

## Withdrawal and suspension of service of a ship in a nutshell

When a charterer fails to make punctual payment, the owner has a variety of remedies. He may elect to lien cargo, (sub) freight and/or (sub) hire (see our articles on these subjects). Alternatively, owners may have the right either to withdraw the vessel from the charter or suspend the service of the vessel and her crew from charterers.

Here are 10 factors to take into consideration. (Note that factors 4, 5, 6, 7 and 9 below apply in relation to withdrawal of the vessel only, ie not also to suspension of service due to charterers' late or non-payment of hire.)

### 1. Do owners have a right to withdraw the vessel from the charter or to suspend service?

Unless stipulated in the charter, there is no right under English law to withdraw the vessel from the charter nor to suspend service due to non or late-payment of hire. Rather, in the event of non or late payment of hire, owners simply have a right to claim for the hire owing plus interest on the late payment/s.

#### a) Where Owners have an express right

NYPE 1946 – Lines 61-62, NYPE 1993 Lines 150-151 and Baltime – Clause 6 / Line 86 all give an express right to withdraw the ship for late payment.

Only the standard NYPE 1993 charter party gives an express right to the owner to suspend service. Other charter parties will need to have a rider clause granting this right such as the Bimco “non-payment of hire clause for time charter parties” ([https://www.bimco.org/Chartering/Clauses/Non-Payment\\_of\\_Hire\\_Clause\\_for\\_Time\\_Charter\\_Parties.aspx](https://www.bimco.org/Chartering/Clauses/Non-Payment_of_Hire_Clause_for_Time_Charter_Parties.aspx)).

#### b) Where Owners do not have an express right

Where there is no express right to withdraw and owners wish to get their ship back from the charter, owners face a more difficult route. In such cases, owners will need to establish that charterers' failure(s) to pay hire also amount to a repudiatory breach of charter which, once accepted by owners, would bring the charter to an end. The difficult question owners face in this situation is how many missed hire payments are necessary to establish a repudiatory breach.

There is no fixed number of missed hire payments or clear answer to this question under English law (Flaux J in *The Astra [2013]*) indicated that charterers' obligation to pay hire on time is a condition of the charter party, meaning that even one late payment will entitle owners to treat charterers' late/non payment as a repudiatory breach which, if accepted by owners, brings the charter party to an end. However, Flaux J's decision is not binding authority for other judges or arbitrators, and as at the time of writing this article, there remains uncertainty as to whether other courts/arbitration tribunals will follow this finding.)

### 2. Is the hire actually late?

#### a) The midnight rule

The charter will very rarely set a deadline/time for payment. In the absence of an express agreement or settled practice, charterers have until midnight on the due day to pay (*The Afonos*). As a result:

- The time the vessel is delivered under charter is irrelevant; and
- It will not matter that the bank is closed and it is too late to transfer the funds.

#### b) When is payment deemed to be made?

The general rule is that payment is made when owners' bank decides to credit the account. As a result:

- Charterers' instructions to transfer does not equal payment
- An irrevocable instruction to the bank to pay the hire might be deemed paid once the order is received and authenticated by owners' bank.

#### c) hire falling due on a non-banking day

For hire 'payable in advance', if hire is due on a non-banking day, payment must be made earlier, although owners must still wait until payment is late on the official due date before withdrawing the vessel (*The Laconia*).

For example, if hire falls due on a Sunday (where Sunday is not a banking day), payment must be made by charterers by



Friday (the last banking day), but owners can only withdraw the vessel or start the withdrawal process (depending on the precise charter term) after midnight on the Sunday. Owners must also beware in case the tribunal finds that there has been a settled practice of acceptance by owners of late payment throughout the history of the charter party.

### 3. Partial/non-payment of hire by charterers relating to a charter party dispute. Can owners withdraw or suspend service for insufficient payment?

Where owners have an express right to withdraw the vessel or suspend hire they can withdraw the vessel from the charter or suspend service when there is no payment, late payment or insufficient payment by charterers. However in certain circumstances, charterers are entitled to make deductions from hire. If, as a result of such entitlement, hire is not owing, owners will not be entitled to withdraw. Two questions arise: a) in what circumstances do charterers have a right to deduct? b) How much hire is the charterer entitled to deduct?

#### a) Do charterers have a right to deduct?

In certain circumstances, charterers are entitled to make deductions from hire either where there is i) a contractual right, ii) an off hire event, or iii) a right of “set-off”.

If there is no right of deduction, the fact that charterers believe, bona fide and reasonably, that they have a right of deduction will not prevent owners from validly exercising their right of withdrawal or suspending service.

#### b) How much hire are charterers entitled to deduct?

If there is a right to deduct, and charterers quantify their loss by a reasonable assessment made in good faith—and deduct only the sum quantified—then they are not in default and owners will not then have the right to withdraw the vessel or suspend service (*The Nanfri*).

