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ΤΙΤΛΟΣ

ΦΙΛΙΠΠΟΣ ΜΑΖΑΡΑΚΗΣ

Μεταπτυχιακή Διατριβή που υποβάλλεται στο καθηγητικό σώμα για την μερική εκπλήρωση των υποχρεώσεων απόκτησης του μεταπτυχιακού τίτλου του Διϊδρυματικού Προγράμματος Μεταπτυχιακών Σπουδών «Νέες Τεχνολογίες στη Ναυτιλία και τις Μεταφορές» του Τμήματος Ναυτιλίας και Επιχειρηματικών Υπηρεσιών του Πανεπιστημίου Αιγαίου και του Τμήματος Μηχανικών Βιομηχανικής Σχεδίασης και Παραγωγής του Πανεπιστημίου Δυτικής Αττικής.

Δήλωση συγγραφέα διπλωματικής διατριβής

Ο/Η κάτωθι υπογεγραμμένος Φίλιππος Μαζαράκης, του Κωνσταντίνου, με αριθμό μητρώου 8056112 φοιτητής του Διιδρυματικού Προγράμματος Μεταπτυχιακών Σπουδών «Νέες Τεχνολογίες στη Ναυτιλία και τις Μεταφορές» του Τμήματος Ναυτιλίας και Επιχειρηματικών Υπηρεσιών του Πανεπιστημίου Αιγαίου και του Τμήματος Μηχανικών Βιομηχανικής Σχεδίασης και Παραγωγής του Πανεπιστημίου Δυτικής Αττικής, δηλώνω ότι: *«Είμαι συγγραφέας αυτής της μεταπτυχιακής διπλωματικής διατριβής και ότι κάθε βοήθεια την οποία είχα για την προετοιμασία της είναι πλήρως αναγνωρισμένη και αναφέρεται στην διατριβή. Επίσης έχω αναφέρει τις όποιες πηγές από τις οποίες έκανα χρήση δεδομένων, ιδεών ή λέξεων, είτε αυτές αναφέρονται ακριβώς είτε παραφρασμένες. Επίσης βεβαιώνω ότι αυτή η διατριβή προετοιμάστηκε από εμένα προσωπικά ειδικά για τη συγκεκριμένη μεταπτυχιακή διπλωματική διατριβή».*

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2. Introduction and Methodology

Maritime industry constitutes a capital-intensive business which includes high value contracts. The fact that there are sizable time-lag effects for the construction of new vessels and also market sentiment effects, makes the booms and the recessions more intense.[1] Considering that the rates of freight in the market is going up and down, it proves how the parties' investment behavior within the maritime industry is affected. Many changes have occurred in the global economy during last decade and it is crucial to examine how vessel owners and charterers are influenced in regards to how they respond to such an unstable environment.

The obligation of paying hire of time charterparties constitutes one of the most significant charterers' obligations against the vessel-owners. Hire functions as an exchange

[1] Costas Grammenos, The Handbook of Maritime Economics and Business, (2nd edn, Informa 2010) 252

for the vessel-owners' services within time charterparty and it also covers their expenses that arise in relation to the relevant services they provide. Thus, charterers' failure to provide payment of hire can create problems in vessel-owners' everyday financial operation, as well as to expose them to grievous cash flow problems.

The significance of the charterers' obligation to provide hire payment along with their obligation to correspond to the vessel-owners' entitlement to timeous hire payment, indicates the importance of available remedies in cases of charterers' failure of payment. The vessel-owners need protection for their right to receive timeous hire payment and the charterers need clarity in a legal position where they have failed to provide hire payment. Therefore, it is crucial for both owners and charterers to have available remedies for such cases.

The English legal framework for the available remedies to the charterers' where there is default in payment of hire in time charterparties can be characterized as dual. It should be noted that there are remedies available at common law along with contractual remedies available through contractual terms.

As described above, the maritime market includes high value contracts and hence any financial disputes between the parties can be proved intense. Within a buoyant market, vessel-owners may wish to get back their ships for fixing them at a better price. However, within a falling market, charterers might not be pleased with the existing hire rate and their wish is to either early redeliver or to negotiate again with the shipowners. An obvious example of the extent of the often-arising financial conflict of interests occurring between the charterers and the shipowners is the Baltic Dry Index fluctuation of 2008[2]. BDI was more than 10 thousand in 2008, while in 2017, its range was between 1,109 and 1,296. It is possible for a charterer involved in a time-chartered bulk carrier which took place in 2008 and for ten years to be unwilling to pay the entire hire promptly or at all. Due to the collapse of the shipping market in 2008, there were many charterers who were locked in durable time charters. However, as they are parties of a charter party which binds them, charterers have to examine all the potential options before acting. When there is a dispute of paying hire promptly or at all, the

[2] Mathieu Kissin, 'Challenging the legal and commercial justification for reclassifying payment of hire as a condition' [2013] 27 ANZ Mar LJ 82

vessel-owner is entitled to either lien the cargo[3] or to terminate the service or to proceed to ship's withdrawal.[4]

The question arising from the latest remedy is whether a shipowner would be entitled to claim damages for any upcoming losses. The recent contrasting decisions of *The Astra* case[5] and *The Spar Shipping* case[6] confused the maritime industry, revealing the relevant legal gaps regarding the shipowner's right on claiming damages for future losses in case of a hire payment dispute. In *The Astra* case[7], the court stated that the charterer's obligation to pay hire constitutes a condition of the contract and enables the shipowner to recover any future losses automatically, while in *The Spar Shipping*[8] case, the court decided that the obligation to pay hire constitutes an innominate term, which restricts the shipowner's ability to recover future losses.

The purpose of this dissertation is to present a critical analysis of the charterer's obligation to continuously pay hire in time. It aims to clarify and to analyze any relevant gaps, by including relevant case law indications, along with legal and regulatory framework challenges and by examining the remedies available to both the charterer and the shipowner in a case of a hire payment dispute, along with the classification of the obligation to pay hire.

The research will examine the relevant aspects and gaps within the regulatory framework of the charterer's obligation to pay hire. While quantitative methods are more appropriate in regard to the issues' quantification through the application of numerical data and, or, statistics, such a large research sample does not look necessary at this point. Hence, for the purposes of this dissertation a qualitative methodology has been selected, providing an efficient way of analyzing and indicating the issues, opinions as well as the motivations of the involved parties. Secondary data along with qualitative information were gathered through relevant regulatory and case law.

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[3] Julien Rabeux, 'Withdrawal and suspension of service of a ship in a nutshell' [2016] < http://www.westpandi.com/globalassets/about-us/claims/claims-guides/west-of-england-defence-guide---withdrawal-and-suspension-of-service-of-a-ship-in-a-nutshell.pdf> accessed 27 Nov 2020
[4] Ibid 3
[5] *The Astra* [2013] EWHC 865 (Comm)
[6] *The Spar Shipping* [2016] EWCA Civ 982
[7] Ibid 5
[8] Ibid 6

3. Chapter 1: The obligation to pay hire in time

3.1 The nature of time charterparties and the charterer's obligation to pay hire

The importance and features of the charterer's obligation to pay hire are primarily governed by the type of the time charterparty. A time charterparty can be described as a certain period contract for the use of a ship under which, in exchange of hire payment, the ship's employment is controlled based on the charterers' orders, while the vessel-owners retain its possession, providing the crew and paying the related running costs, but characteristically excluding certain voyage costs, as for instance, fuel and cargo relevant changes which are covered by the charterers.[9] The exact estimation of costs along with the responsibilities between the parties are determined through the chapterparty clauses. However, the primary characteristic of time charterparty is the fact that they constitute a contract of services, based on which the vessel-owners in return for the charterers' payment, are obliged to provide services for the vessel and its crew, such as to earn capacity of the vessel, available to the charterers[10]. Consequently, it is clear from its definition that during the participation in a charterparty, which is a contract of services, the possession of the vessel is not transferred to the charterers. It should be noticed that a time charterparty is to be different in nature from demise charteparties, which constitute contracts of leasing a vessel based on which of the charterers gain possession of the vessel, and additionally provides its own staff members to operate her.[11]

In regard to its function, the charterers are entitled to manage the ship as to its commercial employment, for instance, they are entitled to give orders in regards to the cargo loading and the planned voyages, and are obliged to pay the specified hire, while the vessel-owners are obliged to perform the agreed services for the charterers. However, if we see it

