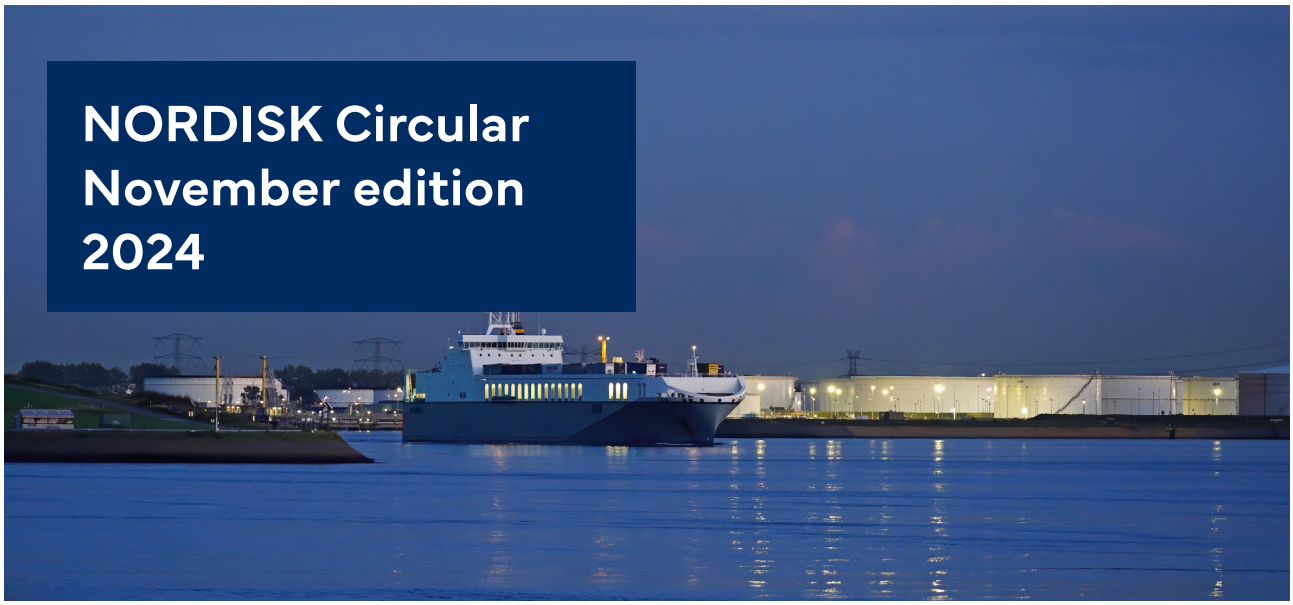


May the Force (Majeure) Be With you: RTI Ltd v MUR Shipping BV – the UK Supreme Court's decision

The UK Supreme Court has clarified that the requirement to exercise 'reasonable endeavours' to overcome a force majeure event does not extend to accepting an offer of non-contractual performance.

In recent years, the interpretation of force majeure clauses has continued to be a hot topic for many of our Members, against a backdrop of tumultuous world events such as the hostilities in the Red Sea, the COVID-19 pandemic and the Russian invasion of the Ukraine.

This trend is also mirrored in the recent string of force majeure cases reaching the English Courts, the latest and most significant of which is the Supreme Court's judgment in *RTI Ltd v MUR Shipping BV*[1], which was handed down earlier this year.

Background

The dispute concerned a contract of affreightment between RTI Ltd ("RTI") as Charterers and MUR Shipping BV ("MUR") as Owners for the carriage of bauxite from Guinea to Ukraine, across a two year period (the "COA").

The COA provided for freight to be paid in US dollars and included the following terms in its force majeure clause:

"A Force Majeure Event is an event or state of affairs which meets all the following criteria:

...

(c) It is caused by ... restrictions on monetary transfers and exchanges;

(d) It cannot be overcome by reasonable endeavours from the Party Affected".

Problems arose in April 2018, when the US government's Office of Foreign Assets Control ("OFAC") imposed sanctions against RTI's parent company (United Company Rusal Plc) ("Rusal") on account of its links to Russian oligarch Oleg Deripaska.

