

HAYNES BOONE

A photograph of an offshore oil rig at sunset. The rig is silhouetted against a bright orange and yellow sky. The sun is low on the horizon, creating a strong reflection on the water. Another smaller rig is visible in the distance to the left.

# SHIPPING AND OFFSHORE ENERGY

LONDON OFFICE NEWSLETTER DIGEST  
2022 YEAR IN REVIEW

# Newsletter Digest 2022

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# Welcome

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Welcome to the 2022 Shipping and Offshore Energy Newsletter Digest from the London Office of Haynes and Boone

As the editor of the newsletter, I am very excited to bring you the first annual digest of our quarterly newsletters. While Haynes and Boone, and CDG before it, has published a newsletter for our shipping, LNG, and offshore energy including oil and gas clients and contacts for many years, and more recently for those in the renewable energy sector, this will be the first time that we have packaged the content from an entire year into a single publication and sent it to our readers. We hope that it is helpful to you to have access to all the material produced in 2022 in one place and that you take the opportunity to read some of the alerts and publications that you may have missed during the year or re-read those that are of particular interest to you.

I have asked some of our partners to provide an introduction to each section of this newsletter – [shipping](#), [offshore energy](#), [renewable energy](#) and [dispute resolution](#) – in which they will reflect on the content we have produced in 2022. In my opinion, it has been a great year for our newsletter, each issue of our newsletter has been bursting with content including the excellent publications on [conversion contracts](#), [knock for knock indemnities](#) and [limitation of liability clauses](#), as well as looking at the [current shipbuilding market](#) alongside the shipbrokers, Affinity. 2022 was also the year we decided, like others working in the offshore energy sector, to change the title of our newsletter to Shipping and Offshore Energy to reflect that our work now extends beyond offshore oil and gas, but includes the broader offshore energy market. This is an exciting development and we are enjoying assisting our existing clients as many of them also move into this sector as well as new clients.

In another recent first, 2022 was the first time we asked our readers for their feedback by way of a formal survey. While I have always invited our readers to get in contact with their feedback on the newsletter, it was great to receive their responses to specific questions and to hear what they like in our newsletter and to receive their ideas for future content.

As I turn to look to 2023, we are planning to continue to provide you with excellent content but are also looking to do so in new ways, so watch this space. We would also love to grow our readership so if you have any colleagues who are interested in receiving our newsletter directly, please pass them a copy of this digest and ask them to contact me to be added to our mailing list.

We are also offering talks on a range of topics including shipbuilding contracts, limitation of liability, liquidated damages, force majeure, arbitration clauses, guarantees and indemnities, termination of contracts and subcontractors. If your company would be interested in a talk on these topics or any of the issues covered in our digest, please contact me to arrange this.

Finally, if you have any questions about the issues covered in the alerts, articles and publications included in this digest, please do get in contact with one of the authors or myself, as we would be happy to discuss these with you.

Happy reading,



**Fiona Cain**  
Editor and Counsel



# Shipping Digest 2022

## Introduction by Mark Johnson, Partner and Andreas Silcher, Partner



Mark Johnson



Andreas Silcher

In 2022, during a turbulent period of geopolitical change and challenges arising from the international energy security situation alongside continuing focus on the energy transition, we supported existing and new clients globally as they navigated a fast-evolving landscape of legal and commercial challenge.

We saw an uptick in activity in the shipbuilding and conversion markets and of particular note was the volume of newbuilding and conversion projects of offshore assets such as FPSOs, FLNGs and FSRUs with which the Haynes Boone team assisted clients.

Two years on from publication of the leading practitioner's text, [The Law of Shipbuilding Contracts](#), William Cecil (co-author of that text) and other members of the Haynes Boone team considered the significant cases that have come before the English courts since the book's

publication, in [Law of Shipbuilding Contracts Update 2022](#). Haynes Boone was also published (as the English law contributors) in the latest [Lexology Getting the Deal Through guide to shipbuilding](#) under English law. Further, Haynes Boone and the shipbroker Affinity brought together legal and market expertise in (i) a podcast on [Shipbuilding – Themes and Risks in a Changed Market](#); and (ii) a booklet discussing the current shipbuilding market and associated legal issues in [Shipbuilding: New Risks in a Changing Market](#).

In relation to conversion projects, 2022 saw the release of the first standard form conversion contract in the form of BIMCO's [CONVERSIONCON](#), discussed by Haynes Boone in [CONVERSIONCON – BIMCO's New Standard Form Conversion Contract](#) and Haynes Boone published "[Conversion Contracts – Commercial Benefits but not Without Challenges](#)", which highlights key legal risks and considerations in conversion projects.

We saw an increased level of sale and purchase activity during 2022 and (in addition to relatively vanilla second-hand tonnage transactions) assisted clients on a number of high value and cross jurisdiction offshore energy asset sale and purchase transactions (including drill ships and on field FPSOs). Earlier in 2022, BIMCO



released SHIPSALE 22 (discussed by Haynes Boone in [SHIPSALE 22 – BIMCO’s New Vessel Sale and Purchase Agreement](#)). Whilst SHIPSALE 22 contains a number of useful new clauses and updates aligning this standard form contract more closely with developments in market practice, our experience has been that the market has thus far continued to work with the Norwegian Saleform 2012. The continued dominance of the Norwegian Saleform (with its wide market familiarity) is in no small part due to parties seeking (in a dynamic second-hand market) to minimise the potential for delays that could arise from negotiating on the basis of a less familiar standard form contract. Whilst we saw a decrease in recycling activity from 2021, we continued to provide assistance to clients disposing of older tonnage, including advising on matters associated with the Hong Kong Convention and the European Ship Recycling Convention.

Concerns around sanctions and attendant risks reached a high point in light of the current

geopolitical situation – both at the pre-contract stage and during operations. We expect to continue to give increased levels of support to clients in this area in 2023. Haynes Boone produced a number of updates on sanctions for the benefit of its clients and contacts, including on Sanctions on Russia ([Court of Appeal decision](#)) as well as a [podcast](#).

In the autonomous vessels sector, 2022 saw the delivery of market leading vessels, including two 78 metre vessels to Ocean Infinity and two 67 metre ferries to Asko Maritime and we continue actively to assist entities involved in this sector. Haynes Boone published updates in respect of [autonomous vessel developments](#), including in respect of consultation for [new UK Workboat Regulations and Code](#) covering remotely operated unmanned vessels.

The increase in market activity discussed above looks set to continue in 2023 and we remain well-placed to assist our clients as they navigate issues impacting the entire shipping life-cycle.

# Shipping Alerts

## [CONVERSIONCON - BIMCO's New Standard Form Conversion Contract](#)

By Fiona Cain | Mark Johnson

June 30, 2022

BIMCO has launched CONVERSIONCON, a standard form conversion contract for the conversion of ships.

Ship conversion typically occurs in two scenarios: when a shipowner expects future hire or freight rates will not justify incurring the capital costs of a newbuilding to service a particular opportunity and decides instead to convert an existing vessel; or where an existing vessel can be repurposed to a more profitable use. In recent years, energy related projects have been a frequent driver for conversions, for example in the oil and gas arena numerous conversions of vessels into FPSOs or FRSUs, and in the offshore renewable energy arena the conversion of various ships and drilling units to offshore support vessels, crane and installation vessels to be used on offshore renewable projects.

