

CHALLENGING THE LEGAL AND COMMERCIAL JUSTIFICATION FOR RECLASSIFYING PAYMENT OF HIRE AS A CONDITION

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1. Introduction

The Astra, a recent first instance decision rendered by Flaux J, marks a departure from the previously accepted view, articulated by Brandon J in *The Brimnes*, that the obligation to pay hire was not a condition of the contract.¹ This paper examines the legal merits of this reclassification and aspires to contribute to the debate by challenging its legal and practical justification.

The first section considers the different categories of contractual terms under English law and their application to time stipulations in charterparties. The second section argues that Flaux J's departure from *The Brimnes* is unsupported by binding legal authority. No higher court had criticized Brandon J's reasoning that hire was not a condition and, until recently, it was generally accepted by practitioners as representing English law. The judicial trend to the contrary cited by Flaux J consists of *obiter* statements from the House of Lords delivered in decisions interpreting sales and shipbuilding contracts rather than charterparties.

The third section explains the allure of post-withdrawal loss of bargain damages following the 2008 credit crisis. Elevating payment of hire to a condition grants shipowners a right to such damages for *any* breach. This paper argues that the change is legally unfounded and unnecessary. Automatic post-withdrawal damages following the charterers' breach of their payment obligation were refused in *Italian State Railways*, an implicit rejection of the 'condition' analysis. Conversely, nothing prevents shipowners from obtaining damages for loss of bargain by proving breach of an intermediate term going to the root of the contract or by satisfying the contractual remoteness rule established in *Hadley v Baxendale*, later refined in *The Achilles*.²

The decision to elevate payment of hire to a condition has potentially wide ramifications for shipowners and charterers. It establishes a troubling precedent of judicial interference in shipping transactions, altering traditional market dynamics by correcting inequalities generally accepted within the industry as risks of doing business. While this intervention provides judicial relief to shipowners in low hire markets, charterers now bear a disproportionate share of the risks of market fluctuations. Treating hire as a condition also risks imposing excessive liability for trivial breaches resulting in minimal prejudice. Intermediate terms were created in order to prevent such unfair outcomes. Lastly, hire as a condition renders withdrawal clauses redundant and further complicates decisions by shipowners and charterers regarding deductions. The paper concludes that the obligation to pay hire should be characterized as an intermediate term, providing remedies commensurate with the gravity of the breach and the prejudice suffered by shipowners.

2. Construing Charterparty Clauses: Conditions, Warranties and Intermediate Terms

Historically, contractual obligations were either 'warranties' or 'conditions'. Warranties are collateral terms whose breach cannot frustrate the intended purpose of the contract.³ Conversely, conditions are mutually dependent terms implicitly recognized as crucial within the context of the contract or explicitly designated as such by the parties.⁴ Any breach of a condition, however slight, deprives 'the party not in default of substantially the whole benefit which

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¹ *Kuwait Rocks Co v AMN Bulkcarriers Inc; (The Astra)* [2013] 2 Lloyd's Rep. 69 ('*The Astra*'); *Tenax Steamship Co Ltd v The Brimnes (Owners); (The Brimnes)* [1972] 2 Lloyd's Rep 465 ('*The Brimnes*').

² *Hadley v Baxendale* (1854) 9 Ex 341, 354 ('*Hadley v Baxendale*'); *Transfield Shipping Inc v Mercator Shipping Inc; (The Achilles)* [2008] UKHL 48 [69] (Lord Walker) ('*The Achilles*').

³ *Hongkong Fir Shipping Company Ltd. v Kawasaki Kisen Kaisha Ltd; (The Hongkong Fir)* [1961] 2 Lloyd's Rep 478, 493 ('*Hongkong Fir*').

⁴ Use of the word 'condition' is not necessary or conclusive: *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.* [1973] 2 Lloyd's Rep 53, 57 (Lord Reid).

it was intended.’⁵ Default therefore relieves the innocent party, if he so elects, of his remaining contractual obligations. Rigorous enforcement is viewed as an acceptable trade-off for the commercial certainty it provides to both parties.⁶

2.1 Intermediate Terms

Classifying obligations into two categories proved simplistic and inconsistent with practical realities. Individual contractual terms often serve multiple purposes and premature classification of obligations as conditions can produce unfair results where the breach is not severe.⁷ In *Hongkong Fir*, Diplock LJ established a third category of obligations, known today as ‘intermediate’ terms, for which the consequences of their non-performance could not be established *a priori*;

Of such undertakings all that can be predicated is that some breach 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 classification of the undertaking as a ‘condition’ or a ‘warranty’.⁸

Using the obligation of seaworthiness to underscore his point, Diplock LJ explained how a default of one obligation could be trivial and easily remedied, such as a few loose screws, or more significant, such as a threat to the physical integrity of the vessel.⁹ Classifying an obligation as an intermediate term enables the courts to provide a remedy commensurate with the consequences of the impugned breach. Serious breaches of intermediate terms entitle the innocent party to termination whereas minor breaches only provide pecuniary damages.¹⁰

2.2 Distinguishing between Conditions and Intermediate Terms

The House of Lords in *Bunge v Tradax* affirmed *Hongkong Fir*’s intermediate term analysis and cautioned that courts ‘should not be too ready to interpret contractual clauses as conditions’.¹¹ However, Lord Scarman clarified that classification required ascertaining the significance attributed to the term when the contract was concluded through ‘express words or necessary implication’.¹² If the parties’ intended to grant the innocent party a right of termination for *any* breach of a particular obligation, the Court should uphold their desire and treat the term as a condition.¹³ Otherwise, the Court should qualify the stipulation as an intermediate term and, only then, proceed to an assessment of the nature and consequences of the breach to determine the appropriate remedy.¹⁴ The appropriateness of allowing rescission must be balanced against the need for certainty. In other words, while the actual breach should have no bearing on the characterization of an obligation, the consequences of hypothetical breaches contemplated by the parties at the conclusion of the contract are relevant.¹⁵

2.2.1 The Waller Test

While classification of particular contractual terms is context-dependent, Waller LJ identified different scenarios in *The Seaflower* where a particular term should be treated as a condition:¹⁶

- 1) Where expressly provided by statute;

⁵ *Hongkong Fir* [1961] 2 Lloyd’s Rep 478, 493.

⁶ *Bunge Corporation v Tradax Export S.A.* [1980] 1 Lloyd’s Rep 294, 307 (Court of Appeal) (Megaw LJ) (‘*Bunge v Tradax*’).

⁷ Beale, H (ed), *Chitty on Contracts*, (31st Ed, 2012), [12-034].

⁸ *Hongkong Fir* [1961] 2 Lloyd’s Rep 478, 494.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Bunge Corporation v Tradax Export S.A.* [1981] 2 Lloyd’s Rep 1, 6 (Lord Wilberforce) (‘*Bunge v Tradax H.L.*’).

¹² *Ibid.*, 8 (Lord Lowry); 7 (Lord Scarman); 12 (Lord Roskill).

¹³ *Ibid.*, 13 (Lord Roskill).

¹⁴ *Ibid.*, 7 (Lord Scarman); 8 (Lord Lowry).

¹⁵ *Bunge v Tradax H.L.* [1981] 2 Lloyd’s Rep 1, 14 (Lord Roskill).

¹⁶ *B.S. & N. Ltd v Micado Shipping Ltd; (The Seaflower)* [2001] 1 Lloyd’s Rep 341, 348.

- 2) Where recognized as such under English law by virtue of a judicial decision;
- 3) Where designated as such in the contract or where the contract expressly provides that breach entitles the innocent party to treat himself as discharged; and
- 4) Where the nature of the contract of the subject-matter or the circumstances of the case lead to the conclusion that the parties must by necessary implication, have intended that the innocent party would be discharged from further performance of his obligations in the event that the term was not fully and precisely executed.

Any term which fails to satisfy one of these criteria will be held to constitute an intermediate term.

2.3 'Time is of the essence'

Where a term renders 'time of the essence', it is more likely to be construed as a condition.¹⁷ Generally, time will be considered of the essence where it is expressly stipulated by the parties or where it can be implied by the "nature of the subject matter of the contract or the surrounding circumstances".¹⁸ While time is of the essence in most mercantile contracts, it ultimately remains a question of construction¹⁹

Relevant factors might include: (a) the object and scope of the contract; (b) potential losses identifiable upon conclusion of the agreement and whether they can be adequately compensated by damages; (c) detrimental reliance by the innocent party on strict compliance within the stipulated time, particularly where breach may cause serious commercial consequences due to the presence of subsidiary or dependent contracts with third parties; and (d) any features peculiar to the relevant commercial context such as whether dilatory performance is expected and commonplace and whether 'commercial considerations, such as fluctuating market prices, costs or seasonal demands compel performance precisely on time'.²⁰ These considerations are particularly important in shipping due to its vulnerability to political and market events.²¹

2.4 Time Terms in Charterparties

Litigants have attempted to maximize or mitigate breaches of commonly used charterparty terms by characterizing them as conditions or intermediate terms. In rendering its judgments, the Court has sought to balance competing values of certainty and proportionality.

Several cases have held time stipulations as conditions on the basis of commercial certainty. In *The Mihalis Angelos*, the Court of Appeal held that 'expected ready to load' (ERL) clauses were conditions.²² An ERL is invalid if issued dishonestly by the shipowner or without reasonable grounds. Given this high standard, allowing the innocent party to terminate the contract upon default was fair.²³ Moreover, treating ERLs as conditions provided certainty and uniformity, desirable values in commercial law:

It is surely much better, both for shipowners and charterers... when they are faced with the necessity for an urgent decision as to the effects of a suspected breach...to be able to say categorically: "If a breach is proved, then the charterer can put an end to the contract", rather than they should be left to ponder whether ...the Courts would be likely, in the particular case, when the evidence has been heard, to decide that in the particular circumstances the breach was or was not such as "to go to the root of the contract". Where justice

¹⁷ *Bunge v Tradax H.L.* [1981] 2 Lloyd's Rep 1, 8 (Lord Lowry).

¹⁸ *Universal Bulk Carriers Ltd v Andre et Cie SA* [2001] 2 Lloyd's Rep 65, 70 (Clarke LJ) ('*Universal Bulk C.A.*').

¹⁹ *United Scientific v Burnley Council* [1978] A.C. 904, 924 (Lord Diplock) ('*United Scientific*'); *Bunge v Tradax H.L.* [1981] 2 Lloyd's Rep 1., 6 (Lord Wilberforce).

²⁰ Lawson, M, 'Performance on Time: An Essential Condition?' (2005) *International Company and Commercial Law Review*, 20, 21.

²¹ Girvin, S, 'Time Charter Overlap: Determining Legitimacy and the Operation of Repudiatory Breach of Contract', (2005) *Journal of Business Law*, 200, 201.

