

DAMAGES FOR CHARTERER'S
BREACH OF A VOYAGE
CHARTERPARTY

INTRODUCTION

Where a charterer of a vessel terminates a voyage charterparty, which is subject to English Law, prematurely they are prima facie liable to pay the ship-owner damages for breach of charterparty in a sum that represents the ship-owner's loss of gross profit. This is sometimes confused by a demand for payment of deadfreight (see below), but is in fact a different concept.

Difficulties arise when trying to quantify the damages payable to the ship-owner, especially where the ship-owner has arranged an alternative fixture in an attempt to mitigate his losses. In this case there are a number of factors which may affect the calculation of damages, these include the duration of the alternative fixture, the location of the vessel on completion of the alternative fixture, demurrage that would have been earned on the original fixture or was earned on the alternative fixture and fees and expenses that have been incurred.

All of the relevant factors and timings must be carefully considered to ensure that the charterer is paying and the ship-owner is receiving an amount of damages that is an accurate representation of the damages that would be awarded in arbitration taking into account all the relevant factors. In identifying this sum at an early stage expensive arbitration or litigation can be avoided resulting in a quick resolution and minimal legal fees.

BREACH OR DEADFREIGHT?

The substance of a voyage charterparty is the payment of lump sum freight for the carriage of cargo, however, if the charterer fails to provide a cargo the ship-owner is prevented from being able to perform the contract. In this situation the ship-owner would have no other option than to terminate the charter resulting in a breach of contract on the part of the charterer. In this situation the ship-owner is regarded as the innocent party.

Deadfreight clauses apply where the voyage goes ahead but with the vessel carrying a smaller quantity of cargo than the minimum quantity set in the charterparty. Deadfreight is not applicable in situations where no cargo is carried and the intended voyage does not take place.

DUTY TO MITIGATE

Where the charterer breaches/terminates a charterparty, the ship-owner is under a duty to mitigate his losses. This requires the ship-owner to act as a prudent person who will bear the loss himself. This usually means that the ship-owner will organise an alternative fixture at the earliest opportunity, even if this means steaming to another loading port or area to employ the vessel. Failure to take measures to find alternative work for the vessel could prevent the ship-owner from recovering the full loss of gross profit they have incurred from the charterer's breach.

GENERAL METHOD OF CALCULATING DAMAGES

Generally, the measure of damages recoverable by the ship-owner is defined as the difference between the contract and the market rates of freight, thus reflecting the measure of damages recoverable in the case of a failure to accept and pay for goods for which there is an available market. However, that is not usually the case where there is an available market and available cargo, meaning that, where the ship-owner is actively attempting to mitigate his loss, the vessel has to proceed to a different load port and a substitute fixture will often commence later. In these circumstances damages are normally calculated by making a comparison between the gross profit (namely freight, demurrage and other charges, less voyage expenses) which the Owner would have derived from the broken charterparty, and the gross profit which he has earned under the substitute charter or charters, the latter being apportioned so as to reflect the amount earned up to the date when performance of the original charter would have been completed. This calculation sometimes involves some assumptions, e.g. that the ship-owner would have used loading and discharge ports that would have imposed the greatest expense to the Owners and that the charterer would have used the entire laytime available.

It is often the case that alternative fixtures run on longer than the original voyage conferring an extra benefit upon the Owner by way of further profits earned outside the period of the original charter. The strict approach set out above does not take this into account; however, there is authority that suggests that this additional benefit may be taken into account if it can be shown that

the Owner would not have had this benefit *but for* the charterer's breach/termination.

OTHER FACTORS

Other factors that may influence the quantification of damages include detention, demurrage, wasted costs and location of the vessel.

Demurrage

The ship-owner may also be able to recover damages for demurrage if it can be shown that demurrage would have been earned had the voyage been carried out. It must be proved that it was more likely than not that demurrage would have been earned on the original voyage had it taken place.

Detention

This is a form of un-liquidated damages payable where it can be shown that the charterer would have caused delay to the voyage that was not provided for in the charterparty. This is usually charged at the demurrage rate, although it is arguable that the market rate for the vessel should apply where there is a large discrepancy.

Wasted Costs

If the charterer terminates a voyage charter at a very late stage the ship-owner may already have incurred some costs, these will be treated as wasted costs and will also be recoverable.

Location of the Vessel

Following an alternative fixture the vessel is often located in a different port than it would have been had the original charter been carried out. This could be in either the Charterer's favour or the ship-owner's favour when

calculating damages. If the vessel is located in a better position for finding alternative fixtures than she would have been under the original voyage an adjustment reducing the overall damages should be made to take this into account. This is because the ship-owner has been saved the expense of either idle time or the bunker costs of proceeding to another port. However, if the vessel is in a less desirable location for finding further work an allowance may be made for idle time and the bunkers required to proceed to a location where further work can be found. Evidence may be required on this point to help quantify the amount of the adjustment.

CONCLUSION

There are many factors which may affect the quantification of damages for breach of charterparty and the charterparty itself must be read carefully to take into account any express terms on this point. Some elements of the

claimable damages may not be an exact amount and the overall figure will often be subject to some negotiation and/or expert evidence in relation to the available markets for certain vessels.

We believe that engaging a specialist maritime lawyer at an early stage in this process can save time and effort to arrive at a sensible resolution expediently whether you are a charterer or ship-owner.

This article is intended only to give general guidance and you should always consult a lawyer with any particular problem you may have.

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