

# Maritime law in 2021: a review of developments in case law

By Dr Johanna Hjalmarsson



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

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Maritime and Commercial Law 

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At Southampton, she teaches shipping and insurance-related modules and received the Vice-Chancellor's Award for Excellence in Teaching in 2009 and the Vice-Chancellor's Award in 2011.

# Maritime law in 2021: a review of developments in case law

## INTRODUCTION

The year got off to an immediate current affairs start with the UK Supreme Court judgment in *Financial Conduct Authority v Arch Insurance (UK) Ltd*,<sup>1</sup> followed by several more decisions involving Covid-19 pandemic-related cases. This was not the only theme of the year, with continued focus on loss spreading following not only the pandemic but also a volcanic eruption, collisions and insolvencies; the OW Bunker collapse in 2014 notably continuing to cast a long shadow.<sup>2</sup> A few cases determined more perennial issues of principle, such as issues related to shipping contract interpretation in *The CMA CGM Libra*<sup>3</sup> and *The Polar*<sup>4</sup> and to COLREGs in *The Ever Smart*,<sup>5</sup> and some finely tuned procedural issues.

The UK Supreme Court's decision in *FCA v Arch*<sup>6</sup> in January 2021 was a decision in principle on the interpretation of business interruption policies and is not considered in depth in this Review. For present purposes, it suffices to note that the judgment considered causation and section 55 of the Marine Insurance Act 1906, but that the implications for marine insurance are mostly indirect in nature. The Supreme Court did say that policy interpretation would rarely turn on causal language such as "arising out of" and "caused by";<sup>7</sup> a contention with which the marine insurance segment of the market may well disagree.

To little surprise, another early Covid-related judgment handed down on 26 January 2021 bore on cruise ships and the distribution of the financial fallout of the pandemic in *P&O Princess Cruises International Ltd v The Demise Charterers of the Vessel "Columbus"*<sup>8</sup> where the right to claim port charges in an admiralty sale were considered by the Admiralty Registrar. Further cruise-related decisions emanating from the pandemic involved cruise passenger claims litigation, in *Karpik v Carnival plc (The Ruby Princess)*.<sup>9</sup> For the business consequences on the cruise industry, see also *Taxidiotiki-Touristiki-Nautiliaki Ltd (trading as Aspida Travel) v The Owners and/or Demise Charterers of the Vessel "Columbus" and the Owners and/or Demise Charterers of the Vessel "Vasco da Gama"*.<sup>10</sup>

Predictions are for fools, but it seems likely that litigation of fallout from the pandemic will continue long past its conclusion.

<sup>1</sup> [2021] UKSC 1; [2021] Lloyd's Rep IR 63.

<sup>2</sup> *The Luna and Another Appeal* [2021] SGCA 84; [2021] Lloyd's Rep Plus 120.

<sup>3</sup> *Alize 1954 and Another v Allianz Elementar Versicherungs AG and Others (The CMA CGM Libra)* [2021] UKSC 51; [2021] 2 Lloyd's Rep 613.

<sup>4</sup> *Herculito Maritime Ltd and Others v Gunvor International BV and Others (The Polar)* (CA) [2021] EWCA Civ 1828; [2022] Lloyd's Rep Plus 9.

<sup>5</sup> *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and Ever Smart)* (SC) [2021] UKSC 6; [2021] 1 Lloyd's Rep 299.

<sup>6</sup> [2021] UKSC 1; [2021] Lloyd's Rep IR 63.

<sup>7</sup> At para 162.

<sup>8</sup> *P&O Princess Cruises International Ltd v The Demise Charterers of the Vessel "Columbus"*; *P&O Princess Cruises International Ltd v The Owners and/or Demise Charterers of the Vessel "Vasco da Gama"*; and in the *Matter of the Claim for Port Dues by Port of Tilbury London Ltd* [2021] EWHC 113 (Admlty); [2021] 1 Lloyd's Rep 440. Noted below under "Ports" at page 26.

<sup>9</sup> [2021] FCA 1082; [2022] Lloyd's Rep Plus 11. Noted below under "Passengers" at page 25.

<sup>10</sup> [2021] EWHC 310 (Admlty); [2021] Lloyd's Rep Plus 67. Noted below under "Admiralty procedure" at page 36.

## CONTRACTS

The undoubted highlight of the year for shipping law enthusiasts came in the shape of the Supreme Court's judgment in *Alize 1954 and Another v Allianz Elementar Versicherungs AG and Others (The CMA CGM Libra)*.<sup>11</sup> The case settles issues surrounding the application of the concept of seaworthiness under the Hague and Hague-Visby Rules. The factual background was that the appellant shipowners' vessel *CMA CGM Libra* had grounded while departing from Xiamen, China, on 18 May 2011. The owners sought contribution in general average. The defendant cargo interests declined to pay on the basis that the grounding was the owners' fault and therefore for the account of owners under general average rules.

The issue was whether defects in the vessel's passage plan and the relevant working chart rendered the vessel unseaworthy on the basis that neither document recorded the warning derived from the Notice to Mariners 6274(P)/10, to the effect that depths shown on the chart outside the fairway on the approach to the port of Xiamen were unreliable and waters were in fact shallower than recorded on the chart.

At first instance,<sup>12</sup> the judge had found that these defects rendered the vessel unseaworthy, that the owners had failed to exercise due diligence in breach of the Hague Rules, article III rule 1, 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 the Hague Rules, article III rule 1. The Court of Appeal having dismissed the appeal,<sup>13</sup> the shipowner appealed to the Supreme Court on the grounds that the vessel was not unseaworthy, that due diligence had been exercised, and that any negligence in passage planning was exempted under the Hague Rules, article IV rule 2(a), as a navigational fault.

The Supreme Court agreed with the lower courts and dismissed the appeal, making a number of salient points. The issue in brief was whether there was a distinction to be made between issues with seaworthiness that

pertained to the attributes and equipment on the one hand, and issues pertaining to the navigation and management of the vessel on the other. The approach of adopting a distinction places a limit on the shipowner's duties in relation to seaworthiness, as it will then not be responsible for the (competent) crew's failures in navigation.

However, the Supreme Court declined to adopt this distinction. Article IV rule 2 exceptions did not apply to a causative breach of the carrier's obligation to exercise due diligence to make the vessel seaworthy under article III rule 1. The nautical fault exception was not intended to impact upon the shipowners' obligation of seaworthiness. It could not be relied upon where there had been a material failure to exercise due diligence to make the vessel seaworthy.

It is neither correct nor helpful to treat the concept of unseaworthiness as being subject to an "attribute threshold", whereby unseaworthiness required there to be an attribute of the vessel which threatened the safety of the vessel or her cargo. The applicable test was the "prudent shipowner" test

The Supreme Court considered that it was neither correct nor helpful to treat the concept of unseaworthiness as being subject to an "attribute threshold", whereby unseaworthiness required there to be an attribute of the vessel which threatened the safety of the vessel or her cargo. The applicable test was the "prudent shipowner" test, namely whether a prudent owner would have required the relevant defect, had it been known, to be made good before sending the ship to sea.

Where the judge had found as a fact that it was "inconceivable" that a prudent owner would allow the vessel to depart on the voyage with a passage plan which was defective in the manner found, the case was not "at the boundaries" of seaworthiness. In "boundary" cases, it might be necessary to address a prior question of whether the defect or state of affairs relied upon sufficiently affected the fitness of the vessel to carry the goods safely on the contractual voyage so as to engage the doctrine of seaworthiness.

<sup>11</sup> [2021] UKSC 51; [2021] 2 Lloyd's Rep 613.

<sup>12</sup> [2019] EWHC 481 (Admty); [2019] 1 Lloyd's Rep 595.

<sup>13</sup> [2020] EWCA Civ 293; [2020] 2 Lloyd's Rep 565.

Drawing a line between articles III and IV of the Hague Rules, the Supreme Court acknowledged that the preparation of a passage plan was a matter of navigation and the failure to note or mark the uncharted depths warning in the passage plan and on the working chart could be regarded as an “act, neglect, or default” in “the navigation ... of the ship” within the article IV rule 2(a) exception. However, it went on to hold that on the proper interpretation of the Hague Rules, the article IV rule 2 exceptions could not be relied upon in relation to a causative breach of the carrier’s obligation to exercise due diligence to make the vessel seaworthy. Where as here the negligence was the decision not to note or mark the uncharted depth warning in the passage plan and on the chart, the unseaworthiness was the consequent defective passage plan and working chart. The negligent navigational act had *caused* the unseaworthiness.

As for the second issue, due diligence, the circumstances here were to be distinguished from those where a lack of due diligence concerned something falling outside of the carrier’s orbit. The vessel had been within the carrier’s orbit at all material times. The carrier could not escape from its responsibilities under article III rule 1 of the Hague Rules by delegating them to its servants or agents. The provision of a competent crew was only one aspect of the carrier’s seaworthiness obligation and to the extent case law suggested that the carrier’s seaworthiness obligation in relation to passage planning was limited to the provision of a proper system, it was not a correct statement of the law.<sup>14</sup>

## Charterparties

There were no bareboat charterparty cases in the course of the year, but a couple of important voyage charterparty cases and a number of time charterparty cases.

### Voyage charterparties

A judgment on the nature of demurrage was handed down by the Court of Appeal towards the end of the year: *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd (The Eternal Bliss)*,<sup>15</sup> in which the court considered the question of what damages precisely demurrage liquidated. Here, the charterer had failed to discharge a cargo of perishable goods from the shipowner’s dry bulk carrier *Eternal Bliss* within the agreed laytime due to port congestion. The delay was not such as to be repudiatory, and there was no separate breach by the charterer. The loss suffered was the consequence of the shipowner having complied with charterers’ orders to load, carry and discharge the cargo. The cargo deteriorated and claims were brought against the shipowner by the cargo interests.

The shipowner, having reasonably settled those claims, sought compensation from the charterers. Out of the arbitration arose the question of law of precisely what damages demurrage liquidated: all of the consequences of the charterer’s failure to comply with laytime, or only some of those consequences? At first instance,<sup>16</sup> the judge preferred the latter position, disapproving *The Bonde*.<sup>17</sup> The charterer appealed.

The Court of Appeal allowed the appeal. In the absence of any contrary indication in a particular charterparty, demurrage liquidated the whole of the damages arising from a charterer’s breach of charter in failing to complete cargo operations within the laytime and not merely some of them. A shipowner seeking to recover damages in addition to demurrage arising from delay must prove an additional breach of a separate obligation. *The Bonde* remained good law. The Court of Appeal also observed on the topic of *Aktieselskabet Reidar v Arcos Ltd*,<sup>18</sup> on an interpretation of which the judge at first instance had relied, that “the ratio of the case on this issue is obscure. It is better to recognise that fact than to continue to search for a clarity which does not exist”.<sup>19</sup>

<sup>14</sup> Distinguishing *The Torepo* [2002] EWHC 1481 (Admlty); [2002] 2 Lloyd’s Rep 535.

<sup>15</sup> [2021] EWCA Civ 1712; [2022] 1 Lloyd’s Rep 12.

<sup>16</sup> [2020] EWHC 2373 (Comm); [2020] 2 Lloyd’s Rep 419.

<sup>17</sup> [1991] 1 Lloyd’s Rep 136.

<sup>18</sup> (1926) 25 Ll L Rep 513.

<sup>19</sup> At para 30.



The decision has drawn early criticism.<sup>20</sup> It will be seen in due course what the effect may be of any appeals and if industry standard terms are revised to accommodate the decision.

The highly specific but often crucial question of what time zone should be used for calculating demurrage was given consideration in *Euronav NV v Repsol Trading SA (The Maria)*.<sup>21</sup> The claimant shipowners here sought summary judgment or striking out of the defendant's defence to owners' claim for demurrage. The parties had on 23 October 2019 entered into a voyage charterparty on the Shellvoy 6 form for the carriage of crude oil from Brazil to a range of ports on the US west coast. Clause 15(3) of the Shellvoy 6 form provided that demurrage claims were time-barred failing notification made "within 30 days after completion of discharge". Questions arose as to the interpretation of this clause.

In the event, discharge had been completed in Long Beach, California on 24 December 2019 local time, by which time it was already 25 December according to central European time (CET). The claims notification was sent and received on 24 January 2020, which charterers asserted was out of time counting from 24 December but owners asserted was within time, counting from 25 December. Available options besides local time, which would not result in time-barring, were the time zone of the sender and receiver of the notification in question, which was CET, and also GMT, on the basis that English law applied to the contract.

The judge dismissed the owners' claim, holding that the date of completion of discharge was to be determined according to the time zone applicable at the place where discharge had occurred. Using California time, the time for claiming was to start on 24 December and the claim was therefore time-barred. The judge went on to note that while the commercial objective of timely notification of the charterer would suggest that the notice should be received by the charterer by the end of its day, the event starting the notification, namely completion of discharge, was a historical event that had occurred in a particular place in its own time zone. That date should be determined, for the purposes of the clause 15(3) period for notification of demurrage claims, using local time at the place of discharge.

<sup>20</sup> Leighton, "The Eternal Bliss: when certainty is not enough", *Lloyd's Shipping & Trade Law*, (2021) 21 LSTL 9 1; Liu, "Demurrage under the loupe", *Lloyd's Shipping & Trade Law*, (2021) 21 LSTL 9 5. See also Song, "Shipowners' recovery of cargo liability under voyage charter", *Lloyd's Shipping & Trade Law*, (2021) 21 LSTL 6 9.

<sup>21</sup> [2021] EWHC 2565 (Comm); [2021] Lloyd's Rep Plus 104.

## Time charterparties

Cases on time charterparties included not just the usual off-hire clause interpretation but a variety of other issues.

In *Regal Seas Maritime SA v Oldendorff Carriers GmbH & Co KG (The New Hydra)*,<sup>22</sup> the issue was the calculation of hire where there had been a change to the published method of hire calculation on which the charterparty relied. The dispute had arisen out of a time charter dated 22 November 2013 on an amended NYPE form whereby the charterers agreed to charter the owners' vessel *New Hydra* for a period of three years with options for the charterers to extend the charter by two further periods of one year. The hire clause read in relevant part:

"Hire payable every 15 days in advance including overtime. The gross daily hire to be calculated basis the average of the 4 Baltic Cape Size Time Charter routes published by the Baltic Exchange over the previous 15 days plus 4% for size adjustment."

Subsequently in May 2015 the Baltic Exchange had published changes to its rates, changing the benchmark vessel from 172,000 mt to 180,000 mt and in July 2015 it had stopped publishing rates for the 172,000 mt benchmark. *New Hydra* was 179,258 mt.

The owners continued with the same calculation in hire statements. The charterparty was renewed in 2017. In July 2018 the owners alleged that the hire had been calculated wrongly for the past three years. Arbitration ensued. The tribunal having dismissed the owners' claims, the owners appealed, maintaining that the base rate remained the same, namely the current rate for the benchmarked ship, and that the size adjustment was subject to an implied term for the eventuality of a change to the benchmarked ship. The charterers' case was that the parties intended the base rate to be that for the 172,000 mt ship.

Sir Nigel Teare ordered the award set aside as obviously wrong and remitted the charterers' remaining defences back to the tribunal. The owners' suggested implied term reducing the percentage size adjustment to nil was necessary to make the hire provision work in circumstances where the tonnage of the benchmark vessel was changed by the Baltic Exchange during the course of the charterparty, in which event the hire would be based upon the average of the four routes published and, if necessary, a reasonable size

<sup>22</sup> [2021] EWHC 566 (Comm); [2021] 2 Lloyd's Rep 580.



adjustment. Far from subverting the hire provision and the parties' bargain, the implied term ensured that the charterparty continued to operate as intended for the period intended by the parties.

In *AI Giorgis Oil Trading Ltd v AG Shipping & Energy Pte Ltd (The Marquessa)*,<sup>23</sup> the question was one of the consequences of termination. The claimant owners of the motor tanker *Marquessa* here sought summary judgment on the merits against the defendant time charterers in respect of unpaid hire and damages consequent upon termination. The time charterparty at issue had been concluded on 1 June 2020. The charterers had from the outset paid a deposit, bunkers on delivery and hire late and when the sixth hire instalment fell due, the owners exercised a lien on cargo on board, agreeing with the sub-charterers to complete the voyage against payment into escrow. Soon thereafter, the owners accepted the charterers' breaches as repudiatory or a renunciation and elected to treat the charterparty as having come to an end. The charterers purported to accept this as a repudiatory breach by way of wrongful termination. The defendants had been served with proceedings, but had not filed a defence and were unrepresented.

The judge granted summary judgment for the owners, addressing the time periods involved separately. First, concerning hire up to termination, the owners were entitled to the balance of outstanding hire payments, with appropriate deductions for payments to date and mitigation. Hire continuing to accrue during periods of suspended performance was not a penalty but an inherent part of the bargain which entailed hire being paid in advance.

Secondly, as concerned liability for the period *after* termination, the charterers had no real prospect of defending the claim that the owners were entitled to treat the charterparty as being at an end. It was not arguable that the owners were in repudiatory breach for suspending performance and reaching an agreement with the voyage charterers. They were entitled to suspend performance as part of the bargain and the arrangement with the voyage charterers was a lawful step in mitigation.

As for the measure of damages, the owners were entitled to damages equivalent to hire at the charterparty rate from their acceptance of repudiation to the date of discharge of the cargo, as there was no scope for a replacement charter for the laden vessel. Credit was to be given for bunkers remaining on board as of the redelivery

date, which the judge found to be the discharge date rather than the termination date.

The long-running litigation in *Space Shipping Ltd v ST Shipping and Transport Pte Ltd (The CV Stealth) (No 4)*<sup>24</sup> provided another instalment in 2021, this time concerning the charterers' right to deduction from hire. The parties had entered into a time charterparty for the vessel *CV Stealth*. Ordered to Venezuela by the defendant charterer, the vessel was detained for three years and redelivered to the head owners upon release and sent for scrap. In arbitration, the disponent owners had been awarded damages for hire, charterer's indemnity and breach of a clause providing for liability in case of capture or seizure. This was the disponent owner's challenge of the arbitrator's deduction of drydocking costs saved, some US\$1.4 million. The issue had also been provisionally considered by Popplewell J in an appeal of an earlier partial final award in *The CV Stealth (No 2)*.<sup>25</sup> The arbitrator had in an earlier partial final award decided on hire due for the period that ought to have included the drydocking, without deciding on drydocking costs. The disponent owners argued that the issue was *res judicata*; that charterers had failed to prove the saving; that any saving lacked a sufficient causal nexus with the breach; and that any saving could not be deducted from the disponent owners' claim for indemnity.

In *The CV Stealth*, it was found that the arbitrator had not erred in law in concluding that there had been a saving to the disponent owners by reason of the dry docking not having taken place

The judge dismissed the appeal. The arbitrator had not erred in law in concluding that there had been a saving to the disponent owners by reason of the dry docking not having taken place. While the liability to the head owners was a loss which could be passed on to charterers, there was no finding that the disponent owners were liable to the head owners for dry docking and no claim from the head owners which could be passed on as damages to the charterers.

<sup>23</sup> [2021] EWHC 2319 (Comm); [2022] Lloyd's Rep Plus 7.

<sup>24</sup> [2021] EWHC 2288 (Comm); [2022] Lloyd's Rep Plus 6.

<sup>25</sup> [2017] EWHC 2808 (Comm); [2018] 1 Lloyd's Rep 276.

The arbitrator had been entitled to find as a fact that upon the head owners' declaration of a constructive total loss, even if rejected by underwriters, drydocking was pointless. As a consequence, redelivery without drydocking was not an independent decision by the disponent owners but flowed causally from the time charterers' breach.

In the partial final award pertaining to the period where drydocking ought to have taken place, drydocking expenses were not dealt with, whether by accident or design. That did not make such a deduction *res judicata*. At the time, it was not certain that there would ultimately be a saving and any allowance that could have been made would have been conceptually different from the calculation of lost trading profits.

The arbitrator had not erred in law in holding that the saving could be deducted from the contractual claim for an indemnity. The indemnity clause in question concerned the "consequences" arising from irregularities in papers which included saving the cost of drydocking. Not considering the saved costs would give disponent owners more than an indemnity.

Another attempt to argue an implied term was considered in *Alpha Marine Corporation v Minmetals Logistics Zhejiang Co Ltd (The Smart)*,<sup>26</sup> the issue being rights to freight following the loss of the vessel. The claimant owners of *Smart* had on 1 August 2013 chartered the vessel to the defendant charterers on an amended New York Produce Exchange form for a time-charter trip. On 19 August 2013 the vessel ran aground while departing the port of Richards Bay in South Africa and was lost.

Correspondence and dissent arose between the owners and charterers as to which party was entitled to recover freight under a voyage charterparty entered into by the defendant and two bills of lading issued by the owners with freight payable "as per charterparty", the owners having purported to exercise a lien and the charterers having invoiced the voyage charterer. The voyage charterer put a sum into escrow, but was subsequently wound up by order of the court without having paid the full amount.

In arbitration, the owners claimed in excess of US\$100 million in respect of the loss of the vessel and asserted that the loss was due to the charterers' breach of a safe port warranty. The charterers denied that the grounding was caused by any unsafety of the port, contending instead that it was caused by negligent navigation by

those on board and pursued counterclaims in respect of lost freight. A partial arbitral award issued on 12 June 2020 held that there was a safe-port warranty, that the port had some shortcomings, but that the loss was due to the master's negligence which had broken the chain of causation, causing the grounding. The issue now for determination was the remedies to which the owners and charterers were entitled, respectively.

The tribunal had held that charterers were entitled to recover as damages the value of freight not paid by the voyage charterer. The question of law upon which permission to appeal had been given was: "Did the charterparty contain an implied obligation that the claimant would not revoke the defendant's authority to collect from the voyage charterer the freight payable under the bills of lading unless hire and/or sums were due to the claimant under the charterparty?"

The judge allowed the appeal and set aside the award in relevant parts, remitting it for consideration by the tribunal of the remaining ground for the charterers' counterclaim. While the precise basis for the obligation of the owners to account to the charterers for any excess in the amount of freight collected had not been the subject of any detailed consideration in the authorities and the bounds of the obligation had not been fully worked out, the existence of the obligation was not in doubt. Considering the factor of business necessity in light of this obligation to account, the present charterparty and other time charters in similar form did not lack commercial or practical coherence in the absence of an implied term restricting the owners' right to intervene. The charterparty did not contain an implied obligation that the owners would refrain from revoking the charterers' authority to collect the freight payable under the bills of lading unless hire or sums were due to the owners under the charterparty.

In *Navision Shipping A/S v Precious Pearls Ltd; Conti Lines Shipping NV v Navision Shipping A/S (The Mookda Naree)*,<sup>27</sup> the issue was whether the vessel was to be off hire in the context of arrest. The vessel *Mookda Naree*, laden with wheat, had been arrested at Conakry, Guinea at the instance of SMG, a Guinean company, in support of its claim against a French wheat trading company, Cerealis, under a sale contract involving shipment of wheat by *Supertramp*, an unrelated vessel. Cerealis was also the ultimate sub-charterer of *Mookda Naree*. The parties to the present litigation were her head owners Precious Pearls, their time charterer Navision and Navision's sub-time charterer Conti.

<sup>26</sup> [2021] EWHC 1157 (Comm); [2022] 1 Lloyd's Rep 1.

<sup>27</sup> [2021] EWHC 558 (Comm); [2022] 1 Lloyd's Rep 41.

Both charters were on the Asbatime form with additional clauses. Additional clause 47, present in both charterparties, put the ship off hire inter alia upon being detained or arrested by any legal process, until the time of release, “unless such ... detention or arrest [was] occasioned by any act, omission or default of the Charterers and/or sub-Charterers and/or their servants or their Agents”. It was common ground that Cerealis fell within the clause 47 proviso. Additional clause 86, appearing in the head charter only, provided inter alia:

“When trading to West African ports Charterers to accept responsibility for cargo claims from third parties in these countries (except those arising from unseaworthiness of vessel) including putting up security, if necessary, to prevent arrest/detention of the vessel or to release the vessel from arrest or detention and vessel to remain on hire.”

