

IN THE MATTER OF THE ARBITRATION ACT 1996

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN:-

COPY

DM SHIPPING CO. LTD. of Busan

Owners/Claimants

- and -

KVG GLOBAL LIMITED of Hong Kong

Charterers/Respondents

MT “CARIBBEAN ORCHID”

Charterparty dated 12.05.17

FINAL ARBITRATION AWARD

WHEREAS:

Introduction

1. By a voyage charterparty dated 12th May 2017 on the VEGOILVOY 1/27/50 form (supplemented by a clean fixture recap), the Claimants (“the Owners”) agreed to charter their motor tanker “CARIBBEAN ORCHID”

("the Vessel") to the Respondents ("the Charterers") on terms and conditions more particularly set out in the charterparty and the fixture recap.

2. By paragraph "C" of the fixture recap, the parties agreed that any disputes arising under the charterparty are to be referred to arbitration in London with English law and the (LMAA) Small Claims Procedure to apply.
3. A dispute arose between the parties as detailed hereafter with the amount at issue being US\$27,516.69. Following an application to the LMAA pursuant to paragraph 2(b) of the Small Claims Procedure, the President appointed me, Lambros Hilas, of "Metropolitan Wharf", 70 Wapping Wall, London E1W 3SS, as sole arbitrator.
4. Pursuant to the provisions of the charterparty and the fixture recap, referred to in Recital 2 above, the seat of the arbitration is London while, as per paragraph 1(a) of the SCP, the provisions of the 2017 Small Claims Procedure apply.
5. The dispute referred to me concerned a claim on the balance of account between the parties in the sum of US\$27,516.69 together with interest and costs. The Respondents denied that the Claimants were entitled to any amount and counterclaimed for service tax on freight.
6. The reference proceeded by the exchange of written submissions between the Claimants' and the Respondents' consultants in the UK.

The background

7. Pursuant to the charterparty, Vessel performed a voyage from Dumai (Indonesia) to Kandla (India) with a part cargo of palm oil. On submission of the final accounts, the Claimants claimed an outstanding balance of US\$27,516.69 arising from demurrage accrued at the loading and discharging ports which the Respondents denied arguing incorrect interpretation and application of the relevant lay-time provisions.

The relevant contractual provisions

8. The fixture recap

Part Cargo: Minimum 7,000MT One Grade Crude Palm Oil (no Stearin, no PFAD) with 2% More in CHOPT but Always WVNS

Load Port: 1 Safe Port/1 Safe Charterers Berth Dumai, Indonesia

Disch Port: 1 Safe Port/1 Safe Charterers Berth Kandla, India

Laytime: 100 MTPH Load/100 MTPH Disch SHINC REV

Demurrage: US\$12,500 PDPR

C/P: Veg Oil Voy Charter Party with KVG Rider Clauses Sub Review

Freight Tax/Withholding Tax/AWRP if any to be for Owners account

Governing Law/Arbitration: English Law/London Arbitration Small Claims Procedure.

Charterers will pay Demurrage within ten days of cargo discharge, after Owners submit NoR, SoF, laytime statement and Demurrage invoice.

9. The pro-forma charterparty

Clause 4: Notice of readiness and Commencement of Laytime

(a) When the Vessel has arrived at the port of loading or discharge and is ready to load or discharge, a notice of readiness shall be tendered to the Charterer or its agent by the Master or Agent by letter, telegraph, wireless or telephone. The Vessel shall be deemed ready within the meaning of this clause whether she arrives during or outside of usual business hours, whether she is in or out of berth or whether or not she has ballast water or slops in her tanks. Laytime shall commence either at the expiration of six (6) running hours after tender of notice of readiness, Vessel in or out of berth, except that any delay to the Vessel in reaching her berth caused by the fault of the Vessel or Owner shall not count as used laytime; or immediately upon the Vessel's arrival in berth ... with or without notice of readiness whichever occurs first.

(b) Notwithstanding anything contained in paragraph (a) of this clause laytime shall commence when the Vessel arrives at the loading or discharging port, whether or not berth is available; provided that notice of

readiness shall always be tendered as therein stipulated

Clause 6: If under Part I hereof the Charterer is given the right to name the loading and discharging berth, the Vessel shall load and discharge at any safe place or wharf or alongside vessels or lighters reachable on her arrival;

KVG Rider Clauses

Clause 2: Total time to be reversible, including the allowable six (6) hours after notice of readiness tendered for all ports. This applies even when vessel is on demurrage. Six (6) hours' notice of readiness at load and discharge port(s) to be given by Master to shippers/receivers as soon as the vessel has arrived and is in every respect ready to load or discharge the cargo(es). Laytime to commence at 7:00 AM or upon expiry of 6 hours' notice which occurs later.

Clause 3: Time shall not count as laytime or if on demurrage as demurrage time when used:

(a) For and on an inward passage moving from anchorage, including awaiting tugs, pilots, tide, daylight or any other reason whatsoever beyond charterers control.

