971 (39 <i>Statutes</i> 846)		s 9	271
s 13(3)	719	11	272, 660
Misrepresentation Act 1967 (29 <i>Statutes</i> 724)		Supreme Court of Judicature (Consoli- dation) Act 1925	272
s 2(2)	113	s 27	664
Northern Ireland Act 1962 (31 <i>Statutes</i> 280)	673	38(3)	673
Nuclear Installations Act 1965 (47 <i>Statutes</i> 785)		39	673
s 17(4)	719	99	683
Oaths Act 1978 (17 <i>Statutes</i> 200)	351	Supreme Court of Judicature (Ireland) Act 1877	
Recorded Delivery Service Act 1962 (41 <i>Statutes</i> 746)		s 61	673
s 1(1)	200	Third Parties (Rights against Insurers) Act 1930 (4 <i>Statutes</i> 688)	137, 517
Road Traffic Act 1930	137	Trustee Act 1925 (48 <i>Statutes</i> 221)	
		s 15(f)	152
		Unfair Contract Terms Act 1977 (11 <i>Statutes</i> 214)	207
		s 3, 7	209
		13(2)	209

Table of cases

	A	PAGE
A v C [1981] QB 956n, [1980] 2 All ER 347, [1981] 2 WLR 629, [1982] RPC 509, [1980] 2 Lloyd's Rep 200; affd [1982] 1 Lloyd's Rep 166		119, 462, 581
Aaby's (E B) Rederi A/S v The Union of India, The Evje [1972] 2 Lloyd's Rep 129; on appeal [1973] 1 Lloyd's Rep 509; affd sub nom The Union of India v E B Aaby's Rederi A/S [1975] AC 797, [1974] 2 All ER 874, [1974] 3 WLR 269, 118 Sol Jo 595, [1974] 2 Lloyd's Rep 57, HL		46, 117, 120, 122, 128, 204, 206, 207, 214
Abraham and Westminster Improvements Co (1849) 14 LTOS 203		385
Abu Dhabi Gas Liquefaction Co Ltd v Eastern Bechtel Corp'n and Chemical Engineering & Construction Co Ltd (1982) 126 Sol Jo 524, [1982] 2 Lloyd's Rep 425, CA		145
Achillet, The. See Mabanafit GmbH v Consentino Shipping Co SA, The Achillet		
Adam & Harvey Ltd v International Maritime Supplies Co Ltd [1967] 1 All ER 533, [1967] 1 WLR 445, 111 Sol Jo 55, [1966] 1 Lloyd's Rep 571, CA		406
Adams v Catley (1892) 66 LT 687, 40 WR 570, 36 Sol Jo 525		473
Addie & Sons v Henderson & Dimmack 1879 17 SLR 15		251
Addison and Spittle, Re (1849) 6 Dow & L 531, 18 LJQB 151, 13 Jur 587		383
Aden Refinery Co Ltd v Ugland Management Co Ltd, The Ugland Obo One [1987] QB 650, [1986] 3 All ER 737, [1986] 3 WLR 949, 130 Sol Jo 861, [1986] 2 Lloyd's Rep 336, [1986] NLJ Rep 1089, [1986] LS Gaz R 1089, CA		380, 605, 606, 630
Adler (trading as Argo Rederei) v Soutos (Hellas) Maritime Corp'n, The Argo Hellas [1984] 1 Lloyd's Rep 296, 134 NLJ 203		410
Adolph (Wm) & Co v Keene Co (1921) 7 Ll L Rep 142		352
Aegis Progress, The. See Cargill Inc v Marpro Ltd, The Aegis Progress		
African and Eastern (Malaya) Ltd v White, Palmer & Co Ltd (1930) 36 Ll L Rep 113		107, 363, 555
Agar v Mackle (1825) 2 Sim & St 418, 4 LJOS Ch 16		459
Agenor, The. See President of India v Taygetos Shipping Co SA, The Agenor		
Aghios Nicolaos, The. See Blue Horizon Shipping Co SA v E D and F Man Ltd, The Aghios Nicolaos		
