

In this series of FD&D Guides, developed by CJC, we provide brief notes on issues to address and practical steps to take in a situation where there is non-payment or short-payment of hire.

This second Guide (which follows on from the Guide on the question of off-hire and equitable set-off) looks at the shipowner's remedy of withdrawal/suspension of performance when a wrongful deduction from hire or short-payment occurs.

Remedies for non-payment of hire: withdrawal/suspension

We summarise in this Guide the shipowner's rights and remedies for withdrawal of the vessel from the charter, claims for damages, and the question of suspension of performance when there has been non-payment or short-payment of hire in circumstances where the charterer is not validly exercising a contractual or equitable entitlement to withhold hire or make a deduction against hire.

To keep matters relatively simple, we base our Guide on the industry standard NYPE form of time charter and English law.

Withdrawal for non-payment of hire

In some circumstances the shipowner can put the defaulting charterer under pressure by withdrawing the vessel from the chartered service, particularly if market conditions would give the shipowner a more favourable financial return under a replacement charterparty.

NYPE 1946 Clause 5 provides:

"...failing the punctual and regular payment of the hire, or bank guarantee, or on 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."

The effect of these words is that if even a single instalment of hire is not paid on time and in full, the owner is entitled to bring the charterparty to an end by withdrawing the vessel from the service of the charter. Withdrawal is effected simply by giving notice to the charterer that the vessel is withdrawn. No particular form of words needs to be used.

Most charters now contain an "anti-technicality clause". These clauses give the charterer a fixed warning period to rectify a default in the payment of hire, before the owner is entitled to exercise the right to withdraw.

The clause in NYPE 93 is typical:

"Where there is a 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 exact number of banking days' grace is blank in the BIMCO form and is to be filled in by the parties.]

It can be seen from the above that, where there is an anti-technicality clause, two notices are required in order to complete the process of withdrawal:

- a. an Anti-Technicality Notice, which can only be given when the time for payment of the instalment of hire has expired, and hire has not been paid in full; and
- b. a Withdrawal Notice which can only be given once the grace period specified in the anti-technicality clause has expired.

The Anti-Technicality Notice needs to be drafted with care. It must state that if hire is not paid before the end of the grace period specified in the clause, the vessel will be withdrawn. It is not enough merely to reserve the right to withdraw the vessel. It is prudent to seek advice and assistance from the Club or legal advisers when preparing the notice.

The Anti-Technicality Notice cannot be given until payment is overdue. This should be taken to mean that it must be given after midnight on the last day of the payment period. Notice given after business hours on the last day but before midnight might be invalid.

It is equally important, however, that the owner does not delay too long after the expiry of the payment date before giving the Anti-Technicality Notice. The Notice must be given within a "reasonable time" of the default. The length is not an exact period. It depends on all the circumstances of the case and ultimately can be determined by an arbitration tribunal or court. It will not usually be more than one or two days.

The following factors are likely to be taken into account:

- the owners must have time to make inquiries of their bankers to establish clearly that the money has not been received;
- if a short payment has been made and the charterer claims the right to make deductions, the owner must have time to investigate the correctness of the deductions;
- the owner should have time to take brief and urgent legal advice.

The owner can also lose the right to withdraw if:

- a late payment is made after the expiry of the grace period, but before Notice of Withdrawal is given, if the late payment is retained and not returned; although it may be possible to retain the late payment as security for other claims against the charterer and still withdraw the ship; or
- the vessel continues to perform the charter after expiry of the grace period – such as by carrying out the orders of the charterer to load cargo.

Future loss of earnings

Before deciding whether to withdraw from the charterparty, an owner will want to know whether any consequential loss of earnings can be compensated by an award in damages. If the vessel is withdrawn from the charter on a falling market, then the owner has lost the difference between the charter rate, and the (lower) market rate, for the balance of the charter period.

Can the owner recover damages for this loss from the charterer?

