LANDMARK NORWEGIAN SUPREME COURT JUDGMENT ON PORT FEES

Flaws in the new Norwegian Act relating to Ports and Fairways (Port Act) exposed as lack of competition between Norwegian ports puts shipowners in a difficult position.

1 Introduction

Norway's new Port Act 2009 (*havne- og farvannsloven*) became effective on 1 January 2012. The Act deals with most aspects of ports, including rights of access to ports and a port's right to charge fees for the use of its facilities.

A key premise for the ports' rights to charge fees under the new Port Act is that competition is assumed to exist both between ports and between different suppliers of quays and services within each port.

BY MATS E. SÆTHER

Nordisk has since 2012 represented its member *Hurtigruten AS* in a landmark case which has exposed how such competition often does not exist between or within Norwegian ports. Among the variety of reasons are that Norwegian ports (i) are normally owned by the local municipality, (b) that the municipality often is the sole provider of quays in each port, and (c) that each port is often the only port serving its local area, island or fjord due to Norway's challenging geography. Additionally it is quite common for several municipalities to establish a joint port authority that determines prices and terms for all ports in an area.

Many owners, including Hurtigruten, have little or no choice about what ports to call, and often they have little or no choice of suppliers of quays and other facilities within each port.

2 "Stranda case"

One of the ports in question is Geiranger port in Stranda municipality. The port increased the fees for Hurtigruten's vessels *fivefold* overnight when the new Act took effect in 2012. Objections against the price hike were rejected and Hurtigruten therefore elected to suspend payments.

Stranda subsequently sued Hurtigruten, demand-

ing (i) an approach fee ("anløpsavgift") and (ii) payment for the use of the quay and other facilities, which Stranda called a "*passenger fee*". Other ports call it a "*quay fee*".

The port lost the case with costs in the District Court, the Court of Appeal and the Norwegian Supreme Court, where it was heard in June 2015. The *approach fee* can only be charged to cover certain specific costs incurred by the municipality, on a non-profit basis. During the case preparation and hearing before the District Court, Nordisk's litigation team discovered that Stranda had knowingly based the fee on incorrect and grossly inflated numbers. After this came to light, this part of the matter was resolved after the port reduced the fee by almost 80 percent.

The claim for a *passenger fee*, which Stranda also lost in the District Court, went on appeal and was heard by both the Court of Appeal and the Supreme Court. The passengers from the vessels in question are brought ashore by a boat that has rented a quay. The Supreme Court therefore held that Hurtigruten's vessels did not "use" the port's facilities, meaning the municipality had no legal basis to charge Hurtigruten a fee. The Supreme Court was divided into a majority of three judges and a minority of two.

One of the judges in the majority also added that the claim for a passenger fee was in any event invalid because it constituted abuse of power by public authorities in handling public infrastructure. The law in this area is a complex mix of public law and contract law principles. The key consideration was unfair treatment of Hurtigruten because they were charged very high prices compared to all other users of the port. The Court of Appeal had unanimously invalidated the claim on this basis.

The result is that the total fees payable by Hurtigruten in Geiranger port are now only a fraction of what the port had claimed, and significantly less than they were under the previous Port Act.

3 Applying the lessons from the Stranda case to other Norwegian ports

As the Stranda case progressed through the court system Nordisk has also worked with Hurtigruten and others in dealing with similar challenges in several other ports. The following comments are limited by the fact that this work is still ongoing.

The work has shown that there seem to be inherent problems with the way Norwegian ports are organized and the port fee system in Norwegian ports. A large number of ports have been unable to show that the *approach fee* is really cost-based, and expert reports from auditors engaged by the shipowners' side suggest the fees in several ports are based on an incorrect understanding of the Port Act and are significantly too high. Some ports have taken steps to correct this. Formal complaints against a dozen other ports have been filed with the Norwegian Coastal Directorate (Kystverket), which has so far (September 2015) initiated government audits at two port authorities.

With regard to *passenger fees and quay fees*, key concerns for shipowners include lack of transparency into what the shipowners are asked to pay for and lack of competition between and within ports. The problem is reinforced by the ports' interest group, the Norwegian Ports Association, having taken the unfortunate and in our view legally untenable position that a port at its sole discretion may decide the terms and prices for use of the public infrastructure it administers, without discussion or negotiation with the users.

Curiously, the Act does not authorize any particular authority to hear complaints over prices and terms in Norwegian municipally owned ports. This means shipowners must in effect bring their complaints before the courts. Court cases are inherently expensive and time consuming and therefore may not be a feasible tool for many shipowners and other port users. The ports also risk little by forcing such cases to court, as no matter what the outcome is the port's legal fees can be charged back to the shipowners through the *approach fee* and other fees. This is what happened in the Stranda case.

4 Revision of the Port Act

Norwegian authorities have initiated a process to review whether the Act works as intended. Hopefully this work will lead to changes to mitigate the problems discussed above, and other problems with the current Act. A good starting point would be to realize that many shipowners – perhaps the majority – have little or no choice when deciding which port to use, and that the Act must be adjusted to take this into account.

