LATEST PUBLICATION COMPLETES BIMCO'S SUITE OF DECARBONISATION CLAUSES FOR TIME CHARTERS

The clauses for EEXI, EU ETS and CII have now all been completed, the latest addition being Guidance Notes for the CII clause published on December 7th.

Work will continue in the BIMCO Sub-Committee to address clauses applicable to other charters and contracts, but the immediate focus now is on the need to implement the clauses in time charters – both those that are on foot into 2023 and beyond, as well as new time charters.

BY LASSE BRAUTASET

We provide an overview of these clauses, particularly the CII clause; as well as give a flavour of the challenges to come as we see them.

EEXI – Our impression is that the efforts to obtain International Energy Efficiency Certificates (IEEC) are well underway for most vessels. To the extent modifications have been needed, Engine Power Limitation has been the favoured solution and this seems to have been achieved without any great challenges. We would remind owners that using the EEXI clause as a basis for the required work is recommended not only for good order and convenience, but also to ensure that the new maximum speed and corresponding consumption has replaced the warranties in an existing charter party.

EU ETS – The seemingly never ending "trilogue" taking place among the EU Parliament, EU Council and EU Commission appears to have resulted in agreement on how shipping should be treated. Insofar as timing is concerned, the regime for shipping

will be effective from 2024 and will apply to vessels exceeding 5000 gt. The EU Emissions Scheme will apply to 100% of intra-EU voyages and 50% of international voyages to/from the EU. However, the allowances payable for the resulting carbon emissions will only be phased in at a rate of 40% in 2024, 70% in 2025 and finally 100% in 2026. It should also be noted that allowances will also be payable for methane emissions from 2026.

CII –The importance of the revolution embodied in the Marpol Carbon Intensity Regulations (CII) cannot be overstated. From 1 January 2023 vessel operations in the time charter context will embark on a new path with increasingly stringent efficiency requirements along with challenges that must be understood and embraced by both owners and charterers. The IMO CII regulations are notoriously complicated, but there is no alternative other than to come to terms with the demands imposed on the industry. The mutual goal thrust upon owners and charterers is to reduce shipping's carbon emissions within the designed framework.

Although the global need to reduce CO2 emissions in shipping, as in other industries is obvious; the IMO approach is both convoluted and demanding. Instead of simply requiring vessels to limit emissions by proceeding at lower speeds, the regulations will take owners and charterers on a roller coaster ride which will require vigilance, cooperation, and accommodation. Like shipbuilders and engineers, operators of ships will need to educate themselves and recognise that the building blocks of their trade will change already in January. If parties fail to understand the mechanics of CII, they will be doomed to run into difficulties. To put it simply, the Marpol Carbon Intensity Regulations will be unforgiving.

The first task for vessel owners will be to convince charterers of existing (and new) charters that the BIMCO CII clause is the best way to regulate the respective responsibilities. If charterers do not agree, there is a risk that trading under existing charters will continue more or less as before. If so, compliance with the regulations will be virtually impossible and may result in stricter legislation or greater consequences to ensure and enforce compliance. Assuming charterers accept the clause, the main challenge will be to ensure that vessels operate in a manner that satisfies the Agreed CII (rating)- the underlying premise being that the rating scale from A-E will in fact matter in the marketplace.

As one will understand, from January 1 2023 and every year thereafter including 2026 (for now), the CII of vessels will be under attack, not from pirates, but from the human tendency to operate business as usual in the hope that things eventually work out. In this regard, CII has some surprises in store for the unwary. An example is the harsh impact of extended port calls due to congestion, i.e. no distance is sailed which has a devestating effect on CII. One is reminded of the adage, "A ship in the harbour is safe, but that is not what ships are built for". However inspirational, even that time honoured quote is only partially true – a ship stuck in port is certainly

not "safe" from a CII perspective. But yes, vessels are meant to sail the seven seas (preferably on long voyages) – but like it or not - at much slower speeds than charterers would prefer.

