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Case No. CL-2018-000049

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Rolls Building
Fetter Lane, London

Date: 12 December 2018

Before :

MR JUSTICE MALES

- -

Between :

SONACT GROUP LIMITED	**Claimant**
- and -	
PREMUDA SPA	**Defendant**

"FOUR ISLAND"

- -

- -

Mr Jeremy Brier for the **Claimant**

Ms Ruth Hosking for the **Defendant**

Hearing date: 12 December 2018

- -

JUDGMENT

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MR JUSTICE MALES:

Introduction

1. This is a challenge pursuant to section 67 of the Arbitration Act 1996 to an arbitration award dated 8 December 2017. The arbitrators held that they had jurisdiction to determine the claim and ordered the claimant (the respondent in the arbitration) to pay the defendant (the claimant in the arbitration) US $600,000 together with interest and costs. The claimant says that they had no jurisdiction to do so.

Background

2. By a voyage charterparty contained in a fixture recap email dated 27 June 2014 the defendant owner chartered its motor tanker "Four Island" to the claimant charterer for a voyage with a cargo of fuel oil from Kavkaz to Novhodka, both Russian Far Eastern ports. The charterparty was on an amended Asbatankvoy form. It included an arbitration clause as follows:

> "Arbitration.
> Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part I of this charter pursuant to the laws relating to arbitration there in force, before a board of three persons, consisting of one arbitrator to be appointed by the Owner, one by the Charterer, and one by the two so chosen. The decision of any two of the three on any point or points shall be final. Either party hereto may call for such arbitration by service upon any officer of the other, wherever he may be found, of a written notice specifying the name and address of the arbitrator chosen by the first moving party and a brief description of the disputes or differences which such party desires to put to arbitration. If the other party shall not, by notice served upon an officer of the first moving party within twenty days of the service of such first notice, appoint its arbitrator to arbitrate the dispute or differences specified, then the first moving party shall have the right without further notice to appoint a second arbitrator, who shall be a disinterested person with precisely the same force and effect as if said second arbitrator has been appointed by the other party. In the event that the two arbitrators fail to appoint a third arbitrator within twenty days of the appointment of the second arbitrator, either arbitrator may apply to a Judge of any court of maritime jurisdiction in the city abovementioned for the appointment of a third

> arbitrator, and the appointment of such arbitrator by such Judge on such application shall have precisely the same force and effect as if such arbitrator had been appointed by the two arbitrators. Until such time as the arbitrators finally close the hearings either party shall have the right by written notice served on the arbitrators and on an officer of the other party to specify further disputes or differences under this Charter for hearing and determination. Awards made in pursuance to this clause may include costs, including a reasonable allowance for attorney's fees, and judgement may be entered upon any award made hereunder in any Court having jurisdiction in the premises.

3. The place chosen was London.

4. In due course the owner had a claim for demurrage of US $718,948.08 and heating costs of US $190,200, which was the subject of correspondence between the parties.

5. Eventually the claim was settled by an exchange of emails, in which the charterer agreed to pay US $600,000 on or before 15 April 2015, later extended to 24 April 2015. This sum covered all the owner's outstanding claims under the charterparty. The charterer's representatives said that they would ask the owner to issue an invoice for this amount, which no doubt the owner did, although the invoice is not in evidence. However, the charterer did not pay.

The arbitration

6. On 23 December 2015 the owner's solicitors gave notice of arbitration as follows:

> "We act had for the Owners in respect of their dispute against charterers under the above referenced charter party. Owners have a number of claims against charterers, including a demurrage claim, a claim for heating costs, a claim for a penalty, a claim for interest and costs, plus various other matters. As you are aware the charterparty is on an amended Asbatankvoy form. The charterparty provides for English law and London arbitration. The arbitration is to be before a board of three persons consisting of one arbitrator to be appointed by owners, one by charterers and one by the two so chosen. In accordance with the terms of the charter party agreed between our respective clients we have appointed Mr Mark Hamsher as owners' arbitrator in respect of any and all disputes under the charter party. …"

7. The charterer did not appoint an arbitrator and in due course the owner appointed Mr John Schofield as the second arbitrator in accordance with the terms of the charterparty arbitration clause. The tribunal was completed by the appointment of Mr Christopher Moss as third arbitrator.

