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WHEN DOES A NOMINATION OF PORT TAKE EFFECT?

Bulk Shipping v. *Ipco Trading SA* (*The Jasmine B*)[1]

IN a voyage charter, the port of loading or discharge can either be specified in the contract from the beginning, or may be left to the election of the charterer. It is an accepted principle that when the choice of port is left to the voyage charterer, the port subsequently nominated by the charterer is deemed to be written into the charterparty from the outset.

Effectively, this means that the charterer is not entitled to change the destination of the ship, as it would amount to a unilateral alteration of the contract. However, it has not been conclusively decided whether the voyage charterer, like the time charterer, has a secondary obligation to re-nominate, *i.e.,* choose an alternative destination if the first one becomes unsafe after the nomination.[2] This question remains unsettled – however, this is not an appropriate place to address it in any great depth.

On the other hand, it has generally been thought that a nomination is effective once the shipowner or master is notified of it. There is need for a second look at this point in the light of His Honour, Judge Anthony Diamond Q.C.'s judgment in *Bulk Shipping* v. *Ipco Trading SA (The Jasmine B).*

In *The Jasmine B,* the vessel had loaded at Batumi in the Black Sea and was ordered by the charterers to Porto Torres for discharge. The vessel duly arrived and tendered notice of readiness. However, there was no receiver to whom the cargo could be delivered and the vessel did not berth there. After a series of exchanges between the charterers and the shipowners, the vessel was eventually ordered to go to Genoa where the cargo was discharged. Several issues arose as to the charterers' right to give certain orders of employment after the failure to discharge at Porto Torres. One of these issues was whether the charterers' order for the vessel to discharge the cargo at Genoa was valid.

The charterparty in that case was in a modified Asbatankvoy form. Part 1 of the charter set out the loading ports as follows:

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[1] [1992] 1 Lloyd's Rep. 39.

[2] The House of Lords in *The Evia (No. 2)* [1983] 1 A.C. 736, at pp. 764-765 did not commit itself on this point.

C. Loading Port(s): one or two safe port(s) Soviet Black Sea ...

There were also what was described as "Special Provisions". These included the following terms:

2. Discharging port(s): one or two safe port(s), United Kingdom, Eire [*etc.*] ...

Always maximum three ports total load and discharge ....

Another set of "Special Provisions" (Clause M.1) provides as follows:

A. Notwithstanding anything else to the contrary in this Charter Party and notwithstanding what loading and/or discharging ports may have been nominated and Bills of Lading issued, Charterer shall have the right to change at any time its nomination of the loading and/or discharging ports in accordance with Part 1 of this Charter Party.

B. Charterer shall have the right to order the vessel to interrupt her voyage at any time during the laden transit and await further orders.

Judge Diamond found that the modifications permitted the charterers to change their loading or discharge port orders at any time, provided that those orders did not result in the vessel having in all more than three ports for loading and discharge.[3]

If the charterers in that case had only one right of nomination, then the Court would have had to decide whether the nomination of Porto Torres was effective so that the charterers no longer had a right to order the ship to go to Genoa. On the facts, as the contract gave the charterers more than one right of nomination, it was not necessary to determine the criterion of an effective nomination. Judge Diamond thought that the meaning of an effective nomination was not clear-cut:

> The question might then arise: by what criterion is one to judge whether a port has become an effective port of loading or discharge? Does one have regard to whether the vessel has given a valid notice of readiness at a port or to whether loading or discharge has actually taken place there? In the present case, for example, was Porto Torres an effective port of discharge so as to exhaust one of the three permitted

[3] *Ibid.,* at p. 43.

