When is a Redelivery Notice Binding?

The recent volatility in the freight markets has led to a significant increase in the number of period charter disputes concerning delivery and redelivery notices. These notices are of vital commercial importance. A time charterer will only be able to fix firm employment for a vessel once he knows when the vessel will be at his disposal. Similarly, an owner needs to know when his ship will be returned to him, so that he can fix a follow-on charter with a minimum of downtime between fixtures.

When the market is rising or falling, late or invalid notice can make a significant difference to the profitability of a vessel’s next employment. It is for this reason that Charterparties contain detailed notice clauses, requiring delivery and redelivery notices to be given at staged intervals, commencing with approximate notices, which are then transformed into a series of definite notices as the date approaches.

In IMT Shipping and Chartering GmbH v Changsong Shipping Company Limited: The Zenovia [2009] EWHC 739 (Comm) Mr Justice Tomlinson had to decide whether an arbitration award holding that Charterers were bound by a redelivery notice should be overturned on appeal.

The Zenovia Charter provided for redelivery within “minimum 20 September 2007/maximum 22 November 2007”. The Charterers were obliged to “give Owners not less than 30 days followed by 20/15/10/7 days notice of approximate redelivery date and intended port thereafter 5/3/2/1 days definite notice of redelivery date and port.”

On 5th October 2007 the Charterers gave “approximate notice of redelivery for the m.v. ZENOVA at OLLOS 1 SP China on about 4th November 2007 basis AGW, WP, WOG, UCE…”

On the strength of this message, Owners then retied the vessel for her next employment. However, on 15th October a further message was sent by Charterers to Owners stating that the vessel would only be redelivered on 20th November. This was because Charterers had decided to perform another voyage.

Owners disputed that Charterers had the right to perform another voyage and withdrew the vessel on 2nd November. Charterers said this withdrawal was wrongful, and commenced arbitration claiming damages for repudiation.

The Charterers argued that their original redelivery notice was hedged about by five well-known reservations: “about”, “agw”, “wp”, “wog”, and “uce”. They said that the effect of these reservations, in particular the terms “without prejudice” and “without guarantee” was that no binding representation as to a redelivery date was made at all.

The arbitral tribunal rejected this argument, although they appeared to regard them as superfluous in the context of a 30-day notice. They nevertheless found in favour of the Owners on two grounds. First, they said that there was an implied charter term that “where an approximate date of redelivery is given by the Charterers, the Charterers are obliged not to do anything deliberately which prevents the approximate date being met”. In other words, Charterers could not decide to perform another voyage. Secondly, they held that the Owners had relied on the original redelivery notice, provisional final hire statement and form of hire payment made by Charterers when fixing the vessel’s next business, which stopped Charterers from withdrawing their earlier notice – in forensic terms, a “promissory estoppel” had arisen.

In allowing the Charterers’ subsequent appeal, the Commercial Court said that the fact that the arbitral tribunal had found that the redelivery notice was expressly given “without prejudice”, had the result that the Charterers were bound to succeed with their claim. This is because according to case law, when a message contains the phrase “without prejudice” this indicates that what is said elsewhere in the message cannot be relied upon by the recipient, unless it leads later to a binding agreement.

The Judge found that no implied term of the type suggested by the arbitral tribunal, or even a modified version of the same, such as that, once a redelivery notice is given, “the Charterers should not do further voyages the effect of which would be that the first approximate date given would not be met”, or that, once a redelivery notice is given it “prevents the Charterers from undertaking additional employment” should be implied into a time charterparty. He pointed out that the very fact that the actual term that should be implied was not at all obvious, was evidence that such a term should not be implied.

The Court also thought it significant that the redelivery clause required each successive notice of approximate redelivery date to give also the intended port of redelivery. The Judge said that it could be inferred from this that the parties envisaged that the intended port may change. If the giving of a Redelivery Notice were, in fact, to impose upon the Charterers some sort of absolute obligation, as envisaged by the arbitral tribunal, it might have been thought necessary to name the intended port only in the first notice.

The promissory estoppel argument relied on by the arbitral tribunal also failed because, in the Court’s view, this was inconsistent with the arbitral tribunal’s factual finding that the Charterers had said nothing from which it could reasonably be inferred that they were abandoning any contractual right. The Court was reluctant to conclude that “a notice of approximate redelivery… given ‘without prejudice’ can without leading to an agreement nonetheless give rise to a promissory estoppel” or that it can, without more, create “an obligation on the charterer not deliberately to do anything which might prevent” that date being met.

The Court also held that the words “without guarantee” were capable of qualifying the effect of a representation and that Owners could not extract a promissory estoppel from what the Charterers had said, when this was qualified by the words “without guarantee”.

Accordingly the Court held that Charterers had not made a clear and unequivocal promise to the Owners either that the current voyage would be the last employment under the charterer or that they would not, in any event, seek to retain the vessel in their employment until the last permitted date for redelivery, namely 22nd November.
Implications for Redelivery Notices

Permission to appeal was requested from the trial judge but denied. Accordingly, the decision stands as it is, until such time as the issue may come before the courts again.

What we have in The Zenovia, is a collision between the commercial purpose of delivery and redelivery notices, which is to enable the recipient to plan the vessel's next employment in advance, and a well-established line of case law - prominent, for example, in speed and performance warranties - which says that parties are not bound by representations made “without prejudice” and “without guarantee”.

The market reaction to the judgment has been critical, and understandable in circumstances where Owners had refixed the ship having been led by Charterers' notice to believe that their previous charter would come to an end when Charterers first said it would. Many vessel operators are unaware of the English law treatment of qualifying reservations on representations made in correspondence. However, given the factual findings made by the Tribunal – in particular their finding that “wp” meant ‘without prejudice’ rather than “weather permitting” - the Judge’s opportunity to reach any alternative conclusion on appeal was limited. Findings of fact made by arbitrators bind a court on appeal.

The decision has been said to be favourable to Charterers. While this is true in the context of redelivery notices, its conclusions are equally favourable to Owners who want to withdraw a delivery notice so as to fit in an intermediate voyage prior to the end of a delivery laycan. In both cases, the judgment suggests that Owners and Charterers can escape the binding effect of notices given by them by qualifying them as “without guarantee” or “without prejudice” (although there is still a residual obligation to give any notice honestly and in good faith as to its accuracy).

For both Owners and Charterers however, the effect of the judgment is clear – if a delivery or redelivery notice is given qualified by the words “without prejudice” or “without guarantee” – or indeed any qualification, then an Owner or Charterer (as the case may be) accepts it at his peril. If such a notice is given then the recipient should reject it and insist on an unqualified notice.

While both Owners and Charterers are under a contractual obligation to give clear notices of approximate delivery and redelivery, if no objection is taken to an uncontractual notice at the time it is given, it may be too late to dispute its effect later on. It may also be worth tightening up Charterparty notice clauses to ensure that their effect is not nullified by subsequent qualifications. One way to amend these would be to make it clear (i) that the recipient of a delivery or redelivery notice is entitled to rely on it, and (ii) that the party giving the notice shall not take any action inconsistent with delivery and redelivery in accordance with the notice.

With thanks to David Semark and Alex Andrews of Reed Smith for preparing this article.