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Maritime law in 2020: a review of developments in case law

By Dr Johanna Hjalmarsson

Bills of lading – Charterparties – Contracts – Collision – Insolvency – Insurance – Jurisdiction – Liability – Passengers – Sale of goods – Sale of ships – Salvage – Shipbuilding – Ship breaking –Shipbrokers

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Maritime law in 2020: a review of developments in case law

INTRODUCTION

2020 was dominated by decisions not on substance but on procedure, whether on jurisdiction, arrest, ship sale or other matters. Few weighty substantive decisions emerged, especially in the second half of the year. Besides the effect of the Covid-19 pandemic on the work of courts, which transitioned to remote hearings, it may also have reduced the appetite for litigation and induced some settlements. A smaller number of judgments does not therefore necessarily translate into a backlog of Athenas crouching to spring from the head of Zeus. Where settlement is impossible, in cases of fraud or insolvency, litigation will often involve unusual constellations of parties, and this was in evidence in a year that notably saw a shipowner suing a voyage charterer for demurrage and costs, where the costs were a settlement with a bill of lading holder.

BILLS OF LADING

The bill of lading cases in 2020 were characterised by the feature that they concerned not just the bill of lading, but also surrounding contractual relationships. Judgments concerned not so much the interpretation of clauses in the immediate contractual relationship between the lawful holder of the bill of lading and the carrier, but more creative litigation on wider shipping relationships: a carrier attempting to recover from a voyage charterer under a bill of lading,[1] or a lawful holder seeking to recover from the carrier where the cargo had been misappropriated by other parties following delivery.[2]

Priminds Shipping (HK) Co Ltd v Noble Chartering Inc (The Tai Prize)[3] concerned a question of attribution. To what party were the statements made in the bill of lading, such as "clean on board", to be attributed? Could the shipper's statements to the master, causing him to sign a "clean on board" bill, be attributed to the voyage charterer, so that the disponent owner could seek damages on the basis thereof?

The background was that the defendant disponent owner had, by a recap voyage charterparty dated 29 June 2012, agreed to let *Tai Prize* to the claimant voyage charterer for the carriage of a cargo of heavy grains, soya and sorghum in bulk from Brazil to the People's Republic of China. The vessel arrived at Santos in July 2012 and loaded a cargo of Brazilian soya beans.

A bill of lading in the 1994 edition of the Congenbill form was offered for signature by or on behalf of the master on 29 July 2012. It stated the port of discharge as "Main Port(s) of South China". Under the heading "Shipper's description of Goods" the cargo was described as being "63,366.150 metric tons Brazilian Soyabeans Clean on Board Freight pre-paid". The bill of lading was executed by agents on behalf of the master without any reservations, stating that the cargo had been: "SHIPPED at the Port of Loading in apparent good order and condition on board the Vessel for carriage to the Port of Discharge ... Weight, measure, quality, quantity, condition, contents and value unknown ..." It also incorporated the Hague Rules.

The vessel arrived at Guangzhou, the port of discharge, and commenced discharge on 15 September 2012. On 17 September discharge from two of the vessel's holds was suspended "Due to charred Cargo Found". The remaining cargo was discharged without complaint and the cargo in the affected holds was discharged but the receiver maintained that the cargo in those holds had suffered heat and mould damage.

In the arbitration between the disponent owner and the voyage charterer, the arbitrator had found inter alia that the cargo had been loaded in pre-damaged condition and that the damage was not reasonably visible to the master, crew or loading surveyors. As the contract of affreightment contained in or evidenced by the bill of lading was with the shipowner, not the claimant, there was no express provision in support of the disponent owner's claim. The arbitrator had held that the shipper as voyage charterer's agent had impliedly warranted the accuracy of any statement as to condition contained in the bill of lading, and had impliedly agreed to indemnify

1 *Priminds Shipping (HK) Co Ltd v Noble Chartering Inc (The Tai Prize)* [2020] EWHC 127 (Comm); [2020] 2 Lloyd's Rep 333.
2 *FIMBank plc v Discover Investment Corporation (The Nika)* (QBD (Comm Ct)) [2020] EWHC 254 (Comm); [2021] 1 Lloyd's Rep 109.
3 [2020] EWHC 127 (Comm); [2020] 2 Lloyd's Rep 333.

the defendant against the consequences of inaccuracy of the statement; and that the statement "clean on board" in the bill of lading was a statement by the shipper as agent of the voyage charterer. As a result, the voyage charterer was ordered to pay the disponent owner's claim in the sum of US$500,000 plus costs and fees.

The voyage charterer appealed on three questions of law, arguing notably that the arbitrator had erroneously conflated information provided by the shipper with the standard form wording contained in the bill of lading, which invited the master to carry out his own assessment of the apparent condition of the cargo; and that the standard wording could not give rise to any representation by the claimant or for that matter the shipper and should not give rise to any implied warranty or indemnity against inaccuracy.

The judge held that by presenting the draft bill of lading for signature by or on behalf of the master, in relation to the statement concerning apparent good order and condition, the shipper was doing no more than inviting the master to make a representation of fact in accordance with his own assessment of the apparent condition of the cargo.

Here, the bill of lading was not inaccurate as a matter of law. It contained no more than a representation of fact by the master as to apparent condition that was not inaccurate because the master did not and could not reasonably have discovered the relevant defects because they were not reasonably visible to him or any other agent of the claimant at or during shipment.

Finally, the arbitrator had erred in implying a guarantee or warranty into the contract. This was a sophisticated and professionally drawn and negotiated agreement between well-resourced parties, so that where an issue had been left unresolved, it was much more likely to be the result of choice than error. It would be wrong in principle to imply into the contract a provision making the claimant liable to indemnify the defendant, when the drafters of the Hague Rules could have but decided not to provide expressly for such a provision. An appeal was dismissed on 28 January 2021.[4]

In the cargo claim *Herculito Maritime Ltd and Others v Gunvor International BV and Others (The Polar)*,[5] a variety of contracts were in issue and the question was as to the outcome of their convergence. *Polar* had been seized and held by pirates in the Gulf of Aden from October 2010 to August 2011. Upon arrival in Singapore, general average was declared. Based on the adjustment, the shipowner claimed under the general average bond and guarantee. The cargo interests argued that the shipowner could not recover the ransom from them, because the bills of lading incorporated a charterparty provision obliging the shipowner to take out kidnap and ransom insurance and war risks insurance, the premium for which was to be paid by charterers.

> Clear words would be required to impose upon bill of lading holders a liability not only to pay freight but also to pay the additional insurance premium as the price for the carriage of cargo

The arbitral tribunal had concluded that the cargo owners were not liable to pay general average in respect of the ransom payment. The shipowners appealed.

Sir Nigel Teare, sitting as a Judge of the High Court, allowed the appeal, holding that the war risks clause in the charterparty, when read into the bills, did not clearly oblige the bill of lading holders to pay the expenses caused by the exercise of the owners' liberties. The obligation of the charterer to pay such expenses should be regarded as an accounting matter between the owners and the charterer.

The Gulf of Aden clause in the charterparty contained three obligations, two of which it was not appropriate to apply to bill of lading holders. The third was the payment of premiums for additional war risks and kidnap and ransom insurance. This obligation was germane to the carriage and delivery of the cargo. However it was not explained how an obligation to pay insurance premiums would be applied to bill of lading holders and consequently it would not be appropriate to manipulate the clause by substituting bill of lading holders for charterers with regard to that liability. Clear words would have been required to impose upon bill of lading holders a liability not only to pay freight but also to pay the additional insurance premium as the price for the carriage of cargo.

The additional war risks cover taken out by the owners covered the vessel's proportion of general average. It did not cover cargo's proportion of general average, which

[4] [2021] EWCA Civ 87.
[5] [2020] EWHC 3318 (Comm); [2021] 1 Lloyd's Rep 150.

would be covered by the cargo insurance purchased by the cargo interests.

On the true construction of the charterparty, the parties had agreed to look to the additional policies for the recovery of relevant losses and so the owners were precluded by that agreement from seeking to recover that loss by way of a contribution in general average from the charterers.

The agreement by the owners in the charterparty not to seek contribution for piracy losses was derived from the agreement by the charterers to pay the insurance premium. However, that was not the case for the bills of lading. Since they contained no agreement by the bill of lading holders to pay the insurance premium, there was no foundation in that contract for an agreement by the owners not to seek a contribution for piracy losses from the bill of lading holders.

As a result, the owners had not agreed *not* to seek contribution in general average from the holders of the bills of lading in respect of losses covered by the additional insurance and were entitled to do so. An appeal is pending with the Court of Appeal and scheduled for hearing in December 2021.[6]

In *FIMBank plc v Discover Investment Corporation (The Nika)*,[7] the issue concerned the end point of the carrier's responsibility and highlights some of the risks involved in delivery of cargo without production of the bill of lading. The defendant was the owner of the vessel *Nika*. The vessel had carried wheat from Chornomorsk in Ukraine to Alexandria in Egypt under bills of lading dated 22 March 2018, consigned to order. AOS Egypt was the notify party named on the bills of lading. The claimant, a Maltese bank, claimed that it had become the lawful holder of the bills of lading pursuant to arrangements with its customer, AOS Dubai, under which the claimant had financed AOS Dubai's purchase of the cargo. In April 2018 the vessel had discharged the cargo at Alexandria to AOS Egypt without production of any bills of lading but against a letter of indemnity in the standard wording of the International Group of P&I Clubs, issued to the defendant by the vessel's time charterers.

The claimant's case was that the cargo was delivered out of the warehouse against production of forgeries of the bills of lading in circumstances where the originals were with a bank in Egypt, acting as collecting bank for the claimant on a "documents against payment" basis. Nothing was ever paid for the cargo by any end buyers; the bills of lading were not collected from the collecting bank and were subsequently returned to and still held by the claimant. The claimant sent the bills of lading to the bank in Egypt on 16 April 2018. The collection instruction, incorporating the terms of the ICC's URC 522, was that "documents are only to be released for the amount paid under this collection and same day value payment to us". The cargo was released from the warehouse, purportedly in respect of the bills of lading, between 25 April 2018 and 12 May 2018 inclusive.

The claimant intended to pursue a claim for damages for misdelivery in arbitration under the bills of lading and had, in August 2019, obtained an ex parte freezing order in support of that claim. This was effectively the return date for the continuation of that freezing order. The defendant cross-applied for the order to be discharged on the grounds of non-disclosure, no good arguable case, an absence of assets, delay, breach of undertakings and an absence of grounds in particular for para 8(2) of the freezing order. The defendant's position was that it had delivered the cargo to an authorised party per instructions and in return for a letter of indemnity, and that what had subsequently happened at the warehouse was a matter for the parties to the stock management agreement, including the claimant and AOS Dubai.

> *The Nika* concerns the issue of the end point of the carrier's responsibility and highlights some of the risks involved in delivery of cargo without production of the bill of lading

The judge dismissed the application for the continuation of the freezing order and allowed the defendant's application. There was no good arguable case that the defendant had a liability for substantial damages such as might have justified the grant of a freezing order or might justify its continuation. The defendant had discharged the cargo to an entitled party. At worst, it was liable for nominal damages but even then the claim faced formidable issues of causation, given that the cargo was released from the warehouse later, against forged documents. Notwithstanding the shipowner's discharge of the cargo otherwise than against bills of lading, the only effective cause of loss was the breakdown in the

6 Per casetracker.justice.gov.uk, accessed on 24 February 2021.
7 [2020] EWHC 254 (Comm); [2021] 1 Lloyd's Rep 109.

arrangements ashore as the claimant became the victim of a fraud that had nothing to do with the shipowner.

Wollongong Coal Ltd v PCL (Shipping) Pte Ltd (The Illawarra Fortune)[8] concerned switch bills, with valuable points made on sub-freights and other matters. PCL was the time charterer of *Illawarra Fortune* and WCL was the shipper under owner's bills of lading in respect of a cargo of coal on board. There was also a voyage charter for the vessel between PCL and WCL's parent company, where freight and shipping costs of US$3.2 million remained unpaid. PCL had taken assignment of the shipowner's rights under the bills of lading and sought to recover the US$3.2 million from WCL in respect of the unpaid freight under the voyage charterparty. Bills of lading had first been issued in August 2013 and identical switch bills had been issued in September 2013, identifying a third party as shipper in place of WCL. The question for the judge was whether the shipowner could have recovered from WCL the freight and shipping costs under the August bills and whether PCL could therefore do the same as assignee from the owner.

The judge, Stevenson J of the New South Wales Supreme Court, dismissed PCL's claim. The cancellation of the August bills and the issue of the switch bills constituted a novation, the effect of which was to extinguish such liability as WCL had under the August bills and to impose a corresponding liability on the shipper named in the switch bills. There was no evidence or authority for PCL's contention that the cancellation of the August bills was intended by the parties only to take effect insofar as the August bills were documents of title and not insofar as they evidenced a contract of carriage between the owner and WCL.

Were it not for the cancellation of the August bills, PCL would have been entitled to succeed against WCL. PCL had taken assignment of the owner's rights under the bills. Although it had paid hire in full to the shipowner, *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd (The Bulk Chile)*[9] was authority for the proposition that the shipowner's right to require payment of bill of lading freight to itself, as the person obliged to render the contractual services in consideration of receipt thereof, could not be regarded as conditional upon an intermediate charterer having defaulted in its obligations.

In *MVV Environment Devonport Ltd v NTO Shipping GmbH & Co KG MS "Nortrader" (The MV Nortrader)*,[10] the issue was whether the claimant was a party to the contract of carriage evidenced by the bill of lading, where it appeared as shipper thereon but this did not correspond to the factual situation.

The defendant's vessel *Nortrader* had on 12 January 2017 been chartered by a third party, RS, for the purpose of transporting waste from a plant in the UK to RS's processing facility in the Netherlands under a contract between RS and the claimant. On 13 January 2017 an explosion on board caused personal injury and the defendant suffered losses of €676,561.46, €45,000 and US$840. The defendant claimed the losses from the claimant in arbitration on the basis of an alleged contract of carriage to which the claimant was alleged to be a party evidenced by the bill of lading and on the basis that an arbitration agreement had been incorporated by reference into the bill of lading. The claimant denied the claims on the basis that it was not the shipper and was not a party to the contract of carriage evidenced by the bill of lading and had been erroneously named as such.

The claimant was a company specialising in converting waste products to electricity, in the process creating a waste product known as "unprocessed incinerator bottom ash" ("UIBA"). It disposed of its UIBA under a contract between it and RS made on 26 November 2013 for the transport by RS of the UIBA to its plant in the Netherlands and for treatment, recycling and disposal by RS in consideration of a monthly payment based on the weight of UIBA removed each month (the "IBA Contract"). The contract was not an agency agreement but was a principal-to-principal contract. It was not one of sale but of disposal of a waste product for which the claimant paid RS a fee. Apart from these matters, the obligations of the parties were closely akin to an "Ex Works" sale agreement. RS was responsible for arranging the shipments of the UIBA to its plant. This included chartering a vessel for the purpose, procuring the shipment of the UIBA aboard the relevant vessel and the issue of a bill of lading for what had been shipped.

In 33 prior shipments, the bill of lading showed the claimant rather than RS as the shipper. In bills of lading following the incident, RS was instead shown as the shipper. On each occasion, after the relevant documents had been generated and the shipment of the UIBA aboard whichever ship was being used, the shipping agent sent a copy of the shipping documentation to a variety of different addressees – not including the defendant – under cover of an email in standard terms, attaching notices of readiness, statements of facts, a non-negotiable copy bill of lading and documentation relating to the transboundary movement of waste. In arbitration,

8 [2020] NSWSC 184; [2021] Lloyd's Rep Plus 16.
9 [2013] EWCA Civ 184; [2013] 2 Lloyd's Rep 38.
10 [2020] EWHC 1371 (Comm); [2021] Lloyd's Rep Plus 17.

the defendant relied on the 33 prior transactions and the transmission of the copy documentation to the claimant as precluding the claimant from arguing as against the defendant that it was not in fact the shipper.

The tribunal concluded that they had jurisdiction. The claimant sought the setting aside of the arbitration award, challenging the tribunal's jurisdiction under section 67 of the Arbitration Act 1996.

The judge held that the tribunal had erred in concluding that the claimant was a party to the contract of carriage. Since the contract of carriage was always concluded before the bill of lading was issued, the starting point was not the bill of lading but the contract of carriage, and it was open to a party to show that it had been wrongly identified as a party to the contract. The question was therefore whether the shipping agent or RS was expressly or impliedly authorised by the claimant to enter into a contract of carriage with the defendant on its behalf. The 33 prior transactions did not assist in resolving the issue of authority, unless the effect of the claimant's inaction was to give the shipping agent actual or ostensible authority to enter into the relevant contract of carriage with the defendant on behalf of the claimant.

The judge further considered that the IBA Contract was evidentially and contextually relevant to an assessment of whether RS or the agent had been authorised by the claimant to enter into a contract of carriage on its behalf with the defendant. That agreement transferred title to the UIBA to RS, on delivery at the claimant's plant. The shipping agent had tendered the first bill of lading issued in respect of the carriage to RS for approval and RS had approved it including the reference to the claimant as shipper within it. That did not have the effect of conferring express actual authority on the shipping agent to enter into a contract on behalf of the claimant, where RS itself was not authorised by the claimant. There was no contract between the shipping agent and the claimant.

The judge noted that the shipping agent had copied the emails to which was attached the shipping documentation naming the claimant as shipper on 33 prior occasions and the claimant had not objected. However, assent was not to be inferred from silence. There was nothing in the circumstances to permit an inference of acquiescence. The actual circumstances of the relationship between the claimant and the shipping agent clearly contradicted the suggestion that the claimant had impliedly authorised the shipping agent to enter into contracts of carriage to which it was made a party in the role of shipper.

A case not concerning a bill of lading, but which did consider the interpretation of the Hague Rules was *Alize 1954 and Another v Allianz Elementar Versicherungs AG and Others (The CMA CGM Libra)*.[11] Here, the Court of Appeal considered the appeal of a case on the scope of the obligation imposed upon a shipowner to exercise due diligence to make the vessel seaworthy before and at the beginning of the voyage, specifically with relation to the development of a passage plan. The Admiralty Judge had dismissed the shipowners' claim against the respondent cargo interests for contribution in general average.[12] The issue was whether defects in the vessel's passage plan and the relevant working chart rendered the vessel unseaworthy because neither document recorded the warning derived from the Notice to Mariners 6274(P)/10 that depths shown on the chart outside the fairway on the approach to the port of Xiamen were unreliable and waters were shallower than recorded on the chart. The judge had found that these defects rendered the vessel unseaworthy; that the owners had failed to exercise due diligence in breach of article III rule 1 of the Hague Rules; and that the breach was causative of the grounding of the vessel.

The owners appealed, arguing that a one-off defective passage plan did not render the vessel unseaworthy; and that actions of the master and crew carried out qua navigator could not be treated as attempted performance by the carrier to exercise due diligence to make the vessel seaworthy under article III rule 1. Cargo interests did not upon appeal challenge the judge's conclusion that they bore the burden of proof for unseaworthiness, limiting the application of the rule on burden of proof in *Volcafe Ltd v Compania Sud Americana de Vapores SA*[13] to article III rule 2 of the Hague Rules. This left seaworthiness as the main remaining issue.

The Court of Appeal dismissed the appeal. Having a defective passage plan was capable of being an "attribute" of the vessel rendering her unseaworthy. The owners' argument that, because the preparation of a passage plan could be said to be an act of navigation involving an exercise of judgment and seamanship it fell within the exception in article IV rule 2(a) and a defect in the plan could not constitute unseaworthiness, was a fallacy. A vessel may be rendered unseaworthy by negligence in the navigation or management of the vessel and the obligation to exercise due diligence to make the vessel seaworthy was an overriding obligation, to which none of the exceptions in article IV rule 2 was a defence.

11 [2020] EWCA Civ 293; [2020] 2 Lloyd's Rep 565.
12 [2019] EWHC 481 (Admlty); [2019] 1 Lloyd's Rep 595.
13 [2018] UKSC 61; [2019] 1 Lloyd's Rep 21.

A defect caused by navigational error by the master or crew before or at the commencement of the voyage could render the vessel unseaworthy. There was a clear distinction between unseaworthiness before and at the commencement of the voyage, for which owners were responsible and to which the article IV rule 2 exceptions did not apply, and what occurred during the voyage, where the exceptions did apply and qualified the obligation under article III rule 2. A distinction such as proposed by owners, between charts which were defective because they were not updated or corrected and charts which, as in the present case, were defective because they did not record the necessary warning in a notice to mariners, would be an unprincipled and artificial one. In each case, the chart was defective and unsafe and the vessel unseaworthy.

As to the second ground of appeal, *Northern Shipping v Deutsche Seereederei GmbH (The Kapitan Sakharov)*[14] was not support for a distinction between acts of the master and crew qua carrier and their acts qua navigator. Nor was it authority for the proposition that, once the owners had become responsible under the contract of carriage and therefore had come under the non-delegable duty under article III rule 1 to exercise due diligence to make the vessel seaworthy, they ceased to be responsible if the acts of the master and crew were to be categorised as acts of navigation, notwithstanding that those acts were in preparation for the voyage and their negligent performance rendered the vessel unseaworthy.

In *Grace Ocean Private Ltd v MV "Bulk Poland"*,[15] there was an application for an anti-suit injunction where bills of lading incorporated a London arbitration clause and court proceedings had been commenced against the shipowner in breach thereof. The defendant had taken delivery at Longkou of a cargo of soybeans which the claimant had carried on board its vessel *Bulk Poland* under "to order" bills of lading. The bills of lading contained a law and arbitration incorporation clause designating English law and London arbitration, and there were three relevant charterparties.

Discharge had commenced on 18 August 2019 and the defendant had immediately served a notice of claim alleging heat damage. Through its P&I Club, and a Chinese insurer, the claimant provided security in those proceedings to prevent the arrest of the vessel. The defendant commenced proceedings before Qingdao Maritime Court on 6 August 2020. The claimant's challenge to the court's jurisdiction was rejected, with the appeal under consideration. The claimant then issued an arbitration claim form and obtained an interim anti-suit injunction from Cockerill J on 12 October 2020 on the basis that the court proceedings had been commenced in breach of the arbitration clause. This was the return date. The defendant was not represented but had been informed of the proceedings.

Bryan J exercised his discretion to continue the anti-suit injunction with the customary cross-undertaking in damages and a P&I Club letter of undertaking. The defendant had presented the "to order" bills of lading at the discharge port. They contained a law and arbitration clause incorporated from the voyage charterparty which constituted an express choice of English law for the purposes of article 3(1) of the Rome Regulation.[16] Under English law, the defendant was bound to London arbitration and the defendant was in breach of the arbitration clause. The security given by the defendant would respond to London arbitration and, although the time bar had expired, the claimants had given an undertaking to submit to arbitration if commenced within 60 days of the interim anti-suit injunction.

In *OCBC Wing Hang Bank Ltd v Kai Sen Shipping Co Ltd (The Yue You 903)*,[17] the Hong Kong Court of First Instance considered an issue of incorporation of an arbitration clause into a bill of lading, where there were no specific words of incorporation, by reference to a charterparty.

Kai Sen was the owner of the vessel *Yue You 903* and carrier of cargoes described in four tanker bills of lading dated 12 April 2018. The cargoes were to be shipped from Dumai, Indonesia to Huangpu, China. The bills of lading were negotiable bills marked "To order". Kai Sen had released the cargoes without presentation of the bills of lading. OCBC commenced these proceedings seeking damages for breach of the contracts of carriage and breach of duty as carrier or bailee. Kai Sen applied to stay the action in favour of arbitration under an arbitration agreement incorporated by reference into the bills of lading.

OCBC, as holder of the bills of lading, denied that it was a party to any arbitration agreement because the bills of lading did not contain specific words of incorporation of the arbitration clause. The charterparty clause stated: "ARB, IF ANY, IN HONGKONG UNDER ENGLISH LAW". Section 20(1)(1) of the Hong Kong Arbitration Ordinance (Cap 609) provided for a stay in favour of arbitration, and

14 [2000] 2 Lloyd's Rep 255.
15 [2020] EWHC 3343 (Comm); [2021] Lloyd's Rep Plus 6.
16 Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation).
17 [2020] HKCFI 375; [2021] Lloyd's Rep Plus 18.

section 19(1)(6) provided for incorporation by reference to a separate document. OCBC relied on *T W Thomas & Co Ltd v Portsea Steamship Co Ltd*[18] for the proposition that an arbitration clause could only be incorporated into a bill of lading by express reference.

> In Hong Kong, as under English law, the rule in *Thomas v Portsea* is still good law in relation to bills of lading. An incorporation by general reference to the arbitration clause in the charterparty could not meet the proviso in section19(1)(6) of the Ordinance

Kai Sen retorted that the Ordinance was not confined to particular types of arbitration agreement. It also relied on a notice of arbitration issued by OCBC to argue that it had submitted to arbitration.

Au-Yeung J dismissed the summons for stay of proceedings. The applicant only needed to show an arguable case that an arbitration clause had been incorporated. If the issue was susceptible to respectable arguments from both sides, the issue should be resolved in favour of arbitration. The governing law, as stipulated in the purported arbitration agreement under the charterparty, was English law. Applying English law, the arbitration agreement in the charterparty had not been incorporated into the bills of lading by specific reference.

Obiter, in Hong Kong, as under English law, the rule in *Thomas v Portsea* is still good law in relation to bills of lading. An incorporation by general reference to the arbitration clause in the charterparty could not meet the proviso in section 19(1)(6) of the Ordinance.

