

Effect of Amended BIMCO Piracy Clause. Whether consent of Owner needed to transit piracy areas. Whether Owner in repudiatory breach by insisting that consent needed to be sought and provided for each transit.

The case concerned the issue of whether Disponent Owners were in anticipatory breach of a three year charter so as to entitle the Charterers to treat themselves as discharged from further performance.

The facts were as follows:-

The charterparty was concluded at a time when the piracy situation in the Gulf of Aden was causing a number of shipowners to refuse to transit that area. The Charterers made clear to the Disponent Owners that they were only prepared to charter a vessel from Disponent Owners if there was no requirement for them to seek Disponent Owners' consent to transit the Gulf of Aden. This the Disponent Owners advised was not a problem for them and the parties then proceeded to negotiate the charter terms. The concluded charter contained an amended BIMCO Piracy Clause and an unamended Conwartime 2004 Clause. The Conwartime 2004 Clause being incorporated in an annex after the negotiated rider clauses, with some standard printed provisions, namely a New Jason Clause, P&I Bunkering Clause and Both to Blame Collision Clause. The BIMCO Piracy Clause had been specifically negotiated between the parties and amended so that paragraphs (a) and (b) were deleted. These deletions, Charterers understood gave effect to the agreement that Disponent Owners' consent did not need to be sought to send the vessel through the Gulf of Aden.

Prior to delivery of the vessel to Charterers, the Disponent Owners advised Charterers (in response to an enquiry from Charterers as what would be the AWRP costs that would be charged for sending the vessel through the Gulf of Aden) that the Head Owners refused to allow the vessel to transit the Gulf of Aden on her maiden voyage. Subsequently (and after numerous exchanges between the various parties) Disponent Owners advised Charterers that they had persuaded Head Owners to grant permission for such a transit, but it was stated that this was for this one voyage only and was not to form a precedent for the future as the Head Owners usual position would be "no". The Disponent Owners made clear that their position on Gulf of Aden transit would always be dictated by that of the Head Owners. When Charterers protested that this was not what had been agreed, the Disponent Owners contended that Charterers were wrong to assert that Disponent Owners consent did not have to be obtained for Gulf of Aden transit and relied in this regard on the unamended CONWARTIME 2004 clause in the charter, which still contained provisions referring to "owners' consent".

With Disponent Owners refusing to back down, Charterers recognised that they would be unable to market the vessel as "GOA OK" and would be at a competitive disadvantage to other vessels which were marketed as "GOA OK". Charterers accordingly treated Disponent Owners insistence that their prior consent would have to be sought on each occasion that Charterers wished to transit the Gulf of Aden as being a renunciatory or repudiatory breach of charter and terminated the charter.

In London arbitration proceedings, a three man tribunal of commercial arbitrators concluded that there was a common market understanding that the effect of deleting paragraphs a.) and b) from the BIMCO Piracy Clause was that the vessel could transit piracy areas without needing to seek the owners' consent. The tribunal further concluded that notwithstanding the reference to "owners' consent" in the CONWARTIME 2004 Clause, on a true construction of the charterparty, the Charterers were not required to obtain Disponent Owners' permission to transit the Gulf of Aden.

Having found in Charterers' favour on this construction issue, the tribunal then turned their attention to what they stated was the more difficult issue; whether Charterers were entitled to terminate the charter for Disponent Owners renunciatory or repudiatory breach. On this issue, the tribunal were split. The majority concluded that a reasonable person viewing all the messages from Disponent Owners would not have concluded that the Disponent Owners had evinced an intention not to comply if at some point in the future Charterers gave orders to transit the GOA. The majority further concluded that such a refusal would not in any event have substantially deprived Charterers of the whole benefit of the contract and that damages would have been an adequate remedy.

The dissenting arbitrator however saw matters very differently on both these legal points. The dissenting arbitrator concluded that Disponent Owners had made it clear that they would not comply and comply promptly with an order from Charterers to transit the GOA as their position would be dependent upon the decision of Head Owners, which Disponent Owners had indicated was likely to be "no". The dissenting arbitrator further concluded that this refusal by Disponent Owners to comply was an essential one which entitled Charterers to treat the charter as terminated. The dissenting arbitrator considered that this refusal by Disponent Owners would have been a serious impediment on Charterers ability to trade the vessel and the notion that it would be sufficient to allow Charterers the right to sue for damages for any specific fixture they had lost was unrealistic. Accordingly, the dissenting arbitrator found in Charterers' favour on both legal points.

Charterers sought leave to appeal the majority decision of the tribunal pursuant to section 69 of the Arbitration Act. Mr Justice Males granted permission to appeal stating that the decision of the majority was open to serious doubt. .

The appeal was duly heard before Mr Justice Popplewell, who decided that the majority's findings of fact could not be overturned and that Charterers' submissions that the tribunal had erred in law were not correct. He ruled that the tribunal's finding was one of fact rather than law. In relation to the first issue of whether the Disponent Owners had evinced an intention not to perform, Mr Justice Popplewell stated:

"the majority addressed the correct question and reached a conclusion of fact which was open to them and which is not susceptible of review on appeal. The minority arbitrator concluded that the Owners made clear that they not be able to comply with orders to transit GOA promptly. That was an alternative conclusion which may have been available on the facts, but it was not the view of the majority."

Whilst that alone was sufficient to dispose of the appeal, Mr Justice Popplewell also went on to consider the secondary issue of whether if there was a breach by the Disponent Owners it was an essential one which went to the root of the contract so as to deprive the Charterer of substantially the whole benefit of the charter. Here too, Mr Justice Popplewell concluded that the majority arbitrators had not erred in law and their findings of fact were not open to challenge under section 69.

The result for the unfortunate Charterers was that despite having concluded a charter on the express understanding and agreement of the Disponent Owners that their consent would not be required to transit the Gulf of Aden, they were stuck with a vessel which they could not market as "GOA OK" and their termination of the charter was held to be wrongful. For many charterers, such a decision of the majority arbitrators would be considered surprising and completely uncommercial. Although the majority's decision was considered by Mr Justice Males as open to serious doubt, the Charterers were stuck with the majority's findings of fact.

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