

29 July 2005

Ref : Chans advice/55

To: Transport Industry Operators

C/P performance guarantee

In the Hong Kong High Court Judgment dated 30/6/2005, Judge William Stone dismissed a charter hire claim of US\$324,894.07 of a vessel's disponent owner against the charterer's ship broker and the alleged guarantor under a charterparty.

By the terms of the fixture concluded on 10/12/1998 the disponent owner chartered its Cyprus flag cape-sized bulk carrier "Cape Horn" to a charterer, for a "period timecharter trip about 90/maximum 150days... trading worldwide with intended cargo of coal and iron ore..." with delivery "on dropping last outward sea pilot Qingdao..." and with redelivery "on dropping last outward sea pilot one safe port Singapore-Japan range including People's Republic of China...". The fixture was on the terms and conditions of the New York Produce Exchange Form of charterparty, with amendments and rider clauses. Charter hire of US\$10,075 per day was payable every 15 days in advance. The vessel was delivered on 27/12/1998, and upon instructions of the charterer proceeded to the nearby port Rizhao on 2/1/1999 bound for Singapore, and thence for Europe via the Suez Canal.

Disputes arose between the owner and charterer. The first hire payment was made late, and the charterer failed to pay any subsequent hire payment. The owner complained that the charterer had issued bills of lading for the ports of Bakar in Croatia and Koper in Slovenia which were outside the trading range permitted by the charterparty, which specifically excluded trading to the Adriatic Sea other than Italy. Relations between the owner and the charterer deteriorated, and the owner, unpaid for charter hire since the initial payment, purported to exercise a lien on sub-freights and on the cargo in respect of the unpaid hire. On 12/2/1999, while the vessel was lying off Bakar awaiting discharge, the owner accepted the charterer's failure to pay hire as a repudiation of the charterparty, and made arrangements to discharge the cargo to Bakar and Brindisi between 18/3 and 5/4/1999.

The dispute between the owner and the charterer was referred to London arbitration, and on 30/10/2000 an arbitration award was made in favour of the owner in the sum of US\$324,894.07, together with compound interest on that sum at the rate of 7.5% per annum and costs. The owner has been unable to enforce that award against the charterer, a company incorporated in the British Virgin Islands. Accordingly it sought to recover against the alleged guarantor or the charterer's broker.

The guarantee was said by the owner to have come into existence during the course of the telex negotiations conducted between the charterer's broker in Hong Kong and the owner's broker in Piraeus. These negotiations were fundamentally concerned with the terms of the fixture, as eventually concluded, between the owner and the charterer.

The owner's contention was that the charterer's broker purported to conclude a guarantee on behalf of the alleged guarantor but that if and in so far as it had no authority so to do, then the charterer's broker must assume liability on the basis of its breach of warranty of authority.

It is common ground that if there was a guarantee, it is found in, or evidenced by, the fixture recap telex of 11/12/1998. This was recap telex VDM 9676 sent by the charterer's broker to the owner's broker, the relevant part of which reads thus:

“...PERFORMANCE AND PAYMENTS TB GUARANTEED BY [the name of the alleged guarantor]...”

The crucial issue is whether the words used in that recap telex, namely “performance and payments tb guaranteed by [the name of the alleged guarantor]” constitute operative words of guarantee, or were they no more than a contractual undertaking given on behalf of the charterer to procure the provision of a guarantee by the alleged guarantor?

The words used on the face of the relevant telex of 11/12/1998 clearly connoted that the guarantee would be something that was to be provided in the future, and that the words amounted to no more than an undertaking, contractually enforceable against the charterer, to procure or to provide a guarantee from the alleged guarantor. However, following this undertaking, the owner had made no attempt thereafter to obtain such a guarantee.

The alleged guarantor submitted that the recap telex of 11/12/1998 was not in the form that one would expect of a guarantee and was a document almost entirely connected with setting out the detailed terms of the charterparty as had been concluded. The ‘guarantee’ evidenced by the telex was not the guarantee itself but merely a provision for a future guarantee – it did not, for example, say “are guaranteed”, or words clearly to that effect. No terms of any such guarantee were agreed by the two brokers or the charterer, let alone with the alleged guarantor, which was not privy to the telex nor had even been sent a copy of that telex. Nothing subsequently had been done towards actually obtaining a guarantee from the alleged guarantor, or securing any sort of confirmation from the alleged guarantor in terms of that which was alleged to be the guarantee; in fact the so-called ‘guarantee provision’ was not even included within the working copy of the charterparty. No one – owner, brokers or charterer – had ever approached the alleged guarantor, before the recap telex or at all, and that the alleged guarantor did not feature within any of the documentation save and except when referred to by others. The alleged guarantor had not been asked if it was willing to act as guarantor, and no confirmation had been sought from it subsequent to the telex – indeed the alleged guarantor had no documents whatever relevant to the case. Moreover, the charterer's broker did not claim to have had authority from the alleged guarantor in this connection, and there was also no evidence that the charterers had authority.

At one time the owner had been keen to obtain a guarantee, and the failure to pursue the matter and to obtain one could be due to a number of causes, the most likely being a fall in freight rates for that part of the world over the Christmas period.

The Judge was unable to conclude that the recap telex, taken by itself in conjunction with other telexes which were part of the documentary stream forming the inter-broker negotiations, constituted the guarantee alleged by the owner to have been made by the charterer's broker

for and on behalf of the alleged guarantor. In the judgment these words form a contractually enforceable promise, by the charterer's broker on behalf of charterer, to owner, that a guarantee would be provided from the charterer's parent, the alleged guarantor.

The consequence of this promise was that if such a guarantee were not to be forthcoming before the time for performance by the owner under the charterparty, the owner would be entitled to treat such failure to procure such a guarantee as a repudiatory breach, and to terminate the charterparty on that basis. In other words, had the issue been pursued, and had the charterer refused to provide a guarantee in due time, such refusal would have constituted a renunciation of the charterparty contract as contained in or evidenced by the fixture recap of 11/12/1998. In purely contractual terms, in this eventuality there would have been a failure by charterer to comply with a condition subsequent, and the owner would have been released from the contractual obligations otherwise arising pursuant to the charterparty.

Whilst this telex recap contained no operative guarantee – there are no words to the effect of “we hereby guarantee” or anything of that sort – nevertheless there was a measure of protection for owners' position in that if and in so far as a guarantee was not forthcoming from the alleged guarantor, as had been promised, as a matter of law owner did not have to comply with the charterparty and to provide charterer with the “Cape Horn”, and accordingly could have terminated the contract for breach of condition. However, the owner did not pursue charterer's promise to provide a guarantee, and instead had opted to continue with their contractual obligations until it terminated on the basis of charterer's failure to pay charterhire.

Regarding the issue of the charterer's broker breach of warranty of authority, there was nothing on the evidence which established that the charterer's broker was acting other than for the charterer. There was no evidence proving the charterer's broker acted for the alleged guarantor.

Accordingly, the Judge dismissed the owner's action.

Please feel free to contact us if you have any questions or you want a copy of the Judgment.

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