

Circular Ref: 2019/0012

Date: 30 July 2019

Protracted Charterparty Dispute

In a recent London Arbitration 14/19, The subject vessel was chartered on an amended Norgrain form as varied and evidenced by a fixture recap email dated 27 February for the carriage of a cargo of hi-pro soybean meal from Savannah, USA to Huelva, Spain, Casablanca, Morocco, and Oran, Algeria.

The relevant Charterparty provided:

21. LAYTIME TO COMMENCE AT LOAD PORT AND FIRST DISPORT AS PER GENCON 94

08:00/14:00. AT 2ND AND 3RD DISCHARGE PORT LAYTIME TO COUNT UPON VESSEL'S ARRIVAL W/W/W/W

OWNS WARRANT THAT VSL'S HOLDS ARE GRAIN CLEAN – IF VSL FAILS TO PASS INSPECTION A NEW NOR WILL BE TENDER UPON VSL'S PASS THE NEW SURVEY.

23. DEMURRAGE USD6,750 ...

24. FREIGHT WILL BE PAID 100% WITHIN 3 BANKING DAYS AFTER SIGNING RELEASING NON-NEGOTIABLE COPY OF B/L MARKED 'FREIGHT PREPAID' AND ORIGINAL B/L WILL BE RELEASED WHEN OWNS BANK CONFIRMS PAYMENT RECEIVED.

29. ANY NORMAL OWNERS/CREW MATTERS (SUCH AS MEDICAL/ REPATRIATION/PROVISIONS/WATER/CASH TO MASTER/REPAIRES/BUNKERS/ SECURITY CHARGES/ALL HUSBANDRY ITEMS ETC) WHICH TO BE FULLY FOR OWNERS ACCOUNT AND COVERED BY OWNERS ...

31. IF THE ORIGINAL BILL(S) OF LADING CANNOT BE PRESENTED AT DISCHARGE PORT(S), OWNERS/MASTER AGREE TO ALLOW THE CARGO TO BE DISCHARGED & RELEASED WITHOUT PRESENTATION OF ORIGINAL BILL(S) OF LADING AGAINST CHARTERERS ISSUING A LETTER OF

INDEMNITY WITHOUT REQUIRING A BANK GUARANTEE OR BANK ENDORSEMENT, ON THE FOLLOWING BASIS:...

(E) SHOULD DISCHARGE OF CARGO BE DELAYED DUE TO CHARTERERS' FAILURE TO STRICTLY COMPLY WITH ALL THE TERMS OF THIS CLAUSE, THEN SUCH DELAY SHALL BE ENTIRELY FOR CHARTERERS' TIME AND ACCOUNT AND LAYTIME SHALL NOT COUNT DURING THE ENTIRE PERIOD OF THE DELAY.

61. AT LOADING PORT THE B/L QUANTITY AND AT THE DISCHARGE PORT THE OUTTURN QUANTITIES ARE TO BE DETERMINED AS PER CUSTOM OF PORT. AT LOADING PORT AND ALL 3 DISCHARGING PORTS, OWNERS TO ARRANGE TO HAVE DRAFT SURVEYS CONDUCTED TO ASCERTAIN QUANTITY OF CARGO LOADED RESPECTIVELY QUANTITY OF CARGO DISCHARGED AT EACH PORT.

IF ANY/ALL CARGO RECEIVERS PRESENT A CLAIM FOR SHORTAGE OF CARGO AT ANY/ALL DISCHARGE PORTS, THE OWNERS ONLY TO BE RESPONSIBLE FOR THAT PORTION OF THE CARGO SHORTAGE CLAIM THAT IS BASED UPON THE OUTTURN DRAFT SURVEY QUANTITY AT THE PORT(S) IN QUESTION. THE AMOUNT OF THE CLAIM THAT IS IN EXCESS OF THE OUTTURN FIGURE AS ASCERTAINED BY THE DRAFT SURVEY AND THE FIGURE AS DETERMINED BY THE CUSTOM OF THE PORT SHALL BE FOR CHARTERERS ACCOUNT AND SHALL BE SETTLED DIRECTLY BETWEEN CHARTERERS AND THE CARGO RECEIVER IN QUESTION.

