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Cover Story

Failure to disclose all available supporting documents within prescribed period of time could result in a charterparty claim being time-barred

Introduction

In November 2019, the Commercial Court of High Court of Justice Business and Property Courts of England and Wales Queen's Bench Division released a judgment (*MUR Shipping B.V. v Louis Dreyfus Company Suisse S.A.* [2019] EWHC 3240 (Comm)) which upheld an arbitration tribunal finding that the disclosure of a relevant and supportive document after the period of time stated in relevant clause would result in a charterparty claim being time-barred.

Case background

The Charterparty for the Vessel TIGER SHANGHAI (the "**Vessel**") was made between MUR Shipping B.V. (the "**Charterers**") and Louis Dreyfus Company Suisse (the "**Owners**"). The Vessel was delivered into the service of the Charterers and advance hire and delivery bunkers were paid.

The first leg of the charter involved loading of a cement clinker cargo at the port of Carbenaros in Spain. When the Charterers discovered that the loading crane at Carbenaros was too short to reach the feeder holes on the Vessel's starboard side, the Charterers sought the Owner's approval to cut new feeder holes into the hatch covers. The Owners refused to approve the required work and the Charterers terminated the charter pursuant to clause 46 of the Charterparty.

Clause 46 of the Charterparty reads as follows:

> *"The Charterers, subject to the Owners' and Master's approval which is not to be unreasonably withheld, shall be at liberty to*

fit/weld any additional equipment and fittings for loading…cargo…"

The Charterers' basis for termination was that the cutting of additional feeder holes fell within the ambit of Clause 46 and Owners' refusal for permission to cut such holes had been unreasonable, so that Owners were in repudiatory breach and Charterers were entitled to terminate the Charterparty. The Charterers commenced arbitration and claim damages against the Owners.

Nearly a year after the commencement of arbitration, the Charterers served claim submissions together with a report by a surveyor dealing with the feasibility of drilling cement holes in the hatch covers (the "**Report**"). As the Report was served after 12 months from completion of charter, pursuant to clause 119 of the Charterparty, the Charterers' claim could be time-barred.

Clause 119 of the Charterparty read as follows:

"[Owners] shall be discharged and released from all liability in respect of any claim or claims which [Charterers] may have under Charter party and such claims shall be totally extinguished unless such claims have been notified in detail to [Owners] in writing accompanied by all available supporting documents (whether relating to liability or quantum or both) and arbitrator appointed within 12 months from completion of charter."

The Owners submitted that the Report went to the heart of the issue of liability and that had it been presented earlier, it was likely that the parties could have resolved the dispute without the need for arbitration. By a majority the Tribunal concluded that the Charterers' claim was time-barred as the Report was a supporting document of the type required by clause 119 of the Charterparty and the Report was not privileged. The Charterers appealed.

Issues in appeal

For the purposes of clause 119 of the Charterparty, the legal issues in appeal are:

1. Is a document which would otherwise be a supporting document one which should not be counted as such if it was arguably privileged?
2. Is a document which is not at least at the time of commencement of the arbitration of relevance to either the identification of or support for a relevant claim as referred to arbitration, a "supporting document"?

Discussion

The Charterers' claim was predicated on the refusal by the Owners having been wrongful, because unreasonable. Without that, the termination was not valid. The material in the Report went to this question of reasonableness and was therefore supportive of the claim of the Charterers at least in broad terms. In drawing the line between broad support / pertinence and necessity to support the case advanced by the Charterers, if the reasonableness of the refusal was in play at the time when the claim was

made, the Report was relevant and supportive.

Clause 119 of the Charterparty combines both specific reference to “all” and specific reference to “liability and quantum”, while not confining itself to any particular sort of claim. It is wider than clauses which tend either to omit the “all” or to arise in the context of a simple accounting claim such as demurrage, where issues such as termination do not come into the equation. Further, the claim (at least as to quantum) in fact depended on the date of termination and the date of termination depended on being entitled to terminate, which itself depended on unreasonable refusal on the part of the Owners. As such, the Report was on its face within the ambit of the claim that the Charterers advanced and supportive of it.

The parties’ commercial intention must also be inferred. Clause 119 of the Charterparty is a clause which specifically requires details and documents to be provided. The purpose of such clauses is to enable parties to assess the claim being advanced: *Babanaft v Avant (“The Oltenia”)* [1982] 1 Lloyd’s Rep. 448. Inferentially, therefore, the clauses are not just to enable an early closure of the books but also, given the provision of details, to enable the claim to be evaluated to facilitate early settlement. Accordingly, since clause 119 of the Charterparty covered the full range of disputes, it became feasible and compelling for supporting documents to include more complex material in appropriate cases. The Court therefore opined that the Report is both supportive in the sense required and a document in the sense required.

