Voyage charterparties

- Berth or port

- Commencement of laytime

The distinction between the two types of voyage charterparty has been accorded further significance recently, particularly following the Court's decision in The Happy Day [see The Swedish Club Letter Issue 1-2002]. This dispute arose under a berth charterparty, but because owners did not tender a valid Notice of Readiness, laytime never commenced at the discharge port and no demurrage was payable to owners (in fact they had to pay despatch!). The vessel had tendered notice when she was not yet an arrived ship in accordance with the terms of the berth charterparty.

Voyage charterparty

In a voyage charterparty, the charterer pays freight to the owner. This is payment, not only for the voyage itself, but also for the agreed time in which to load and discharge his cargo. If a charterer takes longer to load and discharge than the laytime provided for in the charterparty, then he is usually liable to pay damages by way of demurrage. The rate of demurrage is normally fixed on a daily basis and will be payable per day or pro rata for any part of a day. Some charterparties also provide that if the cargo is loaded and discharged in less than the laytime allowed, then the shipowner will pay a sum of money to the charterer. This is despatch and is often set at half the demurrage rate.

Substantial sums of money can turn on exactly when laytime begins and ends. For example, the determination of whether a charterparty is a berth or a port charterparty can simply be dependent on the order of the words in the relevant clause. Donaldson J, in The Finix

Terms of berth charterparty

There are essentially two different types of voyage charter – namely a berth charter and a port charter. The distinction is important for determining when the loading voyage, that is to say the voyage of the ship to the loadport, ends. A berth is a specific place within a port. It is the place where the vessel actually loads and discharges. Under the terms of a berth charterparty, the loading voyage does not end until the vessel is actually in the berth where it will load the cargo. The charterparty will usually name the berth or provide that a berth will be nominated as the place for loading or discharging. This will make the charter a berth charter. The berth is the agreed destination and therefore the vessel will be an arrived ship when she is securely moored there. In the case of North River Freighters Ltd. v President of India [1955] 2 Lloyd's Rep 668 Jenkins LJ made it clear that laytime in a berth charterparty could not commence until the vessel has arrived at its particular berth as specified in the charterparty.

Berth or port charterparty

The determination of whether a charterparty is a berth or a port charterparty can simply be dependent on the order of the words in the relevant clause. Donaldson J, in The Finix

Significant changes in the NLRC Rules of

The National Labor Relations Commission (NLRC) has jurisdiction over the claims of Filipino seafarers. On March 18th 2002, the NLRC amended some of their rules of procedure. Certain changes deserve some discussion.

The old rules of the NLRC provide that Labor Arbiters have jurisdiction to hear and decide claims of ‘all workers’. The new rules now clearly state that Labor Arbiters also have original and exclusive jurisdiction to decide the claims of ‘overseas Filipino workers’ provided by law’. The term ‘overseas Filipino workers’ includes seafarers.

The NLRC amended this provision to conform to the Migrant Workers Act of 1995, which gave the NLRC the original and exclusive jurisdiction to hear the claims of ‘overseas Filipino workers’. This amendment leaves no doubt as to the Labor Arbiter’s jurisdiction to hear the claims of Filipino seafarers.

Declaration of Non-Forum Shopping

A complaint must now include a ‘declaration of non-forum shopping’. This is taken from the Revised Rules of Court of the Philippines, which prohibits the filing of two or more suits in different forum. Forum shopping consists of filing multiple suits involving the same parties for the same cause of action, either simultaneously or successively for the purpose of obtaining a favorable judgment. If a seafarer has filed suit in the NLRC, he is prohibited from filing a similar suit in another forum. This rule has been extended to a respondent or defendant who for some reason commences a new action against a complainant or plaintiff.

A certificate of non-forum shopping is also required in cases of appeal. A mere notice of appeal without such a certificate shall not stop the running of the period for perfecting an appeal.

Surety Bond

The surety bond to be filed together with the appeal shall be accompanied by:

a) a joint declaration under oath by the employer, his counsel, and the bonding company attesting that the bond posted is genuine, and shall be in effect until the final disposition of the case;

b) a copy of the indemnity agreement between the employer-appellant and bonding company; and

c) a copy of the security deposit or collateral securing the bond.

The requirement on the copy of the security deposit or collateral is new. At the moment, it is still not settled as to whether a Club Letter of Guarantee is considered to comply with the new requirement.

Another new provision is the recognition by the NLRC rules of a motion to reduce a bond,
charterparty?

(1975) 2 LLR 668, held that the words in a charterparty ‘one safe berth, London’ would be a berth charterparty, but the words ‘London, one safe berth’ would be a port charterparty. The charterparty must be construed fully to determine whether or not it is a berth or port charterparty. However, when it comes to the tendering of Notice of Readiness and the commencement of laytime, it is important that owners know whether they have a port or berth charterparty to ensure that a valid Notice is tendered and to ensure that time commences.

A berth charter therefore puts the risks of delays and congestion in the port on the owners. Of course, each charterparty will be worded differently and a WIBON (Whether In Berth Or Not) clause may transfer the risk for the delay back to charterers even in a berth charter if the reason preventing the vessel getting into the berth to be an arrived ship is caused by charterers (The Kyzikos (1989) 1 LLR 1).