²² *Mardelanto Compania Naviera S.A. v Bergbau-Handel G.m.b.H.; (The Mihalis Angelos)* [1970] 2 Lloyd's Rep 43, 47, 41, 55 ('*The Mihalis Angelos*').

²³ *Ibid* 55 (Megaw LJ).

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does not require greater flexibility, there is everything to be said and nothing against a degree of rigidity in the legal principle.²⁴

Similarly, in *The Mavro Vetrican*, Staughton J cited commercial certainty in declaring failure to nominate performing vessels within a contractually stipulated laycan period as a breach of condition.²⁵ Stipulations as to time, particularly in mercantile contracts, were to be strictly construed where consistent with the intention of the parties.²⁶ Nomination of a vessel within the laycan period required certainty since the shipowners' breach could foreseeably result in the charterers breaching subsidiary agreements with third parties;

It would lead to great doubt and dispute if the charterers, with their worldwide business commitments, had to assess whether delay in giving a proper nomination, or failure to give a nomination within the laycan period, would ultimately be a breach which deprived them of all the benefits which they were to obtain under the contract. The parties need to know at once whether any particular nomination is or is not one which the charterers are bound to accept.²⁷

Conversely, other charterparty time stipulations have not been held to be conditions. In *The Gregos*, timely redelivery of the vessel was held to be an innominate term.²⁸ Lord Mustill could imagine few instances whereby late redelivery of a few days would lead the shipowners to cancel the charter, since this decision would be detrimental to the shipowners' interests.²⁹ In his capacity as carrier, he would have outstanding obligations to third-parties with interests in the vessel's cargo. Moreover, shipowners were unlikely to bother discharging cargo at an alternative port within short notice on the basis of minimal delay in redelivery. Applying stringent consequences for late redelivery would be incommensurate with the prejudice caused to shipowners given the practical importance of the obligation within the scope of the charterparty;

Even acknowledging the importance given in recent years to time clauses in mercantile contracts (see for example, *Bunge Corporation New York v Tradax Export S.A. Panama*, [1981] 2 Lloyd's Rep. 1...) I would incline to the view that this particular obligation is "innominate" and that a short delay in redelivery would not justify the termination of the contract³⁰

Similarly, in *Universal Bulk v Andre et Cie*, Longmore J held a clause calling for laycan to be narrowed to "10 days spread 32 days prior to the first layday" was not a condition.³¹ While the clause provided critical information to charterers for sub-chartering and loading decisions, it enabled shipowners to arrange their own affairs to a much lesser extent.³² The minimal prejudice occasioned by the charterers' failure to send a laycan notice could thus be adequately compensated by damages.³³

2.5 Conclusion

The construction of contractual terms is often case-specific. However, the aforementioned decisions demonstrate that the Court must always reconcile the competing values of certainty and flexibility given the significant consequences of characterizing a particular term as a condition. The next section demonstrates these considerations are equally crucial in the Court's analysis of late-payment of hire.

3. Is Payment of Hire a Condition?

Time charters are contracts of service whereby shipowners allow charterers to use their vessel for a fixed period of time 'in whatever manner they think fit'.³⁴ Shipowners' interests in punctual advanced hire payment goes beyond

²⁴ *Ibid.*

²⁵ *Greenwich Marine Inc. v Federal Commerce & Navigation Co. Ltd.; (The Mavro Vetrican)* [1985] 1 Lloyd's Rep 580 ('*The Mavro Vetrican*').

²⁶ *Ibid.* 584.

²⁷ *The Mavro Vetrican* [1985] 1 Lloyd's Rep 580, 583.

²⁸ *Torvald Klaveness A/S v Arni Maritime Corporation; The Gregos* [1995] 1 Lloyd's Rep.

²⁹ *Ibid.* 9.

³⁰ *Ibid.*

³¹ *Universal Bulk v Andre et Cie S.A.* [2000] 1 Lloyd's Rep 459; affirmed in *Universal Bulk C.A.* [2001] 2 Lloyd's Rep 65.

³² *Universal Bulk v Andre et Cie S.A.* [2000] 1 Lloyd's Rep 459, 464.

³³ *Ibid.*

³⁴ *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc; (The Nanfri)* [1979] 1 Lloyd's Rep 201, 206 (Lord Wilberforce) ('*The Nanfri H.L.*').

the collection of rent, enabling them to cover the vessel's operating expenses, maintenance costs and wages, without risking personal funds or credit.³⁵ Most time charterparties include clauses granting shipowners a right to withdraw their vessel if charterers fail to pay their instalment of hire on time. While these withdrawal clauses have been the subject of extensive litigation, only *The Brimnes* had directly considered the character of the obligation to pay hire prior to *The Astra*.

3.1 The Astra

Kuwait Rocks Co ('the Charterers') time chartered the *Astra* from its owners AMN Bulkcarriers Inc ('the Owners') for five years on an amended NYPE 1946 form. The charterparty contained both withdrawal and anti-technicality clauses;

Clause 5

Payment of said hire...30 days in advance...as it becomes due...otherwise failing the punctual and regular payment of the hire...or any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claims they (the Owners) may otherwise have on the Charterers...

Clause 31

Referring to hire payment(s), where there is any failure to make 'punctual and regular payment' due to oversight or negligence or error or omission of Charterers' employees, bankers or agents, Owners shall notify Charterers in writing whereupon Charterers will have two banking days to rectify the failure, where so rectified the payment shall stand as punctual and regular payment.³⁶

Following the conclusion of the charterparty, hire rates fell dramatically. Unable to secure a sub-charter at a commensurate rate, the Charterers requested a reduction of hire, warning they would otherwise be forced to redeliver the vessel early and declare bankruptcy.³⁷ When the Charterers defaulted on their instalment of hire, the Owners issued a clause 31 notice. An agreement reached after 'without prejudice' negotiations reduced the rate of hire for a period of 12 months.³⁸ In exchange, the Charterers agreed to pay the Owners for future loss of earnings '[i]n the event of the termination or cancellation of the Charter by reason of any breach by or failure of the Charterers to perform their obligations'.³⁹ Struggling to pay hire punctually, the Charterers requested a further reduction by the Owners. Despite concluding a second addendum providing a reduced rate of hire, the Charterers subsequently defaulted on consecutive hire instalments. The Owners served an anti-technicality notice and withdrew the vessel upon its expiration, the breach not having been remedied by the Charterers. An arbitral tribunal held that while cl. 5 was not a condition, the owner was entitled to damages for loss of bargain on account of the charterers' repudiatory breach.

The charterers appealed the decision to the English Commercial Court. Flaux J held the arbitral tribunal had applied the appropriate test for repudiation, namely that the threatened breach should deprive the innocent party of the substantial benefit they would have obtained from further performance.⁴⁰ The tribunal was entitled to conclude that the Charterers' conduct constituted a repudiatory breach given their factual finding that the Charterers' multiple threats of bankruptcy and consecutive missed hire payments evinced an intention to perform the contract in a manner inconsistent with the charterparty. While this ruling settled the dispute, Flaux J also considered the character of the obligation to pay hire.

Flaux J ruled that the withdrawal clause was, in of itself, a condition of the contract. First, the language employed in the withdrawal clause (cl. 5 NYPE) clearly demonstrated the parties' intention that 'failure to pay hire promptly would go to the root of the contract'.⁴¹ Second, time is of the essence in mercantile contracts containing time

³⁵ *The Astra* [2013] 2 Lloyd's Rep. 69, 79.

³⁶ *The Astra* [2013] 2 Lloyd's Rep. 69, 71.

³⁷ *Ibid* 72.

³⁸ *Ibid*.

³⁹ *Ibid*.

⁴⁰ *The Nanfri H.L.* [1979] 1 Lloyd's Rep 201, 207, citing *Decro-Wall International S.A. v. Practitioners in Marketing Ltd.* [1971] 1 WLR 361 ('*Decro-Wall*'), 380 (Buckley LJ).

⁴¹ *The Astra* [2013] 2 Lloyd's Rep. 69, 95.

stipulations and the House of Lords has on several occasions stated in its *obiter dicta* that time is of the essence with regards to the punctual payment of hire.⁴²

Flaux J elected to eschew Brandon J's decision in *The Brimnes* that payment of hire was not a condition: (1) it was inconsistent with the aforementioned statements of the House of Lords; (2) it relied heavily on decisions since overturned by the House of Lords; (3) it was at odds with the Court's promotion of certainty in mercantile contracts. Failure to recognize payment of hire as a condition would deprive shipowners access to adequate compensation for loss of bargain unless they adopted a commercially-unsound 'wait and see' approach in the hopes that the charterers' breach becomes repudiatory.⁴³ Given the commercial unreasonableness of this course of action and the statements in the House of Lords in *Bunge v Tradax* that the Court should not hesitate to qualify a term as a condition where suitable, Flaux J concluded that payment of hire should be deemed a condition thus entitling the shipowners to claim damages for loss of bargain as a result of its breach.

In the alternative, if cl. 5 NYPE did not make time of the essence and *The Brimnes* was applicable, Flaux J held that the presence of an anti-technicality clause in the charterparty distinguished *The Astra*. Its inclusion made time of the essence, and therefore payment of hire a condition, since it stipulated a clear 'defined period of grace, here two banking days, after which, provided the notice has been given, the owners are entitled to withdraw the vessel.'⁴⁴

While Flaux J's *dicta* are arguably *obiter*, they mark the first in-depth analysis of this issue undertaken by an English court since Brandon J's judgment in *The Brimnes*. It provides an interesting argument for elevating the character of the obligation to pay hire to a condition. However, a reading of the authorities considered by the learned judge reveals his reluctance to acknowledge the crucial role which particular contexts and facts played in these decisions, mitigating their applicability to chartering and the obligation to pay hire.

3.2 Default Strictly Construed

In *Tankexpress*, the House of Lords established that *any* late payment of hire constituted a default by the charterer, regardless of the extent of the delay or its cause.⁴⁵ Lord Wright stated

Default in payment, that is, on the due date is not...excused by accident or inadvertence...The importance of this advance payment [of hire]... is that it is the substance of the consideration given to the shipowner for the use and service of the ship and crew....He is entitled to...periodical payment as stipulated in advance of his performance as long as the charterparty continues. Hence the stringency of his right to cancel.⁴⁶

In *The Astra*, Flaux J stated 'Lord Wright's reasoning is clearly predicated upon it being an essential term of the contract, which as other cases demonstrate, is synonymous with the provision being a condition.'⁴⁷ However, he failed to discuss the context in which these comments were made. *Tankexpress* considered whether payment delayed by a prevailing state of war constituted default. The importance of hire payments was emphasized in regards to timing and method of payment rather than the nature of the obligation and the significance of its breach. Despite emphasizing 'stringency', Lord Wright ruled the charterers were not in default. The charterers had sent the instalment by cheque according to standard practice between the parties and 'payment of hire had been regularly and properly paid in "this way"'.⁴⁸ Shipowners bore the risk of incidental delays in international cash transactions.

