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In this issue

President's Message

By: LeRoy Lambert, SMA President

The SMA and its members may look back with pride at 2021 and look forward to 2022 with optimism.

During halftime interviews at games, Nick Saban, head coach of the Alabama University football team, typically is asked by the sideline reporter what Saban's team needs to do to finish the game with a win. Just as typically, Saban answers: "We just need to do our jobs, and we'll be fine." In 2021 we did our jobs.

The SMA Board of Governors met monthly. SMA Committees met regularly. We held our elections and welcomed new officers as President, Vice-President and Treasurer. We held our monthly luncheons by Zoom, garnering speakers and participants from around the country. We held the Arbitration Seminar, virtually. We published The Arbitrator. Working with the SMA-MLA Liaison Committee, our Rules Committee is revising the SMA Rules. Thanks to our Friends & Supporters, we supported numerous organizations in the maritime industry as they held conferences and honored persons in our industry on whose shoulders we stand. The Yacht Brokers Association of America has listed several of our members on its dispute resolution panel. Charles Anderson, chair of our Yachts Committee, attended the Fort Lauderdale Boat show and made a presentation on force majeure (see Charlie's article on force majeure on page 22). We continued our participation as a member of the Business Network for Offshore Wind and joined the Wind Forum Offshore. At the Connecticut Mari-

time Association Shipping Conference in October presentations were made by Louis Epstein ("Force majeure clauses in International Commodity Sale contracts" – see page 7) and Molly McCafferty ("An Update on Conflicts and Disclosures in Arbitration"). Lucienne Bulow and I attended the MLA meeting in Boston where I made a presentation to the MLA ADR Committee; we attended numerous committee meetings and events in Boston while other SMA members participated virtually. Several of us presented at the monthly Zoom Coffee Breaks organized by the MLA ADR Committee, with whom we are working closely in connection with marking 100 years of the Federal Arbitration Act in 2025.

With the assistance of Soren Wolmar, I was asked to be on an ad hoc committee of the BIMCO Documentary Committee charged with drafting a new BIMCO Mediation/ADR clause. In addition to me, the committee consisted of BIMCO staff, an LMAA representative and participants from Hamburg, Singapore and Hong Kong. We completed our work, and the clause has been adopted: https://www.bimco.org/insights-and-information/contracts/20211220-new-mediation-adr-clause-2021.

Most importantly, though, our SMA members did our job of providing alternative dispute resolution services: our being appointed focused the minds of parties and resulted in many settlements, we heard disputes, we mediated disputes, and we issued awards. That's what we do.

Finally, and drum roll, please: we resumed in person luncheons on December 8 with our Holiday Luncheon at which we welcomed 44 attendees. Mark your calendars for January 12, February 9, March 9, and April 13!

Happy Holidays and New Year!

LeRoy Lambert
President

The Need for Speed: A Review of Recent Expedited Arbitrations under the SMA Rules

By George J. Tsimis, Director, GJT Marine Consultants LLC, SMA Member and Board Member

Much like the seas that vessels sail upon each day, maritime commercial disputes can be unpredictable despite painstaking preparation, planning and foresight, and utilizing the most detailed and specifically tailored contracts and commercial instruments. Oftentimes, when such disputes and differences arise, time is of the essence. However, the need for a speedy resolution can vary. Each passing day in an unusually firm hire market or when there is an impending key contractual deadline for performance can have a significant impact in a multi-million dollar dispute. Fortunately, arbitration under the SMA Rules provides a framework for commercial counterparties to promptly resolve disputes and differences that can arise during any phase of the adventure, be it upon delivery of the vessel, prior to loading, during the voyage itself, at the discharge port, or thereafter.

On page 11 of its 2020 edition of its *Maritime and Commercial Dispute Resolution* booklet, the SMA cites "Speed" as a salient feature of its Rules to provide an efficient practical system for fair disposition of maritime and commercial disputes:

> The immediate intervention of arbitrators is often required to preserve evidence and assets and/or to provide interim relief from an emergency quarrel that threatens the viability of an ongoing contract. SMA arbitration panels can and have been speedily formed on an emergency basis to address such urgent needs and have rendered the needed declaratory relief within hours. In those special instances where time is of the essence, such rapidly convened panels can be invaluable.

The flexibility of SMA arbitration to respond to urgent contractual disputes is further buttressed by the broad discretion afforded under SMA Rule 30

which provides: "The Panel shall grant any remedy or relief which it deems just and equitable, including, but not limited to, specific performance and the posting of security for part or all of a claim or counterclaim in an amount determined by and in a form acceptable to the Panel."

This article will review how three SMA Panels, in the past year, have applied these principles, meeting the challenge of addressing disputes on an expedited basis and granting the different types of relief sought by the moving parties.

In an arbitration between *Absolute Nevada LLC and Grand Majestic Riverboat Company LLC* (The M/V AMERICANA), SMA No. 4384 (March 25, 2020) (Wiswell, Shaw, Tsimis, Chair), a dispute arose between the vessel's owner and its charterer when charterer failed to accept delivery of the vessel by the bareboat charter party's canceling date of November 18, 2019. The Charterer thereafter engaged in conduct interfering with owner's ability to sell or charter the vessel to a third party. The Owner commenced arbitration on December 5, 2019 seeking expedited hearings and (1) declaratory relief that the charter was at an end and that charterer had no right to operate, restrain or otherwise interfere with the owner's use, operation or chartering of the vessel; (2) injunctive relief to enjoin respondent and its officers from actions inconsistent with such declaration; and (3) an award of damages caused by respondent's conduct including attorney's fees. The Owner requested charterer to appoint its arbitrator immediately, but charterer refused to do so until December 24th.

In the meantime, on December 16th, the owner filed a complaint before the SDNY and sought a temporary restraining order and/or preliminary injunction against charterer pending the New York arbitration proceeding to prevent the charterer from engaging in conduct that interfered with the owner's use of its vessel, from representing to the outside world that it controlled and operated the vessel and that the vessel was part of charterer's fleet, and that the charterer interfered with the owner's efforts to charter the vessel to any third parties. On December 23rd, the SDNY issued a temporary restraining order enjoining the charterer from litigating with the owner over the vessel other than in the New York arbitration proceeding and scheduled a January 7, 2020 hearing to address why the preliminary injunction sought by owner should not be granted.

On Christmas Eve, charterer appointed its arbitrator. A chair was appointed on December 26th, and on December 30th, the parties accepted the panel as constituted. Immediately thereafter, the panel ordered that a telephonic conference be held on January 3, 2020 to address any expedited requests for relief and other scheduling matters. During this conference, charterer took the position that there was no need for an expedited proceeding and pressed to have a standard timetable under the SMA rules apply. Charterer also stated that it was seeking relief of its own in the form of specific performance of its rights under the charter to take delivery of the vessel. However, during the hearing, it was pointed out that the charter itself contained a provision that the parties had waived specific performance and certain other equitable remedies. The parties then undertook to use their best efforts to agree a stipulation to address the issues that formed the basis of the owner's request for expedited relief.

On January 6th, the next business day, the parties agreed to a stipulation which was also filed with the SDNY to avoid the need to hold the scheduled January 7th hearing. The stipulation provided that the charter had been cancelled and charterer had no interest in the vessel, that charterer would refrain from representing that the vessel was part of its fleet or otherwise controlled by it, and that charterer would not interfere with owner's efforts to charter or sell the vessel. The stipulation thus put an end to the need for expedited proceedings.

While no substantive hearings were held on the charter party disputes at hand, the AMERICANA panel's prompt scheduling of the telephone conference with the parties' counsel and the issues raised therein clearly placed sufficient pressure on the parties to resolve their differences and stipulate to appropriate findings of fact, thereby obviating the need to further litigate these issues and avoid unnecessary expenses or proceedings. Within one week of the panel's formation, the urgent disputes had been resolved, leaving the remaining issues regarding damages and recoverable legal fees to be addressed in a subsequent partial final award issued on March 25, 2020.

In an arbitration between *Brujo Finance Company and Sea Energy Company* (The M/T ALKIMOS),

SMA No. 4388 (July 3, 2020) (Gluck, Martowski, Shaw, Chair), the panel was faced with a request for emergency relief involving the interpretation of a charter party clause addressing sanctions regulations. The owner sought a partial final award declaring that owner had validly invoked a sanctions clause in a voyage charter party dated March 27, 2020. Specifically, owner contended that on April 13th it properly refused charterer's instructions to perform a ship-to-ship ("STS") transfer of the gasoline cargo to a third-party vessel off the coast of Aruba because charterer failed to provide sufficient information to rule out the prospect that the cargo was ultimately destined to be delivered to Venezuela. The charter party contained a sanctions clause providing owner with the ability to refuse to perform charterer's orders if those orders "could expose the vessel, its owners, managers, crew or insurers to a risk of sanctions imposed by the United States..." At that time, OFAC had issued sanctions regulations targeting Venezuelan interests including PDVSA, Venezuela's state-run oil company, and such sanctions applied to both U.S. and non-U.S. persons.

On May 19th, owner submitted its application for an expedited partial final award declaring the propriety of its refusal to perform the STS transfer and to demand alternative orders. Charterer submitted its opposition on June 4th and owner submitted its reply on June 12th. In its opposition papers, charterer argued that owner's application was procedurally defective, that the SMA rules did not authorize a panel to issue a partial final award on the declaration sought by owner, that the issues were neither ripe and nor severable from the remaining issues for determination, and that there was no need for expedited consideration. Charterer also argued that there was no evidence that the cargo was destined for Venezuela or that the STS would give rise to a sanctions violation.

On July 3rd, the panel issued its partial final award and immediately disposed of charterer's procedural arguments by holding:

> The case law establishes beyond reasonable argument that arbitrators have the power to set their own procedures.
>
> Moreover, section 30 of the SMA's Maritime Arbitration Rules which the parties agreed would apply to this proceeding, make clear that arbitral panels in matters being arbitrated under the Rules can make such orders as they deem "just and equitable."

The panel also rejected charterer's argument that owner's application should not be considered on an expedited basis and denied charterer's request to conduct discovery of owner's records regarding its April 13th demand for alternative voyage orders. The panel further concluded:

> The panel finds that there will be a likely saving in legal and arbitrators' fees and expenses to be gained from a determination at this stage in this proceeding that narrows issues by determining whether owner's demand for alternative voyage orders was valid when made on April 13. The panel considers that this narrowing of issues will not compromise a fair disposition of the merits of the claims and counterclaims over the balance of this proceeding . . . .

Turning its attention to the main issue in controversy, the panel ruled that the sanctions clause gives owner "an absolute discretion to demand and receive alternative orders" and held that there was a discernible risk that the STS as then instructed could lead to a violation of US sanctions. Therefore, owner was within its rights under the sanctions clause in the charter and charterer was obligated to provide alternative voyage instructions to owner.

Within 45 days, the ALKIMOS panel received the emergency application and ruled on the substantive issues before it, thereby promptly addressing and resolving the primary dispute regarding the interpretation of the charter's sanctions clause. The Panel's expedited ruling also narrowed the issues, streamlined the proceedings before it, and saved considerable fees and costs.

In an arbitration between *Kondot S.A. and Duron LLC* (The M/V HANZE GENDT), SMA No. 4395 (August 17, 2020) (Epstein, Gilmartin, Martowski, Chair), Kondot, the claimant-disponent owner (hereinafter "owner") sought an emergency partial final award confirming that it was justified in terminating an April 17, 2020 voyage charter for the M/V HANZE GENDT, which had been fixed to load and carry 30,000 MTs of wheat in bulk from Galveston, Texas (subsequently changed to Houston) to South American ports.

The facts underlying the dispute were complex:

Duron, the charterer, had a contract to sell 60,000 MTs of wheat to a government owned entity in Bolivia, and chartered the HANZE GENDT from Kondot to carry the first shipment of 30,000 MT. Duron entered into a contract to purchase the cargo from a US supplier for approximately $6.9 million, but at the time of loading had paid only $400,000. Hence, under the terms of the purchase contract, title to the cargo remained with the US supplier.