8. The claim advanced by the owner in the arbitration was for the agreed sum of US $600,000 US dollars. However, the charterer contended that the arbitrators did not have jurisdiction to determine this claim. They did so on two grounds, namely that (1) the settlement agreement did not provide for London arbitration and therefore the arbitrators'

appointment did not extend to dealing with a claim for the agreed settlement sum, and (2) the charterparty had been novated so that the new charterer, against whom any claim should be brought, was a different entity, Trade Oil LLC.

The arbitrators' decision

9. The arbitrators held that they did have jurisdiction. Their reasoning on the first ground was as follows:

> "24. We had to consider first the argument that we had no jurisdiction to determine the claim under the settlement agreement because the settlement agreement did not contain an arbitration clause and we therefore had no jurisdiction to determine claims under the settlement agreement.
>
> 25. It is noteworthy that the settlement agreement was not contained in a separate self-contained document. As is usually the case, the parties exchanged views and stated their rival positions as to the demurrage and heating costs payable in exchanges sent through the broking channel. As generally happens, one party eventually put forward what it declared to be its final position and the other party accepted it."
>
> 26. Although in this case the owners had instructed Genoa lawyers, presumably in an attempt to add weight to their position, it did not alter the nature of the process under which both parties exchanged positions and one party eventually accepted the position of the other party.
>
> 27. We had little hesitation in concluding that, given the nature of the negotiations and the manner in which they had been carried out, the objective but unexpressed intention of the parties was that the second agreement should be governed by the same provisions for dispute resolution as the original charterparty under which the claims arose. Indeed the negotiation and agreement of demurrage claims under voyage charterparties and final hire statements under time charters is so much part and parcel of operating and chartering ships that people working in the industry would be astonished to be told that the dispute resolution provision in the governing charterparty did not apply. Should that be the correct analysis, unless the parties expressly agree the fresh dispute resolution provision none would be applicable and they would have to take their chances in attempting to establish jurisdiction of the courts in a country that might or might not be appropriate. This would be such an extraordinary result that we would classify that the evidential burden of establishing that the charter party dispute resolution provisions did not apply to the routine agreement of a demurrage claim rested on the party seeking to argue the contrary. Of course it is perfectly open to parties to agree that any agreement should be governed by dispute resolution provisions that are different to those in the governing charterparty, but particularly where there is no separate self-contained settlement agreement and merely an exchange of emails such an agreement would have to be expressly recorded and could not just be inferred, unless the parties had expressly raised the issue in their exchanges."

10. I need say nothing about the arbitrators' reasoning on the second ground, the novation point, save to say that they rejected the charterer's argument.

11. Accordingly the arbitrators held that they had jurisdiction to determine the claim. Further, as the charterer had not advanced any arguments on the merits, and plainly had no defence, the arbitrators awarded the sum claimed.

The grounds of challenge

12. The charterer now challenges the award pursuant to section 67 on the ground that the arbitrators did not have substantive jurisdiction to determine the claim. Mr Jeremey Brier for the charterer confirms that the novation point is no longer pursued and accepts that the charterer, Sonact Group Limited, is to be treated as the charterer at the time of the disputes. His argument is as follows.

1. The owner's claim was a claim under the settlement agreement, not the charterparty, but the settlement agreement did not contain an arbitration clause. Nor are there any words of incorporation to incorporate the charterparty arbitration clause into the settlement agreement.
2. The arbitrators were in fact appointed to hear disputes under the charterparty, not the settlement agreement.

The court's approach under section 67

13. It is well established and is common ground that a section 67 challenge involves a rehearing and not merely a review of the issue of jurisdiction, so that the court must decide that issue for itself. It is not confined to a review of the arbitrators' reasoning, but effectively starts again. That approach has been confirmed by the Supreme Court in *Dallah Real Estate & Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2010] UK SC 46, [2011] 1 AC 763, which also makes clear that the decision and reasoning of the arbitrators is not entitled to any particular status or weight, although (depending on its cogency) that reasoning will inform and be of interest to the court. See in particular Lord Mance at [36] and Lord Collins at [96].

Did the charterparty arbitration clause apply to the settlement of accounts?