[Read more here](#)

## [SHIPSALE 22 - BIMCO's New Vessel Sale and Purchase Agreement](#)

By Mark Johnson | Mette Duffy

June 07, 2022

BIMCO has launched SHIPSALE 22, the first solely BIMCO-produced standard form contract for the sale and purchase of vessels, which contract BIMCO describes as *"an innovative and comprehensive approach to sale and purchase agreements"*. This addition to the BIMCO suite of contracts has undergone extensive industry consultation, in which Haynes Boone participated (many of Haynes Boone's comments being reflected in the final SHIPSALE 22). Whilst many of the terms of SHIPSALE 22 are immediately familiar to those experienced in contracting on the basis of the widely used Norwegian Shipbrokers' Association's SALEFORM 2012 ("NSF 2012"), SHIPSALE 22 adopts the BIMCO standard box format and incorporates both entirely

new clauses as well as updated arrangements that are intended to be more closely aligned with current market practice. The mix of the familiar and the new within an overall structure that is intended to follow the chronology of a vessel sale and purchase transaction leads Haynes Boone to expect that SHIPSALE 22 will gain traction quickly within the vessel sale and purchase market.

[Read more here](#)

## [Sanctions on Russia revisited: Using reasonable endeavours in the event of force majeure now excuses strict performance](#)

By Glenn Kangisser | Fiona Cain | Kayley Rousell

November 15, 2022

In October 2022, the English Court of Appeal delivered its judgment in *MUR Shipping BV v RTI Ltd* overturning the Commercial Court's judgment and restoring the arbitration award and finding that MUR (the "Owners") could not rely on the force majeure clause to suspend performance, as they should have exercised reasonable endeavours and accepted payment of the contractual amount due for freight in an alternative currency from RTI (the "Charterers").

This latest judgment illustrates the difficulties with interpretation of a force majeure clause requiring the exercise of reasonable endeavours.

[Read more here](#)

## [Maritime Autonomous Surface Ships: Consultation for new MCA Workboat Regulations and Code and further growth in the autonomous vessel sector](#)

By Mark Johnson | Fiona Cain | Kayley Rousell

December 7, 2022

In a welcome demonstration of further support to the Maritime Autonomous Surface Ships ("MASS") industry, on the 6th October 2022 the UK's Maritime and Coastguard Agency ("MCA") released for consultation a new statutory instrument, The Merchant Shipping (Small Workboats and Pilot Boats)



# Shipping Alerts – Autonomous Vessels

Regulations 2023 (the “Regulations”) and the 3<sup>rd</sup> edition of the Code of Practice for the Safety of Small Workboats and Pilot Boats, its accompanying code, (the “Workboat Code”). The new Regulations, when introduced, will revoke the 1998 regulations of the same name, with the new Regulations seeking to provide a more coherent legal framework for the certification of vessels, including the consequences of non-compliance. Further, the new Workboat Code, when introduced in Summer 2023, will replace the previous editions of the Workboat Code with positive recognition for autonomous vessels.

## Other notable MASS developments

- Creation of the National Centre for Coastal Autonomy.
- Ocean Infinity took delivery of their first two 78 metre class vessels – Armada 7801 and 7802.
- In September 2022, ASKO Maritime christened its two sea drone freight ferries, which are designed to sail unmanned.
- The recent International Maritime Organisation Maritime Safety Committee meeting included discussion of a mandatory MASS Code.

[Read more here](#)

## [Autonomous Vessels: Recent Developments](#)

By Mark Johnson | Fiona Cain

August 17, 2022

The growing autonomous vessel market has seen a number of exciting developments in 2022. In this alert, we summarise some of these latest developments.

- ASKO: Two 120 TEU purpose-built electric barges
- *Mayflower 400*: Purpose built trimaran research vessel
- *Project MEGURI2040*
- *Prism Courage*: 122,000 tonne ultra-large LNG carrier

- *Yara Birkeland*: 120 TEU purpose-built battery powered open top container ship

[Read more here](#)

## [Slow Steaming to a Mandatory International MASS Code](#)

By Fiona Cain | Mark Johnson | Christopher Orford

May 27, 2022

The recent IMO’s Maritime Safety Committee (MSC) meeting, MSC 105, has provided an update on the development of the regulation of maritime autonomous surface ships (MASS). Most notable is the approval of the road map to develop IMO goal-based instruments to be adopted in the second half of 2024. Importantly, this code will not be mandatory but will be used to develop a mandatory version of the code that is planned to enter into force on 1 January 2028.

[Read more here](#)

## [Autonomous Vehicle Regulation in the UK Takes a Tentative Step Forward](#)

By Mark Johnson | Fiona Cain | Christopher Orford

January 27, 2022

As autonomous technology advances, it is clear that current legislation and regulations will need to be updated to enable this new technology to operate safely on our roads, seas and airspace. On 26 January 2022 an important step was taken within the UK as the Law Commission of England and Wales and the Scottish Law Commission published their [Automated Vehicles joint report](#) with recommendations for a new regulatory framework to govern the introduction and continued safe use of automated vehicles on UK roads.

The report makes a wide range of recommendations for what is required in order for autonomous vehicles to be legal and operate safely on UK roads.

[Read more here](#)

# Shipping Publications

We have produced three publications relating to shipbuilding and ship conversion projects in 2022 and contributed to Lexology Getting the Deal Through Shipbuilding 2022. Please click on the titles to access them.



## [Law of Shipbuilding Contracts Update 2022](#)

By William Cecil | Andreas Dracoulis  
James Brown | Fiona Cain | Jack Spence

It is two years since the fifth edition of the Law of Shipbuilding Contracts by Simon Curtis, Ian Gaunt and William Cecil was published. In this update, we consider the significant cases relating to the law of shipbuilding contracts and those in the context of general commercial law which impact on shipbuilding and related contracts that have come before the English courts recently.



## [Conversion Contracts – Commercial Benefits but not Without Challenges](#)

By Mark Johnson | William Cecil | Mette Duffy

There has been an increase in vessel conversion particularly in highly specialised sectors (for example, FLNGs, FRSUs, FPSOs and offshore wind construction/installation vessels) in recent years. In this booklet, we take a look at some of the key issues when entering into a conversion contract.



# Shipping Publications



## Shipbuilding: New Risks in a Changing Market

By William Cecil | Mark Johnson with Affinity

In this publication, Affinity discuss the current state of the shipbuilding market and consider the implications for the industry longer term and Haynes Boone discuss the legal issues that may arise in the current shipbuilding market, including causes of shipbuilding disputes and legal challenges associated with shipbuilding capacity constraints.

## Lexology Getting the Deal Through – Shipbuilding 2022: England and Wales

By William Cecil | Fiona Cain | Mette Duffy

The 2022 edition of the Lexology Getting the Deal Through – Shipbuilding guide was published in March 2022.

The chapter on shipbuilding contracts governed by the law of England and Wales is written by Haynes and Boone CDG, LLP's William Cecil, Fiona Cain and Mette Duffy. It has been updated to include recent case law on guarantees, confidentiality of ship designs, and liquidated damages clauses, as well as developments with autonomous vessels and the BIMCO standard form refund guarantee.

# Shipping Podcasts

## [Shipbuilding – Themes and Risks in a Changed Market](#)

June 27, 2022

Haynes Boone and shipbrokers Affinity discuss significant legal and commercial themes that arise as the shipbuilding market adapts to changes in the marketplace.

