

## Withdrawal

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A time charter is a contract for services<sup>42</sup> to be rendered to the charterer by the shipowner. In case of non-performance under such contract the common law generally gives to the innocent party only remedies in damages for breach of contract,<sup>43</sup> unless said breach is of repudiatory character. Accordingly, the common law does not treat the late payment of hire by the charterers as a breach of sufficient gravity to give the owners a right to rescind the contract, unless the conduct of the charterers show unwillingness or inability to pay or delay in payment amounts to repudiation of the charter. In *The Brimnes* both the High Court<sup>44</sup> and the Court of Appeal<sup>45</sup> held that late payment of hire was not of itself repudiatory entitling the owners, in the absence of a withdrawal provision, to terminate the charter.

In order to justify a decision that the charterers' conduct was repudiatory, it would be necessary to find that they evinced clearly by it an intention not to be bound by the terms of the contract.<sup>46</sup>

The owners for evident operational reasons are prepared to insist on timely and punctual payment of hire and usually do so by inserting express provisions into timecharter giving them a right to withdraw the vessel bypassing the common law rule. These provisions called 'withdrawal clauses.' See these provisions in standard forms of timecharter parties such as NYPE 93<sup>47</sup>, BPTIME3<sup>48</sup> and SHELLTIME4<sup>49</sup>. No particular form of words is required to communicate owners

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<sup>42</sup> ... the phraseology still adopted in the case of the charter of a ship where her services are put at the disposal of a charterer but she is not demised are deceptive. The ship is not leased or withdrawn. Her services and that of her crew are put at the disposal of the charterers when the charter begins and when the withdrawal of the ship is spoken of it merely means that those services are no longer supplied, per Lord Porter in *A/S Tankexpress v Compagnie Financiere Belge Des Petroles SA* [1948] 2 All ER 939, at p.943.

<sup>43</sup> Per Lord Diplock in *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 All ER 763

<sup>44</sup> [1972] 2 Lloyd's Rep. 465 at 483

<sup>45</sup> [1974] 2 Lloyd's Rep. 241 at pp. 252, 256 and 262

<sup>46</sup> Brandon J in *The Brimnes Tenax Steamship Co Ltd v The Brimnes (Owners)* [1973] 1 All ER 769, [1972] 2 Lloyd's Rep 465

<sup>47</sup> 11. Hire Payment. (a)... Failing the punctual and regular payment of the hire, ... 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.

<sup>48</sup> Clause Hire 8.4: Where there is a failure to pay hire by the due date, Owners shall notify Charterers in writing of such failure. Within five (5) banking days of receipt of such notification Charterers shall pay the amount due, failing which Owners shall have the right to suspend the performance of any or all of their obligations under this Charter and/or to withdraw the Vessel.

<sup>49</sup> Clause 9. Payment of Hire. ... 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

desire to withdraw<sup>50</sup> but such message must be clear, definite and absolute and given at a time after the default has occurred<sup>51</sup>. The most important feature of express withdrawal provision is that any nonconformance in its performance is treated as going to the root of the contract, without regard to the magnitude of the breach.

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the amount due including interest, failing which Owners may withdraw the vessel from the service of Charterers ...

<sup>50</sup> *Aegnoussiotis Shipping Corporation of Monrovia v A/s Kristian Jebsens Rederi of Bergen, (The Aegnoussiotis)* [1977] 1 Lloyd's Rep. 268 per Donaldson J.

<sup>51</sup> *Afovos Shipping Co SA v Pagnan and another (The Afovos)* [1982] 3 All ER 18, per Lord Denning MR at p22.

## Withdrawal as equivalent to cancellation

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There cannot be a partial withdrawal of the owners' vessel and neither any temporarily suspension of the timecharter can take place [unless such right is expressly granted to them by the contract](#) (read more [Suspension of hire and suspension of service](#)). Withdrawal is irrevocable and therefore operates only in one way: in way of cancellation of charterparty<sup>52</sup>.

