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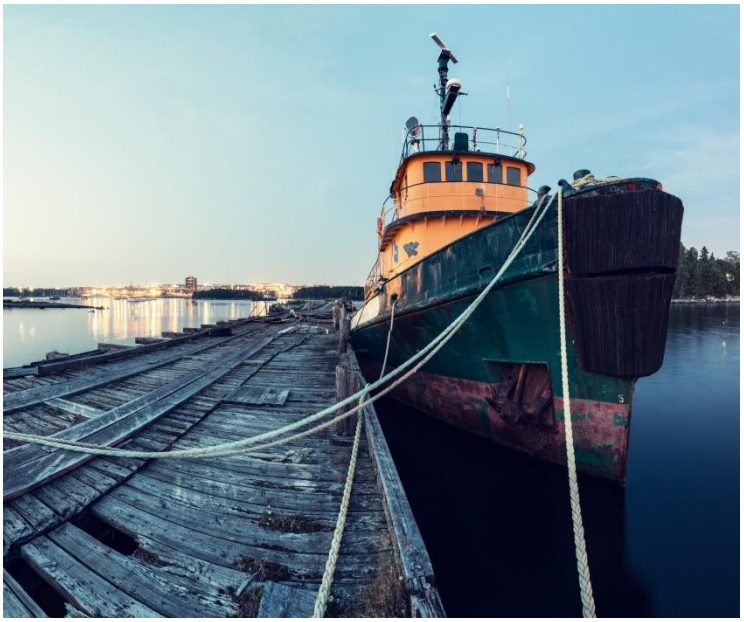

Quarterly Case Update

September 2017

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Gard Shipping AS v Clearlake Shipping Pte Ltd (The Zaliv Baikal) [2017] EWHC 1091 (Comm)

Facts

This was a voyage charterparty between Gard Shipping ("Owners") and Clearlake Shipping ("Charterers"). The charterparty allowed for a second voyage in direct continuation from the first voyage, and the dispute arose in relation to this second voyage. The vessel was instructed by Charterers to sail to Rotterdam and despite tendering NOR, no berthing instructions were given for about 64 days.

Owners argued that they were entitled to claim demurrage at an escalated rate, plus the value of bunkers consumed while the vessel was waiting to discharge cargo at Rotterdam, further to the following contractual clauses:

> Additional Clause 11:
>
> [Subparagraph (1)]
>
> "Notwithstanding any term of this charter to the contrary, Charterers shall have the liberty, at any stage of the voyage, of instructing the vessel to stop and wait for orders FOR MAX 3 DAYS… Charterers shall be entitled to instruct the vessel not to tender NOR on arrival at or off any port or place or to delay arriving at any port of place until Charterers give the order to do so. Time to count as used laytime or time on demurrage, if vessel is on demurrage. AND ALL THE BUNKERS CONSUMED TO BE FOR CHRTS ACCOUNT."
>
> [Subparagraph (2)]
>
> "AFTER FIRST 5 DAYS WAITING FOR ORDERS/DISCH INSTRUCTIONS AT SEA VESSEL TO BE CONSIDERED AS BEING USED FOR STORAGE, AND, UNLESS OTHERWISE AGREED, FOLLOWING INCREASE OF DEMMURAGE RATE TO APPLY
>
> DAYS 6–15 DEMM RATE PLUS $5,000
>
> DAYS 16–25 DEMM RATE PLUS $10,000
>
> DAYS 26–35 DEMM RATE PLUS $15,000
>
> …."
>
> [Subparagraph (3)]
>
> "Chrs option to order the ship to wait at an offshore position provided they give final destination and expected cargo delivery window, In WHICH case the above increase in rates not to apply"

Owners primarily contended that Charterers were not permitted to instruct the vessel to stop and wait for longer than 3 days or to use the vessel as a floating storage, and that they were entitled to the escalated demurrage rate as a result.

Charterers on the other hand argued that the ordinary laytime and demurrage regime applied, as they had given no order to stop and wait prior to the NOR being tendered at Rotterdam; Owners were only entitled to demurrage at the ordinary contractual rate.

