Quadrant CHAMBERS

Quadrant on Shipping

Issue 6 | Winter 2024

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Chambers UK 2025

Shipping Set of the Year 2024 (Chambers and Legal 500)
Shipping Set of the Year 2023 (Chambers)
Shipping Set of the Year 2022 (Chambers and Legal 500)
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EDITORIAL by Saira Paruk

We welcome you to the sixth edition of Quadrant on Shipping.

In what has been a busy year in the shipping industry in general, and in Chambers in particular, there is much to cover!

The ongoing geopolitical situations in the Red Sea, Ukraine and elsewhere mean that the industry continues to face uncertainty and volatility. Having said that, the industry itself is proving to be resilient and adaptable. The range of legal issues arising in these circumstances is broad, as is reflected by the articles in this edition. Many of the articles are by counsel who appeared in the relevant cases, which shows the quality and depth of shipping work undertaken by Quadrant in the last 12 months and in particular they highlight that members of Quadrant are often involved in key decisions across the marine sector.

The breadth of Chambers' work is illustrated by the no fewer than 4 decisions of the Supreme Court covered in this edition. Guy Blackwood KC discusses the decision handed down by the Supreme Court in January 2024 in ***Herculito Maritime Ltd v. Gunvor International BV*** in which he represented the successful shipowners. Chirag Karia KC and Ben Gardner analyse the decision in their case - ***Sharp Corp Ltd v. Viterra BV*** where the Supreme Court addressed issues of mitigation and s.69 appeals. James Shirley appeared in ***RTI Ltd v MUR Shipping BV***, a case concerning sanctions force majeure which he discusses. Lastly, and hot off the press (the decision was handed down in mid-November), Simon Rainey KC discusses the ***FIMBank Plc v KCH Shipping Co Ltd*** decision concerning the Article III Rule 6 time bar in the Hague and Hague-Visby Rules.

Along with articles considering many other important decisions that Quadrant members have been involved in, this edition also includes an article on the Law Commission proposals for reform of the Arbitration Act 1996.

We hope you find all of these articles helpful and of interest.

London International Shipping Week returns next year during the week of 15 September 2025. We are delighted to again be supporting the event as a Silver Sponsor, and look forward to welcoming you to our events during that week. In the not so distant future, we will again be hosting Quadrant's Shipping Review of the Year on 5 February 2025, where we have the chance to engage in discussion and debate of the many issues arising over the last year.

Finally, thank you to all our clients for your support, it really is much appreciated. The shipping team and Quadrant are committed to providing our clients with an excellent level of service and we hope that this is your experience. We look forward to continuing to work with you.

Saira Paruk has a broad commercial practice with particular experience in shipping, commodities and international trade. She regularly appears in the Commercial Court and in arbitration, both as sole and junior counsel. Saira is consistently ranked as a leading junior barrister in the directories, where she has been described as *"insightful, knowledgeable, persuasive, excellent on her feet"*.

"Saira is a powerhouse of the shipping Bar." (Chambers UK, 2025)

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"A number of very commercial, hands-on barristers who are able to drill into the most complex of claims effortlessly".

Chambers UK Bar (2025)

Quadrant CHAMBERS

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Paul Toms Appointed King's Counsel

Quadrant Chambers congratulates Paul Toms on his appointment as King's Counsel.

Paul is a highly experienced barrister with a wide-ranging commercial practice, including International Abitration, Commodities & International Trade, Shipping, Insurance and Reinsurance, Shipbuilding, Energy and Banking.

"Paul has a clear, calm and compelling style of advocacy which inspires confidence in the arguments that he is making." (Chambers UK, 2025)

Quadrant Chambers Annual Shipping Review of the Year

5 February 2025

Time: 08:45-10:45

Venue: Merchant Taylors' Hall, 30 Threadneedle St, London EC2R 8JB

Our annual Shipping Review of the Year is returning in 2025, taking place on the morning of 5 February at Merchant Taylors' Hall.

Our expert panel will discuss key developments in shipping disputes over the last 12 months as well as future issues which are likely to impact the sector. The full speaker line-up will be announced in the new year.

Timings

- 8:45 – Registration and breakfast
- 9:30-10:30 – Seminar
- 10:45 – Coffee and close

To reserve your place, visit the events page of our website or email marketing@quadrantchambers.com.

Register Here

"Their clerks are ace... always approachable, available and prepared to go the extra mile."

Legal 500 2025

Employment orders and the navigational fault defence

Mercuria Energy Trading PTE v Raphael Cotonor Investments Ltd [2023] EWHC 2978 (Comm)

Authors: John Russell KC & Joseph Gourgey

Is a failure to obey charterers' voyage orders subject to the Hague Rules/ USCOGSA negligent navigation defence?

This was the issue which Sir Nigel Teare had to decide in an appeal under section 69 of the Arbitration Act 1996, in ***Mercuria Energy Trading PTE v Raphael Cotonor Investments Ltd*** [2023] EWHC 2978 (Comm).

His answer? A firm "Yes"- the negligent navigation defence did apply to protect owners where the Master failed to comply with voyage orders, and negligently anchored in the wrong place.

The dispute arose under a voyage charterparty for the carriage of 80,000 mt of fuel oil. Following loading of the cargo in Singapore, Charterers ordered the m/t AFRA OAK (*"Vessel"*) to *"proceed to Spore EOPL for further orders. Discharging plan still not yet known"* (*"Voyage Order"*). Instead of anchoring safely in international waters, the Vessel anchored in Indonesian territorial waters.

This happened in February 2019 - just as the Indonesian Navy launched a crack-down on vessels anchoring in its waters. The Navy detained the Vessel - and she remained under detention for over 9 months.

The lengthy detention of the Vessel gave rise to substantial claims and counterclaims by the Owners and Charterers respectively. All of these claims and counterclaims were dismissed by the Tribunal - including Charterers' counterclaim founded on the Master's failure to comply with the Voyage Order, which was a breach of the obligation to comply with Charterers' employment orders.

The precise basis on which this claim was rejected was opaque, and was the subject of argument before the Court. Sir Nigel found that, on a proper construction of the Award, the Tribunal had held that Owners were in breach of the requirement to follow Charterers' employment orders, but that Owners could rely upon the negligent navigation" defence [38]. The key finding of the Tribunal supporting this defence was that the Master *"attempted to comply with the orders given but by simple oversight in the course of navigation anchored the vessel where he should not have done".*

Charterers appealed the finding that Owners could rely upon the negligent navigation defence. The question of law was as follows:

> "Did the Tribunal err in finding that the negligent navigation defence in Section 4(2)(a) of the US COGSA 1936 (which mirrors Art IV.2(a) Hague Rules) affords a defence to a breach of an employment order in the absence of a good reason for departing from that order?

