MARITIME DISPUTES NEWSLETTER – NOVEMBER 2020: MARITIME DECISIONS

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SCROLL DOWN FOR THE LATEST MARITIME DECISIONS MADE BY THE ENGLISH COURTS.

Sins of the father: can a guarantor avoid liability by claiming to have been under "undue influence" of a family member?

In an important case, in which WFW acted for the successful claimant lenders, the Commercial Court has comprehensively rejected arguments advanced by two sons of a shipping magnate – who, together with their father, had given the claimants a number of personal guarantees of a series of shipping loans – that (i) they had acted under their father's undue influence; and (ii) the claimants had been put on inquiry of this. In giving judgment, the judge reviewed the authorities and helpfully clarified a number of aspects of the law of undue influence, which will be of interest both to legal practitioners advising on personal guarantees and related security and to lenders seeking to obtain such security.

YS GM Marfin II LLC & Ors v Lakhani & Ors [2020] EWHC 2629 (Comm)
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> "The question of whether a transaction was brought about by the exercise of undue influence is always a question of fact."
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> YS GM Marfin II LLC & Ors v Lakhani & Ors

Mr Justice Teare praises VDR data in final decision as Admiralty Judge (Sakizaya Kalon / Panamax Alexander / Osios David)

Mr Justice Teare has handed down his final judgment as an Admiralty judge, holding that in an unusual and complex collision case arising out of an incident in the Suez Canal, the causative fault occurred more than an hour before the collision, and also constituted the cause of two subsequent collisions. The owners of a bulk carrier were thus liable for all three collisions. In delivering his judgment the judge highlighted the value of data from Voyage Data Recorders in establishing vessel navigation prior to a collision, noting that a "reconstruction animation video" which could be paused and restarted at will was of considerable assistance in identifying where the vessels were at different times. He emphasised that a trial of a collision action is now more likely to focus on questions of fault and apportionment of liability.

The Owners of the Vessel Sakizaya Kalon v The Owners of the Vessel Panamax Alexander & Ors [2020] EWHC 2604 (Admlty)

Calculating damages for a contract breach – caution when an associated party suffers the loss

When assessing damages for breach of contract, the Commercial Court has accepted that when applying the "net loss approach", which takes into account expenses saved and non-collateral benefits obtained by the claimant as a result of the breach as well as expenses caused or benefits lost, there may be circumstances in which a liability to make a payment should not be brought into account, or not accounted for in full. However, in this case the evidence did not support an argument that liabilities under ship management agreements should not be brought into account when assessing the claimants' damages claim for breach of a contract of affreightment.

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

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Default and summary judgment in the Admiralty Court (Double Venus/Llamedos & Karma/Santorini)

In the context of an *in rem* claim brought by the operator of Brighton marina for outstanding marine dues, the Admiralty Registrar has highlighted a number of issues concerning the availability of default and summary judgment in the Admiralty Court. In particular, the Registrar suggested that although the rules concerning judgment in default of an acknowledgement of service in an *in rem* claim were not amended in April 2020 in line with the rules applicable in other cases, this was simply an oversight and that in order for judgment to be given it is necessary that no acknowledgement has been filed at the date judgment is entered. The Registrar also suggested that it would be appropriate for the Civil Procedure Rule Committee to consider the rationale for the rule that summary judgment is not available in an admiralty claim *in rem*, and whether it is still appropriate in circumstances where summary judgment applications are now public hearings, as are admiralty claims *in rem*.

Premier Marinas Limited v The Owner(s) of M/V "Double Venus" aka "Llamedos" & Anr [2020] EWHC 2462 (Admlty)

Bliss for shipowners! Damages may be claimed in addition to demurrage for voyage charterparty delay (Eternal Bliss)

The question of whether both damages and demurrage can be recovered for a single breach of a charterparty is something on which academic opinion, as well as the authorities, have diverged. However, in the context of a case where a vessel had been kept at anchorage for over 30 days due to port congestion and lack of storage space for cargo ashore, resulting in damage to its cargo of soybeans, the Commercial Court has sought to resolve the issue, holding that the owner was entitled to demurrage as well as damages arising out of the cargo damage. In doing so the court concluded that the decision in *The Bonde* (1991) should not be followed, noting that whilst that decision had stood for nearly 30 years, apparently without direct criticism, this may have been the first occasion on which the arguments of principle had been fully aired.

