

Suspension of performance



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Recent developments in relation to owners' rights to suspend performance under standard time charters have raised some interesting issues which both owners and charterers must be wary of. This article looks at the High Court decision of *Greatship Dhriti* and discusses how London arbitration tribunals have held recently on similar issues.

In *Greatship (India) Ltd v. Oceanografia SA* DE CV [2012] EWHC 3468, the *MV Greatship Dhriti* was chartered under an amended BIMCO Supplytime 1989 form for a period of two years.

A dispute arose concerning the payments clause of the charterparty, clause 10 (e), which provided:

1. "10(e) Payments – [1] Payments of Hire, bunker invoices and disbursements for Charterers' account shall be received within the number of days stated in Box 23 from the date of receipt of the invoice. Payment shall be made in the contract currency in full without discount to the account stated in Box 22. However any advances for disbursements made on behalf of and approved by Owners may be deducted from Hire due.
2. If payment is not received by Owners within 5 banking days following the due date Owners are entitled to charge interest at the rate stated in Box 24 on the amount outstanding from and including the due date until payment is received. Where an invoice is disputed, Charterers shall in any event pay the undisputed portion of the invoice but shall be entitled to withhold payment of the disputed portion provided that such portion is reasonably disputed and Charterers specify such reason. Interest will be chargeable at the rate stated in Box 24 on such disputed amounts where resolved in favour of Owners. Should Owners prove the validity of the disputed portion of the invoice, balance payment shall be received by Owners within 5 banking days after the dispute is resolved. Should Charterers' claim be valid, a corrected invoice shall be issued by Owners.
3. In default of payment as herein specified, Owners may require Charterers to make payment of the amount due within 5 banking days of receipt of notification from Owners; failing which Owners shall have the right to withdraw the Vessel under prejudice to any claim Owners may have against Charterers under this Charter party.
4. While payment remains due Owners shall be entitled to suspend the performance of any and all of their obligations hereunder and shall have no responsibility whatsoever for any consequences thereof, in respect of which Charterers hereby indemnify Owners, and Hire shall continue to accrue and any extra expenses resulting from such suspension shall be for Charterers' account"

Parts (2) and (3) of clause 10(e) of the charterparty provided for a five banking days' notice period before the owners would charge interest or withdraw the vessel. Part (4) of clause 10(e) provided that whilst payment remained due to the owners, they would be entitled to suspend performance of any and all their obligations, but there was no specific mention of the same grace period. The question of whether or not the owners were required to give an antecedent or advance notice was first discussed in a London arbitration.

The arbitrators held in favour of the charterers' submissions that the grace period and express notification provision of five banking days contained in parts (2) and (3) of clause 10(e) also governed part (4), manifesting as an express term. This was decided on the basis that part (4) was not a separate stand-alone provision and could not be read, as the owners sought to read it, divorced from the context in which it appeared in clause 10(e). The owners appealed.

Mrs Justice Gloster in the English Commercial Court disagreed with the arbitrators' decision and it was held that on the proper construction of clause 10(e), the owners were not required to give the charterers five banking days' notice of the suspension in order for the owner's right to withhold service under the charterparty to be validly exercised. It was noted that if the contract used clear and unambiguous language then the court would have to apply the provision however surprising or unreasonable the result may be.

In this case, the court found that the outcome was neither surprising nor unreasonable and that it was not necessary to imply such a term in to the provision in order to give the contract business efficacy – the charterers were already on notice that non-payment would entitle the owners to suspend performance there and then. The right to suspend performance was not as draconian as the right to withhold the vessel and thus terminate the charterparty.

A similar point was discussed in an earlier unpublished London arbitration where notices of lien on cargo were debated. In that case, the tribunal held that if a vessel is laden and the charterparty contains a lien clause, then the owners can effectively exercise a lien over cargo as against their immediate charterers for sums due and outstanding without having to give clear and equivocal notice irrespective of any terms in the charterparty. This case concerned a lien over all cargoes where the owners made no explicit reference to the lien before a demand was made. They retained possession purportedly withholding performance pursuant to an express clause in the charterparty entitling the owners to suspend performance on expiry of a grace period. As a matter of fact, that clause had been deleted from the charter despite the owners relying on the clause expressly when service was suspended.

The tribunal held that, irrespective of whether the owners had purported to exercise a right to suspend service in circumstances where no such right was provided in the charterparty, the lien clause operated to allow the owners to exercise a lien without having to give notice of their intention to do so. The award followed the decision of Mr Justice Mocatta in the *Agios Georgis*, that the owners could exercise a lien without notifying their right to the charterers and it was this argument that held.

Conclusion

What is evident from these two decisions is that, when approaching the question of suspension of performance of obligations under the charterparty for sums due and outstanding, clear and unequivocal words must be used. If the vessel is laden, a lien can be exercised without prior advance notice of such exercise and hire will remain payable throughout the period of the suspension of performance. Of course, each charter should be carefully scrutinised and appropriate legal advice should be sought before any precipitous steps are taken.