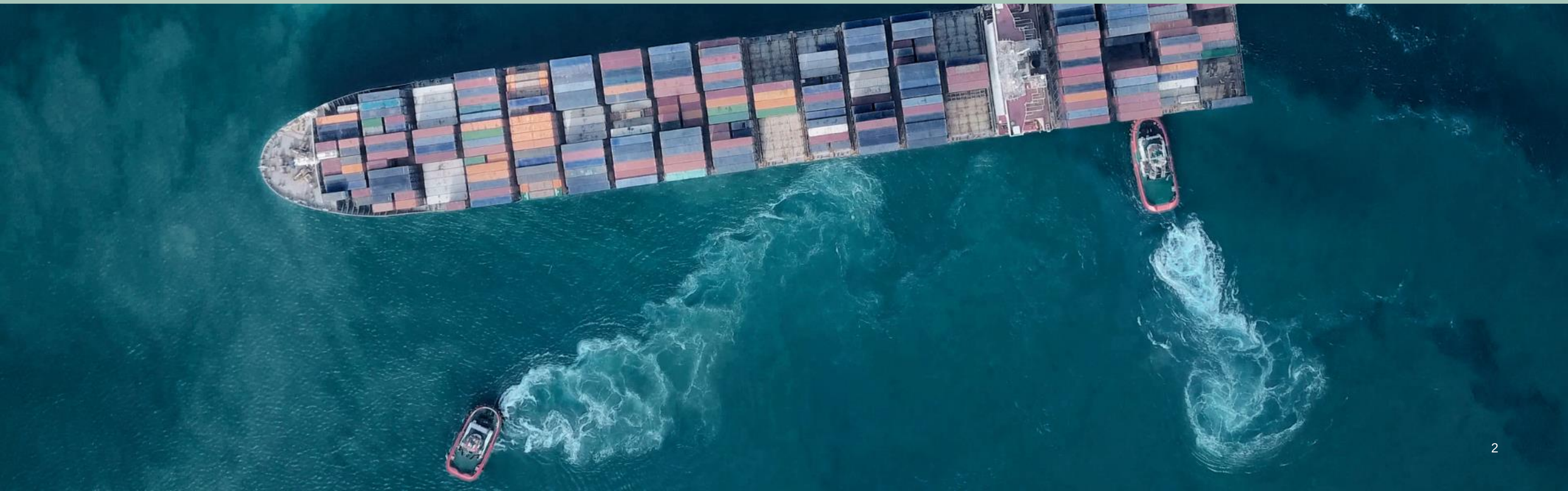
Steamship Mutual

# FDD Cover: What is it?

Jo Sharma

Mutual Vision

# FDD Cover – The Basics



# FDD Cover – The Basics

Different to normal insurance – discretionary cover

- Legal costs in (lawyer' fees) incurred in advising, or incurred in arbitration or court cases
- Surveyors’ and Correspondents’ fees
- Experts’ fees and Witness expenses
- Arbitrators’ / Mediators’ fees
- Security for costs
- In the event a dispute has been supported but is (unexpectedly) lost the costs which Members ordered to pay to the other side
- What is not covered?
  **The claim itself - it is not “mutual”**

# FDD Cover – The Basics

Provided in respect of an entered vessel the costs persuing or defending claims / disputes under Rule 9 can be supported:

- Freight Deadfreight
- Hire
- Demurrage, Despatch, Detention
- Security
- Charterparty, COA, Bills of Lading (or similar)
- Bunkers & Suppliers
- H&M (and other marine insurers)
- Shipyards - building, repairs, conversions
- Ports, Terminals & Agents
- Sale & Purchase
- Authorities, Revenue & Customs
- Salvage, Towage & Pilotage

Any other matters which in the opinion of the Directors should be supported.

# FDD Cover – The Basics

## Claims handling at SSM

- FDD claims are on the whole handled by qualified lawyers within the Club
- 26 English solicitors / Barristers plus 13 overseas qualified lawyers
- FDD cover not just for costs - 75% all files zero estimated – in house advice and conduct of claims

- External lawyers instructed by agreement between Member and Club to provide advice and conduct arbitration / court proceedings and are expected to work closely with the Club so that:

  i. Best possible result can be achieved for Member; and
  ii. Costs incurred are managed and can be supported

- Best possible result, in any given matter, minimises the Member's exposure to alleged liability, or maximises any recovery, taking account of litigation risk and costs

# FDD Cover – How it Works

# FDD Cover – How Does It Work

The Club has a very wide discretion as to what claims or disputes it will support, the extent to which costs will be supported, and how the claim will be run - Rule 11(i)

"The Directors shall have **sole and entire discretion as to:**

- The cases that may be supported;
- The conduct of such cases;
- The period for which such cases may be supported;
- The extent of such support;
- The withdrawal of such support;
- The costs and expenses that may be incurred or reimbursed by the Club whether in respect of the Member or third parties; …."

