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To: Transport Industry Operators

Bunker dispute

The Hong Kong High Court issued a Judgment on 11 January 2019 dealing with a dispute of US$335,858.31 between a bunker supplier and a ship agent. [HCA119/2015] [2019HKCFI57]

In this action the bunker supplier sued for the price of bunkers sold in Singapore by the bunker supplier to the ship agent by way of a contract dated 29 January 2014. The dispute arose because the ship agent alleged that the bunkers were contaminated with microbiological organisms and therefore were not of merchantable quality or reasonably fit for their purpose. The bunker supplier denied that, and said that the evidence relied upon did not prove that the bunkers were not of merchantable quality. In addition, the bunker supplier relied upon the terms of the Contract which prevented the claim from being brought.

Background
The bunkers were delivered to the vessel, the Arkstar Voyager, under delivery note number A00113 dated 1 February 2014 and an invoice, number PCI 2014168 dated 17 February 2014 in the sum of US$335,858.31 was issued. They were delivered by a company known as Palmstone, from whom the bunker supplier had purchased the Bunkers prior to selling them on to the ship agent. The ship agent was the managing agent for the owner of the vessel.

At the time of delivery, as was required by the Contract, four samples were taken by continuous drip feed at the vessel's manifold. They were sealed and numbered, and two were kept by Palmstone and two were kept by the vessel. One of those samples was tested by Maritec, a well known and respected testing house, on the same day, and it did not report any defects in quality. Insofar as the contamination was concerned, the relevant test was the "Appearance" test, and Maritec reported that as "Clear and Bright", which would indicate a pass.

In this context, paragraph 5.6 of the expert report of Mr Christopher Fisher recorded that ISO 8217:2005, which is the relevant international standard for testing of distillate fuel samples, states that if the distillate fuel sample submitted to testing does not appear to be "bright and clear" only then must the sample be tested for water content. He went on to say that a distillate fuel might fail the visual test due to the presence of water or some other contaminant. A distillate fuel contaminated by micro-biological infection is very unlikely to be seen as "bright and clear" and hence it would not pass that test. Consequently, the appearance test is recognised internationally as being an adequate test of contamination and further testing is required only if it fails the appearance test. The Judge accepted that evidence.

The alleged contamination was said to have manifested on 10 May 2014, after the vessel had sailed from Singapore to Bahrain, undergone some upgrading work at Bahrain and then moved to her next destination at Ras Tanura. The manifestation on 10 May 2014 was when two of the vessel's generators broke down. The breakdown was traced to contaminated fuel and it was alleged that the contamination was in the bunkers which were sold by the bunker supplier in February 2014.

The vessel was repaired between May 2014 and June 2014 in Damman Port, giving rise to a loss said by the ship agent to be US$652,874, Singapore Dollar 49,224, and Saudi Riyal 21,000.

On 31 May 2014 the ship agent engaged Maritec to conduct a fuel quality analysis on the fuel remaining on board. Maritec reported on 31 May 2014 on 2 samples which had been taken from the fuel tanks (tank number 6 port and tank number 6 starboard) on 23 May 2014. In relation to both samples Maritec reported the appearance as "Clear & Bright", thereby indicating that the samples did not contain contamination.

The ship agent was concerned that Maritec had not conducted a bacterial test, searching for micro-bacterial contamination, and was also concerned that Maritec had been the original testing house engaged at the time of delivery of the bunkers. As a result the ship agent engaged with another testing house, DNV, to conduct further tests on further samples.

The DNV reports showed that:
(1) on a sample taken from tank number 6 starboard on 17 May 2014 the visual appearance was "Bright & Clear", thereby indicating a pass;
(2) on a sample taken from the forward tank number 1 port/starboard on 17 May 2014 the visual appearance was "hazy", thereby indicating a fail, as a result of which DNV conducted micro-bacterial testing on that sample and concluded that it was contaminated.

To summarise the test results:
(1) the only test done on the sample taken at the time of delivery indicated that there was no microbiological contamination;
(2) two tests done on samples taken from both port and starboard tank number 6 in May 2014 indicated that there was no microbiological contamination;
(3) one test done on a sample taken from tank number 1 in May 2014, some three months after the bunkers were delivered, indicated that there was microbiological contamination.

