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Quadrant on Shipping

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EDITORIAL by John Russell QC

We welcome you to what is now the third edition of Quadrant on Shipping.

And what an extraordinary year it has been since the last edition! At the time of writing, "live" hearings are gradually becoming more common again. What was remarkable was how rapidly, and relatively seamlessly, courts at all levels and arbitral tribunals made the switch to "virtual" hearings. It has become clear that for many matters video hearings can be more time efficient, and thus cheaper, than, real world hearings. I suggest that it is important that there should not be an unthinking return to real world hearings being the default setting for all matters. Rather, on a hearing by hearing basis, the court or tribunal and the parties should consider whether a video or real world hearing is likely to be more effective and efficient.

The quality, breadth and depth of shipping work that Quadrant has undertaken in the past 12 months is reflected in the articles in this edition, which we hope you will find helpful and interesting.

Caroline Pounds appeared in the Supreme Court in *Shagang Shipping* and discusses the decision addressing the proper approach to evidence where there are allegations of bribery and torture, and more generally how the weight to be given to evidence should be assessed. Staying in the Supreme Court, Simon Rainey QC and Nigel Jacobs QC analyse their win in the collision case between *"EVER SMART"* and *"ALEXANDRA 1"*, and Ben Coffer and I discuss the recent hearing in The *"LIBRA"* which considers passage planning as an aspect of unseaworthiness. Some of the many other important decisions that Quadrant have been involved in are also discussed.

Finally, the whole of Quadrant Chambers' shipping team wish to take this opportunity to thank all our clients for their support. We hope that you have continued to experience an excellent level of service from us despite the unusual circumstances this year, and look forward to working with you all in the future.

Nichola Warrender Appointed Queen's Counsel

Quadrant Chambers congratulates Nichola Warrender on her appointment as QC in March 2021. We look forward to when we can celebrate her appointment together.

Nichola is an experienced barrister who enjoys a broad commercial litigation and arbitration practice with particular emphasis on shipping, carriage of goods, commodities, shipbuilding, energy and construction and related insurance and finance disputes.

"Nichola Warrender is perhaps the hardest-working human being who has ever lived and she has an eye for detail which would make most spreadsheets ashamed of themselves." (Chambers UK, 2021)

Shipping Excellence Recognised

John Russell QC was named Shipping Silk of the Year and Caroline Pounds was been named Shipping Junior of the Year, at the Chambers and Partners Bar Awards 2020.

They were both also named in the Lloyd's List Top 10 Maritime Lawyers of 2020. John was named in the number one spot. Huge congratulations to them both.

Contents

The Power of *in rem*

Tecoil Shipping Ltd v Neptune EHF [2021] EWHC 1582 (Admlty)

Author: Tom Bird

This decision considers the effect of an *in rem* judgment in subsequent *in personam* proceedings.

The Facts

The proceedings arose out of a collision in July 2018 between two ships, the "POSEIDON" and the "TECOIL POLARIS". The claimant (**"Tecoil"**) was the owner of the "TECOIL POLARIS'. The first defendant (**"Neptune"**) was the owner of the "POSEIDON". The "TECOIL POLARIS" was at berth in Hull when the "POSEIDON" crashed into her. Neptune had never disputed liability for the collision.

After the collision, Neptune's insurers (**"the Insurers"**) issued a letter of undertaking (**"the LOU"**) which provided:

> "IN CONSIDERATION of your releasing and/or refraining from arresting or re-arresting at any time hereafter or otherwise detaining the 'POSEIDON' or any other vessel or property in the same or associated ownership, management, possession or control for the purpose of obtaining security in respect of your claim arising out of the above collision we hereby undertake to pay you on demand such sum or sums as may be due to you from the owners of the 'POSEIDON' in respect of your said claim either by agreement between the parties hereto or by the final unappealable judgment of the English Courts, provided always that our total liability hereunder inclusive of interest and costs shall not exceed the sum of US$200,000."

In June 2019 Tecoil commenced *in rem* proceedings against the "POSEIDON". No acknowledgement of service was filed and Tecoil applied for judgment in default. The application required evidence proving the claim to the satisfaction of the court and a public hearing of the application in open court. The hearing took place before the then Admiralty Registrar, Mr Jervis Kay QC, who gave judgment on 24 February 2020 ([2020] EWHC 393 (Admlty)). He awarded Tecoil EUR124,462 and £119,033 plus costs assessed at £105,584.50 (a grand total of around US$525,000).

The Insurers made it clear that they were not intending to make payment under the LOU on the ground that it did not respond to an *in rem* judgment. Tecoil issued an *in personam* collision claim against Neptune seeking substantially the same relief. Tecoil joined the Insurers as defendants to these proceedings.

Tecoil applied for and obtained judgment against Neptune in default of an acknowledgment of service under CPR Part 12 in the same terms as the *in rem* judgment. It then made a demand under the LOU. The Insurers rejected the demand – contending that the default judgment was not a "final unappealable judgment" within the meaning of the LOU – and applied to set the judgment aside.

The Decision

After the hearing of this application but before the Registrar had circulated a draft judgment, the parties informed the Court that they had settled the dispute. The Registrar nevertheless exercised his discretion to promulgate the part of his judgment which raised issues of wider interest.

The first issue concerned the Insurers' contention that the judgment was wrongly entered because default judgment was unavailable in a collision claim unless the party seeking judgment had either filed a collision statement of case or at least obtained an order dispensing with that requirement. Rejecting this submission, the Registrar held that an application for judgment could be made in default of an acknowledgment of service under CPR Part 12. There was no requirement to file a collision statement of case.

The more significant point arose on the Insurers' argument that the Court should set aside the default judgment under CPR 13.3 on the ground that there was a reasonable prospect of successfully defending the claim. This depended on the Insurers establishing that it would be open to Neptune to re-litigate the issues determined in the earlier *in rem* judgment. In the Registrar's judgment, however, Neptune was bound by the determinations in the *in rem* claim. At para. 30, he said:

> "This is because although Neptune were not, strictly speaking, parties to the *in rem* proceedings, they were 'at least indirectly impleaded to answer to, that is to say, to be affected by, the judgment of the Court'; see the analysis of Brett LJ in The "Parlement Belge" (1880) LR 5 PD 197 (CA) at 218. The liability to compensate was 'fixed not merely on the property, but also on the owner through the property', ibid. That is why, following longstanding practice, the owners appeared on the *in rem* claim form as nominal defendants and were described there and in other documents as 'The Owners of the Ship 'POSEIDON"; (see PD61 paragraph 3.3)."

The Registrar added that he would hold that this result would follow save, perhaps, in a case where, despite service on the ship, the owners were able to satisfy the court that they had no notice of the *in rem* proceedings.

Conclusion

This is an important decision which supports the proposition that an *in rem* judgment in a collision action can be deployed against the shipowner in later *in personam* proceedings, even if it took no part in the original claim. Shipowners and their insurers who choose not to respond to an *in rem* claim may find themselves bound by the result. This case serves as a cautionary tale.

Whether the LOU would have responded to the original *in rem* judgment remains an open question and one which – given the standard wording – may arise for determination in another case.

Tom Bird was instructed by Haris Zografakis, Rebecca Crookenden and Simon Domin of Stephenson Harwood for the Claimant.

Tom Bird is recommended as a leading junior by Chambers UK and the Legal 500 where he is variously described as "*very responsive, personable, very good with clients*", "*extremely intelligent*", "*tenacious and talented*", with "*first-class*" advocacy skills. Tom specialises in all aspects of shipping. He has acted for broad range of international clients in disputes arising out of bills of lading, voyage charters and time charters both in the Commercial Court and in arbitration. He has extensive experience of most types of claim – including unsafe ports, unseaworthiness, piracy, deviation, off-hire disputes, bunker quality/quantity claims, early/late redelivery cases – and is familiar with most standard form charterparties.

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Shipowner's Unfettered Right to collect Bill of Lading Freight

Alpha Marine Corp v Minmetals Logistics Zhejiang Co. Ltd (The M/V Smart) [2021] EWHC 1157 (Comm)

Author: Paul Toms

The question which fell to be decided by Mr Justice Butcher was whether a time charter in standard form contained an implied term that the owner was not entitled to collect freight under the Bill of Lading in certain circumstances and, if so, what those circumstances were.

The M/V Smart ran aground shortly after departing from Richards Bay. Freight under the voyage charter was still payable notwithstanding the loss of the vessel. Prior to the date for payment of freight under the voyage charter, the Owners notified the voyage charterers, who were also the lawful holder of the Bills of Lading, that freight should be paid to them under the Bills of Lading and not to the Charterers under the time charter trip. Charterers disputed the Owners' right to give such a notice. Nearly two years later a small proportion of freight was paid by the voyage charterers into escrow but then they were wound up.

The Tribunal held by reference to Wilford (which in turn relied upon comments made by Tomlinson LJ in ***The Bulk Chile*** [2013] 2 Lloyd's Rep 38) that there was an implied term which had been breached. It was not explicit from the Award what the content of the term said to be implied was and why it was said to be breached given that the Tribunal awarded the Owners the value of bunkers consumed prior to the loss of the vessel.

On a s. 69 challenge to the Tribunal's Award, Mr Justice Butcher accepted that the test for implication of terms was not met because none of the proposed terms were obvious or necessary as the charterparty did not lack commercial or practical coherence without an implied term restricting Owners' right to intervene to collect freight. In that respect, he relied heavily on the existence of a shipowner's obligation to account for freight which had long been recognised in cases such as ***Molthes v Ellerman's Wilson Line Ltd*** [1927] 1 KB 710, ***Wehner v Dene Steamship Co*** [1905] 2 KB 92 and indeed ***The Bulk Chile*** itself. Whilst he accepted that the precise basis for that obligation had not yet been subject to detailed consideration by the Courts, he observed that the existence of the obligation was not in doubt and, as Tomlinson LJ had said in ***The Bulk Chile***, it had not given rise to real problems in practice. The mischief against which the implied term was directed, namely non-payment to Charterers, was, therefore, already catered for.

He further rejected the argument that an unfettered right of a shipowner to collect freight interfered with a charterer's employment of the vessel or deprived it of the benefit of the vessel's earning capacity. Moreover, on the facts of this particular case, he stated that it was difficult to see how there could be any interference with the Charterers' rights to employ the vessel where at the time of the notice, the vessel had suffered a casualty which had brought the charter to an end.

The judgment in this case is of broad application given the time charterparty and Bills of Lading were in standard form. Whilst it may be rare for a shipowner to be moved to collect freight under a Bill of Lading where there is no default under the head time charter, there may well be cases where the unfettered right to collect freight is of real value to a shipowner, such as where it is anticipated that a future default by the charterer may occur and the due date for the payment of freight is imminent. In such a situation, it is doubtful that the shipowner would be entitled to collect freight under any of the implied terms that had been proposed by Charterers and it is certain that it would not be able to do so under the right of lien on sub-freights in clause 18 of the NYPE form.

Paul Toms was instructed by Guy Mills and Jonathan Cooke of Mills & Co Solicitors Ltd for the Claimant.

| Read the full article at www.quadrantchambers.com/news

Paul Toms is an experienced junior barrister specialising in commercial and international trade disputes. He has been recommended for many years in the Legal Directories, namely Who's Who Legal: UK Bar, the Legal 500 and Chambers UK.
His depth of experience in working with clients in the Asia Pacific region is reflected by his inclusion in the Legal 500's Asia Pacific rankings.

"Careful, considered and astute, he has an unparalleled eye for detail." (Chambers UK, 2021)

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No Deal on Jurisdiction and Enforcement – Where Does Brexit Leave Us? - Part 2
30 June 2021

No Deal on Jurisdiction and Enforcement – Where Does Brexit Leave Us? - Part 1
15 June 2021

EVER GIVEN - a physical disruptor: Part 2
6 May 2021

EVER GIVEN - a physical disruptor: Part 1
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Arrest and off-hire provisions: care in construction, and why *The Global Santosh* is not a "one size fits all" response

Navision Shipping A/S v Precious Pearls Ltd & Ors (the "Mookda Naree") [2021] EWHC 558 (Comm)

Author: Nevil Phillips

Here, the Vessel arrived at Conakry, Guinea, to discharge cargo pursuant to (i) a head charter between A and B, (ii) a sub-charter between B and C, and (iii) a sub-sub-charter between C and D.

Under both the head charter and the sub-charter, additional clause 47 put the ship off hire *inter alia* upon her being detained or arrested by any legal process, until the time of her release, "*unless such … detention or arrest [was] occasioned by any act, omission or default of the Charterers and/or sub-Charterers and/or their servants or their Agents.*". D was a "*sub-Charterer*" within the clause 47 proviso.

Under the head charter (only) additional clause 86 provided "*When trading to West African ports Charterers to accept responsibility for cargo claims from third parties in these countries (except those arising from unseaworthiness of vessel) including putting up security, if necessary, to prevent arrest/detention of the vessel or to release the vessel from arrest or detention and vessel to remain on hire. … ".*

The Vessel was arrested at Conakry by SMG, to secure a shortage claim under a sale contract asserted by SMG against D by reference to a quantity stated in bill of lading relating to earlier carriage on board a different vessel (of which D was again a sub-charterer). Thus, the only link between SMG's claim and Mookda Naree was that D was a sub-charterer in both cases.

In arbitration, tribunals (which were identical) under the head charter and sub-charter (at a hearing in which the issues under both charters were determined concurrently) determined that the Vessel was (by virtue of clause 47) on hire under the sub-charter from the time of any operative omission on the part of D to put up security in response to the arrest; that (by virtue of clause 86) the Vessel remained on hire under the head charter from the time of arrest (meaning that no separate question of off hire properly arose under clause 47 under the head charter – because the extent of clause 86 was greater than clause 47); and that B was liable to A in damages under clause 86 of the head charter (by virtue of any failure to put up security in order to release the Vessel from arrest).

The issues (on s. 69 arbitration appeals under the head charter and the sub-charter) were whether the Vessel was off hire under the charters by reason of the arrest (and, correspondingly, whether B was liable in damages to A for a breach of clause 86 of the head charter). Andrew Baker J held:

(1) As to clause 47 (upholding the tribunals' conclusion), properly construed and distinguishing ***The Global Santosh*** [2016] UKSC 20, it was not the case that, regarding the acts, omissions and defaults of sub-charterers, the proviso was confined to acts, omissions and defaults in the course of performance of their obligations as sub-charterers. Therefore, the Vessel was on hire during the arrest from the time of any operative omission on the part of D to put up security in response to the arrest.

(2) As to clause 86 (overturning the tribunal's conclusion under the head charter), that applied (on its proper construction) only to cargo claims concerning the Vessel's trading under the head charter. SMG's claim was not such a cargo claim – because it related to cargo carried on another vessel at another time. Therefore, the Vessel was off hire, and B was not liable in damages to A, under that clause. However, the off-hire period under clause 86 extended only to the time at which the Vessel went back on hire by virtue of the effect of clause 47.

Nevil Phillips was instructed by Alex Davey, Terry O'Regan, and Shereen Semnani of Birketts LLP.

Nevil Phillips' experience encompasses the entire spectrum of shipping disputes, and reflects his extensive knowledge and expertise with respect to both the contractual and practical trade/technical aspects of disputes. He is especially highly regarded for his experience and knowledge in relation to charterparty and bill of lading disputes (especially dangerous cargo cases, in which his knowledge and experience in alleged cargo liquefaction disputes is market-leading), claims arising in relation to domestic and international contracts of sale, and matters relating to the carriage of goods by road (domestic and international (CMR)) and storage.

