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JAPAN PACK

First Edition

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01

INTRODUCTION

Introduction

This dedicated Japan Pack is designed to help our commercial partners successfully navigate the choppy waters caused by the UK's decision to exit the European Union. HFW will support you to avoid the pitfalls and make the most of the opportunities that Brexit presents. Commentary from HFW Partners, consultants and Japanese expert opinion will provide clarity around the legal and strategic implications for your business.

We look in detail at the current UK-Japan trading relationship, the prospects following UK Prime Minister Theresa May's recent visit to Japan and speech in Florence, and the likely ramifications of Brexit across our sector groups.

This pack will also provide an overview of some key features of the Japanese legal system and how this affects the enforcement of foreign judgment and arbitral awards. It also considers topical features currently under the spotlight in HFW's sectors such as the recovery of hedging losses and mitigating cyber risks.

As 'Global Britain' steps towards a future outside the EU, the Japan-UK relationship is more important than ever. The Japanese Ambassador has even offered to lend trade negotiators to Britain to ensure adequate transitional arrangements. Despite the Japanese snap election in October 2017, a "business as normal" attitude prevails in UK-Japan relations.

In Theresa May's speech in Florence on 22 September 2017, she requested that the EU allow the UK to retain access to the Single Market on current terms for up to 2 years after Brexit.

The speech has been seen as demonstrating the UK government's desire for constructive dialogue on a future UK-EU relationship – and is grounds for optimism for Japanese companies in the UK which depend on frictionless trade with the other EU Member States.

02

THE CURRENT STATE OF UK-JAPAN TRADE

The current state of UK-Japan trade

Japan is the world's largest net overseas investor with $3.2 trillion of assets invested across the world[1]. After China, it is the EU's second largest trading partner in Asia[2]. Imports from Japan to the EU include electrical machinery, motor vehicles, medical instruments and chemicals[3]. Exports from the EU to Japan account for €58 billion in goods and €28 billion in services[4].

The EU negotiated a Free Trade Agreement (FTA) with Japan alongside a Strategic Partnership Agreement in July 2017. The deal includes 'big tariff cuts, co-operation on standards and regulations and the opening of public procurement markets'. The EU estimates the FTA will save it €1 billion in customs duties per year and boost exports to Japan from more than €80bn to more than €100 billion a year[5].

Currently there is no FTA directly between the UK and Japan. Whilst the UK remains a Member State of the EU, UK trade policy remains a matter of exclusive competence for the EU and Japan has indicated that it is in no hurry to conclude a trade deal with the UK post-Brexit.

Japanese investment into the UK is significant:

- almost 1,000 Japanese companies in the UK provide 140,000 jobs.
- 50% of vehicles manufactured in the UK are made by Japanese manufacturers (SMMT, Nissan).
- there was more than £60 billon of investment into the UK by Japanese companies in 2016[6].
- Mitsui Sumitomo Insurance acquired Amlin, a major insurer, for approximately £3.4 billion in 2016.
- Nikkei acquired the Financial Times for £844 million in 2015.
- SoftBank acquired UK-based ARM Holdings plc, a world-leader in semiconductor intellectual property, for £24 billion shortly after the UK voted to leave the EU.

During a trade trip to Japan in August/September 2017, Theresa May secured a pledge from Japanese Prime Minister Shinzo Abe to:

"work closely together to strengthen our economic partnership after Brexit based on strong participation at the political level."

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[1] http://www.reuters.com/article/japan-economy-assets/japan-foreign-assets-hit-record-3-2-trln-as-top-creditor-nation-idUST9N0NT00H20140526

[2] http://ec.europa.eu/trade/policy/countries-and-regions/countries/japan/index_en.htm

[3] Ibid

[4] Ibid

[5] https://www.ft.com/content/572fef42-6260-11e7-91a7-502f7ee26895

[6] http://www.uk.emb-japan.go.jp/files/000201478.pdf

Japan’s biggest interest is the impact of Brexit on its companies in the UK which are looking for a predictable and orderly exit from the EU for supply chain management and tariff-free access to the single market. Any UK-Japan deal will have to take into account how best to preserve these interests in the light of the EU-Japan FTA and the UK's final post-Brexit trade deal.

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03

CYBER RISK

Cyber Risk

During her trade visit to Japan in August 2017 Theresa May announced that the UK and Japan will work closely together on cyber security, counter-terrorism and defence. May's trade delegation included representatives from a number of British cyber security companies.

The UK and Japan are both members of the UN Security Council and are aligned on geopolitical issues including sanctions against the North Korean regime and joint anti-piracy operations in the Gulf of Aden, both of which have cyber risk implications.

Following a series of high-profile cyber attacks on both government and industry, the Japanese government enacted the *Basic Act on Cyber Security* in 2013 and established the National Centre of Incident Readiness and Strategy for Cyber Security (NISC) to coordinate government responses on cyber security-related issues. It is also currently in the process of finalising a new Cyber Security Strategy.

