Neutral Citation Number: [2004] EWHC 2001 (Comm)

Case No: 2004/510

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13th October 2004

Before:

THE HONOURABLE MR JUSTICE MORISON

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Between:

NB Three Shipping Ltd	**Claimant**
- and -	
Harebell Shipping Ltd	**Defendant**

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Mr D Allen (instructed by **Stephenson Harwood**) for the **Claimant**
Mr C Hancock QC & Mr S O'Sullivan (instructed by **Watson, Farley & Williams**) for the **Defendant**

Hearing dates: Tuesday 10 August 2004

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Judgment

Mr Justice Morison:

1. The principal issue on these applications is whether, on a proper construction of Charterparties on an amended Barecon 89 Form and on a proper interpretation of section 9 Arbitration Act 1996, the Defendant ['Owners'] are entitled to stay an action commenced against them by the Claimant ['Charterers'].

Factual background

2. By two bareboat charterparties on the Barecon 89 Form dated 17 January 1994, the Owners agreed to charter two vessels, ARCTIC TRADER and ARCTIC VOYAGER, which the Claimants' predecessors agreed to hire on the terms of the charterparties as amended. The hire payable was calculated on the basis of a 'principal' element and an 'interest' element. The interest element was at a specified interest rate increased by a specified margin. The interest rate was defined as "the cost of funds to [the Owners] of obtaining the amount in dollars equal to the Principal Balance" [the principal element] prior to the relevant payment date. There was provision for the certification in writing of the rate of interest at which the fund providers were providing funds to the Owners in connection with the financing of each of the two, newly built, vessels.

3. In early July 2003 there was a dispute between the parties about increases in the interest rate and an explanation was sought by Charterers for them. This led to exchanges in correspondence, and Owners declared that there were events of default. For their part, Charterers served notices to enable them to pay off the indebtedness and acquire the vessels.

4. Charterers believe, rightly or wrongly, that they have been overcharged and that the Owners have been making a secret profit. On 22 June 2004 Charterers issued a claim form in this jurisdiction claiming against Owners

> "damages and/or specific performance in respect of the Defendant's failure in breach of [the terms of the two charterparties] … to procure the provision of interim certificates and/or damages and/or repayments and/or delivery up of interest over charged in breach of contract and/or overpaid and/or an account of interest paid by the Defendant with interest thereon assessed pursuant to section 35A of the Supreme Court Act 1981 and costs".

On the same day, Charterers issued an application notice for an order requiring Owners to procure from the lenders "written certificates certifying the rate of interest at which [the lender] have provided funds to the Defendant throughout the term of the Charterparties …" and an order that [Owners] carry out a reasonable search to locate a large number of specified documents and "do make and serve on [Charterers] a list and disclosure statement" relating to them.

5. By letter dated 24 June 2004, Owners' solicitors indicated that they were entitled to a reasonable time to "consider whether it will exercise its option to refer any dispute under the Charterparties to arbitration in accordance with clause 47.02". They went on to say: "Given our client's option we are surprised that you did not consult with our client before you commenced court proceedings." The response of Charterers' solicitors was that clause 47.02 "does not apply in circumstances where our clients have exercised their right pursuant to clause 47.09 … to bring proceedings in the High

Court. It is not inappropriate for our client to seek the mandatory orders … in the absence of arbitration proceedings and an established tribunal." On 30 June 2004 Owners purported to exercise their right "to refer the dispute to arbitration" and to indicate that they would be applying to the Court to stay the proceedings. On 6 July 2004 Owners appointed Mr Stewart Boyd QC as their arbitrator under clause 47.10. On 8 July 2004, Owners notified Charterers that there were certain events which they treated as Termination Events and accordingly Charterers' claims to exercise their purchase options were of no effect. A further dispute arose as to whether an Interest Certificate dated 24 June was issued properly in compliance with the Charterparties.

6. I am not concerned with the merits of the underlying dispute. Charterers say that the claims relating to Termination Events are concocted and have no merit and have been raised to try and create a dispute which may be referred to arbitration.

The statutory and contractual provisions in issue

7. The issue between the parties centres on Clause 47 of the Charterparties and Section 9(1) of the Arbitration Act 1996 and I set them out:

"47. **LAW, JURISDICTION AND ARBITRATION**

47.01 This Charterparty shall be governed by, and construed in accordance with, English law.

47.02 The courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Charterparty but the Owner shall have the option of bringing any dispute hereunder to arbitration.

In case of court proceedings the provisions of Clauses 47.03-47.09 (both inclusive) and of Clauses 47.11 and 47.12 shall apply, while in case of arbitration the provisions of Clauses 47.10-47.12 (both inclusive) shall apply.