**And:**
"The Directors will not ordinarily exercise their discretion in favour of reimbursement of costs and expenses incurred **without the Managers' prior approval** …."

# FDD Cover – How Does It Work

## Criteria for exercising discretion:

- Reasonable prospect of successfully establishing or avoiding liability
  i.e. generally but not necessarily better than 50/50 merits – but what constitutes success can vary from case to case

- If Member claimant, a reasonable prospect of making a recovery
  i.e. can any award / judgement be successfully enforced?

- Costs and expenses proportionate to the quantum of the claim
  i.e. What would a prudent, commercially minded, uninsured person do?

## Limit of Liability – US$10 million but US$2 million for ship construction, modification, refit, repair, puchase,  sale & purchase (Rule 13)

- Extremely rare to reach these limits

- Largest dispute US$4.95 million (Queen Mary II)

# FDD Cover – and finally …

- 99.68 million GT FDD entered tonnage (2023)

- Most disputes handled in house without incurring costs of external advice:

  - 2,100 open FDD files on all years of which 70% zero estimated, and 84% estimated at less than US$10,000

- However, litigation can be expensive and involves risk:

  - 120 open files on all years estimated in excess US$50,000 with total estimated (net) costs at US$21.10 million

# Any Questions?

Steamship Mutual

# Mock Arbitration

Mutual Vision

# Force Majeure and “Reasonable Endeavours”

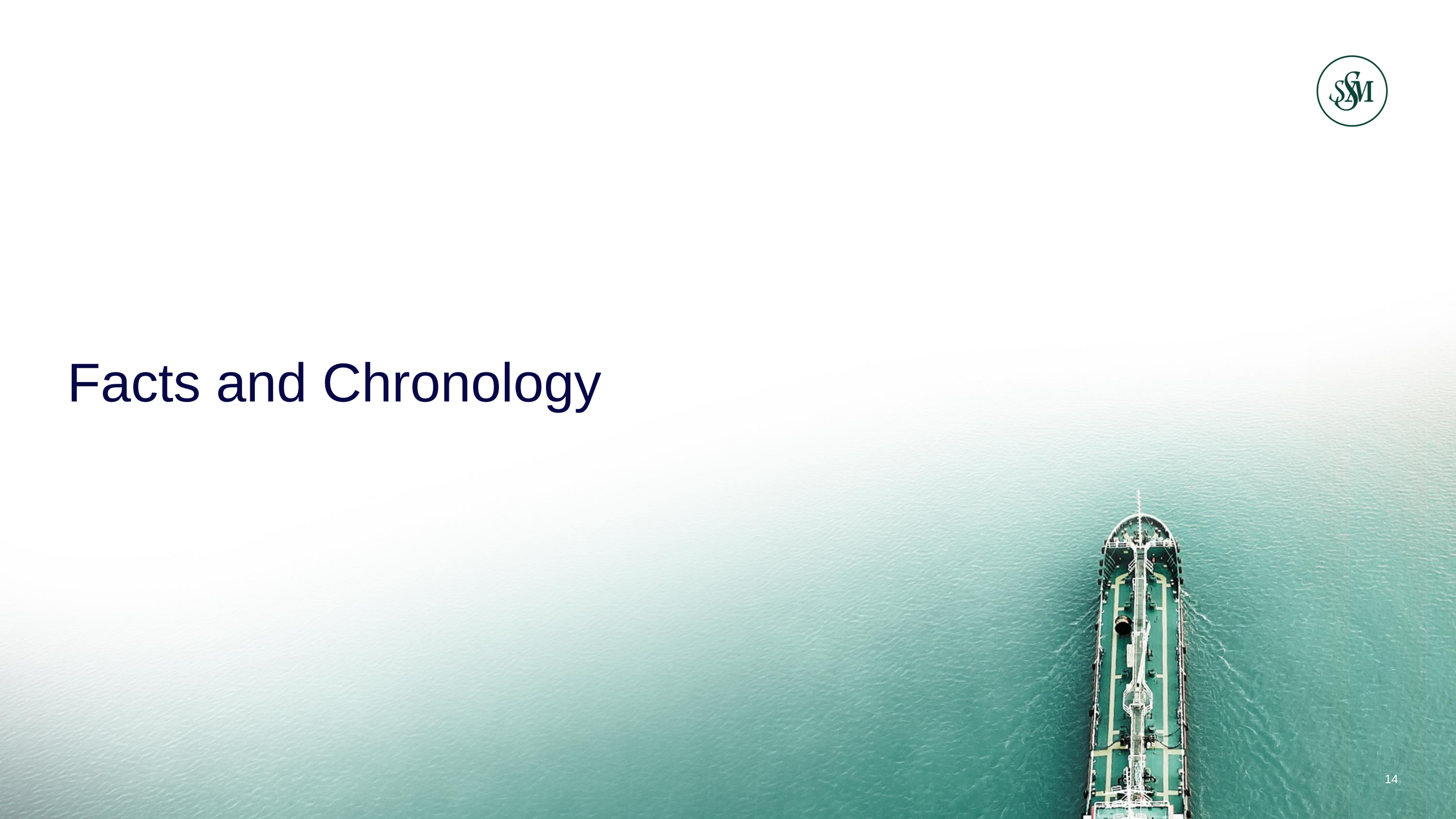
## Charterers’ case

Joanne Sharma

## Owners’ case

Sophie Cordonnier

# Facts and Chronology



# Background

- BC Carriers Inc (“Owners”) – a company registered in the Netherlands – entered into a contract of affreightment with Seaventure Ltd (“Charterers”).

- For carriage of 280,000 mt per month of Bauxite from Guinea to Ukraine for a period of June 2016 to June 2018.

- In practice required a continual flow of vessels at the load port.

- 95% of freight being payable for each cargo within 5 banking days of signing or release of the bills of lading.

- COA stipulates payment of freight in US Dollars to a US Dollar bank account held at a bank in the Netherlands, through a correspondent bank in New York.

# Chronology

6 April 2018

