SHIPPING E-BRIEF
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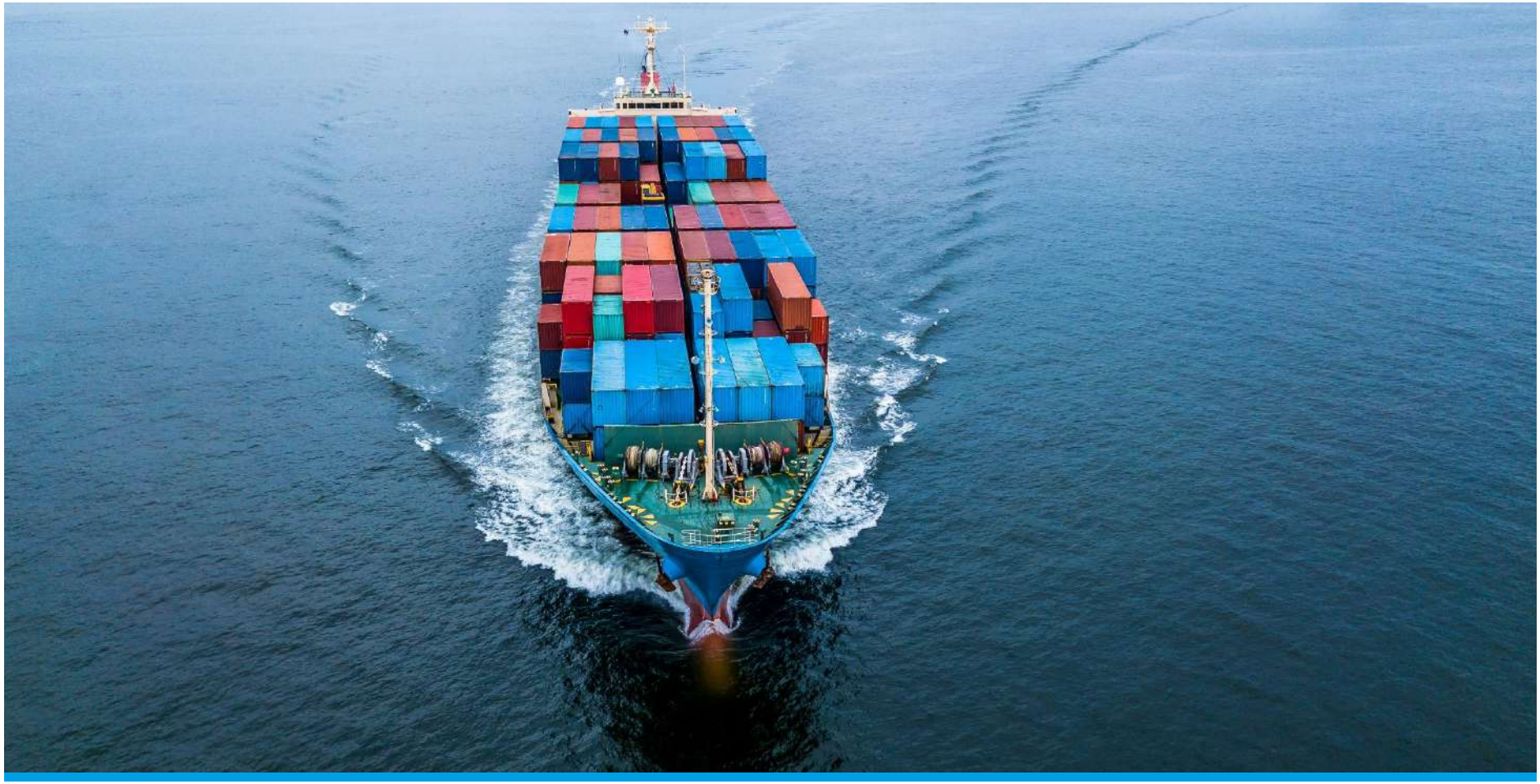

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SHIPPING E-BRIEF

COURT FINDS DEFECTIVE PASSAGE PLAN RENDERED VESSEL UNSEAWORTHY

Alize 1954 and CMA CGM SA v. Allianz Elementar Versicherungs AG and others (CMA CGM Libra) [2019] EWHC 481 (Admlty)

In this recent judgment, in the context of a claim by Owners for a contribution in General Average ("GA"), the Court considered whether a defective passage plan, prepared prior to the commencement of the voyage, rendered the Vessel unseaworthy. On the facts, it was found that that even though the Owners had in place good safety management practices, the Vessel was unseaworthy on the basis that a prudent owner would not have sent the Vessel to sea with such a defective plan, and that due diligence had not been exercised.

THE BACKGROUND FACTS

On 17 May 2011, the container vessel, *CMA CGM Libra* ("the Vessel"), grounded shortly after leaving the port of Xiamen in China.

At the time, the Vessel was about four cables west of the buoyed fairway, in an area where the charted depth was over 30m. The fairway through which the Vessel was navigating prior to the grounding was bordered by areas marked on the chart as "*Former Mined Areas*", the presence of which were noted in the chart notes and Admiralty Sailing Directions as having inhibited hydrographic surveying and, therefore, potentially containing uncharted wrecks and isolated shoals that posed a danger to deep-drafted vessels. Furthermore, a Notice to Mariners issued just five months prior to the grounding advised mariners that "*numerous depths less than the charted exist within, and in the approaches to Xiamen Gang*". It also noted that the fairway had a depth of at least 14 metres. A further Notice to Mariners issued in April 2011 also gave specific examples of depths of water outside the fairway being observed to be considerably less than the charted depth.

Prior to departure, as required by the Owners' Safety Management Systems ("SMS"), a passage plan had been prepared by the Second Officer and approved by the Master. Although some non-causative defects were noted on the plan, the fact that the Notice to Mariners identified the existence of shallower depths than those charted in the vicinity of the fairway which were not included on the plan meant that the Judge held that the passage plan was defective: a source of danger was not clearly marked as it ought to have been. In addition, although the Vessel had on board a memorandum issued by the Owners relating to the difficulties in navigating the waters around Xiamen, the passage plan did not mark or identify any "no-go" areas outside the buoyed channel. In the event, the Master decided to depart from the passage plan to navigate outside the buoyed channel; a decision which, on the facts, was found to be negligent.

