

MLAANZ

2015 – CHARTERING: COOPERATION AND GOOD FAITH – BUSINESS AS USUAL?

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Charter recipe: standard terms + cooperation + good faith + exercise of legitimate interests +



"KRITI FILOXENIA":

- **Laycan** 1-3 April **Cancelling** 16:00 3 April

- Load port nominated – ETA 3 April – vessel en route
- Charterers then request ETAs for nominated load port and two other ports and Owners give ETAs of:
 - nominated load port 3 April: 12:00
 - alternate port A) 3 April: 03:00
 - alternate port B) 4 April: 03:00

- Charterers nominate port B as revised first load port

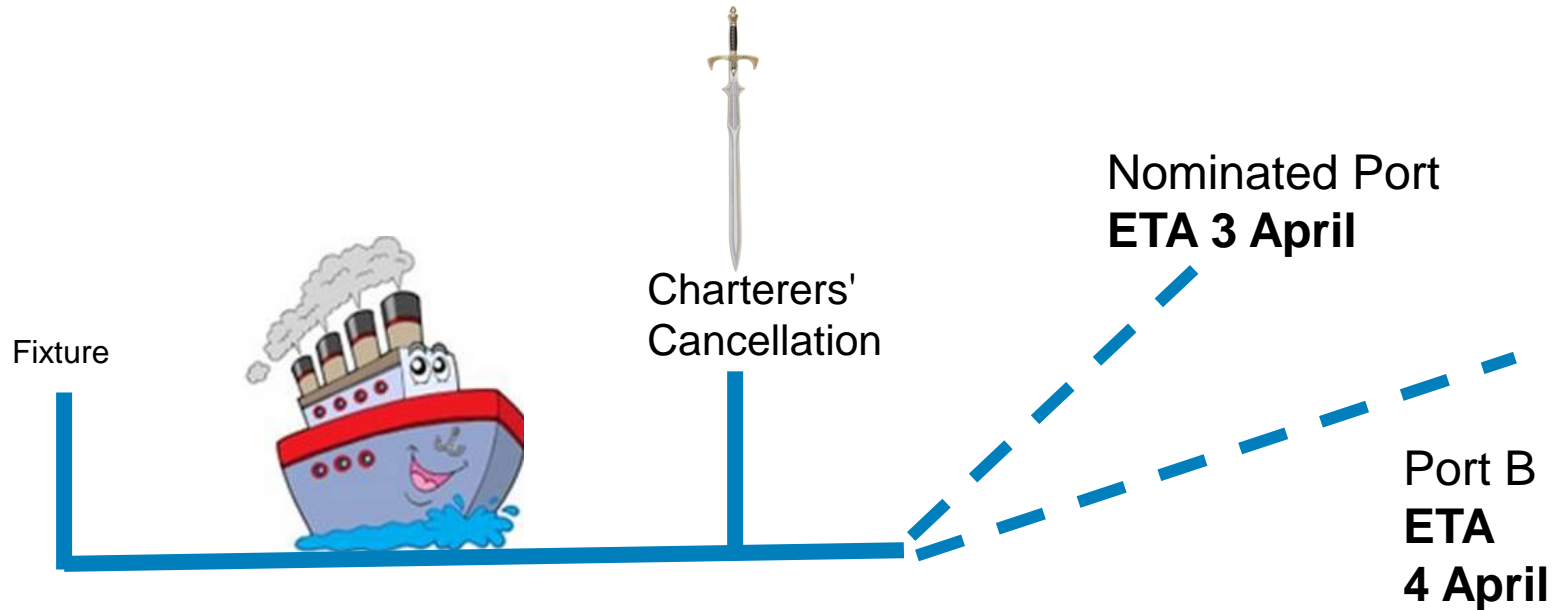
- Owners confirmed ETA of 4 April: 03:00



"KRITI FILOXENIA":

- *"If after any loading port..has been nominated, charterers desire to vary such port ...owners **shall issue** such revised instructions ...to give effect to charterers' revised orders.." [cl 24]*
- *"...If it appears to charterers that the vessel will be delayed beyond the cancelling date, charterers may require owners to notify charterers of the date on which they expect the vessel to be ready to load whereupon charterers shall have the option to cancel...." [cl17]*