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The availability of anti-suit relief, despite delay

Specialised Vessel Services Ltd v MOP Marine Nigeria Ltd [2021] EWHC 333 (Comm)

Author: Saira Paruk

The acknowledged starting point when seeking anti-suit injunctive relief is you must act promptly, but is that the whole story? Despite SVS waiting approximately a year to bring its claim for injunctive relief, Mr Justice Calver was prepared to grant the relief sought. His judgment highlights the factors on which a party can rely to counter an argument that there has been delay. In exercising his discretion, Calver J also considered the impact of the Defendant obtaining an injunction abroad in breach of an exclusive arbitration agreement.

Delay

The judgment reminds us that delay should not be looked at in isolation. Despite strong words in previous cases emphasising the importance of acting promptly, the presence of certain factors can ameliorate the position of tardy claimants.

Calver J's judgment sets out with some precision the factors which the Court considered justified or tempered the effect of the delay, namely that:

- the foreign proceedings had not progressed very much in the intervening period, so no prejudice had been suffered by the defendant;
- the foreign court had not engaged with the substantive merits of the case;
- any resources wasted by the foreign court had been minimal and only in relation to the jurisdictional issues;
- foreign law advice had initially suggested that there was a good chance of dealing with the matter quickly and efficiently in the foreign court, although matters had not progressed as envisaged; and
- the English Court was not being asked to second guess any decision of the foreign court.

In summary, if a party chooses not to bring a claim for injunctive relief immediately after being served with foreign proceedings in breach of an arbitration or jurisdiction clause, relief may still be granted if they can show good reason for the lack of timeliness. Parties should consider the factors set out above and, if and when an application for injunctive relief is made, ensure evidence going to the points above is provided to the court. In particular, evidence of foreign law advice that the approach taken in the foreign court was justified should be provided if at all possible.

Note, however, that as with the exercise of any discretion, these principles and factors should be taken as guidelines only. Each case will turn on its own particular facts. In this case, it was relevant that the delays experienced by the courts in Nigeria were as a result of Covid and other scheduling issues.

The anti anti-suit injunction

Calver J held that just because the Nigerian Court had granted an anti-suit injunction did not mean that the English Court should not intervene on grounds of comity. The egregious nature of the breach by MOP which resulted in their obtaining an anti-suit injunction in the foreign court, was in itself a compelling reason for the English Court to intervene. In this regard the Judge referred to and relied on the case of ***Ecom v Mosharaf*** [2013] EWHC 1276 (Comm).

Relief

In all the circumstances, including MOP's clear submission to London arbitration, the Judge granted the injunctive relief sought.

On the facts (again referring to ***Ecom v Mosharaf***), it was an appropriate case for mandatory relief. Prohibitory relief alone was unlikely to have any practical effect given the anti-suit injunction in the foreign court. In addition, the declaratory relief sought was granted, on the basis that it would assist SVS (i) if MOP did not obey the injunction and (ii) in terms of enforcement.

Saira Paruk was instructed by Ben Bruton of Winston Strawn in conjunction with Maria Borg Barthet and Alistair Johnston of CJC.

| Read the full article at www.quadrantchambers.com/news

Saira Paruk is an experienced commercial practitioner with particular experience in shipping, commodities and jurisdictional disputes. She regularly appears in the Commercial Court and in arbitration both as sole and junior counsel. She has extensive experience of a broad range of shipping and commodities disputes.

"She is very bright, remains steadfastly calm under pressure, great on her feet and very pleasant to work with." (Legal 500 Asia Pacific, 2021)

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'EVER SMART" collision with *'ALEXANDRA 1"*: The Crossing and Narrow Channel Rules

Authors: Simon Rainey QC & Nigel Jacobs QC

On 19 February 2021 the Supreme Court delivered a seminal judgment in the first appeal in a collision to come before the highest court since the mid 1970s and overturned the decisions of both Mr Justice Teare [2017] 1 Ll.R. 66 and of the Court of Appeal [2019] 1 Ll.R. 130.

On 11 February 2015 the outbound *Ever Smart,* a large container ship, collided with the inbound *Alexandra 1*, a VLCC, within the pilot boarding area, just outside the dredged entrance/exit channel to the port of Jebel Ali. The appeal concerned two questions relating to the application of the "crossing rules" as set out in rules 15 – 17 of the International Regulations for Preventing Collisions at Sea 1972.

The first question was whether the crossing rules are inapplicable or are to be disapplied where an outbound vessel (*Ever Smart*) is navigating within a narrow channel and has a vessel (*Alexandra 1*) on a crossing course approaching the narrow channel with the intention of and in preparation for entering it. This question concerned the inter-relationship between the crossing rules and the "narrow channel rules" (rule 9).

The Supreme Court identified three broad groups of cases. Group 1 vessels approaching the entrance of the channel, heading across it, on a route between start and finishing points unconnected with the narrow channel and not intending or preparing to enter. Group 2 are vessels which are intending to enter, and on their final approach to the entrance, adjusting their course to arrive at their starboard side of it. ….. Group 3 are approaching vessels which are also intending and preparing to enter, but are waiting to enter rather than entering. The Court held that the crossing rules would clearly apply in a Group 1 case. The rules would not apply in relation to Group 2 because the approaching vessel is both preparing and intending to enter it, and already shaping on her final approach". The rules would also to apply to a Group 3 waiting vessel, or any vessel approaching the channel intending to enter it, which has yet to shape her course to enter it on her starboard side of it. The rules therefore applied to the *Alexandra 1*.

The second question was whether it is necessary for the putative give-way vessel to be on a steady course for the crossing rules to be engaged.

The Supreme Court held that neither the give-way vessel nor the stand-on vessel had to be on a steady course for the crossing rules to be engage]. It held that two crossing vessels may be approaching each other and remain on a steady bearing, (with consequent risk of collision) without either vessel being on a steady course and that the engagement of the crossing rules is not dependent upon the give-way vessel being on a steady course. If it is reasonably apparent to those navigating the two vessels that they are approaching each other on a steady bearing (over time) which is other than head-on, then they are indeed both crossing, and crossing so as to involve a risk of collision, even if the give-way vessel is on an erratic course. In such a case, unless the overtaking rule applies, the crossing rules will apply. Although it was not in issue on the facts, the Supreme Court also considered that the stand-on vessel need not be on a steady course for the engagement of the crossing rules.

The Supreme Court emphasised that the Collision Regulations must be capable of implementation by all vessels as defined in the Rules, irrespective of their technological capabilities.

Simon Rainey QC and Nigel Jacobs QC represented the successful Ever Smart Interests. They were instructed by Ince Gordon Dadds LLP (Christian Dwyer, Sophie Henniker-Major and James Drummond) in consultation with Stann Law Limited (Faz Peermohamed).

| Read the full article and watch the 5-minute briefing at www.quadrantchambers.com/news

Marsden and Gault on Collisions at Sea 15th Edition Published

Quadrant Chambers is delighted to congratulate editors Prof. Andrew Tettenborn of Swansea University, and John Kimbell QC of Quadrant Chambers, on the latest edition of Marsden and Gault on Collisions at Sea, published by Wildy & Sons Ltd.

The new edition contains substantial commentary on recent legislation across the board in shipping law from some of the world's leading shipping law authors and academics. Marsden and Gault forms part of the highly respected British Shipping Law Series. It serves as an in-depth guide to the specialist and self-contained area of Collision and Loss in maritime law examining recent cases and convention developments.

Simon Rainey QC is regarded as the foremost shipping and international trade QC at the English Bar today. He has been ranked alone in the unique category of "Star Individual" (a special category, ranked above Band 1) for 'Shipping and Commodities' by Chambers & Partners UK in 2015, 2016, 2017, 2018, 2019, 2020 and now again in 2021. Simon was awarded the title of 'Shipping Silk of the Year' by both Chambers and Partners UK and Legal 500 UK Awards in 2017. He was also shortlisted for 'Shipping Silk of the Year' at the Chambers UK Bar Awards 2018, for 'Shipping Silk of the Year' at the Legal 500 UK Awards 2019 and again for 'Shipping Silk of the Year' at the Legal 500 UK Awards 2020.

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Nigel Jacobs QC is a specialist in shipping, insurance, commodity and commercial disputes. His work covers the full range from casualty work (collisions, salvage, unsafe port and limitation) through to disputes in relation to commodities, marine insurance, joint ventures, guarantees, and letters of credit, as well as "traditional" charterparty, carriage of goods by sea and contractual claims. Nigel is consistently ranked as a 'Leading Silk' in Chambers UK, Chambers Global and The Legal 500 directories.

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Guidance in relation to discharge obligations and delay
THE *"SEA MASTER"* [2021] 1 Lloyd's Rep 500

Author: John Russell QC

The voyage charterers of the Vessel "***SEA MASTER***" got into severe financial difficulty during the course of the voyage. This led to a prolonged delay in discharge of part of the cargo, as the charterers' financing bank sought to find an alternative buyer.

Demurrage accrued, but the charterers were unable to pay. The shipowners therefore claimed demurrage, or in the alternative damages, from the receivers and the financing bank, under the relevant bill of lading contracts.

On the hearing of preliminary issues before the arbitral tribunal, and it being assumed that the receivers and/or the bank were potentially liable under the bills, the owners argued that:

» On a proper construction of the voyage charterparty, as incorporated into the bills, the receivers and/or the bank were liable for demurrage; alternatively

» The receivers and/or the bank were in breach of implied terms (1) to take all necessary steps to enable the cargo to be discharged and delivered within a reasonable time; and/or (2) to discharge the cargo within a reasonable time.

The tribunal held in the receivers' / bank's favour that:

» As a matter of construction, the only party liable for demurrage was the voyage charterers. The wording of the voyage charterparty was not to be manipulated so as to make the bill of lading holder liable in demurrage.

» Neither of the alleged terms could be implied.

There was no appeal in respect of the demurrage/ construction issue, but the owners obtained permission pursuant to s69 of the Arbitration Act 1996 to appeal in respect of the implied terms issue.

In a robust judgment handed down in July 2020 HHJ Pelling QC dismissed the owners' appeal.

In relation to the second proposed term, and applying the principles discussed in T***he Jordan II***, the judge held that the incorporated terms from the charterparty were not sufficient to shift the obligation to discharge the cargo from the owners to the charterers or cargo interests.

The relevant wording (from an amended NORGRAIN form) was:

> *"10(a) Cost of loading and discharging … Cargo is to be discharged free of expense to the vessel …*
> *11 Stevedores at Loading Port(s) and Discharging Port(s) …*
> *Stevedores at … discharging port(s) are to be appointed and paid for by Charterers/ Receivers*
> *In all cases, stevedores shall be deemed to be the servants of the Owners and shall work under the supervision of the Master."*

The judge held that clause 10 shifted the *cost* of discharging to the charterer/ cargo interests, *but not responsibility for performance* of discharge itself. The first sentence of clause 11 was one way in which the costs would be shifted, but again did not shift responsibility for performance. The second sentence of clause 11 put it beyond doubt that the owners remained responsible for the performance of discharge.

The decision therefore provides a useful illustration of the principle that the costs of cargo operations can be shifted from the owners, without necessarily shifting the responsibility for performing those operations.

However, the judge held that the second implied term would have failed, even if responsibility for discharge had been transferred to cargo interests: there was no necessity to imply such a term, since the demurrage regime put responsibility for delay in discharge solely on the charterers. The owners' remedy for delay was demurrage. The owners took the risk of the charterers' insolvency.

This is a more problematic analysis (albeit *obiter*), and my need to be reconsidered in future cases. The concept of there being an obligation to perform a task, but no time limit at all within which that task is to be performed, not even the backstop of a reasonable time, is one that is not entirely easy to comprehend.

The judge also rejected the first implied term. He held that discharge and delivery were not collaborative processes. The owners could unilaterally discharge the cargo and offer it for delivery, and if the cargo interests refused to take delivery the owners could warehouse it and charge the cargo interests with the costs. Therefore, again, there was no necessity to imply the term contended for.

This part of the judgment re-emphasises that necessity is the touchstone of implication of terms.

Overall, the case stands as a warning to shipowners that unless the charterparty terms that are incorporated into a bill provide for receivers, as well as charterers, to be liable for demurrage, it will be the shipowners who bear the risk of insolvency of the charterers, and they are unlikely to have redress against other cargo interests.

John Russell QC was instructed by Michael Buisset and Caroline West of HFW Geneva for the successful receivers/ bank.

John Russell QC is an experienced and determined commercial advocate and has acted as lead Counsel in numerous Commercial Court trials, international and marine arbitrations and appellate cases, including two successful appearances in the Supreme Court, including the landmark shipping decision in *Volcafe v CSAV*. He has also appeared as counsel in inquests and public enquiries.

John was named Shipping Silk of the Year at the Legal 500 UK Awards 2020 and the Chambers and Partners Bar Awards 2020. He was also named number one in the Lloyd's List Top 10 Maritime Lawyers of 2020.

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Supreme Court grants permission

Alize 1954 v Allianz Elementar Versicherungs AG (The "CMA CGM LIBRA") [2020] EWCA Civ 293

Author: John Russell QC & Benjamin Coffer

The Supreme Court has heard the shipowners' appeal from the decision in ***Alize 1954 v Allianz Elementar Versicherungs AG (The 'CMA CGM LIBRA")*** [2020] EWCA Civ 293. The appeal concerns the legal test for unseaworthiness, the nature and limits of the carrier's non-delegable obligation to exercise due diligence, and the consequences of a defective passage plan. John Russell QC and Benjamin Coffer appeared for the respondent cargo interests.

The case arises out of the grounding of the CMA CGM LIBRA, a 6,000 TEU container ship, while leaving the port of Xiamen. The grounding occurred because the ship's chart failed to record a warning that depths shown on the chart outside the fairway were unreliable and waters were shallower than recorded on the chart. The Court of Appeal upheld the decision of Mr Justice Teare that the defect in the chart rendered the vessel unseaworthy, and that the failure of the crew to mark the required warning on the chart was a failure to exercise due diligence attributable to the owners.

The owners challenged the decision of the Court of Appeal on the basis that the crew's decision as to what to mark on the chart was a navigational decision rather than an "attribute of the ship", and that it was therefore incapable of making the ship unseaworthy. Alternatively, the owners argued that the failure to exercise due diligence on the part of the crew occurred outside of the owners' "orbit of responsibility". The owners' application for permission to appeal was supported by the International Group of P&I Clubs, who argued that the judgment of Teare J had led to "a marked increase in cargo interests alleging unseaworthiness on the basis of navigational decisions". The International Group also sought to intervene in the appeal in support of the owners' position, but the proposed intervention was successfully opposed by the cargo interests.

The appeal took place in July 2021. The Supreme Court's judgment is awaited.

John Russell QC and Benjamin Coffer were instructed by Jai Sharma, John Reed and Emma Rice of Clyde & Co LLP.

Court of Appeal grants permission

Farrer v Holyhead Marina [2020] EWHC 1750 (Admlty)

Author: Benjamin Coffer

The Court of Appeal has granted permission to appeal from the decision of Mr Justice Teare in ***Farrer v. Holyhead Marina*** [2020] EWHC 1750 (Admlty). The Court will therefore consider whether the Admiralty Judge was correct to hold that a marina constitutes a "dock" for the purposes of section 191 of the Merchant Shipping Act 1995.

