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Commercial contracts - Whose obligations is there to pay in a first instance?

This arbitration *(2018) 994 LMLN 3* concerned a dispute between the Sellers, and the Buyers under a contract dated 8 September 2014 for the sale of a cargo of 3,000mt Ukrainian feed barley on the CFR *(cost and freight)* terms of Incoterms 2000 (the sale contract). Pursuant to the sale contract, the Sellers, as Charterers, entered into a voyage charterparty with Ship owners, dated 8 September 2014, for the carriage of the cargo from Kiliya in the Ukraine to Benghazi in Libya.

The Owners of the vessel refused to release the freight pre-paid bill of lading unless the freight was paid within 3 banking days of signing of the bill of lading. The relevant clauses from the Fixture Note and the relevant charterparty were:

> Fixture Note:
>
> “FREIGHT PAYABLE IN FULL LESS COMMISSION ACCT W/I 3 BDAYS AFTER SIGNING ‘FREIGHT PAYABLE AS PER C/P’ BS/L ... AND IN ANY CASE BBB ...
>
> IF BS/L MARKED FREIGHT PREPAID THEN ORIGINALS TO BE KEPT BY THE OWNERS REPRESANTATIVES [sic] AT LOADPORT UNTIL FREIGHT IS RECEIVED BY THE OWNERS.”
>
> Charterparty:
>
> “Clause14. Freight Payment
>
> 100 per cent OF FREIGHT TO BE PAID WITHIN 3 BANKING DAYS FROM MASTER’S SIGNING/RELEASING BILLS OF LADING [emphasis added] IN ANY CASE BBB.”

As a result, the Owners chose not to discharge the cargo, until the full freight was received by them. This resulted in demurrage at the discharge port, and was accordingly claimed by the Owners against the Sellers. The Sellers in turn claimed the same demurrage against the Buyers pursuant to the sales contract. The Sellers claim against the Buyers was based on Clause 9 of the Sales contract that provided:

> The buyers shall pay freight according to the [charterparty]… and the Owners’ invoice net cash by SWIFT transfer at the buyers’ charge and expenses as soon as possible [emphasis added] after signing Bill of Lading. Balance shall be paid to the sellers net cash by SWIFT transfer at the buyers’ charge and expenses within 48 hours of banking days against

presentation of original shipping documents mentioned in Clause 8 hereof by the sellers' representative at the buyers' bank…

The Buyers argument was notwithstanding the fact they agreed to assist the seller pursuant to the Sales Contract terms in relation to the freight payment, but the fact still remained that it was the Sellers, who were a party to the charterparty with the Owners.

The arbitrator held that though the Buyers pursuant to the terms of the sale contract were in breach of their obligation to pay as soon as possible, but on analysis, the point came where the sellers should have realised the delay from the buyers for this payment and accordingly failed to mitigate their loss. The Sellers instead chose not to pay the freight to the Owners for considerable time, and this was clearly the obligation of the Sellers under the relevant voyage charterparty. It followed that the Sellers lost their case against the Buyers.

FDD division of ALCO advice to the Andrew Liu's clients is:

a) First step is to realise as to whose obligation is to pay in the first instance in any many parties and many contracts situation.

b) Mitigation of losses is one of the most important obligations on the innocent party that has suffered a loss pursuant to the breach of the contractual terms.

c) FDD division of ALCO saved millions of dollars in guiding the correct tactics when dealing with multiple parties. In one recent case, FDD division just last week resolved a multi-party dispute within three days of taking the matter that was already going on for seven days previously due to the involvement of costly lawyers from all sides and could have led to complex multi-million dispute. FDD division's main goal is to resolve the cases rather than stretch them.

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