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Quadrant on Shipping

Issue 2 | Summer 2020

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TOP RANKED Chambers UK BAR 2020

WINNER

EDITORIAL by Robert Thomas QC

Welcome to the second edition of Quadrant on Shipping. In the previous edition of Quadrant on Shipping (Spring 2019), I remarked upon the significant number of important new cases that had been reported in recent months. Somewhat to my surprise, the trend has continued since that date and in this edition members of Quadrant discuss and analyse a number of those cases.

Particular mention should be made of *the CMA CGM Libra* which has caused lively debate on issues of passage planning and unseaworthiness and which is discussed by successful counsel, John Russell QC and Benjamin Coffer. Likewise, the Court of Appeal's decision in *Classic Maritime*, reviewed by Michael Howard QC, has had a profound impact with its analysis of force majeure clauses.

This edition also includes a review of other important decisions and a discussion of topical matters which have recently been discussed by the courts. No review produced at this time could, of course, ignore the effect of Covid-19 and Ruth Hosking discusses the English law's response to the pandemic whilst John Passmore QC considers the implications of the use of vessels to store the glut of petroleum products which is one of the consequences of the current conditions. Nigel Cooper QC reviews recent authority on the duty to cooperate, a matter of considerable importance in times of global volatility and I, together with Ben Gardner, consider one example of the consequences of the shutdown of the Singapore courts due to the virus. Whilst the world economic outlook remains uncertain, it is reasonable to anticipate that the months to come will see further decisions on a range of issues arising from the pandemic.

I hope that you will find everything in this edition both useful and interesting. However, I must end on a very sad note. Just last month we lost our very dear friend and colleague, Simon Kverndal QC. Simon will have been well known to many of you. He was a talented and popular silk of great experience but above all he was a true friend to many in and outside of Chambers. I do hope you will take time to read Michael Howard QC's tribute to him and join us in remembering him.

Quadrant Chambers to welcome two new members

We are delighted to announce that we will be welcoming Celine Honey and Benjamin Joseph as new tenants at Quadrant Chambers upon successful completion of pupillage. Celine and Ben have accepted our offer of tenancy and will join as Members from 1 October 2020.

Celine and Ben will be developing their practices in line with our core areas of work.

Welcome back to Stephanie Barrett and Emily McWilliams

We are pleased to welcome Stephanie Barrett and Emily McWilliams back to Chambers. Stephanie returned in March following a sabbatical and parental leave. Emily returned in February following parental leave.

Stephanie and Emily are both ranked as leading juniors for shipping.

Stephanie is described as an "*...excellent advocate, who is extremely hard working and easy to work with.*" and Emily is described as "*... astute, composed and prepared.*"

Simon Kverndal QC - A Tribute

My dear friend Simon Kverndal QC died, far too young at 62, on Sunday 14th June, peacefully, and surrounded by his immediate family. Many members of Quadrant could have written those awful words; but I have the advantage of having known Simon longer than most. It is often said of people who have lived with long illnesses that they fought them courageously. Simon certainly did that; but he also bore his affliction with discretion and with cheerfulness. Until very recently, he kept the awareness of the illness from which he had been suffering for more than two years from all but a few of his intimates, and even to them he was always upbeat and cheerful. For him, his chemotherapy clinic was a "cocktail lounge".

Though in many ways a typical English gentleman (a recurring theme in many of the tributes which have already started to pour in), as his surname suggests he was ultimately of Norwegian stock. His family were part of the shipping industry for several generations, and one branch had come to England and settled here in the 19th century. But he remained proud of his Norwegian roots. Most summers he went with his family to the lakeside cabin in Norway he shared with his Norwegian cousins. His sons were named Thor and Finn in tribute to their forefathers.

The word clubbable might have been invented for Simon. He was a member of Hawks, Queens, the MCC, the Garrick and the Honourable Company of Shipwrights. The first three announce his sporting prowess. He was good enough at racquets to play in the national Amateur Racquets Championship when over 40, good enough at real tennis to play for Cambridge for four years, being captain for two, the latter possibly a unique distinction. The Garrick and the Shipwrights were places where he could exercise his enormous talent for friendship, for bonhomie without superficiality, for wide-ranging conversation and for charm at all times. It was a matter of great pride to him that he had become Prime Warden of the Shipwrights this year, and it is sad indeed that he was unable to complete his term of office.

He was well-known for his real expertise in matters of wine. He had a blue (technically, a half-blue) for wine-tasting as well as real tennis. He served on the wine committees of the Garrick and the Shipwrights and of the Middle Temple, in essence yet another club, where he was a Bencher. Not many silks can point to articles in Decanter in their CVs.

As it happens, Simon did not mention them in his CV either, because at bottom he was a serious professional. He was a hardworking and popular silk. Having always been a diligent and hardworking advocate, he had blossomed in addition into a very effective arbitrator, renowned for his pleasantness and efficiency and, an unusual gift, for getting the right answer. Relatively recently he had started to act as mediator and his personal qualities were generating a rapidly growing and enthusiastic following.

Simon had from the outset of his career been a member of Quadrant Chambers in its successive iterations. About a dozen strong when he joined, Chambers membership is now almost 70. Always approachable, always ready to help or advise, he was much-loved throughout Chambers, not merely by his contemporaries, but from senior silks to junior juniors and even pupils, as a flood of sorrowful emails and WhatsApp messages attests. For Simon, Quadrant was another club. Simon put in many hours sitting on other less glamorous committees where he would offer sage advice on the organisation of legal institutions and the clubs of which he was a member. The London Shipping Law Centre and the Lloyd's Salvage Working party were among those to whom he lent his spare time and commitment. So also was his local church, to whose doings he was quietly but firmly committed.

This was a full life indeed; but it is right to end where I began – with Simon's family. For all his love of wine, music, friends, sport and conviviality, Simon's chief interest and concern at all times was his family. No-one who knew him could doubt that the centre of his focus was Sophie, on whom he doted, with his two sons only just behind. Their loss is a shocking one; and so is ours.

Michael Howard QC

Salvage before the High Court – evidence and procedure; principles and practice

Keynvor Morlift Ltd v Kuzma Minin, ("The Kuzma Minin") [2019] EWHC 3557 (Admlty)

Author: Nevil Phillips

This was a rare example of a salvage case before the High Court. It arose from an application for default judgment by the salvors (a local consortium of maritime service providers which salved the Vessel – which had grounded on the Cornish coast after dragging its anchor - speculatively, rather than under the terms of a contract). The judgment sought (by way of an award for salvage services) was resisted not by the Owners of the Vessel, but by their mortgagee bank (intervening, by consent). The Vessel was arrested (by other parties) and sold by judicial auction 3 months after the services (for a sum significantly less than the salved value for which the Salvors contended).

The case gave rise to a number of valuable observations, as follows.

Salvage cases: the suggestion of a level of award

The Court emphasised that, in salvage cases, it is inappropriate for the salvors to suggest to the tribunal a particular level for an award. The salvors may address the factors which are relevant to an award, and may submit that the services warrant a particular approach to encouragement, but they should not propose a specific figure: see [38]-[39].

Values: the approach to evidence

The Court expressed a reluctance to rely upon algorithmic assessments of value, rather than an active valuation by an individual sale and purchase broker: see [44]-[48].

The Court also addressed (by detailed reference to authority) the relevance of the price achieved by judicial sale, concluding that, while the value of the salved fund is to be assessed as at the place where and the time at which the salvage is terminated, a subsequent sale value may be weighed in the evidence: see [41]-[43] and [50]-[53]. The Court also addressed the approach to be taken as regards deductions: see [54]-[55].

Services and dangers: the admissibility of the MAIB Report

The Court concluded that, for the purposes of considering the quality and scope of the salvage services and dangers in issue, it was permissible to have regard to the MAIB Report which had been prepared and published in relation to the Casualty. It concluded that the Report's admissibility was only specifically proscribed in proceedings with the purpose of attributing or apportioning liability or blame. As the instant proceedings dealt only with issues of salvage, the Report could be admitted in evidence (with the weight to be placed on its contents being a matter for the decision of the tribunal): see [28]-[29].

Salvage award: a claim for a *quantum meruit* as an alternative

The Court determined that, in the absence of salvage, by agreement or otherwise, a salvor may be able to recover on the basis of quantum meruit but, only where it can establish an express or implied contract for the provision of some services other than salvage, for example towage. Thus, it did not accept that it is open to a salvor simply to assert a right to a recovery based upon quantum meruit as an alternative claim if it fails to establish that the circumstances are such as to render the case one of salvage: see [31]-[32].

Award: the sum awarded

The Court found a salved fund of £1,226,447.78 (net of deductions), which was "*modest by modern standards*". It accepted that, while the services endured for only 9 hours, they were of high intensity. It concluded that the salvage operation demonstrated many of the elements which should lead to a particularly encouraging award without being overly restricted by the size of the salved fund. It awarded £450,000: see [72]-[77].

Costs: the intervention of the mortgagee bank

The Court concluded that the Salvors were entitled to recover their own costs (including those incurred by the Bank's intervention) against the fund representing the *res*, while the Bank was to bear its own costs of the intervention: see [81].

Nevil Phillips acted for the Salvors, instructed by Alex Kemp at HFW. James M Turner QC acted for the Interveners, instructed by Linklaters.

Nevil Phillips is among the most highly-regarded advocates at the Commercial Bar. He has consistently been listed for many years as a first-ranked Leading Junior in Shipping, Commodities, and Trade & Customs by The Legal 500, Legal 500 Asia Pacific, Chambers UK, Chambers Global, Who's Who Legal, and Best Lawyers where he has been variously cited as:

"He is QC level in both his advocacy and academic ability." (Chambers UK, 2020)

"A top QC without the badge – a terrier and the ideal add-on to any winning team." (Legal 500 Asia-Pacific, 2019)

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English shipping law's response to Covid-19

Author: Ruth Hosking

On 5 May 2020, Quadrant Chambers hosted a joint webinar with Maritime London entitled "How English Shipping Law has Responded to the Covid-19 Crisis". The event was moderated by Jos Standerwick, Chief Executive of Maritime London and the panel consisted of Rob Thomas QC of Quadrant Chambers, the (then) President of the LMAA, Ian Gaunt, and Mark Lloyd, partner at Kennedys and Chairman of the Admiralty Solicitors Group. You can watch the webinar here on our YouTube channel - https://www.youtube.com/channel/UCVh0YW-nXNjAgSP2q08ywSg or search Quadrant Chambers YouTube.

First, Rob considered the legal framework for remote court hearings including CPR Practice Directions 51Y and 51ZA as well as the various guidance issued by the courts. England & Wales had been quick off the mark with the first message from the Lord Chief Justice on 19 March and a remote hearing protocol shortly thereafter. He observed that

the unmistakeable message is that parties are expected to embrace the use of technology in order to conduct business as usual (particular for interlocutory and short hearings).

Having done 5 remote hearings since March and May, Rob then provided some top tips. They included (1) proper and timely thought needs to be given to the contents of electronic bundles; (2) try and agree agendas and running orders to minimise interruptions; (3) consider time estimates carefully. Rob noted that it is accepted that remote hearings take longer and are more tiring – therefore advocates should give consideration to a fuller skeleton argument than perhaps they were used to. On a more practical level Rob noted it was important to consider the computer set up required as well as lighting and the background to your room (or whether you needed to download a backdrop). It was also essential to test, test, test your set up and the set up of other parties to make sure it would all run smoothly.

