Neutral Citation Number: [2018] EWHC 163 (Comm)

Claim No. CL-2017-000310

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 02/02/2018

Before :

THE HONOURABLE MR JUSTICE POPPLEWELL

- -

Between :

Claimant

LUKOIL ASIA PACIFIC PTE LIMITED

- and -

Defendant

OCEAN TANKERS (PTE) LIMITED

- -
- -

Ms Natalie Moore (instructed by **Clyde & Co LLP)** for the **Claimant**
Mr Richard Lord QC (instructed by **Thomas Cooper LLP**) for the **Defendant**

Hearing dates: 26 January 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 Popplewell :

Introduction

1. On 8 November 2013 the Claimant ("the Charterers") voyage chartered the tanker OCEAN NEPTUNE ("the Vessel") from the Defendant ("the Owners") for carriage of a minimum 35,000 metric tons, with Charterers' option up to a full cargo, of clean petroleum products, from one safe port Taiwan to one to three safe ports Australia. Demurrage was payable at US$17,500 per day pro rata. Laytime for loading and discharging was 84 hours in total at both ends, Saturdays and holidays included.

2. The Charterers appeal against the decision in a Partial Award dated 25 April 2017 ("the Award") that in respect of delays at one of the discharge ports the demurrage claim by the Owners is not time barred.

The Charterparty terms

3. The voyage charter was contained in a fixture recap email of 8 November 2013 ("the Fixture Recap") which incorporated the standard terms of the ExxonMobil VOY2005 form, and the Lukoil International Trading and Supply Company Exxonvoy 2005 clauses dated 30.05.2006 ("the LITASCO Clauses"), in each case as amended and supplemented in certain respects in the Fixture Recap. The charterparty terms included the following (with strike out or underlining to illustrate where the ExxonMobil VOY2005 form or the LITASCO Clauses were amended by the Fixture Recap):

ExxonMobil VOY2005 form

8. DEMURRAGE/DEVIATION RATE. The rate for demurrage and/or deviation shall be the fixed dollar figure specified in part I(J) or the rate derived by determining the applicable rate from the WORLDSCALE Demurrage Table for tonnage specified in part I (J) and multiplying that rate by the Base Freight Rate. If a Part Cargo Minimum basis is specified in part I (E) and Charterer exercises its option to load additional cargo, any demurrage and/or deviation shall, nevertheless, remain payable at either the aforesaid fixed dollar rate or at the aforesaid rate based on the tonnage specified in Part I(J), whichever is applicable. The applicable rate under this Clause shall hearing after be called "Demurrage Rate" or "Deviation Rate" as is appropriate.

9. LOADING AND DISCHARGING PORT(S)/PLACE(S)

(a) Charterer shall nominate loading or discharging port(s) and/or place(s) or order Vessel to a destination for orders. If Vessel is ordered to a destination for orders, Charterer shall thereafter nominate loading or discharging port(s) and/or place(s). All such nominations or orders shall be made in sufficient time to avoid delay to Vessel.

(b) CHANGE OF DESTINATION. After nominating loading and/or discharging port(s) or place(s) pursuant to Paragraph (a) of this Clause, Charterer may nominate new port(s) or place(s), whether or not they are within the range of the previously nominated port(s) or place(s) and/or vary the rotation of any nominated port(s) or place(s) and Owner shall issue instructions necessary to make such change(s). It is understood and agreed, however, that the aforesaid option to nominate new loading

port(s) or place(s) in different ranges shall lapse on Vessel tendering Notice of Readiness at a nominated loading port or place and that aforesaid option to nominate new discharging port(s) or place(s) in different ranges shall lapse on Vessel tendering Notice of Readiness at a nominated discharging port or place. If a change to, or varying the rotation of, nominated port(s) or place(s) occurs or if Vessel is sent to a destination for orders, any time by which the steaming time to the port(s) or place(s) to which Vessel is finally ordered exceeds that which would have been taken if Vessel had been ordered to proceed to such port(s) or place(s) in the first instance shall be compensated at the Deviation Rate per running day and pro rata for a part thereof. In addition, Charterer shall pay the extra bunkers consumed during such excess time at Owner's documented actual replacement costs at the port where bunkers are next taken.

(c) Any order of Vessel to a destination for orders, all nominations and any renominations pursuant to this Clause shall be consistent with Part I (C) and (D).