OPEN-ENDED DELIVERY DATE?

Review of a London arbitration award concerning the delivery dates for two OSV newbuildings

By Heidi Fredly, Knut Erling Øyehaug and Michael Brooks

We recently acted for one of our members in a London arbitration that illustrates how risky it can be to leave essential terms of the contract either blank or ambiguous.

Factual Background

These are somewhat simplified, but the essential points are that the Buyer contracted with a Chinese yard for the construction of two vessels. The contracts had materially identical terms and each contract contained a specific delivery date such as, for example, "1 January 2011". Events led to the original Delivery Dates being revised from time to time to new specific dates.

BY HEIDI FREDLY

During the course of 2011 and into 2012 it became apparent that the then current Delivery Dates could not be met, mainly because the yard did not have sufficient funds to construct the vessels. In late 2012 the parties met to find a solution. One critical issue that had to be resolved in order to enable the project to proceed was the placing of orders for the vessels' thrusters. As the yard was to provide these, it was the yard's responsibility to engage specialist subcontractors. However, the yard did not have money to proceed. The Buyer therefore agreed to accelerate payments which had yet to fall due under an entirely separate contract for another vessel nearing completion and the yard in turn agreed to use these funds to place orders for and pay down payments for the thrusters. Additionally, it was agreed that the yard would provide refund guarantees from a Chinese bank to cover the Buyer's advance payments, which the Buyer needed in order to obtain further financing to pay future stage payments for the vessels under construction. Both sides were happy with the solution.

However, the Delivery Dates needed to be changed again. Those dates had to be sometime after the delivery of the thrusters to the yard, which all

agreed was critical to completion. The Buyer wanted the first vessel by 31 March 2014. Following further discussion, a new Contract Addendum was agreed. This again extended the vessels' Delivery Dates, but did not state any specific calendar date for delivery. Instead, the Addendum established a formula whereby the Delivery Dates were defined by reference to the arrival at the yard of the thruster packages: the Delivery Date for the first vessel was defined as seven months after the date when the thruster packages for the first vessel arrived at the yard. This formula would allow delivery by 31 March 2014 provided all went smoothly, but with a little room for delay. The Delivery Date for the second vessel would be four months thereafter. Since the responsibility of obtaining the thrusters lay with the yard, on the face of it the formula appeared to establish an open-ended Delivery Date entirely within the yard's control. What would happen if the thrusters were never delivered, be that because of the yard's deliberate action, or some unlucky event? How could Buyer's right to cancel for late or no delivery, work?

Shortly after the 2012 meeting the yard ceased construction of the two vessels, probably due to its own financial issues. Further, and critically, while the yard did in fact remit the thruster payment advanced by the Buyer under the other construction contract in accordance with the agreement, it failed to take any further steps to secure delivery of the thrusters and made no further payments. The Buyer pressed for confirmation that the delivery date of the first vessel was 31 March 2014 – the date that would have been at least seven months after arrival of the thruster package had the yard exercised due diligence to secure prompt delivery of the thrusters. The yard however failed to confirm that there was any firm delivery date.

In 2014 there was no progress at all on the construction of the vessels. The Buyer continued to assert that the Delivery Date was 31 March 2014. The yard however maintained that no firm delivery date existed, and hence that there was no delay beyond the Delivery Date. This issue was critical. The Buyer had made substantial payments to the yard, representing approximately 50% of the purchase price for each vessel. Commercially, the delay was unacceptable: four years after entering into the contract, no delivery was in sight.

BY KNUT ERLING ØYEHAUG

In general, the obvious step for a buyer to take in such a case would be to cancel for delay. The contracts contained a common provision permitting cancellation and imposing an obligation on the yard to refund the amount paid so far. These repayments were secured by refund guarantees, but there was a problem. The guarantees could not be called upon until the underlying contracts had been cancelled in accordance with their terms. Termination for repudiatory breach (for example, if the yard simply failed to build) would not suffice. The only basis for contractual cancellation that seemed possible was if there had been no delivery for a stated period beyond the contractual Delivery Date. But what was the Delivery Date? The yard maintained that the shipbuilding contracts were obviously open ended, and expiry of the refund guarantees was approaching rapidly.

Against this background the Buyer sought our assistance. In accordance with our advice, the Buyer commenced arbitration, seeking a declaration from the Arbitrators as to the Delivery Date under each shipbuilding contract. Shortly after arbitration proceedings were commenced, the yard went into formal bankruptcy. Clearly the vessels would never be built. Unfortunately, bankruptcy as such was not a contractual basis for cancellation. It became even more important to establish the Delivery Dates in order to terminate the shipbuilding contracts and call on the refund guarantees before they expired. The guarantees represented the only way for the Buyer to get its money back.

