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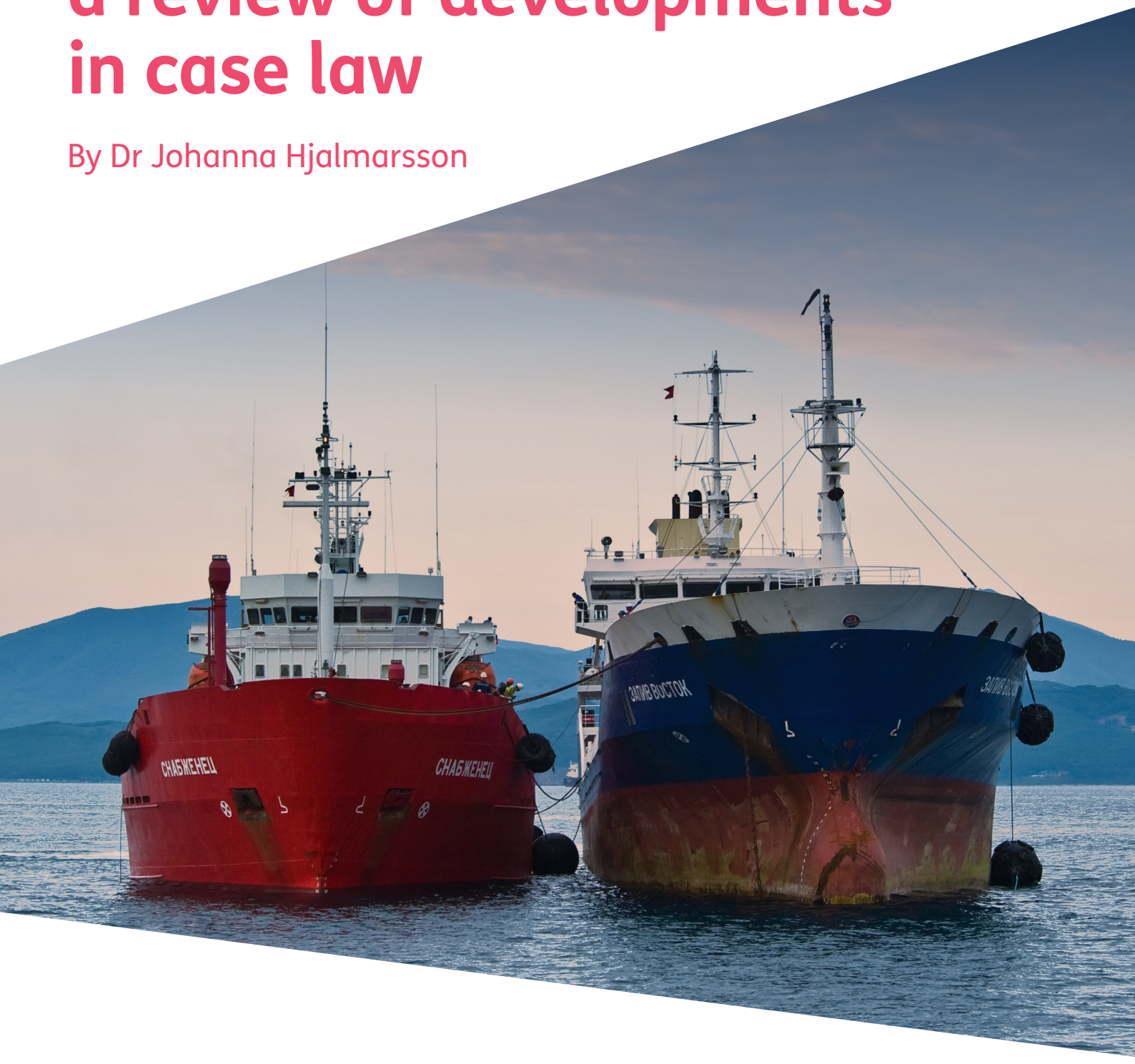
Maritime law in 2018: a review of developments in case law

By Dr Johanna Hjalmarsson



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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 2018: a review of developments in case law

INTRODUCTION

This review summarises and explains some of the most important legal developments in maritime law, including the law of charterparties, marine insurance, general average and admiralty procedure in 2018.

The scope of this analysis encompasses the common law jurisdictions of England and Wales as well as Australia, Canada, Hong Kong and Singapore.

Important cases in 2018 included the Supreme Court decision in *Volcafe*,[1] which emphasised the bailment nature of the bill of lading contract in deciding the burden of proof under the Hague Rules, and *The MV Alkyon*,[2] wherein the Court of Appeal stuck to existing practice in declining to release a vessel from arrest unless a cross-undertaking in damages was made by the arrestor. *The Thor Commander*,[3] an Australian case, was notable for the range of issues addressed including salvage, interpretation of the Hague Rules and general average.

In addition, there were several decisions that will assist the interpretation of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974.

CHARTERPARTIES

While there was more or less the usual number of cases on charterparties, the year is remarkable for having produced only one time charterparty case of note – the weight of litigation was on voyage charterparties and contracts of affreightment.

Time charterparties

The time charterparty case that reached the courts was *Clearlake Shipping Pte Ltd v Privocean Shipping Ltd (The Privocean)*,[4] concerning in the main a claim for unpaid hire. The appeal from the arbitration tribunal's decision was by time charterers whose counterclaim had not found favour with the tribunal. The counterclaim was for damages of US$410,000 for costs incurred as a result of a stowage plan on which the master had insisted. The stowage plan had given rise to extra costs. He had insisted on the cargo in hold 2 being strapped, and had rejected the charterers' stowage plan of leaving hold 4 empty which was equally safe but less costly. The arbitration tribunal had found that the additional fittings required were for the account of the charterers.

On appeal, the first question was for whose account *unnecessary* fittings insisted upon by the master should be, where clause 2 of the charterparty on NYPE wording attributed the provision of *necessary* dunnage and requisite fittings to charterers. The judge, dismissing the appeal, held that the clause in question dealt only with what charterers were to

1 *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA (trading as CSAV)* [2018] UKSC 61; [2019] 1 Lloyd's Rep 21.

2 *Natwest Markets plc (formerly known as The Royal Bank of Scotland plc) v Stallion Eight Shipping Co SA (The MV Alkyon)* [2018] EWHC 2033 (Admlty); [2018] 2 Lloyd's Rep 601.

3 *Mount Isa Mines Ltd v The Ship "Thor Commander"* [2018] FCA 1326; [2019] 1 Lloyd's Rep 167.

4 *Clearlake Shipping Pte Ltd v Privocean Shipping Ltd (The Privocean)* [2018] EWHC 2460 (Comm); [2018] 2 Lloyd's Rep 551.

provide, and not with whether they could recoup costs for materials not strictly within the clause. The qualification for necessity was not made out.

The second question was whether in this case the neglect of the master was in the management of the *ship* or in the management of the *cargo*,[5] for the purpose of the carrier's exemption from liability under section 4(2) of the US Carriage of Goods by Sea Act and article 4 rule 2 of the Hague and Hague-Visby Rules. The judge, resisting a proposed reformulation of the test, directed herself that the question to ask was: "What is the primary nature and object of the acts which caused the loss?". This permitted her to distinguish cases[6] where the primary purpose of the act was to get the cargo safely ashore, and to establish that the stowage plan was primarily about the safety of the vessel. Preferring the argument of the shipowners, she held that the primary nature and object of the acts which caused the loss were ones related to ship management in the sense of stability. What was in operation was not a want of care of cargo, but a want of care of the vessel which had an effect on the cargo.

Voyage charters and contracts of affreightment

There were several decisions on voyage charters and contracts of affreightment, most of which, at first instance, addressed specific points on contract interpretation. There was one Court of Appeal decision, namely *CSSA Chartering and Shipping Services SA v Mitsui OSK Lines Ltd (The Pacific Voyager)*[7] concerning the shipowner's obligation to proceed to the load port for the start of the employment. The Court of Appeal dismissed the appeal, but on subtly different reasoning from that of the judge.

The claimants had chartered the VLCC *Pacific Voyager* from the defendant owners on the Shellvoy 5 form for a voyage from Rotterdam. While proceeding through the Suez Canal to the loadport under a previous charterparty, the vessel made contact with an underwater object and required dry-docking which would take months. The charterers cancelled the charterparty two days after the laycan date of 4 February 2015 and brought this claim for damages. The charter contained no ETA at Rotterdam, nor any date of expected readiness to load, but did contain a laycan range and the usual express power of termination by the charterers if the vessel did not arrive before the specified cancelling date. The fixture recap also gave details of the anticipated timetable for completion of the previous voyage at Le Havre, and contained a provision that the shipowner would proceed with all convenient speed to load port.

The load port ETA or date of expected readiness to load were usually the trigger for an absolute obligation on the shipowner to commence the voyage to the load port at such time as it was reasonably certain that the vessel would arrive on or around the expected date.[8] The charterers contended that where the charterparty did not specify an ETA, but did specify an ETA at the last discharge port, the absolute obligation was instead on the owners to commence the approach voyage by a date when it was reasonably certain that the vessel would arrive at the loading port by the cancelling date. The owners disputed the existence of such an obligation. The judge gave judgment for charterers.[9] His reasoning was that the duty was an absolute one, not subject to due diligence. He relied on the intermediate port estimates under the previous charter, plus a reasonable discharge period, as the starting point for the absolute obligation.

The Court of Appeal dismissed the appeal of the owners. The obligation of utmost despatch was an important obligation intended to give comfort to a charterer and meant that the vessel must either proceed "forthwith" at the date of the charter or, as here, "within a reasonable time". A reasonable time here meant such time as it was reasonable to suppose the vessel would depart Le Havre for

5 As in *The Glenochil* (1896) P 10.
6 Including *The Germanic* 196 US 589 (1905) and *Caltex Refining Co Pty Ltd v BHP Transport Ltd (The Iron Gippsland)* [1994] 1 Lloyd's Rep 335.
7 [2018] EWCA Civ 2413; [2019] Lloyd's Rep Plus 9.
8 *Monroe Brothers Ltd v Ryan* (1935) 51 Ll L Rep 179; [1935] 2 KB 28.
9 *The Pacific Voyager* [2017] EWHC 2579 (Comm); [2018] 1 Lloyd's Rep 57.

Rotterdam after a reasonable period for discharge, on or about 28 January 2015. The owner was therefore in breach and the charterers entitled to damages.

By way of guidance for contract drafters, the court observed that if the owner had wanted to make the beginning of the chartered service contingent on the conclusion of the previous voyage, much clearer words would have been required.

In *The Pacific Voyager*,[10] the Court of Appeal also took the opportunity to reiterate the approach to interpretation of terms in frequent use, saying that while every charterparty must be construed on its own terms, previous decisions on the same or similar clauses must be treated as authoritative or as helpful guides in similar situations, in the interests of business certainty. Charterparty terminology, esoteric to the untrained eye, certainly needs that consistency of approach.

Thus the meaning of the charterparty term "always accessible" in relation to berths was considered in *Seatrade Group NV v Hakan Agro DMCC (The Aconcagua Bay)*.[11] Here, a vessel under a voyage charterparty was to undertake carriage of a cargo from the US Gulf to the Republic of Congo and Angola. While she was loading, a bridge and lock were damaged, so that upon completion of loading she was delayed for a further 14 days. In arbitration, the issue arose as to the meaning of the term "always accessible" and whether it required that the vessel be able to both enter and depart from the berth. Disponent owners argued that "always" conferred a sense of continuity, whereas charterers argued that the term addressed charterers' requirements of owners as to where the vessel would come and what it would do. The judge concluded that the term "always accessible" meant that parties had borne in mind not just entry into but also departure from the berth, disapproving the conclusion to the contrary in *London Arbitration 11/97*.[12] The term was distinguishable from the alternative term in use, "reachable on arrival".

The judgment in a case from Australia, *Mount Isa Mines Ltd v The Ship "Thor Commander"*,[13] considered issues related to salvage,[14] general average[15] and bills of lading,[16] besides the voyage charterparty issues considered here. The voyage charterparty point is novel and concerns the substitution of a vessel by one under different ownership from a pool under common management and is therefore important. The facts were that the general cargo vessel *Thor Commander* suffered an engine breakdown in January 2015, while on a voyage under charter from Chile to Townsville in Australia and drifted towards the Great Barrier Reef. General average was declared and assistance was sought and provided. *Thor Commander* was at the time carrying Mount Isa's cargo of copper anodes at a value 10 times that of the vessel herself. She had been substituted under a charterparty from a pool, but had different owners than the original vessel.

One of the contractual issues that arose was what carriage contract applied between Mount Isa and the shipowners: the bill of lading or the voyage charterparty? This in turn depended on whether the substitution of the vessel also resulted in a novation of the charterparty, with the new shipowners becoming a party to the contract, or whether there was simply a substituted performance of the original charterparty but no novation. The Hague Rules at issue were the Rules as enacted by the Australian Carriage of Goods by Sea Act 1991 (Cth), referred to as the "amended Hague Rules".

The judge ruled that the substitution of the vessel did not result in a novation of the charterparty with owners of the substituted vessel as a party in place of the original owners. That would have required the rescission of the original charterparty, negating remaining obligations of the original shipowner, which clearly was not the intention. As the judge observed, "the charterer would have no contractual recourse against those owners if, for example, the substituted vessel turned out not to be suitable or never arrived at the load port".[17]

10 [2018] EWCA Civ 2413; [2019] Lloyd's Rep Plus 9, discussed above.
11 [2018] EWHC 654 (Comm); [2018] 2 Lloyd's Rep 381.
12 *Lloyd's Maritime Law Newsletter*, (1997) LMLN 463.
13 [2018] FCA 1326; [2019] 1 Lloyd's Rep 167.
14 See below at page 28 under "Admiralty liabilities".
15 See below at page 26 under "General Average".
16 See further below at page 9, and "Letters of indemnity" on page 21.
17 At para 79.

Meanwhile, in *Classic Maritime Inc v Limbungan Makmur Sdn Bhd and Another*,[18] the issue was whether the failure to perform a contract of affreightment following a burst dam was excused by force majeure. The case contains a major plot twist. On 5 November 2015 the Fundão dam burst in Brazil. The claimant Classic Maritime was the shipowner and the defendant Limbungan was the charterer under a 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 them had not supplied pellets in some years and the other could no longer supply pellets following the dam collapse.

Charterers 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. The freight rate was substantially higher than the market rate. The charterer contended that its remaining supplier was unwilling or unable to supply iron ore pellets and that as a result of the dam burst, it was unable to supply cargoes under the COA. The shipowner argued that the collapse of the dam had no causative effect.

The judge considered that the general principle regarding alternative modes of performance was capable of applying in this case to Limbungan's entitlement to ship from two alternative ports. For Limbungan to be regarded as having made "arrangements" to ship, it was obliged to make all reasonable efforts to ship from the alternative port. If it was not possible, then the dam burst could be regarded as the cause of its failure to supply cargoes for the five shipments in question. The question was whether Limbungan could be regarded as having made alternative arrangements to perform. If it had not, it had no defence: the charterer's duty to provide a cargo was non-delegable. It could then not establish that it would have been able to provide the cargoes, "but for" the dam collapse.

Clause 32 of the contract of affreightment, which was headed "Exceptions", read:

> "Neither the vessel, her master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for loss of or damage to, or failure to supply, load, discharge or deliver the cargo resulting from: Act of God, ... floods ... accidents at the mine or Production facility ... or any other causes beyond the Owners' Charterers' Shippers' or Receivers' control; always provided that such events directly affect the performance of either party under this Charter Party ..."

The judge determined that the clause was an exception clause: no part of it stated that it was a frustration clause. While a frustration clause did not require the party to satisfy any "but for" test, an exception clause was different in this regard, because the latter was concerned with excusing a party from liability for breach. Limbungan had failed to show that, but for the dam collapse, they would have performed the contract.

In a surprise plot twist, the judge then went on to hold that shipowners were not entitled to substantial damages, because the dam burst would in fact have prevented Limbungan from shipping any iron ore pellets.

The importance of thinking the claim through was apparent from Fehn Schiffahrts GmbH & Co KG v Romani Spa (The Fehn Heaven).[19] By the time of the appeal from the arbitrators' award to the Commercial Court, a mismatch between the cause of action and the liability was apparent. The appeal concerned the question of the charterers' title to sue as assignees of the straight bill of lading in respect of a cargo of organic sunflower seeds and wheat. The cargo had been fumigated on board and could therefore no longer be sold as organic. Charterers sold the cargo at a discount to other buyers and commenced arbitration against the shipowners for the loss, having also taken assignment from the originally intended buyer, the named consignee under the straight bill of lading. The arbitral tribunal awarded damages to the charterers based on the downgrading of the cargo. The shipowners appealed, querying on what basis the action was brought. If charterers were suing as

[18] [2018] EWHC 2389 (Comm); [2019] Lloyd's Rep Plus 3.