The Owners claimed some US$ 13 million in GA. While 92% of the cargo interests paid their contribution in GA, the remaining 8% refused to do so and so the sum claimed in these proceedings amounted to approximately US$ 800,000. While the Owners said that the cause of the grounding was an uncharted shoal, the cargo interests claimed that the inadequacy of the Vessel's passage plan rendered the Vessel unseaworthy, due diligence had not been exercised, and that, as a result of the unseaworthiness, the Master's navigation was negligent and the grounding caused by the Owners' actionable fault.

THE ADMIRALTY COURT DECISION

Burden of proof

As a preliminary point, the Judge considered the recent decision of the Supreme Court in *Volcafe Ltd. V. Cia Sud Americana de Vapores SA* [2018] 3 WLR 2087 in relation to the burden of proof. The Supreme Court held in that case that the carrier had the burden of proving that there had been no breach of its obligations under Article III r.2 of the Hague Rules to properly and carefully load, carry and care for the cargo or that the damage had been caused by one of the exceptions. The cargo interests argued that the Owners had the burden of proving that the Vessel was seaworthy under Article III r. 1 or, if it was not, that due diligence had been exercised.

However, the *Volcafe* decision was distinguished as only being relevant to the burden under Article III r. 2. The Judge held that the conventional view, that under Article III r. 1 the burden lay on cargo interests to establish that the Vessel was unseaworthy and that the unseaworthiness was causative of the grounding, remained good law.

Unseaworthiness and causation

The Judge cited the usual test of seaworthiness set out in the *Cape Bonny* [2018] 1 Lloyds Rep. 356: whether a prudent owner would have required the relevant defect, had he known of it, to be made good before sending his ship to sea. Under Article III r. 1 of the Hague Rules, the obligation of seaworthiness attaches "*before and at the beginning of the voyage*".

Counsel for the Owners submitted that passage planning is not an aspect of seaworthiness and instead is an aspect of navigation that takes place prior to the actual passage. It was argued that a one-off defective passage plan did not amount to unseaworthiness and that a carrier's duty was discharged by putting proper systems in place to ensure that the Master and crew can prepare an adequate passage plan before the beginning of the voyage. The Judge was unable to accept this, holding that the Vessel was unseaworthy at the commencement of the voyage by virtue of the defective passage plan. He stated that concentrating on the actions of the Owners without considering those of their servants confused the issue of seaworthiness with the non-delegable duty of due diligence.

It was held that the defect in the passage plan was causative of the Master's decision to leave the fairway, which in turn caused the grounding.

Obligation of Due Diligence

The cargo interests argued that the Master and Second Officer's negligence in preparing the passage plan amounted to a failure on the part of the Owners to exercise due diligence to make the Vessel seaworthy. The question then arose whether the Master and Second Officer could reasonably have prepared an appropriate passage plan with the exercise of due diligence. The Judge held that they could have done so. The Owners submitted that due diligence had been exercised because the Owners' SMS contained appropriate guidance for passage planning. The obligation to exercise due diligence only concerned things done by the Owners in their capacity as carrier, and not by the crew in preparing the passage plan, which was a matter of navigation.

The Judge made clear that an Owner's SMS must be adequate to secure a finding that due diligence has been exercised. It was recognised that a well-documented SMS is an important tool for defending claims based on unseaworthiness. However, it is not sufficient for an Owner to demonstrate that it has itself exercised due diligence. The non-delegable nature of due diligence means that it must be shown that the servants and agents relied upon by the Owner to make the Vessel seaworthy at the beginning of the voyage must also have exercised due diligence.

COMMENT

The judgment is a further demonstration that the English Courts consider the concept of seaworthiness to be an evolving obligation which is intended to develop in line with the developments in the shipping industry. As Teare J acknowledged, before the need for passage planning to be adopted by "*all ships engaged on international voyages was recognised by the IMO 1999 Guidelines for Voyage Planning, it may have been the case that a prudent owner would not have insisted upon the preparation of an adequate passage plan from berth to berth. However, I am confident that by 2011 the prudent Owner would have insisted on the preparation of an adequate plan from berth to berth."* It remains to be seen whether the Court's finding on this and other issues will be appealed and, if so, this will be a case to watch.

Significantly, the case breaks new ground and sets a new bar for seaworthiness in finding that a defective passage plan will, of itself, render a vessel unseaworthy if a prudent owner would not have sent the vessel to sea with the relevant defect. It also provides a useful reminder of the non-delegable duty of due diligence. In particular, the decision highlights that even if an owner has in place good SMS practices, the non-delegable duty of due diligence will override it and will not absolve the owner of liability if a crewmember nevertheless fails to follow it or is negligent in its application prior to commencement of the voyage.

We would also make the following observations:

1. There is no doubt that, following this judgment, the adequacy of a vessel's passage plan will come under greater scrutiny. In light of the apparent elevation of a passage plan to a document that could render a vessel unseaworthy, some owners may give consideration to ensuring that additional checks are made on the adequacy of passage plans and may wish to consider arranging for the plans to be approved by owners' operations team, as well as by the master prior to a vessel sailing. This may, however, be a challenge in terms of practicality and resources.

2. That said, a defective passage plan of itself will not lead to liability if the defect is not causative. The burden remains on the cargo interests or charterers to demonstrate that any defects in a passage plan are causative of any loss and a careful analysis of causation will still need to be made on a case by case basis. In this regard, it is noteworthy that it may prove important going forward that navigational experts have the requisite experience of operating and working with electronic charts.

3. We would suggest that it remains questionable whether the requirement of a berth to berth passage plan is practicable and relevant in every case. The defect in the passage plan in this case concerned the immediate departure from the load port and not arrival at the eventual discharge port. As a matter of practice, it is often the case that a vessel's orders change during the voyage or final orders as to the discharge berth are only provided *en route*. In those circumstances, an issue will be whether, if a passage plan is completed during the voyage but contains a defect which is causative of a grounding, the negligent navigation defence under Article IV r. 2(a) of the Hague Rules would in fact still be available to an owner (assuming the relevant documents to complete the passage plan are on board).

4. This particular grounding occurred during a time of transition from paper to electronic charts. While it was found that the Vessel did have the means to prepare a non-defective passage plan, the requirement now to carry electronic charts may aid accurate passage planning.

5. It is noteworthy that the cargo interests argued a number of other points relating to bridge management, incompetence of the Master and fatigue. These were unsuccessful and this suggests that it remains a challenge for cargo interests to prove such issues, particularly where owners do have adequate systems in place.

6. Finally, this case also highlights the importance of obtaining witness evidence immediately after a casualty and demonstrates that witness evidence given several years after the event has little value in comparison. It also gives an insight into the Admiralty Judge's views on and encouragement of the use of Nautical Assessors for issues of passage planning and navigation in GA cases arising from groundings.

