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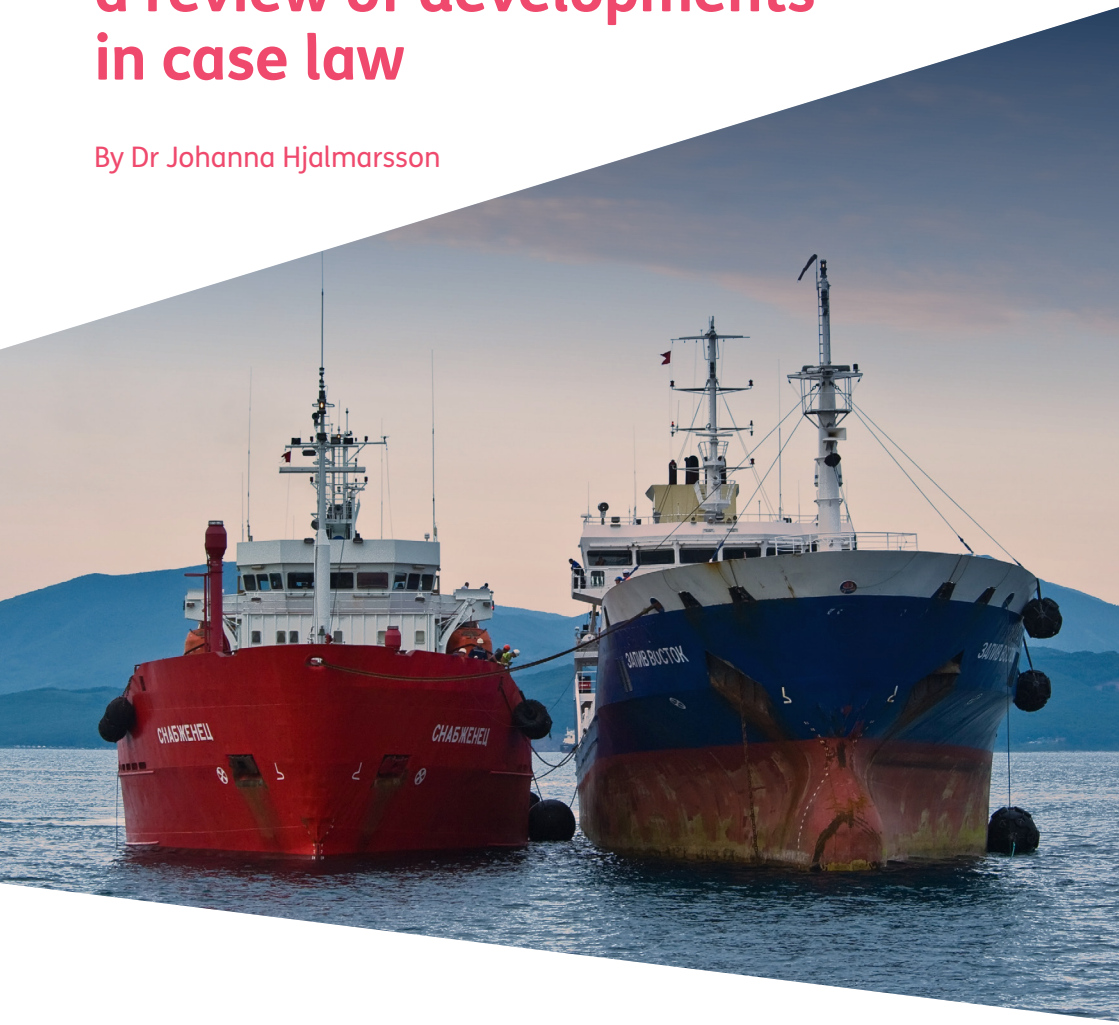
Maritime law in 2018: a review of developments in case law

By Dr Johanna Hjalmarsson



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Johanna has been at the University of Southampton since completing her LLM in Maritime Law in 2004, initially as a researcher with the Institute of Maritime Law and since 2006 on a research position sponsored by Informa.

Before joining Southampton, Johanna served as a junior judge in Sweden and spent several years with the United Nations International Drug Control Programme and the Office of the High Representative in Bosnia and Herzegovina.

Johanna's research covers maritime and commercial law, insurance law and dispute resolution. She is the editor of *Lloyd's Law Reporter* and *Lloyd's Shipping & Trade Law* as well as *The Ratification of Maritime Conventions*, and is a member of the newly formed *Lloyd's Law Reports* Editorial Board.

She takes a particular interest in jurisdictions undergoing comprehensive development and has co-edited two books on *Maritime Law in China* and *Insurance Law in China*, and co-authored two editions of *Singapore Arbitration Legislation* with Professor Robert Merkin.

In 2016 she completed her doctoral thesis on fraudulent insurance claims under English law. Her publications have been cited by courts in Singapore and Australia and by the Law Commissions of England and Wales and Scotland. She received the Vice-Chancellor's Award for Excellence in Teaching in 2009 and the Vice-Chancellor's Award in 2011.

Maritime law in 2018: a review of developments in case law

INTRODUCTION

This review summarises and explains some of the most important legal developments in maritime law, including the law of charterparties, marine insurance, general average and admiralty procedure in 2018.

The scope of this analysis encompasses the common law jurisdictions of England and Wales as well as Australia, Canada, Hong Kong and Singapore.