Given Lord Wright's flexible construction of the payment 'in cash' obligation, it is difficult to believe that *Tankexpress* supports a draconian interpretation of hire as condition capable of terminating the contract for 'any breach'.⁴⁹ While linked by the operation of the withdrawal clause, we should not confuse the right of withdrawal with the obligation to pay hire. Lord Wright's call for stringency in *Tankexpress* concerned the exercise of the right of withdrawal. Shipowners must be able to clearly determine whether there has been default to correctly and promptly exercise their right of withdrawal. Premature withdrawal may be treated as a repudiatory breach, resulting

⁴² *Ibid.*

⁴³ *The Astra* [2013] 2 Lloyd's Rep. 69, 96.

⁴⁴ *Ibid.* 95.

⁴⁵ *Tankexpress A/S v Compagnie Financiere Belge des Petroles S/A; (The Petrofina)* [1949] AC 76 ('*Tankexpress*').

⁴⁶ *Ibid.* 94 (Lord Wright).

⁴⁷ *The Astra* [2013] 2 Lloyd's Rep. 69, 82.

⁴⁸ *Tankexpress* [1949] AC 76, 97.

⁴⁹ *Ibid.*

in serious liability. Shipowners must also fulfil other formalities such as sending an anti-technicality notice or simply a notice of withdrawal to the charterer. Quick action is necessary to avoid losing any opportunities to refix their vessel. Payment must therefore either be on time or late. This does not however preclude drawing a distinction between the exercise of the contractual right of withdrawal and the obligation to pay hire.

3.3 Hire is Not a Condition: Early Pronouncements by the Court

The distinction between the right of withdrawal and the obligation to pay hire was considered in *The Georgios C*.⁵⁰ Due to a banking error, the charterers' payment arrived Monday, rather than Saturday as stipulated. Payment was refused by the shipowners' bank. Likely eager to take advantage of a significantly higher freight market, the shipowners withdrew the vessel pursuant to the withdrawal clause in the Baltimore 1939 form. They then notified the charterers via telex. Unwilling to charter the same vessel at a higher rate, the charterers filed an injunction compelling the return of the vessel refixed by the shipowners to another party.

At trial, Donaldson J held that *Tankexpress* established time to be of the essence only in determining whether there was a default of the obligation to pay hire and not with regards to the significance of such breach;

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 and the situation in which this right is exercisable depends upon the true construction of the contract...⁵¹

This approach was confirmed by Lord Denning MR at the Court of Appeal. Strictness was required when assessing whether a payment was made on time. However, payment was not an essential obligation whose breach automatically allowed the innocent party to terminate the contract.⁵² Lord Denning MR held the withdrawal clause did not constitute an express stipulation to that effect.

Further doubt was cast upon viewing payment of hire as a condition in *The Brimnes*.⁵³ The shipowners, presumably intent on regaining their right to strict compliance, implored the chronically delinquent charterers to make punctual payments. They warned future payments would be strictly enforced, instructing their agents to withdraw the vessel for any future default of payment.⁵⁴ When the charterers defaulted on a subsequent instalment, the shipowners' agents withdrew the ship and notified the charterers. The charterers challenged the withdrawal, arguing they had remedied their default by tendering late payment prior to the shipowners' withdrawal.⁵⁵

The Court of Appeal in *The Brimnes* upheld the withdrawal, distinguishing this case from *The Georgios C* due to the withdrawal clause's insistence on 'punctual payment' of hire.⁵⁶ This addition reflected the parties' intention for a more stringent payment obligation. Once in default, the charterers could not remedy their breach since late payment could never constitute punctual payment.⁵⁷ At the trial level, Brandon J endorsed Donaldson J and Lord Denning MR's reasoning in *The Georgios C* on the 'essential term' issue, rejecting the notion that withdrawal clauses rendered the obligation to pay hire of the essence;

I have reached the conclusion that there is nothing in clause 5 which shows 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.

...

⁵⁰ *Empresa Cubana De Fletes v Lagonisis Shipping Company Ltd; The Georgios C* [1971] 1 Lloyd's Rep 7 ('*The Georgios C*').

⁵¹ *Ibid* 11, quoting Donaldson J.

⁵² *The Georgios C* [1971] 1 Lloyd's Rep 7, 13 (Lord Denning MR).

⁵³ *The Brimnes Q. B.* [1972] 2 Lloyd's Rep 465; *Tenax Steamship Co Ltd v The Brimnes (Owners)* [1974] 2 Lloyd's Rep 241 ('*The Brimnes C.A.*').

⁵⁴ Healy Jr., N, 'Termination of Charter Parties', (1974-1975) 49 *Tulane Law Review*, 845, 850 ('Healy Jr.').

⁵⁵ In *The Georgios C*, Lord Denning MR held that late payment could be remedied by tendering payment prior to withdrawal: *The Georgios C* [1971] 1 Lloyd's Rep 7, 13-14.

⁵⁶ *The Brimnes Q.B.* [1972] 2 Lloyd's Rep 465, 481.

⁵⁷ *The Brimnes C.A.* [1974] 2 Lloyd's Rep 241, 250, 253, 261 (Megaw LJ).

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My decision on the first point of construction means that the owners were not also entitled to withdraw the ship on the ground that the charterers' failure to pay hire by April 1 was a breach of an essential term of the contract which gave them the right to treat the contract as at an end,⁵⁸

While the Court of Appeal in *The Brimnes* did not address this issue, its silence could be considered tacit approval of Brandon J's judgment.

Brandon J's reasoning in *The Brimnes* was cited approvingly in *The Agios Giorgis* where the shipowners temporarily suspended their vessel over disputed deductions made by the charterers.⁵⁹ Discharge only commenced two days later once the charterers paid the disputed amount. Mocatta J ruled the shipowners had no right to partially suspend the vessel or refuse discharge. While Flaux J dismissed this case as irrelevant, Mocatta J clearly contemplated the characterization of hire as a condition.⁶⁰ Noting that previous authorities had equated 'withdrawal' with 'cancellation', he questioned the need for withdrawal clauses, characterized by Greer J in *Leslie Shipping* as inserted for the benefit of the shipowners, if payment of hire was itself a condition.⁶¹

3.4 Doubts Cast on the Authoritative Value of The Brimnes

The binding character of *The Brimnes* was questioned by Flaux J due to its reliance on *The Georgios C*, a decision emphatically overruled by the House of Lords in *The Laconia*.⁶² In that case, the charterers tendered hire 3 days late. The shipowners notified them of the breach and said they were contemplating withdrawal. After refusing payment, the shipowners withdrew the vessel. As in *The Brimnes*, the withdrawal clause called for 'punctual payment'.

At the Court of Appeal, Lord Denning MR acknowledged 'punctual' imposed a more rigorous obligation upon the charterer.⁶³ Nevertheless, a more flexible construction was warranted. By unfairly depriving charterers of the use of vessels for any breach, withdrawal clauses created an imbalance between the parties analogous to forfeiture clauses. These were historically construed in favour of the disadvantaged party.⁶⁴ The shipowners had failed to promptly issue a notice of withdrawal to the charterers and rejected a tender which would have remedied the breach.⁶⁵ Lord Denning MR criticized the shipowners for invoking any pretext to break their existing agreement and profit from the rising hire market. Forfeiture on a technicality was wasteful and commercially inefficient, particularly given the multitude of actors in chartering beyond the contracting parties.⁶⁶ Since the tender preceded the shipowners' notice of withdrawal, he declared the withdrawal invalid.

On appeal, the House of Lords ruled late payment was an unrectifiable breach, citing *The Brimnes* as authority.⁶⁷ A stringent construction of withdrawal clauses provided certainty, an essential element in the commercial context.⁶⁸ Lord Wilberforce criticized the Court of Appeal's interpretation of the withdrawal clause in *The Georgios C* as a reconstruction, failing to see how 'in default of payment' could impose any obligation other than advance payment.⁶⁹ *The Georgios C* had been wrongly decided, an assessment shared by Lords Salmon and Fraser.⁷⁰

Lord Denning MR's forfeiture clause analogy was admonished by the House of Lords. Time charters and property leases were markedly different.⁷¹ Lord Salmon struggled to envision how charterers might be unfairly prejudiced in a manner requiring redress by the courts.⁷² Charterparties lacked the power imbalance which characterized leases.

⁵⁸ *The Brimnes Q.B.* [1972] 2 Lloyd's Rep 465, 482-483.

⁵⁹ *Steelwood Carriers Inc of Monrovia, Liberia v Evimeria Compania Naviera SA of Panama; (The Agios Giorgis)* [1976] 2 Lloyd's Rep 192 ('*The Agios Giorgis*').

⁶⁰ *The Astra* [2013] 2 Lloyd's Rep. 69, 86.

⁶¹ *The Agios Giorgis* [1976] 2 Lloyd's Rep 192, 202 (Mocatta J); *Leslie Shipping Co v Welstead* [1921] 3 KB 420, 426 ('*Leslie Shipping*').

⁶² *The Astra* [2013] 2 Lloyd's Rep. 69, 83; *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia; (The Laconia)* [1977] 1 Lloyd's Rep 315 ('*The Laconia H.L.*').

⁶³ *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia; (The Laconia)* [1976] 1 Lloyd's Rep 395.

⁶⁴ *Ibid* 400.

⁶⁵ *Ibid* 401.

⁶⁶ *Ibid*.

⁶⁷ *The Laconia H.L.* [1977] 1 Lloyd's Rep 315, 317 (Lord Wilberforce LJ).

⁶⁸ *Ibid* 325 (Lord Salmon).

⁶⁹ *Ibid* 318.

⁷⁰ *Ibid* 318, 323, 328.

⁷¹ *Ibid* 319.

⁷² *The Laconia H.L.* [1977] 1 Lloyd's Rep 315, 325.

Charterers and shipowners were sophisticated commercial actors capable of selecting and amending different standard forms to guard their interests. In high markets, charterers should alertly fulfill their payment obligations given shipowners' predisposition for substituting existing commitments with upgraded bargains.⁷³ Such behaviour was commonplace and reciprocated in falling markets by charterers delaying payments of hire, confident that shipowners would not exercise their right of withdrawal.⁷⁴ Charterers could easily protect themselves by including anti-technicality clauses requiring shipowners to notify charterers of their default thus providing a window to rectify the breach.⁷⁵ In any event, serious manipulation of contractual language was beyond the Court's competence.⁷⁶ Lastly, the interest of shipowners for punctual payment in charterparties went beyond the collection of rent.