Agrabele, The. See Gebr Van Weelde Scheepvaart Kantoor BV v Homeric Marine Services Ltd, The Agrabele		
Agrabele, The. See Gebr Van Weelde Scheepvaarkantor BV v Cia Naviera Sea Orient SA, The Agrabele		
Agro Co of Canada Ltd v Richmond Shipping Ltd, The Simonburn [1972] 2 Lloyd's Rep 355; affd [1973] 1 Lloyd's Rep 392, CA		201
Agroexport Entreprise D'Etat pour le Commerce Extérieur v NV Goorden Import Cy SA [1956] 1 Lloyd's Rep 319		209, 352, 354, 570
Agromet Motoimport Ltd v Maulden Engineering Co (Beds) Ltd [1985] 2 All ER 436, [1985] 1 WLR 762, 129 Sol Jo 400, [1985] LS Gaz R 1937		418, 420, 421
Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira (No 2) [1985] 2 Lloyd's Rep 377; on appeal sub nom Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira [1985] 3 All ER 641, [1985] 1 WLR 1222, 129 Sol Jo 812, [1986] 1 Lloyd's Rep 107, CA; revsd [1986] AC 965, [1986] 2 All ER 409, [1986] 2 WLR 1051, 130 Sol Jo 429, [1986] 2 Lloyd's Rep 117, [1986] NLJ Rep 514, [1986] LS Gaz R 1895, HL		145, 562, 582
Aitcheson v Cargay (1824) 2 Bing 199, M'Cle 367, 13 Price 639, 9 Moore CP 381, Ex Ch		385
Aktiebolaget Gotaverken v Westminster Corp'n of Monrovia [1971] 2 Lloyd's Rep 505		626
Aktiebolaget Legis v V Berg & Sons Ltd [1964] 1 Lloyd's Rep 203		201, 203, 405, 413, 550, 558, 569, 570, 595

- Al Bida, The. See Arab Maritime Petroleum Transport Co v Luxor Trading Panama and Geogas Enterprise Geneva, The Al Bida
- Al Faiha, The. See Mediterranean Raffineria Siciliana Petroli SpA v Kuwait Oil Tanker Co SAK, The Al Faiha
- Alan (W J) & Co Ltd v El Nasr Export and Import Co [1971] 1 Lloyd's Rep 401; revsd [1972] 2 QB 189, [1972] 2 All ER 127, [1972] 2 WLR 800, 116 Sol Jo 139, [1972] 1 Lloyd's Rep 313, CA 201, 555
- Albion, The. See Thomas Stone Shipping Ltd v Admiralty, The Albion
- Alfa Nord, The. See Gunnstein A/S & Co K/S v Jensen Krebs and Nielson, The Alfa Nord
- Allen v Francis (1845) 4 Dow & L 607n, 1 New Pract Cas 245, 5 LTOS 178, 9 Jur 691 580
- Allen v Milner (1831) 2 Cr & J 47, 2 Tyr 113, 1 LJ Ex 7 410
- Allen (James) (Liverpool) Ltd v London Export Corporation Ltd [1981] 2 Lloyd's Rep 632 395
- Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D [1983] 3 All ER 737, [1984] 1 WLR 1, 127 Sol Jo 729, [1983] 2 Lloyd's Rep 411; revsd [1985] 2 All ER 796, [1985] 1 WLR 925, 129 Sol Jo 431, [1985] 2 Lloyd's Rep 18, [1985] LS Gaz R 2160, CA 490, 506, 512, 572
- Alma Shipping Corp v Union of India, The Astraea [1971] 2 Lloyd's Rep 494 121, 203, 208
- Alpine Shipping Co v Vinbee (Manchester) Ltd [1980] 1 Lloyd's Rep 400 260
- Altco Ltd v Sutherland [1971] 2 Lloyd's Rep 515 56, 134, 301, 305, 554, 564
- Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] QB 84, [1981] 1 All ER 923, [1981] 2 WLR 554, 125 Sol Jo 133; affd [1982] QB 84, [1981] 3 All ER 577, [1981] 3 WLR 565, 125 Sol Jo 623, [1982] 1 Lloyd's Rep 27, CA 580
- Amalgamated Metal Corp v Khoon Seng Co (1976) 120 Sol Jo 622, [1976] 2 Lloyd's Rep 646, CA; on appeal [1977] 2 Lloyd's Rep 310, HL 209, 364
- American Cyanamid Co v Ethicon Ltd [1974] FSR 312, CA; revsd [1975] AC 396, [1975] 1 All ER 504, [1975] 2 WLR 316, 119 Sol Jo 136, [1975] RPC 513, [1975] FSR 101, HL 330
- American Sioux, The [1980] 2 Lloyd's Rep 224, CA 127, 211
- Ames v Milward (1818) 2 Moore CP 713, 8 Taunt 637 386
- Amram (A A) Ltd v Bremar Co Ltd [1966] 1 Lloyd's Rep 494 301, 366, 582
- Anangel Peace Compania Naviera SA v Bacchus International Commerce Corp, The Anangel Peace [1981] 1 Lloyd's Rep 452 513
- Anderson v Darcy (1812) 18 Ves 447 439
- Anderson v Fuller (1838) 7 Dowl 51, 4 M & W 470, 1 Horn & H 352, 8 LJ Ex 48 439
- Anderson v Wallace (1835) 3 Cl & Fin 26, HL 359
- André et Cie v Cook Industries Inc [1986] 2 Lloyd's Rep 200; revsd [1987] 2 Lloyd's Rep 463, CA 594
- André et Cie SA v Marine Transocean Ltd, The Splendid Sun [1981] QB 694, [1981] 2 All ER 993, [1981] 3 WLR 43, 125 Sol Jo 395, [1981] 2 Lloyd's Rep 29, [1981] Com LR 95, CA 506, 523
- Andrea v British Italian Trading Co Ltd [1961] 2 Lloyd's Rep 392; affd [1962] 1 Lloyd's Rep 151, CA 364, 570
- Andria, The now renamed Vasso [1984] QB 477, [1984] 1 All ER 1126, [1984] 2 WLR 570, 128 Sol Jo 260, [1984] 1 Lloyd's Rep 235, CA 339
- Angelic Grace, The. See Japan Line Ltd v Aggeliki Charis Compania Maritima SA, The Angelic Grace
- Angeliki, The. See Rolimpex (Ch E) Ltd v Avra Shipping Co Ltd, The Angeliki
- Anglo-Newfoundland Development Co v R [1920] 2 KB 214, 89 LJKB 570, 122 LT 731, 84 JP 121, 14 Asp MLC 584, CA 469, 472
- Anglo-Saxon Petroleum Co Ltd v Adamastos Shipping Co Ltd [1957] 2 QB 233, [1957] 2 All ER 311, [1957] 2 WLR 968, 101 Sol Jo 405, [1957] 1 Lloyd's Rep 271, CA; revsd sub nom Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd [1959] AC 133, [1958] 1 All ER 725, [1958] 2 WLR 688, 102 Sol Jo 290, [1958] 1 Lloyd's Rep 73, HL 398, 560
- Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147, [1969] 1 All ER 208, [1969] 2 WLR 163, 113 Sol Jo 55, HL 35, 114, 554, 555, 642

	PAGE
Annefield, The [1971] P 168, [1971] 1 All ER 394, [1971] 2 WLR 320, [1970] 2 Lloyd's Rep 252; on appeal [1971] P 168, [1971] 1 All ER 394, [1971] 2 WLR 320, 114 Sol Jo 862, [1971] 1 Lloyd's Rep 1, CA	106
Anning v Hartley (1858) 27 LJ Ex 145	382
Ansell v Evans (1796) 7 Term Rep 1	435
Antaios, The. See Maritime Transport Overseas GmbH v Unitramp Salem Rederierna AB, The Antaios	