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COURT OF APPEAL FINDS CARRIER COULD RELY ON FIRE DEFENCE

(1) Glencore Energy UK Ltd and (2) Glencore Ltd v. Freeport Holdings Ltd (Lady M) [2019] EWCA Civ 388

The Court of Appeal has upheld the Commercial Court decision in this case and found that the carrier could rely on the 'fire' defence in Article IV Rule 2(b) of the Hague-Visby Rules even where the fire was caused by an act of barratry, save where the vessel was causatively unseaworthy in breach of Article III Rule 1.

THE BACKGROUND FACTS

The *Lady M* was on a voyage from Russia to the USA when, on 14 May 2015, a fire started in the engine room. The Owners engaged salvors and the vessel was towed to Las Palmas, Spain, where general average was declared.

The cargo interests ("Glencore"), as owners of a cargo of approximately 62,250mt of fuel oil carried on board the vessel at the relevant time, sought to claim from the Owners of the vessel ("Owners") the sums incurred to the salvors, as well as the costs of defending the salvage arbitration proceedings.

Glencore alleged that the Owners had breached the contracts of carriage contained in four bills of lading issued for the cargo, alternatively in bailment. The contracts of carriage were subject to the Hague-Visby Rules and Glencore alleged that the Owners had failed to comply with Article III, Rules 1 and 2 of the Hague Visby Rules, the relevant sections of which read:

> *"1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:*
>
> *(a) Make the ship seaworthy;*
>
> *(b) Properly man, equip and supply the ship;*
>
> *...*
>
> *2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.*

Glencore submitted that the fire was started deliberately, and therefore with intent, by one or more members of the crew and consequently the fire was an act of barratry. As a result, Glencore argued that the Owners could not rely on the fire exception in Article IV Rule 2(b) of the Hague-Visby Rules *("Fire, unless caused by the actual fault or privity of the carrier"*), nor could they rely on Article IV Rule 2(q) *("Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier"*).

The Owners positively pleaded that the fire had been started by the Chief Engineer, who was suffering from extreme emotional stress or illness due to the death of his mother or from some other unknown mental illness. They argued that, despite this, they were entitled to rely on the exemptions under Article IV Rules 2(b) and/or (q).

THE COMMERCIAL COURT DECISION

Two preliminary issues were before the Commercial Court for determination:

1. Whether, on the basis of the agreed and assumed facts, the conduct of the Chief Engineer constituted barratry; and

2. If so, whether the Owners were precluded from relying on Article IV Rules 2(b) and/or 2(q) of the Hague-Visby Rules.

The Commercial Court concluded that whether or not the conduct of the Chief Engineer constituted barratry depended on further facts about his relevant state of mind but that, in any case, this issue was not determinative of whether the Owners were exempt from liability for the fire under Article IV Rule 2 (b) or (q).

As to that, the Commercial Court held that, in this case, the Owners could rely on Article IV Rule 2(b) even if the fire was caused deliberately or by barratry, but that they could not rely on the exemption under Article IV Rule 2(q).

THE COURT OF APPEAL DECISION

Glencore appealed on two issues:

1. Whether the defence under Article IV Rule 2(b) was available where fire was caused by an act of barratry (Issue 2)

On this point, the Court of Appeal unanimously upheld the Commercial Court decision that the fire defence is available to a carrier even where the fire is caused by an act of barratry by the Master or the crew.

In doing so, Lord Justice Simon, who gave the leading judgment, gave some useful guidance on how to approach the interpretation of the Hague-Visby Rules. He noted that when interpreting the meaning of the words in the Hague-Visby Rules, if a word or expression had a universally accepted meaning, there was a reasonable presumption that it was used in the Hague-Visby Rules with that meaning. Beyond that, the language used must be given its plain meaning.

Applying this approach, the Court of Appeal noted that the word 'fire' was not a "term of art" (such as, for example, "barratry") - it was a simple word. The Court noted that, in any event, there was no pre-Hague Rules judicial interpretation of 'fire' as a term which had a clearly assigned meaning that excluded fire caused by the crew. Therefore, it must be presumed that it was used in Article IV Rule 2(b) in the same way.

Glencore's argument failed because the meaning of fire was plain. It was not, therefore, necessary to "look behind" the word to ascertain its true meaning or find a feasible alternative, for example by referring to pre-existing case law, common law principles and the *travaux preparatoires* of the Hague Rules as an aide to interpretation of the meaning of the word 'fire'. The Court also noted that Glencore's argument necessarily implied an additional qualification to the words of the fire exception to exclude reliance if caused by "*... the fault or neglect of the crew*" and there was no proper basis for implying such words into the provision.

Furthermore, the Rules contained no qualification as to how the fire had started or who was responsible. It only needed to be determined if the Owners were privy to or at fault for the fire occurring. As it was common ground that an act of barratry, by its very meaning, occurs without the actual fault or privity of the carrier, the Court of Appeal therefore rejected Glencore's appeal on this issue. As there had been no prior causative breach of the Owners' obligations under Article III.1, the Owners were entitled to rely on the exception.

2. That on the basis of certain assumed facts that had been established in the first instance trial, the actions of the crew constituted barratry and that it was not necessary to establish the state of mind when the act of barratry was committed (Issue 1).

As a result of the Court of Appeal's decision on Issue 2 as outlined above, the determination of whether barratry had in fact been committed and what the test for it was fell away.

However, the Court of Appeal stated that the Commercial Court had erred in allowing the Owners to hypothesise on an unpleaded assumption about whether assumed insanity of the crew member who started the fire would prevent his conduct from being deemed barratry, because insanity had not been pleaded by the Owners.

COMMENT

This is a welcome decision for carriers, confirming that the Article IV Rule 2(b) exception will still be available to them, even where a fire is caused by an act of barratry, unless the vessel was causatively unseaworthy at the time.

The case is also a reminder that, where possible, the English Courts will seek to give words in international conventions their plain meanings, except in certain cases where the word or phrase can be deemed a “term of art” (a word that has a particular judicial meaning). It also reinforces the general reluctance of the Courts to imply terms into contracts unless absolutely necessary.

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COURT CONFIRMS BARECON CLASSIFICATION OBLIGATION IS ABSOLUTE

Silverburn Shipping (Iom) Ltd v. Ark Shipping Company LLC (M/V Arctic) [2019] EWHC 376 (Comm)

The Court has held that the obligation to maintain the vessel in class under a BARECON '89 form was both an absolute obligation and a condition of the bareboat charterparty. In doing so, it disagreed with the Tribunal's findings, which had resulted in the Tribunal refusing to grant the Owners an injunction requiring delivery up of the vessel on the grounds of the Charterers' breaches of the bareboat charterparty.