13. LAYTIME/DEMURRAGE

(a) COMMENCEMENT/RESUMPTION. Laytime or time on demurrage, as herein provided, shall commence or resume upon the expiration of six (6) hours after receipt by Charterer or its representative of Notice of Readiness or upon Vessel's Arrival in Berth, whichever occurs first. Laytime shall not commence before ~~0600~~ 0001 hours local time on the Commencing Date specified in Part I (B) unless Charterer shall otherwise agree, in which case laytime shall commence upon commencement of the loading

(b) EARLY LOADING. In the event Charterer agrees to load Vessel prior to commencement of laydays, laytime will begin at commencement of loading and the amount of time from the commencement of loading until ~~0600~~ 0001 hours local time on the commencing date specified in Part I (B), shall be added to the laytime specified in Part I (I).

(c) DURATION. The laytime specified in Part I (I) shall be allowed free of expense to Charterer for the purpose of loading and discharging cargo and all other Charterer's purposes. Laytime or, if Vessel is on demurrage, time on demurrage, shall continue until all cargo hoses have been completely disconnected upon the final termination of the loading or discharging operation. Disconnection of all cargo hoses shall be promptly effected. If Vessel is delayed in excess of two (2) hours after such disconnection of the cargo hoses solely for Charterer’s purpose, laytime or, if Vessel is on demurrage, time on demurrage shall resume upon the expiration of said two (2)-hour period and shall continue from that point until the termination of such delay.

(d) PAYMENT. Charterer shall pay demurrage per running day and pro rata for a part thereof for all time by which the allowed laytime specified in Part I (I) is exceeded by the time taken for the loading and discharging and for all other Charterer's purposes and which, under this Charter, counts as laytime or as time on demurrage.

14. LAYTIME/DEMURRAGE CONSEQUENCES

(a) SPECIFIED. Any delay to Vessel after the expiration of six (6) hours from Charterer's receipt of Notice of Readiness before Arrival in Berth or any delay to Vessel after Arrival in Berth, due to unavailability of berth (prior to Arrival in Berth), unavailability of cargo, or solely for Charterer or terminal purposes, shall count as laytime or, if Vessel is on demurrage, as time on demurrage.

(b) HALF-RATE DEMURRAGE. If demurrage is incurred and the Vessel has been delayed in berthing, loading and/or discharging (hereafter in this Paragraph (b) called "Delay") due to: weather and/or sea conditions; ~~[irrespective of any option given in Part I(C) and (D)]~~; fire; explosion; strike, picketing, lockout, slowdown, stoppage or restraint of labor; breakdown of machinery or equipment in or about the facilities of Charterer, supplier, shipper or consignee of the cargo (hereinafter in this Paragraph (b) separately and jointly called "Listed Conditions"), be the Delay prior to or after the expiration of laytime, that span of time on demurrage equal to the period or periods of Delay as just described shall be paid at half of the Demurrage Rate. If, during a period of Delay, Listed Conditions co-existed, along with any of the other conditions described in Paragraph (a) of this Clause 14, the Listed Conditions shall conclusively be deemed to be the sole cause of the delay, either if they caused the Delay independently of the other conditions or could have caused the Delay if the other conditions had not so co-existed. Weather and/or sea conditions shall include, ~~but not be limited to, lightning,~~ restricted visibility (the term "restricted visibility" shall mean any condition in which visibility is restricted by fog, mist, falling snow, ice, heavy rainstorms, sandstorms and any other similar causes), storm, wind, waves and/or swells. The provisions of paragraph 14 (b) shall apply irrespective of any option given in Part I (C) and (D). The foregoing provisions as to payment of half the Demurrage Rate in respect to weather and/or sea conditions shall not apply where the Vessel is lightered or discharged at sea.

