CHARTERPARTY REQUIREMENTS TO NOTIFY CLAIMS – TAKE CARE!

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Voyage charterparties frequently require the owner to notify any claim with supporting documents within a relatively short period of time. Our recent article on *The Amalie Essberger* [1] touches upon the issues that can arise as a result in the context of demurrage time bars in such charterparties. However, charterparties relating to bulk carrier vessels on the New York Produce Exchange (NYPE) Form often contain similar provisions which, given that claims under time charterparties can be significantly more complicated, may be more onerous for claimants to comply with.

The English High Court recently provided valuable guidance on this issue in The *Tiger Shanghai*[2].

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FACTS

The Tiger Shanghai was time-chartered on the NYPE form. Shortly after delivery, the charterers required its hatch covers to be modified to enable it to load a cargo of cement clinker. However, the owners refused. The charterers terminated the charter, asserting that they were entitled to do so under an express clause of the charterparty by reason of the owners' refusal having been unreasonable. The owners denied this and alleged that the charterers had wrongfully repudiated the charter.

The charterers promptly sent a claim letter to the owners seeking damages for their losses. Arbitration was subsequently commenced and, two years after the termination of the charterparty, the charterers served claim submissions attaching a copy of a survey report first obtained by them two years earlier regarding the feasibility of modifying the hatch covers.

The charterparty provided:

"*[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 accepted that the charterers had properly notified their claim in writing and had appointed their arbitrator within the 12-month deadline running from the termination of the charter. However, they argued that the survey report fell within the ambit of "*all available supporting documents*" and the failure to include it with the claim letter rendered the claim time barred.

Two of the three arbitrators agreed that the survey report was a "supporting document", that it was not covered by legal professional privilege and that it was time barred for the reason the owners had given. The dissenting arbitrator held that the survey report was privileged and, on this basis, did not fall within the ambit of "*all available supporting documents*".

The charterers appealed the majority's decision to the English High Court.

HIGH COURT DECISION

The charterers submitted that "*all available supporting documentation*" merely referred to documents which are reasonably necessary to explain the proposed claim to a recipient with a degree of familiarity with the background of the matter and which documents are unquestionably disclosable at an (early) point.

The owners, by contrast, argued that the clause required a "*cards on the table*" approach – and that applied to all cards. The charterers' claim depended on their termination of the charter being lawful, as to which the report was clearly a supporting document.

The judge (Mrs Justice Cockerill) agreed with the arbitrators that the report was of a surveyor who had attended the vessel to assess the problem which had arisen and to find the best pragmatic solution, rather than the report of an expert witness for future arbitration proceedings.

Against this backdrop, the judge agreed with the owners that the claim was time-barred by virtue of the charterers' omission to provide the report within the 12-month deadline:

1. The judge disagreed with the charterers' submission that to extend the time bar to include the report would be turning the clause into one that required advance disclosure. The clause only concerned documents that supported the charterers' claim;
2. Moreover, the judge noted that the clause required *all* supporting document to be provided – wording indicating an expansive approach that had to be respected;

"The judge agreed with the owners that the claim was time-barred by virtue of the charterers' omission to provide the report within the 12-month deadline."

3. In this regard, the judge held that what make a document "supporting" must be assessed by reference to the claim being advanced at the time. If the claim changes in essence at a later stage (for example, if a correction to a claim is made), this will not mean that documents subsequently relied on will become subject to the time bar (see The Oltenia[3]);

4. By the same token, the judge disagreed with the owners' characterisation of the clause as one requiring a "cards on the table" approach such that anything supportive of the claim and available to the charterers had to be given. She held that, aside from futility (as in the case of duplicative documents), the authorities required one to look at the essence of the document in question. Therefore, she held, a document which was of no real relevance, but which was later appended to submissions, would not be a "supporting document";

5. The judge also considered whether the clause could include 'secondary' documents such as witness statements or experts' reports as well as 'primary' underlying documents, though she did so on an *obiter* (non-binding) basis given that the point had not been run in the arbitration. She was dubious that the clause could extend to such 'secondary' documents, though in any event she considered that the survey report in this case was probably an 'extended primary' document rather than a 'secondary' document;

6. On this basis, the judge rejected the charterers' argument that the report was not a "supporting document" on the basis that it was not relevant to the identification of, or the support of, the claim when arbitration was commenced; and

7. The judge also rejected the charterers' additional argument that, whilst the report was not in fact a privileged document, it was reasonably arguable that it was privileged and, on this basis, it could not be a "supporting document" under the clause. The judge held that this argument, if correct, would lead to disputes as to how arguable a claim to privilege had to be. In her view, the clause could not have intended a bad claim to privilege to make any difference. The width of the clause encompassed this report, even though it would be rare for such clauses to be designed to require the provision of documents that are or may be privileged.

> "This all serves as a reminder that such clauses are awkward when they appear in time charterparties and that, to avoid disputes, they ought not appear in such charterparties at all."

In conclusion, the judge held that although the report was probably towards the limits of what could be caught by the clause in terms of "supporting documents", as it was both "supportive" and a "document" in the sense required by the clause, it was indeed caught. This meant that the charterers' claim was time-barred.

COMMENT

This decision serves as a reminder (to both charterers and owners) that, with a clause drafted as widely as this, care needs to be taken to ensure that all documents that are likely to be relevant are provided, and arbitration commenced, within the required deadline.

Moreover, there may be additional questions as to the point in time from which the time bar begins to run. In this case, the clause was clear: 12 months from completion of the charter. However, such clauses can require notification with all available supporting documents and commencement of arbitration within a certain number of months "from final discharge". Depending on the type of claim and the wording of the clause as a whole, this has the potential to start the clock running for any particular claim item from completion of discharge of the final cargo carried during the voyage being performed when the claim arose, resulting in several time bars where there are several claim items arising at different points in time[4].

This all serves as a reminder that such clauses are awkward when they appear in time charterparties, given the complexity of the claims that could arise under such charterparties, and that, to avoid disputes, they ought not appear in such charterparties at all. But where they appear – take care!

[1] *"Amelie Essberger" Tankreederei GmbH & Co KG v Marubeni Corporation* [2019] EWHC 3402 (Comm)

[2] *MUR Shipping BV v Louis Drefus Company Suisse SA* [2019] EWHC 3240 (Comm)

[3] *Babanaft v Avant (The Oltenia)* [1982] 1 Lloyd's Rep 448

[4] See *The Simonburn* [1972] 1 Lloyd's Rep 355, *The Aristokratis* [1976] 1 Lloyd's Rep 552, *The Sandalion* [1982] 5 Lloyd's Rep 514 and *X v Y* [2011] All ER 125.