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SHIPPING BULLETIN

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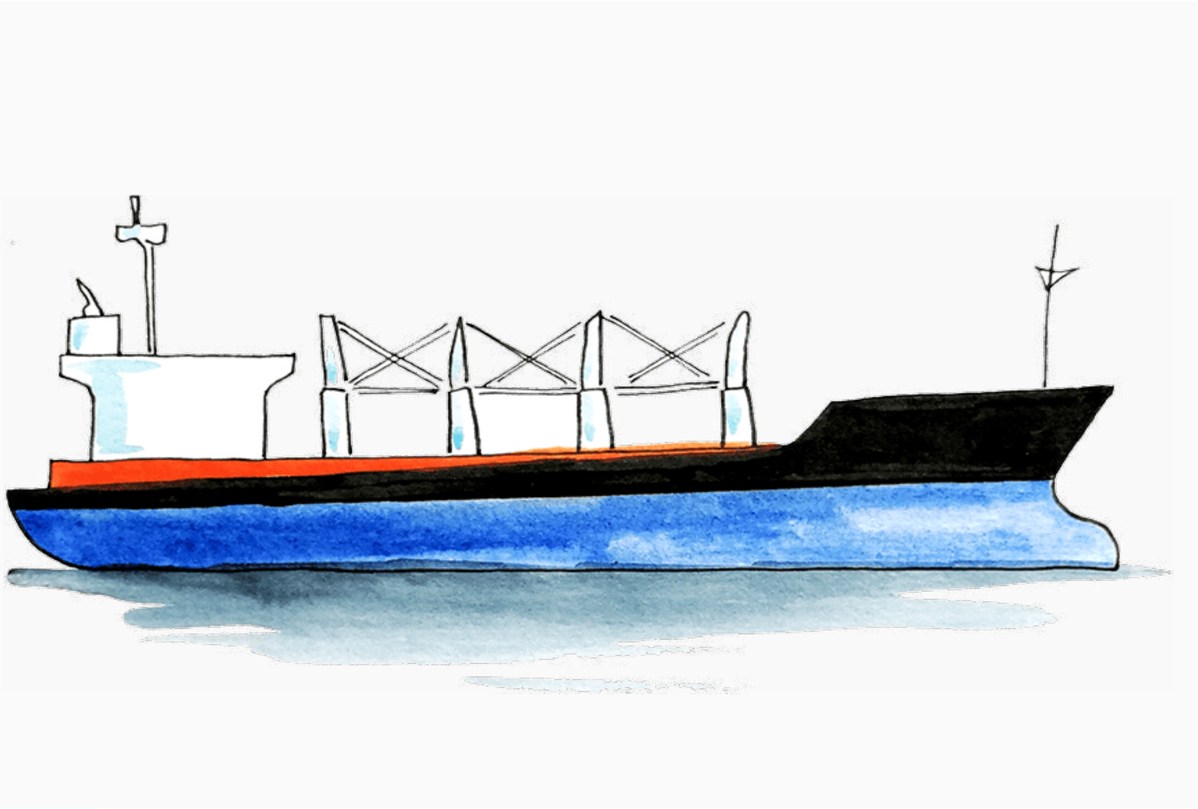

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ZFZ TEAM NEWS

PROMOTIONS

We are absolutely delighted to announce the upcoming promotion of Calum Cheyne to Partner with the firm, effective 1 January 2023.

Calum is currently a Senior Associate with our London office, having joined the firm when we were still in startup mode in the UK and US - determined, focused, punching above our weight.

We look at many factors for partnership, including a passion for the practice of law, the ability to develop relationships both within and without the firm, and the desire to mentor the next generation of ZFZ lawyers. Calum has surpassed expectations.

Calum has earned a reputation for hard work, excellence, diligence, and attention to client needs. He has developed relationships with some of the biggest names in the markets we serve, supporting the growth of the firm and our team-based approach to clients.

Calum has been instrumental in attracting top, talented lawyers to the firm, all while mentoring and supporting the development of our junior lawyers. Calum's energy and enthusiasm to work with those newer to law is exceptional and the sort of role model we value deeply.

Calum – it has been our pleasure to watch you develop as a Senior Associate, and we are most excited to welcome you as a partner!

NEW JOINERS

Continuing with the great news, we are thrilled to announce Miguel Caballero has joined our team in the London office as a Senior Associate.

Miguel is a multilingual Abogado (Spain) and Solicitor (England & Wales) who has gained previous shipping law experience in two IGP&I Clubs, in the claims department of a ship owner, in private practice and in the claims and insurance department of a ship operator.

Miguel read Law at the Universidad de Deusto and obtained a Master Degree in International Trade Law from the University of Essex. He is a Member of the Institute of Chartered Shipbrokers, the Spanish Maritime Law Association and the LSLC – YMP Committee.

We are delighted to have you on board, Miguel!

ACADEMIA

Luke Zadkovich has launched the inaugural International Shipping and Commodities Law course at the University of Wollongong, Australia. Luke was appointed as an Honorary Fellow by the University. The course explores the foundational legal principles in sale and purchase commodity contracts, shipping charterparties and bills of lading, and related case studies in this field. Luke will be teaching this course on an intensive basis over four full lecture days. Aiden Lerch, currently undertaking his PhD at the University of Oxford and working part-time with ZFZ, and Lucy Noble, one of our shipping and commodity associates in the London office, are both alumni of UoW. Aiden and Lucy are assisting Luke with delivering this course.

