Neutral Citation Number: **[2019] EWHC 3240 (Comm)**

Case No: CL-2019-000209

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
IN THE MATTER OF THE ARBITRATION ACT 1996

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Wednesday, 13th November 2019

Before:

MRS. JUSTICE COCKERILL

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Between:

MUR SHIPPING B.V.	**Claimant**
- and -	
LOUIS DREYFUS COMPANY SUISSE S.A.	**Defendant**

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MR. TIMOTHY YOUNG QC (instructed by **Lax & Co**) for the **Claimant**
MR. NICHOLAS VINEALL QC (instructed by **Holman Fenwick Willan LLP**) for the **Defendant**

- -

APPROVED JUDGMENT

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MRS. JUSTICE COCKERILL:

1. This is an appeal by the Claimant, MUR Shipping BV, "MUR", against a Declaratory Arbitration Award dated 5th March 2019 of Ms. Elizabeth Birch and Mr. Robert Gaisford, with Mr. Mark Hamsher dissenting "the Award". MUR are both Claimants and Respondents throughout the counterclaim in the arbitration. By a majority the Tribunal held and declared that "*the claimants' claim in this arbitration is time barred and totally extinguished*".

2. The Award arises in the context of a clause in a NYPE time-charterparty for the TIGER SHANGHAI between MUR, as "Charterers", and Louis Dreyfus Company Suisse ("Louis Dreyfus"), as "Owners". The clause in question, Clause 119, is set out at paragraph 12 of the Award and reads, so far as relevant:

> "[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"."

3. This clause which is in the Additional Clauses and thus not part of the NYPE standard form, is on the evidence one which either in this exact form or in very similar form is not uncommon. This appeal, therefore, falls within the category of raising a point of law of general public importance.

4. This is not the usual case, however, about the time of making of the claim in writing or the appointment of an arbitrator. It is common ground that both the claim letter and the appointment happened well within time. The case rather concerns the question of what is meant by the phrase "*all available supporting documents*". It is not an issue that the claim letter sent was comprehensible and was adequately supported for the purposes of the Owners understanding the amount of the claim made against them. The point is that at the time the letter was sent, MUR had a document which it later relied on, but which it did not send with the claim letter. It was not until nearly a year after the commencement of the arbitration and the provision of the pleadings that Louis Dreyfus raised the issue of the time bar when a document was appended to claim submissions.

5. The majority of the Tribunal found that this document was a "supporting document", that it was not privileged; and that the claim was consequently time barred. The dissenting arbitrator took the view that the document plainly was privileged and thus reached the opposite conclusion.

6. The legal issues for which permission was given are:

> "[Does] ... a time bar clause ... barring claims if '... all available supporting documents...' are not provided within a specified period, operates when the only document found to be not provided is arguably privileged and/or not of relevance to either

> the identification of, or support for, a relevant claim as referred to arbitration at least at the time of commencement of the arbitration."

7. This effectively subdivides into two questions, for the purposes of this clause;

   i) Is a document which would otherwise be a supporting document one which should not be counted as such if it was arguably privileged?

   ii) Is a document which is not at least at the time of commencement of the arbitration of relevance to either the identification of or support for a relevant claim as referred to arbitration, a "supporting document".

Factual background

8. The Charterparty for the TIGER SHANGHAI ("the Vessel") dated 9th August 2016 was made between MUR as Charterers and Louis Dreyfus as disponent Owners. The Charter was for two laden legs, the first of which involved loading of a cement clinker cargo at the port of Carbenaros in Spain. The Vessel was delivered into the service of MUR on 14th August 2016 and advance hire and delivery bunkers were paid.

9. Under clause 46 of the Charterparty:

> "46. The Charterers, subject to the Owners' and Master's approval which is not to be unreasonably withheld, shall be at liberty to fit/weld any additional equipment and fittings for loading ... cargo. Such work shall be done at the Charterer's expense and time, and the Charterers shall remove such equipment and fittings at their expense and time prior to redelivery, if so required by the Owners ..."

10. The feeder holes in the hatch covers were positioned so that the loading crane at Carbenaros was not quite long enough to reach those on the starboard side of the Vessels. The Charterers, therefore, wanted to cut new cement feeder holes into the hatch covers. On 11th August the Master advised Charterers' agents for permission to cut new holes that would have to be sought from Owners.

11. On 12th August 2016, MUR made the request to cut holes in the hatch covers in addition to those which were already there and upon delivery the vessel was dispatched to the loading port, Carbenaros where the facilities required the cement feeder holes but on and after 13th August 2016 Louis Dreyfus refused to approve the required work. That refusal was maintained when the Vessel arrived on 15th August.

