STEPHENSON HARWOOD

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# Commodities in Focus

## In this issue

# Introduction

Editor, Jonathan Spearing

Welcome to the ninth edition of Commodities in Focus (CIF); our bulletin for clients engaged in the production, trading, carriage, storage and financing of commodities.

This edition is the second of two that looks at themes for the coming decade. With that in mind, we have included two UK-focused articles addressing hydrogen projects and the government's clean energy plan. You may also be interested to read the news of the firm's involvement in the creation of The Sea Cargo Charter, an important sustainability initiative with which one of our partners, Haris Zografakis, has been closely involved.

Admittedly, however, our green theme has been somewhat relegated in order to give headline billing to Emma Skakle, our latest partner recruit and co-author of the opening article on the likely impact of the Corporate Governance and Insolvency Act 2020 on the commodities sector.

Emma is a true commodities specialist and brings additional breadth and depth of expertise to what is already a fine team of lawyers. We are very glad to have her on board.

We hope you find this bulletin both useful and interesting. If you have comments or would like to learn more on any topic please do get in touch:

E: jonathan.spearing@shlegal.com
T: +44 20 7809 2228

"Outstanding client-focused and with a very deep level of knowledge in this area."

Legal 500 UK 2019

# What the commodities industries need to know about the Corporate Insolvency and Governance Act 2020

**This article considers how the recent changes to UK insolvency law introduced by the Corporate Insolvency and Governance Act 2020 ("CIGA") might affect those involved in the sale and purchase of commodities. In particular, it looks at the impact of Section 14 of CIGA on contracts for the supply of goods or services, and on the typical rights and remedies of the seller / supplier under such contracts.**

CIGA came into force on 26 June 2020 and introduces a series of changes to UK insolvency law. The changes represent a shift toward a business rescue culture more in line with a number of other jurisdictions, including the United States and Chapter 11 proceedings under the Bankruptcy Code. Significantly, pursuant to Section 14 of CIGA, suppliers of goods and services are now unable to rely on so called *ipso facto* clauses (provisions that permit termination due to the bankruptcy, insolvency, or financial condition of a party), even, in some circumstances, where the 'customer' is based outside of the UK. However, this change does not apply to all types of suppliers, nor does it apply to every type of contract for the provision of goods and services, and we focus here on the scope of the exception relating to commodities contracts.

## An overview of the key aspects of Section 14 of CIGA

Section 14 of CIGA introduces new Sections 233B and 233C and a new Schedule 4ZZA to the Insolvency Act 1986 (the "**IA**"). The key parts of Section 14 provide that:

1. any clause in a contract for the supply of goods or services which provides for automatic or elective termination by the supplier, or for *'any other thing'* to take place or to be done by the supplier, is ineffective when the customer under that contract (the "**Company**") becomes subject to a '*relevant insolvency procedure*'[1] (the "**Prohibition**");

2. a supplier is prohibited from terminating the contract/supply if a breach and a right to terminate arose, but was not utilised, prior to the Company entering a '*relevant insolvency procedure*' (Section 233B(4) of the IA);

3. termination may still be permitted by CIGA if the insolvency practitioner or Company consents, or the court is satisfied that not terminating would cause the supplier 'hardship' and grants permission to the supplier to terminate (Section 233B(5) of the IA); and

4. certain suppliers and contracts are exempted from the provisions of Section 14.

## What is "any other thing"?

"*Any other thing*" is not specifically defined. The Government Explanatory Notes state only that changing payment terms will be prohibited. However, the wording is much broader than that and may capture the exercise of any contractual right triggered by a Company's entry into a relevant insolvency procedure.

## Exclusions

The categories of supplier and contract exempted from the restrictions in Section 14 are inserted by CIGA into Schedule 4ZZA of the IA.

Excluded **suppliers** are predominantly suppliers of **financial services**, such as banks and insurers, but also include clearing houses.

**'Financial Contracts'** are excluded pursuant to paragraph 13(2) of Schedule 4ZZA. The list of 'Financial Contracts' includes reference to 'commodities contracts' and 'futures or forwards contracts' as follows (our emphasis):

*(c) a **commodities contract**, including—*

*(i) a contract for the **purchase, sale or loan** of a commodity or group or index of commodities for **future delivery**;*

*(ii) an **option** on a commodity or group or index of commodities;*

*(iii) a **repurchase or reverse repurchase transaction** on any such commodity, group or index;*

*(d) **a futures or forwards contract**, including a contract (other than a commodities contract) for the purchase, sale or transfer of a commodity or property of any other description, service, right or interest for a specified price at a future date;"*

There is no definition of 'commodities' in Schedule 4ZZA although ancillary legislation suggests that it will cover *'goods of a fungible nature that are capable of being delivered, including metals (and their ores and*

[1] 'Relevant insolvency procedure' is defined in Section 233B(2) of the IA.