Following Prime Minister Abe's visit to the UK's National Cyber Security Centre in 2017, the UK government announced that the UK and Japan will cooperate on cyber security ahead of the 2019 Rugby World Cup and 2020 Tokyo Olympics and Paralympics.

From HFW's perspective, cyber attacks are becoming a greater concern across our industry groups. For example, the 2017 cyber attack on Ukraine disrupted operations at Moller-Maersk, a global leader in container shipping and ports. Similarly, Europol has issued warnings that drug traffickers are successfully recruiting hackers to breach IT systems at ports which control the movement and location of containers, with a recorded breach at the port of Antwerp[7].

The British government estimates that cyber attacks cost the UK oil and gas sector around £400 million a year[8]. Particular risks include loss of intellectual property, financial loss, business disruption, reputational loss and legal costs.

Prevention is always better than cure so consider the following:

Commodities

- Include an express term in contracts stating whether a cyber event is a force majeure event and/or state whether a party should have any relief for failing to pay in the event of a cyber event.
- Consider whether to expressly limit liability in relation to a cyber event.

[7] http://www.bbc.co.uk/news/world-europe-24539417

[8] http://www.reuters.com/article/us-cybersecurity-shipping/all-at-sea-global-shipping-fleet-exposed-to-hacking-threat-idUSBREA3M20820140423

Shipping

- Consider whether a cyber event fulfils the conditions of off-hire clauses.
- An anti-technicality clause may allow a charterer more time to pay after a cyber event.
- Most common laytime exception clauses are narrow but may respond to a cyber event affecting the vessel directly, although possibly not if the port or terminal suffers a cyber event.
- Failing to protect a vessel against cyber attacks could be a failure to exercise due diligence to make the vessel seaworthy, thus breaching the Hague/Hague-Visby Rules and could lead to a claim under a bill of lading.
- At present it is unclear whether a cyber event would render a port unsafe. HFW will monitor future developments.

Insurance

- Consider taking out insurance: 60 companies in the UK and 70 in the USA offer specific cyber insurance policies.
- Standalone cyber insurance policies are unlikely to insure against property damage caused as a result of a malicious cyber event.
- Most standard form property and terrorism insurances are unlikely to insure (and can expressly exclude) loss due to malicious cyber events.
- A very common exclusion in the marine and other specialists markets is the CL380 endorsement (or equivalent) known as the Institute Cyber Attack Exclusion Clause.

For further information on the above please see the HFW Cyber Pack.

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04

AEROSPACE

Aerospace – Sue Barham, Consultant, HFW, London

A transition to wholly UK national safety regulatory oversight outside the European Aviation Safety Agency (EASA) system could impact Japanese airlines and other organisations. Japanese airlines and aerospace companies will see little immediate impact on their operations in the UK until after the proposed transition period.

The EASA regulations:

The UK's aerospace industry is overwhelmingly subject to the EASA framework of safety regulation. Licensing and approvals of airlines, manufacturers, maintenance organisations, flight crew, air traffic controllers, aerodromes and others are predominantly under the aegis of EASA.

A 'no deal' scenario would have the UK outside of the EASA system and require the introduction of a UK national aviation safety regulation, with licences granted at national level. This prospect could damage the production and regulatory approval of UK aerospace products and organisations as it is unclear whether such licensing would be recognised in remaining EU member states.

Industry organisations are advocating continued close ties between the UK and EASA and a continuation of the application of EASA regulation post-Brexit precisely in order to avoid consequences of that nature.

Traffic rights: Japanese airlines which operate code share routes from the UK to EU destinations, or from EU airports to UK destinations, must monitor the Brexit discussions.

A 'no deal' scenario will mean that EU and UK airlines will lose their 'open skies' entitlement to operate flights between the UK and the remaining EU Member States. In large part, traffic rights have a limited impact for Japanese carriers. Japan has bilateral air services agreements with the UK and with other EU Member States which provide for traffic rights for Japanese airlines to operate flights to each country with whom a bilateral ASA exists. Those agreements will continue as before following Brexit.

It is possible the UK may need to seek agreement from Japan to amend the current UK-Japan bilateral ASA because it allows the UK Government to grant traffic rights to operate from the UK to Japan to any EU airline with a base in the UK. Post-Brexit, the UK could seek to restrict those rights to UK carriers only, although our current understanding is that the UK may wish to retain flexibility to allow traffic rights to EU or EEA airlines in some instances. In any event, such amendment will not affect the rights of Japanese airlines flying to the UK.

Traffic rights for UK/EU airlines to/from the EU are in jeopardy post-Brexit until an agreement is in place to address their continuation. Japanese carriers operating flights to the UK and onwards to an EU destination via code share arrangements with UK airlines, or operating flights from Japan to an EU destination and onwards to the UK via a code share arrangement with an EU airline therefore stand to be affected unless there is an agreement which preserves the entitlement of their UK/EU code share partners to continue to operate flights between the UK and the EU. A solution is considered highly likely for the aviation industry which will allow operations to continue and there are plenty of industry voices urging speedy progress so that airlines can properly plan their future operations.

