QUADRANT ON SHIPPING

Quadrant CHAMBERS

Issue 1 Spring 2019

WELCOME from Robert Thomas QC

Welcome to the first edition of "Quadrant on Shipping".

Recent years have seen a significant number of important cases in the shipping context and a seemingly renewed interest amongst the judiciary in ensuring the continuing development of this area of law. That trend has continued unabated in 2018-2019 and our talented juniors have taken the opportunity to put together a round up of the key cases from recent months which we hope will be of interest to the reader. We are also pleased to say that Members of Quadrant Chambers have been involved in many.

Happy reading!

Shipping Set of the Year 2019
Simon Croall QC, Shipping Silk of the Year 2019

Extension of *Fiona Trust* to settlement agreement: *The Four Island* [2018] EWHC 3820 (Comm)

Author: Ruth Hosking

The Four Island was a s.67 jurisdiction challenge (the arbitrators having held they had jurisdiction) which raised issued both as to (1) the scope of the arbitration clause and (2) the scope of the tribunal's appointment.

The parties entered into a voyage charterparty on an amended ASBATANKVOY form which included an arbitration clause for disputes to be determined in London. The clause materially provided that "*Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in … the City of London …*".

Disputes arose and the owner stated it had a claim for demurrage and a claim for heating costs. Following an exchange of emails between the owner and the charterer's brokers the claims were settled for USD 600k. The emails provided for a date of payment, which was subsequently extended by agreement. The parties did not draw up a separate settlement document and the email exchange did not refer to any jurisdiction clause. The settlement sum remained unpaid.

The owner commenced arbitration.

The arbitration notice materially provided:

"We act for the Owners in respect of their disputes against charterers under the above referenced charterparty. Owners have a number of claims against charterers, including a demurrage claim, a claim for heating costs … plus various other matters … In accordance with the terms of the charterparty… we have appointed … as owners' arbitrator in respect of any and all disputes under the charterparty …"

The charterer failed to appoint an arbitrator, so a further two arbitrators were appointed in accordance with the arbitration clause. The charterer challenged jurisdiction before the tribunal and the tribunal held that they did have jurisdiction. The charterers brought a s.67 jurisdiction challenge before the Court arguing (1) the settlement agreement was a separate contract which did not contain an arbitration clause and (2) in any event the tribunal had been appointed to hear disputes under the charterparty and not under the settlement agreement.

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Did the arbitration clause apply to the settlement agreement? Males J dealt with this issue at paragraphs 14 to 20 of his Judgment and held it did. Although the exchange of emails could be described as a "settlement agreement" it was an informal and routine arrangement to finalise sums due under a charterparty. He held it was "obvious" that the parties intended that the arbitration clause in the charterparty continued to apply in the event of the agreed sum not being paid. Furthermore, it was "inconceivable" that the parties intended that, if the agreed sum was not paid, the owners would be unable to pursue its claim in arbitration, the parties' chosen neutral forum, and to obtain an award which would be easily enforceable under the New York Convention, but instead would have to commence court proceedings either in the charterers' home jurisdiction or by seeking permission to serve English proceedings out of the jurisdiction.

Did the owner pursue its claims? Males J dealt with this issue at paragraphs 21 to 26 of his Judgment and held that it had. The notice of arbitration referred to a claim for demurrage and heating costs. Although once settled there was a new cause of action for the agreed sum, the claim for the settlement sum could properly be regarded by commercial parties as a claim for demurrage and heating costs. Adopting the "broad and flexible approach" to notices of arbitration, the arbitration notice was therefore effective to refer the claim for the settlement sum to arbitration.

Other points of note: It is well established that a s.67 challenge involves a rehearing and not merely a review of the issues of jurisdiction, so that the court must decide that issue for itself. Consequently, it is not confined to a review of the arbitrators' reasoning (nor is a court required to read the arbitrators' reasoning) but effectively starts again. However, whilst stating that he had considered the issue for himself Males J stated it would be "*unrealistic not to recognise that on this subject matter the views of these arbitrators, given the combined years of experience of the shipping industry which they can bring to bear, carry considerable weight*" (paragraph 14).

The other point of note relates to clause 10 of the 2012 LMAA terms which materially provides that "*notwithstanding the terms of any appointment of an arbitrator, unless the parties otherwise agree the jurisdiction of the tribunal shall extend to determining all disputes arising under or in connection with the transaction, the subject of the reference and each party shall have the right … to refer … further disputes …*". Males J considered this clause at paragraphs 28 to 32 of his Judgment, although declined to determine whether it provided a further (and separate) answer to the charterer's application noting that "*it is striking that it does not appear to have occurred to any of the highly experienced LMAA arbitrators in this case*". Users of the LMAA terms will therefore have to wait for another case before the Court to determine the meaning of clause 10 of the LMAA terms.

Ruth Hosking acted for successful respondent, instructed by Clyde & Co LLP

Ruth Hosking's practice encompasses the broad range of general commercial litigation and arbitration. Her particular areas of specialism include shipping, civil fraud, private international law and commodities. She undertakes drafting and advisory work in all areas of her practice and regularly appears in court and in arbitration, both as sole counsel and as a junior. Ruth also accepts appointments as an arbitrator (both as sole and as part of a panel).

> view Ruth's profile

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Legal 500 2019

Government interferences under the Sugar Charter Party 1999: *Sucden Middle-East v Yagci Denizcilik ve Ticaret Ltd Sirketi (The Muammer Yagci)* [2018] EWHC 3873 (Comm)

Author: Andrew Carruth

In December 2014, the vessel "Muammer Yagci" arrived at Annaba, Algeria carrying a cargo of sugar under a voyage charterparty on the Sugar Charter Party 1999 form. Suspecting that there had been a false declaration in the import documents as part of an illegal attempt to transfer capital abroad, the Algerian customs authorities seized the cargo. The seizure prevented discharge for a period of about four and a half months.

A demurrage dispute arose between the owners and the charterers, which was referred to arbitration. The charterers said that the time lost as a result of the seizure did not count as laytime or time on demurrage. They relied upon clause 28 of the charterparty, which stated:

> *'STRIKES AND FORCE MAJEURE*
>
> *In the event that whilst at or off the loading place or discharging place the loading and/or discharging of the vessel is prevented or delayed by... government interferences... time so lost shall not count as laytime or time on demurrage or detention."*

The Tribunal found that the actions of the customs authorities had caused the delay to discharge. However, this did not amount to "*government interferences*" because their actions had been an ordinary, foreseeable performance of their appointed functions.