The cover letter of OCBC's notice to commence arbitration expressly disclaimed admission to Kai Sen's position and maintained OCBC's pleaded position that Hong Kong courts had jurisdiction. It was plainly OCBC's act to preserve its claim pending resolution of the jurisdictional dispute, rather than submission to arbitration.

[18] [1912] AC 1.

CHARTERPARTIES

Charterparty cases during the past year have not presented a cohesive view or resulted in significant steps in terms of legal development, but do continue some existing trends and developments in the law.

Voyage charterparties

The issue of what documents to submit in support of a demurrage claim and the time limits for submission returned once more in *Tricon Energy Ltd v MTM Trading LLC (The MTM Hong Kong)*.[19] This time, the issue of submitting bills of lading was added to the mix. The defendants, MTM Trading LLC, were the owners of the vessel *MTM Hong Kong* which was chartered to the charterers under a charterparty on an amended Asbatankvoy form dated 13 February 2017. The owners brought a claim for demurrage in the amount of US$56,049.36 as a result of delays at both the load port, Antwerp, and the discharge port, Houston. A formal demurrage claim was submitted by email on 9 June 2017, with a number of documents attached.

The charterers disputed that the demurrage claimed was due to the owners. The principal grounds were that the demurrage claim did not have attached to it all of the necessary documents and that, because the 90-day period to submit those documents had elapsed, the demurrage claim had become time-barred. At the invitation of the parties, the tribunal made an award on the basis of written submissions alone. By the award, the tribunal held that the owners' demurrage claim succeeded in full. The charterers were granted permission to appeal on the following question.

> "Where a charterparty requires demurrage to be calculated by reference to bill of lading quantities, and contains a demurrage time bar which requires provision of all supporting documents, will a claim for demurrage be time-barred if the vessel owner fails to provide copies of the bills of lading?"

The judge allowed the charterers' appeal and answered the question in the affirmative, adding that he did so only on the basis of an interpretation of the particular clauses

[19] [2020] EWHC 700 (Comm); [2020] 2 Lloyd's Rep 559. This issue was big in 2019 with judgments in the cases *"Amalie Essberger" Tankreederei GmbH & Co KG v Marubeni Corporation (The Amalie Essberger)* [2019] EWHC 3402 (Comm); [2020] 1 Lloyd's Rep 393 and *MUR Shipping BV v Louis Dreyfus Company Suisse SA (The Tiger Shanghai)* [2019] EWHC 3240 (Comm); [2020] 2 Lloyd's Rep 153, both noted in J Hjalmarsson, *Maritime law in 2019: a review of developments in case law*.

in the present case, and without suggesting that there was a requirement to provide bills of lading where these were not available in a particular case. The charterparty in the present case contained an express reference to "Bill of Lading quantities" in clause 10(g). It was made clear by this clause that "pro rating" meant a division according to bill of lading quantities. The charterparty referred not simply to "supporting documentation" but to "all" such documentation.

Although the judge carefully circumscribed his decision, it is becoming increasingly clear that this type of clause can be deployed as a technicality to defeat otherwise legitimate demurrage claims.

In *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd (The Eternal Bliss)*,[20] the issue of the nature of demurrage was broached. What damage precisely did demurrage liquidate? The defendant voyage charterer had failed to discharge goods from the claimant shipowner's vessel *Eternal Bliss* within the laytime (but the delay was not such as to be repudiatory). The cargo deteriorated and claims were brought by cargo owners and insurers against the shipowner, which in turn sought compensation for those claims from the voyage charterer – an unusual claim. Was demurrage the owner's sole remedy for breach? A question of law arose in arbitration and was put to the judge pursuant to section 45 of the Arbitration Act 1996:

> "Where a voyage chartered vessel has been detained at a discharge port beyond the laytime, and such delay has caused deterioration of the cargo and led to the vessel's owners suffering loss and damage and being put to expense (including in the form of liabilities to third parties), are the owners in principle entitled to recover from the charterers, in addition to any amounts payable as demurrage, such loss/damage/expense by way of:
>
> (a) damages for the charterers' breach of contract in not completing discharge within permitted laytime; and/or
>
> (b) an indemnity in respect of the consequences of complying with the charterers' orders to load, carry and discharge the cargo?"

Andrew Baker J answered the question as follows. Although demurrage was liquidated damages, because it was not clear what exactly demurrage liquidated, cases on the exclusivity of liquidated damages provisions from other contexts were of limited assistance. The relevant Norgrain clause 19 specified the rate of "Demurrage … if incurred", and did not specify what demurrage was, or what it sought to liquidate.

The judge considered that the majority conclusion in the leading case *Aktieselskabet Reidar v Arcos Ltd* [21] was that there had been two breaches, not one. As a result, that case did not answer the question arising where, as here, there was no separate breach, but nevertheless a claim other than for the detention of the vessel.

The relevant loss was a liability for damage to the cargo caused by its retention on board the ship. The cargo claim liabilities were unrelated to the loss of the use of the ship as a freight-earning vessel, and K-Line was not claiming damages for detention. The damage to the cargo was, as a type of loss, quite distinct in nature from, and additional to, the detention of the ship.

The classification of demurrage as damages, not debt, did not mean or necessarily imply that the demurrage rate was intended to be more than an agreed measure of the value of the ship's lost time. Agreeing a demurrage rate gave an agreed quantification of the owner's loss of use of the ship to earn freight, nothing more. The judge declined to follow *Richco International Ltd v Alfred C Toepfer International GmbH (The Bonde)*[22] in this respect.

The decision has been appealed to the Court of Appeal.[23] As a result of the judge's interpretation of *Reidar v Arcos* and the rejection of *The Bonde*, this is set to be an interesting appeal.

In *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd (The Sea Master)*,[24] the question was of the responsibility for discharging the cargo. Where the party expected and equipped to perform discharge enters into insolvent liquidation, surviving parties to the maritime adventure will be in search of a pocket from which to recover their losses.

The claimants were the assignees of the registered owners of MV *Sea Master*, who, by a voyage charter on the Norgrain 89 form, had chartered the vessel to a charterer who was now in insolvent liquidation. The first defendant was a bank involved in financing the cargo carried under the contract of carriage contained in or evidenced by a bill of lading dated 7 November 2016. The second defendant

[20] [2020] EWHC 2373 (Comm); [2020] 2 Lloyd's Rep 419.

[21] (1926) 25 Ll L Rep 513; [1927] KB 352.

[22] [1991] 1 Lloyd's Rep 136.

[23] Thanks are due to Dr Meixian Song for pointing this out. Casetracker.justice.gov.uk gives the status of the cases as "hear by 1 November 2021" (accessed on 25 January 2021).

[24] [2020] EWHC 2030 (Comm); [2021] Lloyd's Rep Plus 21.

was the receiver of that cargo, had taken delivery and was the holder of the bill of lading. The cargo in question was corn, soya bean meal and soya pellets loaded in Argentina for discharge in Morocco, which in the event were discharged in Lebanon following a complicated arrangement involving two sets of switch bills. The bill of lading incorporated all the "... terms, conditions, liberties and exceptions ..." of the voyage charter.

In arbitration, the bank claimed damages for misdelivery and shipowners claimed against both defendants for demurrage or damages in lieu. This was the shipowner's appeal on the question of law as to whether it was an implied term that the bank or receivers would take all necessary steps to enable the cargo to be discharged and delivered within a reasonable time, or would discharge the cargo within a reasonable time.

> In the absence of a contractual provision to contrary effect, at common law responsibility for discharge rests with the owner of a vessel. Ousting that rule requires clear language.

HHJ Pelling QC noted that as the defendants maintained, in the absence of a contractual provision to contrary effect, at common law responsibility for discharge rested with the owner of a vessel. Ousting that rule required clear language. Here, clause 10 of the charterparty in clear language transferred the *cost* of discharge from the owner to the charterer, but not *responsibility* for the task of discharge itself.

The argument based on an implied term was also unsuccessful. The owners had contended that there was a term to be implied into the contract of carriage to the effect that the defendant would take all necessary steps to enable the cargo to be discharged within a reasonable time. This was inconsistent with the finding that discharge was an obligation for the owner. The receiver's obligations were limited to the express duty of appointing stevedores. Equally, there was no commercial need to imply a general term supporting collaboration in delivery. The established rule of law in the event of a failure to receive the goods was a right for the carrier to warehouse the cargo and charge the cargo owner.

An issue of contract formation arose in *Nautica Marine Ltd v Trafigura Trading LLC (The Leonidas)*.[25] Had the parties entered into a voyage charterparty, and if so on what terms? The claimant owner of the vessel *Leonidas* and the defendant had, between 8 and 13 January 2016, conducted negotiations for a voyage charter for the purpose of the carriage of crude oil from the Caribbean to the Far East. The dispute concerned whether a charterparty had been concluded as a result of those negotiations, in particular the effect of an outstanding "subject" of the negotiations, "Suppliers' Approval" of the vessel.

Foxton J held that the claim for damages failed. A "subject" was more likely to be classified as a pre-condition rather than a performance condition if the fulfilment of the subject involved the exercise of a personal or commercial judgment by one of the putative contracting parties.

Further, where a "subject" was only resolved by one or both of the parties removing or lifting the subject, rather than occurring automatically as a result of some external event such as the granting of a permission or licence, the "subject" was likely to be a pre-condition rather than a performance condition. The placement of the suppliers' approval subject between pre-conditions suggested that it was also a pre-condition, as did the uncertainty as to the exact meaning of the term which made it unsuitable as a contractual obligation. It should not lightly be inferred that a pre-condition had been converted into a performance condition through subsequent negotiations.

No contract had been concluded and on the proper construction of the suppliers' approval subject, there was no realistic chance of approval being forthcoming by the time required, even if the defendant had taken reasonable steps to obtain that approval.

The remaining two voyage charterparty cases from the year arose out of the same litigation between Trafigura and Clearlake. First, in *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd (The Miracle Hope)*,[26] Trafigura as disponent owner sought an urgent mandatory injunction against its voyage charterer Clearlake, compelling the latter to provide security to enable the release of MT *Miracle Hope* which, on 12 March 2020, had been arrested in Singapore by the purported lawful holder of the bills of lading for cargo on board. The sub-charterer had required the cargo of crude oil on board the vessel to be delivered without production of the bills of lading in November 2019, triggering a clause in the voyage charterparties requiring the cargo to be released on charterers' orders

[25] [2020] EWHC 1986 (Comm); [2021] Lloyd's Rep Plus 23.
[26] [2020] EWHC 726 (Comm); [2021] Lloyd's Rep Plus 12.

but against a P&I Club letter of indemnity. The cargo had been released and the vessel subsequently arrested by a bank holding the bills of lading. Trafigura sought mandatory injunctive relief to enforce the provisions of the voyage charterparty, in particular a security from the charterers to enable the release of the vessel.

The charterparty, on an amended Shellvoy6 form, had originally been concluded on 21 August 2019 and novated to Clearlake by an addendum on 21 December 2019. The bill of lading holder, a bank, had demanded security for release from arrest from the vessel owner, which in turn had sought security from Trafigura as time charterer, leading to these proceedings. In summary, Trafigura alleged that Clearlake was contractually obliged to provide the security sought, but had so far failed to do so.

The defendant submitted that: (i) it was not the right party; (ii) the terms of the indemnity clause had not been complied with because the owner's club indemnity wording had not been provided to the charterer before the fixture was concluded, as required by clause 33(6) of the charterparty which specified "LOI as per Owners' P&I Club wording to be submitted to Charterers before lifting the 'subs'"; (iii) no separate letter of indemnity was provided to the claimant as required by clause 33(6), therefore no indemnity had in fact arisen; and (iv) the circumstances did not justify the extreme urgency with which the application had been brought before the court.

The judge granted the injunction. As a result of the addendum, the defendant had assumed all the charterer's obligations required to be performed thenceforth, whether or not they arose out of events which had previously occurred. The obligations to provide security, defence funds and indemnity to which the application related all fell to be performed following the arrest of the vessel, which post-dated the addendum.

Further, clause 33(6) should not be construed as making provision of the LOI wording before lifting of "subs" a sine qua non, provided that by the time of any instructions to discharge without presentation of original bills the indemnity wording was available to the charterer. Any failure to provide the Club wording before lifting of "subs" would be a breach that could be waived and the defendant's actions in requesting and receiving the wording on 14 October 2019, and then proceeding on 30 October to give discharge instructions invoking clause 33(6), were a plain case of waiver.

The judge observed that notwithstanding that the parties' additional wording should prevail over the standard printed wording, clause 33(6) must be construed as a whole. Thus viewed, it envisaged that the indemnity arose under the clause itself, without the need for any separate letter to contain the indemnity. Indeed, the parties had conducted themselves on the basis that the indemnity under clause 33(6) operated without the need for any separate LOI to be provided.

In support of the injunction, the judge considered that the defendant was obliged to provide security under clause 33(6) but had failed to do so. Irrespective of the lack of substantive evidence of lost chartering opportunities, there was, in light of the volatility of the VLCC market, clearly a very pressing need to secure the release of the vessel. This justified the grant of relief notwithstanding the short notice to the defendant.

Next, on the return date of the injunction, in *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd (The Miracle Hope) (No 3)*[27] the further questions arose as to whether the court hearing the litigation between charterers should decide the issue of what security was sufficient for release of the vessel from arrest. That was strictly speaking an issue for the Singapore court, the court of arrest. What course of action was open to the judge in the High Court of England and Wales?

Teare J considered this issue in the further context of expected court delays due to the Covid-19 pandemic, while speedy action was expected under the injunctions. The injunctions ordered Clearlake (and its sub-voyage charterer Petrobras) "forthwith" to provide such bail or other security required to secure the release of the vessel *Miracle Hope* from arrest in Singapore.

Trafigura sought an amendment to the terms of the order requiring Clearlake to provide, by 24 April 2020 (two days after the hearing), a bank guarantee in the form required by the arresting bank, failing which there should be a payment into the Singapore court within seven working days of the security demanded.

The judge declined to vary the injunctions concerning the provision of a bank guarantee on the terms acceptable to the arresting bank, but did order payment into court. He reasoned that "forthwith" in the present context envisaged that the security would be provided in the shortest practicable time. What was practicable would inevitably depend upon the circumstances of the case.

Further, the phrase security "as may be required" referred to the security required by the court of the place of arrest to release the vessel from arrest, and not to security as

[27] [2020] EWHC 995 (Comm); [2021] Lloyd's Rep Plus 13.

may be required by the arresting party or a court (here, the English court) with jurisdiction to determine disputes between the owner and charterer. In these circumstances (the Covid-19 pandemic), where the court of arrest was unable to determine the application for release until 18 May 2020, there were powerful reasons why the court of the charterparty contract dispute should exercise the jurisdiction the parties had conferred on it to resolve disputes between the owner and charterer and find as a fact whether the security offered matched that which would be required by the court of the place of arrest. The evidence did not indicate that the Singapore court would require a guarantee that would respond to the judgment of a foreign court, as demanded by the bank. Payment into court was, if unusual, an option available to the Singapore court and it was appropriate to make such an order.

Time charterparties

Two time charterparty cases emerged in 2020, one on performance warranties and one on which party to sue in a chain of charterparties where the charters arguably named different parties.

In *SK Shipping Europe plc v Capital VLCC 3 Corporation (The C Challenger)*,[28] the question was of a performance warranty calculated based on faulty numbers. The claimant was the owner and the defendants were the time charterer and charterparty guarantor of the VLCC *C Challenger*. The charterparty contained terms warranting fuel consumption and speed and a term requiring the owner to obtain and maintain approval of at least three oil majors.

Following problems with a turbocharger, the charterers alleged inter alia that the owners had intentionally misdescribed the speed and consumption characteristics and that they were in breach of obligations to maintain oil major approvals, and threatened to terminate or rescind the charterparty. The owners denied breach and offered to adjust hire. On a subsequent voyage the vessel overconsumed to such an extent that it ran out of fuel during a discharge operation, possibly due to hull fouling. On 19 October 2017 the charterer purported to rescind for misrepresentation or to terminate for repudiatory breach. The following day, the owners purported to terminate on the basis that the charterers' message was itself a renunciation.

[28] [2020] EWHC 3448 (Comm); [2021] Lloyd's Rep Plus 24.

Foxton J held that the charterer's and guarantor's claims failed, and that the owner was entitled to damages for the charterer's repudiatory breach. The mere offer of a speed and consumption warranty, and in particular of a continuing warranty as in this case, should not of itself be held to involve an implicit representation as to the vessel's current or recent performance.

Further, a reasonable reader of a letter dated 22 November 2016, sent by intermediate brokers to charterers and comparing vessels' performance, would have been aware that the figures presented were likely to involve some form of extrapolation rather than exclusively measured historical data over the last three voyages. The words "and might be different depends on the seasonal ocean currents and weather conditions" served to reinforce the impression that the data offered involved some representation related to the vessel's actual consumption. The representation was that the data was reasonably consistent with the vessels' average performance. The representations had been made to the guarantor, not the charterer, but were to be treated as made by or on behalf of the owner to the guarantor acting on behalf of the charterer.

> The mere offer of a speed and consumption warranty, and in particular of a continuing warranty as in *The C Challenger*, should not of itself be held to involve an implicit representation as to the vessel's current or recent performance

The speed and consumption data provided was not reasonably consistent with the average performance of the vessel over its last three voyages and was therefore untrue. However, there was no fraudulent intent on the part of the key persons in providing this data. The owners did not have reason to believe that the statement based on the three recent voyages was true. This representation was material, but there was no inducement because if the same warranty had been offered, but no representation made as to the vessel's performance, the charterparty would have been concluded on the same terms. The appropriate counterfactual was the position if the same

warranty had been offered, but no representation made as to performance; not the position if no warranty had been offered.

While a reservation of rights often had the effect of preventing subsequent conduct constituting an election, this was not an invariable rule. Charterers had by 13 July 2017 come to the knowledge that the fuel consumption had been misdescribed and had reserved their rights. Their actions thereafter in fixing a voyage with a sub-charterer were only consistent with an election to maintain the charterparty, and were incompatible with an attempt to reserve rights to set it aside ab initio for the misrepresentation of which it had complained.

On the charterers' further allegations of breaches, a series of non-repudiatory breaches may cumulatively amount to a renunciation or repudiation of a contract. However, the breaches complained of, taken cumulatively, had not deprived the charterer of substantially the whole benefit which it was intended to obtain under the charterparty for the payment of hire, or "go to the root" of the charterparty. As a result, the charterers had not been entitled to terminate the charterparty and their communication to that effect was itself a renunciation, entitling the owners to damages representing the loss it suffered by reason of the early termination.

Americas Bulk Transport Ltd (Liberia) v Cosco Bulk Carrier Ltd (China) (The Grand Fortune)[29] concerned an issue of identity and jurisdiction, where both of the suggested intermediate parties were in insolvent liquidation. The parties to the litigation were sub-charterer (Americas) and head owner (Cosco) respectively of MV *Grand Fortune*. The intermediate charterer was said by Cosco to be Britannia Bulkers and by Americas to be Britannia Bulk, two related companies which were now both in administration or insolvent liquidation. There was no evidence for a charterparty from Bulkers to Bulk. Bulkers was the subsidiary of Bulk, and its charterparty with Cosco had been guaranteed by Bulk. Bulkers' rights under the sub-charter had subsequently been assigned to Cosco. Cosco had commenced arbitration against Americas as assignee of those rights seeking unmet hire payments, and had obtained an award. Americas had then commenced these proceedings objecting to the jurisdiction of the arbitration tribunal on the basis that its charterparty counterpart was not Bulkers, but Bulk, that Cosco had not taken assignment of any rights from Bulk and that therefore it was not entitled to rely on the arbitration clause therein. The arguments of both parties depended on the correct approach to the construction of the charterparty and the disponent owner to which that approach pointed, and also on the importance of extrinsic materials including a "draft charterparty", drafted some four months after the recap fixture and naming Bulk as disponent owner.

The judge dismissed Americas' claim, holding that Bulkers was the right disponent owner. The identification of a party to a contract was a matter of contractual construction, which may be supported by extrinsic evidence known to both parties at the time the contract was made. It was not, as the claimant had argued, a question of fact to be determined by reference to all the relevant evidence even if it post-dated the contract and was known to only one of the parties. Where a contract did not sufficiently unequivocally define the parties, an objective approach to extrinsic evidence should be adopted.

> The identification of a party to a contract is a matter of contractual construction, which may be supported by extrinsic evidence known to both parties at the time the contract is made. It is not a question of fact to be determined by reference to all the relevant evidence

Evaluating some of the extrinsic evidence, the judge found that the effect of the references in the sub-charter to the head charterparty was only to incorporate the terms of that charterparty. It identified the vessel, but did not assist with the identification of the disponent owner. Further, it was permissible to refer to the subjective intent of the agent acting on behalf of the charterer at the time he entered into the contract on behalf of his principal. The evidence did not suggest an intention to charter on behalf of Bulk. The negotiating parties knew of the head charter to Bulkers and that Bulkers had the power to sub-charter. It must be concluded that they had negotiated on that basis. Subsequent conduct could not assist with contractual intentions, but the finding would be that the letters of indemnity naming Bulkers and hire payments made to Bulkers were of greater significance than the draft charterparty naming Bulk.

[29] [2020] EWHC 147 (Comm); [2020] 2 Lloyd's Rep 105.

Bareboat charterparties

As for bareboat charterparties, 2020's crop of cases was, as usual, on the small side.

In *Altera Voyageur Production Ltd v Premier Oil E&P UK Ltd (The Voyageur Spirit)*,[30] the issue was of an interpretation of hire adjustment in a bareboat charterparty, resolved by the judge based on general principles of contract interpretation as enunciated in *Wood v Capita Insurance Services Ltd*.[31]

The claimant Altera sought the sum of US$12,108,072.50 by way of adjusted hire for the FPSO *Voyageur Spirit* due under the terms of a sub-bareboat charterparty between the parties, dated 9 November 2010. The defendant Premier, an oil exploration company, disputed that claim and counterclaimed for the sum of US$3,837,580.91 by way of overpaid hire. The sole question for the court was the correct interpretation of the Hire Adjustment Formula in section 5 of Appendix M of the charterparty. The formula consisted of a narrative plus two worked examples in Appendix M. The latter contained steps not set out in the former. While Altera contended that the formula should be applied as set out in the worked examples, Premier preferred the narrative alone, asserting that Altera's position gave rise to inconsistent results.

The judge gave judgment for Altera. Applying the principles as set out in *Wood v Capita*,[32] the judge reminded himself of the danger of focusing too narrowly on a critical phrase in a lengthy contract. The suite of contractual documents was the product of a negotiation in which elements had been added, other elements discarded, and changes made in the course of drafting, without the consequences always being followed through with rigorous consistency. It was the sort of contract in relation to which the court, in attempting to ascertain the objective meaning of the language in which the parties had chosen to express their agreement, must be wary of focusing too narrowly on the dictionary meaning of individual words and phrases but must look at terms in their commercial context and against the landscape of the instrument as a whole.

Thus, the article defining "Daily Base Hire" referred to the worked examples in Appendix M, not to the article providing for adjustments of hire. The worked examples were therefore not mere optional extras and ignoring them would mean ignoring the agreement that the parties had actually made. While it was *possible*, it was by no means *clear*, that something had gone wrong in the drafting. Permission to appeal appears to have been declined by the Court of Appeal on 13 November 2020.

The appeal in *Neptune Hospitality Pty Ltd v Ozmen Entertainment Pty Ltd (The Seadeck)*,[33] reported in the review of cases from 2019,[34] was dismissed by the Federal Court of Australia. The litigation had arisen out of a joint venture agreement (JVA) to which the claimant OE (appeal respondent) had bareboat-chartered the motor yacht *Seadeck* for the purpose of luxury cruises around Sydney Harbour for 800 passengers. Both the JVA and the charterparty were concluded on 6 January 2016. The defendant Neptune (appellant) was a party to the joint venture agreement, together with Kanki, a company associated with OE. The JVA stipulated cooperation between the parties, including fortnightly financial statements to Kanki and decisions to be taken jointly. The charterparty provided notably that Kanki and Neptune were to be in full possession and control of the vessel; Neptune was to carry out daily operations; the charterers could not make alterations to the ship without OE's agreement; OE warranted that the vessel would need to be fully classed and surveyed for the business and to carry up to 813 passengers; and Neptune was to ensure the maintenance of class and licences.

Even before the agreements were concluded, things had begun going wrong as the vessel was detained for eight months in Egypt in transit from Turkey to Australia, arriving only in November 2015. Neptune had by then incurred significant expenditure to secure the vessel's release and to ensure that repairs, refitting and surveys were performed in Indonesia. Problems continued as classification and a liquor licence could only be secured for 450 passengers. The catering agreement entered into by the joint venture with a party associated with Neptune made no profit for the joint venture. Fortnightly financial statements were not being provided. As business was not going well in Sydney, Neptune unilaterally decided to take the vessel to Brisbane. It also decided to remove 30 cm of the mast to permit passage under a bridge in Brisbane. By September 2018 the business relationship had broken down to such an extent that receivers were appointed. Kanki claimed that it had terminated the JVA on 25 July 2017 based on Neptune's failure to remedy breaches thereof. OE claimed that it had validly terminated the bareboat charterparty on 4 August 2017 because the termination of the JVA meant the failure

30 [2020] EWHC 1891 (Comm); [2021] Lloyd's Rep Plus 19.
31 [2017] UKSC 24; [2018] Lloyd's Rep Plus 13; [2017] AC 1173.
32 Ibid.
33 [2020] FCAFC 47; [2021] Lloyd's Rep Plus 25.
34 *Ozmen Entertainment Pty Ltd and Another v Neptune Hospitality Pty Ltd (The Seadeck)* [2019] FCA 721; [2020] 1 Lloyd's Rep 287. See *Maritime law in 2019: a review of developments in case law*.

of the purpose of the charterparty. In the alternative, Kanki sought equitable relief, pleading that it was just and equitable to now wind up the venture. Neptune disputed these assertions on the facts. It argued that OE was not entitled to equitable relief as it had sought the assistance of a third party in disengaging, apparently intending to go into business with them instead. Neptune also cross-claimed sums based on the JVA. In relation to the charterparty, it argued that it had not been in breach by failing to secure classification for 800 passengers, as its obligation was solely to maintain class. At first instance, the judge had held that OE was entitled to an order for possession and delivery up of *Seadeck*. Neptune appealed, proffering 22 grounds of appeal.

