

Malcolm Jarvis

CALL: 1998

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Languages: French (proficient); Dutch (proficient)



Overview

Malcolm specialises in commercial and EU law. He acts in commercial disputes arising in a variety of sectors including energy, natural resources, international trade and shipping (including shipbuilding).

He acts as advocate in the High Court (Business and Property Courts) and the appellate courts in England. He also represents clients in commercial arbitrations, including institutional (for example ICC and LCIA) and trade (for example LMAA, GAFTA and FOSFA). He is instructed both as sole advocate and as part of a team.

Malcolm's practice often involves cross-border disputes. He has considerable specialisation in jurisdictional and conflict of law disputes and in obtaining and opposing interim applications for anti-suit and freezing injunctions. Malcolm is regularly instructed on challenges to arbitration awards in the High Court.

His EU law practice complements his commercial practice (for example under the Commercial Agents Regulations). It covers competition law (including follow-on damages claims), state aid and public procurement.

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Education

- University of Groningen (The Netherlands): LLD (*Cum Laude*)
- University of Cambridge: MA, LLM (First Class)

Publications

- 'Force Majeure and Causation' (2019) *International Energy Law Review* 18-20.
- 'Oil & Gas: Case Law Review, Hardship Clauses', *Practical Law*.
- 'Obligations and failures to deliver or take under long-term LNG sale and purchase agreements' in *Liquefied Natural Gas: The Law and Business of LNG* (3rd edn, Globe Law and Business 2017) (co-author).
- 'The Proportionality Test: Constructive Dialogue between the English and Scottish Courts' in *Exceptions from EU Free Movement Law* (Hart 2016).
- Contributor to *Oliver on Free Movement of Goods in the European Union* (5th edn, Hart Publishing 2010).

Professional memberships

- Association of International Petroleum Negotiators
- Bar European Group
- Commercial Bar Association
- LMAA: Supporting Member
- United Kingdom Association of European

Lectures/talks

Malcolm regularly delivers talks to various law firm clients. Examples include:

- 'Termination of contracts: Risks and rewards': The International Bar Association, United Kingdom Energy Lawyers' Group (March 2016).
- 'Exclusion clauses: Don't be presumptuous' (September 2018).
- 'The law governing jurisdiction challenges in international arbitration' (September 2017).

Example cases

- *Fehn Schiffahrts GMBH & Co KG v Romani SpA* [2018] EWHC 1606 (Comm); [2018] 2 Lloyd's Rep 385: title to sue for loss caused by unauthorised fumigation of a cargo of organic wheat and sunflower seeds; assignment of claim under bill of lading; whether assignee seeking to recover more from owners than assignor could have done had there been no assignment.
- *Ardila Investments NV v ENRC NV* [2015] EWHC 1667 (Comm); [2015] 2 BCLC 560: interlocutory applications (anti-suit injunctions; attachment orders; summary judgment, security for costs and stay of execution) arising out of share purchase agreement in relation to iron ore mine in Brazil.
- *Assuranceforeningen Gard Gjensidig v The International Oil Pollution Fund* [2014] 2 Lloyd's Rep 219: freezing order in support of claims arising out of an oil spill in Venezuela; whether IOPC Fund enjoys immunity from freezing order relief; existence of legally binding agreement to fund interim-compensation payments for oil pollution damage (with Christopher Hancock QC).
- *WH Newson Holding Ltd and others v IMI plc and others v Sanha GmbH & Co KG and others* (2014): follow-on claims for damages and for contribution in Chancery Division (copper fittings).
- *Lehman Brothers Finance AG v Klaus Tschira Stiftung GmbH* [2014] EWHC 2782 (Ch): whether the initiation of conciliation proceedings by the lodging of a written request for conciliation constitutes "proceedings" before a "court" within the meaning of Articles 27 and 30 of the Lugano Convention 2007 (with Alexander Layton QC).
- *Soufflet Negoce SA v Fedcominvest Europe SARL* [2014] 2 Lloyd's Rep 537: proper construction of the "Notices Clause" in GAFTA Contract no 64 - whether provision that notice received after 16:00 is deemed served on following business day applies in all cases or only in the case of resales or repurchases.
- *Petromec Inc v Petroleo Brasileiro SA Petrobras* [2013] EWCA Civ 150: litigation arising out of the upgrade and then sinking of the oil rig, "Petrobras-36" off the coast of Brazil in 2001. Construction and effect of deviations to specification for upgrade of semi-submersible oil rig.
- *Paiwan Wisdom (Taokas Navigation SA v Komrowski Bulk Shipping KG)* [2012] 2 Lloyd's Rep 416: construction of CONWARTIME 2004 clause in relation to refusal to proceed on a voyage to Kenya where no material change in the risk between date of charterparty and date of order; whether the owners had accepted the risk of trading to Kenya.
- *Enercon GmbH v Enercon (India) Ltd, Commercial Court* [2012] 1 Lloyd's Rep 519: determination of seat of arbitration; stay of proceedings; discharge of anti-suit and freezing injunctions.
- *Fortis Bank SA/NV v Indian Overseas Bank* [2011] 2 Lloyd's Rep. 33: letters of credit, documentary discrepancies, definition of confirming bank under UCP 600; preclusion from relying on discrepancies.