Author
Catherine O'Connor
solicitor (England & Wales)

1 [2024] UKSC 18

Whilst the sanctions were not directly imposed upon RTI itself, RTI still became subject to the same restrictions on account of the fact it was more than 50% owned and controlled by Rusal.

In view of this development, MUR sent RTI a force majeure notice saying that the sanctions would prevent RTI from making US dollar payments of freight, so the COA could no longer be performed.

RTI, in response, proposed the payment of freight in Euros, which could subsequently be converted to US dollars by MUR's bank, and offered to cover any associated conversion costs.

MUR rejected this proposal and suspended operations until 23 April 2023, when OFAC issued a General Licence which extended existing permissions for the carrying out of activities ordinarily incident and necessary to the maintenance and wind down of operations, so as to cover the balance of the COA period.

RTI commenced arbitration proceedings, claiming US$2.17M for the additional costs of chartering in seven replacement vessels during the period of MUR's suspension.

Key Legal Arguments

MUR argued that during the period in question, its performance obligations were excused under sub-clause (c) of the Force Majeure Clause.

RTI, in the other hand, argued that the "reasonable endeavours" provision incorporated at sub-clause (d) had obliged MUR to accept their offer to pay in Euros and bear the conversion costs, which it said would have prevented MUR from suffering any detriment & achieved the same end result.

Arbitration and Court Decisions

The London arbitration tribunal initially decided the case in favour of RTI, agreeing that the "reasonable endeavours" provision required MUR to accept RTI's offer of payment in Euros.

The High Court subsequently overturned this decision on appeal, concluding that as the COA provided for payment in US dollars, a payment in Euros would have amounted to non-contractual performance, which fell outside the scope of the "reasonable endeavours" provision.

However, the Court of Appeal later reversed the High Court's decision, which led MUR to appeal the case again to the Supreme Court.

Supreme Court Judgment

Ultimately, the Supreme Court found unanimously in MUR's favour, on four grounds:

(a) The Court found that "reasonable endeavours" must be assessed strictly in accordance with the terms of the contract, reasoning that "*the object of the reasonable endeavours proviso is to maintain contractual performance, not to substitute different performance*".

(b) The Court emphasised the fundamental importance of the principle of freedom of contract under English law, which it said includes (as in this case) the right not to agree contractual variations proposed by a counterparty.

(c) Applying the same logic, the Court also concluded that clear words would be needed in order for a party to forego its strict contractual rights, something which were not present in the COA in question.

(d) Finally, the Court stressed the importance of certainty in commercial contracts generally. In this regard it highlighted that if RTI's arguments were accepted, it would be very difficult for contractual parties to know whether they could invoke force majeure in each case i.e. as this would require a detailed examination of (i) whether any detriment would result from the proposed non-contractual performance, and (ii) whether such non-contractual performance would in fact achieve the same result.

