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Non-performance of voyage charterparties due to EU restrictive measures: contract law solutions.

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Table of contents

1 INTRODUCTION 3

1.1 Research question. 3

1.2 Factual and legal background. 4

1.2.1 The uncertain international legal framework to sanctions........ 4

1.2.2 The nature of EU sanctions and their impact on the shipping industry........ 6

1.2.2.1 The legal basis for "restrictive measures"........ 6

1.2.2.2 The wide scope of application of EU sanctions within a decentralized enforcement system. 7

1.2.2.3 The reach of EU sanctions on shipping industry. 8

1.2.2.4 EU Sanctions in the context of the global scaled crisis in Ukraine. .. 9

1.2.3 Voyage Charter Parties and restrictive measures: introductory remarks. 10

1.3 Method and sources. 12

1.4 Legal questions and outline........ 13

2 EU SANCTIONS AND RELEVANCE AS TO THE PERFORMANCE OF VOYAGE CHARTERPARTIES 13

2.1 Introduction. 13

2.2 A high «sanctions risks due diligence» threshold. 14

2.3 The increasing complexity of contractual risk anticipation. 16

2.4 Main risks posed by EU sanctions to the the rights and obligations in a voyage charterparty. 17

2.4.1 The risk of impossibility to reach the nominated port. 17

2.4.2 The risks of delay. 18

2.4.3 The risks as to the impossibility to pay or to receive freight. 19

2.4.4 The risks as to insurance coverage. 20

2.4.5 The risks of liability to third parties. 20

3 THE ENGLISH LAW POSITION AS TO THE QUESTION OF NON PERFORMANCE OF VOYAGE CHARTERPARTIES DUE TO A SUPERVENING EVENT 21

3.1 Introduction. 21

3.2 Bringing forward the defence of illegality due to foreign sanctions: a double-edged sword. 21

3.3 The complexity and inflexibility of the frustration doctrine 23

3.3.1 The doctrine of frustration as a default rule for non-performance by reason of an unforeseen event. 23

3.3.2 An inflexible and insufficient tool to overcome the risks induced by sanctions exposure. 24
3.4 Defeating frustration through a contractual allocation of risk: challenges raised by an unpredictable judicial interpretation. 25
3.4.1 Allocating the risks. 25
3.4.2 The unpredictability of the operation of contractual clauses to prevent frustration. 27
3.4.3 Force Majeure Clauses: a rigorously conditioned risk management tool. 30
3.4.4 The shortcomings of other standard contractual clauses to manage sanctions-related risks survenance. 33

4 PATHWAYS TOWARDS A MORE EFFICIENT CONTRACTUAL RISK MANAGEMENT: ENSURING CERTAINTY AND COMPLIANCE WITH SANCTIONS CLAUSES 34

4.1 Introduction. 34
4.2 The principle of "sanctions clauses" in the context of charterparties. 35
4.2.1 The types of sanctions risks related clauses. 35
4.2.2 Purposes of a sanctions clause. 35
4.3 Key points in the construction of an effective sanctions clause : contractual interpretation and language thresholds. 36
4.3.1 Defining a precise scope of operation of the clause to ensure contractual certainty. 36
4.3.2 Electing a workable "risk assessment criterion". 38
4.3.2.1 The evolution of the discretion criterion in standard sanctions clauses. 38
4.3.2.2 The nature of the discretion impacting the court’s inquiry as to interpreting the sanctions clause. 39
4.4 BIMCO Sanctions Clause for Voyage Charter Parties: a proactive tool? 41
4.4.1 Purposes. 41
4.4.2 From a balanced to an objective assessment of risk: questionable efficiency and inconsistencies. 42
4.4.3 Remaining limits and grey areas. 45

5 CONCLUSION 47

1 INTRODUCTION

1.1 Research question.

Recent study has examined how sanctions affect maritime and business players' finances in the context of the Ukraine conflict and political upheaval.

This research focuses on the industry's principal actors, who operate under rigid contracts. The aim is to illustrate how, although affected by the volatility of such politically driven actions and precluded from completing their contractual duties, they must now demonstrate diligence in compliance and risk forecasting.

The definition of rights and obligations in a charterparty is part of a wider question of "contract certainty", which enables the enforcement of each party's responsibilities towards the other. Voyage charterparties are inflexible, but charterers and shipowners can bargain performance flexibility. In the previous decade, sanctions, as public regulations, have been implemented internationally, significantly, and extensively, making contractual management crucial for performance.

This is also especially important to shipowners, who bear more responsibilities under the voyage charterparty than of the charterer. In light of the courts' typically objective interpretation[1], parties are obligated to examine and provide for a clear distribution of risks if they deviate from the usual rights and responsibilities. The following question will be considered in view of the recently developed "sanction clauses" in the maritime industry.

To what extent do the European Union's[2] restrictive measures against Russia place a heavy regulatory burden[3] on maritime operators and, in this context, to what extent can the parties to a voyage charter contractually provide themselves against the risks of exposure to potential sanctions?

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[1] Charterparties, like other commercial contracts, are interpreted according to the parties' explicit intent, not what they meant by entering into the contract. See more in Bennett, H. N., & Carver, T. G. (2021). Carver on Charterparties. Sweet & Maxwell.

[2] EU, hereafter.

[3] Referring to the «costs (financial and non-financial) of complying with the relevant legal and regulatory Requirements» as defined in Irwin, M. (2018, July). Social Access Solar Gardens: Legal Report - uts.edu.au. Norton Rose Fulbright. Retrieved November 30, 2022, from: https://www.uts.edu.au/sites/default/files/article/downloads/SASG%20Legal%20Report.pdf.

1.2 Factual and legal background.

1.2.1 The uncertain international legal framework to sanctions.

The topic is set within a question of International State Responsibility including a wide spectrum of government-imposed sanctions. T. Ruys[4] remarks that it has no legal definition and varies by measure. It can refer to a measure by its objective, such as upholding international law or punishing a state for violating it. It can also relate to its author (a global organisation) or nature (for instance, general economic sanctions, or "targeted" sanctions).

The United Nations[5] has had sole use of force against foreign states since WWII. When wounded by another, States lost the right to employ force. In 2001, the International Law Commission[6], under the UN General Assembly's authority, produced a draught of Articles on the Responsibility of States for Internationally Wrongful Acts[7], defining sanctions as binding collective measures implemented by international institutions or groupings of states. The text refers to «non-forcible» or «self-help» measures and are "one of the least developed areas of international law"[8].

Thus, the law distinguishes between retorsions (no violation is used to intervene) and countermeasures (violations of law in response to a State's violation of international law). The former are a freedom, compared to countermeasures which induce violations of international law, and are therefore regulated. Therefore, customary international law[9], conventional rights, and human rights limit sanctions.

In a context where exchanges with Russia are significantly and in many ways restricted, despite the fact that it is a UN Permanent member and a signatory to numerous multilateral and bilateral agreements, including many with NATO[10], the issue is to define clear boundaries in the international legal framework of sanctions.

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[4] Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework, Tom Ruys, Research Handbook on UN Sanctions, and International Law (Edward Elgar Publishing) (2016), pp. 1-27, at 1-4.

[5] UN, hereafter.

[6] ILC, hereafter.

[7] ARSIWA, hereafter. The same year, ILC adopted the Draft Articles on the Responsibility of International Organisations (DARIO, hereafter).

[8] Ruys, T. (n. 4), 4.

[9] Ruys, T. (n.4) 5–11. The non-intervention principle in a sovereign state's internal or external affairs, which allows a state to freely choose its trading partners; equity, proportionality, misuse of rights, and the non-intervention principle as constraints on states' extraterritorial prescriptive jurisdiction; customary or treaty rules on state immunity....

[10] North Atlantic Treaty Organization.

EU sanctions may be categorised, among other categorizations, by their link to UN sanctions, demonstrating the significance of that question.They can be employed to implement the latter's Resolutions[11], or as decentralised UN sanctions[12], some discretion may be allowed to the EU. However, and more cautiously when targeting third countries, the EU might impose "autonomous" sanctions, which may be important when the UN does not intervene[13].

However, EU sanctions against Russia, a non-member state with whom it has no direct relations, may not fit the ARSIWA or DARIO framework of acceptable countermeasures.

Regarding the legality of countermeasures by States, International or Regional Organizations that are not directly injured[14], jurisprudence[15] draws a distinction between obligations "vis-à-vis" another State in the field of diplomatic protection and obligations of a State "towards the international community as a whole," which "by nature" are the "concern of all States".

A party not itself injured by a breach may invoke the latter's responsibility if it has breached a treaty obligation in the performance of which all parties have a collective interest (erga omnes partes[16]); or if there is a breach of an obligation resulting from a peremptory principle of general international law (erga omnes[17]). Both the jurisprudence and the meaning of Article 48 in light of Article 54 DASR[18] exclude the possibility of countermeasures.
Many authors[19] noted a controversially increasing use of countermeasures and "autonomous" economic sanctions against third States by individual States and Organizations motivated by breaches of this type of obligation (human rights, the law of armed conflict, on the use of force...), which are difficult to fit within the legal framework above. T. Ruys[20] considers it "counterintuitive" and "possibly arbitrary" for regional organisations like the EU to take actions

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[11] For instance against ISIL Daesh, or Al Qaida: Sanctions implementing United Nations Security Council (UNSC) Res 1267 (15 October 1999) UN Doc S/RES/1267.

[12] The EU has the choice to compil or to modify the lists of persons targeted by sanctions, i.e. UN counter terrorism regime established by United Nations Security Council (UNSC) Res 1373 (28 September 2001) UN Doc S/RES/1373.

[13] In order to undertake its objective of Foreign Policy. For instance, such regimes exist against Belarus and Russia.

[14] Being injured by the purported breach of international law is a condition under ordinary international rules on countermeasures, i.e. Article 42 DASR.

[15] ICJ, Barcelona Traction (Belgium v. Spain), 5 February 1970, (1970) ICJ Rep. 3, at §33.

[16] Article 48 (1) (a) ARSIWA; Article 49 (1) DARIO.

[17] Article 48 (1) (b) ARSIWA; Article 49 (2) DARIO. Indeed, peremptory principles of general international law or "jus cogens" which, cannot be derogated from by treaty provisions or by consent, unlike customary international law. These principles give rise to obligations owed to the international community as a whole, in which all States have an interest.

[18] «(...) to take lawful measures against that State to ensure cessation of the breach (...)».

[19] Ruys, T. (n.4), 23 and corresponding citations at related footnotes n.178 to n.181.

[20] Ruys, T. (n.4), 25.

against a third country. Economic sanctions are "at least partly to the mercy of political considerations and power games"[21] until the international legal framework governing sanctions is clarified.

1.2.2 The nature of EU sanctions and their impact on the shipping industry.

1.2.2.1 The legal basis for "restrictive measures".

To determine the possible impact of EU sanctions on private operators, it is necessary to grasp the legal foundation driving them, in a context where EU's actions depend on an attribution of competences by the Member States in the Treaties[22]. Under Title V, Chapter 2 TEU's Common Foreign and Security Policy[23], Article 23 TEU regulates EU international activities, including restrictive measures. This policy, enshrined in the TEU[24] but implemented simultaneously with TFEU rules[25] (covering all EU foreign policies), seeks to maintain international peace and security in conformity with UN Charter principles[26]. The EU's almost raison d'être[27] is to shape international law and export its values and goals. Respect and propagation of Article 21(1) TEU values therefore structure the Union's foreign action's paradigm[28].

In this context, the EU Council unanimously[29] defines "restrictive measures" under TEU, Article 29, establishing the Union's approach to a geographical or thematic area. Following a joint proposal by the High Representative and the Commission, the Council adopts a regulation, based on Article 215 TFEU. Such measures are defined as "interruption, reduction, in part or completely, of economic and financial relations with one or more third countries (...)" (1) that may also be imposed "against natural or legal persons and groups or non-state entities" (2).[30]

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[21] Ruys, T. (n.4), 27.

[22] Article 4 and 5 Treaty on European Union, TEU hereafter.

[23] CFSP hereafter.

[24] Which is the TEU's only policy for political and historical reasons. Since the 1970s, there has been a "set of compromises" with EU Member States, whom were unwilling to "hand-over powers in this area" of foreign policy since it is the "core of the state's function". See Wessel, R. A., & Larik, J. (2020). Eu External Relations Law: Text, cases and materials. Hart Publishing, Bloomsbury Publishing Plc..

[25] Part V, TFEU.

[26] See Common Foreign and Security Policy. Service for Foreign Policy Instruments, European Commission. (n.d.). Retrieved November 29, 2022, from : https://fpi.ec.europa.eu/what-we-do/common-foreign-and-security-policy_en

[27] See Kochenov, D., & Amtenbrink, F. (2016). The European Union's shaping of the International Legal Order. Cambridge University Press.

[28] As laid forth in Articles 2, 3 and 21(2) TEU.

[29] Article 31 (1) TEU.

[30] The legal foundations for decisions is Article 29 TEU, Article 215 TFEU for regulations and Article 291 TEU for implementing regulations.

