

SUMMARY AND ARBITRATION AWARD

This matter was an appeal from an arbitration award, over the correct interpretation of two clauses, namely clauses 49 and 101, in a charter party contract (a deed between a shipowner and a trader for the hire of a ship and the delivery of cargo)(the “Contract”). The arbitration tribunal who had adjudicated the matter (the “Tribunal”) had rejected Eleni Shipping Limited’s, the owners of the vessel and the claimant in the matter (the “Claimant”), claim on the basis that payment for hire of the Vessel during a, specific time period, was excluded by each of the two aforementioned clauses.

On 29 April 2010, Transgrain Shipping B.V., the defendant in the matter (the “Defendant”) chartered a vessel from the Claimant (the “Vessel”) to load a cargo of iron ore from a port in Ukraine, and thereafter the cargo would be discharged at Xiamen, China. The Vessel passed the Suez Canal and sailed through the Gulf of Aden without issue. However, as the Vessel passed through the Arabian Sea a month later, it was attacked and captured by Somali pirates. The Vessel was released by the Somali pirates approximately seven months later. Following the release of the Vessel and having undergone various repairs and resupply, the Vessel proceeded to its final destination being China to discharge the cargo which it duly did. Thereafter, the Vessel was returned to the Claimant. The primary claim by the Claimant against the Defendant was for unpaid hire of approximately USD 4,500,000.00 for the period in which Vessel was under the Somali pirates’ control. The Tribunal adjudicated the matter and, ultimately, rejected the Claimant’s claim based on their interpretation of clauses 49 and 101 of the Contract, which the Tribunal considered to be suspended hire of the Vessel. The Claimant, unsatisfied with the Tribunal’s findings, took the arbitration award on appeal to the in the High Court Of Justice, Business And Property Courts Of England And Wales, Commercial Court (Qbd)(the “Court”).

HIGH COURT HELD

The main issue before the Court was the determination of the correct interpretation of clauses 49 and 101 of the Contract. The Court referred to the recent case law considering the principles applicable to the construction of commercial contracts and further noted that if there are two possible constructions of a clause, the Court should prefer the construction consistent with business common sense. The Court analysed clause 49 of the Contract which provided that “should

the vessel be capture[d] or seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended for the actual time lost ...". The Claimant argued that each of the words in clause 49, "captured", "seized", "detained", "arrested", were qualified by and dependent on the following phrase in the clause "by any authority or any legal process". The Defendant argued that the phrase "by any authority or any legal process" applied only to "arrested" and did not qualify the word "captured", which was separate. Ultimately, the Defendant argued that the Vessel could, therefore, be captured due to any cause including the Vessel's capture by the Somali pirates. The Tribunal agreed with the Defendant's position during the arbitration proceedings. The Court, however, preferred the Claimant's interpretation of the clause. The Court held that all four categories in the clause ('captured', 'seized', 'detained', 'arrested') were separated by the word "or" which in itself was a neutral phrase that did not specify if the phrase "by any authority or any legal process" was intended to qualify all four categories or only the last. Further, the Court held that if clause 49 was to be interpreted in accordance with the Defendant's argument, such clause would be inconsistent with the general off-hire clause contained in clause 15. Clause 15 defined an off-hire event as a limited type of detention, namely "detention by average accidents to ship or cargo". This part of clause 15 would be rendered inoperative if clause 49 applied to any detention to the Vessel notwithstanding the cause or the nature of the detention. In light thereof the Court concluded that clause 49 only applied to a capture carried out by an authority or legal process, and therefore not to the capture of the Vessel by Somali pirates.

Clause 101 of the Contract provided as follows: "Charterers are allowed to transit Gulf of Aden any time, all extra war risk premium and/or kidnap and ransom as quoted by the vessel's Underwriters, if any, will be reimbursed by Charterers. [...] In case vessel should be threatened/kidnapped by reason of piracy, payment of hire shall be suspended [own emphasis added]..." The Claimant argued that to trigger the off-hire provisions of clause 101, the threat/kidnap must happen within the geographical area defined as the Gulf of Aden. The Defendant argued that the clause applied where the threat/kidnap took place as a consequence of the Vessel being required to sail through the Gulf of Aden. The Court noted that the language of clause 101 did not provide guidance as to the interpretation. However, the Court preferred the construction, adopted by the Tribunal, as the primary purpose of clause 101 was to permit the Defendant to engage in trade through the Gulf of Aden and set out that: firstly, (i) the geographical area of the Gulf of Aden cannot be precisely defined. Secondly, (ii) clause 101 applied solely to the Vessel performing voyages through the Gulf of Aden in order to enable the Defendant to trade the Vessel through the Suez Canal. In this

respect, clause 101 allocated the risk of paying and extra war premium to the Defendant, but then the Claimant was to face the risk of delays from a possible detention by pirates as a consequence of the Vessel transiting the Gulf of Aden. Lastly, (iii) the mention in clause 101 of the war risk, kidnap and ransom premium were not subject to a single geographical area. These parts of clause 101 referred to payments which would occur due to the Vessel transiting the Gulf of Aden and did not concern a single and defined geographical area.

The Court concluded that whilst the Claimant succeeded on clause 49, the appeal ultimately failed due to the interpretation of clause 101. Hire was, therefore, suspended during the period of the detention by Somali pirates by virtue of clause 101.

VALUE

This case provides a prime illustration of the manner in which the Court will review the meaning and effect of contractual wording by undertaking a close analysis of the semantics of the terms used in a charter party contract. Further, interpretation of such terms and clauses will require a hybrid analyses made up of not only legal principles and case law but also commercial and business sense and the general allocation of risks under the charter party contract.

Written by Michal Asoulin Checked by Daniella Brocco

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