An arbitration tribunal had held that the arrest did not place the vessel off hire. Sub-charterers Conti and charterers Navision appealed, each against their respective disponent owners Navision and Precious Pearls. The judge characterised the questions as: (a) whether the arbitrators had misconstrued clause 47; and (b) whether SMG’s claim against Cerealis for short delivery of the *Supertramp* cargo was a “cargo claim” within clause 86.

The events of *The Pola Devora* took place during the UK’s transition period following exit from the EU, but the applicable law in relation to Gibraltar was, idiosyncratically, neither internal English or UK law nor the Brussels Regulation Recast, but the Brussels Convention 1968

The judge held first, in relation to clause 47, that the arbitrators had not erred in concluding that an “act or omission or default of ... sub-Charterers” was not confined to conduct in breach of a contractual obligation under the sub-charter in question. Cerealis’s failure to act as it reasonably ought to have acted to deal with the claim made by SMG was an omission by a sub-charterer within the meaning of the clause and had occasioned the arrest.

Secondly, the award in the head charter reference would be remitted to the tribunal. The arbitrators had

misconstrued clause 86. SMG’s claim against Cerealis was for a cargo carried to a west African port, but was carried on a different ship altogether and under a different charter. That claim was not the present charterer’s responsibility under clause 86. Instead of holding that the ship never went off hire, the tribunal should have held that when arrested she went off hire under clause 47 until such time as clause 86 took effect. They had erred in holding that Navision had a liability for damages to be assessed for breach of clause 86.

The final charterparty case to be reported here, *Eastern Pacific Chartering Inc v Pola Maritime Ltd (The Pola Devora)*,<sup>28</sup> concerned the scope of a charterparty jurisdiction clause in the narrow and specific context of arrest in Gibraltar. Out of a charterparty between the parties for the claimant’s vessel *Divinegate*, a dispute had arisen as to hire allegedly owed by the defendant. The claimant had on 2 July 2020 arrested the vessel in Gibraltar as security for its claim to be litigated in England and Wales under the charterparty’s exclusive jurisdiction clause. The vessel was released on 6 July 2020 when the defendant provided documentary support for its position that it was only the time charterer of that vessel. On 4 August 2020 the claimant brought proceedings in London for the hire claim. The defendant submitted a defence and counterclaim, notably for present purposes a counterclaim in tort in respect of wrongful arrest of *Pola Devora*. The claimant sought a declaration that the court did not have jurisdiction over the counterclaim. The jurisdiction clause provided for English law and jurisdiction for “any dispute arising out of or in connection with” the charter.

The events of the case took place during the UK’s transition period following exit from the EU, but the applicable law in relation to Gibraltar was, idiosyncratically, neither internal English or UK law nor the Brussels Regulation Recast,<sup>29</sup> but the Brussels Convention 1968,<sup>30</sup> which applied as between the Gibraltar and English jurisdictions by virtue of SI 1997 No 2602<sup>31</sup> and schedule 1 of the Civil Jurisdiction and Judgments Act 1982.

The judge dismissed the claimant’s application. It was appropriate to exercise the court’s discretion under article 22 of the 1968 Convention to refuse to decline jurisdiction or stay the tort claims, even though the court

<sup>28</sup> [2021] EWHC 1707 (Comm); [2022] Lloyd’s Rep Plus 14.

<sup>29</sup> Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>30</sup> 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

<sup>31</sup> Civil Jurisdiction and Judgments Act 1982 (Gibraltar) Order 1997.

was seized second. This was particularly so where there was a jurisdiction clause engaging article 17.

Taking a common-sense approach, the tort claim might be said to arise “in connection with” the charterparty claim not only where there were parallel claims in tort and contract; but also where the claim arose solely in tort but was in a meaningful sense causatively connected with the relationship created by the charter and the rights and obligations arising therefrom.<sup>32</sup> “In connection with” was naturally broader in scope than “arising out of”.

While steps taken in another jurisdiction to obtain security for a claim did not amount to a breach of exclusive jurisdiction clause per article 24, it did not follow that a substantive claim for damages for tortious conduct could not fall within article 17 and the court had jurisdiction on that basis.

Alternatively, the claimant’s act of seeking time for the legitimate purpose of responding to claims, and then replying in substance on other points while contesting jurisdiction on the particular tort claims did not amount to a submission to the jurisdiction of the court on those claims. The issue of whether it made a difference that the claimant was not domiciled in a state party to the Convention would be left for another day.

<sup>32</sup> *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40; [2008] 1 Lloyd’s Rep 254.

## Bills of lading

Bills of lading next, and while the case *Herculito Maritime Ltd and Others v Gunvor International BV and Others (The Polar)*<sup>33</sup> involved very nearly every kind of shipping contract under the sun, the narrow issue concerned the rights and duties of bill of lading holders. *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 shipowners claimed under the general average bond from cargo owners and under the guarantee from cargo underwriters. The cargo interests argued that the shipowners could not recover the ransom from them, because under the charterparty the shipowner must take out kidnap and ransom (K&R) insurance and war risks insurance, the premium for which was to be paid by charterers up to a capped amount, and those charterparty provisions had been incorporated into the cargo interests’ bills of lading.

The arbitral tribunal’s conclusion that the cargo owners were not liable to pay general average contributions in respect of the ransom payment was reversed by the judge at first instance,<sup>34</sup> Sir Nigel Teare holding that the shipowner’s bargain with charterers on K&R and war risks

<sup>33</sup> [2021] EWCA Civ 1828; [2022] Lloyd’s Rep Plus 9.  
<sup>34</sup> [2020] EWHC 3318; [2021] 1 Lloyd’s Rep 150.

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insurance did not entail a commitment by the shipowner *not* to seek contribution in general average from the bill of lading holders. The cargo interests appealed.

The Court of Appeal dismissed the appeal. Noting that there was no provision for the charterer or bill of lading holders to be named joint insured with the shipowner, the Court of Appeal considered that the charterer's obligation under the charterparty was to make contribution to the cost of additional war risks and K&R insurance, up to a maximum that might not cover the full cost. Distinguishing the situation from those where the contract party is a named joint assured and charged with paying the premium, the Court of Appeal considered this a weaker case than *The Evia* (No 2)<sup>35</sup> or *The Ocean Victory*<sup>36</sup> for concluding that the shipowner had agreed not to seek a general average contribution from the charterer. Here, if a co-insurance agreement existed, it was the natural interpretation of or implication from the contractual arrangements, even without the parties being named as co-insured. Having come thus far, the Court of Appeal proceeded on the basis of a mere assumption that the charterer was a co-insured.

Agreeing with the arbitrators, the Court of Appeal went on to hold that the bill of lading terms were sufficiently wide to encompass the war risks and Gulf of Aden clauses in the charterparty. It was doubtful, however, whether they were sufficiently wide to encompass what was merely *implicit* in the charterparty's express terms considered as a whole. Nevertheless, proceeding through the Gulf of Aden was contingent upon the availability of insurance and the bargain was to that extent incorporated. However, there was no case for manipulating the requirement for the charterer to pay the premium so as to impose that same obligation on the bill of lading holders. The Court of Appeal contemplated the practical issues surrounding such a duty: there was nothing at all in the bills to say how liability would be apportioned or how a jointly liable bill of lading holder might obtain reimbursement from the others. This suggested that the bill of lading holders were not intended to be liable for the premium.

Closing on familiar principles of interpretation, the Court of Appeal considered that the risk of piracy was foreseeable and foreseen and that therefore clear words would have been required for the shipowner to abandon its right to a contribution from the cargo owners in general average.

Further, there was no commercial imperative in favour of the cargo owners' case that an insurance premium had been paid to cover precisely the risk that materialised, where both sides had insurance and both insurers had agreed to cover this risk.

### The fallout and loss distribution from the OW Bunker collapse continued with final judgment in *The Luna and Another Appeal* from the Singapore Court of Appeal

The fallout and loss distribution from the OW Bunker collapse continued with final judgment in *The Luna and Another Appeal*<sup>37</sup> from the Singapore Court of Appeal. Here, the appellants were the owners and demise charterers of bunker barges used to supply bunker fuel to ocean-going vessels. They had taken delivery on board from the respondent supplier of bunkers. The respondent had sold the bunkers on credit to OW Bunker parties and they had been loaded on board the appellants' vessels and delivered by the barges to designated ocean-going vessels. Bills of lading were generated by the Vopak Terminal (the "Vopak bills") and signed and stamped by the master of the vessel. These went to the respondent until payment by OW. Following the collapse of OW, the respondent as holder of the bills demanded delivery of the bunkers from the appellants. If the respondent was a lawful holder of bills of lading in the traditional sense, the appellants had no defence against such claims.

The appellants were granted leave to defend the claims,<sup>38</sup> but were unsuccessful before the judge at first instance. Before the Court of Appeal, the appellants argued that the Vopak bills were not documents of title and contractual documents, but merely acknowledgements of receipt which did not entitle the respondent to seek redelivery.

The Singapore Court of Appeal allowed the appeal, deciding that the Vopak bills of lading were not contracts of carriage or documents of title and that the respondent's claims must therefore fail. This conclusion required a wider view: in the context of a contract formation inquiry

<sup>35</sup> *Kodros Shipping Corporation v Empresa Cubana de Fletes (The Evia)* (No 2) [1982] 2 Lloyd's Rep 307.

<sup>36</sup> *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35; [2017] 1 Lloyd's Rep 521.

<sup>37</sup> [2021] SGCA 84; [2021] Lloyd's Rep Plus 120.

<sup>38</sup> *The Star Quest and Others* [2016] SGHC 100; [2017] Lloyd's Rep Plus 50.

concerning a bill of lading, the court may have regard not only to the perspectives of the shipper and the carrier but also to those of other parties generally known to use the Vopak bills of lading. On a correct reading of the transaction between the respondent and the buyers, the bills were a non-essential document, not serving as a contract of carriage or document of title. As between the respondent and the appellants, neither party could have intended for delivery of the bunkers to be made only upon presentation of an original Vopak bill of lading. The parties' commercial arrangements indicated that they had not intended for the Vopak bills to function as typical bills of lading.

More than one set of bills of lading properly issued for the same cargo was the issue in *Perfect Best Asset Management Inc v ADL Express Ltd and Another*,<sup>39</sup> where misdelivery was alleged. The claimant had manufactured and sold seven containers of computer accessories and shipped them through the defendant logistics services provider. Combined bills of lading (CBLs) had been issued by the defendant as carrier to the plaintiff as shipper. The defendant had then arranged shipment with an actual carrier and received ocean bills of lading (OBLs) issued by that carrier. In all bills of lading, a second defendant (who had not been served with proceedings and the claim against whom was dismissed) was named as consignee. The cargoes had been delivered to the ultimate end buyer in Kotka, Finland, and the plaintiff had been paid in part.

The plaintiff claimed the invoice value of the cargoes from the defendant, with a deduction for the part payment, asserting that it remained in possession of the CBLs and that the cargo had been delivered without their presentation, placing the defendant in breach of the terms of the contract of carriage. The defendant's arguments were, among others, that as per its trading conditions it was an agent of the ocean carrier; and that the plaintiff had undertaken not to sue any agents of the actual carrier, which was the combined transport operator. The defendant further asserted that the release had been authorised by the plaintiff via telex. The defendant also relied on a nine-month time bar in the CBLs and on the Hague-Visby Rules (HVR) time bar and submitted that the plaintiff had failed to prove its loss. For some of these defences, the defendant relied on its trading conditions which the plaintiff said were irrelevant on their own terms once a bill of lading had been issued.

The judge awarded the plaintiff nominal damages. First, as the plaintiff had argued, the bill of lading terms

excluded reliance on the defendant's trading conditions. So did the trading conditions, on their own terms, once a bill of lading had been issued.

Assessing the roles of those involved in the contracts, the judge found that the defendant's relationship with the actual carrier was not one of agency. The defendant had signed the CBLs; it was named as shipper in the OBLs; the actual carrier had another HK agent; the CBLs contained no mention of the actual carrier and there was no written authority from the actual carrier. It was unclear to what agency relationship the words "AS AGENT" printed on the CBLs referred.

The court was bound by precedent to the effect that Hague-Visby Rules obligations only applied during ocean carriage and discharge operations, and not during carriage or handling after discharge from the vessel or to misdelivery thereafter

It could not be concluded that the defendant had authority through telex release instructions from the plaintiff. Evidence of an email agreeing to telex release and payment by the plaintiff of a telex release fee was insufficient to support such a conclusion.

The time-bar clause in the CBLs was capable of being read widely or narrowly and would be construed contra proferentem against the defendant. Its general words were not precise enough to cover a breach of the presentation rule and were ambiguous as to whether or not the shipper must be aware of such loss.

As for the HVR time bar, the court was bound by precedent to the effect that HVR obligations only applied during ocean carriage and discharge operations, and not during carriage or handling after discharge from the vessel or to misdelivery thereafter.<sup>40</sup>

Nevertheless, the defendant having put the plaintiff to proof of the quantum of damages, and the plaintiff having failed to fulfil that burden in circumstances where the

<sup>39</sup> [2021] HKCFI 2310; [2022] Lloyd's Rep Plus 15.

<sup>40</sup> Referring to *Cheong Yuk Fai v China International Freight Forwarders (HK) Co Ltd* [2005] 4 HKLRD 544.

cargoes had in fact been delivered to the right consignee, there would be nominal damages only.

An odd, perhaps ontological argument on the attribution of the words “clean on board” in a bill of lading arose before the Court of Appeal of England and Wales in *Noble Chartering Inc v Priminds Shipping Hong Kong Co Ltd (The Tai Prize)*.<sup>41</sup> The disponent owner Noble had, by a voyage charterparty dated 29 June 2012, agreed to let *Tai Prize* to Priminds 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 on the Congenbill 1994 form was offered for signature by or on behalf of the master on 29 July 2012. 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 incorporated the Hague Rules.

The vessel arrived at the port of discharge (Guangzhou) 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. The head owners were held liable to receivers and obtained an award against the disponent owners, who in turn pursued the charterers in arbitration. In the arbitration, the disponent owner had successfully claimed against the voyage charterer for a contribution towards the sum it had had to pay the shipowner, which in turn had been ordered to pay the receiver of the goods, leading to the present appeal on three questions of law. The disponent owner’s remaining ground upon appeal was that they were entitled to be indemnified against the consequences of the bill of lading being inaccurate as to the apparent condition of the cargo.

The arbitrator had held that the shipper as the 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 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. 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.

At first instance,<sup>42</sup> the judge answered the three questions of law in favour of the voyage charterers. The disponent owners appealed.

The Court of Appeal dismissed the appeal, essentially for the same reasons as the judge, answering the questions of law as follows.

First, the words “CLEAN ON BOARD” and “SHIPPED in apparent good order and condition” in the draft bill of lading presented to the master did *not* amount to a representation or warranty *by the shippers or charterers* as to the apparent condition of the cargo observable prior to loading. They were merely an invitation to the master to make a representation of fact in accordance with the master’s own assessment of the apparent condition of the cargo on shipment.

Secondly, on the findings of fact made by the arbitrator, the statement in the bill of lading that the cargo was shipped in apparent good order and condition was accurate.

Thirdly, obiter, had statements in the bill of lading been inaccurate, the charterers would not have been obliged to indemnify the owners against liability for the cargo claim. To impose liability on the charterers based on the tender of a draft bill of lading containing a statement that the cargo was shipped in apparent good order and condition would be contrary to the scheme of the Hague Rules.

<sup>41</sup> [2021] EWCA Civ 87; [2021] 2 Lloyd’s Rep 36.

<sup>42</sup> [2020] EWHC 127 (Comm); [2020] 2 Lloyd’s Rep 333.

## Letters of indemnity

Letters of indemnity (LOI) permitting delivery without production of the bills of lading at the discharge port continue to lead to litigation to resolve issues of principle, as one potential outcome is that an involved party absconds with the cargo without paying and the remaining parties, including several flavours of charterer, consignee and lawful bill of lading holders are left to resolve who is to carry the loss. Two cases from 2021 both involve disponent owners and their charterers, with the charterparty providing for the possibility of LOIs being issued. Letters of indemnity highlight the need for both trust and solid contract drafting in commercial transactions.

In *Navig8 Chemicals Pool Inc v Aeternum Energy International Pte Ltd (The Navig8 Ametrine)*,<sup>43</sup> the claimant disponent owner of the vessel *Navig8 Ametrine* sought an indemnity from the defendant voyage charterer under a LOI issued in respect of the discharge of a cargo of light naphtha without production of the bill of lading. The charterparty provided for the possibility of such discharge upon voyage charterers' request and against a LOI. Following discharge, a bank asserting that it was the lawful holder of the bill of lading had sought possession of the cargo and arrested the vessel. It was alleged that the defendant's buyer had been selling goods held in its tanks without the knowledge of its banks. As the defendant did not assist in providing security for the release of the vessel from arrest, the claimant paid US\$9.5 million to the bank for the owners' P&I Club to procure the release of the vessel. The issues now before the court essentially concerned the defendant's liability under the LOI. The defendant was by this stage unrepresented.

The judge held that delivery having been affected in accordance with the defendant's request, the LOI was engaged. The obligation on the master was to deliver to the party reasonably believed to be the party identified by the defendant, which was what had been done. By reason of stipulations in the LOI delivery to the bulk tanks was good delivery. Production of identification was not a condition precedent to the triggering of the defendant's obligations, which were instead triggered by the delivery of the cargo to the party identified by the defendant when made without the production of the bill of lading. The defendant had put the claimant to proof as to its obligations under the LOI; but those obligations were

self-explanatory and the defendant had acted in breach of those obligations.

At previous stages of litigation, interim orders had been issued. As those judges had found, this was an appropriate case for an order for specific performance. The defendant could not at this stage advance the impossibility defence, because it had missed procedural deadlines. Not exercising the discretion would be rewarding the defendant for its lack of compliance and participation to date.

The claimant was also entitled to damages for the loss of the use of the vessel for the period of arrest, based on the earnings under her then current employment. Finally, there would be a declaration that the claimant was entitled to indemnity in respect of liability, loss, damage or expense sustained by reason of the delivery of the cargo without production of the bills of lading; and a declaration that the defendant was obliged to supply funds to defend the arrest proceedings.

The defendant had in this case withdrawn from proceedings – presumably for strategic reasons. An adverse judgment was an almost inevitable outcome so this may or may not have been the best strategy.

Letters of indemnity highlight the need for both trust and solid contract drafting in commercial transactions

A further case was decided in 2020 but came to light in 2021, namely *Tenacity Marine Inc v NOC Swiss LLC and Another*.<sup>44</sup> Here, the claimant owners of the motor tanker *Tenacity* sought orders giving effect to a LOI issued by the respondent time charterer, NOC. In the LOI, NOC had agreed to indemnify the claimant in respect of any losses caused by the discharge of a cargo of diesel oil in accordance with NOC's instructions, in circumstances where NOC could not produce the original bills of lading. NOC in turn applied for a similar order against Gulf Petrochem FZC (GP), which was a Part 20 defendant. GP

<sup>43</sup> [2021] EWHC 3132 (Comm); [2022] Lloyd's Rep Plus 16.

<sup>44</sup> [2020] EWHC 2820 (Comm).



had chartered *Tenacity* from NOC under a voyage charter and had issued a LOI to NOC in functionally similar terms and for similar reasons.

The charterparties contained provisions providing for discharge against LOIs in the absence of bills of lading. A bank had at all times held the bills. Ahead of discharge LOIs were provided whereby charterers agreed to provide security should the vessel be arrested, detained or arrest threatened in connection with delivering in accordance with the charterers' instructions. The bank's solicitors had contacted the owners demanding delivery of the cargo or damages for conversion. Their correspondence did not go so far as to say that arrest would be effected, but reserved the claimant's rights and raised the possibility of a discussion of security to prevent arrest. Both NOC and GP asserted that the mandatory orders sought by the claimant should not be granted: (a) because the liability to indemnify had not arisen; and (b) because it was impossible for GP and NOC to comply with any orders in favour of NOC and the claimant respectively.

The judge held that the indemnity was engaged. The language used in the LOI was to be construed in its relevant commercial context. Experienced maritime solicitors would not give express notice of intention to arrest. Words to the effect that the client's rights were reserved and may be enforced without further notice must be construed as a threat to arrest the vessel.

As for the interpretation of the LOI, each LOI in the chain was to be interpreted on its own terms and an order against NOC did not necessarily imply an order against GP.

Further, a court would not order a party to do the impossible, but it was for that party to clearly establish impossibility. On the evidence, NOC had failed to establish impossibility and would be ordered to provide such security as would prevent the arrest or detention of the vessel.

Finally, in circumstances where the chief restructuring officer of GP had not fully explained GP's current finances, it had not been established that it was impossible for GP to provide security in full or at least in part, and an order would be made against GP.

It is notable that in both cases, the impossibility defence failed, albeit for different reasons and presumably under differently worded LOIs. This highlights that the provision of a LOI should not be taken lightly where it places the vessel at risk of arrest, even though speedy delivery may be commercially expedient, freeing up the vessel for other ventures.

## Sale of goods

The buyer's duty to nominate a vessel under a fob sale contract came under scrutiny in the rather prosaically named *A v B*.<sup>45</sup> To what extent was it a condition and in what circumstances had a breach accrued? Five questions of law had been addressed by the GAFTA Board of Appeal. The dispute concerned the sale of a cargo of Ukrainian feed corn fob from one safe berth or safe Ukrainian port and buyers were to nominate a vessel. The seller was the claimant and the buyer the defendant.

On 20 March 2018 the buyers had nominated the vessel *Tai Hunter* without naming the owner as required by the charterparty. The sellers, having received information that the vessel was to proceed to Ireland without further stops in Ukraine, which caused them to doubt that the nomination was genuine, requested a copy of the charterparty. On 26 March 2018 the sellers purported to terminate the contract for repudiatory breach, based on the failure to provide the charterparty and the vessel's itinerary. Two days later the buyers purported to nominate a substitute vessel. The nomination was not accepted. The parties agreed that the contract was at an end and settled subject to arbitration. In arbitration, the Board determined that while the nomination had been invalid, this was not a breach of condition entitling the sellers to terminate. The buyer had been entitled to substitute the vessel. The seller appealed.

The judge held that the award should stand. Under a charterparty, it was a condition that a party providing an ETA must do so on honest and reasonable grounds. A stipulation in a contract of sale requiring the buyer to nominate a vessel was a *condition*. However, under a sale contract where a substitution remained possible, an invalid nomination was not to be treated as breach of a condition. If made otherwise than honestly and in good faith, it was capable of evincing an intention not to perform the contract, entitling the seller to treat the contract as renounced. Here, the Board had been entitled to conclude that as there was further time to make a valid nomination, the buyer's initial nomination was not a breach of condition.

Also, it could not be inferred that the parties intended a requirement that the charterparty should actually be fixed at the time of nomination as a condition.

<sup>45</sup> [2021] EWHC 793 (Comm); [2021] Lloyd's Rep Plus 114.

Finally, a failure to provide a copy of the charterparty immediately upon the seller's request as per the sale contract term was not a breach of condition.

Off-spec cargo next, and *Galtrade Ltd v BP Oil International Ltd (The Pioneer)*,<sup>46</sup> where a cargo had been loaded in spite of the results of preliminary sampling. Both parties to the litigation were fuel oil traders. The dispute concerned a transaction whereby the defendant had agreed to sell to the claimant four parcels of 30,000 to 35,000 mt of low sulphur straight run fuel oil (SRFO), fob Taman, on amended BP general terms and conditions 2015. It was common ground that one of the parcels had not complied with the contractual specification and that the defendant was in breach of contract. The contract provided for ship's tank quality sampling. Extra-contractual shore-based sampling which did not permit rejection of the SRFO had shown the cargo to be off spec, but the claimant had proceeded to load it. It was then agreed that the vessel would proceed to Malta, where following negotiations the cargo was transferred to the defendant's ship, blended and sold on.

