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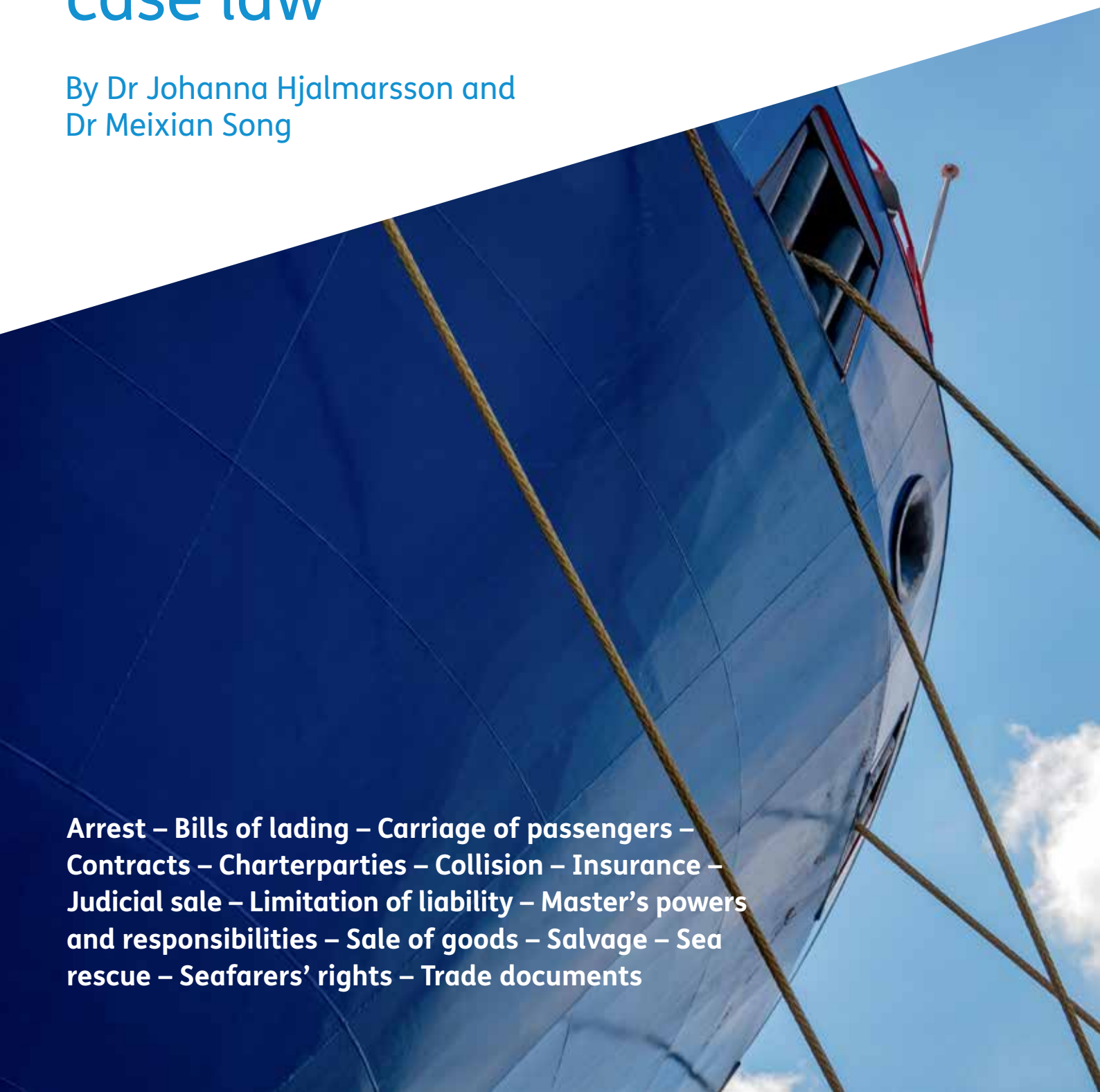
Maritime law in 2022: a review of developments in case law

By Dr Johanna Hjalmarsson and Dr Meixian Song



Arrest – Bills of lading – Carriage of passengers – Contracts – Charterparties – Collision – Insurance – Judicial sale – Limitation of liability – Master's powers and responsibilities – Sale of goods – Salvage – Sea rescue – Seafarers' rights – Trade documents

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Introduction

This review summarises and explains some of the most important legal developments in maritime law in 2022, including the law of shipping contracts, marine insurance, seafarers' rights and admiralty issues.

In 2022 the effect of sanctions on various types of contracts was a particularly notable feature. Questions arose as to the meaning of force majeure in this context, and the weight to be given to the "innocent" party's desire not to itself become the subject of sanctions. Given the geopolitical context, litigation on such issues may well only be in its infancy.

From the domain of charterparties, *OCM Maritime Nile LLC and Another v Courage Shipping Co and Others (The Courage and The Amethyst)*[1] was decided in two instances as was *Mur Shipping BV v RTI Ltd*.[2] The speed with which the courts acted is presumably grounded in the understanding that the efficient functioning of the markets requires settlement of these issues. Further charterparty decisions on sanctions were those in *Laysun Service Co Ltd v Del Monte International GmbH*[3] and *Pola Logistics Ltd v GTLK Europe Designated Activity Company and Others.*[4]

From the area of letters of undertaking, illumination of the sanctions clause was provided by *M/V Pacific Pearl Co Ltd v Osios David Shipping Inc*[5] and letters of credit were considered in *Kuvera Resources Pte Ltd v JPMorgan Chase Bank NA*[6] which provides guidance on the effect of sanctions on the performance of a letter of credit.

A further theme was the *sequelae* of the collapse of the commodity trader Hin Leong Trading, which continued to give rise to case law especially from Singapore courts, noted in the "Bills of Lading" section of this analysis, namely *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"*[7] and *Oversea-Chinese Banking Corporation Ltd v Owner and/or Demise Charterer of the Vessel "STI Orchard"*[8] and *Standard Chartered Bank (Singapore) Ltd v Maersk Tankers Singapore Pte Ltd.*[9] In the "Trade documents" section, we note *Unicredit Bank AG v Glencore Singapore Pte Ltd.*[10]

From the area of wet shipping, an unusually large number of collision cases may be noted, along with the Court of Appeal's decision in the fascinating 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.*[11]

1 [2022] EWCA Civ 1091; [2023] 1 Lloyd's Rep 13.
2 [2022] EWHC 467 (Comm); [2022] 2 Lloyd's Rep 297 (Jacobs J); [2022] EWCA Civ 1406; [2023] Lloyd's Rep Plus 3 (CA).
3 [2022] EWHC 699 (Comm); [2023] Lloyd's Rep Plus 15.
4 [2022] IEHC 501; [2023] Lloyd's Rep Plus 16.
5 [2022] EWCA Civ 798; [2022] 2 Lloyd's Rep 448.
6 [2022] SGHC 213; [2023] Lloyd's Rep Plus 22.
7 [2022] SGHCR 5; [2022] Lloyd's Rep Plus 83.
8 [2022] SGHCR 6; [2023] 1 Lloyd's Rep 22.
9 [2022] SGHC 242; [2023] Lloyd's Rep Plus 18.
10 [2022] SGHC 263; [2023] Lloyd's Rep Plus 20.
11 [2022] EWCA Civ 1318; [2023] Lloyd's Rep Plus 4.

Contracts

Bills of lading

Surprisingly, the question of the status of the bill of lading in the hands of a shipper who is also the charterer, but which divests itself of the charterparty instead of the bill of lading, has never been judicially considered. The opportunity finally arose in *Unicredit Bank AG v Euronav NV*,[12] a litigation between a bank and a shipowner set to determine the rights of shippers and other bill of lading holders everywhere.

The claimant bank sought damages from the defendant owner of the vessel *Sienna* for delivery of a cargo of low-sulphur fuel oil without production of the bill of lading. The bill of lading had been issued by the defendant on 19 February 2020 under a charterparty with BP, to the order of BP or assigns. BP was therefore initially both the charterer and the bill of lading holder.

The bank had financed its client G's purchase of the cargo by a letter of credit on 1 April 2020, with the intention that G's buyers should pay directly to the bank on dates falling in late July and early August. On 6 April 2020 the charterparty was novated by BP to G. In late April and early May the cargo was discharged to other vessels by STS transfer. On 7 August BP endorsed the bill of lading to the bank.

> A shipper who holds the charterparty and a bill of lading and divests itself of the charterparty while holding on to the bill of lading is without a contract of carriage

The judge noted that, on the facts at hand, there was never any endorsement of the bill of lading to a third party. The original shipper had ceased to be the charterer on 6 April 2020 and thereafter the bill of lading was no longer in the hands of the charterer. Unlike in *Tate & Lyle Ltd v Hain Steamship Co Ltd*,[13] the bill of lading was not endorsed by the shipper at any point before it was endorsed to the bank.

The judge went on to hold that *Rodocanachi v Milburn*[14] did not support an analysis of the bill of lading as a document which has merely "temporarily lost its contractual force" while in the hands of the charterer. The claimant had not established that the bill of lading contained or evidenced a contract of carriage following the novation of the charterparty and prior to the alleged misdelivery.

Accordingly, a shipper who holds the charterparty and a bill of lading and divests itself of the charterparty while holding on to the bill of lading is without a contract of carriage. There are logical arguments and sound policy on both sides of the argument, and it will be interesting to see if the conclusion stands upon appeal: the case is expected to be heard at the end of March 2023.[15]

Delivery without production of the bill of lading continues to give rise to plentiful judicial business. There appears to be no prospect of carriers and banks learning the lesson that such practices are fraught with risk and abstaining – instead, ever-increasing methods of securing claims via letters of indemnity continue to be favoured. Singapore courts considered three such cases in the course of 2022, namely *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"*,[16] *Oversea-Chinese Banking Corporation Ltd v Owner and/or Demise Charterer of the Vessel "STI Orchard"*[17] and *Standard Chartered Bank (Singapore) Ltd v Maersk Tankers Singapore Pte Ltd*.[18] All three cases arose out of the collapse of Hin Leong Trading (HLT), but with different parties.

In *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"*,[19] the plaintiff bank had on 13 March 2020 become the holder of bills of lading in respect of a cargo of light naphtha on board the vessel *Navig8 Ametrine*, and subsequently claimed for misdelivery of the goods. The defendant was the demise charterer of the vessel.

The cargo had on 11 February 2020 been delivered to the third party HLT without presentation of the bills of lading. The bank was the issuer of credit facilities for the issuance of letters of credit in HLT's favour against the security of the bills of lading. In an unusual move, having

12 [2022] EWHC 957 (Comm); [2022] 2 Lloyd's Rep 467.
13 (1936) 55 Ll L Rep 159; (1936) 41 Com Cas 350.
14 (1886) 18 QBD 67.
15 Per https://casetracker.justice.gov.uk as of 29 December 2022.
16 [2022] SGHCR 5; [2022] Lloyd's Rep Plus 83.
17 [2022] SGHCR 6; [2023] 1 Lloyd's Rep 22.
18 [2022] SGHC 242; [2023] Lloyd's Rep Plus 18.
19 [2022] SGHCR 5; [2022] Lloyd's Rep Plus 83.

received the bills of lading, the plaintiff mistakenly endorsed and supplied them to a third party, T, but received them back and cancelled the endorsement. When the plaintiff next identified itself to the defendant as the lawful holder, the defendant replied that it had delivered the cargo to T. The plaintiff arrested the vessel and sought summary judgment.

The Assistant Registrar ("AR") declined to give summary judgment, but granted the prayer for interlocutory judgment with damages to be assessed.

In the view of the AR, a prima facie case for summary judgment was made out. T had been aware that the delivery of the bills of lading to it was a mistake and, applying *Aegean Sea Traders Corporation v Repsol Petroleo SA (The Aegean Sea)*,[20] had therefore not become the lawful holder. The actions did not amount to "possession as a result of the completion of an endorsement by delivery"[21] per section 5(2)(b) of the Singaporean Bills of Lading Act 1992.[22] The plaintiff remained the lawful holder and the other elements for a claim for misdelivery were in place.

The defendant's point that the mere fact that English law applied to the bills of lading was sufficient cause for leave to defend was rejected by the AR, who considered that the court should not be too quick to grant leave to defend simply because the applicability of foreign law was in question, or because there were differing opinions advanced by foreign law experts. The expert evidence on English law revealed no material contentious issue as to the application of English law.

The similar point and dismissive treatment thereof taken in the next case reported below is to be noted.

The AR went on to consider that no triable issue arose from the defendant's assertion that the bank had taken the bills purely for the rights of suit, without any genuine interest in the cargo they represented. A very similar argument that this was incompatible with the "good faith" requirement in the UK Carriage of Goods by Sea Act 1992 section 5(2) had been advanced and rejected in *The Yue You 902*.[23]

Nor did the AR discern any triable issue in the defendant's argument that the plaintiff had authorised the delivery to HLT where delivery had taken place before the plaintiff became the lawful holder. Nor was there contractual support for this proposition in any of the relevant contracts.

Finally, while there was authority supporting an award of damages by reference to the invoice value, the authorities did not provide that this was *invariably* the method of calculation of damages. A triable issue arose on the issue of quantum.

A second Singaporean case also arose out of delivery without presentation and the collapse of HLT. In *Oversea-Chinese Banking Corporation Ltd v Owner and/or Demise Charterer of the Vessel "STI Orchard"*,[24] the plaintiff bank was the holder of bills of lading for a cargo of gasoil on board the defendants' vessel *STI Orchard* following the collapse of the buyer of the cargo, HLT, which was not a party to the litigation. The bank had financed HLT's purchase of the cargo through a credit facilities letter and letter of credit. The cargo had been delivered to HLT without production of the bills of lading. Following the collapse of HLT, the bills of lading had on 22 June 2020 been delivered by the seller of the cargo to the bank and on 17 February 2021 had been endorsed by HLT's judicial managers to the bank.

Relying on an alleged breach of the contract of carriage the bank sought summary judgment for the invoice value of the cargo, or interlocutory judgment with damages to be assessed. The shipowner and the intervener, the seller of the cargo to HLT, sought leave to defend on grounds that the plaintiff did not become holder of the bills of lading in good faith; that the bills were spent by the time they were endorsed to the plaintiff; and that the plaintiff had consented to delivery without presentation of the bills of lading.

The AR rejected the plaintiff's application for summary judgment and granted unconditional leave to defend.

First, on a point of the approach to foreign law, the AR noted that English law applied to the bills of lading by virtue of the incorporation of the voyage charterparty choice of law clause, but went on to hold that evidence as to English law was not necessary because the Bills of Lading Act 1992 was in pari materia with the Carriage of Goods by Sea Act 1992. This has been a live question before the Singapore courts in recent times and the conclusion is interesting to note – no doubt realistic and capable of saving the parties some costs of evidence, but some parties will feel that they have not been fully heard.

20 [1998] 2 Lloyd's Rep 39.
21 *The Aegean Sea* at page 59 col 2.
22 Available at https://sso.agc.gov.sg/Act/BLA1992 (accessed on 29 December 2022).
23 [2019] SGHC 106; [2019] 2 Lloyd's Rep 617; [2020] 3 SLR 573.
24 [2022] SGHCR 6; [2023] 1 Lloyd's Rep 22.

The AR went on to hold that the plaintiff had established a prima facie case, but that there was a triable issue on whether it was in possession of the bills of lading in good faith, such that it had title to sue. By the time the plaintiff had taken steps to have the bills of lading indorsed to it, HLT was in financial difficulties and the cargo had been discharged from the vessel and blended. It was, the AR considered, at least arguable that this did not meet the good faith standard of "honest conduct". The determination of this issue required evidence to evaluate the defendants' argument that the bills of lading were not intended to be relied upon by the plaintiff as security for the financing of HLT's purchase of the cargo, where the plaintiff had known that the cargo would be blended and sold on and had looked instead to the sale proceeds for security.

The AR went on to hold that there was also an arguable case that the bills of lading had become spent when they were received by HLT, which had earlier obtained delivery of the cargo. Finally, the defence of consent to delivery without production of the bill of lading was not clearly unarguable on the facts of the case.

A third case arose out of the same broad factual background. In *Standard Chartered Bank (Singapore) Ltd v Maersk Tankers Singapore Pte Ltd*,[25] the plaintiff was yet again a bank. On this occasion, the plaintiff sought damages for breach of the contract of carriage, arising from the defendant carrier's failure to deliver a cargo of gasoil to the plaintiff despite the latter being the lawful holder of the bills of lading. The plaintiff also pleaded an alternative claim in conversion.

This plaintiff had also provided trade financing to its customer HLT, the subsequently defunct oil trading company, for the purchase of the cargo. The sale contract required the seller, an intervener in the proceedings, to deliver the cargo ex ship Singapore and it had chartered the defendant's vessel for this purpose. Payment was to be by irrevocable letter of credit within 30 days of notice of readiness to discharge. Delivery took place without production of the original bills of lading and was completed on 29 February 2020. On 3 March HLT applied to the plaintiff for a letter of credit in favour of the seller, specifying that the latest delivery date was 29 February 2020. Payment to the seller was to take place against original bills of lading or against a letter of indemnity issued by the seller to HLT in consideration of delivery without production of the bills of lading. The form of this letter of indemnity was appended to the letter of credit. Payment took place on 27 March 2020 against such a letter of indemnity, and on 7 August 2020 the seller also endorsed the bills of lading to the plaintiff.

On 19 November 2020 the plaintiff demanded delivery of the cargo on the basis that it was the lawful holder of the bills, subsequently commencing the present proceedings for misdelivery or conversion.

The AR had granted summary judgment for the plaintiff on the issue of liability with damages to be assessed. The defendant appealed.

The judge allowed the appeal, setting aside the order of the AR. There was a triable issue as to whether the defendant's misdelivery had caused the plaintiff's loss, ie whether the plaintiff had suffered a recoverable loss from the defendant's breach of the contract of carriage. Where the letter of credit post-dated delivery, the issue of whether the plaintiff had looked to the bills of lading as security for its financing of HLT's purchase of the gasoil cargo ought to be fully explored at trial with examination of the precise financing and security arrangements between the financing bank claimant and its customer; and whether the plaintiff had known at the time the letter of credit was issued that the cargo had already been discharged to HLT.

[25] [2022] SGHC 242; [2023] Lloyd's Rep Plus 18.

While all three litigations dispense with some issues, they also identify triable issues that must presumably be either litigated or settled. It will be a long time before the final distribution of losses from the HLT collapse is complete.

Several cases of at least local interest addressed issues relating to bills of lading.

In *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG (The BBC Nile)*,[26] questions of Australian law before the Federal Court of Australia were a precursor to arbitration proceedings in London. The litigation plaintiff Carmichael was the buyer of a cargo of steel rails from Whyalla in South Australia to Mackay, Queensland on board *BBC Nile*, under a bill of lading containing in clause 3 a clause paramount and in clause 4 an English law and London arbitration clause. The defendant BBC was the carrier.

Notice of arrival was issued at Mackay on 24 December 2020. The next day the crew observed a stow collapse in one of the holds, as a result of which the rails in that hold were damaged and unusable. The rails were sold as scrap. The parties agreed extensions to the time bar until ultimately 24 September 2022.

On 2 August 2022 the litigation defendant BBC gave notice to Carmichael that it had commenced arbitration in London. On 12 August 2022 Carmichael applied to the court seeking to restrain the commencement or maintenance of any proceedings brought in connection with the first defendant's carriage of the goods otherwise than in Australian courts, asserting a statutory right to an anti-suit injunction under the Carriage of Goods by Sea Act 1991 (Cth) (COGSA). An interim injunction was granted. BBC in turn sought a stay in favour of London arbitration.

Issues arose as to the effect of the combination of the English law and paramount clauses, including whether section 10(1)(b)(ii) of COGSA invalidated the choice of law or jurisdiction clauses. Carmichael pointed to the lower limitation amounts and the mandatory application of the amended Australian Hague Rules. The first defendant undertook not to take any time bar defence not otherwise available to it as at 12 August 2022 in the London arbitration; and to admit in the London arbitration that the Australian amended Hague Rules applied to the bill of lading and the plaintiff's claims thereunder.

The court ordered that the application for an anti-suit injunction be dismissed and the claim stayed in favour of London arbitration, and declared that the Australian amended Hague Rules applied to the bill of lading.

The court observed that both parties agreed that the Australian Hague Rules applied to the bill of lading and it was appropriate for the court to make such a declaration. By virtue of having consented to that declaration, BBC had submitted to the jurisdiction of the court, creating an issue estoppel applicable in arbitration. Given BBC's undertaking that the Australian Hague Rules applied "as applied under Australian law", the question as to lessening BBC's liability by the application of English law was moot.

The court declined to go further into the dispute, taking the view that in light of BBC's admission and in the absence of full argument, the construction of the terms of the bill of lading (including the FIOST[27] clause, the interpretation of which might differ under Australian and English law) was a matter for the tribunal. In the result, clause 4 was not rendered void by COGSA section 10(1).

Nor did the court agree that the legislative history of section 11(2) of COGSA provided support for the proposition that it applied to inter-state carriage within Australia. The section did not prevent the parties to a sea carriage document relating to inter-state carriage from contracting out of a foreign choice of jurisdiction clause.

From Canada, *Arc-en-Ciel Produce Inc v The Ship "BF Leticia"*[28] considered the domestic legal framework designed to protect cargo importers from having to litigate against carriers abroad. This protection depended on whether the carriage was under a bill of lading.

The plaintiff cargo interest claimed against the defendant carrying vessels and associated carrier entities. The action concerned containerised shipments of fresh produce transported from Costa Rica via Wilmington in the United States and then by road to Etobicoke in Canada. The plaintiff sought damages alleging that the cargo had arrived in a damaged and deteriorated state.

The defendants sought a stay arguing that the carriage contracts contained a forum selection clause in favour of a New York court. The plaintiff argued in response that the forum selection clause should be set aside pursuant to section 46 of the Marine Liability Act, SC 2001, c 6 section 46 which provided for this result notably where

[26] [2022] FCAFC 171; [2023] Lloyd's Rep Plus 23.

[27] "Free in and out stowed and trimmed".

[28] 2022 FC 843; [2022] Lloyd's Rep Plus 105 .

the carrier had an agent in Canada as was the case here; and in the alternative that a strong cause existed to set aside the forum selection clause.

