IMLS Newsletter

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Dear Clients, Friends and Industry Members,

As you may recall, our 15th Annual International Maritime Law Seminar was to be held in London on October 8, 2020. Unfortunately, that forum, just like the one in Singapore that was scheduled for May, had to be cancelled as a consequence of the COVID pandemic and public regulations. We do hope that everyone and their families are safe and well. Hopefully, this time next year will be a very different environment and we will be able to resume our popular conference.

We are pleased to report that the Members of the IMLS have put together a compendium of articles on recent developments in the maritime law around the world in hopes that it will "fill the gap" and provide some important information for the industry during this turbulent time.

The compendium is a modest token of our gratitude to all of you for your friendship and business during these tough times.

With our best Wishes from the **IMLS Group**

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Bruno Weber-Steinhaus and Marco Remiorz

ARNECKE SIBETH DABELSTEIN

Coronavirus, Voyage Charter Parties and Force Majeure

A Comparison Between the German and English Law

Against the background of the closures of Chinese ports due to the coronavirus, the question arises under which conditions, expenses and risks the charterer may cancel his voyage charter party. The following article compares the situation between English and German law from the charterer's point of view and asks in particular what happens if the voyage charter party does not contain a force majeure clause.

1. GERMAN LAW

On first appearance, the principle of force majeure is immanent to German transport and shipping law (fourth and fifth book of the HGB (German Commercial Code)). Taken the exclusion of the freight forwarder's liability[1] as an example, the necessary due diligence measures concern the unavoidability of loss of or damage to goods and failure to meet delivery deadlines. The unavoidability test is initially subject to all unforeseeable external events; in this respect, the exclusion of liability corresponds to a force majeure liability limit.[2]

However, when referring to the principle of force majeure, a distinction must be made between reasons for the exclusion of liability in favour of the owner and the possibility to cancel a voyage charter party by the charterer. The voyage charterer subject to sec. 532 HGB may, as far as the charter party does not contain a force majeure clause, cancel the charter party at any time and without giving reasons.

Whether the owner can claim freight (less any expenses saved)[3] or dead freight[4] as well as demurrage then depends on whether a case of "interference with the basis of the transaction"[5] can be assumed.[6]

If the charterer is not able to prove the requirements for "interference with the basis of the transaction"[7], thus cannot prove that the equivalence of performance and consideration as part of the objective basis of the transaction is so severely disrupted by unforeseen changes after conclusion of the contract that the risk normally borne by one party is unreasonably exceeded *("clausula rebus sic stantibus")*, the owner's freight or dead freight claim remains valid. In such case the reason for the termination cannot be assigned to the owner and risk associated with the cancellation of the charter party remains with the charterer.

2. ENGLISH LAW

Regarding English law, the situation is comparable. Under German law, the question of whether a cancellation free of charge is possible, primarily depends on whether the charter party contains a force majeure clause. In the absence of such a clause, recourse must be made to "interference with the basis of the transaction" in German law or "frustration of contract" in English law. Even if these are two separate legal concepts with their own prerequisites, they are both based on the fundamental disruption of the equivalence between performance and consideration.

2.1. No General Recognition Of Force Majeure Under English Law

The necessity of a force majeure clause is due to the fact that English law does not recognise the principle of force majeure on either a statutory or a common-law basis. Therefore, in the event a charterer desires to cancel his charter party under English law due to force majeure, he needs a corresponding force majeure or a quarantine clause, on which he can rely on.

Charter parties subject to English law in most cases can only be cancelled if, and insofar as a fixed date (e.g. the cancellation date) expires or a fixed situation (e.g. a case of force majeure listed in the contract) occurs. As a result, English law does not recognise an anticipated general right of cancellation of the charterer.

For example, a charterer may not cancel a charter party already if it can only be assumed that the vessel will not arrive on time. This principle is supported by the majority decision of the Court of Appeal in the case "The Mihalis Angelos". The Mihalis Angelos was chartered on a Gencon form to ship cargo from Hai Phong (Vietnam) to Europe. It was alleged by the charterer that he had effectively terminated the charter party due to force majeure. In his view, the war-like situation in Hai Phong in July 1965 would have made loading of the Mihalis Angelos impossible.

The Court of Appeal rejected an early cancellation right of the charterer in particular with the argument that due to the agreed cancellation clause the existence of a cancellation right of the charterer regarding force majeure was not necessary in such a

case. Should the conditions of the cancellation clause actually occur, the clause would provide sufficient protection for the charterer.

In the event, a charter party, such as the BIMCO GENCON 1994, does not contain a force majeure and/or an explicit quarantine clause and the parties have not agreed on any such clauses in the recap or as rider clauses, the question arises under which pre-conditions the charter party can be cancelled prematurely.

2.2. Frustration Of Contract

Depending on the circumstances of the individual case, a charterer may recur to the principle of the "frustration of contract" to cancel his charter party prematurely.

Comparable to the pre-conditions on the "interference with the basis of the contract" under German law[8], English law provides for contract to be cancelled irrespective on any cancellation clauses in the event that after the contract was concluded, that due to an unforeseen event (or unforeseen circumstances) and without the fault of either party the purpose of the contract became obsolete. This is the case if reaching the purpose of the contract is excluded.

The reasonableness to execute the contract in the agreed form at all must have been lost for both parties according to objective standards. Purely economic reasons, which usually affect only one of the two parties, are usually not sufficient to assume a "frustration of contract".

In the case of the "Agathon"[9], the "frustration of contract" of a charter party was denied, although the unloading of the Agathon took months due the outbreak of the first Gulf War in 1980. The Court of Appeal did not consider the fact that the Agathon was only able to unload its cargo extremely slowly sufficient. In the opinion of the Court of Appeal, the execution of the contract was considerably delayed, but the intended purpose of the parties was still to be achieved.

Since the question of whether a "frustration of contract" exists depends on the circumstances of the individual case and cannot be conclusively anticipated in view of the scope of the English case law, a "frustration of contract" should only be assumed if, similar to the objective impossibility under German law[10], it can be safely stated at the time of termination of the contract that the contract can no longer be performed. This is because the purpose of the contract then objectively ceases to apply to both parties.

Transferred to the question of the charterer's right of cancellation, this means that he can only cancel the (voyage) charter party on the basis of the "frustration of contract" if at the time of termination it is certain that the port will no longer be open until the Cancellation Date. If the charterer can effectively cancel the contract, the legal consequence of the "frustration of contract" is that the contract is considered terminated as from the date of the frustration and the parties are released from their mutual obligations as from that date.

3. CONCLUSION

Under German and English law, a charter party can only be cancelled without the owner being able to claim freight if and insofar as the parties have agreed a force majeure clause and one of the cases mentioned in the force majeure clause has occurred. If no force majeure clause has been agreed, the charterer must resort to the principle of the "frustration of contract" for an effective and cost-neutral cancellation of the charter party. However, since the exact circumstances of the individual case are important, there is no conclusive legal certainty in applying the "interference with the basis of the contract"[11] and the principle of the "frustration of contract".

Apart from the question whether and under which conditions the charterer can cancel his charter party in the event of closure of a port due to coronavirus, the question arises under German and English law, in particular, as to which party bears the demurrage risk if the ship is factually fixed in the port during its effective tender (NOR - Notice of Readiness).

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[1] Sec. 426 HGB.
[2] Oetker, Handelsgesetzbuch, 6. Auflage 2019, sec. 426, para. 4.
[3] Sec. 532, 489 II No. 1 HGB
[4] Sec. 532, 489 I No. 2 HGB
[5] Störung der Geschäftsgrundlage, Sec. 313 BGB (German Civil Code).
[6] Rabe / Bahnsen – Seehandelsrecht, 5. Aufl. 2018, sec. 532, para. 7; BGH, Urteil vom 06.12.1962 – BGH Aktenzeichen II ZR 112/61LG Hamburg, in VersR 1963, 183.
[7] Sec. 313 BGB.
[8] *Id.*
[9] Kissavos Shipping Cc. S.A. v. Empresa Cubana de Fletes, Court of Appeal, May 25 and 26, 1982 (The "Agathon").
[10] Sec. 275 I BGB.
[11] Sec. 313 BGB.

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Bad Bunkers: Am I completely without rights?

Issues with contaminated bunkers is not a new thing.

Maritime lawyers around the world have for years been used to dealing with "off-spec" bunker cases, but the surge of incidents in 2018 and onwards was unusual with alarmingly high number of problems with bunkers supplied at various ports around the world.

What was also unusual is that in most of the cases, the initial test carried out at bunkering did not show that the bunkers were off-spec. Only when filters started clogging, fuel pumps stopped working and in the worst cases, the main engines were damaged, did the crew realize the vessel was burning bunkers contaminated with what was ultimately believed to be phenolic compounds.

The incidents have led - and can still lead - to serious accidents including blackouts and groundings.

1. Contractual issues

Bunker supply contracts – or the general terms and conditions of bunker traders are notoriously one-sided.

While owners and charterers may see this as unfair, it is important to also view this from the bunker traders' side. In fact, bunker traders often act as a credit facility to owners and charterers. It is not uncommon to see operators having a larger bunker debt than bank debt and on top of that bunkers are often (at least partly) used before payment for the bunkers are even due. In that light, it is understandable that bunker traders' general terms and conditions heavily favor the bunker trader.

While many bunker traders' terms and conditions obviously vary, there are also many similarities. Most, if not all, require a notification of quality claims within a certain time period. Most of between 7 and 30 days of bunkering.

In the 2018-surge of bad bunkers most tests taken at bunkering did not show any quality issues so the vessels only found out when they started using the bunkers and quite often this happened after the notice period had lapsed.

In addition, the bunker traders most often only promise to deliver fuel compliant with MARPOL / ISO 8217 and it is important to stress that this only means that the bunkers have certain compliant characteristics at the time of bunkering. This does not necessarily mean that the bunkers will have the same characteristics when being burned weeks later nor does it mean that it will not hurt the main engine as there could be components in the bunkers not covered by ISO 8217.

