Known Knowns, Known Unknowns, Unknown unknowns

Chairman: Mike Phillips – Stephenson Harwood LLP

Speakers:
Sara Masters QC / Andy Feld - 20 Essex Street
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Monday 14th May 2018 from 6.00pm – 8.00pm

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Introduction:

This seminar aims to advise professionals on 'known knowns' (what to do when faced with conflicting proceedings in different fora and the resultant possibility of anti-suit injunctions), 'known unknowns' (what will happen post-2021, when the FCA will no longer compel contributor banks to voluntarily sustain LIBOR), and 'unknown unknowns' (what to do where a party is unaware of arbitral proceedings against it because it didn't know that purported service of the proceedings had taken place).

Issues for discussion:

Recent developments in the law of anti-suit injunctions, in particular:

- Contractual and quasi-contractual anti-suit injunctions brought by and against non-parties
- Issues of timing and delay

The Abolition of LIBOR

- What is LIBOR ?
- Difficulty in calculation
- The future

When 'good' service goes bad – the curious case of Glencore Agriculture v Conqueror Holdings

- Looking at the perils of service by email on an individual
- Examining the impact of the principles of agency on service

Part A
Sara Masters QC and Andy Feld
The limits of contractual anti-suit injunctions: latest developments

Part B
Roger Jones
LIBOR – A wider perspective

Part C
Max Lemanski
When 'good' service goes bad – the curious case of Glencore Agriculture v Conqueror Holdings

Part D
CURRICULA VITAE

Part A

Sara Masters QC and Andy Feld

The limits of contractual anti-suit injunctions: latest developments

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The limits of contractual anti-suit injunctions

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Andrew Feld
14 May 2018
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1

Overview

- Recap on anti-suit injunctions
- Contractual/quasi-contractual injunctions where there is no privity of contract
- "Good reasons" not to grant a contractual anti-suit injunction.

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Recap of Anti-Suit Injunctions ("ASIs")

- English court grants injunction restraining litigant from pursuing proceedings in another jurisdiction
- *In personam* remedy – English court needs jurisdiction
- Equitable remedy (therefore discretionary)
- Comity issues: binding litigant vs binding foreign court
- Two flavours:
  - Contractual: foreign proceedings in breach of binding jurisdiction/arbitration clause
  - Non-contractual: foreign proceedings are "vexatious and oppressive"

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The two types of ASI

- Contractual: ***Angelic Grace*** [1995] 1 Lloyd's Rep 87 at 96; ***Donohue v Armco*** [2002] 1 Lloyd's Rep 425 at [24]-[25]:
  - Injunction will ordinarily be granted
  - Unless good or strong reasons not to do so
  - Provided injunction sought promptly and before foreign proceedings too far advanced
- Non-contractual: see summary in ***Star Reefers v JFC Group*** [2012] 1 Lloyd's Rep 376 at [25]-[31]:
  - England must be the "natural" or "clearly the more appropriate" forum.
  - Suing abroad must be "unconscionable" or "vexatious and oppressive" or "analogous to abuse of process"
  - Injunction must be necessary to protect applicant's legitimate interest in English proceedings

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The limits of contractual injunctions

- An ***Angelic Grace*** injunction is much easier to obtain but it requires a breach of a binding jurisdiction/arbitration clause
- To what extent can the contractual principles apply even where there is no privity of contract?
  - Multi-party disputes
  - Agency relationships
  - Transfers of rights
- Three scenarios:
  - Scenario 1: assignment of contractual rights
  - Scenario 2: foreign direct action statute
  - Scenario 3: inconsistent claims

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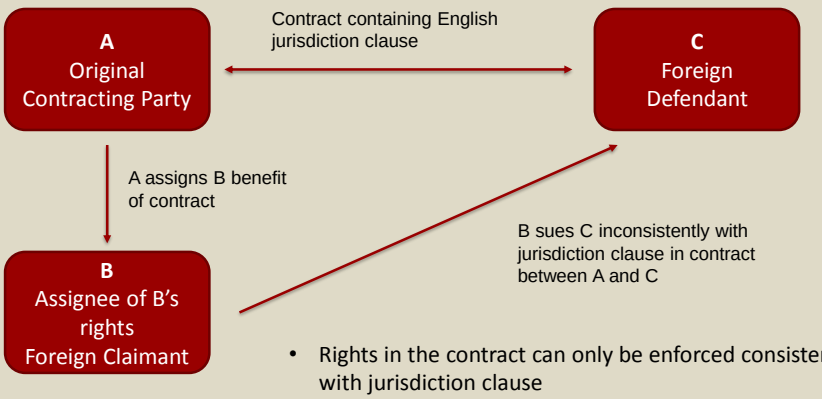
Scenario 1: ***The Jay Bola*** [1997] 2 Lloyd's Rep 279



- Rights in the contract can only be enforced consistently with jurisdiction clause
- Even though only the benefit of the contract is assigned and not the burden
- Positive effectively encumbered by an equity in C's favour

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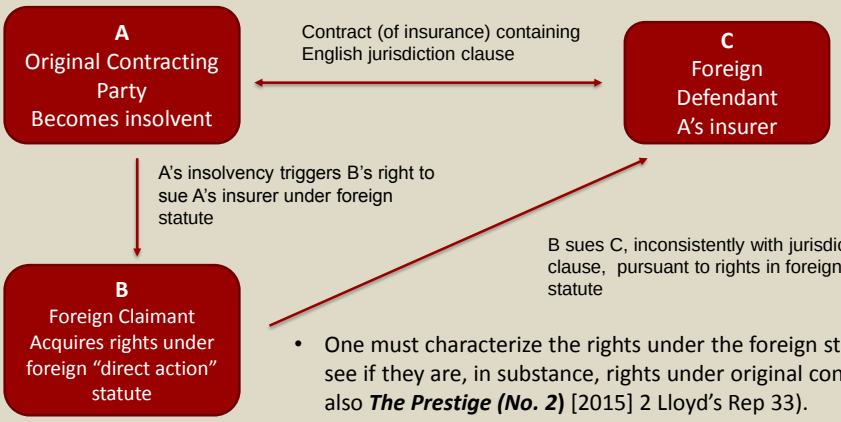
Scenario 2: ***The Yusuf Cepnioglu*** [2016] 1 Lloyd's Rep 279 (c.f. ***The Hari Bhum (No. 1)*** [2005] 1 Lloyd's Rep 67)



- One must characterize the rights under the foreign statute to see if they are, in substance, rights under original contract (see also ***The Prestige (No. 2)*** [2015] 2 Lloyd's Rep 33).
- Had previously been thought that C needed to show unconscionability on part of B – no more.
- In many ways an extension of scenario 1.

