WEST

Defence Guides

Cancellation in a nutshell

Exercising a right to cancel a charterparty terminates the charterparty along with all contractual obligations resulting in parties no longer being bound to one another. The right to cancel may also be exercised even when there is no breach on the part of owners (see The Democritos [1976] 2 Lloyd's Rep 149).

a) Cancelling dates – Fixed, laycan and narrowing clauses

The right to cancel usually arises when owners fail to deliver the ship by the cancelling date or if the ship is not ready to load by the cancelling date. The cancelling date can either be a fixed date or a laycan period to which the right to cancel is only exercisable after the laycan period. The length of the laycan period is a matter for both parties to agree on.

Charterers would be interested in a fixed date of arrival so that they can make firm arrangements for the loading of cargo. On the other hand, it would be in owners' interest to have a flexible date for arrival to take into account delays in delivering the ship.

Parties may also agree on a narrowing of the laycan prior to the ship's delivery. Again, the choice of who should narrow the laycan is a matter for both parties to agree on. If the onus is on charterers to narrow the laycan, a failure to serve a valid laycan narrowing notice would not change the laycan period. On the other hand, if the onus is on owners to narrow the laycan, a failure to serve a laycan narrowing notice may open owners to claim for damages by charterers. If the charterparty does not have a stipulated time of delivery or a cancelling date, owners would be under an implied duty to deliver the ship with reasonable despatch (see The Democritos [1976] 2 Lloyd's Rep 149).

b) Readiness as a pre-requisite to cancellation

Certain charterparties like the Gencon 76, Gencon 94 and Asbatankvoy state that the right to cancel accrues when the ship is not ready to load by the cancelling date. Readiness in the laytime context is different from readiness in the cancellation context. In the former, a vessel is not ready even if a material defect to the vessel can be remedied quickly.

However in the latter, the defect preventing the vessel from being ready must be material in relation to the commercial purpose of the charterparty. For example, unless a charterparty provides otherwise, a shortage of bunkers on delivery may not be seen as material for the purposes of cancelling the charterparty (The North Sea [1997] 2 Lloyd's Rep 324).

This position can be varied contractually. For example, if the charterparty states that "the vessel's holds shall be clean and in all respects ready …. on arrival at first loading port if different from place of delivery. If the vessel fails hold inspection then the vessel shall be off-hire…until the vessel has passed a subsequent inspection." (NYPE 2015), it is arguable that for a ship to be off hire, the ship must have first been accepted and that the ship was ready. This implies that charterers will have to accept the ship and that their remedy is to place the vessel off hire and charterers cannot cancel the charterparty just because the holds are unclean.

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Advance cancellation

a) Can owners require charterers to cancel in advance if owners cannot deliver the ship by the cancelling date?

In the absence of an express provision, owners are not entitled to compel charterers to exercise their right to cancel. Owners may therefore be placed in a difficult position if they know that they are unable to deliver the ship in time. Owners will be contractually obliged to proceed to the delivery port at their expense, knowing that there will be a risk that charterers will cancel the charterparty on arrival.

This situation is remedied by certain pro-forma charters. For example, should owners anticipate that the ship will not be ready to load by the cancelling date, the Gencon cancelling clause allows owners (provided they have exercised due diligence to meet the cancelling date) to notify charterers of a new readiness date and to ask whether charterers will exercise their option of cancelling the charterparty or to agree to a new cancellation date. Charterers' option must be declared within 48 hours after receipt of owners' notice. If charterers do not exercise their rights to cancel, the charterparty shall be deemed to be amended such that the seventh day after the new readiness date shall be the new cancelling date. A similar cancelling clause can be found in clause 16 of the NYPE 1993. The inclusion of such a clause may assist owners in the event their ship is delayed but they do not wish to perform any unnecessary ballast voyage.

b) Can charterers cancel in advance of cancelling date?

Under English law, there is no anticipatory right to cancel a charterparty (see The Madeleine [1967] 2 Lloyd's Rep 224). In other words, charterers are not entitled to a premature cancellation of the charterparty before the cancellation date or before the laycan period. Charterers' premature cancellation is likely to lead to a claim for damages by owners arising out of a repudiatory breach of the charterparty. Notwithstanding the above, the fact that there is no anticipatory right to cancel a charterparty does not affect the other rights of a charterer. Hence, charterers are entitled to terminate a charterparty if owners are in a repudiatory breach of the charterparty or if the contract is frustrated (see The Madeleine [1967] 2 Lloyd's Rep 224).