On the basis of ***The Hill Harmony*** [2001] 1 AC 638, Charterers argued as follows:

- There is a distinction between an order as to employment and an order as to navigation;
- Where a vessel fails to follow an employment order, it matters not whether the reasons for failing to follow this order were "navigational", since the character of that decision is always one of employment;
- As such, the Tribunal erred in finding that the Master's oversight in attempting to comply with the voyage orders was an "act of navigation".

Sir Nigel found that ***The Hill Harmony*** did not stand for the proposition contended for by Charterers.

Whilst a choice not to comply with employment orders cannot (without more) be described as negligent navigation, the ***Hill Harmony*** did not go further than this [66]. The finding of the Tribunal that the Master's oversight in anchoring in Indonesian Territorial waters was a "navigational" one was a finding they were entitled to make, and there could be no appeal against those findings [72]. It is ultimately a question of fact whether a failure to follow an employment order was an act of navigation or not [78]. In this case the Tribunal had found it was, and that was the end of the matter.

He accordingly dismissed the Charterers' appeal.

The case is an important one, as it clarifies (and arguably expands) the scope of the incorporated Hague/ USCOGSA negligent navigation defence in the charterparty context. It illustrates that a very experienced Admiralty judge was not prepared to limit, in any material way, the owners' traditional protection against the negligence of their Master.

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

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Joseph Gourgey has developed a busy practice across a number of Chambers' core areas including shipping, commodities and commercial disputes. He has regular experience as sole and junior counsel in both the Commercial Court and in arbitration. Joseph is ranked as a *"Rising Star"* in Shipping by Legal 500.

"Careful, diligent, with good judgement. Joseph is able to step into the breach to take over the lead in a complex multi-dispute case with no advance warning." (Legal 500, 2025)

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Sanctions, Force Majeure and Reasonable Endeavours in the Supreme Court

RTI Ltd v MUR Shipping BV [2024] UKSC 18

Authors: James Shirley & Maya Chilaeva

Introduction

RTI Ltd v MUR Shipping BV [2024] UKSC 18 concerned the construction of a force majeure ("FM") clause in a contract of affreightment ("COA"). The central issue was whether it was a requirement of declaring FM that the putative FM event had to be incapable of being overcome by reasonable endeavours by the party declaring FM.

As governments worldwide increasingly deploy economic sanctions and trade controls as instruments of state policy, the importance of FM clauses in contracts for international trade and transport is increasing.

The FM Clause

The FM clause in question stated that an event or state of affairs only qualified as a force majeure event if it met several criteria, including that it prevented or delayed the loading or discharge of the cargo (Clause 36.3(b)) and could not *"be overcome by reasonable endeavors [sic] from the Party affected"* (Clause 36.3(d) ("the RE provision"). The question of law on appeal was whether, in the absence of express stipulation, the RE provision could require a party to accept performance that was non-contractual in some way.

The contract operated smoothly until April 2018, when the US government imposed sanctions affecting RTI's parent company. MUR contended that RTI would no longer be able to make US$ payments and declared FM on the basis that the sanctions constituted a FM event, sending a notice of suspension of performance on 10 April 2018.

RTI denied that the sanctions would interfere with cargo operations, and proposed to make payments in €, covering any currency conversion costs themselves. However, MUR refused the offer and maintained their suspension of performance. The impasse lasted two weeks, after which MUR agreed to accept RTI's payments in €, but during the suspension period, RTI had to charter alternative vessels at additional cost. RTI claimed damages in arbitration.

Underlying Decisions

RTI succeeded in its claim before the arbitrators, but its victory turned on the tribunal's finding that the RE provision was not satisfied: MUR could have accepted RTI's proposal to pay the freight in € and bear any additional costs, which the tribunal described as a *"completely realistic alternative"*.

MUR appealed to the High Court (Jacobs J) under s. 69 of the Arbitration Act 1996, and succeeded in reversing the tribunal's decision. But the judge recognised that the point was novel and granted RTI permission to appeal to the Court of Appeal.

RTI succeeded in the Court of Appeal, by a majority. Even the dissenting judge (Arnold LJ) observed that *"[o]n the facts of this case MUR's position has no merit"* (at §66).

Appellate Courts

The Court of Appeal refused permission to appeal, but the Supreme Court granted it and reversed the decision of the Court of Appeal.

It is instructive to compare the contrasting approaches between the two courts.

Males LJ took a broad, purposive approach to interpreting clause 36, and held that terms such as *"state of affairs"* and *"overcome"* are broad and non-technical terms. He suggested that clause 36 should be applied in a common-sense manner that achieves the underlying purpose of the contract. In this case, that

purpose concerned the payment obligations: that MUR should receive the correct amount of US$ in its account at the right time. Males LJ found no reason why RTI's offer to pay in €, which would ensure that MUR received the required amount of US$ after conversion, should not be considered as overcoming the state of affairs resulting from the sanctions . Newey LJ, agreeing with Males LJ in the Court of Appeal, summarised this argument effectively: if all the adverse consequences of the FM event have been completely eliminated, how can it be said that the problem has not been overcome?

The Supreme Court disagreed with the Court of Appeal's interpretation of the FM clause. Hamblen and Burrows JJSC emphasised that MUR had a clear contractual right to be paid in US$, and that it would have required clear and express wording in the contract to remove it. The focus of the enquiry in relation to the RE provision was on steps that would ensure *contractual* performance, not a *substitute* performance. It was not reasonable to expect MUR to accept non-contractual performance, nor would that have overcome the FM event.

Comment

There are three key aspects of the Supreme Court's decision that warrant closer scrutiny.

First, there is a striking difference in how the Court of Appeal and the Supreme Court

approached the construction of the FM clause. The Supreme Court treated their decision as one that would apply to most FM clauses (on the basis that even if an RE provision is not express, it will normally be implied). By contrast, the Court of Appeal unanimously considered that it was concerned with this *particular* FM clause, not reasonable endeavours or FM clauses *in general*. They also accorded more importance to the fact that the reasonableness of endeavours required of MUR had already been determined by the tribunal.

It is arguably a defect in the Supreme Court's general approach that it is insufficiently sensitive to the wording of the FM clause, which must on any view be of central importance. Nothing in the language of clause 36 expressly excluded non-contractual options, and even after the Supreme Court's decision the source of that limitation remains obscure. Construing the word *"overcome"* practically and in context, it was surely focused on the smooth continuation of cargo operations rather than strict compliance with every last letter of the contract.

