

**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

Voyage charter dated 10 September 2021

Polar

RESPONDENT’S SKELETON ARGUMENT

for hearing on 8 June 2022

PARTIES & BACKGROUND

1. Claimant, Fan Gu Shipping, is a company registered in China. Respondent, Powan Trading Ltd, is a company incorporated in India. By way of a voyage charterparty dated 10 September 2021 (the “Charterparty”), Claimant sub-chartered the MV “POLAR” (the “Vessel”) to Respondent for the carriage of a cargo of coal from Kakinada, India to Ningbo, China.
2. On 13 September 2021, three days after the Charterparty was concluded, the WHO declared the outbreak of a new Variant of Concern in India – the Sigma Variant. The

Indian Government declared a nation-wide lockdown on the same day; and port services would continue to function provided that safe distancing measures could be adhered to.

3. On 14 September 2021, Respondent's Mr Sanjay telephoned Claimant's Mr Li and informed him of possible delays due to the outbreak and governmental breakdown which Respondent regarded as force majeure events.
4. On 15 September 2021, the Vessel tendered NOR at Kakinada.
5. On 16 September 2021, the outbreak of the Sigma Variant had just been detected at the port. Subsequently, the port authorities imposed a 50% limit on the workers allowed into the port in order to comply with safe distancing measures. Due to the restrictions, the Vessel called to berth only on 11 October 2021, and left the port on 12 November 2021.
6. Three issues arise for determination by this Tribunal:
 - (a) Whether the Force Majeure Clause (Clause 34) in the 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.

ISSUE A: WHETHER THE FORCE MAJEURE CLAUSE IN THE VOYAGE CHARTERPARTY CAN APPLY TO THE DEMURRAGE PROVISIONS IN THE VOYAGE CHARTERPARTY?

7. Yes undoubtedly. Clause 16 of the Charterparty provides, "*Subject to any other provision to the contrary, demurrage payable at USD15,250 per day pro rata...*" In other words, demurrage payment is subject to a contrary provision. One such contrary provision is the Force Majeure Clause, i.e. Clause 34.

8. Clause 34(1) provides “*Unless otherwise agreed in the contract...expressly or impliedly, where a party to a contract fails to perform...the consequences set out in ...this Clause will follow...*” Parties did not expressly or impliedly agree to exclude demurrage from the relief in Clause 34. Indeed, Clause 16 itself stated that it is subject to “*any other provision to the contrary*” in the Charterparty.
9. Clause 34(5) of the Charterparty provides, “*A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from any liability in damages or any other contractual remedy for breach of contract from the time indicated in paragraph 4.*”
10. Demurrage is a form of “*liability in damages or any other contractual remedy for breach of contract*”. Therefore the force majeure exception under Clause 34(5) applies specifically to demurrage.

ISSUE B: WHETHER THE EVENTS THAT TRANSPIRED FALL WITHIN THE FORCE MAJEURE CLAUSE

11. Under Clause 34(1), to invoke force majeure, the event has to be (i) beyond Respondent’s reasonable control – Clause 34(1)(a); (ii) could not reasonably have been expected at the time of the contract was concluded – Clause 34(1)(b) and (iii) could not reasonably have been avoided or overcome – Clause 34(1)(c). In other words, there are three requirements.
12. However, if the event falls within the list in Clause 34(3), then the first two requirements - Clauses 34(1)(a) and (b) are presumed to have been satisfied. This means it is presumed that the event was beyond Respondent’s reasonable control and that it could not reasonably have been expected at the time the contract was concluded.
13. To recapitulate, the events in India started with the outbreak of a new previously undetected variant of COVID-19. It was more infectious and deadly than previous variants. The WHO declared the outbreak a Variant of Concern with the code name “Sigma Variant”.
14. With the healthcare system coming under increasing pressures by Sigma Variant, the Indian government declared a nation-wide lockdown on 13 September and imposed

severe restrictions on people leaving their homes. Although the government notice did provide that port services would continue to function as per normal, that is only if safe distancing measures could be adhered to.