The bunkers on board could, for instance, have changed characteristics by being contaminated by cat fines. This is especially the case, if the tanks have sediments from earlier stems with cat fines in the bottom and the vessel hit heavy weather before burning the new bunkers.

Consequently, the only way to test the newly stemmed bunkers are by more advanced testing such as GCMS-testing or by test-burning the bunkers after the stem. However, immediate test-burning is only theoretically possible as the bunkers are not allowed to be burned in port, but perhaps the new normal should be to test-burn new bunkers taken on board as soon as legally possible instead of waiting until other tanks are empty and then switch to the new bunkers after perhaps two weeks of sailing, now situated in the middle of the Pacific with a storm looming and the nearest rescue and/or tug boats thousands of kilometers away.

2. What can owners and charterers do?

The relationship between owners and charterers is governed by the charter party, but is a charterer that has bought contaminated bunkers from a bunker trader and only discovers this after the notification period has lapsed, totally without rights?

The answer is that it depends on what country's law that governs the dispute and whether the bunker trader's and/or physical bunker supplier's terms and conditions are legally binding.

If the charterer ordered and bought the bunkers from a bunker trader, the purchase is subject to a contract governed by the bunker trader's terms and conditions and many of these terms and conditions are subject to US law, but they differ as some refer to US general maritime law and some refer to US state law (an even others to both).

If US State law applies, the United States Uniform Commercial Code ("UCC") is normally considered automatically incorporated and UCC section 2-725 states:

> *An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.* (my underlining)

The question is if a notification period of perhaps only seven days, will be considered a breach of UCC 2-725, providing a buyer a one-year limitation instead. If so, the notification period is without effect and the charterer can still bring a claim against the bunker trader.

The US general maritime law does not contain the same rule, so if the standard terms and conditions refer to US general maritime law only, the charterer has lost this argument.

Under UK law, the Sale of Goods Act, article 35 provides a buyer a *"reasonable opportunity to examine"*. The question is when it is reasonable to

examine. Would that be as soon as legally possible or after the two weeks of sailing, now situated in the middle of the Pacific with a storm looming? The bunker traders would certainly argue the first scenario. Further, with the decision in RES COGITANS it should be kept in mind that it is highly questionable if the Sale of Goods Act art. 35 come into play at all.

Are there other options to the charterer left with bad bunkers and a claim from owners due to main engine damage?

If the engine is damaged due to the bad bunkers, and if the bad bunkers can be considered a defective product, then such defective product has caused damage to something different than itself and in most jurisdictions, including Denmark, such claim could be presented as a product liability claim.

In addition, a product liability claim is in most jurisdictions considered an out of contract claim, so if the charterer brings a claim under product liability the charterer may be able to breach the limitation clauses that most general terms and conditions contain which normally limit the bunker traders' liability to the value of the stem.

In addition, by using the product liability regime as a base for the claim, there is also a chance to claim against the physical supplier as the physical supplier delivered the product to the market. In some jurisdictions it may, on the other hand, be difficult to use the product liability regime to claim against the bunker trader. Then again, in some jurisdictions, an intermediary is also considered a supplier under product liability rules, so the possibilities – and pitfalls – are endless, but most importantly, the owners and charterers are not left entirely without rights.

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Conflict of Admiralty & Insolvency/Company Laws: The Bombay High Court Charts A Clear Course

The Hon'ble Bombay High Court (hereinafter referred to as the **"Court"**) on 19th May 2020 pronounced an eagerly awaited judgement in what promises to be a landmark case of *Raj Shipping Agencies v. Barge Madhwa and Anr., CHS No. 66 of 2018 in ADMS 6 of 2015.*

To give context, it was observed by the Court that in various matters pertaining to *in rem* actions in the admiralty jurisdiction, issues pertaining to overlap of the provisions of the Admiralty Act and the IBC and/ or the Companies Act; issues pertaining to initiation or continuation of the admiralty proceedings during the impending moratorium period; and issues relating to the need to seek leave of the Company Court, arose. With a view to setting the debate to rest on all these issues, the Court appears to have tagged all the said categories of matter together and has considered them together in a comprehensive judgement.

A. SUMMARY OF FINDINGS

The Court in the present judgement reviewed the existing body of law and categorically held the following:

1. That *vis-à-vis* the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **"IBC"**), an action *in rem* may be filed and the ship arrested (a) before the moratorium under Section 14 of the IBC comes into force; or (b) during the moratorium period; or (c) even after the corporate debtor is ordered into liquidation. In so doing, the Court held that the provisions of the IBC have to read harmoniously with the provisions of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 (hereinafter referred to as the **"Admiralty Act"**); and
2. That the Admiralty Act (being a special Act) would prevail over the provisions of the Companies Act, 1956 (hereinafter referred to as the **"Companies Act"**) (being a general legislation) and no leave would be required under Section 446 (1) of the Companies Act for (a) commencing a suit under the Admiralty Act; or (b) proceeding with a pending suit against the Company under the Admiralty Act, when a winding up order has been passed or the Official Liquidator has been appointed as Provisional Liquidator.

Pertinently, the Court has also held that an action *in rem* against a vessel will proceed in accordance with the Admiralty Act (being the applicable law), and the priorities for payment out of the sale proceeds of the vessel will also be determined in accordance with the Admiralty Act (*See:* Section 10 therein) and not as per the priorities set out in Section 53 of the IBC. In the same breath, the Court has also held that in the matter of priorities for payment out, Section 10 of the Admiralty Act would prevail over Sections 529 and 529A of the Companies Act.

The Court in the said judgment has also considered previous pronouncements passed on the issue by the Bombay High Court as well as other Courts and particularly appears to have agreed with the conclusion reached by the Division Bench of the Madras High Court in the case of *Pratibha Shipping Company Ltd. v. Praxis Energy Agents SA., (Unreported) Dt. 9.8.2019 in OSA Nos. 20, 317 to 349, 363 & 264 of 2018 & W.A. Nos 738 to 751 of 2013* (hereinafter after referred to **"MT Pratibha Cauvery Appeal Court judgment"**) which in unequivocal terms held that no leave of the High Court/ Tribunal is required under Section 446(1) of the Companies Act/ Section 279 of the Companies Act, 2013 to file or proceed with an admiralty suit, after the Winding Up Order is passed by the Court and an Official Liquidator or Provisional Liquidator is appointed by that Court/ Tribunal (*albeit* for different reasons). Bose & Mitra & Co. had represented M/s. Smit India Marine Services Private Limited, the salvors of the vessel MT Pratibha Cauvery in the said MT Pratibha Cauvery Appeal Court judgment, obtaining a favorable judgment and bringing our clients a step closer to realizing the sums expended towards salvaging the said vessel.

The Court also took note of the order dated 12 October 2017 passed by in *Fleet Ship Management Inc. v. LPG Maharshi Mahatreya, Notice of Motion (L) No.608 Of 2017 in Commercial Suit (L) No.499 of 2017,* wherein it was observed that *"despite this plea, strangely, the Committee of Creditors is not in a position to indicate as to whether and in what manner the arrested vessel ought to be maintained. Apparently, the crew of the vessel must fend for themselves and suffer whilst the Committee of Creditors takes its own time to take a call on these issues which required urgent attention".* Bose & Mitra & Co. had represented the crew members on board the vessels and their manager M/s. Fleet Ship Management Inc. in the said case and were successful in assisting our clients to get their outstanding crew wages, management fees and amounts expended towards maintaining the vessel and providing essential supplies. In the said matter, the Committee of Creditors had opposed the sale of the vessels by the Admiralty Court and even after the said order was passed failed to take measures maintain the vessels despite these assets being mortgaged to them. Eventually, after a passage of about six months, the banks requested the Admiralty Court to sell the vessels. Payments made were opposed by the Committee and protracted litigation ensued even thereafter.

The Court in the present matter, took note of all these facts and appears to have expressed its displeasure in the manner in which assets of an insolvent entity are dealt with by the Banks. Importantly, it took note of the reluctance of the Banks to maintain the vessel, which while not strictly violative of any provision of law, could lead to serious consequences including damage the environment.

B. IMPACT AND ANALYSIS: IS IT ALL SMOOTH SAILING?

The judgement is commendable for providing a detailed analysis of the conflict at hand. It has highlighted the importance of admiralty laws and the Court has, in a well-reasoned and extensively supported judgement, laid out the basis for its conclusions. That said, there are a few possible issues *vis-à-vis* a genuine admiralty claimant, which remain murky and which the Court may once again be called upon to decide.

For instance, the Supreme Court of India in the case of *VSNL v. Kapitan Kud, (1996) 7 SCC 127* (**"Kapitan Kud Judgment"**) also referred to the English case of *The Moschanthy [1971] Lloyd Rep 37*, where it was held that an admiralty action should be stayed only when the hopelessness of the Plaintiff's claim is beyond doubt. The Division Bench of the Bombay High Court in the case of *M/s. Kimberly- Clark Lever Private Ltd. v M.V. Eagle Excellence, [Appeal No. 240 of 2007 in NMS No. 2346 of 2006 in ADMS No. 12]*, in its interpretation of the Kapitan Kud Judgment equated the threshold of enquiry of a Court in the context of a reasonable best arguable case with a *prima facie* case.

From the above, it would therefore appear that a claimant is merely required to present a *prima facie* case to secure an order of arrest (and in practice this is how arrests are granted in admiralty actions). In view of this pronouncement, claimants with potentially frivolous claims, may merely secure an order of arrest (if only to steal a march on the priority determination under the IBC), thereby being afforded the status of a secured creditor *qua* the vessel. In light of this, the Courts may eventually be called upon to separately provide for thresholds and guidelines for inclusion of the maritime claims in the insolvency resolution process.

