THE HONG KONG CONVENTION VERSUS THE BASEL CONVENTION – WHICH ONE IS GOING TO GIVE IN?

As keen readers of the Nordisk Circular will be aware (see the September 2023 Edition), the Hong Kong Convention for Safe and Environmentally Friendly Recycling of Ships (the "**HKC**") will (finally) enter into force on 26 June 2025. One might think that this will not cause any issues with the already existing framework that may apply to ships destined for recycling, including the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal in force since 1992 (the "**Basel Convention**").

Currently however, there is a lack of interplay between the HKC and the Basel Convention which in our view must be resolved before the entry into force of the HKC. Should this not be resolved, there is a risk that a vessel being sold in compliance with the HKC, may be a breach of the Basel Convention.

BY OLA GRANHUS MEDIÅS

The problem is that the Basel Convention and the Basel Ban Amendment (2019) simply ban the export of hazardous waste from a Basel Ban Amendment ratifying state to a non-OECD country. In line with long-standing case law, it is suggested that a vessel that is heading for the recycling yard is regarded as *waste*, and the export to a non-OECD[1] country will in these circumstances be prohibited. Any violation of this prohibition may in several jurisdictions expose the exporter, which is typically the owner of the vessel, to criminal liability.

The inconsistency must be understood against the background of the Basel Convention having a general applicability to any sort of *waste*, whilst the HKC *is shipping specific* and applies to ships and ship recycling facilities.

The consequence of this lack of interplay is that although a vessel has undergone the required preparations to be recycled in accordance with the HKC,

1 - The Organisation for Economic Co-operation and Development - Countries - OECD

the export of the same vessel from a jurisdiction that has ratified the Basel Convention and the Basel Ban Amendment may be regarded as a breach of the Basel Convention and the Basel Ban Amendment, which may lead to both (i) the vessel being detained and (ii) the owners of the same vessel being subject to penal sanctions.

In our view, this is far from satisfactory and creates a real risk of undermining the compliance with the HKC. If shipowners that are recycling vessels in accordance with the HKC run the risk of being prosecuted for a violation of the Basel Convention for the same sale, there is a genuine concern that this may reduce the willingness to choose to recycle in accordance with the HKC.

Nordisk shares the view put forward by Bangladesh, India, Norway, Pakistan, ICS and BIMCO on 25 January 2024, expressing the need for legal clarity and certainty so to ensure that operating in compliance with the HKC will not be sanctioned as a violation of the Basel Convention[2].

This issue is not new, and the EU had to deal with the same problem when deciding how the EU Waste Shipment Regulation ("**WSR**") and the EU Ship Recycling Regulation ("**SRR**") were to work together. The EU solved this by specifying that the WSR shall not apply to any vessels that are in the process of being recycled in accordance with the SRR. The WSR is based on the Basel Convention, whilst the SRR is based on the Hong Kong Convention – perhaps there is room for some inspiration from the EU's solution?

2 - See more in the following article from BIMCO: https://www.bimco.org/news/priority-news/20240215-submission-81-15-5

The Nordisk Recycling Team has extensive knowledge of recycling issues and are prepared to assist members with queries that should arise.

The Nordisk Recycling Team:

Mats E. Sæther
msather@nordisk.no

Olav Eriksen
oeriksen@nordisk.no

Ola G. Mediås
omedias@nordisk.no

Mina Walen Simensen
msimensen@nordisk.no

THE "AQUAFREEDOM" – "A 'SUBJECT TO CONTRACT AGREEMENT' IS NO AGREEMENT AT ALL"

This involved an application for summary judgment by the Owners of the vessel, *Aquafreedom*, (Southeaster Maritime Ltd) against Trafigura Maritime Logistics Pte Ltd ("Trafigura")[1], who purported to be the charterer following a series of negotiations for a time charter.

Owners sought summary judgment on the basis Trafigura had no realistic prospect of successfully resisting Owners' application for a declaration that no binding charterparty had been concluded.

The Facts

Negotiations, which were being conducted by brokers, began on 25 January and culminated in a recap that was circulated on 30 January 2023. The recap included the following terms:

BY VICKI TARBET

Trading
WW trade with exclusions to be agreed
Cargo
Normal DPP/Crude – wording to be mutually agreed
Terms:
As per previously agreed terms sub review both sides.
Subs:
Charterers management approval latest 2 working days after all terms agreed.

During 1st and 2nd February, there were further exchanges between the parties concerning additional terms. The key points of which to note are:

(a) on 1st February Owners sent an email to Trafigura containing amended and/or additional terms including a revised drydock clause, CII, EEXI and ETS clauses;

(b) there was no clean acceptance of this email by Trafigura; but

(c) instead, Trafigura sent various comments to the Owners' clauses over two subsequent emails, some of which Mr Justice Jacobs determined amounted to a counter-offer.

It appears Owners then began to have second thoughts about entering into the contract with Trafigura and stopped responding.