In the alternative, Owners argued that an implied term should be implied into the contract to prevent it from lacking commercial sense, as the commercial purpose of Additional Clause 11 was for Charterers to pay the escalated rate where the Vessel was being used as a floating storage, whereas Charterers

could easily circumvent this by having the Vessel tender NOR.

Decision

The judge found that the structure of Additional Clause 11 was clear.

The first paragraph of Additional Clause 11 gave Charterers the liberty to issue a *positive* order to the Vessel to stop and wait. No such order was given here, and the Court rejected Owners' argument that passive failure to give an order was covered by the clause.

The Court also concluded that paragraph 3 of the clause did not bite either, as Charterers had not given an order for the vessel to wait at "an offshore position" as required. The regime provided for by Additional Clause 11 was therefore not triggered in this case. Consequently demurrage was only payable at the contractual rate and Charterers had paid Owners accordingly.

The Court also refused to imply a term as proposed by Owners, holding that implying such a term would be inconsistent with the charterparty as properly construed. Additional Clause 11 did not lack commercial/practical coherence.

Accordingly, Court was not willing to interfere with the bargain as entered into by the parties.

Comment

This case is testament that it trite law that, in circumstances where contractual wording is sufficiently clear, the Court will not interfere to rectify a 'bad' bargain by implying terms into a contract on the basis of even if it is reasonable to do so on the basis of 'commercial common sense'. As such, care should always be taken when drafting clauses to ensure their effect is not watered down simply because they have not been drafted tightly enough to cover all the possible scenarios.

Glencore International AG v MSC Mediterranean Shipping Co SA [2017] EWCA Civ 365

The Court of Appeal recently considered a number of notable issues following an incident of cargo misappropriation arising from the use of an electronic release system.

Facts

Between January 2011 and June 2012 Glencore International AG ("**Glencore**") contracted with Mediterranean Shipping Company SA ("**MSC**") to carry 69 shipments of cobalt briquettes to Antwerp, under bills of lading with materially similar terms. These provided *"one Bill of Lading, duly endorsed must be surrendered by the Merchant to the Carrier…..in exchange for the Goods or Delivery Order"*.

Since 2011, Antwerp port operated an electronic release system (ERS) under which the carriers provided (against presentation of bills of lading) computer-generated pin codes which were sent in a 'release note' via email to the relevant receivers/their agents and the port terminal. This was instead of delivery orders or release notes which would be presented to the terminal to take delivery of the goods.

On each occasion Glencore (via their agent, Steinwag) presented the bill of lading in exchange for pin codes which then enabled them to obtain delivery of the goods from the MSC terminal at Antwerp.

This case concerned the shipment of three containers of cobalt briquettes. Upon presentation of the bill to MSC, Steinweg received the pin codes. However, when the pin codes were used to collect the containers from the MSC terminal, it was discovered that two had already been delivered to 'unauthorised persons'.

Glencore issued a claim against MSC claiming damages for breach of contract, bailment and conversion on the basis that (as the bill of lading expressly stated) MSC should have delivered the cargo against a bill of lading and not a pin code.

The Commercial Court found in favour of Glencore and MSC subsequently appealed.

The Court of Appeal – decision

On appeal, the applicable issues considered were:

1. whether delivery of the pin codes was symbolic delivery, thereby amounting (as a matter of law) to delivery of the goods;
2. whether MSC's provision of the pin codes constituted provision of the delivery order within the meaning of the bill of lading;
3. whether MSC's provision of the pin codes constituted provision of a ship's delivery order pursuant to s1(4) COGSA 1992; and
4. whether Glencore were estopped from contending that delivery of the cargo upon presentation of the pin codes was a breach of contract/and or duty, because it had permitted use of the pin codes for the previous 69 shipments.

Issue 1 – the pin codes as symbolic delivery

The Court of Appeal held that delivery of the pin codes was not symbolic delivery, amounting in law to delivery of the goods. The contract provided for actual delivery against presentation of the bill or a delivery order, delivery of a code could not itself constitute delivery as this only amounted to a delivery of means of access. Should the bill of lading provided for the provision of pin codes amounting to delivery, then the position may have been different.