Damages

a) Charterers' exposure to damages in the event of early cancellation

In the event charterers prematurely cancel a charterparty, there would be a repudiatory breach of the charterparty (see The Mihalis Angelos [1971] 1 QB) and this would expose charterers to a claim for damages by owners. If owners had fixed another charter with lower rates because the market had fallen, owners would be entitled to damages for the difference between the previous charter rate and the current market rate. The duration to which owners are entitled to claim such damages is the time period of the previous charterparty. As for voyage charterparties, owners are similarly entitled to damages for the difference in freight rates. The duration would be a reasonable time taken to complete the voyage in the cancelled charter.

Needless to say, should the market rates go up, there would arguably be no loss on the part of owners and owners would only be entitled to nominal damages.

b) Charterers can only claim for damages against owners if they can establish a breach on the part of owners

Whilst charterers have an option to cancel a charterparty, the right of cancellation does not automatically give rise to a right to claim damages against owners. Charterers' right to claim for damages would only arise if they can successfully prove a breach on the part of owners.

c) Owners do not have an absolute duty to arrive on time

Owners are under no absolute obligation to ensure that the vessel will arrive by the cancelling date and are not in breach if she does not. However, the cancellation date clearly reflects the parties' expectations as to when the vessel will in fact arrive. The law accordingly seeks to give effect to those expectations by implying a term with regard to the vessel's arrival relative to that date. The scope of that term varies according to the nature of the charter. In a time charterparty, the term is that the owners will exercise due diligence to ensure the arrival of the vessel by the cancelling date. In a voyage charterparty, if there is no date in the charterparty to which the vessel is expected to load, the law implies a term that owners must (as an absolute obligation – and not simply one of due diligence) commence the approach voyage by a date when it is reasonably certain that the vessel will arrive at the load port by the cancelling date (PACIFIC VOYAGER [2017]), although note that the owner's appeal against Popplewell J's decision is due to be heard in October 2018).

The difference in formulation reflects the fact that in a time charterparty the service commences when the vessel arrives at the load port, whereas in a voyage charterparty the service includes the approach voyage, which must be prosecuted with utmost dispatch.

d) Owners do not have an absolute duty to deliver the ship in good condition

There is no obligation arising out of the cancelling clause that the vessel must be in a condition conforming with the charterparty by the cancellation date. As such, damage to the ship which could not be repaired in time before the cancellation date was not considered a breach of the charterparty (see The Democritos [1976] 2 Lloyd's Rep 149).

e) Charterers can only claim for damages against owners if damages were not caused by charterers' own breach

A charterer may not rely on a cancelling clause if his own breach caused the ship to arrive late. For example, where charterers had initially ordered a ship to proceed to a particular range of ports but had subsequently nominated a specific port in another geographical range, the court held that such a nomination was unreasonably late especially when the nomination was made after the ship had taken her course towards the first range of ports (see Shipping Corporation of India v Naviera Letasa S.A. [1976] 1 Lloyd's Rep 132). As a corollary to the above, charterers would not be entitled to claim for damages if the damages stem from their own breach or fault.

f) A charterer cannot claim for damages which solely arise out of his decision to cancel the charter

Unless charterers can show that the decision to cancel amounted to a reasonable mitigation of their losses, charterers cannot claim damages for losses which are solely due to their decision to cancel.

When do charterers lose the option to cancel

a) Expiry of the time stated in the clause

Cancellation clauses often set an express time limit within which the right to cancel can be exercised. For example, clause 14 of the NYPE 1946 form provides for charterers to have the option to cancel "at any time not later than the day of the vessel's readiness". In the absence of any such express time limit, it is likely that a term would be implied that the option to cancel be exercised within a reasonable time of the vessel being tendered for delivery.

c) Charterers' waiver

However, if charterers say or do anything before the expiry of the right to cancel and this expressly indicates that charterers have opted not to cancel, the right to cancel will be lost. Obvious examples would be where charterers accept delivery of the ship and begin to load the ship (see Moel Tryvan v Weir [1910] 2 KB 844). The right to cancel would also be waived if charterers had re-nominated a load port after the ship was not able to reach by the cancellation date. (see St Shipping & Transport Inc v Kriti Filoxenia Shipping Co SA [2015] EWHC 997 (Comm).)

d) Charterers' own breach

As stated in 3(d) above, charterers may not rely on a cancelling clause if their own breach caused the ship to arrive late.

Consequently, the charterer is also barred from claiming damages.

Conclusion

The cancellation of a charterparty is an act bearing significant consequences for both owners and charterers. Members are advised to approach their usual contact/claims handler at the Club if they require any clarifications on the rights in relation to the cancellation of a charterparty.

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