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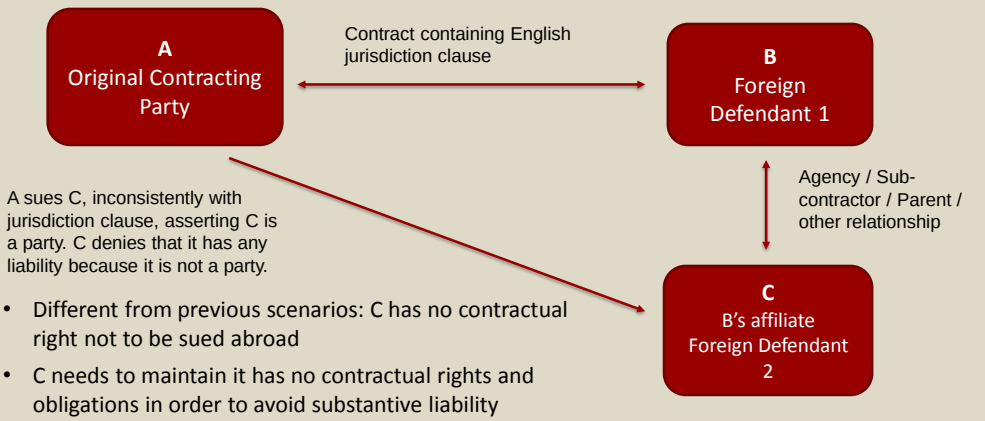
Scenario 3: "Inconsistent claims"



- Different from previous scenarios: C has no contractual right not to be sued abroad
- C needs to maintain it has no contractual rights and obligations in order to avoid substantive liability
- C typically seeks negative declaration in England

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Scenario 3: two analyses

- Contractual:
  - On the true construction of the jurisdiction clause, A promises to bring claims against B or B's affiliates in England.
  - I.e. jurisdiction clause broad enough to encompass claims against non-parties.
  - Promise made to B, albeit for C's benefit. B enforces that promise by ASI

- "Quasi-contractual":
  - As a matter of principle A cannot assert contractual rights against C without respecting jurisdiction clause that forms part of those rights
  - By analogy (although not perfect) with ***Jay Bola*** and ***Yusuf Cepnioglu***)
  - C has an independent right to the ASI against A

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Scenario 3: construction of the jurisdiction clause (1)

- The argument is available in principle, but everything turns on the particular words of the contract: see ***Morgan Stanley v China Haisheng*** [2000] 1 Lloyd's Rep 265 at [21].
- Cases on both sides of the line:

Donohue v Armco [2000] 1 Lloyd's Rep 425 at [60]-[62] (Lord Scott)

Winetka Trading v Julius Baer [2009] Bus LR 1006 [27]-[29] (Norris J)

Dell Emerging Markets v IB Maroc [2017] EWHC 2397 (Comm) (Teare J) (4 October 2017)

Credit Suisse v MLC [1999] 1 Lloyd's Rep 767 at 777-8 (Rix J)

Morgan Stanley v China Haisheng at[21]-[29] (Teare J)

Team Y&R v Ghossoub [2017] EWHC 2401 (Comm) (Laurence Rabinowitz QC) (6 October 2017)

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Scenario 3: construction of the jurisdiction clause (2)

- Useful summary of key factors in ***Team Y&R v Ghossoub*** at [82]:
  - Look at words of whole contract, not just the jurisdiction clause
  - No (or weaker) assumption of "one-stop shop" adjudication when 3rd parties involved
  - Have parties turned their mind to the rights of 3rd parties elsewhere in the contract?
  - Does the interpretation of the jurisdiction clause produce a "contractual imbalance"
  - Is there a rational limitation on the sorts of 3rd parties that might be caught by the jurisdiction clause?
  - In general, one should look for clear words indicating that specific 3rd parties should be caught
- On balance, the construction argument is a difficult one.

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Scenario 3: the "quasi-contractual" ASI (1)

- There is a thin but clear line of authority establishing such an injunction:
  - ***Sea Premium v Sea Consortium*** (11 April 2011, unrep.) at pp. 22-23 per David Steel J (ex tempore judgment)
  - ***The MD Gemini*** [2012] 2 Lloyd's Rep at [15] per Popplewell J (*obiter*)
  - ***Dell Emerging Markets v IB Maroc*** [2017] EWHC 2397 (Comm) at [22]-[23], [27]-[28], [32]-[33] per Teare J (arguably *obiter*)
  - ***Fair Wind Navigation v ACE Seguradora*** [2017] EWHC 3352 (Comm) at [5]-[8] per Knowles J (no reasoning at all)
- Arguably supported by analogy with ***Yusuf Cepnioglu***, although c.f. ***Dell v IB Maroc*** at [31].
- No direct CofA authority.

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Scenario 3: the "quasi-contractual" ASI (2)

- The principle: it is vexatious / abusive / wrongful for the foreign claimant to assert a contractual claim without respecting the jurisdiction clause inherent in that contract (notwithstanding that the defendant says she is not a party)
- That requires the court to look at the substance of what is asserted in the foreign jurisdiction and characterise whether it is essentially a contractual claim: ***Dell v IB Maroc*** at [19], [34]; ***Sea Premium*** at p.22. See also ***Dell Emerging Markets v SETS*** [2018] EWHC 702 (Comm) at [41]-[49].
- Practical issue: there is a risk that this exercise will produce a dispute of foreign law. An applicant for an ASI at the interlocutory stage must prove her case to a "high degree of probability" (***China Haisheng v Chiping Xinfa*** [2009] EWHC 3629 (QB) at [51]-[52])
- Characterisation must proceed effectively accepting injunction defendant's evidence of foreign law.