Ian Gaunt then considered how the LMAA had responded to the pandemic. He noted that about 80% of LMAA arbitrations were already determined on documents alone and so were unaffected by the pandemic. He noted that the LMAA Rules were very flexible which allowed the LMAA to respond easily and quickly to the issues that were arising. The LMAA has encouraged its arbitrators and the parties to see if those matters which require a hearing can proceed and not to have a general approach of kicking them into the long grass.

He noted that many of the remote hearings had been conducted using Zoom and that Zoom training was ongoing. Having been trained in Zoom he was confident that arbitrators would be able to easily adapt to the functionality of other platforms if the parties preferred a different platform to be used. Like Rob, he noted that the degree of concentration required for a remote hearing imposed an additional burden on arbitrators and counsel and that arbitrations were adapting to that by having shorter hearing days with more breaks.

In concluding he noted that the one positive of the current situation was that the legal community had had to adapt quickly to the use of technology and e-bundles and that now having familiarised themselves with it, that may continue post-pandemic which would be music to the ears of those supporting the Green Pledge.

Lastly Mark considered ADR. He noted it was working well and that mediations were now happening remotely, including one involving 55 lawyers. In terms of technology, there were passwords and encryptions, and the mediator had control of the mediation "room" and each party had a break-out "room". Mark noted that it was important there is just dispute resolution and that parties should not be opportunistic because of the current pandemic. Mark noted that there had been good engagement and co-operation from insurers, P&I clubs, solicitors, barristers, arbitrators and the courts.

Mark then considered what the future might hold. He noted that there will be an appetite for some remote hearings even post-pandemic but that how much these were embraced depended on whether they produced costs savings or increased costs (particularly if there needed to be rehearsals to check the technology was working and the potential increased time it takes to conduct a hearing remotely). The ability to work from home was a major factor for businesses to consider going forward. The pressure on court buildings and staff globally was noted and Mark predicted that the Ministry of Justice will be keen to develop more remote hearings in the future.

Jos then directed a series of audience questions to the panel which included questions about the practicalities of hearings and in particular cross examining witnesses remotely as well as adapting the sitting day to take into account any caring responsibilities that participants (whether counsel, arbitrator, solicitor, client or expert) had.

A week after the event the Commercial Bar Association (COMBAR) published its guidance on remote hearings including a specimen PTR checklist for use where a remote hearing of the trial might be required in the Commercial Court (available on its website here: https://www.combar.com/news/combar-guidance-on-remote-hearings/). The guidance will be useful not just for Commercial and Admiralty Court hearings but for arbitrations too as it raises a series of matters which should be considered carefully by all parties to any litigation. It is a welcome and useful step and again demonstrates how forward-thinking and practical English litigation has been to adapting to such fast paced change.

Ruth Hosking's practice encompasses the broad range of general commercial litigation and arbitration. Her particular areas of specialism include shipping, civil fraud, private international law and commodities. Ruth has appeared in the House of Lords, Court of Appeal, High Court and has represented clients in a variety of international and trade arbitrations (including ICC, LCIA, LMAA, GAFTA and FOSFA). She has been involved in a number of high profile cases, including "The Achilleas", a leading case on the contractual principles of remoteness of damage and "The Atlantik Confidence", the first case in which an English Court has determined that a person was barred from relying on the limits provided by the Limitation Convention.

... *'She impresses with her understanding of the issues and professional delivery of expeditious and focused advice."*... (Chambers UK, 2019)

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

The CMA CGM LIBRA – defective passage planning and unseaworthiness

Authors: John Russell QC and Benjamin Coffer

On 17 May 2011, the CMA CGM LIBRA grounded whilst leaving the port of Xiamen, China. The owners claimed general average contributions from the cargo interests. At first instance, Teare J held that the passage plan and working chart were defective because they failed to record a warning in a Notice to Mariners that depths shown on the chart outside the fairway were unreliable and waters were shallower than recorded on the chart. The defective passage plan rendered the vessel unseaworthy.

The owners appealed against the Judge's decision, arguing that defective passage planning could not render a vessel unseaworthy because it involved no more than the recording of a navigational decision.

A strong Court of Appeal (Haddon-Cave, Flaux and Males LLJ) emphatically rejected that argument. The Court held that it is clear on the authorities that errors in navigation or management can render a vessel unseaworthy if they occur prior to the commencement of the voyage. There is no relevant distinction between mechanical acts of the master and crew and acts of the master and crew which require judgment and seamanship. Nor is there any relevant distinction between one-off acts of negligence which render a ship unseaworthy and continuing or systemic failings. The Court doubted whether unseaworthiness requires a defect affecting an "attribute" of the ship but did not find it necessary to decide the point as the defective passage plan and chart were attributes of the ship.

The owners also argued that even if the ship was unseaworthy, there was no relevant failure to exercise due diligence. Again, that argument was roundly rejected by the Court. The Owners are responsible for all the acts of the master and crew in preparing the vessel for the voyage (even if they are acts of navigation) as a consequence of the non-delegable duty under Article III rule 1.

What does the judgment mean for the future? On the facts of the case, the decision should be relatively uncontroversial: the Court of Appeal agreed with the Judge that it turned on a straightforward application of the existing test for unseaworthiness to the defective passage plan and chart. There is no obvious distinction between defective updating of the working chart as part of passage planning and a chart which is defective in any other way.

More difficult, perhaps, is whether defects in passage planning which are **not** recorded in any documentation can make a ship unseaworthy. What if the Master has an intention prior to the commencement of the voyage to navigate in a way which exposes the ship to danger? If there is no requirement to identify any "attribute" of a ship, the Master's intention arguably makes the ship unseaworthy – although it might be questionable whether that prior intention is sufficiently causative. Another possible example, considered in the course of argument before the Court of Appeal, is if the SMS requires a master-pilot exchange to take place prior to departure. If the exchange does not take place, can that constitute unseaworthiness?

The decision re-affirms the carrier's non-delegable duty to exercise due diligence to make the ship seaworthy. But there remains fuzziness at the outer limits of that principle: what does it mean to say that a failure to exercise due diligence occurs outside of the carrier's "orbit"? Are there new situations, beyond the existing cases of shipbuilding defects and dangerous cargo, in which the orbit theory might apply? The judgment raises these sorts of questions as problem areas for the law, but does not provide definitive answers.

[The Owners' application for permission to apply to the Supreme Court is pending]

John Russell QC and Benjamin Coffer appeared for the successful Respondents, instructed by John Reed and Jai Sharma at Clyde & Co.

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

John was named Shipping Silk of the Year at the Legal 500 UK Awards 2020. He was also short-listed for Shipping Silk of the Year for the Chambers & Partners Bar Awards 2019.

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

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CTL, Notice of Abandonment, Salvage and SCOPIC

Author: Michael Howard QC

In ***Sveriges Anfartygs Assurans Förening (The Swedish Club) v Connect Shipping Inc (The Renos)*** [2019] 2 Lloyd's Rep 78, the Supreme Court decided two points of importance in relation to constructive total loss (CTL), concerning the date at which Notice of Abandonment (NOA) is given and the admissibility of SCOPIC expenses to the assessment.

In August 2012, the Renos suffered an engine room fire in the course of a laden voyage. The shipowners engaged salvors on the terms of Lloyd's Form incorporating the SCOPIC clause. The Vessel was towed to one port for temporary repairs and another for final repairs. Broadly speaking, a ship is a CTL if the cost of repairing her after a casualty brought about by an insured peril exceeds her insured value. Generally, in order to recover on a CTL basis, the assured must give Notice of Abandonment timeously to the underwriters. (In this case it was held below that they had.)

Before the Supreme Court, the underwriters argued (i) that expenses of a salvage nature incurred before Notice of Abandonment was given did not count as part of the cost of repairs for the purpose of making the comparison between the cost of repairs and the insured value ("the time issue"); and (ii) that SCOPIC charges were not admissible as part of that assessment ("the SCOPIC issue").

The Court dismissed the insurers' appeal on the first ground but upheld it on the second, so that the shipowners were able to claim only for a partial loss.

The Time Issue

By section 60(1)(ii) of the Marine Insurance Act 1906 there is a constructive total loss of a damaged ship where the cost of repair "would exceed the value of the ship when repaired". A rider to that subsection provides that:

> In estimating the cost of repairs .... account is to be taken of the expense of future salvage operations ....

Section 61 and 62 provide that to claim for a total loss in such a case, the shipowner must give notice of abandonment.

The salvage expenses were incurred before the notice of abandonment was given. The insurers contended that this meant that they could not count as costs for the purpose of establishing whether there had been a constructive total loss. Oddly, there was no authoritative decision on the point.

The insurers argued that the word "would" and the phrase "future salvage operations" meant ignoring expenses which had already occurred by the time of the NOA. The Court rejected this argument. Constructive total loss is a device for determining the *measure* of the indemnity. The assessment of whether or not a ship is a CTL "depends on the objective facts". The absence of an NOA prevents an assured from suing on the basis of a CTL; but it is a procedural bar: it neither gives rise to a cause of action nor affects the nature of the loss. As Lord Sumption pointed out, otherwise the costs of salvage operations would often be excluded from the computation, as these would often be the first chapter of the story.

The SCOPIC Issue

The underwriters sought to exclude SCOPIC from the cost of repairs to be set against the insured value. First, they said that Clause 15 of SCOPIC had the result of excluding such payments when taken in combination with section 1 of the Contract (Rights of Third Parties) Act 1999. The Supreme Court did not deal directly with this argument, which was rightly rejected by courts below: [2016] EWHC 1580 (Comm) (Knowles J); [2018] EWCA Civ 230 (CA). Secondly, it was argued that SCOPIC payments were not salvage costs but related to work directed to saving the shipowners from liability for failing to protecting the environment. The Supreme Court acceded to this argument. The decision of the Court is wrong in a number of respects: that of the Court of Appeal is to be preferred. An article by the present writer exposing the fallacies in the judgment of the Supreme Court appears in the August number of [2020] LMCLQ.

Michael Howard QC is a commercial lawyer who specialises principally in maritime law. He advises and acts as advocate in domestic and international commercial disputes, in particular in disputes concerning sale contracts, agency agreements, insurance and re-insurance matters, supply and distributorship agreements, technical disputes (usually concerned with ship construction or with quantification of damages), maritime contracts (charterparties, bills of lading, COAs, marine policies etc) and marine casualties (including wreck removal and salvage).

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Quadcast Shipping Special - The Unlucky Voyage

14 July via Zoom, 11am BST

This Quadcast Shipping Special charts an ill-fated journey under a voyage charter from Port Elizabeth, South Africa – where either the Master, the pilot, or perhaps both, bring Covid-19 on board - to China. The passage plan goes unfinished because the Chief Officer retires from his duties, feeling unwell. After departing from Port Elizabeth for China, the Chief Officer takes a turn for the worse, spurring the Master to deviate for the nearest port. The Master seeks to persuade the port to allow the Chief Officer's body to be disembarked, to no avail. The Vessel then proceeds to China.

Simon Rainey QC, John Russell QC, Nichola Warrender and Andrew Leung will explore some of the issues arising out of this scenario:

- Was the Vessel unseaworthy?
- Was there a justified deviation?
- Was Port Elizabeth a safe port?

