

MARITIME DISPUTES NEWSLETTER – JULY 2021: OTHER NOTABLE DECISIONS

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SCROLL DOWN FOR DECISIONS ON GENERAL CONTRACT TOPICS MADE BY THE ENGLISH COURTS.

Important new guidance on interpreting exclusion and limitation clauses

A recent decision of the English Technology and Construction Court has provided long overdue and important confirmation on how clauses excluding or restricting liability for breach should be interpreted. The case confirms that the language used by the parties will be the starting point for interpreting the contract, giving weight to the factual, legal and regulatory background and business common sense.

Mott MacDonald Ltd v Trant Engineering Ltd [2021] EWHC 754 (TCC)

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Fixing drafts: a cautionary message on drafting jurisdiction provisions

In a decision concerning an aircraft lease which contained contradictory jurisdiction provisions, the High Court has held that English litigation should be stayed in favour of LCIA arbitration. The decision is an important reminder on the importance of drafting such provisions carefully in order to set out clear and certain rights, and minimise the risk of time-consuming and costly proceedings in the wrong forum.

Helice Leasing SAS v PT Garuda Indonesia (Persero) Tbk [2021] EWHC 99 (Comm)

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What duties does an expert witness owe to their client?

In an important judgment on the nature of the relationship between an expert and their client, the Court of Appeal has confirmed that an expert owed its client contractual obligations of loyalty and so another entity in the same group could not accept an instruction in a related matter against that client. However, notwithstanding the fact that there was no conflict between the expert's duties to the court and a duty of loyalty to their client, the Court of Appeal was reluctant to conclude that a fiduciary duty was owed, noting that such duties normally arise in settled categories of relationship and that concluding there was a duty here might have unforeseen ramifications.

"Exemption clauses including those purporting to exclude or limit liability for deliberate and repudiatory breaches are to be construed by reference to the normal principles of contractual construction without the imposition of a presumption and without requiring any particular form of words or level of language to achieve the effect of excluding liability."

Mott MacDonald Ltd v Trant Engineering Ltd

Secretariat Consulting PTE Ltd & Ors v A Company [2021] EWCA Civ 6

An insight into treatment of jurisdiction clauses after Brexit

In a decision which will be of particular interest to those involved in ship finance transactions, the Court of Appeal has delivered a judgment which sheds light on the treatment of asymmetric jurisdiction clauses post-Brexit. The Court confirmed that such clauses constitute exclusive jurisdiction clauses for the purposes of the Brussels Recast Regulation (which applies to proceedings commenced before the end of the withdrawal period on 31 December 2020), and so any claim brought in an EU Member State in breach of the clause must be stayed. However, without determining the point, the Court indicated that the position may well be different under the Hague Convention on Choice of Court Agreements (which applies to subsequent proceedings between the UK and EU unless and until another agreement is reached).

Ethad Airways PJSC v Flother [2020] EWCA Civ 1707

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Ethics in international arbitration: challenging an arbitrator's appointment in English law

In a significant and long awaited judgment, the Supreme Court has upheld the Court of Appeal's decision that an arbitrator's failure to disclose his appointment in potentially overlapping arbitrations under Bermuda Form liability policies and arising out of the explosion and fire on the Deepwater Horizon drilling rig did not give rise to an appearance of bias. In reaching this decision the Supreme Court confirmed that arbitrators are subject to a legal duty of disclosure in English law, encompassed within their duty to act fairly and impartially. While the duty of disclosure does not override the arbitrator's duty of privacy and confidentiality, the Supreme Court observed that disclosure of limited information may normally be made without express consent where the needed consent is inferred, and a failure to make disclosure may, in certain circumstances, amount to apparent bias. However, the Court noted that in certain types of arbitrations, including LMAA arbitration, it is an accepted feature that arbitrators will act in multiple arbitrations, often arising out of the same events, and so parties which refer their disputes to LMAA arbitration are taken to accede to this practice and accept that such involvement does not call into question the arbitrators' fairness or impartiality.

"The fact that an arbitrator has accepted appointments in multiple references concerning the same or overlapping subject matter with only one common party is a matter which may have to be disclosed, depending upon the customs and practice in the relevant field."

Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)

Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) [2020] UKSC 48

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Operation of material adverse effect clauses

Material Adverse Effect (MAE) or Material Adverse Change (MAC) clauses have been the subject of extensive commentary in light of the Covid-19 pandemic, although English court decisions on their interpretation and application remain relatively few in number. However, in a decision which demonstrates the complex issues that can arise when relying on such clauses, the Commercial Court has held that in deciding whether the Covid-19 pandemic had a relevant “effect” on companies being sold under a share purchase agreement, it was necessary to compare those companies with other participants in the broader payments industry, and not simply those in the “travel payments industry”.

Travelport Limited & Ors v Wex Inc [2020] EWHC 2670 (Comm)

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