Payment of hire – is it a condition?
Spar Shipping v. Grand China Logistics[1]

Olivia Furmston
Legal Director
+44 20 3320 8858
olivia.furmston@ctplc.com

Nearly two years after the controversial decision in *The Astra*,[2] which found the punctual payment of hire under a time charter to be a condition of the contract, this obligation has been restored back to its original status – that of an innominate term.

A **condition** in a contract is defined as a promise or undertaking that is fundamental to the contract, *any* breach of which entitles the innocent party to terminate the contract; in addition to its right to claim damages.

Conversely, a breach of an **innominate term** gives the innocent party the right to terminate *only if* the breach is so serious that it deprives the innocent party of substantially the whole benefit of the contract; in addition to its right to claim damages.

Background facts

In the *Spar Shipping* case, the claimant owner had let, in 2010, three supramax bulk carriers to the defendant charterer using long-term time charters on amended NYPE 1993 forms. In April 2011, the charterer fell behind on hire payments and, despite its continuous apologies, the situation did not improve for the next six months. The owner sent regular anti-technicality notices until September 2011, when it gave notice of withdrawal with immediate effect.

Under guarantees obtained from both the parent company of the defendant and the defendant itself, the owner made two claims:

- The balance due under the three charters prior to termination. This is a standard contractual claim and was not controversial.
- 'Loss of bargain' damages for the remainder of the charter term(s). The recovery of future losses emerges either upon the breach of a condition or the repudiatory breach of an innominate term.

The question, therefore, was whether the punctual payment of hire amounted to a condition and, if not, whether regularly delayed payments of hire amounted to a repudiatory breach.

Is the payment of hire a condition?

Contrary to *The Astra*, the judge in *Spar Shipping* countered against the charterer's obligation to pay hire being a condition of the contract on two key grounds:

- First, one has to view any time charter in its entirety and, when it comes to any breach, decide whether the default in question deprives the innocent party substantially of the whole benefit of the contract. Here it was found that there was no evidence to suggest a single non-punctual payment of hire amounted to a repudiation.
- Secondly, commercial certainty could be, and is, achieved without the general classification of all payment clauses as being conditions. An owner's commercial risk in a hire relationship is to cover the ship's running costs, but its right to withdraw the ship upon default of a hire payment adequately protects this. The owner is thenceforth able to find another charterer and extract full hire charges elsewhere.

The club has covered *The Astra* decision in detail in its earlier publication, which can be found *here*.

Or, is it an innominate term?

Whilst accepting that the sole aim of the NYPE right to withdraw is to protect future performance of the contract, the judge in *Spar Shipping* commented that the language was neutral as to the common law rights of the parties. In fact, it was found that both the language and its interpretation suggested punctual payment of hire to be an innominate term for the following reasons:

- If payment of hire really was a condition of the contract, then there would automatically be the right to terminate and withdraw the ship upon non/late payment. However, in all time charters, there is the express provision as to withdrawal – indicating there wouldn't be such an entitlement absent such express wording.

- Most importantly, and the reason for anxiety post-*Astra*, payment of hire breaches can vary from the trivial (a few hours' delay) to the serious (outright refusal – namely, repudiation). Therefore, the classification of punctual payment as an innominate term is natural and logical. Indeed, situations where parties automatically terminate long-term charters after just a few moments' delay in payment should be avoided.

- Finally, commercial certainty is enhanced by the recognition that trivial delays should not trigger a rash and dramatic legal response. This is further achieved by the presence of anti-technicality clauses in charters, which act to define the seriousness of the breach. Recognising the vast array of possible situations, an anti-technicality notice helps to ascertain whether the breach should be considered repudiatory.

Conclusion

The *Spar Shipping* judgment restores the previously accepted view that punctual payment of hire is not a condition. Therefore, in order to recover future losses following a withdrawal, an owner must be able to demonstrate a default of sufficient seriousness amounting to repudiation by the charterer. 'Sufficiently serious' is defined as substantially the whole benefit of the contract. In this case, the owner was successful in its claim for future losses.

More generally, however, a failure to pay is not the same as a refusal to pay and can be effectively remedied by an owner's prompt withdrawal and the ship's rehire to a new charterer. It is not disputed that an owner is authorised to recover outstanding (earned) hire up to and until withdrawal. Following *The Astra*, it marks a welcome return to a much debated, but historically consistent, position.

1 [2015] EWHC 718 (Comm).
2 [2013] EWHC 865 (Comm).