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Payment of Hire and legal principle of Set-off - A new arbitration matter

In the recent arbitration, *London arbitration 7/19*, the subject vessel was chartered in 2010 on the NYPE 1981 form as amended for a period of between three months and five months in charterers' option. The recap incorporated and amended a proforma charterparty for another vessel (the proforma charter).

The owners brought arbitration proceedings against the charterers claiming a balance of account in the sum of USD 237,719.07. The owners now made two applications. The first application was for an immediate award of USD 80,925.74 based on a hire statement drawn up by the charterers which showed a balance of that amount due to the owners.

The owners' second application related to a deduction of USD 85,266.08 in the charterers' hire statement in respect of three alleged off-hire events and USD 24,388.35 under the heading of "Owners' expenses". The owners said that none of the deductions for off-hire had been agreed. They were prepared to accept the sums claimed for "Owners' expenses" on condition that the supporting vouchers were produced but none had been produced so far. Accordingly, the owners applied for an immediate payment of USD 83,134.43 (USD 85,266.08 net of 2.5 per cent commission) and USD 24,388.35 making a total of USD 107,522.78.

The Charter recap provided, inter alia:

> … CL 54 – DELETE AND REPLACE WITH ‘CHRTRS HAVE NO RIGHT TO MAKE ANY DEDUCTIONS FROM HIRE PAYMENTS **[emphasis added]** BUT IN CASE AN EXTRAORDINARY MATTER SUCH AS ATTENDING TO CREW'S HOSPITALISATION OR SURVEY WORK FOR OWNERS ACCOUNT THEN OWNERS WILL APPOINT THEIR OWN AGENTS OR THEY WILL PAY DIRECTLY’
>
> CHRTS DO NOT HVE THE RIGHT TO DEDUCT FM HIRE PAYMENT ANY AMOUNTS ON ALLEGED UNDER PERFORMANCE, EXCEPT UNDISPUTED OFF HIRE **[emphasis added]**

The Charterers submitted that an immediate award would only be appropriate if the Owners could show how that there was a sum which was indisputably due. That was not the case because the Charterers had a counterclaim arising out of the refusal by the owners to perform a voyage from Kavkaz to Morocco. The Charterers argued that they were entitled to set-off their counterclaim against any sums due to the Owners due to application of legal principle of equitable set-off. The off-hire claims included a performance claim. The "Owners' expenses" deducted related to the off-hire claims and consisted mainly of the costs of bunkers consumed during the off-hire periods. The Charterers also argued that there is some right in other clauses to deduct such expenses.

The Tribunal clearly agreed that in law there is a principle of equitable set-off, but in this case Clause 54 seems to be clear that equitable set-off is not allowed between the parties, except in a scenario where there is undisputed off-hire. The counterclaim from the Charterers was not undisputed. The Charterers' additional argument that they have not deducted the hire, but only suspended also did not cut ice with the Tribunal. The Tribunal however did not comment on the merits of the Charterers' counterclaim at this stage and just commented on the issue of immediate award arising out of construction of Clause 54.

Accordingly, an interim anti-suit injunction would be granted in favor of the owners.

ALCO's FDD department's advices to the clients of Andrew Liu are as follows:

a) Any deductions made from the hire have to comply with any express clauses as such clauses can override legal principles as in this case.

b) FDD department remain available ONLY to clients of ALCO to give advice to clients 24 x 7 and recently won many small claim arbitrations for its clients. Clients should consider FDD department as a resource and should not hesitate to use it.

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