### **Moderator**

William Cecil, Partner and Head of Dispute Resolution, Haynes Boone and co-author of the fifth edition of the Law of Shipbuilding Contracts, published May 2020 (Informa Law from Routledge)

### **Panelists**

Mark Johnson, Shipping Partner, Haynes Boone

Amanda Larrington, Disputes Counsel, Haynes Boone

Nick Pugh, Broker/Analyst, Affinity Shipbuilding LLP

Nick Wood, Head of Newbuilding/Partner, Affinity Shipbuilding LLP



## [Economic sanctions against Russia in the wake of its invasion of Ukraine](#)

April 01, 2022

This HB On Track podcast features Ed Lebow, Counsel in the firm's Washington, D.C. office, and London Partner Andreas Dracoulis discussing the economic sanctions levelled on Russia in the wake of its invasion of Ukraine. The lawyers provide a brief history and regulatory overview of economic sanctions, from a US, and UK perspective, and then cover key issues in regards to the Russia sanctions, including their impact on US and UK companies that do businesses with Russian individuals and companies.



# Shipping External Articles

## [New Singapore Arbitration Rules – Everything you Need to Know](#)

Fiona Cain for Ship Management International

January 27, 2022

From 1st January 2022, arbitrations commenced under the rules of the Singapore Chamber of Maritime Arbitration (SCMA) are subject to new rules.

The 4th edition of the rules was issued by the SCMA to ensure that their arbitrations remain relevant and attractive for parties and also to reinforce cost efficiency for maritime and international trade arbitrations.

[Read more here](#)

## [New SCMA Rules: Reflecting the New World of Arbitration](#)

Fiona Cain for Hellenic Shipping News

February 24, 2022

The Singapore Chamber of Maritime Arbitration (SCMA) provides a framework for maritime and international trade arbitrations.

SCMA arbitration based in Singapore is the default choice for dispute resolution under the Singapore Standard Code of Practice for Bunkering and the Singapore Ship Sale Form.

It is also listed as one of the default choices in BIMCO's Law and Arbitration Clause 2020 and the NYPE Time Charter 2015 and therefore a popular choice for maritime arbitrations.

The SCMA recently launched the 4th edition of their rules, which will govern any SCMA arbitration commenced on or after 1st January 2022.

[Read more here](#)

## [On Demand Guarantees: Don't Tie Your Hands](#)

Andreas Dracoulis and Jack Spence for Maritime Risk International

March 01, 2022

In September 2011 Reignwood International

Investment invested US\$200 million in the purchase of a newbuild offshore drillship from Shanghai Shipyard Co Ltd.

It was perhaps no coincidence, however, that Reignwood – a company with no obvious connection to the offshore drilling sector – happened to invest in the sector amid the sustained period of high oil prices in the early part of the last decade.

Reignwood initially entered into the shipbuilding contract, but always intended to novate the contract to a special purpose company part-owned by Reignwood and its partners (the SPV buyer). The contract required Reignwood to provide a guarantee to the shipyard, securing the final (delivery) instalment of US\$170 million (the guarantee).

[Read more here](#)

## [New EU and US LNG deal](#)

Andreas Silcher quoted in LNG Journal

April 01, 2022

The U.S. LNG deal with Europe has led to more questions than answers.

For example, how will the U.S. export the extra gas when its terminals are almost running at full capacity? Can European terminals cope with the extra imports? Are there enough LNGCs to ship the extra gas, given that the Russian controlled fleet is sanctioned?

Vague Agreement

Importantly, FERC [Federal Energy Regulatory Commission] announced it would slow walk the implementation of new permitting guidelines that would consider greenhouse gas emissions as part of its process.

It is clear that the U.S. and others must accelerate development of energy supplies quickly to offset the impact of current and future sanctions on Russian energy supply, he said.

Andreas Silcher of law firm Haynes Boone added; "This new agreement is significant, as the additional 15 bill cu m to be supplied from this year already can potentially replace all of the Russian gas currently imported by the EU in the form of LNG.

[Read more here](#)



# Offshore Energy Digest 2022

## INTRODUCTION BY GLENN KANGISSER, PARTNER



Glenn Kangisser

I'm delighted to introduce the Offshore Energy section of the first Haynes and Boone Offshore Energy and Shipping Newsletter Annual Digest. There has been some great content in our newsletters in 2022 including

long-reads exploring key topics of risk allocation and limitation clauses in detail, as well as a focus on energy disputes. We have also published some shorter pieces on subcontractor performance and a summary of our long-read on limitation of liability clauses.

In this section you will find the following:

- Glenn Kangisser published a booklet - [Limiting Your Liability – a guide to limitation of liability clauses under English law](#). Written in the specific context of offshore drilling contracts, it contains a helpful summary of legal principles, which are equally applicable to limitation of liability clauses in other types of commercial contracts. This guide provides a summary of the key issues relating to the drafting of limitation of liability clauses and considers how these provisions have been interpreted by the English courts in recent years.

- [Knocking at An Open Door](#) is a new publication from Glenn Kangisser, Teena Grewal and Mette Duffy looking at the English law approach to mutual indemnities in the offshore oil and gas sector.
- James Brown, William Cecil and Andreas Dracoulis have contributed to the [Fifth Edition of the Guide to Energy Arbitrations published by Global Arbitration Review](#). Their chapter addresses the key issues that arise in disputes concerning the construction of offshore vessels and floating units and can be read [here](#).
- In [Incentivising Subcontractor Performance](#), Andreas Dracoulis and Jonathan Morton discuss the ways to encourage good subcontractor performance other than simply using the “stick” of liquidated damages.
- In [Limitation of Liability: A General Overview under English Law](#), Glenn Kangisser and Shu Shu Wong discuss the importance of limiting liability in commercial contracts. This is a summary of the long-read mentioned above.

We are happy to host webinars or in person seminars on the above topics so please do get in touch if this would be of interest.

# Offshore Energy Alerts

## [Limitation of Liability: A General Overview under English Law](#)

By Glenn Kangisser | Shu Shu Wong

October 03, 2022

Limitation of liability provisions are a key aspect of commercial contracts and are often heavily negotiated. Without such provisions, there is no financial limit on the damages a counterparty can recover. Therefore, if a party wishes to reduce its exposure, clearly drafted limitation of liability provisions will need to be included in the relevant contract.

This alert considers:

- Limitation of liability clauses – what are they and why have them?
- Importance of clear wording.
- What is (and what isn't) covered by the cap?
- What about gross negligence and wilful misconduct?

[Read more here](#)

## [Incentivising Subcontractor Performance](#)

By Andreas Dracoulis | Jonathan Morton

March 08, 2022

In any large construction project there is likely to be a chain of subcontractors beneath the head contractor, and even the smallest link in that chain may have the power to seriously derail the project schedule. While much focus in any project will be on the big-ticket items, there is a danger that substandard performance by a minor subcontractor could end up leading to significant problems. As the old proverb tells us: *“For want of a nail the shoe was lost. For want of a shoe the horse was lost. For want of a horse the rider was lost. For want of a rider the battle was lost. For want of a battle the kingdom was lost. And all for the want of a nail.”*

While the use of liquidated damages will operate (in part) to deter subcontractors from breaching their

obligations, there will be situations where the poor performance does not amount to a breach and so does not trigger any liability (whether for liquidated damages or otherwise). There may however be a knock-on effect sufficient to cause the head contractor serious difficulties – for example, the work may become more difficult or time consuming. Contractors will also want to encourage their subcontractors to contribute positively to the project (such as to reduce time and cost), while producing the highest quality work, rather than the minimum sufficient to comply with their contractual obligations.