[19] [2018] EWHC 1606 (Comm); [2018] 2 Lloyd's Rep 385.

assignees of the bill of lading, it was argued that there was no loss because the assignor had not paid for the cargo and therefore not suffered any loss. Charterers responded that if so, they nevertheless had title to sue under the voyage charterparty. The problem with that, the shipowners retorted, was that the tribunal had made no finding to that effect. In effect, the tribunal appeared to have decided that the charterers had title to sue as assignees of the rights under the straight bills of lading; however there was no finding that the assignor of the bills had suffered any loss. Nor was there any express finding that the charterers had title to sue in their own right. The judge upheld the appeal and remitted the matter to the tribunal.

Demurrage

Demurrage usually contributes substantial amounts of case law. Not so this year: only one reported case dealt with the important issue of documentary evidence for a demurrage claim. This is usually specified in great detail in the voyage charter and the purpose is to ensure swift documentary resolution of any claims. Short time bars are therefore attached to the documentary conditions. The conditions for other claims under the voyage charter are not quite as stringent. But to what extent can charterers reclassify a demurrage claim to fall under such more lenient conditions? A claim for demurrage, which owners had sought to reclassify as a claim for time lost waiting for orders was at issue in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The Ocean Neptune)*.[20] Was it time-barred?

On 8 November 2013 the claimants voyage-chartered the tanker *Ocean Neptune* from the defendant owners for carriage of a minimum 35,000 mt, with charterers' option up to a full cargo, of clean petroleum products, from one safe port Taiwan to one to three safe ports Australia. The fixture recap email incorporated the ExxonMobil VOY2005 form and the LITASCO clauses, both amended. Demurrage was payable at US$17,500 per day pro rata. Laytime for loading and discharging was 84 hours in total at both ends, Saturdays and holidays included. This was the charterers' appeal against a partial arbitral award on the preliminary issue of a time bar, wherein it was held that in respect of delays at Gladstone, the owners' demurrage claim was not time-barred.

The charterers' argument was based on the LITASCO clauses, clause 2B of which provided that documents in support of the claim must be provided within 90 days of the completion of discharge. The claim had been submitted shortly after the voyage, but the tribunal held that charterers had failed to provide all supporting documents required because they did not include a statement of facts for each of the ports of Mailiao (the load port), Gladstone, Botany Bay and Port Alma (the discharge ports) countersigned by the terminal, or if it was impossible to obtain such a countersignature, a letter of protest from the master. At one of the intended discharge ports, Gladstone, no discharge had taken place because the receivers declined to take delivery on the basis that the cargo was contaminated. The tribunal held that the claim in respect of Gladstone, where no discharge had taken place and which claim had subsequently been re-labelled as time lost waiting for orders under LITASCO clause 4, was not time-barred. The charterers appealed against that decision asserting that the same documentation was required for a claim under clause 4. The question for the judge was whether a claim for time lost waiting for orders under clause 4 was a demurrage claim.

The judge allowed the charterers' appeal. The parties had taken care with the language in this contract. On a careful reading, there was a distinction between claims that were "to count" as demurrage, and those merely to be quantified using the demurrage rate. Clause 4 was of the former type and therefore engaged the documentary requirements in clause 2B. This construction was also consistent with the commercial need to obtain full documentation of the claim so that it could be settled quickly. Loadport laytime was an essential element in the calculation of time lost under clause 4 and it made sense for the same documentation to be required. If the documents were in some circumstances redundant, that was not a reason not to give effect to the clear language of the contract.

[20] [2018] EWHC 163 (Comm); [2018] 1 Lloyd's Rep 654.

BILLS OF LADING

A high-profile case in the last few years has been *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA*,[21] concerning the burden of proof for the carrier's negligence under the Hague Rules. The judge gave judgment for the cargo claimants against the carrier.[22] The Court of Appeal allowed the carrier's appeal in respect of its defences of inherent vice and inevitability of damage, but dismissed the appeal on the point of the temporal scope of the Hague Rules.[23] The Supreme Court overturned the Court of Appeal decision, reverting to the judge's decision. The emphasis of the Supreme Court's judgment was on the bill of lading as a bailment contract, meaning that several cases that have appeared to adopt a different approach were disapproved in the process.

> It is common for commercial contracts to be regarded as a complete code regulating the relationship between the parties, to the exclusion of surrounding law. The provisions of the contract then provide for the relief, and the only relief, available as between the parties

The facts were that the claimants were bill of lading consignees in respect of a number of shipments of coffee beans from Buenaventura in Colombia, transhipped in Balboa in Panama and then via different routes to north Germany. The beans had been damaged by condensate. Before stuffing, the bare corrugated steel of the container was lined by the stevedores with Kraft paper. The question was of the defendant carrier's liability; more specifically whether or to what extent stowage was properly effected and adequate to meet the threat of condensation, and whether the carrier was liable for any consequent damage. The bills of lading contained a clause paramount subjecting the carriage to the Hague Rules.

In response to the appeal of the cargo interests, the carrier argued that: (i) the Hague Rules constituted a complete code; (ii) an international convention should not be construed in the light of particular features of English law; and (iii) article III rule 2 of the Hague Rules displaced the English law rule about the burden of proof.

The Supreme Court allowed the appeal, restoring the order of Deputy Judge David Donaldson QC at first instance. In doing so, the unanimous court, led by Lord Sumption, considered a number of intricate issues.

First, the Hague Rules were a complete code only on the matters which they covered, but were not exhaustive. Matters of proof were, except where they were specifically regulated by certain articles, subject to the law of the forum.

It is common for commercial contracts to be regarded as a complete code regulating the relationship between the parties, to the exclusion of surrounding law. The provisions of the contract then provide for the relief, and the only relief, available as between the parties. Recent examples include an aircraft transaction in *Airbus SAS v Generali Italia SpA and Others*,[24] a demise charterparty in *Gard Marine and Energy Ltd v China National Chartering Co Ltd and Another (The Ocean Victory)*;[25] and a shipbuilding contract in *Star Polaris LLC v HHIC-Phil Inc (The Star Polaris)*.[26]

It would be a little unusual to consider a bill of lading a complete code in the usual sense of the expression, regulating in every way the relationship between the parties, where it is not a negotiated contract. However, the point made by the Supreme Court appears to have been more subtle than that – it was recognised that the Rules were not exhaustive of all matters relating to the legal responsibility of carriers for the cargo, but intended to regulate only the standard of performance. The point was rather that even where a contract is intended as a complete code, it remains subject to surrounding evidentiary rules.

21 [2018] UKSC 61; [2019] 1 Lloyd's Rep 21.
22 [2015] EWHC 516 (Comm); [2015] 1 Lloyd's Rep 639.
23 [2016] EWCA Civ 1103; [2017] 1 Lloyd's Rep 32.
24 [2018] EWHC 2737 (Comm); [2019] Lloyd's Rep Plus 32.
25 [2017] UKSC 35; [2017] 1 Lloyd's Rep 521.
26 [2016] EWHC 2941 (Comm); [2017] 1 Lloyd's Rep 203.

On the carrier's second argument, the Supreme Court affirmed the rule in *Foscolo, Mango & Co Ltd v Stag Line Ltd (The Ixia)*[27] that conventions should be given an internationally uniform interpretation, but considered that this had no bearing on the incidence of the burden of proof which was a question for the lex fori. In any event, it had not been shown that common law principles regarding the burden of proving the lack of negligence in the carriage of goods were of purely domestic application; the Supreme Court noted that similar principles applied in other common as well as civil law jurisdictions.

It is fair to say that more had been made of the need for uniformity in international conventions in the earlier instances, with greater emphasis on the wording of the Hague Rules themselves. That said, the reasoning of the Supreme Court was principled in emphasising the role of the lex fori and not least consistent with the notion that a complete code paradigm is incongruous in the context of contracts of adhesion such as bills of lading.

On the carrier's third point, Lord Sumption asserted that the carrier's proposition that at common law a bailee was under a strict obligation to redeliver the goods in the same condition as received was based on a misconception. The carrier had posited that the qualified obligation in article III rule 2 supplanted that strict obligation. However Lord Sumption, in considering the common law as it applied to the carrier as common carrier and as bailee of the goods, asserted that there was a significant difference – whereas the common carrier was strictly liable, so that the absence of negligence was irrelevant, a bailee was under an obligation to take reasonable care and therefore bore the legal burden of proving the absence of negligence. That being the case, the duty of care on the carrier under article III rule 2 was consistent with the carrier bearing the burden of proof in disproving negligence.

With those matters addressed, Lord Sumption was ready to allocate the burden of proof for the carrier's negligence under the Hague Rules. In doing so, he approved the dicta of Wright J in *Gosse Millerd v Canadian Government Merchant Marine Ltd (The Canadian Highlander)*[28] for the second reason given, namely that the carrier was a bailee. That being the case, it was for the carrier, once put to proof of the fact, to show that it had not been negligent in performing its duties. Lord Sumption in passing nevertheless disapproved of the first reason given by Wright J, namely that the word "Properly ..." in article III rule 2 implied an obligation to achieve a particular outcome. It only implied an obligation to load, carry and discharge in accordance with a sound system.

This assessment also meant that Lord Sumption disavowed the reasoning in *Albacora Srl v Westcott & Laurence Line Ltd*[29] and *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad (The Bunga Seroja)*[30] on this point. In those cases, it had been held that the burden of proof for negligence did not lay upon the carrier. The courts in those cases had failed to allocate sufficient weight to the fact that the carrier was a bailee and that the burden of proof ought to be consistent therewith.

As a result, once it was shown that the cargo was loaded in good condition and discharged in bad, the carrier must show *either* that the damage occurred without fault in the various respects covered by article III rule 2, *or* that it was caused by a peril excepted under article IV.

Proceeding to the inherent vice exception in article IV rule 2(m), Lord Sumption considered that the burden of proving facts bringing the carrier within the exceptions in article IV rule 2 lay on the carrier. This included disproving negligence for the purpose of invoking those exceptions. The Court of Appeal had relied on *The Glendarroch*[31] to the effect that:

> "once the carrier discharges the onus upon it of showing that the loss apparently fell within the article IV exception, the burden shifts back to the cargo claimant to establish negligence negativing the exception."[32]

27 (1931) 41 Ll L Rep 165; [1932] AC 328.

28 (1927) 28 Ll L Rep 88.
29 [1966] 2 Lloyd's Rep 53; 1966 SC (HL) 19.
30 [1999] 1 Lloyd's Rep 512.
31 [1894] P 226.
32 *Volcafe* [2016] EWCA Civ 1103; [2017] 1 Lloyd's Rep 32, at para 46.

The only exception in article IV rule 2 that explicitly provides for a burden of proof, namely (q), allocates that burden to the carrier. The other exceptions are silent as to burden of proof. The Court of Appeal considered that as under common law, the burden of proof where unspecified in article IV rule 2 of the Hague Rules was that once the carrier had proven an exception, it was for the claimant to prove that there had been negligence on the part of the carrier. This meant disapproval of the decision of Wright J in *Gosse Millerd v Canadian Government Merchant Marine Ltd (The Canadian Highlander)*.[33]

Lord Sumption showed no hesitation in disapproving *The Glendarroch*. The notion that the burden of proof for an exception (negligence) to an exception (inherent vice) should revert to the cargo interests was unsatisfactory because it was, first, too subtle for a commercial contract and, secondly, a matter of causation. *The Glendarroch* could not stand as the source of a general rule governing the burden of proof and should no longer be good law.

It might be noted that this is consonant with the view expressed by the editors of *Carver on Bills of Lading*, 3rd Edition, who express a preference for the bailment approach of Wright J.

Finally, on the nature and content of the inherent vice exception, Lord Sumption elaborated on the meaning of the concept in what must be characterised as a novel way. Not content with a definition along the usual lines of "the unfitness of the goods to withstand the ordinary incidents of the voyage", he went on to discuss the relation between the characteristics of the cargo and the precautions taken by the carrier and to provide a negative definition of the concept. A cargo, he said, does not suffer from inherent vice in the abstract, but only in relation to some assumed standard of knowledge and diligence on the part of the carrier. His conclusion was that: "if the carrier could and should have taken precautions which would have prevented some inherent characteristic of the cargo from resulting in damage, that characteristic is not inherent vice".[34] As a result, the carrier must show that it took reasonable care of the cargo or that any steps that could reasonably have been taken would have failed.

In considering the evidence, Lord Sumption went on to provide some salient criticism of the approach of the Court of Appeal in substituting its own assessment of the evidence for the judge's. The Court of Appeal had considered that it was entitled to substitute its own judgment for that of the judge, where the judge's finding was an inference from undisputed material so that the appellate court was in no worse position than the judge. The Supreme Court nevertheless restored the judge's assessment that there was no evidence of any generally accepted industry practice to which the carrier could claim to have conformed to support that it had proceeded "in accordance with a sound system". Nor should the Court of Appeal substitute its own assessment on what measures had in fact been taken.

Returning to *Mount Isa Mines Ltd v The Ship "Thor Commander"*,[35] once it had been decided that the voyage charterparty did not apply between the parties, the next question was whether the bill of lading terms applied instead. The judge held that they did: where the owners of the substituted vessel were not a party to the charterparty, the bill of lading terms applied between it and the cargo interest, even though the latter was a party to the original charterparty. He went on to hold that there had been a failure to exercise due diligence in making the ship seaworthy before and at the beginning of the voyage on the part of the carrier, who had failed to replace the fuel injection nozzles and clean the fuel injection valves. This was a breach of article 3(1)(a) and (b) of the amended Hague Rules.

A complex question of the rights of the lawful holder of the bill of lading arose in *Sevylor Shipping and Trading Corporation v Altfadul Company for Foods, Fruits & Livestock and Another (The Baltic Strait)*.[36] A cargo of bananas carried by the claimant under a bill of lading was discharged in Tripoli in a damaged condition. An arbitral tribunal held that the carrier was liable for the damage under the terms of the

33 (1927) 28 Ll L Rep 88.

34 At para 37 of the Supreme Court's judgment in *Volcafe* [2018] UKSC 61; [2019] 1 Lloyd's Rep 21.

35 [2018] FCA 1326; [2019] 1 Lloyd's Rep 167, and above at page 3, under "Voyage charterparties and contracts of affreightment".

36 [2018] EWHC 629 (Comm); [2018] 2 Lloyd's Rep 33.

bill of lading, and found that the difference in value of the cargo as discharged and its value, had it been sound on arrival, was US$4,567,351.13. Altfadul was the lawful holder of the bill of lading but had purported to reject the cargo to its seller, the voyage charterer CoMaCo. That dispute had been settled by CoMaCo offering Altfadul credit on future shipments in the amount of US$2,586,105.09. The second defendant, the cargo insurers, had paid a sum of US$2,586,104.93 (16 cents less than the settlement sum) in respect of the shipment and had taken assignment from CoMaCo of its rights, including Altfadul's rights under the bill of lading which had been assigned to CoMaCo.

The arbitrators had given an award for the full damage. They had also rejected the claimant's contention that Altfadul should have to give credit for the credit agreed on future shipments; this was the decision now under appeal. Three issues arose, namely: (i) whether section 2(4) of COGSA 1992 operated where rights of suit under the bill of lading contract had not been previously vested in the party which had suffered loss, or whether it only operated where rights of suit were previously vested in that party but it had lost them by virtue of the operation of section 2(1) of the Act; (ii) whether the lawful holder of the bill of lading could claim, by virtue of section 2(4) of COGSA 1992, loss suffered by the charterer whose charterparty was with the carrier; and (iii) whether Altfadul (and therefore the cargo insurers) was entitled to damages equal to the full value of the cargo damage irrespective of recovery from its seller.

The judge dismissed the appeal. Considering first question (iii), a bill of lading holder suing on the bill of lading in contract may recover full damages despite the earlier recovery through a settlement from an intermediate seller: *R&W Paul Ltd v National Steamship Co Ltd*,[37] a case under the Bill of Lading Act 1855, applied equally under COGSA 1992.

The judge went on to consider additional questions obiter, no doubt for the benefit of the parties' consideration of appeals in this complex case. In relation to question (i) (above), he said that for section 2(4) to apply, there was no requirement that the rights of suit that had become vested in the lawful holder of the bill of lading must have been previously vested in the party suffering the loss but have been lost by it through the operation of section 2(1). On question (ii), the judge considered that the bill of lading in the hands of CoMaCo as voyage charterer had been a mere receipt. *President of India v Metcalfe Shipping Co Ltd (The Dunelmia)*[38] was not authority for the proposition that section 2(1) did not operate where the holder was a charterer to whom the mere receipt rule applied. Section 2(4) added that under such circumstances, section 2(1) did apply, contrary to its terms, but the charterer's rights to recover remained governed by the charterparty.

