Quadrant CHAMBERS

Quadrant on Shipping

Issue 4 | Autumn 2022

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

Legal 500 2023

Shipping Set of the Year 2022 (Legal 500 and Chambers)
Shipping Set of the Year 2021 (Chambers)
Shipping Set of the Year 2020 (Legal 500)
Shipping Set of the Year 2019 (Legal 500)
Shipping Set of the Year 2018 (Chambers)

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EDITORIAL by Nigel Cooper KC

Welcome to the Fourth edition of Quadrant on Shipping, an edition which comes out in volatile times for the global economy generally but also for the shipping industry not least because of the continuing crisis in Ukraine, supply chain issues and rising energy prices. It also comes out at a time when there is a global focus on maintaining the move to net zero and when 1 January 2023 sees the coming into force of amendments to MARPOL which will require ships to calculate their EEXI and to initiate the collection of data for the reporting of their CII and CII rating. Alongside or perhaps because of these trends, 2022 has been a busy year for shipping disputes and 2023 looks set to continue in a similar vein as Poonam Melwani KC and Paul Henton outline in their review of the year below.

The articles in this edition highlight just how often members of Quadrant continue to play a leading role in the determination of key decisions across a breadth of industry sectors, often in the appellate courts. *The Eternal Bliss* will be before the Supreme Court next year to finally determine whether demurrage is an exclusive remedy. *The Polar* is also set for the Supreme Court on the issue of whether owners can recover a contribution to a ransom payment within general average. In the logistics sector, the decision of the Commercial Court in *JTI Polska v Mark-Trans-Sped* is off to the Supreme Court by way of leapfrog appeal to determine the extent to which a liability for excise duties is recoverable under the provisions of the CMR Convention. John Kimbell KC and Maya Chilaeva appear for the appellants while Stewart Buckingham KC and Ben Gardner appear for the respondents.

This year has also seen the resurgence of cases in certain traditional areas of shipping practice with both limitation actions and collision actions coming before the courts more frequently. Some of those cases, for example *The Maersk Honam* and *The Ever Given*, look set to occupy the courts through 2023 and 2024. Other cases of interest include the decision of the Court of Appeal in *The C Challenger* addressing questions of general importance in the law of misrepresentation, *The Naiguatá* considering the extent to which injunctive relief is available against States and *Unicredit Bank v. Euronav NV* which addresses the recurring question of when a bank's claim for damages survives the delivery of cargo without production of a bill of lading.

Shipping is a core specialism for many members of Quadrant Chambers and we are also delighted when we can add to the strength of our team. Chambers welcomes as a new member, James Shirley, who will be known to many of you. We are also delighted with Chambers success at the Legal 500 and Chambers & Partners UK Bar Awards 2022.

London International Shipping Week returns next year in the week of 11 September 2023 and we are pleased to be supporting that event both as a Silver Sponsor and also as an active participant. We look forward to seeing many of you during that week (and no doubt on other occasions).

It only remains for me to say, thank you on behalf of all members of the Quadrant Chambers shipping team to all our clients for your on-going support. We are all committed to providing our clients with an excellent level of service and we hope that this is your experience. We look forward to continuing to work with you in the future.

Nigel Cooper KC appears before the business and appellate courts in England & Wales, and has a strong arbitration practice advising on and acting in disputes before all the main international and domestic arbitral bodies both in London and elsewhere. Nigel accepts appointments as an arbitrator and has acted as a mediator and as a party's representative in mediations. He has experience of public inquiries having appeared for the government in three major formal investigations.

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Quadrant Chambers - Shipping, Commodities and Aviation Set of the Year

Marketing and Front of House Team of the Year

Matthew Reeve and Tom Bird were shortlisted for Shipping, Commodities and Aviation Junior of the Year

Ruth Hosking was shortlisted for Junior of the Year

Chambers UK Bar Shipping & Commodities Overview

Authors: Poonam Melwani KC & Paul Henton

2022 has been a turbulent year for the global economy, and the shipping sector has been no exception. The sector has experienced dramatic falls in freight rates. Ships are reported to be leaving Asia for the US West Coast three-quarters full. Container spot rates are reported to have halved in value during September and October. This may be attributable to a combination of factors- from the easing in supply chain disruptions that were built up over the Covid-19 pandemic, to the ongoing conflict in Ukraine. But most ominously these trends have been heralded as one of the key indicators that a global recession may be on the horizon- with global trade volumes slowing down rapidly in the light of shrinking demand for goods and rising inflationary pressures. These trends look set to continue into 2023.

With market and sectoral volatility comes an inevitable increase in disputes. For example, falling rates inevitably lead to charterers seeking to cancel fixtures. And litigation arising out of Covid-19 related delays, especially at Far East ports taking a zero tolerance policy, is continuing to work its way through the Courts and Tribunals.

More than that. The Ukraine conflict has had a profound effect on the sector. War risks clauses are being tested by owners seeking to exit fixtures which threaten to take them near the theatre of conflict. Force majeure and sanctions clauses are being tested by owners and charterers alike wishing to escape the economic taint of association with sanctioned or suspected-sanctioned entities or cargoes. For every high-value superyacht to make the press, unable to depart some exotic marina, there are dozens more unglamorous cargo-vessels held up in less exotic locations around the world on suspected sanctions bases.

Disputes in this area tend to require consideration of a variety of sanctions regimes (UN, US, EU, and many others), as well as collaboration with and input from overseas lawyers on their likely application by authorities in the jurisdictions in which the vessels or cargoes are located. But the continued popularity of English jurisdiction or London arbitration clauses under the associated charterparties and bill of lading contracts mean that many such disputes are destined to be funnelled towards the English legal system for years to come.

Decarbonisation also continues to present challenges to the maritime industry, with the IMO's carbon intensity indicators (CIIs) set to come into force in January 2023, amongst other things imposing requirements on all vessels to provide energy efficiency management plans. Industry bodies have responded by developing the so-called "Blue Visby protocol" for incorporation into time- and voyage-charters, bills of lading, and sale contracts. It remains to be seen what the take-up will be and how this will impact on disputes between individual contracting parties.

These may be the trends to watch out for, but what of the last year in review? Inevitably the English Courts and London tribunals have continued to be kept busy with a large number of shipping and commodities disputes over the last 12 months. Covid-19 related adjournments are now a distant memory, and both hybrid and fully-remote hearings have become a regular feature of the litigation landscape. The litigation show has remained very much on the road.

Quadrant Chambers

At the coalface, over 100 claimants or groups of claimants have now filed claims against the c. £83 million limitation fund set up by the Owners of the "*Ever Given*" in respect of the well-publicised grounding incident in the Suez Canal. There can be few maritime solicitors left who are yet to be instructed in this goliath piece of litigation. Other sizeable limitation actions are also progressing through the Admiralty Court, including in relation to the "*Maersk Honam*" and "*MSC Flaminia*" catastrophes. These actions and others like them are set to continue to run until well into 2023 and probably beyond, testing the capacity of the Admiralty Court and its practitioners to case-manage and streamline multifarious claims against a limited pot of money.

At the appellate level, two particular highlights are the decisions of the Court of Appeal in ***The Eternal Bliss***, in relation to recoverability of damages in addition to demurrage, and ***The Polar***, in relation

to the incorporation of charterparty war risk clauses and insurance provisions into bill of lading contracts. In each instance the Supreme Court has granted leave to appeal, with the arguments due to be heard in 2023. The latter is particularly topical in the light of the Ukraine conflict which has given renewed prominence to disputes under war risk provisions, and in circumstances where the disputes arising very often involve interplay between both owners and charterers as well as cargo interests under bill of lading contracts.

Finally no review of shipping litigation over the last 12 months would be complete without mention of the decision of the Supreme Court in ***The CMA CGM Libra***, confirming that defective passage planning can render a vessel unseaworthy, and is not to be characterised as an error in navigation (for which an owner's liability is typically excepted under Hague/ Hague-Visby Rules). It has been reported that International Group P&I Clubs have already received passage planning- related claims in excess of US$115 million since the decision was handed down.

Shipping and commodities litigation continues to evolve, but what remains constant is the resolve of its practitioners to rise to the challenges of the day and deliver the very best service to industry clients. In so doing, the practice area has historically generated many of the leading common law decisions of general applicability: from contract to tort to restitution via principles of causation, remoteness, damages assessment, and so on. We can never quite know where the journey will take us next. But we wish all practitioners well as we continue to navigate these choppy waters throughout the rest of 2022 and into 2023 and beyond.

Quadrant Chambers are ranked as a band one leading shipping and commodities set with Chambers UK Bar and Chambers Global.

Poonam Melwani KC is Head of Quadrant Chambers. She is a commercial silk who practises across the full spectrum of commercial, insurance, energy and shipping law, providing advisory and advocacy services. Praised as "...always in demand, she is as good on her feet as she is adept at mastering complex legal, factual and expert material...." (Chambers UK) Poonam was shortlisted for Shipping Silk of the Year at the Chambers & Partners UK Bar Awards 2020.

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Paul Henton is an experienced Commercial practitioner recommended in the directories for Shipping, Energy, Commodities and International Trade. He has been recommended in the directories for many years. He is recommended in Chambers UK, Chambers Global, Legal 500 UK, Legal 500 Asia Pacific and Who's Who Legal. "*A real star and a joy to work with, calm under pressure and clear in his analysis.*" (Legal 500, 2022)

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Winner UK BAR AWARDS 2022

We're very happy to announce that we have won awards across all three shipping and commodities categories at the Chambers & Partners UK Bar Awards 2022.

Shipping Set of the Year

Shipping Silk of the Year
- Simon Rainey KC

Shipping Junior of the Year
- Ruth Hosking

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Quadrant is delighted to welcome James Shirley as a new member of Chambers

James is an experienced trial advocate, equally comfortable appearing in person or remotely, whether in English courts and tribunals or those abroad. He practises in all areas of commercial law, in particular fraud cases, wet and dry shipping and international arbitration, jurisdictional disputes, the sale and carriage of goods, and insurance. Recent cases include the Court of Appeal decision in ***MUR Shipping BV v RTI Ltd*** [2022] EWCA Civ 1406; [2022] EWHC 467 (Comm) (construction of a force majeure clause and its application to sanctions that hindered payments of freight in US dollars) and Supreme Court case ***Nautical Challenge Ltd v Evergreen Marine (UK) Limited*** (Collision case, crossing rule, apportionment). He is ranked as a leading junior by both Chambers & Partners and Legal 500, where he is described as '*Perceptive, strategic and unflappable under pressure. His advocacy is first class and the easy manner he adopts in making submissions finds favour with arbitrators and judges alike.*' (Legal 500 2023).

"I am delighted to welcome James Shirley to his new home at Quadrant Chambers. He is a fantastic addition to our team, specialising in a number of our core areas including shipping and international trade, which remain at the heart of Quadrant Chambers. James will already be familiar to a number of our clients, and I look forward to seeing him flourish here at Quadrant."

Poonam Melwani KC, Head of Quadrant Chambers.

"I'm thrilled to be joining Poonam and my new colleagues at Quadrant. I have no doubt that my practice will thrive in the hands of the clerking and marketing teams led by Simon Slattery and Sarah Longden. On a personal note, Quadrant's strong commitment to social mobility makes it a perfect place for me to contribute to making the bar accessible."

James Shirley

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Demurrage an Exclusive Remedy: the Court of Appeal's Judgment in *The Eternal Bliss*

Authors: Simon Rainey KC & Tom Bird

This was a significant decision on a major point of shipping law concerning the meaning and scope of demurrage.

The underlying 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 daily rate or pro rata.

After arriving at the discharge port, the vessel was kept at the anchorage for 31 days due to port congestion and lack of storage space ashore. Post 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 point of law on assumed facts under s.45 of the Arbitration Act 1996. At first instance, Andrew Baker J found for the shipowner. He held that the cargo claim liabilities were a different type of loss to the detention of the vessel and that the shipowner could recover damages without proving a separate breach of contract.

Like the first instance judge, the Court of Appeal approached the point as one of principle, noting that distinguished judges have struggled, without success, to discern a ratio on this issue in ***Reidar v Arcos*** (the 1926 decision to which the long debate is often traced back). In delivering the Court's judgment, Males LJ held that the case turned on the proper meaning of the term "demurrage" as it is used in the charterparty. The Court of Appeal concluded that, "in the absence of any contrary indication in a particular charterparty, demurrage liquidates the whole of the damages arising from a charterer's breach of charter in failing to complete cargo operations within the laytime" (para 52).

In reversing the first instance decision, the Court of Appeal gave a much broader scope of the meaning of "demurrage" and treated it in much the same way as a standard liquidated damages clause, rather than limiting it to a particular type of loss. But this may not be the last word on the issue.