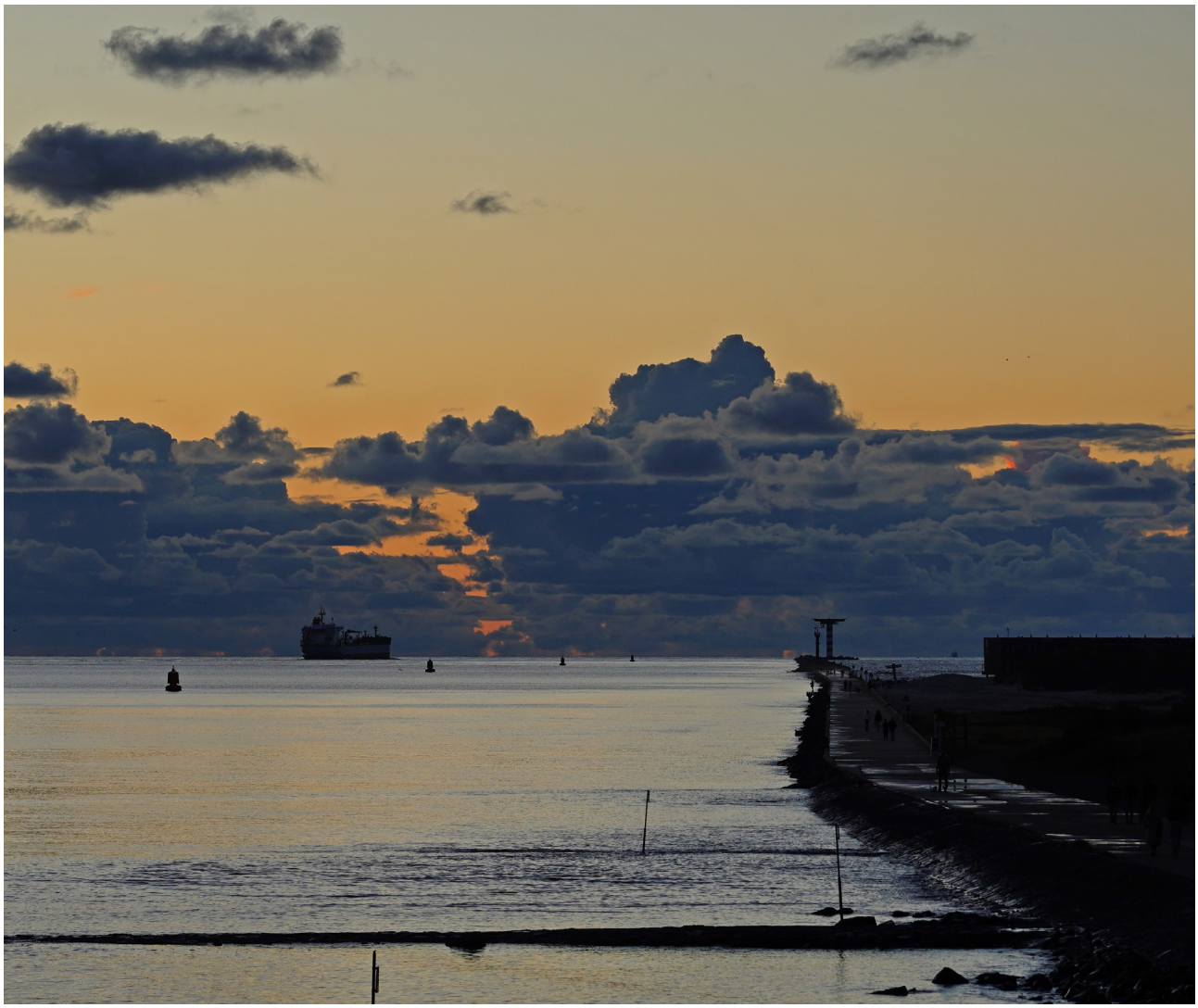
Key Takeaways

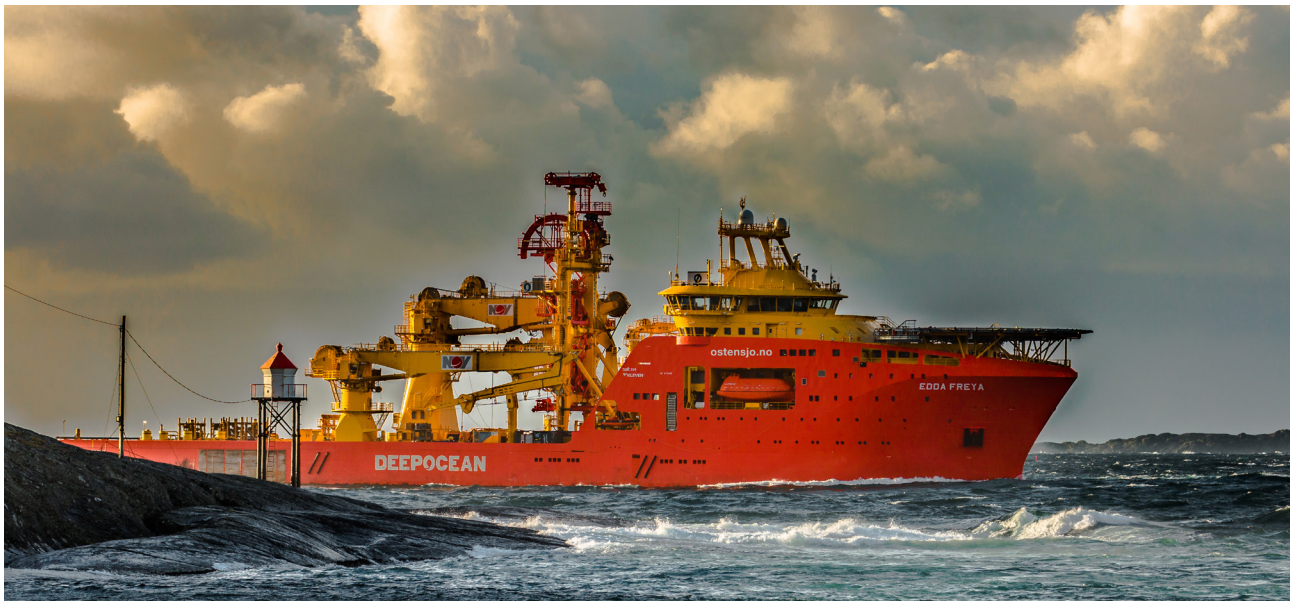
The Supreme Court's judgment provides a welcome clarification of the law, confirming that "reasonable endeavours" does not require a party to accept non-contractual performance, regardless of whether commercially this may offer a convenient solution, in a force majeure scenario.

Further, the judgment is one of general impor-

tance, the Supreme Court having made it clear that even where a Force Majeure clause does not expressly incorporate a "reasonable endeavours" requirement, one is likely to be implied.

Finally, for parties who are concerned that the effect of this judgment will be to make standard force majeure clauses too rigid, the Court made clear that greater flexibility (including the requirement to accept non-contractual performance) can always be addressed via the incorporation of express terms. For commercial parties, this will therefore be something to keep in mind at the negotiation stage, particularly when fixing long term contracts, where the risk of a change of circumstances during the contract period is likely to be greatest.





Hong Kong Convention vs. Basel Convention – a step further

The misalignment between the Hong Kong Convention on ship recycling and the Basel Convention on hazardous waste poses a risk that vessels sold, exported and recycled under the former could breach the export prohibitions of the latter.