The vessel completed loading its wheat cargo on May 8th and bills of lading were issued listing Matarani, Peru, as the discharge port. Charterer paid $793,656.68 in freight to the owner on May 11th. Unfortunately, on May 12th, the contract for the sale of 60,000 MTs of wheat was cancelled. The vessel eventually arrived in Peru on May 23rd and waited for orders to discharge, but those orders never came. Instead, the parties agreed to an addendum to the charter, and the vessel sailed for Puerto Cabello, Venezuela, where, the charterer advised, the entire cargo would be discharged. Charterer agreed to pay a lump sum freight of $365,000 for this voyage from Peru plus detention charges for the delay at Matarani.

The vessel sailed from Peru on May 30th, arrived at Balboa, Panama on June 5th, and waited there because freight and detention had not been paid by charterer as agreed in the addendum. Owner sent several demands through counsel for payment under the addendum, but no payment was made by charterer.

On June 18th, charterer proposed to go to a different Venezuelan port and negotiation ensued for another addendum to the charter, but these negotiations were unsuccessful. On July 1st, with no orders given to the vessel by charterer, with charterer owing over $500,000, with a perishable wheat cargo on board, and with the unpaid US owner of the cargo forbidding the transport of its cargo to Venezuela, the vessel owner demanded that charterer provide adequate assurance of performance failing which owner reserved the right to terminate the charter, to declare charterer in repudiatory breach, and to commence legal proceedings to discharge and sell the cargo to mitigate its losses. Charterer did not respond to these requests by owner.

On July 2nd, Kondot commenced arbitration and, on July 14th, filed an action in the US District Court seeking *inter alia* an order compelling Duron to appoint its arbitrator. Two days later, Duron instructed its counsel and then appointed its arbitrator. A chairman was appointed the next day and the panel was accepted by the parties on July 19th. The parties agreed to an expedited submission schedule with all submissions and reply papers served by August 7th and a virtual oral hearing held on August 12th.

Five days later, on August 17th, the Panel issued an award and unanimously granted Kondot's application for a partial final award confirming its rightful termination of the charter. The Panel noted that Duron breached "its charter obligations at every stage of performance" and recounted the following undisputed facts:

- Charterer had no available cargo to load at Galveston on April 23rd;
- Charterer failed to discharge the cargo at Matarani, Peru on May 23rd;
- After the parties agreed to an addendum on May 29th whereby the vessel would discharge the cargo at Puerto Cabello, Venezuela, charterer failed to pay lump sum freight or the detention charges which charterer had agreed to pay before the vessel transited the Panama Canal for the voyage there;
- Despite repeated requests for payment by owner, charterer did not pay any of the agreed lump sum freight or accruing detention charges at Balboa;
- On June 18th, charterer proposed to change the discharge port again because it had no customer for the cargo at Puerto Cabello; and
- Between June 23rd and July 1st, owner made several demands for adequate assurance of due performance by charterer, yet charterer gave no orders, despite owing more than $620,000.

The Panel further held that charterer had failed to provide adequate assurance of performance, and further concluded: "The breaches by [charterer] were fundamental and material, going to the very root of constituting a repudiation of the charter."

With respect to the propriety of owner's request for emergency relief, the Panel ruled that charterer's "contention that the Panel lacks authority to issue a partial final award in these circumstances or that it is somehow inappropriate to do so is entirely without merit."

The Panel cited page 11 of the SMA Booklet referenced at the beginning of this article, as well as the ALKIMOS award cited above, in recognizing the historically well-established practice of SMA arbitrators to decide emergency applications. The Panel also cited the *Matter of the Arbitration between World Carrier Corporation and Kawasaki Kisen Kaisha Ltd.* (The M/V ENDEAVOR), SMA No. 1152 (September 19, 1977) (Simms, Berg, Nichols, Chair), where that panel decided an overnight application as to whether the vessel owner or charterer was responsible for installing safety ladders while the vessel was undergoing a shipyard survey.

The Panel added:

> In this case, [Owner] seeks the Panel's prompt decision on its right to terminate the Charter as the Vessel remains anchored at Balboa fully loaded without valid discharge orders after over 100 days since loading 30,000 MT of a $6.5 million perishable cargo at Houston on May 8, 2020. The relief requested by [Owner] unquestionably qualifies as emergency relief.

The Panel's prompt intervention to urgently issue the requested relief in the form of a judicially enforceable partial final award enabled owner to "take subsequent measures that are urgently required — e.g. discharge and judicial sale of the cargo — without peril or interference, such as a vessel arrest or other legal action by charterer based upon unfounded claims that the termination was wrongful." And ultimately, the Panel's speedy adjudication of these issues mitigated any further damages by freeing up the vessel so that it could engage in other trades and earn freight or hire.

Conclusion

The AMERICANA, ALKIMOS and HANZE GENDT awards each illustrate how SMA panels have been able to address urgent requests for relief and provide expeditious, efficient, and reasoned adjudications for parties seeking to resolve or narrow their disputes. In these three SMA proceedings, the time frame between the formation of the panel (e.g., acceptance by the parties) and its granting of declaratory, injunctive or other urgent relief was 7 days (AMERICANA), 45 days (ALKIMOS) and 28 days (HANZE GENDT), respectively.

Perhaps the all-time speed record for SMA proceedings took place in the ENDEAVOR matter — cited in the HANZE GENDT — where arbitration was demanded on June 3, 1977, the panel was constituted that same day and held a one-day hearing with both parties submitting oral testimony and documentary evidence and exhibits. That panel was requested to issue an immediate award after the hearing, which it did.[1]

And while the need for speed and the meaning of "time is of the essence" are relative, depending on the specific situation, facts, and circumstances, these SMA panels meted out prompt and equitable relief to the arbitrating parties and provided unequivocal guidance and finality to ensure that the parties could each get on with their respective business activities, while simultaneously minimizing damages and costs.[2]

Also notable is that two of these three 2020 SMA proceedings took place during a global pandemic[3] which threatened to bring the global economy to a grinding halt, but which did not prevent SMA panels from moving forward and performing their ongoing, fundamental task of assisting industry counterparties with resolving their disputes.

Lastly, these three matters provide both legal practitioners and arbitrators alike with some helpful guidance and considerations when making or addressing expedited requests for relief. These considerations include:

- Review your arbitration demand and any accompanying application for expedited relief very carefully to ensure that you present the panel, and your opponent, with a clear, concise, and specific statement of each form of relief requested.
- Assess whether expedited or urgent relief is necessary. Doing so will make sure that the issue needing prompt attention and adjudication will have the panel's full attention, rather than diluting that request for urgent relief with peripheral or less significant issues in dispute that can be addressed later in the arbitration proceeding.
- Propose or provide the panel with a submission agreement (again, a jointly submitted proposal will streamline the proceeding) setting forth the briefing schedule for the parties' respective briefs, evidence to be submitted, witness testimony presentation, and hearing dates, if needed.

- Use your best efforts to confer with your opponent to obtain agreement on briefing schedules and other procedural issues and logistics to avoid any delays that might follow the panel's intervention. In many instances, both parties benefit from such jointly submitted proposals which all panels welcome.

1 In the ENDEAVOR, the parties did not have time to prepare a submission agreement for the panel due to the urgency of the situation. Instead, the scope of the submissions to be made by the parties, as well as the sole issue for the panel to address and resolve, were read into the record during the hearing..

2 It should be noted that this article did not address proceedings in which SMA panels addressed requests for pre-award security which, by its nature, constitutes a form of expedited relief falling within the scope and authority of SMA panels under Section 30 of the SMA Rules.

3 The AMERICANA panel convened during the height of the holiday season between Christmas 2019 and New Year's 2020, and subsequently issued its partial final award on March 25, 2020, during the early days of the pandemic.

Force Majeure Clauses in International Commodity Sale Contracts: The Need for Detail*

By Louis Epstein, Senior Vice President and General Counsel of Trammo, Inc., SMA Member and Co-Editor of The Arbitrator

Commodity sale contracts typically require delivery of the goods to ocean-going vessels and arrangement for their transportation to distant ports. In order to allocate between the buyer and the seller the obligations, costs and risks associated with contracts for carriage of the goods, commodity sale contracts normally contain provisions relating to such maritime matters as laytime, demurrage, dispatch and dead freight. But what happens to those allocations when performance is disrupted by an event of force majeure?

In such contracts, the consequences of supervening events beyond the parties' control are normally regulated by a force majeure clause.[1] Typically such clauses provide that neither party shall be liable for non-performance or delay in performance caused by such events. However, force majeure clauses are often insufficiently precise, failing to take into account the effect that relief from liability will have on the contractual allocation of costs and risks or the different impact that a declaration of force majeure can have at various stages of performance.

An example of a clause lacking such detail may be found in *Keytrade AG v. Umur Tarim Sanayi Ve Ticret A.S.*,[2] where the force majeure clause in a CFR sale contract[3] read as follows:

a) Neither party shall be liable for any non-performance or delay in performance caused by acts of God, industrial disturbances, war (declared or undeclared), civil-commotion, perils of the sea, mandatory or voluntary regulations issued or requested by any governmental authority, breakdown of machinery, equipment or terminal facilities, interruption of transportation or distribution facilities or any other cause whatsoever (whether or not of the same class or kind as those set forth above) beyond is (its) reasonable control (herein 'Force Majeure').

b) The party claiming Force Majeure shall notify the other party within 15 days after the party has notice thereof.

c) If Force Majeure affects Seller, Seller may at its option, exercised by notice to Buyer given within reasonable time either: cancel from this contract the quantities which have not been shipped due to Force Majeure, without affecting the balance of this contract, or ship such quantities in one or more lots, after Seller deems the effect of Force Majeure to have ended, on the same terms as set forth in this contract.

The above sample clause defines force majeure very broadly and states that "neither party shall be liable for any non-performance due to force majeure." That *seems* even handed. But it can result in a significant and unexpected shift of costs and risks in a CFR sale contract from the buyer to the seller.

The typical course of performance, after conclusion of a CFR sale contract is:

a) The seller arranges to purchase the cargo on an FOB basis and agrees to a tentative loading laycan with its supplier;

b) The seller enters the market for a vessel to transport the product, fixes a vessel "on subjects" and nominates the vessel to its supplier and to its buyer;

c) The supplier and buyer each accept the vessel nomination, whereupon subjects are lifted and the vessel is fixed "clean";

d) The vessel sails to the load port, arrives there and loads the cargo;

e) The vessel sails to the discharge port, arrives there and discharges the cargo, and the buyer receives it.

Under INCOTERMS, the CFR seller's obligations with respect to delivery are complete when it has loaded the cargo on board the vessel and arranged for its carriage to the discharge port.[4] The CFR seller bears the costs and risks up to the completion of loading.

Thereafter, responsibility for costs and risks typically passes to the buyer.[5] Among other things, the buyer is normally liable under the CFR sale contract to pay for the cargo, receive it, discharge it at a certain rate or within a certain period of time, and pay demurrage if the time used for discharge exceeds the time allowed.[6]

In *Profindo Pte Ltd v Abani Trading Pte Ltd ("MV Athens")*,[7] the Singapore High Court observed that the allocation to the buyer of the obligation to pay demurrage for any delay in discharge was a basic feature of a CFR contract. In *Profindo*, the buyer argued that, in a CFR contract that did not contain a force majeure clause, there was an implied term that the buyer would not be liable for demurrage for a period when, because of events beyond the buyer's control, the vessel was shifted away from the berth. The court, per Justice Prakash, rejected that contention, holding as follows:

> In my view, if the CIF/CFR seller (i.e, the appellant) is not even "under any duty to ensure the actual physical delivery of the goods" at the port of discharge, it would be quite remarkable to hold that the risk of delay in unloading the goods at the port of discharge after laytime has commenced has to be borne by him. This is especially so when there is a demurrage clause in the contract since the raison d'être of the same must be to transfer the risk of delay in the discharge of goods to the buyer. It is more logical and more in line with commercial realities to hold that such risks, unless they have been expressly allocated to the seller by a specific term in the contract, are to be borne by the CIF/CFR buyer. Since the Agreement did not specify who the risk should fall on if the discharge of goods was to be interrupted after laytime had commenced, I hold that laytime continued to run during the period when the respondent could not have discharged the goods (i.e, 1 and 2 July 2009) because the vessel had shifted away from the berth.[8]

If a CFR sale contract contains a force majeure clause and it states only that, in the case of force majeure, "neither party shall be liable for any non-performance," the occurrence of a force majeure event may relieve the buyer of its most basic obligations under the CFR sale contract: to pay for and receive the cargo, to pay damages to the seller if it fails to do so, and to pay demurrage if there is a delay at the discharge port.