This article will look at methods for incentivising subcontractors to perform where there is not otherwise an actionable breach of contract. That could include a failure by a subcontractor to provide certain documents needed in order for the contractor to begin work, or consistently supplying products/ completing work at the last possible moment. It will also consider how to encourage performance at a level better than the bare minimum.

[Read more here](#)



# Offshore Energy Publications

We have produced two publications focussed on the offshore oil and gas sector on mutual indemnities and limiting liability and contributed to the Guide to Energy Arbitrations and Oil & Gas Contracts, Principles and Practice. Please click on the titles to access them.



## [Knocking at An Open Door - The English law approach to mutual indemnities in the offshore oil and gas sector](#)

By Glenn Kangisser  
Teena Grewal | Mette Duffy

This guide provides a summary of key issues relating to the drafting of knock for knock indemnity clauses and considers the evolution of the interpretation of these provisions by the English courts.

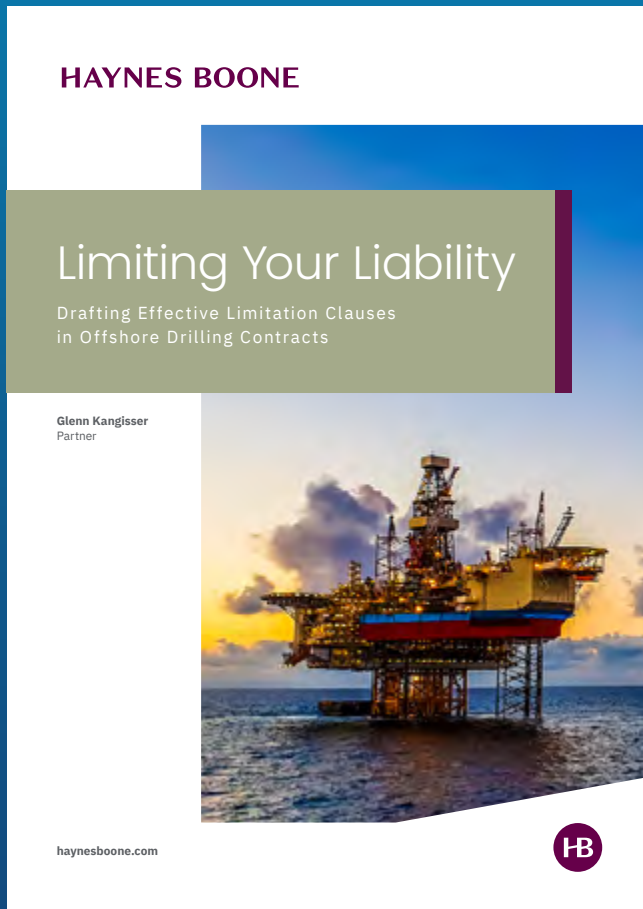
## [Fifth Edition of the Guide to Energy Arbitrations published by Global Arbitration Review](#)

James Brown, William Cecil and Andreas Dracoulis have contributed to the Fifth Edition of the Guide to Energy Arbitrations published by Global Arbitration Review. Their chapter Offshore Vessel Construction Disputes addresses the key issues that arise in disputes concerning the construction of offshore vessels and floating units.

The Guide to Energy Arbitrations is a widely regarded reference tool for energy companies, their advisers and arbitrators. Written by authors who are renowned in the industry, the guide compiles information on the multitude of issues that may arise in energy disputes and provides guidance for minimizing the risk of and resolving such disputes.



# Offshore Energy Publications



## Limiting Your Liability – a guide to limitation of liability clauses under English law

By Glenn Kangisser

A guide to limitation of liability clauses under English law. Written in the specific context of offshore drilling contracts, it contains a helpful summary of legal principles, which are equally applicable to limitation of liability clauses in other types of commercial contracts. This guide provides a summary of the key issues relating to the drafting of limitation of liability clauses and considers how these provisions have been interpreted by the English courts in recent years.

## Third Edition of the Oil & Gas Contracts, Principles and Practice, published by Sweet & Maxwell

Anna Nerush has contributed to the Third Edition of the Oil & Gas Contracts, Principles and Practice, published by Sweet & Maxwell. Anna's chapter on Acquisitions and Divestments in the Upstream Sector addresses the key issues that arise in acquisitions, divestments, farm outs/ins and asset swaps. The Oil & Gas Contracts, Principles and Practice is a widely regarded guide for practitioners and energy companies on the law of upstream, midstream and downstream petroleum contracts.

# Offshore Energy Webinars

## WSG North America Region Discussion: War in Ukraine - Impacts on the Energy Industry, Cybersecurity & Sanctions Enforcement

June 09, 2022

The WSG North America Regional Council hosted a regional update round table discussion with industry experts discussing the impact that the war in Ukraine is having on the oil & gas markets, energy security and transition, cybersecurity and sanctions enforcement. Anna Nerush was one of the speakers on this webinar which was moderated by our US colleague, Ricardo Garcia-Moreno and also included Ryan Patrick.





## [UK's Oil and Gas 'Windfall Tax'](#)

Glenn Kangisser quoted in *Energy Voice*

November 18, 2022

Glenn Kangisser, partner at international law firm Haynes and Boone, said: “Chancellor Jeremy Hunt today announced an extension to the so-called ‘Windfall Tax’ on UK oil and gas companies, known as the EPL. The increase of the EPL from 25% to 35% (meaning a new effective tax rate of 75% on profits) and the extension of its application from 2025 to March 2028, has borne out some of the worst fears of those in the UK oil and gas Industry. Offshore Energies UK commented earlier in the week that such an extension would put both existing oil and gas projects in the UKCS, as well as future investments in the sector, at significant risk.

“While the Chancellor may feel there are good short-term economic and political reasons to extend the EPL so soon after its introduction in May this year, the long-term impact on the UK’s energy security strategy – which naturally requires a reduced reliance on imports – remains to be seen.”

[Read more here](#)

## [Ithaca Energy's £2.5B IPO](#)

Glenn Kangisser quoted in *Law 360*

November 15, 2022

Glenn Kangisser, a partner at international law firm Haynes and Boone, LLP, described the IPO as a “positive development” for the company, despite turbulent times for the oil and gas sector. “The company is right to sound a note of caution over the possible extension to the U.K. windfall tax regime, known as the Energy Profits Levy,” Kangisser told *Law360*.

“With the Autumn Statement due to be delivered next Thursday, we will soon see how the U.K. government seeks to balance the obvious need for companies like Ithaca Energy to develop the U.K. continental shelf assets as part of its energy security strategy,” he added.

[Read more here](#)



# Renewable Energy Digest 2022

## Introduction by Conrad Purcell, Partner



Conrad Purcell

A number of distinct themes emerged from the projects we worked on during 2022. We began the year with new merger control rules, as described in [The National Security and Investment Act Takes Effect on 4 January – What You Need to Know](#) about the National Security and Investment Act. Fortunately, our clients' transactions have not been materially adversely affected by the new rules, notwithstanding that much of our focus is on the energy space and therefore covered by them, as we have helped them to navigate the changed legal landscape.

