



Newcastle Express and the separability principle

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Case update: DHL Project & Chartering Ltd v. Gemini Ocean Shipping Co Ltd (The ‘NEWCASTLE EXPRESS’) [2022] EWCA Civ 1555

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The facts

The claimant charterers (DHL Project & Chartering Ltd (**Charterers**)) and defendant owners (Gemini Ocean Shipping Co. Ltd (**Owners**)) were negotiating a fixture (via brokers), for a voyage from Newcastle, Australia to Zhoushan, China on board the MV ‘NEWCASTLE EXPRESS’ (the **Vessel**). A fixture ‘recap’ containing the main terms was circulated by the broker on 25 August 2020 (the **Recap**), and contained the following ‘subjects’ provision in bold:

“SUB SHIPPER/RECEIVERS APPROVAL WITHIN ONE WORKING DAY AFMT¹ & RECEIPT OF ALL REQUIRED CORRECTED CERTS/DOCS”

The Recap also stated that the Vessel was to be inspected on 3 September prior to sailing from Zhoushan:

“RIGHTSHIP INSPECTION WILL BE CONDUCTED ON 3RD/SEPT. OWNERS WILL PROVIDE REQUIRED CERTS LATEST BEFORE VESSEL SAILING (INT. 5/SEP). OWNERS WILL ENDEAVOUR TO PROVIDE ALL REQUIRED CERTS/DOCS EARLIEST POSSIBLE.”

Clause 17 of the Recap was a law and arbitration clause, which provided: **“GA/ARBITRATION TO BE IN LONDON, ENGLISH [sic. law] TO BE APPLIED, SMALL CLAIMS PROCEDURE TO APPLY FOR CLAIMS USD 50,000 OR LESS”**. At clause 20 of the Recap, the remaining terms were to be **“OTHERWISE AS PER ATTACHED CHARTERER’S PROFORMA C/P WITH LOGICAL ALTERATION”**.

Despite the above ‘subject’ regarding the RightShip inspection, the inspection had not taken place by 3 September, causing Charterers to inform the brokers the same day that **“[s]hippers is not accepting Newcastle Express due to Rightship not rectified, kindly consider this vessel free”**. Charterers followed-up later that day: **“[w]e hereby release the vessel due to RightShip and not holding her any longer”**.

¹ AFMT – after fixing main terms

The Claims

It was common ground between the parties that, at the time of Charterers' messages, they had not 'lifted' the 'subject' of "*SHIPPER/RECEIVERS APPROVAL*". Charterers had not provided confirmation to Owners that either the shipper or receiver had provided approval of the fixture.

Nevertheless, Owners asserted that a binding charterparty had been concluded, and that Charterers' release of the Vessel amounted to a repudiatory breach of that charterparty. Owners sought damages from Charterers, claiming that the relevant 'subject' ("*SUBJECT SHIPPER/RECEIVERS APPROVAL*") was qualified by a term of the proforma charterparty by which the shippers'/receivers' approval was not to be unreasonably withheld. In accordance with clause 17 of the Recap, Owners commenced arbitration.

It transpired that Owners' notice of arbitration was sent to an employee of Charterers who ignored it and did not inform his superiors. As a result, Charterers took no part in the arbitration. The arbitrator found in Owners' favour, holding that Owners were not obliged to provide the result of the RightShip inspection to Charterers until the Vessel sailed from Zhoushan, which was scheduled for 5 September. Consequently, Charterers' rejection of the Vessel on this basis was unreasonable. Damages of USD 283,416.21 were awarded to Owners (the **Award**).

Charterers appealed against the Award under section 67 of the Arbitration Act 1996 (the **AA**) asserting that the arbitrator lacked substantive jurisdiction. They argued that no binding contract had been concluded between the parties as the 'subjects' were never lifted. On this basis, Charterers contended that the 'subject' negated any intent to agree to the arbitration agreement or any other clauses of the recap.

Charterers also sought for leave to appeal against the Award under section 69 of the AA on the basis that it was wrong as a matter of law because the arbitrator had not given proper effect to the 'subject' and had incorrectly construed it as being qualified by other terms of the charterparty.

The Issue

The issue before the Court was whether the proposed charterparty, which was expressly stated to be "*SUBJECT SHIPPERS/RECEIVERS APPROVAL*", contained a binding arbitration agreement which conferred jurisdiction to determine the validity of the charterparty itself on an arbitrator. Did the 'separability principle' operate to preserve the arbitration agreement, in circumstances where the charterparty negotiations never ceased to be 'subject to contract'.

Judgment

The appeal was heard by Jacobs J. in the Commercial Court, who held that the arbitrator had no jurisdiction to determine the dispute as to whether a binding charterparty had been concluded, since the effect of the 'subject' (which was never lifted) was that no arbitration agreement had in fact been concluded. However, he granted leave to further appeal to the Court of Appeal, which Owners did, asserting that Jacobs J. had failed to give proper effect to the 'separability principle'. Owners contended that the parties had clearly evinced an intention to arbitrate, such that determination of whether or not the charterparty was validly concluded was within the arbitrator's jurisdiction.

The Court of Appeal (Males L.J. leading) affirmed the decision of Jacobs J., holding that the arbitrator had no jurisdiction because:

- i) The 'subject's' effect was to negate Charterers' intention to enter into any binding contract, unless and until the 'subject' was lifted (i.e. by confirming approval of terms). This applied to the arbitration clause as much as to any of the other clauses of the Recap and proforma charterparty.
- ii) The 'subject' was in bold text and appeared at the start of the Recap was not qualified by a requirement for 'reasonableness'.
- iii) The arbitration agreement at clause 17 of the Recap was part of the whole of the rights and obligations under negotiation between the parties, and all of those were conditional on the 'subject' clause. It followed that if there was no concluded charterparty, there was also no agreement to arbitrate.

iv) Given the outcome of the section 67 application, it was unnecessary to determine the application under section 69, that the subjects clause was not in fact qualified by a requirement of reasonableness. However, Males L.J. agreed with Jacobs J.'s comment that permission to appeal on these grounds would have been granted, as the Award was "*at least open to serious doubt*".

Comment

This judgment provides clarity on the effect and operation of fixture recap 'subjects' which are commonplace during charterparty negotiations. It clarifies the meaning of such 'subjects' and the effect of 'lifting' them on the remainder of the contractual terms between Owners and Charterers. It emphasises that an appropriately-worded 'subjects' clause will protect parties from an allegation that a binding contract has been entered into.

The issue of the 'separability principle' and whether an arbitrator has jurisdiction to determine if a binding contract has been entered into or not may seem like an arcane legal debate. However, it is of some practical importance. Appeals in relation to the jurisdiction of an arbitration tribunal under s. 67 AA can be brought as of right, without the need for the permission of the Court (as is the case for appeals on a question of law under s. 69).

Any party wishing to assert that a binding contract containing an arbitration clause came into existence must effectively commence arbitration. The Tribunal may find that a binding contract exists. As it has been found that a Tribunal has no jurisdiction to decide whether a binding contract exists if it in fact does not exist, the losing party will have an automatic right of appeal under s. 67 on the grounds that the Tribunal was wrong and had no authority to reach the decision it did. This could lead to the elongation of proceedings relating to whether a binding contract has been formed.

The Court of Appeal did suggest some procedural steps that parties to such disputes could follow to prevent these issues arising. However, such steps would require the cooperation of the parties; it remains to be seen if such cooperation will be forthcoming in practice.

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