The charterers appealed to the Commercial Court under section 69 of the Arbitration Act 1996. They said that the Tribunal's interpretation of "*government interferences*" was wrong. The Tribunal had failed to consider the ordinary meaning of the language of the provision, had focussed inappropriately on considerations of commercial common sense and had been influenced incorrectly by the words "*force majeure*" in the heading of clause 28.

The Owners argued that the Tribunal's interpretation was correct. The actions of the authorities did not amount to "interference", they were simply an ordinary part of the process of discharging the cargo. There was a difference between the process itself and interference with the process. As such, the Tribunal's interpretation was consistent with the language of the provision. Moreover, commercial common sense supported the Tribunal's interpretation because otherwise a wide range of ordinary actions would interrupt laytime.

Knowles J held that the Tribunal had erred in law and allowed the appeal. In particular:

1. The ordinary meaning of the language of the provision did not require the governmental acts to be extraordinary or unforeseeable;
2. The Tribunal had been entitled to refer to the heading of clause 28 when construing the provision, but the phrase "force majeure" did not mean that the clause could only apply to extraordinary or unforeseeable acts;
3. Considerations of commercial common sense favoured the charterers' argument, since it would not be clear how the clause was to apply if there was a requirement that the relevant acts be extraordinary or unforeseeable.

Simon Rainey QC and Andrew Carruth represented the successful Appellant, instructed by HFW.

> link to longer article and judgment

Andrew Carruth undertakes a broad range of commercial work with an emphasis on shipping (wet and dry), energy, commodities, international trade and insurance (marine and non-marine).

> view Andrew's profile

London International Disputes Week
Quadrant Chambers was delighted to support LIDW2019

10 May - Simon Kverndal QC joined the shipping panel exploring the future of international dispute resolution and what London has to offer to the resolution of shipping disputes.

UPCOMING EVENTS

23 May - **Spring Shipping Seminar: Taking Sulphur out of the System: Regulatory, Technical and Legal Issues**

Nichola Warrender chairs the panel which includes LOC's Nick Chell and Quadrant's James M Turner QC and Thomas Macey-Dare QC.

Our panel will consider the hot topic of regulatory, technical and legal issues precipitated by the IMO Marpol Annex VI regulation on limiting sulphur content of bunker fuel, due to come into force on 1 January 2020.

12 June - **Maritime Insolvency Course**

Members of Quadrant Chambers will be running a special 2-hour breakfast course on maritime insolvency.

2 July - **Junior Shipping Breakfast Workshop**

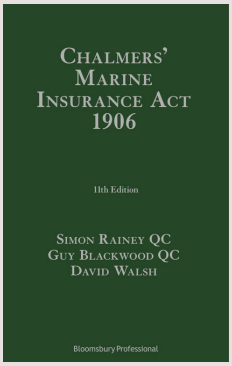
We are holding the next in our series of breakfast workshops aimed at junior practitioners in the shipping market.

London International Shipping Week

Quadrant is pleased to be supporting London International Shipping Week again in 2019.

We will be holding a series of breakfast forums on 9, 10 and 11 September, topics include:

- Marine Insurance
- Cargo Claims post *Volcafe*
- Charterparties



Chalmers' Marine Insurance Act 1906 *- 11th edition published 30 April 2019*

Authors include Simon Rainey QC and Guy Blackwood QC

Book launch to be held in September 2019

21 November - **Quadrant Chambers Annual Piraeus Shipping Law Seminar**

For further details on any of our events, please contact the marketing team:

marketing@quadrantchambers.com

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... masterful expertise in both wet and dry shipping disputes. It has excellent bench strength in the form of both silks and juniors, whom clients describe as "exceptional in their own right"

Chambers UK 2018

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The Pacific Voyager - When is an owner under a voyage charterparty obliged to commence the approach voyage to the loadport?

Author: Stewart Buckingham

In this important decision, the CA considered the owner's obligation under a voyage charterparty to commence the voyage, in circumstances where the charterparty did not contain a date of expected arrival or expected readiness to load at the load port.

It is well settled that, if a voyage charter contains a provision that the shipowner will proceed with all convenient speed or utmost despatch to a load port, and also gives a date of expected arrival or expected readiness to load, then the law imposes on the owner an absolute obligation to commence the voyage at such time as it is reasonably certain that the vessel will arrive on or around the expected date. In effect, the owner is held to the estimated date of arrival/ readiness to load which he gave. That was first settled by the CA in ***Monroe Brothers Ltd v Ryan*** [1935] 2 KB 28, and followed by Devlin J. in ***Evera SA Commercial v North Shipping*** [1956] 2 Lloyd's Rep. 367. In those cases, the charters had specified a date when the vessel could be expected to load. In ***The Myrtos*** [1984] 2 Lloyd's 449, the principle was extended to a charterparty which had an expected time of arrival at the loadport rather than an expected readiness to load.

Monroe also decided that the general exceptions clause in a voyage charterparty does not apply until the approach voyage to the load port has commenced. Therefore, if an excepted cause has prevented the owner from commencing the approach voyage by the relevant date, the owner is unable to rely upon the exception as relieving him from liability.

Here, the charterparty provided that the Vessel was to perform her service with utmost despatch and proceed to the load port, but it did not contain an expected time of arrival or readiness to load. It did, however, give the Vessel's current position, and ETAs for transiting the Suez Canal, loading and then discharging, all qualified "iagw/wp" ("if all going well/ weather permitting"). It also contained a cancelling clause.

Whilst the Vessel was transiting the Suez Canal, she struck a submerged object. Lengthy repairs were required. The charterers terminated the charter under the cancelling clause. They also claimed damages, alleging that the owners were in breach for failing to commence the approach voyage to the load port.

The question was whether, in the absence of any date for the expected time of arrival or readiness to load, there was nevertheless an absolute obligation to begin the voyage to the loading port and, if so, the point in time at which that absolute obligation took effect. It was common ground that the rule identified in ***Monroe*** (above) could not be challenged in the CA, and therefore the owners were unable to rely on the exceptions clause in relation to the incident.

The CA adopted the reasoning of Devlin J. in ***Evera***. If the obligation to proceed with utmost despatch was to be given any effect at all, some time for sailing had to be put in. That meant that the Vessel had to proceed either "forthwith" at the date of the charter, or "within a reasonable time". The inclusion of the itinerary showed that "forthwith" could not be meant. The itinerary for the prior charter was equally useable as an expected date of readiness to load to enable the Court to decide what was the reasonable time at which the obligation of utmost despatch was to attach. The addition of the qualification underscored that the itinerary consisted of estimates, given honestly and on reasonable grounds. If an owner wished to make the beginning of the chartered service contingent on the conclusion of the voyage under the previous charter, then much clearer words were required. The Court therefore did not need to consider whether, in the absence of the itinerary, reliance could be put on the cancelling date.

