Case No: CL-2015-00759

Neutral Citation Number: [2016] EWHC 880 (Comm)
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

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

Date: 20/04/2016

**Before :**

**THE HON. MR JUSTICE POPPLEWELL**

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**Between :**

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| **ST SHIPPING AND TRANSPORT PTE LTD** | **Claimant (Respondent in the arbitration)** |
| **- and -** | |
| **SPACE SHIPPING LTD** | **Defendant (Claimant in the arbitration)** |
| **"CV STEALTH"** | |

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**Mr Simon Croall QC and Mr Koye Akoni** (instructed by **Clyde & Co LLP**) for the **Claimant**
**Mr Sean O'Sullivan QC and Mr James Hatt** (instructed by **Lax & Co LLP**) for the **Defendant**

Hearing dates: 13 April 2016

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# Judgment

**The Hon. Mr Justice Popplewell :**

**Introduction**

1. On 19 September 2014 a Venezuelan Court ordered the detention of the vessel CV STEALTH ("the Vessel") at Puerto La Cruz, where she was waiting to load cargo. She remains there to this day. By a Partial Final Award dated 23 September 2015 ("the Award"), the Arbitrator determined that the charterers of the Vessel were liable to the owners for the financial consequences of the detention. The charterers seek to appeal pursuant to section 69 Arbitration Act 1996. There is an issue as to whether they require permission to appeal.

**The facts**

2. The following facts are taken from the findings in the Award.

3. By a timecharter on an amended Shelltime 4 form dated 10 April 2014 ("the Charterparty"), the Defendant ("the Owners") let the Vessel to the Claimant ("the Charterers") for a period of, in the event, about 8 months. The charter was to last from the date of delivery into the charter until between 1 April and 25 April 2015. Hire was payable monthly in advance at a rate of US$14,500 a day.

4. Clause 13 was in unamended form as follows:

> "13.(a) The master (although appointed by Owners) shall be under the orders and directions of Charterers as regards employment of the vessel, agency and other arrangements…
>
> Charterers hereby indemnify Owners against all consequences or liabilities that may arise
>
> (i) from signing bills of lading in accordance with the directions of Charterers, or their agents, … or … from the Master otherwise complying with Charterers or their agent's orders
>
> (ii) from any irregularities in papers supplied by Charterers or their agents."

5. The off-hire clause, Clause 21, provided in material parts as follows:

> "21.(a) On each and every occasion that there is loss of time for more than 6 (six) hours…
>
> …
>
> (v) due to the detention of the vessel by authorities at home or abroad attributable to legal action against… the vessel, the vessel's owners or Owners (unless brought about by the act or neglect of Charterers)
>
> … the vessel shall be off-hire…"

6. Clause 27 provided:

> "27.(a)… Further, neither the vessel, her master or Owners, nor Charterers shall, unless otherwise in this charter expressly provided, be liable for any loss or damage or delay or failure in performance hereunder arising or resulting from… arrest or restraint of princes, rulers or people"

7. Clause 28 provided

> "28. … No voyage shall be undertaken, nor any goods or cargoes loaded, that would expose the vessel to capture or seizure by rulers or governments."

8. Clause 41 stated that the Charterparty was to be governed by English law and provided for dispute resolution by arbitration in accordance with the BIMCO Dispute Resolution and Law clause set out at Clause 111 of the Charterparty, which provided for the Arbitration Act 1996 to apply. Clause 41 went on at paragraph 41(c) (ii) to provide:

> "The parties hereby agree that either party may –
>
> (a) appeal to the High Court on any question of law arising out of an award;"

9. On 10 August 2014 the Vessel was delivered into the Charterparty.

10. On 4 September 2014 the Charterers sub chartered the Vessel to AS Capital by a voyage charter on an amended BPVoy form. The sub charter was for the carriage of a minimum 50.000 m.t., up to a full cargo, of crude oil from one to two safe ports Venezuela, intention Guaraguao, Puerto La Cruz, Venezuela, to a range of ports in sub charterer's option. It was always the intention of AS Capital to carry a cargo of up to 400,000 barrels, or as limited by draught at the discharge port, of Mesa crude oil from Guaraguao Terminal, Puerto La Cruz, Venezuela for anticipated discharge at a United States terminal.

11. The Charterers gave employment orders to the master on 4 September 2014 in an email in the following terms:

> "Vessel: MT CV Stealth
> Charterers: AS Capital LTD
> …
> Load port: Guaraguao Terminal, PLC, Venezuela
> LAYCAN: 4-5 Sep 2014
> …
> Cargo: Mesa Crude-no heating required. Total cargo up to 400 kbbls or as limited by draft at the discharge port.
> Surveyors: SGS
> Loadport Agents: Atlantic Marine Services SA
> …

Vessel to arrive load port in all respects ready to load the nominated cargo.