Register at www.quadrantchambers.com/events

See page 13 for details of our next Quadcast Shipping Special.

All Quadcasts will be available on our YouTube channel after the live event.

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

The MIRACLE HOPE – who has to put up security in a chain of LOIs, how much and when?

Authors: Robert Thomas QC and Ben Gardner

In April and May 2020, Teare J handed down two judgments in two related actions: ***Trafigura Maritime Logistics v Clearlake Shipping*** and ***Clearlake Chartering USA v Petroleo Brasileiro***. The judgments provide important guidance about the requirements imposed by the International Group of P&I Clubs' standard letter of indemnity ("LOI") and the position of intermediate parties in an LOI chain.

Background

Trafigura was the time charterer of the vessel MIRACLE HOPE. Trafigura sub-chartered the vessel to Clearlake, and Clearlake sub-chartered to Petrobras on back-to-back terms, for a voyage carrying 1 million barrels of crude oil from Brazil to China. The charterparties permitted the charterers to order discharge without production of bills of lading against owners' standard LOI wording.

Petrobras requested discharge to receivers without production of the bills, which Clearlake passed on to Trafigura and Trafigura passed on to head owners, who complied with the request. The receivers' financing bank, Natixis, then arrested the MIRACLE HOPE in Singapore and claimed damages of US$76 million for misdelivery against the head owners.

Trafigura demanded that Clearlake put up security to release the vessel, which Clearlake passed on to Petrobras. No security was put up and so Trafigura obtained an urgent mandatory injunction against Clearlake requiring the provision of security forthwith [2020] EWHC 726 (Comm). Clearlake obtained the same urgent mandatory relief against Petrobras [2020] EWHC 805 (Comm).

The Judgments

Teare J gave judgment at the return date in both actions [2020] EWHC 995 (Comm), 4 weeks after the Trafigura injunction and 3 weeks after the Clearlake injunction. Clearlake and Petrobras explained the delay in posting security on the basis that Natixis, the arresting party, was making unreasonable demands as to the terms of the bank guarantee to be provided as security in Singapore. Trafigura argued that Clearlake breached the injunction to provide security "forthwith" because it had been ordered to do so 4 weeks earlier and had not done so. Trafigura therefore sought an order that Clearlake put up security in whatever form was agreeable to Natixis within 2 business days, alternatively paid cash to Natixis (subsequently modified to a payment into court). Clearlake resisted that variation, but made an equivalent application against Petrobras to maintain its back-to-back position.

The first issue that the Court considered was the meaning of the term "forthwith" in the injunctions, which was treated as equivalent to "on demand". The Court rejected Trafigura's submission that "forthwith" meant immediately (as a dictionary might suggest) and without regard to the practicalities of doing so. Instead, the Judge held that the wording required the indemnifying parties to put up security "in the shortest practicable time", which "will inevitably depend upon the circumstances of the case" [16].

The other construction issue was as to what security was required to provide forthwith. The standard LOI wording provided for "security as may be required" to release the vessel. The Judge considered that there were three potential meanings: (1) the security required by the arresting party, (2) the security required by the court of the place of arrest, or (3) the security required by the court with jurisdiction over the LOI. The Judge held that, consistent with Article 5 of the Arrest Convention, the standard LOI wording required the indemnifying party to put up such security as was required by the arresting forum to secure the vessel's release [28]. Trafigura's argument that Clearlake was required to put up whatever security Natixis demanded was rejected.

The Judge noted that in ordinary circumstances it was the arresting court that would determine whether the security offered was acceptable. However, the Court was unwilling to wait for the Singapore Court to resolve the issue in late May [29] – [30].

The Court was therefore required to decide whether Clearlake and Petrobras should be ordered to put up security by agreeing to Natixis' demands as to the terms of a bank guarantee. The Court was not satisfied that Natixis' security demands were reasonable or that it was possible to provide a guarantee in the terms required, particularly in so far as it required the bank guarantee to respond to the judgment of a foreign court and was "evergreen" in nature. He also rejected Trafigura's suggestion that security be put up under protest because, whatever the position in Singapore, it was unrealistic to expect a bank to put up security under protest in a form to which it objected [64]. The proper way to determine whether the security offered by Clearlake or Petrobras was acceptable was to make an application to the Singapore Court, as Clearlake had done [65].

Nevertheless, the English Court was unwilling to leave the parties at the impasse created by the guarantee negotiations between Natixis and Clearlake / Petrobras and the Singapore Court's inability, in the extraordinary current circumstances, to decide the amount of the guarantee more swiftly. Therefore, the Judge ordered Clearlake and Petrobras to make a payment into the Singapore Court with a view to securing the release of the vessel [67] – [75].

Continues overleaf

Robert Thomas QC's practice has moved from strength to strength since taking silk in 2011. He retains a strong presence in the traditional areas of his practice and has recently complemented this with substantial experience in commercial fraud and related relief. He is ranked as a Leading Silk in the latest editions of both directories, and has been praised in previous editions for having a "fantastically effective and intellectual style", for "*consistently deliver[ing] a first-class service*" and for his ability to handle "*difficult cases on a tight timetable*". He is a registered practitioner in the DIFC and is also receiving an increasing number of appointments as an arbitrator.

"His advocacy is first-class and stands out for being authoritative, reasoned and persuasive." (Chambers 2020)

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Ben Gardner has a busy commercial practice, focussing on shipping, commodities and international trade, energy, insurance and conflict of laws. He was shortlisted for 'Shipping Junior of the Year' at the 2018 Chambers Bar Awards and he is consistently ranked as a leading junior by Chambers UK and the Legal 500 for his shipping and commodities work. He is also recognised for his Energy work in the Legal 500. Recent comments include "very clever and a very good advocate", "*has an exceptional understanding of both the business and legal aspects of a case*", "*quickly processes a high level of technical detail and works extremely hard*", "*an excellent barrister, who is precise, commercial and practical in his focus and forceful and effective in his arguments*", "*thorough, diligent and very personable*", "*easy to work with and respected by clients*" and "*mature beyond his years*" .

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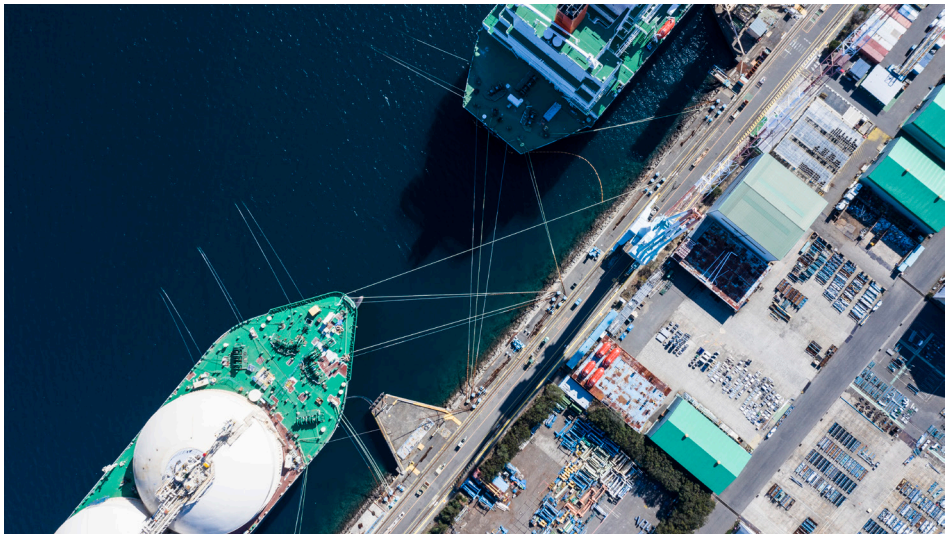
In the consequentials judgment, the Court with "some hesitation" rejected Clearlake's argument that the payment obligations should be staggered, with Clearlake allowed further time if Petrobras failed to comply [22]. The Court recognised the potential wasted costs if Clearlake were ordered to put up security within the same deadline as Petrobras, but considered that Trafigura's rights outweighed that consideration [20] – [22].

As to costs, the indemnity basis was inappropriate because Clearlake had exhibited "responsible behaviour" in acting as it had [33] and "the existence of [the indemnity under the LOI] does not assist in enabling Trafigura to show that Clearlake's conduct of the proceedings is out of the norm" [38]. Petrobras was ordered to pay the majority of both Clearlake's and Petrobras' costs.

Robert Thomas QC and Ben Gardner appeared for the Clearlake parties in the middle of a chain of LOIs, instructed by Andrew Purssell and Karnan Thirupathy of Kennedys.

Floating Storage - risks and rewards

Author: John Passmore QC



As well as producing horrendous human suffering, the COVID-19 pandemic has led to sharply lower demand for crude oil and petroleum products and worldwide recessionary economic conditions. Some estimates put global oil demand at an average of 10 million barrels per day lower for the whole of 2020 compared with 2019. The return to pre-crisis levels is expected to be gradual, with predictions of growth of only 1 million barrels per day year on year.

At the same time, oil producing countries have carried on producing, with the US, Brazil, Guyana, Iraq, the UAE and Canada all expected to continue adding significant supply capacity. The result is well known: oil prices plunging, with the OPEC basket price down by 80% between January and April this year. The world's tank farms are full, and tanker owners are turning from carriage to storage as the best available business. Some reports have put VLCC hire rates at more than US$300,000 per day. At these prices, 10 to 15 year-old VLCCs will earn 100% of their capital values in less than a year.

Employing vessels for floating storage requires careful consideration of the contracts involved. Some time charter forms expressly give charterers liberty to give orders for storage rather than carriage of cargo. An example is BPTIME3 (clause 21). Other forms do not contain this liberty, and are limited to the purpose of going between load and discharge ports, so an order for employment as floating storage is likely to be illegitimate.

A voyage charter is not usually suitable as a contract for anything other than carriage between ports with utmost despatch. In the case of both time and voyage charters, if there is a bill of lading for a cargo already on board then the duties to the bill of lading holder must be considered, including the duty not to deviate. For an existing cargo to be stored afloat, a new contract involving all parties with contractual rights against owners is likely to be necessary. Owners will also need to consider their insurance policies.

Even where a charterparty contains a floating storage clause, it is unlikely to be sufficient to allocate all the potential risks. The contract should cover the termination or subsistence of rights and duties under any existing contract, geographical limits, safety of the storage location(s), rights to terminate storage, hull fouling and other potential damage to the vessel, costs such as extra insurance premiums, and duties regarding care of the cargo: circulation, heating and chemical treatment. The contract should also deal with force majeure for pandemic related issues.

An important operational consideration is the suitability of the vessel and its equipment for long-term storage of crude, or clean or dirty petroleum products. Basic issues such as evaporation and settling out of solids, and more complex issues such as chemical instability and bacterial growth, may need to be considered. There is the potential for damage to cargo tanks and zinc or organic epoxy coatings, and contamination of the cargo from the tanks and coatings themselves. The risks should be allocated by the contract: who will pay for removing unpumpable cargo, or restoring the tanks and pumps? At US$300,000 per day, owners might be prepared to accept some of the risks.

Whichever party accepts the particular risks of using a tanker for floating storage, careful allocation will give savings on legal costs.

John Passmore QC has a commercial litigation and arbitration practice, involving a wide range of business sectors, with emphasis on aviation, banking, insurance, energy, commodities and derivatives, professional negligence, shipbuilding and offshore construction, and wet and dry shipping.