1 - Southeaster Maritime Ltd v Trafigura Maritime Logistics Pte Ltd [2024] EWHC 255 (Comm)

On 6th February, Trafigura purported to accept Owners' offer of 1st February advising they would revert regarding the subject "*Charterers management approval*" as soon as possible. However, prior to that subject being lifted, Owners asked the brokers to inform Trafigura that they were not on subs, as terms had not been agreed. That message was passed to Trafigura after which, Trafigura purported to lift its subject.

The Arguments

Owners' case was that there was no binding contract on 30th January. The relevant arguments for the purpose of this article are that the recap included a subject and it was a condition precedent that the parties reach agreement on all terms before the time period for the subject "*Charterers' management approva*l" would run. Owners further argued there was no binding contract on 6th February because their email of 1st February was not one that was capable of acceptance. Even if it was, it had been rejected by Trafigura's subsequent counter offer(s).

Trafigura took the opposite position. They contended that a binding contract had been concluded on either 30th January or 6th February:

(a) In respect of 30th January, they argued that "*as per previously agreed terms sub review both sides*" meant that the parties had agreed to be bound, even if further terms were agreed. From that it must follow that the subject requiring "*Charterers management approval"* was also a condition subsequent.

(b) In respect of 6 February, they argued that Owners' offer of 1 February was one that was capable of acceptance. It had not been rejected by Trafigura by way of counter-offer but had instead been cleanly accepted on 6th February.

The Court's Decision

The Owners succeeded in their application for summary judgment.

Mr Justice Jacobs considered that it was beyond any serious argument that the subject in the recap must be interpreted in line with the existing authorities (*The Leonidas*[2] & *The Newcastle Express*[3]), namely, that there was no contract between the parties until the subject had been lifted. Mr Justice Jacobs affirmed the view of Lewison LJ in an earlier judgment "*in short, 'a subject to contract agreement' is no agreement at all*"[6]. The subject '*Charterers management approval'* was a condition precedent to the conclusion of a binding contract.

Mr Justice Jacobs also concluded that on the facts, the parties had not reached an agreement on all terms by 6 February, or at all. The Owners' email of 1st February was not an offer that was capable of being accepted by Trafigura, because it called on Trafigura to propose wording for at least one clause. Mr Justice Jacobs further concluded that even if that email did amount to an offer capable of acceptance, Trafigura had not accepted. The emails sent by Trafigura on 1st and 2nd February, amounted to counter offers.

Comment

This case provides further confirmation and upholds the existing line of authority (*The Leonidas* and *The Newcastle Express*) that an agreement made on subjects is not a binding contract and does not become a binding contract until subjects are lifted. Put simply, either party is free to walk away without legal consequences until the subject(s) have been lifted.

The case also provides a valuable reminder that under English law, the legal effect of making a counter-offer is to reject the offer currently on the table. Once rejected, an offer is not capable of acceptance at a later date. This applies equally whether negotiating a contract or a for example, a settlement of a claim.

As the law stands, there is a distinction between what is a mere inquiry for further information/ clarification and a counter-offer. A mere inquiry will not be treated as a rejection to an offer, whereas a counter-offer will. Careful thought should therefore be given by our Members when responding to an offer so as not to (inadvertently) reject it, if that is not what is intended.

2 - Nautica Marine Ltd v Trafigura Trading LLC [2020] EWHC 1986

3 - Dhl Project & Chartering Ltd v Gemini Ocean Shipping Co. Ltd [2022] EWCA Civ 1555

4 - Nautica Marine Ltd v Trafigura Trading LLC [2020] EWHC 1986

5 - Dhl Project & Chartering Ltd v Gemini Ocean Shipping Co. Ltd [2022] EWCA Civ 1555

6 - Above at 1, para 107, as per Lewison LJ Generator Developments Ltd v Lidl UK GmbH [2018] EWCA Civ 396 at 79

THE "ANNA DOROTHEA" – UPHOLDING "PAY NOW, ARGUE LATER" CLAUSES

The Owners (Bulk Trident Shipping Ltd) chartered out the *MV Anna Dorothea* to the Charterers (Fastfreight Pte Ltd)[1], on an amended NYPE 1993 form with additional clauses, for one time charter trip carrying a bulk cargo from East Coast of India to China.

Clause 11 of the Charterparty required the charterers to pay hire instalments every 5 days in advance, at the daily rate of USD20,000. Clause 11 also included the following wording:

"*Notwithstanding of the terms and provisions hereof no deductions from hire may be made for any reason under Clause 17 or otherwise (whether or alleged off hire underperformance, overconsumption or any cause whatsoever) without the express written agreement of Owners at Owners' discretion. Deduction from hire never allowed except for estimated bunker on redelivery*" (the "no deduction" amendment).

BY CAROLINE LINDFORS

The Charterparty also contained off-hire Clause 17 (as referenced in Clause 11) and the BIMCO infectious or contagious diseases clause among the additional clauses ("Clause 67"). Clause 67 also included an off-hire provision for all time lost as a result of the listed events.

