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REPUDIATION AND STATE OF MIND

In SK Shipping (S) Pte Ltd v Petroexport Ltd (The "Pro Victor"), Mr Justice Flaux considered whether, in the context of anticipatory breach of a charterparty, the Defendant Charterers' subjective state of mind was of relevance.

On 17 August 2008 the Owners concluded a charterparty with the Charterers on an amended Asbatankvoy form for the carriage of a cargo of petroleum products from Karachi to Taiwan, Korea and Japan at a lumpsum freight. The laycan was 27 to 29 August. However, on 27 August the Charterers told the Owners that their Buyers had pulled out and that the Charterers would not be stemming cargo for the vessel and had no further use for it. On 28 August the Owners asked the Charterers to confirm whether they were going to load cargo as per the original charter. The Charterers responded as follows:

> "Due to circumstances beyond charterers' control, it may become necessary to declare force majeure.
>
> Charterers have offered Owners two possible alternatives in order to assist Owners to mitigate the situation.
>
> Charterers will consider releasing the vessel from its current charter in order to permit owners to seek other business with Owners and Charterers agreeing to a mutual cancellation.
>
> Please discuss with Owners and obtain their agreement for a mutual cancellation of reference charter."

The Owners replied that they considered the Charterers' response "a declaration of non-performance of the charter". This provoked the following email from the Charterers:

> "… Charterers reject Owners' declaration of non-performance.
>
> Owners have been advised that Charterers have the means to mitigate any alleged losses of Owners by taking the vessel on time charter from Karachi at $18.000 per day for trip via port or ports with redelivery Singapore/S. Korea range with estimated duration of 45/60 days wog.
>
> Charterers have cargo to load promptly from west coast India to east coast Africa hence from AG going east.
>
> If Owners really interested in mitigating losses, they will agree to Charterers' proposal above.
>
> On completion of time charter, Owners and Charterers will be able to calculate Owners' position of alleged losses.
>
> Charterers sincerely regret current circumstances and are doing everything possible to maintain a good relationship with Owners for ongoing business …
>
> Urgent for Owners to agree to Charterers' proposal of time charter in order not to lose the cargo from west coast India and AG …"

Later that day, the Owners received a telephone call from the Charterers repeating they had lost their Buyers and would be unable to proceed with the original charterparty.

On 29 August the Owners asked the Charterers to confirm "unequivocally and unconditionally" by 1500hrs Singapore time that they would provide a full cargo for loading and discharging in accordance with the original charterparty. The Charterers did not provide such confirmation and at 1825hrs Singapore time the Owners terminated the charterparty.

The Owners subsequently brought proceedings against the Charterers claiming damages for anticipatory repudiatory breach of charter. They submitted the Charterers had by their words or conduct between 27 and 29 August, renounced the charterparty thereby entitling the Owners to accept that renunciatory breach as terminating the charterparty.

The judge held the Charterers had relied upon the fact the Owners' witnesses had said they did not consider that the Charterers had evinced an intention not to perform, merely that it was unlikely the Charterers would be able to perform the charterparty.

The Charterers submitted that where the Claimant's subjective state of mind was that it did not consider the Defendant's words and conduct evinced an intention not to perform, but only that it was unlikely that the defendant would be able to perform, the Claimant could not rely upon the Defendant's words and conduct as amounting to renunciation terminating the contract, even if objectively the words and conduct were renunciatory.

In the Court's view a Claimant who contended the Defendant had renounced the contract had to show not only (a) that the words or conduct were objectively evincing an intention not to perform but also (b) that the Claimant subjectively believed that to be the case. The relevant knowledge or state of mind was that of whoever was an "agent to know" on behalf of the company. In the present case the relevant "agent to know" of the Owners did consider at the relevant point in time that the Charterers' words and conduct evinced an intention not to perform the charterparty. Viewed in context, the Charterers' email was renunciatory. The Owners' claim succeeded.

SALVORS AND FUTURE DIFFICULT ECONOMIC CONDITIONS

In the recent case of the "OCEAN CROWN" the Owners of the salved property appealed to the High Court against an Award made by the Lloyd's Salvage Appeal Arbitrator.

