SANCTIONS AND CHARTERPARTY ISSUES – UKRAINE CONFLICT

Many Nordisk members are already impacted, or will be impacted, by the war started by Russia against Ukraine.

Sanctions are continually being implemented or updated by the E.U, U.K., and the U.S in addition to the sanctions already in place. Sanctions implemented to date, while complex, have fortunately been closely coordinated between these three entities so that their sanctions regimes largely mirror each other. It will become critical to understand the scope of such sanctions and particular focus should be placed on identifying the identities of contractual counterparts, and checking them against the various entity lists promulgated by the EU, UK and US. The origin and destination of all cargoes is also now relevant, in addition to the type of cargo being carried, given the sanctions in place to curtail trade with Crimea and the Donetsk and Luhansk regions of the Ukraine. Members should note that grains, oil and gas exports from Russia have thus far not been targeted.

BY PAIGE HALVORSEN

Our offshore members should be prepared for expanded sanctions impacting work conducted in Russia. Sanctions already in place generally limit the export of energy related goods or services. There may be further designations of entities and individuals operating in the offshore sector.

A critical question for most members will also be to determine whether a particular port is safe and/or whether sanctions apply to contemplated contracts. We have advised on the safety of calling at various different ports in Russia and Ukraine over the past few days and while there are significant risks posed by calling at Ukrainian ports, many Russian ports are still operating as normal. Members are encouraged to seek input from local agents, war risk insurers, and flag states, when conducting a risk assessment of any Ukrainian or Russian port.

In connection with fixtures, members should ensure that they have included safe port warranties and have incorporated the latest versions of the war

clauses, CONWARTIME 2013 and VOYWAR 2013, as well as comprehensive sanctions clauses such as the BIMCO Sanctions Clauses for Time or Voyage Charter Parties 2020. Nordisk aims to publish a more in-depth article in the coming days discussing war risk clauses, sanctions clauses, and safe port warranties; for which please also refer to the Nordisk LinkedIn profile and our web page for further updates as these issues develop.

Members are reminded that Nordisk has the resources and capacity to conduct entity sanctions checks and KYC risk evaluations, in addition to any general queries or specific concerns regarding, sanctioned cargoes, insurance cover, or calls at Russian or Ukrainian ports. Any such inquiries can be directed to sanctions@nordisk.no or post@nordisk.no.

THE "ETERNAL BLISS" ON APPEAL – DAMAGES AND DEMURRAGE REVISITED

The Court of Appeal [1] concludes that demurrage is an owner's sole remedy where a charterer fails to load and discharge cargo within the permitted laytime under a voyage charter.

The Facts

The "ETERNAL BLISS" loaded a cargo of soybeans in Brazil, which it carried to China. Due to port congestion, the Vessel waited for about a month before berthing. Upon discharge, the soybeans were found to be damaged with mould. Owners settled the resulting cargo claim for USD 1.1m with the receivers and then sought to recover this amount from the Charterers as damages for failing to discharge within laytime, in addition to demurrage.

BY PAIGE HALVORSEN

1 K Line Pte Limited v Priminds Shipping (HK) Co Limited, the "ETERNAL BLISS", [2021] EWCA Civ 1712

The High Court Decision

The High Court decision was covered in the October 2020 issue of the Nordisk Circular, but by way of recap, the principal question addressed was what damages, exactly, does demurrage liquidate? Owners argued that demurrage only liquidates lost earnings where there has been a failure to load and discharge cargo within the agreed laytime, but charterers contended that it encompasses all losses suffered when there has been such a failure. Thus, the Court was asked to determine whether Owners could recover for the cargo damage, in addition to demurrage on the basis of the same breach (failing to discharge within the agreed laytime). The first instance judge decided that an owner could bring such an additional claim, provided that it was a different type of loss to lost earnings.

The Decision on Appeal

The High Court decision was ultimately overturned

on appeal. After analysing a long line of authorities, the Court of Appeal decided that, on balance, the judgments tended to conclude that demurrage serves to liquidate all losses arising from delay.

In light of the lack of settled authority on the subject, the Court of Appeal decided the issue needed to be approached as one of principle. The Court of Appeal noted that an owner will often have insurance in place to address losses other than demurrage. In addition, if other "types of losses" were to be recoverable then it could lead to disputes as to what types of losses fall within or outside demurrage. In the interest of "*clarity and certainty*" and with an invitation to the industry to "*stipulate a different result*"[2] if desired, the Court of Appeal concluded that "*demurrage liquidates the whole of the damages arising from a charterer's breach of charter in failing to complete cargo operations within the laytime and not merely some of them.*"[3]

Practical Implications

The Court of Appeal judgment ultimately brings welcome legal clarity for now, albeit not perhaps what an owner would wish to hear. It is of course open to the parties to carve out other types of losses from demurrage, such as in respect of cargo claims; or otherwise define which damages demurrage liquifies.

