

# Callidus News

ADVOCATES, CONSULTANTS & NOTARY

BRANCHES: DUBAI | SINGAPORE | DELHI | MUMBAI | KOLKATA | CHENNAI | COCHIN [info@calliduscmc.com](mailto:info@calliduscmc.com)

## Dubai

Business Avenue Building  
Office # 713, Port Saeed Road,  
P.O. Box # 90992, Dubai, UAE.  
Tel : +97142956664  
Fax : +97142956099

## Singapore

20 Maxwell Road  
#04-02 D, Maxwell House  
Singapore - 069113  
Tel: +65 6221 4090

## Delhi

D 1st 145 Basement (Rear)  
Lajpat Nagar R 1  
New Delhi - 110 024  
Tel: +91 11 4132 1037

## Mumbai

8-B, Dariya Building  
2nd Floor, In between American  
Dry Fruits & Zara, Dr. D.N.Road  
Fort, Mumbai 400 001  
Tel: 022-22853371

## Chennai

Old No. 123, New No.255,  
3rd Floor, Hussiana Manzil,  
Ankapanaiken Street,  
Parrys, Chennai - 600 001  
Tel: +91 98 40 844463

## Cochin

Near St. Joseph's High  
School Chittoor Road,  
Cochin - 12, India  
Tel : +91 484 2391895  
[office@callidusindia.com](mailto:office@callidusindia.com)

## DO ALL FIXTURE NOTES BIND THE CONTRACTING PARTIES?



Surprising as the question may seem, non-compliance with the legal and procedural requisites in a liberal jurisdiction may make it easy for a party to wriggle out of their obligations, while those in conservative jurisdictions find themselves bound to the contract even if the Charter Party is not physically signed and is confirmed only via email.

Before proceeding with the article, it is essential to note that Fixture negotiations usually take place in 2 stages – first the main terms are agreed upon

and settled as the “fixture recap” whereas the finer details are left to review, with of course a specific mention against them being “subject to review/details”. In the second stage the parties negotiate the pending details and agree to the terms.

To take an example of how things play out in the real world, under English Law, it is not mandatory or fundamental that the contract be written or executed, it is sufficient that the parties intend to be bound by the terms of the agreement. Therefore, if there is a phrase like

‘subject to review /details’, under English law it gives room for the parties to take a stand that they do not agree to be legally bound, till they review and agree to the details. That being said under English Law there is also a requirement to examine if the “subject to details” is a condition precedent or condition subsequent to bind the parties to the contract. The case in point is Hyundai Merchant Marine Co Ltd (HMM) v Americas Bulk Transport Ltd (ABT) (The “Pacific Champ”) – QBD (Comm Ct) (Eder J) [2013] EWHC 470 (Comm); wherein,



THOUGHT  
for the MONTH

For those who dare to  
dream there is a whole  
world to win

DHIRUBHAI AMBANI

Callidus

the claimant HMM was the bareboat charterer of the vessel Pacific Champ. In this case negotiations commenced on 11th February 2008, via telephone between HMM and ABT, for the possible sub-charter of the vessel by ABT for the carriage from Houston via the Orinoco River, Venezuela, and back to the US Gulf. In the Pacific Champ ruling the judge under the English Law held that the phrase “sub review” in the fixture recap was a condition subsequent and hence it bound the parties subject to a condition, therefore if the condition was not satisfied the contract would cease to exist, this interpretation however did not provide the parties, the liberty to avoid the contract for reasons unrelated to the condition subsequent.

In Singapore, on the other hand, in the case of Toptip Holding Pte Ltd V Mercuria Energy Trading Pte Ltd (The "Pan Gold") [2018] Lloyd's Rep. Plus 9, the Court Of Appeal Of Singapore, gave an interesting interpretation to the “subject to review” phrase in the contract, which under English Law would normally indicate that the parties have not yet agreed to an enforceable contract; the appeal court here based on the factual circumstance and the behaviour of the parties, found the contract to be binding on the parties.