In September 2022, the Supreme Court granted the shipowner permission to Appeal. The stage is now set for the final act and the authoritative determination of a point which has, for almost 100 years, divided eminent judges and commentators.

Simon Rainey KC and Tom Bird act for the shipowner, instructed by Nick Austin and Mike Adamson of Reed Smith LLP.

Simon Rainey KC is regarded as the foremost shipping and international trade KC at the English Bar today. He has been ranked in the unique category of "Star Individual" (a special category, ranked above Band 1) for 'Shipping and Commodities' by Chambers & Partners UK since 2015. Winner: International Arbitration Silk of the Year 2020, Legal 500 (and shortlisted 2017 and 2019). Winner: Shipping Silk of the Year 2017 & 2022, both Chambers & Partners and Legal 500 (and shortlisted 2018; 2019; 2020). Lloyd's List Top 10 Global Maritime Lawyers in 2017, 2019 and 2021. Simon has been shortlisted for Shipping Silk of the Year at the forthcoming Chambers UK Bar Awards 2022.

"The go-to senior shipping silk. First class." (Legal 500, 2023)

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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*", with "*first-class*" advocacy skills. Tom was shortlisted for Shipping Junior of the Year for the Legal 500 UK Awards 2022. 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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Probono: Human Rights at Sea

In 2020, James M Turner KC and Stephanie Barrett, acting pro bono, advised the well-known maritime human rights NGO, Human Rights at Sea ("**HRaS**") on New Zealand's implementation of aspects of the Maritime Labour Convention ("**MLC**") that relate to shore-based seafarer welfare. Further campaigning by HRaS, deploying James and Stephanie's advice, led directly to a change in the law in New Zealand.

This year, James (again acting pro bono), with Maya Chilaeva, assisted by Samuel Walpole of the Queensland Bar, advised HRaS again. This time, their opinion considered the arrangements currently in place in Australia as regards its MLC obligations for shore-based seafarer welfare. The MLC leaves a very great deal of latitude to the member states as to how those obligations – which are themselves not exactly "hard-edged" – are to be implemented.

In this sphere, Australia has traditionally relied to a considerable extent on initiatives such as the Mission to Seafarers, but their fund-raising ability has been eroded of late by the pandemic and by technological changes. The opinion observes that, as a result, the Australian provision of shore-based seafarer welfare is showing signs of strain and, if left unchecked, may leave the Commonwealth in breach of its obligations.

The opinion therefore canvasses an amendment to the Australian Maritime Safety Authority Act 1990, which would have the effect of requiring the Australian Maritime Safety Authority to ensure that shore-based seafarer welfare is sufficiently funded. That would ensure Australia's compliance with its obligations under the MLC.

Their opinion was published by the NGO Human Rights at Sea on 24 February 2022 as part of its international Maritime Levy Campaign, which is still ongoing (with some optimism, following the recent election of a more left-leaning government).

Freight and the Rule Against Set-off

Holleman Special Transport & Project Cargo SRL v Co UK Shipping and Trading Limited [2022] EWHC 1114 (Comm)

Author: Max Davidson

In this case, the claimant sought summary judgment on its claim for what it termed as "freight" due under a transport agreement whereby the claimant had agreed to carry by road numerous wind turbine components from a port to a windfarm site in Sweden. The contract was contained in a document entitled "Transport Contract" and was expressly made subject to the Convention on Contracts for the International Carriage of Goods by Road.

The defendant resisted the claimant's application for summary judgment on the grounds that (i) the amounts claimed by the claimant were not due on the proper construction of the contract, and the proper construction of contract could not be determined until trial; and (ii) the defendant had a cross-claim for damages which exceeded the amount claimed by the claimant, and that it was entitled to set-off that cross-claim and thereby defeat the application for summary judgment.

It was the second of those points which raised a point of principle for the Judge, HHJ Pelling KC. The claimant conceded that the defendant had an arguable counterclaim in an amount exceeding the sums claimed as "freight", but contended that the rule against set-off applicable in contracts of carriage by sea (***The Aries*** [1977] 1 WLR 185) as extended to contracts for the carriage by road (***R H & D International Ltd v IAS Animal Air Services Ltd*** [1984] 1 WLR 573; ***United Carriers Ltd v Heritage Food Group (UK) Ltd*** [1996] 1 WLR 371) should be applied, and therefore summary judgment should be entered for the amount sought by the claimant.

The Transport Contract provided that the claimant was entitled to receive a "*price per day*" or a "*daily price*" for the road transport services provided under the contract. The claimant sought to characterise the price per day or daily price payable under the contract as " *freight* " in order to take advantage of the rule of English law that precludes set off or common-law abatement being asserted against a claim to recover freight payable under contracts of carriage.

The defendant contended that the rule against set-off applied only to claims for "*freight*" properly so-called and would not apply to a daily fee for transport services. In particular, it argued that in the context of maritime law, there is a fundamental distinction between freight payable typically under a voyage charterparty and hire payable under a time charter with the common-law rule against set-off applying to the first but not the second. The defendant placed reliance on comments of Nicholas Vineall KC made in ***Globalink Transportation and Logistics Worldwide LLP v DHL Project & Chartering Ltd*** [2019] EWHC 225 (Comm) where he said that the rule against set-off would not apply to fees due under a road haulage contract where the fees charged were expressed to be daily rates for the provision of vehicles because such payments were "*... closer to the land equivalent of a time charter than the land equivalent of a voyage charter...*"

HHJ Pelling KC, having considered the authorities, found that the issue turned on whether what was payable under the contract was to be treated as freight. What was payable was a daily rate for the use of the trucks to be supplied by the claimant to the defendant. The Judge said the vehicles were being paid for not merely when transporting the parts from port to site but generally for the period fixed by the contract irrespective of use or non-use, which took the case away from freight in the sense of a payment for carrying a cargo and much more towards the concept of hire being a payment for having vehicles available throughout the period fixed by the contract.

HHJ Pelling KC further held that there could be no justification for extending the rule against set-off to apply to payments other than freight as understood in the narrow sense. Therefore, the rule against set-off was of no application.

Max Davidson acted for the successful defendant, instructed by Elizabeth Sloane, Cindy Ko and Nikki Chu in the Hong Kong and London offices of Stephenson Harwood.

Max Davidson is an experienced junior counsel acting in a broad range of commercial disputes, including shipping, commodities, international arbitration, fraud, aviation, energy and insurance. He regularly appears as sole and junior counsel in the Commercial Court and in international arbitration, and has been listed as a leading junior and rising star in the main legal directories for a number of years

"Confident, eloquent, hard working and good on his feet, he the ability to grasp highly complicated matters with ease." (Legal 500, 2022)

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Upcoming Events

Tuesday 15 November

LSLC: The Law Commission's Consultation Paper on the Arbitration Act 1996

Poonam Melwani KC

LSLC The Forum for Shipping, Commercial Law & Dispute Resolution

Thursday 24 November

Quadrant Chambers 9th Annual Piraeus Shipping Law Seminar 2022

Robert Thomas KC, Jeremy Richmond KC and Koye Akoni

Poonam Melwani KC, Nigel Cooper KC, Ruth Hosking, Andrew Carruth and Craig Williams

Friday 25 November

Quadrant Chambers and WISTA Hellas Breakfast Event: Shipping disputes from start to finish - pitfalls and top tips

Poonam Melwani KC, Ruth Hosking, Elina Souli, Britannia P&I, Anastasia Dola Tsotas, LCI Law

Thursday 1 December

SCMA Perspective Series: Cross-border Insolvency and Maritime Law

Jeremy Richmond KC

Wednesday 18 January

Junior Shipping Breakfast Workshop - Anti-suit injunctions in Shipping Claims

Saira Paruk, Gemma Morgan and Peter Stevenson

www.quadrantchambers.com/events or email marketing@quadrantchambers.com for more information.

Piracy – *Herculito Maritime v Gunvor* in the Court of Appeal (*The 'Polar"*)

Author: Guy Blackwood KC

Claim by owner of the POLAR to recover cargo's proportion of general average, the expenditure being a ransom payment to pirates. The claim was defended on the ground that the shipowner's only remedy in the event of having to pay a ransom was to recover under the terms of insurance policies, the premium for which was payable by the voyage charterer.

By a charterparty, the shipowner chartered the vessel to Clearlake for a voyage from Tallin/St Petersburg to Fujairah or Singapore. An additional Gulf of Aden Clause stated:

> *"Any additional insurance premia … shall be for chrtrs account. Max USD 40,000 for charterer's account …"*

A cargo of fuel oil was loaded at St Petersburg between 29th September and 2nd October 2010.

6 bills of lading were issued. The shipper was part of Rosneft, the consignee was "to the order of BNP Paribas …". Bills 1 to 5 stated: "… pursuant and subject to all terms and conditions as per TANKER VOYAGE CHARTER PARTY indicated hereunder, including provisions overleaf." Bill 6 provided : "All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause are herein incorporated."

While transiting the Gulf of Aden, the vessel was seized by pirates. She was held captive before being released. In order to obtain release, a ransom was paid of US $7.7 million, refunded by the K&R and H&M war risks underwriters, who sought a contribution from cargo interests' underwriters.

Two issues arose:

1. Whether the phrase "bill of lading holders" was to be substituted for "charterers" on incorporation into the bills.
2. Whether Owners had agreed, by the Gulf of Aden Clause to constitute their own insurance fund as a complete code for recovery in the event of general average expenditure by payment of ransom, with the consequence that Owners could not seek a contribution.

On Issue 1, the Court of Appeal held that no manipulation was appropriate, because there was nothing in the bills (or the charterparty) to say how liability for the premium would be apportioned between different bill of lading holders.

On Issue 2, the Court of Appeal held that the bills of lading did not exclude Cargo Interests' liability. The risk of piracy and the potential need to pay a ransom were not only foreseeable but were foreseen by the parties to the bill of lading contracts and dealt with expressly by them.

The parties knew that, if the shipowner was to allow its vessel to transit the Gulf of Aden, insurance against this specific risk would need to be taken out. They knew or could be taken to have known that payment of such a ransom would give rise to general average. It would have been straightforward in the circumstances, if that is what they intended, to say in terms that cargo was not to contribute in general average in the event of such a payment.

But the parties had not done so, instead leaving an implicit understanding to this effect to be inferred (on the Cargo Owners' case). That was an unnecessarily convoluted way to express a simple concept, and in the circumstances it was to be presumed that no abandonment of remedies was intended.

Guy was instructed by Richard Neylon and Jenny Salmon at HFW.

The Supreme Court has recently granted cargo interests permission to appeal.

Guy Blackwood KC has a comprehensive commercial practice, which includes large contractual disputes, international arbitration, insurance & reinsurance, banking & finance, civil fraud, energy & utilities, public international law including bilateral investment treaty arbitration, commodities and shipping. Guy is listed as a leading silk in the leading directories in commercial litigation, insurance and reinsurance, commodities and international arbitration.

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"WILFORCE" Collision with "WESTERN MOSCOW": The Application of the Crossing Rules Re-Considered (again)

Authors: Nigel Jacobs KC and Andrew Carruth

On 31 May 2019 a collision occurred in a Precautionary Area of the Singapore Strait Traffic Separation Scheme between the LNG WILFORCE and the bulk carrier WESTERN MOSCOW. WESTERN MOSCOW had been intending to proceed westbound in the TSS but considered that she was constrained by the presence of a southbound tug and tow. Accordingly she entered the Precautionary Area and proceeded southbound before executing a port turn back towards the westbound lane of the TSS. WILFORCE was proceeding eastbound at a speed of about 15 knots.

The Judge considered that the navigation of the vessels before about C-10 was not causatively relevant because there was no risk of collision, even though some aspects of the navigation of WESTERN MOSCOW were questionable. Further, WESTERN MOSCOW's use of VHF to agree to pass port-to-port with WILFORCE was not to be criticised, because VTIS had requested the use of VHF: [92]. Thus the "traditional" approach to the use of VHF in ***'The Mineral Damper"*** [2001] 2 Ll.R. 419 was not applied. The real criticism was that WESTERN MOSCOW had not complied with the agreement: [93].

In relation to the crossing rules, WESTERN MOSCOW alleged that WILFORCE was the give-way vessel and failed to act in accordance with rule 16 from about C-7. WESTERN MOSCOW also alleged that she had complied with Rule 17(a)(i) and maintained her course and speed by continuing her port turn: [156].

WILFORCE submitted that the crossing rules did not apply because it was WESTERN MOSCOW's fault in continually porting after C-7 that brought about the crossing situation. In support of that proposition, WILFORCE relied upon T***he 'Spyros"*** [1953] 1 Ll.R. 501 at 509; ***The 'Toju Maru"*** [1968] 1 Ll.R. 501 at 509; ***The 'Forest Pioneer"*** [2007] EWHC 84 at [39], and the Judge's own decision in ***Nautical Challenge Ltd. v Evergreen Marine (UK) Ltd*** [2017] EWHC 453 at [66].

