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In this issue of *The Arrest News:*

Ship Arrest For Claim Against Personal Debtor Other Than Registered Ship Owner

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The Commercial Court of Montenegro (the "Court") issued a ship arrest warrant to secure the maritime claim against a personal debtor other than the registered owner of the ship, by direct application of Article 1021, para. 2 and 3 of the Maritime and Inland Navigation Act (the "MINA"). In other words, the Court took the approach adopted in Article 3, para. 4 of the International Convention Relating to the Arrest of Sea-Going Ships (Brussels, 1952) (the "Convention"), stipulating that in the case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the person liable.

Factual Background of the Case

The Claimants, i.e. Applicants in the arrest proceeding, were voyage charterers who had a claim for lost profits under the voyage charterparty entered with the Opponents no. 2. At that moment, the Opponents no. 2 had already been chartering the ship pursuant to the time charter with the registered bareboat charterer who were identified in the procedure as the Opponents no. 1. Since the bareboat charterparty was still valid, there was no need for the Applicants to designate the registered owners of the ship as the Opponents.

Upon entering voyage charterparty with the Opponents no.2, the Applicants concluded two fixtures with different sub charterers. However, due to failure of the Opponents no. 2 to deliver the ship in a timely manner, the Applicants were compelled to rescind the original

charterparty and claim damages for lost profits due to cancellation of fixed sub charterparties.

Arrest procedure

Montenegro is a member-state of the Convention. However, in the present case, the ship's flag state (Equatorial Guinea) is not a member-state of the Convention. Hence, the national legislation of Montenegro was to be applied i.e. MINA with subsidiary application of the Law on Enforcement and Security (the "LES").

The Applicants, represented by legal team of Abaco & Law Office Milosevic, applied for the ship arrest based on Article 1021, para. 2 and 3 of the MINA. Namely, the Application was directed against the Opponent no. 1 as the bareboat charterer (Article 1021, para. 2) and against the Opponent no. 2 as the ship operator/ charterer (and not the ship owner) who was personally liable for the maritime claim for which the arrest had been applied for (Article 1021, para. 3).

As evidence for probability of their claim, the Applicants delivered to the court the respective sub-charters as well as relevant correspondence with the Opponents no. 2.

The Court found that there was a *prima facie* validity of the maritime claim on the part of the Applicants. As for the second requirement - the imminent danger of substantial prejudice to the creditor/claimant, the Court ruled that such imminent danger was presupposed since the claim/receivables would have to be collected abroad. Hence, it suffices that only the *prima facie* validity of the claim needs to be proven.

Accordingly, the ship arrest order was issued prohibiting the vessel to sail from the Port of Bar (Montenegro) and to alienate or dispose of the ship until the arrest order was in force. The Harbour Master's Office was charged to implement the arrest order by confiscation of all the ship's documents.

By applying Article 1021, para. 2 and 3 of the MINA, the Court confirmed that the ship in respect of which the maritime claim arose may be arrested even when bareboat charterer, charterer or operator of such ship are personally liable for the maritime claim, pursuant to the applicable law governing their contractual relationship with the owner. It can be concluded that the Court *de facto* granted action *in rem*, i.e. allowed directing the claim against the ship as a debtor. Since action *in rem* (against the ship) is not applicable in civil law countries, such as Montenegro, where only action *in personam* (against personal debtor) is allowed, this case creates a significant court practice and once again confirms coexistence of two legal systems resulted from implementation of the Convention into national law.

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Force Majeure: 'best endeavors' does not require non-contractual performance by Kenra Parriswhittaker, Parriswhittaker (Bahamas)

When can a party to a shipping contract invoke force majeure where the other party's parent company is subject to sanctions?

'Force majeure' means an event, act or circumstances beyond the parties' control or responsibility, with the result that they are no longer bound by their contractual obligations. Its application to any given commercial contract depends on the express terms agreed.

A ruling[1] from the High Court in the UK has confirmed that force majeure can be invoked where the parent company of the other contractual party was under US

[1] MUR Shipping BV v RTI Ltd [2022] EWHC 467

sanctions. The ruling has important persuasive authority on the courts in The Bahamas.

What's the background?

The claimant shipping company entered into a Contract of Affreightment with the defendant charterers in June 2016. The charterers agreed to ship a specified volume of cargo per month from Guinea to Ukraine; the claimant agreed to carry the cargo. The contract expressly provided for payment in US$. It also included a force majeure clause which specified that to amount to a force majeure event, it "*cannot be overcome by reasonable endeavors from the Party affected".*

In April 2018, the US applied sanctions to the charterers' parent company – prompting the claimant to invoke the force majeure clause. It pointed out that sanctions would prevent contractual payment in US$.

At issue for the High Court was whether or not in exercising reasonable endeavours, the affected party was required to agree either to vary the contractual terms or to non-contractual performance.

The case raised a short question of law: whether reasonable endeavours extended to accepting payment in (non-contractual) € instead of (contractual) US$. So, were the charterers contractually required to pay the claimant in US$ or – as the charterers contended – entitled to pay in €?

What did the court decide?

The court concluded that:

- The charterers were contractually required to pay in US$ – and *not* contractually permitted to pay in €
- The exercise of reasonable endeavours did not require the claimant to sacrifice their contractual right to receiving payment in US$

The claimant was not, therefore, required to accept a non-contractual performance – and it had the legal right to invoke the force majeure clause.

What does this mean?

Commercial parties are increasingly relying on force majeure clauses to avoid their contractual obligations. This means it's more important than ever to ensure the meticulous drafting of force majeure clauses to protect your interests.