Important cases in 2018 included the Supreme Court decision in *Volcafe*, which emphasised the bailment nature of the bill of lading contract in deciding the burden of proof under the Hague Rules, and *The MV Alkyon*, wherein the Court of Appeal stuck to existing practice in declining to release a vessel from arrest unless a cross-undertaking in damages was made by the arrestor. *The Thor Commander*, an Australian case, was notable for the range of issues addressed including salvage, interpretation of the Hague Rules and general average.

In addition, there were several decisions that will assist the interpretation of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974.

CHARTERPARTIES

While there was more or less the usual number of cases on charterparties, the year is remarkable for having produced only one time charterparty case of note – the weight of litigation was on voyage charterparties and contracts of affreightment.

Time charterparties

The time charterparty case that reached the courts was *Clearlake Shipping Pte Ltd v Privocean Shipping Ltd (The Privocean)*, concerning in the main a claim for unpaid hire. The appeal from the arbitration tribunal's decision was by time charterers whose counterclaim had not found favour with the tribunal. The counterclaim was for damages of US$410,000 for costs incurred as a result of a stowage plan on which the master had insisted. The stowage plan had given rise to extra costs. He had insisted on the cargo in hold 2 being strapped, and had rejected the charterers' stowage plan of leaving hold 4 empty which was equally safe but less costly. The arbitration tribunal had found that the additional fittings required were for the account of the charterers.

On appeal, the first question was for whose account *unnecessary* fittings insisted upon by the master should be, where clause 2 of the charterparty on NYPE wording attributed the provision of *necessary* dunnage and requisite fittings to charterers. The judge, dismissing the appeal, held that the clause in question dealt only with what charterers were to provide, and not with whether they could recoup costs for materials not strictly within the clause. The qualification for necessity was not made out.

The second question was whether in this case the neglect of the master was in the management of the *ship* or in the management of the *cargo*, for the purpose of the carrier's exemption from liability under section 4(2) of the US Carriage of Goods by Sea Act and article 4 rule 2 of the Hague and Hague-Visby Rules. The judge, resisting a proposed reformulation of the test, directed herself that the question to ask was: "What is the primary nature and object of the acts which caused the loss?". This permitted her to distinguish cases where the primary purpose of the act was to get the cargo safely ashore, and to establish that the stowage plan was primarily about the safety of the vessel. Preferring the argument of the shipowners, she held that the primary nature and object of the acts which caused the loss were ones related to ship management in the sense of stability. What was in operation was not a want of care of cargo, but a want of care of the vessel which had an effect on the cargo.

Voyage charters and contracts of affreightment

There were several decisions on voyage charters and contracts of affreightment, most of which, at first instance, addressed specific points on contract interpretation. There was one Court of Appeal decision,

namely *CSSA Chartering and Shipping Services SA v Mitsui OSK Lines Ltd (The Pacific Voyager)* concerning the shipowner's obligation to proceed to the load port for the start of the employment. The Court of Appeal dismissed the appeal, but on subtly different reasoning from that of the judge.

The claimants had chartered the VLCC *Pacific Voyager* from the defendant owners on the Shellvoy 5 form for a voyage from Rotterdam. While proceeding through the Suez Canal to the loadport under a previous charterparty, the vessel made contact with an underwater object and required dry-docking which would take months. The charterers cancelled the charterparty two days after the laycan date of 4 February 2015 and brought this claim for damages. The charter contained no ETA at Rotterdam, nor any date of expected readiness to load, but did contain a laycan range and the usual express power of termination by the charterers if the vessel did not arrive before the specified cancelling date. The fixture recap also gave details of the anticipated timetable for completion of the previous voyage at Le Havre, and contained a provision that the shipowner would proceed with all convenient speed to load port.

The load port ETA or date of expected readiness to load were usually the trigger for an absolute obligation on the shipowner to commence the voyage to the load port at such time as it was reasonably certain that the vessel would arrive on or around the expected date. The charterers contended that where the charterparty did not specify an ETA, but did specify an ETA at the last discharge port, the absolute obligation was instead on the owners to commence the approach voyage by a date when it was reasonably certain that the vessel would arrive at the loading port by the cancelling date. The owners disputed the existence of such an obligation. The judge gave judgment for charterers. His [illegible] was an absolute one, not [illegible] important obligation intended to give comfort to a charterer and meant that the vessel must either proceed "forthwith" at the date of the charter or, as here, "within a reasonable time". A reasonable time here meant such time as it was reasonable to suppose the vessel would depart Le Havre for Rotterdam after a reasonable period for discharge, on or about 28 January 2015. The owner was therefore in breach and the charterers entitled to damages.

By way of guidance for contract drafters, the court observed that if the owner had wanted to make the beginning of the chartered service contingent on the conclusion of the previous voyage, much clearer words would have been required.

In *The Pacific Voyager*, the Court of Appeal also took the opportunity to reiterate the approach to interpretation of terms in frequent use, saying that while every charterparty must be construed on its own terms, previous decisions on the same or similar clauses must be treated as authoritative or as helpful guides in similar situations, in the interests of business certainty. Charterparty terminology, esoteric to the untrained eye, certainly needs that consistency of approach.

Thus the meaning of the charterparty term "always accessible" in relation to berths was considered in *Seatrade Group NV v Hakan Agro DMCC (The Aconcagua Bay)*. Here, a vessel under a voyage charterparty was to undertake carriage of a cargo from the US Gulf to the Republic of Congo and Angola. While she was loading, a bridge and lock were damaged, so that upon completion of loading she was delayed for a further 14 days. In arbitration, the issue arose as to the meaning of the term "always accessible" and whether it required that the vessel be able to both enter and depart from the berth. Disponent owners argued that "always" conferred a "sense of continuity, whereas charterers argued that the term addressed charterers'

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