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“Too little but too late!" – the Club supports its Member in successful case on charter withdrawal

Nicola Cox
Head of Defence Claims

Under the BIMCO non-payment of hire clause, an owner is not entitled to withdraw his ship from charter in respect of a deduction made from a previous hire instalment. West of England’s charterer Member successfully defends owners’ appeal in the English High Court.

Under an amended NYPE charter party incorporating the BIMCO non-payment of hire clause, the Club’s charterer Member deducted US$8,015.40 in respect of the vessel’s underperformance. This deduction was made from the 4th hire instalment. Whilst this hire deduction was wrongful, the arbitration tribunal found that the owner – who had continued to dispute the validity of the charterer’s deduction from hire – was not entitled to withdraw the vessel from the charter party when, subsequently, the 6th hire instalment fell due. The owner was therefore in breach of charter party and liable to the charterer in damages. The owner appealed the arbitration decision to the English High Court in the case "*Quiana Navigation SA v Pacific Gulf Shipping (Singapore) Pte Ltd (“CARAVOS LIBERTY")*

The BIMCO non-payment of hire clause for time charter parties provides as follows:

If the hire is not received by the Owners by midnight on the due date, the Owners may immediately following such non-payment suspend the performance of any or all of their obligations under the Charter Party (and, if they so suspend, inform the Charterers accordingly) until such time as the payment due is received by the Owners. Throughout any period of suspended performance under this Clause, the Vessel is to be and shall remain on hire. The Owners’ right to suspend performance under this Clause shall be without prejudice to any other rights they may have under this Charter Party.

The Owners shall notify the Charterers in writing within 24 running hours that the payment is overdue and must be received within 72 running hours from the time the hire was due. If the payment is not received by the Owners within the number of running hours stated, the Owners may by giving written notice within 12 running hours withdraw the Vessel. The right to withdraw the Vessel shall not be dependent upon the Owners first exercising the right to suspend performance of their obligations under this Charter Party pursuant to sub-clause (a). Further, such right of withdrawal shall be without prejudice to any other rights that the Owners may have under this Charter Party.

The Charterers shall indemnify the Owners in respect of any liabilities incurred by the Owners under the Bill of Lading or any other contract of carriage as a consequence of the Owners’ suspension of and/or withdrawal from any or all of their obligations under this Charter Party.

If, notwithstanding anything to the contrary in this Clause, the Owners choose not to exercise any of the rights afforded to them by this Clause in respect of any particular late payment of hire or a series of late payments of hire, this shall not be construed as a waiver of their right either to suspend performance under sub-clause (a) or to withdraw the Vessel under sub-clause (b) in respect of any subsequent late payment under this Charter Party.

The owner argued that the reference to “If the hire is not received” in the opening line of the BIMCO clause refers to the

total amount of hire that is owing on "the due date", ie including hire that had fallen due in previous hire instalment/s but which not been paid. The owner further argued that this approach reflects the importance to owners for hire to be paid in advance and accords with both parties' hire statements in which a running account was kept of the total sum due on each hire instalment date. Therefore, as the owner argued before the arbitration tribunal, after the wrongful deduction was made from the 4th hire instalment, the owner allocated part of the payment of the 5th hire instalment to the underpaid 4th hire instalment and then, when the 6th hire instalment was paid, the owner allocated part of the 6th hire instalment to the consequent shortfall in hire from the 5th hire instalment so that, when the 6th hire instalment fell due, the charterer's US$8,015.40 deduction from hire was still a "live" deduction from hire for the purposes withdrawing the vessel and/or was part of "the hire" that was due.

Following the hearing of owner's appeal to the English High Court on Monday 18 November 2019, Cockerill J's judgment was issued on Thursday 21 November. In her judgment, Cockerill J accepted that an underpayment or deduction from hire of any size is the same as non-payment which, subject to any anti-technicality provision in the charter party, entitles an owner to withdraw the vessel from the charter (following The Lutetian [1982]). (Please see our "Withdrawal and suspension" In-a-nutshell guide). However, the Judge agreed with the tribunal that the BIMCO clause, as a matter of contractual interpretation, only gives an owner the right to withdraw his vessel from charter in respect of a current non-payment of hire, namely a non-payment which has been made for the first time; not in respect of any historical non-payment of hire.

Amongst other factors, the Judge reached this conclusion because:

i) Whilst the BIMCO clause does not refer to an "instalment" of hire, the clause refers to *"the hire"* and to a single *"due date"*, indicating that the right to withdraw is tied to a particular hire instalment (non-payment of each hire instalment giving rise to a separate cause of action). Therefore, to interpret the BIMCO clause as giving an owner a right to withdraw in respect of non-payment of a previous hire instalment would involve re-writing the clause because it would mean that "the due date" in the first line would be subject to additional "due dates" each time that subsequent hire instalment dates fell due. The Judge agreed with the tribunal that *"[owners] consciously chose not to exercise their contractual rights. Having taken that course, it is far from clear to us why they should be afforded successive rights to withdraw, at 15 day intervals, as and when future instalments of hire fell due, exercisable in the event that commercial or market considerations had changed and now rendered cancellation for the previous non-payment an attractive course".*

ii) The court found that to interpret the BIMCO clause as the owner argued would be to ignore the distinction between, on the one hand, an owner's continuing entitlement to recover hire as a debt (which arises automatically under English common law) and, on the other hand, the *"nuclear option"* of exercising the right to withdraw which in charter parties is usually *"hedged about by careful contractual requirements – and as the cases make clear, it can be easily lost."*

Looking at the commercial context, the Judge was not persuaded by the owner's argument that interpreting the BIMCO clause strictly in this way does not give an owner adequate protection because the owner may not able to assess within 24 hours following a deduction from hire whether the owner has a right to withdraw the ship. Also, the Judge found that the effect of the owners' interpretation of the BIMCO clause would be that *"[owners] would in effect retain the right to withdraw the vessel at any time up until the debt became time barred, six years after the failure to make payment. Of course, that right would only be "triggered" every fifteen days, and of course it would be activated only when a notice was served; but the net effect would be to keep the weapon hanging in a Damoclean manner. That is a solution which in commercial terms sits very ill with the authorities on withdrawal."*

Whilst not needed for her decision (and therefore not binding on other judges or arbitrators), the Judge found that the right to withdraw only accrues when a charterer fails to pay at the end of the 24, 72 and 12 running hour provisions and that, until then, no right of withdrawal exists. Therefore, it is only if the owner fails to withdraw his vessel at that stage that the owner can be said to have waived his right to withdraw the vessel.

The owner was refused leave to appeal to the English Court of Appeal.

This is a case that the West of England is supporting for its Defence Member. If you would like more detail about the case

please contact Nicola Cox (details below).

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West Defence Cover

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Nicola Cox
Head of Defence Claims

T. +44 20 7716 6071
M. +44 7816 528924
E. Nicola.Cox@Westpandi.com