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NOT PAID?

OSV CHARTERING CONTRACT MANAGEMENT SEMINAR
13 SEPTEMBER 2018

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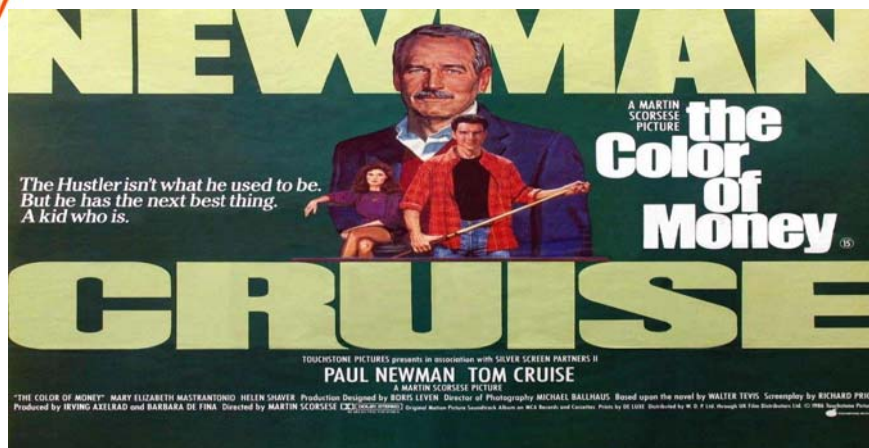
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Don't forget – it's all about the money



DIFFERENCES – 1989, 2005 AND 2017

- 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.
- Variation in 12(e)'17 introduces changes where charterers reasonably believe an incorrect invoice issued and notification at earliest opportunity.
- Rights to and notices are different.



CLAUSE 12(E) '17 - INTEREST

"If payment is not received by the Owners within five (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 material change from '05
- Banking days now defined in '17 "...days on which banks are open in the places stated in boxes 2 & 3 [Owners and Charterers place of business]"

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INTEREST

- Box 24 – payment period
- Box 25 – interest rate
- 2017 payment shall be received rather than made in the currency in box 20
- 2017 specifically adds no right of set off on payment “*in full without discount or set off*” – (clause 12(e))
- Interest rate must not be a penalty – un-enforceable. Rate has to be a genuine pre-estimate of losses – not a detriment on the contract breaker out of all proportion to the legitimate interest of the innocent party
- Negotiations



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CLAUSE 12(E) - INVOICE DISPUTED

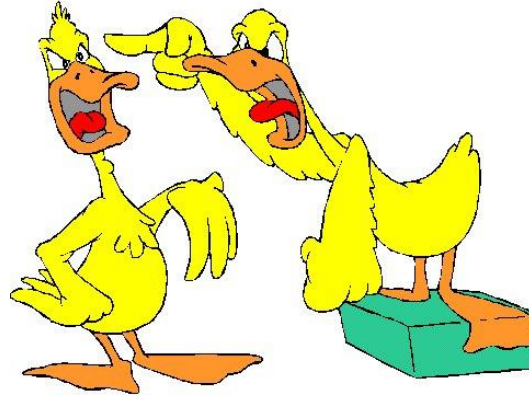
~~"Where an invoice is disputed If the Charterers reasonably believe an incorrect invoice has been issued, they shall notify the Owners before promptly, but in no event no later than the due date and in any event, specifying the reason for disputing the invoice. The Charterers shall pay the undisputed 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 amount. The Owners shall be entitled to charge interest 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 (together with any applicable interest) 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".~~

- Only substantive alteration is reasonable believe that invoice is incorrect but need to specify reason

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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 under '05 prior to due date
- If resolved in favour of Owners payment within 5 days of resolution and interest
- If Charterers right, new invoice to be issued



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SUSPENSION – CLAUSE 12(F)(I) '05 AND (II) '17