Granting permission, Lord Justice Flaux accepted that the appeal on that point had a realistic prospect of success, and considered that it was anyway of importance to the marine leisure sector and insurers. The Lord Justice declined to grant permission for a proposed appeal concerning the area over which the marina "discharges any function" within the meaning of section 191(2).

Benjamin Coffer was instructed by Emma Rice of Clyde & Co for the Claimant, before the Admiralty Judge, and with Robert Thomas QC for the permission to appeal application. Nigel Cooper QC was brought in to lead James Watthey on behalf of the appellant yacht owners for the permission to appeal application. The appeal is likely to be held at the end of October 2021.

Benjamin Coffer's broad international commercial practice has a particular emphasis on commodities, insurance / reinsurance and shipping. He appears as sole and junior counsel in the Court of Appeal, the Commercial Court and the London Mercantile Court, and before arbitral tribunals under the rules of many different international organisations including the LMAA, the LCIA, the ICC, the SIAC, the HKIAC, the Swiss Chambers' Arbitration Institution, FOSFA and GAFTA. He was named Shipping Junior of the Year 2019 at the Chambers & Partners Bar Awards and was shortlisted for Shipping Junior of the Year for the Legal 500 UK Awards 2020.

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'Shipped in apparent good order and condition" Who is representing what, and to whom?

The "TAI PRIZE" [2021] EWCA Civ 87

Author: John Russell QC

The CA decision in The ***'TAI PRIZE"*** [2021] EWCA Civ 87, recapitulates well established principles in relation to the representations that are made, or are not made, by the cargo descriptions in bills of lading, but flags possible new arguments for the future. The arbitrator made the following findings/ non-findings:

- The cargo, of Brazilian soya beans, on shipment suffered from inherent vice (moisture content/ heat damage) and was not in actual good condition.
- The damage was reasonably visible to the Shippers of the cargo pre-shipment as they could have inspected the cargo.
- There was no finding that the Shippers in fact knew that the cargo was not in good condition.
- The pre-existing damage was not reasonably visible to the Master and crew. The Master could have identified the poor condition of the cargo if he had regularly interrupted loading to inspect the beans, but this would not have been the usual loading procedure at the loadport.
- The Shippers/Charterers presented a draft Bill of Lading whichsaid that the cargo was in apparent good condition.
- The Master signed the Bill of Lading in those terms.
- The cargo arrived in China in a damaged condition.

Headowners were held liable to receivers in Chinese proceedings in respect of the damaged cargo. They claimed a contribution from Disponent Owners, who settled that claim.

Disponent Owners then sought to recover from Charterers.

The arbitrator found for Disponent Owners, finding:

- First, that the cargo was not in apparent good order and condition when shipped
- Secondly, there an implied warranty made by Shippers/ Charterers that the statements in the draft Bill of Lading presented for signature were true, because the Shippers could reasonably have ascertained the true facts whereas the Master could not. The Charterers were thus in breach of warranty.

The Award was overturned by HHJ Pelling in the Commercial Court, and his decision was upheld by the Court of Appeal. The key holdings in the Court of Appeal were as follows.

First, for the purposes of the Bill of Lading, the cargo was in apparent good order and condition. Applying ***'The David Agmashenebeli"*** [2003] 1 Lloyds' Rep 92:

- A statement in a bill of lading as to the apparent good order and condition of the cargo refers to its condition, as would be apparent on a reasonable examination, by the Master, "so far as met the eye".
- A reasonable examination depends on the circumstances prevailing at the loadport. The Master is not required to disrupt normal loading procedures.
- What matters is what would be apparent to the Master or other servants of the carrier on loading, not what might be apparent to someone else, such as the shipper, or at some other time.

The arbitrator's finding that the cargo was not in apparent good condition was therefore wrong in law.

Secondly, the presentation, by Shippers/ Charterers, of a draft Bill of Lading for signature, did not constitute a warranty by Charterers that the facts stated in the draft Bill were true. It was merely an invitation by the Charterers to the carrier to make a representation to that effect, by signing the Bill.

The decision itself is relatively uncontroversial. However, some *dicta* raise interesting questions which will arise on different facts (for example, if the shipper has actual knowledge of the inherent vice).

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Abuse of process issue estoppel applies equally within the same arbitral proceedings. No second bites!

Daewoo Shipbuilding & Marine Engineering v Songa Offshore Equinox Ltd [2020] EWHC 2353 (TCC)

Author: Simon Rainey QC

A claimant seeks a preliminary issue on a question of construction. It states that it accepts that if the point is decided against it, then that will be the end of all claims by it in respect of the project in question. The other party on this basis agrees and the tribunal makes a consent order. The claimant loses the preliminary issue and leaves it too late for a s.69 appeal.

Can it then amend to run a different legal case on more or less exactly the same facts complained of, which it could have run in the alternative to its primary case, if wrong on its primary case on construction? Can it resist reliance on *res judicata* on the basis that that principle cannot apply to amendments in the same set of proceedings as those in which the preliminary issue decision was made? Or can the other party preclude the claimant from re-opening any claim on those matters, and, in addition, to defending its counterclaim by seeking to rely on the matters as defences?

Indeed can the other party contend that a binding agreement came into effect concerning the preliminary issue which meant that the claimant had contracted out of its rights (if any) to make any other claims if it lost on the issue?

These stark facts arose in ***Daewoo Shipbuilding & Marine Engineering (DSME) v Songa Offshore Equinox Ltd*** [2020] EWHC (TCC). The Court (Jefford J.), dismissing DSME's double-barrelled s. 69 and s.68 Arbitration Act 1996 applications, held that DSME was estopped *per rem judicatam* from trying to relitigate matters which it could and should have raised before, that it made no difference that this all took place in the same set of proceedings rather than in two separate sets of proceedings and that this preclusion extended to relying on the same matters not only as claims in their own right but also as defences to the respondent Songa's counterclaims.

The judgment contains a detailed and valuable analysis of the circumstances in which it will be an abuse of process to seek to raise new arguments in the same proceedings.

Jefford J. concluded that there was no principled basis for the contention that ***Henderson v Henderson*** estoppel could not apply within the same proceedings or to different stages and determinations within a single set of proceedings [128].

Simon Rainey QC was, instructed by David Leckie and Tom Roberts of Clyde & Co LLP for Songa Offshore Equinox Ltd.

| Read the full article and watch the 5-minute briefing at www.quadrantchambers.com/news

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Arbitral Appeals under s.69... "Question of Law" - No Second Bites (Round 2)

CVLC Three Carrier Corp v Arab Maritime Petroleum Transport Company [2021] EWHC 551 (Comm)

Author: Simon Rainey QC

The claimant Owners chartered two vessels to the Charterers. The defendant, AMPTC, gave two guarantees, as consideration to the Owners for entering into the charterparties with the Charterer. AMPTC stood as primary obligor under the Guarantees. The Owners terminated the charterparties on the grounds of alleged breach by the Charterers. The Owners commenced arbitration against AMPTC, claiming under the guarantees to recover the losses suffered as a result of the Charterers' breach. In support of their claim against AMPTC, the Owners arrested an AMPTC vessel as security for their claims under the guarantees. AMPTC sought a declaration that it was an implied term of the guarantees that the Owners would not seek additional security in respect of the matters covered by the guarantees. The Arbitrator found in favour of AMPTC, considering that because the guarantees had been given in consideration of the Owners contracting with the Charterers it was to be inferred that the guarantees were considered as absolute security with none other available.

The Owners successfully appealed under s. 69 of the Arbitration Act 1996. The decision of Cockerill J. is noteworthy on two levels. First, on implication of terms, the Court conducted a careful analysis of (a) what the term found to be implied in truth was and (b) what the nature of the agreement in which it had been introduced was.

As to (b), while in certain cases, the implied terms might turn on the particular facts in a case, here the guarantees were not generic or *ad hoc*, but were in very typical 'primary obligor' terms, if the arbitrator were right, then such a term would feature commonly in many guarantees, including ones where the guarantor contracts as primary obligor and does so (as stated in the guarantees) in consideration for the beneficiary of the guarantee contrcating with a another party, whose obligations are being guaranteed. That had never been the case.

As to (a), the arbitrator failed to analyse the nature of the term sought to be implied and had confused its effect. Where A has a claim against B, it is entitled to seek security for that claim in any appropriate jurisdiction unless he has contracted out of that basic common law right. Accordingly, the alleged implied term was an *exclusion* clause, which set the threshold even higher: even *express* exclusions are closely scrutinised when they purport to exclude a basic common law right. Further, it was wrong to say that the Owners were being given 'double security'. They had security for the Charterers' obligations by way of the guarantees. If AMPTC failed to honour its separate obligations the right to seek security by arrest etc was nothing to do with the Charterers' obligations but was in respect of the separate AMPTC obligations.

Second, on s.69 practice and procedure, the Court considered the attempt by AMPTC to re-open on the full appeal points which it had taken at the s.69 permission to appeal stage and on which it had failed. (a) Could this be done and when? (b) How was the "question of law" which a tribunal was asked to decide to be identified?

As to (a), the Judge accepted that the decision at the permission stage was not in law necessarily finally binding, but rejected the suggestion that this meant that it was always open to respondent to seek to go back over what it had lost on at that stage. That argument was "a novel one, and one which is not reflected in the way in which appeals have been conducted in this Court for the last 25 years". While it is not impossible to revisit the various component parts of the permission decision, "there will have to be highly unusual circumstances justifying this course". To allow a party free rein "would be consistent neither with the policy of the 1996 Act, nor with the overriding objective."

As to (b), the Court took a pragmatic and anti-technical approach, looking at what in real terms was the question of law which the parties had left the arbitrator to decide: what, in her words, was "the macro question"? It was not necessary that the question must have been asked in exactly the form in which it is now posed at the section 69 stage. She gave a useful practical test: "What is necessary is that the question of law is inherent in the issues for decision by the tribunal. It is often necessary to strip away the accretions of case specific drafting to arrive at the real issue of law."

Simon Rainey QC appeared for the successful appellant, leading Gavin Geary and instructed by Nick Austin and Charles Weller of Reed Smith.

Anti-suit Injunctions against Cargo Receivers: A Current Vogue?

The 'ULUSOY-11' [2021] 1 Lloyd's Rep. 177; *The 'STAR MOIRA'* [2020] EWHC 3657 (Comm)

Author: Gemma Morgan

The last few months has seen a rash of cases involving cargo receivers under bills of lading bringing proceedings in the place of delivery under those bills, usually their home court. Those bills of lading have all incorporated English law and London arbitration clauses. The Commercial Court has therefore considered on a number of recent occasions the correct approach to the grant of an antisuit injunction in those circumstances.

In each case the starting point was the well-known principle in ***The Angelic Grace*** [1995] 1 Lloyd's Rep.87 that an anti-suit injunction will be granted to restrain the bringing of foreign proceedings in breach of an agreement to litigate or arbitrate contractual disputes in this jurisdiction and provided that the application for the injunction has been brought promptly and before the foreign proceedings are too far advanced, unless there are "*strong grounds*" not to do so.

In the 'ULUSOY-11' the Claimant shipowner ("Owners") time-chartered the vessel to charterers ("the Head Charter"), who in turn sub-chartered here for time charter trip from Brazil to China ("the Sub-Charter"). Both of the Charters contained an English law and London arbitration clause. The Claimant issued a bill of lading ("the Bill") for the carriage of a cargo of soya beans from Brazil to China and the defendant cargo receivers ("Receivers") became lawful holder of the Bill. During discharge of the cargo in China damage was observed and the vessel was arrested to obtain security for the cargo claim in the usual way by the Receivers. Owners' P&I Club put up security and the vessel was released but, thereafter, the Receivers commenced substantive proceedings in the Qingdao Maritime Court against Owners, in respect of the cargo damage.

Owners promptly sought an anti-suit injunction in the Commercial Court to restrain the pursuit of those proceedings by Receivers on the basis that the Bill provided that: "*All terms and conditions, liberties and exceptions of the charter party dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.*"

Bryan J held that Owners were entitled to the injunction sought. He found that: (i) the Head Charter was incorporated into the Bill applying the "*general presumption… that it is indeed the head charter which will normally be incorporated into the bill of lading…[h]owever, this will not invariably be so*" (applying ***The San Nicholas*** [1976] 1 Lloyd's Rep.8); (ii) the receivers were the lawful holders of the bill of lading and therefore bound by the arbitration clause (applying ***The Kishore*** [2016] 1 Lloyd's Rep.427); (iii) the Qingdao proceedings were a clear breach of the arbitration agreement because they brought a claim for cargo damage arising out of carriage under the Bill; and (iv) there were no strong reasons not to grant the injunction.

A novel point taken by Receivers was that it ought not to be English law that governed the question of incorporation of the arbitration clause into the Bill but Chinese law (and under Chinese law the arbitration clause of the Charterparty would not have been incorporated into the Bill). The argument run was that under Article 10(2) of the Rome I Regulation on the Law Applicable to Contractual Obligations, the law of the country of a party's habitual residence (here China) could be relied upon to determine the validity of a contractual term where "*it appears from the circumstances that it would not be reasonable to determine the effect of its conduct*" in accordance with the putative law of the contract, which is the law that by Article 10(1) usually governs the validity of a contractual terms.

Giving detailed reasoning Bryan J dismissed Receivers' argument. He found that Article 10(2) did not apply because it was reasonable and in accordance with the ordinary expectations of international trade to judge the effectiveness of the incorporation into the bills of lading of the charterparty law and arbitration clause by reference to the law specified; a bill of lading holder has freedom of choice when concluding a sale contract on particular terms or when taking delivery of a cargo carried under a bill of lading whether or not to do so, but if he does so then he does so on the terms of the bill of lading, which here purported to incorporate charterparty terms.

On very similar background facts, against the same defendant cargo receivers, in ***The Star Moira*** the Commercial Court granted a final antisuit injunction against the cargo receivers for their bringing of Chinese proceedings in breach of the London arbitration clause. In this case, however, the owners had sought to challenge the Chinese court's jurisdiction before the Chinese court before seeking an injunction in England and the Chinese court had already ruled that it did have jurisdiction. The question for the English court was whether the Chinese ruling was a 'strong reason' not to grant the injunction.

Mr Justice Calver treated this as a question of delay and the promptness of the application and considered the authorities in detail. He held that the important issues were the extent to which the foreign proceedings had progressed during any delay in seeking antisuit relief, rather than the length of any delay itself, and whether the foreign proceedings had been allowed to progress on the merits, because that would be a "*powerful factor*" against the grant of an injunction. The Judge found that on the facts that although there was a period of some 8 weeks from the date when the owners had learned of the Chinese proceedings to when they made the application for the injunction, that was not a sufficiently serious delay. Further, he found that the fact that the Chinese court had ruled in favour of its own jurisdiction was not a bar to the grant of an injunction, although as each stage of the foreign proceedings were reached, more time and costs would be wasted by the abandonment of those proceedings consequent upon an anti-suit injunction granted by the English court, and the less desirable the grant of such an injunction would become. A final anti-suit injunction was granted.

Gemma Morgan appeared for the successful Claimant shipowners in The "ULUSOY 11", instructed by Jonathan Green and Bethany Hammerton of Mills & Co, and for the successful Claimant shipowners in The "STAR MOIRA", instructed by Dimitri Vassos and Constantinos Bitounis of HFW Piraeus.

