



## CASES – ENGLAND

(2018) 997 LMLN 1

**Demurrage – Time-bar – Charter providing that demurrage claims should be time-barred unless submitted with supporting documents within 90 days of discharge of cargo – Whether time bar applied to time lost waiting for orders**

*Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The “Ocean Neptune”) – QBD (Comm Ct) (Popplewell J) [2018] EWHC 163 (Comm) – 2 February 2018*

On 8 November 2013 the claimant charterers voyage-chartered the tanker *Ocean Neptune* from the defendant owners for the carriage of petroleum products from Taiwan to Australia. Demurrage was payable at US\$17,500 per day pro rata.

The voyage charter was contained in a fixture recap email of 8 November 2013 which incorporated the standard terms of the ExxonMobil VOY2005 form, and the Lukoil International Trading and Supply Company Exxonvoy 2005 clauses dated 30 May 2006 (the LITASCO Clauses), in each case as amended in certain respects in the fixture recap. The charterparty terms, as amended, included:

### “LITASCO Clauses

#### 2. CLAIMS

A... CHARTERERS SHALL BE DISCHARGED AND RELEASED FROM LIABILITY IN RESPECT OF ANY CLAIMS OWNERS MAY HAVE UNDER THIS CHARTERPARTY (SUCH AS, BUT NOT LIMITED TO, CLAIMS FOR DEADFREIGHT, DEMURRAGE, SHIFTING OR PORT EXPENSES) UNLESS A CLAIM HAS BEEN PRESENTED IN WRITING TO CHARTERERS WITH SUPPORTING DOCUMENTATION WITHIN NINETY (90) DAYS FOR DEMURRAGE AND 120 DAYS FOR OTHER CLAIMS FROM COMPLETION OF DISCHARGE OF THE CARGO UNDER THIS CHARTERPARTY.

B. FOR DEMURRAGE CLAIMS SUPPORTING DOCUMENTS MUST INCLUDE WHENEVER POSSIBLE -

1. OWNERS' CALCULATION OF THE DEMURRAGE DUE; AND
2. THE CERTIFICATE OF NOTICE OF READINESS TENDERED AT EACH PORT OF LOADING AND DISCHARGE; AND
3. THE STATEMENT OF FACTS FOR EACH LOADING AND DISCHARGE BERTH WHICH MUST BE SIGNED BY THE MASTER OR THE VESSEL'S AGENTS AND, WHEREVER POSSIBLE, THE TERMINAL; AND
4. THE VESSEL'S PUMPING LOGS FOR EACH DISCHARGE BERTH; AND
5. ALL LETTERS OF PROTEST ISSUED BY THE VESSEL OR THE TERMINAL. THE NOR [sic].

#### 3. STATEMENT OF FACTS CLAUSE

IN ORDER TO BE CONSIDERED AN AUTHORIZED DOCUMENT, STATEMENTS OF FACTS MUST BE SIGNED BY THE MASTER

OF VESSEL, VESSEL'S AGENTS, SUPPLIERS OR RECEIVERS, IF POSSIBLE. IF NOT POSSIBLE, THEN MASTER TO ISSUE A LETTER OF PROTEST TO THE DISSENTING PARTY, SUBMITTED TOGETHER WITH OWNERS' DEMURRAGE CLAIM.

#### 4. WAITING FOR ORDERS CLAUSE

IF CHARTERERS REQUIRE VESSEL TO INTERRUPT HER VOYAGE AWAITING AT ANCHORAGE FURTHER ORDERS, SUCH DELAY TO BE FOR CHARTERERS' ACCOUNT AND SHALL COUNT AS LAYTIME OR DEMURRAGE, IF VESSEL ON DEMURRAGE. DRIFTING CLAUSE SHALL APPLY IF THE SHIP DRIFTS.

...”

The vessel loaded cargo at Mailiao between 17 and 19 November 2013 and proceeded to her first discharge port, Gladstone, Australia, where she tendered NOR on 2 December 2013 at 21.00. She berthed at 13.50 on 3 December 2013 and remained at berth until 14.10 on 5 December 2013 when she shifted back to the anchorage. She remained at anchor until 23.40 on 15 January 2014 when the charterers ordered the vessel to sail to Botany Bay. The reason for the delay at Gladstone was that the receivers refused to take delivery of the cargo on the grounds that it was alleged to be contaminated/off specification. The vessel discharged part of the cargo at Botany Bay on 18 and 19 January 2014 and proceeded to Port Alma where she discharged the remaining cargo between 22 and 24 January 2014.

