Judgment : Mr Justice Aikens : Commercial Court. 15th July 2005.

Background

1. This is an Appeal on two points of law brought by Sea Success Maritime Inc ("Sea Success") pursuant to section 69 of the Arbitration Act 1996. The Appeal is from a Final Declaratory Award dated 3rd March 2005, which was given by three well known London Maritime Arbitrators, Messrs Edward Mocatta, Anthony Scott and Patrick O'Donovan. The dispute giving rise to the arbitration and the Declaratory Award concerned the proper construction of clause 52 of a time charterparty dated 9th June 2003. By this charterparty, which was on the well known New York Produce Exchange (1981) Form with amendments, the motor ship "SEA SUCCESS" was chartered by Sea Success to African Maritime Carriers Limited ("AMC") for a period of 22/26 months, with a possible extension for a further 11/13 months. Leave to appeal was given by Mr Justice Andrew Smith on 26 May 2005 and I heard the appeal on 7 July 2005.

2. The Arbitration Claim Form seeking leave to appeal under section 69 of the Arbitration Act 1996 identified the two points of law as follows:
   i) "Whether (as contended for by the Applicant) under clause 52 of the charterparty dated 9 June 2003 between the Applicant (ie. Sea Success) and the Respondent (ie. AMC) the master is entitled and obliged to reject cargo which would properly be the subject of a reservation in the bill of lading as to the apparent good order and condition of the cargo or the packing; or whether (as found by the Arbitrators) the master is entitled and obliged to reject cargo only if it, once loaded, would be properly described in the bill of lading in a way which would qualify the statement of the apparent order and condition of the cargo "ultimately proposed" to be stated in the bill of lading by the shipper.
   ii) Consequent on the answer to (i) above, whether the master was entitled and obliged to reject the cargo presented for shipment at Novorossiysk in September 2004".

3. Sea Success is the Owner of the vessel. AMC, as head charterer, sub-chartered the vessel to Daeyang Shipping Company Limited, ("Daeyang"), pursuant to a time charter dated 2nd February 2004. Daeyang, in turn, sub-chartered the vessel to Daeshin Shipping Co Ltd ("Daeshin"), pursuant to a time charter dated 6th July 2004. Daeshin further sub-chartered the vessel to Key Maritime GmbH ("Key Maritime") for a time charter trip, pursuant to a charterparty dated 13th August 2004. All these time charters were on substantially similar terms save as to duration. Therefore, when the dispute arose between Sea Success and AMC, the same issue arose as between the successive disponent owners and time charterers. Very sensibly, the parties cooperated in ensuring that there was the same tribunal for each arbitral reference. The Arbitrators directed that the four references be dealt with concurrently and that the question of the proper interpretation of clause 52 of the Charter should be dealt with without delay.

4. The arbitrators issued separate Final Declaratory Awards in respect of each time charter, but gave common Reasons for and forming part of each of those awards. The hearing before me was, technically, an appeal from the Award in respect of the dispute under the Charter between Sea Success and AMC. However, by agreement, Mr Stephen Hofmeyr QC, counsel for Key Maritime GmbH, also put in written submissions and appeared at the hearing. In the event Mr Hofmeyr decided that he had no need to elaborate those submissions (which were most helpful) with further oral argument.

5. There was a final sub-charter in the chain. Key Maritime sub-chartered the vessel to Ferrostaal AG, Essen, pursuant to a voyage charterparty on an amended GENCON Form dated 21st June 2004. That Charter provided for a voyage from one safe berth Novorossiysk to one safe berth New Orleans and one safe berth Houston. The dispute arose out of the voyage pursuant to that sub-charter.

The Facts giving Rise to the Dispute between the parties

6. During September 2004 the vessel proceeded to Constantza. At Constantza, AMC, on behalf of Key Maritime, tendered for shipment a cargo including steel pipes. The steel pipes were in a damaged condition. The Master refused to accept the cargo on board for carriage. Eventually this problem was resolved by the issue of a Letter of Indemnity. The vessel then proceeded to Novorossiysk. There a cargo of hot rolled steel coils was tendered for shipment by AMC on behalf of Key Maritime. Once

again the cargo was in a damaged condition and the Master refused to permit the cargo to be loaded in accordance with the instructions given by or on behalf of Key Maritime. The problem was solved at Novorossiysk by the parties entering into a "without prejudice" agreement as to their respective rights and the cargo was loaded.