Gemma Morgan is a sought after junior with instructing solicitors and lay clients. She acts in a range of commercial disputes particularly in the fields of shipping, commodities, energy/offshore and construction (shipbuilding). She provides an efficient and thorough service and combines accurate legal analysis and advice with practical commercial and tactical awareness. She has extensive experience of heavy and technically-complex cases, in particular those in the shipping and energy sectors, and enjoys working well as part of a team.

"A star junior, extremely intelligent and focused on the detail of every case" (Legal 500, 2021)

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Letters of Indemnity – Safety Nets or Perilous Traps?

Tenacity Marine Inc v NOC Swiss LLC [2020] EWHC 2820 (Comm), [2020] EWHC 3214 (Comm)

Author: Chirag Karia QC

It is trite law that "*a shipowner who delivers without production of the bill of lading does so at his peril*" (***Sze Hai Tong Bank, Ltd. v. Rambler Cycle*** (1959) (PC), per Lord Denning). Nevertheless, shipowners, particularly those transporting oil and oil products, do precisely that hundreds, if not thousands, of times every day.

Why do they take such obvious risks, against which the English courts have repeatedly warned them? Because it is usually not possible for the original bills of lading ("OBLs") to work themselves through the banking system to the discharge port, so as to be available for presentation there to secure delivery, by the time the carrying vessel completes its voyage from the load port to that discharge port; and it would be expensive to keep vessels waiting on demurrage/ accruing hire and deprive receivers of their much-needed cargo whilst the bills of lading are awaited. Shipowners therefore invariably agree in their charterparties to deliver oil and oil product cargoes without production of OBLs against a letter of indemnity ("LOI") from their charterers under which those charterers not only agree to indemnify the owners against all losses arising from such delivery but, crucially, to lodge sufficient reasonable security to prevent any threatened arrest of the vessel for misdelivery by any claimant holding the OBLs.

Despite repeatedly warning shipowners against this practice, the English courts have been steadfast in enforcing LOIs to their fullest extent, recognising the crucial role they play in international trade. The latest authorities on the issues that arise in such cases are the series of decisions of the Commercial Court in ***Tenacity Marine Inc v NOC Swiss LLC***. In that case, the owners of the MT "TENACITY" had discharged and delivered a cargo of diesel to receivers in the UAE, Gulf Petrochem FZC ("GP"), against an LOI provided by their time charterers, NOC Swiss LLC ("NOC"). Upon serious financial irregularities being discovered in GP's business in the UAE, GP failed to reimburse its financing bank, Natixis Bank, which held the OBLs; being out of pocket to the tune of US$11.5 million, Natixis threatened to arrest the vessel.

Upon the owners' urgent application for a mandatory injunction requiring NOC to lodge security in approximately US$11.5 million plus interest and costs to prevent the threatened arrest by Natixis, the Court reiterated English law's strong policy favouring enforcement of LOIs: *"the obligations imposed on the indemnifier under [an LOI] are amenable to enforcement by a mandatory injunction, with damages being an inadequate remedy,"* and the risk of injustice in not granting the injunction being the *"final metric against which the application should be judged"* ([2020] EWHC 2820 (Comm)).

However, counsel for NOC had argued that, regardless of the clarity of the terms of the LOI and undeniability of the NOC's breach of the LOI in failing to provide the required security, since an injunction was an equitable remedy punishable by contempt of Court for breach, the court could not make the requested order because NOC lacked the necessary funds: a court could not – or at the very least should not – order a party to do that which it is impossible for it to do. Accepting the force of that argument, the court stayed its injunction and fixed a return date to enable NOC to adduce evidence of its financial means.

For the owners, the sting in the tail came when NOC managed in that return hearing to persuade the court that it had no available funds in excess of the US$250,000 it had already lodged as security, and certainly nothing near the US$11.5 million plus interest and costs required to prevent the arrest of the vessel by Natixis. With extreme reluctance, the court concluded that, "*as to the notion that [NOC] can comply with an obligation to provide security for $11.5million odd, it is clear that it cannot*" ([2020] EWHC 3214 (Comm)).

The exceptional nature of that decision in favour of the breaching time charterer (NOC) is highlighted by the later decision in ***Scorpio LR2 Pool Ltd v Winson Oil Trading Pte Ltd*** [2021] EWHC 1305 (Comm) in which Butcher J found, on the evidence before him, that the time charterers had failed to satisfy the heavy burden of proving that it was impossible for them to provide the required security.

Chirag Karia QC acted for the successful time charterers, and was instructed by Richard Strub and Luke Fittisof HFW Dubai.

Chirag Karia QC is a leading commercial silk with a broad commercial, international arbitration, energy, shipping and international trade practice. He appears regularly in the Commercial Court, the Court of Appeal and international arbitrations. He is listed as a 'Leading Silk' for Shipping and Commodities disputes by Chambers UK, Chambers Global, The Legal 500 UK, The Legal 500 Asia Pacific and Who's Who Legal and for Commercial disputes by Legal 500 EMEA. He has been described in directories as: *"... someone who I am always happy to have on my side rather than against me."* (Legal 500, 2021); *"An extremely intelligent, highly erudite and tactically astute barrister"* (Legal 500 Asia Pacific, 2020); and *"An excellent QC who picks the right points and handles complex disputes well."* (Legal 500, 2021)

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Clarification for necessaries claimants… If clarification were necessary

Trans-Tec International SRL, World Fuel Services (Singapore) Pte Ltd v "the Columbus" and "the Vasco da Gama" [2020] EWHC 3443 (Admlty)

Author: Paul Henton

Many practitioners will be familiar with this ongoing litigation, in which various in rem claims are proceeding against the sale proceeds of two cruise ships (*Columbus* and *Vasco da Gama*) being case-managed together.

In the second of three reported decisions so far, the Court considered a novel question on the definition of "*a claim in respect of goods or materials supplied to a ship for her operation or maintenance*" within the meaning of s. 20(2)(m) of the Senior Courts Act 1981.

The claimants were bunker suppliers within the World Fuel Services Group. Whilst the base price for the bunkers admittedly fell within the statutory wording, a rival group of creditors (P&O/ Carnival) took issue with the characterisation of further claims for contractual interest, late payment fees, and a contractual indemnity for collection costs (a total claim of c. US$4.5 million).

At first blush it is hard to see what else these claims could be "*in respect of*", if not the underlying supply of bunkers to the Vessels. However, the point was not directly covered by authority. The judgment upholds the WFS Group argument that the Court should not "*unpick*" or "*slice and dice*" the contractual supply terms. The main reasons were as follows:-

(i) The words "*in respect of*" are "*wide words which should not be unduly restricted*": the ***Edinburgh Castle*** [1999] 2 Lloyd's Rep 362. There is no remit for placing an unduly narrow or restricted gloss on those words;

(ii) The WFS Group claims were materially similar to those upheld in the ***Kommunar*** [1997] 1 Lloyd's Rep 1: which concerned claims on a general account (including for contractual interest), by parties advancing finance for bunkers rather than the physical supply.

(iii) The Hong Kong case of the ***Oriental Dragon*** HCAJ 162/2012 (cited by P&O/ Carnival), was distinguishable in that the claimants there supplied a variety of goods and services, each of which needed to be considered separately against the statutory language. The present case concerned a single commodity: bunkers.

(iv) The contrary construction would mean bona fide bunker suppliers having to bring two separate claims: one *in rem* against the ship/her sale proceeds, the other *in personam* against the (potentially impecunious) operator.

(v) Ultimately the administrative fees and contractual interest were incidents of the bunker supply contract, which followed from the non-payment of the price. The collection costs were at a further remove, but no less part of the contractual bargain. They should not be treated as distinct claims for the purposes of s. 20(2)(m)

The decision provides timely guidance on the interpretation of s. 20(2)(m), particularly in the depressed cruise ship market where arrests are increasingly common.

Bunker suppliers can take comfort that they are not left having to pursue impecunious operators *in personam* to enforce aspects of their contractual remuneration structures which their competitor-claimants do not like.

For claimants under multiple-supply contracts (as in ***Edinburgh Castle*** and ***Oriental Dragon***), each underlying supply must still be considered separately to establish whether or not it falls within the statutory language. Questions of causation/apportionment may also arise e.g. as to whether particular collection costs or late fees were incurred "*in respect of*" the bunker supply, or else in respect of the non-necessaries part of the claim.

It remains to be seen whether a similarly broad approach will be taken in claims under other sub-sections of s. 20(2), where different connectives are in use- such as "*for*", "*arising out of*", "*in the nature of*" and so on. Watch this space!

Paul Henton was instructed by Charles Weller and Nick Wright of Reed Smith for the claimant companies, who were successful on all components of their claims.

| Read the full article at www.quadrantchambers.com/news

Paul Henton is an experienced Commercial practitioner recommended in the directories in four distinct practice areas: Shipping, Energy, Commodities/International Trade, and Aviation. He is recommended in Chambers UK, Chambers Global, Legal 500 UK, Legal 500 Asia Pacific and Who's Who Legal. Most recently he was described as "*Extremely bright, diligent and reliable*", possessing "*A unique ability to absorb a large amount of information and turn it into an effective solution*"(Chambers UK 2020), "*An excellent member of the team [who] gets to grips with the technical issues quickly and is level-headed under pressure.*" (Chambers UK/ Global- Shipping & Commodities 2019); "*Quick to respond, clear, bright and to the point*" (Legal 500 2020- Commodities); "*Hardworking, pragmatic and cool under pressure*" (Legal 500 2020 – Energy).

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Sir Nigel Teare joined Arbitrators at 10 Fleet Street

Arbitrators at 10 Fleet Street was honoured to welcome Sir Nigel Teare as an Arbitrator in October 2020. Sir Nigel sat as a judge of the Queen's Bench Division from 2006 until his retirement from the High Court bench on 30 September 2020. He was the Judge in charge of the Commercial Court and the Admiralty Judge. He is now available to accept appointments as arbitrator.

Sir Nigel has had an exceptional career first as counsel and then as a High Court Judge. He has decided many of the most high-profile cases of recent years across many different business sectors.

Most recently, in 2019-2020 he decided which of two claimants to the Presidency of Venezuela was entitled to give instructions to the Bank of England regarding Venezuela's gold reserves (*Deutsche Bank and Bank of England v Central Bank of Venezuela* [2020] EWHC 1721 (Comm), who was party to a shareholders' agreement concerning a valuable site in central Moscow (*Filatona and Deripaska v Navigator and Chernukhin* [2019] EWHC 173 (Comm), whether a shipowner had scuttled his ship by arranging for it to be attacked by persons pretending to be pirates (*Suez Fortune v Talbot Underwriting* [2019] EWHC 259 (Comm), whether Liverpool Football Club was entitled to have Nike sponsor its football shirts (*New Balance Athletics v Liverpool FC* [2019] EWHC 2837 (Comm) and whether a defective passage plan rendered a vessel unseaworthy (*Alise 1954 v Allianz* [2019] EWHC 481 (Admlty).

Arbitrators at 10 Fleet Street is a separate arbitrator wing set up by Quadrant Chambers.

Visit https://arb10fs.com/

An Admiralty Swansong

Author: James M. Turner QC

On 5 October 2020, Sir Nigel Teare handed down judgment in a three-handed collision dispute: ***Sakizaya Kalon & Osios David v Panamax Alexander*** [2020] EWHC 2604 (Admlty). This was Sir Nigel's last case as Admiralty Judge, a post he held for more than a decade – the fourth member of what is now Quadrant Chambers to do so in succession, following Sir David Steel, Lord Clarke and Sir Barry Sheen.

In the years between Sir Barry's and Sir Nigel's retirements, collision actions have altered almost beyond recognition. In Sir Barry's last case, ***The Vegaland v The Coral Essberger*** (1993), computers had yet to intrude at all (other than as word processors). Plots were still pencil on graph paper and the real focus of the forensic dispute was to establish where and how the vessels had collided.

Fast forward three decades. The advent and (nowadays) ubiquity of VDR, AIS and ECDIS make it rare for there to be any dispute as to where or how the vessels collided. The focus is now on why they did. In the opening paragraphs of his judgment, the judge reflected on these changes, remarking that *"… the wealth of material contained in the VDR audio record provides much scope for detailed submissions (and cross-examination) as to why a vessel was navigated as she was, which submissions can be relevant to, but not determinative of, questions of fault and can also be relevant to the degree of blameworthiness."*

The vessels collided after dark on 15 July 2018, during south-bound transit of the Suez Canal. The Panamax Alexander (PA) collided with the Sakizaya Kalon (SK), which was anchored and stationary alongside the east bank of the Canal; both vessels then collided with the Osios David (OD), which was moored and anchored on the west bank, about 2 cables south of SK. OD broke free and all three vessels collided with each other again before finally coming to rest.

PA fought hard to show that it was not to blame. It criticised OD and SK for not keeping it informed about their mooring plans, and pointed up the difficulties caused by the strong following current and the presence in the Canal of submarine cables where anchors could not be used. Its forensic difficulty lay in showing that it had kept a good lookout with a proper appreciation of the risk of collision or any plan to stop and moor in good time. In addition, both SK and OD had managed to stop and moor in the prevailing current, and there was no reason why PA could not have managed to do so as well.

The judge held PA causatively at fault for failing to appreciate the risk of collision and moor before the cables mentioned above – and for failing after that to drop an anchor as soon as it could after passing those cables. OD was also found to have been at fault for failing to inform SK of where it planned to moor. However, that failure was not causative, because PA could not show that it would have navigated differently if it had known OD's intention sooner than it could have done from its own lookout. SK was also held free from blame.

In his conclusion, the judge remarked that *"this, my last case as the Admiralty Judge, [was] a pleasure to decide"*. Certainly, the judgment bears the hallmarks of an experienced judge, at the top of his game, thoroughly enjoying his swansong.

PA's application to the Court of Appeal for permission to appeal was dismissed in February 2021.

All four counsel in the case are members of Quadrant Chambers. James M. Turner QC was instructed for Osios David by Reed Smith LLP. Chirag Karia QC was instructed for Sakizaya Kalon by HFW LLP. Panamax Alexander was represented by Robert Thomas QC and Ruth Hosking, instructed by Ince Gordon Dadds LLP.

| Read the full article and watch the 5-minute briefing at www.quadrantchambers.com/news

James M. Turner QC is "An outstanding silk who is … always on the ball" (Legal 500 Asia Pacific), James specialises in cross-border commercial disputes in international arbitration, energy, shipbuilding, offshore construction, shipping and banking. James is frequently instructed in charterparty, bill of lading and sale of goods and ship-sale disputes of all hues, involving cargo damage, unseaworthiness, maintenance, due diligence, ISM, off-hire, withdrawal, safe port, bunker contamination, purchase options, demurrage and detention, cancellation, faulty repair, title, risk, rejection (and so on) - and the many and varied issues which arise in connection with them. He also speaks regularly on ship recycling. The co-author of Derrington & Turner on Admiralty Matters, James is a highly experienced Admiralty practitioner, often cited in the Directories for his prowess in wet work.

