

## NOT PAID?

### Bimco Supplytime & Regional Perspectives

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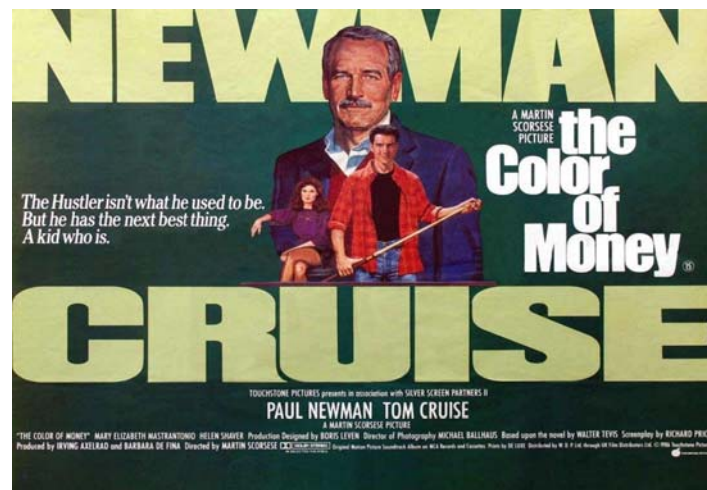
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Don't forget – it's all about the money

## DIFFERENCES – 1989, 2005 and 20XX



- 12(e)'05 materially identical to first two paragraphs of 10(e) '89.
- Only variation is in '05 with requirement for Charterers to notify Owners prior to the due date intention to withhold hire.
- Variations proposed in 20XX introduce changes where charterers reasonably believe an incorrect invoice issued and notification at earliest opportunity
- Rights to suspend/withdraw and notices are different.

## CLAUSE 12(e) - INTEREST



"If payment is not received by the Owners within 5 banking days following the due date the Owners are entitled to charge interest at the rate stated in Box 25 on the amount outstanding from and including the due date until payment is received".

- NO CHANGE IN 20XX

## INTEREST



- Box 20 – amount of hire
- Box 22 – invoicing – advance or arrears, issue by whom and addressed to whom
- Box 24 – payment period
- Box 25 – interest rate
- 20XX Payment shall be received rather than made in the currency in box 20
- 20XX specifically adds no right of set off on payment
- Negotiations



- If payment not made in accordance with Box 24 interest payable at rate in Box 25
- N.B: Interest rate must not be a penalty – unenforceable
- Fact parties are negotiating does not impact on right to interest. If want interest to stop running during discussions need to expressly agree

## CLAUSE 12(e) - INVOICE DISPUTED



~~"If Where an invoice is disputed,~~ the Charterers reasonably believe an incorrect invoice has been issued they shall notify the Owners at the earliest opportunity but in no event no later than before the due date and in any event pay the undisputed portion of the invoice but shall be entitled to withhold payment of the disputed portion provided that such portion is reasonably disputed and the Charterers specify such reason. Interest will be chargeable at the rate specified in Box 25 on such disputed amounts where resolved in favour of the Owners. ~~Should the Owners prove the validity of the disputed portion of the invoice,~~ The balance payment shall be received by the Owners within five (5) banking days ~~after the dispute is resolved~~. Should the Charterers' claim be valid, a corrected invoice shall be issued by the Owners".

## INVOICE DISPUTED



- If genuine dispute in relation to an invoice right to Charterers to withhold payment in whole or part
- Needs to be reasonably disputed and reason given
- Notification prior to due date in '05 and no later than the due date in 20XX
- If resolved in favour of Owners payment within 5 days of resolution and interest
- If Charterers right, new invoice to be issued

## SUSPENSION – CLAUSE 12(f)(i) & (ii) in 20XX



- i. Where there is a failure to make punctual payment of hire ~~pay Hire by the due date~~, the Owners shall notify the Charterers in writing of such failure requiring payment within five (5) days.
- ii. At any time while hire remains outstanding the Owners shall be entitled to ~~and further may also~~ suspend the performance of any or all of their obligations under this Charter Party until such time as all the hire ~~Hire~~ due to the Owners under the Charter Party has been received by the Owners. Throughout any period of suspended performance under this Clause, the Vessel ~~is to be and~~ shall remain on hire ~~Hire~~. The Owners' right to suspend performance under this Clause shall be without prejudice to any other rights they may have under this Charter Party.

