



# Soundings

## A question of class

In the case of *Silverburn Shipping (IoM) Ltd v Ark Shipping Company LLC (M.V. “Arctic”)* [2019] EWHC 374 (Comm), the High Court held that the owner was entitled to terminate a bareboat charter where the charterer had failed to maintain the ship’s class for a short period of time while the ship was in dry dock.

The case provides clarification that a charterer’s obligation to keep a ship in class under a Barecon charter is an absolute obligation and a condition of the contract. It also provides a warning of the importance of maintaining class under a bareboat charter at all times and the potentially drastic consequences of failing to do so.

### Facts

On 17th October, 2012, the owner bareboat chartered the ship to the charterer on an amended BARECON '89 form for 15 years. On 31st October, 2017, she arrived at the Caspian port of Astrakhan for repairs and maintenance, coinciding with her five yearly special survey. The charterer had failed to make adequate provisions in time and her class certificates expired just before she entered dry dock. The owner demanded the return of the ship on a number of grounds, including the charterer’s failure to maintain

class. The charterer disputed the owner’s entitlement to cancel arguing that it was entitled to a “reasonable time” to reinstate class before any right of termination would arise.

The dispute turned on the proper construction of clause 9A of the charterparty, a standard clause of the Barecon '89 form, which provided in relevant part:

*“The Charterers [...] shall keep the Vessel with unexpired classification of the class indicated in Box 10 and with*

*other required certificates in force at all times. The Charterers to take immediate steps to have the necessary repairs done within a reasonable time failing which the Owners shall have the right of withdrawing the Vessel from service of the Charterers without noting any protest and without prejudice to any claim the Owners may otherwise have against the Charterers under the Charter."*

### The arbitration

The owner made an urgent application to an LMAA tribunal requesting (1) a declaration that the charterparty had been lawfully terminated due to the charterer's breach of clause 9A and (2) an order for redelivery of the ship. The tribunal dismissed the owner's application, finding that the classification obligation should be interpreted in a similar manner to the repair obligation. The tribunal considered that, on its proper construction, clause 9A was not an absolute obligation. Instead, if the charterer was in breach of the class obligation, it had to take steps to reinstate the class certificates within a reasonable period of time, failing which the owner could, only then, withdraw the ship.

The owner appealed to the High Court, where Mrs Justice Carr allowed the appeal, finding for the owner.

### The appeal

The appeal raised two issues of law:

- (i) Was the charterer's classification obligation in clause 9A an absolute obligation, or merely an obligation to reinstate expired class certificates "within a reasonable time"?
- (ii) Was the classification obligation a condition of the contract or an innominate term?

The judge considered that on a proper construction of clause 9A the classification obligation was distinct from and additional to, the maintenance obligation. Comparisons with the situation under differently worded time charters could not legitimately affect this construction. Unlike seaworthiness, a ship's class is a matter of status. Clause 9A created an absolute obligation, and the tribunal erred in law in finding that the classification obligation was only an obligation to reinstate class within a reasonable time.

The more difficult question was whether clause 9A should be treated as a condition or an innominate term. An innominate term is a term which can either be classified as a "condition" or a "warranty", depending on the severity of the breach. Breach of a condition entitles the innocent party to terminate the contract, whereas breach of a warranty merely gives rise to a claim for damages.

In reaching the conclusion that it was a condition, the judge weighed up a number of considerations:

- The classification obligation creates an obligation which is immediately, readily and objectively ascertainable. Given that it is clear and absolute, with a fixed time, this suggests that it is a condition.
- Loss of class can have potentially immediate and irreversible adverse consequences, not only for the parties to the contract but also third parties and regulatory authorities. It can affect insurance, ship mortgage and flag.
- The fact that the classification obligation was not labelled a condition, and that express rights of withdrawal were not provided for in the event of its breach but were provided for elsewhere, were not determinative.
- To classify the classification obligation as a condition carries clear and important advantages in terms of certainty. Unlike breach of an obligation of punctual payment, which may be very trivial or minor, breach of the obligation to maintain the ship in class is likely to be serious. Additionally, damages for breach of the classification obligation may be difficult to assess.

### Comment

This decision addressed a point on which there was little authority and provides some welcome clarity. The clause in the BARECON '89 form, on which this decision was based, is materially similar to later versions of the BARECON form (2001 and 2017) and is in common use.

The case serves as a reminder of the importance of maintaining class under a bareboat charter. Both owners and charterers need to be mindful of expiring class certificates, and the risks which this entails. Harsh consequences may stem from a loss of class. It should be noted that the situation might be reversed, so that the owner would have the obligation to maintain class, in cases where the "optional" clause 13(l) of the BARECON '89 charter has not been deleted.

In a more general context, the decision also provides useful general guidance as to some of the factors which are relevant in determining whether or not a particular term of a charterparty is a condition.

**Members are welcome to contact the Managers directly for any further advice and guidance.**

### The UK Defence Club

Thomas Miller Defence Ltd, 90 Fenchurch Street, London, EC3M 4ST  
tel: +44 207 283 4646 fax: +44 207 204 2131  
email: tmdefence@thomasmiller.com web: ukdefence.com