WESTERN MOSCOW challenged this proposition on the basis that it was inconsistent with the reasoning of the Supreme Court that the crossing rule applied where the bearing of one vessel from the other remained constant. WESTERN MOSCOW also alleged it was inconsistent with the Court of Appeal's decision in ***The 'Century Dawn"*** [1996] 1 Ll.R. 125 at 132 although this was rejected: [128] – [131].

The Judge highlighted the difficulties in simply disapplying the crossing rules in the light of the Supreme Court decision: [135] –[140]. However, the Judge considered that it may not matter whether the crossing rules did not apply, or whether the rules applied but the creation of the crossing situation affected apportionment. The action WILFORCE was expected to take at C-7 was the same either way: she should have reduced her speed.

WESTERN MOSCOW was at fault in failing to maintain her course and speed at C-7 whether as a matter of good seamanship or under Rule 17(a)(i). She should have proceeded across the Precautionary Area in the direction of the arrows on the electronic chart: [152] – [159].

The Judge apportioned liability 75:25 (WESTERN MOSCOW : WILFORCE).

Nigel Jacobs KC 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. He is also regularly instructed in (worldwide) freezing injunction, anti-suit injunctions and jurisdictional disputes.

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Andrew Carruth practises primarily in the areas of shipping, commodities, energy, shipbuilding, offshore construction and marine insurance. His shipping work encompasses all areas of both wet and dry shipping including disputes under charterparties and bills of lading, collisions, salvage claims, limitation claims and general average. Andrew's recent work includes major casualties such as the fire aboard 'MAERSK HONAM' and the groundings of 'CSCL JUPITER' and 'EVER GIVEN'.

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Quadrant CHAMBERS

Upcoming Events

Monday 6 February

LSLC Event - Enforcement of Letters of Indemnity, Misdelivery and the post-discharge application of the Hague/Hague-Visby Rules

Simon Rainey KC, Chirag Karia KC

Tuesday 7 February

Annual Shipping Review of the Year

Poonam Melwani KC, Nigel Cooper KC, Ruth Hosking, Andrew Carruth and Craig Williams

Tuesday 14 February

Junior Shipping Breakfast Workshop - Letters of Indemnity

Ben Gardner and Tom Bird

Tuesday 7 March

Junior Shipping Breakfast Workshop - Marine Insurance

Benjamin Coffer and Will Mitchell

www.quadrantchambers.com/events or email marketing@quadrantchambers.com for more information.

Quadrant highly commended at the Legal Business Awards 2022

We were very pleased to be Highly Commended for the Chambers of the Year Award. The awards celebrate the very best in the legal profession, and we are proud to be included.

"A market-leading set, Quadrant Chambers continues to excel, offering a raft of stellar silks and high-calibre juniors who exhibit strong sector expertise in both dry and wet shipping matters as well as significant commodities disputes."

Chambers UK Bar 2023

Sanctions, Contractual Performance and Reasonable Endeavours in the Context of a Force Majeure Clause

MUR Shipping BV v RTI Ltd [2022] EWHC 467 (Jacobs J) and [2022] EWCA Civ 1406 (CA)

Author: Caroline Pounds

Does a clause which requires a party to use 'reasonable endeavours' to overcome a force majeure event or state of affairs require a party to accept non-contractual performance? Mr Justice Jacobs in ***Mur Shipping BV v RTI Ltd*** held that it did not, allowing an appeal from the appellant shipowners ("**MUR**") under section 69 of the Arbitration Act 1996 ("**the Act**") on the proper construction of a force majeure clause invoked following the imposition of Russian sanctions. That decision has in turn recently been overturned by the Court of Appeal ("**CA**"), who found in favour of the appellant charterers ("**RTI**") and restored the decision of the arbitrators.

The dispute arose out of a contract of affreightment ("**COA**") concluded in 2016 as between MUR and RTI for the carriage of bauxite from Guinea to Ukraine over a two year period, at a freight rate of US$12 pmt, with payment to be made to MUR's bank in Amsterdam.

In April 2018, the US Treasury's Office of Foreign Assets Control applied sanctions to RTI's parent company, adding it to the Specially Designated Nationals and Blocked Persons List. MUR in consequence invoked the force majeure clause in the COA, its position being that it would be a breach of sanctions for it to continue with performance of the COA in circumstances where the sanctions meant that MUR was unable to receive dollar payments from RTI (given that virtually all US dollar transactions are routed through US banks, who are bound by US sanctions), and it could not be expected to load and discharge the cargo without receiving payment in accordance with the terms of the COA.

RTI disputed MUR's invocation of the force majeure clause, on the basis that the sanctions did not interfere with cargo operations, payment could be made in Euros (as RTI had offered to do, as well as bearing any costs of converting the payment in Euros to US dollars) and MUR was not a US person caught by sanctions. MUR having temporarily suspended vessel nomination, RTI advanced a claim for damages based on the costs of securing alternative tonnage.

RTI succeeded in its claim before the arbitral tribunal ("**the Tribunal**"). Whilst the Tribunal agreed with MUR that it was otherwise entitled to rely on the force majeure clause ("**the FM Clause**"), the clause included the requirement (in sub-clause (d)) that the 'Force Majeure Event' (defined as either an event or state of affairs) "*cannot be overcome by reasonable endeavours from the Party affected*". The Tribunal held that that requirement was not satisfied given that MUR could have accepted RTI's proposal to pay the freight in Euros and bear any additional costs, which proposal the Tribunal described as a "*completely realistic alternative*".

MUR obtained permission to appeal the Tribunal's decision under the Act, the question of law on appeal being whether the exercise of 'reasonable endeavours' under the FM Clause ("**the reasonable endeavours obligation**") could include accepting payment of freight in Euros as opposed to US dollars. MUR's case was that the reasonable endeavours obligation could not extend to requiring MUR to agree to vary the terms of the COA, or to agree to a non-contractual performance. RTI's case, however, at its broadest, was that for the purposes of the reasonable endeavours obligation, the significance of any contractual obligation was simply one factor to be weighed in the balance in deciding the overall question of reasonableness, which was a question of fact for the Tribunal to determine.

Mr Justice Jacobs rejected RTI's argument, holding that the COA required payment to be made in US dollars and that the obligation to pay freight in the agreed contractual currency was an important right and obligation which formed part of the parties' bargain. The exercise of reasonable endeavours required endeavours towards the performance of that bargain; not performance directed towards achieving a different result which formed no part of the parties' agreement. The reasonable endeavours obligation therefore did not require MUR to "*sacrifice their contractual right to payment in US dollars, and with it their right to rely upon the force majeure clause*".

In reaching his decision, the Judge expressly rejected the notion that whether one should be required to accept non-contractual performance depended on the nature or significance of the term which would be compromised. He concluded that such an approach would be beset with uncertainty and would detract from the paramount importance of the parties' contractual rights and obligations.

The Judge accordingly concluded that, as the parties had agreed that payment should be made in US dollars, there was no requirement for MUR to accept payment in a different currency and to vary the terms of the COA to avoid a force majeure event. In other words, the reasonable endeavours obligation did not require MUR to accept non-contractual performance by RTI. That was so even though MUR could have accepted payment in Euros at no detriment to itself.

RTI sought and obtained permission to appeal Jacob J's decision to the CA. On appeal, the CA emphasised the limited scope of the appeal (in circumstances where the arbitrators had found that the requirements of the FM Clause were otherwise satisfied) and that the only issue before them concerned paragraph (d) of the Clause and whether or not the force majeure event or state of affairs could have been overcome by reasonable endeavours from MUR as the party affected (on the basis that RTI's contractual obligation was to pay freight in US dollars).

The parties' arguments before the CA mirrored those previously advanced before the Tribunal and Jacobs J. In particular, MUR contended that the issue raised on appeal was one of general application, being whether a party could be debarred from invoking a force majeure or excepted perils clause on the grounds that it should instead have agreed to vary the terms of the contract or accept non-contractual

performance. MUR submitted that, because the issue was of general application, the answer was not to be found in a close textual analysis of the FM Clause but in the general principle that, absent some contrary indication in the clause, reasonable endeavours did not require a party to accept anything less than contractual performance (consistent with the purpose of such clauses, the interests of certainty and the principle that a party is not to be taken to be giving up its legal rights in the absence of express clear words to that effect: see ***Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*** [1974] AC 689).

The majority of the CA disagreed, both in its approach and its conclusion. At [54], Males LJ stated that there was no need to discuss the ***Gilbert-Ash*** principle and that to do so would beg the question: there was no question of MUR being required to abandon or vary its right to receive payment of freight in US dollars. Rather, "*the question was whether accepting payment in euros would overcome the states of affairs resulting from the imposition of sanctions … If it would, MUR's contractual right to receive payment in dollars would remain unaffected, and the only consequence would be that it would not be entitled to invoke force majeure as excusing it from its obligation to nominate vessels*".

Males J went on to state (at [55]-[56]) that, whilst the parties' arguments were principally concerned with the question of reasonable endeavours "*in my judgment the real question in this case is whether acceptance of RTI's proposal to pay freight in euros and to bear the cost of converting those euros into dollars would overcome the state of affairs caused by the imposition of sanctions …*" The question, therefore, was whether, in order to overcome the state of affairs in question, it was essential for the COA to be performed in strict accordance with its terms. That was a question which the majority of the CA approached as raising a straightforward point of construction of the FM Clause. Construing the FM Clause (in particular, the words 'state of affairs' and 'overcome') in a broad, practical and non-technical manner, the majority rejected the suggestion that the word 'overcome' necessarily meant that the COA must be performed strictly in accordance with its terms. In light of the arbitrators' findings that there was no detriment to MUR, in that there was no difference between what MUR was entitled to under the COA and what it would obtain from acceptance of RTI's proposal, the majority held that acceptance of RTI's proposal would have overcome the force majeure event within the meaning of the FM Clause (i.e. in a practical sense): see [56]-[60] and [78].

On the particular facts of the case (the CA noting at [60] that it was apparent from the award that the reason why MUR did not accept RTI's proposal was because it no longer wanted to perform the COA in circumstances where it had become disadvantageous to it), the actual decision is readily understandable. One may query, however (and with respect), the extent to which reasoning of the majority of the CA properly grapples with the argument at the heart of RTI's case, viz. that a party should not be required to abandon, or be taken to have abandoned, their contractual rights in the absence of a clear contrary provision: see ***Gilbert-Ash***. That principle is surely one which is relevant to the construction of any clause, as noted by Arnold LJ in his dissenting judgment at [70]-[74] where he stated:

> *"So the issue comes down to this: would the "event or state of affairs", namely the probable delay in payments by RTI in US dollars, have been "overcome" by MUR accepting RTI's offer of non-contractual performance?*
>
> *As I have indicated, I agreed with Males LJ that this is ultimately a question of the proper construction of clause 36.3(d) having regard to its wording, context and purpose. I disagree that the Gilbert-Ash principle is irrelevant to this: the presumption that parties do not give up their legal rights in the absence of clear words to that effect is an important part of the context in which clause 36.3(d) falls to be interpreted.*
>
> …
>
> *I agree that RTI's offer would have solved [the problem of achieving timely payment in US dollars] with no detriment to MUR. The fact remains, however, that what was offered by RTI was non-contractual performance. In my judgment an "event or state of affairs" is not "overcome" within the meaning of clause 36.3(d) by an offer of non-contractual performance, and in particular an offer of non-contractual performance by the counterparty to the Party affected …"*

This author respectfully suggests that there is force in Arnold LJ's reasoning, although there are no doubt others (including newcomer to Chambers, James Shirley, who acted on behalf of RTI led by Vasanti Selvaratnam KC) who would take a different view. It remains to be seen whether or not the CA judgment remains the last word on the subject or whether there will be an appeal to the Supreme Court.

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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s68 Arbitration Act 1996: Commercial Court Sets Aside Part of an Award for Breach of the Tribunal's Duty of Fairness

Ducat Maritime Ltd v Lavender Shipmanagement Incorporated [2022] EWHC 766 (Comm)

Author: Joseph Gourgey

In ***Ducat Maritime Ltd v Lavender Shipmanagement Incorporated*** [2022] EWHC 766 (Comm), Butcher J set aside part of an award made by an arbitrator in an LMAA arbitration ("**the Arbitrator**") under section 68 of the Arbitration Act 1996 on the grounds that the Arbitrator breached his general duty of fairness. The decision provides useful authority on the recourse a party has where the arbitrator has made an obvious mistake but declines to make a correction under the slip rule

The Facts

A simplified version of the facts are as follows: The underlying arbitration was a charterparty dispute, brought under the LMAA Small Claims Procedure, in which Owners claimed outstanding hire of US$37,831 on the basis of their Final Hire Statement. Charterers denied that this was due and instead counterclaimed for the Vessel's underperformance.

