Legal Aspects of Shipping - Basics (Part - 2)

- Jagmeet Makkar

Legal Aspects of Shipping Series: The purpose of this series is to share basic knowledge about the contract law, shipping disputes and prevention with the Shipping Professionals, both onboard and ashore.

FROM LAST ARTICLE : if the intention of the party making a statement is not to enter into a contract and such a statement is only an advertisement or making one's position known, this should be legally clear enough to mean such. These lesser, non-binding statements should be clearly distinguished. One such concept is an "invitation to treat". Accepting an invitation to treat does not result in a binding contract and it is not enforceable. An offer must be "capable of acceptance" and "there should be an intention to contract on clear terms". These are the yardsticks to distinguish an "offer" from the lesser non-binding statements.

THIS MONTH WE WILL DISCUSS RELATING TO FOLLOWING:

1. Advertisement in a news paper that encourages the public to try its product – a mere puff.
2. Unilateral contract through advertisement and tenders.
3. Display of goods in the shops.
4. Auctions

ADVERTISEMENTS - INVITATIONS TO TREAT/MERE PUFF

Partridge V Crittenden (1968):

A man was charged with the offence of 'offering wild birds for sale', which was in contravention to the ***Protection of Birds Act 1954,*** when a notice appeared in a periodical for bird lovers, namely Cage and Aviary Birds. The court held that the advertisement was merely an invitation to treat and not an 'offer' for sale.

Further Details:

An advertisement was placed by a man in the "Cage and Aviary Birds" for the sale of Bramble Finch Hens. As per the ***Protection of Birds Act 1954***, it is an offence to sell Bramble Finch Hens. It was claimed by this man that the advertisement was a mere invitation to treat and was not an offer. A Classified Advertisement was held to be "usually" considered an invitation to treat as against an offer and the seller was not obliged to sell. Again the rationale is very interesting in that if every one accepted to buy, the man would need an unlimited supply of the advertised goods. It would be interesting to contrast this ruling with that in the case of the ***Carlill v Carbolic Smoke Ball Co. (1893)*** case.

It is to be noted that the court will consider objectively all the facts to try to clearly establish the intention of the parties. Thus, it is very important to note that advertisements will not be an invitation to treat in all the circumstances.

Carlill v Carbolic Smoke Ball Co. (CSBC) (1893):

CSBC advertised in a news paper "£100 reward will be paid by Carlill Smoke Ball Co. to any person who contracts the increasing epidemic influenza, colds or any disease caused by taking cold after having used the ball three times daily for two weeks according to printed directions supplied with each ball. £1000 is deposited with Alliance Bank, Regent street, showing our sincerity in the matter".

Mrs. Carlill bought and used the smoke ball but still caught influenza. She claimed £100. CSBC argued that the advertisement was not an offer and refused to pay. Reasoning given was that the advertisement was too vague and a mere puff. However, the court disagreed with CSBC and held that in the given circumstances, it was a genuine offer. The willingness to enter into the contract was clearly evidenced by the deposit of £1000 in the Alliance Bank. Court held that based on this sincerity, a reasonable person

would take the promise of £100 reward seriously.

This brings us to another interesting topic of "types of contracts", e.g. collateral, bilateral and unilateral contracts. The Carlill v Carbolic Smoke Ball Co. contract was held to be a "unilateral" contract. While Mrs. Carlill was not bound to accept that offer but decided to do so by purchase of the ball and using it in response to the advertisement. By this acceptance by Mrs. Carlill, the CSBC was bound by its promise of a reward. A very interesting case which is cited more often that any I have known to the beginners.

Another famous case of a unilateral contract is that of ***Harvela Investments v Royal Trust Co of Canada (1985)*** where it was held that a declaration "we bind ourselves to accept the highest bidder" was clearly an offer for a unilateral contract. Contrast this to the ***Spencer v Harding case (1870)*** where the court held that inviting tenders is not an offer. It is the submitting of the tender that is the act of offer with intention to enter into a legally binding contract. Accepting or rejecting of the offer then depends on the party inviting the tender and they are free to do what ever they decide without being liable to give any explanation (unless any evidence of unilateral contract is proven).