The Report, even though considered as reasonably arguably privileged by the Court, would still have to be disclosed pursuant to the clause 119 of the Charterparty. Non-disclosure would hardly satisfy the requirement of certainty which underpin clauses of this sort.

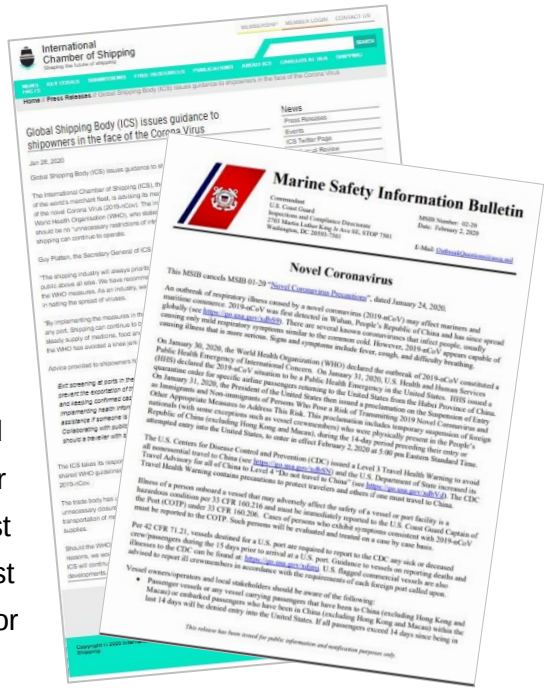
Conclusion

Clause 119 of the Charterparty is wider than standard clauses when it requires the Charterers to provide all available supporting documents (whether relating to liability or quantum or both) within 12 months from completion of charter to bring a claim against the Owners. It covers nearly whole range of disputes as well as full disclosure of all available supporting documents including privileged documents and documents that might not appear to be relevant or supportive when the claim was made. Therefore, for the charterers,

care must be taken when agreeing to such clauses as they would be in a disadvantage position when they have a claim against the owners. As a general rule, if the party putting forward a claim has in its possession a document which might be relevant or supportive to its claim, the party should be cautious enough not to withhold such document and/or disclose it after the prescribed period of time.

Novel Coronavirus: Guidelines issued to shipping

In light of the outbreak of the Novel Coronavirus, the International Chamber of Shipping (the **"ICS**") and the US Coast Guard (the "**USCG**") have issued advisories to the shipping industry.



The ICS recommended all members to follow the measures laid down by the World Health Organisation, including exit screening at ports to detect symptomatic crew or passengers, health information campaigns, and collaborations with public health authorities. The ICS secretary-general Guy Platten indicated that these measures were to avoid the need to close any of the ports.

Meanwhile, the USCG says that travellers from Wuhan entering the United States may be questioned about their health and history. It also requires vessel representatives to report sick or deceased crew and passengers within the last 15 days to the Centers for Disease Control and Prevention and vessel masters to inform Coast Guard boarding teams of any ill crew members on board. The Coast Guard boarding teams will verify illnesses with the Centers for Disease Control and Prevention should they have concerns.

Sources in China said that containers terminals in southern China and Shanghai are operating as normal and local authorities were publishing more control and prevention policies.

New eBill of Lading promises greater security

Wave, an Israel-based fintech start-up, revealed that one of the top container carriers has adopted a new blockchain-based electronic bill of lading and a second one will adopt it by the end of the year.

The blockchain-based electronic bill of lading allows a bill of lading to be sent from one computer directly to another computer without the use of any central register. A decentralised blockchain registry governed by a legal framework for transferring rights and liabilities under the bills of lading is used to exchange original documents. Only one person can control the document at a time, so the original bill of lading cannot be duplicated, and endorsements as digital signatures are required. Further, apart from paper bills, it is possible to have a 'bearer' bill of lading.

Despite of the fact that there are similar products on the market, Wave says that with the ease of use and the security for user, their product is a breakthrough.

Eagle Bulk settles with US over Myanmar sanctions breaches

Eagle Shipping International admitted 36 breaches of the sanctions imposed by the United States by trading with a blacklisted Myanmar company between 2011 and 2014. The sanctions were only lifted in October 2016.

