RIGHT TO WITHDRAW VESSEL UNDER TIME CHARTERPARTIES IN COMMON LAW

MÜŞTEREK HUKUKTA ZAMAN ÇARTERİ SÖZLEŞMELERİNDE GEMİYİ ÇEKME HAKKI

Araştırma Makalesi

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ABSTRACT

In common law, the obligation of payment of hire is, as a rule, not essential in time charters *(time charterparties).* Where vessels are let on time charter terms and the market for such vessels falls, the shipowner may be concerned that if the charterer fails to pay hire as and when it falls due then it is left without a real remedy. If the charterer fails to pay hire or to pay it on due date, what should a shipowner do?

This article will critically discuss shipowner's remedy in a falling market. In this regard, it will initially examine the nature of time charters and the shipowner's right to withdraw the vessel for non-payment of hire, underscoring the requirements, waiver of right, possible bars and the effect of the right. Subsequently, the Astra and Spar Shipping cases, which have examined the nature of hire and reached converse decisions, will be analysed critically.

Keywords: Time Charters, Withdrawal of Vessel, Hire, The Astra, The Spar Shipping

ÖZ

Müşterek hukukta, zaman çarteri sözleşmelerinde tahsis ücreti ödeme yükümlülüğü kural olarak, esaslı bir unsur değildir. Gemiler zaman çarteri sözleşmesi hükümlerine tabi olduğunda ve bu gemiler için piyasa düştüğünde, tahsis olunanın tahsis ücretini ödemeyeceğine dair gemi maliki endişeye kapılabilir ve

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gerçek anlamda bir çareden yoksun bırakılabilir. Tahsis olunan tahsis ücretini ödemezse veya zamanında ödeme yapmazsa gemi maliki ne yapmalıdır?

Bu makale, düşen bir piyasada gemi malikinin başvurabileceği yolu tartışacaktır. Bu bakımdan makale öncelikle, zaman çarteri sözleşmesinin niteliğini ve tahsis ücretinin ödenmemesi durumunda gemi malikinin gemiyi çekme hakkını, bu hakkın koşullarının, haktan feragatin, muhtemel sınırlarının ve hakkın etkisinin altını çizmek suretiyle inceleyecektir. Daha sonra, tahsis ücretinin yapısını inceleyen ve karşıt sonuçlara ulaşan Astra ve Spar Shipping davaları analiz edilecektir.

Anahtar Kelimeler: Zaman Çarteri Sözleşmeleri, Geminin Çekilmesi, Tahsis Ücreti, Astra, Spar Shipping

INTRODUCTION

A charter *(charterparty - çarter sözleşmesi)* is, basically, a contract for the purpose of use of a vessel. It is generally accepted that time charters *(zaman çarteri sözleşmeleri)* are contracts for the services of the owner, crew and the master[1]. The fee which a charterer *(tahsis olunan)* pays for the use of the vessel is called "hire" *(tahsis ücreti)* in time charters. Despite the fact that economically payment of hire is considered significant, from a legal perspective, the obligation of payment is, as a rule, not essential[2].

Commercial considerations give rise to tremendous effect on shipping owing to the fact that it is vulnerable to political and market circumstances[3]. Hire rates for time charters vary under changing market events. In a falling market, charterers are generally reluctant to pay hire, and thus, shipowners *(gemi maliki)* face with difficulties[4].

The purpose of this article is to attempt to respond the question what the shipowners ought to do in a falling market. In this respect, first and foremost, a logical path will be traced so as to analyse the nature of time charters and the shipowner's right

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1 George Wei, 'Time Charterparties: Final Voyage and Contractual Rights' (1992) Sing. J. Legal Stud. 415, 415.

2 Frank Stevens, 'Remedies for Late Payment of Charter Hire' (2017) 23 (6) JIML 443.

3 Stephen Girvin, 'Time Chater Overlap: Determining Legitimacy and the Operation of Repudiatory Breach of Contract' (1995) JBL 200, 201.

4 Anthony Rogers; Jason Chuah; Martin Dockray, *Cases and Materials on the Carriage of Goods by Sea* (Routledge 2016) Chapter 4.

to withdraw the vessel for non-payment of hire, trying to highlight requirements, waiver of right, possible bars and the effect of the right, and exemplifying each point with cases. Subsequently, *the Astra* and *Spar Shipping* cases, which have been held recently and concluded conversely, will be attempt to examine diligently. Eventually, the article will conclude taking notes of crucial aspects of the essay.

I. NATURE OF A TIME CHARTER AND BASIC DIFFERENCES FROM VOYAGE AND BAREBOAT CHARTERS

A charter is an agreement by which a shipowner agrees to lease its vessel, or part of it, to the charterer under specific terms and conditions provided in the charter. This contract between the shipowner and the charterer includes terms for the carriage of goods by sea between the ports on being paid freight, or lets the vessel to the charterer for a certain period of time[5]. There is not a formality requirement to draft charters, accordingly a charter could be oral[6]. However, in practice charters rely on standard form contacts which include similar wording and generally regulate same issues[7].

There exist three basic categories of charters which are the bareboat charters *(çıplak gemi çarteri – gemi kira sözleşmesi)*, the voyage charters *(yolculuk çarteri)* and the time charters. Under a bareboat charter, the control and management of the vessel is transferred to the charterer. The shipowner lets its vessel to the charterer for the duration of the agreed period without crew or equipment. Accordingly, the charterer bears all the responsibility for the commercial operation of the vessel. Comparing to the other types, namely voyage and time charters, under a bareboat charter, the charterer is not rendered any marine services by the shipowner. This type of charter is not prevalent as the other types of charters[8].

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5 Evi Plomaritou, 'A Review of Shipowner's & Charterer's Obligations in Various Types of Charter' (2014) 4 JSOE 307, 307.