The Arbitrator held that the Owners' claim for hire succeeded, save that c. US$10,000 of the claimed sum was not due and owing. However, upon also finding that the Charterers' counterclaim failed, the Arbitrator proceeded to add this unsuccessful claim to the total claimed by Owners, rather than simply not deducting it. As a result, the Arbitrator awarded the Owners more than they were entitled to.

Charterers twice applied under section 57(3) of the 1996 Act to the Arbitrator to correct the Award on the basis of a clerical mistake or error. Owners opposed the application and the Arbitrator declined to correct the Award. It was against this background that Charterers sought to have part of the Award set aside under section 68.

The Decision

Charterers contended that there was a serious irregularity within s68(2)(a) on two grounds:

(1) The Arbitrator reached a conclusion that was contrary to the common position of the parties, without providing an opportunity for the parties to address him on the issue;

(2) He had made an obvious accounting mistake.

On the first ground, Butcher J held that there was such an irregularity. He cited with approval the following passage in ***Russell on Arbitration***, 24th Edn at 5-049:

> "*The parties are entitled to assume that the Tribunal will base its decision solely on the evidence and argument presented by them prior to the making of the award. If the tribunal is minded to decide the dispute on some other basis, the tribunal must give notice of it to the other parties to enable them to address the point*".

It was common ground between the parties that the Charterers' counterclaim was not part of Owners' claim, yet the Arbitrator departed from this common ground and failed to give the parties a chance to address him on this point.

On the second ground, whilst strictly obiter, Butcher J found that where there has been an obvious accounting/arithmetical mistake, this may well represent a failure to conduct the proceedings fairly. This is "not because it represents an extreme illogicality but because it constitutes a departure from the cases of both sides, without the parties having had an opportunity of addressing it" [40]. The parties share a common ground as to how arithmetical processes work and to depart from this may be a procedural irregularity. He therefore concluded that "if a 'glaringly obvious error' in the award... can be said to arise in this way, section 68 can probably be regarded as applicable, without subverting its focus on process" [42].

Joseph Gourgey joined Quadrant Chambers on 1 October 2021, upon successful completion of pupillage. He is developing his practice in line with Chambers' core areas of work.

He graduated from St Hilda's College, Oxford with a first in jurisprudence, obtaining the College prize in both Finals and Prelims. On the BCL he studied Commercial Remedies and Conflicts of Law, winning the Reynolds Scholarship from Worcester College, Oxford. He completed the BPTC with an Outstanding.

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The New Commercial Court Guide: what litigators need to know

Authors: John Kimbell KC, Thomas Macey-Dare KC, Nicola Allsop, Turlough Stone & Maya Chilaeva

Following the publication of the 11th edition of the Commercial Court Guide on 9 February 2022, Quadrant Chambers has published an article and produced a webinar exploring the key themes in the Guide and summarising the main changes in the following areas: (1) Case Management, (2) Disclosure, (3) Junior Advocacy, (4) Applications, (5) Arbitration Appeals, (6) Expert Evidence as to Foreign Law, (7) Witness Statements, (8) Trials, and (9) Negotiated Dispute Resolution.

Overview and Key Themes

The new Guide, while retaining the status, structure and much of the content of the previous version, contains significant changes. Some of these changes reflect important developments in Commercial Court practice that have taken place since the last edition, including the introduction of the Shorter Trials and Flexible Trials schemes (PD 57AB), the disclosure pilot (PD 51U), the new regime for trial witness statements (PD 57AC) and, of course, the effects of the Covid pandemic, which has accelerated the move towards remote hearings and paperless trials.

More broadly, the new Guide signals an important shift in the way the judges want litigation to be conducted in the Commercial Court. That shift is itself designed to further the goals of the Woolf Reforms, encapsulated in the Overriding Objective in CPR Part 1, of dealing with cases justly and at proportionate cost, which involves managing cases in ways which save expense, are proportionate to their value, importance and complexity; ensure that they are dealt with expeditiously and fairly; and allot them an appropriate share of the court's finite resources. A number of the changes in the new Guide are designed to better achieve these aims by encouraging the Court, with the parties' assistance, to manage cases in more considered, bespoke, flexible ways which avoid one-size-fits-all solutions and box-ticking exercises.

One striking feature of the new Guide is that, in a number of areas, it marks a return to the old ways, and reimposes boundaries that have become blurred in recent decades. This reflects the judges' experience of what makes for good case management in the Commercial Court. This trend can be seen most clearly in three areas:

(i) Statements of case: The new Guide re-emphasises that pleadings should not contain general introductions or argument, but should be confined to primary allegations and particulars of those allegations.

(ii) Trial witness statements: The detailed guidance about trial witness statements in the previous edition of the Guide has been jettisoned in favour of a straightforward provision that parties must comply with PD 57AC, which contains rules to ensure that statements only contain the evidence in chief that the witness of fact would have given orally, in their own words, and to prevent them from being used as written advocacy by the lawyers.

(iii) The trial itself: The Guide seeks to solve the problem of how to ensure that the trial judge reads the documents in the case properly, without narrating them in the witness statements or in massively expanded skeleton arguments, and without introducing them for the first time in cross-examination, by reviving the traditional long-form, oral opening. It also introduces new regimes for trial listing and judicial reading time, and a new Agreed Factual Narrative document, which will contain much of the uncontroversial material that would otherwise be contained in witness statements and skeleton arguments.

These and other important changes to trial practice and procedure are examined more in this article and this webinar.

Article

Webinar

Maya Chilaeva is developing a broad commercial practice in line with Chambers' profile. Prior to pupillage, Maya spent ten months as a judicial assistant to the Commercial Court, sitting with a number of judges on matters ranging from without notice applications for freezing injunctions to an eight-week trial in the case of *PCP Capital Partners LLP v Barclays Bank* [2021] EWHC 1852 (Comm). This experience, as well as the training received during pupillage, informs her approach to case preparation and advocacy as a junior barrister.

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Unseaworthiness in the Supreme Court: *The CMA CGM Libra*

Authors: John Russell KC & Benjamin Coffer

The Supreme Court's judgment in ***The CMA CGM Libra*** [2021] UKSC 51 provides an authoritative analysis of seaworthiness and the due diligence obligation under the Hague and Hague-Visby Rules. John Russell QC and Benjamin Coffer appeared for the successful respondents, instructed by Jai Sharma, John Reed and Jessica Cook of Clyde & Co LLP.

The appeal arose out of the grounding of a container ship. The owners claimed general average from the cargo interests. At first instance, Teare J held that the passage plan was defective because it failed to record a warning that depths shown on the chart outside the fairway were unreliable. The defects in the vessel's passage plan and the relevant working chart rendered the vessel unseaworthy. The defects were causative, because if the warning had been on the chart, the Master would not have left the fairway.

On appeal, the owners' primary argument was that passage planning could not render a vessel unseaworthy because it involved no more than recording a navigational decision. The owners argued that a ship could only be unseaworthy if there was a defect affecting an "attribute" of the ship. Although it was incumbent on the owner to have on board everything necessary for the crew to carry out proper passage planning, such as a competent crew, up to date charts and proper systems and instructions, the crew's use of that equipment was a matter of navigation or seamanship.

The owners also argued that even if the ship was unseaworthy, there was no relevant failure to exercise due diligence. The owners argued that navigation was outside their "orbit" because it was a matter solely for the Master and crew.

The Supreme Court confirmed that the exceptions in Article IV.2 cannot be relied upon in relation to a causative breach of Article III.1. If a vessel is unseaworthy it therefore makes no difference whether negligent navigation or management is the cause of the unseaworthiness or is itself the unseaworthiness.

Unseaworthiness does not require there to be an "attribute" of the vessel which threatens the safety of the vessel or her cargo. In most cases, the relevant question will simply be whether a prudent owner would have sent the ship to sea with the relevant defect without requiring it to be remedied, had he known of it – the so-called 'prudent owner' test.

The owners' arguments on due diligence also failed. The Court reaffirmed the non-delegable nature of the carrier's obligation under Article III.1: the obligation on the carrier to exercise due diligence to make the vessel seaworthy requires that due diligence be exercised in the work of making the vessel seaworthy, regardless of who is engaged to carry out that task. It makes no difference that the task may have a navigational element to it.

The carrier is therefore liable for a failure to exercise due diligence by the master and deck officers of his vessel in the preparation of a passage plan for the vessel's voyage. The carrier's obligation requires the carrier to ensure that a proper passage plan is prepared; not merely to provide a proper system to enable the crew to carry out the required planning exercise.

John Russell KC 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 decisions in Volcafe v CSAV and the CMA CGM Libra. He has also appeared as counsel in inquests and public enquiries.

John has been named Shipping Silk of the Year for both the Legal 500 UK Awards 2020 and the Chambers & Partners Bar Awards 2020, having also been nominated in 2019. He was named the top maritime lawyer of 2020 by Lloyd's List. He is ranked in the Legal 500 and Chambers & Partners in Shipping and Commodities.

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Benjamin Coffer was named Shipping Junior of the Year 2019 at the Chambers & Partners Bar Awards, and is shortlisted again in 2022. He was shortlisted for Shipping Junior of the Year for the Legal 500 UK Awards 2020.

He is described by the directories as "a rising star", "a standout shipping and commodities junior" and "a star of the future". He is also recognised as a leading junior in the Legal 500 Asia Pacific Guide.

Ben's broad international commercial practice has a particular emphasis on shipping, insurance / reinsurance and commodities.

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The Naiguatá: Injunctions Precluded Against States

Authors: Poonam Melwani KC and Jamie Hamblen

In a High Court judgment concerning an application for an anti-suit injunction against the Bolivarian Republic of Venezuela, Sir Ross Cranston has held that the granting of injunctive relief against states is impermissible pursuant to section 13 of the State Immunity Act 1978 ("SIA") and rejected an argument to the effect that such prohibition must be read down on Human Rights grounds. The judgment provides important guidance on enforcement mechanisms available against state entities and the circumstances in which the European Convention of Human Rights may require the State Immunity Act 1978 to be read down. Permission to appeal has been granted against the decision.

Poonam Melwani KC and Jamie Hamblen acted for the Bolivarian Republic of Venezuela, instructed by Rasmita Shah of Roose + Partners.

The underlying proceedings arose out of the total loss of a Venezuelan navy patrol vessel, the BVL Naiguatá GC-23, in early 2020, following a collision with the RCGS Resolute, an ice-classed cruise liner, which engaged in tourism to Antarctica. Following the collision, Venezuela brought civil proceedings against the owners of the Resolute and the party believed to be vessel's insurers, the UK P&I Club, in both Venezuela and Curacao. The relevant contract of insurance included a "pay to be paid clause" and an arbitration agreement in favour of London arbitration.

In March 2021, HHJ Pelling QC sitting in the High Court granted an ex parte anti-suit injunction against Venezuela, finding Venezuela bound to arbitrate its foreign claims pursuant to the conditional benefit principle and reading down s.13(2) SIA (which purports to prohibit injunctive relief against states) by applying ***Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*** [2017] UKSC 62.

The latter finding was overturned by Sir Ross Cranston sitting in the High Court at the return date. In particular, the Judge found that:

(a) Article 6 ECHR is engaged by s.13(2)(a) SIA such that the relevant question is whether s.13(2)(a) SIA pursues a legitimate objective by proportionate means and does not impair the essence of the right in question ([93-97]).

(b) The test to be applied was as follows ([104]):

  (1) Restrictions on article 6(1) ECHR rights are only justified if they pursue a legitimate objective by proportionate means and do not impair the essence of the claimant's right;

  (2) Both customary international law and domestic policy may offer a justification: Benkharbouche, [34], [68];

  (3) In the absence of a recognised rule of customary international law, the domestic rule is compatible with article 6(1) if it is within the range of possible rules consistent with current international practices: ***Fogarty v United Kingdom*** (2001) 34 EHRR 12, [36]-[39]; ***Benkharbouche***, [24];

  (4) Domestic and international law distinguishes between the immunity from jurisdiction and the immunity from enforcement. Section 13(2)(a) SIA relates to the latter ([90-92]);

  (5) There is an international consensus as to the scope of state immunity in favour of the restrictive doctrine: ***Benkharbouche***, [52]. However, that is in the context of the immunity from adjudication, rather than the immunity from enforcement ([106]).

(c) In so finding the Judge rejected the Clubs' contention that the judgment in ***Benkharbouche*** required Venezuela to show either a binding rule of customary international law that confers immunity from anti-suit injunctive relief or a tenable view that customary international law mandates immunity from such relief ([98] and [105]).