The Arguments

The Buyer argued that the agreement was that the Delivery Date for the first vessel was seven months after arrival of the thruster packages for the first vessel at the shipyard *on the basis that the yard would perform its obligation of due diligence to ensure a prompt delivery of the thrusters*. The Addendum thus laid down a formula for calculating the delivery date in which the yard's obligation of due diligence was an essential part.

This result followed from construction, being implicit in the language used by the parties in the relevant factual setting and commercial common sense.

During the critical meeting, the Buyer had made it clear that it wanted delivery of the first vessel no later than end of March 2014 to be in time for the North Sea summer season. The yard confirmed that it could meet this date if the thrusters were delivered seven months earlier. The subcontractor delivering the thrusters had in turn confirmed that they could deliver the thrusters by end-August 2013, and probably earlier, as long as the contract was signed and payment of the first instalment was made before end-December 2012. This was the reason why the Buyer had agreed to accelerate payment under the separate contract for another vessel. Moreover, the Buyer argued that, insofar as this construction of the Addendum required that a term had to be implied, any relevant requirement for implication was satisfied.

The yard rejected the above account, and alleged that: i) the Addendum wording was clear and meant what it said; ii) at the 2012 meeting, an oral agreement had been entered into whereby the yard became entitled to deliver the first vessel seven months after delivery of the thrusters at the yard *whenever that might occur;* and iii) the purpose of the meeting was not to fix a new Delivery Date, but to discuss the refund guarantees which the Buyer needed in order to obtain financing to pay for the vessels. The Buyer had thus been willing to bargain and "sacrifice anything" to obtain the refund guarantees. The yard had agreed to find a trading house to arrange the guarantees and the Buyer had in turn given them the right to "control" the delivery date.

The Award

The Tribunal found in favour of the Buyer on the basis that the Buyer's case represented the most probable construction of the agreement reached in 2012, and held that the Delivery Date for the first vessel was seven months after the arrival at the yard of the thrusters for the first vessel *on the assumption that the yard would perform their obligation of due diligence to ensure a prompt delivery of the thrusters*. The Tribunal agreed that, taking account of the relevant factual matrix, this result followed as a matter of construction, but added that insofar as ascertaining that meaning involved implication, the requirements for such implication were satisfied. Furthermore, the Tribunal held that on the facts the yard had not been duly diligent in trying to get the thrusters delivered in time.

BY MICHAEL BROOKS

The Tribunal emphasized the facts pointed out by the Buyer, including that it was known at the time of creating the Addendum that if the yard met the payment terms and exercised their obligation of due diligence, the thrusters would have been delivered at the yard by the end of August 2013, which in turn should have led to a delivery date of the first vessel on 31 March 2014 and of the second vessel on 31 July 2014. The fact that no specific calendar date was included in the Addendum did not detract from this. On the contrary, the formula enabled the earliest possible delivery of the vessels, since there was a possibility that the thrusters could have been delivered even earlier than anticipated. Moreover, the Buyer had recognized that there could be factors outside of the yard's control that could delay delivery of the equipment. Hence, the Addendum was not drafted as an absolute contractual obligation to achieve delivery dates of 31 March and 31 July 2014.

The Tribunal added that the yard's account was "inherently implausible" in that it would expose the Buyer to undeterminable market risks in relation to the employment of the vessels; a need to pay potentially uncapped interest on the funds borrowed for its pre-delivery financing; the risk that it would find itself unable to draw on the pre-delivery financing or be in default to its lender if the latter refused to extend the period of its commitments; and, finally, the risk that it would be unable make a demand for payment under the refund guarantees if the shipbuilding contracts could not be cancelled by the Buyer before the expiry date under the refund guarantees.

The Tribunal thus held that the Delivery Date of the first vessel became 31 March 2014 and that the Delivery Date of the second vessel became 31 July 2014.

Some lessons to learn

Although our members were successful in the end, the dispute could have been avoided. The original Delivery Date was stated as a specific calendar date. So were all the revisions, except the last. It would have been sensible to agree another specific date. Restricted wording in the Refund Guarantees also

added to the risks as these did not cater for at least two obvious risks the Buyer had under the contract. A glaring omission was an obligation to extend the refund guarantee if delivery was delayed, or to answer to a termination of any sort. Further, there were no official minutes of the critical meeting, leading to a reliance on oral witness evidence.

With our help, potential disaster was averted, but it would have been much easier to have got the contract and supporting documents right in the first place. We should add that the yard's administrator stopped participating in the arbitration just before the hearing, although before this time the defence had been very vigorous. This probably made it easier for the Buyer to win. However, from a commercial perspective the Buyer had a strong case, and we do believe that they would have succeeded in any event.

NEWS FROM NORDISK

We are pleased to announce that Tom Pullin has taken up the position of Managing Director of our Singapore office with effect from 15 September.

Please note that Joanna Evje will be on maternity leave until 1 September 2016.

James Rose of Ince & Co will be on secondment to Nordisk from now until September 2016