*alloys), agricultural products and energy such as electricity'.*[2]

There is an ambiguity presented by the wording in brackets in Paragraph 13(2)(d) '*other than a commodities contract*'. We expect to see disputes as to whether this wording operates to exclude certain commodities contracts from paragraph 13 (with the result that they are caught by CIGA).

There is a further exemption for 'spot contracts' under Paragraph 16 of Schedule 4ZZA. 'Commodities contracts' which do not have a future delivery date may be exempted under this separate paragraph.

## Can an overseas Company rely on the Prohibition in CIGA?

If a company is based outside the UK and enters a foreign insolvency procedure (outside the UK), that will not be a 'relevant insolvency procedure' under CIGA. However, there are ways in which an overseas company could still bring itself within the ambit of Section 14 and the Prohibition in CIGA and protect itself from termination by the supplier on insolvency grounds. Such ways might include: applying for a moratorium under Section 1, A5 of CIGA; applying for 'additional relief' to have the foreign insolvency recognised under the Cross-Border Insolvency Regulations 2006; or by being wound up by the Court under Part V, Section 221 of the IA as an 'unregistered' company.

## What should suppliers do going forward?

We recommend that sellers / suppliers:

1. Undertake enhanced due diligence on any new counterparties. Be aware of your counterparty's financial status, as well as any connections it has with England or Wales such that CIGA might apply to them.
2. Identify early warnings of financial difficulties. Include provisions in your contracts that enable you to monitor your counterparty's financial position at key points during the term of your contract. This will enable you to identify financial distress and exercise any accrued termination rights before your counterparty officially enters into an insolvency procedure.
3. Consider renegotiating existing contracts to include alternative protections such as extended rights to terminate for non-insolvency events, earlier termination triggers, and/or advance payment terms or shorter invoicing/payment periods.
4. Ensure you have been provided with the security you require from your counterparty, and that the 'trigger' for being able to call on your security is properly worded (i.e. is not related to entry into an insolvency procedure).
5. Ensure that termination provisions clearly define when breaches will occur and/or recur, and when termination rights will arise.
6. Take a stricter approach to breaches of contract. If a right to terminate accrues, do not delay in exercising it. If your counterparty enters into an insolvency procedure, the right may be lost.

For a broader discussion on the implications of CIGA for the commodities industry, see this Article.

**Emma Skakle**
Partner, London
T + 44 20 7809 2335
E: emma.skakle@shlegal.com

**Caroline Pennington**
Associate, London
T + 44 20 7809 2513
E: caroline.pennington@shlegal.com

[2] See Article 2(6) of the Commission Delegated Regulation of 25.4.2016 supplementing Directive 2014/65/EU

# The "MIRACLE HOPE" – The obligation to put up security in a chain of letters of indemnity

This article focuses on the Commercial Court decisions of Teare J in Trafigura Maritime Logistics v Clearlake Shipping and Clearlake Chartering USA v Petroleo Brasileiro [2020] EWHC 805 (Comm). The judgments provide a timely reminder of the obligation of putting up security pursuant to the issuance of a letter of indemnity ("LOI").

## Background

LOIs are typically issued by cargo interests to request shipowners to allow discharge of cargo at the discharge port in circumstances where the originals of the bills of lading ("OBLs") are not available. It is not uncommon to have a situation where the OBLs are unavailable by the time the vessel reaches the discharge port, usually in the following two scenarios:

(a) The cargo is transported over a short haul distance and the shipping documents may not be finalised in time before the vessel reaches the discharge port; or

(b) The cargo may be involved in a back-to-back sale situation resulting in the OBLs getting stuck in the banking chain. The end-buyer may not be able to get hold of the OBLs even though the cargo may have arrived at the discharge port where the original seller may only release the OBLs upon receiving payment from the intermediary buyer.

LOIs therefore play an important role in commodities trading by allowing discharge of cargo and minimising the chance of delay-associated costs such as demurrage from incurring. However, the discharge of cargo pursuant to an LOI does not exempt a shipowner from its obligations to discharge cargo only upon the surrender of an OBL. While there is no P&I club cover available to shipowners who agree to discharge cargo pursuant to an LOI, the IG P&I clubs have produced standard LOI wording that shipowners may use to accommodate requests to discharge cargo where the OBLs are unavailable.

