



► **LEGAL COSTS COVER (LCC) -
EXERCISING THE RIGHT OF
WITHDRAWAL**



EXERCISING THE RIGHT OF WITHDRAWAL

The right of withdrawal is one of the remedies available to shipowners who have time chartered their vessel, when their charterer fails to pay hire promptly and in full. The right can have significant consequences upon the shipowner unless it is carefully considered beforehand and exercised correctly. Therefore, this guide provides a summary of the way such right appears in practice, how it is exercised and what consequences arise from its application for both the shipowner and charterer.

Payment of hire

Under a time charter, the charterer has an obligation to pay the agreed hire in advance, or before the due date agreed under the charter. This obligation is an absolute one, meaning that any default suffices (even where the amount is only late or the remaining outstanding amount is minimal), regardless of whether non-payment is intentional or an oversight/error.

Charterers' obligation to pay hire punctually constitutes an innominate term (*'Spar Shipping'*¹) and not a condition (as it was previously held in *"The Astra"*²). This means that breach of such duty will not automatically provide shipowners with the right to terminate the charter and claim damages. On the contrary, shipowners' termination right following a breach of the hire provisions will depend on whether the consequences of this breach were so serious as to go to the root of the contract, depriving shipowners of substantially the whole benefit of the charterparty. The Court of Appeal have found

that the latter would occur when there is a persistent pattern of late or under payment of hire by the charterer which could be treated as renunciation of the charter.

The shipowner's right of withdrawal and the anti-technicality clause

Late, or partial payment of hire does not alone give rise to the shipowner's right of withdrawal, unless the charterparty expressly grants such a right. Instead, shipowners may claim their unpaid hire by bringing a debt claim against their charterer. They may also have a right to exercise a lien over cargo, freight and sub-freight, or they may even be entitled to terminate the charter. However, the latter option should be expressly provided to them under the charter; otherwise, it is permitted in exceptional circumstances, when, for instance, charterer's conduct is repudiatory.

However, most time charterparties do contain an express clause giving shipowners the option to withdraw the vessel from their charterers' service in the event the latter fails to pay any hire due in full on the due date. An example being Clause 5 of NYPE 1946. Such clauses are construed strictly which means that it only takes a single instalment not to be paid on time and in full by the charterer for the shipowner to be entitled to exercise its withdrawal right. In this case, withdrawal of the vessel from charterer's service can be effected merely by the shipowner's notice to charterers that the vessel is being withdrawn and once it is given, it is irrevocable unless the charterer consents to the contrary.

1 [2016] EWCA Civ 982

2 [2013] 2 Lloyd's 69 Compania

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Barriers to the right of withdrawal may include:

1. **Certain deductions** – if these are related to any disbursements, speed and performance claims, or off-hire to which charterers might be entitled under the charter (“*The Nanfri*”³). If it is proved that charterers acted in good faith and have reasonably deducted those sums from hire, they will not be in default and any withdrawal would be a repudiatory breach.
2. **Waiver** - the regular acceptance of late hire payments by shipowners may be regarded as waiver of their right to withdraw on account of a future late payment, unless notice is given to charterers that, in future, they will insist on a timely payment. Similarly, acceptance of part hire on or before the due date does not waive shipowners’ withdrawal right, but they should indicate expressly to their charterers that they are not waiving their right in these circumstances.

Due to the harsh consequences upon a charterer of exercising a contractual right to withdraw, parties usually agree on the insertion of an “anti-technicality” clause which requires the shipowner to put their charterers on notice that the vessel will be withdrawn from service unless their hire is paid within a specific deadline included in the clause agreed by the parties. An example of

an “anti-technicality” clause can be found at Clause 11 (b) and (c) of NYPE 2015.

The notice should be issued only when the payment becomes due. It was held in “*The Pamela*”⁴ that the relevant time, when ascertaining the validity of a notice to withdraw, is not the time at which the notice was sent by the shipowner, but the time at which it was likely received by the charterers. A notice given after business hours on the last day but before midnight might be invalid. It is not clear under English law whether the owners or the charterers’ time zone is relevant when considering whether notice has been issued on time.

Following the issuance of shipowners’ notice to their charterers and if the remaining outstanding hire is not settled by the end of the agreed grace period, shipowners can withdraw their vessel and crew from charterers’ service. However, shipowners must make sure that they exercise their withdrawal right at the right time, given that an early withdrawal might constitute a repudiatory breach of charter on their part, whereas a late withdrawal might be treated by the charterers in the circumstances as a waiver.