The decision provides guidance on how the principles in ***Monroe*** are to be applied where there is no statement of the expected time of arrival or readiness to load. That is a not unfamiliar scenario in modern day voyage charters.

Where such statements are absent, the question will be whether an equivalent can be identified, which the parties can be taken to have intended be used as the basis for an absolute obligation requiring the owners to proceed to the load port by a particular date. In this case, the CA considered the itinerary for the prior voyage.

Simon Croall QC and Stewart Buckingham represented the owners, instructed by Kennedys LLP, and John Russell QC represented the charterers, instructed by Clyde & Co LLP.

> link to longer article and judgment

Stewart Buckingham is a commercial barrister, mainly focussing on commercial litigation and international arbitration. He has extensive trial, interlocutory and arbitration experience, and also undertakes advisory work and drafting. His takes a commercially driven approach tailored to the practical needs of his clients, and aims to deliver excellence in the services he provides. He is particularly adept at dealing with complex technical disputes.

> view Stewart's profile

Volcafe v CSAV [2018] UKSC 61: Who has to prove what, when? Cargo damage claims and the burden of proof under the Hague (and Hague-Visby) Rules

Author: Natalie Moore

The claim in ***Volcafe*** concerned condensation damage to containerised cargoes of coffee beans. The carrier argued that the damage was caused by an inherent vice of the cargo (its propensity to emit moisture) and that it was therefore entitled to rely on Article IV.2(m) of the Hague Rules. The cargo claimants argued that the carrier had failed to apply sufficient paper to the container walls to mitigate damage caused by the condensation that would inevitably form during the voyage.

At first instance, the Judge held that proof of damage gave rise to an evidential inference that the damage had been caused by a breach of the carrier's obligations under Article III.2, and that the carrier had not displaced that inference by showing that it had complied with its obligations under Article III.2. Therefore it could not rely on the Article IV.2(m) defence.

The Court of Appeal overturned the decision. It accepted the cargo interests' argument that the carrier, as a bailee, bears a legal burden of bringing itself within one of the defences in Article IV.2. Applying ***The Glendarroch*** [1894] P 226, it held that the carrier could establish a 'prima facie' case of inherent vice merely by proving that the moisture which caused the damage had originated in the goods themselves. The burden would then 'shift' to cargo to prove that the cause of the damage was not inherent vice, but some failure by the carrier to exercise reasonable care.

Upholding the cargo claimants' appeal and overturning ***The Glendarroch***, the Supreme Court held that, as a bailee, a carrier is liable for loss or damage during the voyage unless it proves on the balance of probabilities that it was not caused by any breach by it of its Article III.2 duties, or that one of the defences in Article IV.2 applies. To bring itself within one of the Article IV.2 defences, the carrier must also prove that the loss or damage was not caused by its own negligence or breach of Article III.2. In practice, the burden is therefore on the carrier to disprove causative negligence.

As an alternative ground for the decision, the Supreme Court held that inherent vice meant the unfitness of the goods to withstand the ordinary incidents of the voyage, given the degree of care which the shipowner is required to exercise in relation to the goods. To establish the defence, the carrier would therefore have had to prove either that it provided the contractual degree of care, or that even had it done so, the damage could not have been prevented. As it had not proven either of those matters (on the Judge's findings of fact), it could not rely on the defence.

John Russell QC and Benjamin Coffer appeared for the Appellants, instructed by Clyde & Co LLP.

Simon Rainey QC and David Semark appeared for the Respondents, instructed by Mills & Co.

> link to longer article and judgment

Natalie Moore has a broad commercial practice with particular experience in international commerce and shipping. She regularly appears in the Commercial Court and in arbitration, both as sole and junior counsel.

"She has a razor sharp legal mind, is very commercially minded and is an excellent advocate' (Legal 500 2019).

> view Natalie's profile

Unseaworthiness and Passage Planning: *The CMA CGM LIBRA*

Author: Emmet Coldrick

The CMA CGM LIBRA [2019] EWHC 481 (Admlty) is an interesting modern illustration of the application of seaworthiness principles in the context of the grounding of a container ship.

The vessel grounded whilst leaving the port of Xiamen. It had been navigated outside the buoyed fairway and ran aground on a shoal. The shoal was not marked on the available charts, but Notices to Mariners warned that depths less than those charted existed in the approaches to the port.

The passage plan had not provided for the vessel to leave the fairway. But nor did it contain a warning of the danger of uncharted shallows.

92% of Cargo Interests paid their contribution to GA but 8% refused to do so. They submitted that the unsafe passage plan rendered the vessel unseaworthy and that they had a defence of actionable fault.

The Owners sought to defend the Master's navigational decisions as reasonable in the circumstances and also defended the passage plan, maintaining that it was sufficient that the relevant Notice to Mariners was attached or adjacent to the vessel's working chart.

Teare J found that the navigation of the vessel had been negligent, that the passage plan was defective and that it was causative of the grounding. If there had been a suitable warning on the working chart, the master would not have left the buoyed fairway.

These conclusions were not of themselves sufficient to give rise to a defence of actionable fault. The court had to be persuaded that the defective passage plan rendered the vessel unseaworthy.

The Court held that it did. Teare J reasoned that:

"Given that, as stated in the IMO Resolution of 1999, a "well planned voyage" is of "essential importance for safety of life at sea, safety of navigation and protection of the marine environment" one would expect that the prudent owner, if he had known that his vessel was about to commence

a voyage with a defective passage plan, would have required the defect to be made good before the vessel set out to sea."

The Court rejected a submission on behalf of Owners that due diligence was exercised because their SMS contained appropriate guidance for passage planning. Teare J noted that it has long been recognised that in order to comply with Article III r.1 it is not sufficient that the owner has itself exercised due diligence to make the ship seaworthy. It must be shown that those relied upon by the owner to make the ship seaworthy have done so, as the duty is non-delegable. The master could, by the exercise of reasonable care and skill, have prepared a proper passage plan and as such due diligence was not exercised.

John Russell QC, instructed by Clyde & Co LLP, acted for the successful Cargo Interests.