...

Anticipated discharge destination is TBN Terminal in Houston Ship Channel; complete information to follow"

12. In that email the Charterers also informed the master that there would be a second set of load port agents, Agemar, who were the Charterers' protective agents to oversee events at Puerto La Cruz because the Charterers were unfamiliar with Atlantic Marine Services.

13. The Vessel proceeded to Puerto La Cruz pursuant to those orders and arrived at 2300 hours on 5 September 2014.

14. On 6 September 2014 Atlantic Marine Services were replaced as AS Capital's agents by Grupo Acosta Marine Services ("GAMS"). The master was given an order to communicate with GAMS.

15. On 11 September 2014 the Charterers' operator, Mr Maciejewski, received a document through the broking channels purporting to be from Petroleos de Venezuela S.A. the state oil company ("PDVSA"). This gave details of the cargo to be loaded and a loading window of 14-17 September 2014. It named the Vessel as the vessel on which the cargo was to be loaded. It turned out that this document was not genuine. Nevertheless I shall refer to it, as the Arbitrator did, as the Authorisation. At around the same time, on 11 September 2014, GAMS sent a copy of the Authorisation to the master of the Vessel.

16. The Authorisation was stamped but not signed. It aroused Mr Maciejewski's suspicions, and he put in train enquiries to check its authenticity with PDVSA. On 12 September 2014 Mr Maciejewski instructed the master to ignore the Authorisation and comply only with orders coming from the Charterers themselves.

17. On 13 September 2014 the Vessel was boarded initially by two Port State Control officers, and then by a large team of investigators including six members of the National Guard, government lawyers, security officers from PDVSA, the harbourmaster and customs officers. The investigators inspected, amongst other things, the Vessel's documents and cargo tanks, which were empty. The investigation team's interests were apparently only aroused when they were shown the PDVSA Authorisation. They informed the master that this document was not an official PDVSA document.

18. On 17 September 2014 the Charterers' agents Agemar sought permission from the harbourmaster for the Vessel to sail, the Charterers having purported to cancel the sub charter. The request was rejected on 19 September 2014, with the harbourmaster commenting that she would not be allowed to sail until further notice.

19. Meanwhile in the course of its investigation into the forged Authorisation, PDVSA obtained information that led to the arrest of a Mr Asuncion Rafael Barbosa on 12 September 2014. A representative of GAMS who had sent the

document to the Charterers informed both PDVSA and the National Guard that it was Mr Barbosa who had engaged GAMS' services. Mr Barbosa was subsequently charged with several criminal offences including the forgery of the PDVSA Authorisation and with attempting to export cargo without the necessary authorisation of PDVSA.

20. On 19 September 2014 the local Venezuelan Court, the Sixth Court, made a "pre-precautionary or unnamed order", pursuant to a request from the Regional Prosecutor, prohibiting the Vessel from sailing from Puerto La Cruz. The prohibitive measure was a precautionary measure, pending, and to assist, the investigation into Mr Barbosa's alleged crimes.

21. Despite attempts to have the order discharged, it remained in place and the Vessel has remained detained at Puerto La Cruz ever since. At no stage has there been any allegation made, either by the parties or by the authorities in Venezuela, that the Owners, the Vessel, the crew, or the Charterers, were in any way involved in any improper activity.

22. The Charterers paid hire up to and including January 2015. They contended that the Charterparty was frustrated on 29 January 2015. The Arbitrator rejected that contention, from which there is no appeal.

23. By an email of 1 April 2015, and without prejudice to their position that the Charterparty had been frustrated, the Charterers purported to redeliver the Vessel.

**The Claims and Issues before the Arbitrator**

24. The Owners claimed a balance of hire, together with costs and expenses, up to the time of redelivery of the Vessel on 1 April 2015. The Charterers contended that the Vessel was off hire from 19 September 2014 until 1 April 2015 pursuant to Clause 21(a)(v) of the Charterparty.

25. In relation to the period since redelivery on 1 April 2015, the Owners claimed compensation for the continued detention of the Vessel on one or more of three grounds:

    (1) under the express indemnity in clause 13(a)(i) of the Charterparty ("against all consequences or liabilities that may arise… from the Master otherwise complying with Charterers or their agent's orders");

    (2) under the express indemnity in clause 13(a)(ii) of the Charterparty ("against all consequences or liabilities that may arise… from any irregularities in papers supplied by Charterers or their agents");

    (3) as damages for the Charterers' breach of Clause 28 of the Charterparty.