Issue 2 – the release note and pin codes as a delivery order

It was held that under the bill of lading, pin codes did not constitute provision of a delivery order. A 'delivery order' in the context of an English law contract, should be defined by reference to the definition of a 'ship's delivery order' under COGSA 1992.

As such, a delivery order is provided by owners of a ship, in exchange for a bill of lading and in substitution for it, as an alternative to actual delivery. It should contain an undertaking by the carrier to deliver the goods to the person identified in the bill. As the release note only instructed the terminal to deliver against the entry of the pin codes without an undertaking, neither could constituted a delivery order.

In the premises, the goods were not delivered upon entry of the pin code at the terminal and MSC's obligations to Glencore continued.

Issue 3 – the release note and pin codes as ship's delivery order

MSC argued that the release note (containing the pin codes) was a ship's delivery note as defined by COGSA. As such, MSC undertook to deliver to whoever first entered the pin.

The court did not agree with this and held that a delivery order within the meaning of the bill of lading required an undertaking by MSC to deliver to Glencore or Steinweg.

Issue 4 – estoppel

The court considered whether Glencore could be estopped from contending that delivery (upon presentation of the pin code) was a breach of contract, as Glencore had used the ERS for 69 previous shipments.

In agreement with the court of first instance, it was held that Glencore (and/or its agents) had made no clear representation that delivery was acceptable provided that it was made to the first presenter of the codes.

The fact that delivery, following presentation of the codes, had been made on each of the 69 previous shipments did not indicate the position where delivery was not made. The breach relied on by Glencore was that delivery had never been made not that delivery was made against the codes.

Comment

Whilst modernisation in the shipping industry may appear attractive, this case highlights the importance of ensuring all legal and security risks are adequately considered, consented to and contracted for by all concerned parties.

Fulton Shipping Inc of Panama v Globalia Business Travel SAU (The "New Flamenco") [2017] UKSC 43

Question of law

When assessing the damages suffered by an innocent party as a result of the breach of a charterparty, what determines whether certain benefits obtained by an innocent party can be taken into account?

Facts

The "NEW FLAMENCO" (the "**Vessel**") was time-chartered by the claimant owners (the "**Claimant**") to the defendant charterers (the "**Defendant**") in 2004. In 2007, the Claimant alleged that the parties agreed an extension of the charterparty by 2 years until 2009.

The Defendant, however, disputed that an agreement was reached and redelivered the Vessel in October 2007. The Claimant treated this as an early redelivery and therefore as an anticipatory repudiatory breach. Shortly before the redelivery, the Claimant sold the Vessel for US$23,765,000.

Arbitration

The matter first went to arbitration. Whereas the tribunal agreed with the Claimant that there was an agreement to extend the period of the charterparty, the tribunal did not agree with the Claimant's claim for damages (in the amount of US$7,558,375) for loss of profit during the extended charter period.

The tribunal found that, had the Defendant redelivered the Vessel in 2009, she would have been valued at US$7,000,000.

In the premises, the Defendant argued that the Claimant had to give credit for the difference between the amount the Vessel was sold for in October 2007 and her value in November 2009.

The Claimant, however, argued that the difference in value was legally irrelevant (interestingly, the Claimant was prepared to give credit to US$5,145,000 for a "reduction in the re-sale value"). That said, the tribunal found in the Defendant's favour.

The Claimant appealed the award.

Commercial Court

Popplewell J held that, on the facts found by the tribunal, the Claimant was not required to give credit for any benefit for the difference in the value of the Vessel between October 2007 and November 2009 as: *"it was not a benefit which was legally caused by the breach"*.

Finding in the Claimant's favour, Popplewell J considered that for a benefit to be taken into account in reducing the loss recoverable by the innocent party for a breach of contract: (1) the benefit has to be caused by the breach; and (2) it is not sufficient if the breach has merely provided the occasion or context for the innocent party to obtain the benefit. As such, the court found that the Claimant was not obliged to sell the Vessel upon the breach by the defendant, be it as a matter of fact or law.

The Defendant appealed.

Court of Appeal

The Commercial Court's decision was reversed by the Court of Appeal. Longmore LJ set out that if, in the ordinary course of business, a claimant adopts a mitigation measure which arises out of the consequences of the breach, the resulting benefit must be taken into account in measuring loss unless that mitigation measure is entirely independent of the relationship of the claimant and the defendant.

