Withdrawal for Non-Payment of Hire - Time Charter

At common law, non-payment of hire by charterers will only entitle the owners to treat the governing charterparty as being terminated for repudiatory breach of contract if the charterers’ default evinces an unequivocal intention not to perform their contractual obligations. For this reason, it is fairly difficult to demonstrate that charterers are in repudiatory breach. In order to avoid this trap, most time charters grant the owners an express right of withdrawal for non-payment of hire. By way of illustration, such a right is specifically granted by clause 5 of the New York Produce Exchange 46 ("NYPE 46") and clause 6 of the Baltimore charterparties in the following terms:

"5. Payment of said hire to be made in New York in cash... semi-monthly in advance... tainting 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..."

and

"6. Payment of hire to be made in cash... without discount, every 30 days in advance. In default of payment the owners have the right of withdrawing the vessel from the service of the charterers, without notice or protest and without interference by any court or any other formality whatsoever..."

The effect of withdrawing a vessel for non-payment of hire is that the charterparty comes to an end, leaving the owners free to employ the vessel elsewhere. The owners will be entitled to recover hire payable up to the date of withdrawal but not any additional damages which they may suffer as a consequence of the early termination of the charterparty. Indeed, the owners will have to account to the charterers for any overpaid hire and the value of any bunkers remaining on board at the time of the withdrawal. It can be seen, therefore, that the right of withdrawal is a means by which the owners can get the vessel back from recalcitrant charterers, thereby limiting their exposure to future losses.

However, withdrawal is often only a sensible option if the vessel is free of cargo. This is because withdrawal of the vessel from the charterers’ service does not bring the bill of lading contract to an end. Where the owners are the carriers under the bill of lading contract (as is commonly the case), they will remain under an obligation to deliver the cargo at the port(s) named in the bill of lading despite the withdrawal of the vessel from the charterers’ service. In such circumstances, if the bills of lading in question are “freight prepaid” bills of lading, the owners’ prospects of recovering any of the expenses incurred in the carriage and delivery of the cargo to the port(s) named in the bills of lading will be remote. Where the owners are not the carriers under the bill of lading contract, their position will be somewhat better albeit they will still bear a duty of care as bailors of the cargo to those interested in it. It is clear therefore, that an owner should think carefully before withdrawing a vessel which is laden with cargo because the charterers have not paid hire on time.

Failure to pay hire by the due date

a) Payment in cash

Although it is now well established that payment in cash money is not required as such, payment must be made in a manner which is exactly equivalent to and as good as cash (the "Brinnis"). Where payment is made by way of an inter-bank transfer, it must be on terms which provides that the owners will have unconditional use of the money on or before the due date for payment. Transfer on the due date but for value at a date thereafter is not "payment in cash" and will amount to a late payment (the "Chikuma").

b) Part payment of the amount due

It is established that the owners’ right of withdrawal arises not only when a full hire installment is not paid, but also when a timely payment has been made for a sum which is less than the amount due and the outstanding balance is not paid by the due date (the "Mihallos Xillas").

c) Tender of payment after the due date but before withdrawal

The House of Lords in the "Lacostia" held that owners’ right of withdrawal is not lost merely because the charterers tender the overdue hire before the owners have given notice of withdrawal. If the charterers fall to pay the hire in time they are in default and their tender of hire thereafter cannot alter that position. Having said that, owners in such circumstances would need to consider their position carefully bearing in mind the right to withdraw is not automatically linked with a right to damages.

d) Withdrawal following a deduction made from a hire payment

The answer to the question of whether the owners can withdraw the vessel from the charterers service because they have made a deduction from hire depends on whether the charterers have a right to make the deduction, whether under an express provision of the charterparty or under the doctrine of equitable set-off.

This issue has not been considered by the House of Lords. However, the Court of Appeal suggested in the "Nanfrid" that charterers may not in breach of their obligation to pay hire if the deduction is permitted by the charterparty or by the doctrine of equitable set-off, is reasonable and is made in good faith. The position is different where the charterers’ deduction, albeit reasonable and made in good faith, is not permitted under either the express terms of the charterparty or the doctrine of equitable set-off: in the latter case, the charterers will be in breach and the owners will be entitled to withdraw the vessel (the "Lutetian").

e) Acceptance of late payment by owners

The facts of the the "Lacostia" are as follows. The vessel was chartered on the N.Y.P.E. form, hire being payable semi-monthly in advance to the owners’ account with the London branch of the First National City Bank. A payment fell due on a Sunday, but it was only at about 1500 hours on the following Monday that the charterers’ bank delivered a “payment order” to the owners’ bank for the appropriate amount. Shortly thereafter, the owners’ bank began processing this document (which is the equivalent of cash between banks but which does not produce a credit in the payee’s account for about 24 hours). The owners’ bank telephoned the owners’ London agents as per its standing instructions when the hire was received. The owners’ bank was told to refuse the payment and return it, which it did by a payment order following morning. Meanwhile, the owners gave the charterers notice at 1805 hours on Monday evening that they were withdrawing the vessel. The Court of Appeal held that the owners were not entitled to withdraw the vessel and one of the grounds for this finding was that the owners had waived their right of withdrawal since they were bound by their bank’s acceptance of the payment order. The House of Lords reversed this decision, holding that the owners were entitled to
The position would have been different if the owners had been found to have accepted the late payment and thus waived their right to withdraw. However, the House of Lords found that it was not within the owners’ bank’s express or implied authority to make commercial decisions on behalf of the owners by accepting late payments of hire without instructions. Since the bank had returned the payment the following day pursuant to the owners’ instructions, the House of Lords held that this had taken place within a reasonable time and so it could not be said that the owners had given the charterers any grounds to suppose that the late payment had been accepted.

f) Acceptance of a timely but insufficient payment

The Mihalis Xilas was chartered on the Baltic form with hire to be paid monthly in advance. The charterers mistakenly believed the ninth month to be the last month under the charter party and so they remitted the ninth hire instalment less US$31,000.00. The owners queried the deduction and then withdrew the vessel five days later without returning the part payment of the advance hire.