The carriage of the cargoes was performed under a service contract incorporating the carrier's bill of lading which was said to determine the terms and conditions of the shipment. Carriage was door-to-door, with the carrier's containers packed by the shipper. Once loaded on board, the carrier sent the plaintiff an email containing a notice of arrival and a copy of a shipping document for each container. The plaintiff asserted, but the defendants denied that this shipping document was a bill of lading. On the plaintiff's case, the defendant was a common carrier and Canada's protective rules applied. On the defendant's case, the Canadian statute which was based on the Hague-Visby Rules did not cover the shipping document.

Rochester J granted the stay on condition of defendants waiving any time bar. She first determined that the shipping document was not a bill of lading. It was non-negotiable, no originals were issued, it was not signed and the attestation clause was left blank. It was annotated "express release" and no presentation was required for delivery. These factors weighed heavily against it being a bill of lading or similar document of title under the Hague-Visby Rules, even though it contained numerous references to the "bill of lading" and was headed "International bill of lading".

She went on to note that the shipping document had been treated by the parties as a sea waybill. It was a receipt and evidence of the terms of the contract of carriage, but not a document of title, and was therefore not a "bill of lading or similar document of title" to which the Hague-Visby Rules applied.

On the basis that the Hague-Visby Rules did not apply, she went on to hold that the shipping document was not a "contract for the carriage of goods by water" under section 43 of the Act, and could therefore not be such a contract under section 46 as the words must have the same meaning within the statute. The purposes of the two sections were not so different as to warrant a different construction. Canada's carriage of goods regime and whether it should be extended to apply to waybills was, she noted, a question for parliament.

The order that the carrier was to waive any time bar was issued so as to preserve the rights of the cargo interests.

Issues related to sea waybills and booking notes arose for consideration by the Federal Court of Australia in *Poralu Marine Australia Pty Ltd v MV Dijksgracht*.[29] The case concerned the application of the Australian Hague-Visby Rules and to what extent they apply to contracts that do not fall squarely within their scope. At the heart of the case was a booking note.

The facts were that between 6 and 11 December 2019, 23 pontoons and 11 pallets had been loaded on board the motor vessel *Dijksgracht* at the port of Cork, Ireland, as breakbulk cargo. The cargo was consigned to the plaintiff Poralu Marine Australia Pty Ltd for installation at the Royal Geelong Yacht Club. It was discharged on or about 13 February 2020 at Geelong.

Poralu alleged that the cargo was loaded on board the vessel in sound condition and that three pontoons were found to have been damaged when the cargo was discharged, and commenced two actions for damages arising from the alleged damage to the cargo, both in bailment and the tort of negligence. The first action was in rem against the vessel and its owner, said to be Dijksgracht CV, a Netherlands company. The second was an action in personam against Spliethoff Transport as carrier and Dijksgracht CV, substituted by Rederij Dijksgracht, said to be the shipowner.

The agreement for the carriage had been made by emails between Poralu and Spliethoff Transport, resulting in a filled-out, unsigned booking note. Following loading, a sea waybill was issued. Poralu asserted that the contract of carriage was concluded in the recap, while Spliethoff Transport contended that the contract of carriage was concluded with the agreement of the terms of the booking note, alternatively that it amended or superseded the recap agreement.

Stewart J first considered the recap emails, holding that at the time of their exchange, there was no binding contract. There was insufficient agreement on terms; the emails set out terms "agreed so far". It was clear from the language used that they required confirmation, with more to be agreed.

Next, he held with reference to the booking note that it was an offer capable of acceptance, and that it was accepted. Though there was a signature box, nothing in its wording or prior correspondence required signature. The differences compared to prior exchanges, including

[29] [2022] FCA 1038; [2023] Lloyd's Rep Plus 19.

the omission of an English law and arbitration clause, could not form part of the contract formation analysis.

Further, reading the booking note and the sea waybill together, the override clause in the booking note meant that the terms of the booking note must prevail over the sea waybill. The sea waybill did not embody the contract but was a mere receipt. The booking note formed the contract of carriage.

> It would lead to intolerable uncertainty if the place of issue of a bill of lading depended on where a particular person was at any given time when they sent or received an email

The judge went on to find that under the booking note contract, the Hague Rules and Dutch law, Poralu had a right to demand a bill of lading but had not done so.

As for the terms of the contract, none of the requirements of article 10 of the Hague-Visby Rules were fulfilled where the port of loading was not located in a state party to the Visby Protocol; and where no bill of lading had been issued, whether in a contracting state or not. It would be highly artificial to identify the place where a bill of lading would have been issued, had one been issued. If no bill of lading had been issued, then article 10(a) could not be satisfied.

The bill of lading could in principle be issued anywhere in the absence of any contractual terms to the contrary. If a bill of lading had been issued, it should be regarded as having been issued where it was stated in it to have been issued, and in the absence of such a statement then where it was in fact signed or authenticated. It would lead to intolerable uncertainty if the place of issue of a bill of lading depended on where a particular person was at any given time when they sent or received an email.

Two cases turned on the applicability of the one-year time bar in the Hague-Visby or Hague Rules. In *Fimbank plc v KCH Shipping Co Ltd*,[30] the question arose as to the applicability of the Hague-Visby Rules time bar to a claim for misdelivery.

The claimant was a trade finance bank and the defendant was (or had been) the carrier of goods under certain bills of lading held by the bank. The bills of lading were on the Congenbill form and subject to the Hague-Visby Rules by way of incorporation from the charterparty. Discharge of the cargo of coal had taken place into stockpiles at Indian ports, against letters of indemnity.

In arbitration the bank brought a misdelivery claim against the carrier. The carrier successfully argued that the claim was time-barred by the Hague-Visby Rules, article III rule 6, because the arbitration had been commenced more than one year after discharge. The claimant obtained permission to appeal the award on this point of law, arguing that the time bar did not apply to a claim for misdelivery *following* discharge; and that clause 2(c) of the Congenbill terms disapplied the Hague-Visby Rules to the period following discharge.

Clause 2(c) provided as follows.

> "The Carrier shall in no case be responsible for loss and damage to the cargo, howsoever arising prior to loading into and after discharge from the Vessel o[r] while the cargo is the charge of another Carrier, nor in respect of deck cargo or live animals."

Sir William Blair dismissed the bank's appeal. He directed himself that the purpose of the time bar was to achieve finality, and that there was authority to the effect that the words in article III rule 6 were apt to cover goods which although intended to be loaded are in fact never loaded, finding support in *Compania Portorafti Commerciale SA v Ultramar Panama Inc (The Captain Gregos)*[31] and *Cargill International SA v CPN Tankers (Bermuda) Ltd (The OT Sonja)*.[32]

Having reviewed the authorities, the judge concluded that there was no consensus to the contrary in decisions from other common law jurisdictions or in literature, but there was adequate support in favour of the proposition that the carriage contract continued during storage and until delivery, with the Hague-Visby Rules applied as implied terms before loading and after discharge.

The judge noted that Congenbill clause 2(c) was intended to relieve the carrier of liability for loss of or damage to the cargo after discharge from the vessel. It would be counterintuitive if its effect were that of depriving the carrier of the benefit of a time bar which would otherwise

30 [2022] EWHC 2400 (Comm); [2023] Lloyd's Rep Plus 1.

31 [1990] 1 Lloyd's Rep 310.

32 [1993] 2 Lloyd's Rep 435.

be available. The clause was silent as to the carrier's ability to rely on its immunity under article III rule 6, and about the applicability of the Hague-Visby Rules generally. *The MSC Amsterdam*[33] did not require a different result and could be distinguished: it had considered article IV rule 5 and not article III rule 6, and the clause at issue had been materially different.

The decision has been appealed and is expected to be heard by October 2023.[34]

> Congenbill clause 2(c) was intended to relieve the carrier of liability for loss of or damage to the cargo after discharge from the vessel. It would be counterintuitive if its effect were that of depriving the carrier of the benefit of a time bar which would otherwise be available

The one-year time bar was also the threshold issue in *Ixom Operations Pty Ltd v Blue One Shipping SA*,[35] which may be said to have arisen out of a vexing oversight by otherwise cautious counsel.

The plaintiff Ixom was the buyer and consignee of a cargo of approximately 25,300 mt of sulphuric acid shipped in bulk from Korea to Australia. T, the vendor and consignor but not a party to the litigation, voyage-chartered the tanker *CS Onsan* from the third defendant CS Marine as disponent owner. CS Marine was the bareboat charterer from the first defendant, Blue One Shipping. There was no relevant second defendant. Ixom was not a party to the charterparties but was named as consignee on a non-negotiable tanker bill of lading dated 22 May 2017.

Upon arrival at Gladstone in Queensland on 6 June 2017, discolouration of the cargo was observed. A dispute as to whether Ixom would take delivery of the consignment was resolved by a variation in the arrangements for discharge, and Ixom reserved its rights to pursue a claim. An extension of the limitation period under the Hague-Visby Rules was sought and was granted on 25 May 2018.

The plaintiff's lawyers from the early stages operated on the basis that the carrier might be either Blue One or CS Marine and correspondence used language capable of encompassing both. When the extension of the time bar was sought it referred to "owners" and was granted by "our client", through lawyers acting on behalf of both defendants. However, on 25 November 2020, Ixom commenced proceedings only against Blue One Shipping. CS Marine was later joined to the proceedings.

The position in the litigation was now that the registered owner Blue One Shipping had been sued within the time bar, but denied that it was a party to the bill of lading; and that the time for a claim against CS Marine, which admitted that it was the carrier and a bailee for reward, had expired. The plaintiff argued that as a result of certain communications, Blue One Shipping was estopped from asserting that it was not the carrier.

The judge dismissed the application. Blue One Shipping was not estopped from denying that it was a party to the contract of carriage, and CS Marine was not estopped from relying on the Hague-Visby Rules time bar as against Ixom. Ixom had not established that an email on 25 May 2018 contained any representation that Blue One Shipping as owner was a party to the contract of carriage evidenced by the bill of lading. Nor did the email purport to give an extension only on behalf of Blue One Shipping, or misrepresent the parties to the bill of lading. A reasonable recipient would have understood it to mean that Ixom got the extension it had sought, from whichever party was the carrier. *The Stolt Loyalty*[36] was to be distinguished on its facts as it had turned on the ambiguity of the word "owners" and whether it included the demise charterer; and the extension here had been granted on behalf of both defendants.

Finally, a case presumably entirely on its own facts provided the occasion to consider some wider issues. In *Sea Master Special Maritime Enterprise and Another v Arab Bank (Switzerland) Ltd*,[37] the claimants appealed under section 67 of the Arbitration Act 1996 arguing that certain counterclaims, brought before the tribunal by the claimants themselves, fell outside of the arbitration agreement. The claims concerned reasonable remuneration and quantum meruit and the decision under appeal was the tribunal's decision that they had arisen out of and in connection with the bill of lading at issue.

33 *Trafigura Beheer BV v Mediterranean Shipping Co SA (The MSC Amsterdam)* [2007] EWCA Civ 794; [2007] 2 Lloyd's Rep 622.
34 Per https://casetracker.justice.gov.uk as of 24 December 2022.
35 [2022] FCA 1101; [2023] Lloyd's Rep Plus 27.
36 [1993] 2 Lloyd's Rep 281 (Clarke J); [1995] 1 Lloyd's Rep 598 (CA).
37 [2022] EWHC 1953 (Comm); [2022] Lloyd's Rep Plus 94.

The defendant was a bank and had provided finance for the bill of lading cargo. The cargo was shipped from Argentina, initially to Morocco but on 8 November 2016 a switch bill was issued designating Lebanon as the destination. The cargo was nevertheless discharged in Morocco without production of the bill of lading.

The bank commenced proceedings in Connecticut to obtain security for a misdelivery claim and commenced arbitration seeking damages. Sea Master counterclaimed for demurrage and damages for detention, its charterer having meanwhile become insolvent. The bank challenged the tribunal's jurisdiction over these counterclaims.

It was common ground that Sea Master's claims for reasonable remuneration and quantum meruit were by this time also before the tribunal. The tribunal upheld the bank's challenge to its jurisdiction over "counterclaims under the additional bills of lading". On appeal,[38] Popplewell J had in an order in 2018 held that the bank was bound by the jurisdiction agreement in the switch bill by virtue of having been a bill of lading holder. In a second award, the tribunal then held that the tribunal's first decision that it did not have jurisdiction was binding on the parties and that there was an issue estoppel, *except* insofar as concerned Popplewell J's order that the bank was a party to the bills of lading. Accordingly, the bank applied for a declaration by the tribunal that all of Sea Master's claims had been dismissed. Sea Master retorted that the tribunal's jurisdictional ruling in the first award had been that the counterclaims for reasonable remuneration and quantum meruit fell outside the tribunal's jurisdiction, that that ruling was not challenged on the section 67 application and that the ruling was not disturbed by the order of Popplewell J.

In a further award, the tribunal dismissed Sea Master's claims "arising out of or in connection with the contract contained in or evidenced by the switch bill". The bank applied for the release of the Connecticut security and Sea Master objected with reference to the claims for reasonable remuneration and quantum meruit. The bank sought an anti-suit injunction from the tribunal to restrain Sea Master from pursuing the counterclaims in the Connecticut proceedings.

On 1 November 2021 the tribunal granted the anti-suit injunction, deciding that the counterclaims for reasonable remuneration and quantum meruit were counterclaims in the reference that "arose out of or in connection with" the switch bill. Sea Master appealed this decision under section 67 of the Arbitration Act 1996.

Picken J held that Sea Master's challenge to the jurisdiction of the tribunal failed, reasoning as follows. First, while the tribunal in its first decision had decided that the remuneration and quantum meruit claims were extra-contractual and that it lacked jurisdiction, that decision concluded specifically the issue as to whether the bank was an assignee or an original party to the switch bill, and did not rest upon a reading of the arbitration agreement therein.

Secondly, neither the first award nor the order of Popplewell J gave rise to an issue estoppel to the effect that the counterclaims for reasonable remuneration and quantum meruit did not arise out of or in connection with the bills. The claims were counterclaims within the scope of the award and the order.

Thirdly, even if Sea Master's understanding was that the wording of the order of Popplewell J had the meaning and effect that the counterclaims for reasonable remuneration and quantum meruit were not within the "counterclaims" as defined in the order, because they did not arise out of or in connection with the contract contained in or evidenced by the switch bill, there was no evidence that the bank shared that understanding, such as to give rise to an estoppel by convention.

Finally, there was nothing in the wording of the arbitration agreement to displace the "one-stop" *Fiona Trust*[39] approach. The reasonable remuneration and quantum meruit claims were for storage charges pertaining to the period the cargo remained on board and were self-evidently arising out of or in connection with the switch bill contract.

[38] [2018] EWHC 1902 (Comm); [2019] 1 Lloyd's Rep 101.

[39] *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40; [2008] 1 Lloyd's Rep 254.

Charterparties

In 2022 charterparty litigation came to be dominated, as it will no doubt continue to be, by sanctions-related issues.

Demise or bareboat charterparties

Cases arising out of demise or bareboat charterparties, where the charterparty was being used as a structured finance tool rather than a management tool, were a feature of the year. This involves the lender buying a vessel instead of the intended buyer, and demise chartering it to the intended buyer for the payment period – a form of hire purchase with shipping contracts. The buyer receives unimpeded usage of the vessel and must pay hire and perhaps additional sums, but receives transfer of title at the end of the bareboat charter (purchase sum payment) period. The advantage for the lender, who obtains crystallised and registered property rights instead of a mere mortgage or some other security, are obvious. It might be observed that finance demise charterparties are more likely to be the subject of litigation than management demise charterparties due to the arm's length business relationship underlying the transaction. There appears to be a distinct possibility that the law over time develops to cater for the former, at the expense of the latter.

Several of the cases had to do with sanctions – to which long-term contracts for a valuable item of property are particularly vulnerable.

In *OCM Maritime Nile LLC and Another v Courage Shipping Co and Others (The Courage and the Amethyst)*,[40] decided both at first instance[41] and in the Court of Appeal in 2022, the registered owner sought possession of demise-chartered vessels following sanctions against the owner.

The claimants were the registered owners of the vessels *Courage* and *Amethyst*, bareboat chartered to the defendants, and asserted that various events of default had occurred entitling them to terminate the charterparties. Their parent company had on 12 July 2019 entered into an agreement with the third defendant pursuant to which the claimants would own and the defendants would bareboat charter vessels, as a result of which the claimants would be providing finance for the defendants' purchase transaction. The charters would be bareboat charters of a "hell or high water" character – with few or no off-hire provisions – and on Barecon 2001 terms. The hire was composed of a fixed and a floating element and there was an option for the charterer to purchase, and an obligation to purchase, on the final day of the charter. The purpose of the first two defendants was to enter into these charters. The third defendant was the controlling company and the manager of the vessels.

> It might be observed that finance demise charterparties are more likely to be the subject of litigation than management demise charterparties due to the arm's length business relationship underlying the transaction

On 10 June 2021 Mr M, who controlled the defendants, was designated a "Specially Designated Global Terrorist" by the United States and added to a blocked persons list, as a result of which the defendant companies were also blocked. Soon thereafter, the claimants served notice of events of default and went on to seek declarations that the charterparties had been lawfully terminated and that they were entitled to possession of the vessels.

The defendants did not dispute that events of default had occurred, but denied that on a proper construction of the charterparties the claimants were entitled to possession. They also submitted that the claim for possession relied on provisions in the charterparty that were void and unenforceable, and finally also brought a counterclaim for relief from forfeiture.

At first instance,[42] Sir Andrew Smith held that on a proper construction of the "Owners' rights" clause, typed clause 46, the owners were entitled to call for possession of the vessels. This was not contingent upon a notice being served – following an event of default and termination, the owner had an option to serve a notice; but was not obliged to do so.

The judge rejected the defendants' argument that an immediate right to possession for owners in the event of termination amounted to a penalty because it deprived defendants of their right to purchase the vessels and of their contribution to the purchase price. He considered

[40] [2022] EWCA Civ 1091; [2023] 1 Lloyd's Rep 13.
[41] [2022] EWHC 452 (Comm); [2022] 2 Lloyd's Rep 619.
[42] [2022] EWHC 452 (Comm); [2022] 2 Lloyd's Rep 619.

that the purchase option and obligation clause 48 did not in form or in substance impose any secondary obligation on the charterer in the event of a breach of a primary obligation. As a result the question of whether it was penal did not arise.

Permission to appeal was refused by the UK Supreme Court on 2 November 2022.

The defendants appealed, but the Court of Appeal dismissed the appeal: the judge had been right to construe the charterparty as meaning that upon termination of the charterparty following an event of default, the owner was entitled to possession of the vessel. There was an option for the owner to serve a notice requiring payment, but it was not required to do so.

The Court of Appeal offered some thoughts on the sanctions context while considering the defendants' argument for relief against forfeiture. First, such relief was wholly inappropriate where charterers had advanced a dishonest case on Mr M's continued association with them. It appears that the Court of Appeal here sought honesty as to the defendants' discontinued or continuing relationships with sanctioned entities – an important point for parties seeking equitable relief. Furthermore, the critical point was said to be the effect of the US sanctions regime. Granting relief from forfeiture by restoring the charterparties would have forced the owners into a continuing contractual relationship with, and would require them to transfer the vessels to, a designated person. There was a risk of serious consequences for the owners in that they would themselves become subject to the US sanctions regime – again an important observation for the future, though somewhat contradicted by the result in *Mur Shipping BV v RTI Ltd*.[43]

Next, *Pola Logistics Ltd v GTLK Europe Designated Activity Company and Others*[44] combined the issue of finance demise charterparties with the issue of sanctions.

By an application to the High Court of Ireland on 16 August 2022, the plaintiff Pola Logistics sought specific performance against the second defendant, GTLK Malta, of purchase options contained in a number of charters in relation to five seagoing vessels.

The vessels were tug-boats and barges leased to the plaintiff by GTLK Malta, which was a special purpose vehicle and wholly owned subsidiary of the first defendant GTLK Europe, an Irish-registered company. The ultimate owner of the group of companies was the Ministry of Transport of the Russian Federation. On 2 August 2022 GTLK Europe had been added to the list administered by the US Department of the Treasury's Office of Foreign Assets Control of "Specially Designated Nationals", with the result that the plaintiff was to wind down its relationship with the first and second defendants prior to 1 September 2022. GTLK Europe had also had its assets frozen under the sanctions regulations[45] since 8 April 2022.

The bareboat charters were subject to English law and London arbitration and were essentially hire purchase agreements for 120 months with transfer of title at the end of the period, and with an option to buy at any time. On 10 August the plaintiff had given notice of intention to purchase the vessels with a delivery date of 9 September 2022, subject to authorisation by the Central Bank.

Mark Sanfey J issued an order for specific performance giving effect to the plaintiff's purchase options. The defendants had not applied for enforcement of the arbitration clause. The court had an inherent jurisdiction to grant summary judgment in plenary proceedings, and the invocation of such relief may be particularly appropriate in circumstances where there is either clearly no defence, or where the defendant effectively acquiesces in the relief sought. In the circumstances, there could be no award of damages against entities that were the subject of sanctions. The economic viability of the plaintiff depended on exercising the purchase options. The plaintiff was legitimately exercising a contractual entitlement. The defendants did not object to the orders and there was no evidence of collusive purposes.

In *Ceto Shipping Corporation v Savory Shipping Inc (The Victor 1)*,[46] the claimant Ceto was the demise charterer and the defendant Savory was the owner of MT *Victor 1*, later renamed *Spirit*. The charterparty was entered into on 28 February 2019 and amended in December 2019 and was for a period of 36 months, expiring on 1 April 2022. It was on Barecon 2001 terms as amended by the parties, including notably a deletion of the redelivery provisions. Appended to the charterparty was a memorandum of agreement on the Saleform 2012 also dated 28 February 2019, where the sale price was broken down into an initial payment plus bareboat charterparty hire for 36 months. The December 2019 addendum included a clause 39.1 which provided that title would transfer to Ceto provided they had paid all hire and "all management fees and any other sums due under the management agreement".

43 [2022] EWCA Civ 1406; [2023] Lloyd's Rep Plus 3: see "Voyage charterparties and contracts of affreightment" at page 14 below.

44 [2022] IEHC 501; [2023] Lloyd's Rep Plus 16.

45 Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

46 [2022] EWHC 2636 (Comm); [2023] Lloyd's Rep Plus 24.