> loading and discharge ports? I can see possible reasons for adopting the test that, when a notice of readiness has been given at a port, that port has become an effective port of loading or discharge. Once a vessel has arrived at a port, is ready to load or discharge and has given a notice of readiness, the owner has placed his vessel at the disposal of the charterer for loading and discharge. For the charterer, however, it might be argued that such a criterion would unduly restrict his rights under cl. M.1. Since either view is a possible one, and since the answer happens to make no difference to the result of the present case, I regard it as sensible not to express a view on the matter. It is sufficient to say that there must not be more than three effective ports of loading and discharge.[4]

Thus, even if the nomination of Porto Torres was effective, the charterers were entitled by the express terms of the contract to nominate another port of discharge. Therefore, the instructions to go to Genoa following the Porto Torres order were valid.

It can certainly be seen that where there is only one right of nomination, the question of what an effective nomination is will be a very important issue. In this regard, it is necessary to consider at what point in time the nomination takes effect. Three possibilities arise: (1) when loading or discharge has taken place; (2) when the vessel has become an arrived ship and is ready to load or discharge; or (3) as soon as the charterer conveys the nomination to the shipowner.

It would be surprising if a nomination is deemed not effective unless loading or discharge has actually taken place. If this were so, the charterer would be able to nominate another port although the shipowner had incurred risk and expense in proceeding to the first port. If the charterer nominated a port which was prospectively unsafe and the ship in obeying that nomination found itself in dangerous waters, the charterer could even argue that he was not liable for nominating an unsafe port because the nomination had not taken effect. This would go against a whole series of cases dealing with the nomination of unsafe ports.[5]

Although Judge Diamond was open to either situation (1) or (2) being the test of an effective nomination, he must be speaking only in the context of clause M.1. which permitted the charterer to "change at any time its

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[4] *Ibid.* It may be noted that Judge Diamond used the words "effective port" and not "effective nomination". There is, however, nothing in the judgment to indicate that he was referring to a distinct legal concept.

[5] See *e.g. Ogden* v. *Graham* (1861) 1 B. & S. 773; *Hall Brothers Steamship Co. Ltd.* \ *R.& W.Paul Ltd.* (1914) 30 T.L.R. 598; 19Com.Cas. 384; *Axel Brostrom & Son* v. *Louis Dreyfiis & Co.* (1932) 38 Com. Cas. 79.

nomination of the loading and/or discharge ports".[6] It may be queried whether clause M. 1. has the effect of altering the time when a nomination takes effect. What is clear is that, in the absence of a clause providing for change of nomination, it cannot be argued that a nomination takes effect only when loading or discharge has taken place.

It is submitted that the nomination takes effect at an earlier point in time. The question is whether it takes effect immediately when it is conveyed to the shipowner, or only when the ship has arrived and is ready to load or discharge. There was no indication in earlier cases in favour of the latter possibility.[7] It is difficult to locate precedents for Judge Diamond's treatment of the "effective" port of discharge. One may suggest that he was only addressing the particular provisions of the charterparty which permitted several ports of loading and discharge. Yet, there are indications that he was speaking in a wider context. At one point, he opined that while it is true that a charterer who has exercised a right of election or selection in nominating a port or berth cannot thereafter change the nomination unilaterally, he doubted whether "it is justified to extend that principle so as to hold that a *representation* that the nominated port is to be the sole discharge port constitutes the exercise of a right of election or selection".[8]

This part of Judge Diamond's judgment is rather obscure both in terms of authority and intention. It is by no means clear that Judge Diamond was attempting to draw a distinction between a nomination and the exercise of a right of selection. There seems little value in such play of words. Neither could he have intended to say that a mere notification to the shipowner did not constitute an effective nomination. Indeed, the authorities, including those cited by him, clearly show that a nomination takes effect once it is made.

In *The Prometheus,* counsel for the shipowners argued that the mere selection of a berth under a port charter should not be regarded as unchangeable, except by agreement, if the shipowner has not at the time of change committed his ship to the selected berth and incurred expenses or liability to third parties thereon.[9] This argument was rejected by Mocatta J. who held that the selection of a berth in a port charter, once *notified* to the master or shipowner, is something that the charterers cannot change unilaterally.[10] On the authorities, Mocatta J. found that this was so whether

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6 *Supra,* note 1, at p. 41.