1.2.2.2 The wide scope of application of EU sanctions within a decentralized enforcement system.

EU regulations are binding and directly applicable in Member States without the need for national implementation[31]. Although non-extraterritorial, it is extensive. It applies «within the territory of the Union, on board any aircraft or any vessel under the jurisdiction of a Member State; to any person inside or outside the territory of the Union who is a national of a Member State; to any legal person, entity or body, inside or outside the Union, which is incorporated or constituted under the law of a Member State; and to any legal person, entity or body in respect of any business done in whole or in part within the Union»[32].

This covers third-country EU company branches. Sanctions affect EU-flagged and EU-owned vessels. In the Ukrainian scenario, EU-incorporated enterprises, including Russian subsidiaries in the EU and EU branches in Russia, must comply. Russian subsidiaries of EU parent firms formed under Russian legislation are exempt.

Because the Treaties do not expressly grant competence for the CFSP, national legal orders will substantively regulate restrictive measures enacted pursuant to it, according to Article 5 (2) TFEU[33]. Member States execute and evaluate sanctions violations within their jurisdiction.[34] There is no homogenisation, although enforcement is facilitated by the publication of periodical Commission "FAQs" on different points and areas where sanctions are imposed[35], as well as the insertion of a "penalty clause" in each regulation[36] to guide national authorities.

Under Union standards[37], national laws must provide effective, appropriate, and deterrent sanctions. In 2022, the Council stressed[38] the need to tighten operators' obligations to report their assets and cooperate with authorities in their verification «in view of the increasing

[31] Contrarily to directives, for instance, c.f. Article 288 TFEU.

[32] See latest update on November 8th, 2022 of: European Commission. (2022). *Commission Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014*. Luxembourg: Directorate-General for Financial Stability, Financial Services and Capital Markets Union. Issued on: 22 June 2022, at 10.

[33] Accordingly, a competence that is not ascribed by the Treaties to the Union, is one of Member States.

[34] Which define these restrictive measures, the criteria to adopt in cases of circumvention, and the Member States' duty to report to the UN Commission on their sanctions implementation. See Ballegooij, W. V. (2022). Ending Impunity for the Violation of Sanctions through Criminal Law. Eucrim. https://doi.org/10.30709/eucrim-2022-009

[35] C.f. (n.32), at 12, for instance.

[36] For instance, Clause 8 in Council Regulation (EU) 833/2014 and Council Regulation (EU) 692/2014.

[37] Ibid.

[38] Communication from the Commission to the European Parliament and the Council, Towards a Directive on criminal penalties for the violation of Union restrictive measures, COM(2022) 249 of 25 May.2022.

complexity of sanction evasion schemes, which hamper such implementation»[39]. Council further recommended that Member States impose "as appropriate criminal penalties" for non compliance with sanctions[40]. This is crucial for shipping players, who might be charged with a crime instead of a misdemeanour (liable to imprisonment or heavy fines)[41][42].

In the context of latest sanctions against Russia, some regulations also imposed a higher threshold of sanctions-risks due diligence, introducing an "obligation of result" on operators[43].

1.2.2.3 The reach of EU sanctions on shipping industry.

EU's legal order results from a functional approach, and the two-faceted aspect of CFSP makes restrictive measures concretely relevant to economic operators.

A tension results, between trade policy's instuments of "restrictions" and foreign policy's objectives, for which "export controls" such as embargoes and economic sanctions are exclusively employed[44]. Sanctions are therefore mostly trade policy's instruments used to reach broader purposes than merely economical[45]. Thus, restrictive measures make the economy a political tool and therefore depend on the vagaries of a Union's policy.

The maritime industry and its private operators are especially vulnerable to such controls owing to their commercial interconnections. Shipping is the "backbone of international trade and the global economy"[46]. In 2018, 90% of global trade was undertaken by sea[47]. Most charterparties

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[39] Council Regulation (EU) 2022/1273 of 21st July 2022 modifying Council Regulation (EU) 269/2014, clause 5.

[40] Council Regulation (EU) 2022/879 of 3rd June 2022 modifying Council Regulation (EU) 833/2014, clause 15.

[41] See Ballegooij, W. V. (n.34).

[42] During the editing of this thesis, the Council finally adopted the decision including the violation of restrictive measures in the scope of EU crimes fulfilling the criteria of Article 83 (1) TFEU: Council Decision (EU) 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union (OJ L308). It was the first time the list was expanded beyond the exhaustive list under this provision.

[43] See, Commission's FAQs, (n.32), at 80, question 7; as to the duty of EU operators not to sell, transfer or export Physical banknotes to Russia, through subsidiaries of Russian entities or otherwise related to the Russian government within the EU, if there are grounds to believe that the banknotes would reach the parent companies or other Russian entities.

[45] Unlike if these were limited to pursuing the objectives of the Common Commercial Policy in the TFEU, Article 206.

[46] Review of Maritime Transport 2021, Highlight, UNCTAD. (2021, November 18). Retrieved November 29, 2022, from https://unctad.org/webflyer/review-maritime-transport-2021.

[47] Transport maritime : commerce mondial et guerre des prix (2018, May 29). Retrieved November 29 2022, from: https://fr.boell.org/fr/2018/05/29/transport-maritime-commerce-mondial-et-guerre-des-prix.

form part of international sales contracts[48]. Finally, ship transport accounts for 80% of EU imports and exports in volume and 50% in value[49], making this conclusion crucial in the context of EU sanctions over the Ukraine issue.

1.2.2.4 EU Sanctions in the context of the global scaled crisis in Ukraine.

Regulations target five different aspects of the situation in Ukraine: Russia's actions destabilising the situation in Ukraine[50]; imports of Crimea or Sevastopol, in response to the illegal annexation of the latter[51]; actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine[52]; individual sanctions against certain persons, entities and bodies considered to be involved in the situation in Ukraine[53]; as well as due to Russia's recognition of the non-government-controlled areas in the Donetsk and Luhansk oblasts of Ukraine and the sending of Russian armed forces to these areas[54].

Instead of broad economic restrictions having more sweeping economic impacts[55], authorities are using targeted sanctions to exert economic pressure on the principal target[56]. "Smart sanctions" target "particular persons, groups, and enterprises" and "those at the centre of political regimes which are considered objectionable"[57][58]. For decades, wide embargoes on "trading with the enemy" have restricted maritime trade for political purposes". «Modern economic warfare tactics are more precise»[59].

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[48] Thomas, D. R. (2009). Chapter 1, The evolving flexibility of Voyage Charterparties. In D. R. Thomas (Ed.), The Evolving Law and Practice of Voyage Charterparties (1st ed.). essay, Informa Law from Routledge, London.
[49] Wedemeier, J., & Wolf, L. (2022). Navigating rough waters: Global shipping and challenges for the North Range Ports. Intereconomics, 57(3), 192–198, at 192. https://doi.org/10.1007/s10272-022-1047-4.
[50] Council Decision 2014/512/CFSP and Council Regulation (EU) 833/2014 of 31 July 2014 (OJ L 229).
[51] Council Decision 2014/386 CFSP and Council Regulation (EU) 692/2014 of 23 June 2014 (OJ L 183).
[52] Council Decision 2014/145 CFSP and Council Regulation (EU) 269/2014 of 17 March 2014 (OJ L 078).
[53] Council Decision 2014/119 CFSP and Council Regulation (EU) 208/2014 of 5 March 2014 (OJ L 066).
[54] Council Decision 2022/266 CFSP and Council Regulation (EU) 2022/263 of 23 February 2022 (OJ L 042I).
[55] And Kilpatrick, R. L. (2020). The impact of UN sanctions on commercial shipping activities. Global Challenges and the Law of the Sea, 159–175. https://doi.org/10.1007/978-3-030-42671-2_9, at 159 (abstract), at 164.
[56] Ibid.
[57] Kilpatrick, R. L. (n.55) at 162, which describes the techniques designed to isolate not only States but also particular individuals, businesses, and organisations from the institutional infrastructure necessary to trade.
[58] Jessen, H. (2020). Sanctions compliance risks in international shipping: Closure of five Crimean ports, the sanctions regime in respect of Ukraine/Russia and related compliance challenges. Maritime Law in Motion, 289–309. https://doi.org/10.1007/978-3-030-31749-2_14 at 293.
[59] Kilpatrick, R. L. (n.55).

The target's economy is shuttered by "primary sanctions" that restrict entities and sectors and "secondary sanctions" that expose those who continue to trade with the sanctioned entities or authorities[60].

The author focused on Russia's actions towards Ukraine after 24 February 2022. The need to cripple the Russian economy, make its crucial technology and markets unavailable, and to make it impossible to finance a war which from then on was more likely than ever, was more urgent than ever. Indeed, the EU has massively expanded the sanctions. Eight "packages" of penalties were adopted between 23 February and 6 October 2022.

Since February 2022, four regimes of restrictions have applied to the Ukrainian situation: economic sanctions targeting trade with Russia in specific economic sectors (trade, exports, imports, investments, financing operations, broadcasting bans...)[61], individual restrictive measures (travel bans)[62], and financial measures (asset freezes and a ban on making funds or economic resources available)[63]. Belarus sanctions are separate but crucial[64].

1.2.3 Voyage Charter Parties and restrictive measures: introductory remarks.

Because voyage-charters are less flexible than time-charters[65], they were chosen to explore how sanctions affect charter parties. Rhidian Thomas describes it as «a contract under which the owner agrees to proceed to a specified load port (...) there load a specified cargo made available by the charterer (...) transport the cargo to and discharge it at a specified discharge port»[66]. A voyage charter focuses on the transport of a cargo from a loading port (or ports) to a discharge port (or ports), whereas a time charter focuses on the time charterers may benefit from the use of the ship and its crew. These two charters have different functions, with a different allocation

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[60] This may include a prohibition on insuring or re-insuring transport or cargo, as well as a prohibition on making funds available to sanctioned entities. See, for example, Article 2(2) of Council Decision, which prohibits making funds or economic resources available, directly or indirectly, to legal persons, entities or bodies subject to a freezing of funds or economic resources (referred to in Article 2(1) thereof).

[61] See (n.50).

[62] See (n.52) and (n.53).

[63] See (n.54).

[64] i.e. Council Decision 2012/642/CFSP of 15 October 2012 concerning restrictive measures against Belarus (OJ L 285); and Council Regulation (EC) No 765/2006 of 18 May 2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine (OJ L 134).

[65] For a detailed overview of the obligations and responsibilities in voyage charterparties, Plomaritou, E. (2014). A Review of Shipowner's & Charterer's Obligations in Various Types of Charter. Journal of Shipping and Ocean Engineering 4 (David Publishing), 307–321. Retrieved from: http://www.davidpublisher.com/Public/uploads/Contribute/550a993f0831a.pdf at 319.

[66] See Thomas, R. (n.48).

of rights and responsibilities, and therefore risk allocation is more or less rigid according to the type of charterparty.

Yet, contracts need flexibility to respond to supervening regulations and other governmental policies. Richard Williams said it best: “life being life, things have a habit of changing, often without the fault of either party, thereby requiring modification of even the best laid plans for, otherwise, the charter may be deemed to be frustrated”[67].

In a time charter, the shipowner must follow the charterer's lawful voyage directions, because the latter is in control of the commercial operations. In a voyage charter, the charterer just holds responsibility for loading and unloading of cargoes, thus a restricted responsibility regarding the performance of the voyage. Even if political or market related supervening circumstances enhance the dangers the shipowner considered before contracting, once main terms are agreed, he must protect his ship, crew, and business interests. That is to say that by their very nature, time charters have a substantial degree of flexibility, and on the other hand, rights and duties of parties to a voyage charter are “more rigid and, to some degree, more ossified”[68].

Thus, parties, notably the shipowner, may struggle to safeguard their rights in this scenario. The freedom of contract concept allows parties to a voyage charter to include particular provisions notwithstanding their rigidity. According to Adewale O.[69] «(...) very many contracts in the maritime industry consist of the standard form" which allows for more flexibility. However, because a voyage charterer is often an international seller, buyer, or supplier of products, and the charter often represents the transportation part of the underlying international sale or supply contract. Mostly, charterers will try to ensure that the conditions reflect his viewpoint and that the sales contract is completed as agreed[70], that is to ensure they «cater for any amendments or alterations that may be required to the cargo sale or supply contract»[71].

This raises a question as to the extent to which both parties, but especially the shipowner, can protect their interests in not performing when exposed to sanctions-risks, pursuant to a voyage charterparty that “has none of the innate contractual flexibility of a time charterparty[72]"?

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[67] Williams, R. (2017). How much flexibility is there in a voyage charter? – an eclectic cornucopia! In Soyer Barış & A. Tettenborn (Eds.), Charterparties: Law, practice, and emerging legal issues (pp. 139–167). essay, Informa Law from Routledge.

[68] Ibid.

[69] Adewale, O. (2017, July 5). Preliminary voyage in a voyage charter. Academia.edu. Retrieved December 1, 2022, from https://www.academia.edu/33777983/Preliminary_Voyage_in_a_Voyage_Charter

[70] See Williams, R. (n.67).

[71] Ibid.

[72] Ibid.

1.3 Method and sources.

This research covered international law, public law, private law, and supranational law from supranational organisations like the European Union. It required using several sources of law while keeping in mind the specificities of each legal order's traditions.

On one hand, to evaluate "restrictive measures," it was required to study the EU Treaties, which constitute its legal order, and the judgments that arise from them and impact the reality of its Member States, from which sanctions emerge. First, it is indeed difficult to imagine a solution that encompasses the entire EU structure and legal system, and second, the Treaties' language is often not precise, making its reach unclear. This required considering uncommon concepts and the European Court of Justice's jurisdiction.

