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Floating Storage and Contractual Interpretation

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Two recent decisions looked at sums due to Owners where the vessels concerned had allegedly been used as floating storage.

The Commercial Court in *Gard Shipping AS v Clearlake Shipping Pte Ltd* [2017] EWHC 1091 approached the matter as one of contractual interpretation where an extensive demurrage regime had been agreed in the Charterparty.

In London Arbitration 18/17 the Tribunal had to consider whether a notice of readiness had been validly tendered so that only demurrage would be payable or whether damages could be claimed for an allegation amounting to detention.

Gard Shipping AS v Clearlake Shipping Pte Ltd

The issue in this case was whether or not Owners were entitled to claim demurrage at an enhanced and escalating rate for a period of 64.7083 days during which the vessel was waiting to discharge cargo at Rotterdam.

By a voyage Charterparty dated 9 December 2015 Owners agreed to let to Charterers the "Zaliv Baikal" for one voyage to one or two safe port(s) "*UK CONT North Spain-Hamburg range*". By an addendum a second voyage was agreed in direct continuation from Ust-Luga or St Petersburg with the discharge range as before. The dispute arose in relation to the second voyage.

The Charterparty based on amended BPVOY4 terms contained standard laytime and demurrage provisions, but also incorporated a specifically agreed regime for enhanced demurrage. The key clause upon which the argument turned was Additional Clause 11 which gave liberty to the Charterers to instruct the vessel to stop and wait for orders or discharge instructions for a maximum of three days. If the waiting period lasted five days or more the vessel was to be considered as being used for storage and enhanced demurrage rates were to apply as follows:

- *Days 6-15 demm rate plus US$5,000*
- *Days 16-25 demm rate plus US$10,000*
- *Days 26-35 demm rate plus US$15,000*

Prior to the expiry of 35 days Charterers were to inform Owners if they required more time and new rates were to be mutually agreed. Charterers were also given an option to order the vessel to wait at an offshore position and if a final destination and/or delivery window had been advised the increase rates were not to apply.

It was common ground between the parties that the vessel departed the load port on 31 December 2015, stopped at various ports en-route, and arrived at Rotterdam on 26 January 2016. After the vessel tendered notice of readiness at the discharge port, the Charterers gave no orders for 64 days. The parties agreed that demurrage was due for this period but disagreed as to the actual level payable.

Owners argued that the commercial purpose of the clause was to recognise when the vessel was being used as floating storage. Further, that it did not make commercial sense if the Charterers could avoid the enhanced rate of demurrage by the tactic of giving no orders, rather than giving a "stop and wait" order.

The Court considered the principles of contractual interpretation set out in *Rainy Sky v Kookmin Bank* [2012]1 Lloyd's Rep 34 along with the recent judgment in *Wood v Capita Services* [2017] 2 WLR 1095 in which the Supreme Court set out that in the exercise of contract construction the Court has to balance the indications given by the language and the commercial implications of competing constructions.

The Court rejected the Owners' arguments and agreed with Charterers that there were a number of different demurrage regimes provided for in the Charterparty. The key was to identify under which regime the relevant event fell. The enhanced demurrage regime under Additional Clause 11 only applied when a "stop and wait" order was given. Crucially, Charterers had not given a "stop and wait order". A passive failure to give orders did not fall within the meaning of the wording used. Accordingly, the enhanced regime had not been triggered.

The Court also rejected the Owners' alternative argument that there was an implied term on the grounds of lack of commercial necessity. The Charterparty provided a reasonably comprehensive framework for different types of events and it was not necessary to imply the term sought by Owners.

Owners were only entitled to the ordinary demurrage rate of US$ 32,500 per day.

London Arbitration 18/17

This arbitration related to two separate issues arising under a voyage charter, the first covering additional expenses at the load port (which we will not consider) and a second dispute in relation to delays off the discharge port whilst the Charterers considered whether to discharge at an alternative port.

By way of background, the vessel had been chartered for carriage of petcoke from Port Arthur, USA to Matanzas, Venezuela. Charterers had issued orders "*not to berth nor tender NOR nor discharge any cargo at port in Matanzas, Venezuela until charters give written approval to do so*".

In compliance with Charterers' orders, the vessel anchored on 8 September at sea buoy 0.1. Owners claimed they were entitled to a reasonable daily remuneration based on a commercial rate of US$11,700 per day for allowing the vessel to be used as floating storage during a period of 12.7 days awaiting orders. Charterers submitted that an NOR had been tendered and Owners were only entitled to demurrage at the Charterparty rate of US$8,500 per day.

The Tribunal agreed with Owners that the sea buoy was not a customary anchorage for vessels to wait to transit to Matanzas. Accordingly a valid notice of readiness could not be tendered there and laytime had not commenced. Charterers had been aware of the vessel's position and raised no objection.

The Tribunal decided that under a voyage charterparty the vessel was to sail directly to discharge port where she could tender notice of readiness and laytime would commence. The Charterers' extra-contractual orders prevented the vessel from proceeding to such a position and damages

were payable to Owners for the entire period of delay to the vessel reaching the position where notice of readiness could be tendered.

Owners were entitled to damages rather than demurrage at an adjusted rate of US$9,500 per day, and following *The Saronikos* [1986] 2 Lloyd's Rep 277 Owners were also entitled to bunkers consumed during the waiting time.

Comment

These cases highlight the difficulties for Owners and Charterers if intentions are not made clear. The Court and Tribunal both gave more weight to the actual obligations expressed in the Charterparties rather than arguments which were framed on the parties' competing perceptions of what constituted commercial common sense. An article on the Club's website of June 2017 - The Primacy of Language in the Construction of (Commercial) Contracts – discusses the approach of the English Courts to contractual interpretation in greater detail.

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