15. The Vessel tendered NOR at Kakinada on 15 September 2021. Thereafter, an outbreak of the Sigma Variant was detected at the port, and workers were not allowed in while the port authorities assessed the severity of the outbreak. The port authorities went on to impose a 50% limit on the workers allowed into the port – to comply with safe distancing measures.
16. Accordingly, these events amount to:
 - (a) Act of authority, compliance with any law or governmental order, rule, regulation or direction and/or curfew restriction (Clause 34(3)(d) – “**Act of Authority**”) and/or
 - (b) Act of God, i.e. outbreak of coronavirus disease (Clause 34(3)(e) – “**Act of God**”)
17. As for the third requirement, i.e. Clause 34(1)(c) – “*could not reasonably have been avoided or overcome*”. Respondent could not have reasonably avoided or overcome either the lockdown or Sigma Variant.
18. Alternatively, if the events are not Act of Authority and/or Act of God, they nevertheless satisfy the 3 requirements in Clause 34(1).
 - (a) The Sigma Variant and the government lockdown are beyond Respondent’s reasonable control.
 - (b) At the time the contract was concluded on 10 September 2021, Respondent could not have been reasonably expected the outbreak and the lockdown. Although Mr Sanjay, a director of Respondent, read a news article from the New York Times about the outbreak, the outbreak was not reported in local news outlets. The fact that local news outlets did not carry the news cast reasonable doubts on the severity of the outbreak.

- (c) The WHO declared COVID-19 as a global pandemic in March 2020. As of September 2021, the pandemic had been around for more than 18 months and there had been 4 different variants of concern – Alpha, Beta, Gamma and Delta. By January 2021, India begun its COVID-19 vaccination (see attached The Hindu news article dated 15 January 2021, updated on 16 January 2021).
- (d) It is important to appreciate that as of 10 September 2021 (the date the Charterparty was concluded), the virus was becoming endemic, COVID-19 variants and fresh waves were becoming commonplace, and vaccination had been ongoing for 8 months.
- (e) In the circumstances, Respondent could not have been reasonably expected to take into account the outbreak (which was neither identified as a Variant of Concern nor code named until 13 September 2021) followed by the subsequent government lockdown in Kakinada when the parties concluded the charterparty on 10 September.

ISSUE C – WHETHER NOTICE OF FORCE MAEJURE WAS VALIDLY GIVEN

- 19. It is undisputed that Respondent's Mr Sanjay called Claimant's Mr Li on 14 September 2021. This was one day after WHO declared Sigma Variant as a Variant of Concern and the declaration of a lockdown by the Indian government on 13 September 2021.
- 20. The contents of the call are disputed. Respondent will cross examine Mr Li and make further submissions. For now, Respondent's position is as follows:
 - (a) Although the government notice exempted port workers from the restrictions on people leaving their homes, Mr Sanjay found out from the manager of the stevedoring company that delays were still possible because the port authorities had started to limit the number of workers at the port to comply with safe-distancing measures. The manager also informed Mr Sanjay that the port workers themselves were concerned about the Sigma Variant.
 - (b) Consequently, Mr Sanjay called Mr Li on 14 September 2021 – to inform him of the outbreak of Sigma Variant in India.

(c) Mr Li asked whether the Sigma Variant would have any impact on the Vessel's loading. Mr Sanjay told him that based on the government notice, it did not appear to have any impact because port workers were permitted to work as per normal, subject to compliance with safe distancing measures.

(d) Mr Sanjay also shared with Mr Li his conversations with the stevedoring company and warned Mr Li to be prepared for delays. Mr Sanjay specifically told Mr Li that *“any delay should not be on Powan's account, since the Sigma Variant and the governmental lockdown were acts of force majeure...”*. Indeed, Mr Li agreed and assured Mr Sanjay that Claimant would honour its obligations.

21. Clause 34(4) provides that a party successfully invoking force majeure is relieved from its duty to perform from the time notice is given without delay; or if notice is not given without delay, from the time at which notice reaches the other party. Clause 34 does not stipulate the form of the notice. In other words, either a written or verbal notice suffices – so long as the other party had notice.
22. Respondent gave verbal notice of the force majeure events on 14 September, i.e. one day after WHO declared the Sigma Variant a Variant of Concern and the Indian government's declaration of a lockdown. Notice was therefore clearly given without delay.

CONCLUSION

23. For the reasons above, Respondent humbly requests the Tribunal to dismiss the claim with costs to Respondent.

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