12. Mr. Baeza (of CSS Control Systems Survey "CSS"), attended on board the Vessel on 18th August 2016 at MUR's request and issued a report on 19th August 2016 on the cutting of new cement holes in the hatch covers ("the CSS Report)". On 19th August 2016, after Louis Dreyfus had stated that their refusal was "*final and non-negotiable*" MUR terminated the Charter. Although I have not seen the correspondence, the Award records that the express basis for that termination was that the cutting of additional feeder holes fell within the ambit of Clause 46 and Owners' refusal for

permission to cut such holes had been unreasonably withheld, so that Owners were in repudiatory breach and Charterers were entitled to terminate.

13. On 22nd August 2016, Louis Dreyfus themselves purported to accept that termination as a repudiation by MUR. On any view, therefore, the Charter was at an end by no later than 22nd August 2016.

14. A claim letter was then sent by MUR to Louis Dreyfus. By it MUR claimed the return of hire paid in advance.

15. On 8th August 2017, MUR appointed their arbitrator in respect of "*all disputes connected with the Charterparty*" which was stated to include claims for:

    i) The return of hire and value of delivery bunkers paid in advance,

    ii) costs incurred on the Owners' behalf;

    iii) damages in respect of claim from the sub Charters for the termination of the Charter; and

    iv) the Owners' failure to obey instructions/ breach of Clause 46 of the Charter.

16. A Final Hire Statement ("FHS") was attached, which was described later in the view of the Tribunal as being "quite sufficient". Correspondence between MUR and the Vessel's head Owners was not attached and at a later stage the Tribunal concluded that that correspondence was "*not necessary for the purposes of claimant notification.*"

17. In response, Louis Dreyfus appointed their chosen arbitrator. MUR served claim submissions nearly a year later, on 2nd July 2018. They attached the CSS Report dealing with the feasibility of drilling cement holes in the hatch covers. It was referred to in the following passage from the claimants' submissions:

> "14. Charterers contend that there were no justifiable reasons for Head Owners to refuse to allow Charterers to install temporary new cement holes in the hatchcovers and Charterers rely in this regard upon the survey report of Control System Survey of 19th August 2016. [The report was attached]. As the tribunal will note from this report, the attending surveyor advised "we did not find any technicality to prevent the cutting and creating of new cement tubes to the hatch covers" and advised that upon completion of the welding works the welds would be tested ... and approved by Class… Head Owners simply did not want the works to go ahead so unreasonably refused to consent to same.
> 15. Disponent Owners refusal to abide by the terms of the Charter was a repudiatory breach which entitled Charterers to terminate. Upon Charterers termination of the Charter Disponent Owners were obliged to account to charterers for the value of the redelivery bunkers and all funds paid in advance for hire that would no longer be payable to Owners. Charterers seek an Award for USD100,931.41 plus interest and costs"

18. The CSS Report had not been one of the documents previously provided by MUR and it was that report (amongst several others) which prompted Louis Dreyfus to raise the time bar point. In taking the time bar point Louis Dreyfus argued that the claim was not presented in detail in six respects, including the Charterparty, the correspondence, the termination, acceptance notices, quantum (bunker quantities and proof of payment and commission) and, finally, the CSS Report.

19. As regards the CSS Report, they submitted that this document went to the heart of the issue of liability and that had it been presented it was likely that the parties could have resolved the dispute without the need for arbitration.

20. MUR argued that the CSS Report was a document compiled for the purposes of the arbitration in the light of the dispute and that expert reports and other arbitration documents fell outside the category of "supporting documents" that are to be provided and Clause 119:

> "is concerned only with the submission of primary claim supports and does not extend to secondary supports that are compiled once it is clear that there is a dispute between the parties which will need to be arbitrated."

21. The Tribunal unanimously rejected the arguments raised by Louis Dreyfus - save that in relation to the CSS Report. The basis of the points rejected was that the documents were mostly in the hands of the Owners and represented the context in which MUR's notice was sent, and noted that the final hire statement was sufficient.

22. As the dissenting arbitrator, Mr. Hamsher, put it: *"We were all agreed that the nature and quantum of the claim were adequately particularised in the final hire statement."* However, the non-attachment of the CSS Report split the Tribunal and resulted in the majority holding that MUR's claim was time barred. The majority regarded the main point as whether the report was privileged. They concluded it was not. Mr. Hamsher disagreed. The majority's conclusion on privilege led them, therefore, to conclude that the time bar defeated the claim.

23. In reaching the conclusion the majority of the Tribunal noted that:

    i) The CSS Report was entitled "Survey Report".

    ii) It did not contain "*the usual statement of truth of the opinions expressed*".

    iii) The Survey took place at a time when MUR still had entertained some hope of persuading Louis Dreyfus.

    iv) The Report was produced a year before the arbitration was commenced and it was attached to MUR's pleaded Claim Submissions in July 2018.

24. The majority of the Tribunal described the CSS Report as "*pertinent to the charterer's claim describing the difficulty and possible solutions in detail.*"

The CSS Report.