State Responsibility under international law applies to the question since the sanctions are global. Since this regulation is primarily customary or conventional, answering the legal context in which "restrictive measures" evolve is difficult.

Sanctions clauses, a "relatively recent phenomena," have inspired many legal practitioner papers rather than academic or doctrinal research. Industry groups or organisations that published standard clauses were trusted because their members represent a considerable number of operators worldwide. In that sense, BIMCO sanctions clauses are worth examining to determine their possible impact on future charterparties. If these are complemented by "explanatory notes," no study on this topic has been developed, making their analysis fascinating but restricted to the case-law on marine insurance sanctions provisions.

Charterparties are standardised transport contracts with similar stipulations. Thus, voyage charters and particular clauses in the latter that may allow parties to be excused from performance when exposed to sanctions-related risks were chosen to explore the contractual implications of sanctions, which cause considerable and frequently unanticipated alterations.

Since the parties usually choose English law, academic materials, doctrine, and even legal practitioner writings on interpretation may be easily found. However, the absence of case law to indicate how English law reads the inclusion of these terms in charterparties and the interaction between existing contractual remedies like Force Majeure provisions and other ordinary contractual clauses and the new sanctions clauses made incomplete the analysis.

1.4 Legal questions and outline.

Part II will shed light on why a voyage charterparty's exposure to sanctions-risks pursuant to EU restrictive measures, can significantly impact the rights and responsibilities of the parties, especially those of the shipowners.

Part III will investigate the position of English law as to the possible remedies to put an end to the performance promptly if exposed to sanctions-related risks, without risking their contractual liability. It will demonstrate the challenge of employing legal or contractual solutions and anticipatory contractual management due to interpretation law's unpredictability.

Finally, Part IV will introduce the principle and limits of a sanctions clause in the light of the preceding remarks and case law that has analysed their impact. A discussion will emphasise that while it provides flexibility, a sanctions clause should be used strategically as part of a compliance strategy and not as an "acquired" solution.

Part V will conclude.

2 EU SANCTIONS AND RELEVANCE AS TO THE PERFORMANCE OF VOYAGE CHARTERPARTIES

2.1 Introduction.

Because the voyage charterparties' performance is often tied to other activities and especially sales contracts, contracting parties may seek control over their fate. In parallel, given the possibility of criminalising sanctions, depending on jurisdictions, remaining compliant is paramount.

The complexity of restrictive measures and the inflexibility of voyage charterparties can make the interweaving of these efforts difficult, which raises the following questions:

1. How and to what extent EU sanctions-risks pose a harder burden of compliance on the economic players subject to its jurisdiction?
2. What aspects of a voyage charter exposes its related parties to a higher scale of due diligence?
3. What are the main risks posed by EU sanctions to the rights and obligations of the parties to a voyage charter and how does this affect the «traditional» allocation of risks between the later ?

2.2 A high «sanctions risks due diligence» threshold.

Sanctions risks due diligence, for the purpose of this work, refers to the operators' obligation to ensure that they do not conduct business with sanctioned individuals or entities, or that they do not engage into a sanctioned activity.

The first factor affecting diligence is voyage charterparty duration.

Indeed, EU sanctions are not subject to a transition period of general application[73]. A contract may therefore be immediately affected, with larger implications if it is supposed to last on a short period. Nevertheless, what is referred to as the "wind-down period" is very often considered for specific restrictions. According to that principle, unless otherwise indicated, transitional periods are occasionally permitted for spot market transactions and the execution of existing contracts, despite the entry into force of the regulation, until a specific date.
For example, the six-month wind-down period under the 6th package until 5 December 2022 prohibiting insurance, reinsurance, and financing of the transport of Russian crude oil and Russian petroleum products to countries outside the EU has been extended in the eighth package (article 3n) since the transport itself was still authorised until 5 February 2023 (article 3m).

In that context, voyage charters are neither long-term nor flexible contracts and are traditionally concerned with voyages from point A to point B, making them more vulnerable to immediate sanctions. However, because they often form the basis of longer-term contracts of affreightment, they may also be affected by transitional measures. In addition, the parties frequently have access to the "range of ports" system, under which the shipowner is sometimes dependent on the charterer's right to redirect the ship on route or to order him to wait for further sailing orders. As T. Solvang noted[74], this flexibility might delay the fulfilment of a voyage charter owing to redirection or instructions, making it more vulnerable to sanctions with related issues of contractual liability.

In addition, the reach of exposure to sanctions-risks and the lack of transparency in charterparties and related transactions make scrutiny harder.

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[73] Bibicu, B., & Logesova, J. (2022, June 1). Safely navigating EU sanctions regimes: How to stay compliant - WT. Wolf Theiss . Retrieved November 30, 2022, from: https://www.wolftheiss.com/insights/safely-navigating-eu-sanctions-regimes-how-to-stay-compliant/

[74] Solvang, T. (2012). Charterparty law in the context of flexibility and risk allocation in long term contracts. Universitetet i Oslo. Retrieved November 30, 2022, from: https://www.uio.no/studier/emner/jus/jus/JUS5401/h13/pensumliste/flexibilitysolvang.pdf

Indeed, sanctions threaten parties because they or anyone to whom they are identified are directly targeted by a measure, or because they are associated in any way with a sanctioned person involved in the transaction. The risks are reinforced because chartering and sub-chartering are described as transport processes with a «complex and sometimes confidential nature (...) in which intermediaries regularly arrange transportation on behalf of undisclosed principals»[75].

Furthermore, most of targeting tactics can create a kind of mistrust, slowing down the process of a simple financing or contractual commitment, and instituting complex compliance initiatives with fairly robust sanctions[76].

Sanctioned entities may attempt to disguise themselves by renaming or changing the flag of their vessel, rendering scrutiny inquiries more complex for shipping operators. In addition to KYC, or anti-money laudering programmes, already demanding customer identification verification and prohibit anonymous transactions with certain entities, but sanctions-related compliance programmes add additional compliance burden. Authorities and regulators have stressed that risk assessment and due diligence checks are distinct procedures that must be strong and routinely assessed, especially in targeted economic areas like the financial industry[77].

Finally, ECJ's broad interpretation of Article 215 (1) TFEU makes this threshold of diligence even more hard to reach.
Restrictive measures target "third countries"[78] but the Court includes legal or natural people with a "sufficient link to the targeted 3rd country" because of a presumption that they "draw benefits from the regime of the sanctioned country." Thus, it may encompass the "rulers" of such a country[79], individuals and entities linked with them or controlled directly or indirectly by them[80], and legal persons where necessary and appropriate to avoid sanction circumvention (including business entities).

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[75] Kilpatrick, R. L. (n.55) at 169: " «This extends compliance obligations across the transport chain to intermediairies such as freight forwarders, brokers, and other logisticsproviders organizing cargo movements for customers».

[76] Ibid.

[77] Council Regulation (EU) 2022/1273 of 21 July 2022 (OJ L138), Article 9, where EU Council strengthened its conditions for the application of sanctions by making it compulsory for sanctioned persons to declare their assets in order to facilitate their freezing within the EU.

[78] Article 215 (1) TFEU.

[79] *Johannes Tomana and Others v Council and Commission*, C-330/15 P, EU:C:2016:601, paragraph 84.

[80] *Kadi and Al Barakaat International Foundation v Council and Commission (Kadi I)*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 166; *Pye Phyo Tay Za v Council*, C-376/10 P, EU:C:2012:138, paragraphs 63–4.

Since legal persons—non-state entities or groups—are already protected by Article 215(2) TFEU, this is confusing. If a person contracts for his own account, it might be difficult to determine if he is identifiable to his state. This results in a list of individuals or businesses that may be constantly enlarged, such as asset freeze lists, but can also be challenged before the CJEU for procedural (because the presumption is reversible[81]) and fundamental rights violations[82].

2.3 The increasing complexity of contractual risk anticipation.

The diversity and expansion of sanctions complicate contractual forecasting of sanctions-related risks.

Since the Council has considerable discretion over the extent and kind of mesures to impose and the factors to evaluate[83], they may target new geographical regions, economic activities, and financial transactions. It's hard to predict the type of restriction as an "event" or the risks they represent to the parties' obligations. However, it appears that the Courts will likely construe the parties' wording restrictively, setting aside a contractual clause allocating the risks, the more severe and more unexpected are the incident's repercussions[84].

Moiseienko[85] claims that measures against Russia take place in the course of «the first large-scale and open interstate military aggression in Europe since the Second World War» with «widespread and undeniable reports of war crimes». Sanctions on Russia are meant to affect its behaviour in the long run, but they are unlikely to do so directly. Economic restrictions target a country with an underlying security issue affecting a whole political environment internationally, and therefore they evolve according to more factors. Moiseienko mentions Belarus' 2012 human rights sanctions, which were lifted in 2016 as a "reward for advancing EU and allied interests in foreign affairs" owing to Belarus' constructive role between Ukraine and Russia, and not due to the evolution of "ongoing persecution" that justified sanctions[86].

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[81] *Bouchra Al Assad v Council*, T-202/12, EU:T:2014:113, paragraph 92 – 100.

[82] Case law on the infringement of the right to pursue an economic activity, Article 16, and the right to property, Article 17 (1) European Union's Convention on Fundamental Rights.

[83] *Rosneft*, C-72/15, EU:C:2017:236, paragraphs 86–93.; *National Iranian Oil Company UK Ltd (IOC) v Council*, T-428/13, EU:T:2015:6497, paragraph 7; *Almaz-Antey v Council*, T-255/15, EU:T:2017:25, paragraphs 66–83; *Eyad Makhlouf v Council*, T-383/11, EU:T:2013:431, paragraph 80.

[84] See more on interpretative approach to risk allocation in part 3.

[85] Moiseienko, A. (2022). The future of EU sanctions against Russia: Objectives, frozen assets, and humanitarian impact. Eucrim - The European Criminal Law Associations' Forum, 130–136, at 130. https://doi.org/10.30709/eucrim-2022-008

[86] Ibid, at 131.

Sanctions' efficiency requires flexibility and heterogeneity, while legal certainty requires predictibility.

2.4 Main risks posed by EU sanctions to the the rights and obligations in a voyage charterparty.

2.4.1 The risk of impossibility to reach the nominated port.

A voyage charterparty shipowner is subject to the charterer's loading and discharging port instructions[87]. The charterer has no right or responsibility to ensure the latter's safety or to rename another port if the latter is impossible to reach or unsafe[88]. Although uncertain, an express clause or the Court's interpretation of the contract's contents may imply a warranty of port safety[89]. However, a charterer's contractual ability to rename is usually understood as a right, not a duty[90], therefore the clause introducing it needs to be drafted clearly as to the obligatory effect of a warranty of safety.

Without a revised right to order, a vessel may wait outside the first appointed port until the charter is frustrated.The shipowner may not be able to approach ports without violating sanctions[91], may it be due to EU cargo restrictions or because the vessel is Russian flagged[92].

If the shipowner proceeds to another port, he has no guarantee that the charterer will cover the additional costs and delays.

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[87] As to the irrevocability of the charterer's duty to nominate, see Anglo-Danubian Transport Co Ltd v. Ministry of Food (1949) 83 Ll L Rep 137; Reardon Smith v Ministry of Agriculture, Fisheries [1962] 1 Q.B. 42 (CA).

[88] As opposed to the existence of an obligation to renominate upon supervening unsafety in time charters, c.f. Kodros Shipping Corporation v Empresa Cubana de Fletes (The Evia (No 2)) [1983] 1 AC 736; Duncan v Köster (The Teutonia) (1872) LR 4 PC 171.

[89] The scope of charterer's choice is taken into account. The more precise the port nomination is, the more the shipowner is thought prepared to bear the risk (to assure the place's security) and it is less likely that a warranty of safety will be implied; the less accurate the nomination, the more the charterer must guarantee the safety. Compania Naviera Maropan S/A v Bowaters Lloyd Pulp & Paper Mills Ltd (The Stork) [1955] 2 QB 68.

[90] See The Evia n°2 (n.88).

[91] In order to enforce Article 3ea of Council Regulation 833/2014, Russian flagged vessels, for instance, are even banned, according to the 7th package of sanctions adopted on the 21st July 2022, to access locks to prevent the circumvention of sanctions.

[92] Under Council Regulation 269/2014. See Commission's FAQ (Individual Financial Measures, Chapter 1, question 33), when the vessel is registered under the flag of Russia, because owned or operated by a designated person or entity.

2.4.2 The risks of delay.

Any delay during the preliminary voyage (from the ship's location to the loading port or berth according to the type of charterparty) and the carrying journey (from loading port to discharging port) is the shipowner's responsibility unless an exclusion clause applies[93].

The English "alongside rule" governs the transfer of risks during transport, loading, and unloading. The shipowner is responsible until the «cargo is placed along the ship»[94]. Thus, the charterer assumes risk when the stipulated "laytime" begins and is authorised to load and unload goods at the port of call. If laytime is exceeded, the shipowner takes the risk of delay unless stated otherwise or the charterer caused it. Demurrage or liquidated damages compensate shipowners for loading and discharging delays. Unless stated otherwise[95], the shipowner is not liable for extra losses or delays (war, port strikes, etc.) after demurrage begins to accrue. Prohibitions affect both parties, but the "alongside rule" puts shipowners in a more perilous position when exposed to sanctions-risks.