The owners' claim, with supporting documents, was sent by email on 6 February 2014. The charterers did not pay it and the owners brought arbitration proceedings claiming demurrage in the total sum of US\$772,327.87. The charterers denied liability on the grounds, inter alia, that the claim was time-barred because the documents in support of the claim specified in LITASCO Clause 2B had not been provided within 90 days of the completion of discharge as required by that clause.

The tribunal determined the time bar defence as a preliminary issue. It held that the owners failed to provide all the supporting documents required by LITASCO Clause 2B because they did not include a statement of facts for each of the ports of Mailiao, Gladstone, Botany Bay and Port Alma countersigned by the terminal, or if it was impossible to obtain such a countersignature, a letter of protest from the master. The tribunal held that the demurrage claims were time-barred for that reason, save in respect of the delays at Gladstone. It treated the delays at Gladstone as falling outside the scope of the time bar defence because although the claim was initially categorised as a claim for demurrage by the owners, they subsequently re-labelled it as a claim for time lost waiting for orders falling within LITASCO Clause 4. The tribunal held that the documentary requirements of LITASCO Clause 2B would not apply to the claim so re-labelled. Accordingly, the claim in respect of the delays at Gladstone was not time-barred.

The charterers appealed. They submitted that a claim under LITASCO Clause 4 was a claim for demurrage; and was barred by LITASCO Clause 2B.

The owners submitted that there was a distinction between claims for demurrage in relation to operational delays at the loading and discharge ports, and claims for time lost waiting for orders. Demurrage was liquidated damages for breach of charter in relation

EDITED BY MICHAEL DAICHES, BARRISTER

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to the use of the vessel, whereas LITASCO Clause 4 conferred a contractual liberty which involved no breach by the charterers. The fact that a LITASCO Clause 4 claim was to “count as” demurrage for the purposes of computation did not make it a claim for demurrage for all purposes, and in particular did not do so for the purpose of LITASCO Clause 2B. There was no reason to suppose that any of the categories of documents listed in LITASCO Clause 2B were likely to be relevant or necessary for assessing a claim for time lost waiting for orders.

*Held*, that the language of the charter provided in clear terms that a LITASCO Clause 4 claim was a demurrage claim. Identification of what was meant by a claim for demurrage was to be found in clause 13(d) of the ExxonMobil VOY2005 form. It was there that the obligation to pay demurrage was framed by the use of the words “Charterer shall pay demurrage ...”. It provided that demurrage was to be paid for all time by which the allowed laytime “is exceeded by time taken for loading and discharging and for all other Charterer’s purposes and which, under this Charter, counts as laytime or as time on demurrage.” The language of LITASCO Clause 4 provided that the delay caused by waiting at anchorage should “count as” used laytime or demurrage. The waiting time under LITASCO Clause 4 was, in the words of clause 13(d), time taken for charterers’ purposes which under the charter counted as laytime or demurrage. It therefore fell squarely within clause 13(d), giving rise to a claim for demurrage. It was not just to be quantified in the same way as a demurrage claim at the demurrage rate. It was a demurrage claim under clause 13(d). The italicised words made it clear that there was no distinction between an “ordinary” demurrage claim, in the sense of a claim where the charterers had exceeded the allowed laytime by the time taken for loading and discharging, and a claim for delay waiting for orders where such delay was to count as laytime or time on demurrage. There was only one type of claim: a claim for demurrage to account for the time by which charterers had exceeded the agreed laytime for loading, discharging and for any other of charterers’ purposes which counted as laytime or time on demurrage under the charterparty – including time spent waiting for orders under LITASCO Clause 4.

Providing that time was “to count” as laytime or demurrage and be treated as part of a demurrage claim was a common drafting technique. The formulation was often used to describe periods which would otherwise not form part of the laytime, eg because the ship had not become an arrived ship, but were to be treated as such for the purposes of a demurrage claim: see eg *Dias Compania Naviera SA v Louis Dreyfus Corporation* [1978] 1 Lloyd’s Rep 325.

