BARECON: Is an obligation to keep a vessel with unexpired class certificates a condition?

Silverburn Shipping (IoM) Ltd. v Ark Shipping Company LLC (the "ARCTIC") [2019] EWHC 376 (Comm)

1. Working out the dividing line between conditions, innominate terms and warranties can be a somewhat vexed question.
2. Fortunately, the Commercial Court has provided recent guidance on how that question should be approached in the context of a charterparty on an amended BARECON '89 form. A link to the judgment can be found here. Alexander Wright and Ed Jones of 4 Pump Court acted for the successful owners.

The charter under consideration

3. Clause 9 of the BARECON '89 form imposes an obligation on charterers to "keep the Vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times".
4. The vessel in question, which owners had let to charterers for 15 years, was delivered into service in around October 2012 (the vessel being classed at the time) and, in October 2017, it entered port for repairs and maintenance. The vessel's class certificates expired on 6 November 2017, before her special survey commenced.
5. Owners terminated the charter on 7 December 2017, including on the basis that, in breach of Clause 9, charterers had allowed the vessel's class certificates to expire. Owners contended that charterers' failure to comply with their obligations entitled them to bring the charter to an end. Charterers, on the other hand, contended that the charterparty remained alive, disputing owners' right to terminate.
6. Charterers succeeded before an LMAA tribunal. The arbitrators held that charterers' obligation to keep the vessel in class:

6.1. Was not "absolute", but rather a qualified obligation to the effect that charterers were required to return the vessel to class "within a reasonable time"; and

6.2. Was not a condition, but rather an innominate term.

7. Owners were granted leave to appeal on two questions of law which Phillips J. considered were of general public importance. The matter subsequently came before Carr J.

Pump Court

Senior Clerks Carl Wall and Stewart Gibbs
4 Pump Court, Temple, London EC4Y 7AN
Tel +44 (0)20 7842 5555 Fax +44 (0)20 7583 2036 DX 303 LDE
www.4pumpcourt.com

Pump Court International
www.pumpcourtinternational.hk

The parties' arguments

8. At the hearing of the appeal, charterers conceded that, contrary to the finding of the arbitrators, the classification obligation was "absolute".

9. The critical question then became whether breach of that obligation entitled owners to terminate: was Clause 9 merely a condition, or rather an innominate term?

10. Owners maintained that Clause 9 was, on a proper construction, a condition. They said that the tribunal's reasoning failed to pay sufficient attention to the fact that classification is a documentary obligation and binary in nature. Charterers' duty to maintain class could be breached in only one way, with consequences potentially serious enough to undermine the whole contract if that happened. It followed the requirement to keep a vessel in class was "fundamental" to the charter, and this was particularly so bearing in mind the well-established proposition that, under a time charter, a vessel having its certificates is a condition precedent to delivery.

11. Charterers, on the other hand, emphasised that the court should be slow to substitute its own view for those of the specialist maritime arbitrators. They pointed out that the charterparty did not provide owners with an express right of withdrawal, which in their submission suggested that the obligation was not as fundamental as owners contended. Charterers also suggested that the breach on which owners relied was 'technical', and there was the risk that charters such as the one under consideration could be brought to an end in a large number of trivial or unfortunate circumstances if the term really was a condition.

The judgment

12. Given charterers' concession on the issue of whether Clause 9 was an absolute obligation, Carr J. had little difficulty in agreeing with owners on this point.

13. That conclusion also had consequences for the second question the Court had to consider. In particular, it meant that a breach of the classification obligation was "immediately, readily and objectively ascertainable". As is well known, the more certain an obligation as regards how it can be breached, the more likely it is that it is a condition as opposed to an innominate term.

14. After having referred to the usual authorities on working out the distinction between conditions, innominate terms and warranties (including The "Hansa Nord", Bunge v Tradax, The "Seaflower" and Spar Shipping), Carr J. decided Clause 9 was indeed a condition. The considerations that (a) the obligation was clear as a matter of language, (b) the vessel had to be classed "at all times", and (c) the potentially serious consequences should there be a loss of class all militated in favour of owners' construction.