6 Paul Todd, *Principles of the Carriage of Goods by Sea* (Routledge 2016) 23.

7 Rogers; Chuah; Dockray (n 4); Todd (n 6) 23.

8 Plomaritou (n 5) 307-308; Tjard-Niklas Trümper, 'Charter Party' (2012) Max EuP, Charter Party - Max-EuP 2012 (mpipriv.de) (accessed 29 May 2023).

Another type is the voyage charter. Under a voyage charter, the vessel enables transport for a certain cargo from a loading port to a discharging port at terms which specify a rate per tonne. The charterer employs the vessel – fully equipped and manned- for a particular voyage between the port of loading and port of discharge by paying freight[9]. In case of voyage charter, shipowner agrees to carry a specific cargo on an agreed voyage in exchange for freight, which is a remuneration for the voyage based on the quantity of cargo loaded or discharged[10].

Another category of the charters is the time charters, which is subject to this article. Under a time charter, the shipowner lets its vessel-fully equipped and manned- for a particular period of time to the charterer[11]. The vessel is hired by the charterer for an agreed duration. The length of the duration could be the time of a single voyage or a period of months or years. Under a time charter, while the shipowner undertakes the operational management of the vessel, commercial employment is undertaken by the charterer. Accordingly, shipowner appoints the master and the crew while the charterer decides the trading voyages and pays voyage costs. The hire is paid by the charterer as a specific amount of money per day, every 15 days, 30 days, or monthly[12]. Under a time charter, the shipowner, in principle, controls the vessel, in particular related to maintenance and navigation. However, the vessel and the master are under the directions of the charterer with regard to employment[13]. The possession of the chartered vessel remains on the shipowner and the charterer has no right of possession of the vessel. Also, the master and crew are still the shipowner's servant. Yet, the charterer acquires the right to use of the vessel[14].

In case of a time charter, the vessel is let to the charterer for the carriage of goods. From this respect, time charter does not distinguish from the voyage charter. However,

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9 Plomaritou (n 5) 307-308.

10 Terence Coghlin; Andrew W. Baker; Julian Kenny; John D. Kimball; Thomas H. Belknap, *Time Charters* (7th edn, New York, Informa Law by Routledge 2014) 2.

11 Trümper (n 8).

12 Plomaritou (n 5) 313.

13 Trümper (n 8).

14 Coghlin; Baker; Kenny; Kimball; Belknap (n 10) 2.

while a voyage charter refers to a particular voyage, time charter relates to a specific period of time[15]. That is to say, with a voyage charter, the shipowner let the vessel for the carriage of a specific quantity of cargo between the port of loading and port of discharge. On the other hand, in the case of a time charter, vessel is hired for a specific period of time. Accordingly, under the validity of voyage charter, charterer generally pays for the quantity of cargo. However, in case of the time charter, the charterer pays hire based on the period of time[16].

Another distinction between the voyage and time charters is that under a time charter the vessel, crew and equipment are placed at the disposal of the charterer. Hence, the charterer, in principle acquires full commercial control, incorporating arranging bunkers, operations, port charges and other issues which would normally be managed by the shipowner in case of a voyage charter.[17].

Comparing to the bareboat charters wherein the charterer acquires possession of the vessel and provides its own crew to operate the vessel, under a time charter, the vessel remains under the shipowner's possession. The time charter differs from a bareboat charter in that the charterer acquires the right to use of the vessel through the shipowner's own servants, the master and crew who follow the charterer's orders within the terms of charter[18].

II. RIGHT TO WITHDRAW VESSEL FOR NON-PAYMENT OF HIRE

Under a time charter, hire is considered to be paid to the shipowner by the charterer for the service and use of crew and the vessel[19]. Charterer's obligation for hire generally proceeds during the period of the charter[20]. Time is not of the essence at

15 Trümper (n 8).

16 https://bulkcarrierguide.com/charter-parties.html (accessed 29 May 2023)

17 https://bulkcarrierguide.com/charter-parties.html (accessed 29 May 2023)

18 Coghlin; Baker; Kenny; Kimball; Belknap (n 10) 2.

19 Rogers; Chuah; Dockray (n 4).

20 Braden Vandeventer, 'Analysis of Basic Provisions of Voyage and Time Charter Parties' (1974-1975) 49 Tul L Rev 806, 826.

common law, therefore, a shipowner will not be able to repudiate the charter and withdraw the vessel due to late payment of an instalment of hire unless the cases indicate an obvious intention not to carry out the contract, such as repeated non-payment[21]. Nevertheless, charters, generally, regulate an express contractual right of withdrawal[22]. Several forms of time charters have been improved and used for various kinds of commercial transactions. Most of these forms include standard language involving rights and obligations between the shipowner and charterer[23].

A shipowner generally reserve the right to withdraw the vessel and terminate the charter where the charterer fails to pay hire in the agreed manner. Normally, this right must be reserved explicitly in the charter[24]. In other words, default in charterer's obligation to pay hire alone does not lead to a right to withdraw. Accordingly, charterer's failure to pay hire does not give rise to a right to withdraw automatically. Thus, an express provision is required. Most charters incorporate an explicit clause which gives the owner the right to withdraw the vessel in case of default in regular and punctual payment. One might question what will happen if there is not such an express clause. In the absence of an express withdrawal clause in the charter, the owner will not be able to terminate the charter unless there is an indication of a charterer's apparent intention not to perform the obligation, such as repeated non-payment which could be accepted as repudiation. Then the owner's remedy will normally be to claim for debt[25].

Withdrawal clauses are generally provided within the standard forms. For instance, Clause 5 of the NYPE 1946 states that "Payment of said hire...30 days in advance....as it becomes due... otherwise failing the punctual and regular payment of the hire...or any breach 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

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21 *Cochin Refineries v Triton Shipping* [1978] AMC 444, see in John F. Wilson, *Carriage of Goods by Sea* (Longman-M.U.A 2010) 102.

22 Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011).