[9] Julia Cooke, Tim Young, Michael Ashcroft, "Voyage Charters" [2014]
[10] *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694
[11] Terence Coghlin, Julian Kenny, Andrew Baker, John Kimball, Thomas H. Belknap, "Time Charters" [2014]

from its legal perspective, there is an exchange of promises that takes place; vessel-owners promise to provide services of a vessel and its crew to charterers in exchange of their promise to pay hire. Respectively, hire functions as consideration provided by the charterers to the vessel-owners for the availability and the services of a vessel.[12]

In consequence of the allocation of functions taking place between the charterers and the vessel-owners in a time charterparty, it comes out that the charterers are those who take all the risks related to the vessel's commercial operation, meaning that the charterers have the entire benefit of the incomes from the ship or, in contrast, they have all the detriment, in cases where the trading of the ship ends up to be unprofitable because of adverse market conditions. This is why the payment of hire in time charterparty is commonly calculated per time unit (such as per day, week, month etc.), independently of the actual earnings of the ship, and is agreed in advance. Through this way, the vessel-owners entering a time charterparty, are able to avoid the commercial risks related to the trading of the ship, as well as to receive the benefit of consistent and defined cash flow, while the charterers through this payment method get the right to exploit the ship as a revenue-producing chattel.[13]

Therefore, from a financial perspective, payment of hire operates as remuneration for the vessel-owners' services in a time charterparty, while it covers the vessel-owners' service-related expenses. In this view, charterers' obligation of hire payment constitutes a significant role on the vessel-owners liquidity as well as on their ability to perform the agreed services.[14] Nonetheless, there is not a common and definite answer in regard to whether the charterers' hire pay and the vessel-owners services are interdependent, making payment a condition precedent to the services.

Notwithstanding, from a legal perspective, the hire payment is regardless of the provided services and the expenses being covered by the vessel-owners. This is indicated by the nature of the time charterparty, along with the allocation of the relevant risks between the parties and the fact that the payment of the hire takes place upon the services of the vessel and

[12] *Tankexpress* v. Compagnie Financière Belge des Pétroles (1948) 82 Ll.L.Rep. 43 (H.L.).
[13] Ibid 11
[14] *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694

its crew availability to the charterers. In addition, this means that, if not several exceptions apply, hire payment is made for the entire contractual period between the vessel's delivery and redelivery. Thus, the charterers' obligation to pay hire can be characterized as continuous as well as unconditional.[15]

A further significant legal characteristic of the charterer's obligation to pay hire seems to be an absolute obligation. This means that, if hire payment is not provided on time, charterers are considered to be defaulted, for example being found in breach of the time charterparty, independent of fault.[16]

3.2 <u>Classification of the charterer's obligation to pay hire</u>

Following the above analysis, the question arising is whether the shipowners have the right to claim damages for any loss of bargain in a case where there is not an expressed term in the contract. With the existence of an expressed term in the charterparty that the time of payment is important, as illustrated in *Lombard North Central plc v Butterworth*[17], any delay of payment would constitute a problem arising on the root of the charterparty. This view is also supported by Poole.[18] Firstly, any loss of bargain taking place in hire case, is subsequent to the market rate differentiation during the withdrawal compared to the higher charter rate, being estimated based to *The Elena D'Amico* Principle[19]. This principle indicates that any future losses are examined from the initial charter hire rate and the relevant charter lower rate for the time between the termination and the arranged expiry.

The actual question arising is as to whether the charterer's obligation to promptly provide payment for the hire constitutes a condition of the subsequent contract. If the answer

[15] Ibid 11
[16] Ibid 11
[17] *Lombard North Central v Butterworth* [1987] QB 527.
[18] Jill Poole, Textbook on Contract Law (13th edn Oxford University Press 2016) 307
111 Koch Marine Inc v D'Amica Societa di Navigazione ARL; (The Elena D'Amico) [1980] 1 Lloyd's Rep 75
[19] *Koch Marine Inc v D'Amica Societa di Navigazione ARL;* (The Elena D'Amico) [1980] 1 Lloyd's Rep 75

is positive, any failure of the charterer to proceed with hire payment promptly will lead to contract termination along with the recovery of future losses. In case the answer is negative and the obligation to pay hire constitutes an intermediate term, then the shipowners will have the right to terminate the charterparty because of a payment dispute, but they will not have the automatic right of claiming for future damages. However, claiming for future damages is possible if the shipowners can provide evidence that the payment dispute caused the repudiation or renunciation of the charterparty, even if this is a rare case.[20]

Commonly, based on U.K. law, contractual terms are classified as condition or as warranty. As analyzed in *Hong Kong Fir* by Lord Diplock: "No doubt there are many simple contractual undertakings, sometimes express but more often, because of their very simplicity ('It goes without saying') to be implied, of which it can be predicated that every breach of such an undertaking, must give rise to an event which will deprive the party not in default of substantially, the whole benefit which it was intended that he should obtain from the contract and such a stipulation, unless the parties have agreed that breach of it, shall not entitle the non-defaulting party to treat the contract as repudiated, is a 'condition'. So too there may be other simple contractual undertakings of which it can be predicated that no breach can give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and such a stipulation, unless the parties have agreed that breach of it shall entitle the non-defaulting party to treat the contract as repudiated, is a 'warranty'".[21] Through this case, Lord Diplock found the opportunity to illustrate an additional classification category by stating that : "There are, however, many contractual undertakings of a more complex character which cannot be categorized as being "conditions" or "warranties" ... Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior

[20] Holman Fenwick Willan, 'Payment of hire is a condition – An end to a charterer's ability to deduct from hire?' [2013]
[21] *Hong Kong Fir Shipping v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26

classification of the undertaking as a "condition" or a "warranty""[22]. Notwithstanding that Lord Diplock did not mention the term "innominate" or "intermediate" the latest category is known as such. The "innominate term" was initially mentioned in *L.G. Schuller A.G. v Wickman Machine Tool Sales Ltd.*[23]In the latter case of *Bunge v Tradax*, it was explained by Lord Wiberforce that courts "should not be too ready to interpret contractual clauses as conditions"[24] and he also mentioned that himself had commended the extended flexibility for contracts that HK points the way. It should be noted that the mentioning to the term "condition" is not necessary or conclusive[25]. If the courts decide that there is a term "of the essence" of the contract, they consider it as a condition.[26]

In addition, Professor Andrew Burrows has provided a short but inclusive and well-established analysis of the existing differences of the terms, explaining that: "A condition is a major term of the contract any breach of which entitles the innocent party to terminate the contract… a warranty is, in contrast, a minor term of the contract such that no breach will entitle the innocent party to terminate the contract.

An innominate term (sometimes referred to as an 'intermediate term') is neither a condition nor a warranty; and it would appear that most terms are now regarded as innominate. Where a term is innominate, the question as to whether the contract can be terminated turns on the seriousness of the consequences of the breach (judged at the time of the termination taking into account what has happened and is likely to happen ....) rather than on the importance of the term broken ..."[27].

The classification of terms is crucial, for courts to be able to impose an appropriate remedy for any breach.[28] It can be noticed that even if the payment obligation is classified as

[22] Ibid 21
[23] *L.G Schuler A.G. v Wickman Machine Tool Sales Ltd.* [1973] 2 Lloyd's Rep 53
[24] *Bunge Corporation v Tradax Export S.A.* [1981] 2 Lloyd's Rep. 1
[25] Ibid 23
[26] Ibid 24
[27] A Restatement of the English Law of Contract (Oxford University Press 2016) 113-114
[28] Yvonne Baatz, 'Construction of terms in maritime contracts and remedies for their breach' [2013] 19(3) JIML 209

innominate term, the vessel-owner will not be able to be excluded from claiming any damages according to the *Hadley v Baxendale*[29] Principle, which supports that the innocent party is entitled to claim any subsequent damages from the party who breached the contract, if that party could foresee that upcoming damages would occur from his breach. That principle was certified in the latest case of *The Achilleas*[30]. Based on *The Golden Victory*[31] case, which regarded damage occurred due to early redelivery, the compensation for the innocent party suffering damages from repudiatory breach of contract comes from the loss of bargain.

This is going to be analyzed based on the Principle, stated by Lord Scott, decided in *The Golden Victory*[32] case "The lodestar is that damages should represent the value of the contractual benefits of which the claimant had been deprived by the breach of contract, no less but also no more".

If the hire payment as an innominate term is taken for granted, following a payment dispute the shipowners will have the right to claim for future damages, assuming that they can provide evidence that the breach is either repudiatory or renunciatory[33]. Consequently, the previous was an actual breach of contractual term, causing crucial consequences to the other party and the latest was an anticipatory breach of the contract, whereas the breaching party provided clear intention to the breached party about him being unwilling to perform the contract at all or partly. In both cases, the breached party has the right to terminate the existing contract and proceed in claiming for future damages.