Keen readers of the Nordisk Circular will remember our article from March this year, in which we highlighted the current lack of interplay between the Hong Kong Convention for Safe and Environmentally Friendly Recycling of Ships (the "HKC"), set to enter into force on 26 June 2025, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the "Basel Convention"). The issue is that, as matters stand today, there is a risk that a vessel being sold, exported, and recycled in accordance with the HKC may represent a breach of the export prohibition under the Basel Convention.

In our March article, we pointed out that this situation is unsatisfactory and risks undermining compliance with the HKC. This point was also raised by Bangladesh, India, Norway, Pakistan, ICS, and BIMCO on **25 January 2024,** where these countries expressed the need for legal clarity and certainty to ensure that operating in compliance with the HKC will not be sanctioned as a violation of the Basel Convention.

With the entry into force of the HKC rapidly approaching, it is becoming increasingly urgent to find a solution. We are, therefore, pleased to note that this issue was addressed at the **82nd session of the Marine Environment Protection Committee (MEPC)**, conducted at the IMO's headquarters in London from **30 September to 4 October 2024**.

Ahead of the meeting, the IMO Secretariat prepared a guidance document during the summer of 2024 on the interplay between the HKC and the Basel Convention. In short, this guidance provided a draft for the Committee to approve, outlining a possible way forward in establishing alignment between the HKC and the Basel Convention.