Longmore LJ further considered that where there was no available market, as with the present case, an owner may decide to mitigate losses by selling the vessel. The sale of the Vessel was considered to have both arisen out of the consequences of the breach and in the ordinary course of business, and the benefit obtained by the Claimant should therefore be taken into account.

The Claimant appealed.

Supreme Court decision

The Supreme Court overturned the Court of Appeal's decision.

It considered that for a benefit to be taken into account, the test of whether the benefit must be of the same kind as the loss caused is too vague and potentially arbitrary. The relevant test is to establish causation. The benefit must be either caused by the breach or by a successful mitigation measure.

In this case, the early redelivery of the Vessel by the Defendant did not make it necessary for the Claimant to sell the Vessel.

The Claimant could have made a commercial decision at any point in time during the charterparty at its own risk. The early redelivery was, at most, the occasion for selling the Vessel, not the legal cause of it.

Furthermore, the relevant mitigation measure would be for the Claimant to acquire another source of income stream. The sale of the Vessel was incapable of mitigating the loss of the income stream and therefore could not be considered as a successful mitigation measure which caused the Claimant the benefit in question.

Comment

The case highlights that causation is the focal point when determining whether the benefit accrued by an innocent party in a breach of contract case while mitigating its losses should be taken into account.

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

Question of law

Was Vitol's ("**Buyers**") conduct enough to accept Beta's ("**Sellers**") renunciatory breach? Was Buyers' duty to nominate a vessel a condition precedent to Sellers' duty to provide a cargo?

Procedure

On a procedural point, this case was of interest as it was advanced under the pilot for the Shorter Trials Scheme, set out under CPR PD51N. A 2 day hearing took place with limited disclosure and witness evidence. The judgment was handed down within 10 days of the conclusion of the hearing.

The estimated costs of the action were GBP125,000 for the Claimant Vitol and GBP63,000 for the Respondent Beta.

Facts

Buyers contracted to buy a cargo of biofuel from Sellers. The terms of the contract stipulated that Sellers would deliver the cargo within a certain window between 16 – 30 June.

Before delivery could take place however, it was incumbent on Buyers to nominate an acceptable vessel to Sellers 3 days' prior to the vessel's arrival at the loadport.

Buyers' obligations would be met provided the nominated vessel would be ready to load within 30 June.

In accordance with what Buyers argued was their standard practice, upon contracting to buy the biofuel cargo, they entered into various gasoil future contracts, to hedge against any potential losses suffered as a result of a fall in price of the biofuel cargo.

By early June it was clear that Sellers would not be able to provide the relevant biofuel.

Both parties entered negotiations throughout June to salvage some element of the agreed contract, amidst discussions over what cargo could be sourced and at what price – Buyers reserved their rights throughout.

On 27 June, the final day for to nominate a vessel, Buyers did not do so.

On 30 June, the final day for the delivery of the cargo, Sellers did not do so.

On 7 July, a week after the loading window had passed and with no cargo presented or confirmed available by Sellers, Buyers terminated the contracts alleging Sellers' repudiatory breach.

Dispute

Buyers claimed that Sellers conduct throughout June amounted to renunciatory or repudiatory breach which Buyers accepted in not nominating a suitable vessel.

As a result, Buyers claimed just over US$650,000 in damages arising from Sellers' failure to provide the cargo, calculated with reference to the various hedging activities the Buyers had performed.

As a result of Sellers' inability to perform, Buyers had to amend their hedging positions, and tendered expert evidence to justify the calculations of their lost profits.

In the alternative, Buyers claimed just over US$350,000 based on market value, by way of damages.

Sellers accepted that they had acted in renunciatory breach of contract, but denied that Buyers' conduct in not nominating a vessel was sufficiently clear as to denote acceptance of any breach.

Sellers further contended that Buyers' failure to nominate a suitable vessel relieved Sellers of their obligation to deliver a cargo.

With regard to the claimed damages, losses resulting out of hedging were not recoverable and those damages claimed in relation to the market value were over-stated.