The claimant sought a declaration to the effect that it had acquired title to the ship on 1 April 2022, notwithstanding fees being owed to the ship manager, where those debts were being disputed in good faith.

The judge dismissed the claim. Upon the proper construction of clause 39.1 of the charterparty, title to the ship had not passed to the claimant, and the defendant was under no obligation to transfer title, if the claimant owed management fees or any other sum under its management agreement. Sums due meant sums due.

Time charterparties

Both time charterparty cases under examination here concerned the performance warranty, but in different circumstances: first, the data forming the basis of the fixture in *SK Shipping Europe plc v Capital VLCC 3 Corp and Another (The C Challenger)*;[47] and then in *Eastern Pacific Chartering Inc v Pola Maritime Ltd (The Divinegate)* a question of interpretation of the performance warranty along with a question of wrongful arrest.[48]

The Court of Appeal had its turn in *SK Shipping Europe plc v Capital VLCC 3 Corp and Another (The C Challenger)*.[49] The claimant was the owner and the defendants were the time charterer and charterparty guarantor of the VLCC *C Challenger*. The charterparty contained terms warranting fuel consumption and speed and a term requiring the owner to obtain and maintain approval of at least three oil majors. Following problems with a turbocharger, the charterers alleged inter alia that the owners had intentionally misdescribed the speed and consumption characteristics and that they were in breach of obligations to maintain oil major approvals and threatened to terminate or rescind the charterparty. The owners denied breach and offered to adjust hire. On a subsequent voyage the vessel overconsumed to such an extent that it ran out of fuel during a discharge operation, possibly due to hull fouling. On 19 October 2017 the charterer purported to rescind for misrepresentation or to terminate for repudiatory breach. The following day, the owners purported to terminate on the basis that the charterers' message was itself a renunciation.

At first instance,[50] the judge held that the charterer's recission was itself a repudiation and that therefore the charterer's and guarantor's claims failed, so that the owner was entitled to damages for the charterer's repudiatory breach.

The charterer appealed, contending for more extensive misrepresentations than had been found by the judge, notably that in addition to a representation as to recent performance, the judge ought to have found that the owner expected the vessel to achieve substantially the same performance in future.

The Court of Appeal dismissed the appeal. A prospective charterer familiar with the market would have understood the owner as saying "this is how my vessel has performed on its most recent voyages and these are the warranties I am prepared to give" and nothing more. From the charterers' reasonable inference that the owners believed themselves capable of complying with the proposed warranty it did not follow that the owners were making any representation about this.

The owners' willingness to contract on the terms which were eventually agreed did not amount to a repetition of the representations previously made. There was no general rule that, merely by offering to contract, a party represented that it was able and willing to perform the contract.

The proposed warranties had to be understood in their intended context, which was a guarantee but with detailed provision as to what would happen if the vessel failed to perform accordingly. These were words of obligation, not representation. As the judge had found, the mere offer of a speed and consumption warranty was not of itself an implied representation as to current or recent performance.

On whether the charterer had been induced to enter into the contract, the relevant enquiry was whether the claimant would have entered into the contract if the representation had not been made at all; not whether it would have done so if it had been told the true position. The judge had considered that the relevant scenario was the owners offering the same warranty, but without any representation as to recent performance. Indeed,

47 [2022] EWCA Civ 231; [2022] 1 Lloyd's Rep 521.
48 [2022] EWHC 2095 (Comm); [2022] Lloyd's Rep Plus 99.
49 [2022] EWCA Civ 231; [2022] 1 Lloyd's Rep 521.
50 *SK Shipping Europe plc v Capital VLCC 3 Corp and Another (The C Challenger)* [2020] EWHC 3448 (Comm); [2021] 2 Lloyd's Rep 109. The first instance decision was reviewed in Johanna Hjalmarsson, "Maritime law in 2021: a review of developments in case law" (accessed on 2 January 2023).

the other optional scenarios were highly unrealistic. On that basis, the judge had been entitled to find that the charterparty would still have been concluded on the same terms.

The second case on the performance warranty was *Eastern Pacific Chartering Inc v Pola Maritime Ltd (The Divinegate)*.[51] On 20 March 2019 the claimant disponent owner had trip-time chartered the bulk carrier *Divinegate* to the defendant on an amended NYPE 1946 form with additional clauses for the carriage of a cargo of pig iron from Riga via the Baltic sea to the Mississippi River in the USA. Discharge in New Orleans was completed on 1 November 2019.

> Charterers should not be in a position to benefit, in the event of arrest, from keeping information about internal chartering arrangements out of the public domain

The claimant sought unpaid hire, bunkers and expenses totalling US$99,982.79. The defendant sought deductions from hire of US$93,074.55 for failure to proceed with utmost despatch on the voyage and hull fouling, and also made a counterclaim for US$72,629.01 as damages in tort on grounds of the claimant's allegedly wrongful arrest of the vessel *Pola Devora*. That vessel had been arrested by the claimant on 2 July 2020 at Gibraltar as security for the hire claim. The defendant immediately disputed that they were beneficial owners of *Pola Devora*, maintaining that it was the time charterer, and that the arrest had been wrongful. The claimant retorted that the defendant's claims were time barred and that the arrest had not been wrongful.

The judge held that the defendant succeeded on the time bar. The relevant charterparty clause did not require the charterer to have presented or quantified its claim with such precision and completeness that every aspect of the claim was properly supported by documentation.[52]

On the performance warranty, the judge directed herself that the cases suggested that where the parties have adopted a performance warranty based on good weather performance, applying the warranty was the primary method for assessing any claim since it reflected the chosen benchmark for performance. Where the parties had expressly excluded adverse currents, time spent sailing with a positive current would be counted. Using the established "good weather method", the counterclaim for slow steaming succeeded to the extent that the defendant had established a loss of 16 hours to be deducted from hire. The RPM[53] method was on the facts present not a reliable method to identify loss of time because it relied on incorrect assumptions.

As for the claim for hull fouling, it would be rejected. The use of the good weather method for calculating loss from slow steaming would otherwise lead to double recovery.

While the defendant succeeded in showing that it was not the beneficial owner of the vessel *Pola Devora* at the time of the arrest, it was ultimately unsuccessful on the claim for damages for wrongful arrest. The vessel had been time chartered from a bareboat charterer within the same group of companies which had the vessel on a bareboat charter financing arrangement.[54] However, given the lack of information in the public domain about the ownership of *Pola Devora* at the time of arrest, the claimant's arrest had been a genuine but understandable mistake. The claimant's conduct following the arrest did not give rise to an inference of malice or crassa negligentia. The claim for damages for wrongful arrest would be dismissed.

It may be observed here that it would seem appropriate that charterers should not be in a position to benefit, in the event of arrest, from keeping information about internal chartering arrangements out of the public domain.

51 [2022] EWHC 2095 (Comm); [2022] Lloyd's Rep Plus 99.
52 See *Babanaft International Co SA v Avant Petroleum Inc (The Oltenia)* [1982] 1 Lloyd's Rep 448.
53 Revolutions per minute.
54 As discussed under "Demise or bareboat charterparties" at page 10 above.

Voyage charters and contracts of affreightment

Voyage charterparty cases were dominated by issues related to sanctions getting in the way of the performance of the charterparty, with decisions in two instances in *Mur Shipping BV v RTI Ltd*[55] and the decision in *Laysun Service Co Ltd v Del Monte International GmbH*.[56] Sanctions may be expected to be a topic for the next several years. There were also cases on free pratique and, as ever, demurrage.

In *Mur Shipping BV v RTI Ltd*, the parties had on 9 June 2016 entered into a contract of affreightment (COA) on an amended Gencon form for the carriage of bauxite from Conakry in Guinea to Dneprobugsky in Ukraine. The total volume of approximately 280,000 mt was to be carried in consignments over 24 months. The claimant Mur, a Netherlands company, was the shipowner under the COA and the defendant RTI, a Jersey company, was the charterer.

On 6 April 2018 US authorities applied sanctions to RTI's parent company. On 10 April 2018 Mur invoked a force majeure clause in the COA by sending a force majeure notice saying that continuing the COA would be a breach of sanctions and that payment in US dollars as required was prevented by the sanctions. The charterers rejected the force majeure notice, disputing that there was a force majeure situation and procured the necessary tonnage elsewhere. They brought a claim in arbitration for the difference between the COA rates and the rates for the alternative tonnage. In arbitration, the owners' case on force majeure succeeded, except that the tribunal considered that, where the force majeure clause provided for the exercise of reasonable endeavours, the owners were required to accept payment in euros. The owners appealed on this issue under section 69 of the Arbitration Act 1996.

At first instance[57] Jacobs J allowed the owners' appeal, holding that where the COA specified payment in US dollars, the tribunal had been right to hold that the charterers could not insist as of right on making payments in euros, or tender the currency of their choosing to the owners' bank for conversion to US dollars.

However, upon the charterers' appeal, the Court of Appeal reverted to the tribunal's assessment and allowed the appeal. The court directed itself that each force majeure clause must be construed on its own terms. The "reasonable endeavours" language referred directly to overcoming the force majeure event or state of affairs and it was not a question of whether the affected party had acted reasonably in general.

The majority of the Court of Appeal saw no need to discuss broader principles of law or reasonable endeavours in general. On the facts as found by the arbitrators, there was no difference between what Mur would obtain from acceptance of RTI's proposal and what it was entitled to under the contract. The majority concluded that this equated to a finding that the force majeure had been overcome as required by the clause.

The decision has been criticised.[58] There is no information at this time about any appeal to the Supreme Court.[59]

Laysun Service Co Ltd v Del Monte International GmbH[60] also concerned the interpretation of a force majeure clause, but in this case, sanctions prevented the discharge of cargo.

The parties had entered into a contract of affreightment (COA) with the claimant as owner and the defendant as charterer, to carry refrigerated bananas from the Philippines to Bandar Bushehr in Iran from 1 January to 31 December 2018. There were to be 36 voyages, but after 17 the charterer stopped providing cargoes and gave declarations of force majeure under clause 8 of the COA on 25 and 28 June 2018. This was following the impositions of sanctions on Iran by the US which, the charterers said, meant that payment for the bananas could not be made and import permits could not be obtained. The bananas were sold by the charterers' sister company and the charterers had no involvement in receiving payment or arranging import permits; however the COA specified that they were to bear the cost and risks of loading and discharge. The sister company's buyers in UAE sold the bananas on to Iranian buyers, who performed the unloading.

In arbitration, the tribunal found as facts that the buyers were unable to make payments and that the sister company was unable to receive payments from April or May 2018; and that the government of Iran stopped

55 [2022] EWHC 467 (Comm); [2022] 2 Lloyd's Rep 297 (Jacobs J); [2022] EWCA Civ 1406; [2023] Lloyd's Rep Plus 3 (CA).
56 [2022] EWHC 699 (Comm); [2023] Lloyd's Rep Plus 15.
57 [2022] EWHC 467 (Comm); [2022] 2 Lloyd's Rep 297.
58 Eg Jim Leighton, "When uncertainty is not enough", *Lloyd's Shipping & Trade Law*, (2022) 22 LSTL 10 4.
59 As of 24 December 2022.
60 [2022] EWHC 699 (Comm); [2023] Lloyd's Rep Plus 15.

issuing new import permits from the end of June until at least July 2018. The charterers appealed on questions of law.

Calver J was critical of the questions presented to the court, opining that the suggested questions of law were either premised on supposed factual findings that the tribunal had not in fact made, or were in reality thinly veiled challenges to the tribunal's findings of fact; the alleged errors of law did not arise. He went on to note that the arbitrators had found that the sister company was unable to receive payment via the buyers' Iranian bank, as a result of which the receiver could not obtain the bill of lading and could not obtain customs clearance, which had to be completed before discharge could take place. This, he said, did not equate to a conclusion that charterers could rely on force majeure where the owners could contractually withhold delivery of goods without the bill of lading, and accordingly the purported question of law was flawed.

The judge went on to consider the question of whether the charterers were entitled to invoke clause 8.1 and concluded that it was a question of fact which the tribunal had decided and which owners could not now reopen. The relevant findings were that receiving payments and performing discharge became impossible; not that the receivers had terminated their contracts in voluntary commercial decisions. The tribunal had correctly interpreted clause 8.1 as setting out the meaning of a force majeure event, and clause 8.3 as providing the steps that must be taken in mitigation. The latter clause focused on the effect of the event, which may be felt even after the force majeure event was over and as the tribunal had found on the present facts may continue to prevent the resumption of performance.

Finally, the judge held that it was not now open to the owners to argue that the charterers had a non-delegable duty to secure an import permit and customs clearance to enable discharge, and that there was no distinction between the loading and discharge in this respect. Clause 3.5 did not have the effect of equating the charterers' obligation to provide cargo to a duty to remove cargo from the vessel. If there was such a duty, it was subject to the force majeure clause.

Carriage of passengers

There were no cases dealing squarely with passenger issues during the year. Three cases arose from passenger carriage situations, of which one is dealt with below, but no cases dealt with specific passenger carriage law such as the Athens Convention as amended.[61] The other two cases may be found elsewhere in this Review.[62]

In *Rose v Carnival Corporation*,[63] Robert Centa J of the Ontario Superior Court of Justice considered the jurisdiction position in relation to the contract of a cruise ship passenger wishing to litigate in Ontario, where the carriage contract contained a forum selection clause. In June 2017 Ms Rose, an Ontario resident, had booked a round-trip cruise from Miami. Following the booking, she received a booking confirmation email containing the link to the contract terms and conditions, including a Florida forum selection clause. At online check in, she scrolled through and accepted the terms and conditions. The cruise took place from 17 to 24 June 2017. During its course, an incident took place when Ms Rose attempted to sit down in a booth and it tipped, allegedly causing severe and lasting personal injuries.

The claimant relied on the Ontario Rules of Civil Procedure to serve the claim on Carnival in Ontario on 18 June 2019, the claim being for damage sustained in Ontario arising from a tort. The claim was served on Carnival in Miami. Carnival sought the setting aside of the service and a stay of proceedings.

The judge gave the order sought, on the basis that the forum selection clause contained in clause 13(c) of the contact was exclusive, rather than permissive. Clause 13(c) conferred jurisdiction for all disputes on the courts of Florida, to the exclusion of any other court in the world. This was the type of clear and express language required to confer exclusive jurisdiction. The exact same clause had been considered in *Allen v Carnival Corporation*[64] and had been found reasonable and fair. The judge noted that the contract was one of adhesion; that Ms Rose would have to incur the costs of litigating in Florida; and that the claim may now be statute-barred, but held that it made no difference.

61 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, as amended in particular by the 2002 Protocol.

62 See *Royal Caribbean Cruises Ltd v Rawlings* [2022] NSWCA 4; [2022] 1 Lloyd's Rep 643 under "Master's powers and responsibilities" at page 29 below, and *Corbin v Dorynek* [2022] JRC 47; [2023] Lloyd's Rep Plus 33 under "Collisions" at page 36 below.

63 2022 ONSC 6506; [2023] Lloyd's Rep Plus 30.

64 2007 CanLII 55701 (ONSC), affirmed by the Court of Appeal in 2008 ONCA 57.

Sale of goods

Contracts of sale and commodities trades dealt with relatively minor contract law points this year, and turned mainly on the construction of the particular contract at issue.

The most voluminous case by far was *BP Oil International Ltd v Glencore Energy UK Ltd*.[65] The claimant BPOI had purchased a cargo of crude oil from the defendant Glencore and alleged that it was contaminated with organic chlorides. The case turned on fundamental points of contract formation – identifying the effective offer and acceptance in an email negotiation.

By the contract of sale, formed in April 2019 on now disputed terms, Glencore had sold 100,000 mt +/- 10 per cent of Russian Export Blend Crude Oil to BPOI, to be loaded between 13 and 18 April 2019, delivered CIF Rotterdam, and at a price of "Dated Brent + 0.53 USD" per barrel. The contract of sale incorporated by reference BPOI's General Terms & Conditions for Sales and Purchases of Crude Oil and Petroleum Products 2015 Edition. BPOI had subsequently resold the cargo to BPESE, an affiliated company.

The cargo was loaded on 16 April at Ust-Luga and discharged on 22 April 2019 at Wilhelmshaven. Before loading, the parties' appointed load port inspectors had inspected the cargo. Three certificates, delivered to BPOI on about 17 April and 8 May 2019, made no mention of organic chlorides. On about 20 June 2019 BPOI made arrangements to buy back the cargo from BPESE and to have it shipped to Castellon to be diluted, blended and processed. BPOI contended that sample testing had showed that the cargo was contaminated by organic chlorides.

The issue arose as to the terms on which the contract had been made. Negotiations had been by email starting with a recap from Glencore on 1 April 2019 and concluding with documentary instructions from BPOI on 9 April 2019. BPOI contended that a binding contract had been concluded following offer and acceptance in the first two exchanges on 2 April, whereas Glencore's position was that it had made counteroffers on subsequent dates which had been accepted by BPOI either expressly or by conduct.

Moulder J held that as a result of the subsequent negotiations being unsuccessful, the contract formed was based on the exchanges on 1 and 2 April. On those terms, BPOI was entitled to damages in respect of diminution in value due to contamination, storage, transportation, volume losses and demurrage.

First, BPOI's phrase "We are pleased to have concluded this further business with you" was not sufficient to lead to the conclusion that viewed objectively, by its email of 4 April BPOI had accepted the terms in the Sales Contract as amended by the Glencore proposals in its email of 3 April.

Secondly, nor had BPOI by the words "We are pleased to confirm our agreement to the terms set out in your fax dated 2nd April 2019 subject to the following" on 3 April agreed to the terms. The issue was not whether the parties had reached agreement within the framework of the negotiations on specific points, but whether the parties intended by that email and that phrase in particular, that a binding agreement should come into effect at that point which incorporated only those certain terms which were not in dispute. There were two rival meanings of the words and business common sense provided that no contract had been entered into by the exchange.

Thirdly, Glencore's final email on 8 April and BPOI's subsequent performance could not give rise to a contract,

[65] [2022] EWHC 499 (Comm); [2022] 2 Lloyd's Rep 221.

where BPOI had expressly reserved against performance giving rise to a contract, as a result of which the "last shot" doctrine did not apply.

Finally, the general rule was that while the offer and acceptance analysis applied in battle of the forms cases, that assumed that there was in fact a battle of the forms and that it could be assessed what the parties must objectively be taken to have intended. Here, there was no battle of the forms where the BPOI General Terms & Conditions had been accepted from the outset.

The judge also considered the recap quality clause and the sampling clause, and the method of calculating BPOI's damages.

In *Vitol SA v JE Energy Ltd*,[66] the issue concerned commodities trade contract making. Vitol sought damages from JE Energy Ltd (Jeda) arising from the repudiation of a contract for the sale of 30,000 mt (-/+ 10 per cent) of fuel oil to be delivered free on board (fob) Tema in Ghana. Jeda denied liability on the basis that Vitol was itself in repudiatory breach of contract and presented a counterclaim. On 10 December 2019 the parties had by recap entered into an agreement for an fob sale which specified among other details "Laycan: 23–24 December 2019". Long-form contracts were developed in January 2020 with some changes. Vitol notably did not accept a proposed revision to the laycan dates.

In December 2019 with the laycan approaching, Vitol chased Jeda for a vessel and letter of credit but Jeda, having bought on speculation, had no sub-buyer and were not arranging a vessel or letter of credit but nevertheless kept the conversation going with Vitol into January. Nor did Vitol cancel when the laycan closed. When a letter of credit in favour of Vitol was issued on 17 January 2020, it contained a number of discrepancies. Notably it was for US$17 million; less than the US$17.5 million requested by Vitol and in other details departed from the pro-forma invoice of the previous day. Congestion at Tema contributed to delays in loading while negotiations continued. Jeda's deal with its new buyer represented a loss.

On 1 February 2020 Jeda gave notice that it considered the contract "null and void" and on 2 February its vessel shifted to anchorage awaiting orders. On 10 February 2020 Vitol accepted Jeda's repudiatory breaches in, briefly, failing to nominate a vessel for the agreed laycan; in failing to open an acceptable letter of credit; and in declaring the contract null and void. Jeda retorted notably that laycan here referred to the shipment period and that a shipment date of 31 January 2020 was agreed; and that it was not in breach for failing to nominate a vessel or in relation to the letter of credit.

Lionel Persey KC, sitting as a High Court Judge, held that Vitol's claim succeeded and dismissed the counterclaim as without merit.

First, Jeda's argument that only the recap terms applied would be dismissed. The parties had envisaged long-form contracts and had jointly developed them. Secondly, contrary to Jeda's submissions, laycan here did not mean shipment or loading period but had the usual meaning given to it in the context of fob contracts and also in the long-form contract terms. The parties had not by requesting and stipulating a later load-by date in the letter of credit agreed to change the laycan date. Thirdly, there had been a hope but no common assumption that loading would take place by 31 January 2020; Jeda's argument that Vitol was estopped by convention fell at the first hurdle. Finally, Jeda had failed to put up a letter of credit in satisfactory terms and Jeda was in repudiatory breach of contract when it treated the contract as being null and void without grounds. When Vitol placed the cargo on financial hold, it was entitled to do so because the letter of credit provided had been unsatisfactory. Permission to appeal has been sought.

Sharp Corporation Ltd v Viterra BV (previously known as Glencore Agriculture BV)[67] was a case on the GAFTA Default Clause. Viterra had sold to Sharp a cargo of lentils and peas on c&f free out Mundra terms. The contract incorporated GAFTA Contract No 24 and the cargo was loaded in Vancouver for shipment to India. Sharp exercised its option for a cash against documents payment, which required payment before the arrival at Mundra. It did not pay, and the goods were discharged against a letter of indemnity. The cargo was warehoused to Viterra's order and eventually agreements and addenda were signed reversing part of the sale and allowing Sharp to pay for the remainder of the goods in instalments, which it did not. Viterra sought the release of the goods, but before it could obtain it an import tariff was imposed on such goods. As a result, by the time release was obtained, the – already customs-cleared – goods had increased in market value.

66 [2022] EWHC 2494 (Comm); [2023] Lloyd's Rep Plus 21.

67 [2022] EWHC 354 (Comm); [2022] 2 Lloyd's Rep 43.

In arbitration, the question arose as to the calculation of damages – was the effective date the date of Viterra's declaration of default, or the later date on which they obtained access to the goods? A GAFTA Tribunal and Appeal Board (the Board) chose the latter date.