Author
Ola Granhus Mediås
lawyer

The guidance proposed that states party to both the Hong Kong Convention and the Basel Convention, including those that have expressed consent to be bound by the Ban Amendment[1] , and who believe that the provisions of the Basel Convention should not affect transboundary movements conducted under the HKC, may consider notifying the Basel Convention Secretariat as follows:

"In accordance with Article 11 of the Basel Convention, the Basel Convention Secretariat is hereby notified that the [name of the state that is a party to both the Hong Kong Convention and the Basel Convention] is a party to the [HKC] and will apply the Hong Kong Convention's requirements with respect to transboundary movements of ships intended to be recycled at a ship recycling facility authorized in accordance with the Hong Kong Convention and situated under the jurisdiction of a party to the Hong Kong Convention. Relevant arrangements have been made to ensure environmentally sound management of hazardous wastes and other wastes (arising from ship recycling) as required by the Basel Convention. Consequently, the provisions of the Basel Convention shall not affect transboundary movements which take place pursuant to the Hong Kong Convention."

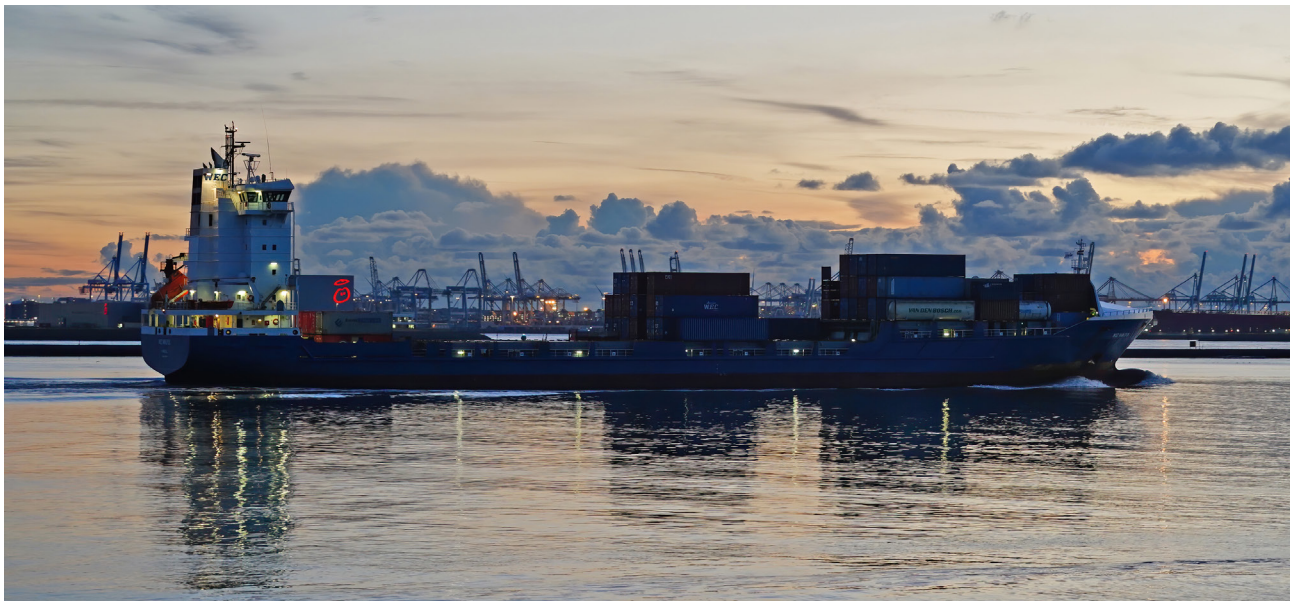
This approach is grounded in Article 11 of the Basel Convention, which stipulates that the Basel Convention may not apply to any bilateral, multilateral, or regional agreements, "*... provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes or other wastes as required by this Convention*". The guidance suggests that the HKC qualifies as such an agreement, as it does not derogate from the sound management of hazardous wastes as required by the Basel Convention.

At the meeting, the Committee approved the provisional guidance as described above. If proven workable, this solution could address the lack of alignment between the HKC and the Basel Convention, allowing the HKC to take precedence.

However, while this is clearly a step in the right direction, we anticipate further discussions at **COP-17[2] to the Basel Convention** about whether the HKC "*derogates from the environmentally sound management of hazardous wastes or other wastes as required [by the Basel Convention]*." If the Basel Convention Secretariat concludes that the HKC does indeed derogate from the standards required by the Basel Convention, then there is a risk of the lack of interplay materializing again, and we will essentially be back to square one.

