MARITIME DISPUTES NEWSLETTER – JULY 2021: ARBITRATION AWARDS

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SCROLL DOWN FOR A SELECTION OF RECENT DECISIONS BY LMAA TRIBUNALS, PUBLISHED IN ASSOCIATION WITH THE LLOYD'S MARITIME LAW NEWSLETTER:

Charterparties

Did laytime start to run when vessel had to wait for berthing and discharge? (London Arbitration 14/21)

An LMAA tribunal has rejected arguments by owners that, by requiring a vessel to wait until berthing and discharging was permitted at the discharge port, charterers had invited them to perform an extra-contractual service to which the laytime regime did not apply and instead they were entitled to payment on a *quantum meruit* basis. Charterers were entitled to use the whole of the agreed laytime, and it did not matter whether they did so by holding the ship off the berth, by berthing her and not working her for some time, or by berthing her and working her immediately.

Abnormally low river water levels could not be relied on by charterers to stop laytime accruing in respect of delays in cargo reaching vessel (London Arbitration 03/21)

In the context of a claim for demurrage, an LMAA tribunal has rejected arguments that laytime should not run in relation to a delay in cargo reaching the vessel. The cargo was transported to the loadport by river, and the charterers contended that there were delays in navigation due to abnormally low water levels in the river at the relevant time. Charterers sought to rely on a clause headed "laytime" in the Synacomex 2000 charterparty, which provided that "*any delays caused by ice, floods, quarantine or by cases of "force majeure" shall not count as laytime unless the vessel is already on demurrage*". However, the tribunal noted that laytime is, by definition, the time allowed for cargo operations, not the time taken to transport the cargo to the vessel, and in any event, the express reference to flooding did not mean that the converse (a shortage of water) would fall within the definition. The charterers had also failed to show that the water levels were unusual or unavoidable and so their reliance on "force majeure" failed. Arguments that owners were responsible for delays at the discharge ports were also rejected, as was the suggestion that some of the claims were time-barred, although the tribunal did not accept that charterers were liable for bunker deviation costs relating to additional port calls.

Breach of charterparty for failure to nominate suitable berth (London Arbitration 07/21)

In circumstances where owners had an option to load 27,000 – 33,000mt of cargo, and had opted to load 33,000mt, but charterers had ordered the vessel to load at a berth which would not allow loading in that quantity, an LMAA tribunal has found that the charterers were liable for damages. Charterers were bound to load whatever amount the owners opted for, up to 33,000mt, and if, by their choice of berth, the charterers frustrated the owner's exercise of their option and prevented the vessel from loading that quantity, charterers were themselves in breach.

Effect of 'no consequential damage' provision in head charter (London Arbitration 13/21)

Where owners had withdrawn a vessel from the charterers' service and then brought a claim for failure to pay hire and other sums, an LMAA tribunal rejected the charterers' counterclaim that the withdrawal was premature and it was entitled to damages for loss of hire under a sub-time charter, a demobilisation fee and loss of profit that would have been made under a proposed renewal of the sub-time charter. The *prima facie* measure of loss for premature withdrawal is the cost of obtaining a substitute contract for the remainder of the charter period but that had not been claimed, and the claims that were made instead were all debarred under a clause in the head charter which provided that neither party would be liable to the other for any consequential damages, which included loss of use and loss of profits. Since the charterers had not specifically raised any defences to the owners' claim, the tribunal found the owners were entitled to a partial final award in their favour.

When can a deduction from hire be made for underperformance? (London Arbitration 06/21)

In an interesting decision which reverses recent trends in performance claims, an LMAA tribunal has found that charterers had been entitled to make a deduction from hire for underperformance. While owners contended that an expert assessment of the relevant sea conditions as "good weather" included conditions that were worse than the good weather conditions specified in the charterparty, meaning that the assessment of performance was not an accurate reflection of the vessel's true performance in good weather, the tribunal disagreed. The expert had considered the effects of current, but the tribunal considered that it had concluded fairly that the effects were negligible and so the report represented a realistic assessment of performance. However, charterers were not entitled to deduct from hire a "penalty" said to have been incurred under a sale contract as a result of the vessel's delayed arrival at the discharge port as the vessel's breakdown had been caused by a negligent failure to adjust the cylinder oil feed rate, and so the owners were entitled to rely on the usual exception in respect of negligence in the management or navigation of the vessel.