Furthermore, the test of indicating repudiatory conduct of a party has been established by Buckley LJ as it follows: "Will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to his remedy in damages as and when a breach or breaches may occur? If this would be so, then a repudiation has taken

[29] *Hadley v Baxendale* [1854] EWHC J70
[30] *Transfield Shipping Inc v Mercator Shipping Inc;* (The Achilleas) [2008] UKHL 48
[31] *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha*; (The Golden Victory) [2007] 2 AC 353
[32] Ibid 31
[33] Ibid 31

place"[34] Therefore, the intention of a party to not perform the contract or not to perform the contract as agreed makes the specific party guilty for anticipatory breach of the charterparty and entitles the breached party to consider it as renunciation.[35] Also, as stated in the *Bulk Uruguay*[36] case, "the anticipated breach must be breach of a condition, or breach of an innominate term which goes to the root of the contract or deprives the innocent party of substantially the whole benefit of the contract", for the non-breaching party to have the right to terminate the contract without the inclusion of express term. Considering the above, it can be noticed that classification of hire payment constitutes "a question of money"[37]

It is important to separately consider the views for innominate and for condition, in order to provide a clearer classification of the charterer's obligation to pay hire. The first judge who referred to that obligation of payment, Brandon J, in the case of *Brimnes*[38] supported that there is no element in Clause 5, which illustrates clearly "that the parties intended the obligation to pay hire punctually to be an essential term of the contract, as distinct from being a term for breach of which an express right to withdraw was given".[39] Brandon J's decision was certified by the Court of Appeal, however they did not mention at all the classification of terms. It has been argued that this silence shows approval on his classification view.[40] In addition, the Sales of Goods Act 1979[41] supports in regard to the stipulation of time that; expect of cases where there is a clearly different intention obvious from the terms included in the contract, requirements regarding the time of payment do not constitute the importance of a contract of sale, and that; whether any further requirements for time are or not of the significance of the contract of sale, depends on the relevant terms included in the contract.[42]

[34] *Decro-Wall International S.A. v. Practitioners in Marketing Ltd., [1971]* 1 WLR 361 380C
[35] *Universal Cargo Carriers Corporation v. Pedro Citati* [1957] 1 Lloyd's Rep. 174
[36] *Geden Operations Ltd v Dry Bulk Handy Holdings Inc;* (M/V "Bulk Uruguay") [2014] 2 Lloyd's Rep. 66
[37] Ibid 2
[38] *Tenax S.S. Co v The Brimnes;* (The Brimnes) [1973] 1 WLR 386
[39] Ibid 8
[40] Ibid 2
[41] Sales of Goods Act 1979
[42] Ibid 41

Further judges have agreed with and supported Brandon J's view. For instance, judge Donaldson J, had expressed a similar opinion in the previous case of *Georgios C*[43] that "It is not of the essence of the contract in the sense that late payment goes to the root of the contract and is a repudiating breach giving rise to a common-law right in the owners to treat the contract as at an end. The right to withdraw the vessel and thus bring the charter-party to an end is contractual...".[44] In that case it was also supported by Denning MR that "The effect of a stipulation as to time always depends on the true construction of the contract. A default in payment does not automatically give the other a right to determine it. Usually it does not do so. It only does so if there is an express provision giving the right to determine, or if the non-payment is such as to amount to a repudiation of the contract".[45] A consequent question arisen and asked by Mocatta J in the case of *Agios Giorgis*[46] regarded the reason of including withdrawal clauses in the contract if the payment obligation constitutes a condition. In the latter case of *The Kos*[47]the judge Smith LJ supported that a failure to provide payment of hire on time constitutes an intermediate term breach, thus is not necessary repudiatory and alone does not provide the owner with the right to claim damages for any loss occurring due the termination of the contract.[48] In the same case, Lord Sumption supported that if there is a charterer's failure to provide hire payment at the time it is due, this does not entitle the owners to claim damages for loss of bargain, neither for any expenses of the termination just because the vessel owners' respond is to withdraw the vessel. This happens because the non-payment alone destroys neither the bargain nor the occasion expenses, except of cases where there is a repudiation that owners of the vessel have accepted as such.

Another case through which it was illustrated that the owners' withdrawal when there is a hire payment dispute deprives them the entitlement to future losses, was the *Antonios M Mavrogordatos*[49], where it was supported that "The non-payment of the hire was not the cause of the loss, if any, incurred by the owner...The real cause was his own act in withdrawing his ship of his own volition...Having done that act, presumably with a just view

[43] *Georgios C* [1971] 1 Lloyds Rep 7
[44] Ibid 43
[45] Ibid 43
[46] *Steelwood Carriers Inc. v Evimeria Cia. Nav. S.A.;* (The Agios Giorgis) [1976] 2 Lloyd's Rep 192
[47] *ENE 1 Kos Ltd v Petroleo Brasileiro SA; (*The Kos) [2010] 2 Lloyd's Rep. 409
[48] Ibid 47
[49] *Italian State Railways v Mavrogordatos and Another* [1919] 2 KB 305

of his own interest, he cannot rely upon it as giving him a right to damages".[50] Also, in *The Riza and Sun*[51] case it was decided that in cases where a ship is withdrawn by its owner due to the charterer's failure to pay hire on time, the owner is entitled to recover the money of the hire up to the time of withdrawal. It should be additionally observed that Wilson as well as the leading book Time Charters support that the obligation to pay hire is an intermediate term.

Moving to the other view, it has been noticed through several judicial dicta that the inclusion of the owners' entitlement to withdraw the ship into the charterparty makes the hire payment obligation a "condition with default consequently repudiatory"[52]. Observably, Lord Diplock is of the view that time is very important in the charterparty in terms of the hire payment. Specifically, he stated in the case of *United Scientific Ltd v Burnley Borough Council*[53]that "in a charterparty a stipulated time of payment of hire is of the essence". Furthermore, in the case *The Afovos*[54], Lord Diplock supported that the second part of Clause 5[55] aims to expressly provide the owners' right in such cases where the charterer fails to fulfill his primary obligation to pay a hire instalment on time and that the owner have the right to see such a breach as being a breach of condition. Following the case *The Scaptrade*[56], Lord Diplock found the opportunity to comment that the anti-technicality clauses are imported in order to make time of highly importance of the charterparty. He specifically stated that "As is well-known, there are available on the market a number of so-(mis)called "anti-technicality clauses", such as that considered in The Afovos, which require the shipowner to give a specified period of notice to the charterer in order to make time of the essence of payment of advance hire; but at the expiry of such notice, provided it is validly given, time does become of the essence of the payment".[57] His view was also supported by Eder J[58].

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[50] Ibid 49
[51] *Petroleum Shipping Ltd. v Vatis* (Trading as Kronos Management) (The Riza) Liner Shipping Ltd. v Same (The Sun) [1997] 2 Lloyd's Rep. 314
[52] Rhidian Thomas, Legal issues relating to time charterparties (Informa 2008) 134
[53] *United Scientific Ltd v Burnley Borough Council* [1978] AC 904
[54] *Afovos Shipping Co S.A. v R. Pagnan & F. Lli;* (The Afovos) [1983] 1 Lloyd's Rep. 335
[55] New York Produce Exchange Form 2015
[56] *Ibid 14*
[57] Ibid 54
[58] *Parbulk II A/S v Heritage Maritime Ltd SA;* (The Mahakam) [2012] 1 Lloyd's Rep

Moreover, in the case of *Bunge v Tradax,*[59] it was expressed by Lord Roskill, with who Poole[60] agrees, that the House of Lords "has recently reiterated in a series of cases arising from the withdrawal of ships on time charter for non-payment of hire the need for certainty where punctual payment of hire is required and has held that the right to rescind automatically follows a breach of any such condition".[61] In the case *Latvian Shipping*[62], which regarded the buyer's failure of payment despite the inclusion of a relevant termination clause, Rix LJ stated: "Although the point has not been decided and is perhaps controversial, there must be a good argument that it follows that the express right to withdraw in the case of unpunctual payment under such a clause is a condition of the contract, breach of which is in itself repudiatory". In the similar case of *Scocznia Gdynia*[63], it was decided that an ill-timed vessel delivery from the shipyard is a breach of contract, that is crucial and goes at the contract's roots, entitling the vessel-owner to terminate that contract and require future losses.

Nonetheless, as payment has not been officially established as a condition, the entitlement to face such a breach as repudiatory is advantageous on the contractual entitlement of withdrawal, as the former permits damages to be recovered. Thus, the judicial dicta indicate that these powers must be analogous. However, dicta are not conclusive or convincing. Therefore, there is a remaining question on whether a withdrawal clause can alone provide that the charterers' obligation to pay is a condition.

