

The use of arbitration in the settlement of maritime disputes

Maintaining balance between the interests of shippers
and carriers

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Introduction

- . Maritime arbitration : definition
 - usual settlement in maritime affairs
- . Maritime arbitration : a type of settlement (x mediation x conciliation)
 - an instrument of settlement
- . Scope of application: maritime contracts
 - salvage ; ship building ; agency ;
 - sale of goods (CIF, FOB, ...) ;
 - carriage of goods (B/L to be used with C/P) ; charter-parties
- . Balance of interests : a requirement in rule of law
 - in maritime law
 - in maritime contracts

Balance of interests : a requirement

- An essential requirement as for choice of arbitration tribunal

Different chambers : London, NY, HK, Hamburg, Paris

Different sensitivities

- . As for choice of applicable law :

civil law vs. common law

some differences concerning adjective law

few differences concerning substantive law

Balance of interests : a requirement

- Under maritime contracts and trade contracts
B/L ; C/P ; insurance (below considered)
- Numerous issues under B/L ; C/P ; insurance.
 - .Classical : cargo claims ; unseaworthiness ; liberties clause ; freight ; payment ; lien ; letter of undertaking ; demurrage ; ...
 - .Recent : hardship clauses ; safe speed clause ; anti corruption clause ; piracy ; ...

I. Carriage contract (B/L) and balance of interests

- Context : B/L to be used with C/P : arbitration clause by reference
Relations between owner who has issued B/L and B/L holder
endorser
What about the clause ? Validity and opposability
What about anti suit injunctions ?
What about applicable rules ? Hague Rules / Hague Visby Rules
paramount clause
- Carrier's liability
Substantive law : burden of proof ; excepted cases, ...
neutralization (effect of carrier's fault)
awards

Adjective law : time limit ; notices

I (some specific issues)

- FIO clauses : validity ? (CAMP award)
- Carrier's liability : excepted cases
- Surveys : how to consider unilateral surveys ?
- Compensation in bulk carriage (Aqasia case)
- Insurer's subrogation (by law ; by contract)

Under Rotterdam Rules

- The new Convention :
not ratified but source of inspiration
one of the goals : balance of interests
arbitration under RR (art. 75 s.)
- Shipper's interests considered :
carrier to make the ship seaworthy during the voyage
nautical fault deleted
higher compensation
- Carrier's interest considered :
duties and liability of the shipper
freedom of contract in services contract (art. 80 s.)

II. Charter parties and balance of interests

A. Voyage charter

Definition (vessel disposal ; nautical and commercial operations assumed by the owner ; freight)

- Recurrent issues between owner and charterer :
lay days ; demurrage ; NOR ; ETA ;
interpretation
CAMP awards

B. Time charter

. Definition (vessel disposal ; nautical operations assumed by the owner ; commercial operations assumed by the charterer)

Relations between owner and charterer

usual disputes : e.g. safe port clause (Eastern city case)
off hire clauses

Relations between parties and third party

third party and time charterer : contractual relation

third party and owner of the ship : principle, non contractual
exception

C. Trip charter and other C/P

- Trip charter

possible qualifications : T/C or V/C ?

accurate qualification : time charter

- Slot charter

relations between parties : freedom

of contract

relations between third party and B/L. issuer

carriage of law

III. Insurance contract

- Arbitration / mediation
- Balance of interests between insurer and insured
ship insurance
commodities insurance :
 - civil law system (abstract exclusions)
 - vs. common law system (enumerated exclusions)
- Balance of interests between third party and liability insurer (P and I Club)
 - civil law system : direct action (may arbitration clauses be circumvented in direct action claims under civil legislation ?)
 - common law system : rule « pay to be paid »

Conclusion

- . Requirement of balance of interests
 - .to reach by the law
 - .to reach by the contract
 - .to reach by arbitration
- Last word :
consider the contract and parties' will
maritime arbitration : « contract first »

Thank you for attention

Awards. Abstract. B/L

- *CAMP n° 1188. Rice in bags under B/L. Shortage and damages to cargo. Letter of undertaking giving jurisdiction to CAMP. Carrier's liability for shortage (yes). For moisture and torn bags (in part).*

A receiver, who is the holder of a B/L to order, is entitled to claim against the carrier identified as such on the B/L. By applying the Hague Rules, the carrier was found liable to indemnify the holder on a CIF basis for the whole shortage but for two thirds only of damages caused by wetting due to condensation, unavoidable on a bulk carrier for the sea passage under consideration and for half of the bag leakages which could not be prevented whatever means of supervision was used.

Awards. Abstract. B/L

- *CAMP n° 1217. Transport of refrigerated containers. Lack of means of wedging inside containers. Shipper's fault. Carrier's liability (no).*

Two refrigerated containers, one packed with boxes of frozen chickens and the other with boxes of frozen meat, were loaded in Brazil on different vessels bound for Asia. On arrival, a partial thawing was observed due to obstruction of cold air supply inside the containers caused by the collapse of piles of boxes. The arbitrators considered that for the shipper to pile up boxes inside a container omitting to provide proper dunnage in empty spaces was tantamount to professional misconduct. To no avail, the shipper pleaded the carrier's assumption of liability since it was clear for the arbitrators that the shipper's misconduct was the certain and sole cause of the damages. On the ground of art. 4-2.i of HR, the carrier was exempted of any liability.

