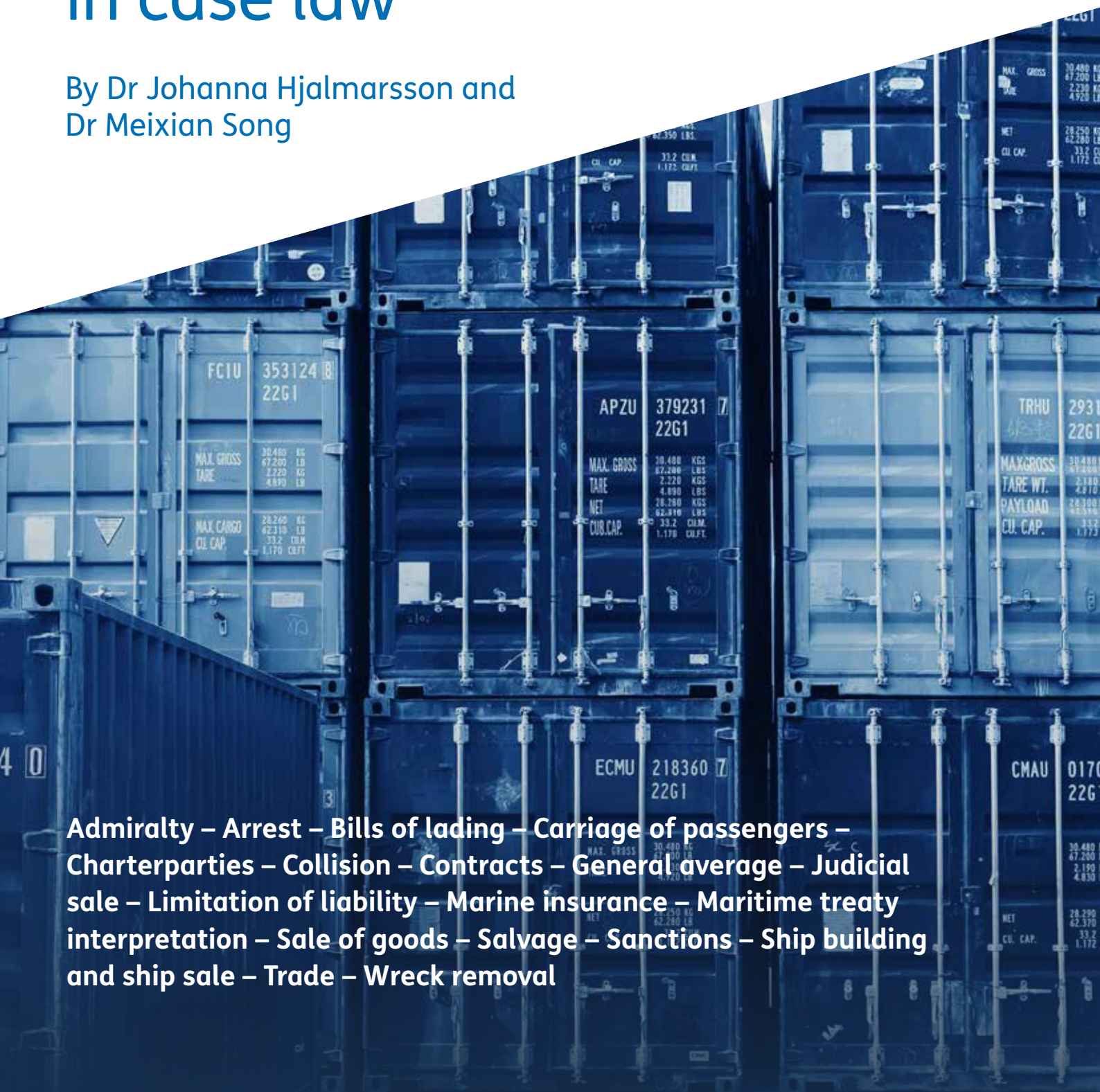
Lloyd's List Intelligence

Maritime law in 2023: a review of developments in case law

By Dr Johanna Hjalmarsson and Dr Meixian Song



Admiralty – Arrest – Bills of lading – Carriage of passengers – Charterparties – Collision – Contracts – General average – Judicial sale – Limitation of liability – Marine insurance – Maritime treaty interpretation – Sale of goods – Salvage – Sanctions – Ship building and ship sale – Trade – Wreck removal

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Introduction

As ever, there are some clear trends in evidence in the case law of 2023. Cases from the widest set of jurisdictions to date is represented in these pages, including courts in the Eastern Caribbean, India and Malaysia. In a sign of the times a new header, "Sanctions", has been added. In this section we consider judicial review of sanctions decisions involving vessels. Two further decisions on sanctions are noted under the "Trade" header. Also noted under the "Trade" header are three cases from Singapore reported at first instance in the 2022 edition of this work, which saw appeal decisions handed down in 2023.

Two judgments arising from Australian cruise ship litigation following Covid-19 outbreaks on board *Ruby Princess* demonstrate the force and impact of Australian consumer law. Right at the end of the year, a Singapore case considered wreck removal standard terms and the definition of ships.

There were fewer charterparty cases than the norm, but roughly the customary number of bill of lading cases and admiralty decisions, including a decision arising from the *Ever Given* grounding in 2021 noted under the "Salvage" header.

Appeals currently in progress are summarised in the Conclusion. 2024 promises to be an exciting year for shipping law.

Contracts

The contract-related decisions from 2023 covered the usual range of bills of lading, charterparties, passengers and trade, but also included a decision on wreck removal contracts and one on general average.

Bills of lading

The significant appeal decision in *Unicredit Bank AG v Euronav NV*[1] was handed down in May 2023, settling the – perhaps surprisingly – previously undecided question of the status of a bill of lading in the hands of the original shipper. Permission to appeal to the Supreme Court was refused in August 2023, making the Court of Appeal's decision the final word on the matter.

The claimant – and appellant – 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. The bank had financed its client G's purchase of the cargo by a letter of credit, with the intention that G's buyers should pay directly to the bank on dates falling in late July and early August. BP made a conforming presentation on 1 April 2020 and was paid the next day, G becoming the cargo owners. On 6 April 2020 the charterparty was novated by BP to G with prospective effect. In late April and early May the cargo was discharged to other vessels by STS transfer without presentation of the bill of lading. On 7 August BP endorsed the bill of lading to the bank. At first instance,[2] the judge dismissed the claim for damages, holding that the bank had not established

[1] [2023] EWCA Civ 471; [2023] Lloyd's Rep Plus 83.
[2] [2022] EWHC 957 (Comm); [2022] 2 Lloyd's Rep 467.

that the bill of lading contained or evidenced a contract of carriage following the novation of the charterparty and prior to the alleged misdelivery.

The bank appealed, arguing that the judge had erred in holding first, that the bill did not contain or evidence a contract of carriage after the novation of the charterparty (the contractual issue); and secondly, that the breach of discharging the cargo without presentation did not cause the loss (the causation issue).

> When the parties to the charterparty were also the bill of lading holder and the issuing carrier, the two contractual documents were to be construed together. Absent clear wording to the contrary, the proper construction was that the charterparty prevailed in the event of any inconsistency

The Court of Appeal allowed the appeal on the contractual issue but dismissed the appeal on the causation issue, reasoning as follows on the contractual issue.

The authorities showed that the principle that the bill was merely a receipt in the hands of the charterer did not rest on some abstract rule or custom of merchants, but on the contractual intention of the parties as a matter of the construction of the charterparty and the bill of lading.

When the parties to the charterparty were also the bill of lading holder and the issuing carrier, the two contractual documents were to be construed together. Absent clear wording to the contrary, the proper construction was that the charterparty prevailed in the event of any inconsistency.

The new contract between a carrier and a bill of lading holder as a result of indorsement of the bill of lading by the charterer sprang up as a result of the operation of the Carriage of Goods by Sea Act 1992, not as the result of common law principles of contract or estoppel. The rationale for this was that it reflected the presumed intention of carrier and indorsee – there was a strong presumption that goods to be carried by sea were to be carried pursuant to a contract. Similarly, if the charterparty ceased for any reason, there must be some contract between the carrier and the former charterer.

The "mere receipt rule" was a prima facie principle subject to contrary agreement that except where a charterparty applied to the contractual relationship, the bill of lading contained or evidenced a contract of carriage. To displace this principle it was necessary to find circumstances evidencing a mutual contrary intention, but none was in evidence here.

As for the causation issue, the Court of Appeal reasoned that the status of the bill of lading at discharge was not determinative of the breach issue, where the bank could acquire contractual rights upon indorsement of the bill of lading, operating retrospectively, based on section 2 of the Carriage of Goods by Sea Act 1992. Where the judge had not erred in her conclusions on the breach as an effective cause of loss, the appeal must be dismissed.

Another persistently contentious issue is the extent of application of the Hague-Visby Rules, addressed in *Fimbank plc v KCH Shipping Co Ltd (The Giant Ace)*[3] which is now on appeal to the Supreme Court.[4] The specific question here was whether a claim for misdelivery following discharge had been extinguished by the application of the Hague-Visby Rules time bar.

The claimant was a trade finance bank and the defendant was the demise charterer and contractual carrier of goods under certain bills of lading held by the bank. The bills of lading were on the Congenbill 1994 form and subject to the Hague-Visby Rules by way of incorporation from the voyage charterparty. Discharge from the carrying vessel *Giant Ace* 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 in essence that the carrier was not to be responsible for loss or damage prior to loading and

[3] [2023] EWCA Civ 569; [2023] 2 Lloyd's Rep 457.
[4] Permission to appeal to the Supreme Court was granted on 13 October 2023.

after discharge. The judge dismissed the appeal of the award.[5] The bank appealed.

The Court of Appeal dismissed the appeal. Adopting a textual approach, its reasoning took its starting point in the Hague Rules and observed the changes made in the Hague-Visby Rules. The original Hague Rules provided that those Rules only applied to carriage by sea, which ended on discharge. Reading article II on the carrier's responsibility in light of the definitions in article I showed that the carrier's obligations in relation to custody and care of the goods before loading and after discharge were subject to contract or the law of bailment. Accordingly the Rules did not apply to misdelivery of cargo stored on land after discharge. Therefore, the applicability of the time bar in article III rule 6 could not extend beyond the scope of the Rules as defined in articles I and II. The words "in any event" could not support an argument that the time bar applied when the Rules did not.

In contrast, the language of the rule in the Hague-Visby Rules was wider and notably read "all liability whatsoever in respect of the goods", weakening the nexus with loss or damage to the cargo. The travaux préparatoires provided the necessary bullseye in support of the proposition that the object of the amendment was to give the text a bearing as wide as possible to encompass claims grounded on the delivery of the goods.

> The original Hague Rules provided that those Rules only applied to carriage by sea, which ended on discharge. ... In contrast, the language of the rule in the Hague-Visby Rules was wider and notably read "all liability whatsoever in respect of the goods"

The Court of Appeal noted the absence of factual findings in the arbitral award on the basis of which a term could be implied in fact. The Hague-Visby Rules applied on their own terms so that no term could be implied in law.

Interpreting the contract terms, the court considered that clause 2(c) of the Congenbill form did not have the effect of disapplying the Hague-Visby Rules time bar in respect of events after discharge.

In *JB Cocoa Sdn Bhd and Others v Maersk Line AS*,[6] the issue was the extent of carrier's duty of care for the cargo, where an alternative explanation for the loss was inherent vice.[7]

A cargo of cocoa beans was transported by the defendant's vessel *Maersk Chennai* from Lagos in Nigeria to Tanjung Pelepas in Malaysia. It was discharged by 1 October 2017 but not collected until around 28 November 2017. It was then found to be affected by condensation and mould damage. The first claimant was the alleged cargo owner, the second was the lawful holder of the bill of lading, and the third and fourth were the insurers of the cargo. The vessel had sailed with 11 containers on board on 8 September 2017 and the bill of lading had been issued by the defendant on 26 September 2017. The delay in issuing the bill of lading was due to the fact that the draft bill referred to 12 containers, of which one had been delayed and shipped separately. The bill of lading was on the carrier's standard form, incorporated the Hague Rules and notably specified "15 days freetime at the discharge port". Upon discharge, a sequence of issues arose until the cargo could be released on 28 November. The first claimant immediately notified the defendant of issues with the cargo and appointed a surveyor. A salvage sale was conducted for €950 per tonne and insurers paid the cargo claim and became subrogated to rights and remedies in respect of the cocoa.

The claimants sought damages on the ground that the cargo was loaded in sound condition at the time of loading and that the defendant had failed to take reasonable care of it following discharge. The defendant put the claimants to proof of the fact that the cargo was loaded in sound condition, denied liability for damage occurring after discharge, argued that it had taken reasonable care of the cargo and placed responsibility on the claimants for presenting the bill of lading only on 17 November 2017 and for failing to mitigate their losses.

The judge dismissed the claims, considering the claimants' cases in turn.

The first claimant, JB Cocoa, had acquired the cargo through a string of cif sales, most immediately from the second claimant, JB Foods. JB Cocoa claimed in

[5] *Fimbank plc v KCH Shipping Co Ltd (The Giant Ace)* [2022] EWHC 2400 (Comm); [2023] 1 Lloyd's Rep 381.

[6] [2023] EWHC 2203 (Comm).

[7] A previous decision on disclosure in the litigation, *JB Cocoa Sdn Bhd and Another v Maersk Line A/S* [2023] EWHC 2168 (Comm) is purely procedural and not considered here.

negligence. To sustain the claim, it must show that it had become the owner of the cargo before the cocoa beans were damaged or indeed at any time prior to delivery, but there was no evidence on the passing of property to JB Cocoa.

As for the third and fourth claimants, the insurers, they had indemnified JB Cocoa and asserted a right to pursue its claim in tort as assignees. Any such rights fell away following the conclusion on JB Cocoa's claim. The judge noted obiter that where no evidence of the French law of assignment had been brought, the plea of indemnity would have been sufficient to show a right to bring a subrogated claim according to English law.

The second claimant as lawful holder of the bill of lading did have standing to claim. This claimant's claim was a matter of contract interpretation.

Having evaluated the evidence, the judge found that at the time of loading the cargo was in good condition and such that after a normal voyage it would arrive sound at its destination. The evidence further tended to indicate that the cargo was not prone to self-heating and inherently vicious. The damage to the cargo was caused by the prolonged containerisation at Tanjung Pelepas.

Where the Hague Rules applied, the carrier's responsibility after discharge was based upon the relationship of bailment as modified by the contract, including clauses 5 and 22. Equating the words "tendering for delivery" with discharge achieved a logical construction of clause 5. Accordingly, failure to tender an arrival notice did not have the effect of extending the period of Hague Rules liability. The clause limited the defendant's liability to loss or damage occurring from loading to discharge. Where there was no obligation to send an arrival notice under clause 22, failure to do so would not be interpreted as a failure to tender the cargo for delivery.

The appeal in *Ixom Operations Pty Ltd v Blue One Shipping SA and Others (The CS Onsan)*[8] was handed down in February. This was a "right defendant?" case where the Federal Court of Australia confirmed the first instance judge's conclusion[9] that the time bar applied, defeating the claim.

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 CFR seller of the cargo and consignor, voyage-chartered the tanker *CS Onsan* from CS Marine, the disponent owner. CS Marine had the vessel on a bareboat charter from the first defendant, Blue One Shipping, which was the registered owner. 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, signed by the master and stamped with the master's seal "M/V CS Onsan – CS Marine". Upon arrival at Gladstone, 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 granted on 25 May 2018.

On 25 November 2020 Ixom commenced proceedings against Blue One Shipping. CS Marine was later joined to the proceedings. The plaintiff had from the early stages operated on the basis that the carrier might be either Blue One Shipping or CS Marine and correspondence had 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.

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. At first instance, reported in the 2022 edition of this work,[10] 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 one-year time bar as against Ixom. Ixom appealed, seeking orders that Blue One Shipping was estopped from denying that it was a party to the bill of lading contract; and that CS Marine was estopped from relying on the time bar; and that both defendants' conduct had been misleading or deceptive. Ixom's central point on appeal was that by granting the extension, Blue One Shipping had represented, or misled Ixom into believing, that Blue One Shipping was the carrier.

The Federal Court of Australia dismissed the appeal. Insofar as Ixom's approach relied on the subjective understanding of its representatives of email

[8] [2023] FCAFC 25; [2023] Lloyd's Rep Plus 87.

[9] *Ixom Operations Pty Ltd v Blue One Shipping SA and Others (The CS Onsan)* (FCA) [2022] FCA 1101; [2023] Lloyd's Rep Plus 27.

[10] "Maritime law in 2022: a review of developments in case law."

communications, it was incorrect. Identifying the content of representations for the purpose of an estoppel was an objective task. The subjective understanding was relevant to the issue of reliance only. Where the bill of lading and letter of undertaking indicating that the bill of lading issuer was CS Marine had been in the representee's possession, the representee's understanding that the extension was granted only on behalf of Blue One Shipping, amounting to a representation that it was the carrier, was not reasonable.

In the next case, among other issues there arose that of the effect of a right to request the issue of a bill of lading. In *Poralu Marine Australia Pty Ltd v MV Dijksgracht*,[11] under a contract of carriage between the appellant Poralu as consignee and the second defendant Spliethoff Transport (ST) as carrier, 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 loaded on board between 6 and 11 December 2019 and consigned to Poralu. 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 ST 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 ST. Later, ST had issued a filled-out, unsigned booking note. Following loading, a sea waybill was also issued.

Poralu asserted that the contract of carriage was concluded in the second recap email, while ST contended that the contract of carriage was concluded with the agreement of the terms of the booking note, alternatively that the booking note amended or superseded the recap agreement. The recap specified English law and the booking note Dutch law, causing an issue as to what version of the Hague Rules applied and as a result to what limitation the carrier may be entitled.

