US Resistance Towards China or the New Dawn of U.S. Shipping?

US's efforts to counter China's dominance in shipping are gaining momentum with proposed tariffs, legislative action and executive measures shaping the future of U.S. shipping.

For those who keep an eye on political developments in Washington D.C., the U.S. Trade Representative (**"USTR"**) Notice of Proposed Action in Section 301 Investigation of China's Targeting of the Maritime Logistics and Shipbuilding Sectors for Dominance ("**Notice**")[1] may not have come as a surprise. The initiation of the Section 301 investigation started in early 2024 and those who knew about the ongoing investigation (and the potential resulting actions) were worried - very worried.

Industry participants are sometimes surprised to learn that addressing the risks posed by China's dominance in shipping (and U.S. Shipping's decline) is a bipartisan issue – it started while President Biden was still in power. The "port tariff issue", as some industry players might refer to it, isn't just about President Trump's aversion towards China - it is one component of a much more ambitious project.

In May 2024 (shortly after the USTR investigation began) Senator Mark Kelly (a Democrat from Arizona) and Representative Michael Waltz (a Republican from Florida), together with Senator Marco Rubio (a Republican from Florida) and Representative John Garamendi (a Democrat from California) released a bipartisan report entitled "Congressional Guidance for a National Maritime Strategy".[2] In October 2024 Kelly and Waltz went on to announced their work on the SHIPS for America Act (the "**SHIPS Act**") which was a direct result of the aforementioned report. The

1 https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-china-targeting-maritime-logistics-and-shipbuilding-sectors-dominance

2 https://www.kelly.senate.gov/wp-content/uploads/2024/05/Congressional-Guidance-for-a-National-Maritime-Strategy.pdf

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SHIPS Act was then formally introduced at the end of the 118th Congress[3].

While the SHIPS Act will need to be reintroduced in the 119th Congress in order for it to be passed into law, the political winds are blowing in its favour. In his remarks in the Joint Address to Congress on 6 March 2024, President Trump announced that he was going to "*resurrect the American shipbuilding industry, including commercial shipbuilding and military shipbuilding*".[4] Two of the SHIPS Act's key advocates now have the close ear of the President - Michael Waltz is President Trump's National Security Advisor and Marco Rubio is the Secretary of State.

The Notice and its corresponding hearing on Monday, 24 March 2025[5], have generated a tremendous amount of attention in the industry over the past few weeks. Concerns have been raised about both the drafting of the Notice and the tremendous impact that the proposed fees would have both within and outside the U.S.

3 https://www.congress.gov/bill/118th-congress/house-bill/10493

4 https://www.whitehouse.gov/remarks/2025/03/remarks-by-president-trump-in-joint-address-to-congress/

5 https://ustr.gov/about-us/policy-offices/press-office/press-releases/2025/february/ustr-seeks-public-comment-proposed-actions-section-301-investigation-chinas-targeting-maritime

The hype surrounding the "port fee issue" was further heightened by the circulation of a draft executive order, the "Executive Order To Make Shipbuilding Great Again" (the "**EO**"), which if signed in an unrevised format, would ultimately require USTR to impose certain fees and tariffs on Chinese built or flagged vessels that dock in U.S. ports, certain cargo handling equipment (again, with a Chinese connection), and vessels that are part of a fleet which includes Chinese built or flagged vessels. It is anyone's guess as to when, or even if, the EO will be signed.

The writing on the wall, however, indicates that this is a bigger issue than port fees imposed on unsuspecting shipowners who purchased vessels in China. There are common threads between the USTR Notice, the EO and the SHIPS Act. The USTR Notice and the EO, for example, both discuss coordinating with allies and partners to reduce dependencies on China, and the EO and the SHIPS Act extensively address the issue of maritime workforce development.

While we will refrain from the impossible task of prognosticating what port fees, if any, might be introduced, it would be naïve to think that the SHIPS Act, in some format, won't be implemented. What that means for US Shipping, however, is anyone's guess for now.

The English Commercial Court Confirms Owners' Right to Sell Liened Cargo

The English Courts upholds shipowners' right to sell liened cargo for unpaid freight, even where that cargo belongs to a third-party consignee.

In a recent judgment in *The Lord Hassan*[1], the English Commercial Court confirmed a shipowners' right to sell a perishable third-party cargo, after it was liened for unpaid freight.