## SUSPENSION



- Failure to pay
- '05 by due date
- 20XX “punctual”
- Written notice
- On hire
- Without prejudice



Oops... **Service Suspended**

- For Owners to suspend performance must be failure to pay by due date and notice from Owners to Charterers
- Changes proposed in 20XX should make no difference BUT in consultation said preferred payment by due date as think “punctual” introduces a possible tolerance
- Notice must be clear, unambiguous and in absolute terms i.e. hire not punctually paid and Owners suspending performance
- During suspension vessel remains on hire and W/P. to any other rights
- N.B: May suspend – don't have to and may suspend some but not all of their obligations

## "GREATSHIP DHRITI" – SUPPLYTIME '89



- As soon as hire becomes outstanding, Owners may suspend performance without notice.

## COMMERCIAL PURPOSE



- Fills a lacuna
- Right to suspend has to be express
- Commercial purpose self evident – puts pressure on Charterers to pay
- Fills lacuna present in most T/C's where right to withdraw but not to suspend
- To suspend must be expressly conferred in C/P

## CAUTION



- Caution needed where Owners agree that Charterers can delegate payment obligations to a third party
- Make sure don't lose rights to suspend or withdraw (terminate in 20XX) if third party fails to pay

## RESPONSIBILITY



"While payment remains due, the Owners shall be entitled to suspend the performance of any and all their obligations hereunder and shall have no responsibility whatsoever for any consequences thereof, in respect of which the Charterers hereby indemnify the Owners and Hire shall continue to accrue and any extra expenses resulting from such suspension shall be for the Charterers' account." (Emphasis added).

- Final part of 10(e) of '89 removed
- '05 form does not contain underlined wording
- Believe for Owners provision that not responsible for consequences of suspension and indemnity are important and therefore recommend adding underlined text to '05 and have recommended it to Bimco for 20XX

## CLAUSE 12 (f)(ii) - WITHDRAWAL CLAUSE 12 (f) (iii) - TERMINATION 20XX



"If after five (5) days of the written notification referred to in ~~Clause~~sub-clause 12(f)(i) the hire~~Hire~~ has still not been received the Owners may at any time while hire~~Hire~~ remains outstanding ~~terminate withdraw the Vessel from~~ the Charter Party. The right to ~~withdraw~~terminate is to be exercised promptly and in writing and is not dependent on the Owners first exercising the right to suspend performance of their obligations under the Charter Party pursuant to ~~sub-clause~~Clause 12(f)(i) above. The receipt by the Owners of a payment from the Charterers after the five (5) day period referred to above has expired but prior to the notice of ~~termination~~ withdrawal shall ~~not~~ be deemed a waiver of the Owners' right to cancel the Charter Party. The Owner's right to terminate under this clause shall be without prejudice to any other rights they may have under this Charter Party"

- Note the deletion of "not" proposed in 20XX
- Addition of final WP sentence in 20XX makes it consistent with suspension



- '89, '05 and 20XX all provide for a grace period (5 banking and 5 days respectively)
- To protect Charterers where delays of remittance of hire due to say banking errors
- If after grace period, Charterers still not paid, Owners entitled to withdraw vessel from C/P or terminate in 20XX

- Written notification
- Expiry of five days
- Non-payment
- Prompt action



For Owners to withdraw, must have been:

- written notification of failure to pay under Cl. 12(f)(i)
- Expiry of 5 days from written notification
- Non-payment of the hire to which the notice relates
- Prompt action and written notice



## WITHDRAWAL / TERMINATION



- Notice of withdrawal must be given to Charterers
- Only operates from time received by Charterers
- Equivocal statement not sufficient
- Valid notice cannot be given until after midnight on due day
  - Owners must indicate clearly that they are exercising their right of withdrawal
  - 23:59 too early – 00:01 O.K.