The judge at first instance held,[12] in essence, that the booking note was a contract of carriage and that ST was entitled to limit liability to GBP100 per pontoon. Poralu appealed and ST cross-appealed.

Allowing the appeal in part, the court reasoned as follows. First, reversing the judge's conclusion on this point, the second fixture recap was the contract of carriage. The correspondence showed an intention to be bound and inaccuracies with which the contract was later recorded in the booking note did not evidence an intention between the parties to amend the agreement in the second recap.

Secondly, in the recap, the parties had agreed that the carrier was to provide a bill of lading on ST's standard form, amended to include the English law and London arbitration riders. Unlike the judge, the court held that where the second recap provided that a bill of lading would be provided and would evidence the contract of carriage, the Hague-Visby Rules applied to the contract according to the Hague-Visby Rules, article 10(c), even if no bill of lading was in fact issued. The reasoning in English authorities on article 10(b) could be applied equally to article 10(c).[13]

At first instance, the Hague Rules "as enacted" in the country of shipment Ireland were the Hague Rules as enacted in the Third Schedule to the Irish Merchant

11 *Poralu Marine Australia Pty Ltd v MV Dijksgracht* [2023] FCAFC 147.

12 *Poralu Marine Australia Pty Ltd v MV Dijksgracht* [2022] FCA 1038; [2023] 2 Lloyd's Rep 18.

13 The court noted the authorities *Kyokuyo Co Ltd v AP Møller-Maersk A/S (t/a Maersk Line) (The Maersk Tangier)* [2018] EWCA Civ 778; [2018] 2 Lloyd's Rep 59, *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 1 Lloyd's Rep 321 and *Parsons Corporation v CV Scheepvaartonderneming "Happy Ranger"* [2002] 2 Lloyd's Rep 357.

Shipping Act, namely the Hague Rules as amended by the Visby and SDR Protocols. The SDR Protocol limit applied to ST's liability.

The court held that like the booking note, the sea waybill had been issued for commercial convenience. Their terms could not displace the terms of the bill of lading.

The court agreed with the judge on a final issue namely that the pooling agreement gave ST the authority to contract for Rederij Dijksgracht on the terms of the Himalaya clause contained in clause 11 of the booking note.

AMS Ameropa Marketing Sales AG and Another v Ocean Unity Navigation Inc[14] concerned a case where some of the cargo was damaged, but where the parties differed on the correct course of action following the loss. Was the cargo interests' salvage sale of a sizeable quantity of cargo a reasonable course of action?

A cargo of 50,000 mt of yellow soybeans carried from Louisiana to Egypt on board the defendant's vessel *Doric Valour* in August 2020 had been loaded in apparent good order but was on discharge found to be part damaged.

The cargo was shipped under Congenbill form bills of lading dated 4 August 2020, issued by the defendant registered owner of the vessel. Upon discovery of the damage, manual segregation took place of about 16 mt of cargo, whereupon mechanical discharge began and 3,600 mt was segregated. Following discharge, 3,600 mt of the cargo was set aside and sold in a salvage sale.

The claimants, the seller of the beans under a CIF sale and a cargo insurer, now sought damages of US$417,190 under the bills of lading. The sum was in respect of loss of value, or in the alternative a slightly smaller sum representing the difference between the sound cif value and actual value as evidenced by the salvage sale; plus in both cases ancillary expenses. The claimant sued as assignee of O, the receiver of the cargo and lawful holder of the bills of lading at discharge.

The carrier admitted breach of the duty to take reasonable care of the cargo, but disputed the claim on the grounds of lack of title to sue and on causation and quantum of the loss. When the assignment from O took place, it had already been made whole. While the claimants sought damages in respect of 3,600 mt of the cargo, the defendant maintained that the damage from its breach affected only between 15 and 88 mt.

The judge held that while the second claimant was merely the cargo insurer and had no right of suit, the first claimant did have title to sue. It was entitled to pursue O's claims under the bills of lading and O's recovery under the sale contract or in the salvage sale did not preclude recovery from the carrier; nor was O bound to give the carrier credit for the recovery.

The judge found on the evidence that 70 to 80 mt of the cargo had suffered physical heat damage. However, the evidence on segregation and admixture did not justify a finding that the contaminated admixed cargo was limited to 300 mt.

[14] [2023] EWHC 3264 (Comm).

The judge held that the owners had failed to prove to the requisite high standard an unreasonable failure by the cargo interests to mitigate their loss. It had not been unreasonable to stop manual segregation or to discharge by grabs. She went on to hold that the cargo interests' conduct in concluding a salvage sale had been a reasonable response to the damage discovered on discharge. A prompt sale at an 18 per cent discount protected against further deterioration and storage costs.

> *AMS Ameropa v Ocean Unity* concerned a case where some of the cargo was damaged, but where the parties differed on the correct course of action following the loss. Was the cargo interests' salvage sale of a sizeable quantity of cargo a reasonable course of action?

Finally, in the absence of evidence of sound market value, the sound CIF invoice value and the salvage value adequately evidenced O's loss and damages of US$293,755.10 would be awarded to the claimant. However, there was no evidence that O would have incurred the ancillary costs and the claim would be rejected in that respect.

A package limitation issue concludes this bill of lading section. In *Trafigura Pte Ltd v TKK Shipping Pte Ltd (The Thorco Lineage)*,[15] the vessel *Thorco Lineage* had stranded on an atoll in French Polynesia and required LOF salvage. Salvage claims had been brought in arbitration. The claimant was the owner of cargo on board under a bill of lading and was required to put up general average security in order to regain possession of the cargo. This was a question of law referred from the arbitration to the court with the agreement of the defendant, the carrier under the bill of lading. The agreed question was whether on the agreed and assumed facts, the defendant was entitled to limit its liability under article IV rule 5(a) of the Hague-Visby Rules, and if so, in what amount in respect of each head of loss. The relevant heads of loss were liability to salvors; physical loss of and damage to the cargo; on-shipment costs; and costs for salvage sale and disposal of some damaged cargo. The question turned on the meaning of the words "goods lost or damaged" at the end of the Hague-Visby Rules provision and, in essence, whether the words extended to economic loss or damage or only referred to physical loss or damage.

The judge began by noting that the observation that the object and purpose of article IV rule 5, as evidenced by the travaux préparatoires, was to provide a maximum limit of liability in the minority of cases where the value of the goods was exceptional was not instructive as to the meaning of article IV rule 5(a).

He went on to observe that having regard to the context of the carriage of goods by sea there was a cogent argument that the ordinary meaning of "lost or damaged goods" in article IV rule 5(a) could include goods which had been economically damaged. To construe the words otherwise would not properly reflect the intention of the Visby Rules conference delegates to confer a right to limit in respect of liability for loss or damage or in connection with the goods.

The judge declined to follow the construction adopted in *Serena Navigation Ltd v Dera Commercial Establishment (The Limnos)*.[16] It would, he observed, lead to claims for economic loss caused by delay not being subject to a limit. The first part of article IV rule 5(a) purported to apply such a limit, and the final words of the clause must be construed accordingly. The same applied to the financial costs of taking steps to mitigate loss or damage.

The judge concluded that the liability of the defendant in respect of the claimant's liability to the salvors was limited to 2 SDRs per kilogramme of the whole cargo. The defendant's liability in respect of the on-shipment costs incurred by the claimant was also limited to 2 SDRs per kilogramme of the whole cargo.

The judge observed obiter that if necessary, it would have been held that the goods on board the vessel were physically damaged within the meaning of article IV rule 5(a) by reason of the imposition of a maritime lien on the claimant's proprietary or possessory interest in them.

[15] [2023] EWHC 26 (Comm); [2023] 2 Lloyd's Rep 338.

[16] [2008] EWHC 1036 (Comm); [2008] 2 Lloyd's Rep 166.

Charterparties

Compared to most years, there was only a small number of charterparty cases in 2023, and none on bareboat charterparties which dominated the crop of cases in 2022.

Voyage charterparties

There was only one voyage charterparty decision this year. In *Rhine Shipping DMCC v Vitol SA*,[17] the claimant was the disponent owner and the defendant the charterer under a voyage charter for the crude tanker *Dijilah*. The charterparty contained a warranty to the effect that "the vessel, owners, managers and disponent owners" were free of legal issues affecting the performance of the charter. Clause 13 provided for indemnification by the owner "for any damages, penalties, costs and consequences" in the event of arrest.

> Compared to most years, there was only a small number of charterparty cases in 2023, and none on bareboat charterparties which dominated the crop of cases in 2022

Before arriving at Dejno, the loadport in Congo, the vessel was detained in Ghana as a result of the arrest by a Ghanaian court of property on board. That arrest was by way of security for a claim subject to London arbitration in a dispute between Ghanaian parties and Party A. Party A was connected to Rhine although there was not much evidence in the litigation as to the precise relationship. There was some common personnel and some common use of correspondence addresses. It was the bareboat charterer of the vessel and was Rhine's disponent owner under its time charter.

A demurrage claim between Rhine and Vitol had been agreed, and the dispute now concerned the defendant's counterclaim for breach of the charter for delay in arriving at the loadport. This delay arose out of the arrest of property on board the vessel by third parties at the previous port in Ghana, which defendants argued was the claimant's responsibility under the warranty and clause 13.

The warranty read:

> "OWNERS REPRESENT AND WARRANT
>
> THAT AT THE TIME OF AND IMMEDIATELY PRIOR TO FIXING THE CHARTER, THE VESSEL, *OWNERS*, MANAGERS AND DISPONENT OWNERS ARE FREE OF ANY ENCUMBRANCES AND *LEGAL ISSUES* THAT MAY AFFECT VESSEL'S APPROVALS OR THE PERFORMANCE OF THE CHARTER." (Emphasis added.)

Clause 13 (Third Party Arrest) read:

> "In the event of *arrest/detention or other sanction levied against the vessel* through no fault of Charterer, Owner shall indemnify Charterer for any damages, penalties, costs and consequences and any time vessel is under arrest/detained and/or limited in her performance is fully for Owner's account and/or such time shall not count as laytime or if on demurrage, as time on demurrage." (Emphasis added.)

The loss claimed was the increased price of the cargo loaded at the loadport. Rhine denied liability.

The judge held that Rhine was liable under clause 13 and the warranty. The arrest of the property on board the vessel in Ghana was plainly an "arrest/detention or other sanction levied against the vessel" in the words of clause 13. The vessel had been detained as an inevitable consequence of that arrest. The vessel did not have to be the target of the arrest.

In interpreting the warranty, the judge posited that reliance on the "definitions" of disponent owner, manager etc in the opening lines of the fixture confirmation was misplaced. The terms were descriptive of categories of entities. Party A fell within the warranty by virtue of their description as managers. The description "disponent owner" was often apt only to describe the party under a particular charter that was acting, for the purposes of that charter, as the disponent owner. Here it had not been the intention so to confine it in the terms of the warranty. Party A also fell within the scope of the term. If it was not a disponent owner, it was in any case an "owner" within the meaning of the warranty. At the time the charter was concluded, a London arbitration was under way

[17] [2023] EWHC 1265 (Comm); [2023] Lloyd's Rep Plus 93.

against Party A in respect of other vessels. That was a qualifying legal issue under the warranty and there was no requirement for any foresight as to what the plaintiffs who later arrested the vessels might do.

The judge observed that the fact that loss of chance analysis was mandatory did not relieve the claimant from the burden of pleading it.

He went on to find that the available evidence of what would have happened at Djeno, absent the detention in Ghana, supported Vitol's case that the bill of lading date would have been 6 May.

Considering the terms of the indemnity in clause 13, they did not suggest that it intended to incorporate the rules on remoteness of damage for breach of contract.

There was evidence and discussion of Vitol's internal offsetting of contractual risks. The judge found that for the purpose of determining the loss, those internal processes were not equivalent to hedging or swap arrangements entered into with third parties to mitigate risk and such precedent was to be distinguished. The physical transactions involved were not entered into for the purpose of mitigating risks or losses.

The judge held that none of the loss claimed was too remote. It was usual in the context of a charter such as this and was reasonably within the contemplation of the parties at the time of contracting and was therefore recoverable in a claim for breach of contract. The assumption of responsibility argument from *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*[18] was inapplicable, but if it were, Rhine could have been reasonably regarded as assuming responsibility for losses of the type at issue. Finally, the clause 13 indemnity was not, in any event, confined to losses within the rules on remoteness of loss for breach of contract.

An appeal is scheduled to be heard by the Court of Appeal on 18 April 2024.[19]

Time charterparties

Two cases on time charterparties resolved issues in relation to hull cleaning following a time charterparty and nautical fault, respectively.

In *Smart Gain Shipping Co Ltd v Langlois Enterprises Ltd (The Globe Danae)*,[20] Langlois were the owners and Smart Gain were the charterers under a time charterparty on an amended NYPE form dated 9 June 2021 for the motor vessel *Globe Danae*. The charter was for a trip with metallurgical coke in bulk from India to Brazil. The charterparty contained a hull fouling clause (clause 86) providing essentially that owners were not to be responsible for decrease in speed and increase in consumption due to hull fouling caused by charterers' staying in ports for more than 25 days in tropical and 30 days in non-tropical waters. It went on to provide that "underwater cleaning of hull including propeller etc to be done at first workable opportunity and always at Charterers' time and expense".

The cargo was rejected by receivers in Brazil and the vessel remained idle in Brazilian waters for 42 days. Following delivery of the cargo, the vessel was redelivered to owners without prior hull cleaning. Owners cleaned the hull and propeller and in arbitration claimed US$74,506.70 for loss of time spent cleaning at the hire rate, and related costs. An arbitration tribunal issued a partial final award for the owners. Smart Gain appealed with the question of law:

> "If a clause in a time charterparty provides for underwater cleaning will [sic] be done at the charterers' time, does that provision give rise to a claim in debt (so that if the owners undertake cleaning after redelivery, they can claim for the cleaning time even if they have not suffered a loss of time)?"

The judge considered that *Damon Compania Naviera v E A L Europe Africka Line GmbH (The Nicki R)*[21] provided authority for the proposition that owners were not required to demonstrate loss of time. The tribunal had been right to hold that the clause placed an obligation on the charterers to pay compensation at the rate of hire, but not hire itself, for hull cleaning. The expression "always at charterers' time" must mean that the charterers must always pay for the time associated with underwater

18 [2008] UKHL 48; [2008] 2 Lloyd's Rep 275.
19 See https://casetracker.justice.gov.uk/getDetail.do?case_id=CA-2023-001299 (accessed on 10 January 2024).
20 [2023] EWHC 1683 (Comm).
21 [1984] 2 Lloyd's Rep 186.

cleaning. The phrase "the first workable opportunity" could mean after the charterparty, especially for a single trip charterparty. It was commercially sensible that the vessel could be redelivered uncleaned, but that in that case the charterers must compensate the owners at the hire rate for cleaning time.

To round off, a decision on navigational fault in *Mercuria Energy Trading Pte v Raphael Cotoner Investments Ltd (The Afra Oak)*.[22] RCI's vessel *Afra Oak* was detained by the Indonesian Navy on 12 February 2019 while in Indonesian territorial waters near Singapore. ME was the charterer of the vessel and the owner of a cargo of fuel oil on board. The vessel was released from detention upon the conviction of the master in criminal proceedings in October 2019. There were substantial claims by the owner and substantial counterclaims by the charterer.

> The expression "always at charterers' time" must mean that the charterers must always pay for the time associated with underwater cleaning

In arbitration, the owner was largely unsuccessful, the tribunal holding that the vessel was not entitled under the United Nations Convention on the Law of the Sea 1982 (UNCLOS) to anchor in Indonesian waters; that such anchoring was prohibited by Indonesian law and that the master was guilty of the criminal offence of which he had been convicted. The tribunal further held that there had been no breach by the charterer of the safe port/place warranty. It went on to hold that the relevant danger was the political danger of detention resulting from anchoring in Indonesian territorial waters contrary to UNCLOS, but it was one which the master could and should have avoided.

The charterer appealed with the following question of law: "Does article IV(2)(a) of the Hague Rules provide a defence where, in breach of an order of its charterers, a vessel proceeds into territorial waters and waits at anchor there in breach of local law?" Sir Nigel Teare held that the answer was: "It may or may not do so depending upon the facts of the particular case".

The judge noted that the tribunal had found that charterer's orders precluded waiting in Indonesian waters. It followed that the vessel had failed to follow the charterer's orders. The tribunal appeared to have applied the exemption from owners' liability.

In the judge's view, *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)*[23] was not authority for the proposition that where there has been a failure to follow an employment order, the exception in respect of a fault in the navigation of the vessel is unavailable. The authorities were to be distinguished on their facts as they involved no error of navigation. As the tribunal had found, in the present case the master had failed to exhibit good navigation and seamanship in failing to take due account of the risk of anchoring in territorial waters, and that failure to exhibit good navigation and seamanship had caused him to fail to comply with the charterer's order.

The judge concluded that where, as found by the tribunal, an error in navigation had caused the master to anchor where he should not have, the tribunal did not err in law in holding that the owner was entitled to rely upon section 4(2)(a) of the US Carriage of Goods by Sea Act 1936 as a defence to the claim that the owner had failed to comply with the charterer's order.

22 [2023] EWHC 2978 (Comm).

23 [2001] 1 Lloyd's Rep 147.

General average

General average has been a hot topic in recent years with a steady trickle of cases. An arguably controversial judgment on the interpretation of York-Antwerp Rules incorporation clauses was handed down in *Star Axe I LLC v Royal and Sun Alliance Luxembourg SA, Belgian Branch and Others*.[24] The claimant carrier was the issuer of seven bills of lading dated in September and October 2021 for cargo on board M/V *Star Antares*. On 19 November 2021, following an incident in which the vessel sustained damage from striking an unknown submerged object, general average was declared.