Nor were there any commercial considerations or consequences which pointed to a LITASCO Clause 4 claim not being a “demurrage claim” for the purposes of engaging LITASCO Clause 2B.

The owners had argued that if the charterers’ construction were correct the owners would at least in some circumstances be required to submit irrelevant documents. An example was where the vessel was ordered to wait at anchorage for further orders prior to arrival at the first loadport and the time so spent exceeded the full 84 days allowed; in those circumstances, the owners argued, the documentation from the subsequent operations at the loading and discharging ports would be irrelevant to a waiting time claim under LITASCO Clause 4. However, there were two answers to that point. First, in the particular example given, in which laytime had already been fully used prior to arrival at the loadport, the owners would be likely to be advancing a demurrage claim for the time taken in loading and discharging thereafter, and they could be expected to collect and submit the documentation for those purposes in any event. Secondly, and even if there might be some circumstances in which the Clause 2B documents were irrelevant, that was not a sufficient reason for failing to give effect to the clear wording of the contract. The requirement was not onerous: it applied to a very limited class of documents which, if they existed, ought to be readily to hand and capable of submission without undue difficulty or expense. If a provision which was designed to operate for good reason in most circumstances might occasionally require irrelevant documents, that was no reason to suppose that the parties did not intend it to have the effect for which it clearly provided. The points made by Lord Neuberger PSC in *Arnold v Britton* [2015] AC 1619 at paras 16 to 23

on the limits to the impact of “commercial common sense” were pertinent in that context.

The appeal would be allowed.

*Natalie Moore, instructed by Clyde & Co LLP, for the charterers; Richard Lord QC, instructed by Thomas Cooper LLP, for the owners.*

## ARBITRATIONS – LONDON

(2018) 997 LMLN 2

**Charterparty – Owners refusing to load cargo of iron ore fines – Whether owners in breach of charter – Time of delivery under charter – Whether vessel off hire – Whether owners entitled to damages for wrongful redelivery**

London Arbitration 7/18

The subject vessel was fixed under a NYPE form as amended for a time charter trip. In the event, the owners refused to load the charterers’ cargo of iron ore fines, and the charter was never performed. As a result, the owners advanced a claim for unpaid hire and bunkers in the sum of US\$145,965.03, alternatively damages, and also damages for wrongful redelivery. The charterers denied liability and advanced a counterclaim, contending that the vessel was off hire, and that the master’s refusal to berth was in breach of the charter.

The charter provided that the intended cargo was iron ore and, in line 13, spelt out:

“... CHTRS CONFIRM THAT CHTRS INTENDED CARGO NOT TO BE LISTED ON IMDG/DANGEROUS CARGO AND BULK HARMLESS GENERAL CARGO.”

The ship was to be delivered to the charterers on dropping the last outward sea pilot “Chittagong, Bangladesh” any time day or night Sundays and holidays included. By lines 21–23 she was to be:

“... on her delivery ... ready to receive any permissible cargo ... and tight, staunch, strong and in every way fitted for the ordinary cargo service ... throughout the period of this Charter vessel to be employed, in carrying lawful merchandise, excluding See Clause 88.”

Clause 88 contained a list of cargo exclusions including:

“... all injurious/inflammable/dangerous goods/commodities as listed in latest IMO DG Code and/or any subsequent amendments/modifications thereof.”

Later in the clause, under a heading “Concentrates loading” there appeared:

“... before loading concentrates, Charterers to supply vessel with shipper’s certificate of flow moistures’ content evidencing cargo compliance with IMO regulations. ...

All cargos always to be loaded/stowed/carried and discharged in strict accordance with local/national and IMO regulations...”

Clause 5 of the printed form of charter had been amended so as to delete the standard words, which would otherwise have provided that on delivery time was to count following the giving of written notice of readiness, or sooner if the charterers chose to use the ship earlier.