Whereas 2020 and 2021 were dominated by the imminent phase out of LIBOR and the need to document the transition to Risk Free Rates (RFRs), especially in relation to Sterling denominated loans where the phase out took place earlier than it did for US Dollar denominated loans, 2022 financings have been taking place in the context of the "new normal" of RFRs. However, differences have emerged in the use of RFRs between Sterling and US Dollar loans as noted in [LIBOR Phase Out of Sterling and US Dollar Markets](#).

We have seen an increased focus this year on new technologies coming to the fore in the energy space, as noted in [Navigating the Deep Waters of Offshore Floating Wind](#) on floating wind turbines. As well as new technologies we have seen clients in the clean energy space use alternative funding sources to the traditional project finance lenders. In [Direct Lending: The optimum solution for UK battery storage project sponsors?](#) we explore the pros and cons of alternative funding sources in the context of battery electric storage project development including bank lending, bond issues, equity capital markets and direct lending from non-bank alternative lenders such as private equity funds.

From new technologies to more established ones [Time to Wind Down? End of Life Options for the UK's Ageing Wind Farms](#) looks at the end of life options for owners of UK onshore windfarms, including repowering. As the onshore wind farm fleet in the UK gets older and the economics of exploiting some of the best and windiest sites for onshore wind farms settle down in a post-subsidy environment it is time for owners to plan for the next phase of their businesses.



## [CCUS: Proposed Commercial Frameworks for Power and Industrial Carbon Capture, and Transport & Storage](#)

By Anna Nerush | Shu Shu Wong | Alethea Barretto

June 01, 2022

The development of Carbon Capture Usage and Storage (“CCUS”) is a key component of the UK’s strategy to achieve net zero emissions by 2050. Successful CCUS deployment requires significant government support, particularly through the introduction of a robust regulatory and contractual framework.

It is the UK’s aim to deploy CCUS in at least two industrial clusters by the mid-2020s, and for two more clusters to be operational by 2030. Since December 2020, the Department for Business, Energy and Industrial Strategy (“BEIS”) has published numerous proposals relating to transport, storage and use of carbon.

To date BEIS is considering three principal business models, the Transport & Storage (“T&S”) Business Model, the Dispatchable Power Agreement (“DPA”) Business Model and the Industrial Carbon Capture (“ICC”) Business Model.

This article will outline the key features of each of the business models in turn.

[Read more here](#)

## [Small Modular Reactors: More than just Fission for Attention?](#)

By Andreas Dracoulis | Jack Spence

March 15, 2022

### **What is a SMR?**

Small modular reactors are nuclear reactors with a power capacity of up to approximately 300 megawatts of electricity.

As countries around the world consider how nuclear energy could play a greater role in decarbonising their economies and ensuring energy independence, the possibility of generating more low carbon energy from these smaller reactors is hugely appealing.

These reactors, together with their advantages, and recent government actions in the UK are considered within this article.

[Read more here](#)

# Renewable Energy Webinars

## Growth of Battery Storage Projects in the UK

January 19, 2022

Conrad Purcell together with Jemma Couchman, a partner at Cameron Barney hosted a webinar discussing the following topics:

- Why there has been a growth of battery storage projects in the UK when it used to be a niche market, inclusive of the route to market, the revenue streams and technology impacting the reduction in cost, and the change in the regulatory landscape.
- Whether there has been an increase in mergers and acquisition activity or project finance following the growth of battery storage projects.
- The long-term contracted revenue streams under offtake agreements and the maturity of technology and the role they have played.
- How the market will evolve over the next 12-24 months as we emerge from the pandemic, inclusive of the risk of market saturation, the benefits for equity return, and likely mergers and acquisition activity longer term.





# Renewable Energy External Articles

## [LIBOR Phase Out of Sterling and US Dollar Markets](#)

Conrad Purcell for *IJGlobal*

August 15, 2022

After decades of service, LIBOR (London Interbank Offered Rate) effectively ceased to be used as an interest rate benchmark at the end of 2021 in most markets. Synthetic LIBOR will continue to be published for Sterling until the end of 2022 but only to support legacy deals that hadn't transitioned to an RFR (Risk Free Rate) by the end of 2021.

Although USD LIBOR was given a bit longer than other currencies to cease being used, that too will no longer be published after 30 June 2023. As such, lenders and borrowers have had to adjust to a post-LIBOR world in which RFRs (which are generally slightly lower than their LIBOR equivalents) are used as the primary interest rate benchmark from which to calculate interest on floating rate loans.

[Read more here](#)

## [Direct Lending: The optimum solution for UK battery storage project sponsors?](#)

Conrad Purcell for *Clean Energy Pipeline*

June 28, 2022

The UK direct lending market has grown rapidly over recent years and it is projected to continue to do so. Some areas in which direct lending has historically played a significant role include acquisition financing of technology, media, entertainment and healthcare companies. However, direct lending structures offer advantages that could also benefit UK battery storage project sponsors, some of whom find that the comparatively shallow banking market offering project finance type loans to battery storage projects do not give them the leverage or flexibility they want.

The UK battery electricity storage market is relatively young and many of the sponsors and funders of battery storage projects have a background of working on mid-market renewable energy projects, with which they share some features. As such it is no surprise

that many of the financing techniques used to fund the capex of renewable energy projects, or to refinance them, have been applied to battery storage projects. However, when the renewables model is applied to a battery storage project it often doesn't quite fit.

There are a range of funding solutions for renewable energy projects, each of which have certain shortcomings for battery storage projects which are important to consider.

[Read more here](#)

## [Navigating the Deep Waters of Offshore Floating Wind](#)

Conrad Purcell and Jonathan Morton for *Infrastructure Investor*

June 08, 2022

Floating offshore wind may be an industry still in its infancy, but it is growing up rapidly. It has now moved from the purely theoretical to the practical, and a flood of new projects are hitting the market. For example, the partners BW Ideol, TotalEnergies and Qair recently reached the final investment decision for the EolMed project, a 30MW off-shore floating wind farm in the French Mediterranean.

Further afield, in Japan, the construction of the first floating wind farm in that region is scheduled to start in September 2022, featuring eight hybrid spar-type floating foundations delivering 16.8MW of power.

[Read more here](#)

## [Troubled Waters? – Managing Risk in Floating Offshore Wind](#)

Jonathan Morton for *OffshoreWIND.biz*

May 18, 2022

The embrace of floating offshore wind has come surprisingly fast. There is already talk of floating wind sites with more than 100 turbines being built by 2032, and the interest and investment in the industry has rapidly globalised.

The path for the industry over the next ten years is therefore steep, potentially perilously so, and the risks are high.

While many of these risks are similar to those for fixed bottom wind projects, there are unique challenges for floating projects in respect of warranties and guarantees; operation and maintenance; and delay and disruption in particular which will need to be considered carefully.

[Read more here](#)

## [Relaxation of Planning Rules for Renewable Projects](#)

Conrad Purcell for *Infrastructure Investor*

May 03, 2022

Washington, DC-based Hull Street Energy has closed its second North America-focused fund, reaching its hard-cap of \$1.1 billion, more than double its predecessor, which had raised about \$500 million in May 2019, Zak Bentley reports.

Hull Street Energy Partners II, which was launched in the middle of last year, is a continuation of the strategy adopted for its debut fund, which “targets investments in the North American power sector as the economy electrifies and decarbonizes,” according to a statement from the firm. ...

Overall, the firm manages 53 power generation stations, providing more than 1.2GW of renewable, gas-fired and dual-fueled generation capacity.