3.3 Remedies for charterer's breach of obligation to pay hire

It is important to examine the available remedies an owner might have in a situation where the charterer breaches his obligation to pay hire. Except of the primary available

[59] Ibid 59
[60] Ibid 18
[61] Ibid 18
[62] *Stocznia Gdanska SA v Latvian Shipping Co* [2002] 1 Lloyd's Rep 436
[63] Ibid 62

remedy of an unpaid owner to withdraw the vessel, he is also entitled to exercise a lien over the cargoes or to put the vessel on a sub-hire.

As Clause 23 of the NYPE 2015 states: "The Owners shall have a lien upon all cargoes, sub-hires and sub-freights (including dead freight and demurrage) belonging or due to the Charterers or any sub-charterers, for any amounts due under this Charter Party...".[64] In practice, the entitlement to a lien can give a faster solution to the vessel owner, comparing to withdrawal of the vessel, because he is able to save time and could also be more effective as a solution, especially in situations of bankrupt head charterers. There are two different sources of income for the head-charterers using the owners' ship; they can carry cargo for their personal interest and they can use the vessel for earning income through freight either from bills of lading, from a sub-voyage charter, or from a sub-time charter.

Commonly, owners own a lien over the cargoes of a time charterparty[65]. Judge Grose J has well-described a lien's nature on cargoes: "A lien is a right in one man to retain that which is in his possession belonging to another, till certain demands of him the person in possession are satisfied".[66] An owner's right of lien is not possible to be exercised before hire payment is due[67]. Also, an owner cannot exercise his lien against a future debt. They are only entitled to exercise their lien over the cargo when they still own possession of the cargo. When there is delivery of the cargo to the party involved, then there is not an exercisable right to lien. An owner has the right to lien solely on charterer's cargo, except if there is a bill of lading on the charterparty that incorporates the lien clause[68]. In such a case, the owner has the right to also lien over the consignee's cargo. If there is not any specific wording indicating otherwise, the owner is not entitled to sell the cargo in question, for obtaining the remaining debt amount. The owner can even be liable against the consignee, for any potential damage or loss of the cargo, if it occurs while the cargo is under lien. Thus, the owner has to be extremely cautious with the cargo. It should be noted that, the fact that ship should be rented

[64] Ibid 55
[65] *Hammods v Barclay* [1802] 2 East. 227
[66] Ibid 65
[67] Ibid 65
[68] Ibid 65

during the period that the right to lien is exercised constitutes a pre-requirement for its validity[69].

A lien that exists either on sub-hire or on sub-freights entitles the owner to claim any costs of the sub-hire or of the sub-freights, that are possible to be paid from the sub-charterer to the other charterer clearing any losses of unpaid hire of the head charterparty. Judge Mocatta J explained in *Richmond Shipping Ltd*[70] that a "lien operates as an equitable charge upon what is due from the shipper to the charterer". It has also been explained that a lien functions as an equitable assignment, aiming to secure the charterer's debt. [71] Like in prior type of lien, related contractual provisions are often expressed.[72] If there is not expressed wording within the charterparty indicating otherwise, liens on sub-hire party cannot be covered by liens of sub-freights based on *The Cebu*[73] case as well as on *The Bulk Chile*[74] case. Based on the NYPE form, vessel-owners have a right on "any amounts due under this Charterparty". Different types of disbursements made from the owner, along with bunker payments are included.[75]

Rationally, the maximum amount of money that can be retained is the amount of unpaid hire of the head time charterparty until the time the entitlement to lien is exercised. The sub-hire liens constitute contractual rights, however, they are not possessory as the liens on cargo. Specifically, the owner is entitled to intercept funds, that are shifting from the sub-charterer to the contractual charterer. Based on *The Spiros C*[76] case, an owner has the right to exercise his lien to the full extend on sub-freights, in cases where charterers are not really in default. In case the lien is not applied as demanded in advance of the sub-freight payment of the third party to the head charterer, entitlement to lien is lost.[77] In *The Spiros C*[78] case was

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[69] Olivia Furmston and Annie O` Sullivan, 'Liens on cargo' (March 2015) <http://www.standard-club.com/media/1665027/defence-class-cover-liens-on- cargo.pdf> accessed 02 January 2020
[70] *Richmond Shipping Ltd v D/S and A/S Vestland;* (The Vestland) [1980]
[71] Ibid 70
[72] Ibid 70
[73] *Itex Itagrani Export S.A. v Care Shipping Corporation;* (The Cebu (No. 2)) [1990] 2 Lloyd's Rep. 316.
[74] *Dry Bulk Handy Holding Inc. and another v. Fayette International Holdings and another* (The Bulk Chile) [2013] EWCA Civ 184
[75] Ibid 55
[76] *Tradigrain SA and Others v King Diamond Marine Ltd; (*The Spiros C) [2000]
[77] Ibid 76
[78] Ibid 76

also stated by Rix LJ that: "The shipowner perfects his right of lien by giving notice to the debtor: if the notice is in time to pre-empt payment of the relevant sub-freight, then the shipowner is entitled to payment from the debtor, even though he otherwise has no contractual relationship with him. But if the shipowner's notice to pay comes too late, and the sub-freight has already been paid, then the lien fails to bite on anything".[79] Conclusively, in case the sub-charterer decides to ignore the notice of lien and he provides payment to the head-charterer for the freight, then the owner is entitled to claim against the sub-charterer for the sub-freight amount, independently of whether the sub-charterer has already paid the debt to the head-charterer[80].

In regard to the primary remedy, it was previously described that NYPE forms clearly specify the owner's entitlement to withdraw the vessel in the absence of payment. This entitlement is additionally specified in all the standard forms of the time charter. It is very important for the vessel-owners to receive regular as well as in advance payment for the hire, because of the running everyday operating costs along with further costs, such as loans. In the case of *Tankerexpress A/C v. Companie Financiere Belge des Petroles S.A*[81] it was explained by Lord Wright that "The importance of this advance payment to be made by the charterers, is that it is the substance of the consideration given to the shipowner for the use and service of the ship and crew which the shipowner agrees to give. He is entitled to have periodical payment as stipulated in advance of his performance so long as the charterparty continues. Hence the stringency of his right to cancel".

Observably, withdrawal can be attractive at periods when there is a rise in the market. This has been also commented by Lord Denning MR in the case of *Tropwood AG of Zug v Jade Enterprises Ltd*[82]as follows: "When the market rates are rising, the shipowners keep close watch on payment of hire. If the charterer makes a slip of any kind-a few minutes too late - or a few dollars too little - the shipowners jump on him like a ton of bricks".[83]

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[79] Ibid 76
[80] Ibid 76
[81] Ibid 12
[82] *Tropwood AG of Zug v Jade Enterprises Ltd;* (The Tropwind No 2) [1982] 1 Lloyd's Rep 232
[83] Ibid 82

Nonetheless, in the cases of *Astra*[84] and *Spar Shipping*[85], that are going to be separately analyzed below, the withdrawal occurred during falling market.

Owners must be very careful, since an unjustified withdrawal can lead to their own repudiatory breach of contract. When a withdrawal takes place, the contract comes to an end and it enables the damaged party to be free of his obligation to act, while the other party is not. The withdrawal has to be final, as temporary withdrawal is not allowed, except if an expressed term in the contract indicates the opposite. This has clearly been indicated by Donaldson J, in the case of *The Michalios Xilas*[86]*;* "temporary withdrawal of a vessel for non-payment of hire is a right which could only exist if specially conferred upon the owners by the terms of the time charter".[87]

The entitlement to withdrawal also exists in cases where payment is made on time, but not the whole amount due. In *The Michalios Xilas*[88], the involved parties adopted the BALTIME form including Clause 39 that states: "the last month's hire to be estimated and paid in advance, less bunker cost and Owner's disbursements and other items of Owner's liability up to such time as vessel is expected to be re-delivered...". The charterers actually provided payment for the ninth month a day before it was due, however they paid less than the total amount, explaining that there were deductions in regard to estimated bunkers as well as disbursements on redelivery, the quantity of which was calculated unilaterally. In fact, owners asked them twice to provide them with detailed vouchers of the estimated deductions,but the charterers did never reply. Thus, five days later, the owners withdrew the ship. The arbitrator held that the deductions amount was irrational and excessive. In that case, Kerr J held that the owners had the right to withdraw. Specifically, he stated that: "In the result there was accordingly an underpayment by the charterers of the ninth month's hire, and