> link to longer article and judgment

Emmet Coldrick has a broad commercial practice, with a particular emphasis on shipping and transport, international trade and commodities, general commercial/ contractual disputes (including civil fraud) and arbitration.

> view Emmet's profile

Collision Liability heads to the Supreme Court: *Alexandra 1 v Ever Smart*

Author: Paul Henton

The ***Alexandra 1 v Ever Smart*** saga continues. The case involved a collision between a laden VLCC (A1) and a container vessel (ES) just outside Jebel Ali. Q4 2018 / Q1 2019 saw further decisions in both the liability and quantum phases of this litigation.

In the liability proceedings, the principal issue is whether the "crossing rules" (rules 15-17 of the Collision Regulations) apply to situations involving one vessel (A1) approaching a narrow channel intending to enter into it, whilst the other (ES) is navigating the narrow channel intending to exit it. If they applied, then the A1 would have been the give-way vessel and ES the stand-on vessel obliged to maintain her course and speed. The difficulty is that it was common ground (and indisputable) that the "narrow channel" rule (rule 9 of the Collision Regulations) also applied to ES and imposed a requirement that she keep as near to the starboard side of the channel as possible.

The Court of Appeal upheld the Judge's decision that the crossing rules were inapplicable. The obvious concern was that the two sets of rules (if both applicable) potentially required different actions at the same time. How could ES be potentially required to both maintain her course (crossing rule) whilst simultaneously altering it to starboard (narrow channel rule)? As Gross LJ noted: "the potential for conflicting requirements is apparent" [62], and it is most unlikely that a proper application of the Collision Regulations would place a Master in an invidious position of this nature [63].

There were persuasive authorities which supported this conclusion (***The Canberra Star*** at first instance, the Hong Kong decision of ***Kulemesin v HKSAR***), and none that compelled a contrary conclusion (the decision of the Privy Council in ***the Albano*** being distinguishable).

In these circumstances the liability apportionment of 80:20 in favour of A1 was not disturbed on appeal. However, permission to appeal to the Supreme Court has been granted on the interaction between the crossing rules and the narrow channel rule. Watch this space for further developments

Meanwhile, in the quantum proceedings, the A1 Interests presented claims totalling some US$40 million (before apportionment). The Judge found that: "*[A1's] claim was infected by a basic misapprehension that anything and everything, or which it might plausibly be said that it would not have happened to [A1] but for the collision, could be claimed*" [14], including a head of loss which the Judge was surprised had ever been pleaded [13]. The A1's central argument was that the repair period and time taken to return to trading had been exacerbated by its own impecuniosity, and that the ES Interests had to "take their victim as they found him" (the "egg-shell skull" principle- or "egg-shell hull", applying to the A1's financial condition as much as to its physical condition)- by analogy with the decision of the House of Lords in ***Lagden v O'Connor***. The Judge rejected that submission on the basis that causation had not been made out on the facts (in the parlance of ***Lagden***, this can be read as a finding that A1 had not shown it had "no other choice" but to remain idle at the yard pending funding of the repair bill).

In these circumstances, the A1's claim was reduced to a fraction of the claimed amount (c. US$9.3m before apportionment). The A1 Interests have filed an application for permission to appeal to the Court of Appeal. Again, watch this space for further developments.

The Court of Appeal's decision on liability is reported at **[2019] 1 Lloyd's Rep 130**. Nigel Jacobs QC and James Turner QC appeared for the ES Interests.

The decision of Andrew Baker J on quantum is at **[2019] EWHC 163 (Admlty)**. Nigel Jacobs QC and Paul Henton appeared for the ES interests.

Simon Rainey QC and Nigel Jacobs QC will represent ES in the Supreme Court.

Paul Henton has a broad commercial practice with an emphasis on shipping and commodities, international trade, energy, banking, aviation, and insurance. Within these fields his work covers the full range of disputes from charterparties to international sales to shipbuilding and FPSO construction/conversion disputes to banking/trade finance to insurance and reinsurance towers to State Immunity disputes to multi-million dollar international arbitrations and much more.

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Quadrant Chambers is delighted to be supporting Advocate (the new name for the Bar Pro Bono Unit) as a Pro Bono Patron for 2019.

Supporting access to justice for vulnerable members of our society through funding for Advocate is of vital importance to all at Quadrant Chambers.

Force majeure and alternative modes of performance: *Classic Maritime Inc v Limbungan Makmum SND BHD* [2018] EWHC 2389 (Comm)

Author: Paul Toms

Classic Maritime decides a number of points of interest to commercial practitioners and, in particular, those in the maritime and international trade sectors. At its heart, the case is one about the meaning and effect of a "force majeure" or, more accurately, exceptions clause in a COA.

Limbungan, as charterer, had agreed to ship iron ore pellets from either Tubarao or Ponta Ubu, Brazil, for discharge in Malaysia. Classic agreed to supply vessels.

At Ponta Ubu, the pellets were mined and supplied by Samarco; at Tubarao, by Vale.

The COA had been mainly performed by Limbungan by using cargo lifted from at Ponta Ubu. Limbungan's position was that it intended to lift cargo there for the shipments in issue.

In November 2015, the tailings dam at Ponta Ubu collapsed. Production was stopped with the result that no cargo could be lifted whatsoever.

Classic brought a claim for breach of contract by Limbungan in failing to supply cargo for five shipments which ought to have taken place between November 2015 – June 2016. It claimed c. US$20 million, namely the difference between the contract and market freight rate.

Limbungan defended the claim by relying on a clause which provided that:

> *"neither … Charterers, Shippers … shall be responsible for … failure to load cargo … resulting from … accidents at the mine … or any other causes beyond the … Charterers' Shippers' … control … provided that such events directly affect the performance of either party…".*

It was common ground that the dam burst was an "accident at the mine".

A number of issues arose for determination by Teare J in the Commercial Court:

(1) Was the test of causation a "but for" test i.e. did Limbungan have to prove that "but for" the dam burst, it would have loaded cargoes at Ponta Ubu?

(2) If the answer to (1) was yes, could Limbungan prove that it would have loaded cargoes?

(3) If the answers to (1) and (2) were yes, could Limbungan prove that the exercise of reasonable steps would not have resulted in iron ore pellets being obtained from Vale instead. If it could not prove this, it was common ground that the clause did not apply because the cause of the non-performance was Limbungan's failure to obtain cargo by another permissible contractual mode of performance i.e. from Vale.

(4) Was the dam burst within the control of "Shippers"? Classic argued that it was because the cause of the collapse was Samarco's failure properly to design, construe and maintain the dam.

