

**IN THE MATTER OF THE SCMA ARBITRATION RULES 2022  
AND  
IN THE MATTER OF A MOCK ARBITRATION**

**BETWEEN:**

**FAN GU SHIPPING**  
(a company incorporated in the People’s Republic of China)  
**Claimant/Owners**

**- and -**

**POWAN TRADING LTD**  
(a company incorporated in the Republic of India)  
**Respondent/Charterers**

**MV Polar**  
**Voyage charter dated 10 September 2021**

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**CLAIMANT’S SKELETON ARGUMENT**  
*for hearing on 8 June 2022*

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**A. INTRODUCTION**

1. This case concerns a claim for demurrage by Fan Gu Shipping (as disponent owners, the “**Owners**”) against Powan Trading Ltd (as voyage charterers, the “**Charterers**”). There are three grounds on which the claim is resisted, to which the Owners’ case is as follows:
  - 1.1. As a matter of construction, the force majeure provision does not apply to the Charterers’ obligation to pay demurrage.
  - 1.2. The occurrence of the impediment was something which the Charterers could reasonably have been expected to have taken into account at the time of the conclusion of the contract, and therefore the force majeure clause cannot be relied on pursuant to clause 34(1)(b).
  - 1.3. No notice of force majeure was given by the Charterers under clause 34(4).

## **B. THE PARTIES**

2. The Owners are the disponent owners of the vessel “Polar” (“**the Vessel**”). The Owners are a PRC company and represented by its director, Mr Li Rui, who has given a witness statement in these proceedings (“**Li 1**”).
3. The Charterers were voyage charterers of the Vessel. The Charterers are an Indian coal trading company based in Kakinada, India and represented by its director, Mr Sanjay, who has also given a witness statement in these proceedings (“**Sanjay 1**”).

## **C. FACTUAL BACKGROUND**

4. Before the Charterparty was concluded, there were reports of a new Covid variant in India. The Indian health authorities reported the outbreak of a new variant, and this was then reported in a New York Times news article dated 3 September 2021, and read by Mr Sanjay.<sup>1</sup>
5. Nevertheless, on 10 September 2021, the parties concluded the Charterparty, which was for the carriage of a cargo of coal from Kakinada (where the Charterers are based) to Ningbo, China.
6. On 13 September 2021, the World Health Organisation declared the new variant to be a Variant of Concern and codenamed it the “Sigma Variant”. On the same day, the Indian government announced a nationwide lockdown, imposing severe restrictions on people leaving their homes except for workers in essential services. The government’s notice stated that port services would continue to function save where safe distancing measures could not be adhered to.
7. On 14 September 2021, there was a conversation between Mr Li of the Owners and Mr Sanjay of the Charterers. There is a dispute as to whether notice of force majeure was given during this telephone conversation: compare Li 1, paras. 7-9 and Sanjay 1, paras. 8-11.
8. On 15 September 2021, the Vessel tendered NOR.

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<sup>1</sup> Sanjay 1, para. 5

9. On 16 September 2021, Mr Sanjay learnt that there was an outbreak of the Sigma Variant at the port and that workers were not allowed in whilst the port assessed the severity of the outbreak. The port subsequently imposed a 50% limit on workers allowed in the port.<sup>2</sup>
10. The Vessel berthed on 11 October 2021, commenced loading on 12 October 2021, completed loading on 12 November 2021 due to the lack of manpower on the ground, and left Kakinada on the same day.
11. The Owners claim demurrage against the Charterers. The quantum is not in dispute.<sup>3</sup>

**D. THE ISSUES**

12. There are three issues:
  - (a) Whether the force majeure notice clause in the Voyage Charterparty can apply to the demurrage provisions in the Voyage Charterparty;
  - (b) Whether the events that transpired at the Port of Kakinada fall within the force majeure clause; and
  - (c) Whether notice of the force majeure was validly given by virtue of the telephone conversation between Mr Sanjay and Mr Li.