## WITHDRAWAL / TERMINATION - EFFECT



- Effect of withdrawal is to terminate the C/P. New reference to termination in 20XX is clearer
- Result can be harsh on Charterers in rising market who lose valuable C/P and suffer heavy losses
- Some judges considered invoking equitable power to give relief against forfeiture
- BUT such equitable relief N/A in cases of withdrawal from time C/P's

## WITHDRAWAL - TERMINATION



- Right to withdraw / terminate not dependent on Owners exercising right to suspend
- '05 even if Owners receive payment after grace period **BUT** before notice of withdrawal given, payment **NOT** a waiver of Owner's right to cancel
- 20XX payment after grace period but before notice of termination will be a waiver of Owner's right to cancel.
- [Important change in 20XX](#)

## WITHDRAWAL - PROMPTNESS



- Owners must act promptly
- Unreasonable delay under '05 could be a waiver
- Will be a waiver under 20XX

ACT  
NOW!

WAIVER – CLAUSE 12 (f)(iii) & CLAUSE 12(f)(iv) in 20XX



"Where the Owners choose not to exercise any of the rights afforded to them by this Clause in respect of any particular late payment of ~~hire~~Hire, or a series of late payments of ~~hire~~Hire, under the Charter Party, this shall not be construed as a waiver of their right either to suspend performance under sub-clause 12(f)(ii)~~Clause 12(f)(i)~~ or to terminate~~withdraw the Vessel from the~~ Charter Party under sub-clause 12(f)(iii)~~Clause 12(f)(ii)~~ in respect of any subsequent late payment under this Charter Party."

- No material changes in 20XX

WITHDRAWAL - WAIVER



- N.B: Owners may withdraw
- If choose not to exercise right to suspend or withdraw / terminate not a waiver right to do so for any subsequent late payment

## WITHDRAWAL - CARGO



•The Charterers shall indemnify the Owners in respect of any liabilities incurred by the Owners under [cargo documents issued pursuant to clause 7\(a\)\(ii\)](#) ~~the Bill of Lading or any other contract of carriage~~ as a consequence of the Owners' proper suspension of and/or ~~withdrawal~~ termination from any or all of their obligations under this Charter Party.



- [If B/L's binding Owners issued Owner still liable to cargo owners after withdrawal \(N.B: Cl. 7\(a\)\(ii\)\(1\): Eureka moment now got this right](#)
- [Owners have duty as bailees to take reasonable care of cargo](#)

## WITHDRAWAL – 2005 BIMCO NOTES



"Where the hire has not been received, for instance, just when the Vessel is about to load for a new voyage with a charterer who is about to go bankrupt, the Owners run the risk of being saddled with the performance of the new voyage without hire being paid and without cover for expenses falling upon the charterers. It is too late to withdraw the vessel if cargo has been loaded and bills of lading have been signed obliging the owners to perform the voyage according to the bill of lading contract. Such risk is guarded against by the provisions of Clause 12(f)(iv)"

"...suspending services of the Vessel may be in conflict with the owners' obligations to the bill of lading holder. Consequentially, the owners should never invoke this right before consulting their P&I Club."

[Not right that cannot withdraw / terminate – can, but need to be careful to observe rights of cargo interests](#)

INDEMNITY – CLAUSE 12(f)(iv) – CLAUSE 12(f)(v) –  
20XX



"The Charterers shall indemnify the Owners in respect of any liabilities incurred by the Owners under cargo documents issued pursuant to clause 7(a)(ii) ~~the Bill of Lading or any other contract of carriage~~ as a consequence of the Owners' proper suspension of and/or termination ~~withdrawal~~ from any or all of their obligations under this Charter Party."

INDEMNITY



- Any liabilities
- Knock-for-knock '05 and 20XX different



- Indemnity for any liabilities to cargo
- Excluded from knock-for-knock in 14(b)(i) under '05 but not in 20XX, but not consequential loss under '05 or 20XX
- Not sure why no longer excluded in 20XX and raised with BIMCO
- Practically normally don't pay because cannot and therefore indemnity worthless – Will come back to that

## BREACH BY OWNERS



- If Owners suspend or withdraw vessel / terminate the C/P incorrectly, will be in breach of C/P and liable in damages for all foreseeable losses subject to operation of 14(c)
- ∴ Be careful, especially if Charterers may have an equitable right of set off
- If off-hire clause does not apply but the downtime results from what Charterers can argue is a breach of contract they can hold off paying hire if they can set off their damage claim against that hire.
  - Very big topic so only a few guidelines
  - General rule – Charterers' damages claims may not be set off against hire unless Owners' breach of charter has deprived the Charterers of the use of the ship
  - The damage claim must also relate to the period for which hire is claimed
- NB under 20XX set off expressly prohibited