Although CII has triggered a fair amount of disagreement, there appear to be two areas of agreement: The IMO regulations do have inadequacies requiring further "correction factors" and the BIMCO clause is much too complicated! While this is fair comment, it must be understood that the clause is the "offspring" of an extremely complicated regulation, which at its core leaves owners and charterers with conflicting interests. Charterers want trading flexibility, while owners wish to protect the Agreed CII and avoid having their ship undervalued in the marketplace - as if it were a derated refrigerator. A simpler variant of the clause could have been drafted, but it would have concealed the complexity of the task owners and charterers are facing.

As a participant in the BIMCO sub-committee, I believe a good faith effort has been made to design a clause that makes it possible for owners and charterers to operate vessels fairly within the parameters of the Marpol Intensity Regulations while pursuing the underlying goal of reducing carbon emissions.

Notwithstanding the relief associated with the publication of the clause, there will inevitably be tough negotiations ahead between owners and charterers. In this connection it is vital that both owners and charterers make a serious investment to understand the building blocks and moving parts in the CII clause. This will allow both parties to negotiate on the same terms, while avoiding pitfalls that should have been understood – some less obvious than others. The recently published BIMCO Guidance Notes should be the first point of reference – see link.

Once the clause has been accepted/agreed, that is when the real work begins. The continual exchange of data and information will provide a basis for informed action, along with a need for much tighter cooperation between personnel in the technical, chartering and operation departments. A vessel's emissions will be measured in real time and a running evaluation of CII will be possible by way of CP Attained CII. When the trajectory of the CII gets out of out of line it will be necessary for those involved to deal with the sharp end of the clause – namely subclause (g). The hope is that the parties will treat that moment and each other with respect and mutual understanding. At the end of the day, we are all in this together!

At Nordisk we stand ready to assist as the decarbonisation revolution makes its way into your charter parties.

MT STENA PRIMORSK - CM P-MAX III LTD V PETROLEOS DEL NORTE SA

Charterers Orders v Safety of the Vessel

Most disputes we deal with at Nordisk are resolved without the need for a formal ruling. Of those that do, the forum of choice for most is arbitration which by its very nature is private and confidential to the protagonists. It is rare to have a matter proceed to judgment in open court but, bucking the trend, the decision was handed down in the "*Stena Primorsk*" in late summer which allows us the chance to share issues and lessons publicly.

At first glance this was a straightforward claim for demurrage and in the scheme of things for not that much at USD 143,000 or so, but the issues were more interesting.

BY MICHAEL BROOKS

The Facts

The "*Stena Primorsk*" was chartered by members CNP-MAX III Ltd to Petrolios del Norte S.A. on an amended Shellvoy 6 form for the carriage of oil from Bilbao to a range of possible ports, but in the event to Paulsboro on the Delaware River in the USA. Laytime was agreed at 72 hours total and there was agreement between both owner and charterer that on leaving the load port Charterers had used 68 hours 53 mins of that laytime, leaving only 3 hours 6 mins in which to discharge before demurrage was inevitably going to be incurred. The events at Paulsboro were the cause of the dispute.

The Vessel arrived at Paulsboro on 29 March 2019 with a draft of 12.15 m. The confirmed depth at the designated berth selected by Charterers was 12.19 m plus an expected 1.6 m at high tide. The Owners' under-keel clearance (UKC) policy was to have no less than 10% of the Vessel's static draft. That required 1.215 m at Paulsboro. Thus, on berthing the Vessel needed a depth of at least 13.36 m on inward passage and at the berth to meet the UKC policy. The Vessel was likely to breach its UKC on the passage to berth as the tide would be less than full. The Master discussed this risk in conjunction with the Vessel's technical managers, who granted a one-off waiver to proceed in on high water on the basis that the berth had assured the Master that the

Vessel would start to discharge upon berthing at high tide and at a rate in excess of 15,000 barrels an hour. At that rate of discharge the Vessel, although initially breaching the UKC on the falling tide, was unlikely to ground.