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The Lloyd's Salvage Arbitrator at first instance awarded the Salvors the sum of US$34,500,000 plus interest and costs. On appeal the Appeal Arbitrator increased that Award to the sum of US$40,750,000 plus interest and costs.

Three issues fell to be determined upon appeal to the High Court namely:-

(1) Whether it is correct to take into account as an enhancing feature the possibility that the Salvors may experience difficult economic conditions in the future;

(2) If it is relevant to take such matters into account, whether it is permissible to take account of the actual economic conditions experienced between the date of termination of the salvage services and the date of the Award;

(3) Whether the principle in the "AMERIQUE" (that the value of the salved fund must not result in a disproportionate Award) is applicable to all types of salvage cases, including complex and comprehensive cases, or whether, as the Appeal Arbitrator found, a different principle applies in such cases.

Mr Justice Gross held that although it would be accepted that there was necessarily a "future" element in the concept of encouragement it did not follow that the risk of a future economic downturn was or should be a specific factor to enhance salvage remuneration. The Court accordingly held that the answer to issues (1) and (2) was "No".

So far as concerns issue (3) the Court took the view that the principle did apply in complex cases. The need to consider the moderating effect of the principle in the "AMERIQUE" was and ought to be a part of the reasoning of the Tribunal considering such issues.

Accordingly the answer to issue (3) was "Yes".

The Court however took the view that the appropriate form of relief was not to reinstate the Award at first instance but to remit the matter to the Appeal Arbitrator for reconsideration.

BERTH OR PORT CHARTER?

In Novologistics SARL v Five Ocean Corporation (The "Merida"), Mr Justice Gross considered in the context of a demurrage dispute whether the charterparty was a berth or a port charter.

On 5 February 2007 the vessel Merida was chartered for the carriage of a part cargo of steel plates, from Xingang to Cadiz and Bilbao. The charterparty was solely contained in a recap (which did not refer to a proforma) and provided:

> "... one good and safe chrts' berth terminal 4 stevedores Xingang to one good and safe berth Cadiz and one good and safe berth Bilbao (the "opening term")
> nor/time-counting as per below c/p terms
> DETAILS TO THE C/P
>
> CLAUSE 2
> [1] The vessel to load at one good and safe port/one good and safe charterers' berths Xingang and to discharge at one good and safe port/one good and safe charterers' berth Cadiz and at one good and safe port/one good and safe charterers' berth Bilbao.
>
> [2] Shifting from anchorage/warping along the berth at port of load and at ports of discharge to be for owners' account, while all time used to count as lay time.
>
> CLAUSE 4
> At port of load and at port discharge notice of readiness to be given and accepted in writing and only during the period from 08.00 hours to 17.00 hours Mondays to Sundays …
>
> CLAUSE 6
> … At port of load and at ports of discharge time to commence to count at 14.00 hours if written notice of readiness is given during ordinary office hours before noon or at 08.00 hours the next day if written notice of readiness is given during ordinary office hours after noon"

The vessel arrived at Xingang and tendered notice of readiness at 0400hrs on Saturday 10 March 2007. The vessel then anchored, awaiting a berth. A pilot boarded at 1700hrs on Friday 30 March and the vessel proceeded to the berth at 1715hrs. She was "all fast" at 1950hrs. Loading commenced at 2125hrs on 30 March and was completed at 0600hrs on 31 March.

The Owners argued the charterparty was a port charterparty, submitting they had been entitled to tender NOR upon arrival at Xingang and that the delay thereafter was for Charterers' account. They claimed demurrage of US$502,267.24. The Charterers contended the charterparty was a berth charterparty and that NOR could not be tendered until the vessel actually berthed. Accordingly, the delay waiting for a berth was for the Owners' account.

Arbitrators decided the charterparty was a port charterparty and made an award in Owners' favour. The Arbitrators considered Clause 2 provided for a port charter since it qualified the wording contained in the terms set out earlier in the recap by referring to both safe ports and berths. Further, Clause 2 provided for shifting time from the anchorage to the berth to count as laytime, which must have been on the basis of the Master's entitlement to tender valid NOR upon arrival. Had it been a berth charter there would have been no need for such a provision. The Arbitrators also held that neither Clause 4 nor Clause 6 assisted the Owners' arguments because both clauses could apply equally to a port or berth charterparty.