## SUSPENSION & WITHDRAWAL - REGIONAL



- Governed by local Maritime codes if not agreed in contract
- No explicit right to suspend under Maritime codes
- Codified right to withdraw / required:
  1. Hire due
  2. Written notice
  3. Expiry of three days

## LIEN – CLAUSE 19



"The Owners shall have a lien upon all cargoes, fuel and equipment owned by the Charterers for all claims against the Charterers under this Charter Party and the Charterers shall have a lien on the Vessel for all monies paid in advance and not earned."

- Talk in itself
- Local issues
- '89 cargo only
- 20XX extras so can lien cargo, fuel and equipment, BUT only if owned by Charterers N/A e.g. where leased

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## REMEDIES - REGIONAL



### □ Lien

- Not recognized as in foreign laws – rights of “retention”
- Owners may not lien cargo or bunkers for outstanding hire unless owned by the charterer
- Requires a court order to place the cargo under a third party custody in the UAE !

## ARREST



An arrest of a ship owned by Charterers who owe hire under a charter for an unrelated vessel.

- Countries where it is possible :
  - **England** – The Span Terza [1982] 1 Lloyd's Rep. 225, The Tychy [1992] 2 Lloyd's Ref. 11(CA)
  - **Singapore** - Permina 108 3 [1978] 1 Lloyd's Rep 311
  - **Hong Kong** – Sextum 11 [1982] 2 Lloyd's Rep 532
  - **Australia** - The Laemthong Pride (1997) 190 CLR 181
  - **Netherlands** – President of the Arrondissementsrechtbank of Rottersam 23 January 1984, [1984] Ship en Schade 53, cited by M. H. Claringbould, Arrest of Ships, supra, chapter 3, n.15
  - **USA** – Rule B attachment

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## ARREST - REGIONAL



- Possible in theory around the region for outstanding hire
- Countries where it is possible in practice:
  - UAE
  - Bahrain
  - Jordan
  - Oman
- Requires: (i) counter security generally but not in Abu Dhabi, Dubai, and Sharjah; and (ii) the commencement of substantive proceedings / claim before local courts and under the charter.
- Bunkers arrest ! It is possible?

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## ARREST



Other jurisdictions where it might be possible to arrest or detain a "deemed sister ship"

- Argentina
- Brazil
- Bulgaria
- Cambodia
- Canada
- Chile
- China
- Costa Rica
- Croatia
- Cyprus
- India
- Korea
- Malta
- New Zealand
- Norway

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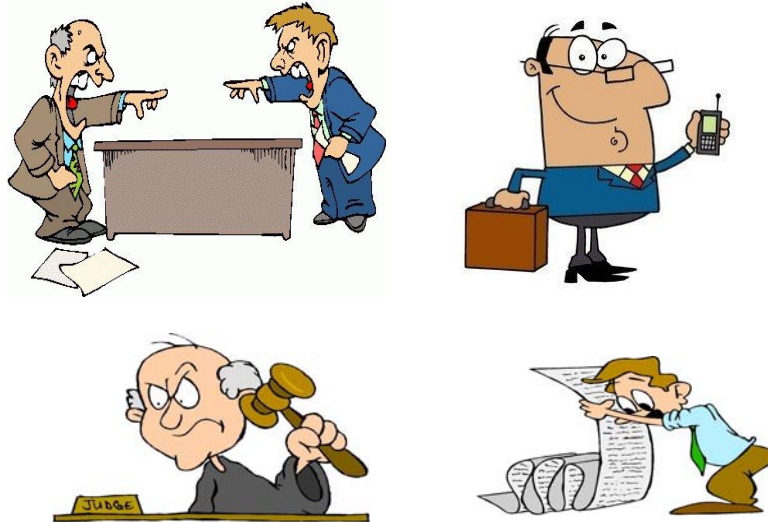
## ARRESTING BUNKERS