*" (I) Where there is a failure to ~~pay Hire~~ **make punctual payment of hire or other sums due and payable** by the ~~due date~~ **Charterers to Owners**, the Owners shall promptly notify the Charterers in writing of such failure and ~~further may also require payment within five (5) days.~~*

*(II) At any time while hire or other sums due and payable by the Charterers to Owners remain outstanding the owners shall be entitled to suspend the performance of any or all of their obligations under this Charter Party until such time as all the 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 **Hirehire**. The Owners' right to suspend performance under this Clause shall be without prejudice to any other rights they may have under this Charter Party."*

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Supplytime '17 “.. *or other sums due and payable*” means Owners have the right to suspend or terminate for payments other than hire.

- In effect the same as '05 except for introduction of “*or other sums due and payable*”

- Failure to pay
- '05 by due date
- '17 “punctual”
- Clear and unambiguous written notice
- On hire
- Without prejudice to any other rights
- May suspend – don't have to and may suspend some but not all obligations



Oops... **Service Suspended**

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"GREATSHIP DHRITI" – SUPPLYTIME '89



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

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COMMERCIAL PURPOSE

- Puts pressure on charterers to pay
- Fills a lacuna
- Right to suspend has to be express

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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 2017) if third party fails to pay

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CLAUSE 12 (F)(II) '05 AND (F)(III) '17 – TERMINATION

"If after **five (5)** days of the written notification referred to in ~~clause~~**Subclause** 12(f)(i) the ~~Hire has~~ **sums referred to have** still not been received, the Owners may at any time while ~~Hire remains~~ **such sums remain** outstanding ~~withdraw the Vessel from~~ **terminate** 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 ~~Clause 12(f)(i)~~ **Subclause 12(f)(ii)** above. The receipt by the Owners of ~~a payment~~ **all sums due** from the Charterers after the **five (5)** day period referred to above has expired but **prior to the** notice of ~~withdrawal~~ **termination** shall ~~not~~ be deemed a waiver of the Owners' right to ~~cancel~~ **terminate** the Charter Party. **The Owners' right to terminate under this Clause shall be without prejudice to any other rights they may have under this Charter Party.**"

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- '89, '05 and '17 all provide for a grace period (5 banking and 5 days respectively)
- N.B: distinction between interest entitlement – 5 banking days and suspension/termination is 5 days
- To protect charterers where delays of remittance of hire due to say banking errors



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





TERMINATION

- Notice of termination 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



TERMINATION

- Right to 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
- '17 states that receipt of "all sums due" after grace period but before notice of termination given, **IS** a waiver of Owners right to terminate
- Addition of final WP sentence in 2017 makes it consistent with suspension under 12(f)(ii)

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TERMINATION - PROMPTNESS

- Owners must act promptly
- Unreasonable delay under '05 could be a waiver
- What is reasonable delay?

ACT NOW!

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WAIVER – CLAUSE 12 (F)(III) '05(F)(IV) IN '17

*"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, or a series of late payments of hire, **or other sums due and payable by the Charterers to Owners** under the Charter Party, this shall not be construed as a waiver of their right either to suspend performance under ~~Clause 12(f)(i)~~ Sub-clause **12(f)(ii)** or to ~~withdraw the vessel from~~ **terminate** the Charter Party under ~~Clause 12(f)(ii)~~ **Subclause 12(f)(iii)** in respect of any subsequent late payment under this Charter Party."*

- Note reference to "other sums" to be consistent with 12(f)(ii)

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



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



- Owners have duty as bailees to take reasonable care of the cargo

"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

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- Any liabilities to cargo interests
- "Knock-for-knock" '05 excluded but not from '17
- Unable to pay? Indemnity worthless?
- Lien
- Guarantee



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- 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) in '05/14(b) in '17
- Be careful, especially if Charterers 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.
- Owners' breach must deprive the Charterers of the use of the ship and relate to the period for which hire is claimed.
- Set off expressly prohibited under '17 form.



