



Richard Reisert - ASBA Legal Counsel Reports

English Court of Appeal Analyzes 1993 NYPE Form; Holds Owner not Entitled to Damages in Event of Termination for Non-Payment of Hire.

In a very timely decision given the recent release of the NYPE 2015 charter party form, the English Court of Appeal in *Spar Shipping AS v. Grand China Logistics Holding (Group) Co. Ltd.* [2016] EWCA Civ 982, addressed whether Clause 11 of the 1993 NYPE allows for the recovery of damages when a charterer fails to make timely payment of hire. The Court held that it did not.

Under English law, unless a contract term is so fundamental to the purpose of the agreement so as to constitute a “condition,” a breach of the agreement (here the charter) will not entitle the non-breaching party to terminate the contract and recover damages based on what would have been earned if the contract had continued.

Clause 11 of the 1993 NYPE provides in pertinent part that:

Failing the punctual and regular payment of the hire, or on any fundamental breach whatsoever of this Charter Party, the Owners shall be at liberty to withdraw the Vessel from the service of the Charterers without prejudice to any claims they (the Owners) may otherwise have on the Charterers.

The practical effect of this is that the owner may terminate the charter, but because there is no express provision for the recovery of damages associated with the unfulfilled period of the charter, no damages for that period are recoverable. In a previous case (*The Astra* [2013] EWHC 865 (Comm); [2013] 2 All ER (Comm) 689), the court came out the other way, holding that a clause similar to Clause 11 of NYPE 1993, which required punctual payment of hire, went “to the root of the contract” and was therefore a fundamental condition that entitled owner to terminate the charter

and recover damages.

In *Spar Shipping*, the lower court disagreed with *The Astra* decision and held that Clause 11 was not a condition, and although the clause permitted an owner to terminate the charter in the event of a failure to timely pay hire, it did not entitle the owner to recover damages. (Note that the lower court ultimately awarded owner damages because charterer's persistent failure to pay and its inability to assure timely payment in the future invoked common law principles of repudiation and renunciation). This decision was upheld by the Court of Appeal.

Notably, the Court of Appeal observed that after the decision in *The Astra* but before the lower court decision in *Spar Shipping*, NYPE 2015 amended the previous version of Clause 11 to expressly provide for the award of damages in the event of withdrawal. The updated clause provides that a charterer's failure to make punctual payment of hire shall entitle the owner:

- (i) to withdraw the Vessel from the service of the Charterers;
- (ii) to damages, if they withdraw the Vessel, for the loss of the remainder of the Charter Party.

While *Spar Shipping* has effectively overruled *The Astra*, an owner's contractual right to withdraw the vessel for non-payment of hire and recover damages based on the unfulfilled portion of the charter is preserved in NYPE 2015. Accordingly, careful consideration should be made during fixture negotiations to incorporate the 2015 form so as to preserve the damages remedy.

M/V ATHOS I Litigation Update.

Previous editions of ASBA News reported on a dispute involving Frescati Shipping Co. as Owner of the M/V ATHOS I (the "Vessel"), a collection of CITGO entities known as CARCO (which included the Vessel's Sub-charterer and the terminal operator), and the U.S. Government which arose when the Vessel struck a submerged anchor on its approach to CARCO's terminal at Paulsboro, New Jersey.

As reported in the November 2013 edition of ASBA News, in May 2013, the Third Circuit Court of Appeals, in reversing a 2012 decision of the District Court, held that although the Owner did not contract directly with CARCO, it was a third party beneficiary of the safe berth warranty contained in the voyage charter between CARCO and Star Tankers (which had time chartered the Vessel from the Owner). (Star Tankers was not a party to the U.S. court proceedings because its dispute with Owner under the time charter was subject to arbitration).

More importantly to our members, the Third Circuit held further that CARCO's safe berth warranty "was an express assurance that CARCO's port would be safe for the ATHOS I within the scope of its invitation - that is, drawing 37 feet or less." The Third Circuit remanded the case back to the District Court to determine whether 37 feet of clearance was actually provided, and advised the lower court that its "analysis may require inquiries into the arriving draft of the ATHOS I and, if the vessel was

drawing more than the agreed-upon depth of 37 feet, the depth and positioning of the anchor.”

