



In a rising market, what price cancellation?

Michael Moon

AS THE demand for raw materials gathers pace and breathes life into a market all but annihilated at this time of year, owners and charterers can look forward to some equilibrium returning to their respective bargaining positions after two years of feast and famine. There is still some way to go. The delivery of newbuildings may need to be stalled for a time yet, but the cargoes are on their way back.

In the meantime, not only does overcapacity enable a charterer to continue to drive a hard bargain at the time of fixing, but once fixed he can also insist on strict performance by the shipowner of his obligations and has a variety of options open to him in the event that the vessel's performance falls short of that which the owner has undertaken to provide.

Nowhere is this more apparent than when the owner fails to deliver the vessel on time and in a condition which complies with the charterparty terms. While it is well established that a charterer cannot pre-judge a vessel's ability to arrive by the cancelling date, by cancelling before that date has arrived (*The Madeline* [1967]), so, too, can the charterer not be required to declare in advance whether or not it will exercise its option to cancel. (*The Democritos* [1975]).

The commonly-used New York Produce Exchange Form, in its latest version, ameliorates this uncertainty by giving the owner of a vessel likely to miss its cancelling date the right to call upon the charterer to state in advance whether it will or will not cancel upon vessel's late arrival at the delivery port, and provides a mechanism for the postponement of the cancelling date.

But what of a vessel that is delivered on time but it is in no condition to load its cargo on delivery due, for example, to damage sustained on the approach voyage?

The New York Produce Form is quite clear and requires that on delivery the vessel must be "ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted for the service ...". The charterer may wish to keep his options open by offering to extend the cancellation date while he waits to discover how long the owner needs to make the ship ready.

As rates rise, this becomes a difficult call to make. A judgement will have to be made about the liabilities he may attract to his shippers by way of, perhaps, carrying charges and the rate he will be called upon to pay later if he can wait no longer. What losses can he expect to recover from the owner? If he decides to accept the vessel despite its unready condition, he may have the opportunity to recover his losses as damages as a consequence of owner's breach, but may also find that the vessel has to undergo an extended period of repair before it can return to service.

The alternative would be to reject the vessel (*The Hong Kong Fir* [1961]) and go out into the market at the earliest opportunity for a replacement. But there is a price to be paid for walking away. The charterer is likely to lose his right to claim damages from the vessel owner. The ship he has chosen to reject has, after all, not been delivered and there can be no breach of the obligation to provide a seaworthy vessel on delivery.

However, if the charterer can show that the owner failed to exercise due diligence to deliver the vessel, damages may well still lie (*The Democritos* [1975]).

Difficult judgements these may be, but most in the industry will be relieved that they are back in play. *Michael Moon is a partner at Bentleys, Stokes & Lowless.*

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