### 4. Can owners withdraw the ship as soon as payment is late?

A distinction must be made according to whether the charter contains an anti-technicality provision/clause or not.

- a. Where there is an express right to withdraw and no anti-technicality provision, owners may withdraw as soon as hire is late and/or overdue.
- b. Where there is an express right to withdraw but the charter does contain an anti-technicality provision, owners will have

to comply with certain formalities and give charterers a grace period before they can exercise their right to withdraw (see paragraph 5 below).

### 5. ‘Anti technicality’ provisions

The standard form of NYPE 93 (but not the 1946 version) contains an “anti-technicality” clause. (Note that where the standard form charter does not include such a provision it is usual to find one in the rider clauses.) If owners fail to comply with the procedure or withdraw earlier than the deadline imposed by the grace period, owners will themselves be in repudiatory breach of charter, entitling charterers either to keep the charter alive, alternatively, to treat the charter as at an end (which in this scenario owners won’t object to) and to claim damages against owners for any losses caused as a result of the termination of the charter party. It is therefore important to follow the anti-technicality procedure to the letter.

#### a) ‘Anti technicality’ provisions: the wording of the notice to be given by owners

The notice must be in absolute terms and unequivocal. Words such as “owners will consider withdrawing/may withdraw/will rely on their rights to withdraw/will temporarily withdraw”, should be avoided.

The wording notice must make it clear that:

1. Hire has not been paid punctually and in full; and that
2. Owners are giving an ultimatum that unless the full hire owing is paid within the stipulated grace period owners “will withdraw” the vessel.

#### b) ‘Anti technicality’ provisions: the timing of notice

The notice cannot be given until after the hire is overdue i.e. after midnight on due date.

But in which time zone is “midnight” to be calculated? Say, for example, that owners are Japanese and charterers are based in Singapore, the vessel is loading cargo in Brazil, hire payments are made in US Dollars (thus going through a New York clearing Bank) and owners’ bank account is in London. Do owners look at the timing by reference to:

- The place of business of charterers?
- The place of business of owners?
- The location of the vessel?
- The location of the paying (or receiving) bank account? (If payment is made in United States Dollars, beware of the different time zones in the United States).

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Under English law, the answer to this question is not clear. Therefore, to be on the safe side, owners should give the notice at the latest date/time that might apply.

## **c) 'Anti technicality' provisions: the period of the Notice**

Very often, the anti-technicality clause will stipulate a grace period by reference to working days or banking days. When calculating the period special caution must be paid to "banking days/working days" as they will often be different to calendar days. This can be difficult to calculate as one will have to take into account in multiple jurisdictions (as above with regard to the timing of the notice) for:

- Public holidays; and
- Weekends (the days for which may differ in different countries).

Once again, caution is to be applied. If owners withdraw the vessel before the end of the grace period, they will be in repudiatory breach.

## **6. Notice of withdrawal**

No particular form or wording is needed for the notice of withdrawal. However it must:

- Make clear that owners are treating non-payment of hire as terminating the charter; and
- Be given to charterers (owners cannot just give it to the master)

## **7. Other considerations: Waiver by conduct or words**

Although owners may have acquired the right to withdraw, they may forfeit their right in certain situations should their subsequent conduct amount to waiver. Owners should be careful that their words and actions do not constitute a waiver of owners' exercise of their right to withdraw.

### **a) Waiver: can owners waive their right to withdraw the vessel from charter if they delay the withdrawal?**

When the grace period expires, owners must withdraw within a reasonable time. Failure to withdraw within a reasonable time may give rise to waiver. What is a reasonable time is essentially a question of fact. Owners will be allowed time to check if the funds are received and to take prompt legal advice.

Generally, the question is this: *have owners acted in such a way as to indicate to charterers that they have elected to continue the charter and as a result waive their right to withdraw* (for example, by accepting a late payment of hire – see below)?

### **b) Waiver: can owners accept full late payment and then withdraw?**

If the funds are accepted without any qualification ie "as if" the hire had been punctually paid, then owners will not be able to withdraw (*The Brimnes*). A waiver could possibly be construed against owners if funds are retained for a long period without withdrawing. However the mere fact that the funds were received by the bank and being processed will not in of itself (without more) constitute acceptance of the hire and waiver of owners' right to withdraw (*The Laconia*)

### **c) Waiver: can owners keep funds received after valid withdrawal notice was served?**

The retention by owners of the funds will not of itself be taken as an affirmation of the contract or as owners waiving their right to withdraw or their having withdrawn the vessel. Owners should however be very careful not to use language or act in a way so as to give rise to new charter after owners have withdrawn the vessel from hire. If owners do seek to retain such funds it is recommended they make clear that the funds are being retained not as hire but as security for other damages claims under the charterparty (see for example *The Brimnes*).