The Contract

The terms of the contract under which the bunkers were sold were contained in the General Terms and Conditions current as of the date referred to on the Sales Confirmation dated 29 January 2014. They contained the following relevant terms:

> "6. Sampling
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> (a) The Seller shall arrange for Four (4) representative samples of each grade of Marine Fuel, to be drawn throughout the transfer of such grade of Marine Fuel. The sampling shall wherever possible be performed in the presence of both the Seller and the Buyer or their respective representatives provided that the absence of the Buyer or its representative shall not prejudice the validity of the samples taken.
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> …
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> (d) The Four (4) samples of Marine Fuel drawn shall be sealed and labelled indicating the Vessel's name, delivery facility, product name and date of sampling and signed by the Seller's representative and the Master of the Vessel or its authorised representative. The samples with seal number marked on BDN are considered as the only valid trading samples.
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> (e) Two of the samples shall be retained by the Seller's after delivery of the Marine Fuel to the Vessel for approximately sixty (60) days, or upon request in writing by the Buyer for as long as the Buyer may reasonably require, or such period of time at the Seller's election and the other 2 sample shall be retained by the Vessel. [*sic*]
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> …
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> (g) the samples stated above shall be conclusively deemed to be representative of the quality of the Products supplied to the Vessel. Any samples drawn from the Vessel's tanks shall not be valid as an indicator of the quality supplied.

9. Payment

(a) Unless otherwise stated in the Confirmation Note, the Buyer shall pay the Seller for the Marine Fuel delivered at the price and in accordance with the instructions set forth in the Confirmation Note within 30 days after completion of delivery of the Marine Fuel to the Receiving Vessel, notwithstanding any disputes or claims.

(b) Payment shall be made in full, without any set off, counterclaim, deduction, withholding or discount and free of bank charges.

11. Product Quality and Claims

(a) The Seller warrants that the Marine Fuel delivered under the Agreement of Sale of Marine Fuel meets the specifications for the Product as set forth in the Confirmation Note, subject to variance.

(b) In the event that the Buyer is not satisfied with the quality of the Marine Fuel delivered, he shall make an appropriate Note of Protest, any remarks on the Bunker Delivery Note and Tank Measurement Form are deemed to be invalid. And the Buyer shall formally confirm such claims to the Seller within twenty-one (21) days from the date of delivery. If any claim is not made in accordance with the foregoing procedure and within the time limit stipulated hearing, it will be deemed waived by the Buyer and that the Buyer's right to such claims would be extinguished.

20. Limitation of Liability

(a) In no event shall the Seller be liable to the Buyer for any incidental, consequential or punitive damages. The Seller shall furthermore not be liable for damages as described above when such damages have been caused by the fault or negligence of its personnel, representatives and/or (sub) contractors.

(b) The Buyer's exclusive remedy for any losses or damages resulting from the sale of the Marine Fuel delivered under the Agreement of Sale of Marine Fuel, including but not limited to any allegation of breach of warranty or breach of contract or negligence or strict liability, shall be limited to the price of the Marine Fuel, for which a claim is submitted.

(c) The Seller shall not be liable for any demurage or loss incurred by the Buyer due to congestion affecting the Seller's prior commitment of bunkering barge, or for any other reasons.

25 Overseas Bunker Supply (Addendum)

(d) In the event of any discrepancy between these General Terms and Conditions and the conditions in Appendix, the conditions in Appendix shall prevail.

26. Governing Law

(a) This General Terms and Conditions and the Agreement shall be governed by and construed in accordance with the laws of Hong Kong Special Administrative Region (Hong Kong) and the parties hereby agree to submit to the exclusive jurisdiction of the Hong Kong Courts.

(b) All Claims of the Buyer shall be time-barred unless legal proceedings have been commenced before the competent court within 12 (twelve) months after the date of delivery or the date that delivery should have been made.

Appendix clause 7, Singapore

Following conditions to apply:

(a) Delivery is in accordance with the code of practice for bunkering (SS600:2008) with the Maritime and Port authority of Singapore (MPA)."

Clause 1.24.to of SS 600:2008 states:

"In the event of any dispute with respect to the quality of bunker(s) delivered, the vessel/buyer should tender a complaint in writing to the bunker supplier within 30 days (or such extended period as may be agreed between the parties) after the bunker delivery."

Analysis of the Contract

The bunker supplier relied particularly on clause 9 of the Contract to found its right to full payment of the price. It contended that the ship agent had no entitlement to make any deduction, and in any event had not notified any dispute as to quality within the 30 day period mandated by SS600:2008. As a result any claim was deemed waived by the ship agent and its right to any such claim was extinguished. It also said that no legal proceedings were commenced before the Hong Kong courts pursuant to the exclusive jurisdiction clause within the 12 months mandated by clause 26(b) of the Contract and hence the claim by the ship agent was time-barred.