In *The Astra*, Flaux J relied on *The Laconia* to support two conclusions. First, it overturned Lord Denning MR's decisions in *The Georgios C* and *The Laconia*. Since Brandon J's judgment in *The Brimnes* was based on *The Georgios C*, its authority was severely undermined by this reversal. Second, although *The Laconia* did not classify payment of hire as a condition, their Lordships' repeated emphasis on punctual payment fostering certainty in the commercial context implicitly endorsed this conclusion. In *STX Pan Ocean Co Ltd v Bowen Basin Coal Group Pty Ltd (No 2)*, a 2010 Federal Court of Australia judgment, Rares J also arguably subscribed to the notion that *The Laconia* supported a view of payment of hire as a condition when he stated;

In a number of well known forms of charterparty (including the New York Produce Exchange, Baltime and Shelltime forms), the obligation of a charterer to pay hire not later than the time it is due, is generally regarded as an essential term that, if breached, entitles the owner to terminate immediately and to withdraw the vessel: *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia* [1977] AC 850 at 868E-870D, 872C-E per Lord Wilberforce, 873C per Lord Simon of Glaisdale, 878E-H per Lord Salmon, 882H-883F per Lord Russell of Killowen.⁷⁷

The designation 'essential term' is certainly consistent with a condition analysis although the consequences of the breach of payment obligation described by Rares J (i.e. termination of the charterparty and withdrawal of the vessel) are essentially those provided for by the operation of withdrawal clauses.⁷⁸ The context of Rares J's statement however raises doubts as to whether he was addressing the contractual classification of the obligation to pay hire. *STX* involved the determination of damages payable to shipowners for the charterers' default of their freight and demurrage payment obligations and whether the charterers' sole shareholder and director should be held personally liable by virtue of his alleged misrepresentations made in contravention of Australian statutory obligations.⁷⁹ Rares J's *obiter* statement was made under the heading 'When was Payment of Freight and Load Port Demurrage due?' and was immediately preceded by a discussion of the natural and ordinary meaning of 'within' in the context of a demurrage clause contained in an addendum to the AMWELSH 93 voyage charterparty.⁸⁰ The essential character of payment of hire was therefore arguably expressed to emphasize the crucial importance of timing when determining a breach of the obligation rather than its classification. This view is consistent with Lord Wright's statement in *Tankexpress* and Brandon J's statement in *The Brimnes* discussed above, that punctual payment should be stringently enforced.⁸¹

Lord Wright's approach in *Tankexpress* was endorsed by the House of Lords in *The Laconia*.⁸² While the House of Lords in both *The Georgios C* and *The Laconia* certainly rebuked Lord Denning MR's Court of Appeal judgments, its disagreements concerned his conclusion that late payment could be remedied and his efforts to protect charterers by analogizing withdrawal clauses with forfeiture clauses.⁸³ The House of Lords expressed no opinion in these decisions on the classification of payment of hire as a contractual term. Its emphasis on stringent construction and commercial certainty focused on whether a default of payment had occurred justifying withdrawal. For reasons mentioned above in the *Tankexpress* discussion, certainty is essential to shipowners exercising their right of

⁷³ *Ibid* 321 (Lord Wilberforce).

⁷⁴ Healy Jr., above n 54, 850.

⁷⁵ *The Laconia H.L.* [1977] 1 Lloyd's Rep 315, 329 (Lord Fraser).

⁷⁶ *Ibid* 325 (Lord Salmon).

⁷⁷ [2010] FCA 1240, [51] ('*STX*').

⁷⁸ As noted above, withdrawal has been equated with cancellation, see *The Agios Giorgis* [1976] 2 Lloyd's Rep 192, 202 (Mocatta J).

⁷⁹ *Trade Practices Act 1974* (Cth), s52.

⁸⁰ *STX* [2010] FCA 1240, [50].

⁸¹ *Tankexpress* [1949] AC 76, 94 (Lord Wright); *The Brimnes Q.B.* [1972] 2 Lloyd's Rep 465, 482-483 (Brandon J).

⁸² *The Laconia H.L.* [1977] 1 Lloyd's Rep 315, 318 (Lord Wilberforce); 323 (Lord Salmon); 328-329 (Lord Fraser).

⁸³ See also *China National Foreign Trade Transportation Corporation v Evlogia Shipping Co SA of Panama; (The Mihalios Xilas)* [1979] 2 Lloyd's Rep 303, 312 (Lord Salmon).

withdrawal. In fact, the certainty provided by the right of withdrawal makes it unnecessary to treat payment of hire as a condition.

3.5 Hire as a Condition: Judicial Trend?

Much of the legal authority cited in support of treating hire as a condition is derived from decisions of the House of Lords. While there is no higher authority, the relevant statements are *obiter* and most are made in decisions which involve contexts other than chartering.

In *The Afovos*, the House of Lords ruled the charterers could only be in default of his payment obligation at the expiration of the hire due date.⁸⁴ Premature issuance of an anti-technicality notice shortened the window for rectification, contrary to the object and purpose of anti-technicality clauses.⁸⁵ Lord Diplock's judgment featured a two-pronged analysis of the NYPE withdrawal clause. Delayed payment of one instalment could not result in a repudiatory breach since it would not deprive shipowners of substantially the whole benefit which they were to obtain under the contract. However, the second part of the clause ('otherwise failing the punctual and regular payment of the hire...or any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers...') transformed the payment obligation into a condition;

The second part of cl. 5 however, starting with the word "otherwise" goes on to provide expressly what the rights of the owners are to be in the event of any such breach by the charterers of their primary obligation to make punctual payment of an instalment. 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 obligations under the charter-party then remaining unperformed.⁸⁶

This was consistent with his earlier statement in *United Scientific Holdings Ltd v Burnley Borough Council* that 'in a charterparty a stipulated time of payment of hire is of the essence.'⁸⁷ In that case however, Lord Diplock provided no context or reasoning for reaching this conclusion. It is the only mention of 'charterparty' in a case concerned with interpreting rent review clauses in commercial leases. While withdrawal has in the past been equated with termination, this does not preclude the Court from distinguishing withdrawal from the pay hire obligation.⁸⁸ The significance of this distinction is more apparent when assessing the consequences of treating hire as a condition with regards to prospective damages, an issue not considered in Lord Diplock's *obiter* statement but which is discussed in Part 3.

In *The Antaios*, the vessel was chartered for three years on a NYPE form.⁸⁹ The charterers issued inaccurate bills of lading and, after a delay, the shipowners withdrew their vessel on the basis that this constituted 'any breach' under the withdrawal clause. The Court rejected a broad interpretation of 'any breach' in cl. 5 NYPE. Withdrawal could only be exercised pursuant to 'a fundamental breach of an innominate term or breach of a term expressly stated to be a condition, such as would entitle the shipowners to elect to treat the contract as wrongfully repudiated by the charterers'.⁹⁰ On the basis of this decision, Rix LJ in *Stocznia Gdanska v Latvian Shipping*, a shipbuilding case heard by the Court of Appeal, opined that payment of hire was a condition;

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.⁹¹

In the *Astra*, Flaux J argues that this pronouncement, and those discussed above, were indicative of a judicial trend which views the obligation to pay hire as a condition.⁹²

⁸⁴ *Afovos Shipping Co SA v R. Pagnan and F. Lli; (The Afovos)* [1983] 1 Lloyd's Rep 335 ('*The Afovos*').

⁸⁵ *Ibid* 338.

⁸⁶ *Ibid* 341 (Lord Diplock).

⁸⁷ *United Scientific* [1978] A.C. 904, 924.

⁸⁸ *The Agios Giorgis* [1976] 2 Lloyd's Rep 192, 202 (Mocatta J).

⁸⁹ *Antaios Compania Naviera SA v Salen Rederierna AB; (The Antaios)* (No. 2) [1984] 2 Lloyd's Rep 235 ('*The Antaios*').

⁹⁰ *Ibid* 238 (Lord Diplock).

⁹¹ *Stocznia Gdanska SA v Latvian Shipping Co* [2002] Lloyd's Rep 436, 451 ('*Latvian Shipping*').

⁹² *The Astra* [2013] 2 Lloyd's Rep. 69, 90.

3.5.1 Time of the Essence

Bunge v Tradax, discussed in the first section, contained a number of statements suggesting that time stipulations in mercantile contracts should be treated as conditions.⁹³ In his judgment, Lord Lowry noted that time is generally of the essence in such contracts for practical rather than legal reasons. Commercial transactions require certainty to facilitate the ability of businessmen to make informed decisions and pre-emptively allocate the risks of non-performance.⁹⁴

Lord Roskill rejected the notion that *Hongkong Fir* limited conditions exclusively to terms whose breach deprived the innocent party of substantially the whole benefit intended under the contract. Citing recent withdrawal cases, he stated that ‘where punctual payment of hire is required...the right to rescind automatically follows a breach of any such condition’.⁹⁵ Flaux J in *The Astra* emphasized this statement. However, as *obiter*, its authority is diminished. Moreover, its persuasive character is limited since the cases on withdrawal to which Lord Roskill is presumably referring, in particular *The Laconia*, never rendered any conclusions regarding the classification of payment of hire.

Flaux J approvingly cited Lord Wilberforce’s rejection of contractual classification premised upon the consequences engendered by the breach. The shortcomings of an *ex post* characterization are evident both from a legal and practical standpoint for the reasons discussed in the first section. The intention of the parties, explicit or implied, as to what would arise following the breach of a particular obligation must be assessed at the conclusion of the contract in order to achieve greater commercial certainty. It is equally accepted that with regard to time stipulations (in this case a notice of loading clause) ‘there is only one kind of breach possible, namely, to be late’.⁹⁶ However, this method of construction does not preclude the finding that a term is intermediate in nature. The underlying thread of both statements is that contractual interpretation remains a case-by-case exercise. The fact that time is often of the essence in mercantile contracts does not mean that it is always so.

Flaux J also overlooked important facts in *Bunge v Tradax* which made time of the essence, facilitating a finding that failure to notify the readiness was a breach of condition. The case involved a sales contract rather than a time charterparty. Sales contracts are often part of a larger chain of string contracts and even parallel agreements.⁹⁷ The buyer may well be acting as a seller in a subsequent transaction. Fostering certainty in such contracts is essential for commercial actors to behave confidently without the spectre of lengthy and costly litigation.⁹⁸ Lord Lowry emphasized that the difficulties for quantification of damages posed by these complex arrangements increased the need to treat the impugned term as a condition.⁹⁹ Moreover, Professor Paul Todd has argued that there is significant commercial incentive to treating time stipulations in sales contract as conditions;

Clearly it is desirable that if one buyer, or one seller in the chain can repudiate, then all can do so. Since the gravity of the breach...might vary as between each contract in the chain, only by construing such terms as condition can the necessary certainty be achieved, in chain sales.¹⁰⁰

Conversely, Todd notes that the Court has been reluctant to interpret time stipulations in charterparties as conditions.¹⁰¹

These considerations were clearly influential in *Bunge v Tradax*, where the House of Lords emphasized the heavy reliance placed by the seller upon the buyer’s performance of his notice obligation. Lord Roskill believed it was unreasonable to expect the respondent seller to nominate a loading port and prepare the transit of their goods until the buyer had given the required 15 day notice of loading.¹⁰² Lord Wilberforce stated;

⁹³ *Bunge v Tradax* H.L. [1981] 2 Lloyd’s Rep 1, 8 (Lord Lowry).

