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PART I

RISK ANALYSIS OF THE IMPACT OF THE CHOICE OF DISPUTE RESOLUTION SYSTEM ON THE OUTCOME OF A MARITIME DISPUTE

By C.Haselgrove-Spurin.*

INTRODUCTION

When a civil dispute[1] or difference arises between two parties there are a number of different ways in which the parties can go about trying to settle that dispute or difference. It is possible for parties entering into a contractual relationship to pre-determine the method of settlement that will apply to future disputes and differences by the insertion of a clause into the contract.[2] Unless the parties subsequently otherwise agree that method of settlement will be used by the parties in the event of a dispute or difference. [3]

Even where there is no choice of dispute settlement mechanism in a contract or where a dispute arises between parties not governed by a contractual relationship it is nonetheless open to the parties to agree upon a dispute resolution mechanism.

The choices available to the parties are broadly :

1) To seek to negotiate a settlement between themselves.
2) To seek to settle the difference with the assistance of a mediator
3) To avail themselves of a third party expert determinator
4) To settle the difference through the courts[4]
5) To arbitrate the dispute.
6) Combinations of the above such as med/arb processes.

Negotiation.

Provided the parties are confident that they have a sufficiently good relationship to deal with disputes or differences between themselves then negotiation is clearly the best, simplest, most harmonious, cheapest and speediest way of dealing with any such dispute or difference that might arise. However, suspicion and distrust, often arising out of imbalances in negotiating power between the parties, frequently result in deadlock and delay. If allowed to fester this can cause irreparable damage to the relationship and so there is a need to consider alternative methods of settling disputes and differences where this occurs. Nonetheless, a provision in a contract requiring the parties to conduct their relationships in a spirit of co-operation and to attempt to settle differences though negotiation is desirable, provided an alternative mechanism for dispute resolution is available in the event of a breakdown in the negotiations and provided the provision makes it clear what the appropriate time and circumstance for referral is and the mechanism for referral is clearly stated.[5]

The Civil Courts.

At the time of writing, the standard default mechanism for dispute resolution is the civil courts. Where a contract is silent on dispute resolution system, a dispute arising out of the contract, if it is to be settled, will at

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1 This paper does not deal with disputes between citizen and state where the interests of the state and its citizens are protected by the courts as typified by criminal trails.

2 See Doke Bishop's paper "A Practical Guide for Drafting International Arbitration Clauses." which provides a thorough review of the various types of ADR clause which can be incorporated into contracts.

3 If one of the parties seeks to over-ride an ADR clause by commencing court action the other party can seek a stay of the court action. If however, the other party also submits to the court action then there is an implied waiver of the right to proceed by way of the alternative dispute resolution.

4 Some jurisdictions e.g. Texas, USA, operate court ordered mediation systems so the element of choice may be restricted by legislation. See later discussion of the effect of non participation in court ordered mediation.

5 See for instance the JAMS/ENDISPUTE clause A1 Duty to negotiation in good faith.

the instigation of one of the parties, find its way to a court.[6] The court has the power to settle the dispute, subject only to any appeal to a higher court. A failure by one party to attend will not prevent the court proceeding to binding enforceable judgement. A defendant has nothing to gain and everything to lose by non-participation. Default in respect of a judgement or court order is immediately subject to court enforcement in pain of contempt proceedings at the behest of the other party. The court can resort to the use of bailiffs to enforce payments of debts. What were previously known as "Mareva Injunctions", but have now been re-titled as "Seizure Orders" by the Civil Procedure Rules 1998 in the U.K., can ensure that assets are not removed from the jurisdiction.

The process is adversarial.[7] The battle-ground is shaped by rules of law and the solutions are limited to those available to the legal system within which the court operates. The judge is unlikely to have any practical business experience and deals with the dispute on a purely legal basis only. The parties have little or no control over the process[8] and its outcome, trusting their legal representative to do the best he or she can to represent their interests. The parties involvement in the process is by enlarge made at a distance during consultations with legal representatives. Participation, if it occurs at all, is on the witness stand.

Whether the central issue depends on an interpretation of a legal issue or a determination by the court of a factual situation, the process is somewhat like a lottery. The outcome is likely to be one of "winner takes all" with the loser bearing the costs of the trial. The court has little scope to slice the cake and achieve a compromise solution to the dispute.[9] This is not to say that it would be better for the courts to render a so called "equitable" solution by sharing out the loss between the parties. Justice often requires hard decisions and the enforcement of the rights of a party who has been unjustly deprived of benefits under a contract or has sustained damage to other interests. Equally, simply because a party to an action has suffered loss does not, without more, entitle the claimant to be compensated for that loss. Nonetheless, it is inevitable that one party will depart triumphant and the other will be left feeling that justice and fairness has not been achieved.[10] This is particularly so where one party wins on a legal technicality. This is not conducive to good relations between the parties in the future.

Arbitration.

The traditional alternative to court settlement of disputes is arbitration. The parties give the tribunal the power to settle their dispute. Arbitral awards are enforceable in domestic courts[11] and international awards are supported by The New York Convention on the Enforcement of Arbitral Awards, providing access to the enforcement powers of the courts of most of the international community. Arbitral awards are not free from challenge in the courts. However, where the jurisdiction permits the issuing of unreasoned awards, or the parties agree to the issuing of an unreasoned award the scope for challenge is severely restricted.[12]

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6 See below for a discussion as to which court might ultimately be seized of the dispute.

7 This is true even of the so called "inquisitorial" civil legal systems. There is a distinction between the way the court conducts its business (adversarial or inquisitorial) and between the way the opposing parties relate to each other which is inevitably adversarial when court or arbitral action is involved. The inquisitorial nature of civil law systems relates merely to the way in which the judge is empowered to cross-question the parties and require paper submissions of evidence, whereas the common law adversarial system involves opposing lawyers presenting evidence to the court and cross questioning the other party before the judge or arbitrator.

8 Once the process has reached the trial stage there is little scope for the parties to withdraw from the process. However, parties frequently broker a settlement pre-trail which often leads to the classic settlement at the courthouse door. Unfortunately, the equality of bargaining power between the parties in such negotiations tends to be poor and negotiation is conducted at a distance by the parties' representatives.

9 Some jurisdiction contain legal rules that enable the court to apportion liability, as with the rules on contributory negligence in tort in England. Where both a claim and counter claim succeed in respect of different elements of a dispute there can likewise be some appearance of a splitting of the cake which can then have a knock on effect for award of costs.

10 See Geoffrey M Beresford-Hatwell's paper "Comparative Analysis of the Ethical Dynamic Involved in Litigation, Adjudication, Arbitration and Mediation."

11 Section 42, 44 & 66 Arbitration Act 1996 amongst others provide powers of the court to support the arbitral process.

12 s52(4) Arbitration Act 1996

To a greater or lesser extent, depending on the jurisdiction governing the dispute and where applicable, the rules of any arbitral organisation chosen by the parties to govern the process[13], the parties are free to agree the range of powers exercisable by the arbitrator. The process as with the courts is adversarial. The battle-ground is shaped by rules of law and the solutions are limited to those available to the legal system within which the tribunal operates.[14] The arbitrator is likely to have practical experience of the industry which enables the arbitrator to better understand the background to the dispute especially when addressing issues of fact.[15]

Again, whilst there are a number of advantages to choosing arbitration, the outcome is nevertheless likely to be a winner takes all situation with the loser bearing the costs of the arbitration. Party participation is much like that in the courts though it is likely to be somewhat less formal. The role of the arbitrator is similar to that of the judge in a court, though the arbitrator's powers are somewhat more limited than those of a judge. So, once more, the outcome of an arbitration is not likely to be conducive to good relations between the parties in the future.

Expert determination and adjudication.

Whilst expert determination and the various forms of adjudication[16] provide a viable way of settling dispute, this paper will not deal with this mechanism in any detail, apart from pointing out that as a fast track form of arbitration it can be cost and time effective but limits the degree of participation that the parties have over the process. The battleground is legal in nature, but the decision will normally revolve around the determination of a fact such as the value of an item, the meaning of the terms of a contract and who is responsible for carrying out contractual duties or whether a certain event has taken place such as the fulfilment of a contractual duty for example the use of specified materials. The expert determinator or adjudicator, is by nature, an expert with experience in the industry and the decision is less likely to be based on the application of esoteric rules of law.

Apart from statutory adjudication schemes where the law gives the adjudicator the power to settle disputes referred to the adjudicator,[17] the power to determine the outcome of the dispute is given to the expert determinator or adjudicator by the parties. The outcome is likely to be a "winner takes all" situation which once again is not necessarily conducive to good relations between the parties in the future. However, since adjudication is frequently used to settle interim disputes that occur during the course of implementing a wider program, it can enable the parties to put an issue to rest and get on with the next task in hand. This is particularly so of adjudication in the construction industry. Frequently however, adjudication is not final and in such cases the decision whilst immediately binding on the parties is subject to subsequent re-evaluation by an arbitrator or the courts.

Mediation.

Mediation is gradually establishing itself as a viable alternative method of settling disputes and differences.[18] Unlike court settlement, arbitration, expert determination and adjudication a third party does not make a decision which settles the dispute.[19] Participation by the parties in the process is central to the way mediation operates. This is both a strength and a weakness of mediation. If one party refuses to participate it is not possible to broker an agreement and the mediator has no power to impose a decision in the absence of participation by one of the parties.

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13 eg ICC Rules, Model Law, LCIA Rules , GAFTA Rules etc

14 See below regarding choice of substantive and procedural law.

15 This is not necessarily so. There has been a tendency in recent years for arbitrators to be drawn from the ranks of lawyers and judges. However, there is often scope within the appointing system for the parties to seek to ensure that the arbitrator is drawn from their peers within their industry.

16 See Tony Bingham's paper, "Adjudication in the Construction Industry in the UK – A Role Model for Malaysia."

17 As under s108 Housing Grants, Construction and Regeneration Act 1996 in the UK and under a host of Acts providing for Ombusdman Review of consumer disputes.

18 As to whether mediation is a new concept or a tradition Asian concept which is establishing itself or re-establishing itself, see Neil Kaplan's address to this seminar supra.