Article 3ea of Council Regulation 833/2014 mandates EU port access prohibition monitoring on authorities. Sanctions may prohibit certain vessels (Russian flagged or vessels that changed their Russian flag or registration after 24 February 2022) or the loading/unloading of certain goods (ex: imports of oil into the EU originated from Russia[96]) or allow them to enter under exceptional conditions laid out in article 3ea (4) and (5). The authorities evaluate and authorise those ships individually. Moreover, a ship that enters and discharges exempt items needs a second authorization to load. Finally, a non-Russian or exceptionally approved vessel may be confiscated under Council Regulation 269/2014 if its owner is a specified person or organisation.

Export/import restrictions may also importantly delay performance. Shippers, consignees, shipowners and charterers under charterparties, bunker service providers, financial intermediaries, and others are involved in the transport of a cargo. It's crucial to check all

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[93] According to the implied duty that the ship shall arrive at the contractual date, or if not agreed, on “reasonable despatch”.

[94] Espiñeira, M. B. (2019). Allocation of risk of delay in time and Voyage Charterparties. ITL. Retrieved November 24, 2022, from http://itl-legalconsultants.com/news_eng/allocation-of-risk-of-delay-in-time-and-voyage-charterparties/, at 2.

[95] The shipowner can be seen to have taken on the risk of circumstances of delay in laytime; but when the laydays are over and upon charterer's default, the shipowner cannot be held responsible for reasons he had nothing to do with. See Lord Russell of Killowen C.J. in Saxon Ship Co. Ltd. v. Union S.S. Co. Ltd (1898) 4 Com. Cas. at 41.

[96] Article 3m of Council Regulation 833/2014): exception article 3m para. 3 (c).

individuals, goods, connections, and legal papers (cargo declarations such as bills of lading, invoices, custom clearance declarations...). Some actors circumvent restrictions by hiding the items' nature or destination, increasing the risk of exposition to sanctions. These inspections, whether internal or by the authorities, may delay the ship being "ready" to be loaded or unloaded, or "ship arrived" so that laytime begins.

Individual restrictive measures such as asset freeze and prohibition to make economic funds available may make the port inaccessible for Russian-flagged vessels. Similar vessels subject to derogations and other non-Russian-flagged vessels may be admitted to the port and seized if their owner is a designated person or entity. Due to the complexity of monitoring sanctions, shipowners might inadvertently experience delays.

The shipowner earns its freight according to the rate tied to the vessel's service (cargo transport) and not to its length of service[97]. However, restrictions may increase the likelihood of frustration by delay, that is if the “purpose of the commercial adventure» was fundamentally affected by sanctions-related risk. The expediency or timing of the transport is not important per se in a charter; nonetheless, it may be fondamental to the contract in light of what the parties are reasonably expected to know[98]. It may be due to the expectations in terms of cargo quality or condition. Again, this depends on the "time-sensitiveness" of each cargo or whether the shortcoming can be fixed using standard procedures with little expenses. To rely on frustration will in addition require a complex case-by-case examination of the contract's construction and business environment[99].

2.4.3 The risks as to the impossibility to pay or to receive freight.

The charterer pays freight upon completion of a voyage. Charter parties must ensure that no payments are made to or from sanctioned countries and industries (as of today or likely to be subject to the latter[100]). Receiving money from certain entities is also forbidden[101].

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[97] Espiñeira, M. B. (n.94).

[98] See as illustration: Eridiana S.p.A. and Others v. Rudolf A. Oetker and Others (The Fjord Wind) [1999] 1 Lloyd's Rep. 307 at 329.

[99] For a more detailed approach, see part 3.

[100] For example, Article 5i of Council Regulation 833/2014 forbids transmitting genuine banknotes denominated in a Member State's legal currency, with rare exceptions. According to the latest FAQs (n.32), this includes Russia's government, legal and physical residents, and "everybody who would be delivering banknotes to Russia or for use in Russia" (question 5, page 80). It targets Russian subsidiaries and businesses associated to the Russian government in the EU if «there are grounds to believe that the banknotes would reach the parent companies or other Russian entities».

[101] For instance, a listed entity or person whose funds or economical resources have been frozen on the basis of

2.4.4 The risks as to insurance coverage.

The shipowner must provide maritime transport insurance, especially for high-risk goods. Insuring or re-insuring transport is prohibited under several restrictions, notably on import and export. Council Regulation 2022/263 banned financing, insuring, and re-insuring Donetsk and Luhansk imports. Exporting Russian crude oil and petroleum products to foreign countries is a better example[102]. Most EU providers provide these services. Only EU insurers and reinsurers are forbidden from insuring the import and insuring certain products (Article 3m) which transit to other states is allowed. Insurers may rely on sanctions clauses in their policy to refuse to cover the parties, which may be very wide depending on how they are structured, even if there is a mere risk of possible exposure.[103]

2.4.5 The risks of liability to third parties.

Shipowners face an additional risk if it defies the restricted measures. Indeed, they may face cargo claims from consignees, cargo receivers, or cargo interests[104] under relevant legislation and jurisdiction in accordance with a responsibility to deliver the cargo[105] (if asserted as carriers under a Bill of Lading or under a Sea Way Bill for instance) due to the effects of their exposure to risks of sanctions in the performance. Owners may assess if they might have recourse against charterers to recover cargo damages. A right of indemnification for complying with charterers' orders and delivering goods may be implicit in the charter[106]. But the ship's activities or the shipowner's charterparty breach can void this entitlement.

Article 2 of Council Regulation 269/2014 cannot pay to fulfil its contractual obligations towards a non-listed entity, unless granted an authorization following Article 6.

[102] See regulation at (n.40).

[103] As to example of such disputes:

Arash Shipping Enterprises v Groupama Transport, [Sveriges Angfartygs Assurans Forening (Intervening) [2011] EWCA Civ 620 [2011] 2 Lloyd's Rep 607;

Mamancochet Mining Ltd v Aegis Managing Agency Ltd [2018] EWHC 2643 (Comm); [2018] 2 Lloyd's Rep 441.

[104] Plomaritou, E. (n.65) at 311.

[105] Ibid, at 319.

[106] The "Island Archon" (CA) [1994] 2 Lloyd's Rep 227.

3 THE ENGLISH LAW POSITION AS TO THE QUESTION OF NON PERFORMANCE OF VOYAGE CHARTERPARTIES DUE TO A SUPERVENING EVENT

3.1 Introduction.

This section is based on the assumption that, due to the unpredictability of the restrictions' type and duration, the parties to a "traditional" voyage charter risk such high sanctions risks that frustration may arise in many situations. Under global economic sanctions, it would be negligent not to seek the best contractual risk management solution. To achieve this, the parties must evaluate the English Common Law stance on non-performance of a voyage charterparty due to sanctions risks and how they could contractually anticipate this assumption.
Thus, the following will be asked:

1. Most charterparties are subject to English law. Having jurisdiction over the matter, does an English law court excuse a performance because of exposure to foreign law measures?
2. Whilst performing the voyage charter subject to English Law, what are the rules and the legal consequences of not performing an obligation because of the survenance of sanctions ?
3. Under the principle of freedom of contract, what is the legal framework of the parties' ability to reallocate rights and obligations to guard against the risk of exposure to sanctions?
4. As a largely "standardised" type of contract, do voyage charterparties have any standard clauses in their panel that could allow them to proactively reallocate risks between parties in the event of exposure to sanctions?

3.2 Bringing forward the defence of illegality due to foreign sanctions: a double-edged sword.

As a defence, the party in breach of its contractual obligations may argue that performing the contract would be unlawful. In principle «apart from any contractual provision that modifies the position, English law will not excuse contractual performance by reference to foreign law unless that law is the law of the contract or the law of the place of performance»[107]. If parties

[107] Lamesa Investments Ltd v Cynergy Bank Ltd [2019] EWHC 1877 (Comm) at [11], referring to Ralli Brothers v. Campania Naviera Sota Y Aznar [1920] 2 KB 287.

are aware that they are subject to EU jurisdiction, they may rely on a compliance clause overriding the presumption, so they can refer to restrictive measures.
It may be easy to prove the law of the «place of performance», but proving what is the «law of the contract» is complex.

In Lamesa Investments[108], the Court interpreted a wide "compliance provision" through a "construction exercise". Firstly, the documentary context (which legal texts the phrase refers to), then the factual and commercial background (i.e. the facts and circumstances known or assumed by the parties at the time of performance, but also the other clauses of the contract). However, the parties' mutual reference to the provision defining "regulation"[109] includes everything but primary or general law. It decided that "any required provision of law" meant all primary or general law legislation from any government or organisation. The Court deemed it "inconsistent"[110] to confine "mandatory provision of law" to English law because "regulation" does not entail a geographical constraint.

The Court noted that nothing connected performance to the US, rendering parties liable to direct sanctions (payment was not to be made in US dollars, to a US bank account or was not concerned with an agreement between US persons or entities, nor to be conducted in the US[111]). At the time of conclusion, the bank knew it may face secondary sanctions[112]. The judges reasoned that since the bank's principal risk was secondary sanctions, the clause was unlikely to protect it from a threat it was not exposed to[113].

In the context of sanctions-related risks however, depending on the broad interpretation of a general compliance provision may have unintended consequences, such as bringing extraterritorial measures into compliance that operators may have assumed were unapplicable.[114]

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[108] Ibid.
[109] Ibid, at [5].
[110] Ibid, at [16].
[111] Ibid, at [18].
[112] Sir Geoffrey Vos emphasised in appeal (Lamesa Investments Ltd v Cynergy Bank Ltd [2020] EWCA Civ 281).
[113] Lamesa investments (n.107), at [18] – [20].
[114] See part 4.

3.3 The complexity and inflexibility of the frustration doctrine

3.3.1 The doctrine of frustration as a default rule for non-performance by reason of an unforeseen event.

The doctrine of contracts, in Common Law, traditionally lies on an "absolute liability" principle. Accordingly, parties which voluntarily enter into a contract are bound by their agreed obligations, even where the performance becomes impossible. It is on the parties to bear the risk as to any contingencies that may impact their contract and to make it a part of their negotiations. The only flexibility provided by law is the operation of «frustration» as a default rule, where non-performance is due to the survenance of an unforeseen event, which was not the fault of either party, and which was not objectively foreseeable.

More likely to arise in the context of voyage charters[115], frustration arises when the performance is rendered impossible or illegal or because the latter undermines the object of the contract, making the fulfillment of the obligation radically different from what was contemplated at the time of the conclusion[116]. In summary, the event changes the nature of the «outstanding rights and/or obligations» of the parties, and it would be «unjust to hold them to the literal sense of its stipulations in the new circumstances», so the law declares both parties discharged from future performance[117]. In cases of impossibility or illegality[118], the court's objective approach as to the possibility of future performance at the time of the preventing event excludes the subjective calculations of the claimant. Frustration by delay comes into consideration, for instance where the event of impossibility or illegality is only suspensory or postpones the performance in time.

The set of conditions to be fulfilled in the fast-moving context of sanctions and shipping activities renders frustration a rather complex option. To begin with, it is not a case comparison exercise, it involves multiple factors, interpreted circumstancially to the specific case and more precisely, with an objective approach[119]. The question is whether at the time of contracting, the parties had, according to the terms of the contract, its matrix or context; a knowledge, expectation, assumption, or contemplation of the event preventing performance. The nature of the event and the parties' «reasonable and objectively ascertainable calculations as to the

[115] Cooke, J., Young, T., Martowsky, D., Kimball, J. D., Ashcroft, M., Lambert, L., Taylor, A., & Sturley, M. (2014). Voyage Charters, Fourth edition (4th ed.). Informa Law from Routledge. At 1024, (10-087).

[116] Davis Contractors Ltd v Fareham UDC [1956] A.C. 696 at 729.

[117] National Carriers Ltd v Panalpina (Northern) Ltd [1981] A.C. 675 at 700, Lord Simon.

[118] Illegality is triggered only where the performance is rendered totally illegal, and not in cases of suspension or postponment in time, see Clapham Steamship Co Ltd v Naamlooze Vennootschap Handels-En TransportMaatschappij Vulcaan of Rotterdam. [1917] 2 K.B. 639 KBD at 645.

[119] Pioneer Shipping Ltd. V BTP Tioxide Ltd. (The Nema) [1982] A.C. 724 at 752.

possibilities of future performance in the new circumstances" will also be assessed[120]. The consequences of frustration do not allow for flexibility either, because a performance which is deemed to be indefinitively prevented will give rise to an "automatic" right to terminate is triggered. Relied on unilaterally[121], the doctrine has even more considerable consequences as it sets aside the ordinary allocation of risk ascribed in the charter[122].

3.3.2 An inflexible and insufficient tool to overcome the risks induced by sanctions exposure.

In the context of sanctions exposure, frustration on its own causes difficulties to enforce the parties' initial bargain. They might wish to modify their contractual rights and obligations in wider assumptions than merely when the performance is effectively affected by an impossibility, an illegality or a frustrating delay.

Firstly, intead of termination, they might simply wish to suspend their obligations or to wait for a possible change in their situation. They may legitimately think that sanctions are not made to last indefinitely and want to postpone their contractual relationship.