### **d) Waiver: can owners accept partial payment of hire and still withdraw?**

If charterers make a timely but insufficient payment of hire, acceptance of that payment is unlikely to amount to a waiver by owners of their right to withdraw. Owners should however bear in mind point c) above and also proceed to withdraw within a 'reasonable time'.

## **8. Other considerations: can owners suspend performance of the vessel/her crew if charterers are late in paying hire?**

Withdrawing a ship is a draconian remedy and, where the market has fallen, it is often a move that owners are unwilling to take. Instead, owners may prefer to suspend the performance of the charter until charterers pay the hire due.

However, unless the charter party (or other contractual provision) grants owners a right to suspend performance of the charter, owners will not be able to suspend service, and if owners were to do so where they do not have such a right, then owners may themselves fall foul of other terms of the charter, for example the duty to comply with charterers' lawful orders. This may then entitle charterers to put the ship off hire or give them a claim for breach of charter.



If the charter party grants owners the right to suspend service, generally this will be a right that usually arises only after the grace period in the anti-technicality provisions in the withdrawal clause has expired. Owners must check such clauses carefully and not suspend performance too soon.

Another factor to take into account is that if the vessel has cargo on board, owners will also generally be party to the bill of lading contract and will have duties as bailee of the cargo and could possibly be in breach of their due despatch obligations vis-à-vis cargo interests and face claims in delay should they suspend performance under the charter party.

### 9. Other considerations: is it the right moment to withdraw the ship ? Is there cargo on board?

Upon withdrawal, the charter comes to an end. However what are owners' rights and obligations if the vessel is still prosecuting a voyage and/or is still carrying cargo? If the ship is still carrying cargo, owners still have an obligation under the contract of carriage to deliver the cargo to cargo interests.

Because the charter has come to an end, all costs which were due to be paid by charterers (loading/unloading/bunkers) will be for owners' account.

Owners may only become entitled to remuneration for those services rendered after withdrawal. They may also have an "equitable" claim to the bill of lading freights if the vessel was withdrawn before the freights became due. Getting these sums back may well end up be costly and fruitless if charterers are insolvent.

### 10. Other considerations: Damages

Unless charterers' conduct in failing to pay hire also amounts to a repudiatory breach, then owners cannot be confident that they will also have a claim in damages for hire under the unexpired period of the charter. English law currently has conflicting cases on this point (and see above regarding *The Astra* [2013] to be compared with the earlier judgment in *The Brimnes* [1974]). As it stands, under English law owners can only be confident of recovering unpaid hire up to the point of withdrawal and no more. Therefore as a practical matter, withdrawal following one missed payment will be more attractive to owners in a rising charter market.

If a charter is lawfully terminated in a falling market as a result of a repudiatory breach by charterers then the proper measure of direct damages will be the difference between the original charter rate and the prevailing market rate for equivalent business at the time of the breach. However, the issue as to which losses are recoverable as damages and how damages are calculated is the focus of numerous English law cases which is outside the scope of this article.

### NYPE 2015

Clause 11 of the NYPE 2015 deals with owners right to withdraw and suspend for non-payment of hire. With regard to suspension of performance of the vessel, there is now no need to issue an anti-technicality notice (as in the previous 1993 version). As soon as the hire is outstanding, owners have a right to suspend performance.

If owners want to withdraw the vessel and terminate the charter for non-payment of hire, owners will have to send a notice giving 3 banking days to rectify the failure (a grace period). This notice is not an "anti-technicality" notice *per se*. Unlike the NYPE 1993 charter party, a notice can be served under the NYPE 2015 whether or not the failure to pay hire promptly is due to "oversight, errors or omissions on the part of the Charterers or their bankers". It is now unqualified meaning that whatever the reason for the charterers' failure to make punctual payment of hire, they will be in breach of charter party entitling owners to serve a notice to rectify the breach and if not rectified within the grace period, owners can terminate the charter party. The new provision simplifies the procedure and avoids the owner having to establish the reason for late payment of hire.

In addition to the right to withdraw the vessel under the charter party for non-payment of hire, owners shall also be entitled under the NYPE 2015 to seek damages for any loss suffered as a result of the early termination of the charter party for the remaining period of the charter. Owners do not have to establish the breach is repudiatory. On the other NYPE versions, if there is no "repudiatory breach", owners' only remedy is a claim for the hire due at the time of withdrawal. This provides a clear means of compensation to the owners should they be exposed to lower market rates than the charter hire rate due to the premature ending of the charter.

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***This note is for general guidance only and should not be relied upon as legal advice. Should you require specific advice on a particular situation please contact the Club.***