23 Tony Nunes, 'Charterer's Liabilities under the Ship Time Charter' (2004) 26 HousJIntlL 561, 567.

24 Rogers; Chuah; Dockray (n 4).

25 https://www.ukpandi.com/news-and-resources/press-release-articles/withdrawal-issues/; Adam Swierczewski; Eleni Pilaviou, 'Hire and Withdrawal' (19 April 2021) https://www.shiplawlog.com/2021/04/19/hire-and-withdrawal/ (accessed 1 September 2023).

Owners) may otherwise have on the Charterers..."[26]. Another example is the Clause 13 of the Beepeetime 2 which states that "In the event of such payment not being made on the due date, Owners shall notify Charterers whereupon Charterers shall make payment of the amount due within seven days of receipt of notification from Owners, failing which Owners shall have the right to withdraw the vessel from the service of Charterers, without prejudice to any claim Owners may otherwise have on Charterers under this charter."[27].

NYPE 1946 is one of the most common used time charter forms[28]. Making a comparison between these two clauses, Clause 5 of the NYPE 1946 permits the shipowners to withdraw the vessel immediately while Clause 13 of the Beepeetime 2 covers an anti-technicality clause which provides a seven-day grace period, stating that "…Owners shall notify Charterers whereupon Charterers shall make payment of the amount due within seven days of receipt of notification from Owners…"[29]. Anti-technicality clauses generally require shipowners to send a notice allowing charterers a specific additional time to remedy the breach before withdrawal[30].

Another example can be found in the NYPE 1993 Form. Clause 11 of the NYPE 1993 includes a withdrawal and an anti-technicality clause which stipulates as follows:

"(a) Payment. Payment of Hire shall be made so as to be received by the Owners or their designated payee in …. or in United States currency, in funds available to the Owners on the due date, 15 days in advance ... Failing the punctual and regular payment of the hire, or 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...

(b) Grace Period. Where there is failure to make punctual and regular payment of

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[26] Mathieu Kissin, 'Challenging The Lagal and Commercial Justification for Reclassification of Payment of Hire As a Condition' (2013) 27 ANZ Mar L J 69, 73.

[27] Todd (n 6) 20.

[28] Todd (n 6) 20.

[29] Todd (n 6) 20.

[30] Todd (n 6) 185; Swierczewski; Pilaviou (n 25).

hire due to oversight, negligence, errors or omissions on the part of the Charterers or their bankers, the Charterers shall be given by the Owners …. clear banking days ..written notice to rectify the failure, and when so rectified within those …. days following the Owners' notice, the payment shall stand as regular and punctual.

Failure by the Charterers to pay the hire within …. days of their receiving the Owners' notice as provided herein, shall entitle the Owners to withdraw as set forth in Sub-Clause 11(a) above"[31].

The amount of grace period varies amongst the forms[32]. For instance, while the duration is filled in by the parties in the Clause 11 of the NYPE 1993, a seven-day grace period is given in the Clause 9 of the Shelltime 4 stating that "…In default of such proper and timely payment: (a) Owners shall notify Charterers of such default and Charterers shall within seven days of receipt of such notice pay to Owners the amount due, including interest, failing which Owners may withdraw the vessel from the service of Charterers without prejudice to any other rights Owners may have under this charter…"[33].

The main purpose of right of withdrawal provisions is to provide pressure on an insistent defaulter. During the fluctuating market rates of hire, shipowner is able to recharter the vessel and takes advantage of current rates, withdrawing the vessel owing to default in punctual and regular payment. Furthermore, in many cases, the shipowner suggests the vessel back to the first charterer[34]. Withdrawal clause has been applied strictly, which means that it does not matter if hire is paid insufficiently by only a few amounts of money or a few minutes[35]. In this sense, in the *Tropwood AG of Zug v Jade Enterprises Ltd (The Tropwind No 2)*, Lord Denning MR underlined that *"when the market rates are rising, the shipowners keep close watch on payments of hire. If the*

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31 https://www.bimco.org/contracts-and-clauses/bimco-contracts/nype-93# (accessed 1 September 2023).

32 Todd (n 6) 185.

33 https://shippingforum.files.wordpress.com/2012/08/shelltime-4-as-revised-20031.pdf (accessed 1 September 2023).

34 Wilson (n 21) 102.

35 Naomi Hart; Sir Bernard Eder; John Robb, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015).

charterer makes a slip of any kind -a few minutes too late- or a few dollars too little- the shipowners jump on him like a ton of bricks. They give notice of withdrawal and demand thenceforward full payment of hire at the top market rate. Very rarely is the vessel actually withdrawn. Arrangements are made by which she continues in the service of the charterer just as if nothing had happened. Then there is a contest before the arbitrators or in the courts. It is as to whether the notice of withdrawal was justified or not. In the ensuing discussion, ... the merits have become submerged in a sea of technicalities. They have deteriorated into a game of wits which is played out between shipowners and charterers, backed up by lawyers, and banks."[36].

A. Requirements

As regards requirements for exercising of right of withdrawal, the charterer must fail to pay the hire or fail to pay it punctually. In *Afavos Shipping Co SA v Pagnan [1983] 1 WLR 195*, the House of Lords stated that if a payment of hire was due on or before a specific day, the charterer was able to pay on whole of the day and not regarded in default until midnight. It was also pointed out that a valid and clear notice cannot be served until the charterer is in default[37]. In addition, it is considered default when only part payment is performed on the due date. If the charterer offers a late payment before the shipowner exercises its right of withdrawal, such late payment, on its own, will not correct the default. Nonetheless, the shipowner wish to embrace such late tender, in this case, it will be deemed to have waived its right to withdraw the vessel[38]. In other words, where the late payment of hire has been tendered, delay in exercising the right to withdraw the vessel by the shipowner might amount to a waiver of right of withdrawal[39]. In *the Georgios*, it was stated that notice given to the master of the vessel is not sufficient by virtue of the fact that the shipowner must give a clear notice to the charterers or their agents[40].