14. I have in these circumstances considered the issue for myself, but I have to say that (with a possible minor quibble at the reference to an "evidential burden") I find the arbitrators' reasoning entirely convincing. It would moreover be unrealistic not to recognise that on this subject matter the views of these arbitrators, given the combined years of

experience of the shipping industry which they can bring to bear, carry considerable weight. Be that as it may, however, I agree with them.

15. The parties' agreement in their email exchange was that the sum of US $600,000 should be paid. That was the sum to be paid in respect of the owner's claim for demurrage and heating costs. Although the exchange of emails can be described as a "settlement agreement", that is a somewhat grandiose expression for what was, in reality, no more than an informal and routine arrangement to finalise the sums due under the charterparty, notwithstanding that Italian lawyers became involved. I agree with the arbitrators that it is obvious that the parties intended that the arbitration clause in the charterparty would continue to apply in the event that the agreed sum was not paid. The wide wording of that clause is sufficient to encompass such a claim, albeit that the agreement to pay US $600,000 represents a new cause of action under a new and binding agreement.

16. It is inconceivable that the parties intended that, if the agreed sum was not paid, the owner would be unable to pursue its claim in arbitration, the parties' chosen neutral forum, and to obtain an award which would be readily enforceful under the New York Convention, but instead would have to commence court proceedings, either in the charterers' home jurisdiction or by seeking permission to serve English proceedings out of the jurisdiction.

17. There is no choice of law clause in the "settlement agreement" either, but it is obvious that the parties intended that the choice of English law contained in the charterparty would continue to apply. Mr Brier submits that the express choice of law contained in the charterparty would not apply to the settlement agreement, although that agreement would probably be governed by English law. That, however, would be as a result of a different analysis under the Rome Convention. To my mind, however, it would be very odd if there were any possibility at all that the settlement agreement, which says nothing about choice of law, could be governed by any law other than that which applies to the charterparty. The need for reference to the Rome Convention only underlines the unreality of the charterer's position. I see no reason why the same is not true of the arbitration clause.

18. It is, in these circumstances, hardly necessary to say anything about the "rational businessman" described by Lord Hoffmann in the *Fiona Trust* case (*Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2008] 1 Lloyd's Rep 254), a character who has since featured in a number of cases who if necessary stands ready once again to come to the aid of common sense.

19. Nor is it necessary to say much about some of the cases cited to me, such as *Stellar Shipping Co LLC v Hudson Shipping Lines* [2010] EWHC 2985 (Comm) and *Uttam Galva Steels Ltd v Gunvor Singapore Pte Ltd* [2018] EWHC 1098 (Comm) [2018] 2 Lloyd's Rep. I accept Mr Brier's submission that those cases dealt with a different situation and can be distinguished, although no doubt the broad principles for which they stand apply here also.

20. Mr Brier submitted that the critical point in the present case is that the settlement agreement gave rise to a new legal relationship between the parties, replacing the relationship under the charterparty. However, there is, in my judgment, no bright line rule that once the parties enter into a new legal relationship, here a settlement agreement, an arbitration clause in the underlying contract necessarily can no longer apply.

The notice of arbitration

21. Thus it was open to the owner to pursue its claim for the agreed sum of US $600,000 in arbitration. Did it in fact do so?

22. It is true that the notice of arbitration did not refer in terms to this agreed sum and spoke instead of a claim for demurrage and heating costs as well as other possible claims. I accept also that strictly speaking once a claim is compromised there is a new cause of action for the agreed sum and that the old cause of action no longer exists: see e.g. *McCallum v Country Residences Ltd* [1965] 1 WLR 657 at 660 and *Foskett on Compromise*, 8th Edition paragraph 6-01. Nevertheless the claim for the agreed sum of US $600,000, which was the sum agreed to be due in respect of demurrage and heating costs, could properly be regarded by commercial parties as a claim for demurrage and heating costs. It is not stretching language to do so, bearing in mind the context in which the claim was made. Indeed I note that when the charterer was requesting further time in which to pay the agreed sum of US $600,000 US dollars, it described this as a demurrage payment:

> "Igor, need your assistance, look, we will not make it with the dem payment till tomorrow. Can you, please, ask the owners to exceptionally grant us an extension until 24 April. Thanks, Xander."

