Quadrant CHAMBERS

Quadrant on Shipping

Issue 5 | Autumn 2023

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‘Quadrant … the premier chambers for shipping matters.’

Legal 500 2023

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

Contents

QuadrantLaw

Quadrant Chambers

Quadrant Chambers

QuadrantChambers

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EDITORIAL by Nigel Cooper KC

This fifth edition of Quadrant on Shipping coincides with London International Shipping Week, the theme of which is 'reframing risk in a complex market'. This theme sets the scene for what should be an informative week of events allowing discussion of major issues currently facing the shipping market and the role of London and the United Kingdom more generally in meeting the global challenges posed by those issues. Quadrant Chambers is proud to be a sponsor of the Conference and will be playing an active part in the week including co-hosting three sessions during the week as well as providing panellists for other sessions including our Head of Chambers, Poonam Melwani KC, as one of the panellists for the headline conference. On the Tuesday evening, we are hosting a reception at which we hope to see many of our friends (old and new).

The theme of reframing risk in a complex market is apt to describe the many issues addressed in the cases and regulatory changes which are the subject of this edition. 'Shipping – A Year in Review' provides a succinct and thoughtful overview to the significant cases and developments of the past year while the individual articles, many from counsel who appeared in the cases discussed, provide a more detailed guide which we hope will both provoke debate and provide helpful insight. The range of topics covered is broad and some of the cases discussed are ones where the market has been waiting to know the court's decision. In this regard, the judgments of the Court of Appeal in ***The Eternal Bliss*** and ***The Siena*** require mention but the decision in ***The Ever Given*** as to whether there was a binding salvage contract was also keenly awaited. It is now on appeal. The Supreme Court in ***JTI Polska v. Jakubowski*** reiterated the limited circumstances in which the court will be prepared to depart from its previous decisions as well as providing guidance on the proper interpretation of the CMR Convention. What is apparent from all the articles is that the shipping sector faces an evolving and volatile environment for the foreseeable future which will require thoughtful and creative solutions to the questions and disputes that will arise. We look forward to helping clients find those solutions.

Inevitably, the majority of Chambers work takes place in London. However, members of Chambers are active globally both in terms of overseas hearings, travelling to meet clients and participating in international conferences. Alongside support for LISW 2023, members of Chambers attended and spoke at the SCMA conference during Sea Asia and Singapore Maritime Week this year. Later in November this year, we return to Piraeus for the 10th of our annual conferences there. We look forward to seeing everyone who is able to attend.

Once again, the support of our clients and peers has meant that Chambers is well represented in the shortlists for Awards as you can see below. Chambers also continues to grow and this year we welcomed Lydia Myers, and we will welcome Tom Hall and Caleb Kirton as members of Chambers with effect from 1 October 2023 when they complete their pupillage.

Finally, as ever, on behalf of all members of Quadrant Chambers shipping team, I would like to thank everyone who has instructed us for your trust and support over the past year. We are all committed to providing our clients with an excellent level of service and we hope that this is your experience and that it will continue to be so.

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

Contents *continued*

Quadrant nominated at the Legal 500 Bar Awards 2023

Shipping, Commodities and Aviation Set of the Year

Shipping, Commodities and Aviation Silk of the Year - Poonam Melwani KC

Shipping, Commodities and Aviation Junior of the Year – Benjamin Coffer and Tom Bird

International Arbitration Silk of the Year - Simon Rainey KC

Matthew Reeve Appointed King's Counsel

Quadrant Chambers congratulates Matthew Reeve on his appointment as King's Counsel.

Matthew is a highly experienced barrister with a wide-ranging commercial practice, including Shipping, Aviation, Insurance and Reinsurance, Travel, Shipbuilding, Energy, Shipbuilding, financial Professional Negligence and Sports Law.

"A superb strategic barrister with an excellent eye for detail and a complete understanding of the law in his area of expertise. An excellent advocate who is able to adjust his style for the tribunal in front of him and the different witnesses he needs to question." (Legal 500, 2023)

Shipping – A Year in Review

Authors: Simon Rainey KC & Lydia Myers

The lasting impact of the COVID-19 pandemic, ongoing geopolitical conflict, a challenging economic climate, and ever-growing environmental concerns have made 2023 a challenging year in the shipping industry. The legal landscape, much like the political one, has also seen many important changes since the end of 2022 including a commercial settlement in 2023, which permitted the Court of Appeal the last word in ***The Eternal Bliss*** litigation holding that demurrage liquidates the whole of the damages arising from a charterer's failure to complete cargo operations within the laytime allowed. These changes have been marked by regulatory changes in the environmental, social and governance sector, developments in case law concerning international conventions such as the Hague Visby Rules and procedural changes in Admiralty Court practices.

As the push towards transparency, clarity, and consistency in the environmental, social and governance space gathers momentum, there have been a number of key regulatory and legislative developments in the area. The International Maritime Organisation sees two new regulations come into effect this year with the MARPOL 2023 regulation developed with the goal of minimising pollution of the oceans and seas, including dumping, oil and air pollution and the IMO 2023 regulation which requires both new and existing ships to report on emissions in pursuit of the goal to reduce such emissions by 40% by 2030.

The trend set in 2022 that saw freight rates continuing to rise and then decline significantly during the second half of the year has continued into 2023, with January having seen the largest decrease in sea freight rates since the COVID-19 pandemic. However, in light of the mandate issued by the IMO in relation to carbon emissions as discussed above, it is expected that these freight rates will begin to increase once more over the next few years as the industry investigates and begins its investment into dual fuel vessels and more sustainable sources of energy. These new regulations have and will undoubtably disrupt the market, creating challenges and opportunities for shipowners and operators moving forwards but it remains to be seen exactly how this new legal framework will be dealt with by the courts and how the regulations will be used and enforced in practice. Some have criticised the new regulations suggesting that they are lacking in clarity and/or may be out of touch with the way in which the market actually operates which begs the question; plus ça change?

There is also clearly a key interrelation between the ESG considerations and other priority topics for actors in the maritime arena many of which have seen their fair share of the spotlight over the past twelve months; the geopolitical landscape, which continues to be focused around the ongoing war in Ukraine, has led to an inevitable increase in disputes. Such disputes have mainly focused on the vessels trapped in Russian and Ukrainian ports and it is anticipated that claims will only continue to increase as February 2023 saw the passing of the twelve-month period since the outbreak of the war in Ukraine and, therefore, also marked the first time at which a notice of abandonment under war risks policies could be validly tendered and used to declare the vessels still trapped as constructive total losses.

Chambers TOP RANKED UK 2023

Quadrant Chambers

Adding to the significant developments in the regulatory and political spheres, there have been a considerable number of decisions this year which mark departures from established case law in the shipping sector. One such decision is that in ***The Thorco Lineage*** [2023] EWHC 26 (Comm) whereby Sir Nigel Teare declined to follow the decision of Burton J in ***The Limnos*** [2008] 2 Lloyd's Rep 166, in holding that Article IV(5)(a) of the Hague Visby Rules did *not* limit claims for economic loss by reference only to the weight of cargo which suffers physical damage. Teare J held that the limit for such claims was to be calculated by reference to the weight of cargo physically *or economically* damaged.

The Giant Ace [2023] EWCA Civ 568 was another matter concerning the Hague Visby Rules heard before the Court of Appeal in which Males, Popplewell and Nugee LJJ found that the time bar under Article III Rule 6 of the Hague Visby Rules would apply to claims in relation to misdelivery after discharge. That decision confirmed the closing of the gap left by the previous decision concerning the Hague Rules time bar in which it was held that misdelivery occurring before or simultaneously with discharge was covered by Article III Rule 6 but where the court specifically left open the question of its application to misdelivery occurring after discharge (see ***The Alhani*** [2018] EWHC 1495 (Comm)).

Adding to the plethora of case law in the maritime sector are the numerous arbitral decisions that have been published this year which have kept arbitrators, practitioners and experts busy on matters such as safe port warranties, over and under supply of bunker issues and of course on the continuing disputes arising out of the sanctions regime implemented following the outbreak of hostilities in Ukraine. In ***London Arbitration 2/23*** (2023) 1129 LMLN 2 an arbitral tribunal rejected the owners' claim for damages for breach of a safe port warranty in a time charterparty on the basis that a '*one-off*' pilot error did not render a port unsafe. The decision was focused on the dictum of Leggatt LJ in ***The Star Sea*** [1997] 1 Lloyd's Rep 360 which emphasised that anyone could make a mistake and that mistake should not necessarily render an individual incompetent.

The limitation actions arising out of the catastrophes on the MSC Flaminia, Maersk Honam and Ever Given continue to make their ways through the Admiralty Court, which has itself seen a revamp in the rules regarding collision claims. New rules dealing with such claims came into force on 6 April 2023 and for the most part have been well received. The changed requirements for early disclosure of navigational data appear to have been welcomed as parties can no longer refuse to release their VDR data because other vessels do not have it in a move towards greater transparency and data sharing. Similarly, the new requirement to explain what data is available should streamline discussions about disclosure and reduce costs of applications for specific disclosure. The rules also mark a change in the way parties prepare their statements of case; parties will need to formulate their case strategy, legal submissions, and evidence earlier such as to enable them to prepare proper and fuller pleadings. Such changes, whilst welcome from a transparency and clarity point of view, will inevitably mean a front loading of time and costs and reality checks on the strength of the parties' respective positions at a much earlier stage in the litigation.

In an increasingly uncertain world with ever changing regulatory frameworks, case law and practice, never have the words of Heraclitus held greater weight; change, is the only constant. As can be seen though, practitioners and market actors alike have embraced the ever-changing landscape in which we all operate, and it is hoped that such progress continues as we look towards and wish our fellow practitioners and colleagues the best for the upcoming year.

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

Simon Rainey KC is one of the best known and most highly regarded practitioners at the Commercial Bar. He has a reputation which is second to none for his intellect and legal analysis ("fantastically intelligent and tactically astute"). His practice focuses on five core areas: commercial litigation, commodities and international trade, energy and natural resources; international arbitration; insurance and reinsurance and shipping and maritime law.