7. The Master of the "SEA SUCCESS" stated that he had refused to permit the cargo to be loaded at Constantza and Novorossiysk because he was performing his duty as set out in the final sentence of clause 52 of the Charter. That clause provides: *"The vessel to use Charterers' Bills of Lading or Bills of Lading approved by Charterers and/or sub-Charterers which to include New Both-To-Blame Collision Clause, New Jason Clause, Clause Paramount General, USA or Canadian, as applicable, P&I Bunkering Clause and Baltime 1939 War Risks Clauses, during the period of this Charter. Master to authorise, time by time, in writing Charterers or their appointed Agents to sign Bills of Lading on behalf of Master in accordance with Mate's receipts. Master has the right and must reject any cargo that are [sic] subject to clausing of the BS/L".*

   At the time the Master, the Owners and their lawyers all contended that only "good" cargo could be loaded; that any cargo that would be "subject to remarks" in the bill of lading must be rejected; and that by reason of the condition of the cargo tendered it would be subject to remarks in the bill of lading and therefore must be rejected by the Master pursuant to the final sentence of clause 52.

8. As appears from paragraph 5 of the Reasons of the arbitrators, there was no dispute as to the actual condition of the goods tendered for shipment at Constantza and Novorissiysk. The arbitrators did not set out details of the condition of the steel pipes. However, in relation to the steel coils cargo, they quote from the pre-loading survey report which was carried out at Novorossiysk by surveyors appointed by the vessel's P & I Club, on behalf of the Owners. The Survey Report states that the hot rolled steel coils had been kept in an open store and subject to adverse weather conditions. The cargo was rusty, with a percentage of it suffering from dents and buckles.

9. In paragraph 6 of the arbitrators' Reasons they record that the Master refused to accept the steel cargo for carriage on the basis that it was "*subject to clausing on the Bills of Lading"*. However, the arbitrators also state that AMC, through its solicitors, had insisted that the bills of lading as presented to the Master would set out, in the "Shippers' Description of Goods" box in the "CONGEN Bill" 1994 Form of bill of lading, a complete and accurate description of the cargo according to the finding of the pre – loading survey by the Owners' surveyors. (See: paragraphs 6, 13, 20 and 63 of the Reasons). Therefore, AMC and the sub - charterers asserted, provided that the description so given was accurate, there would be no need for any "clausing" of the bills of lading by the Master. So he had no good reason to refuse to load the cargo under the terms of the last sentence of clause 52 of the Charter and the sub – time charters.

The Arbitration and Award

10. In the arbitration proceedings, the parties agreed that there were two preliminary issues that the Arbitrators should decide. The questions posed were these:

    i) "In what circumstances, on the true construction of clause 52 of the Charter, is the Master entitled and obliged to reject the cargo presented for shipment/tendered for loading?

    ii) Did those circumstances exist at Novorossiysk?"

    As I have said, each of the time charters contained a clause that was identical to clause 52 of the Charter. Therefore, these issues arose in relation to each of the time charters. At the combined arbitration hearing, AMC and Key Maritime put forward slightly different formulations for the Declaratory Relief that they sought. The arbitrators' Declarations are in the form put forward by Key Maritime, although it is clear from the arbitrators' Reasons at paragraph 66 that they did not regard the differences between the two formulations as significant. The two Declarations made by the Arbitrators in answer to the two Preliminary Issues are as follows:

    "i) On the true construction of the final sentence of clause 52 of the Charter, the Master is entitled and obliged to reject cargo presented for shipment/tendered for loading if the cargo, once loaded would be properly described in the bill of lading in away which would qualify the statement of the apparent order and condition of the cargo ultimately proposed to be stated in the bill of lading by the Shipper.

ii) No – as there was no (or ultimately no) dispute between the Master/Owners, on the one hand and Key Maritime/the Shippers on the other hand as to either the apparent order and condition of the cargo or appropriate description of the cargo to be included in the Bills of Lading"