The occurrence of such an event will *not* be sufficient, however, to relieve the CFR seller from liability to the vessel owner under the charterparty for costs that may be incurred if the shipment is cancelled in whole or in part, or if the destination is changed or for demurrage at the discharge port if discharge is delayed. Nor will a force majeure event affecting the buyer normally excuse the CFR seller from obligations that it has incurred to its supplier to purchase, load, and pay for the cargo.

The result is that, as a consequence of a force majeure event affecting the buyer, basic obligations of the buyer under a CFR contract may be shifted to the seller. The prospect of the seller having to bear these obligations and risks would not normally be foreseen or priced into the bargain between the parties. Nor would a CFR seller normally be in the best position to insure against costs and risks arising from a force majeure event affecting the buyer or to take measures to overcome them.

Over the years, my company, Trammo, Inc. (formerly known as Transammonia, Inc.[9]) has had occasion to consider with some care the potential

consequences for the seller of a force majeure declaration by a buyer under a CFR sale contract. In doing so, we have taken into account that at each stage of performance, the consequences for the CFR seller of a force majeure event affecting the buyer may be different. Among other things, we have tried to address in our standard force majeure clause the following questions:

1) What if the declaration comes before loading but after the seller has entered into an agreement to purchase the cargo from its supplier and has chartered a vessel which is heading for the loadport?
    a) Can the CFR buyer cancel the sale contract?
    b) Is the CFR buyer liable for damages and costs incurred by the CFR seller in cancelling the purchase from its supplier?
    c) Is the CFR buyer liable for costs incurred by the CFR seller in cancelling the vessel?
2) What if a buyer under a CFR contract declares force majeure *after* the vessel has loaded, title and risk have passed and the fully laden vessel is sailing toward the discharge port?
    a) Can the CFR buyer cancel the sale contract?
    b) Must the buyer pay for the cargo?
    c) Who is responsible for deviation and other costs if the vessel must go elsewhere?
    d) Is the buyer liable for discharge port demurrage if, because of the force majeure event, the vessel must wait to berth and discharge its cargo?

In drafting a force majeure clause, our intention was to ensure that costs and risks allocated to the CFR buyer as part of the original bargain between the parties would not shift to Trammo, the CFR seller, upon the occurrence of a force majeure event affecting the buyer. The extent of protection afforded by Trammo's force majeure clause was tested in 2008 in connection with the supply of sulfuric acid to Agrifos, Inc., a phosphate fertilizer producer located in Pasadena, Texas. The ensuing dispute between the parties was the subject of an SMA arbitration.[10]

Trammo sold to Agrifos two cargoes of sulfuric acid under separate contracts on CFR terms and chartered vessels, the MT BOW HERON and the MT HOLMEN, to load each cargo.[11] Both vessels were initially due to arrive at Agrifos's plant in late October 2008, with the BOW HERON (loading in Sweden) expected to arrive shortly before the HOLMEN (loading in India). The BOW HERON cargo was substantially more expensive than the HOLMEN cargo. The CFR sale contract incorporated Trammo's General Terms and Conditions for CFR Sales, including its standard force majeure clause (the relevant subclauses of which are quoted below).

On September 13, 2008, Hurricane Ike struck the Pasadena area. ICIS published the following news report:

> **Agrifos' Texas plant suffers shutdown due to Ike**
>
> **17 September 2008 15:31** Source: **ICIS News**
>
> LONDON (ICIS)—US phosphate fertilizer producer Agrifos could be facing a one-month outage at its Pasadena, Texas, facility following extensive flooding in the wake of Hurricane Ike, trader sources said on Wednesday.
>
> Sources at Agrifos confirmed the plant was not currently operational and that a massive clean-up operation was underway following the flooding, but no further details were forthcoming and the extent of any damage was unknown. The 625,000 tonne/year facility was shut down on 12 September as Hurricane Ike hit the US Gulf of Mexico, sources added. The plant, located on the Houston Ship Channel, makes diammonium phosphate (DAP) and monammonium phosphate (MAP) among other products.
>
> Agrifos supplies DAP and MAP to the US domestic market and also exports product.

The hurricane caused major damage to the Agrifos plant. On September 18, 2008, Agrifos sent to Trammo a notice declaring force majeure and purporting to cancel the more expensive BOW HERON contract. Agrifos did not declare force majeure under the lower-priced HOLMEN contract, even though the HOLMEN was then due to arrive at Pasadena at about the same time as the BOW HERON.

Trammo did not accept Agrifos's cancellation of the BOW HERON contract and urged Agrifos to perform, meanwhile exploring other options for disposing of the product.[12]

Agrifos's efforts to restore plant operations following the hurricane succeeded and the plant was up and running on October 10, 2008 when the BOW HERON was approaching its deviation point for the US Gulf.

On October 16, 2008, Agrifos agreed to receive the BOW HERON cargo on a "without prejudice" basis but refused to pay the full contract price. Agrifos made a provisional payment of what it referred to as a "market price," leaving an unpaid balance of $2,392,950. Agrifos insisted, however, that, having cancelled the BOW HERON contract due to force majeure, it was under no obligation to receive the cargo and declined any responsibility for demurrage in the event that the vessel would be required to wait to discharge its cargo.

The BOW HERON arrived in Pasadena on November 15, 2008, more than two months after Hurricane Ike and after Agrifos's plant had been up and running for more than one month. Agrifos nevertheless kept the BOW HERON waiting to discharge for another six weeks, until December 30, 2008. Discharge was completed on December 31. The delay in berthing resulted in demurrage of more than $1.25 million.

Clause 11 of the BOW HERON contract, entitled "Force Majeure," began with the following definition of the term:

> (a) No failure or omission to carry out or to observe any of the terms, provisions or conditions of this agreement shall give rise to any claim by one party hereto against the other, or be deemed to be a breach of this agreement if the same shall be caused by, or arise out of, war, hostilities, sabotage, blockade, revolution, or disorder; expropriation or nationalization; cutoff of gas supplies to facilities for the production of ammonia; disruption of rail or pipeline transportation of product to the loadport, and consequent delays; breakdown or damage to storage, pipeline or loading or unloading facilities, prevention of loading or unloading by terminal or port authorities; embargoes or export restrictions, acts of God, explosion, fire, frost, earthquake, storm, lightning, tide, tidal wave or perils of the sea; accidents of navigation or breakdown of or injury to vessels; accidents to or closing of harbors, docks, straits, canals or other assistances to or adjuncts of shipping or navigation; strikes, lockouts or other labor disturbances; or any other events, matter, or thing whatever occurring, *of the same class or kind as those above set forth, which shall not be reasonably within the control of the party affected thereby and which by due diligence such party is unable to prevent or overcome (herein called "force majeure")*.... (emphasis added)

The definition of force majeure in Clause 11(a) is considerably narrower than the definition in the sample clause set forth above from the *Keytrade* arbitration. The *Keytrade* clause provides that force majeure shall include not only certain enumerated causes but also "any other cause whatsoever (whether or not of the same class or kind as those set forth above) beyond is (its) reasonable control (herein 'Force Majeure')." It is extremely broad, going so far as to dispense with any inquiry as to whether the event in question is *ejusdem generis* with the enumerated causes.[13]

In contrast, the Trammo force majeure clause, after listing a number of specific events qualifying as force majeure, requires that any causes not enumerated must be "of the same class or kind" as the enumerated causes. In addition to expressly including an *ejusdem generis* requirement, Clause 11(a) also requires that any alleged force majeure event, whether or not enumerated, must be a cause "which by due diligence such party is unable to prevent or overcome." As will be seen, the inclusion of this due diligence requirement played an important role in the outcome of the *Agrifos* arbitration.

Clause 11(b) contained notice requirements and imposed an obligation on both parties to "jointly use their best efforts to minimize any possible resulting waiting time and/or damages and/or costs."[14] Clause 11(d) conferred upon the seller the right, in certain circumstances, to cancel the contract. It is important to note that no similar right was conferred upon the buyer.[15]

Clauses 11(f) and (g) contained provisions clarifying the effect of force majeure on the obligation to make payment for the product and on liability for demurrage:

(f) Notwithstanding the foregoing provisions of this clause, *the Buyer shall not be relieved of any obligation to make payment for product that has been delivered in accordance with Clause 3 or to pay demurrage or detention with respect to vessels chartered and/or loaded before the notification of the force majeure under this clause for a contractual shipment*.

(g) *The foregoing provisions of this Clause 11 shall have no application to the running of laytime or the Buyer's liability for demurrage, which are governed exclusively by Clause 7 and the provisions incorporated therein*. (emphasis added)

Regarding payment, Clause 11(f) was based on the recognition that under a CFR contract, delivery takes place when the cargo is loaded on board the vessel. In this regard, INCOTERMS 2000 for CFR Sales which was incorporated by reference into the contract provided: "The seller must deliver the goods on board the vessel at the port of shipment on the date or within the agreed period."

For the sake of additional clarity, Clause 3 of the sale contract in the *Agrifos* case provided in pertinent part: "The Seller shall be deemed to have complied with its obligations regarding delivery of any product when the product has passed the performing vessel's permanent intake flange of the load manifold at the load port[.]" Under INCOTERMS and under the express provision of the contract, this was also the point when risk of loss with respect to the cargo transferred to the buyer.

Clause 11(f) also took into account the commercial reality that the CFR seller, if, as is often the case, it is purchasing the cargo on an FOB basis, becomes liable upon loading to its supplier for the price of the cargo and to the vessel owner for the cost of transporting the cargo. Clause 11(f) was meant to ensure that in those circumstances, the buyer would be bound, even when affected by force majeure, to pay for the cargo and that Trammo, after having paid its supplier for the cargo and having paid the freight to the vessel owner, would not be left as the unpaid seller of a "floater," with the need to dispose of the cargo in what might be a tight and falling market.

The reason that Clause 11(g) excluded liability for demurrage from the scope of the force majeure clause was the unforgiving nature of charterparties such as ASBATANKVOY, which is the most widely used charterparty for the carriage of liquid cargoes.

Trammo's charters of ocean-going vessels are normally governed by English law. ASBATANKVOY contains clauses providing for exceptions to the running of laytime (Clause 6) or for half demurrage in certain circumstances (Clause 8). It also contains a general exceptions clause (Clause 19) which does not refer specifically to laytime or demurrage. A long line of English cases has held that even the most extreme and unforeseen events – events completely outside the control of the parties – will not excuse the charterer from the obligation to pay demurrage under ASBATANKVOY.

In the leading English case, *Nereide Spa di Navigazione v. Bulk Oil International Ltd (The Laura Prima)*,[16] the court held that the language "reachable on arrival" in Clause 9 of ASBATANKVOY imposes an absolute obligation upon the charterer to designate and procure a berth which can be reached by the vessel immediately upon its arrival at the port and that failure to comply with that absolute obligation, regardless of the reason, prevents the charterer from relying upon the exceptions to running of laytime, including an exception (in Clause 6 of ASBATANKVOY) for delays getting into berth for reasons beyond the charterer's control.

Other English cases have held that Clause 19 of ASBATANKVOY, the general exceptions clause, has no application to laytime or demurrage. For example, in *Sametiet M/T Johs Stove v. Istanbul Petrol Rafinersi A/S (The Johs Stove)*,[17] the charterers contended that the vessel was unable to reach a berth upon its arrival at Kharg Island, Iran because a strike by oil workers had caused congestion at the terminal. Clause 19 of ASBATANKVOY, the general exceptions clause, provided, in relevant part, that the Charterer would not be:

> ... responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: .... strike or lockout or stoppage or restraint of labour from whatever cause.