THE BACKGROUND FACTS

On 17 October 2012, the Owners bareboat chartered the vessel to the Charterers under an amended standard BARECON '89 form for a period of 15 years. The vessel was delivered into the charter service on or about 18 October 2012. She arrived at the Caspian port of Astrakhan for repairs and maintenance on 31 October 2017. She was classed by Bureau Veritas (BV), but her class certificates expired on 6 November 2017, before she entered dry dock for repairs.

On 7 December 2017, the Owners sought to terminate the Charterparty because, among other things, the vessel's class had expired. They alleged that the Charterers were in breach of the classification obligation in Clause 9A) of the charterparty, which provided as follows:

> *9. Maintenance and Operation*
>
> *The Vessel shall during the charter period be in the full possession and at the absolute disposal for all purposes of the Charterers and under their complete control in every respect. The Charterers shall maintain the Vessel, her machinery, boilers, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice and, ~~except as provided for in Clause 13 (I),~~ they shall keep the Vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times. The Charterers to take immediate steps to have the necessary repairs done within a reasonable time failing which the Owners shall have the right of withdrawing the Vessel from service of the Charterers without noting any protest and without prejudice to any claim the Owners may otherwise have against the Charterers under the Charter.*

The Owners also alleged unpaid hire and a failure to maintain the vessel in a good state of repair. They demanded the return of the vessel, but the Charterers resisted that demand and denied any breach, contending that the charterparty remained alive. They argued that the Owners were well aware that the vessel was undergoing scheduled maintenance works. The vessel had arrived at the dock prior to expiration of the documents and representatives of BV were constantly monitoring the vessel during her repairs and maintenance works. The vessel was not out of class. Upon completion of the works, the BV surveyors would undertake a final inspection and a new set of documents would be issued accordingly.

THE TRIBUNAL'S DECISION

The Owners sought a final injunction requiring delivery up of the vessel from the arbitral Tribunal, but the Tribunal dismissed the application. The Tribunal equated the Charterers' obligation to maintain class with the obligation to maintain and repair the vessel. These were not absolute obligations, but only obligations to exercise reasonable diligence.

The Tribunal further held that the obligation to maintain class was not a condition of the charterparty contract which, if breached, would allow the Owners to immediately terminate the charterparty for breach of condition and/or repudiatory breach of contract by the Charterers. Rather, it was an intermediate condition that would allow the Owners to terminate only if the breach was serious enough to deprive them of the substantial benefit of the charterparty. If the Charterers were in breach of their obligations to maintain/repair the vessel and to maintain her class, they had to take immediate steps to carry out the necessary repairs and reinstate the class certificates within a reasonable time, failing which the Owners could then withdraw the vessel from service. However, the burden of proof was on the Owners to establish that the Charterers were in breach of their obligations as of 7 December 2017. On the evidence, the Tribunal did not think that the Owners had established this.

The Owners appealed.

THE COMMERCIAL COURT DECISION

The Court has allowed the Owners' appeal. The Court distinguished between the maintenance obligation, which was one of reasonable diligence, and the classification obligation, which was an absolute one to keep the vessel with unexpired classification of the relevant class and with other required certificates in force at all times. The two obligations were different in quality. There was a distinction to be drawn between a vessel's physical condition and her classification status. A vessel's class was a matter of status and the classification obligation was essentially documentary. Unseaworthiness was not a matter of status. The Charterers could be in breach of the classification obligation without being in breach of the maintenance obligation. The Court stated that the reference to "*other required certificates*" in Clause 9A) reinforced the fact that the classification obligation was not targeted at maintenance. While the two obligations were related, they were not part and parcel of a single obligation, as the Tribunal appeared to have found.

The Court further found that the classification obligation was a condition of the bareboat charterparty. The obligation had an obvious temporal element, because the vessel's class had to be maintained "*at all times*". Either the vessel was in class or it was not. Only one kind of breach was possible. The obligation was clear and absolute with a fixed time element, suggestive of a condition. The Charterers' obligation to keep certificates valid was an integral feature of a bareboat charter because loss of class could have potentially adverse consequences not only for the parties but also third parties and regulatory authorities. It could affect insurance, ship mortgage and flag. Additionally, damages for breach of the classification obligation might be difficult to assess.

The Court distinguished non-payment of hire under a time charterparty. Unlike breach of an obligation of punctual payment, which may be very trivial or minor, breach of the obligation to maintain the vessel in class was likely to be serious. To treat the classification obligation, therefore, as a condition would not risk allowing trivial breaches to have disproportionate consequences.

COMMENT

This decision reflects the importance of a vessel's classification status under a bareboat charter because of the serious consequences that can result from loss of class.

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FOUR ISLAND: A TALE OF TWO AGREEMENTS AND ONE ARBITRATION CLAUSE

Sonact Group Ltd v. Premuda SpA (Four Island) [2019] EWHC 3820 (Comm)

The Court had to consider whether a charterparty arbitration clause also applied to a settlement agreement subsequently entered into by the parties. The issue arose as the settlement agreement did not contain an express dispute resolution clause, nor words incorporating the charterparty arbitration clause. Nonetheless, the Court held that the charterparty arbitration clause did apply to the dispute that had arisen under the settlement agreement.

THE BACKGROUND FACTS

Sonact Group Limited ("Charterers") chartered the vessel *Four Island* from her owners, Premuda Spa ("Owners"). The charterparty was subject to English law and, amongst other things, provided:

> *"Arbitration.*
>
> *Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitration there in force, before a board of three persons…"*

Part I of the charterparty specified London.

The Owners asserted a claim for demurrage and heating costs against the Charterers and, following an exchange of emails, the Charterers agreed to pay the Owners US$600,000 in settlement of all of the Owners' outstanding claims under the charterparty. However, the Charterers did not make payment and the Owners commenced an arbitration pursuant to the charterparty arbitration clause. The Owners' notice of arbitration referred to *"a number of claims against charterers, including a demurrage claim, a claim for heating costs, a claim for a penalty, a claim for interest and costs, plus various other matters"*.

The Charterers did not appoint an arbitrator and a second arbitrator was appointed in accordance with the charterparty arbitration clause (not quoted) and the Tribunal was completed, in due course, by the appointment of a third arbitrator.

