

FEDERAL COURT OF AUSTRALIA
ADMIRALTY AND MARITIME SEMINAR

28 July 2022

Sydney

Justices S C Derrington and Stewart

UNITED KINGDOM

A. What is an ‘operator’ for the purposes of the LLMC?

Splitt Chartering APS v Saga Shipholding Norway AS (The “Stema Barge II”) [2021] EWCA Civ 1880; [2022] 1 Lloyd’s Rep 170

1 Article 1(2) of the LLMC provides that a ‘shipowner’, for the purposes of limiting liability comprises the ‘owner, charterer, manager and operator of a seagoing ship’.

2 In the only Australian case thus far to have considered the phrase ‘manager and operator’, albeit in the context of the now repealed s 10 of the *Navigation Act 1912* (Cth), the Full Court held that the word encompasses notions of a real, substantial, and direct role in the management and control of the ship: *ASP Ship Management Pty Ltd v Administrative Appeals Tribunal* [2006] FCAFC 23; 149 FCR 261 at [105]).

3 The *Stema Barge II* was transporting rock armour from a quarry in Norway to Dover under towage pursuant to a contract by which Stema UK was to supply the rock. It purchased the rock from its associated company Stema A/S, a Danish company. During a storm, *Stema Barge II* began to drag her anchor and tripped an undersea electricity cable between France and England. The French owners of the cable, RTE, claimed damages of approximately €55 million against Splitt Chartering APS, the registered owner of *Stema Barge II*, and Stema Shipping A/S as the charterer or operator of *Stema Barge II*. Stema UK sought a declaration of non-liability.

4 There was no dispute that Splitt, as owner, and Stema Shipping A/S as charterer or operator, were entitled to limit their alleged liability (to an amount of approximately €6.5 million). The question was whether Stema UK could too as an ‘operator’ of the barge.

5 Teare J held, at first instance [2020] EWHC 1294 (Admiralty), and by reference to *ASP Ship Management*, that it was ‘very difficult’ to separate the concept of ‘manager’ from that of

‘operator’. He concluded that the ordinary meaning of the ‘operator’ of a ship within the LLMC ‘embraces not only the manager of the ship but also the entity which, with the permission of the owner, directs its employees to board the ship and operate her in the ordinary course of the ship's business’ (at [99]). Stema UK had placed a barge master and crew member on board to physically operate the barge’s equipment (although there was no accommodation on board). It was entitled to limit its liability being the vessel’s ‘operator’ although it could not be described as its ‘manager’.

6 The Court of Appeal (Phillips, Richards and Henderson LJJ) overturned the decision. It was held that the term ‘operator’ entailed more than the mere operation of the machinery of the vessel, or providing personnel to operate the machinery. The term related to a higher level of abstraction, involving management or control of the vessel or else article 1(4) [any person for whose act, neglect or default the shipowner or salvor is responsible] would be rendered otiose. Phillips LJ said, at [58]:

Whilst the decision in the ASP was addressing the term “operated by” in a different statute employing different language, I consider the approach of the Federal Court (which had in mind the wording of the Limitation Convention) is instructive and accords with my reading of article 1(2). In particular, I would adopt, in the present context, the Federal Court’s view that the mere provision of the crew for a vessel does not mean the vessel is operated by the provider.

7 Phillips LJ said that he saw no difficulty in construing the term ‘operator’ as requiring an element of management and control of the vessel and, importantly, given some of the commentary on the first instance decision, saw no reason why the position should be different in relation to an unmanned vessel. He could see ‘no reason why the physical operation of such a vessel necessarily involves an element of management and control so as to make the provider of the crew the operator of the vessel, regardless of whether they are supervised by an operator from afar’ (at [60]).

B. What is it that Demurrage liquidates?

K Line Pte Limited v Priminds Shipping (HK) Co Ltd (The “Eternal Bliss”) [2021] EWCA Civ 1712; [2022] 1 Lloyd’s Rep 12

8 This is the first authoritative decision that has grappled with the question of whether, and if so in what circumstances, damages may be payable in addition to demurrage under a voyage charterparty since *The Bonde* [1991] 1 Lloyd’s Rep 136. In that case, Potter J held, at 142:

...where a charterparty contains a demurrage clause, then in order to recover damages in addition to demurrage for breach of the charterer’s obligation to complete loading within the lay days, it is a requirement that the plaintiff demonstrate that such

additional loss is not only different in character from loss of use but stems from breach of an additional and/or independent obligation.

9 The *Eternal Bliss* was chartered to Priminds by K Line on the Norgrain form. Priminds failed to discharge the ship within the agreed laytime, causing the cargo to deteriorate without fault on the part of K Line. K Line compromised the cargo claims brought against them by cargo owners and their insurers and sought to recover those from Priminds by way of damages or under an implied indemnity.