But even on the Supreme Court's high level approach, an impediment to contractual performance is surely 'overcome' if the obligation in question is waived, in which case the case turned on whether waiving the right to payment in US$ amounted to more than *"reasonable endeavours"*, as to which nothing was expressly said in the FM clause, and which looks very much like the sort of essentially factual question that is best left to the tribunal of fact.

Second, the Supreme Court gave a far higher billing to commercial certainty than the Court of Appeal, arguably according commercial certainty an importance that could not be justified by reference to the parties' intention. It is a natural response to RTI's position to ask where the line would be drawn in future cases: when would acceptance of a non-contractual solution have required more than reasonable endeavours, or have been regarded as failing to overcome an impediment to performance. But RTI's particular case was one in which there was no detriment to their counterparty whatsoever, so it could be questioned why RTI should have been concerned about the potential line-drawing issues in other cases. After all, it is possible to agree a term that provides flexibility at the expense of some certainty, and that is perhaps what the parties had done in this case.

Third, the Supreme Court did not think that the RE provision should lightly be regarded as amounting to an agreement by MUR to give up its right to payment in US$, and cited the *Gilbert-Ash* principle, which holds that *"parties do not normally give up valuable rights without making it clear that they intend to do so"*. But this principle traditionally applies to statutory or common law rights rather than other contractual rights, and in any case there are equally well-established principles which the Supreme Court did not give such prominence, that say that contracts should be construed as a whole (meaning that the right to payment in US$ was from its inception to be construed subject to the RE provision) and that force majeure clauses should be construed narrowly because they generally permit the suspension or cessation of contractual performance. RTI argued that there was an inherent contradiction in the argument that MUR's right to be paid in US$ should not be removed without clear language, meaning that RTI's right to be supplied with vessels could be easily suspended or ended, even in circumstances where an ideal solution to the sanctions issue had been found.

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

"James Shirley is KC in all but name." (Chambers UK, 2025)

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Maya Chilaeva specialises in commercial and international trade disputes. She has experience in a wide range of practice areas including commodities, shipping, civil fraud, financial services, insurance, partnership and aviation. Despite her level of call, she has appeared at every level from first instance to the Supreme Court and in arbitration.

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The "F1"

MOK Petro Energy v. Argo (No. 604) Limited (The "F1") [2024] EWHC 1935 (Comm)

Authors: Simon Rainey KC & Benjamin Coffer

The judgment of Mrs Justice Dias in ***MOK Petro Energy v. Argo (No. 604) Limited (The 'F1")*** [2024] EWHC 1935 (Comm) contains an important analysis of the requirement of physical "damage" in a particular average claim. It is also one of the first reported decisions to analyse the operation of the Insurance Act 2015 where there has been a breach of warranty.

Simon Rainey KC and Benjamin Coffer appeared for the successful London market reinsurers. Guy Blackwood KC appeared for the Claimant.

The claim was in respect of a blended cargo produced by combining gasoline and methanol blend stocks on board the carrying vessel. The cargo produced by this blending process was prone to separating out into its constituent parts when cooled. This propensity to separate affected its utility and value: samples could not be cooled to the temperatures required by standard gasoline quality tests.

On the facts found by the judge, it was inevitable that the blend produced by the blending of the gasoline and methanol blend stocks in the proportions in which they were actually loaded would undergo phase separation at relatively warm temperatures and therefore would not be able to pass standard quality tests.

The Claimant argued that it nevertheless had a valid claim against its insurers: it argued that the decision by the seller as to the proportions in which the blend stocks should be loaded was a fortuity which was covered by the policy. The result of that fortuity, argued the Claimant, was to cause the blend to suffer physical damage by phase separating when cooled to low temperatures and/or by having a propensity to do so.

The Judge rejected the Claimant's claim. She found that there had been no "damage" to the cargo. "Damage" requires a physical change in state which is economically harmful. Where a blended product is defective from the outset because of the nature of the raw materials from which it is produced, there is no "damage".

The cargo had only ever existed in its defective condition: until the gasoline and methanol blend stocks were loaded, there was nothing which could be said to constitute the cargo, and therefore nothing to which the insurance could attach. The individual blend stocks were not damaged; they were merely combined to form an inherently defective product. The blended product never existed in any other state.

The claim would have failed in any event because there had been a breach of a warranty which required certification of the shore lines at the load port. The Claimant sought to rely on a certificate issued retrospectively by the survey company several years later, but the Judge held that the retrospective certification was insufficient: the certificate was required to be produced as part of the survey at the load port.

The Claimant sought to rely on section 11 of the 2015 Act to argue that a failure to comply with the certification requirement was not a breach which could affect the liability of the insurers because it was immaterial. The Judge accepted the reinsurers' argument that section 11 requires a broad enquiry as to whether compliance with the term in question could have reduced the risk of the loss which actually occurred. In this case, there was no dispute that compliance with the warranty as a whole was capable of minimising the risk of water contamination.

Read the full article here.

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

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Benjamin Coffer has a busy practice focused on shipping, insurance and commodities. He is recognised by the market as a stand-out junior and is ranked in Tier 1 by both Chambers & Partners (Shipping) and the Legal 500 (Shipping & Commodities). He was named Shipping Junior of the Year 2019 at the Chambers & Partners Bar Awards and was shortlisted in 2020 (Legal 500), 2022 (Chambers & Partners) and 2023 (Chambers & Partners). He is also recognised by the directories as a leading junior in Commodities and Insurance. Ben is increasingly appointed as an arbitrator.

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Quadrant Chambers Welcomes Three New Members

Quadrant Chambers welcomed Conor Fenton-Garvey, Jamie Farmer, and Michael Nguyen-Kim as new tenants on 1 October 2024 following successful completion of pupillage.

They are available to accept instructions and will develop their practices in line with Chambers' core areas of work.

Quadrant Chambers recognised by multiple industry awards in 2024

Award Wins


Chambers UK Bar Awards

Shipping Silk of the year - Poonam Melwani KC

Shipping Junior of the year – Ben Gardner

Shipping Set of the Year

Legal 500 Bar Awards

Shipping, commodities and aviation Set of the year

Shipping, commodities and aviation Junior of the year - Paul Henton

Nominations

Legal 500 ESG UK Awards

Environmental/Sustainability: Bar Champion of the Year – James M. Turner KC

Legal Cheek Awards

Best chambers for training

Best chambers for quality of work

Best chambers for colleague supportiveness

Best chambers for social life

The British Legal Awards 2024

Chambers of the Year

Legal 500 Middle East and North Africa Awards

English Bar in the Middle East: Commercial Set of the Year

English Bar in the Middle East: Commercial Silk of the Year – Chirag Karia KC

UAE: Set of the Year

UAE: Practice Management Team of the Year

Quadrant recognised in the 'Top 10 maritime lawyers 2024' guide by Lloyd's List

We are proud to announce that Simon Rainey KC and Luke Parsons KC have been ranked in the 'Top 10 maritime lawyers 2024' guide by Lloyd's List, with Simon securing the number 1 spot for the second time.