The charterers contended that the breach of their obligation under Clause 9 to procure a berth reachable on arrival was excused by Clause 19 because it arose or resulted from the strike. The

court rejected the contention that an event within the scope of Clause 19 could apply to stop the running of laytime or demurrage under ASBATANKVOY:

> I agree with the arbitrator that a general exceptions clause such as cl. 19 will not normally be read as applying to provisions for laytime and demurrage, unless the language is very precise and clear.[18]

A number of U.S. cases similarly hold that general exceptions clauses in charterparties do not apply to laytime or demurrage.[19]

As can be seen, occurrences which might amount to events of force majeure under a CFR sale contract will *not* normally excuse the CFR seller who has chartered the vessel from the running of laytime or liability for demurrage under the charterparty. For that reason, Trammo's standard CFR sale contract incorporated in Clause 7 of its main terms the provisions of the ASBATANKVOY charterparty form and provided, in Clause 11(f) of the General Terms and Conditions, that the force majeure clause would have *no* application to the running of laytime or liability for demurrage and that an event of force majeure would *not* relieve the buyer of the obligation to pay demurrage. Hence, a declaration of force majeure by the buyer would not shift the obligation to pay discharge port demurrage to Trammo. The buyer would be excused from that obligation only if it were excused under the relevant provisions of ASBATANKVOY incorporated in the sale contract.

Clause 11(i) dealt with the timing of the force majeure event. As mentioned above, the potential consequences of a force majeure event for the seller under a CFR contract may differ depending upon whether it occurs before or after (a) the fixture of the performing vessel and(b) loading of the cargo. Clause 11(i) provided as follows:

> (i) Should an event of force majeure occur *after the fixture* of a performing vessel but prior to loading of the vessel from the nominated load port, *the Seller shall be entitled to cancel the Charter Party of the nominated performing vessel,* and any damages or other costs of doing so shall be borne by the Buyer. Should an event of force majeure occur *after the performing vessel has lifted the Buyer's cargo,* the *Seller shall have the option,* in order to mitigate waiting time and damages, *to discharge the cargo at a port or ports other than the port mentioned in the Contract,* and will inform the Buyer accordingly. The price of the cargo shall, in any event, be increased or decreased by any increase or decrease in freight or expenses incurred by the Seller in connection with the voyage, including, but not limited to demurrage, damages for detention, taxes or dues, minus any costs saved. (emphasis added)

This clause reflected the commercial reality that (a) after the fixture of the performing vessel the CFR seller is obligated under the charter party to load the cargo and pay freight and other charges or to pay damages for cancellation of the fixture; and (b) after lifting, the CFR seller may have to find an alternative home for the cargo if, because of force majeure, the buyer is unable to receive it, perhaps incurring deviation costs or other damages. The purpose of Clause 11(i) was to ensure that the CFR seller is not left to bear these costs as a result of a force majeure clause affecting the CFR buyer.

The protective effect of the foregoing provisions can be seen in the award in *Agrifos*.

The dispute presented the following questions.

1. Assuming that there was an event of force majeure, did Agrifos have the right under the force majeure clause to cancel the contract?

The panel concluded, based on its reading of Clause 11, that Agrifos had no such right:

> The language and specific obligations of Clause 11, and the time frame for the performance of these obligations compel us to find that the Contract did not provide Agrifos with the right to cancel the Contract as it did. Firstly, the language does not contain an express right to cancel.... Secondly, Clause 11(a) continues by obligating the allegedly affected party to act (after the occurrence and impact of a force majeure event and its effects) to control, prevent or overcome same. Thirdly, Clause 11(b) obligates both parties to act down the timeline to use their best efforts to minimize and mitigate any possible resulting waiting time (presumably relating to vessels

> and/or performance) and/or damages and/or costs. Fourthly, the express "Seller may ... cancel from this contract" language of 11(d); "shall be entitled to cancel" language of 11(i); and "(t)he Seller may cancel" language of 12(a) shows that when the Contract intends to grant a right of cancellation to a party, it clearly says so.
>
> The Panel unanimously finds that Agrifos was not entitled to cancel the Contract and its actions in doing so were wrongful.[20]

2. Did UCC § 2-615 give Agrifos the right to cancel the contract?

In addition to relying on the force majeure provisions of the contract, Agrifos also sought to rely upon N.Y. U.C.C. § 2-615(a) to justify its decision to cancel the BOW HERON contract.[21]

However, the panel rejected Agrifos' contention, concluding that N.Y. U.C.C. § 2-615(a) applies only to "delay in delivery or non-delivery in whole or in part by a *seller*..." and therefore had no application to a failure to perform by a *buyer* such as Agrifos. Moreover, the panel concluded that even if a buyer could take advantage of its provisions, N.Y. U.C.C. § 2- 615(a) would have no application when the contract contains a force majeure clause specifically setting forth the parties' rights and obligations in the event of force majeure. As one commentator observed in a passage cited by the panel:

> The relationship between U.C.C. Section 2-615 and force majeure clauses in a contract is clearly explained in the notes of the principle Code draftsman, Prof. Karl Llewellyn, which indicate that: "The purpose of Section 2-615 was to provide a statutory basis for a claim of relief from burdensome contracts ... where the parties had not thought to provide their own force majeure clause."[22]

Similarly, the presence of a force majeure clause also precludes resort to the common law doctrine of impossibility.[23]

3. Was the event in question one which by due diligence Agrifos was "unable to prevent or overcome?"

The panel observed that the "burden of demonstrating force majeure is on the party seeking to have its performance excused . . . and the non-performing party must demonstrate its efforts to perform its contractual duties despite the occurrence of the event that its claims constituted force majeure."[24] As to the showing required, the panel noted that under Clause 11 of the sale contract, in order to constitute force majeure, an event affecting a party must be one "which by due diligence such party is unable to prevent or overcome."

Agrifos contended that, because of the hurricane, it had no space in its sulfuric acid tanks to receive the BOW HERON cargo. Trammo argued, however that at its plant Agrifos had available but failed to make use of additional storage capacity, including (a) a tank with 5,000 mt capacity which could easily have been made available by installation of a pump, (b) other sulfuric acid storage tanks with at least 2,000 mt capacity, and (c) a leased sulfuric acid barge that Agrifos kept at its premises with 1,500 mt capacity.

Trammo also argued that Agrifos failed to take advantage of other means at its disposal to make room for the BOW HERON cargo. Agrifos used sulfuric acid to produce phosphate fertilizers, including imported sulfuric acid from suppliers such as Trammo and sulfuric acid that Agrifos produced itself by burning elemental sulfur. Heat from sulfur burning was used to generate steam used in phosphate fertilizer production.

The storage space available for imported sulfuric acid therefore depended, in part, on (a) the extent to which Agrifos consumed supplies of sulfuric acid in the production of phosphate fertilizer and (b) the extent to which Agrifos produced its own sulfuric acid by burning sulfur. Trammo contended that Agrifos made no effort to reduce its sulfuric acid production below its consumption rate in order to make room for the BOW HERON cargo. Among other things, this could have been accomplished very quickly if Agrifos had used a readily available temporary gas-fired boiler to provide steam for phosphate fertilizer production without producing additional sulfuric acid. This became evident when Agrifos finally brought in a temporary boiler in December 2008 resulting in a dramatic decrease in sulfuric acid inventory levels. If Agrifos had brought the boiler in sooner, there would have been no delay in receiving the BOW HERON cargo. Instead, Agrifos chose to burn sulfur to produce sulfuric acid for phosphate fertilizer production. At the rate that Agrifos ran the plant, it produced more sulfuric acid than it consumed and thereby increased the quantity of sulfuric acid in its tanks

rather than reducing the quantity in order to make space for the BOW HERON cargo.

The panel concluded, after hearing extensive evidence and expert testimony, that Agrifos had not exercised due diligence to make space for the cargo:

> ...it was Agrifos' burden to prove by a preponderance of the evidence that it exercised due diligence to make room for the BOW HERON cargo to be received when the Vessel arrived. In other words, Agrifos had to prove that it did "everything in its control to prevent or to minimize the events' occurrence and its effects" *(Gulf Oil) [Gulf Oil Corp. v. Federal Energy Regulatory Commission,* 706 F.2d 444 (3rd Cir. 1983)] i.e., to make ready, increase and utilize sulfuric acid storage space at its facility, and to prevent and overcome the amount and buildup of sulfuric acid in its tanks.[25]

The Panel held that "Agrifos failed to sustain this burden,"[26] explaining that:

> The record does establish that Hurricane Ike did cause major damage to portions of Agrifos' facility and property, and that its efforts to get its plant back into operation, much to its credit, were huge (even "Herculean" and "heroic" as stated by Transammonia), and were largely successful. However, the record also establishes that it was clear very early that there was no significant problem with its berthing facility; its sulfuric acid discharge and storage facilities were undamaged; and there was not major mechanical damage to its fertilizer or sulfuric acid production plants.
>
> Moreover, the record supports, and we find, that Agrifos did not focus on trying to make space available for the HOLMEN or BOW HERON cargoes to any significant extent. It gave little if any thought, and made little if any effort, to make ready, increase and utilize sulfuric acid storage space at its facility, and to prevent or overcome the amount and buildup of sulfuric acid in its tanks.[27]

4. Was Agrifos excused by force majeure from paying the full contract price or from paying demurrage on the BOW HERON?

The panel went on to hold that Agrifos was not excused from paying the balance of the purchase price or from paying demurrage on the BOW HERON. With regard to demurrage, the panel observed that even if there had been a valid claim of force majeure, Clause 11(g) of the sale contract "specifically provides that the force majeure clause of the Contract 'shall have no application to the running of laytime or the Buyer's liability for demurrage, which are governed exclusively by Clause 7 and the provisions [of the ASBATANKVOY form] incorporated therein.'"[28]

The importance for the CFR seller of including specific language to this effect in a force majeure clause is illustrated by the decision of the court in *Toyomenka Pacific Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*[29] In *Toyomenka,* the court held that a hurricane affecting the buyer's refinery excused the buyer from paying demurrage for a ten-day berthing delay on a vessel delivering a cargo to that refinery. Among other things, the court rejected the seller's contention, which was based on the charterparty cases mentioned above,[30] that because the force majeure clause did not specifically mention demurrage, the wording was too imprecise to be read as relieving the buyer of liability for demurrage. In this regard, the court in *Toyomenka* said:[31]

> The force majeure clause states that: "Neither seller nor buyer shall be liable for damages *or otherwise* for any failure or delay in performance of any obligation hereunder other than the obligation to make payment, where such failure or delay is caused by force majeure...." (Contract, Clause QQQ (emphasis added).) Clearly, demurrage did not arise from delay in making payment but rather delay in accepting delivery. Hess's delayed performance of its duty to take delivery was caused by force majeure. To require Hess to pay the resulting demurrage would make Hess "liable for damages or otherwise" resulting from that delay.

The effect of the decision in *Toyomenka* was that the seller was left to bear in full liability for the discharge port demurrage incurred as a result of a force majeure situation affecting the buyer's ability to receive the cargo. The risk of discharge port demurrage, normally assumed by the buyer in a CFR sale contract, was thus shifted to the seller. It was to avoid such a result that Trammo's force majeure clause contained language expressly excluding running of laytime and liability for demurrage from the scope of its force majeure clause.

The importance of including such language in a force majeure clause is further illustrated by an unpublished decision in an ICC arbitration in which I was involved many years ago.[32] The case involved a long-term contract for the supply on a CIF basis of liquefied petroleum gas to a state-owned enterprise. My law firm represented the CIF seller. The contract was governed by French law.

Among other things, the seller asserted a substantial claim for demurrage as a result of long delays in berthing and discharging its vessels at the discharge port. With regard to demurrage, the contract incorporated the provisions of the ASBATANKVOY charterparty, providing:

> The laytime allocated for unloading will be 48 (FORTY-EIGHT HOURS) Sundays and holidays included. The notice of readiness will be 6 h (SIX HOURS).
>
> In general, the laytime, the duration and the delivery of the notice will be regulated by the appropriate provisions of the "Asbatankvoy" charterparty which form part of this contract.[33]

The contract contained a force majeure clause which read in part as follows:

> Neither party will be responsible for any non-performance or delay in performance caused by act of God, industrial disruption, war, declared or not, social unrest, perils of the sea, mandatory or voluntary regulations published or required by any government authority, breakdown of machinery, equipment or facilities of the Terminal, interruption of transport or distribution networks, or unavailability of the product at its origin, or any other cause of the same species or category as those listed above, reasonably beyond its control, referred to here as "Force Majeure".[34]

The main issue in the case, and the one for which it has been principally cited by commentators, was whether a state-owned enterprise may be relieved of its obligations under a commercial contract by a decree precluding performance specially issued for that purpose by the government ministry controlling the enterprise.[35] The tribunal held that such intervention did not constitute an event of force majeure and issued an award in favor of the seller.