10 Andrew Baker J held, at first instance [2022] 2 Lloyd's Rep 419, that K Line was not precluded from recovering damages in addition to demurrage. The damage to the cargo was distinct in nature from, and additional to, the detention of the ship.

11 I shamelessly refer to a paper that I delivered at ICMA in Vancouver in 2012 on the topic of 'Damages in addition to Demurrage' (International Congress of Maritime Arbitrators XVIII, *Proceedings*, 13-18 May 2012, 487). I recall speaking with Andrew Baker QC after that session. It's now clear that he did not agree with my conclusion expressed on that occasion that:

The principles which have emerged from the English jurisprudence seem, at least from a lawyer's perspective, able to be justified both conceptually and as a matter of logic. Thus, an owner is entitled to damages, in addition to whatever amount has been agreed by way of liquidated damages for the detention of the vessel beyond the stipulated lay days, if he is able to prove that the charterer has breached some additional or independent duty or obligation which sounds in a loss to the shipowner beyond mere detention of the vessel. If he cannot do this, his claim will fall within the demurrage clause.

12 A decade later, the Court of Appeal (Vos MR, Newey and Males JJ) appear to have reached the same conclusion. Having reviewed the somewhat unsatisfactory cases that have touched on the issue over the years, the Court said, at [52]:

In circumstances where the cases do not provide a decisive answer and there is no clear consensus in the textbooks, we approach the issue as one of principle. Our conclusion is that, in the absence of any contrary indication in a particular charterparty, demurrage liquidates the whole of the claims arising from a charterer's breach of charter in failing to complete cargo operations within the laytime and not merely some of them. Accordingly, if a shipowner seeks to recover damages in addition to demurrage arising from delay, it must prove a breach of separate obligation.

13 This is because:

- (a) It would be surprising for commercial people to agree that a liquidated damages clause should liquidate only some of the damages arising from a particular breach – it creates uncertainty;

- (b) Whilst it is accepted that demurrage is intended to compensate a shipowner for the loss of prospective freight earnings suffered as a result of charterer's delay in completing cargo operations, that does not mean that this is all demurrage is intended to do;
- (c) If demurrage quantifies the owner's loss of use of the ship to earn freight by further employment in respect of delay to the ship after the expiry of laytime and nothing more, and does not apply to a different type of loss, there will inevitably be disputes as to whether particular losses are of the 'type' or 'kind' covered by the demurrage clause;
- (d) The consequence of the alternative view is to transfer the risk of unliquidated liability for cargo claims from the shipowner who has insured against it (P&I cover), to the charterer who has not;
- (e) The fact that the point does not seem to have been finally settled before now suggests that it has not unduly troubled commercial people engaged in the market so there is no reason to depart from the decision in *The Bonde*;
- (f) To allow the appeal will produce clarity and certainty.

14 Their Lordships summed up this way, at [59], 'If our judgment does not meet with approval in the market, it should not be difficult for clauses to be drafted stating expressly that demurrage only covers certain stated categories of loss.'

C. Which time zone should be used to determine date of completion of discharge?

Euronav NV v Repsol Trading SA (The "Maria") [2021] EWHC 2565 (Comm); [2022] 1 Lloyd's Rep 247

15 The *Maria* was chartered on Shellvoy 6 for carriage of a cargo of crude oil from Brazil to a range of ports on the US West Coast, ultimately Long Beach.

16 There were several possible time zones according to which notice of completion of discharge might be given:

- (1) Local time in California where the discharge took place (in which case the claim was time-barred);
- (2) The time zone of the recipient of the required notice; or the time zone of the giver of the required notice; or GMT because the contract applied English law.

17 Henshaw J held, at [61], that the date of completion of discharge is to be determined applying local time at the place of discharge, essentially, for the following reasons:

- (a) The ordinary and natural approach is to allocate to an event (eg a historical event, or a

person's birth, marriage or death) the date that was current in the place where the event occurred;

- (b) The authorities and commentary provide some support for this view;
- (c) The discharge of cargo is a tangible physical event which occurs at a specific location in a particular time zone, it will usually be recorded in any laytime statement as having occurred at a time and date current applying local time; parties would expect that date as stated to be the date for contractual purposes;
- (d) It would be unnatural and illogical for there to be more than one date of discharge used for contractual purposes or for the date of discharge pursuant to say the HVR to be determined by something as arbitrary and non-transparent as the place of receipt of any notice of any demurrage claim;
- (e) The use of local time at the place of discharge gives rise to a single, clear and easily ascertainable date and time of completion. It tends to promote certainty and reduce the risk of confusion.

