

Update

Indonesian Government clamps down on the exports of raw unprocessed minerals, what are the potential issues for vessel owners and charterers?

Those involved in the export of unprocessed mineral ores from Indonesia will be aware of the huge amount of cargo that has been shipped in recent years. As a result the Indonesian economy is booming but there is an environmental and social cost, with huge swathes of land and rain forest lost to the mining companies and populations displaced without compensation.

To control the exploitation of natural resources and to develop a downstream mineral refining and processing industry and so to increase the value of the country's mineral exports, the Indonesian Government enacted Regulation No. 7 of 2012 regarding the Improvement of Mineral Added Values Through Mineral Processing and Refining ("Regulation No. 7").

Regulation No. 7, bans the export of certain unprocessed metal minerals (including bauxite, chromium, cobalt, copper, gold, iron ore, iron sand, lead, manganese, nickel, platinum, silver

and tin) by mining companies whose Production Operation Licence was granted before 6 February 2012. The ban is imminent and due to come into force on Sunday 6 May 2012, which is 3 months after Regulation No. 7 was enacted. However, the Indonesian Government has agreed that mining companies can continue to export the listed unprocessed metal ores after 6 May, on condition that they satisfy 3 requirements:

- (i) their licences must be clean and clear;
- (ii) they must sign an integrity pact by which they agree to stop exporting unprocessed metal ores by 2014; and
- (iii) they must submit a detailed proposal on how they intend to refine and process their raw commodities by 2014. However, even if the mining companies satisfy the 3 requirements so that they are permitted to continue exporting ores until 2014, their ore exports will be subject to a

significant export tax (for some reportedly as high as 50%).

Despite fierce opposition from the mining industry, the ban is set to be imposed. It remains to be seen how it will be implemented and whether it will prevent the shipment of metal ore cargoes from Indonesia but Regulation No. 7 and the uncertainty regarding its implementation is likely to result in charter party disputes. Possible consequences of Regulation No. 7 could be that vessels may be without cargoes and it is possible that vessels may be detained by the authorities if they are believed to be trading illegally. So who will bear the cost?

Voyage Charters

The charter party will identify exactly what cargo is to be loaded and it is the charterers' obligation to tender for loading a cargo of such type and in such condition as is reasonable to meet the charter party description. If the described cargo is available for loading within the specified load port range, albeit from a different source and/or at greater cost than originally intended, the charterer is obliged to provide a cargo. However, if as a result of Regulation No. 7 the intended shipper is no longer able to provide a cargo, or if the shipper can do so but at a much greater price because of a new export tax, then charterers may seek to terminate the charter party on the grounds of force majeure or frustration rather than incur huge demurrage whilst sourcing a legal cargo.

For the principle of force majeure to apply to a contract under English law, it must be expressly incorporated by a term of the contract. It is common for charter parties to include a force majeure clause in the rider clauses, which identify certain events, and which, if applicable, will exempt charterers from performance or permit them to terminate the charter party. The identified events may be of a similar type in which case the *ejusdem generis* rule may apply to restrict what constitutes a force majeure event under the charter party. However, such clauses often include the word "whatsoever" in which case they will have very wide application. A force majeure clause is in nature an exception clause and in the case of any ambiguity, the interpretation least favourable to the party seeking to rely on it will be preferred. Nonetheless, depending on the wording, if a charter party includes a force majeure clause it may be possible for a charterer to rely on it to avoid performance or to terminate the contract.

Alternatively charterers may seek to argue that the charter party is frustrated. A charter party is frustrated if as a result of some unforeseen, supervening event, beyond the control of either party it becomes impossible to perform the charter party according to its terms or to attain the commercial purpose of the adventure. Whether a charter party is frustrated will depend on the facts and will be a question of degree. However, increased cost of performance almost certainly will not qualify as frustration. So if cargo were available within the load port

range but at a greater cost than expected, a charterer may find it difficult successfully to argue frustration. Charterers will have a better argument if as a result of Regulation No. 7 there were no shippers within the permitted load port range who were able legally to export cargo fitting the charter party description.

It remains to be seen whether the ban will be enforced and if so how but it is possible that vessels which are suspected of loading banned cargoes may be detained by Indonesian authorities. If a vessel were detained, whether there was any liability on the part of owners or charterers would depend on whether they had breached the charter party. However, if the vessel were detained as a result of charterers' orders to load a banned cargo, charterers almost certainly would be in breach of the charter party terms.

There is no express prohibition on the carriage of dangerous cargoes in GENCON 1994 but a shipper of cargo is under an absolute obligation not to ship dangerous cargo, without giving notice to the carrier. A shipper who does not give notice is taken to have warranted that the cargo is not dangerous and that it is fit for carriage in the ordinary way. This obligation is treated as an implied term of the contract of carriage whether a bill of lading or charter party. The charterer is therefore liable to the owner under a charter party if notice is not given, even though the charterer may not be the shipper. This obligation applies not only to cargoes which are physically dangerous but also to cargoes which are legally dangerous, i.e. cargoes which may expose the vessel to delay, detention or seizure. Therefore if the vessel were detained as a result of having loaded banned cargo, charterers would be in breach and owners would have a claim in damages for detention.

Time Charters

Possibly the first question an owner who is ordered to Indonesia to load a cargo of metal ore will ask is whether the order is valid and the answer must be yes, assuming Indonesia lies within the permitted trading range and the cargo is permitted under the charter party terms, as long as legal cargoes are available. The ban on metal ores is not a blanket ban. There will be mining companies which have satisfied the 3 requirements, and/or which were granted a Production Operation Licence after 6 February 2012 which have legal cargo to ship.

Under a time charter party the owner is obliged to follow charterers' orders as to employment and the vessel will remain on hire regardless of whether there is cargo available. As under the voyage charter party, it is the charterers' obligation to tender a cargo for loading. The time charterer/disponent owner, who sits at the bottom of the time charter chain and who has the vessel out on voyage charter terms, is the party who potentially is exposed if no cargo is available and they are left to pursue voyage charterers for damages for detention, and who may be able to rely on force majeure or frustration arguments in any event.

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In the event the vessel were detained by Indonesian authorities on suspicion of loading a banned cargo so that there was no actual breach on the part of charterers, charterers may seek to argue that the vessel is off hire in order to suspend their obligation to pay hire. Although the actual wording of the off hire clause would need to be considered, if the time charter included one of the usual off hire clauses (e.g. NYPE cl. 15) then charterers should find it difficult to sustain such an argument. If the detention was due to the vessel actually having loaded banned cargo so that charterers were in breach of their obligation not to load dangerous cargo, then there should be no question that the vessel would remain on hire.

It remains to be seen whether a ban will be implemented and if so whether the measures taken to enforce it will be effective. If so it may impact significantly on the volume and cost of unprocessed metal minerals being exported from Indonesia. For shippers and charterers with existing contracts to ship the minerals covered by Regulation No. 7 it may prove difficult to source sufficient legal cargoes. If so then disputes can be expected between vessel owners and their charterers and shippers.