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# Maritime law in 2016: a review of developments in case law

By Dr Johanna Hjalmarsson

*This article summarises and explains some of the most important legal developments in maritime law, including the law of marine insurance, ship sale and the sale of goods, in 2016.*

The scope of this analysis encompasses the common law jurisdictions of England and Wales as well as Singapore, Australia and Hong Kong. Highlights include the Supreme Court's decision that the shipowner must pay for bunkers received in the OW insolvency; a decision establishing the Australian position on maritime liens; a definition of insurance fraud, with a controversial departure from 15 years of established thinking; as well as a rare decision to break the shipowner's right to limit liability.

## Admiralty jurisdiction

As the economic downturn continues across many sectors of the global maritime industry, with litigation in its wake, ship arrest continues to be an important tool to extract security for claims. The law continues to develop in equal measure.

The importance of the registered ownership of vessels was considered by Singapore courts in the course of 2016. The judges had the benefit of a series of judgments from the Hong Kong courts on similar issues. In *The Min Rui*<sup>1</sup> a consignment of steel structures had been damaged on board *Min Rui* some time between June and August 2014. The plaintiffs sued as owners, consignees or bill of lading holders in respect of that cargo. It was common ground that the defendant was the defendant in personam, having been the owner of *Min Rui* when the claim arose. The defendant's jurisdictional challenge was limited to the question of whether the defendant was the beneficial owner in respect of all the shares in the vessel on 16 December 2014, the date on which the plaintiffs issued the in rem writ. The defendant's case was that it had sold *Min Rui* in October 2014 to a bona fide purchaser for value and was no longer the owner, although it remained on the Hong Kong Shipping Register as the named registered owner on 16 December 2014. Belinda Ang Saw Ean J allowed the appeal from the decision of the Assistant Registrar, allowing the prima facie inference of ownership arising from the registration as owner to be displaced by evidence of alternative ownership.

In another Singapore case, *The Chem Orchid*,<sup>2</sup> this time from the Court of Appeal, the standard of proof in establishing admiralty jurisdiction was considered. A distinction was made between decisions taken on affidavit evidence only, which were subject to later reconsideration. Such decisions required a prima facie case only, and could be distinguished from setting aside in the form of a conclusive decision after taking full evidence on the jurisdictional issue. Such a decision should be based on the standard of proof enunciated in *The Bunga Melati 5*<sup>3</sup>, namely the balance of probabilities.

<sup>1</sup> [2016] SGHC 183.

<sup>2</sup> [2016] SGCA 04; [2016] 1 Lloyd's Rep 537.

<sup>3</sup> [2012] 4 SLR 546.

This author's award for "most opaque judgment of the year" goes to the Federal Court of Australia for its decision in *The Ship Sam Hawk v Reiter Petroleum*.<sup>4</sup> The court took great pains to ensure that its decision in the case was consonant with historic case law, to the extent of discussing bottomry; the case mentions this antediluvian feature of maritime law meaning a loan against the security of a ship, no less than 47 times. The conclusion can nevertheless be summarised very briefly – against the tide of academic opinion,<sup>5</sup> the court reversed the judge's decision to hold that liens recognised as maritime liens in foreign law should not be recognised as such under Australian law. For a foreign maritime lien to be enforceable in Australia it must correspond with or be sufficiently similar to the limited categories of maritime liens in section 15 of the Australian Admiralty Act 1988. This conclusion is consonant with the Privy Council's approach in *The Halcyon Isle*, but the Australian court carefully explained that the roots of the decision went back further than to that much-criticised decision, and that its crucial distinction between substance and procedure was a "distraction".<sup>6</sup> The ranking of priorities, the Federal Court of Appeal held, even if a matter of substance, was to be determined under the *lex fori*.

## Towage

Towage contracts are a somewhat idiosyncratic beast – the knock-for-knock clause establishing that with certain exceptions, each party is to bear its own losses is the core clause. Such clauses are widely used in the industry and their import carries through to the insurance side, towage warranties being a feature of marine insurance contracts impacting on subrogation rights.

In one case, another frequently used wording came up for review, namely that the vessel should be provided for towage in "light ballast condition". In *Regulus Ship Services Pte Ltd v Lundin Services BV and Another*,<sup>7</sup> Regulus had agreed to tow the defendants' vessel for a lump sum under a TOWCON-based contract. The voyage took longer than expected, and Regulus claimed delay payments at the contractual rate on the basis that the vessel had not been provided "in light ballast condition", also seeking damages in respect of the cost of excess fuel, port demurrage charges and other expenses. The judge was referred by both parties to *Ease Faith Ltd v Leonis Marine Management Ltd*<sup>8</sup> but the parties relied on different parts of that judgment. For Regulus, "light ballast condition" meant that she would be "carrying (as well as any 'constants' and consumables) the minimum ballast that will enable the particular vessel to proceed safely and in a seaworthy condition on her intended voyage".<sup>9</sup> Lundin for its part preferred the judge's subsequent statement that: "At its simplest it comes to this: ballast is any material placed on board the vessel to add weight and the reference to "light" refers to the least amount of ballast with which the vessel can safely and properly proceed on her voyage".<sup>10</sup> Phillips J preferred the interpretation of Regulus, thus reducing the leeway available to Lundin to include its knowledge of the vessel's behaviour and general stability in the equation.

This partial victory for Regulus was as it transpired to no avail, as Regulus had failed to show that the breach of Lundin had caused any delay. Lundin instead

<sup>4</sup> [2016] FCAFC 26; [2016] 2 Lloyd's Rep 639.

<sup>5</sup> Prominently, Lewins, K and Davies, M, (2002), "Foreign Maritime Liens: Should They Be Recognised in Australian Courts?", *Australian Law Journal*, 76, 12, pages 775 to 782.

<sup>6</sup> *Bankers Trust International Ltd v Todd Shipyards Corporation (The Halcyon Isle)* [1980] 2 Lloyd's Rep 325.

<sup>7</sup> [2016] EWHC 2674 (Comm); [2016] 2 Lloyd's Rep 612.

<sup>8</sup> [2006] EWHC 232 (Comm); [2006] 1 Lloyd's Rep 673.

<sup>9</sup> *Ease Faith*, at para 110.

<sup>10</sup> *Ease Faith*, at para 118.

succeeded on its counterclaim on the basis that Regulus had given ineffective notice to terminate the contract. Of interest to the towage industry is the judge's further finding that discussions between the parties as to the expected speed did not amount to a collateral agreement or an implied term. At the time of writing, permission to appeal has been sought.

### Limitation of liability: tonnage limitation

A common feature of much of shipping litigation is the shipowner's and associated parties' right to limit liability – which arose in litigation on several occasions in 2016. A rare decision to break the shipowner's right to limit liability was the result in *Kairos Shipping Ltd and Another v Enka & Co LLC and Others (The Atlantik Confidence)*.<sup>11</sup> The emphasis of the judge's consideration was on the strength of the cargo claimants' evidence that their loss had been caused as a result of the vessel being scuttled. If this was the case, the prerequisite of article 4 of the Convention on Limitation of Liability for Maritime Claims 1976 for denying the right to limit to the shipowner was fulfilled: the right to limit is denied where the loss results from the shipowner's personal act committed with the intent to cause such loss. Rights to limit liability are lost only on very rare occasions, and the standard of proof has only rarely been judicially considered.