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Lydia Myers is developing a litigation and arbitration practice in wet and dry shipping, commodities, and banking, financial services and civil fraud matters. Lydia has gained experience in a broad range of work in these specialist fields and in general commercial and international law. Lydia is frequently instructed as sole counsel against senior counsel including against Silks.

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www.youtube.com/c/QuadrantChambersYouTube

Quadrant Chambers has launched the next series of videos: Quadrant Basics in Ten - QBiT. Each video is a specific commercial disputes topic honed to a dynamic 10 minute bitesize 'what you need to know'.

What is Reflective Loss - Emily Saunderson

What is the Prevention Principle? - Nigel Cooper KC

How to get Security for Costs - Paul Downes KC

What is Market Abuse? - Simon Oakes

What is Without Prejudice? - Chris Smith KC

What is Dishonest Assistance? - Joseph England

How to Analyse a Profit and Loss Account - Paul Downes KC

What is Legal Advice Privilege? - Chris Smith KC

What is a Letter of Credit? - Paul Downes KC

What is the Rule in Clayton's Case? - Paul Downes KC

To be notified of future QBiT recordings, join our mailing list by contacting marketing@quadrantchambers.com

In February 2023 we Welcomed Lydia Myers to Quadrant

"I am very pleased to welcome Lydia to Quadrant Chambers. We have a very strong and talented junior team here and I look forward to seeing Lydia's career develop and progress in the supportive clerking and collegiate environment at Quadrant."

Poonam Melwani KC, Head of Quadrant Chambers

"I am very proud and excited to be coming onboard at Quadrant. The set has a reputation for excellence, and I am looking forward to continuing to build my practice surrounded by leaders in the field and with the support of excellent clerking and marketing teams."

Lydia Myers

Lydia is developing a litigation and arbitration practice in shipping, commodities and international trade, insurance and commercial disputes. She is frequently instructed as sole Counsel against senior practitioners including against Silks. A recent highlight included Lydia acting as Counsel in a challenge to a GAFTA arbitration award under s67 of the Arbitration Act against a senior QC. Lydia is often praised for her skills as an advocate and her ability to cut through complex issues with ease and clarity. Before joining the Bar, Lydia spent two years studying at the Sorbonne in Paris for her Licence 3 and Masters in French Law. Lydia has been exposed to international private law from both an English and French perspective and is able to conduct legal submissions and witness handling in French if required.

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

FIMBank p.l.c. v KCH Shipping Co. Ltd (The Giant Ace) [2023] EWCA Civ 569

Author: Simon Rainey KC

Overview

The Court of Appeal (Males; Popplewell and Nugee LJJ)'s judgment in ***FIMBank p.l.c. v KCH Shipping Co. (The Giant Ace)***, confirmed that the time bar in Article III rule 6 of the Hague-Visby Rules will apply to claims in relation to misdelivery after discharge.

In so holding, the Court found that the travaux préparatoires to the Visby Protocol which amended, *inter alia*, the Hague Rules text of Article III, Rule 6 to give it very wide scope, gave a clear "bull's-eye" for the purposes of Article 32 of the Vienna Convention on Interpretation of Treaties and the English law threshold (see e.g. ***The Giannis NK*** [1998] AC 605) and made it clear that this was the intention of the drafters.

The decision confirms the closing of the "gap" left by the previous decision (on the Hague Rules) in ***The Alhani*** [2018] EWHC 1495 (Comm) in which it was held that misdelivery occurring before or simultaneously with discharge was covered by the Article III Rule 6 Hague Rules time bar but where the Court specifically left open the question of its application to misdelivery occurring after discharge.

The appeal related 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 one year time bar in Article III r 6 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.

The Court of Appeal's reasoning, in rejecting that argument, proceeded in two stages:

First, on the true construction of the language of the unamended Hague Rules, the Court held that, "on balance", "the better view" was that Article III Rule 6 did not apply to misdelivery after discharge but only in relation to all liability of any kind on the part of the carrier which arose during the Hague Rules period of responsibility, i.e. between shipment and discharge.

Secondly, the Court held that position was however different under the Hague-Visby Rules.

The very wide language which was adopted in the amendment of Article III Rule 6 by the Visby Protocol supported the textual conclusion that "the new rule is intended to apply even in cases outside the sphere of application of the Rules".

When regard was had under Article 32 of the Vienna Convention to the travaux préparatoires which explain why that text was changed as it was, there was "no room for doubt" and there was a clear "bull's eye".

As Males LJ put it, "In choosing a time limit deliberately expressed "in the broadest possible terms", the drafters plainly intended that the limit should apply to misdelivery even occurring after discharge. It is unlikely in the extreme that they intended the time limit to apply to misdelivery occurring during the voyage or simultaneously with discharge, but not to the typical case of misdelivery occurring after discharge." This was especially so when "it has for many years been common for delivery to take place some time after discharge has been completed" and "although misdelivery can occur during the voyage or simultaneously with discharge … misdelivery after discharge is the paradigm case".

Simon Rainey KC & Matthew Chan acted for KCH instructed by Kyri Evagora and Thor Maalouf of Reed Smith LLP.

Read full article here.

Simon Rainey KC is one of the best known and most highly regarded practitioners at the Commercial Bar. He has a reputation which is second to none for his intellect and legal analysis ("*fantastically intelligent and tactically astute*"). He is acclaimed for his advocacy skills ("*a stunning advocate*") and his cross-examination ("*excruciatingly superb*"). His practice focuses on five core areas: commercial litigation, commodities and international trade, energy and natural resources; international arbitration; insurance and reinsurance and shipping and maritime law.

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The Thorco Lineage: Limitation Under the Hague-Visby Rules Where There is Physical Damage and Economic Loss

Trafigura PTE Ltd v TKK Shipping Ltd ("The Thorco Lineage") [2023] EWHC 26 (Comm)

Authors: John Russell KC & Benjamin Coffer

Part of a cargo suffers some minor physical damage. But, an economic loss is suffered in respect of the whole of the cargo – perhaps a diminution in market value due to delay, a liability to pay salvors, or transhipment costs.

In ***The Limnos*** [2008] 2 Lloyd's Rep 166, Burton J held that under Article IV(5)(a) of the Hague Visby Rules the economic loss fell to be limited by reference to the weight of the physically damaged cargo, but that if there was no physical damage, the claim would be unlimited. This led to many anomalies, most notably that if there was minor physical damage the entire claim might be limited to a few dollars, but if there was no physical damage at all, the economic loss claim would be unlimited.

In ***The Thorco Lineage*** [2023] EWHC 26 (Comm)), Sir Nigel Teare declined to follow ***The Limnos*** and rejected the argument that Article IV(5)(a) limits claims for economic loss by reference only to the weight of cargo which suffers physical damage. Rather, he held that the limit is to be calculated by reference to the weight of cargo physically or economically damaged.

Article IV(5)(a) of the Hague-Visby Rules limit's the carrier's liability for "loss or damage to or in connection with the goods" by reference to the higher of two alternative figures: 666.67 SDR per package or unit or 2 SDR per kilogram of gross weight of "the goods lost or damaged".

In ***The Limnos***, Burton J held that the words "the goods lost or damaged" only encompass goods which are physically lost or damaged, so that where an incident causes limited physical damage but substantial consequential economic losses, the carrier can limit its liability by reference to the weight of cargo physically damaged. Further, he held that in the phrase, "loss or damage to or in connection with the goods", "the goods" were only those which were physically lost or damaged.

Sir Nigel, sitting as a Judge of the Commercial Court, declined to follow the analysis of Burton J, preferring the view that goods which suffer a diminution in value are "lost or damaged" for the purpose of the rule. That includes a diminution in market value, a liability to a third party such as salvors, or a requirement to tranship or incur other costs.

The Judge went on to hold that, even if the decision in ***The Limnos*** was correct, the entire cargo, in this case, would nevertheless have been considered physically "damaged" because the salvor's maritime lien had the effect of damaging the Claimant's proprietary or possessory title to the cargo, following dicta of Sheen J in ***The Breydon Merchant*** [1992] 1 Lloyd's Rep 373 and Derrington J in an Australian case, ***The Ikan Jahan*** [2019] 2 Lloyd's Rep 235.

The consequence is that claims for pure economic losses, such as diminution in market value, and quasi-physical losses, such as those arising out of the imposition of a lien for salvage or general average, are limited under Article IV(5)(a), whether or not there is conventional physical damage arising out of the same incident. However, the limit will be calculated by reference to the full weight of the cargo to which the losses relate.

John Russell KC and Benjamin Coffer appeared for the Claimant cargo interests, instructed by Stephenson Harwood. Nevil Phillips and Peter Stevenson appeared for the Defendant carriers, instructed MFB.

Read full article here.

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 three 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.

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Benjamin Coffer was named Shipping Junior of the Year 2019 at the Chambers & Partners Bar Awards and is shortlisted for Shipping, Commodities & Aviation Junior of the Year for the Legal 500 UK Awards 2023 & 2020. Ben was also shortlisted for Shipping Junior of the Year for Chambers & Partners UK Bar Awards in 2022. 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.

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Quadrant Chambers to Welcome Two New Members

We are delighted to announce that we will be welcoming Tom Hall and Caleb Kirton as new tenants at Quadrant Chambers upon successful completion of pupillage. Tom and Caleb have accepted our offer of tenancy and will join as Members from 1 October 2023. Tom and Caleb will be developing their practices in line with our core areas of work.

Rule Changes on Collision Statements of Case

Author: James M. Turner KC

The Collision Statement of Case ("CSoC") comes in two parts. The first requires a series of binding admissions regarding key features of the collision: the ships involved; drafts, speed, course, cargo and engine power; place and time of collision; when and how the other ship was first seen; and how the party's ship was navigated in response.

Part 2 is written to a particular formula: Part 1 is repeated; it is alleged that the collision was caused by the other ship's negligent navigation; and somewhat formulaic allegations are made about that negligence, rounded off with an incantation of the provisions of the Collision Regulations said to have been offended.

