



Neutral Citation Number: [2016] EWHC 583 (Comm)

Case No: CL-2015-000552

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

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

Date: 22 March 2016

Before :

THE HON SIR BERNARD EDER

Between :

SBT STAR BULK & TANKERS (GERMANY)
GmbH & Co KG

Claimant/
Owner

- and -

COSMOTRADE SA

Respondent/
Charterer

m/v "WEHR TRAVE" CP dd 16 October 2013

Dominic Happé (instructed by **Loudouns**) for the **Claimant/Owner**
Nevil Phillips (instructed by **Jackson Parton**) for the **Respondent/Charterer**

Hearing date: 29 February 2016

Approved Judgment

.....
THE HON SIR BERNARD EDER

Introduction

1. With leave of the Court, this is an appeal by the claimant pursuant to s.69 of the Arbitration Act 1996 from the Partial Final Award on a Preliminary Issue (the “Award”) of a tribunal comprising Messrs Lindsay Gordon and Peter Giles (the “tribunal”) in the underlying arbitration relating to disputes arising under a charter (the “charter”) between the claimant as owners (“owners”) and the respondent as charterers (“charterers”) of the m/v WEHR TRAVE (the “vessel”).
2. The charter comprises an amended NYPE 1946 form with typed additional clauses numbered 3A-108 and is evidenced by a clean recap dated 16th October 2013 attaching and amending a previous time charter dated 19th May 2010 in respect of a sister vessel, m/v WEHR HAVEL. So far as material, the relevant terms (including deletions) were as follows:

“ll. 13-15

‘... That the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, for ~~one~~ Time Charter trip via good and safe always afloat, always accessible ~~port(s)~~ and/or ~~berths~~ via ~~Continent/Mediterranean/Black Sea/East Mediterranean to Red Sea/Persian Gulf/India, always via Gulf of Aden~~ one Time Charter trip via via good and safe ports and/or berths via East Mediterranean/Black Sea to Red Sea/Persian Gulf/India/Far East always via Gulf of Aden, with steels and/or other lawful/harmless general cargo, suitable for carriage in a cellular container vessel as described. No bulk cargo is allowed. Duration ~~about 40 45 days without guarantee~~ minimum 40 days without guarantee within below mentioned trading limits.’

ll. 18-35

‘Vessel to be placed at the disposal of the Charterers ~~on~~ passing ~~Skaw, Denmark~~ dropping outward pilot Algeciras at any time day or night, Saturdays, Sundays and Holidays included. Vessel on her delivery to be ready to receive any permissible cargo... in such lawful trades, between good safe port and/or good safe ports and good safe berth and/or good safe berths and good safe anchorage and/or good safe anchorages, always afloat, always within Institute Warranty Limits (See also Clause 38) as the Charterers or their Agents shall direct ...’

cl. 4

‘That the Charterers shall pay for the use and hire of the said Vessel at the rate of U.S.\$~~10,000.00~~ 8,200 per day, pro rata

~~including overtime, basis redelivery Mumbai/Colombo range or U.S.\$9,250.00 per day, pro rata including overtime basis redelivery East Coast India, payable every 15 days in advance, commencing on and from the day/time of her delivery, as aforesaid, and at and after the same rate for any part of a day; hire to continue until the time of the day of her re-delivery as per Clause 55 in like good order and condition, ordinary wear and tear excepted, to the Owners (unless lost) on dropping last outward sea pilot one (1) safe port in Charterers' option Mumbai/Colombo range or in Charterers' option one (1) safe port East Coast India range, not north but including Chennai Colombo/Busan range including China not north Qingdao, at any time day or night, Saturdays, Sundays and Holidays included...~~

cl. 8

'... The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency...'

cl. 38 – Trading Exclusions

'Notwithstanding anything to the contrary contained in this charter, the Charterers warrant that the vessel shall not trade in the following places:

Albania, Angola (including Cabinda)

Cambodia Ccos Bay of USA, Cuba, Turkish occupied Cyprus,

Ethiopia

Haiti

Iraq, Israel, Iran

Laos, Lebanon, Liberia

Namibia, Nicaragua, North Korea, Norway

Russian Pacific ports,

Slovenia, Somalia, Syria

War zones and/or war risk zones and/or areas breaching United Nations' sanctions.

all ex Yugoslavian States, Yemen

Zaire

‘Georgia to be allowed ...’