19 See Judge Richard Faulkner's paper "Mediation – What is it and what has it got to offer Malaysia ?"

By contrast, both judges[20] and arbitrators[21] can continue the court or arbitral hearing in the face of the obdurate refusal of a party to attend the hearing, where it is clear that the refusal to attend has no reasonable justification and is carried out for no other purpose that that of attempting to frustrate the process. It is commonly stated that mediation is a non-binding process which relies on the co-operation of the parties to participate in the process. Whilst true, this is increasingly an oversimplification.[22] In jurisdictions which operate court ordered mediation, a failure to attend and even a failure to actively participate in the process can have a variety of adverse consequences for the absentee or non-participant. Under the CPR Rules in the UK the court can order a stay of action pending participation in a mediation[23], and can even award costs against the successful party if that party had intentionally failed to participate in a mediation.[24] If the process works[25] it produces an agreement, brokered between the parties through the good offices of the mediator, which can be made legally binding and enforceable in the courts. [26] In the event of a refusal by one party to abide by the agreement, subsequent court action to enforce the agreement is inexpensive and relatively quick. There is little point is refusing to fulfil the agreement.

The scope for challenging the validity of the agreement is very limited and restricted to allegations of bias, duress and undue influence on the part of the mediator. Proving such allegations is difficult since it is standard practice that all notes and transcripts in the possession of the mediator are destroyed or returned to the parties at the conclusion of the mediation.[27] The parties agree in advance that the mediator and all other parties present should treat all information disclosed in the process as privileged.[28] Thus none of the information disclosed during the process can be subsequently disclosed in court or used as evidence. Offers of settlement, made but not accepted, cannot later be used in court as a substitute for a payment into court. Nor can such offers be disclosed to the court to try and influence the judge's award of damages or costs. The avenues for appeal from the court and the arbitral process, even though limited in scope, are much more extensive than the process for challenging the validity of mediated agreements.

The mediation commences with the mediator welcoming the parties and then laying out the ground rules for the conduct of the mediation[29] followed by opening statements by both parties or their representatives. Once

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[20] In civil cases the court operates on the basis that where a defendant fails to rebut the allegations of the plaintiff the defendant conceeds that point, so a failure to attend has immediate and obvious repercussions for the absentees' defence.

[21] For example s41(4) Arbitration Act 1996 UK

[22] See R.Faulkner, G.Thomas & C.H.Spurin, "Mediation Methods : Representing Your Client at a Mediation" University of Glamorgan Law School Press 1st Ed 1999, pp7-14.

[23] s26(4)(2) CPR 1998 : see also Torith v Stewart Duncan Properties [1999] Employment Appeals Tribunal. LTL 19/12/99 Lawtel C8200316 and see also Neil Kaplan's address to this seminar where he makes it clear that in Hong Kong participation in the mediation process, where an agreement contains a mediation clause, is a condition precedent to court proceedings.

[24] s44.3. C.P.R. 1998

[25] Determining whether or not the mediation process has worked should not however be based entirely on whether or not a settlement of all elements of the dispute has been achieved. Frequently agreement is reached over some elements of the dispute, with the consequence that subsequent litigation is more focussed, and consequently faster and cheaper. Even where no settlement is achieved the process can still deliver benefits in that the differences that separate the parties are much more clearly understood by both parties.

[26] The parties can alternatively make a non-binding agreement, that is to say an agreement "binding in honour only".

[27] See foot note 28 below. The mediator will make this clear during the introduction to the process when he or she sets the ground rules for the mediation.

[28] See for instance the standard form NADR Mediation Agreement which is signed by both parties to the mediation.

[29] A contrast can be drawn here between the courts, where the parties have little or no choice in respect of the procedures which govern the conduct of the trail. Arbitration however does provide the parties with an element of choice providing they can reach agreement, at least in the UK by virtue of all of those provisions under the Arbitration Act 1996 which commence with the legend "Unless the parties otherwise agree .,." and with particular reference to s34 Arbitration Act 1996. In the absence of agreement it is the arbitrator who determines the procedures that will govern the process. The parties however have an element of choice at an earlier stage when they choose the arbitral or mediation body that will handle the dispute, with it is hoped, a keen weather eye on the type of procedures favored by that body and prescribed within its rules for the conduct of the process.

both parties have set out their stance at the commencement of the mediation, for the benefit of the other party and the mediator, the mediator acts both as a conduit for the flow of information between the parties[30] and, as an agent of reality for each of the parties in turn, providing a sounding board for the confidential exploration of concepts and ideas which might form the basis of a negotiated settlement. The mediator can act as devil's advocate to each party in turn, suggesting possible advantages and disadvantages for each party of pursuing different ways of dealing with the differences which divide the parties. The mediator can suggest ideas and concepts which each of the parties might wish to consider. The mediator can help the parties to identify hidden benefits and things that each of the parties can offer the other which are not burdensome for them but which the other party would place value on.

The settlement is likely to be based on some form of "compromise" but this does not inevitably mean that either party ends up compromising their interests. The old adage "no gain without pain" does not necessarily ring true for mediated settlements. By contrast with the judicial system which produces a win-lose situation, mediation can result in a win – win situation where each party settles within their band of expectation and perhaps even above (i.e. receives more than expected) or below (i.e. pays out less than expected) the level at which they were prepared to settle. Furthermore, the benefits of facilitating agreements for future co-operation can far outweigh any concessions made regarding the immediate dispute at hand. All of this embraces settlement concepts which the courts, arbitration and adjudication cannot offer the parties. However, this does not mean that the law does not have a role to play in the process. In particular, the agent of reality is founded on the basis of the legal consequences of a failure to broker an agreement, firstly in respect of the cost of pursuing the difference further at law or through arbitration and secondly because the law is likely to establish the basis of the respective rights and duties of the parties.

Assuming the parties reach an agreement which brings the dispute to an end there is a very good prospect that the parties can continue to do business together and that the dispute will not have caused irreparable damage to their business relations. Indeed, an awareness of the each party's expectations and the limits of each party's tolerances can foster a climate of mutual respect which strengthens the relationship. The early mediation of minor disputes and differences can enable parties to work more closely together in the future.[31] With less at stake than would be the case with court action parties can use mediation as a way of interacting between themselves during the course of business. In this respect mediation is an ideal mechanism for dealing with differences between employees and between employer and employee.

Mediation provides an alternative method of dispute resolution. It does not displace judicial and arbitral dispute settlement. Indeed, there are many disputes which do not lend themselves to mediation.[32] Where there is no dispute at all apart from a blatant refusal to pay for contractual benefits received it is unlikely that the defaulting party will co-operate in the mediation process. The defaulting party may not have the resources to pay and bankruptcy proceedings are the only viable way of moving forward. However, even in these types of cases, if the defaulting party is trying to buy time, it may be an appropriate response for the creditor to take a pragmatic view of the situation and to put aside strict legal rights and broker some form of extended credit agreement, especially if there is a possibility that the financial affairs of the debtor will eventually be solved and the parties will be able to resume a profitable business relationship. Finally, mediation keeps the parties business affairs out of the public arena. The court process is open to the public. Whilst arbitration is private and keeps business affairs out of the public domain, any recourse to the courts for assistance or support or for the enforcement of an award can break down the privacy barrier. Businessmen do not want their dirty linen laundered in public. Litigation sends out a message to prospective customers that business relations with the organisation might be far from harmonious.

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[30] What follows is perhaps an over simplification of the role of the mediator, but which concentrates on a model which lends itself to commercial dispute settlement. There are many different models of mediation process, which have evolved to facilitate different types of dispute between different types of disputant. Indeed, there is no concensus as to how a mediation should be conducted, with advocates of a variety of competing methodologies. See Goldberg, Sander and Rogers, "Dispute Resolution. Negotiation, Mediation, and Other Processes" Aspen Law and Business, for an overview of a wide range of these methodologies.

[31] The adjudication system introduced by the Housing Grants, Construction and Regeneration Act 1996 is based on the same premise.

[32] See NADR guidelines on appropriate cases for mediation.

CHOICE OF JURISDICTION AND CHOICE OF LAW

Introduction.

Whether the parties address the issue of dispute resolution mechanism before or after a dispute arises there are a number of other issues that have to be dealt with at the same time if the dispute is of an international nature, namely, the substantive and procedural law that will govern the respective rights / liabilities and duties of the parties and the conduct of the dispute resolution process respectively. The consequences of, and implications for, dispute resolution processes, of choice of law and choice of jurisdiction clauses depend on whether the dispute ends up in court, arbitration or mediation.

Choice of Jurisdiction.

This is not the time and place to enter into an in depth analysis of jurisdiction. Suffice to say that matters are considerably simplified if the parties ensure that the procedural law of the court handling the suit covers all jurisdictional aspects of the dispute. In international cases, much time and expense can been incurred by parties to disputes where jurisdictional matters have to be ironed out before the court even gets to consider the issues involved in the dispute.

Arbitration is much more flexible in this respect, but even so, the arbitrator is frequently required to deliver an interim award dealing with jurisdiction matters. A lack of clarity in this respect can result in one of the parties having recourse to the courts to settle jurisdictional issues. The degree of support that a court can and will lend to the arbitration process differs from jurisdiction to jurisdiction and this should be taken into account by parties when drafting jurisdiction clauses in contracts.

The degree of support that the judicial system will lend to the mediation process,[33] in particular regarding stay of court action pending participation in the mediation process, the availability of court ordered mediation and the penalties that the court will impose on non-participants in the mediation process depends very much on the substantive jurisdiction that governs the process. In particular, care needs to be taken to ensure that if recourse to the courts is needed in order to enforce the mediated agreement, that the court seized with jurisdiction will recognise and enforce that agreement. Indeed, the mediated agreement itself can include a Law and Jurisdiction clause.

Choice of Law.

Domestic civil courts are not well suited to the consideration and application of foreign law. The courts of England and Wales for instance treat foreign law as a question of fact that has to be established by the parties. This can complicate matters considerably and therefore it is therefore highly desirable that the parties seek to ensure that the contract provides for the contracts to be governed by the substantive law of the courts that will adjudicate over disputes that arise between the parties. However, in so doing, the parties need to maintain a weather eye on statutory provisions that impose rights and duties on the parties. This is particularly so for international disputes, since there are a number of International Conventions that can, through incorporation into domestic law, govern the conduct of the parties. Thus there are three International Conventions that govern the carriage of goods by sea[34], a range of conventions that govern jurisdiction and enforcement of court and arbitral awards and another range of conventions governing limitation of liability in respect of maritime pollution[35] and damage consequent on the carriage of dangerous cargoes. The point is that different jurisdictions will have incorporated different conventions thus providing the parties with differing standards of conduct and differing rights, liabilities and privileges.