25. Before considering the arguments in detail, it is appropriate to set out some details about the CSS Report. I accept the characterisation of it by the Tribunal, which was that it was "*the report of a surveyor who had attended the Vessel in order to assess the problem which had arisen and find the best pragmatic solution rather than the report of an expert witness to be used in future proceedings.*"

26. I accept, (and it was not suggested otherwise,) that it was not an expert report, as such, in that it provided some factual evidence, for example, as to:

    i) the fact that the cement loading tubes on the starboard hatch covers were beyond the range of the terminal loading crane, the reach of the crane and the distance between the crane's reach and the hatch covers,

    ii) the fact that it was not possible to add an extension piece to the terminal crane because it did not permit angle fittings, and

    iii) the fact that it was possible to cut new access holes and that that would involve cutting through one transverse stiffener.

27. The Report also had elements of opinion evidence setting out the views that, although the vessel could in theory be loaded on the port side and re-berthed on the starboard side, that would dangerously affect the vessel's stability for manoeuvring and that the only time and cost effective solution was cutting new access tubes.

The Legal Backdrop

28. The clause is in a standard form contract. The clause itself is an addition but there are similar provisions in other standard form contracts. Thus, while this precise question is new, there is a hinterland of relevant legal thinking by distinguished commercial judges in the case law.

29. The main authorities to which I was taken were as follows: first, *The Captain Gregos* [1991] Lloyds Rep 310 in which Bingham J (as he then was) stated that in the context of the Hague Rules time bar the purpose of a time bar provision was to draw a line and enable parties to close their books where appropriate.

30. This harmonises with what Bingham J (as he then was) said in an earlier case, which is more directly on the point. In *Babanaft v Avant* ("*The Oltenia")* [1982] 1 Lloyd's Rep. 448 he was considering a time bar clause requiring all available supporting documents which was deployed in the context of an argument regarding port disbursements forming part of a loss of profit claim.

31. He said:

> "The commercial intention underlying this clause seems to me plainly to have been to ensure that claims were made by the owners within a short period of final discharge so that the claims could be investigated and if possible resolved while the facts were still fresh (cf. *Metalimex Foreign Trade Corporation v. Eugenie Maritime Co. Ltd.*, [1962] 1 Lloyd's Rep. 378 at p 386, per Mr. Justice McNair). This object could only be

> achieved if the Charterers were put in possession of the factual material which they required in order to satisfy themselves whether the claims were well-founded or not. I cannot regard the expression '*all available supporting documents'* as in any way ambiguous: documents supporting the owners' claim on liability would of course be included, but so would a document relating to quantum only, just as a doctor's bill would be a document supporting a claim for damages for personal injury. The Owners would not, as a matter of common sense, be debarred from making factual corrections to claims presented in time (as they have done to the claim in a. 12 (A)), nor from putting a different legal label on a claim previously presented, but the owners are in my view shut out from enforcing a claim the substance of which and the supporting documents of which (subject always to *de minimis* exceptions) have not been presented in time. It is true that the drafting of the clause would give a legal draftsman little cause for pride, but it was obviously not the work of a legal draftsman and that is a good reason for not embarking on any sophisticated legal exegesis."

32. Louis Dreyfus says that this case gets the Court most of the way it needs to go. The object of such clauses is investigation and resolution while a claim is fresh and that is the same regardless of the time period.

33. Mr. Young, QC, for MUR, referred me to *Forrest v Glasser* [2006] 2 Lloyd's Rep 392, a case arising out of a share sale with a clause barring claims not presented within 12 months, noting that it was there said that every notification clause depends on its individual wording and the exercise to be conducted is to consider how a reasonable recipient would have understood it.

34. The next case in time is *The Sabrewing* [2008] 1 Lloyd's Rep 286, where Mrs. Justice Gloster (as she then was) considered in the context of a demurrage claim a formulation referring to "*supporting documentation substantiating each and every constituent part of the claim*". During the course of judgment, she considered the balancing act as to construction in this type of case. She noted that such clauses have to be clear and that if there is any residual doubt about the matter the ambiguity is to be resolved in such a way as not to prevent an otherwise legitimate claim from being pursued. She also stated that at the same time clauses have to be given their natural meaning with *contra proferentem* being a resolution of last resort. Once the meaning of the clause is established, she considered that such similar clauses in relation to demurrage had to be complied with "carefully and strictly".

