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The Pitfalls of Anti-Technicality Clauses



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Withdrawing a ship from a charterer, who has failed to make full payment of hire is never a straightforward issue. It is still relatively rare to find a charterer making no payment at all, leaving an owner with a simple decision to withdraw the ship. More often than not, the problem tends to involve a charterer making a deduction from hire, which is not approved by the owners of the ship. This leaves the owners to make a difficult call on whether to withdraw the ship using the mechanisms set out in the anti-technicality clause. A recent decision in the English Courts re-enforces the view that once an owner is entitled to exercise the provisions of the anti-technicality clause, it needs to act decisively.

In *Quiana Navigation and Pacific Gulf Shipping (Singapore) Pte Ltd* the charterparty included the BIMCO Non-payment of hire clause for time Charter Parties. That anti-technicality clause provides that:

- If an owner does not receive hire by midnight on the due date, the owners can suspend performance of all of their obligations under the Charterparty until payment is received.
- The vessel is to remain on hire during that period.
- The owners are to notify the charterers in writing within 24 running hours that the payment is overdue and must be received within 72 running hours from when the hire was due.
- If payment is not made within those running hours the owners may give written notice within 12 running hours withdrawing the ship.
- The clause finishes by stating that of the owners choose not to exercise any of their rights in respect of a particular late payment of hire or a series of late payments that will not be construed as waiver of their right to suspend performance or withdraw the ship in respect of any subsequent late payment. In practical terms, this means that if payments are accepted late this does not prevent an owner withdrawing a ship if the next payment is late.

Sequence of events

- The hire payments were due on 27 May, 11 June, 26 June, 11 July, 26 July and 10 August. The bottom line payment every 15 days was USD130.652.
- On 11 July the charterers underpaid hire by USD8, 015.40 claiming that there had been an overconsumption of fuel. The owners protested but they did not serve an anti- technicality notice.
- On 26 July and 10 August the charterers paid the correct hire. The owners hire statements made it clear that USD8,015.40 was still due and payable,
- On 11 August the owners sent the charterers an anti-technicality notice claiming the full balance of the hire due. They then followed through with the notice and withdraw the ship.

The dispute

- The charterers argued that the owners had no right to withdraw the ship. The payment made on 10 August was the correct amount of hire required to be made. The owner's right to send the notice only related to the last instalment which fell due on the particular date and as full payment had been made on 10 August the owners had no right to withdraw the ship for a debt deducted on a previous hire payment.
- The matter was originally looked at by three arbitrators who agreed with the charterers.
- The owners were unhappy with that decision and appealed to the English Court.
- The courts view was that there was an overriding requirement for certainty in commercial transactions when a ship-owner becomes entitled under the terms of his contract, to withdraw a ship from the service of a time charterer, he may wish to act swiftly and irrevocably.
- In the Judges' view the Owners' suggestion that they should be able to withdraw the Vessel from the Charterers for a late payment due some time ago at some stage in the future, on the back of a completely distinct payment was lacking in logic or commercial coherence.
- The Court agreed the withdrawal was invalid.

Quiana Navigation SA v Pacific Gulf Shipping (Singapore) PTE Ltd (“The Caravos Liberty”) [2019] EWHC 3171 (Comm).

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