For instance, in Embiricos v Sydney Reid, a restraint was observed in the form of the Strait of Dardanelles being closed to Greek vessels, but unexpectedly removed temporarily, rendering the performance possible again, but still, the contract was considered to be frustrated. The restraint was in place and in these conditions, the charterer who refused to load cargo onboard a vessel upon the Strait was in his right. Indeed, the removal does not mean that parties "should have foreseen this unexpected event".

Whatever the parties wish in these conditions, the contract is already discharged for the future. As long as the legal conditions are fulfilled, what happens after that is not important even if the obligation has become possible again and even if the party thought to act reasonably in waiting. The other party, who didn't bear the risk at the moment, could bring forward frustration as a defence against a claim for breach of contract. The only exception is if there was a probability that by reasonable forecasts the parties could have foreseen that the performance would again become possible (which ultimately comes down to determining whether there was a "true state of" impossibility)[123]. It is not likely that a court would consider that it was within the parties reasonable forecasts that a sanction was about to be suspended.

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[120] Rix LJ in The Sea Angel [2007] EWCA Civ 547 at [110]-[111].

[121] National Carriers Ltd v Panalpina (Northern) Ltd [1981] A.C. 675 at 700.

[122] The Sea Angel (n.120) at [132]; Bunge SA v. Kyla Shipping Co. Ltd. [2012] EWHC Comm at [83].

[123] Bank Line Ltd v Arthur Capel & Co [1919] A.C. 435 at 454, Lord Summer.

Secondly, in cases of delay, proving that the "purpose of the commercial adventure" has been frustrated adds another layer of interpretation. The expediency or timing of the transport is not essential per se in a voyage-charter (but rather the transport itself); however it may be ascertained, according to the charter's provisions interpreted in light of what the parties are reasonably expected to know, that it is fundamental to the contract[124]. More importantly is the effect that this delay may have on the quality or condition of the cargo. Again, this will depend on the "time-sensitiveness" of each cargo, or whether the deficiency can be rectified by standard procedures with little expenses. Similarly, to rely on frustration here will require a case-to-case assessment, based on the true construction of the contract and its commercial context.

Thirdly, in order not to be exposed to sanctions, the parties will benefit from an option to be excused from performance when there is a mere risk of being exposed to sanctions. This would require the option to terminate or suspend the obligations in prevention, and not because there is an effective illegality, an impossibility or a delay radically changing the performance.
It is within this framework that the author proposes to determine how the Common Law Courts approach the allocation of risks which the parties wish to take advantage of in order to excuse their performance by reason of an exposure to sanctions.

3.4 Defeating frustration through a contractual allocation of risk: challenges raised by an unpredictable judicial interpretation.

3.4.1 *Allocating the risks.*

In the context of the Ukrainian crisis that has been in full swing since 2014, parties entering into a contractual relationship are however aware of their potential exposure to sanctions.

On the one hand, the inflexibility of a voyage charterparty, on the other hand the civil or criminal consequences of sanctions[125] and finally for the shipowner, its position of weakness, should encourage parties to guard against an almost inevitable exposure. Indeed, it should be remembered that there is a tendency in "many contemporary" voyage charters for risk-shifting clauses to be increasingly favourable to charterers[126], which "distinguishes them markedly from more orthodox" forms. For instance, if delay arises in the commencement of loading, the issue is often dealt with by a laytime or demurrage clause, as the charterer may want to maximise his revenue in an underlying sales contract or adapt his overall strategy to changing circumstances.

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[124] See (n.98).

[125] See part 2.

[126] Oana, A. (2012). Standard Clauses of Voyage Charter Shifting Risk of Delay And Readiness. Annals (Constanţa Maritime University) , 13(18), 17–20.

This, according to R. Thomas, adds significantly to the risks for owners who are “left with less control over their commercial destiny”, who “may experience delay, additional costs, be required to deviate, fail to meet a cancellation date under the existing or a subsequent charter, arrive ahead of or after a lay date, or incur third party liabilities”.[127]

The parties can contractually protect themselves against the risk of sanctions by allocating risks in two respects. On the one hand, if they are exposed to frustration, and on the other hand, when the conditions for frustration are not met, if they wish to rely on an exemption clause that they have incorporated in their charterparty.

The allocation of risks will first have to be characterised by the court, since in the event of a dispute, contract law aims to enforce the objective intention of the parties. The common law approach to that effect is not clear and operators need to be alert as to the state of judicial interpretation as to the allocation, in light of the following points for their clauses to operate in the case of exposure to sanctions.

This research will focus on parties who seek to prevent frustration by allocating risk. Frustration will not operate if by reason of the general nature of the contract, its particular terms or the context in which it was concluded, the parties intended the contract to run in those particular circumstances[128]. If the parties have decided what should happen and how the risks should be allocated when exposed to sanctions, then the raison d’être of frustration disappears[129].

A contractual language allocating risks will however be interpreted differently depending on its intended effect. Courts adopt a more restrictive and complex approach when the parties seek to overcome frustration. Modern exemption clauses follow more "regular" construction principles[130]. In that context, "Force Majeure Clauses" are treated very differently if drafted as "contractual frustration clauses" or "exemption clauses" in charterparties, illustrating the linguistic threshold parties face in contractual risk management. These reflections will demonstrate the risks to rely on ordinary charterparty provisions to mitigate sanctions risks.

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[127] See Thomas R., (n.48); and also Solvang T. (n.74) at 4 to 6, in relation to voyage charters used as a basis of long term contracts such as consecutive voyages and contracts of affreightment, and its impacts on the traditional legal thinking and the risks borne by the shipowner.

[128] CTI Group Inc v Transclear SA [2008] EWCA Civ 856, [2008] 2 Lloyd’s Rep. 526, 530 [13] (Moore-Bick LJ) (The Mary Nour).

[129] The Sea Angel (n.120) at [111] (Rix LJ).

[130] Such clauses are subject to statutory regulations under the Unfair Contract Terms Act 1977 (UCTA).

3.4.2 The unpredictability of the operation of contractual clauses to prevent frustration.

To escape frustration, the wording must prove no "radical change" in their obligations arose due to sanctions exposure, because it was within what was foreseen. Force Majeure clauses are an example, setting in advance the list of events capable of hindering their performance and the desired solution ascribed to. Indeed, contrarily to Civil Law's position that it attempts to recreate contractually, Common Law requires the event to be predictable per se[131], paradoxically, to be listed as a Force Majeure.[132]

Ryan Caterwell[133] brings into light the difficulties to foresee the interpretation of a clause allocating the risks in view of the two types of approaches applied by the courts to that question.

On the one hand, a broad approach is applied to general private law questions, that is when the clause aims at defeating the operation of frustration and, on the other hand, a stricter approach is applied to contract law questions[134]. It means that the clause should clearly convey its purpose.

Indeed, both may address a context of frustration, but in the second case, the courts' approach is essentially of construction, as to identify the objective intention of the parties[135]. Whereas when the objective is to operate in lieu of frustration, courts may assess an express allocation of risks (the words of the contract), by reference to reasonable person's understanding, but it can also imply their objective intention, that is through a non-interpretive approach. As explained by Robert Goff J in The Evia, it would be dangerous to simply look at the clause and its literal meaning to conclude that it applies to the event that occurred; where the Court must answer two questions, namely whether on the true construction of the clause in its context the parties intended it to continue to apply in those circumstances, and whether this has the effect of excluding frustration. However, because of a traditional reluctance in interfering with an

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[131] In line with the principle of «absolute liability».

[132] C.f. Article 1218 Code Civil in which the event rendering performance impossible must be external to the parties, irresistible and unpredictable.

[133] Catterwell, R. (2021, April 8). Frustration and assumption of risk. SSRN. Retrieved December 1, 2022, from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814078, at 3-4

[134] Ibid, at 4: «(...) when the assumption of risk concept is employed in construing exclusion or limitation of liability clauses, in insurance law, in determining remoteness of loss (under the law of contract) and in establishing scope of duty (under the tort of negligence)» .

[135] According to contract terms' plain, natural, and ordinary meaning ("simple rules of construction").
Mitchell, C. (2007). Interpretation of contracts (2nd ed.). Routledge, pp. 1.

existing allocation, as it results from the agreement of the parties[136], most cases in the context of frustration are assessed by reference to an express risk allocation[137].

But in this same respect, courts interpret what is 'expressly granted' either strictly or liberally, and neither is applied consistently[138]. This adds a second layer of uncertainty, putting the parties in the impossibility to determine the language threshold they must adopt to convey their intention.

In the liberal approach, the textual requirement is less important, it is sufficient for the contract to state as to the event which might occur (which would otherwise be a case of frustration), and the mere forecast of the latter might suffice to recognize the allocation of risk excluding frustration[139]. Relying on this approach, a "liberty clause" for example has already been considered sufficient to allocate the risk of seizure of the cargo upon the outbreak of war on the charterer[140]; but also a cancellation clause which was interpreted in a Time-Charter as allocating the risk of detention of the vessel in time of war[141].

The strict approach, on the other hand, requires that clear words are used when contemplating the event and dealing exhaustively with the consequences of that event[142]. The scope of the event alleged to have frustrated the contract must be defined as precisely as possible. Courts will interpret the words strictly, making it more likely that the event is not included in those listed. The same procedure is applied to the words relating to the exhaustive consequences of the said event, interpreted as if they did not consider such effects for all obligations of the contract. The objective is to promote a contract construction that limits the implications of an occurrence to which the provision would apply, to leave room for the operation of discharge by frustration due to an unforeseeable event.
R. Caterwell proposed to categorize cases, for reference only, according to whether the contract specifically identifies (or not) the event occurring and addresses (or not) the consequences of the said event. In the ideal situation where the contract specifically identifies the supervening event and addresses its consequences in detail, the interpretation for cases relating to maritime

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136 Where the courts are called upon to rule on a matter which is the subject of an agreement between the parties, they will tend to adopt a rigorous and non-extensive approach in order not to infer with the will of the parties, whose only objective feature is the letter of the contract. For a reminder that the doctrine must be applied within very limited limits: Davis Contractors (n.116) at 715.
137 Canary Wharf [2019] EWHC 335 (Ch), [2019] L.&T.R. 14, 274 [29] (Marcus Smith J).
138 Catterwell, R. (n.133) at 12.
139 Ibid, at 8.
140 The Safeer [1994] 1 Lloyd's Rep. 637 (QB).
141 Admiral Shipping Co Ltd v Weidner, Hopkins & Co [1916] 1 K.B. 429 (KB).
142 C.f. The Florida case below.

transport contracts is mostly narrow. However, even when the parties may think that they addressed the event, a narrow interpretation is not always guaranteed.

For instance, in The Florida[143], a liberty clause described the event as when it became "unlawful (…) to discharge the cargo at the port of discharge" and provided for a comprehensive regime as to the consequences of that event (that the shipowner or the master could require the cargo to be delivered, warehoused, discharged, or retained on board). The vessel arrived at the loading port, where the government of the place banned the importation of the goods to be loaded (rendering it therefore illegal). The clause was considered as insufficient to allocate the risk of a prohibition on importation of a particular product, and to preclude frustration. The reason is that the clause did not make "full and complete provision for all the effects of the supervening illegality", that is to say that it was not dealing with what was to happen in these circumstances if the cargo was not already loaded. Tomlinson J blamed the wording as falling far short of the circumstances which would have the effect of frustrating a charter-party[144]. This narrow approach imposed a high threshold as to what must be described as to the effects of the covered supervening event, for the clause to allocate the risk and escape frustration.

Nonetheless, in comparison, another case handled 12 years earlier also involving the interpretation of a liberty clause within a voyage charterparty was judged with a liberal approach. In The Safeer, the clause stated that the Vessel had to comply with any directions «as to(...) discharge, delivery or any other wise [sic] whatsoever (...) by any Government or by any belligerent or by any organized body engaged in civil war, hostilities or warlike operations». In facts, the Vessel which was to transport rice to Kuwait, was put under military guard on arrival due to the country being invaded by Iraq. Subsequently unloaded of its cargo and seized by the Iraqi army, and the charterers sought to claim that frustration arose, to avoid being accused of a breach in the form of a misdelivery of the goods. On the literal meaning, the clause addresses the compliance with directions as to discharge or delivery, but not necessarily a provision for the specific effect of the supervening illegality (a misdelivery of the goods due to orders to discharge[145]). Rix J explained that despite that, parties made «specific provision for the eventuality in question», and that it was «no longer contended that the literal language of the clause should be narrowed so as to exclude from their scope directions as to discharge and delivery which would constitute a misdelivery of the goods»[146].

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143 The Florida [2006] EWHC 1137 (Comm), [2007] 1 Lloyd's Rep. 1.

144 Ibid at [11].

145 As compared to the "full and complete provision for the effects of the supervening illegality" requirement faced in The Florida latter.

146 The Safeer (n.140) at [643].

It is generally acknowledged that the Court's stance may change, even though the parties have clearly stated the event occurring and alluded to the repercussions they could experience in detail, which has a substantial influence on the predictability of the law. Before The Safeer, it appeared to restrict the terms used to determine if the occurrence and its effects were adequately determined to allocate risk. However, in this example, it does not appear to have a rigorous literal emphasis and yet in The Florida it reverts to a highly stringent literal approach.