Bulk carriers carried sand from Myanmar to Singapore for a company on the Office of Foreign Assets Control's list of specially designated nationals and blocked persons, namely Myawaddy Trading Ltd. According to the United States Treasury, when determining the level of fine, they had regard to the fact that the former president of Eagle Shipping was involved in and approved the transactions, which significantly benefitted Burma's military regime. Eagle Bulk Shipping's management will pay US$1.1 million to settle the claim.

Eagle Bulk underwent a bankruptcy restructuring in 2014, and the new management is committed to enhance its compliance programme by taking remedial measures.

Backhaul rates show weak enforcement of bunker surcharges

The International Maritime Organisation (the "**IMO**") implemented new measures including low-sulphur bunker surcharges, effective from 1 January 2020. According to Sea-Intelligence, it was the pre-Chinese New Year demand rather than the success in implementing low-sulphur bunker surcharges that caused the rising spot rates on headhaul routes from China.

In order to support their argument, Sea-Intelligence compared rates of the backhaul of three major backhaul trades where there were no pre-Chinese New Year seasonable demand. On the transatlantic, there was no change in the rate levels while there was a surge of the rates on the US west coast-Asia trade lane in early January but it dropped back to the normal level again. This reflected that there has been no success of the measures. There was an uplift in the rates on the Europe-Asia trade only, but it has taken place during the past year gradually and it cannot be attributed to the IMO measures.

In light of the above, Sea-Intelligence said that this is a worrying sign for carriers' ability to get full compensation for the real added costs resulted from the IMO measures.

Quiana Navigation SA v Pacific Gulf Shipping (Singapore) PTE Ltd, Caravos Liberty

[2019] EWHC 3171 (Comm)

* *

This case is an appeal concerning the BIMCO non-payment of hire clause for time charter parties, (the "**BIMCO Clause**") and in particular the question of whether it is possible to withdraw a vessel under this standard form clause when the breach in question relates to non-payment of an earlier period of hire.

On 26 May 2017, the time charter in question (the "**Charterparty**") was concluded between the Claimant/Appellant (the "**Owners**") and the Respondent ("**Charterers**") in respect of MV "Caravos Liberty" (the "**Vessel**"). The Charterparty was drafted on an amended New York Produce Exchange form with rider clauses and a fixture recap.

On 27 May 2017, the Vessel was delivered into Charterers' service.

Pursuant to clause 4 of the Charterparty, the Charterers shall pay for the use and hire of the Vessel every 15 days in advance and the BIMCO Clause applies.

Clause 37 of the Charterparty incorporated the BIMCO Clause which governs the right to suspend service, the right to withdraw the Vessel and the anti-technicality procedure to be followed prior to withdrawal. It can be naturally divided into four sub-clauses:

i. sub-clause (a) deals with the gateway to the clause and suspension of performance.

ii. sub-clause (b) provides for the service of an anti-technicality notice ("**ATN**") and withdrawal.

iii. sub-clause (c) deals with indemnities for liabilities as a result of suspension/withdrawal.

iv. sub-clause (d) is an anti-waiver provision, which appears to be primarily directed to Scaptrade type arguments (that acceptance of late payments in the past precludes future prompt withdrawal).

On 11 July 2017 (the 4th date), Charterers underpaid Owners by US$8,015.40 because they claimed that there had been overconsumption of fuel. There were protests from Owners but no ATN was served. On 26 July 2017 (the 5th date) and on 10 August 2017 (the 6th date), Charterers paid 15 days' worth of hire (US$130,652) in full. However, they did not pay for the shortfall of US$8,015.40 (the "**Shortfall**") notwithstanding the requests from the Owners. No ATN was served after the 5th date.

On 11 August 2017, after the 6th date, Owners served ATNs calling for payment of the full balance of hire due which led to the Owners' withdrawal of the Vessel on 14 August 2017, following Charterer's failure to comply with the demand for payment of the full balance.

The Arbitral Tribunal (the "**Tribunal**") accepted that Charterers' deduction on 11 July 2017 was

wrongful and resulted in a Shortfall, and that the Shortfall persisted and remained due thereafter, including on 10 August 2017. However, the Tribunal held that the Owners were not entitled to invoke the withdrawal procedure in respect of the payment made on the 6th date, 10 August 2017, because that payment date equated to the 15 days' worth of hire which fell due on that date. The Tribunal's view was that the BIMCO Clause was not concerned with whether Charterers paid all the hire due on 10 August 2017 but only whether they paid the hire that fell due for the first time on that day, i.e. 15 days' worth.

In the end, the Tribunal ruled that by withdrawing the Vessel without contractual justification, the Owners acted in "renunciatory/repudiatory breach". The Owners appealed against the Tribunal's decision to the Commercial Court.

