

DAMAGES FOR CHARTERER'S BREACH OF A TIME CHARTERPARTY

INTRODUCTION

This article considers the measure of damages a Ship-Owner is entitled to claim, under English Law, from a Charterer who prematurely re-delivers a vessel in breach of a Time Charterparty.

The Time Charter is often used to charter a vessel for a period of time which can range from a few months to several years. This means that damages can be substantial when the charter is terminated at an early point. Owners will want to claim what is due to them under the contract while the Charterer will make every effort to avoid paying, for example, four years' worth of charter payments for which they have not had the benefit.

For the sake of clarity parties must be careful to identify which party has breached the contract, which is not always clear, as only the 'innocent party' can claim damages. It is also important to establish whether a party has breached the contract or whether the contract has been frustrated.

BREACH OR FRUSTRATION?

The doctrine of frustration has been defined in a number of cases under English law, it can only really be determined on the individual facts of a case and it may be advisable to consult lawyers as to whether 'the doctrine of frustration' may be applicable.

Common examples of frustration could be the total loss or commercial destruction of the chartered vessel; requisition or detention of the ship for an extended period of time or that the voyage route may have become illegal, impossible or radically different. It must be something which is not a default of either party and something for which the contract does not make provision. It must be more than pressure from the expense or onerousness of the contract. It is an event that significantly changes the nature of the contractual rights, in a way not contemplated by the parties at the date of execution, making it unjust to hold the parties to their contractual obligations.

WHEN DOES A BREACH OCCUR?

A repudiatory breach is a breach of such significance the other party can treat the contract as having come to an end, terminating it and claiming damages. This will usually occur, in relation to Time Charters, when the Charterer purports to redeliver the vessel before they are entitled to under the terms of the charterparty, including prior to the expiry of a notice period. In these circumstances their conduct is a repudiation of the charterparty.

When this happens the Owner will have a choice; he can either accept redelivery of the vessel and bring the charterparty to an end by accepting the Charterer's breach, or refuse to accept redelivery of the vessel and hold the Charterer to the contract.

If the Owner decides to accept redelivery and termination of the contract his remedy will be in claiming damages calculated as set out below. However, if he decides not to accept redelivery and holds the vessel, crew and master at the Charterer's disposal, his claim will be for hire. Owners should be cautious about taking the second option where damages would be an adequate remedy and it is clear that the charterparty is dead.

DUTY TO MITIGATE

Following a breach by the Charterer of Time Charterparty, the court and/or arbitral tribunal will expect the Owner to have taken all reasonable actions to minimise his losses. This will usually involve re-chartering the vessel on a similar available market at the current rates. The ability of the Owner to do this will depend on the availability of a similar market for that vessel.

The Owner may choose to employ the vessel in a completely different manner, but does so at his own risk (explained further below). If the Owner fails to take measures to find alternative employment for the vessel, choosing instead to allow the vessel to remain idle for the duration of the charter period, he may be prevented from recovering the full extent of the losses from the Charterer.

GENERAL METHOD OF CALCULATING DAMAGES

Damages are calculated differently depending on whether there is a similar available market on which the vessel can be re-chartered on the date of termination of the charterparty. For this reason it could be said that the methods of calculating damages can be split into two

categories: (1) where there is an available market at the date of termination; and (2) where there is no similar available market for the vessel at the date termination.

(1) An Available Market is Available at the Date of Termination

In this case damages will be based on the difference between the anticipated profit under the original charter and the actual profit earned under a replacement charter during the remaining period of the original charter. This can also be phrased as the difference between the charterparty rate and the market rate of hire for that vessel.

The Owner may choose not to re-hire the vessel on a similar market but instead employ the vessel in a different way incurring greater or lesser losses than he would have done had he promptly re-chartered the vessel on a similar market. In the event that the Owner incurs greater losses, damages will still be assessed on the above basis.

However, it is arguable, although not settled law, that if the Owner reduces the losses he would have incurred by re-chartering on a similar market or even makes more money than he would have made on the original charter, damages may still be calculated and awarded on the above basis. This is because the decision to do this is the speculation and a risk of the Owner and not linked to the breach of charterparty. Despite this point being arguable, it may be difficult to apply in practice.

Assumed Date of Termination

It must be assumed that the Charterer would have terminated the charterparty at the earliest contractual opportunity.

Relevant Facts

All relevant facts in relation to the calculation of damages shall be taken into account at the time of assessment, even if they were not known at the date of termination. For example later events that would have given rise to an early termination will be considered to reduce the damages in the Charterer's favour, in accordance with the assumed date of termination above.

Owner's Benefit from the Termination

It can sometimes be argued that a substitute charter, extending beyond the original charter period, has provided the Owner with a benefit he would not have had but for the Charterer's breach. This can reduce the level of damages but the existence and value of such a benefit is a question of fact that turns on the circumstances of the individual case.

(2) No Available Market for the Vessel at the Date of Acceptance of Repudiation

Where no market exists at the time of acceptance of the repudiation of the charterparty damages will be calculated in order to place the Owner in the financial position that he would have been in had the original charter been carried out. An Owner must still make efforts to reduce his losses and act in a reasonable and commercial manner. For the purpose of calculating losses a comparison will be made between what he would have made under the terminated

charterparty and his actual losses up to the date on which the terminated charter would have ended.

In these circumstances the vessel may be placed on the spot market and involve the Owner using the vessel in a different way. Unlike the position in (1) above where there is an available market, this is done out of necessity rather than as a speculative decision by the Owner.

If a Time Charter market later re-emerges, the Owner is not compelled to consider placing the vessel back on the Time Charter market at the end of every spot fixture but he must do what is commercially reasonable. Where this happens the assessment of damages will be subject to the normal rules, including that where an Owner has unreasonably failed to mitigate his losses, he may not claim for self-induced loss. The revival of a market during the remaining period of a terminated charterparty will be relevant to mitigation.

A problem with this method is trying to calculate actual losses prior to the end of the term of the terminated charterparty, this may involve some prediction or the need to defer the calculation of damages until the period has expired.

CONCLUSION

There are a number of factors to take into account when calculating damages for a breach of a Time Charterparty. The sums of money at stake are often substantial and each party will want to consider every material fact and position at law in order to ensure that the correct measure of damages is used.

Owners must take all reasonable steps to reduce their losses in order to ensure a full recovery if the matter should proceed to arbitration and/or litigation. We believe that engaging a specialist maritime lawyer at an early stage can help to identify the likely measure of damages and which may facilitate the parties to negotiate a cost effective and expeditious settlement.

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