R. Catterwell further notes that many statements in judgements and commentaries show that a liberal or restrictive approach to clause interpretation is a judicial or interpretive preference. The basic approach to the interpretation of contracts as to what the parties objectively meant is based on the potential meaning of words, but also the contractual purpose and practical ramifications of such an interpretation.

He suggests that the more profound the event's impact on performance (whether it is «seriously disruptive, catastrophic, affects the contract as a whole, renders subsequent performance by the parties unimaginable, or alters the vital and fundamental terms of the contract, or alters the general character of the adventure») and the more unforeseeable the event, the more the assumption of risk will be considered unintended. Therefore, the language bar will be greater, forcing parties to establish anything that is not self-evident. The Court will be less rigorous in its reading of the words if the event's actual implications are less harsh and foreseeable. He contrasts The Florida and The Safeer examples, the first of which had a less "predictable" incident with a greater impact on the parties' responsibilities. Thus, The Florida focused narrowly, whereas The Safeer focused broadly[147].

In addition, the parties must be careful because «a competing interest trumps the need to give effect to the presumed intention of the parties», that is one of «public policy»[148].
To summarise, considering the severe impacts and the multitude of facets of sanctions-related risks, the parties are not guaranteed that even without ambiguities in their wording, a clause could work to excuse their performance in the event of an exposure. Contractually managing the risks is therefore not a straightforwardest task.

3.4.3 Force Majeure Clauses: a rigorously conditioned risk management tool.

Force Majeure Clauses widen the scope of events excusing a performance in circumstances beyond the parties' control. It provides an option, between termination or suspension, when a

[147] Catterwell R. (n.133) at 23.
[148] Ibid at 6.

foreseen hindering event, radically changes the contractual adventure, with no possibilities to mitigate the event or its consequences[149].

It must be recalled that these will be construed in accordance with their own terms[150], but the approach will be one of construction, meaning that the language of each specific clause will be addressed with "due regard to the nature and terms of the contract as a whole"[151]. In that context, ensuring the clarity of the aim pursued by the clause is not only relevant as its interpretation when questioning an inference of allocation of risks, but it also determines the causation threshold.

An exemption clause will be resolved against the party seeking to rely on it if any ambiguity remains as to its wording and has a "more demanding requirement" of causation, namely a but-for test. Rather than merely showing that the occurrence of the event hindered the performance, it must be proved that the party could or would have performed if the event had not occurred.

If the clause is to operate upon the survenance of an otherwise frustrating event, the requirement is only to prove that the listed event frustrated the performance.

This is relevant in a context where "Force Majeure" clauses in most standard charterparties are rather referred to as "General Exceptions Clause"[152], and this may have an adverse effect even if it is argued that force majeure clauses in charterparties are not exemption clauses[153]. Indeed, in practice, a distinction is drafted according to the wording, between "Force majeure" clause in the nature of exemption clauses and other interpreted as contractual frustration clauses.
This is therefore an additional point of uncertainty that the parties should bear in mind if they rely only on such a clause in a context of sanctions exposure.

Finally, such clauses are generally conditioned to an obligation to mitigate the effects of the described event. In view of the common clauses used in the supply sector, the clauses may either make no express reference to an obligation to mitigate (but may be implied according to

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[149] Definition in B. & S. Contracts and Design Ltd v Victor Green Publications Ltd [1984] I.C.R. 419.
[150] Great Elephant Corporation v Trafigura Beheer BV v Vitol SA & Vitol Asia Pte Ltd v China Offshore Oil (Singapore) International Pte Ltd (The "Crudesky") [2013] EWCA Civ 1547, [2014] 1 Lloyd's Rep 1 at [25].
[151] Moore Bick J (The Kriti Rex) [1996] 2 Lloyd's Rep. 171 at 196.
[152] The recent finding by Males LJ in Classic Maritime Inc -v- (1) Limbungan Makmur SDN BHD & (2) Lion Diversified Holdings BHD [2019] EWCA Civ 1102, shows that although the title of a clause is not conclusive as to its function, if there is no clause providing that titles are to be ignored, that title will be taken into account as part of the Contract.
[153] The Super Servant Two [1990] 1 Lloyd's Rep 1 at [7].

the rules on implied terms[154]), or refer to an obligation to "use all reasonable endeavours"[155] or it may be express and set out the steps to be followed.

Again, there is room for interpretation, and although it is difficult to achieve, the clearest language is a key to the enforcement of the parties' real intentions. A recent MUR Shipping case, which was recently reviewed, shows the importance of how the wording may increase or reduce the scope of the duty to mitigate and consequently, influence the operability of the clause.

Addressing the charterer's duty to pay freight upon the performance of the voyage, the Court of Appeal[156] adopted a liberal approach to reduce the scope of a valid force majeure clause in terms of risk allocation, to assess whether a shipowner reasonably behaved to rely on it.

A Russian charterer related to a sanctioned oligarch was prevented from paying in US dollars and offered to pay in Euros and cover the conversion charges. Force majeure was described as "an event or state of affairs," also referring to a payment delay in the contractual currency. The Court did not confine itself to the exact text of the provision when determining whether the shipowner had showed "reasonable endeavours" in not accepting payment because the contract was in US dollars. According to the judges, interpreting it in light of the contract's underlying objective — the shipowner's right to receive the right amount of US dollars in his bank account at the right time — common sense dictated that the charterer's proposal should have been accepted because it overcame the state of affairs. Thus, it seems that what might seem obvious to the parties, that is the payment *in the contractually agreed currency*[157], may be an ambiguity for the Courts, leaving room for an interpretation. It seems that the parties should specify that in the survenance of a designated force majeure event, payment must be made only and directly in the contractually agreed currency, without the possibility to qualify a possible alternative..

[154] In Banco San Juan Internacional Inc v Petroleos de Venezuela SA [2021] Lloyd's Rep Plus 44.

[155] In MUR Shipping BV v RTI Ltd [2022] EWHC 467 (Comm), "reasonable endeavours" did not consist in changing contractual performance to resolve the issue. On October 27, 2022, in Appeal [2022] EWCA Civ 1406, judges reconsidered. The verdict was not unanimous, and some saw it as restricted to this context.

[156] Ibid, courts adopted a less restrictive view to the clause's wording when assessing whether the shipowner behaved reasonably to circumvent the force majeure situation by refusing to receive payment in a currency other than agreed in charterparty's.

[157] Emphasis added.

3.4.4 The shortcomings of other standard contractual clauses to manage sanctions-related risks survenance.

General clauses usually providing for main rights and obligations in voyage charters are not the most efficient contractual answer to deal with the risks of sanctions. They do not generally provide for quick mechanisms of cancellation and/or instructions in the case where parties would be exposed to impending violations of sanctions. Another difficulty arises in determining who has the authority to give the order as to the course of action to be taken in the performance, as promptly as possible to avoid any delay in complying with the authorities. In The Houda, the facts released show the confusion of the owner's managing director as to whom had authority to give an order on the basis of a war clause and whether it should be acted upon[158]. Finally their practical effectiveness is highly dependent on the vagaries of judicial interpretation.

The cost, time, and unpredictability of any dispute, for example in relation to the determination of laytime, off-hire, delays, and damages where no specific clause addresses the issue in the context of sanctions, can be considerable. Therefore, to alleviate the risks of breach or anticipatory breach of contract, parties have all the reasons to opt for a solid contractual management beforehand.

[158] KUWAIT PETROLEUM CORPORATION v. I & D OIL CARRIERS LTD. (THE "HOUDA") [1994] 2 Lloyd's Rep. 541

4 PATHWAYS TOWARDS A MORE EFFICIENT CONTRACTUAL RISK MANAGEMENT: ENSURING CERTAINTY AND COMPLIANCE WITH SANCTIONS CLAUSES

4.1 Introduction.

Operators engaged in a charterparty are aware that they could «inadvertently run afoul of sanctions»[159], themselves, their counterparts or through their transactions with other parts involved in it.

Thus, operators have included sanctions risk provisions to contracts such as charterparties, bills of lading, and marine insurance policies in addition to numerous compliance programmes (KYC, anti-money laundering, sanctions-screening).

The objective of this section is to elucidate the mechanism(s) of these clauses, with an atempt to answer the following interrogations:

1. How sanctions clauses proactively articulate rights and obligations, in order to anticipate the disruptive impact of sanctions-related risks ?
2. To what extent such clauses are effective in contractually managing the risks of exposure to sanctions?
3. What aspects of their construction may affect their utility in practice?
4. If incorporated in a voyage-charter, how a sanctions clause should be ideally construed, such as to ensure legal compliance whilst providing contractual certainty ?
5. Based upon the example of BIMCO's Sanction Clause for Voyage Charterparties 2020, does a sanction clause effectively provide a balanced allocation of risks between the shipowner and the charterer? To what extent does it specifically addresses this allocation according to its features where the draft is so similar to that of time charters?

[159] Kilpatrick, R. L. (2022, April 5). Lloyd's Maritime and Commercial Law Quarterly. MARITIME SANCTIONS CLAUSES. Retrieved December 1, 2022, from https://www.i-law.com/ilaw/doc/view.htm?id=413497 at 1.

4.2 The principle of "sanctions clauses" in the context of charterparties.

4.2.1 The types of sanctions risks related clauses.

"Anti-sanctions clauses" and "sanctions clauses" are distinguished in the management of sanctions risks in commercial contracts[160]. They differ in the implications for parties' duties. The former obliges the parties to perform notwithstanding the implementation of sanctions, the party in default is regarded accountable for the undue performance. In that context, the parties clearly outlined the situations in which performance and original contractual terms shall not be affected, since they foresee the occurrence as not undermining the balance of contracts and parties' interests. Unlike a "sanctions clause," the occurrence is not a "force majeure" and the defaulting party is not excused.

To the contrary, the "sanctions clause" protects parties against undue performance caused by sanctions. BIMCO's Sanctions Clause for Voyage Charter Parties 2020[161] called it "vital for internationally trading companies to help them manage and mitigate their sanctions risks and to enable them to continue to do business while remaining compliant with the various sanctions regimes".

4.2.2 Purposes of a sanctions clause.

Thus, notwithstanding the contractual constraints, such a clause seeks to protect the interests of parties who would have contractually anticipated sanctions. Therefore, the performance is suspended for the period of the latter, and the parties are relieved from any duty for undue performance (provided that none of them are in breach of that provision). Thus, the "force majeure clause" serves as a basis for the "sanctions clause". The BIMCO Sanctions Clause for instance is an "industry standard clause" intended to provide a balanced allocation of the risks caused by sanctions as between owners and charterers"[162].

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[160] Tserakhau, K., & Struzkho, A. (2021, February 21). (anti)sanctions clause: How to minimize sanction risks – contracts and commercial law - belarus. (Anti)Sanctions Clause: How To Minimize Sanction Risks - Contracts and Commercial Law - Belarus. Retrieved November 30, 2022, from:
https://www.mondaq.com/contracts-and-commercial-law/1033796/antisanctions-clause-how-to-minimize-sanction-risks

[161] This is the first provision specifically addressing voyage charterparties, but it generally shares the same definitions, warranties, and termination rights as for time charterparties.

[162] See «Background» to the standard clause.

4.3 Key points in the construction of an effective sanctions clause : contractual interpretation and language thresholds.

4.3.1 Defining a precise scope of operation of the clause to ensure contractual certainty

According to the few cases analysing the operation of sanctions clauses, language seems to be the main concern, setting a high standard for wording to reflect parties' bargain. In many cases, the question was whether the compliance excused the performance in a case of a mere exposure to the risk of being exposed to sanctions and was enough to trigger the sanctions clause's, or if the performance had to "actually expose" the parties for them to rely on it.

The parties might wish to avoid the ambiguity of sanctions by refusing to perform even if there is a "possible" imposition. The following judgments have helped determine some of the Common Law approaches to distinct formulations of these sanctions clauses in insurance and banking contexts, depending also on the extent of discretion assigned to the assessment of risk.

Arash Shipping Enterprises[163] involved a an automatic renewal of policy each additional year under the conditions of a clause, in addition to a «Iran Sanctions Clause» providing for a right of the insurer to cancel on notice in circumstances where the assured *«has exposed or may, in the opinion of the Insurer, expose (him) to the risk of being or becoming subject to (...)»* inter alia, the risk of EU sanctions. The claimant, a Cypriot company managed by an Iranian entity, maintained that the clause could only be triggered by an affirmative exposure to a «specific risk of criminal prosecution» and not by the mere risk of being possibly exposed, hence the insurer's cancellation was «premature»[164] and «unreasonable»[165]. The right was evaluated based on the policy's language[166], and judges stressed that it shouldn't be interpreted narrowly[167]. In the facts, the paragraph was part of a policy that should be «given a sensible effect»[168]. Indeed, sanctions can target individuals based on their nationality, domicile, or individual activities, as well as their position or function in the targeted country. Restricting the reading of the phrase to the actual exposure to the relevant risk caused by the assured's acts or omissions would deprive the first paragraph of its practical ramifications, since the second paragraph already handles the «most obvious acts of the assured» that might lead to the risk. Reading it that way for the first

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[163] Arash Shipping Enterprises Co Ltd v Groupama Transport, Sveriges Angfartygs Assurans Forening (Intervening) [2011] EWCA Civ; [2011] 2 Lloyd’s Rep 607, 609.
[164] Ibid, at [29].
[165] Ibid at [30].
[166] Ibid, Burton J in the Commercial Court.
[167] Ibid, Stanley Burton LJ rejected the «unduly narrow» interpretations of the claimant, at [613].
[168] Ibid, at [31].

paragraph would require the insurer to forecast the acts or omissions to develop its conclusion that he could be exposed, since «may» translates to potentiality rather than effectiveness.