Finally, with the impending Repeal Bill which is intended to have the effect of enacting EU laws into UK law, Japanese airlines and aerospace companies will see little immediate impact on their operations in the UK. Over time it is possible we may see some adjustments to certain aspects of EU regulation, and the proposed cessation of the influence of the judgments of the Court of Justice of the European Union (CJEU) could also have an impact on how the applicable laws are applied. Japanese airlines will, for example, be only too familiar with EU air passenger rights regulation and with the very expansive manner in which that has been interpreted and applied by the CJEU. Over time we may see some divergence between the English courts' interpretation of such legislation compared with that of the CJEU; however, any such developments are a long way down the line and will, of course, be very much influenced by the final outcome of discussions as to what, if any, continuing influence the CJEU and its jurisprudence will have in the UK.

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ENFORCING ARBITRAL AWARDS AND JUDGMENTS POST-BREXIT

Enforcing Arbitral Awards and Judgments Post-Brexit – Andrew Johnstone, Partner, HFW, Hong Kong

Aim for final determination of existing litigation as soon as possible and consider arbitration for new disputes – enforcement of arbitration awards will not be affected as the UK and all other EU member states are signatories to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Judgments: the current situation

Currently, the *Recast Brussels Regulation* (the Regulation) provides for the reciprocal recognition and enforcement of judgments between EU Member States. Under the Regulation an English judgment can be registered in another Member State and then enforced as if it were a judgment of that country's own courts and vice versa.

The default position regarding jurisdiction (subject to specific rules concerning particular types of proceedings e.g. certain insolvency and intellectual property matters), is that a defendant should be sued in the Member State where it is domiciled. The Regulation also permits parties to choose which Member State's courts will have jurisdiction over their dispute. This gives parties a wide discretion to decide for themselves which court will oversee proceedings.

Judgments: post-Brexit

After Brexit the Regulation will cease to apply to the UK. English judgments will therefore no longer be automatically registrable and enforceable in other EU Member States. Jurisdiction agreements which would previously have fallen under this regime will also cease to have its protection. There are three broad options post-Brexit:

1. A bespoke UK-EU bilateral arrangement governing enforcement and jurisdiction;
2. UK accession to existing international conventions governing enforcement and jurisdiction such as the *Hague Convention on Choice of Court Agreements* and the *Lugano Convention* (which is itself very similar to the *Brussels Regulation*); or
3. Reliance on the domestic law of each Member State concerning enforcement and jurisdiction. In England, this would mean recourse to the well-developed common law framework. In turn, parties seeking to enforce a UK judgment overseas, or to enforce an English jurisdiction clause, would have to rely on the national law of the Member State in which enforcement is sought.

Neither the UK nor the EU has given much indication on how they intend to approach this issue. It is unlikely that much progress will be made until the 'Brexit divorce bill' issue (how much the UK should pay the EU on leaving)is resolved.

Arbitration

Arbitration is likely to offer a relatively 'risk-free' option to parties who still wish to benefit from the rights and remedies available to them under English law.

There is no overarching EU framework dealing with arbitration, which is explicitly excluded from the Regulation's ambit. The international recognition and enforcement of arbitration awards is governed by the *New York Convention* (the Convention). The UK, in common with the remaining 27 EU Member States, is a signatory to the Convention, which will continue to apply post-Brexit in any event.

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06

INSURANCE

Insurance – Richard Spiller, Partner, HFW, London

Given the uncertainty around passporting rights and the possible need to set up a subsidiary within the post-Brexit EU, businesses operating in the insurance sector would be wise to start making plans now.

(Re)insurers and intermediaries which are authorised to carry on insurance activities in the UK can currently "passport" this authorisation into other EEA states to sell (re)insurance cross border or through a branch, and vice versa. Unless a transitional period is agreed as part of the UK's exit deal, passporting between the UK and other EEA states will cease upon Brexit, so (re)insurers and intermediaries which currently passport out of and into the UK to and from other EEA states (i.e. the remaining 27 EU member states plus Norway, Iceland and Liechtenstein) will need to implement contingency plans:

1. UK insurers which passport into the EEA will, practically, need to establish a subsidiary in another EEA state, as the alternative is to apply for each EEA branch to be authorised separately.
2. EEA insurers which passport into the UK should apply for a UK branch authorisation of the insurer. It is not yet possible to make an application.
3. UK reinsurers and EEA reinsurers will both be able to continue writing reinsurance on a cross-border services basis (but not on a branch basis) without further authorisation under the General Agreement on Trade in Services rules (GATS).
4. Intermediaries which currently passport into the European Economic Area (EEA) from the UK or into the UK from the EEA will also need to apply for authorisation of an EEA subsidiary or of a UK branch to enable business to carry on throughout the EEA and the UK.

Lloyd's syndicates will be in a more favourable position, as Lloyd's has taken steps (including authorisation of a Lloyd's subsidiary in Belgium) to ensure that its syndicates can continue writing business in the EEA following Brexit.