RANKINGS

We can also boast that members of our New York team have been ranked by Thomson Reuters' Super Lawyers. Edward Floyd, and Luke Zadkovich, partners in the New York office, have been ranked Super Lawyers in the area of Transportation & Maritime for New York practices. Also, Eva-Maria Mayer, associate in our New York office, has been ranked Rising Star by Super Lawyers in the area of Transportation & Maritime for the second year in a row.

A huge congrats to all of them!

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MARPOL CARBON INTENSITY INDICATOR: REGULATORY AND CONTRACTUAL CONSIDERATIONS

Written by Calum Cheyne and Andriy Shalennyy

The Revised MARPOL Annex VI (the "Regulations") (note in particular Chapters 1,2 and 4 of the Regulations), entered into force on 1 November 2022. The Regulations are effective from 1 January 2023 and implement mandatory provisions relating to both technical and operational measures to reduce the carbon intensity of international shipping (see recitals to the Regulations).

- Technical – The technical compliance will be assessed by reference to the Energy Efficiency Existing Ship Index ("EEXI").

- Operational – The operational compliance is governed by a Carbon Intensity Indicator (the "CII Regulations").

Industry participants appear to have found making arrangements to comply with the EEXI relatively straightforward. However, the CII Regulations have generated significant uncertainty among shipowners, charterers, and shipping associations. This article aims to clarify some of the uncertainties that have arisen on multiple occasions in our instructions related to the CII Regulations.

This article focuses on the position under time charters. Under a voyage charter, the owner retains significant operational control, and therefore it is not clear that a specific contractual regime to deal with the CII Regulations will be necessary.

REGULATORY REQUIREMENTS

Scope

CII relates to operational efficiency of all vessels of 5,000 gross tonnage and above (see Reg 27). From 1 January 2023 each such vessel will need to collect and report data regarding the vessel's CO2 emissions per operational mileage on an annual basis (see Reg 28).

How to comply?

Each vessel will need to record its "Attained Annual Operational CII". This is often referred to as the vessel's "CII Rating". Calculating a vessel's CII rating incorporates certain technical vessel details (which are not likely to change), and the ratio of carbon dioxide emitted per nautical mile travelled (see Reg 27.1, 28.1 and 28.6). This is an important preliminary point to be clear on: the CII Rating targets and is based on a simple ratio of CO2 emitted against distance travelled. Multipliers are then applied to that ratio based on the vessel size and vessel type.

Depending on how a vessel performs, it will be assigned an alphabetical rating of "A" (best) to "E" (worst) (see Reg 28.6).

What rating is required?

A first key area of confusion is what rating is actually required by the CII Regulations. The CII Regulations themselves refer to a "Required CII" and a "Target CII". The two terms are used interchangeably and refer to a mid-point "C" grade working.

However, there is no sanction under the CII Regulations for a failure to obtain the "Required CII" rating. Instead, sanctions only appear to apply if a vessel is rated "E" in any given year, or is rated "D" for three consecutive years.

This raises an important question in contracting. What is a sensible commercial position for an owner to demand and what is a sensible position for a charterer to accept? An owner is likely to argue that the charterer should use the ship in a manner that ensures it will obtain the "Required CII" each year. A charterer will argue that there should not be a more strict duty imposed on the charterer than that which is imposed on the owner under the CII Regulations.

Sanctions for (non)compliance

The CII Rating and the underlying data must be reported within 3 months after the end of each calendar year either to the government of the flag state, or to any organisation nominated by such government (the "Administration") (see Regs 27.3 and 28.2). The Administration will then verify the CII Rating against the data and confirm the vessel's score on the "A" to "E" basis.

The Administration then issues a Statement of Compliance. A vessel scoring an "E" (or a vessel scoring a "D" for the third consecutive year) can still be granted a Statement of Compliance, provided that it has a Corrective Action Plan in place.

However, the CII Regulations do not yet provide for any penalty for a situation where a vessel has not been granted a Statement of Compliance, or where such Statement of Compliance has been withdrawn. There is therefore no fixed 'sanction' in place for a failure to comply with the CII Regula-

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tions. We understand that this is deliberate, as part of a 'soft implementation period'.

For the time being, we note that port authorities and other Administrations are encouraged to provide *incentives* to ships rated "A" or "B".

Who bears the burden of compliance?

Despite targeting operational efficiency, Owners should take note of the CII Regulations. While not stating it plainly, the Regulations place liability on the vessel's owners. This is clear from the following:

1) The Regulations associate the vessel with its corresponding "*company*", which is defined as "*the owner, manager or bareboat charterer*" (see Reg 2.2.8). By contrast, no reference is made to time or voyage charterers;

2) The Regulations refer in numerous places (e.g., Regs 19, 26, 27 and 28) to the "*ship*" as being under certain obligations. In a maritime legal context, this would normally be understood as imposing obligations on the owners or bareboat charterers (note: because a liability incurred by a time charterer will not (absent a maritime lien) ordinarily be enforceable against the ship *in rem*); and

3) Under the existing MARPOL regime, whenever criminal sanctions for non-compliance are imposed, they are generally levied against an owner or bareboat charterer, and not against a time charterer (see See part VI of De La Rue, Shipping and the Environment (2nd Ed, 2009)).