35. *The Abqaiq* [2012] 1 Lloyd's Rep 18 was the next case, a slightly odd case where the Owners had been mistaken about which periods counted towards demurrage and which were detention (which allowed the recovery of bunkers). Tomlinson LJ said, at paragraphs 60-61:

> "60. As noted above, we were referred to an observation of Gloster J in *The Sabrewing* to the effect that parties are obliged to comply carefully and strictly with demurrage time bar clauses of this sort. Gloster J was there concerned with the

> precursor provision in BPVoy3, and in particular with Clause 16 thereof, now Clause 19 of BPVoy4, which calls for the presentation of particular documentation supporting a claim for extra time incurred in consequence of the inability to receive cargo at a discharge pressure of 7 bar measured at the vessel's manifold. For my part I am not sure that it is helpful to introduce into the approach to these provisions a notion of strict compliance. Where in a commercial contract one finds a provision to the effect that one party is only to be liable to the other in respect of claims of which he has been given notice within a certain period, it is fair to assume that the parties wish their relationship to be informed rather by certainty than by strictness. As Stuart-Smith LJ observed, giving the judgment of this Court in *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423, where such an agreement was under consideration:
>
> 'Certainty is a crucial foundation for commercial activity. Certainty is only achieved when the vendor is left in no reasonable doubt not only that a claim may be brought but of the particulars of the ground upon which the claim is to be based. The clause contemplates that the notice will be couched in terms which are sufficiently clear and unambiguous as to leave no such doubt and to leave no room for argument about the particulars of the complaint. Notice in writing is required in order to constitute the record which dispels the need for further argument and creates the certainty.' See at page 442, para 91.
>
> 61. Thus the touchstone of the approach ought in my view to be a requirement of clarity sufficient to achieve certainty rather than a requirement of strict compliance which, if applied inflexibly, can lead to uncommercial results."

36. Mr. Young placed particular weight on the latter words, which he said were significant here. He suggested, in particular, that I read this case as being a discouragement to unattractive time bar arguments.

37. Hamblen J (as he then was) in *The Adventure* [2015] 1 Lloyd's Rep 473, had to construe the following clause, worded similarly to the clause in this case, in the context of a voyage charter:

> "20. Claims Time Bar
>
> 20.1 Charterers shall be discharged and released from all liability in respect of any claim for demurrage, deviation or detention which Owners may have under this Charter unless a claim in writing has been presented to Charterers, together with all supporting documentation substantiating each and every constituent part of the claim, within ninety (90) days of the completion of discharge of the cargo carried hereunder."

38. The provisions also arose in tandem with a Clause 19.7 which set out specific requirements for claims for additional time in cargo operations. There was an issue as to whether Clause 19.7 in that case covered all the material which the claiming party would be required to disclose. Hamblen J said in the context of that provision, at paragraph 27 of the judgment, that disclosure will result in documents which go wider than the requirements of this clause and that the requirements have to be limited by the requirement of certainty inherent in a time bar clause. In that context he said that the documents in question were those primary documents that related to the ordinary running of a ship.

39. In relation to the Clause 20 issue, he held at paragraph 41:

> "Under Clause 20.1 the owners are not merely to provide 'supporting documentation' but 'all' such documentation. Where the Owners have available documentation from the load and discharge ports such as port logs and time sheets those are, as the Tribunal found, 'relevant' to the claim made. In the present case that is specifically borne out by the fact that the letters of protest relied upon refer to delays and stoppages recorded in the port log/time sheets. As such they are clearly supporting documentation for the claim made. In any event I consider they are primary documents containing factual material which should be made available to the Charterers so that they may satisfy themselves that the claim is well founded, consistent with the purpose of the clause."

40. Mr. Young drew to my attention that the documents in that case were documents which plainly existed and were to be provided. Mr. Vineall QC in turn pointed out that the question of whether secondary documentation is required depends on the claim made, as can be seen from the fact that Hamblen J went on to find in that case a secondary document would fall within the ambit of the clause. He, therefore, submitted that this judgment does not support a suggestion that what is required for the purposes of an "all supporting documentation" clause is answered by a categorisation of the document in question as primary or secondary.

41. The most recent case is the decision of Popplewell J (as he then was) in *The Ocean Neptune* [2018] 1 Lloyd's Rep 654. However, that case turned on the characterisation of a particular claim, and whether LITASCO Clauses were applicable to a claim for detention. The question for the Court there was: was it a claim for demurrage (in which case they applied), rather than the specific interpretation of the clause in question. Although that judgment sets out the usual excellent summary of the principles, it provides no relevant guidance in this case other than the brief statement "*the Court will give effect to the clarity and certainty which it is the purpose of such clauses to achieve*."

The Submissions: Supporting Documents

42. The Appellant's written submissions did not concentrate on the detailed analysis of the authorities, which were dealt with more fully in oral argument, but focused instead on the practicalities of the result. MUR noted in particular that the attachment of the documents to the Claimant's submissions was serendipitous. It submitted that the

document might as easily have been attached to the reply submissions or produced upon disclosure or upon the exchange of Experts' Reports; or indeed MUR might just as easily have filed simpler less argumentative Claim Submissions.

43. The submission was that the upshot of the majority's approach was that if, during the progress of an arbitration under a Charterparty with a clause of this nature, a document which became available to the Claimant before the expiry of the time bar came to light in disclosure or otherwise, or its significance was later appreciated as relevant to a dispute which had devolved on the pleadings, then the failure to provide that supporting document at the commencement of the arbitration would nullify claims by retroactive operation of the time bar. That, it was said, was a most unattractive position which the court should be slow to reach.