In Italy, the Tribunal of Milan whilst examining the question of when a contract of the charter is not incorporated into an agreement duly executed by both parties, but instead is contained in a recap fixture exchanged via email was binding on the parties, observed that since the recap fixture was through email exchanges and was very concise with limited details while there was a fully detailed charter party, the Tribunal of Milan held that the terms of the recap fixture were not sufficient to conclude that the parties intention was to be bound by the contract.

In a case before the Supreme Court of India Shakti Bhog Foods Ltd. V. Kola Shipping Ltd., AIR 2009 SC 12, despite there being no signed charter party, the email exchanges between the parties were relied on, which contained negotiations according to

which the cargo was loaded further one of the parties requested via email for the fixture note, for delivery of the cargo, referring to the terms of the charter party, which also contained a clause for arbitration in London. The court concluded that there existed a charter party between the parties which could be identified through the correspondence between the parties as well as the fixture note and the bill of lading signed by the parties.

During the course of handling various disputes concerning to Fixture Notes, and Charter Parties, we have on numerous occasions observed that parties do not properly execute and sign such documents. This itself leaves the doors open to litigation and subject to challenge on the validity of the contract which ultimately boils down to the fact that the parties may not be bound to the agreement. Many nations have laws that do not entertain unsigned agreements or even entertain arbitration awards if the proceedings govern an unexecuted charter party. For instance in one such case the owners proceeded against the charterers for dead freight via the Swedish Club. The charterers who were Spanish did not sign the charter party but performed the voyage. When the owner claimed dead freight the charterers remained silent forcing the owners to proceed with arbitration in London under the fixture recap with Gencon CP terms. The Tribunal provided an ex-parte order in favour of the owners. When the owner proceeded to execute the same in Spain, against the charterers, the charterers argued that there was no signed contract and the Spanish Supreme Court dismissed the owner's case on the basis that there was no clear agreement especially in relation to arbitration; hence the award could not be executed against the charterers in Spain. When the owners decided to proceed against the wholly owned subsidiary of the Spanish charterers in the US, the US counsel advised the owners that since there was no signed charter party the enforcement of the arbitration award in the US

could also prove to be challenging.

From a few of the above instances, one would get a brief idea of various dimension and challenges faced by parties in various jurisdictions, on the same point in question. It is therefore pertinent to take in account a few of the below mentioned key factors, while entering in to Fixture Notes, Fixture Recaps and Charter Parties-

- All understanding, negotiations, agreements and communications must be reduced in writing.
- The intent of the parties should be clearly expressed to avoid ambiguity, vagueness, or uncertainty.
- Retain copies and records of Fixture Recap, pre- fixture communications, etc.
- Use terms like “Subject to details/ review” within the Fixture Note only when and where applicable to avoid unwarranted doubts at the time of arbitration or litigation.
- Prior to the finalization of the Fixture Note the parties should go through the content of the Fixture Note and the Charter Party to check on consistency in the terms; it is highly recommended to get the same vetted by a legal counsel.
- Ensure to sign and execute the Fixture Note and Charter Party to save on time, effort and money, if the contract does land up in dispute.

In the end, the outcome of each case is exceedingly dependent on the location of the suit, the laws and ratified conventions in place; the facts and circumstance; the evidence on record. It is however good to be prudent and avoid laches that may prove detrimental to the case, by acting diligently and adopting measures to protect and safeguard one's interest ■

# INTERNATIONAL MARITIME ORGANISATION (IMO) 2023 REGULATIONS

## [ MARITIME DECARBONIZATION ]



The International Maritime Organization (IMO), is a specialized agency of the United Nations established for ensuring the safety and security of maritime transport and also to prevent marine pollution from ships. Since ocean vessels burn some of the cheapest fuel on the planet called bunker fuel which contributes significant amounts of GHG, sulfur, and other emissions which can cause negative environmental and human health impacts; in order to reduce international shipping carbon emissions, IMO has defined new requirements. After implementing the GHG strategy in 2018 and sulphur fuel regulation in 2020, the IMO will be introducing what is now known as “IMO 2023” which aims to reduce ocean shipping’s carbon emissions and promote greater energy efficiency in the sea freight industry. This regulation will take effect on January 1 2023.