7 *Anglo-Danubian Transport Company Ltd.* v. *Ministry of Food* (1950) 83 Ll.L.R. 137; *The Prometheus* [1974] 1 Lloyd's Rep. 350.

8 *Supra,* note 1, at p. 44 (emphasis mine).

9 *Supra,* note 7, at p. 354.

10 *Ibid.,* at pp. 354-355; following *Anglo-Danubian Transport Company Ltd.* v. *Ministry of Food, supra,* note 7, at p. 139 where Devlin J. rejected counsel's argument that a charterer could still change his nomination at any time before the ship began to discharge, or at any rate, before she became an arrived ship.

it was a case of selecting a port or a place within the port (*e.g.* a berth). Furthermore, it seems to apply equally whether the right of nomination is implied or express.[11]

It seems established, therefore, that a nomination under a voyage charter takes effect immediately upon notification to the shipowner or master. In the absence of express provisions, the charterers are neither obliged nor entitled to change a nomination once made. This is subject to two qualifications.

First, the charterers have no right to nominate a prospectively unsafe port. This is a primary obligation regarding safety of ports. It should not be confused with the question of a secondary obligation to change a nomination when a safe port *becomes* unsafe after nomination. As mentioned earlier, the issue of a secondary obligation remains unsettled.[12] It is true that Judge Diamond in *The Jasmine B* had categorically denied any residual right or obligation in the charterer once the nomination was made:

> In the absence of any special provision in a charter-party, the effect of the nomination of a loading or discharging port by the charterer is that the charter-party must thereafter be treated as if the nominated port had originally been written into the charter-party and that *the charterer has neither the right nor the obligation to change that nomination.*[13]

This was, however, only a dictum and there certainly was no occasion in that case for Judge Diamond to consider whether a voyage charterer had a secondary obligation of re-nomination.

Secondly, the charterers have no right to nominate a port which, apart from questions of unsafety, is an "impossible port". An impossible port is one in which there is a certainty of conditions which will, in all probability, defeat the object of the adventure. Sellers L.J. in the Court of Appeal decision in *Reardon Smith Line Ltd.* v. *Ministry of Agriculture, Fisheries and Food* (*The Vancouver Strike Cases*) gave the example of a port which had been destroyed by earthquake or a nuclear explosion.[14] In a more mundane setting, Wilmer L.J. in the same case held that:

> In these circumstances, assuming in favour of the shipowners that the charterers were under an implied obligation not to nominate an impossible port, I am of the opinion that a port only becomes an impossible port for this purpose when loading [or discharge] thereat

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[11] *The Prometheus, supra,* note 7, at pp. 354-355. This point was conceded by counsel in *Anglo-Danubian Transport Company Ltd.* v. *Ministry of Food, supra,* note 7, at p. 139.

[12] See text accompanying note 1.

[13] *Supra,* note 1, at p. 42 (emphasis mine).

[14] [1961] 1 Lloyd's Rep. 385, at p. 408.

> will subject the ship to such delay as will frustrate the commercial object of the adventure, so that the voyage when performed will be something different from that contracted for.[15]

Where the port nominated is unsafe or impossible, the nomination is bad. The shipowner can require the charterer to nominate another port, or accept the nomination. If the nomination is accepted, the charterer is liable for damages resulting from compliance with the bad nomination, subject, of course, to the normal rules of *novus actus interveniens* and mitigation.[16] The right to damages will not be deemed to be waived merely by acceptance of the nomination. There must be something amounting to an abandonment by the shipowner of their right to damages, and this could only be shown by either an agreement, or an estoppel operating to that effect.[17]

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[15] *Ibid.,* at p. 421.

[16] *Reardon Smith Line Ltd.* v. *Australian Wheat Board* [1956] A.C. 266, at p. 269.

[17] See *e.g. Anglo-Danubian Transport Company Ltd.* v. *Ministry of Food, supra,* note 7, at pp. 139-140; *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391.