11. The arbitrators did not annex the Charter to the Award or their Reasons. However, it was agreed by the parties at the hearing before me that I was entitled to look at all the terms of the Charter, not simply those referred to in the Award. Apart from clause 52, the relevant terms of the Charter are as follows:

i) By lines 45 – 46, it is agreed that the vessel is *"….to be employed in carrying lawful merchandise excluding …… see clause 42"*. Clause 42 provides that the vessel not be employed in the carriage of nuclear and radioactive cargo or waste or other nuclear material. There is also a long list of cargoes that are specifically prohibited from being loaded under the Charter. The clause stipulates that the charterers had the right to load a defined number of particular cargoes (scrap, concentrates and sulphur) within a twelve-month period. There are further detailed provisions in clause 42 as to the loading of cargoes. The clause runs to two and a half pages in all.

ii) Clause 8 of the Charter contains the usual employment and indemnity provision. The clause provides in part: *"However, at Charterers' option, the Charterers or their agents may sign Bills of Lading on behalf of the Captain always in conformity with Mate's receipts, see clause 52. All Bills of Lading shall be without prejudice to this Charter and the Charterers shall indemnify the Owners against all consequences of liability which arise from any inconsistency between this Charter and any Bills of Lading or Waybills signed by the Charterers or their agents or by the Captain at their request."*

iii) Clause 62 sets out detailed trading exclusions for the vessel.

12. The arbitrators' reasons and conclusions can be summarised as follows:

(1) The first questions is: What does the word "clausing" mean, in the context of Clause 52 and the whole of the Charter? In the arbitrators' view the word "clausing" has no ordinary settled meaning and has no settled commercial usage. Therefore, the meaning of the word, in the context of the Charter, must be ascertained by identifying the objective intention of the parties. (See paragraphs 52 of the Reasons).

(2) The commercial purpose of clause 52 is to resolve arguments at load ports which, if not resolved, would lead to disputes as to whether the vessel was off-hire and also to loss of time and expense. *"…….. The final sentence of clause 52 was designed to avoid disputes between the Shipper and the Master, as to the appropriate description of the cargo being loaded or about to be loaded to be inserted in the Bills of Lading."* The clause was not intended *"to operate in circumstances where there is no disagreement between the Master and Shipper as to the proposed description of the cargo in the Bills of Lading."* (See paragraph 60 of the Reasons).

(3) The authorities show that the question of whether the goods are "*in apparent good order and condition"* depends primarily on the nature of the goods and the way in which they are described in the bills of lading that are tendered for signature by the Master. The question of the "*apparent order and condition"* of the cargo to be loaded cannot be divorced from the description of the goods in the bill of lading: (see paragraphs 53 and 54 of the Reasons). The reliance placed by Sea Success on the terms of the UCP 500 is of no assistance in ascertaining the meaning of clause 52. Nor does the distinction drawn in the cases on sale of goods between "condition" and "description" help in the present context. (See paragraphs 55 and 56 of the Reasons).

(4) The common sense construction of the last sentence of clause 52, in the context of the scheme of the Charter, is that "If the Master properly wants to add accurate words to the proposed description of the cargo (which would be the act of clausing the bill) with which the shipper does not agree, then clause 52 applies and the Master is entitled and indeed obliged to reject the cargo in respect of which he considers the addition is necessary". But the clause is not intended to be used if there is no disagreement between the Master and the shipper as to the proposed description of the cargo in the bills of lading. Were it otherwise, then damaged, worn or used goods could never be shipped

under this Charter, despite the fact that certain categories of damaged goods are permitted cargoes within clause 42 of the Charter. (See paragraphs 58 and 60 of the Reasons).

(5) Paragraph 63 set outs the arbitrators' conclusion on the first Preliminary Issue and also answers the second one. That paragraph states: *"If the proper description of the cargo would qualify the description of the apparent order and condition of the cargo that the shippers proposed to put in the bills of lading, then the Master would be entitled and obliged to reject the cargo at the time that the cargo was presented for loading. There will probably always have to be a discussion as to the proper description of the condition of the cargo (in the context of a cargo of steel, that will be done once the pre-loading steel survey is available). In the absence of agreement, the Master will reject the cargo until the condition of the goods is accurately described. It is to be noted that, at Novorossiysk, the Charterers proposed to incorporate the apparent order and description as found by the Club surveyors."*