In the appeal, the key issue to be determined by the Commercial Court is whether BIMCO Clause is engaged in circumstances where:

i. there was a short payment on the 4th payment date;

ii. Owners objected, but did not serve an ATN within the 24-hour period allowed under the BIMCO Clause;

iii. the payments made on each of the 5th and 6th payment dates equated to 15 days' worth of hire, but did not make up the shortfall; and

iv. Owners served an ATN, and then withdrew, on the basis of that shortfall, in the context of the payment due on the 6th date, i.e. 10 August 2017.

The 1st Question: Construction of the BIMCO Clause

The Owners submitted that the Tribunal's conclusion is inconsistent with fundamental characteristics of the time charter bargain and cannot be reconciled with the natural meaning of the words of the BIMCO Clause. According to the BIMCO Clause, there will be an underpayment of hire payable in advance if by midnight on a due date the charterers have not paid sufficient hire to fund the contractually anticipated earning activity of the vessel up to midnight on the following due date.

The Commercial Court rejected the Owners' submission because their construction is strained and unnatural.

First, with reference to sub-clause (a) which states that "*If the hire is not received by owners by midnight on the due date, the Owners may immediately following such non-payment suspend the performance of any or all of their obligations under this Charter Party…*", the Court held that the words "hire" and "due date" would naturally be read together. To a reader the use of the phrase "the

hire", particularly taken with the identification of a single "due date" provides an initial indicator in favour of the right to withdraw being tied to a particular hire instalment. As the Charterers pointed out, each claim for an instalment of hire under a time charterparty is a separate cause of action: *The "C" and "J"* [1984] 2 Lloyd's Rep. 601. It is therefore not a natural use of language to say that, in relation to the sum not paid in respect of the fourth hire payment, its "due date" was the date for payment of the sixth hire instalment. The Shortfall in the fourth instalment fell due on 11 July and remained due at all times thereafter.

The Court held that wordings in sub-clause (a) naturally reflects and reinforces the necessary connection between the relevant hire instalment and the (single) due date. It prescribes conditions for withdrawal that cannot be satisfied in respect of historic arrears. The Shortfall had been due since 11 July, it remained outstanding on 10 August, but it was no more due on 10 August than it had been on 9 August. It would be illogical in those circumstances to say that a withdrawal notice in which time is key (with the time for compliance fixed not just in hours but "running hours" for clarity) should run from a date which meant nothing in the context of that particular sum.

The 2nd Question: Commercial Context

The clash with the nature of a Charterparty

The Owners further submitted that the Tribunal erred in its construction of the BIMCO Clause as it would force the Owners to perform services on credit under the Charterparty. The Court rejected the Owners' argument on the basis that the Owners wrongly elided the contractual entitlement of withdrawal and the continuing entitlement to recover hire as a debt. Just because the right of withdrawal is not available does not mean that the Owners are obliged to perform on credit. In addition, the Owners also ignored the fact that there was an earlier right of withdrawal at the time when the fourth payment fell due when owners consciously chose not to exercise their contractual rights.

Commercial common sense

The Owners contended that the Tribunal's construction of the BIMCO Clause gave (i) inadequate protection if Owners are unable within 24 hours to work out whether they have a right to serve such a notice (for example in a *Nanfri* like deduction based on acting reasonably and in good faith) and (ii) inadequate leverage to Owners to obtain payment of everything payable without forcing them into the nuclear option of withdrawal and that approach should be considered unlikely in the context of a time charter with the need for ongoing co-operation.

The Court rejected the Owners commercial common sense arguments for the following reasons:

First, in this case, commercial parties to the Charterparty had wittingly signed up to a particular regime which is predicated on a 24 hour period for the services of the ATN. Owners presumably would not agree to this if they thought it was likely that this period would be inadequate.

Second, the Owners' construction of the BIMCO Clause lacked logic or commercial coherence. The effect of the Owners' construction, if correct, would be that they would in effect retain the right to withdraw the vessel at any time up until the debt became time barred, six years after the failure to make payment, keeping the weapon hanging in a Damoclean manner. Allowing late hire to be the basis for withdrawal possibly for a period of years would produce a result far from offering a scheme of speedy certainty.

Based on the aforementioned reasons, the appeal was dismissed.