In this example, the clause's operability hinged on the insurer's subjective view[169] and on clear wording (has exposed or may expose/the risk of being or becoming). Other formulations may be more ambiguous.

Mamancochet Mining[170]'s case addressed an insurer's obligation to pay a maritime insurance claim based on a "Sanctions Limitation and Exclusion Clause" stating that payment "*would expose*" the insurer[171]. Instead of ruling that insurers could only depend on it if they were at risk of being sanctioned upon payment, the justices sided with the claimant, who argued that insurers needed prove that payment would place them in violation of applicable sanctions[172]. The Court clarifies that this means the insurer, in order to rely on the clause, must show not only that the payment of the claim (the conduct) is prohibited by the applicable laws or regulations (e.g. subject to a restriction), but also that the agency responsible for enforcing them would sanction this prohibited conduct. Given how EU sanctions are decentralised to the level of the Member States and not harmonised, this option looks fairest, but is difficult to implement because the EU is made up of 27 countries with diverse legal orders.

In similar cases, vague language has been interpreted broadly due to a liberal approach. In a recent case, *Lamesa Investments*[173], Pelling QC J interpreted a clause allowing the insurer to not pay "in order to comply" with various sources of law as referring to an omission or act that would otherwise expose it to "possible" sanctions. This expansive interpretation hinged on the factual and commercial context, which revealed the clause's purpose. The case was limited to "double jeopardy" from US secondary sanctions and an EU blocking regulation that prohibits EU companies from complying with certain extraterritorial US sanctions on Iran and Cuba. If this approach is maintained, the interpretation of sanctions clauses will vary significantly depending on the facts, even if the clause is derived from an industry standard form. What may be seen as 'uncertainty' or 'vagueness' was considered to be the will of the parties, whose «wide and unqualified language» «ensured that the risk was properly and clearly managed contractually»[174]. With such a broad and unqualified formulation, it's questionable whether a

[169] Cf. 4.4.2.
[170] Mamancochet Mining Ltd v Aegis Managing Agency Ltd [2018] EWHC (Comm); [2018] 2 Lloyd's Rep 441.
[171] Ibid, at [43].
[172] Ibid at [46] and [47].
[173] Referring to Lamesa Investments Ltd v Cynergy Bank Ltd [2019] EWHC 1877 (Comm), but lastly appealed [2020] EWCA Civ 281 on 30 June 2020. The appeal upheld the High Court's judgement, with different reasons for some points addressed later in this research.
[174] Ibid [30].

party relying on the clause could always benefit from it, given the generally narrow approach to allocating risks, especially to avoid frustration. Lord Justice Arnold emitted doubts in Appeal and noted the claimant's view that clearer words than «to comply with» should be required for excusing a party from a payment obligation.

Thus, the parties should consider the threshold of risk of sanctions at which they wish their clause to operate, using reflective language in a functional approach to the contract as a whole and considering the factual and commercial context of performance of their charterparty.

In this regard, the adoption of a sanctions clause allows for a clear definition of the scope of relevant sanctions and an exhaustive list of relevant sanctions regimes, rather than relying on the risk of an expansive interpretation of a general compliance clause. Such a clause will leave room for interpretation by the Court, which, as in the Lamesa Investments case, has allowed the inclusion of US sanctions with extraterritorial effect within the scope of required compliance. A sufficiently detailed sanctions clause will increase certainty for the parties, as only the named foreign sanctions will be taken into account in the event of a dispute[175].

4.3.2 Electing a workable "risk assessment criterion"[176].

4.3.2.1 The evolution of the discretion criterion in standard sanctions clauses.

Discretion is a flexibility offered to a party facing exposure to sanctions-risks. Subjectivity versus objectivity involves assigning more or less weight to a person's own viewpoint for judging performance exposure to sanctions. Depending on the journey stages, the charterer or shipowner may be involved. As stated before, on a charterparty journey, the shipowner has extra responsibilities under such an inflexible contract. The more subjective the shipowner, the easier his task will be because he might invoke the clause in the event of sanctions.

Standard charterparty terms can favour the shipowner. The Tanker Owners Industry standard clause, the INTERTANKO sanctions clause can be compared to BIMCO terms for Time Charters and Voyage Charters. The former gives the shipowner "substantial discretion"[177] to

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[175] C.f. 3.2.

[176] Expression by Kilpatrick Jr (n.159) at 13.

[177] INTERTANKO Sanctions Clause, 15 July 2011 : https://www.intertanko.com/info-centre/model-clauses-library/templateclausearticle/sanctions-clause

refuse a charterer's order, «could (any trade in which the vessel is employed under this Charter party) expose the vessel, its Owners, Managers, crew or insurers to sanctions»[178].

BIMCO clauses[179], contrarily, have undergone a shift towards more objectivity, as is the market trend[180]. In 2010 indeed, BIMCO Sanctions Clause for Time Charter Parties was originally providing for a more balanced discretion, in that it referred to shipowner's «*reasonable judgement*» in assessing any trade that «*would expose*» the vessel, owners, managers, crew, insurers or reinsurers to the risk of sanctions.[181] New versions apply instead to a performance which «*involves*» a «Sanctioned Party or a Sanctioned Activity»[182]. Any personal type of assessment of exposure is removed. According to BIMCO[183], this updated language participates to an effort to help the industry participants who are in difficulty to assess whether a trade or activity is in fact prohibited. In order to avoid a dispute as to whether the performance is in breach of sanctions, determining the risk exposure does no longer depend exclusively on the shipowner, and neither on an «indeterminate reasonableness standard»[184]. As a preliminary remark to those which will follow, it can be mentioned to that effect that this would hinder a party to rely as it pleases on the clauses and to determine the faith of the charterparty on its own.

As it is also the case in the marine insurance context, it seems therefore that the wordings «could expose» and «may expose» are more likely interpreted to provide for a subjective risk assessment, whereas «would expose» and «involves» seem to express an objective risk assessment choice.

4.3.2.2 The nature of the discretion impacting the court's inquiry as to interpreting the sanctions clause.

As pointed out by R. L. Kilpatrick, objectivity also generates considerable complications. For instance, «involves», as employed by BIMCO Sanctions Clauses of 2020, has been criticised

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[178] Ibid.

[179] BIMCO Sanctions Clause for Time Charter Parties 2020 and BIMCO Sanctions Clause for Voyage Charter Parties 2020.

[180] Kilpatrick, R. L. (n.159) at 14.

[181] The first paragraph of that clause provided that : (a) The Owners *shall not be obliged to comply with any orders for the employment* of the Vessel in any carriage, trade or on a voyage which, in the *reasonable judgement of the Owners*, *will expose* the Vessel, Owners, managers, crew, the Vessel's insurers, or their reinsurers, to any sanction Or prohibition imposed by any State, Supranational or International Governmental Organisation.

[182] Sections (e) in relation to Time Charter Parties, which also considers the issue as to employment, see section (f) ; section (e) in relation to Voyage Charter Parties.

[183] Cf. Background to BIMCO Sanctions Clause for Voyage Charter Parties 2020.

[184] Kilpatrick, R.L. (n.159) at 14.

as «problematic» in the context of banks including such clauses in trade finance-related instruments[185].

When a party claims that exposure to a sanction prevents it from performing, it is natural to ask what restriction it is and whether the contractual performance is really exposed to sanctions. But the more discretion or subjectivity granted, the less important the assessment of the factual legality of the performance will be.

For instance, in *Arash Shipping*, the sanctions clause provided that the insurer had the right to cancel its participation in the insurance policy if "in the opinion of the" latter, this would expose him to a risk of sanctions. Construed as a subjective clause, the Court has proceeded by resolving simple questions of contractual construction, that is whether the insurer was in his right to assess the risk on its own, rather than delving into the interpretation of the scope of EU sanctions.

Yet, if the clause provides for an objective assessment of the risk of sanctions, this can prevent a party from abusing of its discretion to rely on the clause. However, it also implies that the court will have to interfere further with the contractual text, and that it will interpret the latter in light of the scope of application of an extern context of large and complex foreign laws. In a context of globalized sanctions, sometimes unilateral, multilateral, which may contradict each other or be divided into many regimes, this can lead to numerous disputes, with no certainty and no consistency in the results[186].

If an objective clause can overcome the presumption that performance cannot be excused by reference to foreign laws, Lamesa Investments shows that it is not always the most predictable option. In that case, an «objective clause» did not allow the bank a wide discretion to assess the sanctions risk but when the latter refused to continue paying interests as part of a facility agreeement, because it considered that there was a «realistic risk» of becoming subject to US secondary sanctions risks, the court adopted a kind of double approach to justify the right of the bank not to perform. Indeed, there was a reference in the contract to mandatory provisions of law with sweeping scope[187], which partly justified the fact that the judges interpreted the

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[185] ICC, I. C. of C. (2014). Consolidated ICC guidance on the use of sanctions clauses in trade finance-related instruments subject to ICC Rules - ICC - International Chamber of Commerce. ICC Global Banking Commission. Retrieved December 1, 2022, from https://iccwbo.org/publication/consolidated-icc-guidance-on-the-use-of-sanctions-clauses-in-trade-finance-related-instruments-subject-to-icc-rules/ at 3-4.

[186] ”Although courts are of course equipped to make such determinations, reasonable minds may differ when making judgements on the likelihood of sanctions enforcement in foreign jurisdictions subject to parochial trends in domestic politics”. Kilpatrick, R.L. (n.159) at 15.

[187] Lamesa Investments (n.173) at [21] to [23].

clause as overturning the position and hence evaluated the US secondary sanctions risk. However, another part of the justification was through the wording «to comply» in which the judges identified an ounce of subjectivity[188]. Indeed, they considered that this wording could define compliance in three different manners, one as relied on by the bank, whom, in an effort to comply, sought to adjust its conduct that «might otherwise attract the possible imposition of a sanction (...)».

An objective clause thus prevents the Court from being able to analyse only domestic law in order to justify non-performance in a climate of sanctions, but the parties cannot ensure that their understanding of objectivity will be that of the Court.

4.4 BIMCO Sanctions Clause for Voyage Charter Parties: a proactive tool?

4.4.1 Purposes.

BIMCO's Sanction Clauses are presented and drafted a a proactive mechanim to take the task off the parties by confining in the letter of the contract the criteria and definitions of what is a sanctioning authority, a sanctioned activity or a sanctioned persons. Something «proactive» relates to acting in anticipation of future needs or changes. It should be borne in mind that this clause is only a standard that the parties can modify as they see fit.

In view of the above remarks on the market trend towards objective assessment of the risk, BIMCO clauses followed. In the following, the main changes compared to its previous form and their implications for the execution of voyage charter parties will be listed. Parties need to understand its mechanism in order to understand to what extent the sanctions clause can provide their charter with more flexibility and certainty. In this way, the truth of the claim that these clauses are "owner-friendly"[189] will be assessed.

The first difference brought by the 2020 clauses is that one provides a specific approach to the voyage chartering industry, that are more widely used, for instance within the gas transport industry[190], and given its particularities in terms of allocation of responsibilities.

By considering sanctions tactics, the new clauses seek to frame the human and business factors that define performance. On the one hand, the idea is to strengthen due diligence in

[188] Ibid, at [25].
[189] Lux, J. S., & Shour, R. (2011). Economic Sanctions against Iran and Their Impact on the Maritime Indutry: a UK Perspective. Journal of Transportation Law, Logistics, and Policy, 78(3), 191–198. at 197.
[190] C.f. Asbatankvoy 2020.

identifying the parties with warranties, and on the other hand, to provide for a variety of flexible solutions and reallocation of risks, if despite these efforts their activity is sanctioned.

Both the shipowner and the charterer are subject to an extension of their duty to third parties[191], which they are considered in a «best position» to identify[192]. Considering that this allows a flexibility to the parties, who, contrarily to the operation of frustration, have the choice between terminating and/or claiming for damages only where the breach can be remedied[193], the research will focus on a more controversial aspect of the change brought about by the new clauses.

4.4.2 From a balanced to an objective assessment of risk: questionable efficiency and inconsistencies.

Because of the «objective test»[194], arguing that the sanctions clauses provide a «balanced allocation of the risks posed by the sanction», especially given the responsibilities which in principle belong to the shipowner in a voyage charter, may be questioned.

Abandonning the previous «reasonable judgement» criterion allowed to the shipowner to assess the risk, the new objective approach chooses to define all the objectively assessable factor that the parties can rely on to consider that a trade or an activity is indeed prohibited, that is what is meant by public authorities, sanctioned parties or sanctioned activities[195]. In order to alleviate any abuse or «carte blanche» use of the clause, it requires the parties to bring forward verifiable facts rather than merely discretionary conceptions.

It is necessary first to repeal the aim of such a clause, that is to help in the management and the mitigation of sanctions risks, to enable the parties to continue «to continue to do business while remaining compliant with the various sanctions regimes»[196]. It presents itself as a «proactive» tool, which adjective is defined as something «creating or controlling a situation by taking the initiative and anticipating events or problems, rather than just reacting to them

[191] Namely, as stated by subclauses (b) and (c) of BIMCO’s Sanctions Clause for VCP 2020.