Arbitrators are far more conversant with the concept of applying "foreign" substantive law. Indeed the arbitrator is more able to apply international conventions to disputes and can, with the consent of the parties, even decide a case on an equitable "ex aequo bono" basis. The trick here, from the party's perspective, is to try and ensure that the arbitrator chosen to adjudicate is familiar with the substantive law that governs the dispute.

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[33] See footnote 22 supra.

[34] The Hague, The Hague-Visby and The Hamburg Rules.

[35] See Dr Susan Hodges, "The legal implication os the ISM Code : insurance and limitation of liability." [1999] IJIL 39.

Since the mediator merely facilitates the parties in reaching an agreement it is not immediately apparent what impact the substantive law has on the mediator's role. However, it should be remembered that the mediator will, when providing the parties with reality checks, make reference to both the substantive law that governs the relations between the parties and also to any procedural law that will have an impact, in particular in respect of costs and enforcement powers, on the parties in the event of a failure to broker an agreement.

Check List to Evaluate the Variable Factors Involved in Settlement of a Dispute through The Courts, Arbitration or Mediation

Factors	Court	Arbitration	Mediation
Time to settlement			
Executive costs of preparing for trial etc			
Legal costs of preparing for trial etc			
Costs of trial & do costs follow event ?			
Finality of dispute			
Implications, if any, for future relations			
Need for witnesses / reliability / availability			
Availability of Discoveries			
Availability of Security			
Enforceability			
Limitation of Liability			
Privacy			
Scope for a negotiated settlement			
Implications of payment into court etc			

Conclusion.

There are advantages and disadvantages to each method of dispute resolution. It is difficult for the parties to predict which system will best suit their needs before the true nature of a dispute is disclosed. Nonetheless a well thought out dispute resolution clause taking into account all the known variables and the likely vicissitudes of the shared business venture the parties are about to undertake is likely as not to prove more than adequate and apposite. If not, as with the post dispute reference, it is not necessarily too late, providing the parties can agree, to amend the terms of reference. Similarly, time and effort expended on a well considered choice of law and jurisdiction clause will be rewarded, preventing subsequent delay, expensive litigation and submission to rules which presage unwelcome consequences.

PART II

IMPACT OF CHOICE OF ADR SYSTEM ON A DISPUTE

Comparative analysis of dispute settlement processes

The theoretical differences between taking a claim to law, to arbitration or to mediation are common currency today. Much has been written in the journals about the value of ADR. Still, the legal practitioner in particular tends to remain sceptical and perhaps a little fearful (unjustifiably as it so happens) that the advent of ADR may in fact adversely affect his fee earning capacity. Businessmen may have heard about the existence of ADR but outside the US there is little encouragement to take advantage of it. This is particularly so where the lawyer advising the businessman on choice of dispute resolution system is sceptical about ADR in the first place.

The impact of different choices of dispute resolution system only really hit home to the practitioner when put into practice. This being so, for the benefit particularly of those who have not been involved in ADR processes until now, there follows an analysis of the impact choice of dispute resolution might have on a hypothetical maritime dispute. The dispute is of a common place type. A vessel has been lost at sea along with its cargo. The cargo was insured under an ICC(A) Cargo policy. The assured seeks to recover from the underwriter. The underwriter resists the claim on the grounds that the vessel, with the knowledge of the assured, was unseaworthy. This being contrary to the provisions of the contract of insurance, the underwriter seeks to avoid the policy. From the viewpoint of the assured and the underwriter, which is the best dispute resolution system for settling this dispute ? What are the advantages and disadvantages of choosing one system over another ?

The dispute should not be viewed in isolation. Whilst this will be the only dispute to be settled by the court, arbitrator or through mediation there are a host of other disputes waiting in the wings involving a number of other parties. The underwriter will subsequently seek to recover any monies paid out under the policy by way of subrogation of the assured . The "authorities" will seek to recover damages for pollution and both the ship owner and the charterer will be embroiled in this action. The ship owner will wish to claim on his own insurance policy. The charterer will seek to recover any liability incurred from the ship owner under the charter party. In conclusion, the present dispute is just one of many hurdles that will have to be jumped before all the matters arising out of the incident are finally put to rest. The outcome of this dispute may well have knock on effects for other disputes the parties are involved in with different parties. This analysis will be followed by a demonstration mock mediation of the dispute.

Bangsar Oil Export (M) SDN BHD v Tight Purse Insurance Co.Ltd.

This is a practical exercise illustrating the impact of choice of ADR system on a dispute. It features a dispute between a charterer / assured and an underwriter, involving alleged unseaworthiness due to a purported breach of the International Management Code for the Safe Operation of Ships and for Pollution Prevention.[36]

Personalities involved.

Mr Alan Azad, MD of Bangsar Oil Export (M) SDN BHD (**BOE**) purchased 120,000 tonnes of oil from Malaysian Petroleum (M) SDN BHD (**MPS**) which he then sold under a delivery contract subject to Bankers Documentary Credit, cash payable in advance, to The Tigger Oil Co, (**TOC**) Sri Lanka.
Mr.A.Azad nominated the Damansara Bank, KL as confirming bank.
The VCL Stella Marina and two sister ships, The VCL Luna Marina and The VCL Sola Marina were beneficially owned by the Zarim family, resident in Kuala Lumpur, Malaysia and London, England.
Each ship was owned by a one ship company registered in England, namely the VCL Stella Marina Co Ltd (**SMC**), the VCL Luna Marina Co Ltd (**LMC**) and the VLC Venus Marina Co Ltd (**VMC**) respectively.
All three vessels were effectively managed by Corona Maritime (UK) Co Ltd (**CMC**), directed by Chancer Zarim and his two sons Zachariah Zarim and Absolom Zarim and by Ally Akba, the technical director.
Malaysian Chartering (M) SDN BHD (**MCS**) was the registered managing organisation directed by Chancer Zarim and Mohd Munassor. **BOE** chartered the VCL Stella Marina for 2 years, under a Time Charterparty, commencing the 3rd January 2000, from **SMC** through the auspices of **MCS**.

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[36] The International Safety Management (ISM) Code. See annex 1 below.

Background information.
The VCL Stella Marina was built in 1984 and became part of the Corona fleet in September 1999. All three vessels were of identical design and construction including a full flood carbon dioxide extinguishing system for the engine room, consisting of a rank of C02 cylinders which could be discharged by pulling down a single handle in the bridge house. A series of wires and pulleys linked the handle to the cylinders. In order for the fire suppression system to work effectively it was essential that all doors, windows and ventilation shafts be completely sealed and airtight when the system is triggered off. The vessels were also equipped with an electrically powered main fire pump and an emergency fire pump.

The VCL Stella Marina was arrested by Dutch port officials at Rotterdam during her first voyage in October 1999 and following a survey Captain Chancer Zarim was ordered to effect maintenance and repairs to the main and emergency fire pumps, and to ensure that an effective safety management system (SMS) be adopted on board the vessel.

Captain Chancer Zarim ordered the ship's engineer to carry out a routine inspection and repairs to the vessel and assured the authorities that the task of developing an SMS was well advanced and that all crew would be fully trained and conversant with all aspects of ship safety. The engineer attempted repairs to the fire pumps but failed to get the emergency pump to work. During the course of inspection of the wiring to the main fire pump system blocks of wood were used to jam open a ventilator shaft carrying the wire conduit. The blocks of wood were never removed. Captain Chancer Zarim took a cursory glance at the instructions for operating the full flood carbon dioxide extinguishing system, called the crew together, pointed at the lever and told them "If ever we get a fire, make sure that this lever is pulled down as quickly as possible". The vessel was released from arrest and promptly sailed to Kerteh, Malaysia.

The Charter
The vessel was delivered to **BOE** at Kerteh, Malaysia. A.Azad promptly ordered the vessel to load the cargo of 120,000 tonnes oil with orders to set sail to a Sri Lankan port. A.Azad inspected the ship's log on delivery and was aware that there had been problems in Amsterdam. Having inquired as to the nature of the problem and what had been done about it he was assured by Captain Chancer Zarim that there was nothing to worry about and that everything had now been sorted out, and that the vessel was ready to load and set sail.

The Insurance
Prior to shipment **BOE** insured the cargo under an Institute Cargo Clauses (A) policy with Tight Purse Insurance (UK) Co Ltd (**TPI**).

The policy was stated to be subject to English Law and either (Delete as appropriate)
a) English Jurisdiction
b) London Arbitration or
c) Mediation under the auspices of NADR (M) SDN BHD,
for shipment from Kerteh to a Sri Lankan port.

The cargo was duly loaded on the 4th January and a clean bill of lading issued to Mr.A.Azad., who promptly tendered a receipt and shipping documents in respect of the cargo to the Damansara Bank and received payment in full.

The Incident.
The vessel set sail on the 4th January. At around 3:20 a.m. a fire broke out in the engine room of the VCL Stella Marina. Captain Chancer Zarim, who had been dozing in a chair whilst on night watch promptly engaged the C02 extinguishing system by pulling a lever in the bridge house which should have engaged the system and extinguished the fire. This operation initially smothered much of the fire but failed to extinguish it completely because a block of wood prevented a ventilation shaft from being closed. The fire re-established itself and having generated extremely high temperatures penetrated the cargo hold and ignited the oil cargo. At 5:25 a.m. Captain Chancer Zarim gave the order to abandon the vessel. Following an enormous explosion the vessel broke in two and sank at 6:05 a.m. with loss of all cargo, but without loss of life. The incident has resulted in severe marine pollution in an area of the sea close to the coast of Malaysia with adverse effects on the tourist and fishing industries. The projected costs of pollution control and cleaning up operations are enormous.

The Claim[37]

BOE claimed on the Institute Cargo Clauses (A) all risks policy for the loss of the cargo by fire, a peril insured against under the policy, freight costs and return of premium.

The Defence.

TPI's loss adjuster conducted investigations into the incident and advised that the claim be rejected on the grounds that the VCL Stella Marina was unseaworthy, with the privity of Mr.A.Azad, MD of **BOE**. Consequently, **TPI** denied liability to **BOE** under the policy.