The ship agent, on the other hand, contended that:

(1) clauses 11(b) and 26(b) of the Contract were unreasonable and unenforceable pursuant to the Control of Exemption Clauses Ordinance (Cap 71).
(2) the ship agent was unable to issue a Notice of Protest within 30 days of the date of delivery of the bunkers because it was unable to confirm the microbiological contamination until receipt of the report prepared by DNV dated 24 September 2014.
(3) The ship agent did indeed commence legal proceedings against the bunker supplier in Singapore on 19 September 2014, to set aside a statutory demand issued by the bunker supplier.
(4) In any event Clauses 11(b) and 26(a) did not debar the ship agent from raising the defective quality of the bunkers as a defence, rather than as a claim.

*The Control of Exemption Clauses Ordinance ("**the Ordinance**")*

The bunker supplier did not file a surrejoinder and did not plead that clauses 11(b) and 26(b) were reasonable within the context of the Ordinance.

In submissions the ship agent took a "pleadings point", to the effect that because the bunker supplier had not pleaded any matters relied upon in support of the contention that each clause satisfied the requirement of reasonableness, the bunker supplier was therefore precluded from asserting that the clauses did in fact satisfy the requirement of reasonableness.

In the Judge's view the ship agent was correct in this contention. If a clause in a contract is challenged as being unreasonable then the party seeking to rely upon the clause needs to plead and prove the reasonableness of the clause. The reasonableness is not only a question of law, but inevitably involves questions of fact, such as those set out in Schedule 2 to the Ordinance. The facts relied upon need to be proved, and it is not sufficient to rely (as the bunker supplier did) upon the proposition that the clauses are "clearly" reasonable.

Hence, strictly the bunker supplier was precluded from arguing and proving the factual matters which it needed to prove in order to satisfy the test of reasonableness.

The Judge did not think that it would be appropriate to allow an argument to be run about the reasonableness of the clauses without the factual matters to be relied upon being properly pleaded. The Judge did not allow the bunker supplier to rely upon the unpleaded factual allegations that it must inevitably rely upon to support the proposition that the clauses were reasonable.

In the event that the Judge was wrong on the pleadings point, and that the bunker supplier was entitled to run an argument that the clauses were reasonable, the Judge would have concluded that they were reasonable. In this regard the Judge would have taken into account:

(1) that the clauses appeared to be relatively common within the industry;
(2) that the Singapore Code of Practice contained a clause very similar to that contained in clause 11(b);
(3) that there was good reason for such clauses, in that:
    (a) the composition of distillate fuel could change rapidly over time.

(b) the existence of water as a contaminant was a constant threat on any ship, and the water did not necessarily come only from the bunkers delivered to the ship. It could come from numerous sources and the risk of contamination by other sources would increase over time.
(c) Significant numbers of bunkers were delivered and it would be a significant task to maintain samples for all bunkers for any time significantly longer than a month.

After the conclusion of final submissions, it occurred to the Court that the Ordinance might not apply in any event.

Under section 16 of the Ordinance the limits imposed on the extent to which a person may exclude or restrict liability by reference to a contract term do not apply to liability arising under an exempted supply contract. Section 16(3) states that:

> " For the purposes of this section, and exempted supply contract means a contract-
> (a) that is either a contract of sale of goods or a contract under or in pursuance of which the possession or ownership of goods passes;
> (b) that is made by parties whose places of business (or, if they have none, habitual residences), are in different countries or territories or are in and outside Hong Kong; and
> (c) in the case of which—
> …
> (ii) the acts constituting the offer and acceptance have been done in different countries or territories or in and outside Hong Kong; or
> (iii) the contract provides for the goods to be delivered to a country or territory other than the country or territory where the acts constituting the offer and acceptance were done; or
> (iv) the acts constituting the offer and acceptance were done in Hong Kong and the contract provides for the goods to be delivered outside Hong Kong"

In addition section 17(1) of the Ordinance states:

> " Where the proper law of a contract is the law of Hong Kong only by choice of the parties (and apart from that choice would be the law of the jurisdiction other than Hong Kong) section 7 to 12 do not operate as part of the proper law."

Hong Kong law was applied to this contract by virtue of the choice of the parties in clause 26.

In relation to s16 the ship agent submitted, that it would be unfair to allow a point concerning s16 to be taken by the bunker supplier at this late stage, because insufficient evidence concerning the relevant issues had been adduced.

The Judge agreed with the ship agent that it would be unfair now to disapply the Ordinance on the basis that S16 applied. The Judge did not think that he should reach any conclusion based on s16.