Sharp appealed, arguing that the Board had erred in valuing the goods based on a constructed theoretical cost of: (i) buying equivalent goods fob Vancouver, Canada on the default date; and (ii) shipping those goods to Mundra, where they would arrive over a month after that "default date" of 2 February 2018, instead of valuing them on the available market in Mundra as of that date.

The damage calculation was to be based on GAFTA Default Clause sub-clause (c) namely "the actual or estimated value of the goods, on the date of default". The question was whether this meant the market value at discharge port or the theoretical cost on the date of default of: (i) buying those goods fob at the original port of shipment; plus (ii) the market freight rate for transporting the goods from that port to the discharge port free out.

Cockerill J dismissed the appeal. The correct approach was to value the goods based on the same terms and conditions. In this case a sale on an "as is where is basis", as urged by Sharp, would not be a like-for-like sale: the goods benefitted from the customs clearance and the absence of tariff. The fact that there might be a windfall for one or the other of the parties was the price to pay for a simplified damages assessment clause. The meaning of the words "value of the goods, on the date of default" was to be established on the best evidence, which here meant using the date when Viterra was able to sell the goods and a value assessed by reference to a notional sale on c&f free out Mundra terms. While there was certainly an available market for peas and lentils in India, that market was for small quantities ex warehouse and not for goods in bulk. The Board's method of using fob goods plus freight in the absence of evidence of c&f free out Mundra values was fairly conventional.

An appeal was allowed by the Court of Appeal and the case remitted to the GAFTA Appeal Board.

In *Vitol SA v Genser Energy Ghana Ltd*,[68] the question was mainly one of construction of the particular contract terms. The claimant Vitol was a commodities trader and the defendant Genser was a Ghanaian company operating power plants in Ghana. In 2016 Vitol started supplying propane to Genser. At issue in these proceedings was a sale and purchase agreement for the exclusive supply of propane dated 15 March 2018 and subsequently amended by addenda. The contract was initially on pre-payment terms, but Genser quickly fell behind with payments and Addendum 3 changed the terms to 90 days' credit with a guarantee. Addendum 7 was in dispute, being unsigned, and Vitol's case was that it was performed or that agreement on those terms was reached.

Vitol sought US$3,582,365.95 in respect of the unpaid balance of a settlement sum or alternatively US$559,281.16 in respect of unpaid invoices. The issue arose of the effectiveness of notices of default and the notice of termination.

Ms Lesley Anderson QC, sitting as a Deputy Judge of the High Court, held as follows. The judge directed herself that the charterparty line of case law on anti-technicality clauses[69] should not be applied here, to the different context of a sale and purchase agreement, individually negotiated between commercial parties with the benefit of legal advisers on each side. Notice of default was a matter of the individual clause and must be clear, definite and unambiguous. In the circumstances, while the notice of default "left much to be desired", Genser knew the contractual consequences triggered by a notice to make payment, and Vitol's notice was therefore sufficient.

She went on to hold that, on a proper construction of the notice clause, it had been sufficient for Vitol to serve the notice on only one of the email addresses. Strict compliance with the clause was not necessary and was not a condition precedent to validity.

Had the notice been invalid or improperly served, Genser would have been estopped by convention from that argument. It had not at any time contested the validity of the notice, but had instead sought to present excuses for delays in payment.

[68] [2022] EWHC 1812 (Comm); ; [2023] Lloyd's Rep Plus 32.

[69] The judge here exemplified with the case *Schelde Delta Shipping BV v Astarte Shipping Ltd (The Pamela)* [1995] 2 Lloyd's Rep 249.

Trade documents

Under this heading, three letter of credit and two letter of indemnity (LOI) cases will be considered together.

No less than three letter of credit judgments emerged in the course of the year, all from the Singapore courts and considering sanctions and fraud – indisputably the theme tunes of the judicial year.

The first case considered the situation arising from a complying presentation, but where payment would be incompatible with sanctions. In *Kuvera Resources Pte Ltd v JPMorgan Chase Bank NA*,[70] the plaintiff was a Singapore company trading in coal exported from Indonesia. The defendant was a US bank with a branch in Singapore. The plaintiff had provided finance to the seller in a transaction against security in the goods and was as a result the beneficiary of two letters of credit issued by a Dubai bank at the instance of the buyer.

Upon receiving what the parties agreed was a complying presentation, the defendant performed its sanctions screening. This revealed that the carrying vessel appeared to be beneficially owned by a Syrian entity, causing it to fall within the scope of US sanctions. Its confirmation therefore included a "sanctions clause".

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The plaintiff sued for damages, asserting that the defendant had failed to pay upon a complying presentation under the two letters of credit. The defendant responded that the sanctions clause in the confirmation meant that it was entitled to refuse to pay if the documents involved a vessel subject to the sanctions laws and regulations of the United States of America. The sanctions clause was not present in the draft letters of credit or the UCP600, only in the bank's confirmation.

Vinodh Coomaraswamy J of the Singapore High Court dismissed the plaintiff's action, reasoning as follows from the nature of the several separate transactions involved in a letter of credit. First, each of the contracts in a letter of credit transaction was separate and autonomous and formed only between the parties to that contract on its own terms and conditions. The beneficiary had a contractual right to seek payment either from the issuing bank or the confirming bank.

Secondly, the most satisfactory and complete contractual explanation for the binding force of a letter of credit and a confirmation was that each of them functioned in law as an offer of a unilateral contract subject to the sui generis exception that an issuing or confirming bank had a contractual obligation to the beneficiary not to revoke its offer, without any need for the beneficiary to receive, accept or supply consideration for the irrevocability of the offer.

From this followed that the sanctions clause was a term of the contract between the parties. The defendant had incorporated it as a term of its confirmation, which it could do without supplying consideration or the plaintiff's acceptance. It also followed that the sanctions clause was valid and enforceable. It was not fundamentally inconsistent with the commercial purpose of a confirmed letter of credit and did not render the letter of credit unworkable.

In conclusion, on the facts of the case, where the defendant was subject to US sanctions laws and would have been exposed to a penalty, the sanctions clause operated to permit the defendant to refuse to pay the plaintiff against a complying presentation.

The second and third letter of credit case both concerned alleged fraud. In *Unicredit Bank AG v Glencore Singapore Pte Ltd*,[71] the plaintiff asserted that the letter of credit itself was based on a sham transaction as well as misrepresentation and fraud in the presentation. The plaintiff bank's case was that the defendant, a seller of goods, had committed fraud by simultaneously buying back the same goods without informing the bank about this second transaction.

[70] [2022] SGHC 213; [2023] Lloyd's Rep Plus 22.

[71] [2022] SGHC 263; [2023] Lloyd's Rep Plus 20.

The bank had granted credit facilities to Glencore's buyer HLT,[72] a company now in insolvent liquidation, and had by a letter of credit financed HLT's purchase of 150,000 mt of high-sulphur fuel oil (HSFO) from Glencore. The sale contract between Glencore and HLT stipulated that the HSFO was to arrive on MT *New Vision* and be delivered in Singapore in the period 18 to 25 December 2019. Glencore and HLT agreed that title was to pass to HLT at 00.01 on 2 December 2019, and that it would immediately pass back to Glencore. Nevertheless, on 28 November 2019 when HLT applied for a revision to the letter of credit, it referred to the HSFO as "unsold goods". As a result, when the bank issued the letter of credit on 29 November 2019 and paid Glencore on 3 December 2019, the bank was unaware that Glencore had bought the goods back from HLT.

When in the course of 2020 HLT entered into judicial management and insolvent liquidation, the bank had not been repaid, did not have the bills of lading and did not have security over the goods. It asserted claims against Glencore based on rescission, fraud or deceit, conspiracy and unjust enrichment.

Andre Maniam J dismissed the claims. First, the bank was not entitled to rescind the contract on the ground that it was a sham or fictitious. The structure of the deal with simultaneous sale and buyback was not determinative of whether the agreement was a sham. Glencore's own purchase contract provided for a transfer of title and it therefore did have title available to transfer to HLT. Applying *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd*,[73] a circular transaction where performance was not necessarily expected was not by definition a sham.

Secondly, in presenting the LOI and invoice to UniCredit to obtain payment under the letter of credit, Glencore had not fraudulently misrepresented the fact that it had agreed to locate and surrender the bills of lading. As for Glencore's intentions, an issuing bank was not concerned with the underlying contract; and the seller's intentions should not matter to it. The documents actually presented conformed with the letter of credit and that was why UniCredit had paid.

Finally, there was no evidence of a conspiracy between HLT and Glencore to defraud UniCredit; and no claim for unjust enrichment where Glencore was legally entitled to payment under the letter of credit, having presented complying documents.

The third case also concerned an alleged fraudulent transaction. In *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd*,[74] the claimant CA, a bank, had issued a letter of credit to the defendant PPT for the purchase by Z of a quantity of crude oil from PPT. The oil was subject to a long trade chain directed by Z and involving Z more than once ("round-tripping") and was next to be sold by Z to T. The sale contract between PPT and Z, and therefore the letter of credit, reflected a Platts sale price plus a premium of US$3.24 per barrel. Z had assigned the proceeds of the transaction with T to CA as security. Prior to issuing the letter of credit, CA had received from Z a fabricated contract for the sale to T showing a premium of US$3.60. This was false, and the transaction was in reality conducted at a loss, creating exposure for CA under the letter of credit in the absence of the expected assigned proceeds.

> While letters of credit are the lubricant of international trade, there is also a vulnerability to generally fraudulent practices and to sham underlying transactions that cannot – and should not – be judicially addressed. The prevailing approach of accepting letters of credit on their – relatively superficial – terms is arguably essential to the "lubricant" function

The terms of the letter of credit provided that bills of lading were to be supplied for payment, or if unavailable, LOIs and invoice. The bank had five days from presentation to notify the presenter of discrepancies (per UCP600 article 16(d)). By the time the five days expired, CA suspected fraud but did not notify the presenter and instead obtained a court injunction against PPT. It appeared that Z had assigned the proceeds of the same sale to T to two different banks.

CA sought a declaration that PPT was not entitled to any sums under the letter of credit, alleging that it was a participant in the fraud; alternatively it alleged that PPT

[72] The insolvency of which also led to several bill of lading cases, noted above.
[73] [1965] 2 Lloyd's Rep 229.
[74] [2022] SGHC(I) 1; [2023] Lloyd's Rep Plus 25.

was in breach of the warranties in the LOI and liable for damages in the same amount. PPT for its part sought payment under the letter of credit.

Jeremy Lionel Cooke IJ, sitting in the Singapore International Commercial Court, held that as PPT had made a compliant presentation and CA had failed to give any notice of refusal to pay, CA was, in the absence of fraud in the presentation, bound to honour the letter of credit.

As to whether there was fraud, while the evidence showed that PPT's representatives were aware of the "round-tripping" nature of the transaction and it was not an innocent bystander thereto, they were not, in the absence of knowledge of market prices, in a position to appreciate that they were facilitating credit from CA that was US$9 million in excess of the value of the cargo. As a beneficiary under a letter of credit PPT owed no duty of care to the issuing bank in presenting documents for payment and the absence of inquiry into the transaction did not amount to dishonesty. If Z's intention was to defraud CA, PPT was not privy to that fraud. Recklessness as to fraud did not amount to fraud.

> Letters of indemnity are arguably the most useful and versatile of all shipping and trade contracts. They facilitate discharge when the bill of lading is not available to be presented, and can if the terms of the letter of credit permit replace the bill of lading for a complying presentation, usually accompanied by the sale invoice

Nor did the transactions meet the criteria for a sham, where it was necessary for all the parties to the transaction to have a common subjective intention that the transaction documents are not to create the legal rights and obligations which they give the appearance of creating. There was no evidence that any of the traders in the chain did not intend property to pass in the cargo in accordance with the terms of the sale and purchase contracts which they concluded.

As a result, where the sale contract between PPT and Z was not a sham and conveyed marketable title, the invoice and LOI presented to CA by PPT did not contain any misrepresentation.

The judge observed that the true character of a letter of indemnity must be determined by reference to its terms, rather than some a priori view as to its revocability. Here, the warranties in the LOI amounted to an offer by PPT only if CA made the payment by the due date provided in PPT's contract with Z.

It is notable that while the bank in the first case was successful in pleading a sanctions clause, the banks' reliance on alleged fraud, misrepresentation, sham transactions and such matters in the latter two litigations were entirely unsuccessful. While letters of credit are the lubricant of international trade, there is also a vulnerability to generally fraudulent practices and to sham underlying transactions that cannot – and should not – be judicially addressed. The prevailing approach of accepting letters of credit on their – relatively superficial – terms is arguably essential to the "lubricant" function.

LOIs are arguably the most useful and versatile of all shipping and trade contracts. They facilitate discharge when the bill of lading is not available to be presented, and can if the terms of the letter of credit permit replace the bill of lading for a complying presentation, usually accompanied by the sale invoice.

A further instalment in the long-running, multi-jurisdiction Miracle Hope litigation was handed down in the form of *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd; Clearlake Chartering USA Inc and Another v Petroleo Brasileiro SA (The Miracle Hope) (No 4)*.[75] Trafigura as disponent owner had voyage chartered MT Miracle Hope to Clearlake USA (CUSA) which in turn had chartered it to PBSA. Both charters were on Shellvoy 6 terms and dated 21 August 2019 and in materially identical terms. Both charterparties provided by clause 33(6) that the owners were obliged to comply with orders to discharge cargo without the presentation of bills of lading in consideration for a LOI as per the owners' P&I wording as provided before subs were lifted (ie before the voyage or sub-charters became binding). That wording was only provided on 14 October 2019, after the lifting of subs. The clause also stated "Following indemnit[y] deemed to be given by charterers on … such occasion", with the subsequent standard form language that specified the indemnity struck through.

[75] [2022] EWHC 2234 (Comm); [2023] Lloyd's Rep Plus 6.

PBSA's subsidiary PGT was the seller of the cargo. Upon arrival at the discharge port Qingdao, the cargo receiver sought delivery without presentations of the bills of lading. On 30 October the charterers – first PBSA, then CUSA – requested discharge with invocation of the indemnity clause. No free-standing LOI was issued. Shortly after discharge, the charterparty between Trafigura and CUSA was amended, substituting CSPL as charterer.

The vessel was later arrested in Singapore by the bill of lading holding bank[76] and Trafigura lost a fixture which upon release was substituted with another fixture. Trafigura commenced litigation before the English court against CSPL, and CSPL and CUSA together commenced litigation against PBSA seeking to enforce the respective indemnities, Trafigura seeking compensation for the lost fixture less profit from a replacement fixture and arrest-related expenses. PBSA asserted that it had no liability to CUSA because CUSA – having been substituted by CSPL as charterer – no longer had any liability to Trafigura. The Clearlake parties alleged that there was an internal implied indemnity between them in respect of chartered vessels. A booking note was said to evidence the internal charter.

HHJ Pelling KC, sitting as a Judge of the High Court, held that the LOI claims by Trafigura against CSPL and by CUSA against PBSA succeeded. The judge directed himself in accordance with the observations of Lord Hodge in *Wood v Capita Insurance Services Ltd*[77] that the charterparty in question was not a competently drawn document drafted by skilled professionals, and that therefore contextual issues would play a significant role in construction; business common sense was likely to play a significant part in arriving at a true construction of the document.

Nevertheless, he arguably adopted a textual approach in positing that the words "Following indemnit[y] …" must apply to something that mattered and that the only indemnity was the P&I Club LOI, even though that did not "follow" those words in the clause.

He went on to observe that it was not commensurate with commercial common sense in the context that the owners' failure to supply LOI wording before the lifting of subs should mean that a whole new agreement must be entered into for the indemnity to be effective. The words "before lifting the subs" in clause 33(6) were of no effect from the time the charterparties became unconditional.

He next directed himself that the principle that effect should usually be given to all the language used by the parties must necessarily take account of the very unsatisfactory state of the amendments to the standard form and the very powerful contextual and commercial considerations. While the wording of clause 33(6) as amended was unclear, it was in the commercial context on balance more consistent with the intention that discharge without presentation could only be required against the provision of an indemnity, rather than the alternative.

[76] Leading to several decisions from both the Singapore and English courts: *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd (The Miracle Hope)* [2020] EWHC 726 (Comm); [2021] 1 Lloyd's Rep 533, *Clearlake Chartering USA Inc and Another v Petroleo Brasileiro SA (The Miracle Hope) (No 2)* [2020] EWHC 805 (Comm); [2021] 1 Lloyd's Rep 543, *The Miracle Hope* [2020] SGHCR 3; [2021] Lloyd's Rep Plus 50, *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd (The Miracle Hope) (No 3)* [2020] EWHC 995 (Comm); [2021] 1 Lloyd's Rep 552; [2020] EWHC 1073 (Comm).

[77] [2017] UKSC 24; [2018] Lloyd's Rep Plus 13.

As for the form of the contract, the judge considered that any requirement for a formal LOI, as opposed to an agreement in correspondence and by conduct, had been waived or charterers were estopped from relying on such a requirement in circumstances where all correspondence had been handled by experienced shipping and trading professionals, all of whom would have understood that discharge without presentation of the bills of lading could not be expected without an indemnity.

As to the substitution of CSPL for CUSA, the only sensible interpretation of the post-discharge arrangement between Trafigura and the Clearlake parties was that it was a novation so that CSPL assumed all liabilities under the charterparty. The evidence showed that it was not the practice between the Clearlake parties to issue internal LOI where CSPL chartered in but CUSA chartered out. The Clearlake group intended an implied internal indemnity to arise whenever CUSA was the beneficiary of an express or deemed indemnity and CSPL provided an indemnity, in order to enable liabilities to pass down the indemnity chain.

It seems appropriate that untransparent arrangements within a group of companies should not unduly benefit that group of companies, as that would cause business confidence generally to plummet

The judgment is arguably an interesting example of conscious application of the textual and contextual approaches to construction. As observed elsewhere in this Review,[78] it seems appropriate that untransparent arrangements within a group of companies should not unduly benefit that group of companies, as that would cause business confidence generally to plummet.

In *OCM Singapore Njord Holdings Hardrada Pte Ltd and Others v Gulf Petrochem FZC*,[79] questions arose as to the authority to sign a LOI. The defendant had provided LOIs to each of the claimant carriers who in return had agreed to discharge a hydrocarbon cargo at Fujairah without sight of the original bills of lading. In each case, the holders of the original bills – the French branch of Natixis bank – had made claims for wrongful delivery against the carriers.

The claimants in turn claimed against the defendant under the respective LOI. Proceedings having been commenced by the claimants against the defendant on the LOIs, the defendant had filed defences to each claim. Following a change of solicitors, it had on 7 May 2021 sought to amend its defence to the effect that the signatory of the LOI on behalf of the defendant had lacked the authority to sign; also withdrawing an admission that the LOI was engaged. The claimants opposed the amendment and sought summary judgment.

HHJ Mark Pelling QC, sitting as Judge of the High Court, rejected the applications for permission to amend the defences and held that claimants were entitled to summary judgment. The defendant's case that the only persons with actual authority to sign LOIs on its behalf were the directors was not realistically arguable. There was no evidence to that effect, and the defendant had been a major trading corporation at the time, which made an arrangement that all contracts must be signed by directors inherently implausible. The failure to show a realistically arguable case included the LOI where the signature was illegible and the signatory had not been identified.

The judge went on to note, having considered *First Energy (UK) Ltd v Hungarian International Bank Ltd*,[80] that in any case, it would have been held that the defendant had ratified the LOIs by seeking and obtaining delivery on the basis thereof. It would be commercially absurd and demonstrably unfair to allow the defendant to rely upon the LOIs to obtain delivery, only to then disavow them.

Nor was a financial impossibility defence realistically arguable on the basis of a partial balance sheet, where the defendant continued to trade during restructuring and on the evidence was able to meet large operating expenses.

78 Under "Time charterparties" at page 12 above.

79 [2022] EWHC 57 (Comm); [2023] Lloyd's Rep Plus 26. Earlier judgments in related litigation were *Tenacity Marine Inc v NOC Swiss LLC* [2020] EWHC 3689 (Comm) and *Tenacity Marine Inc v NOC Swiss LLC and Another* [2020] EWHC 2820 (Comm).

80 [1993] 2 Lloyd's Rep 194.

Ship delivery

Two very different cases on the delivery of sold ships are considered here. They have little in common in terms of law or facts, other than that external circumstances – Covid-19 and adverse weather respectively – were obstacles to the successful delivery of the vessel.

In *NKD Maritime Ltd v Bart Maritime (No 2) Inc (The Shagang Giant)*,[81] the Very Large Ore Carrier *Shagang Giant* had been sold for scrap. In March 2020, as her owner attempted to deliver her to the agreed location, pandemic lockdowns were enforced.

Bart, the defendant in the litigation, was the shipowner and NKD, the claimant, was a company specialising in cash acquisitions of shipping tonnage for scrapping at Alang recycling yard in India. The memorandum of agreement (MOA) was subject to English law and jurisdiction and contained a force majeure clause. Following the conclusion of the agreement, the claimant had made an initial payment to the defendant by way of deposit of approximately US$4 million.

On 21 March *Shagang Giant* gave notice of arrival, and was instructed to anchor outside vessel traffic service limits in view of public health orders. The claimant's buyers, the recycling yard, disputed that this constituted arrival at the place of delivery as in turn did the claimant in response to a request by the defendant's brokers to consider the delivery valid or offer an alternative. On 24 March the Ministry for Home Affairs issued a lockdown order and activities at all recycling facilities were suspended. It was now impossible to obtain a Gujarat Pollution Control Board (GPCB) certificate, which was needed for the inner anchorage, because all GPCB officers had been redeployed to hospitals to deal with medical waste.

On 14 April the claimant's brokers sent a notice of termination of the MOA citing the lockdown and force majeure. The defendant's vessel managers disputed the notice of termination, replying that there had not been a force majeure event and accepting the termination as a repudiation.

The vessel departed Alang. Soon thereafter, the government issued some exceptions to the lockdown and, by 23 April, the recycling yards resumed work. The defendant resold the vessel for scrap for US$277 per long ton. The price for the transaction with the claimant had been US$366 per long ton.

Both parties commenced litigation, NKD seeking return of the initial payment on the basis of force majeure and Bart seeking damages for repudiation and asserting that it was entitled to retain the initial payment.

Butcher J, in a judgment focusing on interpretation of the terms of the parties' contract, held, first, that the claimant had not been entitled to terminate on 14 April 2020 and the notice of termination had constituted a repudiation. The defendant was entitled to retain the initial payment. However, it was not entitled to any further amount as damages for repudiation.