Were owners restricted to claiming demurrage in amount specified in second invoice? (London Arbitration 08/21)

An LMAA tribunal has found that owners were entitled to claim the full amount of demurrage invoiced in respect of a voyage charter, despite having submitted a second, reduced invoice to charterers after the first invoice was not paid. The charterers had taken no part in the arbitration, and the tribunal was not told of any negotiations between the parties which led to the second invoice being issued, but the most obvious explanation was that the owners were prepared to accept a slightly reduced amount in exchange for prompt payment, which did not in fact happen.

Can a document be both a demurrage invoice and a laytime and demurrage calculation? (London Arbitration 01/21)

Construing the requirements of a time bar provision under an amended Asbatankvoy form, an LMAA tribunal has followed the decision in *Lia Oil SA v ERG Petroli SpA* (2007) in finding that a document headed "time sheet" which did not state that it was an invoice, but did set out the time and money claimed in a demurrage claim, could be both a laytime and demurrage calculation and an invoice. The owners had also provided a signed document which contained all the information expected of a statement of facts, and other documents which were functionally equivalent to a port log, discharging log and pumping log for the discharging port, and so charterers' application for a declaration that the demurrage claim was time-barred failed.

MOAs

Meaning of "average damage affecting Class" (London Arbitration 12/21)

In a useful and interesting decision, an LMAA tribunal has considered whether a vessel had average damage affecting Class when notice of readiness was tendered by sellers under a memorandum of agreement. It was common ground that the bilge keels showed damage, probably as a result of external contact with ice, but in determining whether this was average damage, it was necessary to consider whether it was the sort of thing for which a shipowner could claim on their insurance policy. H&M cover excluded cover for wear and tear, but the tribunal concluded that in this case the probable circumstances that caused the damage to the bilge keels did not mean that damage was certain to result. The damage could, therefore, be classified as average damage. However, the tribunal did not think that this affected the vessel's Class. The question was whether the damage was of such a character as to result in an objectively reasonable surveyor imposing a qualification on Class, and it was necessary to consider the question by reference to the severity of the damage. In this case, and noting that bilge keels are not a Class item as such, and will only be an item of concern if they endanger the structure or safety of the vessel, the tribunal concluded that the damage would not affect Class. The tribunal had not seen any contemporary evidence that the bilge keels could or would have posed a risk to the integrity of the hull and an objective surveyor would have not imposed a recommendation on Class. The tribunal also rejected arguments that the sellers were negligent pursuant to the terms of the memorandum of agreement in tendering notice of readiness when they did.

Bunker Supply Contracts and Maritime Liens

Was owner party to agreement for bunkers? (London Arbitration 11/21)

Following its decision on jurisdiction in London Arbitration 10/21, the LMAA tribunal went on to reject the respondent's arguments that it was not a party to the relevant bunker supply agreement. The respondent denied that the management company which had placed the bunker orders was acting as its agent, and argued that in fact it had chartered the vessels in question. However, the LMAA tribunal rejected that argument, noting that the charters in question were all voyage charters and under the forms used it was the responsibility of the deponent owners (ie, the respondents). Further, evidence from the claimants showed that in other cases the management company had placed bunker orders for the respondent's ships where there was no suggestion it was doing so in its own capacity as charterer. The tribunal considered that the respondent had simply argued any point that occurred to it as an attempt to avoid liability, but its arguments all failed.

Contractual agreement that bunker suppliers should have maritime lien (London Arbitration 09/21)

A maritime lien confers the very valuable right on claimants to bring an action *in rem* against a vessel, as well as against an owner, and survives any transfer of ownership so that the vessel cannot be sold "free from encumbrances". Under US law, bunkers qualify as necessaries so as to create a maritime lien. While the same is not true under English law, parties may contractually agree that bunker suppliers should have a maritime lien, and in this case an LMAA tribunal accepted that they had done so by incorporation of the supplier's terms and conditions.

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