DRAFTING A CII CLAUSE

Owners will therefore likely seek to incorporate clauses in charterparties to deal with the consequences of any breach of the CII Regulations caused by compliance with a charterer's instructions.

The content of a contract is a matter for negotiation by commercial parties. There is much more at play in any contractual negotiation than we can contain in a legal bulletin. However, all else being equal, a CII clause should recognise the split between the *operational risk* and the *asset risk*. The asset risk would ordinarily lie with the owner (i.e. the owner will warrant what the vessel can and cannot do). The operational risk then lies with the charterer (i.e. within the confines of the owner's warranties as to the vessel's performance and consumption, the charterer should bear the operational risk of complying with the CII Regulations).

BIMCO Clause

The BIMCO "*CII Operations Clause for Time Charter Parties 2022*" (the "BIMCO CII Clause") has recently been published. We would recommend this clause to our owner-clients, but suspect that our charterer-clients will have some well-founded difficulties in accepting it wholesale (see here).

The BIMCO CII Clause places the charterer under a strict obligation to operate the vessel within the values agreed by the period (by default, this is a mid-point "C" grade). Interestingly, the seriousness with which the market is taking the CII Regulations is mirrored in the fact that any warranties as to speed, consumption or due despatch are expressly subject to the charterer complying with its obligation to keep the vessel at a mid-point "C" rating (or better). That creates an interesting situation where:

a) The vessel is over-consuming against the speed and performance warranties;

b) The charterer gives orders that would be CII compliant if the vessel was performing as warranted;

c) However, due to the over-consumption, the orders would push the CII Rating to a "D";

d) Then the owner can decline to follow those orders and require the charterer to give new, CII compliant, orders.

The owner would still have a claim against the charterer under the speed and performance warranty (that right is expressly preserved in the BIMCO CII Clause), but it is important to highlight the restrictions on employment orders that form a part of the incorporation of the BIMCO CII Clause. The ability of a time charter to insist on its voyage orders is a critical component of a time charterparty. That right is typically only subject to a few exceptions and the incorporation of the BIMCO CII Clause would add to that list of exceptions.

There will be a number of circumstances in which the BIMCO CII Clause is appropriate. However, in many cases the

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parties may prefer to agree their own bespoke arrangement.

Trip time charters

We note in particular that the BIMCO CII Clause may not be appropriate for short period time charters (such as those commonly seen in the LNG industry) or for trip time charters.

In each case, a shorter clause could likely be formulated on the basis of an agreed ratio between the amount of carbon dioxide emitted and the nautical miles travelled. That figure can likely be calculated readily based on the anticipated voyage (including any ballast leg) with reference to the vessel's warranted speed and consumption figures.

A key attraction to this approach is that damages can be liquidated based on the hypothetical time (at the hire rate) and the cost of bunkers (at a market rate) that would be required for the vessel to sail at the most efficient eco-speed in ballast in order to bring the ratio of consumption/mileage back down to the agreed level. Of course, the owner does not need to *actually sail* the vessel in ballast, which would not be in line with the environmental aims of the legislation. However, the owner would be fairly compensated for the charterer's operational use of the vessel.

Termination rights?

A number of our clients (both owners and charterers) have sought advice on whether it is appropriate to include a termination right in a CII Clause, and the circumstances in which that termination right might sensibly apply.

In our view, such a right might arising in two circumstances in long term charterparties:

- *A right for an owner to terminate* – We would suggest that an owner might reasonably request a termination right if the charterer's orders has required the vessel to follow a corrective action plan and the charterer then continues to give orders that mean the corrective action plan cannot be followed.
- *A right for a charterer to terminate* – There may be a situation where a charterer absolutely requires the ability to prosecute voyages at certain speeds (e.g. to allow a ship to meet time commitments on its rotations in the liner trade or for cruise ships). In such circumstances, we recommend that the charterer seeks to incorporate termination wording for circumstances where the vessel's performance irreparably falls below a certain level and negates the purpose of the charterparty.

CONCLUSION

The CII Regulations will bring a number of challenges. It is difficult to balance the competing interests between an owner and a charterer and some compromise on both sides will be necessary for the legislation to achieve its widely supported objectives. In a number of cases, that will require the use of bespoke provisions with careful thought to contemplate the actual service intended and the nature of the charterparty.

For additional information and queries, please contact calum.cheyne@zeilerfloydzad.com or andriy.shalennyy@zeilerfloydzad.com

A GLIMPSE INTO THE NEW GREEN MEASURES IN THE SHIPPING INDUSTRY

Written by Jennifer Holdway

The implications of world events, COP27, and CII and EEXI Regulations have left vessel owners and operators with many questions in a world where climate change is taking centre stage. When you consider that the shipping industry emitted 1,056 million tonnes of CO2 in 2018, which equates to a 9.6% increase in 6 years (see Kitack Lim, Highlights and Executive Summary of the Fourth IMO GHG Study 2020 (Hellenic Shipping News Worldwide, 2020)), it is clear that more advanced ship-powering technologies are essential moving forward. Further, the Russia-Ukraine conflict has highlighted the importance of finding alternative resources to fuel ships. Unfortunately, the new regulatory schemes do not adequately address the consequences of present regulatory implementation.