Antares, The. See Kenya Railways v Antares Co Pte Ltd, The Antares	
Antares (No 2), The. See Kenya Railways v Antares Co Pte Ltd, The Antares (No 2)	
Antclizo, The. See Food Corpn of India v Antclizo Shipping Corpn, The Antclizo	
Antco Shipping Ltd v Seabridge Shipping Ltd, The Furness Bridge (No 2) [1979] 3 All ER 186, [1979] 1 WLR 1103, 123 Sol Jo 321, [1979] 2 Lloyd's Rep 267, CA	332, 339, 494
Apex, The. See Phoenix Shipping Corpn v Apex Shipping Corpn, The Apex	
Apollon, The. See Atlantic Lines and Navigation Co Inc v Italmare SpA, The Apollon	
Apollonius, The. See Mafracht v Parnes Shipping Co SA, The Apollonius	
Appleton v Norwich Union Fire Insurance Society Ltd (1922) 13 Ll L Rep 345	234, 236
Arab African Energy Corpn Ltd v Olieprodukten Nederland BV [1983] 2 Lloyd's Rep 419	635
Arab Maritime Petroleum Transport Co v Luxor Trading Panama and Geogas Enterprise Geneva, The Al Bida [1987] 1 Lloyd's Rep 124, CA	630
Arbitration between Becker, Shillan & Co and Barry Bros, Re [1921] 1 KB 391, [1920] All ER Rep 644, 90 LJKB 316, 124 LT 604, 37 TLR 101, DC	401, 557
Arbitration between Lord Gerard and London and North Western Rly Co, Re [1894] 2 QB 915; affd [1895] 1 QB 459, [1895-9] All ER Rep 1144, 64 LJQB 260, 72 LT 142, 43 WR 374, 11 TLR 170, 14 R 201, CA	645
Archipelagos, The. See Bulk Transport Corpn v Sissy SS Co Ltd, The Archipelagos	
Archital Luxfer Ltd v Henry Boot Construction Ltd [1981] 1 Lloyd's Rep 642	397
Arcos Ltd v London and Northern Trading Co Ltd (1933) 45 Ll L Rep 297	556, 564
Arenson v Arenson [1972] 2 All ER 939, [1972] 1 WLR 1196, 116 Sol Jo 298, 122 NLJ 330; affd [1973] Ch 346, [1973] 2 All ER 235, [1973] 2 WLR 553, 117 Sol Jo 247, [1973] 2 Lloyd's Rep 104, 123 NLJ 226, CA; revsd sub nom Arenson v Casson Beckman Rutley & Co [1977] AC 405, [1975] 3 All ER 901, [1975] 3 WLR 815, 119 Sol Jo 810, [1976] 1 Lloyd's Rep 179, 125 NLJ 1192, HL	39, 41, 46, 48, 225
Argenpuma, The. See Dorval Tankers Pty Ltd v Two Arrows Maritime and Port Services Ltd (Pakistan Edible Oils Corpn Ltd (interveners)), The Argenpuma	
Argo Hellas, The. See Adler (trading as Argo Rederei) v Soutos (Hellas) Maritime Corpn, The Argo Hellas	
Aristides Xilas, The. See Exormisis Shipping SA v Oonsoo, The Aristides Xilas	
Aristokratis, The. See Intermare Transport, GmbH v Naves Transoceanicas Armadora SA, The Aristokratis	
Aron (J) & Co v Miall (1928) 98 LJKB 204, [1928] All ER Rep 655, 139 LT 562, 34 Com Cas 18, 17 Asp MLC 529, 31 Ll L Rep 242, CA	280, 333
Aros, The. See Sokratis Rokopoulos v Esperia SpA, The Aros	
Ashville Investments Ltd v Elmer Contractors Ltd [1988] 2 All ER 577, [1988] 2 Lloyd's Rep 73n, CA	112, 115, 117