“[The government being] willing to update English planning policy for repowering is a positive.” – Haynes Boone’s Conrad Purcell on UK’s 2022 Energy Strategy.

[Read more here](#)

## [Time to Wind Down? End of Life Options for the UK’s Ageing Wind Farms](#)

Conrad Purcell for *Energy Voice*

January 24, 2022

By 2030 half of all UK wind farms will be over 20 years old. Not only will the wind turbines have reached the end of their design life after 20 years, but the projects’ leases, planning permission and other contracts will have been structured around this 20-year period.

The owners of aging wind farms have a range of end-of-life options. The default position will be to dismantle the installation, remediate the site and to restore it to its former use.

However, as these early projects reach the end of their design life their current owners may wish to extract some additional value from them by:

- Allowing them to continue running for as long as the equipment lasts.
- Extending the life of the installation by fitting new key components into the existing equipment.
- Dismantling and replacing the old equipment.

[Read more here](#)

## [The National Security and Investment Act Takes Effect on 4 January – What You Need to Know](#)

Conrad Purcell for *New Power*

January 07, 2022

The National Security and Investment Act 2021 (the NS&I Act) will establish a new regime for government approval of transactions that may give rise to a risk to national security when it comes into effect on 4 January. Conrad Purcell, infrastructure and energy projects partner at law firm Haynes Boone, considers the implications for the energy sector.

The NS&I Act seeks to balance the desire to promote the UK’s attractiveness to investors, especially foreign direct investment post Brexit, with the need to protect national security.

The NS&I Act will replace parts of the Enterprise Act 2002 (the Enterprise Act) under which the government was able to intervene in transactions that threatened national security on public interest grounds, if they fell within the UK or EU merger control rules.

Although the NS&I Act will apply to both domestic and foreign investors, the increased scrutiny of investments in the 17 mandatory notification sectors (of which energy is one) comes at a time when other countries around the world are tightening their foreign direct investment screening regimes. The government’s expectation is that up to 1,800 transactions a year may be reviewed by the Investment Security Unit (ISU) (the unit within the Department for Business, Energy and Industrial Strategy responsible for approving transactions under the NS&I Act) a significant increase from the number of interventions under the current Enterprise Act regime.

[Read more here](#)

# Dispute Resolution Digest 2022

## Introduction by James Brown, Partner and Andreas Dracoulis, Partner



James Brown



Andreas Dracoulis

Alongside their busy practices, our disputes lawyers have continued to share details of legal developments and to publish knowledge pieces relating to the resolution of commercial disputes which it is hoped will be of interest to our clients and contacts. As always, we have kept abreast of key decisions of the courts throughout the year, providing updates on a Court of Appeal decision on the ever-current topic of [good faith obligations in contracts](#), another Court of Appeal decision addressing the continued difficulties that courts have when considering [on-demand guarantees](#), a Commercial Court decision relating to the principles to be applied in “[loss of chance](#)” cases, and another Commercial Court judgment in which the court demonstrated it will [hold parties to the strict terms of their agreement even if the result for one party may be harsh](#) (providing a helpful reminder of the need to ensure that securing new business does not lead to a party entering into a one-sided contractual bargain).

In September we were prompted by the “Wagatha Christie” libel trial (as it popularly became known) between the two footballer wives, Rebekah Vardy and Coleen Rooney, to consider [what is a](#)

[document](#) for the purposes of disclosure in both High Court litigation and arbitration. Members of the general public following that case would have probably been surprised to know that the contents of the mobile phone of Ms Vardy’s agent, apparently accidentally dropped into the sea at around the time that Ms Vardy was ordered to disclose relevant documents to Ms Rooney’s legal team, were indeed “documents”. In another article, we detailed [why in our view English law and London-seated arbitration remain very sensible choices for parties agreeing contracts](#).

In a [podcast](#), we considered the impact of the Russian war in Ukraine in terms of sanctions and on contractual performance. Key questions that arise in this context concern not only relevant contract machinery such as force majeure and sanctions clauses, but also access to legal representation and arbitration tribunals where sanctioned entities are involved.

Whilst it is always our aim to obtain a satisfactory resolution of commercial disputes for our clients without the need for court or arbitral proceedings, when that cannot be avoided our articles covering [strategies for success in heavy, complex litigation or arbitrations](#) and covering [freezing orders](#), a powerful remedy of the English court that may be deployed in support even of foreign court or arbitral proceedings, will be of interest. Finally, members of our team have again contributed to the latest edition of [GAR’s Guide to Energy Arbitrations](#), providing guidance on navigating offshore construction disputes.



# Dispute Resolution Alerts

## [Rescuing a wrongful termination](#)

By Fiona Cain | Jack Spence

December 05, 2022

Can a party wrongfully purporting to terminate a contract ever not be in repudiatory breach? This was the question which fell to be decided by His Honour Judge Stephen Davies, in the Technology and Construction Court in *Thomas Barnes & Sons PLC (in administration) v Blackburn with Darwen Borough Council*. The Court held that the answer was yes, at least where the termination was wrongful only for a formal reason, and provided indicative factors as to when this might be the case, including that the innocent party could not show any detriment from the wrongful termination.

[Read more here](#)

## [Breaking down good faith: the importance of context](#)

By Fiona Cain | Alethea Barretto

December 05, 2022

English law does not have a general doctrine of good faith. Instead, it may imply a duty of good faith in certain categories of contracts (i.e., so-called ‘relational’ contracts), but otherwise parties are free to include express obligations of good faith in any contract. This, however, can create uncertainty as it then falls to the courts to interpret the scope of the duty of good faith contained in such a clause, which is what happened in the case of *Re Compound Photonics Group Ltd; Faulkner v. Vollin Holdings Ltd*.

[Read more here](#)

## [No Escape from a Bad Bargain](#)

By James Brown

November 28, 2022

The case of *Optimares S.p.A -v- Qatar Airways Group Q.C.S.C* [2022] EWHC 2461 (Comm), recently determined by the English Commercial Court, acts as

a stark reminder to commercial parties of the need to take great care in the formation of their contractual bargains. The judgment demonstrates clearly that the English courts will not hesitate to hold parties to the terms of their contract even if to do so may impact very negatively upon one party to the contract. As such, the courts will, when the terms of a contract are clear, uphold those terms and not “bend” the meaning, or read into the contract terms that may mitigate an extremely unfortunate commercial outcome for one of the parties.

As world economies enter into recession, and opportunities for new business become more scarce, parties are advised to heed the reminders presented by this case. Parties should be very careful not to enter into bad contractual bargains for the sake of securing new business, anticipating that the courts will mitigate the impact of the terms of that contract for a party.

[Read more here](#)

## [English Court Awards £14.98 Million in “Loss of a Chance” Damages for Breach of a Confidentiality and Exclusivity Agreement](#)

By Glenn Kangisser | Shu Shu Wong

September 16, 2022

In July 2022, the English Commercial Court ruled in *Bugsby Property LLC v LGIM Commercial Lending Limited, Legal & General Assurance Society Limited* [2022] EWHC 2001 (Comm) in favour of Bugsby Property LLC (“Bugsby”), the claimant, in a claim for £366 million in damages arising from a failed bid to acquire the Olympia Exhibition Centre in London. The Court awarded Bugsby “loss of a chance” damages of £14.98 million.

The case demonstrates the application of “loss of a chance” principles and the award of damages in claims arising out of a breach of an agreement containing terms of non-disclosure and exclusivity. Agreements of this nature are commonly entered into by parties contemplating a proposed commercial transaction.