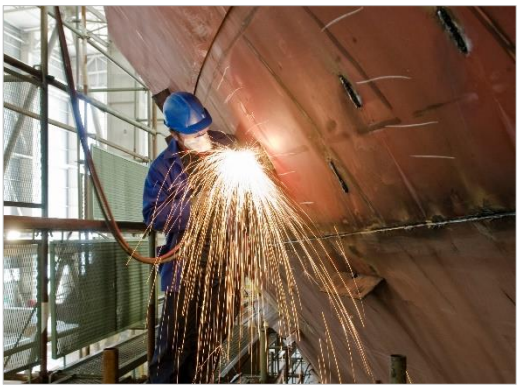
In summary, it was not possible to withdraw a vessel under the BIMCO Clause when the breach in question related to non-payment for an earlier period of hire.

Navalmar UK Limited v Ergo Versicherung AG, Chubb European SE

[2019] EWHC 2860 (Comm)

In this case, the English Commercial Court considered the preliminary issue of whether the defence under Rule D of the York Antwerp Rules ("**YAR**"), i.e. the Actionable Fault Defence, is available to the issuer of a general average ("**GA**") guarantee in the standard Association of Average Adjusters ("**AAA**") and Institute of London Underwriters ("**ILU**") form.

The claimant (the "**Owner**") is the owner of Motor Vessel BSLE Sunrise (the "**Vessel**") which was operating under a time charter from Jebel Ali in Dubai to Antwerp in Belgium for the carriage of about 774.733 MT of offshore pipes (the "**Cargo**") shipped under three Bills of Lading ("**BLs**") on the standard Congenbill form, which provided for GA to be adjusted in accordance with YAR.



On 28 September 2012, the Vessel ran aground off Valencia. The Owner incurred expenditure in attempting to refloat the Vessel and carrying out temporary repairs before resuming the voyage. On 26 November 2012, the Vessel arrived at Antwerp where all Cargo was discharged.

On 5 October 2012, the Owner declared GA. The Cargo interest, Iteco Oilfield Supply France and Iteco Oilfield Supply GmbH, issued Average Bond in the Lloyds Average Form in respect of the three BLs, agreeing to "*pay the proper proportion of any…general average…which may hereafter be ascertained to be properly and legally due from the goods or the shippers or owners thereof…*" on 8 October 2012 and 11 October 2012 respectively in return for the delivery of the Cargo.

The first defendant and the second defendant (the "**Insurers**") issued GA guarantees in the standard AAA and ILU form to "*undertake to pay to the ship owners…on behalf of the various parties to the adventure as their interest may appear any contributions to General Average…which may hereafter be ascertained to be properly due in respect of the said goods*".

On 24 April 2013, the GA adjusters appointed by the Owner issued a certificate recommending the contributions to be paid by the Cargo interests in respect of the GA loss and expenditure.

The Cargo interests and the Insurers maintained that the casualty event occurred because the Owner failed to exercise due diligence before and/or at the commencement of the voyage to ensure that the vessel was seaworthy and/or to properly equip and/or supply the vessel in breach of Art. III.1 of the Hague/Hague-Visby Rules ("**HVR**"), which were incorporated by reference to each of the contracts of carriage contained in or evidenced by the BLs. It is common ground between the

parties that if the casualty event occurred because of a breach by the Owner of Art. III.1 of the HVR, then no GA is due from the relevant Cargo interests by operation of Rule D of the YAR (the "**Actionable Fault Defence**").

The preliminary issue to be determined by the Commercial Court in this case is whether the Actionable Fault Defence is available to the Insurers in relation to their liability under the GA guarantees ("**Preliminary Issue**").

The Court determine the Preliminary Issue with reference to the GA guarantees, the factual and commercial context and the languages used by the parties.

In general, GA applies where one of the parties to a maritime adventure suffers a loss in order to preserve the property of the others. Where that occurs, the others each contribute to the cost of making good the loss suffered by the disadvantaged participant in the adventure.

The Court held that the general principles applicable to the construction of contracts governed by English law apply to the construction of the GA guarantees.

Although the Court accepted the Owner's argument that GA guarantees create a primary obligation as between the insurer concerned and the Owner, it does not lead to the conclusion that the obligation is one that is greater, wider or more onerous than that which exists between the Owner and the Cargo interest concerned under the GA bonds. The Court further held that the constructions of the GA guarantee depends on the language used, viewed in the factual and commercial context, it was not appropriate to construe the GA guarantees without regard to the existence or terms of the GA bonds or the circumstances, that led to the provision of the GA guarantees. The Court applied the case *The Lehmann Timber* [2012] EWHC 844 (Comm) [2012] 2 All ER (Comm) 577 and held that the GA guarantees were intended to operate in conjunction with the GA bonds.