**(1) Issue (a)**

13. As a matter of construction, the force majeure clause does not apply to the Charterers' obligation to pay demurrage.
14. Clause 34 is a general exceptions clause. A general exceptions clause will not normally be read as applying to provisions for laytime and demurrage, unless the language is very precise and clear: see the Court of Appeal's decisions in *The Lefthero* [1992] 2 Lloyd's Rep 109 and *The Kalliopi A* [1988] 2 Lloyd's Rep 101. Clause 34 makes no express reference to any of the laytime and demurrage provisions in clauses 13-16. Therefore, the force majeure clause has no relevance in this demurrage claim.

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<sup>2</sup> Sanjay 1, para. 13

<sup>3</sup> Li 1, para. 13

15. In any event, clause 34(1) opens with “*Unless otherwise agreed in the contract between the parties expressly or impliedly*”. The parties have agreed impliedly that the force majeure provisions do not apply to the demurrage provisions:

15.1. Clauses 13-16 contain a complete code for when demurrage is and is not payable. Clause 14 identifies that the discharge rate is PWWD (per weather working day), and therefore bad weather is capable of interrupting laytime and preventing demurrage from becoming payable. Aside from that, the Charterers bear the risk of all delays at the load port and discharge port.

15.2. This is confirmed by the fact that NOR can be tendered ATDN, SHINC, WIPON, WIBON, WICCON, WIFPON. The parties clearly intended that the Charterers would bear the risk of delays at the ports.

**(2) Issue (b)**

16. If issue (a) is decided in the Charterers’ favour, the Charterers further need to satisfy the following requirements set out in subclause (1) in order to rely on the force majeure clause:

“1)...

*a) That its failure to perform was caused by an impediment beyond its reasonable control; and*

*b) That it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract; and*

*c) That it could not reasonably have avoided or overcome the effects of the impediment.”*

17. Subclause b) is not satisfied in this case. At the time of conclusion of the Charterparty, the Charterers could reasonably have been expected to have taken into account the outbreak of the Sigma Variant. In particular:

17.1. The new variant was reported by the Indian health authorities as “*rampaging through its health system*”, causing the healthcare system to become “*severely overstretched*”, “*more infectious and deadly than previous variants*”, and that severe cases requiring hospitalisation were doubling “*every 2 days*”.

- 17.2. The new variant attracted the attention of the New York Times, which accurately reported the details of the new variant.
- 17.3. Given experience of previous Covid outbreaks, it should have been no surprise that a nationwide lockdown was ordered, causing severe disruption and delay.
18. This issue will be further explored with Mr Sanjay in cross-examination.

**(3) Issue (c)**

19. Even if the above issues are decided in the Charterers' favour, the Charterers still need to satisfy the Tribunal that it gave notice of force majeure. The requirement to give notice is set out in subclause (4) as follows:

*“4) A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from its duty to perform its obligations under the contract from the time at which the impediment causes the failure to perform if notice thereof is given without delay or, if notice thereof is not given without delay, from the time at which notice thereof reaches the other party.”*

20. The Owners submit that no notice of force majeure was given on 14 September 2021, and there was no oral agreement that the delay should not be on the Charterers' account:
- 20.1. At the time of the phone call, Mr Sanjay had been told that there was a “possibility” of delay and a “risk” that the Vessel's loading would be delayed. Any notice of force majeure at this stage would have been premature.
- 20.2. The notice of force majeure is difficult to reconcile with Mr Sanjay's view that, even after lockdown was announced, he was of the view that “*the lockdown would not affect the Vessel's loading operations in Kakinada*”.<sup>4</sup>
- 20.3. The true impediment was (i) the port authorities' decision not to allow workers into the port following an outbreak there, something which Mr Sanjay only learnt about on 16 September 2021; and (ii) the subsequent decision only to allow 50% of workers into the port. Mr Sanjay could not have informed Mr Li of these matters during their phone call on 14 September 2021.

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<sup>4</sup> Sanjay 1, para. 5

- 20.4. There was no written notice of force majeure. Although clause 34 does not require a written notice to be served, given the importance of the notice, it is striking that there is nothing in writing.
21. The Tribunal will be hearing oral evidence from Mr Sanjay and Mr Li on this issue. The Owners will address the Tribunal further following cross-examination.

**E. CONCLUSION**

22. For the reasons set out above, the Tribunal is respectfully invited to award demurrage in favour of the Owners.

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