The court dismissed the appeal. The judge had been entitled to make the findings, draw the inferences, exercise the discretion and come to the conclusions that he did. Neptune's success on points relating to financial reporting obligations and catering information were insufficient to allow the appeal.

In *FIMBank plc v KCH Shipping Co Ltd (The Giant Ace)*,[35] the issues were of interpretation of section 12 of the Arbitration Act 1996, which deals with the court's power to extend time for beginning arbitral proceedings, and the finer points of the law in the judgment are therefore largely beyond the scope of this review. However, the litigation provides an insight into the challenges involved in identifying the correct party to sue in a shipping litigation and the consequences of failing to do so. The bank, as lawful holder of bills of lading in respect of cargo on board M/V *Giant Ace* that had been discharged in April 2018 without presentation of the bills of lading against letters of indemnity, had notified the registered owner of the vessel, MW, of a claim. In the initial process of identifying the correct party to sue, the bareboat charterer KCH had been overlooked.

When MW's P&I Club were notified of the claim, they notified a time charterer, CM. CM's lawyer contacted the bank's lawyer. At this time, CM's lawyer, who knew that KCH was in the chartering chain, thought KCH was a time charterer. Both lawyers party to this exchange therefore had only partial information. Extensions of time were granted, with explicit reference to MW but only oblique reference to KCH. The bank's lawyer remained unaware of KCH's existence until contacted by their solicitor in May 2019, at which point it became clear to her that the bills of lading were demise charterer's bills and that KCH was the carrier. The one-year time bar had expired, and if the extension was on behalf of MW only, so had the claim against KCH. The bank's lawyer opted not to immediately clarify the matter and went on to commence arbitration within the extended time limit against MW, with a notice addressed to KCH and KCH's solicitor. MW retorted that the bills were not its bills. KCH for its part asserted that the claim was time-barred. In litigation, there were mutual accusations of misleading in correspondence and of failing to check basic matters. If the parties to the chartering chain had gone out of their way to conceal the identity of the true head owner, was this a reason for extending time to allow the bank to sue KCH?

Cockerill J held that the application failed. Section 12 was not intended to penalise mere silence or failures to alert a party that it needed to adhere to a time bar.

The importance of initial research to identify all parties to the chartering chain could not be more evident.

[35] [2020] EWHC 1765 (Comm); [2020] 2 Lloyd's Rep 511.

SALE OF GOODS

In *China Coal Solution (Singapore) Pte Ltd v Avra Commodities Pte Ltd*,[36] the Singapore Court of Appeal allowed an appeal from the decision of the judge,[37] wherein he had held that the parties had entered into a contract for the sale of three cargoes of coal. The case raised issues of intention to create legal relations and previous course of dealings. On 29 March 2017 the parties had exchanged four emails which the first instance plaintiff (Avra) claimed gave rise to a concluded contract. The defendant (CCS) admitted that the exchange of emails had taken place, but asserted that the emails were insufficiently certain and insufficiently complete to give rise to a contract; alternatively that the parties had no intention to create legal relations when they exchanged the emails.

The transaction at issue was the plaintiff selling to the defendant a total of 185,000 mt of Indonesian steam coal in three cargoes for delivery fob Tanjung Pemancingan Anchorage in May 2017. The plaintiff had emailed the defendant proposing the sale and there was an exchange of, in all, four emails between the parties with details of a transaction. A draft contract was later emailed from the plaintiff to the defendant "for your review/confirmation". Marked-up draft contracts were exchanged. The plaintiff executed the contract on 17 April 2017, but the defendant never did. On 4 May 2017 the defendant wrote to the plaintiff saying that, due to a weak market, it now only wanted the first of the three cargoes. The plaintiff took the view that a contract had been entered into by the exchange of emails and wrote to terminate the contract on the basis of the defendant's "anticipatory repudiatory and/or repudiatory breach".

The defendant denied that there was a contract, for among other reasons that it had not been executed. On three previous occasions, the parties had entered into similar transactions. The plaintiff had emailed with key terms including the quantity of coal, the type of vessel, the laycan, the loading port, the loading rate, the quality of coal, the price, a price adjustment formula, the time of payment and the demurrage. The defendant had made a counter proposal and drafts had then been exchanged, including terms which had not been discussed before. The first of the contracts, in 2015, had not been performed by the plaintiff, the next two had been executed by both parties and performed. Both parties asserted that this amounted to a course of dealing in their favour. At first instance, Vinodh Coomaraswamy J had held that the parties had entered into a contract for the sale to the defendant of three cargoes of coal and that the defendant was liable in damages.

The defendant appealed. Upon appeal, the issues were whether a contract had come into existence, and if so whether it was unenforceable for uncertainty or incompleteness due to the lack of a surveyor term. The Court of Appeal allowed the appeal. There was no evidence to support the notion that the parties had intended to enter into one contract first, with the prospect of replacing it with a second contract after further negotiations. The parties had, in the entire agreement clause, supplied by Avra, provided for two exclusive situations in which the contract would come into existence.

The parties had not intended to create legal relations by their exchange of the emails. As the draft contract was never signed by China Coal and as China Coal did not nominate any vessel to load any of the shipments, no contract had come into existence. Obiter, the lack of a surveyor term would not have invalidated the contract, had one come into being, as there was surveyor agreement once the parties had agreed on how one would be appointed.

In *HC Trading Malta Ltd v Savannah Cement Ltd*,[38] the question arose of the effect of a settlement agreement. The claimant sought summary judgment on now undefended claims for the price of shipments of bulk clinker cement sold by the claimant to the defendant, demurrage claims as well as an interim order for payment of the demurrage claims. The claims had arisen under a settlement agreement dated 27 August 2019 which followed a sale contract dated 10 October 2018. The clinker had been delivered, but no letters of credit set up and the price was not otherwise paid. Demurrage had arisen under previous sale contracts and arose again under the sale contract at issue. The settlement agreement provided that Savannah must set up letters of credit in respect of the sums owed and that the historic demurrage, in relation to which Savannah admitted liability but disputed the amount, should be referred for expert determination if no agreement was reached within 45 days.

Henshaw J gave summary judgment in respect of the sale contract price. However, the claimant was bound by the settlement agreement to pursue historic

[36] [2020] SGCA 81; [2021] Lloyd's Rep Plus 27.

[37] *Avra Commodities Pte Ltd v China Coal Solution (Singapore) Pte Ltd* [2019] SGHC 287; [2020] Lloyd's Rep Plus 51.

[38] [2020] EWHC 2144 (Comm); [2021] Lloyd's Rep Plus 28.

demurrage claims via expert determination. On a careful construction of the settlement agreement, this included the demurrage under the sale contract at issue. The applications for summary judgment or interim payment on the demurrage claims would be stayed.

Certificates of quality were at issue in *Septo Trading Inc v Tintrade Ltd (The Nounou)*.[39] A cargo of 36,000 to 42,000 mt of "high-sulphur fuel oil RMG 380 as per ISO 8217:2010" was said to be off spec in a dispute between the claimant buyer, Septo, and the defendant seller, Tintrade.

The contract was a recap based on amended BP General Terms and Conditions. Delivery was to be "in one cargo lot, fob one safe berth, one safe port Tallin or Ventspils, for loading on board M/T NOUNOU during the period 1-3 July 2018". On 26 June 2018 the parties jointly instructed SGS Latvija Ltd to perform quantity and quality determinations of the fuel oil. The certificate showed that the cargo was within the contractual specification and it was loaded on board *Nounou* at Ventspils in Latvia in July 2018. Later samples however showed that the cargo was off spec, and Septo attempted to sell it and then proceeded to blend it to produce an on-spec cargo which it sold in the Singapore market.

In support of the claim, Septo asserted that the cargo was off spec at Ventspils and sought an award of damages in the sum of US$7,785,478. According to Tintrade, the cargo was not off spec and the damages claimed were exaggerated. Three questions arose for decision. First, was the buyer prevented from arguing that the cargo was off spec by reason of an independent certificate of quality issued at the loadport? If not, was the cargo off spec? If it was off spec, what damage was suffered by the buyer?

The judge found on the evidence that the analysis of the composite sample prior to loading revealed an on-spec reading because the samples used were unrepresentative of the product loaded on board. The clause in the recap entitled "Determination of Quality and Quantity" did not stand alone but was to be read with clause 1.2.1 of the BP 2007 General Terms and Conditions. The latter could be read as qualifying the otherwise general effect of the recap so that the binding effect of the Certificate of Quality was limited to questions of invoicing, without prejudice to any later claim for breach of contract.

On the facts, the actual condition of the cargo at the ship's manifold meant that the claimant buyer had established the breach of contract. As for the measure of damages, the fuel oil was not damaged or defective, merely off spec, so that further blending was required to make it acceptable to bunker fuel buyers. On the evidence, there were traders who purchased and blended such fuel for on-sale, such that there was an available market. An appeal is scheduled for hearing in early May 2021.[40]

> A party who accepted the other party's repudiation of the contract may subsequently justify the termination on a different ground if that ground existed at the time of termination

Was there a breach of an implied term in the contract for the sale of goods in *Star Group Est Pte Ltd v Willsoon (FE) Pte Ltd*?[41] Star Group had ordered a vacuum tanker from Willsoon for cleaning operations. The tanker was to be mounted on a truck, procured separately, and Star Group sent sample specifications to Willsoon of the machine in relation to the debris/water tank and valves. Upon delivery, it rejected the tanker for a number of reasons, including a breach of the condition implied by section 13(1) of the Sale of Goods Act (Cap 393, 1999 Rev Ed). The District Judge held that Star Group had no right to reject the tanker and was not entitled to damages for Willsoon's alleged breach of contract. Star Group appealed. Upon appeal, it was common ground that the contract was for a sale by description.

Tan Lee Meng SJ allowed the appeal. The delivery of a smaller tank than specified was a breach of the implied condition. A party who accepted the other party's repudiation of the contract may subsequently justify the termination on a different ground if that ground existed at the time of termination. It was neither here nor there whether the delivered tank was not so defective as to substantially deprive Star Group of the benefit of the contract.

A reduction in volume capacity from 15,000 litres to 14,000 litres was not de minimis and could not be excused under section 15A of the Sale of Goods Act. If the written contract specified conditions of weight, measurement and the like, those conditions must be

[39] [2020] EWHC 1795 (Comm); [2021] Lloyd's Rep Plus 8.

[40] Per casetracker.justice.gov.uk, accessed on 24 February 2021.

[41] [2020] SGHC 185; [2021] Lloyd's Rep Plus 29.

complied with.[42] It had not been shown that Willsoon's proposed modification to the valve had been accepted by Star Group, nor that the condition had been waived. However, Star Group was not entitled to claim the deposit for the cancelled truck from Willsoon due to its unreasonably late cancellation of that order.

In *Alegrow SA v Yayla Agro Gida San ve Nak AS*,[43] an appeal on point of law was brought following a decision by a GAFTA Appeal Board regarding the duty of one party to provide a schedule for shipment for sold rice. Alegrow had agreed to sell a quantity of Russian paddy rice to Yayla, only part of which was ultimately shipped. The GAFTA Appeal Board had concluded that, following a series of events culminating in Yayla on 29 March 2017 asking Alegrow to provide by the following day a schedule for shipment of the remaining rice by 15 April 2017, and Alegrow's failure to provide such a schedule, Alegrow was in breach of contract as of 31 March 2017 and (implicitly) that Yayla was entitled on 7 April 2017 to bring the contract to an end. In this appeal of the Appeal Board's decision, Alegrow contended that the Board had been wrong in law to conclude that it was obliged to provide a shipment schedule by 30 March 2017 and was in repudiatory breach by failing to do so. Alegrow's appeal was based on two points of law. First, was the buyer contractually entitled to demand a "shipment schedule" on 29 March 2017? Secondly, was the seller in repudiatory breach of the contract in failing to provide such a shipment schedule by the buyer's deadline of 30 March 2017?

Henshaw J allowed the appeal and varied the order so as to conclude that Alegrow was not in repudiatory (or renunciatory) breach of the contract, but that Yayla had renounced the contract by its notice of arbitration. The Appeal Board had not made the necessary findings of fact on which Yayla's case of renunciation by Alegrow would need to be based. Alegrow's counterclaim was remitted to the tribunal, as regarded both liability and quantum.

SHIPBUILDING

Shipbuilding contracts may become a liability in a downturn. Termination and litigation against guarantors are the inevitable consequences. The general approach to shipbuilding contracts is to consider them a complete code, with limited opportunity to deviate from literal interpretations or to imply terms.

Such complete code reasoning was in evidence in the decision in *Jiangsu Guoxin Corporation Ltd v Precious Shipping Public Co Ltd*,[44] where application of the "prevention principle" under a shipbuilding contract arose. The buyer had rejected two hulls, poetically named 21B and 22B, causing them to occupy space at the shipyard and delaying subsequent builds. The claimant seller had contracted to build the hulls pursuant to shipbuilding contracts made with the respondent buyer, dated 26 February 2014. The contractual delivery date was 31 August 2015 and on 29 January 2016, the buyer terminated the contracts by reason of "non-permissible delays". Previous hulls had been rejected by the buyer, and the seller contended that the "prevention principle" applied because the rejection of those hulls had caused them to occupy berths at the seller's yard, delaying the launch and construction of hulls 21B and 22B.

The appeal arose out of two partial final arbitration awards. The arbitration tribunal had held in partial final awards that there was no room for application of the prevention principle; and that the delay of 151 days in delivery was a "non-permissible delay" under the contract. The seller appealed.

The judge dismissed the appeal. The tribunal had given the right answers to the two issues. Article VIII.1 of the contract was not in the nature of a force majeure clause restricted to matters beyond the control of either party and was therefore wide enough to find application to the present context. The words "other causes beyond the control of the seller or its contractors" should be given their natural and ordinary meaning. The parties had made express provision for an extension of time, and the "prevention principle" did not apply. The tribunal had also been right to hold that whether or not the causes of the delays in question were within article VIII.1, for an extension of time, the seller would have needed to comply with the notification machinery specified in article VIII.2.

42 *Arcos Ltd v EA Ronaasen & Son* (1933) 45 Ll L Rep 33; [1933] AC 470.
43 [2020] EWHC 1845 (Comm); [2021] Lloyd's Rep Plus 22.
44 [2020] EWHC 1030 (Comm); [2021] Lloyd's Rep Plus 30; [2020] BLR 653.

Two shipbuilding cases involved the guarantees associated with shipbuilding contracts. *Korea Shipbuilding & Offshore Engineering Co Ltd v F Whale Corporation*[45] concerned altogether six actions over claims under shipbuilding contracts, where payments had been deferred by agreement and the ships delivered.

The shipyard now sought payment of outstanding sums. First, there were claims for deferred instalments of the price. Secondly, there were claims for deferred payments in respect of adjustments to the price agreed in respect of modifications to the contractual specifications (dubbed "CINO" claims). Both types of claim were guaranteed by TMT or by affiliated shipowning companies and so claims under those guarantees had also been made.

The defendants alleged, first, that the defendants had been released from their liability to pay or that their liability to pay had expired; secondly, that the demands for payment under the guarantees were invalid; thirdly, that certain claims were time-barred; and fourthly, that the claims were compromised by reason of Chapter XI proceedings in the United States.

The judge made findings as to the sums due under the contracts as follows. A contract term which required TMT to pay deferred CINO payments "until 12 months after the delivery" did not mean that TMT was under no obligation after the expiry of 12 months. Such an interpretation would be uncommercial and at odds with words in the same clause.

Further, as the guarantee did not require a payment demand to be made, it did not matter that the payment demand had not been addressed to the corporate obligors. The guarantor was liable as "primary obligor" to guarantee "the due and faithful performance by TMT of all of its liabilities". When the buyer failed to pay, the guarantor was in breach of its liability as guarantor.

As for the effect of Chapter XI proceedings, the judge held that as TMT had not been a party to the proceedings, no claim against it could have been compromised by those proceedings. In respect of its capacity as guarantor, section 524(e) of the US Bankruptcy Code expressly provided that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt". Even if under US law it could affect the liability of a guarantor, that would not affect the liability of the guarantor governed by English law.

The familiar chestnut of what type of guarantee was at issue arose as a preliminary issue in *Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd*.[46] The claimant shipbuilder and the defendant guarantor were parties to a contract, entitled "Irrevocable Payment Guarantee", dated 17 November 2011. The guarantee was governed by English law. It secured a final payment of US$170 million by the buyer under a shipbuilding contract dated 21 September 2011 in respect of a drillship, Hull No S6030. The defendant was originally the buyer under the contract but was replaced as buyer by the Part 20 defendant by a novation agreement dated 30 November 2012. The new buyer was an indirect subsidiary of the defendant guarantor. It did not take delivery of the vessel under the contract, asserting that the vessel was not deliverable.

The builder claimed the final instalment from the buyer and then, on 23 May 2017, made a demand on the guarantor under the guarantee. An arbitration was commenced under the shipbuilding contract on 13 June 2019. Two preliminary issues arose, which may be summarised as follows. On a true construction of the guarantee, was it a demand guarantee or a see-to-it guarantee? Was the guarantor entitled to refuse payment under clause 4 of the guarantee pending and subject to the outcome of the arbitration between the builder and the buyer in respect of a dispute as to the buyer's liability to pay and the builder's entitlement to claim that final instalment: (i) only if the arbitration had been commenced between those parties as at the date the demand was made; or (ii) regardless of when such arbitration had been or might be commenced? If successful on the preliminary issues, the guarantor sought a stay of the court proceedings, pending the resolution of the arbitration.

The judge ordered a stay of the proceedings, deeming the guarantee to be of the see-to-it variety. Where an instrument was not given by a bank or other financial institution, cogent indications that the instrument was intended to operate as a demand guarantee would be required. The question was not a choice between labels or between primary and secondary liability, but whether the guarantee had the relevant characteristics. Here, the language of the guarantee did not make the grade of a demand guarantee without the help of a presumption, and no presumption was successfully engaged. The parent company was not a bank, and although it had in other contexts described itself as offering investment services, the context was not a banking context. In the shipbuilding

[45] [2020] EWHC 631 (Comm); [2021] Lloyd's Rep Plus 31.

[46] [2020] EWHC 803 (Comm); [2021] Lloyd's Rep Plus 34.

industry, the function of an instrument could be the same whether issued by a bank or a parent company.

As to the interpretation of clause 4, the language of the guarantee did not support an interpretation that the parties intended that the benefit of these arrangements would not apply or would be taken away permanently, unless the dispute had been submitted to arbitration *before* a demand was made under the guarantee. On the true construction of the guarantee, the guarantor was entitled to refuse payment under clause 4 pending and subject to the outcome of an arbitration between the builder and the buyer in respect of a dispute as to the buyer's liability to pay and the builder's entitlement to claim that final instalment, regardless of when such arbitration had been or might be commenced. An appeal is scheduled for hearing in mid-July 2021.[47]

The case *Tractors Singapore Ltd v Pacific Ocean Engineering & Trading Pte Ltd*[48] did not involve a shipbuilding contract, but the supply chain of equipment to a shipyard. The defendant shipyard had ordered shipbuilding equipment from the plaintiff under several contracts. The contracts were evidenced by purchase orders and their terms permitted the defendant to advise the plaintiff on a delivery date or a port of destination for the equipment ordered. The equipment was never delivered.

The plaintiff alleged that the failure to deliver was caused by the defendant's repudiatory breaches of implied terms of the contracts. The alleged implied terms included: (a) a term requiring the defendant to advise the plaintiff on a delivery date within a reasonable time; and (b) a term requiring the defendant to nominate a port of destination within a reasonable time, that was sufficiently early to allow the plaintiff to effect delivery by the agreed delivery date. The defendant counterclaimed that the plaintiff had wrongly terminated the contracts in question.

Questions arose as to whether the alleged implied terms existed, whether the defendant was in breach of these terms, and whether the defendant's breach of these implied terms entitled the plaintiff to terminate the contracts.

Vincent Hoong J allowed the plaintiff's claim in relation to eight purchase orders, numbered 9968, 9969, 9992, 10600, 10601, 11289, 11290 and 11651, and dismissed the defendant's counterclaim. Where a contract for the sale of goods gave the buyer the option of nominating the port of destination, it was necessary, for the efficacy of the contract, to imply a term that the buyer was obliged to nominate a port of destination within a reasonable time before the agreed delivery date. As a matter of logic, a term of this nature could only be implied if the parties had in fact agreed on a delivery date, because the point of time at which the obligation to nominate arises must be defined by reference to an agreed delivery date.

> Where a contract for the sale of goods gives the buyer the option of nominating the port of destination, it is necessary, for the efficacy of the contract, to imply a term that the buyer is obliged to nominate a port of destination within a reasonable time before the agreed delivery date

A contractual term which would permit the defendant to postpone delivery indefinitely, based on its ship construction schedule, was not necessary for (or even beneficial to) the efficacy of the contract. Nor had such a term been incorporated by way of a course of dealing between the parties. By failing to nominate a port of destination within a reasonable time, sufficiently early to allow the plaintiff to deliver the equipment ordered by the delivery date, the defendant was in breach of the contracts. A delivery date "TBA by [defendant]" only indicated that the defendant had the right to elect a delivery date at some future time after the date of contract. It did not entitle the defendant to unilaterally postpone a delivery date which both parties had already agreed upon.

The implied term to nominate a port of destination was a condition of each of the contracts evidenced by nine purchase orders numbered 9968, 9969, 9992, 10600, 11289, 11290, 11651, 8874 and 8875, the breach of which would entitle the plaintiff to terminate the contract in question.

47 Per casetracker.justice.gov.uk, accessed on 24 February 2021.
48 [2020] SGHC 60; [2021] Lloyd's Rep Plus 37.

SHIP BREAKING

Ship breaking decisions are rare. In 2019 *Priyanka Shipping Ltd v Glory Bulk Carriers Pte Ltd (The CSK Glory)*[49] concerned the rights of a seller who had attempted to bind the buyer to demolishing the vessel and not trading it. In 2020 the question arose of liability to ship demolition workers in *Begum (on behalf of Mollah) v Maran (UK) Ltd*.[50] The claim was brought on behalf of a deceased worker against the ship manager responsible for the presence of the vessel in the scrapping yard.

The claimant claimed on behalf of the late Mr Mollah, who on 30 March 2018 had fallen to his death while working on the demolition of the defunct oil tanker *Maran Centaurus* in the Zuma Enterprise Shipyard in Chattogram, Bangladesh.

The defendant was a UK company, which the claimant alleged was factually and legally responsible for the oil tanker ending up in Bangladesh where working conditions were known to be highly dangerous. The defendant had been under an agency agreement with the vessel's operator and had in that capacity procured the sale of the vessel for the purpose of demolition. The proceedings concerned damages for negligence under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976 or unjust enrichment; alternatively, under Bangladeshi law.

The defendant applied to strike out the claim, or for summary judgment. Three issues arose. (1) Did the defendant owe a duty of care to the deceased, or did the claimant have a real prospect of establishing the existence of such a duty on the facts? (2) Was the defendant unjustly enriched by the deceased? (3) Did the claimant have a real prospect of establishing that the claim was not statute-barred?

The judge struck out the unjust enrichment claim – it was "not remotely arguable" that the defendant had been enriched at the deceased's expense. However, it would not be appropriate to strike out the claim or grant summary judgment on the footing that no duty of care was owed to the deceased, where there were potential arguments based on either an act or an omission by the defendant in arranging the sale of the vessel for scrap. This area of the law was uncertain across the board and potentially developing, and the claimant did have a real prospect of establishing that English law applied. The evidence that out of the nearly 11 million tonnes of oil tankers demolished in 2018, only 80,000 tonnes were broken up in reputable yards served to fortify the claimant's case on the issue of duty. The defendant's submission that inherently dangerous practice was standard industry practice was rejected: if standard practice was inherently dangerous, it could not be condoned as sound and rational even though almost everybody did the same.

An appeal was heard in early February with judgment on 10 March 2021.[51]

[49] [2019] EWHC 2804 (Comm); [2020] 1 Lloyd's Rep 461.
[50] [2020] EWHC 1846 (QB); [2021] Lloyd's Rep Plus 32.
[51] [2021] EWCA Civ 326.