The matters raised by s17 require the court to address the question of what would be the proper law of the contract but for the choice of law clause. That is ultimately a question of law, albeit one that has factual aspects.

When addressing s17 of the Ordinance, the section requires the court to ignore the choice of law that the parties have expressed in the contract. Therefore the court can only look at what law the contract has the closest and most real connection with. In a simple contract for the purchase of Bunkers, the Judge did not see that it was unfair to the ship agent to address this question even though it had been raised late.

There were various factors which would point to the contract having the closest and most real connection with Singapore. The following had been relied upon by the bunker supplier:

(1) The ship agent was a company incorporated in Singapore. In the Judge's view this was a neutral factor.
(2) The Vessel was anchored in Singapore at the time of delivery. This was a factor which demonstrated a connection to Singapore.
(3) The bunkers were delivered and accepted in Singapore, via a Singaporean supplier Palmstone. This too was a strong factor indicating a close and real connection with Singapore.
(4) The parties mutually agreed to apply the Singapore Code of Practice for Bunkering (SS 600:2008) as the applicable standard for the provision of the bunkers. This was also a strong factor indicating a real and close connection to Singapore.

Overall, the Judge was satisfied that the jurisdiction with which the contract had the closest and most real connection was Singapore, and therefore absent an express choice of law the contract would be governed by Singapore law.

The Judge had to apply Hong Kong to the contract and, under section 17 of the Ordinance, when applying Hong Kong law the Judge had to decide what the proper law of the contract would have been had there not been an express choice of Hong Kong law.

In the Judge's view, absent the choice of law clause, the proper law of the contract would be Singapore law. Consequently section 17 of the Ordinance was engaged and, as a matter of Hong Kong law, there were no restrictions upon exclusion clauses.

The Effect of Clauses 11(b) and 26

The effect of clause 11(b), with the substitution of 30 days as set out in SS 600:2008 in the place of 21 days, was that if no Note of Protest had been delivered within 30 days of the date of delivery then any claim was deemed waived and the right to such a claim was extinguished.

There was no Note of Protest. Consequently the Judge was satisfied that any claim of the ship agent was waived and extinguished.

The ship agent ran two arguments to counter this point.

First it said that clause 11 (b) only waived and extinguished a claim, but did not prevent the bringing of a defence to a claim for the price. It said that the claim of non-merchantable quality of the fuel was a defence rather than a counterclaim. It therefore said that clause 11(b) did not apply.

The Judge did not accept this argument. Under clause 9 (a) of the contract the ship agent was obliged to pay the full price without any "*set off, counterclaim, deduction, withholding or discount*". Therefore, as a matter of contractual construction, there was no basis upon which there could be any set off amounting to a defence to the price. The only way in which the ship agent was entitled under the contract to recover any loss (including the payment of the contract price) that it had suffered as a result of defective bunkers was by bringing a claim for the inadequate quality. In order to do so it must serve a Notice of Protest within 30 days of the date of delivery. If it did so then it remained obliged in any event to pay the contract price, but it preserved a right to claim damages. There was nothing inherently wrong with such contractual provisions, and indeed they occurred in many similar contracts. However in the absence of a Notice of Protest which complied with the contract the ship agent had no entitlement to bring a claim for damages, and no option other than to pay the Price.

Secondly the ship agent said that it could not have known that the bunkers were defective within the 30 day period because the micro-bacterial contamination had not become apparent. This

argument depended upon a conclusion that the microbacterial contamination was indeed in the bunkers at the time of delivery. The only evidence was that it was not, in fact, discovered. The ship agent had not adduced any evidence that it was not possible to discover the bacterial infection within the 30 day period specified in clause 11(b). Consequently the Judge rejected this argument on the face of the evidence.

Moreover, the Judge did not believe the ship agent's proposition would amount to a legitimate reason to avoid the effect of clause 11(b). Clause 11(b) was clear in its terms that absent a Notice of Protest the claim was extinguished. The Judge did not see that there was any way to circumvent this provision.

As to clause 26, it required proceedings to have been commenced "*before the competent court within 12 months after the date of delivery*". The competent court was clearly the Hong Kong court. No proceedings were commenced in Hong Kong within the 12 month period, and therefore the Judge was satisfied that "*All claims of the buyer shall be time-barred*". The ship agent had no entitlement to bring the claim by way of counterclaim in these proceedings.

The Judge dismissed the ship agent's Counterclaim, and held that the matters set out in the Counterclaim did not amount to a defence to the claim.

Disposition

The defence was not made out and the Counterclaim was dismissed. The bunker supplier was entitled to Judgment in the sum of US$335,858.31, plus interest.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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