CSoCs are settled "blind", i.e., without sight of the other side's case. The parties only get to see their opponent's CSoC once both (or all) have been filed. The rules previously required no response to another party's CSoC.

Before voyage data recorders ("VDR"), the combined effect of the parties' CSoCs often produced no collision at all – whereas one had most definitely occurred. The principal enquiry at trial was how the ships had been navigated into collision, with limited scope for investigating why. VDRs and AIS have changed all that: how is usually crystal clear, leaving the way clear to investigate the why much more closely, greatly assisted by VDR audio recordings of what was said and audible on each vessel's bridge.

Reforms have recently been made to CPR Part 61, its Practice Direction and Form ADM3 (the CSoC form). The reforms, which apply in all collision actions commenced after 8 April 2023, come in four parts:

- The existing requirement that electronic track data (which includes audio recordings) be exchanged pre-CSoC has been bolstered by a requirement that, if only one party has such data, it must provide it.
- A further 8 questions have been added to Part 1, the most interesting of which are:
- Who was on the bridge for the half hour before collision?
- A full description of the ship's navigational equipment, whether it was being used and further particulars regarding radar use.
- The real-time availability of electronic track data.
- Whether a bridge audio recording exists.
- Whether the vessel was broadcasting AIS signals and, if not, why not.
- Part 2 is required to be fuller, covering the sequence of material events pre-collision, all allegations of causative negligence and other fault, and any other material facts and matters relied on.
- There must now be a response to the CSoC: defences must be filed within 28 days. Any reply (which is optional) must be served within 21 days of the defence.

These reforms are welcome but will have two related consequences. The timing between exchange of electronic data and filing of CSoCs is too tight for the necessary proper transcription, translation and analysis of bridge audio. Applications to extend time for this may therefore become routine. And the need to have very advanced drafts of the audio transcripts before CSoCs are settled will inevitably substantially increase the front loading of costs in collision actions.

Read full article here.

James M. Turner KC specialises in cross-border commercial disputes in international arbitration, energy, shipbuilding, offshore construction, shipping and banking. In 2021, Lloyd's List named James as one of its Top 10 Maritime Lawyers. In 2022, James acted pro bono in support of one of three judicial reviews of the so-called *"pushbacks policy"* directed at migrants in the Channel, which the government withdrew shortly before the challenges to it were due to be heard.

"He is wonderfully clear in his method and in his advice. He is able to unpick the most complex intellectual knots and lay out the best path ahead to achieve the right results for the client." (Chambers UK, 2023)

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Are Internal 'Hedges' Relevant to the Assessment of Damages

Rhine Shipping DMCC v Vitol SA [2023] EWHC 1265 (Comm)

Author: Paul Toms

Vitol had voyage chartered the M/T Dijilah from Rhine Shipping in part for the purpose of taking delivery of a cargo of crude oil at Djeno, Congo, pursuant to a sale contract. The price payable under the sale contract was determined by reference to the date of the Bill of Lading. The Vessel was detained at the first loadport by reason of an arrest of property on board in support of a London arbitration pursued by third parties against the bareboat charterer of the Vessel. As a result, the price payable under the sale contract significantly increased as compared to the position as it would have been had there been no detention. Vitol claimed the difference in price caused by the delay.

Issues

The Court had to consider, firstly, whether Rhine Shipping were obliged to pay for that loss either as damages for breach of a warranty or under an indemnity in the charterparty.

If so, there were two main quantum questions. The first was whether that loss was reduced by Vitol's internal risk management processes, which Rhine Shipping alleged had the same effect as external hedging. These processes involved recording a notional internal "swap" in respect of each of the pricing dates that would have been used to price the cargo, and then 'rolling' those "swaps" to later dates once the Vessel was delayed. There was no external counterparty for the internal "swaps", which were grouped together with other internal "swaps" derived from unconnected physical transactions concluded in the ordinary course of trading.

The second main quantum question was: if the loss had not been reduced by Vitol's internal risk management processes, was the loss too remote, or not something for which Rhine Shipping had assumed responsibility. Specifically was Vitol only entitled to recover what it would have lost if it had concluded swaps which had been effective to reduce its loss?

The Judgment

Simon Birt KC (sitting as a Deputy High Court judge) held that there had been a breach of the warranty and the indemnity was engaged.

As to the alleged "hedging", the Court considered Vitol's risk management processes, having heard evidence from a commercial analyst at Vitol and oil trading experts from both sides. The Court found that Vitol's processes were not equivalent to the position where external hedges had been entered into or closed out as a result of a breach of contract as canvassed in ***Glencore Energy UK Ltd v Transworld Oil Ltd*** [2010] EWHC 141 (Comm) and ***Choil Trading SA v Sahara Energy Resources Ltd*** [2010] EWHC 374 (Comm). Rather the actions of "netting off" notional internal transactions of this kind did not have the effect of reducing Vitol's loss and/or were *res inter alios acta* such that they were not to be taken into account.

In the light of the evidence before the Court, it was also held that a party in Rhine Shipping's position would have contemplated that Vitol might have had an internal risk management process of the kind it did, and so the loss claimed was not too remote and there was no evidence or special factors to conclude that Rhine Shipping had not assumed responsibility for the loss.

Paul Toms acted for Vitol, instructed by Ingolf Kaiser and Ryan Hunter of MFB.

Read full article here.

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).

"Paul is a talented and effective advocate, and is clearly respected by judges. He quickly gets to the heart of the issues and gives first-rate advice." (Legal 500, 2023)

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Upcoming Events

Thursday 19 October

Junior Shipping Breakfast Workshop

- Starting a Collision claim – top tips from the front line

Ruth Hoskings & Sam Mitchell

Thursday 9 November

Junior Shipping Breakfast Workshop

- Challenging Arbitration Awards

Paul Toms & Tom Bird

Wednesday 22 November

Quadrant Chambers Piraeus 10th Anniversary Reception

Thursday 23 November

Quadrant Chambers Piraeus Shipping Law Seminar 2023 - 10th Anniversary

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

Quadrant Chambers sponsored the YMLA Conference 2023

In June 2023, London hosted the YMLA Conference. Lawyers from all over Europe came to London for a series of brilliant events over 2 days.

Simon Rainey KC, Filippo Lorenzon and Andrew Gray judged the mock arbitration that took place at the National Maritime Museum in Greenwich. Lydia Myers and Rob Ward represented for the UK.

Forward-thinking, commercially astute, and user friendly. They have embraced technology leaving others far behind. A first-class set.'

Legal 500 (2023)

Cargo Hold Inspection and Reinspection

Pan Ocean Co Ltd v Daelim Corporation [2023] EWHC 391 (Comm)

Author: Robert Ward

It is common in time charters for a Vessel's cargo holds to be required to satisfy an inspection by a surveyor prior to loading.

In this case, the cargo holds were required by Clause 69 to pass an inspection of an "independent" surveyor. If the surveyor rejected the holds as unsuitable, then "...the vessel to be placed off-hire until the vessel passes the same inspection and any expense/time incurred thereby for Owners' account". The question which arose in the case was: what obligation do the parties have to arrange the second inspection?

The vessel charterers brought an appeal against the decision of an LMAA tribunal on this point, arguing that the tribunal had implied a strict, unilateral obligation on the charterers to have the cargo holds reinspected "without delay". They submitted that the implied term which was necessary in such circumstances was to impose an obligation on both parties to take reasonable steps to organise a reinspection.

Sir Ross Cranston (sitting as a High Court Judge), held at [48] that it was right that the implied term in this case had to oblige both parties to take reasonable steps to cooperate to organise a reinspection without undue delay. Since the inspector was to be independent, the vessel owners would have had to agree the surveyor so as to make it a joint appointment (in line with the understanding of an "independent" surveyor in ***The Protank Orinoco*** [1997] 2 Lloyd's Rep 42).

On the facts of the case, the tribunal had fallen into error when applying this implied term because it had held that the charterers were in breach of the term as from the moment that the Master notified them that the cargo holds had been cleaned and that the vessel was ready for a reinspection. The tribunal was required to assess how long it would have taken for the parties to organise and complete such a reinspection with reasonable steps. The charterers would only be in breach beyond that point.

Arbitration Act 1996: s70(2)

Another short point arising on this appeal was whether the respondent to an appeal under s69 of the Arbitration Act 1996 was permitted to rely on arguments under s70(2) at both the permission to appeal stage and the hearing of the appeal. The vessel owners had sought to argue at the permission stage that the appeal was prohibited under s70(2) because the charterers had not sought to apply to the tribunal under s57 for the correction of a mistake or the explanation of part of the award.

The charterers relied on ***CVLC Three Carrier Corp v Arab Maritime Petroleum Transport Co*** [2022] 1 All ER (Comm) 839 at [34] in which Cockerill J held that "the permission stage is intended to be a qualifying hurdle which is not revisited". However, the Judge found that this case was limited to addressing the requirements of s69(3) and did not address s69(2) which makes appeals subject to the restrictions of s70(2).

Michael Davey KC and Robert Ward acted for the laimants instructed by Ian Short and Keeley Edmondson of Campbell Johnston Clark.

Robert Ward has developed a busy practice spanning the breadth of Chambers' practice areas including shipping, commercial disputes, international arbitration and aviation. He has appeared as sole counsel in the High Court and County Court and as a junior in several high value matters.

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Sanctions and Strict Contractual Performance

Gravelor Shipping Ltd v GTLK Asia M5 Ltd [2023] EWHC 131 (Comm)

Author: Andrew Leung

Can a party perform its payment obligations by paying into a frozen account in a non-contractual currency where strict contractual performance would risk breaching sanctions? This was one of the key issues in ***Gravelor Shipping Ltd v GTLK Asia M5 Ltd***.

A dispute arose out of two bareboat charters for the MV "WL TOTMA" and MV "WL KIRILLOV", which served as finance leases providing Gravelor, the bareboat charterer, with the means to finance the purchase of the Vessels.