47.03 The Owner may bring proceedings relating to this Charterparty in any other court which has jurisdiction by virtue of the Convention on jurisdiction and the enforcement of judgements in civil and commercial matters signed at Brussels on 27th September, 1968, as amended whether before the date of this Deed or not (the "Brussels Convention").

47.04 Moreover, the Owner may bring any proceedings relating to this Charterparty:-

(a) in any court which has jurisdiction by virtue of any other convention or provision which is covered by article 57 of the Brussels convention; or

(b) in any court in a country or territory which is not at the relevant time a Contracting State under the Brussels Convention and in which property of the Charterer is then situated.

47.05 The Charterer waives any objection which it may have now or later (whether on the ground of forum non conveniens or otherwise) to any proceedings relating to this Charterparty being brought in the courts of England or in any court which is covered by Clause 47.03 or 47.04.

47.06 The Charterer agrees that any process or other document connected with proceedings in the English courts which related to this Charterparty shall be treated for all purposes as having been duly served on it if received by Pannell Kerr Forster, New garden House, 78 Hatton Garden, London EC1N 8JA or by any other process agent appointed under the following subclauses.

47.07 Without the prior written consent of the Owner (which consent shall be granted on condition that the Charterer simultaneously appoints another process agent) the Charterer may not terminate the appointment of a process agent which has been appointed under this clause but, if such a process agent resigns or its appointment ceases to be effective, the Charterer within fourteen days thereafter shall appoint a new process agent.

47.08 A judgment relating to this Charterparty which is given or would be enforced by an English court shall be conclusive and binding on the Charterer and may be enforced without review in any other jurisdiction.

47.09 The Charterer shall have the same right to bring proceedings against the Owner in relation to the performance of its obligations hereunder, limited to bringing proceedings in the courts of England and the provisions of Clauses 47.07 and 47.08 apply equally mutatis mutandis to this clause as if they were set herein in full, changing "Owner" to "Charterer" and "Charterer" to "Owner" and, in relation thereto, the Owner hereby appoints WFW Legal Services Limited, presently of 15 Appold Street, London, EC2 as their process agent.

47.10 Any dispute arising from the provisions of this Charterparty or its performance which cannot be resolved by mutual agreement which the Owner determines to resolve by arbitration shall be referred to arbitration in London or, at Owner's option, in another city selected by the Owner by two arbitrators, one appointed by the Owners and one by the Charterers who shall reach their decision by applying English law. If the arbitrators so appointed shall not agree they shall appoint an umpire to make such decision.

47.11 Nothing in this clause shall exclude or limit any right which the Owner may have (whether under the law or any country, an international convention or otherwise) with regard to the bringing of proceedings, the service or process, the recognition or enforcement of a judgment or award or any similar or related matter in any jurisdiction.

47.12 In this clause "judgment" includes order, injunction, declaration and any other decision or relief made or granted by a court.

Section 9(1) of the Arbitration Act 1996 provides:

> "A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter."

The Parties' Arguments

8. Mr Allen made a number of succinct submissions.

(1) When Charterers commenced proceedings they were not acting in breach of any covenant in the contract; indeed, under the terms of Clause 47, Charterers' only forum of choice was the courts of England.

(2) Therefore, when those proceedings were brought they were not brought "in respect of a matter which under the agreement is to be referred to arbitration".

(3) The court has no inherent jurisdiction to stay proceedings otherwise than under the 1996 Act.

(4) The "option" in clause 47.02 of the charterparty does not apply to proceedings brought by the Claimant. 'Brought' in this context means 'started' or 'commenced'. The word 'bring' is used in that context in Clause 47.09 ["the same right to bring proceedings."]. Thus, Owners have an option either to 'bring' any dispute to arbitration or invoke the jurisdiction of the English court. If Charterers bring their claim in that court then Owners have no option to refer the dispute to arbitration. The words used "bringing any dispute hereunder to arbitration" are not apt to describe an option to *refer* a dispute to arbitration. The word *refer* is in common usage in connection with disputes being sent off for arbitration. Clause 47.10 shows that the parties used the word refer or 'referred' in that context. If clause 47.02 was intended to confer an option on Owners to refer to arbitration a dispute in respect of which Charterers had started proceedings in court, clear words could have been used. If Owners are right, then unusually Owners have been given an option which is not circumscribed by any time constraint or formality.

(5) In any event, even were the matter to be referred to arbitration, the court should make the orders which Charterers were seeking under section 44 of the Act. It is necessary in the interests of justice that the documents sought by Charterers be produced and there can be no good reason for Owners reluctance to produce them.