Ashwin v Societe Maritime et Commerciale du Pacifique (1922) 13 Ll L Rep 164	580
Aspell v Seymour [1929] WN 152, CA	138, 471
Aspen Trader, The. See Libra Shipping and Trading Corpn Ltd v Northern Sales Ltd, The Aspen Trader	
Associated Bulk Carriers Ltd v Koch Shipping Inc, The Fuohsan Maru [1978] 2 All ER 254, 121 Sol Jo 708, [1978] 1 Lloyd's Rep 24, CA	124, 462
Associated Portland Cement Manufacturers Ltd v Tiegland Shipping A/S (1974) 119 Sol Jo 97, [1975] 1 Lloyd's Rep 581, CA	341
Astley and Tyldesley Coal and Salt Co and Tyldesley Coal Co, Re (1889) 68 LJQB 252, 80 LT 116, 15 TLR 154, DC	70, 195
Astraea, The. See Alma Shipping Corpn v Union of India, The Astraea	
Astro Valiente Compania Naviera SA v Pakistan Ministry of Food and Agriculture, The Emmanuel Colocotronis [1982] 1 All ER 578, [1982] 1 Lloyd's Rep 297	602

	PAGE
Astro Vencedor Compania Naviera SA of Panama v Mabanaf GmbH [1971] 2 All ER 1301, [1970] 2 Lloyd's Rep 267; on appeal [1971] 2 QB 588, [1971] 2 All ER 1301, [1971] 3 WLR 24, 115 Sol Jo 284, [1971] 1 Lloyd's Rep 502, CA	106, 117, 118, 121
Athens Cape Naviera SA v Deutsche Dampfschiffahrtsgesellschaft Hansa Aktiengesellschaft, The Barenbels [1985] 1 Lloyd's Rep 528, CA	377
Atisa SA v Aztec AG [1983] 2 Lloyd's Rep 579	594
Atkinson v Jones (1843) 1 Dow & L 225, 7 Jur 881	554
Atlantic Lines and Navigation Co Inc v Italmare SpA, The Apollon [1985] 1 Lloyd's Rep 597	550, 559
Atlantic Shipping and Trading Co v Louis Dreyfus & Co [1922] 2 AC 250, [1922] All ER Rep 559, 91 LJKB 513, 127 LT 411, 38 TLR 534, 66 Sol Jo 437, 10 Ll L Rep 446, 707, 15 Asp MLC 566, 27 Com Cas 311, HL	201, 208
Atlantic Shipping Co SA v Tradax Internacional SA, The Bratislava [1977] 2 Lloyd's Rep 269	213
Atlantic Sunbeam, The. See Sunbeam Shipping Co Ltd v President of India, The Atlantic Sunbeam	
A-G v BBC [1981] AC 303, [1980] 3 All ER 161, [1980] 3 WLR 109, 124 Sol Jo 444, 78 LGR 529, HL	38
A-G v Davison (1825) M'Cle & Yo 160, Ex Ch	352
A-G for Manitoba v Kelly [1922] 1 AC 268, 91 LJPC 101, 126 LT 711, 38 TLR 281, PC	115, 559, 646
Aubert v Maze (1801) 2 Bos & P 371, [1803-13] All ER Rep 516	150
Austin and Whiteley Ltd v S Bowley & Son (1913) 108 LT 921	469, 472
Autothreptic Steam Boiler Co Ltd and Townsend, Hook & Co, Re (1888) 21 QBD 182, 57 LJQB 488, 59 LT 632, 37 WR 15	400
Ayriss (F F) & Co v Board of Industrial Relations of Alberta (1960) 23 DLR (2d) 584	42, 250
Ayscough v Sheed, Thomson & Co (1924) 93 LJKB 924, 131 LT 610, 40 TLR 707, 30 Com Cas 23, 19 Ll L Rep 104, HL	201, 413, 554, 574

B

BP Exploration Co (Libya) Ltd v Hunt [1976] 3 All ER 879, [1976] 1 WLR 788, 120 Sol Jo 469, [1976] 1 Lloyd's Rep 471	89