The owners of the Vessels, GTLK M5 and M6 ("Owners"), were subsidiaries of JSC State Transportation Leasing Company ("JSC"), a company owned by the Russian state. Those companies were sanctioned as a result of the Russian invasion of Ukraine in 2022, which prevented Gravelor from paying hire. Owners treated their non-payment of hire as an event of default which accelerated Gravelor's payment obligations under Clause 18.3 of the charters. On fulfilment of those obligations, the Vessels would be transferred to Gravelor. Owners were also blocked under OFAC sanctions in August 2022, making payments in the contractual currency, US$, impossible.

Gravelor successfully applied for summary judgment on a claim for specific performance requiring Owners to nominate a frozen Euro account into which the Clause 18.3 sum could be paid so as to enable the Vessels to be transferred. Gravelor relied on Clause 8.10 of the charters, which provided:

> "Where a payment under this Charterparty is incapable of being processed by the relevant banking institution and has not been received by the Owner on the due date by virtue of the Owner becoming a Sanctions Target, the Owner and the Charterer shall cooperate and promptly take all necessary steps in order for the payments to be resumed..."

After the imposition of OFAC sanctions, Owners were sold by JSC to a new entity ultimately owned by a local government within the Russian Federation. Without deciding whether this sale was a sham, Foxton J held that it was sufficient to trigger Clause 8.10 that Gravelor's banks could not process payment to Owners due to their having become Sanctions Targets in the past, irrespective of whether they still fell within the sanctions regime.

The Court rejected Owners' contention that, because payment required the payee to receive an unconditional right to the immediate use of the funds transferred per ***The Brimnes*** [1973] 1 WLR 386, payment into a frozen account would not be good discharge. If Owners could not access the funds, this would be the result of constraints in the sanctions context caused by Owners' perceived attributes rather than anything inherent in the process of payment. (Owners obtained permission from Foxton J to appeal on this point, but the appeal was not pursued.)

Finally, drawing on ***MUR Shipping BV v RTI Ltd*** [2022] Bus LR 473, Foxton J considered that the taking of "all necessary steps" under Clause 8.10 obliged Owners to nominate a frozen bank account, and to accept payment in Euros instead of US$. Owners were therefore obliged to accept performance that did not strictly accord with the terms of the charters in order to enable Gravelor to make payment without breaching sanctions.

Chris Smith KC and Andrew Leung acted for the Claimants instructed Nick Phillips and Maddy Askins at Tathams.

Andrew Leung is regarded as a *"go-to junior"* (Chambers UK 2021), *"an incredibly sharp junior advocate with an enormous capacity for hard work and the ability to consistently deliver under pressure"* (Legal 500, 2020) and a *"future star of the English commercial Bar"* (Legal 500 Asia Pacific, 2019), 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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James M. Turner KC Contributes to Maritime Decarbonisation Book

James M. Turner KC has contributed to a new book, titled: 'Maritime Decarbonisation: Practical Tools, Case Studies and Decarbonisation Enablers'.

The publication, which includes contributions from leading experts across the globe, considers new developments in decarbonisation strategies in maritime transport. It is edited by Mikael Lind, Wolfgang Lehmacher and Robert Ward, and will be published this Autumn.

James alongside Neil Henderson from Gard AS and Haris Zografakis, Dora Mace-Kokota and Andrew Rigden Green of Stephenson Harwood co-wrote a chapter, on 'Decarbonise shipping or decarbonise international maritime trade – The present contractual framework and the need for a new contractual architecture'.

See www.maritime-decarbonization.org/our-book/

‘EVER GIVEN’ in the Suez Canal: when is a binding contract concluded?

Smit Salvage B.V. & Ors v Luster Maritime S.A. & Anr (The ‘Ever Given’) [2023] EWHC 697 (Admlty)

Author: Andrew Carruth

On 23 March 2021, the Ultra Large Container Vessel ‘EVER GIVEN’ (the ‘Vessel’) grounded in the Suez Canal. She remained aground for about six days and the Canal was blocked in both directions for that entire period. The incident caused significant disruption to global trade and made headlines around the world.

On the day of the grounding, the Vessel’s owners sought assistance from SMIT Salvage B.V. (‘SMIT’), a leading maritime salvage company based in the Netherlands. By the time the Vessel re-floated on 29 March 2021, SMIT was contributing to the salvage effort by way of a salvage team on board the Vessel; remote assistance from a team onshore including naval architects; and two tugs, ***‘ALP GUARD’*** and ***‘CARLO MAGNO’.***

No sooner had the Vessel re-floated than a dispute arose as to whether a binding contract had been concluded between SMIT and the Vessel’s registered owners (the ‘Owners’). SMIT contended that no binding contract had been concluded and that they were entitled to claim salvage under the International Convention on Salvage 1989 (the ‘Convention’) and/or at common law. The Owners contended that a binding contract had been concluded on 26 March 2021, such that SMIT could not claim salvage because it had not acted as a volunteer.

The contract was said to have been concluded by an exchange of e-mails on the morning of 26 March 2021 between Mr Richard Janssen, SMIT’s Managing Director, and a claims handler acting on behalf of the Defendants. The exchange followed a written proposal sent by SMIT the previous evening setting out the basis upon which they were prepared to offer assistance.

The Admiralty Court held that, contrary to what was argued by the Defendants, no contract was concluded between the parties. The corollary was that the Claimants could claim salvage under the Convention and/or at common law.

Andrew Baker J held that the parties entered into a contract only if they communicated with each other so as to make it appear, objectively, that they had reached agreement upon terms sufficient in law to constitute a contract and that they intended to be bound by those terms whether or not they subsequently agreed a more detailed set of terms.

On the facts of the present case, the tenor of the communications was that the parties had reached agreement on the remuneration terms for a contract which they were still negotiating, enabling them to move on to discuss and negotiate the detailed contract terms by which they were willing to be bound.

Expressions such as ‘subject to contract’ and ‘subject to details’ could be used to make it clear that although certain terms were agreed, the intention was not to be bound unless and until some further terms were also agreed. Although the parties had not used those expressions, the effect of what was said was that the consensus they had reached was ‘sub details’.

Andrew Carruth acted for the Claimants, together with Elizabeth Blackburn KC of 36 Stone. They were instructed by Andrew Chamberlain, Jonathan Goulding and Simon Maxwell of HFW.

Read full article here.

Andrew Carruth undertakes a broad range of commercial work with an emphasis on shipping, offshore construction, international arbitration, energy and commodities. Andrew regularly appears in the High Court (primarily in the Commercial Court) as well as in arbitrations. He has experience of all of the main arbitral rules (including LCIA, ICC, LMAA, UNCITRAL, SIAC, HKIAC and GAFTA). He is a dry shipping specialist with significant experience of wet shipping disputes, including collision actions and LOF salvage arbitrations. *“An outstanding junior, very bright and hard-working, with great instincts.”* (Legal 500, 2023)

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Chambers UK Bar 2023

Court of Appeal Judgment in Respect of Misdelivery Claims under Bill of Lading Contracts

Unicredit Bank A.G. v Euronav N.V. [2023] EWCA Civ 471

Authors: Robert Thomas KC & Paul Toms

The Facts

The Sienna was voyage chartered by BP from Euronav. A Bill of Lading was issued by Euronav with BP named as shipper. Following the sale of the cargo by BP to Gulf Petrochem FZC ("Gulf"), Euronav, BP and Gulf entered into a novation agreement by which Gulf became the voyage charterer in place of BP.

Unicredit had financed Gulf's purchase of the cargo from BP. Gulf had, at Unicredit's request, asked BP to indorse the Bill of Lading and send it to Unicredit. However, due to COVID restrictions, that had not happened by the time of discharge.

Gulf instructed Euronav to discharge the cargo by STS transfer to two vessels which Euronav duly did.

Unicredit was not repaid by Gulf the sum which it had financed. Therefore, when the Bill of Lading was subsequently indorsed to Unicredit, it brought a claim against Euronav alleging a breach of contract contained in or evidenced by the Bill of Lading by reason of the delivery of the cargo without production of the Bill of Lading.

Decision of Moulder J

Moulder J held that Unicredit's claim failed on the basis that:

» The Bill of Lading was – on issuance – a mere receipt because the shipper and the voyage charterer were the same party, i.e. BP. The subsequent novation did not create a contract on terms of the Bill of Lading. Since Euronav's contractual obligations were set out in the charterparty alone, namely to discharge without production of the Bill of Lading if ordered to do so by the voyage charterer, there was no breach of contract.

» Even had there been a Bill of Lading contract at the time of delivery, breach of the same had caused no loss or the same loss would have been suffered in any event.

The Appeal

Unicredit appealed against each of those findings.

As to the first finding, Unicredit's challenge to the judgment succeeded.

Popplewell LJ identified the relevant question as: what was the presumed intention of the parties at the time that the Bill of Lading was issued? He held that the presumed intention was that the Bill of Lading was a contract save only for so long as the holder was a charterer.

He further held that there was no term of the novation agreement which displaced this presumption. The Court, therefore, decided that at the time of discharge there was a Bill of Lading contract.

Popplewell LJ also held that, if that analysis was wrong, the effect of s. 2(1) of the Carriage of Goods by Sea Act 1992 was that upon indorsement of the Bill of Lading to Unicredit subsequent to discharge, a contract on the terms of the Bill of Lading came into existence retrospectively.

However, the judgment in respect of causation was upheld. The Court of Appeal made clear that the Judge had asked herself the correct question i.e. to assess "what would have happened to the Bank's security interest had Owners initially refused to discharge without production of the Bill".

The Judge had made factual findings that had Euronav initially refused to discharge the cargo without production of the Bill of Lading, it would have sought instructions from Unicredit as to what should be done with the cargo and that Unicredit would have instructed Euronav to discharge without production of the Bill of Lading

Since "the obligation to deliver against a bill of lading is a contractual one which can be varied by express consent …", the Court of Appeal held that delivery in those circumstances would not have been a breach of the Bill of Lading contract and, therefore, the breach of contract had caused no loss.