44. It was also submitted that in the context of certainty there was and is in this case no conceivable case that Louis Dreyfus did not know precisely what the claim involved; indeed, it was submitted that Louis Dreyfus necessarily had a better idea of why they had refused to agree to the cutting of cement holes than MUR had.

45. On the question of support in particular, MUR noted that a report describing difficulties and technical problems should not properly be said to "support" the Claim; and a conclusion that the document was supportive was inconsistent with the conclusion that the correspondence which MUR had directly with the Vessel's head Owners was not within the clause. The submission was that the claim for hire, which was the essence of the Claim and which would now be time barred, had been found to be adequately particularised via a Final Hire Statement, and the CSS Report in question had no relevance to that central claim.

46. On that basis it was said that attachment to a pleading cannot be equated without more to a document being a necessary supporting document at an earlier stage. Again, reference was made to the Charterparty which was attached and which the Tribunal had held was not relevant.

47. MUR then submitted that the correct approach to the interpretation and application of such clauses was that they should be construed to ensure clarity and certainty, so that by the time the time limit expires the Recipient of the claim had sufficient documentary material to enable him to see what the claim entails and whether it is well founded, at least *prima facie*, and to take his own protective steps. In particular, it was said that the Recipient should be aware whether he had received all the material he was entitled to.

48. It was therefore submitted that "*all available supporting documentation*" means (and means no more than) all documents which are reasonably necessary to explain the proposed claim to a recipient with a degree of familiarity with the background of the matter and which documents are unquestionably disclosable at an (early) point.

49. Ultimately, MUR submitted that this was about a document which was not, properly defined, supportive of the claim. The document went to no more than a potential dispute about whether that refusal was or was not reasonable; Louis Dreyfus had never purported to justify or explain the reasons for their refusal, so there was no material which until such a justification was advanced was likely to be relevant to (or "supporting of") MUR's argument.

50. In essence, the CSS Report was no more than contingently relevant. It might or might not be relevant depending on how the Owners sought to justify their refusal, but it could be relevant only to the ultimate evidential argument and after Owners had advanced a case of "reasonable refusal". It had no relevance to the Claim and only relevance once that stage had been reached.

51. Louis Dreyfus' submissions were that Clause 119 should be regarded as a classic commercially driven provision directed to achieving prompt notification of claims and maximising the chance of speedy resolution after that notification. The purpose of the requirement of early provision of all available documents is that the responding party can take an early view of the merits knowing that they are getting to see all available supporting documents and that there are no unpleasant surprises to be revealed later.

52. The Clause requires, they said, a "*cards on the table*" approach - and that applies to all cards. As to the question of whether the report was a supportive document, the contemporaneous survey report was, as the Tribunal found, *"pertinent to the Charterers' claims describing the difficulty and possible solutions and charterers relied on it in support of their claim."* Charterers did not contend before the arbitrators that the CSS Report did not support that claim.

53. It was also submitted that the claim here in substance depends on a lawful termination and the question against whether that background the CSS Report is a supporting document. To this, Louis Dreyfus said the answer is an obvious "yes"; as returned by the Tribunal.

Conclusions: Supporting Documents

54. The question, of course, is whether the Tribunal erred in law in this question of construction. I approach that question with the usual cautions as to picking holes in the Award of experienced arbitrators and with the relevant authorities on contractual construction - this being, in essence, a question of construction - both well in mind. What is on its face a simple issue, has been transformed in argument to a question of some complexity, bristling with subsidiary issues. I shall start by outlining the arguments which seem to me to be misplaced.

55. The first are MUR's attempts to argue for a very circumscribed meaning by reference to its specific recastings of the clause, including by reference to disclosure at an early stage or manifestly making out an essential element of their claim. A disclosability test as set out in MUR's skeleton is not easily explained by the wording and imports unnecessary complications, as indeed was noted by Hamblen J in *The Adventure*; and as the Appellants themselves rejected to the extent that a disclosability test was apparently a point relied on by the Respondent.

56. Such a test also provides an unsatisfactory disjunction between the wordings because "explaining" - the word used in the reformulation - is not the same as "supporting". It opens up, in fact, its own field of dispute. That this different word was used by MUR was to an extent ironic given that serious issue was taken with the tribunal for using the word "pertinence" as part of their own examination of the operation of the clause.

57. The "*manifestly makes out*" test expressed later in MUR's skeleton similarly on its face substitutes a completely different test from the one the parties contracted for. It

is a test which adds layers of complication: the line between explanation and arguing out, the question of whether an element would fail without documentation, the question of "*reasonably familiar with the background*". Together it produces the kind of legalistic approach which this commercial wording would appear to be designed to avoid.

58. Generally, also, the restrictive approach evinced by these two different formulations, while paying obvious regard to the authorities as to construction of time bars, in particular as they relate to certainty at the closing of books, pays, in my judgment, insufficient regard to any normal approach to construction. The wording of this clause must be respected. It is cast in terms not simply of "supporting documents" but "all supporting documents". As in the case of *The Oltenia* the wording is clear in this respect. It says "all" - a word which indicates a fairly expansive approach, though, of course, that is qualified by the requirement for documents to be supporting.