BTP Tioxide Ltd v Pioneer Shipping Ltd and Armada Marine SA, The Nema [1980] 2 Lloyd's Rep 83; revsd sub nom Pioneer Shipping Ltd v BTP Tioxide Ltd [1980] QB 547, [1980] 3 All ER 117, [1980] 3 WLR 326, 124 Sol Jo 428, sub nom BTP Tioxide Ltd v Pioneer Shipping Ltd and Armada Marine SA, The Nema [1980] 2 Lloyd's Rep 339, CA; affd sub nom Pioneer Shipping Ltd v BTP Tioxide Ltd [1982] AC 724, [1981] 2 All ER 1030, [1981] 3 WLR 292, 125 Sol Jo 542, [1981] Com LR 197, sub nom BTP Tioxide Ltd v Pioneer Shipping Ltd and Armada Marine SA, The Nema [1981] 2 Lloyd's Rep 239, HL	457, 587, 591, 601, 628, 637
BVS SA v Kerman Shipping Co SA, The Kerman [1982] 1 All ER 616, [1982] 1 WLR 166, 126 Sol Jo 63, [1982] 1 Lloyd's Rep 62	602, 631
Babanaft International Co SA v Avant Petroleum Inc, The Oltenia [1982] 1 Lloyd's Rep 448; affd [1982] 3 All ER 244, [1982] 1 WLR 871, 126 Sol Jo 361, [1982] 2 Lloyd's Rep 99, CA	211, 619, 625, 628
Bache v Billingham [1894] 1 QB 107, 63 LJMC 1, 69 LT 648, 58 JP 181, 42 WR 217, 9 R 79, CA	308, 546
Backhouse and Taylor, Re (1851) 2 LM & P 70, 20 LJQB 233, 16 LTOS 373, 15 Jur 86	256, 580
Badagry, The. See Terkol Rederierne v Petroleo Brasileiro SA and Frota Nacional De Petroleiros, The Badagry	
Bailey v Plant [1901] 1 KB 31, 70 LJQB 63, 83 LT 459, 65 JP 52, 49 WR 103, 17 TLR 48, 45 Sol Jo 57, 3 WCC 209, CA	419
Baker v Cotterill (1849) 7 Dow & L 20, 18 LJQB 345, 14 Jur 1120	360
Baker v Hunter (1847) 16 M & W 672, 4 Dow & L 696, 2 New Pract Cas 237, 16 LJ Ex 203	383
Baker v Yorkshire Fire and Life Assurance Co [1892] 1 QB 144, 61 LJQB 838, 66 LT 161	55
Bamburi, The [1982] 1 Lloyd's Rep 312	265

	PAGE
Bangladesh Government Ministry of Food v Bengal Liner Ltd, The Bengal Pride [1986] 2 Lloyd's Rep 167	182
Bani K/S A/S and K/S A/S Havbulk I v Korea Shipbuilding and Engineering Corpn [1987] 2 Lloyd's Rep 445	336
Bank Mellat v GAA Development and Construction Co [1988] 2 Lloyd's Rep 44	116, 362, 382, 419, 553, 555, 642, 647
Bank Mellat v Helleniki Techniki SA [1984] QB 291, [1983] 3 All ER 428, [1983] 3 WLR 783, 127 Sol Jo 618, [1983] Com LR 273, 133 NLJ 597, CA	64, 67, 90, 91, 336, 342
Bankers and Shippers' Insurance Co of New York v Liverpool Marine and General Insurance Co Ltd (1925) 21 Ll L Rep 86, CA; revsd 24 Ll L Rep 85, HL	62, 114, 524
Bankruptcy Notice, Re [1907] 1 KB 478, 76 LJB 171, 23 TLR 214, 51 Sol Jo 132, 14 Mans 1, sub nom Re Debtor (1906) 96 LT 131, CA	419
Bankruptcy Petition, Re, ex p Caucasian Trading Corpn Ltd [1896] 1 QB 368, 74 LT 47, 12 TLR 226, sub nom Re B, ex p Caucasian Trading Corpn Ltd 65 LJQB 346, sub nom Re Birch, ex p Caucasian Trading Corpn Ltd 3 Mans 1, 44 WR 439, CA	419