In some cases, Japan's Solvency II equivalence may provide sufficient access to the EEA following Brexit. Otherwise preparation for Brexit needs to begin very soon. Applications for authorisation will probably need to be made in the first quarter of 2018 to allow regulators sufficient time to grant approval in advance of Brexit.

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07

EU, COMPETITION AND TRADE REGULATION

EU, Competition and Trade Regulation – Anthony Woolich, Partner, HFW, London

Competition: no substantive changes to UK antitrust law are expected as a result of Brexit.

In the area of antitrust (the prohibitions on anti-competitive agreements and abuse of a dominant position), UK law is largely aligned with that of the EU. However, a significant effect of Brexit will be that companies which may have previously been investigated by the European Commission (EC) only, in respect of activity that has an effect on both the UK market and the markets of other EU Member States, could face parallel investigations by both the EC and the UK's Competition and Markets Authority (CMA). This could mean that businesses under investigation would have to devote more financial and human resources in responding to investigations, and may also be liable to pay separate fines.

Mergers may be affected in a similar manner. Currently, mergers which meet the jurisdictional thresholds set out at Article 1 of the *EU Merger Regulation* would generally only be reviewed by the European Commission, even if the UK's jurisdictional thresholds, set out at Section 23 of the *Enterprise Act 2002*, are also met. Following Brexit, the CMA will have jurisdiction to review such mergers in parallel with the EU (although prior merger control clearance is not mandatory under the UK regime). Whilst multi-jurisdictional filings are increasingly common, the requirement to make a filing in both the UK and the EU will increase costs for businesses and could lead to potentially inconsistent decisions. It could also lead to delays, especially if the CMA is required to adapt to a larger case load post-Brexit.

Trade: following Brexit - after (or potentially even within) any transitional period which may be negotiated - the UK will be in a position to formulate its own trade policy.

The UK's trade policy is currently controlled by the EU as part of the EU's *Common Commercial Policy*. This means for example:

- The UK will not be required to apply the EU's common external tariff to goods arriving from outside the EU, and will be able to negotiate its own free trade agreements with third countries, including Japan.
- There is no guarantee that trade between the UK and the EU will take place on a tariff-free basis. In addition, it is likely that some form of customs controls for goods travelling between the UK and EU would have to be reintroduced. Japanese companies which regularly export goods and components between the UK and the EU should plan ahead in order to reduce any business disruption. Nissan is an

example of a Japanese manufacturer which since the Brexit referendum has reconfirmed its commitment to the UK following discussions with the UK Government.

- There is no guarantee that the UK will continue to benefit from free trade agreements concluded by the EU with third countries before the UK's withdrawal. Therefore, if the terms of the Economic Partnership Agreement between Japan and the EU are concluded before the UK withdraws from the EU, there is no guarantee that trade between Japan and the UK will benefit from its terms following the UK's withdrawal.
- Service providers authorised in the UK which currently benefit from passporting rights may have to make alternative arrangements to safeguard their ability to supply services throughout the EU.

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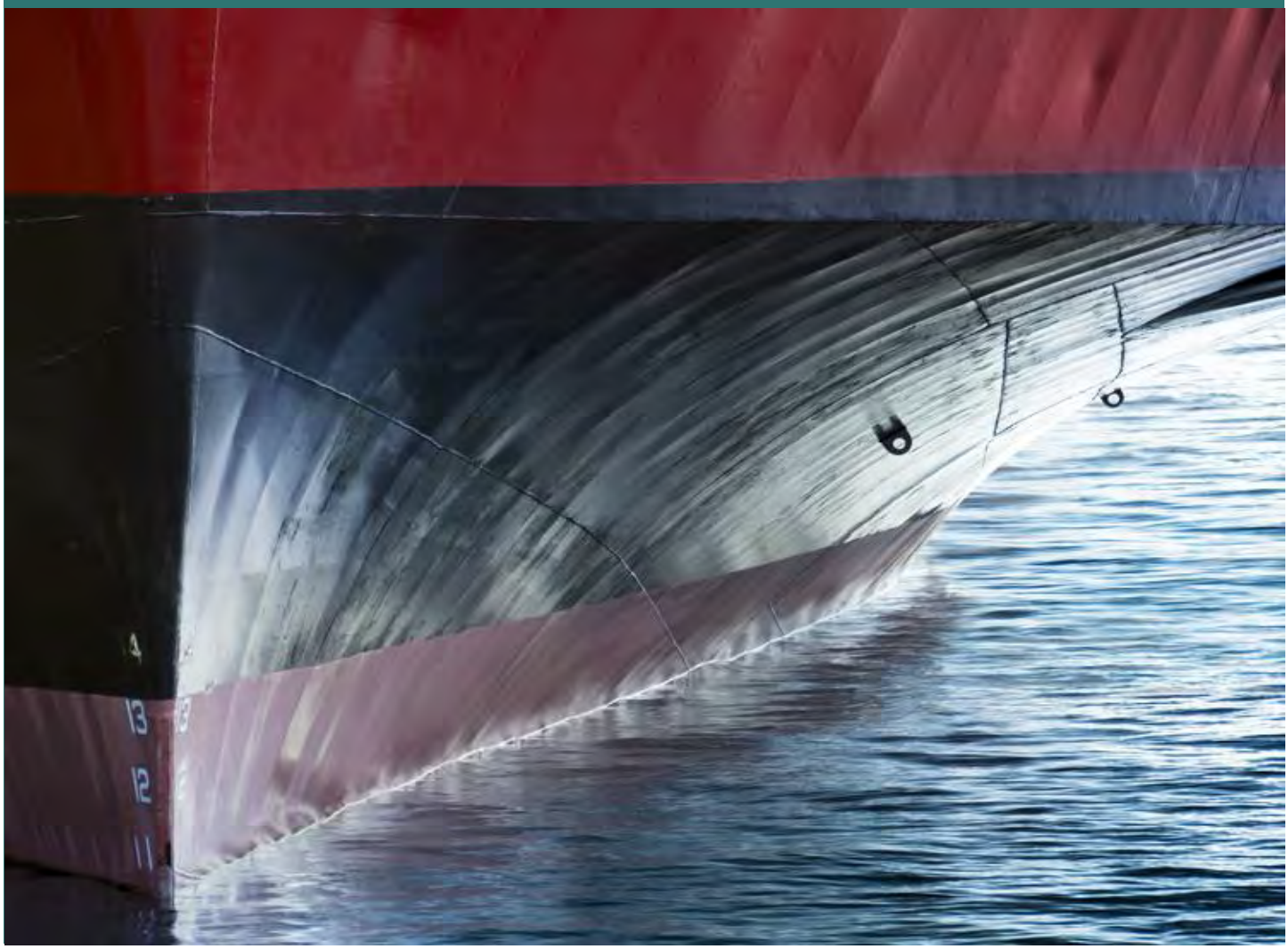
08