In these proceedings, the claimant buyer purported to reject the off-spec parcel and sought damages calculated by reference to wasted expenditure. The defendant counterclaimed, contending that the claimant was in breach by wrongfully repudiating the contract and by refusing to pay for the parcel.

The judge awarded both the claimant and the defendant nominal damages. The sale contract obligations of the defendant to comply with the guaranteed specifications in the contract were not conditions, but intermediate terms. There were as many as 14 guaranteed parameters, which were properly to be regarded as regular or standard quality specifications rather than as part of the description of the product.

The defendant's admitted breaches were not such as to entitle the claimant to reject the parcel. The SRFO remained marketable. On the evidence, the deviations from the specifications would have little practical impact for a refinery.

The pragmatic solution reached by the parties received the nod of the judge, who held obiter that if the claimant had been entitled to reject the parcel, it would not have lost that right by taking the cargo on board or by directing the vessel to Malta.

The return of the SRFO to the defendant meant that there were consecutive breaches: first the defendant's breach of the contractual specifications; and then the claimant's breach in returning the cargo in spite of not being entitled to reject it. On such an analysis, the claimant's expenditure was only wasted because of its unreasonable conduct in wrongly rejecting the cargo, and its damages would be nominal.

As for the defendant's counterclaim, the steps it had taken to sell the off-spec parcel were in mitigation of its own loss, and not as the claimant had argued, the claimant's loss. However, in claiming damages, the defendant must give credit for the loss of value in the off-spec cargo and that credit ought to reflect the notional damages otherwise due to the claimant for the defendant's breach. In the absence of better data, the fairest assessment was the discount agreed between the parties in relation to the previous parcel under the contract. That discount entirely extinguished the value of the counterclaim.

Another off-spec cargo was at the heart of *Septo Trading Inc v Tintrade Ltd (The Nounou)*,<sup>47</sup> the appeal in a dispute between the claimant buyer, Septo, and the defendant seller, Tintrade, of 36,000 to 42,000 mt of "high-sulphur fuel oil RMG 380 as per ISO 8217:2010". The contract was a Recap based on amended BP 2007 General Terms and Conditions for FOB Sales. 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 had jointly instructed SGS Latvia 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 the vessel *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 at first instance had

<sup>46</sup> [2021] EWHC 1796 (Comm); [2021] Lloyd's Rep Plus 117.

<sup>47</sup> [2021] EWCA Civ 718; [2021] 2 Lloyd's Rep 591.

held that a breach of contract was established.<sup>48</sup> The sellers appealed.

On appeal, the issue was whether a quality certificate issued by an independent inspector at the load port was intended to be conclusive evidence of the quality of a consignment of fuel oil supplied under an international sale contract. This depended on the construction of the certification term in the Recap, where the certificate was said to be binding, and its relationship to the certification term in the BP Terms, which provided that the quality certificate would be conclusive and binding for invoicing purposes, but without prejudice to the buyer's right to bring a quality claim. The latter were said to apply "where not in conflict" with the Recap terms.

The Court of Appeal allowed the appeal. On a true construction of the contract, it provided that the quality certificate issued at the load port would be binding, with the consequence that the buyer was precluded from bringing its claim. The BP Term did not apply as it was in conflict with the Recap term and they could not fairly or sensibly be read together – a relatively unusual decision by the Court of Appeal as the outcome of contract interpretation exercises is more often than not that provisions *can* be read together in some way or other.

A somewhat abstract argument for a sale of goods case was presented in *BP Oil International Ltd v Vega Petroleum Ltd and Another*.<sup>49</sup> Was the contract a "modern commercial contract" and if so how did this influence its interpretation? The claimant, BP Oil International Ltd (BPOI), asserted that it had under subsequent iterations of contracts of sale bought and paid for 211,387 barrels of crude oil fob Ras Shukheir Terminal, which it had not received. It now claimed in unjust enrichment, seeking the return of the purchase price, some US\$17,235,448. The parties disagreed on the effect of the contracts: were they contracts for the sale of the oil to BPOI, or did they give BPOI an option to lift quantities of oil, so that the payments were unconditional? It was asserted by BPOI that the defendant was in breach of its delivery obligation under the contracts. It was common ground that the contracts had been terminated, but there was disagreement on when this had happened and on the effects of termination. On BPOI's case, there was a total failure of the basis for its payments to the defendants. It also asserted an implied term to the effect that upon termination the defendants must repay the contract price for unlifted quantities of oil.

The judge held that the "modern commercial contract" theory of the contract proposed by the defendants was unpersuasive. The contract was what it appeared on its face to be, namely an fob sale contract. The defendants had failed to show first that their factual matrix created the necessary ambiguity and then that there was a way of arriving at the reading of the contract for which they contended based on the composite of the wording and the factual matrix.

The judge went on to find that the Egyptian General Petroleum Co (EGPC), whose approval was needed before any cargoes could be lifted at Ras Shukheir, was for the purposes of the contract the agent of the defendants, with the result that the failure to ship cargoes was a breach of contract by the defendants.

Further, BPOI's communications had not terminated the contract. Instead, the termination was effected by the commencement of the proceedings asserting the termination, which termination was then accepted by the defendants.

If the contract was an fob contract, and not some sui generis "modern commercial contract", the test of failure of basis was satisfied. There was no analogy with shipbuilding contract cases which concerned both sale of goods and supply of services.

*In The Nounou* the BP Term in the contract did not apply as it was in conflict with the Recap term and they could not fairly or sensibly be read together – a relatively unusual decision by the Court of Appeal

The defendants' argument that it would be wrong to allow BPOI to rely on its own breach in not lifting any oil under the contract to found a claim in unjust enrichment would be rejected. There was a good deal of authority that a contract breaker could claim in unjust enrichment, if at the time of the termination it had made payments for which the benefit had not been received.

An important decision on the interpretation of contracts on standard terms emerged in *Nord Naphtha Ltd v New*

<sup>48</sup> [2020] EWHC 1795 (Comm); [2021] 1 Lloyd's Rep 258.

<sup>49</sup> [2021] EWHC 1364 (Comm); [2021] Lloyd's Rep Plus 118.

*Stream Trading AG*,<sup>50</sup> where the Court of Appeal considered the use of “wider commercial context” in interpretation. The factual background was that New Stream had sold to Nord Naphtha 30,000 mt of 10 ppm ultra-low sulphur diesel under a contract dated 21 February 2019, for delivery within 20 specified days in April 2019, time being of the essence. Nord Naphtha had per the contract paid an advance on the next day, representing 90 per cent of the provisional value of the product, and had been issued with a comfort letter from the refinery in respect of the transaction. There was no delivery of product due to “operational and production issues” at the refinery. Nord Naphtha subsequently terminated the contract for non-delivery and sought repayment of the advance. New Stream declined to return the advance, contending that liability rested with the refinery.

At first instance, Nord Naphtha obtained summary judgment. This was New Stream’s appeal on the issue of construction of the contract. It denied that it was under any contractual obligation to repay the advance and denied unjust enrichment because it had paid the advance to the refinery as advance payment for the product.

The Court of Appeal dismissed the appeal, taking as its starting point a distinction as against *Totsa Total Oil Trading SA v New Stream Trading AG*.<sup>51</sup> The court stated that a judgment concerning a clause in materially identical terms but in a contract containing further clauses was not relevant to the interpretation of the present contract. It went on to hold that there was no merit in criticism of the judge’s consideration of the wider commercial context *before* the language of the clause. The unitary exercise described in *Wood v Capita Insurance Services Ltd*<sup>52</sup> permitted flexibility.

Applying these principles, the court held that the wider commercial context included the comfort letter. The judge had been obviously right in finding that the comfort letter offered no real comfort in the event that delivery failed in force majeure circumstances. Focus must therefore be on the contract itself.

Finally, on the contract terms, a reasonable person reading clause 14.5 and armed with the information available to the parties as they entered into the contract would have no real doubt that the clause provided Nord Naphtha with a right of repayment of the advance in the event of non-delivery for force majeure reasons. The words of the clause were clear when read objectively.

In *Readie Construction Ltd v Geo Quarries Ltd*,<sup>53</sup> issues arose under the Sale of Goods Act 1979. By an exchange of emails on 11 July 2018 Readie ordered, and Geo agreed to supply, a quantity of “GSB Type 1” aggregate at £19.50 per tonne, to be delivered to a construction site in Bedfordshire. On the same day, Readie also signed an application for credit with Geo, the effect of which was to incorporate Geo’s standard terms and conditions of sale. Clause 4.1 of the sale contract provided in material part: “The Customer shall make payment in full without any deduction or withholding whatsoever on any account by the end of the calendar month following the month in which the relevant invoice is dated”. Geo claimed the price of goods delivered in the period 10 September to 15 October 2018, for which Readie declined to pay on the basis that they were not of the type promised and that, having discovered this, they were under no obligation to pay the price. The county court judge issued summary judgment in favour of Geo.

This was Readie’s appeal on two issues: (i) whether, in the light of the contractual terms agreed between the parties, Readie had a real prospect of success in relation to two grounds of defence pleaded, namely (a) The price had not fallen due; and (b) abatement; and (ii) Whether Geo could bring this claim within the terms of section 49(2) of the Sale of Goods Act 1979 so as to be able to claim the price.

The judge held that the county court judge had been right to award summary judgment to Geo. The price had fallen due. The obligation to pay arose upon a bona fide, purported delivery. The force of clause 4.1 would be nullified if the buyer could pre-empt matters by refusing payment because of perceived non-delivery or defective delivery; and it must be read with clauses covering the situation of non-compliant goods.

The judge observed that much of case law on abatement was distinguishable on the facts. The reference to deduction in clause 4.1 was to be taken to have been intended to exclude abatement.<sup>54</sup>

Geo were unable to rely upon section 49(1) of the 1979 Act because of a retention of title clause. Geo were however able to bring themselves within section 49(2).<sup>55</sup> Clause 4.1 provided for payment in full without deduction by an identifiable date; “the end of the calendar month

<sup>50</sup> [2021] EWCA Civ 1829; [2022] Lloyd’s Rep Plus 18.

<sup>51</sup> [2020] EWHC 855 (Comm).

<sup>52</sup> [2017] UKSC 24; [2018] Lloyd’s Rep Plus 13.

<sup>53</sup> [2021] EWHC 3030 (QB); [2022] Lloyd’s Rep Plus 3.

<sup>54</sup> Referring to *Totsa Total Oil Trading SA v Bharat Petroleum Corporation* [2005] EWHC 1641 (Comm).

<sup>55</sup> *Caterpillar (NI) Ltd (formerly known as F G Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd* [2013] EWCA Civ 1232; [2014] 1 Lloyd’s Rep 180, applied.



following the month in which the relevant invoice is dated". The words "irrespective of delivery" in section 49(2) did not mean that the time for payment must necessarily be contingent upon the time of delivery.<sup>56</sup>

In *Black Sea Commodities Ltd v Lemarc Agromond Pte Ltd*,<sup>57</sup> the question was whether an arbitration agreement had been made. In the appeal under section 67 of the Arbitration Act 1996, the claimant contended that no sale contract had been entered into, but the defendant stated that there had been a binding agreement between 9 and 14 March 2018, subsequently varied or supplemented to include a GAFTA arbitration clause. The transaction at issue was the sale of a consignment of Ukrainian corn fob Odessa. The claimant was the purported seller and the defendant the purported buyer. The parties sought resolution of the question as to whether there was a binding agreement for arbitration, but not whether there was a binding sale agreement. The tribunal had found that it had jurisdiction based on a binding contract containing an arbitration agreement. Before the judge, the claimant contended that the subsequent exchanges of draft arbitration conditions had not resulted in agreement.

The judge held that the claimant's application succeeded. If there was no binding agreement on 9 March, there was no subsequent consensus ad idem to an arbitration clause. If there was a binding agreement on 9 March, the GAFTA arbitration clause was not agreed, then or subsequently. While one should not place conceptual obstacles of strict interpretation of offer and acceptance in the way of referring business disputes to arbitration, there had to be an arbitration agreement before one could consider separability.

For a trade custom to be established, it must be invariable and binding in the market. The evidence was insufficient to establish a trade custom with regard to the GAFTA arbitration clause in the market for Ukrainian corn fob Odessa.

## Ship building

Guarantees are an essential part of ship-building transactions but often lead to questions as to their interpretation. In *Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd*,<sup>58</sup> the Court of Appeal of England and Wales once more returned to the issue of whether a guarantee was in the nature of a demand or "see-to-it" guarantee. The appellant was a shipbuilder incorporated in China and the respondent buyer was a company incorporated in Hong Kong SAR. On 21 September 2011 the parties had entered into a shipbuilding contract on CMAC Standard Newbuilding Contract (Shanghai Form) terms. The third and final instalment was to be paid "upon delivery". There were provisions for guarantees to be provided by each side and the contract was subject to English law and LMAA arbitration in London. On 17 November 2011 the buyer entered into an Irrevocable Payment Guarantee in favour of the shipbuilder in the terms required. A year later, the shipbuilding contract was novated to a subsidiary special purpose vehicle, substituting the buyer. In late 2016 the builder completed the vessel, gave notice to the buyer and demanded payment of the final instalment. When no payment was made, a cancellation notice was sent and the builder made a demand under the guarantee for the final instalment.

Arbitration of disputes under the shipbuilding contract commenced in London on 3 June 2019, by which time the builder had already commenced proceedings in the Commercial Court under the guarantee, serving the claim form on 5 September 2018. At first instance,<sup>59</sup> the judge had held in favour of the guarantor, deciding that the guarantee was a "see-to-it" guarantee and that clause 4 of the guarantee did not mean that there was liability only if the arbitration under the shipbuilding contract had already been commenced at the time of the demand under the guarantee. The shipbuilder appealed.

The Court of Appeal declined to apply a negative presumption that where the issuer of the guarantee was not a financial institution, it must be a see-to-it guarantee. The approach of taking the nature of the issuing institution as the starting point in identifying the type of guarantee – see to it (surety) or demand guarantee – was misconceived. What mattered for the purposes of counterparty risk was the commercial and financial strength and probity of the guarantor. In

<sup>56</sup> The judge here gave approving consideration to *Mitsubishi Corporation RTM International Pte Ltd v Kyen Resources Pte Ltd* [2019] SGHCR 6.

<sup>57</sup> [2021] EWHC 287 (Comm); [2022] Lloyd's Rep Plus 19.

<sup>58</sup> [2021] EWCA Civ 1147; [2022] Lloyd's Rep Plus 1.

<sup>59</sup> [2020] EWHC 803 (Comm); [2021] 2 Lloyd's Rep 51.

the shipbuilding context, it did not matter whether the guarantor was a bank or parent and it had long been established that payment and refund guarantees in the shipbuilding context may be demand guarantees, irrespective of the issuer.

What mattered was not the identity of the guarantor and presumptions based thereupon, but the wording of the instrument. Reliance on decided cases on similarly worded instruments was only of assistance in limited circumstances, namely where the words used in the document taken as a whole were materially identical and if the contractual context was materially identical. The nature of any given instrument turned upon its language as a whole in its particular commercial context.

The Court of Appeal identified critical language in the guarantee pointing to its demand guarantee nature. This included the capitalised words “absolutely” and “unconditionally”; “... and not merely as surety”; “upon receipt by us of your first written demand”; and “we shall immediately pay to you” as well as language in several clauses detaching the guarantee from disputes under the shipbuilding contract.

As for the timing of arbitration, the guarantor was entitled to refuse payment pending and subject to the outcome of an arbitration under the shipbuilding contract only if the arbitration had been commenced between those parties as at the date the demand was made. Otherwise, the builder had an accrued right to immediate payment on demand under the guarantee. For the dispute proviso to the payment clause to be triggered, there must be both a dispute and the commencement of arbitration prior to a valid demand being made: it defined the circumstances in which the demand guarantee ceased to be payable on demand, to become payable against an award.

The protection of design rights is a thorny issue in any industry. *Salt Ship Design AS v Prysmian Powerlink Srl*<sup>60</sup> provides some guidance for the ship design context. How long can exclusivity be expected to last, and how can designs offered be protected? The defendant submarine cable-laying company had held a competitive tender process to appoint a designer of a new cable-laying vessel (CLV), in which the claimant ship design company won the exclusive appointment to supply the concept and basic designs. A short form agreement (SFA) was signed on 13 July 2017. The SFA listed four phases of work and contained an agreement that a design contract would be signed between the designer and the yard contracted for the build.

Most of the payment pertained to Phase 3 of the work. Phases 1 and 2 were completed and the construction tender process initiated. By agreement between the parties, the claimant undertook early design work normally pertaining to Phase 3 during the construction tender, completing that work on 31 January 2018. The claimant’s involvement with the design process effectively ended in April 2018 when the defendant entered into a shipbuilding contract with a yard for the construction of the new CLV.

In the construction tender process, the tendering yards were shown the claimant’s designs, and between 21 December 2017 and 2 January 2018 a sister company of the eventually contracted yard developed an alternative design supporting a substantial reduction in the contract price if it were to replace the claimant as designer. In litigation, the claimant contended that the defendant had acted in breach of the SFA in ceasing the use of its design services. It sought damages assessed by reference to the sums it would have earned for its

<sup>60</sup> [2021] EWHC 2633 (Comm); [2022] Lloyd’s Rep Plus 20.

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further design services, and also contended that the defendant had misused its confidential information in the construction of the new CLV by the shipbuilder, by requesting or instructing the use of the claimant's designs to develop the alternative design. The defendant disputed the claims.

The judge held that, first, the clause in the SFA appointing the claimant as exclusive designer was subject to subsequent clauses, the commercial interpretation of which was that the defendant was entitled to use a different designer if no shipbuilding contract had been concluded by 31 January 2018.

**In *Salt Ship v Prysmian Powerlink* each of the ingredients of a claim in unlawful means conspiracy was made out ... The contract terms used failed to protect the designs of the designer**

Secondly the judge held that, prior to 31 January 2018, the defendant breached the exclusivity agreement in clause 1.1 by agreeing with the shipbuilder in December 2017 that it could and should produce an alternative design. However, such breach was not an effective cause of the project failing to materialise by 31 January 2018, or in terms of damages. At the material date, none of the potential shipbuilders were commercially acceptable. The claimant was entitled to nominal damages only.

However, the only reasonable and proper conclusion was that the yard's sister company, in developing the alternative design over the Christmas period to standards acceptable by the defendant, had drawn extensively on the claimant's design, in a way not limited to extracting functional requirements. The claimant's design reflected months of back and forth between the parties, suppliers and class. The evidence showed that from February to April 2018, the defendant was drawing the attention of the yard's sister company to specific aspects of the claimant's design and that it had paid no regard to the confidentiality provisions of the SFA, regarding the

claimant's design as its own. In agreeing the alternative design, the parties to that contract had relied on the confidential documents of the claimant.

The judge considered it inherently unlikely that the alternative design would have been produced in the Christmas period without active encouragement from the defendant reassuring the bidder that it was worth doing. The relevant yard was the most expensive of the bidders but ahead on all other metrics, and it was apparent that the defendant had an obvious commercial motive to reduce the price by encouraging an alternative design. The information in the claimant's design documents was in principle protected under an obligation of confidence, whether contractual under clause 6.4 of the SFA or equitable. As a result, the defendant was in breach of its confidentiality obligations under clause 6.4.

Each of the ingredients of a claim in unlawful means conspiracy was therefore made out. However, the quantification of damages for the defendant's breach of clause 6.4 and its equitable obligations of confidence, and for the tort of unlawful means conspiracy, were for a later stage in the proceedings. While the case fell within the second category of *Rookes v Barnard and Others*,<sup>61</sup> it was too soon to determine the availability of exemplary damages.

In all, it may be observed that the contract terms used failed to protect the designs of the designer, not least because the cut-off date meant that the contract could simply be waited out before any vessel was commissioned. However, there were limits on what steps the defendant could take towards using the claimant's designs in dealing with a different designer.

<sup>61</sup> [1964] 1 Lloyd's Rep 28.

## Ship sale

Two decisions in the same case in the Federal Court of Australia by Rares J were the only reported ship sale decisions in the year, confirming, if confirmation were needed, that most ship sale disputes are dealt with through commercially confidential avenues. First, in *TWW Yachts Sarl v The Yacht "Loretta" (No 1)*,<sup>62</sup> the question was of variations to a contract for the sale and purchase of a yacht, purportedly made orally at a later meeting.

On 17 September 2020 the parties had entered into a contract for the sale and purchase of *Loretta*, a 40-m pleasure yacht registered in the Cayman Islands and moored at Queensland. Three addenda executed at the same time formed part of the contract, which was expressed in a memorandum of agreement on a MYBA<sup>63</sup> standard form. The claimant TWWYS was the buyer, the ultimate beneficial buyer not wishing to appear in the contract for the time being. A company related to TWWYS was the broker. The issue arose whether the contract had been varied at a meeting on 13 November 2020 between Mr W, a representative of TWWYS, Mr B, a director of the seller, and Dr V, the Maltese advocate who had drafted the agreement. The meeting took place following agreed sea trials which had revealed to the buyer serious problems with the yacht's sailing rig. Before the meeting, three versions of Addendum 4 to the sale contract had been circulating between W, B and V. After the meeting, a further version with an additional clause was mooted by W but not accepted by B.

TWWYS, understanding from rumours that the seller was considering backing out of the sale and moving the yacht to Hong Kong SAR, commenced proceedings on 17 December 2020 and had the yacht arrested until security was provided on 30 December. In these proceedings, the buyer sought specific performance consonant with the purported variation, or damages. The damages sought were based on the deposit under and settlement of a cargo contract for the carriage of the yacht to the Mediterranean which in the circumstances never materialised. The buyer asserted that an agreement had been entered into and that performance had been tendered; the seller, on the other hand, said that the further discussions of the Addendum constituted a counter-offer which had been rejected.

The judge held that there was a binding contract between the parties and that the buyer was entitled to an order for specific performance of the contract as varied. In the 13 November 2020 meeting, it had been agreed that version 3 of the Addendum accurately recorded the variation to the contract and the buyer's consideration for those variations which was to arrange shipment of the yacht and to make a payment towards its share of the holding costs. While the parties did intend to later obtain signatures, the buyer's performance was what bound the parties to the agreement.

The buyer having obtained an order for specific performance, the parties next sought clarification on the issue of to what amount, if any, the buyer was entitled by way of credit in respect of the payment it or the intended beneficial owner of the yacht had made to a transport company for the carriage of the yacht from Brisbane to the Mediterranean. This issue was resolved in *TWW Yachts Sarl v The Yacht "Loretta" (No 2)*.<sup>64</sup> In the event, the carriage contract had been cancelled. The seller argued that the plaintiff contractual buyer had not suffered any loss, because the carriage contract had been made by the ultimate beneficial buyer.

The judge made an order for specific performance of the contract that allowed the buyer credit for the US\$435,000 that the beneficial buyer and the contractual buyer, as yacht owner under the cargo contract, had agreed to pay. The settlement had been reasonable. Once the yacht owner, as defined, had entered into the cargo contract, it was bound to perform it by paying the freight in full. The cancellation had occurred because the seller had breached the sale contract. Under MYBA clause 41 the buyer could assign its right to the yacht under the contract before completion. It was known to the seller that there was a controlling mind behind the contractual buyer and that the yacht would be assigned. The liability of the ultimate buyer under the cargo contract was not a direct liability of the contractual buyer. However, the buyer had tendered the cargo contract as part of its performance of the variation agreement, and the seller had accepted that tender as performance.

For a further decision on enforcement, see below at page 37.

<sup>62</sup> [2021] FCA 240; [2022] Lloyd's Rep Plus 21.

<sup>63</sup> The Worldwide Yachting Association (formerly known as the Mediterranean Yacht Brokers Association).

<sup>64</sup> [2021] FCA 241; [2022] Lloyd's Rep Plus 22.



