HIGHLIGHTS:

FIMBank Plc v KCH Shipping [2022] ("The Giant Ace") Case Reading & Insight

IN A NUTSHELL

Court Of Appeal Finds Owner Should Accept Non-- Contractual Performance

How To Bring ESG Reporting To Life In Shipping Companies

War Risk Insurance – Owners And Charterers Perspective

MARKET SNAPSHOT

Russian Refined Oil Products Price Cap

Shipping Markets

Reinsurance: Challenging Renewal 2023

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The Hague-Visby Rules Time Bar And Misdelivery Claims

Case Reading & Insights: FIMBank p.l.c. v. KCH Shipping Co. Ltd (The "Giant Ace") [2022] EWHC 2400 (Comm)

Article III r.6 of the Hague-Visby Rules ("HVR") provides that claims against the carrier are time-barred unless being brought within 12 months of the date of delivery or the date when the goods should have been delivered. However, it was left unanswered whether this applies to claims for misdelivery occurring after discharge.

In the recent "Giant Ace" case, the Court has handed important judgment on this question.

HVR Time Bar & Misdelivery: "Giant Ace" Case Reading & Insights

❖ Factual Background & Main Disputes

- FIMBank p.l.c. ("FIMBank") was a financer of a coal cargo loaded on "Giant Ace" and the holder of the bills of lading. The cargo was allegedly misdelivered by the Carrier, KCH Shipping Co. Ltd ("KCH").
- The bills of lading were on the Congenbill form, subject to Hague-Visby Rules ("HVR"). Clause 2(c) of the bills provided that, "The Carrier shall in no case be responsible for loss and damage to the cargo, howsoever arising prior to loading into and after discharge from the Vessel…".
- FIMBank served a Notice of Arbitration to KCH over a year after the date when the goods should have been delivered, contending that the one-year time bar in Art III r 6 of HVR did not apply to misdelivery after discharge, based on 1) HVR only applied to the carriage of goods by sea, and the period of responsibility ended with the discharge of cargo; 2) clause 2(c) of the bills prevented the implication and application of HVR.
- The arbitration tribunal determined that the HVR time bar could apply to claims relating to misdelivery after discharge in principle, and FIMBank's claim was therefore time-barred.
- FIMBank was granted leave to appeal to Commercial Court on following two issues:
  - ❑ Issue 1: Whether Art III r 6 of the HVR applies to claims for misdelivery of cargo after discharge.
  - ❑ Issue 2: Whether clause 2(c) of the Congenbill form disapplies the HVR to the period after discharge.

HVR Time Bar & Misdelivery: "Giant Ace" Case Reading & Insights (Cont'd)

❖ Issue 1

The Commercial Court upheld the decision of the tribunal and concluded that Art III r 6, on its true construction, shall apply to claims for midelivery of cargo after discharge:

- The Court accepted tribunal's consideration that most deliveries will be at some time after discharge, but where and how delivery takes place depends on receiver's surrendering of the bills of ladings and their arrangement of receiving cargo, which is outside the control of carriers. Time bar in HVR, as designed to allow carriers to close their books after a year, should be given a broad construction to achieve finality instead of depending on the fine distinction of discharge and delivery.
- Court agreed with tribunal that it was not commercially sensible or even reasonable for carriers' period of responsibility to end immediately post-discharge. It makes no commercial sense that carriers lost the protections provided by HVR whilst FIMBank did not immediately present the bills of lading to the carrier when the goods were discharged.
- Even if its conclusion above to be wrong, Court found the Congenbill terms contained an implied term that the parties intended to extend the application of HVR until delivery took place.

❖ Issue 2

The Court held that on a proper construction, the wording of clause 2 (c) did not disapply the HVR to the period after discharge.

HVR Time Bar & Misdelivery: "Giant Ace" Case Reading & Insights (Cont'd)

❖ Impact On Other Common Law Jurisdictions?

- This decision clarified that under English law the time bar in Art III r 6 of HVR applies to misdelivery claims whether arising at or after discharge; however, there is still a lack of international agreement on this position.
- English common law has traditionally considered time bars to be of procedural nature instead of a substantive law nature, while this may not necessarily be true in other common law jurisdictions. The ambit of the HVR time limit, if extended after its period of voyage, may override the compulsorily applicable provisions in the law of contract of the jurisdiction where the matter is being heard, and the hearing court may not follow this FIMBank v KCH case decision.

❖ Hong Kong Authority "Perfect Best"?