An alternative argument of the CIF seller was that (a) laytime and demurrage were governed by ASBATANKVOY, which was incorporated in the contract; (b) the buyer was not entitled to rely on the exceptions to laytime and demurrage set forth in Clauses 6 and 8 of ASBATANKVOY because of its failure to comply with its absolute warranty to procure a berth reachable on arrival; and (c) because the force majeure clause of the contract did not specifically refer to laytime or demurrage, it was too imprecise to be read as relieving the buyer of liability for demurrage. In support of those propositions, the seller referred to the English law jurisprudence cited above, including the *Laura Prima* and the *Joh's Stove*,[36] and submitted the opinion of a leading expert on French maritime law that, although the question had not yet been decided there, French courts would reach the same conclusion as the English courts.[37]

The Tribunal, which included as a member another well-known expert on French maritime law,[38] disagreed:

> [The seller's] submission based on the Laura Prima decision of the House of Lords ... will not be followed by the Tribunal. Though the preceding paragraph shows that the Tribunal is aware of the fact that English cases, in particular decisions of the House of Lords, enjoy great authority everywhere in the commercial world the Tribunal is in no way bound by them. It will, of course, in the interest of promoting homogenous commercial law internationally be inclined to follow English opinion if there is a situation where arguments for and against a particular construction of a standard clause in a charter party are evenly balanced. In this case, however, English case law has met with serious opposition from highly experienced maritime arbitrators particularly in London who were of the opinion that the Laura Prima doctrine does not reflect the intentions of charterers and shipowners generally.... Under these conditions, the Tribunal prefers an interpretation which gives full effect to Article 21 of the Supply Contract and is compatible with the essence of Clause 8 ("Demurrage") of the Asbatankvoy charter party which clause does not preclude a contractual provision (like Article 21 of the Supply Contract) that contains a slightly different rule on force majeure.

It would, obviously, have been better for the seller if the force majeure clause had specifically excluded laytime and demurrage from its scope.

CONCLUSION

In the *Agrifos* arbitration, the panel awarded to Trammo the unpaid balance of the contract price, demurrage on the BOW HERON and incidental damages relating mainly to Trammo's efforts to mitigate before Agrifos agreed to accept the cargo on a "without prejudice" basis, together with interest and costs, including attorneys' fees. In the opinion of the author, *Agrifos* is a model for how a claim of force majeure should be analyzed, with careful attention to the relevant provisions of the contract and a focus not only on whether a force majeure event has occurred but on whether the affected party has exercised due diligence to overcome its effects. The background and expertise of the experienced panel of maritime arbitrators was of great assistance to that analysis. The arbitrators were fully familiar with the provisions of the ASBATANKVOY charterparty and with the commercial practice regarding the allocation of the risks of delay in discharging a vessel. They were also fully able to absorb and understand the technical evidence in the case and to make a reasoned assessment of the efforts that Agrifos made to receive the cargo.

Above all, the *Agrifos* case illustrates the importance of including in commodity sale contracts force majeure clauses that adequately take into account the effect that relief from liability will have on the contractual allocation of costs and risks as well as the different effects that a declaration of force majeure will have at different stages of performance. A clause that fails to take these factors into account and merely states that both parties are relieved from liability can, in the event of a force majeure event affecting the buyer, result in a shift to the CFR seller of significant costs and risks. If the force majeure clause does not specifically provide otherwise, the CFR seller may be left to bear alone significant vessel-related costs, including the costs of cancellation or deviation, and demurrage if the force majeure event results in a delay at the discharge port. The CFR seller may also be left to bear significant costs and risks in connection with the purchase of the cargo and its disposal if the buyer is unable to receive it. The prospect of the CFR seller bearing these costs and risks is not normally priced into the bargain between the seller and the buyer. A force majeure clause purporting to relieve both the buyer and seller of all liability under the sale contract, although it appears on its face to be even handed, will be of little comfort to a seller who is left bearing all vessel costs and perhaps to dispose of a floating cargo bearing the market risk in what may be a falling market. It is therefore preferable to include in the force majeure clause provisions to deal specifically with the potential consequences of such events and to allocate costs and risks in a way that is consistent with the reasonable expectations of the parties.

* This paper, which was originally presented by Mr. Epstein at a meeting of the Committee on Arbitration and ADR of The Maritime Law Association of the United States ("MLA") on October 18, 2018, was published in the Fall 2019/Spring 2020 issue of the MLA Report. The paper is printed here with permission of the MLA.

1 In civil law jurisdictions, statutes or regulations may define force majeure and to some extent specify its consequences. *See, e.g.,* Article 1218 of the French Civil Code. In the U.S., Section 2-615 of the Uniform Commercial Code may also come into play in certain circumstances. See text accompanying notes 11-13 *infra*.

2 SMA No. 4046, 2009 WL 3647038 (2009) (Arnold, Fox, Hawkins). The clause was adequate to deal with the issues in the *Keytrade* arbitration, in which the panel rejected a claim of force majeure because of economic hardship resulting from market conditions.

3 CFR (cost and freight) (sometimes written as "C&F" or "CNF"), CIF (cost, insurance freight) and FOB (free on board) are among the various terms "used by merchants to clarify the distribution of functions, costs and risks relating to the transfer of goods from seller to buyer." *See* Jan Ramberg, *ICC Guide to Incoterms 2010* (Int'l Chamber of Commerce, 2011). In this article, we will refer mainly to CFR sale contracts, but the views expressed are equally applicable to CIF sale contracts. Frequently, international commodity sale contracts incorporate INCOTERMS, which for each delivery term, sets forth in detail the obligations of the buyer and the seller. The most recent version is INCOTERMS 2020. Although the cases discussed below involved earlier versions of INCOTERMS, the relevant provisions are not materially different.

4 Section A2 of INCOTERMS 2020 for CFR sales provides: "The Seller must deliver the goods either by placing them aboard the vessel or procuring them so delivered."

5 Section B3 of INCOTERMS 2020 provides: "The buyer bears all risks of loss or damage to the goods from the time they have been delivered under A2." Section B9 provides: "The buyer must pay... all costs relating to the goods from the time they have been delivered under A2....

6 Some CFR contracts, like some charterparties, do not provide for a specific rate or time period for discharge –providing, instead, for example, for "customary quick

dispatch." *See generally* J. Cooke, *et al., Voyage Charters* (4th ed. 2014), Chapter 15.A.7 - 15.A.16.

7 [2013] SGHC 10.

8 *Id.* at ¶ 25.

9 I shall use Trammo throughout this article.

10 *See Agrifos Fertilizer Inc. v. Transammonia, Inc.,* SMA No. 4049, 2009 WL 5252833 (Arb. at N.Y. 2009) (Ring, Sheinbaum, Martowski). (The author was co-counsel for Trammo in the Agrifos arbitration together with Stanley McDermott III of DLA Piper.)

11 Both charterparties were governed by English law.

12 For ease of reference, a timeline of events is set forth below in Appendix A.

13 *See Kel Kim Corp. v. Central Mkts.,* 131 A.D.2d 947, 950, 516 N.Y.S.2d 806 (3d Dep't 1987), *aff'd,* 70 N.Y.2d 900, 524 N.Y.S.2d 384, 519 N.E.2d 295 (1987) ("When the event that prevents performance is not enumerated, but the clause contains an expansive catchall phrase in addition to specific events, 'the precept of ejusdem generis as a construction guide is appropriate'—that is, 'words constituting general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned'").

14 Clause 11 (b) provided in part: "The party claiming force majeure shall notify the other party within 2 Tampa business days after the claiming party has notice thereof, and both parties will then jointly use their best efforts to minimize any possible resulting waiting time and/or damages and/or costs...."

15 Clause 11(d) provided, in part: "If force majeure affects the Seller, the Seller may, at its option, exercised by notice to the Buyer within a reasonable time, either: (i) cancel from this contract any quantities which have not been delivered due to force majeure, without affecting the balance of this contract, or (ii) deliver such quantities in one or more lots, after the Seller deems the effect of force majeure to have ended, on the same terms as set forth in this contract...."

16 [1982] 1 Lloyd's Rep 1.

17 [1984] 1 Lloyd's Rep 38.

18 *Id.* at 41. *See also Ellis Shipping Corp v. Voest Alpine Intertrading (The Lefthero),* [1992] 2 Lloyd's Rep 109 (holding that although the words "restraint of princes" in the charterparty general exceptions clause were wide enough to cover a delay caused by the refusal of the port administrator to allow the vessel to proceed to Bandar Abbas during the Iran/Iraq war, the language of the clause was not sufficiently clearly worded to protect the charterer from liability for demurrage); *The Kalliopi A,* [1988] 2 Lloyd's Rep 101 (in which the Court of Appeal held that a similar broadly worded exceptions clause did not apply to demurrage resulting from congestion at Bombay); *Cero Navigation v. Jean Lion (The Solon),* [2000] 1 Lloyd's Rep 292.

19 *See, e.g., The Shetland,* SMA. No. 2787 (1991) (Trowbridge, Arnold, Scofield) ("General exceptions clauses or general exculpatory language appearing elsewhere in the charterparty, do not apply to laytime or demurrage unless a clear intent to the contrary is manifested"); *Yone Suzuki v. Central Argentine Ry. Ltd.,* 27 F.2d 795 (2d Cir. 1928); *Clyde Commercial S.S. Co v. West India S.S. Co.,* 169 Fed. 275 (2d Cir. 1909); *Antalya,* SMA No. 2595 at p. 7 (1989) (Bauer, Nelson, Mordhorst). *But see* R. Meehan, "Reachable on Arrival," The Arbitrator, Vol. 48, No. 1 (2018) pp. 8-10 citing three SMA cases, *The Mountain Blossom,* SMA 3067 (1994) (van Gelder), *The Messiniaki Fontis,* SMA 1630 (1982) (Bauer, Arnold, Berg) and *The Eagle,* SMA 3070 (1994) (Berg, Siciliano, Arnold), in which the arbitrators declined in certain circumstances to follow *The Laura Prima*.

20 2009 WL 5252833 at *13.

21 NYUCC § 2-615(a) provides as follows:
Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

22 P.J.M. Declercq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability,* 15 J.L. & Com. 213, 224 (1995).

23 *Commonwealth Edison Co. v. Allied-General Nuclear Servs.,* 731 F. Supp. 850, 855 (N.D. Ill. 1990) ("If, however, the parties include a force majeure clause in the contract, the clause supersedes the doctrine... For, like most contract doctrines, the doctrine of impossibility is an 'off-the-rack' provision that governs only if the parties have not drafted a specific assignment of the risk otherwise assigned by the provision.")

24 2009 WL 5252833 at *13, citing, *inter alia, Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.,* 782 F.2d 314, 319 (2d Cir. 1985).

25 *Id.* at *14.

26 *Id.*

27 *Id.*

28 *Id.* at *15.

29 771 F. Supp. 63 (S.D.N.Y. 1991)

30 See text accompanying notes 13-16 above.

31 771 F. Supp. at 69.

32 ICC Case No. 6375 (1992). I was then an associate at Reid & Priest and was co-counsel with Gerald Aksen, a partner in the firm. Also assisting in the case were Anne Marie Whitesell (who was then studying for her doctorate at Université de Paris I, Panthéon-Sorbonne before going on some years later to become Secretary General of the ICC) and Fred Fucci (who is now a well-known arbitrator). When I was working on the demurrage issue, Mr. Aksen introduced me to Jack Berg, who was kind enough to give us some free advice and subsequently became a friend and mentor.

33 Translation from the French : "Le temps de planche alloué au déchargement sera de 48 (QUARANTE HUIT HEURES) dimanches et fêtes inclus. La notice de prêt à décharger sera de 6 h (SIX HEURES). D'une façon générale, le temps de planche, la durée et la remise de la notice seront réglés par les dispositions appropriées de la charte – partie "Asbatankvoy" qui font partie du présent contrat."