[192] C.f. « Explanatory Notes » to the subclauses (b) and (c) of the clause.

[193] Subclause (d) of BIMCO’s Sanctions Clause for VCP 2020.

[194] Overview of the draft of BIMCO’s Sanction Clause for VCP 2020, paragraph 2.

[195] Subclause (a) BIMCO’s Sanction Clause for VCP 2020.

[196] Ibid, paragraph 1.

after they have occurred; (hence, more generally) innovative, tending to make things happen»[197].

The efficience of a sanctions clause, in practice, may paradoxically be undermined by this absolute criterion of objectivity in the assessment of sanctions risks.

For instance, the shipowner may refuse orders, pursuant to section (e), when exposed to such risk, as a flexible alternative contrarily to the traditional position. However, is this really guaranteeing a mitigation of exposure if that risk can be avoided by relying on more factors than merely legal changes ? As observed by practitioners[198], an owner may face situations where assessing a sanctions risk over a certain trade may also include non-legal and circumstantial factors (for instance, no change in the law appears, but the enforcement strategy adopted by governing authorities is more aggressive). In this situation, a shipowner may in fact reasonably think that performing would expose them to sanctions-risks and take preventive steps, without a risk of sanctions being a «fait accompli» in objective terms. Thus, the effectiveness of the shift to an objective assessment, proposing to address "uncertainties" in that it is "difficult for the parties to assess whether a trade or activity is prohibited or not"[199], is questionable.

In addition, since the BIMCO clauses have not yet given rise to interpretation in litigation, it seems at first glance that this context reduces the choice given to the party as to the scope of cover, that is to use the clause in the event of a risk of merely possible imposition of a sanction[200]. Indeed, section (e) provides that the owner's has a right to cancel the charter or to refuse to proceed to the discharging port if performance «*involves*» a sanctioned party or a sanctioned activity.

However, a doubt may be induced as to both the nature of the assessment and the nature of the scope of the risk intended to be covered by the clause. A comparative wording between the definition of «sanctioned activities», and on the other hand, its interpretation in the «explanatory notes» leave some room for doubts. The former provides as a standard of

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[197] Kilpatrick, R.L. (n.159); Oxford English Dictionary: https://www.oed.com/view/Entry/151671?redirectedFrom=proactive#eid.

[198] Hansson, L. T., Brandt, A., & Young, W. (2020, February 17). Managing sanctions risk in 2020 – BIMCO releases Fresh sanctions clauses for time and voyage charter parties: Publikationen: Reed Smith LLP. Managing sanctions risk in 2020 – BIMCO releases fresh sanctions clauses for time and voyage charter parties | Publikationen. Retrieved November 30, 2022, from: https://www.reedsmith.com/de/perspectives/2020/02/managing-sanctions-risk-in-2020

[199] C.f. (n.183).

[200] Contrarily to what was decided in Lamesa Investments.

objective assessment that a sanctioned activity refers to «any activity, service, carriage, trade or voyage *subject* to sanctions *imposed* by a sanctioning authority»[201]. The latter explains that the definition is widely cast, such as to cover «all activities *contemplated*» by the performance which «*may become*» the subject to restrictions[202]. If the wording of the original definition «subject to (...) imposed» seems to incur that the activity must be sanctioned as a state of facts, the use of «may become» is confusing. «May» was interpreted in the marine insurance context as allowing for a subjective discretion[203]. Indeed, it includes an aspect of potentiality[204], which seems to call into question the «objective» nature of the assessment as well as the extent of the risk covered by the clause.

This choice of words seems surprising when compared to the words chosen with regard to a "sanctioned party" which is identified as "any persons, entities, bodies, or vessels *designated* (...)"[205], and whose explanation refers to "persons and entities that *are subject* to the sanctions" or to "persons, entities, bodies, or vessels that *are specifically identified* by a sanctioning authority on a sanctions list". This raises the question of why the affirmative "are" was not chosen, in that it could have described the activities contemplated by the performance that are, at the moment of performing, subject to sanctions. If the intention was to impose a totally objective criterion at least, this would not have changed the meaning of the explanation.

Given the shipowner's duties under a voyage charter, it seems paradoxical that if he is given the authority to refuse the charterer's order and the right not to perform if a sanctioned party or activity is identified, he may only rely on it with the same objective discretion as in a time charter. The new standard provision customised to voyage-charters is a step toward a more realistic risk allocation, however it is problematic not to alter the risk assessment criterion. The shipowner is much more exposed and in a better place to judge with a view of the practical issues, and on the other, voyage charterparties are subject to a flexibilization of their terms in favor of charterers. If the decision is not to provide a full discretion[206], and there are genuine worries about abuse of a sanctions clause, the earlier balanced version of BIMCO's Sanctions Clause[207] looked more appropriate in enabling the shipowner to assess the risk

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[201] Subclause (a), paragraph 1.
[202] Explanatory Notes, subclause (a), paragraph 1.
[203] See Arash Shipping (n.163).
[204] See : Wex Definition Team. (2021, July). May. Legal Information Institue. Retrieved November 2022, from : https://www.law.cornell.edu/wex/may.
[205] Subclause (a), paragraph 3.
[206] Contrarily to INTERTANKO Sanctions Clause, (n.177).
[207] Dedicated to time charter parties (n.179).

using the criteria of «reasonability». Both parties, indeed, have a vested interest in avoiding sanctions and, as a result, in developing a viable sanctions provision.

4.4.3 Remaining limits and grey areas.

As has been observed, the language of this standard clause suggests that the clause could be relied upon only if there is an "actually" sanctioned activity or party. However, it has been seen that the use of the word "may" in relation to sanctioned activities can be confusing in that regard, as can an explanation provided in relation to sub-clause (a) paragraph 3[208]. According to the latter, the sanction clause drafted widely regarding the «sanctioning authorities»[209] will operate not only if a one of the parties is in violation of a sanction adopted by a sanctioning authority with extraterritorial effect, but also it merely puts the latter at risk of being listed as a sanctioned party if they continue to perform.

Thus, the clause could be operated such as allowing for non-performance both when a party is actually sanctioned as a listed party but also when it is merely at risk of being listed by reason of an extraterritorial measure. It seems to mean that the more extensive is the definition of a «sanctioning authority», the more the scope of cover is wide. If it can be said that this protects the parties and anticipates more exposure assumptions, it may also cause other uncertainties such as the one expressly recognised by BIMCO's Sanction Clause drafters. Indeed, the latter explains that it can cause situations where two «sanctioning authorities» may adopt sanctions which «directly conflict with» each other, and that both parties may seek to operate this clause[210]. Recognizing a limit, they simply advice the parties to seek legal advice[211] and to check whether they are obliged to comply with any specific or extraterritorial sanctions to avoid the risk of «wrongfully withdrawing from contractual obligations»[212].

The clause offers more protection as regards to charter parties operating or planning to operate between two non-sanctioned countries. Indeed, the explanation to subclause (a) related to «sanctioned parties», paragraph 2, states that if some ««limited» list-based sanctions» restrict only some but not all transactions with a party or an entity, that is in comprehensive sanctions programs, the clause will operate even though the transaction in question is authorised under the latter. Therefore, a party who legitimately continue to trade with a jurisdiction subject to comprehensive programs will not be protected by such wording.

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[208] C.f. paragraph 2 of the explanation.

[209] Including "any other applicable competent authority or government", that is those who are not specifically listed. C.f. Explanatory Notes of subclause (a) paragraph 2 (paragraph 3).

[210] Ibid, (paragraph 4).

[211] Ibid.

[212] Ibid, (paragraph 5).

However, the effect of this gap may be limited in that, it seems that EU's sanction against Russia, which pursue different sets of objectives that evolved since 2014, are mostly upheld with targeting approach rather than a comprehensive approach[213]. In anticipation of a possible change of approach in these sanctions, some authors advise adopting clauses with more bespoke wording in this sense.

As R. L. Kilpatrick Jr concludes its work on maritime sanctions clauses, which was really helpful in undertaking this work, the «diversity of contractual language in current use» and the «corresponding variation in their judicial interpretation» underlines the need to draft such clauses strategically to ensure a «practical utility»[214]. Rather than focusing on broad notions of "objective" or "subjective" clauses, which as we have seen may affect the way courts will deal with the dispute but whose characterisation as such is not assured, it is clear that parties should focus more on the precision of their contractual language and consider any potential interpretation in this regard.

[213] Eckes, C. (2014, March 25). EU sanctions against Russia – halfhearted or best response? Verfassungsblog. Retrieved November, 2022, from https://verfassungsblog.de/eu-sanctions-against-russia-halfhearted-or-best-response/
[214] Kilpatrick, R.L., (n.159).

5 Conclusion

Global crises, on the extent of the current crisis in Ukraine, have dramatically affected the commercial climate in which charter parties operate. Economic sanctions, rising in sorts and quantity, in scope and goals, have produced a great legal instability. The legal and fiscal environment, nevertheless, are one of the keys to the success of businesses[215], among which maritime operators typically conduct their charters in combination with commercial contracts. As measures of public policy, sanctions questioned many legal systems around the world as to the extent to which private interests are affected by abrupt changes in the framework of mandatory law their contract is evolving in, and what alternatives they rely on in order to contractually anticipate such an event.

Firstly, the contractual parties are above all subjects of law who must comply with the norms set by public authorities. The EU's stringent measures, largely economic constraints, subject numerous maritime sector and allied service operators to sanctions-related risks and require from them a high level of sanctions-risks due diligence in two primary areas.

On one side, in imposing "catch-all" economic measures directed to a third country, the EU adopts a strategy of sanctions that puts the contractual operators in a difficulty to anticipate the latter. A comprehensive interpretation by the CJEU of what is meant by «third country» under Article 215(1) TFEU is an illustration of the sheer intricacy of this regulation, expanding the potentially sanctioned entities or persons where charterparty are already vulnerable due to a tradition of non-transparency. The extent of the measures and their kind may also develop due to the extensive discretion of the EU Council in defining them.

On the other hand, the parties who desire to anticipate the subsequent risks generated by EU sanctions, of which they have been aware since 2014 with reference to the conflict in Ukraine, may find themselves in trouble when it comes to contractually regulate their occurrence. Indeed, it is difficult to define precisely something that has so many facets, and if in its international action against Russia, the EU frames its paradigm on the achievement of broad objectives, in reality the restrictions are not necessarily varying according to them.

Yet, in addition to complying, contractual parties also need to adjust their contractual clauses to adapt to an instable legal framework. However, a certain degree of certainty is essential in the fulfilment of a contract. Indeed, the dominant premise in most legal systems, "pacta sunt servanda", stipulates that a properly concluded contract is binding. Due to sanctions risks,

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215 Jurkevicius, V., & Vaidilaite, G. (2022). Impact of Change of Mandatory Rules for the Enforcement of Con tractual Obligations. Balkan Social Science Review, 19, 25-46, at 26.

parties to a voyage charterparty are additionally exposed to contractual liabilities in the case of non performance. Charterers wishing to protect subsidiary economic interests may benefit from charters with additional flexibility and new provisions. Therefore, it is even more in the interest of shipowners, who bear most of the liability in the course of fulfilment of a voyage charter, to prevent the impacts of prospective limitations.

English common law which governs most charterparties, already offers remedies and possibilities to the parties for contractual management of risks, in order to enforce the original bargain and the objective intention of the parties when the performance is fundamentally affected by a change in conditions. However, current solutions—statutory or contractual—may not meet parties' expectations. Indeed, whether as a question of linguistic barrier as to the phrasing, or because of the ambiguity of judicial interpretation of a specific paragraph, depending on these solutions is not clear and does not deliver confidence.

The sanctions clauses in this sense, have appeared and have been developed in recent years, and appeared as standard terms for particular types of contracts or certain sectors. It allows the parties to have an alternative, may it be to foresee the exposure by allowing for a reallocation of the rights and responsibilities of the parties, or in order to react swiftly to an actual exposure by a mechanism to put an end to the contractual connection. The provisions generally include warranties that neither party will involve any sanctioned body or party in the charterparty or its transactions to avoid disputes.

However, the marine insurance industry's few case laws showed that all sanctions clauses were unequal. The parties should be strategic in deciding the extent of "risk," that is, whether there must be an actual or a mere risk of exposure to trigger the clause, or the greater or less subjective degree of discretion the party assessing the risk exposure must have. The Courts indicated that contractual wording must be carefully chosen, and that judicial interpretation may still vary.

Hence, what R. L. Kilpatrick described in the context of UN sanctions equally applies to the impact of EU restrictions on commercial shipping activities. It is true that those restrictive measures target «maritime practices linked to global security challenges», by putting an «economic pressure in the maritime sector». It imposes as a result «regulatory burdens on shipping industry participants attempting to engage in legitimate trade». On the one hand, the pressure exercised by the risk of sanctions on the economic sector depends not only on the execution by States or International Organisations but also on the extent to which shipping participants will put efforts into complying, Thus «used as a tool of international law enforcement», their duty to ensure a contractual risk management to adapt to such a dynamic regulatory framework puts an additional burden whose efficience in practice is not even ascertained due to a hardly foreseeable judicial interpretation.

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