PENNINGTONS
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THE "*TAI PRIZE*"

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SCMA QUARTERLY LEGAL &
COMMERCIAL PERSPECTIVES
17 JUNE, 2021

Facts

- Charter Chain:
  - Head owners
  - Disponent owners (NYPE with ICA incorporated)
  - Voyage charterers (North American Grain CP 1973)
- Soya beans from Brazil to China
- 'Silo burn' pre-shipment damage – not obvious:
  - But would have been discoverable by Shipper by reasonable means
  - Not discoverable by Master or crew during loading (and the Master in fact did not see it in this case).

Facts

- Shippers presented a draft B/L to the Master:
  - In the ‘description of cargo’ part of the draft B/L Shipper’s had typed “*clean on board*”.
  - The B/L also contained the standard printed wording “*SHIPPED … in apparent good order and condition*”.
- Master signs B/L without reservation.
- Upon discharge in Guangzhou, damage is found.

Proceedings

- Receivers pursue Owners in Chinese courts. Awarded USD1,086,564.70 in damages.

- Owners pursued Disponent Owners in London arbitration for 50% (i.e. USD543,282.35) contribution under the ICA as incorporated in the time charter. Claim was not contested but settled at USD500,000.

- Disponent Owners then pursued voyage charterers in arbitration for an indemnity for their losses.

Arbitration

- The Arbitrator found that, whilst there was no express warranty or indemnity in the voyage charter, the Charterers were liable to Disponent Owners because:
  - The Shipper was the Charterers' agent, and so the Charterer had **warranted** the accuracy of statements made by the Shipper in the draft B/L and **impliedly** agreed to **indemnify** the Disponent Owners against any **inaccuracies** in those statements. She said that if it were otherwise, Disponent Owners would have no recourse for wrongs of people on Charterers '*side of the line*';
  - Therefore, the Charterers had warranted the cargo was in "*apparent good order and condition"* when the Shipper gave the Master a draft B/L to that effect;
  - But, the cargo was not in fact shipped in "*apparent good order and condition*" and the Shipper had reasonable means to discover its true condition.
  - Accordingly, the Charterers had to indemnify the Disponent Owners under the indemnity which the arbitrator had found was to be implied.

First Instance (31/1/2020)

- Voyage Charterers appealed. The court was invited to decide three questions:
  - Firstly, whether the words "*clean on board*" or "*SHIPPED … in apparent good order and condition*" in the draft B/L were:
    - **a representation and/or warranty** as to the cargo condition; or, merely,
    - **an invitation** to the Master to make a representation of fact as to the apparent condition of the cargo based *on his own assessment*?;
  - Secondly, whether any statement in the B/L in this case was actually inaccurate as a matter of law?
  - If so, thirdly, whether Charterers had to indemnify the Disponent Owners for such inaccuracy?

First Instance Decision

- The HH Judge Pelling QC held:
  - Firstly, presenting the draft B/L was, as far as the *apparent good order and condition* of the cargo is concerned, an **invitation** only. The Master had to make his own independent assessment of the apparent condition of the cargo and state this in the B/L. That statement was to the Shipper and could be relied upon by subsequent holders of the B/L as reflecting the judgment of a reasonably competent and observant Master as to the apparent state of the goods loaded.
  - As to the second question, the B/L was not inaccurate as a matter of law as it reflected what the Master had actually found on his inspection. As such there could be no indemnity triggered, at all.
  - That made the third question academic, but the judge went on to hold there was no scope to imply an indemnity in this case. This was because it was not necessary to imply it for the contract to work, and the Hague Rules/Hague-Visby Rules Art III Rule 3 and 5 (as applied here) deliberately did not give such an indemnity in respect of the apparent condition of the cargo, but only certain other information provided by Shippers. This must mean therefore that no indemnity was intended to be given, and it would be wrong to imply it.
  - Arbitrator had therefore erred.
  - The Disponent Owner's loss was because it decided to pay Head Owners rather than dispute liability on the basis it was pre-shipment damage.