[Read more here](#)



## [What is a document?](#)

By Glenn Kangisser | Fiona Cain | Christopher Orford

September 01, 2022

When a dispute arises, your lawyers will ask you to preserve and/or provide them with the relevant documents. In the past, we would have expected you to send us the hard copy file(s); more recently this would have been the relevant mailbox folder containing the emails. Now, with ever increasing methods of communication, documents are much more than a piece of paper, computer files or your mailbox folder.

The recent spectacle of the so-called “Wagatha Christie” case between Rebekah Vardy and Coleen Rooney and another recent case demonstrate just how important these “non-traditional” forms of documentation and communication are in forming a clear picture of what has occurred and in determining liability. With the increased use of multiple, different communication platforms between professionals and clients and an increased blurring of work and personal devices, it is therefore important to understand what is meant by the term “document” and to know what you may have to disclose in any future litigation.

## [An Introduction to Freezing Orders](#)

By James Brown

June 28, 2022

Freezing orders (or freezing injunctions) are one of the most powerful forms of relief obtainable from the English courts.

A party subject to a freezing order is directed by the court not to deal with or dispose of its assets save in the very limited circumstances provided in the order.

It therefore provides a means for a claimant to ensure that a defendant’s assets will remain preserved so that the claimant may eventually enforce against them in the event it is successful in the proceedings.

The reach of such orders can be very wide indeed as will be detailed in this briefing note.

Moreover, as well as being obtainable in connection with English court and arbitral proceedings, such orders may be obtained by parties:

1. in respect of assets that are located outside of England and Wales; and/or
2. in support of proceedings that are taking place in a foreign jurisdiction (i.e. taking place other than in England or Wales), whether court or arbitral proceedings.

As such, given the potentially wide range of circumstances in which the English court may be prepared to grant a freezing order, this brief introduction should be of wide interest.

[Read more here](#)



## [Getting From Dispute to Resolution - 10 Strategies for Success in Complex Litigation](#)

By Glenn Kangisser | Andreas Dracoulis

May 06, 2022

Glenn Kangisser and Andreas Dracoulis share 10 strategies for handling large-scale and complex litigation or arbitration proceedings in respect of agreements governed by English law.

Glenn and Andreas recently acted for the successful claimant in a London arbitration and obtained an award in excess of USD \$400 million following a multi-week hearing conducted virtually and in person. Glenn previously obtained a USD \$270 million judgment for the successful claimant in the case of *Seadrill Ghana Operations Limited v Tullow Ghana Limited [2018] EWHC 1640 (Comm)*.

Complex disputes often concern multiple parties, multiple jurisdictions, complex legal issues, lengthy trials and large sums of money. These cases can take years to resolve and often generate very substantial costs for the parties involved.

Fortunately, however, there are a number of strategies to facilitate the handling of large scale and complex proceedings in respect of agreements governed by English law. These will help keep costs and time investment to a minimum.

[Read more here](#)

## [Arbitration Clauses: 10 reasons why you should consider English Law and a London-seated Arbitration for Dispute Resolution](#)

By Fiona Cain | Charlotte Mullis

April 01, 2022

Dispute resolution clauses in a contract provide the parties with an agreed approach to resolve any disputes that arise under the contract. We often find that during contract negotiation, parties adopt the laws and forum that they are familiar with and/or do not seek to negotiate this clause as they hope that they will not have to refer to it. Unfortunately, differences and disputes do arise and if relationships have broken down, it can be too late to seek to amend the clause. It is therefore important to consider the dispute resolution clause as a key element of the pre-contract negotiations. We often recommend a London seated arbitration under English law which provides various benefits to the parties as further detailed in this briefing note.

While this briefing note covers the topic briefly, for those interested in more information, we have produced a detailed comparison of the rules of 7 key arbitral institutions and 3 standalone rules. Please contact [Fiona Cain](#) or [Charlotte Mullis](#) if you would like us to share a copy of this with you.

[Read more here](#)





# Dispute Resolution Webinars

## [Supply Chain Issues in the U.S., China and the UK - How to Navigate Contractual Obligations and Avoid Disputes](#)

William Cecil | Liza Mark | Gilbert D. Porter

January 14, 2022

The webinar discussed the unprecedented disruption of supply chain issues; ways to avoid disputes and the best practice when drafting commercial contracts; and whether contracts need to offer more protection in the future, among other issues.

[Click here for the full webinar](#), and [here to see only the presentation slides](#).



# Dispute Resolution External Articles



## [Why England is an International Hub for Dispute Resolution](#)

Fiona Cain for *The Law Society Gazette*

January 21, 2022

What makes England an ideal international destination?

England is an ideal international destination for dispute resolution due to its long-established and well-respected legal system, which recognises parties' freedom to contract and is supportive of arbitration and commerce.

English law is based on well-founded principles, is transparent and provides predictability of outcome, legal certainty and fairness whilst also being flexible and responsive to the ever-changing world.

[Read more here](#)

# Case Summaries 2022

This is a collection of the case summaries that have been included in our newsletters over the past year and cover issues that we consider would be of interest to those operating in the shipping, offshore energy and renewable energy sectors. If you would like to discuss any of these cases then please reach out to Jack Spence, [jack.spence@haynesboone.com](mailto:jack.spence@haynesboone.com) or your Haynes Boone contact.

## Bribery in the oil and gas sector

Offering a reminder of the importance of ensuring effective Anti-Bribery and Anti-Corruption compliance procedures and safeguards, the Court of Session found that a contract had been induced by bribery, on the basis of emails referring to “sweeties for making it happen”. While this was a case heard by the Scottish courts, the Court also found that there was no distinction between English and Scottish law’s treatment of bribery.

*Oil States Industries (UK) Ltd v “S” Ltd and others* [2022] CSOH 52

## Period of limitation under the Hague Visby Rules applies to mis-delivery after discharge

For claims in respect of carried goods, Article III Rule 6 of the Hague Visby Rules provides for a 1 year limitation period, running from the date of delivery. In the context of goods which had been misappropriated after discharge into stockpiles at port, the Claimant attempted to argue that this limitation did not apply to mis-delivery which took place after discharge. Providing welcome clarity to carriers, this argument was rejected by the Commercial Court, who found that Article III Rule 6 applies to mis-delivery after discharge. This was because most deliveries would be delivered at some point after goods pass over the ships rail and a wide interpretation would be needed to avoid the need to look at fine distinctions (with little commercial significance).

*This decision has since been appealed and the Court of Appeal is scheduled to hear the appeal from this decision before 10 October 2023.*

*FIMBank plc v KCH Shipping Co, Ltd* [2022] EWHC 2400 (Comm)

## Supreme Court recognises a general duty on directors to act in the interest of creditors

In a decision of general relevance to UK companies, the Supreme Court found that there was a general

duty upon directors to act in the interest of creditors when the company is insolvent, or is approaching, insolvency. This was said to be a modification of the ordinary rule that, for the purpose of the directors’ duty to, in good faith, act in the best interests of the company, the creditors’ interests are to be considered (when the company is facing insolvency). Such a duty was said to apply to consideration as to whether to issue a dividend, but the duty would not come into play where there was only a risk (even a real risk) of insolvency.