After looking at the relevant factual and commercial context, the Court held that there was no evidence suggesting that the GA guarantees would have been issued but for the need to provide security for the obligations arising from the GA bonds in accordance with the long standing practice in the shipping industry. There would be no practical purpose in the Owner seeking the issue of the GA bonds from the cargo interests if the intended effect of the GA guarantees was to create an obligation on the part of their insurers to pay the Owner without regard to the ultimate liability of the cargo interests to the Owner. It is difficult to see what commercial interest the Insurers would have had in providing a guarantee that conferred a greater benefit on the Owner than the Owner would have had under the GA bonds secured by a cash deposit.

The Court then examined the wordings of the GA guarantee and held that its liability was limited to those properly due in respect of the said goods. The Court accepted that Insurers' submission and held that "due" means owing or payable and GA does not become owing or payable unless and until the merits of a Rule D defence have been resolved by a court. The inclusion of the word "properly" serves to put the point beyond doubt. One of the reasons for the Court refused to follow the case

Maersk Neuchâtel [2014] EWHC1643 (Comm) as submitted by the Owner was that the guarantee in that case did not require the payment to be “properly” due.

In the end, the Court ruled that the Preliminary Issue should be resolved in favour of the Insurers. Nothing is payable under the GA guarantees issued by them if the loss was caused by the Owner’s actionable default or until that issue has been resolved.

In summary, the GA Guarantee provider is entitled to raise a defence under Rule D of the YAR as a defence to their liability under the GA guarantee in the standard AAA and ILU form

Amalie Essberger" Tankreederei GmbH & Co KG v Marubeni Corporation

[2019] EWHC 3402 (Comm)

* *

The Claimant (the "**Owners**") is the owner of the vessel M/T Amalie Essberger (the "**Vessel**") and chartered the Vessel to the Defendant (the "**Charterers**") for a voyage from Rotterdam, The Netherlands, to Castellon, Spain to carry a cargo of Cyclohexane, under a voyage charterparty dated 18 November 2017 (the "**Charterparty**").

The Charterparty contained the following rider clause ("**Rider Clause 5**"):

"*5) Time Bar*

Any claim for demurrage, deadfreight, shifting expenses or other charges or invoices shall be considered waived unless received by the Charterer or Charterer's broker in writing with all supporting calculations and documents, within sixty (60)<u>90</u> days after completion of discharge of the last parcel of Charterer's cargo(es). Demurrage, if any, must be submitted in a single claim at that time, and the claim must be supported by the following documents:

A. Vessel and/or terminal time logs;

B. Notices of Readiness;

C. Pumping Logs; and

D. Letters of Protest …"

Between 29 November 2017 and 1 December 2017, the Vessel loaded the cargo and then sailed to Castellon. The Vessel arrived at Castellon and commenced discharging on 9 December 2017. However, the receiver refused to accept delivery of that part of the cargo carried in one of the Vessel's tanks ("**Tank 5S**") because that cargo was contaminated with mono ethylene glycol. The Vessel then shifted to an anchorage off Castellon on 10 December 2017, remaining there until 19 December 2017, when the Vessel sailed to Valencia where the cargo in Tank 5S was discharged between 19 and 21 December 2017.

The laytime permitted under the Charterparty was "48hrs shinc ttl" across both the loadport and the discharge port. The Owners claimed that 1 day, 1 hour and 40 minutes (1.07 days) of the laytime were used at Rotterdam and the 48 hours laytime expired at Castellon on 10 December 2017.

On 22 December 2017, the Owners submitted, by email via the broker, a demurrage claim to the Charterers in the sum of US$154,875.00 within the 90 day period referred to in Rider Clause 5 above, together with the Vessel's and/or terminal's time logs, notices of readiness and the Vessel's pumping logs for the discharge ports as supporting documents. The demurrage claim was not accompanied

by the Vessel's pumping log at Rotterdam and a letter of protest issued by the Master of the Vessel dated 30 November 2017 (the "**Disputed Documents**") as they had earlier been provided by the Owners to the Charterers on 1 December 2017.

The Charterers put forward two defences: first, that the delay suffered by the Vessel was the result of the contamination of the cargo in tank 5S which occurred on board the Vessel and therefore was the Owners' responsibility or fault; second, the demurrage claim is time-barred because the demurrage claim was not submitted in accordance with the requirements of Rider Clause 5 of the Charterparty within the permitted time period of 90 days.

The Charterers applied for summary judgment on the basis that on the ground that the Owners have no real prospect of succeeding in their claim for demurrage because of the time bar defence.