One proposal by the International Chambers of Shipping includes a fund and reward system for the use or production of green fuels, with the emphasis being placed on the prevention of greenhouse gas emissions. The proposed reward system would be funded by way of a mandatory flat rate paid by all ships based on the volume of CO2 emitted. The proposal blends elements of the obligations found in the CII Regulations, whilst incorporating the flat rate contribution proposed by the International Chamber of Shipping in September 2021 (see International Chamber of Shipping, 'Inter-

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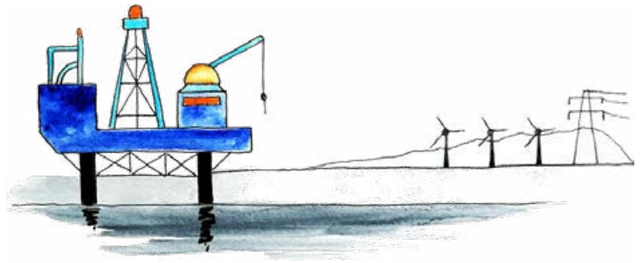
national Chamber of Shipping sets out plans for global carbon levy to expedite industry decarbonisation' (ics-shipping.org, 6 September 2021)). Should the regulatory framework be agreed upon in time by governments in attendance at the International Maritime Organization, it could come into effect by 2024.

COSTS AND BENEFITS OF THE NEW MEASURES

The UN International Maritime Organization seeks to achieve net zero emissions target by 2050, with the UK Government joining their effort (see Department of Transport, 'Decarbonising Transport, Setting the Challenge' (publishing.service.gov.uk)). In order to achieve the goal, new technologies and products must be developed and implemented, with an expected substantial cost. In order to encourage investment in, and use of, such new technologies and products, there must be an incentive for vessel interests faced with green fuel costs that could be two or three times higher than current fuels. Utilizing the fund and reward system, increased costs could be offset by rewarding operators that chose the more environmentally friendly alternatives. The present estimate is that ships could save more than $1 million per year by early adoption of zero-carbon fuels. However, that is a broad estimate only, as the reward is based on the reduction of CO2 emissions.

Further, part of the funding will be earmarked to development of new bunkering infrastructure, and production of new, greener fuels. The hope and goal is that by investing now, resource availability will increase to match demand, in so doing bring prices of newly developed technologies and products down.
This program appears to compliment the CII Regulations which will shortly be coming into effect. Whilst transition will undoubtedly be costly, providing incentives to early adoption of green technologies and products will accelerate use across the market.

For additional information and queries, please contact jennifer.holdway@zeilerfloydzad.com



LONDON ARBITRATION 30/22 – OLD FORMS AND NEW TECHNOLOGY:

TRIBUNAL ACCEPTS THAT NOTICE OF READINESS WAS TENDERED "WIRELESSLY" WHERE IT WAS SENT BY EMAIL

Written by Jakob Reckhenrich

In London Arbitration 30/22, a Tribunal found that Notice of Readiness under an Asbatankvoy fixture could be given by email. This is a surprising result in the light of Popplewell J's (as he then was) decision in *The Port Russel* (see Trafigura Beheer BV v. Ravennavi SpA (The Port Russel) [2013] 2 Lloyd's Rep. 57), on which Charterers relied.

BACKGROUND

The vessel in question had been chartered on an amended Asbatankvoy form. On completion of the voyage, Owners submitted a claim for demurrage. Charterers defended the claim on the basis that no valid Notice of Readiness ("NOR") had been given as the NOR had been tendered by email, but email was not one of the methods of notification contemplated in the charterparty

THE ARBITRATION TRIBUNAL'S DECISION

Charterers relied on *The Port Russel* in defending the claim. The notice provision in that case was clause 19(a) of BPVOY

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3, which provides as follows (emphasis added):

> *"[…] Such Notice of Readiness may be given either by letter, facsimile transmission, telegram, telex, radio or telephone (and if given by radio or telephone shall subsequently be confirmed in writing and if given by facsimile transmission confirmed by telex) […]"*

In *The Port Russel*, Popplewell J found that valid notice could not be given by email. He found that this was the plain meaning of the words and was also supported by a number of further factors, including that the parties had expressly amended another clause to permit notification of demurrage claims by email (by providing an email address for such notification).

One of the further factors concerned certainty, which Popplewell J expressed as follows at [15]:

> *"15 The giving of Notice of Readiness has important commercial and financial consequences. It starts the running of laytime and those involved both in the giving and receiving of such Notices are assisted by certainty as to whether the Notice has been validly given. If clause 19(a) is construed as prescriptive and obligatory it confers such certainty. If it is merely permissive, it leaves a degree of uncertainty over whether a Notice of Readiness which is given by a method which is not one of the six listed methods has been validly given. Therefore, whether or not one can find common features amongst the six listed methods, and whether or not one might, as a matter of business sense, have thought that the parties might be happy with email communication, there is an imperative for treating the listed methods as the exclusive list of permitted methods."*

Compare the clause in The Port Russel with clause 6 of Asbatankvoy, the relevant clause in London Arbitration 30/22, which materially provides as follows (emphasis added):

> *"6. NOTICE OF READINESS. Upon arrival at customary anchorage at each port of loading or discharge, the Master or his agent shall give the Charterer or his agent notice by letter, telegraph, wireless or telephone that the Vessel is ready to load or discharge cargo […]"*

Owners sought to distinguish The Port Russel on the basis that the provision in Asbatankvoy included "*wireless*", which the NOR provision in BPVOY 3 did not include. Owners provided evidence that the email communication from the vessel was sent by a wireless system. Charterers argued that "*wireless*" was a reference to VHF/radio transmissions and that email was therefore not a permitted means of tendering an NOR. The Tribunal accepted Owners' argument and found that the NOR had been validly tendered and thus Owners' claim for demurrage succeeded.