*Held*, that an issue arose as to the time of delivery under the charter. The time of dropping the last outward sea pilot at Chittagong was 02.30 on 21 June 2011. The charterers contended that delivery did not effectively occur until 05.39 on 4 July 2011. They said that at the time of dropping the last outward sea pilot at Chittagong the ship was not in every way fitted for ordinary cargo service because her starboard combination ladder was inoperative as it had a burned-out electrical motor, which was not usable until 05.39 on 4 July 2011. Because of wind and sea conditions at Sandheads, where the ship was waiting before going up river to Haldia (the load port),

pilots normally required, for safety reasons, to use the starboard combination ladder rather than the port combination ladder (which in the present case was fully operational).

A notice of readiness was in fact issued at 23.15 on 21 June 2011, but in the light of the deletion to clause 5 and the express agreement that delivery was to take place at the time of dropping the last outward sea pilot, the tribunal had no hesitation in holding that, subject to the charterers' argument about the starboard combination ladder, that was the moment when delivery occurred and when the charterers' liability to pay hire started to accrue.

The problem with the starboard combination ladder did not cause any material delay. If the pilot had asked for the starboard ladder to be made usable (which could have been done quickly by switching the motor from the port ladder to the starboard one, as indeed happened in due course) that could have been done within a couple of hours; and the pilot could perfectly well have used the port combination ladder in the conditions that prevailed.

The tribunal was therefore unable to conclude that the vessel was not in every way fitted for ordinary cargo service on delivery, and accordingly, hire started to accrue when the outward Chittagong pilot was dropped.

The real problems arose because of the cargoes of iron ore fines that the charterers wished the ship to load. It was notorious that such cargoes should not contain excessive moisture as otherwise they could liquefy during transport, leading to them moving freely and causing ships, in some cases, to capsize. For that reason the IMO had laid down (in the IMSBC Code) strict requirements that had to be fulfilled before a ship loaded a cargo of fines. The charterers, and those under them who were to ship cargo on the subject vessel, did not comply with those requirements at any relevant time.

There were two background facts that were of particular significance. The monsoon season started on 16 June 2011, before the ship arrived at Haldia, and continued throughout the time she was there. And the cargo which the charterers first wanted to load was stored in the open, at a site distant from the berth where loading would have taken place.

The IMSBC Code required that prior to loading a cargo of fines the shippers had to provide a Transportable Moisture Limit (TML) certificate, and a cargo declaration form setting out certain specific information including moisture content (MC) which, for safe carriage, had to be lower than the TML. At no stage were those requirements satisfied in relation to the first intended cargo: in particular there were no proper shippers' declarations and some of the documents showed a MC that was greater than the TML. Although the ship was called to berth, there was no point in her going alongside for as long as the shippers failed to show that their cargo was compliant, as was the case at all relevant times.

There were other very good reasons to suspect that the cargo was unsatisfactory, apart from the non-compliance with the Code. Those included discrepancies between various certificates provided by the shippers, attempts to rely upon unsatisfactory tests, refusal to allow joint sampling with the owners' surveyors, the inland stockpiles showing considerable signs of having been doused by heavy rain and liquefying at the base, and the fact that the stockpiles failed testing by the owners' surveyors.

It was clear to the tribunal that the charterers failed to show that the cargo they first intended to ship complied with the IMSBC Code. On the contrary it was dangerous and thus unlawful. The refusal to load it was therefore justified and not a breach of the charter.

The shippers of the first intended cargo having, according to the charterers, cancelled the shipment and the sub-charter on 7 July, on 13 July the charterers said they were booking an alternative cargo of iron ore fines. Surveyors for the owners (and the head owners) took samples from the proposed stockpiles: those failed moisture tests although the shippers' sample apparently passed, but with what the owners said were suspiciously high figures for TML and Flow Moisture Point (FMP).

Despite the owners having refused to load that cargo, the port authority berthed the ship, whereupon the charterers sought to persuade the master to start loading cargo that was being barged under heavy monsoon showers. Further sampling established that the MC of samples of that cargo taken from the stockpiles exceeded the TML and thus the cargo was not one that was lawful under the charter.

Enormous, but inappropriate, pressure was put on the master to persuade him to start loading. It was suggested that testing could take place alongside using unreliable meters and can-tests, notwithstanding that tests on the stockpile had shown that the cargo was not compliant with the Code, that there were no shippers' declarations as required by the Code, that testing during loading was improper and that mixing cargo parcels would invalidate earlier (failed) certificates of TML.