*Although when Lord Tenterden first wrote his famous text-book on Shipping it was not the practice to provide for hire to be paid in advance and for time charterers to grant an express right of withdrawal on non-payment of such advance payments. these provisions have been common form in time charters in this country and the United States for generations. I think there is much weight in Mr. Pollock's argument that if the word "withdrawal" bore the construction sought to be placed upon it by Mr. Hallgarten so as to include temporary withdrawal or suspension, this would inevitably have come up for decision in the Courts before now. The Courts seem to have treated the word "withdrawal" as equivalent to "cancellation", an interpretation which, if I may say so with respect, seems to me the natural one<sup>53</sup>.*

Commercial cases examining operation of withdrawal clauses in timecharter contracts represent vivid examples of owners' persistent efforts to get rid of economically disadvantageous charterparty on raising market. Pure mercantile background of these disputes was underlined by Lord Hailsham of St. Maylebone, L.C. in *Afovos Shipping Co SA v R Pagnan & Fratelli (The Afovos)* [1983] 1 Lloyd's Rep. 335 at p.340 as below:

*I have only to add that [withdrawal] option ... is not one which the owner is bound to exercise. On the contrary, if the market charge for hire had moved the other way, it seems to me extremely unlikely that he would have wished to do so.*

Since the lawful cancellation itself was usually a matter legally pursued by the owners, there was seldom any claim for damages. The question of damages flows directly from the matter of classification of the breach and it is yet to be decided. But what is clear beyond much doubt is that the owners can certainly recover all outstanding hire accrued by the moment of withdrawal. It remains to be seen what legal issues can eventually come up if or when withdrawal provision will be triggered by the repudiatory breach.

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52 *Italian State Railways v Mavrogordatos* [1919] 2 K.B. 305

53 *Mocatta J in The Agios Giorgis* [1976] 2 Lloyd's Rep 192

## Suspension of hire and suspension of service

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Timely, punctual and continuous payment of hire in advance is a primary obligation of the charterer and also an absolute one which, as Lord Wright said in *The Petrofina* [1948] 2 All ER 939 at p.946, is not excused by accident or inadvertence. The only exception from this rule is deemed to be found in the wording cl 15 of NYPE 46 form providing as follows:

*15. That in the event of loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and extra expenses shall be deducted from the hire.*

In *The Lutetian* [1982] 2 Lloyd's Rep. 140, Bingham, J. held that the language of cl 15 of NYPE 46 form, which said that when time was lost from the listed causes "the payment of hire shall cease", accords with the charterers' construction that the parties intended the owners to be secured by payment in advance in respect of hire which he would or might earn but not in respect of hire which he could never earn. Accordingly, no hire was payable on the due date if the ship was off-hire at that time.

Authors of Time Charters, 6th Edition, 2008 suggest that where the owners are wrongfully withholding the services of the ship, and the charter is on the New York Produce form, such act would fall under the "or any other cause" wording of off-hire clause and may trigger suspension of payment of hire on the principles stated in *The Petrofina* [1948] 2 All ER 939. In other instances when off-hire provisions are not wide enough and the owners have not sought to repudiate the contract, but the ship is not in fact at the disposal of the charterer for some days immediately before and after the first day of the month of hire, the charterer would not be absolved from making the payment<sup>54</sup>.

Contrary to the rule that withdrawal is irrevocable and operates only in way of cancellation of charterparty<sup>55</sup>, the parties can expressly agree on temporary suspension of ship's service for non-payment of hire. Such provision contains, for example, in cl.10(e) of Supplytime89 form:

While payment remains due the Owners shall be entitled to suspend the	260
performance of any and all of their obligations hereunder and shall have no	261
responsibility whatsoever for any consequences thereof, in respect of which	262
the Charterers hereby indemnify the Owners, and Hire shall continue to	263
accrue and any extra expenses resulting from such suspension shall be for	264
the Charterers' account.	265

<sup>54</sup> See *dictum* of Lord du Parc in *Tankexpress v. Compagnie Financière Belge des Pétroles* (1948) 82 Ll.L.Rep. 43, at page 60.

<sup>55</sup> *Italian State Railways v Mavrogordatos* [1919] 2 K.B. 305

## Time is of essence of withdrawal provision

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In *A/S Tankexpress v Compagnie Financiere Belge Des Petroles SA* [1948] 2 All ER 939 the House of Lords held that time was of the essence of the clause which entitles the owner to cancel. Lord Wright said at p.946:

*The importance of this advance payment to be made by the charterers is that it is the substance of the consideration given to the shipowner for the use and service of the ship and crew which the shipowner agrees to give. He is entitled to have the periodical payment as stipulated in advance of his performance so long as the charterparty continues. Hence the stringency of his right to cancel.*

In *The Brimnes*<sup>56</sup> it was held that for late payment of hire to be of repudiatory character it would be necessary to find that they evinced clearly by it an intention not to be bound by the terms of the contract. However in several later decisions of the House of Lords unequivocal statements of Lord Diplock suggest that timely payment of hire is of the essence and therefore a condition of the contract of affreightment.