9. On behalf of Owners, Mr Hancock QC made these submissions:

(1) A clause which grants one party only a right to refer a dispute to arbitration is not uncommon "and it is well established that this does not prevent such a clause amounting to a binding arbitration agreement". He referred me to three authorities and a passage from *Russell on Arbitration* 22nd edition 2003.

(a) *The Messiniaki Bergen* [1983] 1 Lloyd's Law Reports 424. There the English Courts were given jurisdiction over disputes but either party had a right to elect that the dispute be referred to arbitration. It was argued that there was no existing binding agreement to arbitrate but at best an agreement to agree, and that, therefore, the 1950 Act did not apply. Bingham J rejected that submission:

> "I see force in the contention that until an election is made there is no agreement to arbitrate, but once an election is duly made (and the option exercised) I share the opinion of the High court of Delhi in the *Bharat* case, that a binding arbitration agreement comes into existence."

(b) *The Stena Pacifica* [1990] 2 Lloyd's Law Reports page 234 Evans J considered a clause which gave both parties an option or election to refer

disputes to arbitration. In my view this authority really adds nothing to the earlier case, which it approves.

(c) *Lobb Partnership Limited v Aintree Racecourse Company Limited* [2000] 1 Building Law Reports 65. There, the clause in question provided that disputes may be dealt with by arbitration but shall otherwise be referred to the English Courts Each party had a right of election for arbitration. In giving judgment Colman J said this:

> "The English courts have consistently taken the view that, provided that the contract gives a reasonably clear indication that arbitration is envisaged by both parties as a means of dispute resolution, they will treat both parties as bound to refer disputes to arbitration even though the clause is not expressed in mandatory terms."

(d) Page 46/7 of *Russell on Arbitration*

> *"***Mutuality no longer a requirement**. Until 1986 English law required an arbitration agreement to be "mutual" in that it had to give both parties the same right to refer disputes to arbitration. In *Pittalis v. Sherefettin*, a rent review case, the Court of Appeal redefined this requirement, seeing no lack of mutuality in an agreement between two persons which conferred on one of them alone the right to refer to arbitration. As Fox L.J. said:
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> "There is a fully bilateral agreement which constitutes a contract to refer. The fact that the option is exercisable by one of the parties only seems to me to be irrelevant. The arrangement suits both parties…the landlord is protected, if there is no arbitration, by his own assessment of the rent as stated in his notice: and the tenant is protected, if he is dissatisfied with the landlord's assessment of the rent, by his right to refer the matter to arbitration. Both sides have, therefore, accepted the arrangement and there is no lack of mutuality."
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> This case is authority that there is no requirement under English law for an arbitration agreement to allow each party to initiate a reference. A party who is not empowered to initiate a reference to arbitration will be entitled to pursue litigation in respect of a dispute in the absence of agreement on some other mechanism such as expert determination. In practice an increasing number of clause give only one party the right to refer disputes to arbitration, particularly in international derivatives transactions with counterparties in jurisdictions where English court judgments would not be enforced. In these cases it is typical for there to be a clause conferring jurisdiction on the courts of one or more jurisdictions with an option exercisable at the instance of only one party to insist that any dispute be referred to arbitration. Obviously it is important if adopting this approach to ensure that the precise circumstances in which the option may be exercised are clearly set out. Provided this is done, the clause will be valid under English law, although if the seat of the arbitration is in another country the relevant local law will have to be examined. Should enforcement of the resulting award be required in some other jurisdiction it would also be

prudent to check that the law of the place of enforcement considers such clauses to be valid."

(2) There are a number of identifiable disputes between the parties, such as the proper interpretation of clause 3.01 and the meaning of the words "from time to time"; whether the effect of a certificate is to disentitle Charterers from going behind it; the form of the certificate is also in issue. If the court is prepared to grant a stay then what the Claimants are effectively seeking is some kind of preliminary disclosure order. Matters of disclosure are for the arbitrators; they have the necessary powers and I should not pre-empt their decision by making what is effectively a mandatory injunction. On normal principles, in any event, a mandatory injunction should not be granted at this stage. The pleadings have not developed, so the issues have not been properly formulated and the disclosure stage has not been reached. There is no urgency and no prejudice will be caused by my refusing an order, whereas if I granted it and it should transpire that the documents were not disclosable, in the eyes of the arbitral tribunal, I would have done an injustice to Owners.