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Scenario 3: the "quasi-contractual" ASI (3)

Dell v IB Maroc at [34] per Teare J:

"I respectfully agree with the approach of David Steel J. in Sea Premium and with the obiter dictum of Popplewell J. in The MD Gemini . The reason why the jurisdiction clause can be enforced by an injunction in those cases and in the present case is that it would be inequitable or oppressive and vexatious for a party to a contract, in the present case IB Maroc, to seek to enforce a contractual claim arising out of that contract without respecting the jurisdiction clause within that contract. If the approach of Longmore LJ in the Yusuf Cepinioglu is applicable to the present case the reason is simply that IB Maroc, when seeking to enforce a contractual right, is bound to accept that its claim must be "handled through the English courts" as required by the contract in question. As with the claim by Dell UK it is accepted that there is no strong reason for not granting the injunction sought."

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Scenario 3: the "quasi-contractual" ASI (4)

- The analytical basis for the injunction is unclear and would benefit from analysis by the CofA:
  - Is the basis of the injunction that foreign claimant's conduct is "vexatious and oppressive"? (see ***Dell v IB Maroc*** at [34])
  - If so, do the ***Angelic Grace*** principles apply or is the more exacting, non-contractual threshold appropriate?
  - Or is the foreign claimant bound by an equity that can be asserted by the foreign defendant? (c.f. ***Yusuf Cepnioglu***, ***Jay Bola***)
  - Is the foreign claimant somehow estopped from denying the existence of the contract he asserts? (**Raphael, "The Anti-Suit Injunction"**)
  - What role does the "characterization" analysis from ***Yusuf*** play?
- These technical issues are likely to become relevant where facts become complicated or marginal: e.g. ***Dell v SETS***.

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Good reason

- "Good reason" - Grounds for refusing an anti-suit injunction
- Burden upon the Defendant to show
- "Good reason" – Limited grounds e.g.
  - Delay
  - Risk of multiplicity of proceedings even if anti-suit injunction granted
  - Submission on the merits in the foreign forum
  - Public policy/comity

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Comity/public policy

- Fact that foreign court will not enforce an exclusive jurisdiction clause in favour of a foreign court because of mandatorily applicable law of the forum which invalidates the parties choice of law and jurisdiction not generally a "good reason" militating against the grant of an anti-suit injunction – *OT Africa Line v Magic Sportswear* [2006] 1 All ER (Comm) 32 (Case concerned Canadian legislation which went further than the Hamburg Rules)

- NB – Contrast between approach of Longmore LJ [30]-[32] and approach of Rix LJ [57]-[81] in *OT Africa*

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Recent cases raising issues of illegality/public policy

- *The Golden Endurance* [2015] 1 Lloyd's Rep 266 – ASI refused to enforce English choice of law and Hague Rules where alternative forum (Morocco) applied Hamburg Rules
- *Petter v EMC Europe* [2015] EWCA Civ 828 – ASI granted to restrain proceedings in US brought pursuant to US exclusive jurisdiction clause so as to enforce employee's rights under Brussels Recast Regulation. Detailed discussion of *OT Africa* by Sales LJ and its effect – Doctrine described as "controversial" in *The Flag Evi.*

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Recent cases raising issues of illegality/public policy

- *Dell (EMEA) Ltd v SETS* [2018] EWHC 702 (Comm) – ASI to restrain proceedings in Lebanon resisted on grounds that English jurisdiction clause would be considered illegal under Lebanese law and therefore grant of injunction would offend principle in *Railli Brothers* (English Court will not enforce contract which is illegal in place where it is to be performed).
- Argument rejected. Performance of the contract did not necessarily involve doing any act in Lebanon which was illegal in Lebanon.

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The Flag Evi [2017] 1 Lloyd's Rep 467

- ASI sought to restrain proceedings brought against ship owners before Jordanian Courts. B/l contained London arbitration clause.
- Jordan applied Hamburg Rules.
- Defendants (Cargo Interests' Insurers) did not take part
- ASI granted.

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The Flag Evi – Effect of *OT Africa and Petter v EMC*

- Question of when good/strong reason not to grant an injunction will have been shown will require careful consideration in cases where the competing forum has jurisdiction according to its own law;
- Reciprocity (as considered by Rix LJ in OT Africa) one consideration. Another might be linked question of how the public policy on which jurisdiction is based is regarded in this jurisdiction;
- Another factor - nature of the public policy and its intrinsic importance. May be reflected in the way in which that policy is encapsulated into law. Permissive provisions less imperative status than preclusive ones. May be linked to the purpose of the policy or the nature of the person invoking it: the protection of consumers or employees will rank higher than commercial factors.

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Thank You

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Part B

Roger Jones

LIBOR – A wider perspective

LIBOR – A wider perspective

Presentation by Roger Jones

On 14 May 2018

to The London Shipping Law Centre

1

What is LIBOR ?

- The London Interbank Offered Rate
- The original BBA definition was the rate at which an individual contributor bank could borrow funds , were it to do so, by asking for and then accepting offers in reasonable market size, just prior to 11 am London time
- Whilst the BBA excluded outliers the calculation was relatively unsophisticated
- Over the ensuing years LIBOR morphed into a benchmark rate for many non-market contracts

2

History

- Created in the 1960s for pricing syndicated loans with growth driven by US legislation
- 1986 – The BBA (British Bankers Association) assumed control and published LIBOR until January 2014
- 2012 - The Wheatley Review on LIBOR misconduct
- 2013 – LIBOR becomes regulated by the FCA
- 2014 – IBA (ICE Benchmark Administration Ltd) becomes the administrator

3

Evolution

- As already mentioned, over the years LIBOR morphed into a funding benchmark for everything from corporate borrowing and commodity trading to mortgages and even credit cards
- However, this was market driven without any significant regulatory input until the financial crisis
- It also encompassed a number of currencies and maturities, some with a very thin market

4

What happened ?

- Some traders allegedly manipulated rates to enhance their profitability which then affected market and non-market contracts
- This was possible because like a number of longstanding banking processes LIBOR had effectively grown of its own accord without a well planned risk framework which in the case of LIBOR was unfortunately not retro-fitted until after a scandal had occurred

5

Why is the LIBOR incident different from most cases of market manipulation ?