(c) EXCLUSIONS. Notwithstanding the provisions of any other Paragraph of this Clause or any other Clause of this Charter to the contrary, time shall not count as laytime or, if Vessel is on demurrage, as time on demurrage, if such time is spent or lost:

(i) As a result of labor dispute, strike, go slow, work to rule, lockout, stoppage or restraint of labor involving Master, officers or crew of Vessel ~~or tugboats or pilots~~ unless, in the case where Charterer has load/discharge port options, a labor dispute, strike, go slow, work to rule, lockout, ~~stoppage or restraint of labor of tug boats or pilots,~~ is in force at the port at the time Charterer nominated such port;

(ii) On an inward passage, including, but not limited to, ~~awaiting daylight, tide, tugs or pilot,~~ and moving from <u>first</u> anchorage or <u>first</u> other waiting place, even if lightering has taken place at the <u>first</u> anchorage or <u>first</u> other waiting place, until Vessel's Arrival in <u>first</u> Berth;

(iii) Due to overflow, breakdown, inefficiency, repairs, or any other conditions whatsoever attributable to Vessel, Master, officers, crew and/or Owner, including inability to load or discharge the cargo within the time allowed and/or failure to meet Vessel warranties stipulated in this Charter;

(iv) Due to Owner ~~or port authority~~ prohibiting loading or discharging;

(v) By reason of local law or regulations, action or inaction by local authorities (including, but not limited to, Port, Coast Guard, Naval, Customs, Immigration

and/or Health authorities), with the exception, however, of port closure due to weather and/or sea conditions;
(vi) in ballasting or deballasting, lining up and/or draining of pumps/pipelines, cleaning of tanks, pumps, pipelines, bunkering or for any other purposes of the Vessel only, unless same is carried out concurrent with loading and/or discharging so that no loss of time is involved; or
(vii) Due to an escape or discharge of ~~oil~~ cargo and/or pollutant substances (herein after called "pollutants") or the threat of an escape or discharge of ~~oil~~ pollutants on or from Vessel. (The phrase "threat of an escape or discharge of ~~oil~~ pollutants" shall for the purposes of this paragraph (vii) mean a grave and imminent danger of the escape or discharge of ~~oil~~ pollutants which, if it occurred, would create a serious danger of pollution damage).

.....

(e) UNSPECIFIED. Any delays for which laytime/demurrage consequences are not specifically allocated in this or any other Clause of this Charter and which are beyond the reasonable control of Owner or Charterer shall count as laytime or, if Vessel is on demurrage, as time on demurrage. If demurrage is incurred, on account of such delays, it shall be paid at half the Demurrage Rate.

LITASCO Clauses

2. CLAIMS

A..... CHARTERERS SHALL BE DISCHARGED AND RELEASED FROM LIABILITY IN RESPECT OF ANY CLAIMS OWNERS MAY HAVE UNDER THIS CHARTERPARTY (SUCH AS, BUT NOT LIMITED TO, CLAIMS FOR DEADFREIGHT, DEMURRAGE, SHIFTING OR PORT EXPENSES) UNLESS A CLAIM HAS BEEN PRESENTED IN WRITING TO CHARTERERS WITH SUPPORTING DOCUMENTATION WITHIN NINETY (90) DAYS FOR DEMURRAGE AND 120 DAYS FOR OTHER CLAIMS FROM COMPLETION OF DISCHARGE OF THE CARGO UNDER THIS CHARTERPARTY.

B. FOR DEMURRAGE CLAIMS SUPPORTING DOCUMENTS MUST INCLUDE WHENEVER POSSIBLE -

1. OWNERS' CALCULATION OF THE DEMURRAGE DUE; AND
2. THE CERTIFICATE OF NOTICE OF READINESS TENDERED AT EACH PORT OF LOADING AND DISCHARGE; AND
3. THE STATEMENT OF FACTS FOR EACH LOADING AND DISCHARGE BERTH WHICH MUST BE SIGNED BY THE MASTER OR THE VESSEL'S AGENTS AND, WHEREVER POSSIBLE, THE TERMINAL; AND
4. THE VESSEL'S PUMPING LOGS FOR EACH DISCHARGE BERTH; AND

5. ALL LETTERS OF PROTEST ISSUED BY THE VESSEL OR THE TERMINAL. THE NOR [sic].[1]

3. STATEMENT OF FACTS CLAUSE

IN ORDER TO BE CONSIDERED AN AUTHORIZED DOCUMENT, STATEMENTS OF FACTS MUST BE SIGNED BY THE MASTER OF VESSEL, VESSEL'S AGENTS, SUPPLIERS OR RECEIVERS, IF POSSIBLE. IF NOT POSSIBLE, THEN MASTER TO ISSUE A LETTER OF PROTEST TO THE DISSENTING PARTY, SUBMITTED TOGETHER WITH OWNERS' DEMURRAGE CLAIM.