59. That is reinforced by the next section of the wording of the clause, which refers to liability and to quantum, and indeed to both. That need to take a fairly expansive approach in the light of the words of the clause is given some support by the other authorities mentioned above. All in all, in my judgment, this clause is expressing a broad approach to the production of supporting documents, whatever supporting documents may be said to be.

60. Nor am I attracted by the timeline analysis and the broader manifestation of the case against retrospectivity which MUR sought to make. A supporting document is a supporting document whether it is relied on with the Claimant's Submissions in reply or at the final hearing. This was effectively conceded in argument.

61. In truth, what MUR is aiming at here is two points. The first is the point to which I shall come about whether the document supports the claim or something else. The second is the point which Mr. Young described as serendipity. While I do have a real degree of sympathy with this argument, in the sense that in the general run of cases one might expect both parties to have a good idea by the time of the time bar date what documents should have been forthcoming, I cannot accept that that usual state of affairs drives the construction of the clause.

62. In my judgment, it cannot be the case that simply because a document emerges later it cannot give rise to a time bar argument. If, for example, there was an "all supporting documents" clause in a demurrage claim and the Statement of Facts supporting the calculation was appended but, say, a hold cleaning survey also supporting a particularly contentious day's start time was not, I see no reason why that could not give rise to a time bar argument against an appropriately drafted clause. There can, as the authorities make clear, be more than one sort of supporting documentation. An "all documents" clause is naturally geared to the provision of more than the bare essentials; and even in the simpler cases it may be the case that the party receiving the documents may not know the full extent of the documentation available.

63. Another answer to the serendipity argument in some cases, though probably not in all, may be that one might equally say that without a particular document a claim is insufficiently evidenced.

64. At the same time, it is probably not fair to say, as Louis Dreyfus did, that what the clause is expecting is a "*cards on the table*" approach such that anything which is supportive of the claim and which is available to the Claimant must be given. That is because aside from the question of futility, which may well arise in the case of duplicative documents, the authorities appear to support an approach which looks to the essence of the document in question. Thus, if a document which was of no real relevance was appended to submissions, that would not make it a "supporting document." This reflects the Tribunal's conclusion on the futility in this case.

65. Similarly, that question of support has to look to the claim being advanced. So, I do accept the submission that if for some reason the claim somehow changed in essence at a later stage, for example, if a timing point not previously apprehended was made, or a correction needed to be made, this should not mean that documents later relied on became retrospectively relevant at the point of the time bar. This is a point alluded to by Bingham J (as he then was) in *The Oltenia*: "*the Owners would not as a matter of commonsense be debarred from making factual corrections to claims presented in time.*"

66. However, that distinction is not relevant in this case. There was no change in the case or correction. Nonetheless, it was essentially this line which the Appellants sought to hold in what was perhaps the central aspect of their submissions. It was contended that the Appellants relied on the CSS Report not supportively but responsively. This is, as noted above, one respect which underpins the "*time of making of the claim*" aspect of the question of law.

67. The Tribunal found the CSS Report was "*pertinent to the Charterer's claim describing the difficulty and possible solutions in detail".* MUR criticised the Tribunal for this characterisation, given that the issue on the clause was not pertinence but supportiveness. On one level it seems unfair to criticise the Tribunal on this point in circumstances where it was put to the tribunal that the question of repudiation was "the only show in town" and so pertinence implied supportiveness; but in reality, the question of pertinence *per se* was irrelevant to the question for my consideration.

68. When looking at that question it must be borne in mind that the bottom line is that the Appellants claim was predicated on the refusal by Louis Dreyfus having been wrongful, because unreasonable. Without that, the termination was not valid. By the time of the arbitration there was no question of the reasonableness of the refusal not being something which needed to be dealt with; unless it was, there was no valid termination - and if that was the case the claim would be not just for a shorter period but also subject to a cross-claim for damages for wrongful repudiation.

69. The material in the CSS Report went to this question of reasonableness. It was, therefore, properly regarded as being, at least in broad terms, supportive of the claim of MUR as it appeared in the arbitration. However, the issue is where the clause is drawing the line between broad support/pertinence and necessity to support the case advanced by MUR.

70. The "adequately particularised" Final Hire Statement, the claim for the refund of advanced hire and the value of delivery of bunkers and recovery of costs meant that in the Tribunal's mind the claim which MUR advanced was in its sums adequately documented. If one, therefore, regarded the claim as a simple accounting claim, the

material in the CSS Report was a long way from necessary. However, if one regarded the claim as being one essentially for a declaration as to the validity of the termination with the consequent accounting claim, the CSS Report has a more obvious relevance as a supporting document.