- As stated above, in addition to being a market reference rate LIBOR had morphed into a form of base rate for commercial lending and supports trillions of dollars of contracts in several currencies
- The financial impact of the alleged market manipulation will depend on the currency, term and timing but overall is thought to be relatively modest
- However, the reputational damage is far more significant

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Impact

- Although the financial impact may have been modest in wholesale contract terms, the scandal undermined the market and lead to false representations
- It has also lead to the major problem of how, or even if, to replace LIBOR in existing contracts
- Standard market documentation produced by bodies such as ISDA (the International Swaps and Derivatives Association) and LMA (Loan Market Association) contains contingency (or " fallback ") provisions that address the possibility of LIBOR becoming unavailable but this only partly addresses the issue

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Key recommendations of the Wheatley Report (2012)

- Statutory regulation of the administration of, and submission to, LIBOR, including civil and criminal enforcement
- Transferring responsibility for LIBOR from the BBA to a new, private administrator
- introducing a code of conduct to provide guidance for submitting banks (including the use of a hierarchy of unsecured interbank lending and other relevant transactions to assess the interbank funding market);and
- Appointing an oversight committee of market participants to assist with decisions relating to the definition and calculation of the benchmark

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Possible replacement (s) for LIBOR (1)

- Several major central banks have created or proposed overnight benchmarks in their own currencies
- The Bank of England became the administrator of SONIA (sterling overnight index average) in April 2016 and in April 2018 announced that it would capture a broader scope of overnight unsecured deposits by including bilaterally negotiated transactions alongside brokered transactions
- The European Central Bank has announced that it will develop a new overnight reference rate by 2020 as a result of declining confidence in EURIBOR (Euro Overnight Offered Rate) and EONIA (Euro Overnight Index Average)

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Possible replacement(s)for LIBOR (2)

- The ECB's statement said that the new interest rate is intended to complement existing benchmark rates and act as a backstop reference rate
- The Federal Reserve Board has announced plans for the production of three new USD reference rates based on overnight repurchase (repo) transactions secured by Treasury securities. These are :-
  - SOFR Secured Overnight Financing Rate
  - TGCR Triparty General Collateral Rate
  - BGCR Broad General Collateral Rate

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Replacement of longer term LIBOR rates

- This creates a problem for central banks with responsibility for monetary policy since publishing rates with longer maturities could be interpreted as a desired policy stance
- The solution remains unclear but various proposals are emerging , both from rate administrators and other bodies.
- For example, ICE has announced that it will launch a 3 month futures contract based on SONIA

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A selection of relevant legislation and regulation

- EU Market Abuse Regulation (EU) No 596/2014
- EU BMR (Benchmark Regulation) (EU) No 2016/1011
- IOSCO (International Organisation of Securities Commissions) Principles for financial benchmarks
- FSB (Financial Stability Board) Report on reforming major interest rate benchmarks
- ESMA (European Securities and Markets Authority) / EBA (European Banking Authority) principles
- ICE LIBOR Code of Conduct

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The future of LIBOR

- A voluntary agreement has been reached between the FCA and market participants to sustain LIBOR until end 2021
- However, it needs to be recognised that LIBOR, particularly expressed in USD, can diverge from overnight indexed swaps
- There are a number of reasons for this ranging from liquidity shortages to the American corporate tax code that is encouraging repatriation of overseas holdings of dollars

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The objectives of ICE LIBOR

- Produce a wholesale funding rate , anchored in unsecured , wholesale funding transactions to the greatest extent possible
- Publish a standardised , transparent and robust LIBOR methodology and a single, clear and comprehensive LIBOR definition
- Ensure the rate can adapt to changing market conditions and stakeholder needs; and
- Evolve LIBOR through a seamless transition

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Achievement of ICE LIBOR objectives

- To achieve their objectives ICE is proposing a waterfall type methodology comprising:-
  - Level 1 Transaction based
  - Level 2 Transaction derived
  - Expert judgement
- Following industry requests, LIBOR is also considering maintaining LIBOR after the end of 2021
- Interestingly, the Wheatley report did not suggest discontinuing LIBOR

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EMMI Consultation on a hybrid methodology for EURIBOR

- The EMMI (European Money Markets Institute) is consulting on a hybrid methodology for EURIBOR
- The current specification is " the rate at which euro interbank term deposits are being offered within the EU and EFTA countries by one prime bank to another at 11 am Brussels time "
- This is based on a 3 level methodology using a formulaic approach provided by EMMI which includes such arcane concepts as " Adjusted Linear Interpolation from Adjacent Defined Tenors "

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Summary

- Replacement and / or continuation of LIBOR gives rise to highly technical legal and mathematical considerations which this short presentation has made no attempt to address
- It is generally accepted that such a benchmark should be anchored in an active market having observable bona fide arm's length transactions but this is easier said than done , particularly in a thin market or during disturbed market conditions

Part C

Max Lemanski

When ’good’ service goes bad – the curious case of Glencore Agriculture v Conqueror Holdings

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LSLC MARITIME BUSINESS FORUM 14 MAY 2018

When 'good' service goes bad - the curious case of *Glencore Agriculture v Conqueror Holdings*

Max Lemanski – Partner, Stephenson Harwood

The vessel: the "MV Amity"

Glencore Agriculture v Conqueror Holdings
The Facts

Facts

- Voyage C/P: Conqueror (owners) Glencore (charterers)
- LMAA arbitration
- 30.01.15: vessel arrived at anchorage at load port
- 31.01.15: Glencore employee (Florian Oosterman) gave email instructions - do not berth, wait at anchorage until arrival of "the Egyptian delegation".
- Email sent from florian.oosterman@glencore.com.
- 01.02.15: 2 further Oosterman emails to same effect.

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An Egyptian delegation…

The claim

- Vessel waited 9.2 days
- Conqueror claimed demurrage at US$7,000/day minus an account of undisputed items
- Total sum claimed was **US$43,176.27**

"*Although the amount at stake is small, the application has been contested with vigour by the parties and argued with conspicuous skill by counsel on both sides*" [para 1]

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So what happened next?