Considering the contract's terms on certificates, there was no requirement in the force majeure clause that a valid NOR should necessarily be accompanied by the certificates, and therefore no basis for saying that a transfer of title in accordance with the MOA could not take place without the seller being able to tender those documents.

As for the parties' intentions in defining the delivery location as "outer anchorage Alang", they had intended the inspection anchorage, which the vessel had not been allowed to enter. The outer anchorage was typically where vessels arrived to await formalities, port clearance, customs, free pratique and so on, and the words did not properly or naturally describe or apply to an area up to 100 nm from Alang, where the vessel had anchored outside the vessel traffic service area.

However, the contract also provided that where the delivery location was inaccessible, per the second paragraph of the relevant clause there were alternative criteria, which here had been met when the vessel got to the edge of the vessel traffic service area and was prevented from proceeding within it. The place where the vessel had actually anchored was the obvious and sensible place to wait and could on the evidence be described as the place where it was customary for vessels to wait.

Finally, the situation where the vessel could not obtain a GPCB certificate because GPCB staff had been redeployed and instructed not to inspect vessels, and where the vessel therefore could not proceed to the outer anchorage, could be described as a "restraint of governments". However the defendant was not as a result "unable" to transfer title, only hindered or delayed. The period of restraint was not such as to materially undermine the commercial adventure. The considerations were similar to those involved in the question whether a contract was frustrated.

[81] [2022] EWHC 1615 (Comm); [2022] 2 Lloyd's Rep 601.

In a second case, namely *Arnold v Halcyon Yachts Ltd (The Vlaroda)*,[82] the sale of a yacht had already taken place and the new owner had contracted for its delivery from France to the USA, with a disappointing outcome. The claimant was a private individual resident in the USA who had purchased *Vlaroda*, taking delivery in La Rochelle. The defendant was a yacht delivery company contracted by the claimant to undertake the transatlantic voyage and deliver the yacht to Bear in Delaware. Having left the Azores in the course of the crossing, the crew decided to turn the yacht back in a damaged condition. The parties differed on the cause of the damage.

The claimant sought damages based on the repair costs incurred in the Azores and subsequently. The defendant counterclaimed sums outstanding under the delivery contract.

Having considered expert evidence as to the available northern and southern transatlantic routes, Admiralty Registrar Davison found that the shipper's choice of the shorter and more direct northern route across the Atlantic was a reasonable one. Further, the route planning had been carried out with professional care and attention as required by the contract and was also congruent with the best interests of the safety and protection of the vessel and crew.

The contemporaneous evidence also showed that the reason for turning back had been the crew's loss of confidence in the yacht from the cumulative effect of multiple failings, causing justified and reasonable safety concerns. The weather conditions until that point had been unremarkable.

On that basis, to the extent the defects in the yacht were due to manufacturing or production defects rather than the crew's treatment of the vessel, the claimant's claim for repair costs failed. Other damage fell under "fair wear and tear".

Given that there had been no breach of duty in the planning or execution of the voyage and the damage was the product of manufacturing defects, the defendant had committed no repudiatory breach and was entitled to its counterclaim in respect of the sums due under the contract.

Marine insurance

The bankruptcy of Agroinvestgroup followed what appears to have been a wholesale fraudulent scheme involving the alleged sales of commodities in storage in Ukraine and the misappropriation of those commodities. In *Quadra Commodities SA v XL Insurance Co SE and Others*,[83] the English High Court held that insurers should indemnify a commodity trader for the misappropriation of commodities arising from the Agroinvestgroup bankruptcy.

The assured made a number of purchases of grain from Linepuzzle Ltd, a Ukrainian company in the Agroinvest Group. The cargo was to be transported to and weighed at various elevators (terminals), and payment was against various documents including warehouse receipts. The elevators owned or operated by the Agroinvestgroup issued multiple warehouse receipts in respect of the same goods to different buyers, and there was not enough grain to go around. In January 2019 the assured was unable to gain access to the warehouses in order to try to inspect and/or obtain the release of grain.

> *Quadra Commodities v XL Insurance* provides some discussion of what constitutes a "reasonable time" for insurers to pay a claim under section 13A(1) of the Insurance Act 2015, and considers when insurers can rely on section 13A(4) to exempt their liability for delayed payment

The policy, the Institute Cargo Clauses (A) 2009, insured against "physical loss of or damage to goods … through the acceptance … of fraudulent shipping documents, including … Warehouse Receipts"; and "physical damage and/or losses, directly caused to the insured goods by misappropriation". Quadra claimed for the loss of cargo, along with suing and labouring costs representing the costs of the legal proceedings. Further, the assured made a claim for damages for alleged breach of late payment by

[82] [2022] EWHC 2858 (Admlty); [2023] Lloyd's Rep Plus 36.

[83] [2022] EWHC 431 (Comm); [2022] 2 Lloyd's Rep 541.

the defendant of its obligations under section 13A of the UK Insurance Act 2015. The defendant denied all liability. In particular, the defendant denied that the assured had an insurable interest and also that any physical loss had been suffered, in that the cargoes had never existed.

Butcher J held that the assured had an insurable interest, and that the insurers were liable under the policy, for the lost cargo and suing and labouring costs. However, the claim for breach of the implied term under section 13A of the 2015 Act failed.

Before the proof of existence of an insurable interest, the assured must first prove that there were physical losses of the cargoes. The judge affirmed the assured's case that there had been physical loss of property. With regard to insurable interest, although Quadra had not obtained a proprietary interest in a part of the bulk under section 20A of the Sale of Goods Act 1979, having considered a broad concept of insurable interest provided in *Feasey v Sun Life Assurance Corporation of Canada*[84] the judge held that Quadra had an interest by virtue of its payment, as well as a right to possession.

Another noteworthy point concerned the issue of late payment. Given the nature and complicating circumstances of this claim, the judge concluded that a reasonable time to investigate, evaluate and settle the claim, assuming there were no grounds for disputing it, would have been not more than about a year. It was held that the insurer was correct in contending that there were reasonable grounds for disputing the claim, and thus that section 13A(4) was applicable. On these grounds the court concluded that there was no breach of the section 13A implied term and there was no need to consider the relevant damages.

The High Court decision has been appealed to the Court of Appeal and is awaiting a hearing in March 2023.[85] The judgment provides some discussion of what constitutes a "reasonable time" for insurers to pay a claim under section 13A(1) of the Insurance Act 2015, and considers when insurers can rely on section 13A(4) to exempt their liability for delayed payment.

Piraeus Bank AE v Antares Underwriting Ltd and Others (The ZouZou),[86] provided guidance regarding mortgagees' interest insurance and the standard exclusions in a war risk policy. The claimant, Piraeus Bank, was the mortgagee of the vessel *ZouZou* and insured its interest under a mortgagees' interest insurance ("MII") policy on industry standard terms. The policy was broadly designed to cover any shortfalls in indemnity for the bank under the shipowners' own war risks policy. Meanwhile, the vessel was also insured by a Club under a war risks policy which was assigned to the bank and under which the bank was loss payee.

The vessel was detained by the Venezuelan authorities at the end of August 2015 on suspicion of smuggling oil, and four members of the crew were arrested. After a two-year investigation, on 29 September 2016 the prosecutors gave their permission for the vessel's release. On 3 October 2016 the owners tendered a notice of abandonment, claiming that there was a constructive total loss of the vessel under the war risks policy. The Club rejected the notice of abandonment. The vessel was returned to the owners on 12 November 2016. The Club avoided the policy for non-disclosure of breaches, in that the vessel entered an Additional Premium Area without informing the Club. The bank brought the present action against the MII insurers.

The judge rejected the assured's claim. The first issue was whether there would have been cover under the war risks policy, which turned on the construction of the Club's rule 3.5 by reason of the allegation of criminal conduct. The judge observed that the language of the rules did not suggest that they should be read as only applying when the owners themselves were the accused. Upon a close analysis of Venezuelan law and procedure, the judge went on to conclude that the detention of the vessel was not at any stage unlawful. In the result, the ship's detention fell within the rule 3.5 exclusion.

The next issue was whether the vessel had been a constructive total loss. It was held that the vessel was not a constructive total loss in accordance with the Marine Insurance Act 1906 section 60. In this case, when the notice of abandonment was rejected on 10 October 2016, it was likely that the vessel would be recovered, given the fact that prosecutors had consented to release on 29 September 2016.

The question remained if there was any scope for recovery under the MII policy which exceeded and did not depend on shortfalls in the cover under the war risks policy. It provided indemnity where the loss was prima facie covered by the war risks policy but there was refusal to pay by reason of, inter alia: "(i) any act or omission including any breach of warranty or condition, non-disclosure or

84 [2003] EWCA Civ 885; [2003] Lloyd's Rep IR 637.
85 Per https://casetracker.justice.gov.uk as of 29 December 2022.
86 [2022] EWHC 1169 (Comm); [2022] 2 Lloyd's Rep 1.

misrepresentation …" The judge held that the MII policy was entirely subject to the owners' policy. There had to be coverage under the war risks policy in order for a claim to be made under the MII policy. Therefore, the MII policy did not respond to the bank's claim in this case.

From New Zealand, the appellate decision in *JDA Co Ltd and Others v AIG Insurance New Zealand Ltd and Others*[87] upheld the trial judge's ruling[88] that the insurers were not liable under a policy of marine cargo insurance.

Automotive Technologies Ltd (ATL), which owned an inspection depot, developed a scheme under which ATL held an open cover for its customers to provide insurance for cars coming through its depot. The marine cargo policy was designed to cover second-hand cars for transit and storage risks incidental to export from Japan. The policy required monthly declarations and attached to individual cars before the declarations were made. Since Japan had been seriously affected by typhoons in August and September 2018, the lead insurer AIG placed a moratorium on new business to prevent an influx of opportunistic business from entities that had not insured previously or had not done so regularly. ATL's September declaration contained 27,717 cars, which was much higher than had historically been the case. On 26 October AIG gave 30 days' notice of cancellation of the policy.

Vehicles belonging to the claimants awaiting transportation from Japan were damaged in the typhoons, and subsequent claims made under the policy were rejected by AIG. In the marine cargo policy, the assured was ATL and any "customers … for whom [ATL] are arranging insurance …". Questions arose as to the definition of assured in the policy, as to the terms of coverage and on the mechanics of the declarations.

In the High Court judgment,[89] Gault J had reached the following four conclusions. First, he held that the claimant exporters were assureds under the policy, because the policy did not require that exporters be customers of ATL for services other than insurance. Secondly, the policy provided for optional terms: either Institute Cargo Clauses (A) or (B). The judge concluded that in the absence of an election, the implied intention was that ICC (B) would apply. Thirdly, the judge rejected the claimants' argument that ATL was acting as the agent of the insurers and was authorised to bind them to cover without communicating to insurers an intention to take insurance. It was held that it was necessary that the intention to take insurance be communicated to insurers prior to attachment of the risk. 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. It was held that there was a breach of warranty where the vehicle at issue was not included in the declaration for the month in which it entered the pre-shipment holding yard, therefore, such breach was effective to discharge insurers from liability under the policy.

The Court of Appeal upheld all four rulings of the High Court. The last point on breach of warranty seems to be of particular interest to the application of section 11 of Insurance Act 2015 in English law. The question before the Court of Appeal was as follows.

> "did the obligation to declare clause exclude the insurers' liability on the happening of certain events or on the existence of certain circumstances because it was of the view that those events or circumstances were likely to increase the risk of loss occurring, so allowing the insured to show on the balance of probabilities that the loss was not caused or contributed to by such events or circumstances?"[90]

The Court of Appeal reasoned that the declare clause was material to the insurers, in the sense that it affected the risk associated with insured vehicles collectively.

In *PT Adidaya Energy Mandiri v MS First Capital Insurance Ltd*[91] the Singapore International Commercial Court considered issues relating to the insurance coverage for the claim arising from collision damage, including breach of warranties, the proving of constructive total loss (CTL), late notice of abandonment (NOA) and compliance with the policy's claim notification requirements. In the UK, any breach of warranties is now considered in reference to the Marine Insurance Act 1906 (MIA 1906) and the Insurance Act 2015 (IA 2015) together. Singapore has adopted the MIA 1906, but not the IA 2015. The exclusive jurisdiction and the applicable law clauses in this case were in favour of Singapore. An express "Marine Insurance Act Clause" (MIA clause) provided:

> "… all of the terms, conditions, warranties and other matters contained within the Marine Insurance Act 1906 (as amended by the Insurance Act 2015) shall still be applicable to this Policy. …"

87 [2022] NZCA 532; [2023] Lloyd's Rep Plus 12.
88 [2021] NZHC 2912; [2022] Lloyd's Rep Plus 30.
89 [2021] NZHC 2912; [2022] Lloyd's Rep Plus 30.
90 At para 95.
91 [2022] SGHC(I) 14; [2022] 2 Lloyd's Rep 381.

The assured had been engaged to provide, operate, and maintain a single point mooring buoy ("SPM") deployed in an offshore gas field. A crude oil tanker was connected to the SPM by two circumferential mooring hawsers. As a result of a number of collisions between the SPM and the tanker, the SPM was damaged. Initial repairs were conducted. The assured obtained quotations for further onshore repairs to the SPM, all of which exceeded the insured value. The assured then tendered NOA to the insurer around five months later. The insurer rejected the NOA. The assured sold the SPM at a considerable undervalue and continued to use it at all times until the sale. The assured claimed for CTL of the SPM as well as the suing and labouring charges incurred to prevent her from becoming a total loss.

> In the UK, any breach of warranties is now considered in reference to the Marine Insurance Act 1906 and the Insurance Act 2015 together. Singapore has adopted the 1906 Act, but not the 2015 Act

Jeremy Lionel Cooke IJ considered four issues and held against the assured on all of them. First, the assured had breached warranties regarding handling and operating the SPM. The facts showed that there was no static tow utilised to hold the tanker at all times to prevent it from colliding with the SPM and that the crew of the tanker had failed to provide satisfactory watchkeeping to maintain a safe distance with the SPM. The judge applied section 10(2) of the IA 2015 so that the insurer had no liability for either CTL or sue and labour charges while the policy was suspended during the period of breaches. Given the assured's breaches, the judge saw no possibility that the assured could rely on section 11 by showing that "non-compliance with [the term] could not have increased the risk of the loss which actually occurred in the circumstances in which it did occur". Therefore, on this point, it was held that the insurer was not prevented from denying liability.

Secondly, it was held that the assured had failed to give written notice of the claim in time. The policy required the notification of claims within 30 days of the assured becoming aware of an incident giving rise to a claim which might be a total loss. The judge found that the assured had been aware of the collision incidents and the damage to the SPM by 17 July 2018, but had only notified the insurer of the potential claim on 5 September 2018. Thirdly, the judge went on to address the issue of CTL. The extent and permanence of the repairs were in dispute: the assured asserted that the SPM required permanent repairs at a cost that would mean that the SPM was a CTL. The question then became whether reinstating the skirting to a pre-incident condition was reasonably required in order to restore her to safe operation. On an assessment of the expert evidence, the renewal of the skirting was not necessary or reasonable; as a result of which the SPM was not a CTL.

The final issue concerned the NOA and waiver of the right to abandon. In accordance with section 62 of the MIA 1906, the judge held that the assured had failed to tender NOA within a reasonable time and with reasonable diligence after receiving reliable information of the loss. The NOA was tendered on 22 May 2019 although by mid-December 2018 it had been obvious on the facts to the assured that there was a case to be made for a CTL of the SPM. It was also held that the assured had waived its right to abandon the SPM, as the assured had been acting inconsistently with an intention to abandon the insured property. After tendering the NOA, the assured had continued to deal with the SPM as its own property, to the exclusion of the interests of the defendant to whom the SPM had ostensibly been abandoned. The assured had continued using the SPM for hire without accounting for it to the insurer, carried out repairs without informing the insurer, and had sold the SPM to a related company at a price which was shown to be a gross undervalue. Therefore, the assured had waived its right to rely on the NOA.

Shipping and seafaring

Sea rescue

With the rescue of persons in distress at sea over the last several years having encompassed the search for and rescue of persons crossing the Mediterranean in craft unfit to reach Europe, judicial determination of related issues was long overdue. In *Sea Watch eV v Ministero Delle Infrastrutture e Dei Trasporti and Others*,[92] the Court of Justice of the European Union (CJEU) considered some port state control issues and flag state duties in the context of humanitarian non-governmental organisation performing the search for and rescue of persons in danger or distress at sea.[93]

The CJEU matter arose as two requests from the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily, Italy). It sought preliminary rulings on the interpretation of Directive 2009/16/EC of 23 April 2009 on port state control and on the International Convention for the Safety of Life at Sea 1974 (SOLAS).

The claimant in the originating proceedings was Sea Watch and the defendants were the Italian Ministry for Infrastructure and Transport and the port authorities of the ports of Palermo and Porto Empedocle. The harbour masters in those ports had issued detention orders against the claimant's vessels *Sea Watch 3* and *Sea Watch 4*, which flew the German flag and were classified as general cargo or multipurpose ships, certified to carry 30 and 22 persons, respectively. In the summer of 2020, they took turns leaving the port of Burriana in Spain and rescuing persons in danger of distress in the international waters of the Mediterranean.

Having taken rescued persons on board, the vessels were directed by the authorities to Palermo and Porto Empedocle to proceed with disembarkation of the persons on board. *Sea Watch 4* and *Sea Watch 3* were then ordered by the Ministro della Salute (Ministry of Health) to anchor so that the crew could be quarantined for Covid-19 and for cleaning, sanitation and health certification. The harbour masters of the two ports subsequently ordered the two vessels detained. They noted in their decisions that the vessels were not certified to take on board and transport hundreds of persons at sea, and also noted technical deficiencies.

Sea Watch sought the release from detention of the vessels before the Sicilian court. They asserted notably that the harbour masters had exceeded the powers of the port state under the Directive and international law and in particular the rule of mutual acceptance of certificates issued by flag states, by carrying out inspections in order to call into question the classification and certification of the vessels by the German authorities; and that the deficiencies were not such as to justify detention.

The Sicilian court made a reference to CJEU seeking clarification of the legal regime applicable to ships operated by humanitarian non-governmental organisations, such as Sea Watch, in order systematically to carry out activities relating to the search for and rescue of persons in danger or distress at sea. In particular, clarification was sought as to the application of the Directive to vessels which – though classified as cargo vessels – were used exclusively for the search for and rescue of persons in danger or distress at sea.

The court directed the Tribunale amministrativo regionale per la Sicilia as follows. First, the Directive applied to ships that, although classified as cargo vessels, were in use by a humanitarian organisation for non-commercial activities relating to search and rescue at sea. Secondly, national legislation implementing the Directive must not limit its applicability to ships in use for commercial activities. Thirdly, the port state was, under article 11(b) of the Directive, entitled to subject vessels to an additional inspection if there were carefully established serious indications that there was a danger to health, safety, on-board working conditions or the environment, having regard to the conditions under which those vessels operated. Relevant factors included the amount of safety and rescue equipment on board, the sufficiency of sewage facilities and the working conditions of the crew.

Fourthly, with due deference to the duty to search and rescue at sea, such additional inspections could not be based solely on the fact that a cargo ship was being used for search and rescue, resulting in the ship carrying persons in numbers out of all proportion to their carrying capacity as stated in the classification and equipment certificates.

Fifthly, the port state did not during a more detailed inspection have the power to demand proof that vessels held certificates other than those issued by the flag state, or that they complied with all the requirements applicable to some other classification.

Sixthly, it was not permissible to make non-detention or the lifting of detention conditional upon the vessels

92 Joined Cases C-14/21 and C-15/21; [2023] Lloyd's Rep Plus 35.
93 International Convention on Maritime Search and Rescue 1979.

holding certificates appropriate to systematic search and rescue. Finally, the court determined that the port state was entitled to impose such corrective measures relating to safety, pollution prevention and on-board living and working conditions as were justified by deficiencies clearly hazardous to safety, health or the environment, provided they were suitable, necessary and proportionate. Adoption and implementation of those measures by the port state must be the result of sincere cooperation with the flag state.

> The result in *Sea Watch eV* is broadly favourable to the humanitarian organisations performing this kind of search and rescue, as it clarifies that additional (let alone excessive) demands cannot be placed upon those vessels through port state control

The result is broadly favourable to the humanitarian organisations performing this kind of search and rescue, as it clarifies that additional (let alone excessive) demands cannot be placed upon those vessels through port state control. It seems reasonable that a port state may check that sewage facilities and life-saving equipment are in order. The search and rescue vessel must in any case comply with provisions in SOLAS applicable to its type.

Master's powers and responsibilities

The master's exercise of powers is rarely considered in court, but such a case arose this year in *Royal Caribbean Cruises Ltd v Rawlings*,[94] where the Court of Appeal of New South Wales gave consideration to the master's power to detain persons on board.

Here, the respondent had become suspected of sexual assault against another passenger (A) on board the applicant's cruise ship *Explorer of the Seas*, flagged in the Bahamas, while in international waters in the course of a 10-day voyage in the Pacific. By orders of the master, the respondent had been confined to a conference room and then to a guest cabin for five days until the ship returned to Sydney. The respondent subsequently brought proceedings seeking damages for wrongful detention and false imprisonment.

A district court judge had held that the detention was justified in part, but awarded damages in respect of the remainder.[95] The applicant appealed.

At least to the extent that events took place on the high seas, it must be the case that the law of the flag state applied. However, the court noted that neither party had pleaded their cases under Bahamian law or supplied any evidence as to the content of that law. On that basis, the presumption applied that Bahamian law was the same as the law of the forum, New South Wales, and the judge had not erred in applying New South Wales law to the claim.

The Court of Appeal held that the primary judge had not erred in adopting the statement of the justification defence in *Hook v Cunard Steamship Co*[96] as part of Australian common law. In accordance with that test, with respect to the master's power or authority to detain it must be established that the master had reasonable cause to believe, and did in fact believe, that the relevant detention or confinement was necessary for the preservation of order and discipline, or for the safety of the vessel or persons or property on board.[97]

The court then parted company with the judge, holding that he had erred in finding that, on the evidence, the captain had intended to release the respondent from confinement halfway through the confinement. The evidence showed that the captain continued to believe that the respondent's confinement until Sydney was reasonably necessary to maintain safety on board, which in this context included A's emotional well-being. The judge's finding that the conditions of the confinement were unreasonable was also rejected as not supported by the evidence. As a result of these conclusions, the Court of Appeal allowed the applicant's appeal.