26. The Charterers disputed liability under Clause 13 or Clause 28, relying amongst other things on the "arrest or restraint of princes, rulers or people" exception in Clause 27(a) of the Charterparty.

27. The Arbitrator held that:

(1) the Owners were entitled to an indemnity under clause 13(a)(i) because the detention arose from compliance with the orders of the Charterers or their agents;

(2) the Owners were entitled to an indemnity under clause 13(a)(ii) because the detention arose from irregularities in the Authorisation supplied by the Charterers or their agents;

(3) the Charterers were in breach of clause 28 in that the voyage involved the increased risk of detention resulting from Mr Barbosa's intention to export cargo unlawfully;

(4) clause 27(a) provided no answer to these liabilities because they fell within the proviso "unless otherwise in this charter expressly provided";

(5) the Vessel was not off-hire under clause 21(a)(v) because the detention was "brought about by the act or neglect of Charterers" in breaching clause 28 and/or giving the orders and supplying the Authorisation which triggered the obligation to indemnify under clause 13.

**Clause 28**

28. It is convenient to address first the arguments on clause 28.

29. On behalf of the Charterers, Mr O'Sullivan QC submitted that:

(1) The question whether the voyage exposes the vessel to capture or seizure is to be answered prospectively at the time that the voyage order is given by the Charterers, in this case on 4 September 2014.

(2) Clause 28 is only engaged if at the relevant time there are factors which, as a matter of objective fact, materially increase the risk of capture or seizure beyond what is inherent in normal employment of the vessel.

(3) Although the Arbitrator purported to apply a prospective test, his conclusion that clause 28 was breached, expressed in compressed reasoning at paragraphs 100 and 101 of the Award, must have involved an error in one or more of three ways:

(a) In giving a retrospective interpretation to the clause, in spite of saying that he did not; and/or:

(b) in reversing the burden of proof of a risk existing at that date; or

(c) in treating the risk as sufficient merely because at that stage there was no authorised cargo for sale/export by PDVSA.

30. Mr Croall QC for the Owners took issue with the first and third of these submissions.

31. As to the first, it is unnecessary to decide whether Mr O'Sullivan is right, because the Arbitrator was prepared to assume that he was, and made his findings of fact as to the position on 4 September 2014 accordingly. However I would not want to be taken as endorsing the correctness of his proposition. Clause 28 makes no reference to voyage orders, but merely to the undertaking of a voyage. If the increased risk materialises in the course of a voyage, the clause comes into effect irrespective of whether it arises subsequently to the original voyage orders. In the analogous circumstances of safe port warranties in time charters, the contractual promise is a continuing one, such that if a port is prospectively safe when the order to proceed there is given, but becomes unsafe at a time when a time charterer could give a fresh order in time for the vessel to comply with it and avoid the unsafety, the time charterer is in breach of the warranty: see ***Kodros Shipping Corporation v Empresa Cubana de Fletes (The "Evia" (No 2))*** [1982] 2 Lloyds' Reports 309 per Lord Diplock at 310 and per Lord Roskill at pp. 319-320. Similar principles apply to clause 28 of the Shelltime 4 form. If the vessel is ordered to a port at a time when there is no materially increased risk of capture or seizure, but such a risk arises whilst she is en route, clause 28 would entitle the Owners to refuse to continue to comply with the order, if they were aware of it; and in the event of continued compliance, the charterers would be in breach of clause 28, provided that the risk arose before it became impossible for the charterers to give fresh orders which could be complied with in time to avoid the risk. It is common ground that breach of clause 28 does not depend upon any knowledge of the increased risk on the part of the Charterers: see ***Ullises Shipping Corp v Fal Shipping Co Ltd (The "GREEK FIGHTER")*** [2006] EWHC 1729 (Comm) at paragraph 286.

32. As to Mr O'Sullivan's third point, the reasoning of the Arbitrator was not so much "compressed", as he submitted, but expressed concisely because he referred back to the findings of fact he had set out earlier in the Award. On a fair reading of the Award those findings of fact are dispositive of the issue and no question of law arises. The Arbitrator stated at paragraph 75 that he accepted the proposed findings of fact contended for by the Owners, set out at paragraph 72, and expressed his conclusion on the issue of causation at paragraph 76. Those findings included the following (with my emphasis):

    (1) "the charterers ordered the Vessel to proceed to Guaraguao Terminal, Puerto La Cruz, Venezuela **to load the AS Capital cargo** at the PDVSA Terminal;"