It was common ground before the judge that the cargo interests must prove their case on the balance of probabilities and that in determining whether that burden had been discharged, the court's approach should be the same as when a shipowner makes a claim on a hull insurance policy and the insurer alleges that the ship was scuttled.

The case is currently subject to an application for permission to appeal. The legal issues at first instance were dealt with in a paragraph or two, with most of the rest of the decision consisting of findings of fact in relation to the scuttling. Following the Canadian Supreme Court decision in *Peracomo*,<sup>12</sup> where the Supreme Court held that wilful misconduct and the right to limit liability are different standards, it is expected that the comparative weight of those standards, along with issues of burden and standard of proof will take on the starring role upon appeal. The standard of proof in relation to matters of fraud in marine insurance is in this author's view out of kilter with the general law in civil cases, which operates a plain balance of probabilities following *In Re H* and *In Re S-B*.<sup>13</sup>

Meanwhile, a case from the Bombay High Court has established that the legal position in that jurisdiction appears to be that the shipowner's right to limit liability under the Convention on Limitation of Liability of Maritime Claims, 1976 and the 1996 Protocol is absolute, irrespective of fault. In *Murmansk Shipping Co v Adani Power Rajasthan Ltd and Others*,<sup>14</sup> S C Gupte J issued judgment to that effect on 8 January 2016. The outcome was the result of a quirk of Indian implementing legislation, which fails to provide for breaking the limits in accordance with article 4 of the Convention.

<sup>11</sup> [2016] EWHC 2412 (Admlty); [2016] 2 Lloyd's Rep 525.

<sup>12</sup> *Peracomo Inc and Others v Telus Communications Co and Others (The Realice)* 2014 SCC 29; [2014] 2 Lloyd's Rep 315.

<sup>13</sup> *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563; *Re S-B (Children) (Care Proceedings: Standard of Proof)* [2009] UKSC 17; [2010] 1 AC 678; see also Hjalmarsson, J (2013) "The standard of proof in civil cases: the insurance fraud perspective", *International Journal of Evidence and Proof*, 17, (1), 47 to 73.

<sup>14</sup> [2016] Lloyd's Rep Plus 50.



Not only shipowners are entitled to limit liability under the Convention. A helpful definition of the circle of persons entitled to limit emerged from the Canadian case *J D Irving Ltd v Siemens Canada Ltd and Others (The SPM 125)*,<sup>15</sup> where the opportunity of independent contractors to limit liability in respect of liability “co-owned” with the shipowner under article 1(4) of the Convention was a matter of association with the shipowner: where liability was vicarious, the Convention permitted limitation, but where the contractors were independently liable, it did not.<sup>16</sup> This was previously a contentious issue without available case law and where academic commentators differed in their opinions.<sup>17</sup> While the authority of the Canadian judgment is limited to that jurisdiction, it will be persuasive to any court tasked with resolving a similar issue.

In an unusually rich year for case law on tonnage limitation, the Privy Council also had its say. In *Bahamas Oil Refining Company International Ltd v Owners of the Cape Bari Tankschiffahrts GmbH & Co KG (Bahamas)*,<sup>18</sup> their Lordships held that it is possible to contract out of the right to limit liability, but that to do so, the parties must use very clear language, given the importance of the right. A contract signed between the master of a vessel and the oil terminal the vessel was about to use provided for strict liability for the shipowners in respect of damage to the facilities. This was not, the Privy Council held, effective to exclude application of the statute and Convention giving a right to limit. The effect was merely to impose a duty to hold harmless and indemnify, which in turn served as the trigger for the statutory right to limit liability. The Privy Council confined previous long-standing authority to the contrary to its factual context: in *Clarke v Earl of Dunraven and Mount-Earl (The Satanita)*<sup>19</sup>, the specific context was the approval of the rules for racing yachts and the case was not of general relevance.

## Charterparties and contracts of carriage

Continuing with the theme of limitation of liability, but moving to package limitation, two judgments were handed down in 2016, both of which would have changed the law fundamentally if the relevant argument had succeeded; but both of which have – thus far – failed in that ambition.

In *Vinnlustodin HF and Another v Sea Tank Shipping AS*,<sup>20</sup> the pithy question before the judge was whether package limitation rules in the Hague Rules were applicable to bulk cargoes. The claimant owner of a damaged cargo of fishoil sought damages from the defendant carrier. The fishoil was carried on board the tanker *Aqasia* pursuant to a charterparty dated 23 August 2013. The charterparty provided for English law and arbitration and incorporated the Hague Rules. The cargo was described in the charterparty as “2,000 tons cargo of fishoil in bulk”. The defendant’s case was that the carrier was entitled to package limitation under the Hague Rules; article IV rule 5 could be applied to bulk or liquid cargo by reading the word “unit” as a reference to the unit used by the parties to denominate or quantify the cargo in the contract of carriage. The claimants argued that the word “unit” could only refer to a physical item of cargo, or to a combination of physical items bundled together

<sup>15</sup> 2016 FC 69; (2016) 961 LMLN 2.

<sup>16</sup> Gerrish, C, (2016) 16 STL 10 6.

<sup>17</sup> The judge opted for the opinion expressed by Reynolds, B and Tsimplis, M, authors of *Shipowners’ Limitation of Liability* (London: Kluwer International Law 2012).

<sup>18</sup> [2016] UKPC 20; [2016] 2 Lloyd’s Rep 469.

<sup>19</sup> [1897] AC 59.

<sup>20</sup> [2016] EWHC 2514 (Comm); [2016] 2 Lloyd’s Rep 510.

for shipment, so that article IV rule 5 did not apply to a liquid or other bulk cargo: when cargo is shipped in bulk, there are no relevant “packages” or “units”.

The judge held that the words “package”, “unit” and “piece” referred to individual physical items of cargo, not a unit of measurement or customary freight unit, so that package limitation was unavailable to the shipowner in this instance. He referred to the travaux préparatoires in search of the elusive “bullseye”<sup>21</sup> but concluded that far from providing the bullseye, the travaux indicated that bulk cargoes were not intended by the provision – not least because their value in the 1920s would rarely have been such as to fall subject to a limit of £100 in any case. Permission to appeal has been sought – the broad approval with which the first instance decision has been met would seem to indicate that significant ingenuity will be required by counsel for shipowners for the decision to be reversed.

Package limitation also arose before the Court of Appeal in *Yemgas FZCO and Others v Superior Pescadores SA (The Superior Pescadores)*,<sup>22</sup> where the Court of Appeal approved the result at first instance but on slightly different reasoning. The claim had arisen out of damage to machinery and equipment intended for use in the construction of a liquid natural gas facility in Yemen. The cargo had been loaded onboard at the port of Antwerp, Belgium, and six bills of lading issued acknowledging shipment of the cargo on board the vessel in apparent good order and condition for carriage to Balhaf in Yemen. Each bill contained a clause paramount identical to the Congenbill clause, containing this sentence:

“The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract”.

Damage estimated in excess of US\$3.6 million was caused to the cargo in transit. The parties had subsequently agreed that English law and jurisdiction would apply to the dispute, making the Hague-Visby Rules applicable as a matter of statute law, Belgium being a contracting state. The only contentious issue was what package limitation should apply. This was important not for the usual reason that the Hague Rules limit is quite insufficient for modern purposes,<sup>23</sup> but because some packages had a higher limit under the Hague Rules and some under the Hague-Visby Rules.