3. The relevant facts as found by the tribunal and set out in the Award may be summarised shortly as follows:
 - i) The vessel was delivered into the charter on dropping outward pilot at Algeciras at 1930hrs on 16th October 2013. Also on 16th October 2013, charterers gave voyage orders to owners as follows:
 - ii) *“Loading ports rotation: Sevastopol (Ukraine) + reverting (probably Gemlik/Turkey).”*
 - iii) *“Discharging ports rotation: probably will be (Jeddah + Muscat + Hamriyah + Jebel Ali + Dammam.”*
 - iv) The vessel proceeded from her place of delivery to the Black Sea, where she loaded cargoes at three ports – namely Sevastopol/Avitla, Novorossiysk and Constantza/Agigea. She then proceeded on her route, discharging at one port in the Red Sea (Jeddah), one port in the Gulf of Oman (Sohar), and three ports in the Persian Gulf (Hamriyah, Jebel Ali and Dammam). The vessel berthed at Dammam on 7 December 2013.
 - v) On the following day i.e. 8 December 2013, charterers then ordered the vessel to proceed to Sohar (Oman) after sailing from Dammam when the vessel was empty of cargo to load a project cargo for delivery at New Mangalore or Cochin (West Coast of India). (Although not stated in the Award, it was common ground that such order was given before the vessel had completed discharge at Dammam and that I should proceed on that basis.)
4. It is this last order that led to the dispute between the parties and the preliminary issue for the tribunal which is the subject of this appeal. In particular, it was and remains owners’ case that this was an order that the charterer was not contractually entitled to give the vessel under the charter i.e. it was an illegitimate order. In the event, the tribunal concluded that charterers were so entitled. Owners now seek, by this appeal, to challenge that decision.
5. The question of law identified in the Arbitration Claim Form and for which leave was granted is as follows:

“On the true construction of the Charter, was the respondent charterer under a “one time charter trip”, after the vessel had discharged the entirety of all previous loaded cargo, entitled to order the empty vessel to another load port (Sohar) and discharge port to perform a further trip/voyage or only to order the vessel to proceed to the agreed Charter redelivery place having completed the agreed one time charter trip?”

Mr Phillips on behalf of the charterers submitted that the question of law is “infelicitously formulated” in more than one respect. In particular, he submitted that it assumes the answer to the question that the Court must determine, namely whether

charterers had “*completed the agreed one time charter trip.*” Rather, he submitted that the essential issue should be restated as follows:

“Whether or not the particular terms of the charterparty permitted the Charterers to order the vessel to load a further cargo after the initial cargo had been discharged?”

6. I do not think that that there is much difference between these two formulations – although the latter has the merit of being shorter and (as Mr Happé acknowledged) addresses the central issue.
7. On behalf of the owners, Mr Happé’s main submissions were, in summary, as follows:
 - i) The tribunal was wrong as a matter of the straightforward meaning of the words used and of commercial sense.
 - ii) As a matter of authority, there is nothing that supports the tribunal’s interpretation and finding; indeed, the tribunal’s interpretation and finding is not consistent with other decisions which have considered the same or equivalent wording and is contrary to authority on the charterer’s entitlement to load within the agreed range.
 - iii) There are four features of the charter that determine its proper interpretation and the correct answer to the question of law viz.
 - a) The charter was for a “trip” i.e. a journey or voyage from one place or range of places to another. While business parties should be permitted to make contracts in the form that they find suits their commercial interests, as a matter of law and of commercial sense, there cannot be - or, at the very least, the parties would not be likely to make - a charter that is in effect open-ended, the determination of which depends solely on the charterers’ decision. No owner would make such a charter and no charterer could expect that such a charter would be made with it. It would require the very clearest wording for the parties to be taken to have made such an agreement.
 - b) Second, in the case of a time charter trip and of this charter, it is the trip that defines the duration of the charter: see Time Charters, 7th Edition at §4.99 and §I.17. Thus, here the charter was for a “*trip ... with steels a/o other lawful/harmless general cargo* ” i.e. it was a trip carrying cargo. That is explicit from the wording, “*one tct... with steels a/o other lawful/harmless general cargo* ”.
 - c) Third, the charter was for a “*trip [carrying cargo] ... via eastmed/blacksea to redsea/pg/india/fareast*” (emphasis supplied). In other words, the charter was for a trip carrying cargo from one range of ports to another.
 - d) Finally, the charter was for “*one trip [carrying cargo from one range of ports to another]*” (emphasis supplied). There is, obviously enough,

a material distinction between agreeing a single trip (or voyage) and a series of trips (or voyages): see Time Charters at §4.99. The parties can, of course, if they wish, agree a series of trips (or voyages). But that was not what the parties agreed in this case.

