

Circular Ref: 2019/0019
Date: 30 December 2019

ANTI-TECHNICALITY NOTICE

In a new case of *Quiana Navigation SA v Pacific Gulf Shipping (Singapore) Pte Ltd (The "Caravos Liberty")* – QBD (Comm Ct) (Cockerill J) [2019] EWHC 3171 (Comm) – 21 November 2019, an issue of anti-technicality clause was clarified.

The vessel *Caravos Liberty* was time-chartered on an amended New York Produce Exchange form containing the following provisions:

Clause 4: the Charterers shall pay for the use and hire of the said vessel at the rate of USD9,000 daily including overtime, payable every 15 days in advance ... BIMCO non-payment of hire clause for time charterparties to apply

Clause 5: Payment of said hire to be made in cash in United States Currency (as per clause 34) every 15 days in advance [The "said hire" in clause 5 was the US\$9,000 daily hire set out in clause 4].

Clause 34: Hire and all monies due to the Owner under this Charter Party will be paid to Owner's bank account ... First hire 15 and value of bunkers on delivery to be paid within 3 banking days after vessels delivery and charterer's receipt of scanned/signed/stamped relevant hire statement, thereafter every 15 days hire in advance Bimco Non Payment of hire clause for time Charter Parties to apply.

Clause 37: BIMCO Non-Payment of Hire Clause for Time Charter Parties

If the hire is not received by the Owners by midnight on the due date, the Owners may immediately following such non-payment suspend the performance of any or all of their obligations under this Charter Party (and if they so suspend, inform the Charterers accordingly) until such time as the payment due is received by the Owners. Throughout any period of suspended performance under this Clause, the Vessel is to be and shall remain on hire. The Owners' right to suspend performance under this Clause shall be without prejudice to any other rights they may have under this Charter Party.

The Owners shall notify the Charterers in writing within 24 running hours that the payment is overdue and must be received within 72 running hours from the time hire was due. If the payment is not received by the Owners within the number of running hours stated, the Owners may by giving written notice within 12 running hours withdraw the Vessel. The right to withdraw the Vessel shall not be dependent upon the Owners first exercising the right to suspend performance of their

obligations under this Charter Party pursuant to sub-clause (a). Further, such right of withdrawal shall be without prejudice to any other rights that the Owners may have under this Charter Party.

The Charterers shall indemnify the Owners in respect of any liabilities incurred by the Owners under the Bill of Lading or any other contract of carriage as a consequence of the Owners' suspension of and/or withdrawal from any or all of their obligations under this Charter Party.

If, notwithstanding anything to the contrary in this Clause, the Owners choose not to exercise any of the rights afforded to them by this Clause in respect of any particular late payment of hire or a series of late payments of hire, this shall not be construed as a waiver of their right either to suspend performance under sub-clause (a) or to withdraw the Vessel under sub-clause (b) in respect of any subsequent late payment under this Charter Party.

The initial payment of 15 days' advance hire was due on 27 May 2017. The next payment date was 11 June 2017, followed by 26 June 2017, followed by 11 July 2017, followed by 26 July 2017, followed by 10 August 2017. The sum payable by the charterers to fund the 15 days of earning between due dates was USD 130,652 (15 days of hire at USD 9,000 per day, less commission).

On 11 July 2017 (the 4th date), following an exchange of statements showing different amounts, the charterers underpaid by USD 8,015.40. They tendered USD 122,637 instead of the full USD 130,652 payable because they claimed (wrongly) that there had been overconsumption of fuel. The owners protested but they did not serve an anti-technicality notice (ATN). The Owners did not object and waited for the Charterers to remit 5th and 6th payment. After the 6th payment, they insisted and argued, as the hire statements are *rolled in* documents showing previous unpaid sums as well, the Charterers still underpaid them by USD 8,015.40. According, they served anti-technicality notice for this amount. Later, they withdrew the vessel as per the BIMCO clause.

However, the Tribunal confirmed the owners were not entitled to invoke the withdrawal procedure in respect of the payment made on the 10 August 2017 due date because that payment date equated to the 15 days' worth of hire which fell due on that date. The phrases "the hire" and "the payment due" referred only to the amount of hire that fell due for the first time on such due date (i.e., excluding any amount of hire that first fell due on some earlier date, but had not been paid, and thus remained due and payable on the instant due date). The Court confirmed the award of the tribunal. The Court held that the reality was that the USD 8,000 had been due since 11 July; it remained outstanding on 10 August, but it was no more due on 10 August than it had been on 9 August and Owners thereby were held in the breach of the charterparty.

FDD department of ALCO's advice to Andrew Liu clients is that:

- a) Withdrawal procedure is a sensitive step and should not be taken without consulting lawyers.
- b) FDD department regularly assist clients to draft messages at this stage in advisory role.

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