SHIPPING



Shipping – Jean Koh, Partner, HFW, London

Will Japan need to find a new gateway to Europe for shipping? The UK-Japan trade relationship blossomed due to the UK's tariff-free access to Europe and will require near frictionless trade to continue its development.

It is unknown whether the UK will retain tariff-free access to the EU. If greater legislative independence is prioritised in negotiations, then access to the free market may be limited in any bespoke arrangement the UK and EU decide upon. Japanese shippers such as Nippon Yusen Kaisha (NYK), Mitsui OSK Lines (MOL) and K Line ship 700,000 UK-manufactured cars to the continent each year. Any interruption to the smooth supply chains currently in place will lead to a reduction in vehicle carrying traffic between the UK and EU.

However, continued frictionless trade post-Brexit is a possibility. Port of Dover chief executive Tim Waggott said the system could be replicated with a 'passport for goods' that allows pre-clearance away from ports. The technology for this already exists[9]. Ideas such as creating a free trade zone around British ports have also been proposed to keep 'Global Britain' in ship shape.

In the short term, Japanese businesses will benefit from the depreciation in sterling, as UK-based products and services become more affordable to foreign investors. Low sterling is currently a boon for British shipowners repatriating funds normally received in US dollars into British sterling, or otherwise with British sterling expenditure.

Any relaxation of regulations in related to goods imported to the UK for domestic consumption may mitigate any extra burdens on the shipping industry. The EU has 'gold plated' the *Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships*, which complicates the recycling of ships. If the UK incorporates the less onerous Hong Kong Convention without the EU 'gold plating', shippers may get a competitive advantage.

While Britain is part of the EU it has to abide by the rules governing State Aid. This means that the UK government cannot intervene to support struggling industries by giving subsidies, interest or tax reliefs that may distort competition and/or affect trade in the EU. If post-Brexit Britain is not a member of the Single Market, the government may have greater flexibility to support the shipping sector through changes in tonnage tax and corporation tax. It may also positively affect the offshore industry.

[9] https://lloydslist.maritimeintelligence.informa.com/LL111344/Put-plans-in-place-for-a-nodeal-Brexit-urges-Dover-MP

The UK Government has been consistent in declaring the importance of a thriving trade relationship with Japan, as evidenced by the conciliatory tone of Theresa May's Florence speech. The government has sought to reassure UK-based corporations that the UK market will remain competitive.

Whilst there is no guarantee that the UK will benefit from the terms of Japan's Free Trade Agreement with the EU, any future UK-Japan deal is likely to prioritise smooth trade between Japanese exporters and EU Member States.