In deciding the Charterer's summary judgment application, the Court consider the following four issues:

1. Did the Owners' obligation to provide supporting documents under Rider Clause 5 extend only to the Disputed Documents?
2. Did the Owners' obligation to provide supporting documents under Rider Clause 5 require the Owners to provide documents which were already in the Charterers' possession?
3. Must the supporting documents be provided at the same time as the demurrage claim or was it sufficient that the documents were provided at some point before the expiry of the relevant 90 day period?
4. In the event that the Owners failed to provide a particular supporting document in accordance with Rider Clause 5, is the Owners' entire claim for demurrage, or only that part of the claim to which the particular document related, time-barred?

In addressing the four issues above, the Court firstly considered a few case authorities on the construction of a demurrage time bar provision and held that the object of such provision is to ensure commercial expediency, clarity and certainty so as to ensure the Owners are in a position to know what will be required to be done when making a demurrage claim. Given that the demurrage time bar provision has the potential to bar the making of an otherwise valid claim if not presented in accordance with Rider Clause 5, both the time bar and the conditions for the application of the time bar must be clearly stated. If there is any genuine ambiguity in the meaning of the provision, it should be construed restrictively against the Charterers and in favour of the Owners.

1st Issue: Must the supporting documents include the Disputed Documents?

The Court firstly looked at the meaning of "all supporting documents" and held that it requires the Owners to submit documents on which they rely in support of their demurrage claim or documents which taken at face value establishes the validity of the demurrage claim. It doesn't require the owner to submit all documents which are relevant to the demurrage claim, including adverse documents.

Next, the Court then considered the effect of the second sentence of Rider Clause 5, which provided that "*… the claim must be supported by the following documents …*" and then proceeded to list four categories of documents: time logs, the notices of readiness, the pumping logs and the letters of protest. It was held that the four listed categories of documents are deemed to be supporting documents, even if they are strictly irrelevant to the demurrage claim.

The Court held that the Disputed Documents (the pumping log and the letter of protest) were considered supporting documents that would be required to be submitted in support of the demurrage claim within the 90 day time period referred to in Rider Clause 5.

2nd and 3rd issue: Must the supporting documents accompany the demurrage claim?

With reference to the language of the Rider Clause 5, the Court held that there is no express requirement in the language of this provision that the supporting documents must be provided at one time and at the same time as the demurrage claim. It would be treated as a single claim so long as the demurrage claim and the supporting documents were received by the Charterers before the expiry of the 90 day period. If the commercial parties to the Charterparty intended a more stringent requirement for the submission of the demurrage claim, it should have been clearly expressed otherwise in Rider Clause 5.

Given that the Owners had already submitted the Disputed Documents to the Charterers on 1 December 2017 within the 90 days period, requirements under Rider Clause 5 were met. The Court held that the Owner's demurrage claim was not time-barred.

4th issue: the consequence of non-compliance with Rider Clause 5

By reason of the decision on issues 2 and 3, the Court held that issue 4 does not arise. However, the Court in its obiter expressed that if there had been a failure to provide the Disputed Documents in accordance with Rider Clause 5, the whole demurrage claim would have been time-barred.

In the end, the Court held that the Owners' demurrage claim is not time-barred and the Charterers' application for summary judgment was dismissed.

How can ship mortgagees protect and enforce their rights?

Ship mortgage is one of the most common and important securities in ship finance, which is governed by the law of the ship's flag state. This Q&A will discuss the rights of ship mortgagees and the enforcements of the rights.

What is ship mortgage?

In Hong Kong, a registered ship may be made a security for any present or future obligation by way of a mortgage. In most cases, the lender as mortgagee only takes ownership of the ship as security for the repayment of debt and the shipowner as mortgagor continues to be the party who actually possesses and is in charge of the employment of the ship.

How to create and register a ship mortgage?

A ship mortgage in Hong Kong should be entered into pursuant to the Merchant Shipping (Registration) Ordinance (Cap. 415). The instrument creating the ship mortgage should be made in a specified form and set out, among other things, the name and address of each mortgagor and mortgagee. It should also be duly executed by or on behalf of each mortgagor in the specified manner. In case there are other holders of mortgages registered against the ship concerned, prior written consent of all the holders must be obtained.

Upon lodgement of a mortgage instrument and any consents required, the Registrar will enter the particulars of the mortgage in the register and endorse the date and time of registration on the mortgage. All mortgage instruments are registered in the order of their lodgement.

Why is it important for a mortgagee to register the ship mortgage?

