



SEMAPHORE

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Potential International Interest in English Law Contract Interpretation

A recent decision reached by Justice SL Carr of the Commercial Court in London has both set out the current law regarding the construction of contractual terms as well as the charterer's obligation to keep a vessel in class under a bareboat charterparty agreement.

Ben Macfarlane, a partner and experienced solicitor with London-based commercial law firm Jurit LLP, has observed the Silverburn Shipping versus Ark Shipping Company case may consequently have a degree of "international" interest.

In an article published in the April 2019 edition of the China-Europe Commercial Collaboration Association (CECCA) Newsletter on Maritime Law and Commerce, Mr Macfarlane outlined that notice to terminate the charterparty of the vessel Arctic was served in December 2017.

Silverburn Shipping, owners of the anchor-handling tug supply vessel, sought to end the 15-year agreement – which had commenced in October 2012 – primarily on the grounds the Arctic's class certificates had expired, thereby breaching a key contract term.

Ark Shipping refused the termination and Silverburn Shipping then made application to an arbitration panel appointed under the charterparty. That panel held the charterparty had not been lawfully terminated due to the charterers being in the process of remedying the breach at the time of notice.

Although emphasising it was rare for her court to interfere in the decision of a tribunal, Justice Carr nevertheless heard Silverburn Shipping's appeal on February 7 this year – the appeal qualifying on the grounds of it challenging a point of law.

Providing numbering to emphasise the "different issues that must be considered", Mr Macfarlane described Justice Carr's summary of the current state of English law with regard to the interpretation of contractual provisions as entailing:

1. what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean
2. it does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context
3. that meaning has to be assessed in the light of the natural and ordinary meaning of the clause, any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed and commercial common sense, but disregarding the subjective evidence of the parties' intention
4. while commercial common sense is a very important factor to be taken into account, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed. The meaning of a clause is usually most obviously to be gleaned from the language of the provision

“So (1) it is necessary to consider the contract through the eyes of a disinterested observer with knowledge of all the relevant facts, (2) each of the relevant words needs to be considered both in the context of the contract and the relevant factual background, (3) having understood precisely what is meant by each word you need to look at the overall meaning and you can take into account ‘commercial common sense’, but (4) you can normally only import the notion of ‘commercial common sense’ where it does not override the natural or obvious meaning of the words used in the term,” observed Mr Macfarlane.

He noted that a key decision for the court was whether the obligation for the charterer to maintain the vessel in class was either a “condition” or an “intermediary term” of the contract.

“Under English Law, a condition in a contract must be strictly adhered to and, if breached, gives the right to the innocent party to terminate the contract immediately.

“An intermediate term is a term which will only allow termination if the breach of the term was serious enough to deprive the other party of the substantial benefit of the contract – ie, a serious breach.”

Whereas the arbitrators had held the provision was an intermediate term, Justice SL Carr concluded the relevant clause contained two separate obligations – the first to keep the vessel in class, the second to look after the maintenance of the vessel generally.

“The obligation to keep the vessel in class at all times was ‘immediately, readily and objectively ascertainable’. In other words, you can immediately tell if a vessel is in class or not because either her certificates of class are current or they have expired.

“Charterers and their representatives therefore need to be aware of this important construction of the obligation to keep a vessel in class in the BARECON ’89 form of charterparty.

“More generally though, this case provides a very interesting and short synopsis of the factors which need to be considered in interpreting the terms of an English Law contract and specifically the emphasis on the ‘natural meaning’ of the words used.”

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