

**Charterers represented by MFB are successful in performance warranty dispute in the High Court.**

*Hyundai Merchant Marine Co. Ltd -v- Trafigura Beheer BV (The "Gaz Energy") [2011] EWHC 3108 (Comm)*

Background

By a time charter dated 21 November 2005 on an amended Shelltime 3 form with various additional clauses and with Gas Form C, the charterers chartered the vessel "Gaz Energy" from her disponent owners. On the same day, 21 November 2005, the disponent owners chartered the vessel from the owners on identical terms to those agreed with the charterers, save for the rate of hire.

Disputes arose between the parties under both charters in relation to the performance of the vessel – in terms of speed and consumption.

The parties agreed that the disputes be determined as a preliminary issue. The preliminary issue was as follows:-

*"Whether the head charterparty and the sub-charterparty, on a proper construction of all the documents in which the contractual terms may be found, entered into between the respective parties on 21 November 2005 contained an all weather warranty or a weather warranty applying only in weather conditions up to a maximum of Force 4 on the Beaufort Scale"*

Submissions

The charterers' argument was based on the second paragraph of the off-hire clause 21 which refers to clause 24 of the charter. Clause 21 describes the method of calculating off-hire and it is stated as follows:

*"any such loss of time which arises wholly or partly from a reduction in the vessel's guaranteed average speed provided in clause 24 hereof shall be taken to be the difference between the time the vessel would require to perform the relevant service at the said speed and the time actually taken to perform the same..."*

The charterers submitted that if we assume that the owners are right that the Gas Form C must prevail over clause 24 and/or clause 42 of the charter in terms of the vessel's speed and weather warranty, then there is an uncertainty as to how the parties can put the vessel off-hire since off-hire can only be calculated by reference to clause 24. This cannot be what the parties intended and it is inconsistent with clauses 24 and 42.

Therefore, the charterers submitted that, looking at the charter terms as a whole, the all weather warranty in clause 24 must prevail over the good weather warranty referred to in the Gas Form C.

The charterers further submitted that the term "*otherwise as per Gas Form C*" in clause 42 should not displace clauses 24 and 42 of the charter. The significance of the meaning of "*otherwise*" is that Gas Form C should only be supplementary to the charter terms rather than contradicting and replacing them. Given that the parties had detailed negotiations prior to the commencement of the charter and that clause 24 was left unamended, it was submitted that the parties intended to have an all weather warranty.

In response to the charterers' submissions, the owners relied on the clause at the end of line 408 of the charter and line 408 states as follows: "*Additional Clauses Nos 41-74, Gasform C and revised Paramount Clause, as attached, are deemed to be fully incorporated into this Charter Party*"

The owners' submissions were that Gas Form C was fully incorporated into the charter like any other clause. Therefore, the good weather warranty was a term of the charter. The owners relied on *The Rainy Sky [2011] UKSC 50* and submitted that there is no ambiguity in the language used in the charter if we read clauses 24 and 42 together with Gas Form C. As a result, there is no need to construe Gas Form C for the commercial purpose of the charter but treat it as a fully incorporated charter term.

The charterers closed submissions and submitted that if the parties truly intended to rely on the good weather warranty, then they concluded the charter in a rather odd way. Both Shelltime 3 and 4 forms have been available for a long time but the parties chose to use the Shelltime 3 form which contains a very wide weather warranty. Also, if the parties intended to have the good weather warranty, they could have deleted and/or amended the relevant charter terms to this effect. They did not do this. The charterers stated that, from a commercial point of view, it is extremely unusual to apply the good weather warranty.

## Judgment

In a judgment handed down by Mr Justice Flaux on 18 November 2011, the High Court held that:

- 1) Upon proper construction of the charter as a whole, the charterers' submissions were preferred and both charters contain an all weather warranty.
- 2) The Owners are not entitled to rely on the subsequent charterparty dated 22 November 2005 to interpret the present charterparty in question. The parties had agreed to determine this preliminary issue only based on the charterparty dated 21 November 2005 and the subsequent charterparty is a separate and distinct contract between the parties and therefore the submissions in relation to the subsequent charterparty were inadmissible.

Edward Gray, Asad Naqvi and Jae Ha Kwon of MFB represented the successful charterers in this hearing.

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