23. I would hold, therefore, that the notice of arbitration was effective to refer the claim for the agreed sum to arbitration. This conclusion reflects the "broad and flexible approach" to notices of arbitration commended in *The Lapad* [2004] EWHC 1273 (Comm), [2004] 2 Lloyd's Rep 109, notwithstanding that there are, as I accept, limits to that approach (see *Finmoon Ltd v Baltic Reefers Management Ltd* [2012] EWHC 920 (Comm), [2012] 2 Lloyd's Rep 308 at [69]).

24. There is a further point. The Asbatankvoy charter party arbitration clause allows the parties to "specify further disputes or differences under this charter for hearing and determination" after the arbitration has been commenced, albeit that such further disputes or differences do have to be "under this charter".

25. It follows that if the notice of arbitration is properly to be construed as being for demurrage and heating costs only and not sufficient to encompass a claim for the agreed sum of US $600,000 it was open to the owner to specify further disputes by making a claim for that agreed sum. On that hypothesis that is what they did.

26. It remains of course to consider whether the claim so specified was a claim "under this charter" but the *Fiona Trust* case tells us that it was. The tidying up of accounts and the resolution of outstanding claims from a charterparty voyage is clearly a matter which arises under the charterparty.

27. For these reasons, I reject the charterer's challenge to the award.

Arbitration under LMAA Rules

28. This renders is unnecessary to consider an argument advanced by Ms Ruth Hosking, for the owner, which, if correct, would be a separate answer to the charterer's application. This was that regardless of the scope of the charterparty arbitration clause and the terms of the notice of arbitration, the arbitration was conducted in accordance with the LMAA terms 2012, clause 10 of which provides:

> "Jurisdiction
> 10. Notwithstanding the terms of any appointment of an arbitrator, unless the parties otherwise agree the jurisdiction of the tribunal shall extend to determining all disputes arising under or in connection with the transaction, the subject of the reference and each party shall have the right before the tribunal makes its award (or its last award if more than one is made in a reference) to refer to the tribunal for determination any further disputes arising after the commencement of the arbitral proceedings. When and how such a dispute is dealt with in the reference shall be in the discretion of the tribunal."

29. Ms Hosking submits that on any view a failure to pay an agreed sum in settlement of the charterparty claims is a dispute arising in connection with the transaction which is the subject of the reference and that the arbitrators' jurisdiction is expressly not confined by the terms of the notice of arbitration. This appears to be a new point, not taken before the arbitrators. It may be none the worse for that but it is striking that it does not appear to have occurred to any of the highly experienced LMAA arbitrators in this case.

30. The charterparty arbitration clause contains no reference to the LMAA terms. While it may be (there is no evidence but it seems likely) that in each case the arbitrators, who are all full members of the LMAA, accepted their appointment on the LMAA terms, and while it is possible for parties whose arbitration clause does not refer to the LMAA terms to agree that those terms will nevertheless apply to the arbitration, the question would arise whether the parties did so agree in this case. Ms Hosking refers to clause 5 of the terms under the heading "Application", which read as follows:

> "(5) These terms shall apply to an arbitration agreement whenever the parties have agreed that they shall apply and the parties shall in particular be taken to have so agreed (a) whenever the dispute is referred to a sole arbitrator who is a full member of the association and whenever both the original arbitrators appointed by the parties are full members of the association, unless both parties have agreed or shall agree otherwise, (b) whenever a sole arbitrator or both the original arbitrators have been appointed on the basis that these terms apply to their appointment and whenever a sole arbitrator or both the original arbitrators have been appointed on the basis referred to at b such appointments or the conduct of the parties in taking part in the arbitration thereafter shall constitute an agreement between the parties that the arbitration agreement governing their dispute has been made or varied so as to incorporate these terms and shall further constitute authority to their respective arbitrators, so to confirm in writing on their behalf."

31. It appears that the parties' written submissions in the arbitration were headed by reference to the LMAA rules.

32. There is, on the other side, however, the fact that the charterers did not themselves appoint an arbitrator and always objected to the arbitrators' jurisdiction. In those circumstances it is unnecessary and I prefer not to decide whether the conduct of the parties in the arbitration was such as to confer on the arbitrators the jurisdiction set out in clause 10 of the terms.

Disposal

33. As it is, the application is dismissed. I am grateful to both counsel for their clear and succinct submissions.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.