Simon is described as "the obvious choice to take top honours again this year", having been recommended "by several of his peers after smashing it for the winning sides in two of 2024's landmark shipping cases".

Luke is named as "one of the heavy-hitters among marine insurance barristers" and as having "particular expertise in foreign law and multijurisdictional cases".

The guide is part of Lloyd's List's 'One Hundred People 2024' and is compiled by their editorial team in conjunction with Lloyd's Law Reports.

The full set of rankings is available to subscribers of Lloyd's List, here.

Lloyd's List


Sharp v Viterra: Supreme Court elevates mitigation to a fundamental principle of damages and confirms limits on s. 69 appeals

Sharp Corp Ltd v Viterra BV [2024] UKSC 14

Authors: Chirag Karia KC & Ben Gardner

In its judgment in ***Sharp Corp Ltd v Viterra BV*** [2024] 1 Lloyd's Rep. 568, the Supreme Court declared the 'principle of mitigation' to be as fundamental as the compensatory principle in the law of damages and provided authoritative guidance on the limits within which the English Court can act on an appeal under s. 69 of the Arbitration Act 1996.

The dispute arose out of two C&F contracts for the sale of lentils and peas. The sellers shipped the goods, but the buyers failed to pay for them. The sellers landed the goods and customs cleared them before terminating the contract and re-selling in the local market. The damages issue was whether the sellers' loss should be assessed by reference to a hypothetical re-sale in the local market, or on a C&F basis.

The fundamental mitigation and compensatory principles

The Supreme Court first declared the compensatory principle and the principle of mitigation to be the two *"fundamental principles of the law of damages"*. This marks a departure from ***Bunge v Nidera*** and ***The Golden Victory***, where the focus was almost exclusively the compensatory principle.

Lord Hamblen (giving the judgment of the Court) explained that in many cases these two fundamental principles work together, with reasonable steps taken in mitigation fixing the measure of compensatory damages. He explained that, in the case of a buyer's default, the appropriate market to determine the value of the unaccepted goods was the market where *"it is reasonable for the seller to dispose of the goods"*. On the facts, *"the obvious market in which to sell the goods, and in which it would clearly be reasonable to do so, is the ex warehouse Mundra market"*.

The Supreme Court has thus elevated mitigation to a fundamental principle of the law of damages and brought much needed clarity and consistency of principle to the quantification of damages, not only in sale of goods cases but in the law more generally.

Limits on the Court's review under s. 69 of the Act

The Supreme Court held that the Court of Appeal had exceeded the bounds of s. 69 in finding that the sale contracts had been amended and that this was relevant to the damages assessment. In doing so, the Supreme Court helpfully summarised the requirements of s. 69:

- The Court may amend the question of law for which permission has been granted, provided that the substance of the question remains the same.
- The question of law must have been "fairly and squarely before the arbitration tribunal for determination".
- The Court has no jurisdiction in relation to errors of fact and no power to make its own findings of fact.
- The court can infer that the tribunal has implicitly made a finding of fact only if that inference "inevitably follows" from the tribunal's express findings.

Read the full article here.

Chirag Karia KC is a leading commercial silk with a broad commercial, international arbitration, energy, insurance, shipping and international trade practice. He appears in the Commercial Court, the Court of Appeal, the UK Supreme Court and international arbitrations. He is listed as a *'Leading Silk'* for Shipping and Commodities disputes by Chambers UK, Chambers Global, The Legal 500 UK, The Legal 500 Asia Pacific and Who's Who Legal and for Commercial disputes by Legal 500 EMEA.

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Ben Gardner has a busy commercial practice, focusing on international arbitration, energy, shipping and commodities. He is the only barrister recognised by both Chambers & Partners and Legal 500 as a leading junior across each of these fields. Recent comments include *"very clever and a very good advocate"* and *"an amazing, commercially minded barrister"*. Ben's work has extensive appellate experience, including oral advocacy before the Supreme Court and the Court of Appeal. Highlights include four cases in the Supreme Court: ***Sharp v Viterra*** (2024), ***JTI Polska v Jakubowski*** (2023), ***The New Flamenco*** (2017) and ***Versloot Dredging v HDI Gerling*** (2016).

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GAFTA Default Clause Again: What is the date of default for an anticipatory repudiatory breach of contract?

Author: Paul Toms KC

Prior to the Supreme Court's judgment in ***Sharp v Viterra***, there was another judgment in 2024 dealing with the GAFTA Default Clause and grappling with the implications of ***Bunge v Nidera***.

In ***Ayhan Sezer v Agroinvest*** [2024] EWHC 479 (Comm), HHJ Pearce, sitting as a judge of the High Court in the London Circuit Commercial Court, addressed the apparent tension between an obiter dictum of Lord Sumption in ***Bunge v Nidera*** and earlier decisions of the Courts setting out the approach to the identification of the date of default for the purposes of the GAFTA standard form default clause in the context of a claim for damages based on an anticipatory (and not actual) repudiatory breach of contract.

The issue in the case was whether the date of default in the case of an anticipatory repudiatory breach was the date on which (i) the party in breach first repudiated the contract or (ii) the last date on which the innocent party could have permissibly performed its obligations under the contract.

Agroinvest contended that it was the latter by reference to ***Bunge v Nidera***. Ayhan Sezer contended that it was the former by reference to ***Thai Maparn Trading Co Ltd v Louis Dreyfus Commdities Asia Pte Ltd*** [2011] 2 Lloyd's Rep 104.

Having considered the relevant cases, HHJ Pearce stated as follows:

- He was left in some doubt as to what date Lord Sumption was referring to in paragraph 28(3) of his judgment in Bunge v Nidera.
- He accepted that the reference to 'default of fulfilment' in Lord Sumption's judgment could mean that the parties to the contract had not fulfilled their obligations rather than one of the parties had declared an intention not to be bound by them.
- He considered that the "most natural explanation" of Lord Sumption's comments in paragraph 28(3) was that he was not purporting to identify the date of default in the case of an anticipatory repudiatory breach of contract but rather that he was simply stating that where the contractual obligations are renounced, there is non-fulfilment of the contract and, therefore, the date of default needs to be determined.