The Court of Appeal held that the short payment was not a proper payment and, in the circumstances, the owners could elect to either accept the short payment and not withdraw the vessel or refuse it and withdraw the vessel. The Court of Appeal held that the owners’ retention of the short payment, coupled with their demand for further details about the deduction and the fact that the owners took several days to decide to withdraw the vessel, indicated that the owners had waived their right of withdrawal. This decision was reversed by the House of Lords which held that the owners were entitled to take a reasonable time to ascertain whether the amounts deducted from the hire were reasonable before deciding whether to exercise the right of withdrawal and the five days taken by the owners was reasonable in all the circumstances. The House of Lords also found that the owners’ retention of the part payment of advance hire, which the owners were only obliged to refund following the exercise of their right to withdraw, did not amount to an election to treat the charter as continuing and so did not operate as a waiver of their right to withdraw the vessel.

g) Previous acceptance of late payments of hire

The fact that the charterers have made late payments of hire on previous occasions which have been accepted by the owners may preclude the owners from exercising their right to withdraw when faced with a similar failure to pay hire. Where a course of dealing has been established by the owners accepting late payment without protest, the owners will be unable to withdraw the vessel if a subsequent hire instalment is paid late pursuant to that course of dealing. In order to re-establish their right to withdraw in such circumstances, the owners need to give notice to the charterers that they require the charterers to adhere strictly to the hire payment provisions in the charterparty. Only once the owners have re-established that hire must be paid when it falls due will the owners be in a position to exercise their right of withdrawal.

Exercise of the right to withdraw

The owners are allowed a reasonable time in which to ascertain the true position. However, once they are aware of a non- or insufficient payment, they must act quickly or else the right to withdraw may be lost. That said, the owners are allowed a reasonable time to seek legal advice once the position is known. Whilst the owners are considering what to do, they should avoid giving any indication whether by word or by conduct to the charterers that the vessel continues to be on charter since this could result in waiver of their right to withdraw.

a) Anti-technically clauses

Once hire is overdue, the right of withdrawal comes into play subject to the requirements of any anti-technically provisions contained in the charter-party. Typically, the charterparty will contain a clause which requires the owners to send an anti-technically notice to the charterers. Unless the charterparty expressly provides to the contrary, it has been established that in order to be effective an anti-technically notice must inform the charterers that a) the hire is due and has not been paid and b) the vessel will be withdrawn unless the charterers remedy their default within the time specified. In short, it should say, “You haven’t paid up when you should have done. Pay in [48] hours or lose the ship”. This is how it was put in a leading case on withdrawal (the “Atavos”).

The importance of getting the form of the anti-technically notice right is emphasised by the findings of the High Court in the “Pamela” in . In this case, clause 7 of the charterparty gave the owners the right to withdraw the vessel if hire was not paid on time, and referred to rider clause 27. Clause 27 was the anti-technically clause which provided:

“If hire is due and not received, the Owner, before exercising the option of withdrawing the vessel, will give Charterers forty-eight (48) hours notice... and will not withdraw the vessel if the hire is paid within these 48 hours.”

Hire was not received on the due date, and owners’ brokers accordingly sent the following message to charterers,

"Re PAMELA
Pls inform chrs they are in breach of contract due to non-receipt of hire.
Also pls notify chrs of withdrawal of the vl.
"

The Court held that this message, referring to non-payment of hire and withdrawal of the vessel was not sufficient as an anti-technically notice, even if the charterers would have suspected, or presumed, that they could have remedied the default by paying the outstanding hire within 48 hours. The owners’ position would have been secure if they had unequivocally notified the charterers that the vessel would be withdrawn unless charterers remedied their default within the allowed time.

b) Notices of withdrawal

Unless there are express provisions to the contrary contained in the charterparty, the notice of withdrawal must be given to the charterers. The owners are not bound to give prior notice of their intention to withdraw to the charterers. All that is required is that the withdrawal notice is unequivocal. i.e., it states clearly that the owner is treating the non-payment of hire as having terminated the charterparty and that the vessel is withdrawn. Continuing to perform the bill of lading contract by carrying the cargo to destination does not have the effect of reinstating the charter (the "Tropwind" No. 2).

c) Relief against forfeiture

The concept of "relief against forfeiture" is derived from English property law. In a contract for the lease of property, the owner of the property is usually given a right of forfeiture which is a right to re-possess the property for non-payment of rent. In certain circumstances, relief against forfeiture will be granted by the Courts in order to prevent the abuse of this right.

In the context of charterparty contracts, the owners’ exercise of their right to withdraw the vessel from the charterers’ service can also result in great hardship for the charterers. It has been argued that, by analogy with property law, relief against withdrawal should be available in circumstances where charterers may suffer heavy losses in consequence of an oversight or error in the payment of hire. However, the House of Lords rejected this argument in the “Scaptrade” ruling that the English Courts had no jurisdiction to grant this type of relief in the context of withdrawal under a charterparty.