4. WAITING FOR ORDERS CLAUSE

IF CHARTERERS REQUIRE VESSEL TO INTERRUPT HER VOYAGE AWAITING AT ANCHORAGE FURTHER ORDERS, SUCH DELAY TO BE FOR CHARTERERS' ACCOUNT AND SHALL COUNT AS LAYTIME OR DEMURRAGE, IF VESSEL ON DEMURRAGE. DRIFTING CLAUSE SHALL APPLY IF THE SHIP DRIFTS.

Fixture Recap terms

5. BIMCO ISPS CLAUSE

…

(B) (II) EXCEPT AS OTHERWISE PROVIDED IN THIS CHARTER PARTY, LOSS, DAMAGE, EXPENSE, EXCLUDING CONSEQUENTIAL LOSS, CAUSED BY FAILURE ON THE PART OF THE CHARTERERS TO COMPLY WITH THIS CLAUSE SHALL BE FOR THE CHARTERERS' ACCOUNT AND ANY DELAY CAUSED BY SUCH FAILURE SHALL BE COMPENSATED AT THE DEMURRAGE RATE.

…

7. INTERIM PORT CLAUSE

IF VESSEL CALLS MORE THAN ONE (1) LOADPORT AND/OR ONE (1) DISCHARGE PORT, CHARTERERS TO PAY FOR ADDITIONAL INTERIM PORT AT COST WITH ADDITIONAL STEAMING TIME, AT DEMURRAGE RATE, TO BE INCURRED FOR SUCH DEVIATION WHICH EXCEEDS DIRECT PASSAGE,

[1] As the Tribunal found at paragraph 10 of the Award, the added words "THE NOR" were probably a typographical error and were in any event overtaken by the express words of Clause 2B2 which required only a certification of the NOR. They did not require a copy of the actual NOR tendered by the Vessel.

> BASIS BP DISTANCE TABLE, FROM FIRST LOAD PORT TO FINAL DISCHARGE PORT. …
>
> 10. IF VESSEL IS ORDERED BY RELEVANT AUTHORITY(IES) OR CHARTERERS OR AGENTS TO DRIFT OFF OUTSIDE PORT(S), AT A LOCATION IN OWNERS'/MASTER'S OPTION, THEN THE FOLLOWING SHALL APPLY:
>
> (I) TIME FROM VESSEL'S ARRIVAL AT DRIFTING LOCATION TO THE TIME VESSEL DEPARTS, ON RECEIPT OF CHARTERERS' INSTRUCTIONS, FROM SUCH LOCATION SHALL BE COUNTED AS USED LAYTIME OR DEMURRAGE, IF ON DEMURRAGE.
>
> (II) BUNKERS CONSUMED WHILST DRIFTING SHALL BE FOR CHARTERERS' ACCOUNT AT LAST PURCHASED PRICE, OWNERS SHALL PROVIDE FULL DOCUMENTATION TO SUPPORT ANY CLAIM UNDER THIS CLAUSE."

4. The following facts are taken from the Award:

(1) The Owners claimed demurrage in the total sum of US$772,327.87 together with interest and costs. The Charterers denied liability for the claim on the grounds, amongst others, that it was time barred because the documents in support of the claim specified in LITASCO Clause 2B were not provided within 90 days of the completion of discharge as required by that clause. The Charterers also advanced a counterclaim for alleged contamination and short delivery of the cargo in the sum of $2,015,903.09. Pursuant to the Charterers' application, the Tribunal determined the time bar defence as a preliminary issue.

(2) The Vessel tendered notice of readiness at the loadport of Mailiao, Taiwan, at 0900 on 17 November 2013 and the hoses were disconnected at 2250 on 19 November 2013. The Owners claim that the total laytime used at the loadport was 57.25 hours.

(3) The Vessel proceeded to her first discharge port, Gladstone, Australia, where she tendered notice of readiness on 2 December 2013 at 2100. She berthed at 1350 on 3 December 2013 and remained at berth until 1410 on 5 December 2013 when she shifted back to the anchorage. She remained at anchor until 2340 hours on 15 January 2014 when the Charterers ordered the Vessel to sail to Botany Bay. The reason for the delay at Gladstone was that the receivers, Caltex, refused to take delivery of the cargo on the grounds that it was alleged to be contaminated/off specification. It appears that Caltex also declined to co-operate with the Vessel in any way. The Owners calculated the total time used at Gladstone as 1,048.58333 hours.