In *Deep Sea Maritime Ltd v Monjasa A/S (The Alhani)*,[39] the question arose as to the applicability of the Hague Rules to wrongful misdelivery. Did the time bar apply? The claimant shipowner, Deep Sea, sought summary judgment against the defendant shipper and bill of lading holder, Monjasa. The owners' oil product tanker *Alhani* had been chartered by the buyers of a cargo of bunker fuel. Monjasa was the seller in that transaction and the shipper of the bunker fuel. The cargo was discharged to the buyers in a ship-to-ship transfer without production of the bill of lading. The owners' position was that they were acting according to instructions given pursuant to the charterparty. Monjasa had commenced several sets of proceedings: in Tunisia by arresting the vessel, which were subsequently dismissed for want of substantive jurisdiction (a decision currently under appeal); against the shipowners in the Wuhan Maritime Court (settled with buyers and their bank, but upon non-payment judgment was obtained and currently under appeal); and by arresting the vessel at Le Havre which resulted in security and an order to commence proceedings, which Monjasa did before the English High Court pursuant to the applicable exclusive jurisdiction

37 (1937) 59 Ll L Rep 28.

38 [1969] 2 Lloyd's Rep 476; [1970] 1 QB 289.

39 [2018] EWHC 1495 (Comm); [2018] 2 Lloyd's Rep 563.

clause, seeking damages in contract, bailment and conversion. Owners by then had commenced the present proceedings for a declaration of non-liability, applying for summary judgment.

The judge gave summary judgment for the owners. All of Monjasa's claims were subject to article III rule 6 of the Hague Rules. The Rules were capable of applying also to wrongful misdelivery, at least where the misdelivery occurred during the period of the Hague Rules period of responsibility. No settled understanding to the contrary had been demonstrated. Save for any claims being pursued in the Tunisian proceedings, in respect of which it would not be appropriate to grant a declaration due to concerns of judicial comity, Monjasa's claims against the owners were extinguished by operation of article III rule 6.

An arbitration clause in a bill of lading was at issue in *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd (The Sea Master)*.[40] A bank had in the course of transactions become the holder of bills of lading incorporating a charterparty, including the London arbitration clause. A first set of bills had been switched by agreement between the shipowner and the cargo interest, at the bank's counters to preserve its security. The bank commenced arbitration against the shipowners in respect of bills of lading relating to other cargo on board. The shipowners counterclaimed for demurrage under the switch bills, to which the bank responded that it was not a party that had undertaken responsibility under those bills as per section 3 of COGSA 1992, and that it was therefore not a party to the arbitration agreement. The tribunal agreed with the bank, and the shipowners appealed under section 67 of the Arbitration Act 1996.

The judge held that the tribunal did have jurisdiction. The effect of sections 2 and 3 of COGSA was not to bifurcate an arbitration clause in the bill of lading contract into rights and obligations. The bundle of rights, obligations and options were mutual and interdependent. Section 2 involved a lawful holder becoming a party to the arbitration because the section treated the holder as a party to the contract. To that extent, the judge in *Primetrade AG v Ythan Ltd (The Ythan)*[41] had erred in dicta implying a separation between sections 2 and 3.

The effect of the one-year time bar in article III rule 6 of the Hague Rules in the context of a claim commenced within the general six-year time bar was considered in *Dera Commercial Estate v Derya Inc (The Sur)*.[42] The context was the appeal of an arbitration award on a point of law by Dera, the notify party in bills of lading pertaining to a cargo of maize it had purchased. The maize was transported on MV *Sur*, a ship owned by Derya Inc. The bills of lading were on the Congen form and incorporated article III rule 6 of the Hague Rules as well as the charterparty on an amended BIMCO form. The bills of lading were subject to English law and arbitration. The cargo had arrived in such a condition as to be rejected by the Jordanian customs authorities and was taken to Turkey and in April 2012 sold by way of judicial sale, whereupon the proceeds were transferred to the shipowners who asserted a demurrage claim.

Arbitration had been formally commenced by the shipowners in October 2011, within the one-year time bar, but lay dormant until March 2015 when the shipowners served their particulars of claim, seeking a declaration of non-liability in respect of the cargo claim and an order that the letter of undertaking be released. In 2016 the shipowners further sought the striking out of the cargo owner's claim for want of prosecution, to be dealt with as a preliminary issue. The tribunal issued an award accordingly and the cargo owners appealed.

The judge considered that a claim particularised within the six-year limitation period applicable to contractual claims pursuant to section 5 of the Limitation Act 1980 could nevertheless be struck out for "inordinate delay" under section 41(3) of the Arbitration Act 1996, because the parties had contracted for a shorter limitation period, such as here, for one year under article III rule 6 of the Hague Rules.

[40] [2018] EWHC 1902 (Comm); [2019] 1 Lloyd's Rep 101.

[41] [2005] EWHC 2399 (Comm); [2006] 1 Lloyd's Rep 457.

[42] [2018] EWHC 1673 (Comm); [2019] 1 Lloyd's Rep 57.

The judge went on to consider the issue of deviation, previously considered part of the doctrine of frustration, and, perhaps a tad reluctantly, concluded that she was bound by *Tate & Lyle v Hain Steamship Co Ltd*,[43] to the effect that the deviation cases were to be treated as a body of substantive law with rules of its own. Therefore in a contract evidenced by a bill of lading and subject to the Hague Rules, a geographic deviation precluded a carrier from relying on the one-year time bar created by article III rule 6, where the other party elected to terminate. This issue would seem ripe for Court of Appeal determination.

Where the one-year time bar created by article III rule 6 applied, the period between the time that the cause of action arose and the expiry of the contractual time limit was to be taken into account when assessing whether the delay was "inordinate" for the purpose of section 41(3).

As for the proper order, burden and/or standard of proof applicable to a tribunal's assessment of whether a delay was "inexcusable" for the purpose of section 41(3), the legal (or persuasive) burden lay on the applying party to prove on a balance of probabilities that the inordinate delay in question was inexcusable. Although each case was fact-specific, and while it was not generally helpful to speak in terms of a shift of evidential burden in this context, it would normally be the responding party that identified a credible excuse for the delay.

Package limitation

In a Court of Appeal decision, the issue of package limitation for bulk cargoes was settled. *Vinnlustodin HF and Another v Sea Tank Shipping AS (The Aqasia)*,[44] was the appeal of a decision on a preliminary issue in proceedings where the owner of a damaged cargo of fishoil sought damages from the carrier. The fishoil was carried on board the tanker *Aqasia* pursuant to a charterparty dated 23 August 2013. The charterparty was on the London Form, provided for English law and arbitration and incorporated the Hague Rules. The cargo was described in the charterparty as "2,000 tons cargo of fishoil in bulk".

The preliminary issue concerned the carrier's case that it was entitled to package limitation under the Hague Rules: article IV rule 5 could be applied to bulk or liquid cargo by reading the word "unit" as a reference to the unit used by the parties to denominate or quantify the cargo in the contract of carriage. The cargo interests for their part argued that the word "unit" could only refer to a physical item of cargo, or to a combination of physical items bundled together for shipment, so that article IV rule 5 did not apply to a liquid or other bulk cargo: when cargo is shipped in bulk, there are no relevant "packages" or "units". The judge decided in the cargo owners' favour[45] and the carrier appealed.

> The clear meaning of "unit" was that it referred to a physical item of cargo or shipping unit, and not to a unit of measurement or a freight unit and therefore article IV rule 5 did not apply to bulk cargo

The Court of Appeal dismissed the appeal. The clear meaning of "unit" was that it referred to a physical item of cargo or shipping unit, and not to a unit of measurement or a freight unit and therefore article IV rule 5 did not apply to bulk cargo. This was confirmed by the travaux préparatoires, the preponderance of authorities and textbook and academic commentaries.

Similarly on package limitation, in *Kyokuyo Co Ltd v AP Møller-Maersk A/S, trading as Maersk Line*,[46] the Court of Appeal had to consider what items qualified as packages in the context of items stowed in containers. The respondent here was the receiver of three container loads of frozen tuna shipped at Cartagena in Spain for carriage by the appellant to Japan. Sea waybills had been issued in respect

43 (1936) 55 Ll L Rep 159; (1936) 41 Com Cas 350.
44 [2018] EWCA Civ 276; [2018] 1 Lloyd's Rep 530.
45 *The Aqasia* [2016] EWHC 2514 (Comm); [2016] 2 Lloyd's Rep 510.
46 [2018] EWCA Civ 778; [2018] 2 Lloyd's Rep 59.

of the carriage, but it was common ground that the receiver was entitled to request bills of lading. Container A contained bags of frozen bluefin tuna parts and containers B and C frozen tuna loins. The loins in container C had been restuffed into another container following a refrigeration malfunction.

The judge at first instance held, against the carrier's argument, that package limitation was not determined simply by the number of containers.[47] Upon the appeal of the carrier, the Court of Appeal considered the carrier's right to limit liability, and if such a right existed whether under the Hague and Hague-Visby Rules respectively the limitation was as per the containers or the pieces of tuna inside the container.

The Court of Appeal dismissed the appeal. The Hague-Visby Rules applied compulsorily and had the force of law. Until the moment the sea waybills were issued, the cargo interests were entitled to a bill of lading on demand, satisfying the requirements of article I(b) and section 1(4) of the Carriage of Goods by Sea Act 1971 (COGSA). Equally, the judge had been correct in holding that the enumeration of the tuna loins in the sea waybill was sufficient to make them the "units" for the purpose of package limitation under the Hague-Visby Rules. The question had been whether the words "enumeration … *as packed*" required further specification of how the packages and units had been packed in the container: it was held that the statement of the numbers was in itself sufficient to make the tuna loins the relevant packages for the purpose of limitation. On this point, the Court of Appeal declined to follow dicta in *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA*.[48]

The Court of Appeal also stated, obiter, that if the Hague Rules had applied instead of the Hague-Visby Rules, it would have been artificial to base the inquiry into whether something was capable of being a "unit" on consideration of whether the cargo could have been loaded, without further packaging or consolidation, in the refrigerated hold of a break-bulk vessel.

PASSENGERS

Passenger liability decisions are fairly rarely reported because they tend to involve smaller claims dealt with by the county courts. This year, there were three decisions which between them inform the interpretation of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974.

In *Warner v Scapa Flow Charters*,[49] the UK Supreme Court considered the relationship between the Athens Convention and domestic legislation on suspension and interruption of time.

Passenger liability decisions are rarely reported because they tend to involve smaller claims dealt with by the county courts. This year, there were three decisions which between them inform the interpretation of the Athens Convention 1974

Mr Warner had chartered a vessel operated by the defendant for the week 11 to 18 August 2012 for the purpose of diving. On 14 August 2012 he died during a dive. The claimants were his widow and their son, born in November 2011. The claim was lodged on 14 May 2015, more than two years but less than three years after the intended date of disembarkation, which was agreed to be 18 August 2012. The defendant argued that the claim was time-barred under the Athens Convention, which by its article 16 barred claims after two years following intended disembarkation. Upon appeal from the Lord Ordinary, the Inner House held that while the widow's claim was time-barred, the son's claim was not.[50] This was the charterer's appeal of the latter decision.

Article 16 of the Athens Convention reads, in relevant parts, as follows.

47 [2017] EWHC 654 (Comm); [2017] 1 Lloyd's Rep 580.
48 [2004] FCAFC 202; [2004] 2 Lloyd's Rep 537.
49 [2018] UKSC 52; [2019] Lloyd's Rep Plus 25.
50 [2017] CSIH 13.

> "(1) Any action for damages arising out of the death of or personal injury to a passenger or for the loss of or damage to luggage shall be time-barred after a period of two years. ...
>
> (3) The law of the court seized of the case shall govern the grounds of suspension and interruption of limitation periods, but in no case shall an action under this Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later."

The first paragraph represents the ordinary time bar, applicable in this case per para 2(b) from the intended date of disembarkation. Paragraph 3 permits an extension of that time bar to be operated per domestic law.

The applicable Scottish Act was the Prescription and Limitation (Scotland) Act 1973, section 18(3) of which reads:

> "Where the pursuer is a relative of the deceased, there shall be disregarded in the computation of the period specified in subsection (2) above any time during which the relative was under legal disability by reason of non-age or unsoundness of mind."

If this section applied to the case, the two-year time bar could be extended by reason of the son's age, because he was under 16 years of age. This followed from the Age of Legal Capacity (Scotland) Act 1991, section 1. However, the extension could be no longer than three years at the most, because of the absolute time bar in article 16(3) of the Convention. This was enough for the claim to proceed – the three-year time bar had been met.

The question was therefore of the meaning of the words "grounds for suspension or interruption" in article 18(3) – did they include a provision such as section 16(3)?

The vessel operators' argument against application of article 16(3) was that the natural meaning of the words "suspension or interruption" was to denote situations where time had begun running, but was subsequently suspended or interrupted. They were therefore not applicable to a situation where due to the son's minority at the time of the accident, time could not start running.

Alternatively, the meaning of the words was said to be technical and derived from certain civil law systems. Suspension referred "to the situation in which a limitation period, which has started to run but has been paused by an event, such as the onset of mental incapacity, resumes its running when the incapacity ceases with the rest of the period remaining".[51] Interruption on the other hand referred "to a circumstance in which the limitation period, having been halted by an event, commences afresh when the halting event ceases and the time which has expired before the halting event does not count towards the running [of] the limitation period".[52] Either way, the limitation period must have begun before it is paused.

The Supreme Court decided on 17 October 2018 that the claim was not time-barred. By article 16(3) of the Convention, the grounds of suspension and interruption of limitation periods were subject to the law of the court seized. The postponement of the start of the limitation period by reason of non-age in section 18(3) of the Prescription and Limitation (Scotland) Act 1973 fell within the meaning of a suspension or interruption such as envisaged by article 16(3) of the Convention. Since the claim had been submitted within the extended three-year time bar in article 16(3), it was not time-barred.

Lord Hodge gave the speech of the unanimous Supreme Court. He set out the aim of domestic as well as international law to interpret Conventions in such a way as to achieve uniformity. Here, the travaux préparatoires provided no assistance, leading to the question how uniformity in application was to be achieved. That being the case, His Lordship adopted the approach of declining to give the words "suspension or interruption" the technical meaning proposed by the vessel operators and derived from certain civil law systems. He noted

51 *Warner*, at para 9.
52 Ibid.

that the natural meaning of "suspension" included the postponement of the start of the limitation period, and that this was how some common law jurisdictions had perceived the provision. The word "suspension" as used in the Convention itself was not a term of art, at least not at the time it was adopted. Nor was there necessarily uniformity in how civil law jurisdictions interpreted the word.

Lord Hodge also noted the absurd effect that an eligible claimant who is a minor born before the adverse event would not benefit from suspension of the limitation period, whereas a claimant born after would benefit from a suspension from its date of birth.

Lord Hodge then went on to consider the argument that the natural meaning of the words "suspension or interruption" denoted a break in a period or course of events already in train. The vessel operators here relied on the Court of Appeal's judgment in *Higham v Stena Sealink Ltd*.[53] Lord Hodge agreed with that decision insofar as the court declined to exercise discretion on equitable grounds for an action for personal injuries under section 33 of the Limitation Act 1980. However, he disapproved of dicta to the effect that the meaning of "suspension" did not include postponement, reiterating his view that it did.

Secondly, in *Higham*, there were obiter dicta to the effect that only some of the grounds for extension of the time period present in the Limitation Act would operate under article 16(3) of the Convention. Sections including the words "prescribed by this Act" would not extend to the Athens Convention. Disapproving these dicta, Lord Hodge asserted that the reference in article 16 to the law of the court seized referred to any rule that the lex fori would apply to suspend or interrupt the period.

The Supreme Court adopted a pragmatic, open-ended approach to Convention interpretation. No technical meaning was read into its words. Although the provision in itself deals with procedure, deriving its meaning from the procedural laws of other jurisdictions, with their significant potential variations, was not the way forward. This pragmatic approach is clearly correct, in particular if one considers that drawn to its logical (but absurd) conclusion, discerning the technical meaning would entail an investigation into the domestic procedural law only of states participating in the convention negotiations, and its extant state in the early 1970s. It is noted that the disapproval of the dicta in *Higham* may represent an extension of the time bar in a significant number of cases otherwise subject to domestic limitation.

Two UK Court of Appeal decisions on the carriage of passengers emerged at the end of 2017, too late to be included in the 2017 edition of this Review. They concerned points of principle in relation to provisions of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 and assist in moving forward the law on carriage of passengers. The judge in both cases was Hamblen LJ. Issues decided include the meaning of disembarkation affecting the time bar, and the role of the contractual carrier and the performing carrier.

The facts in *Lawrence v NCL (Bahamas) Ltd (The Norwegian Jade)*[54] were that Mr Lawrence, the passenger, was on a holiday involving return air travel to Venice and a cruise departing from and returning to Venice. The contract was entered into with a travel agent. While on the cruise, the claimant left the cruise ship *Norwegian Jade* by boarding the tender *Ipapanti*, owned and operated by the Boatmen Union of Santorini, to be taken from the cruise ship to Santorini. On board the tender, he tripped and injured himself on a poorly marked step.

Before the Admiralty Registrar Mr Lawrence sought and won compensation from the defendant, contending that the incident had occurred during the course of international carriage, that the Athens Convention 1974 applied and that the defendant was at fault or in neglect under article 3 of the Convention. In a decision dated 6 May 2016,[55] the Registrar had held that Mr Lawrence's claim for damages for personal injury for negligence succeeded against the applicant

[53] [1996] 2 Lloyd's Rep 26; [1996] 1 WLR 1107.