The judge at first instance had decided that while the Paramount Clause incorporated the Hague Rules, it did not in addition operate as an agreement between the parties for the higher package limitation – the lower Hague-Visby Rules package limitation applied. The cargo claimant appealed. The Court of Appeal dismissed the appeal, reaching the same conclusion but on different reasons. The higher court held that the words of the Paramount Clause were to be taken to have incorporated the Rules as enacted in the country of shipment, namely Belgium, which was the Hague-Visby Rules. The Court of Appeal considered *Lauritzen Reefers v Ocean Reef Transport Ltd SA (The Bukhta Russkaya)*<sup>24</sup> where the clause paramount referred both to the Hague Rules and the Hague-Visby Rules, and held that where the clause did not distinguish between the two sets of rules, and English law was the chosen law, the natural conclusion would be that the Hague-Visby Rules had been incorporated.

<sup>21</sup> As per *Fothergill v Monarch Airlines Ltd* [1980] 2 Lloyd’s Rep 295.

<sup>22</sup> [2016] EWCA Civ 101; [2016] 1 Lloyd’s Rep 561.

<sup>23</sup> As in *Parsons Corporation v CV Scheepvaartonderneming “Happy Ranger” (The Happy Ranger)* [2002] EWCA Civ 694; [2002] 2 Lloyd’s Rep 357 where the cargo had sustained damage exceeding US\$2 million, which under the Hague Rules would have been limited to £100.

<sup>24</sup> [1997] 2 Lloyd’s Rep 744.

## Formation of contracts

A small number of cases in 2016 addressed the issue of whether a contract had been formed. The place to begin is perhaps with a case on the conclusion of charterparty contracts. The Singapore court held in *Tiptop Holding Pte Ltd v Mercuria Energy Trading Pte Ltd*<sup>25</sup> that no binding charterparty had been concluded because the relevant communication had been “subject to review” of charterers’ pro forma charterparty “with logical amendments”. The conclusion is not controversial and the case is possibly limited to its facts, the terms in question having been supplied upon request purely for information, but the observations are of interest nevertheless, given how finely tuned such cases generally are, with a flurry of communications between the parties and a pervasive lack of clarity in retrospect as to whether main terms, standard terms or anything at all has been agreed. The judge’s conclusion that the use of phrases such as “subject to contract”, “subject to details” and “subject to review” was not by itself conclusive of the intention of the parties is uncontroversial: the question, he said, was whether parties intended to enter into or defer legal relations. His observations on post-alleged fixture events are also worthy of attention – it is true that once a charterparty has been concluded, the parties may need to take immediate steps to ensure that a vessel or cargo are available at the agreed venue, and such measures have occasionally been interpreted as taking steps to fulfil the contract<sup>26</sup> – but as the judge pointed out, the nomination of a vessel and discussion of the laycan date were consistent not only with performance of a charterparty but also with the parties taking steps in anticipation of a contract being concluded. Accordingly, no inference could be made that the defendant had intended to be bound.

Another case on the conclusion of charterparties concerned an allegation that the charterparty had been obtained by bribery. In *Shagang Shipping Co Ltd (In Liquidation) v HNA Group Co Ltd*,<sup>27</sup> a charterparty for a newbuild vessel had been repudiated and the owner Shagang claimed under a guarantee, issued by HNA. HNA raised the defence that the charterparty had been obtained by means of an illicit payment through an employee of Shagang who was the childhood friend of an influential person in the group of companies that included HNA and the charterer. The Shagang employee had allegedly confessed to making the bribe. Evidence was presented purporting to show that the confession had been obtained under duress by the Public Security Bureau. The employee had also pleaded guilty at trial. The judge held that these matters relating to the charterparty did not absolve HNA from paying Shagang under the guarantee. The employee’s confession was here relied upon not against the employee himself but against his employer, and there remained the possibility that it was a false or involuntary confession offered in exchange for lenient sentencing. The judge applied the standard of the balance of probabilities, regard being taken to the seriousness of the allegations, while also holding that there was insufficient direct evidence of torture. The case is under appeal, with a hearing scheduled in June 2017. Depending on the issues arising upon appeal, the importance of this case may not be limited to the shipping sector, with implications on the standard of proof in civil cases and the law of evidence obtained under duress by third parties, from third parties.

<sup>25</sup> [2016] SGHC 173.

<sup>26</sup> See *Proton Energy Group SA v Orlen Lietuva* [2013] EWHC 2872 (Comm); [2014] 1 Lloyd’s Rep 100, where subsequent conduct was advanced as a factor in argument; albeit not referred to in the ratio.

<sup>27</sup> [2016] EWHC 1103 (Comm).



## Interpretation

A judgment that arguably did not get its fair share of attention in 2016, principally because it was handed down on the same day as the decision in *PST v OW*, was *NYK Bulkship (Atlantic) NV v Cargill International SA (The Global Santosh)*.<sup>28</sup> The Supreme Court, led by Lord Sumption with a dissenting judgment by Lord Clarke, considered issues under a time charterparty on amended NYPE terms, stipulating inter alia that the vessel would be off-hire during any period of detention. The disponent owners NYK Bulkship had chartered *Global Santosh* to Cargill for one time-charter trip from Sweden to West Africa. The cargo was one of six shipments of cement sold by Transclear SA (a sub-charterer) to IBG Investment Ltd on C&FFO terms under a contract of sale. IBG were the notify party on the bill of lading, which also specified the discharge port as “Port Harcourt (Ibeto Jetty)”. IBG was responsible for the unloading of the cargo and was liable to pay Transclear demurrage under the sale contract if unloading of the cargo was delayed. At Port Harcourt, *Global Santosh* was arrested by mistake as a result of an arrest order procured by Transclear, prohibiting discharge of the cargo for the demurrage owed under the sale contract. Following a subsequent court order authorising the cargo’s release, discharge of the cargo began on 15 January 2009 and was completed on 26 January 2009, for which period Cargill argued that it was entitled to withhold hire.

The Supreme Court allowed Cargill’s appeal against the Court of Appeal’s decision, holding that as between the parties to the charterparty, responsibility for cargo handling lay with Cargill, and that IBG and Transclear were the agents of Cargill for this purpose, not in the strictly legal sense but within the natural meaning of the word. However, the factual situation of the case was that even if Cargill was responsible for the acts or omissions of its agents in cargo handling, that responsibility could not be engaged where the issue was precisely a failure by the agents to handle the cargo; the issue was not some problem arising from discharge, but that the vessel had been prevented from discharging. Defective performance of cargo handling operations was one thing – absence of cargo handling operations was another.

The overall effect of the judgment is that while Cargill, the time charterer, was able to place the vessel off hire, it may be assumed that it was also able to recover demurrage from its downstream contractual partners. Lord Clarke’s dissent was perhaps more in tune with commercial practice in the shipping industry – he held that Cargill, while under no contractual obligation to NYK to procure discharge at any particular time, did have an interest in the timing of cargo operations and such knowledge of the downstream contracts, the generation of which it had enabled, that it must have appreciated that there might be liabilities for demurrage down the line. As a result, it did not make commercial sense for the result to be different in the period when the vessel was awaiting discharge, compared to during the actual process of discharge.

Trip time charterparties were at issue also in a first instance judgment, concerning the interpretation of such contracts. In *SBT Star Bulk & Tankers (Germany) GmbH & Co KG v Cosmotrade SA (The Wehr Trave)*,<sup>29</sup> the issue was whether a trip time charterparty for one trip permitted the charterer to load a second cargo following discharge of the first cargo. Taking the approach that this was a narrow technical point, the judge held that on a construction of the specific terms of the charterparty, this was not an illegitimate last voyage – the charterer had been entitled to load

<sup>28</sup> [2016] UKSC 20; [2016] 1 Lloyd’s Rep 629.