John is first and foremost an advocate, with experience in a wide variety of courts and arbitrations in the UK, including the UK Supreme Court, and internationally. He is particularly known for his cross-examination skills, and has carried out successful cross-examinations of a Head of State, an Attorney General, heads of civil service departments, senior diplomats, oligarchs, underwriters, derivatives traders, fraudsters, and schoolchildren, as well as some of the most prominent experts in fields of science, engineering, medicine, business, accountancy and foreign laws.

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You can't have your cake and eat it - conditional anti-suit injunction granted despite existence of contract with London arbitration clause being in dispute

Times Trading Corp v National Bank of Fujairah (Dubai Branch) [2020] EWHC 1078(Comm)

Author: Saira Paruk

A person who brings a claim abroad in flagrant breach of an arbitration or jurisdiction agreement will be subject to an anti-suit injunction almost automatically (***The Angelic Grace*** [1995] 1 Lloyd's Rep 87). Should this approach be applied if the existence of the direct contract between the two parties is in dispute? Mrs Justice Cockerill in the Commercial Court held, that it should. Despite the facts not fitting either of the paradigm quasi-contractual categories for the grant of an anti-suit injunction it was held that the test in ***The Angelic Grace*** applied by analogy, such that an (albeit conditional) anti-suit injunction should be granted.

Adopting a principled approach, Cockerill J found that the core principle underpinning the granting of quasi-contractual anti-suit injunctions in earlier authorities – that a party may not claim under a substantive contract without also assuming the burden of that contract – equally applied here. As the defendant (NBF) had asserted the existence of a contract in Singapore, NBF should be required to bring a claim consistent with that contract, even if the existence of that contract was in dispute.

Cockerill J's judgment contains a clear examination of the different categories of application for anti-suit injunctions and the applicable rules and principles. Of most interest, however, is the creativity shown by Cockerill J, which finds expression in two facets of the judgment.

First, reliance on broad underlying principle to extend by analogy the ambit of quasi-contractual anti-suit injunctions to situations which do not fall neatly within specific existing categories. Practitioners should note that the fact that a client's case does not fit neatly within well-established existing categories should not, without more, be a reason not to apply for an anti-suit injunction.

Second, by making the grant of the anti-suit injunction subject to a (rigorous) condition, the judgment demonstrates the flexibility of the tools the court can employ in this context. In future, if there is an element which may militate against the grant of an injunction, it may pay to temper an application (perhaps by proactively suggesting that the grant of the injunction be made subject to a condition) to increase the likelihood of an injunction being granted.

Saira Paruk has a broad commercial practice with particular experience in shipping, commodities and jurisdictional disputes. She regularly appears in the Commercial Court and in arbitration both as sole and junior counsel.

"Effective at holding a court's attention. She goes the extra mile to get to the bottom of an issue and fight the client's corner." (Legal 500 Asia Pacific, 2020)

"She is beautifully eloquent and extremely firm in her pleadings." (Legal 500, 2020)

"She is good on her feet when under pressure." (Legal 500, 2019)

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... home to a large number of eminent silks and juniors able to offer adept counsel in all manner of wet and dry shipping matters ...

(Chambers UK Bar 2020)

Identifying a party to a contract when it is not named:

Americas Bulk Transport Ltd v Cosco Bulk Carrier Ltd [2020] EWHC 147 (Comm)

Author: Paul Toms

It is rare that the owner or charterer under a charterparty is not expressly identified in the recap or engrossed charterparty. The judgment of HHJ Pelling QC in ***Americas Bulk Transport Ltd v Cosco Bulk Carrier Ltd*** [2020] EWHC 147 (Comm) considers the legal approach to be taken in such a case and, indeed, any case where a party to a written contract is not expressly identified.

In May 2008, the Grand Fortune was on time charter from Cosco to Britannia Bulkers A/S ("Bulkers"). A sub-charter was concluded for the vessel. Negotiations for that sub-charter were conducted by phone and email by a Mr Lees and the exclusive broker of the sub-charterer, ABT. Mr Lees was a freight trader employed by, and working from the offices in London of, Britannia Bulk PLC ("Bulk") a related company of Bulkers. However, he concluded charterparties on behalf of both Bulk and Bulkers.

The fixture was concluded rapidly and the recap was very short. The evidence was that there was no discussion about the identity of the owner under the sub-charter prior to the conclusion of the recap. The recap incorporated terms of the head charter between Cosco and Bulkers and the head charter had been provided to the broker prior to fixing.

In September 2008, a draft charterparty was sent to ABT, at ABT's request, which named Bulk as the owner under the sub-charter. That draft charterparty was never agreed by the parties but ABT never objected to the characterisation of Bulk as owners.

Both Bulk and Bulkers subsequently entered insolvency proceedings and a claim arose under the sub-charter against ABT. Cosco obtained an assignment of Bulkers' rights but could not obtain an assignment of Bulk's rights. Cosco commenced arbitration against ABT as assignee of Bulkers. ABT disputed jurisdiction contending that Bulkers was not the owner under the sub-charter; Bulk was.

The tribunal rejected that argument but ABT exercised its right to have a further hearing of the jurisdiction question before the Commercial Court under s. 67 of the Arbitration Act 1996.

The issue which fell for determination was: who was the owner under the sub-charter?

There was a dispute between the parties as to the legal approach to be taken to resolve that issue. ABT submitted that ascertaining the identity of the parties to a contract was a question of fact to be determined by reference to all the relevant evidence even if it post-dated the contract and even if it was not something known to both parties but only to one of them. Cosco, by contrast, submitted that the identification of a party was a matter of contractual construction to be supported by admissible extrinsic evidence known to both parties at the time the contract was made.

The legal test was particularly important given ABT's obvious desire to rely upon the draft charterparty circulated some 4 months after the recap had been concluded.

The Judge held that the applicable principles were as follows at paragraph 19:

(1) The first question which arises is whether the document sufficiently identifies the parties to the contract. If it does, then the question is one to be determined by construction of the relevant document and is not a question of factual investigation and evaluation.

(2) Where the document or documents containing or evidencing the agreement do not enable the parties to be ascertained, then recourse to extrinsic evidence is permitted of what the parties said to each other and what they did down to the point at which the contract was concluded for the purpose of determining who the parties to the agreement were intended to be.

(3) When (2) above applies, the approach that should be adopted is objective not subjective so the question for the Court was what a reasonable person furnished with the relevant information would conclude.

The Judge, therefore, rejected the contention that post-contractual material was admissible.

Applying the principles set out above, the Judge identified the relevant parts of the extrinsic background to the recap as follows:

(a) Bulkers was the charterer of the vessel;

(b) Bulkers, therefore, had the power to sub-charter the vessel;

(c) Mr Lees had not suggested that any entity within the Britannia Group other than the entity which had chartered the vessel under the head charter was to be the disponent owner - there had been no discussion of an internal sub-charter form Bulkers to Bulkers.

He held that a reasonable person, furnished with the relevant information set out above, would have concluded that Bulkers was the disponent owner.

Paul Toms acted on behalf of Cosco, instructed by Mark Sachs, Pennington Manches Cooper. Mark Stiggelbout acted on behalf of ABT, instructed by Jonathan Steer, MFB.

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

He has been recommended for many years in the Legal Directories, namely Who's Who Legal: UK Bar, the Legal 500 and Chambers UK. His depth of experience in working with clients in the Asia Pacific region is reflected by his inclusion in the Legal 500's Asia Pacific rankings.

"Immensely knowledgeable, commercially aware and meticulous." (Legal 500, 2020)

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COVID-19: what are the implications for shipping disputes?

Author: John Russell QC, Ben Gardner & Tom Bird



In this article we consider some of the implications of the Covid-19 pandemic in the shipping context, with a particular focus on force majeure issues.

Quarantines, Coronavirus and Charterparties

The practice of quarantine can be traced back to medieval Venice. The then prosperous maritime republic was a gateway for the bubonic plague's path into Europe. Vessels arriving there from infected ports were required to sit at anchor for 40 days (*quaranta giorni*), which later came to be known as quarantine.

A traditional Venetian quarantine would be most unlikely to amount to a frustrating event in the charterparty context. A delay of just 40 days would seldom render the performance of a charterparty impossible or radically different from anything contemplated by the parties. Such a quarantine might render performance more expensive or more onerous, but that will not suffice for the purpose of frustration.

There must, as the Court of Appeal put it in ***The 'Sea Angel'***, be a "*break in identity between the contract as provided for and contemplated and its performance in the new circumstances*". The doctrine operates within narrow confines.

But the effect of the Coronavirus pandemic and the measures introduced to prevent and delay its spread will doubtless lead parties to invoke exceptions, force majeure provisions and, if all else fails, the doctrine of frustration.

We consider some of the issues that are already arising, and will continue to arise.

Time Charters

Many of the disputes stemming from the present pandemic should be capable of resolution by reference to the terms of the contract. There will be questions about whether the charterers are in breach of the safe port warranty, whether the vessel is off hire (due to crew illness or restrictions imposed by the authorities), and whether any force majeure provisions or exceptions are engaged. The answer to many of these questions will turn on the application of well-known tests to novel factual circumstances.

Where the charter incorporates the BIMCO Infectious or Contagious Diseases Clause, the vessel is not obliged to proceed to or remain at any place which would expose the vessel or crew to "*highly infectious or contagious diseases that is seriously harmful to humans*" or to a risk of quarantine or other restrictions being imposed in connection with the disease. Covid-19 would almost certainly fall within that definition. If the vessel nevertheless proceeds to an affected area, the risk of additional costs, expenses and liabilities are for the charterers' account and the vessel is to remain on hire.

There is unlikely to be a major role for the doctrine of frustration, especially if the parties have contemplated or anticipated the possibility of disruption arising from a virulent disease. The pandemic has caused and will continue to cause significant disruption to the shipping industry. There is also considerable uncertainty over how long it will take for the restrictions to be lifted and life to return to normal. Yet the measures introduced to combat the virus rarely preclude commercial shipping operations. Terminals and stevedores may be operating under much stricter conditions, but are generally still operating. The chief consequence of the restrictions is therefore likely to be delay.

To amount to a frustrating event, a delay would have to be so dramatic that the performance is really in effect that of a different contract. One of the most important factors is the probable length of the total deprivation of the use of the chartered ship compared with the unexpired duration (***Bank Line v Capel***). Unless the anticipated delay is substantial (measured in months, rather than days or weeks), it would be unlikely to amount to a frustrating event. Deciding whether or not to invoke the doctrine will require a difficult judgment call, since the length and extent of the disruption must be assessed as soon as the event occurs, without the benefit of hindsight (***The 'Nema'***).

Voyage Charters

Voyage charters throw up a different set of issues. The impact of restrictions in place at load and discharge ports might well prevent the vessel from tendering valid NOR. The deferral or refusal of free practique – usually a mere formality – could preclude or seriously delay cargo operations. Vessels may be placed under quarantine or have to deviate from the contractual voyage to allow sick crewmembers to seek medical treatment. In most cases, the terms of the charterparty will allocate the risk of such delays. The deviation clause in the Gencon charter, for example, would almost certainly allow the vessel to call at a port for the purposes of obtaining medical treatment for the crew.