(4) The Vessel tendered her notice of readiness at Botany Bay at 1618 on 18 January 2014 and the hoses were disconnected at 2150 on 19 January 2014 having discharged part of the cargo. The Owners calculated that the total time used at Botany Bay was 27.83333 hours.

(5) The Vessel proceeded to Port Alma where she tendered her notice of readiness on 22 January 2014 at 2320. Hoses were disconnected at 0835 on 24 January 2014 following final discharge of the cargo. The Owners calculated that the total time used at Port Alma was 22.9333 hours.

5. The Owners' claim, with supporting documents, was sent by email on 6 February 2014. The Tribunal held the Owners failed to provide all the supporting documents required by LITASCO Clause 2B because they did not include a statement of facts for each of the ports of Mailiao, Gladstone, Botany Bay and Port Alma countersigned by the terminal, or if it was impossible to obtain such a countersignature, a letter of protest from the Master. The Tribunal held that the demurrage claims were time barred for this reason, save in one significant respect. It treated the delays at Gladstone as falling outside the scope of the time bar defence because although this was initially categorised as a claim for demurrage by the Owners, they subsequently re-labelled it as a claim for time lost waiting for orders falling within LITASCO Clause 4; the Tribunal held that the documentary requirements of LITASCO Clause 2B would not apply to the claim so re-labelled. Its reasoning for that conclusion was contained in paragraph 20 of the Award in the following terms:

> "It seems to us that the strict application of the requirements of clause 2.B has to cut both ways and they are not applicable to a claim for time lost waiting for orders. Not only does that follow from the proper construction of the rider clauses, but from a practical point of view it would make sense for the documentary requirements for demurrage not to be applicable to claims for time lost waiting for orders. When a vessel has to wait for orders, she will often do so off port limits in order to avoid port charges. As a result, the contact that a vessel will have with the shore representatives of those handing the cargo may well be totally absent. The vessel's wait for orders may generate no communications at all with anyone at the port."

Submissions

6. The Charterers submitted that a claim under LITASCO Clause 4 was a claim for demurrage; and that LITASCO Clause 2B applied in terms to claims for demurrage. There were no commercial reasons for failing to give the language of the LITASCO Clauses their clear and plain meaning. On the contrary commercial considerations reinforced that plain meaning.

7. The Owners submitted that Clause 2B was a restriction on what would otherwise be the Owners' right to present and prove their claim in a manner and at a time of their choosing, subject to any statutory limitation period, and accordingly should be restrictively construed. There is a distinction to be drawn between claims for demurrage in relation to operational delays at the loading and discharge ports, and claims for time lost waiting for orders, which were to be treated differently.

Demurrage is liquidated damages for breach of charter in relation to the use of the vessel, whereas LITASCO Clause 4 confers a contractual liberty which involves no breach by the Charterers. The fact that a LITASCO Clause 4 claim was to "count as" demurrage for the purposes of computation did not make it a claim for demurrage for all purposes, and in particular did not do so for the purposes of clauses such as LITASCO Clause 2B. There was no reason to suppose that any of the categories of documents listed in LITASCO Clause 2B were likely to be relevant or necessary for assessing a claim for time lost waiting for orders; the Tribunal's reasoning, as a matter of commercial sense, reinforced this construction of the language of the relevant clauses.

Analysis

8. There is an abundance of recent high authority on the principles applicable to the construction of commercial documents, including ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 WLR 896; ***Chartbrook Ltd v Persimmon Homes Ltd*** [2009] 1 AC 1101; ***Re Sigma Finance Corp*** [2010] 1 All ER 571; ***Rainy Sky SA v Kookmin Bank*** [2011] 1 WLR 2900; ***Arnold v Britton*** [2015] AC 1619; and ***Wood v Capita Insurance Services Ltd*** [2017] AC 1173. The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

9. LITASCO Clause 2B applies "for demurrage claims". The question is therefore whether a claim under LITASCO Clause 4 is a "demurrage claim". The ExxonMobil VOY2005 form and the LITASCO Clauses are detailed and carefully drafted terms, and the Fixture Recap is framed by reference to them. It is therefore convenient to start with the language used in the charter as a whole.