18 Summary judgment was entered for charterers as owners' discharge notice was out of time.

D. Is a party offered reasonable security under the ASG2 obliged to accept it?

MV Pacific Pearl Co Ltd v Osios David Shipping Inc [2022] EWCA Civ 798; [2022] 1 Lloyd's Rep 261

19 Ships involved in a collision will often agree upon a jurisdiction where the claims of each owner against the other will be heard and will also agree to an exchange of letters of undertaking from each owner's P&I Club (or Hull Underwriters) securing the claim of each owner against the other. A letter of undertaking (LOU) from an owner's P&I Club is preferable to an arrest. It avoids the costs and uncertainty of an arrest and provides a reliable and trustworthy form of security.

20 Solicitors practising admiralty law in England, the Admiralty Solicitors Group (the ASG), have devised two concise forms of agreement to assist the owners of ships involved in a collision when dealing with the choice of jurisdiction and the provision of LOUs. The first, known as ASG 1, is a draft form of LOU. The second, known as ASG 2, is a draft Collision Jurisdiction Agreement, in which the parties agree to litigate or arbitrate their claims in England. Clause C of ASG 2 provides that "Each party will provide security in respect of the other's claim in a form reasonably satisfactory to the other".

21 Following a collision in the Suez Canal, the owner of the ship that caused the collision,

Panamax Alexander, offered to provide security to the owner of the *Osios David* in the form of an LOU from its P&I Club. *Osios David* refused the offer of security on the basis of the sanctions clause contained in the LOU. Instead, it maintained the arrest of an associate ship, *Panamax Christina*, in South Africa.

22 One month after the collision, the parties signed a bipartite Collision Jurisdiction Agreement on the standard ASG2 terms.

23 At first instance, Sir Nigel Teare, found that the security offered was in a reasonably satisfactory form for the purpose of Clause C but held further that the respondent was free to reject that security and to take whatever steps it saw fit to obtain or maintain alternative security elsewhere.

24 The Court of Appeal reached a different conclusion. The way in which ASG2, is intended to work was described by Lord Justice Males as follows:

- (1) Clause A of ASG 2 deals with the question of jurisdiction for the parties' claims and the law to be applied; instead of arresting the ship in whatever jurisdiction it can be found, and applying whatever law would be applied in that jurisdiction, the parties agree on English jurisdiction and applicable law.
- (2) Clauses D and E deal with the identity of the parties to be sued; they ensure that the registered owners of each vessel are the correct defendants to the claims.
- (3) Instead of having to arrest a ship and serve proceedings *in rem* on the ship itself, the parties agree in clause B that proceedings may be commenced by service on their respective solicitors.
- (4) Clause C deals with the provision of security. Males LJ said:

to my mind it is a straightforward reading of the clause that the security to be provided by each party will be *the* "security in respect of the other's claim"; there is no room for the seeking of alternative security; if a party were free to seek alternative or better security, there would be no need to stipulate that the security to be provided under clause C should be "in a form reasonably satisfactory to the other".
- (5) Clause C also avoids the need to enter cautions (caveats) in multiple jurisdictions in order to avoid an arrest. While clause B contains an undertaking to accept service, clause C contains the undertaking to provide security which must be given in order to obtain the entry of a caution.

- (6) Finally, the combination of clauses C and F means that if there is a dispute about whether the security provided is “in a form reasonably satisfactory to the other”, that dispute is to be determined not in the foreign court where a ship has been arrested (as would be the position absent this agreement), but exclusively in the English court.
- (7) This ensures that, contrary to what may be the position in some jurisdictions, security in the form of an LOU from a member of the International Group of P&I Clubs will be acceptable; and that any issue about the terms of the security is to be determined here in accordance with English law and practice.

25 Thus the effect of clauses C and F is to transfer any dispute about the sufficiency of security from a foreign court where the ship has been arrested to the English court. But the consequences when reasonable security has been provided are unchanged. That is to say, once reasonable security has been provided, there is no justification for an arrest and, if the ship has been arrested, it must be released.

26 Mr Turner QC for the respondent had sought to maintain the position that the right to arrest is so fundamental that it should not be held to have been abandoned without clear words. The Court of Appeal held the true position is that there is no right to arrest where security has been provided.

SOUTH AFRICA

***The MSC Susanna* [2021] ZASCA 135; 2022 (2) SA 85**

(Wallis JA, Navsa, Schippers, Mbatha and Gorven JJA concurring)

27 The *Limitation of Liability for Maritime Claims Act 1989* (Cth) gives almost all the provisions of the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976, the force of law in Australia. Under the LLMC, the owner, charterer, manager and operator of a seagoing ship (together referred to as the “shipowner”) and salvors can limit their liability for claims against them, arising on any distinct occasion, to a certain sum calculated with reference to the tonnage of the ship in respect of which the claims arose.