SHIPBROKERS

Two cases on shipbrokers were decided by the courts in 2020. First, *CH Offshore Ltd v Internaves Consorcio Naviero SA*,[52] where the question arose what amount may be due to a shipbroker, where the parties had agreed a settlement in respect of the charterparty. The claimant was the owner of the two tug supply vessels *Amethyst* and *Turquoise* and the three defendants were shipbrokers. The defendants had been involved in charterparties dated 22 January 2008 whereby the two vessels were chartered to PDVSA, thereby earning a commission. They were not the broker of either party, but intermediate brokers. Commission was to be paid by the claimant out of received hire. PDVSA found itself having no need for the vessels and assigned the charter to another party, acting also as guarantor for that agreement. This eventually resulted in a settlement agreement between PDVSA and the claimant shipowner. The agreement did not refer to the defendants' commission.

The shipbrokers commenced an arbitration against the shipowner for the commission and obtained an award on 14 August 2019. The claimant appealed on three questions of law. First, what duties did intermediary brokers owe to the parties under English law? Did an intermediary broker owe a duty to disclose the full facts of the transaction to their principals? What duties of disclosure did the intermediary broker owe to the shipowner – must it inform the shipowner that PDVSA would have been prepared to pay more hire? The second question was whether an agreement involving "secret" commission was unenforceable on the ground of public policy or illegality. The third question was whether a proportion of the sum paid under the settlement agreement to compromise the shipowner's claims against the charterers retained the character of charter hire, so as to entitle the brokers to commission and consultancy fees.

Moulder J held as follows. The duty of a pure intermediary was to communicate messages honestly. To impose a fiduciary duty would result in the commercial absurdity that the intermediary would be unable to act and perform the role inherent in that of an intermediary as someone who stands between two parties to facilitate the relationship. Accordingly, the tribunal had not erred in concluding that intermediary brokers in the position of the defendants were not under any duty to disclose the underlying commercial position of one party to the other.

It is pertinent to the context of the second question that the broking agreements were (probably) subject to Venezuelan law. The question was therefore formulated as whether they were unenforceable under English law on the grounds of public policy or illegality. However, the judge held that the arbitral tribunal had resolved the issue correctly: an agreement pursuant to which a broker or consultant received commission or other payments was not unenforceable on the grounds of public policy or illegality in circumstances where the *fact* of the payments was known to the parties, and it was open to the party who was aware of the market rates but unaware of the amount payable to the brokers to enquire as to the amount of the payments but it chose not to do so.

On the third question, the term "charter hire" also extended to payments made to settle the claim for charter hire. The hire here had been earned, distinguishing the position from that of a terminated charter. A proportion of the sum paid under the settlement agreement to compromise the claimant's claims against PDVSA retained the character of charter hire, so as to trigger the defendants' right to commission and consultancy fees under the agreements.

A second case regarding commission, but not involving shipbroking in the strict sense was *Forum Services International Ltd and Another v OOS International BV*.[53] The claim was brought by the first claimant Forum, a BVI company, and the second claimant, its Brazil subsidiary, against the defendant in respect of commission of approximately US$13.5 million for charters concluded between the defendant and Petrobras, and various minor claims as well as a counterclaim for repayment of a loan. The parties had since 2010 cooperated in trying to win contracts with Petrobras for the supply of vessels and had drafted, but not executed, partnership agreements. OOS was simultaneously using other chartering agents. Forum contended that it was entitled to commission on a number of charters concluded by OOS.

Robin Knowles J held that there was insufficient evidential basis for rectification of a "Representation Agreement" to the effect argued by Forum. The parties' common intention and outward expression of accord was no more than that the Representation Agreement would extend to assets that were identified in an "Exhibit A" from time to time.

Further, OOS's assertion that Forum's work was carried out in anticipation of a joint venture agreement between the parties was persuasive. While commission may have been on the parties' minds, that was not the basis on which they were working at the time of the charters of the two vessels at issue. There was insufficient evidence to show that the parties had agreed to apply the terms of the Representation Agreement to the two vessel charters.

[52] [2020] EWHC 1710 (Comm); [2021] Lloyd's Rep Plus 33.

[53] [2020] EWHC 170 (Comm); [2020] Lloyd's Rep Plus 104.

CONTRACTS IN GENERAL

In *Taqa Bratani Ltd and Others v RockRose UKCS8 LLC*,[54] an issue of contract interpretation arose along with the effects of characterisation of a contract as "relational" and obligations to exercise powers afforded by a contract in good faith. The parties jointly held petroleum licences from the UK government to extract oil and gas from specified blocks on the UK North Sea continental shelf. Joint operating agreements (JOAs) for each block governed the parties' relationship. The claimants sought declarations that notices by which they purported to terminate the appointment of the defendant as operator under the JOAs were valid and should take effect in accordance with their terms.

The defendant resisted declarations on the basis that the express terms on which the claimants relied were impliedly qualified by obligations requiring the claimants not to exercise their express powers capriciously or arbitrarily and only in good faith and, in consequence, only in the best interests of the operation of the blocks in question; that the claimants did not comply with the qualifications for which the defendant contended and in consequence the claimants' purported notices were invalid and of no effect.

HHJ Pelling QC held that the express terms within the JOAs on their true construction conferred an absolute and unqualified right on the non-operator participants in the joint ventures to discharge the operator on the minimum notice specified in the JOAs. Nothing within the factual or commercial matrix suggested otherwise. The terms on which the claimants relied were not subject to any implied constraint as alleged by defendant. Even if the JOAs were to be regarded as relational contracts, that did not lead to the conclusion that it was necessary to imply a good faith obligation into the exercise of the power on which the claimants relied.

In *Apex Energy International Pte Ltd v Wanxiang Resources (Singapore) Pte Ltd*,[55] a question arose of contract formation, and if there was a contract, the measure of damages for breach. Apex contended and Wanxiang denied that the parties had entered into a contract for the sale of a cargo of light cycle oil. There had been a deal recap on 23 November 2017 and further communications thereafter.

Once the transaction had fallen through, Apex had sold the cargo to another buyer. If there was a contract and a breach, the question arose whether this was a reasonable mitigation. Wanxiang argued that Apex had not proven that the sale was made at an available market price. Apex argued that there was no available market because of price uncertainty at the time and difficulties in selling the cargo so that section 50(3) of the Singapore Sale of Goods Act did not apply. Wanxiang also contended that a hedging arrangement entered into by Apex was unreasonable.

The judge gave judgment for Apex, ordering Wanxiang to pay damages. The counter-offer had been accepted unequivocally by Wanxiang, by their representative's unqualified "yes" to the "deal done" message of Apex's representative quoting the revised price. An offer could be accepted in any manner that was a final and unqualified expression of assent to the terms of an offer. Wanxiang had breached the contract on 29 November 2017 by denying that such a contract even existed.

As for damages, the question was not whether other transactions at better prices existed, but whether the sale had been a reasonable one in the circumstances. Apex was under no obligation to make any effort to obtain the best price available. Here, the mitigating sale had been a reasonable one. The actual alternative sale was a reasonable basis for calculating the loss.

The contractual effect of sanctions was considered in *Banco San Juan Internacional Inc v Petróleos de Venezuela SA*.[56] The claimant, a Puerto Rican bank, sought summary judgment on two claims brought against the defendant Venezuelan state-owned oil and gas company for failure to make repayments under two credit agreements made in 2016 and 2017. The credit agreements were governed by English law and contained English jurisdiction clauses. The defendant sought to advance an argument that repayment was impossible due to being rendered illegal by US sanctions imposed on the defendant. As a result of the sanctions, PDVSA now only held accounts outside Venezuela in banks in Portugal, Russia and Dominica, some of which were themselves the subject of sanctions or for technical reasons would not be able to carry out the transaction required. The credit agreements contained a provision that loans would not be paid with the proceeds of business activities the subject of sanctions, and the defendant argued inter alia that the provision took precedence over the repayment obligation, precluding payment.

[54] [2020] EWHC 58 (Comm); [2020] 2 Lloyd's Rep 64.
[55] [2020] SGHC 138; [2021] Lloyd's Rep Plus 38.
[56] [2020] EWHC 2937 (Comm); [2021] Lloyd's Rep Plus 44.

Cockerill J gave summary judgment for the claimant. The authorities did not show that, as PDVSA had argued, it was considered normal and sensible in commercial agreements to suspend payment obligations where payment would be in breach of unilateral US sanctions.

The clause on non-repayment was a negative covenant triggered by an accrued repayment obligation which gave the bank a right to refuse receipt and a recourse against PDVSA. It provided no basis for the suspension of repayment obligations. Even if the sanctions rendered payment illegal at the place of performance, the party relying on the fact of illegality to excuse performance would not be excused if it could have done something to bring about valid performance and failed to do so. The defendant could have applied for a licence excusing the payment from compliance with the sanctions and as the party bound to perform it bore the burden of doing so.

> The authorities in *Banco San Juan* did not show that it was considered normal and sensible in commercial agreements to suspend payment obligations where payment would be in breach of unilateral US sanctions

The argument that the clause on which the claim was based was a penalty had no real prospect of success. An appeal is scheduled for hearing in early March 2021.[57]

MARINE INSURANCE

In *Swashplate Pty Ltd v Liberty Mutual Insurance Co (trading as Liberty International Underwriters)*,[58] the question concerned the interpretation of Institute Cargo Clauses 2009. The respondent had issued two cargo insurance policies for helicopters to be imported from the USA to Australia. Both helicopters were damaged in transit due to improper stowage and Swashplate claimed under the policies. One of the indemnities was refused by Liberty Mutual on the basis that the insufficiency of packing had taken place before the attachment of the policy.

The clauses contain an exclusion 4.3 for insufficient packing:

> "loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured to withstand the ordinary incidents of the insured transit where such packing or preparation is carried out by the Assured or their employees or *prior to the attachment of this insurance* (for the purpose of these Clauses 'packing' shall be deemed to include stowage in a container and 'employees' shall not include independent contractors)." (Emphasis added.)

The policy was said to attach from 19 May 2018. The packing had taken place on 18 May Mississippi time, but on 19 May in the relevant Australian time zone. Allsop CJ held that the applicant was not entitled to indemnity. This was the outcome where all constituent parts of the policy were taken into account, including the words "Period of insurance" which had the effect of making the policy a mixed time and voyage policy, making the agreed date of 19 May the inception date.

On appeal from the judgment of Allsop J, the Federal Court of Australia[59] reversed his decision. Having contemplated potential incongruencies arising from the first instance decision, the court went on to recognise the significance of the distinction between time and voyage policies, saying that "The distinction assumes significance because certain of the statutory provisions apply only to voyage policies"[60] and that "the legislative context means that it would be a significant step for a party to alter the terms of what was otherwise a voyage policy in a respect that meant it was no longer a policy that insured the subject matter at and from one place to another".[61] Those distinctions were said not to assist, so that resolution of the matter was nevertheless

57 Per casetracker.justice.gov.uk, accessed on 24 February 2021.

58 [2020] FCA 15; [2020] 1 Lloyd's Rep 592.

59 In *Swashplate Pty Ltd v Liberty Mutual Insurance Co (trading as Liberty International Underwriters)* [2020] FCAFC 137; [2021] Lloyd's Rep IR 37.

60 At para 77.

61 Ibid.

a matter of interpretation of the specific policy at hand. It is not entirely clear from the judgment whether this is to be the approach in all cases, or just with policies that are suggested to be mixed time and voyage policies.

Setting out the elements of the policy, the court first noted that the ICC(A) terms were designed as voyage terms and that the cargo facility was for "Helicopter Cargo insurance (single transit)".[62] While the facility was for a period, it covered risks attaching in that period on ICC(A) terms. The Static Cover extension by up to five days before loading did not have the effect of changing the cover to one commencing at an agreed point in time. The court recognised that the placement slip must be on the terms of the facility, which incorporated the terms of ICC(A) addressing the attachment of risk.

It is respectfully submitted that the Federal Court of Appeal's resolution is the right one in this case. It may even be that more could weight could have been placed on the general voyage policy nature of cargo insurance, but in the event the contract terms directed the court to the same outcome.

A few further marine insurance-related cases fall beyond the strict boundaries of policy interpretation and cover but are worth mentioning nevertheless.

In *Aspen Underwriting Ltd and Others v Credit Europe Bank NV*,[63] an issue of recovery of paid insurance proceeds under a hull and machinery policy had reached the Supreme Court. Aspen had been the hull and machinery underwriters of the vessel *Atlantik Confidence* and Credit Europe the mortgagee. The insurance policy contained an exclusive jurisdiction clause in favour of England and Wales. Following the sinking of the vessel, the insurers paid under the policy pursuant to a settlement agreement. Once it had been established by judgment that the vessel had been scuttled,[64] the insurers sought to recover the indemnity paid by commencing proceedings against the owners and managers of the vessel and the bank in which it sought to avoid the settlement agreement.

The Court of Appeal[65] had held that the English court had jurisdiction to hear the case, but only on misrepresentation. Both parties appealed.

The Supreme Court (led by Lord Hodge) dismissed the insurers' appeal, allowed the bank's appeal and declared that the High Court did not have jurisdiction over the insurers' claims against the bank. The bank's entitlement under the policy was as equitable assignee. Applying the conditional benefit doctrine, it was held that as the bank had not exercised any rights under the policy, it was not bound by the exclusive jurisdiction agreement therein. Further, the Supreme Court affirmed the judge's conclusion that this was a "matter relating to insurance" for the purpose of article 14 of the Recast Brussels Regulation (Regulation (EU) No 1215/2012). However, it parted company with the lower courts in holding that the bank was not entitled to rely on the protection of that article. As a beneficiary of the policy, it was.

In *Aegean Baltic Bank SA v Renzlor Shipping Ltd and Others*[66] a Greek bank claimed in debt and damages under a loan agreement, subsequently varied, and related security agreements made to finance the cost of repairs to provide liquidity for the oil and chemicals tanker *MT Starlet*. The first defendant was the vessel's owner and the contracting borrower, a Marshall Islands company; the second and third defendants were the vessel's manager and its managing director who had provided corporate and personal guarantees respectively.

Following a casualty, there were settlement negotiations between the defendant and the hull and machinery (H&M) insurers of the vessel for a constructive total loss. The bank intervened in those negotiations and also paid premiums subsequent to the casualty. An action against the underwriters in London or Italy was contemplated, but did not materialise. There was disagreement as to which entity ought to pay for such litigation. The bank ultimately settled with the insurers for an amount less than the full value of the H&M insurance, having been advised that full recovery was not possible under Italian law. The defendants termed this agreement unreasonable on the basis that the bank ought to have been able to recover the full amount of a constructive total loss.

Mr Adrian Beltrami QC, sitting as judge, found that on the evidence, the notice of abandonment given was ineffective as a matter of Italian law and the only valid claim against the insurers was for a partial loss. Given the existence of a mortgagee's duty in equity to exercise its powers in good faith, there was no necessity for the implication of a term to the same effect. The bank's enforcement of the owner's claim under the H&M insurance was analogous to the exercise of a power of sale over a mortgaged property and it owed duties in equity in respect of the exercise of its relevant rights under the loan agreement and security documents. Accordingly, it was held that the bank had no liability in respect of the settlement agreement.

62 At paras 82 and 84.
63 [2020] UKSC 11; [2020] 1 Lloyd's Rep 520.
64 *Kairos Shipping Ltd and Another v Enka & Co LLC and Others (The Atlantik Confidence)* [2016] EWHC 2412 (Admlty); [2016] 2 Lloyd's Rep 525.
65 *Aspen Underwriting Ltd v Credit Europe Bank NV* [2018] EWCA Civ 2590; [2019] 1 Lloyd's Rep 221.
66 [2020] EWHC 2851 (Comm); [2021] Lloyd's Rep Plus 41.

PASSENGERS

The number of cases involving cruise ship passengers or similar liabilities such as package travel was somewhat above the norm. Several involved the issue of applicable standards, where the safety standards at the travel destination where an accident had occurred were either not proven or fell short of the safety standards applicable at the passenger's domicile.

In *Kellett v RCL Cruises Ltd and Others*,[67] the Irish Court of Appeal considered issues related to liability for injury sustained in the course of an excursion and the standard of care to which a service provider in a foreign country should be held for the purposes of the Package Holidays and Travel Trade Act 1995, section 20. While participating in a cruise on board a ship owned by the first defendant, and while the ship was docked at the island of St Maarten in the West Indies, the plaintiff and her husband participated in a speed boat ride which was advertised as being a "White Knuckle Jet Boat Thrill Ride". The plaintiff had booked this excursion in Ireland when booking the cruise and had paid a supplement for it. The ride was operated by a company located in Phillipsburg, St Maarten. While on the ride, the skipper made a 360-degree turn to the starboard side. The plaintiff was lifted out of her seat even though she was holding on to a bar in front of her seat and fell back into her seat with some force, striking her right elbow against the gunwale on the starboard side of the boat, resulting in a fracture to the elbow.

The plaintiff sought damages on the basis that the boat used for the excursion lacked important safety features and was in an unsafe and dangerous condition having regard to the vigorous manoeuvres to be undertaken. The defendants were the cruise line and the travel agent in Dublin through whom the cruise was booked. It was conceded that they were "organisers" of the package holiday, as defined in the Package Holidays and Travel Trade Act 1995.[68] It was common ground that the cruise booked by the appellant was a package holiday within the meaning of the Act. The defendants maintained that the plaintiff had voluntarily elected to go on an activity which she knew would involve vigorous manoeuvres done at speed. They also submitted that they were entitled to rely on the exceptions to liability on an organiser provided for in section 20(2)(a) and (c) of the 1995 Act. Finally, they alleged that the plaintiff had not discharged the onus of proof of establishing that there had been negligence or breach of duty on the part of the excursion operator. On 6 June 2019 the judge at first instance had dismissed the claim,[69] holding that a holidaymaker from Ireland could not assume that Irish standards would apply in the accommodation or services provided by a third party in a foreign country. There was no evidence as to standards for safety equipment in St Maarten or indeed Ireland. Accordingly, the duty at common law was only to take reasonable care to prevent those injuries that were likely to occur if reasonable care was not taken, not to take steps to prevent all possible injury, no matter how remote or unlikely. In the absence of regulations or standards, there was no basis for finding the boat owner negligent for failing to put padding in place.

The Court of Appeal dismissed Mrs Kellett's appeal. The judge had not erred in holding that the appellant had failed to discharge the requisite onus of proving that the service had been provided without reasonable skill and care when judged against applicable local standards or any relevant Irish standard.

The Court of Appeal went on to clarify that if a prima facie case was established by a plaintiff, even on the basis of standards applicable in Ireland, the onus should then be on a defendant to prove local regulations/standards and compliance with such standards where that was raised as a defence. While the onus rested on a plaintiff to prove all elements of their case on the balance of probabilities, the test of "reasonable skill and care" was a broad and flexible one that might enable a plaintiff in the first instance to prove a want of care based wholly or primarily on failure to perform the contract or supply the services to standards set in Ireland.

An English judgment on the same theme appeared on 9 November 2020, this time on the Package Travel, Package Holidays and Package Tours Regulations 1992,[70] Regulation 15, which corresponds to section 20 in the Irish enactment. In *TUI UK Ltd v Morgan*,[71] the claimant (here respondent) had in 2015 been on a package holiday in Mauritius purchased from the appellant. At around 21.00, she was returning to her hotel room along an outside, unlit sun terrace when she collided with a heavy wooden sunbed and fell, suffering injuries to her knees, face and head. She brought a claim against TUI in contract for damages, alleging breach of an implied term that the services to be provided would be provided with

67 [2020] IECA 138; [2020] Lloyd's Rep Plus 89.

68 The implementing legislation for Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, now replaced by Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements.

69 [2019] IEHC 408; [2020] Lloyd's Rep Plus 83.

70 SI 1992 No 3288.

71 [2020] EWHC 2944 (Ch); [2021] Lloyd's Rep Plus 39.

reasonable care and skill,[72] in particular with regard to the provision of lighting at the place where the accident occurred. At first instance in the county court, TUI had been held liable to Mrs Morgan. The judge had found as a fact that the accident was caused by insufficient lighting. TUI appealed. It was unclear what lighting standards applied in Mauritius.

The judge dismissed the appeal, holding that the burden of proving a breach of the implied term of reasonable skill and care fell on the claimant, but that the burden did not necessarily oblige the claimant to demonstrate what the locally applicable standards were in order to succeed in the claim. In the absence of any identifiable local standard, it was open to the claimant to establish the content of the defendant's duty by leading other evidence. In the litigation, reference had been made to the ISO Standard for emergency lighting. Although this standard was not on its own terms *applicable* to the circumstances of the incident, the judge had not erred in considering it an *appropriate* standard to apply as a proxy for local standards, in determining the factual question of whether the service had been performed with reasonable skill and care.

The burden of proving a breach of the implied term of reasonable skill and care fell on the claimant, but that the burden did not necessarily oblige the claimant to demonstrate what the locally applicable standards were in order to succeed in the claim

The report of a case from 2018 on the Athens Convention 1974 came to light in 2020. In *Jennings v TUI UK Ltd (t/a Thomson Cruises)*,[73] the claimant had been on a cruise on the defendant's vessel and was disembarking in Malaga when he slipped on a wet surface, fell over and suffered injury. The claim was pursued under the Athens Convention 1974, alternatively under the Package Travel, Package Holidays and Package Tours Regulations 1992. On the quay there was a "structure" which allowed passengers to disembark from the vessel and walk to the terminal building which was situated on the quay itself but set back from the face of the quay. In response to the claimant's argument that the claim fell under the Athens Convention, the defendant relied on a proviso in article 1(8) to distinguish between gangways forming part of the ship's equipment on the one hand, and port installations or quays on the other:

> "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."

The judge held that the Athens Convention did not apply. Once the claimant had passed through the port in the ship's side and stepped onto the walkway leading to the terminal the period of carriage was over and the Athens Convention no longer applied. The judge here distinguished *Collins v Lawrence*,[74] in which it was held that as long as the passenger was using equipment designed to bring them safely to shore, disembarkation was not complete and the Convention still applied. The equipment in *Jennings* was a port walkway rather than steps down onto a beach as in *Collins*. As a result of disapplying the Convention, the defendant in *Jennings* had not been under any duty to take steps to warn the claimant of the water on the walkway. Unlike in *Lawrence v NCL (Bahamas) Ltd (The Norwegian Jade)*,[75] the claimant had indeed left the ship.

Further, the incident had occurred during the period governed by the 1992 Regulations, as the package purchased included the return flight from Cardiff to Malaga. However, the defendant could not be expected to warn travellers about routine trip hazards. It could not be held responsible for the state of all walkways and harbour installations used for movement during the course of the holiday package. The claimant had not proved that the walkway fell short of the local standard of services. The defendant had not caused the hazard, or allowed it to develop.

Another case the report of which belatedly came to light in 2020 was *Mahapatra v TUI UK Ltd*.[76] This also concerned an injury sustained at time of disembarkation from a cruise ship and the applicability of the Athens Convention 1974 as enacted by section 183 of the Merchant Shipping Act 1995.

On 16 January 2015 while the defendant's cruise ship *Thomson Dream* was lying alongside in the Port of Havana, Cuba, the claimant had disembarked from an

72 In accordance with the Supply of Goods and Services Act 1982, s 13.
73 [2018] EWHC 82 (Admlty); [2021] 1 Lloyd's Rep 61.
74 HHJ Simpkiss, Canterbury County Court, 21 September 2016, [2017] 1 Lloyd's Rep 13.
75 [2017] EWCA Civ 2222; [2018] 1 Lloyd's Rep 607.
76 [2018] EWHC 3140 (Admlty); [2021] 1 Lloyd's Rep 71.

exit in the side of the ship, and had passed over the gangway between the ship and the permanent walkway, a fixed structure leading to the passenger terminus situated in the port. She had reached a position on that permanent walkway when she slipped and was injured. The claimant alleged that she had slipped on standing water on the gangway. Pursuant to article 1(8) of the Athens Convention, carriage was defined as including:

> "with regard to the passenger and his cabin luggage, the period during which the passenger and/or his cabin baggage are onboard the ship or in the course of embarkation or disembarkation."

It was pleaded for the claimant that, as she was in the course of disembarkation, the defendant was liable for the injury to her regardless of whether or not the defendant owned or operated the gangway in question. The defendant contended that the injury occurred on a part of the structure forming part of the port structure owned by the Cuban Ministry of Transportation and was outside the scope of the Convention.

Article 1(8) of the Convention further provided:

> "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 defendant sought summary judgment and the claimant cross-applied to amend her Particulars of Claim.

The judge gave summary judgment for the defendant. The photographic evidence clearly indicated that the claimant was injured in a position on the walkway or structure which was a permanent fixture operated by the port authority. The court should assess whether there was an absence of reality in a case being put forward. The suggestion that it might be established that the injury occurred other than in an area of the structure which was a permanent part of the port structure lacked reality and should be disregarded for the purposes of deciding the application.

The judge again distinguished *Collins v Lawrence*,[77] preferring the reasoning in *Jennings v TUI UK Ltd (t/a Thomson Cruises)*.[78] There was a distinction between a moveable "gangway" and a walkway which was part of the port installation. The claimant's claim to have been injured in the course of carriage was caught by the proviso contained in article 1(8) of the Convention and had no reasonable prospect of success.

It may be observed here that the disembarkation installation appears to have been more similar to that in *Jennings* than to the more basic steps in *Collins*.

As for the amendment sought by the claimant, although the facts of the injury were the same for both the claim under the Athens Convention and the proposed amendment under the Regulations, it introduced new facts and would therefore not be allowed. The new pleading alleged that the holiday provided by the defendant was a package contract within the meaning of Regulation 2 of the 1992 Regulations and that the owners or the operators of the "gangway" were suppliers of services within Regulation 15 of the Regulations.