Court of Appeal

- Disponent Owners argued:-
  - Firstly, the judge erred because the presentation of the draft B/L is **both** an **invitation** to the Master and a **representation** by the Shipper.
  - Secondly, the B/L was inaccurate because the cargo would have been found not in good order and condition on a reasonable inspection by the Shipper.
  - Thirdly, there was an indemnity in this situation, based upon a number of previous authorities e.g. *Kruger & Co v Tryvan, Elder Dempster v Dunn, Dawson Line v AG Adler*

Court of Appeal

- Final *cri de coeur*, it would be unfair if Disponent Owners were left without recourse when their liability arose from damaged cargo which Shippers (on Charterers' side of the line) could reasonably have discovered was damaged, but the Master not. This would be an encouragement to Shippers to misdescribe cargo in draft B/Ls.

Court of Appeal (28/1/2021)

- Court of Appeal upheld the judgment at first instance:
  - Firstly, confirmed the presentation of a draft B/L was only an invitation for the Master to make his own assessment as to the apparent condition of the cargo.
  - Secondly, the CoA agreed the B/L was not inaccurate in law as:
    - The statement as to *apparent good order and condition* in a B/L is made from the **Master** to the **Shipper**
    - It refers to the external condition of the cargo, apparent so far as meets the eye of the Master on *reasonable examination* (and does not refer to the actual condition of the cargo)
    - Accordingly, the Shipper's knowledge of the state of the cargo has **nothing** to do with a statement in a B/L as to *apparent good order and condition*.
    - In this case the B/L reflected what the Master had found on a reasonable examination, and was therefore not inaccurate.
  - Thirdly, there was no indemnity. None of the authorities relied on as implying an indemnity related to implying indemnities for the description of apparent condition of cargo, so were not helpful.

Court of Appeal

- As to the *cri de Coeur* LJ Males expressed sympathy with the argument that if Charterers / Shippers had actual knowledge of the cargo damage then they should not be able to escape liability. However, as there was no finding in this case that Shippers had such actual knowledge of the damage to the cargo, he did not expand on this but left it open as a matter to be decided in future.

Points to Note

- Affirms position on "*apparent good order and condition*" in B/Ls. Statement by Master, no Charterer indemnity.
- The Court was bound by the facts as found by the arbitrator, and limited by the arguments brought. So it is still possible for different solutions on different facts…:
  - It is possible for an indemnity to arise if the tendering of the B/L is a request to sign the B/L without an inspection i.e. sign 'as is'.
  - The Shipper's typed words "Clean on Board" were not argued before the arbitrator as being a representation. Query if matters would have been different if it had been argued? The first instance judge said this could be viewed as a representation.
  - As we have seen LJ Males left open the possibility that a Shipper could be making a representation in a draft B/L if he had actual knowledge of cargo damage.
  - Bring all arguments in arbitration (so that they are available on appeal), and do not settle claims too quickly!

Further Appeal?

Permission to appeal to Supreme Court was denied by Court of Appeal, but the Disponent Owner has applied for leave.

Watch this space!

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CHINA COAL SOLUTION (SINGAPORE) PTE LTD V AVRA COMMODITIES PTE LTD [2020] SGCA 81

