OFF HIRE UNDER SUPPLYTIME 2005: A RECENT NORWEGIAN ARBITRATION AWARD

Nordisk represented charterers in a recent Norwegian arbitration regarding off hire under a modified *Supplytime 2005* charter party. Initially the dispute was about whether the provision in clause 13 (c) relating to a vessel being on-hire during transit to and from a yard where the vessel is to be drydocked applied to a transit from the area of operation to a shipyard, where a generator was to be replaced without placing the vessel in drydock. In the end, however, the dispute turned on whether there had been loss of time during the transit period, after the arbitration panel raised this point at the hearing on its own initiative.

The five-year charter party in question was concluded while the vessel was under construction. The charter party permitted owners to drydock the vessel during the shipbuilding contract's guarantee period a) for owners to establish whether they had a guarantee claim against the yard; and b) for the yard to perform guarantee work.

BY CAMILLA BRÅFELT

While the vessel was operating in Brazil during the first year after delivery (within the guarantee period), one of her four generators suffered a breakdown. The class inspected the vessel and issued a condition of class requiring replacement of the generator within a given time. It was unclear whether the replacement necessitated drydocking or could be done while the vessel was afloat. The operation in Brazil was completed without replacing the generator and with some time in hand until expiry of the deadline specified in the condition of class.

Charterers then secured new employment for the vessel in Equatorial Guinea. Under this new charter party, charterers' customer had 12 one-day options at the end of the charter period. Charterers informed owners of this new employment, including the duration of the contract. Owners responded by saying that as soon as this next employment was finished, the vessel must proceed to a yard so that the generator could be replaced within the relevant time limit. When the employment in Equatorial Guinea was about to end, owners informed charterers that they had chosen a repair yard at Las Palmas. As the yard did not have drydock facilities suitable for the vessel, the work, including the replacement of the generator, would be done while the vessel was afloat.

Charterers' customer exercised only one of its 12

one-day options. Thereafter the vessel left Equatorial Guinea for Las Palmas.

Although the parties had been engaged in a continuous discussion about the allocation of costs for the transit of the vessel to the repair yard from the time the generator broke down until the replacement was performed, they failed to agree who would pay for the transit time and cost (bunkers and lubes). This issue was therefore referred to arbitration.

Owners argued that clause 13 (c) of *Supplytime 2005*, which states that the vessel shall be on hire during between the place of drydocking and the area of operation shall be for charterers' account, should apply despite the vessel not being drydocked. Their main argument was that the work performed on the vessel was equivalent to that performed during a regular drydocking. Owners also advanced two secondary arguments: 1) according to owners, the parties had agreed prior to the vessel's stay at the yard that the transit should be for charterers' account; and 2) owners argued that charterers had acted in bad faith by failing to make it clear before the transit commenced that charterers believed that clause 13 (c) was inapplicable, since the vessel was not to be drydocked.

On behalf of charterers, Nordisk argued that clause 13 (c) of *Supplytime 2005* applied only if the vessel was actually drydocked. The wording was clear and referred only to transit to a yard where the vessel was to be drydocked. Charterers argued that the provision did not apply in cases where the vessel was repaired afloat.

Charterers also rejected both of owners' secondary arguments. There was little evidence that any agreement had been reached as to who was going to pay for the time and costs of the transit before it took place, as each party had continuously maintained its position in the pre-transit discussions.

Charterers rejected the assertion that they had acted in bad faith by failing to make clear to owners their view that clause 13 (c) applied only where there was a drydocking According to charterers, the parties' disagreement on the particular interpretation of clause 13 (c) in this respect had surfaced only after the vessel's arrival at the repair yard.

