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Affected Areas & Sick Sailors: *The Sagar Ratan*

Background

In February 2022, Pan Ocean Co Ltd. (the "**Charterers**") chartered the "SAGAR RATAN" (the "**Vessel**") from Bunge S.A. (the "**Owners**") for a one-time charter trip from the Philippines via Australia to China (the "**Charterparty**"). Upon arrival in Bayuquan, China, members of the crew tested positive for COVID-19. Rather than quarantining, the Owners decided to sail to Ulsan, South Korea to replace the infected crew. The Vessel then returned to Bayuquan and discharged her cargo.

The Charterers deducted hire and expenses in respect of a period of delay starting with the time of the first positive tests in Bayuquan. The Owners claimed for the total hire withheld by the Charterers and an indemnity for any claim advanced by head owners for the costs of replacing the COVID-19 infected crew.

The Charterparty

The following three clauses were considered in this case:

1. **"Clause 38 Quarantine/ Radio Pratique"**

Normal quarantine time and expenses for the Vessel's entering port shall be for Charterers' account, but any time of detention and expenses for quarantine due to pestilence, illness and etc. of Master, officers and crew shall be for Owners' account [...]."

2. **"Clause 50 – Deviation / Put Back"**

In the event of loss of time either in port or at sea, deviation from the course of the voyage or putting back whilst on voyage, by reason of ...

sickness or accident to the Master, officers, crew ... the hire shall be suspended from the time of the Vessel's inefficiency in port or at sea until the time when the Vessel is again efficient in the same position or equidistance position to the destination.

All directly related expenses incurred including bunkers consumed during such period of suspension shall be for Owners' account. Under this clauses neither Owners not Charterers to be allowed to be benefited at the expense of the other party."

3. **Clause 129** - This clause incorporates, in amended form, the BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2015 (the "**BIMCO Clause**").

"(a) For the purposes of this Clause, the words:

"Disease" means a highly infectious or contagious disease that is seriously harmful to humans.

"Affected Area" means any port or place where there is a risk of exposure to the Vessel, crew or other persons on board to the Disease and/or to a risk of quarantine or other restrictions being imposed in connection with the Disease.¹

[intervening paragraphs deleted]

(h) If, notwithstanding Sub-clauses (b) to (f), the Vessel does proceed to or continue to or remain at an Affected Area:

- i. The Owners shall notify the Charterers of their decision but the Owners shall not be deemed to have waived any of their rights under this Charter Party.*

¹ The words "*imposed in connection with the Disease.*" were in fact deleted from Clause 129, however, it was common ground that this

was a clerical mistake and the High Court ignored the inadvertent deletion.

- ii. *The Owners shall endeavour to take such reasonable measures in relation to the Disease as may from time to time be recommended by the World Health Organisation.*
 - iii. *Any additional costs, expenses or liabilities whatsoever arising out of the Vessel visiting or having visited an Affected Area, including but not limited to screening, cleaning, fumigating and/or quarantining the Vessel and its crew, shall be for the Charterers' account and the Vessel shall remain on hire throughout.*
- (i) *The Vessel shall have liberty to comply with all orders, directions, recommendations or advice of competent authorities and/or the Flag State of the Vessel in respect of arrival, routes, ports of call, destinations, discharge of cargo, delivery or in any other respect whatsoever relating to issues arising as a result of the Vessel being or having been ordered to an Affected Area.*
- (j) *If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation, nor shall it be or give rise to an off-hire event, but shall be considered as due fulfilment of this Charter Party. In the event of a conflict between the provisions of this Clause and any implied or express provision of this Charter Party, this Clause shall prevail to the extent of such conflict, but no further."*

The Tribunal's Award

At first instance, the Tribunal concluded that:

- a. pursuant to Clauses 38 and 50, the Vessel was off-hire while replacing the crew; and
- b. the Vessel was not delayed due to visiting an "Affected Area" pursuant to Clause 129.

Decision of the High Court

The Owners were granted permission to appeal to the High Court on the three questions set out below.

1. **[Clause 129] On the true construction of the BIMCO Infectious or Contagious Diseases Clause for Time Charter Parties 2015, is a port or place an 'Affected Area' if it carries 'a risk of quarantine or other restrictions' or does that definition implicitly exclude situations where a) the crew had a Disease upon arrival there, and/or b) the risk was no**

greater upon arrival there than it was when the charterparty was concluded?

At first instance, the Tribunal found that COVID-19 was a qualifying "Disease" for the purposes of Clause 129. This point was not re-opened before the High Court. The High Court focused on the definition of an "Affected Area" which it described as having "two (disjunctive) limbs":

An "Affected Area" can be port or place where there is a risk of exposure to the Vessel, crew or other persons on board:

- i. To the disease ("**Limb 1**"); and/or
- ii. To a risk of quarantine or other restrictions being imposed in connection with the disease ("**Limb 2**").