28 Section 7 of the Act, however, provides that the applied provisions of the LLMC “do not apply in relation to a ship that belongs to the naval, military or air forces of a foreign country”. (I will refer to such a vessel as a **defence vessel**.) At least two possible questions arise from this provision:

- (1) Can the owner of a civilian wrongdoing ship limit its liability in answer to a claim arising from damage by it to a defence vessel of a foreign country?
- (2) Can the owner of a wrongdoing defence vessel of a foreign country limit its liability in answer to any claims against it arising from damage caused by it?

29 The first of these questions arose for decision in *The MSC Susanna* [2021] ZASCA 135, albeit in a different statutory context and in respect of different statutory language.

30 On 10 October 2017, during a substantial storm in the port of Durban, the containership the *MSC Susanna* broke her moorings and, while drifting in the port, allided with port infrastructure including cranes, and collided with several vessels, including the *FNS 'Floreale'*, a French naval vessel under the control of the Ministère des Armées (**the Ministry**) of the French Republic. The Ministry claimed about €10m (A\$15m) against the owners, underwriters and demise charterers of the *MSC Susanna* for damage to the *Floreale*. There were also other claims against the owners of the *MSC Susanna*.

31 The *MSC Susanna* interests sought to limit their liability under the relevant domestic statutory provisions which are contained in the *Merchant Shipping Act 57 of 1951* (South Africa) (**MSA**). The Ministry resisted any limitation in respect of its claim in reliance on a provision stating that the provisions of the MSA “shall not apply to ships belonging to the defence forces of the Republic or of any other country”.

32 The question was thus whether the *MSC Susanna* interests could limit their liability where their ship caused damage to a ship belonging to a defence force of a foreign country. That question in turn boiled down this: is the claim of the owners of an excluded ship arising from damage to that ship subject to limitation claimed by the owners of the wrongdoing ship?

33 “No”, is the answer to that question, as explained by Wallis JA of the South African Supreme Court of Appeal in his last judgment before retiring. The reasoning commences with the broad wording of the limitation provision which includes claims in respect of all manner of property, ie, not only damage to or loss of ships. The same can be said of Art 2 of the LMCC. The reasoning then shifts to the exclusionary provision and notes that its effect is to exclude the bulk of the provisions of the MSA from application to both domestic and foreign defence force vessels. Those provisions include in respect of registration of vessels, certificates of competency and service of crew, safety of ships and life at sea, shipping inquiries and courts of marine inquiry, carriage of goods by sea, and so on.

34 The Court noted that Chapter 5, Part IV, of the MSA which includes the tonnage limitation provisions differs from those provisions in that it is not concerned with the operation of vessels, the treatment of crew or issues of safety. Its primary focus is on the liability of owners of vessels, first in respect of the division of loss between shipowners in the event of a collision, liability for personal injury and claims for contribution against joint wrongdoers, and secondly tonnage limitation. It reasoned that these provisions are concerned with the liability of owners of ships to third parties, and claims against and between owners of ships. It was said that the focus is on the legal liability of the owners of ships, and that the claims arise out of the operation of ships is incidental. It was thus regarded as particularly significant that the exclusionary provision refers to the MSA not applying “to ships”, and not to the owners of ships. (At [12].)

35 The Court reasoned that linguistically the exclusion provision was not apt to exclude the invocation of limitation by the owners of a vessel, as had been held by the Supreme Court of Canada in relation to a similar provision in *The Queen v Nisbet Shipping Co Ltd* 1953 CanLII 77 (SCC); [1953] 1 SCR 480 (SCC). That was reversed by the Privy Council in *Nisbet Shipping Co Ltd v Reginam* [1955] 3 All ER 11; [1955] 1 WLR 1031 (PC). In that case the situation was reversed – the Canadian government sought to limit its liability for loss caused by a Canadian warship. The South African court disagreed with the Privy Council, emphasising that there is a straight forward difference between provisions dealing with a person’s ships and a provision dealing with the person themselves. (At [23].) It was also held that no discernible reason of policy supports a different construction of the exclusionary provision. (At [26].)

36 Thus, on the basis that it is the claims of, amongst others, owners of ships that are subject to limitation, and that ships themselves make no claims, the *MSC Susanna* interests were able to limit their liability in respect of the claim of the Ministry.