Background

Under the terms of a voyage charter dated 12 April 2024 on amended Synacomex form (the "**CP**"), the Vessel loaded a cargo of 11,000MT Ukrainian corn at Chornomorsk, Ukraine for carriage to Turkey.

The CP incorporated a standard lien clause, and stipulated that freight was to be paid by Charterers in full within three days of signing / releasing bills of lading, but always before breaking bulk.

A bill of lading was issued on 18 May 2024, marked "*Freight Prepaid*", which incorporated the CP terms.

However, as no freight had in fact been paid, the Owners retained the bill of lading & exercised their right of lien on the cargo when the Vessel reached the discharge port in Turkey, then discharged the cargo into a warehouse ashore. The Owners' lien was subsequently recognised by the Turkish Courts on 26 May 2024.

Subsequently, it was determined that the cargo was suffering from self-heating, heavy infestation of insects and maggots, signs of clumping and mould growth.

Accordingly, Owners commenced London arbitration & made an urgent application to the English Commercial Court for permission to sell the cargo before it deteriorated further.

Legal Basis for Owners' Application

Section 44(2)(d) of the English Arbitration Act 1996 bestows upon the Courts a wide power to order the sale of any goods which are "*the subject of proceedings*" and for the purpose of

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1 [2024] EWHC 3305 (Comm)

preserving evidence or assets in urgent cases[2] .

In effect, the above means that the Courts' powers in relation to cases where the substantive claim is to be determined in arbitration, are equivalent to those subject to Court proceedings – this includes the right to order "*the sale of relevant property which is of perishable nature or which for any other good reason it is desirable to sell quickly*" (CPR 25.1).

Judgment

The Judge (Bryan J) granted an Order for the cargo to be sold and for the sale proceeds to be held in escrow pending resolution of the London arbitration.

In order to protect the interests of any third-party cargo interests, however, the Judge also ordered Owners to give an undertaking in damages, backed up by a security of US$75,000, in case it should subsequently transpire that the lien was wrongful.

In reaching the above decision, the Judge was satisfied that on the evidence the cargo would continue to deteriorate and ultimately perish if not sold, thereby fundamentally undermining Owners' security. As such, the Judge considered this to be a "...*paradigm case in which sale should be ordered*".

One key distinguishing feature of this case (unlike in the earlier "*The Moscow Stars*" case) was that the cargo had been sold to a third party. That said, the Judge confirmed that this did not give rise to any defence to Owners' claim or their right to assert a lien, bearing in mind that (i) the bill of lading incorporated the CP right of lien, and that (ii) crucially, the bill of lading had never been released.

In considering this point, the Judge placed particular reliance upon the fact that it is unusual for a charterer to also be the owner of the cargo, meaning that any contrary decision would effectively rob a shipowners' right of lien of any utility in the majority of cases.

Importantly, however, the Judge commented obiter that the position may have been different if the bill of lading had been released into the hands of a third party, bearing in mind that it was marked "*Freight Prepaid*", thereby potentially giving rise to an estoppel in those circumstances.

Comments

This case provides an important confirmation that, under English law, a shipowner's right to exercise lien on cargo and obtain a judicial Order for sale may not be prevented by the fact that the is cargo owned by a third party.

The Judge's *obiter* comments provide a useful reminder, however, of the potential hazards of "Freight Prepaid" bills of lading being released into the hands of a third party, before freight has in fact been received.

Finally, it is also important to bear in mind that before proceeding to lien cargo, it must be checked whether such rights are recognised under local law in the jurisdiction where the lien is being exercised (i.e. the discharge port).

Whilst in this case, the Owners were fortunate enough to be able to obtain recognition of the lien by the local courts thereby enabling them to maintain the lien even after the cargo had been discharged ashore, in some jurisdictions such recognition will generally not be granted (e.g. China) particularly when the cargo is owned by a third party.

2 The English Courts have previously confirmed in "The Moscow Stars" [2017] EWHC 2150 (Comm) that the Court has the power to order the sale of cargo that has been liened to obtain security for a claim in arbitration.

The New English Arbitration Act 2025

A new English Arbitration Act 2025 and the main changes to the position under the Arbitration Act 1996

The new English Arbitration Act 2025 ("**2025 Act**") received Royal Assent on 24 February 2025 after its passage through the UK Parliament, meaning that it becomes law and will come into force. The 2025 Act introduces amendments to the Arbitration Act 1996, which governs many maritime arbitrations. The changes in the 2025 Act are limited and it is far from a complete overhaul of the 1996 Act, which was found to be working well. The new legislation follows from the Law Commission's review of the 1996 Act and is closely based on the Law Commission's recommendations.