    (2) "**that** cargo was not authorised by PDVSA for sale and was not scheduled to be loaded, and hence the cargo was not one which could lawfully be shipped from Venezuela;"

    (3) "**as an incidence of** [the order of 4 September 2014] the charterers ordered the master [on 6 September 2014] to communicate directly with AS Capital's agents, "GAMS;"

    (4) "**as a result of** and as an incidence of the above orders the Vessel received the unauthentic PDVSA authorisation;"

(5) "it was this forged document, which when raised with PDVSA, led on 12 September to the detention of Barbosa on suspicion of trafficking crude oil etc;"

(6) "it was the link between the Vessel, AS Capital's cargo and this forged document which raised the particular interests of the National Guard when they boarded the Vessel on 13 September;"

(7) "it was the fact that the Vessel was the intended means to carry the unauthorised AS Capital cargo, and the consequent possibility that the Owners might have been involved in the crimes, which led to the detention of the Vessel on 19 September 2014."; "had [the Charterers not supplied the Authorisation] the ship would not have been detained" (para 92); "the orders were at least an effective cause [of the detention]" (para 75).

(8) "that detention is the cause of all subsequent delay".

33. These are findings that:

(1) the Charterers' order of 4 September was not merely to proceed to a load port to await orders, but rather to proceed to the terminal for the purposes of loading the AS Capital cargo when presented at the Vessel's manifolds; that there was at that time a cargo which AS Capital intended to export unlawfully from Venezuela; and that it was such an unlawful cargo which the Vessel had been ordered to proceed to the terminal to load. If there were any doubt about that, it is dispelled by the finding in paragraph 69 of the Award that AS Capital always intended to load a cargo of Mesa crude from the terminal; the finding in paragraph 75 of the Award that AS Capital believed on 4 September that there was a cargo to be loaded pursuant to the Charterers' orders; and the finding in paragraph 100 of the Award that there was an intended cargo as at 4 September.

(2) The Charterers had ordered the master to communicate with GAMS, as a direct consequence of the order of 4 September, and it was as a result of that latter order that the Vessel received the Authorisation, without which the interest of those who boarded the Vessel on 13 September would not have been aroused and without which the Vessel would not have been detained.

(3) There was therefore the necessary causative link between the order of 4 September 2014 and the detention of the Vessel. The former was an effective cause of the latter.

34. When addressing clause 28 in paragraph 100 of the Award, the Arbitrator said:

> "Even if [the Charterers] are right on the prospective nature of the clause (which I do not need to decide), however, I refer back to paragraphs 74 and 75 above, and I accept – as Mr Croall argued – that there is no reason to suppose that as at 4 September the intended cargo was any more authorised than it was later, e.g. as at 11 September or 13 September. Thus the risk existed at the earlier date as much as it did later."

35. That did not involve reversing the burden of proof, or any other error of law. It reflected what was inherent in the findings of fact already set out in the previous part of the Award, namely that the increased risk of arrest of the Vessel existed on 4 September 2014 because at that stage Mr Barbosa intended to use the Vessel to try to export an unlawful cargo from Venezuela, which was what caused the detention in due course. That is sufficient to put the Charterers in breach of clause 28, as the Arbitrator correctly held.

36. Mr Croall reminded me of the principles governing the approach to the reading of awards summarised by Teare J in ***Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The "PACE")*** [2010] 1 Lloyds' Reports 183 at paragraph 15, including the oft cited dictum of Bingham J as he then was in ***Zermalt Holdings SA v Nu-Life Upholstery repairs Ltd*** [1985] 2 EGLR 14 that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration". However, there is no need to resort in this case to any presumption in favour of the benevolent reading of awards. The Arbitrator's findings of fact are clear. In truth, this is another example of a disappointed party trying to dress up an appeal against findings of fact as one which turns on questions of law. It hardly needs repeating that it is the policy of the 1996 Act to prevent such illegitimate attempts to go behind a tribunal's findings of fact; in the absence of an irregularity justifying relief under section 68 of the Act, the parties are bound by the findings of fact of their chosen tribunal and cannot challenge them in court, even on the grounds that they were unsupported by the evidence or that they contain internal inconsistencies: see ***Geogas SA v Trammo Gas Ltd (The "BALEARES")*** [1993] 1 Lloyds' Reports 215 per Steyn LJ at pp. 227-228, 232; and ***Demco v SE Banken Forsakring Holding Aktiebolag*** [2005] 2 Lloyds' Reports 650 at paragraphs 38 to 48.