[54] [2017] EWCA Civ 2222; [2018] 1 Lloyd's Rep 607.

[55] [2018] Lloyd's Rep Plus 27.

defendant in the sum of £5,197. The decision of Hamblen LJ determined the cruise ship operator's application of permission to appeal against this decision, the judge refusing permission to appeal. There were three points for consideration. The judge's conclusion was that the appeal had no real prospects of success on any of the three.

Lawrence v NCL and *Collins v Lawrence* concerned points of principle in relation to provisions of the Athens Convention 1974, and assist in moving forward the law on carriage of passengers

First, the cruise ship operator challenged the Admiralty Registrar's finding that it was the contractual carrier, arguing instead that the travel agent had contracted with the passenger as contractual carrier. The judge did not find that conclusion open to doubt – the travel agent had duly informed the passenger that it was acting as agent and that the contract was subject to the tour operator's terms and conditions. It was the defendant who provided booking confirmations, in copy to the travel agent and the guest. The booking conditions stated that for a booking made through a travel agent, a binding contract came into existence with the defendant when the travel agent received confirmation of the booking and a reservation number. This contractual documentation was unequivocal and factors noted by the cruise ship operator were of no importance – viz that the travel agent had advertised the holiday and arranged the booking as well as taken payment.

The reasoning on this point was not an in-depth scrutiny of the contractual relations between the parties. It is clear that Hamblen LJ like the other judges before him did not have much patience for an argument involving the carrier absolving itself of its duties as contractual carrier on spurious grounds such as a clause providing that "where you book cruise-only arrangements with a travel agent your contract may be with us or with the travel agent, depending on how your booking is made".[56]

The second point referred to the quoted provision from the Athens Convention above, article 1.8(a). The cruise ship operator's argument was that the close conjunction between the words "passenger and/or his cabin luggage" determined the words "in the course of embarkation or disembarkation", so that when Mr Lawrence left the ship for a day trip without his luggage, it was not a qualifying disembarkation. Embarkation and disembarkation, the cruise ship operator argued, meant the passenger and their luggage being moved simultaneously. The issue had not been considered before, and the judge was not impressed, mainly it appears on practical grounds: even on terminal embarkation and disembarkation, the passenger and their effects may not be moved simultaneously or in conjunction.

The judge held accordingly that the language seized upon by the cruise ship operator did not imply that for liability to arise when the passenger was being transported from the ship, the passenger had to be transported along with their luggage, as would be the case on terminal embarkation or disembarkation but not on intermediate trips.

Thirdly, the Admiralty Registrar had held that the Boatmen Union of Santorini, acting as performing carriers, were at fault or in neglect in that they should have placed an additional sign at eye level warning passengers of the potentially hazardous step. Hamblen LJ found no fault with this conclusion. The defendant as contractual carrier was accordingly also at fault or in neglect, either because it had taken no action itself or because it was answerable for the fault or neglect of the performing carrier. The narrow question of whether the marking of the step was sufficient was a factual one where the findings of the Admiralty Registrar would not be disturbed.

In *Collins v Lawrence*,[57] concerning the definition of disembarkation, the factual situation was rather different. The applicant claimant had been on a fishing trip on the vessel *Gary Ann* off the coast of Kent when he injured himself while leaving the vessel. In order to disembark, the practice was to winch the boat up onto the shingle beach. Disembarkation was via free-standing, semi-permanent steps onto the beach.

[56] *Lawrence* (CA) at para 19.

[57] [2017] EWCA Civ 2268; [2018] 1 Lloyd's Rep 603.

If the Athens Convention applied to the claim, it was time-barred: the accident had taken place on 14 November 2010 and court proceedings had been commenced on 25 September 2013, more than two years later. The application of the Convention depended on whether disembarkation had taken place, in which case the Convention – with its two-year time bar – had also ceased applying, or whether it was still in progress at the time of the accident. The judge at first instance[58] had found as a fact that the claimant slipped on a wet wooden board at the bottom of the stairs, that disembarkation had not been completed, that the Athens Convention accordingly applied, and that the claimant's claim was time-barred. The steps were a semi-permanent structure, at the foot of which was a wooden plank. Was disembarkation complete when the claimant stepped off the vessel onto the steps, or when he stepped off the steps onto the shingle beach? Hamblen LJ dismissed the appeal against that decision.

The key provision in the Athens Convention 1974 was the following, article 1.8:

> "'Carriage' covers the following periods:
>
> (a) With regard to the passenger and his cabin luggage, the period during which the *passenger and/or his cabin luggage* are on board the ship *or in the course of embarkation or disembarkation* and the period during which the passenger and his cabin luggage are transported by water from land to the ship or vice versa, if the cost of such transport is included in the fare or if the vessel used for the purpose or auxiliary transport has been put at the disposal of the passenger by the carrier. However, with regard to the passenger, carriage does not include the period during which he is in a marine terminal or station or on a quay or in or on any other port installation." (Emphasis added.)

The judge rejected comparisons with other equipment used for disembarkation, such as gangways, and with the Warsaw or Montreal Conventions. In his view, the county court judge had been correct to hold that the process of disembarkation covered the whole period of moving from the vessel to a safe position on the shore and while a person was still using equipment which facilitated disembarkation, such as the steps and board in this case, the person was still in the process of disembarking. In this case, disembarkation had not been completed until the claimant was ashore, which meant safely on the shingle beach. The claim was therefore time-barred.

58 [2017] 1 Lloyd's Rep 13.

CONTRACTS

Shipbuilding

Two cases concerned shipbuilding contracts; both against a fairly idiosyncratic backdrop of facts. In *Crystal Handy CSA and Another v Woori Bank*,[59] the context was an application for summary judgment by the defendant bank. The claimants (Crystal) were SPVs incorporated in Panama for the purpose of purchasing, on behalf of their parent Chang Myung, two cargo ships to be built by Orient. Advance payments were made, but having entered into an insolvency process, Orient nevertheless purported to terminate for non-payment. The claimants accepted this as a wrongful repudiation and sought to recover the advance payments made in the insolvency process. Recovery was allowed by the Korean court. The shipbuilding contracts required refund guarantees. These had been issued by the defendant bank to the claimants in identical terms. The guarantees provided for payment on demand, but also provided for a suspension of payment in the event of arbitration, until the award was finalised. Arbitration notices had been sent, but the arbitration had not progressed as the parties litigated effectively the same matter in the Korean courts.

When the arbitration did get under way, Crystal challenged the jurisdiction of the arbitrator on the basis of formal errors in the notice to arbitrate, including that it had been sent not by the receivers, but by a law firm on behalf of Orient itself; that it named the wrong defendant (Chang Myung instead of Crystal) and that it did not identify the dispute.

Crystal in this action sought a refund under the guarantee, whereas the bank asserted that the arbitration notice was sufficient to comply with the arbitration condition and no refund would be made until the arbitration was final, and sought summary judgment. The question was therefore whether Crystal had real prospects of success on its claim.

The judge dismissed the application for summary judgment and stayed the claim to allow the arbitration to run its course.

Based on the evidence in Korean law, the judge found that it was the receiver who had the authority to commence arbitration. If this was so, it was arguable that this defect went to the root of the conditions requirements which required notification from the builder. The capacity point was real and not fanciful. Furthermore, the condition would give rise to absurd results if arbitration was commenced, but never resulted in an award entitling Crystal to a refund.

The second case, *Sixteenth Ocean GmbH & Co KG v Société Générale*,[60] was a dispute under one of a bundle of shipbuilding financing agreements on the 1992 ISDA Master Agreement form, in particular an interest rate swap agreement entered into thereunder. The claimant was a shipping company incorporated in Germany but a wholly owned subsidiary of Islamic Republic of Iran Shipping Lines. Its contract for the construction of a newbuild (one of four, the other three of which were at a more advanced stage and did go ahead) had been terminated by the shipbuilder due to the imposition of sanctions affecting the group of companies and its ability to make payments. The defendant was the bank providing interest rate hedging under the swap. When the shipbuilding contract was terminated by the shipbuilder, the bank requested a termination payment under the swap, a payment made by Sixteenth Ocean into a suspense account on 14 December 2010. Sixteenth Ocean asserted that this payment was made subject to a reservation of rights and under economic duress and sought restitution of the monies paid. It also asserted that the payment ought to have been calculated as nil, because there was no payment obligation under the swap until the delivery of the vessel.

Société Générale asserted that the claims were time-barred, litigation having been commenced on 10 January 2017. Sixteenth Ocean's case was that the monies had been paid into the suspense account on 14 December 2010, but that they had been distributed to the lenders at a date later than 10 January 2011 and at that point appropriated; and that there was a continuing contractual obligation not to demand the wrongfully calculated termination payment.

[59] [2018] EWHC 1991 (Comm).

[60] [2018] EWHC 1731 (Comm); [2018] 2 Lloyd's Rep 465.

The judge granted Société Générale summary judgment, dismissing Sixteenth Ocean's claim. Sixteenth Ocean's cause of action in restitution based on unjust enrichment had accrued on 14 December 2010, when Société Générale received the termination amount, and in any event no later than 5 January 2011. Whether the monies had been received as agent or principal made no difference.

Société Générale's cause of action for damages for breach of contract accrued on 9 June 2010. That was the date on which the termination payment was calculated and demanded by Société Générale, and there was no continuing breach or successive breaches when the sum was demanded again.

Sixteenth Ocean could not rely on section 32(1) of the Limitation Act 1980 to postpone the start of the running of time. Section 32(1)(a) did not extend to claims based on any unconscionable conduct, even if not fraudulent or dishonest. Section 32(1)(b) required the deliberate concealment of a fact relevant to the claimant's right of action, but it was the date of receipt of monies on 14 December 2010 that was the relevant fact to the cause of action for unjust enrichment, and that was known to Sixteenth Ocean at an early stage.

Sale contracts

A few short, but diverse, points on sale contracts were decided in 2018.

Perhaps most centrally, in *PT Surya Citra Multimedia v Brightpoint Singapore Pte Ltd*,[61] the High Court of Singapore considered issues under the Singapore Sale of Goods Act (Cap 393, 1999 Rev Ed) which largely reflects the UK equivalent. The plaintiff, SCM, was the retailer and the defendant, Brightpoint, was the wholesaler under a sub-distributor agreement for the distribution of Blackberry mobile phones in Indonesia. The claims arose under price protection clauses in the agreement upon the reduction of retail process by the manufacturer of such phones. The purpose of the price protection clauses was to protect the sub-distributor in the event of such price reductions. There was also a counterclaim for damages by the defendant for the alleged failure by the plaintiff to pick up certain mobile phones according to its purchase orders. SCM argued that Brightpoint ought to have given notice before reselling the rejected mobile phones, and that it had failed to mitigate damages by rejecting SCM's offer to buy them at the prevailing market price.

The judge dismissed the plaintiff's claims under the price protection clauses and allowed the counterclaim for damages in part. The approach to determining whether time was of the essence depended on the type of clause and the type of contract. In mercantile contracts, there was the starting point that time was of the essence, but no presumption of fact or rule of law to that effect. As a result there was no reversal of the burden of proof under section 10 of the Sale of Goods Act. While the timing of delivery of goods was generally of the essence, the surrounding circumstances here, including the changeable delivery dates, showed that time of delivery was not of the essence in the present contract.

The judge went on to hold that SCM's contention that it was a pre-condition in law that the seller must give the buyer notice before re-selling the goods pursuant to section 48(3) of the Sale of Goods Act was mistaken. Requirement of notice in that section concerned the circumstances in which the seller could treat the contract as terminated and sell the goods in the event the buyer failed to pay for the goods. In the present case of non-acceptance of the goods, section 50 applied instead.

Finally, the seller must take all reasonable steps to mitigate the loss. The burden of proof was on the defaulting party to show that the post-breach actions were unreasonable. The focus should be on the aggrieved party's actions, rather than on the economic outcomes. While there was no rule relieving the aggrieved party from having to consider a post-breach offer from the defaulting party, Brightpoint's rejection of SCM's offer to buy at the prevailing market price was reasonable in the context of a strained business relationship.

61 [2018] SGHC 245; [2019] Lloyd's Rep Plus 33.

The sale of a container of shrimp gone badly wrong was at issue in *Solea International BVBA v Bassett & Walker International Inc*.[62] The shrimp had been shipped by Solea CIF Manzanillo but was not accepted by BWI at the discharge port, and was therefore returned by Solea to Ecuador. There was no evidence as to what had happened to it subsequently. The Superior Court of Justice of Ontario had granted Solea summary judgment in December 2016, but on appeal the Court of Appeal directed the court to rehear Solea's two motions for summary judgment applying the provisions of the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG).

BWI resisted summary judgment, arguing that it was a fundamental term that a health certificate should be provided guaranteeing that the shrimp were free of certain diseases; that Solea had failed to act reasonably in mitigating damages under the relevant CISG provisions; and that there was an estoppel on the basis of Solea's representation that they would accept return of the order and unjust enrichment as a result of Solea's sale of the goods to a third party leading to double payment. Having considered these defences, the judge granted summary judgment to Solea. Under article 49 of the CISG, reliance on a flawed health certificate to support a fundamental breach would have required BWI to declare the contract avoided. There was no evidence that BWI had done so, and a finding would be made accordingly. BWI's duty to pay for the shrimp was established by article 53 of the CISG.

BWI's further argument that there was a new agreement whereby title would be re-conveyed to Solea in satisfaction of BWI's obligation to pay for the shipment and in consideration for giving Solea future business was rejected. Nor was the return of the shrimp a step taken by Solea in mitigation of damages. Under the CISG, mitigation was not relevant to Solea's claim for the purchase price, but would only have been relevant to a claim for damages under articles 74 to 77. There was no evidence of assurances by Solea that BWI would not have to pay the purchase price and there was therefore no estoppel. Rather, the evidence supported the conclusion that BWI was unable to pay storage and demurrage and that that was the basis on which it agreed to the removal of the container.

The question of demurrage rates in sale contracts came up for decision in *Glencore Energy UK Ltd v OMV Supply & Trading Ltd*.[63] Glencore was the seller and OMV the buyer of Siberian light crude oil under a CFR contract from Novorossiysk in Russia to Augusta in Italy. The contract provided for laytime and demurrage at the charterparty rate and was generally on the 2007 edition of BP Oil International Ltd's General Terms and Conditions for Sales and Purchases of Crude Oil. The charterparty between Glencore and ST Shipping was on the BPVOY4 form and stipulated that demurrage claims must be made within 90 days from the discharge of the cargo and had to have documentary support. The port of Trieste was congested and the vessel arrived at a waiting area in the Mediterranean on 17 November 2015, and gave notice of readiness to discharge. Discharge took place on 13 and 14 December 2015.

The shipowners claimed against Glencore under the charterparty for detention for the time spent at the waiting area. On 19 September 2016 Glencore sent OMV a documented invoice for demurrage. It was rejected the next day on the basis that it concerned detention, not demurrage. Glencore's primary case was that an implied contract came into being as a result of its acquiescence to OMV's request that the vessel wait in the Mediterranean for berthing. OMV's case was that the waiting time fell to be treated as part of a laytime and demurrage calculation under the sale contract, or under a variation thereof as a result of the request to wait, and was therefore time-barred after 90 days.

The judge held that Glencore was entitled to compensation at the demurrage rate and for bunkers consumed. What had happened did not fit within the terms of the sale contract. It did not contemplate that laytime could run in the middle of the carrying voyage. The charterparty terms were not a part of the sale contract. Notice of readiness under the sale contract was a notice to load or discharge at the loading port or discharge port,

62 2018 ONSC 4261; [2019] Lloyd's Rep Plus 12.

63 [2018] EWHC 895 (Comm); [2018] 2 Lloyd's Rep 223.

not for a waiting period. Nor was this a variation of the sale contract. The amendments necessary to the sales contract and the BP Terms would be substantial, and were not necessary to give business reality to what had been agreed to by 17 November 2015. However, an implied contract came into effect on 17 November 2015 to the effect that the vessel would wait in the specified waiting area for further orders, and Glencore would be remunerated. The rate to be applied was the demurrage rate. OMV had on 13 November requested the demurrage rate and Glencore had provided it. OMV had by its conduct accepted that rate. OMV had also requested that bunkers be recorded on arrival to and departure from the waiting area.

> Words of general incorporation in a sales contract, incorporating demurrage provisions from a charterparty, do not carry with them the incorporation of terms ancillary to the accrual of demurrage, such as time bars relating to the presentation of demurrage claims

Demurrage was yet again the issue in *Gunvor SA v CruGas Yemen Ltd and Another*.[64] The case concerned several shipments of gasoline under a term contract for 12 monthly shipments CIF Hodeidah in Yemen. The claimant performed the contract using vessels sourced from various shipowners by Clearlake, a related company. Those contracts, and the term contract, provided for laytime and demurrage. Under varying circumstances, largely attributable to late payment of contractual sums and problems with deliveries at the discharge port, large sums of demurrage had accrued, which Gunvor sought to recover from the defendant.