The key changes brought about by the 2025 Act are as follows:

1. The statutory rule for the law applicable to the arbitration agreement.
Under the 2025 Act, if the parties have not specified which law applies to the arbitration agreement, then the law of the seat of the arbitration will automatically apply (with one exception relevant to investor-State arbitrations). That is a change from the current position (set out in case law rather than in a statute) which is that in the absence of specific provision by the parties, the law of the contract will generally be implied to govern the arbitration agreement. The new approach should be simpler and provide more certainty. It will result in more arbitration agreements being governed by English law when the seat of the arbitration is in England and Wales.

2. Arbitrators' statutory duty of disclosure.
The 2025 Act contains a new statutory requirement for arbitrators and potential arbitrators to disclose any "*relevant circumstances*" which they are aware of or become aware of. Relevant

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circumstances are "*circumstances that might reasonably give rise to justifiable doubts as to the individual's impartiality in relation to the proceedings, or potential proceedings*". While there is a similar duty at common law, the Law Commission recommended codifying the duty in the Act itself. Under the 2025 Act, an individual will be treated as being aware of circumstances of which they *ought reasonably* to be aware. In other words, the duty of disclosure goes beyond actual knowledge. The Law Commission recommended that this higher standard is appropriate given the importance of disclosure to maintaining (the appearance of) impartiality in arbitrators.

3. Tribunal's power to make an award on a summary basis

This new power is similar to a judge's power to give summary judgment in the English courts. This allows a party to apply for an award on a summary basis on a claim or issue where the other party has "*no real prospect of succeeding*" on the issue or in defending the issue. There is little guidance on how this process is to work in practice in the 2025 Act itself, and the Law Commission recommended that the procedure should be a matter for the tribunal, having consulted with the parties. Summary disposal can provide an efficient method of resolving suitable disputes, and it is thought that putting summary disposal on a statutory footing might provide reassurance to arbitrators, and to foreign courts asked to enforce English arbitration awards.

4. Court Determination of the Tribunal's Jurisdiction

The 2025 Act clarifies that a court cannot consider an application to determine the tribunal's substantive jurisdiction if the tribunal has already ruled on the same issue. This reform strengthens the tribunal's autonomy and limits judicial interference in matters already decided by arbitrators.

5. Jurisdictional Challenges to Awards Under Section 67

The 2025 Act introduces significant amendments to Section 67 of the 1996 Arbitration Act, which governs challenges to an award on jurisdictional grounds. Notably, where a party has objected to the tribunal's jurisdiction and the tribunal has ruled on the matter, any subsequent Section 67 challenge by a party who participated in the arbitration will now only be by way of review and not result in a full rehearing of the evidence.

The court will not consider new grounds for objection or fresh evidence unless:
(i) Doing so is in the *interests of justice*, and
(ii) The objecting party neither knew nor could have reasonably discovered the grounds or evidence at the time of the arbitration.

This amendment aims to prevent unnecessary duplication of proceedings and reinforces the tribunal's authority.

6. New Powers to Emergency Arbitrators

The 2025 Act extends to emergency arbitrators under Section 41A, the existing power under the 1996 Arbitration Act – which provided that if a party failed to comply with any order or directions from the tribunal, the tribunal could issue a peremptory order requiring compliance within a prescribed timeframe.

Additionally, the new law empowers emergency arbitrators to grant permission for a party to apply to the court for a Section 44 order. This may include orders for the preservation of evidence, the taking of witness testimony, or other urgent matters. Furthermore, the court is now expressly authorized to issue orders in support of emergency arbitrators, aligning its powers with those already available in regular (non-emergency) arbitration proceedings under the 1996 Act.

7. Immunity of Arbitrators

The 2025 Act also strengthens an arbitrator's immunity by amending Sections 24 and 29 of the 1996 Act. Under the new law:

a. An arbitrator cannot be held liable for costs in removal proceedings unless they acted in bad faith.

b. An arbitrator's resignation does not give rise to liability unless it is shown to be unreasonable.

These changes enhance arbitrators' protections, reducing the risk of vexatious claims and reinforcing the integrity of arbitration proceedings.

