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Maritime law in 2019: a review of developments in case law

By Dr Johanna Hjalmarsson

Arrest and judicial sale – Bills of lading – Charterparty disputes – Collisions – Contract negotiation and interpretation – Jurisdiction – Liabilities – Maritime liens – Package limitation – Sale of goods – Seafarers – Ship construction, sale and finance

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AUTHOR PROFILE

Dr Johanna Hjalmarsson

Informa Associate Professor in Maritime and Commercial Law, Southampton Law School, University of Southampton

Johanna has been at the University of Southampton since completing her LLM in Maritime Law in 2004, initially as a researcher with the Institute of Maritime Law and since 2006 on a research position sponsored by Informa.

Before joining Southampton, Johanna served as a junior judge in Sweden and spent several years with the United Nations International Drug Control Programme and the Office of the High Representative in Bosnia and Herzegovina.

Johanna's research covers maritime and commercial law, insurance law and dispute resolution. She is the editor of *Lloyd's Law Reporter* and *Lloyd's Shipping & Trade Law* as well as *The Ratification of Maritime Conventions*, and is a member of the newly formed *Lloyd's Law Reports* Editorial Board.

She takes a particular interest in jurisdictions undergoing comprehensive development and has co-edited two books on *Maritime Law in China* and *Insurance Law in China*, and co-authored two editions of *Singapore Arbitration Legislation* with Professor Robert Merkin.

In 2016 she completed her doctoral thesis on fraudulent insurance claims under English law. Her publications have been cited by courts in Singapore and Australia and by the Law Commissions of England and Wales and Scotland. She received the Vice-Chancellor's Award for Excellence in Teaching in 2009 and the Vice-Chancellor's Award in 2011.

Maritime law in 2019: a review of developments in case law

INTRODUCTION

From the process of annotating the judgments issued in 2019 for this Review,[1] there are some interesting observations to be made. In a year when the number of reported cases appears to be lower than in the recent past, it is notable how many of the judgments issued have their factual background in some form of fraud. Such suspicions, in some form or other, appear to have been present in *Manchester Shipping Ltd v Balfour Worldwide Ltd and Another*,[2] *K v A*,[3] *Suez Fortune Investments Ltd and Another v Talbot Underwriting Ltd and Others (The Brillante Virtuoso) (No 2)*,[4] *ED&F Man Capital Markets Ltd v Come Harvest Holdings Ltd and Others*[5] and *Natixis SA v Marex Financial and Another*.[6] Further cases, in particular from the insurance field, concern instances of alleged wilful misconduct. One suspects that the mechanism at work is not solely the state of the law, but that there is some self-selection involved – where litigations increasingly settle following mediation or other alternative dispute resolution, fraud-related cases will be the last to persevere to full-blown litigation as the parties have no remaining commercial relationship to preserve. Litigation may be the only available means of extracting fair dues from a fraudster. In some cases, there may also be a psychological element – accusations of fraud may lead to a more vigorous defence.

A recent theme that continued into 2019 was insolvency-related litigation where two parties cannot agree to split the difference of the loss in a third party's insolvency – as seen in the fallout from the OW Bunker insolvency. Such cases include *Materials Industry and Trade (Singapore) Pte Ltd v Vopak Terminals Singapore Pte Ltd*,[7] *Cockett Marine Oil DMCC v ING Bank NV and Another (The M/V Ziemia Cieszynska)*[8] and *Nustar Energy Service Inc v M/V Cosco Auckland*.[9] In contrast, one may observe a relative paucity of disputes involving choice of law and jurisdiction clauses in 2019 – usually a fertile source of decisions. Contract-procedural issues appear to have taken their place – asking what exactly is the mechanism for making a claim under a charterparty?

CONTRACTS

This segment is arranged by contract types, to provide an overview of charterparty, bill of lading and ship transaction judgments – but also contains a separate header on charterparty disputes,[10] where decisions closer to a procedural nature are considered, with conclusions perhaps applicable to all forms of charterparty.

Bareboat charterparties

The issue of whether payment of hire was a condition under a time charterparty having been resolved by the Court of Appeal a few years ago,[11] it was this year the turn of classification terms in bareboat charterparties to come under scrutiny. *Silverburn Shipping (IOM) Ltd v Ark Shipping Co LLC (The Arctic)* was decided at first instance by Carr J[12] on 22 February 2019 and reversed by the Court of Appeal[13] on 10 July 2019. The facts here were that the vessel *MV Arctic* had been under a bareboat charter on modified BARECON 89 terms from October 2012, one of the terms being that the charterer was to maintain the vessel's classification with Bureau Veritas at all times. In November 2017 the classification expired while the vessel was in port for repairs and maintenance, including dry docking in preparation for her special survey. In December 2017 the owners purported to terminate, asserting that the term was a condition of the charterparty. The LMAA tribunal's decision went in

1 The author was assisted in the writing of this review by her summaries for *Lloyd's Law Reporter*, a weekly round-up of new maritime and commercial judgments. *Lloyd's Law Reporter* can be accessed via email and at www.i-law.com.
2 [2019] EWHC 194 (Comm); [2019] Lloyd's Rep Plus 100.
3 [2019] EWHC 1118 (Comm); [2020] 1 Lloyd's Rep 28.
4 [2019] EWHC 2599 (Comm); [2019] 2 Lloyd's Rep 485.
5 [2019] EWHC 1661 (Comm).
6 [2019] EWHC 2549 (Comm); [2019] 2 Lloyd's Rep 431.
7 [2019] SGHC 276; [2020] Lloyd's Rep Plus 28.
8 [2019] EWHC 1533 (Comm); [2019] 2 Lloyd's Rep 541.
9 [2019] Lloyd's Rep Plus 99.
10 At page 7 of this Review.
11 In *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd (The Spar Capella, The Spar Vega and The Spar Draco)* [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep 447.
12 [2019] EWHC 376 (Comm); [2019] 1 Lloyd's Rep 554.
13 [2019] EWCA Civ 1161; [2019] 2 Lloyd's Rep 603.

favour of the charterers and the owners subsequently appealed. Having received permission to appeal on two questions of law,[14] the owners argued as follows before the court. First, the charterers' obligation in clause 9A "to keep the vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times" was an absolute obligation, not merely an obligation to reinstate expired class certificates within a reasonable time. Secondly, the classification obligation was a condition of the contract, not an innominate term.

At first instance, the judge reversed the tribunal's award, holding that the classification obligation in clause 9A was both an absolute obligation and a condition of the charterparty. The charterers appealed. Having dropped the question of whether the classification obligation was an absolute obligation, they asserted on appeal only that their obligation in clause 9A "to keep the vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times" was not a condition of the contract but an innominate term.

The Court of Appeal allowed the appeal. The classification term was not a condition and was properly to be regarded as innominate. The location of the clause in the standard terms, surrounded by continuing, physical maintenance obligations that were plainly not conditions, would have been a surprising place to find a condition. The mention of "other required certificates" that the charterer must maintain meant that, at best, only a part of the term could be a condition – it was a hopeless suggestion that owners should be entitled to terminate a 15-year charterparty for any breach in respect of ballast water management or anti-fouling system conventions. While the loss of class was capable of having grave consequences on flag, finance and insurance, it was improbable that the parties thought that all instances of loss of class, for example one resulting from an administrative error and immediately corrected, should carry the remedy appertaining to conditions.

There appears to have been no appeal against the Court of Appeal's decision. As a result of this judgment, it will be difficult to defend any argument that a term not expressly designated as a condition is, in fact, a condition.

In a second bareboat charterparty case, *Ozmen Entertainment Pty Ltd and Another v Neptune Hospitality Pty Ltd (The Seadeck)*,[15] this time from the Federal Court of Australia, the issue concerned the parties' rights at the end of the life of a bareboat charterparty. Classification duties also arose as one of the issues in this case. The end of the contract had come about when a business venture between the parties ceased prematurely. The litigation arose out of a joint venture agreement (JVA) to which the claimant (OE) had bareboat-chartered the motor yacht *Seadeck* for the purpose of luxury cruises around Sydney Harbour for 800 passengers. Both the JVA and the charterparty had been concluded on 6 January 2016. The defendant (Neptune) was a party to the JVA, together with Kanki, a company associated with the claimant. The JVA stipulated cooperation between the parties, including fortnightly financial statements to Kanki and decisions to be taken jointly. The charterparty provided notably that Kanki and Neptune were to be in full possession and control of the vessel; Neptune was to carry out daily operations; the charterers could not make alterations to the ship without OE's agreement; OE warranted that the vessel would need to be fully classed and surveyed for the business and to carry up to 813 passengers; and Neptune was to ensure the maintenance of class and licences.

The venture was far from plain sailing and even before the agreements were concluded, things had begun to go wrong. The vessel was detained for eight months in Egypt in transit to Australia from Turkey, arriving only in November 2015. Neptune had by then incurred significant expenditure to secure the vessel's release and to ensure repairs, refitting and surveys were performed in Indonesia. Problems continued as classification and a liquor licence could only be secured for 450 passengers. The catering agreement entered into by the joint venture with a party associated with Neptune perhaps unsurprisingly made no profit for the joint venture. Fortnightly financial statements were not being provided. As business was not going well in Sydney, Neptune unilaterally decided to take the vessel to Brisbane, and also decided to remove 30 cm of the mast to permit passage under a bridge in Brisbane. By September 2018 the business relationship had broken down to such an extent that receivers were appointed. In litigation, Kanki claimed that it had terminated the JVA on 25 July 2017 based on Neptune's failure to remedy breaches thereof. OE claimed that it had validly terminated the bareboat charterparty on 4 August 2017 because the termination of the JVA meant the failure of the purpose of the charterparty. In the alternative, Kanki sought equitable relief, pleading that it was just and equitable to wind up the venture. Neptune disputed these assertions on the facts. It argued that OE was not entitled to equitable relief as it had sought the assistance of a third party in disengaging, apparently intending to go into business with them instead. Neptune also cross-claimed sums based on the JVA. In relation to the charterparty, it argued that it had not been in breach

[14] At paras 59 to 60.
[15] [2019] FCA 721; [2020] Lloyd's Rep Plus 8.

by failing to secure classification for 800 passengers, as its obligation was solely to maintain class.

The judge held that OE was entitled to an order for possession and delivery up of *Seadeck*. In Neptune's favour, OE had agreed to demise-charter the vessel to the joint venture in a state where the vessel was out of class and not surveyed to carry 800 passengers, and on a common assumption that Neptune would be successful in obtaining a liquor licence for 800 passengers. There was an express obligation on Neptune under the charterparty to do all things necessary throughout the term to ensure that *Seadeck* was in class and surveyed for 800 passengers. These obligations did rely on the decisions of third parties, and Neptune was not in breach because the vessel had initially been out of class and it had done nothing to put an end to the desired state. OE had then waived the charterparty's obligation to maintain class by agreeing that business would proceed on a basis of classification for 450 passengers in the first season.

However, Kanki's notice to Neptune was a valid notice of a breach of the JVA in relation to financial reporting. Neptune's failure to remedy such faults had brought about the automatic termination of the JVA. Alternatively, the notice had terminated the JVA under common law. It followed that once the JVA was terminated, the express purpose of the bareboat charterparty also ceased. It was a condition of the charterparty that the charterers should operate the vessel jointly for the purpose of the JVA and once Neptune took effective control, in particular through the relocation decision, the charterers evinced to OE an intention not to be bound by the charterparty and OE's notice following those events was effective to terminate the charterparty.

There was no basis for Neptune's assertion that the involvement of the third party gave OE unclean hands. On the facts as found, the third party had become involved at a later stage than alleged by Neptune. As the parties no longer trusted each other, and Neptune had not acted in the best interests of the joint venture, it would in the alternative have been wound up.

While OE was entitled to an order for delivery up of the vessel, the accounts between Kanki and Neptune required considerable investigation to ascertain how the income and expenses of the joint venture and account of profits should be allocated. Neptune owed damages for the use of the vessel since the termination and Kanki might have a claim against Neptune for damages for breach of the JVA. Since all parties involved had limited finances, OE might have to give a ship's mortgage or other security for its and Kanki's obligations to Neptune.

A factual bareboat charterparty issue arose in the collision case *The Mount Apo and The Hanjin Ras Laffan*,[16] where H-Line claimed title to sue as demise charterer of *Hanjin Ras Laffan*. The bareboat charterparty was said to have been novated from Hanjin Shipping to H-Line, but counsel for *Mount Apo* challenged the documents presented by H-Line asserting that the bareboat charter was a sham and that H-Line did not have title to sue as a result. The judge found that H-Line was the demise charterer at the time of the collision and therefore had title to sue; the novation agreement was admissible and authentic.

Time charterparties

This year saw three time charterparty decisions: two on payment of hire and withdrawal, and one on the off-hire clause and piracy.

On payment of hire, there was one win for charterers and one for owners. In *Boskalis Offshore Marine Contracting BV v Atlantic Marine and Aviation LLP (The Atlantic Tonjer)*,[17] the claimants BOMC were the charterers and the defendants AMA the owners of the vessel *Atlantic Tonjer* under a charterparty on Supplytime 2017 terms. Under the charterparty, invoices were to be issued 14 days in arrears and these were to be paid within 21 days. In arbitration, the tribunal had held that clause 12(e) of the incorporated standard form meant that any invoices must be disputed within the number of days agreed from the receipt of an invoice. The charterers appealed, arguing that a failure to challenge the invoice would mean the loss of any substantive defence to it and that clear words were needed for such an outcome.

The judge dismissed the charterers' appeal. Clause 12(e) was clear and unambiguous in requiring prompt payment or prompt identification of issues. It was not analogous to a time bar or any other clause limiting or excluding liability. The options of audit under clause 12(g) and counterclaim remained open to the charterers. The tribunal had not erred in holding that sums paid could not be recovered, even if there was some defence such as off-hire defences, which had not been notified.

Charterers had better winds in *Quiana Navigation SA v Pacific Gulf Shipping (Singapore) Pte Ltd (The Caravos Liberty)*.[18] The claimant shipowner had, on 26 May

16 [2019] SGHC 57; [2019] 2 Lloyd's Rep 287. For the collision issues, see further below at page 26.
17 [2019] EWHC 1213 (Comm); [2020] Lloyd's Rep Plus 9.
18 [2019] EWHC 3171 (Comm); [2020] Lloyd's Rep Plus 29.

2017, chartered the vessel *Caravos Liberty* to the defendant charterers under an NYPE form[19] charterparty incorporating the BIMCO Non-Payment of Hire Clauses for Time Charter Parties, and the vessel entered service on the following day. Hire was payable every 15 days in advance. The BIMCO Non-Payment of Hire Clauses for Time Charter Parties governed the right to suspend service and withdrawal for non-payment. In the fourth hire payment on 11 July 2017, charterers withheld a sum for disputed reasons, but thereafter paid in full on time. Owners at that time did not serve an anti-technicality notice, but did request payment of the shortfall in subsequent payments. After the sixth payment, due on 10 August, owners served an anti-technicality notice and withdrew the vessel on 14 August 2017.

An arbitration tribunal held that owners had not been entitled to serve notice under the BIMCO clause, because the payment on 10 August corresponded to the sum falling due on that date. As a result, the withdrawal of the vessel had not been contractually justified. The owners appealed, arguing that the BIMCO clause was engaged in these circumstances entitling them to serve notice. Cockerill J dismissed the appeal. The tribunal had not erred in construing the clause as referring to each payment as it fell due and not to historic arrears. The right to withdraw was a nuclear option, hedged by careful contractual requirements, and could be easily lost.

In the result, shortfalls in hire payment are not carried forward to entitle owners to withdraw the vessel, as long as charterers' subsequent payments cover the entire sum falling due on the subsequent date. However, as *The Atlantic Tonjer* indicates, charterers will be held to any time limits for disputing the hire invoice.

In *Eleni Shipping Ltd v Transgrain Shipping BV (The Eleni P)*[20] the issue was one of construction of the off-hire clause in the charterparty, in particular the meaning of "capture". The claimant shipowners appealed against an award dated 19 February 2018, by which the majority of the tribunal rejected the bulk of the owners' claims against the defendant time charterers arising out of the capture by pirates in the Arabian Sea of their Panamax bulk carrier *Eleni P*. The charterparty was on the NYPE 1946 form and dated 15 October 2009; the vessel was delivered into the charterparty on 29 October 2009 with redelivery latest 20 August 2010. On 12 May 2010 the vessel was captured and held for seven months by pirates in the Arabian Sea, having transited the Suez Canal en route to China. Following her release, emergency repairs and discharge of the cargo in China, she was redelivered on 18 January 2011. The owners sought hire, the lion's share of which pertained to the period of the seizure. An arbitration tribunal had held that hire was excluded by additional typewritten clauses 49, read as follows.

> "Clause 49 – Capture, Seizure and Arrest
>
> Should the vessel be captures [sic] or seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended for the actual time lost, unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers or their agents. Any extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for the Owners' account.
>
> Should the vessel be arrested during the currency of this Charter Party at the suit of any party having or purporting to have a claim against or any interest in the vessel, hire under this Charter Party shall not be payable in respect of any period during which the vessel is not fully at Charterers' disposal, and any directly related/proven expenses shall be for Owners' account, unless such arrest is due to action against Charterers or sub-Charterers or their Agents or the Contractors or the cargo Shippers or Consignees, thence hire is payable and Charterers undertake the responsibility to release the vessel by taking appropriate and required measures (issuance of security/etc) as the case maybe or arise."

Clause 101 provided:

> "Clause 101 – Piracy Clause
>
> Charterers are allowed to transit Gulf of Aden any time, all extra war risk premium and/or kidnap and ransom as quoted by vessel's Underwriters, if any, will be reimbursed by Charterers. Also any additional crew war bonus, if applicable will be reimbursed by Charterers to Owners against relevant bona-fide vouchers. In case vessel should be threatened/ kidnapped by reason of piracy, payment of hire shall be suspended. It's remain understood [sic] that during transit of Gulf of Aden the vessel will follow all procedures as required for such transit including but not limited the instructions as received by the patrolling squad in the area for safe participating to the convoy west or east bound."

Upon the owners' appeal, Popplewell J held that they would succeed on clause 49 but fail on clause 101. In

[19] The judgment does not specify which edition of the NYPE form.
[20] [2019] EWHC 910 (Comm); [2019] 2 Lloyd's Rep 265.

clause 49, the words "captured or seized or detained or arrested" were governed and qualified by the following words "by any authority or any legal process". That qualification pertained also to "captured".

As for clause 101, the rival constructions were whether the threat/kidnap must occur *within a geographical area* identified as the Gulf of Aden (the owners' case) or whether the threat/kidnap must take place *as an immediate consequence* of the vessel being required to transit the Gulf of Aden (the charterers' case). Both of the rival constructions required reading words into the clause. The tribunal had found as a matter of fact that the expression "Gulf of Aden" was not capable of being given a meaning by way of any *geographical* definition in the context of a time charter of this kind.

In conclusion, the purpose of clause 101 in a period time charter of this nature was to enable charterers to give voyage instructions to transit the Gulf of Aden and allocate risk between the parties. The clause allocated risk by providing that the charterers were to bear the additional cost in insurance premium and crew war risk bonus; but that the owners were to bear the risk of loss of time from piracy putting the vessel off-hire. The third sentence of clause 101 allocated to owners the risk of delay from detention by pirates. That risk was understood by the parties to extend beyond the Gulf itself.

Voyage charterparties

Four voyage charterparty cases in 2019 dealt with cargo-related issues and performance.

In *Alianca Navegacao e Logistica Ltda v Ameropa SA (The Santa Isabella)*,[21] there was detailed judicial consideration of expert evidence as to best practice in ventilating hygroscopic cargoes; that is, cargoes that absorb water. The claimant had carried a cargo of Mexican white maize in bulk from Topolobampo in Mexico to South Africa on board *Santa Isabella* under a voyage charterparty made on an amended Synacomex form and incorporating the Hague-Visby Rules. The vessel proceeded via Cape Horn at a speed of 12 knots, which was less than the 13.3 knots warranted by the charterparty. The cargo had been in good order and condition upon loading, but arrived caked and mouldy leading to delays in discharge at Durban and Richards Bay. The cause of the state of the cargo was condensation (ship's sweat). The claimant disponent shipowner sought discharge port demurrage. Defendant charterers accepted that the delays in discharge prima facie entitled the carrier to demurrage, but relied on the rule that a charterer was not liable for demurrage if the delivery of the cargo could not take place or was delayed due to fault of the shipowner.

The charterers alleged that the damage to the cargo and the delays at the discharge ports were caused by: (a) the vessel taking the Cape Horn route rather than the Panama Canal route. Cape Horn was not a usual and reasonable route, and was therefore either a deviation or a breach of the Hague-Visby Rules article III rule 2; (b) failure by the vessel to ventilate the cargo in accordance with a sound system; (c) failure to disinfest areas of the vessel outside of the cargo holds following loading; and (d) the vessel proceeding to Durban at less than her warranted speed. The claimant disponent owners disputed all of this.

Deputy Judge Andrew Henshaw QC held that where, as here, the carrier asserted that the length and route of the voyage made damage inevitable, it was for the charterer to show that the damage arose from a breach of contract by the carrier.[22] He went on to hold that Alianca had not breached the charterparty by taking the Cape Horn route to Durban. Although it was about 2 per cent longer than the Panama Canal route, it was a usual and reasonable route and did not amount to a deviation. The cargo care duties of the carrier under article III rule 2 of the Hague-Visby Rules were not to the effect that the adoption of a route potentially imperilling the cargo could constitute negligence in breach of that provision; that approach would have the effect of displacing the clear rules for establishing the contractual route.

The judge found as a fact that the vessel had not proceeded to Durban in accordance with her warranted speed, but went on to say that it was not possible to identify any particular element of damage or loss caused by that breach.