In *CM P-Max III Ltd v Petroleos del Norte SA (The MT Stena Primorsk)*,[98] though the argument concerned demurrage, the practical issue was ultimately one of the master's responsibilities for the vessel's safety.

The parties to the litigation were the owner and charterer of MT *Stena Primorsk*. The claimant owner had by a recap

94 [2022] NSWCA 4; [2022] 1 Lloyd's Rep 643.

95 *Rawlings v Royal Caribbean Cruises Ltd* [2020] NSWDC 822.

96 [1953] 1 Lloyd's Rep 413.

97 Slade J in *Hook v Cunard Steamship Co* [1953] 1 Lloyd's Rep 413 sets out the test, quoting from *Halsbury's Laws of England* at page 423 col 2.

98 [2022] EWHC 2147 (Comm); [2022] Lloyd's Rep Plus 100.

fixture dated 9 March 2019 chartered the vessel to the defendant under the terms of an amended Shellvoy 6 form for a single voyage from Bilbao to Paulsboro on the Delaware River. The recap provided for a single allowance of 72 hours of laytime for loading and discharge with demurrage to be paid at the rate of US$22,500 per day pro rata. The Intertanko Chartering Questionnaire 88 (Q88) was provided to charterers and therefore covered by its clause 1(A)(III). Information covered by Q88 included load line information and owners' guidelines for under-keel clearance.

The charter provided for certain circumstances in which time either did not start to run or, having started to run, was suspended. Loading at Bilbao, 68 hours and 54 minutes of laytime had been used.

While the vessel was en route to Paulsboro, her technical managers NMM agreed to a one-off waiver of the NMM under-keel clearance policy for 31 March 2019. The vessel arrived at Paulsboro and tendered notice of readiness. The vessel made fast on 31 March 2019 but cleared the berth after two hours to return to anchorage, the master having decided within 12 minutes of berthing that the available discharge speed would not allow the vessel to maintain safe under-keel clearance.

On 1 April the charterers requested a return to berth to commence discharge at the next high tide, starting at 21.00. The master contacted technical operators with under-keel clearance calculations but at 17.20 NMM refused the waiver stating that there was "very little margin for safety and ensuring adequate under-keel clearance". On 4 April the vessel was lightered at anchor, allowing a return to berth to complete discharge on 6 April, after 154.63 hours of discharge laytime.

The owners sought demurrage in the sum of US$143,153.64. The charterers asserted that the notice of readiness given by owners upon arrival at Paulsboro was not valid because free pratique had not been granted, and further that time had been suspended. Two incidents were said to have suspended time: the owner's decision to leave the discharge terminal within 12 minutes of berthing on 31 March 2019; and the owner's refusal to comply with the charterer's request to return to berth at 21.00 on 1 April. The owners asserted that these decisions were based on the safety of the vessel and did not amount to a breach. The charterers also counterclaimed for lightering costs either as a result of the owners' alleged breach or in reliance on clause 7 (discharge costs).

HHJ Bird found that the master's decision to leave the berth on 31 March had been appropriate for safety reasons and did not place the owner in breach of the charter. He went on to find that the vessel's technical operators had been fully entitled to conclude on 1 April that it was not appropriate to grant a waiver from the under-keel clearance policy to allow the vessel to berth in the circumstances, and that the owners had been entitled to reject charterers' request to berth. He noted that the under-keel clearance policy was a clear and important term of the charter.

He observed that the authorities had acted as if free pratique had been granted, with coastguard and pilots boarding the vessel. The evidence supported the view that there was no formal mechanism for the grant of free pratique. On the balance of probabilities, it had been customary to grant free pratique at the port and it was granted. The port appeared to have operated a free pratique by default system, with decisions communicated if there was disease on board. The notice of readiness had been valid.

Finally, the counterclaim failed – the charterparty provided that the charterers were to meet lightering costs due to an inability to safely discharge at berth. Clause 7 concerned general discharge and had no application in the circumstances.

Following the resolution by the Supreme Court[99] of the time bar issue in the *Warner v Scapa Flow Charters* litigation, it was time to resolve the liability issues.

To recap, the litigation concerned the question of 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 sustained 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 and the time bar issue resolved.

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 and that the injuries from the fall had led to his death. At first instance,[100] it was argued that the alleged faults notably included not providing handrails, which was said to be a "defect in the ship" triggering the presumption in favour of liability under article 3(3) of the Athens Convention.[101] Further, the defenders were said to be at fault in not making a risk assessment for walking on deck in diving equipment.

At first instance,[102] the Lord Ordinary had held that while the presumption did not apply, the defenders were guilty of fault or neglect and had failed to perform a risk assessment and were therefore liable to make reparation to the pursuer in terms of article 3(1) of the Athens Convention. The defenders appealed on the issues of fault or neglect in duties of case and risk assessment.

The Inner House[103] held that fault or neglect on the part of defenders in terms of article 3(1) of the Athens Convention had not been established. Their Lordships considered that the Lord Ordinary had applied the correct standard of care namely that of the reasonable person in the role of the defenders, but had erred in the exercise of weighing the elements. He ought to have given some weight to the practice of experienced divers with knowledge of the risks involved in walking short distances. The divers were better placed than the skipper to decide what constituted a reasonably safe system. The standard of care did not extend to prescribing, monitoring and controlling the manner in which each member of a group of highly skilled and experienced technical divers put on their diving gear and moved to the exit point. The divers had had a genuine and informed choice as to how to proceed. Even if the standard of care did extend to prescribing, monitoring and controlling, it was sufficient that the defenders provided a safe means of reaching the exit point by means of a non-slip and unobstructed deck, handrails and a deckhand.

Their Lordships also considered that the defenders had a duty, both under the 1997 Regulations[104] and as part of their general duty of care, to assess the risks of injury to persons on board. The assessment relevant to non-employees related to risk arising from the defenders' acts and omissions. An assessment of the risk of a diver falling, as a result of tripping over his own fins, would have had to take into account the fact that the risk of tripping was not great and that of serious injury was even less. More importantly, it would have had regard to the fact that the persons best placed to assess and deal with any risk were the technical divers themselves and not the defenders.

The Appellate Court did not have the opportunity to consider the concept of "defect in the ship" and the presumption of liability.

Seafarers' rights

Before moving on to Admiralty issues, it is worth noting a case on the priorities of maritime liens which had the pleasing outcome of affording priority to the ancillaries of seafarers' wages claims in India. In *Vadym and Others v OSV Beas Dolphin*,[105] the vessel *OSV Beas Dolphin* had been sold by order of the court on 24 September 2020 and the proceeds were held by the court.

The claimant crew members had obtained summary judgment for their claim for unpaid wages to be met out of the sale proceeds on 10 December 2020 and 23 August 2021, respectively. Priorities in admiralty for claims was decided by the court on 6 September 2022. There were further claimants ranking lower in priority. Some of the further claimants disputed the maritime lien priority of the crew members' claims for interest and costs in respect of their wage claims.

99 *Warner v Scapa Flow Charters* [2018] UKSC 52; [2019] 1 Lloyd's Rep 529.
100 *Warner v Scapa Flow Charters* [2021] CSOH 92; [2022] Lloyd's Rep Plus 24.
101 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974; and the Merchant Shipping Act 1995, section 183.
102 *Warner v Scapa Flow Charters* [2021] CSOH 92; [2022] Lloyd's Rep Plus 24. See also Johanna Hjalmarsson, "Maritime law in 2021: a review of developments in case law".
103 [2022] CSIH 25; [2023] Lloyd's Rep Plus 28.
104 Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997 (SI 1997 No 2962).
105 High Court of Judicature at Bombay, Admiralty and Vice Admiralty Jurisdiction, Commercial Division, NJ Jamadar J, 29 November 2022; [2023] Lloyd's Rep Plus 29.

The judge noted the imperative of timely payment to crew and considered that interest awarded by the court should be regarded as a part of their legitimate claim for wages. No distinction was to be drawn between contractual and court-ordered interest.

> Costs were a means to compensate a party for having to enforce a legitimate claim and should therefore rank alongside the claim itself in priority

As for the priority of seafarers' claim for the costs of proceedings, section 10(1) of the Admiralty Act 2017 of India provided that maritime claims were ranked: (a) maritime liens; (b) mortgages; and (c) other claims. On the hypothesis that costs in respect of the enforcement of a maritime lien did not rank with the maritime lien, the question would arise whether they were a maritime claim at all. But costs were a means to compensate a party for having to enforce a legitimate claim and should therefore rank alongside the claim itself in priority.

Admiralty

Collision

The year bore a surprisingly healthy crop of collision decisions. The cases addressed a diverse range of points.

The place to begin is with the only appellate court decision, namely *M/V Pacific Pearl Co Ltd v Osios David Shipping Inc*,[106] arising from a collision in the Suez Canal on 15 July 2018 between the three vessels *Panamax Alexander*, *Sakizaya Kalon* and *Osios David*. Collision jurisdiction agreements were signed on terms known as "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 (LOU). It was not suggested that discharging collision payments would be a 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. At first instance,[107] Sir Nigel Teare held that the security offered was reasonably satisfactory, but that the offeree was not obliged to accept it.

The claimant appealed the conclusion that the defendant was free to reject security in reasonably satisfactory form. The defendant challenged in a respondent's notice the conclusion that the security was in reasonably satisfactory form. The judge's conclusion that an LOU containing a sanctions clause could be reasonably satisfactory was not challenged, but the respondent submitted notably that the clause should have provided for "best endeavours" rather than "reasonable endeavours" and questioned how much weight should be attached to the identity of the provider.

106 [2022] EWCA Civ 798; [2022] 2 Lloyd's Rep 448.
107 [2021] EWHC 2808 (Comm); [2022] 1 Lloyd's Rep 261.

The Court of Appeal allowed the appeal.[108] The respondent had been under an obligation to accept the security offered and was in breach of the collision jurisdiction agreement for declining it. On a construction of ASG 2 as a whole, its clear purpose was to operate instead of arrest to found jurisdiction and to enable a claim to be served. It was not the case that a party provided with reasonable security remained free to seek alternative or better security. The same result would be reached by way of an implied term that a party that had been offered security in reasonably satisfactory form would accept that security.

The Court of Appeal declined to interfere with the judge's conclusion that the respondent had not shown that the LOU was reasonably satisfactory to them.

A more traditional assessment of fault and apportionment of blame arose for consideration in *MV Pacific Pearl Co Ltd v NYK Orpheus Corp and Another (The Panamax Alexander, NYK Orpheus and NYK Falcon)*.[109] The events in this case took place on 16 July 2018, the day after the collision the subject of *M/V Pacific Pearl Co Ltd v Osios David Shipping Inc*, and again involved the dry bulk carrier *Panamax Alexander*. Following her collision with *Sakizaya Kalon* and *Osios David*, the vessel was moored on the west bank of the Suez Canal in a damaged condition, waiting to be towed to the Bitter Lakes. She had been made fast with six lines, starboard side to. A northbound convoy of ships, beginning with two smaller vessels and then the containership *NYK Falcon* and the containership *NYK Orpheus* was without incident – until just after the passage of *NYK Falcon* and before the passage of the *NYK Orpheus,* when *Panamax Alexander*'s two stern lines parted and she swung out diagonally across the navigable channel. *NYK Orpheus* ran into the port side of *Panamax Alexander*, puncturing a hold and a ballast water tank.

In litigation concerning collision liability for damage to *Panamax Alexander* and *NYK Orpheus*, Andrew Baker J apportioned the liability to *Panamax Alexander*, *NYK Orpheus* and *NYK Falcon* in the proportion 5:5:2.

The judge held that all three ships were at fault: there had been no significant involvement on the part of senior officers in any of the decisions that mattered; there had been poor communication between pilots and ship officers; and discussions of how to safely pass *Panamax Alexander* had not occurred at all or had been limited to the pilots.

Unusually for a case where one vessel is immobilised at her moorings and perhaps specific to the canal location, the judge held that *Panamax Alexander* carried some of the blame, concluding that no prudent mariner would have remained with the six-line mooring and stand-by use of the tugs in the face of an oncoming convoy. *Panamax Alexander* had also failed to notify *NYK Orpheus* that the passing of *NYK Falcon* was causing difficulty. Finally, *Panamax Alexander* had been unmanned for the several hours leading up to the incident, with the pilots alone on the bridge, and had failed to raise the alarm about the parted mooring lines.

As for the liability of *NYK Falcon*, in spite of not having collided with anything, the vessel was at fault for arriving at *Panamax Alexander*'s position at a speed above minimum safe speed. *NYK Orpheus* had also gone into the passage at excessive speed and had maintained insufficient distance to *NYK Falcon*. *NYK Orpheus* in turn had failed to keep a good lookout, had failed to deploy her anchors to stop, was inadequately prepared for an emergency stop and reacted with insufficient decisiveness.

The judge noted that article 59(3) of the Suez Canal Authority Rules, which provided that Canal officials alone were to direct operations in the event of a grounding, did not override the general rule that the master remained responsible and the shipowner liable for negligent navigation on the part of a pilot and specifically for the mooring arrangements while awaiting towage.

Two decisions wrapped up the *Nautical Challenge v Evergreen Marine* litigation following its turn in the Supreme Court;[110] one on the effect on apportionment of the Supreme Court's decision, and one on costs.

The factual background was the collision between the two vessels *Alexandra 1* and *Ever Smart* just outside the dredged channel of the port of Jebel Ali in UAE on 11 February 2015. The original apportionment at first instance[111] had been 80:20 in *Alexandra 1*'s favour, and in the Court of Appeal[112] 60:40. The Supreme Court had then held that the crossing rule applied, and that *Alexandra 1* was subject to the crossing rule if moving so as to involve a risk of collision while waiting for a pilot in the designated waiting area.

108 [2022] EWCA Civ 798; [2022] 2 Lloyd's Rep 448.
109 [2022] EWHC 2828 (Admlty); [2023] Lloyd's Rep Plus 17.
110 *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and The Ever Smart)* [2021] UKSC 6; [2021] 1 Lloyd's Rep 299.
111 *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and The Ever Smart)* [2017] EWHC 453 (Admlty); [2017] 1 Lloyd's Rep 666.
112 *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and The Ever Smart)* [2018] EWCA Civ 2173; [2019] 1 Lloyd's Rep 130.

In the redetermination, *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd*,[113] it fell to Sir Nigel Teare to resolve the case in light of that judgment. The judge directed himself that the Supreme Court's interpretation of the crossing rule was that in a steady bearing case there was no additional requirement that the approaching vessel be on a steady heading or course. The judge next considered the meaning of the Supreme Court's criterion of "compelling necessity" to disapply the crossing rule as a vessel shapes to enter a narrow channel. In a final comment on the Supreme Court's judgment, the judge noted potential confusion arising out of an obligation on a vessel to apply both the narrow channel and crossing rules at the same time.

He went on to note that in a crossing situation, the give-way vessel's actions must be compliant with both Rule 16,[114] requiring early and substantial action, and Rule 8, requiring action in ample time or good time.

The judge declined to read the Supreme Court's judgment as implying that the effect of *Alexandra 1*'s alteration of course towards the channel at C-5 was to disapply the crossing rule retrospectively from C-23 to C-5.

> The judge noted potential confusion arising out of an obligation on a vessel to apply both the narrow channel and crossing rules at the same time

Assessing the evidence, the judge noted that there was precedent to the effect that assessors in an appellate court spoke with no greater authority than those at first instance. It must therefore be the case that the assessors spoke with no greater authority than those in the first trial. While there was a tension between the advice in both trials, the assessors in the first trial had not been asked to consider the crossing rule context. Having thus considered the advice of the nautical assessors, liability would be apportioned 70:30 in *Alexandra 1*'s favour. The faults of *Ever Smart*, in particular the lack of a lookout, were of greater causative potency, but *Alexandra 1*'s breach of the crossing rule had allowed the close-quarters situation to develop.

The second 2022 decision to be reported in this litigation now encompassing no less than seven judgments was *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd*.[115] The owners of *Ever Smart* submitted that they were the winners of the two issues brought before the Supreme Court and that they should have their costs. The revision of the outcome in substance had been from 80:20 in favour of *Alexandra 1*, to 70:30.

While *Ever Smart* had been successful before the Supreme Court, there were also some offers to consider. On 23 October 2015 the owners of *Alexandra 1* had offered to settle the apportionment dispute at 70:30. On 10 August 2016 they made a further offer to settle at 60:40 and the same offer was made again on 19 June 2020 – ahead of Supreme Court proceedings – and on 24 February 2021.

Sir Nigel Teare held that the general rule that costs followed the event should be displaced to give effect to the offer of *Alexandra 1* on 19 June 2020. Up to 21 days after that date, *Ever Smart* should pay 70 per cent of *Alexandra 1*'s costs and *Alexandra 1* should pay 30 per cent of *Ever Smart*'s costs. Thereafter, *Ever Smart* should pay *Alexandra 1*'s costs of the appeal. *Alexandra 1* had not made any offer ahead of the Court of Appeal proceedings and CPR 61.4 should not be read so as to extend the protection of the offer in advance of the first instance to the subsequent appeal. Without applying CPR Part 36, but by analogy of reasoning with *East West Corporation v DKBS 1912 and AKTS Svendborg; Utaniko Ltd v P&O Nedlloyd*,[116] in the absence of a renewed offer it was reasonable to infer that *Alexandra 1* had not, following the first instance decision, been willing to accept a lesser apportionment than that achieved at trial. *Ever Smart*'s application for permission to appeal was refused.

And finally, two decisions involved more traditional application of the Collision Regulations. In *Wilforce LLC and Another v Ratu Shipping Co SA and Another (The Wilforce and The MV Western Moscow)*,[117] the question arose of the application of collision rules in a designated precautionary area within a Traffic Separation Scheme ("TSS").

113 [2022] EWHC 206 (Admlty); [2022] 1 Lloyd's Rep 470.
114 International Regulations for Preventing Collisions at Sea 1972 (COLREGs).
115 [2022] EWHC 830 (Admlty).
116 [2003] EWCA Civ 174; [2003] 1 Lloyd's Rep 265.
117 [2022] EWHC 1190 (Admlty); [2022] 1 Lloyd's Rep 660.

The collision between *Wilforce* and *Western Moscow* took place on 31 May 2019 in a "precautionary area" of the Singapore Strait TSS. The claimants were the owners and demise charterers of the LNG carrier *Wilforce* and the defendants were the owners and the demise charterers of the bulk carrier *Western Moscow*, and the combined claims for the damage caused were said to be in the region of £14 million. The collision had occurred while *Wilforce* proceeded in the southern, eastbound lane of the TSS and *Western Moscow* executed a loop through the eastbound lane within the precautionary area to join the northern, westbound lane. Questions included which vessel was the give-way vessel, how to navigate in the precautionary area and the standard of lookout on board both vessels.

Sir Nigel Teare apportioned liability by 75 per cent to *Western Moscow* and by 25 per cent to *Wilforce*, reasoning as follows.

Although *Wilforce* had been observed on radar at C-6, its presence was not appreciated until about C-3. This was indicative of a very poor lookout in the precautionary area where *Western Moscow* ought to have been navigating with particular care.

Accepting the advice of the assessors, the judge found that by continuing to turn to port instead of carrying on at such a degree as to enter the westbound lane at a shallow angle, *Western Moscow* had found herself heading in a westerly direction in the part of the precautionary area where there might be vessels proceeding in an easterly direction.

The vessels had agreed by VHF to pass port-to-port. Distinguishing *The Mineral Dampier*,[118] the judge noted that that case concerned the use of VHF in the open sea and in any case passing port-to-port was to be expected in the circumstances. However, *Western Moscow* had failed to turn to starboard to effect such passage and was at fault as a result.

Western Moscow had not displayed the lights recommended for the precautionary area, and was exhibiting deck lights in breach of COLREGs Rule 20(b). However, since *Wilforce* was aware of *Western Moscow*, these faults were not causative of the collision.

As for the actions of *Wilforce*, the vessel had been at fault in operating at a speed inconsistent with local regulations which stipulated "maximum state of manoeuvring readiness". Excessive speed at the early stages would be causative if it inhibited the vessel's ability to reduce speed at the critical stage. Its lookout had been good,[119] and if there were faults they were not causative. *Wilforce*'s ability to reduce speed was impaired by the earlier excessive speed but there was no fault in the lateness of the turn to starboard which was due to the presence of an unlit tow to starboard.

The judge also directed himself as to the crossing rule, but concluded that there was no need to apply it here. If the rule applied, *Western Moscow* was the stand-on vessel. As per *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and The Ever Smart)*,[120] the crossing rule should be applied, unless there was some necessity to do otherwise to avoid imminent danger. However, earlier authorities strongly suggested that the stand-on vessel in a crossing situation was not entitled to claim the status of stand-on vessel when it had, by its own fault, created the crossing situation.[121] The judge concluded that it was not necessary to resolve this conundrum, because if the crossing rule applied from C-7, the action required of *Wilforce* as give-way vessel was the same as that required if the crossing rule did not apply.

Nor did *Western Moscow*'s duties necessitate a resolution of the issue. The stand-on vessel's duty to

118 *The Mineral Dampier and The Hanjin Madras* [2001] EWCA Civ 1278; [2001] 2 Lloyd's Rep 419.

119 A rare finding in a collision case!

120 [2021] UKSC 6; [2021] 1 Lloyd's Rep 299.

121 The authorities offered by counsel for Wilforce were *The Spyros* [1953] 1 Lloyd's Rep 501, *The Tojo Maru* [1968] 1 Lloyd's Rep 365, *The Forest Pioneer* [2007] EWHC 84 (Comm); [2007] Lloyd's Rep Plus 26, and *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and The Ever Smart)* [2017] EWHC 453 (Admlty); [2017] 1 Lloyd's Rep 666, all cited with further detail at para 107, and see the discussion at paras 110 to 139.

keep course had to be "moulded" for the purpose of permitting compliance with the other rule, per *Nautical Challenge Ltd v Evergreen Marine* (SC, above). The "other rule" here was not a COLREGs rule but the IMO Resolution mandating recommendations for navigation in a precautionary area. In any case, navigation in a precautionary area was a special circumstance within the meaning of COLREGs Rule 2(b) justifying a departure from the crossing rule to avoid immediate danger. In the result, there was no difference between the course which *Western Moscow* ought to have steered with or without the crossing rule.