It was not without significance that on 22 July the charterers and shippers refused to participate in any further joint testing. As with the first intended cargo, the second one was not shown to be compliant with the Code and the master was therefore entitled - indeed, right - to refuse it as being dangerous.

It followed that the owners' claims for unpaid hire and bunkers in the sum of US\$145,965.03 were bound to succeed and that the charterers' counterclaims, which depended on them being able to rely on off-hire, which they could not do, and on breach by the owners, which did not exist (indeed, it was the charterers who were in breach), had to fail.

The owners also made a claim for wrongful redelivery. On 22 July, whilst the ship was still at Haldia, the charterers sent a notice redelivering her to the owners. That redelivery was without the advance notice required by the charter and was also wrongful because under the charter the charterers were only entitled to redeliver in the Japan/Singapore range. The owners claimed that they incurred US\$118,968.97 expenses in getting the ship to Singapore, and suffered further losses totalling US\$36,734.74 by way of expenses between her arrival there and delivery under her next fixture.

The tribunal unhesitatingly accepted the first of the two claims. As to the second, there was a strong indication in the master's witness statement that the ship was going to Singapore after the intended voyage in any event, possibly for repairs. The tribunal had specifically raised that point with the owners' solicitors but the response was less than satisfactory. The burden of proving loss lay on the claiming party and the tribunal was not satisfied that it had been discharged by the owners in relation to the US\$36,734.74 claim, which it did not, accordingly, allow.

The charterers, in breach of their obligations under clause 2 of the charter, failed to pay US\$20,000 in respect of port charges at Haldia, so the owners eventually paid that sum in order to have the ship free to sail. They were accordingly entitled to an award for that amount. They were further entitled to US\$29,840.24 in respect of hire during the period the ship was obliged to remain at Haldia until the charges could be paid.

Accordingly, the owners were entitled to an award for a total of US\$314,774.24 together with interest and costs.

### (2018) 997 LMLN 3

**Arbitration – Jurisdiction – Claimant owners bringing arbitration proceedings against party named as charterers in charterparty – Respondent obtaining order for security for costs – Claimant subsequently applying to discharge order for security on basis that arbitrators lacked substantive jurisdiction – Whether claimant precluded from challenging order for security – Identity of charterers**

*London Arbitration 8/18*

The issue in this arbitration concerned the identity of the charterers named in the charterparty, who were named as "X". That name was followed by the phrase "to be fully guaranteed by '[Y]'".

The claimant owners (the owners) began an arbitration against X. There were two competing "X's", but both had the same full name, and both were associated with "Y Corporation" (Y Corp). One was said to have been a business name only. It was common ground that the other was a limited liability company, registered in the Cayman Islands, in existence at the time the contract was made and performed. It was also common ground that it had been dissolved in March 2013 and no longer existed.

During the course of the arbitration X made an application for security for costs in the sum of £173,611. The tribunal subsequently ordered the owners to provide security for costs in the sum of £90,000.

The owners now sought to have that order recalled. They did so on the basis that the party named as the charterer in the charterparty did not exist. The owners had contracted with the Cayman Islands Company which no longer existed. It followed that the tribunal could not have had jurisdiction to make the order as there was no legal person in whose favour the order could have been made. Even if the initial appointment of the arbitrators was valid, the arbitration came to an end when one of the parties to it ceased to exist.

X said that the contract was made not with the Cayman Islands company but with Y Corp which was using the trading name "X". That was not a legal entity, but it denoted a legal entity, namely Y Corp. It was against Y Corp that the claim, if good, would lie. Y Corp still existed and the arbitration therefore continued.

A preliminary point arose as to whether the owners were entitled to make the present application at all. Was an arbitration claimant entitled to argue that the tribunal lacked substantive jurisdiction? Even if it was, did the fact that X's application for security for costs had been made, argued and ruled upon preclude the owners raising the question of jurisdiction now? In that connection, X had referred to section 73 of the Arbitration Act 1996, whereby a party who participated in an arbitration without protest as to (among other things) the jurisdiction of the arbitrators was debarred from raising it at a later stage unless the complaining party did not know and could not reasonably have known of the objection. X submitted that the right to object to the jurisdiction of the arbitrators had been lost.