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[36] *Tropwood AG of Zug v Jade Enterprises Ltd* [1982] 1 Lloyd's Rep 232 (CA).

[37] *Afavos Shipping Co SA v Pagnan* [1983] 1 WLR 195.

[38] Wilson (n 21) 103.

[39] Plomaritou (n 5) 317.

[40] *The Georgios C* [1971] 1 Lloyd's Rep 7.

If the vessel is free of cargo, a notice of withdrawal can be made, even if it is at sea. However, in the case of cargo on board, a withdrawal cannot be exercised until the cargo has been discharged[41].

Right of withdrawal and notice of withdrawal need to be served promptly, otherwise the right will not be exercised[42]. The shipowner has no right of temporary suspension, which means that the withdrawal of the vessel must be final[43].

B. Waiver of Right

Under certain conditions the shipowner may lose its right to withdraw the vessel. The shipowner may be deemed to have waived its right to withdraw where it accepts a late payment or where it does not serve a valid notice to reject it within a reasonable time[44]. However, so as to constitute a waiver, its act must be clear and straightforward which may reasonably makes the charterer believe that the late tender of payment had been accepted as if it had been tendered punctually[45]. In other words, if the charterer makes a late payment and the shipowner receives the hire, the shipowner cannot exercise the right of withdrawal no longer; this is same, even if the shipowner serves notice of withdrawal before taking the hire[46]. In *the Laconia*, Lord Wilberforce pointed out that *"The charterers had failed to make a punctual payment but it was open to the owners to accept a late payment as if it were punctual, with the consequence that they could not thereafter rely on the default as entitling them withdraw. All that is needed to establish waiver, in this sense, of the committed breach of contract, is evidence, clear and unequivocal, that such acceptance has taken place, or, after the late payment has been tendered, such a delay in refusing it as might reasonably cause the charterers to believe that it has been accepted."*[47].

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41 Francis J. O'Brien, 'Freight and Charter Hire' (1974-1975) 49 TulLRev 956, 963.

42 Rogers; Chuah; Dockray (n 4).

43 Coghlin; Baker; Kenny; Kimball; Belknap (n 10) 297.

44 Rogers; Chuah; Dockray (n 4).

45 Wilson (n 21) 103.

46 Wharton Poor, *American Law of Charter Parties and Ocean Bills of Lading* (1920), 21.

47 *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia (The Laconia)* [1977] AC 850.

Receipt of a late payment by an agent will not deemed to waiver if the agent has not authority to take such determinations on behalf of the shipowner. Hence, in *the Laconia*, the House of Lords decided that the shipowners were still have right of withdrawal since their bankers had no entitlement to make commercial decisions on their customers' behalf[48]. Lord Salmon stated that *"Certainly it was not within the bankers' express or implied authority to make commercial decisions on behalf of their customers by accepting or rejecting late payments of hire without taking instructions. They did take instructions and were told to reject the payment. They did so and returned it to the charterers on the following day which in any view must have been within a reasonable time."*[49].

Acceptance of the hire before the due date or of part of the hire does not mean a waiver of the shipowner's right of withdrawal the vessel where the payment of balance is not tendered by midnight on the date due[50].

In *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA (The Mihalios Xilas)*, the shipowner rejected the proposed deductions, however, did not inform their bankers to refuse the tender of hire which was made on 21 March, following which shipowner withdrew the vessel on 26 March. Charterers claimed damages for withdrawal, asserting that the shipowner had waived right to withdraw by virtue of accepting the payment made on 21 March. The House of Lords stated that the charterer had time to tender payment until the end of trading on 22 March, therefore, acceptance of part of the hire on 21 March did not constitute a waiver[51].

After the charterer's failure to pay hire on the due date a delay of from four to five days is not unconscionable and will not give rise to waiver of the breach. In *Scandanavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)*, Lloyd J took the view that *"In some cases it will be reasonable for the owners to take time to consider their position, as withdrawal under a time charter is a serious step not*

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48 Wilson (n 21) 103.

49 *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia (The Laconia)* [1977] AC 850.

50 Wilson (n 21) 104.

51 *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA (The Mihalios Xilas)* [1979] 2 Lloyd's Rep 303 (HL).

lightly to be undertaken. In other cases it may be reasonable for owners to seek legal advise ... it would be quite wrong in cases of this kind to require owners to grasp at the first opportunity to withdraw or to hold that they act at their peril by giving charterers two or three days grace."[52].

C. Possible Bars

It is asserted that where the late payment of hire might constitute a course of conduct with the shipowner's acquiescence, this particular way of tender may impede shipowner from exercising the right to withdraw the vessel, until the owner has given a clear notice which indicates its intention to return to strict legal compliance with the charter will be required in future. In *Tankexpress v Compagnie Financiere Belge des Petroles*, the Petrofina was chartered for seven years, requiring hire to be paid in cash. In practice, a cheque for the relevant amount was posted two days before the due date. This way of payment had been accepted by shipowners by two years, however, shipowners exercised their right of withdrawal the vessel since the September 1939 payment arrived late due to the outbreak of war. The House of Lords decided that the shipowners were not enable to exercise their right to withdraw[53]. On the other hand, where the late payments are accepted occasionally without protest, such method will rarely give rise to a course of conduct which prevents shipowner from its right to withdraw on a future situation of late payment[54]. In *Scandanavian Trading Tanker Co AB v Flota Petrola Ecuatoriana (The Scaptrade)*, Goff LJ stated that *"[I]t is not all easy to infer, from the mere fact that late payments had been accepted in the past by the owners without protest, an unequivocal representation by them not to exercise their strict legal right of withdrawal in the event of late payment by the charterers of subsequent instalment of hire-if only because the circumstances prevailing at the time when the earlier payments were accepted may not be the same as those prevailing in the*

[52] *Scandanavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1981] 2 Lloyd's Rep 425, 429-30.

