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

13th November 2019

MUR SHIPPING B.V. v LOUIS DREYFUS COMPANY SUISSE S.A.

[2019] EWHC 3240 (Comm)

BEFORE: MRS JUSTICE COCKERILL DBE

CASE SUMMARY

On appeal against an arbitration award under section 69 of the Arbitration Act 1996, the Court considered whether the Claimant's case was time barred by reason of its failure to provide the Defendant with "*all available supporting documents*" for its claim within 12 months of completion of the Charter. Cockerill J upheld the majority decision of the arbitral tribunal that the time bar applied.

Background

The Claimant ("MUR") had chartered the vessel "TIGER SHANGHAI" (the "Vessel") from the Defendant ("Louis Dreyfus) on an amended NYPE time charter dated 9th August 2016 (the "Charter"). Clause 119 of the Charter provided that any claims thereunder would be "*totally extinguished unless such claims have been notified in detail to [Owners] in writing accompanied by all available supporting documents (whether relating to liability or quantum or both) and arbitrator appointed within 12 months from completion of charter*".

The Vessel was delivered into MUR's service on 14th August 2016. It was intended that she would load a cargo at Carbenaros, Spain. However, the loading crane at Carbenaros could not reach the feeder holes on the Vessel's starboard side. MUR therefore sought permission from Louis Dreyfus to cut new feeder holes, pursuant to Clause 46 of the Charter: *"The Charterers, subject to the Owners' and Master's approval which is not to be unreasonably withheld, shall be at liberty to fit/weld any additional equipment and fittings for loading… cargo.*"

Louis Dreyfus refused permission. On 18th August 2016 MUR arranged for an expert to attend onboard the Vessel, who on 19th August issued a survey report on the cutting of new feeder holes (the "Survey Report"). On the same day, after Louis Dreyfus had stated that their refusal was "*final and non-negotiable*", MUR terminated the Charter on the grounds that Louis Dreyfus had unreasonably withheld permission to cut additional feeder holes, in breach of Clause 46. On 22nd August, Louis Dreyfus purported to accept that termination as a repudiation by MUR. On any view, therefore, the Charter was at an end by no later than 22nd August 2016.

MUR subsequently sent a claim letter to Louis Dreyfus, in which MUR sought the return of hire paid in advance. On 8th August 2017, MUR appointed their arbitrator in respect of "*all disputes connected with the Charterparty*". A Final Hire Statement was attached. MUR served claim submissions on 2nd July 2018. The Survey Report was attached and referred to in support of a submission that Louis Dreyfus had unreasonably withheld its consent to installing new feeder holes. In response, Louis Dreyfus raised the time bar point: the Survey Report had been adduced more than 12 months after completion of the Charter, in breach of Clause 119.

The appeal

The majority of the tribunal agreed with Louis Dreyfus that the Survey Report was a "*supporting document*"; that it was not privileged; and that the claim was consequently time barred. The dissenting arbitrator took the view that the document plainly was privileged and thus reached the opposite conclusion. The issue for which permission to appeal was given was:

> "*[Does] ... a time bar clause ... barring claims if '... all available supporting documents…' are not provided within a specified period, operate when the only document found to be not provided is arguably privileged and/or not of relevance to either the identification of support, or support for, a relevant claim as referred to arbitration at least at the time of commencement of the arbitration?*"

Cockerill J sub-divided this issue into two questions: (i) Is a document which would otherwise be a supporting document one which should not be counted as such if it was arguably privileged? (ii) Is a document which is not at least at the time of commencement of the arbitration of relevance to either the identification of or support for a relevant claim as referred to arbitration, a "*supporting document*"?