## The Facts

The voyage involved the carriage of crude oil ("Cargo") loaded from Brazil to China, arising from a sale contract between Hontop Energy (Singapore) Pte Ltd ("Hontop") as purchaser and Petrobras Global Trading BV ("PGT") as seller.

Hontop had received financing from Natixis. Under the sale contract, payment for the Cargo was by way of an irrevocable letter of credit ("LC"). Natixis had issued an LC which required payment to be made

upon presentation of OBLs issued or endorsed to the order of Natixis. The LC provided that should the OBLs not be available, an LOI issued by PGT to Hontop could be presented for payment by Natixis. PGT had issued an LOI on 31 October 2019 to Natixis and Natixis provided payment to PGT for the Cargo.

For this voyage, the head owners had time chartered the vessel to Trafigura Maritime Logistics Pte Ltd ("Trafigura). Trafigura voyage chartered the vessel to Clearlake Shipping Pte Ltd ("Clearlake"). Clearlake in turn sub-voyage chartered to Petroleo Brasileiro S.A. ("Petrobras") on back-to-back terms.

The charterparties permitted the charterers to order discharge of cargo without production of bills of lading in exchange for an LOI from the charterers: "***Owners shall discharge such cargo in accordance with Charterers' instructions in consideration of receiving an LOI as per Owners' P&I Club wording."***

Petrobras had requested Clearlake to discharge the cargo without the surrender of the bills of lading, in consideration of an LOI. Clearlake passed on the request to Trafigura and Trafigura passed it on to the Head Owners. An LOI was provided from Petrobras to Clearlake, Clearlake to Trafigura and Trafigura to the head owners. The Cargo was delivered to Hontop in November 2019. Hontop failed to pay Natixis for the amounts disbursed by Natixis.

In March 2020, Natixis demanded that PGT endorsed the full set of the OBLs in their favour and then deliver the OBLs to Natixis, thereby making Natixis the lawful holders of OBLs. Natixis proceeded to arrest the vessel in Singapore as lawful holders of the OBLs and claiming that the Cargo had been misdelivered to Hontop. Natixis demanded security in the sum of US$76.05M from the head owners for the release of the vessel.

## Issues

Natixis's arrest triggered back-to-back security demands. The head owners demanded that Trafigura put up security to release the vessel, who passed the demand to Clearlake. Clearlake subsequently passed the security demand to Petrobras. No security was put up and Trafigura obtained an urgent mandatory injunction against Clearlake requiring security to be provided "forthwith" ([2020] EWHC 726 (Comm)). Clearlake applied and obtained the same urgent relief against Petrobras ([2020] EWHC 805 (Comm)).

The orders obtained by Trafigura and Clearlake required that "*the Defendant (ie Clearlake and Petrobras)* ***must provide forthwith such bail or other security as may be required to prevent such arrest or detention or to secure the release of the vessel*****.**

Both Clearlake and Petrobras attempted to negotiate with Natixis on the terms of the security acceptable to Natixis. However, Clearlake and Petrobras were unable to reach an agreement. Natixis requested a bank guarantee in the form that was not acceptable to both Clearlake and Petrobras. Trafigura and Clearlake subsequently applied for a variation of the injunction order, which was heard by Teare J.

(a) When should security be provided?

The first issue for consideration was the timing in which the security must be provided. Teare J rejected the argument that the security must be provided immediately. Instead, the obligation is to provide security in the shortest practicable time, and what is practicable will depend upon the circumstances of each case. Teare J recognised that Clearlake and Petrobras had made a genuine effort to negotiate with Natixis.

(b) What constitutes sufficient security?

The second issue was to determine the form of security that Clearlake and Petrobras was required to provide. Trafigura had argued that the security must be acceptable to the arresting party. Meanwhile, Clearlake argued that it should be security as required by the court of the place of arrest. A third alternative argument was that the security to be provided must comply with the requirements of the court with jurisdiction over the LOI, ie the English Courts.

Teare J highlighted that it should be the court in the arresting forum that should determine the form and quantum of the security. In fact, Clearlake had filed an application before the Singapore Court to determine the type and form of the security that must be provided to secure the release of the vessel. However, the hearing before the Singapore Court could not take place in time.

Although the Court recognised that the Singapore Court was the proper forum to determine the sufficiency of the security, the Court was unwilling to let the matter drag further. Given the circumstances, the Court ordered Clearlake and Petrobras to make payment into the Singapore Court, given that during the negotiations with Natixis on the security, Natixis had informed Petrobras that payment into court was acceptable.

