

Circular Ref: ALCO 2022/0004

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No Binding Contract, No Valid Arbitration Clause!

In the new case of *DHL Project & Chartering Ltd v. Gemini Ocean Shipping Co Ltd (Newcastle Express)* [2022] EWHC 181 (Comm), in relation to a charterparty dispute, the Commercial Court has set aside an arbitration award on the basis that the Tribunal had no jurisdiction to rule in circumstances, where the parties had not concluded a binding contract after conditions to which the fixture were expressed to be subject (“subjects” or “subs”) were not lifted.

FACTS

- Negotiation between owners and charterers was on the expressed term to the shippers’/receivers’ approval (*i.e.* “on subjects”).
- As shippers could not approve the fixture until a Rightship inspection had been satisfactorily concluded, the Charterers released the Vessel by advising that they would not be lifting subjects and the deal had fallen through.
- In LMAA arbitration, Charterers were in repudiatory breach of charter and awarded the Owners damages on the basis of another clause that ‘the shippers’/receivers’ approval was not to be unreasonably withheld.’. The Tribunal also made the decision on the basis that Rightship results are not to be released by the Owners until sailing.
- Appeal from the arbitration award was made on both s. 67 and s. 69 of Arbitration Act 1996, that is on the basis of Tribunal did not have the jurisdiction and the decision was wrong in law respectively
- The Charterers contended at Commercial Court that:
 - o until the subjects were lifted, there was no binding contract between them and the Owners. Whether or not there was also a binding arbitration agreement (the requirement for the s.67 application) stood and fell with this argument.
 - o ‘Subjects’ qualified the entire contract and were not subject to another clause related to sailing themselves as decided by the Tribunal.

The Commercial Court decision

- The Court found in the Charterers’ favour and set aside the arbitration award pursuant to s.67 of the Act. In these circumstances, the need to consider the s.69 application did not arise. The Court found that the subject fixture was not binding unless and until the Charterers

communicated to the Owners that the subjects were lifted, which they never did. The commercial purpose of such a clause was obvious: a charterer would not wish to enter into a binding contract until both the shipper and receiver had approved the vessel which the charterer was proposing to use and would reserve its position in full until such time.

- The Court also held that the “subjects” in the fixture recap extended to the arbitration agreement contained within it. The Court also referred to the recent Supreme Court decision in *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* [2020] UKSC 38 to dismiss the Owners’ separability argument on the basis that an arbitration agreement was not to be regarded as “a different and separate agreement” from the rest of the contract.

FDD department of ALCO’s advice for Andrew Liu’s clients are as follows:

- a) The issue of finalising the contract with subjects can be tricky and care must be taken.
- b) FDD department is available 24 x 7 to seek any quick advice. This facility is available only to clients of ALCO.

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