

# Soundings

## Supporting Documents and Time Bars: “The Tiger Shanghai”

**A recent decision of the English High Court in MUR Shipping BV v Louis Dreyfus Company Suisse SA (“The Tiger Shanghai”) is likely to add to the sleepless nights of claims handlers who need to submit claims with supporting documents in order to comply with a short contractual time limit.**

The Association supported its disponent owner Member, Louis Dreyfus Company Suisse SA (“LDC”), in defence of a claim brought by its charterer, MUR Shipping BV (“MUR”).

### The claim

The charterparty included the following provision:

*“[Owners] shall be discharged and released from all liability in respect of any claim or claims which [Charterers] may have under Charter Party and such claims shall be totally extinguished unless such claims have been notified in detail to [Owners] in writing accompanied by all available supporting documents (whether relating to liability or quantum or both) and arbitrator appointed within 12 months from completion of charter.”*

The issue in the original arbitration and the subsequent appeal was: what is meant by the phrase “all available supporting documents”?

The purpose of such clauses, as has been noted in earlier cases, is to permit the parties to “close their books”, but also to enable the parties to evaluate any claim and therefore to encourage an early settlement.

MUR intended to load cement clinker but the ship’s existing feeder holes could not be reached by the loading crane. MUR asked that new cement feeder holes be cut, relying on a clause in the charterparty which allowed it to weld or fit new equipment provided the owner approved, which approval was not to be unreasonably withheld. LDC

refused to approve the work. MUR argued that this was an unreasonable refusal and eventually terminated the charterparty alleging repudiatory breach on the part of LDC. During the course of the discussions, MUR instructed a surveyor to attend on board the ship and to report on the situation, including the feasibility of drilling cement holes in the hatch covers, which was recorded in a survey report.

MUR sent an initial claim letter, which the judge later considered to be sufficiently clear and supported by documents to enable LDC to understand the amount and the nature of MUR’s claim. This claim letter and the appointment of MUR’s arbitrator were served on LDC within the 12 month period required under the relevant notification clause. However, the survey report was not submitted until nearly a year later, appended to MUR’s submissions. The question therefore arose as to whether the claim was time barred for failure to submit all supporting documents, namely the survey report, within 12 months.

### **Was the survey report a “supporting document”?**

In the arbitration, the majority of the tribunal held that the survey report was a “supporting document”, that it was not privileged and that the claim was time-barred. In relation to the finding that the survey report was a “supporting document”, the majority of the tribunal held that it was “pertinent to the charterer’s claim describing the difficulty and possible solutions in detail.” It was not the report of an expert to be used in future proceedings.

On appeal to the High Court, the judge construed the particular wording of the subject clause, noting that, in addition to the qualification that the document be “supporting”, the use of the word “all” and the additional words in brackets referring to liability and quantum meant that a broad and expansive approach to construction should be taken. Therefore, the subject clause was wider than the clauses considered in earlier cases and the survey report was a “supporting document” for the purposes of the clause.

There is authority in case law to the effect that a document could later be submitted if the nature of a claim submitted in time changes at a later stage or needs to be corrected. However, the judge did not consider that this was the case here. In this case, MUR argued that LDC’s refusal to permit the cutting of cement holes was unreasonable and, therefore, wrongful and that this justified its termination of the charterparty. The survey report was relevant to the issue of the reasonableness of LDC’s refusal. The accounting issues between the parties which follow any termination of a charterparty depend in part upon establishing when the termination occurred. This might be when the agreed charterparty period ends or, as here, when one party argues that it was entitled to terminate for a repudiatory breach.

Although the judge did not decide the case on this point, she did consider the distinction drawn in “The Adventure” [2015] EWHC 318 (Comm) as to whether a document is a primary or secondary document, with the latter usually including witness

statements or experts’ reports. It would be usual in standard demurrage-type disputes for the focus to be on the primary documents, especially if the clause applies a short time limit to demurrage and detention claims only. In the subject case, where the clause covered a wide spectrum of disputes, the judge commented that “it becomes perfectly feasible and, indeed, compelling for supporting documents to include, in appropriate cases, more complex material”. However, the judge doubted whether it would extend to “truly secondary” documents such as witness statements or experts’ reports. That said, there might still be documents similar to the survey report in this case which would be considered to be “supporting”. The judge thought it was telling in this case that MUR decided, when serving its claim submissions, that the survey report should be attached not only to support its claim but to anticipate a defence brought by LDC.

### **Was the survey report protected by legal privilege?**

There was also an issue as to whether documents which were legally privileged fell within the ambit of “supporting documents”. LDC accepted that, if it were privileged, it would not be a “supporting document” required to be disclosed by the clause.

Whilst MUR accepted that the report was not in fact privileged, they submitted that the report was “arguably privileged”, drawing upon the view of one dissenting arbitrator that it was privileged. MUR argued that a document which was arguably privileged could not be a “supporting document” because this would require a waiver of privilege if it had to be submitted at an early stage. The judge accepted LDC’s submission that this approach would undermine the certainty that is required by such clauses.

### **Lessons learned**

This is another case which reminds us that the wording of charterparty clauses prescribing requirements for the submission of a claim need to be considered carefully and complied with to the letter.

In “The Tiger Shanghai” case, the clause was widely drafted, requiring “all” supporting documents and referring to documents relevant to liability or quantum. The case shows that the question of what is a “supporting document” depends upon the claim that is being made and, in this context, it may be relevant to anticipate a defence which might be raised in response. Difficult questions as to whether a document is legally privileged may also be involved. If there is any doubt as to how the correct interpretation of such a provision, parties should err on the side of caution and it may be sensible to obtain legal advice before submitting a claim as the consequences of making a wrong decision can be severe.

For similar reasons, when drafting a charterparty it is advisable to ensure that such clauses are drafted carefully so as to be clear and unambiguous.

**If Members have any questions in relation to the above issues, they are invited to contact the Association for further information.**

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