The defendants were a large number of cargo insurers who had issued Average Guarantees to the claimant on 26 November 2021, by which they undertook to pay the claimant or the claimant's average adjusters any contribution to general average, salvage or special charges that might be legally and properly due and payable in respect of the goods covered by the bills of lading. A dispute arose as to whether the rights and obligations in general average were governed by YAR 1994 or YAR 2016. The relevant clause in Congenbill 1994 read (with added emphasis):

> "General average shall be adjusted, stated and settled according to York-Antwerp Rules 1994, *or any subsequent modification thereof*, in London unless another place is agreed in the Charter Party."

Were the York-Antwerp Rules 2004 and 2016 "subsequent modifications" or new sets of rules?

The judge held that the parties would be taken to have agreed that the relevant general average adjustment was to be conducted under YAR 2016. The word "modification" ordinarily signified a change that did not alter the essential nature or character of the thing modified. When used in the context of a written instrument or set of Rules it ordinarily had a wider connotation than "amendment", extending to changes in approach, and being less focused than the word "amendment" on textual change. YAR 2004 and YAR 2016 were to be regarded as "modifications" of YAR 1994.

[24] [2023] EWHC 2784 (Comm).

Carriage of passengers

Two decisions arising from the same litigation but in respect of different representative claimants were handed down by the Australian courts. The litigation concerns an outbreak of Covid-19 on board the cruise ship *Ruby Princess* in March 2020.

First, in *Karpik v Carnival plc (The Ruby Princess)*,[25] Mrs K was the lead claimant in a group claim in respect of a cruise onboard the vessel *Ruby Princess*. The claims followed a cruise beginning on 8 March 2020 from Sydney with 2,671 passengers, which was abandoned three days early on 15 March 2020 following an outbreak of Covid-19 on board. The group consisted of passengers and their executors and representatives. The first respondent, Carnival, was a UK cruise operator and a registered foreign company with a registered office in New South Wales, and the time charterer of *Ruby Princess*. The second respondent was a Bermuda company and the registered owner of *Ruby Princess*. Mrs K's husband Mr K had become seriously ill in the course of the voyage and had been hospitalised upon their return home. Mrs K sought damages for personal injury, distress and disappointment.

In a much longer than average judgment, the judge considered the facts in great detail, making numerous findings. Thus the respondents knew or ought to have known that there was a substantial risk of Covid-19 on the previous cruise of *Ruby Princess*, from which the ship had returned on the day of departure of this cruise, and that there was a heightened risk of the virus being on this cruise compared with cruise ships generally.

Cruise ships were peculiarly susceptible to coronavirus infection and transmission and compared very poorly with the community generally in that regard. The respondents knew that and their contentions to the contrary would be rejected.

Interpreting the medical evidence, the judge found that it was more likely than not that Mr K had been infected with coronavirus on board the vessel. It was also more likely than not that Mrs K had contracted the virus on board.

As a result, Mrs K had not had a safe, relaxing and pleasurable cruise holiday. The respondents had failed to comply with the "purpose" and "result" guarantees in Australian consumer law.

[25] [2023] FCA 1280; [2024] Lloyd's Rep Plus 4. See also Hannah Stones, "The long legacy of Covid-19", *Lloyd's Shipping & Trade Law*, December 2023, (2023) 23 LSTL 10 1.

The respondents owed Mrs K a duty to take reasonable care for her health and safety, including with regard to the risk of harm caused by coronavirus infection. It would be incorrect to characterise the duty as one requiring the respondents to prevent the spread of contagious disease; or to in terms of the protection of patrons from one another. The relationship between a ship's operator – being the party in possession or having the management and control of the ship – and its passengers was a special relationship like that of passengers on an aircraft. Passengers on a cruise ship were equally "captive", but for a longer period of time. Their reliance on the respondents for their safety could not be negated merely because the passengers voluntarily decided to board the vessel. As compared to the ordinary passenger, the respondents had peculiar knowledge of the coronavirus. The respondents owed Mrs K a duty to take reasonable care for her health and safety, including with regard to the risk of harm caused by coronavirus infection.

The respondents' floodgates argument would be rejected where such a duty was not novel or burdensome but was imposed in many countries by the Athens Convention 1974 or 2002 or by domestic law without imposing an intolerable burden on cruise lines. The focus of any claim was on the conduct of the cruise line and whether it was negligent, and that was where the focus of attention should be in the present case.

> Cruise ships were peculiarly susceptible to coronavirus infection and transmission and compared very poorly with the community generally in that regard. The respondents knew that and their contentions to the contrary would be rejected

A person of normal fortitude might suffer a recognised psychiatric illness if exposed to the circumstances of the present case. The duty of care was therefore not excluded by the Civil Liability Act 2002 (NSW), section 32(1). The respondents owed Mrs K a duty of care with respect to a recognised psychiatric illness arising from Mr K contracting Covid-19 on the voyage.

The respondents had breached their duty of care in a number of respects, namely by failing to cancel the cruise; warn passengers about the heightened risk of contracting Covid-19 on board *Ruby Princess* as compared with other cruise ships (by reason of the outbreak of acute respiratory illness on the previous voyage and the insufficient quantity of face masks available for use on board); provide temperature screening of passengers and crew prior to boarding; ask all passengers and crew whether they were experiencing symptoms consistent with Covid-19 and deny boarding to those who answered yes; encourage passengers and crew to physically distance on board the vessel; limit numbers of people within all parts of the ship so as to allow for physical distancing and closing such parts which could not permit it; isolate all passengers and crew who presented with acute respiratory illness until 24 hours after their symptoms subsided; from 11 March 2020, isolate passengers and crew who had travelled from or through designated countries and who presented with relevant symptoms; and provide roommates of isolated passengers with face masks, alcohol hand rub and information on how they could protect themselves from disease.

The respondents had made misleading representations that it was reasonably safe for the passengers to embark on the cruise; that the respondents would take reasonable care for the safety of passengers during the cruise; that the respondents had implemented, and would continue to implement, increased monitoring, screening and sanitation protocols to protect the health of passengers which measures were designed to be flexible to adapt to changing conditions and recommended best practice; and that the respondents would supply the promised cruising services as set out in their advertising brochures and passenger contracts and in doing so would do all things reasonably within their ability to enable the passengers to have a safe, relaxing and pleasurable cruise.

The representations that were as to future matters, unless resiled from or corrected, were continuing up until the time of the relevant future event or circumstance, being the cruise. There was a reasonable expectation that the respondents would disclose if they were no longer able to provide the services or protect the safety of the passengers as originally promised.

Mrs K had established causation in accordance with the Civil Liability Act, section 5D, not only on the cancellation case but also on the failure to warn and the failure to implement precautions cases.

Most of the judgment is based on Australian consumer law and undoubtedly provides a fillip to the many claimants in this sizeable litigation.

A second judgment in the same litigation concerned a different lead claimant. In *Karpik v Carnival plc and Another (The Ruby Princess)*,[26] the group representative claimant was Mr H, a Canadian passenger designated representative claimant for 696 passengers with contracts made on the defendants' US Standard Terms and Conditions. The cruise line sought a stay of the claims in the representative proceedings as they related to Mr H. The US Standard Terms and Conditions notably contained a choice of law clause applying the general maritime law of the United States, an exclusive jurisdiction clause in favour of the United States District Courts for the Central District of California in Los Angeles and a class action waiver clause.

At first instance, the stay was refused.[27] The cruise line successfully appealed to the Full Court of the Federal Court, which granting the stay held that the terms had been incorporated.[28] This was the passengers' appeal to the final instance, the High Court of Australia.

The following questions arose before the court. Did section 23 ("Unfair terms of consumer contracts …") of the Australian Consumer Law (ACL) apply to Mr H's contract? If so what was the nature and extent, if any, of the extraterritorial application of section 23 of the ACL? Secondly, if section 23 of the ACL applied to Mr H's contract, was the class action waiver clause in Mr H's contract void under section 23 of the ACL because it was unfair? Thirdly, was the class action waiver clause otherwise unenforceable by reason of Part IVA of the Federal Court of Australia Act 1976 (Cth)? Fourthly, were there strong reasons for not enforcing the exclusive jurisdiction clause?

The court allowed the appeal, setting aside the stay and not granting a renewed stay, reasoning as follows.

Section 23 of the ACL applied to Mr H's contract. The common law "presumption" against extraterritoriality was a mere interpretive principle and subsidiary to statute. *Akai Pty Ltd v People's Insurance Co Ltd*[29] was not authority for the proposition that if the lex causae is foreign law, the local statute cannot apply unless it demands application irrespective of the lex causae. The starting point was not choice of law rules but interpretation of local laws. On a proper construction of section 5 of the Competition and Consumer Act 2010 (Cth), if a corporation carried on business in Australia, the ACL applied to its conduct outside Australia; regardless of whether that corporation was a domestic or foreign corporation. Mr H's contract was subject to the fairness norms in section 23.

> If a corporation carried on business in Australia, the Australian Consumer Law applied to its conduct outside Australia; regardless of whether that corporation was a domestic or foreign corporation

The class action waiver clause in Mr H's contract was void under section 23 of the ACL because it was unfair. It did not protect a legitimate interest of the cruise line, it caused detriment to Mr H and it was not transparent.

The class action waiver clause was not separately unenforceable by reason of Part IVA of the Federal Court of Australia Act.

The stay of Mr H's claims against the cruise line, granted by the Full Court, should be set aside and, in the re exercise of the discretion, a stay should be refused because there were strong reasons for not enforcing the exclusive jurisdiction clause.

[26] [2023] HCA 39; [2024] Lloyd's Rep Plus 5.
[27] *Karpik v Carnival plc (The Ruby Princess)* [2021] FCA 1082; [2022] Lloyd's Rep Plus 11.
[28] *Carnival plc v Karpik (The Ruby Princess)* [2022] FCAFC 149.
[29] (1996) 188 CLR 418.

Ship building and ship sale

Shipbuilding decisions from the courts are perhaps surprisingly uncommon but it appears that most disputes are resolved by arbitration.

In *Seatrium New Energy Ltd (formerly known as Keppel FELS Ltd) v HJ Shipbuilding & Construction Co, Ltd (formerly known as Hanjin Heavy Industries and Construction Co Ltd)*,[30] the claims concerned a contract with a sub-contractor and included claims in tort for good measure. The plaintiff (Keppel) was a Singapore-incorporated company in the business of designing and building mobile offshore rigs and vessels. The defendant sub-contractor (Hanjin) was a Korean incorporated company in the business of manufacturing various types of vessels and providing ship repair and logistical services. On 17 August 2012 Keppel had agreed to design, build and deliver a semi-submersible accommodation unit, *Floatel Endurance*, to its customer (F) on 16 April 2015. DNV was to supervise according to its rules and standards. Keppel appointed Hanjin as a sub-contractor in a contract dated 17 January 2013, amended on 27 December 2013 by a "side letter", according to which Hanjin was to build the pontoons and lower columns. The vessel was delivered on 16 April 2015. The following year, F notified Keppel of welding defects in the pontoons and Keppel notified Hanjin, attributing the defects to Hanjin. Keppel undertook the repairs in a Singapore shipyard.

In this litigation, Keppel sought damages on the grounds that Hanjin's work was defective in breach of the contract; and that Hanjin had owed a duty of care in tort that could be imposed in addition to the contractual duty. Hanjin denied that the works were defective, arguing that the works were compliant with the contract. It asserted that the contract had been varied by the side letter to limit Keppel's right to claim to specified warranty obligations. They also denied any duty in tort.

The judge dismissed Keppel's claim despite first finding that, on the evidence, the defects were attributable to Hanjin's workmanship.

Keppel was successful in its first argument. Considering the words of the contract, Hanjin's contractual duties were not merely to take reasonable care. Hanjin was required to carry out the works in compliance with the requirements of the contract and the detailed technical specifications for the vessel. It had to ensure that the works would fully comply with the requirements of DNV (and other regulatory bodies) and was required to perform the works to such a standard of workmanship that the relevant parts of the vessel constructed by Hanjin, when delivered, would be in all respects a first-class product capable of operating or functioning under its intended conditions. The contract clauses were not vague or insufficiently particularised. The defects were so extensive and serious as to warrant DNV's issuance of a Condition of Class in respect of the vessel. That sufficed to place Hanjin in breach of clauses 2.3(a) and (b) of the contract. It was not sufficient for Hanjin to demonstrate robust procedures on paper. In spite of all this, Keppel's claim was contractually precluded by the side letter. Its proposed interpretation of the scope of the agreement was contradicted by its plain, negotiated words.

The tortious duty of care argued for by Keppel was co-terminous with the contractual duty of care under the sub-contract. General policy and authority militated against superimposing tortious duties of care on a contractual framework.

Regarding sale of second-hand ships, *King Crude Carriers SA and Others v Ridgebury November LLC and Others; Agathonissos Special Maritime Enterprise v Beta Crude Carriers SA (Re An Arbitration Claim)*[31] concerned a dispute arising out of the memoranda of agreement (MOAs) for the sale of four vessels concluded on the Norwegian Saleform 2012. The contracts contained a clause providing for the transfer of management of the vessels. The buyer under each contract was to pay a deposit. The sellers gave notice of readiness but the buyers failed to pay the deposits in accordance with the contract. The sellers commenced arbitration seeking to recover the deposits. The buyers' case was that the transfer of management clause entailed entering into contracts with the existing managers and crew, which during the Covid-19 pandemic was more difficult and that if there was no solution then the parties should cooperate before the notice of readiness; as the sellers had not cooperated but instead wrongfully terminated the contracts, the buyers owed no deposits.

The sellers now appealed the outcome of one of the arbitrations and the buyers appealed the other three. The sellers' appeal was against the arbitrators' decision that the transfer of management clause relieved the buyer from deposit obligations. A precondition to the escrow account being opened was buyers supplying KYC[32] documentation, which they had not done. The sellers relied on a general principle that where a defendant's breach of contract results in the non-fulfilment of a condition precedent to a debt, the condition is deemed to be either waived or satisfied on the basis that a wrongdoer

30 [2023] SGHC 264; [2024] Lloyd's Rep Plus 7.

31 [2023] EWHC 3220 (Comm).

32 "Know Your Customer", a process to verify a client's identity.

should not be permitted to derive an advantage from his own breach ("deemed fulfilment"). The buyers denied liability in debt on the basis that it would have proved impossible to conclude management agreements and disputed the existence of the general principle asserted by sellers; and in damages on the basis that the deposit would in any case have been returned to them so that the sellers would have suffered no loss.

The judge allowed both appeals, remitting the awards to the tribunals for reconsideration.

The "deemed fulfilment" principle dates back to the 19th century Scots law decision of the House of Lords in *Mackay v Dick*.[33] Following a discussion of principle and a detailed review of the authorities, Dias J held that the "deemed fulfilment" principle forms no part of English law. The decision was authority only for the proposition that a contract may be construed as containing an implied term of cooperation wherever justified on grounds of obviousness, necessity and business efficacy in accordance with normal principles. As a result, the sellers could bring a claim in damages, but not in debt.

Clause 2 in principle conferred on the sellers the right to receive and sue for the deposit as a debt forfeitable in the event of buyers' failure to fulfil the MOAs. However, the question whether or not the accrual of the debt was subject to a condition precedent was a question of construction. Where the confirmation of the law firm holding the monies in escrow came with conditions, the sellers could not argue that the entirety of the escrow arrangement, including the confirmation of the law firm, was mere machinery and that the debt in fact accrued due three banking days after signature. The argument would be rejected that sellers became entitled to claim the deposits as a debt on signature of the MOAs.

The tribunals had erred in declining to consider the buyers' submission that it was not inevitable that the deposits would have been released to sellers because the MOAs would inevitably have come to an end in any event as a result of sellers' own breach of their obligation to cooperate under clause 21.

As for the sellers' appeal, the majority had erred in law in holding that clause 21 of the MOAs released the buyers from any obligations under clause 2 unless they had already entered into a management agreement, or a different mutually acceptable solution had been found within the meaning of clause 21. The question should have been answered in the negative.

[33] (1881) 6 App Cas 251.

Sale of goods

A decent crop of sale of goods cases in 2023 began with *Sharp Corporation Ltd v Viterra BV (previously known as Glencore Agriculture BV)*,[34] now on appeal to the Supreme Court. The case revolved around the interpretation of 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 including the Default Clause at clause 25. 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, the goods were discharged and 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 the goods an import tariff was imposed. As a result, by the time release was obtained, the – already customs-cleared – goods had increased in market value.

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 it obtained access to the goods? A GAFTA Tribunal and Appeal 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 para (c) namely "the actual or estimated value of the goods, on the date of default".

The question in arbitration and at first instance 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.

The judge dismissed the buyer's appeal.[35] Sharp appealed.

The Court of Appeal remitted the awards to the Appeal Board for reconsideration in light of its judgment. The

[34] [2023] EWCA Civ 7.
[35] [2022] EWHC 354 (Comm); [2022] 2 Lloyd's Rep 43.

Court of Appeal held that the real question was not the theoretical question of interpretation of C&F contracts for which permission to appeal had been granted. Instead, the question was whether the contract between the parties at the default date, as amended by the LOI and Addenda, was the contract to which the proper measure of damages under para (c) of the Default Clause must be applied.

The key authority *Bunge SA v Nidera BV*,[36] concerning the measure of loss following default by a seller, was good authority for this case concerning default by a buyer, and of considerable weight as to the relationship between GAFTA Default Clause para (c) and common law and the Sale of Goods Act 1979.

The validity of the statements of law in *Bunge* was not confined to anticipatory breach. Following *Bunge*, the Default Clause was a complete code for determining the market price or value of the goods. Paragraphs (a) and (c) concerned different transactions: (a) concerned an actual transaction, and (c) goods which might have been purchased under a notional substitute contract. Where the contract had been amended, it was the terms of the amended contract that were to be replaced following the compensatory principle.