37 In view of the construction question resting in significant part on the overall statutory context of the MSA, whereas in Australia the relevant provision is in a separate statute dealing only with tonnage limitation, the reasoning of the South African Court is not directly applicable to the Australian provision. Indeed, if the Australian exclusion was not to apply to, at least, the invocation of limitation by the owners of foreign defence vessels, it is difficult to see what application it would have at all. It may be, linguistically at least, that the exclusion does not apply to claims made by the owners of a foreign defence vessel against some other wrongdoing vessel and/or its owners. It is also to be noted that there is a possibly material difference in language – the Australian exclusion is “in relation to” defence vessels, whereas the South

African exclusion is “to” defence vessels.

38 The Explanatory Memorandum to the bill that led to the Australian statute states that the exclusionary provision

ensures that the Act applies to vessels belonging to the defence forces of Australia but not to those of other countries. It is unnecessary to extend the Act to vessels of other countries as action could not be instituted in Australian courts against the owners of such vessels and thus there can be no claim to which limitation of liability could be applied.

39 The statement that action cannot be instituted against vessels of other countries is presumably in reference to foreign state immunity (under the *Foreign States Immunities Act 1985* (Cth)) as there is no restriction in the *Admiralty Act 1988* (Cth) on bringing actions *in rem* against foreign government ships (see s 8).

40 Returning to the question of policy, the policy underlying limitation is that without it international shipping would be crippled – the risks in the maritime adventure would potentially outweigh the rewards. That rationale does not apply to defence vessels. Thus, there may well be a policy rationale for not applying the provisions of the LMCC so as to allow foreign defence vessels to claim limitation of liability, but it is hard to see why the claims of the owners of foreign defence vessels should be limited. If that is right, then the result in *The MSC Susanna* would likely be the same in Australia.

HONG KONG

***Pusan Newport Co Ltd v The Milano Bridge* [2022] HKCA 157; [2022] 1 Lloyd’s Rep 441**
(G Lam and Chow JJA)

41 This case deals with competing limitation funds in different jurisdictions, one in South Korea and one in Hong Kong.

42 The plaintiff was the Korean operator of a commercial maritime terminal at the port of Busan, South Korea. The defendants were the owners of the *Milano Bridge*, owned as to 90 per cent by a Japanese company and 10 per cent by a Panamanian company. The vessel was registered in Panama and flew the Panamanian flag.

43 In April 2020, an allision occurred between the vessel and a berth, resulting in damage to some of the plaintiff’s cranes and another vessel. At the time of the incident the vessel was under the compulsory pilotage of a Korean pilot and was assisted by Korean tugs, one at the bow and one at the stern. The plaintiff claimed that the incident was caused by the negligence of the

defendants, their servants or agents in the navigation and management of the vessel, and that it had suffered loss and damage amounting to some US\$90 million.

44 The plaintiff commenced an action against a sister ship in Hong Kong, and another action in Japan.

45 The defendants commenced an action against the plaintiff in South Korea. They also commenced a limitation action in South Korea and deposited a sum of about US\$24 million to constitute the limitation fund in that action. Under Korean law, limitation is governed by the law of the flag of the ship. Under the law of Panama, the applicable limits are calculated with reference to the unamended LMCC 1976.

46 The defendants then applied to stay the proceeding against the sister ship in Hong Kong on forum non conveniens and lis alibi pendens grounds. The primary judge granted a stay, although he characterised the plaintiffs' action in Hong Kong as nothing more than forum shopping which is a practice that is disapproved of by the court. In Hong Kong, the applicable tonnage limitation would be US\$82.6 million – calculated with reference to the LMCC 1976 as amended by the 1996 Protocol.

47 Unlike Australia which applies a “clearly inappropriate forum” test for forum non conveniens (*Voth v Manildra Flour Mills Pty Ltd* [1990] HCA 55; 171 CLR 538), Hong Kong applies the test expounded in *The Spiliada* [1987] AC 460: whether there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of an action, ie, in which the action may be tried more suitably for the interests of all the parties and the ends of justice?

48 That was characterised by the trial judge as involving the following stages of analysis:

(1) Stage 1: the applicant for the stay has to establish that:

Hong Kong is not the natural or appropriate forum ('appropriate' in this context means the forum has the most real and substantial connection with the action);
and

there is another available forum which is clearly or distinctly more appropriate than Hong Kong.

(2) Stage 2: If the applicant is able to establish both of those two matters, then the plaintiff has to show that it will be deprived of a legitimate personal or juridical advantage if the action is tried in a forum other than Hong Kong.

(3) Stage 3: If the plaintiff is able to establish this, the court will have to balance the advantages of the alternative forum with the disadvantages that the plaintiff may suffer.

49 In respect of stage 1(a), for obvious reasons it was found that Hong Kong was not the natural or appropriate forum. That finding was not challenged on appeal. (At [19].)

