

## WITHDRAWAL ISSUES

In a buoyant market, the length of and rate for fixtures are highlighted. As the market rises, owners will want the earliest possible redelivery. Conversely, charterers will be squeezing as many voyages out of the fixture. Withdrawal of a ship on time charter is the owner's traditional remedy against non-payment of hire. However, in a buoyant market, the remedy may be put to a different commercial use. Owners who have fixed at below the market rate may hope for a technical slip in payment of hire, giving them a right to withdraw before the fixture has run its course.

These conflicting aims can lead to costly disputes. Withdrawal is a drastic step with many pitfalls. This briefing will summarise the key issues but is no substitute for full legal advice.

### 1 Is there an automatic right to withdraw?

Late payment of hire alone does not give the owner a right to withdraw. However, most charterparties will contain an express clause that, in default of regular and punctual payment, will give the owner such a right. This is usually found within the standard form clauses. For example, NYPE 46 provides:

**“... failing the punctual and regular payment of hire, ... or any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers ....”**

In the absence of an express right to withdraw, the owner's remedy for non-payment will be to pursue a claim for debt.

Sometimes charterers may indicate a clear intention not to perform the contract by repeated non-payment. The owner can accept that as repudiation, terminate the contract, and claim damages from the charterers.

### 2 When can the owner withdraw?

The right to withdraw arises when the charterer is in default of payment of all or part of the hire due. Default does not have to be deliberate. Compliance with the obligation to pay hire punctually is strict. The smallest slip, whether due to an oversight or to difficulty with the banking system, may allow the owner to withdraw.

### 3 When is the charterer in default?

Under English law, when a party has an obligation to do something on a particular day, he has the whole of that day to do it. The charterer therefore has up to midnight to pay hire due on a particular day. This is regardless of whether, late in

the day, it ceases to be possible to make a payment to the recipient bank. Only at midnight is the payment due but not received. Notice then given by the owner will trigger any contractual grace period.

When payment is made by telegraphic transfer, it is received when the message is received and tested by the bank. This does not mean that it can be transferred immediately by the owner but that, if he made an enquiry at the bank, they would answer, *“Yes, the money has arrived for your account”*. There is a degree of latitude in relation to the bank's internal processing time.

### 4 What if payment falls due on a non-banking day?

Payment must be made on or before the due date. If due on a non-banking day, the time for payment is not extended into the next day. Payment must be made not later than the immediately preceding banking day.

### 5 How much should the charterer owe?

The right to withdraw arises not only where hire is not paid at all, or is paid late, but also where the amount paid is less than the amount due. Whilst the amount by which the charterer has underpaid is irrelevant to the right to withdraw, owners must look carefully at charterers' deductions prior to considering

withdrawal. It is common to see charterparty clauses providing for disbursements, speed and performance claims and off hire periods to be deducted from hire. These amounts can be very small. There may be minor deductions with which the owner may not agree. Provided the charterer has deducted honestly and reasonably, even if he is later proved wrong, he will not be in default. The owner can recover the balance, but that is all.

### **6 What if the charterer pays after the due date?**

Payment of hire after the due date will not deprive the owner of his right to withdraw. The owner can accept the late payment as if it were punctual, waiving the right to withdraw. Alternatively he can promptly reject it and proceed to withdraw. The bank does not have authority to accept the late payment on his behalf.

### **7 What is the effect of the anti-technicality clause?**

A withdrawal clause can operate harshly on a charterer, in particular where the failure to pay is due to an oversight, or to technical issues at the bank. In most charters, the parties agree to an "anti-technicality" clause or "grace period". For example:

**"Where hire is due and not received the Owners, before exercising the option of**

**withdrawing the vessel from the Charterparty, will give Charterers forty-eight hours notice... and will not withdraw the vessel if the hire is paid within these forty eight hours"**

The clause gives the charterer an opportunity to rectify any default in payment. The length of the grace period varies depending on the bargaining positions of the parties. It may range from 48 hours to up to 10 days.

### **8 Can the right to withdraw be lost?**

If the owner has repeatedly accepted late payment without complaint this may establish a course of conduct preventing the owner from exercising the right to withdraw on a further late payment. Here, owners should first give notice to charterers that they wish to enforce their strict contractual rights despite their earlier lenience.

Acceptance of part hire on or before the due date does not waive the right to withdraw, but the owner should indicate expressly to the charterer that he does not waive his right in these circumstances.

The owner must make the decision to withdraw within a reasonable time, or risk losing his right. As withdrawal is a serious step, he should however have time to properly consider the position and seek legal advice. A delay of a few days after the

default in payment would not normally be unreasonable.

### **9 Can there be "temporary withdrawal"?**

An owner must either withdraw the ship permanently or continue. An owner cannot use pressure tactics by closing the hatches to induce the charterers to pay outstanding hire. "Temporary withdrawal" is itself a breach of charter by the owner. It is however possible to contractually agree to a right of "temporary withdrawal". Clause 11 (a) of the NYPE 93 provides such a right.

### **10 Can the owners withdraw for 'Any breach of the charterparty'?**

NYPE 46 (line 61) provides that an owner may withdraw for "any breach of this Charter Party". If strictly construed, this provision would be very harsh. The courts have held that "any breach" means "any repudiatory breach", one so serious as to entitle the owner to treat the charter as discharged. This would include orders to an unsafe port or to load dangerous or excluded cargo.

### **11 Does the reason for withdrawal matter?**

Where there is an express right to withdraw in the charter, it is immaterial whether the owner is withdrawing for persistent non-payment or taking advantage of a technical slip in payment to regain control of the ship. A tactical withdrawal

may be considered sharp practice but it is perfectly legitimate.

**12 What is the effect of withdrawal?**

A valid withdrawal terminates the charter from the moment of withdrawal. The owner is not entitled to any hire for the remainder of the charter period and must return to the charterer any unearned hire paid in advance.

In most cases where there has been a tactical withdrawal, it is usual for the parties to reach agreement that the ship remains on hire to the same charterers but at the higher market rate as if, practically speaking, nothing has changed. Any disagreements over the legitimacy of the withdrawal will then be fought out in arbitration or in the courts.

When hire is not paid, the owner may have other remedies. He may claim for debt. He may have rights to lien cargo, freights and sub-freights. When considering withdrawal, he should also carefully examine his obligations to third parties. If at the time of the withdrawal, a laden voyage is uncompleted, the carriage under the bill of lading must be performed.

**An owner is only likely to withdraw a ship on a rising market, or where genuinely fearful of the ability of the charterer to pay. This decision should not be taken lightly. It is fraught with danger for the unwary and can result in substantial claims against the owner if he gets it wrong. Any Member considering embarking down this route, for whatever reason, should, in the first instance, contact the Defence Club.**