In particular, **TPI** alleged that

1) By virtue of s40(2) Marine Insurance Act 1906[38] in a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

2) That by virtue of s33 Marine Insurance Act 1906[39] breach of the warranty entitled the underwriter to avoid the policy.

3) Clause 5.1[40] of the policy states that in no case shall this insurance cover loss or damage or expense arising from unseaworthiness of vessel or craft, unfitness of vessel ….. for the safe carriage of the subject-matter insured, where the Assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein.

4) Clause 5.2[41] of the policy states that the underwriters waive any breach of the implied warranty of unseaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness.

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[37] Independently from the current dispute, the incident also gave rise to issues regarding Marine Pollution against the ship owners and charterers. There are also outstanding insurance claims against other insurance companies by ship owners and charterers.

[38] s40 Marine Insurance Act 1906 **No implied warranty that goods are seaworthy**

(1) In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy.

(2) In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

[39] s33 Marine Insurance Act 1906 **Nature of warranty**

(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty. As above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

[40] Clause 5.1 Institute Cargo Clauses (A)

In no case shall this insurance cover loss damage or expense arising from unseaworthiness of vessel or craft, unfitness of vessel craft conveyance container or liftvan for the safe carriage of the subject-matter insured, where the Assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein.

[41] Clause 5.2 Institute Cargo Clauses (A)

The Underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness.

5) Following the judgement of the Court of Appeal in The Sea Star it is evident that the Stella Marina was unseaworthy, in that
   a) the Fire Suppression System was ineffective and
   b) by virtue of the fact that the crew were not adequately trained in the operation of said Fire Suppression System and
   c) on account of the failure of owners / operators to institute an effective Safety Management System (SMS)[42] and
   d) on account of the owner/operator's failure to consequently put said SMS into operation, in contravention of s40(2) MIA 1906.

6) Following the judgement of the Court of Appeal in The Sea Star[43] it is evident that the Stella Marina was unseaworthy, in that the Fire Suppression System was ineffective and by virtue of the fact that the crew were not adequately trained in the operation of said Fire Suppression System and on account of the failure of owners / operators to institute an effective Safety Management System (SMS) and on account of the failure to consequently put said SMS into operation, in contravention of Clause 5.1 of the ICC Policy.

7) That the knowledge of such failures by A.Azad, MD of **BOE**, the assured, counteracted the waiver of the breach of the implied warranty of unseaworthiness contained in Clause 5.2 of the ICC Policy.

Additional information.
Each party to this action is likely to be privy to information that the other party does not know about. Further investigation of third parties to the action may well turn up new information that might be central to the resolution of the dispute. Each party is likely to have a hidden agenda. In other words, this is the typical situation faced by party representatives and their clients on the day that a brief is accepted.

Background Statistics for BOE v TPI

Subject Matter :	130,000 tons oil : i.e. 1.5m barrels at $28 US / barrel.	$42.00m US
Insurance Premium :	2% of cargo value.	$8.40m US
Freight :	$2.5 US / barrel.	$3.75m US
Time Charterparty Rate :	$22,000 US / day. Monthly in advance	$0.66m US
Global Legal Costs of Claim :	$1m	$1.00m US
Hull Insurance:	$300 US / day 4 day voyage total $1,200	
Time to Court Settlement :	2-3 years	
Interest on claim for 1 year	at 4% (SBR +1%)	$2.17m US

[42] See ISM Code, Annex 1 below.

[43] **Manifest Shipping & Company Ltd. v Uni-Polaris Insurance Company Ltd. and La Reunion Europeene (The Star Sea)** [1997] 1 Lloyd's Rep 360 C.A. : [1995] 1 Lloyd's Rep 651 at 1st instance.

INTERNATIONAL MANAGEMENT CODE FOR THE SAFE OPERATION OF SHIPS AND FOR POLLUTION PREVENTION

(INTERNATIONAL SAFETY MANAGEMENT (ISM) CODE)

Safety and pollution prevention management requirements

Preamble

1. The purpose of this Code is to provide an international standard for the safe management and operation of ships and for pollution prevention.

2. The Assembly adopted Resolution A.443(XI) by which it invited all governments to take the necessary steps to safeguard the shipmaster in the proper discharge of his responsibilities with regard to maritime safety and the protection of the marine environment

3. The Assembly also adopted Resolution A.680(17) by which it further recognized the need for appropriate organization of management to enable it to respond to the need of those on board ships to achieve and maintain high standards of safety and environmental protection.

4. Recognizing that no two shipping companies or shipowners are the same, and that ships operate under a wide range of different conditions, the Code is based on general principles and objectives.

5. The Code is expressed in broad terms so that it can have a widespread application. Clearly, different levels of management, whether shore-based or at sea, will require varying levels of knowledge and awareness of the items outlined.

6. The cornerstone of good safety management is commitment from the top. In matters of safety and pollution prevention it is the commitment, competence, attitudes and motivation of individuals at all levels that determines the end result.

1 GENERAL

1.1 Definitions

1.1.1. 'International Safety Management (ISM) Code' means the International Management Code for the Safe Operation of Ships and for Pollution Prevention as adopted by the Assembly, as may be amended by the Organization.

1.1.2 'Company' means the owner of the ship or any other organization or person such as the manager or the bareboat charterer, who has assumed the responsibility for operation of the ship from the shipowner and who on assuming such responsibility has agreed to take over all the duties and responsibility imposed by the Code.

1.1.3 'Administration' means the government of the State whose flag the ship is entitled to fly.

1.2 Objectives

1.2.1 The objectives of the Code are to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular, to the marine environment, and to property.

1.2.2 Safety management objectives of the Company should, inter alia:

1.2.2.1. provide for safe practices in ship operation and a safe working environment;

1.2.2.2 establish safeguards against all identified risks; and

1.2.2.3. continuously improve safety management skills of personnel ashore and aboard ships, including preparing for emergencies related both to safety and environmental protection.

1.2.3. The safety management system should ensure:

1.2.3.1. compliance with mandatory rules and regulations; and

1.2.3.2. that applicable codes, guidelines and standards recommended by the Organization, administrations, classification societies and maritime industry organizations are taken into account.

1.3. **Application :** The requirements of this Code may be applied to all ships.

1.4. **Functional requirements for a safety management system (SMS)** Every company should develop, implement and maintain a safety management system (SMS) which includes the following functional requirements:

1.4.1. a safety and environmental protection policy;

1.4.2. instructions and procedures to ensure safe operation of ships and protection of the environment in compliance with relevant international and flag State legislation;

1.4.3. defined levels of authority and lines of communication between, and amongst, shore and shipboard personnel;

1.4.4. procedures for reporting accidents and non-conformities with the provisions of this Code;

1.4.5. procedures to prepare for and respond to emergency situations; and

1.4.6. procedures for internal audits and management reviews.

2. SAFETY AND ENVIRONMENTAL PROTECTION POLICY

2.1. The company should establish a safety and environmental protection policy which describes how the objectives, given in paragraph 1.2, will be achieved

2.2. The Company should ensure that the policy is implemented and maintained at all levels of the organization both ship-based as well as shore-based.

3. COMPANY RESPONSIBILITIES AND AUTHORITY

3.1. If the entity who is responsible for the operation of the ship is other than the owner, the owner must report the full name and details of such entity to the administration.

3.2. The company should define and document the responsibility, authority and interrelation of all personnel who manage, perform and verify work relating to and affecting safety and pollution prevention.

3.3. The company is responsible for ensuring that adequate resources and shore-based support are provided to enable the designated person or persons to carry out their functions.

4. DESIGNATED PERSON(S)

To ensure the safe operation of each ship and to provide a link between the company and those on board, every company, as appropriate, should designate a person or persons ashore having direct access to the highest level of management. The responsibility and authority of the designated person or persons should include monitoring the safety and pollution prevention aspects of the operation of each ship and to ensure that adequate resources and shore-based support are applied, as required.

5. MASTER'S RESPONSIBILITY AND AUTHORITY

5.1. The company should clearly define and document the master's responsibility with regard to:

5.1.1. implementing the safety and environmental protection policy of the company;

5.1.2. motivating the crew in the observance of that policy;

5.1.3. issuing appropriate orders and instructions in a clear and simple manner;

5.1.4 verifying that specified requirements are observed; and

5.1.5 reviewing the SMS and reporting its deficiencies to the shore-based management.

5.2. The company should ensure that the SMS operating on board the ship contains a clear statement emphasizing the master's authority. The company should establish in the SMS that the master has the overriding authority and the responsibility to make decisions with respect to safety and pollution prevention and to request the company's assistance as may be necessary.

6. RESOURCES AND PERSONNEL

6.1. The company should ensure that the master is:

6.1.1. properly qualified for command;

6.1.2. fully conversant with the company's SMS; and

6.1.3. given the necessary support so that the master's duties can be safely performed.

6.2. The company should ensure that each ship is manned with qualified, certificated and medically fit

seafarers in accordance with national and international requirements.

6.3. The company should establish procedures to ensure that new personnel and personnel transferred to new assignments related to safety and protection of the environment are given proper familiarization with their duties. Instructions which are essential to be provided to sailing should be identified, documented and given.

6.4. The company should ensure that all personnel involved in the company's SMS have an adequate understanding of relevant rules, regulations, codes and guidelines.

6.5. The company should establish and maintain procedures for identifying any training which may be required in support of the SMS and ensure that such training is provided for all personnel concerned.

6.6. The company should establish procedures by which the ship's personnel receive relevant information on the SMS in a working language or languages understood by them.

6.7. The company should ensure that the ship's personnel are able to communicate effectively in the execution of their duties related to the SMS.

7. DEVELOPMENT OF PLANS FOR SHIPBOARD OPERATIONS

The company should establish procedures for the preparation of plans and instructions for key shipboard operations concerning the safety of the ship and the prevention of pollution. The various tasks involved should be defined and assigned to qualified personnel.

8. EMERGENCY PREPAREDNESS

8.1. The company should establish procedures to identify, describe and respond to potential emergency shipboard situations.

8.2. The company should establish programmes for drills and exercises to prepare for emergency actions.

8.3. The SMS should provide for measures ensuring that the company's organization can respond at any time to hazards, accidents and emergency situations involving its ships.