ZFZ COMMENTS

The Port Russel was decided in 2012 and concerned a charterparty entered into in 2007. Email has become ever more entrenched as a primary mode of communication since then. It therefore makes good commercial sense for parties to be permitted to tender NORs by email. However, not every party seeking to rely on an NOR tendered by email (or indeed other notifications) will be likely to encounter such a flexible Tribunal as Owners did in this case. Parties should consider amending a standard form they are using to reflect that notices may be sent by email, if desired. Otherwise, unsuspecting owners risk running aground on Popplewell J's formidable reasons in *The Port Russel*.

For additional information and queries, please contact jakob.reckhenrich@zeilerfloydzad.com

MUR SHIPPING V RTI - A FORCE MAJEURE STORM IN A TEACUP?

Written by Philip Vagin

In a recent judgment in *MUR Shipping BV v RTI Ltd* [2022] EWCA Civ 1406, the English Court of Appeal considered whether a shipowner could suspend performance of a contract of affreightment under a *force majeure* clause, on the basis that US sanctions made payment of freight in dollars more difficult.

BACKGROUND

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In 2016, MUR Shipping BV, a Dutch shipowner, entered into a long-term contract of affreightment with RTI Ltd, a ship operator based in Jersey, to carry bauxite. RTI was majority owned by United Company Rusal Plc, one of the entities in the larger Rusal group of companies controlled by Mr. Oleg Deripaska, a Russian aluminium oligarch.

The COA provided for payment of freight in US dollars and contained a rather detailed force majeure clause. Among other provisions, it defined an event of force majeure as follows:

> *36.3. A Force Majeure Event is an event or state of affairs which meets all of the following criteria: … d) It cannot be overcome by reasonable endeavors from the Party affected.*

In April 2018, both Mr. Deripaska and Rusal were added to the US Specially Designated Nationals (SDN) and Blocked Persons List, meaning that no US person (including US banks) could lawfully make payments to them or to entities owned by them for 50%. Shortly after, MUR invoked force majeure, saying that it can no longer carry RTI's cargoes and that "*the sanctions will prevent dollar payments, which are required under the COA*".

In response, RTI argued that the US sanctions did not count as force majeure, as MUR was not itself a US person subject to the US sanctions and, in any event, MUR could overcome the situation by accepting payments in euros instead of dollars. Accepting euros would have then been "reasonable endeavors from the Party affected" under Clause 36.3. Indeed, RTI agreed to bear any costs that MUR could incur due to payments being made in euros.

MUR replied that payment of freight was specifically agreed in US dollars and that, without unrestricted payment of freight, MUR cannot be expected to load and discharge the cargo under the COA. MUR further said that the force majeure clause 36.3 did not require it to accept payment in a non-contractual currency and in effect vary the contract.

THE ARBITRAL TRIBUNAL'S AWARD

RTI commenced LMAA arbitration against MUR, claiming the cost of chartering replacement vessels as damages.

The Tribunal considered expert evidence on US law and found as a matter of fact that MUR would not have been in violation of US sanctions by paying in US dollars. Rather, the transfer would have most likely been delayed by a US intermediary bank until the bank determined that the payment complied with the sanctions.

Crucially, the tribunal held that MUR could have realistically overcome this practical consequence of US sanctions without detriment to itself by accepting payment in euros at its Dutch bank account. This was partly because RTI agreed to compensate any conversion losses that could occur and also because MUR has previously accepted payments from RTI in euros. Therefore, MUR was not entitled to claim force majeure.

THE COMMERCIAL COURT JUDGMENT

MUR appealed on a point of law under section 69 of the Arbitration Act 1996. Importantly, the appeal was limited to a narrow question - whether "reasonable endeavors" under the force majeure clause 36.3(d) of the COA can include accepting payment in a non-contractual currency.

The Commercial Court allowed MUR's appeal. He found that a rule existed under English law that a party was not required to accept non-contractual performance under a reasonable endeavors provision of a force majeure clause (see *Bulman v Fenwick & Co* [1894] 1 QB 179), where it was held that voyage charterers who nominated a discharge port were under no duty to alter that nomination once the chosen port became unavailable.

THE COURT OF APPEAL JUDGMENT

This time, it was RTI who appealed, but on a similarly narrow point of contractual interpretation – whether under the force majeure clause 36.3(d) in question MUR could have overcome the effect of the US sanctions by accepting payment in euros.

In a split judgment, the majority (Males and Newey LJs; Arnold LJ dissenting) found for RTI. The essential reasoning of the majority was that the case turned on the interpretation of the exact force majeure clause in question. The authorities cited by the parties that sought to lay down rules of general application did not deal with force majeure (much less with particular reasonable endeavors wording here) and which therefore gave no assistance.

The majority reasoned that since MUR could have easily and without detriment accepted RTI's offer to pay in euros, this would have "overcome the state of affairs" created by US sanctions. The Court thought that the word "overcome" should be interpreted in a more practical sense and in line with the purpose of the parties' underlying payment obligation. Here, all that mattered for MUR practically was to get the right quantity of US dollars in its account at the right time, in whatever way it would be achieved but without adverse consequences. The force majeure clause technically did not deprive MUR of its right to be paid in US dollars – rather, it prevented MUR from suspending performance if

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MUR did not accept euros.