Finally, a passenger case from the High Court of Australia, *Moore v Scenic Tours Pty Ltd*[79] considered awarding damages for disappointment and distress following a cancelled holiday. Mr Moore had booked a luxury river cruise in Europe with the defendant, which in the event fell far short of expectations due to seriously adverse weather conditions leading to flooding of rivers. Mr Moore sought relief under section 267 of the Australian Consumer Law which regulated the supply of services to consumers, including abroad. The alleged loss included damages for disappointment and distress. The issue arose whether, as Scenic contended, section 16 in Part 2 of the Civil Liability Act 2002 (NSW) applied to preclude Mr Moore from recovering damages for loss of that kind. The provision read:

> "No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case."

Mr Moore argued that it did not apply, because such damages were not damages that related to personal injury. The court allowed Mr Moore's appeal and reinstated the primary judge's order of damages for disappointment and distress pursuant to section 267(4) of the Australian Consumer Law.

[77] [2017] 1 Lloyd's Rep 13 and (CA) [2017] EWCA Civ 2268; [2018] 1 Lloyd's Rep 603.

[78] [2018] EWHC 82 (Admlty); [2021] 1 Lloyd's Rep 61.

[79] [2020] HCA 17; [2021] Lloyd's Rep Plus 43.

ADMIRALTY

Collision

A rather dramatic collision in the Suez Canal on 15 July 2018 provided the factual background to the collision case *The Owners of the Vessel Sakizaya Kalon v The Owners of the Vessel Panamax Alexander; The Owners of the Vessel Osios David v The Owners of the Vessel Panamax Alexander; The Owners of the Vessel Osios David v The Owners of the Vessel Sakizaya Kalon*;[80] the last case of Teare J in the role of Admiralty Judge. The collision between the three vessels had taken place while they were travelling southbound in a convoy through the Suez Canal when, following the engine failure and anchoring of the vessel at the head of the convoy, it was necessary for vessels astern of her to moor.

Panamax Alexander struck *Sakizaya Kalon* in front, which in turn struck *Osios David*, and the three vessels ended up forming a triangle. The case of *Osios David* and *Sakizaya Kalon* was that the collisions were caused by *Panamax Alexander*'s failure to moor before passing KM 149. The case of *Panamax Alexander* was that the collisions were caused by the failure of *Osios David* to inform *Panamax Alexander* that she was about to moor north of KM 152 on the west bank, and by *Sakizaya Kalon*'s decision to moor on the east bank just astern of *Osios David*, thereby blocking the path of *Panamax Alexander*.

Rule 7(a) of the Collision Regulations provided:

> "Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist."

The judge held that the collisions were caused by the fault of *Panamax Alexander* in failing to moor before KM 149. Where vessels were proceeding through the Suez Canal in a convoy and the lead vessel suffered an engine breakdown causing it to anchor in the Canal, the relevant obligations were not those of crossing situations or narrow channels, but those imposed by Rule 5 (the duty to keep a good lookout), Rule 6 (the duty to proceed at a safe speed), and Rule 7 (the duty to determine if a risk of collision exists). The second sentence of Rule 7(a) meant that in the interests of secure safe navigation, a possibility of collision was sufficient so long as it would be recognised as a real risk of collision by a prudent master. Immediate danger was not required before action should be taken.

Although the failure by *Panamax Alexander* to put engines astern was a breach of Rule 6 of the Collision Regulations, it was simply part of the history and not causative in law either of the collision or of the damage caused by the collision. However, the failure of *Panamax Alexander* to appreciate that there was a risk of collision and the resultant failure to moor before KM 149 in order to avoid that risk of collision were breaches of Rules 5, 7 and 8 of the Collision Regulations, and caused the collision between *Panamax Alexander* and *Sakizaya Kalon*. The master and pilot on board *Panamax Alexander* had access to enough information to suggest a risk of collision and yet did not act upon it. The evidence did not support a finding that notification by *Osios David* of her intention to moor would have alerted *Panamax Alexander* to the risk of collision and the need to moor.

On the evidence, *Panamax Alexander* was aware of *Sakizaya Kalon*'s intention to moor and there was no breach of duty in *Sakizaya Kalon*'s failure to advise of the intention to moor without tug assistance or with the assistance of anchors. There was no causative fault by either *Sakizaya Kalon* or *Osios David*. The first collision not merely provided the opportunity for the later collisions but constituted their cause. Permission to appeal was refused on 8 February 2021.[81]

Collision cases commonly "lie where they fall" in terms of jurisdiction. However an interesting exception arose in 2020 in *American Eagle Fishing LLC v The Ship "Koorale"*.[82] Two US-registered tuna fishing boats, *Koorale* and *American Eagle*, had collided on the high seas near American Samoa. *Koorale*, owned by the defendant, went to a New Zealand port for repairs. *American Eagle*, owned by the plaintiff, went to American Samoa, but left soon after to avoid service within that jurisdiction. The plaintiff commenced in rem proceedings against *Koorale* in New Zealand and applied to limit its liability. The defendant had commenced proceedings in American Samoa, not served, and in Florida in the United States, where the present plaintiff had objected to the jurisdiction of the court. The question arose whether New Zealand was the proper forum for the dispute. As the proceedings had been served, the defendant was required to show that New Zealand was forum non conveniens. Because the proceedings were served abroad, the plaintiff needed to show that there was a serious issue to be tried (this was accepted by the defendant), that New Zealand was the appropriate forum and any other circumstances supporting jurisdiction.

[80] [2020] EWHC 2604 (Admlty); [2021] Lloyd's Rep Plus 45.

[81] Per casetracker.justice.gov.uk, accessed on 24 February 2021.

[82] [2020] NZHC 1935; [2021] Lloyd's Rep Plus 51.

The judge stayed the proceedings, holding that Florida was the more appropriate forum. While the common law courts would traditionally not stay proceedings simply because foreign nationals were involved, the New Zealand connection here was demonstrably weak and there were clear advantages and no material disadvantages to having the matter heard in Florida. For a collision on the high seas, the court should be slow to stay proceedings, but where the defendant's connection to the jurisdiction was fragile it should be easier to prove that there was another clearly more appropriate forum.[83] Concerns about delay and costs of proceedings in Florida were insufficiently material to discount the availability of the jurisdiction. There was an alternative forum available for the trial of the collision dispute. Here, both parties were US companies, both vessels were flagged in US and there were investigations under way by US authorities including the US National Transportation Safety Board. The majority of likely witnesses in the proceedings resided in the US, Europe or American Samoa. There was a prospect that the same witnesses as in the investigations would be required to give evidence. The main connection to New Zealand was that *Koorale* had come to its port for repairs.

On a further procedural issue related to collisions, the Singapore High Court in *The Echo Star ex Gas Infinity*[84] considered whether a new owner or the previous owner was the correct in personam defendant to a collision claim. On 7 April 2019 the two vessels now named *Royal Arsenal* and *Echo Star* had been involved in a collision in the Strait of Hormuz. On or about 28 July 2019 SD sold the then-named *Gas Infinity* and transferred ownership of it to C, which took possession and renamed the vessel *Echo Star*. It was undisputed that C was a stranger to the collision. On 6 November 2019 the owners of *Royal Arsenal* commenced an admiralty action in rem issuing the writ against *Echo Star* and owners and charterers. C entered an appearance as defendant and furnished security. SD subsequently also entered an appearance as owner. C then requested to withdraw its appearance as defendant and enter instead an appearance as intervener. The plaintiff did not consent to this. The Assistant Registrar allowed the application. The plaintiff appealed. The questions for the judge were which of SD and C was the proper defendant, and whether C should be allowed to appear as an intervener.

S Mohan JC held that SD was the proper in personam defendant and permitted C to withdraw its appearance and enter an appearance as intervener, with the reasoning that it would be absurd if in order to protect its rights in respect of the ship and secure its release from arrest, C had to enter an appearance as defendant and potentially render itself personally liable for a fault-based claim, in circumstances where it was a total stranger to the events giving rise to the collision. As the damage lien was premised on fault, the only party that could bear personal liability in respect of the collision damage claim was the owner at the time of the collision. The court had complete discretion to permit a defendant to withdraw its appearance and that discretion should be exercised in this case.

In a further collision jurisdiction decision, *Bright Shipping Ltd v Changhong Group (HK) Ltd (The CF Crystal and The Sanchi)*[85] considered the application of the *Spiliada*[86] test, specifically the issue of the clearly and distinctly more appropriate forum where there was litigation also in the Shanghai Maritime Court. A collision had taken place in the People's Republic of China's Exclusive Economic Zone between the Hong Kong-flagged cargo vessel *Crystal* and the Panamanian-flagged tanker *Sanchi*. A collision action was brought before the Hong Kong court. Other actions related to the collision had been brought earlier before the Shanghai Maritime Court.

This was the application for leave to appeal a decision by the first instance judge to stay the action in favour of the Shanghai Maritime Court. The judge had decided that the application to stay failed at stage 1 of the test in *The Spiliada*. The judge had also noted obiter that the lower tonnage limitation applied by the Shanghai Maritime Court would be an important juridical disadvantage for the respondent so that substantial justice would not be done there. The Court of Appeal had agreed with these conclusions.[87] The appellant sought leave to appeal to the Court of Final Appeal.

The court dismissed the application for leave to appeal. Lis alibi pendens was clearly established to be just one of the relevant factors when addressing the Stage 1 question of whether an applicant had demonstrated that another jurisdiction was clearly or distinctly the more appropriate forum. It was not reasonably arguable that the fact that the collision had occurred in the EEZ meant that the location of the tort made the PRC the natural forum for the inter-ship dispute. The weight to be attached to the fact of the collision having occurred within the PRC's EEZ and the pollution claims in the Shanghai Maritime Court were a matter for the judge, to be tested against other factors.

83 *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] 1 Lloyd's Rep 1; [1987] AC 460.
84 [2020] SGHC 200; [2021] Lloyd's Rep Plus 36.
85 [2020] HKCFA 24; [2021] Lloyd's Rep Plus 46.
86 *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] 1 Lloyd's Rep 1; [1987] AC 460.
87 [2019] HKCA 1062; [2020] 2 Lloyd's Rep 1.

The Court of Final Appeal considered that the fact of limitation proceedings commenced in the Shanghai Maritime Court should not be given undue weight. The existence of such proceedings did not require exceptional factors to displace that court as the forum conveniens. The weight to be accorded to such proceedings was a matter for the judge, who had been entitled to conclude that it had not been demonstrated that the other court was the clearly or distinctly more appropriate forum.

Salvage

A question of evidence arose in *Keynvor Morlift Ltd v The Vessel "Kuzma Minin", Her Bunkers Stores and Freight at Risk (if any)*,[88] namely the use of MAIB reports as evidence. The Admiralty Registrar's decision is from late 2019, but was reported in 2020. In an admiralty claim in rem against the vessel *Kuzma Minin*, her bunkers, stores and freight at risk, three claimants sought remuneration of £550,000 for salvage services performed following her grounding at Falmouth, or a quantum meruit, and had applied for judgment in default of acknowledgement of service. The claimants' claim had been served by affixing it to the vessel's bridge window. The vessel had been sold by the Admiralty Marshal and US$1,003,000 had been paid into court. Total claims exceeded that sum. Other claimants, in particular the mortgaging bank, challenged elements of the salvage claim put forward.

The judge held that the claimants were entitled to a sum of £450,000 as reward for the salvage services performed. Under CPR Part 61, to obtain a default judgment it was necessary to satisfy the court that there was a proper claim and that the sums sought were appropriate. As the defendants had not filed an acknowledgment of service and the claimants had filed an application and served it in accordance with the procedures set out together with the evidence necessary to prove the claim to the satisfaction of the court, it followed that the claimants were entitled to judgment in default for a salvage award which must be assessed.

As for the MAIB report, the court had discretion as to whether or not to admit it as evidence. Considering *Rogers v Hoyle*,[89] the Admiralty Registrar considered it sensible to admit it in the present case, as the proceedings were solely dealing with issues of salvage and not with the apportionment of fault or blame. The decision does not directly contradict but is arguably more generous than *Ocean Prefect Shipping Ltd v Dampskibsselskabet Norden AS (The Ocean Prefect)*,[90] decided earlier in the same month by a different judge.

As for the alternative quantum meruit claim, in the absence of salvage, by agreement or otherwise, a claimant may be able to recover on such a basis but only where it could be established that there was in existence an express or implied contract for the provision of some services other than salvage, for example towage.

The submission of a precise figure for the award was contrary to practice and principle. The proper judicial approach was to seek to assess the salvage award without reference to the claimants' suggestion as to the appropriate sum or how it had come about. Where the case as to salved value was unsatisfactory, as it was here, it would not be correct to ignore the actual sale price. The court should come to a decision based upon all the evidence before it as best it could.

The services performed were timely, successful and of the highest order, promptly rendered and at considerable risk to personnel and equipment. Whether professional salvors or not, the fact that the claimants were prepared to cooperate with each other and others was highly meritorious and deserving of encouragement, particularly true as there was a lack of emergency towing vessels on station in the area and there was no evidence of any professional salvor offering to take part in these services.

The most curious case of the year must be the salvage case *Argentum Exploration Ltd v The Silver and all Persons Claiming to be Interested in and/or to Have Rights in Respect of, the Silver (The SS Tilawa)*,[91] both in terms of its facts and the issues. Here, the claimant sought a salvage reward for its services in retrieving 2,364 silver bars from the Indian Ocean. The silver bars had been on board the passenger and cargo liner *SS Tilawa* when she was sunk by torpedoes in 1942. The claim had been served on the silver bars, but their owner, which was the Republic of South Africa (RSA), claimed immunity from the jurisdiction of the High Court. The RSA's immunity depended on section 10(4)(a) of the State Immunity Act 1978, namely whether the bars of silver and the vessel carrying them were, at the time the cause of action arose, "in use or intended for use for commercial purposes". This depended on whether the status of the silver bars in 2017, when the cause of action arose, was that of having lain on the seabed for 70 years or whether their status was that applicable in 1942 at the time of the

88 [2019] EWHC 3557 (Admlty); [2020] 2 Lloyd's Rep 617.
89 [2014] EWCA Civ 257; [2015] 1 QB 265.
90 Teare J, [2019] EWHC 3368 (Comm); [2020] 2 Lloyd's Rep 654. This was discussed in *Maritime law in 2019: a review of developments in case law*.
91 [2020] EWHC 3434 (Admlty); [2021] Lloyd's Rep Plus 40.

sinking. The RSA's retort was that the silver was intended for coinage, which was not a commercial purpose – although if the coinage was to be produced to order for another government, that was also in dispute. The parties differed on whether coinage was a government or commercial purpose.

Teare J held that the RSA was not entitled to immunity. On the balance of probabilities, the bars of silver which were loaded on board the *SS Tilawa* were destined to be used for the production of both South African and Egyptian coin and it was likely that the greater part of the shipment would be used for South African coin.

Applying the 1978 Act to the facts of the case, it must first be considered that the phrase "in use or intended for use for commercial purposes" was not readily applicable to cargoes, which during carriage were not being put to their intended use. Further, admiralty actions in rem did not fall readily into the 1978 Act's distinction between adjudicative (section 10) and enforcement jurisdiction (section 13). While the test "in use or intended for use for commercial purposes" was the same in both, the time at which the test must be satisfied was different in each case. What must be established here was that the silver bars, at the time the cause of action arose in 2017, were in use or intended for use for commercial purposes.

> When a state contracts for its goods to be carried by sea under a commercial contract, there is no reason why it should not be exposed to the same liability in salvage as a private owner of cargo

If the appropriate time for the "in use" test was 2017, there would be surprising consequences for wreck. The mere fact of the vessel becoming a wreck should not determine the immunity of the state. When deciding whether the vessel and cargo were, at the time the cause of action for salvage arose in 2017, in use or intended for use for commercial purposes, the appropriate approach was to consider the status of the vessel and cargo in 1942. At that time, the vessel had been in commercial use. The cargo of silver was intended to be used for commercial purposes, because it had been bought from the Bombay Mint and shipped commercially. The fact that the silver may have been intended for use as part of the governmental or sovereign activity of producing coinage could not affect the "status" of the cargo as a commercial cargo. The status of the cargo as "in commercial use" had not changed following the accrual of the cause of action because the RSA had not made revised plans for the silver.

A cargo being carried was not "in use" in the normal sense of the words, but if that were the meaning of the statute, there would be very few, if any, cargoes to which it might apply. Pursuant to the restrictive theory of state immunity, when a state contracted for its goods to be carried by sea under a commercial contract, there was no reason why it should not be exposed to the same liability in salvage as a private owner of cargo or why it should be immune from the adjudicative jurisdiction under section 10.

Judicial sale of ships

In *Qatar National Bank (QPSC) v The Owners of the Yacht "Force India"*,[92] the claimant bank sought to enforce a mortgage on the superyacht *Force India*, a 49.9 m Mangusta 165. She was under arrest in Southampton. The mortgage on the yacht was in 2016 granted as additional security for a loan to Gizmo, a company related to the yacht's owner, for a business transaction dating back to 2008. The loan was due to be repaid in 2015 but the original Facility Letter was extended by a First Amendment Letter and then again by a Second Amendment Letter dated 29 September 2016, by which the loan was extended to 30 June 2017 on condition that a mortgage was granted over *Force India* which was owned by a company related to Gizmo. By a side letter dated 27 October 2016 it was agreed that the mortgage was limited to "a principal amount of €5 million". The mortgage and associated deed of covenant were not executed until 15 February 2017. The mortgage was governed by Maltese law, the yacht being registered in Malta. The deed of covenant was expressly governed by English law.

Due instalments were not paid and the claimant reserved its rights. By a Third Amendment Letter dated 13 November 2017 it was agreed that if the yacht were sold, the sale proceeds would be paid to the claimant in reduction of the amounts owing under the loan. In January 2018 the yacht was arrested for non-payment of crew wages and judgment in default was obtained in May 2018. The claimant cautioned against release and issued its own in rem proceedings on 30 August 2018.

On 27 January 2020 the judge gave judgment for the sums claimed. In the context of an undefended admiralty

[92] [2020] EWHC 103 (Admlty); [2020] 2 Lloyd's Rep 343.

claim in rem, the claimant must prove its claim so as not to damage the interests of other in rem claimants. Here, the failures to repay the loan constituted events of default for the purpose of the mortgage and deed of covenant. While the mortgage was arguably limited to the sum of €5 million, the deed of covenant was not, as it placed the €5 million limit only on the principal amount guaranteed. The deed of covenant must prevail over the recital in the mortgage insofar as they were inconsistent. Insofar as the mortgage misdescribed the deed of covenant, the parties must have intended that the deed of covenant would prevail and the parties' intention was for the limit only to apply to the principal sum and not to interest on that sum or costs and expenses of collection.

This was not the end of the story, as on 25 March 2020 in *Qatar National Bank (QPSC) v Owners of the Yacht "Force India" (No 2)*,[93] Teare J reversed the order for sale. Following the first order, the Admiralty Marshal had instructed his broker to sell *Force India*. Bids were to be received by 10 March 2020. Meanwhile, negotiations were taking place for the repayment of the mortgage and payments were made, in consideration of which the claimants were to apply for the sale to be revoked. On the day bids were received, the claimants applied to the court for an order setting aside the order for sale. The court suspended the sale on terms that certain undertakings were given. A proper hearing was held following notice to the interested parties, following which the judge set aside the order for sale. In circumstances where the sum secured by the mortgage had in effect been paid by a third party, the judicial sale of the vessel was no longer required. The unusual circumstances of the case were that the loan secured by the mortgage on the vessel was also secured by a French property which the third party wished to acquire. That being the case, the circumstances were unusual enough that setting aside the sale should not cause the market to lose confidence in orders for Admiralty sales.

Nor was this the end of the story, as the yacht remains berthed at Southampton.[94]

The Songa Venus[95] concerned recovery of the costs of enforcing a possessory lien. Did the claimant's costs in enforcing the claim have the same priority as a possessory lien or a statutory lien? The plaintiff, Keppel FELS Ltd, had provided various services to the vessel *Songa Venus* including repairs, modifications, supply of materials and equipment as well as berthing. Having failed to obtain payment for the said services from the owner of the vessel, Keppel FELS commenced proceedings, arrested the vessel, and obtained an order for the vessel to be appraised and sold pendente lite "without prejudice to [Keppel FELS'] possessory lien over the vessel, if any".

Pursuant to the order, the vessel and the bunkers on board were sold by the Sheriff for US$3,749,463.14. Keppel FELS obtained final judgment in default of appearance for the sum of US$1,169,370 with interest. In granting the final judgment, the judge had also declared that Keppel FELS had a possessory lien over the vessel in respect of the portion of its claim relating to repair and modification works, as well as supply of various materials, equipment and services. The intervener, Songa Offshore SE, commenced a separate in rem action against the vessel for sums outstanding under a seller's credit agreement which was secured by a second preferred mortgage over the vessel and obtained final judgment in default of appearance for the sum of US$34,200,000.

The parties agreed on the priority of the relevant claims for payment out of the proceeds of sale, but a dispute arose as to the treatment of the costs of the action. Where a claimant had a *possessory* lien over an arrested ship in respect of a claim which, but for the possessory lien, would have priority only as a *statutory* lien in admiralty, should the claimant's costs in enforcing the claim be accorded the same priority as the possessory lien or the statutory lien?

The defendant argued, first, that the common law possessory lien was a passive remedy which conferred no right of action. Secondly, the common law possessory lien was accorded a high priority by the Admiralty Court as part of the Admiralty Court's undertaking to protect the possessory lien in return for the possessory lien holder giving up possession of the vessel. This was so that a judicial sale could be conducted for the benefit of all parties having in rem claims against the vessel. This undertaking extended only to claims properly coming within the scope of the possessory lien and no more.

The judge held that costs incurred in enforcing a claim protected by a possessory lien should be accorded the same priority as the possessory lien; applying *The Margaret*.[96] The judge reasoned that a possessory lien holder may retain possession of the res until paid what is due, in return for its release. Since the possessory lien holder need not initiate legal proceedings to enforce the possessory lien, such payment for the release of the res would be payment in full without deduction for legal costs.

93 [2020] EWHC 719 (Admlty); [2020] 2 Lloyd's Rep 348.
94 As of 23 January 2021, per Seasearcher from Lloyd's List Intelligence.
95 [2020] SGHC 74; [2021] Lloyd's Rep Plus 49.
96 (1835) 3 Hag Adm 238.

Once the possessory lien holder surrendered the res to the Admiralty Court, it would be necessary to commence an in rem action against the res to participate in the distribution of the proceeds of the judicial sale of the res. In order to make good the Admiralty Court's undertaking to put the possessory lien holder exactly in the same position as if the ship had not been surrendered, the Admiralty Court ought also to protect the possessory lien holder's costs incurred in the said in rem action to the same extent as the possessory lien itself.

The issue of distinction between in personam and in rem liability arose in *Turks Shipyard Ltd v Owners of the Vessel "November"*,[97] an appeal from the Admiralty Registrar's decision on 16 October 2019.[98] The Admiralty Registrar had held that Clean Marine Ltd ("CML") had entered into an agreement with Turks Shipyard Ltd for the drydocking, conversion and painting of the vessel *November*, and in so doing acting as agent for the owners of the vessel *November* who were therefore liable to pay for the work as undisclosed principals of CML. Teare J dismissed the appeal of one of the owners, Mr O, against that decision.

The claimant was a shipyard which had been instructed to undertake works on the vessel, needed in order to satisfy Bureau Veritas that the barge was safe for the purpose of the defendants' venture, which was to moor it on the River Thames near Westminster together with a hydroelectric wheel as an educational conference centre to promote environmental awareness. The barge was drydocked and work performed, but after the first invoice had been paid, subsequent work was carried out and invoiced at £106,220.60 which remained unpaid. The dispute at issue concerned: (a) who was the contracting party or parties in respect of the docking and work performed to the vessel; (b) whether the work performed was authorised; and (c) the reasonableness of the costs put forward by the claimant. The second defendant was a corporate vehicle for the venture, and the third defendant was at times one of its directors and also at times a part owner of the vessel. Only the third defendant had acknowledged service and contested the claim, but disputed both ownership and being a party to the contract and therefore also jurisdiction to consider the claim against him by reason of the provisions of section 21(4) of the Senior Courts Act 1981.

The Admiralty Registrar's judgment in rem for the claimants and orders for appraisement and sale of the vessel were based on findings that the second defendant had entered into the agreement for the drydocking of the vessel and given the relevant instructions to the claimant to perform the works to the vessel. It had done so as agent for the owners of the vessel. It was liable to pay the claimant for the work performed as agent for an undisclosed principal. The owners were liable to pay the claimant for the work performed.

The third defendant, Mr O, who went on to appeal the decision, had acknowledged service as an owner of the vessel. The Registrar considered that it would have been open to him to apply for an order setting aside the arrest and disputed jurisdiction. Having failed to do so he was not now entitled to argue that the court could not exercise jurisdiction in the present claim and was therefore personally liable as an owner of the vessel to pay the claimant for the work performed.

Mr O's appeal was on the ground that the only party liable who would have been liable on the claim in personam was CML, but CML was not, when the cause of action arose, the owner, charterer of or in possession or control of the vessel and accordingly the claimant was not able to bring an action in rem against the vessel pursuant to section 21(4) of the 1981 Act. Mr O had acknowledged service, so that if CML had entered into the agreement on behalf of owners as undisclosed principals, the claim could be enforced against him in personam.