Thus *dictum* of Lord Diplock in *United Scientific Holdings Ltd. v Burnlye Borough Council Cheapside Land Development Co. Ltd* [1978] AC 904 at p.924 says that:

*In commercial contracts for the sale of goods prima facie a stipulated time of delivery is of the essence, but prima facie a stipulated time of payment is not (Sale of Goods 1893, section 10 (1)), in a charterparty a stipulated time of payment of hire is of the essence.*

Later, in *Afovos Shipping Co SA v R Pagnan & Fratelli (The Afovos)* [1983] 1 Lloyd's Rep. 335, Lord Diplock said at p.341:

*The owners are to be at liberty to withdraw the vessel from the service of the charterers; in other words they are entitled to treat the breach when it occurs as a breach of condition and so giving them the right to elect to treat it as putting an end to all their own primary obligations under the charter-party then remaining unperformed.*

And finally, in case *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 All ER 768 Lord Diplock referring to decision in *The Afovos* further explained that:

*When time is made of the essence of a primary obligation, failure to perform it punctually is a breach of a condition of the contract which entitles the party not in breach to elect to treat the breach as putting an end to all primary obligations under the contract that have not already been performed. ... The freight market is notoriously volatile. If it rises during the period of a time charter, the charterer is the beneficiary of the windfall which he can*

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56 [1972] 2 Lloyd's Rep. 465 at 483 and [1974] 2 Lloyd's Rep. 241 at pp. 252, 256 and 262

## Underpayment of hire

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The charterers have a right to deduct from the hire on the basis of equitable set off<sup>59</sup>. But for such the deductions to be permissible it is essential that the estimates of the amounts of each of them were reasonable<sup>60</sup>. If deductions appear to be either unreasonable or unjustified or miscalculated, then withdrawal clause will operate with the same vigour as in events when monthly hire payment had been delayed or not paid at all.

If the owners are considering withdrawing the vessel for deduction from the hire, which was in their view impermissible, they are entitled to a reasonable time to ascertain whether the amounts comprising the deduction were correct, before deciding to exercise a right of withdrawal which would accrue to them only if the deductions were wrong<sup>61</sup>.

When charterparty expressly gives the charterers the right to deduct from hire an amount equivalent to the time lost and/or the cost of any extra fuels consumed in the event of a breach of the speed warranty, as for example clause 18 of NYPE form does, and, subsequently, it turns out that he has deducted too much, the shipowners cannot withdraw his vessel on account of nonpayment of hire nor hold the charterers guilty at that point of any breach of contract if the charterers quantified loss by a reasonable assessment made in good faith<sup>62</sup>. This view was followed by Mocatta J. in *The Chrysovalandou Dyo* [1981] 1 Lloyd's Rep. 159, where he said at p.164:

*The time charter contains a withdrawal clause applying in the event of failure to pay punctual and regular payment of hire, the stringency of which is only lessened by the notice provision of cl. 33. At the same time it permits by cl. 35 the charterers to deduct owners' disbursements from hire against presentation of vouchers or telexed breakdown of estimated disbursements and cl. 56 dealing with deductions from hire in respect of the speed warranty. These two entitlements would be of little value, if, despite being made reasonably and in good faith, they could not be relied upon if by error they were too large.*

It is for the charterers to prove that their calculations were correct. As Bingham, J. said in *The Lutetian* [1982] 2 Lloyd's Rep.140 at 154:

*The duty of calculating the sum due rested on the charterers. They either calculated correctly or incorrectly. If they calculated correctly, the charterers must succeed, but not on this ground. If they calculated incorrectly, they cannot rely on their own legal error to escape the contractual consequences.*

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59 *The Nafri* [1978] 2 Lloyd's Rep. 132, per Lord Denning MR, at p.132

60 Per Mocatta J in *The Agios Giorgis* [1976] 2 Lloyd's Rep 192,

61 Per Lord Diplock in *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama (The Mihaios Xilas)* [1979] 2 Lloyd's Rep. 303 at p.307:

<sup>62</sup> Per Lord Denning in *The Nafri* [1978] 2 Lloyd's Rep. 132 at p. 140.