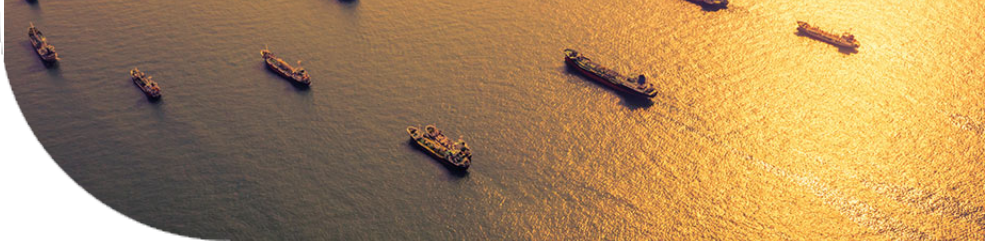

London Arbitration 11/23 – Charterers found liable

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Charterers liable for the late redelivery of the vessel with HSFO onboard, on the basis of implied terms in the Charter.

Factual background

The Disponent Owners and the Charterers entered into a Time Charterparty which was due to end on 15th December 2019. At the time of entering into the Charterparty the parties were aware that the IMO 2020 fuel regulations were due to come into force on 1 January 2020. The effect of these regulations was that the vessel would not be able to burn high-sulphur fuel oil ("HSFO") after that date.

The parties had agreed to gradually decrease the consumption of high-sulphur fuel oil (HSFO) during the duration of the Charter, with a view (at least from the Owners' perspective) to the vessel having as close to - no HSFO onboard as possible by 1 January 2020.

When the vessel arrived at the final discharge port, discharge of the cargo was delayed.

The vessel was required to shift to outer port limits to carry out the de-bunkering of HSFO. The Owners incurred the costs of the de-bunkering operations of the high-sulphur fuel and claimed losses of US$240,070.63 in total.

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The Owners' position:

The Owners argued that if the Charter had ended by December 2019, they would not have suffered the losses claimed in relation to the de-bunkering. They submitted that the Charterers had breached clause 10 of the recap (which they described as the "Debunkering Prevention Provision") by redelivering the vessel with non-compliant bunkers onboard at a time when the IMO 2020 fuel regulations were in force. This, they said, had left them with no choice but to de-bunker.

The Owners argued that if the vessel was redelivered by December 2019, the quantity of HSFO could have been exhausted (consumed) by the vessel before the new IMO 2020 regulations came into force.

After 31 December 2019 the vessel was not able to burn the HSFO bunkers due to the Sulphur Regulations.

The Owners argued that the parties had assumed a redelivery by no later than 15 December 2019 and that although there were no express terms that obliged the Charterers not to leave HSFO fuel on board after December 2019, there was an implied obligation.

The Owners' position was that both parties had been fully aware of the impending IMO 2020 regulations coming into force when entering into the Charter. Losses of the type claimed by the Owners were clearly within the contemplation of the parties and therefore recoverable.

The Charterers' position:

The Charterers denied that there was an implied term so-called "Debunkering Prevention Provision". There was no provision in clause 10, or elsewhere in the Charterparty, addressing de-bunkering of non-compliant fuel or any allocation of risk, responsibility, and remedies between the parties in relation to compliance with IMO 2020.

The Charterers argued that the parties did not intend or contemplate that clause 10 would ensure the consumption of all HSFO before redelivery and the implementation of IMO 2020. What was anticipated was that

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the Charter would come to an end by latest 15 December 2019.

Furthermore, Charterers argued that while HSFO could not be consumed as bunkers after 31 December 2019 by vessels without scrubbers fitted, it could still be carried onboard until 1 March 2020 under IMO 2020.

It was, therefore, a commercially sensible and reasonable reading of clause 10 that the Owners accepted the risk that the vessel might be redelivered with HSFO onboard which they would deal with, whilst still being able to comply with IMO 2020, and that the Charterers would not be in breach in redelivering the vessel with that HSFO onboard.

The Charterers pointed to the fact that there was no reference to de-bunkering in clause 10 of the recap.

The presence of the HSFO was not in itself in breach of IMO 2020: it was only the consumption of HSFO that would be in breach and the vessel did not need to consume it.

The Charterers argued that the Owners' remedy for late redelivery of the vessel would be the difference between the charter hire rate and market rate for the period of overrun.

The Tribunal's decision:

The Tribunal found that the IMO 2020 regulations "were well known across the maritime sector" and "were one of the most discussed topics in the shipping industry". Despite this being the case there was no express provision to cover the situation that arose in this case. Neither party anticipated the vessel being redelivered so far beyond the clearly stated latest date of 15 December 2019 for redelivery of the vessel.

Although the Owners described the clause as the "Debunkering Prevention Provision", the clause made no reference to de-bunkering, directly or indirectly: it simply stated the quantity of HSFO to be onboard at different times, assuming always a timely contractual redelivery before December 2019.

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However, it was clear from the contemporaneous exchanges between the parties that the Owners required the vessel to be redelivered free of HSFO.

The absence of any express provisions to cover the situation drew the Owners to rely on implied terms.

The difficulty that the Owners had, was that they could not show that the alleged implied terms were necessary for the efficacy of the Charter or obvious.

The real cause of the losses alleged by the Owners was the late redelivery caused by the prolonged delays at the final discharge port. The Owners would not have had the problem of de-bunkering the HSFO fuel if the Charterers had redelivered the vessel by the agreed date.

It was in this contest that the Tribunal had to look at the fact that the Charterers were well aware that the consumption by the vessel of HSFO after 1 January 2020 would be prohibited. The Charterers knew the consequences of the vessel being redelivered late with the quantity of HSFO bunkers onboard.

The type of loss claimed by the Owners was therefore within the contemplation of the parties at the time the Charterparty was fixed and therefore it was recoverable in principle. For this reason, the Charterers were liable for the losses flowing from the late redelivery of the vessel with HSFO onboard.

Conclusion:

The Owners were entitled to an award in the total amount of US$91,190.57, together with interest at a commercial rate with effect from one month after redelivery until payment.

The Owners had succeeded in obtaining an award in their favour, although not for the full amount of their claim. They did, however, succeed on the major issue in the reference, namely as to whether the Charterers were liable in principle for the late redelivery of the vessel with HSFO onboard.

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