Campbell Johnston Clark

IAN SHORT AND KEELEY EDMONDSON I APRIL 2023

Right of Appeal over *DL Lilac* inspection

Campbell Johnston Clark recently acted for Charterers in the English High Court successfully bringing an appeal under s69 of the Arbitration Act 1996 against the award of an LMAA Tribunal concerning off-hire following the failure of a vessel's cargo holds inspection. Ian Short and Keeley Edmondson provide the details.

Background

Daelim Corporation ("Owners") and Pan Ocean Co Ltd ("Charterers") had entered into a charterparty for a time charter trip on amended NYPE 1993 terms (the "Charterparty") for the carriage of urea cargo in bulk on the vessel "DL LILAC". The Charterparty contained clause 69 "BIMCO Hold Cleaning/Residue Disposal for Time Charter Parties" which provided:

"Vessel's holds on delivery or on arrival 1st load port to be clean swept/washed down by fresh water and dried as to receive Charterers' intention cargoes in all respects free of salt, rust scale, and previous cargo residue to the satisfaction of the independent surveyor.

If vessel fails to pass any holds inspection the vessel to be placed off-hire until the vessel passes the same inspection and any expense/time incurred thereby for Owners' account."

The vessel failed the inspection at berth due to the presence of rust, paint flakes and cargo residue and was ordered off the berth by the terminal. Although the Master had said that holds were clean at 1530 hours on 19 February 2017, inspections were not permitted at anchorage and it was not until late on 3 March that the vessel re-berthed with holds approved following the reinspection early on 4 March.

The Arbitration Award

The arbitration award was handed down by three arbitrators on 27 January 2022. The dispute which was subject to appeal related to Charterers' deduction of hire and bunkers arising out of the cargo holds failing the first inspection, with the vessel placed off-hire until the vessel passed the reinspection.

The Tribunal accepted that the terminal had been under some pressure due to congestion at the berths and that once the vessel moved to anchorage efforts were made to expedite the reinspection.

However, the Tribunal found that it was reasonable for Charterers to be under an implied term to have the vessel reinspected without delay once the Master said that the holds were clean and found that the vessel went back on hire at the moment that the Master said that the holds were clean at 1530 hours on 19 February.

The Court's decision

The first point addressed by Sir Ross Cranston in his Judgment dated 24 February 2023 and which took up the majority of the hearing, was Owners' contention that it was not open to Charterers to appeal

against the arbitration award as any challenges to it should have been subject to the Tribunal under s57 of the Arbitration Act and Article 27 of the LMAA Terms 2017. In the Judge's view the Tribunal's finding in the award was intentional and therefore did not fall within the scope of either of the provisions. He agreed that this was not a situation that could be corrected by asking the Tribunal for clarification and thus there was no choice but for Charterers to appeal.

Whilst the Judge accepted that the Arbitration Tribunal applied the correct test for the implication of a term notwithstanding its reference to "reasonableness", the Judge confirmed that any implied term had to oblige both parties to take reasonable steps to cooperate to organise a reinspection without undue delay. Such an implied term would accord with necessity and business efficacy, and would be consistent with clause 69. The Judge went on to confirm that the Tribunal was wrong in law to make the determination that the vessel was immediately back on hire once the Master had notified the agents on 19 February 2017 that the holds were ready for reinspection. That was inconsistent with clause 69 of the charterparty, that the off-hire period ceased at the point of a successful reinspection. Nor did it accord with the implied term as found by the Tribunal.

The Judge set out that the Tribunal needed to decide by when the reinspection should have been undertaken had there been compliance with the implied obligation to exercise reasonable diligence to have the vessel reinspected without undue delay. It would follow that the vessel was back on hire at that point, not when the Master requested a reinspection once the holds had been cleaned. He went on that in light of the implied term, the Tribunal would need to decide what could and should have been done by the parties regarding reinspection, whether either party was in breach in this regard, the relevant timescales (e.g., the time within which the reinspection could have been arranged and completed had there been no breach of the implied obligation), and the financial consequences of any breach.

The matter was remitted back to the Tribunal to determine whether either party was in breach of the implied term.

Comment

The Judgment provided clarity on the right to appeal when an intentional decision was made by an Arbitration Tribunal, rather than a mistake or a slip. The Judge also confirmed that he had the right to consider the issue of whether there was a right to appeal notwithstanding the fact that leave to appeal had already been granted by another Judge, in this case Mr Justice Andrew Baker. As it was, Sir Ross Cranston agreed with Charterers' position that there was indeed a right to appeal on a point of law and found that the Arbitration Tribunal had erred when applying the implied term.

The Judgment also provides some comfort to Charterers when encountering delays following the vessel failing its hold inspection following arrival at the first loadport.

Michael Davey KC and Robert Ward of Quadrant Chambers were instructed on behalf of Charterers.

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