Neutral Citation Number:[2018] EWHC 654 (Comm)

Case No: CL-2017-000196

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2018

Before :

MR JUSTICE ROBIN KNOWLES CBE

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IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION

Between :

SEATRADE GROUP N.V. — **Claimant**

- and -

HAKAN AGRO D.M.C.C — **Defendant**

"The Aconcagua Bay"

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Nevil Phillips and Ben Gardner (instructed by **Birketts LLP**) for the **Claimant**
Andrew Feld (instructed by **Davies Battersby**) for the **Defendant**

Hearing dates: 23 February 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

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MR JUSTICE ROBIN KNOWLES CBE

Mr Justice Robin Knowles :

Introduction

1. This is an appeal by the Owners of the "Aconcagua Bay" ("the Vessel") under section 69 of the Arbitration Act 1996. In granting leave for the appeal, Leggatt J (as he then was) was satisfied that the question of law raised by the appeal was one of general public importance. It is common ground that there is no binding authority on the question.

2. The question of law is whether the warranty in a voyage charterparty that a berth is "always accessible" means that the vessel is always able not only to enter but also to leave the berth. In an Award dated 23 February 2017 ("the Award") Mr Ian Kinnell QC as Umpire found that a warranty in those terms referred to entry and not to departure.

3. The charter of the Vessel was for carriage from the US Gulf to the Republic of Congo and Angola. The charterparty, on an amended GENCON 1994 form, provided:

> "10. Loading port or place (Cl.1)
> 1 good safe berth always afloat always accessible 1-2 good safe ports in the USG in Charterers' option …"

4. Whilst the Vessel was loading, a bridge and lock were damaged. As a result the Vessel was unable to use a channel so as to be able to leave the berth until 14 days after she had completed loading. The Owners claimed damages for detention from the Charterers for the period of delay.

5. The applicable principles of interpretation were not in issue. In interpreting a contract the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge that would have been available to the parties would have understood them to be using the language in the contract to mean; the court focusses on the meaning of the words in their documentary, factual and commercial context: see Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38; [2009] AC 1101 at [14] per Lord Hoffmann; Arnold v Britton [2015] UKSC 36, [2015] AC 1619 at [14]-[23] per Lord Neuberger; Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900 at [14]-[30] per Lord Clarke; Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173 at [8]-[15] per Lord Hodge.

6. There are judgments and awards which have examined the term "always accessible" in relation to a vessel's arrival, but have not needed to address the position on departure.

7. However in an arbitration award published at London Arbitration 11/97 (1997) LMLN 463 the term "always accessible" was found not to extend to leaving the berth. Even then the point was not decisive in that arbitration, as pointed out by Mr John Schofield in *Laytime and Demurrage* (7th edition) and *Sumerskill on Laytime* (6th edition by Professor Simon Baughen). The tribunal nonetheless addressed it.

8. The tribunal looked at textbooks, finding these "of little assistance". It then looked at the Voylayrules 93, finding an inference from the absence of reference to a ship leaving a berth or port.

9. But as Mr Donald Davies points out in his book *Commencement of Laytime* (2006), the tribunal in 11/97 did not have the benefit of seeing the Baltic Code 2003 (and 2007, and see also 2014) which specified that "Where the charterer undertakes the berth will be 'always accessible', he additionally undertakes that the vessel will be able to depart safely from the berth without delay or at any time during or on completion of loading or discharge". See also Laytime Definitions for Charterparties 2013 (BIMCO special circular no. 8 dated 10 September 2013).

10. The Umpire in the present case, as with the tribunal in 11/97, also looked at English dictionary definitions. So too in Seacrystal Shipping Ltd v Bulk Transport Group Shipping Co Ltd (The "Kyzikos") [1987] 1 Lloyd's Rep 48 at 58, where the Court was examining arrival not departure, Webster J looked to the shorter Oxford English Dictionary for the meaning of "access" as "way or means of approach" and "accessibility" as "capable of being approached".

11. Yet if regard is had to a wider selection of dictionaries, then capable of "use" or usability will be found among the available meanings of accessibility. This is material because "use" is a word that can readily include departure. Of course that is not conclusive, but it suggests that a dictionary cannot resolve the point of interpretation.

12. Some reliance by the Owners is placed on the word "always" in the term "always accessible". Their submission is that the word conveyed a sense of continuity. The Charterers, by Mr Andrew Feld, argue that the addition of the word begs the question of the meaning of the word "accessible". There is force in both submissions.

13. However it is perhaps where (as here) the full term used is "always afloat always accessible" (sometimes elsewhere "always afloat, always accessible" and sometimes "always accessible, always afloat"), that it is a little easier to recognise the point about continuity. "Always afloat" refers (as the Charterers accepted) to the duration of the period alongside or in berth. "Always accessible" refers at least to entry into that berth. So the question is then whether the parties really intended to omit departure from berth.

14. The Charterers argue that it is important to keep in mind that the particular context is that of a voyage charter. The berth is a nominated destination that the Charterers know will be used for one vessel, one time, and for one purpose (loading or discharge). The term "always accessible" is used, they argue, in a warranty that concerns the Charterers' requirements of the Owners as to where the vessel should come and what it should do.

15. The risk allocation that the parties intend should not be assumed to be the same for entry as for departure, the Charterers' argument continues. The loading voyage stage of the adventure, to be succeeded by the stage that is the loading operation, calls for acts of performance by the Owners alone (see EL Oldendorff & Co GmbH v Tradax Export SA (The Johanna Oldendorff) [1974] AC 479 at 556E per Lord Diplock). The risk of delay would fall on the Owners, unless the parties have otherwise provided. It should not be assumed, argue the Charterers, that once the vessel has entered the berth its departure on the carrying voyage stage (a stage also calling for acts of performance by the Owners alone) alters the risk allocation.

16. These points highlight, but do not I think answer, the point that is central. Did the parties intend to provide for departure in the wording they used? Where commercial parties have addressed the question of the accessibility of a berth, I can see no basis for a conclusion that they should be taken to have addressed entry alone. Importantly in my view the Umpire did not provide an answer to this. The submission by Mr Nevil Phillips and Mr Ben Gardner for the Owners that the reasonable commercial party looking at the subject of berthing would bear all aspects in mind and not confine itself to getting into the berth, is to my mind decisive.

17. I accept that London Arbitration 11/97 may have informed some commercial decisions in the 20 years since that award. I should be cautious to disturb a meaning if it had become settled. As the Charterers submit, business people can be taken to choose words carefully when risk allocation is at stake. However London Arbitration 11/97 has not always been free from question when commentaries refer to it. The issue remains whether, as here, the Umpire was correct in law. In my respectful view he was not.

18. The term "reachable on arrival" is to be found in some charterparties (particularly tanker charters according to London Arbitration 5/12 in LMLN 1 Oct 2012). The Owners submit that this self-evidently applies to arrival only. I am left with the perspective that there is a useful vocabulary from which parties can choose, if "always accessible" applies to departure as well as entry and if "reachable on arrival" applies to entry alone.

19. I appreciate that a number of textbooks treat the two terms as synonymous (as did Webster J for the purposes of his judgment in The Kyzikos (above)) or as to much the same effect. However I respectfully consider that the position is more precisely that the terms are to the same effect when arrival is considered. Thus, as it was put in London Arbitration 5/12 "[b]oth these provisions provided that the vessel in question would be able to proceed directly to the designated loading (or discharging) berth either on arrival or … at the opening of the laycan spread".

20. I am grateful for the well prepared submissions on both sides of the argument on this appeal.