Having examined the expert evidence, the judge further found that the cargo had not been properly and carefully ventilated in accordance with a sound system, in breach of Alianca's duties to properly care for the cargo. This breach was the cause of the damage to the cargo, which in turn was the cause of the long delays in discharging at Durban.

Furthermore, Alianca was also in breach of the duties to properly care for the cargo in that it had failed to properly

[21] [2019] EWHC 3152 (Comm); [2020] Lloyd's Rep Plus 30.

[22] Distinguishing *Volcafe Ltd v Compania Sud Americana de Vapores SA* [2018] UKSC 61; [2019] 1 Lloyd's Rep 21.

disinfest the vessel's topsides, this being the likely cause of insect infestations encountered at Durban and Richards Bay; in turn the cause of delays in discharging at Richards Bay.

But for these breaches, discharge at Durban would have been completed within 3.7 days in excess of the remaining laytime, and the discharge at Richards Bay would have been completed within the laytime.

There was also a question as to the interpretation of the actions of the South African authorities in giving instructions as to how to handle the cargo. The judge held that these actions did not amount to quarantine within the meaning of the charterparty provisions. He appeared here to take the view that the charterparty reference to quarantine was to a specific procedure, not a general reference. While the damaged cargo had to be dealt with in a way so as not to infest further cargoes or the local environment, the cargo, vessel and crew had not been isolated in the manner of a proper quarantine.

Sucden Middle-East v Yagci Denizcilik ve Ticaret Ltd Sirketi (The MV Muammer Yagci)[23] concerned the meaning of the words "government interferences". It was an appeal under section 69 of the Arbitration Act 1996 of a partial final award on a question of law, namely "where a cargo is seized by the local customs authorities at the discharge port causing a delay to discharge, is the time so lost caused by 'government interferences' within the meaning of clause 28 of the Sugar Charter Party 1999 form?" The facts as found were that false documents had been submitted to local customs authorities in relation to a cargo of sugar for discharge in Algeria, in response to which the cargo was seized under customs laws and regulations. The delay to discharge was four-and-a-half months. The tribunal had answered the question in the negative.

Robin Knowles J allowed the appeal, carefully confining the affirmative answer to the question of law to the precise circumstances at hand. The answer was concerned only with the seizure of a cargo, and with that seizure by a customs authority being a state revenue authority acting in a sovereign capacity.

What is the effect of tendering a notice of readiness (NOR) outside the office hours specified by the charterparty? Can the NOR be valid for the purpose of cancellation of the charterparty, but at the same time invalid for the purpose of commencement of laytime? These questions were answered in *Bilgent Shipping Pte Ltd and Another v ADM International Sarl and Another (The Alpha Harmony)*.[24] The litigation concerned two voyage charterparties for the vessel *Alpha Harmony*: the head charterparty from Oldendorff to ADM concluded on 13 November 2014, and the sub-charterparty from ADM to Bilgent concluded on 5 November 2014. The head charterparty was on amended Norgrain terms and the sub-charterparty on an amended Baltimore Form C berth grain form. The head charterparty concerned two voyages, and the sub-voyage charterparty just one voyage from Brazil to China. The relevant laycan period under both charterparties ended on 31 May 2015 and was subsequently narrowed to end on 10 May. Both charterparties provided for NOR to be delivered between 08.00 and 17.00 on a weekday and 08.00 and 11.00 on a Saturday, but no provision was made for delivery of NOR on a Sunday. The vessel tendered NOR by email at 07.04 on 10 May 2015, which was a Sunday. Bilgent cancelled the sub-charterparty at 20.47 on the same day, and ADM cancelled the head charterparty at 05.55 the following morning. An arbitration panel held that the charterers' cancellations were invalid where NOR had been tendered before the relevant time on the cancelling date but not during the permitted hours. Bilgent and ADM appealed under their respective charterparties.

Teare J allowed Bilgent's appeal but dismissed ADM's appeal. The language of the clauses as amended was to be taken at face value. The "strange result" that a NOR could be valid for the purpose of avoiding the option to cancel, but invalid for the purpose of commencement of laytime, was one parties were free to contractually agree if they so wished.

The case *Classic Maritime Inc v Limbungan Makmur Sdn Bhd and Another*[25] reached the Court of Appeal, having been adjudicated at first instance in 2018.[26] At first instance, Teare J had held that there was liability for the charterer, but for nominal damages only. Much was therefore at stake. The background to the case was that, on 5 November 2015, the Fundão dam had burst in Brazil. Classic Maritime was the shipowner and Limbungan was the charterer under a long-term contract of affreightment (COA) for the carriage of iron ore from Brazil to Malaysia. The second defendant was the guarantor of the charter. There were two contracted suppliers of iron ore pellets in Brazil, one of which had not supplied pellets in some years. The other could no longer supply pellets following the Fundão dam collapse.

[23] [2018] EWHC 3873 (Comm); [2019] Lloyd's Rep Plus 65. The judgment is dated 2 November 2018 but came to light in March 2019.

[24] [2019] EWHC 2522 (Comm); [2020] Lloyd's Rep Plus 16.

[25] [2019] EWCA Civ 1102; [2020] Lloyd's Rep Plus 5.

[26] *Classic Maritime Inc v Limbungan Makmur Sdn Bhd and Another* [2018] EWHC 2389 (Comm); [2019] 1 Lloyd's Rep 349. See *Maritime law in 2018: a review of developments in case law*.

Limbungan relied on the bursting of the dam as excusing it from performance of five shipments that would have followed the date of the collapse. At first instance, the judge held that the charterer was not entitled to rely upon an exceptions clause referring to "accidents at the mine" because it would not have been ready and willing to provide cargoes for shipment *even if* the accident had not occurred, and was therefore in breach of an absolute duty to provide such cargoes. In a plot twist, the shipowner was nevertheless not entitled to recover substantial damages. The shipowner appealed on the issue of damages and the charterer cross-appealed on the issue of liability.

The Court of Appeal allowed the appeal of the shipowner, awarding damages of US$19,869,573. It dismissed the cross-appeal of the charterer. Adopting a narrow textual approach to the charterparty, the court held that although the exceptions clause shared some features with a force majeure clause, the question was purely one of construction of the language, context and purpose of the clause in the present contract. Where but for the dam burst the charterer would not have performed its obligations, its failure to perform could not fairly be said to have resulted from the dam burst.

While a frustration clause brought the contract to an end, an exceptions clause operated to relieve a party from the obligation to pay damages for a past breach. Where the effect of a clause was to discharge the parties from an obligation to perform in the future, as distinct from to relieve them from liability to pay damages for a past breach, this had a bearing on the nature of the causative effect an event was required to have on a party's performance. A simple and straightforward causation requirement would not require investigation of matters known only to one party.

The performance to which the shipowner was entitled under the contract was the supply of cargoes. The reasons why the charterer had failed to supply cargoes were irrelevant; only the fact that it had not done so mattered. Applying the compensatory principle, the compensation to which the shipowner was entitled was the freight it would have earned on the cargoes, less the cost of earning it. The judge had therefore erred in awarding nominal damages.

Charterparty disputes

Certain procedural issues of wide importance arose and were addressed in cases in 2019.

The time bar for claims in charterparties is short – often 100 days or less. Clauses specify that claims must be accompanied by supporting documents, the omission of which will cause the claim to fail as a result of the time bar. The purpose of these clauses is "to ensure that claims were made … within a short period of final discharge so that the claims could be investigated and if possible resolved while the facts were still fresh".[27] Two cases in 2019 considered such clauses. Both judges emphasised the language of the specific clause as key to the resolution, but the approaches were otherwise different.

MUR Shipping BV v Louis Dreyfus Company Suisse SA (The Tiger Shanghai)[28] concerned a documentation clause which read as follows.

> "[Owners] shall be discharged and released from all liability in respect of any claim or claims which [Charterers] may have under Charter Party and such claims shall be totally extinguished unless such claims have been notified in detail to [Owners] in writing accompanied by *all available supporting documents* (whether relating to *liability or quantum* or both) and arbitrator appointed within 12 months from completion of charter."[29]

The clause appeared in what seems to have been a trip time charterparty dated 9 August 2016, otherwise on the NYPE form for the vessel *Tiger Shanghai* between Louis Dreyfus as disponent owners and MUR as charterers. The charterparty was terminated by MUR on 19 August 2016 following a refusal by Louis Dreyfus to allow certain works on board which would have facilitated loading the cargo. Louis Dreyfus accepted the termination as a repudiation on 22 August 2016. MUR claimed the return of hire paid in advance.

It was common ground that both the claim letter and the appointment happened well within time. However, there was disagreement as to what was meant by the phrase "all available supporting documents". While the claim was clear and comprehensible at the time it was sent, MUR at that time had a document which it later relied on, but which it did not send with the claim letter. A year after the commencement of the arbitration and the provision of the pleadings, Louis Dreyfus raised the issue of the time bar when a document was appended to claim submissions. The majority of the tribunal found that this document was a "supporting document", that it was not privileged; and that the claim was consequently time-barred. MUR appealed, having been successful in respect of the other documents Louis Dreyfus asserted that it

[27] *Babanaft International Co SA v Avant Petroleum Inc (The Oltenia)* [1982] 1 Lloyd's Rep 448 at page 453 col 1.
[28] [2019] EWHC 3240 (Comm); [2020] Lloyd's Rep Plus 31.
[29] Judgment, para 2; emphasis added.

ought to have submitted. The document at issue was a survey report, commissioned by charterers, pertaining to the works they had proposed be done to the vessel. It was the report of a surveyor who had attended the vessel in order to assess the problem which had arisen and find the best pragmatic solution, rather than the report of an expert witness to be used in future proceedings.

The charterers notably made the points that Louis Dreyfus knew why it had rejected the works, and that the report was not supportive of the claim.

Cockerill J characterised the argument of MUR essentially as seeking to rephrase the clause at issue. "The wording of this clause must be respected. It is cast in terms not simply of 'supporting documents' but 'all supporting documents'".[30] To the judge, the addition of the word "all" indicated that "this clause is expressing a broad approach to the production of supporting documents, whatever supporting documents may be said to be".[31]

The survey report went to the reasonableness of the charterer's termination. By the time of the arbitration, there was no question that this was relevant. However, the question was where to draw the line between "supportive" documents in the context of a final hire statement, which was essentially accounting, and documents pertinent or necessary to support MUR's case as to the validity of the termination. In terms of the wider contractual dispute, "the burden of proving that consent is unreasonably withheld is on the party contending that the other was unreasonable".[32]

The judge paid close attention to the language of the clause, noting the words "all" and "liability and quantum". This made it wider than the clauses in the authorities and capable of applying not just to simple accounting claims but also to more complex termination claims.[33] The claim here depended on the date of termination and the date of termination in turn depended on being entitled to terminate, which itself depended on unreasonable refusal on the part of the owners. The report was therefore, on its face, within the ambit of the claim that MUR advanced and supportive of it.[34] Considering the clause in its context, the judge found that the parties had intended the clause to cover all disputes under the charterparty, including claims arising out of wrongful termination. Such claims required the parties not simply to be able to close the books, as with more narrowly drafted clauses, but to enable them to assess the claim being advanced. The survey report was in such circumstances "both supportive in the sense required and a document in the sense required".[35]

The second case was *"Amalie Essberger" Tankreederei GmbH & Co KG v Marubeni Corporation*,[36] where the judge had to consider what documentation must be submitted in support of a demurrage claim, and when. The claimant owners of M/T *Amalie Essberger* had voyage-chartered the vessel to the defendants for carriage of a cargo of cyclohexane from Rotterdam in the Netherlands to Castellon in Spain. The charterparty was dated 18 November 2017 and made on an amended Asbatankvoy form, permitted laytime being "48 hrs shinc ttl" (48 hours, Sundays and Holidays included, total) across both load and discharge ports.The charterparty also included Rider Clause 5, reading as follows:

> "(5) TIME BAR
>
> Any claim for demurrage, deadfreight, shall be considered waived unless received by the Charterer or Charterer's broker in writing with all supporting calculations and documents, within 90 days after completion of discharge of the last parcel of Charterer's cargo(es). Demurrage, if any, must be submitted in a single claim at that time, and the claim must be supported by the following documents:
>
> A. Vessel and/or terminal time logs;
>
> B. Notices of Readiness;
>
> C. Pumping Logs; and
>
> D. Letters of Protest ..."

The cargo was loaded between 29 November and 1 December 2017. Upon arrival at Castellon on 9 December 2017 the receiver refused to accept delivery of part of the cargo as it was contaminated with monoethylene glycol. Having discharged the accepted part of the cargo, the vessel sailed to Valencia and disc harged the remainder there, completing discharge on 21 December 2017. On 22 December the owners submitted a demurrage claim along with some of the supporting documents listed in Rider Clause 5 of the charterparty, headed "Time bar". The clause listed as supporting documents for a demurrage claim the vessel and/or terminal time logs, notices of readiness and pumping logs and letters of protest. These were supplied, with the exception of load port pumping logs and a letter of protest issued by the master on 30

30 At para 58.
31 At para 59.
32 At para 71.
33 At para 74.
34 At para 75.
35 At para 86.
36 [2019] EWHC 3402 (Comm); [2020] Lloyd's Rep Plus 17.

November 2017. Those documents had been supplied to charterers following loading, in accordance with Rider Clause 23 of the charterparty, headed "Documentation clause" which required their submission within seven banking days after completion of the respective operation.

In response to the owners' demurrage claim, the charterers asserted first that the delay had resulted from contamination for which owners were responsible, and secondly that the claim was time-barred because it was not submitted in accordance with the requirements of Rider Clause 5 of the charterparty. The charterers sought summary judgment on the second ground.

Peter McDonald Eggers QC, sitting as Deputy Judge, dismissed the charterers' application for summary judgment. Having directed himself as to the law, the judge broke the first issue down as follows:

> "There are in fact two separate questions. First, what does the phrase 'all supporting … documents' mean in the first sentence of Rider Clause 5? Secondly, what is the effect of the second sentence of Rider Clause 5 in listing the four specified categories of documents, including the Disputed Documents?"[37]

The disputed documents, namely the pumping log and the letter of protest from the load port, were required to be submitted in support of the demurrage claim within the 90-day period specified in Rider Clause 5. The judge's reasoning was as follows.

The phrase "all supporting documents" meant either documents on which owners relied in support of their claim, or documents which, taken at face value, established, promoted or advanced the validity of the demurrage claim. It did not mean documents which were objectively relevant including adverse documents. While "relevant" documents would have to be disclosed in any subsequent legal proceedings, the wider meaning and therefore wider scope of disclosure would detract from the certainty and clarity required by the demurrage time-bar provision. What charterers were entitled to was the opportunity to assess the prima facie validity of the demurrage claim, to investigate it and formulate their defence, if any. The phrase "all supporting documents" therefore did not stretch to encompass "any relevant" documents.

However, the clause specifically listed four categories of documents. These, including the load port pumping log and letter of protest, must be supplied.

The next question concerned the temporal modality of submission of the demurrage claim and supporting documents. Some documents had been submitted earlier and were therefore already in the charterers' possession. Must they again accompany the demurrage claim submission? The charterers conceded that where documents were voluminous, more than one submission might be required, or that a mistakenly omitted document might be sent immediately afterwards, but went no further. The owners for their part submitted that they were not required to resubmit documents already in charterers' possession. Rider Clause 5 specified that demurrage must be "submitted in a single claim at that time, and the claim must be supported by the following documents …".

The judge held that the effect of the language of the clause was not that each of the supporting documents must necessarily be provided at the same time as the claim, so long as by the end of the stipulated 90-day period following discharge, they had been submitted. A stricter requirement regarding the supporting documentation would have had to be more clearly expressed in the clause. The owners were therefore not required to resubmit documents already submitted.

Finally, and obiter in view of the conclusion that the documents in question did not need to be resubmitted, the issue of what elements of the claim would have been time-barred as a result of the failure was decided in favour of the charterers. A failure to comply with the demurrage claims clause would result in waiver of the whole claim, not just the part of a divisible claim to which the missing document related.

The demurrage time-bar clause is generally construed with commercial expediency foremost in mind, so as to permit the charterers to make an immediate assessment of the claim. However, the judge here took a more nuanced view and relied primarily on the language of the clause. He bore in mind not just the need for commercial expediency, but also the draconian effect of the clause, failure to comply with which bars claims altogether unless submitted formally and correctly within a relatively short period – 60 days according to the standard form, here amended to 90 days. Accordingly, he placed the onus on the charterers to demonstrate the precise requirements of the language of the clause. While "supporting documents" had the narrower meaning argued for by owners, and did not include adverse documents, the documents explicitly named in the clause must in any case be submitted. However, the charterers' narrow window for when the documents must be submitted was not accepted by the judge: the window remained open

[37] At para 29.

for submission. The conclusion relied on the language of the clause and a more narrowly formulated clause would almost certainly have resulted in the window closing sooner, once the claim had been submitted.

The judge in *MUR Shipping*[38] also sought commercial expediency and, having concluded that the clause had a very wide ambit, she did reflect that the report was "towards the limits of what would be caught by a clause such as the present one".[39]

In *Harmony Innovation Shipping Pte Ltd v Caravel Shipping Inc*,[40] the defendant charterer unsuccessfully sought the discharge of an ex parte interim injunction obtained against it on 11 February 2019 by the disponent shipowner Harmony. There was also a second application for a similar order between other parties in the chartering chain. The ex parte injunction required Caravel to provide security and to take necessary steps to secure the release of the vessel *Universal Bremen* from arrest in Singapore. The background was that nine months after discharge of a cargo of coal against letters of indemnity issued throughout the chartering chain, a bank had demanded delivery of the coal, claiming to be the lawful holder of the pertinent bills of lading. This led to the arrest of the vessel upon a claim for misdelivery. The letters of indemnity were on the International Group standard form. The question of whether to grant the applications for injunctions turned on the judge's degree of assurance that the applicant would succeed at trial.

Sir Ross Cranston continued and issued the injunctions requested. In spite of the incoherent constellation of parties involved in the delivery, there was a high degree of assurance that the coal had been properly delivered to the right recipient ("actual delivery"). There was nothing to suggest that it would be possible to prove at trial that the master's belief that the coal was being delivered to the right party was dishonest or unreasonable ("believed delivery"). Damages were not an adequate remedy to satisfy clause 3 of the letters of indemnity which, unlike the general indemnity in clause 1, was specifically to ensure that security was advanced to permit an arrested vessel to continue trading.

Manchester Shipping Ltd v Balfour Worldwide Ltd and Another[41] concerned the defendants' application to discharge worldwide freezing orders over the defendants' assets. The orders were in the context of Manchester's claim that the defendants had fraudulently conspired to divert hire in the sum of US$5.577 million due from Manchester's charterer KGK in respect of three vessels. The fraud admittedly consisted in parallel sham charterparties between KGK and the defendants, diverting hire to the defendants. Surrounding this arrangement was a complex and now very antagonistic relationship between two former business partners to a joint venture. The defendants contended that the party to whom Manchester was liable for 99 per cent of the hire under an undocumented charterparty was the "wrong" party under that wider arrangement. The defendants sought the discharge of the freezing order on the basis that Manchester had not suffered any loss, so that it did not have a good arguable case in support of the freezing orders and the freezing orders were not just or convenient. The defendants also asserted that Manchester was guilty of breach of the duty of full and frank disclosure. Manchester disputed all of this.

Judge Sonia Tolaney QC rejected the discharge application. The fact that the sham had failed, in that there had been judgment in a Russian court against them, did not mean that Manchester had no good arguable case that it had suffered loss in the amount of the hire. On the contrary, the conspiracy had caused the hire not to be paid to Manchester. The loss of Manchester was not limited to the 1 per cent it was entitled to retain as commission.

Bills of lading

An abundance of bill of lading-related decisions from a wide geographical variety of courts made for an interesting year. Courts in Australia, Israel, Singapore and the United Kingdom contributed decisions on a range of issues.

A Singapore case, *Wilmar Trading Pte Ltd v Heroic Warrior Inc (The Bum Chin)*,[42] is notable for the ultimate absence of any contracts applicable to the arising issues. There was no bill of lading issued and no charterparty applicable between the parties: an FOB buyer of goods and a carrier.

The plaintiff, Wilmar, a commodities trader, had as buyer entered into three sale contracts for various palm oil products FOB Indonesian ports. It nominated the carrying vessel *Bum Chin*, a Hong Kong-flagged oil/chemical tanker, for the shipment of a consignment of palm oil products to be loaded at Kuala Tanjung terminal

[38] *MUR Shipping BV v Louis Dreyfus Company Suisse SA (The Tiger Shanghai)* (QBD (Comm Ct)) [2019] EWHC 3240 (Comm); [2020] Lloyd's Rep Plus 31.
[39] At para 86.
[40] [2019] EWHC 1037 (Comm); [2020] Lloyd's Rep Plus 4.
[41] [2019] EWHC 194 (Comm); [2019] Lloyd's Rep Plus 100.
[42] [2019] SGHC 143; [2019] Lloyd's Rep Plus 70.

in Indonesia for carriage to Jeddah and Adabiyah. The defendant, Heroic Warrior Inc, was the registered owner of the vessel. There was no charterparty between the parties; instead the plaintiff was nominated as charterer by a contractual sub-charterer. No bill of lading was issued. An incident on board *Bum Chin* on 17 April 2013 caused physical damage to the vessel as well as loss of and damage to the palm oil consignment. The plaintiff arranged for a substitute vessel to transport the palm oil purchased under the sale contracts.