## Key Takeaways

1. The discharge of cargo upon issuance of an LOI is always a risk to a shipowner. This case recognises the enforceability of an LOI in

commodities trading and that shipowners can rely upon the IG P&I LOI wording to make a demand under the LOI to put up security if a vessel has been arrested. Shipowners should as far as possible avoid any variation from the IG P&I LOI wording.

2. The indemnifying party is only required to provide security which is deemed acceptable by the court of the arresting forum. The indemnifying party must do everything practicable to provide the security without delay, including negotiating with the arresting party on the acceptable security. If there is any dispute with the arresting party as to the form and amount of security, the indemnifying party should make an application before the court of the arresting forum for guidance on the adequacy of the security. The indemnifying party does not have any obligation to accede to any unreasonable demands by the arresting party.

3. A back-to-back charterer will always find itself in a difficult position when it comes to a request to discharge cargo without the surrender of the originals of the bills of lading and having to issue an LOI. However, they can always pass such demands up and down the charterparty chain.

4. In this case, Petrobras had sold the cargo to Hontop on DES terms. The situation would have been different if the cargo been sold on a FOB basis, as it would have been the buyer who would have to arrange the shipping.

**Michelle Yong**
Partner, Singapore
T + 65 6622 9691
E: michelle.yong@shlegal.com

**Nur Hijazi Jaffar**
Associate, Singapore
T + 65 6622 9650
E: nurhijazi.jaffar@shlegal.com

# What are the top 5 points raised by leading UK hydrogen developers?

**With everyone talking about hydrogen, Stephenson Harwood lists the top 5 takeaways after discussing hydrogen projects with three market leading UK hydrogen developers.**

On 8 December 2020, Cathal Leigh-Doyle hosted Stephenson Harwood's second hydrogen focused webinar on the topic of "Hydrogen Projects – From the developers' perspective" (link to recording **here**). For the 205 registered attendees, listeners were given an unmatchable insight by three market leading UK hydrogen developers' perspectives, namely:

- Mark Griffin from BOC UK & Ireland – Mark discussed one of Europe's largest hydrogen refuelling stations in Kittybrewster, Aberdeen;
- Julia Pyke & Shekhar Sumit from Sizewell C – Julia and Shekhar discussed Sizewell C's hydrogen demonstrator project which aims to produce up to 800kg of low-carbon hydrogen per day using electricity from nuclear power, with the potential to use low-carbon heat from nuclear power as part of this process in the future; and
- Chris Jackson from Protium Green Solutions Ltd – Chris discussed the HESCO contract model, current learnings from projects to date, and early project considerations.

**The top 5 points to note are:**

**Point 1: – integration with the Net Zero agenda**

- A significant attraction in using hydrogen is that it is a multi-vector energy carrier that can decarbonise a variety of different applications. This is becoming increasingly important as the UK Government embarks on the challenge of converting notoriously carbon-intensive industries to Net Zero, rather than simply decreasing carbon emissions. The panellists provided examples of how their pioneering projects are approaching the inherent challenges of Net Zero.
- BOC is proving that a fleet of commercial hydrogen vehicles can be decarbonised effectively, efficiently, and commercially. Kittybrewster hydrogen refuelling station has facilitated over 1 million miles driven by hydrogen-fuelled buses, saving around 100 tonnes of $CO_2$ in the process. After just 10-12 minutes of hydrogen refuelling from a normal hand pump, a bus can travel 260 miles.
- Sizewell C is initiating the production of hydrogen from the low-carbon heat and electricity generated from nuclear power. The initial demonstrator project could refill on average 16 buses, or 160 cars, or 4 trains per day. This will help to "green" the construction of the nuclear power plant, provide a platform to scale up the demonstrator once Sizewell C is operational, and kickstart the local hydrogen economy.

- Protium is assisting clients in meeting their own decarbonisation agendas by delivering end-to-end bespoke hydrogen projects in difficult to decarbonise industries such as aviation. Protium is playing an important role in leading the design, funding and deployment of hydrogen projects in the UK and abroad.

- All of the developers stressed that in order for the UK's targets to be met, easy and difficult industries to decarbonise must be addressed together at the same time. We cannot focus on easy to decarbonise industries as this will not suffice for Net Zero.

## Point 2 – System design and scaling up

- It is critically important to design a system that allows for future scaling up. Currently, the limited use of hydrogen (especially in mobility) means that it is possible to calculate the end consumption. However, as the market expands, this will become more difficult, if not impossible.

