Payment of Hire and Freight - Time and Voyage Charters

Payment of hire under time charters

Time charterparties provide that hire is payable in advance, although the parties sometimes agree that hire is payable in arrears. The charterparty will also specify whether hire is to be paid monthly, semi-monthly, every 16 days or by reference to some other period agreed by the parties.

Advance hire

The charterers must pay any advance hire installment on or before but not later than the due date. This means that, unless the charterparty provides otherwise, the charterers have until midnight on the due day in which to effect payment even though this is after the close of the banking day. Since the funds must reach the owners' designated bank account, the relevant time zone usually will be dictated by the location of the bank holding the account in question. If a hire installment falls due on a non-banking day, the charterers must make payment by midnight on the last banking day before the installment falls due in order for the payment to be made in advance (the "Zographia") and the "Laconia"). The paramount importance of the owners receiving regular payment of hire is underscored by the right which is given to them under most time charterparties to withdraw the vessel for non-payment of hire subject to compliance with any anti-technicality provisions.

Deductions from hire

a) Deductions expressly permitted by the charterparty

The charterers may make deductions from hire if these are expressly permitted by the charterparty. Thus, the NYFO 46 form allows the charterers to deduct in respect of inter alia, advances for ship's disbursements (see lines 65 and 66), off-hire claims (see lines 91 to 99) and in respect of time lost, fuel consumed and expenses incurred as a result of a reduction in speed caused by a defect in or breakdown of the ship's hull, machinery or equipment (see lines 99 to 101).

b) Deductions in respect of off-hire events

No deduction from hire can be made in respect of an anticipated period of off-hire (the "Lutetian"). Strictly speaking, an off-hire claim does not give rise to a right to deduct from hire if the charterparty-off-hire clause specifies that "the payment of hire shall cease" in respect of any period of off-hire since this prevents the hire in question falling due. However, since hire is generally paid in advance it has been accepted that advance hire overpaid in respect of a period of off-hire may be deducted from a subsequent hire payment (the "Namiri" and the "Lutetian" supra).

c) Deductions by way of equitable set-off

The charterers may make a deduction from hire by way of equitable set-off if they have been deprived of the use of the vessel, in whole or in part, by virtue of a breach of charter by the owners (the "Namiri", supra). In this case, Lord Denning described the type of claims which can give rise to a right of set-off as those which "... arise out of the same transaction or are closely connected with it ... and ... which go directly to impeach the plaintiffs' demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce them without taking into account the cross-claim."

The operation of the doctrine of equitable set-off was further considered in the "Aditya Vaibhav". In this case, the charterers claimed that the owners' breach of charter in failing to properly clean the vessel's holds delayed the vessel at Jeddah and caused them to suffer consequential loss and expense. They subsequently made deductions from hire by way of equitable set-off in respect of hire lost due to the vessel's lack of cleanliness and b) their consequential loss and expenses. The owners challenged the charterers' right to deduct for their consequential loss and expenses. The Commercial Court held that, although element b) of the charterers' cross-claim arose out of the same transaction as the owners' claim for hire, the owners' claim for hire could not be impeached because they were asking to be paid for a service which they had provided (i.e., full use of the vessel after cleaning). Thus, the charterers had satisfied the first but not the second of the requirements outlined by Lord Denning in the "Namiri" (supra).

The exact scope of application of this doctrine in the context of charterparty claims has not yet been established by the Courts and so it is difficult to provide more than general guidance from the few cases which have considered the issue. By way of example, equitable set-off has been permitted in relation to claims for breach of charterparty speed warranty (the "Chrysovalandou Dyo") and failure by the owners to load a full cargo (the "Teno"). In contrast, claims in respect of damage to cargo do not give rise to a right of set-off (the "Namiri", supra).

d) Quantification of the sum to be deducted

The judicial position on this issue is presently divided. In the "Namiri" (supra), Lord Denning expressed the view that the charterers are entitled to quantify their loss by a reasonable assessment made in good faith and deduct the sum so quantified from hire. In contrast, Lord Goff opined that, where the charterers decide to make a deduction from hire, they do so at their peril. The distinction between the two approaches is quite significant. Lord Denning's formulation means that the charterers will not be in breach of charter if their deduction turns out to have been wrongful provided they acted reasonably and in good faith in making it. The charterers are not so protected by Lord Goffs' formulation.

Off-hire

a) Off-hire events

Charterparties specify which events constitute off-hire events either by listing these events individually or by category. This is illustrated by clause 15 of the NYFO 46 form which provides as follows:

"That in the event of the loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost ..."

The clause clearly contains a list of specific off-hire events and also a category of events which fall within the scope of the phrase "or by any other cause". It seems to be accepted that the scope of this category is limited to other causes of a similar nature to those listed specifically by operation
of the ejusdem generis rule. Where, however, clause 15 is amended to read "or by any other cause whatsoever preventing the full working of the vessel", the category is not so restricted. The charterers bear the burden of proof and must demonstrate that the event in question is an off-hire event under the terms of the charterparty.