[84] Ibid 5
[85] Ibid 6
[86] *China National Foreign Trade Transportation Corporation v Evlogia Shipping Co Ltd;* (The Mihalios Xilas) [1978] 2 Lloyd's Rep. 186
[87] Ibid 86
[88] Ibid 86

it was not disputed that on the facts found this constituted a 'default of payment' for the purposes of the second paragraph of cl. 6 containing the right to withdraw thevessel".[89]

Furthermore, equitable estoppel is founded in cases where one of the parties makes an implied or expressed representation to the other party, that it will not insist on its strict contractual rights. For example, in the case of *Effy*[90], the owners accepted to get paid through a complex practice, that was not in compliance with the payment conditions stated in the charterparty, based on which charterers would inform their local bank to transfer money to the owner's account through another bank. It is possible for the representation to be revoked by one party and to come back to the initial strict contractual terms. However, the latter party has to provide notice to the other for doing so. Late payments are able to be noticed because of different mode of payments from charterers. Despite owners used to accept such late payments in the prior years, it is not likely to make them stop exercising the right to withdraw.[91]

Judge Goff LJ, in the case of *The Scaptrade*[92] supported that the charterers are able to rely on the doctrine of equitable estoppel given that the owners had showed "unequivocally" that they were not going to exercise their right to withdrawal. As the charterers had not set up this representation of the vessel owners, they are not entitled to rely on the doctrine of equitable estoppel. In the same case, the Court of Appeal was not able to infer from the owner's typical acceptance of late payments appropriate representation to accept the application of the equitable defense from the charterers.

It must be noticed that the owners have to give notice for withdrawal to the charterers, clarifying that they are going to apply their right to withdraw the vessel. In *The Georgios C*,[93] judge Denning MR's explained about the fact that owners gave notice solely to the Master that: "That was, I think, insufficient. In order to exercise a right to withdraw a ship, the shipowners must give notice to the charterers. The withdrawal only operates from the time

[89] Ibid 86
[90] Ibid 43
[91] Ibid 91
[92] Ibid 14
[93] Ibid 11

notice is received by the charterers".[94] As stated from Donaldson J in the past, there is not a requested standard form of notice.

Finally, it must be clear that the withdrawal has no effect to the relevant rights as well as obligations of both parties until a withdrawal notice occurrence. A lawful withdrawal is not a breach of contract from the owners, thus charterers cannot claim damages.

4. Chapter 2: Contrasting cases which involve the obligation to pay hire as a condition or as an innominate term

4.1 <u>The Astra case</u>

4.1.1 Introductory highlights

The Astra[95] case is a recent judgement made from the Commercial Courts' judge, named Flaux J, supporting that the obligation to pay hire constitutes, under clause 5 (NYPE) a condition. The case caused a lot of discussion between legal practitioners and is broadly seen as debatable. This chapter aims to analyze *The Astra*, in particular the legal grounds based on which the decision was taken, and discuss if there is space for a contrary conclusion that the obligation to pay hire is an intermediate term and not a condition. Before the analysis, the highlighted background facts will be presented, along with the arbitrator's decision and all the legal grounds the Commercial Court's judgement was based on.

[94] Ibid 43
[95] Ibid 5

4.1.2 The Background Facts

The ship Astra was chartered for 5 years, on an amended form of NYPE 1946, starting from the 6th of October in 2008. There was a requirement from Clause 5 (NYPE) for the charterers, named Kuwait Rocks Co, to provide punctual as well as regular payment of hire a month (30 days) in advance, the breach of which would allow the vessel-owners, named AMN Bulkcarriers Inc, to withdraw the ship and terminate the charterparty. In addition, the charterparty contained an imposed anti-technicality clause, through clause 31, that required the vessel-owners to provide the charterers the period of 2 banking days of notice of the hire payment failure before they were able to apply their right to terminate.

Following the conclusion of the charterparty, the hire rates fell, while the agreed hire price of 28.000 dollars per day soon became above the market. Thus, the charterers could not trade the ship profitably and therefore sought reductions in hire. Sometimes the charterers went having a variety of proposals for reduction in the hire price and continuously threatened that if the vessel owners did not compromise, they would declare bankruptcy. Finally, the vessel-owners agreed at a reduced hire rate of 21.000 dollars per day, in July 2009 and for one year, and the relevant parties included an addendum clause 4 that stipulated: 24"[i]n the event of the termination or cancelation of the Charter by reason of any breach by or failure of the Charterers to perform their obligations, Charterers shall...pay the Owners compensation for future loss of earnings...".[96]

Nonetheless, the renegotiated charterparty could not terminate the charterer's requests for more reductions in the hire price as well as threats regarding bankruptcy if they did not compromise. A year later, upon the expire of the renegotiated charterparty. The involved parties had a compromise agreement, that the charterers were unable to comply with and they did not provide appropriate payment of hire. The vessel-owners subsequently applied an anti-technicality notice and finally withdrew the ship on the 3rd of August 2010, terminating the contract and claiming charterer's repudiatory breach.

[96] Ibid 5

A month later the vessel owner indicated their loss by way of fixing the vessel at a suitable charter of 17.500 dollars per day and, having a very important loss of hire, initiated arbitration proceedings against the involved charterers.

4.1.3 The arbitrators' decision

At the arbitration proceedings the vessel owners supported that whey had a right to recover damages for all the remaining period of the charterpary, thus for future losses, as (a) the charterers made a breach of condition by not paying hire and/or (b) and the breach was repudiatory/renunciatory.

In regard to (a), the arbitrators declined the vessel owners claim that the obligation to pay hire based on clause 5 (NYPE) is a condition supporting that, while their instinct of being commercial arbitrators was to treat the obligation based on clause 5, as being a condition, they could not be convinced that the then current state of U.K. law.[97]

In regard to (b), the arbitrators supported that the vessel-owners claim that the charterers made a repudiatory/renunciatory breach based on that all the evidence (continuous threats for bankruptcy and failure to comply with the renegotiated charterparties) could only be seen as the intention of the charterers to do at least the forthcoming section of the charterparty through a way which was not consistent to it.

The charterers appealed based on two law questions, arguing that the arbitrators erred the law (a) by adopting the wrong test for examining repudiation/renunciation and (b) by failing in finding that the Compensation Clause actually was a penalty clause. The vessel owners on their respondents' notice additionally challenged the arbitrators holding that (c) the obligation to pay hire based on clause 5 (NYPE) did not consist a condition. [98]

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[97] Ibid 5
[98] Ibid 5

4.1.4 The Commercial Court's decision

Flaux J on his judgement dismissed the charterers' appeal for both grounds, although noticed that the second question about whether the Compensation Clause is a penalty is academic, since having dismissed the appeal of the repudiation/renunciation point, the vessel owners had the right to recover damages for any loss of bargain in accordance to the usual principle of the contract law.

In regard to the issue coming from the vessel-owners that the arbitrators "erred in law" at the time they considered that the obligation to pay hire does not constitute a condition under clause 5 (NYPE), the judge Flaux J held on the vessel owners' favor that clause 5 (NYPE) constitutes a condition (independent of whether it is on its own or along the anti-technicality clause). He specifically stated that: "it is difficult to see how the reservation of the right to compensation for future loss of earnings in the Compensation Clause can be said to be penal. The clause is not saying that the owners will be entitled to such "compensation" even if they have not suffered a loss, for example because the market rate has risen again. In the circumstances, I would answer the second question of law in the negative".

That conclusion was also supported by detailed and continuous review from the authorities that nearly the last century touched upon the question of whether the obligation to provide hire payment on time was a condition and was in accordance to these four important reasons:

(i) clause 5(NYPE) give a right to withdraw the ship in cases where there is charterer's failure to provide punctual payment of hire, for instance the right to withdrawal based on clause 5 exists independently of the breach's gravity. As Flaux J stated: "this is a strong indication that it was intended that failure to pau hire promptly would go to the root of the contract and thus that the provision was a condition".

(ii) the normal rule in commercial contracts usually is that terms are of essence, hence conditions, based on the obiter dicta statements made by the House of Lords, with

exception the *The Brimnes* case,[99] that has not been followed, the obligation of punctual hire payment constitutes a provision in cases time is of essence.

(iii) the significance to businessmen of certainty within commercial transactions.

(iv) the obiter statements in *Stocznia v Latc*[100]*o* and in *Stocznia v Gearbulk*[101] justify th conclusion that the obligation to pay hire is a condition.

