

The '*Astra*': is failure to pay
hire a breach of condition?

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Introduction

- ***Kuwait Rocks Co v AMN Bulkcarriers Inc (The “Astra”) [2013]***
 - **Is Failure to pay hire a breach of condition?**
 - **Law prior to the ‘Astra’ decision**
 - **Findings in the ‘Astra’ – Arbitration / Commercial Court**
 - **Implications for owners and charterers**
 - **Conclusion**

Background - Clause 5 - NYPE

- **If a condition, the right to terminate the charterparty and the right to claim damages over the remaining period of charter**
- **But if not, then the owner must establish repudiation of the charter before terminating and claiming damages.**
- **A contractual right to withdraw - generally only provide the owner with the right to claim hire up to that point.**

The law prior to The 'Astra'

- *The Brimnes* [1972] C.A. --- Orthodox view – not a condition
- Time Charters: - Michael Wilford

"Despite these dicta, the better view is that damages for the loss of the charter are recoverable only where repudiatory....

Whether Clause 5 [of NYPE] is a condition?may be not.

But uncertainty will remain until the House of Lords (now Supreme Court) has shed more light on this important question."

The 'Astra': facts

- NYPE 1946 Form for five years.
 - *"Payment of said hire to be ... 30 days in advance ... failing the punctual and regular payment ... the Owners withdraw the vessel without prejudice to any claim they (the Owners) may otherwise have on the Charterers"*.
- Owners agreed a hire reduction for a defined period.
- Further fixed period at a reduced rate, this time if agreement could not be reached, they would declare bankruptcy. Owners agreed.
- After expiry of the second fixed period, charterers continued to pay the reduced sum.
- Owners held charterers in breach and claimed US\$13million for the remaining on the charter.

Arbitration

- **The two issues**
 - (1) Repudiatory Breach?
 - (2) Breach of Condition?
- **For repudiatory breach, the refusal to pay the full charter rate after the end of the fixed period were tantamount to repudiatory Breach**
- **The Tribunal ruled in owners' favour and awarded damages of around US\$12.5 million**
- **Breach of Condition, the Tribunal followed the "orthodox" view that the punctual payment of hire is not a condition.**

The Commercial Court

- **Flaux J considered that the Tribunal had applied the correct legal test for Repudiatory Breach.**
- **This is the rationale of the Court's decision and, therefore, as a general principle, it is only this part of the decision that should be binding on arbitration tribunals**
- **Subsequent Court judges (unless there is a cogent and convincing reason) will uphold the rationale**
- **However, the Judge also proceeded to deliver his judgment in relation to the Breach of Condition issue.**

Breach of Condition

- The Judge's view was – “*Obiter Dicta*”
1. Clause 5 - right to withdraw is a strong indication that a failure to pay hire promptly would go to the root of the contract;
 2. As time is made of the essence, it is consistent with the requirement being a condition;
 3. *The Brimnes* can be distinguished. The *Georgios C* has been overruled by the *Laconia*;
 4. The importance to businessmen of certainty in commercial transactions

Implications

- **So what does this mean? Is the uncertainty resolved?**
- **(1) Unfortunately the answer is 'no'. Arguably even less clear than before.**
- **(2) Strictly speaking, the decision is obiter, not the rationale. different Judge may elect to follow the orthodox view.**
- **(3) However, LMAA Tribunals are likely to consider themselves obliged to follow the decision in the first instance.**

Implications

- (4) The view - contrary to the position that has been adopted in the industry to date – must show repudiatory breach to claim damage.
- (5) Whilst the NYPE Form, the Judge's reasoning goes wider - will impact other time charterparty form – Baltime / Shelltime etc
- (6) Uncertainty - future cases by conflicting obiter statements, ---- Lord Sumption in the Supreme Court's decision in *The Kos* [2012].
- (7) Uncertainty - remains regarding the effect of anti-technicality clauses.

Implications

- (8) In current arbitration cases - Owners use this case to enable them to rely on a breach of condition - a stronger position.
- (9) For future cases, it still remains difficult for owners whether a minor breach - a breach of condition?
- (10) Charterers face particular problems - deductions from hire.
- (11) *The Aquafaith* [1212], if owners affirm the charter --- they may take some comfort -- they may still be able to argue, later, that the next failure to pay an instalment could be a breach of condition.

Conclusion

- **Unfortunately, uncertainty - this important area of law has not been reduced.**
- **Until the Supreme Court, both owners and charterers be with some caution.**
- **Negotiating position of owners, but the issue is far from having been decisively settled.**
- **Much will depend on the facts of each individual case**
- **Early advice and assessment of the available options will be essential.**

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