- The Court considered Hong Kong authority of *Cheong Yuk v China Intl Freight Forwarders [2005] 4 HKLRD 749* ("Cheong Yuk"). In "Cheong Yuk", the misdelivery took place after a further land carriage from Hamburg to Moscow, long after discharge from ship, and the it was decided that HVR obligations only applied during ocean carriage and discharge operations, and not during carriage or handling after discharge or to misdelivery thereafter. The court said contrary to "Giant Ace"'s précis, "Cheong Yuk" does not focus on whether the wrong delivery occurred during "the period governed by the Rules". The time bar did not apply to wrong delivery "after inland carriage", because the Rules apply to contracts of carriage "by sea".
- "Cheong Yuk" was followed in *Perfect Best Asset Management v ADL Express [2021] HKCFI 2310* ("Perfect Best"), even to misdelivery in or near the port environs. It will be interesting to see whether future Hong Kong court will follow "Giant Ace" rather than "Perfect Best" on the basis that "Cheong Yuk" was distinguishable.

❖ Other Comment

- When electronic bills of lading are issued, the opportunity for misdelivery is reduced as the chance of e-BLs being unavailable at discharge is remote.

In A Nutshell

Court Of Appeal – Force Majuere Clause, Non-contractual Currency

Case Reading of Mur Shipping BV v. RTI Ltd [2022] EWCA Civ 1406

Factual Background

- Owners and Charterers have concluded a contract of affreightment (COA) in 2016, in which the freight was agreed to be paid in US Dollars. The COA also contained the force majeure clause, defining a force majeure event shall meet a number of criteria, including:
  - ❑ It prevented or delayed the loading or discharging of the cargo at the load or discharge port; and
  - ❑ It cannot be overcome by reasonable endeavours from the Party affected.
- In 2018, US OFAC imposed sanction against a US parent company of Charterers that had guaranteed Charterers’ obligation under the COA, despite Charterers themselves are not sanctioned.
- Owners declared force majeure, arguing the sanction prevented US Dollar payment as required under the COA. If the freight was not guaranteed to be paid, Owners will not continue with loading and discharging operations.
- Charterers denied, as the sanction would not interfere with cargo operation, and proposed to pay freight in Euros as well as bearing the incurred currency exchange losses.
- Owners initially disagreed but resumed their COA obligation 11 days after giving force majeure notice, and accepted payment in Euros. Charterers then sought to recover costs of chartering in replacement vessels.

Court Of Appeal – Force Majuere Clause, Non-contractual Currency (Cont'd)

Arbitration Award

Owners shall not be entitled to invoke the force majeure clause, as this event could have been overcome by the exercise of reasonable endeavours. Therefore, Charterers can claim damages for Owners' refusal to nominate vessels for relevant cargo loading.

Commercial Court Decision

It supported Owners, holding that Owners are not obliged to accept non-contractual performance, i.e. payment in Euros instead of US Dollars, to circumvent the effect of the force majeure clause.

Court of Appeal Decision

The majority of the Court of Appeal restored the arbitration award, holding that the event in question could have been overcome by Owners' reasonable endeavours, with following reasoning:

- The force majeure clause should be applied in a common sense way that achieved the purpose underlying the parties' obligations.
- Charterers' proposal to pay freight in Euros and to bear the currency converting expenses would overcome the problem caused by the sanction on the Charterers' parent company, and acceptance of the proposal would have achieved precisely the same result as performance of the contractual obligation to pay in US Dollars.
- The position would have been different if payment in Euros would result in any detriment to Owners because then the force majeure clause is not "overcome". But that was not the case.
- Additionally, it was found that Owners' rejection against the Euro-payment proposal is because they wanted to stop performing the contract which had become disadvantageous to them.

The majority judges emphasized the reasoning is based on the specific terms of this force majeure clause, and is not concerned with force majeure or reasonable endeavours clauses in general.

The dissenting judge agreed with the decision of the commercial court. As the decision was not unanimous, the final result remained to be seen whether the case will go to the Supreme Court.

How To Successfully Bring ESG Reporting To Life In Shipping Companies

Background

Today, regulators, banks, insurers and investors are focusing more and more on managing ESG risks, which include but are definitely not limited to the increasingly stricter environmental regulations. This pressure is felt in maritime industry, where ship owners, cargo owners and charterers are also required to report and control their ESG performance.

The ESG reporting of shipping companies goes beyond an issue of compliance; furthermore, it is also about creating trust in their stakeholders. Therefore, it is essential to have a robust and enforceable strategy to turn the ESG risks into opportunities.

A Typical ESG Process For A Shipping Company?