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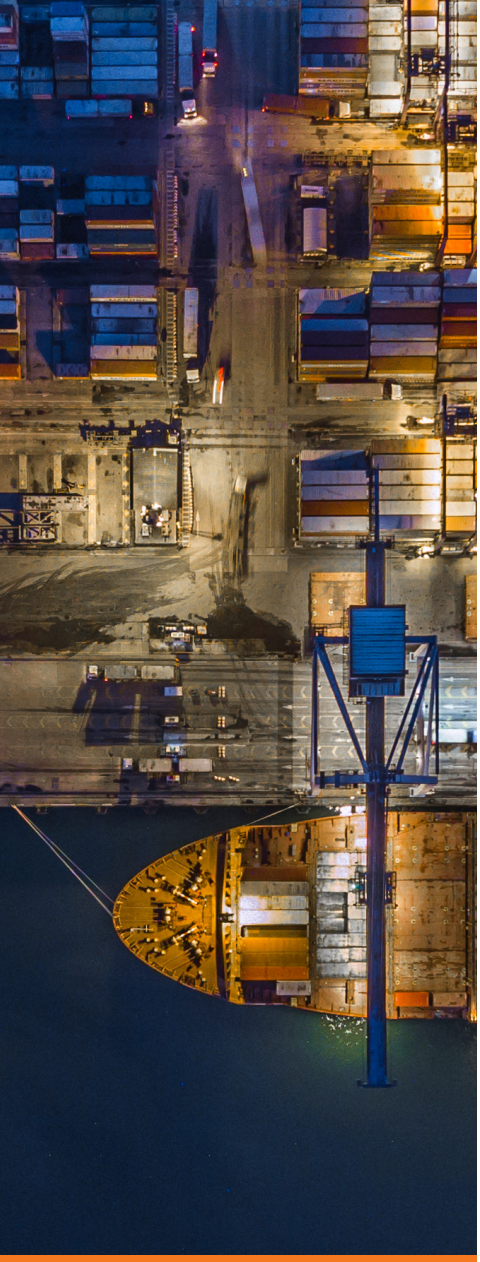

State Immunity and *in rem* claims

Argentum Exploration Limited v The Silver [2020] EWHC 3434 (Admlty)

Author: Stephanie Barrett

South Africa's claims of state immunity in respect of a cargo of silver bars (current value: US$43 million) were successfully resisted in ***Argentum Exploration Limited v The Silver*** [2020] EWHC 2323 (Admlty). An action in rem by salvors of the silver could therefore be brought in the English courts.

The silver was purchased by South Africa from the Indian government under a FOB sale contract in 1942, and was intended for use in the South African mint. The South African Government were also party to the contract of carriage contained in or evidenced by a bill of lading for the silver, which was carried on the SS Tilawa - a privately-owed merchant ship. The Tilawa was sunk in international waters by Japanese torpedoes as she made the crossing from Mumbai to Durban, carrying (among other cargo) the silver. The wreck and the silver sank to depths which until recently had precluded salvage.

Argentum salved the silver in 2017 and brought it to the United Kingdom, where it was declared to the Receiver of Wreck pursuant to section 236 of the Merchant Shipping Act 1995. Argentum then commenced proceedings in rem in the English Admiralty Court claiming a salvage reward from the owner of the silver. South Africa claimed ownership of the silver (which was later accepted by Argentum) but argued that it was immune from the Court's jurisdiction due to sovereign immunity.

Resolution of the matter hinged on whether, for the purposes of s 10(4)(a) of the State Immunity Act 1978 ("SIA"), the silver and the Tilawa could be said to be "in use, or intended for use for commercial purposes" in 2017, when Argentum's cause of action against South Africa arose. Section 10(4)(a) states that a state is not immune from the English Court's jurisdiction as respects "an action in rem against a cargo belonging to that state if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes". South Africa argued that, in 2017, neither the SS Tilawa nor the silver bars were in use or intended for use by them.

Judgment was handed down in December 2020. Sir Nigel Teare (sitting as a judge of the High Court) held that (for the purposes of s 10(4)(a) SIA) the Tilawa and the silver were both in commercial use when the wreck was salved. On sinking in 1942, the ship was a merchant vessel in use for commercial purposes and the silver had been bought and was being shipped under ordinary commercial contracts of sale and carriage. The status of the vessel and cargo on sinking was a relevant factor to its status in 2017, and although the relevant contracts had terminated nothing had happened between 1942 and 2017 to alter the status of the ship or cargo. There was no reason in principle why a state which had chosen to have its cargo carried under an ordinary commercial contract of carriage and had benefitted from salvage services should not be exposed to the same liability in salvage as a private cargo owner.

Argentum v The Silver is the first case ever to consider SIA s 10(4)(a) – and only the second in which SIA s 10 has been considered. An appeal to the Court of Appeal in this case is outstanding, and therefore the first instance judgment may not represent the "last word" on this interesting issue.

"A market-leading set, Quadrant Chambers continues to excel, offering a raft of stellar silks and high-calibre juniors who exhibit strong sector expertise"

Chambers and Partners – UK Bar, 2021

Stephanie Barrett's broad commercial practice is primarily focussed on dry and wet shipping (especially charterparty and bill of lading disputes), shipbuilding and offshore construction, international trade and insurance. She has appeared as junior or sole counsel in arbitrations on various terms and in the Commercial Court, Admiralty Court and the Court of Appeal. Her practice often involves cases of technical complexity, such as unsafe port claims, dangerous cargo claims and shipbuilding disputes.

"She is a first-rate and fierce advocate." (Legal 500, 2021)

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Damages and the group company trap

Palmali Shipping SA v Litasco SA [2020] EWHC 2581 (Comm)

Author: Tom Bird

Palmali claimed US$1.9 billion in damages under what it said was a long-term contract of affreightment with the defendant, Litasco.

This judgment concerned Litasco's application for reverse summary judgment on Palmali's damages claim and shows the impact of group company arrangements when it comes to the recovery of loss.

Palmali contended that the contract of affreightment gave it the exclusive right to carry oil products to be shipped by Litasco between various ports up to a total monthly volume of 700,000 mt/month and obliged Litasco to ship a minimum monthly quantity of 400,000 mt over a 15-year period. The damages claim was for the profits that Palmali said it would have made performing additional voyages.

Most of those additional voyages would allegedly have been performed using vessels in the so-called "Palmali fleet". For these "own fleet" vessels, Palmali's profits were calculated by taking the revenue that would have been earned and subtracting the port expenses and bunkers. The calculation assumed that Palmali would not itself have to pay any freight, hire or other expenses in respect of these vessels.

However, the vessels in question were in fact owned by different companies in the Palmali group. Some of those vessels were subject to ship management agreements that only entitled Palmali to retain 2.5% of any earnings. Other "own fleet" vessels were chartered to Palmali by a related company. Palmali's original damages claim failed to take these contractual arrangements into account.

Litasco successfully applied for reverse summary judgment on the quantification of Palmali's claim for lost profits on the ground that the alleged loss (if suffered at all) was suffered by other companies in the Palmali group. Those other companies were not parties to the contract of affreightment, nor claimants in the litigation.

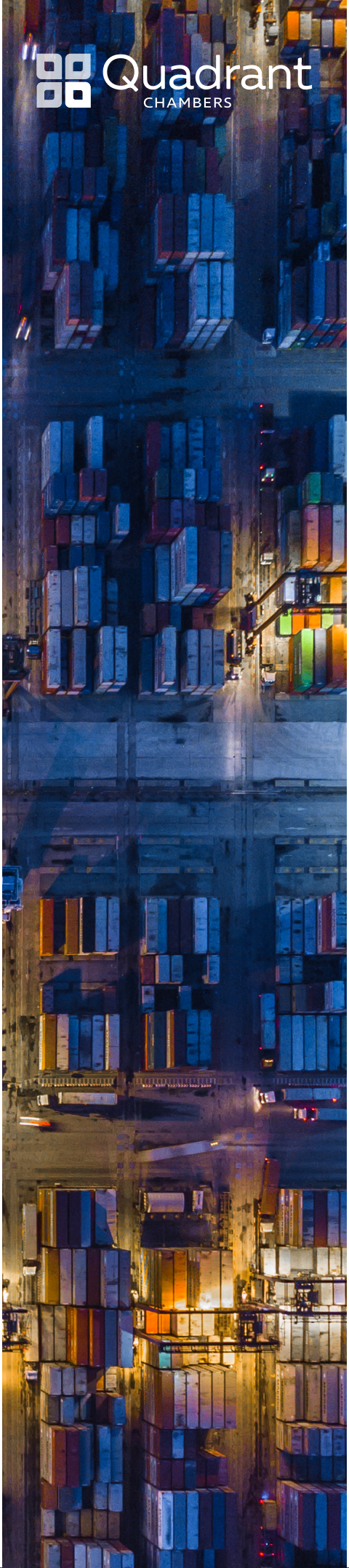
Palmali sought to resist the application on two main grounds, both of which were rejected by Foxton J.

First, Palmali argued that "in practice" Palmali was never required to pay the sums due under the ship management agreements and was effectively able to treat the entire amounts received from Litasco as its own. In rejecting this argument, the judge held that determining the loss which a claimant has suffered for the purposes of awarding damages involves a "net loss approach", which "takes account of expenses caused or benefits lost by the breach, but also expenses saved and non-collateral benefits obtained as a result of the breach" [30]. In conducting this "net loss" calculation, the law of damages does not generally distinguish between a liability and the discharge of that liability. Palmali's argument that the court should ignore the liabilities which it accepted would have come into existence if further cargoes had been lifted under the contract when calculating its "net loss" would "involve a very significant departure from the conventional position" [32].

Second, Palmali sought permission to amend its claim to recover the losses suffered by the related companies under the "transferred loss principle". The court held that Palmali's claim was not arguably capable of being brought within the scope of this principle. Palmali could not "realistically argue that the common intention or 'known object' of the [contract] was to benefit such of the owning companies as Palmali might contract with for the purposes of performing its obligation to lift cargos under the [contract] (any more than its known object was to benefit any owners of 'third party vessels' in the same way)." [49] The object, found Foxton J, was for Palmali to benefit from the financial obligations assumed by Litasco, it being a matter for Palmali how it went about putting itself in a position to perform its reciprocal obligations and thereby release those benefits.

This judgment provides a saliant reminder of the unintended consequences of group company arrangements on the recoverability of damages.

Tom Bird was instructed by Kevin Lloyd and Ardil Salem of Hogan Lovells for Litasco SA. John Russell QC was instructed by Lax & Co LLP for the Claimant.



Praised by clients as the 'go-to chambers for shipping disputes', Quadrant Chambers continues to be involved in major cases involving the full range of shipping matters.

(Legal 500 – UK Bar, 2021)

Deal or No Deal? Commercial Court considers the subject of subjects

Nautica Marine Limited v Trafigura Trading LLC [2020] EWHC 1986 (Comm)

Author: Paul Henton

Any shipping practitioner considering issues of contract formation would be well advised to study the judgment of Foxton J in ***the Leonidas*** [2020] EWHC 1986 (Comm). Particularly if it involves the familiar scenario of a main terms recap or agreement "on subs", followed by further negotiations. The decision provides arguably the most comprehensive analysis to date of the relevant principles which inform the all-important question: Have the parties reached a binding agreement or not?

The facts of the case are of secondary importance, given that every case will turn on the particular facts and the wording used. But in short the relevant "subject" at issue was contained in a recap stated to be "*subject to Chtrs' S/S/RGMT approval*"- which meant the fixture was subject to the availability of cargo and to the approval of the suppliers, receivers and charterers' management. The Charterers' subjects were never lifted. The Owners alleged that a binding agreement was nevertheless concluded, and sued for repudiatory breach.

The Owners' arguments were rejected. The Judgment contains a detailed analysis and rationalisation of the many authorities in this area, however the following particular principles emerge:-

» The critical question in every case is whether the parties objectively reached agreement on all essential terms and objectively intended to create a legally binding relationship. It is up to the parties to decide (objectively) whether agreement on any particular issue is to be a prerequisite of a binding contract.

» The law recognises two types of "subjects". A "pre-condition" is one which prevents a contract coming into existence until it is lifted. A "performance condition" is one which does not prevent the conclusion of a binding contract, but might bring it to an end if not satisfied.

» A "subject" is more likely to be classified as a pre-condition rather than a performance condition if its fulfilment involves the exercise of a personal or commercial judgment by one of the contracting parties (e.g. lifting of BOD approval)- effectively a right of "veto".

» In the particular context of Charterparties fixed on main terms, the assumption is that there is no binding agreement until the "subjects" are lifted. The expression "on subjects" is well known and generally signals that pre-conditions to any binding contract remain outstanding.

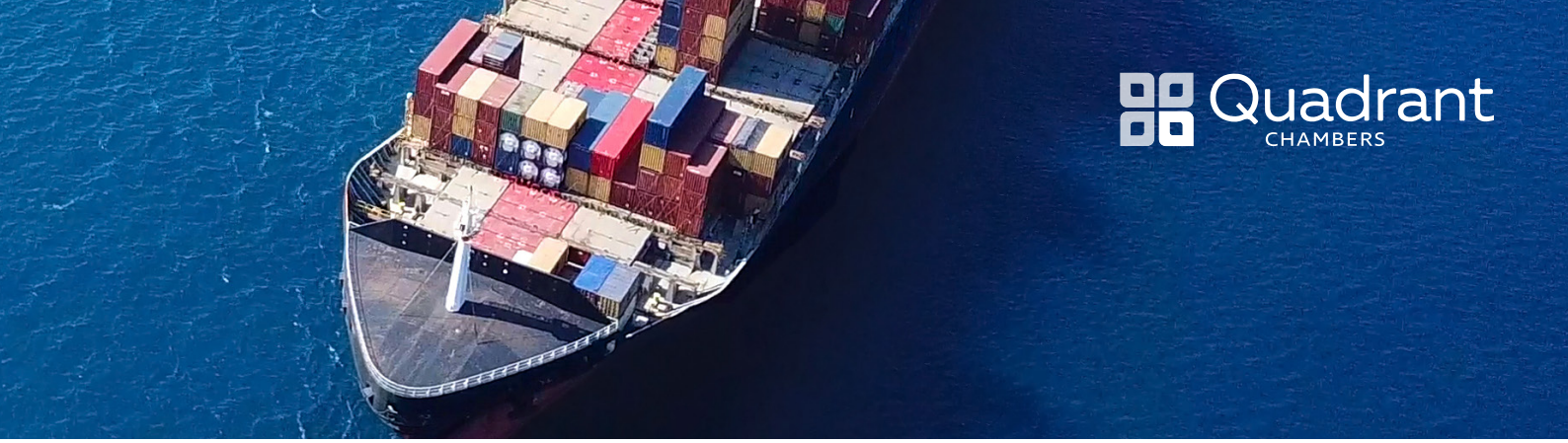
» However there will be cases where the "subject" involves some external event- e.g. the granting of an import/export license or similar- where the correct analysis is that the agreement is binding, albeit liable to come to an end if the subject fails (potentially with one party taking on an obligation to procure the lifting of the subject).

Returning to the facts, the Charterers' subjects were pre-conditions to any binding agreement. The Judge applied a multi-factorial approach, with particularly relevant factors including: (i) items such as BOD approval are classically within the Charterers' own commercial judgment (suggesting pre-conditions); (ii) the other "subs" were interspersed between classic pre-conditions and so likely intended to have the same characterisation, and (iii) the wording was quite vague/uncertain as to its exact meaning, and so was an unlikely candidate for a contractual obligation. But perhaps most important of all in the balance was the explicit recognition of the relevant commercial context in charterparty cases.