⁹⁴ *Ibid.*

⁹⁵ *Ibid* 19 (Lord Roskill).

⁹⁶ *Ibid* 5 (Lord Wilberforce).

⁹⁷ *Ibid* 9 (Lord Lowry).

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ Todd, P, ‘ERG Raffinerie v Chevron: An Unhappy Marriage between Sale and Carriage Contract Terms’, (2007) 6 *Shipping and Transport*, 9, [9] (‘Todd’).

¹⁰¹ *Ibid.*, [12].

¹⁰² *Bunge v Tradax* H.L. [1981] 2 Lloyd’s Rep 1, 9.

In this present context it is clearly essential that both buyer and seller (who may change roles in the next series of contracts, or even in the same chain of contracts) should know precisely what their obligations are, most especially because the ability of the seller to fulfil his obligation may well be totally dependent on punctual performance by the buyer.¹⁰³

Such reliance was foreseeable at the conclusion of the contract and was clearly a determining factor in this case. Could the same be said about a payment of hire? Perhaps, but it requires proof through an assessment of the parties' intentions and not simply on the basis of this general statement in *Bunge v Tradax*.

3.5.2 Anti-technicality Notice makes Time of the Essence

In *The Astra*, Flaux J argued that if cl. 5 NYPE was not in of itself a condition, the inclusion of an anti-technicality notice made time of the essence, thereby rendering payment of hire a condition upon its expiration. His argument was premised upon *Latvian Shipping*. In that case, Rix LJ ruled that a clause in a shipbuilding contract providing a 21-day grace period for payment should be deemed a condition since it provided "default entitling rescission".¹⁰⁴ The relevant part of the provision stated "[i]f the Purchaser defaults in the payment of any amount due to the Seller under sub-clauses (b) or (c) or (d) of Clause 5.02 for twenty-one (21) days after the date when such payment has fallen due the Seller shall be entitled to rescind the contract."¹⁰⁵

Flaux J held this grace clause was analogous to an anti-technicality clause. Therefore, a default to pay hire upon the expiration of an anti-technicality notice should be treated as a breach of condition.

However, these clauses are not analogous. In *The Afovos*, Lord Hailsham L.C. described anti-technicality clauses as protective buffers alerting charterers of their default.¹⁰⁶ Due to the complex network of actors involved in the payment of hire, charterers often mistakenly assume that their obligations are fulfilled once they instruct their banks to make payment. Shipowners may withdraw their vessel immediately upon default of payment by charterers. Since this may cause substantial prejudice to charterers, particularly third party liabilities, anti-technicality clauses provide them with a short window in which to remedy their default of which they may well be unaware.

The *Latvian Shipping* clause shares none of these characteristics. There is no obligation requiring shipbuilders to notify buyers of their default. The 21-day grace period far exceeds the short window which anti-technicality notices offer charterers to remedy their breach. Charterers who have not paid their instalment of hire within 21 days of the due date would not only be in default, but also arguably in repudiatory breach if their conduct suggested an intention not to be bound by the contract.¹⁰⁷ The shipbuilding clause is more of an extended payment due date rather than a formal notice clause. Its inclusion may have been attributable to the fact that the contract was part of a series of shipbuilding contracts between parties sharing a longstanding business relationship.¹⁰⁸ Nevertheless, the considerations present in chartering, particularly concerning the harsh operation of withdrawal clauses, are clearly absent. *Latvian Shipping* therefore provides little guidance to the characterization of the obligation to pay hire punctually.

Lastly, concerns in shipbuilding contracts are different to those in chartering. Shipbuilding contracts are hybrid contracts of sale with certain features borrowed from building contracts.¹⁰⁹ Sellers receive consideration not only for the goods but the manufacturing process. The high cost of newbuildings and the extended timeframe required to build them means that both parties undertake significant commercial risks.¹¹⁰ Since shipbuilding is an expensive endeavour, failure to pay an instalment may jeopardize the entire project, in particular procurement of building materials, payment of subcontractors and, most importantly, stipulated delivery dates. Moreover, in the event of rescission, shipbuilders are left with an incomplete vessel. Limiting their damages to overdue payments would not

¹⁰³ Ibid 6 (Lord Wilberforce).

¹⁰⁴ *Latvian Shipping* [2002] Lloyd's Rep 436, 451.

¹⁰⁵ Ibid 446.

¹⁰⁶ *The Afovos* [1983] 1 Lloyd's Rep 335, 339 (Lord Hailsham L.C.).

¹⁰⁷ *The Astra* [2013] 2 Lloyd's Rep. 69, 86.

¹⁰⁸ *The Afovos* [1983] 1 Lloyd's Rep 335, 440.

¹⁰⁹ Curtis, S, *The Law of Shipbuilding Contracts* (4th Ed, 2012), Part 1.

¹¹⁰ Ibid.

likely provide satisfactory compensation. Selling an incomplete ship is more complicated than refixing a vessel because the technical specifications in shipbuilding contracts are often the result of meticulous negotiations to suit the technical specifications required by the buyer.¹¹¹

Conversely, through withdrawal, shipowners regain control of their vessels, a commodity which they are subsequently free to exploit for commercial gain by refixing, particularly where hire rates have increased. Even in low hire markets, shipowners may still benefit from withdrawal by refixing with a different charterer whose solvability is beyond reproach. Ultimately, the withdrawal clause offers shipowners an election. If shipowners value certainty, they may withdraw their vessel. If pecuniary compensation is a greater priority, they can adopt a wait and see approach, before establishing a repudiatory breach by the charterers and regaining both control of their vessel and their lost bargain. The risk of this delay is mitigated by the sizeable reward of lost profits, as discussed in Part 3. Flaux J argued in *The Astra* that Rix LJ's approach had been followed in relation to charterparties by Eder J in *The Mahakam*.¹¹² While he conceded the contract in that case expressly stipulated that time was of the essence, he neglected to mention that this was the sole basis on which Eder J held the hire provision was a condition and not importance was accorded to the anti-technicality clause: 'the agreement that "time shall be of [the] essence" in respect of hire payment under clause 38.3 made the obligation to pay hire a condition of the contract, subject to the period of grace.'¹¹³

Moreover, *The Mahakam* was a bareboat charter case. Under English law, bareboat charters are treated distinctly from time charters since they involve a transfer of possession and control of a vessel from the owner to the charterer.¹¹⁴

Flaux J's argument that anti-technicality notices make time of the essence and payment of hire a condition on the basis of *Latvian Shipping* and *The Mahakam* is therefore unconvincing. Furthermore, it would be ironic for charterers to be undone by a clause inserted for their own benefit. In *The Qatar Star*, Clarke J reiterated that anti-technicality clauses are inserted to protect charterers, a practice encouraged by courts loathe to terminate contracts on the basis of technicalities.¹¹⁵ They should therefore not be interpreted in a manner which penalizes charterers.

3.6 Bucking the Trend?

In *The Kos*, the shipowners exercised their right of withdrawal pursuant to the charterers' breach of the payment of hire obligation.¹¹⁶ The Shelltime 3 withdrawal clause was similar to cl. 5 NYPE and there was no anti-technicality clause. At the time of withdrawal, the vessel was in port and had already loaded some of the charterers' cargo. The shipowners claimed expenses for the detention of the vessel and the bunker consumed to discharge the cargo 2.94 days following withdrawal. While the litigants agreed not to treat the breach of the hire payment as repudiatory, Smith J nevertheless opined that payment of hire was an intermediate term;

as Rix LJ said in *Stocznia Gdanska SA v Latvian Shipping Co* [2002] 2 Lloyd's Rep 87) there must be a good argument that the 'express right to withdraw in the case of unpunctual payment under such a clause is breach of a condition of the contract, breach of which is in itself repudiatory'. However, the general view is, I think, that a failure to pay hire when it is due is a breach of an intermediate term, and not necessarily repudiatory and does not in itself entitle the owner to claim damages for loss resulting from the termination of the charterparty.¹¹⁷

Since the point was never argued by either of the parties, these passages are *obiter*. The persuasive nature of this statement would also have been enhanced by a discussion of the authorities considered above. Smith J's statement demonstrates at the very least that payment of hire is not viewed unanimously among judges as a condition.

¹¹¹ *Ibid.*

¹¹² *The Astra* [2013] 2 Lloyd's Rep. 69, 95; *Parbulk II A/S v Heritage Maritime Ltd SA; (The Mahakam)* [2012] 1 Lloyd's Rep 87 ('*The Mahakam*').

¹¹³ *The Mahakam* [2012] 1 Lloyd's Rep 87, 103 (Eder J); Clause 38.3 provided: 'The Charterers shall pay hire due to the Owners in accordance with the terms of this Charter punctually, in respect of which time shall be of the essence...' (emphasis added), *The Mahakam* [2012] 1 Lloyd's Rep 87, 90.

¹¹⁴ Davis, M, *Bareboat Charters* (2nd Ed, 2005), 1.1.

¹¹⁵ *Owneast Shipping Ltd v Qatar Navigation QSC; (The Qatar Star)* [2011] 1 Lloyd's Rep 350, 354.

¹¹⁶ *ENE 1 Kos Ltd v Petroleo Brasileiro SA; (The Kos)* [2010] 1 Lloyd's Rep 87 ('*The Kos*').

¹¹⁷ *The Kos* [2010] 1 Lloyd's Rep 87, 95.

3.7 Conclusion

In *The Antaios*, Lord Diplock described the usefulness of *obiter* as ‘persuasive only, their persuasive strength depending upon the professional reputation of the Judge who voiced them.’¹¹⁸ Their persuasiveness is also presumably determined by their underlying reasoning. We would therefore caution overemphasizing the above pronouncements of the House of Lords which were primarily opinions rather than reasoned conclusions. Some of the statements are not only *obiter* to the issue of the characterization of payment of hire as an obligation; they are made within the different context of sales and shipbuilding contracts where the rights, interests and obligations of the parties are different than those in chartering.

4. Hire as a Condition: Loss of Bargain and Potential Unintended Consequences

Classifying payment of hire as a condition rather than as an intermediate term allows shipowners to obtain damages for loss of bargain without satisfying the traditional burden of proof of contractual remoteness. The ability of shipowners to recover the balance of hire payments at the charterparty rate became more important as hire markets collapsed in the aftermath of the 2008 global credit crisis. However, treating payment of hire as an intermediate term has never precluded recovery for loss of bargain. Moreover, there was no demonstrable demand within the shipping industry for reclassifying the obligation to pay hire as a condition.