The judge held that words of general incorporation in a sales contract, incorporating demurrage provisions from a charterparty, did not carry with them the incorporation of terms ancillary to the accrual of demurrage, such as time bars relating to the presentation of demurrage claims. There was no need to imply a term requiring the claimant to prove that demurrage rates reflected the market; but in any event the claimant had offered satisfactory evidence to that effect. The entitlement to demurrage under the term contract was free-standing and not an indemnity. The claimant was not required to prove that it had incurred and paid demurrage to Clearlake.

As reported previously,[65] the Canadian *Canpotex* litigation – an OW Bunker insolvency-related case – represents a rare success for a physical supplier of bunkers in getting paid in the context of the insolvency of intermediate bunker sales contracting. The decision in *Canpotex Shipping Services Ltd and Others v Marine Petrobulk Ltd and Others*[66] sheds interesting light on words used perhaps casually in contract drafting. In *ING Bank NV and Others v Canpotex Shipping Services Ltd and Others*,[67] the Federal Court of Appeal had allowed the appeal of ING and referred certain issues back to the judge. As a result of that decision, the judge now reconsidered 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" (emphasis added).

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.

64 [2018] EWHC 2061 (Comm); [2019] Lloyd's Rep Plus 34.

65 See "Maritime law in 2017: a review of developments in case law".
66 2018 FC 957; [2019] Lloyd's Rep Plus 8.
67 2017 FCA 47; [2017] 2 Lloyd's Rep 270.

Letters of indemnity

Letters of indemnity are key to the timely delivery of the cargo where the bill of lading is unavailable, but judicial decisions are relatively rare. Decisions in the first[68] and second[69] instances of *The Songa Winds* in 2018 contribute to the canon, complemented by a short point in the *Thor Commander* case.[70]

The facts of *The Songa Winds* were that a cargo of sunflower seed oil, sold by charterers Glencore to Aavanti, was delivered to Aavanti's buyer Ruchi Agritrading (Pte) Ltd without production of the bills of lading. Ruchi was the notify party under the bills of lading. It had taken delivery of the 6,000 mt of sunflower seed oil at two different ports against letters of indemnity from Aavanti to Glencore, requesting delivery to Ruchi or such party as Glencore reasonably believed to be acting on behalf of Ruchi.

LOIs were also issued by Glencore to Navig8 and by Navig8 to Songa, the carrier. These LOIs specified delivery to Aavanti or a party reasonably believed to be acting on behalf of Aavanti. All LOIs were on the International Group of P&I Clubs standard form. The litigation concerned Navig8's liability to Songa and Glencore's liability to Navig8 under their respective LOIs. Songa and Navig8 requested summary judgment against their respective counterparties on the basis that the LOIs had been triggered when delivery took place to Ruchi. Glencore resisted summary judgment on the basis that the evidence did not establish that, in taking delivery of the sunflower seed oil, Ruchi represented or acted on behalf of Aavanti.

At first instance,[71] Andrew Baker J held that if delivery to Aavanti could be effected by delivery to Ruchi, as Aavanti's LOI to Glencore suggested, then it was simply a question of fact as to Ruchi's role. Aavanti had not been paid, but there was contemporaneous evidence that between those parties prior payment was not necessarily the practice. As a result, the facts pointed to Ruchi having claimed delivery of the cargo on behalf of Aavanti. The judge also considered, obiter and on the assumption that Ruchi had *not* taken delivery on behalf of Aavanti, that the reference in the standard form LOI to a "belief" that the actual recipient was acting on behalf of the intended receiver meant the belief of the person by whom the delivery in question was made, namely the carrier acting by the master.

The judge also held that Glencore could not escape liability under the LOI on the basis of clause 38 of the voyage charterparty, which required claims to be presented within three months. Glencore appealed this part of the judge's decision to the Court of Appeal.[72] The argument was not based on incorporation, as there was no mention of the voyage charter in the LOI. Glencore's argument was that clause 38 of the charterparty – stipulating that any release of cargo without production of the bills of lading was to be against LOIs valid for three months – must be read into the LOIs. The Court of Appeal dismissed the appeal, reasoning that the LOI was to be regarded as a self-contained, distinct agreement designed to be relied on by third parties, who would be unaware of and unable to discover an unexpressed collateral term from a charterparty. The terms of the chain of LOIs issued were back-to-back and while Glencore had been entitled by the charterparty to insist upon the inclusion of a time limit, it had not.

Several factors in the genesis of LOIs have always been judicially held to point strongly to a literal, non-technical interpretation. Thus they are usually made on the International Group standard form and therefore highly standardised, not least to be able to operate back-to-back in a chain of LOIs. They are quickly negotiated contracts of an international nature and should therefore not be given an idiosyncratic interpretation based on domestic law. That position was confirmed in both instances of this case. The first instance decision is

68 *Songa Chemicals AS v Navig8 Chemicals Pool Inc; Navig8 Chemicals Pool Inc v Glencore Agriculture BV (The Songa Winds)* [2018] EWHC 397 (Comm); [2018] 2 Lloyd's Rep 47.

69 *Navig8 Chemicals Pool Inc v Glencore Agriculture BV (The Songa Winds)* [2018] EWCA Civ 1901; [2018] 2 Lloyd's Rep 374.

70 *Mount Isa Mines Ltd v The Ship "Thor Commander"* [2018] FCA 1326; [2019] 1 Lloyd's Rep 167, discussed above.

71 *The Songa Winds* [2018] EWHC 397 (Comm); [2018] 2 Lloyd's Rep 47.

72 *The Songa Winds* [2018] EWCA Civ 1901; [2018] 2 Lloyd's Rep 374.

also of interest in giving the carrier a good measure of latitude in exercising its judgment in delivering the cargo to a party that presents itself at the discharge port.

In *The Thor Commander*,[73] the question arose whether the letter of indemnity supplied by Mount Isa, the cargo owner, to the shipowner MarShip in return for partial discharge of the cargo without production of the bill of lading prevented Mount Isa from recovering transhipment costs from Gladstone, the port to which *Thor Commander* had been towed, to Townsville, the intended destination of the cargo. The judge held that Mount Isa was not prevented by the terms of the letter of indemnity from recovering such costs. The transhipment costs were incurred because the ship was in Gladstone, not Townsville, and when discharge would eventually take place at Townsville there would be a shortfall. The purpose of the letter of indemnity was to protect against wrongful delivery to third parties, which did not include Mount Isa. The latter was mitigating its costs by taking delivery.

MARINE INSURANCE

Marine insurance decisions were delivered by the UK Supreme Court, the Court of Appeal and High Court in the year, with more set to come in the near future.

The Supreme Court decision was that in *Atlasnavios-Navegação Lda v Navigators Insurance Co Ltd and Others (The B Atlantic)*.[74] The facts in the case were that the vessel *B Atlantic*, insured under a war risks policy on Institute War and Strikes Clauses Hulls – Time (1/10/83) terms, had been detained and then confiscated by Venezuelan authorities after drugs were found attached to the hull under the waterline. The Court of Appeal had held[75] that the drugs were concealed there by smugglers, and therefore in principle covered as a loss resulting from persons acting maliciously (under clause 1.5 of the policy). However, there was also an exclusion in the policy for detainment by reason of infringement of customs regulations (clause 4.1.5) and on the usual policy interpretation, exclusions prevailed over risks covered. The shipowners' appeal to the Supreme Court was based on the interpretation of the policy. It was argued that clause 1.5 concerned malicious acts by third parties, and that it was therefore not cut back by the exclusion referring to customs infringements in clause 4.1.5.

In the hearing of the shipowner's appeal, the Supreme Court took the unusual step of asking the parties for further submissions on the meaning of the words "malicious acts", found in the policy. Their Lordships thought that the common ground between the parties that malicious acts were necessarily acts by third parties was in error and wished to consider the point. Having received further submissions, the Supreme Court ruled that smuggling did not amount to conduct of third parties "acting maliciously". Essentially, there must be a mental element of spite or ill-will to the property insured, other property or a person, and consequential loss of or damage to the insured vessel or cargo. Where the state of mind of spite, ill-will or the like was absent, it could not be a malicious act. Here, the smugglers did not intend for the

[73] [2018] FCA 1326; [2019] 1 Lloyd's Rep 167.

[74] [2018] UKSC 26; [2018] 2 Lloyd's Rep 1.

[75] [2016] EWCA Civ 808; [2016] 2 Lloyd's Rep 351.

drugs to be discovered and as a result for the vessel to be confiscated; quite the contrary. This therefore did not qualify as a malicious act. The judgments in *Strive Shipping Corporation v Hellenic Mutual War Risks Association (The Grecia Express)*[76] and *North Star Shipping Ltd v Sphere Drake Insurance plc (The North Star)*[77] were read down accordingly: they did not support a broader interpretation of the concept of "persons acting maliciously".

This was not a case where the attempted smuggling could be regarded as having been aimed at the detention or constructive total loss of or any loss or damage to the vessel or any property or person. Under Venezuelan law, the smuggling was no doubt itself a wrongful act done intentionally without just cause or excuse. But the smugglers were not intending that any act of theirs should cause the vessel's detention or cause it any loss or damage at all. They were therefore not acting maliciously within the meaning of clause 1.5, which did not cover the present circumstances.

As a result, the appeal was dismissed, but the Supreme Court also took the opportunity to consider the interpretation of clause 4.1.5. First, in contrast to what owners had argued, clause 4.1.5 did provide an exclusion to clause 1.5, not only to the clauses to the wording of which they corresponded. Nor was clause 4.1.5 to be read down to be inapplicable where the only reason why there had been an infringement of the customs regulations by the vessel was because of the malicious acts of third parties. Finally in relation to causation, the Supreme Court held that where the act constituting the customs infringement was also the malicious act, there was no room for arguing that the malicious act took precedence in causative terms.

An interesting point on the timing of the notice of abandonment was considered by the Court of Appeal in *Connect Shipping Inc and Another v Sveriges Angfartygs Assurans Forening (The Swedish Club) and Others (The Renos)*.[78] Permission to appeal to the Supreme Court was subsequently granted.[79]

On 23 August 2012 a fire broke out in the engine room of *MV Renos* while she was off the Egyptian coast in the Red Sea and was laden. The damage to the vessel was significant. The claimants were the owners and managers of the vessel and the defendants were insurers under hull and machinery policies. The insured value was US$12 million. The defendant insurers represented 85 per cent of the risk between them, the remainder having been settled by another insurer. The Swedish Club was the lead insurer and had also, alone, insured *Renos* under an increased value policy. The increased value under this policy was US$3 million.

It was common ground that the casualty was an insured peril under the policies and that the owners were entitled to be indemnified in respect of their loss. However, there was a dispute concerning the measure of indemnity. The owners contended that they were entitled to be indemnified on a constructive total loss (CTL) basis, having given notice of abandonment to the insurers on 1 February 2013. The insurers for their part contended that the owners were entitled to be indemnified on a partial loss basis. Besides the insurers' argument that the notice of abandonment was given late, there was also a question as to what costs were to be included in the calculation of the CTL. Section 60 of the Marine Insurance Act 1906 provides that a CTL is at hand when the costs of repair exceed the repaired value of the vessel.

At first instance,[80] Knowles J gave judgment for the shipowners, considering that owners had been entitled to give notice of abandonment when they did, and that the notice of abandonment so given had been effective. Considering the amount of expenses to be calculated and the insured value of the ship (as per the contract), the vessel had been a CTL. The Court of Appeal held a similar line, noting that the assured had not elected *not* to abandon the vessel. There was no failure in reasonable diligence arising from the time lag between the incident and the formal notice of abandonment.

76 [2002] EWHC 203 (Comm); [2002] 2 Lloyd's Rep 88.
77 [2005] EWHC 665 (Comm); [2005] 2 Lloyd's Rep 76.
78 [2018] EWCA Civ 230; [2018] 1 Lloyd's Rep 285.
79 For the details available on the appeal, see in the following and under *Looking ahead*, at page 36, below.
80 [2016] EWHC 1580 (Comm); [2016] 2 Lloyd's Rep 364.

As for the costs to be included in the calculation of the costs of repair, the Court of Appeal overruled previous authority to the effect that only costs incurred *after* the notice could be included in the calculation.[81] The salvage costs incurred early on could therefore be included.

As noted, the Supreme Court has given permission to appeal in this case. There are no formal requirements on a notice of abandonment, simply the requirement to clearly convey the intention to abandon. The difference between a partial loss and a (constructive) total loss is the measure of indemnity, which in this case was substantial. The Marine Insurance Act 1906 section 62(3) provides that notice of abandonment must be given with "reasonable diligence" after the receipt of "reliable information" of the loss, but where the information is of a doubtful character the assured is entitled to a "reasonable time" to make inquiry. The judge made findings of fact as to the information available at first instance, but the question on appeal is as to whether the information identified qualifies as "reliable information of the loss" under section 62(3).

It is perhaps surprising that this issue has not come up for judicial interpretation sooner. The recorded cases are exclusively from the pre-steam, pre-telegraph era of the 18th and 19th centuries. With that in mind, it seems likely that interpretation of the provision needs to be updated for the modern era with immediate communications and asbestos-coated steel vessels. On the one hand, the section does need to be updated for modern, more complex, repair-worthy and safer vessels; on the other, the speed of modern communications means that the first notice of a loss is based on solid information and not word of mouth of the vessel's delayed arrival at some distant port.

Engelhart CTP (US) LLC v Lloyd's Syndicate 1221 for the 2014 Year of Account and Others,[82] turned on the interpretation of a cargo policy. A trader bought and on the same day sold a cargo of copper ingots cif China but when opened in Hong Kong the containers were found to contain slag of nominal value. All the documentation was fraudulent: bills of lading, packing lists and quality certificates. The receiver in China refused to pay and the trader claimed from the insurer under the Marine Cargo and Storage policy. The cover extended to "shortage and/or difference in weight and/or difference in volume as is appropriate howsoever arising". There was also a Container Clause, para 1 of which stated that the seaworthiness of containers was admitted. Paragraph 2 stated that the insurance was "also" to pay for shortage of contents notwithstanding that seals appeared intact.

> Sanctions have been a blight on trade over the years, preventing some payments for legitimate transactions and potentially being used opportunistically in defending claims

Affirming past case law on non-existent cargoes, the judge held that insurers were not liable to pay. Marine cargo policies covered loss of or damage to property, not non-existent property. The losses were economic losses due to the acceptance of fraudulent documents. The "shortage" wording in the risks was not sufficiently broad to expand the scope of the policy to such losses. As for para 2 of the Container Clause, it merely served to qualify para 1 and was not directed at extending cover to paper losses. The Fraudulent Documents Clause only covered physical losses incurred through the acceptance of fraudulent documents and not the present situation.

Sanctions have been a blight on trade over the years, preventing some payments for legitimate transactions and potentially being used in an opportunistic manner in defending claims. In *Mamancochet Mining Ltd v Aegis Managing Agency Ltd and Others*,[83] the question arose of the interpretation of a sanctions clause in a policy against the risk of theft of the cargo. Essentially, the clause negated cover and liability in the event

81 *Helmville Ltd v Yorkshire Insurance Co Ltd (The Medina Princess)* [1965] 1 Lloyd's Rep 361.
82 [2018] EWHC 900 (Comm); [2018] 2 Lloyd's Rep 24.
83 [2018] EWHC 2643 (Comm); [2018] 2 Lloyd's Rep 441.

payment thereunder "would expose" the insurer to restrictions or sanctions under US or EU law. The cargoes of steel billets had been placed in bonded storage upon arrival in Iran and were stolen by presentation of fraudulent documents. This happened at some time between 22 September 2012 and 7 October 2012. On 9 March 2013 sanctions entered into force in the US which would have prevented payment of the claim. A window for trading with Iran under licence was revoked on 8 May 2018 so that no claim could have been paid after 5 November 2018 (the judgment date was 12 October 2018). It was common ground that under the EU sanctions, payment could not have taken place from 21 December 2012 to 16 January 2016, but could take place thereafter. The claimants argued that the sanctions did not apply, and that those defendants that were incorporated within the EU were not to comply with US sanctions.

As it happened, the judge's determination of the case rested more upon the policy wording than upon the interpretation of the sanctions regimes themselves. He said that per the policy wording, a risk of being exposed to sanctions was not sufficient. The policy used the words "would expose [the insurer] to any sanction", as opposed to a simple reference to a *risk* of exposure. As a result, the insurers were required to establish, on the balance of probabilities, that payment would put them in breach of the applicable sanctions and thus would lawfully expose them to sanction. On the evidence of US law, the insurers had no defence to payment before 5 November 2018. Generally, the effect of the sanctions clause was not to extinguish liability but to excuse the insurers from making payments that would expose them to sanctions. Where liability was suspended, non-payment was simply in reliance on the policy terms, and the EU Regulation was not engaged.