The plaintiff claimed damages on grounds of contract and negligence, asserting that the defendant as contracting carrier had failed in its duty to ensure that the vessel was seaworthy; and that the defendant, through its servants or agents, had failed to take reasonable care of the cargo. A key contention was that tank 4S was not cargoworthy. The defendant counterclaimed against the plaintiff for the cost of repairs to *Bum Chin*, asserting that the plaintiff was responsible for the damage sustained by *Bum Chin* because the terminal involved in the loading of the cargo was acting as the plaintiff's agent and the terminal had improperly performed its part of the cargo operations. Belinda Ang Saw Ean J found for the plaintiff, dismissing the defendant's counterclaim, reasoning as follows.

In *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd*,[43] the contract of carriage was between the shipowner and the cargo interest. In the present case, there was no such contract between the plaintiff and the defendant. The bills to be issued would have been *charterers'* bills and the defendant was not the contractual carrier.

The plaintiff had no proprietary interest to found a cause of action in negligence. Under an FOB sale, transfer of property depended on whether payment had been made. The evidence brought was insufficient to demonstrate payment before loading. Further, the initial non-negotiable bills foreseen by the charterparty indicated that the seller of the oil was reserving title under section 19 of the Sale of Goods Act.[44]

The legal requirement of proving ownership of or a possessory interest to the cargo in order to bring a claim in negligence for loss flowing from the damage no longer applied in Singapore: *NTUC Foodfare Cooperative Ltd v SIA Engineering Co Ltd*.[45] Pure economic loss was claimable under Singapore law and the question was whether the defendant owed a duty of care.

The defendant as performing carrier would have reasonably foreseen that its negligence would cause economic loss to a buyer of cargo who bore the risk of damage to or loss of the cargo. The requirement of legal proximity was also satisfied. The plaintiff, as FOB buyer, was responsible for nominating the defendant's registered vessel *Bum Chin* and took on the risk of damage to the palm oil products on board. The countervailing policy consideration of indeterminacy did not arise because the plaintiff as FOB buyer bore the risk of loss or damage to the cargo. In the absence of a contract of carriage, the defendant owed the plaintiff a duty to take reasonable care of the cargo loaded on board.

The defendant's counterclaim was dismissed on the basis that where there was no contract of carriage between the parties, the plaintiff, who was not responsible for the actions in loading of the FOB seller in agency or otherwise, owed no duty of care to the defendant.

On the evidence, there were lapses in loading procedure on board *Bum Chin*. Structural weaknesses were a cause of the failure of the tank which had caused leakage and contamination of the cargo. The loss suffered by the plaintiff was caused by the defendant's negligence in that the latter had failed to provide a cargoworthy vessel and further failure to take care of the cargo on board.

A case from the Supreme Court of Israel, *Feyha Maritime Ltd v Miloubar Central Feedmill Ltd and Another*,[46] considered the time bar in the Hague-Visby Rules. The applicant was the owner of the ship *Feyha* on which the first respondent's cargo of corn was being shipped from Ukraine to Israel, when it was lost to a fire on board. The second respondent, Phoenix, was the insurer of the cargo. The first respondent had submitted a claim against the insurer before the court in Haifa. The insurer issued a third-party notice against the shipowner to join it to proceedings, but went on to settle its claim against the shipowner. The first respondent pursued the claim against the carrier, for the eventuality it would not recover in full from the insurer. This was the carrier's application for leave to appeal the decision to join it to the proceedings on the basis (i) that the cargo claimant was not the consignee under the bill of lading and therefore had no cause of action, and (ii) of the Hague-Visby Rules one-year time bar. The first respondent sought to amend the claim to reflect that the consignee (a related company) was the claimant. This depended on whether one of the two in-time claims, namely the first respondent's claim

43 [1954] 1 Lloyd's Rep 321; [1954] 2 QB 402.
44 Cap 393, 1999 Rev Ed.
45 [2018] SGCA 41; [2018] 2 SLR 588.
46 Civil Leave to Appeal 7195/18; [2020] Lloyd's Rep Plus 18, Supreme Court of Israel, Hendel J, 12 May 2019.

against the insurer or the insurer's against the carrier, had been effective to stop time running.

The court gave leave to appeal, allowed the appeal and dismissed the claim against the carrier. A claim submitted by the wrong party did not stop time running. Nor did the insurer's claim stop time running. In the case of a substantive time bar such as under the Hague-Visby Rules, the right to claim had been voided. Permitting claims against carriers for an unlimited time simply because a claim had been submitted by another party on a similar cause within the time bar would be severely prejudicial.

The always-thorny issue of rights of suit and spent bills of lading arose again in 2019, this time for the Singapore High Court. In *The Yue You 902 and Another Matter*,[47] OCBC, a bank, claimed against the defendant owner of the vessel *Yue You 902* for its failure to deliver to OCBC a cargo of palm oil subject to 14 bills of lading in OCBC's possession. OCBC had extended a loan to the buyer of the cargo, Aavanti Industries Pte Ltd, for the purchase price of the cargo, and had taken the bills of lading as security for the loan. The cargo had been discharged to a party nominated by the seller before the loan was granted, at which point OCBC became the holder of the bills of lading, raising the question whether the bills of lading were spent before OCBC became their holder. Also at issue was what constituted relevant prior "contractual or other arrangements" for the purpose of section 2(2)(a) of the Bills of Lading Act[48] and what constituted "good faith" for the purpose of section 5(2) of the same Act. OCBC had obtained summary judgment from the Assistant Registrar on 11 September 2017. The judge had confirmed that decision after a hearing on 29 January 2018. This was the shipowner's appeal against that decision.

Pang Khang Chau JC gave summary judgment for the plaintiff. Section 2(2) of the Bills of Lading Act applied to a bill of lading regarded at common law as spent. This was irrespective of whether the phrase "possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates" was to be understood as referring to the transfer of contractual right to possession or to the transfer of constructive possession. Delivery to a person not entitled to delivery did not cause a bill of lading to be spent.

The cargo seller, who was the holder of the bills of lading at the time of discharge although they were in custody of OCBC, did not remain a person entitled to delivery under the bills of lading, just because the bank or the buyer had not yet become persons so entitled. It had endorsed the bills of lading and parted company with them for the purpose of demanding payment. As a result, the bills of lading were not spent by the time OCBC became holder of the bills and the defendant had failed to raise a triable issue on the point.

Obiter, if the bills were spent, the loan facility agreement made several years earlier between OCBC and Aavanti was the contractual arrangement in pursuance of which the transaction had been effected for the purpose of section 2(2)(a), so that OCBC had obtained rights of suit under the bills of lading. Given the broad approach to causal connection adopted in *Standard Chartered Bank v Dorchester LNG (2) Ltd (The Erin Schulte)*,[49] OCBC could alternatively have relied on the sale between the seller and Aavanti.

For the purpose of section 5(2) of the Bills of Lading Act, the holder of a bill of lading held it in good faith if he became its holder honestly. There was nothing dishonest about OCBC's decision to grant the loan to the buyer against security over the bills, even on the assumption that it knew that the cargo had been discharged.

OCBC had not consented to delivery without production of the bills of lading and the defendant did not have a defence on the basis that such consent caused it to believe it no longer had liabilities under the bills of lading.

In *Glencore Energy UK Ltd and Another v Freeport Holdings Ltd (The Lady M)*,[50] the Court of Appeal considered issues arising from a fire which according to the agreed facts had been set by the chief engineer on board the vessel. This raised questions as to the interpretation of the Hague-Visby Rules article IV rule 2(b). A fire in the engine room of the vessel *Lady M* had immobilised her during a voyage carrying a cargo of fuel oil from Taman in Russia to Houston in the USA. The cargo interests engaged salvors to tow her to Las Palmas. General average was declared. The claimant cargo owners (Glencore) claimed against the shipowner for salvage expenses and the cost of defending salvage arbitration, brought under four bills of lading. The shipowner, for its part, claimed a contribution in general average. It was common ground that the fire had been set by the chief engineer and as yet it was undetermined what his state of mind was at the time.

Popplewell J at first instance[51] had held that while the conduct of the chief engineer in starting the fire might be capable of constituting barratry, further facts

47 [2019] SGHC 106; [2019] 2 Lloyd's Rep 617.
48 Cap 384, 1994 Rev Ed; equivalent to the United Kingdom Carriage of Goods by Sea Act 1992.
49 [2014] EWCA Civ 1382; [2015] 1 Lloyd's Rep 97.
50 [2019] EWCA Civ 388; [2019] 2 Lloyd's Rep 109.
51 [2017] EWHC 3348 (Comm); [2018] Lloyd's Rep Plus 22.

were needed about his state of mind and whether this amounted to legal insanity. He also held that the owner's exception of liability for fire under article IV rule 2(b) did not depend on how the fire was caused, for example deliberately or barratrously. This was Glencore's appeal of the judge's decision on two grounds: (1) on the agreed and assumed facts, the conduct of the chief engineer in starting the fire constituted barratry and this conclusion did not depend on a close analysis of his state of mind at the time; and (2) the article IV rule 2(b) defence was not available where the fire was caused by the barratrous act of the master or crew.

The Court of Appeal allowed Glencore's appeal on issue (1) but dismissed its appeal on issue (2). First, the issue of whether the conduct of the chief engineer in starting the fire constituted barratry was not determinative of whether the owners were exempt from liability for the fire under article IV rule 2(b), because on the agreed facts the fire was caused deliberately by him with intent to cause damage. Secondly, the words "fire, unless caused by the actual fault or privity of the carrier" in the Hague-Visby Rules article IV rule 2(b) had a natural and ordinary meaning and contained no implicit qualification as to how the fire was started or who was responsible.

Loss of deck cargo was the issue in *Aprile SpA and Others v Elin Maritime Ltd (The Elin)*.[52] The defendant was the owner of MV *Elin* and the claimants were the cargo interest in respect of a cargo of "fournitures et équipements" for an offshore project shipped on board under a non-negotiable bill of lading issued by an agent on behalf of the owner for carriage from Thailand to Algeria. The bill of lading contained the following exclusion: "The carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising … in respect of deck cargo".

Some of the cargo was lost overboard in heavy seas. For present purposes it was assumed that it had been carried on deck. The cargo interests brought claims in contract, tort and bailment, alleging a breach of duty, or of the contract contained in or evidenced by the bill of lading. Owners denied liability on the ground that it was expressly excluded by the bill of lading. Cargo interests argued notably that the exclusion was ineffective in the face of an overriding obligation of seaworthiness and suggested alternative interpretations of the exclusion. The question for trial was whether, on a true construction of the bill of lading, the defendant was not liable for any loss of or damage to any cargo carried on deck howsoever arising, including loss or damage caused by unseaworthiness or the defendant's negligence. It was assumed that the bill of lading terms (including incorporated charterparty terms) and common law applied, but not the Hague or Hague-Visby Rules. Deputy Judge Stephen Hofmeyr QC held that on a true construction of the bill of lading, the owner was not liable for any loss of or damage to any cargo carried on deck, including loss of or damage to any cargo carried on deck caused by the unseaworthiness of the vessel and/or the owner's negligence. The words used were effective to exclude liability for both negligence and unseaworthiness.

A jurisdictional issue arose for consideration by the Hong Kong SAR Court of First Instance in *Li Lian International Ltd and Others v Herport Hong Kong Ltd and Another (The MOL Comfort)*.[53] The applicant was Nippon Yusen Kaisha (NYK) which by an order dated 11 September 2017 had been joined as a third party to the litigation at the application of the defendant, Herport. NYK sought to discharge the order to join it to proceedings, set aside service, stay proceedings and declare that the court had no jurisdiction over NYK.

The factual background was that following the total loss of the vessel *MOL Comfort* the plaintiff cargo interests commenced proceedings against the defendant non-vessel operating common carriers. The latter had sub-contracted the carriage to NYK, a slot charterer, which had issued the bills of lading. The NYK bills of lading contained an exclusive jurisdiction clause in favour of the Tokyo District Court. Herport's joinder of NYK to the proceedings was in pursuit of an indemnity in respect of the plaintiffs' claims. There were limitation proceedings ongoing in Japan involving the shipbuilder and owner.

Ng J held that Herport's claim against NYK was based on the NYK bill of lading and that the claim fell within the description in the jurisdiction clause. As a result, Herport was bound to bring its claim in the Tokyo District Court. Herport's argument that the clause was not a valid jurisdiction clause, and that therefore the burden was on NYK to show that there was a more appropriate forum than HK, was unfounded. Finally, Herport had failed to discharge the burden of demonstrating that there were strong reasons why it should be allowed to act in breach of the jurisdiction clause. The fact that the claim was now time-barred under Japanese law was not relevant juridical prejudice. It was not a factor outside the reasonable contemplation of the parties at the time the contract was made, but was a foreseeable situation of the party's own making.

[52] [2019] EWHC 1001 (Comm); [2019] Lloyd's Rep Plus 71.

[53] [2019] HKCFI 826; [2020] Lloyd's Rep Plus 15.

In *Tritton Resources Pty Ltd and Others v Ever Rock Navigation SA (The Ikan Jahan)*,[54] the Federal Court of Australia considered certain preliminary issues in a litigation on the rights as between successive holders of bills of lading and the effect of transfers. Plaintiffs Tritton, JP Morgan and Sterlite had been successive holders of certain bills of lading for cargo on board the defendant's MV *Ikan Jahan*. Tritton was the seller of the cargo of ore and also the voyage charterer. The vessel grounded in Indonesia while transporting ore from Australia to India and the shipowners engaged salvors to refloat her. She arrived in India with a delay and the cargo was discharged. At the time of the grounding, risk but not property in the cargo had transferred from JP Morgan to Sterlite. There were salvage charges as well as a demand for general average contribution against cargo owners. The bills of lading were on Congenbill 1994 terms and subject to Australian law, referred to as the amended Hague-Visby Rules (AHVR). In the litigation, the plaintiffs sought damages for breach of the contract of carriage evidenced by the bill of lading.

The preliminary issues for decision arose from the fact that solicitors representing the cargo insurers, AEGIS, had agreed several consecutive extensions of the time bar with the defendant, while the salvage arbitration and general average adjustment were finalised. The shipowner asserted that the action was nevertheless time-barred because the extension had been granted only to JP Morgan. It was common ground that it was Sterlite that had title to sue under the bill of lading.

Derrington J held that a binding agreement to extend time existed. The agreement reached was that Ever Rock would grant an extension to AEGIS for itself and its insureds in respect of actions arising in relation to the carriage of goods by sea under the bill of lading under article III rule 6 of the AHVR. The time bar in this provision of the AHVR did not afford the defendant any defence to the plaintiffs' claims in the action. The time bar was extended by the defendant in favour of all plaintiffs and the action was commenced within that extended period.

However, only Sterlite was entitled to pursue all actions against Ever Rock arising under the bill of lading regardless of when the cause of action arose. JP Morgan was entitled to pursue a cause of action in tort, if any, for loss or damage done to the goods while it had title to them, including salvage charges. Tritton had no cause of action against Ever Rock.

[54] [2019] FCA 276; [2019] 2 Lloyd's Rep 235.

Sale of goods

As remarked initially, a significant share of cases this year arose from circumstances of alleged fraud or insolvency. This was particularly the case for sale of goods cases.

Materials Industry and Trade (Singapore) Pte Ltd v Vopak Terminals Singapore Pte Ltd,[55] was a Singapore High Court judgment concerning competing liens in a cargo of palm methyl ester (PME). The competing liens were held by the storage facility and the contractual owner of the goods. The defendant maintained a storage tank facility and had leased some of its tanks to a company called IBRIS under a service agreement. Following failure by IBRIS to make monthly payments or provide a second bank guarantee, the defendant disposed of a large quantity of PME stored in its tanks, in reliance on a lien in the service agreement.

The plaintiff commenced this action for conversion against the defendant, asserting that it was the owner of the PME as a result of a transaction whereby it had purchased it from a seller against upfront payment, and sold it to IBRIS on credit terms. That transaction was designed to enable IBRIS, which had cash flow problems and was later wound up, to meet its obligations under the onward sale contract it had in place for the PME.

The PME was delivered into the storage tanks over time from 2 September 2014. On 15 October 2014, at a point when most but not all of the PME had been delivered, the plaintiff and IBRIS entered into a storage agreement backdated to 1 September 2014, pursuant to which title in the PME "shall not pass" until all balances were fully paid. In addition to the plaintiff's action for conversion, there was also a claim for storage charges by the defendant.

Ang Cheng Hock J dismissed the plaintiff's claim as well as the defendant's counterclaim. There had been an unconditional appropriation of the PME upon each batch of delivery and this was assented to by the parties, fulfilling the conditions for the transfer of property to IBRIS under the Singapore Sale of Goods Act, section 18 rule 5(2).[56] The terms FOB and ITT (in tank transfer) did not make it clear that appropriation would only occur upon delivery of the full contractual amount. The terms did not refer to the transfer of title but only addressed the method and means of delivery. The plain meaning of the storage agreement was that the plaintiff was to retain title in the PME which had not already passed to IBRIS on

[55] [2019] SGHC 276; [2020] Lloyd's Rep Plus 28.

[56] Cap 393, 1999 Rev Ed, section 17 and section 18 rule 5, which closely follows the United Kingdom Sale of Goods Act 1979.

15 October 2014. It did not have the effect of returning title to the plaintiff which had already passed to IBRIS.

The defendant's lien under the service agreement was not akin to a floating charge, but was based on its possession of the PME and gave it a right to retain possession and dispose of it; *Diablo Fortune Inc v Duncan, Cameron Lindsay and Another*.[57] This lien could be exercised only from 29 November 2014, when the defendant terminated the service agreement, all liabilities fell due and the bank guarantee was exceeded.

The defendant's conduct was relevant in determining whether, where the contract was silent on that point, it was required to give IBRIS notice before exercising the lien. However, the correspondence in July to September 2014 could be read equally as a threat to exercise the lien. It did not amount to a notice and could therefore not be relied upon to infer an understanding by the parties that the defendant was required to give notice. Nor was it an implied term of the contract between the defendant and IBRIS that the defendant should give notice; it was not necessary to give the contract business efficacy.

In accepting that the PME would be stored in the defendant's tanks, the plaintiff must have impliedly granted actual authority to IBRIS to grant possession of the PME to the defendant on terms that would include a right of lien, as was industry practice. The defendant was entitled to exercise that lien also over the small quantity of PME delivered after the storage agreement between the plaintiff and IBRIS on 15 October 2014. The defendant had not shown that IBRIS had authority to bind the plaintiff to an obligation to pay storage charges. There had been no unjust enrichment, where the defendant was entitled to exercise its lien over the whole of the PME cargo.

The monumental[58] judgment in *Natixis SA v Marex Financial and Another*[59] addressed numerous issues including the obligation on a seller of goods to pass good title, common mistake, allocation of risk, mitigation and the validity of exclusion clauses. A full review of the issues will not be attempted here. Of particular interest in the present context are observations on the law applicable to warehousing receipts and their authentication. The factual background[60] was that Marex, a commodities trader, had agreed to sell, and Natixis, a bank, had agreed to buy nickel stored at warehouses belonging to Access World in Korea and Malaysia. The contracts were five spot purchase contracts dated between 22 November 2016 and 10 January 2017. These transactions formed part of "conditional repo" transactions, under which Marex had options to repurchase the nickel at later dates. The documentation that Marex was obliged to deliver to Natixis included warehouse receipts. Pursuant to each purchase contract, Marex delivered hardcopy documents (including documents which purported to be genuine Access World warehouse receipts) to Natixis's London branch and Natixis thereafter transferred the relevant payment amount to Marex, with the last such transfer occurring on 10 January 2017. A total of 16 purported warehouse receipts were delivered to Natixis by Marex. On 27 January 2017 Access World issued a statement that there were forged warehouse receipts in circulation and encouraging holders of such receipts to seek authentication. Following an authentication process, it transpired that all of the warehouse receipts at issue were counterfeit. Marex never had, and Natixis never acquired, title to any of the nickel. Natixis commenced litigation against Marex, Access World and an insuring Lloyd's syndicate. The defendants counterclaimed and Marex also claimed in tort against Access World. Bryan J held that Natixis's claim against Marex under the purchase contracts succeeded, as did Marex's claim in tort against Access World. Marex's claim against the syndicate was settled.

The judge held that there was no scope for applying the doctrine of common mistake. He reaffirmed the observation that it must first be established that the contract itself is silent, expressly as well as by implication, on which of the parties bears the risk for the relevant mistake.[61] In the event, Marex as seller bore the risk of the warehouse certificates not being genuine.

As for the liability of Access World, it was common ground that a warehouse receipt was not a document of title such as a bill of lading. Absent such a document, there was no existing relationship between a warehouseman and any buyer, unless and until the warehouseman attorned to the buyer, the warehouseman holding the goods to the order of the owner until then.[62] Access World was holding the goods as bailee for the depositor, and statements in the warehouse receipts that it would deliver the goods to an endorsee who presented the receipts were not to the effect of unilateral contracts with a series of endorsees.

57 [2018] SGCA 26; [2018] 2 SLR 129.
58 559 paragraphs. The full judgment is reported at [2019] Lloyd's Rep Plus 90.
59 [2019] EWHC 2549 (Comm); [2019] 2 Lloyd's Rep 431.
60 For these facts, see para 2 of the judgment.
61 *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1989] 1 WLR 255 and *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407; [2002] 2 Lloyd's Rep 653; [2003] QB 679.
62 *Mercuria Energy Trading Pte Ltd v Citibank NA* [2015] EWHC 1481 (Comm); [2015] 1 CLC 999.

Access World in authenticating the documents had (where no disclaimer was attached) issued that statement knowing that Marex was purchasing the metal, and the loss arising under the sale contract to Natixis was of a type from which the statement was intended to protect Marex. The position of Access World in terms of capability to authenticate its own documents was well within the special skill giving rise to a duty of care contemplated in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[63] Access World was therefore liable in tort to Marex, but not to Natixis as it did not owe a duty of care; nor had it assumed any responsibility towards Natixis in authenticating documents.