As a matter of choice, Flaux J found that even in case his conclusion about the obligation to pay punctually pay hire constitutes a condition based on clause 5 (NYPE) was wrong, the relevant Compensation Clause made that obligation of a status of a condition. [102]

4.1.5 Legal grounds of *The Astra*

The first legal ground in *The Astra* was the express right to withdrawal as being an indication of the parties' intentions. As explained above, one of the most important reasons for Flaux J's conclusion, that clause 5 (NYPE) constitutes a condition, was the provision of the right to withdraw the vessel in cases where there is not a promptly payment for the hire, under clause 5 (NYPE). Based on Flaux J the entitlement to terminate the contract independently of the breach's (to pay punctual hire) gravity strongly indicates the intention of the parties that any type of such failure goes to the charterparty's root and therefore the provision constitutes a condition.

In order to support that conclusion, Flaux J, mentioned the Moore Bick LJ reasoning in the case of *Stocznia v Gearblulk*[103] and declined the view that in time charters the entitlement to withdraw only provides to the obligation to pay hire an element of condition

[99] Ibid 38
[100] Ibid 63
[101] *Stocznia* Gdynia SA *v Gearbulk* Holdings Ltd [2009] EWCA Civ 75
[102] Ibid 5
[103] Ibid 101

saying that the view is "somewhat heretical", since an "obligation either is a condition or it is not".[104]

Based on the reasoning given in *Stocznia v Gearbulk*[105], Flaux J supported that: "...there are obvious differences between the structure of that contract and the charterparty in the present case...and there are no terms of the charterparty which provide a remedy of liquidated damages. Nonetheless, it does seem to me that the reasoning of Moore-Bick LJ is of some assistance, particularly because it makes clear that where the right to terminate for a particular breach indicates that, on the true construction of the contract in question, the breach goes to the root of the contract, in other words the term is a condition or essential term, upon termination, the innocent party will be entitled to claim damages for loss of bargain" (emphasis added).[106]

It is accepted that there might be cases where parties of a contract expressly agree on the contract that one of the parties has the right to terminate the contract in the circumstance of a specified breach from the other party, however there must be no intention for the breach of the obligation, in order to take advantage of the right to terminate for elevating the status of condition. In fact, there are cases that are in accordance with the submission.

In the case of *Financings Lts v Badlock*[107], there was a hire-purchase agreement regarding a truck, which was terminated based on an expressed term allowing termination in the absence of hire payment, as the hirer had two instalments pending. Additionally, the hire-purchase agreement included an express right for repossession, along with a minimum payment clause, giving the right to the vessel-owners to claim the two-thirds of the whole cost of hiring, in case of termination. As the agreement did not face the time of the payment important, and there was not an express agreement indicating that the hire payment clause constituted a condition, it was decided by the Court of Appeal that since the hirer's dispute was not enough to be considered as a repudiatory breach and also the minimum payment

[104] Ibid 5
[105] Ibid 101
[106] Ibid 101
[107] *Financings Ltd v Baldock [1963] 2 QBD 104*

clause constituted a penalty, the relate finance company had not the right to claim damages for any loss of bargain.

Contrary to that, the case of *Lombard*[108] was practically no different from the *Financings Ltd v Badlock*[109] case, where it was held that the plaintiff finance company that terminated the contract of hire-purchase of one computer for failure to provide hire payment had the right to claim damages for any loss of bargain. The difficult decision of the Court of Appeal had only one difference from the *Financings Ltd v Badlock*[110]that "skilled draftsman can easily side-step", which is because a promptly payment of hire was expressly states of the essence of the contract and hence a condition. It should be noticed that the Court of Appeal did face *Financings Ltd* as bad law and it in fact noted that this case was followed in a number of other cases.

It is clear that the actual basis for the decision of that case was the legal ground of the damages for any loss of bargain. It is recommended that the legal ground for entitlement to damages for loss of bargain is the repudiatory breach that has the forward-looking perspective that a non-repudiatory breach has not and that is more evident in cases where the repudiatory breach adopts the form of renunciation, for instance the defendant reveals the intention to not comply with the contract, however substantial failure to perform along with the breach of a condition usually are treated with the same way. Despite this rationale of damages for loss of bargain had been attempted to be criticized, it is interesting that it is the current state of U.K. law.

Hence, the *Financings Ltd v Badlock* case is subject to critique and to support, however for the purposes of this dissertation it sufficiently indicates that there may exist contractual terms that are provided with an element of condition, in particular the entitlement to terminate due to any breach, however they do not deliberate automatically over the innocent party the damages for any loss of bargain and hence there are not conditions on its classic sense.

[108] Ibid 17
[109] Ibid 107
[110] Ibid 107

As Peel explained in Treitel on the law of Contract the reasoning of express termination clauses is no other than to prevent disputes from occurring as to usual hard question whether the relevant failure in performance of the contract is adequately serious in order to justify a termination and they occur despite the absence of a substantial failure. [111]

From another perspective, an indirect support on the proposition indicating that express termination entitlement due to a breach of a term of the contract does not unavoidably indicates that a breached term constitutes a condition have been seen in *The Antaios*[112]. In this case the House of Lord found that the withdrawal clause might not be invoked based on any breach of contract (unless the breach amounts repudiation). It should be noticed that, in circumstances where the court has to manage an express termination right arising due to any breach of contract, the it has to incline to a commercial reasonableness analysis as well as an analysis of business commonsense, used as a mirror to the parties' intentions, and only in case is found that the parties intend that the express termination right should be invoked du to any breach, termination is found to be valid.

Therefore, it is accepted that under clause 5 (NYPE) any express termination right (for instance a withdrawal clause) just on its own is not necessarily showing that the involved parties intended that any failure of promptly hire payment will go to the center of the contract. It is the involved parties' intentions that are important, however, they are not removed only based on an express contractual right to termination.

The second legal ground of the *Astra*[113] case was that the obligation to pay hire promptly is of the essence of the charterparty. A further important rationale for the conclusion that clause 5(NYPE) constitutes a condition was the fact that the obligation to pay hire promptly is a provision in cases where time is of the essence of the contract and hence a condition.

[111]Treitel "The Law of Contract" (2015)
[112] *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* (The Antaios (No. 2)) [1984] 2 Lloyd's Rep. 235
[113] Ibid 5

Flaux J broadly relied in the *Bunge v Tradax*[114] case, for supporting the pre-statement that the obligation to pay hire promptly constitutes a provision when time is of the essence of the contract. He read the case as providing a firm ground in regard to the proposition that "the general rule in mercantile contracts, where there is a "time" provision requiring something to be done by a certain time or payment to be made by a certain time, is that time is considered of the essence"[115] Despite is usually true that requirements about time in commercial environment are faced differently comparing to the ones in non-commercial contracts, it is commonly accepted that there is no inference of fact which indicates that time is of importance in mercantile contracts so that requirements as of time in such contracts might, on their true construction, be held not of the essence of the contract and hence an intermediate term.

In regard to the charterer's obligation of hire payment there is an absence of a firm authority on whether such obligation is a condition subsequent to the vessel owners' provision of services to the involved charters. Notwithstanding, in the case of *Agios Giorgis*[116] the judge stated there was force within the argument, according to *Brimnes and Leslie Shipping*[117], that such an obligation, based on clause 5 (NYPE) does not constitute a precedent to the immediate further performance of the vessel-owners. Nonetheless, Flaux J declined the relevance of the case of *The Agios Giorgis* on the ground of difference in facts of the circumstances as well as on the ground of its similarity to *The Brimnes* case. It should be noted that Flaux J, made no reference in the dicta of *The Tankexpress*, which mentioned the interdependence of the obligation to provide hire payment and provision of the vessels' services, albeit tended to, however he did not conclude on that there is no any interdependence between the two. Despite that, as there is an absence of firm authority indicating the obligation to pay hire constitutes a condition precedent to vessel owners' ability to give the agreed services of the charterparty, the submitted rule in *Bunge v Tradax* regarding the stipulations as to time seems inapplicable.

[114] Ibid 24
[115] Ibid 24
[116] Ibid 46
[117] Ibid 38

Provided the small extend of reference to the case of *Bunge v Tradax*, the time stipulations slightly differ from other type of stipulations of commercial contracts. It is consequent to the case law that if there is not an express agreement the courts will construe time requirements of commercial contracts as of importance through a way of making a value judgement in regard to the commercial significance the relevant term has in its factual as well as in its contractual setting.

laux J, in order to support his view, he mentioned dicta of 5 different cases of the House of Lords; *The Tankexpress, The Laconia, The Mihalios Xilas, United Scientifics Holdings,* and *The Afovos.* The first three cases regarded the interpretation of an express withdrawal clause where the courts have suggested literal application of the withdrawal clause and saw the obligation to hire payment as an absolute obligation. The relevant argumentation of commercial certainty is employed in such cases and not, as provided by Flaux J, to suggest that the hire payment obligation constitutes a condition. The forth case (the *United Scientific Holdings)* regarded the rent review clauses of tenancy contracts and there was only one obiter statement in this case saying: "*in a charterparty a stipulated time of payment of hire is of the essence*"[118] and was made without any reference to relevant authorities, hence it is of little assistance.

