Tankers On Demurrage? And If So, At What Rate?

The Court of Appeal recently provided helpful clarification of the way in which a well-known provision in the Asbatankvoy charter form the most widely used charter in the tanker industry, is to be interpreted.

The case, The "Afrapear" (2004) 2 LLR 305, concerned Clause 8 of the Asbatankvoy which provides, where relevant, as follows:

"Charterer shall pay demurrage at the rate specified in Part 1 ... if, however, delays occur and/or demurrage shall be incurred at ports of loading and/or discharge by reason of ... breakdown of machinery or equipment in or about the plant of the charterer ... such delays shall count as half lay time or if on demurrage the rate of demurrage shall be reduced one-half of the amount stated in Part 1."

The case involved a sea line that was connected to a terminal operated by the consignee of a cargo of fuel oil. The poor condition of the sea line precipitated the arrival of the "Afrapear" but, as a consequence of its condition, during discharge there was leakage from the line. The result was that the vessel was twice ordered off the sea line first so that temporary repairs could be undertaken and then, when these failed to stop the leak, permanent repairs. Discharge was delayed by 19 days.

The question for the Court was whether pursuant to clause 8 of the Charterparty there was a "breakdown of machinery or equipment" so that, during the delay occasioned by the repairs to the sea line, demurrage accrued at half rate. The Court of Appeal, reversing the High Court Judge at First Instance, held that the fact of the pre-existing nature of the damage was immaterial and there was a breakdown of equipment for the purposes of Clause 6.

Clarke LJ in the Court of Appeal relied on the "Thanassios A" (Oikena SA v Psara Maritime Inc (Unreported, March 22, 1982)) where the vessel was unable to berth because of damage to equipment on the berth caused by another vessel. In that case the Court held that the damaged pipes on the jetty were "equipment" but that the jetty itself was not. When determining whether there had been a breakdown of equipment for the purpose of Clause 8, the Court J said that:

"The cause of the breakdown is immaterial. It could be some external agent, or it could be some internal defect in the machinery or equipment, but if the machinery or equipment does not function, and possibly also if it malfunctions, then there is a breakdown of the machinery or equipment."

Therefore, there is a distinction between a breakdown and the cause of that breakdown of equipment. The "Afrapear" was delayed from discharging by a series of breakdowns; when the pipeline leaked that prevented discharge, notwithstanding that the cause pre-dated the vessel's arrival at the terminal. On a true construction of clause 8 of the Charterparty there was a breakdown of equipment within the meaning of the clause, and half demurrage was payable.

The Club has recently been involved in a London arbitration on similar facts. The award was published less than a month after the Court of Appeal decision in The "Afrapear". The arbitration decided that when the mooring hawser of an SBM in the Indian Sub Continent was damaged by the vessel coming alongside, the vessel was also damaged in the collision but was ready to resume loading within three days. However, due to the fact that, in breach of international guidelines for the operation of SBMs the charterers, who were also the terminal operator, did not have a spare mooring hawser in stock, the vessel remained at anchor while charterers arranged for delivery of a second hand hawser.

Having decided in an earlier interim award that owners were responsible in law for the actions for the mooring masters, whose negligence caused the collision, the tribunal decided that lay time did not run until the vessel had been repaired and was ready to resume loading. The period of delay after the vessel had been repaired was not caused by the charterers', but the charterers' failure to replace the broken hawser with a spare one. It was not foreseeable that repairs, and therefore the vessel, would be delayed while charterers located and acquired a replacement hawser.

As in the case of The "Afrapear", the delay was caused by the breakdown of the SBM but, and unlike The "Afrapear", the tribunal rejected charterers' argument that pursuant to clause 8 of the Charterparty, demurrage was payable at half rate. The delay was not caused by the breakdown of equipment in or about the plant of the charterer, but rather by the charterers' failure to replace their broken hawser.

The finding that the charterers were also the owners of the terminal distinguishes the award from The "Afrapear" in which the Court of Appeal specifically rejected a similar argument. In The "Afrapear" the charterers were not the terminal owners and could not reasonably have been expected to have been aware of the problem with the sea line, and were not responsible for nor did they cause the delay while repairs were undertaken. It was not necessary to imply into clause 8 a term to the effect that there was only a breakdown of equipment in or about the consignees plant in the absence of fault on the part of the consignee.

Although the facts in the recent arbitration are somewhat unusual, they do illustrate how, in certain circumstances, it is not enough for a charterer who also owns the terminal either to show that the delays were caused by anything over which they had control, so that time does not run by virtue of Clause 6, or that pursuant to Golf J's definition of breakdown of equipment clause 8 applies so that only half demurrage is payable. If charterers, when dealing with the consequence of the initial problem, fail to act reasonably in mitigating their loss the ensuing delays cease to be governed by the demurrage provisions in the charter and charterers may become liable to pay owners damages for demurrage.

It is true law that each dispute turns on its facts but this analysis of The "Afrapear" and recent arbitration neatly illustrates the point.

"Clause 6 of the Asbatankvoy provides "...Where delay is caused to a vessel getting into berth after giving notice of readiness for any reason over which charterer has no control, such delay shall not count as used lay time..."