The Astra has corrected market inequalities generally accepted within the industry as risks of doing business, placing the burden of market fluctuations squarely upon charterers. Withdrawal can already occur immediately upon default, regardless of the severity of the breach. Treating hire as a condition compounds the significant liabilities the charterer may consequently incur by awarding significant damages without proof of prejudice or loss. The change also increases risks for both shipowners and charterers in making decisions concerning deductions from hire instalments through equitable set-off.

4.1 The Impact of the 2008 Credit Crisis on the Shipping Industry

Shipping is a capital-intensive industry whose fortunes are intimately linked to global economic trends.¹¹⁹ Financial institutions underwrite risks of maritime adventures, bankroll shipbuilding projects and finance 90% of all international transactions.¹²⁰ Thus, the 2008 global credit crisis had a particularly devastating impact on the shipping industry. Banks, hard hit by the recession, became reluctant to issue letters of credit or loans, creating a liquidity crisis.¹²¹ Decreased international trade and consumption drove freight rates down an estimated 80% with hire rates falling correspondingly.¹²² Many vessels were laid up as newbuildings, commissioned amid projections of continued economic growth when credit was widely available, exacerbated the oversupply of ships.¹²³ High oil prices further reduced profit margins.¹²⁴

4.2 Withdrawal and the Rate Cycle

The classification of hire payments is a question of money. After the collapse of rate markets, many charterers found themselves locked in time charters at pre-2008 rates, unable to recover these costs through sub-charters or freight earnings. The charterer in *The Astra*, on the verge of bankruptcy, could only sub-charter the vessel at a severely reduced rate. In a low hire market, charterers have traditionally been able to adopt a more relaxed attitude towards

¹¹⁸ *The Antaios* [1984] 2 Lloyd’s Rep 235, 451.

¹¹⁹ De Monie, G, Rodrigue J P, and Notteboom, T, ‘Economic Cycles in Maritime Shipping and Ports: The Path to the Crisis of 2008’ in Hall P, McCallam R, Comtois, C, and Slack, B (eds), *Integrating Seaports and Trade Corridors* 1st Ed, (2010), Hoftra University, <http://people.hofstra.edu/jean-paul_rodrigue/downloads/De%20Monie-Rodrigue-Notteboom_Chapter_v2.pdf>, 20 July 2013 (‘De Monie’).

¹²⁰ *Ibid* 6.

¹²¹ Evans-Pritchard, A, ‘World Shipping Crisis Threatens German Dominance as Greeks Win Long Game’, *The Telegraph* (London), August 13, 2012, 1 (‘Evans-Pritchard’); Schulz, T, *That Sinking Feeling: Global Crisis Hits Shipping Industry Hard*, (2008), Spiegel Online, <<http://www.spiegel.de/international/business/that-sinking-feeling-global-crisis-hits-shipping-industry-hard-a-594710.html>>, 2 August 2013 (‘Schulz’); De Monie, above n 119, 7.

¹²² The bulk freight rate Baltic Dry Index, considered a ‘leading indicator’ of economic activity, plummeted 94% from July to December 2008: Evans-Pritchard, above n 121, 1; Schulz, above n 121, 1; De Monie, above n 119, 10-11, 13.

¹²³ De Monie, above n 119, 13; Schulz, above n 121, 1.

¹²⁴ Evans-Pritchard, above n 121, 1.

payment of hire, confident shipowners would not exercise their right of withdrawal.¹²⁵ Shipowners usually exercise their right of withdrawal in increased hire markets, refixing their vessels at a premium.¹²⁶ Withdrawing in a low market would mean refixing at a reduced rate.

4.3 The Significance of Classifying Payment of Hire as a Condition

By treating hire as a condition, Flaux J could grant shipowners loss of bargain damages pursuant to any breach.¹²⁷ His conclusion was premised upon *Stocznia Gdynia v Gearbulk Holdings* where the Court of Appeal considered whether a shipbuilding contract termination clause restricted the buyer's ability to obtain damages for loss of bargain. The shipyard had failed to deliver the vessel by the agreed date. Moore-Bick LJ noted that under the common law, a party is entitled to the intended benefit secured by his contractual agreement. Where deprived of this benefit, he may terminate the contract and recover damages for lost profit upon proving breach of a condition or of a contractual term going to the root of the contract.¹²⁸

The shipbuilding contract contained two separate clauses outlining grounds for termination by each party. The buyer's termination clause granted an expedited right of recovery of previously paid instalments by virtue of a bank guarantee. The shipyard argued this remedy was exhaustive. Moore-Bick LJ disagreed since it inadequately compensated the buyer and insufficiently deterred the seller from deliberate non-performance.¹²⁹ Moreover, since the seller's termination clause provided compensation for loss of bargain, it was unlikely that the parties intentionally deprived the buyer of a corresponding right. Parties were free to designate particular breaches as essential to the contract or, in other words, conditions. Moore-Bick LJ ruled that this was such a case. Where a term goes to the root of the contract, the innocent party could obtain damages for loss of bargain regardless of whether termination was exercised by virtue of a contractual term or the operation of the common law.¹³⁰ The Court could therefore not preclude the buyer from benefitting from a corresponding right to claim loss of bargain given his common law entitlement to such damages.¹³¹

Moore-Bick LJ also rejected the seller's argument that the buyer's loss was attributable to his election to terminate the contract. However, the manner in which he formulated his conclusion arguably weakened its wider applicability:

Whatever may have been said in other cases about other contracts, I think it is clear that in this case the contract proceeds on the footing that if Gearbulk chose to exercise its right, the yard's breach was to be viewed as the effective cause of the contract's termination¹³²

The fact that *Gearbulk Holdings* did not consider two previous shipping cases concerning post-withdrawal damages further diminishes its applicability to chartering. In *The Astra*, Flaux J seemed unable to reconcile Moore-Bick LJ's decision with *Italian State Railways v Mavrogordatos* where the Court of Appeal rejected the owners' claim for post-withdrawal hire until the vessel was "redelivered" to them at Barry.¹³³ Withdrawal ended the contract, preserved the rights accrued by the shipowners and extinguished both parties' future obligations under the charterparty, including the charterers' payment obligations.¹³⁴ Once the vessel was no longer under the charterers' orders, physical re-delivery was unnecessary.¹³⁵ Bankes LJ questioned which loss the shipowners suffered after withdrawing the services of their vessel and its crew. Duke LJ went further, declaring any subsequent loss suffered by the shipowners attributable to their *own* election;

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 of his own interest, he cannot rely upon it as giving him a right to damages.¹³⁶

¹²⁵ *The Astra* [2013] 2 Lloyd's Rep. 69, 73.

¹²⁶ *Ibid* 79.

¹²⁷ *Ibid* 96.

¹²⁸ *Stocznia Gdynia v Gearbulk Holdings* [2009] 1 Lloyd's Rep 465, 465-466 ('*Gearbulk Holdings*').

¹²⁹ *Ibid* 467.

¹³⁰ *Ibid*.

¹³¹ *Ibid* 467-468, 471.

¹³² *Ibid* 471.

¹³³ *Italian State Railways v Mavrogordatos* [1919] 2 KB 305 ('*Italian State Railways*').

¹³⁴ *Ibid* 312 (Bankes LJ).

¹³⁵ *Ibid*.

¹³⁶ *Ibid* 314 (Duke LJ).

Duke LJ's reasoning is opposite to Moore-Bick LJ's in *Gearbulk Holdings*. Flaux J dismissed the relevance of *Italian State Railways* to the shipowners' right to claim damages for loss of bargain stating that Bankes LJ had reserved judgment on this issue and Duke LJ restricted his findings to a claim for damages for redelivery to the port of discharge following the shipowners' withdrawal.¹³⁷ This is an unreasonably narrow reading of the case. The charterparties in both cases were ended by withdrawal and the damages sought by the shipowners were for alleged subsequent losses. The causation reasoning is therefore relevant to the issue of loss of bargain in the *Astra*. On the basis of *Italian State Railways*, shipowners cease to provide services by withdrawing the vessel, thereby extinguishing their relationship with the charterers. Any subsequent losses become a direct consequence of their own conduct.¹³⁸ On the basis of this decision, shipowners should therefore consider the depressed state of the hire market prior to making his election. Either *Gearbulk Holdings* conflicts with this decision, despite the Court of Appeal being bound by its previous decisions, or it can be reconciled by accepting that it was implicit in *Italian State Railways*' conclusions that payment of hire was neither a condition nor a breach going to the root of the contract.

Flaux J attempted to overcome *Italian State Railways* by relying on *Leslie Shipping v Welstead*, a lower court decision. Here, the shipowners withdrew their vessel following several consecutive unpaid instalments of hire. They sought damages for the balance of hire due under the charterparty or alternatively, given the depressed hire market at the time, the difference between the market rate and the charterparty rate.¹³⁹ In his judgment, Greer J considered the issue of damages for loss of bargain;

the point is not free from difficulty, and if I had not already expressed my opinion upon it in a previous case...I might have taken time to consider the point, but having regard to my previous expression of opinion, I do not think it is necessary that I should do so.

On the whole my view is that the damages arise as the natural and probable consequence of the defendant's breach of contract in failing to pay the two instalments of hire which were due at the time of the withdrawal.¹⁴⁰

Greer J was referring to his decision in *Merlin Steamship Co. v Welstead*.¹⁴¹ However, this decision provides no greater analysis on the loss of bargain issue than *Leslie Shipping*, since Greer J neglects to mention whether he awarded damages for breach of condition or repudiatory breach. In both *Merlin* and *Leslie Shipping*, consecutive hire payments were missed and Greer J held that the shipowners' belief that they might never receive another payment of hire from the charterer was reasonable.¹⁴² The disputed withdrawals were therefore arguably made pursuant to repudiatory conduct.

Thus, while Greer J declared in *Leslie Shipping* that (1) the shipowners' decision to withdraw the vessel should not preclude them from claiming damages to which they would otherwise be entitled and (2) the purpose of clause 5 was to protect the interests of shipowners by facilitating the withdrawal of their vessel and the cancellation of the contract, he never characterized payment of hire as a condition.¹⁴³ These comments arguably apply only to post-withdrawal damages for repudiation. *Leslie Shipping* is therefore of minimal assistance to the determination of damages in *The Astra* on the basis of a breach of condition, a point conceded by Flaux J.¹⁴⁴

4.4 Damages for Loss of Bargain are not Contingent on Treating Hire as a Condition

Even if we ignore *Italian State Railways*, it is unclear why Flaux J believed a finding of condition was necessary to award loss of bargain damages since treating payment of hire as an intermediate term would not preclude such an award. On the basis of *Gearbulk Holdings*, a severe breach of an intermediate term substantially depriving the innocent party of the intended benefit of the contract would entitle him to damages for loss of bargain. Similarly, why should breach of an obligation to pay hire allow shipowners to circumvent the general contract law principle of

¹³⁷ *The Astra* [2013] 2 Lloyd's Rep. 69, 81.