1 https://www.basel.int/Implementation/LegalMatters/BanAmendment/Overview/tabid/1484/Default.aspx

2 - Due to be held in Geneva, Switzerland, from 28 April to 9 May 2025



Incorporation of arbitration clauses under English law

Why should parties take extra care when incorporating arbitration clauses that are outlined in a separate document?

In the shipping industry, it is common for parties to set out the terms of their agreement in multiple documents. As a result, ascertaining the full terms of a contract when these terms are spread across different documents can be a challenge and the risk of failing to identify the correct terms can lead to unfavourable consequences.

We often encounter cases involving our Members where it is necessary to consider whether an arbitration agreement contained in a separate document has been effectively incorporated into a primary contract, such as a charterparty or bills of lading. Under English law, the question of whether an arbitration clause has been effectively incorporated is determined by applying principles of construction and by objectively assessing the parties' intentions in light of the surrounding evidence.

As a general rule English law recognises that standard terms (such as the Gencon 1994 form), including the arbitration clause contained in those standard terms, can be effectively incorporated into a contract by the use of general words of reference to that document.

The rationale for this rule is that parties are expected to be familiar with the standard terms that they have incorporated, including the arbitration clause contained in those terms, and therefore the scope of ambiguity is less.

In this regard, Section 6(2) of the English Arbitration Act 1996 provides that "*the reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement*". However, the complication that often arises is in determining when the reference "is such" as to make that clause part of the agreement.

A leading judgment on this topic, The "*Athena*"

Author
Rituparna Chattopadhyay
solicitor (England & Wales)

No.2[1], saw the English Court distinguish between what is called a 'single-contract case', between what is called a 'single-contract case', where the arbitration clause is found in the standard terms within another document[2], and a 'two-contract case', where the arbitration clause is contained in a secondary contract involving at least one party different from those in the main contract.

In essence, in a single-contract case the arbitration clause (along with any other terms) is contained in a separate document (for example in a standard form), that is incorporated by reference, in its entirety, into the main contract. In such cases, general words of incorporation are typically sufficient and there is no need to refer explicitly to the arbitration clause[3].

In a two-contract case, the arbitration clause is contained in a secondary contract to which at least one of the primary contracting parties is not a party. This raises the question of whether the primary contracting parties are bound by the arbitration clause, particularly if one (or both) of them has no notice of the terms in the secondary contract. In such cases, English courts are generally known to take a stricter approach, requiring an express reference to the arbitration agreement contained in the secondary contract, as general words of incorporation are typically insufficient. This means that there must be a clear and specific reference to the arbitration clause itself, not merely to the contract in which it is contained. The reason is that, in situations where at least one of the parties to the primary contract is different from the parties in the secondary contract whose terms are intended to be incorporated, the different party may not have knowledge of the relevant terms in the secondary contract.

A good example of the stricter approach often applied in a two-contract case is when bills of lading incorporate some or all of the terms of a charterparty. This is because bills of lading are negotiable instruments and may be transferred to a party in a different jurisdiction who may not be privy to the terms of the underlying charterparty. Therefore, for the arbitration or jurisdiction clause in the charterparty to effectively incorporated into the bills of lading, the clause in the charterparty must be specifically referenced in the bills of lading.

Another reason why general words of incorporation of charterparty terms may not be sufficient is that the terms may need modification to sensibly apply in a bill of lading context, further emphasizing the need for a specific reference to clarify that incorporation is intended.

The English courts have held that general words of incorporation used in bills of lading incorporate only those clauses of the charterparty which are applicable to the contract contained in the bill. In *TW Thomas & Co Ltd v Portsea Steamship Co Ltd (The Portsmouth)*[4] the House of Lords rejected the argument that general words of incorporation effectively incorporated an arbitration clause from a charterparty on several grounds, including that the clause was not germane to the receipt, carriage, or delivery of the cargo or the payment of freight, and that bills of lading are negotiable instruments. This is further supported by the Supreme Court's recent decision in *The Polar*[5].