The Judgment should be well received by the market. It is strongly reflective of market practice in charterparty cases, where it is generally understood that there is no binding agreement at the "main terms" recap stage where the deal remains "on subs". This stage is generally seen as a precursor to the negotiation of detailed terms to be included in a "clean" recap later, and to the lifting of "subs" in due course- at which point the fixture is binding.

The Judgment also considered an argument that the Charterers had waived or abandoned their "subjects" via subsequent correspondence and conduct. This too was rejected. It is possible that for the parties to agree to convert a pre-condition into a performance condition (variation) or abandon their "subjects" altoge0ther without ever lifting them (waiver): but it would be a rare case in which anything short of actual part-performance of the fixture will suffice. This is in line with the well-established principle that clear and unequivocal words or conduct are required for a finding that a party has waived/abandoned its rights.

| For those interested to hear more there is a 1-hour Quadcast Shipping Special devoted to the decision entitled "Deal or No Deal?", available on the Quadrant Chambers youtube channel



Arbitration Agreements and LOU's in cargo claims: on the same page?

Lavender Shipmanagement Inc v Ibrahima Sory Affretement Trading S.A. & Ors [2020] EWHC 3462 (Comm)

Author: Celine Honey

The Commercial Court's decision in ***Lavender Shipmanagement Inc v Ibrahima Sory Affretement Trading S.A. & Ors*** [2020] EWHC 3462 (Comm) reinforces the principle that arbitration provisions in LOU's for cargo claims should be construed in a broad and commercial sense.

Five bills of lading had been issued in respect of a cargo of bagged rice. Each bill incorporated the terms of the voyage charterparty, including the law and arbitration clause. The cargo Claimants alleged the cargo was short, damaged and/or wet upon arrival at the discharge port. Owners' Club issued an LOU which defined "Cargo" as 25,000 MT of bagged rice (the total amount carried under all five bills of lading) and under "Bill of Lading" listed all five bills by number. The LOU was stated to cover "*the above claim*" (singular).

The cargo Claimants commenced arbitration proceedings in London. Owners disputed the Tribunal's jurisdiction (on the basis that there was no arbitration agreement providing for a three-man tribunal or for a consolidated reference) and brought a s.67 challenge.

Mr Justice Calver dismissed the s.67 application, finding:

"As a matter of objective construction against the relevant factual background, I consider that the meaning that the LOU would convey to a reasonable person, applying business common sense to it, is that it is an agreement to consolidate all of the claims (of loss, shortage and/or damage) in respect of the entire cargo of 25,000MT of bagged rice before a London arbitration tribunal constituted in accordance with clause 69 of the Charterparty" [46].

This was for the following reasons:

- The opening words of the LOU were clear in that they intended to apply to anyone who was entitled to sue in respect of the loss of/shortage to/damage to the cargo.
- The references to "claim" (singular) and how "claim" was defined in the heading, coupled with the fact that the cargo was described compendiously as "25,000MT", made it clear that the parties were referring to one combined claim in respect of the lost/damaged/short cargo.
- The parties must be taken to have had in mind that a properly constituted London Arbitral Tribunal was a reference back to clause 69 of the charterparty (rather than this wording in the LOU being meaningless).
- There was considerable commercial sense to this construction, as it meant that the issues with one shipment could be resolved in one combined arbitration, avoiding the inconvenience of having to commence five separate arbitrations and the risk of inconsistent awards.

Both parties referred to ***The Quest*** [2014] EWHC 2654 (Comm). The LOU in ***The Quest*** contained more detail (as to procedure) and it was held by Males J that the LOU replaced (entirely) the charterparty arbitration clauses. Whilst Calver J did not go so far, he still gave a broad and commercial construction to the LOU arbitration provisions and considered they referred back to the arbitration clause in the charterparty only where necessary.

The decision provides further comfort to cargo claimants bringing proceedings under multiple bills of lading, each with separate arbitration clauses, where the club provides one LOU in respect of the entire "claim". Whilst any LOU would need to be determined on its own wording and against the relevant factual background, if the intention is to consolidate all the claims in respect of the "cargo" into one arbitration reference, a tribunal or court is likely to find as such. That is so even if the LOU is informally drafted and/or where it might be necessary to refer back to the charterparty provisions for full details of the Arbitration Agreement.

Celine Honey joined Chambers in October 2020 upon successful completion of pupillage. Celine is developing a busy shipping and commercial practice and she is regularly instructed in charterparty, bill of lading and Hague/Visby disputes. Celine has appeared as sole and junior counsel in the High Court (including the Commercial Court and Admiralty Court) and regularly assists members of Chambers as junior counsel in arbitration.

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Relevance of Insurance Provisions to Cargo Interests' Liability to Contribute in General Average

Herculito Maritime Limited and others v Gunvor International BV and others [2020] EWHC 3318 (Comm)

Author: Paul Toms

The case concerned the hijacking of the mv Polar ("the Vessel") in the Gulf of Aden whilst it was performing a voyage charter ("the Charterparty") between Herculito and Clearlake. Gunvor were the lawful holder of Bills of Lading which provided that freight was payable as per the Charterparty. The Bills also contained general words of incorporation.

The Charterparty had a clause which required Clearlake to pay for additional War Risks and Kidnap and Ransom ("K&R") insurance to transit the Gulf of Aden.

The Vessel was released following the payment of ransom by Herculito. General average was declared.

Under the terms of the Charterparty, Herculito had procured War Risks and K&R cover (at Clearlake's expense) which indemnified them for the entirety of the ransom paid.

The underwriters, pursuant to their rights of subrogation, sought to recover payment of Gunvor's contribution in general average in the amount of US$4,829,393.22 under a general average bond and against Gunvor's insurers under a guarantee.

That claim was met with the defence that the Charterparty provisions which required Clearlake to pay the insurance premiums for the War Risks and K&R cover had the effect that Herculito had agreed that it would only look to its underwriters (and not Clearlake or Gunvor) for any losses falling within the scope of that cover.

Sir Nigel Teare identified three principal issues which fell to be determined:

1. Were the Charterparty provisions concerning the payment of insurance premiums incorporated into the Bills of Lading?

2. Was the effect of the insurance provisions in the Charterparty such as to prevent a claim being made by Herculito against Clearlake under the Charterparty?

3. Was the effect of the insurance provisions in the Charterparty such as to prevent a claim being made by Herculito against Gunvor under the Bills of Lading?

Issue 1

Sir Nigel Teare held that the words of incorporation in the Bills of Lading were wide enough to incorporate the relevant clauses from the Charterparty.

However, he held that it was not appropriate to substitute the words *"holder of the bill of lading"* for "*Charterers*" so as to make the Bill of Lading holders liable under the Bill of Lading contracts to pay the insurance premium.

Firstly, the price to be paid by the Bill of Lading holder for the carriage of his cargo to Singapore was freight as per the Charterparty. As such, the Judge held that "*clear words would be required to impose … a liability … also to pay the additional insurance premium as the price for the carriage of his cargo*" and there were no such words. Secondly, the Bills of Lading gave no indication as to what each Bill of Lading holder was to pay given that the additional premium was for the entire voyage and not on a per bill of lading basis.

Issue 2

The Judge held by reference to the dicta of Lord Roskill in ***The Evia No. 2*** [1983] AC 736 and the analysis of Longmore LJ in ***The Ocean Victory*** [2015] 1 Lloyd's Rep 381 that the fact of the agreement that Clearlake, as charterer, was to pay for the insurance premium meant that it was exempt from liability to Herculito for losses falling within the scope of the cover put in place at its expense.

Issue 3

Gunvor argued that no claim could be brought against it because the scheme of the Charterparty was that the *"insurance based solution was set up at no cost to the Owners so that they could perform the contract of carriage and recover any resultant loss from underwriters"*.

Sir Nigel Teare held that the authorities made clear that what was required for a party to be taken to have agreed to look only to its underwriters to be compensated for a particular loss was an agreement that the contractual counterparty should pay for the relevant insurance premium. In the absence of such an agreement, there were no words in the Bill of Lading contracts which established an *"insurance code"* or expressly stated that Herculito had agreed to look only to the underwriters.

In other words, Sir Nigel Teare held that the lack of incorporation of the obligation in the Charterparty to make payment of the insurance premiums into the Bill of Lading contracts was fatal to Gunvor's defence.

Guy Blackwood QC of Quadrant Chambers appeared on behalf of Herculito, the successful appellant, instructed by Richard Neylon and Jenny Salmon of HFW.

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Can a party's silence alone result in an enforceable contract? Bills of lading are like any other contract

MVV Environment Ltd v NTO Shipping [2020] EWHC 1371 (Comm)

Author: Simon Rainey QC

HHJ Pelling QC's judgment in ***MVV Environment Ltd v NTO Shipping*** [2020] EWHC 1371 (Comm) is a rare example of an arbitration award being successfully challenged in the Courts,.

MVV is a company specialising in the conversion of waste products into energy. A waste management company in turn collected a waste product from MVV known as "unprocessed incinerator bottom ash" (UIBA). for transport to a recycling plant in the Netherlands.

Each shipment of UIBA from MVV's Plymouth facility to the Netherlands was evidenced by shipping documents, including a bill of lading for each shipment naming MVV as 'shipper'. Two on board explosions in January 2017 caused damage to the ship and injury to a member of the crew, and were alleged to have been caused by the UIBA.

The vessel's owner (NTO) commenced an LMAA arbitration against MVV claiming damages caused by the two explosions. The bill of lading for the shipment incorporated a law and jurisdiction clause from a charterparty which provided for a London seated arbitration. MVV immediately challenged the jurisdiction of the arbitration Tribunal on the grounds that MVV was not the "shipper", was not a party to the contract of carriage, and, therefore, not a party to any arbitration clause with NTO. The Tribunal held that MVV was the shipper, and a party to the contract of carriage, and that the Tribunal did have jurisdiction to hear the dispute. Shortly after receipt of the Award, MVV brought a s67 challenge in the Commercial Court.

The key issues in the case were:

1. Whether the bill of lading contained or evidenced the terms of the contract of carriage;

2. Whether the naming of MVV as "shipper" in a bill of lading was decisive as to the identity of the parties to the contract of carriage; and

3. Whether the ship's agent who prepared the bill of lading, or the waste management company, had express or implied authority, or whether the ships agent had ostensible authority, to enter into a contract with the shipping company on behalf of MVV.

HHJ Pelling QC found that it was unhelpful to rely on MVV being named as shipper; the persons named in the bill of lading as shipper and carrier are only the starting point to determining the parties. The contract of carriage is concluded before the bill of lading evidencing its terms is issued, and it is open for a party to show that it has been wrongly identified as a party to the contract of carriage in the bill of lading. The court could not infer assent from MVV's silence in not having corrected earlier bills of lading on which it was named as shipper.

Given this, the case turned on the third issue, and the court found that the ship's agent did not have actual express or implied authority from MVV, and that in fact the waste management company should at all times have been described as the shipper. As a result, MVV was not a party to the contract of carriage and, therefore, not a party to the arbitration agreement either. The arbitration award was set aside.

Comment

This case makes clear that, while bills of lading have a number of functions and are vital tools in international trade and shipping, insofar as they contain or evidence a contract of carriage they follow the same rules as any other contract. The quirks and curiosities of bills of lading should not distract from the application of ordinary contractual principles.

It is also clear that in order for an individual or company to confer authority to another, unconnected and unrelated party, there must be an action conferring that responsibility as authority cannot arise from silence alone.

This is a rare example of an award being successfully challenged. It is one of the strengths of English law arbitrations that Courts are generally slow to interfere where parties have chosen to have their disputes determined in arbitration. It is only proper, though, that questions of jurisdiction can be challenged.

Simon Rainey QC was instructed by Jonathan Spencer of Simmons & Simmons for MVV Environment Ltd.

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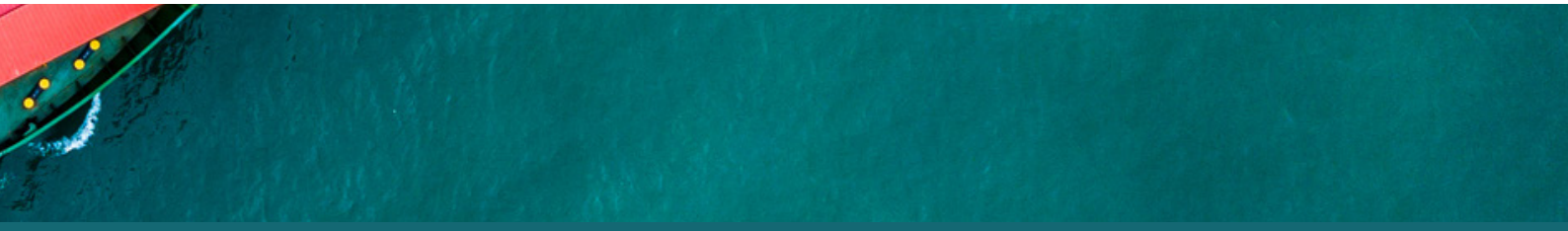

A non-binary approach to the weighing of evidence in a civil trial and taking into account the risk that evidence may have been obtained by the use of torture

Shagang Shipping Company Ltd (In Liquidation) v HNA Group Company Ltd [2020] UKSC 34

Author: Caroline Pounds

Sometimes, the most unexpected of cases can give rise to important statements of principle by the Supreme Court.

In ***Shagang v HNA,*** Shagang's claim began as a relatively straightforward claim for damages (*qua* disponent owners) for repudiatory breach of a long-term time charterparty. HNA having guaranteed the charterers' performance of the charterparty, Shagang sought to recover its losses from HNA under the guarantee. Part way through the proceedings, HNA amended its case to plead that the charterparty had been procured by bribery (with the consequence that the guarantee was unenforceable), relying on confessions to the alleged bribe having been given to the Public Security Bureau (akin to a police force) in the People's Republic of China by the individuals who had allegedly paid and received the bribe. Shagang in turn alleged that the confessions had been obtained by torture and were therefore inadmissible in evidence, alternatively that no weight should be afforded to them.

At first instance before Knowles J, Shagang succeeded in its claim, the Judge finding that the alleged bribery had not been proved on the balance of probabilities. The Judge further stated, however, that the fact that he could not rule out torture further reduced the confidence that he could place in the confessions but that, in the circumstances of his conclusion that there was no bribe, it was not necessary to express a definitive conclusion on whether there was torture. Those two short statements led to HNA appealing the judgment.

The Court of Appeal allowed HNA's appeal, remitting the matter back to the Commercial Court for redetermination. They accepted HNA's argument that the Judge had failed to ask and answer the correct legal question as to what weight should be accorded to the confession evidence and had fallen into legal error in failing to take all appropriate matters into account and failing to exclude irrelevant matters in considering whether the alleged bribe was paid (namely, his finding that torture could not be ruled out as a reason for the confessions).

The Supreme Court disagreed on all points. Whilst it accepted that it was logical to decide the admissibility issue first, before going on (if necessary) to consider the weight to be afforded to the confession evidence, it rejected the notion that such an approach was mandatory, emphasising that "*how and in what order questions concerning the admissibility and weight of evidence are dealt with is very much a matter for the trial judge*". Moreover, the Court of Appeal had been wrong to conclude that, since the Judge treated the confessions as admissible, then he must have held that torture had not been proved on the balance of probabilities. On the contrary, the Supreme Court considered it clear that the Judge had – as he was entitled to – deliberately refrained from deciding that question.