On July 25, 2016 the District Court issued a 193 page decision which among many other things, found that the Vessel was drawing less than 37 feet and that CARCO breached the safe berth warranty notwithstanding that it did not know about the existence of the submerged anchor. The District Court held further that CARCO, as a terminal operator, owed to all foreseeable users of the terminal a duty to “periodically scan the approach [to the terminal] for hazards to navigation using side-scan sonar and to remove the hazards or warn incoming ships of them.” By failing to do so, CARCO was found to be negligent.

Lest one thinks that the curtain has finally come down on this 12 year-old dispute, members are advised that the case has been appealed back up to the Third Circuit Court of Appeals (perhaps not surprising given that about \$56 million is at stake). Because the appeal was only docketed on October 21, 2016, it is not yet clear which issues will be the focus of the appeal.

Although quite lengthy, the District’s Court opinion is well-organized, clearly written and easy to follow. The full text can be found at:

<http://www.americanmaritimecases.com/assets/July-2016/Athos-I.pdf>

ASBA Annual Cargo Conference

EDEN ROC - MIAMI BEACH

September 28 - 30, 2016



ASBA's 14th Annual Cargo Conference was again very well attended and received! Our most sincere thanks are extended on behalf of our Conference Committee to our many generous member and non-member sponsors without whom the conference would not be possible. The 240 plus delegates enjoyed a great program of panelists who shared their views on the tanker and dry cargo trades as well as our keynote speaker, **Gary Vogel , CEO of Eagle Bulk Shipping, Inc.** (Photo on left). Our meet and greet evening events are an important part of the conference experience and saves those in attendance a business trip or two.

Conference delegates included 60 dry cargo brokers, 55 dry cargo owner/operators, 56 ship agents, 22 dry cargo charterers, 7 tanker owner/operators/charterers, 10 tanker brokers, and 58 others (S&P, tug companies, ports, service providers, US government officials, lawyers etc.) of which 42 were from South America, 17 Europe, 10 Canada, 8 Mexico, 7 Central America, 1 UAE and 183 USA. International recognition of the value of our cargo conference is on the rise.

Mark your calendar and plan to register early in 2017 - September 27-29.

Joshua Shapiro, Robin Heath,
Jeanne Cardona, Michael McCormick
& Jason Klopfer

Arthur Savage, Gary Vogel,
Marygrace Collins, Mike Glennon,
Gerry Desmond & Patrick Helgesen



Brian Telford, Bill Rocha,
Susanne Ogle, Mary Mann
& Robin Heath

Tom Roberts, Scott Jones,
Marygrace Collins, Bill Stewart,
Even P. Johansen & Chris Young

THANK YOU!

Speakers

- Gary Vogel - Eagle Bulk Shipping - Keynote
- Christoph Clauss - DVB Transport (USA)
- Robin Heath - Diamond S Management
- David Hodory - The David J. Joseph Co.
- Jason P. Klopfer - Navig8 Americas
- Eric LaRosee - Louis Dreyfus Company
- Gil Landy - Pasternak, Baum & Co., Inc.
- Ashish Mathur - ADM Rice, Inc.
- Michael McCormick - Chembulk Tankers
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IMO Solidifies Marine Sulfur Emissions Implementation

Excerpt from Poten Tanker Opinion by Erik Broekhuizen - Nov. 4, 2016

The International Maritime Organization (IMO) has decided on the timing of the sulphur emissions cap for marine bunker fuel. The IMO had already decided to reduce global permissible sulphur oxide emissions by 2020 (requiring a reduction of the sulphur content of marine fuel from 3.5% to 0.5% or other emission reducing equipment), but there was an option to delay the implementation to 2025 if a fuel availability study concluded that not enough low sulphur fuel could be produced. The IMO has now eliminated the uncertainty on the timing of the implementation by deciding not to delay the sulphur cap to 2025.