High Court Decision

The court held that acceptance of any repudiatory / renunciatory breach required no particular form – it is solely necessary that the communication or conduct is sufficiently clear to convey that the aggrieved party is treating the contract as an end.

The Buyers' failure to nominate the vessels here was not sufficient to amount to acceptance of Sellers' breach, but there was no question that Buyers terminated the contract by virtue of their message of 7 July.

The court then went on to consider whether Buyers' failure to nominate a vessel relieved Sellers of their duty to deliver the biofuel.

Albeit that there was established authority to show that the obligation of a FOB buyer to nominate a vessel is a condition precedent to the seller's duty, and there are circumstances in which a failure to give shipping instructions can exempt a seller for liability for non-delivery, those cases could be distinguished from these facts.

In those cases, there had been no fixed lifting period, and the duty to deliver arose only on nomination of a vessel.

Further, there was no suggestion (as there repeatedly and plainly was here) that the defaulting party had indicated its inability to perform in advance of the deadline for nomination.

The court held that where the parties knew that contractual performance was impossible, the obligation to nominate a vessel was simply stripped of its purpose. There would have been no point here in making a useless nomination when the biofuel could not be delivered.

With regard to the damages claimed, on the specific facts of how the hedging losses had been calculated, the court rejected that this represented a fair calculation.

It was not stated that hedging losses in general were too "remote" but rather that the method of the calculation and comparison of losses here did not amount to a fair and proper basis of compensation.

The court awarded Buyers the alternative sum of US$350,000.

Comment

This case highlighted the importance of being clear and unequivocal in accepting any renunciatory or repudiatory breach.

It also showed that in order to rely on nomination of a vessel as a condition precedent to provision of a cargo, it was necessary to be able to show that you were physically able to provide said cargo.

Hedging losses were not in themselves considered too remote or unforeseeable to be claimed, but on the specific facts in this case, the hedging losses were not considered a fair assessment of Buyers' loss.

London Arbitration 15/17 (2017) 977 LMLN 3

Background

This arbitration involved a balance of accounts dispute under the NYPE form. Owners were claiming US$40,403.85 was due to them, whereas Charterers submitted a final hire statement showing a balance of account of US$23,080.04 was due to them.

Issues

(a) *Bunkers during off-hire*

The first issue was down to a provision in clause 15 of the charter. The charterers said that the owners ignored the provision which stated that the value of bunkers during off-hire was to be taken at the actual price at the last bunkering port. The owners said that the provision meant the prices were deemed at the last port at which bunkers were supplied and approved, by way of a fuel analysis report. The tribunal saw no reason to imply such a requirement as this was not what clause 15 stated. Instead the words in clause 15 should have their literal meaning.

(b) *Off-hire Periods due to crane break-down*

Charterers claimed that the Vessel was off-hire during various periods due to crane break-down.

The Tribunal stated that the burden was on the charterers to show that they had actually suffered a loss of time and were therefore entitled to claim that the Vessel was off-hire.

In certain instances Charterers had been able to show that they had suffered a loss of time, however in other periods, the Tribunal considered that there was no such evidence because for example, it has been shown that they engaged an additional shore crane or that they would not have used that number of gangs even if the crane had been working.

The Tribunal did however, accept the costs (US$5,619) of hiring a shore crane as a replacement crane during one period that the Vessel's crane was broken down.

(c) *Claim for Owners' Expenses / Off-hire Survey Costs*

Owners also tried to claim that they were not liable to reimburse Charterers for certain "owners' expenses" and owners' share of the off-hire survey costs because these documents had not been provided in original by Charterers.

The relevant parts of the clause in question (Clause 40) allowed the charterers:

> "*the right to withhold from charter-hire…such amounts due to them for Owners' disbursements, but with proper supporting statements to be sent to the Owners promptly".*

The Tribunal determined that there was nothing in Clause 40 which entitled the Owners to insist upon original invoices and accordingly rejected Owners' position under this head of claim.

(d) *Claim for lashing materials*

Clauses 99 and 107 of the Charterparty provided as follows:

> *Clause 99 – Lashing Materials*
>
> *The owners to deliver the vessel in a fully fitted condition for loading of logs with a full set of new lashing materials and wires/chains/blocks etc, however cost for replacement and/or repair of such lashing*

materials during the charter period shall be borne by charterers. It is obligation to keep charterer's supplies of lashing materials etc safe and sound when not in use. Charterers likewise to redeliver the vessel in the same condition, wear and tear accepted [sic].