- 20.08.15: Letter Before Action addressed to Glencore Grain for Mr Oosterman's attention and sent to Oosterman e-mail address – no response
- 09.09.15: invitation to agree sole arbitrator – no response
- 21.01.16: appointment of arbitrator, 14 days for Glencore to appoint arbitrator – no response
- 05.02.16: sole arbitrator (s.17 AA 1996) – no response
- And so on: claim submissions, peremptory orders, schedules of costs and eventually a message on **20.09.16** that tribunal proceeding to award - no response

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What about Florian Oosterman?

- Left Glencore September 2016 so received most of material correspondence in arbitration – but not passed on to legal

A Cabinet of
Unresolved Issues

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What about Florian Oosterman?
His role – the LinkedIn version

- On LinkedIn: *"He describes himself as having been "responsible for all operational matters related to South American grain trade" with a throughput of about 7-10 million tons annually; and that this included managing commercial relationships with a variety of stakeholders including ship agents, brokers and suppliers, "documentation" and managing bulk shipments."* [Para 17]

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What about Florian Oosterman?
His role – the Court's view

- Employment contract described him as, "*A Junior Employee in the Back Office World Department*"
- €2,050/month
- Promoted to "*Employee in the Back Office World Department*"
- *"Given the documents in his personnel file, it seems likely that there is an element of exaggeration in this for the purposes of self promotion"* [para 17]
- "*Mr Oosterman was in the generally accepted sense a junior employee*" [para 18]

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The Unknown Arbitration

- 28 October 2016: Glencore receive award by post
- Glencore challenge under s.72 AA '96 (alternatively s.67/s.68) – first they knew about it
- The issue: whether the notice of arbitration and notice under s.17 (appointment of sole arbitrator) were validly served by being sent to Mr Oosterman's email address pursuant to s.76 AA '96
- (Remember, in arbitration parties free to agree method of service, otherwise provisions of AA apply)

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Glencore Agriculture v Conqueror Holdings

Conqueror's arguments

- Service was on a Glencore Grain email address and so on Glencore. Agency principles irrelevant
- *The Eastern Navigator* [2006] - service on info@bernuth.com held valid service on Bernuth Lines
- Alternatively if agency then Oosterman had actual / ostensible authority

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Are agency principles engaged?

- Helpful discussion at paragraphs 24 – 38

Essential points:

- difference between sending to generic email address (e.g. info@shippingco.com) and specific one (bob@shippingco.com)
- just because employee has general authority to act on behalf of employer does not necessarily mean has authority to accept service of notice of arbitration
- **Key question:** did Oosterman have actual or ostensible authority to receive service on behalf of Glencore

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Glencore Agriculture v Conqueror Holdings

- Service on individual - individual must have *actual* authority (*express* or *implied*) or *ostensible* authority
- ***Express authority*** – given by express words
  - No express authority conferred on Oosterman in his contract or elsewhere on the evidence
- ***Implied authority*** – agent has:
  - authority to do whatever is ordinarily incidental to express authority; and
  - such authority as is to be inferred from conduct of the parties and the circumstances of the case
  - on facts, Oosterman had no implied authority to '*assume the serious and distinct responsibility for accepting service of legal process*' [para 40] - he was a junior ops man

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Glencore Agriculture v Conqueror Holdings

- ***Ostensible authority*** –
  - estoppel;
  - based on representation by principal to third party that agent has authority.
- Such authority required representation of Oosterman's authority, given by Glencore to Conqueror
- The 3 emails he sent – which were operational emails reflecting his limited operational role in the voyage - were insufficient to establish that he had authority to accept service

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Glencore Agriculture v Conqueror Holdings

Held

- Glencore succeeded – award set aside (s. 72 AA '96)
- Distinguish between:
  - generic email address, eg info@glencore.com
  - address of individual employee, eg john.smith@glencore.com.
- Does service to *individual's* email address constitute service on *company*? Answer lies in agency principles
- Even wide general authority does not generally include authority to accept service of notice of arbitration

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Glencore Agriculture v Conqueror Holdings

Comment

- If in doubt, serve on every address in sight
- Serve on legal department
- Inquire at generic address for correct person / email
- Ask through broking channel for correct person / email – do NOT rely on service via brokers
- Get an acknowledgment
- Don't forget service by post on body corporate's registered or principal office - deemed effective (AA '96, s 76(4))

STEPHENSON HARWOOD

Thank you

- A well-known shipping and energy litigator, Max works for a wide range of international shipowners and offshore contractors, P&I/FD&D clubs, shipyards and financers. Clients value his considerable experience and expertise, which span the full spectrum of dry shipping and energy litigation and arbitration disputes as well as non-contentious contract negotiations.
- Max represents a wide range of shipowner clients and their P&I/FD&D clubs. His experience includes the full range of dry shipping issues, including time and voyage charter disputes and claims under bills of lading. Max also has considerable expertise in shipbuilding disputes.
- In the offshore sector, Max works with many of the firm's oil and gas clients and has considerable expertise advising in relation to FPSO disputes with clients based in Aberdeen, Norway and Houston. He has also developed expertise in the FLNG field.

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Max Lemanski: Winner of the Client Choice Award 2016 for Shipping and Transport in the UK

STEPHENSON HARWOOD

Part D

CURRICULA VITAE

THE CHAIRMAN

Mike Phillips Partner

Mike is a partner and head of Stephenson Harwood's marine and international trade practice. He specialises in shipping, carriage of goods, contentious ship finance disputes and ship and offshore vessel construction. Mike's clients include banks, shipowners, traders and P&I clubs/insurers.

Acting for some of the world's largest and most well-known shipowners, he has experience of dealing with a wide range of matters from cargo claims and off-hire disputes to groundings and vessel fires. On the contentious ship finance side, Mike represents leading ship finance banks in a wide array of disputes arising from both pre and post-delivery finance.

Sectors

Ship and Offshore Finance
Shipping Litigation
Marine and International Trade
Shipbuilding and Offshore construction
Banks and Banking

Accolades

Winner - The i-law Maritime Law Award

Recognised as one of the top 10 maritime lawyers 2017 in Lloyd's List Top 100 most influential people in the shipping industry

UK Client Choice Award - Shipping & Transport 2015

SARA MASTERS QC

Queens Counsel
Date called: 1993 Silk: 2012

20 ESSEX STREET

Sara specialises in all areas of commercial law. She has a particular interest in jurisdictional disputes, including jurisdictional issues in arbitration and in private international law and conflicts of law. She also has extensive experience in insurance and reinsurance, sale of goods, shipping (including ship-building and ship sale disputes) and commodities, aviation, construction, energy and European Union law, particularly competition law.