WHEN THE BUSINESS CONFIRMATION EMAILS DO NOT AMOUNT TO A LEGALLY BINDING CONTRACT

FORMATION OF CONTRACT – GENERAL PRINCIPLES

OFFER

ACCEPTANCE

CONSIDERATION

INTENTION TO CREATE LEGAL RELATIONS

GIST OF THE FACTS

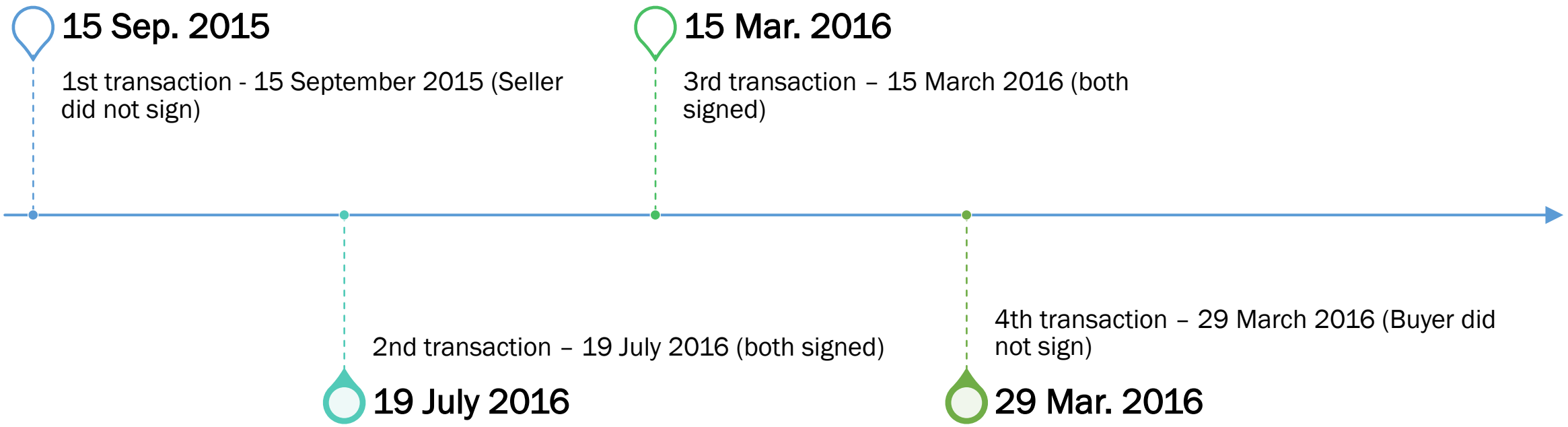
- Email offer from seller setting out main terms
- Negotiations on main terms via email
- Email acceptance from buyer
- Business Confirmation Email from seller confirming the agreement followed by draft contract on seller's standard terms setting out all the other clauses.

CLAUSE 26

- *"This Agreement contains the entire agreement between the Buyer and the Seller with respect to the subject matter herein and supersedes all previous writings, understandings, negotiations, representations or agreements with respect thereto, except where provided otherwise.*

- *<u>This Agreement shall only come into force after being signed by both the Buyer and the Seller.</u> Any amendments to this Agreement shall be in the form of an addendum to the Agreement and shall come into force only after both Parties will have signed the addendum, where after it will form an integral part of this Agreement."*

PRIOR DEALINGS BETWEEN THE PARTIES



CA'S DECISION

Common intention that parties will contract on Seller's standard terms.

Contract based on Seller's standard terms. Seller cannot approbate and reprobate.

Evidence shows that parties did not intend the contract to be formed based on the Business Confirmation Email even though the Business Confirmation Email did not contain any "Subject to Contract" clause.

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Legal & Commercial Perspectives

Case Study

China Coal Solution v Avra

Case Study - Avra v CCS

Commercial Suggestion – DO Contract Review

During this reviewing, there are 3 situations where clauses need to be paid extra attention.