(5) If Limbungan could not rely on the clause, was Classic entitled to substantial damages?

Teare J held as follows:

(1) The causation test was "but for".

(2) Limbungan did not satisfy the "but for test". As such, it was not entitled to rely on the clause.

(3) It was more likely than not that Vale would not have agreed to supply iron ore pellets to Limbungan after the dam collapse. In other words, had Limbungan satisfied the "but for test", the fact that it had not obtained cargo from Vale would not have prevented its reliance on the clause.

(4) An event was only within the control of "Shippers" for the purposes of the clause if it arose out of delegated performance by Samarco, as shippers, of Limbungan's obligations under the COA to supply and load cargo. The design, construction and maintenance of the dam were "not elements of the charterer's obligations to supply and load a cargo which were delegated to Samarco".

(5) Classic was not entitled to substantial damages because had Limbungan been able and willing to ship the five cargoes, "no cargoes would in fact have been shipped because of the dam burst and the dam burst would, in that event, have excused Limbungan from its failure to make the required shipments". An award of damages would, therefore, offend the compensatory principle as it would put Classic in a better position than had Limbungan been able to perform its obligations under the COA.

The matter is due to be heard by the Court of Appeal in June 2019.

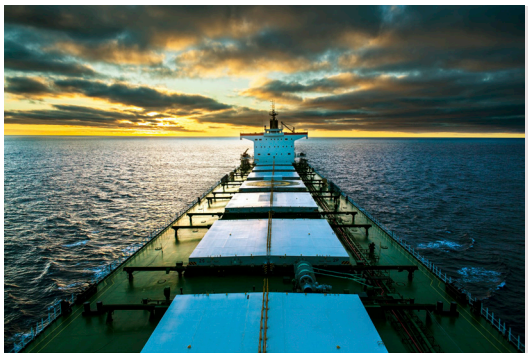
Simon Rainey QC and Andrew Leung represented the successful Defendants, instructed by Hill Dickinson LLP

> link to longer article and judgment

Paul Toms is an experienced junior barrister practising across a wide range of commercial disputes. "Extremely experienced. He knows shipping back to front and is very approachable and easy to deal with. He is extremely good on paper, very good on his feet and very good with clients in conference too." (Chambers UK 2019).

In 2017, he appeared in the Supreme Court in The Longchamp, which considered the meaning of Rule F of the York Antwerp Rules.

> view Paul's profile



Quadrant Spring Shipping Seminar: Taking Sulphur out of the System: Regulatory, Technical and Legal Issues

23 May 2019

At the Quadrant Chambers Spring Shipping Seminar, our panel will consider the hot topic of regulatory, technical and legal issues precipitated by the IMO Marpol Annex VI regulation on limiting sulphur content of bunker fuel, due to come into force on 1 January 2020.

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Set-off against freight: freight-forwarding and project cargoes

Author: Emmet Coldrick

In ***Globalink Transportation and Logistics Worldwide LLP v DHL Project & Chartering Ltd*** [2019] EWHC 225 (Comm) (19 February 2019), the Commercial Court considered the scope of the rule in ***The 'Aries"*** [1977] 1 WLR 185 (HL), which precludes set-off against freight, and decided that the rule does not extend to freight-forwarding contracts.

Defendants to claims for money due under commercial contracts often seek to defend on the basis that they have a counterclaim, which should be set-off to extinguish or reduce the claimant's claim. Broadly speaking, English law allows this sort of defence to be advanced, particularly where the counterclaim arises out of the same contract as the claim.

But there is an exception in the case of claims for freight under a contract of carriage. In such cases, no defence of set-off is permitted. The carrier is entitled to its freight – and can obtain summary judgment for it – even if the defendant has a counterclaim with a real prospect of success. The defendant must pay the freight and decide whether to pursue the counterclaim as a freestanding claim.

Since the no set-off rule was confirmed in ***The Aries***, it has been held to apply to all sorts of counterclaims (see, for example, ***The 'Elena"*** [1986] 1 Lloyd's Rep 425) and to extend to claims in respect of carriage by land as well as carriage by sea; see ***RH&D International Ltd v IAS Animal Air Services Ltd*** [1984] 1 WLR 573 (international land carriage) and ***United Carriers v Heritage Food Group (UK) Ltd*** [1996] 1 WLR 371 (domestic land carriage). Recently, it was held to extend to carriage by air; ***Schenker Ltd v Negocios Europa Ltd*** [2018] 1 WLR 718.

However, in ***Globalink v DHL*** the Commercial Court declined to extend the rule further, whether to freight forwarding contracts generally or to the particular project cargo forwarding contract in issue.

DHL was engaged by its client, Sinopec, to arrange the carriage of large items of plant and machinery from China to Atyrau, Kazakhstan, where they were required for use in a refinery modernisation project. DHL sub-contracted the arrangement of carriage from Novorossiysk on the Black Sea to Atyrau to the claimant, Globalink, and a price was agreed for the transportation.

2 barges laden with the cargo set out from Novorossiysk on the same day. One of them made it to Atyrau in good time. The other failed to reach its destination. It had made slow progress and its draught was too deep to complete the final leg of the voyage, from the Caspian Sea to Atyrau, before the Ural-Caspian Canal closed to navigation for winter. The cargo was stored over winter. The next spring, DHL engaged Globalink to arrange for the carriage, to Atyrau from the place of storage, to be completed, and it was completed, at substantial additional cost.

DHL refused to pay the final two instalments in respect of the transportation to Globalink. It maintained that breaches of the contract on Globalink's part had caused the cargo to fail to reach Atyrau as originally planned and that it had a counterclaim that extinguished Globalink's claim.

Globalink applied for summary judgment. It contended both that DHL's counterclaim had no real prospect of success and that in any case the rule in ***The 'Aries"*** applied and so a set-off defence was unavailable.

Although it was a summary judgment application, the Judge (Nicholas Vineall QC) decided to 'grasp the nettle' and finally decide the set-off point. Having been satisfied that the counterclaim was well arguable, he concluded that a set-off defence was in principle available, holding that "the rule in ***The Aries*** does not extend, and should not be extended, to cover the services provided by a freight forwarding agent, when those services are to arrange the carriage of goods".