The Supreme Court also rejected HNA's arguments that the Judge had failed properly to address the question of what weight should be given to the confession evidence, concluding that it was "*not a case in which it can be said that the judge failed to have any regard to material evidence … The real complaint is as to the degree of depth in which he did so and that he did not do so in a sufficiently systematic way. Such a shortcoming, whilst regrettable, does not involve an error of law or otherwise justify intervention by an appellate court*".

In rejecting the Court of Appeal's criticisms of the Judge's weighing of the evidence, the Supreme Court also reaffirmed the general principle of the law of evidence that, in assessing what weight (if any) to give to evidence, a court should have regard to any matters from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence (see section 4 of the Civil Evidence Act 1995). In reliance on ***In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)*** [2008] UKHL 35, HNA had argued – and the Court of Appeal accepted – that, applying the 'binary principle' of the law of evidence, the fact that the Judge had not found on the balance of probabilities that the confessions had been procured by torture "*was, in law, a finding that there was no torture*" with the consequence that, in estimating the weight to be attached to the confession evidence, the Judge was "*bound entirely to disregard the possibility that the admissions had been obtained by torture*".

The Supreme Court rejected that argument, endorsing the view, already expressed in ***A v Secretary of State for the Home Department (No. 2)*** [2005] UKHL 71 that, where there is a real risk that evidence was obtained by torture, that risk should be taken into account when evaluating the evidence. The Court observed that, whilst it is correct that, if a legal rule requires a fact to be proved the law operates a binary system, not all legal rules do require relevant facts to be proved in a binary way. In particular, the rule governing the assessment of the weight to be given to hearsay evidence in civil proceedings (indeed, the assessment of the weight to be given to any evidence) does not admit of such a binary approach. Rather, the assessment of weight is evaluative and multi-factorial, requiring the court to have regard to all the available evidence before it and to afford that evidence such weight as the court deems appropriate in all the circumstances. It is not a binary exercise which requires the court to have regard only to proven facts.

In addition to the above important statement of principle, the decision also provides a salutary reminder of the restraint that an appeal court should exercise before interfering with a judge's factual findings (or inferences drawn therefrom) or a judge's process of reasoning. The Supreme Court was clear that the Judge's reasoning had been not merely succinct, but sparse, and that he had approached his task "*in too cursory a manner*". The question on appeal, however, was whether his decision was wrong, which it was not in circumstances where the Judge had not made any error of law or reached a conclusion which no reasonable judge could have reached. Thus, and notwithstanding the shortcomings of the first instance judgment, it was nonetheless not one with which the Court of Appeal ought to have interfered.

Caroline Pounds appeared at each stage of the proceedings as junior counsel, acting on behalf of the appellants, Shagang, instructed by HFW.

| Read the full article and watch the 5-minute briefing at www.quadrantchambers.com/news

Caroline Pounds is an experienced and sought-after senior junior (popular with leaders, instructing solicitors and lay clients alike), particularly in the shipping and energy/offshore fields. She has twice been awarded 'Shipping Junior of the Year' at the Chambers UK Bar Awards (in 2020 and 2015) and was shortlisted for Shipping Junior of the Year for the Legal 500 UK Awards 2019. She was also recognised as one of Legal Week's 'Stars at the Bar', ("*Her attention to detail and analysis are first class and advocacy skills are excellent*") and is further praised by Chambers UK for being "*Hard-working, thorough and user-friendly*"; '*responsive, available and highly intelligent*" and '*tough as nails, very bright and very succinct*".

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C CHALLENGER – the perils of overconsumption

SK Shipping Europe PLC v (3) Capital VLCC 3 Corp (5) Capital Maritime and Trading Corp [2020] EWHC 3448 (Comm)

Author: Chris Smith QC

Approximately 8 months into a 2 year time-charter for the vessel C Challenger, the charterer purported to rescind it on account of alleged fraudulent misrepresentations relating to the Vessel's consumption capabilities. The shipowner commenced proceedings arguing that the charterers' purported termination was unlawful. In December 2020, judgment was handed down by the Commercial Court in favour of the shipowner.

The case gives rise to the following issues of general importance to the shipping industry.

Will a shipowner, by offering speed and consumption warranties, be taken to have implicitly represented the accuracy of those warranties?

The charterer sought to argue that the shipowner, by providing a speed and consumption warranty, was to be taken to impliedly represent that the Vessel's actual consumption was in accordance with the warranted levels.

The latter argument gave rise to an issue as to the circumstances in which a party to a contract is to be taken to make implied representations relating to the subject-matter of one of the contractual terms. It was held that there was no implied representation. The Court was of the view that the decision in ***The Larissa*** [1983] 2 Lloyd's Rep. 325 was inconsistent with such a conclusion. More specifically, there were good reasons why the mere offer of a speed and consumption warranty by a shipowner should not be held to involve an implicit representation as to the vessel's actual performance levels.

To what extent can a charterer or shipowner avoid affirming a charter by consistently reserving its rights?

Whilst the charterer first alleged in March 2017 that the shipowner had misrepresented the Vessel's consumption capabilities, it did not purport to rescind the Charter until 19th October 2017. In the circumstances, the shipowner contended that the charterer affirmed the Charter by not seeking to rescind it sooner. The charterer argued in response that it could not be taken to have affirmed the Charter as it had persistently reserved its rights in its communications with the shipowner.

The Court noted that there had not been extensive consideration of the effect of a reservation of rights in this context in any of the previous authorities. Ultimately, the Court concluded that a reservation of rights frequently will have the effect of preventing subsequent conduct from constituting an election to keep the contract alive. In particular, a reservation of rights is likely to prevent a party from being deemed to have affirmed the contract whilst performing its own obligations or seeking information from its counterparty. By contrast, where the innocent party demands substantial contractual performance from the other, this will be treated as an affirmation, irrespective of any reservation of rights. In such a scenario, the innocent party's actions will speak louder than its words.

In what circumstances will documents signed by a broker constitute a written memorandum of a guarantee for the purposes of the Statute of Frauds 1677?

In addition to its claim against the charterer, the shipowner sought to claim against a third-party guarantor of the charterers' obligations. The guarantor argued that as there was no signed written memorandum of the guarantee, it was unenforceable pursuant to the Statute of Frauds 1677.

A critical issue in this regard concerned whether the shipowner could rely on communications sent by Poten, a ship-broker involved in the transaction. Poten was found by the Court to have acted as an intermediate broker. In the circumstances, the Court had to grapple with an issue on which, as it noted, there is very little authority, namely the scope of the authority of an intermediate broker. Whilst Poten as an intermediate broker did not have the necessary authority to sign the guarantee or even any memorandum on behalf of the guarantor, the Court held that it did have authority to forward communications from the guarantor. In the circumstances, the same legal consequences should flow as if the guarantor had sent the relevant communications personally, and so the relevant messages from Poten could be used to satisfy the Statute.

Chris Smith QC was instructed by Fanos Theophani, and the associates Harriet Thornton and Hayley Flood of Preston Turnbull LLP.

| Read the full article and watch the 5-minute briefing at www.quadrantchambers.com/news

Chris Smith QC has a broad practice encompassing all areas of commercial law, with a particular focus on dry shipping, commodities, energy, and insurance disputes. He is recommended as a leading barrister in the field of Shipping law in both Chambers and Partners and The Legal 500, as well as for Energy in The Legal 500. Comments have included: "*He is outstanding in his legal analysis and presentation of cases before tribunals.*"; "*a star of the future and is a fierce advocate*"; "*he is thoroughly commercial and has sound judgment as to what points to fight*";"...*a particularly tenacious and effective advocate; exactly the man you want in tight situations...*". He was nominated for Junior Shipping Barrister of the Year in the Chambers UK Bar Awards in 2015.

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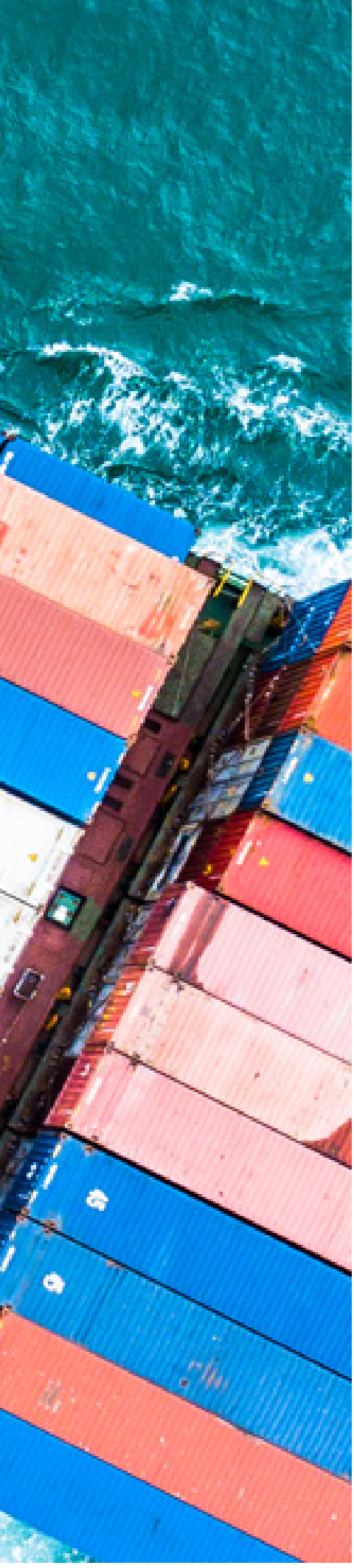

The availability of damages in addition to demurrage - *The Eternal Bliss*

K Line Pte v Priminds Shipping (HK) Co. Ltd [2020] EWHC 2373 (Comm)

Author: Tom Bird

In ***The Eternal Bliss*** Andrew Baker J determined an issue that has long divided legal commentators: when can a shipowner recover damages in addition to demurrage?

The dispute arose from a voyage charter for the carriage of soybeans from Brazil to China. The charter was drawn up on an amended Norgrain form, which provided that demurrage, if incurred, was to be paid at a certain rate.

After tendering NOR at the discharge port, the vessel was kept at the anchorage for 31 days due to port congestion and lack of storage space ashore. After discharge, it was said that the cargo exhibited significant moulding and caking throughout the stow in most of the cargo holds. The owners commenced arbitration against the charterers seeking to recover the cost of settling the cargo claim. The sole breach of contract relied on was the charterers' failure to discharge within the laytime. The charterers contended that demurrage was the owners' exclusive remedy for that breach.

The parties invited the court to determine this as a preliminary point of law on assumed facts under s.45 of the Arbitration Act 1996. As Andrew Baker J noted at [22] of his judgment, the main point of principle involved asks what it is that demurrage liquidates: "It is well-established that demurrage is by nature liquidated damages, but in respect of what does demurrage, calculated in accordance with the voyage charter, fix (and therefore limit) the owner's recovery?"

In ***The Bonde*** [1991] 1 Lloyd's Rep. 136 Potter J had found that in order to recover damages in addition to demurrage a shipowner was required to demonstrate (a) that such additional loss is different in character from loss of use of the vessel, and (b) that the additional loss stems from breach of an "additional and/or independent obligation" (i.e. one other than the failure to load or discharge the vessel within the time allowed).

Andrew Baker J held that ***The Bonde*** was wrongly decided. It was not necessary to prove a separate breach.

"Agreeing a demurrage rate", he held, "gives an agreed quantification of the owner's loss of use of the ship to earn freight by further employment in respect of delay to the ship after the expiry of laytime, nothing more. Where such delay occurs, the demurrage rate provides an agreed measure by which the parties are bound for the owner's claim for damages for detention, but it does not seek to measure or therefore touch any claim for different kinds of loss, whatever the basis for any such claim." [61]

This is a significant decision, which puts the principles applicable to the scope of a demurrage provision on a coherent footing. Where a shipowner has suffered a different type of loss arising from a failure to load or discharge the vessel within laytime (such as cargo claim liabilities) there should now be no need for the owner to establish a separate and independent breach of contract in order to recover damages as well as demurrage.

Tom Bird acted for the owner, K Line Pte Ltd, instructed by Nick Austin and Mike Adamson of Reed Smith. The case is heading to the Court of Appeal in October 2021, where he will be led by Simon Rainey QC.

| Read the full article and watch the 5-minute briefing at www.quadrantchambers.com/news

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(Legal 500 – Asia Pacific, 2021)

Summary and Default Proceedings *in rem*

Premier Marinas v The Double Venus and The Santorini [2020] EWHC 2462 (Admlty)

Author: Robert Ward

Admiralty Registrar Davison handed down judgment in ***Premier Marinas v The Double Venus and The Santorini***, a case in which the Registrar considers two aspects of Admiralty procedure that may require re-examination by the Civil Procedure Rules committee.

The Facts

The Claimant owns and operates marinas in the south of England. An Admiralty *in rem* claim was brought against two vessels in respect of which berthing fees remained unpaid. Those vessels were arrested.

After service of the claim, an application for default judgment was made on the basis that no acknowledgement of service had been filed. The owner of the vessels filed a late acknowledgement of service and the applications for default judgment were dismissed.

After exchange of pleadings, the Claimant sought to strike out the vessel owner's defence and counterclaim at a CMC on the basis that it disclosed no reasonable grounds or was incoherent. The Defendant failed to attend the remote hearing for the CMC and the application was stood over to trial.

The Judgment

At trial judgment was entered for the claimant, the Registrar holding that a debt presently due and owing to the Claimant had been proven.

The judgment is of interest for the Registrar's commentary on the procedure for default judgment and summary proceedings in Admiralty *in rem* claims.

Default Judgment

CPR rule 61.9(1) contains specific provision for default judgments for *in rem* claims which is substantially similar to CPR rule 12.3(1) for other claims. However, from 6 April 2020 the latter rule was amended to clarify that judgment could only be given if no acknowledgement of service had been filed *"at the date on which judgment is entered"*.

No such amendment was made to r61.9(1).

The Registrar took the view that, in any event, r61.9(1) would only permit default judgment for an *in rem* claim in circumstances where there had been no acknowledgement of service at the time judgment was to be entered. In that regard he followed the decision of Andrew Baker J in ***Cunico Resources NV v Daskalakis*** [2018] EWHC 3382 (Comm), a decision in relation to r12.3(1) prior to its amendment.

One other difference between default judgment in Admiralty *in rem* proceedings and proceedings generally is that default judgment can only be obtained on application and after proving the claim. However, the Registrar did not regard this as a reason to take a different approach to late filed acknowledgements of service.

Summary Judgment/Strike Out

Another peculiarity of the Admiralty *in rem* procedure, which the Registrar stated was *"arguably a defect"* is that CPR rule 24.3(2)(b) prohibits summary judgment.

This had a material impact because in this case the Registrar indicated that he may have granted summary judgment but that he would not have granted strike out. The Registrar noted that the rationale for the rule is obscure and that it may have been carried over from pre-CPR rules which provided for summary judgment applications to be made in chambers, whereas *in rem* claims require public hearing due to the potential to affect other parties with an interest in the proceedings. However, that rationale for the rule would no longer apply.

Another explanation is that it is unnecessary to have summary judgment for an *in rem* claim because once the action becomes defended then a claimant can proceed in personam against a defendant who enters an appearance, thereby making summary judgment available. That was considered to be the position by the Privy Council in ***The August 8*** [1983] 2 AC 450, a pre-CPR decision.