1- Any clause in conflict with the agreement previously done via email exchange/ main terms agreed

2- Any clause giving additional explanation / condition / exclusion, which is not the intention

3- Any clause which specifies the other condition for the contract to validate or become binding. (may consider to include one CP administration clause)

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Case Study - Avra v CCS

Any clause giving additional explanation / condition / exclusion

Example: express exclusion to main terms agreed

As per Recap, 'NOR can be tendered any time SHINC upon arrival at the port, whether in anchorage or not, whether in berth or not, whether custom cleared or not, whether if free pratique or not. '

But base CP states, *'if berth is not occupied upon vsl arrival, then NOR to be tendered upon vsl all fast at the berth'.*

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Case Study - Avra v CCS

Any clause giving additional explanation / condition / exclusion

Example: Additional Condition

As per recap '*vessel nominated must be geared bulk with 4 cranes of 30mt, grabber or non -grabber, not older than 20 years, ...'*

While base CP states, ' *In case vsl nominated is above 15 years, then vsl owners should pay chrts usd 0.5/mt as additional premium on cargo insurance, same cost can be deducted from freight without presentation of vouchers from chrts.'*

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Case Study - Avra v CCS

Charter Party Administration Clause

Generally CP administration clause meant that Physical CP was never drafted.

e.g. **GASVOY 2005: CLAUSE 31 Charter Party Administration Clause (Optional)**

This Clause is optional and shall only apply where the parties have specifically agreed in the fixing confirmation (in the form of PART I or similar document). The Charter Party terms and conditions are evidenced by the fixing confirmation (which shall include the negotiated terms in full and all amendments, additions and deletions, if any, to GASVOY 2005) sent by the brokers and approved by the parties. Such approval shall be confirmed in writing by return to the brokers. The brokers shall then confirm receipt of said confirmation to both parties promptly in writing.

Except as requested in writing by either the Owners or the Charterers there shall be no formal written and signed Charter Party.

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Case Study - Avra v CCS

Important to Know

Generally,
Standard form template favors the contract drafter and may sometimes contain contract trap, thus the counterparty should pay extra attention to standard contract form!

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LEGAL & COMMERCIAL PERSPECTIVES - 17 JUNE

REGAL SEAS MARITIME V. OLDENDORFF

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The vessel in question was a Cape size carrier of 179,258 tonnes and was on time charter from 22 November 2013 (the “Charterparty”) for a period of three to five years.

The hire clause provided:

"Hire payable every 15 days in advance including overtime. The gross daily hire to be calculated basis the average of the 4 Baltic Cape Size Time Charter routes published by the Baltic Exchange over the previous 15 days plus 4% for size adjustment."

By an Addendum No. 5 dated 16 November 2017, the charterparty was extended on the following terms:

“Charterers hereby declare the option for the second optional year with 3 months more or less in Charterers' option on final period at 104% BCI 4TCS less 3.75% address commission."

FACTS

Hire was calculated by reference to the Baltic Cape Size Time Charter routes or the Baltic Capesize Index ("BCI") with a size adjustment of 4%.

In November 2013, the benchmark ship was 172,000 tonnes and four time charter (4TC) routes were assessed in calculating the rate (172 4TC).

From 31 July 2015, no 172 4TC rate was calculated, with rates being assessed solely on the basis of a benchmark 180,000 tonne vessel. Rates for 172 4TC were still published however, based on a constant dollar differential from the 180 4TC rate, and from January 2017 the 180 5TC rate (adding a fifth route to the assessment).

From December 2017, no 170 4TC rate was published, but could be calculated by applying the constant dollar differential.

179,258 MT (the vessel size).

BALTIC CHANGES

From 31 July 2015, the 180,000 tonnes ship was the only ship being assessed by the Baltic's panellists. The 172,000 tonnes ship was no longer assessed.

From 3 August 2015 until 23 December 2016 the Baltic would publish **a "*daily rate for the 172 4TC ….derived from the 180 4TC at a constant dollar differential".*** The differential was to be established by reference to the ***"average differences between the panellist-reported 172 4TC and 180 4TC for the preceding 12 months."***

On 31 July 2015 the Baltic announced the dollar differentials which were to be applied to ***"generate the published value for the 172,000 4TC average".***

From **1st August 2015** the Owner's hire statements continued to calculate the hire due by taking the 172 4TC figure and adding 4% to it.

In 2017 as discussed Charterers declared the option for the second optional year on final period "at 104% BCI 4TCS less 3.75% address commission."