Many "Sea Venture" articles have been written dealing with specific examples of off-hire events and these are listed below should readers wish to refer to them: Vol. 7, page 39 (Off-hire provisions – section 15 of the NYPE form); Vol. 8, page 73 (Off-hire as a result of arrest); Vol. 11, page 67 (Operation of the off-hire provisions of NYPE form); Vol. 12, page 48 (Off-hire under the NYPE form); Vol. 15, page 72 (Time: delay due to bank cleaning – whether off-hire); Vol. 16, page 72 (Time: off-hire) and Vol. 17, page 100 (Timecharts: NYPE: whether interference by authorities is an off-hire event).

b) "Net loss of time" and "Period" off-hire clauses

A "net loss of time" off-hire clause is one which provides that the payment of hire shall cease for the time lost as a consequence of an off-hire event. Clause 15 of the NYPE 46 form has been held to be a net loss of time clause because the charterers are only entitled to place the vessel off-hire in respect of time lost due to the off-hire event (the "fraud"). However, it is important to note that the inclusion of the words "preventing the full working of the vessel" in clause 15 mean that hire becomes payable as soon as the vessel is again fully efficient even if time continues to be lost as a consequence of the original off-hire event (the "Manika M").

A period off-hire clause simply specifies the events which start and end the off-hire period without requiring the charterers to prove that any time was actually lost. An example of such a clause is "hire to cease from commencement of such loss of time until steamer is again in efficient state to resume service ..." (Tyndale v Anglo-Soviet[1]). Under this type of clause, the vessel will be off-hire until she is again fully efficient to perform the service required of her regardless of whether all this time is actually lost to the charterers as a consequence of the off-hire event. For example, a vessel which becomes a dead ship within the discharge port may cause the off-hire clause to be in effect, but congestion may mean that the vessel is fully repaired before there is any prospect of the vessel berthing. Whilst the charterers would suffer no actual loss of time due to the off-hire event, the vessel would be off-hire under a period off-hire clause. The position would be different if the off-hire clause was a net loss of time clause.

Payment of freight under voyage charters

At common law, freight is the consideration payable for the carriage of the goods to, and their delivery at, the destination. In the absence of any special contractual provision, freight is earned only when the goods are delivered at their destination.

Advance freight

Words such as "freight to be considered earned on shipment" are sufficient to alter the common law position that freight is payable on delivery (the "Loma"[2]). Several such "freight" clauses have been tested in the English Courts.

In the "Dominique"[3], the charterparty provided that "freight shall be pre-paid within 5 days of signing and surrender of final bills of lading, full freight deemed to be earned on signing bills of lading, discountless non-returnable, if vessel and/or cargo lost or not lost ...". The vessel loaded a full cargo and bills of lading were signed before the vessel left the loadport. A creditor arrested the vessel at an intermediate port where the vessel had called to stem bunkers. The owners indicated that they were unable and/or unwilling to continue the voyage with the result that the charterers were obliged to transship the cargo to a new vessel for on-carriage to the discharge port.

A dispute arose as to the charterers’ obligation to pay freight. The charterers argued that it was a condition precedent to their liability to pay the freight that the final bills of lading should have been signed and surrendered and the 5 day period completed. Since the owners had repudiated the charterparty before the end of the 5 day period, the charterers asserted that the freight was never earned. The owners’ bank, which had taken an assignment of all the vessel’s earnings, submitted that freight had been earned on the signature of the bills of lading and that the provision upon which the charterers relied merely established the time frame within which the freight had to be paid. The House of Lords found in favour of the owners, ruling that the freight was deemed to have been earned upon the signature of the bills of lading and that the charterers thereafter owed a debt to the owners (or their assignees) which did not have to be discharged until 5 days after the surrender of the bills of lading. Lord Brandon, who delivered the leading judgment in the House of Lords, held that the owners’ right to freight was not affected by their own repudiation of the charterparty.

In the "Karim Vats"[4], the charterparty contained a similar provision, under which freight was deemed earned as cargo was loaded. 95% of freight to be paid within 3 days of loading after completion of loading and surrender of signed bills of lading ... vessel and/or cargo lost or not lost. Balance of freight ... to be settled within 20 days after completion of discharge and Owners’ presentation of laytime statements from load/discharge port ...". The vessel was lost on passage and the owners claimed the 5% balance freight. The Court of Appeal found that the clear intention of the charterparty was that freight deemed earned as cargo loaded was to be paid by the owners and/or cargo lost or not lost. The mechanics of payment (i.e. 95% within 3 days of releasing the bills of lading and the 5% balance 20 days after completion of discharge) did not create a condition precedent to the owners’ right to recover such freight. Since discharge had never taken place, the Court of Appeal was prepared to infer a term into the charterparty effect that the balance freight should be paid within a reasonable time where the vessel was lost and therefore found in the owners’ favour. It is clear that the charterers would have prevailed if the freight clause referred to the 5% balance freight being payable after "safe arrival".

Deductions from freight

a) Deductions expressly permitted by the charterparty

The general rule is that freight, once earned according to the terms of the charterparty, is payable without deduction. Valid deductions may only be made if the charterparty contains express rights of deduction from freight: for example, clauses permitting deduction from freight in respect of the value of cargo short-delivered or of damage to cargo.

b) Deductions by way of equitable set-off

In the "Dominique" (supra), the charterers argued that they were entitled to set-off their claim for damages flowing from the owners’ repudiation breach of the charterparty against their liability in respect of freight payable to the owners. The House of Lords, however, held that the owners’ right to freight was unimpeachable and that charterers cannot exercise a right of set-off in equity in respect of damages for repudiation or non-repudiation breach of charterparty on the part of the owners. This should be contrasted with the position under time charterparties where the charterers may, in certain circumstances, deduct from hire by way of equitable set-off.

[1] [1976] 2 Lloyd’s Rep 362
[2] [1977] 1 Lloyd’s Rep 515
[3] [1982] 2 Lloyd’s Rep 140