- At present, there is no global standard for ESG reporting. SASB (Sustainability Accounting Standards Board) sketches a basis for ESG reporting, but such is yet sufficient to meet the ESG KPIs.
- Shipping is a heavily regulated industry, and the existing requirements on DCS/MRV reporting, SEEMP III plans, BWMC, MLC, CII, safety management procedures, etc. have, to some extent, implemented several ESG-related aspects.

How To Improve ESG Process?

The major challenge is to link the existing processes and data into an ESG context, and to identify where the ESG risk exposures are, in addition to what have been managed.

- It can be helpful to talk to the stakeholders on their material ESG assessment, in order to figure out what is important for the company, main KPIs and why, so to introduce additional measures or adjustment.

How To Successfully Bring ESG Reporting To Life In Shipping Companies (Cont'd)

How To Improve ESG Process? (Cont'd)

- It is reflected by shipping companies that data collection for ESG reporting is a common pain point, as it is typically collected through manual steps, imposing on the crew and shore personnel with additional burden, which also increases risk of data errors. To resolve such problems, it is advisable to bring standardization of data in ESG reporting to increase efficiency and accuracy within the entire data value chain, such as through 19847/48 and operational vessel data, so the data can be collected once but used for multiple times. Some service providers are also devising ESG dashboard solutions for the fleets to automate data gathering and visualizing.
- ESG performance data gradually becomes part of financial and commercial processes in shipping, so additional requirements are placed in accuracy and trust of the data. For example, in order to put trusted data into GHG reporting, cargo owners and charterers are recommended to obtain third-party verification on the data.
- As the coming sustainability regulations would require more structured sustainability report showing how decarbonization risks are managed, it is advisable to value elaboration of energy efficiency management plan, preferably looking beyond the required three years ahead, which will also build trust in stakeholders who wish to know how the company is prepared for the future.
- Crew or staff training is essential, not only in terms of enforcing the company ESG process and procedures, but also it relates to ethical business practice and company governance, which contributes to "S" and "G".

War Risk Insurance - Owners and Charterers Perspective

Owners

- There is no ordinary P&I cover for Owners regarding the liabilities, costs or expenses caused by war, any hostile act by or against a belligerent power, or any act of terrorism.
- Cover for these types of liabilities is customarily placed to marine war insurers, i.e. a primary war risk cover. When the vessels are ordered to sail through Listed Areas, war insurers may charge an additional premium.
- International Group Clubs provide an excess war risk P&I cover. It covers in excess of proper value of the vessel which should be recoverable under the primary war risk cover.
- The excess war risk P&I cover includes but not limited to crew, pollution and other P&I risks, up to a limit of USD500 million above an Owner’s primary war cover and subject to aggregation.

Charterers

- Unlike Owners’ entry, P&I Clubs customarily provide ‘ground up’ war risk cover for P&I liabilities, i.e. without any underlying excess point.
- The limit on this cover per claim is USD100 million.
- No requirement on Charterers for notification and additional premium before sailing through Listed Areas.

War Risk Insurance - Owners and Charterers Perspective (Cont'd)

❖ Liability For War Risks Between Owners And Charterers

- When Charterers are required to pay or contribute towards the war risks additional premium by the terms in charterparty.

  It will be often implied that Owners have agreed not to claim against Charterers for any damage or loss that is covered by that war risks cover.

  The judgment in "The Evia" (No. 2) case stated that it would be "the wrong result" if Charterers had to pay insurance premiums to insurers but were then liable to the same insurers when the latter exercised rights of subrogation against Charterers.

- When a joint insurance policy is entered into where the Charterers are named as joint assured on the policy with the Owners.

  The English Supreme Court held in the "Ocean Victory" case that the insurers, having paid the Owner's claims, would have been unable to claim back against Charterers, as the joint insurance policy has constituted an "insurance code" among Owners, Charterers and the insurers.

Market Snapshot

Prepare For Low Sulphur Fuel Operation In The Mediterranean Sea

- Mediterranean Sea has become the fifth area worldwide to be designated an Emission Control Area (ECA) with effect from 1st May 2025.
- Ships operating in the entire Mediterranean Sea will be required to burn fuel oil with a sulphur content not exceeding 0.10% m/m or use alternative solutions for compliance such as scrubbers.
- As a variety of areas, states and ports throughout the world continue to establish their own sulphur emission limitations, ship operators must ensure that crew are aware of the sulphur emission limits in force, not just those listed in the MARPOL as ECAs, but also in all jurisdictions where they trade.
- It is recommended that ship masters always consult with their local agents early before the ship's scheduled port visit, as new local rules or modifications to current legislation may come into force with only short notice in advance, and the regulatory enforcement approach may vary from place to place.

