MV HARRIER - GULATING COURT OF APPEAL (NORWAY) UPHOLDS THE DISTRICT COURT'S PRISON SENTENCING IN LANDMARK SCRAPPING CASE

BY OLA GRANHUS MEDIÅS

Background

Back in 2020, a Norwegian shipowner was convicted and sentenced to six months in prison for violating the Norwegian Act Concerning Protection Against Pollution and Concerning Waste (the "Pollution Act") which incorporates the EU Waste Shipment Regulation (NO 1013/2006). The shipowner appealed the case, and the Gulating Court of Appeal has now published their judgment, upholding the decision from the Sunnhordaland District Court.

The case concerned the attempted export of the Vessel, "*Harrier*" (former "Tide Carrier" and "Eide Carrier") that had been lying on the Norwegian west coast for more than 10 years whilst the owner sought employment for her. The Vessel was eventually sold and taken over by the cash buyers whilst still in Norwegian waters. Shortly after commencing her voyage from Norway, the Vessel suffered a main engine breakdown and needed to be salvaged just south of Stavanger, Norway[1].

Upon the examination of documentation found

1 The Buyers were fined seven million NOK for attempted export of the Vessel in violation of the Pollution Act, a fine which has been accepted by the Buyers. The Buyers that they made a "commercial decision" to pay the fine rather than challenge it in the Norwegian Court System, but that they disputed that the decision to issue the fine was correct.

onboard the Vessel following the salvage operations, Norwegian authorities believed the Vessel was heading to Gadani, Pakistan for beaching and scrapping in violation of the Pollution Act. Criminal proceedings were brought against the shipowner for *facilitating and providing assistance* to the Buyers of the Vessel, in order to arrange for the export from Norwegian waters.

Under the Pollution Act any export of waste to any non-EU or non-OECD countries is prohibited. The Key questions for the Court of Appeal to answer were (i) whether an operating vessel could be regarded as waste and (ii) what level of assistance may be subject to criminal liability.

Court of Appeal's Finding

The Court of Appeal upheld the District Court's decision. Of interest are the Court's comments on page 19 of the judgment, which state that as the Buyers were recycling the Vessel, it was waste even before the Vessel was exported from Norway. As part of the analysis of what constitutes "waste", the Court held that it is of no relevance whether the Vessel could sail under its own power or not. The Court also said that the fact that relevant provisions of the Waste Shipment Regulation are complicated, underscores the importance of anyone considering recycling a Vessel to seek legal advice to ensure that they have a correct understanding of the relevant provision(s).

In terms of what level of assistance may be subject to criminal liability, two of the seven judges dissented as they did not find it proven that the shipowner had provided sufficient assistance to amount to criminal liability. The majority, i.e., the five judges, found the shipowner had provided *sufficient* assistance by virtue of being the person in charge at the selling company, which included instructing his employees to provide extensive assistance in order for the Vessel to reach an operative condition to sail. Examples that the Court relied on included moving the Vessel from a layup state, as well as assisting in certification and testing of equipment. The Court held that although the assistance provided by the shipowner himself and his employees was not decisive for the Vessel's ability to leave, the majority found that the assistance provided was closely connected to the attempt to illegally export the Vessel.

It is worth noting that the Court states the prison sentence would most likely have been longer had the shipowner retained ownership and had attempted to export it himself. The Court also states that it will not make much difference whether a vessel is sold through a third party or sold directly to the relevant recycling facilities.

The two dissenting judges agreed with the majority that the Buyers had received substantial assistance in reactivating the Vessel, but did not find it proven that the shipowner himself carried out the assistance or instructed anyone else to carry out the assistance.

Summary Observations

The judgment is in line with the current understanding of when a vessel may be regarded as waste. Perhaps just as interesting are the comments about what may amount to aiding in an attempt, whether successful or unsuccessful, to export a vessel that is regarded as waste from Norway to a country outside the EU or the OECD.

The decision is still subject to appeal.

For any questions related to recycling of vessels, please contact the Nordisk Recycling Team:

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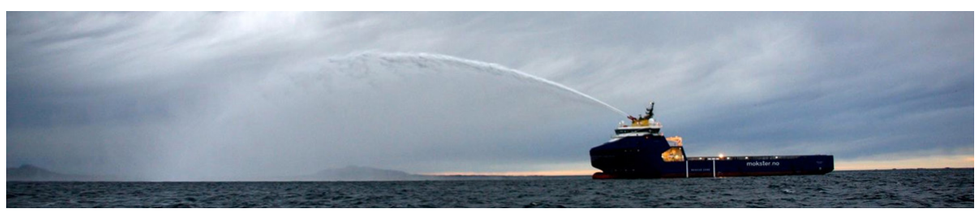

SCMA (SINGAPORE CHAMBER OF MARITIME ARBITRATION) RULES – NEW 4TH EDITION: A SNAPSHOT OF KEY CHANGES

With effect from 1 January 2022, the new fourth edition of the SCMA Rules ("**Rules**") shall apply to all SCMA arbitrations, that is where the parties have agreed to refer disputes to arbitration in accordance with the Rules.