Additionally, the Court has stated that the claimants securing the order of the arrest would be treated as secured creditors. It would be interesting to see how the law in this regard develops, namely whether the present judgement of the Court is interpreted to mean that the rights afforded to a secured creditor under the IBC (such as notice of meetings, voting rights, etc.) would also be provided to maritime claimants.

Further, financial institutions such as banks may see this judgment as an embargo over their rights under IBC and may therefore proceed to commence admiralty actions for realization of their security. That said, their right to sale proceeds would be after that of maritime lien holders but before that of other maritime claimants.

C. CONCLUSION

The judgment is indeed a laudable step in reconciling two fields of law which have for long been perceived to be at odds with each other. The authors hope that this judgment goes a long way in highlighting the special nature of maritime cases. Unlike other movable assets, a ship/vessel is a living ecosystem in itself and cannot be abandoned by shutting it lock stock and barrel. This should prove to be a timely reminder to the officials involved that a ship/vessel is to be taken care of especially during the period of insolvency/liquidation and cannot be left to fend for itself, as this may lead to terrible consequences. The Admiralty Court would also protect the rights of its own and be a savior in dire circumstances.

This article is an extract of a longer article by the same authors which can be accessed through Bose & Mitra & Co.'s LinkedIn Page or on request.

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Polish Courts on a Dispute Resolution Forum Agreement in BIMCO's Repaircon 2002 Form

Facts

A ship repair contract on BIMCO's REPAIRCON 2002 form [**Form**] was concluded between a foreign ship owner [**Owner**] and Polish shipyard [**Yard**] [**Contract**].

The Form consists of two parts. Part I contains boxes to be filled in, where are some printed guidelines. Moreover, there is a printed wording at its bottom, which provides that: *"In the event of a conflict of conditions, the provisions of PART I [...] shall prevail over those of PART II to the extent of such conflict, but no further"*. Part II contains printed terms and conditions.

In Box 18 the Form reads: *"Dispute resolution (state 12(a), 12(b) or 12(c), as agreed; if 12(c) agreed state place of arbitration) (of not filled in 12(a) shall apply) (Cl. 12)"*.

Clause 12 – BIMCO Dispute Resolution Clause – of the Form provides options for: (i) English law and arbitration in London (Cl. 12(a)); (ii) US law and arbitration in New York (Cl. 12(b)); (iii) choice of law and arbitration (Cl. 12(c)). Clause 12(e) reads: *"If Box 18 in Part I is not appropriately filled in, clause 12(a) of this Clause shall apply". The explanatory note to Clause 12 reads: "Clauses 12(a), 12(b) and 12(c) are alternatives; indicate alternative agreed in Box 18"*.

Box 18 of the Contract was filled in as follows: *"polish law, Szczecin civil court, POLAND"*. No deletions were made nor were there any other alterations made to the printed guidelines in Box 18, nor to the printed terms and conditions of Clause 12.

A dispute arose between the Owner and the Yard [**Parties**] under the Contract.

Dispute and submissions

Because of the dispute, the Yard submitted points of claim to a court (a common/ordinary one) in Szczecin (Poland), but not to an arbitration tribunal.

The Owner questioned the jurisdiction of the Polish court, and argued that an arbitration was the only competent forum. The Owner alleged that the BIMCO Form only provided for arbitration, but not for a jurisdiction of the courts. Therefore, filling in Box 18 of the Contract with: "*polish law, Szczecin civil court,* POLAND", the Parties either agreed for an *ad hoc* arbitration in Szczecin (Poland) and Polish law (Clause 12(c) of the Form/Contract) or for the arbitration in London and English law (Clause 12(e) of the Form/Contract, in case filling in Box 18 of the Contract as aforesaid was inappropriate, which triggered application of Clause 12(a) of the Form/Contract). Alternatively, relaying on an informative letter received by the Owner from BIMCO, the Owner alleged that, although the BIMCO Form was drafted with arbitration contemplated as the forum for dispute resolution, in case the Parties wanted to agree for to a court, then they should have done it very clearly by deleting Clause 12 of the Contract and the printed guidelines in Box 18 of the Contract.

The Yard disagreed with the Owner allegations. First of all, the Yard argued that the Form was drafted and published for use to assist and simplify parties to conclude contractual relations, and not to limit them. Therefore, parties using the BIMCO Form were allowed and free to agree to the use of a courtin place of arbitration. Second of all, the BIMCO Form was so constructed in such a what that whatever in Part I conflicted with Part II, Part I prevailed. Therefore, it was sufficient to express the parties' intentions/will in Part I for the purpose of giving it effect, but not necessary to delete or otherwise alter Part II.

First instance court

The first instance court dismissed the Owner's motion to strike out the points of claim on the basis of a lack of jurisdiction by the courts, and accepted its jurisdiction.

The first instance court shared the Yard position that the Form allowed the parties to agree to the use of courts to resolve disputes, and not only for an arbitration. Under the terms of this specific agreement, the court held that the Parties effectively agreed to the use of the courts in Poland, and not arbitration.

The Owner appealed to the second instance (appeal) court.

Second instance court

The second instance court did not agree with the court of first instance, and overruled the latter's decision.

The second instance court concluded that: (i) the construction of the BIMCO Form did not allow for the possibility of the parties to agree that disputes would be resolved under the jurisdiction of courts; and that (ii) filling in Box 18 with a reference to courts was ineffective.

Nonetheless, the second instance court held that a deviation from an arbitration under the BIMCO Form required an express reference/wording therein.

Therefore, the second instance court summarised that the Parties agreed in the contract to arbitration. However, it did not take a position whether the Parties agreed for an *ad hoc* arbitration in Szczecin (Poland) or, because of operation of Clause 12(e) of the Form/Contract, the arbitration had to be held in London, as the appeal court found it to be outside of the scope of its cognition.

The decision of the second instance court is final.

However, the Yard had a right to submit an extraordinary appeal (cassation) to the Supreme Court.

And, the Yard did so.

Supreme Court

The cassation is still waiting to be heard by the Supreme Court.

The Yard repeated its allegations to the cassation that were made in the proceeding before the first instance court, and thus criticised and disagreed with the second instance court's decision.

Moreover, before submitting the appeal to the cassation, the Yard obtained from BIMCO further comments in respect of the latter's informative letter, which was sent by BIMCO to and upon which the Owner relied in the proceeding before the first instance court, and which the Yard relied on in the cassation. The comments stated that BIMCO's goal in developing contractual forms was to provide clarity. Therefore, BIMCO suggested in their informative letter that the proper way making changes was by introducing amendments into the forms through deletions; that should have put beyond doubt the parties intentions. However, even if the parties failed to make proper changes, BIMCO argued that the specific agreement of parties should override a general wording of the form. BIMCO concluded that the use of their forms was purely voluntary and that the forms were designed to provide a fair and reasonable contractual platform on which parties can build a commercial agreement.

Comments

The Supreme Court's decision is highly expected, as it should give more precise guidelines and more certainty as to freedom of contracting when using contractual forms in Poland.

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Using O.C.E.A.N. When Responding to a Vessel Casualty

Quite a few years ago I was charged with teaching young Associates in our office the skills needed to respond to a vessel casualty event (VCE). To simplify the process and to make it more easily memorable I developed an acronym that I would like to share with readers and update for purposes of dealing with issues that have arisen in the shipping world related to the Coronavirus.

The acronym is: O.C.E.A.N. When responding to a VCE, whether it is a collision, grounding, pollution, personal injury or any other major issue the steps outlined by O.C.E.A.N. are important to apply. The acronym stands for: **O**rganize, **C**onfirm, **E**xperts, **A**gents and **N**otify. This article will expand on each of these steps.

ORGANIZE: Let's assume that you are enjoying a comfortable night's sleep when your phone rings at 2 a.m. with a call from a vessel's Master reporting a VCE. What should you do? The first step is to organize the information that you need to gather in order to make an informed decision on the next steps to be taken. The type of information that you'll want to gather includes such details as:

- ✓ Name of the vessel;
- ✓ who are the owners / charterers,
- ✓ what Club is the vessel entered with,
- ✓ the vessel's location;
- ✓ what type of VCE is involved,
- ✓ who the vessel's local agent is and their contact details,
- ✓ whether anyone else has been contacted including the USCG, the agent, owners / charterers, others?

Depending on the type of VCE you'll need other information as well. For example if the VCE involves a pollution event you'll want to know if the National Spill Response Center has been notified and, if so, at what time and what spill number has been assigned. If the matter involves a personal injury or death you'll need to know the name and nationality of the crew member, passenger or longshoreman and their current status. If the VCE involves cargo matters you'll want to learn as much as you can about the type of cargo involved and its shipping details including the shipper, receiver and bill of lading number.

It is important that all this information be gathered and organized quickly so that you can move on to the next steps.

CONFIRM: Not all VCE events will be covered by the vessel's P&I or Hull and Machinery carriers. Ship Masters and vessel agents sometimes erroneously assume that everything that has happened on a vessel will fall within the P&I or H&M coverage. They also assume that the owners or charterers are current on their premiums which is not always the case. It is also possible that another firm has already been retained by the owners / charterers or Club. For this reason, as soon as you have Organised the most important information your next step should be to confirm that you are authorized to act on behalf of the vessel by calling the relevant insurer. If the matter does not fall within the vessel's insurance coverage (whether P&I or H&M) then you'll need to contact the owners or charterers to confirm your appointment. In short, don't assume that the Master has the authority to retain your services; he or she isn't going to be the one paying the bills.

In the age of Covid it is important to keep your list of Club offices and contacts up to date. Many of the offices are closed and Club representatives are working from home. Make sure you know how to quickly reach the appropriate person(s) at the Club to confirm your instructions.