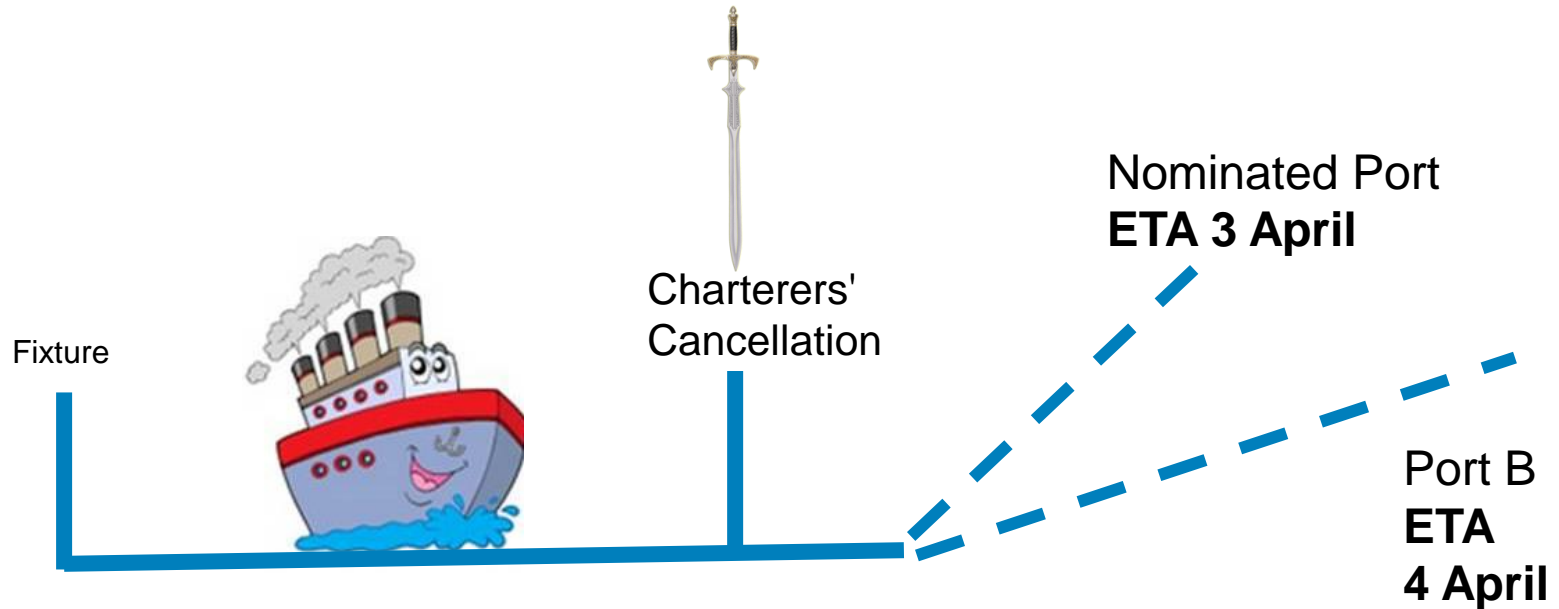
"KRITI FILOXENIA ": key issues



Two key issues:

- Whether right to cancel survives re-nomination
- If it does whether Charterers are entitled to re-nominate at a time when an ETA for the re-nominated port is after the cancelling date

"KRITI FILOXENIA": competing commercial interests



- Timing of the re-nomination did not prevent vessel meeting the cancelling date – vessel could not have reached port B by cancelling date even if nominated from outset
- At all times prior to the re-nomination the vessel was in time to reach the originally nominated load port before the cancelling date

Charterers' main arguments:

- cl 24 equated to re-nomination of first load port so all rights relating to the first load port automatically transferred to the re-nomination port
- accepted an implied fetter on charterers' right to re-nominate but was limited to those duties applying to the original nomination ie Charterers' obligation is to nominate first load port:
 - not too late so as to impair cancelling date (cancelling date achievability)
 - early enough not to delay the vessel due to lack of orders

First nomination was "written in pencil" and as they had re-nominated port B before any deviation point their re-nomination was compliant with their duties and therefore no fetter on re-nominating to a port at a time that the port could not be reached

failed:

- Arbitrators and court found for the Owners that re-nomination deactivated the cancellation clause
- The value of Charterers' right to cancel was acknowledged but could not override the competing importance to Owners of certainty of employment following a contractual nomination
- Established principle that where a contract requires both parties to do something even where no express words are used each party is required to cooperate and do what is required of it to give effect to the agreement
- In a cancelling regime the party with the right to cancel had obligation not to impair the cancelling date achievability
- Charterers' rights under clause 24 were incompatible with application of cancelling regime after re-nomination

"MTM HONG KONG"