## Ship breaking

Departing briefly from the header “Contracts”, a case in tort raised interesting issues on the responsibilities for hazardous ship breaking. In *Begum (on Behalf of Mollah) v Maran (UK) Ltd*,<sup>65</sup> the claimant claimed on behalf of her late husband 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 at first instance struck out the claim for unjust enrichment but allowed the claim on a duty of care to proceed.<sup>66</sup> Maran appealed. The Court of Appeal held as follows.

First, the duty of care alleged did not sit comfortably within the principles of *Donoghue v Stevenson*,<sup>67</sup> but was not so fanciful that it should be struck out. This was particularly so as the alternative argument had better prospects of success.

Secondly, on the alternative argument, it was arguable that by sending the ship to be scrapped, the defendant had been responsible for creating a state of danger

resulting in the shipyard causing injury to the claimant; a well-established exception from the general principle under which the defendant would not be liable for harm caused by the acts of a third party. It was an unusual argument in a rapidly developing area of law and should not be struck out.

It was arguable that by sending the ship to be scrapped, the defendant had been responsible for creating a state of danger resulting in the shipyard causing injury to the claimant; a well-established exception from the general principle under which the defendant would not be liable for harm caused by the acts of a third party

The time-bar issues were complex: the one-year time bar in Bangladeshi law applied per article 4 of the Rome II Regulation,<sup>68</sup> unless articles 7 or 26 applied. Article 7 concerned environmental damage but this was rather a matter of workplace safety and the claimant’s reliance on the article was misplaced. As a result, the claim was time-barred, unless the claimant was able to establish undue hardship, in which case article 26 of the Rome II Regulation meant that the one-year time bar in Bangladeshi law could be disapplied as manifestly incompatible with English public policy.

<sup>65</sup> [2021] EWCA Civ 326; [2021] 2 Lloyd’s Rep 505.

<sup>66</sup> [2020] EWHC 1846 (QB); [2021] Lloyd’s Rep Plus 32.

<sup>67</sup> [1932] AC 562.

<sup>68</sup> Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations.

## PASSENGERS

A number of passenger decisions were handed down, some clarifying matters related to the various iterations of the Athens Convention<sup>69</sup> and others simply deciding the issue of jurisdiction.

In *Warner v Scapa Flow Charters (No 2)*,<sup>70</sup> the Outer House of the Scottish Court of Session wrapped up the litigation following the Supreme Court's decision on the time bar, where the latter court had held that the underage child of the passenger, LW, retained the right to pursue the claim because the Athens Convention time bar was "suspended or interrupted"<sup>71</sup> under domestic law.<sup>72</sup> The remaining questions concerned the defenders' liability for the death of LW on 14 August 2012 while diving from the defenders' vessel. While wearing full gear on board the diving boat, LW fell and suffered internal injuries which became apparent only afterwards. He nevertheless elected to continue with the dive, but ascended unexpectedly, was found to have stopped breathing at the surface and was pronounced dead in hospital later that day. Quantum had been agreed. The pursuer's case on liability was that LW had fallen on the deck as a result of the fault or neglect of the defenders, notably in not providing handrails or making a risk assessment, and that the injuries from the fall had led to his death; and that the lack of handrails was a defect in the ship triggering the presumption for liability under article 3(3) of the Athens Convention. This necessitated consideration of the concept of defect in the ship, of the presumption of fault or neglect and of the carrier's duties in the absence of a defect in the ship.

The judge held that the defenders were liable to make reparation to the pursuer in terms of article 3(1) of the Athens Convention. On the evidence, LW had fallen because he had tripped on his fins while attempting to walk from his seat to the dive gate. The pain from the injury sustained in the fall had caused LW's decision to make the emergency ascent, in the course of which he became unable to retain his mouthpiece and drowned.

The judge held that the presumption in article 3(3) of the carrier's fault in the presence of a defect in the ship did not apply. The evidence was insufficient to conclude that the slope in the deck contributed to the fall or constituted a defect in the ship, and where LW's fall had occurred in

the vicinity of a handrail which he was not using, there was no basis for any finding that the lack of additional handrails constituted a defect in the ship.

There being no conclusion of any defect in the ship, the pursuer must establish fault or neglect. The defenders had been under a duty to carry out a risk assessment for the benefit not only of workers but also of passengers; Regulation 7 of the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations.<sup>73</sup> Lord Sandison held that the defenders were guilty of fault and neglect in terms of article 3 of the Athens Convention, through the skipper's failure to recognise that the system of dive preparation permitted or even encouraged divers to walk on deck in fins, and that that was well recognised as an inherently risky activity to the extent that consideration should have been given to putting in place mechanisms apt to eliminate it or at least bring it under close control.

Questions as to the meaning of "contract of carriage" in the Athens Convention arose before the Supreme Court of British Columbia in *Knight v Black and Others*.<sup>74</sup> Ms Knight had sustained personal injuries when the boat on which she was travelling on a British Columbia river collided with a sandbar or other object. Mr Black had agreed to transport individuals on the river for payment, for the purposes of a reconnaissance trip to identify riverbank erosion sites requiring emergency works. Ms Knight was a habitat ecologist for the Department of Fisheries and Oceans. Mr Black had invoiced the highway maintenance service company for the trip which in turn had invoiced the Ministry of Transport. Canada was not a party to the Athens Convention, but had adopted articles 1 to 22 with modifications, through legislation stating that the articles were to have the force of law and apply in Canadian waters. In litigation, issues of limitation of liability arose.

The question arose whether Ms Knight was on the boat pursuant to a "contract of carriage" under the Athens Convention. Ms Knight asserted that the contract was not a contract of carriage because it had the characteristics of a trip-time charterparty.

The judge considered the meaning of "contract of carriage" under the Athens Convention and held that it was a contract made by or on behalf of a carrier for the carriage by water of a passenger. There had been an agreement between the maintenance service company and Mr Black to transport individuals for the reconnaissance trip and Mr Black had done so, had invoiced and been paid. Mr Black was therefore a

<sup>69</sup> 1974 Athens Convention relating to the carriage of passengers and their luggage by sea.

<sup>70</sup> [2021] CSOH 92; [2022] Lloyd's Rep Plus 24.

<sup>71</sup> Athens Convention, article 16.

<sup>72</sup> *Warner v Scapa Flow Charters* [2018] UKSC 52; [2019] 1 Lloyd's Rep 529.

<sup>73</sup> (SI 1997 No 2962).

<sup>74</sup> 2021 BCSC 19; [2021] 2 Lloyd's Rep 410.

performing carrier under the Athens Convention, which applied to the case. Ms Knight did not need to be privy to the contract of carriage to be a passenger. Liability was therefore limited to 175,000 units of account.

A significant amount of litigation has ensued as a result of the ill-fated excursion from the cruise ship *Ovation of the Seas* to Whakaari (White Island) in New Zealand when a volcano erupted on 9 December 2019, which resulted in loss of life and personal injury, not to mention loss of a planned holiday. The affected cruise passengers were from a variety of domiciles with individual preferences as to the location of litigation. There were no less than three reported decisions from the Australian courts: *Royal Caribbean Cruises Ltd and Another v Reed and Another*,<sup>75</sup> *Royal Caribbean Cruises Ltd and Another v Reed and Another (No 3)*<sup>76</sup> and *Royal Caribbean Cruises Ltd v Browitt*.<sup>77</sup>

A significant amount of litigation has ensued as a result of the ill-fated excursion from the cruise ship *Ovation of the Seas* to Whakaari in New Zealand when a volcano erupted, which resulted in loss of life and personal injury, not to mention loss of a planned holiday

First, the two decisions from the Reed litigation. In *Royal Caribbean Cruises Ltd and Another v Reed and Another*,<sup>78</sup> the question arose as to service abroad. The respondents, the Reeds, had suffered serious injuries on their shore excursion to Whakaari. At the time, they were passengers on a cruise that had departed from Sydney, called and was due to call at a number of ports in New Zealand, and was scheduled to end in Sydney. The cruise vessel *Ovation of the Seas* was bareboat-chartered and operated by RCL Cruises Ltd (RCL). RCL was incorporated in the United Kingdom and registered as a foreign company in Australia, with a registered office in New South Wales.

The Reeds had commenced proceedings in Miami in the United States on 7 December 2020 against a different entity, Royal Caribbean Cruises Ltd (RCCL), a corporation

incorporated in Liberia with its principal place of business in Florida. Those claims were based on the tort of negligence. The RCL companies then commenced the present proceedings with the aim of restraining the Reeds from proceeding in Florida. RCL and RCCL sought an anti-suit injunction based on an alleged breach of an exclusive jurisdiction clause favouring NSW in the contract of carriage between the parties, or alternatively on the basis that the Florida proceedings were vexatious and oppressive. This was their application for leave to serve the proceedings on the Reeds in the State of Maryland, their place of residence. The applicants, in order to succeed, would have to satisfy the court that: (a) the court had jurisdiction in the proceedings; (b) the proceedings were of a kind referred to in the Federal Court Rules, rule 10.42; and (c) they had a prima facie case for all or any of the relief claimed in the proceedings. Only RCCL was a defendant in the Florida proceedings, and there was uncertainty as to whether RCL or RCCL was the Reeds' contractual counterpart.

The judge gave leave to serve the originating papers on the Reeds in the State of Maryland in accordance with a method of service permitted by the law applicable there, as contemplated by rule 10.43(3)(c)(iii) of the Federal Court Rules. This was a claim in personam arising out of a contract of carriage between RCL and the respondents. Such a claim was "a claim arising out of an agreement relating to the carriage of ... persons by a ship" within the meaning of section 4(3)(f) of the Admiralty Act 1988 (Cth); a "general maritime claim".

The contract of carriage was said by the applicants to have been made on behalf of the Reeds by or through an agent carrying on business or resident in Australia and thus in relation to a contract "made on behalf of the person to be served by or through an agent who carries on business, or is resident, in Australia" within the meaning of item 3(b) of the schedule in rule 10.42. The contract was said to be governed by the law of NSW, so that the proceedings were in relation to a contract "governed by the law of the Commonwealth or of a State or Territory" within the meaning of item 3(c) of the schedule in rule 10.42.

There was a dispute as to whether the carriage contract was with RCL or RCCL. If the latter, the Florida proceedings appeared to have been brought in breach of the exclusive jurisdiction clause. Once it was justified that there be service for RCCL, it was equally justified that those papers be served for RCL because they were the same papers and set out a common basis for the same relief – it was only necessary that there should be a prima facie case for "any" rather than all of the relief claimed in the proceedings.

<sup>75</sup> [2021] FCA 51; [2022] Lloyd's Rep Plus 25.

<sup>76</sup> [2021] FCA 225; [2022] Lloyd's Rep Plus 26.

<sup>77</sup> [2021] FCA 653; [2022] Lloyd's Rep Plus 31.

<sup>78</sup> [2021] FCA 51; [2022] Lloyd's Rep Plus 25.



Service on the Reeds under Maryland law having failed, the court next ordered substituted service through the Reeds' US lawyers on 18 February 2021, which had been effected. In *Royal Caribbean Cruises Ltd and Another v Reed and Another (No 3)*,<sup>79</sup> the court considered the Reeds' interlocutory application to set aside the order of 18 February 2021. In response, the RCL companies sought orders that the Reeds had been served with the relevant documents. The Reeds had filed an unconditional appearance contesting the claim and service thereof, this apparently being necessary for the conduct of the US proceedings. The basis for their application to set aside service was essentially that service through their US lawyers was not effective under the Maryland Civil Code.

The judge held that the orders sought would be pointless, given that there was no doubt that the Reeds were well aware of the case against them as set out in the statement of claim. The Reeds had entered an unconditional appearance without contesting the jurisdiction of the court. The issue of whether service had been properly effected was to be assessed under the law of the forum. Serious efforts had been made to effect service and it was not necessary to exhaust every available option under Maryland law before substituted service became available. In these circumstances, it was not necessary to issue the order sought by the RCL companies.

A third decision in the same litigation was *Royal Caribbean Cruises Ltd v Browitt*.<sup>80</sup> RCCL and the second applicant (RCL) had commenced proceedings in Australia, asserting that there was a contract of carriage under the exclusive jurisdiction of the New South Wales courts and seeking an anti-suit injunction in respect of the Florida proceedings.

The judge dismissed the proceedings. Although the respondents were bound by the second applicant's terms, the Florida proceedings had not been brought in breach of the exclusive jurisdiction agreement because the first applicant was not a party to the agreement and did not enjoy the benefit of it. The Florida proceedings were not vexatious or oppressive.

On the evidence, the travel agent was authorised by Mrs Browitt to make the booking on her behalf subject to RCL's terms and conditions, "including conditions of carriage and limitations of liability". The contract terms included RCL's terms which became binding on the respondents. Although the booking contract was expressed to be between the passenger and "either RCCL or RCL", depending on which was to be the ship operator, there was no place to interpret this as both entities: the contractual counterparty was RCL.

The dispute resolution clause was not phrased in such a way as to be enforceable against non-parties such as RCCL; nor were the parties so closely intertwined as to indicate that the parties' objective intention was for the exclusive jurisdiction clause to apply to claims against the non-parties. The Florida proceedings had therefore not been brought in breach of the jurisdiction clause; nor were they vexatious and oppressive. RCCL's head office was located in Florida and the proceedings concerned acts and omissions by RCCL. There were no parallel proceedings against RCCL in Australia. RCL was not entitled to an anti-suit injunction.

It must be assumed that the several outbreaks of Covid-19 on board cruise ships will cause some litigation or swingeing settlements going forward. An early decision

<sup>79</sup> [2021] FCA 225; [2022] Lloyd's Rep Plus 26.

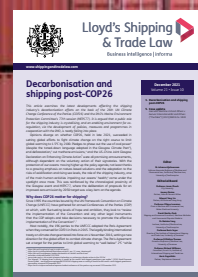
<sup>80</sup> [2021] FCA 653; [2022] Lloyd's Rep Plus 31.

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Maritime and Commercial Law 



arose in *Karpik v Carnival plc (The Ruby Princess)*,<sup>81</sup> where an outbreak of Covid-19 on board *Ruby Princess* in March 2020 had caused illness and death among passengers on board. The applicant, Mrs K, and her husband had become ill and now claimed against the first respondent time charterer and the second respondent owner and operator of the vessel.

These were representative proceedings on behalf of group members including a passenger group, an executor group (representing the estates of deceased persons) and a group of close family members of those affected. Claims were brought in tort and under the Australian Consumer Law.

Early jurisdictional issues arose. The respondents applied for a stay of claims, on the ground that some of the passengers' bookings were subject to US terms and conditions or UK terms and conditions, which contained various dispute resolution clauses. The US terms contained an exclusive jurisdiction clause and a class action waiver clause. The UK terms were made subject to non-exclusive English jurisdiction, English law and the EU and UK Athens Convention framework, that is, the 2002 Protocol and Regulation (EC) No 392/2009.<sup>82</sup> Mr H and Ms W respectively were designated as representative cases for these sub-groups of claimants. The respondents alleged notably that the claims were an abuse of process and that the court was a clearly inappropriate forum in which to hear them.

However, the judge declined to stay the claims. The stipulations in the agreement between the respondents and the travel agent who had effected Mr H's booking, to the effect that the travel agent was not the agent of the respondents, could not give rise to an inference that she was instead the agent of Mr H. In the absence of proof by the respondents that the travel agent was H's agent, the travel agent appeared to have acted as an intermediary.

As for the communications and correspondence leading to the booking, Mr H's booking was an acceptance. The later booking confirmation was not an offer, to be accepted by Mr H. At the time of the booking, Mr H was told nothing of the terms and conditions other than the principal details. On that basis, the clauses set out in the respondent's US terms and conditions – notably the exclusive jurisdiction and waiver of class action clauses – were not incorporated. In any event, the jurisdiction and waiver clauses were onerous and unusual and the

generality of the booking confirmation was insufficient as a reasonable step to bring them to Mr H's attention.

The respondent vessel owner was the contractual counterparty of the passengers who had contracted on Australian terms and regularly sold or marketed cruises in Australia, operating a set of standard Australian terms and conditions. It therefore carried on business in Australia and the terms of Mr H's contract were subject to the Australian Consumer Law and its fairness assessment. However, had it been incorporated, the exclusive California jurisdiction clause would not have been found to be unfair. The class action waiver created a significant imbalance and would have been found unfair; however there was insufficient evidence to conclude that reliance upon the clause would have been unconscionable.

If the exclusive jurisdiction clause and the class action waiver clause had been incorporated, the claimants' challenges to their enforceability would have failed, except that the class action waiver clause was void as an unfair contract term under section 23 of the Australian Consumer Law.

The claims of US sub-group members could not be stayed as a group, because their contracts depended on individual circumstances surrounding contract formation and whether the US terms had been incorporated. Finally, the court was not a clearly inappropriate forum in which to determine the claims of the US and UK sub-groups.

<sup>81</sup> [2021] FCA 1082; [2022] Lloyd's Rep Plus 11.

<sup>82</sup> Regulation (EC) No 392/2009 of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents.

## PORTS

The cruise company Cruise & Maritime Voyages (CMV) ceased operations amid the early throes of the pandemic in 2020. In *P&O Princess Cruises International Ltd v The Demise Charterers of the Vessel "Columbus"; P&O Princess Cruises International Ltd v The Owners and/or Demise Charterers of the Vessel "Vasco da Gama"; and in the Matter of the Claim for Port Dues by Port of Tilbury London Ltd*,<sup>83</sup> Admiralty Registrar Davison had to decide issues related to port charges for some of its cruise ships. Four of CMVs managed cruise ships, including *Columbus* and *Vasco da Gama*, had been berthed at the Port of Tilbury after being laid up due to the Covid-19 pandemic. Favourable rates had been agreed by the port in view of the situation and the long-standing commercial relationship between the port and CMV. Invoices were paid up until June 2020. On 19 June 2020 the vessels were detained by the Maritime and Coastguard Agency for non-payment of crew wages. On 20 July the CMV empire collapsed and some of the CMV companies went into administration. This did not include the bareboat charterers of the two vessels. On the same day, the port emailed various contacts at CMV stating that the port rate from the following day would be the published tariff; a thirty-fold increase. The vessels were subsequently arrested and sold by the Admiralty Marshal, and an order was made that the port's fees were to be payable by the marshal as an expense of sale. This was the registrar's decision on the objection of interested parties against the port's charges. Those parties argued that since the bareboat charterers were not insolvent, the contract between those parties, which incorporated the Port of Tilbury's Trading Regulations 2005, applied. There had been no variation; and notice of the change in tariffs was inadequate. Accordingly the agreed rate continued to apply. The port maintained that it was entitled to charge the higher tariffs.

The Admiralty Registrar held that the port was entitled to recover its charges at the tariff rate from 20 August 2020, being 28 days after the date of the letter of 23 July 2020, to 16 October 2020 (*Vasco da Gama*) and 22 October 2020 (*Columbus*), which were the dates of final delivery to purchasers. The contract remained on foot and the port was entitled to give notice of a variation and had done so through the letter, albeit that a reasonable notice period was required. A reasonable notice period would have been 28 days.

Liability and limitation of liability for ports materialised as an issue in a small number of interesting cases. In *Arklow Shipping Unlimited Co and Others v Drogheda Port Co DAC (The Arklow Valour)*,<sup>84</sup> the High Court of Ireland had its say on a port's occupier's liability under the Occupiers' Liability Act 1995. The plaintiff shipowner interests sought damages from the defendant port operator following the grounding of the plaintiffs' vessel *Arklow Valour* on a sandbar within the limits of the harbour managed and controlled by the defendant. The issue for decision was whether there was a legal and factual basis for any claim in respect of the grounding of the vessel against the port company. The plaintiffs alleged that the port company owed a contractual duty to provide safe navigational and pilotage services; a duty of care at common law to provide such services; a statutory duty of care pursuant to the Occupiers' Liability Act 1995; and a statutory duty pursuant to the Harbours Act 1996. The plaintiffs' case was that the harbour master's advice as to maximum sailing draught had been incorrect and also that there had been a failure by the port company to take reasonable care to ensure that the vessel did not suffer damage by reason of the danger created by the sandbar.

For the purposes of occupiers' liability, a harbour authority was an occupier of premises and an invitor, and a shipowner using a harbour operated by such authority was an invitee. The harbour authority as a result had a duty to take reasonable care that users of the harbour may navigate without danger

The judge dismissed the claim. The plaintiffs had failed to establish that the port company owed any statutory duty under the 1996 Act to users of the port which was relevant to the grounding of the vessel, such as to give rise to a cause of action under the Act.

As for occupier's liability, the port company was an occupier of premises in relation to those areas of the port owned by it and also any area of the harbour or the approaches to the harbour over which it exerted control. This included the area at the bar across the navigable channel regularly

<sup>83</sup> [2021] EWHC 113 (Admlty); [2021] 1 Lloyd's Rep 440.

<sup>84</sup> [2021] IEHC 601; [2022] Lloyd's Rep Plus 28.

dredged by the port company. The 1995 Act applied to the claim and the duties and liabilities arising under the 1995 Act had effect in place of the duties and liabilities previously existing at common law. For the purposes of occupiers' liability, a harbour authority was an occupier of premises and an invitor, and a shipowner using a harbour operated by such authority was an invitee. The harbour authority as a result had a duty to take reasonable care that users of the harbour may navigate without danger.

On the evidence, the harbour master had indicated a maximum permissible sailing draught. Section 3(2) of the 1995 Act required the court to take into account the care which a visitor to the port may reasonably be expected to take for his or her own safety. In this regard, it had not been established by the plaintiff that the vessel was exposed to danger because the advice given by the harbour master was wrong. They had failed to prove that the loss of depth at the sandbar at the time of the grounding was greater than that predicted by the harbour master. On the evidence brought, the estimate provided could not be assumed to be wrong, and there was therefore an insufficient basis to conclude that the port company should have prevented the vessel from sailing.

A further case, *Robertson and Another v Bembridge Harbour Improvements Co Ltd (The Tangent)*,<sup>85</sup> concerned the issue of liability for a marina owner. While moored at Bembridge Marina, the motor yacht *Tangent* had become submerged at the berth. The vessel owners claimed, alleging that the cause of the casualty was the inadequate maintenance of the marina and seeking damages for losses of £165,964.40 caused by the sinking. This sum consisted notably of insured value minus salvaged value, salvage agent fees and expenses and loss of use of mooring. The vessel owners' case was that in breach of the contract between the parties, the defendant marina had failed to take all reasonable steps to maintain the facilities in reasonably good working order, by failing to repair certain corrosion holes in the piles as a result of which the vessel was held down as the tide rose, eventually sinking her. The defendant marina owner denied that there had been any breach of contract and asserted a different causal mechanism for the sinking, starting from inadequate mooring. It counterclaimed £3,765 for costs incurred in dealing with the casualty, based on the claimants' alleged breach of their contractual responsibility for maintaining mooring lines and fenders.

The judge held that the defendant had not taken all reasonable steps to monitor the corrosion holes in the

piles. Repairing the holes before October 2017 would have been a reasonable step, such that it was a breach of contract to omit to take it. The risk would have been patent to any reasonable harbour owner in the position of the defendant. On the evidence, the claimants' theory as to how the sinking happened was significantly more likely than the defendant's theory. There was no evidence rendering either party's theory impossible or certain to be right. Where neither party had suggested any third mechanism could have operated the claimants' causal mechanism had been established on the balance of probabilities. The vessel had been sunk as a result of the defendant's breach of contract in failing to take all reasonable steps to maintain the marina in reasonably good working order.

As for the measure of damages, the insurers had been willing to pay £140,000 in lieu of repairs. This would be found to be the market value of the vessel before the incident. The value afterwards had been conceded to be £45,000. The loss of use of mooring was a sunk cost not caused by the defendant's breach of contract. The salvage costs had been incurred reasonably.