The Vessel proceeded inwards and was all fast at 23:30 on 31 March. At this point the Terminal informed the Master that the discharge rate in excess of 15,000 barrels an hour would not be met. For the first 7-8 hours the receiving rate would be only 5,000 barrels an hour. The Master's rapid calculation was that at this rate the Vessel's UKC polity would rapidly be breached and citing safety decided at 23:48 hours that he should return to the anchorage where the Vessel proceeded on a falling tide.

The following day at around 11:00. the Terminal advised it could now accept cargo at the rate of initially 10,000 barrels per hour into two tanks for the first six hours and thereafter at approximately 15,000 to 20,000 barrels an hour. The next high tide was at 21:00. The Charterers ordered the Vessel to go in. The Master's calculations in conjunction with the technical managers based on the available data of (i) the available water at high tide (ii) the Vessel's draft and, assuming the promised discharging rate, (iii) the rate of decrease in Vessel's draft (due to reducing cargo weight) and (iv) the depth loss as the tide ebbed, meant that the UKC policy was going to be breached.

The Owners refused to issue any further UKC waiver, and the Charterers then arranged lighters to remove cargo at the anchorage before the Vessel finally berthed at 23:54 on 4 April.

The Charterers' case

The Charterers contended that laytime or time on demurrage should not run against them from

a) 23:48 on 31 March, when the Master decided to return to the anchorage until 23:34 on 4 April (save for the actual time spent discharging into lighters), alternatively

b) from 21:00 on 1 April when they ordered the Vessel to return to the berth until 23:54 on 4 April, again less any discharge time into barges.

Charterers further counter claimed the costs of the lighter barges to the tune of USD 65,000 or so.

Disputes are almost always a mixture of contractual terms and the facts. The Charterers relied on the Owners' obligation to "*perform the service with dispatch*" and "*proceed as ordered to such berths as Charterers may specify*" (Clause 3(ii)) and the exception to the running of laytime at clause 14 if time was lost "*as a result for breach of Charterers' orders by Owners*".

The Owners' case

In turn, Owners pointed to Part I clause A III where the information in the Q88 (which contained the UKC policy) was warranted by them and that "*this information is an integral part of the charterparty*". Further, by an amended clause 3(ii) whilst Owners were responsible for the consequences of a failure to obey Charterers' orders, this was tempered with the proviso that such orders "*are considered safe by the Master*".

The Judgment

Whilst there was much debate, there was significant agreement between the experts that on arrival at the berth for the first time the Master had little time to decide what to do and was lucky the pilot was still on board. Ultimately, the Judge considered that the rights of the Charterer to give orders and utilize the Vessel was not absolute but always tempered that whatever Charterers wanted to do, it was a question of safety and whether, in the light of the available knowledge, the Master acted reasonably.

This was a sensible cutting through some precise legal niceties, mindful of the grave consequences of a laden tanker grounding and the risk of pollution, particularly in the USA where the Oil Pollution Act hold owners strictly liable. Under the Shellvoy 6, like many Charterers' forms, the charterer does not warrant the safety of the berth to which he may send the vessel.

The Judge agreed with Owners that the Q88 was part of the Contract and that, as Nordisk argued, was to be read as a limit on the Charterers' rights to order the Vessel to berth where the safety policy would or might be breached.

The Judge was equally pragmatic in dismissing the Charterers' objection to the running of any laytime at the discharge port on the basis that Owners

failed to meet the requirement to obtain free pratique, unless this was not customarily issued prior to berthing, within six hours of tendering NOR. If that was breached, the NOR would not be valid.

Although there was no evidence of free pratique being granted, and indeed the Master protested that it was not, there was little evidence on whether it was customarily granted prior to berthing or not. The Judge approached this on the basis that he did not think the port authority would have allowed the Vessel to berth if free pratique was a prior requirement and indeed had acted as if it was granted. He ruled that effectively the port had a system of granting free pratique by default – i.e. you had it if you were called in, unless it was specifically refused.

Conclusions

On this basis, the Master's actions leaving the berth on the first occasion and refusing to return until the UKC policy could always be met or substantiated, were not faulted. The lesson is that the Court will give the master and owners the benefit of the doubt if acting based on safety issues. With no breach by the Owners, both the demurrage claimed fell due and Charterers' counterclaim for the lighterage fell away. Nordisk's members were entirely successful.

