

The KRITI AKTI – Shelltime 3 permits otherwise illegitimate voyage orders

In Issue 2 of 2004 we reported on the High Court ruling in the *KRITI AKTI*. This was an appeal by the charterer against the award of the arbitration tribunal. The charterer was successful in its appeal to the High Court. With the support of the Association, the owner Member brought the case before the Court of Appeal. The case was heard in January of this year and the judgment has now been issued.

The case revisits an important issue: the length of a time charter containing options affecting its duration. This particularly affects charterers' final voyage orders. The case itself turns on the interpretation of clause 18 of Shelltime 3 which provides:

'...Notwithstanding the provisions of Clause 3 hereof, should the vessel be upon a voyage at the expiry of the period of this charter, charterers shall have the use of the vessel at the same rate and conditions for such extended time as may be necessary for the completion of the round voyage on which she is engaged and her return to a port of redelivery as provided by this charter...'

The previous issue sets out the details of the facts and dates in question. However, in brief, the case turns on the inter-relation of clause 18, clause 3 (which added an option period of '15 days more or less' to the fixture), and clause 50 (which gave the charterer an option to add on any off-hire periods).

The Court considered two questions:

- Whether 'period of this charter' in clause 18 includes the off-hire option period; and
- If so, whether the charter so extended by the off hire period also includes a further 15 days under clause 3.

The owner's case was that the period of the charter in clause 18 referred only to the 11-month period in clause 3. Alternatively, the owner argued that, even if that period is extended by the off-hire period, the charterer could not add a further 15-day margin under clause 3.

The charterer claimed it could add *both* periods and that any voyage ordered during the period so extended should have been performed.

The Court of Appeal judges felt bound by their previous decision in the *WORLD SYMPHONY* dating from 1991. This case also involved the Shelltime 3 form. There, clause 3 provided for a charter period of 'six months fifteen days more or less in charterers' option'. The Court held that the crucial words in clause 18:

'Notwithstanding the provisions of clause 3...'

overrode clause 3, *and* any distinction between legitimacy and illegitimacy of last voyage orders. The Court held that clause 18 permitted the charterer to give orders during the six-month period for a voyage that would overrun the six months plus fifteen days. Without clause 18, those orders would have been illegitimate.

Clause 18 therefore gives considerable freedom to the charterer as regards the date by which the ship has to be redelivered. It can enable a round charter trip to be added on to what would otherwise have been a fixed term charter.

The judgment in the *KRITI AKTI* extends this principle to hold that, even when, as with the *KRITI AKTI*, the crucial order is not given during the basic period, but during the margin period, the owner must perform that voyage. The charterer is then entitled to the use of the ship at the charter rate, rather than any higher rate, throughout that final round voyage.

Clause 18 of Shelltime 3 therefore has the following effect:

- It takes as its starting point the time charter period. [In the *KRITI AKTI* this was 11 months plus off-hire plus 15 days].
- It applies when the ship is on a voyage at the expiry of that period.
- It gives the charterer further use of the ship for a round voyage at the charter rate.

In the words of Lord Justice Mance, clause 18 of the Shelltime 3 form exposes owners to:

'a final round voyage of no fixed length, which it is clear from the outset will extend very considerably beyond the final termination date.'

Without clause 18, charterers must give orders by reference to the final termination date constituted by the basic period (extended by any off hire option plus any margin).

Though unlikely, those orders may be given during the margin period. However, they must be orders for a voyage expected to be complete no later than the final termination date, otherwise they will be illegitimate orders.

The Shelltime 4 form contains an equivalent clause (clause 19) which begins:

'If at the time this charter would otherwise terminate in accordance with clause 4 ...'

This clause has been held to have a *differerent* effect from clause 18 of the Shelltime 3.

In the *AMBOR*, a High Court decision from 2000, the judge held that, whilst clause 19 would protect the charterer from the consequences of late redelivery, it did not entitle the charterer to order the ship on an illegitimate last voyage. To put this in context, the *AMBOR* was delivered on 28th July 1987 for 12 months plus or minus 20 days, with an option to extend by six months, which was exercised. The redelivery window was therefore 7th January to 17th February 1989. Orders given on 16th December 1988 for a voyage contemplating redelivery on or about 7th March were held to be illegitimate. Clause 19 did not assist. It would only have done so if legitimate orders had been given, but for some other reason the ship had then been redelivered late.

Use of the Shelltime 4 clause in the *KRITI AKTI* would have meant final voyage orders given on 1st June, for a voyage which could not have been completed until well after 14th June (the final termination date on the charterer's best case), would have been

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illegitimate and the owner's refusal to perform that voyage justified.

This is a significant case as it involved the Court reconsidering several important judgments dating back to the 1970's, which involved the interpretation of a standard form of contract.

Members currently fixed on Shelltime 3 contracts should calculate the expiry of the charter by adding any off-hire option period. They should then add any margin under clause 3. In accordance with the Court of Appeal's decision, a voyage may be commenced at any time during that period, even if it will overrun the final termination date. Charter hire for the overrun will only be payable at the charter rate.

Members negotiating fixtures using the Shelltime forms can avoid this result by using clause 19 of Shelltime 4. Members should note that clause 19 also distinguishes between whether the ship is on a ballast voyage to her redelivery port or a laden voyage at the termination date. It does not, however, cover situations where the ship is on a ballast voyage out and loading back to her redelivery port at that point. Members should consider amending the clause if this is relevant to the trade in which their ship is to be used.

US ruling confirms distinction between Shelltime 3 and 4

Arbitrators in New York have also recently dealt with the issue of last orders under the

Shelltime 4 form, as distinct from Shelltime 3.

In the *SEAWORLD*, a New York tribunal found that, in circumstances similar to the *KRITI AKTI* but using the Shelltime 4 form, the operation of clause 19 *would not* force the owner to perform an otherwise illegitimate voyage. In this case, the charterer instructed the owner to perform a voyage that, on the owner's calculation, could not be completed by the redelivery date. It would overrun by three and a half days. In a rising market, the owner agreed to perform the voyage but reserved the right to claim damages.

The ship was redelivered 20½ days late. The charterer paid hire for the overrun at the charter rate. The owner claimed hire at the prevailing market rate. The owner claimed that the final voyage was illegitimate, as it could never have been completed by the final termination date.

The tribunal agreed with the owner. The absence in clause 19 of Shelltime 4 of the crucial words in clause 18 of Shelltime 3, set out above, made all the difference. The tribunal held:

'Under Shelltime 4, a last voyage order is not legitimate if it cannot be reasonably contemplated to complete the voyage on or before the contractual redelivery date'

English and US law therefore agree on the distinction between the two Shelltime forms on this point. Members who contract under US law can also be guided by the recommendations set out in this briefing.

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