50 In respect of stage 1(b), it was found that the court of South Korea was clearly or distinctly the more appropriate forum. That was on account of the following factors:

- (1) the issues in the trial;
- (2) the witnesses and evidence, including evidence on liability and quantum and expert witnesses;
- (3) the governing law, being the law of Korea in respect of the plaintiff's cause of action in tort;
- (4) it was considered that the forum non-conveniens principles were not applied differently in a case such as the present where there was service of the writ in the action in rem as of right, especially where the jurisdiction of the Admiralty Court was invoked only on the arrest of a sister ship and Hong Kong had no connection to the events giving rise to the incident;
- (5) the plaintiff's forum shopping; and
- (6) *lis alibi pendens*, and the *Cambridgeshire* factor, which the judge found had no application. (At [20].)

51 Aside from the treatment of forum shopping, stage 1(b) was also not challenged on appeal.

52 Stage 2 was considered to be the nub of the dispute before the primary judge. It was concluded that the higher tonnage limit in Hong Kong was a distinct legitimate juridical advantage to the plaintiff to maintain the proceeding in Hong Kong, but that the deprivation of such an advantage would not outweigh a case where proceedings were started in Hong Kong for little more than the reason of forum shopping. (At [21].)

53 With respect to stage 3, the primary judge concluded that it was in the interests of all the parties and the ends of justice that the proceeding be stayed in Hong Kong notwithstanding the deprivation of juridical advantage to the plaintiff. (At [22].)

54 The Court of Appeal held that the primary judge's characterisation of the plaintiff's conduct of litigating in Hong Kong because of the higher tonnage limitation as "forum shopping" was

incorrect. It was held that the pejorative description of “forum shopping” is a conclusion only to be drawn after the court has performed the entire *Spiliada* exercise and reached the view that the other forum outside Hong Kong is more suitable for the interests of all the parties and the ends of justice. It is then that maintenance of the proceeding in Hong Kong would be aptly described as “forum shopping”. (At [31] and [46].)

55 The Court cited *The Tigr* 1998 (4) SA 740 and ***Goliath Portland Cement Co Ltd v Bengtell*** (1994) 33 NSWLR 414 to conclude that the pursuit of proceedings in Hong Kong in order to enjoy a higher tonnage limitation regime is rightly characterised as a legitimate juridical advantage which “serves to neutralize the opprobrium that accompanies the dyslogistic and equally unhelpful phrase, forum shopping” (per Gleeson CJ in *Goliath* at 419G). (At [33]-[34].)

56 Given the plaintiff’s acceptance that Hong Kong was not the natural or appropriate forum, and South Korea was an available forum which was clearly or distinctly more appropriate than Hong Kong, and the conclusion that the plaintiff would be deprived of the juridical advantage of a higher tonnage limitation if its claim against the defendants was tried in South Korea, the remaining question was whether, balancing the advantages of the alternative forum with the disadvantages that the plaintiff may suffer, the defendants were able to establish that substantial justice would still be done in South Korea. (At [39].)

57 Ultimately it was held that the defendants had established that substantial justice would be done in South Korea, notwithstanding the lower limit of liability applicable in that jurisdiction. (At [44] and [61].)

SINGAPORE

***The Luna* [2021] SGHCA 84; [2022] 1 Lloyd’s Rep 216**

(Steven Chong JCA, Judith Prakash JCA and Quentin Loh JAD concurring)

58 It is well recognised that the modern bill of lading serves three functions: it operates as (a) a receipt by the carrier acknowledging the shipment of goods on a particular vessel for carriage to a particular destination; (b) a memorandum of the terms of the contract of carriage; and (c) a document of title to the goods. (*The Rafaela S* [2005] 2 AC 423 at [38].)

59 The *Luna* was one of six bunker barges in the port of Singapore that was arrested at the instance of a bunker supplier, Phillips, following the collapse of the OW Bunker bunker trading group in November 2014. Phillips blended and stored bunkers at a shore facility, and sold them on FOB terms to OW Bunker companies. Payment by the buyers was 30 days after the certificate

of quantity (CQ). Title to the bunkers passed on delivery to the barges, which then delivered them onto oceangoing ships within a few days pursuant to sales by the OW Bunker companies to the ships.

60 When OW Bunker went under, there were some 30 days' worth of delivered but unpaid for bunkers. It was that value that Phillips claimed from the barges on the basis that they had delivered the bunkers to the ships without bills of lading being produced, ie, a liability in conversion.

61 The bills of lading reflected Phillips as shipper and were consigned to Phillips' order. They were signed by the barges' masters on the bunkers being stemmed on board, and reflected the place of delivery as "bunkers for ocean going vessels". They were retained by Phillips, which only sent the CQs on to its buyers, the OW Bunker companies, to trigger the 30 days for payment to start running and to form the basis for the amount to be invoiced.