Comment

The judgment provides a helpful clarification in respect of default judgment applications for *in rem* claims. The approach to late acknowledgements of service filed before judgment is obtained will be the same as for other claims under rule r12.3(1). CPR rule 69.9(1) would benefit from amendment to reflect this.

The judgment also calls for a re-evaluation of the rule prohibiting summary judgment for *in rem* claims. The rationale for the rule is unclear and is arguably unjustified in the modern Civil Procedure Rules.

Robert Ward appeared for the Claimant, instructed by Elliot Bishop at Shoosmiths.

Robert Ward has developed a busy practice spanning the breadth of Chambers' practice areas including shipping, commercial disputes, international arbitration and aviation. Shipping is one of Rob's core practice areas. He is regularly instructed on charterparty and bill of lading disputes in court proceedings and in arbitrations, particularly under LMAA Rules, and also has experience in relation to wet shipping matters such as collisions and general average.

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The risk of not knowing the contractual chain

Fimbank v KCH Shipping (The Giant Ace) [2020] EWHC 1765 (Comm), [2020] 2 Lloyd's Rep 511

Author: Ruth Hosking

The Application

Fimbank had commenced arbitration (within time and in accordance with agreed time extensions) against the registered owner of the vessel the "GIANT ACE". However, they had not commenced arbitration (or agreed time extensions) with the bare boat charterer. Consequently, Fimbank applied under s. 12 of the Arbitration Act 1996 ("the 1996 Act") to extend time for commencing arbitration against the bareboat charterer.

Fimbank relied on two grounds:

(1) s. 12(3)(a) of the 1996 Act "that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time"; or

(2) a. 23(3)(b) of the 1996 Act "that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question."

The Court's Approach to s. 12.

It is well established that the Court is entitled to determine a s.12 application on the assumption that the time bar in question applies to the claimant's claim, without prejudicing a claimant's right to argue subsequently: see ***The Seki Rolette*** [1998] 2 Lloyd's Rep. 638 at 646.

The Court endorsed the approach of Hamblen J in ***SOS v Inerco Trade*** [201] 2 Lloyd's Rep. 345 at paragraphs 47 & 48 that the approach to the construction of s. 12 should start from the assumption that when the parties agreed the time bar, they must be taken to have contemplated that if there were any omission to comply with its provisions in not unusual circumstances arising in the ordinary course of business, the claim would be time barred unless the conduct of the other party made it unjust that it should be.

The Court's Approach to s. 12(3)(a).

This section imposes a double requirement for the applicant to surmount in that the relevant circumstances must both have been (1) outside the reasonable contemplation of the parties when the contract was entered into and (2) injustice. Moreover, under (1) there are two separate questions:

(1) whether there were relevant circumstances beyond the reasonable contemplation of the parties when they agreed the provision; and

(2) if so, whether, if the parties had contemplated them. They would also have contemplated that the time bar might not apply in such circumstances. "Reasonable contemplation" means "not unlikely to occur" : see Haddon-Cave LJ in ***Haven Insurance v. Elephant Insurance*** [2018] EWCA Civ 2492 at paragraph 35.

The Court's approach to s. 12(3)(b)

Under this ground the applicant must show some positive conduct on the part of a respondent that renders reliance on the time limit unjust. However, the respondent's conduct does not have to be the sole or even the predominant cause of the failure to meet the deadline. Nor does the respondent's conduct have to be wrongful or blameworthy: unintentional conduct on the part of the respondent may suffice.

The Court's findings

No extension of time was granted:

(1) s. 12(3)(a): although originally the case was put on the basis of concealment of the bareboat charter and he correspondence that changed. Fimbank instead argued that the parties could not have reasonably foreseen, at the time the Bills were first issued, that third parties, with a financial interest in the shape of their LOIs, would contribute to misleading the bank into wrongly believing that a party other than the bareboat charterer was liable under those bills.

The Court considered the two prongs of the first limb:

(i) were the circumstances, viewed overall, outside the responsible contemplation of the parties when the contract was entered into? No. The circumstances were no more than a mistake, compounded (but not caused by) correspondence with other parties innocently reinforcing that mistake, compounded by a yet further error;

(ii) if the parties had contemplated them, would they also have contemplated that the time bar might not apply? No. Owners are entitled to stay silent, and if they do so, the court will not extend time under section 12.

(2) S. 12(3)(b): the court considered whether various communications sent by time charterers' lawyers could be attributed to the bareboat charterers. The Court concluded that the time charterer's lawyers acted on the bareboat charterer's behalf on one occasion. The judge considered that the single message, read alone and in the abstract, would naturally be taken as referring to different parties. However, it did not stand alone. The Court held that it was not a case where it was possible to conclude that the conduct of the bareboat charterer made it unjust to hold Fimbank to the strict terms of the provision in question.

(3) Residual discretion? The Court did not have to determine whether, even if the requirements of s. 12 of the 1996 Act were satisfied, the Court nevertheless has a residual discretion. The Judge said if it were necessary she would have found that a discretion remained and that s. 12(3) simply defined the circumstances in which that discretion could be exercised. Thus if a party fails to make an application under s. 12 of the 1996 Act promptly a court may decline the application even if it otherwise satisfies the requirements of s. 12.

Comment

This case confirms the orthodoxy as summarised by Ambrose, Maxwell and Collett in London Maritime Arbitration (4th edition) "*The authorities suggest that the test will be extremely difficult to satisfy and an extension will probably only be granted if the circumstances are entirely out of the ordinary*". It also serves as a warning to all practitioners to make sure contractual chains are properly investigated well in advance of a timetable expiring.

An interesting question, which does not appear to have been considered in this case (or in another recent s. 12 case ***Times Trading Corporation v National Bank of Fujairah (Dubai Branch)*** [2020] EWHC 1938(Comm)) is whether to make an application under s. 12 of the 1996 Act the contractual time bar needs to be in the arbitration agreement itself as the words in s. 12(1) "where an arbitration agreement" seems to suggest it must. As the authors of *Merkin and Flannery on the Arbitration Act 1996* opine if there is a contractual time bar contained elsewhere in the contract than within the arbitration agreement, it may be said that the section has no relevance: see section 12.4. This does not appear to be a point which has ever been run: parties appear to assume that s. 12 can apply where the limitation provision is in a different part of the contract than the arbitration agreement. It will be interesting to see what the Court does with such an argument should it ever be run.

Simon Rainey QC acted for the successful respondent, KCH Shipping Co Ltd, and was instructed by Kyri Evagora and Thor Malouf of Reed Smith LLP.

Ruth Hosking has extensive experience of all kinds of dry shipping, commodities and transport disputes, including numerous disputes under charterparties, COAs and bills of lading including general average disputes. She also acts and advises in salvage, collision & admiralty work.

"She is the all-round package, a brilliant barrister." (Chambers UK, 2021)

"Has a quick grasp of complex issues." (Legal 500, 2021)

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Culpable Delay No Bar to Extending Time Under s12 of the Arbitration Act 1996

National Bank of Fujairah (Dubai Branch) v Times Trading Corp [2020] EWHC 1983 (Comm)

Author: Nichola Warrender QC

In ***National Bank of Fujairah (Dubai Branch) v Times Trading Corp*** [2020] EWHC 1983 (Comm) Foxton J granted relief under s12 of the Arbitration Act 1996 to the National Bank of Fujairah ("NBF") and extended time for the commencement of proceedings against Times Trading Corp ("TTC") in respect of an alleged misdelivery of cargo against letters of indemnity without production of bills of lading held by NBF and which claim was subject to a one year time bar.

That extension was granted notwithstanding that NBF was itself guilty of significant culpable delay in seeking relief and in circumstances where NBF had not only delayed in commencing arbitration against TTC pending the outcome of the application but on learning of TTC's involvement as carrier had actively taken other steps including amending a guarantee given as security for its misdelivery claim and serving proceedings which had been issued within time against TTC (and others) in the High Court of Singapore.

The application was heard after TTC had obtained an anti-suit injunction against NBF (***Times Trading Corporation v National Bank of Fujairah (Dubai Branch)*** [2020] EWHC 1078 (Comm)) on condition that TTC undertook not to take any limitation defence against NBF in arbitration proceedings, something which it was unwilling to do, and in respect of which condition TTC had failed to obtain permission to challenge on appeal.

In determining the s12 application, Foxton J adopted at [27]-[32] the summary of the governing principles from ***FIMbank Plc v KCH Shipping Co Ltd*** [2020] 1765 (Comm) at [73]-[83] which draws on the summary of Haddon-Cave LJ in ***Haven Insurance v Elephant Insurance*** [2018] EWCA Civ 2494 at [33]-[38].

As ever the outcome determined by an application of those principles was highly fact-sensitive.

On the facts, the primary submission that the Court had jurisdiction under s12(3)(b) succeeded (see [34]-[50]). Foxton J held that an impression that the carrier was the registered owner ("Rosalind") which had been given on TTC's behalf by solicitors initially ignorant of the existence of a bareboat charter and thereafter in an attempt to avoid revealing TTC's involvement had the effect of reinforcing NBF's own solicitors' erroneous understanding of the true position. That misleading conduct was a significant factor in NBF missing the time bar and the requisite causative nexus was established making it unjust to hold NBF to the strict terms of the time bar.

NBF's fall-back argument under s12(3)(a) failed (see [51]). This was for the same reasons as given in the ***FIMbank*** case at [92] and [95]-[96].

The most surprising aspect of the decision is that TTC failed to persuade Foxton J to exercise the discretion to refuse to extend time notwithstanding that there had been a significant and culpable delay (of months) in serving any s12 application, no steps had been taken by NBF to commence arbitration against TTC and yet after it had been informed that TTC was the carrier, steps were taken by NBF to secure an amendment to the guarantee given as security for its misdelivery claims and serve proceedings already issued High Court of Singapore, which made the delay thereafter particularly difficult to justify.

Perhaps concerned that Foxton J would refuse the extension by exercising the discretion against it, NBF had reserved the right to challenge, on appeal to a higher court, that there was any such discretion to do so if a jurisdictional threshold was met. This was despite the observations of Cockerill J the previous week in the ***FIMbank*** case at [121] in support of its existence.

In the event, Foxton J exercised the discretion in NBF's favour.

In doing so, at [57]-[58] Foxton rejected TTC's submission that culpable delay by NBF was itself sufficient to preclude s12 relief preferring the submission that delay was but one factor in the exercise of the discretion. Foxton J also endorsed Cockerill J's observation at [119] in the ***FIMbank*** case that the approach to the issue of delay might be impacted by "*the exact nature of the jurisdictional hurdle, and the margin by which the relevant hurdle was cleared.*"

The relevant factors which persuaded Foxton J to grant the relief in this case were in summary as follows (see [59]):

- NBF had been misled into firmly believing Rosalind was the carrier and the s12(3)(b) jurisdictional hurdle relied upon had been cleared by "*an appreciable margin.*"
- That belief continued even after receipt of the information that it was TTC who was the carrier.
- TTC continued to play a part in NBF's delay in seeking relief. TTC refused to provide a copy of the bareboat charter when asked to do so and even though it must have been appreciated that TTC's involvement might well be discounted for as long as no such document was produced. Once the bareboat charter had been provided for the anti-suit injunction, NBF prepared and issued its s12 application in short order.
- TTC's complaints about now having to meet a "*stale claim*" had to be viewed in the context of it being aware of the misdelivery claim and the arbitration which had been commenced in time against Rosalind with both instructing the same solicitors. It was also relevant that it was TTC who had suggested that the constitution of the tribunal in that arbitration be put on hold on "*an open-ended basis.*"

Whilst this decision is authority for the proposition that culpable delay is not a complete bar to an extension of time under s12, the balance struck by Foxton J in exercising the discretion was undoubtedly influenced by his dim view of the actions of TTC and the period over and extent to which those affected NBF's conduct. Had TTC and those corresponding with NBF on its behalf been open as to the identity of the carrier under the bills, and particularly so after the expiry of the one year time bar, then there could have been a very different result. Accordingly, it remains best practice for any s12 application to be made promptly and prudent to commence arbitration proceedings as soon as possible.

Nichola Warrender QC Dry shipping, commodities and transport form a substantial part of Nichola's practice. As a result, she has developed a wealth of experience in these fields.

"Her attention-to-detail is outstanding, she is highly personable, and is a persuasive orator."; "Nichola pays exceptional attention to detail and has an excellent memory; she is very valuable on long-running matters involving complex facts and multiple expert disciplines."

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The duty on an arbitrator to disclose multiple appointments

Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48

Author: Simon Rainey QC

On 27 November 2020, the Supreme Court handed down its highly anticipated judgment in ***Halliburton Company v Chubb Bermuda Insurance Ltd*** [2020] UKSC 48, unanimously dismissing Halliburton's appeal. In doing so, it found that, at the relevant time of assessment, a fair-minded observer would not have considered that the circumstances gave rise to reasonable doubts as to the impartiality of the chairman of the tribunal hearing the parties' dispute arising out of the Deepwater Horizon incident in 2010.

However, the decision brings finality to a key issue in the English law of arbitration, namely the existence of a legal duty to disclose an arbitrator's participation in other arbitrations involving the same subject matter and a common party. In addition, it delivers clarity in relation to certain other aspects of disclosure and arbitral practice more generally – notably including the interaction between the duty of disclosure on one hand and the obligation of confidentiality on the other, and the application of the English rules on disclosure just as equally to party-appointed arbitrators as to tribunal chairs.

The issues before the Supreme Court were (i) whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias, and (ii) whether and to what extent the arbitrator may do so without disclosure.

Giving the leading judgment, Lord Hodge made clear that in cases of apparent bias such as the present, the court was not concerned "to 'make windows into men's souls' in search of an animus against a party or any other actual bias, whether conscious or unconscious." Instead, its task was to examine "how things appear objectively". [Para. 52]

The analysis was done in the context of section 24(1)(a) of the Act which allows for the removal of an arbitrator where "circumstances exist that give rise to justifiable doubts" as to the arbitrator's impartiality. The court considered that this could be the case "if the arbitrator at and from the date of his or her appointment had such knowledge of undisclosed circumstances as would, unless the parties waived the obligation, render him or her liable to be removed under section 24 of the 1996 Act". Agreeing with the Court of Appeal, the Supreme Court affirmed that this gave rise to a legal duty to make a disclosure of such matters which would otherwise cause the arbitrator to be in breach of their "statutory obligation of fairness". In other words, "an arbitrator who knowingly fails to act in a way which fairness requires to the potential detriment of a party is guilty of partiality". [Para. 78]

The court accepted the submissions of the ICC, LCIA and CIArb who favoured the recognition of such a legal duty in international arbitration proceedings; and those of the GAFTA and the LMAA to the effect that parties who chose to arbitrate their commodities and shipping disputes under those specialist rules understood that the smaller pool of specialist arbitrators involved might well act in multiple arbitrations arising out of the same subject matter, without needing to disclose that fact. Lady Arden reinforced the importance of having clear evidence of a practice of dispensing with parties' consent for arbitrators to appear in multiple arbitrations: while the English courts might trust arbitrators to decide cases on the basis of the evidence before them and set aside any inequality of arms and material asymmetry of information, this was something that "may not translate easily for the many parties to arbitrations who are familiar with different legal systems".

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