Barenbels, The. See Athens Cape Naviera SA v Deutsche Dampfschiffahrtsgesellschaft Hansa Aktiengesellschaft, The Barenbels	
Barnes v Youngs [1898] 1 Ch 414, 67 LJ Ch 263, 46 WR 332, 42 Sol Jo 269	477, 479
Barni v London General Insurance Co (1933) 45 Ll L Rep 68, CA	121
Baron v Sunderland Corpn [1966] 2 QB 56, [1966] 1 All ER 349, [1966] 2 WLR 363, 109 Sol Jo 1029, 64 LGR 86, CA	41
Bartle v Musgrave (1841) 1 Dowl NS 325, 5 Jur 1061	582
Barton v Ranson (1838) 3 M & W 322, 6 Dowl 384, 1 Horn & H 11, 7 LJ Ex 86	440
Bath (Henry) & Son Ltd v Birgby Products (1962) 106 Sol Jo 288, [1962] 1 Lloyd's Rep 389	54, 285, 301, 353
Baxters and Midland Rly Co, Re (1906) 95 LT 20, 70 JP 445, 22 TLR 616, CA	550, 560
Beattie v E & F Beattie Ltd [1938] Ch 708, [1938] 3 All ER 214, 107 LJ Ch 333, 159 LT 220, 54 TLR 964, 82 Sol Jo 521, CA	105
Beaufort (Duke) v Welch (1839) 10 Ad & El 527, 3 Jur 794	385, 386
Beck and Jackson, Re (1857) 1 CBNS 695	361, 363
Beddow v Beddow (1878) 9 Ch D 89, 47 LJ Ch 588, 26 WR 570	521, 571
Bede Steam Shipping Co Ltd v Bunge y Born Ltda SA (1927) 43 TLR 374, 27 Ll L Rep 410	122, 131, 201, 204
Bede, The. See Rahcassi Shipping Co SA v Blue Star Line Ltd, The Bede	
Behren v Bremer (1854) 3 CLR 40	360
Bekhor (A J) & Co Ltd v Bilton [1981] QB 923, [1981] 2 All ER 565, [1981] 2 WLR 601, 125 Sol Jo 203, [1981] 1 Lloyd's Rep 491, [1981] Com LR 50, CA	342
Bell v Sun Fire Insurance Office (1927) 29 Ll L Rep 236	474, 481
Ben Line Steamers Ltd v Compagnie Optorg of Saigon (1936) 56 Ll L Rep 83; on appeal (1937) 42 Com Cas 295, 57 Ll L Rep 194, CA	550, 562
Benabu & Co v Produce Brokers Co Ltd (1921) 37 TLR 851, 26 Com Cas 335, 7 Ll L Rep 45, CA	406
Bengal Pride, The. See Bangladesh Government Ministry of Food v Bengal Liner Ltd, The Bengal Pride	
Bennett v Watson 29 LJ Ex 357	581
Berk (F W) & Co Ltd v Knowles and Foster [1962] 1 Lloyd's Rep 430	134, 263, 365, 558, 574
Beswick v Beswick [1968] AC 58, [1967] 2 All ER 1197, [1967] 3 WLR 932, 111 Sol Jo 540, HL	417
Biakh (Bill) K/S A/S v Hyundai Corpn [1988] 1 Lloyd's Rep 187	522, 525, 555, 559, 642
Bickett v Morris (1866) LR 1 Sc & Div 47, 14 LT 835, 30 JP 532, 12 Jur NS 802, HL	648
Bidder and North Staffordshire Rly Co, Re (1878) 4 QBD 412, 48 LJQB 248, 40 LT 801, 27 WR 540, CA	619
Biglin v Clark (1905) 49 Sol Jo 204, DC	263, 580
Bignall v Gale (1841) 2 Man & G 830, 9 Dowl 631, Drinkwater 151, 3 Scott NR 108, 10 LJCP 169, 5 Jur 701	580
Birkett v James [1978] AC 297, [1977] 2 All ER 801, [1977] 3 WLR 38, 121 Sol Jo 444, HL	213
Birtley District Co-operative Society Ltd v Windy Nook and District Industrial Co-operative Society Ltd [1959] 1 All ER 43, [1959] 1 WLR 142, 103 Sol Jo 112	546