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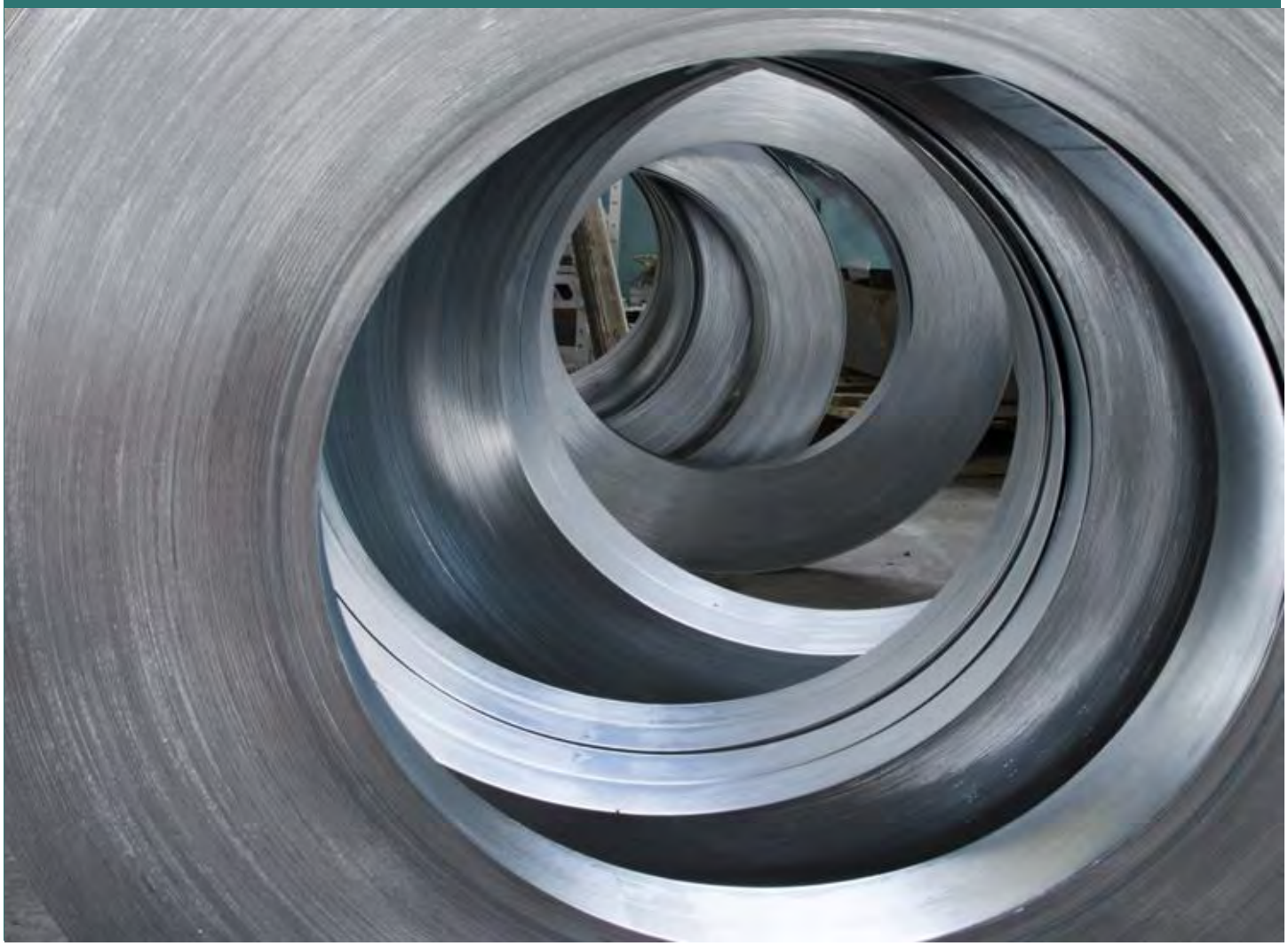
09

COMMODITIES - THE RECOVERABILITY OF HEDGING LOSSES



Commodities and the recoverability of hedging losses – Brian Perrott, HFW, London

Markets may be uncertain, but your rights and liabilities regarding hedging instruments need not be. The court takes hedging losses and gains into account in disputes involving sophisticated commodities traders but is unlikely to do so where the party in breach is a shipowner, charterer or cargo interest. The key issues to note are causation, remoteness and foreseeability.

Ever since the first modern futures contracts were placed at Dojima Rice Exchange in the 1700s, commodities traders have been looking for ways to limit their exposure to volatile markets and supply-side issues. Futures markets have expanded far beyond their agricultural origins to encompass contracts for hedging the values of oil, metals, minerals, freight and even carbon credits. 21st century English common law is at the vanguard of creating precedents regarding hedging instruments in commodities disputes. Other common law jurisdictions such as Hong Kong and Singapore have taken note[10].

Since the turn of the Millennium the English courts have been increasingly willing to consider the effect of hedging losses and gains in the assessment of damages[11]. The issues at play are causation, remoteness and foreseeability. Firstly, one party's breach of contract must be the direct cause of the loss that the counterparty suffers under the hedging instrument on a 'like for like' basis[12]. Secondly, any loss or gain from using the hedging instrument must have been foreseeable by the party in breach. Thirdly, thus far, the courts have only found hedging to be foreseeable between traders in the same commodities trades, but never between shipowners and charterers or cargo interests.