- iv) In summary, Mr Happé submitted that charterers' entitlement was to load in "eastmed/blacksea" (where in fact she did load - Sevastopol, Novorossiysk, Agigea) for a trip to "redsea/pg/india/far east" (where in fact she did discharge - Jeddah, Hamriyah, Jebel Ali, Dammam); that there was no entitlement at all to load in "red sea/pg/india/far east"; that the "trip" therefore came to an end with the conclusion of the cargo carrying journey and the entitlement to load cargo came to an end with that trip.
 - v) The simple answer is that Sohar was not within the agreed range of load ports.
8. In considering these submissions, it is important to bear in mind that the present charter is a time charter. As submitted by Mr Phillips, time charters can be divided into two main categories viz term time charters (where the charter period is agreed in advance), and trip time charters (where the charter period is defined by a trip within a geographical range). In both cases, the defining characteristic of the charter is that the vessel is under the directions and orders of the charterer as regards her employment for the charter period. In that context, Mr Phillips drew my attention to the observations of Popplewell J in *The Wisdom C* [2014] EWHC 1884 (Comm), [2015] 1 WLR 1 (a case that arose out of a trip time charter) at paras. 28-29:

"28. ... A time charter is not [a voyage charterparty]: the owner does not agree to carry goods from and to specific or nominated ports, but rather to make the vessel and her crew available to the charterer, in return for hire, as a means for the charterer to transport goods. The defining characteristic of a time charter is that the vessel is under the directions and orders of the charterer as regards its employment. It is the charterer who determines what voyages the vessel is to undertake and what cargo it is to carry, within the geographical and other constraints contained in the particular charterparty clauses ... What matters is that the charterparty is not in nature an undertaking by the owner to carry goods, but an undertaking by the owner to make available to the charterer a vessel and crew for the latter to employ in transporting goods.

29. This is as true of a trip time charter, such as the charterparty in this case, as of a term time charter. Although the length of the period of hire is limited by a trip defined within a geographical range (and sometimes, though not in this case, by a maximum duration), the nature of the contract for the duration of the period remains that of making the vessel and her crew available to the charterers as a means for the charterers to transport goods, not a contract for carriage of the goods by the owners."

9. In addition, Mr Phillips referred me to the earlier case of *The Eugenia* [1963] 2 Lloyd's Rep 381 which was also a case that arose out of a trip time charter and where the same characterisation of a charterer's rights under a trip time charter is set out in particular in the Judgment of Lord Denning at p388 rhc:

"This is a time charter-party, the essence of which is that the shipowners place the ship at the disposal of the charterers for a time – the charterers paying hire for that time. In some time-charters the time is fixed beforehand, such as six months or 12 months. In other time-charters the time is uncertain, and is to be measured by the time occupied by a particular voyage."