There may be more difficult issues if restrictions bite whilst the vessel is on demurrage. Clause 8 of the Asbatankvoy form, for instance, sets out a limited number of exceptions that result in the demurrage rate being reduced to half. There is no express reference to disease or quarantines, but one of the exceptions - "*stoppage or restraint of labor or by breakdown of machinery or equipment in or about the plant of the Charterer, supplier, shipper or consignee of the cargo*" – could conceivably be triggered by the effects of the pandemic on the shoreside operations of one of the listed parties.

There may be more scope for the operation of the doctrine of frustration than in the time charterparty context. If the effect of the pandemic is to prevent loading at the agreed port or to so delay it as to defeat the commercial purpose of the contract, frustration could prove a neat solution which frees the vessel for further trading. Yet frustration would be a very different and riskier proposition with a laden vessel given the practical difficulties that would arise (principally, what to do with the cargo) and the continuing duties that the shipowner would owe as bailee.

Shipbuilding Disputes

The Covid-19 pandemic raises acute problems for parties to shipbuilding and ship repair contracts. China, along with South Korea, is responsible for the majority of the world's shipbuilding. There are reports of Chinese yards running 60 days behind schedule because of labour shortages caused by the pandemic and, as it spreads, the shipbuilding supply chain and the buyers are increasingly affected as well.

Whether a yard is excused for delays by reason of the epidemic will turn on the wording of the particular force majeure clause. Following the SARS and MERS outbreaks, more contracts now contain wording that excuses delays caused by epidemics, as do the SAJ, Norwegian and Newbuildcon

standard forms. It seems likely that the epidemic would also fall within a general clause excusing delays outside the parties' control, but many shipbuilding contracts specify the force majeure events, and yards may find that delays are not excused by their shipbuilding contracts. For example, the definition of force majeure in ***Adyard Abu Dhabi v SD Marine Services*** does not include a catch-all or a disease / quarantine category of force majeure provision.

Assuming that a force majeure clause is capable of applying, a yard (or perhaps a buyer responsible for approving drawings or supplying parts and materials) faces further hurdles before it is relieved of its obligations. One difficulty is likely to be causation and the need to demonstrate an impact of the pandemic on the critical path. Recent authority suggests that the force majeure event must be the sole operative cause of the inability to perform (***Seadrill Ghana v Tullow***). The delay attributable to the pandemic may be obvious, for example if the yard is forced to close, but the impact of labour or part shortages are likely to be harder to quantify in a complex construction process.

Another difficulty is likely to be giving effective notice. Shipbuilding contracts often require a yard to give notice of delays caused by an event beyond its control within short time limits, including notice of when the event started and ended and the resulting delay caused by the event. These clauses are generally given effect, as in ***Adyard*** (supra), although only if they can properly be read as conditions precedents to delays being treated as permissible.

The notice periods in clauses of this type can be very short, such as the 7-day period in ***Zhoushan v Golden Exquisite***. In the midst of the pandemic, it could be very challenging for a yard to ensure timely and accurate force majeure notices are given. However, the strict approach of the English Court in cases like ***Adyard*** would seem to give yards little room to manoeuvre by arguing that the force majeure event made giving notice impractical. These notice provisions are just one example of how the parties' contractual regime does not fit easily with the unprecedented disruption caused by the pandemic.

Practical tips to bear in mind in the shipbuilding context include:

- Review notice provisions and stand ready to issue notices with the calculation of time lost promptly;
- Check the force majeure wording and do not assume that your contract will respond to the pandemic as an event of force majeure;
- Keep records of how the Covid-19 pandemic has impacted upon construction work;
- Consider how the effects of the pandemic can be mitigated to avoid delay;
- Ensure future contracts contain express provision for epidemics and quarantine.

Lateral thinking and new arguments

Covid-19 presents the world with an unprecedented challenge. However, in terms of its impact on legal disputes, the main differences are likely to be ones of scale and magnitude, rather than ones of principle.

That said, there will be many areas where lateral thinking may be required and new law may be made.

To take one example, most of the articles that have been written about the impact of Covid-19 in the shipping context refer to the excepted causes of "*Arrest or restraint of princes, rulers or peoples, or seizure under legal process*," and "*Quarantine restrictions*" in the Hague Rules and suggest that these will operate to protect shipowners against claims in respect of damage to or delay in delivery of cargo.

But is that necessarily so? The exceptions in Article IV(2) of the Rules only protect against liability under Article III(2), and do not protect against a breach of the carrier's Article III(1) obligation to exercise due diligence to make the ship seaworthy and ensure she is properly manned and equipped. Will a vessel be considered unseaworthy if she has a crew-member suffering from Covid-19 on board? Will she be unseaworthy by reason of a recent call at a port with a particular infection problem leading to quarantine restrictions (as in the pre-Hague Rules case of ***Ciampa v British India Steam Navigation Company***)? Questions such as these will raise the issue whether unseaworthiness must relate to an "attribute" of the ship, and if so, what is meant by an "attribute" (an issue discussed in, but left unresolved by, the Court of Appeal in the recent decision in ***The 'CMA CGM LIBRA"*** (see The CMA CGM LIBRA – defective passage planning and unseaworthiness - John Russell QC and Benjamin Coffer). Equally, how will the concept of due diligence operate in this context? It is trite that the carrier is liable for a failure to exercise due diligence on the part of any person to whom it has delegated responsibility for making the ship seaworthy. What does that mean in practice? Can it be argued that each individual crew member has an obligation in relation to seaworthiness to self-report symptoms (or even a risk of exposure) and that the carrier is fixed with responsibility if she or he fails to do so, and the ship is subsequently detained as a result?

The lesson is that in any case we need to avoid a purely mechanistic application of existing principles, and ensure that all possible angles are explored.

Quadcast Shipping Special - Letters of Indemnity

21 July via Zoom, 11am BST

In the second of our Quadcast Shipping Specials, our team will be looking at a second ill-fated voyage, this time culminating in delivery against back-to-back LOIs.

Covid-19 is rearing its head: this time causing delays in the banking chain and restricted discharge port facilities. Discharge is requested to receivers without production of bills of lading, into a shore side warehouse which is identified by the port agents. Head Owners comply with the request without asking too many questions, primarily because the port is at risk of being locked down due to the increase in Covid-19 cases. Subsequently the Vessel is arrested by the receivers' financing bank and damages are claimed for misdelivery against the Head Owners. There is a chain of potential litigation targets, each of whom has issued a back to back LOI, under which injunctive relief is being considered. But not all of the parties have means or readily identifiable assets.

Nigel Cooper QC, Chris Smith QC, Paul Henton and Saira Paruk discuss:

- Legal and practical advice on seeking injunctive relief
- Construction of LOIs – possible pitfalls and how to avoid them
- Security/ counter-security requirements
- Relevant legal thresholds and problems of proof

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Documentary Time-Bar clauses - will we ever tire of debating the meaning of "[all] supporting documents"?

Author: Paul Henton

Documentary time-bars are proving once again to be one of the most fertile sources of shipping litigation.

Such clauses typically provide for the absolute extinguishment of all claims, unless they are presented within a specified period of time (often short: 90 days and 12-months being particular favourites amongst drafters) and accompanied by "*[all] [relevant / available] supporting documents*".

The classic statement of principle comes from Bingham J in ***the Oltenia*** (1982): the commercial intention of such clauses is that claims should be presented within a short period so that they may be investigated and if possible resolved whilst the facts are still fresh.

But since then there has been a steady stream of reported decisions (see: ***the Sabrewing***, ***the Bow Cedar***, ***the Eternity***, ***the Eagle Valencia***, ***the Abqaiq***, ***the Adventure***, ***the Ocean Neptune***, to name a few): the combination of bespoke drafting, short/ early deadlines for compliance (potentially before lawyers are involved), competing policy considerations (finality/ "closing the books" vs the need for clear words to deprive a party of legal remedies), and draconian consequences for those who fall foul, all conspiring to make this a rich source of litigation.

The last few months have brought (at least) three more: ***the Tiger Shanghai*** [2019] EWHC 3240 (Comm), ***the Amalie Essberger*** [2019] 3402 (Comm), and ***the MTM Hong Kong*** [2020] WHC 700 (Comm).

The Tiger Shanghai concerned a disputed termination by time charterers, after the Owners refused to permit them to cut new cement holes in the hatch-covers. Both sides accused the other of repudiatory breach. The Charterers presented their letter of claim in time but omitted to attach a survey report going to the reasonableness of the Owners' refusal.

The case raised issues as to the necessary threshold of relevance to the issues in dispute in order to fall within the meaning of "*all supporting documents*". This is a fact-specific exercise which depends on the nature of the claims being made and the disputed document. Thus, since the reasonableness of the Owners' refusal went to the validity of the Charterers' termination, which was one of the "building blocks of the case as to liability", a report going to that issue fell within the clause and needed to be provided.

The judgment of Cockerill J also supports the following further propositions: (i) the use of the additional word "all supporting documents…" tends to necessitate more "expansive" enquiry and a wider casting of the net; (ii) the word "supporting" is not to be watered down or re-cast as "explaining" or similar; (iii) therefore it is irrelevant that the Owners well knew the essence of the claims presented even without the report being attached at the initial claims presentation stage

The case is also a salutary reminder that the time-bar point may arise at any time during the litigation: for example, if relevant supporting documents come to light on disclosure or (as in this case) as attachments to submissions in the reference. It is never too late to analyse documents belatedly provided and consider whether they ought to have been attached to the initial claim presented for time-bar interruption purposes.

Two further issues arose but were not decided finally, and therefore can be expected to give rise to yet further disputes in the future:

» First, whether such clauses only cover primary documents (statements of facts, bills of ladings, notices of readiness, etc), rather than secondary documents created later and for the purpose of the dispute. The issue did not directly arise because the report contained at least some factual evidence as to the hatches and the current and proposed arrangements for cement loading (in addition to secondary opinion evidence). However, the Judge wished to "record [her] thinking on the point" and was "dubious" as to whether documentary time-bar clauses could extend to "truly secondary" documents such as experts' reports or similar. It is not difficult to envisage this obiter categorisation of documents into not just primary and secondary but also "extended primary documents" as a source for future dispute.

» Second, the issue of whether report was a "document" at all if it was arguably privileged. On this point, the Judgment raises more questions than answers: remarking "*one can readily see that the distinction would provide highly fertile ground for protracted disputes, such as just how arguable a claim has to be in order to be arguable or reasonably arguable…*" but that "the argument on "what is a document?" *may well in many cases provide an answer here…*".

Watch this space for further developments on these untested issues.

Meanwhile, ***the Amalie Essberger*** provides confirmation that documents falling within specifically listed categories will need to be provided to break the time bar even if strictly irrelevant to the claim presented.

Finally, ***the MTM Hong Kong*** decision provides a rare example of a s. 69 appeal being allowed: this time on the basis that bills of lading fell within "all supporting documents" where the Charterparty provided for delay/demurrage claims to be calculated based on "bill of lading quantities".

Stephanie Barrett covers these two cases in more detail in her article on page 17.

What remains certain is that these cases will not be the last word in this contentious area.

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

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Managing the unforeseen – is there a duty to cooperate?

Author: Nigel Cooper QC

The current pandemic emphasises just how unforeseen events can interfere with contractual arrangements, particularly long-term ones. It is therefore no surprise that there has been a considerable focus on the application of force majeure clauses and the doctrine of frustration.