Decision

10. I start with the proper construction of Clause 47 of the Charterparty. It seems to me that under the agreement, Charterers' right to litigate against the Owner is "limited" to bringing proceedings in the English Court: Clause 47.09. In the normal course of events, where a dispute arose the parties would seek to resolve by agreement whether that dispute was to be arbitrated or litigated, but with a reservation of a right to Owners to decide to ["determines to"] have that dispute referred to arbitration [Clause 47.10]. Thus it would have been in the contemplation of the parties that the issue of arbitration or not would be decided before proceedings were commenced in the courts by Charterers. In this case, Charterers have not initiated the discussion contemplated by Clause 47.10 and, in those circumstances, were bound to start an action in the English court, as they did. If Charterers' construction of clause 47.02 were correct, the clause would have a very limited effect. The first part of the clause confers jurisdiction on the English court to "settle any dispute" arising out of or in connection with the Charterparty; the second part gives the Owner an option. If Charterers are right, that option only applies when the Owners are deciding whether to start an action in the court; once court proceedings are started, no question of an option could arise. If Charterers started an action then, so the argument goes, the option did not exist; if Owners started an action then their option has been exercised. Effectively, therefore, the second part of Clause 47.02 says nothing. Further, by starting proceedings without a letter before action, Charterers could avoid the consequences of Clause 47.10 and Owners' right to determine that the disputes should be resolved by arbitration.

11. I cannot accept that argument because it seems to me to contradict the commercial sense of the clause as a whole. Clause 47 is designed to give 'better' rights to Owners than to Charterers. Thus, although Charterers are limited to action in the English Court, Owners are given the right to bring proceedings in any court which has jurisdiction by virtue of a Convention and Charterers waive objections on grounds of forum non conveniens; Charterers are required to provide a place for service within this jurisdiction whereas Owners are not; Charterers are constrained not to challenge enforcement of any judgment "which is given or would be enforced by an English Court" whereas Owners are not. It seems to me that clause 47.02 gives Owners a

right to stop or stay a court action brought against them, at their option. This gives the clause some practical effect and was designed to apply in circumstances such as these. If Charterers seek to bypass the Owners' determination to have disputes resolved by arbitration as contemplated by Clause 47.10, then Owners' option of bringing the disputes to arbitration remains, continuing Owners' control over the issue of arbitration or court. Charterers can obtain no advantage from 'jumping the starting gun'. Whilst I can see the force of the submission as to the words 'bringing any disputes' and the absence of the word 'refer'; it is, in my view putting too much weight on what is a point of semantics. The sense of the whole of Clause 47 is clear, I think. It seems to me that the option granted by clause 47.02 is not open ended. It would cease to be available if Owners took a step in the action or they otherwise led Charterers to believe on reasonable grounds that the option to stay would not be exercised. It would have been better had the precise circumstances in which the option could be exercised or lost were spelt out with greater clarity, but this failure does not, in my judgment render the clause unenforceable. In other cases referred to, the election or option has been properly circumscribed; here, Owners have given themselves in this Charterparty considerable latitude, consistent with what is, largely, a one-sided clause.

12. What is the interrelationship between section 9(1) of the Act and this interpretation of the contract? Mr Allen says that no case has been decided where the stay is applied for against a party who has, by bringing proceedings, not breached any agreement to arbitrate. It seems to me that that point is not well made. Clause 47, as Mr Hancock QC submitted has two streams running through it: the litigation stream and the arbitration stream. The arbitration stream [Clause 47.10] satisfies the requirements of an arbitration agreement since a one sided choice of arbitration is sufficient. The words of section 9(1) "in respect of a matter which under the agreement is to be referred to arbitration" are to be applied when the application for a stay is applied for. Are these disputes under the agreement to be referred to arbitration? Yes, once the option which Owners have has been exercised. These are disputes which, at Owners' option they wish to be arbitrated under the arbitration agreement. Neither the fact that the proceedings were properly brought nor that the terms of section 9(1) only applied after the option was exercised affects the conclusion. A party might commence an action in the belief that the other party would not exercise a right to apply for a stay; his action may have been proper. So here, if Owners had decided not to exercise their option. I would be sorry if any other conclusion had to be reached. Apart from anything else, one of the fundamental objectives of the 1996 Act is to give the parties' autonomy over their choice of forum. On my view of the contract, once Owners exercise their option the parties have agreed that the disputes should be arbitrated. By refusing a stay the court would not be according to them their autonomy.

13. Accordingly, in my judgment section 9(1) of the Act applies and I should order a stay pending arbitration.

14. As to the claim for section 44 relief, I am bound to say that I can see no grounds for making the orders sought for the reasons advanced by Mr Hancock QC which I have referred to above. Disclosure of documents is a matter for the Arbitrators; they have the necessary powers; if early disclosure is thought to be desirable then an application can be made to them for that relief. A mandatory order at this time is not appropriate.

15. Accordingly, I dismiss Charters' applications and grant Owners' application for a stay of the proceedings under section 9 of the Arbitration Act 1996.