<sup>29</sup> [2016] EWHC 583 (Comm); [2016] 2 Lloyd’s Rep 170.

a further cargo. Trip-time charterparties are generally given the briefest possible judicial treatment, and this case was no exception.

The first instance decision of Leggatt J in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt*<sup>30</sup> caused a slight stir, because the judge appeared to endorse a notion of good faith in commercial contracts. Upon appeal,<sup>31</sup> its impact was tempered. The case concerned a cargo of cotton which had become stuck for several years in storage in Chittagong in Bangladesh, inside 35 containers shipped under five bills of lading. MSC Mediterranean, the carrier, was the owner of the containers but not the cotton, and expected them to be redelivered to it. The shipper, Cottonex Anstalt, considered that it had been paid for the cotton and had no right to collect the containers. The consignee, which was not a party to the proceedings, took the view that the bills of lading presented under the letter of credit were fraudulent, showing a compliant but untruthful date, and had brought proceedings in a Chittagong court to prevent payment under the letter of credit. The containers, with the cotton, were<sup>32</sup> held in storage in Chittagong and the customs authorities refused to release them to the carrier for unpacking. The bills of lading contained a clause 14.8 stipulating demurrage payable by “the Merchant”, which was defined inter alia as the shipper or consignee claiming the goods under the bill of lading. No one had done claimed the goods, and no one could claim the goods, so that by the time of litigation the demurrage amounted to many times the value of the cargo of cotton inside. The litigation concerned the carrier’s claim for container demurrage under the bill of lading contracts against the shipper.

Leggatt J at first instance held that the shipper had repudiated the contracts, but that the carrier could not affirm the contracts and continue to claim demurrage indefinitely. He observed, controversially, that: “There is increasing recognition in the common law world of the need for good faith in contractual dealings”<sup>33</sup> going on to say that there was a rule “firmly established in English law ... that, in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith for the purpose for which it was conferred, and must not be exercised arbitrarily, capriciously or unreasonably (in the sense of irrationally)”<sup>34</sup>. Upon appeal, the Court of Appeal largely approved the judgment at first instance with a small variation, but on entirely different grounds. Once the carrier had offered to sell the containers to the shipper in order to provide a solution to the problem, which would have had the result that the shipper was relieved from the obligation to redeliver the containers, the commercial purpose of the adventure had become frustrated so that in commercial terms, the containers had been lost. The option of affirming the contract was thereafter not open to the carrier. The Court of Appeal carefully extinguished the judge’s comments about good faith, Moore-Bick LJ stating that: “There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement”<sup>35</sup>.

The Court of Appeal in *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd (The Spar Capella, Spar Vega and Spar Draco)*<sup>36</sup> addressed an issue which had arisen before it as a result of divergent first instance decisions. The issue itself was simple: how was a term for payment of hire in a time charterparty to be classified – as a

<sup>30</sup> [2015] EWHC 283 (Comm); [2015] 1 Lloyd’s Rep 359.

<sup>31</sup> [2016] EWCA Civ 789; [2016] 2 Lloyd’s Rep 494.

<sup>32</sup> And presumably still are.

<sup>33</sup> At para 97.

<sup>34</sup> At para 97.

<sup>35</sup> At para 45.

<sup>36</sup> [2016] EWCA Civ 982; [2016] 2 Lloyd’s Rep 447.

condition entitling the innocent party to terminate the contract and to damages, or as an innominate term? At first instance,<sup>37</sup> Popplewell J, had held that absent contractual stipulation to the contrary, payment of hire was not a condition but an innominate term – this was at odds with the first instance decision of Flaux J in *Kuwait Rocks Co v AMN Bulkcarriers Inc (The Astra)*.<sup>38</sup> Popplewell J also held that on the facts, the charterer’s conduct nevertheless amounted to a renunciation, so that the appeal was mainly one on a point of principle important to the industry. The charterer’s appeal was dismissed by the Court of Appeal, which held that payment of hire was not a condition of a time charterparty but an innominate term. There was no general presumption as to time being of the essence and the presence of an anti-technicality clause did not convert the term into a condition. As a result, *The Astra* is no longer good law on this point.

Another reversal of accepted case law came in *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA*.<sup>39</sup> The claimants in the case were bill of lading consignees in respect of a number of shipments of coffee beans from Colombia, transhipped in Panama and then via different routes to north Germany. The beans had been damaged by condensate. Before stuffing, the bare corrugated steel of the container had been lined by the carrier’s stevedores with Kraft paper. The question was of the defendant carrier’s liability; more specifically whether or to what extent stowage was properly effected and adequate to meet the threat of condensation, and whether the carrier was liable for any consequent damage. Under condition 10 of the bills of lading, the carrier undertook responsibility for the whole of the intermodal transport. Condition 2 was a clause paramount subjecting the carriage to the Hague Rules, and the carrier accordingly argued that the stowage was not subject to the Hague Rules, having taken place before the loading on board ship. The judge gave judgment for the claimants against the carrier. The Court of Appeal allowed the carrier’s appeal in respect of its defences of inherent vice and inevitability of damage, but dismissed the appeal on the point of the temporal scope of the Hague Rules.

The first issue for decision was a technical one of the burden of proof. The Court of Appeal here disapproved the fairly well-accepted and long-standing authority provided by the first instance decision in *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd (The Canadian Highlander)*,<sup>40</sup> where the judge had relied on the carrier’s status as bailee to hold that it bore the onus of proof for its absence of negligence. The Court of Appeal<sup>41</sup> preferred a division of the burden of proof that relied more intimately on the structure of the Hague Rules themselves – where unspecified in article IV rule 2, once the carrier had proven an exception, the burden shifted to the claimant of proving that there had been some negligence on the part of the carrier.

The Court of Appeal also held that the judge had erred in conflating inevitability of damage with inherent vice – an issue thoroughly threshed out in marine insurance<sup>42</sup> but less so in connection with carriage of goods by sea. The inherent vice defence was here, available to the carrier in respect of “normal” cargoes like this one without first having to show that a sound system for carrying the goods had been employed. The argument that a sound system must be shown to have

<sup>37</sup> [2015] EWHC 718 (Comm); [2015] 2 Lloyd’s Rep 407.

<sup>38</sup> [2013] EWHC 865 (Comm); [2013] 2 Lloyd’s Rep 69.

<sup>39</sup> [2016] EWCA Civ 1103; [2017] 1 Lloyd’s Rep 32.

<sup>40</sup> (1927) 28 Ll L Rep 88.

<sup>41</sup> (1928) 32 Ll L Rep 91.

<sup>42</sup> See most recently *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor MOPU)*, especially at first instance, [2009] EWHC 637 (Comm); [2009] 2 Lloyd’s Rep 72 at paras 85 to 89.



been employed is reminiscent of that in *Mayban General Insurance Bhd v Alstom Power Plants Ltd*,<sup>43</sup> where the effective reasoning was that if the insured were to prove that the seas were no worse than could be expected, the conclusion must be that the cause of the loss must be inherent vice – subsequently overruled in *The Cendor MOPU*.<sup>44</sup> It is pleasing to see the interdependent laws of marine insurance and carriage of goods taking similar approaches.