34 Translation from the French: "Aucune des parties ne sera responsable en cas de non performance ou retard de performance causés par acte Dieu, perturbation industrielle, guerre, déclarée ou non, agitation sociale, périls de la mer, réglementations obligatoires ou volontaires publiées ou exigées par toute autorité gouvernementale, panne de machinerie, des équipements ou des installations du Terminal, interruption du transport ou des réseaux de distribution, ou indisponibilité du produit à son origine, ou tout autre cause de la même espèce ou catégorie que celles listées ci-dessus, raisonnablement hors de son contrôle, dénommées ici 'Force Majeure'"

35 *See,* e.g., E.S. Romero, *Are States Liable for the Conduct of their Instrumentalities?*, published in E. Gaillard and J. Younan, *State Entities in International Arbitration* (Juris 2008).

36 See text accompanying notes 13-15.

37 The seller's expert was Emmanuel du Pontavice. Professor of the Université de droit, d'économie et de sciences sociales, Paris. I vividly recall Ms. Whitesell and I visiting Professor du Pontavice at his beautiful apartment near the Luxembourg Gardens.

38 Pierre Bonassies of the University of Bordeaux, was a member of the Tribunal.

APPENDIX A: AGRIFOS TIMELINE

9-13-2008	Hurricane Ike Strikes Pasadena, Texas
9-17-2008	BOW HERON gives ETA of 9-29-08 for loading at Rönnskär, Sweden, with ETA US Gulf discharge ports of 10-21-08 – 10-23-08.
9-18-2008	The HOLMEN completes loading in Dahej, India at around 12:30 pm EDT
9-18-2008	At around 3:30 pm EDT, Agrifos declares force majeure and advises Trammo that it is canceling the BOW HERON contract, but not the lower priced HOLMEN contract.
10-02-2008	BOW HERON completes loading in Sweden, including 10,500 metric tons for Agrifos.
10-02-2008 to 10-16-2008	Trammo urges Agrifos to perform its obligations and in the meantime seeks to mitigate damages by seeking alternative possibilities for disposing of the cargo, including the delivery to a customer in New Brunswick, Canada.
10-16-2008	Agreement that Agrifos will receive the BOW HERON cargo on a "without prejudice" basis and will make a provisional payment of what Agrifos refers to as the "market price", leaving an unpaid balance of approximately $2.4 million.
11-15-2008	BOW HERON arrives and tenders NOR at Pasadena at 0:800 hours.
11-20-2008	Agrifos berths and discharges the lower priced HOLMEN ahead of the BOW HERON.
12-30-2008	The BOW HERON is permitted to berth.
12-31-2008	The BOW HERON completes discharge after incurring demurrage of over $1.25 million.

Force Majeure

By Robert C. Meehan, Partner, Eastport Maritime, SMA Member and Vice-President

Having dual roles as a New York arbitrator and active chemical tanker broker increases awareness when navigating through disputes in either setting. This experience assists when rendering a decision — or avoiding the need to decide in the first place — by offering insight into the surrounding circumstances of any dispute or elevating awareness of the consequences of any compromise during charter party negotiations. As anyone involved in negotiating a charter party can attest, most negotiations involve requirements that do not align, with each party seeking the most favorable terms. Not surprisingly, the negotiation process often involves adding, deleting, or amending provisions concerning events for which a party is not responsible or only partly responsible. Negotiating from weakness or time pressure, overlooking provisions, or less than honorable behavior all contribute to the risk the parties assume in the final agreement. One provision that is generally excluded from this process deals with force majeure.

Black's Law Dictionary defines force majeure (French: "a superior force") as "[a]n event or effect that can be neither anticipated nor controlled; esp., an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars)."[1] Since force majeure derives from civil law rather than common law, parties to charter parties or other contracts governed by English or US law can only invoke force majeure if the contracts contain a force majeure clause or its equivalent.

Force majeure is not specifically mentioned in the boiler plate of most charter party forms and the subject is often overlooked during any negotiation. For instance, two of the well-known charter forms, GENCON and ASBATANKVOY, do not have force majeure clauses. ASBATANKVOY contains a General Exceptions clause which enumerates many of the same kinds of events (e.g., Act of God) found in force majeure clauses.[2] Unlike the bargained compromise of other terms, parties do not typically delete or materially amend clauses such as the ASBATANKVOY General Exceptions clause but instead are willing to assume the risk that the event will occur. In the past, this decision was a considered an acceptable risk as declaring force majeure was quite exceptional. Over time, however, the market's perception of force majeure, at least in the chemical sector, has changed as it appears that more companies are quicker to invoke Force Majeure, whether because of a different mindset regarding contractual obligations or the occurrence of more damaging events – perhaps both.

Assuming that the charterparty contains a force majeure clause, simply declaring force majeure is not sufficient to be excused from performance; rather, the party invoking it must establish that certain conditions exist. The conditions that must be shown vary with the clause. Generally speaking, first and foremost, the force majeure event must be within the scope of events included in the charter party clause. Second, the event must be unforeseeable and beyond the control of the party invoking it. Finally, the affected party must establish that it could not have taken reasonable steps to avoid the event or its consequences. Often, the clause also includes a requirement that any force majeure declaration be made in a timely manner, serving to afford the counterparty the opportunity for remedy or mediation. Worth noting is that even if the clause is silent on prompt notification, arbitrators likely will view an untimely force majeure invocation unfavorably, as delayed notification may suggest that the declaration was an afterthought. Similarly, even if the clause does not specifically contain a mitigation provision, if the party seeking to excuse performance fails to attempt to mitigate the consequences of the event, then arbitrators may not uphold a force majeure declaration.

Weather, and its collateral effects, remains a common ground for invoking force majeure and was the basis of the dispute in the M/V HA SKLENAR, SMA No. 4287 (Arnold, Sheinbaum, Dooley) (2016). This arbitration involved a charterer who committed to load five iron ore cargos from Pt. Cartier, Quebec over January and February of 2013, and then voyage-chartered vessels to transport the product to the US Gulf. The M/V HA SKLENAR (the "Vessel") was fixed to load the first cargo against a January 5/15 laycan. However, Vessel delays resulted in the parties twice extending the laycan, with a final laycan of January 25 to February 5 representing the third lifting. The Vessel arrived within her laycan but was heavily iced, with about 500 MT of her prior cargo of petcoke frozen to the sides of some of the holds, and as a result the Vessel was unable to load the entire contracted volume. Owner pursued several options to deal with the problem, including removal of the frozen petcoke and discharging it ashore, or into barges; isolating the petcoke to one hold and loading the iron ore on top; and nominating a substitute vessel. After exploring these options without success, Owner declared a force majeure event created by weather conditions that rendered the Vessel unable to load the minimum contracted volume under the charter party, relying on Rider Clause 14 which provided in material part as follows:

> Any circumstances beyond the control of the affected party which makes it partially, temporarily, or totally impossible or so difficult that it would be unreasonable to claim fulfillment of their obligations under this charter party (Force Majeure)] shall relieve the affected party from their respective contractual obligations...The affected party shall use commercially reasonable efforts to cure or remove the Force Majeure event...

Charterer rejected the force majeure declaration, claiming that Owner breached its charter party obligation by failing to nominate a vessel capable of performing the charter and remained in breach by failing to nominate a suitable substitute. Charterer canceled the charter party, in-chartered alternate tonnage at a higher rate and claimed for damages. Owner countered that only a substantial breach permits repudiation of a charter and that the inability of the Vessel to load the entire cargo did not rise to that level. Owner counter-claimed for damages representing lost revenue from the canceled fixture, less cleaning and commission expenses.

The Panel unanimously found that no force majeure event existed which prevented Owner from meeting its contractual obligation of lifting the minimum contracted volume. The Panel was not convinced that there were no alternatives available for the removal of the petcoke, finding that owner failed to take any reasonable steps to avoid the event or its consequences. The Panel held for Charterer, stating that Charterer acted properly in mitigating its damages. Owner's counterclaim for damages was denied.

Plant disruptions preventing Charterer from loading the contracted cargo were the basis for invoking force majeure in M/T UACC DOHA, SMA No. 4350, (Shaw, Sole Arbitrator) (2018). The M/T UACC DOHA (the "Vessel") was fixed to load 5,000-Mt styrene monomer from one safe port/berth Lake Charles for discharge in Asia (as well as a parcel of glycol from Geismar which was not part of this dispute). On October 14, the styrene supplier, Westlake, declared force majeure stemming from a fire at its facility that caused an emergency production shutdown. Based on the extent of the damage, Westlake was allocating product to its customers at 50% of the contracted volume. On October 16, Charterer declared force majeure, invoking the relevant charter party rider clause the wording of which expanded the reach of the ASBATANKVOY Clause 19 – General Exceptions clause, in material part as follows:

> The second sentence of the 'General Exceptions" [Part II, Clause 19] shall be amended as follows: Neither party shall be liable for damages or otherwise to the extent that its ability to fulfill any provision of this Charter Party is delayed, hindered or prevented by...fire, explosion...breakdown of any plant of Charterer's customers or suppliers...breakdown of loading or receiving facilities...any event, matter or thing wherever occurring and whether or not of the same class or kind as those set forth which by the exercise of due diligence the party concerned is unable to overcome, whether or not such occurrence is reasonably foreseeable.

The Vessel loaded the styrene parcel at Lake Charles on October 17/18, albeit at 50% of the contracted volume, then proceeded to Geismar to complete the charter by loading the glycol parcel, which proved uneventful. Upon completion of loading on October 24, Charterer presented Owner with a 4,500-mt styrene parcel ex Geismar[3], at a lower freight rate than the Lake Charles parcel, although the larger volume would have yielded Owner a higher return than the revenue from the 2,500 MT of styrene that had not been loaded at Lake Charles. Owner declined the parcel, electing to pursue another replacement cargo although ultimately Owner did not load any substitute cargo in place of the non-loaded 2,500 MT of styrene.

On October 26, Owner rejected Charterer's force majeure declaration, stating the fire was in a benzene line to the Westlake plant which had no impact on Westlake's ability to load the contracted 5,000-Mt styrene which was in-tank and available for shipment, and held Charterer responsible for dead freight. The sole arbitrator ruled in favor of Charterer finding that the fire at the Westlake Plant which resulted in restricting the allocation of cargoes was a force majeure event covered in the Rider clause because Charterer's ability to load the full parcel was "[d]elayed, hindered, or prevented by ... a breakdown of any plant of Charterer's... suppliers."

Another example of physical damage affecting loading, but with a different outcome, is the M/T GERTRUD SALAMON, SMA No. 4036 (Mordhorst, Ring, Dooley) (2009). In this case, Owner claimed dead freight owing by reason of Charterer's cancellation of the charter party on the basis that loading was prevented by a force majeure event.

On December 17, 2007, Owner fixed a full cargo of coal to be loaded at one safe berth Baltimore for discharge at one safe berth Immingham or Rotterdam, against a 1/15 February laycan. The charter party vessel was 'TBN' (to be nominated). On January 3, Charterer received a force majeure notice

from CNX Marine Terminal that, due to a structural deficiency in Pier 2 of the Terminal, all cargo operations from the Terminal would be suspended until repairs - expected to take about four weeks - could be effected. This resulted in Charterer's inability to load the contracted cargo of coal, which required special blending to meet the Immingham customer's specifications. The Charterer offered the owner an alternate coal cargo which would generate less revenue than the December 17 fixture but revenue which was higher than current market rates.

Owner rejected Charterer's force majeure declaration and the substitute cargo and nominated the M/V GERTRUD SALAMON to perform the fixture. Owner's position was that the charter party provided for loading from one safe berth Baltimore, which Owner asserted was unaffected by the temporary shutdown at the CNX Marine Terminal. Charterer maintained its position of canceling the charterparty after which the Owner fixed the M/V GERTRUD SALAMON for another cargo at a lower rate and claimed for lost revenue.

According to the arbitrators, the threshold issue was whether the charter party was for a "stemmed cargo" specific to the CNX Terminal. The Panel found for Owner, citing the fixture recap as the clearest representation of the parties' intention at the time of negotiating, and held that if Charterer intended to load a specific grade from a defined load berth then it should have included those details in its fixture confirmation.[4] Addressing Owner's rejection of Charterer's substitute cargo, the Panel noted that Owner was under no obligation to accept it and that Owner's efforts in mitigating its damages were sufficient.