In accordance with the compensatory principle, the buyer's case that in a C&F contract a sale of landed goods at destination as of the date of default was the only available measure of loss would be rejected. It was to be inferred that the bills of lading had become accomplished upon discharge to the buyer's order and that therefore as of the date of default the contract was no longer a C&F contract but something akin to a sale ex warehouse contract, with sale of specific goods on instalment payment terms. In the result, the value of the goods under para (c) of the Default Clause fell to be measured by reference to a notional sale of the goods in bulk ex warehouse Mundra on 2 February 2018, on instalment payment terms as per the Addenda, but with risk passing to the buyer at the date of contract.

The decision is on appeal to the Supreme Court and the hearing is to take place on 21 and 22 February 2024. The question posed to the Supreme Court has been refined in line with the Court of Appeal discussion and now reads:

> "Where goods sold Cost & Freight free out are located at their discharge port, on the date of the buyer's default, in the circumstances as found by the GAFTA Appeal Board in the Awards, is 'the actual or estimated value of the goods, on the date of default' under sub-clause (c) of the GAFTA Default Clause to be assessed by reference to:
>
> (a) The market value of goods at that discharge port (where they are located on the date of default); or
>
> (b) The theoretical cost on the date of default of (i) buying those goods Free on Board 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?"[37]

Glencore Energy UK Ltd v NIS JSC Novi Sad[38] involved a dispute arising from a settlement agreement on the storage fees accrued under a sale of goods contract. Pursuant to a sale contract between the parties dated 24 January 2019, the claimant Glencore had as seller delivered a cargo of crude oil into a storage facility at Omisalj in Croatia on 31 December 2019 and 1 January 2020. The cargo was contaminated by organic chlorides leading to NIS paying storage fees to the terminal operator. NIS had on 28 May 2020 demanded and Bank C had, pursuant to a performance bond dated 30 January 2020 and opened at the request of Glencore, paid the sum of US$2,094,000 in respect of the storage fees. Glencore now sought reimbursement of that sum on the basis of a settlement agreement between the parties dated 19 March 2020. The settlement agreement had been concluded in haste due to the availability to lift the cargo on that day and had left some matters to be determined by negotiations, including the claim by the storage facility against NIS and compensation by Glencore, with reference to the storage facility's "actual loss" and prevailing market rates. Unbeknownst to Glencore, NIS had agreed to pay the default rate to the storage facility before the settlement agreement was signed. Glencore's case was that for this to be recoverable from NIS, and in turn from Glencore, the storage facility must have suffered an actual loss.

The judge held as follows. NIS's primary case for breach of the sale contract in respect of the storage fees would be rejected. The claim had been settled save for the entitlement to be reimbursed. The clause stipulating that outstanding claims were to be "presented and dealt with" in accordance with the sale contract was a procedural rather than a substantive clause.

[36] [2015] UKSC 43; [2015] 2 Lloyd's Rep 469.

[37] See https://www.supremecourt.uk/cases/uksc-2023-0029.html (accessed on 30 December 2023).

[38] [2023] EWHC 370 (Comm); [2023] Lloyd's Rep Plus 60.

Regarding the construction of the settlement agreement, the court held that the language in the settlement agreement was designed to narrow the scope of the dispute over NIS's entitlement to reimbursement. Construing the term, the "actual loss" and prevailing market rates were not to separate hurdles for NIS to clear. Actual loss referred to losses arising out of the emergency situation or the contamination of the cargo and the prevailing market rate must accordingly be rates for storage at the facility on a spot basis.

A further point was that the parties had undertaken to negotiate in good faith. Good faith required conduct which would be regarded as commercially acceptable by reasonable and honest people. Absent "special factors", the product of the good faith negotiation would match the basic entitlement (eg to be paid the reasonable cost). On the evidence, merely leaving the negotiation at the bottom of Glencore's list of priorities would not, of itself, amount to a failure to conduct that negotiation in good faith. It would take a more extreme case in order for that point to be reached. There was no evidence of deliberate slowing down.

> Good faith required conduct which would be regarded as commercially acceptable by reasonable and honest people

The court found that it was necessary to decide on the evidence what final figure would have been arrived at in the negotiation. The facility's default rates for storage were akin to a penalty charge and did not reflect the prevailing market rate for storage. Having made a finding as to the prevailing market rate, and applying it for the three-month period, the total reimbursement due from Glencore to NIS was US$1,062,000. NIS was to return the remainder paid pursuant to the performance bond.

The point in *Mitsui & Co (USA) Inc v Asia-Potash International Investment (Guangzhou) Co Ltd*[39] was fairly straightforward. The parties had on 2 May 2012 entered into a contract of sale for a cargo of soy beans for delivery FOBST ex Santos 15 to 31 July 2012. Mitsui was the seller and the defendant, referred to as DGO, was the buyer. The contract was on FOSFA 4 and ANEC 41 terms and payment was to be by letter of credit. The contract was part of a string of non-identical contracts. The vessel *Yusho Regulus* was nominated and commenced loading on 13 September 2012. Two days thereafter, the vessel broke free from its moorings, damaging port equipment in the process and was arrested. A solution was sought, with Mitsui seeking performance and DGO asserting that the contract had been terminated. Mitsui took the view that DGO could have had the vessel called back to berth from 16 October 2012. The letter of credit expired on 30 November 2012. In early January 2013 Mitsui accepted DGO's repudiation and commenced arbitration against its sellers, seeking to pass its sellers' claims down the chain to DGO and DGO's claims and defences up the chain to its sellers.

A FOSFA arbitrator found in favour of Mitsui, but the FOSFA Board of Appeal allowed DGO's appeal.

Before the court, Mitsui asserted that its case was based on breach, causation, mitigation and remoteness. DGO for its part argued that Mitsui's case focused on the string nature of the various contracts instead of, as was proper, the alleged breach of contract with damages (or an indemnity) on a causation and remoteness basis.

The judge allowed Mitsui's appeal. The judge considered that Mitsui should not be understood as having asserted that it was sufficient for there to be string or back-to-back contracts. Remoteness had been referenced in the context of the loss. The award was to be read as using string or back-to-back contracts as shorthand for Mitsui's case on conventional principles of breach of contract. The Board of Appeal had erred on the issue of remoteness, in failing to consider whether the losses were of a "type" or "kind" which would have been in the parties' reasonable or specific contemplation at the time of contracting. It had plainly taken the view that the string or back-to-back issue was all that mattered for remoteness purposes. Therefore, the question of remoteness would be remitted to the Board of Appeal to be considered on the correct legal basis.

[39] [2023] EWHC 1119 (Comm).

Trade

In last year's review, three cases concerning letters of credit from the Singapore courts were reported. This year appellate decisions in all three litigations have been handed down by the Singapore Court of Appeal. A further case concerns sanctions in the context of trade.

The first decision is *Kuvera Resources Pte Ltd v JPMorgan Chase Bank NA*,[40] considering the situation arising from a complying presentation, but where payment would be incompatible with sanctions. The plaintiff, now appellant, was a Singapore company trading in coal exported from Indonesia. The defendant, now respondent, 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 which revealed a concern in relation to the carrying vessel. According to the defendant's internal lists, the vessel appeared to be beneficially owned by a Syrian entity, which would cause it to fall within the scope of US sanctions. The bank therefore included a "sanctions clause" in the confirmation. 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. At first instance, the judge dismissed the plaintiff's action.[41] The plaintiff appealed.

The Singapore Court of Appeal allowed the appeal in part, awarding damages to the appellant. The court first affirmed that it was settled law and the judge had been correct in holding that a documentary credit transaction comprised a number of discrete contracts with each being autonomous and separate from the others, and that the contracts in a compound letter of credit transaction operated independently of each other. Only the confirming bank became liable under the confirmation and a confirming bank's liability under a confirmation could therefore be subject to conditions not reflected in a letter of credit. Letters of credit and confirmations were best understood as unilateral contracts bearing the sui generis quality of irrevocability.

With regard to the sanctions clause, the court went on to hold that the true meaning and effect of this clause was that where the vessel was not "listed in" any "applicable restrictions", but only in the bank's internal lists, the bank must establish that the vessel was "otherwise subject to any applicable restrictions". While as the judge had found it was rational to prefer to be sued over non-payment to being subject to US sanctions, it was not contractually justified.

Where the bank had chosen to rely on its internal list, it must accept the risk that such reliance may not be sufficient to discharge its burden of proof.

While the bank had sufficiently established that the vessel was in Syrian beneficial ownership in 2015, the evidence that it remained so in 2019 was inconclusive.

Existing case law on change of ownership in the context of in rem jurisdiction was instructive since it ultimately addressed the same inquiry, namely the evidential process by which a change of ownership of a vessel is established. Ownership and changes therein was an issue capable of proof. Because of its reliance on the sanctions clause, the bank bore the burden of such proof and it had not succeeded in displacing the prima facie inference of ownership arising from the registration of the vessel, so that the appeal would be allowed.

A comment made obiter is noteworthy. The court observed that the beneficiary of a letter of credit was

[40] [2023] SGCA 28.
[41] [2022] SGHC 213; [2023] 1 Lloyd's Rep 604.

typically not involved in the nomination of the vessel and the beneficial ownership of the vessel might not be apparent from the publicly available records. In such cases, a sanctions clause entitling the confirming bank to deny payment against a complying presentation according to its own assessment of the risk of being sued by either the US Office of Foreign Assets Control or the payee was most likely incompatible with the commercial purpose of the letter of credit, because of the uncertainty it would introduce.

While the authorities showed a growing recognition of sanctions clauses, cases concerning types of contracts other than letters of credit were not instructive.

Moving from the sanctions clause to fraud in trade, *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd*[42] was an appeal from the Singapore International Commercial Court. The appellant bank CACIB had been induced by the circular trading fraud of Z, a commodities trading company, to issue an unconfirmed letter of credit subject to UCP 600 and dated 3 April 2020 in favour of the respondent, PPT. Payment under the letter of credit was due 60 days after the bill of lading date, in the event 5 June 2020. In this litigation, the bank sought notably an injunction against payments under the letter of credit, a declaration that PPT was not entitled to any sums thereunder and an order that PPT reimburse the bank; or if PPT was entitled to receive payment under the letter of credit a finding that PPT was liable under a letter of indemnity (LOI) presented in lieu of shipping documents under the letter of credit. PPT cross-claimed for a declaration that payment was due under the letter of credit. The bank's position at trial, disputed by PPT, was that PPT was aware of Z's fraud.

At first instance, the judge in the Singapore International Commercial Court held that as PPT had made a compliant presentation and CACIB had failed to give any notice of refusal to pay, CACIB was, in the absence of fraud in the presentation, bound to honour the letter of credit.[43]

The Court of Appeal rejected the bank's appeal in relation to the letter of credit but allowed the appeal on the question whether PPT was in breach of warranty under the LOI. The court drew the distinction between authorities concerning on-demand instruments but where the beneficiary was party to the fraud or misrepresentation and a letter of credit transaction. The former involves one relationship, whereas the latter, as in the present case, concerns two autonomous relationships.

It was held that acceptance of the asserted principle that fraud precluded not only the original party but every other party from taking any benefit would undermine the contractual relationships between sellers and banks, treated as binding by mercantile usage even without consideration and relied on accordingly, even at the risk that it may subsequently emerge that the buyer has procured the credit by fraud. Such a principle would cut across, confuse and potentially undermine the established principles governing letters of credit.

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 court held that the LOI tendered to the bank in place of shipping documents under the letter of credit was not as the judge had found a unilateral contract the effect of which was conditional upon the bank paying the sale contract price as stipulated. It was effective from the moment of its issue. The obligation to make payment at or by the due date was not a strict condition but an innominate term. This was especially so where the bank's LOI obligation in this regard was already in the letter of credit, where it was not a condition.

However, the court held that PPT was in breach of the warranty to provide a "marketable" title where its title was of uncertain value in circumstances where inconsistent charges had been granted over the same goods, the floating charges had been crystallised, Z was not a seller acting in the ordinary course of business and PPT was not a bona fide purchaser for value or an innocent bystander to the fraud.

Also in the case of alleged circular trading, in *UniCredit Bank AG v Glencore Singapore Pte Ltd*,[44] 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. The bank had granted credit facilities to Glencore's buyer HLT, 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 HL 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" and for several

42 [2023] SGCA(I) 7; [2024] Lloyd's Rep Plus 8.
43 [2022] SGHC(I) 1; [2023] Lloyd's Rep Plus 25.
44 [2023] SGCA 41.

months thereafter continued to conceal the sale back to Glencore. As a result, when the bank issued the letter of credit on 29 November 2019 and paid Glencore on 3 December 2019, based notably on a letter of indemnity from Glencore addressed to HLT ("the Glencore LOI"), 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.

At first instance,[45] the bank asserted claims against Glencore based on rescission; fraud or deceit; conspiracy and unjust enrichment. The judge dismissed the claims. UniCredit appealed, on the ground only that the judge had erred in dismissing the bank's claim in the tort of deceit.

The Court of Appeal dismissed the appeal. First, the bank's appeal failed to distinguish between the fraud exception to the principle of autonomy of letters of credit and the principles of the tort of deceit, to establish a representation made by Glencore to UniCredit. The tort of deceit was based on the right not to be lied to and the fraud exception was based on the maxim that "fraud unravels all".

The court went on to hold that establishing the fraud exception required evidence that at the time of presentation of the documents under the credit, the beneficiary of the credit had no intention at all to locate and surrender the bills of lading, contrary to what was represented to UniCredit in the Glencore LOI. However, the LOI was a document stipulated under the credit and was a genuine document. It did not give rise to any sort of representation to UniCredit that Glencore had agreed to locate and surrender the bills of lading. Without any appeal against the judge's finding that the sale contract was not a sham, the maxim "fraud unravels all" could not be relied upon.

Furthermore, the tort of deceit had not been established where the alleged representations had not been established. Representations in a letter of indemnity from Glencore to HLT, by which it undertook to deliver the bills of lading or pay an indemnity, had not been made to UniCredit and were not representations that the bills of lading would be found and delivered. There was on the facts no deceit on the part of Glencore.

Litasco SA v Der Mond Oil and Gas Africa SA and Another[46] concerned the effects of sanctions on trade. The judge notably declined to offer the case up as a test case on the Russia (Sanctions) (EU Exit) (Amendment) Regulations 2019, where there was no evidence that those regulations applied.

The claimant Litasco and the defendant Der Mond were both oil trading companies. The second defendant was Der Mond's parent company. Litasco entered into a contract to sell Der Mond 950,000 barrels of ERHA (Nigerian) crude oil, CFR Dakar, Senegal. The contract contained a force majeure clause (clause 14) and a trade sanctions clause. The cargo was delivered and Der Mond made partial payments in November 2021 and January 2022 in the amounts of €13,284,917.19 and €4,425,562.05 respectively, but then failed to pay the remainder. Litasco and Der Mond entered into a Deed of Payment incorporating all rights and remedies under the contract and providing for payment in five instalments over five months.

Following failures to pay under the Deed, Litasco demanded the outstanding balance by this claim under the Deed of Payment. Negotiations continued and proceedings were stayed. An addendum was concluded on 4 or 5 November 2022 for payment in instalments until July 2023. During these negotiations, there was also discussion of other business opportunities. Der Mond made the first two payments under the addendum.

> Clauses triggered when a force majeure event "hindered" performance of an obligation had a wider field of operation than those limited to events which "prevented" performance

On 13 March 2023 following a lifting of the stay, Litasco filed amended particulars of claim. Der Mond served a defence, essentially arguing that the addendum formed part of a broader commercial arrangement and that Litasco had by conduct falsely represented that it intended to enter into additional business with Der Mond. Litasco applied for summary judgment. The defendants contended in reply that they had a realistic prospect of defending the claim and that there was in any event a compelling reason for a trial.

The judge held that it was not arguable that any representation had been made as to Litasco's intention

[45] [2022] SGHC 263; [2023] Lloyd's Rep Plus 20.
[46] [2023] EWHC 2866 (Comm).

to enter into a joint venture for the purpose of inducing the defendants to sign the addendum. The argument that Litasco did not intend to enter into a joint venture of some kind with the defendants in relation to sales to West African customers when the addendum was signed had no realistic prospect of success, and without evidence was little more than an exercise in ungrounded speculation.

Where there was no evidence of a promise of a joint venture agreement, there was no representation by which the defendants could have been induced to enter into the addendum agreement, especially where there was in any case the incentive of more time to pay existing obligations.

As for whether there had been a force majeure event under clause 14, the judge observed that it was well-established that clauses triggered when a force majeure event "hindered" performance of an obligation had a wider field of operation than those limited to events which "prevented" performance.

The judge directed himself that an argument that a party owing an accrued debt obligation was relieved of performance because paying the debt has been made more difficult should be approached with particular circumspection. Even in the context of force majeure clauses under which hindering performance was sufficient, before difficulty in making payment would suspend performance of an accrued obligation, a significant degree of difficulty would be required, perhaps one approaching, albeit falling short of, impossibility. Here, the evidence fell far short of establishing a realistic prospect that payment of the accrued debt was hindered for the purpose of clause 14.

Evaluating the sanctions clause at issue, the judge held that only sanctions changes, not trade sanctions per se, permitted a party to serve written notice suspending its performance. Having assessed the position at the date of the contract and committed to performing the contract, the parties had assumed the risk, if and to the extent that any trade sanctions in force at the date of the contract prevented them from performing. The defendants had not identified any sanctions change occurring after 7 November 2022 and its sanctions defence must therefore fail.

Finally, where there was no arguable evidence that the 2019 Regulations applied, Litasco should not be deprived of the summary judgment merely because it would provide a test case on the 2019 Regulations.

Wreck removal

Next, to *Bumi Jaya Salvage & Engineering Sdn Bhd v Brave Worth Shipping Co Ltd (The Kmax Pro)*.[47] This case from Singapore turned on procedural issues, but the judge took the rare opportunity to consider the standard form wreck removal terms, which provided the substantive context for those procedural issues. Judgment in default had been entered against the defendant. Permission for an application to set aside was granted, and following the hearing the judge varied that default judgment in part, holding that the defendant had a prima facie case.