10. In my judgment the language of the charter provides in clear terms that a LITASCO Clause 4 claim is a demurrage claim. Identification of what is meant by a claim for demurrage is to be found in clause 13(d) of the ExxonMobil VOY2005 form. It is

there that the obligation to pay demurrage is framed by the use of the words "Charterer shall pay demurrage…." It provides that demurrage is to be paid for all time by which the allowed laytime "is exceeded by time taken for loading and discharging *and for all other Charterer's purposes and which, under this Charter, counts as laytime or as time on demurrage*." The language of LITASCO Clause 4 provides that the delay caused by waiting at anchorage shall "count as" used laytime or demurrage. The waiting time under LITASCO Clause 4 is, in the words of clause 13(d), time taken for Charterers' purposes which under the Charter counts as laytime or demurrage. It therefore falls squarely within clause 13(d), giving rise to a claim for demurrage. It is not just to be quantified in the same way as a demurrage claim at the demurrage rate. It *is* a demurrage claim under clause 13(d). The italicised words make it clear that there is no distinction between an "ordinary" demurrage claim, in the sense of a claim where the Charterers have exceeded the allowed laytime by the time taken for loading and discharging, and a claim for delay waiting for orders where such delay is to count as laytime or time on demurrage. There is only one type of claim: a claim for demurrage to account for the time by which Charterers have exceeded the agreed laytime for loading, discharging and for any other of Charterers' purposes which count as laytime or time on demurrage under the Charterparty – including time spent waiting for orders under LITASCO Clause 4.

11. Providing that time is "to count" as laytime or demurrage and be treated as part of a demurrage claim is a common drafting technique in charterparty terms. The formulation is often used to describe periods which would otherwise not form part of the laytime, for example because the ship has not become an arrived ship, but are to be treated as such for the purposes of a demurrage claim: see for example per Lord Diplock in ***Dias Compania Naviera S.A. v Louis Dreyfus Corporation*** [1978] 1 WLR 261 at 263F-G.

12. This construction is reinforced by the fact that a claim for waiting time under LITASCO Clause 4 is not simply or necessarily a claim for all such time. A claim under the clause is not only to be quantified at the demurrage rate, but is also qualified by the laytime otherwise used or not used in the course of performance of other parts of the voyage. If a claim arises under the clause it is to count as laytime: to the extent that laytime has not otherwise been used, it will reduce the waiting time for which a claim can be made under the clause. It follows that any Clause 4 claim will have to take account of the time which has counted as used laytime, if any, at other stages of the voyage. In some circumstances there may be none, as for example when the order is to wait at an anchorage after the commencement of the approach voyage but prior to arrival at the loadport (although even then laytime used elsewhere will be relevant unless the waiting time itself exceeds the full 84 hours allowed); but it must have been intended to apply also when the waiting for orders takes place after arrival at the loadport and/or after loading and/or after part discharge at one discharging port. In such circumstances a Clause 4 claim could only be part of a claim for demurrage because it would not be possible to apply clause 13(d) as a separate claim for demurrage: a clause 13(d) claim for demurrage would by its terms have to treat the waiting time as laytime, because Clause 4 requires it, and could not ignore it so as to permit a demurrage claim to be advanced based only on the laytime used in loading and discharging. The Clause 4 claim is necessarily part and parcel of a clause 13(d) demurrage claim.

13. This construction is also supported by the contrast between the wording of LITASCO Clause 4 and that of clauses 5 and 7 of the Fixture Recap. Where the parties wanted to draw a distinction between demurrage claims and other types of delay claim they used clear language to do so. Clause 5 provides that any delay caused by breach of the ISPS clause obligations by the Charterers "shall be compensated at the demurrage rate". Clause 7 provides that where the Charterers deviate to an interim loading or discharging port beyond the number agreed, they are to "pay for…additional steaming time, at demurrage rate." This does not involve any analysis of used laytime and refers to the demurrage rate, not demurrage, as the yardstick for quantification of the value of the relevant time. The presumption that where parties have used different language in different parts of their contract they intend to achieve a different effect, is one whose strength will vary according to the context. In this charterparty context, with specific additions and amendments to standard form clauses, it is to be inferred that the parties have taken care with the language used, and the presumption carries some weight.

14. Ms Moore argued that this construction gained further support from the fact that the detailed exceptions and qualifications to laytime and demurrage set out in ExxonMobil VOY2005 clause 14 must also apply to the question of what part of the time spent waiting for Charterers' orders counts as laytime or demurrage, relying in this context on paragraph 15.60 of *Cooke on Voyage Charters* 4th edn and the decision of Hobhouse J on a different clause in ***Huyton S.A. v Inter Operators S.A.*** [1994] 1 Lloyd's Rep 298; so for example, she argued, the half rate demurrage provisions in clause 14(b) apply to such a period. That may be so, but I do not need to decide the point and prefer not to do so in a case where it does not directly arise in respect of particular facts.