It was not **until July 2018** that the Owners alleged that the parties had been calculating the hire due for the previous three years in the wrong manner. The Charterers did not agree and the ensuing dispute was submitted to the Tribunal for determination.

DISPUTE

The Owners submitted that from August 2015, the Charterers should have been paying hire based on the 180 4TC rate plus 4%, as set out in the charterparty. Alternatively, that they should have been paying on the basis of 180 4TC but with a reasonable size adjustment, which was said to be nil as the vessel's tonnage was nearly identical to that of the benchmark ship.

The Charterers' case is that the parties intended the base rate to be a rate for the 172,000 tonnes vessel throughout the life of the Charter. The 4% uplift was fixed and unalterable. It must follow that the parties intended the base rate of hire to be calculated by reference to a rate for the 172k vessel throughout the life of the Charter, because the 4% uplift was only applicable to a base rate for such a vessel. Ergo, to the extent that a rate for the 172k vessel continued to be published or made available by the Baltic, the parties must have intended to adopt that rate.

- Since the tonnage of the vessel was greater, almost 180,000 tonnes, it was necessary for there to be a "size adjustment". The parties agreed plus 4% for that purpose.
- The hire clause did not expressly deal with the calculation of hire if the size of the benchmark vessel used by the Baltic was changed. [**A gap in the Contract.**]
- The hire clause provided for the base rate to be fixed by reference to the average of the 4 routes published by the Baltic **over the previous 15 days.**
- But from 31 July 2015 no such rate was published for a 172,000 tonnes vessel

The 172 4TC rate is not an average of 4 routes but a rate derived from such an average reduced by a discount calculated by reference to historic average rates. **The difficulty with the Charterers' construction** is even greater when one looks at the period after December 2017. From then on no 172 4TC rate was published at all.

> “I consider that the difficulties facing the Charterers' construction are formidable. They can only be overcome by reading the reference to an "average" rate published by the Baltic as encompassing what the Baltic itself described as a "daily rate for the 172 4TC ….derived from the 180 4TC [later the 180 5TC] at a constant dollar differential".
>
> [Per; TEARE J]

"Hire payable every 15 days in advance including overtime. The gross daily hire to be calculated basis the average of the 4 Baltic Cape Size Time Charter routes published by the Baltic Exchange over the previous 15 days plus 4% for size adjustment."

Judge said Charterer's case **amounts to a re-writing of the hire provision.** With regard to the period after December 2017 it would be necessary to say that the formula announced by the Baltic for the calculation of the 172 4TC rate for use in the FFA market was an average published by the Baltic even though no 172 4TC rate was published at all.

That would require further re-writing. The phrase used by Charterer's counsel to describe the rate capable of being calculated after July 2015 as **"an official rate endorsed by the Baltic".**

- Owners do not have to re-write the clause because the clause can be properly regarded as including an implied term that the size adjustment should be reasonably revised in the light of a change to the benchmark ship, so as to become a reasonable size adjustment.
- Judge accepted that the words "plus 4% for size adjustment" do not allow for any adjustment other than plus 4%. However, that linguistic meaning gives rise to the difficulty that if the benchmark vessel is altered by the Baltic the stated differential will produce an inappropriate adjustment. That is not consistent with business common sense.
- What is consistent with common sense is that the "plus 4% for size adjustment" was intended to apply to the benchmark vessel at the date of the charterparty, namely, 172,000 tonnes.
- There is scope for **an implied term that the appropriate size adjustment in the event of a change to the size of the benchmark vessel was intended to be a reasonable adjustment.**

THE PARTIES AGREED UPON AN APPROPRIATE SIZE ADJUSTMENT FOR THE BENCHMARK VESSEL CURRENT AT THE DATE OF THE C.P. BUT MADE NO PROVISION FOR THE SIZE ADJUSTMENT IN THE EVENT THAT THE SIZE OF THE BENCHMARK VESSEL WERE INCREASED.