**The Procedural Issue**

37. That is sufficient to dispose of the Charterers' appeal because Mr O'Sullivan accepted that the Charterers could not succeed on the points on clauses 13, 21 and 27 if the detention was caused by their breach of clause 28.

38. There is however a residual procedural question which arises in this way. When bringing the appeal by way of arbitration claim form, the Charterers argued that they did not need permission to appeal because there was an agreement of the parties in clause 41 of the Charterparty which fulfilled section 69(2)(a) of the Arbitration Act 1996. In response, the Owners contended that the clause did not cover the questions the Charterers were seeking to raise. In considering the application on paper, Phillips J ordered that the question of permission be addressed at an oral hearing together with the substantive hearing of the appeal if permission were held to be unnecessary, or were to be granted. A question therefore arises whether the order should be to refuse the Charterers permission to appeal or to dismiss their appeal.

39. The argument advanced by Owners is as follows. Mr Croall accepts that clause 41 of the Charterparty is capable of fulfilling s. 69(1)(a) of the Arbitration Act 1996, which permits appeals to be brought with the agreement of all other parties to the proceedings: see ***Poseidon Schiffahrt GmbH v Nomadic Navigation Co***

***Ltd (The "TRADE NOMAD")*** [1998] 1 Lloyds' Reports 57 at p. 60. However the agreement is only to an appeal on questions of law which arise out of the award. If, as I have found, the clause 28 argument involves no question of law arising out of the Award, it does not come within the scope of clause 41 or s. 69(1)(a) of the Act; nor does it fulfil the statutory criteria for permission under s. 69(1) of the Act. Accordingly permission to appeal is required and should be refused.

40. Moreover, he submits, the same applies to the remainder of the issues upon which the Charterers seek to appeal, because clause 41 is to be construed as an agreement to the bringing of appeals only if and to the extent that the questions of law will substantially affect the rights of the parties. That is the statutory test reflected in section 69(3)(a) of the Act, whose relevance is reinforced in this case by specific reference to the 1996 Act in the BIMCO Dispute Resolution and Law clause. The parties cannot have intended to agree to appeals on points of law which would be academic. Accordingly, he submits, the questions raised in respect of clause 13, clause 21 and clause 27 do not fall within the clause because, as is accepted by Mr O'Sullivan, they cannot succeed if the detention was caused by the Charterers breach of clause 28: even if points of law arising out of the Award, their determination will not substantially affect the rights of the parties.

41. Mr O'Sullivan accepted that clause 41 was not engaged by questions which were academic. He submitted that the other issues were not academic in this case because for procedural reasons the Tribunal has left over for future determination questions of quantification of the Owners' loss after July 2015. He submitted that it may make a difference in quantifying such loss whether the basis of liability is an indemnity claim under clause 13 or a damages claim for breach of clause 28, because questions of remoteness might arise if the detention stretched indefinitely into the future, especially since the Owners had hired the Vessel under a bareboat charter which had now expired. He resisted the suggestion that it was for him to establish to the Court's satisfaction that the determination of the remaining questions would substantially affect the rights of the parties; it was enough, he submitted, if they were not obviously academic.

42. In my view Mr Croall is correct on this issue. Clause 41 was clearly drafted with the terms of section 69 of the Act in mind. Once it is accepted that the scope of clause 41 must be limited to a question of law whose determination by the Court may serve a useful purpose for the parties, and which is not academic in that sense, the statutory context suggests that the criterion should be that the question will substantially affect the right of the parties.

43. Two further points deserve emphasis. First, the issue is whether the determination of the question of law *will* substantially affect the rights of the parties, not whether it *may*. In this respect the wording of s. 69 of the 1996 Act differs from its predecessor: under section 1(4) of the Arbitration Act 1979 the test was whether the question of law *could* substantially affect the rights of the parties. Secondly, it is for a party asserting that he does not need the permission of the Court under s. 69(2)(b) of the Act, on the grounds that he has an agreement falling within section 69(1)(a), to establish that fact. The applicant

must do so by adducing evidence when he makes his application, unless it is obvious from the terms of the award.

44. I was unable to conclude from anything Mr O'Sullivan submitted orally that these criteria were fulfilled. The argument that there *might* be differences in loss depending on arguments of remoteness was put no higher than that, and without any greater exposition than reference to the bareboat charter position, on which there was no evidence and which was not foreshadowed in any written argument. Accordingly, permission to appeal is required, and is refused because the statutory criterion in s. 69(3)(a) is not fulfilled. In fact I would in any event have upheld the Arbitrator's decision on the points raised on clauses 13, 21 and 27 had permission been unnecessary or been granted.

**Conclusion**

45. Accordingly I refuse permission to appeal on all grounds.