Clause 107 – Log clause

Owners shall provide an initial supply of sufficient lashing materials such as lashing wires, chain etc, but Charterers shall bear the cost for maintenance of such lashing materials and for replacement of missing or damaged materials during the currency of this Charter. Charterers shall redeliver the vessel with the same quantity and conditions of such lashing materials as they were delivered with the vessel, ordinary wear and tear excepted.

Clause 99 required the owners to deliver the Vessel with a full set of equipment / materials for the loading of logs. The evidence showed that the Vessel was not delivered in such a state – whilst there were some new materials provided, it was by no means a "full set".

In spite of their breach of clause 99, that did not necessarily deprive Owners of their right to claim for replacement / repair costs of lashing materials during the charter and/or mean that Charterers were not obliged to bear the costs of maintaining the same. However, the Tribunal determined that Owners would have to show that the result would have been the same (or at least only a proportion worse) if Owners had complied with their obligations. In this instance, the Tribunal considered that Owners' claim failed for these reasons.

Charterers counter-claimed for the cost of the lashing materials on the basis that these would not have been required during the charter period if Owners had complied with their obligations under the Charterparty to provide new equipment on deliver and/or to provide an initial supply of sufficient lashing materials.

On the basis that the Tribunal considered the evidence showed that Owners were in breach of their Charterparty obligations for failing to provide a "full set" of materials / equipment on delivery, Charterers were allowed their counter-claim for the cost of the lashing materials.

The final conclusion from the tribunal in respect of this arbitration was that the charterers were entitled to US$24,984.49 which was awarded together with interest. The charterers were also entitled to their costs, which would be fixed at £3,500, and the costs of the award.

Comment

This case provides some useful indications of how a Tribunal might determine common balance of accounts dispute issues.

(e) In particular, it confirms that it will be necessary for a Charterer to actually show a loss of time to claim that the vessel is off-hire.

London Arbitration 16/17 (2017) 978 LMLN 2

Background

The vessel was fixed on an amended NYPE charter form evidenced by a fixture recap under which owners agreed to carry a cargo of sulphur.

The fixture recap and charterparty made provision for spraying the cargo holds with hold block, namely:

Fixture recap

"The vessel shall tender as well with holds lime-washed or hold-block covered…at Charterers' time and expense.

Hold Block/all chemicals for cleaning to be provided by Charterers and line washing to be done by crew at Charterers' time."

The charterparty

By clause 30 all holds, prior to loading, must be sprayed with "hold block 10" ("**HB10**") by charterers at their time, risk and expense to the Master's satisfaction. Further, if HB10 could not be fully removed, then charterers are to arrange removal/cleaning of the cargo at their time and expense.

The facts

Charterers were unable to locate hold block in a timely manner and invited owners to arrange for this on the basis that they would reimburse owners with the first hire payment. Owners agreed and duly provided hold block known as "SlipCoat Plus", after which it was applied and the subject cargo loaded on board the vessel.

During discharge operations at Dakar it rained. As a consequence of the cargo being wet and the use of heavy bulldozers, the sulphur cargo became compacted, compressed and stuck to the sides of holds like concrete. This necessitated prolonged cleaning operations before the vessel could load her next cargo. During the course of the cleaning operation two of the vessel's electric grinding machines were damaged.

Owners claimed the balance of US$99,473.24 whereas charterers final hire statement showed a balance of US$8.202.39 in their favour.

Charterers sought to put the vessel off-hire during time spent cleaning and also brought a speed and performance claim against owners.

Charterers' arguments

Charterers were not responsible for the prolonged cleaning at the disport due to the condition of the cargo on completion of discharge. They argued that the hold block provided by owners did not satisfy the requirements of *clause 30*, therefore owners assumed and ran the risk of coating the hold with that product. Furthermore, they were not aware of any product called HB10 and, therefore, could not have agreed to its use to coat the vessel's holds.