In *K v A*,[64] the parties' communications had been manipulated by fraudsters, causing payment to the wrong bank account and a shortfall in payment. The question was where the fallout from these events should land. By an arbitration award, the GAFTA Board of Appeal ordered the claimant K to pay to the defendant A US$161,616.93 plus interest as the balance of the price due from K as buyers of a cargo of sunflower meal under a contract of sale. The shortfall had arisen out of complications in the payment to A's bank following the hacking of email accounts by a fraudster and forged payment instructions which gave details of a fraudulent account with the same bank for payment. K paid to that account before the fraud was discovered. When the funds were repaid upon discovery, there was a shortfall due to fluctuations in exchange rates. A claimed the shortfall in arbitration and the GAFTA Board of Appeal gave award in its favour. K sought to challenge the award under sections 67, 68 and 69 of the Arbitration Act 1996. It argued that its contractual obligation was merely to pay to the bank, which had been done.

The judge remitted for reconsideration by the Board its reliance on clause 18 of GAFTA 119[65] with the benefit of submissions from the parties on the point, dismissing all other applications. As was common ground, A had not relied on clause 18 as a basis for treating A's notification of the destination account details to the broker as sufficient to constitute notification to K itself. It followed that K was not given any opportunity to address the point. This was a serious irregularity within the meaning of section 68. A substantial injustice might arise if, as a result, K paid more than the contract price; the clause was an essential part of the Board's reasoning; and the Board might well have reached a different view.

However, K's appeal on a point of law under section 69 was dismissed. The contractual payment obligation was only to pay "net cash" to the "seller's bank". However it was not the bank which must have unconditional use of the funds, but the seller. Commercially it was impossible to transfer funds to a bank without identifying the beneficiary and the destination account, and accordingly the contract contemplated that A would nominate further details necessary for payment. The grounds for appeal advanced under the section 67 applications were equally without merit.

In *Avra Commodities Pte Ltd v China Coal Solution (Singapore) Pte Ltd*,[66] the issue was contract formation in the commodities sale context. The question was whether the four emails exchanged on 29 March 2017 added up to offer and acceptance such that a contract had been formed, although most of the terms were then agreed over the following weeks. While the plaintiff claimed that a contract had been concluded, the defendant admitted that the exchange of emails had taken place, but asserted that the emails were insufficiently certain and insufficiently complete to give rise to a contract; alternatively that the parties had no intention to create legal relations when they exchanged the emails. The transaction at issue was the plaintiff selling to the defendant a total of 185,000 mt of Indonesian steam coal in three cargoes for delivery fob Tanjung Pemancingan Anchorage in May 2017. The plaintiff had emailed the defendant proposing the sale and there was an exchange of, in all, four emails between the parties with details of a transaction. A draft contract was later emailed from the plaintiff to the defendant "for your review/confirmation". Marked-up draft contracts were exchanged. The plaintiff executed the contract on 17 April 2017, but the defendant never did.

On 4 May 2017 the defendant wrote to the plaintiff saying that due to a weak market, it now only wanted the first of the three cargoes. The plaintiff took the view that a contract had been entered into by the exchange of emails and wrote to terminate the contract on the basis of the defendant's "anticipatory repudiatory and/or repudiatory breach". The defendant denied there was a contract for among other reasons that it had not been executed. On three previous occasions, the parties had entered into similar transactions. The plaintiff had emailed with key terms including the quantity of coal, the type of vessel, the laycan, the loading port, the loading rate, the quality of coal, the price, a price adjustment formula, the time of payment and the demurrage. The defendant had made a counter proposal and drafts had then been exchanged, including

63 [1963] 1 Lloyd's Rep 485; [1964] AC 465.
64 [2019] EWHC 1118 (Comm); [2020] 1 Lloyd's Rep 28.
65 Available here: www.gafta.com/write/MediaUploads/Contracts/2018/119_2017.pdf (accessed 20 January 2020).
66 [2019] SGHC 287.

terms which had not been discussed before. Two of these contracts had been executed and per-formed, the third had not been performed by the plaintiff. Both parties asserted that it amounted to a course of dealing in their favour.

The judge held that the parties had entered into a contract for the sale to the defendant of three cargoes of coal and that the defendant was liable in damages. The contract arose on 29 March 2017 from the business confirmation emails which the parties exchanged on that day. The emails had used the language of offer and acceptance. The terms agreed then were faithfully reproduced in the subsequent drafts and never renegotiated. That the parties continued to nego-tiate other details of the draft contract was no bar to finding that they intended objectively to be bound by the agreement which they reached on 29 March 2017. The subsequent drafts made up of the contract were dated 29 March 2017.

The agreement into which the parties had entered was not "subject to contract". The subject to contract clause in clause 26 of the draft contract, based on the plaintiff's standard terms, was never an aspect of the parties' negotiations on 29 March 2017. The subject to contract clause came into play only after the parties had exchanged the business confirmation emails.

The parties' previous dealings were no guide where it had been established that the parties did intend to create legal relations by the 29 March 2017 emails. Although the transaction in 2015, where the plaintiff had backed out essentially in the same way as the defendant had done here, was not before the judge for decision, the ruling here implies that the defendant then would have had occasion to sue the plaintiff for breach, had it been so inclined.

The judge went on to hold that out of the essential terms, only the load port surveyor was not agreed on 29 March 2017, but there was a mechanism for agreeing it and it was in fact later agreed. There was no indication that the parties would have failed to agree on a load port surveyor. The contract was therefore sufficiently certain for enforcement. Damages fell to be assessed under the general rule set out in section 50(3) of the Sale of Goods Act. The date of breach rule would be applied and the date of breach was the end of the laycan for each cargo. There was an available market for the coal at the load port on those dates. The defendant was liable to pay the plaintiff damages for breach of contract in the amount of US$1,465,850. As the judge noted, the defendant had appealed the decision.

In *Aden Refinery Co v Gunvor SA*,[67] a contract for the sale of gasoil went awry in a falling market. By a contract dated 8 May 2014, the defendant had agreed to sell to the claimant around 60,000 mt of gasoil. Delivery was agreed for July 2014, but the delivery date was subsequently postponed to August 2014 and again to September 2014. The claimant was to prepay for the cargo before it was delivered, and as a result of the delay and a change of list pricing between July and August 2014, differences arose on what price was to be paid. On or about 15 September 2014, the claimant paid US$58,563,752 to the defendant. The defendant was prepared to deliver only 56,164.211 mt for that sum. The claimant maintained that it had overpaid by US$4,475,482 and in these proceedings sought the return of that sum. The defendant admitted an overpayment of US$786,505.08 but advanced counterclaims by way of set off. The case turned largely on the authority of an intermediary, Energen, who with authority from the defendant had agreed the original contract with the claimant, and had gone on to agree with the claimant a variation on delivery time and invoice price, to resolve the situation that arose.

The judge held that in agreeing the variation, Energen was intervening in its own right and not on the defendant's behalf. It had offered its own proposal and issued its own invoice in connection with that proposal, and was prepared to take some personal risk in doing so. The defendant had on the evidence not left final pricing to Energen. As for the counterclaims, the claimant's failure to make the full payment required of it for the cargo amounted to a breach of clauses 9 and 10 of the contract, which obliged it to accept and pay the defendant for the cargo at an average of the relevant July Platts prices. In the present case, the best evidence of the market price of the remaining cargo was the price at which the defendant was able to sell it to Glencore.

Ship construction, sale and finance

The cases in this segment are all very different – what they have in common is that they arise out of transactions for ships.

Nobiskrug GmbH v Valla Yachts Ltd[68] concerned the fallout of a complex yacht construction project. The arbitration appellant Nobiskrug was a German shipyard and the defendant Valla Yachts was the purchaser of a yacht under a shipbuilding contract dated 29 March 2012. The yacht had been delivered on 27 January 2017. During the build, issues had arisen with sub-contractors which were making demands for payments and threatening to discontinue the

67 [2019] EWHC 3555 (Comm).
68 [2019] EWHC 1219 (Comm); [2019] Lloyd's Rep Plus 56.

work. There were four such sub-contractors with separate claims. Following negotiations involving both parties, Valla Yachts had made certain payments to the sub-contractors under various conditions and reservations. Nobiskrug took the view that it had no liability to the sub-contractors and that it was not obliged to reinstate Valla Yachts. The arbitration tribunal had ordered Nobiskrug to repay Valla Yachts on the basis of unjust enrichment, and Nobiskrug appealed.

Sir Ross Cranston allowed the appeal and ordered the issues remitted to the tribunal for further consideration. Certain findings by the tribunal relevant to Nobiskrug's liability to Valla Yachts, notably regarding Nobiskrug's project management failures, meant that the analysis in unjust enrichment was not spelt out completely on the face of the award.

France And Another v Discovery Yacht Sales Ltd[69] concerned a yacht that upon delivery had been found to be unseaworthy and in need of extensive work. By a purchase agreement dated 21 October 2015 the first claimant and his special purpose vehicle (the second claimant) had purchased a yacht from the first defendant, to be built by a related company. Defects materialised after delivery such that the yacht was unseaworthy and in September 2017 an agreement on repairs was made, but the repairs were not carried out. The claimants claimed for breach of contract, against the first defendant for breach of its obligations under the warranty clause in the purchase agreement, and against the second defendant for breach of the September 2017 agreement.

Teare J gave judgment for the claimants and awarded damages. The first defendant was liable for its failure to honour the warranty in the purchase agreement and for breach of the terms implied by the Consumer Rights Act 2015, sections 9 and 10. The contemporaneous evidence, and in particular the views of the contracted skipper, showed that the faults and defects which developed on the yacht so soon after delivery were caused by the failure of the first defendant to ensure that the yacht complied with the specification, was of satisfactory quality and was fit for its intended purpose.

As for the September 2017 agreement, the second defendant and no other was the party that stood to benefit from the claimant agreeing that the yacht be shown at the Annapolis Boat Show to promote the second defendant's sales. In entering into the agreement, B must therefore have been acting on behalf of the second defendant, which was in breach by not honouring it.

In *TMF Trustee Ltd and Others v Fire Navigation Inc and Others*,[70] a summary judgment application was refused to allow the defendant to mount a defence based on the prevention principle, where the claimant's arrest of the vessel might have contributed to the predicament in which the defendant found itself. The claimants were the lenders and the first and second defendants the borrowers under a loan agreement for the purpose of the acquisition of two vessels. The third defendant had guaranteed the obligations of the borrowers under the loan agreement. The vessels were purchased but subsequently arrested by the claimants and had either been sold or remained under arrest. In these proceedings, the claimants sought summary judgment against the first to third defendants for a money judgment, as well as declarations that: (i) the principal amount of the loan became repayable no later than 29 December 2017; and (ii) that an event of default under the loan agreement occurred no later than that date. The defendants proposed two lines of defence: first, that the loan agreement was terminated before the maturity date because the claimants' repudiatory breach in arresting the vessel had caused the agreement to terminate automatically, or that the repudiation had been accepted by conduct in failing to perform obligations subsequent to the arrest; and secondly, a defence based on the broad "prevention principle", namely, that a party in breach of contract was excused where prevented from performing the relevant obligation by the breach of the other party.

Phillips J refused the application for summary judgment: the second defence based on the prevention principle had reasonable prospects of success. The effect of the no set-off clause in the loan agreement was that the borrowers could not resist liability for amounts due by reason of any alleged set-off or cross-claim, but that did not stop them from arguing that the amounts claimed were not due in the first place, which was the true effect of the argument based on the prevention principle.

In *Priyanka Shipping Ltd v Glory Bulk Carriers Pte Ltd (The CSK Glory)*,[71] a vessel was sold for scrap under a contract containing a clause prohibiting use of the vessel. A changing scrap market prompted buyers to voyage charter the vessel. The claimant was the buyer of the vessel *CSK Glory* and the defendant was the seller. The Memorandum of Agreement, dated 26 April 2019, was on the Saleform 1993 and contained a clause 19 specifying that the vessel was sold for the purpose of demolition only, the buyers guaranteeing not to trade the vessel or sell it for any purpose other than demolition. At trial, the

[69] [2019] EWHC 3552 (Comm).

[70] [2019] EWHC 2918 (Comm); [2020] Lloyd's Rep Plus 32.

[71] [2019] EWHC 2804 (Comm); [2020] Lloyd's Rep Plus 19.

seller explained that this was its usual practice when selling vessels, to help reduce competition in its market.

The vessel was delivered on 14 May 2019. In a softening demolition market, buyers entered into voyage fixtures for the vessel on 31 May 2019, on 15 July 2019 and again immediately before the hearing. The buyer commenced this action seeking a declaration that the seller was entitled to nominal damages only for the breach of clause 19. The seller sought an injunction against fixtures and damages at common law, damages in addition to an injunction or damages in lieu of an injunction.

David Edwards QC (sitting as a judge of the High Court) granted the injunction. Negative covenants would ordinarily be enforced unless vexatious or oppressive, and damages were not a sufficient and appropriate remedy in this case. The seller had a legitimate and commercial interest in insisting upon the buyer adhering to the terms of its bargain by scrapping the vessel and it would not be just to leave the seller to its likely limited and difficult remedy in damages.

The seller's counterclaim for substantial damages in respect of the breaches of clause 19 would be dismissed; the seller was entitled only to nominal damages. Once the vessel was sold and delivered to the buyer, the seller had no proprietary or financial interest in her. The buyer's use of the vessel did not involve the buyer taking or using something in which the seller had an interest (following *Morris-Garner and Another v One Step (Support) Ltd)*.[72] The rights at issue were more analogous to the non-compete obligation in *One Step*.

A declaration would be made that the seller was only entitled to nominal damages for the breaches of clause 19 in respect of the first and second fixtures. No such declaration would be made in relation to subsequent fixtures.

Contract negotiation and interpretation

A few cases addressed contract interpretation methodology in the context of various shipping contracts, and it is worth dealing with them together.

Cockett Marine Oil DMCC v ING Bank NV and Another (The M/V Ziemia Cieszynska)[73] turned on the meaning of "insistence" on contract terms in the context of OWBG's standard terms. In this OW Bunker insolvency-related litigation, Cockett Marine had shortly before the insolvency purchased oil from the Malta and Middle East OW entities for supply respectively to the two vessels *Ziemia Ciesynska* and *Manifesto*. An arbitration tribunal had held that it had jurisdiction because the contract terms, incorporating OWBG's standard terms from 2013, included a London arbitration clause. Cockett Marine challenged the award on the ground that the tribunal lacked jurisdiction. Three issues arose for the consideration of Teare J.

First, the arbitration tribunal had held notably that OWBG's standard terms, including the law and London arbitration clause, had been incorporated into the contract either expressly or by a course of dealing. The judge dismissed this challenge to the arbitrators' jurisdiction. On the evidence of the contractual negotiations, where conduct amounting to acceptance – namely acceptance of the bunkers – had been identified by OW, their counter-offer was accepted by that conduct.

Secondly, the question arose as to whether the arbitration clause had been varied because OWBG's physical supplier had "insisted" on its own terms, as provided by clause L.4 of the standard terms. On this, the judge held that there was no evidence of "insistence" that the third party's clauses should bind the parties to the contract. The commercial purpose of the clause was not to ensure that the contracts were back-to-back, but to provide a mechanism by which OW Bunker could give effect to a third party's insistence.

Finally, there was also an issue as to whether there had been a valid assignment of OW's claim to ING Bank. The judge considered that although the Supreme Court had held in *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)*[74] that contracts such as those at issue were not sale contracts for the purpose of the Sale of Goods Act 1979, they could properly be characterised as sale contracts in a commercial sense and were therefore encompassed by the assignment by OWBG to ING Bank.

In considering the second issue, Teare J appears simply to have considered the factual evidence of "insistence" and found it insufficient in the case. He did not refer to *ING Bank NV and Others v Canpotex Shipping Services Ltd and Others*,[75] where the words at issue were given a different treatment, using an approach to interpretation arguably alien to English contract law and friendlier to the physical supplier. The Canadian Federal Court of Appeal had allowed the appeal of ING and referred certain

[72] *Morris-Garner and Another v One Step (Support) Ltd* [2018] UKSC 20; [2018] 1 Lloyd's Rep 495.
[73] [2019] EWHC 1533 (Comm); [2019] 2 Lloyd's Rep 541.
[74] [2016] UKSC 23; [2016] 1 Lloyd's Rep 589; [2016] AC 1034.
[75] 2017 FCA 47; [2017] 2 Lloyd's Rep 270. This case was reported in the 2018 edition of this Review, *Maritime law in 2018: a review of developments in case law.*

issues back to the judge. As a result of that decision, the judge was tasked with reconsidering the meaning of the alternative version of clause L.4, present in the OW Group's General Terms and Conditions, and its effect on the relationship between OW UK, Canpotex (which had purchased the bunkers and deposited the purchase price to be paid with solicitors pending determination) and Petrobulk (the physical supplier). The main material difference compared to the L.4 clause was the words:

> "These terms and Conditions are subject to variation in circumstances where the physical supply of Bunkers is being undertaken by a third party *which insists* that the Buyer is also bound by its own terms and conditions."[76]

The judge considered that "insistence" did not necessarily mean something over and above "usual business dealings" but was analogous to "require" or "demand" and would depend on the context. Any ambiguity must be resolved contra proferentem against OW and in favour of Petrobulk. As a result of these findings, the judgment for payment out of the funds deposited by Canpotex would be much the same as in the first decision.

In *Navalmar UK Ltd v Ergo Versicherung AG and Another (The BSLE Sunrise)*,[77] the issue was one of construction of a general average guarantee. MV *BSLE Sunrise* ran aground off Valencia while carrying the cargo of the defendant insurers' insureds. The claimant shipowners incurred expenditure in refloating and repairing the vessel and declared general average. The cargo interests supplied general average bonds and their insurers supplied general average guarantees promising:

> "in consideration of the delivery in due course of the goods specified below to the consignees thereof without collection of a deposit"

to pay any contributions

> "which may hereafter be ascertained to be properly due in respect of the said goods."

The cargo interests maintained that the casualty event had occurred because the owner had failed to exercise due diligence before and at the commencement of the voyage to ensure that the vessel was seaworthy, and properly to equip or supply the vessel in breach of article III rule 1 of the Hague-Visby Rules, which were incorporated by reference into all the material contracts. It was common ground that Rule D of the 1974 iteration of the York-Antwerp Rules precluded recovery in such a case. This was the determination only of a preliminary issue, namely whether the Rule D defence was available to the insurers as issuers of the general average guarantees.

HHJ Pelling QC held that it was. The General Average Guarantees created primary obligations as between the insurer concerned and the owner, but that did not lead to the conclusion that the obligation was greater, wider or more onerous than that between the shipowner and the cargo interest concerned under the general average bond. Against the background of the factual and commercial shipping context, the guarantees must be construed as covering the liability of the cargo interest and no more. On the whole, general average guarantees were intended to operate in conjunction with, not as substitution for, general average bonds. That meant not only that the shipowner could not recover any more than the adjustment sum, but also that where there was no liability, there could be no recovery.

The wording of the guarantee expressly limited the obligation to paying "... *on behalf of the various parties to the adventure as their interest may appear* any contributions to General Average which may hereafter be ascertained to be properly *due* ...".[78] "Due" had been established to mean "legally owing or payable".[79] Sums would only become legally due once it had been decided whether the Rule D defence succeeded or failed. That suggested that what the insurer had agreed to pay was what the parties to the adventure would otherwise have had to pay themselves.[80] Finally, the wording of the general average guarantee did not entail contracting out of rights to challenge the adjustment, which would have had the effect that the defence would be unavailable.[81] *St Maximus Shipping Co Ltd v A P Moller-Maersk A/S (The Maersk Neuchatel)*,[82] which appeared to support making the defence unavailable, concerned a letter of undertaking rather than a general average guarantee and furthermore did not contain the wording "*properly* due".[83]

It might be commented that the judgment fully recognises the idiosyncrasy of contracts made in the shipping context, and the peculiar balance of commercial interests within the industry. The general approach to commercial contracts would undoubtedly have been to consider the contracts as separate and not

[76] Emphasis added.
[77] [2019] EWHC 2860 (Comm); [2020] Lloyd's Rep Plus 20.
[78] At para 24; emphasis added.
[79] *State Trading Corporation of India v Doyle Carriers Inc and Others (The Jute Express)* [1991] 2 Lloyd's Rep 55 considering a general average bond applied equally in the context of a general average guarantee.
[80] At para 24(ii).
[81] *The Jute Express* [1991] 2 Lloyd's Rep 55 applied; *The Maersk Neuchatel* [2014] EWHC 1643 (Comm); [2014] 2 Lloyd's Rep 377 distinguished.
[82] [2014] EWHC 1643 (Comm); [2014] 2 Lloyd's Rep 377.
[83] Emphasis added.

interdependent. However, the application of the standard framework on guarantees would have been an awkward and commercially unrealistic fit.

In *Rubicon Vantage International Pte Ltd v KrisEnergy Ltd*,[84] similar *Fingerspitzengefühl* was demonstrated by the judge in considering a charterparty guarantee. The claimant, Rubicon, and KEGOT, a subsidiary to the defendant KrisEnergy, had entered into a bareboat charterparty for a floating storage and offloading facility. The defendant had provided a charterer's guarantee to the claimant for sums owed under the guarantee. This was a dispute under the guarantee. Hire had been paid on time throughout the charter, but KEGOT disputed liability for sums invoiced by Rubicon in respect of various works to the vessel before she entered into service. Those sums had not been paid, and Rubicon contended before the judge that KrisEnergy must pay them. The issues arising were: (1) whether the guarantee was an on-demand guarantee only in relation to claims where liability had been admitted by KEGOT; (2) the proper construction of the guarantee's provisions as to what constituted a proper demand; (3) a mixed question of fact and law as to whether or not, in the light of the proper construction of the contract, the demands that were in fact made were compliant; and (4) a factual dispute as to whether or not an admission had been made by KEGOT.

