NOMA INTRODUCES NEW FAST TRACK ARBITRATION RULES

The NOMA (Nordic Offshore and Maritime Arbitration) arbitration rules, also referred to as "Nordic Arbitration", were introduced to the Scandinavian market in 2017 and have turned out to be popular.

From early on, NOMA planned to introduce separate rules for less complicated disputes, similar to what has been done by several other arbitration institutes and organisations. An example is the LMAA Small Claims Procedure which has been in place for many years and widely used, but there are many others as well. In October 2018, a working group was established within the Norwegian part of NOMA to consider and prepare draft rules. The group consisted of lawyers from some of the major Norwegian law firms, including Nordisk. From the outset, the working title was "*Small and Medium Claim Guidelines*" and as the name suggests, the aim was to make guidelines rather than firm rules.

BY KNUT ERLING ØYEHAUG

The working group compiled a survey of major arbitration rules applicable in other jurisdictions such as the LMAA, ICC etc. Using this survey, they prepared a recommendation which was circulated to the NOMA-representatives in the other Nordic countries for comments. The recommendation was to make separate Fast Track rules, not just guidelines, and a number of proposals were made as to what the rules should include, such as the monetary threshold for the rules to apply, whether they should apply automatically in NOMA arbitrations (opt-out) or only when agreed expressly by the parties (opt-in).

In October 2019, the working group received feed-back from NOMA-members in the respective countries and commenced drafting a new set of rules. The first drafts were based on the idea that the regular NOMA Arbitration Rules would apply, and that the Fast-Track rules would be a separate chapter setting out applicable amendments to the ordinary rules. It was also proposed that the Fast-Track rules should apply automatically when the parties agreed NOMA arbitration, unless the parties specifically agreed that they should not (opt-out).

However, after circulating a draft on this basis, it was decided that the rules should be stand-alone rules (i.e. not rely on references to the ordinary rules), and only apply if expressly agreed by the parties (opt-in). As a result, a fresh draft was prepared, taking the ordinary rules as a starting point and amending and simplifying them as appropriate. The end result was adopted by NOMA in the early part of 2021 and can now be found on the NOMA web site Nordic Arbitration.

The NOMA Fast Track Arbitration Rules apply when the parties have expressly agreed so in their dispute resolution clause(s) or otherwise, and where the aggregate amount of the claim and/or counterclaim of a dispute does not exceed USD250,000.

As a main rule, the arbitration panel will consist of a sole arbitrator, but the rules are open for the parties to agree a panel of three arbitrators. The rules regulate certain aspects of how the arbitration proceedings shall be conducted, seeking to simplify and speed up the process compared to the ordinary rules, and to reduce the costs involved. Accordingly, and by way of examples, the time limits for appointing the arbitrator and the service of submissions have been shortened, the number of submissions allowed is limited, as a starting point there shall be no oral hearing, and the fees of the arbitrator(s) and recoverable costs of the parties are subject to restrictions.

In summary, NOMA now has a comprehensive set of rules which will hopefully result in faster and less costly arbitration proceedings for disputes that involve relatively small amounts. It remains to be seen whether arbitrations conducted under the Fast-Track rules will be significantly more efficient and less costly than under the ordinary rules, and whether they will gain popularity in the industry.

It may be said that the end result perhaps includes too much content from the ordinary rules, by, for example, allowing flexibility to agree three arbitrators and permit oral hearings etc, which risks undermining the aspirations of the Fast Track Rules. Hopefully, these possible concerns will remain theoretical in practise.

NORDISK 101 – CONTRACTUAL TERMS - CONDITIONS FOR A CONDITION?

During these Nordisk 101 articles, we shall look at the nuts and bolts of contract law (principally English law, but sometimes other jurisdictions including US law and Norwegian law), with a focus on contracts of carriage. It seldom hurts to go back to basics!

In the last edition, we covered some key issues to ponder when sizing up a contractual counterparty. In this and subsequent editions, we will cover express terms of a contract, starting with conditions.

The term "condition" can be a confusing one, as it is sometimes used in other ways such as, for example, a condition precedent or interchangeably as a synonym for 'terms'. In this article however we are considering a "condition" as a class of term that is so fundamental to the contract that any breach allows the innocent party to terminate the contract, as well as claim damages.

BY VICKI TARBET

Contrast this to a term which is merely a "warranty," the breach of which allows the innocent party to claim damages alone and what are perhaps the most difficult, "innominate" or "intermediate" terms which fall somewhere between the two and the remedy for breach of which depends on the consequences. If the consequences of a breach are such as to deprive the innocent part of substantially the whole benefit of the contract, then the term is treated as a condition and the innocent party can terminate the contract and claim damages. If the effect of a breach is not sufficiently serious, it is treated as a warranty and the innocent party is only entitled to claim damages.

The question of whether a term is a condition or not, is answered by looking at the contract as a whole to assess its importance to the purpose of the contract. Whilst not conclusive, labelling a term a "condition" is a good start. Other considerations include previous court decisions that have categorised a term as a condition, the importance of the term, the consequences of treating the term as a condition and whether there is a need for the certainty which a condition provides[1] .