Awards. Abstract. V/C

- CAMP n° 1215. Synacomex 90. Social unrests. Strike, curfew. Force majeure (no). Laytime calculation.

During the so called « arab spring », a vessel was chartered to discharge a cargo of wheat in bulk in a tunisian port. After remittance of her NOR and while the authorities ordered a curfew from 9 pm to 5 am, the vessel had to wait a few days before coming alongside and her discharging was frequently interrupted by a sit-in of the receiver's staff. The dispute related to the laytime calculation. The arbitrators considered the charterer did not prove the curfew constituted a force majeure case which prevented discharging. The demonstration of the staff in charge of the discharge, were aimed at protesting against the nomination of a new chief executive. This was not sufficient, under French law, to qualify as strike. In addition, because the C/P have been concluded during the Tunisian events, the charterer could not claim that he was able to anticipate such disturbances.

Awards. Abstracts. V/C

- *CAMP n° 1195. Discharging in Ivory Coast. European regulation forbidding any financial relationship with Ivory Coast authorities. Impossibility to perform. Ship owner compensation (yes). Unrecovered expenses (yes). Loss to opportunity of profit (no).*

The V/C to Abidjan was contrary to European regulation forbidding at the time any payment through the local authorities, rendering its execution impossible which vindicates the charterer's decision to cancel the C/P. However, as the charterer's decision was not free from any mistake, the charterer must indemnify the ship owner for his unrecoverable expenses, but not for his lost opportunity of profit.

Awards. Abstracts. V/C

- *CAMP n° 1220. Synacomex. Wheat in bulk. Cargo wetting. Claimant insurers. Admissibility (yes). Legal subrogation. FIO clause. Shipowner liability (no).*

During cargo discharging in an african port, heavy rains interrupted operations several times. Some cargo having been wetted, the insurer ordered a survey in the receiver's warehouse after the vessel's departure in order to assess the damage. Having indemnified the insured, the subrogated insurer claimed compensation from the ship owner based on the C/P terms which included the HR. The shipowner challenged the validity of the subrogation, opposed the claim timebar and, on the merits, maintained that C/P clause 5 attributed the risk of the discharge operation to the charterer. On the merits, the arbitrators observed that the statement of facts and time sheet showed that holds had been closed in due time before rain started and that moisture could only happen after the goods were out of the holds. According to clause 5, cargo was to be discharged at the risk of the charterer, applying consequently a « jurisprudence of CAMP » (this clause prevails on art. 3-2 HR).

Awards Abstracts T/C

- CAMP n° 1221. NYPE 46. English law. Claimant shipowner. Off hire for cranes breakdowns. Crane damages by stevedores.

On the off hire periods for crane breakdowns, the arbitrators applied an additional clause which, contrary to the printed clause of the C/P, did not charge the ship owner for the bunkers spent when the hire was reduced proportionally to the number of available cranes and reinstated the periods wrongly deducted when a shore crane was supplied by the ship owner in the place of a broken down crane. They also declared the charterer liable for the damage to the crane caused by stevedores and its consequences.

Awards. Abstracts. T/C

- CAMP n° 1224. NYPE Produce. Identification of the carrier.

A vessel was time chartered for a shipment of rice in bags from Vietnam to two ports in West Africa. Shortage and damages due to moisture were ascertained in both discharge ports. The claimant cargo insurers asserted that because the B/L were headed with the shipowner's name, it should assume the responsibility of the sea carrier while the shipowner disputed the admissibility of the cargo insurer's claims well as the description of sea carrier attributed to him. Firstly, the arbitrators declared the claim admissible after having verified the validity of the subrogation. Then, they have considered that by allowing in the C/P the name of the owning Cy., the shipowner was in fact the sea carrier, and legally linked towards the B/L holders. Therefore, they judged that the shipowner was liable for the shortage but, as far as damage due to moisture was concerned, the amount was to be shared with the time charterer whose fault the shipowner could take advantage of in order to mitigate his liability.

Awards. Abstracts. Insurance

- *CAMP n°1231. Rice in bags. French marine cargo insurance policy. Ship damage during voyage. Cargo discharging and redirection. Goods depreciation due to late arrival near the use-by-date. Indemnification by insurer (no). Depreciation of the commercial value alone. Natural depreciation not provided.*

Awards. Abstracts. Insurance

- *CAMP n° 1191. Rice in bags under B/L to order. Surrogate insurer. Loss payee clause. Admissibility (yes). Assessment of loss.*

Despite some clerical errors in documents produced by the claimant, it appears from the facts that the seller received the indemnity of behalf of the buyer to whom he transferred it (the buyer debtor of the sale price had asked for the insurer to pay the indemnity in the hands of the seller : loss payee clause). Therefore, by virtue of the deed of subrogation delivered by the receiver, the insurer is entitled to claim. The carrier's liability being undisputed, in the absence of official market prices, the arbitrators assessed the damages on the basis of the CIF price invoiced plus 5 %.