*Clause 44: Charter Party Administration clause as follows to apply:
The agreed terms and conditions of this charter shall be recorded and evidenced by the production of a fixture recap sent to both charterer and owner within twenty-four (24) hours of fixture being concluded. This recap shall state the name and date of the standard pre-printed charter party form, on which the charter is based, along with all amendments/additions/deletions to such charter party form. This fixture recap shall be approved and acknowledged in writing as correct by both owner and charterer to ship broker. No formal written and signed charter party will be produced unless specifically requested by charter or owner.*

The claim for demurrage

10. At Dumai

Vessel arrived at the loading port at 07:30 hours on 25th May 2017, but

tendered Notice of Readiness at 04:40 hours on the same day, while she shifted to berth at 01:10 hours on the 30th. The loading operation commenced at 23:55 hours on the same day and completed at 23:20 hours on the 31st when hoses were disconnected. According to Claimants, the time used at this port was 6.3403 days while according to the Respondents it was 1.923 days.

11. At Kandla

Vessel arrived at Kandla at 10:30 hours on 11th June 2017 and, having tendered Notice of Readiness at 11:00 hours on the same day, she shifted to the discharge berth at 13:50 hours on the 12th. Discharge commenced at 16:40 hours on 12th June and completed at 13:50 hours on the 13th. Claimants counted against lay-time 1.7222 days while the Respondents 0.663 days. For some reason, the Respondents' calculations failed to take account of cargo operations at the second discharge installation where Vessel discharged 3,799.957mts.

12. The net effect of the above is that, according to Claimants, demurrage at the rate of US\$12,500 accrued for a total of 2.2292 days while, as per Respondents, there was a time saving of 3.246 days. Leaving aside the completion time of the discharge operation at Kandla, the parties were apart in terms of:

- (a) The commencement of lay-time at both load and discharge ports; and
- (b) Periods which, in the Respondents' view, were excluded from lay-time as the delay experienced was beyond their control.

The Claimants' case

13. It was the Claimants' case that, as per clause 4 of the charterparty, time started counting against lay-time (in both ports) six hours after Master tendered Notice of Readiness. Therefore, insofar as the loading port is concerned, lay-time commenced at 13:30 hours on 25th May and at the discharge port at 17:00 hours on 11th June. The Claimants argued that, to the extent that rider clause 2 was relevant, this had the effect of causing time not to commence before 07:00 hours on any day. According to them, on the true interpretation of clause 2, lay-time could only commence six hours after tendering NoR between 01:00 and 18:00 hours and at 07:00 hours on the

next day if the NoR was served after 18:00 hours up/until 01:00 hours. The Claimants further said that, if there was conflict between charterparty clause 4 and rider clause 2, this ought to be taken against them only if no effect could be given to both clauses. This was not the case on this occasion and, therefore, the six hours rule correctly applied whether under clause 2 or 4.

14. As regards clause 3(a), it was the Claimants' position that this did not cover delays whilst Vessel was at anchorage and that it provided exception for delay experienced only during the inward passage from anchorage to berth.

The Respondents' case

15. The Respondents argued that, as there was conflict between printed clause 4 and rider clause 2, the latter ought to prevail as a matter of construction of the charterparty. Accordingly, lay-time could only commence at 07:00 hours on 26th May at the loading port and at 07:00 hours on 12th June at the discharge port. The Respondents also said that, even if lay-time commenced as alleged by Claimants, the period up to the commencement of shifting to the loading and discharging berths respectively ought to be excluded as the delay in berthing was due to the port authority's failure to allocate a berth in time. According to them, rider clause 3(a) had the effect of interrupting lay-time from counting if the reason for the delay was beyond the Respondents' control. The Respondents also excluded from lay-time some additional periods by relying on rider clause 3(a).
16. Finally, the Respondents made a claim for, what appears to be, service tax on freight without, however, producing accounts or clarifying whether they incurred a liability in that respect.

Discussion

17. Starting with the commencement of lay-time, there is conflict between charterparty clause 4 and rider clause 2 in that, whereas the former envisages lay-time commencing either six hours after NoR is tendered or immediately upon the vessel's arrival at berth whichever occurs first, the latter provides for time to commence at 07:00 hours AM or upon expiry of six hours whichever occurs later. Accordingly, there is inconsistency and,

as a matter of construction, rider clause 2 ought to prevail. It is worth noting that, according to the fixture recap, the KVG rider clauses were “sub review” and, as the parties were in (apparent) agreement, full effect should be given to negotiated clause 2.