EXPERTS: One of the unfortunate truths in the industry is that there are not enough experts to rely on when the ship hits the dock, spills oil, damages cargo or injures a crew member or passenger. In many ports in the U.S. there may be only one or two truly qualified experts and, in some ports, there may be none at all. In any VCE it is important nonetheless to locate and retain an expert as soon as possible to both lend assistance during the investigative process and interact with local authorities but also to keep those experts from being retained by the opposing parties. Keep your list of experts up to date, check in with them on a regular basis to know what types of cases they handle and their availability and to let them know that you will be calling them in the event of a VCE so they know not to take cases from other counsel until they have spoken with you first.

Once you have organized your information, confirmed your instructions and contacted your expert set the expert to work helping with the next steps in the response process including arrangements to attend on board the vessel with you.

When retaining an expert in the age of COVID you should encourage them to undergo regular COVID testing so that they will not be delayed in responding to a VCE. The same goes for you and the members of your firm that are part of an incident response team. The last thing you want is to be precluded from attending a vessel or an incident command center because you have not had the proper testing done in advance. You should also locate a local company that can perform COVID testing with a fast turn-around time in case some member of your team needs their testing updated.

AGENTS: Anyone reading this article will already be familiar with the major role that ship agents play in every port call and in every VCE. The agent is an important part of the VCE response team helping to coordinate the vessel's schedule, relay messages, gather documentation, and arrange transportation to and from the vessel or onto the terminal. It is also possible that the vessel's agent will in the early stages be a step or two ahead of you in responding to an incident. For this reason you need to find out, for example, if they have already provided the proper notifications to local and national authorities or have already made arrangements for someone to be out on the vessel.

They also have contacts within the industry that may prove helpful. Once you have received confirmation to proceed with your representation reach out to the vessel's agent to coordinate the next steps in your response.

NOTIFY: Now that you've gathered the critical information, confirmed your instructions, retained an expert and coordinated with the vessel's agent it is time to make sure that the proper authorities have been notified of the VCE. If it is an oil pollution incident the Federal regulations require that the National Spill Response Center be notified "immediately." Vessels that fail to give timely notice may be prevented from relying on certain defenses and limitations of liability. It may be that the vessel's Master or agent has already given notice but, regardless of what you are told, a member of your spill response team must confirm the date and time of the notice and the spill or incident number that has been assigned.

The five steps involved in an O.C.E.A.N. response are only the beginning of a full vessel casualty response. The steps should be completed as quickly as possible and hopefully within a half hour to hour of the time that you first receive a call. The quicker that you can complete these steps the better.

Greg Poulos

Cox Wootton Lerner Griffin & Hansen

COVID-19 – Argentina

There has been much news and many interesting articles regarding the current Pandemic situation that has affected all of us, in different measures, but with one common worry: to find solutions to this new reality, this new "normality ", until the vaccine arrives.

In Argentina, we are currently suffering the worst stage of the epidemic, (September 2020), and the contagion is still increasing. We hope that numbers will start to slow down in the near future.

Argentina started very early (mid-March) to lockdown all the population in a very strict way at the beginning of the outbreak, and then focused its main efforts on the big cities.

After more than 180 days of lockdown we are gradually recovering. Commercial activity is essential for the survival of enterprises. Remember that Argentina had being going through a bad economic crisis long before the Pandemic.

Our Maritime Association received from the CMI a questionnaire in relation to the impact of Epidemic and Pandemics worldwide. I thought it would be interesting to make a brief comment so as to understand the way our nation has handled the situation in our sector.

Being members of the World Health Organization (WHO), we have followed every recommendation given by the Crisis Committee for the Prevention of Covid-19, in accordance with the Government's responsible authorities: the Ministry of Transport, the Sub Secretary of Ports, Waterways and the Merchant Navy.

Our President formed a Crisis Committee with the Ministry of Health, and a Committee of Infectious Diseases, who provided assistance on the different issues and development of the statistics.

Regarding the topics in the questionnaire, passenger traffic on Ferries and Cruise ships was not restricted until the first local case of Covid-19 was detected. That incident was also done at the same time the Government issued its decision to close our borders.

Until that moment, Argentina had only followed the protocols recommended by the WHO.

However, as to matters regarding the import, export or transit of cargo, no restrictions were imposed. Ports continued to operate subject to the compliance with the protocols established by our local authorities.

Specific protocols were developed by each Port, with the approval of the governmental authorities. Persons/ Workers involved in cargo transport were required to obtain special permits to enter the port areas and engage in any essential activity.

Not that many of the maritime commercial enterprises had to had to develop and propose their own protocols, following general guiding lines, and then obtain governmental approval (with important delays from authorities to approve them).

The Government issued a list of essential activities which were exempt from the strict restrictions imposed on all other businesses. Exemptions were also permitted for specific activities so as to allow for travel, such as in the cases of health problems.

Argentina did not accept the concept of 'herd immunity', and from the very beginning has adopted the 'lockdown' procedure, with the strong conviction that such a process will flatten the curve of cases and avoid overload of the health system and increase hospitals' capacity.

Fortunately, we still have some open capacity in both Public and Private Hospitals at this current moment, inspite of the high numbers.

The questionnaire from the CMI also included some points regarding the Ebola Epidemic outbreak. However, a national contingency plan was established by our Ministry of Health regarding that epidemic. Fortunately, there have been no cases of Ebola to report in Argentina.

In general terms, no vessel has been denied free practice during the current pandemic situation. Our country's entire operating system, both administratively and commercially, has kept activity in the best possible manner under the circumstances.

In sum, the shipping sector in Argentina has responded in a responsible way to the COVID crises, and there have been no significant interruptions. Our biggest concern remains about the damages that this situation is causing to our economy. The new Government that started at the beginning of the year must face important complications that cannot be avoided in these difficult times.

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Abandonment at sea: adapting the MLC 2006 to protect seafarers caught in the Covid crisis.

After years of difficult recovery from the last financial crisis, the maritime industry has once again been hit hard by the global Covid-19 crisis. International trade was brought to a halt, save for the most essential products. The Asia-Pacific and Asia-Europe routes suffered directly, with a significant fall in carriage. Ships and crew were left stranded in port, without cargo. Berth fees exceeded the costs of operating vessels, resulting in a fleet of ghost ships roaming the seas without cargo, and without any specific objectives, rather than remaining at dock. Seafarers aboard these empty vessels were and, in some cases, still are prevented from flying home or disembarking.

The situation recently became a public concern when on the 25th of July 2020, the MV Wakashio hit the coral reef of Pointe d'Esny in Mauritius, spilling 800 tons of fuel oil and 200 tons of diesel into the Mauritius coral reefs. The ship had been navigating with no cargo and no clear destination. Some of the crew had been kept beyond their contractual term and had not been relieved in more than 12 months. Although the circumstances of the casualty are still unclear, one cannot but presume that an exhausted crew had some influence on the grounding of the vessel.

An incident of this magnitude, in the exceptional circumstances caused by the pandemic, makes us question the ways in which international maritime law should evolve to better tackle the rising challenges surrounding ships and seafarers stranded at sea.

Some 150,000 to 200,000 seafarers were reported at sea in June 2020, without regard to the terms of their employment contract. World leaders and the IMO called early on for the elaboration of an *"outbreak plan"* regarding the management of seafarers with the overarching objective of preserving the crew's physical and mental health.

Crew wellbeing is a key issue. A Yale study conducted in November 2019 had shown that feelings of isolation and anxiety are already commonplace for seafarers. Further studies evidenced that 25 % of seafarers suffer from severe depression and that 9% of deaths at sea are attributed to suicide. However, the situation has taken a turn for the worse, as the lack of wifi or other means of communication at sea along with limited calling times in port have left seafarers ever more isolated, without news of their loved ones or families. Unions and organizations such as *Seafarers UK* confirmed an increase in the number suicides since the beginning of the crisis.

The International Labor Organization (ILO) noted that seafarers were no longer being offered the same basic rights as shore-based employees with regards to access to healthcare, protective equipment and rest periods. The Organization made it clear that the Covid crisis should not be used as an excuse for shipowners to circumvent or breach the terms of the Maritime Labour Convention of 2006 (MLC 2006).

In particular, there is a risk that Members will increasingly rely on the terms of the MLC 2006 to forgo annual leave for imperative reasons of public health emergency (Standard A2.4) or in case of exceptional circumstances akin to force majeure, for example if the ship is in quarantine. Panama, for example, granted dispensation to extend the period without leave to a maximum of 17 consecutive months. One can only imagine the devastating effects this may have on crew moral and ship safety.

The most pressing concern remains the willingness expressed by some Members to authorize a temporary reduction in the minimum safe manning levels to take into account absentee crew members. Instead of stopping the operations of the vessel and reducing safe manning requirements to those in force during maintenance operations, some Members have decided to allow these reduced safe manning levels to apply to ships operating at sea. This is clearly a move in the wrong direction and would surely only increase the risks of creating circumstances allowing for a repeat of the Wakashio incident.

On the 9th of July 2020, the United Kingdom organized a virtual summit to discuss the new challenges faced by seafarers and notably the issues surrounding their possible repatriation and relief. States declared that seafarer tours should not surpass 12 months and emphasized the need for international protocols to be developed in order to better implement certain key corrective regulations. Member States also approved a resolution allowing seafarers the right to disembark and have access to emergency healthcare event in the absence of a scheduled call to port. Finally, a solution put forward by the IMO States was to designate seafarers as "key workers", which would facilitate their movement on land.

These recommendations have been adopted in France. The French Maritime Affairs Directorate have dedicated resources to facilitate the return of seafarers to their normal place of residence. Since the beginning of the crisis more than 15,000 seafarers were given a temporary authorization to transit or stay in France pending the arrival of the relief crews.

MLC 2006 Members continue to discuss relevant amendments to the MLC 2006 to adapt it a crisis that shows no sign of disappearing. These debates may well pave the way for an update to the Maritime Labor Convention of 2006 in the near future, placing the mental wellbeing of seafarers at the heart of the debate. If that is the case, then something good may ultimately have come out of these trying times.