Charterers appealed, submitting that if the opening term stood alone it was clear this was a berth charterparty. Clause 2(1) was not inconsistent with the opening term: it did no more than add a safe port warranty and had nothing to do with the contractual destination. In any event, had Clause 2(1) stood alone, the charterparty would still have been a berth charterparty. As to Clause 2(2), the Arbitrators had it the wrong way round: that provision as to time spent shifting made sense in a berth, not a port, charterparty; alternatively, Clause 2(2) was neutral.

The judge held that in the case of a voyage charter, arrival at the specified destination was the point both geographically and in time when the voyage stages ended and the loading/discharging operations began. Identification of the "specified destination" – whether "berth" or "port" – impacted on the incidence of loss occasioned by delay in loading or discharging when the delay was due to the place at which the vessel is obliged by the terms of the charterparty to load or discharge her cargo being occupied by another vessel.

In the present case, the opening term of the charterparty concisely defined the contractual destinations both as to place of loading and place/s of discharge. It did so in a manner which, if it stood alone, made it plain that this was a berth charterparty.

The opening term was in a form which identified the destination as the berth. The specified destination was not Xingang; it was one "good and safe…berth…..Xingang". That would by itself suffice to make it a berth charterparty, assuming that the opening term was not overridden by any other provision(s) of the charterparty.

On its true construction the opening term provided expressly for Charterers to nominate the berth at Xingang. That express right was given to Charterers by the wording "chrs' berth" in the opening term. On that ground also, the charterparty was a berth charterparty.

If matters had rested with the opening term, the argument was all one way in Charterers' favour. However if Clause 2(1) had the meaning attributed to it by the Arbitrators the opening term was deprived of any meaning or purpose. So far as concerned the contractual destination it was, on the Arbitrators' construction, negated. Having regard to the structure of the charterparty, that would be odd. The charterparty would have commenced with the opening term, pointing overwhelmingly to it being a berth charterparty. Clause 2(1) would then have converted the charterparty into a port charterparty. There was no apparent reason why the parties should have done that.

If instead Clause 2(1) was viewed as introducing a safe port(s) warranty and reiterating the safe berth(s) warranty, then there was no inconsistency between the opening term and Clause 2(1). The opening term expressed the contractual destination relevant to the allocation of the risk of delay; Clause 2(1) focused on a different matter (the safety of the ports and berths) and imposed additional obligations on Charterers. It was true the opening term would have sufficed to impose a safe berth(s) obligation on Charterers so that the repetition of that obligation in Clause 2(1) was strictly unnecessary. But reiteration of that warranty at least avoided argument and gave rise, at worst, to surplusage. That was the preferred construction of Clause 2(1).

Clause 2(2) was neutral. It signified merely that the parties had made express provision for (1) the costs and (2) the time involved in shifting and warping. By so doing, they had sought to prevent disputes arising with regard to those matters. On that view, the presence of Clause 2(2) did not assist either Owners or Charterers.

If that was wrong, the Arbitrators had fallen into further error. The Arbitrators had said that if this was a berth charterparty there would have been no need for a provision such as Clause 2(2). The judge disagreed. If this were a port charterparty, Clause 2(2) might have been unnecessary insofar as it dealt with time counting, since (provided the anchorage was within port limits) the vessel would probably have been an arrived ship throughout. But if the charterparty was a berth charterparty, the provision in Clause 2(2) as to time counting had a real meaning – absent some such or other express provision, no time would have counted prior to the vessel actually berthing.

Accordingly, in the present case, the charterparty was a berth - not a port - charterparty. The appeal was allowed and the Owners' claim for demurrage failed.

JURISDICTION OF COURT TO ORDER PRE-ARBITRATION DISCLOSURE

By Section 9 of the Arbitration Act 1996 the Court has the power to stay legal proceedings brought in the Court in respect of disputes that are to be referred to arbitration pursuant to a valid arbitration clause. In EDO Corporation v Ultra Electronics Limited the High Court considered an application by the Claimant for pre-action disclosure and, in turn, an application by the Defendant for a stay of the same.