10. In response, Mr Happé made a general submission that the tribunal here went astray because it was too astute to emphasise the distinction between a time charter trip and a voyage charter; that although such a distinction should be borne in mind, its overemphasis appears to have led the tribunal to take its eye off the ball both as to the nature of the trip agreed and the ranges.
11. This is not the place to perform an exhaustive analysis of the differences between the various types of charter. However, I do not agree that the tribunal took its eye "off the ball". For present purposes, it is sufficient to note that from the charterer's perspective one of the advantages which a time charter (including a time trip time charter) has over a voyage charter is that voyage orders under a time charter do not constitute an irrevocable election: see, for example, the comments of Donaldson J in *The Aragon* [1975] 1 Lloyd's Rep 628 at p633 lhc where he stated that it was "*wholly foreign to the whole conception of a time charter-party, which entitle[s] the charterer upon paying the hire to call upon the vessel to visit any port or ports which he wishe[s] within trading limits subject to any express agreement to the contrary*".
12. For my part, I think that it is also important to recognise that the concept of a "trip time charter" embraces (or at least may embrace) a number of possible permutations. For example, a "trip" may involve loading cargo at A and a single voyage to X to discharge the cargo there i.e. at X. Alternatively, it may involve loading cargo at a number of different ports e.g. A, B and C and a voyage to X to discharge the cargo there or perhaps at a number of different discharging ports e.g. X, Y and Z. Alternatively, it may involve several loading and discharging operations at different ports along a route from A to Z e.g. loading at A discharging at X, then loading at B discharging at Y and then loading at C discharging at Z. As a matter of language, I think that these examples might all be described as involving a single "trip". In my view, there is no single definition as to what constitutes a "trip" or "one trip". It follows that I do not consider that the fact that the charter here was for "*one*" time charter trip (a point which Mr Happé emphasised repeatedly) is of much, if any, assistance.
13. Ultimately, the scope of any "trip time charter" will depend upon the particular terms agreed between the parties. However, I accept the basic underlying notion of any time charter including a trip time charter viz. that the vessel will generally be under the directions and orders of the charterer as regards her employment for the charter period. Of course, the charterers' entitlement to give directions and orders may be restricted by whatever may be agreed between the parties with regard, for example, to period, trading limits, geographical route and even (perhaps) number and designation

of loading and discharging ports or ranges. However, any such restriction would have to be specifically agreed and, in my view, would require clear words.

14. In light of these observations, it seems to me that the question of law in the present case does not involve any general point of public importance but turns on a rather narrow question of construction of this specific charter – and, in particular, whether this specific charter contains sufficiently clear words to exclude Sohar as a loading port.
15. In my view, it is plain that, as submitted by Mr Phillips, the charterers were not (as a matter of language) restricted to loading the vessel at a single port. The charter in the present case specified a delivery port/range and a redelivery port/range. By and within that range, it specified a route. On that route the vessel was to trade “*between good safe port and/or good safe ports and good safe berth and/or good safe berths and good safe anchorage and/or good safe anchorages, always afloat, always within Institute Warranty Limits (See also Clause 38) as the Charterers or their Agents shall direct*” (ll. 18-35). Thus, I agree that the charterers were, in principle, entitled to call at such ports as they wished provided that the calls were within the trading limits (ll. 18-35 and cl. 38) and the route was not inconsistent with the contractual route, which was a voyage from Algeciras to the Colombo/Busan range via the East Mediterranean and/or the Black Sea and/or the Red Sea and/or the Persian Gulf and/or India and/or the Far East (always via the Gulf of Aden and always ending in the Colombo/Busan range).
16. For the avoidance of doubt, I should say that (as was common ground) proceeding to Sohar was not inconsistent with the contractual route; it is both (i) between Dammam and New Mangalore/Cochin (which were permissible discharge ports) and (ii) between Dammam and Colombo (which was the closest redelivery port). Further, owners have never contended that Sohar was anything other than safe, within IWL and not excluded by cl. 38. I should also mention that it was common ground that the “obliques” in the phrase ‘*to red sea/pg/india/far east*’ were conjunctive *or* disjunctive in charterers’ option, such that charterers were entitled to order the vessel to proceed to ports in the Red Sea and the Persian Gulf and India and the Far East, if they so desired.
17. In essence, it seems to me that the core of Mr Happé’s argument seeks to construe the word “*via*” in the phrase “*via eastmed/blacksea...*” as a term identifying – and thereby restricting - the range at which the vessel might load cargo; and the word “*to*” in the phrase “*to redsea/pg/india/fareast...*” as a term identifying – and thereby restricting - the range at which the vessel might discharge cargo. Taken together with the other features of the charter identified by Mr Happé, that is the foundation of his argument that the charterer was not entitled to give orders to the vessel to proceed to Sohar and there load cargo.
18. Like the tribunal, I do not agree. As it seems to me, the word “*via*” simply means “*by way of*”; and the word “*to*” simply denotes the contractual route. Even in the context of this being a charter for “*one*” charter trip, I do not read those words as restricting the charterers’ general entitlement to give orders and directions with regard to loading and discharging provided, of course, that, as already stated, the calls were within the trading limits and the route was not inconsistent with the contractual route. To adapt the language of Donaldson J in *The Aragon*, the charterer was – upon paying hire -

here entitled to call upon the vessel to load and discharge at any port or ports within trading limits and on the contractual route subject to any express agreement to the contrary – and I do not read the words relied upon by Mr Happé as constituting such contrary express agreement. At the very least, I do not consider that those words are sufficiently clear to lead to the conclusion advocated by Mr Happé.