"THUS THE SUGGESTED IMPLIED TERM IS NECESSARY TO MAKE THE AGREED HIRE PROVISION WORK IN THE EVENTS WHICH HAPPENED AFTER JULY 2015. THE TERM IS TO BE IMPLIED, AS IT IS PUT IN THE CASES, TO GIVE "BUSINESS EFFICACY" OR "COMMERCIAL OR PRACTICAL COHERENCE" TO THE CHARTERPARTY."

[Per; TEARE J]

The parties agreed upon an appropriate size adjustment for the benchmark vessel current at the date of the charterparty but made no provision for the size adjustment in the event that the size of the benchmark vessel was increased.

[The “Gap Trap”]

"Thus the suggested implied term is necessary to make the agreed hire provision work in the events which happened after July 2015. The term is to be implied, as it is put in the cases, to give **"business efficacy"** or **"commercial or practical coherence"** to the Charterparty.

It is unlikely that the parties contemplated that with a charter which would last for 3-5 years there would be no agreed formula for fixing the rate of hire in the event that the benchmark vessel was changed. That is a consideration which would cause the reasonable man reading the clause to doubt that it provided for the benchmark vessel to be fixed at 172,000 tonnes for the duration of the charterparty.

"Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. Certum est quod certum reddi potest."

[Mamidoil and Jetoil v Okta [2001] EWCA Civ 406; per Rix LJ]

SCMA
LEGAL & COMMERCIAL PERSPECTIVES - 17 JUNE

REGAL SEAS MARITIME V. OLDENDORFF

Key Points

- Vessel in question – 179,258 DWT Cape - Time Charter from 22 Nov'13 for 3 option 5 years period
- Daily hire – benched marked to 'average of of 4 Baltic Cape Size Time Charter routes, over previous 15 days +4% adjustment
- The standard cape size used by Baltic then was 172,000 DWT.
- On 16th Nov'17 Charter was extended for two more years without any change in benchmarking
- From 31st Jul'15 Baltic changed the benchmark vessel to now 180,000 DWT Cape, although the rates for 172K DWT was also published basis a "constant dollar differential", which means a difference in time charter was decided upon by the Baltic which would be used by the earlier 4TC index to shadow the new, basis a certain formula:

DATE	NEW 5TC	OLD 4TC	DIFFERENCE
29 Jul'15	15,894	14,475	1,419
31 Jul'15	17,242	15,690	1,552
3 Aug'15	18,065	17,162	903
4 Jan'17	12,410	11,346	1,064
13 Jan'17	10,343	9,279	1,064
16 Jan'17	11,002	9,938	1,064
20 Dec'17	21,797	20,733	1,064
21 Dec'17	21,110	20,046	1,064

- After Dec 2017 the differential calculations on routes for Old 4TC stopped
- Basically, from Jul'15 the only cape being assessed by Baltic was the 180,000 DWT

Switching over to Legal.....

Take Home – For Future

- Linking of charter hires to index is not an unusual thought process. Similar concepts are seen in say a BAF (bunker adjustment factor) for e.g. or ‘open book calculation for change of port’.
- It would be a good idea to have a base calculation agreed to, which would set a logic to the understanding, allowing any change in any of the parameters to show an equivalent result.
- For eg, a calculation sheet as follows in next slide, which shows the routes and the average index calculated on index vessel parameters v/s the intended vessel for charter. Going forward, any change in the description should give an effective link basis the same logic as originally intended.

