UK DEFENCE CLUB

December 2010

soundings

Message from the Managers

Daniel Evans, Club Manager

Members will be aware that at their meeting on 4th November, 2010 the Board decided that there should be a 2.5% General Increase for the 2011/12 policy year. This reflects the Association's strong financial position but also the expectation that claims inflation is likely to continue for the foreseeable future.

In terms of the Managers, Paul Kaye has recently replaced Alan Mackinnon as Senior Director of Claims following Alan's transfer to Thomas Miller P&I as its Deputy Claims Director.

On a final note, the Managers would like to take this opportunity to wish all of the Association's Members a prosperous and successful 2011.

UKDC IS MANAGED BY **THOMAS MILLER**

AET Inc Ltd v Arcadia Petroleum Ltd, (The "Eagle Valencia"), [2010] EWCA Civ 713.

The ruling of the Court of Appeal highlights that the Courts will treat documentary requirements under demurrage clauses very strictly but it is also stated that in relevant circumstances it is not unreasonable to expect an owner to include alternative notices of readiness when it submits a demurrage claim.

The Facts

The EAGLE VALENCIA was chartered by the Member, AET, to Arcadia under an amended Shellvoy 5 Form. The ship arrived at Escravos, the Chevron Terminal in Nigeria, and tendered NOR, ("the original NOR"), but was required to wait as the berth was occupied. The following day the Port Health Authority boarded the ship and free pratique was granted. The Master tendered a further NOR, ("the second NOR"), expressed to be without prejudice to the original NOR. The ship however waited at anchorage for a further 3 days before she berthed.

AET submitted a demurrage claim with supporting documents, (within the requisite 90 days after completion of discharge), based on the original NOR. The second NOR was not included in the supporting documents. Well after the 90 days period had expired, Arcadia contended that laytime had not commenced until the ship was alongside since free pratique was not obtained within 6 hours as per the Shell Additional Clauses clause 22, set out below.

[22.1] If owners fail

(a) to obtain Customs clearance and/or

(b) free pratique and/or

(c) to have onboard all papers/certificates to perform this charter

Either within the six hours after the notice of readiness originally tendered or when time would otherwise normally commence under this charter, then the original notice of readiness shall not be valid.

AET Inc Ltd v Arcadia Petroleum Ltd, (The "Eagle Valencia"), [2010] EWCA Civ 713.

[22.2] A notice of readiness may only be tendered when customs cleared or free pratique has been granted and/or all papers/certificates required are in order in accordance with relevant authorities' requirements.

[22.3] Laytime or demurrage, if on demurrage, would then commence in accordance with the terms of the charter.

[22.4] All time costs and expenses as a result of delays due to any of the foregoing shall be for Owner's account.

[22.5] The presentation of the notice of readiness and the commencement of laytime shall not be invalid where the authorities do not grant free pratique or customs clearance at the anchorage or other place but clear the vessel when she berths.

[22.6] Under these conditions the NOR would be valid unless the timely clearance of the vessel for customs or free pratique is caused by the fault of the vessel".

The High Court

AET was successful in its claim for demurrage in the High Court. Mr. Justice Walker noted that the provisions of clause 22 appeared to conflict with one another.

He considered however that where the parties had provided in the latter part of the clause that a NOR would remain valid where the authorities did not grant free pratique at the anchorage but cleared the ship when she berthed, even if this was more than six hours after the NOR had been tendered, then the parties must have intended that similar circumstances should apply, for instance, when the ship was at anchorage. This conclusion meant that the judge was not required to consider whether the second NOR was valid or whether the claim was time barred. However, he proceeded to do so and concluded that AET would be barred from asserting a claim under the second NOR but in the light of the judge's finding on clause 22 of the SAC this ruling was of no consequence.

Court of Appeal

Arcadia obtained leave to appeal. The Court of Appeal disagreed with the High Court judge's conclusions on clause 22. Lord Justice Longmore considered that:

"SAC 22.1 provides that clause 13 will continue to govern if free pratique is granted within 6 hours of the tender of notice of readiness; but if it is not granted (and is thus, perhaps, less of a formality than expected) within 6 hours of the notice of readiness, then the "original" notice of readiness is not to be valid. That will not, however, prevent a fresh notice of readiness from being tendered once free pratique has been granted (SAC 22.2) and time will then run after 6 hours from the tender of that fresh notice of readiness (SAC 22.3). Up to that point in time, costs and expenses will (as one would expect) be for Owners' account (SAC 22.4). This is an eminently workable scheme and, although not so favourable to Owners as clause 13, at least allows them to start the laytime clock 6 hours after such fresh notice of readiness is tendered. If the port remains congested, laytime will still accrue, although it has started somewhat later than envisaged by clause 13".

So far as AET's alternative claim was concerned, Lord Justice Longmore agreed that this claim was time barred. He considered:

"…in the present case it might well be fair to say that the substance of the owners' claim was presented in time in as much as it was always clear that they were claiming that a particular number of days and hours had been spent at Escravos when no berth had been accessible for the vessel. That an essential document in support of every demurrage claim is the notice of readiness, and if the only notice of readiness submitted is a contractually invalid notice, the claim cannot be said to be "fully and correctly documented" within the wording of [the charterparty]".

Implications

The implications of this case are unlikely to be wide ranging in terms of the construction of the clauses themselves which have now been superseded by the Shellvoy 6 form, clause 13 of which sets out the regime for failure to obtain customs clearance and / or free pratique.

The ruling on the time bar however highlights two worthy points to note:

i) The court will treat documentary requirements under demurrage clauses very strictly, as has been shown in a number of previous cases.

ii) Out of an abundance of caution an owner might consider tendering a fresh NOR after free pratique has been granted and submit the second NOR, together with the supporting documents when tendering a demurrage claim.

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