The Court of Appeal also took the opportunity of developing its thoughts on what constitutes a sound system of carriage. A sound system for carrying the goods, it held, was that it was in line with general industry practice. Perfection, or scientific calculation or study, were not required – the judge had been too demanding in this regard.

Finally, the Court of Appeal considered the – in the event irrelevant – issue of whether dressing and stuffing of the containers, where performed by the carrier, formed part of the loading process and was therefore subject to the Hague Rules. Here, the judge had been right to hold that where cargo was loaded into a carrier's containers which were subsequently loaded on the vessel, it was unrealistic to treat this as anything other than a single loading process, even if there was some interval between the two. The issue is of great practical importance – the Rules themselves do not answer this question expressis verbis because they predate the use of containers. This element of the carrier's services may be carried out at some distance from and pre-dating by quite some time the actual loading onto the vessel. Nevertheless, the slight extension of the tackle-to-tackle rule approved in *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd*<sup>45</sup> should also apply here, where the parties had agreed that lining and stuffing the containers formed part of the loading process. While this temporal extension of the carriage contract may appear radical, the impact of the judgment on this point should not be overstated: the subjection of earlier actions by the carrier to the Hague Rules is always subject to the terms of the carriage contract agreed by the parties, and the carrier is free to limit the services that it is prepared to perform.

Two judgments to be issued in early 2017 look set to influence the law profoundly. One of the first important events of 2017 looks likely to be the Supreme Court's judgment in *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (Formerly Travelplan SAU) of Spain (The New Flamenco)*.<sup>46</sup> The hearings were completed in November 2016 and judgment is likely to be forthcoming early in 2017. The Court of Appeal in *The New Flamenco* reversed the judge's decision, restoring that of the arbitrator. The case arises out of facts where the shipowner had sold the vessel at a favourable price following premature termination of the charterparty. The vessel would have fetched a much lower price if sold at the projected end of the charterparty instead. The issues were essentially what effect this should have on the calculation of damages for repudiation.

The other case pending before the Supreme Court which is likely to influence the law going forward is *Gard Marine and Energy Ltd v China National Chartering Co Ltd and Another*.<sup>47</sup> The question posed is "Whether as a matter of law in the circumstances there was a breach of a safe port warranty". Both this case and *The New Flamenco* were heard in November 2016, but judgment was delayed by

<sup>43</sup> [2004] EWHC 1038 (Comm); [2004] 2 Lloyd's Rep 609.

<sup>44</sup> [2011] UKSC 5; [2011] 1 Lloyd's Rep 560, at para 34.

<sup>45</sup> [1954] 1 Lloyd's Rep 321.

<sup>46</sup> [2015] EWCA Civ 1299; [2016] 1 Lloyd's Rep 383.

<sup>47</sup> [2015] EWCA Civ 16; [2015] 1 Lloyd's Rep 381.

other business - including the judgments in *Belhaj and Another v Straw and Others*<sup>48</sup> (seven Lawlords) and *R (on the application of Miller and Another) v Secretary of State for Exiting the European Union*<sup>49</sup> (all 11 Lawlords) and at the time of writing remains unpublished.

## Ship construction and sale

A number of shipbuilding cases were decided in the course of the year. These cases are often intensely contractual in nature; yet there are factors pointing to their conclusions being confined to the sector itself. While shipping cases generally have had a tremendous impact on contract law over the years,<sup>50</sup> ship construction cases are often idiosyncratic in nature in that the contract is intended as a complete, independent code. This makes conclusions somewhat less immediately transferrable to the general contractual context.

Accordingly, while the conclusion of Sir Jeremy Cooke in *Star Polaris LLC V HHIC-Phil Inc (The Star Polaris)*<sup>51</sup> that the phrase “consequential or special losses” was not to be read in consonance with *Hadley v Baxendale*<sup>52</sup> may appear alarming at first sight, the conclusion is contingent upon the nature of shipbuilding contracts. In the case, the vessel *Star Polaris* was built by the defendant yard and delivered to the claimant buyer on 14 November 2011. On 29 June 2012 she suffered serious engine failure and was eventually towed to South Korea for repairs. The defendant shipyard denied all liability for the incident. The buyer contended that the engine failure was caused by the shipyard’s breaches of contract, and claimed compensation encompassing the cost of repairs and expenses caused by the engine failure. The contract excluded losses for “consequential ... losses, damages or expenses”, which a tribunal had interpreted as referring to a cause-and-effect relationship, and not to the principles established by *Hadley v Baxendale*. Upon appeal, the judge agreed. He held that the contract provided a complete code between the parties, and that the factual matrix against which the words “consequential losses” and “special losses” should be read did not extend to the accepted meaning of those words in English law. “Consequential or special losses” in this context had a wider meaning than the second limb of *Hadley v Baxendale*.

While perhaps surprising on its face, the ruling is motivated more by the specificities of shipbuilding contracts and less by the concepts and language of English law. It would take a contract as self-contained as a shipbuilding contract to reach a similar conclusion in a future case. For those who would consider this conclusion unpalatable, it is worth noting that in another shipbuilding case in the course of the year, *Saga Cruises BDF Ltd and Another v Fincantieri SpA (Formerly Fincantieri Cantieri Navali Italiani SpA)*,<sup>53</sup> the judge without more took the mention of consequential losses to be a reference to *Hadley v Baxendale*; albeit in a different contractual and factual context. The self-contained nature of ship-building contracts was also affirmed in a case during the year: the judge in *Neon Shipping Inc v Foreign Economic*

<sup>48</sup> [2017] UKSC 3.

<sup>49</sup> [2017] UKSC 5.

<sup>50</sup> Examples are hardly needed, but so as not to owe the reader one, *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1961] 2 Lloyd’s Rep 478, which contemplated what became known as “innominate terms” will be mentioned here.

<sup>51</sup> [2016] EWHC 2941 (Comm); [2017] 1 Lloyd’s Rep 203.

<sup>52</sup> (1854) 9 Exch 341.

<sup>53</sup> [2016] EWHC 1875 (Comm); [2017] Lloyd’s Rep Plus 2.

& *Technical Corporation of China and Another*<sup>54</sup> read the contractual time-bar as applying to all claims, proscribing any claims notified after 30 days including those for wear and tear that could not in fact have been discovered within the time limit.

## Sale of goods

### OW insolvency and litigation

The Hanjin insolvency has already given rise to a number of court cases across several jurisdictions. It is the most high-profile shipping insolvency after the OW bunker insolvency, which has already given rise to a number of judgments in many jurisdictions – not all of which are consistent with each other.

A glimmer of hope has been provided by a Greek court of first instance, which held, obiter, that if the master rather than the chief officer had signed the receipt for delivery, contractual relations between the shipowner and the physical bunker supplier might have arisen permitting the supplier to recover the price of the bunkers from the shipowner.<sup>55</sup> That hypothesis remains to be tested, but there is no doubt that it will be tested in the short term. Short of this opening, there has not been much in the way of good news for physical suppliers.