	DWT	Draft	TPC	Ballast Speed	Laden Speed	Ballast Cons	Laden Cons	In Port Working	In Port Idle
Baltic 180k	180,000	18.2	121	13.0	12.0	43	43	5.5	4.5
Shine On	179,405	18.324	122.64	13.5	12.25	36.00	36.00	6.0	4.5

Route		Ballast Dist	Laden Dist	ECA Zone	Cargo Intake	Load Rate	Disch Rate	TT	Sea Margin	Ballast days	Voyage days	HSFO Usage	LSMGO Usage	Port DA + Misc Cost
Qingdao	Tubarao	11,217	11,217	-	177.3	3	30,000	1.25	9%	40.0	93.3	3,569	-	175,000
Qingdao	Sudeste	11,340	11,340	-	172.5	80,000	30,000	1.25	9%	40.0	93.2	3,602	-	265,000
Qingdao	Dampier	3,528	3,528	-	174.9	90,000	30,000	1.50	5%	12.0	34.5	1,117	-	245,000
Qingdao	Whyalla	5,599	5,599	-	176.0	35,000	30,000	1.00	7%	19.0	53.4	1,788	-	210,000
Rotterdam	Pto Bolivar	3,961	3,961	790	166.5	50,000	25,000	1.00	5%	13.0	42.0	1,217	164	270,000
Qingdao	Saldanha	8,163	8,163	-	177.3	90,000	30,000	1.75	9%	29.0	70.5	2,610	-	190,000

Route		Ballast Dist	Laden Dist	ECA Zone	Cargo Intake	Load Rate	Disch Rate	TT	Sea Margin	Ballast days	Voyage days	HSFO Usage	LSMGO Usage	Port DA + Misc Cost
Qingdao	Tubarao	11,217	11,217	-	176.7	3	30,000	1.25	9%	38.0	91.0	2,919	-	175,000
Qingdao	Sudeste	11,340	11,340	-	170.3	80,000	30,000	1.25	9%	39.0	90.7	2,944	-	265,000
Qingdao	Dampier	3,528	3,528		170.3	90,000	30,000	1.50	5%	11.0	33.6	922	-	245,000
Qingdao	Whyalla	5,599	5,599	-	175.2	35,000	30,000	1.00	7%	18.0	52.2	1,473	-	210,000
Rotterdam	Pto Bolivar	3,961	3,961	790	164.3	50,000	25,000	1.00	5%	13.0	41.0	1,039	164	270,000
Qingdao	Saldanha	8,163	8,163	-	176.7	90,000	30,000	1.75	9%	28.0	68.8	2,138	-	190,000

	BC3	Sudeste	BC5	Whyalla	BC7	C17	Rdam VSLFO	Rdam HSFO	SGP VSLFO	SGP HSFO	LSMGO
Spot	27.50	28.40	11.75	16.45	13.20	20.80	520.00	405.00	540.00	445.00	590.00

	VLSFO					
	BC3	Sudeste	BC5	Whyalla	BC7	C17
Baltic 180k	28,542	27,596	32,995	30,343	27,255	28,412
Shine On	33,158	31,778	36,275	34,335	29,588	32,837

	HSFO					
	BC3	Sudeste	BC5	Whyalla	BC7	C17
Baltic 180k	32,367	31,461	36,231	33,691	30,762	32,112
Shine On	36,366	35,022	38,441	37,155	32,653	35,943

	Premium over Index					
	BC3	Sudeste	BC5	Whyalla	BC7	C17
Shine On	4,615	4,183	3,280	3,992	2,333	4,425
	116.2%	115.2%	109.9%	113.2%	108.6%	115.6%

	Premium over Index					
	BC3	Sudeste	BC5	Whyalla	BC7	C17
Shine On	7,824	7,426	5,446	6,812	5,398	7,531
	127.4%	126.9%	116.5%	122.5%	119.8%	126.5%

Points to be Remembered:

- is when the charter hires moves, the resultant differentials do not necessarily move with same gap.
- Hence along with agreeing to a base calculation, it should also be agreed as to when the change over data is to be applied ie the charter hires / relevant values, to be taken, should be those as of original charter or the change over date.
- In case of unforeseen situations, the contract should allow for a mutual discussion / agreement before the charter continues or extends.
- More the clarity = Easier is the life !!