"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
- 2017 extras so can lien cargo, fuel and equipment, BUT only if owned by charterers N/A e.g. where leased

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 Rotterdam 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

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

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



- 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 2017 lien clause





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	CYPRUS	KUWAIT	PHILIPPINES
ALBANIA	CZECH REPUBLIC	KYRGYZSTAN	POLAND
ALGERIA	DEMOCRATIC REPUBLIC OF THE CONGO	LAOS	PORTUGAL
ANDORRA	DENMARK	LATVIA	QATAR
ANGOLA	DJIBOUTI	LEBANON	ROMANIA
ANTIGUA AND BARBUDA	DOMINICA	LESOTHO	RUSSIAN FEDERATION
ARGENTINA	DOMINICAN REPUBLIC	LIBERIA	RWANDA
ARMENIA	ECUADOR	LIECHTENSTEIN	SAINT VINCENT & THE GRENADINES
AUSTRALIA	EGYPT	LITHUANIA	SAN MARINO
AUSTRIA	EL SALVADOR	LUXEMBOURG	SAO TOME & PRINCIPE
AZERBAIJAN	ESTONIA	MACEDONIA, THE FORMER YUGOSLAV	SAUDI ARABIA
BAHAMAS	FIJI	REPUBLIC OF	SENEGAL
BAHRAIN	FINLAND	MADAGASCAR	SERBIA
BANGLADESH	FRANCE	MALAYSIA	SINGAPORE
BARBADOS	GABON	MALI	SLOVAKIA
BELARUS	GEORGIA	MALTA	SLOVENIA
BELGIUM	GERMANY	MARSHALL ISLANDS	SOUTH AFRICA
BENIN	GHANA	MAURITANIA	SPAIN
BHUTAN	GREECE	MAURITIUS	SRI LANKA
BOLIVIA	GUATEMALA	MEXICO	SWEDEN
BOSNIA & HERZEGOVINA	GUINEA	MOLDOVA, REPUBLIC OF	SWITZERLAND
BOTSWANA	GUYANA	MONACO	SYRIAN ARAB REPUBLIC
BRAZIL	HAITI	MONGOLIA	TAJIKISTAN
BRUNEI DARUSSALAM	HOLY SEE	MONTENEGRO	TANZANIA UNITED REP. OF
BULGARIA	HONDURAS	MOROCCO	THAILAND
BURKINA FASO	HONG KONG	MOZAMBIQUE	TRINIDAD & TOBAGO
BURUNDI	HUNGARY	MYANMAR	TUNISIA
CAMBODIA	ICELAND	NEPAL	TURKEY
CAMEROON	INDIA	NETHERLANDS	UGANDA
CANADA	INDONESIA	NEW ZEALAND	UKRAINE
CENTRAL AFRICAN REPUBLIC	IRAN, ISLAMIC REPUBLIC OF	NICARAGUA	UNITED ARAB EMIRATES
CHILE	IRELAND	NIGER	UNITED KINGDOM
CHINA	ISRAEL	NIGERIA	UNITED STATES OF AMERICA
COLOMBIA	ITALY	NORWAY	URUGUAY
COMOROS	JAMAICA	OMAN	UZBEKISTAN
COOK ISLANDS	JAPAN	PAKISTAN	VENEZUELA
COSTA RICA	JORDAN	PALESTINE, STATE OF	VIETNAM
COTE D'IVOIRE	KAZAKHSTAN	PANAMA	ZAMBIA
CROATIA	KENYA	PARAGUAY	ZIMBABWE
CUBA	KOREA, REPUBLIC OF	PERU	

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PERFORMANCE GUARANTEE



"To quote my broker, 'Past results are no guarantee of future performance.'"

- No specific provision in Supplytime
- Towhire 2008 – Box 40 and clauses 10 & 21(iii)
- Towcon 2008 – Box 36 and clauses 12 and 23

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FRAUD



- Oceangrafia submitting false bank remittance slips

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ANY QUESTIONS?



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13 SEPTEMBER 2018

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