In the light of those conclusions, it was necessary for the Judge to determine what the date of default was in an anticipatory repudiatory breach situation. He analysed the position as follows:

- Once the breach was accepted, there was no remaining fulfilment obligation, the failure of which might be the basis of calculation of the date of default such that the 'date of default' had to be no later than the date of acceptance of a repudiatory breach.
- The interpretation of a 'date of default' as meaning the date of breach, whether or not anticipatory, has the "benefit of avoiding uncertainty as to the date of calculation of losses under the GAFTA default clause".
- Where the interpretation of the clause was arguable, there was a powerful argument for consistency in the law i.e. the same approach should apply to actual and anticipatory repudiatory breaches.

He, therefore, held that the date of default was the date on which the first in time anticipatory repudiatory breach occurred.

Paul Toms KC specialises in commercial and international trade disputes. He is described in the legal directories as *"very erudite and quick on his feet; he has an unparalleled eye for detail and is careful, considered and astute"* (Chambers UK) and *"a talented and effective advocate … clearly respected by judges. He quickly gets to the heart of the issues and gives first-rate advice."* (Legal 500, 2023). Paul was appointed King's Counsel in 2024.

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If it ain't broke, don't fix it - The Law Commission recommends only limited reform of the Arbitration Act 1996

Authors: Poonam Melwani KC & Claire Stockford

The recently-elected UK government has indicated that it will continue the work started by its predecessor to revise the UK's arbitration legislation.

In September 2023, we wrote about the Law Commission's final report on its review of the Arbitration Act 1996 (the Act). The report recommends only limited amendments to the Act.

The full report and draft bill can be found at https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996. In our view, the most significant proposals are:

» The introduction of a new rule on the governing law of the arbitration agreement

The current common law position is that the law governing the arbitration agreement will be the law chosen by the parties. If (as is often the case) there is no choice of law specific to the arbitration agreement, then the law chosen to govern the matrix contract will be taken as the implied choice of law to govern the arbitration agreement, unless this might render the arbitration agreement invalid, in which case another law could be deemed to govern. Where there is no choice of governing law in the matrix contract, the arbitration agreement will be governed by the law with which it is most closely associated (usually the law of the seat of the arbitration).

The Law Commission proposes that the current several step analysis be replaced by a much simpler rule: where there is express agreement as to the law governing the arbitration agreement, that law will apply, otherwise the law of the seat will apply.

» The introduction of a power for arbitrators to make an arbitral award on a summary basis

The proposed changes in this area would introduce an explicit power for arbitrators to dispose of matters before them on a summary basis. Parties are free to opt out or set limits to this power if they wish, but otherwise the report proposes that arbitrators should be able to summarily dispose of matters before them on the basis that a party has no real prospect of success of succeeding on that issue.

» No second bites at the cherry under section 67 of the Act (lack of jurisdiction)

Section 67 allows a party to challenge a tribunal's own ruling on jurisdiction through the courts and, in Dallah v Pakistan, the Supreme Court indicated that any challenge under section 67 would be by way of a full rehearing.

The Law Commission proposes moving away from the Dallah approach such that where a party making a 67 challenge has participated in the arbitration proceedings in question, the court will not entertain any new grounds of objection or any new evidence (unless it could not with reasonable diligence have been put before the tribunal), and that evidence would not be reheard, save in the interests of justice.

We concluded that the consultation process led to a balanced and welcome set of recommendations, whilst perhaps missing an opportunity to address discrimination in arbitration.

Read the full article here.

Poonam Melwani KC is Head of Quadrant Chambers. She is a commercial silk who practises across the full spectrum of commercial, insurance, energy and shipping law, providing advisory and advocacy services. Praised as *"clever, imaginative and user-friendly … diligent and fights very hard for her clients."* (Chambers UK) Poonam has been ranked as a *'Leading Silk'* over many years by the Legal Directories and is shortlisted for Shipping Silk of the Year at the Chambers UK Bar Awards 2024.

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Claire Stockford specialises in arbitration, both international commercial arbitration and investor state disputes. Claire was called to the Bar of England and Wales in 1999. Before joining Quadrant, Claire spent more than 20 years practising from the London offices of international and UK law firms, for the last seven of those years as a partner. Recently, Claire's practice has focused on renewables, including solar, on-shore and off-shore wind and battery storage. She is particularly interested in climate change disputes.
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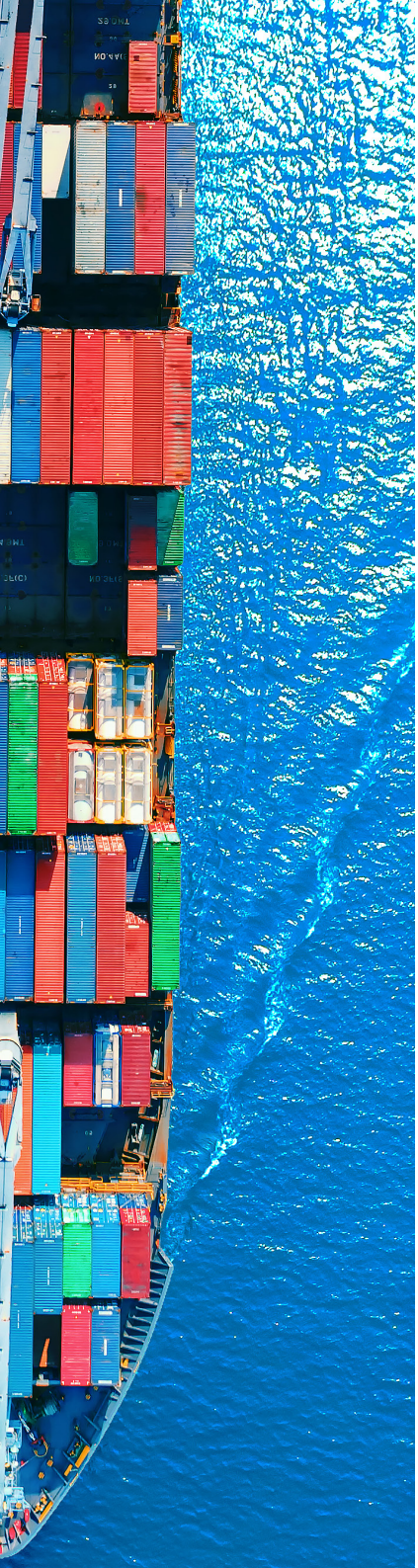

The Star Antares – Which York Antwerp Rules Appy under the Congenbill 1994 Form?