9. REPORTS AND ANALYSIS OF NON-CONFORMITIES, ACCIDENTS AND HAZARDOUS OCCURRENCES

9.1. The SMS should include procedures ensuring that non-conformities, accidents and hazardous situations are reported to the company, investigated and analysed with the objective of improving safety and pollution prevention.

9.2. The company should establish procedures for the implementation of corrective action.

10. MAINTENANCE OF THE SHIP AND EQUIPMENT

10.1. The company should establish procedures to ensure that the ship is maintained in conformity with the provisions of the relevant rules and regulations and with any additional requirements which may be established by the company.

10.2. In meeting these requirements the company should ensure that:
10.2.1 inspections are held at appropriate intervals;
10.2.2 any non-conformity is reported with its possible cause, if known;
10.2.3 appropriate corrective action is taken; and
10.2.4 records of these activities are maintained.

10.3. The company should establish procedures in the SMS to identify equipment and technical systems the sudden operational failure of which may result in hazardous situations. The SMS should provide for specific measures aimed at promoting the reliability of such equipment or systems. These measures should include the regular testing of stand-by arrangements and equipment or technical systems that are not in continuous use.

10.4. The inspections mentioned in 10.2 as well as the measures referred to in 10.3 should be integrated in the ship's operational maintenance/routine.

11 DOCUMENTATION

11.1. The company should establish and maintain procedures to control all documents and data which are relevant to the SMS.

11.2. The company should ensure that:
11.2.1. valid documents are available at all relevant locations;
11.2.2. changes to documents are reviewed and approved by authorized personnel; and
11.2.3. obsolete documents are promptly removed.

11.3 The documents used to describe and implement the SMS may be referred to as the 'safety management manual'. Documentation should be kept in a form that the company considers most effective. Each ship should carry on board all documentation relevant to that ship.

12 COMPANY VERIFICATION, REVIEW AND EVALUATION

12.1 The company should carry out internal safety audits to verify whether safety and pollution prevention activities comply with the SMS

12.2 The company should periodically evaluate the efficiency and when needed review the SMS in accordance with procedures established by the company

12.3 The audits and possible corrective actions should be carried out in accordance with documented procedures.

12.4 Personnel carrying out audits should be independent of the areas being audited unless this is impracticable due to the size and the nature of the company.

12.5 The results of the audits and reviews should be brought to the attention of all personnel having responsibility in the area involved.

12.6 The management personnel responsible for the area involved should take timely corrective action on deficiencies found.

13. CERTIFICATION, VERIFICATION AND CONTROL

13.1 The ship should be operated by a company which is issued a document of compliance relevant to that ship.

13.2 A document of compliance should be issued for every company complying with the requirements of the ISM Code by the administration, by an organization recognized by the administration or by the governments of the country, acting on behalf of the administration in which the company has chosen to conduct its business. This document should be accepted as evidence that the company is capable of complying with the requirements of the Code

13.3 A copy of such a document should be placed on board in order that the master, if so asked, may produce it for the verification of the administration or organizations recognized by it

13.4 A certificate, called a safety management certificate, should be issued to a ship by the administration or organization recognized by the administration. The administration should, when issuing the certificate, verify that the company and its shipboard management operate in accordance with the approved SMS.

13.5 The administration or an organization recognized by the administration should periodically verify the proper functioning of the ship's SMS as approved.

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PART III

RISK ANALYSIS EXERCISES

Introduction

The basis of any negotiated settlement turns on the evaluation that each of the parties makes of their respective chances of success in litigation / arbitration and of their respective risks of failure. The outcome of the suit will be based on an application of both facts and law. Were establishing any fact or any rule of law is uncertain a risk arises as to the outcome of the dispute. A risk analysis therefore must consist of a chart identifying the variable factors that will arise during the trial in the order that they will have to be decided and the outcomes that flow from the decision going for or against the litigant. This is illustrated in the quick sketch line diagram below.

FIGURE 1 QUICK SKETCH Simple line drawn decision tree.

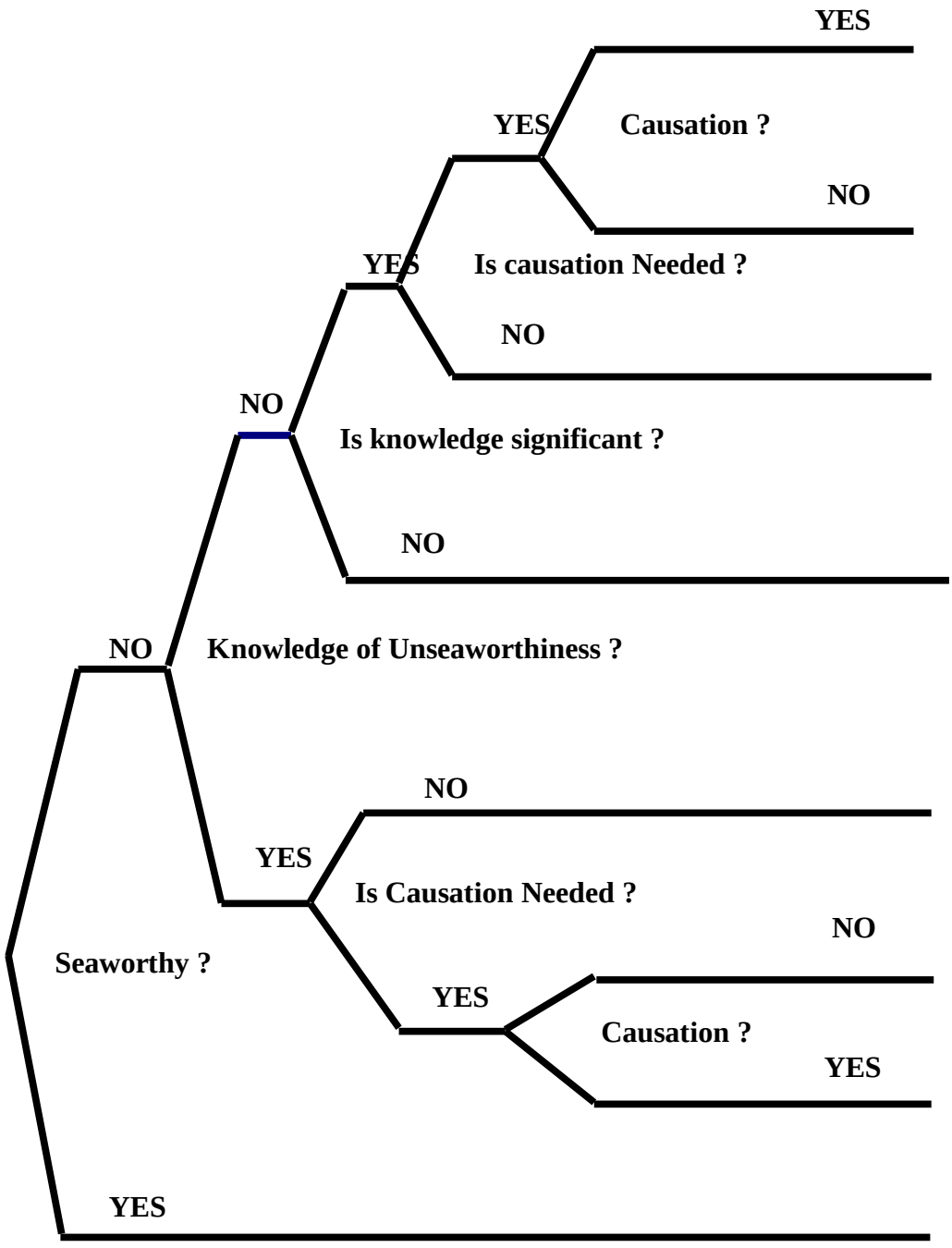


Figure 2 Win / Lose Decision Tree

This diagram covers the same factors as the simple line scheme but provides an opportunity to input more information about the decision making process and paves the way for the introduction of figures and calculations at a later stage.