  For this reason, developers cannot underestimate the importance of projects that can be scaled up to meet future hydrogen demands in a cost-effective manner.

- For example, in the short term, Sizewell C plans to start producing hydrogen using a demonstration project with a private wire to Sizewell B. However, in the future, the larger-scale developed hydrogen project will link directly with Sizewell C (once the nuclear power plant is operational).

  This system design enables the project to be future-proofed – it will provide hydrogen during the initial construction period of the nuclear power station and also a wider audience in the future. Ultimately, Sizewell C is ensuring that it is making a no-regret decision now despite the uncertain production needs of the future.

- Another example is BOC's Kittybrewster hydrogen refuelling station, which originally launched to refuel 10 single-decker buses. Due to market demand, the station has grown considerably, and now services double-decker buses, road sweepers, vans and cars. This expansion was only possible because the original system design catered for scalability. This enabled BOC to take advantage of commercial opportunities as they arose.

## Point 3 – Market collaboration

- Collaboration by hydrogen players is essential to ensure hydrogen as an energy and technology continues to develop at the rate required to meet the UK Government's target. In order to have a successful hydrogen producing commercial asset, all developers agreed that irrespective of market competition, collaboration throughout the entire process remains important.

- With its expression of interest issued in November 2020, Sizewell C is aiming to do just that by identifying and bringing together businesses with relevant expertise in producing, storing and using hydrogen. By undertaking such an exercise in the planning stages, Sizewell C is trying to reduce project risk and maximise the skills available in ensuring that the most effective system design, technology and end uses are identified and implemented.

- BOC provided a great example of successful collaboration at Kittybrewster between local government, private companies and the local residents. It was highlighted that clear and frequent communication with local residents and stakeholders is essential throughout the process of developing, constructing and utilising hydrogen projects.

- The developers also agreed that the success of one hydrogen developer is ultimately a success for all hydrogen developers; the more hydrogen is utilised, the better it is for all involved. The role of Government in making documentation public also assists market players as the documentation would otherwise have remained confidential.

## Point 4 – Financing and cost models

- Government grants and funding schemes play a major role in shaping how quickly hydrogen projects across the UK continue to develop. The UK Government needs to develop its process for issuing and accessing these grants and funding schemes. Uncertainty around issues such as whether the Government will require matched-funding, increases the difficulty in relying upon and ultimately using such schemes which are essential for the short term development. At present, in order for a developer to make use of the Renewable Fuel Transport Obligation, the developer needs to rely on their own renewable energy

generation capabilities (rather than using the grid).

The general conclusion was that this position should not be required in the future, as requiring such capabilities dramatically reduces developers' ability to apply for such grants in the first place.

- That said, the Kittybrewster project by BOC used UK Government grants and funding. This project is a great example of how grants were available and successfully utilised in creating a commercially viable hydrogen production and consumption model. As of March 2019, the public funding period closed for this specific project and it has continued as a commercial private venture.

- The production cost of hydrogen and the price of hydrogen to consumers are also major considerations for project developers and financiers. New technologies, such a creating low-carbon hydrogen from Sizewell C, must be developed further to ensure a short-term route to producing low cost hydrogen is utilised. As demonstrated by other renewables, when the technology increases in efficiency and reduces in cost, it is expected that the cost of production and consumption will decrease accordingly.

## Point 5 – The role of the UK Government

Private financing and financial modelling for hydrogen projects will only become more accessible if the UK Government clearly sets out exactly what it is looking for, how it considers it will meet its objectives, and the measures it will put in place to assist project developers. The 10-point plan released in November 2020 (see our article above) was the first step in the right direction, however it is essential that the eagerly awaited Energy White Paper and Climate Change Committee's carbon budget (which was issued yesterday) go considerably further in informing stakeholders on how the UK Government will meet its target.

UK hydrogen developers cannot over-emphasise how important it is for these upcoming communications from the UK Government to clarify what the future for hydrogen in the UK will look like. Given that hydrogen projects require such a range of expertise and could impact so many sectors, hydrogen can only develop at the speed and capacity needed to meet the Net Zero by 2050 target if the UK Government offers a joined-up approach to its financing, regulation and integration with the wider decarbonisation energy mix.

## Conclusion

The best advertising for hydrogen is for UK projects to be approved, constructed and utilised.

Hydrogen developers are eager to collaborate and share learnings where possible to ensure that the speed of development and utilisation continues to increase.

The UK Government however needs to clearly set out how it perceives hydrogen will be used in the UK in meeting its 2050 target. It cannot be underestimated how important this clarification and certainty is for developers to undertake increasingly complex and high value hydrogen projects.