This new regulation is part of the initial IMO Greenhouse Gas (GHG) Strategy, which aims to reduce the carbon intensity of international shipping by 40% by 2030, and by 70% by 2050 compared with a 2008 baseline level. To achieve these targets IMO has developed short-term, mid-term and long-term measures. For short-term measures IMO has developed technical and operational energy efficiency measures for both new and existing ships. To achieve a 40%

reduction in carbon emissions by 2030 compared to 2008, shipping companies are required to adopt two new measures: 1) the Energy Efficiency Existing Ship Index (EEXI) and 2) the Carbon Intensity Indicator (CII) rating scheme. The IMO 2023 regulation affects both commercial and non-commercial vessels.

The EEXI is a rating system that measures the energy performance of existing ships based on their specification and key metrics, such as energy consumption, speed, power, and engine size. It is a measure related to the technical design of a ship. The ships are then rated for its overall performance based on these metrics. All ships must comply with the IMO 2023 regulations, if not they will have to deal with IMO 2023 penalties and restrictions and need to make modifications to their engines or systems. It will be assessed at the first international Air Pollution Prevention Certification survey after January 1, 2023.

CII measures the greenhouse gas released with the distance travelled and the amount of cargo carried. Therefore it is used to rank and monitor the efficiency of individual ships. All vessels must have an established CII. Based on the performance each vessel will receive a grade from A (good) to E (poor). Ships with 3 consecutive years of D class or one year of E class are required to implement a corrective

**Angel Mary Joy**

Bharata Mata School of Legal Studies

action plan to achieve A, B or C grades.

The impacts to be expected are economic. The shipping costs are going to increase because vessel owners and operators will be investing in new fuel technologies and upgrading their fleets to meet IMO 2023 regulations

On the other hand, organizational impacts such as:

1. The detention of old vessels for compliance
2. A potential decrease in capacity due to the reduction in speed
3. An increase in transit time, with disparities between routes.
4. Disruption of charters due to the reduction in speed to reduce fuel consumption.

To conclude there is no doubt that the new IMO 2023 regulations may be a challenge in the beginning, but will bring significant positive changes in the international shipping industry in the coming years. By implementing stricter regulations for carbon emission, IMO 2023 is likely to affect the global shipping landscape significantly. To reduce carbon emission and improve fuel efficiency the vessel owners and operators can also adopt various options such as operations optimization, modernization of vessels with energy saving technology, Switching to low carbon fuels etc. IMO has put an amazing effort by implementing new technologies and steps towards greener ocean freight logistics. Each and every person engaged in this process is doing a commendable job in paving the way for the shipping sector in achieving the IMO’ goal for a brighter and sustainable future ■



 **HOT NEWS**

## THE URGENCY OF CURBING POLLUTION FROM SHIPS

The government of the UAE has released an official list of commercial activities open to onshore companies with 100 per cent foreign ownership – the so-called positive list. Previously, all onshore UAE companies required a local shareholder but for those activities on the positive list this is no longer a requirement.

This is considered a major breakthrough, particularly for ocean carriers, ship operators and charterers,

and other companies in the marine industry wishing to establish a presence in the UAE. Activities on the positive list include ship repair; maritime cargo transport; ship chartering; and pilotage and towage.

There are still some residual restrictions to full foreign ownership, even for activities on the positive list. This includes for example some minimum share capital requirements

[www.themaritimstandard.com](http://www.themaritimstandard.com)



Lets pray together for peace, prosperity and health  
While we take our fasting with a pure heart

Address: Near St. Joseph's High School, Chittoor Road, Cochin- 12, India, T:+91 484 2391895, [office@callidusindia.com](mailto:office@callidusindia.com)

**Disclaimer** *The materials contained in our News Letter and our accompanying e-mail have been prepared solely for information purpose. Neither Callidus nor any of its affiliates make any warranties in relation to the use or reproduction of its contents. The information contained in the news letter is solely for academic and discourse purposes, meant for private circulation; this e-mail message and it's attachments may be confidential, subject to legal privilege, or otherwise protected from disclosure, and is intended solely for the use of the intended recipient(s). If you have received this communication in error, please notify the sender immediately and delete all copies in your possession.*