Perhaps the most hotly anticipated judgment from the UK Supreme Court in 2016 was *PST Energy & Shipping LLC and Another v OW Bunker Malta Ltd and Another (The Res Cogitans)*<sup>56</sup>, delivered on 11 May 2016. The facts were standard for a post-OW litigation: The first respondents, OW Bunker Malta Ltd (“OWBM”) had supplied 1,000 mt of fuel oil and 100 mt of gasoil to *Res Cogitans* at Tuapse pursuant to a contract which incorporated its standard terms of business. Those terms provided for payment 60 days after delivery and included a retention of title clause under which property was not to pass to the vessel’s owners or managers until the bunkers had been paid for in full. The contract provided that from the moment of delivery the vessel was entitled to use the bunkers for the purposes of propulsion. OWBM had obtained the bunkers under a contract with the ultimate parent company of the group, “OWBAS”, which had obtained them from another bunker supplier, “RMUK”. RMUK had obtained the bunkers from one of its associated companies, “RNB”, which had facilities at Tuapse and made the delivery to the vessel. The contract between OWBAS and RMUK incorporated RMUK’s standard terms which provided for payment to be made 30 days after delivery and also included a retention of title clause. That contract did not allow the owners to use the bunkers for the purposes of the propulsion of the vessel pending payment. OWBAS then entered into restructuring before the Danish courts; an event of default under the financing agreement. The arbitration tribunal, Males J at first instance and the Court of Appeal had held in unison that the Sale of Goods Act did not apply to the contract.

In a turn of events that failed to surprise, the Supreme Court dismissed the appeal, considering that the contract did not fall within the definition of section 2 of the Sale of Goods Act, because it failed to pass property to the buyers. The Supreme Court differed in its reasoning from the Court of Appeal, which focused on the failure to deliver property in bunkers remaining at the time of payment, which it

<sup>54</sup> [2016] EWHC 399 (Comm); [2016] 2 Lloyd’s Rep 158.

<sup>55</sup> Amaxilati, Z, “A glimmer of hope for physical suppliers”, (2016) 16 STL 10 5.

<sup>56</sup> [2016] UKSC 23; [2016] 1 Lloyd’s Rep 589.



said was in normal circumstances not significant enough to entail a total failure of consideration. The Supreme Court instead held that there was no implied term that the sellers would perform or had performed its obligations to its supplier, in particular by paying for the bunkers timeously, enabling them to pass property. Lord Mance in his judgment suggested a more promising line of argument for sellers in circumstances where the contract was indeed one of sale: in such circumstances the sellers could have claimed the purchase price through an action under section 49(2) of the Sale of Goods Act 1979, provided that the seller was ready to deliver the goods, and because a “day certain” included a credit term of 60 days.<sup>57</sup>

The case exposes gaps in the Sale of Goods Act 1979 which are likely to persist within the English and Welsh jurisdiction, and has given rise to the opportunity for some creative arguments well beyond the scope of the bunker trade and indeed the Sale of Goods Act 1979. In a subsequent case on the Supply of Goods and Services Act 1982, where holidaymakers had suffered gastrointestinal complications, it was argued – unsuccessfully – that the food and drink never became their property until it was destroyed when they placed it in their mouths.<sup>58</sup>

Other cases arising out of the OW insolvency in 2016 included *Newocean Petroleum Co Ltd v OW Bunker China Ltd and Another (The Cosco Felixstowe)*.<sup>59</sup> The judge there held that there was a good arguable case that a clause in the contract which had not been present in *The Res Cogitans* contracts, stipulating that the bunkers must be kept separate until payment, meant that following consumption of the bunkers without permission there was an arguable cause of action in the tort of conversion. The judge also made the fine distinction that an expectation of immediate consumption of the bunkers was not the same as an authorisation or consent to immediate consumption without resulting liability. This distinction is one that could travel to other ongoing proceedings and be considered by courts in other jurisdictions – the industry expectation is certainly that bunkers will be consumed immediately: but does that equal permission to do so? A further OW-related case, before the Singapore Court of Appeal, turned on issues idiosyncratic to the contracting situation: the claimant here failed to establish that its contracting counterparty had acted as agent for the recipient of the bunkers.<sup>60</sup>

Equally in the Singapore Court, but at first instance, *The Star Quest and Others*<sup>61</sup> concerned the local bunker supply chain. A physical supplier had supplied bunkers to bunker barges for subsequent loading onto ships. Bills of lading had been issued. In normal circumstances, the physical supplier as shipper and lawful holder of the bills of lading would have been entitled to summary judgment without more; but the judge declined to give summary judgment, considering that the bunker barge interests had a good arguable case that the bills of lading were never intended to serve as such, but were mere acknowledgements, so that the physical supplier was estopped from denying that the bills were anything more than receipts, by reason of previous course of dealing where the appellant had not objected to delivery without production of the bills. If the bills did not operate as documents of title, the physical supplier could not argue that it retained title to the bunkers, but it could still present claims in bailment and conversion on the basis that it had an immediate right to possession of the bunkers as holder of the bills. This depended on the terms of the underlying sale contracts regarding possession, which appeared to contemplate an

<sup>57</sup> At para 58.

<sup>58</sup> *Wood v TUI Travel plc t/a First Choice* [2017] EWCA Civ 11; [2017] 1 Lloyd's Rep 322.

<sup>59</sup> [2016] HKCFI 492; [2016] 1 Lloyd's Rep 581.

<sup>60</sup> *The “Bunga Melati 5”* [2016] SGCA 20 – not to be confused with *The Bunga Melati 5* [2012] 4 SLR 546.

<sup>61</sup> [2016] SGHC 100.

immediate right of disposal of the bunkers upon loading. The conclusion was that the barge interests did have an arguable defence and that summary judgment was not appropriate. The case is presumably proceeding to a full trial.

## Marine insurance

There were significant developments in marine insurance in the course of the year. The volume of general insurance litigation in England and Wales had shrunk perceptibly ahead of the entry into force of the Insurance Act 2015 in UK,<sup>62</sup> which made the establishment of precedent under existing law redundant – but such considerations did not necessarily affect marine insurance litigation which continued undeterred. Some significant developments resulted.

In *Connect Shipping Inc and Another v Sveriges Angfartygs Assurans Forening (The Swedish Club) and Others (The Renos)*,<sup>63</sup> issues related to notices of abandonment arose for consideration of the court. This venerable old concept is certainly in need of updating for the modern context of complex metal-structure ships with a variety of materials and technological equipment on board, as well as the speed of modern communications. The case also addressed the method of assessment of the amount of loss and whether salvage costs incurred prior to notice of abandonment could be included.

The vessel *M/V Renos* was damaged by fire on 23 August 2012. In February 2013, the assured gave a notice of abandonment and claimed for a constructive total loss, in response to which the insurers asserted that there was a partial loss only. Insurers had been involved in the complex assessment of the damage more or less from the outset, and while the notice of abandonment was disputed, it could not have come as a surprise. The judge held that there had been a constructive total loss: the notice of abandonment had been given with reasonable diligence after the receipt of reliable information about the loss, in accordance with section 62(3) of the Marine Insurance Act 1906. The judge also permitted, declining to follow existing case law,<sup>64</sup> repair costs from before the giving of notice of abandonment to be included in the assessment.

The case is currently under judicial consideration for permission to appeal. It is not known exactly what issues are being appealed, and much of the first instance judgment constituted decisions of facts which will be difficult to navigate upon appeal; but there is certainly a need for modern parameters for what is a “reasonable” delay in giving notice of abandonment.<sup>65</sup>

The most definitive case of the year was undoubtedly the Supreme Court’s judgment in *Versloot Dredging BV and Another v HDI Gerling Industrie Versicherung AG and Others (The DC Merwestone)*.<sup>66</sup> While the case overturned well-accepted case law going back some 15 years,<sup>67</sup> with foundations in 19th century case law and contractual interpretations,<sup>68</sup> the conclusion is easily summarised: the use of fraudulent means

<sup>62</sup> On 12 August 2016.