For those interested in reading further, the case citation is *CNP-MAX III Ltd v Petrolios del Norte S.A. (the "Stena Primorsk")* [2022] EWHC 2147 (Comm).

DO YOU THINK YOUR NORWEGIAN ARBITRATION IS CONFIDENTIAL?

PART II: A CAUTIONARY TALE TO COMMERCIAL PARTIES AND LAWYERS ALIKE

In the August 2022 edition, we looked at the requirements set out in Section 5 of the Norwegian Arbitration Act (the "Arbitration Act") to ensure that the arbitration proceedings and/or the award are subject to confidentiality. We concluded that it was at best an open question whether an agreement on confidentiality can be made *before* the proceedings have been initiated, *i.e.*, in the dispute resolution clause contained in the parties' agreement, or if the duty of confidentiality must be agreed upon after the proceedings have been initiated. The recommended approach, for parties who want their arbitration to be confidential, was to specifically agree on the duty of confidentiality at the outset of the arbitration proceedings. That conclusion may have come as a surprise to some.

BY BENEDICTE HAAVIK URRANG

In this follow up article, we address the legal consequences of bringing an action to set aside an award that is confidential. The starting point for this discussion is that the parties have validly agreed that the arbitration award is to be kept confidential. The question is what happens to the confidentiality after such an action has been made?

The answer is clear when looking at the applicable legislation, but the answer does – according to our experience – still come as a surprise to both lawyers and their clients. Once an action to set aside the award is brought before the Norwegian courts, the award becomes publicly available. It is not published in any way, but *anyone* may request access to the award.

The public's right to request access to certain court records and documents is set out in Section 14 2 of the Norwegian Dispute Act (the "Dispute Act"). The right to access includes access to evidence that has been relied upon by either party. When an action is brought against an arbitration award, the award itself becomes part of the evidence. Paragraph 3 of Section 6 of the Arbitration Act provides that the

rules in the Dispute Act apply whenever the courts deal with arbitration proceedings or an application to set aside an award. Following this simple line of reasoning, the courts are obliged to give anyone access to the award if such a request is put forward.

However, there are a few exceptions to the public's right to request access to court documents in Section 14-4 of the Dispute Act. The only relevant exceptions for commercial arbitration awards are (i) trade or business secrets or (ii) a statutory duty of confidentiality. Assuming the award does not contain any trade or business secrets, we are left with the statutory duty of confidentiality. We will then have to assess whether there is any such duty applicable to arbitration awards.

The earlier article explained how Section 5 of the Arbitration Act states that the award is not confidential unless the parties have *specifically* agreed to make it confidential. Party autonomy means that the parties may of course agree on a duty of confidentiality but such a contractual duty is not a *statutory* duty of confidentiality.

The Supreme Court has also confirmed that a contractual duty of confidentiality does not affect a witness' duty to testify in court.[1] Applying the same line of reasoning, this means that a contractual duty of confidentiality has no effect on the public's right to access to documents as set out in Section 14-2 of the Dispute Act.[2]

1 See Rt. 2002 s. 385 and Rt. 1964 s. 1423
2 This was recently confirmed by Hordaland District Court (22-133191TVI-THOD)

If the courts were to acknowledge a contractual duty of confidentiality as a basis for limiting the public's right of access to court documents, the courts would unreasonably limit the fundamental Norwegian principle that court proceedings and hearings are public.

Conclusion

Consequently, an arbitration award becomes publicly available to anyone if an action to set aside the award is made. The decision by the court when dealing with such an application may even be made public on Lovdata and the existence of the award will be made known. If anyone then wishes to read the award itself, they may request that the court send a copy of the award.

The threshold of succeeding with an action to set aside an award is very high to begin with, but both the parties and their lawyers should also take into consideration that the award will then become publicly available if an application to set aside the award is made.

Photos courtesy of and (c) DOF (page 1 and 3), Awilco (page 2), Christian Romberg (page 4), Eidesvik Offshore (page 6), Østensjø Rederi (page 7), Solstad Offshore (page 8).