71. Thus, if the reasonableness of the refusal was in play at the time when the claim was made, this document was relevant and supportive. At common law and in the absence of statutory intervention, the burden of proving that consent is unreasonably withheld is on the party contending that the other was unreasonable. See, for example, Balcombe LJ in *International Drilling Fluids v Louisville Investments (Uxbridge) Limited* [1986] Ch 513, at 519.

72. Was this issue in play, however, at the time the claim was made? Louis Dreyfus aligned itself closely with the position at the time of the arbitration pointing out that it had paid all of the undisputed sum and what remained in issue was effectively the time period or counterclaim referable to the question of who was entitled to terminate, hence the *"only show in town*" analysis.

73. MUR pointed to the timeline in more detail, reminding me that on any analysis the contract was at an end; when it made its claim there was no such payment made and no counterclaim. It submitted that it was perfectly possible that the Owners might simply argue that making cement holes was not within the scope of Clause 46 at all, perhaps on the basis that a cement hole was not a "fitting or equipment" and thus the CSS Report would have no relevance at all.

74. Ultimately, however, the problem for MUR is twofold. The first is that the clause combines both specific reference to "all" and specific reference to "liability and quantum", while not confining itself to any particular sort of claim. It is, thus, wider than the clauses in the authorities which tend either to omit the "all" or to arise in the context of a simple accounting claim such as demurrage, where issues such as termination do not come into the equation.

75. The second is, while the case had not refined itself so far as it had done at the time of the hearing, the claim (at least as to quantum) in fact depended on the date of termination and the date of termination depended on being entitled to terminate, which itself depended on unreasonable refusal on the part of the Owners. As such, the report was on its face within the ambit of the claim that MUR advanced and supportive of it.

76. Even had matters not proceeded as they did by the time of drafting the Claim Submissions, one can readily see that in advancing the building blocks of the case as to liability and quantum it would be natural to plead or otherwise set out the termination as a foundation for the calculation and, hence, as was actually done, to append a document supporting the position taken on termination.

77. One point which I did raise during the course of argument was whether the true focus of the dispute should rather have been on the question of whether the CSS Report was a supportive underlying <u>document</u> i.e. whether the emphasis should be on the latter word rather than, as MUR had done in formulating the question for appeal, on the former.

78. The issue here is whether such a clause is apt to cover secondary documents as opposed to primary documents. The argument, of course, references the line drawn by Hamblen J in *The Adventure*. This was a point which was at least floated in the arbitration. I have seen the submissions which reference the point and the Award picks it up in its recital of MUR's argument, though it certainly appears from later passages that privilege was the primary issue debated. It appears not to have been an issue which was debated in any detail or, indeed, put to the Tribunal quite in those terms in the arbitration.

79. This is an interesting point, though it is dubious whether I could properly decide the case on this basis, given the terms of the issue of law defined. For the reasons given below, I do not need to consider whether it would be possible to do; but it is probably useful, given the debate, if I record my thinking on this point.

80. It certainly appears to be the case that on the whole these issues, as to documents to be provided to satisfy time bar provisions, have arisen in the context of cases where what was looked to was primary material. So, in *The Adventure* Hamblen J draws a distinction at paragraphs 27-28 between primary and secondary material, returning to a similar distinction at paragraphs 41-42. On the face of it, this perhaps suggests that clauses such as this are not usually designed to capture disclosure of early witness statements or experts reports (and if that were the case, of course, the issue as to privilege would not arise).

81. That would also tie in with the "closing of the books" approach to certainty. The issue is to what extent one can safely read across from such cases. As Gloster J noted in *RWE Nukem Ltd v AEA Technology plc* [2005] EWHC 78 Ch, every notification clause turns on its particular wording. And it is not impertinent that those cases concerned situations where the claims were concerned with such matters as demurrage and detention, those being claims which themselves hinge on detailed primary documents. So, in a sense, in those cases one sees simply what one should expect to see: the clause makes sense as referring to primary documents and caution should therefore perhaps be exercised in reading across.

82. I must however concentrate on this clause in its context here. In this context the parties have intended the clause to cover all disputes under the Charterparty, including inferentially claims arising out of wrongful termination; certainly no one has suggested that it would not cover such claims. The parties' commercial intention must be inferred. Here we are not looking simply to closing the books, as was the case in *The Captain Gregos* because it is a clause which specifically requires details and documents to be provided. The purpose of such clauses is given in *The Oltenia*. It is to enable parties to assess the claim being advanced. Inferentially, therefore, the clauses are not just to enable an early closure of the books but also, given the provision of details, to enable the claim to be evaluated to facilitate early settlement. There seems no reason not to accept this as the commercial purpose in this context also.

83. Where this is the case (intention to facilitate early settlement meets time bar provision covering the full gamut of disputes) it becomes perfectly feasible and, indeed, compelling for supporting documents to include, in appropriate cases, more complex material. This was in fact the case in *The Adventure* where there was an issue about a manuscript note on an email made by the Owners' shore-based representative, that the

Master had received free pratique by VHF at Port Sudan. As in this case, that document appears to have been presented during the course of the arbitration.