The Appeal was, accordingly, dismissed.

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

Read full article here.

Robert Thomas KC is an established commercial silk. His practice focuses on the following core areas: shipping, commodities and international trade; energy and natural resources; international arbitration and commercial litigation (in particular, in commercial fraud and related relief). He has been consistently ranked as a Leading Silk in both directories, and has been praised (amongst other things) 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*".

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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). "*Paul is a talented and effective advocate, and is clearly respected by judges. He quickly gets to the heart of the issues and gives first-rate advice.*" (Legal 500, 2023)

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Monday 11 September

LISW23: The Future of Maritime Arbitration

Quadrant Chambers and The LMAA are pleased to be co-hosting a panel discussion as part of LISW23.

Our panel will be Jon Elvey, Arbitrator and Full Member of the LMAA, Nigel Cooper KC, Quadrant Chambers, Prof Sarah Green, Commissioner for Commercial and Common Law, The Law Commission, Nicola Cox, Head of Defence Claims, West of England Insurance Services (Luxembourg) SA, Andrew Preston, Partner, Preston Turnbull. The discussion will be chaired by Gemma Morgan.

The panel will be discussing:

- Hot topics for users of maritime arbitration – legislative reform?
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- Maritime disputes in international arbitration

Tuesday 12 September

The Quadrant LISW Debate - Debating new horizons in Trade Finance and Decarbonisation

Chair: Chirag Karia KC The panel of Simon Rainey KC, Robert Thomas KC, Ruth Hosking & Koye Akoni will debate (1) whether the Court of Appeal were right in *Unicredit Bank AG v Euronav NV* and the likely wider impact on trade finance and (2) where the balance is to be struck between the stakeholders in a changing regulatory environment regarding greener shipping and decarbonisation.

Tuesday 12 September

Quadrant Chambers LISW Reception - Join us in celebrating London International Shipping Week.

Thursday 14 September

LISW23: Shipbuilding Contracts, Technological Innovation and Decarbonisation with Norton Rose Fulbright

With new technologies come new risks for both buyers of newbuilding vessels, technology providers and shipyards Poonam Melwani KC will moderate an interactive panel discussion on how shipbuilding contracts will have to adapt – covering the risks, complications, opportunities and ways to manage them. Poonam will be joined by James Turner KC, Charlotte Winter, Ieronymos Bikakis and Andrew Craig-Bennett, columnist, "Splash 24/7".

Contact: marketing@quadrantchambers.com

Tuesday - 11 September - BIMCO's GENCON 2022 – key clauses and industry insight

BIMCO has arranged a seminar co-hosted with Swansea University and HFW to give the industry insight into GENCON 2022 and its key clauses, why they differ from earlier versions of GENCON. Simon Rainey KC joins the panel.

Wednesday - 13 September – LISW Headline Conference - Reframing Risk in a Complex Market

Poonam Melwani KC is a panellist at the LISW Headline Conference: 'Internal Industry Factors: Collaboration or Fragmentation'.

Thursday 14 September - The Future of UK Maritime Dispute Resolution - Opportunities and Challenges

Minister Mike Freer MP will join industry experts Damian Honey, HFW, Gemma Morgan, Quadrant Chambers and Daniella Horton, Arbitrator in a Fireside Chat to discuss the UK's key role in global maritime arbitration and insights into the direction of global maritime arbitration.

No Binding Arbitration Agreement; Renewed Importance of the Classic Principles of Construction and Interpretation

Emirates Shipping Line DMCES v Gold Star Line Ltd [2023] EWHC 880 (Comm)

Author: Lydia Myers

The question before the Court in this challenge under S67 of the Arbitration Act 1996 was whether the parties to the proceedings were also parties to a memorandum of understanding governing the operation of a container shipping line containing, *inter alia*, an LMAA arbitration clause which Emirates Shipping Line DMCEST ("ESL") sought to rely upon.

Various communications were exchanged between the parties in or around October 2019 whereby it was agreed that ESL would phase in a vessel into the liner service in January of the following year and in return, ESL would purchase slots on the vessels presently in the service. The question was therefore whether there was agreement between the parties as to the applicability and binding effect of the memorandum as concerns the slot purchase aspect of the deal.

ESL contended that the slot purchase was governed by the memorandum of understanding whether by virtue of an express or implied agreement to the same effect or as a result of an estoppel by representation or convention. The estoppel that ESL relied upon arose out of an email sent after a dispute arose between the parties whereby Gold Star Line's ("GSL") representatives stated, 'with reference to the MOU dated 24.4.2018 between you, other liner partners and Gold Star Line Ltd, we were the 'vessel operator' and you were the 'slot charterer' for the purpose of the voyage of IAN H'. GSL denied the same and contended that the slot purchase was a separate agreement to the phasing in of the Vessel and that estoppel could not give rise to a cause of action in ESL's favour.

The Judge, having considered the arguments as to the objective meaning of the memorandum and the intention of the parties at the date of the contract, concluded that the slot purchase and phasing in of the vessel were two separate agreements and that therefore the slot purchase was not governed by the 2018 MOU.

Interestingly however, as concerns the estoppel argument, the Judge denied that this was a case where estoppel was relied upon to give rise to a new cause of action. The Judge correctly held that this was a case where estoppel was used not to give rise to a cause of action but to enable a party to succeed in a claim which would otherwise have failed by preventing the other party from relying on a defence. Put differently, it was the effect rather than the substance of the memorandum of understanding that the estoppel submission supported and therefore there was no reason in principle why estoppel could not aide ESL in the circumstances. The Judge also distinguished the judgment in ***The Eleni P*** [2014] EWHC 4202 (Comm). However, notwithstanding ESL was not barred from relying on an estoppel, on the facts the judge found that no such estoppel operated for want of reliance on ESL's part.

The outcome of the case as concerns the objective interpretation of the parties' written exchanges and conduct is fact specific although serves as a useful reminder of the need for certainty and clarity in parties' agreements. The judgment on estoppel also provides an interesting analysis of when estoppel may or may not be said to give rise to a cause of action and highlights the continued importance of demonstrating actual reliance on a representation or shared assumption before an estoppel can be made out.

Lydia Myers acted for Emirates Shipping Line DMCEST instructed by Andrew Hughes & Ellie Hall of MFB Solicitors.

Lydia Myers is developing a litigation and arbitration practice in wet and dry shipping, commodities, and banking, financial services and civil fraud matters. Lydia has gained experience in a broad range of work in these specialist fields and in general commercial and international law. Lydia is frequently instructed as sole counsel against senior counsel including against Silks.

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The Power of Deduction (or Not …) in Relation to the Payment of Hire

Fastfreight Pte Ltd v Bulk Trident Shipping Ltd ("Anna Dorothea") [2023] EWHC 105 (Comm)

Author: Caroline Pounds

In this decision, the Commercial Court was tasked with considering the following question of law on an appeal pursuant to section 69 of the Arbitration Act 1996 ("the 1996 Act"):

"Where a charterparty clause provides that no deductions from hire (including for off-hire or alleged off-hire) may be made without the shipowner's consent: is non-payment of hire a 'deduction' if the Vessel is off-hire at the instalment date?"

Henderson J held that it was, upholding the decision of an arbitral tribunal ("the Tribunal") that the charterers, Bulk Trident Shipping Ltd ("Charterers"), had not been entitled to withhold hire on the basis of an alleged off-hire period.

The dispute arose in the following circumstances. Fastfreight Pte Ltd ("Owners") had chartered their vessel "ANNA DOROTHEA" ("the Vessel") to Charterers for a trip time charter for the carriage of a bulk cargo from East Coast, India, to China ("the Charterparty"). Pursuant to the Charterparty, hire was payable every 5 days in advance and Clause 17 was an off-hire clause in relatively standard form. Clause 23 was a lien clause which provided (amongst other things) for Charterers to have a lien on the Vessel for all monies paid in advance and not earned "and any overpaid hire or excess deposit to be returned at once". Clause 11, which was the key clause in issue, further provided as follows:

> "Notwithstanding of the terms and provisions hereof no deductions from hire may be made for any reason under Clause 17 or otherwise (whether/or alleged off-hire underperformance, overconsumption or any other cause whatsoever) without the express written agreement of Owners at Owners' discretion. Charterers are entitled to deduct value of estimated Bunker on redelivery. Deduction from the hire are never allowed except for estimated bunker on redelivery …"

The Vessel loaded iron ore pellets in India and was ordered by Charterers to sail to China for discharge. She arrived at her discharge port on 4 May 2021 but was not able to obtain a berth. In the event, the cargo was not discharged and the Vessel was not redelivered to Owners until 28 August 2021.

With the exception of a five day period between 22 and 26 May 2021, Charterers did not pay any hire for the Vessel between 4 May and 28 August 2021, contending that the Vessel was off-hire due to a number of crew members testing positive for Covid on 1 May 2021. That was disputed by Owners, who applied to the Tribunal for a partial final award of hire under section 47 of the 1996 Act.

Owners' application succeeded before the Tribunal, with the Tribunal holding (in summary) that: (i) Charterers' failure to pay hire constituted a 'deduction' within the meaning of Clause 11 (even where the Vessel was alleged to be off-hire at the time an instalment fell due); and (ii) Owners had reasonable grounds to dispute Charterers' claim that the Vessel was off-hire and thus for refusing written permission to withhold hire pursuant to Clause 11. The Tribunal accordingly awarded Owners the hire claimed, without prejudice to Charterers' right thereafter to counterclaim the whole or any part of that sum.

Charterers sought and obtained the Commercial Court's permission to appeal the Tribunal's Award pursuant to section 69 of the 1996 Act. As set out above, the particular question before the Court was whether, pursuant to Clause 11, hire remained payable (absent Owners' written agreement to the contrary) even if it was later determined or agreed that the Vessel was off-hire (see [26]).