The Facts

On the reported facts at least, the Vessel loaded in India without a hitch and arrived at the disport, Lanqiao in China on 4 May 2021. However, on 1 May, three crew members testing positive for Covid-19. The Vessel was then delayed in berthing and ultimately, not re-delivered to the Owners until the end of August 2021.

The Charterers relied on Clause 67 and contended that the Vessel was off-hire as a result of crew testing positive, for the entire 120 period as

1 - Fastfreight v Bulk Trident Shipping [2023] EWHC 105 (Comm)

from 1 May through to re-delivery on 28 August. Thus, Charterers did not pay hire to the tune of USD2,147,717.79.

Partial Final Arbitration Award

In addition to disputing the off-hire period on the facts, Owners sought an interim award for the hire, relying on the "no deductions" amendment at Clause 11. Owners argued that Charterers were not entitled to retain the hire absent Owners' express written agreement, which agreement had not been given.

In response, Charterers contended that the "no-deduction" amendment did not apply. Essentially they argued that the "*no deductions from hire*" language in Clause 11 pre-supposed that hire was due and payable in the first place. But as the Vessel was off-hire as at the hire installment date(s), the obligation to pay hire was suspended (as per *The Lutetian*)[2]. As such, Charterers did not pay hire and thus had not made a "deduction".

The Tribunal found in Owners' favour and concluded that Charterers' interpretation of the "no deduction" amendment is not what commercial parties would have understood "*no deductions from hire"* to mean. The overall intention was to ensure that the Charterers could not withhold hire without the Owners' agreement. The Tribunal held that this "clear intention" arose from some or all of the following language in the "no deduction" amendment (emphasis added):

(i) "Notwithstanding of the terms and provisions hereof" coupled with the catch-all "any reason under Clause 17 or otherwise" wording

(ii) "whether/or alleged off-hire…..or any cause whatsoever" and

(iii) Deduction from hire never allowed…"

The Tribunal also concluded that *The Lutetian* was of no assistance to Charterers, since the charterparty in question there did not contain any provision along the lines of the "no deduction" amendment to Clause 11.

Appeal to the High Court (Commercial Court)

The Charterers appealed the interim partial award to the Commercial Court (Henshaw J). The question of law to be considered was:

"Where a charterparty clause provides that no deductions from hire (including for off-hire or alleged off-hire) may be made without the shipowner's consent: is non-payment of hire a "deduction" if the Vessel is off-hire at the instalment date?"

The Judge concluded that the answer was "yes" and upheld the Award. The Tribunal had correctly applied the ordinary principles of contractual interpretation. Whilst ideally Clause 11 would have referred to no "withholding" of hire rather than no "deductions", the reasonable and commercial understanding of the "no deduction" provision was to impose a "*hell or high water*" absolute payment obligation[3] , thereby limiting any exercise of rights Charterers would normally have had under the off-hire provisions.

Having so concluded, the Judge decided he did not need to reach a view on whether or not to follow *The Lutetian*. He did however also observe the absence of any "no deduction" language from *The Lutetian*, such that it could not provide an answer to the question posed.

Commentary

This is perhaps an unsurprising decision given the wide wording of Clause 11 (indeed the Tribunal went so far as to say it might even be "*said to suffer from overkill"*[4]), but a salutary reminder to charterers that tribunals and the Courts are giving effect to these types of clauses. Indeed, the Tribunal observed that these provisions had, in their experience, become increasingly common to guard against spurious / alleged off-hire deductions[5].

Although the Owners continued to perform in this instance, given the absolute obligation to pay hire on the due date, the Charterers were running the risk that Owners may have triggered the anti-technicality provision of Clause 11 and, potentially, exercised their right of withdrawal absent payment.

Nordisk is always available to assist its members vis a vis their rights and obligations to pay and receive hire.

2 - Tradax Export SA v Dorada Compania Naviera, QBD Comm Ct [1982] 2 Lloyds Rep 140

3 - Footnote 1 above, at paragraph 39

4 - Footnote 1 above, at paragraph 18

5 - Footnote 1 above, at paragraph 19

UPCOMING DATES FOR THE DIARY – OFFSHORE SEMINAR SERIES 2024

In March the Nordisk Offshore team is hosting two seminars for Nordisk Members, as follows:

- Wednesday 13th March – Fosnavåg – Thon Hotel Fosnavåg, Gerhard Voldnes Veg 7
- Tuesday 19th March – Haugesund – Haugesund Rederiforening, Møllervegen 6

Registration commences at 16.00, with the seminars starting at 16.30. Light food and refreshments will then be served afterwards from around 18.30.

Invitations have already been dispatched by e-mail and reminders were sent out on 26 February, but there are still places left so if you have not yet signed up, please contact Siri at srosendal@nordisk.no.

We look forward to seeing you there!

Photos:
Courtesy of (c) Tim Börner (page 1), DOF Management (page 2), Kees Torn (page 3 and 5), Umoe Wind (page 7)