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Payment Obligation of hire is not a condition of Charter**- Owners be careful !**

In a recent case of *Spar Shipping A.S. v. Grand China Logistics Holding (Group) Co. Ltd.* that came in the first week of October from Court of Appeal. The Court of Appeal in this case dismissed the appeal made by Grand China Logistics Holding (Group) Co. Ltd ('Charterers'), from the decision of Poppelwell J of Commercial Court (Court of First Instance).

In this case, the time charters were three long-term NYPE 1993 charters. The Charterers paid the hire punctually on all the three charters until 11 April 2011, but thereafter the Charterers began to default. The Charterers were apologizing to the Owners for non-payment for some time. The unpaid period, for which the Owners claimed was from April to September 2011. Thereafter, the Owners withdrew the vessels for non-payment of hire, and reserving their rights to claim damages for loss of bargain on the basis that the Charterers were in breach of condition and/or in repudiatory breach of an innominate term.

The Commercial Court in its judgment had clarified that the obligation to pay hire was not the condition of the contract on basis of the following reasons that could be understood by the careful analysis of the judgment:

- a) there is usually a withdrawal clause along with the anti-technicality clause in almost all time charters. This is the option available to the Owners to withdraw the vessel for non-payment of hire;
- b) stipulations as to the time of payment would not be treated as condition of the charter unless it is clearly mentioned in the charter that time for payment of hire is of essence, and therefore this clause should be treated as condition of the contract;
- c) breach for non-payment of hire could be due to banking delay, while a serious breach could be for no intention to pay. Therefore, there is a range from the trivial to the serious breaches, so classification of the payment obligation is not suitable for it to be classed as a condition of the contract.
- d) in the absence of the express right to terminate the charter, it was not possible for the judge to foresee that the parties to a charterparty would have allowed the owner to terminate the long term charter for a delay of a few minutes in the payment of hire.
- e) the Judge did not agree with argument that the payment obligation being classed as a condition brings a necessary commercial certainty and he said that any certainty needs to be counterbalanced with the need not to impose liability for a trivial breach in undeserving case; and
- f) in any event, for many years, commercial men continued to trade without any problem, that was even before the famous case *The Astra* [2013] EWHC 865 (Comm) that seems to have brought with it the notion that the payment obligation was the condition of the charter.

The Commercial Court therefore found that payment obligation was not the condition of charter, but the Owners did win on the argument that the Charterers having not paid the hire for a while, and therefore had evinced an intention not to perform the Charter in a way that deprived the Owners of substantially their whole benefit under them. The Charterers had therefore renounced the charter.

The Charterers sought, and thereafter obtained the leave to appeal on the basis that the test of renunciation was applied too strictly against them. The Court of Appeal dismissed the appeal of the Charterers.

FDD division has the following advice for the clients of Andrew Liu:

The Court of Appeal confirmed that payment obligation was not a condition of the charter. Therefore, in our view, now there should not be anymore doubt as to whether the Owners can terminate or not terminate the charter on the basis of non-payment of a single hire payment. However, based on the option available in the contract, i.e. the right to withdraw option in the contract, they can, however, withdraw the vessel from the charter. However, all the messages need to be drafted carefully when using this contractual option to withdraw the vessel.

When the Owners can show by evidence that the Charterers have no intention to make any payment, then, it may mean, that the conduct of the Charterers went straight to the root of the contract. It may then amount to a renunciatory breach, and thereby entitling the Owners to terminate the charter. This area of law pertaining renunciation is never straightforward, and the Owners are advised to draft every email very carefully and take legal assistance.

Source of Information: Andrew Liu & Co., Ltd www.andrewliu.com.hk