Determining the foreseeability of a Force Majeure event and whether it was beyond the invoking party's control is an important aspect of validating a force majeure declaration and was the focus of the dispute in EPOS, SMA No. 4335 (Martowski, Sole Arbitrator) (2018). This arbitration involved a charterer claiming draft restrictions at loading as a force majeure event.

The M/V EPOS (the "Vessel") was fixed under a Mediterranean Ore charter form to load a full cargo of two grades of iron ore — fines and sinter feed — with loading to commence at Puerto Ordaz on Venezuela's Orinoco River and with topping off at the Boca Grande Transfer Station[5] (also on the Orinoco River) for discharge in China. The stowage plan called for loading about half the volume to the maximum allowable draft at Puerto Ordaz and completing with the balance of the cargo at the deeper port of Boco Grande.

The Vessel arrived at Puerto Ordaz within laycan and began loading on November 12. The following day, the Harbor Master issued a draft notice restricting vessels to a maximum of 10.0M draft when departing the Orinoco River, subsequently reducing the draft further to 9.5M accounting for the "squat" factor.[6] The Master then revised the stowage plan, indicating that additional fines would need to be loaded at Boco Grande to make up for the lesser quantity the Vessel was now limited to loading at Puerto Ordaz due to the draft restriction. After completing loading at Puerto Ordaz, the Vessel arrived at Boco Grade to top off on November 18, at which time Charterer issued a force majeure Notice relating to the draft restriction imposed by the Harbor Master five days earlier, noting Charterer was unable to load the full contracted charter party quantity. Owner rejected the Notice, stating that this was a simple matter of cargo shortage resulting in a claim for dead freight. Owner noted there was nothing unusual or unforeseeable about draft changes on the Orinoco River, adding that there was no draft restriction at Boco Grande.

The Panel noted that downriver shoaling/silting is commonplace in the Orinoco River causing frequent reductions in draft at Puerto Ordaz and that this was well-known to the parties and clearly foreseeable. The Panel therefore ruled that the draft restriction was not a force majeure event. Addressing the delay of Charterer's force majeure declaration, the Panel noted, "[w]hile neither 'prompt' nor necessarily fatal to its defense, its issuance five days later cannot help but suggest something of an afterthought."

Going forward, with the likelihood of the occurrence of future force majeure events (e.g. hurricanes in the U.S. Gulf), contracting parties can be expected to elevate the importance of incorporating a specific force majeure clause during the negotiating process. If parties intend to use a clause like the ASBATANKVOY General Exceptions clause (rather than a stand-alone force majeure clause) to deal with force majeure situations, they need to be mindful that, unlike a force majeure clause,

a General Exceptions clause is "...a shield against liability rather than a limitation on ... [charter obligations]."[7] It is therefore vital that the clause be properly drafted, specifying not only the events or types of events within its scope but also the effect that such events must have on performance. Also important is to be mindful of the possibility of overlapping or conflicting wording with other charterparty clauses.[8] Finally, reliance on "catch-all" language, such as BPChem VOY3, *"or any other cause beyond the control of Charterers,"* may be misplaced, as arbitrators will interpret the event according to the ejusdem generis rule, confining the event to the same types of events specifically defined.

1 Black's Law Dictionary, (11th ed. 2019) at 788

2 See ASBATANKVOY Clause 19 – General Exceptions Clause, stating in material part that *"[a]nd neither the Vessel nor Master or Owner, nor the Charterer, shall,* ***unless otherwise in this Charter expressly provided,*** *be responsible for any loss or damage or delay or failure in performing hereunder, arising or resulting from: - Act of God; act of war; perils of the seas, or act of public enemies...."* [bold added]. This is standard wording in many charterparty formats, with some, such as BPChem VOY3, expanding the reach with all-inclusive language such as *"[o]r any other cause beyond the control of Charterers."*

3 Styrene monomer is not produced in Geismar, only in Carville, St James, and New Orleans.

4 The distinguishing feature in this arbitration, as compared with the UACC DOHA, is that while neither charterparty mentioned a specific load terminal, Westlake was the only styrene monomer producer in Lake Charles.

5 Due to restricted draft at Puerto Ordaz, ships loading at that port regularly top off with the balance of their cargo at the off-shore floating Transfer Station at Boca Grande, which is a converted 200,000 DWT VLCC [Berge Brioni] with a storage capacity of 180,000-Mt.

6 The "squat effect" results from a vessel moving quickly through shallow water creating an area of lowered pressure that causes the ship to be closer to the seabed than would otherwise be expected.

7 Gilmore & Black, *The Law of Admiralty* (2nd ed. 1975) at 234

8 For example, the ASBATANKVOY General Exceptions clause states "unless otherwise in this Charter expressly provided."

Force Majeure and Yacht Charters

By Charles B. Anderson, SMA Member and Chair of the Yacht Committee

The doctrine of force majeure has attracted considerable attention in the yacht industry as a result of the Covid-19 pandemic because of its potential effect on yacht charters, purchase and sale agreements and construction contracts and was the main focus of a day-long seminar at the Fort Lauderdale Mariners Conference in October 2021, attended by over 300 participants, including yacht owners, brokers, insurance representatives and other service providers. While some yacht charters have been described as the "ultimate Covid-19 antidote" (Forbes, November 10, 2020) and demand for superyacht as well as more affordable smaller yacht charters has soared due to travel restrictions and cancellations in the cruise industry, concerns remain as to what remedies may be available to owners and charterers if a contract is cancelled or terminated as a result of the Covid-19 virus or one of its newly spreading variants.

The standard Mediterranean Yacht Brokers Association (MYBA) as well as the American Yacht Charter Association (AYCA) Charter Agreements contain similar force majeure clauses. Clause 18(a) of the MYBA Agreement provides the following definition of force majeure:

> In this Agreement 'force majeure' means any cause directly attributable to acts, events, non-happenings, omissions, accidents or Acts of God beyond the reasonable control of the OWNER, the Crew, or the CHARTERER (including, but not limited to, strikes, lock-outs or other labour disputes, civil commotion, riots, acts of terrorism, blockade, invasion, war, !re, explosion, sabotage, storm, collision, grounding, fog, governmental act or regulation, contaminated fuel, major mechanical or electrical breakdown beyond the Crew's control and not caused by lack of maintenance and/or OWNER's or Crew's negligence). Crew changes and shipyard delays not attributable to the aforementioned causes, do not constitute force majeure.

As explained in Robert Meehan's accompanying article, since the doctrine of force majeure is a civil law concept unknown to the common law of England or the United States, where the laws of these countries are applicable, the doctrine must be made a specific part of the parties' contract.

Unlike the force majeure clauses in most commercial charterparties, which excuse or suspend performance of the entire contract in the event of a demonstrable force majeure event, the MYBA and AYCA charters apply the doctrine to specific events such as (a) delay or failure to deliver and (b) cancellation by owner or delay in re-delivery, and they provide for specific remedies for the owner or charterer.

If, for example, the owner fails to deliver the vessel by reason of force majeure within 48 hours or a period equivalent to one-tenth of the charter period, whichever is shorter, under MYBA Clause 9 the charterer is entitled to treat the agreement as terminated, but the charterer's exclusive remedy is the immediate repayment without interest of the full amount of all payments, or, if the parties mutually agree, an extension of the charter period by a time equivalent to the delay or postponement.

If re-delivery of the vessel is delayed by reason of force majeure, Clause 10 simply provides that re-delivery shall be effected as soon as possible without penalty or additional charge against the charterer.

In the event of a vessel breakdown or disablement or other cause which prevents the reasonable use of the vessel for a period of 12 to 48 hours or one tenth of the charter period, the owner must make a pro rata refund to the charterer or, if mutually agreed, extend the charter period. If the disablement continues for a period of more than 48 hours or one tenth of the charter period, the charterer may terminate the charter. If force majeure is invoked, the yacht owner must submit a detailed technical report, a copy of the maintenance log and other supporting documentation to the charterer. Whether a Covid-19 occurrence would be considered a cause preventing "the reasonable use of the vessel" remains an open question.

Other than an event covered by these specific clauses, force majeure is not available as a potential defense to a claim for damages for loss of use or enjoyment of the vessel. If, for example, the yacht is subject to quarantine because of the outbreak of Covid-19 among the yacht's passengers or crew, the owner arguably would still be entitled to hire, even though the event would appear to fall under the "governmental act or regulation" exclusion of Clause 18(a).

To address these issues, the MYBA Charter Agreement now contains a "Covid-19 Addendum" which provides that the Covid-19 disease and any direct consequences, such as quarantine, travel bans or entry or exit restrictions from local or national authorities, will be considered a force majeure event under Clause 18(a).

The Addendum further provides that if the charterer or owner is directly prevented from performing its material obligations under the Agreement or if it is reasonably expected that the enjoyment of the vessel could be materially affected, the party claiming force majeure shall notify the other party of the relevant circumstances and shall discuss in good faith for a maximum period of ten days to mitigate the effects of the occurrence, including changing the port of delivery or re-delivery or changing the cruising area or charter period. If the parties fail to reach agreement, either the charterer or the owner will be entitled to cancel the charter on notice in writing, and all payments made by the charterer must immediately be repaid without interest.

In the case of an outbreak of Covid-19 aboard the vessel, the parties undertake to discuss in good faith possible solutions, prioritizing the health and safety of the charterer, guests and crew. Such measures would include taking protective measures on board, deviating to a port to disembark affected crew or passengers, or terminating the charter.

Under Clause 5(a) of the Addendum, if the termination is due to the charterer or a guest being infected or because the captain reasonably believes there is a risk of infection as evidenced by symptoms identified by the World Health Organization (WHO), charter hire remains due and payable in full.

If the termination is due to an infected crew member of if the captain reasonably believes there is a risk of infection according to the WHO criteria, the hire must be reimbursed to the charterer on a pro rata basis according to the charterer's use of the vessel.

Discretion is given to the captain not to follow the charterer's instructions to the extent the instructions would expose the passengers or crew to the risk of exposure or prevent the crew from performing its duties or from following "any instructions, regulations, laws, recommendations, good practices issued by any Governmental Entity or the World Health Organization" in connection with the pandemic.

Other provisions of the Addendum address responsibility for provisions paid in advance by the owner, broker commissions, and the sharing of information in relation to countries where the vessel or crew have travelled prior to commencement of the charter.

Yacht charters generally provide for arbitration as the preferred means of dispute resolution. They may provide for arbitration in Florida under the rules of the newly formed International Yacht Arbitration Council (IYAC), in New York under SMA Rules, in London under LMAA Rules, or in another venue of the parties' choice. Regardless of the chosen venue, however, disputes arising in the event of termination of the charter will likely present some challenges for arbitrators.

Although the Addendum makes it clear that an outbreak of Covid-19 or its direct consequences fall under the definition of force majeure and provides specific remedies for such occurrences, the express obligation to negotiate in good faith to mitigate the effects of a Covid-19 incident is a subjective standard that may be difficult to apply in practice. The good faith obligation in the context of commercial contracts has been described as "an elusive concept similar to beauty being in the eye of the beholder."[1] It generally requires the parties to act reasonably and prudently and could include disclosing all material facts about the incident and avoiding action that prevents performance by the other party or raises a frivolous dispute. Moreover, it does not override other, more specific, contractual rights and obligations. In the absence of a generally accepted definition of "negotiate in good faith" arbitrators will have to apply the standard on a case-by-case basis.

Another potential difficulty with the Addendum is the delegation of responsibility to the yacht captain to determine whether a risk of infection exists according to WHO criteria. While this might appear to be a practical solution, arbitrators may have to decide whether the captain lacked the requisite expertise to interpret the risk criteria or the applicable local government laws and regulations.

Arbitrators likely will also require the party seeking to rely on the force majeure clauses to prove that a force majeure event has occurred and to show what steps the party took to avoid the force majeure event or mitigate its consequences, as these issues are not addressed in the main Agreement or Addendum. Although the clause may omit a requirement for prompt notification, as Robert Meehan explains in his article, arbitrators may be inclined to view this as an implied term to demonstrate that a genuine force majeure event existed and to avoid surprise to the other party.