The judge considered the balance of responsibilities under Wreckhire 2010, Wreckfixed 2010 and Wreckstage 2010. The latter was the material set of terms in the case. The claimant was a Malaysian provider of salvage and engineering services and the defendant was the owner of *Kmax Pro*, which had caught fire and grounded. The defendant engaged the claimant to salvage the vessel under a contract based on the Wreckfixed 2010 form. The parties disagreed on whether the salvage was successful. The parties then entered into a second agreement using the Wreckstage 2010 form for the discharge of the vessel at berth. This agreement was subject to Singapore law and the jurisdiction of Singapore courts. Under its terms, the defendant was to appoint a scheduled (hazardous) waste contractor and to make an advance payment to the claimant. The claimant commenced work and sent several reminders of those duties, and ceased work when no scheduled waste contractor was appointed and the advance payment was paid only late and in part. Default judgment having been entered, the defendant obtained permission to argue that it should be set aside. The issue before the judge was whether the defendant had a prima facie defence.

> What distinguished wreck removal contracts from other shipping contracts was the uncertainty inherent in the contract venture. Accordingly, the agreed balance and detail of liabilities in the contract was important, along with the scope for and actual amendments

[47] [2023] SGHCR 21; [2024] Lloyd's Rep Plus 9.

Drawing on Nicholas Gaskell and Craig Forrest's work *The Law of Wreck*,[48] the judge noted that what distinguished wreck removal contracts from other shipping contracts was the uncertainty inherent in the contract venture. Accordingly, the agreed balance and detail of liabilities in the contract was important, along with the scope for and actual amendments. The judge observed that with Wreckhire, the balance of risk was on the shipowner, with Wreckfixed it was on the contractor, with Wreckstage providing an intermediate risk profile. The differences lay in guaranteed outcomes and in the choice of daily rates, key stage instalments or "upon completion" payments. The parties had chosen the intermediate Wreckstage form, with intermediate stages paid for upon their completion.

Accordingly, there was no triable issue in relation to the advance payment which had fallen due. For other staged payments, the issue was whether the work had been completed. Where it had not, the further issue was whether the reason was the fault of the defendant, for example because it had failed to appoint a scheduled waste contractor, so that there was a triable issue. As the works progressed, there had been "variation orders" and here the defendant had established a triable defence simply by pointing out the failure of the claimant to properly plead that these were a separate agreement rather than variations to the Wreckstage agreement. The indemnity for standby charges of a tug sought by the claimant was also triable where those charges appeared to be for the claimant under the Wreckstage contract and were connected to the "consequences of pollution", of which there was no evidence.

The consideration and characterisation of wreck removal contracts based on Gaskell and Forrest, and on Rainey,[49] are of some interest, given how rarely such contracts appear in published judgments. The judge endorsed several passages from each work.

Marine insurance

Two marine insurance cases will be examined here. The first is the appellate decision in *Quadra Commodities SA v XL Insurance Company SE and Others*,[50] the second is *Chubb Insurance Singapore Ltd v Sizer Metals Pte Ltd*[51] handed down by the Singapore Court of Appeal.

In *Quadra Commodities* the assured commodity trader had 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 Agroinvest group 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 inspect and/or obtain the release of grain. Quadra claimed 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 late payment by the defendant in alleged breach of its obligations under section 13A of the Insurance Act 2015. The defendant insurer denied all liability. In particular, the defendant denied that the assured had an insurable interest and denied that there had been any physical loss, in that the cargoes had never existed.

> It is the rule for now that an insurable interest can arise in unascertained goods, regardless of whether they form part of an unascertained bulk and where title and/or a proprietary interest has not yet passed to the assured, so long as payment or part payment has been made

Butcher J had in 2022[52] ruled in favour of Quadra, deciding that the insurers should indemnify Quadra Commodities for the misappropriation of commodities arising from the Agroinvest group fraud and bankruptcy. The Court of

48 Informa, 1st Edition, 2019.
49 Simon Rainey, *The Law of Tug and Tow and Offshore Contracts*, Informa, 4th Edition, 2017.
50 [2023] EWCA Civ 432; [2023] Lloyd's Rep IR 455.
51 [2023] SGHC(A) 17; [2023] Lloyd's Rep Plus 95.
52 *Quadra Commodities SA v XL Insurance Company SE and Others* [2022] EWHC 431 (Comm); [2022] 2 Lloyd's Rep 541; [2023] Lloyd's Rep IR 26.

Appeal now upheld the first instance decision, affirming that the first instance judge had been entitled to find that the goods had been in existence in the Elevators when the warehouse receipts were issued. As to insurable interest, it is the rule for now that an insurable interest can arise in unascertained goods, regardless of whether they form part of an unascertained bulk and where title and/or a proprietary interest has not yet passed to the assured, so long as payment or part payment has been made. Following the decision, the insurers were granted permission to appeal to the Supreme Court.

Chubb v Sizer Metals[53] concerned the issue of burden of proof in circumstances where there was no direct evidence of when or where the loss had occurred under a marine cargo insurance policy. At first instance, Sizer Metals successfully sued Chubb for the loss of four shipments of tin concentrate in drums under a Marine Cargo Open Policy which incorporated standard Institute Cargo Clauses (A) (1/1/1982) terms.[54] The Singapore Court of Appeal upheld the trial judge's decision.

The policy terms provided that the risk attached "from the time the goods leave the warehouse or place of storage" until delivery. There had been a theft either at seller's premises in Rwanda or in the subsequent transit by road to a bonded warehouse in Kigali before the cargo was transported to the port of Dar es Salaam for shipping to Penang. In its appeal, Chubb argued that the trial judge had wrongly reversed the burden of proof in some instances by ruling out possibilities – such as that the theft took place in Penang – instead of requiring Sizer to prove that the metals were not stolen there.The Court of Appeal by a majority held that Sizer had discharged its burden of proof that the loss had occurred in transit by demonstrating that there was no serious possibility that the theft could have taken place on the seller's premises. Applying *The Popi M*,[55] by a process of elimination, the loss would have occurred in transit. Chubb had been unable to produce evidence rebutting that possibility.

As can be drawn from *The Popi M* and the present judgment, once the assured has managed to prove a theory on the balance of probabilities, the insurer should be liable for the recovery without more. An insurer who decides to defend and reject the assured's theory also shoulders the burden of proof for its theory of the case.

Maritime treaty interpretation

The Supreme Court's judgment in *JTI Polska SP z o o and Others v Jakubowski and Others*,[56] concerned matters related to the carriage of goods by road, but contains important dicta on the interpretation of conventions, specifically the use of supporting materials such as travaux préparatoires.

The appellants were road hauliers based in Poland and the respondents were international tobacco traders based in Switzerland. The parties had entered into a contract for the carriage by road of 1,429 cartons of cigarettes from the appellants' premises in Poland to the respondents' premises in Crewe in the UK. The consignment was subject to tobacco excise duty when released for commercial consumption. Due to an excise duty suspension arrangement, the application of excise duty was suspended until such time as the consignment was released for commercial consumption, or was deemed to have been released for commercial consumption as in the case of an irregularity occurring during its movement such as non-delivery or partial delivery due to theft.

While the carrying vehicle was parked at a service station on the M25 overnight, 289 cases were stolen by thieves who cut a hole into the side of the vehicle. HMRC were notified and levied excise duty from the respondents on the basis that the stolen cigarettes were deemed to have entered into circulation within the UK following the theft. The respondents claimed the excise duty from the appellants on the basis of article 23.4 of the Convention on the Contract for the International Carriage of Goods by Road 1956 (CMR).

At first instance,[57] the judge was bound by *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd*[58] in which a broad interpretation of article 23.4 had been adopted by the House of Lords according to which the excise duty was recoverable. A certificate was granted to appeal to the Supreme Court.

Article 23.4 read:

> "In addition, the carriage charges, Customs duties and *other charges incurred in respect of the carriage of the goods* shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss, but no further damages shall be payable." (Emphasis added.)

53 [2023] SGHC(A) 17; [2023] Lloyd's Rep Plus 95.
54 HC/S 1248/2019.
55 *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 2 Lloyd's Rep 1.
56 [2023] UKSC 19; [2023] 2 Lloyd's Rep 64.
57 [2021] EWHC 1465 (Comm).
58 [1978] 1 Lloyd's Rep 119.

The Supreme Court dismissed the appeal. It did so providing what is arguably a subtly revised approach to the use of supplementary materials in convention interpretation.

The Supreme Court relied on the rules of interpretation in articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969. While this post-dated CMR, it reflected customary international law. The Supreme Court stated that those principles, as well as the structured approach in the articles should be followed.

Article 32 (Supplementary means of interpretation) reads as follows.

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to *confirm* the meaning resulting from the application of article 31, or to *determine* the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable." (Emphasis added.)

The Supreme Court observed that according to article 32, recourse to supplementary materials such as travaux préparatoires may be had to *confirm* the meaning resulting from article 31, or to *determine* the meaning of a treaty provision when the interpretation according to article 31 left the meaning ambiguous or obscure or led to a manifestly absurd or unreasonable result.

In what is arguably a departure from the previous approach that "Only a bull's eye counts. Nothing less will do",[59] a "bull's eye" was only required where materials were used to "determine" rather than to "confirm" the meaning resulting from the application of article 31. Given the past difficulties in identifying a bull's eye in the preparatory works to the Hague and Hague-Visby Rules, the ruling could be significant. The revised approach applies to all maritime conventions and the judgment was noted in *MSC Mediterranean Shipping Co SA v Stolt Tank Containers BV and Others (The MSC Flaminia) (No 2)*,[60] considered below, in relation to the interpretation of the Convention on Limitation of Liability of Maritime Claims 1976 as amended. In *JTI Polska* itself, there were insufficient reasons to depart from the broad interpretation of article 23.4 CMR established in *Buchanan*, not least where there was no settled international view.

[59] *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] 1 Lloyd's Rep 337 at page 348 col 1, per Lord Steyn.
[60] [2023] EWCA Civ 1007.

Admiralty

To begin this admiralty section, a decision on the foundational question of the meaning of "ship", this time from Singapore. The vessel at issue in *Vallianz Shipbuilding & Engineering Pte Ltd v Owner of the Vessel "Eco Spark"*[61] was a steel dumb barge, *Eco Spark*, that had been converted into a floating fish farm.

It had no engines and no propulsion, no master or crew and was not registered and no longer classed. The conversion work had been undertaken by the claimant under a contract containing an arbitration clause. A dispute arose as to the sums owed. On 14 March 2023 the claimant had *Eco Spark* arrested. The defendant owner sought to strike out and set aside the claim in rem and to set aside the warrant of arrest, on the ground that *Eco Spark* was not a ship within the definition of section 2 of the High Court (Admiralty Jurisdiction) Act 1961 (HCAJA). The defendant also applied for a stay in favour of arbitration.

The judge rejected the defendant's applications for strikeout and setting aside, but granted the stay in favour of arbitration. *Eco Spark* was a ship. Combining the definitions of "ship" in the HCAJA and "vessel" in the Interpretation Act 1965 gave the phrase "floating craft of every description used in navigation". Whether *Eco Spark* met that definition was a jurisdictional fact to be established on the balance of probabilities. The statutory provision conferring admiralty jurisdiction must be given a broad and liberal construction. If a vessel was designed and capable of being used in navigation, that should be a weighty consideration that that vessel fell within the definition of a "ship" under section 2 of the HCAJA, irrespective of its current usage. The navigability of a vessel gave rise to the risk of it being removed from a jurisdiction to defeat legitimate in rem claims and was a reason to invoke the court's admiralty jurisdiction to arrest it.

The extent of the actual movement of a vessel should not have a bearing on the finding that the vessel was actually being used in navigation. Instead the test was whether the vessel was capable of being used in navigation. The barge before conversion had been navigable and the installation of the floating fish farm atop the barge structure had not resulted in any significant change to the physical structure or design of the vessel such as to render it no longer navigable.

"Spudding down"[62] was not determinative where the vessel could be de-spudded and towed.

The evidence showed that the parties had intended the vessel to remain in class and that the Marine and Port Authority required it to be classed and maintained in class. The fact that it was not currently classed was attributable to the defendant's failure, not to the vessel being incapable of being classed. The classification society recognised that such structures were ships.

> The judge disagreed with the approach articulated in *The Von Rocks* that "at an irreducible minimum", the definition of a "ship" is that the craft must not only "be capable of traversing" significant water surfaces, but must do so regularly in its "operative life"

For aficionados of this particular issue, the judge provided an erudite review of the approach to the meaning of ship in a variety of jurisdictions and notably disagreed with the approach articulated in *The Von Rocks*[63] that "at an irreducible minimum", the definition of a "ship" is that the craft must not only "be capable of traversing" significant water surfaces, but must do so regularly in its "operative life".[64]

61 [2023] SGHC 353.

62 Lowering and embedding the legs into the seabed.
63 [1998] 2 Lloyd's Rep 198.
64 At page 206 col 2.

Admiralty liabilities

Even after centuries of admiralty jurisdiction, issues remain unresolved. This year saw judgments on collision and salvage liabilities.

Collisions

In *FMG Hong Kong Shipping Ltd, Demise Charterers of FMG Sydney v Owners of the MSC Apollo*,[65] the question for Sir Nigel Teare concerned interpretation of COLREGs and the meaning of early and substantial action, as well as the crossing rule in a head-on situation. The background was that on 29 August 2020 the very large ore carrier *FMG Sydney* had collided with the container ship *MSC Apollo* in the approaches to Tianjin in China, in good visibility, light winds and slight seas. Both vessels were in ballast. *Sydney* was outbound heading generally East and *Apollo* was inbound heading generally West. Following an initial position where the vessels were going to cross port-to-port, *Apollo* used VHF to suggest to *Sydney* and other nearby vessels that they cross starboard-to-starboard. *Sydney* had altered course to starboard and *Apollo* to port, causing *Sydney's* port bow to strike *Apollo*'s starboard side at a 40-degree angle. The factual circumstances of the collision were largely agreed, with the issue of fault before the judge. *Apollo* submitted notably that a head-on situation had been at hand so that Rule 14 applied and *Sydney* had maintained an unsafe course and speed, whereas *Sydney* argued that it was a crossing situation with *Apollo* the give-way vessel.

> "Navigation will be safer if mariners observe and heed the 'bright light' of the crossing rule"

Unusually, the judge found causative fault on the part of *Apollo* but no causative fault on the part of *Sydney*. On the evidence *Apollo* as give-way vessel had failed to take early and substantial action in line with Rules 15 and 16. It followed that *Apollo* must be held solely responsible for the damage caused by the collision.

The judge observed that the obligation upon the give-way vessel was to take early and substantial action to keep well clear of the other vessel. As the Assessors' opinion showed, the latest point at which early and substantial action could have been taken was C-7. *Apollo* had failed to take action before this point to keep clear of *Sydney*. Instead of taking early and substantial action, *Apollo* had turned to port such that she went from a course to pass astern of *Sydney* to a course crossing ahead of *Sydney*, in breach of Rule 15.

The judge noted *Mineral Dampier v Hanjin Madras*[66] and observed that although the use of VHF could in some circumstances be used by the give-way vessel to inform the other vessel of action being taken to comply with the Collision Regulations, exceptional circumstances such as to justify its use to agree a course of navigation contrary to the Collision Regulations had not been at hand in this case.

Where the difference between the vessels' reciprocal headings at C-12 was 17 degrees, the judge rejected the suggestion on behalf of *Apollo* that the vessels were on nearly reciprocal courses and that instead of a crossing situation it was a head-on situation where Rule 14 applied. The alignment test in Rule 14(b) must be met by both vessels.

In conclusion, the judge observed that: "Navigation will be safer if mariners observe and heed the 'bright light' of the crossing rule".[67]

The Singapore Court of Appeal in *Owner of the Vessel "Navigator Aries" v Owner of the Vessel "Leo Perdana"*[68] allowed an appeal where the issue was narrow channel navigation.

Just before midnight on 28 June 2015, the LPG tanker *Navigator Aries* and the container vessel *Leo Perdana* had collided in the Surabaya Strait in Indonesia. The damage to both vessels was great with a fire breaking out on board *Navigator Aries*. Until about a minute before the collision, the vessels were calmly under way under compulsory pilotage and were on course to pass each other port-to-port, by agreement. At that point, *Leo Perdana* suddenly experienced a sheer onto the path of *Navigator Aries* and attempted to alert that vessel via VHF that its steering was not responding.

The judge at first instance found as a fact that the port sheer had caused the collision and that it was in turn caused by a bow cushion effect from a bank on the starboard side of *Leo Perdana*. There was no appeal from those findings. The judge had apportioned blame 70:30

65 [2023] EWHC 328 (Admlty).

66 [2001] 2 Lloyd's Rep 419.
67 At para 163.
68 [2023] SGCA 20.

in favour of *Leo Perdana*, on the basis that *Navigator Aries* had created the situation of difficulty or danger by failing to comply with Rule 9 (Narrow channels) of the COLREGs and forcing *Leo Perdana* to a position where the bow cushion effect would operate. *Navigator Aries* had also been found at fault under Rule 5 (Lookout) and Rule 7 (Risk of collision), whereas *Leo Perdana* had travelled at excessive speed. *Navigator Aries* appealed, seeking a 50:50 apportionment and arguing that its faults were not the immediate cause of the collision; and that *Leo Perdana*'s speed and other causative faults should be given greater weight than afforded to them by the judge.

> Vessels in a narrow channel were required to navigate as close to the outer limit of the channel as was safe and practicable; not by reference to a notional mid-channel line

The Court of Appeal allowed the appeal and held that both vessels were equally to blame. In its view, the "midships" order given at a time when the rudder ought to have been kept to starboard to counteract the bow cushion effect was causative and *Leo Perdana* was in breach of Rule 8(a), (c), and (d) (Actions to avoid collision). However, *Leo Perdana*'s helm actions which had allowed the existing bow cushion effect to develop into a port sheer were not subsequent intervening acts.