In the oil and metal trades, it is common practice for traders to hedge in order to protect against volatile markets. In a dispute between traders, the courts expect contracting parties to be aware of the likelihood that the counterparty will hedge their position in the event of late or non-delivery. The courts aim to put the wronged party in the position it would have been in had the contract been performed correctly. The judge will take into account the wronged party's net position, which will naturally include the cost of hedging instruments as direct losses rather than consequential losses: *'the costs of the hedging devices*

[10] *Prestige Marine Services Pte Ltd v Marubeni International Petroleum (S) Pte Ltd* [2011] SGHC 270

[11] *Addax Ltd. v Arcadia* [2000] 1 Lloyd's Rep. 493

[12] *Vitol SA v Beta Renowable Group SA* [2017] EWHC 1734 (Comm)

are an integral part of the calculation of the net position, and if the net position is a directly relevant loss, so must the hedging costs be so regarded"[13].

It follows that any hedging gains will be taken into account as well. So if the price of oil suddenly increases after one party breaches the contract, and the trader's hedge improves its net position, the quantum of any damages will be reduced by the hedging gain. If the price of oil rises so abruptly that the trader makes a profit from its hedging instrument (or profits by selling the oil to a third party for a higher price) the trader will be unable to claim damages under the original contract because it has not suffered any loss[14].

It is understandable that shipowners cannot be expected to consider the trading operations of the owners of the numerous cargoes they transport around the globe. Any hedging losses or gains therefore may be too remote and are unlikely to be taken into account if the party in breach is a shipowner[15]. The law regarding tanker owners is still uncertain as it has yet to be tested in the English courts. We may question whether a tanker owner could plead ignorance of hedging practices. If a tanker owner is familiar with how oil trading works, or is aware that its counterparty is likely to hedge, then hedging losses or gains are less likely to be too remote.

There is no substitute for clarity. To avoid any uncertainty about whether hedging losses or gains will be taken into account, it is advisable to include an express clause in the contract stipulating that any hedging losses or gains are recoverable; or an express clause that excludes them entirely. In 2017 the courts confirmed that the *contra proferentum* rule, which states that any ambiguous clauses will be interpreted against the interests of the party that requested the inclusion of the clause, has very limited application in commercial contracts. Recent Supreme Court judgments demonstrate that judges may refuse to depart from the objective meaning of contractual provisions even if this works out 'disastrously' for one of the parties[16]. The courts will interpret any exclusion clause literally as the agreed expression of both parties' wishes, especially if they are of equal sophistication and bargaining power[17].

[13] *Addax Ltd. v Arcadia* [2000] 1 Lloyd's Rep. 493
[14] *Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 374 (Comm)
[15] *Mediterranean Shipping Company SA v Trafigura Beheer BV - "MSC Amsterdam"* [2007] EWCA Civ 794
[16] *Arnold v Britton & Ors* [2015] UKSC 36
[17] *Persimmon Homes Ltd and others v Ove Arup & Partners Ltd and another* [2017] EWCA Civ 373)

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10

THE RECOVERABILITY OF HEDGING LOSSES IN JAPAN

The recoverability of hedging losses in Japan – Makoto Hiratsuka, Senior Partner, Hiratsuka & Co., Tokyo

Under Japanese law, damages for breach of contract must arise ordinarily from the breach and/or under special circumstances where such circumstances were foreseeable (Article 416 of the Civil Code). This allows for damages claims which have 'reasonable causation' with the breach, where reasonableness is determined by foreseeability.

There is one publicised Japanese court precedent concerning hedging loss, where a bank's claim for hedging loss against a consumer (who had breached a Coupon Swap Contract) was denied- *The Asahi Bank, Limited v. (K. Hiroi)*, Tokyo Court of Appeal Judgment of 3 March 1997.

This was a first instance judgment which denied the hedging loss claim for the following reasons:

(i) the Hedging Contract was entered into by the Bank by its own initiative without relation to the consumer;

(ii) a consumer cannot be expected to know that it is customary amongst financial institutions to hedge loss; and

(iii) there was no express provision within the Coupon Swap Contract to allow for recovery of hedging loss.

At second instance this judgment was upheld, however reference was made only to the first of the reasons outlined above.

Since this was a case which involved a consumer and a bank, it is uncertain how the Japanese courts will react to similar cases involving businesses-to-business transactions. However, in view of the court's ruling, when drafting contracts clients are encouraged to:

(a) include an express term regarding the recoverability of hedging losses, and/or

(b) include a contractual representation regarding the parties' intention to hedge risks in order to improve the recoverability of hedging loss under Japanese law.

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11

NOTABLE FEATURES OF THE JAPANESE LEGAL SYSTEM

Notable features of the Japanese legal system – Makoto Hiratsuka, Senior Partner, Hiratsuka & Co., Tokyo

This section is by way of commentary only and is not intended to constitute legal advice. Please contact local Japanese counsel before seeking to enforce a judgment or award against a Japan-domiciled client.

Sovereign immunity

In 2009 Japan enacted the *Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc. (Law No. 24 of 2009)*. This follows the *2004 UN Convention on Jurisdictional Immunities of States and Their Property*, which was signed and ratified by Japan.