19. In my view, that is sufficient to dispose of this appeal. However, in fairness to Mr Happé and also to Mr Phillips, I should deal briefly with certain further points that were addressed in argument before me.
20. First, Mr Happé submitted that the tribunal was quite wrong to say that, on the owners' case, the vessel "*could have sailed from Dammam to load at Sohar if she still had a small parcel of cargo on board on departure from Dammam*". I am not sure that this criticism is entirely fair because elsewhere in the Award, the tribunal records what it says was the "*central feature*" of the owners' arguments viz that the charterers' entitlement to load further cargo came to an end at Dammam where the last cargo loaded in the Black Sea was discharged. In any event, Mr Happé made plain that the main thrust of his case on this appeal did not depend on whether or not there was any cargo on board when the order to load at Sohar was given or after departure from Dammam. Rather, his submission was simply that Sohar was not within the agreed range of load ports – and I have already dealt with that submission.
21. Second, Mr Happé submitted that as a matter of commercial sense, if the charter was not circumscribed by its nature as a "trip" in conjunction with its geographical ranges it would be entirely open-ended; that if the tribunal were correct then the charterers here could have employed the vessel for as many voyages with load and discharge ports in the Red Sea, Persian Gulf, India and Far East as they liked; and that in the case, for example, of a time charter trip from, say, East Coast USA to West Coast Australia, the charterers would effectively be entitled to trade the vessel for as long as they wished. I accept that such argument has some superficial attraction. However, it is not correct to say that the charter here was "open-ended". At the risk of repetition, the charterers could not give orders for the vessel to proceed outside the stipulated trading limits or which were otherwise inconsistent with the contractual route. In my view, those two features imposed important constraints. As to the example of a possible time charter trip from East Coast USA to West Coast Australia, I confess that I have never come across such a charter. In any event, the proper construction of such charter would obviously depend upon its own specific terms.
22. Third, Mr Happé submitted that the tribunal was wrong to say that owners' argument was "*commercially unattractive*" because it meant that the charterers were obliged to ballast the vessel to the place of redelivery without earning freight. In particular, he submitted that only the charterers knew the programme for the cargo; that they could have ordered the vessel to carry the cargo loaded to a port in the discharge port range that was closer to or in the range of places of redelivery; and that was the charterers' choice. Of course, Mr Happé is right in saying that the programme for the cargo was the charterers' choice; and I also readily accept that if the charter were to be construed in the way submitted by Mr Happé then the charterers here would have been obliged to ballast the vessel to the place of redelivery without earning freight. However, it seems to me that the tribunal was saying no more than given the general nature of any time charter – including a time charter trip – it would be commercially unattractive for the charterers to have to ballast the vessel to the place of redelivery and pay hire to

owners throughout such ballast voyage without having the possibility of earning freight. As it seems to me, that is a factor which these experienced arbitrators were properly entitled to take into account in reaching their conclusion. But even if that is wrong, it does not affect the conclusion which I have reached as to the construction of the charter in the present case.

23. Fourth, Mr Happé submitted that there was no authority in favour of the tribunal's decision. In particular, he sought to distinguish the two cases relied upon by Mr Phillips viz *The Aragon* [1975] 1 Lloyd's Law Rep 628 and *Ispat Industries Ltd v Western Bulk Pte Ltd (The Sabrina 1)* [2011] EWHC 93. Indeed, I understood Mr Happé to rely on these cases in support of owners' case. I accept that these cases are of some interest. However, in my view, they both turn on their own particular wording and are of little (if any) assistance in the present context; and I say no more about them.

Conclusion

24. For all these reasons, I would answer the question of law as follows: "*The charterers were entitled to order the vessel to load further cargo at Sohar.*" It follows that the appeal should be dismissed and, subject to any further submissions to the contrary, that the charterers are entitled to the costs of this appeal. Counsel are accordingly requested to draft an order for my approval. Failing agreement, I will deal with any outstanding issues.