

Court finds that charter agreement was binding despite failure to perform conditional test of vessel

20 January 2021 | Contributed by [WSCO Advokatpartnerselskab](#)

Facts

Decision

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On 16 November 2020 the Maritime and Commercial Court ruled that a charter agreement was binding on a charter even though a conditional test of the vessel was not performed.

Facts

On 21 February 2019 a Danish offshore company (A) entered into an agreement with another Danish offshore company (B). The agreement concerned the chartering of a ship (FS1), which was owned by B. The charter party was based on the Baltic and International Maritime Council's Time Charterparty for Offshore Service Vessels. A was using the ship in connection with the performance of a task for a customer (S). In connection with the agreement's expiry, the parties began negotiations on the conclusion of a new charterparty concerning FS1.

In an email of 1 March 2019, A wrote to B:

As you well know, it is the 'subject' customers approval. We are still in dialogue and expect clarification starting next week. I therefore hope that you will be willing to give us 'first right of refusal' based on your submitted offer.

To this, B replied: "All ok!". On 2 April 2019 A sent an email to B and indicated the following:

In relation to what we have talked about, I have changed the firm period and the options...

As mentioned, we have a clear expectation of using ['FS1'] to ['S'] to the 30/6, but we will have to make sure that we do not potentially end up in a set scenario.

FS1 goes on-hire for ['S'] 07/08.04.2019 after successful inspection/push test.

Please confirm.

In case it is necessary to switch to a fender with a 'nose', do you have any fenders with any other specifications?

The parties entered into an agreement based on this email, without a decision having been made as to whether the agreement should be regarded as a conditional or final agreement on chartering FS1. Between 2 April 2019 and 5 April 2019, A and S discussed whether FS1 could be approved by S, and S raised objections in this respect, of which A failed to inform B.

On 5 April 2019 FS1 sailed from Sassnitz, Germany, to Rømø, Denmark, where some of the ship's fenders were changed. When FS1 arrived at the agreed baseport on 6 April 2019, it was rejected by S. As such, no push tests or inspections were carried out.

A denied that a final agreement on chartering FS1 had been settled with B. Further, A refused to pay the charter rent of €212,000, referring to the fact that the chartering agreement was conditional on S's approval. B claimed that:

- A had chartered the ship without reservation;

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- in the email of 2 April 2019, which constituted the chartering agreement, A had not stipulated that the ship should be approved by A's customer, but only that it was subject to a successful "inspection/push test"; and
- the failure to perform the test was not due to B's circumstances.

Decision

The Maritime and Commercial Court concluded that it had not been proven that the charter agreement was conditional, but that a final agreement had been entered between A and B. The court stated as follows:

In this connection, the Court notes that in principle, there is nothing to prevent a charter agreement from one party from being conditioned by the end customer's approval of the ship, and that such a condition will often be included as a normal part of the intermediary's risk management...

With regard to A's e-mail of 1 March 2019, the Court does not find that there are grounds to exclude that the reservation of 'customers' consent' on A's part was intended as a condition that the charter agreement should only enter into force, if S approved the ship's technical specifications. The Court, on the other hand, does not find that the reservation is contained in A's e-mail of 2 April, which only refers to a 'successful inspection/push test'...

After the presentation of evidence, it must be assumed that the charter agreement was entered on the conditions in the e-mail of 2 April, with the exception of the condition of agreement period, which was agreed per phone shortly after. On this basis, and after an overall assessment of the information in the case, the Court finds that it has not been established that the charter agreement on A's part was made conditional on S' approval of the ship's technical specifications. In this connection, it has also been included as a factor in the Court's assessment that A after the conclusion of the agreement failed to inform B of S' objections to the ship, which A should have done if they were of the belief that the agreement was conditioned on S' approval of the technical specifications, and they should have done so in particular at the time when A became aware that the ship had fenders replaced in preparation for the task for S.

Comment

This decision shows that a party which wishes to enter into a conditional chartering agreement must formulate the condition clearly and, in negotiations on the conclusion of the agreement, maintain the reservation in question (using 'subject to' or similar). It follows from the decision that in cases where a charter agreement is conditional on performing an end customer's inspection or push test, the reservation may not lead to the agreement being non-binding if the test in question is not performed due to the end customer's circumstances.

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