Shipping

June 2013

THE "ASTRA"

APPEAL STATUS AND UPDATE

Further to our April 2013 Briefing regarding Mr Justice Flaux's decision in *Kuwait Rocks Co v AMN Bulkcarriers Inc (The mv Astra)* [2013] EWHC 865 (Comm) we now provide an update on the status of that decision. It was originally held (in obiter) that the obligation upon a charterer to make punctual payment of hire in clause 5 of the NYPE 1946 form charter is a contractual condition, a breach of which entitles an owner to terminate the charter and claim damages for future loss of earnings.

The charterers have not obtained leave to appeal the High Court's decision. Therefore, until there is a clear and binding decision on point, Mr Justice Flaux's conclusions regarding the status of the clause 5 obligation to pay hire is the most relevant and up-to-date authority in this area. As such, it may well be considered persuasive by other High Court Judges and arbitrators, although they are not obliged to follow the decision on the basis that Mr Justice Flaux's conclusions were obiter.

At first blush it would seem that the decision in the Astra provides clarity in respect of a charterers' failure to pay hire. However, on closer inspection it arguably creates potential uncertainty in two main respects.

First, as mentioned above, the status of the clause 5 obligation to pay hire was not a ground of appeal from the original tribunal's decision and therefore Mr Justice Flaux's conclusions are obiter. If Mr Justice Flaux's approach is followed, an owner who **does not** terminate in a prompt manner following a single missed payment of hire would become exposed to arguments that they have affirmed the contract due to delay. This creates a quandary for owners who, following a payment default by charterers, must decide whether to terminate or not in the face of uncertainty as to whether the decision in the *Astra* will be followed.

holman fenwick willan hfw

Secondly, it is now arguable that a deduction from hire may be a breach of condition and therefore repudiatory. All may turn on whether or not the deduction was valid. If the owner terminates and the deduction is later found to be valid then the owner will himself be in repudiatory breach and liable in damages to the charterer. If the owner terminates and the deduction is later found to be invalid then the charterer will be liable in damages to the owner. As a result, the consequences of a charterer making deductions from hire are now potentially very serious if an owner decides to press the issue.

Therefore, it would seem that Mr Justice Flaux's attempts to bring some clarity, could actually have the unintended effect of creating further uncertainty due in part to the obiter nature of the decision.

The eventual impact of the *Astra* decision is potentially ground-breaking, however, it remains to be seen whether it will be followed either at first instance level or in the appeal courts and further decisions on the point will be closely watched.

In the meantime, parties will need to consider payment of hire issues in a new way. It may lead charterers seeking amendments to their standard form charters aimed at revising provisions regarding payment of hire and changing the contractual regime to provide better protection when making deductions from hire.

Whilst the *Astra* judgment is of significant potential benefit to owners, in the short term at least, owners may face a dilemma as to whether or not to rely upon the *Astra* to terminate a charter following a single payment default by charterers and claim prospective damages or follow the previous conflicting authorities.

For further information, please contact Rory Butler, Partner, on +44 (0)20 7264 8310 or rory.butler@hfw.com, or Menelaus Kouzoupis, Associate, on +44 (0)20 7264 8482 or menelaus.kouzoupis@hfw.com, or your usual HFW contact.

Should you have any questions in relation to this case, please contact

Paul Dean
London Partner
T: +44 (0)20 7264 8363
paul.dean@hfw.com

Guillaume Brajeux
Paris Partner
T: +33 (0)1 44 94 40 50
guillaume.brajeux@hfw.com

Jeremy Davis
Geneva Partner
T: +41 (0)22 322 4810
jeremy.davis@hfw.com

Dimitri Vassos
Piraeus Partner
T: +30 210 429 3978
dimitri.vassos@hfw.com

Hugh Brown
Dubai Partner
T: +971 4 423 0501
hugh.brown@hfw.com

Paul Aston
Singapore Partner
T: +65 6305 9538
paul.brown@hfw.com

Paul Hatzer
Hong Kong Partner
T: +852 3983 7788
paul.hatzer@hfw.com

Nicolas Poynder
Shanghai Partner
T: +86 21 5888 7711
nicolas.poynder@hfw.com

Robert Springall
Melbourne Partner
T: +61 (0)3 8601 4515
robert.springall@hfw.com

Nic van der Reyden
Sydney Partner
T: +(0)2 9320 4618
nic.vanderreyden@hfw.com

Hazel Brewer
Perth Partner
T: +61 (0)8 9422 4702
hazel.brewer@hfw.com

Lawyers for international commerce

HOLMAN FENWICK WILLAN LLP
Friary Court, 65 Crutched Friars
London EC3N 2AE
T: +44 (0)20 7264 8000
F: +44 (0)20 7264 8888

hfw.com

© 2013 Holman Fenwick Willan LLP. All rights reserved

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.

Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please contact Craig Martin