We now await the Energy White Paper which will hopefully paint a much clearer picture of hydrogen in the UK.

Due to the Sixth Carbon Budget only being released on 9 December 2020, we have not provided an analysis here, however the executive summary confirms that there is a methodology report and policy report included which will no doubt be welcomed by developers.

Cathal also hosted part one of our hydrogen webinar series, 'Why is everyone talking about Hydrogen?' To listen to this recording, click here.

**Cathal Leigh-Doyle**
Senior Associate, London
T + 44 20 7809 2658
E: cathal.leigh-doyle@shlegal.com

*Stephenson Harwood trainees, Andy Ross and Francesca Cadoux-Hudson, also contributed to this article.*

# The UK Government has set out its 10-point clean energy plan – what comes next?

**On 17 November 2020, Boris Johnson published the UK government's priorities for future investment in clean energy. The 10-point plan sets out the UK's "green revolution agenda".**

The announcement from the Prime Minister is welcomed in so far as it demonstrates that the UK Government is planning for the UK to transition towards Net Zero.

Mr Johnson states clear timetables and that new regulation will follow once discussions have been completed with the UK businesses that will be contributing to his plan.

Achieving the transition to Net Zero will require substantial investment and a joined-up approach across technology, infrastructure and industry. The devil will ultimately be in the detail.

We will look at the top 4 points in the UK government's plan:

### Point 1: Offshore Wind

In October 2020, the Prime Minister announced impressive offshore wind power generation goals at the Conservative's party conference. Mr Johnson has reinforced his earlier announcement by stating that he wants 40GW of green offshore capacity to power every home in the UK by 2030.

While the UK is already a market leader in offshore wind and has approximately 24GW of capacity installed, this is a large increase which will require further rounds of consents, grid updates and increasing the commercialisation of offshore floating windfarms.

Ireland recently announced one of its offshore windfarms shall develop a joint 220kV substation to supply power to a new data centre. This is only one example of the huge potential (even in the immediate future) for UK offshore windfarms to achieve energy efficiencies by directly supplying power to green/low carbon clusters located around the UK coast such as Teesside and Port Talbot.

### Point 2: Hydrogen

With the UK government's energy white paper eagerly awaited, the announcement of a £500m investment into hydrogen has been welcomed by those involved and those who wish to be involved.

The £500m investment will assist in further technology development and pilot projects however most businesses who are interested in hydrogen will want further information on how (and when)

hydrogen will be developed nationally. In order for UK businesses to fully embrace hydrogen, the UK government needs to create the conditions such that the costs associated with hydrogen decrease while the technology advances continue.

The scale of UK government investment may be questioned given recent announcements by similar economies who have invested several billions into their hydrogen sectors. Nevertheless, the quicker the conditions are created, the quicker hydrogen will be a central power source in the green revolution.

### Point 3: Nuclear Power

The UK government has confirmed that large and small scale nuclear power will be developed and play a critical role in the UK meeting nNet Zero by 2050. With the majority of the UK's nuclear power plants scheduled to be decommissioned over the next number of years, the UK government's commitment to large scale nuclear power may be an indication that planned projects, such as Sizewell C, will be given the green light (when the energy white paper is eventually released).

The £525m investment into nuclear power is a demonstration of support from the UK government. Similarly to hydrogen, clear policies are required in order to enable nuclear power to be embraced and developed.

Small scale nuclear reactors give additional flexibility in terms of cost, proximity to use and generation of power. The additional investment now available to develop the relevant technology is also a positive step in progressing small scale nuclear towards commercialisation.

Ensuring that the right financing models exist is critical to the expansion and increased use of nuclear. Innovative financing is already being developed which enables private investor to be involved in large scale nuclear projects.

### Point 4: Electric Vehicles ("EV")

The UK government announced that it will spend £1.3bn on EV charging points, £582m on grants for EV buyers and £500m on boosting mass production of EV batteries in the UK.

Like offshore wind, grid updates will be essential for such development. The UK government announcing the ban on sales of new petrol and diesel vehicles in 2030 will assist in continuing the commercialisation of EVs.

### Conclusion

In order to achieve Net Zero, every renewable source of energy will need to be developed in tandem. This is not an easy task and the clock is ticking.

While there are a lot of questions to be answered and policies to be put in place, the 10-point plan is nevertheless a positive step forward. We are cautiously optimistic, however one thing is clear, what comes next is critically important.