Despite these potential difficulties, the Covid-19 Addendum will undoubtedly help clarify the parties' obligations under the force majeure provisions of the Charter Agreement and assist arbitrators in resolving disputes that arise as the yacht industry awaits an end to the pandemic.

1 *Kawasaki Kisen Kaisha Ltd. v. Alumina Transport Corporation,* SMA No. 3267 (Berg, Laing; Arnold dissenting).

SMA Award Service.... At-a-Glance

By Captain Thomas F. Fox, President of Southold Maritime Services Corp., SMA member and Chair of the SMA Salvage Committee

An Analysis of Two Salvage Awards Rendered under SMA Rules

The first award illustrates the attempts undertaken by salvors to deal with unforeseen or unexpected developments that often arise during protracted salvage and wreck removal operations.

The second award deals with the dynamics often at play when recreational vessel owners and salvors negotiate salvage contracts.

PICO 4, SMA No. 4277
(Burke, Shirley, Fox) (2016)[1]

WRECKHIRE 2010 – Cancellation – Damages – Fraudulent Inducement – Interest – Punitive Damages – Non-Payment

The dispute arose under a WRECKHIRE 2010 form between Salvor and Owner (the "Contract"), covering the retrieval of three legs of the lift boat PICO 4 that had suffered a "punch-through" in November 2011 while it was maneuvering next to an oil production platform in the Gulf of Campeche in Mexican waters.

The lift boat was a three-legged self-propelled jack-up oil field service platform that was in the process of "preloading" its legs in preparation for jacking near the production platform.

The Contract provided for Salvor to be paid at daily rates covering the salvage vessel and associated equipment and personnel. Payments to Salvor were earned daily and were non-refundable.

The forward starboard leg "punched through" the sea floor, causing the hull to take on a 15-degree list. An earlier salvor had freed the three legs from the lift boat, and they were later cut to provide navigational clearance.

The sea bottom was described in the WRECKHIRE as "mud," and Salvor planned its retrieval of the legs on that basis, using an anchor windlass-type chain puller arrangement through the "moon pool" of a dynamic positioning salvage vessel. However, the seabed was in fact "clay" and required more extraction force than mud, as the legs and their pads were more deeply embedded in the sea floor than as described in the Contract.

After six days of attempting to extract one of the legs, the chain pullers failed, and further work was suspended until the parties subsequently entered into an Addendum reflecting the new extraction requirements. Nonetheless, the total extraction time exceeded the estimated time specified in the Addendum, and the Contract was terminated by the Owner on September 6, 2012.

Salvor subsequently claimed for about $18,000,000 as the balance of unpaid hire and interest at the contracted rate of 1.5% per month, asserting that Owner failed to exercise "best endeavors" under the Contract.

Owner counterclaimed for a refund of hire of about $10,000,000 for sums paid but not earned, asserting that Salvor failed to use "due care" under the Contract. Owner also alleged that it had been fraudulently induced to enter into the Contract and sought punitive damages against the Salvor.

Twenty hearings were held in which testimony was heard from the parties' fact and expert witnesses. After determining that Salvor had failed to use "due care" with respect to time lost due to the chain puller failures, the Panel discounted Salvor's claim by the time and expenses lost for that failure and also dismissed the Owner's counterclaim in total.

The Panel unanimously awarded Salvor an adjusted amount of about $28,000,000, including approximately $11,000,000 in interest and about $1,300,000 in attorneys' fees and costs, as well as arbitrators' fees.

S/V ILENE, SMA No. 4132
(Dooley, Martowski, Mordhorst) (2011)[2]

Rhode Island Standard Form – Low Order Salvage – Marine Peril – Post Casualty Value – Savage vs Towage

This dispute between Owner and Salvor arose under a No Cure/No Pay Marine Salvage Contract on the Rhode Island Standard Form dated August 23, 2010 (the "Salvage Contract"). Section 6 of the Salvage Contract provided for arbitration in accordance with SMA Rules for Recreational and Small Commercial Vessel Arbitration.

The ILENE (the "Yacht") was a 1999-built 43-foot Saga Marine auxiliary powered sailing yacht enroute from City Island, Bronx, New York, to Newport, Rhode Island.

Owner was a retired attorney and experienced yachtsman, with U.S. Navy Reserve credentials. The Vessel was entered as a member in BoatUS, a nationwide insurance, towage and rescue organization.

Salvor was a professional towage and salvage operator and the local affiliate of BoatUS.

On August 23, 2010, the Vessel, seeking refuge in Point Judith, Rhode Island from stormy weather on Long Island Sound, drifted from the marked channel while under sail and motor power enroute

to the protected area known as Point Judith Pond and ran aground on a sandbar. The tide was ebbing and the Vessel was subsequently unable to free itself. At around 2300 on that date, Salvor's salvage towboat arrived on the scene and, after protracted negotiations, the Salvage Contract was signed and the Yacht was towed off the sandbar and towed to a nearby marina.

Salvor sought a salvage award commensurate with the customary percentage of the $232,000.00 post-casualty value of the Yacht, amounting to some $43,750.00 plus a 10% equitable uplift of $2,187.50, as well as attorney's fees of $5,971.32, pre-judgment interest and arbitrators' fees.

In the meantime, Owner's insurance company paid Salvor a negotiated interim salvage fee of $27,840.00.

Owner conceded that he had entered a salvage contract, albeit under duress ("over a barrel") and also acknowledged that his "free towage privileges" may not apply.

Therefore, Owner sought annulment of the Salvage Contract, or a maximum fee to Salvor of $4,000.00 on the basis of the low level "salvage" services provided. Owner also sought the refund by Salvor of the $23,840.00 interim salvage fee paid by his insurance company.

However, as more detailed information of the rescue efforts became available, Salvor claimed that it had been underpaid and demanded a substantially higher reward based on a percentage of the post-casualty value of the Yacht.

In contrast, Owner's insurance company disputed Salvor's arguments and realized that it had likely overpaid the Salvor. The parties subsequently entered arbitration proceedings.

Salvor described the situation as extremely dangerous with the Yacht aground in shallow water with a falling tide at night, with limited visibility and exposed to extremely violent winds which threatened to take the Yacht into a shore-side rock wall.

Owner viewed the immediate circumstances as an unfortunate accident from which he could not extricate himself, despite serious efforts by him and his crew.

After the Salvage Contract had been agreed by the parties, Salvor passed a single line to the Yacht, which was refloated with a single pull on that line. It then took 36 minutes for the Yacht to be towed to the fuel dock of a nearby marina.

The Panel considered the parties' arguments and evidence and unanimously concluded that the rescue/salvage effort was successful and well executed.

However, that effort was also found to be of low value, which required minimal skill and efforts by Salvor and only exposed Salvor and his equipment to minimum risk, time and expense.

Salvor was awarded $11,000.00, equivalent to 5% of the post-casualty value of $232,000.00. However, as Owner's insurance company had already paid Salvor an interim salvage fee of $27,840.00, the insurance company was therefore entitled to a reimbursement $16,240.00.

The parties were ordered to bear their own attorneys' fees, and the panel fees were assessed at 70% against Salvor and 30% against Owner. No pre-judgment interest was awarded to Salvor in view of the agreed interim salvage fee.

1 This synopsis has been adapted from a presentation made by the author at the MLA's October 2018 meeting.
2 This synopsis has been adapted from an earlier presentation by the author at Sea Tow International's Annual Meeting in November 2012.

Focus on SMA Members

The SMA is pleased to welcome Captain Kevin J. Roach as a member. Proficient in all aspects of dry bulk, break-bulk and tanker chartering, operations and trading, Captain Roach has represented both owners and charterers in handling time and voyage charter party disputes and arbitrations. He has served as a Merchant Navy officer and Master (unlimited gross tons upon all oceans) of bulk carriers (handy to cape-size), heavy-lift/container vessels and product and crude tankers. He has held shore-side management positions for more than twenty-six years, including shipbuilding superintendent, marine surveyor and port captain; fleet operations manager; chartering manager; tanker and dry-bulk shipbroker and director of legal affairs, insurance and claims.

Captain Roach studied at Liverpool Polytechnic, Fleetwood Nautical College (England) and the University of Ulster (Northern Ireland) and at New York Maritime College (M.S. Transportation).

He holds professional memberships in numerous maritime organizations, including the Honourable Company of Master Mariners UK, the Royal Institute of Naval Architects, the Society of Naval Architects and Marine Engineers and the Association of Supply Chain Managers, and is a fellow of the Royal Institute of Navigation and the Royal Meteorological Society. He is proficient in conversational and nautical Spanish, Italian and Greek. His full resume and contact details can be accessed at https://www.smany.org/member-roster.html#R.

Jerry Georges

With deep regret, we report the passing of long time SMA member Jerry Georges (January 26, 1924 - November 24, 2021). Jerry joined the SMA in 1967 and served on many arbitration panels, participating in some 30 published awards. One of the longest serving SMA members, he was also an AAA, NYSE and NASDAQ arbitrator. Jerry was with National Shipping and Trading Corp. for 60 years, having held positions as manager, secretary-treasurer and director of insurance and claims. He was a contributor to the Friends & Supporters of the SMA. We extend our deepest condolences and sympathy to Jerry's family.

Spotlight on the SMA

SMA "Zoom" Presentations:

Beginning in November 2020, in response to the COVID-19 pandemic, the SMA initiated a series of "Bring Your Own Lunch" Zoom presentations in lieu of the SMA's traditional in-person monthly luncheons. The series started with a panel discussion, "Virtual Mediation: The Good, The Bad and The Ugly" followed in December 2020 by an overview of the financial markets presented by **Tom Joyce,** Managing Director of MUFG Securities America Inc. In January 2021 **Ross Gould** introduced us to The Business Network for Offshore Wind (BNOW) and offshore wind opportunities. In February, **Todd Lochner** and **Eugene Samarin** of The Lochner Law Firm (which in 2020 in cooperation with the Yacht Brokers Association of America (YBAA) updated all YBAA form agreements) discussed the perils and pitfalls of yacht sales. Our March 2021 presenter was **Andrea Jansz,** General Counsel of Resolve Marine Group, who provided insight into commercial salvage operations. In April **Petter Heier**, CEO of Grieg Green A/S, discussed sustainable ship recycling. In October **Paul Mazzarolli** of the Baltic Exchange provided a comprehensive overview of the Exchange. November's presenter was **John Weale**, former Risk Manager of Fednav, who is leading the BIMCO Documentary Committee's revision of the 1994 GENCON charter form. John discussed "A New Gencon: Transforming a Standard Charter for the Modern World."

Links to many of these Zoom Presentations can be accessed at www.smany.org (Notices).

Return of In-Person SMA Monthly Luncheons and upcoming January 12, 2022, luncheon:

On December 8, 2021, the SMA held its holiday luncheon, welcoming 44 attendees. This marked the first in-person SMA luncheon since the start of the COVID-19 pandemic some twenty months ago.

The next scheduled luncheon will take place on January 12, 2022, and will feature a presentation by Mike Leahy, Managing Director, and Claudia Botero Götz, Senior Lawyer, of Gard (North America) on Container Ship Fires and Cargo Misdeclarations.

"Maritime Arbitration in New York":

The SMA will offer its popular, comprehensive seminar "Maritime Arbitration in New York" as an online Zoom program in March 2022. The seminar provides 12 hours of CLE credits over four consecutive weekly three-hour live Zoom video sessions: March 4, March 11, March 18 and March 25, 2022. Please see the program flyer for program and registration details. #arbitration #education #maritime (go to LinkedIn).

In Closing

Many thanks to every person who contributed to this issue of The Arbitrator.

If you have articles and ideas to contribute to future editions, please let us know! We welcome your feedback to help us with ensuring that The Arbitrator provides timely and relevant articles and information to the maritime arbitration community in New York and around the world. And thanks to Tony Siciliano and others who keep our membership abreast of maritime news items and developments.

Please contact us with your thoughts and suggestions at: dick.corwin@icloud.com; sandra.gluck@gmail.com; or louis.epstein@trammo.com.

Wishing you a wonderful holiday season and a Happy and Healthy 2022!

THE ARBITRATOR

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