Actual/Intended Fixture		Substitute
Vessel en route to load in Uruguay South America for Rotterdam	19 January	Vessel en route to load in Uruguay South America for Rotterdam
[Charter Party repudiated]	21 January	Charter Party repudiated - vessel continued on to South America
	2 February	Arrived in Uruguay South America and unexpected delay in fixing
	24 February	Vessel fixed Argentina to Europe with Glencore
ETA Rotterdam Europe 43.6 days	17 March	
<p>Follow on fixture 1: Europe USA</p> <p>Follow on fixture 2: USA Europe</p>		
	12 April	Substitute Glencore charter completed – vessel in Europe

- Owners claimed loss of profits on the difference between the profit actually earned on the substitute charter to Europe and:
 - the 43.6 day charter fixture South America to Europe voyage
and also on
 - the two follow on fixtures which had been fixed at the time of the repudiation and would have resulted in the vessel being positioned in Europe at about the same time the Glencore substitute charter ended

Owners argued that usual measure of damages did not meet the compensatory principle because of the 22 day delay in South America – which prevented the vessel earning much higher freight rates obtainable in Europe

- Compensatory principle is fundamental to assessing damages
- Accepted prima facie measure for Owners' loss of profit on repudiation of a charter is that:
 - Owners' freight losses are the net freight that would have been earned if the repudiated charter had been performed
 - Less any deductions that should be made from the repudiated charter freight to reflect mitigating alternative employment
- Where Owners suffer a different kind of loss eg where the vessel is less advantageously positioned as a result of the repudiation it may be appropriate to look beyond prima facie measure in some factual circumstances

- Referencing the The "ACHILLEAS" - not always too speculative to look beyond the immediate end of the original fixture period – on the facts the only calculations necessary were in relation to reasonably certain charters over a defined period broadly in line with the replacement fixture charter period
- Assumption of responsibility not too remote where repositioning for higher value market – freight rate and load/discharge ports inextricably linked as part of the deal and therefore reasonably within contemplation of the parties
- No implied term to the effect that charterer limits liability for all losses to the original charter period

- Owners therefore entitled to recover:
 - Net freight that would have been earned on the repudiated voyage
 - Plus** net freight on the two follow on charters
 - Minus** net freight earned on the substitute charter
- No statement of law of general application possible, even on the facts. Decision based on the arbitrators' findings and the specific factual circumstances namely:
 - Owners had acted reasonably in proceeding to South America notwithstanding the delay then encountered
 - No suggestion that the losses were too remote
 - Damages for loss of position could be calculated with "a reasonable degree of confidence"

"GREAT CREATION": good faith



"On redelivery charterers to tender 20 / 15 / 10 / 7 days approximate and 5 / 3 / 2 / 1 days definite notice"

- Permitted redelivery within period: 29 March - 14 May
- 13 April 20 day redelivery notice given
- 14 April 15 / 10 / 7 notices given
- 16 April 3 / 2 / 1 definite notices given
- 19 April redelivered the vessel
- [1 May 20 day notice period]
- 21 April owners fixed

"GREAT CREATION": relevant rates

- Charter rate US\$ 18,000 / day
- Market rate US\$ 28,500 / day 31 March
- Owners fixed to Oldendorff at US\$ 22,000 / day:
 - due to short notice; and
 - the follow-on fixture required an unpaid ballast leg...

the net rate over the substitute fixture as a whole was US\$13,485 / day ("Oldendorff rate")

