

Circular Ref: 2022/0014

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Covid-related Quarantine At A Port – Which Party Is Responsible For Time Loss?

In a recent *LMAA arbitration ((2022) 1113 LMLN 2)*, the issue arose as to which party would be responsible for the time loss due to the port's quarantine order. This is one of the first cases related to COVID to pass through a full-fledged arbitration and present interesting issues of fact-analysis and Burden of Proof.

Facts

- In March 2020, at the very start of COVID-19 pandemic, the claimant, Owners chartered the subject vessel to the respondent for duration of 65/70 days, on an amended NYPE form for a time charter loading in South America with discharge and redelivery in the Far East.
- On 12 April 2020, when the vessel arrived at the load port, the Bosun tested positive for Covid - 19. Accordingly, the vessel was quarantined by the Port Health Authority until 1 May 2020.
- The Charterers off-hired the vessel from 12 April 2020 until 1 May 2020, while Owners demanded USD275, 108 for that period. The Charterers counterclaimed for damages as a result of the vessel's and/or crew's history prior to delivery.
- The parties' dispute went to arbitration in London, and each party appointed their own arbitrator pursuant to the Arbitration clause.

The material clauses from the charter party were as follows:

Clause 15

That in the event of the loss of time from default and/or deficiency of men including strike of officers and/or crew or deficiency of ... stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost ...

Clause 78 – Pestilence and Illness

Normal quarantine time and expenses to enter port shall be for Charterers' account. Any extra time or detention and/or expenses for quarantine due to pestilence and illness of the vessel's Master, Officers and crew shall be for Owners' account but if quarantine detention is due to the vessel having been sent by Charterers to an infected port, such detention time and expenses shall

be for Charterers' account.

Clause 114

Notwithstanding anything in this charter to the contrary, in the event that, at any time during the currency of this charter, the vessel suffers any loss of time (directly or indirectly) in connection with procedures (including, but without limitation, inspections and/or quarantine and/or disinfection) imposed on the vessel, cargo or officers/crew by any port authority or other authorized authority, body or agency, in order to combat avian influenza (or other similar disease) (influenza procedures), the vessel shall not be off hire for any such loss of time and any such loss of time (and the consequences of any such loss of time) shall be for charterers account and, irrespective of whether or not there has been any loss of time charterers shall be liable for the cost of all such influenza procedures which may be charged to or levied against the vessel or owners or officers/crew or cargo **provided always** that the vessel shall be off hire in respect of any such loss of time and shall be responsible for all influenza procedure costs which arise solely as a consequence of the vessel's or officers/crew's history prior to delivery under this charter [emphasis added] ...

Tribunal's finding of Facts

The tribunal made a number of following factual findings:

- On 16 March 2020, third engineer ("3/E") was logged as suffering from "COUGHING – DRY"
- The **Medical log** recorded further complaints of "COUGHING (DRY)" on 21, 22, 27 March and "COUGHING-DRY" on 30 March.
- On 28 March, master sent the mandatory pre-arrival documents, including excerpts from the Medical log and a Maritime Declaration of Health, proclaiming no ill persons were on board.
- The last shore leave was recorded on 29 October 2019 and this information at a request of the port was provided along with the 3/E's symptoms.
- The vessel arrived at the load port on 12 April at 06.10 (LT) and accordingly tendered Notice of readiness (NOR). The port agents acknowledged the NOR and advised that the earliest berthing prospect was on 15 April.
- Due to the issue of 3/E, Port Authority **did not grant** free pratique on 16 April and brought another vessel to the berth.
- On 17 April, Port authorities carried out IgM and IgG antibodies testing and Bosun out of 20 was found positive. Vessel was asked to quarantine for 14 days.
- On Owner's insistence, Bosun was tested 22 April, Bosun results showed negative for IgG antibodies, but positive for IgM antibodies.
- On 1 May, the vessel was released from mandatory quarantine, and free pratique was granted.
- Tribunal considered *Expert evidence*.
 - Both Owners and charterers retained experts to advise them on the testing procedures carried out at the load port and reasonableness of the port authority's actions.
 - The owners' expert expressed the opinion that there was an unnecessary delay due to the wrong

test being requested, and inadequate expertise sought about the tests and the interpretation of results. He cited that the antibody test was a clear false positive. Had there been a real infection, other crew members would have had symptoms, or at least developed positive antibody responses. The absence of either confirmed that there was no history of Covid-19 amongst the crew.

- For the charterers' experts, they agreed with the port health authority's decision and actions given the medical log history prior to arrival.

Parties' case

- *Owners' case* – The Owners' relied on clause 114 and argued it prevails over Clauses 15 and 78. Further they claimed on the basis of implied indemnity as a result of their compliance with the charterers' orders.
- *Charterers' case* – The charterers accepted that clause 114 was engaged on the facts but argued on the basis that last two lines of the clause will be relevant, and it arises due to vessel's crew history. They agreed they have the burden to prove that they came within the exceptions available in these two lines. They argue on the alternative basis off hire due to Clause 15 as due to port actions arising out of the crew. Further, they argued from the basis of Clause 78.

DECISION OF TRIBUNAL

a) By the incorporation of the words "*Notwithstanding anything in this charter to the contrary*" in Clause 114, the tribunal was satisfied that the parties intended the clause to operate as a complete code to regulate the charterers' liability to pay hire and the associated costs of procedures once engaged based in facts and accordingly clauses 15 and 78 did not apply. Finally, in the absence of any ambiguity the *contra proferentem* rule was not relevant and there was no need to imply further terms to argue otherwise to deviate from this simple interpretation of the clause.

b) The tribunal confirmed that as the exclusion in clause 114 operated for the benefit of the Charterers, and accordingly they must bring themselves within its scope by establishing, on the balance of probabilities, that the quarantine procedures imposed resulted from the information recorded in the medical log. They analysed the facts and since 3/E was not positive on testing, the only reason for quarantine measures was due to Bosun testing positive, otherwise the free pratique would have been granted. Therefore, the quarantine was not due to history of the vessel prior to delivery of the vessel and accordingly Charterers could not prove their case to bring them within the exception of Clause 114.

c) Hence they considered Charterers as responsible for all the hire for the quarantine period. Further Owners were declared entitled to their cost.

FDD Department of ALCO advice to clients of Andrew Liu is:

a) All cases revolve around of burden of proof and ability of parties to prove their case. Just by reading a clause, at times the issue is not clear to parties and expert assistance is needed.

b) FDD department remains open 24 x 7 discuss the issue of burden and standard of proof in cases to assist the clients of ALCO.

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

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