THE TRIBUNAL'S DECISION

The Owners claimed the sum of US$600,000 i.e. the amount agreed in settlement of all their outstanding claims under the charterparty. The Charterers alleged that the Tribunal did not have jurisdiction to determine the Owners' claim. Among other things, the Charterers contended that, as the settlement agreement did not provide for London arbitration, the Tribunal's appointment could not extend to the Owners' claim for the agreed settlement sum.

The Tribunal found in favour of the Owners. The Tribunal concluded that *"given the nature of the settlement negotiations and the manner in which they had been carried out"*, it was *"the objective but unexpressed intention of the parties that the* [settlement] *agreement should be governed by the same provision for dispute resolution as the original charterparty under which the claims arose"*. The Tribunal reached this conclusion as:

a. In circumstances where the negotiation and agreement of demurrage claims under voyage charterparties/final hire statements under time charters was part and parcel of operating and chartering ships, the industry would be astonished if the dispute resolution provision in the governing charterparty did not apply;

b. On the Charterers' argument, a party would have to take their chances and attempt to establish the jurisdiction of the courts in a country that might or might not be appropriate to the claim in issue. In the Tribunal's view, this would be an extraordinary result; and

c. In the absence of a separate standalone agreement, agreement as to a different dispute resolution clause would have to be expressly agreed and, unless expressly raised in the exchanges, could not be inferred.

As the Charterers had not advanced a defence on the merits, the Tribunal then went on to award the Owners the sum claimed.

THE COMMERCIAL COURT DECISION

The Charterers appealed, alleging that the Tribunal did not have substantive jurisdiction to determine the Owners' claim. The Court, however, dismissed the Charterers' challenge. The Court's reasoning was as follows:

a. Although described as a "settlement agreement", in reality, the exchange of emails was no more than an informal and routine arrangement to finalise sums due under the charterparty. On this basis, the Court agreed with the Tribunal that it was obvious that the parties intended the charterparty arbitration clause to apply in the event that the Charterers did not pay the agreed amount to the Owners;

b. Whilst the Charterers' agreement to pay the Owners the sum of US$600,000 was a new cause of action under a new and binding agreement, the wording of the charterparty arbitration clause was wide enough to encompass the Owners' claim for the agreed sum;

c. In the Court's opinion, it was inconceivable that the parties intended that, in the event of non-payment by the Charterers, the Owners would be unable to pursue a claim in arbitration and would instead have to commence court proceedings; and

d. While the notice of arbitration did not expressly refer to the Owners' claim for the agreed sum, it was effective to refer the claim for the agreed sum to arbitration. In particular, commercial parties could properly regard the agreed sum of US$600,000 as a claim for demurrage and heating costs.

COMMENT

This judgment is a useful reminder of the potential dangers, and additional costs, which can arise in the absence of an express jurisdiction clause in a settlement, or, indeed, any agreement. While in this case the Court decided that the charterparty arbitration clause applied to the Owners' claim under the settlement agreement, this will not always be the case, as each matter will turn on its own facts.

Accordingly, to avoid disputes, parties should look to include express wording that sets out how disputes are to be determined in their settlement (and other) agreements.

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WHETHER SEIZURE OF CARGO BY LOCAL CUSTOMS AUTHORITIES AMOUNTED TO "GOVERNMENT INTERFERENCE" UNDER CHARTERPARTY

Sucden Middle-East v. Yagci Denizcilik Ve Ticaret Limited Sirketi (MV Muammer Yagci) [2018] EWHC 3873 (Comm)

This recent Commercial Court decision has held that the seizure of a cargo by local customs authorities at the discharge port, leading to a delay in discharge, amounted to a "*government interference*" within the relevant charterparty provision, with the consequence that time lost would not count as demurrage.

THE BACKGROUND FACTS

The receiver of a cargo of sugar for discharge in Algiers, Algeria, submitted import documentation to the Annaba Customs Directorate (the "ACD"), part of the Algerian Ministry of Finance, for the clearance and payment of customs duties on the cargo. Upon inspection, the ACD found a discrepancy between the invoice price of the cargo and the market price, which allegedly breached Algeria's Foreign Exchange regulations.

In response, the ACD seized the cargo under powers given to it under Algeria's customs laws and regulations. As a result of the ACD's decision to seize the cargo, the discharge of the cargo was delayed by four and a half months. The seizure of the cargo involved not only the ACD, but also the General Director of Customs, a high ranking government officer, and Algeria's Public Prosecutor.

The Charterers sought to rely on Clause 28 of the Sugar Charter Party 1999 Form, which has a side heading "Strikes and Force Majeure" and which provides that time lost will not count as laytime or time on demurrage in a number of circumstances, one of which is "*government interferences*".

In arbitration, the Tribunal found in favour of the Owners, concluding that seizure of the cargo by the ACD could not be construed as "*government interference*". The Charterers appealed.

THE COMMERCIAL COURT DECISION

There was no dispute that those involved in the seizure of the cargo were government entities. Accordingly, the focus of the appeal was on the meaning of "*interferences*". The Court noted that an ordinary meaning of the word included an intervention in this specific form, that is, the seizure of a cargo.

Reference was made to the 2012 decision in *The Ladytramp*, which set out a number of examples of activities carried out by a port authority that would not or might not amount to "*government interferences*". This list included a port authority ordering a vessel off a berth for the reason of poor weather or in order to accommodate the berth or terminal operator's desire to give priority to another vessel.

In distinguishing the ACD's actions in this case, the Court considered that seizure of a cargo by a government authority could not be treated as a routine occurrence. The Court disagreed with the Tribunal's finding that the seizure of the cargo following the submission of false documents was expected and was, therefore, an ordinary action. In the usual course of things, cargo is not seized and on the facts of this case and, in particular, in light of the finding that the seizure was by a State revenue authority acting in a sovereign capacity, the seizure fell within Clause 28.

The Court also rejected the argument that the submission of the false documents caused the delay. Rather, it was the ACD's decision to seize the cargo that resulted in the delay.

The Court noted that the clause's side heading incorporated the words "*force majeure*". However, force majeure was not a term of art and the words simply acted as the label for a list, with the list including a mixture of matters. The list informed the meaning of the heading rather than the other way around.

COMMENT

The Court gave the words "*government interferences*" their natural and ordinary meaning. In doing so, it highlighted that its decision was concerned only with the seizure of a cargo by a government entity. Nonetheless, the Court noted that it might not always be necessary to have the involvement of high level government agencies and officers in the seizure in order for Clause 28 to apply. The Court said it could not have been intended that the parties should have to ask how high up the chain of government command the action was authorised or would need to be authorised in order to come within the clause. Query, however, whether a government entity acting in a purely administrative capacity might come under Clause 28.