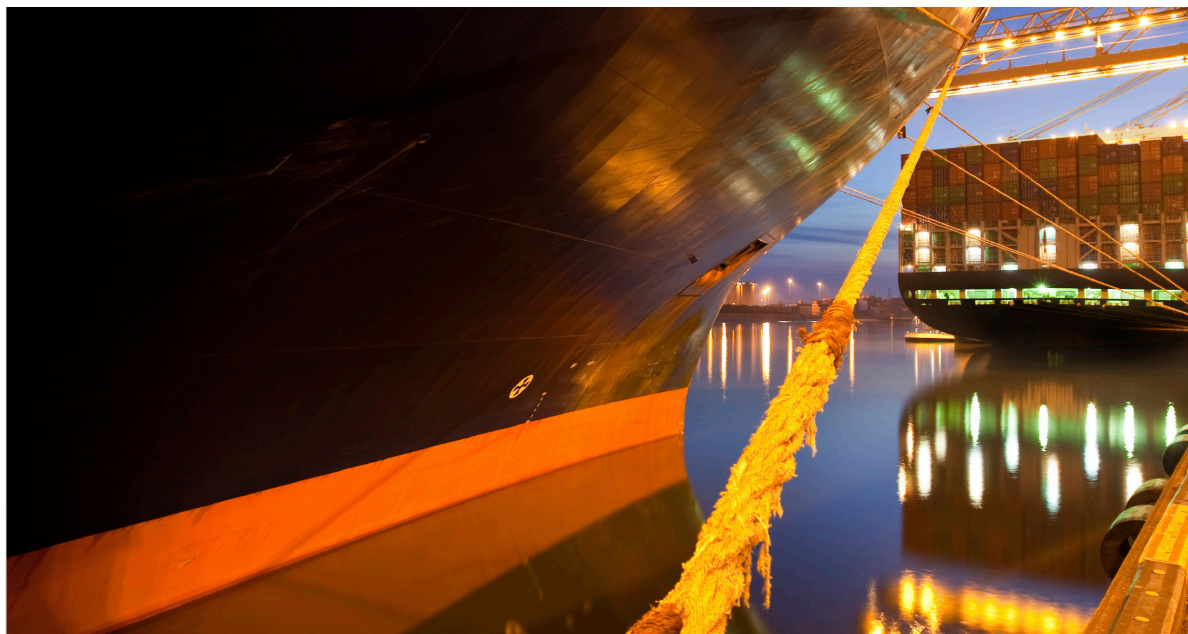
The arbitrators agreed with all of Nordisk's arguments to the effect that clause 13 (c) did not apply if there was no drydocking. The tribunal also supported charterers' responses to owners' secondary arguments, rejecting owners' claim that the vessel was on hire during the transit pursuant to clause 13 (c).

During the hearing, however, the arbitrators asked whether the requirements for placing the vessel off-hire pursuant to the general off-hire provision in clause 13 (a) had been fulfilled .In particular the arbitrators questioned whether charterers had suffered a loss of time, which is one of the key requirements for placing the vessel off-hire pursuant to clause 13 (a). The background to this question was that charterers had potentially had an obligation to their customer to make the vessel available for 12 days after the end of the firm charter period (due to the 12 one-day options). The tribunal assumed that charterers could not have found alternative employment in this period (due to their potential commitments to their customer). For this reason, the tribunal decided that the charterers did not suffer a loss of time during the part of the transit that was performed during the 11 unused one-day options at the end of the charter in Equatorial Guinea. Regarding the part of the transit performed after this 11-day period, the tribunal held that charterers had suffered a loss of time resulting in the vessel being off-hire.

Furthermore, the tribunal argued that the transit had been performed in owners' interest only. On this basis and despite the wording of the charter party, the tribunal decided that charterers should not pay for bunkers and lubes for the part of the transit performed while the vessel was on hire.

Nordisk was pleased to see that the tribunal applied the standard Norwegian law approach to the interpretation of commercial contracts by giving decisive weight to the wording of the charter party. However, we are of the view that the arbitration panel was not correct in deciding that there was no loss of time in a situation where owners actually took the vessel back from charterers and sailed her to a yard for repair, even though charterers had no other work for the vessel due to the decision by charterers' customer not to exercise 11 of its 12 one-day options.

Nordisk is concerned that the arbitration panel saw fit to raise issues on its own initiative at a late stage in the hearing, after all the evidence had been presented. As a result the parties had no opportunity to submit evidence as to facts assumed by the tribunal on an issue that turned out to be decisive.