Upon liability follows limitation. A novel issue arose in *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*,<sup>86</sup> namely whether a marina had a right to limit liability. This depended on the judicial interpretation of the words "dock" and "landing place, stage or jetty" in section 191 of the Merchant Shipping Act 1995. The background was that on March 2018, Storm Emma had hit Holyhead from the north-east and damaged the marina in Holyhead Harbour and 89 craft therein. The claimant was the lessee of that marina. Anticipating many claims totalling some £5 million, it had issued proceedings seeking limitation of its liability to £550,000 pursuant to section 191 of the Merchant Shipping Act 1995. 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. Further, they argued that the right to limit had been lost under article 4 of the Limitation Convention.<sup>87</sup> Finally they argued 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.

<sup>85</sup> [2021] EWHC 1025 (Comm); [2022] Lloyd's Rep Plus 32.

<sup>86</sup> [2021] EWCA Civ 1585; [2022] Lloyd's Rep Plus 29.

<sup>87</sup> 1976 Convention on limitation of liability for maritime claims.

At first instance,<sup>88</sup> 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 defendants appealed, the sole question upon appeal being whether the marina was a dock within the meaning of section 191. The Court of Appeal dismissed the appeal.

The terms used in section 191(9) included terms capable of referring to structures used for and by leisure craft and should not be read to concern only commercial shipping. While the marina was not a dock within the ordinary meaning of the term, it was a “landing place, stage or jetty”. The terms were general and should not be given a narrow construction. While the purpose of limitation was to facilitate trade, that was not its only purpose and there was no reason to read section 191 as informed by the Limitation Convention 1976, so as to exclude the leisure craft context.

## MARINE INSURANCE

Insurance cases in the UK are reportedly going almost exclusively to arbitration at this time, with very limited litigation in courts. It may be overly hasty to attribute this to uncertainty in the wake of the Insurance Act 2015, given that although only one case materialised in the UK (albeit adjudicated at both first instance and in the Court of Appeal), there were equally only one case each from Australia (again with decisions in two instances), New Zealand and Singapore. The cases are a mixed bag of fairly esoteric insurance issues.

A significant piece of litigation cleared two instances of the courts of England and Wales within the year. At first instance of *ABN AMRO Bank NV v Royal & Sun Alliance Insurance plc and Others*,<sup>89</sup> a mammoth judgment of some 1,036 paragraphs, the judge considered notably the interesting question of a policy renewal which was said to be “as expiry” but where the parties were at cross-purposes as to the expiring terms. Some of the defending insurers had been unaware of an amendment agreed between the insured and the leading underwriter, and the broker had represented that the policy was “as expiry”. The judge held that the “as expiry” representation constituted an estoppel by convention preventing the insured from relying on the amended terms. This decision was appealed on behalf of the insured by the 15th defendant broker which had been sued for breach of contract or negligence in placing the policy, in the event claims against any of the underwriters failed. The broker’s appeal was successful, on the more detailed analysis of estoppel by convention and its interaction with a non-avoidance clause before the Court of Appeal.

The other appeal was by those underwriters who had been held liable under the policy, which was a marine cargo policy that unusually contained a clause of quite a different nature, covering credit risk, referred to as the TPC. The Court of Appeal heard the appeal on this clause and delivered its judgment<sup>90</sup> although the issue had settled at a late stage. Arguments included whether this was a marine policy at all, based on sections 1, 3, 5 and 26 of the Marine Insurance Act 1906. According to the underwriters, the policy defined the subject matter of the insurance with reference to property, being goods or merchandise, so that the TPC also required physical loss and was merely to be regarded as an alternative measure

<sup>88</sup> [2020] EWHC 1750 (Admlty); [2021] 2 Lloyd’s Rep 221.

<sup>89</sup> [2021] EWHC 442 (Comm); [2021] Lloyd’s Rep IR Plus 22; [2021] Lloyd’s Rep IR 467.

<sup>90</sup> [2021] EWCA Civ 1789; [2022] Lloyd’s Rep IR Plus 2.



of indemnity. However, the Court of Appeal agreed with the insured that what the parties had done was combine two forms of insurance coverage within a single policy and that the provisions of the Marine Insurance Act 1906 could not override the clear terms agreed.

From New Zealand, in *JDA Co Ltd and Others v AIG Insurance New Zealand Ltd and Others*,<sup>91</sup> a marine cargo policy was designed to cover second-hand cars being exported from Japan and passing through a particular depot. The policy had been arranged by the owner of the depot, ATL, through its insurance broker. The policy required periodic declarations and attached to individual cars before the declarations were made. In August and September 2018 several typhoons struck Japan, after the third of which the insurer, AIG, placed a moratorium on new business by contacting ATL's brokers. Next day, the brokers sent AIG a list of 21,855 declared vehicles. A final monthly declaration on 10 October included 27,717 vehicles. On 26 October AIG gave 30 days' notice of cancellation of the policy.

Following the typhoons, the plaintiffs made claims in respect of damaged cars, some of which were rejected by AIG. Questions arose as to the definition of assured in the policy, as to the terms of coverage and on the mechanics of the declarations.

First, some of the declarations concerned business where only insurance was provided by ATL, and no other services. The judge held that those claimants did not, as AIG had argued, fall outside the language of the policy. The words "... and other customers" in the description of the insured was apt to include customers of the depot company, to whom ATL supplied only insurance and no other services. Secondly, the policy provided for optional terms of Institute Cargo Clauses (A) or (B). AIG had argued that this meant that each insured must make an election. Here, the judge agreed that the implication was that the insured must make an election, but concluded that in the absence of an election, the implied intention was that ICC (B) would apply. Thirdly, any insurance must be preceded by an intention to take out insurance, and the claimants who had standing orders with ATL for insurance had not necessarily expressed such an intention because ATL, which had arranged the cover with its broker, could not bind AIG to the insurance. There needed to be either an established course of dealing in supplying the monthly declarations, or communication of the intent to take insurance prior to the attachment of the insurance. Where nominations had been made unsystematically at

different times for different cars by a claimant that also used other insurance schemes, there was no established course of dealing. Equally, individual declarations did not amount to an established course of dealing. Finally, the terms requiring declaration of vehicles in the compound within seven days of the end of a calendar month did as insurers had argued constitute a warranty and were therefore effective to discharge insurers from liability.

The litigation in *Technology Swiss Pty Ltd v AAI Ltd, trading as Vero Insurance*,<sup>92</sup> known upon appeal as *AAI Ltd, trading as Vero Insurance v Technology Swiss Pty Ltd*<sup>93</sup> arose from a marine cargo policy for the carriage of a shipment of fog cannon from Australia to Thailand. The cannon were found to be damaged upon arrival. The insurers indemnified the insured by AUS\$200,000 and, following the conclusion of a deed of settlement, a further AUS\$425,000. The insured then recouped AUS\$738,615.40 from the shipping company. The insured eventually agreed that it must repay AUS\$200,000 to the insurer, but there was a dispute concerning the AUS\$425,000 paid under the deed of settlement which – unlike the sum recovered from the carrier – covered also storage charges for the damaged cannon and costs of the dispute, so that it was possible to take the view that the insured had not been indemnified for those costs. It was asserted against the insurers that since they had paid under a deed of settlement in consideration of bringing proceedings to an end rather than under an insurance policy, there was no right of subrogation as that right only pertained to insurance. Allsop CJ and the Court of Appeal gave short shrift, though after a thorough review of case law, to this argument. The proper approach to the settlement was to ascertain whether it could be concluded that any part of it represented an indemnity under the policy as a bona fide compromise of the claim. Here, it could be concluded that there was such an element. However, deductions were to be made from the sum of AUS\$425,000 in respect of cost items not referable to the damage, such as, notably, storage costs.

Another subrogation case, this time from Singapore, *Sompo Insurance Singapore Pte Ltd v Royal & Sun Alliance Insurance plc*,<sup>94</sup> concerned the issue of whether an insurer had a subrogated claim against the issuer of a performance bond. The insurance policy was subject to English law, so that the relevant statutory provision was section 79(2) of the Marine Insurance Act 1906, in the same terms as Singapore law on the issue. The performance bond and the carriage contract under

<sup>91</sup> [2021] NZHC 2912; [2022] Lloyd's Rep Plus 30.

<sup>92</sup> [2021] FCA 95; [2021] Lloyd's Rep IR 377.

<sup>93</sup> [2021] FCAFC 168; [2022] Lloyd's Rep IR Plus 5.

<sup>94</sup> [2021] SGHC 152; [2021] Lloyd's Rep IR Plus 31.

which it had been issued were subject to Singapore law. RSA's insured was the Singapore government, which had entered into a carriage contract with a carrier which required the carrier to provide a performance bond from a bank or insurance company in respect of its obligations. This had been provided by Sompo. In the performance of the carriage, a container had fallen into the sea. RSA indemnified the government's loss and took assignment of the government's rights to claim under the performance bond under section 79(2). Sompo defended the claims on the grounds that RSA was not entitled to claim for various reasons. The Registrar agreed with RSA and Sompo appealed that decision. On appeal, the Judicial Commissioner held first, that the demand had been made correctly on behalf of the government and secondly, on the subrogation issue as follows. Hypothetically, if the government had called upon the insurance and thereafter on the performance bond, it followed from the principle of indemnity that it would have been accountable to RSA for the proceeds. RSA was not limited to the carrier for its remedies any more than its insured was. Sompo had had the opportunity of assessing the carrier as a credit risk and obtain security before issuing the performance bond, and it was right that it should carry the risk of its failure to pay.

## ADMIRALTY

### Liabilities

#### Collision

An early highlight in 2021 was a rare UK Supreme Court decision in a collision liability case in *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and Ever Smart)*,<sup>95</sup> providing guidance on the application of the Collision Regulations (COLREGs).<sup>96</sup> The case arose from a collision on 11 February 2015 just outside the dredged channel by which vessels entered and exited the port of Jebel Ali. The vessels were a laden VLCC, *Alexandra 1*, owned by Nautical Challenge Ltd, a company registered in the Marshall Islands; and a laden container vessel, *Ever Smart*, owned by Evergreen Marine (UK) Ltd, a company registered in the UK.

At the time of the collision, *Alexandra 1* was about to enter the narrow channel; *Ever Smart* was in the channel, outward bound. The collision took place at night but there were clear skies and good visibility. The damage to both vessels was considerable. At first instance<sup>97</sup> and upon appeal,<sup>98</sup> it had been held inter alia that the narrow channel rule applied rather than the crossing rules, making *Ever Smart* the give-way vessel. The owners of *Ever Smart* appealed, in essence asking two questions. First, were the crossing rules applicable where an outbound vessel was navigating within a narrow channel and a vessel was approaching the narrow channel in preparation for entering it? Secondly, if the crossing rules applied, was it necessary for the give-way vessel to be on a steady course for the rules to be engaged?

The Supreme Court allowed the appeal, referring matters of apportionment of liability back to the Admiralty Court. Distinguishing between a vessel waiting to enter a narrow channel and one actually shaping to enter the channel, the crossing rules would only be overridden by the narrow channel rules once the approaching vessel *was actually shaping to enter*, adjusting course and speed to arrive at the entrance on her starboard side of it, on her final approach, in accordance with rule 9(a).

The crossing rules were capable of applying before both vessels were on a steady course. If two vessels, both

<sup>95</sup> [2021] UKSC 6; [2021] 1 Lloyd's Rep 299.

<sup>96</sup> International Regulations for Preventing Collisions at Sea 1972, as amended.

<sup>97</sup> [2017] EWHC 453 (Admty); [2017] 1 Lloyd's Rep 666.

<sup>98</sup> [2018] EWCA Civ 2173; [2019] 1 Lloyd's Rep 130.

moving over the ground, were crossing so as to involve risk of collision, the engagement of the crossing rules was not dependent upon the give-way vessel being on a steady course. If it was reasonably apparent to those navigating the two vessels that they were approaching each other on a steady bearing other than head-on, then they were indeed both crossing so as to involve a risk of collision, even if the give-way vessel was on an erratic course. Unless the overtaking rule applied, the crossing rules would apply.

Where mutual liabilities resulting from a collision were to be set off following apportionment, making one party a net payor, could that party deduct the amount of its own claim against the other party where that claim was time-barred? This question arose before the Singapore High Court in *The Caraka Jaya Niaga III-11*.<sup>99</sup>

The plaintiffs were the registered owner and demise charterer of *Grand Ace12*, which had been in a collision with the defendant's vessel *Caraka Jaya Niaga III-11*. Their claim was issued just before the time bar expired. Although the defendant later sought to pursue its claim by a writ and by a counterclaim, those efforts were unsuccessful and it had become time-barred. Apportionment of liability was agreed between the parties, as a result of which the defendant became the net payor. The defendant now relied on the single liability principle in *The Khedive*<sup>100</sup> to assert that the fact that its counterclaim was time-barred was irrelevant.

The judge considered that a defendant shipowner who was a net payor would only be able to rely on the single liability principle to reduce its liability if its counterclaim was not otherwise time-barred. *MIOM 1 Ltd v Sea Echo ENE (No 2)*<sup>101</sup> would not be followed.

In *River Countess BV and Others v MSC Cruise Management (UK) Ltd*,<sup>102</sup> Andrew Baker J had to consider the recoverability of non-physical losses under Italian law. The litigation followed the collision between the defendant demise charterer's vessel *MSC Opera* and the claimants' vessel *River Countess* in the Giudecca Canal in Venice on 2 June 2019. *River Countess* was berthed at the time and the defendant had accepted 100 per cent responsibility for the collision. The three claimants, being the registered owner, a demise charterer and a tour operator under a cruise charter (akin to a time charter), had suffered losses in the form of lost revenue and earnings.

The question arose of the recoverability in principle under Italian law of certain contentious items of the third claimant's claims. Could a loss of earnings suffered by the third claimant by reason of the temporary unfitness of *River Countess* for service due to the collision be claimed by the third claimant from the defendant upon the basis of the defendant's fault (in the form of negligence) in causing the collision?

The judge held upon review of evidence of the applicable Italian law that the third claimant could in principle recover net loss of revenue in respect of cancelled cruises because *River Countess* was out of service due to the collision and also costs incurred in discharging liabilities to customers in respect of airline cancellation or rescheduling charges; but that claims for wider loss of revenue and claims for professional fees were irrecoverable. Ex gratia refunds were in principle recoverable if they met the criteria of Italian law and upon proof of facts, unless the refunds were paid in mitigation of wider, irrecoverable loss of income.

Two further cases addressed procedural issues specific to collision cases.

In *Happy Shipping Ltd (Owners of the M/V "Happy Lucky") v Marine Shipping Co Ltd (Owners of the M/V "Fesco Voyager")*,<sup>103</sup> the vessels of the parties had been in a collision in April 2019. P&I Club discussions followed on security and jurisdiction. On 27 April 2021 the respondent issued proceedings in Singapore and a warrant of arrest for the applicant's vessel *Happy Lucky* was issued by that court. Security by way of a LOU was provided for the release of the vessel. The applicant brought an application before the English court asserting that the Singapore proceedings had been brought in breach of an agreement between the P&I Clubs providing for English jurisdiction and seeking an anti-suit injunction. The respondent retorted that agreement on jurisdiction had not been reached, it had strong reasons to resort to the Singapore court, and in any case justice required that conditions be imposed if an anti-suit injunction was to be granted.

The judge held that the claimant had not established that agreement as to English jurisdiction had been reached. Correspondence evidenced no meeting of minds on jurisdiction, even one subject to later agreement on security. The ASG 2 form could not be incorporated by a reference to that form and the email said to evidence acceptance expressly stated that a draft agreement would be sent "for approval".

<sup>99</sup> [2021] SGHC 43; [2021] 2 Lloyd's Rep 549.

<sup>100</sup> (1882) 7 App Cas 795.

<sup>101</sup> [2011] EWHC 2715 (Admlty); [2012] 1 Lloyd's Rep 140.

<sup>102</sup> [2021] EWHC 2652 (Admlty); [2022] Lloyd's Rep Plus 33.

<sup>103</sup> [2021] EWHC 2641 (Comm); [2022] Lloyd's Rep Plus 38.

The question in *Falcon Trident Shipping Ltd v Levant Shipping Ltd*<sup>104</sup> was the effect of a pre-action settlement offer and what might be included in its scope. The factual background was that the parties' vessels had been involved in a collision in India on 21 April 2019. The defendant's vessel was arrested in India and it later admitted 100 per cent liability. The parties had agreed London jurisdiction. In May 2020 the claimant had made and the defendant accepted a settlement offer encompassing quantum, pursuant to Part 36 of the CPR.

The claimant now sought a declaration that it was entitled to pre-action legal costs up to 22 May 2020, and that the costs of the proceedings included six listed items totalling US\$86,825.31. The defendant accepted some, but not all of the costs sought by the claimant, disputing four items under the terms of the settlement agreement. The items were fees to two Indian advocates, P&I correspondent's fees and the fees to Italian lawyers instructed by H&M insurers. Against the claimant's position that these related to gathering evidence and surveys and were recoverable as costs pursuant to Part 36, the defendant retorted that they had been settled in May 2020.

The judge dismissed the claim. The settlement agreement was a binding contract that superseded the acceptance of the Part 36 offer. The parties' objective intention was to provide a fuller settlement agreement, not merely an agreement memorialising the Part 36 offer. The Part 36 offer was thus part of the factual matrix of the settlement agreement, as was the Scott Schedule sent by the claimant before its conclusion. The definition of "claim" in recital D of the settlement agreement included those items listed in the Scott Schedule within the sum referred to in the recital, including the four disputed items.

Obiter, fees to lawyers instructed to obtain security, admit liability, or agree English jurisdiction would be recoverable as legal costs. Agency fees, P&I correspondent fees and the costs of gathering contemporaneous surveys were much less obviously identifiable as costs. Such items were more frequently claimed as damages or expenses.

## Admiralty procedure

### Service

Beginning with the usual starting point of proceedings, there were several interesting decisions in 2021. In *Tecoil Shipping Ltd v The Owners of the Ship "Poseidon"*,<sup>105</sup> the decision on service materialised in 2021, having been handed down in 2020. A subsequent decision in the litigation is noted below under "Letters of undertaking" at page 35. The factual background was that the claimant's vessel *Tecoil Polaris*, while at berth in Hull, had been struck by the vessel *Poseidon*. The claimant's claim for damages, interest and costs in rem against the owners of *Poseidon* was served, but the defendant did not file any acknowledgement of service. The vessel was deemed served on 3 July 2019 and the claimants applied for judgment in default of acknowledgement of service. The question arose whether the court had jurisdiction to grant judgment in default of an acknowledgement of service in an in rem collision claim. CPR 61.9(2) provided that in a collision claim, a party who had filed a collision statement of case may obtain judgment in default of a defendant's collision statement of case "only if [...]", and unlike for non-collision claims, the subsequent options did not include "in default of acknowledgement of service". CPR 61.4 provided that "an acknowledgement of service must be filed".

The judge gave judgment in default of acknowledgement of service, holding that it was open to the court to do so by reason either of the court's inherent jurisdiction, or the operation of CPR Part 12, which provided generally for judgment in default of acknowledgement of service. The quantum of the claim had been proven to the satisfaction of the court.

In *CSBP Ltd v BBC Chartering Carriers GmbH & Co KG*,<sup>106</sup> a question arose before the Federal Court of Australia of the interpretation of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965, to which Australia is a party. The plaintiff CSBP Ltd was the consignee named in a bill of lading issued on behalf of the master of *Caspian Harmony* on 24 May 2020. It sought damages for breach of the contract of carriage. The bill of lading named the defendant BBC Chartering Carriers GmbH & Co KG (BBCC) as carrier and noted that 10,000 tonnes of ammonium nitrate in 8,000 bags of 1,250 kg each

<sup>104</sup> [2021] EWHC 2204 (Comm); [2022] Lloyd's Rep Plus 36.

<sup>105</sup> [2020] EWHC 393 (Admlty); [2021] 2 Lloyd's Rep 421.

<sup>106</sup> [2021] FCA 554.



had been loaded onboard the ship, freight prepaid. The cargo was loaded in Puerto Angamos, Chile, for delivery to Kwinana in Western Australia. The bill of lading was on the 1994 Congenbill form commonly used with the Gencon 1994 uniform general charterparty. There was no suggestion that CSBP was a party to the charterparty. At the discharge port, CSBP presented a copy of the bill of lading. On the available evidence, discharge was marred by trouble with the ship's cranes but eventually completed using the cranes of another vessel. CSBP sought permission to serve BBCC with the documents in the proceedings in Germany.

The judge gave CSBP leave to serve the documents on BBCC in Germany in accordance with the Hague Convention 1965. CSBP had a prima facie claim against BBCC under the contract constituted by the master's acceptance of CSBP's presentation of the bill of lading, as the basis on which the ship discharged the cargo at CSBP's direction.

In *The Poseidon* judgment was given in default of acknowledgement of service, holding that it was open to the court to do so by reason either of the court's inherent jurisdiction, or the operation of CPR Part 12

There was also a prima facie case that the cranes on *Caspian Harmony* were not in a condition in which they could properly discharge the goods carried, amounting to an apparent breach of article 3(2) of the amended Hague Rules. The evidence supported a prima facie inference that there was a substantial delay in completing discharge caused by the state of the cranes; and that CSBP had incurred extra costs for the extended discharge operations.

The court had jurisdiction over a breach of contract in Australia in relation to a contract governed by the law of Australia. CSBP asserted that the bill of lading contained a clause paramount incorporating the legislation of the country of destination where no enactment of any version of the Hague Rules was in force in the country of shipment, Chile.

A further case on the same convention arose in *ANL Singapore Pte Ltd v Visy Paper Pty Ltd*,<sup>107</sup> again before Rares J in the Federal Court of Australia. Here, the plaintiff carrier sought permission to serve a claim out of the jurisdiction. The claim was for demurrage in respect of containers supplied by the plaintiff loaded on board *MS Eagle* at Port Botany in Sydney and discharged in Jakarta, Indonesia, under contracts of carriage under which the plaintiff was the carrier. The plaintiff sought to serve additional defendants in their home jurisdictions of the Marshall Islands and Hong Kong SAR, in accordance with the laws of the Marshall Islands and the Hague Convention, respectively.

The judge granted leave to serve the claim out of the jurisdiction. Although there were indications that there was a plausible defence, there was a prima facie case that the containers either had not been collected at Jakarta, the port of destination, or returned to ANL since their arrival there, so that the demurrage claimed was owed.

Both of the proposed defendants were persons within the definition of "merchant" in the relevant waybill. If that waybill were presented at the port of destination, the person on whose behalf that was done would assume contractual liabilities to ANL by that act.

Disclosure has been a theme before the Singapore courts over the years and arose again in *Tecnomar & Associates Pte Ltd v SBM Offshore NV*,<sup>108</sup> this time before the Court of Appeal. The appellant at first instance<sup>109</sup> and on appeal alleged breach of a contract that it had entered into with the respondent to provide decontamination, cleaning and preparation services for the vessel *Yetagun FSO* for "Green Ship" recycling. The respondent's case was that it had not concluded any such contract with the appellant and that the contract had instead been concluded between the appellant and its subsidiary South East Shipping Co Ltd (SES), the owner of *Yetagun FSO*. The appellant was a Singapore company in the business of marine and offshore engineering consultancy. The respondent was a Netherlands company providing systems and services to the offshore oil and gas industry and the holding company of the SBM Offshore group of companies. The writ was served out of the jurisdiction but upon entering an appearance, the respondent applied to have the service order discharged on the basis that there had not been full and frank disclosure by the appellant in its application for the service order. The materials presented by the appellant in support of its application for leave

<sup>107</sup> [2021] FCA 439.

<sup>108</sup> [2021] SGCA 36.

<sup>109</sup> [2020] SGHC 249.

appeared to deliberately omit any mention of SES. The Assistant Registrar discharged the order, as did the High Court Judge upon appeal. The appellant appealed to the Court of Appeal.

The court dismissed the appeal. There had been material non-disclosure by the appellant in its application for leave to serve out. The duty of full and frank disclosure required a party to furnish information relevant to the opponent's case to permit the court to properly deliberate. This was a clear case of deliberate and systematic non-disclosure, aimed at omitting any trace of SES.

The court declined to exercise any discretion as the appellant fell some considerable way short of having established a good arguable case that it had entered into a contract with the respondent. Costs would be awarded against the appellant on an indemnity basis.