(d) There is no clear and settled view in customary international law regarding orders for injunctions and specific performance against states in proceedings relating to their non-sovereign activities or otherwise, but the restrictive doctrine of state immunity is not in play in this area. There seems to be a substantial uniformity that if a court does order a coercive measure against a state, any criminal or financial penalties attached are of no effect ([107]-[115]).

(e) In any event, Article 6 ECHR would be justified on grounds of domestic policy, as it was legitimate to consider that remedies of a personal nature such as injunctions and orders for specific performance were not appropriate against state, it is an area of considerable international sensitivity, there are issues of comity and procedural propriety, and the injunction applicant may well have other remedies available ([117-124]).

(f) In any event, it was not possible to read down s.13(2)(a) SIA without crossing the line into legislating, which would go beyond the interpretive exercise allowed by s. 3 of the Human Rights Act 1998 ([125-128]).

Poonam Melwani KC is Head of Quadrant Chambers. She is a commercial silk who practises across the full spectrum of commercial, insurance, energy and shipping law, providing advisory and advocacy services. Praised as "...always in demand, she is as good on her feet as she is adept at mastering complex legal, factual and expert material...." (Chambers UK) Poonam has been ranked as a 'Leading Silk' over many years by the Legal Directories and was shortlisted for Shipping Silk of the Year at the Chambers & Partners UK Bar Awards 2020. She represents clients in a wide variety of jurisdictions and arbitral regimes including ICC, LCIA, LMAA and ad hoc, as well as English High Court Litigation, mainly in the Commercial Court and the Appellate Courts.

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Jamie Hamblen has a wide-ranging and growing practice which reflects the variety of work undertaken by Chambers, including commercial disputes, shipping and shipbuilding, commodities and international trade, international commercial arbitration, energy and natural resources, banking and financial services, insurance and reinsurance, insolvency and restructuring proceedings, aviation and travel.

"*Very responsive and accessible, he has a good ability to gauge and engage with the Tribunal and quickly gets to grips with detailed facts and complex law.*" (Legal 500, 2023)

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The CMR Convention in the Supreme Court

JTI Polska v Mark-Trans-Sped

This is a "leapfrog" appeal to the Supreme Court on the correct interpretation of the CMR Convention, which regulates the international carriage of goods by road between contracting countries.

The case concerns a consignment of cigarettes which was stolen whilst being delivered from Poland to England.

At first instance, the defendant road carrier accepted that the cargo claimant was entitled to recover the excise duty charged on the stolen cigarettes (which was far greater than the value of the goods), under Article 23(4) of the CMR Convention. That was because of the binding decision on this point by the House of Lords in ***Buchanan***.

However, the carrier was given permission to appeal directly to the Supreme Court, to argue that ***Buchanan*** was wrongly decided.

If ***Buchanan*** is overturned, it will have significant implications for carriers and insurers.

Counsel for the Appellant are John Kimbell KC and Maya Chilaeva of Quadrant Chambers. Instructing solicitors are DWF, whose team comprises Darren Kenny, Ben Griffin and Stephanie Sandford-Smith.

Counsel for the Respondent are Stewart Buckingham KC and Ben Gardner of Quadrant Chambers. Instructing solicitors are Christopher Chatfield and Sara Askew at Kennedys.

John Kimbell KC
Maya Chilaeva

Stewart Buckingham KC
Ben Gardner

Who can Limit as an "Operator" Under the 1976 Limitation Convention?

Splitt Chartering APS v Saga Shipholding Norway AS (The "Stema Barge II") [2022] 1 Lloyd's Rep 170

Author: Chirag Karia KC

The 1976 Limitation Convention, like the 1957 Convention before it, entitles a ship's "operator" to limit its liability in the same way as its registered owner. But what does "operator" mean? What role must a party play in relation to the ship to qualify as its "operator" under Art 1(2) of the Convention and thereby limit its liability?

Much-needed clarity on those issues has been provided by the Court of Appeal's recent decision in ***Splitt Chartering APS v Saga Shipholding Norway AS (The 'Stema Barge II")*** [2022] 1 Lloyd's Rep. 170.

Despite its use for more than 60 years in conventions ratified by over 75 countries, there had been no authority on the meaning of "operator" from any jurisdiction prior to this case.

The question in this case was whether Stema UK was entitled to limit its liability under Art 1(2) when the dumb barge, "STEMA BARGE II" ("the Barge"), dragged her anchor off Dover during a storm, damaging the France-to-England underwater electricity cable belonging to Réseau de Transport d'Électricité SA ("RTE"). RTE claimed damages totalling €54 million.

Stema UK had bought rock amour from Stema A/S, which was transported from Norway to Dover on the Barge. Stema UK did not own the Barge or have any involvement in its management or operation until it arrived off Dover, at which time it transhipped the rock armour. Whilst the Barge was at anchor off Dover, Stema UK's employees attended to matters set out in checklists prepared by Stema A/S, including ballasting the Barge, maintaining its generators, checking its navigation lights and visually checking its position.

RTE denied Stema UK's right to limit. At first instance, Teare J held that Stema UK was entitled to limit because it was "the operator of the barge off Dover".

Allowing RTE's appeal, the Court of Appeal accepted RTE's argument that Teare J had interpreted "operator" at too low a level of abstraction and applied a circular test.

After noting that "operator" could be used at several levels of abstraction, the Court of Appeal held that "operator" in Art 1(2) was used at a higher level of abstraction than mere physical operation, and required an element of management or control over the vessel and the personnel on-board. Merely operating the vessel's machinery or providing the crew to operate that machinery, as Stema UK had done, is insufficient; otherwise Art 1(4) would be rendered otiose and service providers would be entitled to limit, contrary to the intention revealed in the travaux préparatoires.

This is a welcome decision which provides clarity and gives effect to the contracting parties' intention, recorded in the travaux préparatoires, to restrict the category of persons entitled to limit and exclude from that right those who merely assist another in the operation, management or navigation of a vessel.

Chirag Karia KC, instructed by Alex Kemp, Partner, and Jenny Salmon, Senior Associate, of HFW LLP acted for the successful Appellant, RTE.

Chirag Karia KC 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 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 KC who picks the right points and handles complex disputes well."*

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Legal 500 (2023)

Commercial Court Dismisses Misdelivery Claim

UniCredit Bank AG v Euronav NV [2022] EWHC 957 (Comm)

Authors: Robert Thomas KC & Paul Toms

Mrs Justice Moulder handed down judgment in the matter of ***Unicredit Bank AG v Euronav NV*** [2022] EWHC 957 (Comm), a claim by a German bank for damages under a Bill of Lading for misdelivery by the owners of the Sienna, Euronav.

Unicredit had financed the purchase by Gulf Petrochem FZC ("**Gulf**") of 80,000 mt of LSFO ("**the cargo**") from BP Oil International Limited ("**BP**"). The arrangements put in place between Unicredit and Gulf were that the cargo would be re-sold to sub-buyers on terms that required those sub-buyers to pay Unicredit directly and, thereby, repay the sums financed.

BP had initially chartered the Vessel from Euronav and was the shipper under the Bill of Lading. The charterparty required Euronav to discharge the cargo without production of the Bill of Lading if requested by the charterer.

Following payment of the purchase price by Gulf to BP by way of a letter of credit issued by Unicredit, BP, Euronav and Gulf entered into a novation agreement by which BP ceased to be the charterer and Gulf became so in its place.

At the time of discharge of the cargo, the Bill of Lading remained in BP's possession and had not been endorsed.

Euronav discharged the cargo without production of the Bill of Lading.

The sums financed by Unicredit were not repaid by Gulf or the sub-buyers. Having become the lawful holder of the Bill of Lading subsequent to the date of discharge, Unicredit, therefore, brought a claim for damages for breach of a contract of carriage said to be contained in the Bill of Lading by Euronav delivering the cargo without production of the Bill of Lading

Mrs Justice Moulder dismissed the claim.

Firstly, she held that that the Bill of Lading did not contain any contract of carriage at the time of discharge: see paras 27-49 of the judgment. She held that the Bill of Lading, when issued, was a mere receipt since BP was also the voyage charterer at that time. She rejected Unicredit's argument that the novation had the same effect as if BP had endorsed the Bill of Lading to a third party. In other words, she rejected the argument that a contract "sprang up" between BP and Euronav on the terms of the Bill of Lading when BP ceased to be the charterer by reason of the novation.

Secondly, she held that even if the Bill of Lading had contained a contract of carriage at the time of discharge, the discharge of the cargo without production of the Bill of Lading did not cause the loss claimed or such loss would have been suffered by Unicredit in any event: see paras 89-122.

An appeal from Mrs Justice Moulder's judgment will be heard by the Court of Appeal in March 2023

Robert Thomas KC and Paul Toms acted for Euronav, instructed by Andrew Preston, Dolly Brown and Paul Best of Preston Turnbull LLP.

Robert Thomas KC retains a strong presence in the traditional areas of his practice and has recently complemented this with substantial experience in commercial fraud and related relief. Ranked as a Leading Silk, he has been praised for having a "*fantastically effective and intellectual style*", for "*consistently deliver[ing] a first-class service*" and for his ability to handle "difficult cases on a tight timetable". He is a registered practitioner in the DIFC. Rob is receiving an increasing number of appointments as an arbitrator.

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Paul Toms is an experienced junior barrister specialising in commercial and international trade disputes. He is described as "*very erudite and quick on his feet; he has an unparalleled eye for detail and is careful, considered and astute*" (Chambers UK 2020). He has been recommended for many years in the Legal Directories. 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.

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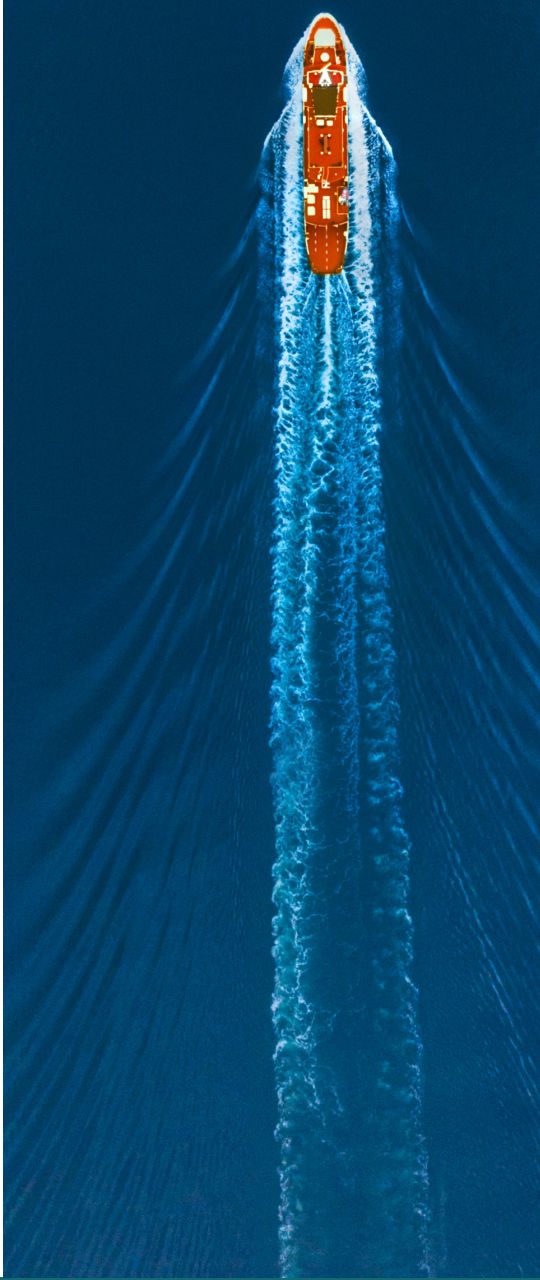

Cyclists from across the UK's maritime industry helped smash the £100,000 target and raising more than £110,000 ($127,059), which will benefit three charities.

Quadrant Chambers took on the Graig100 challenge for the first time on 3 September, with an enthusiastic team of silks & juniors raring to take on the hills of South Wales to raise funds for these brilliant charities: Mission to Seafarers; Velindre, The Hospice of Hope, and Mind. Quadrant Chambers raised £3460 in total!

Photos by Paul D Stillman

Implied Representations, Affirmation and s2(2) of the Misrepresentation Act 1967

SK Shipping Europe Ltd v Capital VLCC 3 Corp and another company (The "C Challenger") [2022] EWCA Civ 231

Authors: Chris Smith KC & Mark Stiggelbout

This decision addresses several points of general importance in the law of misrepresentation, including the circumstances in which a representation of fact will be implied from the offer of a contractual term, the effect of a reservation of rights on an alleged affirmation, and the operation of section 2(2) of the Misrepresentation Act 1967 concerning damages in lieu of rescission.