G7 Nations Designing Price Caps On Russian Refined Oil Products

- On 5th February, 2023, the EU is scheduled to implement a ban on the import of refined Russian oil products and to impose price caps on exports to third coutries, which would particularly affect diesel, naphtha and fuel oil.
- The refined petroleum price cap is in some ways more complicated to devise and implement, and G7 is aiming to design two price cap mechanisms for high-value products and low-value products. It is because diesel and kerosene historically trade at premium prices compared to crude, while fuel oil sells at a discount and the prices have also been extremely volatile over the past year.
- At the time of implementing price cap on Russian crude oil back to December 2022, Russia has objected strongly and said to introduce new monitoring regulations which aimed to limit any possible price discounts on its oil products that are emerging.
- European market worries about a shortage of Russian diesel supplies as a result of the price cap, but some G7 officials opined that the diesel can be purchased from Middle East and US, and it would be a reshuffling of the trade across the Atlantic. If such reshuffling becomes a trend, it can be expected that the shipping cost will increase as the voyage distance becomes longer.

Container Shipping Rates Collapsing, Relief Is Still Months Away

- On the demand-sensitive spot market, the price of shipping a container from Asia to the United States has decreased by more than 80% since peaking in September 2022 at over USD20,000 for a 40-foot container.
- Major carriers, like MSC and A.P. Moller-Maersk, are anticipating the delivery of hundreds of new container ships, which amplifies risk since carriers currently have more capacity than the demand.
- Maersk and other carriers would keep raising prices by canceling trips to match the shrinking demand. In order to reduce capacity, they are also scraping tiny, outdated vessels.
- Long-term contract rates finished 2022 about 20% lower than the pandemic peak of more than USD8,000 per container. Although the top retailers such as Walmart, Home Depot and Amazon.com have not yet dictated contract terms which usually happens around May, it is expected that contract rates may halve in 2023 at about USD3,200, versus the pre-pandemic rate of around USD1,500.
- Several factors could support longer-term contract rates, including upheaval from China's COVID outbreak, war in Ukraine, and high labor costs.

Ship Recycling 2022: Fewer But Bigger Ships To India, Lion's Share Of Bulkers And Tankers To Bangladesh

- 2022 saw all freights in dry vessel sectors started to soar at various points, followed by rises of the tanker markets. As a result, all ship recycling locations experienced the lowest year for over a decade in 2022.
- India undertook recycling the same number of vessels with Bangladesh who cleared around 5% more if measured by deadweight. Bangladesh received the lion's share of dry and wet vessels, despite vessels for demolitions sent to India were usually larger. Turkey received around 50 vessels in total but averaging around 5,500 dwt only.
- Financial situation of Pakistan and Bangladesh caused concern to the industry, as both governments are now reluctant to approve fresh letters of credits from their dwindling USD reserves.
- Towards the end of 2022, container ships and dry bulk markets started to calm down. It is predicted that 2023 will see more ship demolitions, a majority of which would be these dry vessels, as they grew one year older and put more selling pressure on their owners.

Crude Oil Imports / Export Review During 2022

- According to market data, in the first 11 months of 2022, global crude oil loadings (excluding cabotage trade) were up 8.6% year on year at 1,866.8 million tonnes, above the same period in 2021.
- In Jan-Nov 2022, year-on-year figures of exports from Saudi Arabia, Russia and USA were in uptrends by 17.3% to 331.1 million tonnes, 11.7% to 200.2 million tonnes and 24.2% to 149.2 million tonnes respectively; whilst exports from West Africa and the North Sea however each experienced a drop of 3.0% to 155 million tonnes and 1.8% to 98.3 million tonnes downward.
- During the same period, as to demand of crude oil, year-on-year figures of imports to the EU and India increased by 12.5% to 411.9 million tonnes and 11.6% to 203.9 million tonnes respectively. Imports into China shrunk by 4.6% to 393.0 million tonnes, which was its lowest since 2018.