Star Axe I LLC v Royal & Sun Alliance Luxembourg S.A. and Others (The "Star Antares") [2023] EWHC 2784 (Comm)

Author: Chirag Karia KC

Introduction

The Congenbill 1994 standard form is one of the most extensively used standard form bills of lading in international trade. Clause (3) of that form provides for general average ("GA") to be *"adjusted, stated and settled according to York-Antwerp Rules ["YAR"] 1994, or any subsequent modification thereof"*. Although the YAR 1994 were followed by the YAR 2004 and YAR 2016, the received wisdom within the shipping industry and among legal commentators was that clause (3) incorporated the YAR 1994, and not the later rules; and a vast number of adjustments have been carried out on that basis.

That consensus was shattered by the Commercial Court's decision in ***Star Axe I LLC v. Royal and Sun Alliance Luxembourg S.A. and others ('The Star Antares")*** [2024] 1 Lloyd's Rep 342, in which Butcher J held that the received wisdom was wrong and clause (3) in fact incorporates the YAR 2016.

The Background

In his Commentary on the York-Antwerp Rules 2004 published in July 2004, Richard Cornah reported that the CMI had agreed that the new Rules should be given the title of "York-Antwerp Rules 2004" to make it clear that these were new rules, and not simply an amendment to or modification of the YAR 1994. He also expressed the view that the words *"or any subsequent modification thereof"* did not incorporate those later YAR versions. In 2007, BIMCO agreed that the YAR 2004 were *"a new set of Rules and not in anyway a modification or amendment of the 1994 Rules"*.

Thus, by 2018, the editors of the 15th edition of *Lowndes & Rudolf: The Law of General Average and The York-Antwerp Rules*, were able to declare that it is possible to contend that there is a binding practice in London that language such as that in the Congenbill '94 form does not incorporate the York-Antwerp Rules 2004 or later versions.

The Judgment and its Implications

In his judgment, Butcher J rejected the owners' argument that the words of clause (3) should be construed against the background of the publications summarised above.

Instead, he first construed the operative words, *"any subsequent modification"* without reference to those publications and held that those words were *"reasonably to be understood as capable of applying to a new version of the Rules."* He then held that some of those publications could not be considered because they were not reasonably available to the parties. Finally, he ruled that, if those publications could be taken into account, a reasonable person *"would consider such a statement of opinion as being neither necessarily correct nor a sure guide to how a court would construe the relevant words"*. He concluded that the YAR 2016 were *"at least a 'modification' of the YAR 1994"* and therefore the Congenbills in dispute incorporated those 2016 Rules.

Although Butcher J granted permission to appeal to the Court of Appeal, the appeal was not pursued. This decision will therefore govern unless and until another case makes it all the way to the Court of Appeal.

The consequences of this ruling are potentially far reaching and extremely disruptive. GA assessments completed under the YAR 1994 are at risk of being challenged on the basis that the wrong Rules have been applied, leading to uncertainty and potential litigation. More importantly, the 1-year time bar in Rule XXIII of the YAR 2016 – which does not appear in the YAR 1994 – poses a very serious risk of shipowners, other GA contributors and average adjusters being time barred from recovering GA contributions which they had been relying on receiving to make the payments required by the adjustment. Such a result would undermine the fundamental principle underlying the concept of GA, being that, *"that which has been given for all should be replaced by the contribution of all."*

Chirag Karia KC of Quadrant Chambers acted for the claimant shipowner in ***The Star Antares.***

Chirag Karia KC is a leading commercial silk with a broad commercial, international arbitration, energy, insurance, shipping and international trade practice. He appears in the Commercial Court, the Court of Appeal, the UK Supreme Court & international arbitrations. He is listed as a *'Leading Silk'* for Shipping and Commodities disputes by Chambers UK, Chambers Global, The Legal 500 UK, The Legal 500 Asia Pacific & Who's Who Legal & for Commercial disputes by Legal 500 EMEA.

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You can't pick and choose - A useful restatement that third parties suing an insured's insurers direct are as much bound by the terms of the insurance contract as the insured

The London Steam-Ship Owners' Mutual Insurance Association Ltd v Trico Maritime & Others [2024] EWHC 884 (Comm)

Authors: Simon Rainey KC, Natalie Moore & Joseph Gourgey

Introduction

Will a claimant, wishing to bring proceedings against an indemnity insurer abroad on the basis of the actions of its insured, be bound by the terms of the underlying insurance contract even though it is not a party to it?

This was the question considered by the Commercial Court in ***The London Steam-Ship Owners' Mutual Insurance Association Ltd v Trico Maritime & Others*** [2024] EWHC 884 (Comm) in a claim for a final anti-suit injunction and declaratory relief.

Background

The claim arose out of the sinking of the container ship the X-Press Pearl ("the Vessel") off Sri Lanka on 2 June 2021. The Vessel was insured by the London Steam-Ship Owners' Mutual Insurance Association ("the Club") pursuant to a contract of insurance incorporating the Club's Rules ("the Insurance Contract").

Various plaintiffs in Sri Lanka who asserted an interest in the cargo on board ("the Cargo Claimants") brought proceedings in May and June 2023 against both the Vessel interests and the Club.

The Club consequently applied for a final anti-suit injunction and declaratory relief, in support of its right to be sued only by a claim referred to arbitration in London, subject to the terms of the Insurance Contract.

The Decision

In considering whether to grant the injunction, the Court relied upon the legal principles derived from ***The Yusuf Cepnioglu*** [2016] EWCA Civ 386 and ***Foxton J in QBE Europe v Generali Espana de Seguros*** [2022] EWHC 2062 (Comm) and held as follows:

1. First, it was necessary to classify the right being asserted by the claimant in the foreign proceedings, by reference to English conflict of law principles. This was to ascertain whether the foreign claimant was seeking to enforce a contractual obligation derived from the contract of insurance or was advancing an independent right of recovery under a local law. In this case, it was the former since the claim was brought on the basis of the Club's liability "as the insurer" [15]. The right being asserted was therefore governed by the law of the insurance contract, namely English law.

2. As a result, the Cargo Claimants were treated as bound by the insurance contract, including the arbitration provisions. A foreign claimant cannot enjoy the benefit of the right derived from the insurance contract without complying with the associated obligation to pursue that right only in arbitration.

3. Since stages (1) and (2) led to the conclusion that the claim was linked to the enforcement of the insurance contract containing the arbitration agreement, Bright J had no difficulty in finding that the Club was entitled to be sued only by reference to arbitration in London and so granted the anti-suit injunction.