This depends on whether the withdrawal clause in the charter is regarded as:

- a cancellation provision, which merely wipes out the contract, without further consequences; or
- a Termination for breach of condition clause, which brings with it the consequence of damages.

This issue appears to have been settled, at least at Court of Appeal level, by the judgment in *Spar Shipping* [2015] 2 Lloyd's Rep. 407. It determined that the withdrawal clause is a cancellation provision such that withdrawing the vessel by the contractual mechanism does not automatically bring with it the right to claim damages.

However, the owner may be able to claim damages for the balance of the period if the conduct of the charterer is repudiatory or renunciatory at common law – broadly speaking, if the charterer is a persistent defaulter, a deliberate defaulter, or is clearly unable to continue performing. But we will look at “repudiatory or renunciatory” in a little more detail.

Conduct is repudiatory if it deprives the innocent party of substantially the whole of the benefit he is intended to receive as consideration for performance of his future obligations under the contract. This is sometimes expressed as a breach that goes to the root of the contract.

Conduct is renunciatory if it shows an intention to commit a repudiatory breach, that is to say if it would lead a reasonable person to the conclusion that the party does not intend to perform his future obligations where the failure to perform such obligations when they fell due would be repudiatory. An intention to perform but in a manner which is substantially inconsistent with the contractual terms is an intention not to perform. This has been applied to repeated failures to pay hire on time and in full.

An intention to perform includes a willingness to perform, but willingness in this context does not mean a desire to perform despite an inability to do so. “I would like to but I cannot” negatives intent just as much as “I will not”. This may well be the case where the charterer is so financially unstable that although they would like to pay hire on time and in full, they simply cannot.

If conduct is repudiatory or renunciatory, it is still wise to follow the contractual withdrawal notices, but in the same notices, to state clearly that the charterer’s conduct is repudiatory or renunciatory, and that the charter is being terminated at common law for repudiation/renunciation.

It is also possible to amend the standard forms of charter to make the obligation to pay hire promptly and in full a condition – that is, a term any breach of which entitles the owner to terminate the charter and claim damages for breach. **A suitable amendment to NYPE 1946 clause 5 would read as follows:**

“...the punctual and regular payment of hire shall be a condition of this Charter Party, and failing the punctual and regular payment of the hire, or bank guarantee, or on any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterer, without prejudice to any claim they (the Owners) may otherwise have on the Charterers.”

Some charters have been amended simply to state that in the event of withdrawal by the owner, the owner shall be entitled to recover damages for the balance of the charter at the difference between the charter party rate and the market rate. But this type of amendment is not so satisfactory for the owner because it could be invalid as a penalty clause.

What about the cargo?

Another important factor for the owner to consider before deciding whether to withdraw from the charterparty is what happens to the cargo if the withdrawal occurs when the vessel is laden.

If a vessel is withdrawn (or the charter terminated) with cargo on board then:

- in all events the owner is under a duty as bailee to take reasonable care of the cargo;
- the owner remains under a duty to complete the voyage under bills of lading that have been issued;
- if freight has already been paid to the charterer under such bills of lading then the owner is not entitled to recover the freight again from cargo interests;
- the owner may also be exposed to the cost of discharge, if that cost is for the carrier under the bills of lading;
- if the charterer's own cargo is on board then the owner may be entitled to recover the cost of taking care of the cargo until it can be discharged, including the use of the ship at the current market rate of hire;
- if a sub-charterer requests the owner to complete the voyage, then this request can lead to a new implied contract with the sub-charterer under which the sub-charterer is obliged to pay for the use of the ship at the current market rate of hire.

Suspension of performance

An owner might prefer to exert pressure simply by suspending operations until the outstanding hire is paid, but this is not permissible because in principle withdrawal must be final. A withdrawal clause alone gives no right to suspend. To be legitimate, suspension must be founded on an express clause. The right therefore depends on the express wording of the clause.

Compared with the corresponding wording in **the 2015 edition, the NYPE 1993 clause** for suspending performance seems unclear. It would be better to amend it to match the wording in the 2015 edition.