Application of the collision regulations to a collision between a jet ski and a speedboat was the issue before the Jersey Royal Court in *Corbin v Dorynek*.[122] The claimant, C, had suffered injuries while a passenger on the jet ski of the second defendant, F, when it collided with a speedboat driven by the first defendant, D. The collision took place on a sunny day with good visibility, little or no wind and calm seas in the southern part of St Brelade's Bay.

C sought damages for negligence. F also sought damages from D. D had admitted liability to both C and F on the basis that he had failed to keep a proper lookout. Remaining issues for the court were whether F had also been negligent and if so the apportionment between F and D in respect of C's claim, as well as the level of contributory negligence of F in relation to his claim against D.

The judge noted that the test in collisions at sea was not one of perfection; it was to act as would a reasonably prudent and careful helmsman.

Here, there were three possible situations: a crossing situation, a jet ski overtaking situation or a speedboat overtaking situation. On the evidence, in any of those scenarios, F had been negligent in failing to keep a proper lookout according to COLREGs Rule 5. A jet ski driver could keep a proper lookout astern by periodically looking over the shoulder using peripheral vision. F's negligence was causative, and he was liable to C along with D.

Further, on the expert evidence this had not been a speedboat overtaking situation as the speedboat had not come up to the jet ski at an angle greater than 22.5 degrees abaft the beam as required by Rule 13. There had on the evidence been a crossing situation from the time the speedboat turned to starboard. Considering the speeds and angles of approach, it was extremely unlikely that the jet ski had at any point been 22.5 degrees abaft the beam of the speedboat.

If there had been a jet ski overtaking situation before the speedboat's turn, the turn had been performed in breach of the speedboat's duties as stand-on vessel under Rule 17(a)(i). However, there was no satisfactory evidence that there had been a jet ski overtaking situation before the turn for the purposes of Rule 13.

In conclusion, in a crossing situation with the speedboat as give-way vessel, although both D and F had failed to keep a proper lookout, liability would be apportioned by 60 per cent to D and 40 per cent to F with the same apportionment for F's contributory negligence.

Salvage

The fascinating story of the silver bars, salvaged from the bottom of the Indian Ocean after 70 years and brought to Southampton only to become the subject of litigation, had its day in the Court of Appeal in 2022. *Argentum Exploration Ltd v The Silver and all persons claiming to be interested in and/or to have rights in respect of the Silver*[123] concerns question of state immunity, because the defendant and appellant South Africa[124] asserted immunity under the State Immunity Act 1978.

Argentum was the salvor seeking reward for its salvage services in retrieving 2,634 silver bars from the Indian Ocean. The silver bars had been on board the passenger and cargo liner *SS Tilawa* when she was sunk by torpedoes in 1942. Once salvaged, the silver bars were brought to Southampton and held to the order of the Receiver of Wreck. The claim had been served on the silver bars but their owner at the time of sinking was South Africa, which claimed immunity from the jurisdiction of the High Court.

South Africa's immunity depended on section 10(4)(a) of the State Immunity Act 1978, namely whether the silver bars and the vessel carrying them were, at the time the cause of action arose, "in use or intended for use for commercial purposes".[125] This in turn depended on whether the status of the silver bars in 2017, when the cause of action arose, was prospective or retrospective:

122 [2022] JRC 47; [2023] Lloyd's Rep Plus 33.

123 [2022] EWCA Civ 1318; [2023] Lloyd's Rep Plus 4.

124 At the time, the Union of South Africa; now the Republic of South Africa. For consistency, here referred to as South Africa.

125 State Immunity Act 1978, section 10(4)(a).

was its status that of having lain inactive on the seabed for 70 years; or did it remain what it was in 1942, at the time of the sinking?

South Africa's case was that the silver bars were intended for coinage. At first instance,[126] Sir Nigel Teare found that the cargo had in 1942 been intended for a predominantly sovereign use, a finding not challenged upon appeal. The judge further held that South Africa was nevertheless not entitled to immunity as the proceedings fell within the exception to immunity for cargoes that were "when the cause of action arose, in use or intended for use for commercial purposes".[127]

> The question of whether a cargo that is in the ownership of a state and intended for the production of sovereign currency, but that at the time of the incident is being commercially transported as cargo on board a commercial ship under way to the discharge port, is a wonderfully convoluted one

South Africa appealed. In the Court of Appeal, the Receiver of Wreck intervened with two questions: namely whether section 10(4) of the 1978 Act, on its true construction, applied at all to wreck; and whether, under the Merchant Shipping Act 1995, the Receiver of Wreck had the power to determine salvage, and an obligation only to release property against a payment of salvage (or the provision of security), even if the owner could invoke state immunity in court proceedings.

The Court of Appeal by a majority (Laing LJ dissenting) dismissed the appeal. First, while section 10(4)(a) of the State Immunity Act essentially only applied to in rem cargo salvage claims, it must be interpreted consistently with section 10(4)(b), which was of wider application, in relation to the question of immunity for in personam salvage claims in respect of state-owned cargoes.

Secondly, the silver was "in use" by South Africa for commercial purposes when it was on board the vessel. The silver had been purchased on fob terms and placed on board the vessel and had been placed on board the vessel pursuant to a contract of carriage. The specific context of section 10(4)(a) was salvage, including salvage of wreck. The intended use of the cargo on completion of the voyage was legally and logically irrelevant to such a claim.

Laing LJ dissented on this point, observing that as a matter of ordinary language a cargo would rarely be "in use" by its owner for any purpose while being carried and the key question ought therefore to be whether, when the casualty occurred, the cargo was *intended* for use by the state for commercial purposes.

The question of whether a cargo that is in the ownership of a state and intended for the production of sovereign currency, but that at the time of the incident is being commercially transported as cargo on board a commercial ship under way to the discharge port, is a wonderfully convoluted one. Teare J was arguably correct in observing that if a cargo being carried was not "in use" in the normal sense of the words, there would be very few, if any, cargoes to which the statute might apply.

Laing LJ also observed, and Andrews and Popplewell LJJ here agreed, that the Receiver of Wreck did not have a statutory implied power to decide whether salvage was due in the present case.

Arrest

The Singapore Court of Appeal considered the appeal in *The Jeil Crystal*,[128] the first instance decision in which was handed down in the final days of 2021.[129] The case concerned notably the continuation of arrest for a different cause of action than that originally pleaded. *Jeil Crystal* had been arrested and an application was submitted to set aside the warrant of arrest. It transpired that the original claim stated in the warrant of arrest had never existed.

126 [2020] EWHC 3434 (Admlty); [2021] 2 Lloyd's Rep 1. Noted in Johanna Hjalmarsson, "Maritime law in 2020: a review of developments in case law".
127 State Immunity Act 1978, section 10(4)(a).
128 *Owners of the vessel Jeil Crystal v Owners of the cargo lately laden onboard Jeil Crystal* [2022] SGCA 66; [2023] Lloyd's Rep Plus 31.
129 [2021] SGHC 292.

The arresting bank had asserted in support of the claim that it was the lawful holder of the bills of lading in respect of cargo released without presentation, whereas in fact it had previously endorsed the bills of lading to its trade finance client so that it was no longer in its possession.

Following release of the vessel against security, the bank sought to amend its statement of claim from misdelivery of cargo to breach of the contract of carriage in wrongfully switching the bills. The question arose whether, if the amendment was allowed, the warrant of arrest could be upheld on the newly pleaded cause of action or should be set aside. The judge at first instance declined to set aside the warrant of arrest,[130] because the plaintiff had applied to amend the statement of claim and that application was allowed, backdating the amended claim to the date of the in rem writ. The shipowner interests (JIL) appealed.

The question before the Court of Appeal was: "In an application to set aside a warrant of arrest of a ship, can the warrant of arrest be upheld on the basis of an amended claim and/or cause of action which was not originally pleaded by the arresting party at the time of the application for and the issue of the warrant of arrest?"[131]

The Court of Appeal allowed the appeal and ordered the arrest warrant set aside. The judge had erred in upholding the warrant of arrest.

While the judge had been correct to hold that an amendment to the statement of claim would result in a consequential amendment to the in rem writ, it did not follow that the same conclusion must be drawn in respect of a warrant of arrest. An arrest warrant was in its nature an order of the court. As such it could, according to the Rules of Procedure, only be amended in limited circumstances. Warrants of arrest were issued by the court on the basis of the claim as verified in the supporting affidavit filed by the in rem plaintiff in the arrest application. On the basis of the supporting affidavit, the court determined if its discretionary powers of arrest should be exercised. Where an amendment had been allowed to the statement of claim and the underlying in rem writ, that would constitute a change in the claim pursued by the plaintiff, but any such amendment to the statement of claim and the in rem writ could have no effect on the averments in the supporting affidavit.

In *Continental Radiance Offshore Pvt Ltd v MV Lewek Altair (IMO No 9413183) and Another*,[132] the characterisation of a charterparty as a time or bareboat charterparty was crucial to the question of arrest.

The plaintiff applied for a review of a decision vacating an ex parte order of arrest of the motor vessel *Lewek Altair*, issued on 14 December 2021. The first respondent was the vessel and the second respondent was its owner. The plaintiff had bareboat-chartered two vessels it owned to a third party, VP, and had claims against VP under those charters. It asserted that VP was the bareboat charterer of *Lewek Altair* so that the plaintiff was entitled to proceed in rem against the vessel. The owner of *Lewek Altair* was a SPV[133] and its ISM manager was VM, a wholly owned subsidiary of VP. The arrest order was later vacated based on the second respondent's objection that VP was not the bareboat charterer. A charterparty had been concluded between the second respondent and VP on 24 March 2019, but the parties disagreed on whether it was a bareboat or a time charterparty.

The plaintiff sought a review seeking to prove that VP was the bareboat charterer. The respondent objected that the evidence did not show that VP was the bareboat charterer, and that in any case the plaintiff would have had the opportunity to bring the same evidence at an earlier time.

NJ Jamadar J rejected the review petition and the interim application for arrest. First, the documents in question had either been in the plaintiff's possession on 14 December 2021 or were public documents and there was no reason they could not have been submitted then, meaning that the Civil Procedure Code supplied no ground for review.

Secondly, the fact that the charterparty dated 24 March 2019 between the second respondent and VP was headed "time charterparty" was not decisive. However, a reading of the document as a whole did not give rise to an inference that the legal relationship brought about by it was a bareboat charter. The second respondent did not divest control over the ship, master and crew. The charterer did not appear to undertake liability to third parties or appoint crew. The charterparties entered into by VP and further parties were not enlightening and could not alter the nature of the present charterparty.

130 [2021] SGHC 292.
131 [2022] SGCA 66; [2023] Lloyd's Rep Plus 31, para 3.
132 High Court of Judicature at Bombay, Admiralty and Vice-Admiralty Jurisdiction, NJ Jamadar J, 19 April 2022; [2023] Lloyd's Rep Plus 34.
133 Special purpose vehicle.

Thirdly, the fact that the person who had entered into the charterparty on behalf of VP was also the 99.99 per cent shareholder in the second respondent was neither here nor there, when the ownership had subsequently changed before the maritime claim arose. Nor was any weight to be given to the fact that VP's subsidiary was the ISM manager of the vessel.

Finally, the semantics of what test was to be applied at the arrest stage – whether "reasonably arguable best case" as under common law or some other test under the Admiralty Act 2017 – would not be considered where the plaintiff had not succeeded in showing a prima facie case.

From the Federal Court of Australia, *Viva Energy Australia Pty Ltd v MT "AG Neptune" (No 2)*,[134] was a short decision concerning the practical circumstances of a voyage undertaken while under arrest, on the orders of the court. The judge had, in a decision two days earlier,[135] made orders permitting the MT *AG Neptune* to proceed to Gladstone while under arrest, provided that it remain at all times within the territorial sea of Australia, on the basis that the vessel should remain within the jurisdiction of the court. The owners and demise charterers sought a variation to that order so as to allow the vessel to exit the territorial sea for a short while on its approach to Gladstone, due to navigational hazards.

Stewart J made the order sought, reasoning as follows. First, if the vessel were to leave the territorial sea, that would not invalidate the arrest or cause the vessel to leave the custody of the Marshal because the vessel would be proceeding under and subject to the orders of the court after being arrested within the jurisdiction. Section 22 of the Admiralty Act 1988 (Cth) provided that a ship or other property may be arrested in an action in rem at any place within Australia, including a place within the limits of the territorial sea. There was no provision to the effect that, once arrested, a vessel must remain at all times within the territorial sea in order for the arrest to remain valid.

Secondly, while there was a jurisdictional question as to making orders purporting to take effect beyond territorial waters, the demise charterer and registered owner had made undertakings to the court not to take a point on that basis in proceedings and not to give any orders causing a breach of the undertakings.

Finally, the named relevant persons had entered an unconditional appearance in the in rem action, so that the court had personal jurisdiction in respect of them per *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[136] and *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd (The Comandate)*.[137]

Limitation of liability

Two decisions in the *MSC Flaminia* litigation emerged in the course of the year. The background was that on 14 July 2012, as a result of an explosion on board, hundreds of containers were destroyed or damaged and the vessel itself suffered serious damage.

The explosion was caused by auto-polymerisation of the contents of one or more of three tank containers loaded at New Orleans. At the time, *MSC Flaminia* was under a time charter between MSC as charterer and Conti as registered owner. The time charter provided for arbitration in London. Conti commenced arbitration and in 2021 obtained three awards under which it was awarded damages of some US$200 million. The awards held that MSC was in breach of the charterparty by failing to inform Conti of the dangers from the cargo, but declared that there had been no negligence by MSC in the shipping itself. On 5 October 2021 MSC's limitation fund was established. The limitation figure was some £26.5 million.

First, in a decision issued on 12 April 2022,[138] Andrew Baker J held that Conti could not rely on article 4 of the Convention on the Limitation of Liability for Maritime Claims 1976, as amended ("the Convention"). The article required intent or recklessness and knowledge that such loss would probably result, and the arbitral tribunal had held that MSC had not been negligent, resolving that issue as between the parties and creating an issue estoppel between them.

That resolved the article 4 defence, making it unavailable, but there remained Conti's case based on article 2 of the Convention. On 2 November 2022[139] the judge went on to consider this alternative case, whereby Conti argued that the claims at issue were not subject to limitation because they did not fall within the scope of article 2 of the Convention. It was common ground that damage to property and loss of property *to cargo* had occurred. Conti's claims were for damage and expenditure flowing

134 [2022] FCA 533; [2023] Lloyd's Rep Plus 38.
135 *Viva Energy Australia Pty Ltd v MT "AG Neptune"* [2022] FCA 522.
136 (1976) 136 CLR 529.
137 [2006] FCAFC 192; [2008] 1 Lloyd's Rep 119; (2006) 157 FCR 45.
138 *MSC Mediterranean Shipping Co SA v Stolt Tank Containers BV and Others (The MSC Flaminia)* [2022] EWHC 835 (Admlty); [2022] 2 Lloyd's Rep 341.
139 *MSC Mediterranean Shipping Co SA v Stolt Tank Containers BV and Others (The MSC Flaminia)* [2022] EWHC 2746 (Admlty); [2023] Lloyd's Rep Plus 40.

from the incident, including costs such as discharge of cargo necessary to undertake repairs to the ship; and the costs of repair. Conti had succeeded in those claims in arbitration and the question here was solely of MSC's right to limit liability.

Article 2(1)(a) made subject to limitation:

> "claims in respect of loss of life or personal injury or loss of or damage to property..., occurring on board or *in direct connection* with the operation of the ship or with salvage operations, *and consequential loss resulting therefrom*." (Emphasis added.)

The judge held that MSC was not entitled to limit liability in respect of Conti's claims. Conti's most far-reaching proposal, that claims between entities falling under the definition of "shipowner" in article 1(2) were only subject to limitation if they originated from third parties, would be rejected. Where a ship was under charter, a cargo claim by the charterer against the owner in respect of loss of or damage to cargo owned by the charterer would fall within article 2(1)(a) of the Convention, likewise a claim by an owner against the charterer for loss of or damage to containers owned by the owner.

However, Conti's claim as owner against MSC as charterer in respect of loss or damage to the ship, including consequential loss resulting therefrom, was not limitable under article 2(1)(a) or otherwise. The present claim was not one for loss of or damage to cargo, including consequential loss therefrom. MSC's proposition that if cargo damage causes damage to the ship, an owner's claim against the charterer for damages for damaging the ship is a claim in respect of cargo damage so as to be limitable, would be rejected.

The judge went on to affirm that the resistance of the common law to claims in tort for economic loss consequent upon damage to property in which the claimant has no proprietary or possessory interest was not a reason to assume, when construing the 1976 Convention, that such claims could not be made.

Finally, there was no need to embark, other than obiter, upon individual characterisation of Conti's heads of claim under articles 2(1)(e) and (f), where Conti had made good in the arbitration a single claim for damage to the ship and consequential losses, to which tonnage limitation did not apply. Permission to appeal has been sought.[140]

[140] Per https://casetracker.justice.gov.uk as of 24 December 2022.

The highly specific issue of limitation of liability for wreck removal claims was considered by the Hong Kong Court of Appeal in *Perusahaan Perseroan (Persero) PT Pertamina v Trevaskis Ltd and Others (The Star Centurion and The Antea)*.[141] The Convention on Limitation of Liability for Maritime Claims 1976 permits states to make reservations against the ability to limit liability for such claims and is implemented in Hong Kong by the Merchant Shipping (Limitation of Shipowners Liability) Ordinance, Cap 434, Part III.

The litigation arose out of a collision between the plaintiff's vessel *Antea* and the defendant's vessel *Star Centurion*, which occurred on or about 13 January 2019 off Horsburgh Light House in the South China Sea. *Star Centurion* was at anchor in Indonesian waters and sank. The owners of *Antea* brought an action seeking to limit liability. The owners of *Star Centurion* for their part sought a declaration that part of their claim for raising and removal of the wreck of *Star Centurion* should not be subject to limitation under article 2 of the 1976 Convention. The claim was unusual in that the claimant was a private entity.

The application of article 2(1)(d) was excluded by a reservation under article 18 made by the UK, in its original ratification in 1980.[142] This was continued by the People's Republic of China with effect from 1 July 1997. The corresponding statutory provision was the UK Merchant Shipping Act 1979 (Hong Kong) Order 1980, subsequently amended and re-enacted, most recently in 1993.[143] As in the corresponding UK provisions,[144] the ordinance permitted a designated official to set up a fund for the purpose of meeting the costs of removal of wreck. No such fund had been set up.

The owners of *Antea* argued in essence that the domestic suspending provision was aimed at claims by statutory authorities, but not at private recourse claims. These, it was argued, fell under article 2(1)(a) or (c) and were subject to limitation. At first instance,[145] the judge held that the claim of the owners of *Star Centurion* was not subject to limitation. The owners of *Antea* appealed.

[141] [2022] HKCA 1089; [2023] Lloyd's Rep Plus 5.

[142] The UK continues to maintain this reservation until such time as a fund has been set up by the Secretary of State to respond to wreck removal claims. The purpose appears to be to ensure that port authorities are not made to bear prohibitive costs of wreck removal within their areas of responsibility.

[143] Merchant Shipping (Limitation of Shipowners Liability) Ordinance, Cap 434, Part III, see especially section 15.

[144] 'Merchant Shipping Act 1995, Schedule 7, Part I, article 11 and Part II, 3.

[145] *Perusahaan Perseroan (Persero) PT Pertamina v Trevaskis Ltd and Others (The Star Centurion and The Antea)* [2021] HKCFI 396; [2021] 2 Lloyd's Rep 637.

The Court of Appeal dismissed the appeal. As the judge had held, on a proper construction of the ordinary meaning of the relevant provisions in the 1976 Convention, the claim for wreck removal was excluded from the limitation regime under the ordinance through the reservation made under article 18(1), against article 2(1)(d).

> The higher tonnage limitation was a legitimate juridical advantage which the plaintiffs were entitled to seek. Seeking it did not amount to forum shopping

It appears evident that the reservation under article 18, and in particular the UK's implementation thereof as reflected in the Hong Kong provisions, are aimed squarely at wreck removal claims by port authorities. The purpose is to ensure full financial compensation for wreck removal to port authorities, not private entities. However, this distinction is not made anywhere in the implementing provisions, so that the Court of Appeal's decision – with respect – appears to be the only possible conclusion.

The argument that higher limits of liability are a legitimate reason to litigate in a particular venue are occasionally raised in forum choice litigation. The importance of that argument was considered on appeal by the Hong Kong Court of Appeal in *Pusan Newport Co Ltd v The Owners and/or Demise Charterers of the Ships or Vessels "Milano Bridge", "CMA CGM Musca" and "CMA CGM Hydra"*,[146] on appeal from the decision of the judge at first instance who emphasised that forum shopping was undesirable.[147]

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 Panamanian-registered vessel *Milano Bridge*. The plaintiff sought damages for business interruption and damage to cranes arising out of an allision involving contact between the vessel, some of the plaintiff's cranes and another vessel.

The damages sought exceeded the mutual limitation of liability in the terminal services agreement concluded with charterers, but to which the defendants were not parties. They also substantially exceeded the limit of liability of the Convention on Limitation of Liability for Maritime Claims 1976, applicable to a claim in South Korea. The sister ship *CMA CGM Musca* had been arrested in Hong Kong 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 accident investigation as well as litigation materially identical to the present proceedings in Japan, where the main vessel owner was incorporated.

The defendants applied for the action to be stayed on the grounds of forum non conveniens or lis alibi pendens. At first instance, the judge had stayed the proceedings. The terminal operator appealed, asserting that the judge had been wrong to refer its attempt to seek the advantage of Hong Kong's higher tonnage limitation as "forum shopping"; arguing that the higher tonnage limitation in Hong Kong was a legitimate juridical advantage under stage 2 of the *Spiliada* test;[148] and that as a result the judge had erred in ordering the stay. It was by now accepted that the court of South Korea was clearly or distinctly the more appropriate forum.

The Court of Appeal dismissed the appeal. Considering at first the higher tonnage limitation in Hong Kong in the context of jurisdiction proceedings, it should be regarded as a legitimate juridical advantage which the plaintiffs were entitled to seek. The judge had erred in concluding at stage 2 of the *Spiliada* exercise that seeking it amounted to forum shopping.