Bright J also considered the Club's claim for a declaration that it was entitled to rely upon the "Pay to be paid" clause in the Insurance Contract as against the third party Cargo Claimants. Following the House of Lords decision in *The "Fanti"* and *The "Padre Island"* [1991] 2 AC 1, he granted the declaration, stating the Club was to be under no liability to the Cargo Claimants unless and until their claims had been paid in full by the insured.

Read the full article here.

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

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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 the directories, 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 is as sharp as they come, but what really makes her stand out is that she always goes the extra mile to ensure the matter runs as smoothly as possible. A Rolls Royce service." (Legal 500, 2025)

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Joseph Gourgey has developed a busy practice across a number of Chambers' core areas including shipping, commodities and commercial disputes. He has regular experience as sole and junior counsel in both the Commercial Court and in arbitration. Joseph is ranked as a *"Rising Star"* in Shipping by Legal 500.

"Careful, diligent, with good judgement. Joseph is able to step into the breach to take over the lead in a complex multi-dispute case with no advance warning." (Legal 500, 2025)

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Hedging and Damages for Breach of Contract

Rhine Shipping DMCC v Vitol SA [2024] EWCA Civ 580

Author: Paul Toms KC

In ***Rhine Shipping v Vitol*** [2024] EWCA Civ 580, the Court of Appeal heard an appeal from the judgment of Simon Birt KC (reported at [2024] 1 Lloyd's Rep 652) in which the Deputy Judge concluded that profits on internal swaps booked within Vitol's risk management system, and which were varied in response to Rhine Shipping's breach of a voyage charter, did not reduce Vitol's damages for breach of contract. That was because (i) such swaps – being purely internal – had no effect on Vitol's financial position; (ii) a portfolio of risks which had booked a gain in respect of those internal swaps could not be treated as a separate legal entity from another portfolio of risks which had made an equal and opposite loss on those internal swaps; (iii) even if Vitol could be treated as having made a gain on the internal swaps, the gain was to be ignored for the purpose of assessing Vitol's damages on the basis that such benefit was *res inter alios acta*, being ultimately derived from physical trades concluded by Vitol independently both of Rhine Shipping's breach of contract and the underlying affected physical trades.

Before the Court of Appeal, Rhine Shipping did not seek to pursue the appeal on the basis that it had advanced its case before Simon Birt. Indeed, the Court of Appeal observed that Simon Birt's analysis was "unimpeachable" and "compelling".

Rather Rhine Shipping sought to re-cast its case arguing that the gain which Vitol had obtained as a result of the breach of contract was the avoidance of a loss-making external hedge which, but for the breach, Vitol would have concluded.

The Court of Appeal held, by reference to cases such as ***Singh v Dass*** [2019] EWCA Civ 360, that it was not open to Rhine Shipping to advance such a case on Appeal as the argument was, in substantial part, one of fact and the factual matters had not been investigated at trial still less been the subject of factual findings of the first instance judge.

Popplewell LL also expressed doubt that, had the point been open to Rhine Shipping, it would have succeeded stating at [59] that "the collateral benefit principles would place formidable difficulties in the way of Rhine's new argument".

The Court of Appeal did, however, express agreement at [12] with Simon Birt's view that had the swaps in question not been internal but rather external with a third party, the gain made under such an equivalent external hedge would have been taken into account in reducing Vitol's damages either applying the principles of mitigation or avoided loss.

Paul Toms KC specialises in commercial and international trade disputes. He is described in the legal directories as *"very erudite and quick on his feet; he has an unparalleled eye for detail and is careful, considered and astute"* (Chambers UK) and *"a talented and effective advocate … clearly respected by judges. He quickly gets to the heart of the issues and gives first-rate advice."* (Legal 500, 2023). Paul was appointed King's Counsel in 2024.

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The Polar, Piracy in the Gulf of Aden

Herculito Maritime Ltd v. Gunvor International BV (the "Polar") [2024] UKSC 2

Authors: Guy Blackwood KC

On 17 January 2024 the Supreme Court handed down judgment in ***Herculito Maritime Ltd v. Gunvor International BV*** (the "Polar") [2024] UKSC 2, which considered the ramifications of a piratical seizure in the Gulf of Aden on insurers, owners, charterers and cargo interests holding the bills of lading. The court considered whether the charter contained an implied insurance code, incorporation from the charter into bills of lading and manipulation of wording.

Guy Blackwood KC led Oliver Caplin, Twenty Essex for the successful shipowners, their H&M and their K&R underwriters instructed by Richard Neylon and Jenny Salmon of HFW (London).

Implications and contemporary relevance

For the first time, the Court identified the juridical basis on which an implied insurance code arises as a matter of construction in a contract, by which parties agree to look solely to insurers as the avenue of recourse and not to their contractual counterparty. An insurance code was "akin to a necessarily implied term and involves a similarly high threshold". That high threshold was not met. This has implications for contracts which provide that one contractual party is obliged to pay insurance premium, including charterparties, construction/ finance contracts and commercial leases.

The Supreme Court approved the decision of the Court of Appeal in ***The Product Star*** and dicta contained in ***The Paiwan Wisdom***. As a consequence, in charterparties containing an agreement to proceed via Suez and necessarily the Gulf of Aden/ Red Sea, the shipowner cannot exercise general liberties to deviate and proceed around the Cape of Good Hope in order to avoid war risks unless there has been *"a change in the nature of the piracy risk, or a change in its degree sufficient to make it qualitatively different"*.

This is of immediate contemporary relevance in the context of attacks by the Houthi movement on commercial vessels in the Gulf of Aden/Red Sea and the present deterioration of geopolitical circumstances in the Middle East more widely.

For the first time, the Court gave detailed consideration to whether a clause other than an arbitration or jurisdiction clause was incorporated from a charterparty into a bill of lading by general words of incorporation. The question to be addressed was whether the clause "directly relate[s] to shipment, carriage and delivery". Whilst not changing the law on incorporation or manipulation, the judgment contains a concise but wide-ranging analysis of the principles, which ought to limit the need to refer to older authority.

Read the full article here.

Guy Blackwood KC has a comprehensive commercial practice, which includes insurance & reinsurance, large contractual disputes, international and investment treaty arbitration, banking & finance, civil fraud, energy & utilities, commodities and shipping, shipbuilding and offshore construction.