Withdrawal should be exercised within reasonable time of the default (“*The Laconia*”⁵). Although what constitutes “reasonable time” remains a question of fact, it is believed that shipowners should be provided with sufficient time to consider their position.

The consequence of withdrawal

Once the shipowner decides to proceed with

3 [1979] 1 Lloyd’s Rep 201, HL

4 [1995] 2 Lloyd’s Rep 249 (QB)

5 [1977] 1 Lloyd’s Rep 315, HL

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the vessel's withdrawal, if such right is exercised validly as described above, it results in the termination of the charter. Although some charter parties (such as NYPE 2015 under Clause 11(c)) might expressly provide to the shipowner the right to claim damages in respect of the loss of the remainder of the charterparty, mere withdrawal does not automatically entitle them to claim for the remaining fixture period lost against charterers. Unless otherwise agreed or the charterers' conduct is repudiatory, the shipowner will be entitled only to any hire due until the withdrawal date plus interest and cannot claim hire for the remaining charter period. Charterers will be entitled to claim from the shipowner reimbursement of any unearned hire paid in advance.

Temporary withdrawal of the vessel constitutes a breach of charterparty by the shipowner, unless otherwise agreed. This is because the notice to withdraw is irrevocable once issued and so, it cannot be withdrawn except with the charterer's consent (*"The Mihaios Xilas"*⁶).

The withdrawal of the vessel by the shipowner may have an impact upon third parties as well and thus should be carefully considered before making any decision. Specifically, if the vessel is laden at the time of withdrawal, shipowners should comply with their bill of lading commitments and are obliged to deliver the cargo to its destination. However, they will no longer be entitled to any hire, or freight from the cargo interests if a "freight prepaid" bill was issued.

Shipowners' efforts to reach an agreement with the cargo interests that they will contribute towards the costs of the voyage following the vessel's withdrawal, may not be of any assistance, as courts have held such action to be unenforceable by reason of duress (*"The Alev"*⁷). However, they are entitled to recover any additional expenses incurred following the withdrawal due to the performance of their bills of lading obligations against charterers on the grounds that such costs were incurred pursuant to charterers' legitimate employment orders before withdrawal. The Supreme Court in *"The Kos"*⁸ has held that such costs may also be recoverable in bailment given that shipowners maintain a continuing duty of care for the cargo after the vessel's withdrawal, as this remains in their possession without their choice.

Shipowners may also be entitled to claim a quantum meruit remuneration from their sub-charterers if upon their request, shipowners had to carry the cargo to its destination (*"The Bulk Chile"*⁹).

Suspension of services

Often under time charters, shipowners are provided with an express additional means of exercising pressure to their charterers to settle outstanding hire. This recognises the owners' right to suspend the operations of their vessel until the hire due is paid, instead of withdrawing the vessel entirely from charterers' service (e.g. Clause 8(c) of Gentime, clause 12(f) of Supplytime 2017). Normally, when there is a provision in the charter for such right, it allows it to be exercised following the issuance of notice of

6 [1978] 2 Lloyd's Rep 186, QB

7 [1989] 1 Lloyd's Rep 138

8 [2012] UKSC 17

9 [2013] EWCA Civ 184; [2013] 1 WLR 3440

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withdrawal by the shipowner and during the grace period agreed under the charter's "anti-technicality" clause (however, the contrary applies under clause 11 of NYPE 2015). Also, similarly with the owners' withdrawal right, it is important for the suspension of services to be performed on time, as the consequences of an invalid suspension might be significant to shipowners. Therefore, shipowners are advised to carefully look at the wording of such clauses so to avoid suspending performance of their services too soon.

When owners are considering whether to exercise this right, they should also take into account the effect such suspension might have over the cargo interests.

Conclusion

Traditionally, the withdrawal of the vessel from charterer's service was proven to be for shipowners, as a drastic tool to remedy any delay against non-payment of hire by their charterers. However, given that the conditions of the valid exercise of such right have become more delicate and complex over the course of time, Members are advised to seek the Club's advice when in doubt as to whether/when their withdrawal right should be exercised and be guided as to the best course of action.

For further information please visit www.shipownersclub.com/lcc

If you have any further questions about LCC, please contact the LCC Managers.

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