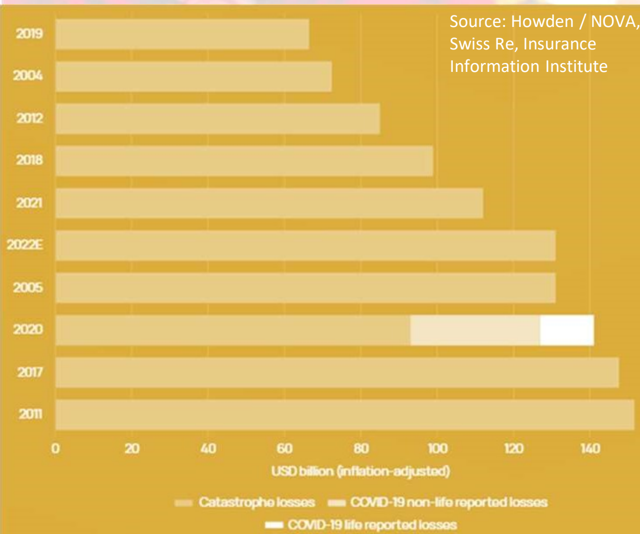
Early Year Dry Bulk Demand Could Favor An Increase In Freight Rates

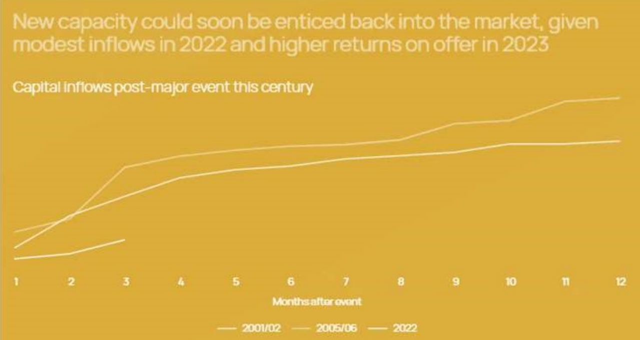
- Dry bulk market indices experienced dramatical fall in the beginning of 2023; however, market observers are expecting the increase in freight rates on following grounds.
- China's cancelling of the strict Covid policies has created enthusiasm to the dry bulk market, as such can be a catalyst for a significant demand increase.
- A market hearsay is Chinese authorities will consider to import Australian coal again, after a two-year hiatus.
- India is expected to boot coal import, as its authorities announced power plants relying on imported coal should be compensated when ordered to supply electricity. Its power stations which ceased operating due to high coal price will gradually reopen and consequently increase the coal demand.

Tankers in 2023: More Reasons to Be Optimistic Than Pessimistic

- Despite the first Baltic Exchange assessments in early January 2023 showed TCE earnings decreased compared with the values recorded in late December 2022, voices from the market believe earnings remain healthy and keep optimistic towards the tanker market in 2023.
- Since 5th December 2022 when G7 and Australia effected price cap on Russian crude on, it is noteworthy that tankers controlled by companies in UAE, India, China and Russia carried around 60% of Russian oil, more than double of the previous percentage before the EU embargo.
- There is a supply tightness of tankers, as the new IMO regulations (e.g. CII, EEXI) will encourage the exit of the ageing tankers, whilst newbuildings above 25,000 dwt (non-Russian) scheduled to be delivered in 2023 is 133, compared to 184 units in 2022.
- Meanwhile, analysts believed that recent changes of China's Covid policy will boost its oil demand in long term, predicting long haul crude trade from the Atlantic Basin into Asia will be benefited.
- On negative side, Russia announced it will ban the supply of crude oil and oil products from 1st February 2023 for 5 months, to nations abiding the price cap. Initially this means that the mainstream market is likely to be flooded with tonnage that previously lifted Russian barrels.

Global Reinsurance Market 2023: Challenging Renewals & Great Realignment





- While the global reinsurance market is still afflicted with industrial loss after COVID and the complexity of the cyber risk picture, about half of 2022's insured losses were caused by Hurricane Ian and the conflict in Ukraine. All these have made 2022 a top 10 largest loss years on record.

- There was also severe capacity shortage that resulted from capital suppliers pulling back while others were merely ready to maintain allocations coupled with demand-side pressures.

- Having been hit by surprise losses in recent years, reinsurers are navigating more retrocession in coverage terms to enhance coverage certainty by adding exclusions to all-risks cover or moving to named perils.

- Classes with the highest price rises included cyber and catastrophe-exposed property whilst premiums for worker's compensation and directors and officers (D&O) were subject to less pressure and registered decreases in certain regions.

- London market casualty reinsurance excess-of-loss rates, including adjustments for exposure changes and inflationary impacts, rose by 5% on average at 1st January 2023 renewal.

- Going into 2023, the state of the world economy remains uncertain. The war in Ukraine has surpassed COVID-19 as the main economic driver, and economic growth has slowed down as a result of a combination of an energy shock, high inflation, increasing interest rates, and geopolitical concerns.

Happy Chinese New Year Of Rabbit !

Editor: Summer Hao
summerhao@cmhoulder.com

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Acknowledgment

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