However, in the balancing exercise considering the factors in favour of and against a stay, the defendants had established that substantial justice would be done in South Korea, notwithstanding the lower limit of liability.

On jurisdictions applying the lower 1976 Convention limits, the Court of Appeal opined that comity required recognition that justice could be obtainable in a jurisdiction applying those limits.

146 [2022] HKCA 157; [2022] 1 Lloyd's Rep 441.

147 [2021] HKCFI 1283; [2022] Lloyd's Rep Plus 48. See also Johanna Hjalmarsson, "Maritime law in 2021: a review of developments in case law", at footnote 145.

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

Judicial sale

From Australia, a case on the finer points of orders for judicial sale came in the form of *Bank of New Zealand (Security Trustee) v The Vessel MY "Island Escape"*,[149] where the question was whether a valuation should be ordered.

The plaintiff mortgaging bank commenced proceedings in rem against the luxury cruise ship *Island Escape* on 18 August 2022. The ship was arrested at Broome on 19 August 2022. On 22 August 2022 two parties filed caveats against release from arrest. No appearance was entered for the defendant within the 21-day period prescribed in rule 23 of the Admiralty Rules 1988 (Cth), and on 9 September 2022, the plaintiff applied for sale of the ship without a valuation under rule 69 of the Admiralty Rules; or alternatively for the sale order to be made pendente lite. The ship had in September been directed to sail, while under arrest, from Broome in tropical waters to Fremantle, and while the costs of arrest were lower at Fremantle they would continue to mount.

The plaintiff sought a judicial sale without valuation, submitting that a valuation had been performed in June 2022 by one of its four nominee shipbrokers. The plaintiff's evidence suggested that the market for the ship was niche and specialised and that the use of an international shipbroker may be necessary to achieve the best price.

In the Federal Court of Australia, Feutrill J made an order for judicial sale without valuation. No steps had been taken by the registered owner or demise charterer to pay the debt; no opposition to the sale had been registered; the costs of the arrest continued to diminish the value of the plaintiff's security; the continued arrest had an impact on the crew and those maintaining the ship; and there was no apparent prospect of alternative security.

The judge also made an additional order permitting the Marshall to undertake a valuation, should this be considered necessary. Noting judicial observations in *Bank of Scotland plc v Owners of The M/V "Union Gold", The M/V "Union Silver", The M/V "Union Emerald" and The M/V "Union Pluto"*[150] and *Norddeutsche Landesbank Girozentrale v The Ship "Beluga Notification" (No 2)*,[151] no order would be made *compelling* the Marshal to perform a valuation, but the Marshal would be *permitted* and justified to have the ship valued if this was considered necessary or desirable for the purpose of the sale of the ship.

149 [2022] FCA 1230; [2023] Lloyd's Rep Plus 41.

150 [2013] EWHC 1696 (Admlty); [2014] 1 Lloyd's Rep 53.

151 [2011] FCA 665.

The relatively rare issue of demarcation between admiralty and insolvency proceedings was considered by the High Court of Judicature at Bombay in *Angre Port Pte Ltd v The "Tag 15" (IMO 9705550) and Another*.[152]

The first defendant was the vessel *Tag 15*. The plaintiff claimed in rem on the basis that the vessel had been incurring port charges, berth charges, salvage charges and similar fees in the plaintiff's port continuously since 13 February 2019. The salvage charges were in respect of two separate monsoon-related incidents when the port had supplied assistance to the vessel. The vessel had first been arrested by a creditor on 4 March 2019. On 24 April 2019 the owner of the vessel entered into involuntary insolvency proceedings and was wound up by court order on 26 September 2019. The second defendant was the liquidator of the owner.

The crew had abandoned the vessel on 7 May 2019 amid failure to make provisions for them. The plaintiff obtained an arrest order on 20 January 2020 but the liquidator was granted limited relief to attempt to sell the vessel. An admiralty sale was then conducted with a bill of sale signed on 29 October 2020. The plaintiff now sought summary judgment for its claims. The liquidator objected on four grounds, including res judicata in the insolvency proceedings, the procedural bar in insolvency, and that the salvage charges had been rejected in the insolvency proceedings for want of supporting evidence.

The judge granted summary judgment to the plaintiff in respect of port charges, berth charges, penal berth hire charges and mooring crew, but not the salvage charges for which there was insufficient documentation available. The judge first observed that the Insolvency and Bankruptcy Code, section 33(5) prevented suits from being instituted against the corporate debtor. However, this did not affect an action solely in rem against the vessel under the Admiralty Act 2017.

Further, the principles of res judicata applied when the same matter between the same parties had been adjudicated in a previous suit, but did not apply here. The vessel and the liquidator of its owner were not the same parties for these purposes and the claim for salvage charges had not been considered by the liquidator on its merits.

[152] High Court of Judicature at Bombay, Admiralty and Vice Admiralty Jurisdiction, BP Colabawalla J, 3 January 2022; [2023] Lloyd's Rep Plus 43.

Conclusion

Some exciting appeals are under way from these decisions, which promise to keep the Court of Appeal very busy indeed. Already on 11 January 2023, the appeal in *Sharp Corporation Ltd v Viterra BV*[153] was allowed by the Court of Appeal and the case remitted to the GAFTA Appeal Board.

The appeal in *Unicredit Bank AG v Euronav NV*[154] is expected to be heard at the end of March 2023.[155] The decision in *Fimbank plc v KCH Shipping Co Ltd*[156] has been appealed and is expected to be heard by October 2023.[157]

Equally, the High Court decision in *Quadra Commodities SA v XL Insurance Co SE and Others*[158] has been appealed to the Court of Appeal and is awaiting a hearing in March 2023.[159]

In *MSC Mediterranean Shipping Co SA v Stolt Tank Containers BV and Others (The MSC Flaminia)*,[160] permission to appeal has been sought from the order of 2 November 2022.[161]

Permission to appeal has also been sought in *Vitol SA v JE Energy Ltd*.[162]

And finally, permission to appeal to the Supreme Court in *SK Shipping Europe plc v Capital VLCC 3 Corp and Another (The C Challenger)*,[163] was refused on 2 November 2022.[164]

[153] [2023] EWCA Civ 7. The first instance decision, [2022] EWHC 354 (Comm); [2022] 2 Lloyd's Rep 43, is noted under "Sale of goods" on page 17 above.
[154] [2022] EWHC 957 (Comm); [2022] 2 Lloyd's Rep 467.
[155] Per https://casetracker.justice.gov.uk as of 29 December 2022.
[156] *Fimbank plc v KCH Shipping Co Ltd* [2022] EWHC 2400 (Comm); [2023] Lloyd's Rep Plus 1.
[157] Per https://casetracker.justice.gov.uk as of 24 December 2022.
[158] [2022] EWHC 431 (Comm); [2022] 2 Lloyd's Rep 541.
[159] Per https://casetracker.justice.gov.uk as of 29 December 2022.
[160] [2022] EWHC 2746 (Admlty); [2023] Lloyd's Rep Plus 40.
[161] Per https://casetracker.justice.gov.uk as of 24 December 2022.
[162] [2022] EWHC 2494 (Comm); [2023] Lloyd's Rep Plus 21, noted under "Sale of goods" on page 17 above.
[163] [2022] EWCA Civ 231; [2022] 1 Lloyd's Rep 521, noted under "Time charterparties" on page 12 above.
[164] www.supremecourt.uk/news/permission-to-appeal-november-2022.html, accessed 20 January 2023.

APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED IN THIS REVIEW

2022 judgments analysed

AG Neptune, The (FCA) [2022] FCA 533; [2023] Lloyd's Rep Plus 38
Alexandra 1, The (QBD (Admlty Ct)) [2022] EWHC 206 (Admlty); [2022] 1 Lloyd's Rep 470
Alexandra 1, The (QBD (Admlty Ct)) [2022] EWHC 830 (Admlty); [2023] Lloyd's Rep Plus 39
Amethyst, The (QBD (Comm Ct)) [2022] EWHC 452 (Comm); [2022] 2 Lloyd's Rep 619; (CA) [2022] EWCA Civ 1091; [2023] 1 Lloyd's Rep 13
Angre Port Pte Ltd v The "Tag 15" (IMO 9705550) and Another 3 January 2022; [2023] Lloyd's Rep Plus 43
Antea, The (HKCA) [2022] HKCA 1089; [2023] Lloyd's Rep Plus 5
Arc-en-Ciel Produce Inc v The Ship "BF Leticia" 2022 FC 843; [2022] Lloyd's Rep Plus 105
Argentum Exploration Ltd v The Silver and all Persons Claiming to be Interested in and/or to have Rights in Respect of the Silver (CA) [2022] EWCA Civ 1318; [2023] Lloyd's Rep Plus 4
Arnold v Halcyon Yachts Ltd (The Vlaroda) (KBD (Admlty Ct)) [2022] EWHC 2858 (Admlty); [2023] Lloyd's Rep Plus 36
Bank of New Zealand (Security Trustee) v The Vessel MY "Island Escape" (FCA) [2022] FCA 1230; [2023] Lloyd's Rep Plus 41
BBC Nile, The (FCAFC) [2022] FCAFC 171; [2023] Lloyd's Rep Plus 23
BF Leticia, The 2022 FC 843; [2022] Lloyd's Rep Plus 105
BP Oil International Ltd v Glencore Energy UK Ltd (QBD (Comm Ct)) [2022] EWHC 499 (Comm); [2022] 2 Lloyd's Rep 221
C Challenger, The (CA) [2022] EWCA Civ 231; [2022] 1 Lloyd's Rep 521
Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG (The BBC Nile) (FCAFC) [2022] FCAFC 171; [2023] Lloyd's Rep Plus 23
Ceto Shipping Corporation v Savory Shipping Inc (The Victor 1) (QBD (Comm Ct)) [2022] EWHC 2636 (Comm); [2023] Lloyd's Rep Plus 24
CM P-Max III Ltd v Petroleos del Norte SA (The MT Stena Primorsk) (QBD (Comm Ct)) [2022] EWHC 2147 (Comm); [2022] Lloyd's Rep Plus 100
CMA CGM Hydra, The (HKCA) [2022] HKCA 157; [2022] 1 Lloyd's Rep 441
CMA CGM Musca, The (HKCA) [2022] HKCA 157; [2022] 1 Lloyd's Rep 441
Continental Radiance Offshore Pvt Ltd v MV Lewek Altair (IMO No 9413183) and Another [2023] Lloyd's Rep Plus 34
Corbin v Dorynek [2022] JRC 47; [2023] Lloyd's Rep Plus 33
Courage, The (QBD (Comm Ct)) [2022] EWHC 452 (Comm); [2022] 2 Lloyd's Rep 619; (CA) [2022] EWCA Civ 1091; [2023] 1 Lloyd's Rep 13
Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd [2022] SGHC(I) 1; [2023] Lloyd's Rep Plus 25
Dijksgracht, The (FCA) [2022] FCA 1038; [2023] Lloyd's Rep Plus 19
Divinegate, The (QBD (Comm Ct)) [2022] EWHC 2095 (Comm); [2022] Lloyd's Rep Plus 99
Eastern Pacific Chartering Inc v Pola Maritime Ltd (The Divinegate) (QBD (Comm Ct)) [2022] EWHC 2095 (Comm); [2022] Lloyd's Rep Plus 99
Ever Smart, The (QBD (Admlty Ct)) [2022] EWHC 206 (Admlty); [2022] 1 Lloyd's Rep 470
Ever Smart, The (QBD (Admlty Ct)) [2022] EWHC 830 (Admlty); [2023] Lloyd's Rep Plus 39
Fimbank plc v KCH Shipping Co Ltd (QBD (Comm Ct)) [2022] EWHC 2400 (Comm); [2023] Lloyd's Rep Plus 1
ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine" (SGHC) [2022] SGHCR 5; [2022] Lloyd's Rep Plus 83
Island Escape, The (FCA) [2022] FCA 1230; [2023] Lloyd's Rep Plus 41
Ixom Operations Pty Ltd v Blue One Shipping SA (FCA) [2022] FCA 1101; [2023] Lloyd's Rep Plus 27
JDA Co Ltd and Others v AIG Insurance New Zealand Ltd and Others (NZCA) [2022] NZCA 532; [2023] Lloyd's Rep Plus 12
Jeil Crystal, The (SGCA) [2022] SGCA 66; [2023] Lloyd's Rep Plus 31
Kuvera Resources Pte Ltd v JPMorgan Chase Bank NA (SGHC) [2022] SGHC 213; [2023] Lloyd's Rep Plus 22
Laysun Service Co Ltd v Del Monte International GmbH (QBD (Comm Ct)) [2022] EWHC 699 (Comm); [2023] Lloyd's Rep Plus 15
Lewek Altair, The [2023] Lloyd's Rep Plus 34
M/V Pacific Pearl Co Ltd v Osios David Shipping Inc (CA) [2022] EWCA Civ 798; [2022] 2 Lloyd's Rep 448
Milano Bridge, The (HKCA) [2022] HKCA 157; [2022] 1 Lloyd's Rep 441
Miracle Hope, The (No 4) [2022] EWHC 2234 (Comm); [2023] Lloyd's Rep Plus 6
MSC Flaminia, The (QBD (Admlty Ct)) [2022] EWHC 2746 (Admlty); [2023] Lloyd's Rep Plus 40
MSC Flaminia, The (QBD (Admlty Ct)) [2022] EWHC 835 (Admlty); [2022] 2 Lloyd's Rep 341
MSC Mediterranean Shipping Co SA v Stolt Tank Containers BV and Others (The MSC Flaminia) (QBD (Admlty Ct)) [2022] EWHC 835 (Admlty); [2022] 2 Lloyd's Rep 341
MSC Mediterranean Shipping Co SA v Stolt Tank Containers BV and Others (The MSC Flaminia) (QBD (Admlty Ct)) [2022] EWHC 2746 (Admlty); [2023] Lloyd's Rep Plus 40
Mur Shipping BV v RTI Ltd (QBD (Comm Ct)) [2022] EWHC 467 (Comm); [2022] 2 Lloyd's Rep 297; (CA) [2022] EWCA Civ 1406; [2023] Lloyd's Rep Plus 3
MV Pacific Pearl Co Ltd v NYK Orpheus Corp and Another (The Panamax Alexander, NYK Orpheus and NYK Falcon) (KBD (Admlty Ct)) [2022] EWHC 2828 (Admlty); [2023] Lloyd's Rep Plus 17
Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and The Ever Smart) (QBD (Admlty Ct)) [2022] EWHC 206 (Admlty); [2022] 1 Lloyd's Rep 470
Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and The Ever Smart) (QBD (Admlty Ct)) [2022] EWHC 830 (Admlty); [2023] Lloyd's Rep Plus 39
Navig8 Ametrine, The (SGHC) [2022] SGHCR 5; [2022] Lloyd's Rep Plus 83
NKD Maritime Ltd v Bart Maritime (No 2) Inc (The Shagang Giant) (QBD (Comm Ct)) [2022] EWHC 1615 (Comm); [2022] 2 Lloyd's Rep 601
NYK Falcon, The (KBD (Admlty Ct)) [2022] EWHC 2828 (Admlty); [2023] Lloyd's Rep Plus 17
NYK Orpheus, The (KBD (Admlty Ct)) [2022] EWHC 2828 (Admlty); [2023] Lloyd's Rep Plus 17
OCM Maritime Nile LLC and Another v Courage Shipping Co and Others (The Courage and The Amethyst) (QBD (Comm Ct)) [2022] EWHC 452 (Comm); [2022] 2 Lloyd's Rep 619; (CA) [2022] EWCA Civ 1091; [2023] 1 Lloyd's Rep 13

OCM Singapore Njord Holdings Hardrada Pte Ltd and Others v Gulf Petrochem FZC [2022] EWHC 57 (Comm); [2023] Lloyd's Rep Plus 26
Oversea-Chinese Banking Corporation Ltd v Owner and/or Demise Charterer of the Vessel "STI Orchard"; Winson Oil Trading Pte Ltd (Intervening) (SGHC) [2022] SGHCR 6; [2023] 1 Lloyd's Rep 22
Owners of the vessel Jeil Crystal v Owners of the cargo lately laden onboard Jeil Crystal (SGCA) [2022] SGCA 66; [2023] Lloyd's Rep Plus 31
Panamax Alexander, The (KBD (Admlty Ct)) [2022] EWHC 2828 (Admlty); [2023] Lloyd's Rep Plus 17
Perusahaan Perseroan (Persero) PT Pertamina v Trevaskis Ltd and Others (The Star Centurion and The Antea) (HKCA) [2022] HKCA 1089; [2023] Lloyd's Rep Plus 5
Piraeus Bank AE v Antares Underwriting Ltd and Others (The ZouZou) (QBD (Comm Ct)) [2022] EWHC 1169 (Comm); [2022] 2 Lloyd's Rep 1
Pola Logistics Ltd v GTLK Europe Designated Activity Company and Others (IEHC) [2022] IEHC 501; [2023] Lloyd's Rep Plus 16
Poralu Marine Australia Pty Ltd v MV Dijksgracht (FCA) [2022] FCA 1038; [2023] Lloyd's Rep Plus 19
PT Adidaya Energy Mandiri v MS First Capital Insurance Ltd [2022] SGHC(I) 14; [2022] 2 Lloyd's Rep 381
Pusan Newport Co Ltd v The Owners and/or Demise Charterers of the Ships or Vessels "Milano Bridge" and "CMA CGM Musca" and "CMA CGM Hydra" (HKCA) [2022] HKCA 157; [2022] 1 Lloyd's Rep 441
Quadra Commodities SA v XL Insurance Co SE and Others (QBD (Comm Ct)) [2022] EWHC 431 (Comm); [2022] 2 Lloyd's Rep 541
Rose v Carnival Corporation 2022 ONSC 6506; [2023] Lloyd's Rep Plus 30
Royal Caribbean Cruises Ltd v Rawlings [2022] NSWCA 4; [2022] 1 Lloyd's Rep 643
Sea Master Special Maritime Enterprise and Another v Arab Bank (Switzerland) Ltd (QBD (Comm Ct)) [2022] EWHC 1953 (Comm); [2022] Lloyd's Rep Plus 94
Sea Watch eV v Ministero Delle Infrastrutture e Dei Trasporti and Others (CJEU) Joined Cases C-14/21 and C-15/21; [2023] Lloyd's Rep Plus 35
Shagang Giant, The (QBD (Comm Ct)) [2022] EWHC 1615 (Comm); [2022] 2 Lloyd's Rep 601
Sharp Corporation Ltd v Viterra BV (previously known as Glencore Agriculture BV) (QBD (Comm Ct)) [2022] EWHC 354 (Comm); [2022] 2 Lloyd's Rep 43
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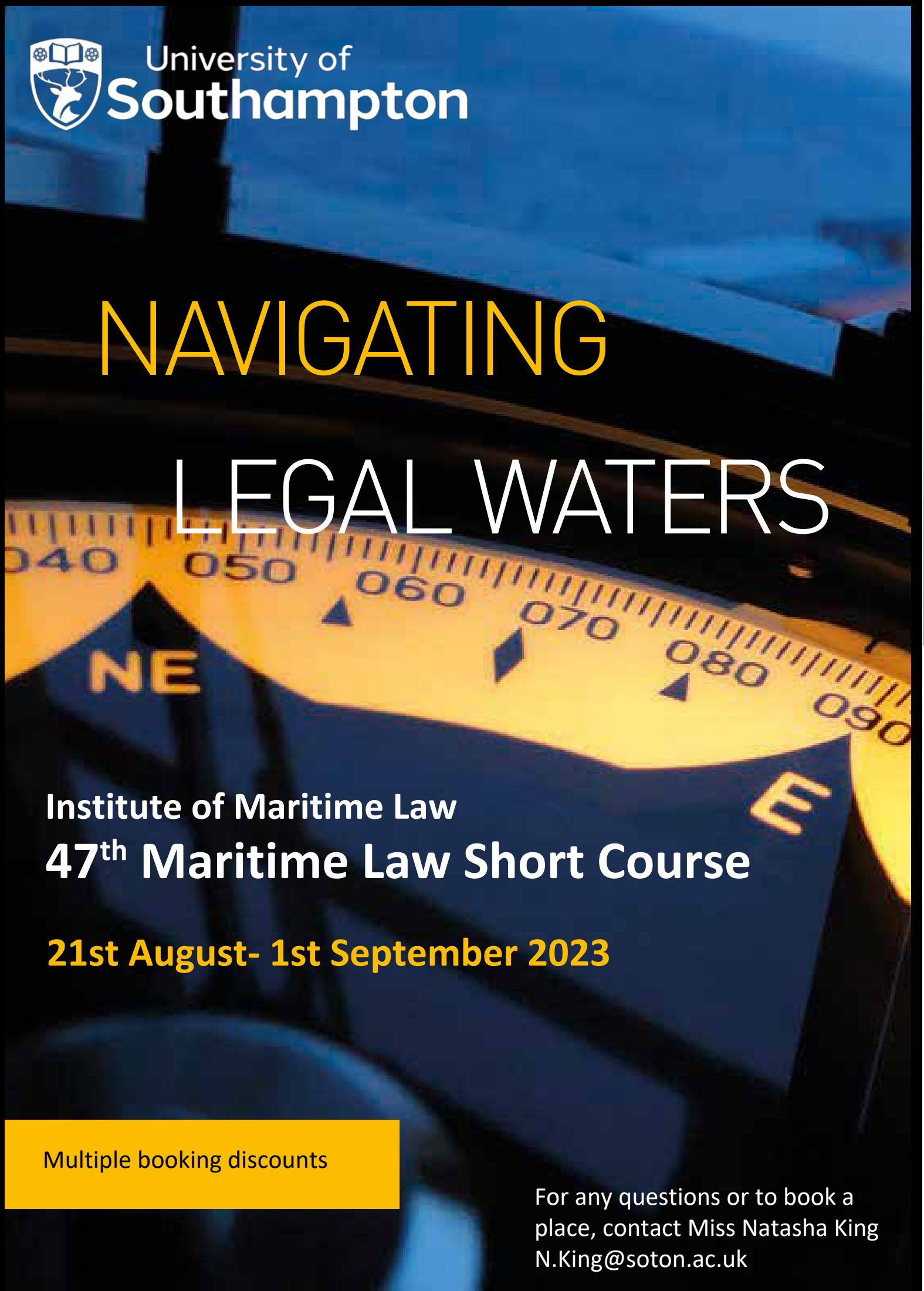
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