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COURT DECLINES TO EXTEND RULE PRECLUDING SET-OFF AGAINST FREIGHT TO FREIGHT FORWARDERS

Globalink Transportation and Logistics Worldwide LLP v. DHL Project and Chartering Ltd [2019] EWHC 225 (Comm)

The Commercial Court has confirmed that the rule in *The Aries*, which precludes set-off against freight, does not extend to sums payable to a freight forwarding agent for arranging carriage under a freight forwarding contract.

THE BACKGROUND FACTS

In 2014, the Chinese energy giant Sinopec was engaged for the modernisation of the oil refinery at Atyrau in Kazakhstan, near where the Ural river drains into the Caspian Sea. Sinopec engaged DHL to arrange the transport of refinery units from China.

DHL sub-contracted Globalink for the sea and road leg from the Black Sea port of Novorossiyk through the Ural-Caspian canal to the refinery. Their agreement was entitled "*Freight-Forwarding Services Contract*", Globalink was referred to as the "*Forwarding Agent*", and they were to be liable for any delay in delivery.

In October 2014, two barges carrying the units launched from Novorossiysk. One barge failed to arrive at the destination because the water level in the Ural-Caspian canal was too low for its draught. To make matters worse, on 23 November 2014, the Ural-Caspian canal closed for winter, so some of the cargo had to be put into storage. Globalink were only able to complete the carriage to the destination when the canal re-opened the following spring.

As a result of this delay, DHL refused to pay the final two instalments of the contract price due to Globalink. Globalink brought a claim for those sums plus the winter storage charges, amounting to US$ 1,647,780. DHL contended that they had a counterclaim of US$ 2,364,976.05, being the costs they incurred in excess of what they would have paid to Globalink if the original agreement had been fulfilled.

Globalink applied for summary judgment, relying among other things on the rule precluding the set-off of counterclaims against the payment of freight under voyage charterparties.

THE LEGAL ISSUES

Defendants to claims for money due under commercial contracts often resist payment on the basis that they have a counterclaim, which they wish to set-off against the sums due. English law generally permits this where a claim and cross-claim are so closely connected that it would be unjust to enforce one without taking the other into account.

One notable exception is the long-established principle that a defendant is not entitled to raise any counterclaims it may have in order to reduce the freight payable under a contract of carriage.

The courts have taken a strict approach in only applying this rule to claims for freight payable under a contract of carriage. It does not, for example, extend to claims for hire under a time charterparty. However, while the rule is most widely known for its application to freight payable under voyage charterparties, it is not limited to the carriage of goods by sea and has been held to apply to the carriage of goods by road and by air.

It has also been held, in *Britannia Distribution v Factor Pace* [1998] 2 Lloyds Rep 420, that if a freight forwarder has acted as agent in entering a contract of carriage with a carrier and that carrier charges freight, then the forwarder is entitled to claim the sums due for that freight from his principal and the rule against set-off applies.

In this case, Globalink argued that the sum charged by Globalink to DHL was charged in consideration for transporting the equipment from one place to another. It was, therefore, properly described as freight, such that the rule in *The Aries* should apply.

DHL argued that the rule in *The Aries* only applies to contracts of carriage and that this was not such a contract. It was instead a contract to arrange carriage and was not subject to the rule against set-off.

THE COMMERCIAL COURT DECISION

The Court's starting point was to consider the nature of the contract between the parties. It noted that the contract described itself as a freight forwarding agreement, not a contract of carriage.

He stated that "*the essential nature of [Globalink's] obligation is not an obligation to carry, but an obligation to procure that carriage is achieved by others.*" The fact that Globalink could incur liability for delayed delivery of the cargo did not mean that Globalink was a carrier, nor that Globalink accepted an obligation to deliver on a particular date. It just meant that if Globalink did not arrange for others to deliver the cargo by that date, it would incur a penalty to DHL.

The Court considered that applying the no set-off rule in this case would represent an extension of the existing law, increasing the ambit of the rule beyond contracts of carriage and beyond freight in the narrow sense established by the authorities.

It concluded that it was not open to the Court to extend the rule to cover the services provided by a freight forwarding agent, when those services were simply to *arrange* the carriage of goods.

COMMENT

This decision confirms that the rule preventing set-off against freight only applies in cases of payment of freight under a contract of carriage. It will not assist freight forwarders who merely contract to arrange the carriage of goods by another.

It is advisable for freight forwarders who wish to avoid deductions being made from payment due to them to insert clear wording in their contracts, requiring the payment of all sums due in full and prohibiting their counterparty from making any deductions or set-offs against the sums that are payable.

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COURT UPHOLDS WORLDWIDE FREEZING ORDER IN SHAM CHARTERPARTY DISPUTE

Manchester Shipping Ltd v. (1) Balfour Worldwide Ltd & (2) Mr N V Sochin [2019] EWHC 194 (Comm)

The underlying dispute in this case involved allegations of fraud and sham charterparties. The English Court upheld a Worldwide Freezing Order ("WFO") granted against the Defendants' assets in an application brought by the Claimants ("Manchester"). The WFO was granted in the context of Manchester's claim that the Defendants had fraudulently conspired to divert hire of over US$5.5 million under several charterparties.

The Court dismissed arguments that Manchester had not suffered any damage, that it did not have a good arguable case capable of supporting the WFOs and/or that the WFOs were neither just nor convenient. The Court also dismissed allegations that Manchester was guilty of breaching its duty of full and frank disclosure.

THE BACKGROUND FACTS

Mr Sochin ("S") and his former business partner, Mr Branov ("B"), jointly operated an international shipping business through a web of companies. S and B fell out and there were disputes between them which resulted in legal proceedings in various jurisdictions.

Manchester was one of the companies S and B used to charter vessels to third parties. The hire received (less a small commission) would be remitted by Manchester to companies forming part of the joint business.

There were three vessels involved in this dispute – however, the contractual chain was not clear. It was Manchester's case that the charter chain was undocumented. The vessels were bareboat chartered to Ark Shipping ("Ark"). Ark chartered the vessels to Silverburn, which in turn chartered them to Manchester. Manchester would then let the vessels to third parties at a market rate. Manchester was liable to remit 99% of any hire received to Silverburn, the balance being Manchester's commission.