¹³⁸ *Italian State Railways* [1919] 2 KB 305, 314 (A.T. Lawrence J).

¹³⁹ *Leslie Shipping* [1921] 3 KB 420, 422.

¹⁴⁰ *Ibid* 425-426.

¹⁴¹ *Merlin Shipping Co. v Welstead* (1921) 7 Lloyd's Rep 185 ('*Merlin*').

¹⁴² *Merlin* (1921) 7 Lloyd's Rep 185, 186; *Leslie Shipping* [1921] 3 KB 420, 426.

¹⁴³ *Leslie Shipping* [1921] 3 KB 420, 426.

¹⁴⁴ '[S]omewhat uncertain foundation upon which to base any firm conclusion that the obligation to make prompt payment of hire under a time charter is a condition': *The Astra* [2013] 2 Lloyd's Rep. 69, 82.

contractual remoteness? Nothing precludes damages for loss of bargain on the basis of the rule in *Hadley v Baxendale* which holds the defaulting party responsible for damages which he knew or should have known were likely to result from his breach.¹⁴⁵

The underlying rationale of the *Hadley v Baxendale* rule is that a party should not be responsible for losses resulting from circumstances of which he is completely unaware.¹⁴⁶ It establishes two ‘limbs’ of recoverability for foreseeable damages: those arising ‘naturally’ from the breach and those resulting from special circumstances of the particular contract known to both parties.¹⁴⁷ Ultimately, remoteness is a rebuttable ‘assumption of responsibility’ by the parties.¹⁴⁸ Thus in the *Heron II*, the defendant was held liable for the loss in market value of a sugar consignment occasioned by his unjustified deviation because ‘it was not unlikely that the sugar would be sold...at market price on arrival and he must be held to have known that in any ordinary market, prices are apt to fluctuate from day to day’¹⁴⁹

While the *Hadley v Baxendale* rule is applied *prima facie* to determine the scope of the defaulting parties’ liability for damages, the House of Lords in *The Achilles* raised the possibility of adopting a consent-based approach in special commercial contexts such as shipping.¹⁵⁰ In *The Achilles*, the shipowners fixed a follow-up charter assuming their vessel would be redelivered on time. When the charterers failed to do so, the shipowners had to renegotiate the following fixture at a lower rate as market rates had plummeted. They claimed the difference in rate during the overlapping period prior to redelivery and the difference between the original and renegotiated rate.

Lord Hoffman declared remoteness should be assessed with reference to the intention of the parties, assessed objectively, to assume a particular risk ‘upon the interpretation of the contract as whole, construed in its commercial setting’.¹⁵¹ Thus, while the first loss was recoverable, the second loss, while foreseeable, was not considered recoverable within the shipping industry.¹⁵² Moreover, the second loss would be unquantifiable at the conclusion of the contract, the charterer being unaware of any following charters or its terms.¹⁵³ The charterer could therefore not be held to have reasonably assumed responsibility.

The Achilles stands for the proposition that where there are special market considerations, assumption of responsibility must be determined according to an objective assessment of the parties’ intentions. Since the Court of Appeal’s decision in *Italian State Railways* has endured for almost 100 years and no industry reforms have tackled the issue of post-withdrawal loss of bargain in the absence of repudiatory breach, it is arguable that such damages are not considered recoverable within the shipping industry on the basis of any breach, regardless of its significance.

4.5 No Evidence of Industry Demand for Change

Flaux J cited commercial certainty for this new classification but provided no evidence of need or demand for such a change within the shipping industry. While not conclusive, the following factors strongly suggest an absence of demand for change within the shipping industry. There have been no reported cases in the 41 years on this issue since Brandon J’s judgment. Though there may admittedly have been confidential out-of-court settlements and arbitral awards on the basis of hire as a condition, the arbitrators in *The Astra* clearly believed that, under English Law, hire was not a condition.¹⁵⁴ Furthermore, when the NYPE and Baltime forms were revised, no changes were

¹⁴⁵ Stiggelbout, M, ‘Contractual Remoteness, “Scope of Duty” and Intention’, (2012) *Lloyd’s Maritime and Commercial Law Quarterly*, 97, 98 (‘Stiggelbout’); Sabapathy, S, ‘Falling Markets and Remoteness’, (2013) *Lloyd’s Maritime and Commercial Law Quarterly*, 284, 289 (‘Sabapathy’).

¹⁴⁶ *Hadley v Baxendale* (1854) 9 Ex 341, 355; Stiggelbout, above n 145, 99.

¹⁴⁷ *Hadley v Baxendale* (1854) 9 Ex 341, Stiggelbout, above n 145, 99, 103.

¹⁴⁸ Sabapathy, above n 145, 288.

¹⁴⁹ *C. Czarnikow Ltd. v Koufos*; (*The Heron II*) [1969] 1 AC 350, 382 (Lord Reid); Stiggelbout, above n 145, 102.

¹⁵⁰ *The Achilles* [2008] UKHL 48 [9]; Sabapathy, above n 145, 288.

¹⁵¹ *The Achilles* [2008] UKHL 48 [11]-[12] (Lord Hoffman), [78] (Lord Walker); Stiggelbout, above n 145, 105.

¹⁵² *The Achilles* [2008] UKHL 48 [6], [23] (Lord Hoffman); Coghlin, T, Baker, A, Kenny, J, and Kimball, J, *Time Charters* (6th Ed, 2008), [4.20] (‘Time Charters’); Stiggelbout, above n 145, 104-105.

¹⁵³ *The Achilles* [2008] UKHL 48 [23] (Lord Hoffman), [31], [32], [36] (Lord Hope).

¹⁵⁴ *The Astra* [2013] 2 Lloyd’s Rep. 69, 73; Maritime practitioners generally accepted payment of hire was a condition prior to *The Astra*. See Taylor, A, and Allan, E, *Is Payment of Hire a Condition: A Long-standing Controversy Resolved*, (2013), Reed Smith LLP, <<http://www.reedsmith.com/Is-payment-of-hire-a-condition-a-long-standing-controversy-resolved-04-18-2013/>>, 25 August 2013; Gavin, F, and Richards, D, *The Astra: Single Hire Default Entitles Owners to Withdraw and Claim Loss of Profit For Remaining Charter Period*, (2013), Ince & Co International LLP, <<http://incelaw.com/documents/pdf/strands/shipping/article/the-astra>>, 25 August 2013; Kouzoupis, M, and Butler, R,

made to the withdrawal clauses to time of the essence in the payment of hire.¹⁵⁵ Given the current economic climate, there are likely many pending cases involving missed or late hire payments which could be affected by *The Astra*.¹⁵⁶ Flaux J's judgment may also result in the following unintended and undesirable consequences.

4.5.1 Upsetting Traditional Market Dynamics

There is no denying that shipowners are at a disadvantage in a low rate market. However the post-2008 period is not the first time that the hire market has been depressed. Cyclical markets are an accepted risk of the inherently volatile shipping industry: 'navigating... treacherous shipping cycles is what shipowners get paid for'.¹⁵⁷ While treating hire as a condition delineates the legal consequences of its breach, it alters the free market dynamic aptly described by Lord Diplock in *The Scaptrade*.

In that case, he rejected the charterers' application for judicial relief from the owner's withdrawal after inadvertently defaulting on his payment obligation.¹⁵⁸ Shipowners and charterers were sophisticated businessmen fully cognizant that the hire market was prone to significant fluctuations and both could take advantage of this fact.¹⁵⁹ In high rate markets, withdrawal simply 'transferr[ed] the benefit of the windfall from the charterer to shipowner'.¹⁶⁰ Lord Diplock held that judicial interference in parties' exercise of their contractual rights would undermine commercial certainty.

The House of Lords also declined to relieve the charterer in *The Laconia* against the harsh operation of the withdrawal clause. If he desired such protection, the charterer should simply have negotiated a more favourable agreement.¹⁶¹

Given these two decisions, why should shipowners be afforded judicial protection when the market situation is reversed? Parties have always been free to stipulate that time is of the essence in the payment of hire as was done in *The Mahakam*.¹⁶² By treating hire as a condition, Flaux J has imposed a judicial interpretation of the parties' rights unsubstantiated by any market understanding. *The Astra* unfairly shifts the burden of market risks entirely upon the charterer. In high markets, the shipowner can withdraw his vessel and refix at a higher rate and in low markets he is automatically protected from the consequences of his withdrawal. The pro-shipowner approach disrupts the free-market nature of international trade. Since shipowners are also frequently charterers in other contracts, such an imbalance is likely undesirable.

4.5.2 Providing an Incommensurate Remedy

The main uncertainty regarding payment of hire is the threshold of repudiatory breach. Flaux J alluded to this issue in stating the undesirability of shipowners adopting a 'wait and see' approach to breaches by charterers of the punctual payment obligation until it became repudiatory.¹⁶³ The test for repudiatory breach was restated in *The Nanfri* by Lord Wilberforce as follows;

To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract...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...¹⁶⁴

Payment of Hire Is A Condition – And End to A Charterer's Ability to Deduct from Hire?, (2013), Holman Fenwick Willan LLP, <<http://www.hfw.com/Astra-Briefing-April-2013>>, 25 August 2013.

¹⁵⁵ 'New York Produce Exchange Form (NYPE 93) Time Charter', Standard Form, Association of Ship Brokers and Agents (USA) Inc., 1993), cl 11(a), 3; Wilson, J, *Carriage of Goods by Sea* (7th Ed, 2010), app 12, 'Baltim 1939' Uniform Time-Charter (as revised 2001), cl 6, 483.

¹⁵⁶ Kouzoupis, M, and Butler, R, 'An End on Deductions', (2013) 27(5), *Maritime Risk International*, 1, 1 ('Kouzoupis and Butler').

¹⁵⁷ Stopford, M, "Challenges For Global Shipping In the Wake of the Great Shipping Boom", seminar on the occasion of the 125 years' anniversary of the Danish Shipowners Association, (2009), Clarkson's, available at <<http://www.clarksons.net/sin2010/papers/>>, 5 August 2013.

¹⁵⁸ *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana; (The Scaptrade)* [1983] 2 Lloyd's Rep 253.

¹⁵⁹ *Ibid* 258 (Lord Diplock).

¹⁶⁰ *Ibid*.

¹⁶¹ *The Laconia, H.L.* [1977] 1 Lloyd's Rep 315, 325 (Salmon LJ).