The court found at least some suggestion in literature[69] that Rule 9 should be construed as a particular application of Rule 14 (Head-on situation) in narrow channels. However, it was not necessary to consider Rule 14 in the present case as findings of breach such as to underpin apportionment had already been made in relation to Rule 8, and Rule 14 had only been briefly argued.

The court observed that Rule 9(a) embodied the limit requirement rather than the lane requirement from the 1960 COLREGs, so that vessels in a narrow channel were required to navigate as close to the outer limit of the channel as was safe and practicable; not by reference to a notional mid-channel line.

The court rejected the argument that Rule 9(a) had required *Leo Perdana* to navigate past the western edge of the dredged channel and determined that the appellant's argument that *Leo Perdana* was in breach of Rule 2 by lacking a safety passage plan was not made out and in any case would not have been causative. However, *Leo Perdana*'s excessive speed and failure to slow down when she first experienced bow cushion effect placed the vessel in breach of Rules 6 and 8(e).

As for apportionment, the judge had placed too much weight on *Navigator Aries*' breach of Rule 9(a), and none on *Leo Perdana*'s "midships" order.

In conclusion, *Navigator Aries*' breach of Rule 9 and *Leo Perdana*'s breaches of Rules 6 and 8 were such that a 50:50 apportionment was appropriate.

In a further decision, *The Navigator Aries*,[70] the same court considered what costs order ought to be made in light of the above appeal outcome and the offers to settle made in the course of litigation. After the commencement of the action, *Leo Perdana* had made an offer to settle at 60:40 in its own favour. As noted, the judge at first instance had decided on an apportionment of 70:30 in *Leo Perdana*'s favour. *Navigator Aries* appealed. Before the appeal was heard, *Navigator Aries* made a Calderbank offer (a letter without prejudice save as to costs) to settle at 50:50. The case was then transferred to the Court of Appeal in light of its importance to shipping practice. *Leo Perdana*'s offer to settle was withdrawn before the Court of Appeal hearing and *Navigator Aries*' Calderbank offer was revoked after the hearing. Considering the costs of the trial, the appeal and the transfer application, the Court of Appeal ordered that each party was to bear 50 per cent of the other party's costs for the first instance trial and ordered the respondent to pay fixed costs of S$100,000 to the appellant for the transfer application and appeal.

Salvage

The sole decision in salvage in 2023, *SMIT Salvage BV and Others v Luster Maritime SA and Another (The Ever Given)*,[71] arose from the notable *Ever Given* grounding in the Suez Canal in March 2021. By the time the vessel was refloated on 29 March, the maritime salvage company SMIT had a salvage team on board and two tugs assisting. The two defendants were the owners of the vessel. The claimants – SMIT and its contractors – now sought salvage under the Salvage Convention 1989 or at common law. The defendants disputed that salvage

[69] Citing Nicholas J Healy and Joseph C Sweeney, *The Law of Marine Collision* (Cornell Maritime Press, 1998).

[70] [2023] SGCA 26.

[71] [2023] EWHC 697 (Admlty); [2023] 2 Lloyd's Rep 201.

services had been provided as alleged and further asserted that if salvage services had been rendered, they were performed under a pre-existing contract and not as volunteers.

Once the vessel had been refloated, the parties had entered into a written jurisdiction agreement dated 25 June 2021 between the claimants, the defendants and their insurers.

Before the judge, the parties' dispute concerned the question of whether an agreement had been concluded between the parties at the time of the salvage operation. It was the defendants' case that communications had addressed all necessary terms and caused a contract to be concluded on 26 March 2021. The claimants disputed that any contract had come into being and asserted that the parties had still been negotiating.

The judge held that no contract such as that alleged by the defendants had been concluded. The decision turned on whether there had been contractual intent to be bound. That issue was to be determined by considering what was reasonably conveyed by the parties to each other, by the way they expressed themselves and by their conduct visible to the other, considered as a whole, at least up to and including the moment at which it was alleged that a contract was concluded. An intention to be bound could not be found where it was not the only reasonable connotation of the parties' exchanges and conduct, taken as a whole.

On the evidence, the parties had not purported to conclude a contract. Agreement was reached on the remuneration terms for a contract that was being negotiated, but the parties made clear to each other that they were still negotiating. The tenor of their exchanges was that they did not intend to be bound. The counter-proposal on detailed terms put the parties some considerable distance apart, and that gap was never closed.

Unsurprisingly given the sums at issue, there is an appeal by the shipowners scheduled for hearing in early February 2024. If the first instance outcome is to stand, and if SMIT can adequately show that it was a salvage volunteer, it will be entitled to salvage either under common law or the Salvage Convention as a proportion of the total value of *Ever Given* and its cargo.

Admiralty procedure

Forum

The occasional case considering *The Spiliada*[72] and forum non conveniens still provides new angles to the test developed by Lord Goff. In *The Sea Justice*[73] the defendant's vessel *Sea Justice* and the plaintiff's vessel *A Symphony* had been in a collision off Qingdao in PRC territorial waters, resulting in oil pollution.

There were four actions before the Qingdao Court. A limitation fund had been constituted. The defendant had commenced a collision liability claim against the plaintiff and the plaintiff had reciprocated. The actions had been consolidated. The plaintiff's P&I Club had also set up a limitation fund. The plaintiff's proceedings against the defendant in personam in the Marshall Islands had been stayed. The Qingdao Court had declined to issue the equivalent of an anti-suit injunction. When *Sea Justice* arrived in Singapore, the vessel was arrested on the application of the plaintiff.

> Chinese courts were better equipped to hear claims under Chinese law; it was a civil law system and the fact that both jurisdictions were bound by COLREGs was insufficient where the limitation and liability regimes were different

The issues arising for consideration were whether the court should grant a stay of the Singapore proceedings in favour of the proceedings in the Qingdao Court; whether the warrant of arrest granted on 19 October 2022 should be set aside for material non-disclosure; and, if the court decided to grant a stay of the Singapore proceedings, what order should the court make with respect to the security furnished by the defendant to secure the release of *Sea Justice* – a "case management stay" or a "conditional stay".

[72] *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] 1 Lloyd's Rep 1.

[73] *Owner and/or Demise Charterer of the Vessel "A Symphony" v Owner and/or Demise Charterer of the Vessel "Sea Justice"* [2023] SGHCR 24.

The assistant registrar ordered an unconditional stay of the proceedings, dismissed the defendant's application to set aside the warrant of arrest and ordered that the security be returned to the defendant in full. Qingdao was clearly and distinctly the more appropriate forum.

The AR noted that the only connecting factor to Singapore was the ship arrest, an insignificant factor compared to those connecting to the Qingdao Court. Chinese courts were better equipped to hear claims under Chinese law; it was a civil law system and the fact that both jurisdictions were bound by COLREGs was insufficient where the limitation and liability regimes were different. There was substantial evidence of the incident and clean-up located in PRC.

The AR went on to distinguish authorities permitting two sets of proceedings to go ahead. Unlike in *The CF Crystal and the Sanchi*,[74] the collision had taken place in PRC territorial waters and service of PRC proceedings had not been accepted, whereas here the plaintiff was an active participant. Unlike in *Shijiazhuang Iron & Steel Co Ltd v Hui Rong Navigation Corporation SA (The Peng Yan)*,[75] the PRC limitation fund had been constituted first.

Moving on to the *Spiliada* stage 2 inquiry, the AR observed that the plaintiff's security obtained through the ship arrest was equal to the Singapore limitation amount. It was an attempt to circumvent the limitation amounts available through the Qingdao Court. Losing that security was a disadvantage, but not an injustice. The forum for limitation of liability was the defendant's inalienable choice.

Finally, the AR considered that allowing the security to stand through a conditional stay would be contrary to judicial comity. The plaintiff had not showed that the oil pollution claims fell outside the PRC limitation fund.

Arrest

The year saw one decision on the nature of claims in rem from a Malaysian court. Three decisions on the finer points of ship arrest management were handed down by Australian and Indian courts.

The combination of insolvency and rights in admiralty gives rise to thorny questions, where a moratorium on litigation against the company collides with attempts to enforce rights in rem against a vessel it owns. Such issues were resolved for Malaysia in *The Owners and/or Demise Charterers of the Ship "Edzard Schulte" v The Owners and/or Demise Charterers of the Ship "Setia Budi"*.[76] On 12 January 2021 a barge being towed by the tug *Setia Budi* and another tug had collided with the vessel *Edzard Schulte*, causing damage. While the plaintiff owners of *Edzard Schulte* were pursuing their claim against the defendant, the owners of the defendant were going through the steps to have a scheme of arrangement approved. On 19 November 2021 the court issued an order in support of the scheme of arrangement under section 368 of the Companies Act 2016, restraining and staying all current and further proceedings in any legal actions or proceedings against the owners of *Setia Budi* or their assets for a period of three months, except by leave of the court. This order was subsequently extended until 18 November 2022.

The combination of insolvency and rights in admiralty gives rise to thorny questions, where a moratorium on litigation against the company collides with attempts to enforce rights in rem against a vessel it owns

None of this was brought to the attention of the owners of *Edzard Schulte*, who on 9 June 2022 gave notice of a claim and on 11 July 2022 commenced an action in rem, obtaining a warrant of arrest on 12 July. The warrant was served on *Setia Budi* on 14 September 2022. No response was forthcoming, and the plaintiffs applied for judgment in default on 18 October 2022. On 15 November the

[74] *Bright Shipping Ltd v Changhong Group (HK) Ltd (The CF Crystal and the Sanchi)* [2018] HKCFI 2474; [2019] 1 Lloyd's Rep 437.

[75] [2008] HKCA 505; [2009] 1 HKLRD 144.

[76] High Court of Malaya at Kuala Lumpur in the Federal Territory, Malaysia (Commercial Division), Ong Chee Kwan J, 2 August 2023.

defendants sought the striking out of the writ and warrant on the basis of the restraining order dated 19 November 2021. On 15 December 2022, by which time the restraining order had expired, the plaintiffs applied for an order that the proceedings did not require the leave of the court, alternatively permission to commence and maintain the proceedings. The defendants obtained a fresh restraining order on 11 January 2023, extended until 10 October 2023. The vessel remained under arrest and for all practical purposes abandoned.

The judge first considered the overall situation, noting that the scope of the restraining order was not confined to proceedings existing at the date of the order and further actions taken in such proceedings, but included subsequently commenced proceedings. The filing of the writ in rem constituted proceedings such as to fall under section 368. The Singapore decision in *The Ocean Winner*[77] would not be followed. Section 368 empowered the High Court to restrain unsecured and secured creditors alike from enforcing their securities against the company.

Significantly, the judge went on to hold that following the personification theory for Malaysia in actions based on maritime liens, an action in rem based on a maritime lien was an action against the res, not the company. The judge distinguished *Republic of India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No 2)*.[78]

As a result, the first restraining order did not apply to the in rem action against the vessel filed on 11 July 2022 and leave was not required to commence that action.

> Following the personification theory for Malaysia in actions based on maritime liens, an action in rem based on a maritime lien was an action against the res, not the company

However, from the date when the owner entered an appearance on 4 November 2022, leave was required to pursue the action in personam, failing which the action continued in rem only. The moratorium under the first restraining order was spent. The second restraining order required leave to proceed and the application on 15 December 2022 would be deemed an application for such leave.

The vessel was practically abandoned and by the defendant's own admission would play no major part in the scheme of arrangement. Leave to continue the action in personam and to maintain the arrest would be granted.

In *Delta Corp Ship Management DMCCO v The Ship "Caledonian Sky"*[79] the plaintiff Delta had, on 25 August 2023, obtained the arrest of the passenger vessel *Caledonian Sky* in pursuit of payment of sums owed to it by the bareboat charterer under a ship management agreement. Caveats against release were entered by various creditors, including by the bareboat charterer. At 17.00 on Sunday 3 September, Delta applied to the Admiralty Registrar for the release of the vessel under rule 51(3) of the Admiralty Rules, giving the necessary undertakings. The application was notified by the Registrar to caveators in the evening of that day and also referred to the court as required by rule 51(5). The court considered the application in the afternoon of 4 September. Caveators asserted that they had not had time to take instructions on an arrest.

The release from arrest of a vessel in respect of which there were caveats against release was to be determined by the court, not the Registrar. The question arose as to whether this was a determination under rule 51(5) or rule 52 of the Admiralty Rules.

Rule 51 is entitled "Release by registrar" and subrule (5) reads:

> "If a caveat against the release from arrest of the ship or other property is in force, an order must not be made under subrule (1), (3) or (4) in relation to the ship or property unless the court so orders."

Rule 52, entitled "Release from arrest by the court" reads:

> "(1) A party to a proceeding may apply to the court in accordance with Form 19 for the release of a ship or other property that is under arrest in the proceeding.
>
> (2) If a caveat against release of the ship or property is in force, a copy of the application must be served on the caveator.
>
> (3) On an application under subrule (1), the court may order the release from arrest of the ship or property on such terms as are just.

[77] [2021] SGHC 8; [2022] Lloyd's Rep Plus 39.
[78] [1998] 1 Lloyd's Rep 1.
[79] [2023] FCA 1058; [2024] Lloyd's Rep Plus 10.

(4) The court must not hear an application for the release from arrest of a ship or any property under this rule unless:

(a) the applicant for the release has given to the plaintiff notice, being notice that the court is satisfied is reasonable in the circumstances, of the hearing of the application for the release; or

(b) the court is satisfied that there are exceptional circumstances that justify hearing the application without giving notice to the plaintiff.

(5) If the court orders under subrule (1) that a ship or any property is to be released from arrest, the court must give notice of the release to the Marshal in accordance with Form 19A."

A further question arose as to the position of caveators.

The judge ordered the release of the vessel, reasoning as follows. The court's power to order the release of the vessel in the circumstances arose from the provisions of rule 51(5), rather than rule 52. The application remained one under rule 51(3), but could not be granted by the Registrar unless the court so ordered. That limitation was imposed by rule 51(5), and it was under that rule that the court then decided whether or not to so order.

> It would be an unfair burden on the plaintiff to delay release of a vessel for which a plaintiff has otherwise qualified, including by giving the necessary undertaking, merely to give a caveator further opportunity to get itself organised

As for the position of caveators, weighing the interests of the plaintiff in having the vessel released and the caveator in maintaining the arrest, it would be an unfair burden on the plaintiff to delay release of a vessel for which a plaintiff has otherwise qualified, including by giving the necessary undertaking, merely to give a caveator further opportunity to get itself organised. A caveator should be in a position to immediately seek a warrant for the arrest of the vessel. The caveator's right was to have notice of an application for release so that it could arrest the vessel, not so that it could delay the release in order to give itself more time to act.

A complex case on sister ship arrest with an unusually long litigation history was decided by the High Court of Judicature at Bombay in *Angsley Investments Ltd v Jupiter Denizcilik Tasimacilik Mumessillik San ve Ticaret Ltd Sirketi and Others (The Lima I and The Lima II)*.[80] Angsley appealed as intervener against an order dated 8 November 2006, whereby the judge had ordered in favour of the respondent bunker supplier, a Turkish company. The original parties to the litigation were on appeal the respondents. Jupiter, originally the plaintiff, had between 9 October 2000 and 13 March 2001 supplied bunkers to the vessel *Lima II* and its owner, originally the defendants. Following unsuccessful attempts to secure payment of the invoice, Jupiter had filed an admiralty suit and had served the warrant of arrest on the vessel's agent and the port authority, but not on the vessel which was in outer anchorage. *Lima II* did not submit to the arrest and departed the port of Kandla. An apparent sister ship, *Lima I*, was on 31 October 2001 ordered by a temporary injunction not to leave the port of Calcutta. Angsley had purchased the vessel and was working on releasing it from legal proceedings to facilitate a further sale. Angsley having provided security, *Lima I* was permitted to sail. Angsley now sought the return of its security. Its case was in essence that there had been no suit in admiralty against *Lima I*; that the court had not had territorial jurisdiction to issue the injunction against *Lima I* in Calcutta; and that *Lima I* was not a sister ship of *Lima II* at any material time.

The court allowed the appeal, reasoning as follows. First, the suit in personam against the original defendant was not tenable – the defendant was a foreign corporate entity and had not submitted to the jurisdiction of the court.

Secondly, the suit against *Lima II* continued to be a suit in rem. The judge had erred in holding that the arrest conferred jurisdiction over the subject matter of the litigation. Arrest only conferred jurisdiction over the vessel. No security had been provided for the release of *Lima II* such as to confer jurisdiction over the foreign corporation defendant.

Thirdly, the injunction against *Lima I* had been issued without adding the vessel as a party to the litigation.

[80] High Court of Judicature at Bombay, Ordinary Original Civil Jurisdiction, KR Shriram J and Rajesh S Patil J, 8 March 2023.

A party could not be added by way of interlocutory order without being made a party to the litigation. Further, on an assumption that the vessels were sister vessels, proceedings against the sister vessel must be issued in rem. The Admiralty Act 2017 section 5 consolidated pre-existing law.

Fourthly, injunctions and attachments were features of in personam jurisdiction and could not be made against vessels. Here, the action remained one in rem. Conjoint actions were not permissible.

Finally, it was trite law that the supply of bunkers was a maritime claim as opposed to a maritime lien but the issue was in any case academic where the warrant of arrest had not been served on the vessel *Lima II* and *Lima I* was never arrested or made a party.

From Madras, *M/S Cargo Care International v Owners and Parties Interested in the Vessel MV "Norasia Tegesos" and Others*,[81] concerned security from a P&I Club to release the vessel from arrest.

The claimant (and now applicant) Cargo Care, a cargo transport business, was the consignee under a bill of lading dated as long ago as 24 July 1999 for a shipment of personal effects from Abu Dhabi to the Port of Kochin. The cargo was lost at sea. The applicant obtained judgment against the second and third respondents, which were businesses involved in the transport of the cargo, from the Principal Sub Court at Kochi on 30 June 2004. Following appeals, that judgment became final on 4 January 2023.