The only case which "presents difficulty…that clause 5 is not a condition" is the case of *Afovos,* because of Lord Diplock's cause of the impression that clause 5(NYPE) constitutes a condition. This case regarded a withdrawal based on clause 5(NYPE) where the vessel-owners provided a premature notice about the withdrawal of the vessel and hence, it was inapplicable making the withdrawal unlawful. Nonetheless, based on the assumption that at the time the vessel owners gave their notice became clear that they were able to apply the principle of anticipatory breach. As a repudiatory breach was not found, the principle of anticipatory breach was ineffective.

It is supported that vessel owners "argument was misconceived", as clause 5 did not constitute a condition and the contract just provided an express right on giving a notice in the

[118] Ibid 53

occurrence of a clearly specified event that had not occurred. Thus, if in that case the clause 5 was received as a condition the outcome would be different. Lord Diplock's statement adds more complication to this case. It can be noted that Lord Diplock saw clause 5 as including a characteristic of condition by saying: "The owners are to be at liberty to withdraw the vessel from the service of the charterers; in other words they are entitled to treat the breach when it occurs as a breach of condition and so giving them the right to elect to treat it as putting an end to all their own primary obligation sunder the charterparty then remaining unperformed"(emphasis added) and when he stated that "But although failure by the charterers in punctual payment of any installment, however brief the delay involved may be, is made a breach of condition it is not also thereby converted into a fundamental breach; and it is to fundamental breaches alone that the doctrine of anticipatory breach is applicable" (emphasis added).[119]

Provided the above analysis, there is doubt on whether the relevant authorities suggest that clause 5 constitutes a condition. In the contrasting case of *The Gregos*[120] was found that the redelivery clause in regard to time was not considered a condition despite that the commercial setting of a chartering business the exact time of redelivery might often be crucial, not complying with which can result is the vessel owners loss of subsequent time charteparties and hence being exposed to additional loss. Therefore, it is not straightforward if time requirements in time charterparties are considered of the essence and thus conditions.

The third legal ground of *The Astra*[121] case is the anti-technicality clause distinguishing *The Brimnes*[122] case. As mentioned above, Flaux J found that time of payment within clause 5 is of essence of the contract and suggested his conclusion mentioning the relevant dicta of the House of Lords. Notably he suggested that the case *The Brimnes*[123] has an opposite effect, in order to overcome that difficulty, he supported that the anti-technicality clause of clause 31 distinguished the case of *The Brimnes*[124]from the currently presented case.

[119] Ibid 54
[120] *Torvald Klaveness A/S v Arni Maritime Corpn;* The Gregos; [1993] CA.
[121] Ibid 5
[122] Ibid 38
[123] Ibid 38
[124] Ibid 28

In his conclusion, Flaux J suggested that the anti-technicality clause is what made time of the essence of the contract if otherwise was not. In order to support his conclusion, he referred to the [125] case, for which Lord Rix held that: ""In a contract where a vessel is to be built with funds provided by the purchaser in stages, an installment notice is to be given requiring payment within 5 banking days, and a further 21 days of grace are then allowed, I do not see why provision for what is then called default entitling rescission should not be regarded as setting a condition of the contract".[126]

The above case does not seem to have the 21 days period making time of essence, hence a condition. It is more likely the contract itself "where a vessel is to be built with funds provided by the purchaser in stages" supports the importance of payment by the agreed time. Accordingly, Flaux J's mentioning to *The Mahakam*[127] case to evidence his reasoning about the ability of the anti-technicality clause to make the obligation of hire payment a condition, being of little persuasive values. The latter case is different from the circumstances in *The Astra*[128]initially because the case regarded the bareboat charter's obligation of hire payment and secondly because their obligation to pay hire was expressly stated as being of essence in their contract.

The fourth legal ground of the currently examined case was that *The Brimnes*[129]case was wrongly decided. Flaux J provided 3 reasons. One, the case cannot be reconciled according to the House of Lords dicta in most of the cases stated above. Two, that the case was based on *The Georgios C*[130] that was subsequently overruled from the House of Lords in *The Laconia.* Three, the conclusion of Brandon J in the case of *The Brimnes*[131] included acceptance of the debate that the word "punctual" provided little or nothing on the word "payment" being just itself, a debate which's validity was depended on whether the decision in the case of *The Georgios C*[132] was correct or not. It should be noted that despite Flaux J

[125] Stocznia v Latco [2002] EWCA Civ 889,
[126] Ibid 125
[127] *Parbulk II A/S v Heritage Maritime Ltd SA; (*The Mahakam) [2012] 1 Lloyd's Rep 87
[128] Ibid 5
[129] Ibid 38
[130] Ibid 43
[131] Ibid 38
[132] Ibid 43

does not give enough attention to *The Brimnes*[133]decision, the House of Lords has accepted it in two further cases.

The fifth legal ground of *The Astra*[134]was the requirement of certainty in case of failure to provide punctual payment of hire. Flaux J found in that case that it is crucial for businessmen the certainty within commercial transactions. The case, where the vessel owners received no payment of their rent within a falling market would have no remedy in damages, except of cases of repudiatory breach, and for claiming damages they would have to "wait and see" for as long as they were not in position to understand if the charterers where in a repudiatory breach, based on Flaux J, "is inimical to certainty".

The sixth legal ground was the fourth important reason of Flaux J's conclusion about clause 5 being a condition, in *The Astra*[135]. This have been explained above that's why it will not be repeated at this part of the dissertation.

4.2 The Spar Shipping case

In *The Spar Shipping*[136] case, there were three ships in a long chartered through three time charterparties on the 5th of March in 2010 on the amended NYPE 1993 forms by Grand China Shipping (Hong Kong) Co Ltd. The first vessel, Spar Draco, had been chartered for 35 to 37 months with a daily hire of 16.500 dollars. It was delivered to charter on the 31st of May, in 2010. The two other ships, named Spar Cappella and Spar Vega, had been new and their delivery to the charterparties occurred on the 6th and on the 12th of January in 2011, for the minimum period of 59-62 months on the daily hire of 16.750 dollars. The owners were entitled through Clause 11(a) to take back the ships in a case of failure of hire payment. The Clause 11(b) was an established anti-technicality clause.

[133] Ibid 38
[134] Ibid 5
[135] Ibid 5
[136] Ibid 6

The overdue payments started occurring from April 2011. The vessel owners asked the charterers' payment on the 16th of September of the same year. On the 23th of September the vessel owners withdrew the vessel Spar Capella and a week later the other two vessels, while commencing arbitration proceedings requiring the unpaid hire until the termination of the charterparties and future damages for as long as the initial expiry of the contracts was. Between the time the overdue payments started and the owner's notice, the vessel owner was able to recoup some arrears from sub-freight/sub-hire through the exercise of its lien. Following the commencement of the arbitration proceedings but in advance of the hearing, the charterers declared bankruptcy and the proceeding were stayed.[137]

The Commercial Court Decision will now be described. The vessel owners claimed against GCL based on the Guarantees, requiring not only the unpaid installments and damages but also any arbitration proceeding costs that occurred. GCL declined liability on the ground that the Guarantees had been signed with no Authority and that they had not force on local laws. In case the court hold the charters were bound to Guarantees, the GCL disputed liability of the unexpired period with the reasoning of that the withdrawal clause constituted a contractual option and that their conduct did not indicate repudiatory breach of contract. Alternatively, if the court concluded that they were in repudiatory breach, GCL denied the method of measurement for future damages, as they were not available markets for a substitute time charter to cover the four years' unexpired period. The vessel owners calculated the damages as the money difference between the original charterparties and the final hire, when the charters claimed that the damages shall be measured through the difference between the original hire and the hire that would have been gained by a series of timely shorter charterparties, considering that there were not markets for four year charters. Also, the charterers denied the arbitration proceeding costs on the basis that it was recoverable from the Guarantees.[138]

For the purposes of this dissertation focus will be given to the dicta of Popplewell J on whether the obligation to pay hire constitutes a condition of the charterparty. Popplewell

[137] Ibid 6
[138] Ibid 6

focused on the approach in the case of *Financings Ltd v Badlock (CA)*[139] in regard to the termination clauses. Based on this case, a termination clause constitutes a contractual option, the application of which does not give a right to the innocent party for future damages, except if it is clearly stated in the contract.[140] Popplewell J held that the effect of a withdrawal clause does not indicate that payment of hire is a condition and he analyzed if without a withdrawal clause, payment constitutes a condition.[141]