In maritime contracts (charterparties and ship sale & purchase agreements for example), the agreement to arbitrate is usually contained in a written arbitration clause in the contract. Arbitral institutional rules such as the Rules, or LMAA (The London Maritime Arbitrators Association) Terms with which Members may be more familiar, are typically incorporated in the arbitration agreement either expressly by reference, or where an institution's model arbitration clause is used.

BY EILEEN LAM

Given the Rules were last amended in October 2015, these were updated to ensure continued relevance to the ever-evolving maritime arbitration landscape, and with the aim of facilitating the dispute resolution process whilst keeping costs down. We summarise the key changes below.

Adoption of Technology

The ongoing Covid-19 pandemic and consequent restrictions have no doubt affected the way dispute resolution is conducted today. The Rules now reflect current market practice.

- **Electronic service of documents**
  Documents will be deemed effectively served and received when sent to the addressee's desig nated email address.
- **Virtual hearings and case management conferences**

- Any case management meetings and hearings may be held in person, by telephone, by video-conference, or in other manner the constituted tribunal deems appropriate.
- **Electronic signing of awards**
  Arbitral awards may be signed by the arbitrators electronically and/or in counterparts.

Streamlining of Proceedings

- **Oral hearings no longer mandatory**
  An oral hearing is no longer the default. The constituted tribunal will have the power to decide if an oral hearing should be held or if the matter is to proceed on a documents-only basis. However, a hearing will still be held if a party so requests.
- **Arbitrations may proceed with two arbitrators**
  The default number of arbitrators under the Rules is three. However, two party-appointed arbitrators may now see a documents-only arbitration to its conclusion without the appointment of a third arbitrator unless (a) there is a substantive hearing or (b) the two arbitrators cannot agree on any matter.
- **Change in legal representation subject to Tribunal's approval**
  Any change of a party's authorised representative(s) after the tribunal is constituted will now be subject to the Tribunal's approval, primarily to prevent a party from deliberately changing counsel at a late stage to try and delay proceedings. The Tribunal will be able to withhold its approval where it is satisfied that there is a substantial risk that the change requested may prejudice (a) the conduct of the proceedings or (b) enforceability of any award.
- **Closure of proceedings**
  Arbitration proceedings shall be deemed closed three months from the date of any final written submissions or final hearing unless the parties agree, or the tribunal directs, otherwise. The Rules separately provide for a tribunal to make its final award within three months from the close of proceedings.
- **New expedited procedure**
  The Expedited Procedure, previously known as the Small Claims Procedure, shall now apply to any dispute where the aggregate amount of the claim and counterclaim (if any) is no more than USD 300,000 (excluding interests and costs). The procedure is intended to be a quick and cost-effective method of resolving a dispute, with there being a sole arbitrator, no oral hearing (unless required by the tribunal) and an award being issued within 21 days from receipt of the parties' case statements.

Others

- **Standard terms of appointment**
  To ensure greater certainty and transparency in the appointment of arbitrators, the newly introduced SCMA Standard Terms of Appointment shall apply to all arbitrations by default. The terms cover matters such as independence and impartiality of arbitrators, arbitrator fees, and the exclusion of liability.

The amendments are, overall, a welcome update to the Rules which are likely to improve the cost-efficiency of SCMA arbitrations. The new and improved Rules can therefore be expected to broaden the attractiveness of SCMA arbitrations going forwards, particularly among parties trading in Asia and/or with Asian counterparties.

NEW UPDATE ON SANCTIONS FOLLOWING UKRAINE CONFLICT

New Compliance Lawyer at Nordisk

We are pleased to welcome our new compliance lawyer, Anjalie Astrup-Heber to the Oslo team.

Anjalie has extensive experience within regulatory compliance focusing on KYC, anti-money laundering, sanctions, anti-bribery, and corruption. She is a qualified Barrister and Solicitor and holds a Chief Compliance Officer designation from the Canadian Securities Institute.

Prior to joining Nordisk, she held the position of Global Head of Compliance & Fund Structuring for an international asset manager.

Find out more about Anjalie here.