Charterers' main arguments on appeal were that (see [28]): (i) the word 'deduction' in Clause 11 presupposed that a sum was due in the first place (for a deduction can only be made where there is something to deduct from); (ii) Clause 11's prohibition of 'deductions' was, thus, an 'anti set-off'

provision; it did not restrict Charterers' right not to pay hire on the grounds that the obligation to pay hire had not accrued; (iii) any ambiguity in Clause 11 should be construed against Owners because clear and unambiguous language was required to exclude a right of set-off; (iv) where a vessel is off-hire on the hire due date, the obligation to pay hire is suspended (in reliance on ***The 'Lutetian"*** [1982] 2 Lloyd's Rep 140); (v) the wording of Clause 23 (as quoted above) suggested that Clause 11 was directed at deductions for overpaid hire; and (vi) the Tribunal had been wrong to suggest that clauses such as Clause 11 are seen as necessary to prevent a charterer from withholding payment on spurious grounds because, were it to do so, the owner would still be entitled to bring a claim of the type brought in the present case.

Henshaw J dismissed Charterers' appeal. In doing so, he applied the usual principles of contractual construction (see [21]-[22]) and reiterated a number of well-established principles in relation to the payment of hire under a time charter (see [23]). Applying those principles to the Charterparty before him, Henshaw J held that (see [32]-[42]):

» On its true construction, the restriction on 'deductions' in Clause 11 applied to any exercise of rights that would otherwise arise under or by reason of Clause 17 to reduce (wholly or partly) a hire payment based on the Vessel being off-hire. The restriction was not limited to set-off for overpaid hire as Charterers alleged and that was the case whether or not the off-hire was proven, or merely alleged.

» There were good commercial reasons for a clause such as Clause 11 to be inserted, to protect Owners from losing critical hire income based on potentially spurious allegations that the vessel was off-hire. Conversely, Charterers retained important remedies (e.g. under Clause 23) and Owners' discretion when deciding whether or not to agree to an alleged off-hire was not unfettered: their discretion had to be exercised for a contractually appropriate purpose and rationally.

» Charterers' approach to Clause 11 would substantially undermine it, for an alleged off-hire period of any significant duration would quickly lead to the cession of hire payments on their due dates and, as the present case demonstrated, even with an expedited procedure, it may take months for the Owners to obtain any award in respect of the unpaid hire.

» Finally, and whilst it was not necessary for the Judge to reach any conclusion on the point, the Judge indicated that ***The 'Lutetian"*** was distinguishable on the grounds that the charterparty in that case contained no equivalent to Clause 11 and there was no dispute that the vessel was off hire on the date on which a hire instalment would otherwise have fallen due.

Charterers' appeal was accordingly dismissed. Whilst the decision turned on the specific wording of Clause 11, similarly worded ' no deduction' clauses are a common feature of many charterparties and serve the valuable commercial purpose of protecting the owner's income stream from spurious off-hire allegations. The Judgment highlights the importance of the parties paying close attention to the wording of such clauses and the need to use clear and unambiguous language when negotiating and agreeing to them.

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. Caroline was named one of the top 10 maritime lawyers of 2020 by Lloyd's List. She was also recognised as one of Legal Week's 'Stars at the Bar'. Caroline's practice encompasses the broad range of general commercial litigation and arbitration. Her particular areas of specialism include shipping, carriage of goods, energy/offshore, shipping and commodities.

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John Russell KC Features in Lloyd's List Top 10 Maritime Lawyers 2022

John Russell KC featured in the Lloyd's List Top 10 Maritime Lawyers of 2022.

John Russell KC is probably best known in shipping law circles for his successful appearances in two landmark Supreme Court cases, ***Volcafe v CSAV*** and ***CMA CGM Libra.***

John topped the same list in 2020 and has also been named as Shipping Silk of the Year in both the Legal 500 UK Awards and the Chambers & Partners Bar Awards.

Andrew Baker J Imposing Order on Chaos

MSC Mediterranean Shipping Company S.A. -v- Stolt Tank Containers B.V. and others 'The MSC Flaminia [2022] EWHC 2746 (Admlty)

Author: James M. Turner KC

The MSC Flaminia and much of its cargo was badly damaged by a container explosion and subsequent fire-fighting efforts. Its owner's claim against the time charterer (MSC) for breach of the obligation not to ship dangerous cargo was upheld in arbitration.

MSC sought to limit its liability under the Amended 1976 Limitation Convention. It is of course well established that a charterer cannot limit its liability for damage to the ship (***The CMA Djakarta*** *and* ***The Ocean Victory***). Undeterred, MSC claimed that it could nonetheless limit its liability in relation to several heads of loss associated with that damage, including salvage charges, ship repair costs and the costs of removing cargo, damaged cargo, waste and firefighting water from the vessel.

Its principal argument, in essence, was that that damage was consequential on damage to cargo and thus within Article 2(1)(a) of the Convention. Its alternative argument was that several heads of claim were within Article 2(1)(e) (*"Claims in respect of the removal, destruction or the tendering harmless of the cargo of the ship"*) or (f) (*"Claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with the Convention, and further loss caused by such measures"*).

For its part, the owner sought to argue that claims between *"insiders"* (i.e., members of the class of those permitted in principle to limit their liability under the Convention) could never fall within Article 2(1)(a).

The judge rejected all these arguments. Claims between *"insiders"* – most obviously in relation to cargo claims – could certainly fall within Article 2(1)(a), and the owner's broad submission was therefore rejected. MSC's submissions likewise failed, in essence because they sought to mischaracterise the owner's claims by reference to causation. The proper approach, according to the judge, was to characterise them by reference to their nature. A claim for damage to a ship caused by damage to cargo was still a claim for damage to the ship, not a claim consequential upon damage to cargo. Similarly, the costs of removing cargo waste and firefighting water were incurred to prepare the ship for repair and so were also claims for damage to the ship.

The judge also rejected an argument (founded on a contention in *Derrington & Turner on Admiralty Matters*) that *"consequential loss"* in Article 2(1)(a) referred only to losses suffered by the owner or person entitled to possession of physically damaged or lost property. The judge preferred the conclusion of Finkelstein J in the Australian case of ***The APL Sydney***, upholding the right to limit against a claim for pure economic loss resulting from damage to a pipeline in which the claimant had no proprietorial interest, but on which its business depended.

This lengthy and careful judgment would repay careful reading. However, it is not the last words on these questions. The Court of Appeal heard the appeal in July and its judgment is expected in October.

James M. Turner KC specialises in cross-border commercial disputes in international arbitration, energy, shipbuilding, offshore construction, shipping and banking. In 2021, Lloyd's List named James as one of its Top 10 Maritime Lawyers. In 2022, James acted pro bono in support of one of three judicial reviews of the so-called *"pushbacks policy"* directed at migrants in the Channel, which the government withdrew shortly before the challenges to it were due to be heard.

"He is wonderfully clear in his method and in his advice. He is able to unpick the most complex intellectual knots and lay out the best path ahead to achieve the right results for the client." (Chambers UK, 2023)

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We were pleased to Sponsor and Support the SCMA Conference 2023 as part of Singapore Maritime Week.

Nigel Cooper KC spoke on the panel Misdelivery Claims – Good Faith, Causation and Consent.

Practice Statement Makes Perfect: The Supreme Court Affirms *Buchanan v Babco*

JTI Polska v Jakubowski [2023] UKSC 19

Author: Ben Gardner

In a leapfrog appeal, ***JTI Polska v Jakubowski*** [2023] UKSC 19, the Supreme Court was invited to overturn the majority decision of the House of Lords in ***Buchanan v Babco*** [1978] AC 141. It has been clear since Buchanan that senders of cigarettes and alcohol have been entitled to recover their excise duty liability to HMRC as "other charges" under Article 23.4 of the CMR, in addition to the market value of the cigarettes ex duty. This followed from the 3:2 majority decision of the House of Lords in Buchanan, adopting the broad interpretation of Article 23.4 adopted by the French Court rather than the narrow interpretation adopted by the Dutch Court.

In a leapfrog appeal, the Appellants challenged Buchanan based on sustained criticism of that decision by academics and the Court of Appeal in ***Sandeman v TTI*** [2003] QB 1270, together with a detailed analysis of the travaux préparatoires.

The Supreme Court began by considering the proper interpretation of international conventions. The Court clarified that the use of travaux is not, as is sometimes thought, limited to 'bull's eye' material which demonstrates a definite legislative intent. That well-known test is appropriate to determine the meaning of a treaty provision. However, when seeking confirmation of an interpretation indicated by the wording of the clause, a more liberal and unconstrained approach is appropriate. However, the travaux to the CMR provided little guidance because the documents relied upon did not reveal the common intention or understanding of the parties to the CMR.

The Court went on to consider the interpretation of Article 23.4 of the CMR in Buchanan. As Lord Hamblen noted at para. 42, "it will always be necessary to do more than to persuade the present panel of Justices that the prior decision is wrong". The Court considered that the threshold test was that the previous decision was "untenable", which the Appellants had not met. The ratio in Buchanan, as well as the Supreme Court decisions in Denmark, Belgium, Lithuania and Czechia, demonstrated that the broad view was tenable. The Court had little time for the academic criticism of Buchanan, which appeared to be overstated and to have no real world impact. The Court was also unimpressed by the Sandeman critique of Buchanan and considered that the invitation in Sandeman to limit Buchanan to its facts "should not have been made".

This was a road carriage case, but it provides two more general insights to shipping lawyers:

- It is unnecessary to point to a 'bull's eye' if the travaux are confirmatory rather than definitive. That opens the door to wider deployment of travaux, but it is important to remember that this judgment joins a long list of commercial decisions in which the travaux have not impacted on the Court's judgment.
- The 1966 Practice Statement on departing from Supreme Court decisions is a formidable hurdle. It is difficult to envisage a (modern) judgment which is susceptible to challenge on the basis that it is obviously wrong, especially if foreign judges have adopted the same approach. A material change in circumstances will be a more fruitful line of challenge to a Supreme Court / House of Lords judgment.