Ship owners have two options to deal with the emissions cap: burn low sulphur fuel (maximum 0.5% sulphur content) or install Exhaust Gas Cleaning Systems (often called scrubbers). Existing engines should be able to burn low sulphur fuel oil, either lighter gas oil or low sulphur heavy fuel oil. The use of LNG is also an option, however, this would require significant modifications to existing vessels that would include installation of fuel tanks thereby only making it a viable option for newbuilding tonnage.

For owners, the decision will be driven by the cost of installing scrubbers and the expected spread between HFO and the alternative fuel, either Marine Gas Oil (MGO) or low sulphur fuel oil, which is currently only produced in small quantities. Cost of scrubbers can range from \$3 - 6 million depending on the vessel size and design. The cost of operating the scrubber system is estimated at about \$20-50 per ton of consumption.

At this point, most ship owners and refiners appear to be sitting on the fence. Owners are likely waiting to see how prices and differentials develop before making a decision. The overall state of the freight market will certainly be an important factor as well.

PRE-HOLIDAY COCKTAIL PARTY

Hudson Grille - Stamford, CT

Link to all event photos: www.asba.org

Lou Mellis, Huy Nguyen, Amr Mostafa & David Quigley



Will Stocker, David Land,
Matt Konchan & Kasper Madsen



Trevor Jones, Daniel Williams,
Gorm Dam Andersen,
Jessica DiLorenzo & Caleb Dorsey



NYPE 2015 ROADSHOW

On November 10th in Stamford, CT, ASBA welcomed our Charter Party and Documentary Committee members along with those from BIMCO and SMA to introduce the NYPE 2015 to an audience of over 50 industry representatives. You will recall, the update of the NYPE was jointly authored by the three organizations. The team effort took three years. NYPE is the most widely used standard time charter party in the dry cargo sector of the industry. The objective of the revision effort was to author a version of NYPE that would have global appeal. The revision process has benefited from the direct involvement of owners and charterers whose goal was to achieve a balanced charter party that can be used for trip or period time charters. Based on audience comments, it appears the team was able to do just that. **Only thing left to do is to FIX NYPE 2015.**



**Inga Froyso, Robert Dillon, Soren Wolmar, Paul Hirtle,
Jonathan Young, John Freydag, Henry Mytton-Mills and Grant Hunter.**
Not pictured: Nigel Hawkins, ASBA Chairman & Gerry Desmond, Committee Member

OFAC - Calling CUBA

The U.S. has amended the Cuban Asset Control Regulations to ease the 180 Day Rule prohibiting vessels from calling at US ports for 180 days after leaving a Cuban port. According to Freehill, Hogan and Mahar LLP, "If a vessel calls at Cuba with only cargo from a third country, which cargo, if it were subject to the U.S. Export Administration Regulations, would be designated as EAR99, or would be controlled on the Commerce Control List only for anti-terrorism reasons, that vessel is not

prohibited from thereafter calling at a U.S. port." That said, it is best to *GET GUIDANCE FROM THE SOURCE* by using the OFAC email hotline for a response to your "specific" trade question/s within 48 hours: OFAC_feedback@treasury.gov

As information, OFAC is hosting a Trade Seminar in Washington, D.C. on December 7th - interested parties should visit their website to register.

CALENDAR OF EVENTS

check out website for more event and course details

www.asba.org

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|-------------------|---|
| February 2, 2017 | Agency Affairs Meeting – Noon, Harvard Club, NYC |
| February 2, 2017 | ASBA Annual Meeting – 6:30 PM, Harvard Club, NYC |
| February 6, 2017 | SBCVO Online Course |
| February 16, 2017 | ASBA Tanker Lunch – Houston, TX |
| February 27, 2017 | Maritime Law Online Course |
| March 20, 2017 | ASBA – BALTIC – Stamford, Hilton |
| May 4, 2017 | ASBA Golf Outing – NY Country Club, New Hempstead, NY |

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Maritime Law

Kelsie Brien
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Basic Principles of Chartering

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