Summary judgment was accordingly refused. The Court was willing, however, to make a conditional order, requiring payment into court of a small proportion of sum claimed. In ***Britannia Distribution v Factor Pace*** [1998] 2 Lloyds Rep 420, it was held that freight forwarders acting as agents had the benefit of the no set-off rule to the extent that they could show that the sum of which they sought payment was in respect of freight that they had paid to a carrier. Here, the Judge was satisfied that an underlying US$113,000 of the c.US$1.65 million claimed had been shown to be freight payable to a carrier, albeit in the absence of proof of payment by Globalink the appropriate course was a conditional order in respect of the sum in question, rather than summary judgment for it.

Emmet Coldrick, instructed by Barrett Solicitors, acted for DHL.

> link to judgment

Emmet Coldrick has a broad commercial practice, with a particular emphasis on shipping and transport, international trade and commodities, general commercial/ contractual disputes (including civil fraud) and arbitration.

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No requirement for cross-undertaking in damages: *THE "MV ALKYON"*

Author: Andrew Leung

The usual Admiralty practice, dating back at least 150 years, is that an arresting party is not required to give a cross-undertaking in damages as the price of maintaining the arrest. The central question for the Court of Appeal in ***Stallion Eight Shipping Co SA v NatWest Markets Ltd (THE "MV ALKYON")*** [2018] EWCA Civ 2760 was whether to depart from this practice. The Court declined to do so, and confirmed the arrestor-friendly position under English law that no damages can be claimed for wrongful arrest absent bad faith or gross negligence by the arresting party per ***The Evangelismos*** (1858) 12 Moo PC 352.

The claimant bank had issued an in rem claim form and arrested the MV ALKYON to secure a claim against the owners under a loan agreement secured by a mortgage over the vessel. The owners applied under CPR r.61.8(4) for the vessel's release unless the claimant provided a cross-undertaking in damages in the form usually given in the context of freezing orders.

At first instance, Teare J refused the application. He held inter alia that to grant the owners' application would subvert the principle that a claimant in rem may arrest as of right, and clash with the court's long-held practice that a cross undertaking in damages from the arrestor is not required. Any change to historical Admiralty law and practice was not a matter for the Court to change overnight, but for Parliament or the Rules Committee to consider after proper consultation: [57]. The owners appealed.

The Court of Appeal (Sir Terence Etherton MR, Gross and Flaux LJJ) upheld the first instance decision. They recognised that the rule in ***The Evangelismos*** could work harshly against a shipowner. This put a spotlight on why the position of a maritime arrestor should continue to diverge from that of a claimant obtaining a freezing order: [82]. However, the case against a quick judicial change to the settled law and practice was overwhelming (see [84]-[93]):

1. The availability of arrest provides the unique feature of the claim in rem.
2. Should the owners' appeal succeed, as there is nothing unusual about the present case, the requirement of a cross-undertaking would likely become routine, making the stakes in in rem litigation vertiginously high.
3. There is no doubt as to the efficacy of the remedy of arrest or even the threat of arrest in compelling the provision of some other security, which P&I Clubs and hull underwriters routinely give. Any disturbance of these commercial arrangements should not be lightly embarked upon.
4. A ship arrest is asset specific. It does not "freeze" the entirety of the shipowner's business in the same manner as a freezing order might do. The analogy between the maritime arrest and the freezing injunction is neither exact nor compelling.
5. Though an arrest has not been a requirement for establishing Admiralty jurisdiction since 1883, there has been no reconsideration of the law and practice of maritime arrests in this jurisdiction. Further, there is no, or no significant, pressure from the maritime industry for a change in the balance between the shipowners and potential maritime claimants.

The prospect of the court reconsidering the position if properly informed as to the views of the industry implications of any proposed changes was left tantalisingly open: [95]. But the status quo, where the claimant in rem may arrest as of right to obtain security and found jurisdiction, remains undisturbed for now and, in all likelihood, for the foreseeable future. So, too, do the advantages of arresting a ship in this jurisdiction (if the arrestor has an arrestable claim) over obtaining a freezing injunction.

Andrew Leung has a broad commercial practice which encompasses commercial dispute resolution, international arbitrations, shipping, commodities, energy, insurance and reinsurance, and banking and financial services.

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Deck cargo exclusion clauses: *Aprile SPA v Elin Maritime Ltd* ("*The Elin*")

Author: Max Davidson

In ***The Elin***, the court held that a clause in a bill of lading providing that certain cargo was "*loaded on deck at shipper's and/or consignee's and/or receiver's risk; the carrier and/or Owners and/or Vessel being not responsible for loss or damage howsoever arising*" was effective to exclude a carrier's liability for any loss of or damage to the deck cargo, including any loss or damage caused by the unseaworthiness of the vessel or the carrier's negligence.

The cargo interests had argued that, by applying the guidance to the interpretation of exclusion clauses set out in ***R v Canada Steamship Line*** [1952] AC 192, the clause should be read as not excluding the carrier's liability for loss or damage caused by the carrier's negligence or the unseaworthiness of the vessel. That outcome had found favour in the Singapore Court of Appeal in ***Sunlight v Ever Lucky Shipping Company Ltd*** [2004] 2 Lloyd's Rep. 174 and in the Canadian Court of Appeal in ***Belships v Canadian Forest Products Ltd*** (1999) A.M.C. 2606, in which similarly worded exclusion clauses were held not to exclude a carrier's liability for unseaworthiness and negligence respectively.

The carrier argued that the words should be given their plain and natural meaning, and invited the court to follow the obiter decision of Langley J in ***The Imvros*** [1999] 1 Lloyd's Rep 848, in which it had been held that a similarly worded deck cargo exclusion clause was effective to exclude losses caused by unseaworthiness.

Stephen Hofmeyr QC, sitting as a Judge of the High Court, dismissed numerous academic and judicial criticisms of Langley J's decision in ***The Imvros***, and held that as a matter of plain language and good commercial sense the carrier's construction should be preferred. He declined to apply the approach espoused by the Privy Council in ***Canada Steamship Line*** mechanistically, which might have led to the exclusion clause being interpreted in the manner contended for by the cargo interests.

This decision resolves a conflict which had existed in the authorities as to the interpretation of deck cargo exclusion clauses. The English court declined to follow the approach adopted in the Singapore and Canadian Courts of Appeal, and instead confirmed that, as a matter of English law, a clause providing that a carrier will not be liable for loss or damage to deck cargo "*howsoever arising*" will be effective to exclude liability for the carrier's negligence or its failure to exercise due diligence to make the vessel seaworthy. In order for the exclusion clause to operate, the cargo must be stated to be carried on deck and in fact carried on deck.

Max Davidson acted for cargo interests, instructed by Roose & Partners.