15. I turn to consider whether there are any commercial considerations or consequences which point to a LITASCO Clause 4 claim not being a "demurrage claim" for the purposes of engaging LITASCO Clause 2B.

16. Clause 2B identifies documents which must accompany a demurrage claim, which by Clause 2A must be made within 90 days of final discharge. Such provisions are common in voyage charters, and often reflect a corresponding provision in a sales contract requiring the same conditions to apply to the charterers' claim against shippers or receivers: see *Schofield on Laytime and Demurrage* 7th edn paragraph 6.284. They are intended to enable the parties to have a final accounting as swiftly as possible and, if any factual enquiries have to be made, to ensure that the parties are able to do so whilst recollections are reasonably fresh. As Bingham J put it in ***Babanaft International Co S.A v Avant Petroleum ("The OLTENIA")*** [1982] 1 Lloyd's Rep 448, 453:

> "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."

The arbitrators themselves described the purpose of LITASCO Clauses 2 and 3 in paragraph 9 of the Award in the following terms:

> "The aim of rider clauses 2 and 3 is that the Charterers should be presented with documentation complying with those clauses so they can accurately calculate their liability for demurrage. Not only is that conclusion consistent with giving proper effect to the contractual clauses agreed by the parties, but it is also consistent with the general trend for operational matters and demurrage claims to be handled by different departments in a charterer's organisation. Indeed the evaluation of demurrage claims is often outsourced to a third party".

17. Courts and arbitration tribunals regularly insist on strict compliance with such clauses for this reason, although the expression strict compliance has been deprecated, and it is perhaps more accurate to say that the court will give effect to the clarity and certainty which it is the purpose of such clauses to achieve (see ***National Shipping Company of Saudi Arabia v BP Oil Supply Co ("The ABQAIQ")*** [2012] 1 Lloyd's Rep 18 at [60]-[61]).

18. This rationale applies as much to a claim for waiting time under LITASCO Clause 4 as to any other aspect of a demurrage claim. The Tribunal focussed on the fact that documents of the kind enumerated in Clause 2B might not exist in relation to the waiting place of the Vessel, and in particular on the fact that if the Vessel was waiting for orders off port limits there would be no communications with anyone at the port. With respect to the Tribunal, I do not find it helpful to look to the application of the clause in circumstances where there would be no documents of the type enumerated, because the clause is qualified by the words "whenever possible", and since it will not be possible to send documents which never existed the requirements of the clause will not be engaged. The Tribunal did not say that there would never be circumstances in which such documents came into existence, and there clearly could be (as the particular facts of this dispute illustrate). What is of more significance is that when such documents do exist in relation to a Clause 4 claim, they will often be relevant and necessary to fulfil the function which Clause 2 is designed to serve. Whenever the waiting at anchorage takes place after arrival at the relevant port, there will be an NOR and likely be a statement of facts which can be required to be signed by the terminal or non-signature protested by the Master in relation to that port. That will likely assist in the swift resolution or further investigation of events which give rise to the Clause 4 claim. Clause 2B fulfils its primary function when such documents do exist, and is not engaged when they do not.

19. Moreover, and to my mind importantly, it is not only the place where the Vessel waits which is relevant to this issue. If the delay occurs at any stage of the voyage after NOR has been tendered at the first loading port, it will be necessary to calculate what laytime has been used quite apart from that caused by waiting for Charterers' orders. In the present case, for example, the Clause 4 claim for time spent waiting at Gladstone necessarily requires a calculation of the laytime used at the loadport, Mailiao. The very purpose of Clause 2B is to require those documents to be provided, and if they are regarded as necessary for a demurrage claim based solely on loading and discharging operations, there is no reason why they should be regarded as any less necessary when they determine a constituent element of a Clause 4 claim. Yet if the Owners' submissions be correct, there is no need to provide any of the Clause 2B documents for the loadport. Mr Lord QC sought to avoid this consequence by arguing that there would still be an obligation under Clause 2A to provide "supporting documentation" under the wording in that part of the clause; and that what amounted