The parent company and the ultimate beneficial owner of Seaventure Ltd becomes subject to US sanctions. The parent company is placed on OFAC's SDN list.

Seaventure Ltd is not subject to any sanctions but is more than 51% owned by the sanctioned parent company.

10 April 2018

BC Carriers suspend performance by serving the following force majeure notice on Seaventure Ltd:

*"BC Carriers were sorry to note that guarantors Sovietneft have been placed on the OFAC SDN list, and that as Charterers, Seaventure, are a subsidiary of Sovietneft, Charterers are similarly to be treated as if they are named on the list.*

*Having reviewed the effect of these sanctions and General License 12 we note that, subject to the terms of that license, it would be a breach of sanctions for Owners to continue with the performance of the COA for contracts entered into after 6 April 2018.*

*We further note that the sanctions will prevent dollar payments, which are required under the COA. Therefore, as a result of the sanctions placed on Charterers and their guarantors, we are left with no option but to claim force majeure and suspend performance in accordance with clause 36 of the COA."*

# Chronology - continued

14 April 2018 — Seaventure Ltd sent an email to BC Carriers rejecting the Force Majeure Notice, suggesting that payment could be made in Euros rather than US Dollars, and BC Carriers are not a US person caught by the sanctions.

17 April 2018 — BC Carriers emailed their disagreement:

*"... Freight is specified in US dollars in the recap, and 'restrictions on monetary transfers' is listed as a force majeure event which might prevent loading and discharging for the very good reason that if monetary transfers from Charterers to Owners are restricted Owners cannot be expected to load and discharge the cargo without receiving payment in accordance with the COA."*

23 April 2018 — OFAC issued General License no 14 containing an extension of permission to maintain or wind down activities until 23 October 2018.

25 April 2018 — BC Carriers resumed nominations of vessels under the COA and accepted payments in Euros, which was converted to USD by its bank on receipt.

# Background

- During the period between 10 and 25 April when no nominations were made of vessels by BC Carriers seven vessels would have been nominated.

- Seaventure Ltd sought alternative tonnage, chartered at an additional cost.

