Liability for Freight and Demurrage under a Bill of Lading

In this arbitration the Claimant was the Head Charterer who, unsuccessfully, argued that it was the contractual carrier under the contract of carriage.

The Facts

The Claimant chartered the vessel from the registered Owners on voyage charter terms and in turn sub-chartered the vessel, again on voyage charter terms. The vessel was fixed to carry a bulk cargo of wheat. The underlying sale contract was on FOB terms. The buyer under the sale contract and the sub-Charterer were affiliated companies.

Upon loading the cargo, bills of lading were issued on the Congenbill form and were signed by the Master. The bills specified that freight was payable as per the sub-charterparty. The terms of the sub-charterparty, including the law and jurisdiction clause, were expressly incorporated into the contract of carriage.

The cargo was loaded by 24 May. However, the vessel’s sailing was delayed at the request of the shipper. It subsequently transpired that the sale contract had been repudiated by the buyer. The shipper, reportedly on behalf of the buyer, entered into negotiation with the Head Charterer to try to break the impasse and get the ship moving, but the negotiations were inconclusive. In the event, the shipper obtained a court order to discharge the cargo at the load port. Meanwhile the vessel sat waiting at the roads for about six months.

For reasons that are not explained in the case report (although perhaps indicating the sale contract was not the only contract that had turned sour) the Head Charterers commenced arbitration against the shipper rather than the sub-Charterer and sought damages of around two million US Dollars. The Head Charterer asserted it was the carrier under the contract of carriage, pursuant to which, the shipper was liable to them for either freight and demurrage, or detention damages and expenses.

The issues to be decided by the tribunal

The main issues that fell to be decided by the tribunal were:

1. Who were the parties to the contract of carriage?
2. Was the shipper estopped from denying that the Head Charterer was the contractual carrier?
3. Was there an implied contract between the shipper and the Head Charterer?
4. Was the relationship between the shipper and the Head Charterer subject to the sub-charterer’s dispute resolution clause?

The tribunal’s decision

In the normal course, under a sale contract on FOB terms title for the goods will pass to the buyer upon the completion of loading, which in turn will mean, upon loading, the rights and obligations of the seller as shipper under the contract of carriage will also pass to the buyer. On the facts of this case however the tribunal was willing to accept that, contrary to the normal position, here, the shipper did retain rights and obligations under the contract of carriage after the completion of loading.

In reaching this decision the tribunal seems to have been swayed by the fact that the shipper was able to both lien the cargo and then obtain a court order for its discharge. It was considered that both of these steps were inconsistent with the shipper no longer being a party to the contract of carriage. The tribunal also considered that, as the bills had not been endorsed (or even issued) to the buyer and the buyer had repudiated the sale contract, these facts also weighed in favour of the shipper still having obligations under the contract of carriage. But to whom were these obligations owed?

The resounding answer was: not to the Head Charterer.

The tribunal referred to the House of Lords’ guidance in The Star Shiner [2003] 1 Lloyd’s Rep 571 that the first place to look to ascertain the identity of the carrier was the face of the bill. Here the bill was signed by the Master, thus raising the presumption that the Head Owner was the carrier. There was nothing else on the face of the bill, or in the conditions of carriage, or in the incorporated sub-charterparty terms to displace this presumption. The Head Owners were therefore the carrier.

The tribunal then turned to Head Charterers’ estoppel argument. Finding no grounds to support this argument, it was held that the essential elements to found an estoppel were missing as:

1. There was no pre-existing legal relationship between the parties.
2. The shipper’s actions before and during loading were consistent with the actions of a FOB seller in ensuring the cargo was properly loaded. There was no evidence presented to the tribunal which would amount to a representation by the seller that it intended (or represented) any other contractual relationship to prevail.
3. Head Charterers could not identify any act or omission they took in reliance of the shipper’s representations that was to their detriment.
4. In any event - rendering the previous reasons superfluous - estoppel can only be used as a defence to a claim and cannot be used to bring a claim (per Danning LJ): estoppel could not be used as a “sword”.

A US case was also considered by the tribunal (non-English law cases can be persuasive, but not binding, in English litigation / arbitration). Head Charterers alleged that the shippers had embraced favourable parts of the sub-charterparty and so were now estopped from denying the non-favourable parts including the obligation to pay freight. A US first instance court had snapped referred to such cherry-picking as the “knowing exploitation theory of equitable estoppel”. The tribunal reiterated the evidence available to it did not support any such knowing exploitation had taken place by the shipper, whom it considered had acted consistently as only a FOB seller.

The shipper therefore did not owe the Head Charterer duties under the bills of lading or the sub-charter. This left Head Charterers’ only tail-back, an argument that there was an implied contract between themselves and the shipper. It was noted by the tribunal that in certain circumstances an
implied contract could arise in respect of a bill of lading. The tribunal was not however prepared to accept that the evidence before it established there was any such implied contract between the shipper and the Head Charterer.

The tribunal then proceeded to deliver the coup de grace. Even if there was an implied contract between the shipper and the Head Charterer, there was no authority that provided such an implied contract would include an arbitration clause. The result was there was no arbitration agreement between the parties, the arbitration had not been properly commenced and consequently, with the exception of the tribunal’s decision that it did not have jurisdiction, the rest of the proceedings were a nullity.

The missing piece in this story is the sub-Charterers. If they had been on the scene and, were fixed on standard voyage charter terms the Head Charterers should not have been left ‘holding the baby’. The reason for this, and the lesson one could learn from it, are unfortunately hidden behind the anonymity that comes with London arbitration.

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