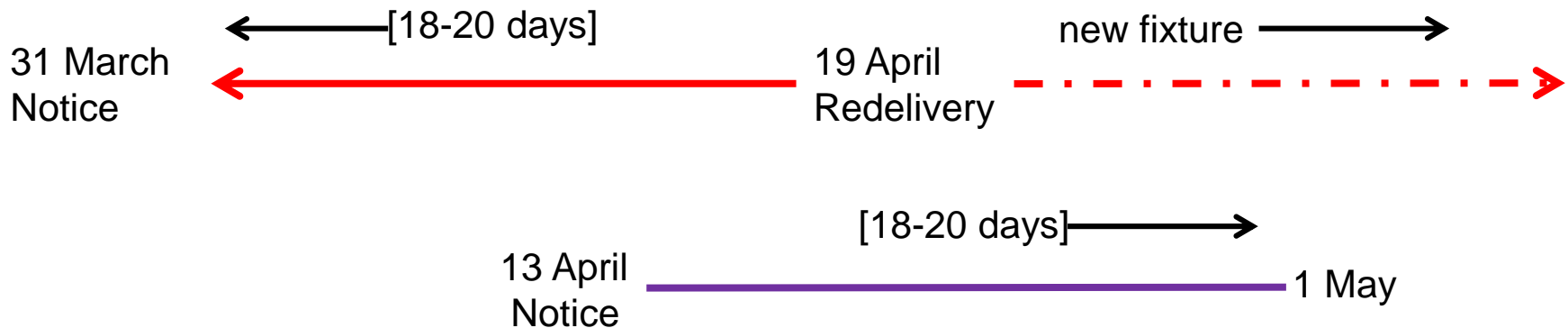


"GREAT CREATION": the arguments

- Breach occurred on 31 March because for redelivery on 19 April notice should have been given 20 days prior to redelivery on 31 March
- Charterers could not have given a good faith notice on 31 March
- Charterers' breach was not redelivering 20 days after 13 April notice
- Owners needed 20 days' lead time to secure the market rate.
- If proper notices had been given on and after 31 March Owners would have fixed a 'Notional Voyage' at the market rate of US\$ 28,500 / day
- This 'Notional Voyage' would have occurred between 19 April and 17 May
- Hypothetical Notional Voyage was an open ended loss and too remote. Owners' actual loss was the hire payable at the existing charter rate for the notice days not given ie 12 days from 19 April to 1 May.
- Losses of about US\$ 425,000

"GREAT CREATION": appeal

- **What was the breach?** Was it:
 - i. a failure to give the first approximate notice of redelivery 20 days before actual redelivery on 19 April, or
 - ii. in not redelivering the vessel 20 days after that first approximate notice of redelivery was given on 13 April?
- **'Open-ended loss' argument** - Did Owners' analysis of measure of loss by reference to a hypothetical follow-on charter inevitably mean that the loss was unquantifiable / unpredictable, and therefore too remote?



"GREAT CREATION": decision

- Charterers' arguments on (i) good faith; (ii) causation, and (iii) remoteness succeeded
- Breach was failure to give 20 days notice and effect of the breach was to deprive Owners of hire from 19 April to 1 May – a period of 12 days (the 'missing notice period')
- In this case, what the parties would have had in contemplation was loss of hire from date of actual redelivery to the date when the vessel should have been redelivered, assuming proper notices had been given

"GREAT CREATION": decision

- Liability for hypothetical lost business opportunity was too remote
- Liability for the difference in rate of a follow-on fixture of an uncertain duration was not in the contemplation of the parties at the date of the charter
- Owners' 'Notional Voyage' was entirely hypothetical, and was also more than double the period of the short notice
- Owners' analysis was unquantifiable, unpredictable, uncontrollable and disproportionate at the date of entry into the charter (as it was in The "ACHILLEAS")

"GREAT CREATION": decision

- Proper measure of damages could not include a period running beyond the end of the 'missing notice period'
- Losses assessed at 12 days' at charter hire rate = US\$ 216,450

- But there are complexities here:
 - Owners achieved no earnings during the ballast leg [21 – 30 April]
 - the rate obtained on the follow-on c/p was not full market rate
 - the market rate never became available during the missing notice period

MSC v COTTONEX: termination and legitimate interest



- Impasse in which 35 containers remained stuck at the discharge port with no immediate prospect of their return to the Carrier – July 2011
- The Carrier gives formal notice to Shippers to redeliver the containers and Shippers respond that they have been paid and have no interest/title in the goods in the containers – September 2011
- The Carrier offered to sell the containers to the Shippers for \$200,000 – January 2012
- The Carrier claimed that demurrage continued to run for as long as the containers remained unreturned - an accrued debt of more than \$1,000,000 and counting – January 2013

- Is the Carrier entitled to sit back and allow demurrage to accrue even if there is no real prospect of the Shipper being able to return the containers?
- Demurrage accrued until the contract was brought to an end
- When the Shipper made it clear that it could not redeliver the Shipper repudiated the bill of lading contracts
- The Carrier could in principle accept or reject the repudiation
- Did the Carrier have a “legitimate interest” in keeping the contract alive and claiming demurrage, as opposed to terminating the contract and claiming damages?
- Keeping the contracts alive in order to claim demurrage indefinitely was not a legitimate interest. The Carrier was not suffering loss as a result of the Shipper’s breach

- In coming to its conclusion, the Court identified the "*increasing recognition in the common law world of the need for **good faith** in contractual dealings*"
- In effect, "*a contractual discretion must be exercised in good faith for the purpose for which it was conferred, and must not be exercised arbitrarily, capriciously or unreasonably*"
- Whilst the concept of good faith has so far developed in the context of the exercise of an express contractual discretion or option, the Court held that the concept and line of authority should apply equally to the exercise of an option to terminate the contract

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