NO WITHDRAWAL FROM TIME CHARTER UNDER BIMCO NON-PAYMENT OF HIRE CLAUSE FOR PREVIOUS UNPAID HIRE INSTALMENTS

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In *The Caravos Liberty[1]*, the English Commercial Court has held that an owner does not have the right to withdraw a vessel under the BIMCO "Non-Payment of Hire Clause for Time Charter Parties" in respect of non-payment of an earlier hire payment. This may come as a surprise to some and should therefore be borne in mind for the future.

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THE FACTS

The MV "Caravos Liberty" was delivered under a time charterparty which provided for payment of hire 15 days in advance. The charterparty contained a BIMCO "Non-Payment of Hire Clause for Time Charter Parties" which stated that:

a. 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 this 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;

b. 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 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);

c. 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; and

> d. 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.[2]

The charterers paid the first six hire payments on time but deducted US$8,015.40 from the fourth hire payment in respect of alleged over-consumption by the vessel.

When the deduction was made from the fourth hire payment, the owners protested but initially took no further action. However, just after payment of the sixth hire payment, the owners served an 'anti-technicality' notice providing the 72-hour grace period required by the clause for the US$8,015.40 shortfall to be paid. Thereafter they withdrew the vessel from the charter under the clause for non-payment of the shortfall.

The charterers argued that the owners' withdrawal from the charter was wrongful and that it constituted a repudiatory breach of the charterparty. The owners argued that their withdrawal was in accordance with the BIMCO clause and, therefore, lawful.

THE TRIBUNAL'S DECISION

In arbitration, the tribunal accepted that the charterers' US$8,015.40 hire deduction was wrongful. However, it held that the owners could not, after payment of the sixth hire payment, invoke the withdrawal procedure under the BIMCO clause in respect of under-payment of the fourth hire payment. The tribunal therefore held that the owners were in repudiatory breach of the charterparty by wrongfully withdrawing the vessel.

APPEAL TO THE COMMERCIAL COURT

The owners appealed to the English Commercial Court, arguing that they had been entitled to withdraw the vessel on the basis that:

1. In *The Libyaville**[3]**,* it was common ground that there is an underpayment of hire payable in advance if, by midnight on a due date, the charterers have not paid sufficient hire to fund the contractually anticipated earning activity of the vessel up to midnight on the following due date;
2. The natural and ordinary meaning of the words used favoured their construction. The opening words of sub-clause (a) stating "if the hire is not received by the Owners by midnight on the due date" referred to the full amount of hire outstanding as at that date and not just the particular 15-day hire instalment;
3. This also made sense of the words "until such time as the payment due is received by the Owners" at the end of the first sentence of that sub-clause, as well as other references in the clause to "payment due" (which was said to refer to the full hire payable);
4. The owners contended that their construction also gave the most realistic approach to the requirement in sub-clause (b) for their anti-technicality notice to be given within 24 running hours of "the payment" being overdue. In this regard, sub-clause (b)'s introduction of a grace period mechanism did not change owners' suggested meaning of the words "the hire";

5. The tribunal's approach undermined the essential nature of the bargain struck between the parties to a time charter and, in particular, the substance of the consideration to be received by the shipowner in return for the promise to provide a service to the charterers. It essentially deprived the owners of the opportunity of taking action on an underpayment which may not be apparent within 24 hours of the due date or of taking a commercial approach rather than invoking the nuclear option of withdrawing; and
6. Various commercial common-sense factors favoured the owners' approach.

MRS JUSTICE COCKERILL HELD THAT THE OWNERS DID NOT HAVE THE RIGHT TO WITHDRAW THE VESSEL UNDER THE CLAUSE, FINDING THAT THE TRIBUNAL'S APPROACH WAS CLEAR AND LOGICAL.

THE COMMERCIAL COURT'S DECISION

However, Mrs Justice Cockerill held that the owners did not have the right to withdraw the vessel under the clause, finding that the tribunal's approach was clear and logical:

1. In her view, the words "the hire" in combination with "due date" in sub-clause (a) provided an initial indicator that the right to withdraw was tied to a particular hire instalment, even though the clause did not use the word "instalment". The judge did not think it was a natural use of language to say (as the owners did) that the "due date" for the shortfall of the fourth hire instalment was the date of that hire instalment as well as the date of each subsequent hire instalment. It would be artificial to ignore the temporal dimension inherent in the reference to a "due date", and equally artificial to say the sum outstanding from the fourth hire payment was "due" as at the date of the sixth hire payment;
2. The clause also prescribed conditions for withdrawal which could not be satisfied in respect of historic arrears;
3. The reference in sub-clause (d) to "any particular late payment of hire" suggests that the remedies for failure to pay relate to individual hire instalments and not (as the owners were arguing) to a rolling account;
4. There is a distinction between the continuing right to recover hire as a debt and the independent right to withdraw (the 'nuclear option', as the judge put it). However, the owners' argument merged these two separate rights, betraying the error in their argument;
5. Owners' construction would mean that the owners could retain the right to withdraw the vessel at any time until the debt became time barred (six years after the failure to make payment), a right they could activate by serving the required notice. That did not sit well with the case law on withdrawal from time charter parties, and indeed, lacked logic or commercial coherence;

6. As to *The Libyaville* (which concerned the NYPE withdrawal provision), the judge was not persuaded that it gave rise to the proposition contended for by the owners. In any event, since the point in question had not actually been decided in that case, it was not binding authority for what the owners were arguing in this case, and further in that case the withdrawal was based, at least partly, on a shortfall for the relevant payment. *The Libyaville* could therefore make no difference to the conclusions indicated by the wording and commercial context of the BIMCO clause; and

7. Finally, on a separate note, in the judge's view, the normal common law rule requiring an owner to give an anti-technicality notice, and thereafter notice of its withdrawal of the vessel, for unpaid hire within a "reasonable time" is superseded by the BIMCO clause (which specifies 24 hours to give the anti-technicality notice, 72 hours after that to effect payment, and 12 hours thereafter for owners to notify their withdrawal of the vessel for continued non-payment). The common law rule on "reasonable notice", however, provides a useful backdrop for construing the contractual scheme here and, as a result, the period which would be allowed at common law would be abridged.

COMMENT

The Commercial Court's decision sets out a practical and, it is submitted, correct, common-sense approach towards the construction of the BIMCO "Non-Payment of Hire Clause for Time Charter Parties", under which the owner retains the right to be paid previously unpaid (or underpaid) hire instalments but can only withdraw the vessel from the charter in respect of the latest hire instalment that is due, by following the procedure and the tight timetable set out in the clause.

Parties to time charterparties will therefore need to bear this in mind moving forward.

[1] [2019] EWHC 3171 (Comm)

[2] The sub-clause numbering was added by the court.

[3] [1975] 1 Lloyd's Rep 537