to sufficient supporting documentation would be for a tribunal to determine in any given case, but it would not be the prescriptive minimum required by Clause 2B. If this were right, it would produce the surprising result that the parties intended different or potentially different documentation to be required in order to calculate used laytime at the loadport for the purposes of the two claims, notwithstanding that in each case it was to be provided for an identical purpose, namely to facilitate a swift accounting for, or investigation of, the laytime used. The arbitrators found that the documentation supplied at the loadport in this case failed to fulfil the Clause 2B requirements and was not sufficient to fulfil a demurrage claim relating to loading and discharging operations. That provided a complete time bar defence to the demurrage claim in respect of time at the loadport and the two discharge ports after Gladstone, irrespective of the additional deficiencies in the documentation for the latter two ports. Why, one asks, should the Owners be entitled to supply less rigorous documentation for Mailiao, merely because the claim is one for waiting at Gladstone, notwithstanding that loadport laytime is an essential element in both? Commercial business sense suggests that the parties would have intended the same regimen in each case.

20. There is an echo here of what Bingham J said in the passage in his judgment in ***The Oltenia*** immediately following that quoted above: "the owners would not, as a matter of common sense, be debarred from making factual corrections to the claim presented in time…..nor from putting a different legal label on a claim previously presented, but the 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." Just as owners who have complied with the documentation requirements are not prevented from putting a different legal label on the claim, so conversely they should indeed be shut out from pursuing a claim which has not so complied and should not avoid that consequence merely by re-labelling the claim.

21. Mr Lord argued that if the Charterers' construction were correct the Owners would at least in some circumstances be required to submit irrelevant documents. He gave as an example where the Vessel was ordered to wait at anchorage for further orders prior to arrival at the first loadport and the time so spent exceeded the full 84 days allowed; in those circumstances, he argued, the documentation from the subsequent operations at the loading and discharging ports would be irrelevant to a waiting time claim under LITASCO Clause 4. To my mind there are two answers to this point. First, in the particular example given, in which laytime had already been fully used prior to arrival at the loadport, the Owners would be likely to be advancing a demurrage claim for the time taken in loading and discharging thereafter, and they could be expected to collect and submit the documentation for those purposes in any event. Secondly, and even if there might be some circumstances in which the Clause 2B documents were irrelevant, that is not a sufficient reason for failing to give effect to the clear wording of the contract. The requirement is not onerous: it applies to a very limited class of documents which, if they exist, ought to be readily to hand and capable of submission without undue difficulty or expense. If a provision which is designed to operate for good reason in most circumstances might occasionally require irrelevant documents, that is no reason to suppose that the parties did not intend it to have the effect for which it clearly provides. The points made by Lord Neuberger in ***Arnold v Britton*** at

paragraphs [16]-[23] on the limits to the impact of "commercial common sense" are pertinent in this context.

22. Mr Lord also argued that the amended LITASCO Clause 4 dovetailed with clause 10 of the Fixture Recap, with the latter applying where the Vessel was drifting, and providing for the same consequences save that a contribution to bunkers was required because of the greater use of bunkers when not at anchorage. He argued that because both were concerned with conferring on the Charterers a liberty to wait, and that there would never be any Clause 2B documents when ordered to wait drifting "outside ports", it followed that no such documents were intended to be required when ordered to wait at anchorage. I agree that clause 10 of the Fixture Recap dovetails with LITASCO Clause 4, in each case using the technique of time counting as laytime or demurrage so that a claim under either clause is a demurrage claim. The premise for Mr Lord's argument is, however, a false one: there may be Clause 2B documents relating to the loading and/or discharging ports which are relevant to the calculation of laytime which may be a necessary part of a clause 10 drifting claim. If the laytime is not all used in the loading and discharging operations, a clause 10 claim will be reduced or extinguished pro tanto. Moreover, even if one were to assume that there could never exist Clause 2B documents which were relevant for a clause 10 claim, so that the former clause would not be engaged on its terms, it simply would not follow that Clause 2B was not intended to apply to a LITASCO Clause 4 claim where such documents do exist and Clause 2B is triggered on its terms. Clause 10 of the Fixture Recap does not advance the construction for which the Owners contend.

Conclusion

23. Notwithstanding the deference which I naturally pay to this experienced maritime tribunal, I find myself unable to agree with their conclusion for the reasons I have endeavoured to explain. Accordingly the appeal will be allowed. I will hear the parties on the appropriate form of relief.