Teare J dismissed the appeal. There was a burden on the yard as claimant to rebut the description of CML in the booking note as the client, which description amounted to evidence that CML was intended to be the principal. The burden had been described as heavy in *Filatona v Navigator*,[99] but where (as here) the other party to the contract was seeking to enforce it against the undisclosed principal, it must be borne in mind when considering whether the words of the contract had been rebutted that the other party would not have access to evidence on the subject of the agency relationship, save by the process of disclosure and cross-examination. The circumstances were only consistent with CML entering into the contract *on behalf of* the owners.

Teare J disagreed, obiter, with the Registrar on a different point. The Registrar had held that Mr O (having failed to apply for an order setting aside the warrant of arrest), was not now entitled to argue that the court could not exercise its jurisdiction in rem. The judge for his part considered it strongly arguable that Mr O was entitled at trial to defend the claim in rem on the basis that the conditions required by section 21(4) of the 1981 Act had not been established.

97 [2020] EWHC 661 (Admlty); [2021] Lloyd's Rep Plus 20.

98 *Turks Shipyard Ltd v Owners of the Vessel "November" and Others* [2019] EWHC 2715 (Admlty); [2021] Lloyd's Rep Plus 11.

99 [2019] EWHC 173 (Comm).

In *Premier Marinas Ltd The Owner(s) of M/Y "Double Venus" aka "Llamedos", and the Owner(s) of M/Y "Karma" aka "Santorini"*[100] it fell to the Admiralty Registrar to address an apparently inadvertent discrepancy in the Civil Procedure Rules as to judgment in default in admiralty proceedings. The claimant was a marina operator and the defendants to the claim were two vessels berthed at its Brighton marina. The claims concerned unpaid marina dues falling under section 20(2)(n) of the Senior Courts Act 1981. The vessels had been arrested on 5 and 6 March 2020. Service was not acknowledged and the claimant sought judgment in default. The vessel owner then acknowledged service and stated an intention to defend the claims, and later also filed a defence and counterclaim although particulars of the claim had not yet been filed. The claimant filed a combined reply and defence to the counterclaim and applied for the defence and counterclaim to be struck out.

The issue arose whether default judgment should be given. CPR 61.9(1), unlike the general rule on default judgments, had not been amended to the effect that in order for judgment in default to be given, it was necessary that no acknowledgement of service had been filed at the date on which judgment is entered. The Admiralty Registrar Mr Davidson made an order for the appraisement and sale of the vessels. His assessment was that in admiralty cases, as in other cases, the court should only enter judgment in default where at the time of judgment there was no acknowledgement of service and the time for acknowledging service had expired. The failure to amend the CPR 61.9(1) must be taken to be an oversight. The debt was due and owing and there was no viable or proven defence to the claims.

A judgment of potential relevance to unmanned vehicles was handed down by the Federal Court of Australia, namely *Guardian Offshore AU Pty Ltd v SAAB Seaeye Leopard 1702 Remotely Operated Vehicle Lately on Board the Ship "Offshore Guardian" and Another*.[101] Was a remotely operated vehicle a ship within the meaning of the Admiralty Act?

On 10 September 2019 Guardian had commenced proceedings invoking the admiralty jurisdiction of the court. The writ named two Seaeye Leopard ROVs as in rem defendants. The first defendant was described as "Saab Seaeye Leopard 1702 Remotely Operated Vehicle lately on board the Ship 'Offshore Guardian' (the Ship)", and the second defendant as: "Saab Seaeye Leopard 1702 Remotely Operated Vehicle, as surrogate for the Ship". The correct identifier for the second ROV was in fact "1704". ROV 1704 was arrested. DWS sought the setting aside of the arrest, asserting ownership of both ROVs. Both ROVs were leased to and in the possession of FCDS. The ROVs in question were deployed from a ship (main vessel) and operated remotely from the deployment vessel. They were designed to be lowered below the surface within a launch and recovery system (LARS). The LARS comprised equipment in a frame holding the ROV in a manner enabling both the LARS and the ROV to be winched underwater. The LARS remained connected by an umbilical to a surface vessel which provided a power source, tether and control mechanisms, known as a tether management system (TMS). Once it had been lowered to the desired depth, the ROV could be manoeuvred away from the LARS for distances of up to 150 m. However, the ROV remained tethered to the LARS. Issues arose as to whether the correct ROV had been arrested; whether FCDS was the owner for the purposes of the Admiralty Act; and whether an ROV was a ship subject to the admiralty jurisdiction.

Colvin J dismissed the proceedings for want of jurisdiction and set aside the arrest. First, on the issue of the identity of the ROV, the arrested ROV was, on the evidence, that described as the second defendant, ROV 1704. The evidence further showed that DWS was the owner of ROV 1704 and leased it to FCDS. In view of the conclusion on the issue of whether the ROV was a ship, it was unnecessary to decide the issue of whether FCDS was a demise charterer of the ROV.

On the issue of what constituted a ship, case law demonstrated that a variety of factors needed to be considered. "Use in navigation" did not necessarily denote use for transportation. There was no authority for the exclusion of vessels that moved through, as opposed to on, the water. The purpose, attributes and capabilities of the structure must be considered as a whole. The ROV lacked sufficient attributes and was not a ship. It did not displace water. Water flowed through the ROV. It could be steered or navigated through water, but relied on the LARS and the main vessel for transportation and deployment. Its self-propulsion was limited and could not be described as capable of navigation. It was unable to evade claims by leaving the jurisdiction by its own effort and was not registered as a ship. It was small and did not look like a ship.

The charterparty litigation *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd (The Miracle Hope)*, noted on page 9 of this Review, concerned relations between the disponent owner and charterer following the arrest of the vessel *Miracle Hope* in Singapore. That

[100] [2020] EWHC 2462 (Admlty); [2021] Lloyd's Rep Plus 47.
[101] [2020] FCA 273; [2021] Lloyd's Rep Plus 7.

arrest resulted in a further reported decision, this time from the High Court of Singapore.[102] The plaintiff in the Singapore proceedings of *The Miracle Hope* was the Singapore branch of the bank Natixis, which had arrested the vessel *Miracle Hope* for breach of the contract of carriage evidenced by bills of lading.

The second intervener, Petrobras, applied to set aside the warrant of arrest on the basis that Natixis had failed to bring certain material facts to the court's attention at the time it applied for the warrant of arrest. In the suit, Natixis asserted rights as the holder of original bills of lading issued in respect of 1,001,649.37 US barrels (net) of crude oil loaded onboard the vessel for carriage from Porto do Acu, Brazil, to one or more safe ports in China.

The defendant was the registered owner of the vessel. It had time-chartered the vessel to Trafigura Maritime Logistics Pte Ltd which had then voyage-chartered the vessel to the first intervener, Clearlake Shipping Pte Ltd, which had in turn sub-voyage-chartered the vessel to Petrobras.

On 11 March 2020 Natixis, as holder of the bills of lading, made a demand to the owners for delivery of the cargo and, on 12 March 2020, arrested the vessel as security for what it described as a "straightforward misdelivery claim". Following the charterparty litigation in the English courts, Petrobras paid US$76,050,000 into the Singapore court as security for the release of the vessel, which was released on 11 May 2020. Petrobras alleged material non-disclosure by Natixis in the course of obtaining the warrant of arrest and sought its setting aside and damages for wrongful arrest.

The judge dismissed Petrobras's application to set aside the warrant of arrest. On some matters, the judge agreed with Petrobras: Petrobras did have locus standi to apply for the setting aside of the arrest. Its rights as intervener were not limited by the specific nature of the interests it asserted. In any event, Petrobras did have an interest in the vessel as voyage charterers that would ultimately be liable if Natixis succeeded in its claim against the owners. Nor was the challenge of Petrobras out of time. It was not jurisdictional in nature; its application concerned the security aspect of the warrant of arrest, not the jurisdictional aspect.

However, none of the matters alleged by Petrobras rose to a breach by Natixis of its duty to give full and frank disclosure to the court when it applied for the warrant of arrest.

A bunker supply claim against a vessel was subject to default judgment in *Trans-Tec International Srl v The Owners and/or Demise Charterers of the Vessel "Columbus"*,[103] but it was disputed that costs and other ancillary sums could be regarded as in rem claims. The admiralty actions had been brought in rem by various bunker suppliers, all subsidiaries of WFS, against the vessels *Columbus* and *Vasco da Gama*. The claims concerned payment for bunkers supplied in the first quarter of 2020 and connected fees, interest and collection costs. The bunkers were supplied under contracts on World Fuel Services Corporation's standard terms and subject to US and Florida law. The vessels had been sold and the actions continued against the proceeds of sale. The claimants applied for default judgment. Other in rem claimants disputed that the connected fees, interest and costs were in rem claims, arguing that they could only be brought in personam because they did not fall under section 20(2)(m) of the Senior Courts Act 1981, which encompassed claims "in respect of goods or materials supplied to a ship for her operation or maintenance".

Mr Admiralty Registrar Davidson held that the phrase claims "in respect of" goods or materials should not be given a narrow or restricted interpretation. The fees and interest at issue were incidents of the contract which followed from the non-payment of the price. The collection costs were further removed, but were no less a part of the contractual bargain. Where the contract concerned the supply of a single commodity, the court would not unpick the contractual consequences of non-payment or treat them as separate and distinct claims for the purpose of section 20.

Two swift decisions were issued by the Australian courts in respect of the two vessels *Teras Bandicoot* and *Lauren Hansen*.[104] The decisions are mostly identical and only the decisions regarding the former vessel are reviewed in the following. The issue was of service of the warrant of arrest on the vessels, where these were uncrewed, and it was unlikely that serving the warrant on board would serve any purpose, compared to service by email.

In *Bhagwan Marine Pty Ltd v The Ship "Teras Bandicoot"*,[105] the plaintiff sought an order for service by email of a warrant for the arrest of a ship. The vessel *Teras Bandicoot* had been moored in Darwin since February 2018, without crew on board or any maintenance or operation since then. The plaintiff's claim concerned mooring fees for

102 *The Miracle Hope* [2020] SGHCR 3; [2021] Lloyd's Rep Plus 50.

103 [2020] EWHC 3443 (Admlty); [2021] Lloyd's Rep Plus 56.

104 *Bhagwan Marine Pty Ltd v The Ship "Lauren Hansen"* [2020] FCA 1225; [2021] Lloyd's Rep Plus 53.

105 [2020] FCA 1224; [2021] Lloyd's Rep Plus 52.

the use of the plaintiff's cyclone mooring. The owner of the vessel was an Australian company, Teras Maritime Proprietary Ltd ("TM"), registered in the Northern Territory. Its registered office appeared to be a vacant plot of land. The vessel was, to the plaintiff's best knowledge, being operated out of Singapore and an earlier letter to an email address at TM had produced a response from W, identifying himself as writing for and on behalf of TM, with an email address at TM's sole shareholder. Rule 6A of the Admiralty Rules 1988 (Cth) gave the court the discretionary power to grant relief from the requirements of the Rules: "The Court may dispense with compliance with any of the requirements of the Rules, either before or after the occasion for compliance arises".

On 25 August 2020 McKerracher J made the order sought. Documents served or executed by delivering to W's email address would in all reasonable probability come to the attention of the owners of the vessel. Serving the writ and executing the warrant on board the vessel was unlikely to come to the attention of the owner of the uncrewed ship. There was no apparent practical benefit in boarding the vessel to affix the writ or execute an arrest warrant on board. By a decision issued on 14 October 2020, the same judge ordered the vessels sold on an unopposed application.[106]

Limitation of liability

A small number of cases clarified minor points on tonnage limitation. First, a question as to the right to limit of a vessel operator and who qualified as operator, in *Splitt Chartering APS and Others v Saga Shipholding Norway AS and Others (The Stema Barge II)*.[107] The applicable law in the case was the Limitation Convention 1976 as enacted by section 185 and Schedule 7 of the Merchant Shipping Act 1995. Article 1(2) of the Convention provides:

> "The term 'shipowner' shall mean the owner, charterer, manager *or operator* of a seagoing ship." (Emphasis added.)

The action concerned limitation of liability for damage caused by the anchor of the barge *Stema Barge II* to an underwater cable carrying electricity from France to England. The damages action against the owner and charterer of the vessel was pending in Denmark. The vessel operator, Stema UK, had sought a declaration of non-liability before the UK court, which was currently stayed. The present issue was whether Stema UK was within the class of persons entitled to limit their alleged liability. Until arrival off Dover "the operator" of the barge had been Stema A/S. Upon arrival of the tug and barge off Dover on 7 November 2016, Stema UK had placed a barge master and crew member on board. They had dropped the barge's anchor in the location advised by the tug. The barge master and crewman had checked items such as navigation lights and the emergency towing wire. For this purpose they had used a check list provided by the registered owner. Whilst the barge was at anchor and whilst cargo was being transhipped they had attended to various matters, such as the ballasting of the barge as the cargo was discharged and transhipped, maintaining the generators and ensuring the navigation lights were in order.

The judge held that Stema UK was entitled to limit its liability, considering that the meaning of "operator" must be understood in the context of the word "manager". The manager of a vessel was typically a person entrusted by the owner with sufficient of the tasks involved in ensuring that the vessel was safely operated, properly manned, properly maintained and profitably employed. The judge went on to reflect that in ordinary usage, the terms manager and operator were used interchangeably and while they could be distinguished, any attempt to draw a bright line between them would be fraught with difficulty. The ordinary meaning of "the operator of a ship" included "the manager of a ship". There could also be more than one operator of a ship. Those who caused an unmanned ship to be physically operated had some management and control over the ship. If, with the permission of the owner, they sent their employees on board with instructions to operate the ship's machinery in the ordinary course of the ship's business, they could be said to be the operator of the ship within the ordinary meaning of that phrase, though not the manager of it. An appeal is scheduled to be heard in early March 2021.[108]

In England and Wales a limitation fund can be constituted by means of a P&I Club guarantee. This was decided in *Kairos Shipping Ltd and Another v Enka & Co LLC and Others (The Atlantik Confidence)*,[109] and Singapore law is to the same effect.[110] In two Singapore cases from 2020, some useful guidance was provided on such limitation funds.[111] In *AS Fortuna OPCO BV and Another v Sea Consortium Pte Ltd and Others*,[112] a case from the Singapore High Court, the defendants did not object to the plaintiffs'

106 *Bhagwan Marine Pty Ltd v The Ship "Teras Bandicoot" (No 2)* [2020] FCA 1481; [2021] Lloyd's Rep Plus 57.
107 [2020] EWHC 1294 (Admlty); [2021] Lloyd's Rep Plus 42.
108 Per casetracker.justice.gov.uk, accessed on 24 February 2021.
109 [2014] EWCA Civ 217; [2014] 1 Lloyd's Rep 586.
110 Order 70 rule 36A(1)(b) of the Rules of Court.
111 Coincidentally, the 1996 Protocol to the 1976 Limitation Convention entered into force for Singapore around the same date, on 29 December 2019. The 1976 Convention entered into force for Singapore on 1 May 2005.
112 [2020] SGHC 72; [2021] Lloyd's Rep Plus 48.

application to constitute a limitation fund by way of a letter of undertaking (LOU) from a P&I Club, but a question arose as to the applicable post-constitution interest rate to be provided for in the LOU. Pang Khang Chau J held on 14 April 2020 that for an LOU to be "adequate" or "acceptable", it should place the claimants in a position no worse than if the limitation fund had been constituted by payment into court. Accordingly, an LOU ought to make provision for post-constitution interest at a rate approximating the interest which could be earned on a limitation fund paid into court during the period that the fund remained in court. An appropriate post-constitution interest rate would therefore be 2.5 per cent per annum.

In a further case, *Thoresen Shipping Singapore Pte Ltd and Others v Global Symphony SA and Others*,[113] the question arose as to the fate of remaining funds in the limitation fund constituted by an LOU. The plaintiff applied for the return and cancellation of the LOU deposited in court for a limitation fund in respect of the collision between the plaintiff's vessel *Thor Achiever* and the vessel *Global Vanguard*. The parties had reached a settlement that payment was to be made based on the value of the limitation fund as of 31 December 2019, and payment was made to the defendants on 30 January 2020. In the 30 days between the value date and the payment date, interest had continued to accrue on the LOU so that there was a small sum of money remaining in the "pot" following payment. Before the court, there arose questions of evidence and technical questions as to how to proceed with the LOU. The plaintiff had requested a finding that the LOU should be deemed exhausted, but the interest accrued after the payment date meant that in reality, it was not.

In the event, Pang Khang Chau J ordered the return for cancellation of the LOU and also ordered that the LOU was discharged, reasoning that by agreeing a settlement based on the value of the limitation fund on a date one month prior to the date of payment, the defendants had foregone their claim to interest accruing thereafter. The term for submitting new claims had expired some two-and-a-half years previously. An order to return for cancellation would not prejudice any party and would therefore be issued. In addition, because the LOU was as a matter of fact not exhausted, it could only be brought to an end by an order of the court. An order for the discharge of the LOU would therefore be made, in addition to the order that it be returned for cancellation.

The rare issue of application of the Limitation Convention framework to installations such as marinas and docks was considered in the English Admiralty court case *Holyhead Marina Ltd v Farrer And All Other Persons Claiming or Being Entitled to Claim Damages in Connection with Storm "Emma" Striking Holyhead Marina on 1 and 2 March 2018*.[114] The background was that in March 2018 Storm Emma had hit Holyhead from the north-east, damaging the marina in Holyhead Harbour and 89 craft present therein. The claimant was the lessee of that marina. Anticipating many claims totalling some £5 million, it had issued proceedings seeking a limitation of its liability to £550,000 pursuant to section 191 of the Merchant Shipping Act 1995, which applies the Limitation Convention to "a harbour authority, a conservancy authority and the owners of any dock or canal".[115] The defendants to the limitation action were the owners of damaged craft. They denied that the claimant had a right to limit liability on the basis that it was not the owner of a "dock" within the meaning of section 191, that the right to limit liability had been lost under article 4 of the Limitation Convention, and that the applicable limit exceeded the amount of the anticipated claims.

The claimant applied to strike out the allegations forming the defence and for summary judgment on the claim for a limitation decree. The judge struck out the defences that the marina was not a dock and that the right to limit was greater than the anticipated claims, but not the defence that the right to limit had been lost. The first question was as to the meaning of "dock" in the legislation. The Act contains the following definitions:[116]

> "'dock' includes wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing places and jetties; and
>
> 'owners of any dock or canal' includes any authority or person having the control and management of any dock or canal, as the case may be."

The judge considered that while a marina was not a dock within the ordinary meaning of that word, in ordinary usage the pontoons making up the marina were both mooring places and landing places, sufficient to bring them within the ordinary meaning of landing place. This was true although they were not used in the course of merchant business or passenger liners. They therefore fell within the statutory definition of dock.

As for the loss of the right to limit under article 4 of the Convention, this required precision as to the person who was the alter ego of the person entitled to limit as

113 [2020] SGHC 153; [2021] Lloyd's Rep Plus 58.

114 [2020] EWHC 1750 (Admlty); [2021] Lloyd's Rep Plus 35.

115 Section 191(1), Merchant Shipping Act 1995.

116 Section 191(9).

well as actual knowledge and foresight of the very loss that actually occurred. There was no evidence of such knowledge. However, the defence had, only just, a real prospect of success and the defendants were permitted to proceed.

The final question concerned the quantification of the right to limit. The usual calculations under the Convention applicable to ships are clearly inapposite for facilities such as docks. The 1995 Act provides that

> "The liability … shall be limited in accordance with subsection (5) below by reference to the tonnage of the largest United Kingdom ship which, at the time of the loss or damage is, or within the preceding five years has been, within the area over which the authority or person discharges any functions."[117]

The statute further defines the method of calculation as follows:

> "a ship shall not be treated as having been within the area over which a harbour authority or conservancy authority discharges any functions by reason only that it has been built or fitted out within the area, or that it has taken shelter within or passed through the area on a voyage between two places both situated outside that area, or that it has loaded or unloaded mails or passengers within the area."[118]

In short, the amount of the limit should be calculated by reference to the largest vessel visiting the area over which the limitation claimant discharged a function. Traffic in the general area of Holyhead included some fairly large vessels, whereas the marina itself was designed for smaller vessels, so this question was important to what was at stake in the litigation. The judge considered that it could not be said that the claimant discharged a function over the area of the harbour beyond the boundaries of the marina. There was no logic or reason in limiting the liability of the marina by reference to a passenger ferry that used the harbour, but over which the owners of the marina exercised no function and that did not use the marina. An appeal in the case is scheduled for hearing in October 2021.[119]

Insolvency and winding up

The interpretation of new legislation in light of the applicable insolvency framework arose in *Raj Shipping Agencies v Barge Madhwa and Another*,[120] a case from the High Court of Bombay. Was leave required under the Companies Act 1956 to proceed with a suit in admiralty? Orders of arrest against vessels had been obtained in a large number of suits in 2015. On 5 May 2017 the court received a petition to wind up GOL, the owner of the defendant vessels in two of the suits. On 4 December 2017 the company was ordered wound up. When on 9 March 2018 the suit concerning one of those vessels was listed, the liquidator objected to the suit proceeding without leave under section 446 of the 1956 Act.

Questions arose as follows. Was there a conflict between actions in rem filed under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017 and the provisions of the Insolvency and Bankruptcy Code 2016 ("IBC"). If so, how was the conflict to be resolved? Was leave under section 446(1) of the 1956 Act required for the commencement or continuation of an admiralty action in rem where a winding-up order had been made or the Official Liquidator had been appointed as provisional liquidator of the company that owned the ship?

K R Shriram J held the IBC must prevail over the Admiralty Act if there were inconsistencies between the two, because it contained a provision giving it overriding effect, whereas the Admiralty Act contained no such provision. However, an action in rem was only against the ship which was considered as having a legal personality independent of that of the corporate owners. An action in rem against the ship was not an action against the owner of the ship who may be the corporate debtor as defined under the IBC. Nor was the action in rem considered proceedings against the asset of the owner or corporate debtor, but as proceedings against the ship to recover the claim from the ship. Accordingly, the provisions of the two Acts could be read and construed harmoniously so as to give effect to both.

An action in rem filed under the 2017 Act for arrest of the ship would not amount to an institution of a suit against a corporate debtor as defined under the IBC, nor would continuation of an action in rem amount to continuation of a suit against the corporate debtor. Consequently, declaration of a moratorium under IBC would not prohibit the institution of an action in rem or continuation of a pending action in rem. In the event a moratorium was declared under the IBC, then an action in rem instituted prior to the declaration of the moratorium would not be continued during the corporate insolvency resolution process as this would defeat the very purpose of insolvency resolution under the IBC.

117 Section 191(2).
118 Section 191(7).
119 Per casetracker.justice.gov.uk, accessed on 24 February 2021.
120 K R Shriram J, Admiralty and Vice Admiralty Jurisdiction of the High Court of Judicature at Bombay, 19 May 2020, [2021] Lloyd's Rep Plus 62.

As for whether permission under the 1956 Act section 446 was required for the commencement or continuation of an admiralty action in rem, where a winding-up order had been made or a liquidator appointed, the Admiralty Act was a special act and a later act whereas the Companies Act was a general act. The Admiralty Act was also a consolidating act and a complete code as regarded Admiralty jurisdiction, arrest of ships, maritime claims, sale of ships and determination of priorities. Proceedings for which leave was necessary under section 446(1) of the 1956 Act must be proceedings capable of being withdrawn and disposed of by the winding-up court. The Company Court did not have jurisdiction to adjudicate upon matters within the High Court's admiralty jurisdiction. It followed that permission under section 446(1) of the 1956 Act was not necessary for proceedings pending before the High Court or which may be sought to be commenced before it.

> The (Indian) Admiralty Act is a consolidating act and a complete code as regards Admiralty jurisdiction, arrest of ships, maritime claims, sale of ships and determination of priorities

In *BW Umuroa Pte Ltd v Tamarind Resources Pte Ltd*,[121] the Singapore High Court considered a winding-up application of a bareboat charterer. The plaintiff applied to wind up the defendant on the basis of an unsatisfied statutory demand arising from two unpaid invoices.

On 16 September 2019 the defendant had bareboat-chartered a floating production storage and offloading vessel (FPSO) from the plaintiff. On the same day, a company related to the plaintiff entered into a separate Operations and Maintenance Agreement with a New Zealand-based company for the maintenance of the vessel. On 30 September and 31 October 2019, the plaintiff issued invoices for hire of US$2,503,136 and served a statutory demand for the alleged unpaid debt on the defendant. On 29 January 2020 the plaintiff filed the winding-up application.

On 31 January 2020 the defendant issued a notice of arbitration against the plaintiff pursuant to an arbitration clause in the bareboat charter, seeking declarations that the plaintiff was not entitled to the alleged unpaid debt and was in breach of the bareboat charter. The defendant's application before an emergency arbitrator for an injunction to restrain the plaintiff from filing a winding-up application was dismissed on 13 February 2020. Before the court, the defendant submitted that the application to wind up should be stayed or dismissed, on among others the following grounds.

First, the alleged unpaid debt was disputed, and the dispute should be referred to arbitration as agreed by the parties under the bareboat charter; and where such an arbitration agreement existed, the law on the standard of proof, which the defendant must meet to show that there was a dispute over the debt which should be referred to arbitration, was in a state of flux. Secondly, the defendant asserted that it had substantial cross-claims under the bareboat charter, which should also be referred to arbitration.