# Charterparty Clauses

# Force Majeure Clause

36.1. Subject to the terms of this Clause 36, neither Owners nor Charterers shall be liable to the other for loss, damage, delay or failure in performance caused by a Force Majeure Event as hereinafter defined. **While such Force Majeure Event is in operation the obligation of each Party to perform this Charter Party** (other than an accrued obligation to pay monies in respect of a previous voyage) **shall be suspended**.

36.2. Following the end of the Force Majeure Event, the Parties shall consult in good faith to make such adjustments as may be appropriate to the shipment schedule under this Charter Party.

36.3. **A Force Majeure Event is an event or state of affairs** which meets **all** of the following criteria:

a) It is outside the immediate control of the Party giving the Force Majeure Notice;

b) It **prevents or delays the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port**;

c) It is caused by one or more of acts of God, extreme weather conditions, …, **restrictions on monetary transfers and exchanges;**

**d) it cannot be overcome by reasonable endeavours from the Party affected.**

# Force Majeure Clause - continued

36.4. A Party wishing to claim force majeure in respect of a Force Majeure Event must give the other Party a Force Majeure Notice **within 48 hours** (Saturdays, Sundays and holidays excepted) of becoming aware of the Force Majeure Event. Such Force Majeure Notice shall be a notice in writing which:

a) sets out or attaches details of the Force Majeure Event, and

b) states that the Party giving the Force Majeure Notice wishes to claim force majeure in respect of such Force Majeure Event.

c) Give reasonable estimated duration of the Force Majeure Event to the extend [sic] it is reasonably possible to do so at the time of giving the Force Majeure Notice.

36.2. Following the end of the Force Majeure Event, the Parties shall consult in good faith to make such adjustments as may be appropriate to the shipment schedule under this Charter Party.

# The Issues

# The Central Claim

Are Charterers entitled to claim the sum of US$2m for the seven replacement vessels which they chartered whilst Owners were claiming their performance under the COA was suspended by operation of the force majeure clause?

# The “Agreed” Issues:

1. The Owners’ notice sent on 6 April 2018 complied with the requirements for an effective FM notice under Clause 36.

2. The sanctions permitted continued performance of the COA.

3. However, the sanctions had an impact on the Charterers’ ability to make US$ payment to the Owners which fell within Clause 36.3(c) - “*restrictions on monetary transfers and exchanges*”.

4. The consequent restrictions were causative of prevention or delay to the loading of the cargo or its discharge – Clause 36.3(b).

5. The Charterers were contractually required to pay in US$.

# The Issue in Dispute:

Can the "reasonable endeavours" required under the Force Majeure clause include accepting payment in Euros instead of the stipulated US Dollars?

# The Outcome

# The Tribunal

**Can the "reasonable endeavours" required under the FM clause include accepting payment in Euro instead of the stipulated US Dollars?**

**YES - CHARTERERS WON THEIR CASE!**

The event/state of affairs could have been “*overcome by reasonable endeavours*” if Owners had accepted Charterers' proposal to make payment in Euros.

The Tribunal described this as a “*completely realistic alternative*”.

# The Commercial Court

**Can the "reasonable endeavours" required under the FM clause include accepting payment in Euros instead of the stipulated US Dollars?**

**NO - OWNERS SUCCEEDED ON APPEAL!**

- The party affected was not required to "*sacrifice their contractual right to payment in US Dollars, and with it their right to rely upon the force majeure clause*"

- The Court cited *Bulman v Fenwick* and *Vancouver Strikes* in reaching its decision.

- *"If there was a contractual right to payment in US$, and a contractual obligation to pay in that currency, then this was a right and obligation which formed part of the parties' bargain."*

# The Court of Appeal

**Can the "reasonable endeavours" required under the Force Majeure clause include accepting payment in Euros instead of the stipulated US Dollars?**

**YES - CHARTERERS WON IN THE COURT OF APPEAL!**

The majority held that:

- The word "*overcome*" did not mean that the "*contract must be performed in strict accordance with its terms".*
- Acceptance of Charterer's proposal *"would have achieved precisely the same result as performance of the contractual obligation to pay in US$*"

**BUT WAIT!**

**Arnold LJ dissented on the simple basis that "*what was offered by [Charterers] was non-contractual performance*".**

# The End?

**Not yet!** Permission to appeal has been granted and the Supreme Court will have the final say.

# Any Questions?