[53] *Tankexpress v Compagnie Financiere Belge des Petroles (the Petrofina)* [1949] AC 76.

[54] Wilson (n 21) 105.

future."[55].

D. The Effect

The effect of the withdrawal the vessel is that after a valid withdrawal, the charter terminates[56]. In other words, if there is an express withdrawal clause in the charter, a valid withdrawal of the vessel from the service of the charterer terminates the charter[57]. Therefore, it is widely accepted that the owner is normally not be able to demand any hire for the rest of the charter duration and he would solely claim any unpaid hire by the date of the withdrawal[58].

The shipowner is not entitled to withdraw vessel temporarily so as to force charterer to tender payment of hire if there is not a clear term in the charter, which may produce a breach of contract. The owner has also no right to take any other act, such as withdrawing the charterer's entitlement to sign bills of lading[59].

The shipowner will generally has right to terminate the charter even though the breach of liability to pay hire is trivial[60]. Accordingly, one may question as to whether the shipowner could claim damages for loss of bargain, characteristically resulting from the market rate at the time of the withdrawal.

Any breach of contract enables the innocent party to claim for loss resulting from the breach. However, different aspect of the loss of bargain damages is that they are rendered for a breach which will never actually be committed. For instance, A and B sign a contract for five years period, B fails to pay a monthly fee agreed under the

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55 *Scandanavian Trading Tanker Co AB v Flota Petrola Ecuatoriana (The Scaptrade)* [1983] 1 QB 529 (CA), 535.

56 Wilson (n 21) 107. For the example of relevant clause, see Clause 5 of the NYPE 1946 "Payment of said hire.. .30 days in advance....as it becomes due... otherwise failing the punctual and regular payment of the hire...or any breach 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..." see in Kissin (27) 73.

57 Edwin Peel, 'Loss of Bargain Damages' (2020) LMCLQ 449, 464.

58 https://www.ukpandi.com/news-and-resources/press-release-articles/withdrawal-issues/ (accessed 1 September 2023); https://www.hfw.com/downloads/Client%20Brief%20-%20Astra%20[A4%204pp]%20April%202013.pdf (accessed 1 September 2023).

59 Wilson (n 21) 107.

60 Herman Steen, 'Cancellation Clauses in Voyage Charter Parties', 2006 SIMPLY 111, 137.

contract. In such a scenario, A is entitled to any loss arising from not having been paid prior to termination. However, if A is entitled to loss of bargain damages, recovery will also include the future damages as if the contract had run its full duration. These damages are evaluated on an anticipatory basis[61].

The innocent party is entitled to loss of bargain damages, only if there is a termination of contract relied on a repudiatory breach, or a breach of condition[62]. Repudiatory breach is a breach which is considered crucial to terminate the contract, going to the root of the contract and depriving the innocent party of substantially whole benefit[63]. A breach of a condition term also enables the innocent party to claim loss of bargain damages.

Returning to the question whether the shipowner is enabled to loss of bargain damages, one should ask in the first place whether the obligation to pay punctually is a condition[64].

Contractual obligations could be warranties, conditions or intermediate terms.

A warranty is a contractual obligation whose breach gives the innocent party merely the entitlement to claim damages[65]. Breach of warranties cannot result in frustration of the intended objective of the contract[66].

On the other hand, a condition is an essential term whose breach enables an innocent party to terminate the contract and claim damages[67]. Conditions are the terms either implicitly adopted as significant within the scope of the contract or explicitly stated as such by the contract[68]. It is generally argued that the breach of a condition deprives *"the party not in default of substantially the whole benefit which it was intended."*[69]. In case of a breach of condition term, the innocent party is entitled to

61 Peel, 'Loss of Bargain Damages' (n 57) 449.

62 Ibid 451.

63 Ibid 450.

64 Coghlin; Baker; Kenny; Kimball; Belknap (n 10) 310.

65 Plomaritou (n 5) 308.

66 Kissin (n 26) 69.

67 Peel, 'Loss of Bargain Damages' (n 57) 453.

68 Kissin (n 26) 69.

69 *Hongkong Fir* [1961] 2 Lloyd's Rep 478, 493.

terminate the contract even though the breach does not really constitute a repudiatory breach. Termination for breach of condition is considered tantamount to termination for repudiatory breach, and hence entitles the innocent party to loss of bargain damages.[70]

Another type of a contractual term is an intermediate term, consequences of whose breach could not priorly be constituted[71]. An intermediate term is neither a condition nor a warranty. If an intermediate term is breached, it enables the innocent party to damages, however it only enables the innocent party to terminate where the breach constitutes a repudiatory breach[72]. In other words, if the breach of an intermediate term is not repudiatory, that is to say, does not substantially deprive the innocent party of the whole benefit, the innocent party is only entitled to damages for loss suffered. Conversely, if a condition is breached, regardless of the seriousness, the innocent party is entitled to terminate and damages for future loss. In *Hongkong Fir*, it was outlined that *"Of such undertakings all that can be predicated is that some breach will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty'."*[73]. Therefore, whether a term establishes a condition or a warranty depends on the parties' intention and surrounding circumstances[74]. In this respect, trivial breaches of intermediate terms only entitle the innocent party to sue damages while serious breaches provide termination[75].

In the *Seaflower,*[76] L.J. Waller constituted a test, known as "Waller test", which outlines that a term should be considered as a condition:

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70 Peel, 'Loss of Bargain Damages' (n 57) 454.

71 Kissin (n 26) 70.

72 Peel, 'Loss of Bargain Damages' (n 57) 454.

73 *Hongkong Fir* [1961] 2 Lloyd's Rep 478, 494.

74 Plomaritou (n 5) 308.

75 Kissin (n 26) 70.

76 *B.S. & N. Ltd v Micado Shipping Ltd; (The Seaflower)* [2001] 1 Lloyd's Rep 341, 348.