Energy and natural resources

- *London Arbitration* (2017): arising out of the cancellation of a contract to design, build and deliver a semi-submersible drilling rig.

- *Assuranceforeningen Gard Gjensidig v The International Oil Pollution Fund* [2014] EWHC 3369 (Comm): Existence of legally binding agreement for funding interim compensation payments for oil pollution damage; intention to create legal relations; whether IOPC Fund is immune from suit under the terms of a Headquarters Agreement with the UK Government incorporated into English law by an Order in Council made under the International Organisations Act 1968.
- *Assuranceforeningen Gard Gjensidig v International Oil Pollution Compensation Fund* [2014] 2 Lloyd's Rep. 219: Freezing order in support of claims arising out of an oil spill in Venezuela; whether IOPC Fund enjoys immunity from freezing order relief; dissipation of assets in advance of winding up.
- *Petromec Inc v Petroleo Brasileiro S.A. Petrobras and Others*: Complex litigation arising out of the upgrade and then sinking of the oil rig, "Petrobras-36" off the coast of Brazil in 2001. The Petrobras-36 was the world's largest offshore production platform and this litigation has been aptly described as "the world's largest oil platform dispute" (The Times).
 - Court of Appeal [2013] EWCA Civ 150: Construction and effect of deviations to the specification for upgrade of oil rig (relating to the gas compression system and risers).
 - Commercial Court [2006] EWHC 1443 (Comm), [2007] 1 Lloyd's Rep. 629: Claims for fraudulent and negligent misrepresentation.
 - Commercial Court [2007] EWHC 1589 (Comm) and Court of Appeal [2007] EWCA Civ 1371, [2008] 1 Lloyd's Rep. 305: 'Global' claims for damages; necessity to plead and prove causal nexus.
 - Court of Appeal [2004] EWCA Civ 156, [2004] 1 Lloyd's Rep. 629: Loss payment due following actual total loss of semi-submersible production platform; proper construction of agreement for sale and purchase of semi-submersible production platform and of security agreements.
 - Commercial Court [2004] All ER (D) 10 (Feb) and Court of Appeal [2005] EWCA Civ 89, [2006] 1 Lloyd's Rep. 121: Claims arising out of upgrade of semi-submersible production platform; dispute in relation to finality of sums paid pursuant to Variation Orders; enforceability of contractual obligation to negotiate in good faith.
 - Commercial Court [2004] EWHC 1180 (Comm), [2005] 1 Lloyd's Rep. 219 and Court of Appeal [2005] EWCA Civ 89, [2006] 1 Lloyd's Rep. 121: Claims in relation to entitlement to insurance proceeds following loss of the rig; whether company appointed to upgrade platform retained title to materials and equipment; passing of property in a contract for work and materials.
- *Ardila Investments NV v ENRC NV* [2015] EWHC 1667 (Comm); [2015] 2 B.C.L.C. 560: various interlocutory applications (anti-suit injunctions; attachment orders; summary judgment, security for costs and stay of execution) arising out of SPA in relation to iron ore mine in Brazil.
- *London Arbitration*: Acting for owners of offshore support vessels in disputes under Supplytime 89 charterparty.
- *ICC Arbitration*: Acting for oil company in claim arising out of and in connection with a farmout agreement in respect of interests in two petroleum blocks offshore Brazil.
- Acting for owner of power station in claim against oil major for damages for failure to supply quantities of natural gas nominated pursuant to a long term contract for the sale of natural gas.
- *UNCITRAL Arbitration*: Acting for international oil company in tax dispute with host state under Production Sharing Contract.
- *Reliance Industries Ltd v Enron Oil and Gas India Ltd* [2002] 1 Lloyd's Rep. 645: Acting for international energy company in claim under Joint Operating Agreement relating to oil and gas fields offshore India. Appeal to High Court and dispute as to statutory criteria for grant of permission to appeal against arbitration award.
- *Arbitration*: Acting for oil trading company in dispute following default in performance of a crude oil marketing services agreement.
- *London Arbitration*: Acting for trading company in US\$7 million claim for breach of a long-term coal sale agreement on the Standard Coal Trading Agreement (SCoTA) form.