> link to judgment

Max Davidson undertakes work in a broad range of commercial disputes, including shipping, sale of goods, international arbitration, conflicts of law, aviation, energy and insurance. He regularly appears in the Commercial Court and in international arbitration.

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The Athens Convention: *Warner v Scapa Flow Charters* [2018] UKSC 52; [2018] 1 WLR 4974

Author: Tom Bird

Mr Warner chartered a vessel for a week of diving off Cape Wrath in Scotland. On 14 August 2012, when in full diving gear, he fell on the deck of the vessel, but continued with the dive and subsequently died. On 14 May 2015 his widow brought claims in Scotland against the vessel owners both on her own behalf and as guardian of their infant son. The owners argued that the claims were time-barred pursuant to the 2-year limitation period in Article 16(1) of the Athens Convention 1974. It was common ground that the Athens Convention applied to the circumstances of the accident.

In this appeal, the central issue concerned the proper interpretation of Article 16(3) of the Convention:

> "The law of the court seized of the case shall govern the grounds of **suspension and interruption of limitation periods**, but in no case shall an action under this Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later."

The Supreme Court held that the word "suspension" was sufficiently wide to cover domestic rules (here, the Scots law of limitation) which postponed the start of a limitation period as well as those which stopped the clock after the limitation period had begun: it is apt to include the deferment or suspension of something which has not yet started. Accordingly, the claim brought on behalf of Mr Warner's son was not time-barred (the relevant domestic rules suspended the running of time whilst he was underage). However, the Supreme Court held that a domestic "suspension" provision cannot defer the expiry of the Convention's limitation period beyond the 3-year long stop.

This is a welcome decision. The Supreme Court's approach reflects the international character of the Convention and its interpretation of Article 14(3) avoids the serious anomalies that would arise if the postponement of the start of the limitation period could never amount to a suspension.

Tom Bird has a broad commercial practice with a focus on shipping, commodities, marine insurance, energy/offshore and aviation. He is recommended as a leading junior by The Legal 500 and Chambers UK where he is variously described as "very responsive, personable, very good with clients", "commercial", "tenacious and talented".

> view Tom's profile

Time Charter Disputes: Owners cannot claim hire for vessel detained by pirates – *The Eleni P*

Author: Tom Nixon

In ***Eleni Shipping Limited v Transgrain Shipping BV ("The ELENI P")*** [2019] EWHC 910 (Comm), Popplewell J held that Owners were not entitled to claim hire from Charterers in the sum of around US$4.5 million in respect of a period of seven months during which the Vessel was detained by Somali pirates in the Arabian Sea.

The Vessel, subject to a time charter on an amended NYPE 1946 form, was ordered to load a cargo of iron ore at a port in Ukraine for discharge in China. The Vessel was routed via the Suez Canal and the Gulf of Aden. She sailed through the Gulf of Aden without incident and into the Arabian Sea, but was there attacked and captured by pirates. She was only released by the pirates some seven months later.

Owners claimed hire in respect of the time during which the Vessel was captured and detained by pirates. The Tribunal rejected the claim, relying on Clauses 49 and 101 of the Charterparty – and Owners appealed to the Commercial Court.

Clause 49 – Capture, Seizure and Arrest – *Should the vessel be captured* [sic] *or seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended for the actual time lost* [...]

The question for the Court was whether this applied so as to suspend hire when the Vessel was captured by pirates, rather than captured by "*any authority or by any legal process*". Popplewell J, disagreeing with the Tribunal, rejected this argument. The phrase "*any authority or any legal process*" must apply to the whole preceding list of events - if it applied only to arrest it would be superfluous, and the drafting would be "*surprisingly inept*". His Lordship also found that the contrary construction was inconsistent with the terms of Clause 15, which only put the Vessel off-hire for detention "*by average accidents to ship or cargo*" – on Charterers' construction, Clause 49 would render any detention an off-hire event and "*substantially cut across the careful allocation of risk in clause 15, without any apparent commercial rationale for doing so*".

Clauses 101 – Piracy Clause – *Charterers are allowed to transit Gulf of Aden any time, all extra war risk premium and/or kidnap and ransom as quoted by the vessel's Underwriters, if any, will be reimbursed by Charterers. [...] In case vessel should be threatened/ kidnapped by reason of piracy, payment of hire shall be suspended. It's remain understood [sic] that during transit of Gulf of Aden the vessel will follow all procedures as required for such transit including but not limited the instructions as received by the patrolling squad in the area for safe participating to the convoy west or east bound.*

The question for the Court was whether this applied only to piracy *within* the specific finite geographic area known as Gulf of Aden, or whether it could also apply to piracy occurring *as an immediate consequence* of transiting through the Gulf of Aden more widely understood. Popplewell J agreed with Charterers that the latter was the correct construction. At the core of his reasoning was the purpose of Clause 101 – to permit Charterers to engage in trade *through* the Gulf of Aden – and that the Clause was intended to allocate the risks associated with such trade, not solely within a specifically defined geographical area. Accordingly, Owners' appeal failed, as hire had been suspended over the period of detention by Clause 101.

Owners were represented by Robert Thomas QC, and Charterers were represented by Thomas Macey-Dare QC.

> link to longer article and judgment

Tom Nixon has developed a practice that matches the breadth of Chambers' practice areas, including international commercial disputes, shipping, conflicts of laws, commodities, aviation, commercial chancery and company work. He has acted, both as sole counsel and as a junior, on claims varying in value from hundreds of pounds to multiple billions. He enjoys difficult cases, and prides himself on being responsive and easy to work with.