"Andrew Guy Blackwood is the go-to silk for insurance and reinsurance counsel." (Chambers UK, 2025)

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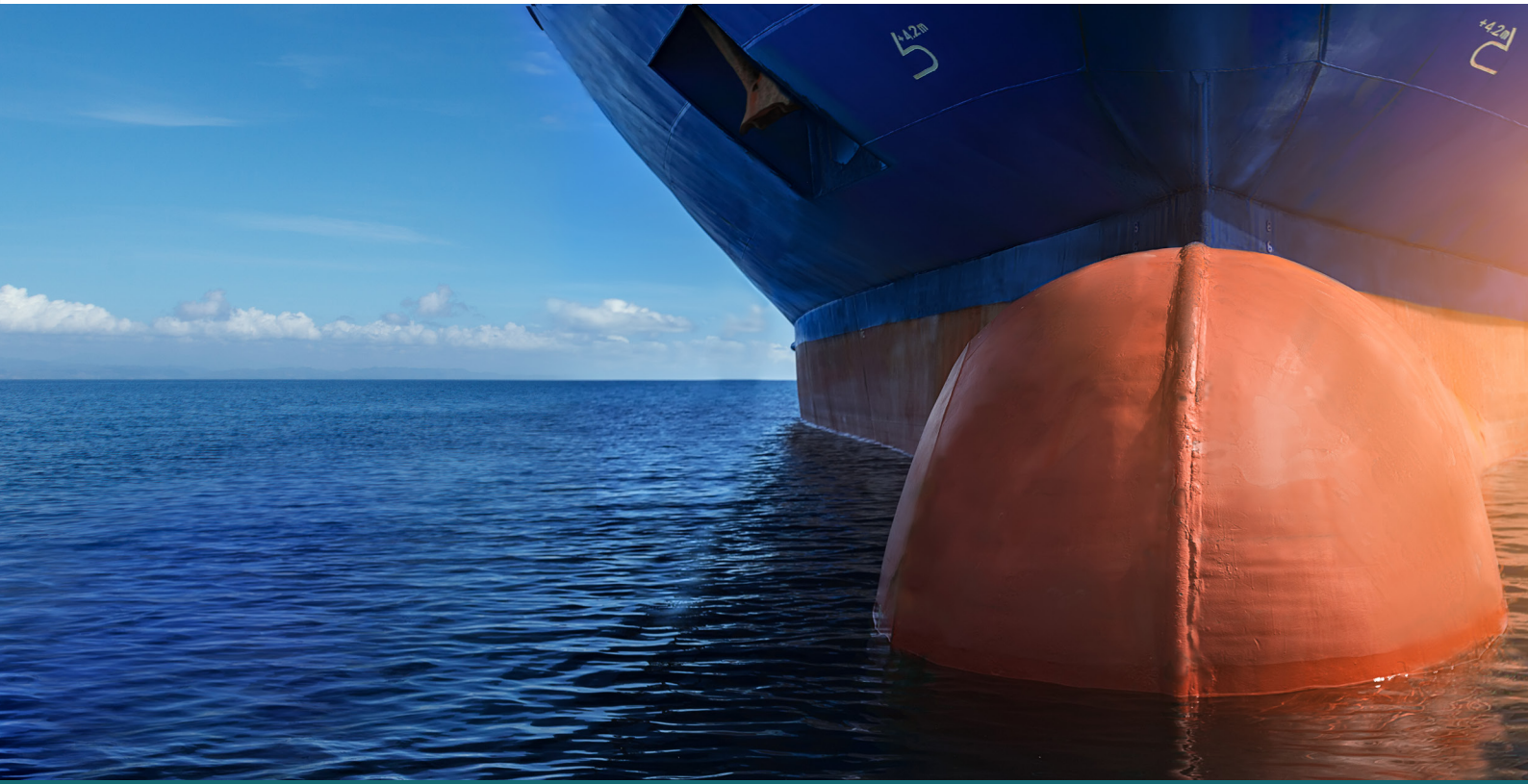

The Article III Rule 6 time bar applies to breaches after discharge under both the Hague and Hague-Visby Rules

FIMBank Plc v KCH Shipping Co. Ltd (The Giant Ace) [2024] UKSC 38

Author: Simon Rainey KC

Summary

The question whether Article III Rule 6 time bar under the Hague and Hague-Visby Rules applies to misdelivery (and other breaches) occurring after discharge of the goods has now finally been settled by the Supreme Court in *The Giant Ace*. In the words of Lord Hamblen (at [107]) the Article III Rule 6 time bar applies "to breaches of duty by the carrier which occur after discharge but before or at the time of delivery, including misdelivery" and it "may equally apply to breaches of duty which occur before loading" where the claim has "a sufficient nexus with identifiable goods carried or to be carried".

Background and procedural history

FIMbank claimed for alleged misdelivery of cargo by the carrier, KCH. The bills of lading were subject to the Hague-Visby Rules.

However, its claim was made after the Article III Rule 6 time bar had expired. It argued that its claim was nevertheless not caught by the time bar, contending that: (a) on the facts, delivery took place after discharge; and (b) as a matter of law, the time bar did not apply to claims for misdelivery occurring after discharge because the Hague-Visby Rules do not regulate a carrier's obligation to deliver cargo (as opposed to the carriage of goods by sea), and only relate to a 'period of responsibility' which ends with the discharge of cargo.

The argument failed both before the arbitrators and in the Commercial Court.

The Court of Appeal drew a distinction between the position of Article III Rule 6 under the Hague and the Hague-Visby Rules, Under the former, the operation of Article III Rule 6 was confined to liabilities arising within the "period of responsibility" (loading to discharge). Under the latter, given the clear intention the time bar to misdelivery claims whenever arising, as shown by the relevant travaux préparatoires, Article III Rule 6 of those Rules did apply to misdelivery occurring after discharge so that FIMBank's claim was time barred.

The reasoning of the Supreme Court

The Supreme Court held that under **both** the Hague and Hague-Visby Rules Article III Rule 6 operated as a time bar in respect of all breaches of duty on the part of the carrier, including misdelivery of the goods, up to and including delivery of the goods by the carrier.

The principal reasoning concentrated on the Hague Rules. The Court held that the language and purpose of Article III Rule 6 showed that it was concerned with the period up to delivery and with events occurring after discharge. Its purpose was finality, without factual niceties around when and how discharge was completed. The Court rejected the argument that all of the Rules were to be read as concerned only with the "period of responsibility".

Given the position under the Hague Rules, the position was therefore the same under the Hague-Visby Rules.

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

Read the full article here.

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

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Tuesday 16 September – 6:00 PM – Late – Evening reception

Thursday 18 September – 8:30 – 10:30 AM – Breakfast seminar

Quadrant Chambers in Piraeus

Thank you to everyone that joined us at our drinks reception and seminar in Piraeus in November 2024. It was great to be back for another year and to catch-up with lots of familiar faces.

Email marketing@quadrantchambers.com to be kept informed about our future Piraeus events.

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