Choo Han Teck J granted the winding-up order and appointed liquidators. The defendant had not successfully raised a dispute or cross-claims against the plaintiff which should be referred to arbitration. The issue of whether the winding-up application should be stayed or dismissed must be determined under Singapore law, regardless of whether the arbitration tribunal might be applying another law to the substantive dispute. Singapore law governed whether the defendant had rebutted any presumption that it was unable to pay its debts, or had met the requisite standard of proof in showing that there was a dispute over the debt or that it had a cross-claim, so as to justify a stay or dismissal.

The dispute and cross-claims forming the defendant's case arose from the bareboat charter and the management agreement, which were governed by English law. Accordingly, the defendant had to show that it had raised a dispute or cross-claim with sufficient basis in English law to meet the requisite standard of proof under Singapore law for staying or dismissing a winding-up application. There was a fine, but appreciable, difference between the law applicable to the agreements forming the basis of the defendant's dispute and cross-claims, and the law applicable to the granting, staying or dismissal of a winding-up application. Even if Singapore law had applied to the relevant agreements, the defendant had not shown that either ground had sufficient basis in Singapore law to meet the standard of proof.

121 [2020] SGHC 71; [2021] Lloyd's Rep Plus 9.

Other admiralty and vessel-related procedure

In *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd (The Seven Champion)*,[122] the High Court of Singapore had to consider the issue of an anti-suit injunction in relation to ship arrest proceedings in the UAE, where an arbitration agreement existed designating Singapore. The plaintiff sought an anti-suit injunction against the defendant to restrain it from continuing proceedings in Sharjah, UAE, against MV *Seven Champion*, the vessel's owner (the plaintiff) and the bareboat charterer.

The defendant had carried out crane upgrading works on the vessel at its yard in Singapore pursuant to an agreement between it and the bareboat charterer which was subject to Singapore law and arbitration. Substantial sums in respect of the works remained outstanding. Meanwhile the bareboat charterer was also behind on its hire payments and upon the plaintiff's application was wound up in July 2017 and the defendant proved in the liquidation proceedings.

In January 2018 the defendant applied to the Sharjah court for attachment orders against the vessel naming the plaintiff and the bareboat charterer as defendants and commenced a substantive suit. The vessel was by this time under a new bareboat charter to another party. The plaintiff brought this action applying for an anti-suit injunction restraining the defendant from maintaining the arrest on the basis that the proceedings were vexatious and oppressive; or that the plaintiff was enforcing its contractual rights as assignee of the bareboat charterer's contractual rights under the agreement. The vessel had been released against security.

Quentin Loh J granted the anti-suit injunction and ordered that the parties proceed with the arbitration with all due dispatch. The natural forum for the dispute was clearly Singapore. The only factor connecting the dispute to Sharjah was the vessel's fortuitous presence in Sharjah. The defendant had engaged in vexatious and oppressive conduct inter alia: by alleging in the UAE proceedings that the plaintiff was jointly liable with the bareboat charterer and intending to proceed on that basis in substantive proceedings; by seizing the vessel in Sharjah almost six months after the bareboat charterer was wound up in Singapore and several months after the defendant filed its proof of debt in the charterer's liquidation; and by refusing to accept security.

When considering the grant of an ant-suit injunction on the basis of an arbitration clause, the judge applied the prima facie test to determine whether there was a valid and binding arbitration agreement. The same test should be applied to the question of whether the arbitration agreement had been assigned to the plaintiff or whether the plaintiff could otherwise avail itself thereof. There was here just about a prima facie case for assignment of the arbitration clause such as to support sending the case to the arbitration tribunal to decide the issue.

Finally, it was held that a claimant whose cause of action arose under a contract remained bound by the dispute resolution clause in that contract when pursuing a claim thereunder, albeit against someone who was not a party to that contract either by way of novation or subrogation. *Sea Premium Shipping Ltd v Sea Consortium Pte Ltd*[123] and subsequent cases showed that the English courts took the view that, in general, they were entitled to treat a third party wishing to take the benefit of a contract as bound by the burden of any exclusive jurisdiction clause therein. This reasoning was persuasive and should be followed by Singapore law.

Crowther v Crowther[124] was an unusual case combining divorce proceedings, charterparties and freezing injunctions. The appellant, Mrs Crowther, and the first respondent, Mr Crowther, were spouses who had each issued petitions for divorce on 6 September 2019. Their business had originally been set up to encompass shipowning and ship management functions, but starting in 2012 their vessels had been sold to CSM, a Gibraltar company owned by the second respondent, Mr K, and bareboat-chartered back to the Crowthers' business. Shortly after the divorce petition, Mr Crowther had gone to Gibraltar, and CSM had given notice to the Crowthers' business and had instead chartered the vessels to a business owned by Mr Crowther. In December 2019 Mrs Crowther obtained an injunction to restrain the respondents from disposing of, charging, or diminishing the value of five vessels. She did so contending that the arrangements entered into in 2012 and described above were a sham, that the arrangements in 2012 had been designed only to reduce tax liabilities, and that CSM was holding the vessels on trust for the Crowthers. CSM subsequently terminated the bareboat charter with Mr Crowther's company and issued admiralty proceedings claiming a declaration of legal and beneficial ownership of four of the vessels. On the return date, in the context of the divorce proceedings, the injunction against the second to sixth respondents was dismissed. Mrs Crowther appealed.

The Court of Appeal allowed Mrs Crowther's appeal and continued the freezing order on terms permitting an

122 [2020] SGHC 20; [2021] Lloyd's Rep Plus 14.

123 [2001] EWHC 540 (Admlty).

124 [2020] EWCA Civ 762; [2021] Lloyd's Rep Plus 60.

arm's-length sale of one of the vessels and other limited measures to support the fleet financially. Mrs Crowther had a good arguable case that the arrangements made in 2012 had been a sham. In such circumstances, the risk that assets would be put beyond the reach of any judgment spoke for itself. Applications for permission to appeal appear to have been rejected.[125]

An order for the joinder of persons unknown was sought in *Calm Ocean Shipping SA v Win Goal Trading Ltd and Others*,[126] presumably as the most convenient way of pre-empting claims from further, unknown parties to a bill of lading claim. The plaintiff was the carrier of a cargo of steel billets under a bill of lading on board the vessel *Sophia Z*. Upon arrival in Algeria on 11 September 2015, the cargo was rejected and the vessel was forced to sail on. It could not continue to Italy due to draft restrictions at the port of destination and had to await instructions at Malta. The cargo was eventually unloaded in Italy and on 25 March 2016 was sold by the plaintiff. The primary claim of the plaintiff was against the first defendant for breach of the contract evidenced by the bill of lading. By the present summons, the plaintiff sought an order that the first defendant be appointed to represent all members of a class of persons; alternatively that the plaintiff be at liberty to join members of the class to the action under the style of "persons unknown". The plaintiff asserted a legitimate concern that in future a party, for example an insurer of the cargo, would approach it claiming as holder of the bill of lading or owner of an interest in the cargo and alleging that the plaintiff had dealt with the cargo in an unauthorised manner or had committed mis-delivery or conversion or was not entitled to sell the cargo or deduct its expenses from the proceeds.

Anthony Chan J granted the alternative relief sought, an order against persons unknown. The plaintiff was an innocent party and there existed potential claims against it in connection with the carriage or disposal of the cargo. The alternative relief would serve to ensure, as far as possible, that all interested parties would be before the court and that the issues in these proceedings could be resolved with finality.

As for the representative action application, it was not appropriate to grant it. There were likely to be disputes between the various groups of defendants. Given the current number of defendants to the proceedings, it was unlikely that the number of persons within the class could be numerous, as required by the relevant provision, Order 15 rule 12(1) of the Rules of the High Court (Cap 4). It would not be appropriate as a matter of discretion to impose on the first defendant the duties of defending the claim on behalf of the class.

Issues of pre-action discovery and disclosure arose before the Singapore Court of Appeal as well as before the Admiralty bench of the High Court of England and Wales. First, in *ED&F Man Capital Markets Ltd v Straits (Singapore) Pte Ltd*,[127] the Singapore Court of Appeal considered the effect of use of document obtained through proceedings. In this commodities sale litigation, the appellant had unsuccessfully applied for pre-action discovery. In resisting the application, the respondent had filed several affidavits to explain why the application should be dismissed. It had exhibited various documents sought by the appellant to its affidavits. The appellant had subsequently used those documents in aid of its application to join the respondent to proceedings commenced against other parties in the United Kingdom.

Was this an abuse of the pre-action discovery regime? The judge at first instance thought it was, and enjoined the appellant from adducing or relying on the disclosed documents in any foreign proceedings. The Court of Appeal dismissed the appeal against that decision. The appellant's use of the disclosed documents in the UK proceedings was an abuse of the court's process given the manner and context under which the disclosure was made. The judge's order to enjoin the appellant from using those documents and affidavits for that purpose would be affirmed. The decision did not prevent the appellant from independently seeking discovery of documents, including the documents forming the subject matter of the appeal, from the respondent in the UK proceedings.

A rather different disclosure issue arose in *The Owners of the Motor Vessel "Gravity Highway" v The Owners of the Motor Vessel "Maritime Maisie"*,[128] where disclosure was said to be plainly incomplete or insufficient and the question arose as to the appropriate sanction. MV *Gravity Highway*, a newbuild car carrier which was undergoing sea trials before the completion of her fitting out, and MV *Maritime Maisie*, a chemical/product tanker, had collided on 29 December 2013 in the Korea Strait. The *Maritime Maisie* caught fire and the *Gravity Highway* 's bow was badly damaged. The *Gravity Highway* interests subsequently issued proceedings. On 31 May 2017 liability had been apportioned by one-third to *Gravity Highway* and by two-thirds to *Maritime Maisie*.

Quantum issues were referred to the Registrar. The claimant's largest item was "item 1", concerning the cost

125 Per casetracker.justice.gov.uk, accessed on 24 February 2021.
126 [2020] HKCFI 801; [2021] Lloyd's Rep Plus 54.
127 [2020] SGCA 64; [2021] Lloyd's Rep Plus 61.
128 [2020] EWHC 1697 (Comm); [2021] Lloyd's Rep Plus 59.

of repairs. In the course of the litigation, various orders were issued, in particular one in October 2019 directing the defendant to ask clarification questions and the claimant to answer them. That order was amended in December 2019 to encompass an unless order so that if the claimant did not provide the requested information by a date in January 2020, item 1 of their claim should be struck out. Following disclosure by the claimant in January, the defendant requested that item 1 be struck out. The question was whether the claimant had complied with the order.

Butcher J dismissed the defendant's appeal against the Registrar's decision not to strike out item 1. The information provided by the claimants was not "plainly incomplete or insufficient" and they were not in breach of the unless order. He noted obiter that the imposition of a striking-out sanction had been clearly disproportionate and wrong in principle and outside the ambit of discretion entrusted to the Registrar, who had been wrong for the purposes of CPR 52.21(3)(a).

A case management conference was held in *The Kingdom of Spain v The London Steam-Ship Owners' Mutual Insurance Association Ltd*.[129] The Club appealed against an order pursuant to which the judgment of the Spanish Supreme Court on liability for pollution damage from the vessel *Prestige* was registered. The potential liability of the Club was limited to approximately €855 million. The Club had, following English court decisions on the competency of the arbitrators, obtained an award and resisted the registration of the Spanish judgment on the basis that it was irreconcilable with the English court decisions. This case management conference concerned issues of disclosure.

First, Spain argued that the English judgments fell foul of the Brussels I Regulation[130] because the Club was an insurer. Against this, the Club sought disclosure of documents showing that Spain was an entity entitled to benefit from the Regulation's special insurance jurisdiction in section 3 of the Regulation, asserting that a substantial part of its business was insurance. Teare J declined to so order, preferring Spain to provide its evidence on the topic in a fair manner. Secondly, the Club sought disclosure of documents regarding an alleged refusal by the Spanish courts to allow the master to participate in an underwater investigation of the strength of the vessel's hull and refuse to disclose the results of the investigation, breaching the master's right to a fair trial. The judge again declined presently to order disclosure as Spain could be expected to provide evidence on such factual circumstances to support its case, and an order could be made thereafter. Thirdly, besides agreed expert evidence, the judge gave the Club permission to adduce the expert evidence of a naval architect on the question whether the results of the underwater inspections enabled conclusions to be drawn as to the strength of the hull and if so what those conclusions were. A timetable was fixed with the trial in December 2020.

Adaptation to pandemic working conditions and remote hearings was a necessity in most of the world during 2020. In *Huber and Another v X-Yachts (GB) Ltd and Another*,[131] the question addressed concerned overseas attendance at remote court hearings. In litigation regarding defects in the yacht *Silver X*, the judge had issued an order for a remote hearing. Claims in the litigation addressed the question of on what terms the claimants had contracted to buy the yacht; whether ownership had transferred and if so on what terms; whether the yacht was defective; whether the claimants were entitled to reject her; whether they had validly done so; whether they were entitled to damages; and if so in what amount. One of the parties had requested that further persons, based outside England and Wales, be permitted to access the hearings. The question arose whether this would contravene section 71 of the Senior Courts Act 1981.

Adaptation to pandemic working conditions and remote hearings was a necessity in most of the world during 2020. In *Huber v X-Yachts*, the question addressed concerned overseas attendance at remote court hearings

Kerr J gave permission for such access on specified terms. The silence in the statutory provisions was not to be interpreted as an implicit prohibition against permitting remote attendance from outside England and Wales. There were good reasons for concluding that the intention to be imputed to Parliament was to the contrary. An order would be made permitting remote attendance from abroad of one person for each party; an officer of choice in the case of the corporate defendants.

Minor procedural issues were addressed in *DVB Bank SE (Formerly Named DVB Bank AG) and Another v Vega Marine*

129 [2020] EWHC 142 (Comm); [2020] 2 Lloyd's Rep 351.

130 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

131 [2020] EWHC 3082 (TCC); [2021] Lloyd's Rep Plus 55; [2021] BLR 54.

Ltd and Others.[132] The claimants applied for summary judgment and other relief in respect of sums claimed to be due to them as lenders pursuant to: (a) a loan agreement for the purpose of financing two vessels dated 23 April 2007 as amended and supplemented by a series of later agreements including a fourth supplemental agreement dated 25 November 2016; and (b) a written guarantee dated 25 November 2016 between the first claimant and the third defendant.

The claimants were German banks. The defendant borrowers were companies incorporated in Liberia. The guarantor was a Greek national involved in the shipping industry. On 5 April 2019 the claimants had served a notice of default and demand for payment of US$11,741,758.12 on the defendants. The claimants had served the claim form and other documents on the defendants via a process agent in London as provided in the agreements. According to CPR 6.11(1), the claim form may be served as provided in the contract, but there was no equivalent provision in the CPR applicable to service of other documents. The defendants did not participate in the proceedings.

Henshaw J allowed the claimants' application for summary judgment. Even if service in the present case could be made on any of the defendants under the Hague Convention or other treaty setting out exclusive arrangements for service, it was not logical that exceptional circumstances should need to be shown where the parties had agreed that service may be effected by delivery to an agent within the jurisdiction of England and Wales. Alternatively, such an agreement did constitute exceptional circumstances, justifying an order for service by the alternative means of serving the documents in question on the duly appointed agent for service.

The judge found good reason to order – and, if necessary, exceptional circumstances justifying an order – that the claimants had permission to serve, and had retrospective permission to have served, documents relating to the proceedings other than the claim form on the defendants by delivering the documents by registered post or by hand to the process agent.

As a result, the defendants had been validly served and had chosen not to participate in the proceedings or challenge jurisdiction. Given the claimants' need to enforce a judgment in Greece or outside the European Union, which necessitated a reasoned judgment, it was clearly just to grant permission to apply for summary judgment. The defendants had no real prospect of success in defending the claims and there was no compelling reason for the claims to be determined at trial.

[132] [2020] EWHC 1494 (Comm); [2021] Lloyd's Rep Plus 63.

JURISDICTION

This section considers a small number of jurisdiction decisions of particular shipping interest.

First, the decisions of the Advocate General and full Court of Justice of the European Union in *LG and Others v Rina SpA and Another*,[133] both of which were issued in 2020. The factual background was that in 2006, the Panama-registered passenger ferry *Al Salam Boccaccio'98* had sunk in the Red Sea with the loss of more than a thousand lives. Survivors and relatives of the victims brought an action for damages before the Tribunale di Genova (District Court, Genoa, Italy), against the companies Rina SpA and Ente Registro Italiano Navale, arguing that the defendants' certification and classification activities, the decisions they took and the instructions they gave, were to blame for the ship's lack of stability and its lack of safety at sea, which were the causes of its sinking.

The classification and certification had been carried out by the defendants under a contract concluded with Panama, for the purposes of obtaining that state's flag for the vessel. The defendants for their part contended that the classification and certification operations they had conducted were carried out upon delegation from the Republic of Panama and a manifestation of the sovereign powers of the delegating state. They relied on the international law principle of immunity from jurisdiction of foreign states. The claimants argued in response that the principle did not cover activities governed by non-discretionary technical rules unrelated to the political decisions and prerogatives of a state. The Tribunale referred a question as to whether the Brussels I Regulation prevented it from holding that it had no jurisdiction.

The Tribunale di Genova sought a preliminary ruling from CJEU on the issue of immunity. The Advocate-General in his decision[134] proposed a ruling on the meaning of "civil and commercial matters" according to article 1(1) of the Brussels I Regulation. Soon thereafter, the CJEU ruled on the matter and arrived at the same conclusion. In the judgment of the court, it was ruled that article 1(1) of the Regulation must be interpreted as meaning that an action for damages, brought against private-law corporations engaged in the classification and certification of ships on behalf of and upon delegation from a third state, fell within the concept of "civil and commercial matters", within the meaning of that provision, and therefore within the scope of the Regulation. This conclusion assumed that the

[133] Case C-641/18; [2020] 2 Lloyd's Rep 582.
[134] Opinion of AG Szpunar, 14 January 2020.

classification and certification activity was not exercised under public powers within the meaning of EU law. The principle of customary international law concerning immunity from jurisdiction did not preclude the national court seised from exercising the jurisdiction provided for by that Regulation in a dispute relating to such an action, where the court found that such corporations had not had recourse to public powers within the meaning of international law.

A jurisdiction decision from the Queen's Bench Division concerned a yacht lost overboard while transported across the Atlantic and the application of the Recast Brussels Regulation[135] where there were exclusive jurisdiction clauses as well as lis alibi pendens in play. In *Weco Projects APS v Loro Piana and Others*,[136] the background was that Mr Loro Piana's yacht *My Song*, owned by the company C, was to be transported from Antigua to Genoa on board another vessel but was lost overboard. The yacht was transported under a booking note created by PMS and issued by its principal PML. It incorporated "Heavy Lift Rider Conditions" and the standard terms of the British Institute of Forwarding Agents, and contained two exclusive jurisdiction clauses, both providing for English law and court jurisdiction. PML procured a sea waybill from the carrier, with which it also had a contract of affreightment. The claimant, Weco, was the bareboat charterer of the carrying vessel. Its time charter formed the start of the chain of charterparties, ending with the contract of affreightment to PML.

As well as a multitude of contracts, there was also quite a profusion of litigation following the loss of the yacht. On 14 June 2019, Mr Loro Piana commenced proceedings against PML and PMS in Milan. Weco commenced proceedings before the English court on 27 June 2019 seeking negative declaratory relief against Mr Loro Piana and C, as well as PML. PML then commenced Part 20 proceedings against Mr Loro Piana and C, and also sought negative declaratory relief. PMS also commenced proceedings against Mr Loro Piana and C, seeking negative declaratory relief. On 13 May 2020 Mr Loro Piana separately commenced proceedings against the carrier and Weco in Genoa.

The decision at issue here resulted from an application whereby the defendants in the two sets of proceedings sought the setting aside of service, on the grounds that the English courts did not have jurisdiction to hear the claims.

Christopher Hancock QC first considered what parts of the Recast Regulation were applicable. Thus, in circumstances where PML had liberty to perform the carriage and where the booking note clearly contemplated that it might charter a vessel for the purpose, the contract between Mr Loro Piana and PML was clearly a contract of transport within the meaning of article 17(3) of the Regulation. It was therefore excluded from the scope of the consumer provisions in the Regulation. The relevant test for whether Mr Loro Piana was a consumer was whether the business use of the yacht was limited. The burden of establishing this lay on Mr Loro Piana. It had not been shown that the intended business usage of the yacht was no more than negligible. The exclusive jurisdiction clause was therefore not invalid under the Regulation's consumer provisions. Nor was the clause unfair for the purposes of section 62 of the Consumer Rights Act 2015.

The contention of Weco that the court had jurisdiction over its claim for negative declaratory relief against Mr Loro Piana as one of several defendants by virtue of article 8[137] of the Recast Regulation would be upheld. Foreseeability was not a separate test but part of the inquiry into whether there was a sufficiently close connection between the relevant claims. There was clearly a good arguable case that Mr Loro Piana would have foreseen that all claims relating to the casualty would be determined in the English courts.

There was clearly a close connection between Weco's claims against PML and their claims against PML and C. The factual materials relating to the cause of the casualty were common to both sets of claims, and were likely to play a very substantial part in the process of decision making. It was desirable that these factual issues should be determined in the same forum.

On Weco's alternative ground for jurisdiction, the Himalaya clause in the booking note did benefit Weco. In performing the obligations of PML, it was an agent or servant of PML. However, the Himalaya clause did not on its wording encompass an exclusive jurisdiction clause and Weco was not entitled to the benefit of that clause.

PMS had shown a good arguable case that the conditional benefit doctrine entitled them to the benefit of the exclusive jurisdiction clause. Even if Mr Loro Piana was not relying on the booking note contract in the Milan proceedings, claims on other grounds might also be caught by the exclusive jurisdiction clause. As against C, however, PMS could not rely on the Himalaya clause or the conditional benefit argument. An application for permission to appeal appears to be under consideration.[138]

135 Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

136 [2020] EWHC 2150 (Comm); [2021] Lloyd's Rep Plus 63.

137 Regarding closely connected claims that it is expedient to hear and determine together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

138 Per casetracker.justice.gov.uk, accessed on 24 February 2021.

A decision by the Court of Appeal considered asymmetric jurisdiction clauses under the Recast Regulation, article 31(2). In *Etihad Airways PJSC v Flöther*,[139] the question for decision was whether article 31(2), on its true interpretation as a matter of EU law, applied to an agreement conferring exclusive jurisdiction on the courts of a member state of the EU, in circumstances where the exclusive choice of court agreement applied to proceedings initiated by one party, but not (or not necessarily) to proceedings initiated by the other party. Article 31(2) read:

> "Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement."

The agreement in which the jurisdiction clause at issue was contained was a facility agreement between Air Berlin as borrower and Etihad Airways, as lender. The appellant, Professor Dr Flöther, was the insolvency administrator of Air Berlin. The jurisdiction clause provided for exclusive English jurisdiction, but went on to provide that this was for the benefit of the lender only and that the lender would not be prevented from taking proceedings in any other courts with jurisdiction. At first instance,[140] Jacobs J had held, insofar as relevant upon appeal, that article 31(2) applied to the asymmetric clause in the facility agreement. Professor Dr Flöther appealed.

The Court of Appeal (composed of Henderson, Hickinbottom and Newey LJJ) dismissed the appeal. There was no good reason why the concept of "a court … on which an agreement … confers exclusive jurisdiction" should be construed as excluding asymmetric jurisdiction clauses. Insofar as the bound party was concerned, the choice of jurisdiction was indeed exclusive.

Finally, the meaning of "same parties" and "same cause of action" in the Regulation was elucidated in *Federal Republic of Nigeria v Royal Dutch Shell plc and Others*.[141] The Federal Republic of Nigeria ("FRN") claimed that certain Nigerian oil rights, namely rights in respect of an Oil Prospecting Licence for block 245 ("OPL 245"), were procured by a fraudulent and corrupt scheme, in which the defendants had knowingly participated, and that the defendants were liable to it for bribery, dishonest assistance and unlawful means conspiracy. As a result, the FRN claimed against all the defendants that it was entitled to rescind a set of agreements made in April 2011 and sought damages.

The defendants disputed the jurisdiction of the court. Criminal proceedings were under way in Italy, and the FRN had joined those as a civil claimant. The defendants contended that the claim against Royal Dutch Shell (RDS) in the Milan proceedings, and in the English proceedings, satisfied the three "identities", of parties, cause and objet, so that the court should decline jurisdiction pursuant to article 29 of the Recast Brussels Regulation and the proceedings should be dismissed. The FRN's position was that article 29 of the Regulation did not apply. The article read:

> "Without prejudice to Article 31(2), where proceedings involving the *same cause of action and between the same parties* are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established."

Butcher J declined jurisdiction over RDS. It followed that the court had no jurisdiction over the other defendants. The two sets of proceedings against RDS were "between the same parties" for the purposes of article 29. Although the Public Prosecutor was a party to the Italian criminal proceedings, it was not in any relevant way a party to the Italian civil claim. In any case, the identity between the parties did not have to be complete.

The cause was the same in the two proceedings against RDS. In each case, the basic facts were clearly the same.[142] Whether the actions were in tort or civil liability did not matter.

The only claim made in the Italian proceedings was for monetary damages, while in the English action claims were also made for a declaration of entitlement to rescind the April 2011 agreements, other declaratory relief, an account of profits and tracing remedies. In answering whether the proceedings had the same objet, the focus must be on the claims against the anchor defendant RDS. The end in view for both proceedings was to obtain redress for RDS's alleged responsibility for bribery and corruption. The tracing claim against other defendants did not change this; nor did the claim for an account of profits or the claim for a declaration of an entitlement to rescind the April 2011 agreements. RDS was not a party to that agreement and the proceedings against RDS could not have their rescission as an objet.