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

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Did interpretation of addendum to shipbuilding contract raise matters of general public importance?

The English High Court has rejected arguments that the interpretation of an addendum to a contract for the delivery of two semi-submersible drilling rigs, which was intended to preserve certain claims in relation to FEED documentation whilst enabling delivery to proceed, raised a matter of general public importance. The argument, which was raised in the course of an appeal from an LMAA arbitration award refusing a shipbuilder permission to amend its claim, was made on the basis that many Korean shipbuilders enter into such agreements, and that without an answer to the question, shipbuilders would be exposed to uncertainty as to what disputes fall within an addendum agreement when making delivery. However, the High Court noted that the addendum was a bespoke agreement, and that it was for the parties to achieve clarity. Any judicial consideration would only be of the interpretation of the particular bespoke clause, as against the background of the claims in this case.

> "From time to time, a case provides the opportunity to resolve a long-standing uncertainty on a point of law of significance in a particular field of commerce. This is such a case."
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> K Line Pte Ltd v Priminds Shipping (HK) Co Ltd

Daewoo Shipbuilding and Marine Engineering Company Limited v Songa Offshore Equinox Limited & Anr [2020] EWHC 2353 (TCC)

Arbitrator's conclusion on vessel value in light of class documentation upheld

In determining a challenge to an arbitration award, the Commercial Court has rejected arguments that an arbitrator had wrongly assessed the market rate of hire of a vessel on the basis of her own reading of class documentation. The vessel had been described as landing craft/general cargo vessel but could (and did) carry marine gas oil (MGO). There was nothing to suggest that the vessel was in class to carry MGO, but the arbitrator considered that this was unsurprising, since such notation would only be available for a vessel designed primarily to carry oil. Accordingly she held that the vessel could have been marketed and used to carry MGO, and assessed its value on that basis. While the charterers contended that the arbitrator had reached this conclusion on the basis of her own reading of the class documentation, without inviting submissions, and that this amounted to an irregularity causing it substantial injustice, the Commercial Court held that the arbitrator had drawn an inference, which she was entitled to do, on an issue which the charterer itself had raised during the course of the hearing.

ASA v TL & Anr [2020] EWHC 2270 (Comm)

Transport contract exclusion to consumer protection provisions of Brussels Recast Regulation (My Song)

The Commercial Court has rejected arguments that a contract to arrange the carriage of a sailing yacht was subject to the consumer protection provisions of the Brussels Recast Regulation, which would have enabled claims for the loss of the vessel to be brought in the owner's home court notwithstanding an English exclusive jurisdiction clause in the contract of carriage. The contract in question was a "contract of transport" and so was excluded from the consumer protection provisions, and in any event the contract was entered into for a dual purpose, which included business usage that was more than negligible.

Weco Projects APS v Piana & Ors [2020] EWHC 2150 (Comm)

Care required when drafting settlement agreements

Where the parties had entered into a settlement agreement in an attempt to settle claims under a 2018 sale contract, the Commercial Court held that a reference to a "historic demurrage dispute" in the settlement agreement included demurrage that accrued in relation to the shipments under the sale contract, as well as demurrage still due in respect of shipments made prior to the sale contract. The decision, which demonstrates the importance of care and precision when drafting settlement agreements, also found that an expert determination clause applied to those disputes, with the result that the claimant's claim for demurrage was stayed to allow for expert determination to take place.