13. The Arbitrators also dealt with other arguments, which were repeated before me.

The arguments of Sea Success on the appeal

14. The arguments of Mr Steven Berry QC on behalf of Sea Success were as follows:

i) The provision in the last sentence of clause 52 is to deal with differences between (a) the apparent order and condition of the cargo as it is described in voyage orders given to the ship which will be set out in the bill of lading prepared for signature, and (b) the actual apparent order and condition of the cargo to be loaded, as seen by the Master when he examines the cargo immediately before loading. The description of cargo given in voyage orders will usually follow that given in any sale contract for the goods concerned.

ii) A Shipper is entitled to give a description of the cargo for inclusion in a draft Mate's receipt or bill of lading that is in accordance with the description given in the sale contract relating to the goods. Indeed the shipper may be obliged to do so under the sale contract.

iii) It is the duty of the ship's Mate when he completes and signs a Mate's receipt to ensure that the description of the cargo received and its condition as stated on the receipt is accurate. Likewise it is the duty of the Master (or his agent) to ensure that the description of the cargo and the condition of the cargo as set out in the bill of lading are accurate before he signs it. (Mr Berry relied in this regard in particular on the analysis of Mustill LJ in ***Naviera Mogor SA v Societe Metallurgique de Normandie: "The Nogar Marin" [1988] 1 Lloyd's Rep 412 at 420 – 421).***

iv) If, in order that the Master (or his agent) can sign the bill of lading as recording accurately both the description and the condition of the cargo, he has to add words to the description of the cargo to be loaded, then that additional wording constitutes "clausing of the bill of lading".

v) This meaning of the word "clausing" is consistent with the normal meaning of that word in relation to bills of lading as understood in the shipping and international sale of goods community. Mr Berry drew my attention to the reference in paragraph 28 of the arbitrators' Reasons which quotes a passage from a document produced by the Skuld P&I Club, called "Carriage of Steel Cargoes". That document describes a *"clean bill of lading"* as one which states the cargo as being in *"apparent good order and condition without containing adverse remarks"*. The Skuld document contrasts this with " a claused bill of lading". The Skuld document comments that where the cargo is not in *"apparent good order and condition"*, the carrier is *"entitled to insist on the bill of lading being claused…."*.

vi) Mr Berry submitted that this interpretation of the word "clausing" is also consistent with authority. He referred to ***British Imex v Midland Bank [1958] 1QB 542 at 551,*** where Salmon J gave a definition of a "clean" bill of lading as "one that does not contain any reservations as to the apparent good order and condition of the goods or the packing". That, Mr Berry submitted, was in contrast to a "claused" bill of lading. Mr Berry also referred to ***Boukadoura Maritime Corporation v Societe Anonyme Marocaine de L'Industrie et due Raffinage: "The BOUKADOURA" [1989] 1 Lloyd's Rep.393 at 396,*** where Evans J describes a claused bill of lading as being one which qualifies the apparent good order and condition of the cargo as described in the bill of lading.

vii) The arbitrators' Declaration as to the meaning of the final sentence of clause 52 was inconsistent with the actual wording of the sentence in the clause. The arbitrators apparently contemplated some discussion between the Master and the charterers or shippers before the cargo was loaded and then a situation where the Charterers or Shippers "ultimately proposed" a statement as to the description and apparent order and condition of the cargo in the draft bill of lading tendered to the Master. But the notion of a discussion ***before*** loading as to the draft terms of the bill of lading was impractical: ("the impracticability point").

viii) Moreover, Mr Berry submitted, at the stage that the discussion was complete and the draft bill of lading tendered for signature, the cargo would already have been loaded and so it would be too late for the Master to reject the cargo and he would have failed to comply with the provision in the last sentence of clause 52 that he must "*reject any cargo that are [sic] subject to clausing of the bs/l*." (This was dubbed "the timing point").

ix) Mr Berry said that the last sentence of clause 52 has two commercial purposes. The first, he said, is to avoid delay and expense at a load port. Once the Master had inspected the goods, if it was clear that there was a difference between the description of the goods as set out in the voyage orders as reflected in the draft Mate's receipt and bill of lading to be signed, and the goods waiting to be loaded, then the Master had a duty immediately to refuse to load that cargo. The second object is to prevent the Master and Owners from being put in the invidious position of refusing a shipper's request to sign "clean" bills of lading, even though it was clear to the Master that the cargo, as described in the voyage orders and the Shippers' description of the goods in the bill of lading, does not match the condition of the cargo to be loaded. Because the Master had the duty to reject any such cargo, the exercise of that duty would avoid the possibility of subsequent "spurious or unjust claims or proceedings" - to use the phrase recorded at paragraph 36 of the arbitrators' Reasons.