Under a port charterparty

By contrast, under a port charterparty, a vessel becomes an arrived vessel for the purpose of calculating laytime once it arrives within the confines of the port as stipulated by Lord Reid in The Johanna Oldendorff [1973] 2 Lloyd’s Rep 285. In this case, Lord Reid said that the test was whether the vessel was at such a place within the port that she was at ‘the immediate and effective disposition of the charterers’. If she is at a place where waiting vessels customarily lie, then there is a presumption that she has arrived unless the charterers can show otherwise. Conversely, if she is at some other place within the port, then it is for the owners to show that she is nonetheless at the charterer’s disposition.

With a port charterparty then, if the berth is free, the vessel will only be an arrived ship when she is all at the berth. However, if she is unable to proceed directly to the berth because of congestion, tides, bad weather, the lack of availability or unavailability of tugs etc. she will still have arrived at her agreed destination under a port charterparty if she has satisfied the Lord Reid test above: i.e., she has reached a position within the port and at that position she is at the immediate and effective disposition of the charterers.

In the case of a port charterparty, a WIPON (Whether In Port Or Not) clause can assist owners if they are unable to enter the usual port area, providing all other requirements of readiness are met.

Valid Notice of Readiness

Therefore, for owners to ensure that they are serving a valid Notice of Readiness, it is important to establish whether or not they have entered into a berth or port charterparty so that in the event that the vessel cannot steam straight to the berth, owners know whether or not they can tender a valid Notice of Readiness. There are several other clauses, often within a charterparty, which will impact on when the vessel can validly tender notice, for example in the Asbatankvoy charter – clause 9, which puts an additional obligation on charterers that a berth will be ‘reachable on arrival’. Therefore, if there is a berth charterparty (under which laytime would not start because the vessel has not reached the berth) that contains a reachable-on-arrival warranty, charterers would pay for the time lost waiting to berth because they would be in breach of their obligations to provide a berth reachable on arrival. In the absence of such provisions in a berth charterparty, owners must consider whether the vessel has reached her destination pursuant to the charterparty. Is the vessel where she should be to tender notice? As The Happy Day confirmed, an invalid notice will not become valid. A new and valid notice must be tendered to commence laytime.

The concept of an arrived ship is a complex one under English law and this article has only touched on one or two major aspects; the well-known London arbitrator Mr Donald Davies managed to write a whole book on the subject!

Procedure

provided a ‘bond in a reasonable amount’ is posted. If a shipowner claims that his liability is only USD 60,000, and the decision of the Labor Arbitrator is for USD 100,000, the shipowner may file a motion to reduce the amount of the bond together with the appeal. However, it is still unclear as to what is to be considered a ‘reasonable amount’. It would appear, however, that the appeal could be considered perfected provided a bond in a reasonable amount is posted.

Execution Proceedings

Whereas under the old rules, execution may issue after the decision of the NLRC Commission has become final, under the new rules, it is required that a pre-execution conference is held within two (2) working days from the receipt of the motion for the issuance of a writ of execution. Thus, there will be no surprises for the respondents as to the execution of a decision.

Another rule change deals with the filing of a petition for certiorari, with a higher court assailing the decision of the NLRC Commission. Even if such a petition is filed before the Court of Appeals or the Supreme Court, execution proceedings will still proceed unless the aforesaid courts issue a temporary restraining order. Under the old procedure, the Labor Arbiters do not issue a writ of execution in deference to the petition for certiorari filed with the higher court. Now, under the new rules, it is quite clear that execution may issue unless a temporary restraining order is issued by the higher court.

Unfortunately, when an execution of the decision is effected and the higher court reverses the decision, it is quite difficult to retrieve the judgment award from the complainant.

Conclusion

The new provisions on the jurisdiction of Labor Arbiters and the certification of non-forum shopping may impact on actions filed in foreign jurisdictions by Filipino seafarers. The new provisions on appeal may cause the non-perfection of the appeal if the new rules are not followed. It is important that expert advice be obtained on the new rules.

POEA implements Amended Standard Employment Contract

We are pleased to report on the latest developments referring to the implementation of the amended POEA Contract of 2000 as per the above statement received from our correspondents Del Rosario & Del Rosario. Should you have any questions in relation to the relevant contract which is now in force or in connection with other crew contracts, please do not hesitate to call us. Birgitta Hed

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The Swedish Club Letter 2–2002

The Happy Day

Conclusion

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POEA implements Amended Standard Employment Contract

■ The Philippine Overseas Employment Administration (POEA) issued Memorandum Circular No. 02 dated June 5th 2002 immediately implementing the amended POEA Contract. The Philippine Supreme Court has finally dismissed with finality the two petitions filed by seafarers groups questioning the provisions of Section 20 of the amended Contract. The amended Contract has added provisions on work-related injury, illness or death, release from ‘all claims’ upon payment of benefits, a third physician to resolve disputes on disability gradings, concealment of past medical condition and voluntary arbitration.

We are pleased to report on the latest developments referring to the implementation of the amended POEA contract of 2000 as per the above statement received from our correspondents Del Rosario & Del Rosario. Should you have any questions in relation to the relevant contract which is now in force or in connection with other crew contracts, please do not hesitate to call us. Birgitta Hed

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