HC Trading Malta Limited v Savannah Cement Limited [2020] EWHC 2144 (Comm)

Responsibility for discharge (Sea Master)

Emphasising that responsibility for discharge normally rests with the owner, and provisions which transfer responsibility for the cost of discharge to a charterer or receiver will not usually have the effect of also transferring the obligation to carry out the task, the Commercial Court has upheld an arbitration award refusing to imply terms into a contract of carriage obliging a financing bank or receiver to discharge the cargo within a reasonable time, or take all necessary steps to enable the cargo to be discharged and delivered in a reasonable time.

Sea Master Shipping Inc v Arab Bank (Switzerland) Limited & Anr [2020] EWHC 2030 (Comm)

> "When the main terms for a charterparty have been agreed but the parties have yet to enter into contractual relations, this is generally referred to by shipowners, charterers and chartering brokers as an agreement on "subjects" or "subs", an expression which signals that there are pre-conditions to contract which remain outstanding."
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> Nautica Marine Limited v Trafigura Trading LLC

Lifting the lid on subjects (Leonidas)

In a case which will be of interest to all those engaged in contract negotiation, the English High Court has provided helpful guidance on the legal effect of agreements on "subjects" or "subs", and in particular, whether an outstanding subject will be construed as a pre-condition to the formation of a binding contract or as a performance condition which excuses a party from performing an otherwise binding contract if unsatisfied. The decision, which concerned the negotiation of a crude oil voyage charter, provides an important reminder of the need for clarity and precision when using "subjects".

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

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Identifying the parties to a claim (1) (Archagelos Gabriel)

In contrast with the decision in the *Giant Ace* (below), the Commercial Court has agreed to extend time to bring a misdelivery clam in arbitration in circumstances where the claimant had failed to correctly identify the relevant carrier within the time bar set by the Hague Rules. The bill holder was unaware that the vessel had been bareboat chartered, and its erroneous understanding that the correct party to the claim was the owner had been reinforced by the lawyers who acted on behalf of both the owner and the bareboat charterer. It was therefore unjust to hold the bill holder to the strict terms of the time bar.

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

Identifying the parties to a claim (2) (Giant Ace)

Demonstrating the importance of identifying all the relevant parties in a charterparty chain, the Commercial Court has rejected an application for a retrospective extension to the one year time bar for a misdelivery claim under the Hague/Hague-Visby Rules. The bill holder's mistake as to the identity of the carrier was not outside the reasonable contemplation of the parties, and a considerable portion of the causative burden for the error lay with the bill holder. The court's conclusion in this case can be contrasted with that in the case of the *Archagelos Gabriel*, above.

Fimbank Plc v KCH Shipping Co Ltd [2020] EWHC 1765 (Comm)

Use of worked examples in calculation of hire (Voyageur Spirit)

Worked examples in a contract can provide a useful and efficient means of explaining precisely how formulae are intended to work. However, in a case in which an FPSO charterparty provided for the rate of hire to be adjusted by reference to changes in production and processing operations, the Commercial Court has emphasised the importance of ensuring that worked examples are consistent with narrative formulae, holding that where worked examples contained an additional step not set out in the narrative formula, the worked example should be preferred.

Altera Voyageur Production Limited v Premier Oil E&P UK Ltd [2020] EWHC 1891 (Comm)

Ship scrapping: who owes a duty of care? (Maran Centaurus)

In a decision with potentially far-reaching implications for the shipping industry, the High Court has refused to strike out a claim for negligence brought by the widow of an individual who had died while working on the demolition of an oil tanker that had been sold for that purpose by the defendant. The decision reinforces the principle that, when a ship reaches end of life, a shipowner's liability does not necessarily end upon sale.

Begum (on behalf of Mollah) v Maran (UK) Ltd [2020] EWHC 1846 (QB)

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Effect of incorporation of standard terms into recap (Nounou)

The impact of incorporating industry standard terms has been highlighted in the context of a case concerning the supply of a cargo of high sulphur fuel oil. While the recap evidencing the contract provided for the quality of the oil to be ascertained by an independent inspector at the loadport, and for "such result to be binding on parties save fraud or manifest error", the contract was also subject to the BP 2007 General Terms and Conditions for FOB sales, which provides that certificates of quality and quantity are "conclusive and binding … for invoicing purposes", but without prejudice to the parties' rights to make other claims. The judge concluded that the BP terms were not in conflict with the recap, but rather qualified or explained the recap. The buyer was not therefore prevented from claiming damages for breach of contract arising out of the supply of off-spec oil, even though a certificate of quality had been issued by an independent expert at the loadport.