Manchester said that it let the vessels to KGK under a series of written charterparties and that US$5.5 million in hire remained unpaid. Manchester contended that it was not paid hire by KGK because the Defendants wrongfully sought to divert those payments to Balfour by fraudulently procuring KGK and Balfour to enter into sham charters, the material terms of which mirrored those of the Manchester charters ("the Balfour Charterparties").

The Defendants argued that Ark, rather than Silverburn, chartered the vessels to Manchester. They produced written charterparties in support of their contention. The Defendants claimed that the hire ought to have flowed up from KGK to Manchester and then to Ark. They said that B wanted to avoid this outcome as Ark was now controlled by S and so B sought to ensure that the hire flowed instead to Silverburn, which he controlled.

The Court noted, however, that the Defendants had previously argued that the hire was payable to Balfour pursuant to the concocted Balfour Charterparties and Balfour had, in fact, brought proceedings in Russia against KGK. The Defendants later admitted that the Balfour Charterparties were a sham authored by S.

Manchester intervened in the Russian proceedings and then brought separate claims against KGK for the unpaid hire. Manchester then assigned its rights of action against KGK to a Russian entity, Morshelf, under a deal whereby Morshelf would remit to Manchester the first $2.3 million of any sums recovered from KGK, and retain any further recoveries.

The English proceedings were concerned with the KGK claim and the WFOs were granted in respect of that claim. The Defendants applied to discharge the injunctions, which had been granted *ex parte*.

THE COMMERCIAL COURT DECISION

i. No loss

The Court considered the argument that Manchester had suffered no, or no substantial, loss. There was no dispute that Manchester had a good arguable case on liability, the Defendants having admitted that they concocted the Balfour Charterparties. The critical issue was whether Manchester had a good arguable case that it had suffered loss and damage in the amount of the hire (accepting that credit would be given for any sums that were received from Morshelf).

The Court found in favour of Manchester. There was a good arguable case that the Defendants' conspiracy to divert payment of the hire to Balfour had caused Manchester not to be paid the sums due by KGK under the relevant charters. Specifically, a backdated letter by S to KGK stating that hire was due to Balfour under the fabricated Balfour charterparties had resulted in KGK refusing to pay hire to Manchester. The Court found that the ordinary risk of enforcing a straightforward debt claim against a counterparty is very different to the risk that materialised as a result of the Defendants' conduct. But for the Defendants' interference, KGK might well have paid the hire to Manchester.

The Court rejected the argument that Manchester had only suffered loss in respect of 1% of the hire, which it was entitled to retain as commission. The full hire (not just the 1% commission) was payable to Manchester and accordingly, it was entitled to sue for the full amount. The arrangements it made in respect of any onward payment were not relevant to the question of its loss.

ii. Material non-disclosure

The Defendants also submitted that the WFO should be discharged on the grounds that Manchester committed multiple and serious breaches of its duty of full and frank disclosure to the Court when it applied for the WFO.

The Court revisited the principles applicable in considering whether there was a material non-disclosure. The test is whether the matter not disclosed would be relevant to the exercise of the Court's discretion. A fact is material if it would have influenced the Court when deciding to make the order or deciding on its terms. Among other things, the applicant has a duty to: disclose all facts which reasonably would or could be taken in to account by the Court; investigate the facts and fairly present the evidence to the Court; draw the Court's attention to significant factual, legal and procedural aspects of the case and; draw the Court's attention to weaknesses in his case and make sure the Court understands what may be said on the other side.

The Court, however, dismissed the application and was critical of the Defendants. Neither the evidence nor the written submissions served by them identified with precision the facts and matters alleged not to have been disclosed. The Defendants took a scattergun approach of making a large number of generalised complaints and this was deemed unsatisfactory.

COMMENT

This is another shipping case involving fraud, which is interesting because it confirms that Manchester was entitled to claim the whole of the hire due from KGK – not just the 1% that it was entitled to keep by way of commission. It also provides a useful reminder of the approach taken by the English Courts in relation to WFOs and, in particular, allegations of non-disclosure. The decision illustrates the English Courts' intolerance of parties who engage in fraudulent activities and subsequently seek to hide behind technical legal and procedural arguments.

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DOCUMENTS OBTAINED IN CRIMINAL INVESTIGATION DISCLOSABLE IN CIVIL PROCEEDINGS

Omers Administration Corporation v. Tesco PLC [2019] EWHC 109 (Ch)

This case is the latest in a string of recent decisions on disclosure and privilege arising in a regulatory context. The Court held that documents obtained by a party under investigation by the Serious Fraud Office (SFO), under S.2 of the Criminal Justice Act 1987 (CJA), were disclosable in civil proceedings, despite objections of confidentiality raised by third parties.

THE BACKGROUND FACTS

The Claimant brought an action against the Defendant for compensation under the Financial Services Act 2000 (FSMA) for losses that they had incurred due to the Defendant's false and misleading statements to the market. It was these circumstances that also gave rise to the SFO's investigation, which the Court found was of direct relevance.

The SFO provided the documents to the Defendant for the purpose of negotiating a deferred prosecution agreement. Strict conditions were imposed by the SFO with regard to the use of the documents in order to protect the people who provided the documents. The documents consisted of: i) documents provided to the SFO by third parties and; ii) documents containing information provided to the SFO by third parties, which included transcripts of interviews with third parties and their witness statements.

There was no doubt or argument between the parties that the documents were relevant to the Claimant's case. The Defendant was willing to disclose the documents if ordered to do so by the Court and the Claimant understood that certain restrictions would be imposed upon disclosure. However, objections were raised by a number of third parties, who had provided the documents or information contained within them.

THE COURT DECISION

The Court had to weigh up the confidentiality of the documents against their disclosable nature. Their potential to confer a 'litigious advantage' or a 'litigious disadvantage' if not disclosed was considered within the framework that civil trials should be conducted on the basis of all relevant material being provided to ensure a fair trial. The Court referred to and distinguished between public and private interest confidentiality, described as "*public interest in maintaining the confidentiality of individuals who provide information under compulsion to prosecuting authorities such as the SFO*" and the "*private interest of individuals in maintaining the confidentiality of information related to them in the SFO Documents and their right to privacy and family life pursuant…to the Human Rights Convention*". The element of compulsion involved in public interest confidentiality was given particular weight by the Court. The Court also noted the importance of preserving the integrity of criminal investigations and protecting those who provided information to prosecuting authorities from any wider dissemination of the information otherwise than in the resultant prosecution.