She has appeared in the High Court, the CAT, the Court of Appeal, the House of Lords, and the Privy Council and before the European Court of Justice and the DIFC Courts. Sara is registered to appear before the Singapore International Commercial Court. She also appears frequently before arbitrators in a broad range of disputes both in the UK and abroad.

She accepts appointments as an arbitrator both in the UK and abroad and has a wide experience both of institutional and ad hoc arbitrations, and is also a CEDR accredited mediator. She is appointed to the SCMA (Singapore Chamber of Maritime Arbitration) panel of arbitrators and is also a member of the CIETAC panel.

She was instructed for the insurers in "The Front Comor" (West Tankers v Allianz SpA), an important case before the ECJ on the compatibility with EU law of anti-suit injunctions to enforce arbitration clauses.

Sara lectures frequently, particularly on arbitration, jurisdiction and conflicts of law and sanctions. She is the European editor of The White Book (English civil procedure rules) and also edits the sections dealing with service out of the jurisdiction, jurisdictional challenges, and depositions and evidence for foreign courts.

Current work of particular topical interest includes cases involving the impact of UN and EU sanctions in the commodities, shipping, banking and financial services sector; instructions in "follow on" competition damages claims before the Chancery Division and the CAT; a series of anti-suit injunctions in the IT sector; and a long running and substantial dispute involving the construction of one of the largest super-yachts in the world.

Specialisations:

- Arbitration
- EU law / Competition law
- Private International law
- Sale of Goods
- Shipping (including ship-building and ship sale disputes) and Commodities

Principal Cases:

Arbitration - as arbitrator

Co-arbitrator in LCIA arbitration between offshore companies and Russian individual arising out of shareholders? agreement.

Chair in LMAA arbitration concerning claim for freight and demurrage under various voyage charters. Raised Iranian sanctions issues.

Chair in an LMAA arbitration concerning very substantial claim for repudiatory breach of long term time charter.

Sole Arbitrator in LCIA arbitration concerning dispute over publishing royalties.

Sole Arbitrator in LCIA arbitration concerning dispute under commodities sales contract.

Co-Arbitrator in LCIA arbitration concerning claim under an oil trading consultancy agreement.

Chair in LMAA arbitration concerning very substantial dispute over construction of super-yacht.

Chair in ad hoc arbitration concerning ship-building dispute.

Co-arbitrator in LCIA arbitration concerning dispute under consultancy agreement involving Polish interests.

Sole Arbitrator in an LCIA arbitration concerning a claim under loan agreement and associated security documents involving Russian interests.

Chair in LCIA arbitration concerning a claim for sales demurrage under commodities sale contract.

Co-arbitrator in LMAA charterparty dispute reference concerning explosion at discharge port.

Sole arbitrator in an LCIA arbitration concerning a dispute involving Russian and Italian interests under shareholders agreement.

Co-arbitrator in two concurrent LMAA charterparty references concerning damage to vessel occurring during STS transfer.

Co-arbitrator in LCIA arbitration concerning claims under loan agreement and associated security documents.

Sole arbitrator in UNCITRAL arbitration concerning claim under guarantee arising out of oil field project management agreement.

Chair in LMAA arbitration concerning alleged repudiatory breach of long term bare boat charter.

Co-arbitrator in LCIA arbitration concerning claims under finance documents.

Party appointed arbitrator in ad hoc shipping reference concerning damage to vessel and other charterparty claims.

Party appointed arbitrator in ad hoc shipping reference concerning charterparty claims.

Chair in LCIA arbitration concerning claim under loan agreement and associated financing documents.

Sole Arbitrator in SIAC arbitration concerning claim under commodities contract.

Co-arbitrator in LMAA arbitration concerning claim for short-delivery.

Co-arbitrator in LMAA charterparty reference.

Co-arbitrator in LCIA reference concerning claim under commodities contract.

Sole arbitrator in LCIA reference concerning claim under Settlement Agreement.

Sole Arbitrator in LCIA reference concerning employment law dispute arising out of Share Purchase Agreement.

Arbitration - as counsel

Recent cases examples include:

X v Y Z [2015] EWHC 395 (Comm) - Challenge to arbitration award - Supply Contract - Iranian Law-Preliminary Issues.

West-Tankers Inc v Allianz SpA [2012] EWHC (Comm); [2012] 2 Lloyd's Rep 103 - Damages for breach of arbitration agreement - Compatibility with EU law.

West Tankers Inc v Allianz SpA - Judgment 6 April 2011 [2011] EWHC 829 (Comm) - Section 66 of the Arbitration Act - Declaratory judgments - Enforcement.

West Tankers Inc v Ras Riunione Adriatica di Sicurta "The Front Comor" [2008] 2 Lloyd's Rep 661 (ECJ AG Opinion), [2007] 1 Lloyd's Rep 391 (HL) - Arbitration - Anti-suit injunctions - Law applicable to subrogated claim - Law applicable to arbitration clauses.

Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH [2010] 1 Lloyd's Rep 533; [2011] 1 Lloyd's Rep 243 - Arbitration - Section 72 of the Arbitration Act, 1996 - Right to fair and public hearing - Article 6 - ECHR.

English Courts

Examples of recent cases include:

Maersk Tangier [2018] EWCA Civ 778 - Acting on behalf of Maersk in respect of claims against them for damage to a cargo of frozen bluefin tuna loins. The case is the key Court of Appeal authority in respect of the compulsory applicability of the Hague-Visby Rules where seaway bills are issued, marking a significant legal development since the well known decision of the House of Lords in The Rafaela S, and also in respect of the package or unit limitation in the context of containerisation under both the Hague and Hague-Visby Rules.