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International Maritime Law Seminar 2020

Recent developments in Chile

I. COVID-19 crisis and changes to cargo delivery Procedures in Chile

1. Introduction

In the context of the current COVID-19 crisis, on March 2020 Customs issued Resolution 1179/20, which implemented transitory modes for the treatment of various customs procedures and the ways of presenting documents associated therewith to facilitate foreign trade transactions.

Among these transitory measures, Customs authorised electronic exchanges and amendments to bills of lading. However, customs agents must now obtain the original bill of lading from its issuer and keep it in its importation file.

2. Antecedents

The main regulations applicable to cargo delivery procedures are the Hamburg Rules, which are incorporated without major changes into Article 974 and following of the Commercial Code. In addition, the Customs Ordinance, the Compendium of Customs Regulations and the Coastal Shipping Regulations apply.

Article 977 of the Commerce Code defines a 'bill of lading' as a document by which the carrier undertakes to deliver the goods against surrender of the document to the order of a named person, or to order, or to bearer.

With this in mind, the Compendium of Customs Regulations expressly includes the original bill of lading as one of the documents used to prepare import declarations.

In this respect, from an ocean carrier's perspective, the most important aspects of the customs procedures set out in the Compendium of Customs Regulations are as follows:

- Customs agents must surrender the original bill of lading to the carrier once the import declaration has been accepted for its handling and prior to withdrawing the goods from the warehouse under the jurisdiction of Customs.
- The import declaration must be drawn up on the basis of several documents, including the original bill of lading.
- In the case of cargo in containers, the surrender of the original bill of lading to the ocean carrier is a condition precedent for the issuance of the title for the temporary admission of containers.
- Customs agents must keep a copy of the bill of lading in their file. This copy must show:
  - the endorsement of the bill of lading to the customs agent, which constitutes its authority to collect the goods; and
  - the acknowledgment of receipt from the person authorised to receive the original bill of lading.
- In the case of transport documents issued by freight forwarders (eg, house bills of lading) and used as the basis for the import declaration, these documents must include a reference to the transport document from which they are derived so that the information is stated in the customs destination declaration.

3. Implications of Resolution 1179/20

The main implications of Resolution 1179/20 for ocean carriers were as follows:

- A copy of the exchange of the original bill of lading and amendments to it can now be sent to custom agents electronically.
- Customs agents had 30 consecutive days to obtain the original bill of lading that was accepted as part of the import declaration. Upon receipt, the original bill of lading must be kept within the customs agent's file.

4. Complementary resolutions

Customs subsequently issued three complementary resolutions, which can be summarised as follows:

- Circular 120/20 (26 March 2020) allows bills of ladings to be amended and their exchange to be notified through an email to a customs agent.
- Resolution 1377/20 (1 April 2020) allows bodies of state administration and people related thereto to make submissions before Customs through a general email provided by the latter.
- Resolution 1556/20 (17 April 2020) allows as follows:
  - The 30-day period to obtain an original bill of lading must be counted as of the time when Resolution 1179/20 is lifted.
  - Customs agents can prepare import declarations based on a non-negotiable copy of the bill of lading sent by the ship agency involved via email when the document is issued in Chile.

- The instructions contained in the resolution must be understood as facilitation measures that may be accepted by the interested parties without subsequent liability for Customs.
- As regards the application of the legal presumption of cargo abandonment set out under the Customs Ordinance, non-compliance with the applicable deadlines is allowed due to *force majeure*. Surcharges over goods already under an abandonment presumption may be exempted or lowered by Customs (discretionary faculty).

5. Comment

The above measures seek to facilitate foreign trade operations, prevent the displacement of related people and personnel involved in these operations and establish procedures that can be carried out electronically.

However, given that Resolution 1179/20 has not expressly modified the Chilean Customs Compendium, grey areas remain regarding their interpretation and practical implementation, particularly in connection with the potential delivery of cargo without surrender of the original bill of lading. In this respect, ocean carriers should proceed carefully and liaise with their Chilean port agents to define interim protocols. They should also consider requesting letters of indemnity or similar guarantees from their shippers or consignees, as the case may be.

II. Constitutional remedy incorrect legal tool for challenging vessel arrests

In an unprecedented action, the owners of a vessel attempted to undermine arrest measures by bringing a constitutional remedy before the Concepción Court of Appeal.

1. Background

Under Chilean law, anyone can file a prompt and summary proceeding regarding the protection of constitutional guarantees (known as *Recurso de Protección*) where an arbitrary or illegal act or omission of the public authorities or an individual has or may imminently damage, limit, modify or threaten their rights and guarantees as recognised by the Constitution, a treaty or a law, provided that no other legal remedy exists. Depending on the nature of the alleged act or omission, this remedy must be filed within 30 days from:

- the execution or occurrence of the alleged act or omission; or
- when the affected party learns of such act or omission.

2. Facts

In the present case, a port agent and a bunker supplier arrested a vessel due to unpaid fees arising from agency services and disbursements and the supply of bunkers, respectively. The arrest orders were granted by first-instance courts in Valdivia and Talcahuano. The owners provided no guarantees to lift the arrests and lodged no incidental motions objecting to them in accordance with the applicable procedural regulations.

The owners subsequently challenged the arrest orders by filing a constitutional remedy of protection, arguing that their issuance violated several fundamental rights of the owners and crew, including their right to property, as the arrest prevented the owners from performing their duties and would lead to the vessel's deterioration. In addition, according to the owners, the arrest endangered the crew and their rights to freedom of movement, life and physical and mental integrity.

The arresting parties challenged the remedy on various grounds. According to them, there had been no illegal or arbitrary acts since the arrest had been granted by the competent courts. In this case, the owners had failed to challenge the arrest properly and on time and an arrest order neither prohibits a diligent owner from maintaining their vessel nor extends to the crew, as it is restricted to the vessel (the vessel in the present case had already deteriorated at the time of the arrest). In addition, one of the petitioners argued the lack of legal standing as a defendant given that the act that granted the arrest did not emanate from such party but from a judicial resolution issued by a Chilean court.

3. Decision

The Concepción Court of Appeal rejected the remedy of protection, holding that it requires the accreditation of pre-existing undisputed rights and the verification of the existence of an arbitrary or illegal act or omission (ie, irrational or affecting such rights in a haphazard fashion). The alleged arbitrary and illegal act charged to the arrest petitioners was the arrest imposed over the vessel by the competent courts. As regard the defence based on lack of standing as defendant, it was held that the acts under stake are arrest orders decreed by courts in use of their legitimate powers and there was no direct intervention of the arrest petitioners. Therefore, the aforementioned defence was accepted. Last but not least, the court ruled that the remedy had been filed in an untimely manner.

The Supreme Court upheld the Concepción Court of Appeal's decision.

4. Comment

The above decision restricts the use of constitutional remedies of protection in the context of vessel arrest proceedings and imposes a high standard for succeed. The decision helps to protect the institution and procedure relating to vessel arrests and implies more certainty in terms of the outcome of such proceedings.

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US Courts divided about obligation to provide foreign arbitrations with the benefit of US discovery instruments. Will London find the American cupboard bare?

28 USC §1782 is a US statute that allows foreign parties to a totally foreign court proceeding to access U.S. courts with the purpose of obtaining evidence located in the United States that can assist the proceeding abroad. Given the broad scope of discovery tools allowed under US procedural law, this statutory provision can offer great benefit to the parties that decide to take advantage of this instrument, regardless of where they are located in the world, as long as the evidence they are seeking to gather is located within the US.

While this process of gathering evidence is routinely accepted for evidence sought in aid to a foreign court proceeding, US courts have traditionally resisted the idea that US style discovery could be compelled when the requesting parties were foreign arbitral tribunals, or parties to said arbitral proceedings. Following the U.S. Supreme Court decision in the *Intel* case, however, the tide seems to have changed with respect to the interpretation of 28 USC §1782.[1] As will be described more in detail below, we might very well be on the eve of a historical pivot regarding the effectiveness of discovery tools available to parties to foreign arbitration, and US courts might soon become the best friends to parties to arbitration proceedings all around the world.

On Monday, September 14, 2020 the Court of Appeals for the 9th Circuit heard oral argument in the *HRC-Hainan v. Yihan-Hu* case that was decided earlier this year by the US District Court for the Northern District of California.[2] The appellants in this case are seeking reversal of an order with which the District Court applied 28 USC §1782 to compell a US entity to provide discovery in aid of a private arbitration pending in front of the China International Economic and Trade Arbitration Commission ("CIETAC").

Section 1782 allows a foreign tribunal or a party to foreign proceeding to seek discovery on US territory provided that: "(1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made, (2) the discovery is for use in a foreign proceeding before a foreign [or international] tribunal, and (3) the applications is made by a foreign or international tribunal or any interested person."[3]

Whether 28 USC §1782 can be used to gather evidence on US territory in aid of foreign arbitration proceedings is of prominent importance for the Maritime world. 28 USC §1782 could potentially be used to guarantee the preservation and gathering of evidence every time in which parties to an arbitration pending outside the United States are seeking to collect documents or testimonies from individuals physically located in the US.

A conspicuous number of charter party agreements contains clauses that direct the parties to arbitration for the resolution of any controversies arising from the charter party. A very popular arbitration forum that charter parties often elect is London, often through the London Maritime Arbitrators Association ("LMAA"). A party to a London arbitration that, for example, is seeking to obtain evidence in the US might have no recourse to do so right now other than relying on the voluntary compliance of the entity from which the evidence is sought. While 28 USC §1782 is routinely used by US courts as grounds to compel disclosure of evidence pursuant to requests from foreign courts, the same is not true for requests from private arbitration tribunals or from the parties to the arbitral proceedings.