For the facts of *Griffin Underwriting Ltd v Varouxakis (The Free Goddess)*,[84] see under *General Average* below. The judge considered, obiter, the meaning of "matters related to insurance" in the Recast Brussels Jurisdiction Regulation (EU) No 1215/2012. The claimant, a subrogated insurer, would in the ordinary course have had a claim for a general average contribution against the bill of lading holders and under average guarantees issued by cargo insurers prior to the delivery of the cargo at the discharge port. A settlement agreement concluded between the claimant and the shipowners and managers of the vessel subrogated claimants to the rights of the latter in general average or at common law. However, this presupposed performance of the bills of lading contracts but the delivery of the cargo never took place due, the claimant argued, to the breaches induced by the defendant. Instead, the vessel was sold and bareboat-chartered back, destroying the shipowner's possessory lien over the cargo for general average. An arbitration in London between the bill of lading holders and the shipowner resulted in various orders against the shipowner, which were not complied with.

When the present action for inducing or procuring breaches of the settlement agreement was commenced, Varouxakis acknowledged service but indicated an intention to contest jurisdiction. Judgment in default was sought on 1 May 2018, whereupon the jurisdiction of the court was challenged. The judge ruled, obiter in view of the conclusion on extension of time, that the fact that the claimant was an insurer was mere background, and that where the claims were not in themselves insurance-related they did not qualify as matters of insurance.

Inter-Club Agreement

The Inter-Club Agreement is an important mechanism for settling losses on a mechanical basis. This can preserve business relationships and more importantly permits speedy settlement of claims. Not so in *Agile Holdings Corporation v Essar Shipping Ltd (The Maria)*,[85] the arbitration award which went on appeal to the High Court. Agile was the owner and Essar was the charterer of the vessel *Maria* under a one-trip time charter for a cargo of direct reduced iron ("DRI") from Tunisia via Trinidad to India. The DRI was on fire from Trinidad onwards and upon discharge, Agile commenced arbitration proceedings seeking a declaration that it was entitled to indemnification from Essar for

[84] [2018] EWHC 3259 (Comm); [2019] Lloyd's Rep Plus 35.

[85] [2018] EWHC 1055 (Comm); [2018] Lloyd's Rep Plus 79.

any liability it might have to cargo interests. The charterparty provided for disputes to be settled in accordance with the Inter-Club New York Produce Exchange Agreement ("ICA"), which in relation to cargo claims arising out of loading, stowage etc provided that they should be apportioned 100 per cent to charterers; unless the words "and responsibility" were added, or there was "a similar amendment making the master responsible for cargo handling", in which case the apportionment should be 50/50. The question was if clause 49 of the charterparty, entitled "Stevedore Damage", was "a similar amendment". It dealt with stowage, but not loading. The tribunal had found that it was and split liability 50/50.

> The Inter-Club Agreement is an important mechanism for settling losses on a mechanical basis. This can preserve business relationships and more importantly permits speedy settlement of claims

HHJ Waksman QC allowed the appeal of the shipowners, with the effect that liability should be apportioned wholly to the charterers. The ICA aimed for an expedited, simplified approach to distribution of liability between the parties, by allocation of 100 per cent or at a 50/50 ratio. The words "similar to" were intended to connote a provision in the charterparty which was of the same kind or to the same effect as the addition of the words "and responsibility", but without repeating the words "and responsibility". In context, this must mean a *full* transfer of responsibilities for cargo handling to the owner. A partial transfer resulted in apportionment to charterers. As clause 49 dealt with stowage only, not loading etc, it was only a partial transfer of responsibility and therefore not a "similar amendment".

GENERAL AVERAGE

In contrast to the rich crop of general average cases in 2017, only two short points on general average were decided in 2018.

In *Mount Isa Mines Ltd v The Ship "Thor Commander"*,[86] the judge found that the vessel was unseaworthy: there had been a failure to exercise due diligence before and at the beginning of the voyage on the part of the carrier, who had failed to replace the fuel injection nozzles and clean the fuel injection valves. As a result of this finding, Mount Isa had a remedy in general average under the exception to Rule D of the York Antwerp Rules, incorporated by the bill of lading. They could recover substantial damages equal to the amount of any contribution in general average.

In *Griffin Underwriting Ltd v Varouxakis (The Free Goddess)*,[87] a short point on general average was decided obiter. The facts relevant to the point were that in February 2012, while carrying a cargo of rolled steel coils from Egypt to Thailand under bills of lading issued in January 2012, *MV Free Goddess* was seized by pirates and taken to Somalia. She was eventually released and taken to Oman, arriving in October 2012. General average was declared. The claimant had paid out under the insurance policy as a result of the hijacking and would in the ordinary course have had a claim for general average contribution against the bill of lading holders and under average guarantees issued by cargo insurers prior to the delivery of the cargo at the discharge port. However, the vessel was abandoned by the owners in Oman, to the extent that the seafarers on board were left reliant on humanitarian aid.

A settlement agreement concluded between the claimant and the shipowners and managers of the vessel subrogated claimants to the rights of the latter in general average or at common law. However, this agreement presupposed performance of the bills of lading contracts and the delivery of the cargo never took place due, the claimant argued, to

[86] [2018] FCA 1326; [2019] 1 Lloyd's Rep 167.
[87] [2018] EWHC 3259 (Comm); [2019] Lloyd's Rep Plus 35.

the breaches induced by the defendant. Instead, the vessel was sold and bareboat-chartered back, destroying the shipowner's possessory lien over the cargo for general average.

An arbitration in London between the bill of lading holders and the shipowner resulted in various orders against the shipowner, which were not complied with. Obiter, due to the judge's ruling on the jurisdiction issue, the judge also considered that the general average claim had been lost when the voyage was abandoned in Oman, so that the place where the damage occurred was not England as it might have been if general average contributions had become due in London. At that time, the general average adjustment then became pointless.

ADMIRALTY

Admiralty liabilities

Admiralty claims considered by the courts included two collision cases from Singapore and England and Wales, as well as one from New Zealand on the wages of fishing crews.

The Tian E Zuo[88] concerned a double collision that took place on 12 June 2014: the plaintiff's vessel *Arctic Bridge* and the defendant's vessel *Tian E Zuo* had both collided with *Stena Provence*, a vessel at anchor. The collisions resulted from anchor dragging, entanglement and involuntary towage. The parties had jointly settled the claims concerning damage to *Stena Provence* without prejudice to their rights as against each other. They then claimed and counterclaimed, both parties arguing that the other was wholly to blame for the damage.

The judge divided responsibility for the collision equally between the two parties. There had been serious faults in respect of both vessels. The blameworthiness and causative potency of those faults led to an apportionment of blame of 50:50. She first considered the application of the "but for" test, holding that it was insufficient where, as here, there were multiple causes arising from the faults of both parties. The "but for" test was concerned with factual causation, but there was a further need to establish legal causation. This case did not involve a single continuous chain of events that stemmed from *Tian E Zuo*'s initial negligence.

Considering the facts of the collision, the judge assessed the decision of *Arctic Bridge* to stop her engines for two minutes as a serious fault and a breach of rule 8(d) of the International Regulations for Preventing Collisions at Sea 1972 (COLREGS), which had created the close-quarters situation. The failure to appreciate that the vessel was dragging *Tian E Zuo* and to observe the situation was also a fault. The fault amounted to a breach of rules 5 and 7 of COLREGS. *Arctic Bridge*'s defence of "agony of the moment" against the counterclaim could arise

[88] [2018] SGHC 93; [2018] 2 Lloyd's Rep 297.

only out of situations involving faults by the other vessel, but in the relevant time period there were no relevant faults.

Tian E Zuo had been busy observing the developing situation in regards to two other vessels to her stern and had failed to appreciate the developing situation with *Stena Provence*. This was a breach of rules 5 and 7. During the involuntary towage, *Tian E Zuo* was to be regarded as a vessel under way, not a vessel at anchor. The judge here followed *The Foreric*[89] and *The Palembang*.[90]

A rare appeal in a collision case was dismissed in *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and Ever Smart)*.[91] The case concerned the choice between the crossing rule and the narrow channel rule in the COLREGS, as amended. The collision took place just outside the dredged channel by which vessels enter and exit the port of Jebel Ali on 11 February 2015 between a laden VLCC, *Alexandra 1*, owned by Nautical Challenge Ltd, a company registered in the Marshall Islands; and a laden container vessel, *Ever Smart*, owned by Evergreen Marine (UK) Ltd, a company registered in the UK. *Alexandra 1* was about to enter the narrow channel; *Ever Smart* was in the channel, outward bound. The collision took place at night but there was a clear sky and good visibility. The damage to both vessels was considerable.

At first instance,[92] the judge held inter alia that the narrow channel rule applied rather than the crossing rules, making *Ever Smart* the give-way vessel. The Court of Appeal dismissed the appeal of the owners of *Ever Smart*, holding that the judge had been right that the crossing rules were inapplicable to the situation and that the narrow channel rules applied. Also of interest is the court's observation that the mere fact that *Alexandra 1* was waiting in the pilot area did not make her a vessel restricted in her ability to manoeuvre.

The judgment in *Mount Isa Mines Ltd v The Ship "Thor Commander"*,[93] considered above, also resolved an issue related to salvage. Following the engine breakdown on 13 January 2015, when the vessel was drifting towards the Great Barrier Reef, salvors were engaged. However, in view of the urgency of the situation, the Australian Maritime Safety Authority (AMSA) also issued a notice requesting vessels to assist. Without entering into a LOF, the capesize *Xinfa Hai* assisted by towing the vessel away from the reef for five hours until salvors could get there. The question arose whether the AMSA notice affected the status of *Xinfa Hai* as a volunteer. The judge ruled that *Xinfa Hai* was indeed a volunteer in relation to *Thor Commander*, in spite of the direction issued by AMSA. Her actions were undertaken to assist a vessel in danger and therefore qualified as salvage operations. Considerable skill and effort had been deployed by the crew of *Xinfa Hai* and there was an element of risk. The total salved value was US$70 million, of which about 10 per cent vessel and 90 per cent cargo value. An overall salvage award of US$1 million would have been appropriate and Mount Isa was entitled to damages of US$909,000 out of the salvage settlement.

Navigator Spirit SA v Five Oceans Salvage SA (The Flag Mette),[94] concerned some arbitration issues in the context of a LOF salvage arbitration. The arbitrator's award, in which the risk of collision as a cause for salvage was rejected, was appealed to the Lloyd's appeal arbitrator and reversed. That award was in turn appealed to the court on the basis that the appeal arbitrator had allowed the salvors' appeal on grounds which were not part of the grounds of appeal. The appeal arbitrator had posited an alternative scenario to the parties, had allowed the appeal and determined the award on that basis. In considering the issue whether this was a serious irregularity the judge commented on the particularities of LOF arbitration. He noted that these are more informal in character than other arbitrations, and that:

> "As a result of the relative lack of formality and the expectation that the arbitrator or arbitrator on appeal will form his or her own views of the

89 (1926) 24 Ll L Rep 329.
90 (1929) 34 Ll L Rep 107.
91 [2018] EWCA Civ 2173; [2019] 1 Lloyd's Rep 130.
92 [2017] EWHC 453 (Admlty); [2017] 1 Lloyd's Rep 666.
93 [2018] FCA 1326; [2019] 1 Lloyd's Rep 167.
94 [2018] EWHC 1108 (Comm); [2018] 2 Lloyd's Rep 391.

> matters in issue based upon his or her own experience, knowledge and understanding of maritime matters counsel have to be prepared to deal with points raised by the arbitrator or appeal arbitrator which may not have been raised by his opposing counsel."[95]

The judge concluded that given these characteristics of LOF arbitration, the conduct of the appeal arbitrator did not qualify as a serious irregularity.

In *Hartono and Others v Ministry for Primary Industries and Another*,[96] the Supreme Court of New Zealand was asked to consider the forfeiture of vessels under the Fisheries Act 1996. Sajo Oyang Corporation of South Korea owned and operated the fishing vessels *Oyang 70*, *Oyang 75* and *Oyang 77*. The vessels fished in New Zealand's exclusive economic zone (EEZ) under charter to Southern Storm Fishing (2007) Ltd, a New Zealand company. *Oyang 70* sank on 18 August 2010 and *Oyang 75* and *Oyang 77* were later forfeited to the Crown as a result of convictions for offences against the Fisheries Act 1996. Southern Storm Fishing became insolvent. The forfeiture regime under the Fisheries Act provided for relief to be sought by those who could establish an "interest", as defined by section 256 of that Act, in forfeited property. Applications for relief were filed by 26 crew members for unpaid wages in respect of the forfeiture of the two vessels.

The claims were resisted to the extent that the wages were earned on other vessels or were founded on statutory liens in respect of which no proceedings had been issued before forfeiture, but were accepted insofar as they were based on maritime liens. The Fisheries Act provided that property forfeited to the Crown vested in the Crown absolutely and free of all encumbrances. Forfeit property could, among other options, be delivered to someone with a property interest therein, with or without directions as to payment of a sum of money, but this only applied to property interests.

The Supreme Court allowed the fishermen's appeal. Subsection 256(b)(ii) of the Fisheries Act would be interpreted so as to mean that eligible claims included statutory claims in respect of which proceedings had not been commenced before the forfeiture and concerning wages earned on sister ships of vessels, including foreign-owned fishing vessels. This was supported by the purpose behind the amendment to section 256.

This was a satisfying outcome to those of us who consider that payment to seafarers and crew should be considered a priority for the courts. It is not stretching the imagination to hold that the legislator is deemed to be mindful of the vulnerable position of crews, who are essential to maritime activities and exposed to dangers and hardships even without the iniquity of going unpaid.

Admiralty procedure

A central admiralty case in a relatively rich field in 2018 was the Court of Appeal's decision in *Natwest Markets plc (formerly known as The Royal Bank of Scotland plc) v Stallion Eight Shipping Co SA (The MV Alkyon)*, considering the release from arrest of *MV Alkyon*.[97] The case was decided at first instance by Teare J on 31 July 2018,[98] and by the Court of Appeal on 11 December 2018.

The claimant bank had in 2015 lent US$15,700,000 to the defendant owner of the vessel against the security of a mortgage on the vessel. In March 2018 the bank notified the shipowner that the value-to-loan ratio exceeded the amount of the loan and that additional security was required or else there would be an event of default. The shipowner disputed the valuation and the loan was declared immediately payable. The bank issued an in rem claim form and the vessel was arrested at Newcastle on 26 June 2018. The shipowner applied for an order releasing the vessel from arrest unless the bank provided a cross-undertaking in damages.

Teare J at first instance held that in the absence of existing practice, a cross-undertaking in damages would not be required to continue the arrest. In view of a long-standing debate that a requirement

95 *The Flag Mette*, at para 51.
96 [2018] NZSC 17; [2018] 2 Lloyd's Rep 233.
97 [2018] EWCA Civ 2760; [2019] Lloyd's Rep Plus 15.
98 [2018] EWHC 2033 (Admlty); [2018] 2 Lloyd's Rep 601.

for a cross-undertaking in damages would be appropriate, owners appealed.[99] The Court of Appeal distinguished existing case law on wrongful arrest including the venerable authority *The Evangelismos*:[100] the power to release a vessel from arrest was discretionary. As a result, higher authority was not needed to depart from existing practice. However, the case against a departure from settled practice was overwhelming and the court would not intervene with the judge's discretion.

> The prospects for an appeal in *The MV Alkyon* are not encouraging, with both junior courts declining to depart from existing practice, although the Court of Appeal stated that it considered it had the authority to do so without the authority of the Supreme Court or a change of written procedural rules

The prospects for an appeal are not encouraging, with both junior courts declining to depart from existing practice, although the Court of Appeal clearly stated that it considered it had the authority to do so without Supreme Court authority or a change of written procedural rules.

Although *The MV Alkyon* was dealt with in two instances in five months, it does not scoop the award for speedy appeals for the UK courts – that honour goes to the Australian courts for their efforts in *Korea Shipping Corporation v Lord Energy SA (The MV Dangjin)*. The decision of Rares J was issued on 7 November 2018[101] and that of The Federal Court of Appeal on 15 November 2018.[102]

The facts were that on 26 October 2018, Lord Energy SA had filed a writ in rem against the ship *MV Dangjin*, flagged in the Republic of Korea, claiming damages for breach of charterparty. Lord Energy alleged that *Dangjin* was liable on the claim under section 19 of the Admiralty Act 1988 (Cth) as a surrogate, or sister ship of DS *Valentina*, on the basis that the owner of each ship was Korea Shipping Corporation (KSC). *Dangjin* was arrested on 28 October 2018 as she entered the Port of Newcastle to load a cargo of coal. On 30 October 2018 KSC filed an interlocutory application seeking an order that the arrest warrant and the arrest be set aside for want of jurisdiction.

The issue was whether KSC was the owner of *Dangjin* when the proceedings were commenced on 26 October 2018, as required by section 19(b) of the Admiralty Act, and *Dangjin* was therefore a sister or surrogate ship of DS *Valentina*. From about 15 March 2018, the legal and registered owner of the vessel was IBK Securities Co Ltd, which held the vessel in its capacity of trustee of KSC as a result of a complex series of secured loan transactions between KSC, IBK and KSC's bank, governed by Korean law. KSC was the trustor, beneficiary and debtor under the transactions. The bank was the preferred beneficiary. KSC contended in support of its application to set aside the arrest that, under the trust arrangement, it had no right to repay the debt to the bank early or to dispose of the ship because of the existence of the trust over *Dangjin* and the restrictions on bringing about any early termination contained in the various transaction documents. It contended that these considerations demonstrated that it was not capable of being characterised as the owner, in particular as the beneficial owner, of *Dangjin*.