The second respondent was also the owner of the ship *Norasia Tegesos*. On 6 October 2004 that vessel was arrested at Tuticorin Harbour in respect of the debt from the judgment dated 30 June 2004. On 8 October 2004 the fourth respondent, the West of England P&I Club, issued an undertaking headed letter of indemnity (LOI) in the sum of US$177,078, enabling the vessel to sail. The judgment debt with interest was by now a higher amount than the LOI. The applicant issued a notice of demand for the LOI sum and interest against the P&I Club on 6 October 2022. There was no payment.

The applicant now sought an order directing the fourth respondent P&I Club to pay a sum of US$177,078 under the LOI dated 8 October 2004. The P&I Club responded that the LOI was in respect of the liability of charterers of *Norasia Tegesos* and could not be extended to the liability of the owners of the vessel or any other third party. The second respondent was the owner of the vessel.

The judge directed the P&I Club to pay the LOI amount. While the LOI did specify "liabilities of the charterer", it also identified by registry number both the original legal proceedings in which the liability was adjudged and the arrest proceedings in respect of which the LOI was issued, and those were brought by the applicant.

[81] High Court of Judicature at Madras, RN Manjula J, 29 September 2023.

Limitation of liability

The Court of Final Appeal confirmed the law applicable in Hong Kong SAR to the limitation of liability for wreck in *Perusahaan Perseroan (Persero) PT Pertamina v Trevaskis Ltd (The Star Centurion and The Antea)*.[82]

On 13 January 2019 the vessel *Star Centurion* sank following a collision with the vessel *Antea* off Horsburgh Light House in Indonesian waters in the South China Sea. *Star Centurion* was at anchor at the time of the collision. Its owners were issued with a wreck removal order and raised the vessel for removal. They claimed for the loss of the vessel and wreck removal expenses against the owners of *Antea*, who did not dispute liability for the collision. The owners of *Antea* constituted a limitation fund.

The owners of *Star Centurion* sought a declaration that their claim for raising and removal of the wreck should not be subject to limitation under article 2 of the 1976 Convention. The application of article 2(1)(d) was excluded by a reservation under article 18 by the UK, in its original ratification in 1980. This was continued by the PRC 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. As in the corresponding UK provisions, the ordinance permitted a designated official to set up a fund for the purpose of meeting the costs of wreck removal. 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 which fell under article 2(1)(a) or (c) and were subject to limitation.

At first instance and in the Court of Appeal it was held that the claim of the owners of *Star Centurion* was not subject to limitation. The owners of *Antea* appealed to the Court of Final Appeal, which dismissed the appeal.

The court considered the interpretation of the Convention, determining that it must be interpreted so as to give full effect to the ordinary meaning of the words used in their context and in light of its evident object and purpose, without any English law preconceptions. In particular, the legal characterisation of the claim and any distinction between debt and damages were immaterial, where the convention distinguished only between kinds of claim.

These observations are in line with how an English court would consider treaty-based law as set out notably by Lord Mance in *Deep Vein Thrombosis and Air Travel Group Litigation*.[83]

The court went on to hold that the defendant's proposal for a distinction between recourse claims by a shipowner and authority claims by a harbour authority was without substance. The language of article 2(1)(d) offered no basis for such a distinction. Travaux préparatoires and judicial decisions from the courts of states parties did not support a distinction.

The conclusion means that Hong Kong and English law appear to be aligned on this point, although the specific issue of limitation of a private wreck raising claim has not been tested before the English courts.

Issues of tonnage limitation for claims between a shipowner and charterer was again considered in *MSC Mediterranean Shipping Co SA v Stolt Tank Containers BV and Others (The MSC Flaminia) (No 2)*,[84] this time by the Court of Appeal. The question concerned loss suffered by the shipowner itself.

> Article 2 of the Limitation Convention 1976 must be interpreted so as not to apply to claims by a shipowner against a charterer to recover losses suffered by the owner itself

As a result of an explosion on the vessel *MSC Flaminia* on 14 July 2012, 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 for damages of some US$200 million. The awards held that MSC had breached the charterparty by failing to inform Conti of the dangers from the cargo, but declared that there had

82 [2023] HKCFA 20.

83 [2005] UKHL 72; [2006] 1 Lloyd's Rep 231 at para 54.

84 [2023] EWCA Civ 1007.

been no negligence by MSC in the shipping itself. On 5 October 2021 MSC's limitation fund was established. The limitation figure was some £28.2 million.

In earlier proceedings,[85] it had been held that Conti could not rely on article 4 of the Convention on the Limitation of Liability for Maritime Claims 1976, as amended, as MSC had not been found negligent by the arbitration tribunal. This was Conti's alternative case that the claims at issue were not subject to limitation because they did not fall within the scope of article 2 of the Convention.

At first instance, the judge had held that MSC was not entitled to limit liability because Conti's claims were not within the scope of article 2 of the Convention. MSC appealed.

The Court of Appeal dismissed the appeal. Article 2 of the Limitation Convention 1976 must be interpreted so as not to apply to claims by a shipowner against a charterer to recover losses suffered by the owner itself.

In *Sun Vessel Global Ltd v HQ Aviation Ltd and Another*,[86] a decision from the Eastern Caribbean Supreme Court considered judgment interest where the Convention on the Limitation of Liability for Maritime Claims 1976 applied and no limitation fund had been set up.

On 10 May 2017 an accident had occurred while a helicopter ditched into the sea while trying to land on the aft leisure deck of the superyacht *Bacarella* in Bergen, Norway. The cover of the temporary fuel tank was blown off by the down blast of the helicopter's rotors and became entangled in the rotors. The appellant was the owner of the yacht and the first respondent was the owner of the helicopter. The second respondent was its insurer. No limitation fund had been constituted. The shipowner had admitted liability for negligence in leaving the cover inadequately secured. The issues of contributory negligence and limitation were at trial determined in favour of the shipowner.[87]

This was the shipowner's appeal of the judge's separate ruling on interest and costs.[88] The judge had determined that section 404 of the BVI MSA, which was entitled "Constitution of limitation fund" and based on article 11 of the 1976 Convention, only applied where a limitation fund was set up. The main issue on appeal was whether in a case where the shipowner has elected not to constitute a limitation fund, section 404 should be construed as requiring the court to apply, to any pre-judgment interest on damages, the same rate of interest as would have been prescribed if a limitation fund had in fact been constituted.

The court dismissed the shipowner's appeal on this question. It observed that no authority had been shown for the proposition that section 404 applied where no limitation fund had been established. The Singapore case *AS Fortuna Opco BV and Another v Sea Consortium Pte Ltd and Others*[89] was not authority for the proposition that there should be no difference in relation to the interest on the limitation amount whether the article 10 or article 11 route was taken. The case considered the interest rate to be applied where a limitation fund was set up by a letter of undertaking and considered that the claimant should be in no worse position – not that the claimants should be in no better position in the reverse case.

Where section 404 expressly only covered cases where a fund had been constituted, it was for the appellant to provide as a matter of construction or interpretation a legal basis for the application of the prescribed rate to a case where no fund was constituted, and no such legal basis had been offered.

There was also on appeal a question of the costs for an English legal practitioner, namely whether the judge had erred as a matter of law in permitting the respondents to recover pre-commencement costs in respect of legal fees paid to a legal practitioner who was not called to the BVI bar. Here, the appeal was allowed. The court held that the judge had erred in holding that the costs for English solicitors preparing for a claim in English courts were recoverable as pre-action costs on the ground that the English solicitor was, as a legal practitioner, providing assistance with the BVI litigation while his name was not on the BVI Roll.

[85] [2022] EWHC 835 (Admlty); [2022] 2 Lloyd's Rep 341, noted in the 2022 edition of this work.

[86] Eastern Caribbean Supreme Court, Court of Appeal, Territory of the Virgin Islands, 9 January 2023; [2023] Lloyd's Rep Plus 86.

[87] *HQ Aviation Ltd v Sun Vessel Global (The MY Bacarella)*, Jack J, Eastern Caribbean Supreme Court, British Virgin Islands, High Court of Justice, Commercial Division, judgment dated 29 April 2021 (ex tempore), 17 May 2021 (written).

[88] *HQ Aviation Ltd v Sun Vessel Global (The MY Bacarella)*, Jack J, Eastern Caribbean Supreme Court, British Virgin Islands, High Court of Justice, Commercial Division, order dated 20 January 2022.

[89] [2020] SGHC 72; [2021] Lloyd's Rep Plus 48.

Judicial sale

Issues related to judicial sale were considered by the Federal Court of Australia in *GeelongPort Pty Ltd v The Ship "Voyager P"*.[90] On 16 June 2023 the owner of the defendant vessel *Voyager P* had applied to berth the vessel at the Point Henry Pier at the Port of Geelong which was operated by the plaintiff. The stay was to be for two days, 17 to 18 June. The vessel had berthed and had remained there without any berthing fees being paid. The plaintiff had repeatedly attempted to make contact with the owner for payment of the fees and removal of the vessel. On 14 July 2023 the vessel was arrested and on 1 August 2023, the plaintiff applied to the court for its sale pendente lite.

The judge ordered that the vessel be sold by the Marshal and that the vessel be repositioned from the Point Henry Pier berth to the Bulk Grain Berth or such other location as the Marshal may determine and remain there until further order of the court.

The judge observed that the principles applicable to sale pendente lite were well-established and had recently been set out in *Dan-Bunkering (Singapore) Pte Ltd v The Ship "Yangtze Fortune"*.[91]

On the evidence here, the vessel had been abandoned. The stay was to be for two days but the vessel had not since been moved and all attempts to contact the owner had been unsuccessful. Berthing fees continued to accrue.

> Principles applicable to sale pendente lite were well-established and had recently been set out in Dan-Bunkering (Singapore) Pte Ltd v The Ship "Yangtze Fortune"

The principles on permission for an arrested vessel to move from one port to another had been summarised in *Viva Energy Australia Pty Ltd v MT "AG Neptune"*.[92] Those principles included considerations of convenience, or practicality, and cost. The vessel's location at the Point Henry Pier meant other vessels could not use the berth. The Bulk Grain Berth had better protection and better access in the context of a sale.

From Mumbai, in *Sequeira and Others v MV Karnika (IMO No 8521220)*[93] the issue for the High Court of Judicature at Bombay was sheriff's expenses.

The defendant vessel had been arrested on 17 March 2020 and sold by an order of the court on 28 October 2020. Applicants 1 to 44 were crew members and applicant 45, AMV, was the P&I correspondent. AMV submitted an interim application to treat certain items as sheriff's expenses. P&I Club cover had been terminated as from 6 October 2020 but following a request from crew members the Club directed AMV to arrange for the supply of essentials. The 44 crew members' salaries from the date of arrest until 26 October 2020, the date of the application, had been paid by AMV in addition to expenses for various provisions and necessaries supplied to the ship. By its application, AMV sought reimbursement from the proceeds of sale held by the court for the wages from the arrest to the application date, and supplies and necessaries. There had been no permission from the court to incur these wage expenses and the question arose whether they could be treated as Sheriff's expenses.

The judge held that while ordinarily, post-arrest expenses were incurred with the prior approval of the court and, more often than not, under the aegis of the Sheriff, this did not imply that the court had no jurisdiction to sanction expenses incurred as Sheriff's expenses without its prior approval. In the judge's view, the court retained discretionary jurisdiction to direct that such expenses, even if incurred without its approval, were to be treated as Sheriff's expenses. On the facts as found in the present case, AMV's application for payout from the sales proceeds must await final determination of the matter and the determination of priorities.

Vadym and Others v OSV Beas Dolphin[94] concerned the priority in admiralty of interest and costs for seafarers wages, a maritime lien.

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

90 [2023] FCA 918; [2024] Lloyd's Rep Plus 11.
91 [2022] FCA 1556; [2023] 2 Lloyd's Rep 59.
92 [2022] FCA 522.
93 High Court of Judicature at Bombay, NJ Jamadar J, 18 January 2023.
94 High Court of Judicature at Bombay, Admiralty and Vice Admiralty Jurisdiction, Commercial Division, 29 November 2022; [2023] Lloyd's Rep Plus 29.

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, and also raised an issue as to the currency conversion date for the payment of the claim.

The judge ranked the interests and costs claims of the seafarers with the wages claims, observing that timely payment to crew was imperative. Interest awarded by the court should be regarded as a part of their legitimate claim for wages. There was no distinction to be drawn between contractual and court-ordered interest.

In further reasoning, the judge considered that section 10(1) of the Admiralty Act 2017 provided that maritime claims were ranked: (a) maritime liens; (b) mortgages; and then (c) other claims. If costs in respect of the enforcement of a maritime lien did not rank with the maritime lien, the question arose 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 rank alongside the claim itself in priority.

Finally, in respect of the currency conversion date, section 134 of the Merchant Shipping Act 1958 provided that notwithstanding anything in the agreement between the shipowner and the seaman, if the seaman had agreed to receive the wages in a specified currency, they were entitled to payment at the rate of exchange for the time being current at the place where the payment was made. There was authority to the effect that a claimant could choose to claim in Indian or foreign currency. The claimants had claimed in US dollars, decree had been issued in US dollars and if no issue arose with payment in US dollars, then the issue was moot.

It is always pleasing to see proper judicial priority for the rights and claims of seafarers, who are often the first victims of the circumstances leading to a ship arrest.

Disponent ownership can sometimes be a murky picture, as was the case in *Sealanes (1985) Pty Ltd v The Vessel MY "Island Escape"*.[95] The defendant motor yacht *Island Escape* had in earlier proceedings been arrested and on 23 February 2023 sold by the Admiralty Marshal. The plaintiff now applied for summary judgment or default judgment against the defendant on the basis of its claim against the demise charterer Island Escape Cruises. The demise charterer had not entered an appearance; nor had any other interested party.

The judge held that the defendant had no reasonable prospect of defending the proceedings and ordered summary judgment for the plaintiff, observing as follows. The claim was based on unpaid invoices for goods supplied to the ship, the receipt of which had been duly acknowledged by signature. Such a claim fell under section 4(1) and (3)(m) of the Admiralty Act 1988 (Cth). The court had jurisdiction over claims commenced as actions in rem pursuant to section 10, including against a charterer by demise under section 18.

It is always pleasing to see proper judicial priority for the rights and claims of seafarers, who are often the first victims of the circumstances leading to a ship arrest

The judge went on to consider the concept of a demise charter, observing that it was not limited to a relationship created by contract. A demise charterer was a person in possession of the ship with the consent of the owner and who both managed and employed the crew on their own account. In the absence of evidence of ownership or a charterparty, it would be inferred from the invoices signed by the Chief Stewardess on behalf of Island Escape Cruises that the latter was in possession of the vessel with the consent of the owner. A witness affidavit for the plaintiff indicated that the bareboat charter had been terminated on 9 September 2022. The writ had been issued on 1 September and served on 8 September 2022.

[95] [2023] FCA 414; [2023] Lloyd's Rep Plus 111.

Sanctions

Sanctions decisions are the theme of the day. Here we consider two decisions on judicial review of sanctions-related measures against ships. The decisions related to sanctions clauses in *Kuvera Resources Pte Ltd v JPMorgan Chase Bank NA*[96] and *Litasco SA v Der Mond Oil and Gas Africa SA and Another*[97] are considered above under "Trade".

Dalston Projects Ltd and Others v The Secretary of State for Transport[98] concerned a vessel owned by a person "connected with" Russia, where that owner was not a person designated for sanctions.

The relevant framework here is the Sanctions and Anti-Money Laundering Act 2018 under which the Russia (Sanctions) (EU Exit) Regulations 2019[99] were made. The latter is continuously and by now comprehensively updated in line with geopolitical developments. Part 6 is entitled "Ships". The material provision in this case was Regulation 57D, "Detention of ships", which reads in part:

> "(3) The Secretary of State may direct a harbour authority to give a detention direction to the master of:
>
> (a) a ship owned, controlled, chartered or operated by a designated person,
>
> (b) a ship *owned, controlled, chartered or operated by persons connected with Russia*."[100]

The Secretary of State had pursuant to the 2019 Regulations decided to detain a 58.5 m luxury motor yacht, MY *Phi*. The detention decision was issued on 28 March 2022 and the stated ground was that *Phi* was "owned, controlled or operated by [the second claimant], a person connected with Russia". The first claimant was the registered owner and the second claimant, a Russian businessman, was the beneficial owner. He was not a designated person under the Sanctions Regulations.

The claimants challenged the Secretary of State decision under the Sanctions and Anti-Money Laundering Act 2018, section 38 ("Court review of decisions"). The grounds for challenge were that first, although falling within the regulatory language, the decision to detain the claimants' vessel was unlawful since it was taken for purposes not contemplated by the legislation; and secondly, that the decision to detain the vessel was disproportionate in breach of article 1 of the First Protocol of the European Convention on Human Rights.

The judge dismissed the claim for review. First, the claimants had not established that the Secretary of State had acted for an improper purpose in making the detention direction. Secondly, the Sanctions Regulations contained distinct regimes for designated persons and persons "connected with" Russia. The detention power in Regulation 57D of the Sanctions Regulations was not limited to designated persons. There was an additional power for those "connected with" Russia. The fact that the Foreign, Commonwealth and Development Office had decided not to designate the second claimant had no bearing on the propriety of the Secretary of State acting under these distinct legislative provisions.

The judge saw nothing in the language, legislative context, or underlying purpose of the Regulations Part 6 to support the suggestion that detention played a subsidiary role in a scheme to prevent Russian ships entering UK ports. Regulation 57D was not subsidiary to Regulation 57A, under which ships with the necessary Russian connection may not be given access to UK ports. The judge went on to observe that the purpose of the detention power in Regulation 57D was not merely to disrupt Russia's maritime trade and the transport of goods and personnel. The "connected with" language as well as Parliamentary material showed the purpose to have been to confer powers in the broadest possible terms to allow Ministers to impose sanctions that would exert maximum pressure on Russia in a wide variety of ways.