Any business entering into a commercial relationship with another party should take specialist expert advice from commercial solicitors who are experienced in negotiating and drafting robust force majeure clauses. Unambiguous wording is necessary to minimise the risk of expensive litigation in the future.

For advice and assistance from shipping and commercial contracts and disputes, get in touch with the award winning commercial lawyers at ParrisWhittaker.

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ESG and Shipping: Navigating towards a sustainable maritime industry by K. Murali Pany, Joseph Tan Jude Benny LLP (Singapore)

While Environmental, Social and Governance (ESG) may not be on every shipping company board's agenda, this is likely to change very soon.

Maritime transport represents a significant source of greenhouse gas (GHG) emissions, accounting for about 3% of global GHG emissions annually.[1] The United Nations International Maritime Organization (IMO) has adopted an initial strategy on the reduction of GHG emissions from vessels and aims to phase them out as soon as possible in this century. Key strategic objectives include (i) the reduction of carbon intensity of international shipping by 40% by 2030, pursuing efforts towards 70% by 2050, compared to 2008 levels and (ii) the reduction of total annual GHG emissions by 50% by the year 2050, compared to 2008 levels.

In accordance with the latest European Union (EU) proposal, the shipping sector will be included in the

[1] https://www.imo.org/en/OurWork/Environment/Pages/GHG-Emissions.aspx

Emissions Trading Scheme (ETS) by 2024. The measures have an extra-territorial reach and will also affect the movement of cargo outside of the EU's borders. When the new proposal comes into force, a 'shipping company' (which will be defined under the new regulation), will have to purchase allowances for 50% of emissions produced by ships of 5,000 gross tonnage or over for voyages connecting EU and non-EU ports, (unless the distance is less than 300 nautical miles, in which case 100% of emissions). In this regard, some players have taken steps in advance to manage this compliance cost. For example, one shipping line has announced that they will be imposing surcharges on their customers from next year, in anticipation of the revisions to the legislation.[2]

From 1 January 2023, all vessels will be required to calculate their attained Energy Efficiency Existing Ship (EEXI) to measure their energy efficiency and to initiate the collection of data for the reporting of their carbon intensity indicator (CII) and CII rating. The EEXI will apply to existing vessels of 400 gross tonnage and the CII will apply to vessels of 5,000 gross tonnage and above. This is pursuant to the IMO regulations to introduce carbon intensity measures that entered into force on 1 November 2022. The CII and EEXI regulations are in the Annex VI of the International Convention for the Prevention of Pollution by Ships (MARPOL). As of 1 November 2022, MARPOL Annex VI has 105 Parties, representing between them 96.81% of world merchant shipping by tonnage.[3]

The increasing number of ESG regulations is a reflection of the emphasis that investors, customers and other stakeholders are placing on the sustainability agenda of shipping companies. Investors are integrating ESG risk factors in their decision-making processes. It is no longer uncommon for ESG criteria to be adopted in the evaluation of a shipping company's ability to achieve long-term sustainable growth and therefore access to financing.

Recent market trends and demands by customers for a net zero supply chain are pushing shipping companies to prioritise ESG and provide investor grade ESG disclosures. This is further accelerated by recent initiatives, such as The Poseidon Principles which are adopted by leading banks and shipping finance providers. The Poseidon Principles is an industry framework used for assessing and disclosing the climate alignment of ship finance portfolios. It is not unusual for signatories to the framework, mainly with a significant exposure to shipping, to choose to finance a shipping company with an established ESG strategy and published ESG report over a company without one.

The 'S' component of ESG includes traditional shipping risks such as accidents, pay, crew safety and welfare issues. It pertains to the measures adopted by the company in terms of managing stakeholders such as the customers and employees, including the crew. The IMO's International Safety Management (**ISM**) Code provides an international standard for the safe management and operation of ships and for pollution prevention.

Apart from corruption, ownership transparency is also a pertinent issue for the shipping industry. A shipping company that prioritises the 'G' component of ESG will have to put in place processes and policies that will assure their stakeholders that these ESG-related risks are being dealt with by the management. Companies also need to be aware of the changing sanctions landscape and the impact of laws such as the UK Bribery Act and the US FCPA on their operations. It is critical for shipping companies to take the necessary measures to mitigate those risks in order to avoid non-compliance resulting in fines and loss of reputation.

What shipping companies can do to stay ahead

Companies should set out their sustainability goals and the steps they plan to take to achieve the outcomes. It is important to engage stakeholders and to set specific, achievable targets. For shipping companies, the pressure is on addressing the 'E' component in ESG, in light of the upcoming regulations. Apart from switching to fuels that generate lesser carbon emissions, shipping companies can also consider incorporating climate clauses into charterparties, such as the following:

[2] https://www.maersk.com/news/articles/2022/07/12/eu-ets-latest-developments

[3] https://www.imo.org/en/MediaCentre/PressBriefings/pages/CII-and-EEXI-entry-into-force.aspx

- Encouraging the parties to consider opportunities and cooperate to maximise the laden ratio of the vessel and minimise repositioning voyages in ballast during the charter period
- A contractual duty in charterparties for both parties (charterers and owners) to take all reasonable steps to maximise energy efficiency
- An optional mechanism for time charterparties, to share the cost (between owners and charterers) of upgrades which improve the fuel efficiency of time chartered vessels

Companies should start planning ahead and be prepared to meet the increasing stakeholder demands and comply with the upcoming regulations. This will require the effort of the entire organisation and importantly, buy-in from management to render the necessary time and resources to navigate towards a sustainable future.

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