Dell Emerging Markets (EMEA) Ltd & Ors v Systems Equipment Telecommunications Services SAL [2018] EWHC 702 (Comm) (19 April 2018) - Anti-suit injunction and substantive claim in relation to an information technology distribution agreement. The distributor, SETS, prevented other partners from selling Dell products in the Lebanon. Dell says this is a breach of the distributorship agreement and purported to terminate the agreement. The distributor commenced proceedings in Lebanon against a range of Dell entities in various countries.

Dell Emerging Markets Limited v IB Maroc Com SA - Claim for an anti-suit to restrain proceedings brought in Morocco in breach of an exclusive jurisdiction clause and a claim for unpaid invoices.

X v Y Z [2015] EWHC 395 (Comm) - Challenge to arbitration award - Supply Contract - Iranian Law-Preliminary Issues.

Petter v EMC[2015] EWCA 828 - Employment - Section 5 of Brussels I (Recast) regulation - Anti - Suit Injunction.

DB Schenker Rail (UK) Ltd & Ors v Schunk GMBJ & Ors (CAT) [2014] Cat 2 - Follow on damages claim.

Emerald Supplies Ltd & Ors v British Airways plc (HC0802468) - Follow on damages claim - Air Cargo.

United Arab Shipping Co v Kuwait Insurance Company [2012 Folio 1681] (Comm Court) - Anti-suit injunction - B/l dispute - Impact of mandatory rules of foreign forum.

Amanda Ackerley and Others v Alpha Panareti and Others (Comm Court) - Multi-party dispute arising out of purchase of property in Cyprus - Professional negligence claim against Cypriot solicitors - Jurisdiction of English Court.

Swiss Re International v SAP AG (2012 Folio No 1096) - (Comm Court) - Anti-suit injunction - insurance coverage dispute - US Court's attitude towards enforcement of arbitration clause.

West-Tankers Inc v Allianz SpA [2012] EWHC (Comm); [2012] 2 Lloyd's Rep 103 - Damages for breach of arbitration agreement - Compatibility with EU law.

Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH [2010] 1 Lloyd's Rep 533; [2011] 1 Lloyd's Rep 243 - Arbitration - Section 72 of the Arbitration Act, 1996 - Right to fair and public hearing - Article 6 - ECHR.

West Tankers Inc v Allianz SpA - Judgment 6 April 2011 [2011] EWHC 829 (Comm) - Section 66 of the Arbitration Act - Declaratory judgments - Enforcement.

West Tankers Inc v Ras Riunione Adriatica di Sicurta "The Front Comor" [2008] 2 Lloyd's Rep 661 (ECJ AG Opinion), [2007] 1 Lloyd's Rep 391 (HL) - Arbitration - Anti-suit injunctions - Law applicable to subrogated claim - Law applicable to arbitration clauses.

EU Law / Competition Law

Examples of casework in the field include:

Petter v EMC [2015] EWCA 828 - Employment - Section 5 of Brussels 1 (Recast) regulation - Anti-suit Injunction.

DB Schenker Rail (UK) Ltd & Ors v Schunk GMBJ & Ors (CAT) [2014] Cat 2.

Emerald Supplies Ltd & Ors v British Airways plc (HC0802468).

McCall v MIB [2010] - uninsured drivers - interpretation of EU law.

Private International Law

Examples of case work include:

In Re Haji-Ioannou (Deceased) [2009] EWHC 2310 (QB); [2010], All ER (Comm) 303 - Law applicable to intestate succession - Registration of judgment under the Brussels Regulation.

Caterpillar Financial Services Corporation v SNC Passion [2004] 2 Lloyd's Rep 99 - Rome Convention - Law applicable to loan agreement.

Akai Pty Ltd v The People's Insurance Co Ltd [1998] 1 Lloyd's Rep 90 - Insurance (Credit) - Anti-suit injunctions.

Shipping & Commodities

Some recent case exmaples include:

Maersk Tangier [2018] EWCA Civ 778 - Acting on behalf of Maersk in respect of claims against them for damage to a cargo of frozen bluefin tuna loins. The case is the key Court of Appeal authority in respect of the compulsory applicability of the Hague-Visby Rules where seaway bills are issued, marking a significant legal development since the well known decision of the House of Lords in The Rafaela S, and also in respect of the package or unit limitation in the context of containerisation under both the Hague and Hague-Visby Rules.

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West Tankers Inc v Allianz SpA - Judgment 6 April 2011 [2011] EWHC 829 (Comm) - Section 66 of the Arbitration Act - Declaratory judgments - Enforcement.

Education and Career:

Trinity College, Cambridge (MA)

Universite Libre de Bruxelles, licence speciale en droit europeen (Grande distinction)

Appointments and Society Memberships:

- CEDR accredited mediator
- LMAA
- LCLCLBA
- LCIA European Users' Council
- SCMA panel member
- CIETAC Panel Member
- MOOGAS International Arbitrator and Mediator Panel Member
- Member of Arbitralwomen
- Registered to appear before the Singapore International Commercial Court

Lectures and Teaching:

Lectures frequently on arbitration, jurisdiction and conflicts of law issues of topical interest.

Quotes:

Recent coverage in legal directories includes:

"Very good with complex, technical issues." Chambers Global & UK Bar 2018

"A strong leader, who can direct cases very well." Legal 500 2017

"First-rate." Legal 500 2017

"She's clearly very clever and she understands what needs to be done for the client. I find her approachable and user-friendly with a good sense of humour." Chambers UK Bar 2017

"She is very good on her feet and has a real command of the subject matter." Chambers UK 2016

"Brilliant - an academic heaven and sensible adviser, who empathises with clients." Legal 500 2016

"Very approachable, effective and responsive." Legal 500 2015

ANDREW FELD

Andrew is a junior at 20 Essex Street with a busy commercial practice encompassing all areas of chambers' work, including shipping, shipbuilding and commodities, commercial disputes and insolvency and restructuring. He has particular experience in cases involving the conflict of laws, including anti-suit injunctions, contested jurisdiction challenges and cross-border insolvency issues.

Andrew regularly appears, both as sole counsel and as part of a larger team, in the Commercial Court and a range of arbitral tribunals, as well as the Court of Appeal. Andrew also actively seeks out opportunities for trial advocacy, as a result of which he has appeared as sole counsel in several multi- and fast-track trials.