15. Mrs. Justice Carr concluded by saying that "the key question is to strike the right balance as identified in Spar Shipping. To classify the classification obligation as a condition carries clear and important advantages in terms of certainty … To treat the classification obligation as a

condition does not engage the risk identified of permitting trivial breaches to have disproportionate consequences."

Analysis

16. There should be little surprise Carr J. decided as she did. Classification is unlike many, if not most, obligations that can be found in a charterparty. The vessel is either classed or it is not. The clause is either breached or it is not. There is no grey area.
17. Even though the clarity as to how an obligation can be breached may not, of itself, be enough to justify construing it as a condition, that the duty to classify could only have been intended to be a condition is put beyond doubt when one considers the importance of class to any shipping venture.
18. A loss of class can have serious consequences for owners, potentially invalidating any insurance (e.g. under the ITC Hull clauses or the Nordic Marine Plan) or placing them in default with their lenders. Classification may well also be necessary for a vessel to be able to enter certain ports and to maintain flag. A breach of an obligation to keep a vessel in class will also almost inevitably have serious knock-on effects down the chain of charterparties. The potential for claims (and with them arrests) is difficult to overstate.
19. The problem with the Tribunal's approach was that an owner, faced with what was on any view a very serious breach of charterers' obligations, may have found itself unable to get its (potentially uninsured) vessel back through an early termination of the charterparty. Even then, its right to do so would be subject to the amorphous test of whether enough time had passed since the vessel was last classed to enable it to terminate.
20. Given these considerations, Carr J.'s decision should be welcomed. Parties are entitled to know where they stand, and the judgment in this case provides welcome guidance as to when a party can terminate based on breach of a classification obligation.

\- Robert Scrivener

Jurisdiction agreements in general average guarantees- "The BBC Colorado"

W Bockstiegel GmbH & Co Reederei KG MS BBC Colorado v Chilena Consolidada Seguros Generales SA [2018] EWHC 3690 (Comm)

1. The High Court upheld an interim anti-suit injunction restraining Chilean proceedings commenced in contravention of an arbitration clause in a general average guarantee.
2. The BBC Colarado broke down on her voyage from China to Chile. Chilena was the cargo insurer for ENAP, a consignee of the cargo onboard the vessel, which provided general average guarantees for ENAP's general average contribution. By those guarantees Chilena undertook to pay "the proper proportion of any… general average…which may hereafter be ascertained

to be properly and legally due…". The guarantees contained English law and arbitration agreements. Chilena paid a sizeable contribution in accordance with the GA adjustment. The vessel was then sold by the applicant and Chilena subsequently commenced proceedings in Chile against "the proprietors and/or operators of the motor vessel BBC COLORADO" for damages "as those who are actually responsible for what was initially treated as a general average."

3. Cockerill J granted an interim anti-suit injunction against Chilena *ex parte* on the basis that the commencement of proceedings in Chile was a breach of the law and arbitration clauses in the guarantees. Chilena was not present at the return date hearing before Sir Ross Cranston where the injunction was, unsurprisingly, upheld.

4. The argument for Chilena ran, amongst other things, that since the guarantees had come to an end when they were paid out the English law and arbitration clauses did not survive. Both Cockerill J and Sir Cranston were of the view that Chilena's claims arose out of, or had some connection with, the guarantees and were therefore subject to the law and arbitration clauses in them.

5. The Court's decision is consistent with the approach of the House of Lords in *Fiona Trust* [2007] UKHL 40 which advocates a liberal construction of jurisdiction or arbitration agreements especially in an international commercial contract (*per* Lord Hoffmann at [6-8] & [12-13]). The Commercial Court is clearly following the principle that arbitration clauses should be considered in a way which reflects commercial common sense: it is doubtful that business people want only some of their disputes referred to arbitration. In this case Chilena's obligation in the guarantee was premised on the proportion of GA "properly and legally due". One can see how the Court therefore came to the conclusion that the parties' intention was to subject any dispute as to the underlying liability for the general average incident on which ENAP's proportion of GA was parasitic to English law and London arbitration.

- Rani Noakes

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