62 The barge owners and demise charterers contended that the bills of lading had served only as acknowledgment of receipt of the bunkers onto the barges. They also asserted other defences which were not required to be decided. Phillips contended that the bills of lading gave rise to contracts of carriage and constituted documents of title.

63 Steven Chong JCA for the Court of Appeal commenced the reasoning by drawing a distinction between cases in which bills of lading are required to be construed and cases such as the present which concern contract formation. In such cases, the approach to background is wider as there is no restriction on the evidence which the court may consider. Citing *The Starsin* [2004] 1 AC 715 at [175]-[176], it was reasoned that the identity of the parties to a contract is fundamental. It is not simply a term or condition of the contract. It goes to the very existence of the contract itself. That is a question of fact which may be established by evidence that is admissible even where the contract is in writing, at least so long as it does not contradict its express terms, and possibly even where it does.

64 A number of circumstances were identified which led to the conclusion that the bills of lading were neither memorials of the terms of any contracts of carriage, nor were they documents of title.

65 With respect to the underlying sale arrangements between Phillips and the buyers, the following observations were made. First, the 30-day credit period given by Phillips to the buyers meant that Phillips accepted the risk of default by the buyers. Such sales of bunkers on

credit terms are entirely explicable in the bunker trade. In such situations, the buyer purchases the bunkers on credit, on-sells the bunkers within the credit period, and then uses the sale proceeds to pay the seller prior to the expiry of the credit period.

66 Second, payment was required to be made by the buyers against presentation of Phillips' commercial invoice and CQ. There was no reference to bills of lading in the terms of the sale contract, and contrary to the conventional situation the bills of lading were not required to be presented by Phillips to obtain payment of the purchase price. Thus, as between Phillips and the buyers, the bills of lading were non-essential documents with no contractual force or effect as a contract of carriage or as a document of title. The bills of lading did not and could not serve the traditional functions of a bill of lading. It was concluded that at best, the bills of lading assisted Phillips and the buyers to divide a particular shipment of bunkers into different quantities to be allocated to different contracts and/or different buyers. In this way, the bills of lading were used to reflect the quantity of bunkers allocated to each sub-parcel, whereas the CQ was of limited utility as it only reflected the aggregate amount of bunkers loaded in each shipment.

67 With reference to the role of the bills of lading in the relationship between Phillips and the owners and demise charterers of the barges, it was acknowledged that typically a carrier that issues a bill of lading assumes a fundamental obligation to deliver the goods at destination only against presentation of the bill. However, in light of Phillips' commercial arrangements with the buyers, it knew that the bills of lading would not allow it to regain possession of the bunkers it had sold by presenting the bills of lading to the barge owners and demise charterers and demanding delivery.

68 An analysis of the facts showed that the bunkers were delivered to various ocean-going vessels very shortly after they were loaded on board the barges, and well before the expiry of the 30 day credit period. There were also occasions of commingling of bunkers and cases where the barges returned to load further shipments of bunkers even before the 30 day credit period had expired. It was held that that would have indicated to Phillips that the bunkers were being discharged shortly after loading without production of the bills of lading, since it was still in possession of the bills at the material time.

69 On that basis, neither party to the bills of lading could have intended for delivery of the bunkers to be made only upon presentation of an original bill. Put differently, the bills were not regarded as the keys which in the hands of a rightful owner were intended to unlock the door of the

warehouse, floating or fixed, in which the goods may chance to be – paraphrasing *Sanders Brothers v Maclean & Co* (1883) 11 QBD 327 at 341.

70 Further, the destination of discharge being reflected as “bunkers for ocean going vessels” was for various reasons unworkable, including that there were hundreds of ships that were possible recipients of bunkers at any one time. This suggested that the parties intended to omit a destination altogether. The intention was that the bunkers would be pumped from the barges into the bunker tanks of ocean-going vessels to be consumed as fuel. It was also contemplated that the bunkers would be delivered to multiple ocean-going vessels.

71 Finally, it was reasoned that it was untenable to suggest that the barge owners and demise charterers somehow agreed to accept the risk of non-payment by the OW Bunker companies. If that were so, they would be in breach of their obligations under the bills of lading in every case which could not have been intended.