18. As regards the wording of the clause, this is at best ambiguous insofar as lay-time commencing at 07:00 hours AM “on the next day” is concerned. For the Respondents’ interpretation to be preferred, clause 2 ought to cater for such an eventuality by making the intention clear; especially as the Respondents introduced the clause. On my reading of clause 2, the parties agreed that lay-time is to commence either at 07:00 hours AM or six hours after NoR is tendered on the same day, whichever is later, so that (practically) the shippers/receivers and the agents have at least six hours to put finishing touches to berthing and all relevant cargo works.
19. The Respondents’ allegation that the cause of delay between the Vessel’s arrival in port and at berth was due to “berth allocation by the port authorities” or “waiting for pilot” lacks at least factual merit. Both statements of fact are silent while it is more likely that congestion and customary port procedures prevented the Vessel from proceeding directly to berth.
20. As for clause 3(a), I agree with the Claimants that this cuts in only when Vessel is on an inward passage to the load and discharge berths. Accordingly, only time spent during this passage does not count against lay-time. For the record, even if clause 3(a) had general application, it could not be considered in isolation as it interrelates with other provisions of the charterparty and, in particular, clause 6 by which the Respondents undertook to procure berths that were *reachable on arrival* upon naming the load and discharge ports. As noted in the submissions, the inter-relationship of a reachable on arrival provision with an exceptions clause was considered in *The “Laura Prima” [1981] 1 Lloyd’s Rep.1* where, on appeal by owners, the House of Lords upheld Mocatta J.’s finding that, in circumstances where there is an exceptions clause, this applies and prevents lay-time from running “if the charterers designate and procure a safe place reachable upon the vessel’s arrival”. As the reason for the Vessel’s failure to reach her loading and discharging berths on arrival was congestion, and

there is no provision placing the risk of congestion with the owners, clause 3(a) cannot operate to protect the Respondents in any event.

21. Finally, as the Respondents failed to prove a loss in respect of service tax on freight, I cannot but reject their counterclaim. The submission that, in the absence of loss or damage, the Respondents are nevertheless entitled to the tax because the charterparty makes the Claimants accountable cannot stand in law.

My findings

22. In view of the above, I find that lay-time commenced six hours after Notice of Readiness was tendered by Master at both loading and discharging ports and that clause 3(a) applies only insofar as the inward passage to the load and discharge berths is concerned. Accordingly, the Claimants have correctly drafted their demurrage statement and I therefore award to them the sum of US\$27,516.69.

Interest

23. I find and hold that Claimants are entitled to compound interest on the amount awarded at a rate and in a manner that is usual in London maritime arbitration to run from 26th June 2017 (namely ten days from the date of submission of the Claimants' debit note) until payment by the Respondents.

Costs

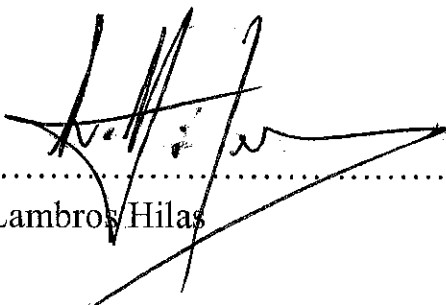
24. As the Claimants were successful with their claim, I find and hold that they are entitled to the fees and the costs of this arbitration that follow the event in the normal manner in accordance with English law. Mindful of the nature of the reference, the extent of the exchanges and submissions, the amount involved and the current limitation on costs under the SCP, in the exercise of my discretion, I awarded the Claimants the sum of £4,000.

NOW I, the said Lambros Hilas, having taken upon myself the burden of this reference, having considered the written evidence and submissions put before me

and having given due weight thereto, DO HEREBY MAKE, ISSUE AND PUBLISH this my FINAL ARBITRATION AWARD as follows:

- A) **I FIND AND HOLD** that the Claimants' claim in the amount of US\$27,516.69 succeeds in full.
- B) **I THEREFORE AWARD AND ADJUDGE** that the Respondents shall pay forthwith to the Claimants the sum of US\$27,516.69 (twenty seven thousand five hundred and sixteen United States Dollars and sixty nine cents) together with interest at the rate of 4.5% (four and one-half per cent) per annum compounded at three-monthly rests from 26th June 2017 until the date of payment.
- C) **I FURTHER FIND AND HOLD** that the Respondents' Counterclaim fails and is dismissed.
- D) **I FURTHER AWARD AND ADJUDGE** that, pursuant to paragraph 8 of the 2017 SCP, the Respondents shall bear their own and the Claimants' recoverable costs in the reference which I hereby tax at £4,000 (four thousand Pounds Sterling) together with interest at the rate of 3.50% (three and one-half per cent) per annum compounded at three-monthly rests with effect from the date of this Award until the payment of such costs to the Claimants by the Respondents **AND FURTHER** that if, in the first instance, the Claimants shall have borne any part of the costs of my Final Award, which I have assessed at £3,250 (including the administration fee of £250 payable to the LMAA), they shall be entitled to an immediate refund from the Respondents of the sum so paid together with interest thereon at the rate of 3.50% (three and one-half per cent) per annum compounded at three-monthly rests from the date of payment by the Claimants until the date of such refund.

GIVEN UNDER MY HAND in London this 3rd day of April 2018


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Lambros Hilas

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