Nicholas Vineall QC held that the first demand had been valid and that KrisEnergy was obliged to pay the sum demanded under the invoices. The guarantee had features of both a see-to-it and an autonomous guarantee – it was by a parent company in respect of its subsidiary, but in some circumstances KrisEnergy could be liable to pay upon a compliant demand, even if there was a dispute between Rubicon and KEGOT. The presumption that in a transaction outside the banking context an instrument would not be regarded as an autonomous guarantee was spent, once it had been determined that an instrument did to some extent operate as an autonomous guarantee and could not be applied analogously.[85] A careful construction led to the finding that the on-demand liability for the first £3 million arose for any disputed claims, regardless of whether they were disputed as to liability or quantum. On a reasonable construction of the demand clause, calculations and supporting documentation, and not mere certification, was required. The first demand on 3 September 2018 fulfilled those requirements.

MARINE INSURANCE

As yet, no decisions shedding light on the interpretation of the Insurance Act 2015 in a commercial or maritime context have materialised, although the court came tantalisingly close in *Natixis SA v Marex Financial and Another*.[86] A narrowly circumscribed point on waiver was considered in *Young v Royal and Sun Alliance plc*.[87]

The most significant marine insurance case of the year was doubtless *Sveriges Angfartygs Assurans Forening (The Swedish Club) and Others v Connect Shipping Inc and Another (The Renos)*,[88] a short judgment in which the UK Supreme Court considered a claim by shipowners against hull underwriters for a constructive total loss. Notice of abandonment had been served on the insurers on 1 February 2013, while the vessel was at Suez following a fire on board on 23 August 2012. Both of the issues before the court related to the expenditure to be taken into account in computing the cost of repair for the purpose of determining whether the vessel was a constructive total loss under section 60(2)(ii) of the Marine Insurance Act 1906.

The first issue was one of timing: should the comparison sum include expenditure already incurred before the service of notice of abandonment? This was an important question in the case, given the delay between the fire and the notice of abandonment, in which period significant costs were incurred. The insurers argued that the question whether there had been a constructive total loss fell to be decided at the time when notice of abandonment was given, and by reference to the facts then existing, because the parties' rights were crystallised at that point. The Supreme Court rejected this argument. Having noted the surprising paucity of authority, the court fell back on first principles, namely the hold harmless character of insurance contracts, according to which the insured event causes the insurer to be in breach and owing liquidated damages from the moment of occurrence. Everything thereafter was simply a matter of evidence as to the damage to the vessel and the impact of that damage upon the measure of indemnity. The notice of abandonment did not alter this equation, as it did not change the facts of the loss itself. The expenditure of the owner on salvage or repair did not serve to reduce the loss; it was part of the measure of loss against which the owner was entitled to be indemnified.[89]

84 [2019] EWHC 2012 (Comm); [2020] Lloyd's Rep Plus 6.
85 Distinguishing on this point the leading case *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395; [2005] 2 Lloyd's Rep 231.
86 [2019] EWHC 2549 (Comm); [2019] 2 Lloyd's Rep 431.
87 [2019] CSOH 32; [2019] Lloyd's Rep IR 482.
88 [2019] UKSC 29; [2019] 2 Lloyd's Rep 78.
89 At para 18.

The second issue was whether the relevant costs included charges payable to the salvors under the SCOPIC[90] clause of the Lloyd's Open Form. For context, the SCOPIC charges incurred amounted to about half of the total salvage remuneration. It therefore potentially made the difference between recovery on a partial or total loss basis. The Supreme Court held that SCOPIC charges were not part of the "cost of repairing the damage" for the purpose of section 60(2)(ii) of the Act or the "cost of recovery and/or repair" for the purpose of clause 19.2 of the Institute Clauses. Their purpose was unconnected with the damage to the hull or its hypothetical reinstatement. The insured had argued that the SCOPIC charges were part of the "cost of repairing the damage" because they were an integral part of the salvors' remuneration which had to be paid if the ship was to be salved and repaired. However, the Supreme Court rejected that argument in reliance on the objective purpose of SCOPIC charges:

> "It was not to enable the ship to be repaired, but to protect an entirely distinct interest of the shipowner, namely his potential liability for environmental pollution. That purpose has nothing to do with the subject-matter insured, namely the hull. It was no part of the measure of the damage to the ship, and had nothing to do with the possibility of repairing her."[91]

As a result, the matter was remitted to the judge for the necessary assessments and computations.

In *McKeever v Northernreef Insurance Co SA*,[92] the claimant's yacht had grounded on a reef in the Sulu Sea on 19 March 2014. The claimant and her crew, consisting of one man, had to abandon her due to weather conditions. When they returned the next day, the yacht had been comprehensively looted.

This was notified to the defendant, a Uruguayan yacht insurer, on 20 March 2014. The yacht was refloated and taken to a boat yard on 7 April 2014. The insurer did not reject the claim, but equally did not pay it and while not disputing the English court's jurisdiction, having filed a defence on the merits, it had engaged minimally with proceedings. The claimant in the proceedings asserted her right to recover under the policy for the damage sustained to the yacht as well as the stolen items, all of which losses were caused by perils of the seas, piracy, malicious acts or theft. She also sought to recover sums paid to a fishing vessel to stand guard over the yacht and the removal of the yacht from the reef and towage to the boatyard as sue and labour expenses.

The judge made findings as follows. The grounding was fortuitous. The claimant's evidence as to charts on board and lookout kept were accepted. The policy provision as to continuing maintenance of the yacht was not a warranty but a condition precedent to cover and therefore fell to be proved by the insured. The clause concerned the structural condition of the yacht, not the maps and navigational equipment on board which had already been found to be adequate. As for the seaworthiness defence, it fell to be proven by the defendant and as it had submitted no evidence in respect of the charts, that defence also failed. The burden was also on the defendant to prove negligence, and it had failed to do so. As for causation, the judge accepted that the damage was proximately caused by the grounding.

The claimant's case on piracy was unsustainable. While the thieves had been engaged in indiscriminate plunder for personal benefit at sea, there had not been force directed at any person; the thieves had broken into an abandoned vessel and helped themselves. The definition of piracy in the United Nations Convention on the Law of the Sea 1982, although incorporated into domestic law by section 26 of the Merchant Shipping and Maritime Security Act 1997, was directed at the law between nations.

It had been clarified by the Supreme Court in *Atlasnavios-Navegação Lda v Navigators Insurance Co Ltd (The B Atlantic)*[93] that for a loss to be caused by a malicious act, there was a requirement of some element of spite or ill-will and so it did not encompass random acts of vandalism. In deliberately smashing the windows of the yacht so as to gain entry for the purposes of looting, the thieves had indeed been acting with the requisite spite and ill-will, even if they did not specifically intend the water ingress which subsequently occurred.[94] However, much like the conspirators in *Shell International Petroleum Co Ltd v Gibbs (The Salem)*,[95] the breaking of windows and padlocks on the yacht was merely a by-product of a larger operation carried out for gain. The water ingress resulting from the breaking of windows therefore did not result from malicious acts within the meaning of the policy. However, the water damage was recoverable as a loss caused by perils of the seas. The theft which involved the smashing of windows and the forcing of hatches was entirely fortuitous from the point of view of the claimant and the water ingress may

[90] Special Compensation, Protection and Indemnity Clause. Essentially, costs incurred by the salvor to minimise environmental impact of the incident are compensated on a commercial basis under the Lloyd's Open Form, if so agreed.
[91] At para 25.
[92] 2019 WL 02261376; [2019] 2 Lloyd's Rep 161.
[93] [2018] UKSC 26; [2018] 2 Lloyd's Rep 1; [2018] 2 WLR 1671.
[94] At para 89.
[95] [1983] 1 Lloyd's Rep 342; [1983] 2 AC 375.

therefore be regarded as a peril of the seas. As for sue and labour expenses, the costs of salvaging the yacht and towing it to the boatyard as well as the cost of engaging the fishing vessel to stand guard had all been reasonably and properly incurred, even though the latter cost was incurred after the damage and looting had already taken place.

On the whole the case was dominated by issues of burden of proof and evidence as a result of the defendant's minimum participation in the litigation. The legal issue that was perhaps the most controversial arose on malicious acts, where the judge relied on an aside by Lord Mance in *The B Atlantic*[96] in referring to cases where the damage is merely a by-product of a larger operation and therefore not malicious.

The judge was arguably right to disregard the UNCLOS definition of piracy, as marine insurance differs also in other respects; for example the UNCLOS definition is restricted to actions on the high seas or otherwise outside the control of any nation, whereas in marine insurance, piracy may take place in waters other than the high seas.[97]

A long litigation concluded this year with the mammoth[98] decision in *Suez Fortune Investments Ltd and Another v Talbot Underwriting Ltd and Others (The Brillante Virtuoso) (No 2)*[99] on 7 October 2019. The first available decision in this litigation dates to 15 January 2015,[100] when Flaux J held that the vessel had been a constructive total loss. Soon thereafter, underwriters alleged that the fire had been started deliberately and that the owner could not recover for its loss due to wilful misconduct under section 55(2)(a) of the Marine Insurance Act 1906. The owner's claim was subsequently struck out as a result of the owner having, in breach of a court order, provided his solicitors with an electronic archive of documents and had lied to the court. The mortgaging bank and its mortgagee's interest insurers continued the litigation undeterred. The bank maintained, first, that the vessel was not scuttled, and secondly, that even if it was, the bank could still recover because it was a co-assured under the policy and did not merely have a claim derived from that of the owner. This decision was on their claim.

Having considered the evidence, Teare J concluded that the vessel had been scuttled. The armed men who had boarded the vessel in the Gulf of Aden had done so with the intention of starting a fire on board and the master and crew had assisted them in that endeavour. The fake pirate attack had been orchestrated by the shipowner. As a result, if the owner's claim had not been struck out, it would have failed. However, the bank was not just an assignee but also a co-insured and therefore had its own interest in respect of which it could claim. The bank submitted that the loss was caused by an insured peril, namely piracy, persons acting maliciously, vandalism and sabotage or capture and seizure.

As to piracy, the judge noted the features of the attack were consistent with piracy, but went on to hold that the vessel had not been lost by piracy where the purported pirates were only masquerading as such and had in fact been invited on board by the owner:

> "First, there was no attack on the vessel. Rather, there was an arranged rendezvous at sea pursuant to which the master was willing to let the armed men board. Second, the motives of the armed men were not to steal or ransom the vessel or to steal from the crew, but to assist the Owner to commit a fraud upon Underwriters."[101]

The bank had sought to disengage from the owner's actions by asserting that it was a co-insured with a separate interest and that the piratical acts or intents of the owner should not be attributed to the bank.[102] However, the judge did not accept that argument where the issue was one of determining the nature of the event causing the loss, stating acerbically that "[i]n my judgment an attempted insurance fraud is not an act of piracy, whether looked at from the point of view of the Owner or of the Bank".[103] Citing *McKeever v Northernreef Insurance Co SA*,[104] the judge also observed that the violence or threat thereof to persons was insufficient in this case to qualify as a piratical act.

As for malicious acts, it could not be said that those who had boarded the vessel had acted out of "spite or ill-will or the like" in relation to the vessel. They did intend to damage the vessel – not out of spite or ill-will but because the owner had requested that they did so.[105] Nor did the property damage inflicted qualify as vandalism or sabotage where it was neither wanton, nor senseless but directed to assisting the owner with his insurance fraud.

96 Cited at para 83 of the judgment.
97 *Republic of Bolivia v Indemnity Mutual Marine Assurance Co* [1909] 1 KB 785. See also *Suez Fortune Investments Ltd and Another v Talbot Underwriting Ltd and Others (The Brillante Virtuoso) (No 2)* [2019] EWHC 2599 (Comm); [2019] 2 Lloyd's Rep 485 at para 481 specifying "territorial seas, tidal waters and ports and harbours".
98 At 598 paragraphs, the longest decision covered here.
99 [2019] EWHC 2599 (Comm); [2019] 2 Lloyd's Rep 485.
100 [2015] EWHC 42 (Comm); [2015] 1 Lloyd's Rep 651.
101 [2019] EWHC 2599 (Comm); [2019] 2 Lloyd's Rep 485, at para 487.
102 Relying on *P Samuel & Co Ltd v Dumas* (1924) 18 Ll L Rep 211; [1924] AC 431.
103 At para 491.
104 2019 WL 02261376; [2019] 2 Lloyd's Rep 161.
105 At para 499.

The bank had also argued that the vessel had been lost by capture, seizure, arrest, restraint or detainment, but this was equally unsustainable where the vessel had remained in the owner's possession through the master and thereafter the armed men with whom he was acting in concert. The bank's claim was dismissed as it had failed to show that the vessel was lost by an insured peril.

The bank gained a somewhat hollow victory in relation to one of the insurers' defences. It appeared that the owners and charterers had conspired to hide that the cargo on board was fuel oil, misdescribing it in the bills of lading as bitumen mixture so as to benefit from lower import duties. This was a breach of the warranty that the adventure was to be carried out in a lawful manner; however, the bank as co-insured had no control over such matters and as a result it was protected by the words "so far as the assured can control the matter" in section 41 of the Marine Insurance Act 1906.

By way of aftermath on 4 December 2019,[106] the judge took the unusual step of ordering the bank to pay costs on an indemnity basis as it had unreasonably maintained the litigation after it was known that the loss resulted from wilful misconduct.

[106] [2019] EWHC 3300 (Comm).

SEAFARERS

Several cases involving the rights and duties of seafarers and the liability fallout between other parties were decided during the year.

In *Alize 1954 and Another v Allianz Elementar Versicherungs AG and Others (The CMA CGM Libra)*[107] Teare J ruled that a vessel was unseaworthy due to a defective passage plan, prepared before the voyage. The case raised important issues as to the liability fallout of the master's inadequate plan. In the litigation, the shipowner claimed general average contributions from cargo interests. Its container vessel *CMA CGM Libra* had grounded shortly after sailing from the Port of Xiamen. A passage plan had been prepared before sailing and approved by the master. The charts on board did not show the hazard on which the vessel later grounded, but a Notice to Mariners had been issued with respect to it, saying that the charted depths were not reliable. Owners had failed to exercise due diligence to make the vessel seaworthy irrespective of guidance in the Safety Management System. In sailing, the master departed from the passage plan in such a way that the vessel came aground.

The judge held that the cargo interests were not liable to contribute in general average. The master's decision to depart from the passage plan and to navigate outside of the buoyed fairway was negligent. The burden was on the cargo interests to establish that the vessel was unseaworthy and that such unseaworthiness caused the grounding. The owners must then prove that due diligence had been exercised to make the vessel seaworthy. *Volcafe Ltd v Compania Sud Americana de Vapores SA*[108] would be distinguished: it concerned article III rule 2 of the Hague-Visby Rules; the burden of proof in this case concerning article III rule 1 was expressly determined by article IV rule 1.

Neither the chart nor the passage plan recorded the necessary warning. The vessel was unseaworthy before and at the beginning of the voyage from Xiamen because it carried a defective passage plan. That defective passage plan was causative of the grounding of the vessel. Due diligence to make the vessel seaworthy was not exercised by the shipowners because the master and second officer, acting qua carrier, failed to exercise reasonable skill and care when preparing the passage plan. It was not sufficient for shipowners to issue

[107] [2019] EWHC 481 (Admlty); [2019] 1 Lloyd's Rep 595.
[108] [2018] UKSC 61; [2019] 1 Lloyd's Rep 21.

guidance in the Safety Management System as to how to prepare a passage plan. The grounding of the vessel was caused by the actionable fault of the owners.

Rashid v Oil Companies International Marine Forum[109] concerned the important issue of ship inspectors' accreditation and the procedures applied in withdrawing them. The claimant, Captain Rashid, was an experienced seafarer who had become a consultant ship inspector. Among other accreditations, he held that of OCIMF, a voluntary association of oil companies comprising around 109 companies worldwide, including all the oil majors and most national oil companies. In July 2017 OCIMF informed the claimant that it had opened an enquiry in regard to certain inspections which was expanded to other "anomalies" in the claimant's inspections schedule. These involved allegations of dishonesty and challenges to the claimant's integrity. Following completion of an Inquiry Report in September 2017, OCIMF's disciplinary committee was convened. Before its hearing, OCIMF's general counsel stated in an email that the hearing would be restricted to four specific matters. Following the hearing, in January 2018, OCIMF withdrew Captain Rashid's accreditation. The claimant disputed any irregularities and commenced proceedings seeking damages, on the ground that the disciplinary procedure had been unfair and did not comply with contract terms. In the Inquiry Report, certain allegations of dishonesty had been raised and although the general counsel had indicated that these would not be pursued, they had not been formally withdrawn. The Inquiry Report had been supplied to the panel before the hearing.

Martin Spencer J held that the defendant had acted unlawfully and in breach of contract in withdrawing the claimant's accreditation. The claimant was entitled to damages for loss of income and expenses, but not for loss of reputation.

The judge rejected an argument that there was a lack of consideration flowing between Captain Rashid and OCIMF. Besides the annual fee, similarly to athletes joining a federation, consideration existed in the inspector's submission to OCIMF's rules and to OCIMF's jurisdiction, and in both parties' agreement on the procedures for resolution of any disputes contained in the rules.[110]

As to the procedures adopted by the Committee, natural justice required that the person the subject of disciplinary proceedings should know what the charges were, although this requirement did not rise to the exactitude of criminal proceedings. Fairness would have required that the panel be told positively that OCIMF itself considered the additional allegations unjustified, so as to negate any prejudice that might have lingered in the minds of the panel from having read the inquiry report. It was not sufficient to state that Captain Rashid's counsel had requested that attention be drawn to this fact. Each of the matters which formed the basis for the decision of the Disciplinary Committee could and would have been addressed in advance by Captain Rashid's lawyers with potentially decisive answers. The process which led to the removal of Captain Rashid's accreditation was therefore deeply flawed and wholly unfair and a serious breach of the principles of fairness and natural justice. No mandatory injunction to reinstate Captain Rashid's accreditation would be issued but he was at liberty to apply, should that fail to be done.

An application for permission to appeal appears to have been rejected by the Court of Appeal on 28 October 2019.

In *New Zealand Maritime Pilots' Association v The Director of Maritime New Zealand*,[111] the High Court of New Zealand considered an application for declaratory judgment as to the interpretation of the Maritime Rules, rule 90.41(1)(b) providing the criteria applicable for applicants for maritime pilot licences. The rules provided that an applicant must: (i) hold a certificate as master; or (ii) an equivalent certificate; or (iii) must provide evidence of acceptable equivalent experience and qualifications. The plaintiff was a pilots' association and the defendant was the director of Maritime New Zealand. The latter had relied on (iii) to issue a licence to an experienced dredge skipper, prompting the present application. The pilots' association considered that the licence had been wrongly issued.

Collins J held, approving the argument of the pilots' association, that rule 90.41(1)(b)(iii) of the Maritime Rules allowed the Director when receiving an application for a pilot's licence to accept either evidence of qualifications, experience and competencies that were equivalent to a certificate as master; or evidence of pilot-related qualifications, experience and competencies that demonstrated the candidate's seafaring skills were of an equal calibre to a person holding a certificate as master.

Diep v Wuolle,[112] a Canadian case from the Civil Resolution Tribunal, concerned the standard of seamanship applicable in a litigation for damages in tort. In a

109 [2019] EWHC 2239 (QB); [2020] Lloyd's Rep Plus 33.
110 *Modahl v British Athletic Federation* [2002] 1 WLR 1192.
111 [2019] NZHC 591; [2019] 2 Lloyd's Rep 325.
112 2019 BCCRT 541; [2020] Lloyd's Rep Plus 34.

dispute about damage to a sailboat, the applicant, Diep, asserted that the respondent, Wuolle, had crashed Diep's sailboat into a rock and sought damages of CAN$5,000, being the costs of repair. The applicant had purchased the sailboat with the intention of relocating it to British Columbia. The respondent accompanied the applicant on the trip to pick up the boat. As the parties sailed towards British Columbia, they discussed the intended route and direction of travel, with reference to a GPS application on the applicant's phone. At approximately 23.00, when the applicant was below deck and the respondent was at the helm, the boat struck some rocks. On the applicant's case the respondent had agreed to help him relocate the boat as he had lots of sailing experience and had taken responsibility for and "complete control" of the boat. According to the applicant, the respondent had ignored the agreed-upon course, driven the boat to the shore, and hit the rocks at full speed. The respondent denied responsibility.

The judge dismissed the applicant's claims. The evidence did not support the conclusion that the respondent purposely deviated from the planned route or intentionally ignored the rocks as suggested by the applicant; nor did he deliberately run the boat aground. Despite the applicant's perception that the respondent was in a "senior" position, the respondent had not agreed to take "complete control" of the boat.

On the law, the respondent was at the helm at the time the boat ran aground and would bear some liability if he was negligent in the operation of the boat. The test of negligence under maritime law was determined by the actions of the ordinary mariner, rather than the ordinary person. Seamen under criticism should be judged by reference to the situation as it reasonably appeared to them at the time, and not by hindsight, as determined in *The Boleslaw Chrobry*.[113] Although in hindsight, information about tides would have been important information to have, the nature of the tide was not determinative of what reasonably appeared to the respondent at the time of the incident. On the facts, negligence was not proven.