Hardship clauses – Are they back? Should they be back?

The hardship clauses usually amount to little more than a promise to discuss changes, without any binding obligation.

In turbulent times hardship clauses tend to come to the surface. We have seen a few in recent weeks, and especially linked to uncertainty caused by the potential US tariffs on Chinese built ships.

When something new comes up we take a look in the mirror to see whether similar issues have come up in previous times, and our experience says that they often have. Searching 136 years of our Nordisk Circulars, we wrote quite a bit about hardship clauses in the 60s (Suez crisis) and late 70s (devaluations, yard crisis, shipping crisis).

In **Nordisk Circular, Issue 476 (May 1967)**, we noted that they often have wording saying the parties "*mutually affirm that on request of either party they will closely examine the situation with good will to ascertain whether it is possible to rectify or ameliorate the hardship*". Such clauses do not ensure consequences of the hardship will actually be ameliorated. Obligations are fulfilled when parties have "closely examined" the situation. As such, the clauses can give a false sense of security.

In **Nordisk Circular, Issue 503 (March 1978),** we wrote that hardship clauses (aka "be kind" clauses) were not very popular but did come to the surface from time to time in long term contracts. He noted that the highly respected Norwegian law professor Arnholm had said in a lecture that the hardship clause "*probably amounts to no more than that – one cannot be thrown out of the other party's office the first time one comes and asks for a change in the contract.*"

A Nordisk case on the topic was mentioned: An owner asked a charterer for a rate increase under a hardship clause after costs rose sharply due to the Suez Crisis in 1956. The charterer was earning enormously in the high market and agreed to the request. The market then collapsed, and the charterer now requested a revision back to the original rate under the hardship clause. The shipowner refused, and the QC instructed laconically stated that **the fact that the charterer had been kind and foolish in a given case did not imply**

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any obligation for the other party to be equally kind and foolish.

This generally remains the position still. Hardship clauses can perhaps serve as a sign of trust between the parties, but if that trust is there the clause might be unnecessary because they could always sit down to discuss if the situation changed. And if the trust is not there, then the clause does not help because it will not ensure an actual adjustment of contract terms if hardship strikes. This is so under both English law and Norwegian law.

Under Norwegian law, the Contracts Act § 36 allows the courts to adjust the parties bargain in some cases, and to a larger extent than the English law doctrine of frustration. But it does not matter to the application of § 36 whether a hardship clause is included in the contract. And the Norwegian Supreme Court just reconfirmed in HR-2025-251a (Red Rock) that the threshold for using § 36 is indeed very high between professional parties. Hence, the hardship clause remains at best a promise to meet to discuss a change in circumstances, with no obligation to agree to any actual amendment of the contract.

One idea that has been used from time to time is to include a mechanism where external arbitrators will decide an adjustment, if the balance of the contract has become very different from what was intended. The Nordisk May 1967 article said that if a hardship clause is to have any actual effect, then one must incorporate a form of arbitration language. This would say that the decision on changes in contract terms should be left to one or more independent persons. In such case, this should be done through a relatively simple and expedient procedure. Such wording was sometimes added to hardship clauses at the time, and especially regarding currency devaluations. The decision would typically be left to "*three commercial men*" in London. Such a simple arbitration mechanism is of course risky, as one never knows what independent commercial representative might decide.

The Nordisk 1978 article similarly mentions the rare hardship clauses that include wording stating that if the parties do not agree on a revision of the contract, this should be left to an expert tribunal. However, the article highlighted how the uncertainty this entails is an obvious disadvantage. We had seen agreements where the tribunal was to adjust the terms so that the economic outcome for the parties should be largely the same as if the circumstances had not changed. That this can be very difficult in practice is beyond doubt.

In conclusion, we do not think hardship clauses are very useful. One should take into account what the clauses do and what they do not do, and consider whether better options might exist. We would generally recommend instead to try to regulate precisely what should happen to the charterparty or other contract if circumstances change, including if new US tariffs are introduced on Chinese built vessels or those operating them are introduced. We have seen one version in the form of what someone called a "Trump clause", which simply places all responsibility on the other party.

It will be interesting to see in coming months and years how this develops, as the sun appears to be setting on the era of globalisation and potentially taking us back to a world of superpower rivalry and trade wars.

No matter what the future brings, the Nordisk team is at your service for discussions and drafting support, as we have been for the last 136 years.

Photos:
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