Conclusion and Reasons

15. I cannot accept the submissions of Mr Berry, despite the characteristically cogent way in which they were put both orally and in writing. In my view the arbitrators undoubtedly came to the correct conclusion on the construction of the last sentence of clause 52, although I might not have made the Declaration in precisely the same terms as they did. There are a number of reasons for my conclusion.

16. First, I accept Mr Males QC's submission that the construction of a commercial document is partly a question of fact and partly one of law. Commercial documents must not be construed in a vacuum. They must be construed in the context in which they are intended to be used. Here the context is a time charterparty by which the Owners have agreed to permit their vessel to be employed by the charterer for the carriage of different sorts of cargo as defined in the charterparty itself. The three arbitrators, all of whom are experienced in the shipping world, were aware of the general and particular factual background against which the wording in clause 52 must be construed. Therefore when the arbitrators' state their view (in paragraph 52 of their Reasons) that the word "clausing" has no ordinary settled meaning and no settled commercial usage, that must refer to the shipping and international trade world in general and to the factual matrix of this case in particular at the time the Charter was concluded. The conclusion that "clausing" has no settled meaning or usage cannot be challenged.

17. Next, I accept the submissions of Mr Males (which Mr Hofmeyr would support) that there is no authority which gives a definition of "clausing" that must be adopted in the context of this charterparty clause. In ***British Imex v Midland Bank (supra),*** Salmon J was careful to emphasise that a "clean" bill of lading had never been exhaustively defined and that he was not attempting to do so in that case. The reference by Evans J in ***The BOUKADOURA*** to a "clean (unclaused) bill of lading" does not assist. The judge was not grappling with the present problem.

18. Thirdly, the arbitrators, being leading maritime arbitrators, know well the commercial practices involved in the employment of a ship under time charter, including such matters as voyage orders, the procedure at ports for loading cargo, and the procedures involved in the preparation of Mate's receipts and bills of lading. No expert evidence was called or required on those matters in the

arbitration. The arbitration clause in the Charter, clause 74, requires that arbitrators appointed to determine disputes under the Charter shall be members of the London Maritime Arbitrators' Association ("LMAA"). The arbitrators came to their conclusions on construction against the background of their knowledge of the shipping trade generally.

19. Fourthly, the construction of clause 52 and the word "clausing" in particular must be seen against the general position, both in law and practice, of the roles of Owner, Master, time charterer and shipper when a ship is employed under a time charter such as the present. The position was summarised (in my view entirely accurately) in the submissions of AMC to the arbitrators that are set out at paragraphs 42 and 43 of their Reasons. As I read the Reasons, this description was not challenged before them and was accepted by the arbitrators.

20. The legal position, in briefest summary, is this: (i) it is for the time charterers to decide how the vessel should be employed. (ii) Subject to any restrictions in the charterparty, (such as set out in clause 42 in this case), the charterers are entitled to order the vessel to carry any lawful merchandise. (iii) It is, at least in the first instance, for the time charterers to decide what form the bill of lading should take. (This is clearly so in this case, given the terms of the first sentence of clause 52). (iv) Subject to any specific provisions in the time charter, the Master (or his authorised agent) is obliged to sign the bills of lading "as presented" by the time charterers or their agents. (v) Specific provisions may govern the form of the bill of lading that is to be signed by or on behalf of the Master. In this case the Charter states that bills of lading must contain certain standard terms, which are identified in clause 52. These include a Clause Paramount, by which the Hague Visby Rules are incorporated into the bill of lading terms. Those Rules include the provisions of Article III (3), requiring a carrier to issue a bill of lading to a shipper after receipt of the goods on board, showing amongst other things "*the apparent order and condition of the goods*". Also in this case (as is usual) the bills of lading presented had to be in accordance with the Mate's receipts. (v) There is no requirement, either in the law generally, or under the terms of this time charter, that the bills of lading should describe the cargo as being in "good" or "apparent good" condition. I would add that a Master or his representative who signs a bill of lading that inaccurately describes the cargo as being in "good" or "apparent good" condition is making a misrepresentation of fact, which can have considerable legal consequences.