## Letters of undertaking

A particular feature of the year was several cases clarifying the law and procedure surrounding P&I Club letters of undertaking issued to avert or reverse ship arrest.

The first arose from the Suez Canal – while *Ever Given* provided the most high-profile shipping drama of 2021, there was also some Suez Canal-related drama in the courts. In *M/V Pacific Pearl Co Ltd v Osios David Shipping Inc*,<sup>110</sup> an issue of some practical importance was settled, namely what constituted a letter of undertaking in “reasonably satisfactory form”.

On 15 July 2018 a collision had taken place in the Suez Canal between the three vessels *Panamax Alexander*, *Sakizaya Kalon* and *Osios David*. Collision jurisdiction agreements (CJA) were signed on the terms of ASG 2, requiring the parties to provide security in a “reasonably satisfactory” form. In pursuit of security, the sister ship *Panamax Christina* was arrested in South Africa. The P&I Club of *Panamax Alexander* and *Panamax Christina* offered security for her release, but as the destination of *Panamax Alexander* was Iran, proffered the “sanctions clause” as part of the letter of undertaking. It was not suggested that discharging collision payments would be in breach of sanctions simply because the cargo consignee happened to be an Iranian entity on the sanctions list; instead the circumstance was described as an “Iranian nexus”.

Two issues of principle arose. First, was the LOU offered by the owners of *Panamax Alexander* “in a form reasonably satisfactory” to the owners of *Osios David*, notwithstanding that it contained a sanctions clause? Secondly, if the LOU was in a reasonably satisfactory form, were the owners of *Osios David* contractually obliged by the collision jurisdiction agreement to accept it?

The judge held that the security offered was reasonably satisfactory, but that the offeree was not obliged to accept it. The words “reasonably satisfactory” in clause C of the standard CJA terms implied an objective test.

On the evidence, when there was an Iranian nexus, a P&I Club would typically seek to introduce a sanctions clause in deference to banks' low risk tolerance and additional compliance requirements

On the evidence, when there was an Iranian nexus, a P&I Club would typically seek to introduce a sanctions clause in deference to banks' low risk tolerance and additional compliance requirements.

The provision that the Club was not obliged to pay not only when payment would be unlawful but also when a bank in the chain was unwilling to pay was consistent with the wider complexities when sanctions were present. The absence or presence of the clause did not guarantee against any trouble arising from the Iranian nexus. A LOU containing a sanctions clause recognised an inevitable commercial reality and was not unreasonable for doing so.

A sanctions clause which on its terms did not *terminate* but merely *suspended* the Club's liability did not for that reason lack the quality of being reasonably satisfactory.

Having thus provided important guidance on what constitutes reasonably satisfactory security, the judge went on to hold that clause C of the CJA nevertheless did not oblige the offeree to accept reasonable security on offer. It did not follow from the wording and it was not necessary nor obvious that a term to that effect should be implied. Surrendering the right to arrest required commensurate language.

<sup>110</sup> [2021] EWHC 2808 (Comm); [2022] Lloyd's Rep Plus 12.

In a second LOU-related case, *Tecoil Shipping Ltd v Neptune EHF and Others (The Poseidon) (No 2)*,<sup>111</sup> the question was of enforcement of the LOU, where the issuing insurers had carefully avoided taking any part in the proceedings. The decision arose from the collision in Hull between the vessels *Tecoil Polaris* and *Poseidon*, while the former was at berth and the latter manoeuvring towards berth. The claimant was the owner of *Tecoil Polaris* and the defendants the owner and insurers of *Poseidon*. The owner of *Poseidon* had never disputed liability and was now in liquidation. Judgment in default had been issued for the claimant on its in rem claim in *Tecoil Shipping Ltd v The Owners of the Ship "Poseidon"*.<sup>112</sup> The insurers had issued a LOU, but had carefully avoided taking any part in the in rem proceedings and had taken the position in negotiations that the LOU did not respond to an in rem judgment, causing the claimant to issue a claim in personam against the owner of *Poseidon* to which it added the insurers. When default judgment was issued, the defendants objected to a claim under the LOU on the ground that insurers' liability was not engaged for various reasons.

The defendants applied to set aside the default judgment. The claimant for its part applied for permission to plead the claim based on a demand on the LOU made following the default judgment; and for summary judgment against the insurer that had issued the LOU. Some of the issues had settled, but judgment was issued on the status and effect of an in rem judgment.

The judge held first, that the defendants' arguments did not provide cause to revisit the Registrars' decision that judgment in default was available in collision claims, where no collision statement of case had been filed. As no acknowledgement of service had been filed, the application was governed by CPR 61.9, sub-rule (3)(b) which referred to the general rule on default judgments in Part 12.

Secondly, the proceedings that had led to the default judgment were in rem proceedings, because they had been brought against a res. The defendants' observation that the default judgment did not decide the status of the res was neither here nor there, except insofar as they were right that the judgment was not binding on the shipowner. However, the claimants were not seeking to enforce the judgment in the in rem proceedings against the shipowner, but had brought new proceedings in personam.

On the evaluation of evidence, as against the shipowner, the judgment in rem was conclusive evidence of the matters therein decided. It did not follow from *The Conoco Britannia*<sup>113</sup> and *The Nordglimt*<sup>114</sup> that the shipowner was entitled to relitigate the issues.

The judgment should not be set aside as a matter of discretion. The defendants had had the right and opportunity to participate but had taken care not to.

The judgment will cause parties to recalibrate the delicate calculation as to whether to participate in litigation or avoid doing so.

A third judgment involving LOUs concerned the effectiveness of arbitration clauses in a LOU, and can conveniently be summarised here. The judgment in *Lavender Shipmanagement Inc v Ibrahima Sory Affretement Trading SA and Others (The Majesty)*<sup>115</sup> was issued at the end of 2020 but came to light only in 2021. In a cargo claim, an arbitrator had been appointed referencing the arbitration clause in a LOU as well as the bills of lading. The defendants appointed their arbitrator under protest of jurisdiction, asserting that the relevant Club LOU contained no arbitration agreement. The tribunal had held that the terms of the LOU had the effect of consolidating the separate bill of lading arbitrations into a single ad hoc arbitration and that time extensions agreed between the parties had operated to grant the cargo claimants an extension in respect of the commencement of arbitration proceedings under the arbitration agreement in the LOU. The shipowners, who were the defendants in the arbitration, disagreed with these findings and sought the review of the court under sections 67 and 69 of the Arbitration Act 1996.

The judge noted that the surveyors who had inspected the damaged cargo of rice and provided a report had made their assessment in respect of the entire cargo of bagged rice, without attributing rice or damage to the five bills of lading involved in the claim. That factual background led to the conclusion that a business-like interpretation of the LOU must be that it was intended as an agreement to consolidate all of the claims. As for what terms to apply, the relevant charterparty arbitration clause contained a reference to the Small Claims Procedure – that sentence was simply inapplicable in the circumstances of a claim exceeding that procedure, so that the tribunal had been properly constituted.

<sup>111</sup> [2021] EWHC 1582 (Admlty); [2021] 2 Lloyd's Rep 429.

<sup>112</sup> [2020] EWHC 393 (Admlty); [2021] 2 Lloyd's Rep 421.

<sup>113</sup> [1972] 1 Lloyd's Rep 342.

<sup>114</sup> [1987] 2 Lloyd's Rep 470.

<sup>115</sup> [2020] EWHC 3462 (Comm); [2021] 2 Lloyd's Rep 23.

For a further judgment involving letters of undertaking, see also *Enemalta plc v The Standard Club Asia Ltd (The Di Matteo)*<sup>116</sup> below at page 39. See also for the agreement between P&I Clubs *Happy Shipping Ltd (Owners of the M/V “Happy Lucky”) v Marine Shipping Co Ltd (Owners of the M/V “Fesco Voyager”)*,<sup>117</sup> noted above at page 31.

A question as to who was an eligible claimant arose in *Taxidiotiki-Touristiki-Nautiliaki Ltd (trading as Aspida Travel) v The Owners and/or Demise Charterers of the Vessel “Columbus” and the Owners and/or Demise Charterers of the Vessel “Vasco da Gama”*,<sup>118</sup> a cruise industry case in the wake of Covid-19. The claimant Aspida Travel (AT) had claimed against the proceeds of sale of the vessels *Columbus* and *Vasco da Gama* in respect of travel agency services for the transport of crew to and from the vessels, seeking judgment in default. Other persons claiming against the vessels, as well as the former vessel owners Carnival, objected to AT’s claims on the basis that they did not meet the requirements of section 21(4) of the Senior Courts Act 1981 in that the persons liable to AT were the demise charterers of the two vessels at the time the services were provided, and that those entities were no longer the demise charterers by the time the claims were brought in November 2020; the charterparties having been terminated in October 2020.

The judge declined to give judgment in default on the claims. Carnival had held off from terminating the charterparties for five weeks. Its assurances that the charterparties would remain on foot during the period of arrest could not be taken to be open-ended and it could not be said that it had held inconsistent positions.

Carnival’s termination with immediate effect had been valid under common law. Because of the terminations, AT immediately before the sale of the vessels did not have a valid in rem claim such as would transfer and attach to the proceeds. The further point that AT had valid claims against Carnival required evidence and was adjourned.

An issue also as to who was the right claimant, albeit entirely different in nature, arose in *Tregidga v Pasma Holdings Pty Ltd*<sup>119</sup> before the Federal Court of Australia. The claimants were natural persons whose motor yacht *Miss Angel* had on 8 June 2016 sustained extensive fire damage from a fire starting in the engine room. On the day of the fire, T, an electrician employed by the defendant, had been undertaking work on board.

The claimants sought damages alleging that the fire was caused by the defendant’s breach of contract, breach of statutory guarantee or T’s negligence. Questions arose first, as to the ownership of the vessel. The claimants had intended to import *Miss Angel* to Australia through a company, A, set up by them for the purpose of operating a business with the vessel. For the sake of speed, the vessel was instead imported and registered as a private leisure vessel in the names of the claimants.

Secondly, questions also arose as to the contractual relationship between the parties. Before she could be employed in the business, works were needed to achieve the Australian commercial survey standard, including electrical works. The parties had made an oral agreement for the work and it was performed on 8 June 2016 and invoiced by the defendant a few days later to A. The invoice was paid by the second claimant from her personal bank account.

<sup>116</sup> [2021] EWHC 1215 (Comm); [2022] Lloyd’s Rep Plus 40.

<sup>117</sup> [2021] EWHC 2641 (Comm); [2022] Lloyd’s Rep Plus 38.

<sup>118</sup> [2021] EWHC 310 (Admlty); [2021] Lloyd’s Rep Plus 67.

<sup>119</sup> [2021] FCA 721; [2022] Lloyd’s Rep Plus 13.

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Maritime and Commercial Law 



The judge dismissed the application. It had not been established on the balance of probabilities that Pasma was liable for the damage caused by the fire.

On the ownership issue, the claimants' statement to their insurer that ownership was to revert to A upon arrival of *Miss Angel* in Australia was a statement as to future intentions, not a contractually binding promise or a declaration of trust. The claimants, who remained the registered and insured owners were also the legal and equitable owners.

On the contractual issues, an objective assessment of all the relevant surrounding circumstances provided that the contract for the works had been made between the defendant and A, not the claimants. The first claimant had been acting on behalf of A in making the contract. The claimants as owners of *Miss Angel* were beneficiaries of services to the vessel and therefore as consumers entitled to benefit from the statutory guarantee in section 60 of the Australian Consumer Law.

However, addressing the duty of care of Pasma, the judge held that the scope of its duty of care in tort did not extend to a requirement that it take action to prevent *Miss Angel* sustaining injury or harm from the manifestation of a fire hazard risk arising from a defect in her electrical system. On the evidence, the claimants had failed to establish that T had breached his duty of care when carrying out the works on *Miss Angel*, and on the assumption that he had been negligent, that such negligence had been a cause of the fire. No breach of the guarantee of due skill and care under section 60 of the Australian Consumer Law had been established.

Costs in the case were dealt with by the decision *Tregidga v Pasma Holdings Pty Ltd (No 2)*.<sup>120</sup>

From the right claimant to the right defendant with a question of joinder of a third party involved with the ship in question. In *TWW Yachts Sarl v The Yacht "Loretta" (No 3)*,<sup>121</sup> the Federal Court of Australia considered the enforcement of a judgment against the beneficial owner of a yacht.<sup>122</sup> Specific performance had been ordered for the buyer of the yacht *Loretta*. The seller appeared unwilling to comply with the orders. This was the buyer's application to join F, a person based in Hong Kong SAR who was the beneficial owner of the yacht and in control of the seller, as a party to the proceedings and to serve F in Hong Kong under the Hague Convention 1965 and by email to various addresses.

Rares J ordered that F be joined as second defendant to the proceedings and gave further orders pertaining to the modalities of service of F. F's cooperation was required to enforce the judgment and service was therefore permissible under rule 9.05(1)(b)(i) of the Federal Court Rules 2011 which permitted such joinder even in the absence of a course of action against a person. F controlled the seller and was a person whose cooperation was required. Although the proceedings were commenced in rem, the seller had appeared in personam. Service was to take place under the Hague Convention and also by email, subject to what Hong Kong law permitted in that regard.

The relationship between insolvency and admiralty law is an old chestnut, a novel guise of which was addressed by the High Court of Singapore in *The "Ocean Winner" and Other Matters*.<sup>123</sup> *Ocean Winner* and three other vessels were under demise charters to Ocean Tankers (Pte) Ltd (OTPL) on 22 April 2020 when the plaintiff, PetroChina International (Singapore) Pte Ltd (PCI), filed admiralty in rem writs against them in respect of bill of lading claims. OTPL applied to set aside or strike out the writs on the basis that there was a subsisting automatic moratorium under section 211B of the Companies Act (subsequently re-enacted as section 64 of the Insolvency, Restructuring and Dissolution Act) in OTPL's favour at the time. OTPL had applied for moratorium relief on 17 April 2020, thereby triggering an automatic moratorium for 30 days.

Section 211B required the permission of the court to file writs against a company under a moratorium, which PCI had not obtained, taking the position that leave of court was not required because the mere filing of the admiralty in rem writs was not prohibited by section 211B(8) of the Companies Act. The questions for determination were whether the filing of the writs were: (i) the commencement of proceedings against OTPL; or (ii) an execution, distress or other legal process against property of OTPL, in which case they fell under section 211B(8)(c) and (d) respectively and leave was required.

The judge held that the filing of the writs did not come within the meaning of the statutory provisions and that no leave of the court was required to file them. On issue (i), while a liquidation moratorium was designed to prevent proceedings resulting in creditors stealing a march from other unsecured creditors, the purpose of the moratorium under section 211B(8)(c) was to give the company time to devise a restructuring plan without the distraction of proceedings. The mere filing of writs, without serving them, created the statutory lien but did

<sup>120</sup> [2021] FCA 1439.

<sup>121</sup> [2021] FCA 498; [2022] Lloyd's Rep Plus 23.

<sup>122</sup> See further under "Ship sale" above at page 20.

<sup>123</sup> [2021] SGHC 8.

not invoke the jurisdiction of the admiralty court and were not contrary to this purpose. OTPL's submission that the proceedings in rem were not in reality against the company also failed. On issue (ii), the steps in question were not an "execution, distress or other legal process" against property under section 211B(8)(d). Although the bareboat charters were capable of being property for the purpose of the provision, "other legal process" must be interpreted narrowly to mean enforcement proceedings, excluding these writs which only created the statutory lien over the vessels.

### Limitation of liability

Limitation of liability saw a surprisingly vivacious year of cases with new, sometimes peculiar issues decided.<sup>124</sup>

The Court of Appeal had its say on limitation in *Splitt Chartering APS and Others v Saga Shipholding Norway AS and Others (The Stema Barge II)*.<sup>125</sup> The Limitation Convention in its 1976 and 1996 versions provides that a shipowner is entitled to limit liability for claims, article 1(2) defining shipowner as "the owner, charterer, manager and operator of a seagoing ship". While the meaning of "shipowner" has some innate clarity and that of "charterer" has been considered in cases such as *CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)*,<sup>126</sup> the meaning of "manager" or "operator" has not received much of an outing in courts. At first instance, Teare J had held that Stema UK was entitled to limit its liability as "operator" of the barge.<sup>127</sup> RTE appealed.

The action concerned damage caused to an underwater cable carrying electricity from France to England by the barge *Stema Barge II* when it dragged its anchor during a storm. The cable was owned by the appellant, RTE. While it was accepted that the shipowner and charterer were entitled to limit liability, RTE disputed the fourth claimant's Stema UK's application for a declaration of non-liability. Stema UK was the receiver of cargo on board the barge and had no formal role in its management or operation, but its personnel did operate the machinery of the barge while off Dover and were involved in monitoring the weather and in the decision to leave the barge at anchor during the storm. The present issue was whether Stema UK qualified as an "operator" and was therefore

within the class of persons entitled to limit their alleged liability pursuant to the Limitation Convention 1976 and the Merchant Shipping Act 1995, section 185.

The Court of Appeal allowed the appeal, stating by way of guidance that the meaning of "operator" must be considered at a higher level of abstraction than mere physical operation. It must involve an element of management or control, and must entail more than the mere operation of the machinery of the vessel or providing personnel to operate that machinery. This applied equally to unmanned vessels such as the barge. The Limitation Convention was not intended to extend to third parties providing services to the vessel.

There is a possibility that the Court of Appeal in deciding *The Stema Barge II* bore in mind also the implications for autonomous vessels. A future issue will be what entities qualify as operators of such vessels

Stema A/S, which had undoubtedly been the operator up until a certain point, remained the operator throughout. Stema UK's actions were for, on behalf of and supervised by Splitt and Stema A/S. To the extent that any of its actions amounted to operating the barge, they were plainly by way of assistance to Stema A/S in its role as operator, not by way of becoming a second or alternative operator or manager.

The Court of Appeal did recognise that the expression "the operator" in the Convention did not imply that there could be no more than one operator; however it cautioned against readily finding that there had been more than one operator.

There is a possibility that the Court of Appeal in deciding this case, involving a barge, bore in mind also the implications for autonomous vessels. A future issue will be what entities qualify as operators of such vessels: shore-based controllers? Non-sailing crew on board operating machinery? This judgment should be capable of providing some guidance. While there may be more than one operator, relevant operation must involve some element of management or control.

<sup>124</sup> A further case on the rights of a harbour to limit liability is noted above under "Ports" at page 26. See also under "Passengers" at page 22.

<sup>125</sup> [2021] EWCA Civ 1880, [2022] Lloyd's Rep Plus 10.

<sup>126</sup> [2004] EWCA Civ 114; [2004] 1 Lloyd's Rep 460; approved by the Supreme Court in *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35; [2017] 1 Lloyd's Rep 521 at paras 58 to 87.

<sup>127</sup> [2020] EWHC 1294 (Admlty); [2021] 2 Lloyd's Rep 307.

Meanwhile, the issue of limitation of liability for wreck, pending in UK as the special fund for clearing wreck has not been set up by the Secretary of State so that there is no right to limit, was decided for the purposes of the Hong Kong SAR. In *Perusahaan Perseroan (Persero) PT Pertamina v Trevaskis Ltd and Others (The Star Centurion)*,<sup>128</sup> it was judicially determined that there is similarly no right to limit liability for wreck removal claims. The litigation arose from a collision between *Star Centurion* and *Antea*, on or about 13 January 2019 in the South China Sea, which had sunk *Star Centurion* which was at anchor at the time of the collision. The defendants were ordered by the Indonesian Ministry of Transportation to raise, remove and render harmless the wreck. The plaintiff owners of *Antea* commenced an action before the Hong Kong court to limit their liability, having accepted by way of settlement 100 per cent of the liability for the collision. Limitation decree was granted and a limitation fund constituted. The wreck removal claims were expected to be greater than the limitation fund. The defendants applied for a declaration that their claims against the plaintiff owners of *Antea* were not subject to limitation under article 2 of the Limitation Convention. Hong Kong had made a reservation under the Convention for the application to wreck.

The judge gave the declaration sought. The Merchant Shipping (Limitation of Shipowners Liability) Ordinance, Cap 434 provided that article 2(1)(d) of the Limitation Convention was not to apply unless an order had been made by the chief executive for the setting up and management of a fund to be used for the making of payments to harbour or conservancy authorities to compensate them for the reduction, in consequence of para 1(d) of article 2 of the Convention, of amounts recoverable by them in claims of the kind there mentioned. No such order had been made by the chief executive.

The judgment confirms the effect of the HKSAR reservation against article 2(1)(d), limitation against wreck removal claims, for the purpose of the SAR jurisdiction.

A jurisdiction-related limitation issue arose in the English court leg of international litigation, in *Enemalta plc v The Standard Club Asia Ltd (The Di Matteo)*.<sup>129</sup> According to the claimant's background facts, the vessel *Di Matteo* had damaged the claimant's high voltage connector cable in international waters, causing a nationwide blackout in Malta. The defendant, a Singapore company, was the vessel's P&I insurer and had provided security

to the claimant under a letter of undertaking subject to English law and exclusive jurisdiction. Proceedings were under way against the shipowners in Malta and would be subject to the 1996 Protocol of the Limitation Convention. Owners for their part had commenced proceedings in Singapore seeking to establish a limitation fund under the 1976 Limitation Convention, seeking also an order for the release of any existing security. The LOU, which by its terms was subject to the jurisdiction of the English court, was the only known such security.

The claimant sought declarations from the English court concerning the status of the LOU. The matter now for decision was the defendant's challenge to the court's jurisdiction whereby it sought setting aside or stay in favour of the courts of Singapore, on the basis that the Singapore court had sole and exclusive jurisdiction to make an order under article 13(2) of the Limitation Convention, which read in relevant part (with emphasis added):

"After a limitation fund has been constituted in accordance with Article 11, any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, may be released by order of the Court or other competent authority of such State."

The judge did not decline jurisdiction, holding that as a matter of English law it was better than seriously arguable that the LOU was not a security within the jurisdiction of the Singapore court. It was not a vessel or other property attached within the jurisdiction of any state party to the 1976 Convention, nor was the security given to obtain the release of a vessel or other property attached within the jurisdiction of any state party to the 1976 Convention. To the extent physical location was relevant, the LOU was located in Malta, which was not a state party to the 1976 Convention.

The exclusive jurisdiction agreement governed all disputes between the parties concerning the LOU. The question whether any order of the Singapore court had the effect of releasing the defendant from its LOU would be a dispute to be determined in England according to English law. There was no principled reason why the court would not have jurisdiction to determine by declaration the present dispute as to the effect on the LOU of an order by the Singapore court under article 13(2).

<sup>128</sup> [2021] HKCFI 396; [2021] 2 Lloyd's Rep 637.

<sup>129</sup> [2021] EWHC 1215 (Comm); [2022] Lloyd's Rep Plus 40.

The judgment aligns with the policy of English courts of adherence to the parties' own exclusive choice of jurisdiction.

The constituency of entities entitled to limit was considered in *Owners and Underwriters of MV "MSC Susanna" and Another v Transnet (Soc) Ltd and Another (The MSC Susanna)*.<sup>130</sup> The litigation arose from a collision between the appellants' vessel *MSC Susanna* and the second respondent's vessel *FNS Floréal* in the port of Durban, South Africa. During a storm, *MSC Susanna* had broken her moorings and drifted into several other vessels, including *FNS Floréal* which was a French naval vessel controlled by the second respondent, the Ministère des Armées of the French Republic. When action was commenced by the first respondent against the appellants, they responded by applying to limit liability under the Merchant Shipping Act 1951, section 261(1)(b) and by seeking to join the Ministère des Armées to the limitation action. The Ministère des Armées resisted the application, arguing that section 3(6) of the same statute had the effect of excluding the right to limit as against foreign naval vessels such as *FNS Floréal*. Section 3(6) read:

"The provisions of this Act shall not apply to ships belonging to the defence forces of the Republic or of any other country."