AUSTRALIA

***Royal Caribbean Cruises Ltd v Rawlings* [2022] NSWCA 4; [2022] 1 Lloyd’s Rep 643**
(Meagher JA, Bell P and Leeming JA concurring)

72 Mr Rawlings was a passenger on the appellant’s Bahamian-flagged cruise ship *The Explorer of the Seas* during a ten day voyage which departed Sydney on 10 November 2016 for various islands in the Pacific, and returned to Sydney on 20 November 2016. In the early morning of 15 November, an incident occurred in the guest cabin shared by Mr Rawlings and a male friend, which resulted in his being suspected of having sexually assaulted an 18 year old female passenger, Ms A, whilst she was too intoxicated to be able to give consent. The alleged assault occurred whilst the vessel was in international waters.

73 As investigations into the incident proceeded on board, Mr Rawlings was confined in the ship’s conference room, and subsequently in a guest cabin, from around 9 am on 15 November until around 1 pm on 20 November 2016, ie, some hours after the ship had returned to Sydney. In the meanwhile, early on 17 November the Master had received an email from the appellant’s onshore Global Security department which recommended that Mr Rawlings be released on condition that he have no contact with Ms A or her mother, sister and grandparents (who were also on board). Following a meeting between the Master, senior ship’s officers or crew, and Ms A and her mother later that morning, at which Ms A’s mother became emotional and threatened to throw Mr Rawlings overboard if he were released, the Master communicated his decision at midday to keep Mr Rawlings in confinement until the ship returned to Sydney.

74 Mr Rawlings brought proceedings in the District Court, claiming damages for wrongful detention and false imprisonment. The primary judge held that the Master was justified in detaining Mr Rawlings up to midday on 17 November 2016, but not thereafter. In so doing, his Honour applied the substantive law of New South Wales to the alleged tort; and accepted as part of the Australian common law the justification defence, summarised by Slade J in *Hook v Cunard Steamship Co* [1953] 1 WLR 682; [1953] 1 Lloyd's Rep 413, that a ship's Master has the power to detain or confine a passenger if he or she has reasonable cause to believe, *and does in fact believe*, that confinement is necessary for the preservation of order and discipline, or for the safety of the vessel or of persons or property on board. The primary judge awarded general damages of \$70,000 and aggravated damages of \$20,000 for the period of unlawful detention.

75 The issues that were decided in the appeal were:

- (1) Whether the primary judge erred in applying in relation to the appellant's justification defence the law as stated in *Hook v Cunard Steamship Co* as part of the law of New South Wales (ground 3);
- (2) Whether the primary judge erred in finding that that justification defence was not made out for the period of detention beyond midday on 17 November 2016 (grounds 1 to 4).

76 The Court identified that under Australian choice of law rules, the law applicable to a tort committed on a vessel while on the high seas – at least, where the effects of the tort are confined to the vessel – is the law of the state in which the vessel is registered, referred to as the law of the flag. Here, that law was the law of the Bahamas. (At [20].)

77 However, in the present case Mr Rawlings' claim was pleaded as if the tort had occurred in New South Wales, and accordingly was governed by the law of New South Wales. The appellant pleaded no defence under or peculiar to the law of The Bahamas, and neither party sought to lead evidence of the content of the law of The Bahamas. Had the law of the place of the tort been pleaded in accordance with Australian choice of law rules as the law of the vessel's flag, in the absence of evidence of the content of the law of The Bahamas, the primary judge would have been correct in applying the substantive law of New South Wales by way of presumption. (At [22].)

78 The appellant contended that the Master's subjective belief in the necessity of confinement is not an element of the defence. After canvassing the English authorities and identifying that

there are no Australian authorities on point, the Court concluded that the primary judge had not erred in this respect. That is to say, the Australian common law with respect to the Master's power or authority to detain is that it must be established that the Master (1) has reasonable cause to believe, and (2) does in fact believe, that the relevant detention or confinement is necessary for the preservation of order and discipline, or for the safety of the vessel or persons or property on board. (At [35].)

79 As to the facts, the Court concluded that the primary judge erred in holding that the Master did not subjectively believe at the outset of the meeting with Ms A and her mother on 17 November that Mr Rawlings' continued detention was necessary beyond that point. It was established that the Master's intention before, and after, the meeting was to keep Mr Rawlings confined until the ship returned to Sydney. The email from Global Security recommending Mr Rawlings' release on condition that he not have contact with Ms A or her family was understood by the Master as "guidance" rather than an instruction, and it remained for the Master to consider whether the proposed condition would be effective to prevent such contact.

80 It was also held that the primary judge further erred in finding that the conditions of Mr Rawlings' confinement after midday on 17 November 2016 were unreasonable and "akin to solitary confinement", in circumstances where his welfare was regularly checked by ship's security and medical officers and, on a daily basis, by an Australian consular officer; he was allowed daily access to open air and smoking breaks; and there is no record of his having made any complaint about his conditions of confinement either to the ship or to the consular officer.