Septo Trading Inc v Tintrade Ltd [2020] EWHC 1795 (Comm)

> "The right to limit liability pursuant to the Merchant Shipping Act 1995 now rarely gives rise to dispute, essentially because the right to limit is "almost indisputable"... Perhaps because of the difficulty of barring the right to limit questions now arise as to whether there is, in principle, a right to limit."
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> Holyhead Marina Ltd v Farrer & Ors

Is a marina a "dock" for limitation purposes under Merchant Shipping Act 1995?

Emphasising the reciprocal nature of limitation rights available under the Merchant Shipping Act 1995, the Admiralty Court has found that the lessee of a marina made up of an arrangement of floating pontoons for the mooring of small leisure craft, was the owner of a "dock", and so entitled to limit its liability for damage caused to vessels when the pontoons broke up during an unusually serious storm. While the judge was not persuaded that it would be correct to say that the marina was a dock within the ordinary meaning of that word, the pontoons were landing places, jetties or stages, and so fell within the extended definition of dock set out in the Act.

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

Duties of intermediary brokers (Amethyst & Turquoise)

In relation to a dispute concerning the commission to be paid to an intermediary broker for the charter of two tug supply vessels, the Commercial Court has rejected arguments that there was a duty on the broker to disclose the "spread" between the rate of hire the charterer had agreed to pay, and the rate received by the owner. Even if it could be said that such brokers were agents, which the court doubted, the scope of their duties were limited to the duty to communicate messages honestly.

CH Offshore Limited v Internaves Consorcio Naviero SA & Ors [2020] EWHC 1710 (Comm)

No state immunity in relation to claim by P&I Club for breach of arbitration agreement (Prestige)

The Commercial Court has rejected arguments that the Kingdom of Spain could claim immunity from suit under the State Immunity Act 1978 in relation to claims brought by a P&I insurer for breach of an arbitration agreement. The claims, which arose out of a 2002 marine pollution incident that caused significant pollution to the shorelines of Spain and France, followed previous findings by the English court that pursuant to the "conditional benefit principle", by pursuing a direct claim against the relevant shipowners' insurers in Spain, the state had agreed to submit the claims to arbitration. The Commercial Court rejected arguments that the "conditional benefit principle" was limited to claims against the Club, confirming that it could also extend to claims made by the Club for breach of the relevant arbitration agreement.

In a subsequent judgment the Commercial Court also rejected arguments that Spain and France had state immunity in relation to claims concerning the failure to honour arbitration awards arising out of the pollution incident, together with English judgments enforcing those awards. The former could be said to "relate to" an arbitration and the latter related to a "commercial transaction", and so both fell within the exceptions to state immunity under the 1978 Act.

The London Steam-Ship Owners' Mutual Insurance Association Limited v The Kingdom of Spain [2020] EWHC 1582 (Comm)

The London Steam-Ship Owners' Mutual Insurance Association Limited v The Kingdom of Spain [2020] EWHC 1920 (Comm)

Going once! Going twice! Sold – English court gives helpful guidance on ship auction sale procedure (Sertao)

In this long-running case, in which WFW acted for the mortgagee bank that was security agent for a group of US noteholders, the English Admiralty Court has given a useful insight into its approach in relation to distressed sales of ships through its auction process. The court's comments on sales at below the reserve price, and the approach to property onboard belonging to third parties, will be of interest to both maritime lawyers and ship financiers.

Deutsche Bank Trust Company Americas v The Owner of the Motor Vessel "Sertao" [2020] EWHC 2590 (Admlty)

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KEY CONTACT

ANDREW WARD
PARTNER • LONDON
T: +44 20 7863 8950
award@wfw.com

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