At first instance,<sup>131</sup> the judge agreed with the second respondent, but gave leave to appeal. The Supreme Court of Appeal allowed the appeal and joined the Ministère des Armées as a defendant in the action.

The court considered that linguistically, section 3(6) was not apt to exclude the invocation of limitation by the owners of *MSC Susanna*. While the Merchant Shipping Act was not concerned with naval vessels, the appellants' claim to limit liability was clearly a concern of merchant shipping or a matter incidental thereto. The owners of *MSC Susanna* were relying upon a right granted by section 261, which was a different proposition from whether naval defence forces should be able to limit liability for claims from merchant ships. Accordingly, the Supreme Court of Appeal of South Africa distinguished *Nisbet Shipping Co Ltd v The Queen*.<sup>132</sup>

## Ship sale

Although judicial ship sales are presumably no more a rarity than otherwise in current times of great uncertainty and with significant issues affecting the shipping industry in various ways, there was only a very small number of reported decision in 2021, and they were effectively the same case twice, namely *Malayan Banking Berhad v Proceeds of the Sale of the Ship "Teras Bandicoot"*<sup>133</sup> and *Malayan Banking Berhad v Proceeds of the Sale of the Ship "Lauren Hansen"*,<sup>134</sup> McKerracher J in the Federal Court of Australia had to decide various issues arising in relation to an application for default or summary judgment against the proceeds of sales ordered by decisions in 2020.<sup>135</sup> The vessels *Teras Bandicoot* and *Lauren Hansen* had been arrested and sold upon the application of an unrelated creditor and the court held the sale proceeds. The plaintiff bank held ship mortgages over the vessels and sought default or summary judgment so that its claim could be included in the determination of priorities. The defendant had not appeared. The bank claimed that the mortgages were enforceable because events of default had occurred. It sought full repayment of the outstanding sums secured by the mortgages, including interest.

The judge ordered that judgment be entered against the defendant, with interest. The court had jurisdiction in respect of the ship mortgages under section 16 of the Admiralty Act 1988 (Cth). But for the judicial sale, it was clear that the bank could have commenced in rem proceedings against the vessels, so that the claim was properly pursued as an action in rem.

There was no reasonable possibility of a defence being raised against the claim. Although judgment in default would be possible, summary rather than default judgment was the appropriate mechanism here.

<sup>133</sup> [2021] FCA 285; [2022] Lloyd's Rep Plus 42.

<sup>134</sup> [2021] FCA 286; [2022] Lloyd's Rep Plus 43.

<sup>135</sup> *Bhagwan Marine Pty Ltd v The Ship "Teras Bandicoot"* [2020] FCA 1224; [2021] Lloyd's Rep Plus 52; *Bhagwan Marine Pty Ltd v The Ship "Lauren Hansen"* [2020] FCA 1225; [2021] Lloyd's Rep Plus 53; and *Bhagwan Marine Pty Ltd v The Ship "Teras Bandicoot" (No 2)* [2020] FCA 1481; [2021] Lloyd's Rep Plus 57. Noted in Hjalmarsson J, "Maritime law in 2020: a review of developments in case law", Informa.

<sup>130</sup> [2021] ZASCA 135; [2022] Lloyd's Rep Plus 41.

<sup>131</sup> *Owners and Underwriters of MV "MSC Susanna" and Another v The National Ports Authority of South Africa, a division of Transnet (Soc) Ltd and Others (The MSC Susanna)* [2020] ZAKZPHC 51.

<sup>132</sup> [1955] 2 Lloyd's Rep 173.



## Multiple proceedings

Several procedural decisions concerned the right forum for proceedings, where the parties had different starting points on the matter. Several decisions have been noted above under “Passengers” at page 22. In addition, the following may be noted.

In *The Navios Koyo*,<sup>136</sup> the Singapore Court of Appeal provided some important guidance on its approach to imposing conditions to accompany a stay. The appellant had financed the purchase of a cargo of pine logs for the buyer of the cargo and now claimed against the respondent carrier under bills of lading in the Congenbill 1994 form, which incorporated a charterparty and its arbitration clause. Discharge from the vessel *Taikoo Brilliance* was completed by 23 September 2019, allegedly without presentation of the bills of lading and without the knowledge of the appellant.

Having initially elected to pursue the buyer of the cargo, on 18 August 2020, the appellant commenced an admiralty action against the respondent carrier before the Singapore court and went on to secure the arrest of the sistership *Navios Koyo*. Following provision of security and release of the vessel, the appellant did not discontinue the admiralty actions in favour of arbitration. The respondent sought and obtained an unconditional stay in favour of arbitration under section 6 of the International Arbitration Act.<sup>137</sup> The appellant now appealed seeking instead a stay order conditional upon waiver of the time bar. An arbitration had been commenced on 22 December 2020, in which a time-bar defence had been raised by the respondent.

The Court of Appeal declined to exercise its discretion to impose the condition sought. The court would not insulate the appellant from the consequences of its own actions by imposing a condition carving out an accrued, substantive defence. The time-bar defence was a matter to be dealt with in the arbitration itself. The significant quantum of the claim was irrelevant in determining whether a condition ought to be imposed and suggestions to that effect in existing case law should not be followed.

In *The Big Fish*,<sup>138</sup> the High Court of Singapore addressed thorny questions of procedure. The plaintiff had arrested the defendant’s vessel *Big Fish* in Singapore for loss and damage arising out of a vessel collision between

the parties’ vessels in the Indonesian territorial sea. The vessel had been released against a P&I letter of undertaking. The defendant had previously commenced proceedings in Indonesia for the same collision, just within the two-year time bar. Following the arrest, the plaintiff filed a counterclaim against the defendant in the Indonesian proceedings. The defendant now sought the setting aside of the arrest and striking out of the proceedings. It asserted that the plaintiff must elect either the Indonesian forum or the Singapore forum, to which the plaintiff retorted that there was no need as the counterclaim in the Indonesian proceedings had been withdrawn. The defendant further asserted that the time bar in Indonesia was two years, not 30 as posited by the plaintiff, and that on the facts of Indonesian law, the claim must be struck out as having been commenced too late. Finally, it argued that the plaintiff ought to have disclosed the potential time-bar defence when applying for the warrant of arrest, along with its true intention of obtaining security answerable to the Indonesian counterclaim; and the fact that its expert opinion was not by an independent expert.

In *The Navios Koyo*, the Singapore Court of Appeal provided some important guidance on its approach to imposing conditions to accompany a stay

The assistant registrar set aside the warrant of arrest but dismissed the prayer for striking out, making no order on the matter of forum election. The plaintiff’s conduct in pursuing the same cause in two separate proceedings was prima facie vexatious, but that vexatious conduct had ceased by the time the application fell to be considered as a result of the withdrawal of the counterclaim in Indonesia. The plaintiff had thereby made an affirmative election and it was unnecessary to make any order. Before the Singapore court, the time bar under Indonesian law was a question of fact. The plaintiff’s position, while perhaps tenuous, was not plainly unsustainable or inherently unprovable, and the issue should not be decided at this stage in proceedings.

However, there had been material non-disclosure by the plaintiff in support of the arrest application such as

<sup>136</sup> [2021] SGCA 99; [2022] Lloyd’s Rep Plus 44.

<sup>137</sup> That decision is reported at *The Navios Koyo* [2021] SGHC 131.

<sup>138</sup> [2021] SGHCR 7; [2022] Lloyd’s Rep Plus 45.

to justify the setting aside of the warrant of arrest. The plaintiff was aware of the special collision time bar under Indonesian law and it was, if applicable, of such weight as to deliver a “knock-out-blow” to the claim. The plaintiff’s arrest application had led the assistant registrar to believe that the applicable time bar was 30 years.

In *ZHD v SQO*,<sup>139</sup> the claimant ZHD sought an anti-suit injunction. ZHD was the carrier and the defendant SQO was the notify party under a bill of lading issued in respect of a cargo of corn loaded on board the claimant’s vessel *Precious Sky*. Issues having been identified with the cargo by surveyors at the discharge port, the vessel was arrested and subsequently released by Vietnamese courts. SQO proceeded before the Vietnamese courts, ZHD objecting to jurisdiction on the basis that the bill of lading incorporated the arbitration clause from a sub-charter. A complication was the risk that the Vietnamese court required a notarised original of the sub-charter, which the carrier could not supply, not being a party thereto. The carrier was also concerned that the Vietnamese court might proceed with the jurisdiction challenge and the merits at the same time, forcing it to defend so as not to lose its rights. The carrier therefore proceeded with London arbitration, seeking an anti-suit injunction in respect of the Vietnamese proceedings.

<sup>139</sup> [2021] EWHC 1262 (Comm); [2022] Lloyd’s Rep Plus 46.

The judge held that the claimant had established that the charterparty clause was incorporated into the bill of lading and that SQO was in breach thereof by commencing proceedings in Vietnam. The wording of the arbitration clause was sufficiently wide, not only based on *The Delos*<sup>140</sup> but in particular with reference to *Fiona Trust & Holding Corporation v Privalov*,<sup>141</sup> to encompass breaches beyond the narrow bill of lading liabilities. The claims had been made promptly, not least in the sense that the Vietnamese proceedings had not progressed very far. There were no strong reasons against granting the anti-suit injunction. Notably, the expiry of the time bar was of SQO’s own doing.

### Forum non conveniens

The test in *Spiliada Maritime Corporation v Cansulex Ltd*<sup>142</sup> continues to be applied and developed with two cases to be noted here from the Singapore and Hong Kong SAR courts respectively. In *Sinopec International (Singapore) Pte Ltd v Bank of Communications Co Ltd*,<sup>143</sup> the underlying issue in the litigation was the plaintiff’s presentation under letters of credit issued by the defendant bank. This

<sup>140</sup> [2001] 1 Lloyd’s Rep 703.

<sup>141</sup> [2007] UKHL 40; [2008] 1 Lloyd’s Rep 254.

<sup>142</sup> [1987] 1 Lloyd’s Rep 1.

<sup>143</sup> [2021] SGHC 245.

# Powering Shipping

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was the defendant's application to stay proceedings on grounds that it had not been properly served and also that a more appropriate forum was available and that proceedings were in progress elsewhere.

The plaintiff had presented documents to a collecting bank in Hong Kong but these had been rejected by the defendant through its Hong Kong branch due to "suspected bill of lading fraud". It appeared that the plaintiff's buyer had become concerned about its own buyer's ability to pay for the cargo, that the cargo had been discharged without presentation of the bills of lading (but against letters of indemnity) and that the buyer had filed a police report in Shanghai alleging fraud. The defendant bank's position, which the plaintiff disputed, was that the entire sale transaction was a sham to obtain payment by other means than from the ultimate buyer in financial difficulties.

The judge held, declining to stay proceedings, that the claim had been properly served on the defendant and that it had not been shown that any other court was a distinctly more appropriate forum than Singapore.

The defendant's Tokyo and Singapore branches were part of the same legal entity and although it was the Tokyo branch that had issued the letters of credit, service upon the Singapore branch was effective to found jurisdiction. Noting *Taurus Petroleum Ltd v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq*<sup>144</sup> wherein the UK Supreme Court recognised that the effect of article 3 of the UCP 600 was that branches of the same bank were to be treated as separate for the purpose of determining the situs of the debt, the judge nevertheless went on to conclude that article 3 could not alter the rules of service of process.

In terms of connecting factors for the purpose of the first limb of the *Spiliada* test, the governing law of the letter of credit was determined at the time the contract was made. For a freely negotiable credit, the governing law must be that of the place where the parties had contemplated that documents would be presented, which given that the plaintiff was a Singapore business must be taken to be Singapore. In any event, the general similarity between Hong Kong SAR and Singapore law meant that the governing law was a factor of limited weight.

Regarding availability of third-party witnesses, the approach of Singapore courts was that compellability was in issue, unless there was evidence of unwillingness of a witness to testify in Singapore.

To succeed in its fraud defence, the defendant must prove the existence of the alleged prior sale contracts regarding the cargo. On the evidence, some relevant third-party witnesses located in China could not be compelled to testify before the Singapore court, which was a factor in the consideration of stage 1 of the *Spiliada* test. However, that evidence could alternatively be obtained through discovery. It had not been shown that witnesses said to possibly be in Hong Kong SAR or Japan were in fact located in those jurisdictions.

Finally, the judge noted that the competing civil proceedings in China were for a negative declaration and had been commenced well after the present proceedings, apparently for strategic reasons to bolster the case that it was a more appropriate forum. They should be given no weight in the forum non conveniens analysis.

In *Pusan Newport Co Ltd v Owners and/or Demise Charterers of the Ships or Vessels "Milano Bridge" and "CMA CGM Musca" and "CMA CGM Hydra"*,<sup>145</sup> the plaintiff was the South Korean operator of a commercial maritime terminal at the port of Busan and had no business operations outside South Korea. The defendants were the owners of the vessel *Milano Bridge*. The plaintiff sought damages for damage to cranes and business interruption arising out of an allision involving contact between the vessel, some of the plaintiff's cranes and another vessel. The sister ship *CMA CGM Musca* had been arrested in Hong Kong SAR in respect of the claim but the dispute was otherwise unrelated to Hong Kong. There were several sets of litigation in progress, including a limitation fund set up in South Korea, and an accident investigation as well as litigation materially identical to the present proceedings in Japan. The defendants applied for the action to be stayed on the grounds of forum non conveniens or *lis alibi pendens*.

The judge stayed the proceedings. Most connecting factors pointed to South Korea. The most that could be said for Hong Kong was that the court was available and jurisdiction had been founded by service on the sister ship. The burden of proving that there was another clearly or distinctly more appropriate forum rested on the defendant. This was not a matter of a standard of proof, but of a holistic determination. On the liability issue, several important witnesses were based in South Korea and most of the documentation was in Korean, making South Korea the clearly and distinctly more appropriate forum. On the issue of quantum, key witnesses including the plaintiff's CEO and loss adjusters and surveyor were

<sup>144</sup> [2017] UKSC 64; [2018] 1 Lloyd's Rep 29.

<sup>145</sup> [2021] HKCFI 1283.

based in South Korea. Korean law governed the plaintiff's action in tort. South Korea was clearly and distinctly the more appropriate forum.

In *The Milano Bridge*, *CGM Musca* and *CMA CGM Hydra* there was more than a whiff of strategy about the plaintiff's choice of the Hong Kong jurisdiction, causing the judge to point out that the court frowned upon forum shopping

As for the plaintiff's loss of the juridical advantage of the higher tonnage limitation in Hong Kong in the event of a stay, it was not so conclusive that a stay should be refused where the connections to Hong Kong were weak. The judge distinguished *Bright Shipping Ltd v Changhong Group (HK) Ltd (The CF Crystal and The Sanchi)*.<sup>146</sup>

There was more than a whiff of strategy about the plaintiff's choice of the Hong Kong jurisdiction, causing the judge to point out that the court frowned upon forum shopping.

## Costs

A small number of significant costs decisions from shipping-related proceedings will be noted next. In *Monjasa Ltd and Another v The Vessel "Astoria" and Another*,<sup>147</sup> the vessel *Astoria* had been arrested and subsequently released following which the claimants applied for permission to discontinue the claim. The claimants accepted that they had a liability for costs arising from the arrest of the vessel, but there was a dispute as to which of the parties should be liable for the further costs incurred before the claim was discontinued largely arising out of "the port charges issue".

The claimants were bunker suppliers claiming for bunkers supplied under section 20(2)(m) of the Senior Courts Act 1981. Before the claim was commenced, the defendant bareboat charterer had already terminated the charterparty and redelivered the vessel. The claimants

continued with the arrest after having received information of this fact. At that stage, the Admiralty Marshal indicated that there were outstanding port charges, which the claimants characterised as effectively a claim by the defendants for a contribution to port charges.

The Admiralty Registrar held that having commenced a claim, arrested the vessel and thereafter discontinued the claim, the claimants were the unsuccessful party in the litigation and were not entitled to recover any of their costs. The first defendant was entitled to all of its costs associated with the claim until the claim was discontinued. Insofar as there was "a port costs issue" that was a matter which should have been resolved between the claimants and the Admiralty Marshal.

In *Owners of "Ken Breeze" v Owners of "Pacific Grace" and Others*,<sup>148</sup> the question arose of how to allocate the costs of a trial which by agreement had been stayed in one forum in favour of another. The two ships *Ken Breeze* and *Pacific Grace* had on 6 November 2020 collided in PRC territorial waters. The owners of *Ken Breeze* had issued a collision action in rem against the owners of *Pacific Grace* before the Hong Kong SAR court. Cargo interests with damaged cargo on board the *Ken Breeze* also commenced an action in rem against *Pacific Grace* and the defendants issued bail bonds to all of the plaintiffs.

The parties subsequently agreed to stay the Hong Kong proceedings in favour of the Haikou Maritime Court, agreeing adequate security for those proceedings, but only after extended negotiations culminating in the defendant's offer on 12 August 2021 being accepted by plaintiffs.

The issue arose of costs in the Hong Kong proceedings. The defendants considering that they were the successful party and should have their costs. The plaintiffs retorted that the defendants had been dilatory in coming up with suitable replacement security to enable a stay.

The judge noted that costs followed the event and held that where the defendant's application for a stay had been successful, they should have their costs. If the plaintiffs complained that the defendants had failed to come up with an acceptable offer until 12 August 2021, the same criticism could be levied against the plaintiffs. This was particularly so where the ship plaintiff, in resisting the stay application, had failed to address the issue of whether Hong Kong was the natural and appropriate forum for the action.

<sup>146</sup> [2018] HKCFI 2474; [2019] 1 Lloyd's Rep 437.

<sup>147</sup> [2021] EWHC 134 (Admty); [2022] Lloyd's Rep Plus 49.

<sup>148</sup> [2021] HKCFI 2832; [2022] Lloyd's Rep Plus 50.



## THE VIEW FORWARD

The UK Supreme Court on 11 November 2021 granted permission to appeal in the shipbuilding contract case *Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd*,<sup>149</sup> examined above at page 17. The Supreme Court is here in a position to provide authoritative guidance on what factors are to be given weight in the interpretation of shipbuilding guarantees, and perhaps also other contracts.

This correspondent is very much looking forward to the appeal in the silver bars 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, being the Government of the Republic of South Africa (The SS Tilawa)*,<sup>150</sup> reported in the 2020 edition of this Review.<sup>151</sup> An appeal in the case is scheduled for hearing by the Court of Appeal in mid-March 2022. This was a decision by Sir Nigel Teare and the case raises interesting issues of state immunity and salvage.

There appears to be an application for permission to appeal pending in *M/V Pacific Pearl Co Ltd v Osios David Shipping Inc*,<sup>152</sup> the letter of undertaking case noted above at page 34. The case considers the issue of what constitutes a letter of undertaking in “reasonably satisfactory” form – a limited issue that is of tremendous importance to the industry. The case is listed as “awaiting bundles”.

An appeal is also pending in *SK Shipping Europe Ltd v Capital Crude Chartering Inc and Others*, from an order issued on 5 February 2021. The hearing is tentatively scheduled for 8 or 9 February 2022.

<sup>149</sup> [2021] EWCA Civ 1147; [2022] Lloyd's Rep Plus 1.

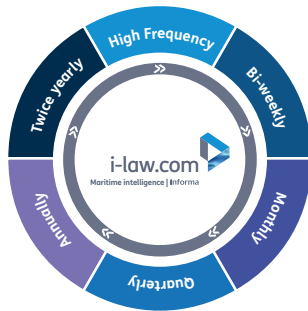
<sup>150</sup> [2020] EWHC 3434 (Admlty); [2021] 2 Lloyd's Rep 1. Source for appeal data: <https://casetracker.justice.gov.uk/> (accessed on 24 January 2022).

<sup>151</sup> Hjalmarsson J, “Maritime law in 2020: a review of developments in case law”, available on [www.i-law.com](http://www.i-law.com) at [www.i-law.com/ilaw/doc/view.htm?id=417041](http://www.i-law.com/ilaw/doc/view.htm?id=417041)

<sup>152</sup> [2021] EWHC 2808 (Comm); [2022] Lloyd's Rep Plus 12.

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## APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED IN THIS REVIEW