Japanese law adopts a 'restrictive theory of sovereign immunity' whereby a foreign state is subject to a Japanese court's jurisdiction only if the matter relates to the state's commercial acts with a private entity (*de jure gestionis*). The public acts of foreign governments (*de jure imperii*) are immune from the Japanese court's jurisdiction[18].

A foreign state or state body will be subject to the jurisdiction of Japanese courts if it gives consent to be so.

Witness evidence

A witness in Japan is able to travel to a foreign court to give testimony. However, in cases where this is not possible, evidence can be taken from a witness based in Japan for use in foreign proceedings, provided it does not infringe Japan's sovereignty. Japan is not a party to the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970*, but is a signatory of the *Hague Convention on Civil Procedure*.

There are three methods of obtaining evidence from a witness in Japan for use in foreign proceedings:

- Request that a Japanese court, through the Ministry of Foreign Affairs, obtain evidence under the *Hague Convention on Civil Procedure* (the Convention), for example, through letters rogatory. This method can only be used if the foreign country is party to the Convention. Under the Convention, the District Court that has jurisdiction over a witness obtains evidence from the witness.
- Request that a Japanese court obtain evidence under a bilateral agreement or with approval from the Japanese government, secured through diplomatic channels, on a case-by-case basis. The District Court that has jurisdiction over a witness obtains evidence from the witness.

[18] http://globalarbitrationreview.com/jurisdiction/1000216/japan

- Obtain evidence at the foreign country's consulate in Japan under a bilateral agreement. For example, under the *US-Japan Consular Convention*, a deposition can be taken from a willing witness for use by a court in the US, if the deposition is both:
  - presided over by a US consular officer under a court order or commission; and
  - conducted on the US consular premises.

Recognition and enforcement of foreign judgments

Japan is a contracting party to the *International Convention on Civil Liability for Oil Pollution Damage 1969* (the ICCLOPD) and the *Hague Civil Procedure Convention*. Compulsory enforcement of judgments can be carried out by providing the relevant documents under Article 22 of the *Civil Execution Act*.

When the ICCLOPD does not apply, a judgment rendered by a foreign court is valid only if it meets all of the following requirements (Article 118, *Civil Procedural Act*):

- The foreign court's jurisdiction is recognised under laws and regulations, conventions or treaties.
- The defendant has been served (excluding service by publication or any other similar service) with the requisite summons or order for the commencement of litigation, or has appeared without being served.
- The contents of the judgment and the litigation proceedings are not contrary to public policy in Japan.
- A guarantee of reciprocity is in place.

To enforce a foreign judgment in Japan, the successful party must obtain an enforcement judgment in the court in Japan which has jurisdiction over the unsuccessful party or its assets. The enforcement judgment is granted if the foreign judgment is final and satisfies the above four requirements (Article 22(6) and Article 24, *Civil Execution Act*).

One Tokyo District Court case established reciprocity between Japan and England and Wales (*HanreiJihou 1509-101*, 31 Jan 1994). This judgment is not an established precedent, but the judgments of courts in England and Wales are likely to be enforceable, provided the three other requirements above are satisfied.

Applications for both an enforcement judgment and enforcement proceedings are made with notice and will usually take between six months to a year to reach a resolution. Applicants must provide security for costs. The limitation period is subject to the provisions of the law applicable to the obligation of the judgment debtor in the foreign judgment.

A creditor can apply for interim measures from the court before or while a court considers fulfilment of the requirements for recognition of a foreign judgment. If an enforcement judgment is ordered with a declaration for provisional enforcement, the declaration is enforceable and functions as an interim

measure. However, a foreign judgment with a declaration for provisional enforcement is not enforceable under Japanese law because the declaration itself is not a final and binding judgment.

Recognition and enforcement of foreign arbitral awards

Japan is a signatory to the *New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention) and the *Geneva Convention on the Execution of Foreign Arbitral Awards* (the Geneva Convention).

The form of the arbitral award in Japan is the same as that provided under Article 31 of the *UNCITRAL Model Arbitration Law*.

Monetary awards are enforceable. A foreign currency is acceptable but the awarded party can choose for the award to be issued in Japanese Yen applying the applicable exchange rate in place at the time of the application or at the end of the enforcement decision proceedings.

Awards containing injunctions ordering or prohibiting the performance of any action will be enforceable. An award ordering specific performance will be enforceable if the successful party or a third party is ordered to perform the obligation in substitution of the unsuccessful party's performance. The losing party will be ordered to pay the costs (Article 171, *Civil Execution Law*).

The decision of a Japanese court in preliminary/provisional proceedings on an arbitration dispute will be enforceable. Therefore, court proceedings are typically used for preliminary or provisional attachments or injunctions.

The Japanese Ministry of Justice is considering introducing a system under which the creditor can seize the debtor's bank account by specifying the debtor's bank alone.

For the avoidance of doubt, the above comments do not amount to legal advice and represent commentary only. Should you require legal advice please feel free to contact your usual HFW contact who (subject to conflicts) will be able to assist.

HFW

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