The *HRC-Hainan v. Yihan-Hu* case is just the last one of a series of many in which Federal Courts of Appeals throughout the United States had to address the issue of whether a private arbitration falls within the scope of section 1782. Just in the past 12 months, also the 6th, 2nd and 4th Circuit issued decisions on very similar points of law.[4] The various Circuits are already split on the issue with the 2nd and 5th Circuits choosing to exclude foreign arbitration from the application of §1782, and the 4th and 6th Circuit opting to interpret the statute otherwise.[5] Depending on how the 9th Circuit will rule on this case, it could strike the balance in favor of one side or the other.

The main source of disagreement among the Circuits appears to be whether a foreign arbitration panel can be considered a "foreign or international tribunal"[6] under §1782. The Appellate Courts that reject this possibility do so by arguing that private arbitration panels lack a "public" or "state-sponsored" function[7], and that interpreting the statute otherwise and subjecting arbitration to formal discovery instruments would undermine the swiftness of arbitration as an alternative means of resolving disputes.[8]

Among all this division and uncertainty with respect to the interpretation of the statute, one thing seems to grow more and more likely: if any of the parties to the actions that were adjudicated in this past year were to petition the U.S. Supreme Court for cert, there is a good chance that the Court would take the case and seek to resolve the Circuit split.

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[1] *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

[2] *HRC-Hainan Holding Co., LLC v. Yihan Hu,* No. 19-MC-80277-TSH, 2020 WL 906719 (N.D. Cal. Feb. 25, 2020).

[3] *Mees v. Buiter,* 793 F.3d 291, 297 (2d Cir. 2015) (citation omitted).

[4] *See Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020); *In re Application to Obtain Discovery for Use in Foreign Proceedings,* 939 F.3d 710 (6th Cir. 2019); *In Re Guo,* 965 F.3d 96 (2d Cir. 2020), as amended (July 9, 2020).

[5] For the 5th Circuit *See: El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa,* 341 F. App'x 31 (5th Cir. 2009).

[6] 28 U.S.C.A. § 1782(a).

[7] *In Re Guo,* 965 F.3d 96 at 107.

[8] *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999)

Time Bar for Indemnity Claims

Under Panamanian law, time bar is a are matter of public policy, thus, time bar periods cannot be extended or decreased by mutual agreement. So, for example, article 1650 of our Code of Commerce provides that the time bar for claims arising out of a contract of carriage of goods by sea is one year which should be counted from the date the goods were delivered or should have been delivered. Furthermore, the same Code provides a general time bar of five years for contracted matters, which starts from the date in which the obligation was made enforceable.

However, with respect to our maritime jurisdiction, there has been no provision in our laws or any court decision regarding when does the time bar period begin to run in a case involving an action for indemnity. Recently, in a case which is currently being handled before the First Maritime Court of Panama, this question arose. In 2013, a major ship operator filed an indemnity claim against a local container terminal for a settlement amount paid in 2015 to a shipowner as a consequence of having to pay damages which were suffered by a vessel at the terminal in 2006.

In 2018 attorneys for the terminal filed a motion to dismiss the case as time-barred alleging that the action brought by plaintiffs was time barred because the obligation became enforceable in 2006, when the vessel had suffered damages. Therefore, the five-year period of the time allowed to start a lawsuit had elapsed. Plaintiffs, in turn, alleged that the obligation arose when the settlement amount was paid to owners in 2015, so their claim was filed in time.

Because no Panamanian maritime jurisprudence pertaining to this issue was found, the Court reviewed decisions from other maritime jurisdictions including both Common Law and Civil Law systems such as the United States, England, Spain and Argentina. Also, legal opinions were prepared by colleagues from Freehill Hogan & Mahar, Quadrant Chambers, San Simón & Duch and Marval O'Farrel & Mairal and were furnished to the Court.

The said evidence showed that, under the law other eminently maritime jurisdictions, the topic is well-settled, the cause of action for indemnity does not accrue until the party seeking indemnity: a) has settled the underlying claim or; b) has been cast in judgment. Therefore, time bar in an indemnity situation whatever period it could encompass – does not start to run until "a" or "b" takes place.

Respecting the fact that maritime law is a body of laws mainly characterized by its uniformity around the globe and citing the aforementioned evidence, the First Maritime Court denied the motion to dismiss filed by attorneys for the terminal. The judge ruled that the action accrued when the settlement amount was paid. Therefore, the five-year time bar period started to run only from that moment. Defendants appealed the lower court ruling and in late 2019, through a unanimous decision, the Maritime Appeals Tribunal established a precedent confirming all the arguments and conclusions reached by the First Maritime Court.

Given that this is the first time that this issue has been brought before our maritime courts, it is important for the recognition of Panama as an international maritime forum that both the lower court and the court of appeals have followed well-settled principles in other eminent maritime jurisdictions.

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Legal Implications of use of Tankers as Floating Storage

On 14 of March 2020, the Spanish Council of Ministers agreed and issued Royal Decree 463/2020 by means of which the state of alarm was put in place for managing the health crisis caused by COVID-19. Initially, the state of alarm was meant to last for a period of 15 days, but it was extended until 00:00 hours of 21 June, by virtue of the authorisation granted for this purpose by Congress to the Government.

In these months, we have witnessed the publication of several legal provisions that seek to address the significant challenges posed by the (health, economic and social) crisis caused by COVID-19. However, the impact of COVID-19 on the Spanish legal shipping market extends beyond these regulations.

Among other new situations, we have seen an unprecedented surge in the use of tankers as floating storage for oil and petroleum products. Spain, with nearly 7000 Km of coastline and 46 ports of general interest, managed by 28 Port Authorities, has witnessed a collapse in capacity of oil refineries and storage facilities and consequently a high demand for floating storage. It could be said that Spain was surrounded by "floating stores".

The strategic geographic situation of Spain, making it an excellent platform to serve North Africa, from the Far and Middle East and the Americas, has aggravated the situation.

Although the practice of charterers using oil tankers for floating storage is nothing new, many legal issues may arise.

As a starting point, it should be considered that neither BIMCO/international authorities nor major international oil companies have a specific "floating storage clause" in their charter parties and the decision to employ the vessel as floating storage rests with the charterers. However, the specific clauses of BPTIME 3 (jointly developed by BIMCO and BP) and the applicable clauses contained in SHELLVOY 6 and BPVOY 4 and BPVOY 5 should be considered. If a time charter party contains a "floating storage clause" (such as Clause 21 from BPTIME 3), there is a right to order the vessel to act as floating storage. However, if we are in the presence of a voyage charter party, the legal implications of stopping a vessel would be uncertain and the particular bill of lading should be considered.

As has been said, the legal issues connected with the use of tankers as floating storage may arise and have arisen. The first question to be considered would be where to wait. The location for the tank shall be agreed and must be a safe place (within the meaning of the charter party) for the vessel and for the crew. The second question to be considered would be the duration of the storage and the impact that extended storage may have on the condition of the cargo and the vessel's tanks, valves, and pipework.

The third question relates to a potential oil spill: if an oil spill were to occur from a vessel engaged in oil-storage, oil traders (and/or their financiers since they own the oil) might not escape legal action. Pollutants from tankers used to store oil have potentially damaging effects on human health. Last but not least, Ship to Ship transfer operations and their risks should be also considered.

Proper insurance is an important aspect and both parties should check with their respective insurers (cargo, P&I, pollution, etc) if additional insurance premiums maybe required and which party should bear the cost. Owners are contractually obliged to care for the stored cargo, so it is important that the characteristics of the cargo are taken into account and its condition closely monitored, bearing in mind that oil products may degrade over time. In addition, there may be an impact on tank coatings and cargo-related equipment due to prolonged idleness which normally fall under owners' maintenance obligations.

The other side of the coin is the legal relationship between the owner of the stored oil products and the owners of the shore-based storage. Situations arising from the COVID-19 crisis have also arisen in connection with the storage agreement between the owners of the tanks and their lessors as a part of the circle. Due to the disruption caused by COVID 19, storage companies have occasionally been unable to provide storage capacity ashore and connected services in Spanish ports since they were compelled to adopt many measures and take difficult decisions on a daily basis. For instance, they were forced to reduce personnel, they faced problems executing preventive and corrective maintenance and they even encountered difficulties in obtaining epidemic prevention materials. In the meantime, cargo owners could not unload the products at terminals/tanks, but were paying astronomical daily hire rates.

Could the effects of Royal Decree 463/2020 declaring the state of alarm be considered as force majeure exonerating the storage company from performing the agreement? Were the parties to the contract entitled to rely on force majeure in these circumstances? Would the charterer of the tanker used as floating storage be entitled to invoke force majeure within the charter party frame because it was unable to unload the vessel? Much is uncertain because up to now the possible impact that the Sanitary Emergency Status and the measures approved by the government of Spain (through the several regulations enacted by the Spanish Government) have yet to be tested by the Spanish Courts.

The Spanish Civil Code establishes as a general principle that the contracting parties will not be liable in cases of force majeure. In particular, Article 1105 of the Spanish Civil Code provides that apart from the cases expressly mentioned in law, and those cases in which the obligation is declared, no one shall be responsible

for those events which could not have been foreseen, or which, if foreseen, were inevitable.

Force majeure situations could be described as events that could not have been foreseen in the ordinary and normal course of life, they are unusual or extraordinary and completely unpredictable and unavoidable events, so their adverse effects cannot be prevented even through prudent and diligent conduct by the parties. These are unavoidable events due to external factors and beyond the sphere of the parties (judgment of the Spanish Supreme Court number 4688/1983 dated 30 September). In addition, the judgment of the Supreme Court number 1321/2006 dated 18 December 2006, establishes that "force majeure must be understood to be an event that takes place after the date of the agreement, which renders useless any diligent effort to achieve what has been agreed, (...); There must also be a complete absence of fault, because fault is incompatible with force majeure and a fortuitous event. "Force majeure" must consist of a force beyond all control and foresight, and its occurrence must be weighed against the normal and reasonable foresight that the circumstances require to be adopted in each specific case, or inevitability in a practical possibility". While the situation arising from COVID-19 could be considered as a case of force majeure, it should be analysed individually on a case-by-case basis as described herein.