Such a restrictive approach, which is an exception to the general rule, does not apply where standard terms are incorporated by reference into a contract like a charterparty. As a matter of general practice however it is advisable to make clear and explicit reference to the arbitration clause contained in a secondary document or contract, if the intention is for that arbitration clause to apply to the primary contract.

As always, Nordisk is available to assist Members with any queries that they may have in relation to the above. Please do not hesitate to contact us.

1 - [2007] 1 Lloyd's Rep. 280

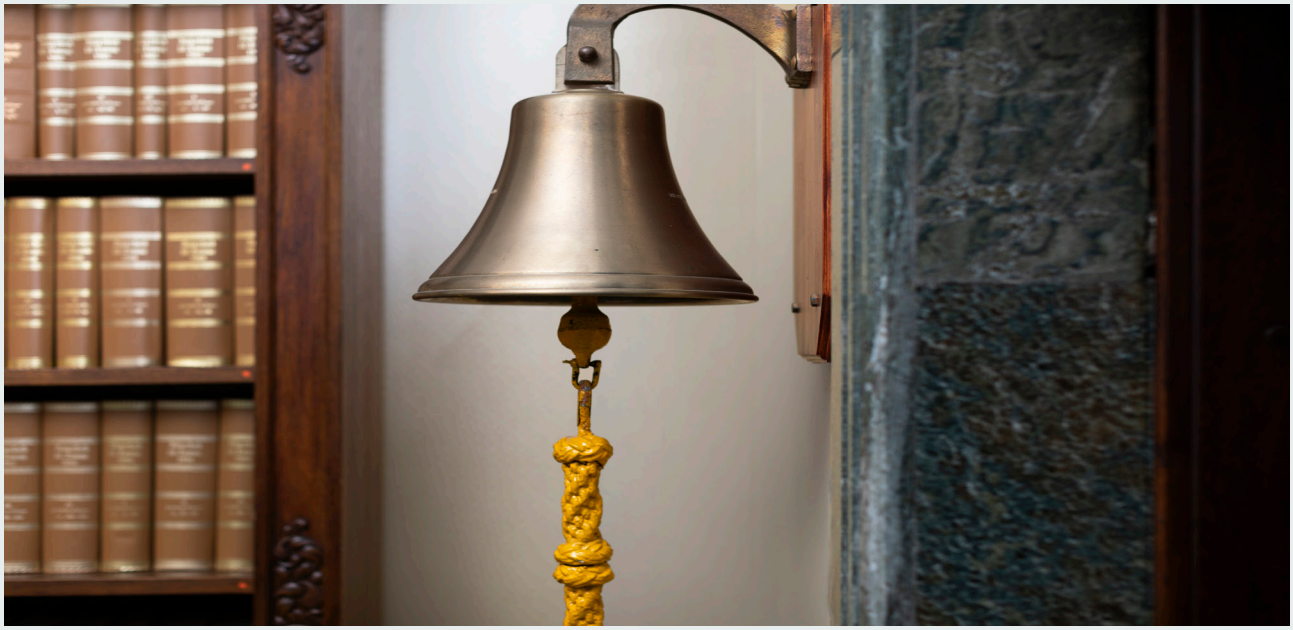
2 - The 'single-contract' rule has recently been extended by the courts to apply in cases where the incorporation of the terms of a separate contract is made between the same parties (as opposed to situations where there are different parties as in the 'two contract case').

3 - *The St Raphael* [1985] 1 Lloyd's Rep 403

4 - [1912] AC 1

5 - [2024] UKSC 2 (paras.76-87)

NORDISK MEMBER SEMINARS - UPCOMING DATES



Please save the date for your city so that we can meet you and your colleagues again!

Grimstad
Tuesday 21 January - Clarion Collection Hotel Grimstad

Oslo:
Tuesday 28 January – Norges Rederiforbund

Bergen:
Tuesday 4 February – Grand Hotel Terminus

For all seminars: Registration from 16:00 with seminar from 16:30, followed by finger food and refreshments.

Invitation and detailed programme will follow in due course.

Photos:
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