We will keep you posted if permission to appeal the Court of Appeal ruling to the Supreme Court is granted.

2 Ibid at 59
3 Ibid at 52

BIMCO ELECTRONIC SIGNATURE CLAUSE 2021

Nordisk, together with other actors from the maritime community, recently worked with the BIMCO Documentary Committee to develop an electronic signature clause . The purpose of the exercise was to craft a clause that would allow parties to sign a contract, and any documents associated with or required by such contract, electronically; thereby making the formality of signing documents more straightforward. Shipping, like other industries, has become increasingly digitalized and this fact in part inspired the decision to create this new clause.

The team spent a fair amount of time defining an electronic signature to ensure that the parties to the contract and those who might be called upon to interpret it, such as arbitrators or courts, would be clear as to what constituted such a signature. The adopted definition is purposely broad and is in line with the EU and UK laws on electronic identification. The permissible types of signatures include cutting and pasting or typing a name into a contract, inserting an image into a contract or using a digital signature created by encryption technologies such as *DocuSign*.

BY SUSAN CLARK

Are signatures necessary?

Given that few charterparties are physically signed, some may question the need for such a clause. A recent case Nordisk handled in Italy illustrates the difficulties that may arise when a charter is not signed and the relevant importance of such a clause.

Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "Convention"), an arbitration agreement must be in "writing[1]" for it to be enforceable. While many signatories to the Convention accept that such an agreement must only be evidenced in writing, such as in a recap, some interpret the Convention to require such an agreement to be signed by the parties.

In the aforementioned case, a dispute arose under a charter governed by English law and subject to London arbitration. With Nordisk's assistance, our

1 Article II

member won the arbitration in London, but faced difficulties in trying to enforce the award against the respondent former charterers, an Italian corporation, in Italy. In the enforcement proceedings, the charterers claimed that the arbitration agreement, placed into the recap of the charterparty by their own brokers, was invalid and, therefore, non-binding, because neither party had signed the contract.

Unfortunately, Italian courts disagree on whether an arbitration agreement has to be signed to be legally binding, so there is no clear-cut answer. The case was eventually settled after much time and money was spent on arguing the point, but had the contract been signed with the ease of electronic signatures, this issue may have been avoided.

Enforcement

Sub-clause (b) of the BIMCO electronic signature clause was drafted with problems of enforceability, not only of an arbitration agreement, but indeed the contract as a whole, in mind. One of the main points courts address in cases where questions of the validity or enforceability of a contract or clause arise is evidence of the parties' intent to be legally bound. For example, in the Italian case mentioned above, the court was concerned with finding evidence that the charterers in fact agreed to give up a right to go to court in favour of arbitration. The language used in this sub-clause is meant to give an electronic signature the same weight in respect of evidence on the issue of intent as a physical or hand-written signature. Sub-clause (c) recognizes that this may not be sufficient in jurisdictions that are sceptical to or simply do not recognize electronic signatures. Thus, the sub-clause obliges the parties to promptly provide a handwritten signature on any relevant document on request.

Although this provision may be difficult to enforce in cases where the parties are no longer on speaking terms, especially once arbitration or enforcement proceedings are commenced, it, together with sub-clause (b), may provide sufficient ammunition to a party seeking to enforce an agreement that both parties wished to be legally bound at the time they entered into the contract.

Conclusion

The electronic signature clause, which was published by BIMCO in late 2021, is designed to be used in any contract, including charterparties and other shipping documents such as letters of indemnity and bills of lading. We hope that it will lead to contracts being signed more frequently, so as to potentially avoid the enforcement issues as we encountered above. Whether courts in jurisdictions requiring a signed arbitration agreement will view the electronic signature as sufficient remains to be seen, but the hope is that the new BIMCO clause will at the very least provide ammunition for parties attempting to enforce contractual agreements.

DATES FOR THE DIARY – OFFSHORE SEMINARS

By way of reminder to our Members who have already signed up, in March our offshore team is hosting three seminars for Nordisk members, as follows:

- Tuesday 8 March: Forsnavåg, Thon Hotel Fosnavåg
- Tuesday 15 March: Kristiansand, Clarion Hotel Ernst
- Tuesday 22 March: Haugesund, Haugesund Rederiforening

The topics we will cover include sanctions, Covid-19 and offshore wind.

We look forward to seeing you there!