¹⁶² *The Mahakam* [2012] 1 Lloyd's Rep 87, 103.

¹⁶³ *The Astra* [2013] 2 Lloyd's Rep. 69, 96.

¹⁶⁴ *The Nanfri H.L.* [1979] 1 Lloyd's Rep 201, 207, citing *Decro-Wall* [1971] 1 WLR 361, 380 (Buckley LJ).

It is ultimately a case-by-case determination. A degree of uncertainty is therefore unavoidable, regardless which type of obligation is breached. However, Johanna Hjalmarsson and Edward Yang Liu have argued, on the basis of two London arbitral awards, that a high standard exists for repudiatory breach of payment of hire and precludes instances where the charterer has made *bona fide* deductions disputed by the shipowner or inadvertently defaulted on his payment obligation.¹⁶⁵ For this reason, practitioners contend the decision to terminate early for repudiatory breach is fraught with risks as it is unclear how many missed instalments are required to satisfy the test.¹⁶⁶

Elevating payment of hire to a condition is a heavy-handed resolution to this problem. A full assessment of termination pursuant to repudiatory breach for failure to pay hire is beyond the scope of this paper. But Lord Diplock provided some guidance in *The Afvos* in holding one missed instalment was insufficient to amount to a repudiatory breach since it would not “have the effect of depriving the owners of substantially the whole benefit which it was the intention of the parties that the owners should obtain” under the contract.¹⁶⁷ This position suggests that allowing termination for a trivial breach on the basis of hire being a condition would be equally unjustified.

Classifying payment of hire as condition to overcome this ambiguity rather than awaiting the development of clearer judicial criteria is disproportionate. The damages awarded for loss of bargain pursuant to the charterer’s repudiatory breach in *The Astra* were upwards of \$12 million. Flaux J’s decision creates the possibility of a similar award for a one-minute late hire instalment. Such a delay already entitles the shipowner to withdraw his vessel, forcing the charterer to scramble and fix another vessel while potentially incurring significant third party liabilities.

Advanced hire payments are necessary to pay the vessel’s operating expenses without risking the shipowner’s personal funds or credit. But automatically requiring the charterer to pay the balance of the charterparty for an inadvertent or trivial delay would be unjustifiably harsh considering the shipowner will likely have suffered little or no loss. Such a rigid approach is incommensurate and typifies the unfair results which Diplock LJ sought to eliminate by introducing intermediate terms.¹⁶⁸ Treating payment of hire as an intermediate term allows for a more flexible approach without precluding the possibility of damages for loss of bargain for serious breaches such as a lengthy delay in payment or several consecutive missed payments.

4.5.3 Removing the Rationale for Withdrawal Clauses

Treating payment of hire as a condition would also render withdrawal clauses redundant.¹⁶⁹ Why stipulate the terms for withdrawal if late payment itself allows automatic termination?

4.5.4 Complicating Deductions from Hire

In *The Nanfri*, Lord Denning MR held a charterer has a common law right to deduct corresponding sums from his upcoming instalment of hire where the shipowner has breached an obligation under the charterparty in a manner which ‘wrongly deprived the charterer of the use of the vessel or...prejudiced him in the use of it’.¹⁷⁰ A deduction will be valid so long as it is the result of a ‘reasonable assessment made in good faith’.¹⁷¹ If the reasonable deduction proves excessive, the charterer can rectify the discrepancy without any further consequences.¹⁷² In the same decision, Goff LJ adopted a stricter view that the charterer exercise his right to equitable set-off at his own peril.¹⁷³

While the House of Lords expressed no opinion on the issue on appeal, Lord Denning MR’s position appears to have been preferred in later decisions. In *The Chrysovalandou Dyo*, Mocatta J stated it was consistent ‘with what

¹⁶⁵ Hjalmarsson, J, and Yang Liu, E, ‘Charterer’s Failure to Pay Hire: Owner’s Right to Damages Where the Vessel is Withdrawn’, (2013) April *Shipping and Trade Law*, 1 (‘Hjalmarsson and Liu’); London Arbitration 12/11, reported in (2011) 837 *Lloyd’s Maritime Law Newsletter* 3; London Arbitration 3/04, reported in (2004) 635 *Lloyd’s Maritime Law Newsletter*.

¹⁶⁶ Kouzoupis and Butler, above n 156, 1.

¹⁶⁷ *The Afvos* [1983] 1 *Lloyd’s Rep* 335, 341.

¹⁶⁸ *Hongkong Fir* [1961] 2 *Lloyd’s Rep* 478, 494.

¹⁶⁹ *The Agios Giorgis* [1976] 2 *Lloyd’s Rep* 192, 202 (Mocatta J).

¹⁷⁰ *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc; The Nanfri* [1978] 2 *Lloyd’s Rep* 132, 141 (Lord Denning MR) (*The Nanfri* C.A.).

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ *Ibid* 141 (Goff LJ).

commercial considerations demand'.¹⁷⁴ However, his decision was premised to some extent on the presence of two deduction clauses in the charterparty, one allowing the charterer to make deductions from hire for owners based on estimate and another for slow steaming: '(t)hese two entitlements would be of little value, if despite being made reasonably and in good faith, they could not be relied upon if by error they were too large'.¹⁷⁵

In *The Kostas Melas*, Goff J also endorsed Lord Denning MR's judgment: 'we now have the authority of a majority of the Court of Appeal that a charterer may, by virtue of the principle of equitable set-off, set off certain claims against hire, even where the contract does not expressly give him the right to do so.'¹⁷⁶

Nonetheless, he acknowledged that difficulties remained in (1) determining whether the claims fell within the scope of the broadly worded criteria of 'arise out of the same transaction or are closely connected with it' and 'which go directly to impeach the plaintiff's demands'¹⁷⁷ and (2) assessing the reasonableness of claims which required complex and time-consuming verifications.¹⁷⁸

Further doubts on the application of Lord Denning MR's test were raised by *The Aditya Vaibhav* where Saville J restricted equitable set off to claims 'in respect of a period during which the owners, in breach of the charter, have failed to provide the very thing for which that hire was payable'.¹⁷⁹ Questions therefore remain whether equitable set-off claims are restricted to hire during periods the charterer was deprived of the use of the vessel or extend to losses incurred by charterers as a result of the shipowner's failure to provide the services of his vessel.¹⁸⁰ *The Astra* will add yet more uncertainty for both charterers and shipowners as outlined by Menelaus Kouzoupis and Rory Butler;

a deduction from hire may expose a charterer to the risk that his action was a breach of a condition and therefore repudiatory...If the owner terminates and the deduction is later found to be valid then the owner will himself be in repudiatory breach and liable to damages to the charterer. If the owner terminates and the deduction is later found to be invalid then the charterer will be liable in damages to the owner.¹⁸¹

5. Conclusion

It has been said that *The Astra* 'provides much certainty in this previously undecided area'.¹⁸² However, the impact of this decision remains to be seen. Flaux J's reasoning is arguably *obiter* since the case was decided on the basis of the Charterers' repudiatory conduct.¹⁸³ Additionally, both *The Astra* and Brandon J's decision in *The Brimnes* were first instance decisions and therefore a conclusive characterization of hire payments is unlikely until the matter is resolved by the House of Lords.¹⁸⁴ Nevertheless, Flaux J's thorough review of the authorities and elaborate reasoning ensures that *The Astra* will figure prominently in any subsequent jurisprudence. Although Flaux J exhibited judicial courage in forging a new path, this paper questions his legal reasoning.

Treating payment of hire as a condition assuredly provides certainty, but at what cost? The failure to consider the wider ramifications of this departure is, in this paper's view, one of *The Astra*'s major weaknesses. Commercial certainty expects that the Courts will not interfere with the parties' freedom to contract by imposing judicial interpretation to protect commercial actors from the disadvantages of market fluctuations. Hire as a condition undoubtedly heralds a harsh new world for charterers. Breach of payment obligation, however minor, will now open the door for sizeable damage awards for loss of bargain without proof of any prejudice. Does this reasonably reflect the intention of the parties in withdrawal clauses such as cl. 5 NYPE? Would it not be expected that such an onerous

¹⁷⁴ *Santiren Shipping Ltd. v Unimarine S.A.; (The Chrysovalandou Dyo)* [1981] 1 Lloyd's Rep 159, 164 ('*The Chrysovalandou Dyo*').

¹⁷⁵ *The Chrysovalandou Dyo* [1981] 1 Lloyd's Rep 159, 154.

¹⁷⁶ *SL Sethia Liners Ltd. v Naviagro Maritime Corporation; (The Kostas Melas)* [1981] 1 Lloyd's Rep 18, 25 ('*The Kostas Melas*').

¹⁷⁷ *The Kostas Melas* [1981] 1 Lloyd's Rep 18, 25.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Century Textiles & Industry Ltd v Tornoe Shipping (Singapore) Pte Ltd; (The Aditya Vaibhav)* [1991] 1 Lloyd's Rep 573, 574.

¹⁸⁰ Gay, R, 'How to Apply the Principle of Equitable Set-off to Time-Charter Hire', (2006) 12 *Journal of International Maritime Law*, 251, 251, 254; *Compania Sud America de Vapores v Shipmair BV; (The Teno)* [1977] 2 Lloyd's Rep 289.

¹⁸¹ Kouzoupis and Butler, above n 156, 1.

¹⁸² Hjalmarsson and Liu, above n 165, 3.

¹⁸³ *The Astra* [2013] 2 Lloyd's Rep. 69, 77.

¹⁸⁴ Time Charters, above n 152, [16.132].

Challenging Reclassification of Payment of Hire as a Condition

assumption of responsibility be explicitly stipulated in the charterparty? After all, avoiding disproportionate remedies for trivial breaches was the impetus for creating a separate category of intermediate terms. Shipowners' plight in a slumping rate market, though less profitable than in a high market, is not untenable. If they desire certainty and the comfort of refixing with a more reliable and solvent charterer, they can do so upon the slightest default of the charterer's payment obligation. If the breach is severe and goes to the root of the contract or satisfies the contractual remoteness requirement, they will still be able to petition the court for loss of bargain damages. If they value profit more than certainty, they may delay withdrawal and wait until the charterer is in repudiatory breach. While the criteria for repudiatory breach could admittedly be clearer, the risk of delay and uncertainty occasioned by the shipowner waiting is ultimately counterbalanced by the reward of automatic damages for loss of bargain. It still beats being a charterer locked into a charterparty well above market rates.

Treating hire as an intermediate term provides greater flexibility, balancing certainty and equity, as well as providing remedies which are commensurate to the loss occasioned by the charterer's breach.¹⁸⁵

¹⁸⁵ *The Mihalis Angelos* [1970] 2 Lloyd's Rep 43, 55 (Megaw LJ).