The Claimant, who had bid successfully to manufacture a sonar system for the Royal Navy, sub-contracted with the Defendant to supply equipment. The sub-contract provided for any disputes between the two parties to be referred to arbitration. The Defendant later secured a similar contract with the Australian Navy and the Claimant contended the Defendant in so doing had misused proprietary information belonging to the Claimant in breach of the terms of the sub-contract. However in order for the Claimant to ascertain whether it had a substantive dispute, it required sight of tender documents the Defendant had submitted to the Australian Navy. On this basis the Claimant made an application for pre-action disclosure pursuant to section 33(2) of the Supreme Court Act 1981 and CPR Part 31.16. The Defendant applied to stay the application under section 9 of the Arbitration Act.

The issues for determination by the Court were (1) whether the procedure for pre-action disclosure provided by section 33(2) is available to a Claimant where the contract in dispute contains a valid arbitration clause, and (2) if so, whether section 9 of the Arbitration Act enabled the Court to stay such an application.

The Claimant argued in relation to the first issue that the Court has jurisdiction under International Chamber of Commerce Rule of Arbitration 23(2) to award "interim and conservatory" measures even before an arbitration tribunal has been appointed. On the issue of a stay, the Claimant submitted the application for pre-action disclosure is not a "legal proceeding" to which section 9 applies, but instead an application prior to legal proceedings for which the Court does not have jurisdiction to issue a stay.

The Court rejected the Claimant's reliance on the ICC Rules. It held first that these apply only when a substantive claim has begun, second a Section 33(2) application is not an "interim or conservatory" measure and third the ICC does not have the power to grant to the High Court a jurisdiction beyond that with which it had been endowed by Parliament.

It was further held that section 33(2) does not confer jurisdiction on the Court to make an order for pre-action disclosure in aid of the arbitral process. The section applies only where the applicant is "likely to be a party to subsequent proceedings **in that Court**" (our emphasis). It was therefore concluded that section 9 cannot apply. Incidentally, the Court also held that a section 33(2) application does not constitute "legal proceedings" within the meaning of section 9 anyway.

Application dismissed.

DATE OF PAYMENT INTO COURT BY CHEQUE

In ENE Kos v Petroleo Brasilieiro the Court of Appeal had to consider the effective date of payment into Court when it was made by cheque.

The appeal followed a summary judgment of Mr Justice Field that withdrawal of the vessel by her Owners for unpaid hire was lawful and valid. Initially the Judge conditionally refused the application for summary judgment upon condition the Defendant Charterers

paid into Court or provided security for $500,000 by 5pm on 27 February 2009. The Defendant lodged a Dollar cheque for that sum in the Court Funds Office before 4.30pm on that day. The Judge nonetheless granted summary judgment in favour of the Claimant on the grounds that the Defendant's cleared funds had to be held by the Court Funds Office by the specified date in order to comply with his order. The Charterers appealed.

Dyson LJ scrutinised the language of Court Funds Rule (CFR) 16(6)(ii), which he concluded was clear and unequivocal. The Rule states the effective date of lodgement of a cheque is "the date of its receipt in the Court Funds Office or such later date as the Accountant General may determine." In contrast, if the effective date were to be the date the funds cleared, the matter would be taken out of the control of the paying party, creating uncertainty, which could not have been the intention of the draftsman of the rule.

The Claimant Owners argued in the alternative that payment into Court may not be made by foreign currency cheque. The relevant rule of the CFR (rule 38), is silent on this issue. Dyson LJ rejected the Claimant's argument, holding that there is no reason for reading CFR 16(6)(ii) as being limited to Sterling cheques.

The Court therefore concluded the effective date of payment was the date the cheque was lodged in the Court Funds Office. The Judge had therefore erred in holding that the Defendant had not satisfied the condition in his order. Notwithstanding this, the Court dismissed the appeal on the basis the Defendant's case in the substantive proceedings had no prospect of success.