84. Hamblen J concluded:

> "Whether the email with the manuscript notes had to be presented is open to more doubt. In most cases secondary documentation of this kind would not be so required. However, in this case the time when free pratique was granted was important to the commencement and the proper calculation of laytime and there was no record in the documentation provided of when it was granted in Port Sudan …. In such circumstances, it probably is to be regarded as a supporting document…."

85. Whether such a clause would extend to witness statements or experts' reports which are truly secondary, in the sense of being created later and for the purposes of the dispute I do not need to decide. It seems to me at least dubious that it should do so. However, a document such as the CSS Report which might well, like the email in *The Adventure,* be categorised as being an extended primary document rather than a secondary document is different. As such, there is no real reason why, against the background of a wide clause covering the full range of claims to which more than the usual accounting documents may be key, such a document should not be a supportive document as the Tribunal found. It may also be that the reason why this point was not argued before the Tribunal or pursued in terms on appeal, is explained by the position to which I have come.

86. In conclusion, this case may well be one towards the limits of what would be caught by a clause such as the present one. However, on analysis I have concluded that the CSS Report is both supportive in the sense required and a document in the sense required.

87. I return to the point so strongly urged by Mr. Young as to certainty. He is quite right that the authorities indicate that the party who has to comply with it must be able to ascertain what is needed for compliance. I do not see this conclusion as conflicting with this requirement.

88. What is supportive is dictated by the claim which is being advanced. What is required to support the claim is elucidated by the process of setting out the limbs of the claim, here covering both liability and quantum. If there is a document which supports any limb or claim it needs to be supplied; and it is telling that when following that process, albeit at a later stage of the dispute, MUR turned to this document and it did so to support its case as well as anticipating a defence.

Privilege

89. This point is all about arguably privileged documents as opposed to actually privileged documents. This is because: (i) MUR accepts that the document was not privileged and (ii) Owners are prepared to proceed on the assumption that the cause does not require provision of a privileged document.

90. It is common ground for these purposes that the document was reasonably arguably privileged. This is demonstrated by the dissent of Mr. Hamsher who concluded it was privileged. MUR also made criticisms of the majority reasoning in concluding the document was not privileged and that these need not in the circumstances consume time.

91. MUR submitted that if a document is reasonably arguable to be privileged, then its disclosure is not required by an "all supporting documents" time bar clause and it does not matter even if, in the final analysis, it is held not to be privileged. If, it is said, there is scope for reasonable difference of opinion as to the privilege, MUR says that there is no authority for the proposition that a party who thinks a document is privileged should provide it or else risk, perhaps much later, a time bar being held to fall. It would also leave the proper analysis of the claim to privilege to its rightful place in a valid and timeous arbitration.

92. Attractively as this point was put, I am persuaded that the submissions of Louis Dreyfus on this point are correct. MUR's argument is "profoundly uncommercial". Such an approach would sit very ill with the requirements of certainty which underpin clauses of this sort and which were, in the other context, so strongly urged by MUR.

93. One can readily see that the distinction would provide highly fertile ground for protracted disputes, such as just how arguable a claim has to be in order to be arguable or reasonably arguable. There seems to be no good reason why the parties should be taken to have intended that a bad claim to privilege should make any difference.

94. It does, however, seem to me that the argument on "what is a document?" may well in many cases provide an answer here. Rarely will such clauses be designed to require that the provision of the kinds of documents which are or may be privileged. This is, in a sense, an unusual case in that the width of the clause and the nature of the disputes capable of arising could give rise to at least an arguable point.

95. However, this is not a reason to bend the construction of the clause or render the clause unworkable. The answer is that such clauses may not be the most comfortable fit covering wider disputes than those they usually embrace and in such broader contexts parties may need to consider the width of the clauses which they adopt.

96. In the circumstances, it matters not in practical terms whether this argument was one which was properly open to MUR. Louis Dreyfus contended that the question of law did not arise out of the Award and that the argument had proceeded not on the basis that the privileged point was arguable, but on the binary basis that the document was privileged or not privileged. It was submitted that to permit it to be raised now undercut the Arbitration Act's philosophy of speedy finality.

97. Although I was initially unwilling to consider this issue, I conclude that it was a question which was open to Louis Dreyfus to run at this stage despite the grant of permission. However, in the circumstances where the question was, in essence, a different slant on the point which was actually run, I would, if the privilege point had been a good one, have been minded to follow the approach taken by Andrew Baker J in *The Baltic Strait* [2018] EWHC 629 Comm and [2018] 2 Lloyd's Rep 33, where he upheld a claim on somewhat different grounds to those argued before the arbitrators,

though arising out of the same point and hence out of the Award. In any event, for the reasons given the appeal is dismissed.

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This transcript has been approved by Mrs Justice Cockerill