The Court was noticeably swayed by the fact that RTI was prepared to bear the costs of currency conversion and that accepting payment would have required no effort from MUR. The delays in making payments could therefore have been "overcome" by accepting an equivalent amount in euros.

That said, the majority did note that if RTI's proposal had resulted in any detriment to MUR or in something different from what had been required in the contract, the position would have been different.

In a strong dissent, Arnold LJ found that interpreting the force majeure clause as requiring to accept payment in euros would have resulted in MUR giving up its strict legal right to payment in US dollars. He thought that words clearer than "reasonable endeavors" would have been required.

COMMENT

The case is likely to be appealed to the UK Supreme Court. That said, it is fair to say that it may soon confined to its own facts, whatever may be the outcome on that further appeal.

First, there will probably be a rather limited number of circumstances where the party sustains no detriment or burden as a result of non-contractual performance. Payment obligations might just be the only obligations in this category. Here, the receiving bank of MUR would have converted euros that RTI would have paid into US dollars (plus MUR agreed to indemnify RTI for any conversion costs), so MUR realistically would have suffered no detriment or prejudice.

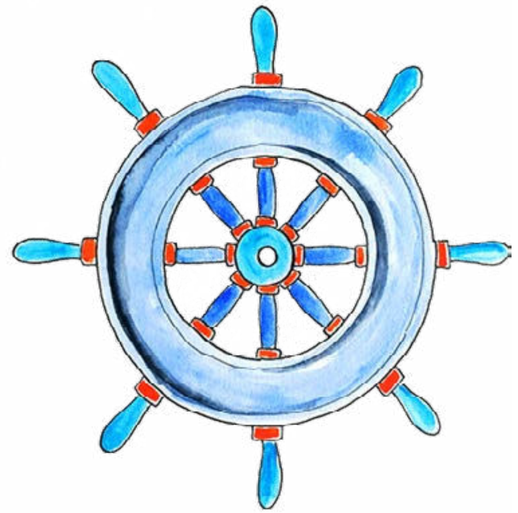
However, when one moves further away from the narrow context of payments in a different currency, the holding of MUR is more difficult to apply. For instance, if the debtor is unable to make payment to a contractual account, but the creditor has a second account? What if that second account is in a different country? Already in this scenario, the creditor may be able to identify why it would have mattered that payment be made into the specific contractual account. If non-payment obligations are concerned, it is easier still to point to a burden on the creditor from accepting non-contractual performance. It is likely for this reason that the majority in the Court of Appeal said that a different result would have been reached if MUR suffered *any detriment* or non-contractual performance would have required MUR to accept *something different*.

Second, force majeure disputes typically revolve around specific wording in the particular force majeure clause. It is suggested that even a slightly differently drafted clause would have changed the analysis in this case. For instance, it could have provided for "reasonable endeavors *in performance of the Contract*" or imply for "best endeavors" (which typically requires the party exercising the endeavors to sacrifice at least some of its interest). From a practical perspective as well, many contracts involving entities that can foresee being subject to sanctions or at least expect difficulties in processing payment due to sanctions include alternative currency / accounts clauses or contain "anti-sanctions" wording (e.g. that sanctions do not qualify as force majeure).

Despite the fascinating discussion of the practical impact of US sanctions on dollar payments and case law on waiver and mitigation, this might just be a case decided under the peculiar provisions of a particular force majeure clause at issue. While it has and will certainly generate substantial discussion, both practical and academic, its value for parties dealing with force majeure disputes may in the final account turn out to be quite limited.

For access to the full judgment, please click on this link.

For additional information and queries, please contact philip.vagin@zeilerfloydzad.com



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THE MEANING OF "LAYCAN" IN THE CONTEXT OF FOB SALE CONTRACTS

Written by Miguel Caballero

The judgment handed down by the English Commercial Court on 07 October 2022 in the *Vitol S.A. v JE Energy Ltd* [2022] EWHC 2494 (Comm) case clarifies the meaning of "laycan" in the context of an international sale of goods contract and serves as a reminder to Buyers and Sellers of the importance of carefully drafting the contractual provisions by which they intend to be bound in order to avoid issues of interpretation.

BACKGROUND

By means of a deal recap dated 10 December 2019, Vitol S.A. ("Vitol") agreed to sell and JE Energy Ltd ("JE Energy") agreed to buy 30,000 mt of fuel oil (+/- 10%) on "*FOB Tema in one lot*" terms. The Deal Recap provided that the laycan is "*23 — 24 December 2019*". The parties envisaged that the Deal Recap would be followed-up by a long-form contract, which was Vitol's standard practice.

Discussions between the parties with regards to the terms of an acceptable Letter of Credit ensued. It was finally agreed by the parties that Vitol would only accept a Letter of Credit issued or confirmed by international recognised banks approved by Vitol.

As the laycan window was approaching, Vitol started making enquiries regarding the arrangements made by JE Energy for the performing vessel and the Letter of Credit. The laycan closed on 24 December 2019. At that time, JE Energy did not have a sub-buyer for the cargo and had not made any attempts to open a Letter of Credit.

On 09 January 2020 Vitol drew-up its long-form contract, which was sent to JE Energy by means of a Sales Confirmation.