Stewart Buckingham KC and Ben Gardner acted for the Respondents, instructed by Christopher Chatfield and Sara Askew of Kennedys and John Kimbell KC and Maya Chilaeva acted for the Appellants, instructed by Ben Griffin, Darren Kenny, and Stephanie Sandford-Smith at DWF.

Read full article here.

Ben Gardner has a busy commercial practice, focusing on international arbitration, energy, shipping and commodities. He is the only barrister recognised by both Chambers & Partners and Legal 500 as a leading junior across each of these fields. Recent comments include "*very clever and a very good advocate*", "*an amazing, commercially minded barrister*", "*excellent on his feet*", "*has an exceptional understanding of both the business and legal aspects of a case*"

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Another Crossing Rule Case

FMG Hong Kong Shipping Ltd, the Demise Charterers of FMG SYDNEY v Owners of the MSC APOLLO [2023] EWHC 328 (Admlty)

Author: Nigel Jacobs KC

At 2232:15 on 29 August 2020 SYDNEY, a very large ore carrier, collided with APOLLO, a container ship, in the approaches to Tianjin, Northern China. Sir Nigel Teare held that APOLLO was 100% to blame for the collision. The Court of Appeal granted permission to appeal on a discrete point in relation to the application of the Head-on Rule (Rule 14). The Judge, on the other hand, decided that the Crossing Rule applied (Rules 15-17) and rejected the application of Rule 14. The Court of Appeal dismissed the more general application for permission to appeal against the Judge's findings and the apportionment itself.

Fault

The Judge held that APOLLO was solely to blame for the collision. In particular, from C-12 the Crossing Rules applied. APOLLO was the give-way vessel and failed to take early and substantial action. At that stage APOLLO was shaping to pass astern of SYDNEY, SYDNEY was fine on the starboard bow of APOLLO and the CPA was less than 0.5nms. Not only did APOLLO fail to take early and substantial action but instead incrementally altered course to port to cross ahead of SYDNEY (in breach of Rule 15). APOLLO also made inappropriate use of her VHF. In accordance with the approach set out in ***Mineral Dampier v. Hanjin Madras*** [2001] EWCA Civ 1278 the Judge deprecated the use of VHF as a means of collision avoidance, especially in circumstances when such action was in conflict with the Collision Regulations. APOLLO's speed was excessive and visual and aural lookout were poor.

For her part SYDNEY took appropriate action at the correct time under Rules 17(a)(ii) and/or 17(b). Although her speed over the ground increased between C-10 (10 knots) and C-2 (11.4 knots), this was not a breach of Rule 17(a)(i) because there was no change in her engine speed from C-13: [129] and ***The 'Cederic"*** (1924) Ll.List L.R. 391 at 393.

For present purposes and in the light of the prospective appeal, the Judge's reasons for the non-application of Rule 14 are perhaps of most interest: see [97] – [106]. APOLLO submitted that Rule 14(b) was in effect a stand-alone provision which created ("deemed") a head-on situation in circumstances in which at C-12 SYDNEY saw both sidelights of APOLLO. For various reasons APOLLO's arguments were decisively rejected by the Judge.

First, it is clear from Rule 14(a) that *"a head-on situation is one where two vessels are meeting on reciprocal or nearly reciprocal courses so as to involve risk of collision …. "* [99] & [101]. However these vessels were not on reciprocal courses: the difference in headings and courses made good was in the order of 17°. Rule 14(b) cannot construed in a vacuum divorced from the reciprocity requirement in Rule 14(a).

Second, if APOLLO's submission was correct, Rule 14 would apply where vessels were crossing [101].

Third, the previous iteration(s) of the Collision Regulations (1960, 1954 & 1910) referred to the "End-on" Rule in which *"each vessel is in such a position as to see both sidelights of the other"*. There was no reason to suggest any intention to alter the fundamental nature of a head-on or end-on situation "to cases where the vessels were crossing and not meeting on reciprocal or nearly reciprocal courses" [104]. The author would add that further post-hearing research in relation to the *travaux preparatoires* supported the Judge's conclusion

Finally, the first requirement of Rule 14(b) is that Rule 14(b) applies *"when a vessel sees the other ahead or nearly ahead"*. In the present case, APOLLO was about 17° off SYDNEY's port bow.

Nigel Jacobs KC acted for FMG Hong Kong Shipping Ltd, the Demise Charterers of FMG SYDNEY instructed by Ian Teare & Peter Thornton CBE of Hill Dickinson.

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 a calm and composed advocate who probes every fact and distils the issues methodically. He is very approachable and a pleasure to work with in a team." (Chambers UK, 2022)

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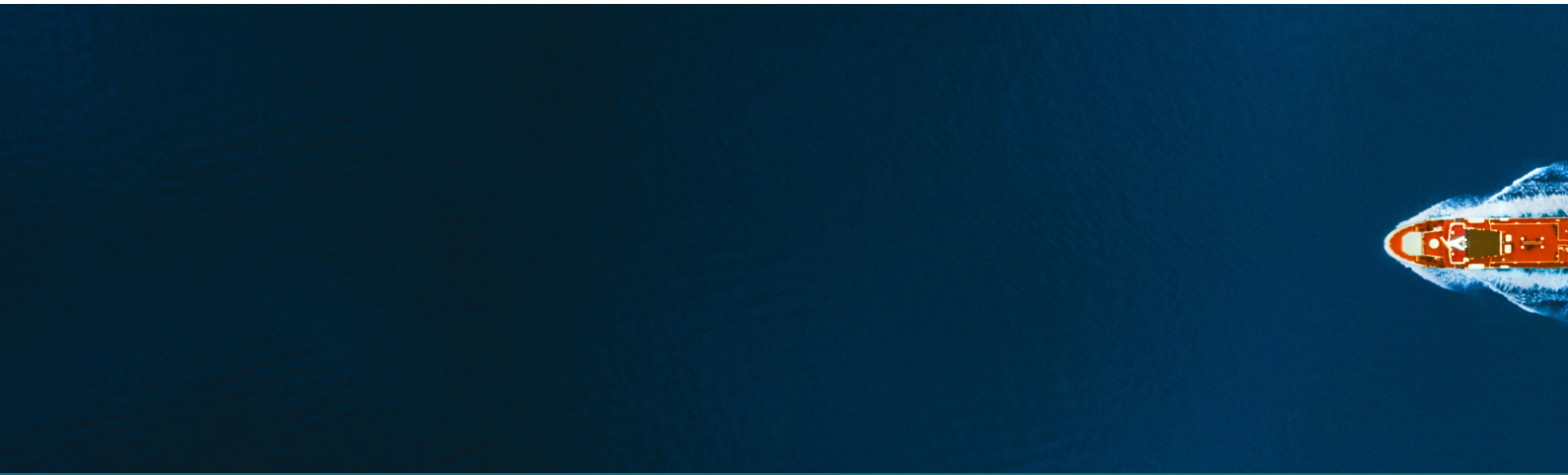

The End of the One-Stop Shop

DHL Project & Chartering Ltd v Gemini Ocean Shipping Ltd (the "Newcastle Express") [2022] EWCA Civ 1555

Author: Benjamin Joseph

In ***The Newcastle Express***, Owners of the vessel and the would-be Charterers agreed the terms of a recap for a voyage charterparty which expressly provided "subject shipper/receivers approval."

In addition to the substantive provisions, the recap included a clause providing for the agreement to be governed by English Law, with disputes to be resolved by arbitration in London.

Had the parties bound themselves to an agreement to arbitrate? The Court of Appeal held that they had not. A condition providing "subject shipper approval" - much like "subject to contract" or "subject to details" - negatived the intention to contract. No binding main contract was formed, and neither was any arbitration agreement.

The Separability Principle

The Court of Appeal distinguished between questions of contract formation and contract validity.

Where it is alleged that the contract apparently agreed is void or voidable (for example for illegality), the Court must consider whether the invalidity amounts to "an attack on" or "impeaches" the arbitration clause. The Court of Appeal found that it will not necessarily do so and, indeed, will be presumed not to do by virtue of the principle of separability, unless the issue relates directly to the arbitration agreement.

By contrast, where it is successfully contended by one party that no binding main contract was ever agreed, this was said to *"necessarily affect the arbitration clause because it means that the arbitration clause was not agreed either."* The principle of separability was said to have no application to this scenario.

The End of the One-Stop Shop?

The decision of the Court of Appeal is clear and well supported by the appellate authorities cited within. But there are at least two potentially problematic practical consequences.

First, I am sceptical that business persons who had agreed all terms including an arbitration agreement (subject to a condition such as shipper approval) would consider that it was left entirely open where any disputes as to whether a final agreement had been reached would be resolved - including a dispute as to whether shipper approval had actually been granted.

The answer of the Court of Appeal was that "One-stop shopping is all very well, but if the parties have not entered into an arbitration agreement, the shop is not open for business in the first place."

However, whether the shop is open for business is not an entirely straightforward question. By way of illustration, the Court of Appeal's view was that if the condition in question had instead read "subject to shipper approval…such approval not to be unreasonably withheld", the arbitration agreement would have been binding even if shipper approval was never granted. The distinctions in this area are fine and are unlikely to be on the minds of those negotiating charterparties.

Second, a difficult respondent (is there any other kind?) is given multiple bites at the cherry - a jurisdiction challenge before the Tribunal, a Section 67 challenge by way of re-hearing, and potentially an appeal to the Court of Appeal. Plus even if successful on jurisdiction, there will be subsequent arguments on liability and contractual interpretation before the Tribunal, with the potential for further Section 68 and 69 challenges to the Courts.

It is an unsatisfactory position for efficiency in dispute resolution by arbitration. Indeed, in part citing concerns arising from ***The Newcastle Express***, the Law Commission has proposed restricting new grounds of objection and new evidence in jurisdictional challenges under Section 67 of the Arbitration Act.