Background

In November 2016, the Claimant / Owner circulated the Vessel's speed and consumption capabilities to the market, attempting to find a long-term charterer. In December 2016, it succeeded in chartering out the Vessel to the 1st Appellant / Charterer. The Charter contained consumption warranties in a standard form.

The Vessel was delivered in February 2017. Throughout the Charter period, the Vessel's consumption exceeded the warranted levels. As early as March 2017, the Charterer asserted that the consumption capabilities had been misrepresented. The Charterer continued to employ the Vessel until September 2017, but repeatedly reserved its rights. In July 2017, the Vessel was ordered to perform a sub-fixture. In October 2017, the Charterer purported to rescind the Charter.

The Representation

The Court of Appeal (Males, Phillips and Carr LJJ) agreed with Foxton J at first instance ([2021] 2 Lloyd's Rep. 109) that the Owner had not made any representations as to the Vessel's future or expected performance. It confirmed that an offer to contract will not generally be regarded as amounting to a representation about future performance, but noted that an offer to contract on certain terms may sometimes carries with it an implied representation as to the party's honesty in relation to the proposed transaction. It declined to go further than this, doubting any general rule that, merely by offering to contract, a party represents that it is able and willing to perform the contract.

Affirmation

The Court also held that, whilst a reservation of rights will often prevent subsequent conduct from constituting an affirmation, this is not an invariable rule. One must have regard to all the circumstances and weigh up the nature and terms of any reservation of rights against the nature and consequences of any demand for future performance. Foxton J had been correct to conclude that the order to perform the July 2017 sub-fixture constituted an affirmation, notwithstanding the Charterer's reservation of rights.

S2(2) of the Misrepresentation Act 1967

The section 2(2) issues were difficult, giving rise to a host of sub-issues such as whether rescission is a self-help remedy or requires an order of the Court, and what damages can be awarded in lieu of rescission under section 2(2) (given that that measure will be relevant to the question of whether the Court should exercise its discretion to refuse rescission). In obiter dicta, the Court said that it should not be taken to endorse the approach of Foxton J (who would have awarded damages in lieu of rescission) but wished to leave the question open for decision in a case where it mattered. The Court nonetheless made certain observations suggesting that it disagreed with the refusal of rescission in such a case, whilst also identifying various reasons why rescission might not be justified on the facts. The law therefore remains uncertain on these issues.

The Charterer's application for permission to appeal to the Supreme Court is pending.

Chris Smith KC and Mark Stiggelbout were instructed by Fanos Theophani, and Harriet Thornton and Florence Preux at Preston Turnbull LLP.

Chris Smith KC has a broad practice encompassing all areas of commercial law, with a particular focus on dry shipping, commodities, energy, and insurance disputes. He has appeared extensively in the Commercial Court, representing clients at all stages of proceedings, from urgent pre-action interlocutory applications all the way through to trial. Chris also appears regularly in both domestic and international arbitrations, and has undertaken cases before tribunals in London, Zurich and Hong Kong. Chris is recommended as a leading barrister in in both Chambers and Partners UK and Global editions, and in the Legal 500 UK, EMEA and Asia Pacific editions. He is recommended for shipping and commodities and energy.

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Mark Stiggelbout has a broad international commercial practice, with particular emphasis in shipping, commodities, insurance, international arbitration, aviation, and energy disputes. He is recommended as a leading practitioner in both of the independent guides to the market - Chambers UK and the Legal 500. Mark regularly acts as sole counsel in litigation and arbitration proceedings, which has included obtaining freezing injunctions against persons unknown and a Norwich Pharmacal order. Mark has published articles in leading journals in the fields of contract, tort and the conflict of laws. These have been cited in leading practitioner texts, academic articles and student textbooks.

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Marinas can Limit their Liability Under the MSA 1995: *Holyhead Marina v Farrer* [2021] EWCA Civ 1585

Authors: Robert Thomas KC & Benjamin Coffer

In ***Holyhead Marina v Farrer*** [2021] EWCA Civ 1585, the Court of Appeal upheld the decision of Mr Justice Teare that a marina counts as a "dock" for the purposes of section 191 of the Merchant Shipping Act 1995, and is therefore entitled to limit its liability under that section.

Nigel Cooper KC appeared for the Appellants leading James Watthey instructed by Daniel Crockford at Ince; Robert Thomas KC and Benjamin Coffer appeared for the Respondent instructed by Emma Rice at Clyde & Co.

A severe storm caused substantial damage to Holyhead Marina and damage to yachts and other ships which were present in and around the Marina. The owners of the Marina sought to limit their liability under section 191, which grants "the owners of any dock or canal" a right to limit their liability similar to the right of a shipowner under the 1976 Limitation Convention. The liability of the dock or canal owner is limited by reference to the tonnage of the largest UK ship which has been within "the area over which the authority or person discharges any functions" at any time within the last five years. "Dock" is given a wide meaning by section 191(9) to include "wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing places and jetties."

The owners of yachts which were damaged by Storm Emma resisted the right to limit, arguing that the Marina was not a "dock" for the purposes of section 191. The yacht owners argued that while the individual elements of the Marina might constitute landing places, jetties or stages the Marina as whole could not be described as a single landing place, jetty or stage so as to entitle the Marina to limit liability. They further argued that the consequence of the Judge's analysis was that there ought to have been that there was a separate limitation fund available in respect of each floating pontoon or combinations thereof. The yacht owners also suggested that the right to limit was primarily intended to encourage commercial shipping, and should therefore not be extended to structures used primarily by leisure craft unless those structures fell clearly within the natural and ordinary meaning of the terms used by the section.

The Court of Appeal upheld the first instance judgment, which the Master of the Rolls described as "excellent" and "erudite". The Court agreed that the Marina was not a "dock" on the ordinary meaning of that term, but held that it could properly be described as a "landing place". The suggestion that each pontoon should have its own limitation fund would lead to an absurdity. The Court agreed with the judge that there was no justification for excluding structures used primarily by leisure craft from the section. Males LJ pointed out that the terms used in section 191 are not used in a technical sense, and that there is considerable overlap between them. The Judge had "reached a common sense conclusion which was clearly correct."

Robert Thomas KC retains a strong presence in the traditional areas of his practice and has recently complemented this with substantial experience in commercial fraud and related relief. He is ranked as a Leading Silk and has been praised in previous editions for having a "fantastically effective and intellectual style", for "consistently deliver[ing] a first-class service" and for his ability to handle "difficult cases on a tight timetable". He is a registered practitioner in the DIFC and is also receiving an increasing number of appointments as an arbitrator.

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Benjamin Coffer was named Shipping Junior of the Year 2019 at the Chambers & Partners Bar Awards, and is shortlisted again in 2022. He was shortlisted for Shipping Junior of the Year for the Legal 500 UK Awards 2020.

Ben's broad international commercial practice has a particular emphasis on shipping, insurance / reinsurance and commodities.

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The ZouZou: no Insurance Cover for Ship Detained Under Venezuelan Anti-smuggling Laws

Authors: Guy Blackwood KC & Benjamin Coffer

The Commercial Court's judgment in ***Piraeus Bank v Antares ('The ZouZou")*** [2022] EWHC 1169 (Comm) concerns mortgagees' interest insurance and the standard exclusions in a war risk policy.

Guy Blackwood KC and Benjamin Coffer appeared for the successful insurers, instructed by Jonathan Evans, Craig Boyle-Smith and Ingrid Hu of Kennedys LLP.

The claim arose out of the detention of the vessel "ZouZou" in Venezuela following an allegation that the crew were attempting to smuggle diesel oil. The vessel was detained for about 14 months and then released. Four members of the crew were subsequently tried and acquitted. The owners of the vessel claimed for a constructive total loss under their war risks cover, but the war risks underwriters avoided the policy on the grounds of material non-disclosure by the owners, unrelated to the detention.

The Claimant bank was the mortgagee of the vessel, and had taken out mortgagees' interest insurance (or '**MII**') with the Defendant insurers to protect its interest as assignees and loss payees under the owners' policies. Following the avoidance of the war risks policy, the bank sought to recover from the Defendants under the MII. The bank's claim was for about USD 71 million plus interest.

The Defendants successfully argued that there was no MII cover because the loss would not have been covered by the war risks policy, irrespective of the avoidance. There would have been no cover under the war risks policy because that policy contained exclusions for any loss "arising out of action taken by any state or public or local authority ...under the criminal law of any state ... or on the grounds of any alleged contravention of the laws of any state".

The bank's primary argument was that these exclusions did not apply because the detention of the vessel had been unlawful under Venezuelan law. The evidence of Venezuelan law took up most of the trial, but was ultimately irrelevant: Mr Justice Calver held, following the Court of Appeal's decision in ***The Anita*** [1971] 1 Lloyds Rep 487, that a bona fide error of Venezuelan law by the local court or (in this case) prosecuting authority would not take the detention outside the scope of the exclusions. It was only if the error was perverse or politically motivated (which had not been alleged by the bank) that the exclusions would not apply.

The bank also argued that even if the loss would have been excluded from the war risks policy, it was nevertheless entitled to recover in full under the MII. The bank's argument was essentially that the MII wording provides cover for any loss or damage caused by the owners or their servants or agents if there is subsequent non-payment by the owners' insurers. The Judge rejected that argument too. The purpose of MII was to indemnify the bank where there is a loss which would ordinarily be covered under the owners' insurance, but the owners' insurers decline cover because of something done or not done by the Owners. MII therefore would not respond to a loss which would have been excluded from the Owners' insurance in any event.

Guy Blackwood KC has a comprehensive commercial practice, which includes large contractual disputes, international arbitration, insurance & reinsurance, banking & finance, civil fraud, energy & utilities, public international law including bilateral investment treaty arbitration, commodities and shipping. Guy is listed as a leading silk in the leading directories in commercial litigation, insurance and reinsurance, commodities and international arbitration.

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Benjamin Coffer was named Shipping Junior of the Year 2019 at the Chambers & Partners Bar Awards, and is shortlisted again in 2022. He was shortlisted for Shipping Junior of the Year for the Legal 500 UK Awards 2020.

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Legal 500 Awards

Misdelivery by the Carrier After Discharge and the Article III Rule 6 Time Bar: the 'Alhani gap' is Filled

FIMBank plc v KCH Shipping Co Ltd [2022] EWHC 2400 (Comm)

Author: Simon Rainey KC

The Commercial Court (Sir William Blair) handed down judgment in ***FIMBank p.l.c. v KCH Shipping Co., Ltd***, an appeal under section 69 of the Arbitration Act 1996, holding that the time bar in Article III rule 6 of the Hague-Visby Rules can apply to claims in relation to misdelivery after discharge. The Court's decision resolves an important question which had not previously been decided by the English courts, and which has divided leading academic commentators as well as judges in other common law jurisdictions.

Background

The appeal relates to a claim brought by FIMBank p.l.c. ("**FIMBank**"), as the holder of bills of lading, for the alleged misdelivery of cargo by the contractual carrier, KCH Shipping Co., Ltd ("**KCH**"). The bills were concluded on the Congenbill form, and were subject to the Hague-Visby Rules, including the time bar in Article III r 6 of one year after delivery which applies to claims against carriers.

FIMBank served a Notice of Arbitration on KCH after that time bar expired. Its position was that its claim was nevertheless not caught by the time bar, contending that: (a) on the facts, delivery took place after discharge; and (b) as a matter of law, the time bar did not apply to claims for misdelivery occurring after discharge. In its submission, this was so given that the Hague-Visby Rules do not regulate a carrier's obligation to deliver cargo (as opposed to the carriage of goods by sea), and only relate to a 'period of responsibility' which ends with the discharge of cargo. FIMBank further argued that the parties had, in any event, contractually disapplied the Rules in respect of the period after discharge, insofar as Clause 2(c) of the Congenbill form provided: "*The Carrier shall in no case be responsible for loss and damage to the cargo, howsoever arising prior to loading into and after discharge from the Vessel…*".

In an Award on preliminary issues, the arbitral tribunal determined that FIMBank's claim was time-barred irrespective of whether delivery post-dated discharge on the facts (which remained a matter in dispute). This was because: (i) the Hague-Visby Rules time bar can apply to claims relating to misdelivery occurring after discharge; and (ii) Clause 2(c) of the Congenbill form does not disapply the Rules in respect of the period after discharge.

The Court's reasoning

The Court upheld the tribunal's decision on both questions, and accordingly dismissed the appeal.