The scope of Clause 119

Cockerill J first addressed the scope of Clause 119 and the words "*all available supporting documents*". The Judge referred to the decision of Bingham J (as he then was) in *Babanaft v Avant ("The Oltenia")* [1982] 1 Lloyd's Rep 448, where he said:

> "*The commercial intention underlying this clause seems to me plainly to have been to ensure that claims were made by the owners within a short period of final discharge so that the claims could be investigated and if possible resolved while the facts were still fresh… This object could only be achieved if the Charterers were put in possession of the factual material which they required in order to satisfy themselves whether the claims were well-founded or not… [T]he owners are in my view shut out from enforcing a claim the substance of which and the supporting documents of which (subject always to* de minimis *exceptions) have not been presented in time.*"

Cockerill J also considered the decision in *The Sabrewing* [2008] 1 Lloyd's Rep 286, where Gloster J (as she then was) observed that clauses such as this have to be clear and that if there is any residual doubt about the matter, the ambiguity is to be resolved so as not to prevent an otherwise legitimate claim from being pursued. In *The Abqaiq* [2012] 1 Lloyd's Rep 18, Tomlinson LJ stated at [61] that "*the touchstone of the approach ought in my view to be a requirement of clarity sufficient to achieve certainty rather than a requirement of strict compliance which, if applied inflexibly, can lead to uncommercial results.*"

MUR submitted that the effect of the tribunal's decision would be to nullify claims by the retroactive operation of the time bar if, during the course of an arbitration, relevant documents came to light. The correct approach to a clause such as Clause 119, MUR submitted, was that they should be construed to ensure clarity and certainty regarding the nature and merits of the case: here, Louis Dreyfus had plainly been able to understand MUR's claim. It was therefore submitted that "*all available supporting documents*" means only those documents which are reasonably necessary to explain the proposed claim to a recipient with a degree of familiarity with the matter and which are unquestionably disclosable at an early stage. Further, a document like the Survey Report was not truly "*supportive*" because it was only contingently relevant, in

that it was only necessary if Louis Dreyfus advanced a case that their refusal of permission was reasonable.

Louis Dreyfus submitted that Clause 119 was directed at achieving prompt notification of claims and maximising the chance of speedy resolution after that notification. This required the early provision of all relevant documents. Louis Dreyfus also noted that MUR's claim depended on a lawful termination, to which the question of reasonable refusal (and thus the Survey Report) was central.

In considering these submissions, Cockerill J observed that MUR's attempts to recast Clause 119 as requiring the provision of only a narrow class of documents were contrary to the expansive wording of "*all*" supporting documents, as well as the next section of the clause which refers to both liability and quantum. Although Cockerill J accepted that this analysis meant that the time bar would operate even when a document was disclosed at a late stage in proceedings, she did not consider this a sufficiently unpalatable result so as to warrant a different outcome: a supporting document would fall within Clause 119 irrespective of the stage at which it was adduced. The Judge also rejected the submission that the Survey Report had been adduced responsively, such that it was not a "*supporting document*": the claim depended on the date of termination, which in turn depended on whether MUR had been entitled to terminate. As such, the Report was on its face within the ambit of the claim that MUR advanced, and supportive of it.

Cockerill J also considered, *obiter*, whether Clause 119 was apt to cover secondary as opposed to primary documents. The Judge observed that in cases where such a distinction had been drawn, the clauses in question concerned a specific type of claim (for example, demurrage) and were principally directed at achieving finality. In those situations, it was understandable that only primary documents were required. By contrast, Clause 119 encompassed all disputes arising under the Charter, and its wide wording made clear that its purpose was not only to draw a line under disputes, but also to facilitate early settlement. It followed that the Clause ought to encompass a wider range of supporting material, of which the Survey Report was an example.

Privilege

The issue as to privilege was whether the Survey Report was "*arguably*" privileged, because (i) MUR accepted that the document was not privileged; and (ii) Louis Dreyfus was prepared to proceed on the assumption that Clause 119 does not require the provision of a privileged document. It was common ground that the document was reasonably arguably privileged, given that the dissenting arbitrator had concluded that it was.

MUR submitted that if there is scope for reasonable difference of opinion as to privilege, a party should not be required to provide it or else risk, perhaps much later, a time bar being held to fall. However, Cockerill J accepted Louis Dreyfus' argument that this approach was "*profoundly uncommercial*" as it would sit ill with the requirement of certainty which underpins these clauses and provide fertile ground for further disputes.

For the reasons summarised above, the appeal was dismissed.