His recent cases in the High Court include:

- Dell Emerging Markets (EMEA) Limited v Systems Equipment Telecommunications Services SAL [2018] EWHC 702 (Comm) (Anti-suit injunctions against non-contractual parties; termination of international IT distributorship agreement; the rule in Ralli Brothers; characterisation)
- Seatrade Group NV v Hakan Afro DMCC ("The Aconcagua Bay") [2018] EWHC 645 (Comm) (leading case on the scope of the warranty "always accessible" in a voyage charter, whether such warranty applies to departure from the berth)
- Marks and Spencer PLC v Union Apparels (Private) Limited [2018], London Circuit Commercial Court (Anti-suit injunction, ex parte injunction, sale of goods)
- Glencore Energy UK v Freeport Holdings Limited ("The Lady M") [2018] LLoyd's Rep Plus 22; [2018] Bus LR 294; [2017] EWHC 3348 (Comm) (leading case on the definition of barratry and the scope of the fire exception in Art. IV(2)(b) Hague/Hague-Visby Rules. Currently on appeal to the Court of Appeal)
- Dell Emerging Markets (EMEA) Limited v IB Maroc.com [2017] EWHC 2397 (Comm) (Anti-suit injunctions against non-contractual parties, technology dispute concerning delivery of cloud infrastructure)
- C21 London Estates Ltd v Maurice Macneill Iona Ltd [2017] EWHC 998 (Ch): franchise agreements, fraudulent misrepresentation, conditions vs innominate terms, repudiatory breach. Currently under appeal to the Court of Appeal
- Kolmar Group AG v La Seda de Barcelona [2016], Commercial Court (cross-border insolvency; jurisdiction challenge; interaction between Brussels I Recast (Ref

1215/2012) and the Insolvency Regulation (Reg 1346/2000); dispute under long-term chemical supply contract).

His recent cases in arbitration include:

- Ad Hoc Arbitration (2017) – multi-million-dollar dispute concerning the impact on ten shipbuilding contracts of US, UN and Korean sanctions against Iran, including the designation of a party under US Executive Order 13382 making dollar payments unlawful and impossible. Issues included whether the contracts were frustrated and whether such frustration was self-induced or foreseeable. Further issues over whether a party was entitled to terminate for an event of insolvency.
- LCIA Arbitration (2017) – multi-million-dollar shipbuilding dispute concerning buyer's entitlement to cancel in respect of trial run performance and whether trial-run results had been fraudulently prepared.
- LMAA Arbitration (2017) – dispute arising out of an investment a chartering venture, part of a series of arbitrations relating to an alleged investment fraud. Issues as to rectification, agency and the scope of supervisory obligations.
- LCIA Arbitration (2016) – dispute between a major private equity fund and a European bank over entitlements to carried interest. The case concerned with a fraud allegedly perpetrated by the bank was an event of default resulting in its loss of entitlement to carried interest.

Before coming to the Bar, Andrew worked for several years as a competition and regulatory economist. He initially practised at the Competition Commission before moving to the private sector as an economic consultant. His experience is an asset in matters involving competition law, as well as in cases of a technical or complex nature more generally.

CURRICULUM VITAE – ROGER STUART JONES - ACIB

Career Summary

- Wide technical, risk and general management experience in a major UK bank including working in New York
- Experience of retail, wholesale and international business
- Responsibility for litigation affecting international business and giving evidence in court
- Specific expertise in operational risk, payments and trade finance
- Responsibility for high level technical issues
- Specific responsibility for policy relating to payments, trade finance and SWIFT
- Four years partly working for APACS (now known as UK Payments) to implement Settlement Risk reduction in the UK payment systems.
- Joined Lloyds Bank in August 1961 and retired as a Senior Executive of Lloyds TSB Bank in September 2006
- Since retirement, has worked as a Banking Consultant providing advisory and expert witness services

Key External Appointments

- Member ICC UK Banking Committee and ICC Banking Commission
- Member ICC Financial Crime Risk and Policy Group
- Chairman, TARGET Working Group (TWG) – TARGET 2 is the Euro RTGS system owned by the Eurosystem settling circa EUR 2 trillion per day and the TWG represents the European banking industry

Major Former External Appointments

- Member of the European Payments Council (EPC which is responsible for retail payments in euro) and Chairman Audit Committee
- Director, ABE Clearing S.A.S. (The EBA Clearing Company which is the largest private euro payment system operator) and Chairman, Audit & Finance Committee
- Director SWIFT (UK) Ltd
- Chairman ICC UK Banking Committee (for 18 years)

Publications and Advisory Work

- Consultant to Law of Bank Payments by Brindle & Cox (all editions)
- Principal author of the Trade Finance section of the JMLSG (Joint Money Laundering Steering Group) Guidance
- Various articles for Butterworths Journal of International Banking and Financial Law

Contact Details

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July 2017

Max Lemanski

A well-known shipping litigator, Max works for a wide range of international shipowners, P&I/FD&D clubs, shipyards and financing banks. Clients value his considerable experience and expertise, which span the full spectrum of dry shipping litigation and arbitration disputes as well as non-contentious contract negotiations.

Max has broad experience representing clients in international arbitrations (with particular expertise in LMAA and ICC arbitrations) and High Court disputes (including injunctive relief). He has also litigated in the European Court of Justice.

Max represents a wide range of shipowner clients and their P&I/FD&D clubs, with a focus on the London market and jurisdictions including the Scandinavian countries, Monaco, India and Singapore. His experience includes the full range of dry shipping issues, including time and voyage charter disputes and disputes under bills of lading. Max also has considerable expertise in shipbuilding disputes (acting for owners, financing banks and yards, especially in Korea).

In the offshore sector, Max works with many of the firm's oil and gas clients. He has developed niche expertise in the LNG field. He also works on the non-contentious side, negotiating contracts such as shipbuilding contracts, time charters and refund guarantees. Max works with a number of yacht owners and specialist yards on disputes including refit disputes, paint problems and contractual cancellations.

Once a banking lawyer, Max also works closely with the firm's finance team on enforcement actions for financing banks, including ship arrests and sales.

He regularly gives seminars for companies such as the Lloyd's Maritime Academy.

Max Lemanski

Partner

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