Many contracts also contain provisions, which permit termination for convenience or on the happening of defined events (such as insolvency) or which may permit one party to suspend performance or structure performance in a way which reduces or postpones that party's financial liabilities. Clearly, while not originally intended as a means of dealing with the current situation, such clauses may provide another route to manage financial exposure or escape from a contract.

But is it possible to prevent a party using express contractual rights to its advantage and to the disadvantage of the other party in situations, which were not foreseen or which are not what the clauses were intended for?

The law will recognise an implied term that neither party will actively prevent performance of a contract by another party; ***Stirling v Maitland*** (1864) 5 B & S 841. In certain situations, the law will also recognise an implied term that the parties will cooperate if that cooperation is necessary to enable the contract to be performed; see ***Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd.*** [2013] EWHC 1191 (TCC) at [34]. However, such implied terms have limitations including the need to establish that implication of the term is necessary and that it does not conflict with any of the express terms of the contract.

There are also cases, which suggest that in certain circumstances a party is under a duty not to act capriciously, arbitrarily, perversely or irrationally, when exercising a contractual discretion which will affect the rights and obligations of both parties; ***Braganza v BP Shipping Ltd*** [2015] 1 WLR 1661.Implied terms to similar effect may arise in long-term joint venture and similar agreements due to the need for mutual trust, confidence and loyalty in order to enable performance of the contract; ***Al Nehayan v Kent*** [2018] EWHC 333 (Comm).

Such implied terms may provide a route to prevent one party deliberately engineering circumstances, which would allow it to exercise rights of termination; for example deliberately creating a situation which puts the other party in default under a clause allowing termination when certain material events occur.

However, recent authority suggests that the circumstances in which a party can rely on such implied terms will be unusual. In ***Taqa Bratani Ltd v Rockrose UKCS8 LLC*** [2020] EWHC 58 (Comm), the Commercial Court considered whether a party to a joint venture for the extraction of oil and gas from fields in the North Sea could be prevented from exercising a right to discharge another party as the operator under a number of joint operating agreements. The claimants discharged the defendant as operator following a majority vote of the joint venture partners and having given the required contractual notice. The defendant challenged the legitimacy of the termination of its role on grounds that the claimants' rights were circumscribed by implied terms of the type discussed above. The judgment is a comprehensive review of the authorities concerning the use of the process of construction to seek to qualify a party's express rights and the limitations on the use of implied terms particularly in the context of professionally drawn or standard form contracts. The judge held that where a party has an unqualified express right of termination, which is exercised in accordance with the required contractual mechanism, that right is not to be qualified by implied terms of the type discussed above. The judge rejected an argument that there was any industry or general practice which supported the implied terms alleged. The judge also held that even if he had been prepared to accept the right of termination was qualified, the claimant was still entitled to exercise the rights of termination as it had.

It is inevitable that with the current volatility of the global economy, parties are going to be looking to their contracts for innovative solutions to their commercial situation. The cases discussed above illustrate both potential routes and the likely hurdles that may be encountered. In exceptional circumstances, implied duties not to act arbitrarily or capriciously may be a useful foil to counter express contractual rights. But it will be a heavy burden to establish both that the duty arises and that it has been breached.

Nigel Cooper QC has a commercial practice predominantly covering the fields of shipping, energy and insurance/reinsurance law. He 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. 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. Nigel is recommended as a leading silk for shipping and commodities (Chambers UK & Global), Shipping (Legal 500 UK and Asia Pacific) and for Energy (Legal 500 Asia Pacific).

"A class act: intelligent, sharp, quick on his feet and incisive in his thinking." (Legal 500 Asia Pacific, 2019)

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Quadrant continues to support London International Shipping Week in 2021

Sunk by the Brussels Regulation Recast:

Aspen Underwriting Ltd v Credit Europe Bank NV [2020] UKSC 11

Author: Andrew Leung

The ill-fated vessel "Atlantik Confidence" caught fire and sank in 2013. In ***The Atlantik Confidence*** [2016] EWHC 2412 (Admiralty), Teare J held that she had been deliberately scuttled by her Owners. The end of this saga spelled the beginning of another. Aspen Underwriting Ltd (the "Insurers"), who were the vessel's hull underwriter, had paid out US$22m to Credit Europe Bank NV (the "Bank"), the assignee of the policy, in settlement of the Owners' claim to be indemnified. But given the scuttling of the "Atlantik Confidence", they launched High Court proceedings against the Owners and the Bank to claw this money back.

The Dutch Bank invoked its right to be sued in The Netherlands under Articles 4 and 14 of Brussels Regulation Recast (Regulation (EU) 1215/2012) (the "Regulation"). The High Court and Court of Appeal rejected their jurisdictional challenge, but in ***Aspen Underwriting Ltd v Credit Europe Bank NV*** [2020] UKSC 11, they prevailed before the Supreme Court.

Lord Hodge gave the judgment of the Court, holding that the Bank could only be sued on its home turf for these reasons.

First, the Bank was not bound by the exclusive jurisdiction clause in favour of the Courts of England and Wales in the insurance policy. While the Bank could not assert its assigned rights inconsistently with the terms of the policy, it had not asserted any rights through the commencement of legal proceedings: [26]-[30]. It was the Insurers who were suing the Bank, not vice versa.

Second, though the Insurers were seeking to avoid their settlement agreement with the Owners on grounds of the Owners' misrepresentation and the Insurers' mistake, their claim was nonetheless a "*matter relating to insurance*" under Chapter II, Section 3 of the Regulation: [34]-[41]. Section 3 was concerned not only with the rights of parties to an insurance contract, but also of beneficiaries and injured parties, i.e. non-parties such as the Bank. In any case, the alleged fraud of the Owners for which the Bank was said to be vicariously liable would inevitably entail a breach of the insurance contract.

Third, the Bank was entitled to rely on the protection afforded by Chapter II, Section 3 of the Regulation, including Article 14(1) which provided that an insurer may sue only in the defendant's domicile: [60]. Notwithstanding Recital 18 to the Regulation, which stated, "*In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules*", this protection was not premised on the person sued by the insurer being the "*weaker party*" (which the Bank was not): [43].

This ruling is likely to outlive Brexit. The Regulation will govern until the expiry of the transition period on 31 December 2020. After that, the present indications are that the UK will segue from the Regulation to the Lugano Convention, Article 12 of which mirrors Article 14.

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

"Good at grasping the issues and working with heavy litigation involving a huge range of technical information." (Legal 500 Asia Pacific, 2020)

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Demurrage time-bar clauses under the spotlight again

Author: Stephanie Barrett

Demurrage time-bar clauses often cause problems for unsuspecting shipowners who have otherwise valid demurrage claims. Two recent judgments add to the long line of decisions in this area.

The first decision is ***The Amalie Essberger*** [2019] EWHC 3402 (Comm). In that case owners failed to attach to their demurrage claim the vessel's loadport pumping log and a letter of protest issued by the Master, but these documents had been sent to charterers earlier and were assumed at the hearing to be irrelevant to the demurrage claim made. The relevant clause (Clause 5) required the claim "with all supporting…documents" to be provided within 90 days of completion of discharge, and also stated that the claim "must be supported by" specific documents including pumping logs and letters of protest. Peter McDonald Eggers QC held that the claim was not time-barred. Regardless of their relevance to the demurrage claim, because specifically mentioned in Clause 5 the documents had to be provided before the expiry of the time-bar period. However, they did not need to be provided at the same time as the demurrage claim. Because expressly identified as documents which the claim "must be supported by", it should have been apparent to charterers that these documents constituted supporting documents under Clause 5 that were already in their possession.

The second case is ***Tricon Energy Ltd v MTM Trading LLC*** [2020] EWHC 700 (Comm) (Robin Knowles, J.), where the relevant clause also required "all supporting documents" to be provided. Charterers' cargo was one of several parcels onboard and under the charterparty laytime and time on demurrage were to be pro-rated between parcels according to the bill of lading quantities. Owners submitted a demurrage claim and supporting documents on time but did not attach the bills of lading for the parcels discharged at the discharge port. Even though the parcel quantities were recorded in statements of fact provided, the demurrage claim failed. The Charterparty provided that pro-rating for demurrage purposes was to be calculated by reference to bill of lading quantities and therefore the bills constituted "supporting documents" which had to be provided.

As is clear from the judgments, both results turned on construction of the particular clause in issue. This may be frustrating in terms of legal certainty, but there are decisions covering some of the common clauses (such as that in the BPVoy4 form) and, in any event, an inclusive approach is always advisable. As illustrated by ***The Amalia Essberger***, if specific documents are mentioned in the time-bar clause then they should be provided regardless of relevance. However, as ***Tricon*** makes clear, when deciding which documents to include, owners cannot consider the demurrage time bar clause in isolation and should also refer to (in particular) the laytime and demurrage regime. In most cases bills of lading are not relevant to a demurrage claim, but if, for example, the amount of laytime is based on bill of lading quantities then it is necessary to include them.

Stephanie Barrett's practice encompasses a wide range of commercial litigation and arbitration, but is primarily focused on dry shipping (especially charterparty and bill of lading disputes), shipbuilding and offshore construction, international trade, insurance, aviation/travel and energy. Her practice often involves cases of technical complexity, such as unsafe port claims, dangerous cargo claims and shipbuilding contract termination claims involving large numbers of defects. She undertakes drafting and advisory work in all areas of her practice. Stephanie also appears regularly (both as a junior and as sole counsel) in Commercial Court hearings and in commercial arbitrations on various terms including LMAA.

"She is first-rate." (Legal 500 UK 2020)

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When UK/EU and US sanctions collide: between a rock and a hard place

Author: Michael Davey QC

When Trump announced in May 2018 that the US was withdrawing from the Iran Nuclear deal, and unilaterally reinstating sanctions that were suspended as part of that deal, the sanctions regimes in the UK/EU and in the US were set on a collision course. US sanctions purport to have extra-territorial effect, with consequences outside of US territory for non-US persons and companies. The indirect effect of breaching such sanctions include banks refusing to handle all US dollar transactions, whether or not connected with Iran. The EU considers this to be objectionable, and since 1996 has had in force a "Blocking" regulation (Council Regulation (EC) 2271/96) protecting against the effects of the extra-territorial application of specified legislation. The regulation was updated in August 2018 to include various US sanctions against Iran. As implemented in UK law, it is a criminal offence to "comply" with such sanctions. Those involved in transactions which fall foul of US extraterritorial sanctions, but are UK/EU persons are therefore given a choice between criminality on the one hand and risking a loss of banking services.

In ***Mamancochet Mining Limited v Aegis Managing Agency Limited*** (2018), a marine cargo policy covered consignments of steel billets from Russia to Iran in 2012. The cargoes were stolen from bonded storage in Iran and the insured made a claim in March 2013. Of the 30 underwriters, 9 were ultimately controlled or owned by a US person, and were therefore a relevant entity for the US sanctions regime. They declined to pay their proportions of the claim on the basis that they would be subject to US sanctions were they to do so. Although the insurance was not subject to sanctions at the time it was entered into, or at the time the cargo was stolen, payment would arguably have been caught by the US sanctions regime by the time the claim was submitted to underwriters.

The policy included the standard wording developed by the Joint Hull Committee as follows:

> "No (re)insurer shall be deemed to provide cover and no (re)insurer shall be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose

> that (re)insurer to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws, or regulations of the European Union, United Kingdom or the United States of America."