On the first question, it concluded that, on its true construction, Article III r 6 of the Hague-Visby Rules applies to claims for misdelivery of cargo after discharge. The Court noted that this conclusion avoided the need for fine distinctions as to the point at which discharge ended, and accorded with the objective of the rule which was intended to achieve finality and to enable the shipowner to clear its books. It further observed that, although certain common law authorities and commentaries might be said to support the construction of Article III r 6 for which FIMBank contended (including ***Carver on Charterparties and Voyage Charters***), there was no international judicial or academic consensus to that effect.

The Court held that, even if its conclusion above was wrong, the tribunal's decision was in any event justified by its finding that the bills of lading contained an implied term providing that the Hague-Visby Rules obligations and immunities are to continue after actual discharge and until delivery takes place, in line with the reasoning of the Court of Appeal in ***The MSC Amsterdam*** [2007] EWCA Civ 794.

On the second question, the Court held that, on a proper construction, Clause 2(c) did not disapply the Hague-Visby Rules to the period after discharge. Although FIMBank relied in this regard on The MSC Amsterdam, in which the express terms of the bill of lading concerned were held to have disapplied the Hague Rules after discharge, the Judge held that that decision did not warrant a different result, insofar as it featured a bill of lading with materially distinguishable terms.

Simon Rainey KC of Quadrant Chambers and Matthew Chan of Twenty Essex acted for KCH, instructed by Kyri Evagora and Thor Maalouf of Reed Smith LLP.

Simon Rainey KC is regarded as the foremost shipping and international trade KC at the English Bar today. He has been ranked in the unique category of "Star Individual" (a special category, ranked above Band 1) for 'Shipping and Commodities' by Chambers & Partners UK since 2015. Winner: International Arbitration Silk of the Year 2020, Legal 500 (and shortlisted 2017 and 2019). Winner: Shipping Silk of the Year 2017 & 2022, both Chambers & Partners and Legal 500 (and shortlisted 2018; 2019; 2020). Lloyd's List Top 10 Global Maritime Lawyers in 2017, 2019 and 2021. Simon has been shortlisted for Shipping Silk of the Year at the forthcoming Chambers UK Bar Awards 2022.

"The go-to senior shipping silk. First class." (Legal 500, 2023)

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When is an Appeal Under s69 of the Arbitration Act 1996 not a s69 Appeal?

Laysun Service Co Ltd v Del Monte International GmbH [2022] EWHC 699

Author: Yash Kulkarni KC and Andrew Leung

Laysun Service Co Ltd v Del Monte International GmbH [2022] EWHC 699 (Comm) is a rare example of a case where permission was granted to appeal against an award on purported questions of law which were ultimately held not to be questions of law at all.

The appeal arose out of a COA between Laysun Service Co Ltd ("Owners") and Del Monte International GmbH ("Charterers") for the carriage of refrigerated bananas from the Philippines to Bandar Bushehr in Iran. Charterers had successfully established in arbitration that they were excused from liability to Owners for failing to perform some 19 shipments under the *force majeure* provision in the COA, on two grounds. First, payment could not be received from the Iranian receivers due to the Trump administration's increasingly hawkish stance against Iran, culminating in the US imposing sanctions against Iran (the "**Payments Issue**"). Absent payment, there would be no receiver to present bills of lading required for the cargo to be cleared for discharge. Second, various import restrictions imposed by the Iranian government (the "**Import Issue**") prevented the cargo from being discharged to Iranian receivers, and finding alternative customers was not reasonably practicable .

On appeal, Owners challenged whether Charterers could invoke the force majeure clause because, due to payment difficulties, bills of lading might not arrive at the discharge port so that Owners could decline to permit delivery. Calver J gave this question short shrift. It was based on "an entirely false factual premise" and Owners were "shooting at an imaginary target". The Tribunal had simply held that the goods could not be discharged without the bills of lading. In *obiter dicta*, Calver J also rejected Owners' contention that Charterers had an absolute, non-delegable obligation to ensure bills of lading were presented at the loadport: [41].

In relation to the Import Issue, Owners raised three questions of law, none of which actually arose in Calver J's judgment: [23]-[27]. The Court observed that Owners had constructed false factual findings and then impermissibly sought to challenge the same, which was presumably why Owners' criticisms of the Award – which included charges that the Tribunal's conclusions were "rationally bizarre and commercially absurd"; "unintelligible to any shipping lawyer"; "simple and utter nonsense as a matter of English law" – were "somewhat hyperbolic": [27].

Finally, again *obiter*, Calver J held that a party may, subject to the wording of the force majeure provision, continue to be excused from non-performance if the force majeure event is outlasted by its effects. To illustrate, if a port is shutdown as a result of a force majeure event taking the form of a riot by the workers at the port, and the port is damaged as a result, the effects of that damage may continue to prevent performance even after the riot has ended. On the correct construction of the COA's force majeure clause, Charterers would be excused from non-performance at that port provided they could not mitigate the after-effects of the riot, as the clause required.

Yash Kulkarni QC and Andrew Leung were instructed on behalf of the successful respondent by Rob Collins, Natalie Johnston and Lachlan McLeod of Preston Turnbull LLP.

Yash Kulkarni KC has a busy and broad commercial practice, covering significant contractual disputes, international trade, shipping, banking, information technology and telecoms, and insurance. *'Yash has a knack for finding a runnable argument when the issues seem stacked against a client. He is not frightened to wade into technical, complex detail.'* (Legal 500, 2023)

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Andrew Leung is regarded as a "go-to junior" (Chambers UK 2021), with a "first rate legal mind" (Legal 500 Asia Pacific, 2022) whose "drafting is second to none" (Legal 500, 2023). He has a broad commercial practice which encompasses commercial dispute resolution, international arbitrations, shipping, energy, commodities, insurance and reinsurance, and banking and financial services.

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Bareboat Charter Dispute Goes to Penalties

OCM Maritime Nile LLC v Courage Shipping Co [2022] EWHC 452 (Comm)

Author: James Shirley

Sir Andrew Smith's judgment in ***OCM Maritime Nile LLC v Courage Shipping Co*** [2022] EWHC 452 (Comm) provides a brief but interesting recap of the law on penalty clauses, and in particular the fundamental scope of the rule that such clauses are unenforceable.

The starting point on penalties these days is ***Cavendish Square Holding BV v Makdessi*** [2013] UKSC 76, one of the appeals in which concerned parking charges levied by ParkingEye on motorists who failed to comply with a two-hour parking time-limit at a car park. In a decision widely regarded as narrowing the scope of the rule on penalties, the Supreme Court upheld the parking charge and said that a clause would not be void unless it imposed a detriment on a contract breaker out of all proportion to any legitimate interest the innocent party had in enforcing the contract.

In ***OCM Maritime***, the Claimants were the owners of two vessels ("**the Vessels**") which were bareboat-chartered to the Defendants (strictly-speaking the *first two* defendants) ("**the Charterparties**") as part of a deal which saw the Claimants' group finance the Defendants' purchase of the Vessels.

Clause 48 of the Charterparties, '*Purchase Option… and Obligation*', gave the Defendants an option to purchase the Vessels at specified prices on specified dates, provided an '*Event of Default*' (of which there were a long and diverse list) was not continuing, and provided the Claimants had not lawfully terminated the Charterparties pursuant to their terms ("**the Purchase Option**"). The Purchase Option eventually matured into an *obligation* to purchase ("**the Purchase Obligation**").

Following the designation of the then-shareholder of the Defendants as a Specially Designated Global Terrorist by the US authorities in June 2021, the Claimants declared an Event of Default and purported to terminate the Charterparties and disown any obligation to deliver the Vessels to the Defendants.

The Defendants argued that clause 48 was an unenforceable penalty clause because the Claimants' reliance on the caveats in the Purchase Option would deprive the Defendants of the value of their investment in the Vessels, and that was a detriment out of all proportion to the Claimants' legitimate interest in enforcing performance of the Charterparties.

On the issue of proportionality, the judge appeared persuaded that the Defendants were right and that the test explained in ***Makdessi*** was satisfied: (i) clause 48 entitled the Claimants to rely on any one of many and varied default events, some of which might cause no, or no significant, damage; whereas (ii) the detriment to the Defendants in losing the Purchase Option would likely be substantial whenever it occurred because they had contributed half of the purchase price of the Vessels, and paid hire in advance; (iii) indemnities in the Charterparties meant that the Claimants stood to lose little or nothing in the event of the Defendants' failure to comply with the Purchase Obligation.

However, the Defendants' penalty defence faced a more fundamental problem: the Claimants objected that clause 48 imposed *primary* rather than *secondary* obligations, and only the latter engaged the rule against penalties. Secondary obligations in a contract are those which apply only when a party is in breach of a primary obligation.

English contract law does not, at least through the law on penalties, regulate the general fairness of contract provisions: parties are generally free to exchange whatever promises they want, regardless of whether they are out of proportion to each other from an objective standpoint. The law on penalties is directed only at a particular type of unfairness: that which may arise when a contract stipulates a remedy for breach which the common law would not have provided and which is wholly disproportionate to the breach to which it applies.

As ever, some of the distinctions in play are easier to state in the abstract than apply in practice, and one might reasonably ask whether there is any meaningful difference between a situation where a contract obliges a party to do X on pain of making a payment (potentially a penalty because the payment is pursuant to a *secondary* obligation) and one in which the party has an option to do X (provided he has not breached the contract) but must otherwise make a payment (where the payment is said to be made pursuant to a conditional *primary* obligation).

In the present case, clause 48 was not concerned with situations in which the Defendants had failed to comply with other terms of the Charterparties and clause 48 itself did not oblige the Defendants to do anything at all. Default was involved only by way of qualification of the Claimants' obligation to complete a sale, and if the Claimants opted to avoid the sale, the Defendants would also be released from the Purchase Obligation.

There is nothing ground-breaking about Sir Andrew Smith's decision on the penalty clause defence in ***OCM Maritime***: it is a fairly routine application of established principles. But it does serve as a reminder of how seriously the courts treat the distinction between primary and secondary obligations for the purpose of applying the rule on penalty clauses: even in a case in which the judge appeared sympathetic to the idea that the high post-***Makdessi*** disproportionality threshold for a penalty was met, he was not inclined to accept the Defendants' argument that the scope of the rule was wide enough to encompass the situation before him.

Chris Smith KC and Claudia Wilmot-Smith acted for the defendant charterers, instructed by Michael Lax and Catriona Lewis at Rosling King.

James Shirley practises in all areas of commercial law, in particular fraud cases, wet and dry shipping and international arbitration, jurisdictional disputes, and insurance. James is an experienced trial advocate, equally comfortable appearing in person or remotely, whether in English courts and tribunals or those abroad.

"Perceptive, strategic and unflappable under pressure. His advocacy is first class."(Legal 500 2023)

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Meet the Practice Management Team

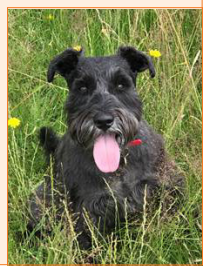
Simon Slattery is the Senior Clerk at Quadrant Chambers. He joined Quadrant in September 2013 from Atkin Chambers, where he was Senior Clerk, having begun his career at 4 Pump Court in 1988. Simon leads our clerking and administrative teams working closely alongside the Chambers COO, Peter Blair and Business Development Director, Sarah Longden.

Simon Slattery: "He is brilliant. He is extremely responsive, very collaborative and someone you consider to be part of the team when working on matters involving Quadrant lawyers." Chambers, 2023

Favourite film: Gerry Maguire

What pearls of wisdom would you give your younger self? Life is not a dress rehearsal.

What is the best advice you've been given? Always respond to Sarah Longden's e-mails, it's just not worth trying to avoid doing so..... (great advice!).



What two things would you take with you to a desert island? My dog and a Genie in a bottle.....

What is on your bucket list? To play one final game of rugby on the hallowed turf at Twickenham Stadium, which I duly did aged 52.....

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Daniel Westerman is the Senior Practice Manager at Quadrant Chambers. He began his clerking career in 2002 as a Junior Clerk at Quadrant Chambers (formerly 4 Essex Court), moving to Essex Court Chambers in 2006 and then New Square Chambers in 2008. Daniel returned to Quadrant in 2013. He assists the senior clerking team and is responsible for the day-to-day practice management of Members of Chambers. This includes all levels of fee negotiation, diary management and work allocation.

"Always very helpful and efficient with Daniel Westerman being a stand-out performer." Legal 500, 2022

What is the best advice you've been given? Never assume.

What pearls of wisdom would you give your younger self? Asking for help is not a weakness.

What is on your bucket list? Sunday at Augusta for the Masters.

A quirky fact most people do not know about you. I have the voice of an angel (but not according to Simon Cowell).

Two things would you take with you to a desert island? A knife and fork.

Do you have any irrational fears? Flying.