However, some judgments of the Spanish Courts have also considered in similar circumstances the "rebus sic stantibus" rule, which is intended to deal with problems arising from a sudden change in the situation or circumstances existing at the time of the signing of the contract, provided that the change is so relevant that it imposes an unreasonable burden or cost on one of the parties or frustrates the purpose of the contract (Judgment of the Supreme Court number 820/2013, dated 27 January 2013).

The rationale behind the principle "rebus sic stantibus" is that the clauses of a contract are agreed according to the concurrent circumstances at the time of its signature, so if the circumstances change substantially, the clauses should be modified accordingly.

We must emphasize that the application of the principle described above is highly restricted in scope and its application strictly limited by case law.

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SAN SIMÓN & DUCH

Ship's Arrest in Italy

Recent Case Law on Article 3 (4) of the 1952 Brussels Convention

By judgement issued on 21st February 2019, the Court of Oristano confirmed the prevailing trend of Italian case law to grant the arrest of a vessel owned by a company/person other than the debtor only in case the claim is assisted by a lien.

The case concerned a claim arising out of a ship management contract. Claimants arrested the ship on the faulty assumption that she was in the ownership of their debtor. Upon the issuance of the Order of Arrest, the registered owner of the vessel entered the relevant proceedings and challenged the arrest maintaining that, according to Article no. 3 (4) of the 1952 Brussels Convention (which Italy ratified on 25th October 1977), the right of arresting a ship owned by a person/company other than the debtor is subject to the existence of a lien.

The above issue has been debated for years by Italian Courts. Although some judgements pronounced in favour of the arrest, on the basis that the literal meaning of Article no. 3 (4) of the 1952 Brussels Convention allows the ship's arrest for a claim against the demise charterer without requiring a maritime lien and that other subjects (like time charterers) have been considered as being in the same position of the demise charterer, the trend now prevailing in Italian case law is that a lien is always required to arrest the vessel in case the debtor is not the registered owner.

This is indeed the interpretation shared by the Court of Oristano, which grounded its judgement on both the systematic reading of the provisions of the 1952 Brussels Convention (namely combining Article no. 3 (4) with Article no. 9) and the application of the international provisions in light of the main principles of the Italian legal system.

In particular, the Court, considering that the Italian legal system does not contemplate the institution of the *"actio in rem"* (which belongs to common law) and that it is instead based on the principle of the debtor's personal liability, held that the arrest of a vessel owned by a person/company other than the debtor can be granted only if the relevant claim is assisted by a lien. The Court considered that, being the existence of a lien a compulsory requirement under Italian Law to enforce a judgement over goods belonging to a third party (Articles no. 2740 and 2910 of the Italian Civil Code), the absence of a lien would lead to the actual impossibility for claimants (in case the arrest is confirmed) to enforce the subsequent judgement on the merits over the arrested vessel.

The Court also clarified that maritime claims, as listed under Article no. 1 of the 1952 Brussels Convention, are not necessarily assisted by a maritime lien, as Article no. 9 of the afore said Convention specifically provides that the Convention cannot be construed as creating any maritime liens which do not exist under the law applied by the Court which was seized of the case or under the 1926 Brussels Convention on maritime mortgages and liens (if the latter is applicable).

The above arguments have been later shared by further Italian judgements on ship's arrest (Court of Venice 29th May 2019, Court of Venice 17th July 2019 and Court of Siracusa 16th September 2019), thus confirming that the prevailing trend of Italian case law adheres to a restrictive interpretation of Article no. 3 (4) of the 1952 Brussels Convention.

However, it is worth to note that the Court of Oristano, differently from most of the legal precedents sharing the above restrictive interpretation of Article no. 3 (4) of the 1952 Brussels Convention, specified that, in case the debtor is the demise charterer, the arrest can be granted even in the absence of a maritime lien. The Court justified such an exception holding that the demise charterer, having the full nautical control and management of the vessel, has a higher probability than the registered owner to take legal obligations giving rise to maritime claims.

The principles shared by the Court of Oristano are in line with the 1999 Geneva Convention on the Arrest of Ships (still to be ratified by Italy), which indeed clarifies that a ship's arrest for a claim not assisted by a lien is permissible not only against the registered owner, but also against the demise charterer, whilst it cannot be granted for claims against time charterers, managers or operators.

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THOMMESSEN

Scrapping of Ships - Is Beaching Illegal?

1 October 2020

Scrapping ships by so-called "beaching" is in the spotlight worldwide. Media reports show that beaching remains a widespread practice when scrapping ships. The question is though, is beaching illegal? Or will it be in the future?

1 What is beaching and why is it a problem?

"Beaching" entails that a ship due for scrapping is simply sailed onto a beach for demolition and dismantling. The demolition works is often undertaken by extensive use of manual work, and has been subject to massive criticism due to dangerous and hazardous working conditions, and because hazardous waste is not handled in an environmentally responsible manner.

The beaching method is mainly used in India, Pakistan and Bangladesh, accounting for approximately 70 - 80% of the scrapping of large commercial vessels.

2 International regulations

In 1992, the Basel Convention came into force. So far, 186 countries have ratified the Convention. The Convention generally forbids both transportation of hazardous waste to countries that have not ratified the Convention, and transportation of hazardous waste between member states when the recipient country cannot deal with the waste in line with the Convention. Decommissioned ships will in most cases be considered hazardous waste due to the existence of substances such as asbestos, lead and PCB. Furthermore, demolition of ships by the beaching method is not consistent with the Convention's requirements for proper handling of hazardous waste. Beaching will therefore in most cases be prohibited by the Basel Convention.

The Basel Convention as such is only binding upon the ratifying states, and has no direct legal effect on natural persons or legal entities in the ratifying states unless the Convention is implemented into domestic law.

2.1 EU and Norway

Within the EU, the Basel Convention has been implemented by EU's regulation regarding cross-border shipments of waste (Regulation 1013/2006, the Cross-Border Regulation). The Cross-Border Regulation establishes stricter rules than the Basel Convention. It prohibits the export of ships ready for scrapping (hazardous waste) to non-OECD countries. Export of vessels ready for scrapping within the OECD require the consent of both the export and import country's authorities.

Through the Waste Regulation (FOR-2004-06-01-930) Chapter 13, Norway has implemented the Cross-Border Regulation. As a consequence, it is prohibited to export decommissioned ships (hazardous waste) from Norway to non-OECD countries. Such export from Norway to another OECD country requires consent of both the Norwegian and importing country's authorities.

The application of both the Waste Regulation and the Cross-Border Regulation depends on the ship's geographical location when the scrapping decision was made, i.e. whether the ship at the time is located within Norway or the EU. There is no general ban prohibiting the exportation of ships for scrapping that are registered in *Norway or within the EU or owned (directly or indirectly) by Norwegian or EU domiciled interests*. On the other hand, both the Waste Regulation and the Cross-Border Regulation applies to *foreign owned or flagged ships which are located in Norway or within the EU* when the scrapping decision is made.

India, Pakistan and Bangladesh are not members of the OECD. Exportation of decommissioned ships from Norway or the EU for scrapping in these countries is therefore prohibited.

2.2 Potential criminal liability

In Norway, violation of the rules regarding export of ships for scrapping may lead to criminal liability. According to the Norwegian Pollution Act, anyone who intentionally or negligently imports or exports waste in violation of the Waste Regulation and Cross-Border regulation, risks fines or imprisonment for up to 2 years.

The Norwegian Pollution Act is supplemented by the Norwegian Criminal Act's general provision regarding criminal contribution (the Criminal Act Section 15). Anyone who intentionally or negligently contributes to the violation of the export rules, including contribution to the export of ships from Norway to beaching yards outside the OECD, may be held criminally liable.

In March 2018, a Dutch court handed down a historical verdict. For the first time, a shipping company was fined for illegal export of ships that were to be scrapped at a beaching yard. The Dutch shipping company Seatrade sold four ships to an intermediary (a so-called "cash buyer"), who would scrap the ships at beaching yards in India and other countries offering beaching facilities. Both Seatrade and two of the company's managers were charged with violation of the Cross-Border Regulation. Seatrade's defense was, *inter alia*, that the decision to scrap the ships was taken while the ships were located outside the territorial waters of the EU. The court, however, found that both the owner of the ships, Seatrade, and the two managers had acted in violation of the Cross-Border Regulation. Due to the case being the first of its kind, the defendants were not sentenced to imprisonment, but a total fine of $925,000 was imposed. In addition, the two managers were imposed a one-year ban on having leading roles within the shipping industry.

3 New regulations within the EU and internationally

The need for improved and more comprehensive regulations has led to an international effort to prepare new regulations. In 2009, the International Convention regarding Safe and Environmental Recycling of Ships (the Hong Kong Convention) was adopted by the IMO. The Convention establishes requirements for ships both during their operational lifetime, as well as requirements for the scrapping process and the shipyards used for scrapping.

The Hong Kong Convention has not yet been ratified by a sufficient number of states to enter into force. EU has, however, taken an initiative to implement the Convention's substantive content, and adopted in 2012 the EU Ship Recycling Regulation (Regulation 2013/1257). The regulation implements the Hong Kong Convention's requirements for ships and scrapping yards, and impose stricter requirements than the Convention in some areas.

The Regulation now also forms a part of the European Economic Area Agreement (EEA Agreement), and has been implemented into Norwegian law trough the Ship and Mobile Offshore Unit Recycling Regulation (FOR-2018-12-06-1813).

