



THE ASTRA CASE

WITHDRAWAL OF THE VESSEL AND LOSS OF BARGAIN

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In a market where hires have dramatically fallen down, how can shipowners protect their interests when charterers fail their obligation to punctually pay hire rates?

The answer seems to come out from a recent case: *Kuwait Rocks Co v AMN Bulcarriers Inc (The Astra)* judged in London, before the High Court of Justice, Queen's Bench Division, Commercial Court, on 18th April 2013.

The above case refers to the M/v "Astra" chartered for a period of five years on an amended NYPE 1946 form, dated 6th October 2008. The rate of hire was USD 28,600.00 per day. From the very beginning problems arose, due to the subsequent rapid falling down of the freight market, which caused Charterers facing difficulties in paying punctually the instalment of the hire, fixed at an high hire rate compared with the changed market rates. Finally, after nearly two years of continuous, belated and partial payment, Owners issued the final **anti-technicality notice** in respect of the unpaid hire, according to **Clause 31**, requiring Owners to give

Charterers two banking days' notice to rectify any failure in payment due to oversight, negligence, error or omission. When the whole balance owed was not received, Owners exercised the right to withdraw the vessel, according to **Clause 5** - requiring hire to be paid punctually and regularly in advance, failing which Owners could elect to withdraw the vessel and terminate the charter - reserving the right to treat Charterers' conduct as **repudiatory**.

Then, Owners commenced arbitration against Charterers to claim damages suffered as consequence of the loss of earnings from the date of the withdrawal to the date when the vessel would have been redelivered according to the above charter party.

Owners claim was grounded mainly on two different arguments:

- i) Charterers were in **repudiatory breach** of the contract;
- ii) the payment of hire under clause 5 was a condition, breach of which entitled Owners to claim relevant damages.

The Arbitration Tribunal rejected the latter argument, but recognized that the conduct of the Charterers amounted to a repudiatory breach of the contract, entitling Owners to damages.

The Charterers appeal was dismissed. Indeed, the High Court upheld the decision on the issue of repudiatory breach, finding that the Tribunal, contrary to the allegations made by the Charterers, applied the test for repudiation/renunciation correctly. Furthermore, the Court, invited to do so by the parties, judged also on the second arguments raised by the Owners, stating that the Clause 5, with or without Clause 31, should be considered a condition, the breach of which entitles Owners to damages for loss of bargain.

The above decision is significant in that it radically changes the traditional approach to the matter.

Traditionally, the Owners had to prove that the Charterers were in repudiatory breach of the contract, in order to recover additional damages in addition to the withdrawal of the vessel and to the claim for the unpaid hire. Hence the difficulties for the Owners, seeking to claim damages in addition to the unpaid hire, to prove the unequivocal intention of the Charterers no longer to be bound by the contract.

On the contrary, the above decision stated that the obligation to pay hire is a condition of a time charter party, the failure of which entitles Owners to claim damages upon termination of the contract for loss of bargain (in practice, the difference between the hire fixed by the charter party and the market hire).

The decision is grounded mainly on the following arguments:

- the wording of the Clause 5 makes itself clear that the failure to make punctual payment, entitling the Owners to withdraw the vessel and terminate the contract, would go to the root of the contract and thus that the above provision is a condition.

- in mercantile contracts ruled by English law time is generally considered of the essence, thus the relevant provision represents a condition of the contract. That is the obligation to make punctual and prompt payment provided by Clause 5. In any case, should Clause 5 alone be considered not sufficient to make time of essence, Clause 31 does it by the end of the relevant grace period;

- the importance of certainty in commercial transaction, especially in a falling market where owners could suffer damages following the withdrawal of the vessel, makes the obligation of punctual payment a condition. Thus owners will be entitled to recover damages without having to prove charterers' repudiation and charterers will have the certainty to be held liable for damages for loss of bargain in case of withdrawal of the vessel due to their failure to make prompt payment;

- the decisions held in the previous cases were limited to the particular provisions they were considering and did not extend to the obligation to make prompt and punctual payment in itself.

Thus, as consequence of the breach of the obligation to punctually pay hire rate, the Owners may now be entitle to withdraw the vessel from the service, to terminate the contract, to claim unpaid hire and damages.

The Astra case stressed the importance of punctual and advance payment of hire to cover the expenses incurred on a daily basis by the owner to run the vessel, as well as the importance of certainty in commercial transaction.

It is true that in a market of rising freight and hire rates, owner would have commercial reasons to withdraw a vessel in order to charter the same at a higher rate. Nevertheless, this is no longer the current market. The above decision reflects the needs of the present situation, where owner have to carefully consider the consequence of an early withdrawal of the vessel in terms of damages for loss of bargain.

The future application of the principles settled in the Astra case will tell us if Courts really acknowledge the changes of the current market conditions.

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice. For any further information, please contact Studio Legale Garbarino Vergani at the following contacts as reported hereunder.

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