In *Lambert v V J Glover Ltd and Another (The Rejoice)*,[114] issues of vicarious liability arose. The claimant, L, sought damages in the sum of £582,348.76 plus interest following a personal injury suffered while working onboard the motor fishing vessel *Rejoice*. The first defendants, V J Glover Ltd, were the owners of the vessel, and the second defendant, S, was the skipper of the vessel at the material time. L had suffered a serious, unpleasant and lasting injury to his dominant left hand when it was caught between the vessel and the quayside while he was disposing of some rubbish over the side of the vessel. There was a dispute as to the instructions given by the skipper as to this action, and also as to precisely how the vessel had been moored to the quay. On the claimant's case, his injuries arose in circumstances where he was acting under the instructions of S in circumstances where the vessel was inadequately secured in the prevailing weather conditions.

Admiralty Registrar Jervis Kay QC dismissed the claim. Shipowners were usually considered vicariously liable for the negligence of the masters or skipper which they had appointed. They were equally liable if a skipper, by negligence or fault, caused a collision or other injury to property or person. As the claimant in this case was a self-employed share fisherman, he was not an employee. Nonetheless, a ship or vessel was property for the purposes of the Occupiers' Liability Act 1957, and it followed that the owner was under a duty to maintain the vessel and its operation in a reasonably safe condition in respect of those onboard with its permission. It was incumbent upon the owner to ensure both that the equipment was in good order and that the person appointed as skipper was reasonably competent. However, the injury to L's hand was not caused by any fault of S but was L's own fault. The first defendant was not at fault as the injury was not caused by a person for whom it was vicariously liable, nor was it caused by a defect in the vessel or her equipment. There was insufficient evidence to establish that S was not a proper person to be appointed as skipper of the vessel or, in any event, that the instruction to clean the galley arose as a result of any lack of competence on his part.

113 [1974] 2 Lloyd's Rep 308, at page 316 col 2.
114 [2019] EWHC 776 (Admlty); [2020] Lloyd's Rep Plus 21.

PASSENGERS

There were as ever few reported passenger cases, no doubt with additional judgments flying unreported under the radar. From the High Court of Ireland, *Kellett v RCL Cruises Ltd*[115] concerned liability to a cruise passenger for injury sustained in the course of an excursion under the Package Holidays and Travel Trade Act 1995. While participating in a cruise on board a ship owned by the first defendant, and while the ship was docked at the island of St Maarten in the West Indies, the plaintiff and her husband participated in a speed boat ride which was advertised as being a "White Knuckle Jet Boat Thrill Ride". The plaintiff had booked this excursion in Ireland when booking the cruise and had paid a supplement for it. The ride was operated by a company located in Phillipsburg, St Maarten. While on the ride, the skipper made a 360 degree turn to the starboard side. The plaintiff was lifted out of her seat even though she was holding on to a bar in front of her seat and fell back into her seat with some force, striking her right elbow against the gunwale on the starboard side of the boat and fracturing her elbow.

The plaintiff sought damages on the basis that the boat used for the excursion lacked important safety features and was in an unsafe and dangerous condition having regard to the vigorous manoeuvres to be undertaken. The defendants were the cruise line and the travel agent in Dublin through whom the cruise was booked. It was conceded that they were "organisers" of the package holiday, as defined in the 1995 Act. However, they maintained that the plaintiff had voluntarily elected to go on an activity, which she knew would involve vigorous manoeuvres done at speed. They also submitted that they were entitled to rely on the exceptions to liability on an organiser provided for in section 20(2)(a) and (c) of the 1995 Act. Finally, they alleged that the plaintiff had not discharged the onus of proof of establishing that there had been negligence or breach of duty on the part of the excursion operator.

The judge dismissed the claim. The 1995 Act imposed a type of vicarious liability on the organiser as defined in the Act, in respect of negligence and breach of duty on the part of third parties engaged to provide accommodation or other services as part of the holiday package. The liability imposed by the 1995 Act was not strict. The plaintiff must establish negligence or breach of duty on the part of the service provider in order to establish liability against the organiser. In signing up for the ride, the plaintiff would be taken to have consented to such injuries as could reasonably be expected might occur in the course of such an activity, but she did not consent to any injuries that may have been inflicted upon her as a result of the negligence of the excursion operator.

As for the standard of care expected of the service provider in the foreign country, a holiday maker from Ireland could not assume that Irish standards would apply in the accommodation or services provided by a third party in a foreign country. There was no evidence as to standards for safety equipment in St Maarten or indeed Ireland. The duty at common law was only to take reasonable care to prevent those injuries that were likely to occur if reasonable care was not taken, not to take steps to prevent all possible injury, no matter how remote or unlikely. In the absence of regulations or standards, there was no basis for finding the boat owner negligent for failing to put padding in place.

115 [2019] IEHC 408.

ADMIRALTY AND ENFORCEMENT

Collisions

In *Bright Shipping Ltd v Changhong Group (HK) Ltd (The CF Crystal and The Sanchi)*,[116] the issue arose of jurisdiction over a collision in China's Exclusive Economic Zone (EEZ). The collision had taken place on the high seas, but within the EEZ of the People's Republic of China. Both the Hong Kong and the Shanghai action had been initiated on 9 January 2018, three days after the collision. The Shanghai Maritime Court had accepted jurisdiction under the applicable law of China, which differed from the United Nations Convention on the Law of the Sea 1982, although China was a party to that convention. The Shanghai proceedings had not yet been served on Bright Shipping, the Hong Kong plaintiff in this in personam action for collision liability and quantum. The Hong Kong defendant, Changhong, had applied to stay proceedings on the grounds of forum non conveniens. The tonnage limits of liability were significantly higher in Hong Kong than in mainland China. The plaintiff accepted that there was no natural forum for a collision in international waters, but asserted its right to bring the litigation as of right, as Changhong was a Hong Kong company. The plaintiff argued that the *Spiliada* test[117] should be applied in its favour; in particular the assessment whether the Shanghai Maritime Court was clearly and distinctly the more appropriate forum. At first instance,[118] the judge declined to stay the action, notably remarking that due to the difference in tonnage limitation, substantial justice could not be obtained in the Shanghai action. Changhong appealed.

The Court of Appeal declined to stay the action. The evaluative exercise to be conducted was closely analogous to the exercise of a discretion, and there was no cause to interfere with the judge's assessment that lis alibi pendens and related proceedings did not tip the balance in the *Spiliada* stage 1 analysis. Hong Kong but not the People's Republic of China was a party to the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC). China had, however, enacted closely analogous legislation, drafted with reference to the LLMC. The barring of parallel actions under LLMC was predicated upon there being a fund constituted in accordance with article 11 in any state party to the convention. The Court of Appeal here referred to the Australian authority *CMA CGM v The Ship "Chou Shan" (The Chou Shan)*[119] in which the Federal Court of Australia noted that:

> "The bar to other actions in article 13 is expressly predicated, however, on there being a fund constituted in accordance with article 11 in any State Party in which legal proceedings are instituted."[120]

As China was not a party to LLMC, there was no obligation on the HK Court to "give way" to the Shanghai Court. Obiter, the court also noted that the disparity in tonnage limits constituted a legitimate juridical advantage for Bright Shipping.

In *The Mount Apo and The Hanjin Ras Laffan*[121] the two vessels the subject of the case had collided in the Singapore Strait, giving rise to a claim and counterclaim between the parties on apportionment of liability. *Mount Apo* had entered the westbound lane of the Traffic Separation Scheme (TSS), intending to cross it into the eastbound lane, when the collision took place. *Hanjin Ras Laffan* was approaching in the westbound lane, navigating to overtake another vessel. Pang Khang Chau JC in the Singapore High Court had a number of Collision Regulation[122] issues to consider, and apportioned responsibility for the collision 60:40 in favour of *Hanjin Ras Laffan*, observing the following.

There was a distinction between alterations in course and speed made by a stand-on vessel to avoid collision (which were not permitted by rule 17(a)(i)) and such alterations in the ordinary course of navigation (which were). If entering into the TSS had been unsafe, it would have been within *Mount Apo*'s master's power to take action in the preceding minutes to avoid getting into a position where there were no safe options. There had been a failure to consider contingency plans. It would have been practicable for *Mount Apo* to cross the TSS at a right angle instead of a shallow angle. The purpose of the crossing rules was to impose a duty on the give-way vessel to keep clear. The stand-on vessel's manoeuvres must be "open and notorious" to the seafarers on the other ship in the ordinary course of navigation. The period of time to which rule 15 (crossing situation) applied began shortly before a risk of collision materialised. While in the open seas the vessels would have been in a crossing situation, in the context of the TSS the evaluation was different as, to an observer, *Mount Apo*'s course was not clearly that of a

116 [2019] HKCA 1062; [2020] Lloyd's Rep Plus 22.
117 *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] 1 Lloyd's Rep 1; [1987] AC 460.
118 *Bright Shipping Ltd v Changhong Group (HK) Ltd (The CF Crystal and The Sanchi)* [2018] HKCFI 2474; [2019] 1 Lloyd's Rep 437; noted in the 2018 edition of this review, *Maritime law in 2018: a review of developments in case law*.
119 [2014] FCAFC 90.
120 At para 70.
121 [2019] SGHC 57; [2019] 2 Lloyd's Rep 287.
122 International Regulations for Preventing Collisions at Sea 1972 (COLREGs).

vessel crossing the TSS until the point where she crossed the northern boundary of the westbound lane. At this time, the vessels became crossing vessels. The master of *Hanjin Ras Laffan* had then acted unreasonably in attempting to agree a crossing incommensurate with COLREGs. The vessel had also failed to turn starboard just before the collision to limit the damage.

The collision between the vessels *Ever Smart* and *Alexandra 1* on 11 February 2015 has by now turned into a fairly long-running collision litigation and the cynical maritime lawyer will not be surprised to learn that the impecuniosity of one of the parties has surfaced as an issue. *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and The Ever Smart) (No 2)*[123] was the assessment of damages arising from the collision between the claimant's vessel *Alexandra 1* and the defendant's vessel *Ever Smart*, liability having previously been apportioned by the court by 20 per cent to *Alexandra 1* and 80 per cent to *Ever Smart*.[124] *Ever Smart*'s losses were undisputed at US$2,531,373.71. *Alexandra 1* claimed for losses arising directly from the collision such as the reasonable cost of repairing the damage, and claimed further sums arising in part as a result of its impecuniosity following the collision.

Andrew Baker J assessed the apportionable losses of *Ever Smart* to be US$2,531,373.71 and *Alexandra 1*'s to be US$9,308,594.71. *Alexandra 1*'s claims could not succeed simply on the basis that they would not have arisen but for the collision. They must be effectively caused thereby.

To points taken by the parties, the judge held that it had been reasonable to use the closer repair yard in spite of it being more expensive, and that the argument of *Alexandra 1* as to what was a reasonable repair period (200 days) was accepted. While the cost of airfreight of parts had in the circumstances not been reasonably incurred, the cost of technical managers and consumed bunkers and luboil, paint and classification society charges would be allowed in whole or in part.

The claim for loss of use succeeded for the reasonable period of repair. On the evidence, *Alexandra 1* would have continued to achieve SIRE inspection status. In assessing general damages, there was no need for detailed information about previous fixtures. If it was the case that *Alexandra 1* had been trading cargoes in breach of Iran sanctions, it did not follow that she was not entitled to damages for loss of use measured by reference to earnings on normal, lawful markets.

Obiter, arising out of the financial circumstances of Nautical Challenge following the collision, it must be shown to be reasonable foreseeable that Nautical Challenge might be unable to fund collision repairs absent a prompt payout or acceptance of liability to pay by hull underwriters. Provisionally, it would be found in favour of *Alexandra 1* that this was indeed reasonably foreseeable, and that it was also reasonably foreseeable that an owner may or may not be able to achieve a prompt payout from hull underwriters. However, the causative relationship between the collision and the further losses had not been made out on the facts.

In *Ocean Prefect Shipping Ltd v Dampskibsselskabet Norden AS (The Ocean Prefect)*,[125] an important procedural issue was settled. Teare J was tasked with considering the use of reports by the Marine Accident Investigation Branch (MAIB) in arbitration. MAIB reports are often the most reliable record of an incident, but are compiled with shipping safety in mind, not liability. As a result, witnesses interviewed about the incident can speak openly without concern as to consequences for themselves or their employer. The Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 (SI 2012, No 1743), regulation 14(14)[126] provides:

> "If any part of any document or analysis it contains to which this paragraph applies is based on information obtained in accordance with an inspector's powers under sections 259 and 267(8) of the Act, *that part is inadmissible in any judicial proceedings whose purpose or one of whose purposes is to attribute or apportion liability or blame* unless a Court, having regard to the factors mentioned in regulation 13(5)(b) or (c), determines otherwise."[127]

MAIB had conducted a flag state accident investigation following the grounding on 10 and 11 June 2017 of *Ocean Prefect* while entering the port Umm Al Quwain in the UAE. The MAIB report was issued on 27 April 2018. In *The Ocean Prefect*, the court's permission was sought in accordance with the regulation 14(14) provision to use the report in arbitration proceedings in which shipowners alleged that the grounding was caused by the charterers' breach of the safe port warranty. The owners argued that the use of the MAIB report was a matter for the tribunal according to section 34(2)(f) of the Arbitration Act

123 [2019] EWHC 163 (Admlty); [2019] 1 Lloyd's Rep 543.
124 See [2017] EWHC 453 (Admlty); [2017] 1 Lloyd's Rep 666 (Teare J) and [2018] EWCA Civ 2173; [2019] 1 Lloyd's Rep 130. Partial permission to appeal the latter decision was granted by the Supreme Court in April 2019.
125 [2019] EWHC 3368 (Comm); [2020] Lloyd's Rep Plus 23.
126 Available at www.legislation.gov.uk/uksi/2012/1743/regulation/14 (accessed 20 January 2020).
127 Emphasis added.

1996, according to which admissibility and evaluation of evidence is a matter for the tribunal.[128] MAIB and the charterers considered that the court's permission was needed, and should not be given.

Teare J held that arbitration proceedings were judicial proceedings within the meaning of the Regulations. Their purpose was to attribute blame or liability. As a result, the court's permission was required to use the report. The privacy of arbitration proceedings meant that the consideration of the report would not be in the public domain, but a decision to permit use of the report would be, and that simple fact could prejudice future MAIB accident investigations. As for the interests of justice in this case, the paramount concern was the likely prejudice to future accident investigations. The interests of safety at sea outweighed the parties' commercial interests.

Maritime liens

Physical supplier litigations following the OW insolvency continue in jurisdictions that have proven more favourable to the claimant. In *Nustar Energy Service Inc v M/V Cosco Auckland*,[129] the US Fifth Circuit Court of Appeals considered a claim for payment by a physical supplier of bunkers to vessel under contract supply chain where one intermediate party had become insolvent. NuStar, a physical supplier of bunkers, appealed asserting a maritime lien against MV *Cosco Auckland* in respect of bunkers it had supplied under contract with the contractual bunker supplier OW Bunker (in insolvent liquidation). OW's secured creditor, ING Bank, asserted competing maritime liens based on assignment to it by OW entities of all rights, title and interest in respect of amounts owed to such entities for the sale of bunkers. At first instance, the judge had held that NuStar did not hold liens under the Commercial Instruments and Maritime Liens Act[130] because it had delivered the bunkers on the order of OW, not on the order of the vessel or her owners. It was further held that the relevant OW entity did hold liens and that they had been validly assigned to ING. NuStar appealed. It did not challenge the district court's ruling that OW had a lien, but challenged the validity of the assignment of the maritime liens to ING, arguing that under English law, which applied due to a choice of law clause, maritime liens were not transferable.

The Court of Appeal dismissed the appeal, affirming the District Court's judgment in rejecting NuStar's maritime liens. The physical supplier did not possess a lien on the vessel supplied because it was not acting on the orders of the vessels or their agents. Accordingly, it lacked standing to appeal a decision that the secured creditor did hold a lien.

Arrest and judicial sale

In the case *Yacht Club Sopot SP ZOO v The Yacht "Monster Project"*,[131] the novel situation arose of a vessel suffering damage while under arrest. The defendant sought a stay of the sale of the ship so as to permit investigation of a claim of negligence against the Marshal. On 9 May 2019 the judge had made orders providing for the Marshal to sell the yacht *Monster Project* by a closed-bid tender. There were 12 bids from 10 parties, the highest one of which was for AUS$165,000. The Marshal informed the parties that she would be applying for an order authorising her to accept that bid and to effect the sale. On about 10 April 2019 the ship, while under arrest, had taken on water and partially sunk at the wharf of the marina where she was being held in the custody of the Marshal. The owners and a mortgagee applied for a stay of the sale and sought disclosure of any insurance policy made by the Marshal and surveyors reports on the condition of the vessel. The owners wished to investigate whether they had any claims against the Marshal in respect of the incident.

Rares ACJ declined to stay the sale of the ship and ordered that it be sold to the highest bidder. In circumstances where, in the six months that had elapsed since the vessel was arrested the owners had failed to put up any security, there was no proper basis on which the interests of all of the creditors with claims against the ship would be protected if the sale were stayed.

In *The King Darwin*,[132] the Singapore High Court had to consider the grounds for striking out a claim. The plaintiff appealed against a decision by the Senior Assistant Registrar (SAR) to strike out the plaintiff's notice of discontinuance in an admiralty action in rem. The action was in respect of a small sum remaining unpaid for services the plaintiff had rendered to the defendant's vessel. The vessel had been arrested and released upon provision of a letter of undertaking and the plaintiff subsequently filed a notice of discontinuance (NOD). The intervener applied to strike out that notice and the SAR granted that application. Order 21 rule 2(1) of the Rules of Court provided the

128 Which reads: "whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented".

129 [2019] Lloyd's Rep Plus 99, United States Court of Appeals for the Fifth Circuit, Circuit Judges Wiener, Southwick and Costa, 14 January 2019.

130 46 US Code Chapter 313.

131 [2019] FCA 1083; [2020] Lloyd's Rep Plus 24.

132 [2019] SGHC 177; [2020] Lloyd's Rep Plus 35.

circumstances in which a plaintiff may, without the leave of the court, discontinue its action or withdraw a claim. While leave was not required, the plaintiff's right to discontinue the action or withdraw the claim was subject to the inherent powers of the court, and the NOD could be set aside if the purported discontinuance amounted to injustice or an abuse of process. The intervener submitted that by discontinuing the action, the plaintiff would deprive the intervener of its right to pursue its claim for wrongful arrest, which must be pursued in the context of the arresting party's in rem action. SAR granted the order sought and the plaintiff appealed.

Vincent Hoong JC dismissed the appeal, disallowing the discontinuance, but ordered that the plaintiff be allowed to withdraw its claim. This was an appropriate case for the court to exercise its inherent powers to strike out the notice of discontinuance. A review of the authorities showed that the discontinuance of the action in rem would not prohibit the intervener from pursuing a claim for wrongful arrest. The claim could be pursued as a claim in tort under the tort of wrongful arrest independently of the action. Uncertainty around the applicable test in such a tort action was not in and of itself sufficient to set aside the notice of discontinuance.

However, allowing the action to be discontinued would deprive the intervener of advantages already gained which it would lose in a fresh action, especially in light of the defendant's insolvency. In light of the uncertainty surrounding the test, costs were not adequate compensation. In order to preserve the balance between the parties, terms would be imposed in the striking-out order to prevent the plaintiff having to litigate against its will. The plaintiff would be permitted to withdraw its claim, and if so prevented from commencing a fresh action for the same claim

The same litigation reached the Hong Kong Court of Appeal twice in the course of the year. *Norddeutsche Landesbank Girozentrale, Singapore Branch v Owners of the Ship or Vessel "Brightoil Glory"*[133] concerned a contentious sale of an arrested vessel. The plaintiff mortgagee applied for leave to appeal a judicial decision that the sale pendente lite of the VLCC *Brightoil Glory* be stayed until 24 April 2019. Following arrest of the vessel in January 2019, an order for appraisement and sale had been made on 4 February 2019. Tenders were to be submitted by 28 March 2019 with completion to take place on 4 April 2019. On 27 March 2019 the defendant owners obtained the stay against which the plaintiff sought leave to appeal. The reasons raised against a stay were broadly that the vessel was included on a list of assets based upon which a refinancing agreement was being negotiated by the defendants. The plaintiff's application was based on an argument that inclusion of the list was potentially a contempt of court as it interfered with the judicial sale process. Concerns for the safety of the vessel in view of the coming typhoon season were also cited as a reason against a delay.

The court dismissed the application with costs to the defendant, making also an order for advertisement and sale with undertakings from the defendant. There was no valid basis to interfere with the discretion of the judge, who had considered the matters raised and taken a realistic and pragmatic route in suspending the sale.

However, the court's patience with the defendant eventually wore out. The second decision made on 24 April 2019 concerned the defendant shipowner's application for leave to appeal, by which the judge declined to grant a further stay of the order for sale pendente lite of *Brightoil Glory*. The defendants argued in support of the application based on *The Myrto*[134] that where the order for sale was defended and opposed, the judge should examine critically the reasons for making an order sought. If the order for sale was wrongly or prematurely made, that represented a powerful reason for it not to take immediate effect.

The court again declined to grant leave to appeal. Where the judge had not been tasked with considering an appeal of the order for sale, but an application for a stay thereof, she had not been in error in dismissing the application. While the refinancing had made some progress and there was in evidence an MOA and draft charterparties, and it was said that a private sale might be completed in nine days, the draft agreements contained English law and jurisdiction clauses capable of further complicating matters and placing the order for sale in limbo. Further, advertising the same judicial sale for the third time would not be desirable.