NEW JUDGMENT ON CONSEQUENTIAL DAMAGES

The Court of Appeal has recently overturned the 2014 Commercial Court decision in *Transocean Drilling UK Ltd v Providence Resources Plc* concerning the construction of a consequential loss clause in a drilling contract. The potential impact of this decision goes beyond drilling contracts and may signify the beginning of a change in the interpretation of consequential losses.

Background

Transocean Drilling UK Ltd ("Transocean") entered into a contract for the drilling of an appraisal well with Providence Resources Plc ("Providence"). Disputes arose concerning the payment of hire during periods of downtime and whether Providence's wasted "spread costs" (by which we mean the cost of 3rd party personnel, equipment and services incurred during downtimes) were recoverable under the contract.

BY VICKI TARBET

Clause 20 of the contract provided that each party indemnified and held the other harmless against its own consequential losses, a form of "knock for knock" clause. Consequential loss was defined as being any indirect or consequential losses/damage under English law, i.e. the second limb of Hadley v Baxendale and to the extent not covered by the foregoing:

"…*loss of use (including, without limitation, loss of use or the cost of the use of property, equipment, materials and services including without limitation, those provided by contractors or subcontractors…)" (Clause 20(ii)).*

The parties accepted that Clause 20(i) did not apply. The "spread costs" were not pure consequential losses as per the second limb of *Hadley v Baxendale.* However, Transocean sought to argue (amongst others) that the costs were excluded under Clause 20(ii), falling within the meaning of "loss of use".

The Commercial Court found that (1) Providence were not liable to pay hire to Transocean for periods where the delay was caused by Transocean's own breach of contract and (2) Providence were entitled to recover their "spread costs" during such downtimes. Justice Popplewell concluded that the "spread costs" did not fall within Clause 20(ii). Transocean appealed the recoverability of "spread costs".

Court of Appeal Decision

The question before the Court of Appeal was confined to whether or not the "spread costs" fell within Clause 20(ii).

The Court of Appeal allowed the appeal, concluding that the "spread costs" were consequential losses within the meaning of Clause 20(ii). Their reasoning was underpinned by the principle of freedom to contract. They concluded that the parties were of equal bargaining power and as such, should be free to agree terms, which the courts are then obliged to uphold.

The effect of Clause 20 was that the parties had agreed to give up their right to claim consequential losses, which might have otherwise been recoverable. However, since Clause 20 was part of a wider scheme for apportionment of losses, its meaning had to be considered in the context of the contract as a whole.

The starting point was to look at the ordinary and natural meaning of the clause. The natural meaning of "loss of use" (Clause 20(ii)) would refer to the loss of the ability to make use of property/equipment. However, the parties had widened its meaning by reference to a non-exhaustive list of examples contained in the brackets that followed. These included "the cost of the use of property". The Court of Appeal concluded that the intention was to give the phrase "loss of use" a broad meaning, which would clearly include "spread costs".

The Court of Appeal disagreed with the Commercial Court's application of the contra preferentum rule. They did not consider Clause 20 to be one-sided or ambiguous in its wording, which are the requirements for the principle to apply. They also disagreed with the Commercial's Court's approach that a party would be unlikely to give up their basic right to recover damages, instead taking the view that the language of Clause 20 was sufficiently clear to override any such assumption. Both parties had agreed to give up their right to claim consequential losses from the other.

It is not yet known whether Providence intend to appeal the Court of Appeal decision.

Impact of the Decision

The Court of Appeal decision gives support to the general principle of freedom of contract, which will come as a relief to a number of industries where contracts routinely exclude consequential losses and/or include "knock for knock" provisions.

The decision may also have wider reaching effect. The Court of Appeal questioned whether certain lines of authority on consequential loss would be decided in the same way if heard today, when courts are more willing to look at the context of a particular contract. Whether this is just a passing comment is yet to be seen. If, however, it signifies a general change in the courts' attitude to the interpretation of consequential loss, we could see a development in this area of the law, taking a turn away from the long-established principles.

The Commercial Court decision also remains of significance to the drilling industry, to the extent that it has clarified that day rates will not be payable for periods of down time caused by the contractors own poor maintenance. This is contrary to the general view held previously across the industry, but will be a welcome change result for operators/oil & gas companies.