Admitted Sums - When There Is, Or Is Not, A Dispute

In the recent judgment, the High Court discussed whether an admitted but unpaid claim was within the meaning of the words "any dispute" in relation to an arbitration clause that provided "any dispute arising under this charter to be referred to arbitration in London." The "dispute" was in relation to unpaid hire. Clause 27 of the charter party provided for demurrage to be "settled latest within 30 days of completion of discharge." Shortly after completion of the Owners sent the Charterers a debit note claiming demurrage for the sum of US$140,892.

The Charterers admitted that Owners were entitled to the sum claimed and offered to pay "either in installments or in a lump sum in about 7/9 months commencing from 9th September 2005." The Owners rejected the Charterers' offer and started arbitration on 14th September, 2005. On the 15th December, 2005, the Charterers paid US$10,892, reducing the outstanding sum to US$130,000.

The Charterers' defence was that there was no "dispute" sufficient to give jurisdiction to an arbitrator pursuant to the arbitration clause in the charterparty. There position was simply that they had admitted liability and the amount of the claim as well as a due date for payment and the fact that payment had not been made - all they had not done was pay. Therefore there was no dispute. The arbitrator disagreed: "[Owners] have a claim. Charterers have not and are not paying despite their admission. I simply fail to see how that cannot be regarded as a "dispute" under the terms of the charter party ..."

Appeal

The Charterers applied to the English High Court to set aside the award for want of jurisdiction. The same issues were before the court, whether there was "any dispute" between the parties.

Langley J dealt with the appeal in short order. He described the application as "wholly unmeritorious" and pointed out the difficulties that would result if a claimant could not seek an award from the tribunal for an admitted claim. The only available remedy would be court proceedings.

However, before courts of which jurisdiction should such proceedings be brought? Furthermore, if there was any doubt as to when a claim had been admitted, or surrounding the circumstances in which it was claimed an admission had been made, a claimant that started court proceedings ran the risk of being time barred if, in relation to any element of the claim, the correct course of action was arbitration. The only safe course for a claimant would be to start arbitration and proceedings before a court, with the consequent risk of conflicting decisions and additional costs.

Notwithstanding the clear decision in this case the words "any dispute" have caused a number of reported disputes. Prior to the Arbitration Act 1996 court proceedings were often pursued notwithstanding a valid arbitration agreement where the court was satisfied that there was "not in fact any dispute" between the parties to be referred to arbitration. In The "Halik" a case decided after Arbitration Act 1996 had been enacted Swinton Thomas L J took the view that a dispute exists until the defendant admits the sum claimed is due and payable. This view was supported by earlier authorities pre dating the Arbitration Act 1996, for example The "M. Erefti" in which Kerr J said that an "admission would in effect amount to an agreement to pay the claim and there would then clearly be no basis for referring it to arbitration or treating it as time barred if no arbitrator is appointed."

However, the majority of the Court of Appeal in The "Halik" took the view that section 9 of the Arbitration Act 1996 had introduced a restriction to the Court's power to allow legal proceedings where a claim was indisputable or there was no arguable defence.

The facts of The "Halik" were similar to those in Exfin Shipping save that the defendant Charterers had refused both to admit liability and therefore also to pay the claim. In Exfin Shipping the Charterers sought to distinguish The "Halik" on this basis although Langley J dismissed the argument out of hand stating "It would be remarkable if parties had chosen to address the issue of jurisdiction by reference to whether non payment was due to a failure to admit a valid claim rather than the failure to pay it." Referring to Clark J at first instance in The "Halik" Langley J relied on the decision of Clarke J that the arbitration clause in The "Halik", which was materially the same as in Exfin Shipping, was intended to give arbitrators jurisdiction over "all claims which either party refused to pay". He also sought support from the Court of Appeal in Glencore Grain Ltd v Agros Trading Co in which Clark LJ said:-

"I do not see how an admission can supersede the deemed dispute. I do not accept that a dispute cannot continue to be a dispute once the claim has been admitted. An important purpose of the clause and indeed of the arbitration machinery is to enable a claimant to obtain an arbitration award which will be enforceable under the New York Convention ... As I see it; the scheme of the contract is that it is the duty of the paying party to settle final invoices without delay. If they are not so settled a dispute is deemed to exist."

Prior to Exfin Shipping there probably was no binding authority on the availability of summary judgment where a claim has been admitted but had not been paid. The case law was finely balanced. Subsequent to Exfin Shipping it would now seem that although always a matter of construing the relevant clause, unless there is a clear acknowledgement of a debt within the meaning of Section 29(5) of the Limitation Act 1980, the correct and safest approach is to commence arbitration in accordance with the charter party arbitration clause.

1. Exfin Shipping (India) Ltd v Toalpi Shipping Co Ltd [2006] EWHC 1059 (Comm)
2. Halik Shipping Corporation v Sopex Oils Ltd. (The "Halik") [1986] 1 LLR 465
3. [1981] 2 LLR 169
4. [1999] 2 LLR 410