The judge dismissed the application, considering that in spite of the restrictions on KSC's

99 The court noted Stewart Boyd QC, "Shipping lawyers: land rats or water rats?" [1993] LMCLQ 317; Bernard Eder, "Wrongful Arrest of Ships: A Time for Change" (2013) 38 Tul Mar LJ 115; Martin Davies, "A Reply to Sir Bernard Eder" (2013) 38 Tul Mar LJ 137; Shane Nossal, "Damages for the wrongful arrest of a vessel" [1996] LMCLQ 368; Michael Woodford, "Damages for Wrongful Arrest: section 34, Admiralty Act 1988" (2005) 19 MLAANZ Journal 115; and D J Cremean, "Mala fides or crassa negligentia?" [1998] LMCLQ 9.

100 (1858) 12 Moo PC 352.

101 [2018] FCA 1717; [2019] Lloyd's Rep Plus 16.

102 [2018] FCAFC 201; [2019] Lloyd's Rep Plus 17.

opportunities to dispose of the ship, KSC was the beneficial owner of *Dangjin*. Its interest, as the residuary beneficiary under the trust, was comparable to that of a mortgagor of land holding the equity of redemption. KSC had real and complete control over the ship, how she operated and where she sailed. It only owed money to the bank whose sole interest, in combination with that of IBK, was having security over the ship and the marine freight receivables until KSC repaid its secured debt in full. KSC appealed successfully.

The Federal Court of Australia applied a different perspective to the issues: whether KSC was the beneficial owner of the ship must be assessed entirely under Korean law. The transaction documents did not suggest that KSC had ownership or proprietary rights in the vessel before any approval or agreement for early repayment or before any modification of the trust by the court. Further, the rights under the transaction could not be characterised as ownership under Australian law. In rare criticism of the approach of Rares J in an admiralty case, the court asserted that analogies with Australian law, where the mortgagor was entitled to the equity of redemption, would be a misuse of the presumption that foreign law was the same as the lex fori.

A number of minor cases addressed fact-specific or unusual procedural issues. In *Noor Maritime Ltd v Calandra Shipping Co Ltd*,[103] the HKSAR Court of First Instance considered the representation of a party to a complex collision action: could they be represented by different solicitors in their position as plaintiff and defendant respectively?

The vessels *Rainbow* and *Calandra* had been in a collision in which *Rainbow* sank. Her owner, the plaintiffs, went into liquidation but was restored to the register for the purpose of collision proceedings. In the action in personam by the plaintiffs against the owners of *Calandra*, the writ had been served on owners' behalf by solicitors representing the hull and machinery underwriters. Liability had been settled at one-third to *Calandra* and two-thirds to *Rainbow*, but damages had been referred to the Registrar. The question had arisen whether owners could be represented by a different firm of solicitors in its capacity of defendant to the cross-claim, an action for damages, given that P&I insurers would have to pay any damages arising and that they had their own solicitors. The judge ruled that while the primary rule was that there should be no separate representation, this was a proper case for exercising discretion to permit the plaintiff to be represented by two different teams of solicitors. Owners having been paid, the insurers were the real entities having an interest in the litigation. Their rights derived from different sources and did not overlap; nor was there any conflict of interest.

In *The Nur Allya*,[104] the defendant applied to set aside ex parte extension orders issued in a collision action. The defendant's vessel *Nur Allya* had been in a double collision with the plaintiffs' vessels on 4 January 2015. Within the two-year time bar, the plaintiffs applied for a writ to be issued, the validity of which expired on 2 January 2018. Correspondence proceeded slowly, with many failures to reply to correspondence by the defendant, but LOUs were provided in October 2017. In December 2017 the plaintiffs' patience wore thin and they called upon the defendant to appoint a Singapore law firm to accept service and for a substantive response on the settlement of the claims. The defendant had asked for time until 19 January 2018 in view of intervening holidays, but did not supply the information by that date. The plaintiffs realised only on 25 January that the writ had expired and on 29 January applied for an extension. The writs were deemed served in May 2018.

In his decision, the Assistant Registrar observed that the decision to extend the validity was a matter of discretion. In establishing whether the plaintiff had shown good reason for the extension to be granted, he distinguished between the period until the LOUs were provided and the period thereafter. Before that time, it was sufficient good reason that no vessels had called on the port of Singapore so that there was no reasonable opportunity to serve the writs. Thereafter, it was clear, in spite of the delays in correspondence especially on the part of

103 [2018] HKCFI 1136; [2019] Lloyd's Rep Plus 10.

104 [2018] SGHCR 12; [2019] Lloyd's Rep Plus 36.

the defendant, that the parties were involved in settlement negotiations. The defendant's conduct led the plaintiffs to think that it was unnecessary to serve the writs. The defendant's specific act of asking for an extension until 19 January 2018 was a satisfactory explanation for the plaintiff's failure to apply for an extension within time. The balance of hardship did not militate in favour of a different conclusion.

Permission to serve out of the jurisdiction was granted in the case *Australian Maritime Safety Authority v Globex Shipping SA and Another*.[105] The Australian Maritime Safety Authority (AMSA) were pursuing AUS$1.4 million in clean-up costs following the escape of 90 tonnes of bunker oil in North Queensland in July 2015, which following an investigation was attributed to *MV Regina*, a Maltese-registered bulk carrier. AMSA applied for the court's permission to serve the application and statement of claim on Globex Shipping outside Australia, asserting that Globex Shipping was the registered owner of the vessel. The second defendant was its P&I Club at the relevant time. AMSA's claim related to liability under the Australian Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008 (Cth), which implemented the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

The judge ordered that the applicant be granted leave to serve the application and statement of claim in South Korea, via the Central Authority, or in Panama, via the diplomatic channel. The claimant had by evidence of investigations of the oil spill established the prima facie case against owners of *MV Regina* that was required for an order of service out under rule 10.43 of the Federal Court Rules 2011 (Cth). The first defendant had addresses in Korea and Panama.

Forum non conveniens

The decisions on forum non conveniens in the year were relatively uncontroversial applications of accepted law. The collision case *Owners of the Ship "Al Khattiya" v Owners and/or Demise Charterers of the Ship "Jag Laadki"*[106] concerned a collision in UAE territorial waters between the VLCC *Jag Laadki* and the LNG carrier *Al Khattiya*. The owners of the latter served proceedings in rem at Milford Haven on sister ship *Jag Pooja*, founding jurisdiction as of right. The defendants accepted 100 per cent of the blame for the collision, making the only remaining issue one of quantum. The defendants were pursuing proceedings in UAE, which had a significantly lower limit of liability than the UK, seeking to set up a limitation fund and limit liability. The claimants had been granted an anti-suit injunction in April 2017, which the defendants now appealed, also seeking a stay of the claim on forum non conveniens grounds. The anti-suit injunction was in respect of a claim for damages and a declaration of non-liability, also pursued in UAE but withdrawn pending final determination of the jurisdiction issue.

The judge dismissed the applications for a stay and for the anti-suit injunction to be set aside. Applying *The Spiliada*,[107] the burden of proof where the claimants had established proceedings as of right by serving the in rem claim form was on the defendants to show that another court was clearly and distinctly the more appropriate forum. They had failed to show that UAE was such a forum. The place of the tort was important but only one of the connecting factors. It was not a clear-cut rule that it was not manifestly just and reasonable for a claimant to have to pursue his claim in the country where the defendant committed the wrong. Where liability was admitted, and only quantity in dispute, that cut across the very factor making the country where the collision took place the appropriate forum due to the presence of relevant witnesses, associated investigations etc. The defendants had failed to prove that UAE law was materially different from English law and that a Fujairah judge

105 [2018] FCA 1477.

106 [2018] EWHC 389 (Admlty); [2018] 2 Lloyd's Rep 243.

107 [1987] 1 Lloyd's Rep 1; [1987] AC 460.

would be better placed to apply it. The judge also stated, obiter, that for an anti-suit injunction to be granted, it was not necessary for England to be the natural forum.

The *Spiliada* test was also applied in *Bright Shipping Ltd v Changhong Group (HK) Ltd (The Crystal and The Sanchi)*.[108] At issue was the defendant's application for a stay of proceedings on the grounds of forum non conveniens in an in personam action for collision liability and quantum. The collision took place on the high seas, but within the EEZ of the People's Republic of China. The Hong Kong and a Shanghai action had both been initiated on 9 January 2018, three days after the collision. The Shanghai Maritime Court had accepted jurisdiction under the applicable law of the PRC, which differed from the United Nations Convention on the Law of the Sea (UNCLOS). The Shanghai proceedings had not yet been served on the claimant. The limits of liability were significantly higher in Hong Kong than in mainland China. It was accepted by the plaintiff that there was no natural forum for a collision in international waters, but it nevertheless argued that the *Spiliada* test should be applied in its favour.

The judge in the HKSAR Court of First Instance declined to stay the action. The occurrence of the collision in international waters meant that there was no natural forum for the action. The evidence on both liability and quantum was likely to be available to the Hong Kong court which was well placed to deal with it. Where Bright Shipping had brought the action as of right, given Changhong's domicile in Hong Kong, the fact that trial of the case in Shanghai might be more convenient for Changhong did not entail such unusual hardship as to make the Shanghai court clearly and distinctly the more appropriate forum. The judge also observed that he was bound by Court of Appeal authority to the effect that the significant difference in applicable tonnage limitation meant that substantial justice could not be obtained in Shanghai.

Finally, in *SGB Finance SA v Owners and all Persons Claiming an Interest in The MV Connoisseur*,[109] a rare admiralty decision from the Irish courts, the question arose, but was in the event not directly addressed, of the relationship between the Recast Brussels Regulation 1215/2012/EU and the Arrest Convention 1952. Article 71 of the former makes space for specialised law including the Arrest Convention.

The background to the case was that CCL, a UK company, had purchased the yacht MV *Connoisseur* part-financed under a loan agreement with the plaintiff SGB, a French company. This agreement was governed by the laws of England and Wales and subject to the non-exclusive jurisdiction of the English courts. The loan agreement was secured by a deed of assignment over the earnings of the vessel and a mortgage over the vessel, although the signature page of the registered copy was blank. CCL fell into arrears and SGB sought to enforce its security by arresting the vessel in Dún Laoghaire in Ireland for the purpose of sale. CCL challenged the court's jurisdiction asserting that there was no valid ground for arrest because the arrest application was based on the loan agreement, not the mortgage; the proceedings ought therefore rightly to have been commenced against it in its domicile in the UK. The plaintiff argued that it had correctly founded jurisdiction based upon the arrest of the vessel in Ireland.

The judge refused the challenge to the jurisdiction and application for a stay. The plaintiff had a maritime claim which was sufficiently disclosed at the time of arrest. A claim secured by a mortgage fell within the ambit of article 1(1)(q) of the 1952 Convention. In the absence of an explicit reference to the mortgage, the context of the reference to the article in question was sufficient to show that the loan agreement was secured by a mortgage.

The judge declined to refer the issue of whether the Recast Regulation's lis alibi pendens provisions applied equally to 1952 Convention cases falling under article 71 to the Court of Justice of the European Union, instead making an assumption that the forum non conveniens doctrine continued to apply. He went on to hold that the matters at issue were most closely connected with England and Wales. The connecting factors were that CCL was an English company; that the issues were matters of English law; that the loan agreement was subject

108 [2018] HKCFI 2474.
109 [2018] IEHC 699; [2019] Lloyd's Rep Plus 11.

to English law; and that together they made that jurisdiction the most appropriate forum. Having said that, the judge considered that justice required that the proceedings should be heard in Ireland. The vessel was under arrest and there was a need for a speedy determination.

The case raises potential issues of great interest on the Recast Regulation, which will no doubt be considered in some future case, but as matters unfolded was mainly an issue of the effect of the claimant's failure to refer directly to the mortgage interest in the application.

Judicial sale

In keeping with continued difficult market and credit conditions, there were several cases on judicial sales from a variety of jurisdictions. From Singapore, *The Long Bright*,[110] a case brought by a shipyard for wharfage and related charges incurred by *Long Bright*. The mortgagee and crew members intervened in respect of further liabilities. A judicial sale was ordered with the deadline for submitting bids set for Monday 20 August 2018. Five bids were received. However, on 18 August the plaintiff applied to discharge the order for sale as it had reached a settlement with the first intervener, the mortgagee. The plaintiff argued that its claim had been extinguished and that it could seek the release of the vessel as of right. The defendant had not entered an appearance.

The judge discharged the order for sale, allowing the release of the vessel. Given the existence of caveats against release, a judicial order discharging the arrest was necessary for release. The judge noted that the mortgagee had plans at an advanced stage to re-arrest the vessel to achieve a higher price. That being the case, it did not appear to the judge that the remaining interveners would be significantly disadvantaged by a release. The situation of the intervening crew members was not explicitly considered. Their interest in getting paid would arguably have been a reason for a speedy sale; however, a release from arrest and the opportunity for the vessel to continue trading may equally be useful to them.

Equally from Singapore, *The Swiber Concorde*[111] addressed the issue of what to do with a deposit forfeited upon a rescinded sale. Should it be forfeited to the state, or should it form part of the proceeds of sale? The plaintiff was the mortgagee of the vessel *Swiber Concorde*. To recover the loan secured over the vessel, the plaintiff commenced in rem proceedings, caused the vessel to be arrested, obtained judgment in default of appearance, and obtained an order for appraisement and sale of the vessel and her bunkers. Pursuant to the order for appraisement and sale, the Sheriff conducted two rounds of bidding at which all bids received were below the appraised value of the vessel. The plaintiff obtained the court's permission on 1 November 2017 for the vessel to be sold below its appraised value and on the Sheriff's usual terms and conditions of sale to VML, the highest bidder in the second round of bidding. VML had on submission of its bid paid a deposit of US$50,000 and was under the conditions of sale required to pay the balance of the purchase price on specified dates in November 2018, but failed to do so. The sale was cancelled and the deposit forfeited. The ship was subsequently sold to another bidder at a price below the valuation in a third round of bidding. The question arose as to whether the deposit forfeited by the Sheriff was forfeited to the state or should be paid out with the proceeds of sale.

> *The Swiber Concorde* addressed the issue of what to do with a deposit forfeited upon a rescinded sale. Should it be forfeited to the state, or should it form part of the proceeds of sale?

The judge ordered that the forfeited deposit should be treated as part of the proceeds of sale of the vessel and paid out to the plaintiff. Although the deposit was a term of the sale contract between

110 [2018] SGHC 216; [2019] Lloyd's Rep Plus 19.

111 [2018] SGHC 197; [2019] Lloyd's Rep Plus 2.

the Sheriff and the buyer, the forfeited sums were not to be retained by the Sheriff's office or the state. The Sheriff did not contract on behalf of the state when entering into a contract for the sale of an arrested vessel. Title in the arrested vessel remained with the shipowner until the sale was completed. In selling the vessel, the Sheriff was acting under the court's commission for the benefit of interested parties, and must pay the proceeds into court. The forfeiture was also done for the benefit of the interested parties.

A question of appointment of broker arose in *Deutsche Bank Trust Company Americas v Owners of the MV "Sertao"*.[112] The drill ship *MV Sertao* was owned by the defendants and mortgaged to the claimant bank. She had been arrested and laid up in England and the claimants sought a sale pendente lite provided the sale achieved the appraised value; if it did not they wished to wait for an upturn in the market for similar ships. The claimants also requested the use of specialised ship brokers who had been involved in the matter for the last two years, instead of the firm traditionally used by the Admiralty Marshal. Pragmatically, the judge agreed that the vessel was a wasting asset due to maintenance costs and issued an order for sale pendente lite. The specialist brokers would be appointed alongside the traditionally used brokers, with the commission apportioned between them.

Issues arising from the sale of a ship outside the judicial procedure in connection with the insolvency of her owner were considered in *Close Brothers Ltd v AIS (Marine) 2 Ltd (In Liquidation) and Another (The Ocean Wind 8 of Hartlepool)*.[113] The claimant bank had made a loan to the first defendant, now in liquidation, against the security of its wholly owned vessel *Ocean Wind 8 of Hartlepool*, with the second defendant, a director of the first defendant, as personal guarantor. Following failure to make repayments, the vessel was repossessed and sold through a shipbroker at a price less than the loan valuation, leaving a balance to be paid which the bank claimed from the defendants. The action against the first defendant had been stayed under the Insolvency Act 1986, section 130. The vessel had been sold by an independent broker appointed by the bank, to one of the bank's clients following marketing via email. The only higher bid was conditioned upon receiving a 100 per cent loan from the bank. At trial, the defendants had abandoned the argument that the sale to the bank's client was a sale to a connected person. This would have placed the burden of proof on the bank to show that the sale price was reasonable.