"(i) If expressly provided for in the statutes.

(ii) Whether it has been classified as the result of a previous court ruling (although it has been stated that many decisions on the matter are precise and open for review by the House of Lords and in many others, the facts that constitute the cases vary considerably, despite of the claim being on the same concept).

(iii) If the condition is expressly defined or the consequences of its breach, the innocent party's right to terminate the contract is explicitly provided for in the contract.

(iv) If the nature of the contractual agreement, the subject matter or the circumstances of the case lead to the conclusion that the parties must, with the necessary consequences, have as their object the purpose of constraining the innocent party from the further performance of its obligations if the condition has not been fully and accurately met."[77].

Any term which does not meet one of these criteria is treated as an intermediate term[78].

Conditions are legal terms either implicitly recognised as essential in the contract or explicitly provided as such by the parties. If there is a term of "of the essence" in the contract, it is generally regarded as a condition. Usually, time will be construed of the essence where it is explicitly agreed by the parties or it can be deduced from the nature of the contract[79].

In light of these considerations, if the payment of hire is a condition, any failure to pay hire on time – even it is one day late or a small amount less- enables the shipowner to claim damages for loss of bargain in case of termination[80].

The Brimnes directly analysed the nature of the obligation of payment of hire. In this sense, Justice Brandon noted that the obligation to pay hire on time is not a condition, having expressed the view that *". . . I have reached the conclusion that there is nothing in Clause 5 which shows clearly that the parties intended the obligation to*

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77 Michael Boviatsis, 'Comparative Analysis of Charter Party Clauses versus Marine Insurance Contractual Terms: Present Legal Status and Future Trends', (2023) 22 WMU JoMA 91, 95.

78 Kissin (n 26) 71; Boviatsis (n 77) 95.

79 Kissin (n 26) 71.

80 Coghlin; Baker; Kenny; Kimball; Belknap (n 10) 310.

pay hire punctually to be an essential term of the contract, as distinct from being a term for breach of which an express right to withdraw was given." On the contrary Justice Flaux reached at the opposite conclusion in *the Astra*. In arriving his view that payment of hire is a condition, Justice Flaux was affected by the existence of anti-technicality clause, which distinguished *the Astra* from *the Brimnes* in which there was not such a clause[81]. From his point of view, as the anti-technicality clause stated an explicit "defined period of grace, here two banking days, after which, provided the notice has been given, the owners are entitled to withdraw the vessel", this clause made the time of the essence, and thus payment of hire a condition[82].

Do the right to withdraw and anti-technicality clauses really indicates that a shipowner is deprived of substantially the whole benefit even where there is only one occasion on which the payment is rendered one day late under a time charter of many years[83]? Or could it be a reasonable expectation that such a risk sharing be clearly stated in the charter[84]?

It was held in *the Brimnes* that there was no indication in the withdrawal clause demonstrating that punctual payment of hire was an essential term of the charter[85]. Nevertheless, English law has recently evoked a debate on how to classify time provisions in charters.A withdrawal clause generally furnishes the shipowner to withdraw the vessel and terminate the charter owing to late payment. However does such late payment of hire also give rise to a breach of condition? Whilst in *the Astra*, Justice Flaux held that it constitutes a breach of condition, in *Spar Shipping*, Justice Popplewell held that it does not[86].

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81 Coghlin; Baker; Kenny; Kimball; Belknap (n 10) 310.

82 Kissin (n 26) 74.

83 Coghlin; Baker; Kenny; Kimball; Belknap (n 10) 310.

84 Kissin (n 26) 88-89.

85 *Tenax Steamship Co Ltd v Reinante Transoceanica Navegacion SA (The Brimnes)* [1973] 1 WLR 386.

86 Edwin Peel, 'Withdrawal for Late Payment of Hire Under a Charterparty' (2016) 132 LQR 177, 177-182.

III. KUWAIT ROCK CO V AMN BULKCARRIERS INC (THE ASTRA) [2013] EWHC 865

A. The Facts

Kuwait Rock Co chartered the Astra from AMN Bulkcarriers Inc by an amended NYPE 1946 form time charter dated 6 October 2008 for a five year period. The charter included withdrawal and anti-technicality clauses.

The relevant provisions of the charter were as follows:[87]

Clause 5

"Payment of said hire to be in London net of bank charges in cash in United States Currency 30 days in advance and for the last 30 days or part of same the approximate amount of hire, hire is to be paid for the balance day by day as it becomes due, if so required by Owners, otherwise failing the punctual and regular payment of the hire, or bank guarantee, or any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers. …"

Clause 31

"…Referring to hire payment(s), where there is any failure to make 'punctual and regular payment' due to oversight or negligence or error or omission of Charterers' employees, bankers or agents, Owners shall notify Charterers in writing whereupon Charterers will have two banking days to rectify the failure, where so rectified the payment shall stand as punctual and regular payment."

Pursuant to clause 5 of the NYPE charter, the hire was required to be paid in cash 30 day in advance. In addition, where the charterer failed to adhere to this payment obligation, the shipowner had right to withdraw the vessel. Moreover, under clause 31 of the charter, when the payment was not tendered, the shipowner should give the charterer a written notice to obey the payment obligation and permit the charterer two days to make due payment[88].

After charterers delayed in making payment, shipowners provided a notice for failure. Shipowners exercised their right to withdraw the vessel and cancelled the

[87] *The Astra*, parag. 3.

[88] *Kuwait Rock Co v AMN Bulkcarriers Inc (The Astra)* [2013] EWHC 865, parag. 3

charter since the charterers was not able to rectify the situation. After terminating the charter, the shipowners signed a substitute charter at a subsequently lower hire rate. The charterers attempted to re-negotiate the hire which was at US$26,800 per day due to the fact that it was above the market rate, warning the shipowners that they would have declared bankruptcy if the hire rate had not been reduced[89].