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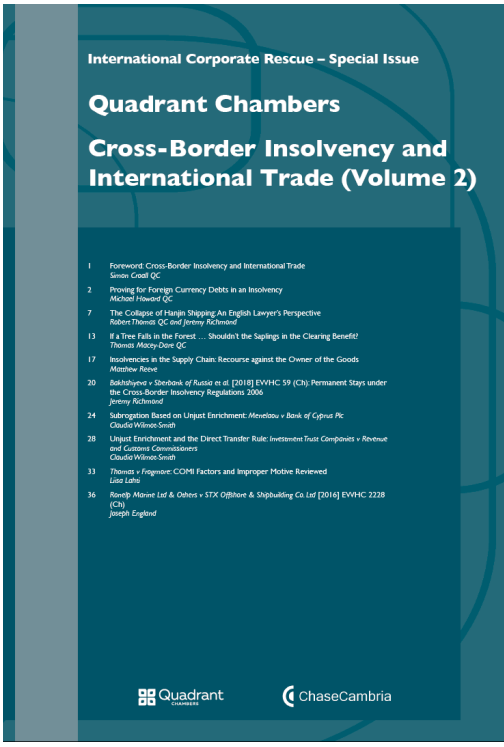
NEWS

- Quadrant Chambers in the Supreme Court:
  - First collision liability appeal to go to the Supreme Court - *Evergreen Marine UK Ltd v Nautical Challenge Ltd* - Simon Rainey QC and Nigel Jacobs QC
  - Permission to appeal granted: *Shagang Shipping Company Ltd v HNA Group Company Ltd* - Ruth Hosking and Caroline Pounds
- Chris Smith appointed Queen's Counsel
- Quadrant Chambers featured twice in The Lawyer Top 20 cases of 2019 - which includes *Suez Fortune Investments Ltd and Piraeus Bank SA v Talbot Underwriting Ltd (The Brilliante Virtuoso)* - Nichola Warrender is part of the team on this 12-week war risk insurance trial.
- Quadrant Chambers awarded Shipping Set of the Year 2019 by Legal 500



Quadrant Chambers Cross-Border Insolvency and International Trade Vol 2 was published in November 2018.

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The "LADY M" – The Court of Appeal considers the meaning of the 'fire' exception

Author: Benjamin Coffer

The Court of Appeal's judgment in the "LADY M", provides definitive guidance on the scope of the 'fire' defence in Article IV Rule 2(b) of the Hague Rules, and the proper approach to the construction of the Article IV defences more generally.

The Court has held that the carrier can rely on the fire defence even where the fire is caused intentionally by the crew, unless the vessel was causatively unseaworthy in breach of Article III.1, or the fire was caused with the actual fault or privity of the carrier. In construing the fire defence, the Court took a restrictive view of the relevance of the pre-existing common law prior to the Hague Rules, and the relevance of the travaux préparatoires, instead concentrating on the literal wording of the Rules.

The case concerned a fire in the engine room of "LADY M" while she was carrying a cargo of 62,250 mt of fuel oil from Russia to the US. The fire did not take hold but was said to have been sufficient to immobilise the vessel such that salvage services were required and cargo interests incurred a substantial liability to the salvors. In these proceedings, cargo interests sought to claim that sum (together with associated costs and expenses) from Owners, together with a declaration of non-liability for general average. Owners counterclaimed a general average contribution.

The cargo interests relied on the fire as a breach of Article III Rule 1. In Owners' defence, it was admitted that the fire had been started deliberately by a member of the crew with the intent to cause damage. Owners' case was that the culprit was the Chief Engineer and that at the time that he set the fire he was under extreme emotional stress and/or anxiety due to the illness of his mother, alternatively suffering from an unknown and undiagnosed personality order and/or mental illness.

Cargo interests argued that the fire defence was not applicable to fires caused by acts of barratry. They relied principally on pre-existing common law cases in which it had been held that contractual defences in bills of lading (even when apparently clearly worded) were inapplicable when the excluded peril was caused by deliberate conduct on the part of the crew.

At first instance, Popplewell J determined as a preliminary issue that the fire defence was capable of applying even if the fire was caused by barratry on the part of the crew, but rejected the owners reliance on Article IV Rule 2(q). He also held that there could be no barratry if the Chief Engineer was insane: for an act to constitute barratry, it required the mental element necessary to make the conduct criminal, which would not be present in a case of insanity.

The Judge's decision that the carrier could rely on Article IV.2(b) was upheld on appeal. The Court of Appeal held that it was not permissible to refer to the pre-existing case law, because the words of Article IV.2(b) were clear. The Court endorsed the Judge's view that it was only permissible to make reference to prior authorities where they established that a particular word or phrase already had a judicially settled meaning. It held that there was no settled meaning of 'fire' prior to the enactment of the Rules. In reaching that view, the Court declined to follow the decision of the New Zealand Supreme Court in ***The Tasman Pioneer*** [2010] 2 Lloyd's Rep 13 that the Article IV defences are not applicable to acts of barratry.

The Court of Appeal went on to consider the Judge's analysis of the requirements for an act to constitute 'barratry'. The Court held that the Judge should not have determined whether the assumed insanity of the Chief Engineer would prevent his conduct constituting barratry, because insanity had not been pleaded by the shipowners. All three judges were critical of the shipowners for asking the Court to determine the preliminary issue on the basis of a hypothetical and unpleaded assumption ("the Owners were acting as if they were conducting a tutorial group").

Robert Thomas QC and Benjamin Coffer appeared for the cargo interests, instructed by Clyde & Co LLP.

> link to judgment

Benjamin Coffer is described by the directories as "a rising star" (Legal 500, 2019); "a standout shipping and commodities junior" (Chambers & Partners, 2018) and "a star of the future" (Chambers & Partners, 2017). He is also recognised as a leading junior in the Legal 500 Asia Pacific Guide.

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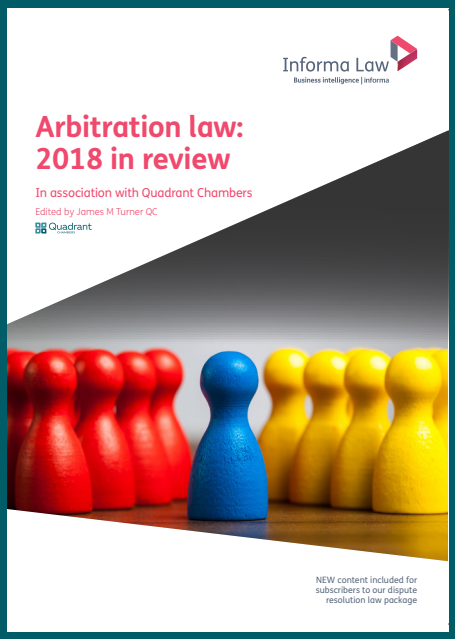
- Simon Croall QC named Shipping Silk of the Year at the Legal 500 UK Awards 2019
- Stewart Buckingham featured in Lloyd's List Top 10 Maritime Lawyers 2018
- Quadrant awarded Shipping Set of the Year at the Chambers & Partners Bar Awards 2018



Informa has published 'Arbitration Law: 2018 in Review' written by Quadrant Chambers and edited by James M Turner QC.

Authors include: Michael Howard QC, Simon Rainey QC, Nigel Cooper QC, Nevil Phillips, Ruth Hosking, Paul Toms and David Semark.

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