**Cathal Leigh-Doyle**
Senior Associate, London
T + 44 20 7809 2658
E: cathal.leigh-doyle@shlegal.com

**Tom Adams**
Partner, London
T + 44 20 7809 2628
E: tom.adams@shlegal.com

*Stephenson Harwood trainees, Andy Ross and Francesca Cadoux-Hudson, also contributed to this article.*

# Arbitrator bias – one size doesn't fit all

## Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48
## Supreme Court decision

More than a year after the hearing, the Supreme Court has handed down its decision in *Halliburton v Chubb*. The Court considered the appointment of an arbitrator in multiple related arbitrations and the impact of such appointment upon the perceived impartiality of the arbitrator in question. The Court reached the same conclusion as the two lower courts, namely that nothing in this case gave rise to justifiable doubts as to the arbitrator's impartiality, although its reasoning differed in some respects.

In the process, the Supreme Court has clarified a number of key points:

- Appointment of an arbitrator in multiple related arbitrations will sometimes, but not always, give rise to an appearance of bias;
- Whether such multiple appointments give rise to an appearance of bias in a particular case will depend on the circumstances. Those circumstances include whether such multiple appointments are customary in the relevant field of arbitration;
- In principle, an arbitrator is legally obliged to disclose to all participating parties their involvement in such multiple related arbitrations, provided the arbitrator obtains the consent of those parties to do so; and
- Such consent may be express but may also be implied in accordance with the custom of the relevant field of arbitration.

The decision surely guarantees much debate in future as to what is "customary" within any given field of arbitration. Likewise, it surely consolidates the current situation in practice, where parties must account for different rules in different arbitral fora. Appointees within one institution or trade will apply one approach, while others will apply another. Given that the issue in consideration here, the perception of impartiality, is one of principle, it is remarkable that the Court has seen fit to apply a very flexible, pragmatic, approach. One size does not fit all.

**Mike Phillips**
Partner, London
T + 44 20 7809 2627
E: mike.phillips@shlegal.com

**Joanne Champkins**
Senior Associate, London
T + 44 20 7809 2623
E: joanne.champkins@shlegal.com

# Case digest

### Defective passage plan – vessel unseaworthy

The passage plan is an aspect of seaworthiness, not of navigation. The passage plan on board the CMA CGM LIBRA was defective because it did not record a warning to mariners about depths outside the fairway being unreliable. A prudent owner would not have sailed with a passage plan which was defective or inadequate in the way in which this one was.

The vessel was unseaworthy at the beginning of the voyage. Owners were not therefore able to claim contributions in general average from cargo interests.

(*Alize 1954 and CMA CGM SA v Allianz Elementar Versicherungs AG* [2020] EWCA Civ 293)

### Limitation of liability – whether party could limit as "operator"

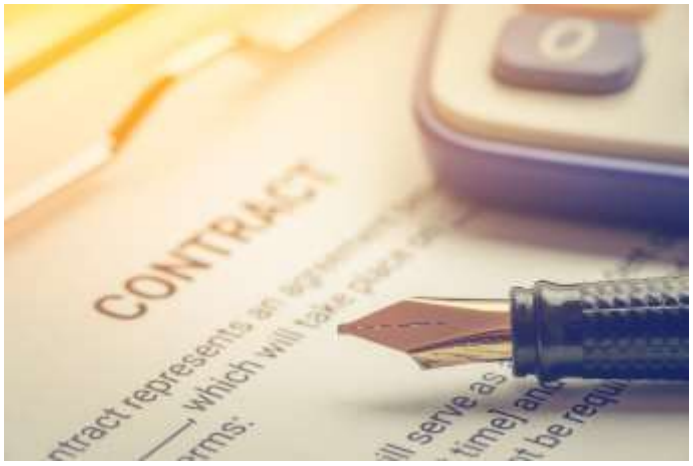
Stema UK was able to limit its liability as operator of a dumb barge which broke free from its anchor and caused damage. This was in spite of the fact that Stema UK had only been involved for two weeks putting people on board to safely anchor the vessel and ensure safe ballasting. It had been the only company operating the vessel at that time. Stema AS was the charterer of the barge and operator at all other times, but there could be more than one operator for the purposes of the Convention.

(*Splitt Chartering v Saga Shipholding, The "STEMA BARGE II"* [2020] EWHC 1294 (Admlty))

### Demurrage time bar – supporting documentation – bill of lading not provided

Where the charterparty required "all supporting documentation" for demurrage claims and that demurrage should be calculated by reference to bill of lading quantities, the provision of the statement of facts was not sufficient, even though it recorded the bill of lading figure. The bill of lading was one of the documents within the requirements of "all" supporting documentation. Owner's demurrage claim was therefore time-barred.