As the vessel's speed and performance, charterers claimed that the vessel overconsumed IFO and MGO during the voyage between Uta-Luga and Dakar, as well losing time during the voyage between Conakry and Dneprobugsky.

Whereas charterers were obliged to clean the vessel's hull for any prolonged stay over 20 days plus in the 'Tropical Zone' (the "**Prolonged Port Stay Clause**"), due to cleaning required after the carriage of sulphur (which was for owners' account), their obligation was not triggered.

Owners' arguments

On a true construction of clause 30, as the crew could not fully remove the cargo/HB10 charterers were to do so at their own time, risk and expense, and were therefore liable for damage to the vessel's grinding machines.

Charterers had been given the opportunity to satisfy themselves of the adequacy of the product for use in coating the vessel's holds. In any event, it was charterers who requested owners to arrange supply of the hold block spray and that this had been arranged by owners as agents thereto charterers.

As to charterers' speed and performance claims, owners rejected these and highlighted that charterers had failed to discharge their obligation under the Prolonged Port Stay Clause, and that that was the proximate cause of the vessel underperforming.

Tribunal's decision

Hold block and hold cleaning

Held, charterers were aware of the product that was to be supplied and agreed to its use. In any event, there was nothing to suggest that the hold block owners supplied was anything other than acceptable or appropriate for the purposes required.

Owners were not responsible for prolonged cleaning as a result of the condition of the sulphur in the vessel's holds – this would be entirely for charterers' account as being liable for any consequences of loading, carrying and discharging the cargo.

Charterers could only put the vessel off-hire if they were able to evidence owners' negligence. The tribunal rejected any argument that the master had acted negligently in discharging during periods of heavy rain.

Charterers' claim for off-hire and bunker consumption during the period of cleaning therefore failed.

The tribunal also found charterers liable for damage to the vessel's grinding machines as such arose as a consequence of the prolonged cleaning for which they were liable.

Charterers' speed and performance claim

Charterers were entitled to deduct for overconsumption of IFO and MGO during the vessel's voyage between Ust-Luga and Dakar.

Finding in owners' favour, the tribunal dismissed charterers' claim in respect of the second voyage between Conakry and Dneprobugsky. Whereas charterers were contractually bound to undertake hull-cleaning pursuant to the Prolonged Port Stay Clause they failed to do so.

Accordingly, the tribunal were satisfied that charterers were precluded from pursuing any claim against the owners for failing to discharge their obligation under the Prolonged Port Stay Clause, as to allow them to do so would allow them to benefit from their own breach.

In any event, the tribunal were satisfied that the cleaning operation undertaken by owners actually improved the vessel's performance. Therefore, as charterers' claim was based on an alleged breach of charter by owners (in withdrawing the vessel temporarily from charterers' service) any such loss was more than offset by the benefit to charterers of owners having undertaken the cleaning. Thus, the cost of cleaning would also fall for charterers' account (US$9,619.20).

Outcome

The tribunal would allow for the deduction of US$1,376.88 for the overconsumption of IFO and MGO, and owners would be entitled to the award of US$98,096.36.

Comment

This decision serves as a useful reminder of the consequence of a charterer giving employment orders to an owner which

subsequently results in owners suffering loss/damage – i.e. the implied indemnity principle arising under clause 8 of the NYPE form charter.

Furthermore, a charterer wanting to bring an underperformance claim in respect of speed should ensure they are able to evidence that they have discharged any obligation as regards liability for hull-cleaning under a prolonged port stay clause.

London Arbitration 19/17 (2017) 982 LMLN 3

Background

The vessel was fixed on back-to-back terms on an NYPE form charter incorporating the ICA.

Under the sub-charterparty, owners agreed to carry a cargo of steel products from East Asia (via the Cape of Good Hope) to a range of named European ports.

Between 4 and 22 April charterers ordered the vessel to load a cargo of steel coils at a variety of ports throughout East Asia (Chengsu, Jingtang (China) and Kaohsiung (Taiwan)).

The vessel arrived at Antwerp on 17 June where it was found that the cargo had suffered wet damage.

Surveyors, acting on cargo interests' behalf, reported that damage had "*clearly sustained moist damage* [due to sweat/condensation arising from] *inappropriate carrying condition during ocean transportation*".

