Campbell Johnston Clark

The "ACONCAGUA BAY" - What is the meaning of "always accessible"?

Introduction

We suspect that, if previously asked about this common voyage charterparty warranty, few would immediately have said that it means that a vessel must always be able not only to enter, but also to *leave*, the berth. That though was the 26 March decision in the "ACONCAGUA BAY" ([2018] EWHC 654 (Comm)).

It is the High Court's first ruling on this point, and to many it will be counterintuitive. "Accessible" seems to describe that which can be reached. Access to a location suggests getting to it, rather than from it: it does not happily convey the notion of leaving, as well. But does the permanence in the prefix "always" change this? Would for instance "sometimes accessible" offer a different shade of meaning? We submit not.

Facts

The vessel was chartered for carriage from the US Gulf under an amended Gencon 1994 form which provided:

"*Loading port or place ... 1 good safe berth always afloat always accessible 1-2 good safe ports in the USG in Charterers' option …*"

Unconnected damage to nearby structures during loading meant that she could not leave the berth for about a fortnight afterwards, and owners sought damages for detention.

(Some fixtures apply half laytime or demurrage where for instance there has been a failure of equipment "in or about" the port, but it does not appear that this one did.)

Consideration

In tackling "always accessible" within this particular fixture, the judge, Mr Justice Knowles, summarised the available guidance as follows:

1. Just as in a note issued by BIMCO in 2013, according to several editions of the Baltic Code the charterer thus promises that the vessel will <u>also</u> be able readily to depart from the berth; however,

2. though dictionary definitions and the textbook commentators did not offer much help, there was some suggestion that leaving the berth was <u>not</u> covered; also

3. many decisions have dealt only with a vessel's <u>arrival</u>. (Pausing here, it is unclear to what extent this is (a) because the issue had not arisen on departure or (b) an arguable guide to prior understanding, in that nobody raised it where it did); and moreover

4. According to London Arbitration 11/97 (1997) LMLN 463 this warranty did <u>not</u> extend to leaving the berth, and this might have influenced subsequent thinking;

5. The term “reachable on arrival” is common, too, especially in tanker trades, and (though owners here urged that such is confined to arrival) some commentators have treated it and “always accessible” as meaning the same thing.

Decision

In a very short ruling, running to just over three pages of text, the judge said however that the crucial thing was whether the parties had intended to address departure. He found it decisive - though for reasons which were not developed - that reasonable commercial parties would consider all aspects and not confine themselves to *getting into* the berth.

This standard voyage charterparty term was not here restricted to entry. Charterers had additionally warranted that the vessel would be able always to depart and were liable for the delay.

Another appeal?

The case was an appeal from an Arbitration Award, which had been in charterers’ favour. As it is hard even to get permission to challenge Awards it is unusual for them to happen and uncommon for them to succeed.

The judge refused charterers permission to appeal further, but they might seek and perhaps yet get that from the Court of Appeal itself. We will issue a further commentary if that happens and there is later an appeal decision.

Discussion

It is important to remember that while seemingly of wide application, as concerning a very common term, this ruling is a decision on just one charterparty. While, as always, a fixture wording must be prepared and considered as a whole, it should in most cases be straightforward to confine an accessibility warranty to *entry* to the berth. That might be done by providing that it is “reachable on arrival” or using similar wording, but the entire context needs to be considered, every time.

As well as causing some surprise, and even concern, in the industry, this decision is also a prompt that what may have seemed settled wording might need to be re-examined, so that parties can be sure that it captures what they intend. Perhaps, together with their advisors, owners and charterers alike will want to review what may be standard provisions, or reconsider the wisdom of any “last done” terms, and review any such alongside call options and any problems that might be anticipated with the vessel entering, *and now leaving*, a berth.

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