SQUIRE PATTON BOGGS

"Don't Shoot Yourself in the Foot" – London Arbitration 12/15 (2015) 930 LMLN – 24 July 2015

By a voyage charter under Gencon 94 form, charterers chartered a vessel from Nikolaev, Ukraine, to Le Legue, France (the "Charterparty").

Pursuant to the terms of the Charterparty, the laycan was agreed as 16/17 October. In potential breach of their duty to prosecute the voyage with reasonable dispatch, and without consulting the charterers, owners decided, before presenting under the fixture, to complete short intermediate voyage from Novorossiysk, Russia, to a port in Romania. In doing so owners sought an extension of laycan to 18/21 October. The charterers agreed.

The vessel arrived at the load port on 21 October and presented a Notice of Readiness within the amended laycan of 18/21. The vessel sailed on completion of loading on 24 October, arrived at the discharge port on 9 November and tendered its NOR on 10 November.

Due to congestion at the berth, berthing was delayed until 22 November; the inevitable result being the delay of discharging operations, for which owners claimed demurrage.

It was established that had the berth not been occupied on the vessel's arrival and there been no vessel ahead of her, she would have proceeded direct to berth, discharged and departed without delay.

In defence to owners' demurrage claim, charterers alleged that, if the Charterparty had been performed in accordance with the originally agreed laycan of 16/17 October, discharging operations would not have been delayed and demurrage would not have occurred. Charterers therefore argued that the amount claimed as demurrage equalled the damage suffered by charterers as a result of the owners' failure to prosecute that voyage with convenient speed or reasonable dispatch.

Charterers relied on the legal principal that, bar express wording, the risk of delay on an intermediate voyage resulting in the vessel missing the expected arrival date, is for the owners account. This principal was confirmed in *Monroe Bros v Ryan* [1935] 2 K.B 28, in which the Court of Appeal held that "it was the obligation of the owners to proceed to [the load port] at a time when it was reasonably certain that [the vessel] could arrive by [the designated time of arrival]". If owners failed to do so, they were liable to a claim in damages.

Accordingly, if an intermediate charter will make it impossible for the chartered vessel to arrive by the agreed arrival date, as was the case in *Nelson v Dundee* 1907 S.C. 927, then the owner will, inevitably, be in breach of his duty to prosecute the voyage with reasonable dispatch.

This is even, as made clear in the case of *Evera S.A. Comercial v North Shipping* [1956] 2 Lloyd's Rep 367, if the intermediate voyage was agreed prior to, and even referred to, in the charter. Unless express wording making the duty to proceed to the load port subject to the completion of a prior engagement, the risk remains for the owners account.

However, in this instance, the charterers had agreed to vary the laycan to 18/21 October. By agreeing to amend the Charterparty, the commencement of the owners' obligation to prosecute the upcoming voyage with due dispatch, was moved from 16/17 to 18/21 October. As the owners tendered the Notice of Readiness within the agreed amended laycan date range, namely 21 October, owners were not in breach of their duties, and, as stated in the LMAA Winter 2016-2017 newsletter, **no breach means no damages**.

Instead of agreeing the amendment, the charterers should rather have (a) refused to amend the laycan; (b) not exercised their right to cancel the charter for late arrival of the vessel; and (c) reserved the right to claim damages for owners' failure to meet their obligations in respect of the contracted voyage. By giving a time extension, the tribunal had found that charterers had, essentially, shot themselves in the foot.

Alternatively, if charterers do agree to amend the laycan they need to ensure additional wording is inserted whereby owners take responsible for any loss of time resulting from the amended laycan.

Charterers should gauge the true consequences of delayed delivery of the vessel in advance. If delay is likely to arise only at the load port, one commonly used method of protecting charterers' position is to agree to amend the laycan, provided, however, that owners agree that time only starts to count from when the vessel berths at the loadport.

If delay is more likely to arise due to berthing delays at the discharge port, charterers should place the condition that time only starts to count from when the vessel berths both the load and discharge ports. Tactically speaking, it may be best to seek to reserve ones position and only once the vessel arrives at the load port seek the amendments suggested above.

A significant lesson from this case is that sometimes matters which may be legally obvious are not always commercially expected. It is worth considering both the legal and commercial implications before agreeing to any contractual amendments.

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