The High Court was primarily concerned with the application of Limb 2. It held that the language "any port or place where there is a risk of exposure to the Vessel, crew or other persons ... to a risk of quarantine or other restrictions being imposed ..." is most naturally directed at a characteristic of the port or place itself (e.g. policies or other measures introduced generally in response to a Disease)², and should be given its geographical meaning. Therefore, Limb 2 applies to the port or place where quarantine or other restrictions are liable to be imposed. A port or place will be an "Affected Area" where the risk of quarantine or other restrictions being imposed is caused by the Vessel having previously visited a port affected by a Disease. However, the port or place is not an "Affected Area" purely on the basis that there is a risk of quarantine or other restrictions being imposed in the event that an incoming vessel has one or more crew members infected with a Disease.

In the present case, Bayuquan was not an "Affected Area". The quarantine imposed depended entirely on the actual infected status of the crew and did not arise from any policy of quarantining incoming vessels who had visited particular countries or in general. It resulted from a characteristic of the Vessel / crew rather than a place to which the Charterers had ordered the Vessel to proceed.

Increased risk

The High Court did not accept the Charterers' submission that, where a port has been specified

² The High Court commented that even if a country did not routinely require COVID-19 testing on arrival, the presence of an infected crew member would still create a "risk" of quarantine or

other restrictions such that the port or place would likely fall within the scope of an "Affected Area".

as a destination in the charterparty, there must have been an increase in the risk of quarantine or other restrictions from the date of conclusion of the charterparty for that port to constitute an "Affected Area".

As the Owners agreed to sail to any port in China, the Charterers argued that the Owners had accepted the COVID-19 testing and quarantine procedures present in all Chinese ports at the time the charterparty was concluded. However, under the amended version of the BIMCO Clause incorporated by Clause 129, the Owners were not permitted to refuse to visit a port named as a destination in the charterparty, even if it is an "Affected Area", and the High Court held that to construe "Affected Area" in a way that depended on showing an increase in risk since the inception of the charterparty would make its application more complex and uncertain. The High Court acknowledged that the position may be different under the unamended BIMCO Clause.

Causation under the BIMCO Clause

The High Court considered that, for the Vessel to remain on hire under subclause (h)(iii) of the BIMCO Clause, the visit to the Affected Area must be causative of the delay or additional expense.

2. [Clause 38] For the purposes of an off-hire clause, is there a 'detention' for 'quarantine' if the vessel can and does avoid quarantine by changing the crew at another port?

The High Court held that, at a minimum, a quarantine is a restriction on contact or movement imposed in order to avoid the spread of disease and, for the purposes of an off-hire clause, can be interpreted as covering a restriction imposed in order to avoid infection which prevents the Vessel from entering the port (particularly where entering that port is part of the core venture of the charterparty).

The fact that the Vessel subsequently sailed to another port to replace crew does not alter the fact that a quarantine procedure prevented its entry into Bayuquan. As such, the High Court held that a detention for quarantine was imposed on the Vessel at Bayuquan, and the vessel was off-hire.

3. [Clause 50] Is the vessel off-hire in respect of a period when it can and does comply with the service immediately required?

Read literally, this is a question of law to which the answer is well established. Instead, the High Court considered whether the Vessel could perform the service immediately required of her after the crew members tested positive for COVID-19 (which it deemed to be a mixed question of construction and fact).

The Owners relied on *The Berge Sund*³ to argue that an unexpected and extraordinary crew change, which was a reasonable course of action to enable the Vessel to comply with the Charterers' orders (discharging at Bayuquan), was the service immediately required. This essentially sought to draw an analogy between the crew change required in the present case and the unexpected and extraordinary cleaning exercise required in *The Berge Sund*. However, the High Court held that the crew change was more analogous to an engine breakdown (Staughton LJ's example of an activity not "*in the ordinary way*" in *The Berge Sund*). Therefore, the Vessel was not providing the service immediately required and was off-hire.

Conclusion

The Owner's appeal was dismissed and the High Court upheld the Tribunal's award.

Comment

This case provides some guidance on the interpretation and application of the BIMCO Clause, particularly in circumstances where a vessel is carrying an infected crew. However, readers should note that the BIMCO Clause in the present case was substantively amended, and the Court's *obiter* comments suggest that some submissions (such as the Charterers' increased risk argument) may have been approached differently if the applicable charterparty featured an unamended version of the BIMCO Clause.

³ *The Berge Sund* [1993] 2 Lloyd's Rep. 453

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