The presence in the English proceedings of claims additional to those for financial compensation did not mean that the proceedings could not be regarded as involving only the same cause of action as those in Italy.

139 [2020] EWCA Civ 1707; [2021] Lloyd's Rep Plus 66.
140 *Etihad Airways PJSC v Flöther* [2019] EWHC 3107 (Comm); [2020] 2 WLR 333.
141 [2020] EWHC 1315 (Comm).
142 *The Alexandros T* [2013] UKSC 70; [2014] 1 Lloyd's Rep 223.

CONCLUSION

In spite of the additional complications involved in pandemic litigation, appeals were not a rarity in the year and some interesting decisions are awaited in 2021. The decision in the appeal of *Priminds Shipping (HK) Co Ltd v Noble Chartering Inc (The Tai Prize)*[143] was handed down on 28 January 2021, the Court of Appeal dismissing the shipowner's appeal. The Court of Appeal's decision in *Begum (on behalf of Mollah) v Maran (UK) Ltd* was issued on 10 March 2021.[144]

An application for permission to appeal the decision in *Weco Projects APS v Loro Piana and Others* appears to be under consideration.[145]

> It remains to be seen how many appellants will have cold feet or are forced to discontinue proceedings in the context of the pandemic and its undeniable effect of making litigation more complicated

The appeals court will have a continuing stream of interesting cases to consider in 2021. In *Banco San Juan Internacional Inc v Petróleos de Venezuela SA*, an appeal is scheduled for hearing in early March 2021.[146] The appeal of *Splitt Chartering APS and Others v Saga Shipholding Norway AS and Others (The Stema Barge II)* is also scheduled to be heard in early March 2021.[147] In *Septo Trading Inc v Tintrade Ltd (The Nounou)*, an appeal is scheduled for hearing in early May 2021.[148] In *Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd*, an appeal is scheduled for hearing in mid-July 2021.[149] In *Holyhead Marina Ltd v Farrer*, an appeal is scheduled for hearing in October 2021.[150] The judge's decision in *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd (The Eternal Bliss)* is also under appeal and scheduled for hearing in November 2021.[151] In *Herculito Maritime Ltd and Others v Gunvor International BV and Others (The Polar)*, an appeal is pending with the Court of Appeal and scheduled for hearing as far ahead as December 2021.[152]

Several applications for permission to appeal were rejected – thus permission to appeal in *Altera Voyageur Production Ltd v Premier Oil E&P UK Ltd (The Voyageur Spirit)* appears to have been declined by the Court of Appeal on 13 November 2020. An application for permission to appeal in *Crowther v Crowther* appears equally to have been rejected.[153] Permission to appeal was refused in *The Owners of the Vessel Sakizaya Kalon v The Owners of the Vessel Panamax Alexander; The Owners of the Vessel Osios David v The Owners of the Vessel Panamax Alexander; The Owners of the Vessel Osios David v The Owners of the Vessel Sakizaya Kalon*[154] on 8 February 2021.[155]

Finally, the yacht *Force India* remains berthed in its habitual spot in Southampton, presumably still subject to some form of proceedings. It remains to be seen how many of these appellants will have cold feet or are forced to discontinue proceedings in the context of the pandemic and its undeniable effect of making litigation more complicated.

143 [2021] EWCA Civ 87.
144 [2021] EWCA Civ 326.
145 Per casetracker.justice.gov.uk, accessed on 24 February 2021.
146 Ibid.
147 Ibid.
148 Ibid.
149 Ibid.
150 Ibid.
151 Per casetracker.justice.gov.uk, accessed on 24 February 2021.
152 Ibid.
153 Ibid.
154 [2020] EWHC 2604 (Admlty); [2021] Lloyd's Rep Plus 45.
155 Per casetracker.justice.gov.uk, accessed on 24 February 2021.

APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED IN THIS REVIEW

2020 judgments analysed

Aegean Baltic Bank SA v Renzlor Shipping Ltd and Others (QBD (Comm Ct)) [2020] EWHC 2851 (Comm); [2021] Lloyd's Rep Plus 41

Alegrow SA v Yayla Agro Gida San ve Nak AS (QBD (Comm Ct)) [2020] EWHC 1845 (Comm); [2021] Lloyd's Rep Plus 22

Alize 1954 and Another v Allianz Elementar Versicherungs AG and Others (The CMA CGM Libra) (CA) [2020] EWCA Civ 293; [2020] 2 Lloyd's Rep 565

Altera Voyageur Production Ltd v Premier Oil E&P UK Ltd (The Voyageur Spirit) (QBD (Comm Ct)) [2020] EWHC 1891 (Comm); [2021] Lloyd's Rep Plus 19

American Eagle Fishing LLC v The Ship "Koorale" (NZHC) [2020] NZHC 1935; [2021] Lloyd's Rep Plus 51

Americas Bulk Transport Ltd (Liberia) v Cosco Bulk Carrier Ltd (China) (The Grand Fortune) (QBD (Comm Ct)) [2020] EWHC 147 (Comm); [2020] 2 Lloyd's Rep 105

Apex Energy International Pte Ltd v Wanxiang Resources (Singapore) Pte Ltd (SGHC) [2020] SGHC 138; [2021] Lloyd's Rep Plus 38

Argentum Exploration Ltd v The Silver and all Persons Claiming to be Interested in and/or to Have Rights in Respect of, the Silver (The SS Tilawa) (QBD (Admlty Ct)) [2020] EWHC 3434 (Admlty); [2021] Lloyd's Rep Plus 40

AS Fortuna OPCO BV and Another v Sea Consortium Pte Ltd and Others (SGHC) [2020] SGHC 72; [2021] Lloyd's Rep Plus 48

Aspen Underwriting Ltd and Others v Credit Europe Bank NV (SC) [2020] UKSC 11; [2020] 1 Lloyd's Rep 520

Banco San Juan Internacional Inc v Petróleos de Venezuela SA (QBD (Comm Ct)) [2020] EWHC 2937 (Comm); [2021] Lloyd's Rep Plus 44

Begum (on behalf of Mollah) v Maran (UK) Ltd (QBD) [2020] EWHC 1846 (QB); [2021] Lloyd's Rep Plus 32; (CA) [2021] EWCA Civ 326

Bhagwan Marine Pty Ltd v The Ship "Lauren Hansen" (FCA) [2020] FCA 1225; [2021] Lloyd's Rep Plus 53

Bhagwan Marine Pty Ltd v The Ship "Teras Bandicoot" (FCA) [2020] FCA 1224; [2021] Lloyd's Rep Plus 52

Bhagwan Marine Pty Ltd v The Ship "Teras Bandicoot" (No 2) [2020] FCA 1481; [2021] Lloyd's Rep Plus 57

Bright Shipping Ltd v Changhong Group (HK) Ltd (The CF Crystal and The Sanchi) (HKCFA) [2020] HKCFA 24; [2021] Lloyd's Rep Plus 46

Bulk Poland, The (QBD (Comm Ct)) [2020] EWHC 3343 (Comm), [2021] Lloyd's Rep Plus 6

BW Umuroa Pte Ltd v Tamarind Resources Pte Ltd (SGHC) [2020] SGHC 71; [2021] Lloyd's Rep Plus 9

Calm Ocean Shipping SA v Win Goal Trading Ltd and Others (HKCFI) [2020] HKCFI 801; [2021] Lloyd's Rep Plus 54

C Challenger, The (QBD (Comm Ct)) [2020] EWHC 3448 (Comm); [2021] Lloyd's Rep Plus 24

CF Crystal, The (HKCFA) [2020] HKCFA 24; [2021] Lloyd's Rep Plus 46

China Coal Solution (Singapore) Pte Ltd v Avra Commodities Pte Ltd (SGCA) [2020] SGCA 81; [2021] Lloyd's Rep Plus 27

CH Offshore Ltd v Internaves Consorcio Naviero SA (QBD (Comm Ct)) [2020] EWHC 1710 (Comm); [2021] Lloyd's Rep Plus 33

CMA CGM Libra, The (CA) [2020] EWCA Civ 293; [2020] 2 Lloyd's Rep 565

Columbus, The (QBD (Admlty Ct)) [2020] EWHC 3443 (Admlty); [2021] Lloyd's Rep Plus 56

Crowther v Crowther (CA) [2020] EWCA Civ 762; [2021] Lloyd's Rep Plus 60

Double Venus, The (QBD (Admlty Ct)) [2020] EWHC 2462 (Admlty); [2021] Lloyd's Rep Plus 47

*DVB Bank SE (Formerly Named DVB Bank AG) and Another v Vega Marine Ltd and Others (*QBD (Comm Ct)) [2020] EWHC 1494 (Comm); [2021] Lloyd's Rep Plus 63

Echo Star, The ex Gas Infinity (SGHC) [2020] SGHC 200; [2021] Lloyd's Rep Plus 36

ED&F Man Capital Markets Ltd v Straits (Singapore) Pte Ltd (SGCA) [2020] SGCA 64; [2021] Lloyd's Rep Plus 61

Eternal Bliss, The (QBD (Comm Ct)) [2020] EWHC 2373 (Comm); [2020] 2 Lloyd's Rep 419

Etihad Airways PJSC v Flöther (CA) [2020] EWCA Civ 1707; [2021] Lloyd's Rep Plus 66

Federal Republic of Nigeria v Royal Dutch Shell plc and Others (QBD (Comm Ct)) [2020] EWHC 1315 (Comm)

FIMBank plc v Discover Investment Corporation (The Nika) (QBD (Comm Ct)) [2020] EWHC 254 (Comm); [2021] 1 Lloyd's Rep 109

FIMBank plc v KCH Shipping Co Ltd (The Giant Ace) (QBD (Comm Ct)) [2020] EWHC 1765 (Comm); [2020] 2 Lloyd's Rep 511

Force India, The (No 2) (QBD (Admlty Ct)) [2020] EWHC 719 (Admlty); [2020] 2 Lloyd's Rep 348

Force India, The (QBD (Admlty Ct)) [2020] EWHC 103 (Admlty); [2020] 2 Lloyd's Rep 343

Forum Services International Ltd and Another v OOS International BV (QBD (Comm Ct)) [2020] EWHC 170 (Comm); [2020] Lloyd's Rep Plus 104

Gas Infinity, The (The Echo Star) (SGHC) [2020] SGHC 200; [2021] Lloyd's Rep Plus 36

Giant Ace, The (QBD (Comm Ct)) [2020] EWHC 1765 (Comm); [2020] 2 Lloyd's Rep 511

Grace Ocean Private Ltd v MV "Bulk Poland" (QBD (Comm Ct)) [2020] EWHC 3343 (Comm); [2021] Lloyd's Rep Plus 6

Grand Fortune, The (QBD (Comm Ct)) [2020] EWHC 147 (Comm); [2020] 2 Lloyd's Rep 105

Gravity Highway, The (QBD (Comm Ct)) [2020] EWHC 1697 (Comm); [2021] Lloyd's Rep Plus 59

Guardian Offshore AU Pty Ltd v SAAB Seaeye Leopard 1702 Remotely Operated Vehicle Lately on Board the Ship "Offshore Guardian" and Another (FCA) [2020] FCA 273; [2021] Lloyd's Rep Plus 7

Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd (The Seven Champion) (SGHC) [2020] SGHC 20; [2021] Lloyd's Rep Plus 14

HC Trading Malta Ltd v Savannah Cement Ltd (QBD (Comm Ct)) [2020] EWHC 2144 (Comm); [2021] Lloyd's Rep Plus 28

Herculito Maritime Ltd and Others v Gunvor International BV and Others (The Polar) (QBD (Comm Ct)) [2020] EWHC 3318 (Comm); [2021] 1 Lloyd's Rep 150

Holyhead Marina Ltd v Farrer And All Other Persons Claiming or Being Entitled to Claim Damages in Connection with Storm "Emma" Striking Holyhead Marina on 1 and 2 March 2018 [2020] EWHC 1750 (Admlty); [2021] Lloyd's Rep Plus 35

Huber and Another v X-Yachts (GB) Ltd and Another (QBD (TCC)) [2020] EWHC 3082 (TCC); [2021] Lloyd's Rep Plus 55; [2021] BLR 54

Illawarra Fortune, The (NSWSC) [2020] NSWSC 184; [2021] Lloyd's Rep Plus 16

Jennings v TUI UK Ltd (t/a Thomson Cruises) (QBD (Admlty Ct)) [2018] EWHC 82 (Admlty); [2021] 1 Lloyd's Rep 61

Jiangsu Guoxin Corporation Ltd v Precious Shipping Public Co Ltd (QBD (Comm Ct)) [2020] EWHC 1030 (Comm); [2021] Lloyd's Rep Plus 30; [2020] BLR 653
K Line Pte Ltd v Priminds Shipping (HK) Co Ltd (The Eternal Bliss) (QBD (Comm Ct)) [2020] EWHC 2373 (Comm); [2020] 2 Lloyd's Rep 419
Karma, The (QBD (Admlty Ct)) [2020] EWHC 2462 (Admlty); [2021] Lloyd's Rep Plus 47
Kellett v RCL Cruises Ltd and Others (IECA) [2020] IECA 138; [2020] Lloyd's Rep Plus 89
Keynvor Morlift Ltd v The Vessel "Kuzma Minin", Her Bunkers Stores and Freight at Risk (if any) (QBD (Admlty Ct)) [2019] EWHC 3557 (Admlty); [2020] 2 Lloyd's Rep 617
Koorale, The (NZHC) [2020] NZHC 1935; [2021] Lloyd's Rep Plus 51
Korea Shipbuilding & Offshore Engineering Co Ltd v F Whale Corporation (QBD (Comm Ct)) [2020] EWHC 631 (Comm); [2021] Lloyd's Rep Plus 31
Kuzma Minin, The (QBD (Admlty Ct)) [2019] EWHC 3557 (Admlty); [2020] 2 Lloyd's Rep 617
Lauren Hansen, The (FCA) [2020] FCA 1225; [2021] Lloyd's Rep Plus 53
Leonidas, The (QBD (Comm Ct)) [2020] EWHC 1986 (Comm); [2021] Lloyd's Rep Plus 23
LG and Others v Rina SpA and Another (CJEU) Case C-641/18; [2020] 2 Lloyd's Rep 582
Llamedos, The (QBD (Admlty Ct)) [2020] EWHC 2462 (Admlty); [2021] Lloyd's Rep Plus 47
Mahapatra v TUI UK Ltd (QBD (Admlty Ct)) [2018] EWHC 3140 (Admlty); [2021] 1 Lloyd's Rep 71
Maritime Maisie, The (QBD (Comm Ct)) [2020] EWHC 1697 (Comm); [2021] Lloyd's Rep Plus 59
Miracle Hope, The (No 3) (QBD (Comm Ct)) [2020] EWHC 995 (Comm); [2021] Lloyd's Rep Plus 13
Miracle Hope, The (QBD (Comm Ct)) [2020] EWHC 726 (Comm); [2021] Lloyd's Rep Plus 12
Miracle Hope, The (SGHC) [2020] SGHCR 3; [2021] Lloyd's Rep Plus 50
Moore v Scenic Tours Pty Ltd (HCA) [2020] HCA 17; [2021] Lloyd's Rep Plus 43
MTM Hong Kong, The (QBD (Comm Ct)) [2020] EWHC 700 (Comm); [2020] 2 Lloyd's Rep 559
MVV Environment Devonport Ltd v NTO Shipping GmbH & Co KG MS "Nortrader" (The MV Nortrader) (QBD (Comm Ct)) [2020] EWHC 1371 (Comm); [2021] Lloyd's Rep Plus 17
Nautica Marine Ltd v Trafigura Trading LLC (The Leonidas) (QBD (Comm Ct)) [2020] EWHC 1986 (Comm); [2021] Lloyd's Rep Plus 23
Neptune Hospitality Pty Ltd v Ozmen Entertainment Pty Ltd (The Seadeck) (FCAFC) [2020] FCAFC 47; [2021] Lloyd's Rep Plus 25
Nika, The (QBD (Comm Ct)) [2020] EWHC 254 (Comm); [2021] 1 Lloyd's Rep 109
Nortrader, The (QBD (Comm Ct)) [2020] EWHC 1371 (Comm); [2021] Lloyd's Rep Plus 17
Nounou, The (QBD (Comm Ct)) [2020] EWHC 1795 (Comm); [2021] Lloyd's Rep Plus 8
November, The (QBD (Admlty Ct)) [2020] EWHC 661 (Admlty); [2021] Lloyd's Rep Plus 20
OCBC Wing Hang Bank Ltd v Kai Sen Shipping Co Ltd (The Yue You 903) (HKCFI) [2020] HKCFI 375; [2021] Lloyd's Rep Plus 18
Offshore Guardian, The (FCA) [2020] FCA 273; [2021] Lloyd's Rep Plus 7
Osios David, The [2020] EWHC 2604 (Admlty); [2021] Lloyd's Rep Plus 45
Panamax Alexander, The [2020] EWHC 2604 (Admlty); [2021] Lloyd's Rep Plus 45
Polar, The (QBD (Comm Ct)) [2020] EWHC 3318 (Comm); [2021] Lloyd's Rep Plus 2
Premier Marinas Ltd The Owner(s) of M/Y "Double Venus" aka "Llamedos", and the Owner(s) of M/Y "Karma" aka "Santorini" (QBD (Admlty Ct)) [2020] EWHC 2462 (Admlty); [2021] Lloyd's Rep Plus 47
Priminds Shipping (HK) Co Ltd v Noble Chartering Inc (The Tai Prize) (QBD (Comm Ct)) [2020] EWHC 127 (Comm); [2020] 2 Lloyd's Rep 333
Qatar National Bank (QPSC) v Owners of the Yacht "Force India" (No 2) (QBD (Admlty Ct)) [2020] EWHC 719 (Admlty); [2020] 2 Lloyd's Rep 348
Qatar National Bank (QPSC) v The Owners of the Yacht "Force India" (QBD (Admlty Ct)) [2020] EWHC 103 (Admlty); [2020] 2 Lloyd's Rep 343
Raj Shipping Agencies v Barge Madhwa and Another K R Shriram J, Admiralty and Vice Admiralty Jurisdiction of the High Court of Judicature at Bombay, 19 May 2020, [2021] Lloyd's Rep Plus 62
Sakizaya Kalon, The [2020] EWHC 2604 (Admlty); [2021] Lloyd's Rep Plus 45
Sanchi, The (HKCFA) [2020] HKCFA 24; [2021] Lloyd's Rep Plus 46
Santorini, The (QBD (Admlty Ct)) [2020] EWHC 2462 (Admlty); [2021] Lloyd's Rep Plus 47
Seadeck, The (FCAFC) [2020] FCAFC 47; [2021] Lloyd's Rep Plus 25
Sea Master, The (QBD (Comm Ct)) [2020] EWHC 2030 (Comm); [2021] Lloyd's Rep Plus 21
Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd (The Sea Master) (QBD (Comm Ct)) [2020] EWHC 2030 (Comm); [2021] Lloyd's Rep Plus 21
Septo Trading Inc v Tintrade Ltd (The Nounou) (QBD (Comm Ct)) [2020] EWHC 1795 (Comm); [2021] Lloyd's Rep Plus 8
Seven Champion, The (SGHC) [2020] SGHC 20; [2021] Lloyd's Rep Plus 14
Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd (QBD (Comm Ct)) [2020] EWHC 803 (Comm); [2021] Lloyd's Rep Plus 34
SK Shipping Europe plc v Capital VLCC 3 Corporation (The C Challenger) (QBD (Comm Ct)) [2020] EWHC 3448 (Comm); [2021] Lloyd's Rep Plus 24
Songa Venus, The (SGHC) [2020] SGHC 74; [2021] Lloyd's Rep Plus 49
Splitt Chartering APS and Others v Saga Shipholding Norway AS and Others (The Stema Barge II) (QBD (Admlty Ct)) [2020] EWHC 1294 (Admlty); [2021] Lloyd's Rep Plus 42
SS Tilawa, The (QBD (Admlty Ct)) [2020] EWHC 3434 (Admlty); [2021] Lloyd's Rep Plus 40
Star Group Est Pte Ltd v Willsoon (FE) Pte Ltd (SGHC) [2020] SGHC 185; [2021] Lloyd's Rep Plus 29
Stema Barge II, The (QBD (Admlty Ct)) [2020] EWHC 1294 (Admlty); [2021] Lloyd's Rep Plus 42
Swashplate Pty Ltd v Liberty Mutual Insurance Co (trading as Liberty International Underwriters) (FCA) [2020] FCA 15; [2020] 1 Lloyd's Rep 592; (FCAFC) [2020] FCAFC 137; [2021] Lloyd's Rep IR 37
Tai Prize, The (QBD (Comm Ct)) [2020] EWHC 127 (Comm); [2020] 2 Lloyd's Rep 333
Taqa Bratani Ltd and Others v RockRose UKCS8 LLC (QBD (Comm Ct)) [2020] EWHC 58 (Comm); [2020] 2 Lloyd's Rep 64
Teras Bandicoot, The (FCA) [2020] FCA 1224; [2021] Lloyd's Rep Plus 52
Teras Bandicoot, The (No 2) (FCA) [2020] FCA 1481; [2021] Lloyd's Rep Plus 57
The Echo Star ex Gas Infinity (SGHC) [2020] SGHC 200; [2021] Lloyd's Rep Plus 36
The Kingdom of Spain v The London Steam-Ship Owners' Mutual Insurance Association Ltd (QBD (Comm Ct)) [2020] EWHC 142 (Comm); [2020] 2 Lloyd's Rep 351
The Owners of the Motor Vessel "Gravity Highway" v The Owners of the Motor Vessel "Maritime Maisie" (QBD (Comm Ct)) [2020] EWHC 1697 (Comm); [2021] Lloyd's Rep Plus 59
The Owners of the Vessel Sakizaya Kalon v The Owners of the Vessel Panamax Alexander; The Owners of the Vessel Osios David v The Owners of the Vessel Panamax Alexander; The Owners of the Vessel Osios David v The Owners of the Vessel Sakizaya

Kalon (QBD (Admlty Ct)) [2020] EWHC 2604 (Admlty); [2021] Lloyd's Rep Plus 45
Thoresen Shipping Singapore Pte Ltd and Others v Global Symphony SA and Others (SGHC) [2020] SGHC 153 [2021] Lloyd's Rep Plus 58
Tractors Singapore Ltd v Pacific Ocean Engineering & Trading Pte Ltd (SGHC) [2020] SGHC 60; [2021] Lloyd's Rep Plus 37
Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd (The Miracle Hope) (No 3) (QBD (Comm Ct)) [2020] EWHC 995 (Comm); [2021] Lloyd's Rep Plus 13
Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd (The Miracle Hope) (QBD (Comm Ct)) [2020] EWHC 726 (Comm); [2021] Lloyd's Rep Plus 12
Trans-Tec International Srl v The Owners and/or Demise Charterers of the Vessel "Columbus" (QBD (Admlty Ct)) [2020] EWHC 3443 (Admlty); [2021] Lloyd's Rep Plus 56
Tricon Energy Ltd v MTM Trading LLC (The MTM Hong Kong) (QBD (Comm Ct)) [2020] EWHC 700 (Comm); [2020] 2 Lloyd's Rep 559
TUI UK Ltd v Morgan (Ch D) [2020] EWHC 2944 (Ch); [2021] Lloyd's Rep Plus 39
Turks Shipyard Ltd v Owners of the Vessel "November" (QBD (Admlty Ct)) [2020] EWHC 661 (Admlty); [2021] Lloyd's Rep Plus 20
Voyageur Spirit, The (QBD (Comm Ct)) [2020] EWHC 1891 (Comm); [2021] Lloyd's Rep Plus 19
Weco Projects APS v Loro Piana and Others (QBD (Comm Ct)) [2020] EWHC 2150 (Comm); [2021] Lloyd's Rep Plus 63
Wollongong Coal Ltd v PCL (Shipping) Pte Ltd (The Illawarra Fortune) (NSWSC) [2020] NSWSC 184; [2021] Lloyd's Rep Plus 16
Yue You 903, The (HKCFI) [2020] HKCFI 375; [2021] Lloyd's Rep Plus 18

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Alize 1954 and Another v Allianz Elementar Versicherungs AG and Others (The CMA CGM Libra) (QBD (Admlty Ct)) [2019] EWHC 481 (Admlty); [2019] 1 Lloyd's Rep 595
"Amalie Essberger" Tankreederei GmbH & Co KG v Marubeni Corporation (The Amalie Essberger) (QBD (Comm Ct)) [2019] EWHC 3402 (Comm); [2020] 1 Lloyd's Rep 393
Arcos Ltd v EA Ronaasen & Son (HL) (1933) 45 Ll L Rep 33; [1933] AC 470
Aspen Underwriting Ltd v Credit Europe Bank NV (CA) [2018] EWCA Civ 2590; [2019] 1 Lloyd's Rep 221
Atlantik Confidence, The (CA) [2014] EWCA Civ 217; [2014] 1 Lloyd's Rep 586
Atlantik Confidence, The (QBD (Admlty Ct)) [2016] EWHC 2412 (Admlty); [2016] 2 Lloyd's Rep 525
Avra Commodities Pte Ltd v China Coal Solution (Singapore) Pte Ltd (SGHC) [2019] SGHC 287; [2020] Lloyd's Rep Plus 51
Bonde, The (QBD (Comm Ct)) [1991] 1 Lloyd's Rep 136
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