The Admiralty Registrar held that the mortgagee owed a duty in equity to take reasonable care to obtain the best price reasonably obtainable at the time. Absent a sale to a connected person, the burden of proof was on the defendants to show that the vessel was sold at an improperly low price due to a lack of reasonable care on the part of the bank. On the expert evidence, the price achieved was within the acceptable bracket. He also considered, obiter, that while the duty to take reasonable care was not delegable, the bank had not been in breach of its duties to the mortgagor or guarantor in appointing the shipbroker in question; it was a well-established shipbroker of good reputation. Its marketing efforts had been more than adequate in the restricted market and a quick sale was justifiable for a wasting asset.

112 [2018] EWHC 1013 (Admlty); [2018] 2 Lloyd's Rep 275.
113 [2018] EWHC B14 (Admlty); [2019] Lloyd's Rep Plus 18.

LOOKING AHEAD

We understand that *Glencore Energy UK Ltd and Another v Freeport Holdings Ltd (The Lady M)*,[114] a decision by Mr Justice Popplewell dated 21 December 2017, has been given a reserved judgment in the Court of Appeal awaiting publication. The case was reported in the "Maritime Law Review 2017" and – at first instance – concerned questions of what facts owners must prove to avail themselves of the barratry exception in article IV rule 2(q) of the Hague-Visby Rules where a fire had purportedly been deliberately set by the chief engineer.

The Supreme Court on 25 July 2018 granted permission to appeal in part in *Connect Shipping Inc and Another v Sveriges Angfartygs Assurans Forening (The Swedish Club) and Others (The Renos)*.[115] The question for appeal, according to the Supreme Court's website, are:

> "i. Was the CA right to conclude that the respondents did not have 'reliable information of the loss' by 1 February 2013 for the purposes of section 62(3) Marine Insurance Act ('MIA');
>
> ii. Was the CA right to conclude that the Respondents served NOA with 'reasonable diligence' following 25 January 2013 for the purposes of section 62(3) of MIA;
>
> iii. Can costs incurred prior to NOA rank towards the calculation of CTL for the purposes of section 60(2) (iii) of MIA; and
>
> iv. Can Special Compensation Protection and Indemnity Clause ('SCOPIC') costs rank towards the calculation of CTL for the purposes of section 60(2)(iii) of MIA."

The case is scheduled for hearing on 10 to 11 April 2019.

In February 2019 the Supreme Court also granted permission to appeal in part the Court of Appeal's decision in *Shagang Shipping Co Ltd v HNA Group Co Ltd*,[116] a case originating on its facts in a charterparty dispute but concerning in the main allegations of bribery and torture.

The decision of Teare J in *Classic Maritime Inc v Limbungan Makmur Sdn Bhd and Another*[117] has been appealed and is listed for hearing on 11 June 2019. *Deep Sea Maritime Ltd v Monjasa A/S (The Alhani)*[118] is also under appeal, awaiting a listing. In *Griffin Underwriting Ltd v Varouxakis (The Free Goddess)*,[119] permission to appeal appears to have been declined.

114 [2017] EWHC 3348 (Comm); [2018] Lloyd's Rep Plus 22.
115 [2018] EWCA Civ 230; [2018] 1 Lloyd's Rep 285.
116 [2018] EWCA Civ 1732; [2019] 1 Lloyd's Rep 150.
117 [2018] EWHC 2389 (Comm); [2019] Lloyd's Rep Plus 3.
118 [2018] EWHC 1495 (Comm); [2018] 2 Lloyd's Rep 563.
119 [2018] EWHC 3259 (Comm); [2019] Lloyd's Rep Plus 35.

APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED IN THIS REVIEW

2018 judgments analysed

Agile Holdings Corporation v Essar Shipping Ltd (The Maria) (QBD (Comm Ct)) [2018] EWHC 1055 (Comm); [2018] Lloyd's Rep Plus 79

Airbus SAS v Generali Italia SpA and Others (QBD (Comm Ct)) [2018] EWHC 2737 (Comm); [2019] Lloyd's Rep Plus 32

Atlasnavios-Navegação Lda v Navigators Insurance Co Ltd and Others (The B Atlantic) (SC) [2018] UKSC 26; [2018] 2 Lloyd's Rep 1

Australian Maritime Safety Authority v Globex Shipping SA and Another (FCA) [2018] FCA 1477

Bright Shipping Ltd v Changhong Group (HK) Ltd (The Crystal and The Sanchi) (HKCFI) [2018] HKCFI 2474

Canpotex Shipping Services Ltd and Others v Marine Petrobulk Ltd and Others (Can FC) 2018 FC 957; [2019] Lloyd's Rep Plus 8

Classic Maritime Inc v Limbungan Makmur Sdn Bhd and Another (QBD (Comm Ct)) [2018] EWHC 2389 (Comm); [2019] Lloyd's Rep Plus 3

Clearlake Shipping Pte Ltd v Privocean Shipping Ltd (The Privocean) (QBD (Comm Ct)) [2018] EWHC 2460 (Comm); [2018] 2 Lloyd's Rep 551

Close Brothers Ltd v AIS (Marine) 2 Ltd (In Liquidation) and Another (The Ocean Wind 8 of Hartlepool) (QBD (Admlty Ct)) [2018] EWHC B14 (Admlty); [2019] Lloyd's Rep Plus 18

Collins v Lawrence (CA) [2017] EWCA Civ 2268; [2018] 1 Lloyd's Rep 603

Connect Shipping Inc and Another v Sveriges Anfgartygs Assurans Forening (The Swedish Club) and Others (The Renos) (CA) [2018] EWCA Civ 230; [2018] 1 Lloyd's Rep 285

Crystal Handy CSA and Another v Woori Bank (QBD (Comm Ct)) [2018] EWHC 1991 (Comm)

CSSA Chartering and Shipping Services SA v Mitsui OSK Lines Ltd (The Pacific Voyager) (CA) [2018] EWCA Civ 2413; [2019] Lloyd's Rep Plus 9

Deep Sea Maritime Ltd v Monjasa A/S (The Alhani) (QBD (Comm Ct)) [2018] EWHC 1495 (Comm); [2018] 2 Lloyd's Rep 563

Dera Commercial Estate v Derya Inc (The Sur) (QBD (Comm Ct)) [2018] EWHC 1673 (Comm); [2019] 1 Lloyd's Rep 57

Deutsche Bank Trust Company Americas v Owners of the MV "Sertao" (QBD (Admlty Ct)) [2018] EWHC 1013 (Admlty); [2018] Lloyd's Rep 275

Engelhart CTP (US) LLC v Lloyd's Syndicate 1221 for the 2014 Year of Account and Others (QBD (Comm Ct)) [2018] EWHC 900 (Comm); [2018] 2 Lloyd's Rep 24

Fehn Schiffahrts GmbH & Co KG v Romani Spa (The Fehn Heaven) (QBD (Comm Ct)) [2018] EWHC 1606 (Comm); [2018] 2 Lloyd's Rep 385

Glencore Energy UK Ltd v OMV Supply & Trading Ltd (QBD (Comm Ct)) [2018] EWHC 895 (Comm); [2018] 2 Lloyd's Rep 223

Griffin Underwriting Ltd v Varouxakis (The Free Goddess) (QBD (Comm Ct)) [2018] EWHC 3259 (Comm); [2019] Lloyd's Rep Plus 35

Gunvor SA v CruGas Yemen Ltd and Another (QBD (Comm Ct)) [2018] EWHC 2061 (Comm); [2019] Lloyd's Rep Plus 34

Hartono and Others v Ministry for Primary Industries and Another (NZSC) [2018] NZSC 17; [2018] 2 Lloyd's Rep 233

Korea Shipping Corporation v Lord Energy SA (The MV Dangjin) (FCA) [2018] FCA 1717; [2019] Lloyd's Rep Plus 16; (FCAFC) [2018] FCAFC 201; [2019] Lloyd's Rep Plus 17

Kyokuyo Co Ltd v AP Møller-Maersk A/S, trading as Maersk Line (CA) [2018] EWCA Civ 778; [2018] 2 Lloyd's Rep 59

Lawrence v NCL (Bahamas) Ltd (The Norwegian Jade) (CA) [2017] EWCA Civ 2222; [2018] 1 Lloyd's Rep 607

Lawrence v NCL (Bahamas) Ltd (The Norwegian Jade) (QBD (Admlty Ct)) [2018] Lloyd's Rep Plus 27

Long Bright, The (SGHC) [2018] SGHC 216; [2019] Lloyd's Rep Plus 19

Lord Energy SA v The Ship "MV Dangjin" (FCA) [2018] FCA 1717; [2019] Lloyd's Rep Plus 16

Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The Ocean Neptune) (QBD (Comm Ct)) [2018] EWHC 163 (Comm); [2018] 1 Lloyd's Rep 654

Mamancochet Mining Ltd v Aegis Managing Agency Ltd and Others (QBD (Comm Ct)) [2018] EWHC 2643 (Comm); [2018] 2 Lloyd's Rep 441

Mount Isa Mines Ltd v The Ship "Thor Commander" (FCA) [2018] FCA 1326; [2019] 1 Lloyd's Rep 167

Natwest Markets plc (formerly known as The Royal Bank of Scotland plc) v Stallion Eight Shipping Co SA (The MV Alkyon) (QBD (Admlty Ct)) [2018] EWHC 2033 (Admlty); [2018] 2 Lloyd's Rep 601; (CA) [2018] EWCA Civ 2760; [2019] Lloyd's Rep Plus 15

Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and Ever Smart) (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

Navig8 Chemicals Pool Inc v Glencore Agriculture BV (The Songa Winds) (CA) [2018] EWCA Civ 1901; [2018] 2 Lloyd's Rep 374

Navigator Spirit SA v Five Oceans Salvage SA (The Flag Mette) (QBD (Comm Ct)) [2018] EWHC 1108 (Comm); [2018] 2 Lloyd's Rep 391

Noor Maritime Ltd v Calandra Shipping Co Ltd (HKCFI) [2018] HKCFI 1136; [2019] Lloyd's Rep Plus 10

Nur Allya, The (SGHC) [2018] SGHCR 12; [2019] Lloyd's Rep Plus 36

Owners of the Ship "Al Khattiya" v Owners and/or Demise Charterers of the Ship "Jag Laadki" (QBD (Admlty Ct)) [2018] EWHC 389 (Admlty); [2018] 2 Lloyd's Rep 243

PT Surya Citra Multimedia v Brightpoint Singapore Pte Ltd (SGHC) [2018] SGHC 245; [2019] Lloyd's Rep Plus 33

Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd (The Sea Master) (QBD (Comm Ct)) [2018] EWHC 1902 (Comm); [2019] 1 Lloyd's Rep 101

Seatrade Group NV v Hakan Agro DMCC (The Aconcagua Bay) (QBD (Comm Ct)) [2018] EWHC 654 (Comm); [2018] 2 Lloyd's Rep 381

Sevylor Shipping and Trading Corporation v Altfadul Company for Foods, Fruits & Livestock and Another (The Baltic Strait) (QBD (Comm Ct)) [2018] EWHC 629 (Comm); [2018] 2 Lloyd's Rep 33

SGB Finance SA v Owners and all Persons Claiming an Interest in The MV Connoisseur (IEHC) [2018] IEHC 699; [2019] Lloyd's Rep Plus 11

Sixteenth Ocean GmbH & Co KG v Société Générale (QBD (Comm Ct)) [2018] EWHC 1731 (Comm); [2018] 2 Lloyd's Rep 465

Solea International BVBA v Bassett & Walker International Inc (ONSC) 2018 ONSC 4261; [2019] Lloyd's Rep Plus 12

Swiber Concorde, The (SGHC) [2018] SGHC 197; [2019] Lloyd's Rep Plus 2

Tian E Zuo, The (SGHC) [2018] SGHC 93; [2018] 2 Lloyd's Rep 297

Vinnlustodin HF and Another v Sea Tank Shipping AS (The Aqasia) (CA) [2018] EWCA Civ 276; [2018] 1 Lloyd's Rep 530

Volcafe Ltd and Others v Compania Sud Americana de Vapores SA (SC) [2018] UKSC 61; [2019] 1 Lloyd's Rep 21

Warner v Scapa Flow Charters (SC) [2018] UKSC 52; [2019] Lloyd's Rep Plus 25

Judgments considered

Albacora Srl v Westcott & Laurence Line Ltd (HL) [1966] 2 Lloyd's Rep 53; 1966 SC (HL) 19

Atlasnavios-Navegação Lda v Navigators Insurance Co Ltd and Others (The B Atlantic) (CA) [2016] EWCA Civ 808; [2016] 2 Lloyd's Rep 351

Caltex Refining Co Pty Ltd v BHP Transport Ltd (The Iron Gippsland) (NSWSC) [1994] 1 Lloyd's Rep 335

Collins v Lawrence (Canterbury CC) [2017] 1 Lloyd's Rep 13

Connect Shipping Inc and Another v Sveriges Anfgartygs Assurans Forening (The Swedish Club) and Others (The Renos) (QBD (Comm Ct)) [2016] EWHC 1580 (Comm); [2016] 2 Lloyd's Rep 364

CSSA Chartering and Shipping Services SA v Mitsui OSK Lines Ltd (The Pacific Voyager) (QBD (Comm Ct)) [2017] EWHC 2579 (Comm); [2018] 1 Lloyd's Rep 57

El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA (FCAFC) [2004] FCAFC 202; [2004] 2 Lloyd's Rep 537

Evangelismos, The (PC) (1858) 12 Moo PC 352;

Foreric, The (PC) (1926) 24 Ll L Rep 329

Foscolo, Mango & Co Ltd v Stag Line Ltd (The Ixia) (HL) (1931) 41 Ll L Rep 165; [1932] AC 328

Gard Marine and Energy Ltd v China National Chartering Co Ltd and Another (The Ocean Victory) (SC) [2017] UKSC 35; [2017] 1 Lloyd's Rep 521

Germanic, The (USSC) 196 US 589 (1905);

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

Glendarroch, The (CA) [1894] P 226

Glenochil, The (1896) P 10

Gosse Millerd v Canadian Government Merchant Marine Ltd (The Canadian Highlander) (KBD) (1927) 28 Ll L Rep 88

Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad (The Bunga Seroja) (HCA) [1999] 1 Lloyd's Rep 512

Helmville Ltd v Yorkshire Insurance Co Ltd (The Medina Princess) (QBD (Comm Ct)) [1965] 1 Lloyd's Rep 361

Higham v Stena Sealink Ltd (CA) [1996] 2 Lloyd's Rep 26; [1996] 1 WLR 1107

ING Bank NV and Others v Canpotex Shipping Services Ltd and Others (FCA) 2017 FCA 47; [2017] 2 Lloyd's Rep 270

Kyokuyo Co Ltd v AP Møller-Maersk A/S, trading as Maersk Line (QBD (Comm Ct)) [2017] EWHC 654 (Comm); [2017] 1 Lloyd's Rep 580

Monroe Brothers Ltd v Ryan (CA) (1935) 51 Ll L Rep 179; [1935] 2 KB 28

Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and Ever Smart) (QBD (Admlty Ct)) [2017] EWHC 453 (Admlty); [2017] 1 Lloyd's Rep 666

North Star Shipping Ltd v Sphere Drake Insurance plc (The North Star) (QBD (Comm Ct)) [2005] EWHC 665 (Comm); [2005] 2 Lloyd's Rep 76

Palembang, The (Adm Div) (1929) 34 Ll L Rep 107

President of India v Metcalfe Shipping Co Ltd (The Dunelmia) (CA) [1969] 2 Lloyd's Rep 476; [1970] 1 QB 289

Primetrade AG v Ythan Ltd (The Ythan) (QBD (Comm Ct)) [2005] EWHC 2399 (Comm); [2006] 1 Lloyd's Rep 457

R & W Paul Ltd v National Steamship Co Ltd (KBD) (1937) 59 Ll L Rep 28

Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada) (HL) [1987] 1 Lloyd's Rep 1; [1987] AC 460

Star Polaris LLC v HHIC-Phil Inc (The Star Polaris) (QBD (Comm Ct)) [2016] EWHC 2941 (Comm); [2017] 1 Lloyd's Rep 203

Strive Shipping Corporation v Hellenic Mutual War Risks Association (The Grecia Express) (QBD (Comm Ct)) [2002] EWHC 203 (Comm); [2002] 2 Lloyd's Rep 88

Tate & Lyle v Hain Steamship Co Ltd (HL) (1936) 55 Ll L Rep 159; (1936) 41 Com Cas 350

Vinnlustodin HF and Another v Sea Tank Shipping AS (The Aqasia) (QBD (Comm Ct)) [2016] EWHC 2514 (Comm); [2016] 2 Lloyd's Rep 510

Volcafe Ltd and Others v Compania Sud Americana de Vapores SA (QBD (Comm Ct)) [2015] EWHC 516 (Comm); [2015] 1 Lloyd's Rep 639; (CA) [2016] EWCA Civ 1103; [2017] 1 Lloyd's Rep 32