

## Charterparty Termination

TIMING IS OF THE ESSENCE

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### Introduction

When terminating the charterparty of a time chartered vessel, Owners must carefully consider the timing of withdrawal in order to avoid the waiver of their right to terminate. Owners must provide Charterers enough time to fulfil their responsibilities to avoid breach of charterparty and in addition they must ensure they do not wait too long to withdraw vessel as this may amount to a waiver of their right by affirming charter.

This matter was raised before the English Commercial Court in the case of *Parbulk II AS v Heritage Maritime Ltd SA (Mahakam)* [2011] EWHC 2917, which was heard on appeal from the London maritime arbitration. A dispute arose between the parties when Owners withdrew vessel as a result of Charterers' failure to pay several outstanding hire instalments. Charterers argued that Owners had waived their right to terminate the charter.

### The facts of the case

The parties had entered into a bareboat charterparty on an amended BARECON 2001 form. The vessel was chartered for the period of 60 months and it was agreed between the parties that hire would be payable to Owners twice per month.

The charterparty contained an anti-technicality provision providing Charterers with a three day grace period to make good any outstanding payments. Charterers would need to make payment within three days of receipt of Owners' written notice. Otherwise it will amount to an event of default under the charterparty. Owners would then be entitled to terminate the charter, withdraw the vessel and recover the outstanding amounts.

### Clause 46 – Events of Default

"46.1.1 If any instalment of Charter Hire or any other sum payable by the Charterers under this

Charter shall not be paid on its due date, or in the case only of sums expressed to be payable by the Charterers on demand, within five (5) Banking Days following the date of demand therefore, and such failure to pay is not remedied within three (3) Banking Days' of receipt by the Charterers of written notice from the Owners notifying the Charterers of such failure and requesting remedial action; or

46.2 The occurrence of an Event of Default shall entitle the Owners by notice to the Charterers with immediate effect to terminate the chartering of the Vessel under this Charter by withdrawing the Vessel from the service of the Charterers, and to recover any and all amounts due and payable hereunder and/or resulting from such termination."

Charterers had failed to make payment of four instalments and so Owners sent Charterers notice of default after each missed payment. Despite this, Owners continued the charter with an effort to reach a commercial arrangement with Charterers. However, Charterers failed to make payment of any of the instalments and subsequently a meeting was held between the parties and the Owners' solicitor with the aim of reaching an agreement. The meeting had no fruitful outcome and so Owners' solicitor sent a letter to notify Charterers that Owners were entitled to place them on notice and withdraw the vessel if no commercial proposal was made. With five instalments now outstanding, the Owners sent their final notice with reference only to the fifth instalment. When nothing was received at the end of the three days Owners terminated the charterparty.

The dispute between the parties was taken to arbitration where the tribunal decided in favour of Owners and awarded them the sum of USD27,031,759.04. The Charterers appealed against the award and argued that Owners had waived their right to terminate the charterparty by requesting payment for future hire and continuing charter despite being aware of Charterers' default.

## Further information

If you would like further information please contact:

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## The Commercial Court

On appeal, the court considered Charterers' argument that demand for future hire constitutes a waiver of Owners' right to withdraw the vessel. The court stated that Owners may have waived their right to terminate the charterparty for the first four outstanding instalments but their right to terminate remained with regards to the fifth instalment as a break in the pattern emerged when Owners served notice on Charterers, instructed their solicitors and made clear to Charterers that if payment was not received within the grace period they would arrest the vessel and terminate with immediate effect.

It is important to note that Owners had in each notice reserved their rights by stating that they reserved all their rights under the bareboat charter. However, the court did not consider this to be an effective measure to avoid the waiver of their rights. Furthermore, the court stressed that they considered Owners' termination notice against the wording of the charterparty and not solely based on the wording of the termination notice itself.

The court was satisfied that Owners' termination notice adhered to the charterparty provisions and Owners were entitled to terminate the charter on the basis of non-payment of hire in breach of the charterparty and their right to terminate remained with respect to the fifth and final instalment. On that basis, the court upheld the arbitrator's award and held that Owners had brought the charterparty to an end both at common law and terminated the contractually at the same time.

## Observations

The court and the tribunal have made clear that a fine line exists between a decision to terminate and Owners being in breach for terminating too early or too late. Owners must carefully consider the timing of withdrawal of vessel and ensure their actions do not manifest an intention to keep the charter alive. Furthermore, Owners must ensure when withdrawing vessel that it is done in line with the terms of the charterparty.