The US owned underwriters argued that they were not liable to pay the claim, as they were at risk of being sanctioned by the US authorities, and were therefore "exposed" to sanctions. The judge construed the sanctions clause as requiring it to be shown that payment would actually be a breach of sanctions. This the underwriters were unable to do, and so they were liable to pay the claim. Accordingly, the court did not have to consider the impact of the EU Blocking Regulation on the sanctions clause, an issue which remains alive.

Article 5 of the Blocking Regulation provides that no EU person "shall comply, ... actively or by deliberate omission, with any requirement or prohibition" in specified laws, including some US sanctions. , ... based on or resulting, directly or indirectly, from [specified] laws..."

The sanctions clause responds to sanctions from four different sources: the United Nations; the European Union; the United Kingdom; and the United States of America. As a matter of English law there is an alignment between most of these regimes, the US being the exception. English law gives effect (through legislation) to UN sanctions, and until recently there was no difference between EU and UK sanctions law. Even post-Brexit, UK and EU sanctions law in practice remains aligned, at least for the present. US sanctions law, however, has no force in English law and would be irrelevant to a policy governed by English law where performance would not take place in the US.

The sanctions clause first provides that no insurer "shall be deemed to provide cover". The word "deemed" is a little awkward, as sometimes it has connotations of the position being treated as if it were something other than what it really is. However, if the clause responds to a change in sanctions, it is more than a mere rule of construction, and purports to vary the parties' rights and obligations as to cover. The clause further provides that no insurer "shall be liable to pay any claim". This cannot be construed as a limit on cover, since it plainly assumes that there is a valid claim. In ***Mamancochet***, the judge decided that the sanctions clause only suspended the obligation to pay, and did not extinguish it. The effect of the clause was therefore that for the duration of the US sanctions, underwriters would not be liable to pay, but upon the sanctions ending, the payment obligation would once again be effective.

The insured argued that failing to pay was contrary to public policy due to the Blocking Regulation. Underwriters responded that if the sanctions clause applied, there is no liability that insurers are declining to discharge in prohibited compliance with sanctions. The judge was attracted to this short answer on the basis that the underwriter is not complying with the extraterritorial sanctions but is simply relying on the terms of the policy. This seems to be too quick an answer. The sanctions clause is an agreement in advance that the parties' rights and obligations will be suspended in accordance with US sanctions. If the blocking regulation would otherwise have made it unlawful not to pay a claim, it is difficult to see why an agreement in advance that payment would not be made is not also caught. If so, the sanctions clause would be unenforceable as contrary to public policy. In ***Mamancochet***, underwriters were found not to be at risk of US sanctions, but if underwriters do find themselves at risk, the sanctions clause is not likely to provide them with much comfort.

This article was first published in The Marine Insurer, March 2020.

Michael Davey QC's practice covers a broad range of commercial matters, including shipping, international trade, insurance and oil and gas exploration and production. He also has particular expertise in fisheries litigation.

Michael has been continually ranked as a Leading Barrister in both Chambers & Partners and the Legal 500. Comments in previous editions have included: *"...outstanding..."* ; *"...an encyclopaedic knowledge of the law which allows him to argue cases by reference to the law rather than gut feeling..."*; *"...extremely user-friendly and impressive..."*; *"...has vast experience..."*and *"...ideal for any case which is slightly complex and unusual..."*.

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Who can limit?

Author: John Passmore QC

Who can limit their liabilities under the Limitation Convention 1976? Shipowners and salvors.

What is a "shipowner"? The owner, charterer, manager or operator of a ship.

But what is a "manager", and what is an "operator"?

The Admiralty Court handed down its first-ever judgment on this question.

In November 2016 a large dumb barge was moored off Dover. Storm Angus struck, with storm force winds up to force 9, and the barge dragged its anchor.

RTE own the England-France electricity connection. They allege that the barge's anchor tripped an undersea cable causing €55 million worth of damage. Parties interested in the barge claimed to be entitled to limit their liabilities (if any) to about £5.5 million, based on tonnage.

It was accepted by RTE that the owners and charterers of the barge could limit. But they denied that a third entity, Stema UK, could limit its liability. They said that Stema UK merely provided some services to the barge, but was not "the operator" or "the manager".

Teare J explained that, under the 1976 Limitation Convention, a "manager" is the person entrusted by the owner with sufficient of the tasks involved in ensuring that a vessel is safely operated, properly manned, properly maintained and profitably employed to justify describing that person as the manager of the ship. If a person is entrusted with just one limited task it may be inappropriate to describe that person as the manager of the ship.

As for "operator", the learned judge decided that it includes the manager, and that in many cases involving conventional merchant ships there may be little scope for operator to have any wider meaning. However, in the case of a dumb barge, operator includes those who, with permission of the owner, send their employees on board with instructions to operate the ship's machinery in the ordinary course of the ship's business.

Stema UK can therefore limit its liability.

A more detailed article is included on our website. www.quadrantchambers.com/news/who-can-limit-john-passmore-qc

John Passmore QC represented the limitation claimants, including the operator Stema UK. He worked with Alistair Johnston, Maria Borg Barthet, Danyel White, Debo Fletcher and Christopher Chane at Campbell Johnston Clark. John and CJC also worked with Stewart Buckingham QC in a related collision action against a cargo vessel called SAGA SKY. Chirag Karia QC represented RTE. Nigel Jacobs QC and Nichola Warrender represented the owners of SAGA SKY.

John Passmore QC has a commercial litigation and arbitration practice, involving a wide range of business sectors, with emphasis on aviation, banking, insurance, energy, commodities and derivatives, professional negligence, shipbuilding and offshore construction, and wet and dry shipping.

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Charterparty 'keep vessel in class' obligations... are NOT conditions

Ark Shipping Company LLC v Silverburn Shipping (IOM) Ltd, "ARCTIC" [2019] EWCA Civ 1161

Authors: Simon Rainey QC and Natalie Moore

The question of law on this appeal was whether the term in a bareboat charterparty obliging charterers to "keep the vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times" was a condition or an innominate term.

In their partial final award, two experienced LMAA arbitrators held that the term was **not** a condition.

On appeal, Carr J held that the term **was** a condition, **any** breach of which entitled the Owners to terminate the charterparty.

The Court of Appeal disagreed. The term was innominate. To terminate for breach of the term therefore required the owner to show a breach going to the root of the contract and depriving it of substantially the whole benefit of the charter (something the owner did not even allege). Given the similarity of wording of time charter terms where the corresponding obligation is on the owner, the decision is of importance in this context also.

The Court reasoned as follows:

1. ***Wording***. The term was not expressed to be a condition. This was significant, especially given that the BARECON 89 Form is an industry standard form.
2. ***Not a time clause***. The term was not a time clause of the nature under consideration in *Bunge v Tradax* [1981] 1 WLR 711.
3. ***No inter-dependence***. There was no interdependence of obligations. There were no sequencing issues in relation to the performance of the contract.
4. ***Type of breach***. Although the term goes to the classification status of the vessel and only one kind of breach is possible, this was outweighed by a plethora of other factors.
5. ***Clause 9A as a whole***. The term was found in the middle of clause 9A dealing with Charterers' maintenance obligations. If the classification obligation was intended to be a condition, this was a surprising place to find it. The classification and maintenance obligations are closely connected and Charterers' obligation as to the physical maintenance of the vessel was plainly not a condition.
6. ***'Other required certificates"***. The term also required Charterers to keep "other required certificates in force at all time". This wording could not be limited to certificates required by class because it would add nothing to Charterers' obligation to maintain class. Therefore the Owners were driven to say either that only part of the term is a condition (not including the "other required certificates" wording or the maintenance obligation) or that Charterers' obligation as to "other required certificates" forms part of the condition for which they contend. The former was unattractive and improbable. The latter was hopelessly open ended and would mean that this 15 year charterparty could be terminated if Charterers committed *any* breach in respect of various minor certificates.
7. ***The scheme of the charterparty***: ***insurance***. An important strand of Owners'

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News

John Russell QC was named Shipping Silk of the Year at the Legal 500 UK Awards 2020.

Benjamin Coffer was awarded Shipping Junior of the Year 2020 at the Chambers & Partners Bar Awards.

Quadrant took the title of Shipping Set of the Year at the Legal 500 UK Awards for the second year running.

We were shortlisted for Shipping Set of the Year at the Chambers & Partners UK Bar Awards 2019.

Associate Member, Bruce Harris was elected President of the LMAA.

Stewart Buckingham and Jeremy Richmond were appointed QC in March 2020.

Poonam Melwani QC and Belinda Bucknall QC featured in the Top 100 Women in Shipping for 2019.

Simon Rainey QC was in the Lloyd's List top 10 Maritime Lawyers 2019.

Quadrant Chambers took part in Tour de Law to support Breast Cancer Care. We had over 40 members, staff and guests take part. We were delighted to raise over £5,500 for such a worthwhile charity.

case was that breach of the term puts at risk Owners' insurance. But Charterers' obligation in clause 13B to insure the vessel against P&I risks is not a condition. If leaving the vessel uninsured does not constitute a breach of condition, putting the vessel at *risk* of being uninsured is or ought not to be classified as a condition. The same scheme applied in relation to hull or war risks cover under clause 12 of the standard BARECON 89 Form.

8. ***Consequences of breach***. The consequences of breach of the term may likely result in trivial, minor or very grave consequences, thus suggesting that the term is innominate. On the facts of this case, the breach of the term resulted in no adverse consequences.
9. ***A continuing obligation***. It is one thing to conclude that a statement as to the vessel's class at the commencement of the charterparty is a condition or condition precedent (as suggested in ***The Seaflower*** [2001] 1 All ER (Comm) 24). However, there is no authority which decides that a continuing warranty as to classification status is a condition.

Simon Rainey QC and Natalie Moore (neither of whom appeared below) were instructed for the successful appellant in the Court of Appeal by Menelaus Kouzoupis at Stephenson Harwood LLP.

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

"Considered a legendary figure by the whole shipping world." "He is a true star." (Chambers UK, 2020)

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

Natalie is consistently ranked as a leading junior barrister in Chambers & Partners UK Bar and Global, and Legal 500 UK and Asia-Pacific editions, where she has been described as "*an excellent junior*", "*an intelligent and persuasive advocate*" and "*a rising star*" with "*a razor sharp legal mind*".

"She has a first-class mind and is commercially astute." (Legal 500 Asia Pacific, 2020)

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Scuttling: the innocent co-assured's (uninsured) peril - *'The Brillante Virtuoso"*

Author: Nichola Warrender

What is required to establish an insured peril of "piracy" "malicious mischief" "persons acting maliciously" "vandalism" or "sabotage" in a war risks policy? This was a question answered in ***Suez Fortune Investments Ltd & Piraeus Bank AE v Talbot Underwriting Ltd & others ('The Brillante Virtuoso")*** [2019] EWHC 2599 (Comm).

On 5/6 July 2011 armed men were permitted to board the ship as she drifted off Aden. They ordered her to Somalia. Shortly thereafter an IED was detonated causing an engine room fire which spread, causing the crew to abandon ship and severe damage. Owners claimed this was a fortuitous hostile third-party attack. They and the mortgagee bank, as separate co-assureds, sued their war risks insurers. Liability was denied (amongst other things) on the basis of wilful misconduct and lack of an insured peril.