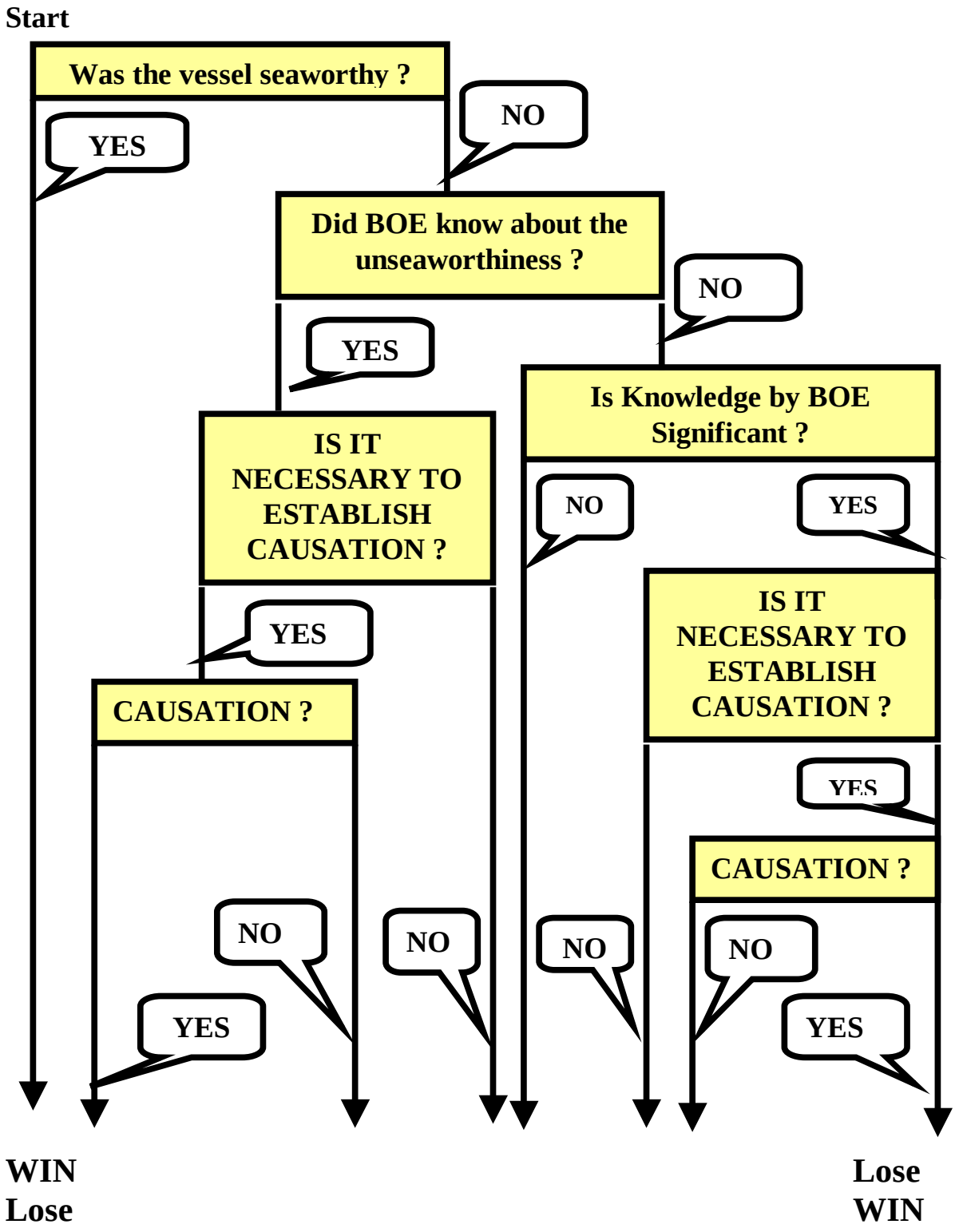


FIGURE 3. Win / Lose Decision Tree Strengths and Weaknesses

The same diagrammatic scheme can be expanded to include information about the factors that influence the assessment of risk, be they factual or legal. This enables the assessor to make a reasoned and considered assessment of the risk factors.

Start

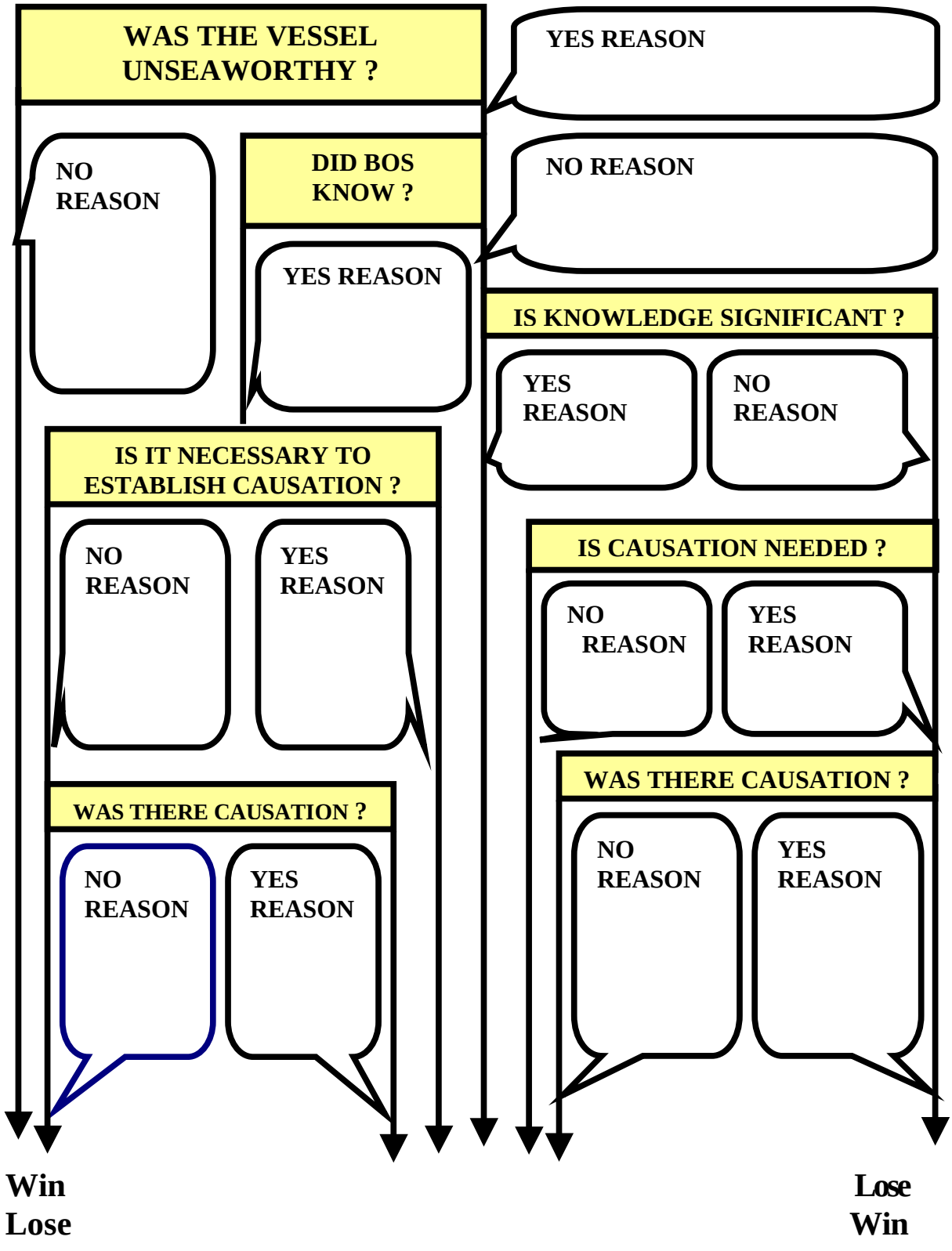


Figure 4 Win / Lose Decision Tree : Qualitative Analysis
This diagram contains information regarding a qualitative analysis of the projected outcome of the trial of each stage of the decision making process.

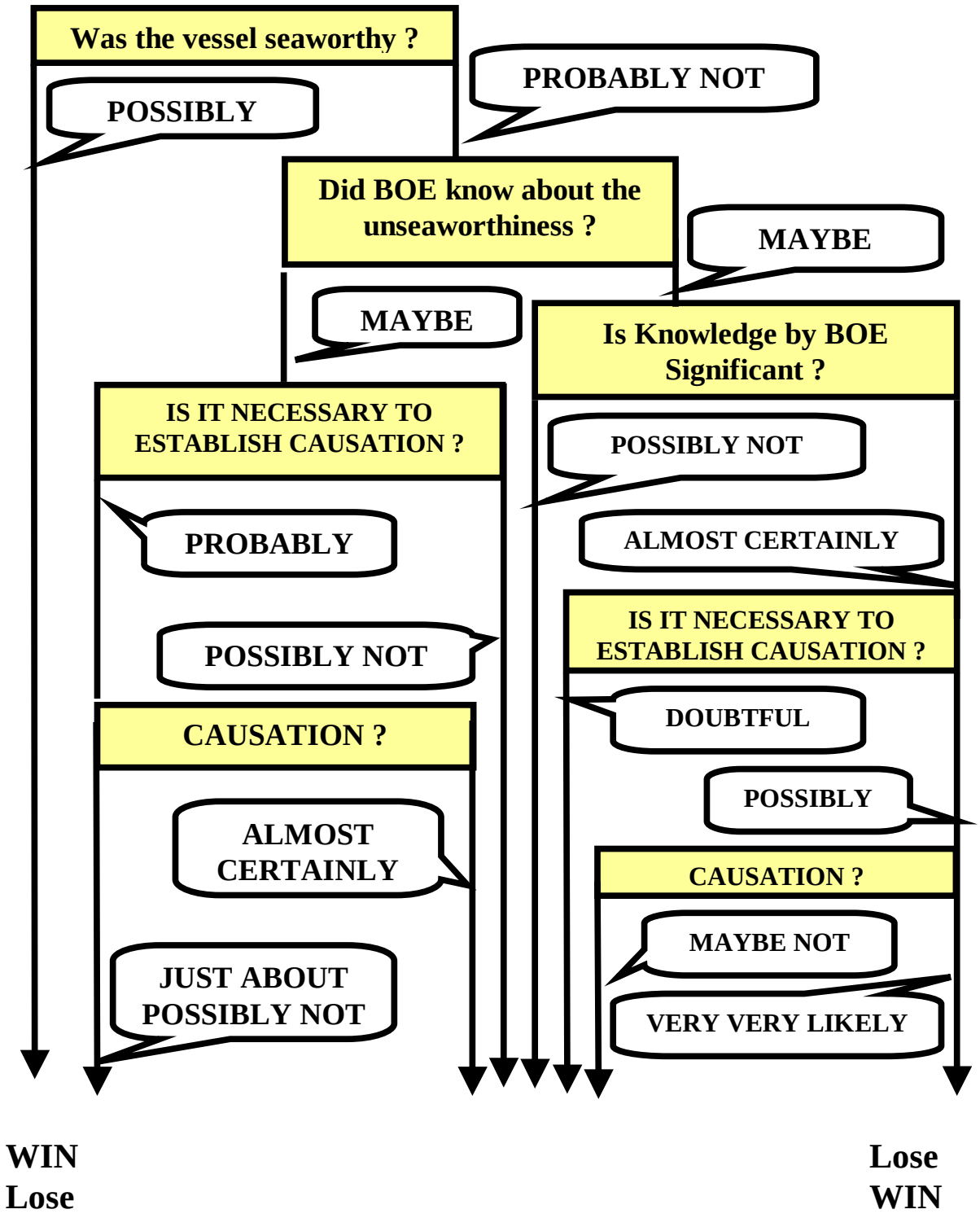
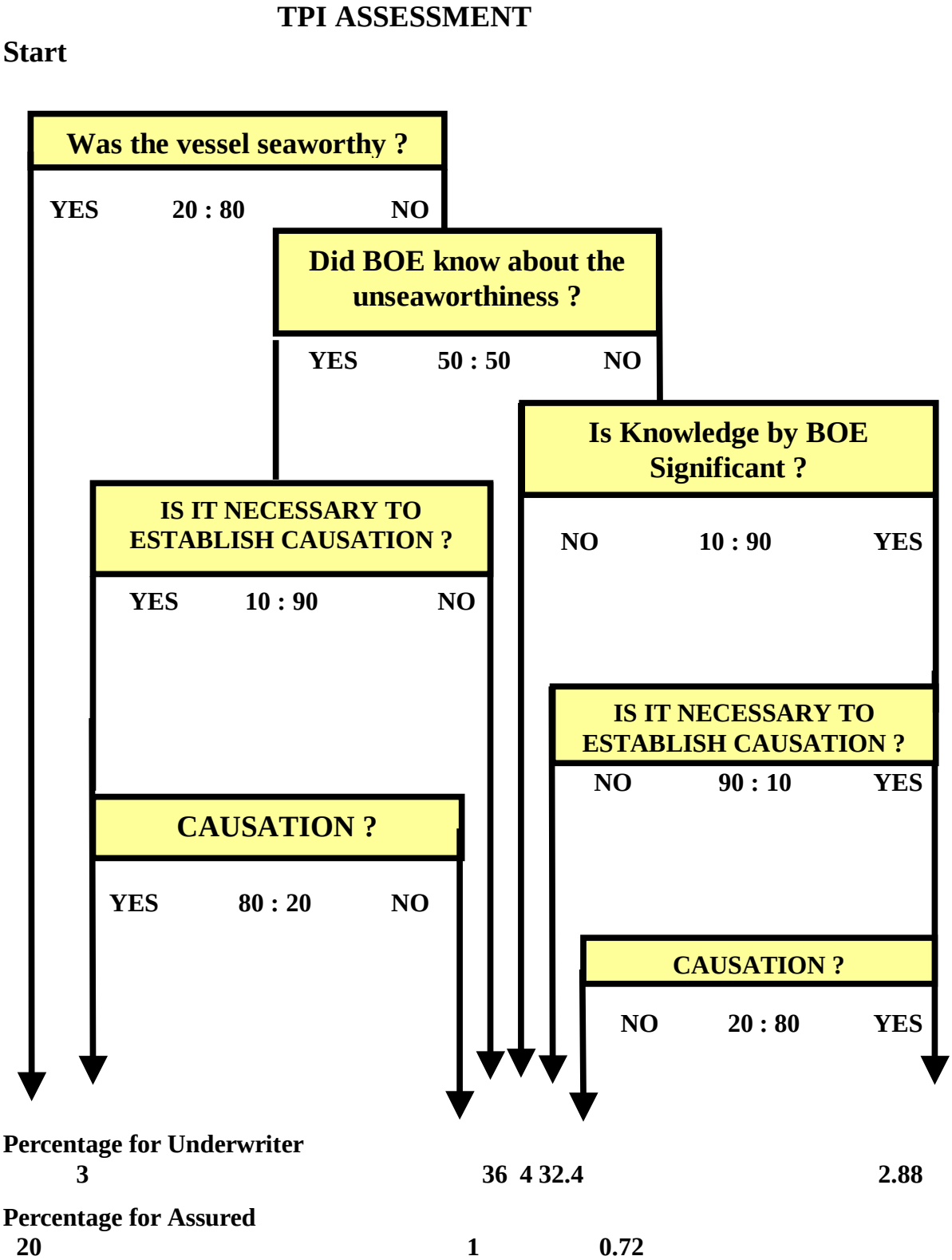