21. On the practice, the position is, in my view, accurately recorded in paragraph 43 of the arbitrators' Reasons where they set out the submissions of AMC on this point. The shipper will prepare drafts of both the Mate's receipts and the bills of lading for signature by, respectively, the ship's Mate (or his agent) and the Master, or his agent. Both these documents will contain a description of the goods in question and that description will be given, in the first place, by the charterer, or the shipper who will usually present the drafts on behalf of the charterer under the charterparty. As well as the description of the goods, the Mate's receipts and bills of lading will include a statement as to the apparent order and condition of the goods. It is up to the charterer/shipper how the goods are described in the Mate's receipts and bill of lading. (See also ***The "Nogar Marin" (supra) at pages 420 – 1 per Mustill LJ).***

22. The arbitrators also specifically concluded that, as a matter of practice, there will "probably" always have to be a discussion between the charterers/shippers and the Master (or his agent) as to the proper description of the condition of the cargo. They said that in the context of a cargo of steel, that would be done once the pre – loading steel survey was available: see paragraph 63 of the Reasons.

23. Given that legal and practical background, it seems to me that there is not and cannot really be any dispute as to the correct interpretation of the word "clausing" in its context in clause 52. In its context, the word "clausing" means a notation on the bill of lading by the Master or his agent, which qualifies existing statements in the bill of lading as to the description and apparent condition of the goods.

24. Here I note that Mr Berry accepted in argument that the word "good" in the phrase *"apparent good order and condition"* means "proper", as in *"proper order and condition*" of the goods as described in the bill of lading. He accepted that cargo that is properly described as damaged or imperfect in some way can be stated to be in *"good order and condition"* in the sense of being in "proper" order and condition. Thus a cargo described in a bill of lading as "scrap" or as *"hot rolled steel coils with pitting and gouging"* can be stated to be in *"good order and condition"*. In the context of clause 52, therefore, the position is

that if the description of the goods is such that the Master can sign a bill of lading that says that those goods, as described, are in "*apparent good order and condition"*, then the cargo will not be "*subject to clausing of the bill of lading"*. But if the Master would have to make a notation on the bill of lading so as to reconcile the description of the goods with a statement that they are in "*apparent good order and condition*", then the cargo is "*subject to clausing of the bill of lading"*.

25. Next, it seems to me, therefore, that the real question at issue is not the meaning of the word "*clausing*" but precisely when will cargo become "*subject to clausing of the bill of lading"* within the meaning of clause 52, so that the Master is obliged to reject the cargo tendered for loading. Ultimately the argument between the parties comes down to one of timing; does this obligation to reject arise when the Master sees the first draft of the bill of lading or does the charterer/shipper have a chance to revise the description of the cargo and to state its description and apparent order and condition in a way the Master is willing to sign as being accurate?

26. As I have already pointed out, it is for the charterers/shippers to decide what description of the cargo is to be given in the bills of lading. I accept, as Mr Berry submits, that in the first place the charterers or shippers will probably have a description of the goods that is taken from a sale contract or a supplier's note. That may well provide the basis for the description of the goods given in the draft Mate's receipt and bill of lading as prepared by the shipper. But, as Colman J points out in his judgment in ***"The DAVID AGMASHENEBELI" [2003] 1 Lloyd's Rep 92 at 103***, it is the shipper or his agent who is delivering the cargo and so it is the shipper who has actual or imputed knowledge as to its condition. The shipper will or ought to know whether there is any discrepancy between the description of the cargo in the sale documents or supplier's note and the cargo which is actually to be loaded on board the ship.

27. As Colman J also points out in "***The DAVID AGMASHENEBELI",*** at ***page 104 – 5***, if the Master is under an obligation to the shipper under Article III(3) of the Hague Visby Rules, the Master must issue a bill of lading indicating the apparent order and condition of the cargo loaded on board Clause 52 of the Charter stipulates that the Hague Visby Rules are to be incorporated into bills of lading issued pursuant to this Charter. So in this case the Master must issue a bill of lading which indicates the apparent order and condition of the cargo that has been loaded on board.