New update on sanctions following Ukraine conflict

BY ANJALIE ASTRUP-HEBER

Since our last update, new sanctions rules have been implemented in rapid succession by the EU, US, and the UK, in addition to those already imposed following the outbreak of the conflict in February 2022.

What are the new sanctions implications?

Energy sector

Since the March update, the US has banned the importation of Russian origin oil, liquified natural gas, and coal into the US. The UK Government has informed that it intends to phase out imports of Russian origin oil by the end of 2022.

In the fifth sanctions package published by the EU currently in force, Russian origin coal is now banned. The sixth EU sanctions package is under negotiation at the time of writing this article and it is expected to phase out imports of Russian origin crude oil (seaborne and pipeline) within 6 months and Russian origin refined products from the EU by the end of 2022. Norway as an EEA member is aligned with the EU and have now implemented the EU's fifth sanctions package.

It is expected that the phasing out of Russian origin oil from the EU may see some Member States heavily reliant on Russian oil being given an extension until sometime in 2023.

Ports

The US has imposed a prohibition on Russian-affiliated vessels from entering US ports. The definition of 'Russian-affiliated vessels'[1] means Russian flagged, owned, and operated.

The UK[2] has imposed a similar ban for UK ports on vessels flagged, registered, owned, or operated by anyone connected to Russia.

The EU has followed the US and UK with a non-binding resolution that bans entry of Russian-flagged vessels. Due to the non-binding nature of the port ban, each Member State will adopt the rules according to their circumstances. For example, the European port ban has been implemented in Norway with an exception given for Russian fishing vessels.

Expanded designated lists and financial restrictions

The UK, US, and the EU have continued to add to the designated lists. In addition to the impact on the energy sector with the 6th sanctions package, the President of the European Commission has announced that other measures will include further designations of high-ranking military officers and removal of Sberbank and two other banks (yet to be specified by the EU) from the SWIFT messaging system.

Other sanctions issues

- We are seeing concerns about Russian origin bunker oil and owners and suppliers are self-sanctioning by refraining from purchasing bunker oil that has been sourced in Russia, to avoid potentially breaching sanctions rules that are complex and ambiguous. Thus far bunker oil is not subject to sanctions, with the EU still contemplating sanctioning Russian origin oil.
- We have been reviewing sanctions clauses in loan agreements, which also need to be considered. Typically, the clauses in loan agreements are stricter than the actual sanctions rules.
- The recent *Strait Shipbrokers Pte. Ltd*[3] ("Strait") case from Singapore illustrates the importance of fulfilling a company's due diligence duty. Due to weak KYC procedures and lack of a sanction compliance program, OFAC observed that Strait failed to inquire about the country of origin of the cargo or specific port details or check the US Specially Designated Nationals ("SDN") list. This left Strait non-compliant with US sanctions in their capacity as brokers. Strait was found to have lacked visibility of the details of the contracts underlying the deals they were brokering and was consequently placed on the US SDN list.
- Law enforcement authorities in the UK and the US have announced a more aggressive enforcement approach. The UK Government has announced the establishment of a new 'Kleptocracy' team with the US announcing a similar task force called 'KleptoCapture'. It should be remembered that US sanction rules can apply to non-US persons through the secondary sanctions regime and thereby have extraterritorial reach. The EU has published a FAQ on Circumvention and Due Diligence requiring EU operators to perform appropriate due diligence using a risk-based approach and to ensure there is ongoing monitoring to prevent any breaches of sanctions rules. EU operators are guided to develop, implement, and routinely update their sanctions compliance programme to assist in detecting red flag transactions.

Conclusion

Many Nordisk members are experiencing challenges from sanctions imposed due to the war in Ukraine. Members should continue to have a particular focus on conducting comprehensive compliance due diligence reviews. Such reviews should consider (among numerous other considerations), (i) identifying the beneficial owners (including ultimate beneficial owners) of contractual counterparties to ensure there are no sanctioned persons or entities in the ownership chain, (ii) ensuring that origin, destination, and type of cargo are not subject to any sanctions imposed thus far, and (iii) the potential counterparties are not the subject of adverse media.

Nordisk has available resources and has expanded its capabilities to provide sanctions and compliance services to its members in the offshore and shipping sectors. Any such queries can be directed to sanctions@nordisk.no or post@nordisk.no.

1) A Proclamation on the Declaration of National Emergency and Invocation of Emergency Authority Relating to the Regulation of the Anchorage and Movement of Russian-Affiliated Vessels to United States Ports | The White House
2) UK introduces new sanctions against Russia including ban on ships and fresh financial measures - GOV.UK (www.gov.uk)
3) USCOURTS-dcd-1_21-cv-01946-0.pdf (govinfo.gov)