EU and competition

- *W.H. Newson Holding Limited and others v IMI plc and others v Sanha GmbH & Co KG and others* (2014): Follow-on claims for damages and for contribution in Chancery Division (copper fittings).
- *Jersey Produce Marketing Organisation Limited v The States of Jersey* (Case C-293/02) [2005] ECR I-9543, [2006] 1 CMLR 29: European Court of Justice: Legislation on the export of Jersey Royal potatoes from Jersey to the United Kingdom; Whether a measure that applies only to trade within an EU Member State is subject to the free movement of goods rules; Protocol No. 3 to the Act of Accession of the United Kingdom.
- *George Moundreas & Company SA v Samsung Heavy Industries Co Ltd*: Commercial Court claim concerning the application of the Commercial Agents Regulations to an agency agreement between a shipbroker in Greece and a yard in Korea.

- *Commission v Atlantic Energy Ltd* (Case T-182/08): Court of First Instance: Contract for financial assistance concluded under a specific Community programme in the field of non-nuclear energy; reimbursement of sums advanced; statutory set off; procedure for judgment by default.
- *R (on the application of Angliss (UK) Ltd) v London Port Health Authority*, Administrative Court [2002] EWHC 1106 (Admin); [2002] All ER (D) 159 (Apr): European Community; free movement of goods; judicial review of Defendant authority's notice to re-dispatch or destroy meat products; EC Directives 64/433 and 97/78.
- Confidential Early Neutral Evaluation in Commercial Court arising out of alleged State aid to the defence sector.
- Advising on impact of EU requirements for the reduction of the sulphur content of liquid fuels (Directive 2005/33) on four shipbuilding contracts.
- Advising on challenges to tender process by an NHS Trust under the Public Contracts Regulations 2006 and by the Scottish Executive under the Maritime Cabotage Regulation.

Private international law

- *Shulman v Kolomoisky and Bogolyubov* [2018] EWHC 3182 (Ch): Article 6(1) of Lugano Convention; Whether and when it is appropriate to stay determination of a jurisdiction challenge by co-defendant following dismissal of claim against anchor defendant, pending appeal.
- *Lehman Brothers Finance AG v Klaus Tschira Stiftung GmbH* [2014] EWHC 2782 (Ch): Stay of proceedings pursuant to Article 27 of Lugano Convention 2007; whether the initiation of conciliation proceedings by the lodging of a written request for conciliation constitutes "proceedings" before a "court" within the meaning of Articles 27 and 30 of the Lugano Convention 2007.

Shipping

- *Fehn Schiffahrts GMBH & Co KG v Romani SpA* [2018] EWHC 1606 (Comm); [2018] 2 Lloyd's Rep. 385: Title to sue for loss caused by unauthorised fumigation of a cargo of organic wheat and sunflower seeds; assignment of claim under bill of lading; whether assignee seeking to recover more from owners than assignor could have done had there been no assignment.
- *LMAA Arbitration (2017)*: Claim for commission due, and damages for breach of, exclusive agency agreement between shipyard and brokers; claims under Commercial Agents Regulations.
- *LMAA Arbitration (2017)*: Dispute as to whether representations made by release of "freight prepaid" bills of lading to charterers.
- *Taokas Navigation SA v Komrowski Bulk Shipping KG (GmbH & Co)* (PAIWAN WISDOM) [2012] 2 Lloyd's Rep 416: Construction of CONWARTIME 2004 clause to justify refusal to proceed on a voyage to Kenya if no material change in the risk between date of charterparty and date of order; whether the owners had, by the terms of the charterparty, construed in their factual context, accepted the risk of trading to Kenya.
- *Zodiac Maritime Agencies Ltd v Fortescue Metals Group* (KILDARE), Commercial Court, [2011] 2 Lloyd's Rep. 360: Repudiation of a five year consecutive voyage charter for carriage of iron ore from Australia to China; measure of damages; whether available market for a substitute period charter. Damages awarded c. \$80 million.
- *Golden Fleece Maritime Inc v ST Shipping* (ELLI and FRIXOS), Commercial Court, [2008] 1 Lloyd's Rep. 262 and Court of Appeal, [2008] 2 Lloyd's Rep. 119: Shelltime 4 charter; change in international regulations (MARPOL) rendering carriage of fuel oil by vessel unlawful without flag exemption certificate; whether owners in breach of charter by not modifying vessel to comply with new regulations.
- *Koch Shipping Inc v Richards Butler (a firm)*, Commercial Court, [2002] Lloyds Rep. PN 201, Court of Appeal [2002] EWCA Civ 1280, [2002] 2 All ER (Comm) 957, *The Times*, 21 Aug 2002: injunction to prevent breach of duty of confidentiality to former client; arbitration.