28. It follows from these two points, as Colman J further notes in ***"The DAVID AGMASHENEBELI", at page 105,*** that before the Master can issue bills of lading that comply with the Hague Visby Rules obligation, he has to take a reasonable, non – expert view of the cargo that is about to be loaded, as he sees it. He must decide whether the *"apparent order and condition"* of the cargo to be loaded is accurately described in the bills of lading and, if the expression "apparent good order and condition" is used in the bill of lading, whether the apparent order and condition of the cargo is "good", ie. "proper".

29. It is obviously contemplated by clause 52 that the Master will do this inspection of the cargo ***before loading***, otherwise he could not "*reject*", (which must mean "refuse to allow to be loaded"), any cargo that would be "*subject to clausing in the bill of lading"*.

30. Now, if the Master, on examining the cargo, takes the view that he would have to qualify the bill of lading in order to ensure that the description of the cargo given is consistent with a statement as to the cargo's "apparent order and condition", then it would seem to me that there are two options open to the parties. Either the charterers/shippers agree to reformulate the description of the cargo in the draft bill of lading, so that the Master is prepared to sign it as accurately representing the description and condition of the cargo; or the charterer/shippers will not do so and the Master must then qualify, or "clause" the bill of lading so that it records accurately the shippers/charterers' description of the cargo and the actual condition of the cargo loaded on board, as assessed by the Master.

31. This view of the options accords with the arbitrators' appreciation of what will happen before loading. They state, in paragraph 61 of their Reasons, that "*in appropriate cases"* there would have to be a discussion as to the condition and proposed description of the cargo prior ***to loading,*** (my emphasis) -

"as eventually happened here and indeed as usually happens following receipt by the Owners of their pre-loading steel survey".

32. Given the practice which is described by the arbitrators at paragraphs 61 and 63 of their Reasons, which I take to be part of the "factual matrix" against which clause 52 must be construed, it follows that when clause 52 was agreed the parties contemplated that there will be room for negotiation as to the description of the cargo in the bills of lading ***before*** the goods are loaded. It is only if the shippers continue to insist on their description and the Master concludes that in his view, (which must be reasonably held), the cargo would be described in the bill of lading in a way which is inconsistent with a statement as to the cargo's apparent order and condition, that he has the right and duty to reject the cargo. But that does not mean that he has the right finally to reject cargo as first described in a draft bill of lading.

33. Therefore I conclude that the arbitrators' construction of the last sentence of clause 52 is correct. That construction is neither impractical nor does it fail to take account of the timing of events on loading, as suggested by Mr Berry. On the contrary, that construction is consistent with the practice, at the time of presentation of cargo and the presentation of draft bills of lading, as noted by the arbitrators. It is also consistent with the implied requirement (which must obviously be necessary in a charterparty such as the present) that the parties to it will act reasonably to make the contract work.

34. The Charter is still running, as I understand it. Therefore it may help the parties if I set out the version of the Declaration on Preliminary Issue One that I believe more accurately reflects the arbitrators' conclusion on the construction of clause 52, with which I agree: *"On the true construction of the final sentence of clause 52 of the Charter, the Master is entitled and obliged to reject cargo presented for shipment/tendered for loading if the cargo so presented/tendered is described in the wording of the bill of lading (as ultimately proposed by the shipper) in a way that would require the statement of the apparent order and condition of the cargo so described to be qualified, so that the bill of lading as signed by the Master would be accurate".*

35. The arbitrators found as a fact in paragraph 63 of their Reasons that at Novorissiysk the charterers (ie. AMC, who must have acted via the shippers), *"proposed to incorporate [in the bill of lading] the apparent order and description [of the steel coils cargo] as found by the Club surveyors".* If so, there would have been no need to qualify the statement of the apparent order and condition of the cargo as described in the bill of lading presented for signature by the Master or his agent. Accordingly, on the proper construction of clause 52 of the Charter, the Master did not have the right to reject the cargo at Novorossiysk. Therefore I agree with the conclusion of the arbitrators on Preliminary Issue Two.

36. For these reasons I conclude that the arbitrators did not err in law. Therefore the appeal must be dismissed.

Mr Steven Berry QC (instructed by Holman Fenwick & Willan, Solicitors, London) for the Claimant
Mr Stephen Males QC and Mr John Russell (instructed by Middleton Potts, Solicitors, London) for the Defendant
Mr Stephen Hofmeyr QC (instructed by Bentleys Stokes & Lowless, Solicitors, London) for Key Maritime GmbH