*Held*, that there was no reason in principle why an arbitration claimant should not be entitled to raise a jurisdiction argument, just as an arbitration respondent was entitled to. As to section 73, the complexities of X's position had come to light only gradually. Much confusion remained, not merely on the owners' part. Moreover, the owners accepted that the tribunal had jurisdiction at the time of the commencement of the arbitration. On the owners' argument, however, the respondent to the arbitration ceased to exist when the Cayman Islands company was dissolved in March 2013. That would suffice to deprive the arbitrators of jurisdiction and bring the arbitration to an end.

In the circumstances, the owners were not debarred by the fact that the tribunal had made a ruling, or by section 73, from advancing the argument that the tribunal had no jurisdiction.

The substantive issue was: Who was the actual charterer? The owners' case was that at all material times it was the Cayman Islands corporation. It was not in dispute that that company had been dissolved, so that if the owners' contention was correct, there was no longer a respondent to the arbitration in whose favour the order for security for costs could be made.

The owners had contended that the parol evidence rule prevented there from being any evidence as to the identity of the charterer, and they referred to *Shogun Finance Ltd v Hudson* [2004] 1 AC 919. However, *Shogun* was concerned with a mistake as to the identity of a contracting party. That question did not arise in the present case. There was no evidence that any mistake was made by the owners, or indeed that it had any particular interest in the identity of the party with whom it was contracting.

The ambiguity in the present case was as to the person identified by the name in the charterparty. There was no logical difficulty in "X" denoting the company or Y Corp by its business name. The question which had to be answered was not one of construction, but one of fact: who were the actual parties to the contract? Evidence might be adduced to explain or identify a person named in a contract but evidence would not be allowed to contradict the written contract. There was no question of contradiction in the present case. As there were two bodies which bore the name appearing in the charterparty, there were two possible candidates for the role of charterer. The charterparty was explained, not contradicted, by identifying the correct party.

The owners had relied on the fact that the charterer was identified in the fixture recap as "X which to be fully guaranteed by Y Corp". They contended that as a matter of construction that expression

showed that the charterers were not Y Corp but some other entity. Otherwise, there would be an absurdity as Y Corp purported to guarantee its own liability.

In the tribunal's view there was a clear commercial purpose in a substantial corporation offering a guarantee of its own liability incurred under a business name. It might or might not be possible in law to double contractual undertakings in that way; but it made commercial sense from the point of both parties that that should be done. The "guarantor" did not have to disturb the pattern of his commercial dealings, with the practical consequences from the point of view of documentation and accounting which would follow if he used his own name rather than the name under which he was trading for this class of business; and the other party had the comfort he sought. Whether or not that gave rise to a separate legal obligation, it was natural to treat the business name and the legal entity as apparently different for some purposes.

X/Y Corp had adduced statements from Y Corp to the effect that its chartering operations were carried out in the name "X" which was registered as a business name in the USA.

The evidence also indicated that the Cayman Islands company of the same name was indeed dissolved, and that that company was at all times dormant. No monies came into or out of the company's account. At the date of its dissolution, it had neither assets nor liabilities.

In the tribunal's view, if that last was correct, then there was no room for doubt as to what the facts were. Moreover, the owners were expressly informed of the true position by an email exchange after the contract had been made but before the vessel had been delivered under it. The owners' brokers had asked the charterers' brokers to:

"Clarify full style of charterers as I recvd telex re next voyage from time chrrs Messrs [Y Corp] but last yr re next charterers is [X]".

To which the reply was:

"Fyg kindly assure Master that "[Y Corp]" and "[X]" is same com. From habit, sometime chars mic uses [Y Corp] or [X] ..."

In the light of the factual material available it was plain beyond argument that the Cayman Island Company played no part in the present contract. That eliminated any alternative to the contracting party being Y Corp, using its business name. Y Corp continued in existence so as to be a party to the arbitration.

Accordingly, the tribunal continued to have jurisdiction and there was no reason to alter the order for security for costs.

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3/18, **995(1)**

4/18, **995(2)**

5/18, **996(3)**

6/18, **996(4)**

7/18, **997(2)**

8/18, **997(3)**