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John Walker began his career in 1985 as a junior clerk at 39 Essex Street, moving to Brick Court in 1987 and to Quadrant in 1989. He qualified as a member of the Institute of Barristers' Clerks in 1992. John was appointed to the position of Practice Manager at Quadrant Chambers in 1999 and assists the senior clerking team with the management and maintenance of counsel's diaries.

John Walker is an excellent clerk who makes sure all the barristers are properly prepared, impressive and reliable; he's a pleasure to deal with. Chambers, 2023

What is on your bucket list? To buy a house on the Cornish coast with far reaching views of the sea.

A quirky fact most people do not know about you. I went to school with Graham Thorpe, one the best left-handed Test cricketers England has ever produced – taught him everything he needed to know.

Also, I can fold my ears inside each other and make them stay there (room temperature permitting).

What two things would you take with you to a desert island? A nice motor cruiser and an experienced skipper (not Uncle Albert).

Do you have any irrational fears? Not a great fan of going up ladders. The bottom half of the interior walls in my house look fantastic though.

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Rob Frankish joined Quadrant in 2020 from Keating Chambers, having started his clerking career in 2009. He is responsible for the management and development of all aspects of Members of Chambers' practices, including diary management, allocation of new work, fee negotiation, managing client relationships and listing.

"Very good service – Rob Frankish is very responsive and helpful."

What is the best advice you've been given? 'A smooth sea never made a skilled sailor'.

Your favourite film? Forrest Gump or Drive, can I have two!?

What is on your bucket list? Cage diving with Great White sharks in South Africa, as well as a safari whilst there...!

What is the first album you owned? Red Hot Chili Peppers - Californication / Oasis – Supersonic.

Where is your favourite place in the world? Thailand, with the Philippines coming a close second.

What two things would you take with you to a desert island? iPod (I would say iPhone but think that has more than one use so might not be allowed!)

Sun cream, for obvious reasons!

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Mike Wright started his clerking career in 2009 at Stone Chambers and joined Quadrant in January 2022, as Practice Manager. Mike assists with the management and development of the Quadrant Chambers members, including fee negotiation, complex listing arrangements, work allocation and managing client relationships.

'Absolutely top notch, approachable, and efficient. Special praise must be reserved for Mike Wright.

What is on your bucket list? Next on the list is the London to Paris cycle with family & friends in 2023 to celebrate my Dad's 65th birthday.

A quirky fact most people do not know about you. I am a qualified FA referee. I referee at Step 3 of the non-league pyramid so you can usually find me being hounded by hundreds of fans on a Saturday afternoon...someone has to do it! In the 2021/2022 season I made my FA Cup debut, refereeing in the competition's preliminary stages.

Your favourite film? Gladiator

Where is your favourite place you in the world? I'm a big fan of Asia. I spent 3 weeks island hopping in Thailand before joining Chambers and it's safe to say the January blues were non-existent.

What two things would you take with you to a desert island? A superyacht & swim shorts

Do you have any irrational fears? England in a penalty shoot-out

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'The team is expertly led by Simon Slattery. He has excellent knowledge not only of the particular work streams and specialists of individual Counsel in chambers but wide and in-depth knowledge of the markets in which chambers practice. The clerks understand the pressures solicitors are under and respond accordingly. They set the chambers apart from their immediate rivals.'

Legal 500 (2023)

Mark Waterson joined Quadrant Chambers as a practice manager in October 2022. Mark has built up over 15 years' experience at a leading civil set. He is responsible for the management and development of all aspects of Members of Chambers' practices, including diary management, allocation of new work, fee negotiation, managing client relationships and listing."

"*Mark Waterson ... efficient, proactive and commercially savvy clerk*" Chambers 2023

Where is your favourite place you have been in the world? It's a close-run race between Vietnam or New Zealand, for very different reasons.

Your favourite film? I'm much more of music buff but the film that has really stuck with me is Uncut Gems. A film that can make me feel stressed just thinking about it has done a fantastic job!

What pearls of wisdom would you give your younger self? No one has all the answers, and no one should expect you to have them. If anyone ever tells you that they do, they know even less than you!

Oh, and look after your knees!

What two things would you take with you to a desert island? A wind-up DAB radio and a copy of Moby Dick, I've tried to finish it 3 times without success; the lack of distractions may focus the mind.

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Billy Beckett joined Chambers in March 2013 as the third junior clerk after starting his clerking career at 4 Stone Buildings. In 2019 he was made Assistant Practice Manager. He assists the senior clerking team on a daily basis with the management of the members' practices. This includes the liaising with Listing Offices and Judges Clerks.

"*Billy Beckett is very responsive, always willing to assist and very efficient when asked to help out with something.*" Chambers 2023

What is on your bucket list? To drive Route 66.

What is the first album you owned? Demon Days (Gorillaz).

What pearls of wisdom would you give your younger self? Don't take school for granted, finishing at 3pm used to seem like a hard day.

A quirky fact most people do not know about you. I lived in Spain in my teens and I can't speak a word of Spanish.

Where is your favourite place you have been in the world? St Lucia.

What two things would you take with you to a desert island? Flares and massive sign that says help.

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Rhys Durban joined Chambers in November 2019 and was promoted to Assistant Practice Manager in October 2021. He is responsible for overseeing the team of Junior Clerks and works closely with the Practice Managers and Senior Clerk on a daily basis with the management of the members' practices. Rhys also assists with the fixing of cases, liaising with Listing Officers and Judges Clerks.

What pearls of wisdom would you give your younger self? Don't stress too much over the little things, everything will fall in to place eventually. (although we preferred Rhys's first answer of .... I am still young, so I'm unable to answer this one).

What is the best advice you've been given? You miss 100% of shots you don't take.

What is on your bucket list? To travel Australia with the prospect of moving out there and to Skydive, there's something about jumping out of a plane that seems very appealing.

A quirky fact most people do not know about you. I wouldn't say its quirky, but I play hockey every weekend for a local team.

What two things would you take with you to a desert island? A crate of beers and sun cream, I might as well make the most of it!

Do you have any irrational fears? Spiders, but this totally contradicts with moving to Australia...

What is your pet peeve? When people type loudly on the keyboard.

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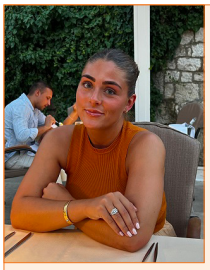

Megan Pryde joined Quadrant Chambers in August 2022 as an Assistant Practice Manager, after commencing her clerking career in 2017 at a leading civil set of Chambers.

Megan's main responsibilities include diary management, negotiating fees, fixing cases, liaising with clients, allocating cases, and developing members' practices.

What pearls of wisdom would you give your younger self? - Don't grow up, it's a trap.

What is the best advice you've been given? You can't have a rainbow without a little rain.

What is on your bucket list? A lot! But Swimming with Pigs in the Bahamas is hopefully next.

A quirky fact most people do not know about you. I am a former Regional Gymnast, and have also played National Netball.

Do you have any irrational fears? Lifts, spiders, maggots, long underground tunnels, and flushing airplane toilets.

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Bradley Edwards joined Quadrant Chambers in November 2022 as an Assistant Practice Manager from Radcliffe Chambers.

Bradley's main responsibilities include diary management, negotiating fees, fixing cases, liaising with clients, allocating cases, and developing members' practices.

What pearls of wisdom would you give your younger self? - Don't grow up, it's a trap.

Your favourite film? Forrest Gump or Drive, can I have two!?

What two things would you take with you to a desert island? Suncream and a knife.

What is on your bucket list? To see the Northern Lights.

A quirky fact most people do not know about you. – I talk in my sleep, a lot!

Do you have any irrational fears? Spiders are the worst.

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Liability for Creating a Source of Danger

Author: John Passmore KC

A broker sells a piece of plant or equipment. The circumstances of the sale – the location of the buyer, or the price – indicate to the broker that the plant/machinery is going to be used or worked on where there is a serious lack of health and safety provision. The danger arises because of the unsafe working practices of the buyers or sub-buyers. But the broker is potentially liable for creating a source of danger.

These legal risks are perhaps not intuitive, but they are real, and demonstrated in the recent Court of Appeal case of ***Begum v Maran (UK) Ltd***. This was an application for strike out (and reverse summary judgment) of a claim by the widow of man who tragically fell to his death whilst breaking up a tanker on the notorious beaches of Chattogram, Bangladesh.

At Chattogram, ships are demolished by hand, working from the top downwards. There is no dock infrastructure. There are no cranes, scaffolding, cradles or harnesses, and few health and safety controls or inspections.

For the purpose of the application the essential facts were assumed:

- Maran was the shipowners' in-house broker whose services included negotiation and agreement of contracts of sale when ships reached the end of their working lives;
- Maran had complete control over who vessels were sold to and at what prices;
- The relevant vessel came to the end of its life, and Maran obtained quotations and conducted negotiations for its sale;
- Maran had a choice as to whether to sell the vessel to a buyer who would send it to a yard which was safe, or one who would send it to a yard which was unsafe;
- The negotiations led to a contract with a cash buyer called Hsejar, who Maran understood would sell on to a breaker's yard;
- The price was US$ 16 million, and the vessel was sold "as is" at Singapore with only a small quantity of fuel on board;
- The price, and the amount of fuel on board, meant that Maran knew that the vessel would be broken up in Bangladesh rather than China (the only safe place to break up such a large tanker);
- Maran also knew that breaking up a vessel on a beach was inherently dangerous, and that safety standards at Chattogram were particularly egregious, leading to regular fatalities and injuries;
- Maran therefore made a contract for sale which it knew would lead to workers being exposed to a real risk of death or personal injury during the demolition of the vessel, and it was foreseeable that claimant's husband would sustain a serious accident.

The basic principle is that people are responsible for their own acts but not the acts of others. A defendant is generally not liable for harm caused by the acts of a third party. There are, however, recognised exceptions, and according to Coulson LJ the scope and extent of the exceptions are one of the fastest developing areas of law.

One exception arises where a defendant has created or is otherwise responsible for a danger which a third party has then exploited, causing harm to the claimant.

Coulson LJ referred in particular to four authorities: ***AG of BVI v Hartwell*** [2004] ***UKPC 12 and Robinson v Chief Constable of West Yorkshire Police*** [2018] UKSC 4.

In ***Hartwell***, a police officer fired his service revolver at his partner in bar and caused serious injury to a tourist who happened to be in the bar at the time. it was held that a police authority owed to the public at large a duty to take reasonable care to see that an officer with access to firearms was a suitable person to be entrusted with dangerous weapons. Lord Nicholls said: "If this duty seems far-reaching in its scope it must be remembered that guns are dangerous weapons. The wide reach of the duty is proportionate to the gravity of the risks. Moreover, the duty imposes no more than an obligation to exercise the appropriately high standard of care to be expected of a reasonable person in the circumstances."

In ***Robinson***, an elderly passer-by was injured whilst police officers attempted to arrest a suspect in a town centre. Lord Reed noted that it is one thing to require a person to exercise care when embarking on action which may harm others, but it is another matter to hold a person liable for failing to prevent harm caused by someone else. There are however circumstances where such a duty may be owed, and they include where a public authority has created a danger of harm which would not otherwise have existed.

In ***Begum***, the claimant argued that Maran created a danger in selling the vessel in circumstances in which it knew that the vessel would be broken up at Chattogram. Coulson LJ said that ***Hartwell, Mitchell, Michael and Robinson*** demonstrate the restricted circumstances in which a defendant will be liable in tort for damage caused by the intervention of a third party, and that it will only be in a relatively extreme case that the "creation of danger" exception will operate.

Coulson LJ asked: can it really be said that an oil tanker is the equivalent of the loaded gun in ***Hartwell***? And did Maran create a danger of harm which would not otherwise have existed? According to Coulson LJ, the answers to both questions were, arguably, Yes. It was arguable that Maran had created a danger by selling to Hsejar. It was arguable that the death of the claimant's husband was foreseeable, that there was a relationship of proximity between Maran and those who might be killed or injured, and that it would be fair, just and reasonable to find such a duty of care.

It is not difficult to imagine other scenarios in which a company might be liable for creating a source of danger. An important area is the potential liability of parent companies for unsafe working practices of their subsidiaries. A parent company might lease assets, such as plant or equipment, to a subsidiary. A danger to third parties might arise because of the unsafe practices of the subsidiary, but the parent company might be liable for creating the source of danger.

John Passmore KC has a commercial arbitration and litigation practice, covering a wide range of business sectors including aviation, banking and financial services, commodities, construction, derivatives, energy, healthcare, hospitality, insurance (marine and non-marine), mining, real estate, shipbuilding, shipping (wet and dry), telecoms and travel.

"One of the sharpest brains I have ever come across. Extremely intelligent together with an ability to translate the most complex of arguments into a structured, succinct and flawless explanation." (Legal 500, 2022)

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