The final chapter in the saga of *The MV Alkyon*, where the Court of Appeal declined to require security for arrest,[135] was the order for the sale of the vessel in *Natwest Markets plc (formerly known as the Royal Bank of Scotland plc) v Stallion Eight Shipping Co SA (The MV Alkyon)*.[136] The claimant banks were the mortgagees, secured lenders and security agents under mortgages and secured loan agreements dated in early 2015 with the defendant shipowner as borrower. The claimants sought to recover US$12,800,000 in respect of

133 First in [2019] HKCA 395; [2020] Lloyd's Rep Plus 25, decided by Cheung and Kwan JJA on 28 March 2019; then in [2019] HKCA 561; [2020] Lloyd's Rep Plus 26, decided by the same panel on 17 May 2019.

134 [1977] 2 Lloyd's Rep 243.

135 [2018] EWCA Civ 2760; [2019] 1 Lloyd's Rep 406.

136 [2020] Lloyd's Rep Plus 27.

outstanding principal under the loan agreement together with interest. The vessel had been arrested at the port of Tyne in June 2018 and the banks now sought an order of sale. On 25 April 2018 the banks had served a VTL notice, accelerating the loan, on the defendant. The defendant had not complied with the notice, disputing its validity. The defendant was unrepresented at trial.

Robin Knowles J held that the claimants were entitled to an order for the appraisement and sale of the vessel. The valuation performed was in accordance with the market valuation term. The appointment of the valuers was not made otherwise than in pursuit of the claimant's legitimate commercial interests and was therefore not a breach of the appointment term.

A caveat against sale was considered by the Federal Court of Australia in *Motor Yacht Sales Australia Pty Ltd v Megisti Yacht Charters Ltd (The Hunter)*.[137] The luxury motor yacht *Hunter* was registered in the Australian General Shipping Register to the applicant as owner. On 9 August 2019 its previous registered owners (respondents in the action) had lodged a caveat which was entered in the register three days later. The caveat forbade the entry in the register of any instrument relating to any dealing with *Hunter* until after notice of the intended dealing to the respondents as caveators. The interest claimed by the respondents in the caveat was described as "beneficial owners". Also on 9 August, the applicant had entered into a sale contract for the yacht. The onus was on the caveator to justify the caveat, and the respondents were summoned under section 47B of the Shipping Registration Act 1981 (Cth) to show cause why it should not be removed. The respondents' justification of the caveat was that either the applicant held *Hunter* in trust for the respondents, or they retained a proprietary claim in the vessel.

Stewart J ordered that the caveat in the shipping register should be removed and had no force. Section 47B(2) of the 1981 Act required the caveator to establish a serious question to be tried (a prima facie case) in relation to the interest it asserted to justify the caveat and that the balance of convenience favoured the maintenance of the caveat. There was no serious issue to be tried as to whether completion of the sale had occurred; and there was no reasonable basis for implying a trust or presuming a resulting trust. One way or the other, the balance of convenience favoured the removal of the caveat. The principal consideration was that the respondents could assert their interests in conventional proceedings and there was no suggestion that any judgment would not be met.

[137] [2019] FCA 1454; [2020] Lloyd's Rep Plus 36.

JURISDICTION

The Supreme Court in *Lungowe and Others v Vedanta Resources plc and Another*[138] considered the issue of the proper place in which to bring a claim with multiple defendants. The claimants, who were the respondents in the Supreme Court, were a group of Zambian citizens asserting that their health and their farming activities had been damaged by discharges of toxic manner from the Nchanga Copper Mine into the watercourses on which they relied for water. The first defendant (appellant) was the controlling parent company, incorporated in the UK, of the owner of the copper mine, KCM, which was the second appellant. The Zambian citizens were asserting claims in common law negligence and for breach of statutory duty. The mining companies had objected to UK jurisdiction, which the respondents asserted on the basis of article 4 of the Recast Brussels Regulation.[139] As against KCM, the respondents relied upon the "necessary or proper party" gateway of the English procedural code for permitting service of proceedings out of the jurisdiction, to be found mainly in para 3.1 of CPR Practice Direction 6B. Both the judge at first instance and the Court of Appeal had rejected the jurisdiction challenges. The mining companies appealed against the decision of the Court of Appeal.

The Supreme Court dismissed the appeal, making several important points. First, if article 4 of the Recast Brussels Regulation contained an abuse exception, it was to be construed narrowly and limited to cases where the circumvention of the article was the sole purpose of the joinder of the anchor defendant.

Secondly, in assessing connecting factors and the issue of proper place, the risk of irreconcilable judgments was not to be viewed as a trump card. *If* substantial justice was available to the parties in Zambia, it would offend the common sense of all reasonable observers to think that the proper place for the litigation was England, if the risk of irreconcilable judgments arose purely from the claimants' choice to proceed against one of the defendants in England rather than against both of them in Zambia. However, there was here a real risk that substantial justice would not be obtained in Zambia.

Finally, the judge had not misdirected himself with respect to the meaning of "substantial justice". The claimants

[138] [2019] UKSC 20; [2019] 2 Lloyd's Rep 399.

[139] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

could not fund litigation in Zambia, and the Zambian legal profession lacked the resources and experience with which to conduct such litigation successfully. That enquiry was directed to the question whether the scale and complexity of the case could be undertaken with the limited funding and legal resources available within Zambia.

The second point in *Lungowe v Vedanta* raised immediate questions as to the scope of the Supreme Court's observations on self-inflicted risk of irreconcilable judgments. *ED&F Man Capital Markets Ltd v Come Harvest Holdings Ltd and Others*[140] was decided at two instances in 2019. The background to the litigation was that the claimant ED&F Man considered that a fraud had been perpetrated upon it. It appeared to be a substantial fraud, using forged warehouse receipts in commodities (nickel) transactions. The claimant had issued proceedings in the English court against two defendants on deceit and unjust enrichment, and had undertaken pre-action proceedings in the Singapore court against further defendants that appeared to be implicated in the fraud, before joining them to the English proceedings.

The 10th defendant, Straits, challenged the jurisdiction of the English court, seeking to set aside the ex parte order made on 23 November 2018, wherein the judge had granted permission to the claimant to serve the proceedings on Straits in Singapore. Straits asserted that the claimant had procured the order using material obtained in the pre-action disclosure proceedings in Singapore, which was subject to an undertaking restricting its use. Straits argued that as a result the order could not stand, and further argued that the claimant's pursuit of pre-action disclosure in Singapore amounted to a choice of that jurisdiction. In relation to jurisdiction, Straits accepted that there was a serious issue to be tried and that it was a necessary or proper party for the purpose of the gateway in Practice Direction 6B para (3) (but not the tort gateway (9) or the constructive trusts gateway (15)), but argued that the court should not exercise its discretion to permit service out of the jurisdiction.

Daniel Toledano QC dismissed Straits' jurisdiction challenge as well as its self-standing challenge to the order of 23 November 2018. The matters raised in relation to the order of 23 November 2018 did not amount to reasons to set it aside or conclude that it could not stand. Further, and distinguishing the Supreme Court's decision in *Lungowe and Others v Vedanta Resources plc and Another*,[141] the claimant here had been constrained by jurisdiction clauses so that it had no choice but to proceed against some of the parties in England and England was the proper place for all claims against all parties because it was the only jurisdiction where a single composite forum could be achieved. The fact that the claimant had temporarily contemplated the Singapore jurisdiction was not a factor against that conclusion. Conspiracy being alleged in this case, it was especially important to avoid multiplicity of proceedings. The place where the damage occurred for the purpose of article 4(1) of the Rome II Regulation was England as that was where the claimant had made payment upon receiving the forged documentation.

The 10th defendant appealed to the Court of Appeal. It argued that ED&F Man could not rely upon the risk of multiplicity of proceedings and conflicting judgments, where it would have had a choice as to whether to commence proceedings against the 10th defendant in England. It was accepted that there was a serious issue to be tried and a good arguable case. On 26 November 2019[142] the Court of Appeal dismissed Straits' appeal against the judge's decision. *Lungowe and Others v Vedanta Resources plc and Another*[143] should not be read so as to represent a step-change in the law, requiring the court to discount the importance of the avoidance of multiplicity of proceedings and the risk of irreconcilable judgments as a factor favouring resolution of all the claims against all defendants in one forum, England.

In *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV and Others (The Atlantic Tiburon 1)*,[144] the Court of Appeal considered the meaning of "a good arguable case" and of "much the better argument", in the context of the test to be applied on an application to set aside jurisdiction. The case also featured the important issue of undisclosed principals. In the context of a management structure for the vessel involving a manager, a bareboat charterer, the owner and the owner's parent company, were the latter undisclosed principals of the former?

The appellant had performed works on a cantilever jack-up rig, *Atlantic Tiburon 1*, under a contract containing an exclusive jurisdiction clause and sought payment for those works. The first and second defendant were the managers and bareboat charterers of the rig, while the third was her owner and was in turn a wholly owned subsidiary of the fourth defendant.

140 [2019] EWHC 1661 (Comm).
141 [2019] UKSC 20; [2019] 2 Lloyd's Rep 399.
142 *ED&F Man Capital Markets Ltd v Straits (Singapore) Pte Ltd* [2019] EWCA Civ 2073; [2020] Lloyd's Rep Plus 37.
143 [2019] UKSC 20; [2019] 2 Lloyd's Rep 399.
144 [2019] EWCA Civ 10; [2019] 2 Lloyd's Rep 128.

The third and fourth defendants challenged jurisdiction on the basis that they were not undisclosed principals to the agreement, on whose behalf the first and second defendant had entered into the contract. At first instance,[145] the judge declared that the court had no jurisdiction to try the claim of the appellant against the third and fourth defendants. The claimant appealed. The point of law was as to the test to be applied on an application to set aside jurisdiction and, in particular, whether the test had two discrete parts or one part with composite ingredients.

The Court of Appeal dismissed the appeal. If the Supreme Court had intended to reverse and change the relative "better argument" test in *Canada Trust Co v Stolzenberg (No 2)*,[146] then it would have said so expressly. While the three-limbed test to be applied had been confirmed by *Goldman Sachs International v Novo Banco SA*,[147] the Supreme Court had not expressly explained how the test worked in practice nor as to what was meant by "plausible" or how it related to "good arguable case"; nor how the various limbs interacted with the relative test in *Canada Trust*. Limb 1 of the test was a relative test, namely plausibility alone. The claimant was required to show that it had the better argument, but not "much" the better argument. Limb 2 of the test was an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it "reliably" could, recognising that jurisdiction challenges were invariably interim and characterised by gaps in the evidence. Limb 3 arose were the court to find itself simply unable to form a decided conclusion on the evidence before it and therefore unable to say who had the better argument. The test was the same where the Brussels Recast Regulation applied.

As for the question whether the vessel's owner and its mother company were undisclosed principals to the agreement, the judge at first instance had found that the case for this point was weak, and the Court of Appeal saw no reason to interfere with his conclusions on the facts. However, it did add the significant observation that as the agreement contained an "entire agreement" clause, the effect was to exclude further parties:

> "The entire agreement clause is evidence that the named contractual parties were to treat each other, and no one else, as the parties with liabilities and rights under the agreement and hence the persons to sue or be sued thereunder."[148]

In *Pan Ocean Co Ltd v China-Base Group Co Ltd (formerly China-Base Ningbo Foreign Trade Co Ltd) and Another (The Grand Ace 12)*,[149] the defendants sought a declaration that the English court had no jurisdiction and an order setting aside the claim form; the claimant, Pan Ocean, sought an anti-suit injunction preventing the continuance of proceedings in Singapore.

The factual background was that Pan Ocean had issued a bill of lading in respect of light cycle oil and gas oil loaded at Zhoushan in China and Taichung in Taiwan. That cargo had been topped up with a small amount of additional cargo at Subic Bay in the Philippines and it was alleged that switch bills had been issued for the whole cargo, misdescribing it as light cycle oil loaded in the Philippines. The cargo was discharged into onshore tanks in Nansha in China. No bills of lading were presented and no indemnity given. The purpose of the transaction was apparently to avoid import duties. The cargo was impounded by the China anti-smuggling bureau. The defendants commenced proceedings against Pan Ocean in Singapore on 13 April 2017, seeking damages for loss and damage suffered by reason of false statements in the switch bills and cargo manifests. Pan Ocean subsequently commenced proceedings in the English court. The questions before the judge were: (1) was there a contract between the claimant and the defendants? (2) If so, did it include an exclusive jurisdiction clause in favour of the English court? (3) Did that exclusive jurisdiction clause satisfy the requirements of article 25 of the Recast Regulation? and (4) Should an anti-suit injunction be issued?

Deputy Judge Christopher Hancock QC decided the jurisdiction issue based on question (3). Article 25 of the Recast Brussels Regulation required consent to the exclusive jurisdiction clause to be clearly and precisely demonstrated. The purpose of the formal requirements in the article were to establish consent to the necessary degree of certainty. If there was no written agreement, there must at least be written confirmation. Agreement to an exclusive jurisdiction clause compliant with article 25 could not be implied solely from the conduct of the parties at the discharge port. As a result, there was no need to decide the first question of whether an implied contract existed between the parties. That issue would be left for the Singapore court to decide.

145 *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV and Others (The Atlantic Tiburon 1)* [2017] EWHC 2598 (Comm); [2017] 2 Lloyd's Rep 575.
146 [1998] 1 WLR 547.
147 [2018] UKSC 34; [2018] 1 WLR 3683.
148 At para 112.
149 [2019] EWHC 982 (Comm); [2019] 2 Lloyd's Rep 335.

As for the anti-suit injunction, even in the event an exclusive jurisdiction agreement existed, the application would have been rejected. The warrant of arrest had been issued on 28 February 2018 and Pan Ocean had thereafter proceeded on the basis of the existence of an arbitration clause, not the exclusive jurisdiction clause, until shortly before the decision upon appeal (after which it was common ground that they would be deemed to have submitted to the jurisdiction). In such circumstances it could not be said that the application had been brought promptly.

ADMINISTRATIVE REVIEW

Win More Shipping Ltd v Director of Marine[150] was a Hong Kong case of administrative review of decisions by the Hong Kong Director of Marine upon the application of the shipowner, Win More. The shipowner sought to challenge decisions by the Director of Marine to close the registration of the Hong Kong-registered motor tanker *Lighthouse Winmore*; and to delay or refuse making a request to the United Nations Security Council Sanctions Committee for the release of the vessel from detention.

Lighthouse Winmore had been in class with Bureau Veritas, set to expire at the end of October 2019. In November 2017 the vessel had been detained in a South Korean port, initially for safety deficiencies but then for breach of UN sanctions against North Korea in connection with a suspected ship-to-ship transfer of petroleum products to a North Korean vessel in breach of UN Security Council Resolution 2375. The vessel remained impounded at the port. Soon thereafter, the insurers of the vessel cancelled hull and liability policies. On 3 February 2018 the recognised organisation, Bureau Veritas, had withdrawn class and cancelled the vessel's Statutory Certificates. The Hong Kong Director of Marine was informed of the decision. On 6 February 2018 the Director of Marine gave 90 days' notice of intention to close the vessel's registration (which in the event had not been actioned, pending judicial review).

On 1 August 2018 the applicant sought judicial review of that decision, and of the Director's inaction in failing to request the UN Security Council Sanctions Committee to release the vessel from detention. Paragraph 9 of Resolution 2397 provided that an impounded vessel could be released after six months upon the request of the flag state, provided adequate arrangements had been made to comply with the resolution. Such arrangements were proposed and on 4 February 2019 the Director of Marine submitted them to the Ministry of Foreign Affairs of the People's Republic of China, along with comments terming them "unconvincing".

The applicant also sought to add Bureau Veritas as a respondent to challenge its withdrawal of the class of the vessel and cancel the Statutory Certificates. In a first

[150] Both decisions by Hon Chow J; the first [2019] HKCFI 168; [2019] Lloyd's Rep Plus 57 on 22 January 2019, and the second [2019] HKCFI 1137; [2019] 2 Lloyd's Rep 420 on 2 May 2019.

decision on 22 January 2019,[151] the judge granted leave to join Bureau Veritas Marine China Co Ltd and to serve all the papers filed in the proceedings and the orders granted out of the jurisdiction, reasoning as follows. The statutory grounds for service out, although not strictly applicable, would be applied as part of the discretionary considerations. Bureau Veritas was a proper party to the proceedings in view of the fact that the stated basis of the Director's decision was the decision by Bureau Veritas to cancel or withdraw the Statutory Certificates. There were serious issues to be tried as to whether the decision of Bureau Veritas to cancel or withdraw the Statutory Certificates was amenable to judicial review. In the event, the case against Bureau Veritas was not pursued.

On 2 May 2019 the judge dismissed the application for leave to apply for judicial review. It was not reasonably arguable and had no prospects of success. The applicant's case was based on the premise that the Director had a statutory duty under article 94 of the United Nations Convention on the Law of the Sea 1982, to make a request to the Sanctions Committee for the release of the vessel pursuant to para 9 of Resolution 2397. This was not sustainable for several reasons. First, article 94 supported no duty on the flag state in relation to Resolutions by the Security Council. Secondly, an international treaty did not give rise to legal rights or obligations directly enforceable in the domestic court. Thirdly, HKSAR was not a state in the meaning of para 9 of Resolution 2397. The Central People's Government had standing under the Resolution, not HKSAR authorities. Obiter, the judge remarked that the Director's comment that the measures adopted were unconvincing was an assessment that she was entitled to provide to the Central People's Government; indeed it would expect the Director to conduct a detailed assessment and form an opinion. As the Director's decision had been notified but not yet actioned, it was a mere intention to deregister, provisional only and the application was premature. The Director's decision had not been based solely on the withdrawal of the safety certificates by the classification society, but also on concerns for the safety, risk of pollution or health and welfare of persons employed on board. It therefore did not matter if, as the applicant argued, BV's decision had been defective.

151 *Win More Shipping Ltd v Director of Marine* [2019] HKCFI 168; [2019] Lloyd's Rep Plus 57.

COMING EVENTS AND CONCLUDING OBSERVATIONS

A promising crop of cases are awaited from the Supreme Court. *Aspen Underwriting Ltd v Credit Europe Bank NV*,[152] concerning jurisdiction issues in relation to the hull and machinery policy for the vessel *Atlantik Confidence*[153] was heard by the Supreme Court on 4 November 2019 and judgment can be expected in the immediate term. *Halliburton Co v Chubb Bermuda Insurance Ltd and Others*,[154] litigation following the *Deepwater Horizon* blowout in the Mexican Gulf, was heard on 12 November 2019. The case concerns issues of removal of arbitrators for alleged bias.

In April 2019 permission was granted in a collision case, namely *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and The Ever Smart)*.[155] Collision cases are for the most part a matter of establishing and weighing the facts and therefore do not often reach the Supreme Court. The collision between *Alexandra 1* and *Ever Smart* gave rise to questions of how vessels must apply COLREGs when approaching a narrow channel to enter. It is not known what precise issues will be considered upon appeal.

A partial appeal was also granted in February in *Shagang Shipping Co Ltd (in liquidation) v HNA Group Co Ltd*,[156] which arose out of a charterparty transaction, but it appears unlikely that the issues on appeal will be directly related to shipping.

In March 2019 permission to appeal was refused in *Navig8 Chemicals Pool Inc v Glencore Agriculture BV (The Songa Winds)*,[157] concerning the construction of letters of indemnity. The Court of Appeal judgment therefore stands.

In contrast, there appear to be no significant cases pending in the Court of Appeal as at the time of writing, although presumably some of the cases dating from late 2019 will be appealed: the latest available information is a statement released by the Court of Appeal on 5 December 2019.[158]

152 The Court of Appeal judgment can be found at *Aspen Underwriting Ltd v Credit Europe Bank NV* [2018] EWCA Civ 2590; [2019] 1 Lloyd's Rep 221.

153 Deliberately sunk by master and crew as held by Teare J in *Kairos Shipping Ltd and Another v Enka & Co LLC and Others (The Atlantik Confidence)* [2016] EWHC 2412 (Admlty); [2016] 2 Lloyd's Rep 525.

154 Appeal of the Court of Appeal's judgment in *Halliburton Co v Chubb Bermuda Insurance Ltd and Others* [2018] EWCA Civ 817; [2018] 1 Lloyd's Rep 638.

155 [2018] EWCA Civ 2173; [2019] 1 Lloyd's Rep 130.

156 [2018] EWCA Civ 1732; [2019] 1 Lloyd's Rep 150.

157 [2018] EWCA Civ 1901; [2018] 2 Lloyd's Rep 374; first instance decision [2018] EWHC 397 (Comm); [2018] 2 Lloyd's Rep 47.

