

## **Petroleo Brasileiro SA v ENE Kos 1 Ltd (“The Kos”) [2012] UKSC 17**

The vessel “Kos” was chartered on the Shelltime 3 form for 36 months plus or minus 15 days at Charterers’ option. The charter contained a standard employment and indemnity clause (Clause 13) which read as follows:-

*“charterers hereby indemnify owners against all consequences... that may arise from the master... complying with charterers’ order”*

Following non-payment of hire, the vessel was validly withdrawn by Owners in accordance with the charter, but at the time the vessel was part laden with Charterers’ cargo. Owners ordered Charterers to immediately remove the cargo, but the vessel was detained for 2.64 days at the port until discharge of cargo could be arranged.

The issue before the court was whether Owners were entitled to recover for the use of the vessel and bunkers consumed during that 2.64 days. Owners submitted that they were entitled to compensation and relied on the following four bases:-

- a) Under Clause 13 (employment and indemnity clause) of the charter;
- b) Under express or implied contractual obligations arising from the exchanges after the withdrawal of the vessel;
- c) On the grounds of unjust enrichments; or
- d) Under the law of bailment

At first instance, Andrew Smith J held that Owners were entitled to reimbursement under the law of bailment, but this decision was then overturned by the Court of Appeal. The Court of Appeal rejected Owners’ submissions on all four bases above.

Owners subsequently appealed to the Supreme Court and the appeal was allowed. The Supreme Court reinstated the initial judgment of Andrew Smith J and held that Owners could recover the market rate of hire and bunkers consumed from Charterers on two bases. First, in agreement with Andrew Smith J, it was unanimously held that Owners were entitled to recover in bailment under the principles set out in *China Pacific S.A. v Food Corporation of India (“The Winson”)* [1982] AC 939. Secondly, it was held by a majority (Lord Mance dissenting) that Owners were entitled to recover on the basis of the employment and indemnity clause because the loss of time resulted from the cargo being on board at Charterers’ order and there was a “direct and unbroken” causal link.