NO "SUPER" HOLIDAY

The LOWLANDS ORCHID was a voyage chartered to carry out a cargo of coal in bulk from Richards Bay to Europe. The charterparty was a fixture recap with the pertinent provision stating "Scale load/25,000 MT SHINC" and, "otherwise as per "EUROSAILOR" charterparty dated 2 March 2004 with clause 42 last paragraph deleted logically amended to reflect main terms agreed as above...". The EUROSAILOR proforma charterparty contained provisions that the cargo was to be discharged at an average rate set out later in the charterparty per weather working day of 24 consecutive hours with Sundays and holidays included as part of laytime; that if the vessel was detained then the Charterers were to pay demurrage of US$60,000 per running day or if discharge was completed sooner than permitted laytime Owners were to pay dispatch at US$30,000 per day; clause 63 of the proforma charterparty provided the discharge rate was 25,000 MT Sundays and holidays included, excluding Super Holidays.

The vessel, having loaded a cargo of about 168,000 MT of coal proceeded to discharge at Rotterdam with the balance of cargo at Immingham over the Christmas period. Owners claimed demurrage and a dispute arose as to whether laytime counted during the Super Holidays at Immingham during the period between 24 and 27 December when cargo operations stopped. The Tribunal had to consider whether and to what extent the terms from the proforma charterparty were to be incorporated into the fixture recap which in turn required the Tribunal to consider whether the words "25,000 MT Sundays and holidays included, excluding Super Holidays" in clause 63 of the proforma charterparty were inconsistent with the words "25,000 MT SHINC" in the fixture recap.

The majority of the Arbitrators held there was no inconsistency and concluded that the term "Super Holidays" was widely used as an exception to time counting as laytime under the normal meaning of SHINC terms. They held that the shorthand term "SHINC" was capable of qualification and was not to be taken in the context of the fixture recap as a definitive term which would override provisions in a proforma charterparty referred to in the fixture recap. The majority concluded Charterers were entitled to dispatch. However a dissenting arbitrator considered that SHINC was plain English and meant that Christmas Day was included and that there was an inconsistency with clause 63 of the proforma charterparty.

The Owners appealed the Tribunal's decision to the High Court. Their primary case was that clause 63 was not incorporated into the charterparty at all because holidays were already dealt with in the fixture recap by the "H" in "SHINC" and the words "otherwise as per Eurosailor". The exclusion of Super Holidays in clause 63 was inconsistent with the fixture recap therefore this provision could not be incorporated into the contract. In the alternative, Owners argued that if clause 63 was incorporated it had to be logically amended as stipulated in the recap in order to accord with the main terms agreed in the recap.

The Court held as to the Owners' primary case that the fact the "H" in "SHINC" related to holidays did not prevent a qualification of that term in the proforma charterparty or mean that any qualification was contradictory. The term "otherwise" also did not have that effect. The provision in the fixture recap of "25,000 MT SHINC" was qualified by a comprehensive laytime code in the proforma charterparty and on reading that phrase in the recap the parties would know that it did not contain the entirety of the contractual provisions relating to laytime.

As to the Owners' alternative argument of inconsistency between negotiated terms and proforma charterparty terms and that in a case of inconsistency the negotiated terms would prevail, the Court held that clause 63 of the proforma charterparty did not substantially or entirely deprive the SHINC term in the recap of effect. Time would count as laytime during holidays unless they were Super Holidays such as Christmas. That the recap stated the proforma charterparty was to be logically amended to reflect the main terms agreed above did not mean the main terms in the recap could not be qualified by the terms of the proforma charterparty. It is common practice for main terms related to laytime and demurrage in a recap to be qualified by the proforma charterparty incorporated into that recap.

Accordingly, there was no clear direct and irreconcilable conflict between clause 63 of the proforma charterparty and the recap. The two clauses could and should be read together sensibly and in a commercially satisfactory way. Clause 63 clearly had been agreed by the parties to qualify the SHINC term contained in the fixture recap. The Court dismissed the Owners' appeal.

The above are only intended to be short summaries.

If you require any further information please feel free to contact us.

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