<sup>63</sup> [2016] EWHC 1580 (Comm); [2016] 2 Lloyd’s Rep 364.

<sup>64</sup> *Helmville Ltd v Yorkshire Insurance Co Ltd (The Medina Princess)* [1965] 1 Lloyd’s Rep 361.

<sup>65</sup> See Hjalmarsson, J, “Constructive total losses: the limits of reasonableness”, *Shipping & Trade Law* (2016) 16 STL 77.

<sup>66</sup> [2016] UKSC 45; [2016] 2 Lloyd’s Rep 198.

<sup>67</sup> Especially *Agapitos v Agnew (The Aegeon)* (CA) [2002] EWCA Civ 247; [2002] 2 Lloyd’s Rep 42.

<sup>68</sup> *Britton v Royal Insurance Co* (1866) 4 F & F 905.

and devices, or collateral lies, is not outlawed by English insurance law. Insurers have understandably been perturbed by the ruling, given the significant industry investment over the years to clamp down on insurance fraud; but the answer to concerns of holding doors wide open to insurance fraud is simply that insurers must insert in their standard terms a clause addressing the matter. This has not been standard practice in marine insurance, but this will undoubtedly develop now.

The Supreme Court's judgment importantly also clarifies that the resulting position is that where a claim has been made using fraudulent means, such statements and evidence may be withdrawn without penalty where the claimant has second thoughts. This is not the end of litigation of fraudulent claims: insurers will continue to decline claims perceived as fraudulent and the next frontier is likely to be where the insured has suppressed the existence of some defence available to insurers. In such cases, the fraudulent claims rule does apply – but there has thus far been no litigation because the fraudulent means and devices rule represented comparatively low hanging fruit for insurers. It could also be argued that the Supreme Court's ratio is not entirely coherent: much was made of the fact that the genuine loss pre-exists the claim in cases such as that at issue, and that in cases of wholly invented claims there is no pre-existing genuine loss; but that logic cannot consistently be applied to another accepted class of fraudulent claims, namely exaggerated claims, where the genuine loss also pre-exists the fraudulent claim. Given that the insurance claimant had to see a unanimous arbitration tribunal, each of the judges at first instance and in the Court of Appeal as well as one Law Lord<sup>69</sup> rule against them on the path to the plot twist judgment in their favour, appetite for litigation may be tempered in spite of the existence of obviously litigable issues.

It is appropriate to close with another marine insurance case, where the issues currently at stake are procedural but of tremendous importance to marine insurers. Permission to appeal the judgment of the Court of Appeal, handed down in April 2016, in *Shipowners Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusuf Cepnioglu)*<sup>70</sup> has been granted by the Supreme Court, which will presumably hear the case in the course of 2017. The issue is none other than the old chestnut of whether a third-party liability insurance claimant – in this case, a charterer claiming against the shipowner's P&I Club – is bound by the arbitration clause in the insurance contract. The P&I Clubs' stance in previous case law has been that they have only agreed to London arbitration and are entitled to defend the claims in London arbitration. However, legislation in especially civil law countries frequently permits claims on a statutory footing against the insurer. The law of England and Wales only permits this where the insured party is insolvent, and in a few other specified cases. Many other jurisdictions have a blanket provision permitting the insurer to be sued directly, making them a very attractive proposition to claimants. Such jurisdictions are also unlikely to honour the pay-to-be-paid clause in the P&I Club's rules, which remains valid in marine insurance under the Third Parties (Rights Against Insurers) Act 2010.

In *The Yusuf Cepnioglu*, a dispute between a charterer and a shipowner in respect of lost cargo was already under arbitration between the parties in London, when charterers also commenced litigation before Turkish courts seeking to attach the shipowner's P&I Club's assets as security for a direct claim. An injunction was granted at first instance by the English court and continued by the Court of Appeal.

<sup>69</sup> Lord Mance.

<sup>70</sup> [2016] EWCA Civ 386; [2016] 1 Lloyd's Rep 641.



The Supreme Court's judgment is likely to provide definitive guidance on characterisation and jurisdiction, where the charterers could fairly take the position that they had not agreed to the arbitration clause in the P&I Club's agreement with the shipowners at all, so that it becomes a question of what rights to claim are transferred to the charterer. A key issue is also whether an anti-suit injunction requires the direct claim to be vexatious and oppressive. The charterers' claim in Turkey was arguably not vexatious or oppressive at all, but just an exercise of legitimate rights provided by Turkish statute. The Supreme Court will have no shortage of complex case law to consider in this case. Whatever the outcome on the technical issues, there is certainly also a wider issue of judicial approaches to disputes arising from the global shipping and insurance industries.

## Concluding observations

As 2016 moved into 2017, while some issues had been resolved, others remained wide open. The decision of the Supreme Court in *Versloot Dredging BV and Another v HDI Gerling Industrie Versicherung AG and Others (The DC Merwestone)* is final and binding, but follow-up questions must now be asked about the correct analysis and remedy where the insurance claimant has suppressed a defence – and is the conclusion that a fraudulent device can now be withdrawn or corrected with exonerating effect correct? *PST Energy & Shipping LLC and Another v OW Bunker Malta Ltd and Another (The Res Cogitans)* has already been called upon to support an argument in a liability case – will it influence the law in broader terms going forward, or is it confined to its facts? Some of the decisions discussed in this text remain under appeal with a higher court – as noted we await decisions in *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (Formerly Travelplan SAU) of Spain (The New Flamenco)* and *Gard Marine and Energy Ltd v China National Chartering Co Ltd and Another* from the Supreme Court. *Shipowners Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusuf Cepnioglu)* was granted leave to appeal to the Supreme Court in November 2016. *Kairos Shipping Ltd and Another v Enka & Co LLC and Others (The Atlantik Confidence)* is awaiting a decision on permission to appeal to the Court of Appeal, as is *Vinnlustodin HF and Another v Sea Tank Shipping AS*. *Shagang Shipping Co Ltd (In Liquidation) v HNA Group Co Ltd* will be heard in the Court of Appeal in June 2017, and *Connect Shipping Inc and Another v Sveriges Angfartygs Assurans Forening (The Swedish Club) and Others (The Renos)* has equally received permission to appeal, and is awaiting hearing in November 2017. The future looks promising.

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## Appendix:

### Judgments analysed and considered in this article

2016 cases referred to:

- Atlantik Confidence*, The [2016] EWHC 2412 (Admlty); [2016] 2 Lloyd's Rep 525  
*Bahamas Oil Refining Company International Ltd v Owners of the Cape Bari Tankschiffahrts GmbH & Co KG (Bahamas)* [2016] UKPC 20; [2016] 2 Lloyd's Rep 469  
*Bunga Melati 5*, The [2016] SGCA 20  
*Cape Bari*, The [2016] UKPC 20; [2016] 2 Lloyd's Rep 469  
*Chem Orchid*, The [2016] SGCA 04; [2016] 1 Lloyd's Rep 537  
*Connect Shipping Inc and Another v Sveriges Angfartygs Assurans Forening (The Swedish Club) and Others (The Renos)* [2016] EWHC 1580 (Comm); [2016] 2 Lloyd's Rep 364  
*Cosco Felixstowe*, The [2016] HKCFI 492; [2016] 1 Lloyd's Rep 581  
*DC Merwestone*, The [2016] UKSC 45; [2016] 2 Lloyd's Rep 198  
*Global Santosh*, The [2016] UKSC 20; [2016] 1 Lloyd's Rep 629  
*J D Irving Ltd v Siemens Canada Ltd and Others (The SPM 125)* 2016 FC 69; (2016) 961 LMLN 2  
*Kairos Shipping Ltd and Another v Enka & Co LLC and Others (The Atlantik Confidence)* [2016] EWHC 2412 (Admlty); [2016] 2 Lloyd's Rep 525  
*Min Rui*, The [2016] SGHC 183  
*MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789; [2016] 2 Lloyd's Rep 494  
*Murmansk Shipping Co v Adani Power Rajasthan Ltd and Others* [2016] Lloyd's Rep Plus 50  
*Neon Shipping Inc v Foreign Economic & Technical Corporation of China and Another* [2016] EWHC 399 (Comm); [2016] 2 Lloyd's Rep 158  
*Newocean Petroleum Co Ltd v OW Bunker China Ltd and Another (The Cosco Felixstowe)* [2016] HKCFI 492; [2016] 1 Lloyd's Rep 581  
*NYK Bulkship (Atlantic) NV v Cargill International SA (The Global Santosh)* [2016] UKSC 20; [2016] 1 Lloyd's Rep 629  
*PST Energy & Shipping LLC and Another v OW Bunker Malta Ltd and Another (The Res Cogitans)* [2016] UKSC 23; [2016] 1 Lloyd's Rep 589  
*Regulus Ship Services Pte Ltd v Lundin Services BV and Another* [2016] EWHC 2674 (Comm); [2016] 2 Lloyd's Rep 612  
*Renos*, The [2016] EWHC 1580 (Comm); [2016] 2 Lloyd's Rep 364  
*Res Cogitans*, The [2016] UKSC 23; [2016] 1 Lloyd's Rep 589  
*Saga Cruises BDF Ltd and Another v Fincantieri SpA (Formerly Fincantieri Cantieri Navali Italiani SpA)* [2016] EWHC 1875 (Comm); [2017] Lloyd's Rep Plus 2  
*Sam Hawk, The v Reiter Petroleum* [2016] FCAFC 26; [2016] 2 Lloyd's Rep 639  
*SBT Star Bulk & Tankers (Germany) GmbH & Co KG v Cosmotrade SA (The Wehr Trave)* [2016] EWHC 583 (Comm); [2016] 2 Lloyd's Rep 170  
*Shagang Shipping Co Ltd (In Liquidation) v HNA Group Co Ltd* [2016] EWHC 1103 (Comm)  
*Shipowners Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusuf Cepnioglu)* [2016] EWCA Civ 386; [2016] 1 Lloyd's Rep 641  
*Spar Capella, Spar Vega and Spar Draco*, The [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep 447  
*Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd (The Spar Capella, Spar Vega and Spar Draco)* [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep 447

SPM 125, The 2016 FC 69; (2016) 961 LMLN 2  
*Star Polaris LLC V HHIC-Phil Inc (The Star Polaris)* [2016] EWHC 2941 (Comm);  
[2017] 1 Lloyd's Rep 203  
*Star Polaris*, The [2016] EWHC 2941 (Comm); [2017] 1 Lloyd's Rep 203  
*Star Quest and Others*, The [2016] SGHC 100  
*Superior Pescadores*, The [2016] EWCA Civ 101; [2016] 1 Lloyd's Rep 561  
*Tiptop Holding Pte Ltd v Mercuria Energy Trading Pte Ltd* [2016] SGHC 173  
*Versloot Dredging BV and Another v HDI Gerling Industrie Versicherung AG and Others (The DC Merwestone)* [2016] UKSC 45; [2016] 2 Lloyd's Rep 198  
*Vinnlustodin HF and Another v Sea Tank Shipping AS* [2016] EWHC 2514 (Comm);  
[2016] 2 Lloyd's Rep 510  
*Volcafe Ltd and Others v Compania Sud Americana de Vapores SA* [2016] EWCA  
Civ 1103; [2017] 1 Lloyd's Rep 32  
*Wehr Trave*, The [2016] EWHC 583 (Comm); [2016] 2 Lloyd's Rep 170  
*Wood v TUI Travel plc t/a First Choice* [2017] EWCA Civ 11; [2017] 1 Lloyd's  
Rep 322  
*Yemgas FZCO and Others v Superior Pescadores SA (The Superior Pescadores)*  
[2016] EWCA Civ 101; [2016] 1 Lloyd's Rep 561  
*Yusuf Cepnioglu*, The [2016] EWCA Civ 386; [2016] 1 Lloyd's Rep 641

#### Cases considered:

*Aegeon*, The [2002] EWCA Civ 247; [2002] 2 Lloyd's Rep 42  
*Agapitos v Agnew (The Aegeon)* [2002] EWCA Civ 247; [2002] 2 Lloyd's Rep 42  
*Astra*, The [2013] EWHC 865 (Comm); [2013] 2 Lloyd's Rep 69  
*Bankers Trust International Ltd v Todd Shipyards Corporation (The Halcyon Isle)*  
[1980] 2 Lloyd's Rep 325  
*Belhaj and Another v Straw and Others* [2017] UKSC 3  
*Britton v Royal Insurance Co* (1866) 4 F & F 905  
*Bukhta Russkaya*, The [1997] 2 Lloyd's Rep 744  
*Bunga Melati 5*, The [2012] 4 SLR 546  
*Canadian Highlander*, The (1927) 28 Ll L Rep 88; (CA) (1928) 32 Ll L Rep 91  
*Cendor MOPU*, The [2009] EWHC 637 (Comm); [2009] 2 Lloyd's Rep 72; (SC) [2011]  
UKSC 5; [2011] 1 Lloyd's Rep 560  
*Clarke v Earl of Dunraven and Mount-Earl (The Satanita)* [1897] AC 59  
*Ease Faith Ltd v Leonis Marine Management Ltd* [2006] EWHC 232 (Comm); [2006]  
1 Lloyd's Rep 673  
*Fothergill v Monarch Airlines Ltd* [1980] 2 Lloyd's Rep 295  
*Fulton Shipping Inc of Panama v Globalia Business Travel SAU (Formerly Travelplan  
SAU) of Spain (The New Flamenco)* [2015] EWCA Civ 1299; [2016] 1 Lloyd's  
Rep 383  
*Gard Marine and Energy Ltd v China National Chartering Co Ltd and Another*  
[2015] EWCA Civ 16; [2015] 1 Lloyd's Rep 381.  
*Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor MOPU)*  
[2009] EWHC 637 (Comm); [2009] 2 Lloyd's Rep 72; (SC) [2011] UKSC 5; [2011]  
1 Lloyd's Rep 560  
*Gosse Miller Ltd v Canadian Government Merchant Marine Ltd (The Canadian  
Highlander)* (1927) 28 Ll L Rep 88; (CA) (1928) 32 Ll L Rep 91  
*H (Minors) (Sexual Abuse: Standard of Proof)*, Re [1996] AC 563  
*Hadley v Baxendale* (1854) 9 Exch 341  
*Halcyon Isle*, The [1980] 2 Lloyd's Rep 325  
*Happy Ranger*, The [2002] EWCA Civ 694; [2002] 2 Lloyd's Rep 357

*Helmville Ltd v Yorkshire Insurance Co Ltd (The Medina Princess)* [1965] 1 Lloyd's Rep 361  
*Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1961] 2 Lloyd's Rep 478  
*Hongkong Fir, The* [1961] 2 Lloyd's Rep 478  
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