Banking and derivatives

- *Fortis Bank SA/NV v Indian Overseas Bank*, Commercial Court [2010] 1 Lloyd's Rep 227 and Court of Appeal [2011] 2 Lloyd's Rep. 33: Letters of credit, documentary discrepancies, definition of confirming bank under UCP 600; preclusion from relying on discrepancies.
- *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI*, Commercial Court [2010] 1 Lloyd's Rep 631: ISDA Master Agreement, forward freight agreements (FFAs), bankruptcy event of default, availability of netting, mistake, restitution.

Sale of goods and commodities

- *Soufflet Negoce SA v Fedcominvest Europe SARL*, Commercial Court [2014] 2 Lloyd's Rep. 537: Proper construction of the "Notices clause" in GAFTA Contract No. 64. Whether provision that notice received after 16:00 hours is deemed served on following business day applies in all cases or only in the case of resales or repurchases.
- *Bunge SA v Nibulon Trading BV*, Commercial Court [2014] 1 Lloyd's Rep. 393: Whether claim admitted for determination by the first-tier GAFTA tribunal so that Board of Appeal obliged to consider it on the merits. Interplay between the respective discretion of first-tier tribunals and boards of appeal to admit claims that are time barred under the GAFTA arbitration rules.
- *Fortis Bank SA/NV v Indian Overseas Bank*, Commercial Court [2011] 2 Lloyd's Rep. 190: Claim for damages in respect of port storage costs and container demurrage as a result of failure to honour letter of credit.
- Arbitrations concerning long-term agreement for sale of coal on SCOTA terms (2016) and GAFTA arbitration concerning sale of medium grain rice (2016).

Insurance and reinsurance

- Arbitration concerning disputes arising out of the US PA and Workers' Compensation market, acting for retrocessionaires.

Arbitration and mediation

- *Fehn Schiffahrts GMBH & Co KG v Romani SpA* [2018] EWHC 1606 (Comm); [2018] 2 Lloyd's Rep 385: Appeal on a question of law arising out of an award under s. 69 of Arbitration Act 1996; remittal of award to the tribunal for reconsideration in circumstances where it is not clear on the face of the award whether the tribunal made an error of law.
- *GAFTA Arbitration (2016)*: Circumstances in which an arbitration reference automatically ceases to exist on the dissolution of the original party to the arbitration following assignment of claim.
- *Enercon GmbH v Enercon (India) Ltd*, Commercial Court [2012] 1 Lloyd's Rep. 519: Determination of seat of arbitration; stay of proceedings; discharge of anti-suit and freezing injunctions.
- *Reliance Industries Ltd v Enron Oil and Gas India Ltd*, Commercial Court [2002] 1 Lloyd's Rep. 645: Statutory criteria for grant of permission to appeal against arbitration award; contract governed by law of India; parties agreed that Indian law the same as English law; whether appeal raises 'question of law of England or Wales' under s 82(1) Arbitration Act 1996.

Recommendations

A good team member who is willing to roll up his sleeves up and help solicitors to achieve the right result for the client. [The Legal 500 UK Bar 2020](#)

He is a pleasure to work with, very efficient and a very strong advocate in court. [Chambers UK Bar 2020](#)

Extremely bright and a very calm operator, he is impressive on his feet – robust and determined. [The Legal 500 UK Bar 2020](#)

He is quick at understanding complex cases and good to work with in a team. [Chambers UK Bar 2020](#)

Regularly instructed on major energy disputes. [The Legal 500 UK Bar 2018](#)

He's articulate, very thoughtful and incisive in his advice. [Chambers UK Bar 2019](#)

Very bright and user friendly, he gives straightforward and practical advice and is a persuasive advocate. [The Legal 500 UK Bar 2018](#)

The most intellectually able barrister; he produces silk-quality work. [The Legal 500 UK Bar 2017](#)

Very user friendly, hugely approachable, and highly intelligent, he delivers a high-quality product on time. [Chambers UK Bar 2017](#)