Norgrain pro-forma provides:

9(B) Once the Bills of Lading have been signed and Charterers call for surrender of Original Bills of Lading against freight payment (see Clause 57) it will be incumbent upon the Owners' or their Agents to comply immediately with such call for release during office hours, Monday to Fridays inclusive.

The vessel completed loading the cargo at Savannah on 11 March. The relevant cargo figures at the loading port were as follows:

- The quantity of cargo loaded, according to a Weight Certificate based upon railcar and truck weight certificates, amounted to 19,068.556 mt. Bills of lading making up that total were signed on behalf of the master on 11 March.
- On 12 March, after the vessel had sailed from Savannah, the master issued a letter of protest in which he stated that according to a draft survey undertaken by the vessel prior to departure, the total cargo on board was 18,653 mt, some 414.68 mt less than the bill of lading quantity. The letter of protest specified the draft survey figures for cargo intended for discharge at each of the three discharge ports,

showing discrepancies of 190.39 mt for the Huelva cargo, 42.33 mt for the Oran cargo and 181.964 mt for the Casablanca cargo when compared to the bill of lading figures.

The surveyors, appointed by the Owners at the load port identified following issues with Master's Letter of Protest:

- potential issues reading drafts;
- non-declaration of the full quantity of fuel oil on board;
- the onboard computer having an apparent fault;
- the depth of water at the berth;
- clerical errors.

There were various disputes between the Owners and the Charterers:

1. Delay in release of bills even after the freight was paid.
2. Change in order of the discharge ports for which the Charterers had agreed to pay an extra sum after a few days' waiting at Casablanca.
3. Receivers brought cargo shortage claims and dispute in relation to it between them;
4. Charterers claimed security charges of USD 4,360 charged to them by agents at Savannah for port security expenses;
5. The charterers claimed charges of USD 17,624.72 raised by the surveyors instructed by them at Savannah to investigate the discrepancy between the shore and draft cargo figures.
6. The owners counterclaimed demurrage of USD 40,720.32.

The Tribunal held that:

1. Clause 31 did not impose an obligation on the charterers to provide a letter of indemnity if original bills of lading could not be presented at a discharge port and thereby rejected Owner's submission around it. Rather, clause 31 imposed an obligation on the owners to accept a letter of indemnity signed by the charterers, without the requirement of any bank counter-signature, if offered by the charterers.
2. The Tribunal analysed Clause 61 that clearly envisages that two figures by custom of the port and by a draft survey could be different, and that alone could not be the reason for delaying the release of the bill by the Owners. On that basis, the Owners would have been in breach of the charter by delaying the release of the non-negotiable bills of lading as they did. The Owners could not win for the lost time waiting at Casablanca when they did not release the bills, but Charterers having agreed for additional payment to change the rotation should be paid by the Charterers as agreed on the arms-length basis between the parties.
3. Clause 61 did not call for a comparison of draft surveys at both ends but only called for check between the bill of lading figure and discharge draft survey. Accordingly, the charterers were entitled to recover on that basis or if the settlement with receivers was lesser.
4. Pursuant to Clause 29, the Owners won the security charges and they could not find any evidence of any charge other than 'normal' or clause limiting those charges as raised by the Owners.
5. It was held that it was reasonable for the charterers to instruct their own surveyors to investigate, not least because of the significance of draft survey figures on discharge under clause 61. However, the

Tribunal did not allow the surveyor's traveling expenses as the local surveyors could have been used.

6. The waiting time at Casablanca went against the Owners due to interpretation of Clause 61. The lost time during a draft survey went against the Charterers as they had the burden to prove if they are deducting off-hire and if nothing is written in the clause.

ALCO's FDD department advice to Andrew Liu's client is as follows:

- For such protracted dispute, the operating team should always maintain appropriate records as they can be a good evidence for your case.
- FDD department can be contact 24x 7 in relation to evidence. This is the service only available to clients of ALCO.
- It is important that a Letter of Protest is not issued blindly and as a routine matter as can be seen in this case.

Source of Information: Andrew Liu & Co., Ltd www.andrewliu.com.hk