JE Energy concluded the sub-sale contract for the cargo on 10 January 2020, though the contract was not drawn-up until 14 January 2020. Two days later, the performing vessel arrived at the port of Tema, Ghana, but did not obtain permission to berth until 17 January 2020 due to the berth being occupied. At that time, the cargo was still on "Financial Hold" due to presentation of a non-compliant Letter of Credit. However, the vessel proceeded to the berth. Due to the non-compliance, cargo operations did not go forward.

The jetty was required to load other cargoes and the vessel was therefore shifted to anchorage on 20 January. On 22 January, JE Energy suggested the laycan be amended to "18 - 20 January 2020", but Vitol would not amend the terms of the Deal Recap.

On 01 February 2020 JE Energy notified Vitol that the contract was deemed "null and void" as the jetty was still unavailable. Vitol, however, called upon JE Energy to perform the contract. Later that day, the performing vessel rebirthed. However, the Letter of Credit had become worthless, as the agreed shipment date had passed. The cargo had to be again placed on "Financial Hold".

After failed negotiations, on 10 February 2020, Vitol accepted JE's repudiatory breach and brought the contract to an end.

THE DISPUTE

Vitol pursued a claim for damages against JE Energy for repudiatory breach alleging, among other issues, that JE Energy had breached the contract by having failed to nominate a performing vessel within the agreed laycan.

JE Energy denied any liability and contended that Vitol was itself in repudiatory breach of contract. JE Energy pleaded that "laycan" in the context of a sale contract meant "the shipment or loading period".

THE COMMERCIAL COURT'S DECISION

The English High Court found in Seller's favour and held that JE Energy had acted in repudiatory breach of the sale contract by having treated it as being null and void.

More importantly, it also clarified that the definition of laycan, in the context of FOB contract remains as per the definition of laycan provided in *The Luxmar* (see E*RG Raffinerie Mediterranee SpA v Chevron USA Inc* (*The Luxmar*) [2007] 2 Lloyd's Rep 542): "*the earliest day upon which an owner can expect his charterer to load and the latest day upon which the vessel can arrive at its appointed loading place without being at risk of being cancelled*".

ZFZ COMMENTS

The decision of Lionel Persey KC (sitting as judge of the High Court) sets a precedent as to the distinction between the concepts of "shipment or loading period" and "laycan". It

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also reaffirms the meaning of "laycan", i.e. the period during which the vessel must arrive at port. Had JE Energy wanted to refer to a "shipment or loading period," they should have expressly incorporated a term to that effect, instead of using the term "laycan".

The following statement by Dunedin LP. in *Muihead & Turnbull v Dickinson* (1905) 7F 686, 694 arguably summarises the stance taken by the Commercial Court regarding the interpretation of the relevant clause in this case: "*Commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say*".

A copy of the full judgment can be found here.

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ALL ABOARD: TICKET TO LIMITATION OF LIABILITY OF PASSENGER VESSELS

Written by Katherine Georginis

Under US law, a passenger vessel owes each passenger the duty of reasonable care under the circumstances. Therefore, anyone who is lawfully aboard a vessel and suffers injury due to the negligence of the vessel or its crew is entitled to damages. However, vessel owners can limit their exposure to liability through carefully crafted passenger tickets.

A passenger ticket, including its terms and conditions, is a contract that binds the passenger to its terms. Courts will enforce the terms if they are both reasonable and reasonably communicated to the passenger. The terms and conditions can include provisions regarding damages, forum and suit time, providing vessel owners with significant defenses to claims that fail to meet the requirements of the contract. In such circumstances, a plaintiff-passenger is often left to argue that they did not receive adequate notice of the terms and conditions at the time of purchase. Notice of the terms and conditions, however, is subject to a reasonable communication analysis, independent of passenger claims that they were unaware of such terms.

US courts hold that a clause that limits the liability of the vessel must be reasonably communicated to passengers, *Wallis v. Princess Cruises Inc.*, 306 F.3d 827 (9th Cir. 2002), and must be "fundamentally fair" *Carnival Cruise Lines v. Schute*, 499 U.S. 585, 111 S.Ct. 1522 (1991). *"[T]he 'proper test of reasonable notice is an analysis of the overall circumstances on a case-by-case basis, with an examination not only of the ticket itself, but also of any extrinsic factors indicating the passenger's ability to become meaningfully informed of the contractual terms at stake."* *See id*. at 835. Under the test, courts focus on the physical characteristics of the ticket, including font type and size, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provisions in question. *Id.* at 836. Extrinsic factors include the time and incentive under the circumstances to study the provisions of the ticket, and any other notice that the passenger received outside of the ticket. *See id*. When analyzing the fundamental fairness of the clause, courts consider whether the clause discourages legitimate complaints, and whether there was any evidence of fraud or overreaching. *Schute*, at 595.

In *Wallis*, the plaintiff sued Princess Cruises for the drowning death of her husband after he fell from a cruise ship near Greece. The vessel owners moved for summary judgment seeking to limit damages to the claim limitation amount of $60,000 in the cruise contract, which the district court granted. On appeal, the Ninth Circuit found that the ticket satisfied the first prong of the reasonable communication test, but it failed fundamentally fairness element under the circumstances. The subject passenger ticket pointed the passenger's attention to the relevant passages in the contract. However, the claim limitation amount was not directly included in the terms. Instead, the provision incorporated the limitations amount in the Athens Convention. The court concluded that a passenger had to do a significant amount of work in order to determine any limitations. This, the court held, was unfair to the passenger as it would require a typical passenger to perform statutory investigation and interpretation. *See id*.