Figure 5 Win / Lose Decision Tree : Quantitative Analysis

Qualitative analysis gives the parties a feeling for their chances of success, but negotiation requires hard figures. A quantitative analysis produces concrete percentages much like the odds used for betting. Just like an accumulator where the winnings of successive races are put onto the next race, the odds of each of the risks of winning and losing each stage of the decision making process can be totted up to produce an assessment of the global risk involved in the trial.



The probability that the assured's claim fails in court is thus 78:22 (78.28 : 21.72)

Figure 6 Claims and Costs.

A significant factor in the settlement of any dispute involves an assessment of not only what the party seeks to recover of defend against but also the costs of taking the case to trial. The assessment of risk arrived at in figure 5 can then be used in conjunction with the concretized costs and expenses involved in the trial which are also at risk in order to identify the optimum figure for settlement of the dispute.

Figure 6a

Claimant : Assured - BOE

Costs & Claims in £ Sterling	NonRecoverable	Recoverable
A : Cargo		£A
B : Freight		£B
C : Premium		£C
D : Lost Executive Time : Administration : Travel : Accommodation	£D	
E : Pre-Trial Legal Advisors Cost	£E	
F : Legal Advisors Costs at Trial		£F
G : Witnessess & Experts		£G
H : Court Costs		£H
TOTAL : X - W	**£W**	**£X**

Total sum to be recovered if successful : X (A + B + C + F + G + H) **– W** (D + E)

Figure 6b

Defendant : Underwriter TPI

Costs & Claims in £ Sterling	NonRecoverable	Recoverable
A : Cargo		£A
B : Freight		£B
C : Premium		£C
I : Lost Executive Time : Administration : Travel : Accommodation	£I	
J : Pre-Trial Legal Advisors Cost	£J	
K : Legal Advisors Costs at Trial		£K
L : Witnessess & Experts		£L
H : Court Costs		£H
TOTAL : Z – Y	**£Y**	**£Z**

Total costs of the trial even if successful : Z (I + J) **– Y** (A + B + C + K + L + H)

Both parties can repeat the exercise to evaluate the costs involved in losing.

Figure 7 Win / Lose Decision Tree : Cost Analysis

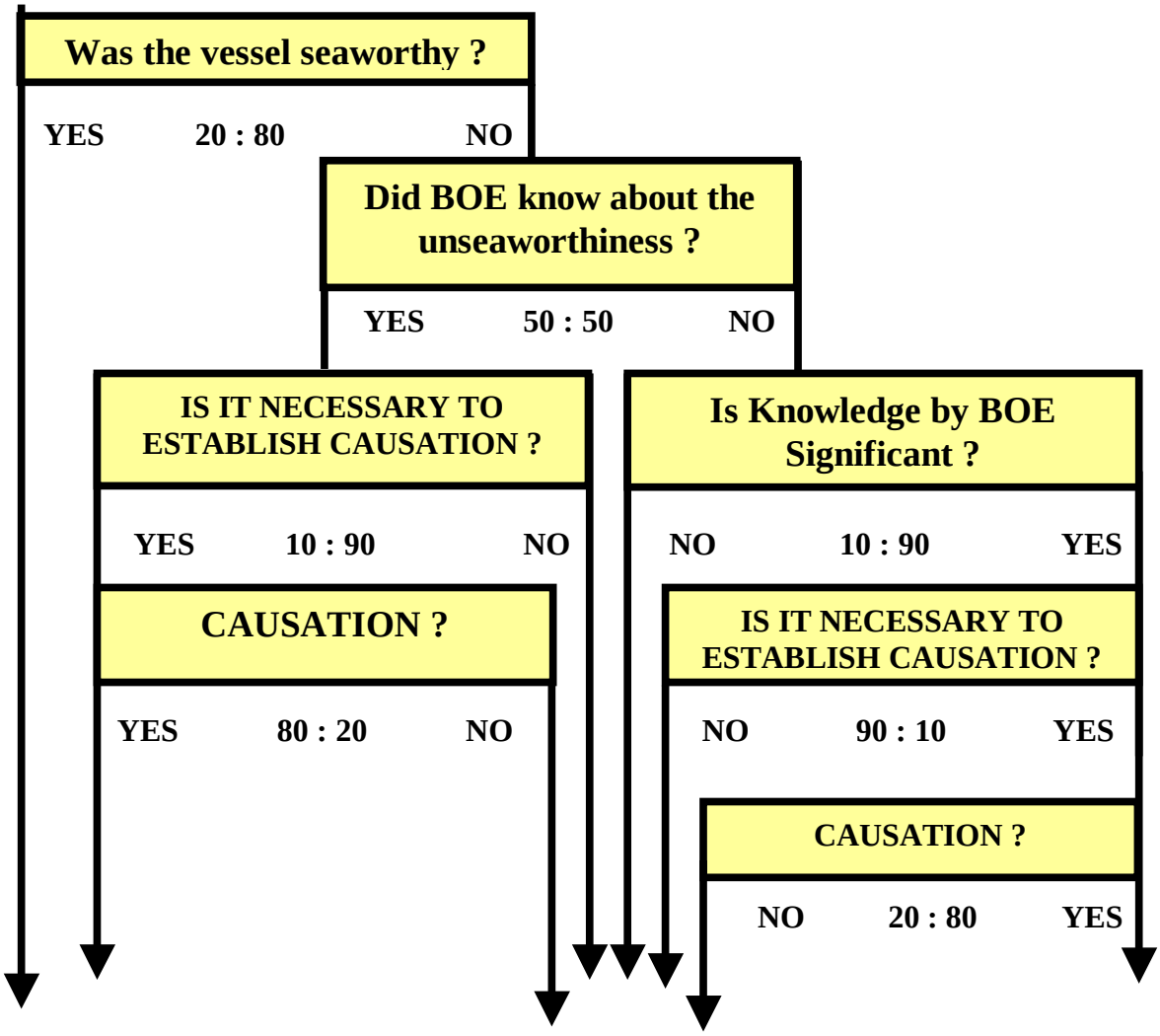
The figures generated in figure 6 can be fed into the decision tree cost analysis by either party.

Percentage down the total loss or gain figure and insert at the end of each branch.