The judge observed that to be lawful, a measure interfering with the peaceful enjoyment of property must pursue a legitimate aim in the public interest, and there must be proportionality between the means employed and that aim. The aim of detaining the vessel was that the detention of Russian assets was part of the UK Government's foreign policy response including a wider sanctions package taken in light of Russia's actions in Ukraine. Detention was rationally connected to that aim in spite of the fact that the second claimant had no proximate responsibility for events around Ukraine, and could not be said to have assisted the Russian regime. The weighty public interest factors of the aim justified interference with the second claimant's property rights.

Finally, the detention decision had not resulted in the conversion of the vessel. *Club Cruise Entertainment and Travelling Services Europe BV v Department for Transport*

96 [2023] SGCA 28.
97 [2023] EWHC 2866 (Comm).
98 [2023] EWHC 1885 (Admin); [2023] Lloyd's Rep Plus 101; [2023] Lloyd's Rep FC 385.
99 SI 2019 No 855.
100 See www.legislation.gov.uk/uksi/2019/855/regulation/57D (accessed on 11 January 2024).

(The Van Gogh)[101] provided authority for the related proposition that a notice of detention for public health reasons, preventing a cruise, did not constitute the assumption of ownership or dominion over the ship such as to amount to conversion.

The appeal to the Court of Appeal was heard on 19 January 2024.[102]

> To be lawful, a measure interfering with the peaceful enjoyment of property must pursue a legitimate aim in the public interest, and there must be proportionality between the means employed and that aim

A further decision on judicial review of sanctions materialised in the Eastern Caribbean Supreme Court decision in *Flying Dutchman Overseas Ltd and Another v The Port Authority and Another*.[103]

In March 2022 the Cayman-registered motor yacht *Alfa Nero* had entered Falmouth Harbour in Antigua. Its registered owner Flying Dutchman was a BVI company, as was the second applicant, the owner of several works of art on board. Both companies, through a Guernsey trust, appeared to be controlled by Mr G. On 2 August 2022 the US Office of Foreign Assets Control imposed sanctions on the vessel making it "blocked property" of Mr G, so that no financial transactions could be carried out in relation to it. On 19 August 2022 the vessel was seized, but it was soon released.

The sanctions caused the vessel not to be maintained or payments to the crew to be made and it was reported that the government intended to sell the vessel. On 20 March 2023 an amendment to the Port Authority Act was gazetted, inserting section 38A which had the effect of permitting the sale of the vessel. On 21 March the Port Manager had a notice published stating that the vessel posed an imminent threat to the harbour and to other vessels and that it was a risk to the economy of Antigua and Barbuda, advising that should the owner fail to take all necessary steps to remove the vessel, the Port Manager would have it sold.

By an application submitted in May 2023, the applicants sought an interim order to prohibit the sale of the vessel and judicial review of the Port Manager's decisions.

The judge declined to issue an interim injunction restraining the sale of the vessel, but granted permission to challenge the decision to offer the vessel for sale by judicial review, reasoning as follows.

For judicial review of the Port Manager's decisions to be allowed, the applicants would need to show arguable grounds for judicial review which had a realistic prospect of success. The applicants did have a realistic prospect of success in judicial review on the ground of procedural fairness, due to the Port Manager's failure to respond to correspondence about the sale. The vessel was no longer subject to sanctions as blocked property, apparently to facilitate the sale of the vessel. The issue of sanctions was relevant to the application of section 38A and should be considered at the substantive hearing of the claim.

It had been established that the vessel was releasing untreated sewage into the harbour due to a technical issue and there were only a few crew members on board. Due to the risk of damage to the environment and risks to navigation, the balance of convenience weighed heavily in favour of not restraining the sale of the vessel. The applicants had made an undertaking in damages but their ability to pay such damages was in doubt due to sanctions. Damages were an adequate remedy and could be estimated with relative ease based on the replacement value of the vessel and valuations of the art on board.

101 [2008] EWHC 2794 (Comm); [2009] 1 Lloyd's Rep 201.
102 https://casetracker.justice.gov.uk/getDetail.do?case_id=CA-2023-001658 (accessed on 11 January 2024).
103 Eastern Caribbean Supreme Court Antigua and Barbuda in the High Court of Justice, 8 June 2023; [2024] Lloyd's Rep Plus 12.

Conclusion

The judicial year 2024 began on a high note with the judgment in *Herculito Maritime Ltd and Others v Gunvor International BV and Others (The Polar)*,[104] noted in the 2021 edition of this work, on 17 January. The question for consideration was:

> "What is the proper interpretation of a charter agreement and bills of lading for a vessel, in respect of losses arising out the seizure of the vessel by pirates[?]"[105]

Currently awaiting judgment is the appeal in the silver salvage case, *Argentum Exploration Ltd v The Silver*,[106] heard on 28 and 29 November 2023. The question for the Supreme Court upon the appeal of the Republic of South Africa is:

> "Whether the silver and the ship carrying it fell within the following provision of the State Immunity Act 1978 section 10(4)(a): 'both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes' such that the Republic of South Africa is not immune to the jurisdiction of the United Kingdom in respect of Argentum's salvage claim."[107]

Quadra Commodities SA v XL Insurance Company SE and Others[108] has received permission to appeal to the Supreme Court. There has not been any significant apex court case law on insurable interest since the House of Lords' decision in *Macaura v Northern Assurance Co Ltd*[109] in 1925 and this should be an opportunity to carefully consider the requirement and definition of an insurable interest for modern markets.

Permission to appeal was granted in *Sharp Corporation Ltd v Viterra BV (previously known as Glencore Agriculture BV)*[110] in May 2023 and the case is to be heard in February 2024.

MUR Shipping BV v RTI Ltd,[111] a case noted (twice) in the 2022 edition of this work, is also before the Supreme Court with hearing scheduled for 6 and 7 March 2024. The case on its face concerns currency of payments in the context of sanctions. The question before the court is as follows.

> "Where a contractual force majeure clause contains a proviso requiring the party which is affected by force majeure to exercise reasonable endeavours to overcome it, can the proviso require the affected party to agree to accept a non-contractual performance?"[112]

There is as yet no judgment in *Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Co Ltd*,[113] heard in December 2022.

Permission to appeal was granted in October 2023 for *FIMBank plc v KCH Shipping Co Ltd (The Giant Ace)*,[114] concerning the scope of application of the Hague-Visby Rules.

The appeal to the Court of Appeal in *Dalston Projects Ltd and Others v The Secretary of State for Transport*[115] concerning a vessel owned by a person "connected with" Russia but not designated for sanctions was heard on 19 January 2024.[116] An appeal is pending in the *Ever Given* decision on contractual intent and scheduled for hearing early February 2024.[117] The appeal in *Rhine Shipping DMCC v Vitol SA*[118] is scheduled to be heard by the Court of Appeal on 18 April 2024.[119]

104 [2024] UKSC 2; [2024] Lloyd's Rep Plus 6.
105 https://www.supremecourt.uk/cases/uksc-2022-0009.html (accessed on 30 December 2023).
106 *Argentum Exploration Ltd v The Silver and all Persons Claiming to be Interested in and/or to Have Rights in Respect of, The Silver and Secretary of State for Transport and Another (Interveners)* [2022] EWCA Civ 1318; [2023] 1 Lloyd's Rep 405.
107 https://www.supremecourt.uk/cases/uksc-2022-0162.html (accessed on 30 December 2023).
108 *Quadra Commodities SA v XL Insurance Company SE and Others* [2023] EWCA Civ 432; [2023] Lloyd's Rep IR 455.
109 (1925) 21 Ll L Rep 333.
110 [2023] EWCA Civ 7.
111 [2022] EWCA Civ 1406; [2023] 1 Lloyd's Rep 463.
112 https://www.supremecourt.uk/cases/uksc-2022-0172.html (accessed on 30 December 2023).
113 [2021] EWCA Civ 1147; [2022] 1 Lloyd's Rep 202.
114 [2023] EWCA Civ 569; [2023] 2 Lloyd's Rep 457.
115 [2023] EWHC 1885 (Admin); [2023] Lloyd's Rep Plus 101; [2023] Lloyd's Rep FC 385.
116 https://casetracker.justice.gov.uk/getDetail.do?case_id=CA-2023-001658 (accessed on 11 January 2024).
117 See https://casetracker.justice.gov.uk (accessed on 9 January 2024).
118 [2023] EWHC 1265 (Comm); [2023] Lloyd's Rep Plus 93.
119 https://casetracker.justice.gov.uk/getDetail.do?case_id=CA-2023-001299 (accessed on 10 January 2024).

APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED IN THIS REVIEW

2023 judgments analysed

AMS Ameropa Marketing Sales AG and Another v Ocean Unity Navigation Inc (KBD (Comm Ct)) [2023] EWHC 3264 (Comm)

Angsley Investments Ltd v Jupiter Denizcilik Tasimacilik Mumessillik San ve Ticaret Ltd Sirketi and Others (The Lima I and The Lima II) High Court of Judicature at Bombay, Ordinary Original Civil Jurisdiction, KR Shriram J and Rajesh S Patil J, 8 March 2023

Bumi Jaya Salvage & Engineering Sdn Bhd v Brave Worth Shipping Co Ltd (The Kmax Pro) (SGHC) [2023] SGHCR 21; [2024] Lloyd's Rep Plus 9

Chubb Insurance Singapore Ltd v Sizer Metals Pte Ltd (SGCA) [2023] SGHC(A) 17; [2023] Lloyd's Rep Plus 95

Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd (SGCA) [2023] SGCA(I) 7; [2024] Lloyd's Rep Plus 8

Dalston Projects Ltd and Others v The Secretary of State for Transport (KBD (Admin Ct)) [2023] EWHC 1885 (Admin); [2023] Lloyd's Rep Plus 101; [2023] Lloyd's Rep FC 385

Delta Corp Ship Management DMCCO v The Ship "Caledonian Sky" (FCA) [2023] FCA 1058; [2024] Lloyd's Rep Plus 10

FIMBank plc v KCH Shipping Co Ltd (The Giant Ace) (CA) [2023] EWCA Civ 569; [2023] 2 Lloyd's Rep 457

Fimbank plc v KCH Shipping Co Ltd (The Giant Ace) (KBD (Comm Ct)) [2022] EWHC 2400 (Comm); [2023] 1 Lloyd's Rep 381; (CA) [2023] EWCA Civ 569; [2023] 2 Lloyd's Rep 457

Flying Dutchman Overseas Ltd and Another v The Port Authority and Another (E Carib SC) [2024] Lloyd's Rep Plus 12

FMG Hong Kong Shipping Ltd, Demise Charterers of FMG Sydney v Owners of the MSC Apollo (KBD (Admlty Ct)) [2023] EWHC 328 (Admlty); [2023] Lloyd's Rep Plus 75

GeelongPort Pty Ltd v The Ship "Voyager P" (FCA) [2023] FCA 918; [2024] Lloyd's Rep Plus 11

Glencore Energy UK Ltd v NIS JSC Novi Sad (KBD (Comm Ct)) [2023] EWHC 370 (Comm); [2023] Lloyd's Rep Plus 60

Herculito Maritime Ltd and Others v Gunvor International BV and Others (The Polar) (SC) [2024] UKSC 2; [2024] Lloyd's Rep Plus 6

Ixom Operations Pty Ltd v Blue One Shipping SA and Others (The CS Onsan) (FCAFC) [2023] FCAFC 25; [2023] Lloyd's Rep Plus 87

JB Cocoa Sdn Bhd and Another v Maersk Line A/S (KBD (Comm Ct)) [2023] EWHC 2168 (Comm)

JB Cocoa Sdn Bhd and Others v Maersk Line A/S (KBD (Comm Ct)) [2023] EWHC 2203 (Comm)

JTI Polska SP z o o and Others v Jakubowski and Others (SC) [2023] UKSC 19; [2023] 2 Lloyd's Rep 64

Karpik v Carnival plc (The Ruby Princess) (FCA) [2023] FCA 1280; [2024] Lloyd's Rep Plus 4

Karpik v Carnival plc and Another (The Ruby Princess) (HCA) [2023] HCA 39; [2024] Lloyd's Rep Plus 5

King Crude Carriers SA and Others v Ridgebury November LLC and Others; Agathonissos Special Maritime Enterprise v Beta Crude Carriers SA (Re An Arbitration Claim) (KBD (Comm Ct)) [2023] EWHC 3220 (Comm)

Kuvera Resources Pte Ltd v JPMorgan Chase Bank NA (SGCA) [2023] SGCA 28

Litasco SA v Der Mond Oil and Gas Africa SA and Another (KBD (Comm Ct)) [2023] EWHC 2866 (Comm)

M/S Cargo Care International v Owners and Parties Interested in the Vessel MV "Norasia Tegesos" and Others High Court of Judicature at Madras, Hon Ms Justice RN Manjula, 29 September 2023

Mercuria Energy Trading Pte v Raphael Cotoner Investments Ltd (The Afra Oak) (KBD (Comm Ct)) [2023] EWHC 2978 (Comm)

Mitsui & Co (USA) Inc v Asia-Potash International Investment (Guangzhou) Co Ltd (KBD (Comm Ct)) [2023] EWHC 1119 (Comm)

MSC Mediterranean Shipping Co SA v Stolt Tank Containers BV and Others (The MSC Flaminia) (No 2) (CA) [2023] EWCA Civ 1007

Owner and/or Demise Charterer of the Vessel "A Symphony" v Owner and/or Demise Charterer of the Vessel "Sea Justice" (SGHC) [2023] SGHCR 24

Owner of the Vessel "Navigator Aries" v Owner of the Vessel "Leo Perdana" (SGCA) [2023] SGCA 20

Owner of the Vessel "Navigator Aries" v Owner of the Vessel "Leo Perdana" (SGCA) [2023] SGCA 26

Perusahaan Perseroan (Persero) PT Pertamina v Trevaskis Ltd (The Star Centurion and The Antea) (HKCFA) [2023] HKCFA 20

Poralu Marine Australia Pty Ltd v MV Dijksgracht (FCAFC) [2023] FCAFC 147

Quadra Commodities SA v XL Insurance Company SE and Others (CA) [2023] EWCA Civ 432; [2023] Lloyd's Rep IR 455

Rhine Shipping DMCC v Vitol SA (KBD (Comm Ct)) [2023] EWHC 1265 (Comm); [2023] Lloyd's Rep Plus 93

Sealanes (1985) Pty Ltd v The Vessel MY "Island Escape" (FCA) [2023] FCA 414; [2023] Lloyd's Rep Plus 111

Seatrium New Energy Ltd (formerly known as Keppel FELS Ltd) v HJ Shipbuilding & Construction Co, Ltd (formerly known as Hanjin Heavy Industries and Construction Co Ltd) (SGHC) [2023] SGHC 264; [2024] Lloyd's Rep Plus 7

Sequeira and Others v MV Karnika (IMO No 8521220) High Court of Judicature at Bombay, 18 January 2023

Sharp Corporation Ltd v Viterra BV (previously known as Glencore Agriculture BV) (CA) [2023] EWCA Civ 7

Smart Gain Shipping Co Ltd v Langlois Enterprises Ltd (The Globe Danae) (KBD (Comm Ct)) [2023] EWHC 1683 (Comm).

SMIT Salvage BV and Others v Luster Maritime SA and Another (The Ever Given) (KBD (Admlty)) [2023] EWHC 697 (Admlty); [2023] 2 Lloyd's Rep 201

Star Axe I LLC v Royal and Sun Alliance Luxembourg SA, Belgian Branch and Others (KBD (Comm Ct)) [2023] EWHC 2784 (Comm).

Sun Vessel Global Ltd v HQ Aviation Ltd and Another (E Carib SC CA) [2023] Lloyd's Rep Plus 86

The Owners and/or Demise Charterers of the Ship "Edzard Schulte" v The Owners and/or Demise Charterers of the Ship "Setia Budi" High Court of Malaya, 2 August 2023

Trafigura Pte Ltd v TKK Shipping Pte Ltd (The Thorco Lineage) (KBD (Comm Ct)) [2023] EWHC 26 (Comm); [2023] 2 Lloyd's Rep 338

Unicredit Bank AG v Euronav NV (CA) [2023] EWCA Civ 471; [2023] Lloyd's Rep Plus 83

UniCredit Bank AG v Glencore Singapore Pte Ltd (SGCA) [2023] SGCA 41

Vadym and Others v OSV Beas Dolphin High Court of Judicature at Bombay, Admiralty and Vice Admiralty Jurisdiction, Commercial Division, 29 November 2022; [2023] Lloyd's Rep Plus 29

Vallianz Shipbuilding & Engineering Pte Ltd v Owner of the Vessel "Eco Spark" (SGHC) [2023] SGHC 353

Judgments considered

Akai Pty Ltd v People's Insurance Co Ltd (HCA) (1996) 188 CLR 418

Argentum Exploration Ltd v The Silver and all Persons Claiming to be Interested in and/or to Have Rights in Respect of, The Silver and Secretary of State for Transport and Another (Interveners) (CA) [2022] EWCA Civ 1318; [2023] 1 Lloyd's Rep 405

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

Bright Shipping Ltd v Changhong Group (HK) Ltd (The CF Crystal and the Sanchi) (HKCFI) [2018] HKCFI 2474; [2019] 1 Lloyd's Rep 437

Bunge SA v Nidera BV (SC) [2015] UKSC 43; [2015] 2 Lloyd's Rep 469

Carnival plc v Karpik (The Ruby Princess) (FCAFC) [2022] FCAFC 149

Club Cruise Entertainment and Travelling Services Europe BV v Department for Transport (The Van Gogh) (QBD (Admin)) [2008] EWHC 2794 (Comm); [2009] 1 Lloyd's Rep 201

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