Nonetheless, in this case, the Court considered that the greater public interest lay in the parties and the Court having all the relevant material in order to obtain a fair and just result. The Court considered the relevant civil procedure rules regarding the production of documents, but concluded they did not apply in these particular circumstances. In drawing its conclusions, the Court put great emphasis on the overriding objective of dealing with the case justly and at proportionate cost. It considered whether this could be achieved without production of the documents or whether the documents could be obtained from another source, but concluded that neither option was available in this case.

COMMENT

The documents in this case were obtained as part of a criminal investigation yet were found to be disclosable in related civil proceedings. The decision, similar to other recent decisions, illustrates the recent trend for the English Courts to order disclosure where there is no dispute that the documents are relevant. Consideration will be given to confidentiality, the element of compulsion and other factors but, unless there is an overwhelming reason not to disclose, then disclosure will usually be ordered to dispose of the matter in a fair and just manner.

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NEWS & EVENTS

FIRM NEWS

CHAMBERS SHIPPING GUIDE 2019 BY INCE GORDON DADDS

The team at Ince Gordon Dadds recently contributed the UK chapter of the Chambers Shipping Guide 2019 which has now been published and is available for download.

The guide provides our shipping lawyers' expert opinion on a range of topics including:

1. Maritime Finance: Legal Incentives for Maritime Finance Entities and Projects
2. Substantive Provisions for Limitation of Liability for Maritime Claims
3. Procedure for Judicial Sale of Vessels Before Maritime Courts
4. Carriage of Goods by Sea Claims
5. Marine Accidents in Waterways

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INCE GORDON DADDS ASSOCIATE IS THE FIRST GREEK LAWYER TO QUALIFY IN THE REPUBLIC OF THE MARSHALL ISLANDS

Vanessa Tzoannos, a senior associate in the Piraeus office, is the first Greek lawyer, and one of the first female lawyers, to qualify as counsel to practice law in the Republic of the Marshall Islands. Vanessa's qualification will enable the firm to offer its international clients even more extensive support in corporate, maritime, insolvency and financial law matters.

Click here for more information.

INCE GORDON DADDS ADVISES ALGOMA ON THE CAD$115 MILLION CANCELLATION OF FOUR SHIPBUILDING CONTRACTS

Ince Gordon Dadds has advised Algoma Central Corporation ("Algoma"), a leading provider of marine transportation services, on the cancellation of four shipbuilding contracts with Uljanik and 3Maj Shipyard of Croatia.

Click here for more information.

EVENTS

CYPRUS SHIPPING LAW

Paul Herring, Captain Stuart Francis and Ester Toumpouris will be speaking at the Cyprus Shipping Law seminar on Wednesday 17 April.

Topics:

- Misdelivery claims – a growing concern?
- Cargo claims: Supreme Court creates nightmare for carriers?
- Use of VDR and other electronic data in casualty investigations

If you would like more information, please contact DeniseLong@incegdlaw.com

LONDON INTERNATIONAL SHIPPING WEEK

Ince Gordon Dadds is proud to be a sponsor of London International Shipping Week taking place 9 to 13 September 2019.

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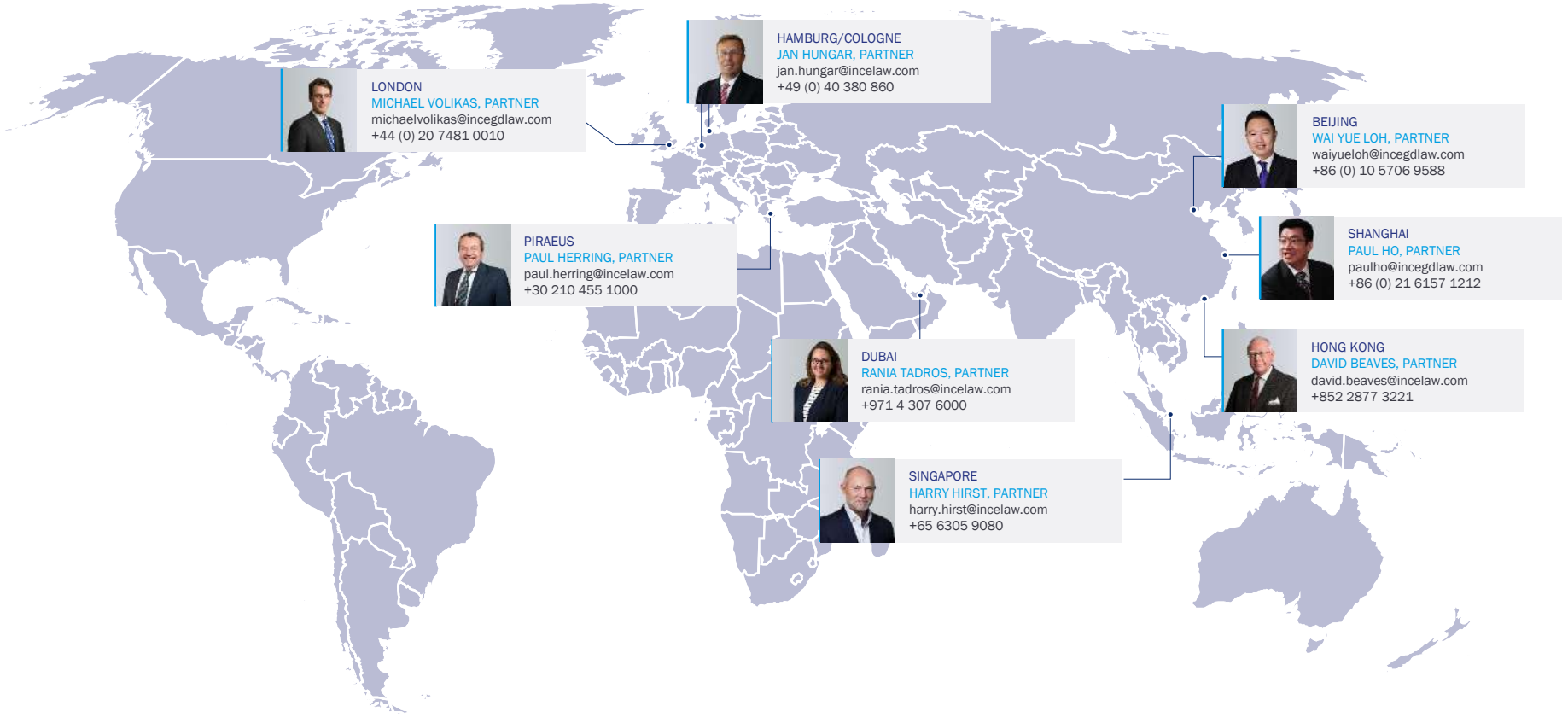

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