If BOE wins its ultimate financial position will be X – W
IF BOE loses its ultimate losses will be X + W +Z

If TPI wins its ultimate financial position will be Z – Y
If TPI loses its ultimate loses will be X + Y +Z

Start



Percentage for Underwriter

3 **£***

36 **4** **32.4** **£*** **£*** **£***

2.88 **£***

Percentage for Assured

20 **£***

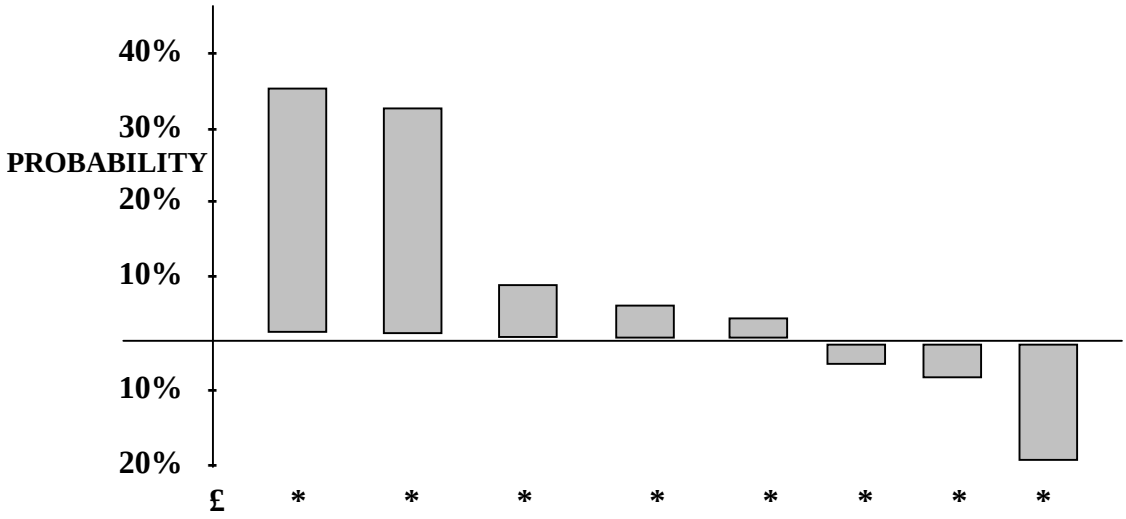
1 **£***

0.72 **£***

FIGURE 8 Converting the probabilities into a graph

Using a graph provides a very clear but direct way of illustrating the risks and costs involved in litigation.

TPI sets out with a top side target of £Z-Y and a bottom side of X +Y + Z



Total Payment £*.***

FIGURE 9 : The probability weighted average or "Expected Value"

By adding all the weighed probabilities of recovery together and subtracting the totaled weighted probabilities of expenditure the expected value of litigation, represented by the sum of the percentage value of each probability, can be generated.

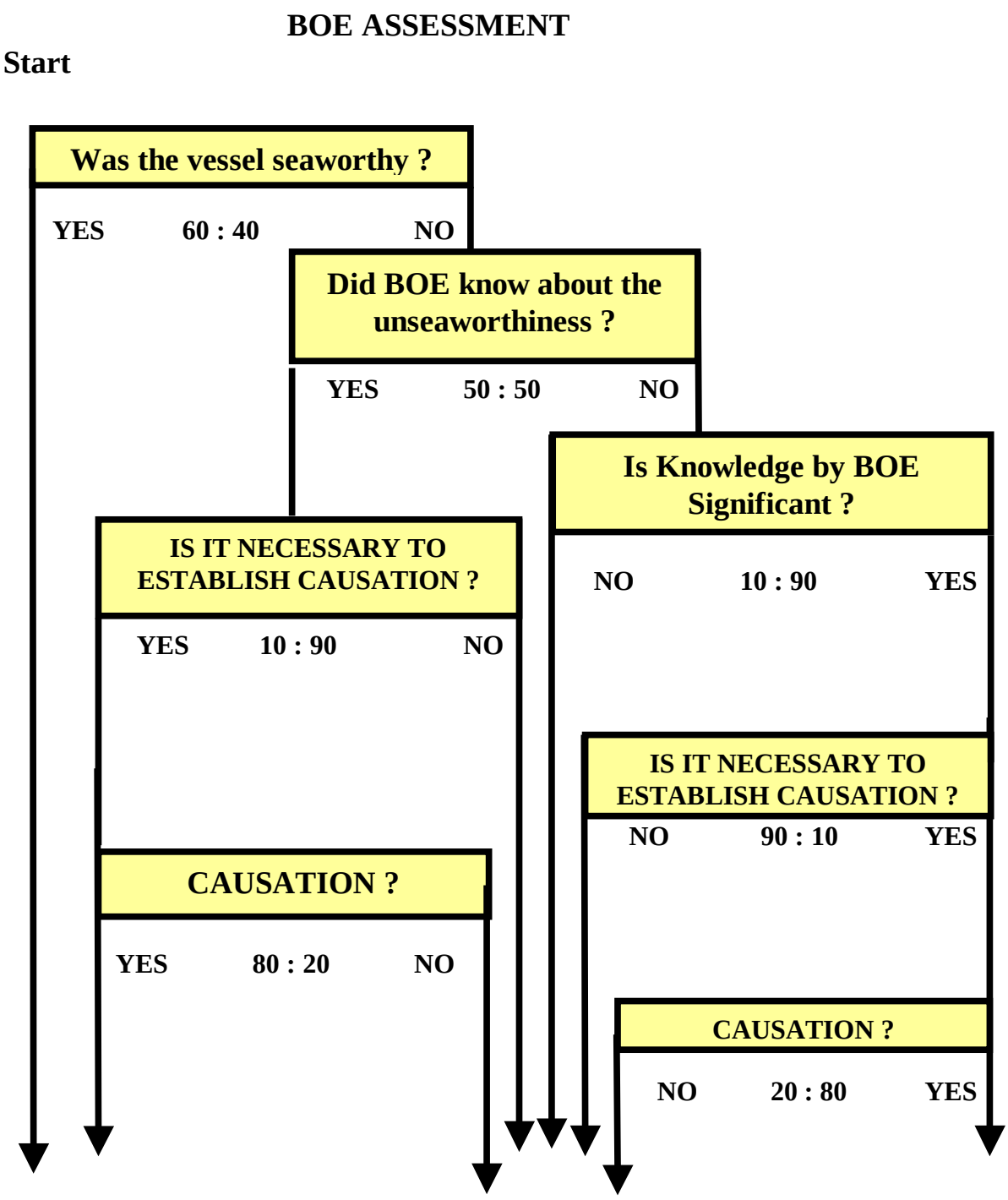
ADD				
£**	x	36%	=	£**.
£**	x	32.4%	=	£**.
£**	x	4%	=	£**
£**	x	3%	=	£**.
£***	x	2.88%	=	£**
SUBTRACT				
£**	x	20%	=	£**
£**	x	1%	=	£**
£**	x	0.72%	=	£**
TOTAL		**100%**	**=**	**£***.**

This is the optimum figure for a settlement for TPI Less would be a win : more would be the equivalent of a loss.

This evaluation process should be carried out by both parties. Since at the outset both parties anticipate success, it is hardly surprising that the figures imputed into the process will differ significantly from TPI. Thus, as demonstrated in the final diagram, figure 10, BOE's qualitative analysis would project a positive view of their probability of winning the action.

The difference between the two assessments will expose the gap that the mediator has to try and bridge. The task of the mediator is, by way of reality testing to, where appropriate, modify the evaluations of both parties in figures 5 and 9 so that the gap between their assessments of success and failure are narrowed as much as possible. If the gap is sufficiently small that it out weights the perceived risks of litigation for both parties a settlement is assured. However, if the perceived risks are not significant, in the absence of other extraneous factors such as the long term mutual benefit of maintaining the training relationship which outweigh the potential gains through litigation, a settlement will not be achievable.

FIGURE 10 Win / Lose Decision Tree : Quantitative Analysis



Probability assured's claim succeeds in court: 61 : 39 (60.76 : 39.24)

Conclusion

Given the assessment's of the parties at the outset, BOE the claimant assured predicts, in round figures, that there is a 61% chance of success. By contrast the defendant TPI predicts a 78% chance of successfully defending the claim.

The scenario deliberately does not provide concretized figures for the claim and counter-claim, because an integral part of the live demonstration that will take place this afternoon will require each of the parties to put figures on their claims and counterclaims and to fix the figures at this stage would rob the demonstration of its vitality and immediacy. However, given the fact that the claimant is seeking to recover $42m for the lost oil, $8.4m insurance premium and $0.66m freight the global claim excluding litigation costs is $51.6m US.

The claimant started out with an expectation or Best Alternative To a Negotiated Agreement (BATNA) of $51.6m and a Worst Alternative To a Negotiated Agreement (WATNA) of $0.0 US. The defendant started out with a BATNA of $0.0 US and a WATNA of $51.6. This therefore results in an enormous gap between the expectations of the parties at the outset. However, if the parties are prepared to settle on the basis of their evaluation of the chances of success or failure then the BATNA figures of the respective parties become 78% of $51.6 and 39%, resulting in a divide of $39m - $20m. Whilst $19m is still a considerable gap between the expectations of the parties it is considerably less than $51.6. The gap may well still be too large at this stage to bridge but the task is immediately less daunting.

The risk assessment weightings put into each party's risk analysis are purely subjective. This is as much an art as a science. Different advisors might well input different figures, depending on the degree of optimism they have towards the outcome of the dispute based on their own professional experience. The task of the mediator would be too provide reality checks for both parties on their expectations, thereby reducing their probability assessments even lower in appropriate circumstances. If successful and taking into account the costs of litigation which are also at risk, it is often possible to narrow the gap between the expectations of each party to a level where the expectations either converge or the gap is so insignificant that the risks of trail no longer appear to be justifiable and a settlement then becomes probable.

It is not only the parties who should carry out such risk analysis exercises. Once a mediator has sufficient knowledge and understanding of the respective stances of the parties to be able to make an objective analysis doing so is valuable for the mediator. The analysis will give the mediator a target range for an achievable settlement that would be demonstrably reasonable for both parties. Any settlement within that range would be viewed as a WIN/WIN situation and the outcome of the mediation would thus be a quantifiable success. This is a tried and tested analysis process. As a mediator, the author has successfully predicted, with a very small margin of error, the final settlement figures of a large number of disputes before him at mediation.

This afternoon you will have the opportunity to see a live demonstration of a mediation of the BOE v TPI dispute, conducted by members of the panel. This should give you all a bird's eye view of the mediation process in action and demonstrate the way that both the mediator and the parties evaluate their risks and apply them to the dispute resolution process. Judge Richard Faulkner will act as mediator. Dr Susan Hodges will act as representative TPI and Professor Geoffrey M Beresford-Hartwell will act as claims adjuster for TPI. Corbett Haselgrove-Spurin will act as representative for BOS and Ernest Azad will act as the cargo owner claimant. The demonstration is completely unscripted. The panel members have the same information that you have been provided with. The question as to whether or not a settlement is achievable or not and if so what the terms of the settlement will be is completely open. I hope you enjoy the demonstration and learn a great deal about the mediation process from watching it.

Following the demonstration there will be an open panel discussion where you will have the opportunity to ask the panel questions about the settlement process and how the parties arrived at their final assessments of risk and why they adopted their final stances at the end of the process.