1 See Chapter 3.21 to 3.25 of *Time Charters* (7th ed, Informa, 2014) T Coghlin *et al* for a closer discussion on these considerations.

BY CAROLINE LINDFORS

Examples from charterparties may illustrate these considerations:

• Some items of a vessel's description which are relevant to when the vessel is expected to start the chartered service, such as the expected date of readiness to load provisions[2] and statements as to the location of the ship[3] , both of which have been found by the Courts to be conditions.

• Descriptions relating to status, undertakings as to a vessel's class at the date of delivery[4] and descriptions of a vessel being oil major approved[5]. In contrast, note the 2019 Court of Appeal decision in *The Arctic*[6] in which an ongoing obligation to maintain the vessel in class throughout the entire (bareboat) charter period was not a condition, but an innominate term.

The answer is not always an easy one, as illustrated by the first instance decision in *The Astra*[7] and the Court of Appeal in *Spar Shipping*[8] – the former concluding that the obligation to pay hire is a condition, the latter confirming that it is not. For an in-depth analysis of these two decisions, please see our articles in Nordisk Medlemsblad no.576 and Nordisk Circular November 2016 edition.

Examples of conditions in sale contracts:

• In the Norwegian Saleform 2012, a failure to lodge the deposit (clause 2) or pay the purchase price (clause 3) are both conditions, which entitle the seller to cancel the contract and claim damages if breached.

• Under the Sales of Goods Act 1979 ("SGA 1979") certain conditions can be implied into the contract for the sale of a second-hand vessel. For example, the sale contract may be subject to an implied condition that the vessel will correspond to the description given, (see s.13(1) of SGA 1979).

• In the Singapore Saleform 2011, it is a condition of the contract that the vessel be free from encumbrances, charters, mortgages etc. on delivery (see clause 9a). In contrast, under the corresponding clause in the Norwegian Saleform 2012, that same provision is only a warranty.

Conclusions

As can be seen from this last example, the classification of a term as a condition as opposed to a warranty can leave the innocent buyer in a very different position, even though the consequence of the breach to the innocent party would be identical.

When deciding whether to terminate a contract for breach of a condition, it is important that any decision to terminate is made within a reasonable time. Otherwise, the innocent party can be deemed to have affirmed the contract, i.e. confirmed their intention to continue performing, despite the breach. In that scenario, the remedy is limited to damages.

As highlighted from the above examples, it may not always be easy to distinguish whether a term is a condition or something lesser, especially when under time and commercial pressure to make a decision. If an innocent party terminates due to their counterparty's breach of a clause they wrongly believe to be a condition, the consequences are serious and the innocent party can end up themselves facing a significant liability in damages for their own wrongful termination/repudiation of the contract.

Nordisk is always available to assist our members when faced with such issues, so please get in touch if you have any questions.

2 *The Mihalis Angelos* [1970] 2 Lloyd's Rep 43 at [47].
3 *Behn v Burness* (1863) 3B. & S. 751 at [759].
4 *The Seaflower* No.2 [2001] 1 Lloyd's Rep 341 (C.A) as per Rix LJ at [63].
5 *The Rowan* [2012] 1 Lloyd's Rep at [16].
6 [2019] EWCA Civ 1161.
7 *Kuwait Rocks Co v AMN Bulk Carriers Inc* [2013] EWCH 865 (Comm).
8 *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982.

NEW REQUIREMENTS FOR THE TRANSPORT OF LIQUID CHEMICALS IN BULK FOR NORWEGIAN OFFSHORE SUPPORT VESSELS

Many of our members are no doubt aware of new requirements for the transport of liquid chemicals in bulk for Norwegian flagged Offshore Support Vessels (OSVs). The background for this is the amendments to the IBC Code (International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk) and incorporation of the OSV Chemical Code in Norwegian legislation.

The new requirements may necessitate structural changes to existing OSVs, and the development of new requirements for training of personnel on board OSVs are also anticipated. Whilst the Norwegian Maritime Authority have allowed a transition period to give OSV owners time to consider and implement the new requirements, they are anticipated to come into force in January 2022.

BY ANDERS EVJE

Owing to the complex technical nature of the requirements, we are unable to go into the finer detail at this stage, but for further and more detailed information on the impact of the new requirements, time limits, the challenges and possible solutions, please see circular RSV 23-2020 issued by the Norwegian Maritime Authority. DNV has also provided useful comments on how to address the new requirements.

THE FLAVOUR OF NEXT MONTH – NORDISK WEBINAR ON IMO AND EU GHG MEASURES, WITH PARTICULAR FOCUS ON CHARTERPARTIES

BY LASSE BRAUTASET

Decarbonisation is an increasingly hot topic in the maritime press with a primary focus on the political and technical aspects of the problem.

The expectation is that we will know more about the shape of the future GHG measures during June, so it is important for both owners and charterers to be alert to the potential impact on their operations. Our webinar in May will thus focus on the potential contractual implications, especially in relation to time charters, voyage charters and contracts of affreightment (COAs).

Further details on the exact date and how to join the webinar will follow to Nordisk Members by email invitation.

Photos:

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