*BTI 2014 LLC v Sequana SA* [2022] UKSC 25

## No arbitration agreement without an agreement

In an endorsement of the orthodox position, the Court of Appeal rejected that a charterparty which expressly had “subjects” (i.e. conditions) which needed to be lifted before becoming legally binding, could nevertheless bring into effect a binding arbitration agreement, such that the Arbitration Act Section 67 challenge brought against the decision of an arbitral tribunal was successful, on the basis of a lack of jurisdiction. The “separability” principle (whereby the court will endeavour to separate an arbitration agreement from an otherwise void/voidable contract) could not be used to evade the fact that the parties had agreed there would be no binding contract at all until the “subject” had been lifted.

*DHL Project & Chartering Ltd v Gemini Ocean Shipping Co. Ltd* [2022] EWCA Civ 1555

## When is time of the essence and how do you ensure you retain the right to terminate?

In *D Classics*, the Commercial Court found that the time of payment stipulated in a clause was not a condition, breach of which would entitle the innocent party to terminate. The Court reached this conclusion as another clause within the same contract expressly provided that time was of the essence. An express right of withdrawal within the clause was also found

## CASE SUMMARIES CONTINUED

to suggest that time was not of the essence (as an express right would not be required if time were of the essence).

*D Classics Ltd v Chen* [2022] EWHC 1357 (Comm).

### Unable to perform for a force majeure clause

When considering a clause which provided that “Should the Seller be unable to transfer title of the Vessel... due to ... restraint of governments ... then either the Buyer or the Seller may terminate this Agreement”, the Court found that genuine prevention of performance, rather than performance being made more onerous or delayed, was required. “Inability” would be shown where the extent of the delay was such that the commercial venture of the contract was materially undermined.

*NKD Maritime Ltd v Bart Maritime (No 2) Inc* [2022] EWHC 1615 (Comm)

### Payment under a guarantee where a demand was made after termination

The Court found that, where contingent liability had been incurred before the termination of a guarantee, a valid demand could still be made thereunder, even after the guarantee had been terminated. The guarantee itself provided that upon termination, liability would cease “*except for any liability arising hereunder before that date*”.

*Euler Hermes SA (NV) (acting through its registered branch Euler Hermes UK) v Mackays Stores Group Ltd and others* [2022] EWHC 1918 (Comm)

### Tortious damages in the context of a contract

Sellers made a number of warranties inducing the buyers to purchase the company, which were held to have been fraudulent. The Court therefore held that the measure of damages would be tortious damages, rather than contractual damages. The significance of this was that that Court found that the buyers overpaid for the company on the assumption that the warranties were true. Under contractual damages (the difference between the price of the company as warranted and the current value), this loss could not

be recovered. However, under tortious damages (the loss caused by the representation, which was found to induce the buyer to purchase), this loss could be recovered.

*MDW Holdings Limited v Norvill* [2022] EWCA Civ 883

### Significant connection with the UK, giving rise to an entitlement to interest under the Late Payment of Commercial Debts Act 1998

The Commercial Court held that a propane sales contract had a “significant connection” with England, under s12(1)(a) of the Late Payment of Commercial Debts Act, as payments and decisions in relation to the contract were made in England (despite the fact that neither party was English and the propane was to be supplied in Ghana).

*Vitol SA v Genser Energy Ghana Limited* [2022] EWHC 1812 (Comm)

### When the Court will decline to apply the “Last Shot” doctrine

A number of draft contracts were sent between the buyer and seller of crude oil. The Court found that a binding contract was formed between the parties in an earlier exchange and the subsequent exchanges, objectively, were to consider whether the terms of this contract should be varied. This offers a reminder to act with caution in the contracting process, to ensure that you contract on the terms you intend to.

*BP Oil International Ltd v. Glencore Energy UK Ltd* [2022] EWHC 499 (Comm)

### One representative signing for both parties

Tower PLC guaranteed a contract between Geoquip and Tower Cameroon, which was later extended in duration. While a guarantor will usually be released from a guarantee if there is a material variation in the terms of the guaranteed contract, the Court held that this was not the case here. This was because the managing director of Tower Cameroon (a Mr Asher) was also an authorised representative of Tower PLC and, as such, Tower PLC was taken to have also agreed to the extension.



## CASE SUMMARIES CONTINUED

*This decision has since been appealed and the Court of Appeal is scheduled to hear the appeal from this decision on 2 March 2023.*

*Geoquip Marine Operations AG v Tower Resources Cameroon SA and another [2022] EWHC 531 (Comm)*

### Terminating – second time lucky?

Lombard and Skyjets entered into a contract to purchase a plane. Skyjets later became insolvent and Lombard terminated the agreement on the ground of non-payment of sums under the contract. The Court found that, although Lombard could not show that Skyjets had been late in making payment, Lombard were still entitled to terminate the contract due to Skyjets' insolvency. The fact that Lombard had stated the wrong reason in their notice did not prevent this, as there was no "cure period" in the contract, so Skyjets could not be said to have suffered any prejudice by Lombard providing the incorrect ground.

*Lombard North Central Plc v European Skyjets Ltd [2022] EWHC 728 (QB)*

### Wasted expenses in exclusion clauses

The Court held that a clause which excluded liability for "indirect or consequential losses, or for loss of profit, revenue [or] savings" did not preclude the buyer from recovering expenditure which it had incurred in anticipation of the completion of the contract, but which was wasted as a result of the supplier's repudiation.

*Soteria Insurance Ltd (formerly CIS General Insurance Limited) v IBM United Kingdom Ltd [2022] EWCA Civ 440*

### Incorporating previous terms into an oral agreement for supply of petroleum

Offering an example of a successful argument on incorporation through course of dealing, the Commercial Court accepted that an English jurisdiction clause had been incorporated into the parties' oral agreement for the supply of petroleum. This was as a result of a series of prior spot agreements between the parties which contained such a clause.

*Addax Energy SA v Petro Trade Inc [2022] EWHC 237 (Comm)*

### Correct assessment of damages for delivered goods in international sale contracts

Following the decision in *The Bunge*, the Court held that damages in a GAFTA contract (which replicates the Sale of Goods Act and common law positions) should be assessed by reference to the market value of the goods purchased on the same contractual terms, and not their value at the discharge port following delivery. As such, the windfall created by a tariff imposed by the Indian government after the goods were imported would accrue to the buyer, not the seller.

*Sharp Corp Ltd v Viterro BV [2022] EWHC 354 (Comm)*

### Offer and acceptance required for repair works on aircraft

Reaffirming the requirements for an act of offer and acceptance, and offering a warning to parties to re-evaluate their contracting/ordering process, the Commercial Court refused to find that a contract for the repair of LNT's aircraft was entered into between LNT and Airbus when Airbus had issued an Alert Service Bulletin and the parties had proceeded to discuss possible solutions but the detailed conditions for the work to be performed had not been provided.

*LNT Aviation Ltd v Airbus Helicopters UK Ltd [2022] EWHC 309 (Comm)*

### Fuel consumption: how to demonstrate inducement in a misrepresentation claim

The Court of Appeal considered the Commercial Court's approach in determining whether a misrepresentation concerning the fuel consumption of the vessel had induced the charterer to enter into the charterparty. They endorsed the lower court's approach of considering a hypothetical scenario whereby an equivalent warranty, but no representation was provided, reaching the conclusion that the charterparty would still have been concluded on the same terms.

*SK Shipping Europe Ltd v Capital VLCC 3 Corp and another company [2022] EWCA Civ 231*

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