Fisher V Bell (1961):

Bell had displayed a flick knife in his shop window. Can he be charged with 'offering for sale' a flick knife, contrary to the Restriction of Offensive Weapons Act 1959? It was held that Bell was not guilty of an offence as the display of the flick knife was not an offer, but an invitation to treat.

Does this mean that anything displayed in a shop window with a price tag is not an offer but invitation to treat? The answer is helped by the above case in that it is an "invitation to treat" i.e. a lesser non-binding statement.

Pharmaceutical Society of Great Britain (PSGB) v Boots Cash Chemist (BCC) (1953) (CA):

BCC operated a self-service shop where it sold certain drugs. Some of these drugs were specified under the ***Pharmacy and Poison Act 1933,*** which required their sale to take place under the 'supervision' of a qualified pharmacist.

BCC employed a qualified pharmacist who was situated near the cash counters. PSGB argued that the sale of the drugs took place when the customers took the goods from the shelves and put them in the baskets provided, and as this was away from the tills, it was 'unsupervised' contrary to the 1933 Act.

The Court of Appeal (CA) disagreed and held that the display of goods on the shelves was an invitation to treat. The offer was only made when the customer takes the goods from the shelves and presents the goods at the cash counter. The offer could then be accepted or rejected, under the supervision of the pharmacist, thus fulfilling the requirements of PSGB. This is a very interesting case and the court decision was based on a solid rationale as we will see hereunder.

RATIONALE – GOODS DISPLAYED IN THE WINDOWS OF A SHOP OR IN A SHOPPING MALL:

Just think about the practical scenario – if a binding contract was made as soon as you put an item into your shopping cart, it will take away your right to change your decision to keep it back and pick up an alternative or simply change your mind not to buy!

It is to be noted that the court will consider objectively all the facts to try to clearly establish the intention of the parties.

AUCTIONS:

Harris v Nickerson (1873):

An advertisement that an auction would be held at a particular time and place is not an offer to hold the auction. Harris expended time and money in travelling to the place of auction which was cancelled. He claimed expenses but his action failed as it was held that the advertisement was not an offer which could be accepted by travelling to the place. The advertisement was only a declaration of an intention and was not an offer with expression of willingness to contract.

Warlow v Harrison (1859):

While not a ratio decidendi (a ruling or decision), as obiter dicta (an observation) it was stated that where an auction sale is declared "without any reserve", the auctioneer is bound to sell to the highest bidder.

Next month we will discuss a few cases about communication of an offer and its acceptance.

Important: Above well-known cases have been collected from various sources and explained in a very simplified way for understanding of the readers and are discussed above strictly for educational purpose.

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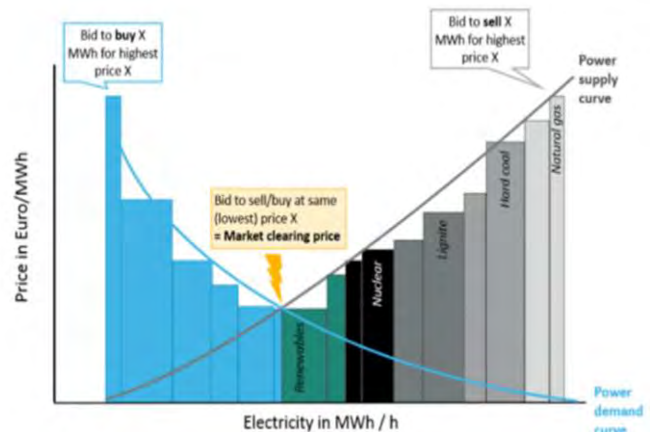
The Rationale for Oil Prices Turning Negative