In contrast to the Waste Regulation and the Cross-Border Regulation, which only apply to ships that are geographically located in Norway/EU, the Ship Recycling Regulation include all ships ., regardless of where the ship is located. The Ship Recycling Regulation requires the scrapping of ships to be done only in approved scrapping yards (yards on "the European list"). In order to be approved as a scrapping yard, it is required that the yard is operated in a proper and environmentally secure manner, that the yard is operated from permanent constructions and that damaging effects on human health are prevented. Whether or not beaching can be legally used as a scrapping method for ships sailing under the EU/EEA flag will therefore depend on whether beaching yards are approved or not.

To date, only 41 yards are approved for scrapping, of which 34 yards are located in Europe, 6 in Turkey and 1 in the USA. Several Asian yards have applied for approval, but so far none have been approved. The European Commission is, however, under pressure to include more yards on the list. It is argued that the yards that have so far been approved do not have sufficient capacity to handle the amount of ships that are to be scrapped in the coming years.

Ships that do not sail under the EU/EEA flag are also after 31 December 2018 governed by the Waste Regulation in Norway and the Cross-Border Regulation within the EU. For these ships, it will still be their geographical position at the time the scrapping decision is made that determines whether or not exportation for scrapping and a subsequent beaching is illegal under Norwegian and/or EU law.

4 The regulations are increasingly supplemented by "corporate responsibility"

The situation is thus that under current regulations, there is not a total ban against beaching of Norwegian or EU owned ships. Whether beaching is legal or not will depend on which flag the ship is sailing under (EU/EEA or non-EU/EEA flag), and also where the ship is located at the time the scrapping decision is made.

The damaging effects of beaching, in combination with the regulatory limitations, has, however, led to efforts being made by third parties, in an attempt to limit the use of beaching. In 2018, DNB Bank ASA, along with other European banks, joined the "Responsible Ship Recycling Standards". These are guidelines for the banks' ship financing business, which instruct the banks to incorporate the requirements of the Hong Kong Convention and EU's regulations directly into loan agreements etc. In this way, the borrower is obliged *by contract* to perform in accordance with the requirements of the regulations.

According to the NGO Shipbreaking Platform, large companies such as Volvo, Volkswagen, ABB and Philips have communicated similar views when selecting shipping companies to ship their products.

The development is thus clear – irrespective of whether beaching is legal or illegal under applicable regulations, ship owners must increasingly also adhere to requirements and expectations regarding sustainable recycling of ships from partners and customers.

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COVID-19 crisis and contractual obligations: some considerations under Dutch Law

Introduction

The shipping and transport sector is one of the hardest hit by the COVID-19 crisis. Container transport virtually came to a standstill, production and logistics processes were disrupted, capacity problems increased and supply chains were disrupted worldwide. These interruptions have in many cases resulted in various players in the chain defaulting on their contractual obligations. In this article we will assess such non-performance of obligations due to the impact of COVID-19 from a Dutch contract law point of view, and we will also discuss some remedies from a Dutch law perspective (such as force majeure and unforeseen circumstances).

Freedom of contract

The concept of contractual freedom is well enshrined into Dutch contract law. Therefore, the primary course of action for parties whose performance under a contract may be affected by circumstances or an event suddenly disrupting performance, is to carefully review the provisions of the contract to assess their position. Party autonomy is paramount under Dutch law, and this implies that a party can, in principle, force the other party to perform in accordance with the agreement. The principle of party autonomy means that Dutch courts will not easily set aside a performance claim, nor will they quickly interfere in contractual agreements between parties, especially when commercial parties are involved.

Force majeure

An important question is whether the COVID-19 crisis constitutes force majeure in a particular case. This could be the case if the debtor is unable to perform (in time) due to statutory COVID-19 measures, for example due to import or export bans, the closure by government of certain companies, buildings or roads, etc.

A successful invocation of force majeure has the following legal consequences under Dutch law:

1. the debtor cannot be obliged to perform (performance is impossible);
2. the creditor cannot claim damages;
3. where performance is permanently impossible, the creditor lacks the power to suspend performance;
4. a debtor may require rescission or modification of the contract, in whole or in part, if unforeseeable circumstances exist.

A failure to perform under a contract may be excused by force majeure if the force majeure event does not result from a fault of the debtor and the debtor cannot be held accountable for it. A question whether the debtor should bear the risk for his non-performance follows from the law, the legal provisions in the contract (e.g. a force majeure clause) and common opinion as well as the facts and circumstances of each individual case. Courts in the Netherlands will carefully consider whether the contract addresses the risk of a certain event taking place and whether or not this risk is shifted to a party. If non-performance under a contract can be excused by a force majeure event, performance can no longer be enforced by the creditor and the creditor is also barred from claiming damages, except if the debtor derives certain benefits from the non-performance that it would not have had in the case of proper performance. A party is not automatically discharged from its obligations. The party suffering from the force majeure event has the right to suspend performance, or he could also terminate the contract if performance has become permanently impossible, or if a reasonable time to perform has been granted by the creditor and performance has still not taken place.

When assessing whether reliance on force majeure in Dutch law governed contracts is possible, the parties should take the following into account (these points should also be considered when drafting new contracts):

1. Consider if the COVID-19 outbreak makes that party's performance impossible or just burdensome, and depending on the outcome, assess what position to take with respect to the contract;
2. review existing commercial contracts to establish whether they contain provisions on force majeure or any other provisions (such as change of law or Material Adverse Change) which may provide remedies against non-performance, assess whether the COVID-19 outbreak falls within the scope of these provisions, and assess the consequences for relying on these provisions;
3. If the COVID-19 outbreak impacts the performance of a party and reliance on these clauses is not possible, the party whose performance is affected should confer as quickly as possible with the other party to the contract to discuss what arrangements can be made to mitigate the risks arising from the non-performance. This follows from the obligation for all parties to a contract to act in good faith;
4. properly document the impact of the COVID-19 outbreak on the business, and determine whether a specific default under a particular contract as a result of the COVID-19 outbreak may trickle down to defaults in other contracts (notably financing arrangements); and
5. Assess whether the negative effects of the COVID-19 outbreak are covered by insurance policies.

If the parties did not include specific provisions on force majeure in their contract, Dutch statutory law applies (article 6:75 Dutch Civil Code, "DCC"). Furthermore, general principles of reasonableness and fairness apply to all Dutch law governed contracts and may impact reliance on contractual provisions.

Unforeseen Circumstances

Another option under Dutch statutory law is reliance on the provisions pertaining to unforeseen circumstances (article 6:258 DCC). Under Dutch law, a contract may be amended or terminated due to unforeseen circumstances.

This provision can only be relied upon if the unforeseen circumstances are of such a nature that the other party cannot demand that the contract is maintained in an unmodified form. Any contracting party may request the Dutch courts or arbitral tribunal to amend or rescind the agreement (in whole or in part) in view of unforeseen circumstances. The courts or arbitrators will then have to consider whether, in view of the seriousness of the circumstances, the unaltered performance of the contract may not be expected according to standards of reasonableness and fairness. This is a high threshold; the starting point is that a contract party must perform.

There are "unforeseen circumstances" if, after the conclusion of an agreement, circumstances arise that were not taken into account at the time the agreement was concluded. Whether or not the risk was actually unforeseeable is not decisive. It can be assumed that contracting parties generally did not take the outbreak of the COVID-19 virus and its consequences into account. Unforeseen circumstances cannot be invoked if, according to the nature of the contract or the currently prevailing opinion, the circumstances remain for the account of the debtor (article 6:258 paragraph 2 DCC).

When amending or rescinding the agreement, the courts and arbitrators have a great deal of freedom. They will consider what is reasonable and equitable in view of all the circumstances of the case. The objective will be to restore the contractual balance disturbed by the unforeseen circumstances, taking into account the changed situation. An important question is then how the disadvantages of the situation are to be distributed among the contracting parties. After all, none of the parties is to blame for the COVID-19 crisis. The starting point will be that the contractual sharing of risk should be maintained; a party should not benefit. Potential benefits that a party will enjoy as a result of unforeseen circumstances (for example any governmental financial support) should also be taken into account.

On 29 April 2020, the Netherlands Commercial Court in an M&A matter rendered the first Dutch judgment in a case in which unforeseen circumstances were invoked in view of the COVID-19 crisis. The case revolved around the question whether a transaction agreement had been concluded between the parties (the agreement had not been signed) and, if not, whether the fee of 30 million euros owed in that case had to be amended or reduced in accordance with articles 6:94 (penalty clause), 6:248 (reasonableness and fairness) or 6:258 (unforeseen circumstances) of the Dutch Civil Code because of the current COVID-19 crisis. With respect to the question whether the COVID-19 crisis should be regarded as unforeseen circumstances, the judge of the Netherlands Commercial Court considered that the crisis may be unforeseen, but not of such a nature that the plaintiff, according to standards of reasonableness and fairness, may not have expected an unchanged continuation of the fee obligation. The purpose of the fee construction was to encourage the parties to enter into the transaction and to divide the risks between them. This objective would be thwarted if the fee could be reduced in the event of a decline in the value of the target company.

Reasonableness and fairness

Finally, general principles of reasonableness and fairness may be relied upon. These principles must be applied irrespective of whether a contract contains a specific provision on force majeure and even if the COVID-19 crisis does not qualify as force majeure or as unforeseen circumstances under Dutch law, a party may still not permitted to demand performance from the non-performing party if such a demand would be unacceptable on the basis of reasonableness and fairness.

Conclusion

The main rule of Dutch contract law remains: "pacta sunt servanda". For a successful appeal to force majeure or unforeseen circumstances, the party in question will have to meet the burden of proof. In practice, this does not always appear to be an easy task. In the future, when a new contract is concluded, the force majeure clause can in any case be formulated in such a broad way that a pandemic such as the COVID-19 crisis falls within the definition of force majeure. For existing contracts, reasonableness and fairness might require a renegotiation obligation for parties based on unforeseen circumstances.

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