He provided a negative answer on the following grounds. First, he supported that the inclusion of the withdrawal clause indicates that the obligation to pay hire is not a condition. The second ground was the existence of the assumption that without the inclusion of a contrary contractual obligation, the provisions which regard payment should not be seen as conditions. Third, he explained that there are trivial breaches as well as serious breaches. Their difference is that serious breaches go to the center of the contract. Thus, he supported that payment is an innominate term. The fourth ground regarded the intention of the vessel owners to terminate timely longer contracts for a very little time delay in payments coming from the withdrawal clause. The fifth ground was that the necessity to establish certainty in commercial mercantile contracts has two sides. From one side it is right to consider commercial transactions to be of certainty, however, it is right to consider that parties shall not be legally punished for trivial breaches on undeserving cases. In addition, he became critical to Flaux's J view that the entitlement to terminate shows serious breach to the center of the contract by saying that: "once it is recognized that a clause providing for termination on any breach of a term, however trivial, may constitute an option to cancel, the fact that the clause is triggered by such a breach tells nothing about whether the term breached is to be characterized as a condition".[142]

It should be noted that despite all his analysis and the antithesis to the charterer of the payment obligation as condition, the judge Popplewell J concluded that the charterer's conduct on this case was seen as renunciatory and it took from the owners to enjoy all the

[139] Ibid 107
[140] Ibid 6
[141] Ibid 6
[142] Ibid 6

benefit of their contract. The charterers' conduct indicated that they had no intention to perform the charterparty, either at all or as agreed. GCL supported that they indicated intention to perform the charterparty and that they made attempts to find financial solutions. Then, Popplewell explained that "I would like but I cannot" in such cases equals to "I will not". Hence, the owners had the right to future damages, allowing them to be placed " in the same financial position as if the contract had been performed" in accordance with *The Elena D'Amico* principle.[143]

Finally, Popplewell agreed with the owner's claim, providing judgement on this claim under The Guarantees against the GCL for first, the due hire until the termination and second, for future damages of the unexpired period. He also stated that the vessel owners had the right to recover the relevant arbitration proceedings cost against the GCS.

Following that decision, GCL made an appeal to the Court of Appeal, claiming that Popplewell J was mistaken in holding that the charterers renounce their contracts. The vessel owners agreed with the decision of the judge but they argued that based on Clause 11 the obligation of hire payment should be a condition. In the judgements the three Lords of Justice of Appeal agreed in that Popplewell J's conclusion that the condition issue was totally correct, when Flaux's J conclusion was wrong.

The leading judgement was of Gross LJ, who question, in regard to the condition issue, the outcome of the withdrawal clause, as well as the significance of including in case payment of hire is considered as a condition. He disagreed with Flaux J's view that the inclusion of a termination clause shows that payment constitutes a condition. He supported that the right interpretation of the analysis in *The Hongkong Fir* case[144] was that all conditions give the innocent party the right to terminate the contract, however all contractual termination clauses are not conferred for breaches of condition alone. He highlighted that there is an absence of clarity in the language used in the withdrawal clause in regard to whether it provides that time is of the essence. In addition, he noted the absence of a specific contractual

[143] Ibid 19
[144] Ibid 21

term that should stipulate the legal consequences in case of a breach, for indicating it as a condition. It is obvious that the anti-technicality clause did not influence his view.

On his view, the anti-technicality clause provided a grace period, but nothing more or less. The industry developed that clause, for providing the charterers' protection especially for circumstances where there is failure because of technical reasons, and not for making time be of essence. He agreed with Popplewell's view that the provisions that regard the payment in mercantile contracts should not be seen automatically as conditions, as well as that considering payment a condition because of the significance of certainty on commercial contracts constitutes a two-edged sword.

From one side, the innocent party can be sure that he has the right to future damages. From another side, the innocent party might apply this in acting on his own interests, when trivial breaches occur. Finally, in regard to the renunciation problem, Gross LJ agreed with the view of Popplewell that the GSC renounced the charterparties.

It is worth mentioning that GLS appealed to Court of Appeal, which affirmed Popplewell's decision.

5. Chapter 3: Discussion and conclusion.

The two judgements of Flaux J and Popplewell J in the contrasting cases of *The Astra* [145]and *The Spar Shipping*[146], caused a lot of debate in the shipping sector, about the issue on whether or not hire payment constitutes a condition of the contract. The conclusion of the Court of appeal provided an air of confidence to the shipping industry, regarding payment not

[145] Ibid 5
[146] Ibid 6

being a condition. Despite that, from an author's view, the dispute will not be completely clear until the House of Lords carefully examine it.

It was obvious from the Authorities that both judges relied on their judgement, on that the opinions being at best ambiguous. It is not easy to accept that there is clarity as well as certainty in the matter as Lord Diplock stated in *The Afovos*[147]that the withdrawal clause gives the owners the right "to treat the breach when it occurs as a breach of condition". Thus, it looked like there is specific uncertainty rather than certainty in such cases, especially during failing markets.

There is an uncertainty in regard to the legal and commercial consequences. Facing payment as a condition would induce the charterers to pay punctually, as based on Lord Phillip there can be uncertainty on whether the stage is reached "at which the charterer's defaults amount to renunciation or repudiation".[148] That commercial approach was commented by Sir Bernard Eder; in that specific context, what is "commercial common sense"? The truth is: I have no idea. From the owner's point of view, it may well be commercial common sense that the charterer should pay the hire due on time—and not a minute or even a second late; and that any failure to pay by the due date should entitle the owner to bring the charter to an end and claim substantial damages. From the charterer's point of view, it may well be commercial common sense that if, for example, the hire is late by a very short period due to no fault of his own (e.g. some fault in the banking system), such failure should not amount to a repudiation so as to entitle the owner to bring the charter to an end and claim substantial damages[149]. In this dissertation Popplewell J's and Gross LJ's view was followed that taking payment as a condition because of the significance of certainty in such commercial contracts can enable the innocent party to apply this for his own interests in circumstances of trivial breaches.

Commercially speaking, the market tried to elucidate this uncertainty, trying to react directly to below mentioned developments. Particularly, Clause 11 (c) under new NYPE 2015

[147] Ibid 54
[148] *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation;* (The Laconia) [1977] 1 Lloyd's Rep. 315
[149] Sir Bernard Eder, 'The construction of shipping and marine insurance contracts: why is it so difficult?' [2016] 2(May) LMCLQ 231

stated that: "*Failure by the Charterers to pay hire due in full within three (3) Banking Days of their receiving a notice from Owners under Sub-clause 11(b) above shall entitle the Owners, without prejudice to any other rights or claims the Owners may have against the Charterers: (i) to withdraw the Vessel from the service of the Charterers; (ii) to damages, if they withdraw the Vessel, for the loss of the remainder of the Charter Party"*. A longer grace period clause is noted compared to previous forms.

Despite that clear words such as "condition" and "time if of the essence" are not stated in the sub clause, the latter is of high importance. Gross LJ is of the opinion that "*following Brandon J's decision in The Brimnes no attempt was made to alter the wording of standard form time charterparties so as to make payment of hire timeously a condition, although this could very easily have been done (as illustrated by the post-Astra NYPE 2015 form*"[150]. The author of this paper strongly holds the view that this inclusion will provide to owners the right to withdraw the vessel and claim future damages in case of non-payment.

In conclusion, the aim of this dissertation was to critically examine and analyze the charter's obligation to provide continuously and punctually hire in a time charterparty. It was noticed that payment shall be punctual and before the date due, giving the vessel owners a income for their vessel's use and services, including the crew along with any mortgage and financing commitments. The owner's main concern regards the withdrawal within a falling market, because of the uncertainty on whether they could recover future damages. The two landmark cases of *The Astra*[151] and *The Spar Shipping*[152]indicated that there is unclarity in the law on the classification of the payment obligation and aimed to tackle the issue. It was concluded that seeing payment as being an innominate term gives extra flexibility, creating a balance between the certainty and the justice. It should be noticed that there is still a degree of uncertainty because of the obiter of the comments stated above and the Supreme Court will have to decide on this issue. For now, the obligation of payment is an innominate term, thus it can be commented that within a rising market, a withdrawal clause is in favor of the owner,

[150] *The Spar Shipping* [2016] EWCA Civ 982 para [93]
[151] Ibid 5
[152] Ibid 6

when in a falling market it is in favor to the charterers, in the absence of the owner's possibility to recover future damages.

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