158 Available at www.supremecourt.uk/docs/permission-to-appeal-2019-1011.pdf (accessed 20 January 2020).

APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED IN THIS REVIEW

2019 judgments analysed

"Amalie Essberger" Tankreederei GmbH & Co KG v Marubeni Corporation [2019] EWHC 3402 (Comm); [2020] Lloyd's Rep Plus 17

Alexandra 1, The and The *Ever Smart (No 2)* [2019] EWHC 163 (Admlty); [2019] 1 Lloyd's Rep 543

Alianca Navegacao e Logistica Ltda v Ameropa SA (The Santa Isabella) (QBD (Comm Ct)) [2019] EWHC 3152 (Comm); [2020] Lloyd's Rep Plus 30

Alize 1954 and Another v Allianz Elementar Versicherungs AG and Others (The CMA CGM Libra) (QBD (Admlty Ct)) [2019] EWHC 481 (Admlty); [2019] 1 Lloyd's Rep 595

Alkyon, The [2020] Lloyd's Rep Plus 27

Alpha Harmony, The [2019] EWHC 2522 (Comm); [2020] Lloyd's Rep Plus 16

Aprile SpA and Others v Elin Maritime Ltd (The Elin) (QBD (Comm Ct)) [2019] EWHC 1001 (Comm); [2019] Lloyd's Rep Plus 71

Arctic, The [2019] EWHC 376 (Comm); [2019] 1 Lloyd's Rep 554; (CA) [2019] EWCA Civ 1161; [2019] 2 Lloyd's Rep 603

Atlantic Tiburon 1, The (CA) [2019] EWCA Civ 10; [2019] 2 Lloyd's Rep 128

Atlantic Tonjer, The (QBD (Comm Ct)) [2019] EWHC 1213 (Comm); [2020] Lloyd's Rep Plus 9

Bilgent Shipping Pte Ltd and Another v ADM International Sarl and Another (The Alpha Harmony) [2019] EWHC 2522 (Comm); [2020] Lloyd's Rep Plus 16

Boskalis Offshore Marine Contracting BV v Atlantic Marine and Aviation LLP (The Atlantic Tonjer) (QBD (Comm Ct)) [2019] EWHC 1213 (Comm); [2020] Lloyd's Rep Plus 9

Bright Shipping Ltd v Changhong Group (HK) Ltd (The CF Crystal and The Sanchi) (HKCA) [2019] HKCA 1062; [2020] Lloyd's Rep Plus 22

Brightoil Glory, The [2019] HKCA 395; [2020] Lloyd's Rep Plus 25; [2019] HKCA 561; [2020] Lloyd's Rep Plus 26

Brillante Virtuoso, The *(No 2)* (QBD (Comm Ct)) [2019] EWHC 2599 (Comm); [2019] 2 Lloyd's Rep 485; [2019] EWHC 3300 (Comm)

BSLE Sunrise, The [2019] EWHC 2860 (Comm); [2020] Lloyd's Rep Plus 20

Bum Chin, The [2019] SGHC 143; [2019] Lloyd's Rep Plus 70

Caravos Liberty, The (QBD (Comm Ct)) [2019] EWHC 3171 (Comm); [2020] Lloyd's Rep Plus 29

CF Crystal, The and The *Sanchi* (HKCA) [2019] HKCA 1062; [2020] Lloyd's Rep Plus 22

Classic Maritime Inc v Limbungan Makmur Sdn Bhd and Another [2019] EWCA Civ 1102; [2020] Lloyd's Rep Plus 5

CMA CGM Libra, The (QBD (Admlty Ct)) [2019] EWHC 481 (Admlty); [2019] 1 Lloyd's Rep 595

Cockett Marine Oil DMCC v ING Bank NV and Another (The M/V Ziemia Cieszynska) [2019] EWHC 1533 (Comm); [2019] 2 Lloyd's Rep 541

Cosco Auckland, The (USCA) [2019] Lloyd's Rep Plus 99

CSK Glory, The (QBD (Comm Ct)) [2019] EWHC 2804 (Comm); [2020] Lloyd's Rep Plus 19

Diep v Wuolle 2019 BCCRT 541; [2020] Lloyd's Rep Plus 34

ED&F Man Capital Markets Ltd v Come Harvest Holdings Ltd and Others (QBD (Comm Ct)) [2019] EWHC 1661 (Comm)

ED&F Man Capital Markets Ltd v Straits (Singapore) Pte Ltd (CA) [2019] EWCA Civ 2073; [2020] Lloyd's Rep Plus 37

Eleni P, The (QBD (Comm Ct)) [2019] EWHC 910 (Comm); [2019] 2 Lloyd's Rep 265

Eleni Shipping Ltd v Transgrain Shipping BV (The Eleni P) (QBD (Comm Ct)) [2019] EWHC 910 (Comm); [2019] 2 Lloyd's Rep 265

Elin, The (QBD (Comm Ct)) [2019] EWHC 1001 (Comm); [2019] Lloyd's Rep Plus 71

Feyha Maritime Ltd v Miloubar Central Feedmill Ltd and Another (SC Israel) Civil Leave to Appeal 7195/18; [2020] Lloyd's Rep Plus 18

Glencore Energy UK Ltd and Another v Freeport Holdings Ltd (The Lady M) [2019] EWCA Civ 388; [2019] 2 Lloyd's Rep 109

Grand Ace 12, The (QBD (Comm Ct)) [2019] EWHC 982 (Comm); [2019] 2 Lloyd's Rep 335

Harmony Innovation Shipping Pte Ltd v Caravel Shipping Inc [2019] EWHC 1037 (Comm); [2020] Lloyd's Rep Plus 4

Hunter, The (FCA) [2019] FCA 1454; [2020] Lloyd's Rep Plus 36

Ikan Jahan, The (FCA) [2019] FCA 276; [2019] 2 Lloyd's Rep 235

K v A (QBD (Comm Ct)) [2019] EWHC 1118 (Comm); [2020] 1 Lloyd's Rep 28

Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV and Others (The Atlantic Tiburon 1) (CA) [2019] EWCA Civ 10; [2019] 2 Lloyd's Rep 128

King Darwin, The (SGHC) [2019] SGHC 177; [2020] Lloyd's Rep Plus 35

Lady M, The [2019] EWCA Civ 388; [2019] 2 Lloyd's Rep 109

Lambert v V J Glover Ltd (The Rejoice) (QBD (Admlty Ct)) [2019] EWHC 776 (Admlty); [2020] Lloyd's Rep Plus 21

Li Lian International Ltd and Others v Herport Hong Kong Ltd and Another (The MOL Comfort) [2019] HKCFI 826; [2020] Lloyd's Rep Plus 15

Lungowe and Others v Vedanta Resources plc and Another (SC) [2019] UKSC 20; [2019] 2 Lloyd's Rep 399

Manchester Shipping Ltd v Balfour Worldwide Ltd and Another (QBD (Comm Ct)) [2019] EWHC 194 (Comm); [2019] Lloyd's Rep Plus 100

Materials Industry and Trade (Singapore) Pte Ltd v Vopak Terminals Singapore Pte Ltd (SGHC) [2019] SGHC 276; [2020] Lloyd's Rep Plus 28

McKeever v Northernreef Insurance Co SA (QBD (Comm Ct)) 2019 WL 02261376; [2019] 2 Lloyd's Rep 161

MOL Comfort, The [2019] HKCFI 826; [2020] Lloyd's Rep Plus 15

Monster Project, The [2019] FCA 1083; [2020] Lloyd's Rep Plus 24

Motor Yacht Sales Australia Pty Ltd v Megisti Yacht Charters Ltd (The Hunter) (FCA) [2019] FCA 1454; [2020] Lloyd's Rep Plus 36

Mount Apo, The and The *Hanjin Ras Laffan* (SGHC) [2019] SGHC 57; [2019] 2 Lloyd's Rep 287

Muammer Yagci, The (QBD (Comm Ct)) [2018] EWHC 3873 (Comm); [2019] Lloyd's Rep Plus 65
MUR Shipping BV v Louis Dreyfus Company Suisse SA (The Tiger Shanghai) (QBD (Comm Ct)) [2019] EWHC 3240 (Comm); [2020] Lloyd's Rep Plus 31
Natixis SA v Marex Financial and Another (QBD (Comm Ct)) [2019] EWHC 2549 (Comm); [2019] 2 Lloyd's Rep 431
Natwest Markets plc (formerly known as the Royal Bank of Scotland plc) v Stallion Eight Shipping Co SA (The MV Alkyon) [2020] Lloyd's Rep Plus 27
Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and The Ever Smart) (No 2) [2019] EWHC 163 (Admlty); [2019] 1 Lloyd's Rep 543
Navalmar UK Ltd v Ergo Versicherung AG and Another (The BSLE Sunrise) [2019] EWHC 2860 (Comm); [2020] Lloyd's Rep Plus 20
New Zealand Maritime Pilots Association v The Director of Maritime New Zealand [2019] NZHC 591; [2019] 2 Lloyd's Rep 325
Nobiskrug GmbH v Valla Yachts Ltd (QBD (Comm Ct)) [2019] EWHC 1219 (Comm); [2019] Lloyd's Rep Plus 56
Norddeutsche Landesbank Girozentrale, Singapore Branch v Owners of the Ship or Vessel "Brightoil Glory" [2019] HKCA 395; [2020] Lloyd's Rep Plus 25; [2019] HKCA 561; [2020] Lloyd's Rep Plus 26
Nustar Energy Service Inc v M/V Cosco Auckland (USCA) [2019] Lloyd's Rep Plus 99
Ocean Prefect Shipping Ltd v Dampskibsselskabet Norden AS (The Ocean Prefect) [2019] EWHC 3368 (Comm); [2020] Lloyd's Rep Plus 23
Ocean Prefect, The [2019] EWHC 3368 (Comm); [2020] Lloyd's Rep Plus 23
Ozmen Entertainment Pty Ltd and Another v Neptune Hospitality Pty Ltd (The Seadeck) [2019] FCA 721; [2020] Lloyd's Rep Plus 8
Pan Ocean Co Ltd v China-Base Group Co Ltd (formerly China-Base Ningbo Foreign Trade Co Ltd) (The Grand Ace 12) (QBD (Comm Ct)) [2019] EWHC 982 (Comm); [2019] 2 Lloyd's Rep 335
Priyanka Shipping Ltd v Glory Bulk Carriers Pte Ltd (The CSK Glory) (QBD (Comm Ct)) [2019] EWHC 2804 (Comm); [2020] Lloyd's Rep Plus 19
Quiana Navigation SA v Pacific Gulf Shipping (Singapore) Pte Ltd (The Caravos Liberty) (QBD (Comm Ct)) [2019] EWHC 3171 (Comm); [2020] Lloyd's Rep Plus 29
Rashid v Oil Companies International Marine Forum (QBD) [2019] EWHC 2239 (QB); [2020] Lloyd's Rep Plus 33
Rejoice, The (QBD (Admlty Ct)) [2019] EWHC 776 (Admlty); [2020] Lloyd's Rep Plus 21
Renos, The (SC) [2019] UKSC 29; [2019] 2 Lloyd's Rep 78
Rubicon Vantage International Pte Ltd v KrisEnergy Ltd (QBD (Comm Ct)) [2019] EWHC 2012 (Comm); [2020] Lloyd's Rep Plus 6
Santa Isabella, The (QBD (Comm Ct)) [2019] EWHC 3152 (Comm); [2020] Lloyd's Rep Plus 30
Seadeck, The [2019] FCA 721; [2020] Lloyd's Rep Plus 8
Silverburn Shipping (IOM) Ltd v Ark Shipping Co LLC (The Arctic) [2019] EWHC 376 (Comm); [2019] 1 Lloyd's Rep 554; (CA) [2019] EWCA Civ 1161; [2019] 2 Lloyd's Rep 603
Sucden Middle-East v Yagci Denizcilik ve Ticaret Ltd Sirketi (The MV Muammer Yagci) (QBD (Comm Ct)) [2018] EWHC 3873 (Comm); [2019] Lloyd's Rep Plus 65
Suez Fortune Investments Ltd and Another v Talbot Underwriting Ltd and Others (The Brillante Virtuoso) (No 2) (QBD (Comm Ct)) [2019] EWHC 2599 (Comm); [2019] 2 Lloyd's Rep 485; [2019] EWHC 3300 (Comm)
Sveriges Angfartygs Assurans Forening (The Swedish Club) and Others v Connect Shipping Inc and Another (The Renos) (SC) [2019] UKSC 29; [2019] 2 Lloyd's Rep 78
The King Darwin (SGHC) [2019] SGHC 177; [2020] Lloyd's Rep Plus 35
The Mount Apo and The Hanjin Ras Laffan (SGHC) [2019] SGHC 57; [2019] 2 Lloyd's Rep 287
The Yue You 902 and Another Matter (SGHC) [2019] SGHC 106; [2019] 2 Lloyd's Rep 617
Tiger Shanghai, The (QBD (Comm Ct)) [2019] EWHC 3240 (Comm); [2020] Lloyd's Rep Plus 31
TMF Trustee Ltd and Others v Fire Navigation Inc and Others (QBD (Comm Ct)) [2019] EWHC 2918 (Comm); [2020] Lloyd's Rep Plus 32
Tritton Resources Pty Ltd and Others v Ever Rock Navigation SA (The Ikan Jahan) (FCA) [2019] FCA 276; [2019] 2 Lloyd's Rep 235
Wilmar Trading Pte Ltd v Heroic Warrior Inc (The Bum Chin) [2019] SGHC 143; [2019] Lloyd's Rep Plus 70
Win More Shipping Ltd v Director of Marine [2019] HKCFI 168; [2019] Lloyd's Rep Plus 57; [2019] HKCFI 1137; [2019] 2 Lloyd's Rep 420
Yacht Club Sopot SP ZOO v The Yacht "Monster Project" [2019] FCA 1083; [2020] Lloyd's Rep Plus 24
Young v Royal and Sun Alliance plc (CSOH) [2019] CSOH 32; [2019] Lloyd's Rep IR 482
Yue You 902 and Another Matter, The (SGHC) [2019] SGHC 106; [2019] 2 Lloyd's Rep 617
Ziemia Cieszynska, The [2019] EWHC 1533 (Comm); [2019] 2 Lloyd's Rep 541

Judgments considered

Alexandra 1, The and The *Ever Smart* (QBD (Admlty Ct)) [2017] EWHC 453 (Admlty); [2017] 1 Lloyd's Rep 666; (CA) [2018] EWCA Civ 2173; [2019] 1 Lloyd's Rep 130
Alkyon, The (CA) [2018] EWCA Civ 2760; [2019] 1 Lloyd's Rep 406
Aspen Underwriting Ltd v Credit Europe Bank NV (CA) [2018] EWCA Civ 2590; [2019] 1 Lloyd's Rep 221
Associated Japanese Bank (International) Ltd v Crédit du Nord SA (QBD) [1989] 1 WLR 255
Atlantic Tiburon 1, The (QBD (Comm Ct)) [2017] EWHC 2598 (Comm); [2017] 2 Lloyd's Rep 575
Atlantik Confidence, The (QBD (Admlty Ct)) [2016] EWHC 2412 (Admlty); [2016] 2 Lloyd's Rep 525
Atlasnavios-Navegação Lda v Navigators Insurance Co Ltd (The B Atlantic) (SC) [2018] UKSC 26; [2018] 2 Lloyd's Rep 1; [2018] 2 WLR 1671
B Atlantic, The (SC) [2018] UKSC 26; [2018] 2 Lloyd's Rep 1; [2018] 2 WLR 1671

Babanaft International Co SA v Avant Petroleum Inc (The Oltenia) (QBD (Comm Ct)) [1982] 1 Lloyd's Rep 448
Boleslaw Chrobry, The (QBD (Admlty Ct)) [1974] 2 Lloyd's Rep 308
Bright Shipping Ltd v Changhong Group (HK) Ltd (The CF Crystal and The Sanchi) (HKCFI) [2018] HKCFI 2474; [2019] 1 Lloyd's Rep 437
Brillante Virtuoso, The (QBD (Comm Ct)) [2015] EWHC 42 (Comm); [2015] 1 Lloyd's Rep 651
Canada Trust Co v Stolzenberg (No 2) (CA) [1998] 1 WLR 547
CF Crystal, The and The *Sanchi* (HKCFI) [2018] HKCFI 2474; [2019] 1 Lloyd's Rep 437
Chou Shan, The (FCAFC) [2014] FCAFC 90
Classic Maritime Inc v Limbungan Makmur Sdn Bhd And Another (QBD (Comm Ct)) [2018] EWHC 2389 (Comm); [2019] 1 Lloyd's Rep 349
CMA CGM v The Ship "Chou Shan" (The Chou Shan) (FCAFC) [2014] FCAFC 90
Diablo Fortune Inc v Duncan, Cameron Lindsay and Another (SGCA) [2018] SGCA 26; [2018] 2 SLR 129
Erin Schulte, The (CA) [2014] EWCA Civ 1382; [2015] 1 Lloyd's Rep 97
Glencore Energy UK Ltd and Another v Freeport Holdings Ltd (The Lady M) (QBD (Comm Ct)) [2017] EWHC 3348 (Comm); [2018] Lloyd's Rep Plus 22
Goldman Sachs International v Novo Banco SA (SC) [2018] UKSC 34; [2018] 1 WLR 3683
Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace) (CA) [2002] EWCA Civ 1407; [2002] 2 Lloyd's Rep 653; [2003] QB 679
Great Peace, The (CA) [2002] EWCA Civ 1407; [2002] 2 Lloyd's Rep 653; [2003] QB 679
Halliburton Co v Chubb Bermuda Insurance Ltd and Others (CA) [2018] EWCA Civ 817; [2018] 1 Lloyd's Rep 638
Hedley Byrne & Co Ltd v Heller & Partners Ltd (HL) [1963] 1 Lloyd's Rep 485; [1964] AC 465
ING Bank NV and Others v Canpotex Shipping Services Ltd and Others (FCA) 2017 FCA 47; [2017] 2 Lloyd's Rep 270
Jute Express, The (QBD (Admlty Ct)) [1991] 2 Lloyd's Rep 55
Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV and Others (The Atlantic Tiburon 1) (QBD (Comm Ct)) [2017] EWHC 2598 (Comm); [2017] 2 Lloyd's Rep 575
Kairos Shipping Ltd and Another v Enka & Co LLC and Others (The Atlantik Confidence) (QBD (Admlty Ct)) [2016] EWHC 2412 (Admlty); [2016] 2 Lloyd's Rep 525
Lady M, The (QBD (Comm Ct)) [2017] EWHC 3348 (Comm); [2018] Lloyd's Rep Plus 22
Maersk Neuchatel, The (QBD (Comm Ct)) [2014] EWHC 1643 (Comm); [2014] 2 Lloyd's Rep 377
Marubeni Hong Kong and South China Ltd v Government of Mongolia (CA) [2005] EWCA Civ 395; [2005] 2 Lloyd's Rep 231
Mercuria Energy Trading Pte Ltd v Citibank NA (QBD (Comm Ct)) [2015] EWHC 1481 (Comm); [2015] 1 CLC 999
Modahl v British Athletic Federation (CA) [2002] 1 WLR 1192
Morris-Garner and Another v One Step (Support) Ltd (SC) [2018] UKSC 20; [2018] 1 Lloyd's Rep 495
Myrto, The (QBD (Admlty Ct)) [1977] 2 Lloyd's Rep 243
Natwest Markets plc (formerly known as the Royal Bank of Scotland plc) v Stallion Eight Shipping Co SA (The MV Alkyon) (CA) [2018] EWCA Civ 2760; [2019] 1 Lloyd's Rep 406
Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and The Ever Smart) (QBD (Admlty Ct)) [2017] EWHC 453 (Admlty); [2017] 1 Lloyd's Rep 666; (CA) [2018] EWCA Civ 2173; [2019] 1 Lloyd's Rep 130
Navig8 Chemicals Pool Inc v Glencore Agriculture BV (The Songa Winds) (QBD (Comm Ct)) [2018] EWHC 397 (Comm); [2018] 2 Lloyd's Rep 47; (CA) [2018] EWCA Civ 1901; [2018] 2 Lloyd's Rep 374
NTUC Foodfare Cooperative Ltd v SIA Engineering Co Ltd (SGCA) [2018] SGCA 41; [2018] 2 SLR 588
Oltenia, The (QBD (Comm Ct)) [1982] 1 Lloyd's Rep 448
P Samuel & Co Ltd v Dumas (HL) (1924) 18 Ll L Rep 211; [1924] AC 431
PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans) (SC) [2016] UKSC 23; [2016] 1 Lloyd's Rep 589; [2016] AC 1034
Pyrene Co Ltd v Scindia Steam Navigation Co Ltd (QBD) [1954] 1 Lloyd's Rep 321; [1954] 2 QB 402
Republic of Bolivia v Indemnity Mutual Marine Assurance Co (CA) [1909] 1 KB 785
Res Cogitans, The (SC) [2016] UKSC 23; [2016] 1 Lloyd's Rep 589; [2016] AC 1034
Salem, The (HL) [1983] 1 Lloyd's Rep 342; [1983] 2 AC 375
Shagang Shipping Co Ltd (in liquidation) v HNA Group Co Ltd (CA) [2018] EWCA Civ 1732; [2019] 1 Lloyd's Rep 150
Shell International Petroleum Co Ltd v Gibbs (The Salem) (HL) [1983] 1 Lloyd's Rep 342; [1983] 2 AC 375
Songa Winds, The (QBD (Comm Ct)) [2018] EWHC 397 (Comm); [2018] 2 Lloyd's Rep 47; (CA) [2018] EWCA Civ 1901; [2018] 2 Lloyd's Rep 374
Spar Capella, The, *The Spar Vega and The Spar Draco)* (CA) [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep 447
Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd (The Spar Capella, The Spar Vega and The Spar Draco (CA) [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep 447
Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada) (HL) [1987] 1 Lloyd's Rep 1; [1987] AC 460
Spiliada, The (HL) [1987] 1 Lloyd's Rep 1; [1987] AC 460
St Maximus Shipping Co Ltd v A P Moller-Maersk A/S (The Maersk Neuchatel) (QBD (Comm Ct)) [2014] EWHC 1643 (Comm); [2014] 2 Lloyd's Rep 377
Standard Chartered Bank v Dorchester LNG (2) Ltd (The Erin Schulte) (CA) [2014] EWCA Civ 1382; [2015] 1 Lloyd's Rep 97
State Trading Corporation of India v Doyle Carriers Inc and Others (The Jute Express) (QBD (Admlty Ct)) [1991] 2 Lloyd's Rep 55
Suez Fortune Investments Ltd and Another v Talbot Underwriting Ltd and Others (The Brillante Virtuoso) (QBD (Comm Ct)) [2015] EWHC 42 (Comm); [2015] 1 Lloyd's Rep 651
The Boleslaw Chrobry (QBD (Admlty Ct)) [1974] 2 Lloyd's Rep 308
The Myrto (QBD (Admlty Ct)) [1977] 2 Lloyd's Rep 243
Volcafe Ltd v Compania Sud Americana de Vapores SA (SC) [2018] UKSC 61; [2019] 1 Lloyd's Rep 21