### 2021 judgments analysed

- A v B (The Tai Hunter)* (QBD (Comm Ct)) [2021] EWHC 793 (Comm); [2021] Lloyd's Rep Plus 114
- AAI Ltd, trading as Vero Insurance v Technology Swiss Pty Ltd* (FCAFC) [2021] FCAFC 168; [2022] Lloyd's Rep IR Plus 5
- ABN AMRO Bank NV v Royal & Sun Alliance Insurance plc and Others* (QBD (Comm Ct)) [2021] EWHC 442 (Comm); [2021] Lloyd's Rep IR Plus 22; [2021] Lloyd's Rep IR 467; (CA) [2021] EWCA Civ 1789; [2022] Lloyd's Rep IR Plus 2
- AI Giorgis Oil Trading Ltd v AG Shipping & Energy Pte Ltd (The Marquessa)* (QBD (Comm Ct)) [2021] EWHC 2319 (Comm); [2022] Lloyd's Rep Plus 7
- Alexandra 1, The* (SC) [2021] UKSC 6; [2021] 1 Lloyd's Rep 299
- Alize 1954 and Another v Allianz Elementar Versicherungs AG and Others (The CMA CGM Libra)* (SC) [2021] UKSC 51; [2021] 2 Lloyd's Rep 613
- Alpha Marine Corporation v Minmetals Logistics Zhejiang Co Ltd (The Smart)* (QBD (Comm Ct)) [2021] EWHC 1157 (Comm); [2022] 1 Lloyd's Rep 1
- ANL Singapore Pte Ltd v Visy Paper Pty Ltd* (FCA) [2021] FCA 439
- Arklow Shipping Unlimited Co and Others v Drogheda Port Co DAC (The Arklow Valour)* (IEHC) [2021] IEHC 601; [2022] Lloyd's Rep Plus 28
- Arklow Valour, The* (IEHC) [2021] IEHC 601; [2022] Lloyd's Rep Plus 28
- Astoria, The* (Admlty Ct) [2021] EWHC 134 (Admlty); [2022] Lloyd's Rep Plus 49
- Begum (on Behalf of Mollah) v Maran (UK) Ltd* (CA) [2021] EWCA Civ 326; [2021] 2 Lloyd's Rep 505
- Big Fish, The* (SGHC) [2021] SGHCR 7; [2022] Lloyd's Rep Plus 45
- Black Sea Commodities Ltd v Lemarc Agromond Pte Ltd* (QBD (Comm Ct)) [2021] EWHC 287 (Comm); [2022] Lloyd's Rep Plus 19
- BP Oil International Ltd v Vega Petroleum Ltd and Another* (QBD (Comm Ct)) [2021] EWHC 1364 (Comm); [2021] Lloyd's Rep Plus 118
- Caraka Jaya Niaga III-11, The* (SGHC) [2021] SGHC 43; [2021] 2 Lloyd's Rep 549
- CMA CGM Hydra, The* (HKCFI) [2021] HKCFI 1283
- CMA CGM Libra, The* (SC) [2021] UKSC 51; [2021] 2 Lloyd's Rep 613
- CMA CGM Musca, The* (HKCFI) [2021] HKCFI 1283
- Columbus, The* (QBD (Admlty Ct)) [2021] EWHC 113 (Admlty); [2021] 1 Lloyd's Rep 440
- Columbus, The* (QBD (Admlty Ct)) [2021] EWHC 310 (Admlty); [2021] Lloyd's Rep Plus 67
- CSBP Ltd v BBC Chartering Carriers GmbH & Co KG* (FCA) [2021] FCA 554
- CV Stealth, The* (No 4) (QBD (Comm Ct)) [2021] EWHC 2288 (Comm); [2022] Lloyd's Rep Plus 6
- Di Matteo, The* (QBD (Comm Ct)) [2021] EWHC 1215 (Comm); [2022] Lloyd's Rep Plus 40
- Eastern Pacific Chartering Inc v Pola Maritime Ltd (The Pola Devora)* (QBD (Comm Ct)) [2021] EWHC 1707 (Comm); [2022] Lloyd's Rep Plus 14
- Enemalta plc v The Standard Club Asia Ltd (The Di Matteo)* (QBD (Comm Ct)) [2021] EWHC 1215 (Comm); [2022] Lloyd's Rep Plus 40
- Eternal Bliss, The* (CA) [2021] EWCA Civ 1712; [2022] 1 Lloyd's Rep 12
- Euronav NV v Repsol Trading SA (The Maria)* (QBD (Comm Ct)) [2021] EWHC 2565 (Comm); [2021] Lloyd's Rep Plus 104
- Ever Smart, The* (SC) [2021] UKSC 6; [2021] 1 Lloyd's Rep 299
- Falcon Trident Shipping Ltd v Levant Shipping Ltd* (QBD (Comm Ct)) [2021] EWHC 2204 (Comm); [2022] Lloyd's Rep Plus 36
- Fesco Voyager, The* (QBD (Comm Ct)) [2021] EWHC 2641 (Comm); [2022] Lloyd's Rep Plus 38
- Financial Conduct Authority v Arch Insurance (UK) Ltd* (SC) [2021] UKSC 1; [2021] Lloyd's Rep IR 63
- Galtrade Ltd v BP Oil International Ltd (The Pioneer)* (QBD (Comm Ct)) [2021] EWHC 1796 (Comm); [2021] Lloyd's Rep Plus 117
- Happy Lucky, The* (QBD (Comm Ct)) [2021] EWHC 2641 (Comm); [2022] Lloyd's Rep Plus 38
- Happy Shipping Ltd (Owners of the M/V "Happy Lucky") v Marine Shipping Co Ltd (Owners of the M/V "Fesco Voyager")* (QBD (Comm Ct)) [2021] EWHC 2641 (Comm); [2022] Lloyd's Rep Plus 38
- Herculito Maritime Ltd and Others v Gunvor International BV and Others (The Polar)* (CA) [2021] EWCA Civ 1828; [2022] Lloyd's Rep Plus 9
- 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* (CA) [2021] EWCA Civ 1585; [2022] Lloyd's Rep Plus 29
- JDA Co Ltd and Others v AIG Insurance New Zealand Ltd and Others* (NZHC) [2021] NZHC 2912; [2022] Lloyd's Rep Plus 30
- K Line Pte Ltd v Priminds Shipping (HK) Co Ltd (The Eternal Bliss)* (CA) [2021] EWCA Civ 1712; [2022] 1 Lloyd's Rep 12
- Karpik v Carnival plc (The Ruby Princess)* (FCA) [2021] FCA 1082; [2022] Lloyd's Rep Plus 11
- Ken Breeze, The* (HKCFI) [2021] HKCFI 2832; [2022] Lloyd's Rep Plus 50
- Knight v Black and Others* (BCSC) 2021 BCSC 19; [2021] 2 Lloyd's Rep 410
- Lauren Hansen, The* (FCA) [2021] FCA 286; [2022] Lloyd's Rep Plus 43
- Lavender Shipmanagement Inc v Ibrahima Sory Affretement Trading SA and Others (The Majesty)* (QBD (Comm Ct)) [2020] EWHC 3462 (Comm); [2021] 2 Lloyd's Rep 23
- Loretta, The* (No 1) (FCA) [2021] FCA 240; [2022] Lloyd's Rep Plus 21
- Loretta, The* (No 2) (FCA) [2021] FCA 241; [2022] Lloyd's Rep Plus 22
- Loretta, The* (No 3) (FCA) [2021] FCA 498; [2022] Lloyd's Rep Plus 23
- Luna, The, and Another Appeal* (SGCA) [2021] SGCA 84; [2021] Lloyd's Rep Plus 120
- M/V Pacific Pearl Co Ltd v Osios David Shipping Inc* (QBD (Comm Ct)) [2021] EWHC 2808 (Comm); [2022] Lloyd's Rep Plus 12
- Majesty, The* (QBD (Comm Ct)) [2020] EWHC 3462 (Comm); [2021] 2 Lloyd's Rep 23
- Malayan Banking Berhad v Proceeds of the Sale of the Ship "Lauren Hansen"* (FCA) [2021] FCA 286; [2022] Lloyd's Rep Plus 43
- Malayan Banking Berhad v Proceeds of the Sale of the Ship "Teras Bandicoot"* (FCA) [2021] FCA 285; [2022] Lloyd's Rep Plus 42
- Maria, The* (QBD (Comm Ct)) [2021] EWHC 2565 (Comm); [2021] Lloyd's Rep Plus 104
- Marquessa, The* (QBD (Comm Ct)) [2021] EWHC 2319 (Comm); [2022] Lloyd's Rep Plus 7
- Milano Bridge, The* (HKCFI) [2021] HKCFI 1283
- Monjasa Ltd and Another v The Vessel "Astoria" and Another* (Admlty Ct) [2021] EWHC 134 (Admlty); [2022] Lloyd's Rep Plus 49
- Mookda Naree, The* (QBD (Comm Ct)) [2021] EWHC 558 (Comm); [2022] 1 Lloyd's Rep 41
- MSC Susanna, The* (SA SC) [2021] ZASCA 135; [2022] Lloyd's Rep Plus 41
- Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and Ever Smart)* (SC) [2021] UKSC 6; [2021] 1 Lloyd's Rep 299

- Navig8 Ametrine*, The (QBD (Comm Ct)) [2021] EWHC 3132 (Comm); [2022] Lloyd's Rep Plus 16
- Navig8 Chemicals Pool Inc v Aeternum Energy International Pte Ltd (The Navig8 Ametrine)* (QBD (Comm Ct)) [2021] EWHC 3132 (Comm); [2022] Lloyd's Rep Plus 16
- Navios Koyo*, The (SGCA) [2021] SGCA 99; [2022] Lloyd's Rep Plus 44
- Navision Shipping A/S v Precious Pearls Ltd; Conti Lines Shipping NV v Navision Shipping A/S (The Mookda Naree)* (QBD (Comm Ct)) [2021] EWHC 558 (Comm); [2022] 1 Lloyd's Rep 41
- New Hydra*, The (QBD (Comm Ct)) [2021] EWHC 566 (Comm); [2021] 2 Lloyd's Rep 580
- Noble Chartering Inc v Priminds Shipping Hong Kong Co Ltd (The Tai Prize)* (CA) [2021] EWCA Civ 87; [2021] 2 Lloyd's Rep 36
- Nord Naphtha Ltd v New Stream Trading AG* (CA) [2021] EWCA Civ 1829; [2022] Lloyd's Rep Plus 18
- Nounou*, The (CA) [2021] EWCA Civ 718; [2021] 2 Lloyd's Rep 591
- Ocean Winner, The, and Other Matters* (SGHC) [2021] SGHC 8
- Owners and Underwriters of MV "MSC Susanna" and Another v Transnet (Soc) Ltd and Another (The MSC Susanna)* (SA SC) [2021] ZASCA 135; [2022] Lloyd's Rep Plus 41
- Owners of "Ken Breeze" v Owners of "Pacific Grace" and Others* (HKCFI) [2021] HKCFI 2832; [2022] Lloyd's Rep Plus 50
- P&O Princess Cruises International Ltd v The Demise Charterers of the Vessel "Columbus"; P&O Princess Cruises International Ltd v The Owners and/or Demise Charterers of the Vessel "Vasco da Gama"; and in the Matter of the Claim for Port Dues by Port of Tilbury London Ltd* (QBD (Admlty Ct)) [2021] EWHC 113 (Admlty); [2021] 1 Lloyd's Rep 440
- Pacific Grace*, The (HKCFI) [2021] HKCFI 2832; [2022] Lloyd's Rep Plus 50
- Pacific Pearl Co Ltd, M/V v Osios David Shipping Inc* (QBD (Comm Ct)) [2021] EWHC 2808 (Comm); [2022] Lloyd's Rep Plus 12
- Perfect Best Asset Management Inc v ADL Express Ltd and Another* (HKCFI) [2021] HKCFI 2310; [2022] Lloyd's Rep Plus 15
- Perusahaan Perseroan (Persero) PT Pertamina v Trevaskis Ltd and Others (The Star Centurion)* (HKCFI) [2021] HKCFI 396; [2021] 2 Lloyd's Rep 637
- Pioneer*, The (QBD (Comm Ct)) [2021] EWHC 1796 (Comm); [2021] Lloyd's Rep Plus 117
- Pola Devora*, The (QBD (Comm Ct)) [2021] EWHC 1707 (Comm); [2022] Lloyd's Rep Plus 14
- Polar*, The (CA) [2021] EWCA Civ 1828; [2022] Lloyd's Rep Plus 9
- Poseidon*, The (No 2) (QBD (Admlty Ct)) [2021] EWHC 1582 (Admlty); [2021] 2 Lloyd's Rep 429
- Poseidon*, The (QBD (Admlty Ct)) [2020] EWHC 393 (Admlty); [2021] 2 Lloyd's Rep 421
- Pusan Newport Co Ltd v Owners and/or Demise Charterers of the Ships or Vessels "Milano Bridge" and "CMA CGM Musca" and "CMA CGM Hydra"* (HKCFI) [2021] HKCFI 1283
- Readie Construction Ltd v Geo Quarries Ltd* (QBD) [2021] EWHC 3030 (QB); [2022] Lloyd's Rep Plus 3
- Regal Seas Maritime SA v Oldendorff Carriers GmbH & Co KG (The New Hydra)* (QBD (Comm Ct)) [2021] EWHC 566 (Comm); [2021] 2 Lloyd's Rep 580
- River Countess BV and Others v MSC Cruise Management (UK) Ltd* (QBD (Admlty Ct)) [2021] EWHC 2652 (Admlty); [2022] Lloyd's Rep Plus 33
- Robertson and Another v Bembridge Harbour Improvements Co Ltd (The Tangent)* (QBD (Comm Ct)) [2021] EWHC 1025 (Comm); [2022] Lloyd's Rep Plus 32
- Royal Caribbean Cruises Ltd and Another v Reed and Another* (FCA) [2021] FCA 51; [2022] Lloyd's Rep Plus 25
- Royal Caribbean Cruises Ltd and Another v Reed and Another* (No 3) (FCA) [2021] FCA 225; [2022] Lloyd's Rep Plus 26
- Royal Caribbean Cruises Ltd v Browitt* (FCA) [2021] FCA 653; [2022] Lloyd's Rep Plus 31
- Ruby Princess*, The (FCA) [2021] FCA 1082; [2022] Lloyd's Rep Plus 11
- Salt Ship Design AS v Prysmian Powerlink Srl* (QBD (Comm Ct)) [2021] EWHC 2633 (Comm); [2022] Lloyd's Rep Plus 20
- Septo Trading Inc v Tintrade Ltd (The Nounou)* (CA) [2021] EWCA Civ 718; [2021] 2 Lloyd's Rep 591
- Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd* (CA) [2021] EWCA Civ 1147; [2022] Lloyd's Rep Plus 1
- Sinopec International (Singapore) Pte Ltd v Bank of Communications Co Ltd* (SGHC) [2021] SGHC 245
- Smart*, The (QBD (Comm Ct)) [2021] EWHC 1157 (Comm); [2022] 1 Lloyd's Rep 1
- Sompo Insurance Singapore Pte Ltd v Royal & Sun Alliance Insurance plc* (SGHC) [2021] SGHC 152; [2021] Lloyd's Rep IR Plus 31
- Space Shipping Ltd v ST Shipping and Transport Pte Ltd (The CV Stealth)* (No 4) (QBD (Comm Ct)) [2021] EWHC 2288 (Comm); [2022] Lloyd's Rep Plus 6
- Splitt Chartering APS and Others v Saga Shipholding Norway AS and Others (The Stema Barge II)* (CA) [2021] EWCA Civ 1880; [2022] Lloyd's Rep Plus 10
- Star Centurion*, The (HKCFI) [2021] HKCFI 396; [2021] 2 Lloyd's Rep 637
- Star Quest, The, and Others* (SGHC) [2016] SGHC 100; [2017] Lloyd's Rep Plus 50
- Stema Barge II*, The (CA) [2021] EWCA Civ 1880; [2022] Lloyd's Rep Plus 10
- Susanna*, The (SA SC) [2021] ZASCA 135; [2022] Lloyd's Rep Plus 41
- Tai Hunter*, The (QBD (Comm Ct)) [2021] EWHC 793 (Comm); [2021] Lloyd's Rep Plus 114
- Tai Prize*, The (CA) [2021] EWCA Civ 87; [2021] 2 Lloyd's Rep 36
- Tangent*, The (QBD (Comm Ct)) [2021] EWHC 1025 (Comm); [2022] Lloyd's Rep Plus 32
- Taxidiotiki-Touristiki-Nautiliaki Ltd (trading as Aspida Travel) v The Owners and/or Demise Charterers of the Vessel "Columbus" and the Owners and/or Demise Charterers of the Vessel "Vasco da Gama"* (QBD (Admlty Ct)) [2021] EWHC 310 (Admlty); [2021] Lloyd's Rep Plus 67
- Technology Swiss Pty Ltd v AAI Ltd, trading as Vero Insurance* (FCA) [2021] FCA 95; [2021] Lloyd's Rep IR 377
- Tecnomar & Associates Pte Ltd v SBM Offshore NV* (SGCA) [2021] SGCA 36
- Tecoil Shipping Ltd v Neptune EHF and Others (The Poseidon)* (No 2) (QBD (Admlty Ct)) [2021] EWHC 1582 (Admlty); [2021] 2 Lloyd's Rep 429
- Tecoil Shipping Ltd v The Owners of the Ship "Poseidon"* (QBD (Admlty Ct)) [2020] EWHC 393 (Admlty); [2021] 2 Lloyd's Rep 421
- Tenacity Marine Inc v NOC Swiss LLC and Another* (QBD (Comm Ct)) [2020] EWHC 2820 (Comm)
- Teras Bandicoot*, The (FCA) [2021] FCA 285; [2022] Lloyd's Rep Plus 42
- Tregidga v Pasma Holdings Pty Ltd* (FCA) [2021] FCA 721; [2022] Lloyd's Rep Plus 13
- Tregidga v Pasma Holdings Pty Ltd* (No 2) (FCA) [2021] FCA 1439
- TWW Yachts Sarl v The Yacht "Loretta"* (No 1) (FCA) [2021] FCA 240; [2022] Lloyd's Rep Plus 21
- TWW Yachts Sarl v The Yacht "Loretta"* (No 2) (FCA) [2021] FCA 241; [2022] Lloyd's Rep Plus 22
- TWW Yachts Sarl v The Yacht "Loretta"* (No 3) (FCA) [2021] FCA 498; [2022] Lloyd's Rep Plus 23
- Vasco da Gama*, The (QBD (Admlty Ct)) [2021] EWHC 113 (Admlty); [2021] 1 Lloyd's Rep 440
- Vasco da Gama*, The (QBD (Admlty Ct)) [2021] EWHC 310 (Admlty); [2021] Lloyd's Rep Plus 67
- Warner v Scapa Flow Charters* (No 2) (CSOH) [2021] CSOH 92; [2022] Lloyd's Rep Plus 24
- ZHD v SQO* (QBD (Comm Ct)) [2021] EWHC 1262 (Comm); [2022] Lloyd's Rep Plus 46



## Judgments considered

- Aktieselskabet Reidar v Arcos Ltd* (CA) [1926] 25 Ll L Rep 513
- Alexandra 1, The* (QBD (Admlty Ct)) [2017] EWHC 453 (Admlty); [2017] 1 Lloyd's Rep 666; (CA) [2018] EWCA Civ 2173; [2019] 1 Lloyd's Rep 130
- 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; (CA) [2020] EWCA Civ 293; [2020] 2 Lloyd's Rep 565.
- Argentum Exploration Ltd v The Silver and all Persons Claiming to be Interested in and/or to Have Rights in Respect of, the Silver, being the Government of the Republic of South Africa* (The SS Tilawa) (QBD (Admlty Ct)) [2020] EWHC 3434 (Admlty); [2021] 2 Lloyd's Rep 1
- Begum (on Behalf of Mollah) v Maran (UK) Ltd* (QBD) [2020] EWHC 1846 (QB); [2021] Lloyd's Rep Plus 32
- 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)* (FCA) [2020] FCA 1481; [2021] Lloyd's Rep Plus 57
- Bonde, The* (QBD (Comm Ct)) [1991] 1 Lloyd's Rep 136
- Bright Shipping Ltd v Changhong Group (HK) Ltd* (The CF Crystal and The Sanchi) (HKCFI) [2018] HKCFI 2474; [2019] 1 Lloyd's Rep 437
- Caterpillar (NI) Ltd* (formerly known as F G Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd (CA) [2013] EWCA Civ 1232; [2014] 1 Lloyd's Rep 180
- CF Crystal, The* (HKCFI) [2018] HKCFI 2474; [2019] 1 Lloyd's Rep 437
- Cheong Yuk Fai v China International Freight Forwarders (HK) Co Ltd* (HKCA) [2005] 4 HKLRD 544
- CMA CGM Libra, The* (QBD (Admlty Ct)) [2019] EWHC 481 (Admlty); [2019] 1 Lloyd's Rep 595; (CA) [2020] EWCA Civ 293; [2020] 2 Lloyd's Rep 565
- CMA CGM SA v Classica Shipping Co Ltd* (The CMA Djakarta) (CA) [2004] EWCA Civ 114; [2004] 1 Lloyd's Rep 460
- CMA Djakarta, The* (CA) [2004] EWCA Civ 114; [2004] 1 Lloyd's Rep 460
- Conoco Britannia, The* (QBD (Admlty Ct)) [1972] 1 Lloyd's Rep 342
- CV Stealth, The* (No 4) (QBD (Comm Ct)) [2017] EWHC 2808 (Comm); [2018] 1 Lloyd's Rep 276
- Delos, The* (QBD (Comm Ct)) [2001] 1 Lloyd's Rep 703
- Donoghue v Stevenson* (HL) [1932] AC 562
- Eternal Bliss, The* (QBD (Comm Ct)) [2020] EWHC 2373 (Comm); [2020] 2 Lloyd's Rep 419
- Ever Smart, The* (QBD (Admlty Ct)) [2017] EWHC 453 (Admlty); [2017] 1 Lloyd's Rep 666; (CA) [2018] EWCA Civ 2173; [2019] 1 Lloyd's Rep 130
- Evia, The* (No 2) (HL) [1982] 2 Lloyd's Rep 307
- Fiona Trust & Holding Corporation v Privalov* (HL) [2007] UKHL 40; [2008] 1 Lloyd's Rep 254
- Gard Marine & Energy Ltd v China National Chartering Co Ltd* (The Ocean Victory) (SC) [2017] UKSC 35; [2017] 1 Lloyd's Rep 521
- Herculito Maritime Ltd and Others v Gunvor International BV and Others* (The Polar) (QBD (Comm Ct)) [2020] EWHC 3318; [2021] 1 Lloyd's Rep 150
- Holyhead Marina Ltd v Farrer and Others* (QBD (Admlty Ct)) [2020] EWHC 1750 (Admlty); [2021] 2 Lloyd's Rep 221
- 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
- Khediye, The* (HL) (1882) 7 App Cas 795
- Kodros Shipping Corporation v Empresa Cubana de Fletes* (The Evia) (No 2) (HL) [1982] 2 Lloyd's Rep 307
- Lauren Hansen, The* (FCA) [2020] FCA 1225; [2021] Lloyd's Rep Plus 53
- MIOM 1 Ltd v Sea Echo ENE* (No 2) (QBD (Admlty Ct)) [2011] EWHC 2715 (Admlty); [2012] 1 Lloyd's Rep 140
- Mitsubishi Corporation RTM International Pte Ltd v Kyen Resources Pte Ltd* (SGHC) [2019] SGHCR 6
- MSC Susanna, The* [2020] ZAKZPHC 51
- Nautical Challenge Ltd v Evergreen Marine (UK) Ltd* (The Alexandra 1 and Ever Smart) (QBD (Admlty Ct)) [2017] EWHC 453 (Admlty); [2017] 1 Lloyd's Rep 666; (CA) [2018] EWCA Civ 2173; [2019] 1 Lloyd's Rep 130
- Navios Koyo, The* (SGHC) [2021] SGHC 131
- Nisbet Shipping Co Ltd v The Queen* (PC) [1955] 2 Lloyd's Rep 173
- Nordglint, The* (QBD (Admlty Ct)) [1987] 2 Lloyd's Rep 470
- Nounou, The* (QBD (Comm Ct)) [2020] EWHC 1795 (Comm); [2021] 1 Lloyd's Rep 258
- Ocean Victory, The* (SC) [2017] UKSC 35; [2017] 1 Lloyd's Rep 521
- Owners and Underwriters of MV "MSC Susanna" and Another v The National Ports Authority of South Africa, a division of Transnet (Soc) Ltd and Others* (The MSC Susanna) [2020] ZAKZPHC 51
- Polar, The* (QBD (Comm Ct)) [2020] EWHC 3318; [2021] 1 Lloyd's Rep 150
- Priminds Shipping Hong Kong Co Ltd v Noble Chartering Inc* (The Tai Prize) (QBD (Comm Ct)) [2020] EWHC 127 (Comm); [2020] 2 Lloyd's Rep 333
- Richco International Ltd v Alfred C Toepfer International GmbH* (The Bonde) (QBD (Comm Ct)) [1991] 1 Lloyd's Rep 136
- Rookes v Barnard and Others* (HL) [1964] 1 Lloyd's Rep 28
- Sanchi, The* (HKCFI) [2018] HKCFI 2474; [2019] 1 Lloyd's Rep 437
- Septo Trading Inc v Tintrade Ltd* (The Nounou) (QBD (Comm Ct)) [2020] EWHC 1795 (Comm); [2021] 1 Lloyd's Rep 258
- Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd* (QBD (Comm Ct)) [2020] EWHC 803 (Comm); [2021] 2 Lloyd's Rep 51
- Space Shipping Ltd v ST Shipping and Transport Pte Ltd* (The CV Stealth) (No 4) (QBD (Comm Ct)) [2017] EWHC 2808 (Comm); [2018] 1 Lloyd's Rep 276
- Spiliada Maritime Corporation v Cansulex Ltd* (HL) [1987] 1 Lloyd's Rep 1
- Splitt Chartering APS and Others v Saga Shipholding Norway AS and Others* (The Stema Barge II) (QBD (Admlty Ct)) [2020] EWHC 1294 (Admlty); [2021] 2 Lloyd's Rep 307
- Star Quest, The, and Others* (SGHC) [2016] SGHC 100; [2017] Lloyd's Rep Plus 50
- Stema Barge II, The* (QBD (Admlty Ct)) [2020] EWHC 1294 (Admlty); [2021] 2 Lloyd's Rep 307
- Susanna, The* [2020] ZAKZPHC 51
- Tai Prize, The* (QBD (Comm Ct)) [2020] EWHC 127 (Comm); [2020] 2 Lloyd's Rep 333
- Taurus Petroleum Ltd v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* (SC) [2017] UKSC 64; [2018] 1 Lloyd's Rep 29
- Tecnomar & Associates Pte Ltd v SBM Offshore NV* (SGHC) [2020] SGHC 249
- 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
- SS Tilawa, The* (QBD (Admlty Ct)) [2020] EWHC 3434 (Admlty); [2021] 2 Lloyd's Rep 1
- Torepo, The* (QBD (Admlty Ct)) [2002] EWHC 1481 (Admlty); [2002] 2 Lloyd's Rep 535
- Totsa Total Oil Trading SA v Bharat Petroleum Corporation* (QBD (Comm Ct)) [2005] EWHC 1641 (Comm)
- Totsa Total Oil Trading SA v New Stream Trading AG* (QBD (Comm Ct)) [2020] EWHC 855 (Comm)
- Warner v Scapa Flow Charters* (SC) [2018] UKSC 52; [2019] 1 Lloyd's Rep 529
- Wood v Capita Insurance Services Ltd* (SC) [2017] UKSC 24; [2018] Lloyd's Rep Plus 13

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