An addendum was made in the charter, which was a lower hire of US$21,500 per day after the instalment due on 1 July 2009 was not paid. In July 2010, the charterers failed to pay instalment on due date. After issuing an anti-technicality notice, the shipowners withdrew the vessel and terminated the charter in August 2010 and commenced arbitral process[90].

The arbitrators held that the charterer's obligation to pay hire under clause 5 of the charter was not a condition in English law. On the other hand, they determined that where charterers' acts indicated an intention no longer to be bound by the charter, repeatedly warning to declare bankruptcy, it was regarded as a repudiatory breach of contract which entitled the shipowners to damages for future loss of earnings[91].

The charterers and the shipowners appealed the award rendered by arbitrators.

B. The Court's Decision

The case was held by Justice Flaux of the Commercial Court, who stated that the term of clause 5 of the NYPE charter *"makes it clear that there is a right to withdraw whenever there is a failure to make punctual payment"* and this right to withdrawal, on its own, enables the termination of the contract. It was also determined that *"this (right of withdrawal) is a strong indication that it was intended that failure to pay hire promptly would go to the root of the contract and thus that the provision was a condition"*[92] .

In addition, Justice Flaux pointed out that *"the obligation to pay hire punctually*

[89] *The Astra*, parag. 4.

[90] *The Astra*, parag. 9-12.

[91] *The Astra*, parag. 17-21.

[92] *The Astra*, parag. 109.

being such a provision where time is of the essence and hence a condition."[93]. He also argued that despite the fact that the aim of anti-technicality clause was to protect the charterer from the risk of termination, it also had the influence of making time of the essence, even though clause 5, per se, did not make time of the essence[94].

Moreover, Justice Flaux held that as a regard of requirement for certainty in commercial transactions, the case that the right of withdrawal leaves the shipowners with no remedy on a falling market would leave the shipowners *"in a position of uncertainty as to whether to withdraw the vessel or to soldier on with a recalcitrant charterer until such time as the owners were in a position to say that the charterers were in repudiatory breach."*[95]. Hence, the provision of clause 5 of the charter ought to be considered a condition of the contract.

IV. SPAR SHIPPING AS V. GRAND CHINA LOGISTICS HOLDING (GROUP) CO. LTD. [2015] EWHC 718 (COMM)

A. The Facts

In Spar Shipping, Grand China Logistics chartered by three long term NYPE 1993 charters from Spar Shipping. The withdrawal clause, including an anti-technicality clause was provided under clause 11 in the NYPE 1993 Charter.

Relevant provision was as follows:[96]

Clause 11 "(a) Payment. Payment of Hire shall be made so as to be received by the Owners or their designated payee in United States currency, in funds available to the Owners on the due date, 15 days in advance .. Failing the punctual and regular payment of the hire, or 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.

At any time after the expiry of the grace period provided in Sub-Clause 11(b) hereunder and while the hire is outstanding, the Owners shall, without prejudice to the

93 *The Astra*, parag. 110.

94 *The Astra*, parag. 111.

95 *The Astra*, parag. 115.

96 https://www.casemine.com/judgement/uk/5b2897fd2c94e06b9e19eab5.

liberty to withdraw, be entitled to withhold the performance of any and all of their obligations hereunder shall have no responsibility whatsoever for any consequences thereof, in respect of which the Charterers hereby indemnify the Owners, and hire shall continue to accrue and any extra expenses resulting from such withholding shall be for the Charterers' account.

(b) Grace Period. Where there is failure to make punctual and regular payment of hire due to oversight, negligence, errors or omissions on the part of the Charterers or their bankers, the Charterers shall be given by the Owners 3 clear banking days ..written notice to rectify the failure, and when so rectified within those 3 days following the Owners' notice, the payment shall stand as regular and punctual.

Failure by the Charterers to pay the hire within 3 days of their receiving the Owners' notice as provided herein, shall entitle the Owners to withdraw as set forth in Sub-Clause 11(a) above."

The charterer started to fail to pay hire from April 2011, following which the shipowner exercised his right to withdraw the vessels and terminated the charters on 30 September 2011[97].

The shipowner, subsequently, claimed the hire and loss of bargain owing to termination of the charters, initiating arbitral process. The shipowner asserted that he was able to invoke the damages for loss of bargain since payment was a condition of the contract and failing to pay hire produced repudiatory breach of contract[98].

B. The Court's Decision

The case was held by Justice Popplewell of the Commercial Court, who stated that *"(i)f the owner is not paid fully and on time in advance, effect should be given to the right for which he has bargained, in unqualified term, no longer to provide the services of the master and crew to the defaulting charterer, and to be free to employ his*

[97] *Spar Shipping AS v. Grand China Logistics Holding (Group) Co. Ltd.* [2015] EWHC 718 (Comm) , parag. 3.

[98] *Spar Shipping*, parag. 8-9

vessel elsewhere"[99], and thus, the payment of hire was not considered a condition.

Justice Popplewell also pointed out that hard-headed and experienced business men negotiated the contract, and balanced exposure, bearing the peril of chartering at a higher rates when the contract was terminated[100].

In addition, Popplewell held that where a breach of a contract might deprive the innocent party of substantially the whole benefit intended that he ought to acquire from the contract, such a provision, unless there is an agreement that a breach will not entitle the innocent party to treat the contract as repudiated, is a condition[101]. Hence, Justice Popplewell did not conclude that where there is a contractual right of termination of the contract for the breach of non-payment of hire, such provision is *per se* a condition of the contract[102].

Further, Justice Popplewell contradicted Justice Flaux that there is unique issue of commercial certainty to consider, stating that *"there is no uncertainty over the ability to put an end to future performance"*. Popplewell argued that commercial uncertainty regarding intermediate terms is prevalent to all contracts and commercial parties commonly faced such an uncertainty. He could *"see no reason why shipowners should be treated more favourably in this respect than others; owners of vessels are not unique in the commercial world."*[103].

