COURT SUPPORT FOR ARBITRATION: SETTLEMENT AGREEMENTS

Sonact Group Ltd v Premuda SpA (Four Island) [2019] EWHC 3820 (Comm)

Background

In June 2014, owners of the MT FOUR ISLAND chartered the vessel for the carriage of fuel oil from Kavkaz to Novhodka on an amended Asbatankvoy form.

The charterparty contained an agreement for London arbitration which covered "[*a*]*ny and all differences and disputes of whatsoever nature arising out of this Charter*".

On completion of the voyage, Owners presented a claim for demurrage in the amount of USD 718,948.08 and heating costs of USD 190,200. Charterers disagreed with the sums claimed and following an exchange of emails the parties agreed to settle the claims at USD 600,000. No separate settlement agreement was drawn up.

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Charterers failed to pay in accordance with what had been agreed and Owners gave notice of commencement of arbitration in respect of "*a demurrage claim, a claim for heating costs, a claim for a penalty, a claim for interest and costs, plus various other matters.*"

Charterers argued that on agreeing settlement of the claims the parties entered into a new agreement, i.e. a settlement agreement, and that there was no agreement for London arbitration in that new agreement. Charterers therefore concluded that the appointed arbitrators did not have jurisdiction to hear the dispute.

Arbitration

The arbitrators found against Charterers:

We had little hesitation in concluding that, given the nature of the negotiations and the manner in which they had been carried out, the objective but unexpressed intention of the parties was that the second agreement should be governed by the same provisions for dispute resolution as the original charterparty… Indeed the negotiation and agreement of demurrage claims under voyage charterparties and final hire statements under time charters is so much part and parcel of operating

and chartering ships that people working in the industry would be astonished to be told that the dispute resolution provision in the governing charterparty did not apply.

Appeal

Charterers appealed to the High Court on the basis that the Tribunal lacked jurisdiction to make the award.

The Court dismissed Charterers' challenge and found that the charterparty arbitration clause covered a dispute over failure to pay under the agreement to settle.

The following reasons were given in the judgment:

1. The agreement to settle at USD 600,000 was an agreement in respect of Owners' claim for demurrage and heating costs. The exchange of emails was described as a "settlement agreement" but was, in reality, no more than an informal and routine arrangement to finalise sums which fell due under the terms of the original charterparty.

2. The wording of the charterparty arbitration clause was wide enough to encompass a claim for failure to pay, even though the agreement to pay USD 600,000 was a new cause of action under a new and binding agreement.

3. It was obvious that the parties intended that the arbitration clause would continue to apply in the event that Charterers failed to pay the agreed sum. It was inconceivable that the parties intended that Owners would have to commence court proceedings rather than pursue their claim in arbitration which the parties had selected as the neutral forum for disputes under the charterparty.

Comment

The judgment serves as a reminder of the Court's willingness to give effect to an agreement to arbitrate in a manner that reflects the commercial intentions and assumptions of parties operating in the industry. It is likely a decision with which most shipping operators would agree.

The decision should, however, be treated with caution.

This was a decision reached on the facts of the particular case and is not one which gives blanket protection that an arbitration agreement in an underlying contract will be implied into related agreements, whether a settlement agreement or other subsequent contract.

SUPPLYTIME 2017: CHALLENGING INVOICES OUT OF TIME

Boskalis Offshore Marine Contracting BV v Atlantic Marine and Aviation LLP ("The Atlantic Tonjer") [2019] EWHC 1213 (Comm)

In May 2019, the High Court handed down judgment in *The Atlantic Tonjer* on a charterer's obligation to question invoices within the agreed deadline.

Background

Under a BIMCO Supplytime 2017 form, Atlantic Marine (Owners) chartered the vessel "*Atlantic Tonjer*" to Boskalis Offshore (Charterers) for 21 days plus optional periods.

In Part I of the Supplytime form, invoices were to be issued 14 days in arrears (Box 22) and payment of hire was to be made 21 days after that (Box 24) with a maximum audit period of 4 years (Box 26).

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The key parts of clause 12 of the Supplytime form read as follows:

(e) *<u>Payments</u> Payments of hire, fuel invoices and disbursements for the Charterers' account shall be received within the number of days stated in Box 24 from the date of receipt of the invoice. Payment shall be received in the currency stated in Box 20(i) in full without discount or set-off…*

If the Charterers reasonably believe an incorrect invoice has been issued, they shall notify the Owners prompty, but in no event no later than the due date, specifying the reason for disputing the invoice. The Charterers shall pay the undisputed portion of the invoice but shall be entitled to withhold payment of the disputed amount…

(g) <u>Audit</u> The Charterers shall have the right to appoint an independent qualified accountant to audit the Owners' books directly related to work performed under this Charter Party at any time after the conclusion of the Charter Party, up to the expiry of the period stated in Box 26, to determine the validity of the Owners' charges hereunder…

During the course of the charterparty, Owners issued invoices for hire, accommodation, meals and other services during the period of the charterparty. Charterers did not pay the invoices within the contractual 21 days and later raised an off-hire defence in respect of most of the invoiced hire.

Arbitration

Owners commenced arbitration in accordance with the terms of the charterparty and applied to the Tribunal for a partial final award on the invoices issued.

The Tribunal found that Charterers had not challenged any of the invoices before their due date (i.e. 21 days after receipt of each invoice) and that under clause 12(e) Charterers had to pay the invoiced sums.

The Tribunal's decision was based on the express wording of clause 12(e), the importance of cash flow to an owner under a time charter and the role of clause 12(g) which allows for the validity of charges to be re-opened up to four years after the conclusion of the charterparty where there has been an accounting-type error.

Appeal

Charterers applied for and obtained permission to appeal on the questions of whether clause 12(e) prevents Charterers from later raising defences to Owners' invoices that were not raised within the due date if those defences did not give rise to an independent counterclaim or an "accounting" issue for resolution by audit under clause 12(g).

The Court dismissed Charterers' appeal and found that the wording of clause 12(e) was clear and unambiguous. The effect of clause 12(e) is to prevent Charterers from raising defences to an invoice if they did not challenge that invoice within the agreed deadline – in this case 21 days from the date of receipt:

"What clause 12(e) requires is prompt payment or prompt identification of any issue preventing payment."

The Court disagreed with Charterers' argument that this interpretation of clause 12(e) would be uncommercial: cash flow is of considerable importance to an owner of a ship and the time periods were negotiated by two commercial parties of equal bargaining power who were free to negotiate the period of time within which an invoice should be challenged.

The Court found that Charterers have three remedies available to them if there is believed to be an error in the invoice:

(i) Charterers may notify Owners under clause 12(e) within the period agreed in the contract;

(ii) Charterers have audit rights under clause 12(g) to reclaim amounts paid in accounting-type errors (e.g. incorrect hire rate, wrong number of meals, etc); and

(iii) Charterers can bring a counterclaim if they have paid sums which they later believe were not properly payable provided there is a legal basis for the same (e.g. a claim for breach of contract by Owners).

It is understood that Charterers were denied permission to appeal.

Comment

Parties should always take note of time limitations agreed in their contractual terms. English law will give effect to contractual language which limits the rights and remedies normally available to a party, provided the agreement is expressed clearly.

In this case, hire was to be paid in arrears such that at the time the invoice was issued any off-hire event would already have taken place. Where hire is agreed to be paid in advance and subsequently adjusted for off-hire in accordance with clause 13(a) there has been no determination as to whether this adjustment must be done within the payment deadline for the next hire invoice.