Despite the outlier cases, terms and conditions of passen-

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ger tickets are routinely enforced. In the well-known case of *Carnival Cruise Lines v. Shute*, the US Supreme Court reemphasized that passengers hoping to avoid a forum selection clause bear a "heavy burden." *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991).

Much like forum selection clauses, vessels can limit the time in which passengers can bring suit. See *Gibbs v. Carnival Cruise Lines*, 314 F.3d 125 (3d Cir. 2002). In many instances, a carrier may limit the time for suit for personal injury at sea to one year, while also requiring notice of a claim from the passenger within six months of the incident. 46 U.S.C.A. § 30508. *See id*. If the suit time provision does not diminish the time limits contained within the relevant statute, it is presumed valid and enforceable and as long as it has been reasonably communicated to the passenger. *See Cohen-Chapman*, 2011 WL 1887879 (Conn.Super.) *applying Shute*, 499 U.S. 585 (1991), *and Ward v. Cross Sound Ferry*, 273 F.3d 520 (2d Cir. 2001).

By the careful crafting of terms and conditions on passenger tickets, and providing adequate notice of terms and conditions, vessel owners have significant defenses available to minimize exposure to injury claims.

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SUMMONING A SUMMONS IN FUTILITY: NO SUMMONS REQUIRED TO CONFIRM AN AWARD AGAINST A STATE

Written by Mozar Ross

In a recent Second Circuit decision, *Commodities & Minerals Enterprise LTD v. CVG Ferrominera Orinoco, C.A.*, the court addressed service on an instrumentality of a state for purposes of confirming an arbitration award. This underlying service issue emanates from the Federal Arbitration Act's ("FAA") and the Foreign Sovereign Immunities Act's ("FSIA") opposing statutory schemes as to service requirements.

BACKGROUND

CVG Ferrominera Orinoco, C.A. ("Ferrominera") was an entity owed by the Bolivarian Republic of Venezuela. Venezuela created Ferrominera to legally monopolize the iron ore industry and to export the raw material on behalf of the State. Commodities & Minerals Enterprise LTD ("CME") was a British Virgin Islands entity in the business of trading commodities and minerals, chiefly iron ore.

In 2004, CME formed a contract with Ferrominera for the sale and purchase of Venezuelan iron ore, by which Ferrominera agreed to sell to CME certain quantities of various iron ore products. However, Ferrominera was often short of cash and had challenges maintaining a steady output of iron ore from its mines. The troubles increased during the financial crisis of 2008. Consequently, Ferrominera began to barter coal in exchange for various services from CME to sustain and improve its mining operations. Additionally, to support logistics, CME entered into a charter party with Ferrominera, under which Ferrominera chartered the MV GENERAL PIAR from CME.

By the early part of 2016, CME had continued payment issues. CME therefore initiated SMA arbitration proceedings in New York pursuant to the terms of the charter party. In its defense, Ferrominera claimed the panel lacked jurisdiction, that the charter party contained an invalid arbitration agreement due to fraud under Venezuelan law, and that CME's claims were outside the scope of the arbitration provision. On December 20, 2018, the Panel found in favor of CME and awarded damages.

CME then sought confirmation of the award in the United States District Court for the Southern District of New York. Ferrominera opposed, contending that the district court should set aside the for the same reasons rejected by the

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SMA panel. Finally, Ferrominera argued that the court lacked personal jurisdiction because it had never been served with a summons and complaint, as required under the FSIA.

The district court rejected Ferrominera's arguments. It held that the SMA panel correctly applied New York law in finding an agreement to arbitrate existed. Additionally, the district court determined all issues addressed by the SMA Panel were within the purview of the arbitration agreement. In denying fraud, the district court reasoned Ferrominera's claims of fraud went to the underlying contract rather than the award.

KEY ISSUE: WHETHER A NATION-STATE DEFENDANT MUST RECEIVE A SUMMONS FOR A PLAINTIFF TO DULY INITIATE A CONFIRMATION ACTION AGAINST IT

Ferrominera further argued that CME's failure to serve it with a summons and complaint deprived the federal court of jurisdiction over the confirmation proceedings. The district court disagreed and the Second Circuit affirmed. The court noted a central issue regarding Ferrominera's status as a state-owned entity. The FSIA provides that an instrumentality of a foreign state must be served with a "summons and complaint" as a procedural and jurisdictional requirement. However, as to service, the New York Convention as incorporated into the FAA does not require service of a "summons and complaint." Rather, the only requirement to affirm an award is notice of the application.

In affirming the district court, the Second Circuit held "(1) the FAA itself defines the documents to be served, and cross-reference other provisions (including Rule 4 [of the Federal Rules of Civil Procedure] and the FSIA) only to fill gaps in the permissible manner of service of a 'summons and complaint' into the FAA because motions to confirm arbitral awards are not commenced by the filing of a complaint." In addition, the court noted that "a proceeding to confirm an arbitral award under the FAA is commenced by an application rather than a 'complaint'; accordingly, there is no basis for serving a 'summons and complaint…'"

CONCLUSION

The Second Circuit held that the New York Convention and FAA do not require service of a summons and complaint in an application to confirm a foreign arbitral award. Therefore, the intersection between the FAA and the FSIA did not create a conflict when pursuing confirmation of awards in US courts.

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