V. DISTINCTION BETWEEN THE ASTRA AND THE SPAR SHIPPING

Both judgments involve elaborate analysis of considerable amount of precedents in respect of conditions. The withdrawal clauses of the charters subject to the judgments, NYPE 1946 form (clause 5) and NYPE 1993 form (clause 11), basically stipulate that where the shipowner does not receive the hire within the agreed period, he

99 *Spar Shipping*, parag. 114.

100 *Spar Shipping*, parag. 141.

101 *Spar Shipping*, parag. 154.

102 *Spar Shipping*, parag. 155.

103 *Spar Shipping*, parag. 200.

has the right of withdrawal the vessel and before exercising such right, the shipowner must notify the charterer in writing. Notwithstanding the fact that there is no distinctive difference between the two clauses with regard to the non-payment of hire, they came to converse conclusions.

First and foremost, Justice Flaux concluded that default in payment of hire was considered a condition by the parties by virtue of the fact that right to terminate the contract as a result of failure to pay hire indicated that non-payment was substantially serious to justify termination. Flaux stated in this sense that *"the right to withdraw vessel was a strong indication that it was intended that failure to pay hire promptly would go to the root of the contract and thus that provision was a condition."*[104]. On the contrary, Justice Popplewell pointed out that *"existence of a termination provision tells one nothing about the status of the term without discovering the intention of the parties as to the consequences of the contractual right of termination by this process of interpretation."*[105].

Justice Flaux, in addition, claimed that the solely existence of the anti-technicality clause in the charter was indication of the significance of due payment of the hire, and hence, it was a condition[106]. Conversely, Justice Popplewell argued that such clauses did not affect whether due payment was a condition however, solely provided the stipulations when the shipowner was entitled to withdraw the vessel[107].

Another distinction between the judgments is in respect of commercial certainty. Justice Flaux argued that if the shipowners were not able to receive damages for loss of bargain when charterer failed to pay hire, in a falling market, the shipowners might have to decide whether to withdraw the vessel or to continue with a charterer reluctant to pay hire[108]. On the other hand, Justice Popplewell alleged that shipowner was entitled to terminate the contract and withdraw the vessel in case of non-payment of hire thus there

[104] *The Astra*, parag. 109.

[105] *Spar Shipping*, parag. 155.

[106] *The Astra*, parag. 111.

[107] *Spar Shipping*, parag. 182.

[108] *The Astra*, parag. 115.

was no uncertainty in case of breach[109].

Further, Justice Flaux underlined that the pivotal part of time charters was to receive hire so as to proceed business hence failure to payment was to be regarded so paramount as to mean a breach of a condition[110]. In contrast, Justice Popplewell disagreed with this argument, pointing out that time charters generally include a period of several years and thus claiming damages for the remaining period of the contract would be disproportionate[111].

Spar Shipping went to the Court of Appeal and decision was rendered in October 2016. The Court of Appeal held that the obligation to pay hire was not a condition of the charters. The withdrawal clause provided shipowners to terminate the contract. It was stated that *"(t)he simple and important point to keep in mind was that conditions entitled the innocent party to terminate the contract, but not all contractual termination clauses were conferred for breaches of condition alone."*[112]. In this sense, the court overruled the Astra.

The decision rendered by the Court of Appeal affirmed that charterer's failure to pay hire on time does not lead to a right to damages for loss of bargain automatically. Instead, since the term is not a condition but an intermediate term, shipowner must prove that such a failure has gone to the root of the contract and deprived substantially of the whole benefit of the charter[113].

Although considering payment of hire as a condition assures certainty and relief for shipowners in low hire markets, this may give rise to disproportionate consequences for the charterers particularly in case of trivial breaches[114]. Instead, the category of intermediate terms were created so as to avoid such disproportionate remedies for minor

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[109] *Spar Shipping*, parag. 205

[110] *The Astra*, parag. 42.

[111] *Spar Shipping*, parag. 205.

[112] *Spar Shipping* [2016] EWCA Civ 982, parag. 1.

[113] https://www.hilldickinson.com/insights/articles/court-appeal-decides-obligation-pay-hire-not-condition; Kissin (n 26) 69.

[114] Kissin (n 26) 69.

breaches. Therefore, it could be argued that treating payment of hire as an intermediate term may provide remedies proportionate with the severity of breach, striking a right balance between certainty and equity[115].

CONCLUSION

In conclusion, in order for a shipowner to exercise its right to withdraw the vessel, the charterer must fail to make payment of hire or fail to pay it punctually. In other words, if the charterer fails to pay hire or to pay it on due date, the remedy for the shipowner will be to withdraw the vessel where there is a clause providing right of withdrawal in the charter.

In addition, the shipowner must exercise its right to withdraw promptly, or it will lose the right. If the shipowner is obliged to give notice before exercising its right of withdrawal, it cannot serve notice until the charterer fails to pay hire.

Where the late payments are often accepted by the shipowner and such method results in a course of conduct, it generally prevents the shipowner from withdrawal of the vessel.

The effect of the withdrawal the vessel is to terminate the charter.

As regards nature of hire, two recent cases, which are *the Astra* and *Spar Shipping*, examined the feature of hire and obligation of payment meticulously, and reached converse decisions. Since the Spar Shipping judgment, it is more apparent that the liability to pay hire punctually is not a condition, which was also held by Court of Appeal. Providing that there is a withdrawal clause in the charter, despite the fact that failure to pay hire punctually gives rise to termination of the contract, it does not, entitle the shipowner to claim for loss of bargain automatically. Nonetheless, it is possible for the shipowner to claim for loss of bargain where the charter explicitly enables to claim damages for future loss of earnings or if the breach is repudiatory.

[115] Kissin (n 26) 89.

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