Dutch court overrules London on email charterparty agreements

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Decision flies in the face of commercial reality, leading local shipping lawyer warns

THE DUTCH COURT INSISTED THAT IT WAS UNABLE TO PROCESS THE ENFORCEMENT AWARD WITHOUT SIGHT OF THE ORIGINAL AGREEMENT.

EMAIL confirmation of charterparty agreements — now standard practice in shipping — renders the arbitration clause void in the Netherlands, the Dutch Supreme Court has ruled.

The decision comes as judges upheld a ruling in the case of the cargo vessel Alexander Tkachenko that enforcement of a default arbitral award issued in London should be denied, after the claimants failed to produce an original agreement containing the arbitration clause.

As is common in shipping practice, the charter party and arbitration agreement had been documented by email only.

The decision has surprised market practitioners and prompted lawyers to warn shipping parties of their exposure.

Haco van der Houven van Oordt, a partner in the transport and trade team at the Rotterdam offices of Dutch shipping law firm AKD, said that the decision flies in the face of commercial reality, given that vast majority of charterparty negotiations today are concluded by email.

“Shipping interests who enter into charterparty agreements by email only, and who could feasibly be looking to seek enforcement in the Netherlands in the event of a dispute further down the line, may be well advised to at least reconsider including in their contracts provisions for domestic litigation or arbitration.”

The issue related to a charter party concluded by the Russian owners of the vessel *Alexander*, with a charterer domiciled in the Netherlands.

When a dispute arose under the charter in connection with the payment of deadfreight, the owner initiated arbitration in London. A default award was subsequently granted by the arbitrator when the charterer failed to appear.

The owner applied to the Dutch courts for an order to facilitate enforcement of the arbitral award against the assets of the charterers in the Netherlands.

But the Den Bosch Appeal Court denied the application and refused the enforcement order on the grounds that the owner had not been able to submit an original arbitration agreement. The Supreme Court has now confirmed the ruling.

The court ruled that in order to enforce the award it would need to verify the original arbitration agreement. The owner countered that such a document did not exist, since the terms of the charterparty including the arbitration agreement had been documented by email only.

The court insisted that it was unable to process the enforcement award without sight of the original agreement.

IT specialists were then engaged in an attempt to prove the authenticity of the arbitration agreement made by email. Using publicly available software, these specialists were able to establish how the relevant email had travelled from the originator to the addressee.

But although they maintained that it was unlikely that anybody could have interfered with the contents of the email, they were unable to state categorically that it was impossible for anybody to have done so. As a result, the court said it was unable to issue the enforcement award.

Ironically, one of the perceived advantages of arbitration over litigation is the worldwide recognition and enforceability of arbitral awards on the basis of the New York Convention, Mr Van der Houven van Oordt added.

The decision should thus serve as a warning to those considering inserting a clause for foreign arbitration in their contracts.