- Jurisdictions which permit arrest of a Charterer's vessel are also likely to permit the arrest or seizure of Charterers' bunkers
- Other countries may also have alternative approaches under their local laws ,e.g. *Saisie conservatoire*, freezing orders or other comparable remedies
- NB specific "fuel" addition in 20XX lien clause

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## DISPUTE RESOLUTION



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## ISSUES WITH DISPUTE RESOLUTION - REGIONAL



- Various law and jurisdiction clauses are used within the region
- Usually referring to English law and arbitration
- Recently referring to English law and local arbitration – No issues with the seat of arbitration but the mechanism of enforcing foreign awards is different than local awards
- Validity of agreeing English Law when both parties are local – Why it is an important issue?

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## NEW YORK CONVENTION



Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

N.B Partial final award for hire refused where dispute between parties on what claims were disputed and undisputed

Various countries are a party, but if no security will have to enforce where can find assets. Can take years, e.g. India have a case still going strong after 20 years

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## NEW YORK CONVENTION PARTIES



Afghanistan	Georgia	Macedonia, the Former	Qatar
Algeria	Germany	Yugoslav Republic of	Romania
Angola	Ghana	Madagascar	Russian Federation
Argentina	Greece	Malaysia	Rwanda
Australia	Guatemala	Mali	Saint Vincent & the
Azerbaijan	Guinea	Malta	Grenadines
Bahrain	Guyana	Marshall Islands	San Marino
Barbados	Haiti	Mauritania	Sao Tome & Principe
Belgium	Holy See	Mauritius	Saudi Arabia, Kingdom of
Bhutan	Honduras	Mexico	Senegal
Bosnia & Herzegovina	Hong Kong	Moldova	Serbia
Brazil	Hungary	Monaco	Singapore
Bulgaria	Iceland	Mongolia	Slovakia
Burundi	India	Montenegro	Slovenia
Cameroon	Indonesia	Morocco	Spain
Central African Republic	Iran, Islamic Republic of	Mozambique	Sri Lanka
China	Ireland	Myanmar	Sweden
Congo	Israel	Nepal	Switzerland
Costa Rica	Italy	Netherlands	Syrian Arab Republic
Cote D'Ivoire	Jamaica	New Zealand	Tajikistan
Cuba	Japan	Nicaragua	Tanzania United Rep. Of
Cyprus	Jordan	Nigeria	Thailand
Czech Republic	Kazakhstan	Niger	Trinidad & Tobago
Denmark	Kenya	Norway	Tunisia
Djibouti	Korea, Republic of	Oman	Turkey
Dominica	Kuwait	Pakistan	Uganda
Dominican Republic	Kyrgyzstan	Palestine	Ukraine
Ecuador	Laos	Panama	United Arab Emirates
Egypt	Latvia	Paraguay	United Kingdom
El Salvador	Lebanon	Portugal	United States
Estonia	Lesotho	Peru	Uruguay
Fiji	Liberia	Philippines	Uzbekistan
France	Liechtenstein	Poland	Venezuela
Gabon	Lithuania	Portugal	Vietnam
	Luxembourg		Zambia
			Zimbabwe

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## ENFORCEMENT UNDER NEW YORK CONVENTION - REGIONAL



- Pre-NY Convention: foreign arbitral awards were dealt with as foreign judgment.
- The misinterpretation :
  - (i) Applying local laws governing enforcement of foreign judgment or local arbitral awards
  - (ii) Expanding the role of Public Police
- Examples include:
  - Considering validity of the arbitration clause under local law
  - Procedural issues during arbitration process (witnesses, award ..etc)
  - Jurisdictional issues ! (Dubai's Court Case 2013)
- Recent Developments in the UAE - Two landmark judgements

## PERFORMANCE GUARANTEE



- To avoid enforcement issues worth thinking about guarantees
- No specific provision in Supplytime for performance guarantee or proposed in 20XX
- However, no obstacle to negotiating
- Contrast with TOWCON/TOWHIRE 2008 where specific provisions –  
TOWHIRE 2008 – Box 40 and Clauses 10 & 21(iii) and TOWCON 2008 –  
Box 36 and Clauses 12 and 23

## FRAUD



NB: Oceangrafia submitting false bank remittance slips.

## ANY QUESTIONS?



Lawyers for international commerce  
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