Surveyors concluded that the principle reason for the cargo sweat was the difference in temperatures between the loading ports in East Asia and that, together with poor ventilation on board, this was exacerbated by the need to open hatches to load further cargo at Kaohsiung.

Cargo interests' claims

In the event, cargo interests brought two cargo claims against head owners (as carriers under the bills of lading) in the amount of €5,110.02 (settled at €3,000) and €65,000 (settled at €50,000).

Pursuant to the ICA incorporated into the head-charterparty, head owners brought a claim against owners. The parties reached a settlement and owners thereafter claimed the balance of €77,721.91 (being €53,000 in settlement of the cargo claims and €24,721.91 for surveyors' and legal fees) from charterers under the sub-charterparty.

In neither case was the basis of the owners' liability explained, nor were any documents relating to the negotiation of the settlement of the cargo claims submitted.

Terms of the charterparty

The charterparty provided that:

"…charterers shall handle cargo claims in the first instance and provide security to cargo interests in respect of cargo claims within a reasonable time of receipt of a request to do so".

Owners' claim against charterers

Owners presented their claim under three heads, namely that:

(i) Charterers failed to handle cargo claims in the first instance. This resulted in owners suffering loss and damage in indemnifying head owners under the head-charterparty pursuant

to the ICA and/or implied indemnity; and/or

(ii) The cargo claim arose out of loading and/or stowage of the cargo by charterers which caused wet damage to the cargo. Therefore, owners were entitled to be indemnified (pursuant to the implied indemnity arising under NYPE clause 8) for all loss/damage arising from compliance with charterers' orders; and/or

(iii) Cargo claims are to be apportioned 100% to charterers pursuant to:
- *para 8(b) ICA* – the cargo claim arose out of the loading and/or stowage; or
- *para 8(d) ICA* – because there was clear and irrefutable evidence that cargo damage occurred as a consequence of charterers' act (i.e. ordering loading of cargo into the same holds at different ports).

The tribunal's decision

First head of claim

This would be dismissed. Regardless of which party handled the cargo claims in the first instance, ultimate liability would still be determined by the respective charterparties. Owners incurred no net liability for charterers' default as any responsibility of owners under the head-charterparty would have been matched by charterers' responsibility to owners as the charterparties were on back-to-back terms.

Second head of claim

The tribunal found a number of difficulties with this head of claim.

Firstly, it was assumed that the sole cause of the wet damage was charterers' decision to load cargo at Kaohsiung into holds containing cooler cargo previously loaded in China – this was not borne out of the facts. In particular, part of the cargo comprising the second claim was stored in a hold not worked at Kaohsiung. Furthermore, the tribunal recognised that the ventilation of the cargo could rightly be criticised as a failure to properly carry and care for the cargo on board.

Secondly, the implied indemnity under NYPE clause 8 was not triggered by owners following all charterers' orders. Owners agreed to load a cargo of steel products from East Asia to Europe via the Cape of Good Hope. As such, the voyage inevitably involved the possibility of loading cold cargo which then had to be carried through warmer waters. Therefore, the risk of cargo sweat was inherent in the very voyage that owners agreed to undertake.

Thirdly, as regards cargo claims, the implied indemnity had to give way to the express provisions that cargo claims were to be apportioned pursuant to the ICA.

Third head of claim

That owners were entitled to 100% pursuant to *para 8(b) ICA* failed on the facts – the cause of the damage was not solely due to stowage.

As to *para 8(d) ICA*, as the tribunal had already found that the damage was not solely due to charterers' 'act', owners claim for 100% reimbursement necessarily failed. Interestingly the tribunal found it difficult to categorise charterers' loading of a cargo of a type, at a range of ports, for a voyage and at a time of year (all agreed between the parties) as an 'act' for the purposes of *para 8(d)*. The tribunal concluded that an 'act' was with reference to a specific and definable event or occurrence and not charterers' general compliance with their contractual obligations.

Owners' claim for 100% reimbursement of the amounts paid in settlement of the cargo claims and expenses thereof failed. Rather, and pursuant to *para 8(d) ICA*, owners were entitled to reimbursement of 50% of their claim only.

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