The case has a protracted procedural history. The vessel was found to be a constructive total loss: see [2015] EWHC 42 (Comm). Owners' claim was struck out for failing to disclose documents and relief for sanctions was refused: see [2016] EWHC 1085 (Comm). Only the bank's claim and insurers' counterclaim for declaration of non-liability proceeded to trial.

After a detailed factual enquiry into the circumstances of the loss, Teare J held that Owners had scuttled the vessel. Nevertheless, the bank argued that, so far as it was concerned, what had occurred was an insured peril. Teare J disagreed.

1. It was not piracy because there must not only be an unlawful attack at sea but conduct which a business man would say amounted to piracy. The events did not amount to piracy in the popular or business sense. There was no attack on the vessel. The motives of the armed men were not to steal or ransom the vessel or steal from the crew but to assist Owners commit a fraud upon insurers. An attempted insurance fraud is not an act of piracy.
2. It was not "persons acting maliciously" because following the Supreme Court decision in ***The B Atlantic*** [2018] UKSC 26 an element of "spite ill-will or the like" was required to establish the malice. This was absent in the present case. There was an intention to damage the vessel but this was in furtherance of a fraudulent plan and no doubt with an intention to profit. As in ***The Salem*** [1982] QC 946 the vessel was not lost or damaged because of a desire to harm the vessel or Owners. It was damaged because the armed men wanted to assist Owners and make money from their actions. It was not "malicious mischief" for the same reason.
3. It was not vandalism since this requires not just the damage to property but damage which was wanton or senseless. The damage in this case was not undirected or mindless violence or of a nature ordinarily described as vandalism.
4. It was not sabotage. To establish this required damage to, or disabling of, property so as to frustrate the use of that property for its intended purpose.

At its heart, this was a case of wilful misconduct. Teare J gave practical guidance as to the nature of the evidence and the approach taken to evaluate the evidence in such cases which is useful reading for anyone alleging scuttling in the future. In the context of marine insurance, it is no surprise that a pretend pirate attack is not an act of piracy. But on each of the other insured perils, Teare J's analysis means that mere proof of physical damage

is insufficient and the motive or manner in which such damage is carried out must be established: the additional requirements of "spite ill-will or the like"; that the damage was "undirected or mindless" or done to "frustrate the use of the property for its intended purpose." In this case, the intentions of the armed men formed part of the factual investigation into Owners' wilful misconduct but this will not be so in every case. In future, those bringing insurance claims under these classes of peril should adduce evidence which enables the Court to form an assessment of the state of mind or motive of those perpetrating the damage so as to be able satisfy these requirements.

Nichola Warrender acted for the war risk insurers led by Jonathan Gaisman QC, Richard Waller QC and together with Keir Howie (all of 7KBW), instructed by Chris Zavos, Jo Ward, Anna Haigh, Suzy Oakley and Jacob Hooper at Kennedys Law LLP.

Nichola Warrender is an experienced junior with a broad commercial litigation and arbitration practice with particular emphasis on shipping, carriage of goods, commodities, shipbuilding, energy and construction and related insurance and finance disputes. Many of her cases involve issues of jurisdiction, private international law or require careful analysis of complex factual, expert and technical or legal issues. She has experience in various forms of pre-emptive remedies such as freezing orders, anti-suit injunctive and other pre-action relief and has obtained or resisted most forms of pre-trial applications.

"Nichola pays exceptional attention to detail and has an excellent memory; she is very valuable on long-running matters involving complex facts and multiple expert disciplines." (Chambers UK, 2020)

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General average guarantees and the actionable fault defence:
The BSLE Sunrise [2019] EWHC 2860 (Comm)

Author: Benjamin Coffer

In a judgment handed down in November 2019, following a hearing on a preliminary issue, the Commercial Court held that the "actionable fault" defence under Rule D of the York Antwerp Rules is available to the issuer of a general average guarantee in the standard AAA / ILU form.

The Case

The dispute arose from the grounding of the "BSLE SUNRISE" off Valencia in September 2012. The owners declared general average. Cargo interests issued general average bonds. The defendant insurers provided security for those bonds on the standard form general average guarantee approved by the Association of Average Adjusters and the Institute of London Underwriters.

Owners brought a claim under the guarantees for contribution in general average and it was agreed that the question of whether the wording of the guarantees made a Rule D defence available in principle to the guarantors would be decided by way of preliminary issue.

The guarantees provided that the insurers undertook to pay '"*any contribution to General Average and/or Salvage and/or Special Charges which may hereafter be ascertained to be properly due in respect of the said goods.*"

Judgment

HHJ Pelling QC, siting as a High Court Judge, held that if the actionable fault defence was available to the receivers, no sums were payable under the guarantees. The standard form wording preserved the insurer's right to rely on the defence available to the receivers under Rule D if the loss was caused by the shipowner's actionable fault.

The Judge considered that the word "*due*" in the bonds signified a sum that was legally owing or payable. He relied on the judgment of Sheen J in ***The Jute Express*** [1991] 2 Lloyds Rep 55 in holding that "*and which is payable*" means "*and which is legally due.*" He noted that the payment was to be made "*on behalf*" of the cargo interests concerned, suggesting that what the insurer was agreeing to pay was what the parties to the adventure would otherwise have had to pay themselves.

The inclusion of the word "*properly*" served to put the point beyond doubt. The Judge found support in the success of insurers resisting claims under similarly worded guarantees in ***The Cape Bonny*** [2017] EWHC 3036 and ***The Kamsar Voyager*** [2002] 2 Lloyds Rep 57 (the Judge inferring that the guarantee in ***Kamsar*** was worded similarly to those in the present case).

Owners relied upon ***The Maersk Neuchatel*** [2014] EWHC 1643 in support of their interpretation. Hamblen J had held a that Letter of Undertaking assumed an obligation to pay the sum determined under the average adjustment. The Judge distinguished the case on the basis that the wording of the LOU in that case was different.

Conclusion

It is now clear that actionable fault is a defence available to insurers under the standard form ILU / AAA guarantee. The same is also likely to be true for most other forms of guarantee: the Judge considered that his conclusion was in accordance with the settled practice and understanding of the shipping industry, and that only very clear wording could justify departing from that practice and understanding. ***The Maersk Neuchatel*** looks to be the exception rather than the rule.

Ruth Hosking appeared for the claimant shipowner. Benjamin Coffer appeared for the defendant insurers, instructed by Andrew Nicholas and Cameron Boyd of Clyde & Co.

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

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Force majeure in the Court of Appeal

Classic Maritime Inc v Limbungan Makmur SDN [2019] EWCA Civ 1102 BHD

Author: Michael Howard QC

This case concerned two main issues. The first was whether a clause in a contract of affreightment protected suppliers from liability when the material to be supplied was unavailable because of a natural disaster. The second was whether, if it did not, they were in any event liable only for nominal damages because the receivers would have suffered the same loss in any event.

By a contract of affreightment, the Defendants ("Limbungan") agreed to supply cargoes of iron ore pellets to be shipped from ports in Brazil to Malaysia in tonnage to be provided by the Claimants ("Classic") in 2015 and 2016. Halfway through the shipment period, the Fundi dam burst, terminating the mining operation from which the ore was sourced. Limbungan, relying on clause 32 of the COA, disputed liability for five shipments which should have taken place subsequently, on the ground that the dam burst rendered further performance impossible. It was found that Limbungan would never have loaded the disputed two cargoes because of lack of demand in Malaysia. Teare J held that Limbungan were in breach of contract and were not protected by Clause 32. He held however that they were liable only for nominal damages, because there never would have been any ore available for the five shipments scheduled for the period after the dam burst.

The Court of Appeal upheld Teare J on the liability question but reversed him on the damages question.

Liability. In both courts, the question of liability turned on the construction of the construction of clause 32 of the Contract of Affreightment. Limbungan contended that it was a *force majeure* clause, alternatively a contractual frustration clause; Classic that it was an exceptions clause and inapplicable on the facts. Limbungan argued that the clause possessed the general characteristics of a *force majeure* clause, but the Courts held that it was an exceptions clause. It was also held that the clause did not resemble the "contractual frustration" clauses seen in the cases arising out of the 1973 US grain embargo of which the leading case is ***Bremer v Vanden Avenne***.

The supplier's undertaking was absolute. It was insufficient that it was impossible for Limbungan perform because one of the matters listed in the clause *would have* prevented it. They had to go further and show that it *did actually* prevent it. The phrase "resulting from" required a but-for test to be satisfied. The crucial requirement was that of causation, and there would have been no shipment even if the dam had remained intact.

Damages. Teare J awarded only nominal damages because "Classic cannot be put in a better position than it would have been in had Limbungan been able and willing, but for the dam burst, to ship the required cargoes". The Court of Appeal disagreed. It distinguished the decisions in ***The Golden Victory*** and ***Bunge SA v Sidera BV*** on the basis that those cases were concerned with anticipatory breaches of contract and not with actual breaches. This was not, however, the *ratio decidendi* and appears to be both *obiter* and dubious.

The true basis for the decision was that the contract imposed an absolute obligation on Limbungan to ship the relevant cargoes. As Males LJ said "Limbungan's obligation was not to be ready and willing to supply a cargo in each case, but actually to supply one". They took the risk of non-delivery for any reason whatever.

The case is reported at [2018] EWHC 2389 (Comm) (Teare J); [2019] EWCA Civ 1102 (CA). *Simon Rainey QC and Andrew Leung were Counsel for Limbungan.*

The case is considered at length by Howard and Knott, *Force Majeure, Frustration and Exceptions Clauses: Damages in Hindsight* [2020] LMCLQ 179.

Michael Howard QC is a commercial lawyer who specialises principally in maritime law. He advises and acts as advocate in domestic and international commercial disputes, in particular in disputes concerning sale contracts, agency agreements, insurance and re-insurance matters, supply and distributorship agreements, technical disputes (usually concerned with ship construction or with quantification of damages), maritime contracts (charterparties, bills of lading, COAs, marine policies etc) and marine casualties (including wreck removal and salvage).

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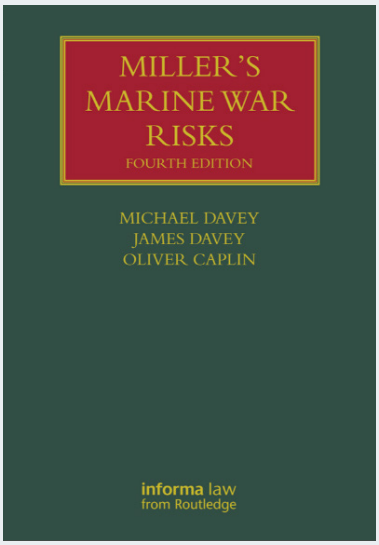

June 2020 saw the publication of Miller's Marine War Risks.

Michael Davey QC is co-author with James Davey, Professor of Insurance & Commercial Law, University of Southampton and Oliver Caplin of Twenty Essex.

This 4th edition merges analysis of the legal principles, case law, and legislation with the practice of the insurance market in order to provide commentary on difficult questions concerning liabilities, claims, and coverage.

An event to mark the launch of the book, chaired by Sir Bernad Rix was held on 29 June. A recording is available on our YouTube channel https://www.youtube.com/channel/UCVh0YW-nXNjAgSP2q08ywSg or search Quadrant Chambers YouTube.

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