(*Tricon Energy v MTM Trading LLC* [2020] EWHC 700 (Comm)).




### Charterparty – subject supplier's approval

The requirement during charterparty negotiations that the vessel had to be approved by the supplier of the cargo was a pre-condition of the contract coming into existence. Therefore no binding contract had been concluded and the defendant was not liable to pay the claimant owner damages.

(*Nautica Marine Limited v Trafigura Trading LLC* [2020] EWHC 1986 (Comm))

### Bill of lading – apparent good order and condition

A statement in a bill of lading that cargo was in "apparent good order and condition" was not a warranty by shippers. It was an invitation to the master to make a representation of fact in accordance with his own assessment of the cargo condition. Where cargo damage was not reasonably visible to the Master, the representation that it was in "apparent good order and condition" was accurate.

There was no implied indemnity in respect of the statement of apparent good order and condition on the bill of lading.

(*Priminds Shipping v Noble Chartering, The MV "TAI PRIZE"* [2020] EWHC 127 (Comm))

# In the news

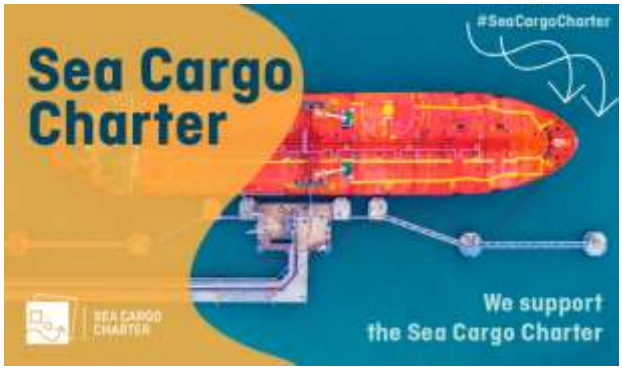
## Emma Skakle joins Stephenson Harwood as partner

We strengthened our marine and international trade practice with the appointment of commodities specialist Emma Skakle as partner, who is based in the firm's London office.

Emma specialises in resolving complex disputes for clients across the international trade, shipping and commodities sectors. She has represented clients in London arbitrations under the rules of GAFTA, FOSFA, ICC, LCIA, LMAA and SAL, and in the English High Court and Court of Appeal, as well as in mediation.

In addition to providing advice on issues that typically arise in the sale and transportation of commodities (including charterparty disputes, fraud and sanctions) her practice encompasses upstream oil & gas disputes, where she has acted in multi-jurisdictional arbitrations relating to JOA and post-acquisition claims and cross-claims. Emma presents at seminars and training courses around the world (and now virtually) on all aspects of her practice, and was seconded to the legal team of a global owner-operator of petroleum tankers as well as a large steel trader.

## Global Maritime Forum




Stephenson Harwood LLP has advised the Global Maritime Forum (GMF) on the creation of The Sea Cargo Charter, which was launched earlier this year. Stephenson Harwood is the sole international law firm partner of the GMF.

The Sea Cargo Charter follows in the footsteps of the Poseidon Principles, another GMF initiative, and is a further development towards the aim of sustainability in the maritime industry. It aspires to set a new benchmark for transparent climate reporting, and improved decision-making in line with the United Nations decarbonisation targets.

The Founding Signatories of the Sea Cargo Charter include Anglo American, ADM, Bunge, Cargill Ocean Transportation, COFCO International, Dow, Equinor, Gunvor Group, Klaveness Combination Carriers, Louis Dreyfus Company, Norden, Occidental, Shell, Torvald Klaveness and Trafigura.

## Commodities disputes team retains tier 1 ranking, Legal 500

We are delighted that our team has retained its Tier 1 ranking in the commodities disputes category in Legal 500. Individuals within the team have also be recognised, including Haris Zografakis who was ranked in their "Hall of Fame", the highest category for individuals.

We thank our clients and peers for taking part in various surveys and research interviews throughout the year.

"The team boasts some highly experienced commodities lawyers, especially in metals, coal and oil trading sectors."

Legal 500 2021

## Get in touch

If there is a topic or area that you would like us to cover in future editions, or if you have feedback or comments, please get in touch by email (jonathan.spearing@shlegal.com) or telephone (+44 20 7809 2228).

Previous editions of Commodities in Focus

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For those clients interested in the LNG and floating production industry we also produce the following publications:

**Well Heeled Edition 1**
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