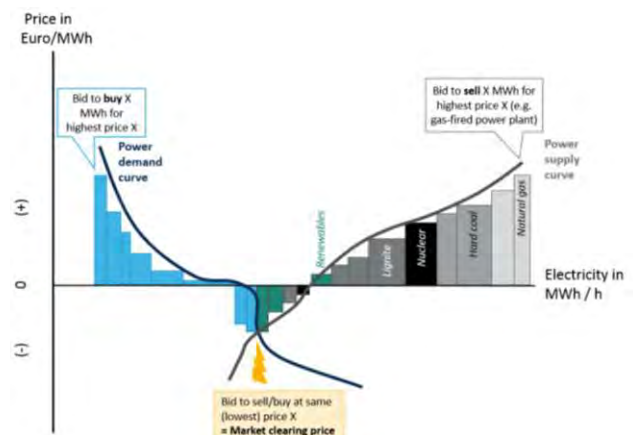
- Jagmeet Makkar

On the 20th April 2020, the crude oil prices for May went into negative which means the seller, theoretically, would pay you to buy his crude oil. What an interesting world would that be for retail buyers where you go to fill up your petrol in the car and instead of paying, you return with a brown envelope full of cash (after filling up, of course)!

Well, even though the May closing prices went into negative, the impact on the price of retail petroleum product was negligible. Why does this phenomenon of negative pricing occur? In order to understand this, let us first take the example of negative electricity or power prices, especially in a world, where we want to see a transition to green or renewable energy.

We know that electricity cannot be stored in large amount, while some solutions to store energy by way of pumped-up hydro, heating brine or storing in batteries is considered as 'work in progress'. Negative electrical pricing on ***an electricity exchange*** is an outcome of high and inflexible power generation or supply at a time when the demand for electricity is low. For example, on a public holiday during high renewable power supply (lots of wind and sun), power producers offer their electricity for negative prices on the exchange. In this event, the market clearing price can be set





Source: https://www.cleanenergywire.org/factsheets/why-power-prices-turn-negative

below zero (see Figures).

Just as electricity (or power) is traded on an exchange, oil (crude as well as its products) is also traded on various exchanges. There are some basic differences though in the trading of power and oil. What is common is that the buyers and the sellers take forward positions. For simplicity, suppose I, as an oil trader, need 100,000 barrels of oil in July to supply to my customer (who is a small refinery). I am afraid that the price of crude oil may go up. So, I will buy on the exchange, 100,000 barrels of crude oil for forward delivery in July. The settlement will take place for this position in June. Two things can happen when the time comes to settle this position that I have taken:

· The buyer of my crude oil (i.e. my customer/refinery), is unable to buy this crude oil from me (due to reduced demand resulting from Covid-19).

· I myself may not have the storage capacity to keep this 100,000 barrels of crude oil when it is delivered to me.

So, what do I do?

I will either need to settle the position with the seller of the forward position, if possible or find another buyer of crude oil who has spare booked storage space.

In brief, I need to get rid of my forward position or find ways to get rid of the crude oil (I had agreed to buy), even if I have to pay to do so!

Let us now see what happened on 20th April 2020 when oil prices went into negative territory for May delivery before bouncing back for June delivery.

Source: https://oilprice.com/oil-price-charts/45

1. Demand side: Due to Covid-19, 30-35% of global demand for oil vanished (for information, before Covid-19, global crude oil demand was about 100 million barrels per day). It means demand for about 30-35 million barrels per day was not there (Reason: Lessened economic activities).

2. Supply side: While Saudi Arabia and Russia had come to an agreement in early April to reduce the oil production, this reduction had not yet taken place in third week of April. It should be noted that even after agreed reduction, world was awash with excess crude oil supply in the range of 20-28 million barrels per day! In short, too much supply in the face of highly reduced demand.

3. Any such imbalance causes downward pressure on the prices. Users and buyers of oil started to buy this cheap oil and started to store it on land as well as by afloat means (ships/VLCCs etc.). This resulted in large tanker daily hire rates to go up as these large tankers were (and are) being used for storing oil.

4. As earlier mentioned, the people who had futures contracts for crude oil for delivery in May and did not have storage space tried to close positions for negative crude oil prices.

   These May futures contracts expired on Tuesday, 21st April, thus pressure on the sellers was on Monday, the 20th April.

5. The oil price that went negative for two days was West Texas Intermediate (WTI: Benchmark for US Crude Oil) and not Brent Global benchmark which did not go into negative.

Can this (negative pricing in the power and oil markets) happen again?

Yes. While in power markets, it happens more frequently, this was the first time we saw negative crude oil prices. When the supply is in abundance and cannot be reduced to compensate for collapsing demand (as we are experiencing due to the pandemic) with less or no storage capacity, we may see negative prices again.