Whilst the Law Commission's consultation is ongoing, this change is unlikely to significantly mitigate the problems above. The preferable practical solution is likely to be for a claimant to start arbitration proceedings and apply for a preliminary determination of jurisdiction by the Court under section 32 of the Act, provided it can obtain the agreement of their counterparty or the Tribunal.

So, is it the end of the one-stop shop for arbitration? No. But there is certainly at least potentially a degree of erosion of the arbitral tribunal as the 'first stop.'

Benjamin Joseph joined Quadrant in October 2020 following successful completion of pupillage. He has developed a broad and busy practice in line with Chambers' core areas, with a particular focus on international trade, shipping, energy, and international commercial arbitration.

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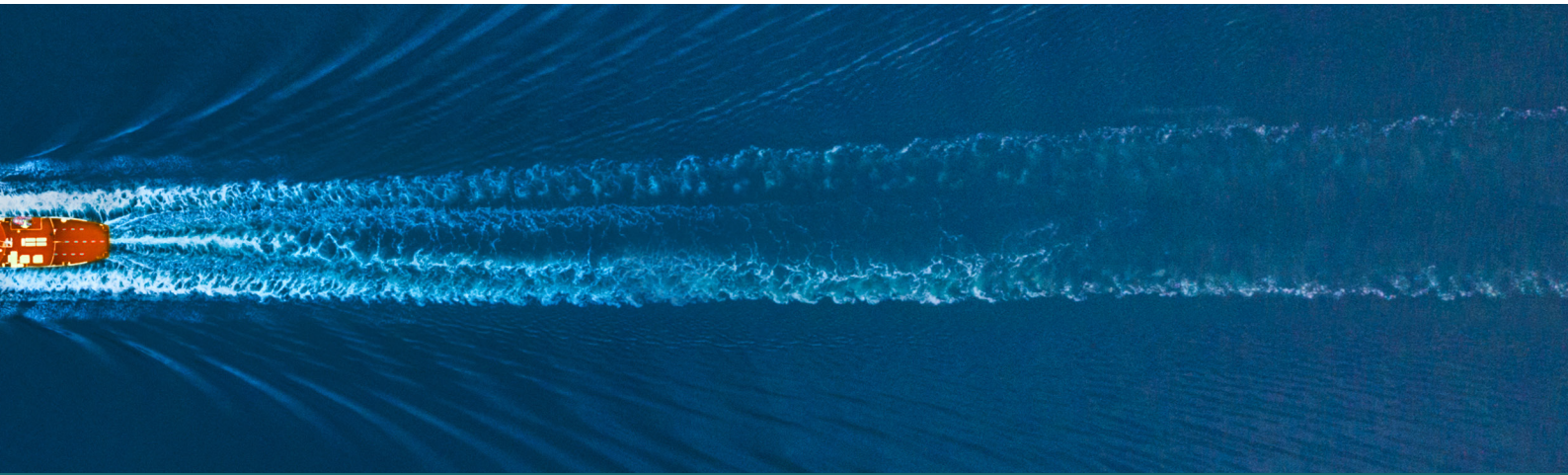

When the Skipper Fails to Testify

Arnold v Halcyon Yachts Ltd [2022] EWHC 2858 (Admlty)

Author: Tom Nixon

In late 2017, Mr Arnold purchased a newly constructed yacht, the M/Y VLARODA, from a shipyard in France. He then contracted with Halcyon Yachts Ltd (who were not involved in the yacht's construction) to sail the yacht from La Rochelle, France, to his home in Delaware, USA, on what would be her maiden voyage.

The yacht first was sailed by Halcyon from La Rochelle to Ponta Delgada, Azores (via Spain). The crew then intended to proceed on a leg from Ponta Delgada to Bermuda, across the North Atlantic in late November/early December 2017. At some point during that leg, the crew made the decision to turn back to the Azores. When the yacht arrived back at the Azores, she had faced significant damage, primarily to her carpentry and joinery. Mr Arnold hired another company to complete the voyage the following year.

Mr Arnold brought a claim against Halcyon, claiming repair costs and the cost of hiring the alternative carriage. He alleged that the yacht had been negligently navigated into rough weather in breach of contract and bailment; that the yacht had been damaged thereby; and the crew had been forced to turn back to minimise that damage. Halcyon disputed the claim, alleging that the navigation of the yacht had not been negligent; that the yacht ought to have been able to withstand the weather conditions she in fact faced; and the crew turned back because the yacht had been poorly constructed and was flexing dangerously, rendering it unsafe to continue the voyage.

Each party relied upon expert evidence in the fields of yacht construction and transatlantic navigation.

Strikingly, none of the crew members who were actually on board the yacht during the abandoned voyage gave evidence. One junior crew member adduced a witness statement several days before trial, many months after the deadline for adducing witness statements; the Court agreed not to admit that evidence, as it was tendered too late without sufficient good reason. The failure of the skipper to offer any evidence meant that the primary decision maker, whose decision-making was accused of being negligent, was unable to be cross-examined.

Accordingly the Court was left to attempt to reconstruct what had happened to the yacht, based on its positioning and decision-making as stated in the skipper's contemporaneous logbook, third party weather reports, and various surveys of the yacht after the event.

The Admiralty Registrar nonetheless held that the crew had not been negligent in its planning or decision-making, and thus Mr Arnold's claim failed. Rather, the decision to turn back to the Azores was the crew's reasonable response to the yacht's construction defects (albeit those defects were, in the event, not major). This was so notwithstanding that the burden was upon Halcyon, as bailees, to disprove the crew's negligence. This is a clear example of the Admiralty Court being willing to "grasp the nettle" and make subtle and contested inferences based on documentary evidence, even when the major first hand witnesses choose not to give evidence.

Tom Nixon acted for Andrew Arnold instructed by James Wingfield of Howard Kennedy LLP.

Tom Nixon has developed a practice that matches the breadth of Chambers' practice areas, including international commercial arbitration and litigation, shipping, fraud, conflicts of laws, commodities, aviation, commercial chancery and company work. He has acted on claims varying in value from hundreds of pounds to multiple billions, and a growing proportion of his practice is taken up by appellate work. He enjoys difficult cases, and prides himself on being responsive and easy to work with.

"Excellent attention to detail with out-of-the-box and razor sharp thinking." (Legal 500, 2023)

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We were pleased to sponsor the WISTA UK Summer Drinks 2023 at the IMO

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One-off Pilot Error did not Render Port Unsafe

Author: Thomas Macey-Dare KC

Owners chartered their bulk carrier for a time charter trip via safe ports to China. Charterers ordered her to Chaozhou. The Master obtained the latest UKHO chart, but it was out of date and too small scale. A large scale, up to date, Chinese chart was available, but he did not obtain it. The Vessel entered the port with a compulsory pilot on board and three tugs made fast. She failed to make the turn into the harbour basin and grounded on a charted shoal patch outside the dredged channel. The pilot was aware that she was not turning but was unable to retrieve the manoeuvre.

Owners contended that the port was unsafe on the basis of pilot incompetence. They argued that his handling of the tugs and his failure to use the specialist technique of "indirect" towage to avoid the grounding was more than negligent and demonstrated a disabling lack of skill or knowledge: ***Papera Traders Co Ltd v. Hyundai Merchant Marine Co Ltd (The Eurasian Dream)*** [2002] 1 Lloyd's Rep 719.

The tribunal found that indirect towage was not needed at Chaozhou, and there was no reason why the pilot should be expected to know how to perform it. There was no other evidence that he was incompetent: he had worked as a pilot at Chaozhou for years, continued to do so afterwards, and had not been involved in any other incidents. The tribunal concluded that this was a one-off negligent mistake by an otherwise competent pilot, and not a defect in the set-up of the port: ***Kodros Shipping Corporation v. Empresa Cubana de Fletes (The Evia)(No 2)*** [1982] 1 Lloyd's Rep 334. Therefore, it rejected Owners' claim for breach of the safe port warranty.

This meant that the tribunal did not have to decide Charterers' alternative case that the Vessel was unseaworthy before and at the beginning of the voyage to Chaozhou, in breach of Article III.1 of the Hague Rules, because she lacked the proper charts: ***McFadden v. Blue Star Line*** [1905] 1 KB 697; ***The CMA CGM Libra*** [2021] 2 Lloyd's Rep 613; and that this was an effective cause of the grounding, as it meant that the Master and deck team could not effectively monitor the Vessel's progress and intervene if necessary. It was common ground that this argument, if successful, would give Charterers a defence of circuity of action to Owners' claim for breach of the unsafe port warranty, according to the principle in ***Post Office v. Hampshire*** [1980] QB 124. The tribunal concluded that the Vessel was unseaworthy but that this was not an effective cause of the grounding.

This case demonstrates that tribunals regard a charge of professional incompetence as a grave allegation requiring convincing evidence. It also highlights that, in an unsafe port case, the competence of a pilot is to be judged by reference to the specific port which is alleged to be unsafe: if a particular skill is not required there, the pilot will not be condemned as incompetent if he does not possess it, even if other pilots at other ports employ it routinely.

Tom Macey-Dare KC, Martin Dalby, and Joshua Thomson, acted for the Charterers. The article was co-authored by Quadrant Chambers and Ince.

Read the full article here.

Tom Macey-Dare KC is a leading commercial barrister specialising in shipping, shipbuilding, energy, international trade, insurance and international arbitration. He is recognised as a leading practitioner by the Legal 500 in Commodities and Shipping, and by Chambers & Partners in Shipping & Commodities.

"*His undoubted strength lies in his ability to process heavy and highly technical issues, and his advocacy style is calm, considered and forensic.*" (Legal 500, 2023)

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Settlement reached in *The Eternal Bliss*

Authors: Simon Rainey KC & Tom Bird

The appeal to the Supreme Court, which was to be heard in June 2023, did not proceed after a settlement agreed between the parties. For now, the law stands with the Court of Appeal's decision that demurrage liquidates the whole of the damages arising from a charterer's failure to complete cargo operations within the laytime allowed, even if the shipowner has suffered a further type of loss other than the loss of use of the ship (such as the cargo claim liabilities at issue in this case).

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