Where two or more mortgages are registered in respect of the same ship, the priority among the mortgagees will follow the order of registration of the mortgages, regardless the dates on which the mortgages were made or executed. Even if an unregistered mortgage was executed before a registered mortgage and its existence has come to the knowledge of the parties to the registered mortgage at the time of execution, the rights of the registered mortgagee will still have a higher priority over the unregistered mortgage. Therefore, it is important for the mortgagees to register the mortgage as soon as possible after execution to protect their rights.

What is the order of priority of claims for ship mortgagee?

A registered mortgagee has priority over all the claims except for the cost of arresting the ship, possessory claims, and maritime liens for salvage claims, collision damage and crew's wages.

In what circumstances can a mortgagee exercise its right to possession on the mortgaged ship?

A mortgagee can exercise its right to take possession of the mortgaged ship when the mortgage debt or any part of it is due, or even

before any part of the mortgage debt is due, if its security is being impaired in some material way.

The mortgagee can exercise its right to possession by way of actual possession or constructive possession. Actual possession can be taken by putting people in the ship or arresting the ship. Constructive possession means the mortgagee has actual control over the ship without having physical control in the meantime, which may be due to the ship located outside the mortgagee's jurisdiction. The mortgagee must further give notice to all affected stakeholders, such as charterers, cargo owners, insurers and any third-party claimants to make the constructive possession effective.

After taking possession, the mortgagee can act in place of the mortgagor and enjoy any contractual rights in relation to the employment of the ship. Nonetheless, the mortgagee also has to fulfil and perform the contractual duties incurred by the mortgagor provided that they will not impair the security. Further, the freight which is in the process of being earned and not yet due under the existing contracts are all belonged to the mortgagee after taking possession. For the freight already earned and due before taking possession but only paid afterwards, it should be credited to the mortgagor's account.

How can a mortgagee make an application for an order for sale of the mortgaged ship?

A mortgagee can make an application under Order 75 rule 12 of the Rules of High Court by filing and serving summons or notice of motion, and supporting affidavits, for an order for sale of the mortgaged ship.

According to *The "Myrto"* [1977] 1 Lloyd's Rep 243, the Court may make an order for sale where the subject matter is "of a perishable nature or likely to deteriorate if kept or which for any other good reason it is desirable to sell forthwith". The Court should not make such order except for good reason. The question whether such an order should be made normally only arises where there has been default of appearance or defence. In such a case, the Court will commonly make an order for sale on the ground that, unless such order is made, the mortgagees' security for their claim will be diminished by the continuing costs of maintaining the arrest, to the disadvantage of all those interested in the ship. Where the action is defended, and the defendants oppose the making of such an order, the court should examine more critically than it would normally do in a default action the question of whether good reason for making an order exists or not.

What is the usual way to conduct the sale of the mortgaged ship?

After the mortgagee obtains the order for sale of the ship from the court, it shall give an undertaking in writing satisfactory to the bailiff that it will pay the fees and expenses of the

bailiff on demand, otherwise, the commission for appraisement and sale will not be executed. The bailiff will then appoint an independent surveyor to conduct an appraisement of the ship and ascertain its minimum value. The Court generally will not depart from the usual course of appraisement and sale by public tender to allow a private sale unless there are special reasons to justify it. After the sale of the ship, the bailiff shall pay into Court the proceeds of the sale.

Nonetheless, even after an order for sale is obtained, the shipowner may apply for stay of the order for sale and hinder the enforcement of the mortgagee's rights. In *Landesbank Girozentrale, Singapore Branch v The Owners of the Ship or Vessel "Brightoil Glory" (Hong Kong flag)* [2019] HKCA 561, after the order for sale has been stayed for 4 weeks, the shipowner applied for a further stay on the same ground of pursuing its proposed re-financing. D'Almada Remedios J refused to grant a further stay and refused leave to appeal. The shipowner appealed to the Court of Appeal. The Court of Appeal held that it is the burden of the shipowner to satisfy the court that a further stay is warranted. It is also held that the ship mortgagee's rights might be prejudiced due to any further stay as the proposed private sale of the mortgaged ship in the re-financing plan was uncertain and unsatisfactory in nature and the prospective buyers who have spent time and money responding to the earlier invitations to tender might not wish to participate in a third round of tendering in case the private sale fell through later. Therefore, the Court of Appeal refused leave to appeal.

The above case authority illustrates how the shipowner may obstruct the mortgagee from executing the order for sale of the mortgaged ship. However, the Court of Appeal's judgment has reinforced the Hong Kong Court's position in safeguarding the rights of the mortgagees in enforcing the mortgages and realising their securities.

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